U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 December 2018

CASE NO.: 2017-STA-46

IN THE MATTER OF:

JOHN A. GRIFFITH

Complainant

v.

S.H.I. LOGISTICS

Respondent

APPEARANCES:

ADAM MOREL, ESQ.
For The Complainant

RICHARD GREER, ESQ.
For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and the regulations promulgated thereunder at 29 C.F.R. Part 1978 (2016). The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment. 49 U.S.C. § 31105(a)(1).

I. PROCEDURAL BACKGROUND

On or about January 23, 2017, John A. Griffith (herein Complainant) filed a complaint against S.H.I. Logistics (herein Respondent) with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), alleging Respondent would not

rehire him as a truck driver in reprisal for voicing safety concerns during Complainant's previous employment with Respondent. An investigation was conducted by OSHA and on March 13, 2017, the Regional Administrator for OSHA issued the Secretary of Labor's Findings concluding that Complainant's complaint lacked merit.[1] (ALJX-1). On April 12, 2017, Complainant subsequently filed a request for formal hearing with the Chief Administrative Law Judge, Office of Administrative Law Judges. (ALJX-2).

This matter was referred to the Office of Administrative Law Judges, Covington, Louisiana District Office for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a hearing in Birmingham, Alabama, on October 26, 2017. (ALJX-3). On June 20, 2017, in compliance with the Pre-Hearing Order, Complainant filed a formal complaint alleging the nature of each and every violation claimed as well as the relief sought in this proceeding. (ALJX-4). On June 30, 2017, Complainant filed an amendment to his June 20, 2017 Complaint. On August 10, 2017, Respondent duly filed its Answer to the Complaint. (ALJX-5). On September 7, 2017, an Order Rescheduling Formal Hearing and Revised Notice of Hearing and Pre-Hearing Order was issued, rescheduling the formal hearing in Birmingham, Alabama, to be held on March 20, 2018. (ALJX-6). Thereafter, on December 27, 2017, a Notice Stating Location of Hearing was issued in the instant case. (ALJX-7).

On March 20, 2018, the formal hearing was conducted in Birmingham, Alabama. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs.[2] The following exhibits were received into evidence at the formal hearing: Administrative Law Judge Exhibit Numbers one through seven;[3] Complainant Exhibits one through five; and Respondent Exhibits one through seven.

Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-___.

[2] In the instant case, the parties elected to provide closing arguments at the end of the March 20, 2018 formal hearing in lieu of filing post-hearing briefs. (Tr. 154).

[3] The Administrative Law Judge Exhibits consist of an OSHA letter of referral dated March 13, 2017 (ALJX-1); Complainant's objections to the Secretary's findings and request for hearing dated April 12, 2017 (ALJX-2); the Notice of Hearing and Pre-Hearing Order dated May 30, 2017 (ALJX-3); Complainant's Complaint filed on June 20, 2017 (ALJX-4); Respondent's Answer and Defenses to Complainant's Complaint filed on August 10, 2017 (ALJX-5); an Order Rescheduling Hearing and Revised Pre-Hearing Order dated September 7, 2017 (ALJX-6); and a Notice Stating Location of Hearing dated December 27, 2017. (ALJX-7).

II. STIPULATIONS

1. At all times material, Complainant was an employee within the meaning of 49 U.S.C. § 31105. (Tr. 10-11).

2. At all times material, Respondent was an employer within the meaning of 49 U.S.C. § 31105. (Tr. 10).

3. At all times material, Ryan Swalve, was the owner and president of S.H.I. Logistics. (Tr. 9).

III. ISSUES

The unresolved issues presented by the parties are:

1. Whether Complainant engaged in protected activity within the meaning of the STAA?

2. Whether Complainant was not rehired in retaliation for his protected activities in violation of the STAA?

3. If Complainant meets his burden of entitlement to relief, did Respondent establish, by clear and convincing evidence, that it would have taken the same adverse action absent the alleged protected activity?

4. Whether Complainant is entitled to remedies and attorney fees?

IV. STATEMENT OF THE CASE

The Testimonial Evidence

Mr. Ryan Swalve

Mr. Swalve testified at the formal hearing that Complainant was employed by Respondent on two separate occasions, during which Complainant made reports of safety issues about Respondent's equipment. (Tr. 15-16). Mr. Swalve identified CX-1 as a February 6, 2017 letter he sent to OSHA, responding to Complainant's allegations against Respondent, and why Complainant was not rehired. (Tr. 16). At some point in 2017, Mr. Swalve recalled Complainant sought employment with Respondent again, but Mr. Swalve did not rehire Complainant. (Tr. 17). In his February 6, 2017 letter to OSHA, Mr. Swalve explained he did not rehire Complainant because Complainant only wanted to work for Respondent if Complainant did not have to "haul plants" and/or "show his license to customers." (Tr. 17-18). Mr. Swalve made no mention to OSHA about there being "no trucks available" when Complainant sought employment for a third time. (Tr. 19).

Mr. Swalve heard Complainant was having problems hauling plants, but he did not hear Complainant ever say he objected to hauling plants. (Tr. 19). Mr. Swalve heard from an employee who was involved in Respondent's day-to-day operations that Complainant objected to hauling plants. (Tr. 20-21). However, Mr. Swalve does not know why Complainant objected to hauling plants. There are four individuals who work in Respondent's day-to-day operations, that being, Galley Smith, Adam Howard, Tiffany Beavers, and Bill Moore. (Tr. 21). At least on one occasion, Complainant hauled plants for Respondent, but Mr. Swalve was not sure if Complainant hauled plants on other occasions. (Tr. 22). Mr. Swalve did not check company records to determine how many times Complainant may have hauled plants because the turnover rate for drivers is high, and it is impossible for him to determine what Complainant hauled two and one-half years ago. Mr. Swalve explained Respondent's turnover rate is in keeping with the national average of 110 percent, which equated to approximately five drivers a month during the time of January 2017 through March 2017. (Tr. 23).

Mr. Swalve acknowledged it is difficult to find good drivers. Respondent's insurance company informs Mr. Swalve whether drivers have good driving records. Mr. Swalve agreed that it is valuable to have a driver with a good driving record. (Tr. 24).

In his February 6, 2017 letter to OSHA, Mr. Swalve did not mention Complainant had worked for Respondent on two previous occasions and that he did not want to rehire Complainant for a third time.[4] (Tr. 25). Mr. Swalve confirmed Respondent hired a driver, William Riggs, on a third occasion. (Tr. 25-26). Mr. Swalve has owned S.H.I. logistics for fifteen years, but he could not recall how many drivers he has hired for a third time. (Tr. 26). Mr. Swalve was not aware of why Mr. Riggs left the company on prior occasions, or that Mr. Riggs started a business that competes with Respondent. (Tr. 27). Mr. Swalve explained that drivers leave their employment with Respondent for many different reasons, and sometimes, they return to Respondent for re-employment. (Tr. 27-28). Mr. Swalve had no knowledge of whether Mr. Riggs objected to hauling plants or complained about safety issues, but according to Mr. Swalve, all drivers report safety issues. (Tr. 28). Mr. Swalve explained that drivers will go to the dispatch office, which is adjacent to his office, and he will hear drivers' complaints at various times. (Tr. 28-29). However, Mr. Swalve never heard Mr. Riggs objecting to anything or making complaints. (Tr. 29). Mr. Swalve would not dispute Mr. Riggs' statement that he hauled plants for Respondent on three different occasions, or that Mr. Riggs hauled plants for other companies prior to working for Respondent. (Tr. 30). Mr. Swalve explained that if Mr. Riggs had any objection to hauling plants while working for Respondent, it would have been up to Mr. Riggs to safely

[4] Complainant's Exhibit 1 was offered and received into evidence without objection. (Tr. 25).

secure the load, and if it was not secured, Mr. Riggs would not be liable to sign the bill of lading and transport the load. (Tr. 30-31).

Mr. Swalve identified CX-2 as Respondent's "driver's record of duty station" dated April 15, 2016. Nevertheless, Mr. Swalve did not know what the notation "21 broken pots, INTDMG" indicated. (Tr. 32). Mr. Swalve explained that at times Respondent will haul just pots, but it will not include a "plant load." (Tr. 33). However, Mr. Swalve acknowledged the aforementioned document demonstrates it was a "plant load" with Mr. Griffith's signature on the document, and that a "driver rework" occurred. (Tr. 33-34). Mr. Swalve explained that a driver rework can indicate a trailer is loaded incorrectly and is too heavy on the front or back end, "lumping a load if it was a driver assist load," or securing a load if a driver did not secure a load properly which caused the trailer to shift. The truck and trailer involved in the April 15, 2016 driver's record was "16 and 99," respectively. (Tr. 34). Mr. Swalve stated the "99" trailer is refrigerated, but does not have an "e-track," which is a system of hooks and straps inside a trailer that secures any type of load. (Tr. 35). However, refrigerated trailers secure products by a "load lock" and each driver is required to carry two load locks with them. (Tr. 36). Mr. Swalve explained that a load lock and load strap are the same, and they look similar to a "bar." (Tr. 36-37). Mr. Swalve confirmed that the trailer Complainant was using on April 15, 2016, did not have an e-tracks or load straps, but Complainant should have had a load lock, which he was required to carry.[5]

Mr. Swalve has personal knowledge that Complainant refused to show his license to Miller Coors, one of Respondent's customers. The manager of the Miller Coors facility in Albany, Georgia, called Mr. Swalve and informed him that Complainant refused to show his license. (Tr. 38). However, Mr. Swalve could not recall whether this incident occurred during the first or second time period of which Complainant was employed by Respondent. (Tr. 39).

Mr. Swalve identified CX-3, as another driver record of duty station (S.H.I. document) dated October 30, 2013, which identifies the equipment operated by Complainant as being "30 and 100," and that Complainant was delivering product to Miller Coors in Albany, Georgia. (Tr. 40-41). Mr. Swalve confirmed October 30, 2013, would have been the time period during which Complainant first worked for Respondent. Mr. Swalve confirmed there are no other records showing Complainant was ever at Miller Coors in Albany, Georgia, on any other date besides October 30, 2013. Mr. Swalve confirmed that he hired Complainant for a second time after this incident at Miller Coors where he would not provide his license. (Tr. 42).

[5] Complainant's Exhibit 2 was offered and received into evidence without objection. (Tr. 37).

Mr. Swalve acknowledged that from January 2017, over the course of the next several months, Respondent was actively seeking over-the-road drivers because the turnover rate with respect to drivers is high.[6] (Tr. 43). Mr. Swalve confirmed that CX-4 contained advertisements dated December 2, 2016, February 24, 2017, March 15, 2017, and May 24, 2017, that stated Respondent was seeking over-the-road drivers, the exact position in which Complainant worked. (Tr. 44). Mr. Swalve further confirmed the advertisements stated drivers could make $1,000.00 to $1,200 per week. (Tr. 45). Mr. Swalve could not attest to whether Respondent hired five workers from January 2017 through April 2017.[7] (Tr. 45-46).

Mr. Swalve acknowledged CX-5 is Respondent's supplemental response to Complainant's interrogatories, which shows Respondent hired James Higgins, David Duke, Ron Mohrhoff, John Thompson, and My Tran between January 2017 and April 2017. (Tr. 46-47). Respondent hired a total of 15 workers between January 2017 and January 2018. Mr. Swalve confirmed Complainant had sent him letters on January 11, 2017 and January 17, 2017, "threatening" Respondent, which did nothing to encourage Respondent to re-hire Complainant. (Tr. 48-50). Mr. Swalve had no knowledge as to whether Complainant made an objection to hauling plants due to a safety issue, rather Mr. Swalve heard Complainant simply made an objection to hauling plants. (Tr. 51-52).

Mr. Swalve testified that Mr. Galley Smith is in charge of Respondent's operations, and Mr. Swalve communicates with Mr. Smith "quite often." Over the past months, Mr. Swalve has also communicated with Mr. Smith about the instant case. (Tr. 53). In CX-5, p. 2, "the decision" Mr. Swalve was referring to was when Complainant stated he was going to quit while in Alabama, and Mr. Swalve informed Complainant he could quit, but Mr. Swalve would not re-hire him for a third time. (Tr. 53-54). Mr. Swalve's decision not to re-hire Complainant was due to Complainant's objection to hauling plants.[8] (Tr. 54).

On cross-examination, Mr. Swalve confirmed CX-1 is his statement he sent to OSHA, stating "I chose not to rehire Mr. Griffith because he has stated he will only come back if he does not have to haul plants and not show his license to customers." (Tr. 55-56). In January 2017, Complainant wrote a letter to Mr. Swalve that Complainant would not come back to work if he had to haul plants or show his license to any customers. (Tr. 56). Mr. Swalve received Complainant's January 2017 handwritten letter while he was at his

[6] Complainant's Exhibit 3 was offered and received into evidence without objection. (Tr. 43).
[7] Complainant's Exhibit 4 was offered and received into evidence without objection. (Tr. 43).
[8] Complainant's Exhibit 5 was offered and received into evidence without objection. (Tr. 55).

office in South Dakota. (Tr. 56-57). Mr. Swalve showed Complainant's January 2017 letter to Mr. Smith, Tiffany Beavers, and Mike Stokely, but he threw the letter away because he did not believe anything more would transpire. (Tr. 57-58). Mr. Swalve confirmed that sometime between when Complainant filed his complaint on January 23, 2017, and February 6, 2017, when Mr. Swalve sent his letter to OSHA, Mr. Swalve disposed of Complainant's January 2017 letter. (Tr. 58). Mr. Swalve confirmed he received Complainant's January 2017 letter in the mail. (Tr. 59).

Mr. Swalve testified he informed Complainant that he would not rehire Complainant following Complainant's second voluntary resignation. Since this was Complainant's second time working for Respondent, Mr. Swalve informed Complainant there was not going to be a third re-hire because sometimes it will change an employee's mind to quit the job. (Tr. 60). Mr. Swalve had general knowledge of Complainant complaining about hauling plants, but he did not have knowledge of Complainant's specific objection. (Tr. 60-61).

Mr. Swalve confirmed RX-1 is a fax from Complainant to Respondent dated January 11, 2017, in which Complainant noted "RS" (Mr. Swalve's initials), and stated "You guys need me," and "Any carrier with SMS scores that bad can use some help." (Tr. 61-62). Attached to Complainant's fax was roadside inspections of equipment. Mr. Swalve explained that "SMS scores" are Safety Management System scores from the federal government, which show weight violations, speeding tickets, red light tickets, and accidents. (Tr. 62). Mr. Swalve recalled that he received Complainant's handwritten letter sometime in January 2017, prior to receiving the January 11, 2017 fax from Complainant. (Tr. 62-63). At the time he received the January 2017 handwritten letter, Mr. Swalve was not aware that Complainant had contacted Mr. Smith or anyone else about a job. (Tr. 63). Mr. Swalve stated that several factors are involved in rehiring a truck driver, such as timing, the availability of equipment, and receipt of threatening letters. (Tr. 63-64). Mr. Swalve informed Complainant he was not going to rehire him when Complainant voluntarily left his employment with Respondent for a second time. Therefore, Mr. Swalve stated he did not need a reason not to rehire Complainant, and receiving a letter and fax from Complainant did not change Mr. Swalve's prior decision not to rehire Complainant. (Tr. 64).

Mr. Swalve testified that truck drivers are required and expected to perform a "pre-trip" every day, which includes checking all the equipment on a truck to ensure it is fit for transportation. If something is defective on a truck, the truck driver has an obligation to record it in a log book and report the defect. (Tr. 64). Mr. Swalve stated Respondent enforces the rule that truck drivers keep proper daily logs, which is also required by the federal government. (Tr. 65). Mr. Swalve confirmed that Complainant's complaint, which stated Complainant reported issues with an engine, exhaust system, fuel system, brakes, body, charging system, climate control, clutch, driveline, electrical distribution, frame and mounting, lighting

system, radio and CB system, steering system, suspension, and transmission and annual vehicle inspection, were all issues that Mr. Swalve expected the drivers to report when there are mechanical problems. Mr. Swalve explained Respondent had a poor "SafeStat" score the last couple of years, which occurred when issues were detected during inspections. (Tr. 66). Respondent's insurance costs went up due to poor "SafeStat" scores. Mr. Swalve wanted every driver to report any issues on equipment that was in need of repair. (Tr. 67).

Mr. Swalve acknowledged Complainant's complaint stated that in December 2015, Complainant made a verbal complaint about an "inoperative ABS," which Mr. Swalve testified is not uncommon. However, Mr. Swalve had no idea to whom Complainant made his verbal complaint. (Tr. 67). Mr. Swalve explained that issues with "ABS's" are common because they go off of the wheel due to movement. Mr. Swalve also explained that Complainant's alleged verbal complaint on February 4, 2016, regarding a defective tire is likewise not uncommon. According to Mr. Swalve, approximately 15 to 20 tires per week are changed on Respondent's equipment. (Tr. 68). Mr. Swalve testified that he wanted the equipment to be maintained to keep the "SafeStat" scores down, and if the trucks are not out on the road it results in less profit for Respondent as well as drivers. (Tr. 68-69). Mr. Swalve did not recall any report dated April 14, 2016, from Complainant regarding a retaliatory threat from one of Respondent's logistics customers.[9] (Tr. 69).

Mr. Swalve confirmed RX-2 is Complainant's complaint which states that on April 16, 2016, Complainant dropped a "unit" at Respondent's South Dakota terminal for repairs including tires, operative required lamps, interior damage, inoperative axle locking pins, and a blown hub seal. (Tr. 70). Mr. Swalve would expect a driver to make a written report about such issues, but he insisted these are common issues. (Tr. 70-71). Mr. Swalve testified there is not one day that goes by that Respondent is not making repairs on equipment. (Tr. 71).

Mr. Swalve again examined CX-4, containing Respondent's advertisements to hire drivers that were posted on Craigslist. Mr. Swalve created the advertisements, which are posted on Craigslist for 30 days. (Tr. 72). Mr. Swalve renews the Craigslist advertisements every month because of the turnover rate of truck drivers. (Tr. 73). With respect to CX-5, Mr. Swalve confirmed Mr. James Higgins worked for Respondent from January 3, 2017 through September 2017, and after he was hired Respondent continued to advertise on Craigslist. (Tr. 73-74). In addition, when Mr. Duke and Mr. Mohrhoff were hired, along with all the other employees listed in CX-5, Respondent's advertisements remained on Craigslist. Mr. Swalve testified he never removes an advertisement after Respondent hires someone. (Tr. 74). Mr. Swalve testified that just because advertisements are listed on Craigslist, it does not necessarily indicate Respondent has positions

[9] Respondent's Exhibit 1 was offered and received into evidence without objection. (Tr. 69-70).

currently available, rather it is in anticipation that an employee could leave employment at any time. (Tr. 74-75).

Mr. Swalve identified RX-3 as a fax from Complainant dated January 17, 2017, which reads "Please see attached. If you do not plan to call me, please be advised I will not be available telephonically today." (Tr. 76). The fax was sent to Mr. Swalve and Mr. Galley Smith. (Tr. 76-77). Attached to the fax was a letter dated January 17, 2017, that Mr. Swalve recalls receiving after his receipt of Complainant's handwritten letter. (Tr. 77-78). Mr. Swalve confirmed the January 17, 2017 letter stated "Dear Ryan, as you know, last week I contacted Galley Smith about the possibility of my coming back abroad with S.H.I?" However, Mr. Swalve confirmed he did not speak with Complainant at any time in January 2017, nor did he direct anyone to speak with Complainant. (Tr. 78). Further, in RX-3, Complainant wrote in his January 17, 2017 letter "Your arbitrary decision to not rehire me is nothing more than a clumsy and indirect attack on me for criticizing you with regard to maintenance issues with S.H.I. equipment." Nevertheless, Mr. Swalve testified that maintenance issues and/or repairs had nothing to do with his not rehiring Complainant. Mr. Swalve did not talk to any other personnel about any of Complainant's repair and/or maintenance requests during the first or second period of Complainant's employment. (Tr. 79).

When asked whether Mr. Swalve was aware of Complainant, during his first period of employment, making any written reports for vehicle repair requests, driver study logs, or driver vehicle inspections, Mr. Swalve testified he expected Complainant to make such reports. (Tr. 79-80).

On re-direct examination, Mr. Swalve confirmed he did not mention Complainant's handwritten letter that he threw away in his affidavit. (Tr. 82). Mr. Swalve confirmed CX-2 is a driver's record of duty dated April 15, 2016, indicating there were broken pots. (Tr. 82-83). Complainant also alleged that on April 16, 2016, he communicated various issues to the "dispatcher." (Tr. 83). However, Mr. Swalve did not recall ever speaking with Complainant on April 17, 2016, about any equipment problems or the shifting of the load within the trailer. (Tr. 83-84).

On re-cross examination, Mr. Swalve confirmed that a load-shifting issue or other repair issue would not be unique to Complainant because there could have been 15 to 20 drivers who came through Respondent's office on the same day with similar issues. (Tr. 84).

On further re-direct examination, Mr. Swalve testified it was not common for a cargo load of plants to shift as long as the driver secured it properly on e-tracks or load-locks.[10]

[10] Respondent's Exhibit 3 was offered and received into evidence without objection. (Tr. 86).

Complainant

Complainant testified he is familiar with Respondent's customer, Miller Coors, who is in Albany, Georgia. (Tr. 87). Complainant only went to Miller Coors' location in Albany, Georgia on one occasion. (Tr. 87-88). Complainant confirmed CX-3 contains a daily log dated October 30, 2013, that he completed for Respondent in Albany, Georgia, at 2:00 p.m. at Miller Coors. (Tr. 88). Complainant provided his license to the employees at Miller Coors, which occurred during his first period of employment with Respondent. However, Complainant avers Mr. Swalve knew about the "situation" at Miller Coors and rehired Complainant for a second time. (Tr. 89).

Complainant only hauled plants on two occasions, and he objected to hauling plants on the second occasion which he voiced to Mr. Swalve and Mr. Howard, the dispatcher. (Tr. 89). The numbers of the tractor and trailer Complainant used during the first period of employment with Respondent was 61 and 99, respectively. Complainant testified he objected to hauling the plants because he did not have the proper equipment to carry the load safely. Complainant had issues with the load of plants because it was taken out of a "cave in Kansas City with a driveway about as steep as anything in San Francisco," which caused the load to shift to the back of the trailer. Complainant explained that the "cave" is an underground tunnel. (Tr. 90). Complainant believed not having the proper equipment for the plant loads was unsafe because the "99" trailer did not have an e-track to hold the plants in place. Complainant stated the plants shifted as soon as he drove up the tunnel. (Tr. 91).

On April 15, 2016, Complainant completed paperwork to be turned in to Respondent which stated there was interior damage due to the plant load and 21 broken pots. (Tr. 92). Complainant called Mr. Swalve on the telephone to inform him of what happened, but he could not reach Mr. Swalve. (Tr. 92-93). Thereafter, Complainant called the dispatcher, who in turn called Mr. Swalve and asked that Mr. Swalve speak with Complainant. While Complainant was in Platt City, Missouri, he spoke with Mr. Swalve and "Adam" about what occurred with the plants due to the lack of equipment. While on the phone with Mr. Swalve, Complainant asked Mr. Swalve if he knew of any place with a dock where Complainant could unload the trailer because Complainant could not get inside the trailer due to everything being jammed against the doors and the load-locks being crushed and bent. Complainant had two load-locks with him and "Container Centralen" gave him a third load-lock that he used. (Tr. 93). Complainant expressed to Mr. Swalve that normally plant loads should not be done without e-tracks. Complainant knew the plants were going to move as soon as he started up the tunnel, and he informed "Adam" as to the same. (Tr. 94). Complainant is not sure that he mentioned to Mr. Swalve that he did not have the proper equipment to do the plant load; Complainant did not "go after him about motor carrier regulations or nothing [sic] like that." (Tr. 95). In RX-2 is Complainant's recollection of what

he reported to Adam Howard and to Mr. Swalve. (Tr. 95-96). Complainant explained he did not "dispatch" on the Blue Bunny load because he had to drop off the trailer for repairs. Complainant was also not sure if Mr. Swalve needed to investigate the cargo and file an insurance claim. (Tr. 96).

Other than objecting about not having the proper equipment, Complainant never objected to hauling plants at any other time while working for Respondent. Complainant liked hauling plants, which he did for other employers before working for Respondent. Complainant hauled plants for Layman Wholesale Nurseries ("Layman") which is now owned by Costa Farms, and he worked for them on three different occasions, two of which were contracted through Fleetsource. (Tr. 97). The third time, Complainant worked directly for Layman, and he sought employment with the company despite knowing he would haul only plants. (Tr. 97-98). Complainant sought employment with Layman again during two additional plant hauling seasons, but he was not rehired by Layman. Complainant's employment with Layman occurred prior to his employment with Respondent. (Tr. 98).

On cross-examination, Complainant confirmed that the day he was hauling plants that shifted inside the trailer, the trailer did not have e-tracks. Despite the trailer not being set up for hauling plants, Complainant decided to haul the plants even though he could have refused to take the load of plants. (Tr. 99). Complainant was not sure if Mr. Swalve cared whether trailers or trucks were properly equipped because trailers are supposed to have e-tracks rather than straps and shoring bars in order to properly haul plants. (Tr. 99-100). Complainant did not know who approved Respondent to haul plants for Costa Plants, but he acknowledged that Respondent was indeed approved to do so. Complainant confirmed he chose to haul the plants with the knowledge that the trailer was not equipped with e-tracks. Complainant admitted it is not his opinion that Mr. Swalve does not care about the goods Respondent transports. (Tr. 100). Complainant informed Mr. Swalve that the load was damaged due to not having proper equipment and if Complainant was going to transport plants again, the trailer needed e-tracks. (Tr. 101-02). Complainant's purpose in talking to Mr. Swalve after the load was damaged was to inform Mr. Swalve that "we got [sic] problems here because we do not have the proper equipment." Complainant testified Mr. Swalve never said he was not going to ensure trailers had the proper equipment in the future. (Tr. 103). Complainant only heard Adam Howard state that only one of Respondent's trailers had e-tracks, and therefore Complainant did not understand how Respondent was approved to haul plants. (Tr. 103-04). Nevertheless, Complainant had no evidence to suggest Mr. Swalve did not desire to equip trucks and trailers with proper equipment. (Tr. 105).

Complainant confirmed he was employed by Respondent on two different occasions, the first of which was for seven months from August 28, 2013 through March 2014. (Tr. 107-08). The second time he worked for Respondent for approximately five months. Complainant was

not employed from May 2016 through January 2017, when he sought re-employment with Respondent for a third time. The longest period in which Complainant was employed by a trucking company was for three years when he worked for Atlantic Inland Carrier in 2001, or 2003. (Tr. 108). Complainant worked for U.S. Express for approximately 2.2 years in the 1990s. Claimant recalled that he last worked for Atlantic Inland Carrier in December 2003. (Tr. 109). Complainant also worked for D&D Sexton for approximately four months. (Tr. 109-10). Complainant was employed by Smith Motor Express on two different occasions for a total of one year. (Tr. 110).

In January 2017, when Complainant reapplied to work for Respondent, he had been unemployed since May 2016. On January 9, 2017, Complainant contacted Mr. Galley Smith by telephone to discuss going back to work for Respondent, which is what Complainant had done in the past. (Tr. 111). Complainant did not have any contact with Mr. Swalve or Mr. Smith after he stopped working for Respondent on the second occasion, except calling Mr. Smith to inform him about a "reefer trailer" for sale in Alabama. Complainant testified he got along with Mr. Smith quite well. When Complainant did not hear back from Mr. Smith about being rehired with Respondent for a third time, Complainant was "really disappointed," and Complainant knew he was not going to be rehired. (Tr. 112). Because Mr. Smith did not call Complainant back on January 9, 2017, when Complainant inquired about being rehired by Respondent, Complainant assumed Mr. Swalve "put the word out that [he] was persona non grata." Complainant knew there was something wrong because he was a "jam up driver for these guys" and Mr. Smith did not call Complainant back to explain as to why he was not being rehired. (Tr. 113).

On January 11, 2017, Complainant sent a fax to Mr. Swalve, stating "you guys need me." Complainant sent the fax because he was "hoping Ryan [Swalve] would come to his senses," and because Complainant always liked working for Respondent. (Tr. 114). Complainant attached to his January 11, 2017 fax, three vehicle inspections that were "perfect" inspections Complainant received with the commercial vehicle enforcement, which Complainant stated was bringing down Respondent's SMS scores. Complainant testified Respondent needs drivers like him because it has serious issues with "SMS" and drivers like Complainant would "go a long way" in solving such issues. (Tr. 115). Complainant did not correspond with Mr. Swalve prior to his January 11, 2017 fax, and Complainant denies ever sending a handwritten letter to Mr. Swalve in January 2017. (Tr. 116).

Complainant confirmed RX-4 are documents from Complainant's first time period of employment with Respondent, which include driver's vehicle inspection reports, vehicle repair requests and daily reports dating from August 13, 2013 through March 2014. (Tr. 119-121). Complainant confirmed that RX-4 also contained similar reports he completed while employed by Respondent for a second time. (Tr. 122-23). Complainant confirmed there was no difference between the kind

of documents and/or reports he completed when he worked for Respondent on two different occasions. Complainant testified he completed similar reports for every motor carrier for which he was employed. However, according to Complainant, many driver's rubber stamp the reports in order to show no "defects," and there are companies that have told Complainant not to show any "defects" on his reports. (Tr. 124). Nonetheless, Mr. Swalve never asked Complainant to avoid reporting "defects." (Tr. 124-25).

After not being rehired by Respondent in January 2017, Complainant has filled out applications and looked on Craigslist for employment. However, Complainant did not keep copies of applications or emails when he applied for work. (Tr. 125). Complainant applied with McCormick Trucking and spoke with "Allison" in human resources on July 24, 2017, but he ultimately was not hired by McCormick.[11] (Tr. 126-27).

Complainant identified RX-5 as copies of letters and emails Complainant sent or received in connection with his efforts to obtain employment. Complainant stated he turned down many potential employers because he is not required to take a job in the instant case unless it is "virtually identical" to that of his employment with Respondent, which Complainant believed is "very difficult to find." (Tr. 128). Complainant confirmed RX-5 contains a letter dated August 21, 2017, that Complainant sent to McCormick Trucking after he did not hear back from McCormick Trucking about employment. In his August 21, 2017 letter, Complainant stated "I cannot understand why I was not hired to drive for McCormick and am [sic] concerned that something is amiss." Complainant explained he wrote the aforementioned statement because he was concerned he was "black listed." Complainant never received any communication from McCormick after he sent his August 21, 2017 letter. (Tr. 129).

Complainant could not say how many companies never communicated with him after he applied for employment. (Tr. 129). Complainant "disqualified" some of the potential employers because they had "bad scores," lousy equipment, or required drivers to drive to 48 states and Canada. Even though Respondent had "bad scores," Complainant enjoyed working for Respondent because he could be home every week, which is unique in the trucking industry. Presently, Complainant works for Johnson Feed and has done so since November 2017. (Tr. 130).

Complainant did not contact Mr. Swalve when he was at Miller Coors and they asked Complainant for a photocopy of his license, pictures, and fingerprints. It bothered Complainant that Miller Coors wanted such documentation because motor carriers have theft insurance, and the documents Miller Coors requested were an offensive invasion of Complainant's privacy. Complainant did not want his private

[11] Respondent's Exhibit 4 was offered and received into evidence without objection. (Tr. 127).

information on file "all over the country" because he is concerned about identity theft. (Tr. 131). Complainant explained he did not have an issue with showing his license at the Miller Coors facility, but it was the photocopying of his license and taking pictures of Complainant with another person's cell phone that troubled Complainant. If another company required Complainant to take his picture, fingerprints or photocopy of his license, Complainant believed he is not obliged to cooperate because it is "going too far."[12] (Tr. 132).

Mr. Galley Smith

Mr. Smith testified he is currently employed with Respondent and he resides in Alabama. (Tr. 137). Mr. Smith tries to assist the president and owner of S.H.I. Logistics with any issues that arise. Mr. Smith has worked in the trucking industry for 59 years, and he has completed "turnarounds" for some trucking companies as well as started trucking companies. Mr. Smith has worked as a truck driver and owned trucking companies. Approximately seventeen or eighteen years ago, Mr. Swalve worked for Mr. Smith's trucking company until Mr. Swalve became mad and informed Mr. Smith that he could run a company better than Mr. Smith. (Tr. 138). In 2012, Mr. Smith began working full-time with Respondent. For the past four to five years, Mr. Smith has tried to get Respondent's accounting "headed in the right direction" by identifying costs and revenue. Mr. Smith also handles Respondent's hiring. (Tr. 139).

Mr. Smith is familiar with Complainant, and he was involved with the initial decision to hire Complainant, but he cannot remember if he rehired Complainant the second time. (Tr. 139-40). During Complainant's second period of employment with Respondent, from December 2015 through May 2016, Mr. Smith corresponded with Complainant via text message. (Tr. 140). Upon Complainant voluntarily leaving his employment with Respondent the second time, Mr. Smith met with Complainant at the Turnipseed Truck Wash just outside of Birmingham, Alabama. (Tr. 140-41). Complainant met with Mr. Smith in order to return supplies that belonged to Respondent. Mr. Smith was "amazed" that a driver like Complainant would return Respondent's supplies, and Mr. Smith spoke with Complainant about his dislike for hauling plants, which Complainant stated was "unsafe." Mr. Smith also talked with Complainant about "Homeland Security and the showing of CDL among other things." (Tr. 141). Complainant informed Mr. Smith that he believed showing his CDL was an opportunity for someone to steal Complainant's identity. (Tr. 142).

Mr. Smith remembers communicating with Complainant in or around January 2017, about Complainant seeking employment again with Respondent. However, Mr. Smith cannot recall if he communicated with

[12] Respondent's Exhibit 5 was offered and received into evidence without objection. (Tr. 135-36).

Complainant via text or verbally. (Tr. 142). Complainant informed Mr. Smith he wanted to work again for Respondent, and Mr. Smith let Complainant know he would speak with Mr. Swalve to see if any positions were available. (Tr. 142-43). Mr. Smith did speak with Mr. Swalve and the decision was made not to rehire Complainant. (Tr. 143).

Mr. Smith confirmed RX-4 contains documents that identified "maintenance issues that needed correction." Mr. Smith stated RX-4 does not contain any substantive differences in what drivers report about maintenance-related issues. (Tr. 144).

Mr. Smith also confirmed he is familiar with the documents in RX-5 in that he is familiar with the same types of reports completed by other drivers who worked for Respondent. (Tr. 144-45). Mr. Smith stated that other than Complainant's "editorializing," there is nothing different from Complainant's reports when compared to reports of other drivers employed by Respondent. (Tr. 145).

Mr. Smith identified RX-6 as a "mileage analysis" and a total for each vehicle during January 2017. Mr. Smith reviewed Respondent's January 2017 mileage records, and in doing so, noted there was not any truck available for assignment to Complainant.[13] (Tr. 146).

In January 2017, Mr. Smith recalled seeing a handwritten letter from Complainant that was addressed to Mr. Swalve about seeking re-employment with Respondent. (Tr. 147). According to Mr. Smith, the letter stated Complainant sought re-employment with Respondent, but Complainant had a "problem with showing his CDL" to certain shippers because Complainant believed it was an invasion of his privacy. In his January 2017 letter, Complainant also communicated that "plant hauling was not good." Mr. Smith recalled that Mr. Swalve read the letter, and thereafter, brought the letter to "Tiffany," who also read the letter before giving it to Mr. Smith. Mr. Smith was under the impression that Mr. Swalve destroyed the letter after Mr. Smith read it. (Tr. 148).

Mr. Smith testified he previously reviewed RX-7, Complainant's Complaint in the instant case that lists issues related to Complainant's alleged verbal and written reports of safety and repair and maintenance problems in which Complainant allegedly reported to Respondent. (Tr. 149-50). Mr. Smith explained that drivers, such as Complainant, are responsible for reporting issues that arise with equipment so Respondent can fix mechanical problems. Therefore, Mr. Smith testified there is nothing unusual regarding Complainant's complaint which alleged Complainant reported defects or potential defects with the engine, exhaust system, and driveline, among many other things. (Tr. 150-51).

[13] Respondent's Exhibit 6 was offered and received into evidence without objection. (Tr. 146).

On cross-examination, Mr. Smith confirmed that between January 2017 and April 2017,[14] Respondent hired five drivers.[15] (Tr. 152). Complainant spoke with Mr. Smith on January 9, 2017, about returning to employment with Respondent.

The Contentions of the Parties[16]

Complainant avers Respondent did not rehire him for a third time because he engaged in protected activity. In particular, Complainant avers he only objected to hauling plants without proper equipment while employed with Respondent, which is a safety issue. Complainant contends he reported this safety issue to Mr. Swalve, which Mr. Swalve does not dispute. On this basis, Complainant contends Mr. Swalve has repeatedly stated he did not rehire Complainant based upon Complainant's prior objection to hauling plants. Consequently, Complainant asserts he has shown that his report of a safety issue is a contributing factor in Respondent's decision to not rehire Complainant.

Complainant argues the evidence clearly shows that he reported to Respondent the incident in which the plants he was hauling shifted in the trailer when driving up a tunnel. Complainant avers the record shows he hauled plants for other companies prior to working for Respondent. Complainant asserts that the incident when he refused to show his license occurred during the first time period he worked Respondent, and not the second time as noted by Tiffany Beavers.

Complainant argues Respondent hired multiple drivers from January 2017 to present. Complainant does not seek damages between May 2016 and January 2017, rather he seeks damages from January 2017 until November 2017, when Complainant found alternative employment. Complainant contends Respondent's Craigslist advertisements show Respondent's drivers make between $1,000.00 and $1,200.00 per week. Complainant seeks all available remedies under the Act, as well as attorney's fees.

Respondent avers Complainant only worked for them on two different occasions, once for a period of seven months, and second, for a period of five months, both of which ended when Complainant voluntarily left his employment with Respondent. Respondent further avers Complainant sought employment for a third time, but was not

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[14] On January 3, 2017, Respondent hired James Higgins; on February 20, 2017, Respondent hired David Duke; on March 24, 2017, Respondent hired Ron Mohrhoff; on April 7, 2017, Respondent hired John Thompson; and on April 17, 2017, Respondent hired My Tran. (CX-5).

[15] Respondent's Exhibits 2 and 7 was offered and received into evidence without objection. (Tr. 152-53).

[16] At the March 20, 2018 formal hearing, the parties elected to present closing arguments in lieu of filing post-hearing briefs. (Tr. 154). Accordingly, the contentions of the parties are based upon Complainant's and Respondent's closing arguments.

rehired. From the time Complainant last worked for Respondent until he re-applied for employment for a third time, Respondent contends Complainant was not employed elsewhere. Respondent argues that except for a long stint of employment in the 2000s, Complainant has only worked for short periods of time, leaving large gaps in his employment history. As such, Respondent notes that Complainant quit his job with Respondent in May 2016, and did not seek re-employment with Respondent until January 9, 2017, during which the entire time Respondent's Craigslist ad for qualified truck drivers was running. Nevertheless, Respondent avers Complainant did not seek work with Respondent during this time.

Respondent argues that despite being told he would not be rehired for a third time, Complainant sought employment with Respondent again. However, Mr. Swalve did not waver from his prior decision that Complainant was not to be rehired, and Complainant's insults did not cause Mr. Swalve to divert from his decision. Respondent contends Complainant was nothing but a short-term employee, who had large gaps in employment. Further, Respondent avers it has only hired one employee for a third time, that being, Mr. Riggs.

Respondent contends that Mr. Swalve's February 6, 2017 letter to OSHA set forth bases for not rehiring Complainant, both of which derived from Complainant's January 2017 handwritten letter that he did not want to haul plants or present his license to some of Respondent's customers. Respondent argues Complainant precipitously filed a complaint on January 23, 2017, in the present matter because Complainant assumed he was not going to be rehired when he did not obtain an immediate response from Respondent on the day he called to be rehired. Moreover, Complainant filed his OSHA complaint at a time when Respondent had no trucks available for Complainant to drive.

Respondent contends Complainant's reporting that a trailer did not have e-tracks which caused plants to slide to the back had nothing to do with Respondent not hiring Complainant for a third time, and thus is not a contributing factor to any alleged adverse action. On this basis, Respondent avers it was Complainant who was at fault for taking the haul of plants when Complainant knew he did not have a proper way to secure the load. Respondent asserts it has the right not to hire people for a third time, and has exercised such a right over the years as well as in the instant case.

Based on the foregoing, Respondent argues it has provided clear and convincing evidence that it would not have rehired Complainant regardless of Complainant's report that he could not properly secure the plants in his assigned trailer. Respondent asserts Mr. Swalve made a decision he would not rehire Complainant, and nothing more than a business decision was executed by Mr. Swalve. Respondent avers Mr. Swalve's prior employment decision was further reinforced by Complainant's January 2017 handwritten letter seeking re-employment only if Complainant did not have to haul plants and/or show his license to Respondent's customers.

III. DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tenn. Valley Auth., Case No. 1992-ERA-19, slip op. at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." Indiana Metal Prods. v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so **natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe** . . . Credible testimony is that which meets the test of plausibility.

Id. at 52(emphasis added).

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Constr. Co. v. NLRB, 514 F.2d 8, 16 and n.5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

In the present matter, Complainant's burden of persuasion rests principally upon his testimony. I found Complainant to be generally credible. In particular, although Mr. Swalve testified he does not recall speaking with Complainant on April 17, 2016, about the shifting of the plants inside unit 99, I credit Complainant's testimony that he spoke with Mr. Swalve. That notwithstanding, I also find Complainant's testimony regarding the same is somewhat inconsistent. For example, Complainant testified he informed Mr. Swalve that normally plant loads should not be done without e-tracks. (Tr. 94).

However, Complainant later testified he is not sure that he mentioned to Mr. Swalve that he did not have the proper equipment to do the plant load, stating he did not "go after him about motor carrier regulations or nothing [sic] like that." (Tr. 95). Nevertheless, during cross-examination, Complainant testified he informed Mr. Swalve that the load was damaged due to not having proper equipment and if Complainant was going to transport plants again, the trailer needed e-tracks. (Tr. 101-02). Complainant stated his purpose in talking to Mr. Swalve after the load was damaged was to inform Mr. Swalve that "we got [sic] problems here because we do not have the proper equipment." (Tr. 103). Therefore, while I credit Complainant's testimony that he spoke with Mr. Swalve about the plants shifting inside the unit 99 trailer, causing damage to the interior of the trailer, I find his testimony that he informed Mr. Swalve he did not have proper equipment (i.e., e-tracks) to be inconsistent and unpersuasive.

As will be discussed below, I also credit Mr. Swalve and Mr. Smith's testimony over that of Complainant, concerning the assertion Complainant did in fact send a handwritten letter to Respondent and/or Mr. Swalve in January 2017, stating Complainant would not come back to work if he had to haul plants or show his license to Respondent's customers. On this basis, Mr. Smith's testimony that, upon leaving his employment for a second time, Complainant informed Mr. Smith he disliked hauling plants because it was unsafe and Complainant believed showing his commercial driver's license was an opportunity for someone to steal Complainant's identity, comports with Complainant's return-to-work conditions set forth in Complainant's January 2017 handwritten letter.

Additionally, I found Mr. Swalve to be a credible and forthright witness. Mr. Swalve did not appear to harbor any animosity toward Complainant, and Mr. Swalve's recollection of events was generally consistent with and corroborated by Mr. Smith. I also found Mr. Smith was a credible witness. Mr. Smith was sincere and truthful in his recollection of the facts relating to the instant case, as well as his interactions with Complainant.

B. The Statutory Protection

The employee protection provisions of the STAA provide, in pertinent part:

> (a) Prohibitions.
>
> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
>
> (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial

> motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> > (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;
>
> (B) the employee refuses to operate a vehicle because
>
> > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
> >
> > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

49 U.S.C. § 31105(a). Thus, under the employee protection provisions of the STAA, it is unlawful for an employer to impose an adverse action on an employee because the employee has complained or raised concerns about possible violations of DOT regulations. 49 U.S.C. § 31105(a)(1)(A). See e.g., Reemsnyder v. Mayflower Transit, Inc., Case No. 1993-STA-004, slip op. at 6-7 (Sec'y Dec. and Ord. On Recon. May 19, 1994). Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to drive because operating a vehicle violates DOT regulations **or** because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C. § 31105(a)(1)(B).

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982).

The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of enforcement through formal proceedings." (Emphasis added). Davis v. H.R. Hill, Inc., Case No. 1986-STA-018, slip op. at 2 (Sec'y Mar. 19, 1987).

C. Burden of Proof

In 2007, Congress amended the STAA's burden of proof standard as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). Under the amendment, STAA whistleblower complaints are governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b)(AIR 21); Beatty v. Inman Trucking Mgmt., Inc., ARB No. 13-039, ALJ Nos. 2008-STA-020, 021, slip op. at 7 (ARB May 13, 2014). Under the AIR 21 standard, complainants must show by a "preponderance of evidence" that a protected activity is a "contributing factor" to the adverse action described in the complaint. 49 U.S.C. § 42121(b)(2)(B)(i); see also 75 Fed. Reg. 53545, 53550; Salata v. City Concrete, LLC, ARB Nos. 08-101, 09-104, ALJ Nos. 2008-STA-012, 2008-STA-041 (ARB Sept. 15, 2011). The employer can overcome that showing only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545, 53550; 49 U.S.C. § 42121(b)(2)(B)(i).

Under the 2007 amendments to the STAA, to prevail on his STAA claim, the complainant must prove by a preponderance of the evidence that: **1)** he engaged in protected activity; **2)** that the respondent took an adverse employment action against him; and **3)** that his protected activity was a contributing factor in the unfavorable personnel action. Salyer v. Sunstar Engineering, ARB No. 14-055, ALJ No. 2012-STA-023, slip op. at 2 (ABR Sept. 29, 2015); Clarke v. Navajo Express, Inc., ARB No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011) (citing Williams v. Domino's Pizza, Case No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011)). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Id. The complainant can succeed by "providing either direct or indirect proof of contribution." Id. "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." Id. If direct evidence is not produced, the complainant must "proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating" the complainant's employment. Id. "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." Id. (citing Riess v. Nucor Corporation-Vulcraft-Texas, Inc., Case No. 2008-STA-011, slip op. at 3 (ARB Nov. 30, 2011)). If the complainant proves pretext, an ALJ may

infer that the protected activity contributed to the termination, but he is not compelled to do so. Williams, supra, slip op. at 6.

If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. Williams, supra, slip op. at 6 (citing 49 U.S.C. § 4212(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" Id. (citing Brune v. Horizon Air Indus., Inc., Case No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006)).

D. The Protected Activity

1. Internal Complaints

An employee engages in STAA-protected activity where he files a complaint or begins a proceeding "related to a violation of a motor vehicle safety regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A)(i). Internal complaints to **management** are protected activity under the whistleblower provision of the STAA. Williams, supra, slip op. at 6. A complaint **need not** expressly cite the specific motor vehicle standard allegedly violated, but the complaint must "**relate**" to a violation of a commercial motor vehicle safety standard. Ulrich v. Swift Transportation Corp., Case No. 2010-STA-041, slip op. at 4 (ARB Mar. 27, 2012)(emphasis added). When determining whether a complaint is "related" to a safety violation, the scope of protected activity should be liberally construed. Dick v. Tango Transport, ARB No. 14-054, ALJ No. 2013-STA-060, slip op. at 9 (ARB Aug. 30, 2016). An internal complaint must be communicated to a **manager or supervisor**, but it may be **oral, informal or unofficial**. Ulrich, supra, slip op. at 4. A complainant must show that he reasonably believed he was complaining about the existence of a safety violation. Id. This standard requires the complainant to prove that a person with his expertise and knowledge would have a "**reasonable belief**" that there was a violation of a commercial vehicle safety regulation. Calhoun v. United Parcel Serv., ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 11 (ARB Sept. 14, 2007).

Protected disclosures (i.e., an internal complaint to management) remain protected even where **the employer resolves the safety concern**. Thus, the fact that "management agrees with an employee's assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee's disclosure was objectively reasonable." Benjamin v. Citationshares Mgmt., LLC, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 6 (ARB Nov. 5, 2012); Dick, supra, slip op. at 10.

In the present matter, Complainant's June 20, 2017 Complaint states he engaged in protected activity pursuant to the Act. (ALJX-4). Complainant's alleged protected activity is as follows:

1. Complainant prepared driver vehicle inspection reports on each commercial vehicle he operated and submitted it to Respondent as required pursuant to 49 U.S.C. § 396.11.[17] Complainant averred such reports were related to "the engine, exhaust system, fuel system, brakes, body, charging system, climate control, clutch, complete vehicle, driveline, electrical distribution, frame and mounting, gauge and warning device, lighting system, radio and CD system, steering system, suspension, transmission, and annual vehicle inspection."

2. On December 22, 2015, Complainant made a verbal complaint to Respondent about an inoperative ABS on unit 71, which was repaired in Birmingham, Alabama by Great Dana [sic] Trailer. Complainant avers this complaint relates to a violation pursuant to 49 U.S.C. § 393.55(d)(3) and is protected pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

3. On January 20, 2016, Complainant made a verbal complaint to Respondent about an inoperative ABS on unit 86, but no repairs were authorized. Complainant avers this complaint relates to a violation pursuant to 49 U.S.C. § 393.55(d)(3) and is protected pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

4. On February 4, 2016, Complainant made a verbal complaint to Respondent about a defective tire on unit 103, which was replaced by Respondent. Complainant avers this complaint relates to a violation pursuant to 49 U.S.C. § 393.75(a) and is protected pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

5. On March 10, 2016, Complainant made a verbal complaint to Respondent about a defective tire on unit 99, which was replaced at Goodyear Commercial Tire in Birmingham, Alabama. Complainant avers this complaint relates to a violation pursuant to 49 U.S.C. § 393.75(c) and is protected pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

6. On March 29, 2016, Complainant brought unit 97 to Respondent's South Dakota terminal for repairs, including tire replacements, which was repaired by Respondent. Complainant avers this complaint relates to violations pursuant to 49 U.S.C. §§ 393.55(d)(2), (3), 393.75(c), and 396.17(g), and are protected pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

7. On April 14, 2016, Complainant made a verbal complaint to Respondent "in response to a driver's hours-of-service-related

[17] No dates were provided for any specific driver vehicle inspection reports that Complainant allegedly completed and submitted to Respondent. (ALJX-4).

'retaliatory threat' via a new S.H.I Logistics customer." However, Complainant acknowledged he was indeed behind in his schedule due to customer delay. Complainant avers this complaint relates to a violation pursuant to 49 U.S.C. § 395.3 and is protected pursuant to 49 U.S.C. § 31105(a)(1)(B)(i).

8. On April 14, 2016, Complainant made a verbal complaint to Respondent that Complainant was unable to properly secure a shipment in order to prevent movement of freight during transit and unloading. Complainant avers this complaint relates to violations pursuant to 49 U.S.C. §§ 392.9 and 393 subpart I Protection Against Shifting and Falling Cargo, and are protected pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

9. On April 27, 2016, Complainant traveled "somewhat out of route" to Respondent's South Dakota terminal facility for repairs to unit 99. Complainant avers this complaint relates to violations pursuant to 49 U.S.C. §§ 393.9, 393.207(b), and 393.75(c), and 396.5(b), and are protected pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

On June 30, 2017, Complainant filed an amendment to his June 20, 2017 complaint. (RX-2). Complainant alleged that on April 16, 2016, he dropped off "unit 99" at Respondent's South Dakota terminal for repairs, including "tires, inoperative required lamps, interior damage, inoperative axel locking pins, and a blown hub seal." In addition, Complainant stated there was an issue with an insurance claim that required documentation. Complainant further alleges that he communicated to Respondent's "dispatcher" that due to customer delays, multiple re-works, equipment problems, and an ongoing cargo claim, Complainant had reached the "point of no return" with regard to completing his next delivery. According to Complainant, he informed "dispatch" that unit 99 was in need of repair, he requested that his next delivery be rescheduled and that Mr. Swalve inspect unit 99's interior (along with the damaged cargo) in order that Mr. Swalve could make an insurance claim prior to unit 99 being reloaded. (RX-2).

Complainant also alleges in his amended complaint, that on April 17, 2016, he spoke with Mr. Swalve on the telephone about "what was going on," and Complainant "held forth with the issues, as stated, in detail above, and the parties concluded the conversation." (RX-2).

On April 18, 2016, Complainant avers he conducted a pre-trip inspection on unit 99 and he was "puzzled and distressed" when he discovered unit 99 was reloaded, but only the interior of the trailer was repaired. Complainant avers no other repairs were made. Complainant avers the aforementioned events included both verbal and written complaints related to violations of 49 U.S.C. §§ 393.9(a)(1), Section 393 Subpart I Protection Against Shifting and Falling Cargo, and Sections 393.75, 393.207(a), (b), 395.3(a)(1),(2), (b)(2), 396.3(a)(1), 396.5(b), 396.11(c), 13(a), and 17(g). Complainant

alleges he engaged in protected activity pursuant to 49 U.S.C. §§ 31105(a)(1)(A)(i) and (a)(1)(B)(i), (ii). (RX-2).

In the instant case, Respondent does not dispute that during Complainant's tenure with Respondent he prepared driver vehicle inspection reports, but Respondent disputes that any of these alleged reports were considered protected activity pursuant to the Act.

Likewise, Respondent does not dispute that on December 22, 2015, Complainant verbally reported what Complainant stated was an "inoperative" antilock brake system on a trailer that was inspected and repaired in Birmingham, Alabama. However, Respondent argues it is not protected activity. (ALJX-5, p. 2).

Similarly, Respondent does not dispute that on January 20, 2016, Complainant verbally reported the antilock brake system on a trailer was "inoperative." Nonetheless, Respondent avers the trailer was inspected and it was determined the brake system was "operative." Therefore, Respondent did not repair the antilock brake system. Respondent contends that Complainant's January 20, 2016 report is not protected activity. (ALJX-5, p. 2).

Respondent admits that on February 4, 2016 and on March 10, 2016, Complainant verbally reported what he said was "defective" tires on trailers. Respondent avers that the tires were inspected and replaced, but that neither verbal report is subject to the applicable law, and thus is not protected activity. (ALJX-5, pp. 2-3).

Respondent also admits that on March 29, 2016, Complainant verbally reported there were "defective" tires on a trailer, and that the tires were inspected by maintenance personnel and determined to have tread depth allowed by applicable law. Therefore, Respondent did not replace tires. Nevertheless, Respondent argues Complainant's March 29, 2016 report about "defective" tires is not protected activity. (ALJX-5, p. 3).

Respondent does not dispute that on April 14, 2016, Complainant verbally reported that he was running behind schedule due to a customer's delay, but Respondent denies that Complainant's report is protected activity. Respondent also does not deny that on the same day, Complainant verbally reported he was unable to properly secure a shipment of plants, resulting in the plants falling over during shipment. Respondent avers Complainant was the only employee involved in loading and securing the plants, as well as signing the bill of lading. Respondent denies Complainant's verbal report of the damage to the load of plants was protected activity. (ALJX-5, p. 3).

Respondent admits that on April 27, 2016, Complainant made a written report that he was instructed by Respondent to travel outside his designated route to Respondent's terminal so that the trailer could be repaired. Respondent avers the repairs were made in accordance with standard safety and maintenance procedures. However,

Respondent denies that Complainant's written report is protected activity under the Act.

With respect to Complainant's allegations set forth in his June 30, 2017 amendment to his complaint, Respondent admits that on or about April 16, 2016, Complainant dropped off a trailer to Respondent's South Dakota terminal so that repairs could be made to the trailer. (ALJX-5, p. 4). Nevertheless, Respondent denies that Complainant's actions constitute a complaint subject to the applicable law, and thus is not protected activity. Respondent also admits that on April 16, 2016, Complainant spoke with a "dispatcher" about "various issues," and on April 17, 2016, Complainant spoke with Mr. Swalve, but Respondent argues neither communication constitutes a complaint subject to the applicable law. In sum, Respondent denies that Complainant's "state of mind or any of the events" described in his amendment constitute protected activity under the Act. (ALJX-5, p. 5).

In general, it is undisputed that Complainant prepared driver vehicle inspection reports that he submitted to Respondent about equipment that was in need of repair pursuant to 49 U.S.C. § 396.11. (RX-4). Mr. Swalve testified that while Complainant was employed with Respondent, Complainant made reports of safety issues regarding Respondent's equipment. Further, Mr. Swalve testified each one of Respondent's drivers is expected to perform a "pre-trip" inspection every day, which included checking all equipment to make sure it is fit for transportation. Mr. Swalve expected drivers, like Complainant, to record and report any equipment defects.

Complainant alleges he prepared and submitted driver vehicle inspection reports concerning equipment such as "the engine, exhaust system, fuel system, brakes, body, charging system, climate control, clutch, complete vehicle, driveline, electrical distribution, frame and mounting, gauge and warning device, lighting system, radio and CD system, steering system, suspension, transmission, and annual vehicle inspection." However, Complainant does not provide any dates on which he submitted the reports, nor does he identify specific evidence of record demonstrating he reported issues with the aforementioned equipment.[18] Furthermore, Complainant has also failed to provide any evidence that these internal reports were provided to a manager or supervisor of Respondent, nor has he provided testimony demonstrating

[18] In his exhibits, Complainant only provided two driver's "record of duty station" dated October 30, 2013 and April 15, 2016. However, neither record notes any reports of defects that would relate to a violation of commercial motor vehicle safety regulations, with the exception of the April 15, 2016 report which states "21-Broken Pots, INT. DMG." (CX-2; CX-3). Moreover, Respondent provided at least two hundred pages of Complainant's driver vehicle inspection reports and vehicle repair requests. (RX-4). Nonetheless, Complainant has failed to identify which, if any, relate to the alleged violations he identified in his original and amended complaints. (ALJX-4; RX-2).

he reasonably believed that these internal reports about equipment related to violations of a commercial vehicle safety regulation. See Williams, supra, slip op. at 6; Ulrich, supra, slip op. at 4. Accordingly, I find that Complainant's general accusation that he engaged in protected activity when he prepared and submitted driver vehicle inspection reports is not protected activity pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

With respect to Complainant's alleged verbal and written complaints dated December 22, 2015, January 20, 2016, February 4, 2016, March 10, 2016, March 29, 2016, April 14, 2016,[19] and April 27, 2016, I also find that these internal complaints are not protected activity pursuant to 49 U.S.C. §§ 31105(a)(1)(A)(i), (B)(i). Complainant's complaint states he verbally complained about an inoperative antilock brake system, defective tires, and a "driver's hours-of-service-related retaliatory threat,"[20] as well as offering a written complaint about "repairs" to unit 99. Nevertheless, Complainant set forth no documentary evidence or testimony about to whom the internal complaints were made (i.e., a manager or supervisor of Respondent), nor has Complainant provided testimony demonstrating he reasonably believed that these internal reports about equipment related to violations of a commercial vehicle safety regulation. See Williams, supra, slip op. at 6; Ulrich, supra, slip op. at 4. Accordingly, I find Complainant's general accusation, as set forth only in his complaint, that he engaged in protected activity when he provided verbal and written complaints about the aforementioned issues does not constitute protected activity under the Act.

Plant Hauling Incident

Complainant also contends he engaged in protected activity on April 14, 2016, when he made a verbal complaint about being unable to properly secure a shipment in order to be able to prevent movement during transit and unloading. Complainant testified that he was hauling plants out of an underground tunnel with a steep embankment, which caused the plants to shift to the back of the trailer because the trailer did not have e-tracks to hold the plants in place. Complainant further testified that on April 15, 2016, he completed paperwork noting there was interior damage to the trailer (unit 99), as well as 21 broken pots. (CX-2). Complainant avers he spoke with Mr. Swalve and Adam Howard about what occurred with the plants due to

[19] Complainant alleged that he engaged in protected activity on two different occasions on April 14, 2016, the first of which involves a verbal complaint to Respondent in "response to a driver's hours-of-service-related retaliatory threat via a new S.H.I. customer," while the second incident involved the transit of an unsecured load of plants. (ALJX-4). The undersigned is addressing the first incident, and the report of the unsecured load of plants will be discussed seriatim below.

[20] Mr. Swalve testified he did not recall any report dated April 14, 2016, from Complainant regarding a retaliatory threat made by one of Respondent's customers. (Tr. 69).

the lack of equipment, and he informed Mr. Swalve that "e-tracks" are required in order to properly secure plants in a trailer. However, Complainant later testified he was not sure he mentioned to Mr. Swalve that he did not have the proper equipment to transport the plant load; Complainant did not "go after him [Mr. Swalve] about motor carrier regulations or nothing [sic] like that." Notwithstanding the foregoing, Complainant subsequently testified he informed Mr. Swalve that the load was damaged due to not having proper equipment and if Complainant was going to transport plants again, the trailer needed e-tracks. (Tr. 101-02). Complainant's purpose in talking to Mr. Swalve after the load was damaged was to inform Mr. Swalve that "we got [sic] problems here because we do not have the proper equipment." Admittedly, Complainant stated he knew the plants were going to move as soon as he started up the tunnel, and he informed Adam Howard of the same. Indeed, Complainant acknowledged he chose to haul the plants with the knowledge that the trailer was not equipped with e-tracks.

Mr. Swalve testified he did not recall speaking to Complainant on April 17, 2016, about any equipment problem relating to the loading of plants and the shifting of the plants within the trailer. Mr. Swalve also testified that the "99" trailer is refrigerated, but it does not have e-tracks or load locks, but instead Complainant was required to carry two load locks with him at all times.

Complainant contends his report about the load of plants not being properly secured was related to a myriad of violations pursuant to 49 U.S.C. § 392.3(a)(1), Section 393 Subpart I Protection Against Shifting and Falling Cargo,[21] and Sections 392.9, 393.9(a)(1), 393.75, 393.207(a), (b), 395.3(a)(1),(2), (b)(2), 396.3(a)(1), 396.5(b), 396.11(c),[22] 13(a), and 17(g). As such, Complainant argues he engaged in protected activity pursuant to 49 U.S.C. §§ 31105(a)(1)(A)(i), (a)(1)(B)(i), (ii). More specifically, the regulations identified above include ensuring the motor vehicle is free of oil and grease leaks (§ 396.5(b)); ensuring the motor vehicle's lamps are operable (§ 393.9(a)); having tires that comply with regulatory standards (§ 393.75); having suspension systems that comply with regulatory standards (§§ 393.207(a), (b)); ensuring a driver does not exceed the maximum driving time for property-carrying vehicles (§§ 395.3(a)(1), (2)); before driving a motor vehicle, the **driver** must be satisfied it is in safe operating condition (§ 396.13(a)); the motor carrier ensuring the motor vehicle is maintained and promptly repaired to minimum standards set forth in the applicable regulations (§

[21] There are numerous regulations within Section 393 Subpart I Protection Against Shifting and Falling Cargo, but Complainant failed to identify upon which regulation he relies. (ALJX-4; RX-2). Therefore, the undersigned will not consider whether Complainant's report of the plants shifting in the trailer relates to a violation pursuant to Section 393 Subpart I.

[22] Upon reviewing 49 U.S.C. **§** 396.11, the undersigned has determined the regulation does not contain Section 396.11(c). Therefore, Section 396.11(c) is not included in the discussion that follows.

396.17(g)); the motor carrier must ensure its motor vehicles are inspected, repaired, and maintained, and the parts and accessories must be in safe and proper operating conditions at all times (§ 396.3(a)(1)); and the motor carrier may not permit or require a driver to operate a commercial motor vehicle unless the cargo is properly distributed and adequately secured (§ 392.9).

With respect to the alleged violations that Complainant reported on April 16, 2016, that is, repairs for "tires, inoperative required lamps, inoperative axel locking pins, and a blown hub seal," I find Complainant has provided no testimony or documentary evidence demonstrating he reported these issues to management (i.e., a supervisor or manager of Respondent). Rather, Complainant has only presented a "driver's record of duty station" dated April 15, 2016, demonstrating a notation that there was "21 broken pots, INT. DMG." (CX-2). Therefore, concerning the aforementioned repairs, I find Complainant has failed to show by the preponderance of the evidence that he engaged in protected activity by making an **oral or informal complaint** to someone in **management** that relates to a violation of commercial motor vehicle safety standards. See Ulrich, supra, slip op. at 4; Williams, supra, slip op. at 6.

As discussed above, I found Complainant provided inconsistent testimony about what he reported to Mr. Swalve on April 17, 2017, regarding the load of plants. Accordingly, I only credited Complainant's testimony that he informed Mr. Swalve the plants shifted inside the unit 99 trailer, which caused damage to the interior of the trailer due to the plants shifting. As such, I find Complainant made an internal complaint to Mr. Swalve (i.e., management) that the plants had shifted inside the unit 99 trailer, causing damage to the interior of the trailer.

Pursuant to Calhoun, in addition to showing Complainant made an internal complaint to management, Complainant must demonstrate that a person with his expertise and knowledge would have a "reasonable belief" that there was a violation of a commercial vehicle safety regulation. Calhoun, supra, slip op. at 11. While it is unclear how long Complainant has been a professional truck driver, Complainant testified that in the 1990s he drove a truck for U.S. Truck for 2.2 years, and that he worked for Atlantic Inland Carrier for three years around 2003. Complainant testified he worked for other transportation companies such as Smith Motor Express for a total of one year, and D&D Sexton for four months. On the other hand, Complainant worked for Respondent on two different occasions for a total of approximately 11 months. Thus, I find Complainant has been a professional truck driver for at least seven years. Complainant also testified that he hauled plants for Layman Wholesale Nurseries on three different occasions. Therefore, under the standard set forth in Calhoun, Complainant must show that a driver with seven years of experience, some of which was hauling plants, would have a "reasonable belief" that there was a violation of a commercial vehicle safety regulation.

Complainant argues his complaint about the plants shifting and causing internal damage to his assigned trailer (unit 99) was related to a violation of 49 C.F.R. § 392.9, which states **the motor carrier may not permit or require** a driver to operate a commercial motor vehicle unless the cargo is properly distributed and adequately secured. As discussed above, I found Complainant credibly testified he informed Mr. Swalve that the plants had shifted in the unit 99 trailer and caused interior damage. However, I found Complainant's testimony that he informed Mr. Swalve the plants were not properly secured with e-tracks to be inconsistent and unpersuasive. Therefore, on this basis, pursuant to Section 392.9, I find Complainant did not engage in protected activity when he informed Mr. Swalve that plants had shifted in the trailer and caused interior damage. While Complainant may have communicated to Mr. Swalve that the plants shifted, I find this does not comport with communicating a violation of Section 392.9 which occurred due to Respondent permitting or requiring Complainant to haul a load of plants that were not adequately secured.

Complainant also contends that his complaint about the plants shifting in the trailer and causing internal damage to the trailer relate to a violation of Section 396.3(a)(1). Section 396.3(a)(1) requires that the motor carrier must ensure its motor vehicles are inspected, repaired, and maintained, and the parts and accessories must be in safe and proper operating conditions at all times. Complainant avers he reported to Mr. Swalve there was interior damage to the trailer, and that he reported it on his driver's duty station report on April 15, 2016. (CX-2). Respondent admits that on or about April 16, 2016, Complainant dropped off a trailer to Respondent's South Dakota terminal so that repairs could be made to the trailer. (ALJX-5, p. 4). Based on Complainant's testimony and the documentary evidence, I find that it was reasonable for Complainant to believe the damage to the interior of the trailer (unit 99) related to a violation of 396.3(a)(1), in that the trailer was in need of repair. See Williams, supra, slip op. at 6; Ulrich, supra, slip op. at 4; Calhoun, supra, slip op. at 11. Moreover, Respondent repaired unit 99 after the interior was damaged by the plants shifting. Therefore, pursuant to Benjamin, Respondent's repair of the trailer (unit 99) demonstrates Complainant's disclosure of the damage was objectively reasonable as well. Benjamin, supra, slip op. at 6. Accordingly, I find Complainant's internal complaint to Mr. Swalve regarding the damage to the interior of the trailer was related to a violation of 49 U.S.C. 396.3(a)(1), and thus is protected activity.

E. Adverse Employment Action

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court's Burlington Northern & Sante Fe Railway Co. v. White, 548 U.S. 53 (2006) decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the U.S. Department of Labor, including the AIR-21, incorporated into the STAA. Melton v. Yellow

Transportation, Inc., ARB No. 06-052, ALJ No. 2005-STA-00002 (ARB Sept. 30, 2008). The Court stated that to be an unfavorable personnel action the action must be "materially adverse" meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington Northern, 548 U.S. at 57. Moreover, "adverse actions" refer to unfavorable employment actions that are "**more than trivial**, either as a single event or in combination with other deliberate employer actions alleged." Williams v. American Airlines, Inc., ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010))(emphasis added)(holding that a performance rating drop from "competent" to "needs development" was more than trivial and was an adverse action as a matter of law).

The STAA states that an employer may not "discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment." 49 U.S.C. § 31105(a)(1). Thus, termination or discharge from employment is not required; rather demonstration of an adverse action by the employer is sufficient. An employee who **resigns** from employment **without coercion** has not been subjected to an adverse employment action within the meaning of STAA's whistleblower provision. Hoffman v. Noco Energy Corp., ALJ No. 2014-STA-055, ARB Nos. 15-070, 16-009, slip op. at 4 (ARB June 30, 2017). Complainant bears the burden of establishing by the preponderance of the evidence that Respondent took adverse action against him. 29 C.F.R. § 1978.109(a).

In August 2010 the Secretary of Labor issued new implementing regulations under the STAA that define the scope of discipline or discrimination actionable under the STAA's whistleblower protections. 29 C.F.R. § 1978.102. Those regulations make it a violation for an employer to "**intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee**[.]" 29 C.F.R. §§ 1978.102(b), (c)(emphasis added). The Administrative Review Board (ARB) has recognized that the regulations broaden prior interpretations of what constitutes an adverse action under the STAA. Strohl v. YRC, Inc., Case No. 2010-STA-35 (ARB Aug. 12, 2010).

In the instant case, Complainant argues he suffered adverse action when Respondent failed to hire him for a third time. Respondent confirmed Complainant was employed with Respondent on two separate occasions. First, from August 17, 2013 through March 31, 2014, and second, from December 17, 2015 through May 2, 2016. Nevertheless, Complainant **voluntarily resigned** on both occasions. According to Mr. Swalve, when Complainant informed Mr. Swalve that he was leaving his employment for a second time, Mr. Swalve informed Complainant that he would not be re-hired for a third time.

In addition, in his February 6, 2017 letter to the OSHA, Mr. Swalve confirmed he did not rehire Complainant because Complainant would only work for Respondent if he did not have to haul plants

and/or show his commercial driver's license to customers. Mr. Swalve explained that his response was made in light of a January 2017 handwritten letter he received from Complainant, who was seeking to be re-hired for a third time, stating he would only work if he did not have to haul plants or show his license to Respondent's customers. Mr. Swalve confirmed he showed Complainant's handwritten letter to Mr. Smith, among others, who work for Respondent. Mr. Smith confirmed he reviewed Complainant's January 2017 handwritten letter, which stated Complainant had a problem with "showing his CDL" to certain shippers and that "plant hauling was not good." Mr. Smith further testified that he met with Complainant, after Complainant resigned for the second time, during which Complainant voiced his dislike for hauling plants because it was "unsafe," and Complainant stated he did not like showing his commercial driver's license because Complainant believed someone could steal his identity.

Undoubtedly, Complainant's May 2016 voluntary resignation without coercion is not an adverse employment action. Hoffman, supra, slip op. at 4. In January 2017, when Complainant sought re-employment with Respondent, Mr. Swalve and Mr. Smith simply did not reply to Complainant's multiple inquiries to return to work. Mr. Swalve testified he did not speak with Complainant, nor did he direct anyone who works for Respondent to speak with Complainant about his request to return to work. However, Mr. Swalve testified he did not rehire Complainant because Complainant would only work for Respondent if he did not have to haul plants and/or show his commercial driver's license to some of Respondent's customers.

Notwithstanding the foregoing, pursuant to 29 C.F.R. §§ 1978.102(b), Complainant's not being hired by Respondent for a third time can be characterized as a form of retaliation against an employee. Accordingly, I find and conclude Complainant suffered an adverse action when Respondent did not rehire Complainant when he re-applied for employment.

F. Contributing Factor

Complainant must prove by a preponderance of the evidence that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 31105(b); Williams v. American Airlines, Inc., ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010); Peters v. Renner Trucking & Excavating, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009); Sievers v. Alaska Airlines, Inc., ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 262-63 (5th Cir. 2014) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5th Cir. 2008)); accord Ameristar Airways, Inc. v. Admin. Rev. Bd., 650 F.3d 563, 567 (5th Cir. 2011); Palmer v. Canadian Nat'l Ry., ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53 (ARB Sept. 30, 2016)(en banc). A complainant can succeed by providing

either direct or indirect proof of contribution. Id. Direct evidence is "smoking gun" evidence that conclusively links the protected activity and the adverse action and does not rely upon inference. Id. at 4-5. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. Brucker v. BNSF Ry. Co., ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 10-11 (ARB July 29, 2016)(noting that intent and credibility are crucial issues in employment discrimination cases). Whether considering direct or circumstantial evidence, an administrative law judge **must make a factual determination** and **must be persuaded that it is more likely than not** that the complainant's protected activity played some role in the adverse action. Palmer, supra, slip op. at 55-56.

1. Temporal Proximity

"Temporal proximity between the employee's engagement in a protected activity and the unfavorable personnel action can be circumstantial evidence that the protected activity was a contributing factor to the adverse employment action. See Kewley v. Dep't of Health and Human Servs., 153 F.3d 1357, 1362 (Fed. Cir. 1998) (noting that, under the Whistleblower Protection Act, 'the circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, prima facie, that the disclosure was a contributing factor to the personnel action') (internal quotation omitted)." Direct evidence of an employer's motive is not required. Araujo v. N.J. Transit Rail Operations, Inc., No. 12-2148, 708 F.3d 152, 2013 WL 600208 (3rd Cir. Feb. 19, 2013).

The timing and abruptness of a discharge are persuasive evidence of an employer's motivation. NLRB v. Am. Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983), citing NLRB v. Advanced Bus. Forms Corp., 474 F.2d 457, 465 (2d Cir. 1973); see NLRB v. RainWare, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984). The United States Eleventh Circuit Court of Appeals, under whose jurisdiction this case arises, held that temporal proximity must be "very close" in order to constitute sufficient evidence of causation. Jennings v. Walgreen Co., 805 F. Supp. 2d 1345, 1352 (11th Cir. 2011); Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (holding that a **three to four month** disparity between the statutorily protected activity and the adverse employment action is insufficient to create an inference of retaliation); see also Williams v. S. Coaches, Inc., 99-STA-044 (Sec'y Sept. 11, 1995)(stating that a lapse in **six weeks** between the protected activity and adverse action is not too distant to negate a negative inference); Bolden v. Distron, Inc., 87-STA-28 (ALJ Mar. 21, 1988), aff'd, (Sec'y June 3, 1988)(holding **15 months** too remote in time to create an inference of retaliation);

Evans v. Wash. Pub. Power Supply Sys., ARB No. 96-065, ALJ No. 1995-ERA-052, slip op. at 4 (ARB July 30, 1996)(finding that a lapse of **approximately one year** was too much to justify an inference that protected activity caused the adverse action).

Determining, what, if any, logical inference can be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a "fact intensive" analysis. Brucker v. BNSF Ry. Co., ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 11 (ARB July 29, 2016)(quoting Franchini v. Argonne Nat'l Lab., ARB No. 11-006, ALJ 2009-ERA-014, slip op. at 8-9 (ARB Sept. 26, 2012). Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. Jennings, supra at 1352; Robinson v. Northwest Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. at 9 (ARB Nov. 30, 2005). However, where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. Barber v. Planet Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

Here, on April 17, 2016, Complainant avers he reported to Mr. Swalve that the plants he was hauling shifted in the trailer and caused damage to the interior of the trailer. In January 2017, approximately **nine months** later, Complainant sought employment with Respondent for a third time. Thereafter, Respondent simply did not reply to Complainant's multiple inquiries to seek re-employment with Respondent for a third time. That notwithstanding, I find that the nine months between the time Complainant reported damage to the interior of the trailer and when he applied for employment with Respondent for a third time, but was not rehired, is too remote to create an inference of retaliation. Accordingly, I find and conclude that Complainant's protected activity is not close in time to Respondent's adverse action such that it creates an inference of causation based on temporal proximity. See Kewley, supra.

2. Respondent's Knowledge of the Protected Activity

Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. See Gary v. Chautauqua Airlines, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); Peck v. Safe Air Int'l, Inc., ARB Case No. 02-028 (ARB, Jan. 30, 2004). The ARB has noted that knowledge of protected activity is a factor to be considered under the contributing factor analysis. See Hamilton v. CSX Transp., Inc., ARB No. 12-022, ALJ No. 2010-FRS-025 (ARB Apr. 30, 2013).

Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a

discrimination complaint. Bartlik v. TVA, Case No. 1988-ERA-15, slip op. at 4, n.1 (Sec'y Apr. 7, 1993), aff'd, 73 F.3d 100 (6th Cir. 1996). However, "[C]onstructive knowledge of Complainant's protected activities on the part of one with ultimate responsibility for personnel action may support an inference of retaliatory intent." Frazier v. Merit Sys. Prot. Bd., 672 F.2d 150, 166 (D.C. Cir. 1982). The Board has noted that while "knowledge of the protected activity can be shown by circumstantial evidence, that evidence must show that an employee of Respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge of the protected activity." Bartlik v. Tenn. Valley Auth., Case No. 1988-ERA-15 (Sec'y Apr. 7, 1993).

Mr. Swalve testified he did not recall speaking with Complainant on April 17, 2016, about any problems with equipment. As previously discussed, I credited Complainant's testimony he reported to Mr. Swalve that plants shifted to the back of his assigned trailer and caused interior damage. Thus, I find that Mr. Swalve had knowledge of Complainant's protected activity when he reported damage to the interior of his assigned trailer on April 17, 2016.

I also find that Mr. Swalve is the decision maker who decided Complainant would not be hired for a third time. Mr. Swalve testified he informed Complainant that he would not rehire Complainant for a third time upon Complainant voluntarily resigning for the second time in May 2016. Therefore, I find Respondent had knowledge of Complainant's protected activity.

3. Disparate Treatment

Complainant did not specifically argue that he was treated differently from other employees who engaged in protected activity. Rather, Complainant argues that Respondent hired Mr. William Riggs on three different occasions, but would not rehire Complainant for a third time.

To establish disparate treatment a plaintiff must demonstrate that a **similarly situated**" employee under **nearly identical** circumstances was treated differently. See Anderson v. WBMG-42, 253 F.3d 561 (11th Cir. 2001); see also Summers v. Winter, 2008 U.S. Dist. LEXIS 15889, at *30 (Fla. Dist. Ct. App. Feb. 29, 2008); Douglas v. Skywest Airlines, Inc., ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014, slip op. at 17 (ARB Sept. 30, 2009)(the ARB defined "similarly situated" employees as individuals "involved in or accused of the same or similar conduct but disciplined in different ways."). To be a proper comparator the employee must have "**held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially similar violation histories**." Lee v. Kansas City S. Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009)(emphasis added). Of **most importance**, the employee's conduct that elicited the adverse personnel action must be

"nearly identical to that of the proffered comparator who allegedly drew a dissimilar employment decision." Id.

Here, Mr. Swalve confirmed Respondent did hire Mr. Riggs for a third time. Mr. Swalve testified he was not aware if Mr. Riggs ever objected to hauling plants or reported safety issues, but he expected all of Respondent's drivers to report safety issues.

Complainant has presented no evidence to demonstrate whether Mr. Riggs, like Complainant, engaged in protected activity, but was still rehired. Neither did Complainant provide evidence that Mr. Riggs ever conditioned his being rehired upon not hauling plants or showing his commercial driver's license as did Complainant. Accordingly, I find a showing that Respondent simply rehired Mr. Riggs for a third time does not sufficiently demonstrate that Complainant was disparately treated when he was not rehired on a third occasion in January 2017. Therefore, I find and conclude Complainant has failed to present any evidence of disparate treatment which would support a finding that Complainant's protected activity contributed to Respondent's adverse action. See Williams, supra, slip op. at 7.

4. The Legitimacy Reasons for Employer's Actions

The Act does not prohibit an employer from discharging a whistleblower where the discharge is not motivated by retaliatory animus. See, e.g., Newkirk v. Cypress Trucking Lines, Inc., Case No. 1988-STA-17, slip op. at 9 (Sec'y Feb. 13, 1989)(although a complainant engaged in protected activity, he was terminated by the respondent's managers who collectively determined to discharge the complainant for his failure to secure bills of lading); cf. Lockert v. U.S. Dep't of Labor, 867 F.2d 513, 519 (9th Cir. 1989)(an employee who engages in protected activity may be discharged by an employer if the employer has reasonable grounds to believe the employee engaged in misconduct and the decision was not motivated by protected conduct).

The Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether the complainant has demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Palmer, supra, slip op. at 29, 55; Brune, supra at 14 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See Florek v. E. Air Cent., Inc., ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)). The complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. Douglas, supra, slip op. at 11. Furthermore, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employe[r] taking the alleged

prohibited personnel action in order to establish that his [or her] disclosure was a contributing factor to the personnel actions." Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993).

Complainant contends he was not rehired by Respondent because he engaged in protected activity when he reported he did not have proper equipment, and as a result, plants shifted in his assigned trailer, causing pots to break and interior damage to the trailer. Moreover, Complainant contends he made many reports of safety issues during his employment with Respondent, which also contributed to Respondent's decision not to rehire Complainant in January 2017.

Conversely, Respondent argues that upon Complainant's second voluntary resignation from employment, Mr. Swalve informed Complainant that he would not be re-hired for a third time. Respondent contends that Complainant was not rehired because Mr. Swalve made a business decision that he would not rehire Complainant for a third time after Complainant voluntarily left his employment twice before. In addition, Respondent avers Mr. Swalve stated he would not rehire Complainant based upon Complainant's January 2017 handwritten letter, stating Complainant would only return to work if he did not have to haul plants and/or show his commercial driver's license to Respondent's customers. On this basis, Respondent avers that Complainant's report of plants sliding to the back of a trailer, causing damage, has nothing to do with Respondent not rehiring Complainant for a third time.

Mr. Swalve testified that he informed Complainant he was not going to rehire Complainant for a third time, thus Mr. Swalve did not need a reason to disregard Complainant's inquiry for employment. Moreover, Mr. Swalve stated that receiving Complainant's January 2017 letter and faxes did not change his prior decision not to rehire Complainant. Nevertheless, Complainant's January 11, 2017 and January 17, 2017 letters, "threatening" Respondent (as well as Mr. Swalve) did nothing to encourage Mr. Swalve to rehire Complainant.

Specifically, on January 11, 2017, Complainant faxed a letter stating to Mr. Swalve "you guys need me. Any carrier with SMS scores this bad can use some help." Thereafter, on January 17, 2017, Complainant sent another letter to Mr. Swalve entitled "RE Workplace Retaliation (Failure to Rehire)," stating that he contacted Mr. Galley Smith about coming back to work for Respondent, but he never heard back from Mr. Smith. Complainant wrote, in part, the following:

> Your arbitrary decision to not rehire me is nothing more than a clumsy and indirect attack on me, for criticizing you with regard to maintenance issues with SHI equipment. (By the way, you have never once had to call for a mobile repair service due to my having dead-lined SHI equipment at a state scale and you know it.).

> But when it comes to motor carrier safety, and, in particular, what is required of drivers under the FMCSRs, i.e., the driver is responsible for the safe and legal operation of the truck, I do not much care about your or Frank's politics.
>
> If you disagree, if you believe that truck drivers have no right to make safety complaints to management and that "at will" employment forces me and those who would dare to criticize you to stand silent or be punished, I welcome the opportunity to stand silent or be punished, I welcome the opportunity to have the Labor Department's OSHA give you a pep talk, perhaps.

(RX-3, pp. 5-6).

Mr. Swalve testified he also received a handwritten letter, that Mr. Smith also reviewed, in which Complainant wrote he would only return to his employment with Respondent if he did not have to haul plants or show his commercial driver's license to Respondent's customers. Notably, Mr. Smith credibly testified that when he met with Complainant in Alabama, following Complainant's second voluntary resignation, Complainant communicated his dislike for hauling plants, which Complainant stated was "unsafe." Complainant also communicated to Mr. Smith that he believed showing his commercial driver's license presented opportunities for someone to steal Complainant's identity. Although Complainant testified he never sent a handwritten letter to Mr. Swalve, stating conditions on which he would return to work for Respondent, I credited Mr. Swalve and Mr. Smith's testimony that Complainant did indeed send a handwritten letter in January 2017. Furthermore, Complainant's return-to-work conditions espoused in his January 2017 handwritten letter comport with Complainant's statements made to Mr. Smith after he resigned from his employment in May 2016.

Based on the foregoing, I find Respondent had a legitimate reason for not hiring Complainant for a third time, namely, that Complainant voluntarily resigned on two previous occasions, and in doing so, Complainant was informed by Mr. Swalve he would not be rehired for a third time.[23] As the owner and president of S.H.I. Logistics, Mr. Swalve is entitled to render decisions about whom will work for his company. Although Complainant claims he was not rehired because he reported safety issues and damage to the interior of his assigned trailer, Complainant has failed to present any evidence that Respondent retaliated against Complainant for reporting such issues. To the contrary, in his amended complaint, Complainant avers Respondent fixed the interior of his assigned trailer, and as a result, Complainant was asked to make another delivery the next day.

[23] Mr. Swalve's testimony that Complainant was informed he would not be rehired for a third time upon resigning for a second time, is uncontradicted by Complainant and is not called into question by any other testimony or evidence.

(RX-2). Indeed, the record is devoid of any credible evidence demonstrating Respondent retaliated against Complainant for reporting any safety issues or damage to equipment during the course of his employment with Respondent. Significantly, Respondent admitted at least 200 pages (RX-4) of what Complainant stated were driver's vehicle inspection reports, vehicle repair requests, and daily reports he made during the course of his employment with Respondent, but Respondent never terminated Complainant during this time. Instead, Complainant voluntarily resigned from his employment with Respondent on two different occasions.

Additionally, Complainant's letters seeking re-employment on a third occasion are discourteous and hostile in nature, which **arguably** would discourage a reasonable employer from hiring an employee. When Complainant contacted Mr. Smith about being rehired by Respondent, Mr. Smith simply did not call Complainant about any job openings. Similarly, Mr. Swalve did not speak with Complainant about his third employment inquiry. Nevertheless, Complainant assumed he was not going to be rehired, and thereafter, began sending indecorous letters to Mr. Swalve. That notwithstanding, Complainant also placed conditions upon Respondent that he would not return to work unless he did not have to haul plants and/or show his commercial driver's license to Respondent's customers. Complainant argues Respondent hired him for a second time after he objected to showing his license to Respondent's customer, Miller Coors, and thus, Respondent did not hire him for a third time because he engaged in protected activity, that is, he reported the plants were not properly secured in his assigned trailer (unit 99). However, at the time Complainant was rehired by Complainant for a second time, Complainant had not sent a letter to Mr. Swalve conditioning his re-employment on not hauling plants and not showing his commercial driver's license to Respondent's customers.

Looking at the totality of the evidence, Complainant has failed to demonstrate by a preponderance of the evidence that his protected activity contributed to, in any way, his not being rehired with Respondent in January 2017. Complainant may have established that Mr. Swalve, who made the decision not to rehire Complainant, had knowledge that Complainant reported damage to the plants he was hauling and the interior of his assigned trailer (unit 99). However, I find the temporal proximity between Complainant's protected activity and alleged adverse action does not establish causation supportive of discrimination. See Barber, supra. Nor did Complainant provide competent evidence of disparate treatment. By contrast, there is evidence demonstrating Complainant was not rehired for legitimate reasons, namely, he voluntarily resigned on two prior occasions, he sent hostile letters to Respondent, and Complainant's request for re-employment was conditional, all of which the STAA does not shield. See Newkirk, supra, slip op. at 9.

G. Same Action Defense

As denoted by Palmer, Respondent must establish that it would have **taken the same action** absent the Complainant's protected activity. Palmer, supra, slip op. at 22. A respondent's burden to prove this step by **clear and convincing** evidence is a purposely high burden, as opposed to complainant's relatively low burden to demonstrate that the protected activity was a contributing factor in the adverse personnel action. Id. Clear and convincing evidence that an employer would have disciplined the employee in the absence of protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. Id. (stating that the same action defense asks whether the non-retaliatory reasons, **by themselves**, would have been enough that the respondent would have taken the same adverse action absent the protected activity). To meet the burden, Respondent must show that "the truth of its factual contentions is **highly probable**." Colorado v. New Mexico, 467 U.S. 310, 316 (1984)(emphasis added).

Assuming, **arguendo**, Complainant had shown any protected activity to be a contributing factor for his failure to be rehired, Respondent has satisfied its burden of rebuttal by showing through **clear and convincing** evidence it **would have taken the same employment action** irrespective of Complainant's protected activity. As discussed above, Complainant voluntarily left his employment, not once, but twice, and upon seeking employment with Respondent for a third time, Complainant conditioned his return on not hauling plants and not showing his commercial driver's license to Respondent's customers. Complainant also sent insulting and hostile letters to Mr. Swalve, owner of S.H.I. Logistics, when Complainant assumed he was not going to be rehired by Respondent. Finally, Mr. Swalve informed Complainant he would not be rehired when Complainant voluntarily resigned for the second time from his employment with Respondent. Thus, the aforementioned events in this matter, **by themselves**, clearly and convincingly demonstrate that Respondent would have taken the same adverse action absent Complainant's protected activity.

Accordingly, I find and conclude Respondent has demonstrated by **clear and convincing** evidence that it would have taken the same adverse actions absent Complainant's protected activities.

IV. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent did not unlawfully discriminate against John A. Griffith because of his alleged protected activity and, accordingly, John A. Griffith's complaint is hereby **DISMISSED**.

ORDERED this 28th day of December, 2018, at Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (e-File) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1978.110(b).