

U.S. Department of Labor

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Issue Date: 23 April 2019

CASE NO.: 2018-STA-00038

In the Matter of:

KEVIN WALKER,
Complainant

v.

R. PETERSON ENTERPRISES, LLC,
RICK PETERSON,
NICK PETERSON,
Respondents

Appearances:

Peter L. LaVoie, Esq. and Luke Haqq, Esq.,
For the Complainant

Max T. Lindsey, Esq.
For the Respondents

Before: Drew A. Swank
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105, *et seq.*, (the “Act” or the “STAA”), as amended by the implementing recommendations of the 9/11 Commission Act of 2007 and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging, disciplining, or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment. 49 U.S.C. § 31105(a)(1).

I. PROCEDURAL HISTORY¹

Complainant, Kevin Walker (hereinafter “Walker” or “Complainant”), filed a complaint with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL) against R. Peterson Enterprises, LLC, Rick Peterson, the owner of R. Peterson Enterprises, LLC, and Nick Peterson, a supervisor employed by R. Peterson Enterprises, LLC (“Respondents”), pursuant to the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105. Said complaint which was filed on or about January 10, 2018, and amended on January 24, 2018 alleges that Respondents retaliated against him and discharged him on January 9, 2018, due to alleged protected activity consisting of various complaints about an air leak in the truck to which he was assigned (Truck #46) and his refusal to drive Truck #46 after he took it out of service on January 3, 2018, as well as his refusal to drive Truck #48, on January 3, 2018, an alternate truck provided to Complainant on January 3, 2018, which had an illuminated warning light. JX-6.

An investigation was conducted by OSHA and on March 8, 2018, the Assistant Regional Administrator for OSHA issued the Secretary of Labor’s Findings concluding that “OSHA finds no reason to believe Respondent violated the provisions provided by STAA.” JX-7 at 5-6. On March 13, 2018, Complainant filed, with the Chief Administrative Law Judge, Complainant’s objection to the Secretary’s preliminary order and a request for hearing before an Administrative Law Judge. JX-7 at 1-4. The case was assigned to the undersigned Administrative Law Judge and on April 23, 2018, a Notice of Hearing and Pre-Hearing Order was issued scheduling this case for hearing on November 1, 2018 in St. Paul, Minnesota. ALJX-1.

II. HEARING AND EVIDENCE

Pursuant to the Notice of Hearing, the undersigned held a formal hearing in this case in St. Paul, Minnesota on November 1, 2018, at which all parties had a full and fair opportunity to present evidence and argument as provided by law and applicable regulations.

A. STIPULATIONS

The parties entered into the following stipulations a copy of which was admitted as ALJX-3. TR 14:

1. Complainant was employed by R. Peterson Enterprises, LLC as a truck driver, from November 27, 2017 through January 8, 2018.
2. In the course of his employment, Complainant operated commercial motor vehicles with a gross weight of at least 10,001 pounds in interstate commerce.

¹ References in the text are as follows: “ALJX” refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judge; “CX ” refers to complainant’s exhibits; “RX” to respondent’s exhibits; “JX” to exhibits jointly offered by the parties; and “TR” to the hearing transcript.

3. On January 2, 2018, Complainant placed Truck #46 out of service. Additionally Complainant texted Respondent Nick Peterson pictures of the air pressure gauge on Truck #46.
4. On January 2, 2018, Respondent Nick Peterson re-assigned Complainant to Respondents' Truck #48.
5. On January 3, 2018, Complainant had an in-person meeting with Respondent Nick Peterson.
6. On January 4, 2018, Complainant filed a complaint against R. Peterson enterprises, LLC with the Secretary of Labor, through the Regional Administrator for OSHA Region 5, alleging that R. Peterson Enterprises, LLC had retaliated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105(a).
7. On March 8, 2018, the Secretary of Labor, by Assistant Regional Administrator Mary Ann Howe of the Occupational Safety and Health Administration, issued Findings pursuant to 49 U.S.C. § 31105(b)(2)(A) dismissing Complainant's complaint.
8. On March 13, 2018, Complainant, by counsel, filed a timely objection to the Secretary's Findings and requested a hearing *de novo* before an administrative law judge of the Department of Labor.
9. On April 23, 2018, the Secretary of Labor, by Administrative Law Judge Drew A. Swank, issued Complainant a Notice of Hearing and Pre-hearing Order scheduling Complainant's hearing for November 1, 2018.

B. ADMITTED EVIDENCE

The following exhibits were admitted into evidence:

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|--------|--|
| ALJX-1 | Notice of Hearing and Pre-Hearing Order issued April 23, 2018. TR 14; |
| ALJX-2 | Evidentiary Order Regarding Affidavits of Michael Case and Tammy Stegall issued October 26, 2018. TR 14; |
| ALJX-3 | Joint Stipulations of the parties dated October 23, 2018. TR 14; |
| JX-1 | Video of dashboard gauges dated 12/29/17; |
| JX-2 | Photos of dashboard gauges with various dates; |
| JX-3 | Video account of conversation between Complainant and Respondent Nick Peterson on 1/3/18; |
| JX-4 | Text message screenshots of text messages exchanged between Complainant and Respondent Nick Peterson; |
| JX-5 | Termination letter dated 1/8/18; |
| JX-6 | OSHA complaint dated 1/23/18; |
| JX-7 | Complainant's objections to Secretary's Findings dated 3/13/18; |

(Joint exhibits admitted at TR 15).

- CX-1 Photo of R. Peterson, Enterprises with Now Hiring sign. TR 165;
- CX-2 Email dated 5/22/18 from Leyla Aktekin to Kevin Walker stating, “Thank you for your interest in a driving position with Jeff Foster Trucking however, we are unable to offer you a position at this time.” TR 164;
- CX-3 Daily vehicle inspection report dated 1/2/18. TR 170;
- CX-4 Kevin Walker paystubs from employment at R. Peterson, Enterprises, LLC, dated 11/26/16-12/30/17. TR 171;
- CX-5A Kevin Walker paystubs from employment with Ashland Ford Chrysler on 9/8/18, 9/17/18 and 9/18/18. TR 175;
- CX-5B Scaffidi Truck Center - 2 page invoice dated December 18, 2017. TR 251;

- RX-3 Complainant Statement filed with U.S. Department of Labor-OSHA on 1/10/18 and received by facsimile by R. Peterson Enterprises on 1/10/18, regarding Complainant’s whistleblower complaint against the Respondents. TR 64;
- RX-4 Daily timecards completed and signed by Complainant on days he drove, dated 11/27/17–12/30/17. TR 188;
- RX-8 Complainant’s initial disclosures, signed by Complainant’s Counsel, Peter L. LaVoie, dated 5/7/18. TR 226;
- RX-9 Wisconsin Department of Transportation driver record abstract pertaining to Kevin Walker dated 10/25/18, noting that current medical certification was not filed; previous medical certification expired 3/29/18; “No CMV operation without valid CDL and cert. in possession.” TR 230;
- RX-10 Copy of R. Peterson Enterprises, LLC cell phone and texting policy signed by Kevin Walker, dated 11/15/17, stating in pertinent part, “Text messaging or use of cell phones in commercial vehicles is illegal and now is forbidden for this company during driving time.” TR 254;
- RX-11 R. Peterson Enterprises in-house repair and service work orders for Truck #46 dated 7/17/17, 9/11/17, 11/27/17, 1/3/18, 1/4/18, 1/13/18, 1/26/18. 5/30/18. TR 264;
- RX-12 Mechanic Randy Engel timesheet for 12/26/17-12/30/17. TR 295.

C. SUMMARY OF TESTIMONY

1) Testimony of Complainant, Kevin Walker

Complainant Kevin Walker (“Complainant” or “Walker”) testified that he received training as a truck driver at Midwest Trucking School in Escanaba, Michigan, where he went through a four week program directed at “[e]verything you have to know to get a CDL-A (Commercial Drivers License).”² TR 115. He stated that he learned about such trucking related

² Walker also testified that he served in the U.S. Army National Guard of Wisconsin between 1991 and 1995 where he operated some military vehicles such as “6-ton dumps, C9 Cats, and Hummels (sic).” TR 117-118. He also

matters as “how to pre-trip a truck” and he also learned about “air systems” on trucks. *Id.* His training ended prior to 2013 and he was not trained on a 2017 automatic Mack truck. TR 183. He confirmed that he has never had training specific to a 2017 automatic Mack truck. TR 184.

Complainant testified that his first trucking job was for Windy Hill Foliage in Marchfield, Wisconsin where he worked for about 13 months after he completed his CDL training in 2011 or 2012. TR 118. He was employed for Respondent, R. Peterson Enterprises, LLC, as a truck driver from November 27, 2017 through January 8, 2018. (See Stipulation 1). He testified that he hauled pulp and pulpwood while he worked for the Respondent. TR 120. When he first began working for the Respondent he was assigned Truck #46, which was a 2017 Mack automatic. This was the only truck he drove while working for the Respondent. TR 121. Complainant testified that he had driven an automatic before which he stated was different from a standard transmission because you don’t have to do the double-clutching and shifting of the gears. *Id.*

Walker testified that he observed there “might be an issue with the air system in Truck #46” on the very first day that the truck was assigned to him. He testified:

I noticed that there were audible air leaks. I wouldn’t call them severe or anything, but I knew that they – they didn’t exist on the last truck that I operated, either at Hartwig’s, nor at Rands, for two-and-a-half years I was there, or any other truck that I have ever operated on the highway.

TR 121-122.

Complainant testified to his understanding of the air system on the Mack truck he was assigned (Truck #46). He stated:

This truck is designed a little differently, being an automatic, in the way Mack designs their truck... their transmission runs off from (sic) a reserve tank. ...And as for the air, the air takes and operates components of the transmission somehow. And if you don’t drain the moisture or the tanks, whatever it be, out of there, with it being cold weather, it’ll cause problems with the transmission.

TR 122-123.

Complainant testified that he understood the air system controls, in addition to the transmission, the air brakes and every other component that’s linked up to the air system, including the driver’s seat. TR 123. He testified to his understanding of the importance of the air system:

You can have several different things arise, as far as problems [with the air system] go. It depends on where the air leak is. If you have one tire area,

attended three years of college at Mid-State Technical College at which time he studied “computer aided design.” TR 116.

whatever it be, and that brake components in that system fail, then that's the one that's going to seize up on you, and if you have both of them fail out because of a box that that's linked to, you would have both of them. So as far as understanding the whole air system goes on a vehicle ...you can't roll down the road without it. That's what releases your brakes."

TR 123-124.

He further stated, "if your air pressure goes below 60 pounds of [] psi [pounds per square inch], both your buttons will come out. And when that happens, your S-cam assembly inside the hubs take and turn and puts (sic) all the brakes on." TR 124. Complainant confirmed his understanding that in order for the air system to work properly pressure has to stay over the 60 psi level. TR 126.

Walker testified that when he was first assigned Truck #46 and noticed an audible air leak, he reported it to his boss, Rick Peterson. He testified that he first called him and then went to his office to discuss it with him. TR 128. He testified that he was directed to take the truck to the two in-house mechanics, Randy and Brad, to be checked. TR 129. Walker testified that Brad looked at the truck. Walker alleges that Brad also heard air leaks and suggested that Walker have Scaffidi Truck Center ("Scaffidi"), a certified Mack truck dealer, look at the truck. TR 129, 132. Walker stated that he communicated this to Rick Peterson who agreed Scaffidi should look at the truck. Peterson told the Complainant to stop at Scaffidi the next day after picking up his pulp load. TR 132.

Complainant testified that he brought the truck to Scaffidi and told them what he believed were issues with the truck. Per his testimony,

I told them there was a[n] issue with the ride height unit, I could hear audible air leaks, so you might want to check all the connectors and fittings and stuff. And the mechanic says, 'Sure will. We'll get it done.' And they did come across all the issues that I had pointed out to both Brad, Rick, and the mechanic at Scaffidi's. I mean, there's replacement parts on there and all the issues that I told them I came across when I got the truck.

TR 133.

Although Complainant testified he did not receive a copy of the invoice, dated December 18, 2017, when he picked up the truck, the invoice has been admitted at CX-5B. TR 133. Walker testified that he performed a pre-trip inspection on the truck the next morning after it had been serviced by Scaffidi Trucking. Walker testified that he noticed it took longer for the primary and secondary gauges to reach 60 psi. He also noticed that the secondary gauge didn't climb the same as the first one. Later, after he started operating the truck he noticed the truck was losing pressure. He testified, "I went to use it, after getting the truck looked at by Scaffidi's, the truck's still -it's losing this air pressure. It's 18 to 25 psi on the secondary gauge as I used

it.” TR 135. Walker further testified that in his experience as a truck driver the gauges should climb together.

He explained his understanding of the air system as follows:

Your primary and secondary are all linked in the whole system together. It's almost like a linear system, but it's broke down by components of where it branches off to give that air supply to. When you start—and this —they teach you this right in truck school. If your gauges are not climbing and kicking out at the same time, there's an issue there. If you got one that's kicking out and releasing the air pressure off from the primary tank reserve and the secondary one is not kicking out, you have air loss. And that secondary usually relates to your trailer. And so, for whatever reason -- it could be ice on you glad hands, your glad hand seals are shot, you could have a small fitting letting the air out as you go down the highway, whatever it be, and I just noticed that when that wasn't rising and climbing with the primary there's an issue somewhere within the air system. It's common sense.

TR 135-136.

He further explained that this was what he learned in CDL school, and that he never had a vehicle where the primary and secondary gauges did not rise at the same time. TR 136.

Complainant confirmed that Exhibit JX-2 is a series of cell phone photos which he took on two different dates and different locations, throughout his assigned trip, which show the gauge cluster on Truck #46. Walker testified that the primary and secondary gauges shown in these photos show different readings. TR 136-138.

A review of JX-2 reflects somewhat different readings between the two gauges in each photograph with the difference in the primary and secondary tank levels ranging between 0 and approximately 13 psi. All primary and secondary tank pressure readings in the fourteen photos range between approximately 103 and 122 psi. Complainant confirmed during his cross examination that none of the secondary gauge readings is below 100 psi. TR 192.

Walker testified that these photos were taken after the truck was serviced at Scaffidi, probably about the second week in December. TR 140. He also testified that he showed these photos to the two in-house mechanics, Brad and Randy, who according to Walker's testimony indicated that nothing was wrong with the truck. *Id.* Complainant noted that he began working at R. Peterson Enterprises on November 27, 2017, he brought the truck to Scaffidi during the first week of his employment, and after the truck was serviced at Scaffidi he still believed there was a problem. *Id.*

Walker testified that he continued to operate the truck although he still thought there was a problem. TR 143. He testified he continued to make complaints to Rick Peterson, Nick Peterson, and mechanics, Brad Hanson and Randy Engel. TR 143-144. Walker testified that he

took the truck to Scaffidi a second time, which he stated was probably in the third week of December, approximately December 18, 2017. He told the mechanics at Scaffidi that he would hear a high pitched whistling sound when he drove the truck. He was told they would look at it. Walker testified that after he waited for about one and a half hours, he was told that the mechanics couldn't find anything wrong. TR 144.

Walker also testified that on December 30, 2017, Walker called and spoke to Rick Peterson to let him know that when he used the truck on Saturday [December 30, 2017], the truck still had an audible air leak. Walker also testified that on the previous day, December 29, 2017, Nick Peterson had given him Brad Hanson's phone number. TR 238.

Complainant confirmed a series of text messages between himself and Nick Peterson which are found at Exhibit JX-4. In these text messages, which according to the date on the text message printout occurred on January 2, 2018, Complainant continued to express his dissatisfaction and belief that a problem still existed with Truck #46 despite it being serviced on two occasions at Scaffidi and multiple times by the in-house mechanics who could find nothing wrong with the truck. These text messages reflect that Nick Peterson continued to try to address his concerns and offered to let him drive Truck #48 (the red bark truck), instead of Truck #46 due to Walker's belief that something was still wrong with Truck #46, despite the fact it had been serviced by both Scaffidi and the in-house mechanics. Nick Peterson explained that there was a warning light on Truck #48 which was on due to a malfunction in the sensor but explained that the truck had been inspected and was safe to drive. Complainant continued to express his belief that there was something wrong with the truck and his belief that his complaints weren't taken seriously despite the truck being serviced on multiple occasions in a four week period. During this text message exchange which became heated, Walker stated, "I'll just get dressed here and go get my things out of it. I'm not arguing with anyone over anything else. Done with your *****." See JX-4.

Walker testified that when he went in on January 3, 2018, the day after the January 2, 2018 text message exchange, Truck #48 was not there and Truck #46 was the only truck in the yard. He testified that he was never told he had to drive Truck #46. TR 151, 222. Walker testified that he did not drive any loads on January 3, 2018. TR 216.

During his testimony, Complainant explained that he would complete a driver's log form [driver's daily time card] on each day that he drove. He explained that a minor item could be noted as needing repair, or in a more severe case that the truck could be taken out of service. TR 168-169, 185-188. Walker testified on cross examination that he had completed driver log forms on each day that he drove, but had never listed the air leaks on any of these forms until the one he completed on January 2, 2018. TR 189-190, 243. (The signed driver daily timecards were admitted as RX-4, TR 185-188, with the exception of the January 2, 2018 log, which was admitted as CX-3, TR 167-170.)

Walker testified that after he completed his runs on January 2, 2018, he took Truck #46 out of service. Regarding the post-trip log that he completed on January 2, 2018, at 8pm CX-3, he stated:

The second box that's check marked, as it is in this case, is to put the truck out of service. And what that means, if the vehicle was deemed by me, the driver, to be unsafe to be on the freeways, them (sic) roadways, whatever it be, and I felt that it was the best interest to put it out of service. I noted what the service problem was and the defective part. I put down, 'Air brake system has known defect in the secondary air system.' I put down there that the 'Problem needs to be fixed before safe operation of vehicle.'

TR 169.

Walker testified that he turned this driver log/time card in on January 3, 2018. TR 169.

Walker confirmed that he never noted the air leak on the daily time cards he completed other than the January 2, 2018 card. TR 255. He also testified that the air leak he noted on the January 2, 2018 card, when he took the truck out of service, was the same complaint that he had made the entire time that he was driving Truck #46. TR 256. He testified that the air leak did not get any worse on January 2, 2018, it was the same as the other days he had driven Truck #46. TR 257. He testified that he put the truck out of service because he believed he had been lied to and his complaints had been ignored regarding any air leak in Truck #46 throughout the time he had driven the truck. TR 257-259.

Walker identified a video with audio, made while he "was driving north on I-39/US -51," which was taken on his cell phone, and which he testified reflected the high decibel whistle he was complaining about, and which he believed represented an air leak. TR 154-156.

Complainant confirmed during his testimony that he never received "any kind of discipline, warnings, or anything like that" from his former employer, R. Peterson, Enterprises. TR 166.

Walker testified that he filed his OSHA complaint (admitted as R-3) on January 10, 2018. TR 142, 212- 213. He also testified that on January 15, 2018, he received a certified letter from Rick Peterson dated January 8, 2018, informing him that he had been laid off. TR 152-153, 202. See JX 5. Walker also testified that he never called R. Peterson Enterprises after January 10th to apply for more work, even after he saw the "Now Hiring" sign at R. Peterson Enterprises in April or May of 2018. TR 240-241.

2) Testimony of Rick L. Peterson

Rick L. Peterson testified that he and his wife were the owners of R. Peterson Enterprises, a small trucking business in Northern Wisconsin. Although he holds an active commercial driver's license he performs primarily management activities now with the company. TR 18. He currently employs eighteen truck drivers and 37 non-trucking employees. TR 19-20. He employed about fifteen truck drivers on November 1, 2017, but the number fluctuates. TR 20. His three main customers are Flambeau River Paper, Futurewood Corporation, which is the

company that buys the wood for the paper mill, and Sappi Fine Paper in Cloquet, Minnesota, in addition to several smaller customers. All of the trucking work involves hauling logs or wood products. TR 21. The trailers used to haul logs are called “crib trailers,” which are equipped with air brakes. *Id.* The trailers do not have their own air system. Everything is run off of the tractor. TR 22.

Peterson testified that he has his own repair shop at his terminal to repair small defects such as lights, air leaks etc. If it’s something major such as a transmission or a motor it would be taken to the dealer where he bought the truck because he buys the “big warranty” on them. The dealer is Scaffidi Motors in Tomahawk and Stevens Point who sells only Mack trucks. He testified that his entire fleet of trucks are Mack trucks with the exception of four Western Stars. TR 23. He buys trucks every two to three years and his oldest truck is a 2015. TR 23. Peterson testified that the typical procedure he directs his drivers to follow when a defect or problem on a truck is noticed, is that they take the truck to the in-house shop mechanics first. If the problem is something the in-house mechanics cannot fix, the mechanics are directed to call Peterson who makes a decision as to where to take the truck for repairs. TR 27-28.

Peterson testified regarding JX-5, the certified letter in which the Complainant was laid off. Peterson testified that he made the decision to let Walker go, “[a] couple days after the Flambeau paper mill announced they were shutting down paper machine number 3.” TR 34, 68, 69. On cross examination he stated he thought this was about January 5, 2018. He stated that they were hauling about 40 to 60 loads for the paper mill per week at that time, which they lost. TR 53. Another customer, Verso Paper Company, also reduced their loads at about the same time from about 24 per week to 8 per week. TR 53, 70. Peterson testified that he had to shift the jobs of his other drivers around, at that time, so they would be able to make equal paychecks, but all of the drivers had a reduced workload over that period of time. TR 56.

Peterson acknowledged that the termination letter stated “if and when these situations change then we may be able to change our employment also.” He stated that what he meant by this sentence was: “That I wasn’t firing him. That I was letting him know that he was being released because we didn’t have enough work. I didn’t fire the man.” TR 34. Peterson testified:

We didn’t have any choice, because we lost – when the paper mill shut the paper machine down, we lost 40 to 60 loads a week, roughly, because that was one of our main haulers. He [Walker] was the new hire, and so we had to start somewhere to—we didn’t have the wood to haul for people to make a living.

TR 33-34.

Peterson testified that at the time the termination letter was sent he had not yet received the Complainant’s formal complaint from OSHA. TR 55. He later testified that he received the January 10, 2018 OSHA complaint (admitted as RX-3) on January 10, 2018. TR 63-64. Peterson confirmed that he had already sent the termination letter to Walker at the time he received the OSHA complaint. TR 64.

Peterson admitted that there has been a “Now Hiring” sign at the Peterson facility for about three years. He testified that this is because he is always hiring someone for one of the businesses he runs, but he is not always hiring truck drivers. TR 36-37.

Peterson testified that the reduced workload continued until he was able to find more work, which he testified occurred in about March or April [2018]. TR 56. At that time he was able to hire a new employee. He testified that Walker did not apply for a trucking job with his company after he was laid off. *Id.* Peterson testified that he does not go looking for individuals to hire, rather he chooses from individuals who apply. TR 57.

Peterson stated that after multiple complaints by Walker regarding the air system on his truck, he made an appointment at Scaffidi and told him to take it there. He stated he told Walker, “‘They’re professionals on these trucks. Have them work on it. That’s all I can do.’ We couldn’t find nothing (sic) wrong in our shop, so we took it there.” TR 39.

Peterson testified that the air system on the Mack, as well as other trucks, controls many aspects of the operation of the truck, including the suspension and brakes. TR 40. He testified that if there is a serious air leak and the air tank gets to a certain pressure, the alarms and lights on the dash go off, and the brake buttons pop out and the brakes are automatically applied. He testified that if this were to happen the brakes are applied gradually, allowing a driver to pull to the side before the truck stops completely. TR 41-42.

He testified that after Scaffidi performed their inspection of the truck and repaired the leaky air valve, he believed the issue was taken care of. TR 43.

Regarding the qualifications of his in-house shop mechanics, he stated that Randy has been working on trucks for about 40 years and Brad’s been working on them for 6 years, but neither is certified by Mack trucks. TR 45.

Peterson testified that Complainant came to his office on January 3, 2018 and they had a conversation/argument which Complainant recorded. Peterson testified that he asked Walker why he didn’t drive Truck #48 (the red bark truck), which his son, Nick Peterson, had offered to Walker the previous day. Peterson stated that Walker said, “When Number 46 is fixed, call me, I will be ready to roll.” TR 57-58. Peterson testified that he did not fire Walker when he came to his office on January 3, 2018. TR 58. Peterson testified that he had a conversation with a Wisconsin state Department of Transportation inspector and asked if he would come to his shop and inspect Truck #46 to see if he could find anything wrong because his mechanics could not find anything wrong. TR 59. Peterson testified he was told that if he couldn’t find the problem, the truck should not be “red-tagged,” and could be run. TR 59.

Peterson testified that his mechanic, Randy Engel, had returned to the shop after his regular hours on December 29, 2017, at Peterson’s direction, to inspect Truck #46 again, due to Walker’s continued complaints about it. TR 66. Peterson testified that the mechanic could not find anything wrong with the truck. *Id.*

Peterson confirmed that it is the driver's responsibility to pre-trip a truck and take it out of service or "red tag" it, if there is something wrong. TR 67-68. He also confirmed that after Walker left on January 3, 2018, he was never called back. TR 68. He also testified that the loss of work due to the Flambeau paper mill closure caused him to lose 25 to 40 percent of his loads. This caused him to shift workers around in order to keep them on a paycheck. TR 69, 71. He testified that he only laid off one worker, Walker, due to the slow-down in work. TR 69.

C. Testimony of Nicholas L. Peterson

Nicholas Peterson ("Nick Peterson") testified that he has worked for his father, Rick Peterson at R. Peterson Enterprises, since November, 2001. TR 74. He is in charge of the daily operations and oversees everything including the shop, inventory, the road, scheduling, etc. TR 74. He is not a truck driver and has never held a CDL (Commercial Driver's License). He testified that he is aware of the U.S. Department of Transportation ("DOT") and Wisconsin Department of Transportation regulations regarding commercial trucking but has not had formal training in these regulations or DOT safety training. TR 75. He does not have any formal training as a mechanic but worked at a full-service gas station doing oil changes and that type of thing for approximately eight years. *Id.* He helps out sometime in the truck shop doing minor things. *Id.* He does not perform inspections which he testified would be handled by Brad Hanson who has worked for the company for about two years. TR 76. The trucks receive annual DOT inspections. *Id.*

Nick Peterson testified that drivers will sometimes discuss minor problems concerning the trucks with him. TR 76-77. He does not have a regular work schedule but the mechanics work 8 a.m. to 4 p.m., Monday through Friday and weekends, if needed. TR 77. The truck drivers do not have a regular work schedule as they set their own schedule. *Id.* They will sometimes arrive prior to the mechanics. TR 78. If the drivers do a pre-trip inspection before the mechanics arrive, they could call the mechanic if they find a defect, but this generally does not happen. *Id.* Office staff works from 9 a.m. to 5 p.m. TR 79. He testified that no one would generally be in the shop at 5 a.m. or 8 p.m. but this is generally not a problem because they have new trucks. If the truck has a problem on the road, or breaks down, they would call one of the truck dealerships to service the truck on the road, such as Nuss Trucks or Scaffidi in Tomahawk. TR 80.

He testified that he is not responsible for decisions regarding hiring or firing although he may discuss an application regarding insurance coverage, etc., or decisions that are made. TR 80. Peterson testified that he has never had to fire anyone. TR 81.

Peterson testified that he recalled Walker making complaints about the air system in Truck #46, which was the truck assigned to him. TR 81-83. He remembers the complaints were within Walker's first two to three weeks of driving. TR 83. He initially complained about the leveling valve because of a ride height issue. Peterson remembered that Walker pulled the truck up to the front door, where the mechanics unhooked the trailer, checked the leveling valve and could find nothing wrong. TR 83.

Peterson testified that he would communicate with drivers through text messages regarding scheduling and other matters. TR 85. He confirmed that the text messages at JX-4 were text messages between him and Walker. TR 86. He confirmed that he responded to Walker's text message on January 2, 2018, regarding a continuing air leak and photos of air gauges, by saying, "Still trying to figure it out." He explained his response meant, "Trying to figure out what he [Walker] is saying was wrong, because we had three different people look at it and couldn't find anything leaking." TR 89. He also confirmed that he told Walker, "Take the red bark truck [Truck #48] the rest of the week. Starting tomorrow." TR 91. Peterson also confirmed that he informed Walker that the fuel water light is always on in Truck #48. He told him that there is a malfunction in the warning light that causes it to come on. He noted that the light had been on since the day they got the truck, but it has nothing to do with the operation of the truck. He stated, "[W]e've changed the fuel separator and everything and cleared the light, and it comes back on." TR 92. He also explained the text regarding the work performed on Truck #46, by the in-house shop mechanics the weekend prior to January 2, 2018, noting that he had personally witnessed the in-house mechanics working on Truck #46. TR 94, 107. He noted:

They did a brake test, an air leak test where the system was full and you hold your foot on the brake for 2 minutes or whatever and it can only drop so many pounds. And that was fine. And soapy water. Listening—you know, nothing was running in the shop—trying to hear an air leak.

TR 94.

Peterson testified that it was his understanding that Walker would drive Truck #48 on January 3, 2018, since he had offered Truck #48 to him in the text message sent on January 2, 2018. TR 105. Peterson stated that he had come in on January 3, 2018, to make sure Walker was able to hook Truck #48 up to Walker's trailer. He stated, "I wanted to be down there to hook 48 up, have it hooked up to his trailer so there was no lull time for him." TR 98, 105. Peterson testified that Walker did not drive Truck #48 when he came in on January 3, 2018, nor did he do a pre-trip inspection of Truck #48 on January 3, 2018. TR 105, 106.

Peterson noted that Walker claimed in the text messages that no one had looked at Truck #46, but Peterson disagreed with this claim, based on Peterson's personal observation of the mechanics who had worked on the truck the prior weekend. TR 95, 107. Peterson stated that his only other conversation with Walker was the following day, January 3, 2018, when Walker put the truck out of service. TR 96. Peterson noted that Walker came in that day and began arguing and swearing and claiming the mechanics do not fix anything and challenging him to fire him. Peterson told Walker he wasn't firing him, but told him not to speak to him in that way. TR 96-97, 110.

Peterson stated this conversation, which became heated, ended with Walker saying, "Let me know when truck is fixed and I can roll." TR 109. He understood this to mean, when Truck #46 was fixed he would be ready to drive. However, it was Peterson's understanding based on the mechanics' reports that Truck #46 was in working order. *Id.*

4) Testimony of Bradley J. Hanson

Bradley Hanson (“Brad Hanson”) testified that he has worked for the Respondent, R. Peterson Enterprises, LLC for approximately one and one half years. TR 262. Prior to working for R. Peterson Enterprises he gained experience working on big trucks for a total of six years’ experience working on trucks. *Id.* He testified that he was familiar with Truck #46 and has conducted maintenance on this truck which is a 2017 Mack automatic. Hanson testified, on cross examination, that he has not been certified by the Mack company as a certified Mack mechanic. TR 281.

Brad Hanson identified Exhibit RX-11, which was admitted into evidence, and represents his work orders in relation to Truck #46. He stated these work orders accurately represent the work he had performed and the dates he had performed the work. TR 263-264. Hanson confirmed the entries which per Exhibit RX-11 show the following:

- 1) Truck #46 passed its annual inspection on July 17, 2017 with no air leaks noted. TR 264-265;
- 2) Truck #46 was serviced on September 11, 2017. Notations include “grease and inspect,” “full svc” (service) which included “oil, oil filters, fuel filter and air filter.” (Hanson testified that the work order did not reflect that any air leak on the truck was repaired at this time.) TR 265;
- 3) Truck #46 was serviced on November 27, 2017, which involved replacement of the passenger side ¼ fender and particle matter sensor. (Hanson testified that as far as he knew this was the first time that Kevin Walker drove the truck and he is listed as the driver on the work order. Hanson also noted that no defect in the air pressure system was noted on the work order, nor any defect in the tires.) TR 265-266;
- 4) Shop time sheet dated December 29th, noting that Truck #46 was checked for an air leak and that glad hand seals were changed. (Regarding the reason for changing the glad hand seals, Hanson testified that the glad hands are a wearable part and it is common practice to change them every once in a while. He stated: “Kevin wanted me to look for the air leaks on the truck that—the alleged air leaks on the truck. And I thought, ‘I should – I’ll change the glad hand seals, just to change them,’ because they hadn’t been changed for a while, but there was nothing wrong with them at that time.” TR 267. Hanson explained that the glad hand seals were not causing an air leak and that no air leak was found on December 29, 2017.) TR 266-267;
- 5) Work order dated January 3, 2018, indicates that Truck #46 was road tested for an air problem. Notations include, “no problem found, truck operates normal as it should.” The work order also notes “replace headlight bulb; and replace drive tires—Highway closed shoulder tread.” (Hanson testified that he got in the truck and drove it around for about an hour. He stated he did not find any problems with the truck and specifically nothing wrong with the air system.) TR 267-268;

6) Work order dated January 4, 2018 notes, "Got called in truck wouldn't start--Got it running but will need a starter. (Hanson testified that this entry also showed no issue with an air leak.) TR 268.

Hanson testified generally in regard to the subsequent work orders for Truck #46 dated January 13, 2018, January 26, 2018, and May 30, 2018, noting that at no point were there any air leaks noted in any of the repairs for Truck #46. TR 268. Hanson testified that he has never found any air leaks in the truck and has not made any repairs for an air leak. TR 268. He also testified that Truck #46 has been driven "pretty much continuously since early January of 2018." *Id.* He also testified that the new driver of the truck has never made any complaints about an alleged air leak in the truck. TR 269.

Hanson explained the operation of the automatic transmission in the Mack 2017 truck (the type of transmission in Truck #46) as follows:

On an automatic truck, it uses air to shift. So it wouldn't be uncommon to be going up the road and you will hear – every time the truck shifts, you'll hear it— pssh, pssh, pssh – so that uses air, so your air gauge will move down, but as long as it doesn't get past – it gets down to the buzzer, I mean, it's fine ... and then in the downshifting, you're using brakes as well as using air to shift your transmission. So you're constantly using that air, and it's going to keep coming down, it's going to keep coming down, and then it gets to 100, and then the air compressor kicks back in and builds the pressure back up.

TR 269.

Hanson testified that if the pressure goes down to 100 psi the alarms will not go off. *Id.* He stated that the pressure in any one air gauge would have to be around 60 psi before the alarm would go off. He also testified that the truck will make a whistling sound through the turbo/exhaust. He also noted that this whistling noise would be audible from inside the cab and especially if you have the window down. *Id.*

Hanson testified that they (the mechanics) had looked at Truck #46 on numerous occasions when the Complainant made complaints but they never found anything. In regard to the type of inspection they would perform he stated:

... just like a DOT inspection on this truck every time, from shutting it off and making sure that the air gauges ain't (sic) moving down while the truck is sitting there to holding the brake pedal down to make sure that the air gauges ain't (sic) going down. I mean, from front to back of this truck was checked over.

TR 274.

He testified that a work order would not be completed on those occasions unless a repair was actually made. *Id.* He also stated that he spoke with the Complainant about the operation of the truck. In regard to the air leak sound Walker complained about, Hanson stated:

I tried explaining to him that this is the exhaust on the truck. You could start up any truck in our yard, and it would make this sound. I tried explaining to him the operation of the transmission – to no avail, I guess.

TR 275.

Hanson also testified that he tried explaining to Walker the sound of the turbo and that automatic shifting does take air from the secondary tank. He stated, “The transmission has a separate air tank, but it is filled from the secondary air tank. So as the transmission is shifting and pulling air from the transmission air tank, it has to be refilled with the secondary air tank.” *Id.* Therefore, he explained to Walker that the transmission doesn’t pull from the primary and the secondary at the same time and that it is common that the secondary air tank is lower than the primary air tank. *Id.* He also testified that this, in no way, indicates a safety concern. TR 276. He stated that the brake system also runs off of the secondary tank. *Id.*

Hanson also listened to the audio on the cell phone driving video taken by Complainant while he was driving Truck #46. TR 276-277. Hanson testified that the whistling sound in the background is the sound of the turbo on a 2017 Mack truck and that he had explained this to Walker. TR 277.

Hanson testified, based on his experience as a mechanic, and his experience working on Truck #46, that Truck #46 was safe to drive. TR 278. He also testified that the warning light on Truck #48 was a water in fuel light that was on due to a faulty sensor in the bottom of the filter housing. He stated that a diagnostic had been run on the truck to make sure the truck was safe and he testified that the light had no safety implications to that truck. *Id.* He also noted that the light had been on since the first day they had the truck. He stated that Nick Peterson also was aware of the problem with the warning light on Truck #48. *Id.*

Hanson testified that he had inspected Truck #46 at least a half a dozen times between November 27th and December 18th 2017. He did not believe the leveling valve was leaking at the time of those inspections even though the leveling valve had been replaced by the Scaffidi mechanics when they inspected the truck. TR 282-283.

5) Testimony of Randall G. Engel

Randall G. Engel (“Randy Engel”) testified that he is employed for the Respondent, R. Peterson Enterprises and that he has forty years of experience working on trucks. TR 292. He considers himself an expert in the field of truck mechanics. TR 293. He testified that he is familiar with the 2017 Mack automatic diesel truck, which is the type of Truck that Truck #46 is. He is familiar with the operation of Truck #46 and has done maintenance on this truck, the entire

time that it has been at R. Peterson Enterprises. TR 293. He stated that he did not have any special training or certification from the Mack Company. TR 301.

Engel identified Exhibit R-12 as his worksheet for the week of December 26 through December 30, 2017. TR 294-295. He confirmed that the entry for Friday, December 29th states, "Come back in 2 hours, Truck 46 check for any air leaks." He testified that this entry reflected that he had come back in after working that day just to check Truck #46 to see if there were any air leaks. He stated that he did this due to a complaint by Kevin Walker about an air leak on the truck. TR 295. Engel testified that he did a full inspection at that time and did not find any air leaks. TR 296. He testified that he also worked on December 30, 2017 and he recalled speaking with Walker that day. Engel testified that Walker thanked him for looking at his truck and told him the truck ran great that day. He also gave him a 30 pack of beer at that time. TR 297.

Engel testified that he was aware that Walker had been making complaints about an air leak on Truck #46. *Id.* He stated that he thought the sound he complained about was the turbo when the motor was running. TR 298. Engel confirmed on the basis of his 40 plus years of experience as a truck mechanic, that he believed Truck #46 was safe to drive. *Id.*

III. ISSUES

The unresolved issues presented by the parties are:

1. Whether Complainant engaged in protected activity within the meaning of the STAA?
2. Whether Complainant meets his burden of proving by a preponderance of the evidence that his alleged protected activity was a contributing factor in the termination of his employment?
3. If Complainant meets his burden of proving that protected activity contributed to his termination does Respondent establish, by clear and convincing evidence, that it would have taken the same adverse action absent the alleged protected activity?
4. Whether Complainant is entitled to remedies and attorney fees?

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The STAA provides that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. These protected activities include:

- (A)(i) making a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order;
- (B)(i) refusing to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(B)(ii) refusing to operate a vehicle because 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)(A)(i) - (B)(i)-(ii).

The STAA further provides that under paragraph (B)(ii) “an employee’s apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain correction of the hazardous safety or security condition.” 49 U.S.C § 31105 (a)(2).

To prevail on an STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay or terms or privileges of employment; and that the employee's protected activity was a contributing factor in the adverse employment action. *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052 (ARB Jan. 31, 2011); *Riess v. NuCor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010). Once the employee has established that the protected activity was a “contributing factor” in the employer’s decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

Thus the STAA employs the AIR 21 two-step analytical framework: (1) whether the complainant has met his burden of establishing that protected activity was a “contributing factor” in the alleged adverse personnel action, and if so, (2) whether the respondent can establish by “clear and convincing evidence” that it would have taken the same adverse action in the absence of the protected activity. *See Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 21 (ARB May 13, 2014).

A) Protected Activity

In this case the Complainant alleges that he engaged in protected activity under Section A(i) of the STAA in making internal complaints of safety issues to his Employer, as well as protected activity under Sections B(i) and (ii) in refusing to operate a vehicle.

1) Complaints regarding safety violations under 49 U.S.C. § (a)(1)(A)(i)

Complainant’s alleged protected activity under Subpart A(i) of the STAA, the complaint clause, will be addressed first. Internal complaints filed with supervisors which are related to reasonably perceived violations of commercial vehicle safety regulations are protected under 49 U.S.C. § (a)(1)(A)(i). *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101 & 159, ALJ No. 2005-STA-63, at 9 (ARB June 30, 2008). Complainant alleges that his complaints related to

reasonably perceived violations of commercial vehicle safety regulations at 49 C.F.R. §§ 392.1, 392.7,³ 393.1, 393.40, 393.45, 393.48, 393.51, 396.1(a), 396.3, 396.7, 396.13, 396.17 and Part 393, Subpart C.

There is no dispute that the Complainant made complaints concerning what he perceived as an air leak in the truck he was assigned to drive, Truck #46, from nearly the first time he began driving for Respondent, R. Peterson Enterprises, LLC, on November 27, 2017. Testimony also supports that the complaints made by the Complainant related to safety issues covered by one or more of the above noted regulations, in that the air system of the type of truck involved in this case, that is, the Mack 2017 automatic, controlled essential elements of the operating system of the truck, including the brakes. Further, 49 C.F.R. § 392.7 provides generally that a truck should not be driven unless the driver is satisfied that essential elements of the operating system, including the brakes, are in good working order.

However, in order for such complaints to constitute protected activity under Subpart A(i) (the complaint clause of the STAA), such complaints must be based upon a subjectively and objectively reasonable perception of a violation of a commercial vehicle safety regulation. *See Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, 2010-STA-41 (ARB Mar. 27, 2012). Therefore, the various complaints made by the Complainant regarding safety violations must be analyzed to determine whether they can be determined to be both subjectively and objectively reasonable, in order to be deemed protected activity under this Part of the STAA. (Emphasis added).

In reaching the determination of subjective and objective reasonableness, under the STAA, the Administrative Review Board (ARB) has considered this standard as applied under the environmental whistleblower statutes which require a “reasonable belief” of a violation, rather than an actual violation. Under these statutes, “the ‘subjective’ component of the reasonable belief test is satisfied in the same manner as it was when it was identified as the ‘good faith’ test by showing that the employee actually believed that the conduct he complained of constituted a violation of relevant law ... An objective reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant...” *Ass’t Sec’y & Bailey v. Koch Foods, LLC*, ARB

³ 49 C.F.R. § 392.7 states (a) No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed: Service brakes, including trailer brake connections. Parking (hand) brake. Steering mechanism. Lighting devices and reflectors. Tires. Horn. Windshield wiper or wipers. Rear-vision mirror or mirrors. Coupling devices. Wheels and rims. Emergency equipment.

(b) Drivers preparing to transport intermodal equipment must make an inspection of the following components, and must be satisfied they are in good working order before the equipment is operated over the road. Drivers who operate the equipment over the road shall be deemed to have confirmed the following components were in good working order when the driver accepted the equipment:

- Service brake components that are readily visible to a driver performing as thorough a visual inspection as possible without physically going under the vehicle, and trailer brake connections - Lighting devices, lamps, markers, and conspicuity marking material - Wheels, rims, lugs, tires - Air line connections, hoses, and couplers - King pin upper coupling device - Rails or support frames - Tie down bolsters - Locking pins, clevises, clamps, or hooks - Sliders or sliding frame lock.

No. 10-001, slip op at 9, ALJ No. 2008-STA-61 (ARB Sept. 30, 2011) (Reasonable belief of violation requires both subjective reasonableness, and objective reasonableness, which is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant).⁴

In applying this standard of reasonableness to the Complainant's complaints of an air leak in Truck #46, the undersigned notes a significant distinction between the complaints made by Walker initially, that is, those made prior to the inspection and repair of Truck #46 by the Mack dealership ("Scaffidi Truck Center" or "Scaffidi"), and those complaints made subsequent to the inspection and repair of the truck by Scaffidi Truck Center. The complaints made initially by Walker satisfy both the subjective and objective components of the reasonable belief standard, while the complaints made after Truck #46 was serviced by Scaffidi (and continued to be inspected by the shop mechanics) lack objective reasonableness.

The evidence in the record supports that the Complainant actually believed there was a problem with the air system in Truck #46. It is undisputed that the Complainant began complaining about what he perceived as an air leak, shortly after he began his employment for the Respondent on November 27, 2017, and continued complaining up until his last day, on January 3, 2018.

Walker testified that he observed there "might be an issue with the air system in Truck #46" on the very first day that the truck was assigned to him. He testified:

I noticed that there were audible air leaks. I wouldn't call them severe or anything, but I knew that they – they didn't exist on the last truck that I operated, either at Hartwig's, nor at Rands, for two-and-a-half years I was there, or any other truck that I have ever operated on the highway.

TR 121-122.

Complainant continued to complain about his perception of an air leak and the significance he placed on a potential air leak, as well as his concern that the primary and secondary air tanks did not rise and fall at the same rate.

Complainant testified that he understood the air system to control, in addition to the transmission, the air brakes and every other component that's linked up to the air system, including the driver's seat. TR 123. He testified to his understanding of the importance of the air system:

⁴ In *Bailey* the Board stated, "[t]he Board has consistently held that under the complaint clause [of the STAA], the complainant must at least be acting on a reasonable belief regarding the existence of a violation, citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091; ALJ No. 2006-STA-032 (ARB Sept. 24, 2010); *Guay v. Burford's Tree Surgeon's Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045 (ARB June 30, 2008). The Board further recognized that a reasonable belief of a violation requires both subjective reasonableness, and objective reasonableness, which is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant. See *Bailey*, slip op. at 8-9.

You can have several different things arise, as far as problems [with the air system] go. It depends on where the air leak is. If you have one tire area, whatever it be, and that brake components in that system fail, then that's the one that's going to seize up on you, and if you have both of them fail out because of a box that that's linked to, you would have both of them. So as far as understanding the whole air system goes on a vehicle ...you can't roll down the road without it. That's what releases your brakes."

TR 123-124.

He further stated, "if your air pressure goes below 60 pounds of [] psi [pounds per square inch], both your buttons will come out. And when that happens, your S-cam assembly inside the hubs take and turn and puts (sic) all the brakes on." TR 124. Complainant confirmed his understanding that in order for the air system to work properly pressure has to stay over the 60 psi level. TR 126.

Walker explained his understanding of the air system as follows:

Your primary and secondary are all linked in the whole system together. It's almost like a linear system, but it's broke down by components of where it branches off to give that air supply to. When you start—and this —they teach you this right in truck school. If your gauges are not climbing and kicking out at the same time, there's an issue there. If you got one that's kicking out and releasing the air pressure off from the primary tank reserve and the secondary one is not kicking out, you have air loss. And that secondary usually relates to your trailer. And so, for whatever reason -- it could be ice on you glad hands, your glad hand seals are shot, you could have a small fitting letting the air out as you go down the highway, whatever it be, and I just noticed that when that wasn't rising and climbing with the primary there's an issue somewhere within the air system. It's common sense.

TR 135-136.

Walker further explained that this was what he learned in CDL school, and that he never had a vehicle where the primary and secondary gauges did not rise at the same time. TR 136.

After reviewing the evidence, the undersigned finds that Walker's initial complaints regarding the alleged leak in the air system are both subjectively and objectively reasonable. The evidence supports that he believed there was an air leak and thus the belief was subjectively reasonable. The evidence also supports that his belief was initially objectively reasonable "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant." See *Bailey v. Koch*, ARB Case No. 10-001, slip op. at 9. The evidence supports that the Complainant had limited experience with the Mack 2017 automatic. Although the evidence is not completely clear regarding Walker's prior trucking

experience, it shows that he had at least 2 and ½ years of experience as a truck driver. In addition, although he attended “CDL school” for about 4 weeks in 2011 or 2012, he admitted that he had not been trained in the 2017 Mack automatic truck which was the type of truck he drove while employed for the Respondent (Truck #46). Complainant’s testimony supports that the air tanks in other trucks he had driven would rise and fall simultaneously. Accordingly, the undersigned finds that it would be objectively reasonable for Walker to initially question whether there was a problem with the air system, in light of his limited experience in driving the 2017 Mack automatic and his limited truck driving experience, generally. Therefore, as his initial complaints would be both subjectively and objectively reasonable, they would constitute protected activity under the STAA.

However, the Respondent Employer’s response to Walker’s initial complaints appears to be entirely reasonable and appropriate. According to Complainant’s own testimony he was told to take the truck, first, to the in-house shop mechanics who did not find the alleged air leak problem, and then to the dealership, Scaffidi Truck Center, who inspected and serviced the truck.

Walker testified that when he was first assigned Truck #46 and noticed an audible air leak, he reported it to his boss, Rick Peterson. He testified that he first called him and then went to his office to discuss it with him. TR 128. He testified that he was directed to take the truck to the two in-house mechanics, Randy and Brad, to be checked. TR 129. Walker testified that Brad looked at the truck. Walker alleges that Brad also heard air leaks and suggested that Walker have Scaffidi Truck Center (“Scaffidi”), a certified Mack truck dealer, look at the truck. TR 129, 132. Walker stated that he communicated this to Rick Peterson who agreed Scaffidi should look at the truck. Peterson told the Complainant to stop at Scaffidi the next day after picking up his pulp load. TR 132.

Walker’s testimony also supports that the Scaffidi mechanics inspected Truck #46 and addressed his concerns. He testified that he brought the truck to Scaffidi and told them what he believed were issues with the truck. Per his testimony,

I told them there was a[n] issue with the ride height unit, I could hear audible air leaks, so you might want to check all the connectors and fittings and stuff. And the mechanic says, ‘Sure will. We’ll get it done.’ And they did come across all the issues that I had pointed out to both Brad, Rick, and the mechanic at Scaffidi’s. I mean, there’s replacement parts on there and all the issues that I told them I came across when I got the truck.

TR 133.

However, after the Complainant had Truck #46 serviced at the dealership he continued to make the same complaints despite the fact that the truck was inspected on multiple occasions by both the in-house mechanics and also the mechanics at the dealership, Scaffidi Truck Center. There has been no evidence presented which would call into question the objectivity of the dealership mechanics who are not employees of the Respondent.

The undersigned does not find Complainant's continued complaints regarding the same air leak issue to be objectively reasonable, subsequent to the inspection and service of Truck #46 by the Mack dealership mechanics.

Complainant noted during his testimony that he began working at R. Peterson Enterprises on November 27, 2017, he brought the truck to Scaffidi during the first week of his employment and after the truck was serviced at Scaffidi, he still believed there was a problem. TR 140.

Walker testified that he continued to operate the truck although he still thought there was a problem. TR 143. He testified he continued to make complaints to Rick Peterson, Nick Peterson, and mechanics, Brad Hanson and Randy Engel. TR 143-144. Walker testified that he took the truck to Scaffidi a second time, which he stated was probably in the third week of December, approximately December 18, 2017. He told the mechanics at Scaffidi that he would hear a high pitched whistling sound when he drove the truck. He was told they would look at it. Walker testified that after he waited for about one and a half hours he was told that the mechanics couldn't find anything wrong. TR 144.

Complainant identified and testified regarding JX-2, which is a series of cell phone photos which he took on two different dates and different locations, throughout his assigned trip, which show the gauge cluster on Truck #46. TR 136-138. Walker testified that these photos were taken after the truck was serviced at Scaffidi, probably about the second week in December. TR 140.

A review of JX-2 reflects somewhat different readings between the two gauges in each photograph with the difference in the primary and secondary tank levels ranging between 0 and approximately 13 psi. (Emphasis added). All primary and secondary tank pressure readings in the fourteen photos range between approximately 103 and 122 psi. Complainant confirmed during his cross examination that none of the secondary gauge readings is below 100 psi. TR 192. Walker testified that he showed these photos to the two in-house mechanics, Brad and Randy, who according to Walker's testimony indicated that nothing was wrong with the truck. TR 140.

The testimony of the in-house mechanics, Brad Hanson and Randy Engel, also confirms that they attempted to explain to Walker that the air system in the Mack 2017 automatic truck is such that the primary and secondary air gauges would rise and fall at different times, and that this did not indicate a safety concern.

Hanson explained the operation of the automatic transmission in the Mack 2017 truck (the type of transmission in Truck #46) as follows:

On an automatic truck, it uses air to shift. So it wouldn't be uncommon to be going up the road and you will hear – every time the truck shifts, you'll hear it— pssh, pssh, pssh – so that uses air, so your air gauge will move down, but as long as it doesn't get past – it gets down to the buzzer, I mean, it's fine... and then in the downshifting, you're using brakes as well as using air to shift your

transmission. So you're constantly using that air, and it's going to keep coming down, it's going to keep coming down, and then it gets to 100, and then the air compressor kicks back in and builds the pressure back up.

TR 269.

Hanson testified that if the pressure goes down to 100 psi the alarms will not go off. *Id.* He stated that the pressure in any one air gauge would have to be around 60 psi before the alarm would go off. He also testified that the truck will make a whistling sound through the turbo/exhaust. He also noted that this whistling noise would be audible from inside the cab and especially if you have the window down. *Id.*

Hanson testified that they (the mechanics) had looked at Truck #46 on numerous occasions when the Complainant made complaints, but they never found anything. In regard to the type of inspection they would perform he stated:

... just like a DOT inspection on this truck every time, from shutting it off and making sure that the air gauges ain't (sic) moving down while the truck is sitting there to holding the brake pedal down to make sure that the air gauges ain't (sic) going down. I mean, from front to back of this truck was checked over.

TR 274.

He testified that a work order would not be completed on those occasions unless a repair was actually made. *Id.* He also stated that he spoke with the Complainant about the operation of the truck. In regard to the air leak sound Walker complained about, Hanson stated:

I tried explaining to him that this is the exhaust on the truck. You could start up any truck in our yard, and it would make this sound. I tried explaining to him the operation of the transmission – to no avail, I guess.

TR 275.

Hanson also testified that he tried explaining to Walker that automatic shifting does take air from the secondary tank. He stated, "The transmission has a separate air tank, but it is filled from the secondary air tank. So as the transmission is shifting and pulling air from the transmission air tank, it has to be refilled with the secondary air tank." *Id.* Therefore, he explained to Walker that the transmission doesn't pull from the primary and the secondary at the same time and that it is common that the secondary air tank is lower than the primary air tank. *Id.* He also testified that this, in no way, indicates a safety concern. TR 276. He stated that the brake system also runs off of the secondary tank. *Id.*

Hanson also listened to the audio on the cell phone driving video taken by Complainant while he was driving Truck #46. TR 276-277. Hanson testified that the whistling sound in the

background is the sound of the turbo on a 2017 Mack truck and that he had explained this to Walker. TR 277.

Further, Complainant's testimony also supports that the complaints he continued to make up through the final day he drove for the Respondent trucking company on January 2, 2018, involved the same alleged air leak that he had complained of since the first day he drove for the Respondent. He complained, as indicated in a series of text messages admitted at JX-4, that there was a problem with an air leak in Truck #46 which he believed still existed, despite the fact that the truck had been inspected twice by the Scaffidi mechanics and multiple times by the shop mechanics, Brad and Randy.

Walker testified that the air leak he noted on the January 2, 2018 daily time card, when he took Truck #46 out of service, was the same complaint that he had made the entire time that he was driving Truck #46. TR 256 He testified that the air leak did not get any worse on January 2, 2018. It was the same, as the other days he had driven Truck #46. TR 257. He testified that he put the truck out of service because he believed he had been lied to, and his complaints had been ignored regarding any air leak in Truck #46 throughout the time he had driven the truck. TR 257-259.

After considering all of the evidence in the record, the undersigned finds that the Complainant's complaints regarding an air leak in Truck #46, which continued even after the truck had been inspected and serviced by the Mack dealership, Scaffidi Truck Center, which occurred the first week of Walker's employment, are not objectively reasonable, and therefore do not constitute protected activity. As noted above, a reasonable person with the Complainant's limited experience and training in the workings of the Mack 2017 automatic truck, to which he was assigned, could have reasonable concerns regarding sounds he perceived as air leaks as well as a misunderstanding of the operation of the air system which support his initial complaints and requests that the truck be inspected. However, after the truck had been inspected and serviced by the mechanics at the Mack dealer, Scaffidi Truck Center, as well as the in-house shop mechanics, Walker's continued complaints and failure to accept the explanations provided to him by the trained mechanics, cannot be deemed objectively reasonable. It is not objectively reasonable for the Complainant to reject the opinions of multiple trained mechanics including those mechanics employed by the Mack dealership, in favor of his own opinion, which was based on limited trucking experience, no experience as a truck mechanic, and no prior training or experience in the type of truck he was assigned, that is, the Mack 2017 automatic. Accordingly, the undersigned finds that Walker's continued complaints are not protected activity under the STAA as they lack objective reasonableness.

2) Complainant's refusal to drive under 49 U.S.C. §§ (a)(1)(B)(i) and (ii)

An individual's refusal to drive constitutes protected activity under subpart (B)(i) of the STAA, if the operation of the vehicle violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health. The refusal to operate the vehicle is protected activity under subpart (B)(ii) of the statute, if the employee refuses to operate the

vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. See 49 U.S.C. § 31105 (a)(1)(B)(i)-(ii).

The STAA further provides that under paragraph (B)(ii) “an employee’s apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain correction of the hazardous safety or security condition.” 49 U.S.C § 31105 (a) (2).

There is some disagreement in the case law as to whether subpart B(i) requires an actual violation of a motor vehicle safety regulation to constitute protected activity under the STAA, or whether an employee’s refusal to operate a motor vehicle where the employee reasonably believes at the time that operation of the vehicle would violate a pertinent safety law is sufficient to constitute protected activity. (Emphasis added). The undersigned applies the standard as articulated by the Administrative Review Board in *Ass’t Sec’y & Bailey v. Koch Foods, LLC*, ARB No. 10-001, slip op. at 9, ALJ No. 2008-STA-61 (ARB Sept. 30, 2011).⁵ In *Bailey* the Board stated,

[W]e conclude that the protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee’s reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined.

Id.

Thus protected activity under both subparts would require that the Complainant’s refusal to operate the vehicle was both subjectively and objectively reasonable. Subpart (B)(i) addresses whether the employee reasonably believes a violation of a motor vehicle regulation would occur and subpart (B)(ii) addresses whether the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.

⁵In *Ass’t Sec’y & Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-61 (ARB Sept. 30, 2011) the ARB affirmed the ALJ’s decision and applied the standard noted above that is, “the protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee’s reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined.” *Bailey* slip op. at 9. However, on appeal to the Eleventh Circuit Court of Appeals, the Eleventh Circuit disagreed with the Board on this issue and concluded that Section 31105(a)(1)(B)(i) covers “only those situations where the record shows that operation of a motor vehicle would result in the violation of a regulation, standard, or order related to commercial motor vehicle safety, health, or security.” *Koch Foods, Inc. v. Secretary, U.S. Dept. of Labor*, 712 F.3d 476(11th Cir. 2013). As this case arises in the Seventh Circuit, where this issue has not been addressed, the undersigned applies the standard articulated by the ARB. See also *Ass’t Sec’y & Bailey v. Koch Foods, LLC*, ARB No. 14-041, ALJ No. 2008-STA-61 (ARB May 30, 2014).

After analyzing the evidence presented in this case, the undersigned finds that the Complainant has failed to prove that his refusal to drive on January 3, 2018 was protected activity under either Subpart (B)(i) or (B)(ii) of the STAA statute.

The evidence in this case shows that after the Complainant completed his runs on January 2, 2018, he took Truck #46 out of service as stated on his completed time card for that day. *See* CX-3. Complainant turned that timecard in on January 3, 2018, and chose not to drive due to what he continued to perceive as an air leak in Truck #46.

During his testimony, Complainant explained that he would complete a driver's log form/driver's daily time card on each day that he drove. He explained that a minor item could be noted as needing repair or in a more severe case that the truck could be taken out of service. TR 168-169, 185-188. Walker testified on cross examination that he had completed driver log forms on each day that he drove but had never listed the air leaks on any of these forms until the one he completed on January 2, 2018. TR 189-190, 243. The signed driver daily timecards were admitted as RX-4, TR 185-188, with the exception of the January 2, 2018 log, which was admitted as CX-3, TR 167-170.

Walker testified that after he completed his runs on January 2, 2018, he took Truck #46 out of service. Regarding the post-trip log that he completed on January 2, 2018, at 8pm, CX-3, he stated:

The second box that's check marked, as it is in this case, is to put the truck out of service. And what that means, if the vehicle was deemed by me, the driver, to be unsafe to be on the freeways, them (sic) roadways, whatever it be, and I felt that it was the best interest to put it out of service. I noted what the service problem was and the defective part. I put down, 'Air brake system has known defect in the secondary air system.' I put down there that the 'Problem needs to be fixed before safe operation of vehicle.'

TR 169.

Walker testified that he turned this driver log/time card in on January 3, 2018. TR 169.

Walker confirmed that he never noted the air leak on the daily time cards he completed other than the January 2, 2018 card. TR 255. He also testified that the air leak he noted on the January 2, 2018 card, when he took the truck out of service, was the same complaint that he had made the entire time that he was driving Truck #46. TR 256. He testified that the air leak did not get any worse on January 2, 2018, it was the same, as the other days he had driven Truck #46. TR 257. He testified that he put the truck out of service because he believed he had been lied to and his complaints had been ignored regarding any air leak in Truck #46 throughout the time he had driven the truck. TR 257-259.

Complainant's actions in taking Truck #46 out of service and his consequent refusal to drive, for the reason stated on his timecard, that the "Air brake system has known defect in the

secondary air system” and that the “Problem needs to be fixed before safe operation of vehicle” are determined by the undersigned to lack objective reasonableness. Accordingly, Complainant has failed to prove his refusal to drive is protected activity.

As noted in the previous discussion pertaining to the complaint clause of the STAA, by the time the Complainant refused to drive on January 3, 2018, he had made the same complaints regarding an air leak in Truck 46 for over one month, beginning shortly after he began driving for the Respondent employer on November 27, 2017. The evidence supports that his complaints were addressed appropriately in that the truck was inspected and serviced on multiple occasions including twice by the Mack dealership, Scaffidi Truck Center, as well as by the in-house shop mechanics. There has been no evidence submitted, nor can any reasonable inference be drawn that the mechanics at the Mack dealership, who are non-employees of the Respondent, lacked objectivity in regard to Walker’s complaints of an air leak. The first time they inspected the vehicle they did make some repairs to the truck. However, even the day following these repairs, Complainant continued to complain that what he perceived as an air leak had not been fixed. His testimony supports that he took the vehicle to the dealership on a second occasion when it was again inspected by the Scaffidi mechanics, but the mechanics could find nothing wrong.

The in-house shop mechanic, Brad Hanson, testified credibly that he explained to the Complainant that the whistling sound he heard was the normal sound of the turbo/exhaust on the truck and did not represent a safety concern. He also explained the operation of the air system to the Complainant in regard to the gauges for the primary and secondary air system and the reason why the two gauges do not rise and fall simultaneously, contrary to the Complainant’s belief.

The undersigned finds it is not objectively reasonable for the Complainant to reject the opinions of multiple trained mechanics, including those mechanics employed by the Mack dealership, in favor of his own unsupported opinion which was based on limited trucking experience, no experience as a truck mechanic, and no prior training or experience in the type of truck to which he was assigned, that is, the Mack 2017 automatic. Accordingly, the undersigned finds that the Complainant’s refusal to drive Truck #46 on January 3, 2018, for his stated reason that there was a known air leak and the truck could not be safely driven until that leak is repaired is not protected activity under the STAA as his refusal to drive does not represent an objective belief that a safety regulation would be violated, or that the safety of himself or other drivers would be placed in jeopardy. His claim that there was a known air leak and that the truck could not be safely driven is an unsubstantiated claim lacking in any credible support.

Also significant to note is the Complainant’s own testimony that there was no change in what he perceived as an air leak in Truck #46 at the time he refused to drive, but rather it was the same complaint that he had made since he first began driving for the Respondent employer. *See* TR 256-257. Thus the refusal was not based on a new or worsened condition, but rather the same issue that had been addressed on multiple occasions by experienced mechanics.

Further support for the lack of objectivity, in the Complainant’s continued belief that there was an air leak in Truck #46, is the evidence presented by the Respondent in the form of the service record of the vehicle subsequent to January 3, 2018, and the testimony of the shop

mechanic who testified that he has continued to be responsible for the servicing of the vehicle since that time. Both the service record admitted as RX-11 and the testimony of Brad Hanson support that the vehicle has not been serviced for an air leak subsequent to January 3, 2018 through the date of the hearing. TR 268. Further, the truck has been driven throughout that period with no complaints of an air leak recorded in the service record. TR 269.

For the above reasons, the undersigned finds that the Complainant has failed to establish that his refusal to drive Truck #46 on January 3, 2018 was protected activity under the refusal to drive provisions of the STAA.

The Complainant, had also been offered by the Respondent, an alternate truck, Truck #48, known as the red bark truck, in the text message exchange between Complainant and Nick Peterson on January 2, 2018. The undersigned finds that the Respondent's offering of this vehicle as an alternative to the truck to which Walker had been assigned (Truck # 46), was another example of the Respondent's reasonable attempt to address Walker's continued complaints. However, as the Complainant never attempted to drive Truck #48, nor did he locate or attempt to perform the usual "pre-trip" inspection of this vehicle, I find that Walker's actions in relation to Truck #48, do not constitute a refusal to drive under the STAA. Accordingly, the Complainant's actions regarding Truck #48 do not amount to a showing of protected activity under the refusal to drive provisions of the STAA.

B) Contribution of protected activity to the adverse action

In order for a Complainant to prove his prima facie case under the whistleblower provisions of the STAA an employee must prove by a preponderance of the evidence that he engaged in protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay or terms or privileges of employment; and that the employee's protected activity was a contributing factor in the adverse employment action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052 (ARB Jan. 31, 2011); *Riess v. NuCor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010).

Under the AIR 21 burden of proof framework which is applicable to this case, the Board has noted:

[T]he complainant is initially required to show by a preponderance of the evidence that protected activity was a 'contributing factor' in the alleged adverse personnel action. Should the complainant meet the 'contributing factor' burden of proof, the burden shifts to the employer who is required, in order to overcome the complainant's showing, to prove by 'clear and convincing evidence' that it would have taken the same adverse action in the absence of the protected conduct."

(*Beatty v. Inman Trucking Management Inc.* ARB No.13-039, slip op. at 8, ALJ Nos. 2008-STA-20, 21 (ARB May 13, 2014)).

As noted by the Board in *Beatty*,

[T]he ARB has consistently determined that a contributing factor is ‘any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision.’ Thus, for example, a complainant may prevail by proving that the respondent's reason, ‘while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity.’ Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence.

Beatty, slip op. at 8-9.

Complainant confirmed during his testimony that he never received “any kind of discipline, warnings, or anything like that” from his former employer, R. Peterson, Enterprises. TR 166. Thus the only proven adverse action would be the termination of the Complainant’s employment.⁶ Walker testified that on January 15, 2018, he received a certified letter from Rick Peterson dated January 8, 2018, informing him that he had been laid off. TR 152-153, 202. *See* JX-5.

Rick Peterson, the owner of Peterson Enterprises, LLC, testified regarding, JX-5, the certified letter in which the Complainant was laid off. Peterson testified that he made the decision to let Walker go, “[a] couple days after the Flambeau paper mill announced they were shutting down paper machine number 3.” TR 34, 68, 69. On cross examination he stated he thought this was about January 5, 2018. He stated that they were hauling about 40 to 60 loads for the paper mill per week at that time, which they lost. TR 53. Another customer, Verso Paper Company, also reduced their loads at about the same time from about 24 per week to 8 per week. TR 53, 70. Peterson testified that he had to shift the jobs of his other drivers around at that time, so they could make equal paychecks, but all of the drivers had a reduced workload over that period of time. TR 56.

Peterson acknowledged that the termination letter stated “if and when these situations change then we may be able to change our employment also.” He stated that what he meant by this sentence was “That I wasn’t firing him. That I was letting him know that he was being released because we didn’t have enough work. I didn’t fire the man.” TR 34. Peterson stated:

We didn’t have any choice, because we lost – when the paper mill shut the paper machine down, we lost 40 to 60 loads a week, roughly, because that was one of

⁶ To the extent that one could argue that the Respondent’s failure to contact Complainant to rehire him, after his lay off, when trucking positions became available, could be deemed an adverse action, the undersigned concludes that this does not constitute an adverse action under the facts of this case. Complainant cites no statute or regulation which would require the Respondent to rehire a worker after a lay off. Further, Walker testified that he never called R. Peterson Enterprises after January 10th to apply for more work, even after he saw the “Now Hiring” sign at R. Peterson Enterprises in April or May of 2018. TR 240-241. In addition, Rick Peterson confirmed that Walker had not applied for a trucking job with his company after he was laid off. He also stated that he does not look for individuals to hire, rather he chooses from individuals who apply. TR 56-57.

our main haulers. He [Walker] was the new hire, and so we had to start somewhere to—we didn't have the wood to haul for people to make a living.

TR 33-34.

Peterson testified that at the time the termination letter was sent, he had not yet received the Complainant's formal complaint from OSHA. TR 55. He later testified that he received the January 10, 2018 OSHA complaint (admitted as RX-3) on January 10, 2018. TR 63-64. Peterson confirmed that he had already sent the termination letter to Walker at the time he received the OSHA complaint. TR 64.

As discussed previously, the undersigned has only found the Complainant's initial complaints of an air leak, prior to the servicing of Truck #46 at the Mack dealership, Scaffidi Truck Center, to constitute protected activity.

Complainant has provided no credible evidence that these initial complaints contributed in any way to the termination of his employment. To the contrary, the evidence, including the Complainant's own testimony, supports that the Respondent took Walker's complaints seriously and directed that the truck be inspected not only by the in-house shop mechanics, but also by the mechanics at the Mack dealership, Scaffidi Truck Center. In addition, the undersigned finds there is no temporal proximity or other circumstantial evidence which would support that the Complainant's initial complaints of an alleged air leak which occurred during the first week of his employment, and prior to the initial inspection and servicing of the vehicle by the Mack dealership, contributed in any way to his termination, approximately a month after Walker's initial complaints regarding the alleged air leak were made. Further, the undersigned finds the testimony of Rick Peterson regarding the reason for the lay-off due to a reduction in his workload to be credible.

Accordingly, the undersigned finds that the Complainant has failed to establish his prima facie case under the whistleblower provisions of the STAA, as he has failed to show based on a preponderance of the evidence that his protected activity (his initial complaints regarding an air leak in Truck #46) were a contributing factor in the termination of his employment.

As the claim for relief under the STAA is denied, the issue of damages and request for attorney fees is moot and therefore is not addressed in this decision.

ORDER

For the foregoing reasons, the claim for relief under the whistleblower provisions of the STAA is hereby **DENIED**.

DREW A. SWANK
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, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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

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

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

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