U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 20 December 2018

OALJ Case No.: 2018-STA-00019
OSHA Case No.: 5-4760-17-022

In the Matter of:

RONALD L. RANTZ,
Complainant,

v.

BLAKE SCHOOLS,
Respondent.

DECISION AND ORDER
AWARDING REINSTATEMENT AND DAMAGES

The above-captioned case arose under the "whistleblower" protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, and the applicable regulations issued thereunder at 29 C.F.R. Part 1978. These provisions empower the Secretary of Labor to investigate and determine whistleblower complaints filed by employees of commercial motor carriers who were allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles. Ronald L. Rantz ("Complainant") alleges that Blake Schools ("Respondent") terminated his employment in violation of the STAA after he reported to management that the school bus he was assigned had caught fire and refused to drive the same bus afterwards because he believe it was unsafe to operate.

PROCEDURAL BACKGROUND

Complainant filed his initial complaint with the Occupational Safety and Health Administration ("OSHA") on April 7, 2017. On November 13, 2017, OSHA issued written findings that Complainant had reported an electrical issue with the bus he was assigned to drive, but there was no reasonable basis for him to refuse to drive the same bus after it was repaired. OSHA found that while Respondent relied upon Complainant's refusal to drive his assigned bus as a reason for terminating his employment, it had other reasons that constituted a valid defense to an alleged STAA violation. On December 10, 2017, Complainant objected and submitted a request for a de novo hearing before the Office of Administrative Law Judges. The case was

filed and docketed in the Office of Administrative Law Judges ("OALJ") on December 19, 2017. The case was assigned to me on January 24, 2018 and I issued a Notice of Hearing and Pre-Hearing Order on February 5, 2018 setting this case for hearing on May 2, 2018. The hearing date was continued and the hearing was held on July 26, 2018, in Minneapolis, Minnesota. (ALJX 1-4, TR 5-6).[1]

Both parties attended the hearing and were represented by counsel. Both parties had a full opportunity to offer evidence, to call and to cross-examine witnesses, to present arguments and to submit final post-hearing briefs. I placed into the record four orders related to the convening and scheduling of the hearing and two orders resolving prehearing motions. (ALJX 1-6; TR 6-7). The parties offered nine joint exhibits. (JX 1-9; TR 7-8). Complainant offered ten additional exhibits that were admitted during the course of the hearing. (CX 4-5, 12, 14, 21-22, 24-25, 27[2], 29; TR 158, 236, 296-297, 35, 274, 40, 38, 91, 266, 22). They were admitted without objection except for CX 14 and 21. (TR 35, 274). Respondent did not offer any documentary evidence at the hearing and relied upon the joint exhibits. (TR 9). The parties did not stipulate to any facts prior to the hearing. Complainant testified at the hearing, as did Lawrence Carlson, Harry "Woody" Herrman and Laurel McMullen.

On October 16, 2018, I issued an order informing the parties that I intended to take official notice that the Surface Transportation Board approved the Soo Line Railroad Company's abandonment of a portion of a railroad located between Essex Street SE and the bridge crossing Interstate 94 in Minneapolis, Minnesota, in U.S. Postal Service Zip Code 55414. I gave the parties an opportunity to object. Complainant submitted a letter that I received on November 14, 2018, stating he had no objection. Respondent did not submit a response. The evidentiary record is now closed. I received Respondent's post-hearing brief on October 24, 2018 and Complainant's post-hearing brief on October 26, 2018.

FACTUAL SYNOPSIS

Respondent employed Complainant as a school bus driver beginning with the 2015-2016 school year. Prior to the events in the latter part of January 2017 that led to his termination, Complainant had not been disciplined for misconduct or substandard performance, rather he had received recognition for his good work. On January 19, 2017, as Complainant was preparing to start his afternoon route using his assigned bus, the electrical wiring in the mirror on the front right side of the bus shorted out. According to Complainant, the mirror caught on fire. According to Respondent, the shortage in the electrical wiring caused smoke, but there was no fire. Complainant reported the problem with the mirror and used a spare bus that was the same make and model as the bus he was assigned. Respondent's mechanic repaired the electrical wiring the next day. Complainant was informed on either January 20 or January 21, 2017, that his assigned bus was repaired and ready for use. Complainant used a spare bus on January 21, 2017. He was told that he needed to use his assigned bus, which he did the following Monday.

[1] Administrative Law Judge Exhibits are designated "ALJX," Complainant's Exhibits are designated "CX," Joint Exhibits are designated "JX," and citations to the hearing transcript are designated "TR" and accompanied by the relevant page number(s).

[2] CX 27 was not admitted in its entirety. Only the response to interrogatory 12 was admitted. (TR 266).

Respondent's transportation manager told Complainant to practice his LearningWorks route between his morning and afternoon runs on January 21, 2017 because Complainant had difficulty completing the route in a timely manner. Complainant did not do any practice runs. Complainant missed a noon route on January 20, 2017 because his bus was behind another of one of Respondent's buses that experienced a brake failure while they were out on a fieldtrip. Respondent contends that it was Complainant's duty to make sure the noon route was covered and he failed to do so. Respondent contends that Complainant waited too long for students, was late for drop offs, and missed or was late for routes.

Complainant was counseled by the interim director of transportation on January 26, 2017 about the alleged performance issues and he was informed that he had ten days to improve his performance. Two days later, the interim director of transportation accompanied Complainant on the Saturday morning LearningWorks route. Respondent dispatched its buses that day by mistake because there was no LearningWorks program scheduled for that Saturday. Drivers were notified to cancel their routes once the scheduling error was detected. The interim director of transportation said that he instructed Complainant to go ahead and run his route despite the fact that there were no students to pick up. The interim director of transportation alleges that Complainant failed to stop at a railroad crossing, used his eight-way hazard lights instead of his four-way hazard lights when he stopped at another railroad crossing, and twice stopped in an oncoming lane of traffic at student pick-up/drop-off points. Complainant completed his morning route the following Monday, January 30, 2017. He was terminated prior to the afternoon route.

SUMMARY OF THE LAW

Congress enacted the employee protection provisions of the STAA in order to encourage transportation industry employees to report noncompliance with safety regulations governing commercial motor vehicles. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987). In order to achieve that objective, at 49 U.S.C. § 31105, the Act states:

> (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) the employee … has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety … regulation, standard, or order, or …
>
> (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;
>
> (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.

To establish unlawful activity under the STAA, a complainant must show: (1) that he engaged in protected activity, (2) that the employer knew of the protected activity, (3) that the complainant suffered an adverse employment action amounting to discharge, discipline, or discrimination regarding pay, terms, privileges of employment, and (4) that the protected activity was a contributing factor in the adverse employment action. *Clark v. Hamilton Haulers, LLC*, ARB Case No. 13-023, ALJ Case No. 2011- STA-00007, slip op. at 3-4 (ARB May 29, 2014); *Ferguson v. New Prime, Inc.*, ARB No. 10-75, ALJ No. 2009-STA-00047, slip op. at 3 (ARB August 31, 2011); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-00018, slip op. at 4 (ARB June 29, 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." *Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)). Accordingly, a complainant need only show that the protected activity played some role in the employer's decision to take adverse action and any amount of causation will satisfy this standard. *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-00035, slip op. at 14-15, 51-55 (ARB Jan. 4, 2017). All evidence relevant to this issue may be considered, including the employer's proffered reasons for the adverse action. (*Id.*).

If a complainant satisfies these requirements, the burden shifts to the employer to establish by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1978.104(e)(4); *Arjuno v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 2008-STA-00021, slip op. at 7-11 (ARB May 13, 2014). Clear and convincing evidence "denotes a conclusive demonstration, *i.e.*, that the thing to be proved is highly probable or reasonably certain." *DeFrancesco v. Union Railroad Co.*, ARB No. 13-057, ALJ No. 2009-FRS-00009, slip op. at 8 (ARB Sept. 30, 2015). The burden of proof for clear and convincing evidence rests between "preponderance of the evidence" and "proof beyond a reasonable doubt." *See Araujo*, 708 F.3d at 159 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 525 (1979)). Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when, based on the evidence, the proffered conclusion is highly probable. *DeFrancesco*, ARB No. 13-057 at 7-8.

SUMMARY OF THE TESTIMONY AND EVIDENCE

Ronald L. Rantz – Complainant

Ronald L. Rantz ("Complainant") began working for Respondent in September 2016. Prior to that, he worked in the automotive industry in various capacities. He moved from

California to Minnesota after he retired from the automotive industry and he decided to become a school bus driver in order to get out of the house and to supplement his retirement income. (TR 20-21). At the time of the hearing, he was employed as a school bus driver at Providence Academy, a position he had held since February 23, 2017. (TR 21; CX 29). Complainant has not done any work for Providence Academy during the summer months when school is not in session. (TR 23). When he worked for Respondent, he worked part-time over the summer doing maintenance work and he averaged 30 to 35 hours of work per week. He thought Respondent paid him a little less for doing maintenance work than for driving a school bus. (TR 26). When he was a bus driver for Respondent, he had a morning and an afternoon route. He also drove for athletic events, field trips, and other special events. He averaged 32 to 36 hours per week, and sometimes 40 hours. (TR 27-28).

Complaint testified that did not have any problems at work until he reported that the mirror on his assigned bust had caught on fire and then "things just kind of spiraled in days afterwards very rapidly." (TR 33). In June 2016, at the end of the 2015-2016 school year, Complainant received a letter informing him that he had been nominated for a "Staff Recognition Award." The Associate Head of the school wrote a personal note on the letter saying "Thank you, Ron. This is awesome." (TR 34-36; CX 14). In January 2017, Complainant was one of several bus drivers "awarded the bus driver performance stipend for the first half of 2016-17." (TR 37-38; CX 24). He got an extra $225 in his January 15, 2017 paycheck for his good work in the first half of the school year. (TR 38; CX 24).

Complainant said that Brian Houghton was the transportation director until January 27, 2017, when he resigned and moved on to another job. Mr. Carlson became the interim transportation director that day, which was the same day that Mr. Carlson disciplined him. (TR 47, 66-68, 78; JX 5). One week earlier, on January 19, 2017, is when Complainant experienced the problem with the mirror on his bus. He described what happened as follows:

> Q. Okay. And tell me how this bus fire happened or what you saw.
>
> A. Well, I arrived at the school for my afternoon route. And my bus – Blake School, the Hopkins campus, has two parking lots, basically. The lower lot is where we park the buses and where the buses are parked in between routes and so on, so forth, and in the evenings and that. The upper parking lot is where employees park, parents, visitors, all that and that, but there is a section along the sidewalk where we stage the buses for the students to get on.
>
> Okay. At the time we depart the lower lot, we kind of form a line, based upon where you pull in into the spaces, just to be somewhat organized and easier to manage that. I was always the last bus up the hill. I was the last one in the line. So my bus always departed at the end of the line every day.
>
> I got on the bus to get ready for depart and I turned on the bus, and at first I just noticed a lot of smoke coming from the right-hand side of the bus. Didn't really have any idea what it was, but it was a lot of smoke, so I knew it wasn't good. Followed by that was flames. Then I realized the flames were coming out

of the mirror and that, on the right-hand side of the bus. Well, these flames were – they were going pretty good.

Q. Can I just stop you?

A. So all's I thought was –

Q. Mr. Rantz, can I stop you real quick?

A. Okay.

Q. You did a gesture, and it's not going to be clear for the record what a gesture is. Can you explain what your gesture was?

A. Well, the flames were 16, 18, 24 inches high. I mean, they were not just a few sparks or a little bit of – you know, it was a substantial amount of flames. And did I – I didn't panic, but at the same token I just moved into action to put this fire out. I knew I had to put the fire out.

Well, I got the fire out. I turned off the ignition. And there was a lot of smoke. So, now, I don't recall if I turned off the ignition before I extinguished the fire. And I didn't use the fire extinguisher and that. Just didn't think of it. All's I thought about is got to get these – this fire out and that. I didn't want it to spread. Got it out.

There was still a lot of smoke. So I knew I couldn't turn the ignition back on, that that was something you didn't want to do. So I got on the substitute backup bus and that. The key to my bus would open any other Freightliner bus that we had. So I opened the other bus and that, got on the radio, and I immediately told Brian that I wasn't up the hill because the bus had caught on fire. And his response was – naturally was, "What are you talking about? What do you mean the bus caught on fire?" And I told him. I said, "The bus caught on fire." I says, "I have no idea how it caught on fire or why it caught on fire, but it caught on fire." I says, "You cannot drive this bus." He said, "Fine. Take the backup bus, come up to the staging area, and we'll deal with it." So that's what I did. I came up to the staging area.

Q. Okay. And I have a few questions that I wanted to ask in there. I just didn't want to interrupt. I know there's some confusion if it was the 18th or the 19th, in terms of when this fire was. Do you recall what shift it occurred before? What shift, the morning or afternoon shift?

A. Afternoon shift.

Q. And about how long between it started smoking to you putting it out? How long was that fire?

A. Oh, 5, 6, 7 minutes? I don't know. Not that terribly – I knew I had to get the fire out fast. That's all I knew.

Q. And how did you get the fire out, then?

A. A combination of – I had a coat, so I kind of smothered it a little bit so to speak, and that. Because the only thing I saw fire, it was in the mirror area. I didn't know if it was under the hood, anywhere else. I figured if that was the case, then at that point I was going to back up and let number 4 be bygones.

Q. And then you indicated that you radioed Brian. And that would be Brian Houghton, correct?

A. Yes. I actually just radioed up the hill, and he just happened to be – I knew that either him or Larry Carlson, they carry a walkie-talkie-type radio with them. In other words, they had communication with the bus – buses and stuff. So I knew that one of them would respond to me when I radioed up.

Q. Sure. It's not a dedicated frequency. The radio goes out to no channel?

A. No. I just turned on the radio and –

Q. And both Mr. Houghton and Mr. Carlson would have heard about the fire, correct?

A. I would assume they probably both heard. I don't – I don't really know. I know who responded back was Brian.

Q. And then I think sort of – when sort of you ended your explanation, you said you pulled up to – well, let me back up, actually. I'm sorry.

Which bus was this that had the fire?

A. Bus number 4.

Q. Was that your regular bus?

A. That was my regular bus.

Q. And how many students would you normally transport on bus number 4?

A. Well, it varies, depending on morning and evening shift, but, on an average, seven or eight students, I want to say, on a daily basis. Both directions.

Q. And, I'm sorry, so you get back up to, I guess the upper area to pick up the students, you're in the different bus. Did you talk to anyone else about the fire when you were up there?

A. I believe Brian came over. And probably I kind of clarified with him exactly. And then I told – I believe I talked to Larry Carlson as well. It was just kind of they wanted to know what happened, I think.

Q. And, I'm sorry, you said you clarified sort of what happened to Mr. Houghton. What did you mean by "clarified," I suppose?

A. Well, I just kind of explained to him exactly what the problem was and what happened. And I wanted to make sure that the bus didn't get started again, because if it was – it seemed like, when I turned off the bus and the smoke was gone, let's just leave it alone until somebody can address the issue, come look at it. So I wanted to make sure. I knew Woody would come in in the morning and start up all the buses and stuff. I wanted to make sure that he didn't start that bus.

Q. And for the benefit of everyone – you mentioned Woody. Who is Woody?

A. Woody is the, I would say, transportation mechanic, as well as a substitute bus driver. Woody is kind of like the jack-of-all-trade type of guy. Let's put it that way.

Q. Okay. And so after you extinguished the fire you believed it was unsafe to drive?

A. Oh yeah. I didn't want to be back in that bus, so yes.

Q. And if you were driving bus number 4 on your regular route and that fire happened, would that be unsafe?

A. If I was out on the road and that happened, yes, because I would've had a combination of things to have to do all at the same time. Number one thing: get the students off the bus. That would've been the number one thing. If that bus would've burnt up, then so be it, but my number one job would've been then to get the students. In this case, thank God, there was no students on the bus.

Q. Sure. And I'm just sort of talking, if you were out on the road when that happened, do you think someone – if that fire happened, happened again, do you think there would be a good chance that people would get hurt?

A. Oh, I think –

MR. MOSVICK: Objection. Calls for speculation.

JUDGE DAVIS: Isn't it kind of intuitive that a bus catching on fire in traffic would be an unsafe condition?

MR. LELAND: Thank you, Your Honor, but there might be disagreement about that, perhaps. But –

JUDGE DAVIS: That just seems to be kind of common sense that –

MR. LELAND: Okay.

BY MR. LELAND:

Q. That bus, that bus number 4, about how many gallons of fuel does that carry?

A. If I recall, that bus has about 65 gallons of fuel when it's completely filled up.

Q. So, fair to say it would be concerning to have a fire on a vehicle that carries 65 gallons of fuel?

A. You want my opinion?

Q. Yes, sir.

A. I don't want to be anywhere around any vehicle that's got 65 gallons of fuel on it with a fire.

Q. And so to backtrack a little bit, you sort of indicated who you talked to when you got up to the upper area to pick up students. Anything else you recall about after you pulled up? Anything else happening that you recall specifically – before you left, I guess, for a route?

A. Nothing in particular after that. It was just a matter of calming yourself down so that you can drive the bus on your route and stuff of that nature. I mean, I don't care who you are, you're in a situation like that, flames and stuff like that, your adrenaline gets going and you – you know. So that would be the only thing I had to do. I had a very short period of time where the students were going to be loading on the bus and I had to resume my route and stuff, so I had to just kind of put it beside me at the moment and drive on.

Q. And do you recall which bus then that you were using to do your route?

A. To my best recollection, I want to say it was either bus number 5 or bus number 2. The bus I drove and bus number 4 was a model called a Freightliner. And bus number 4, 2, 5, and, I want to say, maybe even number 10 – I'm not sure and that – but those three buses for sure, they're identical. I mean, if I parked them here and took the numbers away from them, you couldn't tell one from another.

Q. Okay. And so then I just – did you just do your normal regular route for the remainder of that day?

A. I did my normal route for the remainder of the day, brought the substitute bus back, parked it in the places where we normally would be. Number 4 was still parked there. And I had locked it up to make sure. And I conveyed as many messages I could to anybody that would have contact with Woody in the morning, and I'm almost a hundred percent sure I must've told Mr. Carlson to make sure Woody didn't start the bus until – or he was at least understanding what this problem was with the bus.

Q. Okay. And so about how long were you driving or using this alternative bus, bus 2 or 5? How many days?

A. Well, I drove the bus actually every day until I was instructed not to. And one reason was, too, bus number 4 was parked in the corner of the lot in the service area, and I had absolutely no idea what they were going to do with the bus: repair it, decide it was not to be driven anymore, or what. I had no idea. It sat there. And I didn't know if it was waiting on parts. Nobody conveyed anything to me what the status was of the bus, and, quite frankly, I didn't even ask.

Q. And you said, "I drove that alternative bus until I was instructed not to." My question really was, do you have a recollection of like how many days or when you stopped using that bus?

A. Well, schooldays, I would say 4 days, 5 days, maybe. Something like that.

Q. Okay. And, as a general matter, you might want to keep Exhibit 22 handy just because that has some dates on it that might be helpful, or at least dates you can count down from.

And so if just taking a look at Exhibit 22 to see if it's helpful and you indicated that you believe that you drove this alternative bus for 4 or 5 days, based on your testimony that you believe it was the 19th or the 20th, the day of the fire, that would take you into the week of January 23rd, correct?

A. Mm-hmm.

Q. Yes?

A. Yes.

JUDGE DAVIS: I thought he – I thought Mr. Rantz said it was the 18th or 19th.

MR. LELAND: I –

THE WITNESS: The day of the fire?

MR. LELAND: Yes.

THE WITNESS: The day of the fire, it was the 18th or the 19th. I'm not –

JUDGE DAVIS: I just wanted to make sure, because you said the 19th or 20th.

MR. LELAND: Okay. Then I may have misspoke –

THE WITNESS: No. It was –

MR. LELAND: – or may have misheard him.

THE WITNESS: It was probably either the 18th or the 19th.

JUDGE DAVIS: That's what I thought I heard you say.

THE WITNESS: Okay.

BY MR. LELAND:

Q. Okay. And so if it was the 18th or the 19th, do you believe that you were driving that bus into the week of January – this alternative bus until January – through the week of January 23rd?

A. Oh, yes. I drove it more than just 1 day or 2 days. I mean, I may have drove it up until the Tuesday or Wednesday of the following week, till I was instructed not to drive it.

Q. Well, what do you mean by you were instructed not to drive it?

A. Well, on the – when I was told not to drive it, what I – would you like me to explain exactly what happened?

Q. Yes. That's what I'm asking.

A. Oh, okay. I was parked in my staging area with either bus 2 or 5, whichever one it was. I just – I don't really recall. I know for sure it was one of them and that that I was driving. And I was approached by Mr. Carlson and I was asked why am I still driving the substitute bus, why am I not back in bus number 4. And my response – and I kind of had to check myself at that point because I was still upset about bus number 4 in general, the fire and the bus itself. I didn't want to go back in bus number 4, period, and that. And it wasn't just for my sake. If the bus would've caught on fire again, I have students that I have to deal with to get off the bus safely.

So I was approached by Mr. Carlson and asked why I was not driving my number bus, bus number 4. And my response was, "The bus is down in the service department, and nobody has conveyed to me the status of the bus, what was done to it, or anything." I had no idea that – what they were doing with the bus, let alone driving the bus. And then I was told that the bus was repaired, "You should drive" – "go back into bus number 4." At that time, I said – and I tried to do this tactfully as well and that. I said, "We need to have a conversation. We need to sit down and talk about the safety of that bus. I don't feel that bus is safe, not only for me to drive, but to put students on that bus anymore. I just am not comfortable with that bus." And I says, "We need to definitely talk about it." And he said, "You are to go back into your bus." And that was it. He just departed.

Q. Anything else you recall about that conversation?

A. No, I – as, again, I tried to keep it to where I didn't let my emotions, shall we say, take over and that. I tried to diplomatically say "We need to talk."

Q. And did you start driving bus 4 right after that?

A. I started driving the next day. I didn't drive it that day. I drove the substitute bus that afternoon and that, because I was already in the staging area as well and the students would be getting ready to load into the bus. So I don't doubt that he probably would've said "Go ahead and take it today" and may even said "Go ahead and drive it today, but then go into."

So the following day, I did start driving bus number 4, reluctantly. And I thought about it that night quite a bit and that. And, naturally, I talked to wife about it. And the reason I went back in the bus is because I didn't know how this would affect my relationship at the school and my job and so on, so forth. So I thought, "Well, I'll drive it, but I'll drive it cautiously."

Q. And you were anticipating that there would be a meeting to discuss the safety of number 4, right?

A. Well, I was hoping there would be.

Q. Well, that's what you asked for.

A. That's what I asked for.

Q. And I'm sorry that maybe this has been a little confusing about dates. You have some maybe a little bit of fogginess about some of these dates from, I don't know, 18 months ago. Is that kind of fair?

A. Well, yes. The event itself is not foggy. The dates – kind of that whole week run together.

Q. Okay. And, by "that whole week," are you referring to the week just prior to your termination?

A. Yes.

Q. And that was the week in which you had this conversation that you just discussed, with Mr. Carlson?

A. Yes.

(TR 48-61).

Complainant denied the allegations listed in the counseling memorandum Mr. Carlson prepared on January 27, 2017. (JX 5). He said that when he drove buses other than his assigned bus on January 20-21, 2017, he did so because his assigned bus had caught on fire. (TR 70). He denied that he was ever notified of any infractions related to the Saturday morning LearningWorks route that he drove about once a month. (TR 71-72). The memorandum informed Complainant that he and Mr. Carlson would meet again in ten days to review his performance and if it did not improve he would be terminated. (JX 5). Complainant said he did not meet again with Mr. Carlson in ten days to discuss his performance because he was terminated less than ten days later. (TR76).

Mr. Carlson did a "ride-along" with Complainant on Saturday, January 28, 2017. (TR 76). That was the day after Mr. Carlson became the interim transportation director and the day after he counseled Complainant about his job performance. (TR 78). Complainant said the Saturday morning route consisted of about nine stops. After one or two stops, when it was apparent that no students were waiting for the buses and the scheduling mistake was discovered, all of the drivers were informed to terminate their routes and to put down four hours of work on their timesheets. (TR 46, 77-79). Complainant said he drove back to the school, dropped Mr. Carlson off at his office, took the bus down to the parking lot, secured it, and went home. He said he and Mr. Carlson had general conversation during their time together and nothing was discussed concerning his work performance. (TR 78-79). The following Monday, January 30, 2017, after he had completed his morning route, Complainant said Mr. Carlson asked him to come in early that afternoon and to meet him at the office. He met with Mr. Carlson and Ms. McMullen that afternoon in the HR office, where he was informed that he was being terminated and presented with his last paycheck and a termination letter. (TR 81; JX 4). The termination letter said he was terminated effective that day for three alleged reasons. The first reason was the performance matters referenced in the counseling memorandum from his meeting with Mr. Carlson on January 27, 2017. The second reason was his inability to follow his assigned Saturday route as observed by Mr. Carlson on January 28, 2017. The third reason was:

> Safety concerns and violations of DOT regulations as observed during the ride-along by your supervisor on 1/28/2017. These violations included:
>
> - Failure to follow procedure at two railroad crossings
> - Unsafe drop off protocol in two instances

(JX 4). The termination letter was signed by Ms. McMullen and Mr. Carlson.

Complainant testified that the only work events that occurred between the time he was counseled by Mr. Carlson on Friday afternoon and terminated by Mr. Carlson and Ms. McMullen on Monday afternoon was his Friday afternoon route, the aborted Saturday morning route, and his Monday morning route. (TR 85). Complainant denied that he failed to follow proper drop off procedures when Mr. Carlson rode along with him on the Saturday morning route because there were no students to drop off due to the scheduling mistake. (TR 88). He denied that he failed to follow proper procedures at two railroad crossing. At one crossing on Excelsior Boulevard near the 100 freeway, he said he "did what I do at every railroad crossing," which was to stop about 30 feet before the crossing, activate the "four-ways," pull up to the white line at the crossing, open the door and a window, turn the radio off, look and listen for a train, and then proceed over the tracks. (TR 86-87). At the second crossing, Complainant said the crossing did not exist and offered photographs he took to illustrate his testimony. (TR 89; CX 25). One photograph shows rail tracks imbedded in the blacktop of a roadway with the rails terminating at the edge of the pavement where a concrete barrier is positioned several yards in front of an apartment building that is under construction. A sign says the new building will be Prime Place Apartments. (CX 25). Complainant said there was a parking area for the construction workers for the apartment building on the other side of the road where the tracks ended at the edge of the pavement. (TR 89, 92-93). Complainant estimated that the rail tracks imbedded in the blacktop of the roadway were about 20 feet in length and could not accommodate a train. (TR 94).

One of the allegations in the counseling memorandum Mr. Carlson gave Complainant on January 27, 2017 was that he missed a noon kindergarten route on January 20, 2017. (JX 5). Complainant said that morning he drove one of two buses that were supporting a field trip. The field trip was supposed to end in time for him to drop off the students back at the school around 11:30 and then do his noon route, which involved picking up one kindergarten student and taking her home. As the buses were returning from the field trip and were on the 494 freeway, the other bus pulled off on the side of the road due to a brake problem. The dispatcher said Woody Herrman, the school's mechanic, would bring another bus out to the scene and take responsibility for the disabled bus. Complainant said the dispatcher told him to take the students to the lower school for lunch and a recital and then take them back to the middle school. Complainant said he asked, "[w]ell, what about my …" and was told "[d]on't worry about this. We'll take care of the rest. You stay with the students and bring them back." (TR 97-98). Complainant said they were stopped on the 494 freeway for about 10 to 15 minutes and that it is one of the busiest freeways in the Twin Cities. (TR 99). Complainant was not sure which dispatcher he spoke with on the radio that day, but he believed it was Larry or Gene. He said he told the dispatcher he had a student to pick up and he was told "[d]on't worry about that." (TR 100-101).

Another allegation in the counseling letter was that Complainant was late for a service day trip on January 24, 2017. He said that after he dropped off a student at the office that morning, he moved his bus to the staging area for the service day trip. He had been at work since 5:30 a.m. and knew he would not get back from the service day trip until noon, so he and the other two drivers for the service day trip walked down the hill to use the restroom. When he got back to the staging area, Mr. Carlson was standing there. Mr. Carlson asked him, "[w]hy

aren't you here for your field trip?" and Complainant responded "I am here. Here is the bus. I'm ready." (TR 102-103).

Complainant said he earned about $18.00 per hour working for Respondent and now earns $16.75 per hour working for Providence Academy, a difference of $1.25 per hour. (TR 103). He said Providence Academy is a smaller school, so there are fewer buses and he works fewer hours, about ten hours less per week. (TR 103-104). He believed that Respondent provided a three percent pay increase each year, so the $18.00 per hour rate would have increased three percent for the current school year. Complainant worked 32-36 hours per week over the summers when he was employed by Respondent. He does not work over the summer for Providence Academy. (TR 106). He was unemployed from the time he was terminated by Respondent on January 30, 2017 until he was hired by Providence Academy on February 23, 2017, a period of about three weeks. (TR 107).

On cross-examination, Complainant testified that he had applied for summer jobs, but no one wanted to hire him since he was only available for a month or so. (TR 111). Complaint said railroad crossing violations are "number one" and "it's a big deal." (TR 113). He agreed that the correct procedure at a crossing is to use the four-way lights and not the eight-way lights, which are used when picking up or dropping off students. (TR 113). He did not recall if there was a sign that said the railroad crossing he went over with Mr. Carlson on January 28, 2017 was an exempt crossing. (TR 116). Complainant agreed that he said he saw 16 to 24 inch flames coming out of the mirror of his bus and that he used his coat to help extinguish the flames. (TR 117). He agreed that he did not use the fire extinguisher that day and he could not recall if he put snow on the fire. (TR 118). Complainant said he spoke briefly with Mr. Carlson the week after the fire and told him that his assigned bus was unsafe. He did not tell Mr. Carlson there were any other things on the bus that needed to be repaired. (TR 120).

In response to questions by me, Complainant said the bus he was assigned was a Freightliner and carried 44 passengers. (TR 122-123). He described the mirror that was alleged to have caught on fire as rectangular and long with a fisheye mirror at the bottom and electrical wiring for a defogger. (TR 123). He said that when a bus is turned in for maintenance, the driver relied on the mechanic or the dispatcher to let him know when it is ready for use again. He said no one told him his assigned bus was ready for use again until the week after the alleged fire. (TR 125).

Lawrence P. Carlson – Respondent's Transportation Manager

Mr. Carlson testified that his job title is transportation manager and he has worked for Respondent for nine years. He became transportation manager in November 2016. (TR 184-185). He knew Mr. Houghton, who had been the transportation director for Respondent before leaving that job during the period relevant to this complaint. (TR 129). Mr. Carlson said he is responsible for managing the day-to-day operations of the transportation department, including managing personnel. He had the authority to discipline Complainant and the authority to terminate his employment. Mr. Carlson said that he and Ms. McMullen made the decision together to terminate Complainant. (TR 130).

Mr. Carlson testified that Complainant told him that the mirror on his bus had caught fire, but Mr. Carlson did not see the fire himself. (TR 132-133). He said he personally inspected the mirror later that day and saw no evidence that there had been a fire. He believes Complainant made it up. He did not recall how he heard about the alleged fire, but he heard about it the afternoon the incident occurred. (TR 133). Mr. Carlson stated, "[a]ny fire related to a school bus is absolutely a serious issue." (TR 134). The incident occurred on a Thursday the week prior to him taking disciplinary action against Complainant. (TR 136). Complainant used a different bus to do his Thursday afternoon route and his Friday morning route, but then he was told he should resume using his assigned bus for his Friday afternoon route. (TR 137-138).

Mr. Carlson did not recall Complainant telling him that his assigned bus was unsafe. (TR 138). Complainant's counsel had Mr. Carlson read from Respondent's answers to interrogatories, specifically the answer to Interrogatory Number 12. (TR 139; CX 27 at 8-9). The answer states that Complainant used a different bus for his Friday afternoon route. Afterwards, when Mr. Carlson asked him why he had not used his assigned bus since it had been repaired, Complainant said the bus was "unsafe." (TR 141; CX 27 at 9). Mr. Carlson testified that he did not recall that conversation, although he agreed that Complainant said the bus was unsafe a few times during the period after the alleged fire. (TR 141-142). The answer to the interrogatory continued, saying that Complainant used a different bus on Saturday, January 21, 2017, and Mr. Carlson told him afterwards that he needed to use his assigned bus. Complainant resumed using his assigned bus the following Monday morning. (TR 142; CX 27 at 9). With respect to whether Complainant told Mr. Carlson that he was driving a different bus because he believed his assigned bus was unsafe, the following exchange took place between Complainant's counsel and Mr. Carlson:

> Q. Sure. Did Mr. Rantz tell you that he was using a different bus because bus number 4 was unsafe?
>
> A. No.
>
> Q. Never happened?
>
> A. I don't understand the question.
>
> Q. Sure. My question is, that never happened?
>
> A. I don't know what you're referring to.
>
> Q. The prior question.
>
> A. Wow. I don't know what to say.
>
> JUDGE DAVIS: Wasn't the question whether Mr. Rantz ever said he wasn't going to drive bus 4 because it was unsafe?
>
> MR. LELAND: Yes.

JUDGE DAVIS: Is that –

THE WITNESS: That's correct. I do not recall Mr. Rantz ever telling me he was not going to drive bus 4 because it was unsafe after he was notified that the bus was repaired and ready for him to drive again.

(TR 144).

Complainant's counsel had Mr. Carlson review a portion of the written response Respondent provided to the OSHA investigator who conducted the investigation of the complaint. (TR 150; CX 21). The following exchange followed:

Q. Are you on page 4 of Exhibit 21, Mr. Carlson?

A. Yep.

Q. And there's a Section D. Do you see that?

A. Yes.

Q. Okay. And counting down the third paragraph in Section D. See that?

A. Yes.

Q. Okay. This reads: "Nevertheless, Rantz took the spare bus to run his afternoon route. After Rantz ran his afternoon route, Carlson questioned why Rantz was in the spare bus when his bus had been fixed. Rantz claimed, without explanation, that his bus was 'unsafe.'"

Do you see that?

A. I do.

Q. And did I read that correctly?

A. I believe so.

Q. Okay. And it's my understanding from your testimony today is you don't recall that happening.

A. I don't recall that he specifically made an argument that it was unsafe. The point was he was supposed to use bus 4.

(TR 154).

Mr. Carlson agreed that Complainant received a bus driver performance stipend for the first half of the 2016-2017 school year and that he had not been disciplined for any performance

violations during that period. (TR 155-156). Mr. Carlson acknowledged that he sent an email to Mr. Houghton on January 24, 2017 – a few days after Complainant reported the alleged fire on January 19, 2017 – and asked Mr. Houghton if there were any write-ups on Complainant. Mr. Houghton responded that there were none. (TR 159; CX 4). Mr. Carlson agreed that he sent the inquiry about prior disciplinary actions to Mr. Houghton because he intended on disciplining Complainant at that time. (TR 159).

Mr. Carlson prepared a disciplinary memorandum on Complainant on January 27, 2017. (TR 160-161; JX 5). It included "not accepting direction – using different bus than assigned without permission – 1/20/17; 1/21/17." Mr. Carlson said those were the days Complainant did not use his assigned bus to do his route. (TR 161). He could not recall Complainant ever telling him that his assigned bus was unsafe. (TR 162). He agreed that his January 24, 2017 inquiry to Mr. Houghton about any prior documented disciplinary actions against Complainant came after the January 20-21 dates when Complainant did not drive his assigned bus. (TR 162; CX 4). Mr. Carlson prepared notes after his January 28, 2017 ride along with Complainant. (TR 162-163; JX 5 at 2). He did not recall if he prepared the notes before or after Complainant was terminated. (TR 163). He reviewed a document (CX 6)[3] he prepared on February 9, 2017, which he said he believed was the date he provided the notes to Ms. McMullen in Human Resources. He agreed that the February 9, 2017 notes (CX 6) and the second page of JX 5 concerning the January 28, 2017 ride along were substantively similar. (TR 163-164).

In addition to using a bus other than the one he was assigned, Mr. Carlson disciplined Complainant on January 27, 2017 for refusing to run his "LearningWorks" route and other LearningWorks issues.[4] (TR 164-165; JX 5). Mr. Carlson said that Complainant was twice instructed to run the route for practice in order to improve his performance and he failed to do so. He also waited for students longer than instructed and was late dropping students off at the Northrop Campus. Mr. Carlson agreed that Complainant had never been written up for any of these LearningWorks issues. (TR 165-166). He disciplined Complainant for not doing a noon kindergarten route on January 20, 2017. Mr. Carlson acknowledged that was the route Complainant missed when he stopped along the freeway with another bus that had brake failure while they were transporting students on a field trip. (TR 166-167). He also disciplined Complainant for showing up late for a service day trip on January 24, 2017. He did not recall if Complainant said he had gone to use the restroom or whether he asked Complainant why he was late getting to his bus. (TR 167-169). The January 27, 2017 disciplinary memorandum stated that Mr. Carlson would meet with Complainant again in ten days to review whether his performance had improved, but the follow-up meeting did not take place because Complainant was terminated less than ten days later. (TR 169).

On Saturday, January 28, 2017, Mr. Carlson decided to ride along with Complainant on his LearningWorks route because Complainant had problems with the route. There were no students to pick up or drop off that day because the LearningWorks schedule had been changed and there was no LearningWorks program on January 28, 2017. (TR 169-171). Mr. Carlson said he and Complainant ran the entire LearningWorks route, which consisted of about ten stops. He

[3] CX 6 was not offered into evidence and is not part of the record.

[4] LearningWorks is a Saturday morning (about 9:00 a.m. until noon) educational program that is held about once a month during the school year beginning in September. (TR 71, 183, 196).

said that he heard Complainant's testimony that they only made a few stops and then returned to the school, but that was false and never happened. (TR 171).

Mr. Carlson said he believed that he and Ms. McMullen worked on the January 30, 2017 termination memorandum together. He agreed that he provided the only information Ms. McMullen had about Complainant's performance because she had no independent knowledge of the facts other than what he told her. (TR 172; JX 4). The termination memorandum contained three bullet points that explained the reasons for Complainant's termination. (JX 4). Mr. Carlson agreed that bullet point number one in the memorandum prepared on Monday repeated the substance of what was contained in the disciplinary memorandum from the previous Friday. (TR 172-173).

Mr. Carlson was familiar with the photographs Complainant made of the railroad tracks imbedded in the roadway adjacent to what appeared to be an apartment building that was under construction along the LearningWorks route they drove on Saturday, January 28, 2017. (TR 173-174; CX 25). Mr. Carlson agreed that it was not possible for a train to cross the roadway on the tracks. (TR 174). He said, however, that school buses are required to stop before crossing over railroad tracks unless marked with a sign saying "exempt." (TR 174-175). While he claimed the railroad tracks shown in the photographs constituted a railroad crossing, he acknowledged that "they're clearly tracks that are not in use." (TR 175). He said Complainant should have stopped before crossing over the tracks and he failed to do so twice. (TR 176). Mr. Carlson agreed that there were no students for Complainant to drop off on Saturday, January 28, 2017. (TR 176-177).

Mr. Carlson testified about another employee – a dispatcher – who was disciplined and then terminated. (TR 177-181; JX 2-4). The former employee received a disciplinary memorandum on May 5, 2017 documenting a verbal discussion with Mr. Carlson on May 3, 2017 in which notified her of problems with her performance and the need to improve. She was placed in probationary status and advised that her performance would be evaluated again in ten days. (JX 3). She received a second disciplinary memorandum on May 23, 2017 informing her that her performance was still unacceptable and if it did not improve by the end of the school year on June 2, 2017, she would be terminated. (JX 4). On June 1, 2017, the former employee received a termination memorandum signed by Mr. Carlson. (JX 2). Mr. Carlson agreed that the purpose of the disciplinary steps he took was to give the former employee notice of her deficiencies and an opportunity to correct them. (TR 180). He also agreed that Complainant had never received any written discipline prior to him reporting that his assigned bus had caught on fire. (TR 183).

On cross-examination, Mr. Carlson testified that a lot of time is devoted prior to the start of each school year training bus drivers on safety and learning their routes. (TR 187). A form entitled "Annual School Pre-Trip Evaluation" is provided by the Minnesota State Patrol and is used in evaluating bus drivers. (TR 188; JX 9). Part of the evaluation includes a ride-along and, in this case, Mr. Houghton conducted the ride-along evaluation of Complainant on August 6, 2016. (TR 189; JX 9). Additionally, the Minnesota State Highway Patrol does an in-depth inspection of all school buses. Respondent's buses were inspected every September. (TR 192).

Mr. Carlson said Complainant had problems the first time he ran the LearningWorks route in September 2016. He discussed it with him afterwards and told him "[t]he next time around, let's have this thing figured out, then let's get it." (TR 194). Bus drivers can use the time between their normal runs to do practice runs so they are familiar with their routes. They can do so using their assigned buses or they can use their personal vehicles and Respondent will reimburse them for the mileage. (TR 195). Mr. Carlson said Complainant continued to struggle with the LearningWorks route. (TR 196). His route was "shortened a little bit" by taking "a student or two off the route and maybe another student quit or two quit riding after all or arranged a different situation when the bus was not reliable at that point." (TR 198). Mr. Carlson told Complainant twice in January 2017 to run his LearningWorks route in real time as if he had students on board and to write it down and to keep working on the route. He said Complainant acknowledged that he never did so and it was verified by checking GPS tracking data for his bus. (TR 202-203).

The alleged fire took place on Thursday, January 19, 2017. Mr. Carlson learned of it that afternoon. (TR 203). He notified the mechanic, Mr. Herrman, and told him to check it out the next morning. Mr. Carlson inspected the bus that evening around 5:00 p.m. and saw no evidence of a fire. (TR 204). The next morning, Friday, January 20, 2017, Mr. Herrman replaced electrical wiring that had shorted out in one of the mirrors. In Mr. Carlson's opinion, the bus was safe to use to transport students at that point. (TR 205). The bus was used that afternoon by another driver to transport students to a sports event. (TR 206). Complainant started using his assigned bus again on Monday, January 23, 2017. (TR 206).

Mr. Carlson could not recall what he and Complainant discussed when he gave him the disciplinary memorandum on January 27, 2017. He said, "I don't remember if I literally read the letter or just highlighted a few things or not. I don't recall." (TR 208). Mr. Carlson said the disciplinary action was "not at all" related to Complainant reporting a safety issue with his assigned bus. (TR 208).

Concerning the LearningWorks route on January 28, 2017 and his decision to terminate Complainant on January 30, 2017, Mr. Carlson testified:

> A. Obviously, when you look at the pictures, there is no danger that a bus – that a train is going to be crossing there. But that said, the letter of the law is unless there is a sign there, we stop, we perform it as if it's, you know, a regular crossing. And, that day, we had to cross that location twice. So we crossed the track, and then I brought up the situation and I said exactly that. I said, "Now, obviously, we're not going to get hit by a train when we cross that, under the circumstances." But I did point out to Mr. Rantz that, you know, we still got to take into account that this is a legal requirement. And then, when we went into the neighborhood to do the mock pickup, we came out over the same tracks, and he went right over the tracks again, without acknowledging them or without stopping or without saying anything to me.
>
> Q. And were there signs on either side of the road, regarding the railroad track?

A. No.

Q. No signs that said it was an exempt crossing?

A. Correct.

Q. Okay. This wasn't the only railroad track incident that you witnessed on January 28th, though, is it?

A. Correct.

Q. What was the second incidence?

A. It was mentioned earlier there's a railroad crossing on Excelsior Boulevard near Highway 100, just west. It's a standard, you know, two-lane-going-in-either-direction crossing with the full stop arms and lights and everything.

Q. And trains do ride on those tracks.

A. Yes. I've seen trains on that track.

Q. You've seen them.

And what was the issue with Mr. Rantz's stop or crossing of that railroad track?

A. The issue was his eight-way system was still engaged when he made the stop. And then so what basically happens is, when the door gets – when the eight-way system is activated, there's amber lights that flash back and forth. And as soon as the door is activated, it switches to red lights, making it illegal to pass a school bus, because the red lights are flashing and the stop arm comes out. And that's part of the reason why that's illegal to do at a railroad crossing. You're only supposed to be using your four-way system and not your eight-way system. So he performed a railroad crossing there, except the eight-way system was activated and not the four-way system.

Q. And the stop arm came out when he opened the door?

A. Correct.

Q. Did you say anything to him about this?

A. You know, I don't recall. I don't recall the specifics. I certainly would have. I'm just saying I don't recall. But normal for me under a – that's a really big deal, to be crossing with using your eight-ways. So, while I don't recall the specific conversation, I most certainly would have mentioned something about that to him.

Q. Would you expect a trooper to give a ticket if they would have seen that?

A. Oh yes.

Q. Were there any other issues that you observed while riding along with Mr. Rantz?

A. On the 20 –

Q. On 28th. Yes. The 28th.

A. On the 28th. Yes. There were several different things. Obviously, we started the route as has been talked about before. And then it came to all of our attention that nobody was having students show up, so we realized the error. And, again, I instructed Mr. Rantz that we're – "We're going to do the whole route anyway. Even though there's no students, we're still going to do it as if the students were riding." And –

Q. And so, by that, do you – you expected him to perform a stop at every stop that would have been on that route?

A. Yes. Correct.

Q. And expected him to use the appropriate bus lights for those stops?

A. Correct. That would be the expectation. Now, in full disclosure, I'm not saying we couldn't have maybe talked about certain aspects of it under the circumstances that we don't have students driving right now, but modus operandi is that we do the route and we do everything as if there were students on board.

Q. Were there any practice stops that caused you concern?

A. Yes.

Q. Can you describe the first one?

A. Sure. There were two incidents in particular. Beyond the fact that was mentioned there too is that he was still waiting too long at the stops, which was also resulting in the route going longer. We're instructing all of our drivers – we run a really tight ship because we have a lot of students that day. So they have an assigned time. We wait 30 seconds and then we move on. And it's just what it is, you know, I'm saying, in that circumstance.

But in the first instance it was a residential road, two-way traffic, and he pulled into the opposite lane with the student's home on the driver's side. So in and of itself, I didn't understand that at all, because we need to stay in our own lane of traffic, of course, and his stop there would have required the student to

cross into, you know, the normal lane of traffic to enter the bus. And, again, I don't know why that was the case.

In the second instance it was a one-way, two-lane road, and the same thing: the student would have been picked up on the driver's side. And just to say this, I guess, for the record, the passenger door is on the right side, what's considered the passenger side. And in that case as well the student would have been required to go into an active lane of traffic to enter the bus.

So those were the two instances that, along with the railroad crossing, in particular were very concerning to me that day. And just to say, there were other things that I didn't have understanding of that day. I would give Mr. Rantz instruction – literally, "Please take your next left," and he would go right. Or I would say, "We're going to redo that section again," and he wouldn't do it. And I didn't understand what the issue was. But we continued to work that route and we completed the route in its entirety.

Q. And so the next Monday morning at a certain point you had discussions with Ms. McMullen, right?

A. Yes. I don't remember the exact timing of that, but yes.

Q. Did you tell Ms. McMullen you wanted to terminate Mr. Rantz because he reported a fire on his bus?

A. Not at all.

Q. Did you want to terminate Mr. Rantz because he reported a fire on his bus?

A. No.

Q. Did any part of your discussion with Ms. McMullen about Mr. Rantz's termination touch on the reported fire on his bus?

A. No.

Q. Did it touch on him making any reports about the safety of his bus?

A. No.

Q. So your testimony, I just want to make sure it's clear to me, is that Mr. Rantz either reporting a fire on his bus or reporting safety concerns played absolutely no part in his termination.

A. That is correct.

(TR 209-214).

On re-direct examination, Mr. Carlson said there could have been other bus drivers present when the alleged fire occurred. He said he did not ask any of the other drivers whether they saw a fire. (TR 218). Mr. Carlson said the bus that was assigned to Complainant was a Freightliner as were the other two buses he drove after the alleged fire. He said, "[t]he buses are virtually identical, except for the numbers on them." (TR 219). Mr. Carlson said that he never saw the wiring that was removed from the mirror of Complainant's assigned bus, but he was told "there was some sort of short in wiring that required it to be replaced." (TR 219-220).

Harry "Woody" Herrman – Former Bus Driver and Mechanic for Respondent

Mr. Herrman started working for Respondent in 2010 as a bus driver. He began assisting Respondent's mechanic in addition to driving a bus and, when the mechanic passed away, he took over the responsibilities as the mechanic. (TR 242). Mr. Herrman lived in Minnesota for most of his life. He moved to Florida in September 2017. (TR 241-242).

Mr. Herrman testified that the area where he did mechanical worker on Respondent's buses was small and outdoors, and he only had a limited set of tools. Repair and maintenance work that was more substantial than what he could handle with his limited resources was sent out to a qualified mechanical shop. (TR 242). Mr. Herrman used to drive bus number 4, which was the same bus that was later assigned to Complainant. He helped to train Complainant on his route because it had been Mr. Herrman's route until Complainant was hired. (TR 243).

Mr. Herrman said that on January 20 or January 21, 2017, someone notified him that there was an issue with a mirror on bus number 4 and that the wiring had started to smoke. He could not recall who notified him. (TR 243). No one ever used the word "fire" to describe the issue and he saw no evidence that there had been a fire. He said he went down to where the bus was parked and drove it up to the maintenance area. He took the passenger-side mirror off and observed that the electrical wiring had rubbed against the metal mounting bracket, which wore through the wiring's insulation and caused it to short when it came into contact with the metal bracket. The insulation had melted and the mirror was not working. He said he had seen this kind of thing happen before. (TR 244). Mr. Herrman described how the electrical wiring ran from the dashboard, outside the bus to the mirror mounting bracket and then up to the mirror head. The wiring is zip-tied into place. He said buses vibrate a lot in the course of normal use and that vibration causes the wiring insulation to rub and eventually wear through and short out against the metal mirror bracket. When it shorts out, the wire gets hot and melts the plastic insulation off and the wiring is no longer able to carry an electrical current. (TR 247). Mr. Herrman said he had never seen that cause a fire, but he testified that a fire was possible. He testified: "I've never seen it happen. Could it? You know, maybe. I would believe it would smoke, especially on a January day, you know, where it's cold out. You would see smoke from plastic burning, you know, the insulation melting. But I've never seen wiring flame up. No." (TR 247-248). He said once the wiring came into contact with metal it probably took a minute or two for the insulation to melt away completely. (TR 248).

Mr. Herrman said he replaced the mirror, the heating grid that warms up the mirror, and the wiring that runs from the mirror to the dashboard. He considered it to be a minor repair. (TR

248). He tested the wiring with a current tester, started up the bus and made sure the mirror was heating up properly. He also zip-tied the wiring into place and, at that point, he believed the bus was safe and ready to go back into service. He could not recall if he told anyone that the bus was repaired and ready for use. He said that normally after a minor repair he would just drive the bus back to down to the bus parking area and probably plug in the block heater so it would be ready for the bus driver. (TR 249). The total cost of the parts he used to make the repair was $35.00 and it took about an hour of Mr. Herrman's time. (TR 250-251; JX 1).

On cross-examination, Mr. Herrman said that he was not present when Complainant had the problem with the mirror. (TR 254). He stated that he had never seen an electrical short like this cause a fire, but he acknowledged that it could happen. (TR 255).

Laurel McMullen – Respondent's Director of Human Resources

Ms. McMullen has been Respondent's director of human resources for more than eight years. (TR 258). She is involved in employee disciplinary matters as a part of her normal duties. (TR 258-259). She acknowledged that as a general matter a big part of her job is to support management. (TR 259-260). She supervises two people, but she does not supervise any of the bus drivers. Ms. McMullen agreed that the general purpose of employee discipline is to give the employee notice that there is a problem and an opportunity to correct it. (TR 260).

Ms. McMullen's first involvement in Complainant's case was on about Wednesday of the week prior to his termination. (TR 260-261). Mr. Carlson approached her to discuss his concerns about Complainant and Ms. McMullen told him to gather whatever documentation he had and she offered to assist him in drafting a disciplinary action since Mr. Carlson had only recently become a manager. She agreed that Mr. Carlson provided her all of the factual information she had about Complainant's deficiencies. (TR 261). Ms. McMullen at first testified that she agreed that Mr. Carlson told her Complainant had said the mirror on his bus caught fire, but then she said she did not recall the exact words, but it had something to do with a shorted wire or smoke. (TR 262).

Ms. McMullen reviewed the responses to interrogatories Respondent submitted and acknowledged that she had signed the document before a notary public on behalf of Respondent. (TR 263-264; CX 27 at 12). She said she read the responses before she signed the document and she agreed that she believed the answers Respondent provided were accurate. (TR 264). She agreed that in response to interrogatory number 12, Respondent said that when Complainant was asked why he was still using the spare bus after his assigned bus had been repaired he said it was because his assigned bus was "unsafe." (TR 267). Ms. McMullen said she could not recall speaking with anyone other than Mr. Carlson about the facts alleged in the response to interrogatory number 12. (TR 271).

Ms. McMullen agreed that she reviewed the letter submitted to the Department of Labor on Respondent's behalf and she believed the information contained therein was true. (TR 272-273; CX 21). She also agreed that in it Respondent said that when Complainant was asked why he used the spare bus to run his afternoon route after his assigned bus had been repaired and he said it was because his bus was "unsafe." (TR 272-274; CX 21 at 4).

Ms. McMullen testified that she drafted the disciplinary memorandum Complainant received on January 27, 2017 based upon the factual information provided to her by Mr. Carlson. She drafted it because Mr. Carlson was new to his job as a manager and had never done this sort of disciplinary action before while working for Respondent. Mr. Carlson reviewed the memorandum and he and Ms. McMullen worked on it together to put it into final form. (TR 275; JX 5). Ms. McMullen agreed that the memorandum said that Complainant's performance would be reviewed in ten days and the purpose of the ten day period was to give him an opportunity to correct the problems. (TR 276).

Ms. McMullen testified that she drafted the termination memorandum Complainant received on January 30, 2017 and that the reasons she cited as the basis for termination came from Mr. Carlson. (TR 276-277; JX 4). She recalled Mr. Carlson saying that with respect to one of the railroad track incidents that the tracks were out of service, but the regulations still required Complainant to stop. She recalled Mr. Carlson saying that with respect to Complainant following an unsafe drop off protocol that there were no students on the bus for Complainant to drop off. When asked if she thought that was still a reason for terminating Complainant's employment, Ms. McMullen testified, "Absolutely." (TR 278). She said Mr. Carlson asked her whether he should take another disciplinary action against Complainant, but she recommended terminating his employment because she "was extremely concerned about the safety issues that were being raised." (TR 278). She said her discussion with Mr. Carlson took place on Monday, January 30, 2017, she drafted the termination memorandum immediately thereafter, and Complainant was notified of his termination sometime around 8:15 or 8:30 that same morning. (TR 278-279).

Ms. McMullen reviewed payroll records and agreed that Complainant's rate of pay was $17.95 per hour and that he received a $225.00 safety bonus on January 13, 2017. (TR 280-282; CX 12). She also agreed that if there was a fire on a school bus it could be very dangerous. (TR 282-283).

On cross-examination, Ms. McMullen testified that Respondent's whistleblower protection policy is set forth in its employee policy manual and she agreed that non-retaliation against whistleblowers is important. (TR 283-285; JX 8). She said that Mr. Carlson never said anything about Complainant reporting a fire or any other issues with his bus during their discussions about the January 27, 2017 disciplinary memorandum. Likewise, with respect to her discussions with Mr. Carlson on January 30, 2017 about terminating Complainant's employment, she said "[t]he issue of the bus fire, or whatever it might have been, never came into the conversation." (TR 286). She agreed that the morning of January 30, 2017, Mr. Carlson did not come in to see her wanting to terminate Complainant and that she was the one who came to that conclusion after Mr. Carlson described the events he observed on the January 28, 2017 ride-along. (TR 287). Ms. McMullen said that she believed Complainant would have been terminated based upon the January 28, 2017 ride-along even if he had a perfect record up until that point. (TR 287-288). She stated that other bus drivers have been terminated for safety violations. (TR 288). She also said that Complainant's summer employment with Respondent was not guaranteed. (TR 289).

On re-direct examination, Ms. McMullen agreed that implementation of Respondent's whistleblower policy assumes that its supervisors and managers will not retaliate against

whistleblowers. She agreed that a supervisor or manager could face significant disciplinary action if he or she engaged in retaliation, but she said there would have to be an investigation into the circumstances. (TR 291). She said there was no investigation of Complainant's retaliation allegations because she only found out about them after he complained to the Department of Labor. She agreed that Mr. Carlson could face "pretty significant trouble with [Respondent]" if it was found that he retaliated against Complainant. (TR 292).

In response to questions by me, Ms. McMullen said that from the time Complainant was hired in September 2015 until January 27, 2017, she had not been involved in any disciplinary actions against him. She said that during Mr. Houghton's last week working for Respondent – the week of January 23-27, 2017 – she went into his office and asked if there had been any issues with Complainant and he responded that he did not have anything documented and could not think of anything. (TR 293). She believe that conversation took place on about Wednesday, January 25, 2017. (TR 293-294). Ms. McMullen clarified that on Monday, January 30, 2017, she met with Mr. Carlson at about 8:15 in the morning and then met with Complainant to terminate his employment later that day prior to his afternoon route. (TR 294). She could not recall whether she was aware at the time she recommended Complainant's termination that he had said he did not drive his assigned bus because it was unsafe. (TR 294-295).

Documentary Evidence

Joint Exhibit 1

Maintenance entry form showing that the mirror wiring on bus number 4 was repaired on January 20, 2017. The convex glass and heat grid were replaced at a cost of $35.00 and there was $20.00 worth of labor.

Joint Exhibit 2

Notice of Termination dated June 1, 2017 issued by Mr. Carlson to another employee. The letter states that Mr. Carlson met formally with the employee on May 5, 2017 and May 23, 2017, as well informally on many occasions, to discuss problems with her performance.

Joint Exhibit 3

Disciplinary memorandum dated May 5, 2017 issued by Mr. Carlson to the same employee referenced above. The memorandum noted specific performance deficiencies and stated that the employee's performance would be reevaluated in ten days.

Disciplinary memorandum dated May 23, 2017 issued by Mr. Carlson to the same employee referenced above. The memorandum noted specific performance deficiencies and stated that Mr. Carlson would meet with the employee at least twice a week to discuss her performance and if it did not improve by the end of the school year her employment would be terminated.

Joint Exhibit 4

Notice of Termination dated January 30, 2017 issued by Mr. Carlson and Ms. McMullen to Complainant.

Joint Exhibit 5

Disciplinary memorandum dated January 27, 2017 issued by Mr. Carlson to Complainant listing specific performance deficiencies and stating that Complainant's performance would be reevaluated in ten days and if it did not improve he would be terminated.

An undated report relating to the termination of Complainant prepared by Mr. Carlson. It lists Mr. Carlson's version of events from the January 28, 2017 ride-along with Complainant.

Joint Exhibit 6

The same undated report reference above relating to the termination of Complainant prepared by Mr. Carlson concerning the January 28, 2017 ride-along with Complainant.

Joint Exhibit 7

Ten-page spreadsheet showing repairs made to Respondent's buses between June 2016 and May 2017.

Joint Exhibit 8

Eight pages extract from Respondent's Employee Manual.

Joint Exhibit 9

Annual School Bus Pre-Trip Evaluation for Complainant dated August 5, 2016.

School Bus Driver Evaluation for Complainant dated August 6, 2016.

Evaluator Certification for Complainant dated August 22, 2016.

Student Conduct and Students with Special Needs Survey for Complainant dated October 23, 2015.

Complainant's Exhibit 4

Email exchange between Mr. Carlson and Mr. Houghton on January 24, 2017.

Complainant's Exhibit 5

Mr. Carlson's email to himself dated January 25, 2017 with notes on events involving Complainant on January 20-21, 2017.

Complainant's Exhibit 12

Payroll Register, ten pages, from January 15, 2015 to March 15, 2018.

Complainant's Exhinit 14

Letter dated June 3, 2016 informing Complainant that he was nominated for the Staff Recognition Award for the 2016 school year.

Complainant's Exhibit 21

Respondent's letter to OSHA Investigator dated May 19, 2017. Seven pages.

Complainant's Exhinit 22

Complainant's timesheet for weeks ending January 22, 2017 and January 29, 2017.

Complainant's Exhibit 24

Email from Mr. Houghton dated January 4, 2017 stating Complainant was awarded a $225.00 bus driver performance stipend for the first half of school year 2016-2017.

Complainant's Exhibit 25

Two photographs showing railroad tracks imbedded in asphalt pavement.

Complainant's Exhibit 27

Answers to Complainant's First Set of Interrogatories signed by Ms. McMullen and dated April 19, 2018. 12 pages. Only answer to interrogatory number 12 is admitted into evidence.

Complainant's Exhibit 29

Letter dated July 16, 2018 from the business manager at Providence Academy stating Complainant started work there on February 23, 2017 and earns $16.75 per hour.

DISCUSSION AND ANALYSIS

STAA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century at 49 U.S.C. § 4212l(b). *See* 49 U.S.C. § 31105(b)(l); *Tocci v. Miky Transport*, ARB No. 15-029, ALJ No. 2013-STA-00071 (ARB May 18, 2017). To prevail, a complainant must establish by a preponderance of the evidence that: (1) he engaged in protected activity as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-00009, slip op. at 6-7 (ARB Jan. 31, 2012). Failure to prove any one of these essential elements requires dismissal of the

whistleblower's claim. If, however, the complainant meets his or her burden of proof, the employer may avoid liability if it can demonstrate by clear and convincing evidence that it would have taken the same adverse action in any event. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, slip op. at 6 (ARB Jan. 31, 2011); 49 U.S.C. § 4212l(b)(2)(B)(iii) and (iv).

1. Protected Activity

The STAA prohibits a covered employer from terminating an employee for refusing to drive a vehicle if "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." 49 U.S.C. § 31105(a)(1)(B)(ii). Section (a)(2) further clarifies the "reasonable apprehension" requirement:

> 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.

The burden is on Complainant to prove by a preponderance of the evidence that he engaged in protected activity under the STAA. *Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 054, ALJ No. 2003-STA-00039, slip op. at 5 (ARB June 29, 2007) *aff'd Luckie v. Administrative Review Board*, 321 Fed. App'x. 889 (11th Cir. 2009) (unpub.) (In a trial on the merits the issue is not whether complainant established a prima facie case, it is whether he proved by a preponderance of the evidence that respondent took adverse action against him because of protected activity). To prove a fact by a preponderance of the evidence means that, all relevant and admissible evidence considered, a fact is more likely than not. *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-00001, slip op. at 11 (ARB Apr. 25, 2014).

In *Treur v. Magnum Express, Inc.*, ARB No. 15-001, ALJ No. 2014-STA-00002, slip op. at 6 (ARB July 26, 2016), the Administrative Review Board said, "[a]ll the circumstances surrounding a refusal to drive – including but not limited to existing conditions, weather forecasts, timing, the condition and nature of the vehicle, and the driver's experience – must be considered in determining the reasonableness of the driver's refusal and whether the refusal constitutes protected activity." In that case, the complainant was terminated after he refused to drive because the weather forecast predicted blizzard conditions along his route during the time he was scheduled to be out on the road. The administrative law judge found that "reasonable apprehension" was not established because there was no blizzard at the time complainant was to start driving, only a prediction that there would be blizzard conditions at some point in the future. The Board vacated the judge's decision saying, "[t]o demonstrate that a refusal to work is protected under the 'reasonable apprehension' clause, a complainant must show not only that he had a subjective apprehension of serious injury but also an objectively reasonable apprehension; that is, that a reasonable person in his position given the information available at the time of the refusal would have concluded that operation of the vehicle would pose a risk of serious injury."

Id. at 9. The Board said a driver is not required to drive into a blizzard before determining the blizzard conditions are too hazardous and it is not his responsibility to establish that there was no possibility he could drive safely.

To establish a violation, however, it is not sufficient for a complainant to demonstrate a good faith subjective opinion alone. Instead, a complainant must prove that his assessment of the condition is reasonable. *Brame v. Consolidated Freightways*, 1990-STA-00020 (Sec'y June 17, 1992) (complainant's refusal to drive a truck was not reasonable because the only evidence of faulty brakes was his own subjective opinion). In *Harris v. C & N Trucking*, ARB No. 04-175; ALJ No. 2004-STA-00037 (ARB Jan. 31, 2007), the complainant refused to drive a truck because he believed the front end of the vehicle was unsafe and the wheels might come off. The pivotal issue was whether the complainant's apprehension was objectively reasonable. While a complainant is not required to prove the existence of an actual safety defect, he must provide sufficient evidence to establish that the assigned vehicle could reasonably be perceived as unsafe by a reasonable person. The administrative law judge found the complainant failed to meet his burden of proof because the only evidence he offered was his own subjective opinion that he believed the wheels were likely to come off if he drove the truck. In *Dick v. J.B. Hunt Transport, Inc.*, ARB No. 10-036, ALJ No. 2009-STA-00006, slip op. at 6 (ARB Nov. 16, 2011), the Administrative Review Board said that an employee "need not prove an actual violation of a motor vehicle safety regulation, standard, or order, but must at least be acting on a reasonable belief regarding the existence of an actual or potential violation." *See also Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (noting that STAA protection is not dependent upon whether the complainant proves a safety violation).

Respondent argues that Complainant did not engage in protected activity, stating:

> Complainant's claim fails because [Respondent] fixed the concern which led Complainant to drive a different bus. [Respondent's] on-site mechanic promptly repaired the minor wiring issue the morning after Complainant reported it. As soon as Complainant was informed of this minor repair and that his bus was safe to drive, he no longer had a good faith reason to have "apprehension of serious injury." Further, Complainant admits he did not report any other safety concerns with his bus, nor were any other repairs made before Complainant himself was fine with driving it. Therefore, Complainant did not engage in protected activity.

(Resp. Brief at 10).

Complainant contends that he engaged in protected activity by reporting that his assigned bus had caught on fire and by later telling Mr. Carlson that his assigned bus was unsafe. (Resp. Brief at 11-12).

The parties are in agreement that on Thursday, January 19, 2017, Complainant reported that the mirror on his assigned bus malfunctioned and that Respondent's mechanic determined the next day that the malfunction was the result of a short in the electrical wiring for the mirror's heating element. While the parties are in dispute over whether the malfunction produced a fire or smoke, Respondent has not disputed that it was subjectively and objectively reasonable to

conclude that the short in the electrical wiring constituted a hazardous safety condition; therefore, I find that Complainant reporting the problem was protected activity under the STAA.

The complicating factor in this analysis of this prong centers around this part of Respondent's argument: "As soon as Complainant was informed of this minor repair and that his bus was safe to drive, he no longer had a good faith reason to have 'apprehension of serious injury.'" The record contains varying accounts of when Complainant was informed that his assigned bus had been repaired and was safe to operate.

According to Complainant's testimony at the hearing, the malfunction occurred when he was preparing to do his afternoon route on Thursday, January 19, 2017. He used a substitute bus for his afternoon route that day and continued using it "till I was instructed not to drive it," which Complainant believed was on Tuesday or Wednesday of the following week. (TR 58). He said that after the incident, he saw his assigned bus sitting in the lot and he "had absolutely no idea what they were going to do with the bus: repair it, decide it was not to be driven anymore, or what." (TR 56). Complainant said that Mr. Carlson approached him in the bus staging area a few days later and asked him why he was not using his assigned bus. He said he told Mr. Carlson that no one had told him anything about the status of the bus. He testified that Mr. Carlson informed him the bus had been repaired and he needed to use it. Complainant said he told Mr. Carlson that the bus was unsafe, but Mr. Carlson instructed him that he was to use it and there was no further discussion about the safety of his assigned bus.

According to Mr. Carlson's testimony at the hearing, both he and Respondent's mechanic told Complainant that his assigned bus had been repaired prior to Complainant beginning his Friday afternoon route on January 20, 2017, but Complainant continued using a substitute bus. (TR 140). Mr. Carlson testified that he told Complainant again after the afternoon route was completed that he needed to use his assigned bus, but Complainant used a substitute bus on Saturday, January 21, 2017, for the LearningWorks route. Mr. Carlson said he told Complainant a third time after the LearningWorks route that he needed to use his assigned bus. Mr. Carlson said Complainant resumed using his assigned bus on Monday, January 23, 2017. (TR 206).

According to Mr. Herrman's testimony (the mechanic) at the hearing, he did not remember telling anyone on Friday, January 20, 2017, that he had repaired Complainant's assigned bus. He said that his normal practice after completing a minor repair was to return the bus to the same place from where he retrieved it and, in cold weather conditions, perhaps plug in the block heater so the bus was ready for use when the driver arrived to run his or her route. He thought that Mr. Carlson was "managing or dispatching, and I usually let him know that if a bus was out that it's back." (TR 249).

In the email that Mr. Carlson sent to himself (CX 5) on Wednesday, January 25, 2017, he wrote:

> 1/20&21/17 Took bus 2 instructed to take bus 4
>
> Woody communicated to Ron that bus 4 was ready and safe and to let Larry know if he wanted to take a different bus. He did not. I told the pre-school teacher that

> he was going to be back in bus 4 – he was in bus 2 without speaking to me. Also the next day.

In the May 19, 2017 letter to the OSHA investigator assigned to investigate Complainant's STAA complaint, Respondent stated:

> In between Rantz's morning and afternoon routes on January 20, both Blake's mechanic and Carlson informed Rantz that his bus had been fixed and was safe to operate. Rantz did not raise any concerns about his bus being unsafe to drive.
>
> Nevertheless, Rantz took the spare bus to run his afternoon route. After Rantz ran his afternoon route, Carlson questioned why Rantz was in the spare bus when his bus had been fixed. Rantz claimed, without explanation, that his bus was "unsafe." Carlson again explained to Rantz that his bus had been fixed and there was no electrical or fire issues, and that Rantz was expected to drive his normal bus the next day. Rantz did not say anything further to Carlson.
>
> Yet, the next day, Rantz again took the spare bus for his Saturday Learning Works route. Rantz had not raised any further safety concerns about his usual bus. After the route was complete, Carlson instructed Rantz, for the third time, to us his usual bus. On the following Monday, January 23, Rantz resumed driving his usual bus.

(CX 21 at 4). Ms. McMullen said that she had no personal knowledge about the underlying events that were the basis for Respondent taking disciplinary action against Complainant and that all of the factual information she had was conveyed to her by Mr. Carlson. (TR 261). Ms. McMullen had reviewed the information contained in the letter to the OSHA investigator and testified that she believed the information contained in the letter was accurate. (TR 272-273).

In the April 19, 2018 Answers to Complainant's First Set of Interrogatories, in response to interrogatory 12, Respondent stated:

> 1. On Thursday, January 19, 2017, Complainant brought the bus to staging for the on-site mechanic to inspect and used the spare bus to run his afternoon route. The next morning, January 20, Complainant's regular bus had not yet been repaired so he used the spare bus again for his morning route.
>
> 2. While Complainant ran his morning route, Blake's on-site mechanic repaired a shorted electrical wire on the driver's side mirror of Complainant's normal bus – a minor repair. In between Complainant's morning and afternoon routes on January 20, both Blake's mechanic and Mr. Carlson informed Complainant that his bus had been fixed and was safe to operate. Complainant did not raise any concerns about his bus being unsafe to drive.
>
> 3. Complainant took the spare bus to run his afternoon route. Following the afternoon route, Mr. Carlson questioned why Complainant used the spare bus when his bus had been fixed. Complainant claimed, without explanation, that his

> bus was "unsafe." Mr. Carlson again explained to Complainant that his bus had been fixed and there were no electrical or fire issues, and that Complainant was to drive his normal bus the next day. Complainant did not raise any further safety concerns to Mr. Carlson.
>
> 4. On January 21, Complainant again took the spare bus for his Saturday Learning Works route. Complainant had not raised any further safety concerns about his usual bus. After completing the route, Mr. Carlson instructed Complainant, for the third time, to use his normal bus.
>
> 5. Complainant did not run any routes with Blake on January 22, 2017.
>
> 6. On Monday, January 23, Complainant resumed driving his usual bus. Complainant never requested any further work be done on his usual bus and raised no further concerns with his usual bus.

(CX 27 at 8-9). Ms. McMullen said she signed the answers as Respondent's designated representative and had attested under penalty of perjury that the information provided was accurate. (TR 264; CX 27 at 12).

Whether Complainant's decision not to drive his assigned bus on Friday afternoon, January 20, 2017, and on Saturday, January 21, 2017, constitutes protected activity under the STAA depends upon whether his version of the events or Mr. Carlson's version of the events is accurate. For the reasons set forth below, I find that Complainant's account is more credible and carries greater weight.

Mr. Carlson has given three official accounts of the events that transpired between the morning of January 19, 2017 and the morning of January 23, 2017 – the account in the letter to the OSHA investigator, the account in the answers to interrogatories and the account in his testimony at the hearing – and the three are inconsistent internally and with the other evidence of record.

The letter Respondent submitted to the OSHA investigator and the answer to interrogatory number 12 were based upon information that came exclusively from Mr. Carlson. Both of those documents, which set forth Respondent's official position, say that on the morning of January 19, 2017, Complainant drove his assigned bus up from the bus lot to the staging area for the mechanic to inspect and the mechanic repaired electrical wiring in the driver's side mirror the next day and told Complainant that his bus had been repaired and was safe to drive.[5] (CX 21 at 4; CX 27 at 8).

In his testimony, Mr. Carlson said that he notified Mr. Herrman the afternoon of January 19, 2017 that a fire had been reported on Complainant's bus and that Mr. Herrman needed to check it out the next morning, which differs from Respondent's written accounts that

[5] Complainant, Mr. Carlson and Mr. Herrman all described the campus site to include a lower lot where school buses are parked when not in use, an upper lot where teachers and visitors park, a mechanical and grounds-keeping area, and a staging area adjacent to the school where students load and off-load the buses. (TR 49, 216-217, 245).

Complainant had already taken the bus to Mr. Herrman to be inspected in the morning. (TR 205). Complainant and Mr. Herrman testified, and the documentary evidence confirms, that the faulty wiring was in the passenger side mirror, not the driver's side mirror. The testimonies of all three of the witnesses show that Complainant left his assigned bus in the lower lot after the wiring shorted out rather than driving it up to the staging area. Finally, Mr. Herrman testified that he did not remember telling Complainant or anyone else that the bus had been repaired and Complainant testified that the first time he was informed that the bus had been repaired was by Mr. Carlson on January 21, 2017. (TR 49, 58-60, 133, 204-205, 249-251; JX 1).

I had the opportunity to observe the demeanor of Complainant and Mr. Carlson as they testified and as they participated in the proceedings over the course of the entire day. They were both personable and came across as sincere, so I find them equally credible from that perspective. Where the scales tip in Complainant's favor is when their versions of the events are assessed in conjunction with other factors. As noted above, for instance, there are some discrepancies in Mr. Carlson's testimony at the hearing and Respondent's written representations that were derived solely from information provided by Mr. Carlson.

There are other factors that lend credence to Complainant's version of the events. Complainant testified that his assigned bus (bus number 4) and the spare buses (buses number 2 and 5) were identical Freightliner school buses that you could not tell apart aside from their different numerical designations. (TR 56, 122-123). Mr. Carlson agreed that the three buses were the "[s]ame model, same make" and that they were "virtually identical, except for the numbers on them." (TR 219). That begs the question; why would a reasonable person who had three virtually identical school buses to choose from not want to drive one of the buses? The answer is implicit in one of Mr. Carlson's responses: "The specific idiosyncrasies of any bus are – should be and usually are best known by the person that drives it every day." (TR 222). The parties agree that the electrical wiring in the exterior passenger side mirror on Complainant's bus shorted out on January 19, 2017 and that if he believed there was a fire it would constitute a serious safety concern. (TR 136). Complainant testified that he had other problems with his assigned bus, including a problem he considered "very bad" a couple of weeks prior to January 19, 2017, but he did not describe the problems during his testimony. (TR 122). Respondent represented that Complainant had a conversation with Mr. Carlson the afternoon of January 20, 2017 in which he said his assigned bus was "unsafe," but he did not explain why. (CX 21 at 4; CX 27 at 9). Mr. Carlson testified that he did not remember the conversation (TR 141), but he agreed that at some point after the alleged fire and before Complainant resumed using his assigned bus Complainant said his assigned bus was unsafe. (TR 141-142).

When I consider all of those facts together, I find that on January 20 and January 21, 2017, when Complainant chose not to drive his assigned bus but to use one of the virtually identical spare buses instead, he did so because he believed his bus was unsafe to operate. I also find that a reasonable person standing in Complainant's shoes could logically come to the same conclusion given that on January 19, 2017 the electrical wiring caused the mirror to catch fire or smoke. Accordingly, I find that when Complainant did not use his assigned bus on Thursday afternoon, January 19, 2017; Friday morning and afternoon, January 20, 2017; and on Saturday, January 21, 2017, he was engaging in protected activity under the STAA.

Additionally, I find that there was only one conversation between Mr. Carlson and Complainant in which Mr. Carlson informed Complainant that his bus had been repaired, Complainant said the bus was unsafe without explaining why, and Mr. Carlson instructed him to use his assigned bus. The first purported record of what transpired is the email Mr. Carlson wrote and sent on Wednesday, January 25, 2017, to remind himself of the chain of events. (TR 233-234; CX 5). In the email, Mr. Carlson wrote:

> Woody communicated to Ron that bus 4 was ready and safe and to let Larry know if he wanted to take a different bus. He did not. I told the pre-school teacher that he was going to be back in bus 4 – he was in bus 2 without speaking to me. Also the next day.

(CX 5). According to the email, the only person who communicated to Complainant that his bus had been repaired and was safe to use was Mr. Herrman, and Mr. Herrman testified at the hearing that he did not remember telling anyone that he had repaired the bus. (TR 249). Instead, Mr. Herrman testified that his normal practice after completing a minor repair was to return the bus to the place where he found it. (TR 249). Complainant testified that he used a substitute bus until he was instructed to return to his assigned bus. He said his assigned bus sat in the lot and "I had no idea. It sat there. And I didn't know if it was waiting on parts. Nobody conveyed anything to me what the status was of the bus, and, quite frankly, I didn't even ask." (TR 56-57).

Complainant's account is consistent with the testimony of Mr. Herrman – who, I note testified by telephone after Complainant testified and provided what is the only account anywhere in the record of his involvement in this matter – and it is not inconsistent with the details Mr. Carlson wrote in the email to himself as a reminder of what transpired. Likewise, in the January 27, 2017 disciplinary memorandum, Mr. Carlson said Complainant used a "different bus than assigned without permission" on January 20 and January 21, 2017, but did not mention that Complainant blatantly ignored his specific directives to resume using the assigned bus. (JX 5). I do not see any motive for Mr. Carlson to claim that he told Complainant three times that his assigned bus had been repaired and he should use it nor do I see any motive for Complainant to deliberately ignore a specific directive and continue using a substitute bus that was identical to his assigned bus if he understood that he was not supposed to do so. It appears that this was a situation akin to what Storther Martin and Paul Newman experienced in *Cool Hand Luke*; a "failure to communicate." Therefore, I find that the weight of the evidence establishes that Mr. Herrman never told Complainant that he had repaired his assigned bus and once Mr. Carlson communicated to Complainant that his assigned bus had been repaired and, despite any unexplained safety concerns he might have had, he was to use it, Complainant resumed using his assigned bus.

2. <u>Unfavorable Personnel Action</u>

Respondent terminated Complainant's employment on January 30, 2017. (JX 4). I find – and no one disputes – that termination of Complainant's employment was an unfavorable personnel action under the STAA.

3. Contributing Factor

The burden is on Complainant to establish that his protected activity was a contributing factor in Respondent's termination of his employment; that is, he must establish that his protected activity played some role in his termination. *Neier, Inc.*, ARB No. 16-084, ALJ No. 2014-STA-00068, slip op. at 9-10 (ARB June 22, 2018). In *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-00035, slip op. at 17 (ARB Jan. 4, 2017), the Administrative Review Board said:

> At step one, an ALJ may consider any and all relevant, admissible evidence to determine whether the protected activity did in fact play some role – was in fact a "contributing factor" – in the adverse action; as long as the employer's theory of the facts is that the protected activity played no role whatsoever, the ALJ must consider the employer's evidence of its nonretaliatory reasons. Whether the ALJ is permitted to find a "violation" or is required to find a "violation" at that point does not affect, in any way, the ALJ's determination of the complainant's burden at step one, since an ALJ who finds for the employee at step one must adjudicate the question in step two before ordering any relief, irrespective of whether we denominate it a "violation" after step one or not.

Mr. Carlson and Ms. McMullen testified that Complainant's protected activity played "absolutely no part in his termination." (TR 214; 286). The January 30, 2017 termination letter listed three bulleted reasons for terminating Complainant's employment. (JX 4). The first bullet referred specifically to the disciplinary memorandum Complainant received from Mr. Carlson on January 27, 2017 in which he was counseled on insubordination and failure to follow directions to use his assigned bus on January 20 and January 21, 2017. (TR 173, 237; JX 5). I found that Complainant engaged in protected activity when he did not use his assigned bus on those occasions; therefore, I find, "based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action." *Palmer, supra* at 52.

Additionally, in *Pattenaude v. Tri-Am Transport, LLC*, ARB No. 15-007, ALJ No. 2013-STA-00037, slip op. at 7 (ARB Jan. 12, 2017), a truck driver complained about low air pressure in a tire on his truck, was suspended the next day and was terminated 12 days later. The Board said that "the close temporal proximity in this case is alone sufficient to establish the contributing factor element." Here, Complainant notified Respondent that he believed his bus had caught on fire on January 19, 2017, he was disciplined for the first time ever eight days later, and terminated three days after that, a course of events that spans just 11 days. Accordingly, temporal proximity alone is sufficient to establish that Complainant's protected activity was a contributing factor in his termination.

4. Employer's Affirmative Defense

If a complainant satisfies his or her burden of proof, the burden shifts to the employer to establish that it would have taken the same adverse action regardless. The Administrative Review Board explained this second prong of the analysis in *Palmer, supra* at 53-54:

> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

The Board added, "It is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have." *Palmer*, supra at 58 (emphasis in original).

In *Kao v. Areva, Inc.*, ARB No. 16-090, ALJ No. 2014-ERA-00004, slip op. at 4 (ARB Apr. 30, 2018), the Board explained:

> At the affirmative defense stage, an employer is not required to prove that there was no contributing factor, but by the same token, it is not enough for an employer to show merely that the employee's conduct violated company policy or constituted a legitimate business reason justifying the adverse personnel action. The express language of the statute requires that the "clear and convincing" evidence prove what the employer "would have done," not what it "could have done," in the absence of protected activity. Instead, the employer is "required to demonstrate through factors extrinsic to [complainant's] protected activity that the discipline to which [complainant] was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations." (citing *Speegle v. Stone & Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014) and *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 13-14 (ARB Sep. 30, 2015)).

In *Speegle v. Stone & Webster Constr. Inc.*, ARB No. 14-079, ALJ No. 2005-ERA-00006 (ARB Dec. 15, 2014), the Board noted that in a prior decision[6] it stated that the "statutory mandate requires adjudicators of whistleblower cases to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how 'clear' and 'convincing' the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer 'would have' taken the same adverse action; and (3) the facts that would change in the 'absence of' the protected activity." *Speegle*, slip op. at 4 (citations omitted). In doing so, the administrative law judge should consider whether the employer has direct or circumstantial evidence of what it would have done and that the circumstantial evidence may include, evidence of the temporal proximity between the non-protected conduct and the adverse action, the complainant's work record, office policies, evidence of how similarly situated

[6] The Board's earlier decision was appealed to the U.S. Court of Appeals for the Tenth Circuit who remanded the case to the Board for further consideration. *Stone & Webster Constr. Co. v. U.S. Dep't of Labor*, 684 F.3d 1127 (11th Cir. 2012).

employees were treated and the proportional relationship between the adverse action and the basis for the action. (*Id.*).

While it is abundantly clear that I am to assess whether Respondent would have terminated Complainant's employment absent his protected activity by using a clear and convincing evidence standard, it is not clear what standard applies to my assessment of the facts alleged to establish other alleged non-protected incidents. In other words, while an employer has to prove by clear and convincing evidence that despite the employee's protected activity it would have taken the same adverse action because of A, B, C and D, does the employer have to prove the facts alleged as A, B, C and D by clear and convincing evidence or by a preponderance of the evidence? In the analysis that follows I apply the preponderance of the evidence standard to assess whether the other incidents Respondent alleged would have resulted in Complainant's termination are established. Obviously if the evidence does not cross the preponderance threshold it would not cross the clear and convincing evidence threshold as well.

Respondent contends that Complainant would have been terminated regardless of whether there was protected activity because he "committed four separate violations of Minnesota law, each of which would have put students in grave danger," when he drove his LearningWorks route with Mr. Carlson aboard on January 28, 2017. (Resp. Brief at 13). Complainant contends that these post-protected activity infractions are a pretext for unlawful retaliation. (Compl. Brief at 20).

The January 30, 2017 termination notification stated:

> Your termination is the result of the following:
>
> • Insubordination and unwillingness to follow repeated directives from your supervisor Larry Carlson; route issues for LearningWorks; and attendance concerns for not showing up on time for your route. These concerns were shared with you in person and in a letter of disciplinary action on Friday 1/27/17.
> • Continued concerns regarding your ability to follow your assigned route for LearningWorks as observed during a ride-along by Larry Carlson.
> • Safety concerns and violations of DOT regulations as observed during the ride-along by your supervisor on 1/28/2017. These violations included:
> - Failure to follow procedure at two railroad crossings
> - Unsafe drop off protocol in two instances

(JX 4). Each of the reasons cited as a basis for terminating Complainant's employment is analyzed separately and then collectively.

Reason One

The first reason cited are the matters addressed in the January 27, 2017 disciplinary memorandum Complainant received from Mr. Carlson. (JX 5). The disciplinary memorandum listed three separate categories of alleged performance and conduct deficiencies:

(1) Not accepting direction:

-- Using different bus than assigned without permission – 1/20/17 and 1/21/17
-- Refusing to run LearningWorks route – 2 infractions

(2) LearningWorks route issues:

-- Ongoing difficulties with route and directions
-- Waiting for students longer than instructed
-- Being consistently significantly late dropping off students at the Northrup Campus

(3) Other issues:

-- Missing noon kindergarten route on 1/20/17
-- Showing up late for service day trip on 1/24/17

The issue of using a bus other than the one he was assigned on January 20 and January 21, 2017 was previously addressed and constitutes protected activity. That is not a valid reason for issuing a disciplinary memorandum or terminating Complainant's employment.

The second item under "not accepting direction" relates to the LearningWorks route, which is also addressed separately and encompasses the entire second category in the list of reasons cited for the disciplinary action. Mr. Carlson testified that Complainant had ongoing difficulties with his LearningWorks route from September 2016 to January 2017.[7] He admitted that none of these difficulties resulted in any documented disciplinary action. (TR 165-166). On cross-examination, Mr. Carlson said that he had encouraged Complainant over the fall semester to work on his LearningWorks route. (TR 196). On one Saturday in January 2017, he told Complainant to run his LearningWorks route twice between his 9:00 a.m. drop off and noon pickup in order to practice his route, but Complainant did not do so. (TR 202-203). Complainant testified that the LearningWorks route "was a complicated route, and it was difficult, at best … the route that I had was always difficult." (TR 72-73). I find that Complainant did have performance issues with his LearningWorks route and that those issues were unrelated to and predated his protected activity. The fact that Respondent chose not to document anything related to Complainant's handling of the LearningWorks route until after he engaged in protected activity, however, is some indication of the significance Respondent attached to the matter prior to the protected activity.

The third category labeled "other issues" lists two incidents. The first incident was Complainant missing a noon kindergarten route on January 20, 2017. Complainant said that he was driving one of two buses that were out supporting a field trip that morning. As planned, the trip should have gotten him back to campus in time to do his noon route, which consisted of transporting one student. The other bus experienced a brake failure on the return leg of the trip and pulled off on the side of the freeway. Complainant pulled over and stayed with the other bus while the problem was assessed. Complainant claims the dispatcher said that Mr. Herrman was coming out to the scene with a spare bus and Complainant was directed to drive the students on

[7] Mr. Carlson said the LearningWorks program is held on Saturdays from 9:00 a.m. until noon about 11 times during the school year. (TR 193, 196).

his bus to the Wayzata School and not to worry about the one student he was supposed to pick up at noon. (TR 96-101). Mr. Carlson did not dispute Complainant's version of the events, except he said the dispatcher telling Complainant not to worry about picking up the student at noon "never happened." (TR 166-167).

The second incident was on January 24, 2017 when Complainant was a few minutes late for an 8:30 a.m. service day trip departure. According to Complainant, he had been at work since 5:30 a.m. that morning. He said he and two other drivers walked down to the restroom before beginning their service day trip routes because they did not expect to return to the campus until about noon. When the drivers returned to their buses, Complainant said Mr. Carlson asked him why he was not ready for the service day trip and Complainant answered "I am here. Here is the bus. I'm ready." (TR 102-103). Mr. Carlson did not dispute Complainant's version of the events, except he said Complainant never told him he was late because he went to the restroom. He agreed that Complainant was present at work the whole time, but he said Complainant was late getting to his bus for the service day trip. (TR 167-169). Mr. Carlson testified that he did not recall if Complainant explained to him why he was late getting to his bus. (TR 168).

Both of these incidents occurred after January 19, 2017 when Complainant first engaged in protected activity. With respect to his alleged failure to complete his noon route on January 20, 2017, Complainant testified that the dispatcher told him to stay with the students he had on his bus and "don't worry about" the noon route. (TR 95-101). Mr. Carlson agreed that Complainant stopping on the side of the freeway with the bus that experienced brake failure caused him to be late for the noon route, but he testified that the alleged conversation Complainant had with the dispatcher "never happened." (TR 166-167). The dispatcher who was on duty at the time was not identified anywhere in the record, did not testify at the hearing and there was no other evidence introduced about what transpired that morning. With respect to the second incident when Complainant was a few minutes late for an 8:30 a.m. service day trip on January 24, 2017, Complainant did not dispute Mr. Carlson's account that he was not at his bus and ready to depart at 8:30 a.m. as scheduled, but he said he had been on duty since 5:30 a.m. and went to the restroom before doing the service day trip. (TR 102-103).

The burden of proof at this stage is on Respondent. The evidence concerning whether or not the dispatcher excused Complainant from his noon route on January 20, 2017 is evenly balanced; therefore, Respondent did not meet its burden of proof. The evidence does establish that Complainant was a few minutes late for the 8:30 a.m. service day trip on January 24, 2017, but it does not establish that this was a significant event, that it caused any harm or that it would ordinarily result in disciplinary action.

Reason Two

The second reason was concern over Complainant's ability to follow his assigned LearningWorks route as observed by Mr. Carlson on January 28, 2017. Complainant testified there had been a scheduling mistake and it became apparent early in the route that there were no students to pick up that morning. He said the route was terminated and he returned to the school where he dropped Mr. Carlson off at the office and then he took the bus down to the bus lot and parked it. Complainant said he and Mr. Carlson engaged in general conversation while they were on the bus, but they did not discuss anything related to work or the route. (TR 77-79). Mr.

Carlson testified that he instructed Complainant to go ahead and do the whole route and to do it "as if students were riding." (TR 211-212). He said they drove the entire route and that Complainant's testimony about terminating the route early and returning to the school was false. (TR 171).

Obviously both versions of what occurred the morning of January 28, 2017 cannot be true; either they ran the entire route or they terminated it early after discovering the scheduling error. As noted before, Complainant and Mr. Carlson were both credible witnesses. On the question of whether they did or did not run the entire route on January 28, 2017, I find no other evidence in the record that would tend to corroborate or contradict the testimony of either one of the only two parties involved in the event. Mr. Carlson testified that he had verified that Complainant failed to practice his LearningWorks route earlier in January 2017 by checking the GPS data for the bus, which showed the bus returned to the school in between the drop off and pick up times. (TR 203). If there was GPS data for the route on January 28, 2017 then perhaps it would shed some light on which version of the story is true, but no such evidence was introduced into the record. The evidence on this issue is evenly divided; therefore, Respondent did not meet its burden of proof to establish that this was a basis for terminating Complainant's employment.

Reason Three

The third reason cited in the termination notification was safety concerns and violations of Department of Transportation regulations on the January 28, 2017 ride-along with Mr. Carlson. Specifically, it was alleged that Complainant failed to follow proper procedures at two railroad crossing and twice followed an unsafe protocol for dropping off students.

There was no evidence introduced of any Department of Transportation regulations. There was evidence introduced of Minnesota statutory law and administrative rules that require school buses to stop at railroad crossings, not to use eight-way warning lights at railroad crossings, and to load and unload students in the right lane of roadways. See Minn. Stat. § 169.28; Minn. R. 7470.1000; Minn. R. 7470.1100. (CX 21).

With respect to the first railroad crossing incident, Mr. Carlson testified that Complainant drove over a particular crossing twice without stopping. He said that he told Complainant after he drove over it the first time that it was a legal requirement to stop even though it was obvious a train could not use the tracks. (TR 209). Complainant offered photographs that showed the railroad tracks. (TR 89; CX 25). One photograph shows tracks imbedded in the pavement of a roadway. The rail tracks end at the edge of the pavement where a concrete barrier is placed in front of Prime Place Apartments, which was then under construction. (CX 25). Complainant said there was a parking area for the construction workers on the other side of the road where the tracks also ended at the edge of the pavement. (TR 89, 92-93). Complainant estimated that the tracks ran across the pavement for about 20 feet and could not accommodate a train. (TR 94).

On October 16, 2018, I issued an order notifying the parties I intended to take official notice of the address for Prime Place Apartments, that it is located between Essex Street SE and Interstate 94, and that on October 13, 2015 the Surface Transportation Board entered a Decision and Order giving the Soo Line Railroad Company authority to abandon 0.4 miles of railroad located in Minneapolis between Essex Street SE and the bridge crossing Interstate 94 effective

on April 10, 2016.[8] I gave the parties 14 days to object to me taking official notice of these facts and neither party submitted an objection.

It is clear whatever operational railroad tracks may have once existed, that was no longer the case – the track had been cutoff at the edge of the pavement and removed, and a building erected where the tracks once ran. The federal agency Congress empowered to approve the creation, modification and abandonment of railroad lines had issued a public order of the line's abandonment. Additionally, Mr. Carlson admitted that it was obvious there was no danger of a train crossing the road at that location. Accordingly, I find that Respondent has not met its burden to establish that Complainant's conduct created a valid safety concern or a violation of any Department of Transportation regulations or Minnesota statutes or rules.

The second incident was at a different location – Excelsior Boulevard just west of Highway 100 – and there was no dispute over whether it involved a legitimate railroad crossing. (TR 86, 210). According to Mr. Carlson, Complainant used his eight-way hazard warning lights instead of his four-way lights, which Mr. Carlson said was "a really big deal" that would likely result in a ticket if a state trooper observed it. (TR 201-211). According to Complainant, he "did what I do at every railroad crossing," which he said was to activate his four-way lights as he approached the crossing. (TR 87). He said that was "just standard procedure at every railroad crossing." (TR 87).

The evidence concerning whether Complainant used his four-way or his eight-way lights is evenly divided. Since the burden rests with Respondent, it has not met its burden of proof to establish the facts alleged. Assuming, however, that Complainant did use the eight-way lights, Respondent did not introduce any evidence of a Department of Transportation regulation that prohibited doing so as alleged in the termination notification. Instead, after Complainant was terminated, Respondent identified a Minnesota state statute and a Minnesota state administrative rule it argues proscribed the conduct. The statute establishes requirements for school buses crossing over railroad tracks, but it states no requirement with respect to the use of warning lights. Minn. Stat. § 169.28. I note, too, that it establishes no penalty, which is in contrast to Minn. Stat. § 169.26 that authorizes a police officer to make an arrest and charge an individual with a misdemeanor offense for violating the railroad crossing requirements set forth in that section (which is not applicable in this situation). The administrative rule does state that four-way hazard warning lights will be used and that the eight-way system "must not be used at railroad crossings." Minn. R. § 7470.1100.F. The rule does not establish a penalty for a violation nor does it state that a violation would authorize a state trooper to make a stop and issue a ticket. Therefore, even if Complainant used the eight-way hazard warning system it was a mistake and a violation of the Minnesota administrative rule, but it was not a "really big deal" as Respondent has alleged.

[8] The Interstate Commerce Commission Termination Act of 1995 established strict filing and procedural requirements for railroad abandonment applications (*see* 49 U.S. Code § 10904) and the Surface Transportation Board adopted regulations (see 49 C.F.R. § 1152) to implement these requirements. Soo Line Railroad Company gave notice to the Surface Transportation Board in September 2015 that it intended to abandon 0.4 miles of rail line between Essex Street SE and Interstate 94 and the notice was published in the Federal Register on September 14, 2015. 80 Fed. Reg. 55,173 (Sep. 14, 2015). The Surface Transportation Boards Decisions and Orders are publicly available on the Board's website at www.stb.dot.gov.

Finally, Complainant is alleged to have followed improper drop off protocol twice during the ride-along. According to Mr. Carlson, Complainant made two stops where students would have been required to step into an active lane of traffic to get on or off the bus. (TR 213). He acknowledged that there were no students to pick up or drop off. (TR 176-177). Mr. Carlson testified that while there were no students on the bus that morning, "the modus operandi is that we do the route and we do everything as if there were students on board." TR (212). He also testified that it was normal practice for him to "ride along with other drivers on similar routes," but he "had not ridden along with [Complainant] on the [LearningWorks] route previously that school year." (TR 170).

There was no evidence that Mr. Carlson had ever done a ride-along with Complainant prior to January 28, 2017. The evidence shows that Mr. Houghton did the ride-along for Complainant's August 2016 bus driver evaluation and Complainant successfully completed every item on the checklist, including all 18 loading and unloading tasks listed on the form. (TR 189, JX 9). There was no evidence introduced that Respondent had a policy on how drivers were to conduct training runs where there were no students on their buses. Thus, the record does not establish that Complainant had any reason to know Mr. Carlson's modus operandi (i.e., his routine habit or normal mode of operation) for assessing drop off protocol on a ride-along when there were no students on board to drop off. Additionally, if Complainant did the stops exactly as Mr. Carlson alleged it would not constitute a violation of the Minnesota administrative rule mandating loading and unloading from the right lane because there were literally no students to load or unload that day. Minn. R. § 7470.1100, Subpart 2, Para. 3. There was no evidence introduced of any Department of Transportation regulations that might be applicable. I find that Respondent failed to satisfy its burden to establish that the protocol Complainant followed on January 28, 2017 endangered safety or violated federal or state law.

Mr. Carlson testified that he had been involved in the termination of one dispatcher and one bus driver prior to terminating Complainant's employment. He testified about his involvement in disciplining and terminating the dispatcher, but he did not discuss his involvement in terminating the bus driver. (TR 177-181). Documentary evidence was introduced into the record concerning the dispatcher, but not the bus driver. (JX 2 and 3). Ms. McMullen testified that other school bus drivers had been terminated for federal or state safety violations. (TR 288). She did not provide any information about how many bus drivers had been terminated, when they were terminated or any of the details about the reasons for their terminations, and there was no documentary evidence offered concerning the same. Ms. McMullen said that she spoke with Mr. Houghton and asked him if there had been any issues with Complainant and he said he could not think of anything. She testified she had not been involved in any corrective actions involving Complainant prior to January 27, 2017 when Mr. Carlson approached her about his concerns. (TR 293).

Looking at all of these factors together, I find that Respondent has not carried its burden to prove by clear and convincing evidence that it would have terminated Complainant's employment in the absence of his protected activity.

First, as noted earlier, Complainant had a spotless record prior to reporting that his bus had caught on fire; in fact, less than a week before his protected activity he received a cash award for his good performance in the first half of the school year.

Second, the acts alleged as justification for Complainant's termination began on January 20, 2017 – the day after he reported the bus fire – when he missed his noon route and ended eight days later on January 28, 2017 when Mr. Carlson rode along on the LearningWorks run. Complainant was terminated two days after that. The temporal proximity of Complainant's protected activity, his non-protected activity and his termination strongly suggests a connection.

Third, Respondent's Employee's Handbook required drivers to "comply with all safety and traffic laws and ordinances." (JX 8 at 20). There was no other evidence introduced of policies that might have been relevant in this matter. For instance, there was no evidence of a policy governing practice routes or the use of spare buses. The only conduct alleged not to have been in compliance with safety and traffic laws and ordinances was during the January 28, 2017 ride-along, and I found there were no violations of laws or ordinances proven: the first alleged railroad crossing was not officially or logically a crossing; Respondent did not meet its burden to establish that Complainant used the eight-way hazard warning system at the other railroad crossing or, if he did, that it was a "really big deal" as Mr. Carlson alleged; and there was no loading and unloading infraction because there were no students to load or unload.

Fourth, the only evidence introduced of an adverse action against another employee was evidence concerning the termination of a dispatcher. Mr. Carlson testified that he had been involved in the termination of one other bus driver and Ms. McMullen testified that other bus drivers had been terminated for safety violations, but neither of them provided any details that would permit comparison to the conduct alleged in this case. Therefore, I cannot find that similarly situated employees were treated in a similar manner to Complainant.

Fifth, I found that the only allegations Respondent met its burden to establish were that Complainant had difficulties with his LearningWorks route and that he was a few minutes late getting to his bus for the service day trip that was supposed to depart at 8:30 a.m. on January 24, 2017. Mr. Carlson testified that LearningWorks is a Saturday morning program that is held about 11 times over the course of a school year. (TR 193, 196). Assuming the sessions are spaced out about evenly over the course of the year and that Complainant had difficulties each time, it indicates that he had difficulties five or six times prior to his protected activity. There was no evidence that he had similar difficulties with his regular route that he ran every day that school was in session. Mr. Carlson did not say when Complainant arrived at his bus for the January 24, 2017 service day trip, only that he was supposed to be there at 8:30 a.m. and he was not there as of 8:35 a.m. The inference I drew from the testimony of Mr. Carlson and Complainant was that he was a few minutes late getting to his bus. There was no evidence introduced that his late arrival had an adverse impact on the event.

There was no evidence of actions taken against other bus drivers for similar conduct, so there is no basis to assess whether termination for the two reasons Respondent established would be proportional. Common sense suggests that for a bus driver with a spotless record and who just received a cash award for his performance in the first half of the school year the answer would be no, it would not be proportional.

There were two other non-protected events where the evidence was evenly divided, which meant Respondent failed to satisfy its burden of proof: missing the noon route on January

20, 2017 and using the eight-way warning system at the railroad crossing on January 28, 2017. Assuming that the scales had tipped in Respondent's favor in those two instances, it still would not make termination a proportional action. Mr. Carlson acknowledged that Complainant was late returning to campus on January 20, 2017 because he pulled over on the side of the freeway with the other bus that experienced brake failure. Even if Complainant should have been more proactive to insure that the noon route was covered, his decision to stop with the other bus was reasonable and puts this incident in a different light than if he missed the route because he had decided to take a nap and overslept or had gone off on some frolic. The prohibition on using the eight-way hazard warning system is in an administrative rule, not a statute. The rule prescribes no penalty for a violation in contrast to some other school bus related infractions where the States permits fines or criminal sanctions.

The burden at this stage is on Respondent to establish by clear and convincing evidence that it is highly probable that it would have terminated Complainant's employment in the absence of his protected activity. For the reasons discussed above, I find that Respondent has fallen well short of meeting its burden of proof. Accordingly, I find that Respondent did not prove that it would have terminated Complainant's employment in the absence of him engaging in protected activity under the Act.

5. <u>Complainant's Damages</u>

I found that Complainant met his burden of proof, and that Employer failed to rebut Complainant's case by proving that it would have taken the same action in the absence of protected activity. Accordingly, Complainant's case succeeds and he is entitled to recover damages under the Act. 49 U.S.C. § 31105(b)(3). The damages that are available include reinstatement, compensatory damages, punitive damages and attorney fees and costs. The Act states:

> (A) If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor shall order the person to –
>
> (i) take affirmative action to abate the violation;
>
> (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
>
> (iii) pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
>
> (B) If the Secretary of Labor issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary of Labor may assess against the person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint. The Secretary of Labor shall determine the costs that reasonably were incurred.

(C) Relief in any action under subsection (b) may include punitive damages in an amount not to exceed $250,000.

49 U.S.C. § 31105(b)(3)(A-C). *See also* 29 C.F.R. § 1978.109. In this case, Complainant seeks $19,904.08 in lost pay and benefits through December 31, 2018; $19,904.08 in emotional distress damages, and $75,000.00 in punitive damages, which is a total of $114,808.16. (Compl. Brief at 22-27). Respondent did not address the issue of damages in its final brief. Each category of potential relief is discussed in turn below.

(a) Reinstatement

Reinstatement is an automatic remedy under the STAA and must be ordered unless it is impossible or impractical. *Dickey v. West Side Transport, Inc.*, ARB Nos. 06-150, 06-151, ALJ Nos. 2006-STA-26 and 27 (ARB May 29, 2008). 29 C.F.R. § 1978.109(d)(1) requires an order directing "reinstatement of the complainant to his or her former position with the same compensation, terms, conditions, and privileges of the complainant's employment." Accordingly, Respondent is **ORDERED** to reinstate Complainant to his position as a bus driver with the same compensation, terms, conditions and privileges as he enjoyed before. Respondent will award Complainant credit for the period beginning January 31, 2017 until the date of his reinstatement for purposes of determining his rate of pay, seniority and any other term, condition, privilege or benefit based upon length of employment. The evidence was clear that Complainant had a clean record prior to engaging in protected activity; therefore, Respondent will expunge all derogatory information from Complainant's personnel records.

(b) Lost Earnings

Complainant contends that he is entitled to $19,904.08 for lost wages from the date he was terminated through December 31, 2018. (Compl. Brief at 24). His wage calculation has five components: (1) Period of unemployment between termination and hiring at Providence Academy; (2) Losses due to fewer work hours at Providence Academy; (3) Losses due to lower hourly wage at Providence Academy; (4) Losses due to no summer employment at Providence Academy; (5) Losses due to no bonus payments at Providence Academy.

(1) Losses due to unemployment[9]

Respondent terminated Complainant's employment on January 30, 2017. He was earning $17.95 per hour at the time. (TR 281, CX 12). He was hired as a bus driver at Providence Academy beginning on February 23, 2017. (TR 107, CX 29). Complainant testified that he usually worked 30 to 35 hours per week when he worked for Respondent. (TR 26). In his final brief, Complainant states that he worked an average of 33.75 hours per week. (Compl. Brief at 23). That figure is generally consistent with his undisputed testimony at the hearing as well as the pay records Respondent provided and Complainant introduced into the evidentiary record. (CX 12).

[9] Respondent has not contested whether Complainant acted diligently to mitigate his damages by finding similar suitable employment. I find that the fact he secured employment as a school bus driver three weeks after he was terminated establishes that he acted diligently to find another job.

Complainant's period of unemployment began on January 31, 2017 and extended through February 22, 2017, which is a period of 23 calendar days. It spans 16 work days since the Presidents' Day holiday falls during that period. Complainant requests **$1,817.44** for three weeks of unemployment based upon 33.75 hours per week at a rate of $17.95 per hour. I find that the amount requested is supported by the evidence of record and it is **APPROVED**.

(2) Losses due to fewer work hours

Complainant testified that as a school bus driver for Providence Academy he works about 25 hours per week. (TR 104). As noted above, his pay records show that he worked an average of about 33.75 hours per week when he was employed by Respondent. He claims that he is entitled to compensation for 7.5 fewer work hours per week for the time he has worked at Providence Academy.

For the remainder of the 2016-2017 school year, Complainant claims that he is entitled to $1,077.04 (7.5 hours per week x 8 weeks x $17.95 per hour). For the 2017-2018 school year, Complainant contends that he is entitled to $4,992.30 (7.5 hours per week x 36 weeks x $18.49 per hour). For the first half of the 2018-2019 school year, Complainant contends that he is entitled to $2,280.00 (7.5 hours per week x 16 weeks x $19.00 per hour). The higher hourly wage figures for the last two periods represent a three percent pay increase each year.

Complainant testified at the hearing, "From my understanding, the normal rate increase at Blake School was to be 3 percent of the prior year, from what I understand." (TR 106). There is no other evidence of record indicating the rate of pay for the 2017-2018 school year or the 2018-2019 school year. I find that I do not have sufficient information to increase the hourly wage rate to calculate Complainant's entitlement based upon fewer work hours.

For the remainder of the 2016-2017 school years, Complainant claims he is entitled to compensation for an additional 7.5 hours per week for eight weeks. He started work at Providence Academy on February 23, 2017. There was no evidence of when the school year ended at Providence Academy, but there is evidence of record that Respondent's school year ended on June 2, 2017. (JX 3 at 2).[10] It is reasonable to assume that Providence Academy's school year ended on or about the same date. From February 23, 2017 to June 2, 2017 is a period of a little over 14 weeks. It is reasonable to assume that during that period there was a spring break, a Memorial Day holiday, and likely other days where school buses did not operate; therefore, I find that Complainant worked 12 weeks in the remainder of that school year and is entitled to $1,615.50 (7.5 hours per week x 12 weeks x $17.95 per hour) for his reduced work hours.

Complainant contends that he is entitled to $4,992.30 for lost time in school year 2017-2018 based upon 7.5 hours per week for 36 weeks at $18.49 per hour.[11] As noted above, I do not have sufficient information to adjust Complainant's hourly wage upwards; therefore, I will use

[10] A disciplinary memorandum on another employee stated that her performance would be "monitored for the remainder of the school year ending June 2, 2017."

[11] I find that 36 weeks is a reasonable estimation of how many weeks a typical school bus driver would work over the course of a full year.

the $17.95 per hour rate he was earning at the time he was terminated. I find that Complainant worked 36 weeks over the course the 2017-2018 school year and is entitled to $4,846.50 (7.5 hours per week x 36 weeks x $17.95 per hour) for his reduced work hours.

Complainant contends that he is entitled to $2,280.00 for lost time in the first half of school year 2018-2019 based upon 7.5 hours per week for 16 weeks at $19.00 per hour. As noted above, I do not have sufficient information to adjust Complainant's hourly wage upwards; therefore, I will use $17.95 per hour. I find that Complainant will have worked 16 weeks in the first half of the 2018-2019 school year and is entitled to $2,154.00 (7.5 hours per week x 16 weeks x $17.95 per hour) for his reduced work hours.

In total, I find that Complainant is entitled to **$8,616.00** for the reduced number of hours he worked after Respondent terminated his employment through December 31, 2018, and that amount is **APPROVED**.

(3) Losses due to lower hourly wage

Complainant earned $17.95 per hour working for Respondent. (CX 12). He earns $16.75 per hour working for Providence Academy. (CX 29). That is a difference of $1.20 per hour. He contends that for the remainder of the 2016-2017 school year he is entitled to $131.25 for losses due to the pay differential. It appears that calculation is mistaken and reflects only one month (26.25 hours per week x 4 weeks) and a $1.25 per hour differential. I found earlier that there were 12 work weeks between the time Complainant was hired at Providence Academy and the end of the school year and the differential in pay was $1.20 per hour. I find that Complainant is entitled to $378.00 (26.25 hours per week x 12 weeks x $1.20 per hour) for the pay differential for the remainder of the 2016-2017 school year.[12]

Complainant claims that he is entitled to $1,644.40 for the pay differential in the 2017-2018 school year (26.25 hours per week x 36 weeks x $1.74 per hour) and $15.75 for the first half of the current school year (26.25 hours per week x 4 weeks x $3.75 per hour). First, the $15.75 figure for the current year is clearly a mistake – that reflects the pay differential for a few hours of work rather than several months of work. In any event, I found earlier that I have insufficient information to adjust the $17.95 hourly rate the evidence established for the 2016-2017 school year. Using the $17.95 hourly rate, I find that Complainant is entitled to $1,134.00 (26.25 hours per week x 36 weeks x $1.20 per hour) for the differential in the 2017-2018 school year and $504.00 (26.25 hours per week x 16 weeks x $1.20 per hour) for the first half of the current school year.

[12] I find that 26.25 hours is a reasonable estimation of the average hours per week Complainant works as a bus driver for Providence Academy. He testified he worked "about 25 hours a week." (TR 104). He said he worked less hours than when he worked for Respondent because it was a smaller school; as many as ten fewer hours per week, but "it can vary." (TR 104). During the testimony, the difference was described as five to ten hours at one point. (TR 105). The pay record show that Complainant worked about 33.75 hours per week for Respondent. (CX 12). Complainant used the mid-point of the five to ten hour range discussed during the hearing and used 7.5 hours as the number of hours he worked less per week on average. If he worked 7.5 hours less per week for Providence Academy than the 33.75 hours per week he worked for Respondent, it would be about 26.25 hours per week.

In total, I find that Complainant is entitled to **$2,016.00** for the lower hourly wage rate he earned after Respondent terminated his employment and that amount is **APPROVED**.

(4) Losses due to no summer employment

Complainant testified that during the summers of 2015 and 2016, while school was not in session, Respondent employed him to do maintenance work. He said he ended up doing a lot of painting. (TR 23, 25-26, 106-108). Pay records show that he was paid $13.00 per hour for work in the maintenance department and he earned $3,523.00 the summer of 2016. (CX 12 at 5-6). The hearing was held on July 26, 2018 and Complainant testified that he did not get any summer work from Providence Academy. He said he applied for some other summer jobs, but no one wanted to hire him for just a month or two. (TR 108, 111). Complainant contends he is entitled to **$7,046.00** ($3,523.00 for each of the two summers since he was terminated by Respondent) for lost summer employment. I find that amount is reasonable and supported by the evidence, and it is **APPROVED**.

(5) Losses due to no bonus payments

Respondent paid Complainant a safety bonus of $225.00 on January 2017 for his performance in the first half of the school year. (TR 38-39, 155-156, 282, CX 24). Complainant claims that he is entitled to **$900.00** ($225.00 each for the last half of school year 2016-2017, both halves of school year 2017-2018, and the first half of school year 2018-2019). I find that amount is reasonable and supported by the evidence, and it is **APPROVED**.

Considering the foregoing, Complainant has established entitlement to $20,395.44 in lost pay and benefits. However, to properly compute damages in current dollars, Complainant must also receive interest on this amount. The Secretary has explained, and the Board has confirmed, that interest on awards under the Act will be calculated according to the methodology for underpayments in 26 U.S.C. § 6621 (compounded daily). *See Laidler v. Grand Trunk Western Railroad Co.*, ARB No. 15-087, ALJ No. 2014-FRS-00099, slip op. at 9-10 (ARB Aug. 3, 2017). Moreover, the regulation at 20 C.F.R. § 1978.109(d)(1) explains that such back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and will be compounded daily. The Applicable Federal Rate for short term quarterly/monthly compounding periods is calculated by the Internal Revenue Service each month. *See* INTERNAL REVENUE SERVICE *Index of Applicable Federal Rates* (AFR) Rulings, https://apps.irs.gov/app/picklist/ list/federalRates.html.

To compensate Complainant most accurately, I apply daily compound interest using the average rates for each year. This result may not be perfectly accurate, but it is a reasonable way to account for the fluctuations in the interest rate. Upon determining that value, I then round the rate to the nearest full percent. *See* 26 U.S.C. § 6621(b)(3). Starting from the date Complainant was terminated, January 30, 2017, I find that Complainant is entitled to an additional **$1,258.96** in interest. In total (including interest), Complainant is entitled to $21,654.40 in lost earnings.

The total award for lost earnings (plus interest) through and including December 31, 2018 is **$21,654.40** and Respondent is **ORDERED** to pay that amount to Complainant.

(c) Compensatory Damages for Emotional Distress

Complainant claims that he is entitled to an amount equal to his lost earnings as compensatory damages for the emotional distress caused by Respondent's retaliatory action. (Compl. Brief at 25). At the hearing, he testified:

> Well, I won't get into it, but this wasn't about the money. This was about somebody that had a perfect record and very proud of that attendance record and everything, brought forth a safety issue, thought he was doing the right thing, concerned with the students, and because of that was terminated.

(TR 108). Respondent's counsel objected and, while I did not sustain the objection, I did move Complainant along rather than permitting his counsel to develop more fully the impact Respondent's actions had on Complainant. (TR 109).

In addition, the following exchange took place between Complainant and his counsel:

> Q. Do you enjoy being a bus driver?
>
> A. I enjoy it so much, I plan on continuing it. Yes. Yes.
>
> Q. Why do you enjoy being a bus driver?
>
> A. Quite frankly, when I started being a bus driver, when the whole idea came about, I made a commitment to my wife that I would try it for 1 year and after that I would evaluate whether I want to continue. And, quite frankly, it was just so much enjoyable. And the kids. The kids are just great. That's all I can say. I mean, just really good kids.
>
> Q. Okay. And you enjoy interacting with the students, I guess?
>
> A. Oh yeah. Yeah.
>
> Q. How did it feel to lose your job with Blake?
>
> MR. MOSVICK: Objection. Relevance.
>
> JUDGE DAVIS: What is the relevance of the question?
>
> MR. LELAND: I think the relevance of the question is it's important to evaluate his testimony.
>
> JUDGE DAVIS: Can you answer the question, how it made you feel?
>
> THE WITNESS: Oh. Yes. I can answer.

JUDGE DAVIS: Okay. Go ahead.

THE WITNESS: Losing my job at Blake, I was personally upset about it, simply because the fact that I took a lot of pride in that job. I took a lot of pride. Let's put it that way. And that's why I worked in the school in the summertime just as well. It was a job that I – I enjoyed it. Let's put it that way.

BY MR. LELAND:

Q. Why do you believe you were fired?

A. Why I believe I was fired? I honestly believe I had no problems up until the time the bus caught on fire. And things just kind of spiraled in days afterwards very rapidly.

Q. Why did they spiral in the days afterwards rapidly?

A. I believe – and, again, this is my belief. I believe because I stood up and just said that this bus is not safe, not only for me to drive, but for students and children to get on this bus. I mean, after that fire, that was kind of the – you know the old expression "the straw that broke the camel's back"? Well, that was it.

(TR 32-33).

Concerning the day of his termination, Complainant testified:

Q. And at that meeting did you look at Joint Exhibit 4 at all?

A. In the meeting?

Q. Did you read it?

A. Did I read it?

Q. Yes.

A. I don't recall and that, if I read it or not. I pretty much understood I was being terminated. And at that point, like I said, I just kind of – my focus had changed, I mean.

Q. Is that because you were upset?

A. Yes. I was upset. Very upset.

(TR 82-83).

Complainant has the burden to demonstrate by a preponderance of the evidence that he suffered emotional harm caused by Respondent's unlawful retaliation against him. Awards for emotional damages "generally require that a plaintiff demonstrate both: (1) objective manifestation of distress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress." *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040, slip op. at 8 (ARB Nov. 30, 2007), quoting *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993-SWD-00001, slip op. at 17 (ARB July 30, 1999) (internal quotations omitted). *See also Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, slip op. at 7 (ARB Aug. 31, 2011). Reasonable awards for emotional distress can be based upon Complainant's testimony alone, and there is no fixed limit on the amount that can be awarded. *See Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-00035, slip op. at 8 (ARB Jan. 31, 2008); *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-30, slip op. at 31 (ARB Feb. 9, 2001).

It is helpful to look at awards for emotional distress in similar cases. In a recent decision in *Riddell v. CSX Transportation, Inc.*, OALJ No.: 2014-FRS-00054, slip op. at 41-42 (ALJ Dec. 12, 2018), an administrative law judge awarded a complainant $3,500.00 for emotional distress where he was removed from service, but reinstated two months later with back pay. The complainant suffered no economic loss and was still working for the employer at the time of the hearing. The judge found there was no lasting harm, but the complainant had suffered emotional strain caused by the public nature of his removal and being labeled as "a rat" for reporting drug abuse by his co-workers. In contrast, in *Butler v. Neier, Inc.*, OALJ No. 2014-STA-00068, slip op. at 27 (ALJ (July 29, 2016), *aff'd* ARB Case No. 16-084, (ARB June 22, 2018), an administrative law judge awarded $50,000.00 where the complainant and his wife testified that his termination caused him to be upset, worried, confused and experience problems sleeping. He fell behind on paying his bills and had to seek public assistance. His distress interfered with his relationship with his wife and children, and he sought medical treatment for depression and was prescribed an antidepressant. Finally, in *Loftus v. Horizon Lines, Inc.*, OALJ No. 2014-SPA-00004, slip op. at 40-41 (ALJ July 12, 2016), *aff'd* ARB No. 16-082, (ARB May 24, 2018) the administrative law judge awarded the complainant $10,000.00 for emotional harm where the complainant testified that his termination caused anxiety, sleeplessness, and humiliation, and that he had compiled an unblemished record and he thought constantly about clearing his name.

In this case, Complainant is 70 years of age. He worked in the automotive industry before he retired and moved to Minnesota where he has been a school bus driver for four years. He testified that he enjoyed being a bus driver, particularly interacting with the students, and he intended to continue working as a bus driver. He said he took pride in his work and was very upset when he was terminated. He said he had no work-related problems prior to reporting that his bus had caught on fire. I was able to observe Complainant from about 9:00 a.m. when the hearing began until about 5:30 p.m. that evening when it ended. That included nearly three hours when he was on the witness stand and the remaining time when was seated with his counsel at their table in the hearing room. My observation of his demeanor was consistent with his testimony: It reflected a person who enjoyed being a school bus driver, took pride in his work and was genuinely distressed over his termination. There was no evidence introduced that Complainant's termination caused severe or lasting economic, physical or psychological harm.

Having considered all of the evidence and relevant factors, I find that an award of **$15,000.00** for emotional distress is reasonable and warranted, and Respondent is **ORDERED** to pay that amount to Complainant.

(d) Punitive Damages

In *Loftus v. Horizon Lines, Inc.*, ARB No. 16-082, ALJ No. 2014-SPA-00004, slip op. at 9 (ARB May 24, 2018), the Board addressed the criteria for an award of punitive damages:

> We also find that the ALJ did not abuse his discretion in determining that an award of $225,000 was necessary to punish and deter Horizon for its misconduct. *See Raye*, ARB No. 14- 074, slip op. at 9. Consistent with our precedent, the ALJ based his evaluation on three guideposts widely recognized as determinative: (1) the degree of reprehensibility of the respondent's misconduct; (2) the relationship between the harm to the complainant and the size of the punitive award, and (3) punitive damage awards in comparable cases. *Id.* at 6. The ALJ supported each of these factors with comprehensive fact findings and legal analysis. D. & O. at 42-46. In sum. the ALJ reasoned that a large punitive damage award was necessary to deter and punish Horizon given its longstanding "inaction in addressing Loftus's safety concerns," the chilling effect Horizon's retaliatory actions likely had on other marine employees, and the harm it visited upon Loftus personally. *Id.* at 46. We thus affirm the ALJ's $225,000 punitive damage award.

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003), the Supreme Court noted that "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." Moreover, Congress has specifically limited punitive damages under the Act to a maximum $250,000.00. *See* 49 U.S.C. § 31105(b)(3)(C).

(1) Reprehensibility of Respondent's conduct

The Supreme Court has instructed courts to consider the following in establishing reprehensibility: (1) whether the harm suffered by the plaintiff was economic or physical; (2) whether the defendant's conduct demonstrated a reckless disregard or indifference to the safety or health of others; (3) whether the plaintiff was financially vulnerable; (4) whether the defendant's conduct was habitual as opposed to an isolated incident; and (5) whether the defendant acted with intentional malice, deceit, trickery, or mere accident. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 419 (2003); *BMW of North America v. Gore*, 517 U.S. 559, 576-77 (1996). The mere existence of one of the factors does not necessarily warrant a punitive damages award and the absence of all of the factors renders a punitive damages award suspect. *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 575. It is presumed that the complainant is made whole for the harm he suffered by compensatory damages, so punitive damages should only be awarded if the employer's conduct is so reprehensible as to justify imposing further sanctions to achieve punishment or deterrence. *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 575.

This case is not at the extreme end of the reprehensibility scale as were *Loftus* and *Riddell* where six-figure punitive damage awards were warranted against employers who engaged in very deliberate patterns of behavior, including the orchestrated public humiliation of their aggrieved employees. There is, however, a level of malice indicated by Mr. Carlson's conduct towards Complainant. Complainant had a clean record and had been recognized for his good performance as late as the week before he alleged that his bus caught on fire on January 19, 2017. His problems started the next day as Mr. Houghton began to transition out as the director of transportation and Mr. Carlson began to transition in to take over the role on an interim basis, which he did on January 27, 2017. This is the chronology over that 11 day period:

Date	Event	Established by Evidence	Comment
Thursday 1/19/17	Complainant alleged bus mirror caught fire prior to afternoon route, used spare bus.	Yes	
Friday 1/20/17	Complainant used spare bus for his morning route.	Yes	
	Mr. Herrman replaced wiring in mirror and returned bus to the bus lot where he found it.	Yes	
	Complainant stopped along freeway with other bus that had brake failure.	Yes	
	Complainant failed to do his noon route or inform the dispatcher that he would be unable to do the route.	No	Complainant said he notified dispatcher, Mr. Carlson said he did not. Dispatcher did not testify, no other evidence on this issue.
	Mr. Carlson and Mr. Herrman told Complainant his assigned bus had been repaired prior to his afternoon route.	No	Mr. Herrman had no recollection of telling anyone the bus was repaired. Mr. Carlson said he told Complainant bus was repaired, Complainant said he was not told until the next day.
	Mr. Carlson told Complainant after his afternoon route that his assigned bus had been repaired.	No	Mr. Carlson said he told Complainant a second time his bus was repaired, Complainant said he was not told until the next day.
Saturday 1/21/17	Complainant used the spare bus for both legs of his LearningWorks route.	Yes	
	Mr. Carlson told Complainant a third time his assigned bus was repaired and he was to use it.	Yes	Both Complainant and Mr. Carlson testified to this conversation.

	Complainant told Mr. Carlson his assigned bus was unsafe without explaining why. Mr. Carlson told Complainant to use his assigned bus.	Yes	Both Complainant and Mr. Carlson said that Complainant alleged his assigned bus was unsafe. Complainant says this took place on Saturday. Mr. Carlson did not recall when Complainant told him the bus was unsafe.[13]
Monday 1/23/17	Complainant was a few minutes late getting to his bus for an 8:30 a.m. service day trip.	Yes	Complainant said he had been at work since 5:30 a.m. and went to the restroom before leaving on the 8:30 trip. Mr. Carlson did not recall Complainant saying he went to the restroom.
	Mr. Carlson spoke with Mr. Houghton and asked if there had been any disciplinary actions against Complainant.	Yes	Mr. Carlson inquired because he intended to discipline Complainant.
Tuesday 1/24/17	Mr. Carlson emailed Mr. Houghton and asked if there were any prior write-ups on Complainant and said he was going to finalize a course of action that day if possible. Mr. Houghton responded and said that there were no write-ups.	Yes	
Wednesday 1/25/17	Mr. Carlson emailed himself with notes he wrote on Complainant about the incidents described above. Was considering probation.	Yes	Email repeated that Mr. Herrman told Complainant his bus was repaired.

[13] The following exchange took place between Mr. Carlson and Complainant's counsel :

Q. And then, I think looking along here – well, did Mr. Rantz ever tell you that his bus was unsafe or, excuse me, bus number 4 was unsafe?

A. Certainly.

Q. And when did that happen?

A. I don't remember exactly, but related to this fire.

The alleged fire, I guess I should say.

Q. And how many times did Mr. Rantz tell you that the bus was unsafe?

A. I have no idea.

Q. But you know he told you it was unsafe, right?

A. Yes.

(TR 141).

Friday 1/27/17	Prior to the afternoon route, Mr. Carlson gave Complainant a disciplinary memorandum.	Yes	Said progress would be reevaluated in 10 days.
Saturday 1/28/17	Mr. Carlson did ride-along with Complainant on LearningWorks route. Scheduling error discovered and route canceled. No students.	Yes	
	Mr. Carlson instructed Complainant to drive his normal LearningWorks route.	No	Complainant said route was aborted after a stop or two and they returned to the school. No GPS data offered to corroborate either version of the event.
	Complainant did not follow proper railroad crossing procedures on Essex Street.	No	Track was officially abandoned. Photo showed track only existed in pavement and was not usable.
	Complainant did not follow railroad crossing procedures on Excelsior Boulevard.	No	Complainant testified that he followed the customary procedure and used the 4-way warning system. Mr. Carlson testified that Complainant used the 8-way warning system.
	Complainant did not follow proper student unloading procedures at two stops.	No	There were never any students on the bus.
Monday 1/30/17	Complainant's employment terminated.	Yes	Reasons cited were the issues listed in the 1/27/17 disciplinary memorandum and the issues Mr. Carlson alleged during the 1/28/17 LearningWorks ride-along.

It is unclear exactly what caused Mr. Carlson's animosity towards Complainant, but it is clear that from the moment he took over from Mr. Houghton as interim transportation director he was already loaded for bear. The day Mr. Houghton departed was the day Complainant received his first disciplinary action and three days later he was fired. There was no evidence that Complainant had any problems with his daily route prior to January 19, 2017. There was evidence that he had some difficulties with his LearningWorks route, which Complainant acknowledged. Mr. Carlson testified that he discussed the problems with Complainant several times and he recalled specifically the first LearningWorks session in late September 2016 where he got "a little irritated" with Complainant and later apologized if he had been too harsh. (TR 194). According to Mr. Carlson, there are about 11 LearningWorks sessions per school year, so presumably there were five or six sessions prior to Complainant's protected activity. Mr.

Houghton was the director of transportation for the entire school year until he left the job on January 27, 2017, and when Ms. McMullen asked him if there had been any issues with Complainant he said he could not think of anything.

Perhaps it was his irritation with Complainant for the problems with the five or six LearningWorks sessions that school year or perhaps it was something else; regardless, from the time Complainant reported a safety issue on January 19, 2017 until he was terminated on January 30, 2017, Mr. Carlson seized upon every opportunity to draw spots on what had until then been a spotless record. There were some instances where there was a legitimate basis for disciplinary action, such as Complainant being a few minutes late for the service day route. There were others, however, where Mr. Carlson attempted to make a mountain out of a mole hill. The best example is citing a failure to obey the law at the Essex Road rail tracks as a basis for termination. Not only was there public notice published that the tracks were officially abandoned, but no reasonable person could look at the site shown in the photographs and believe there was any safety issue at all.

There is no evidence that suggests Ms. McMullen had any animosity towards Complainant. She did not have any personal knowledge of Complainant's performance or conduct and, except for conferring with Mr. Houghton and learning that he had not had any issues with Complainant during his tenure as transportation director, she relied exclusively on Mr. Carlson for the factual details that led her to conclude that Complainant should be terminated. There was no evidence that anyone else acting on behalf of Respondent played a role in terminating Complainant's employment.

Complainant's protected activity was the precipitating event in the chain of events that unfolded rapidly and ended in his termination. I find that Mr. Carlson's conduct is sufficient to register on the reprehensible conduct scale, but it does not warrant significant punitive damages.

(2) Relationship between harm to the complainant and size of the punitive award

While Complainant was certainly harmed, the harm is largely remedied by reinstatement and the award of compensatory damages. Accordingly, the degree of harm suffered by the Complainant does not support awarding substantial additional penalties.

(3) Punitive damage awards in comparable cases

As noted earlier, punitive damage awards in *Loftus* and *Riddell* were well into the six figures – $225,000.00 and $150,000.00, respectively – but those case are not factually comparable to the situation here because they involved very deliberate patterns of behavior, including the orchestrated public humiliation of the complainants for engaging in protected activity.

In *Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-00018, (ARB Dec. 21, 2012), the Administrative Review Board approved an administrative law judge's award of $1,000.00 in punitive damages where an employer took disciplinary action against an employee after she filed an injury report. The employee filed the report following in incident where she flipped over backwards in an office chair and sustained minor injuries. The

employer claimed the disciplinary action was for her for failure to inspect the chair before she sat down. The judge ordered the disciplinary action removed from the employee's record, the repayment of two days' wages for the time she took off from work to attend the hearing on her disciplinary action, and $1,000.00 in punitive damages to deter the employer from taking such actions in the future. The judge noted that the employee had not been terminated or demoted, and her harm was mainly limited to the lost wages, which the employer was ordered to repay with interest.

I reviewed a number of other decisions where administrative law judges awarded punitive damages of $25,000.00 or more.[14] I note that nearly all involved large employers and more egregious facts than the facts present in this case. While there was no evidence offered concerning the size of Respondent, it is readily apparent that the school is not a major railroad, trucking company or shipping line where a significant punitive award might be necessary as a deterrent to prevent future violations.

All factors considered, I find that a punitive damage award in the amount of **$15,000.00** is warranted by the facts, sufficient to punish Respondent and deter it from engaging in similar conduct in the future, and is fair and reasonable in comparison to other whistleblower cases. Accordingly, Respondent is **ORDERED** to pay that amount to Complainant as punitive damages.

(e) Total Damages

Complainant is entitled to a total award of **$51,654.44** and Respondent is **ORDERED** to pay him that amount.

6. Attorney Fees and Costs

Complainant is entitled to reasonable costs, expenses, and attorney fees incurred with the prosecution of his complaint. *See* 49 U.S.C. § 31105(b)(3)(B). Counsel for Complainant has not submitted a fee petition in this matter. Counsel for Complainant is instructed to file and serve a fully supported application for fees, costs, and expenses (stating the work performed, the time spent on such work, and the reasonable basis for counsel's rate). Complainant's counsel is granted 30 days from the issuance of this order to provide a fee application, and Respondent is granted 30 days thereafter to file its objection (should objections be warranted).

7. Conclusion

Based upon the foregoing, I find that Respondent violated Complainant's right to be free from retaliation under the Surface Transportation Assistance Act. *See* 49 U.S.C. § 31105(a). Complainant proved by a preponderance of the evidence that he engaged in protected activity on January 19, 2017 by reporting that the school bus he was assigned to drive was not safe to operate and that he refused to operate the bus through January 21, 2017 when he was informed that it had been repaired. I also find that Respondent knew of Complainant's protected activity

[14] Complainant has requested $75,000.00 in punitive damages, arguing that Respondent was aware Complainant alleged his assigned bus was unsafe and took no action to investigate the merits of his claim.

and that his protected activity was a contributing factor in Respondent's decision to take adverse action against him. Respondent did not prove by clear and convincing evidence that it would have taken the same adverse action against Complainant notwithstanding his protected activity.

ORDER

It is hereby **ORDERED** that:

1. Blake Schools shall immediately offer Ronald L. Rantz reinstatement to his former position as a bus driver with the same pay, terms and privileges of employment that he would have received had he continued working in that position from January 30, 2017 to the date of the offer of reinstatement.

2. Blake Schools shall immediately expunge from its personnel records all derogatory information from the personnel record of Ronald L. Rantz, including the disciplinary memorandum dated January 27, 2017 and the notice of termination dated January 30, 2017.

3. Blake Schools shall pay Ronald L. Rantz $21,654.40 in lost pay. This amount includes interest through December 31, 2018. If not paid by that date, interest shall continue to accrue as provided in the regulation.

4. Blake Schools shall pay Ronald L. Rantz $15,000.00 in emotional distress damages.

5. Blake Schools shall pay Ronald L. Rantz $15,000.00 in punitive damages.

6. Ronald L. Rantz is granted 30 days from the date of issuance of this order to submit an application for attorney fees.

7. Blake Schools is granted 30 days thereafter to file its objections to the fee application.

SO ORDERED.

MORRIS D. DAVIS
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 (eFile) 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, the Associate Solicitor, 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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).