UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Cincinnati, OH 45202
513-684-3252 - Office

Issue Date: 28 February 2023

OALJ CASE NO.: **2019-STA-00040**
OSHA CASE NO.: **8-1700-18-022**

In the Matter of:

JERRY JONES,
Complainant,

v.

SCHWAN'S HOME SERVICE, MATTHEW HOLBROOK, MONIQUE INGOLD, AND PATRICK HICKSON,[1]
Respondent.

Appearances:
Paul Taylor, Esq.
Trucker Justice Center
Edina, Minnesota
For the Complainant

Nathan Pangrace, Esq..
Littler Mendelson, P.C.
Cleveland, OH
For the Respondents Schwan's Home Service and Matthew Holbrook

Before:
John P. Sellers, III
Administrative Law Judge

[1] At the hearing (Tr. 39-40), both parties agreed that Hickson was the correct surname of this individual, although the name had previously appeared in documents as Hickman, including on his written statement. (JX 26.) Consequently, Hickson has been substituted for Hickman throughout this decision.

DECISION AND ORDER[2]

This matter arises from a claim under the employee-protection provisions of amended and re-codified Section 405 of the Surface Transportation Assistance Act ("STAA") of 1982, 49 U.S.C. § 31105. The implementing regulations appear at Part 1978 of Title 29 of the Code of Federal Regulations ("CFR"). Section 405 of the STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee because the employee has undertaken certain enumerated protected activity, including 1) filing a complaint related to the violation of a commercial motor vehicle safety regulation, standard, or order or 2) refusing to operate a motor vehicle when its operation would violate such rules.

This decision is based on the exhibits admitted at the hearing,[3] the testimony of the witnesses, and the arguments of the parties in their post-hearing briefs.

PROCEDURAL HISTORY

Jerry Douglas Jones (the "Complainant") initially filed an undated complaint under the STAA, alleging that Schwan's Home Delivery in Salt Lake City, Utah, had discriminated against him and terminated his employment in retaliation for "refusing to take direction from his manager regarding the safety status of a truck to which he was assigned." (JX 9.)

On February 20, 2018, Counsel for the Complainant filed an Amended Complaint against Schwan's Home Delivery, Inc., Monique Ingold, Matthew Holbrook, Patrick Hickson, and "John Doe and Mary Roe." (JX 16.) The Amended Complaint identified Monique Ingold as a Human Resources representative for Schwan's; Matthew Holbrook as area manager for Schwan's depot at Salt Lake City, Utah; and "John Doe and Mary Roe" as individuals who "took actions to motivate" Schwan's to terminate the Complainant's employment. Patrick Hickson was not further identified.[4]

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[2] This document has been formatted to substantially comply with Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. § 794d), as amended ("Section 508"). Section 508 requires electronic and information technology procured, developed, maintained, and used by Federal departments and agencies to be accessible to and usable by people with disabilities, unless an exception applies.

[3] At the hearing, the following exhibits were admitted: Administrative Law Judge Exhibits ("ALJX") 1-3 (Tr. 7); Joint Exhibits ("JX") 1-30 (Tr. 8); Complainant's ("CX") 1-6 (Tr. 13); and Respondent's Exhibits ("RX") 1-2 (Tr. 17). RX 3 and 4 were withdrawn at the hearing. (Tr. 17.) At the hearing, it was discussed that CX 2, although identified on the Complainant's exhibit list as a transcript of the conversation between the Complainant and Ingold on January 11, was actually a transcript of the Complainant's conversation with Mark Wortman on that date. (Tr. 11-12.) The transcript of the meeting with Ingold on the 11th was obtained after the hearing and is marked and admitted as CX 7. Of note, CXs 1 and 2-5 are digital audio files. These were submitted electronically and have been transferred to a CD ROM and made part of the record in that manner.

[4] In his original complaint, the Complainant identified Hickson as a "Route Sales Rep with management responsibilities" who acted as Holbrook's second-in-command but was "the true manager at the depot

According to his amended complaint, the Complainant had engaged in certain specific activity protected by the STAA: 1) filing internal complaints that vehicles assigned to him were in a condition that violated commercial-vehicle safety regulations, and 2) refusing to drive unsafe vehicles assigned to him on January 10 and 11, 2018. Moreover, he alleged that as a result of his protected activity, he was placed on suspension on January 11, 2018, and thereafter discharged on January 16, 2018.[5]

An investigation conducted by the Occupational Safety & Health Administration ("OSHA") of the Department of Labor ("DOL") followed. On May 8, 2018, the OSHA Area Director issued the investigation's findings. (JX 30.) The investigation found that the Complainant had indeed engaged in protected on January 10 and 11, 2018, when he "reported" and "voiced concerns" about two separate Schwan's vehicles to which he had been assigned. The Area Director also determined that the "Respondent" must have known about the protected activity. The Area Director concluded, however, that the "evidence supported [the Complainant] had resigned" and therefore "was not subjected to an adverse employment action." (*Id*.)

On May 28, 2019, this Office received the Complainant's Objection to Secretary's Findings and Order. (JX 30.) On July 22, 2019, Chief Administrative Law Judge Henley issued an Order Appointing Mediator. (ALJX 4.[6]) On August 5, 2019, Judge Henley issued a Supplemental Order Concluding Mediation, advising that the parties had not been able to reach a settlement. (ALJX 5.[7])

The matter was subsequently assigned to me. A hearing was originally noticed and scheduled for May 20, 2020. (ALJX 1.) Disruption caused by the Covid-19 Pandemic and continuances requested by the parties delayed hearing of the matter. On July 7, 2021, a hearing was noticed and scheduled to begin on September 14, 2021. (*Id*.) The hearing was conducted via videoconferencing. The parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of

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as [Holbrook was] just learning the ropes." Elsewhere in the record, after Holbrook took over as area manager on January 8, 2018, Hickson is referred to as the "assistant manager." (Tr. 322.) In the proceedings below, Schwan's indicated that Hickson's actual title was Sales Operation Specialist, or SOS. (JX 15 at 3.)

[5] The Complainant sought reinstatement, back pay, compensatory damages for emotional distress and mental pain, punitive damages, interest on damages, attorneys fees and expenses, expungement of adverse information from his employment file, amendment of his records to reflect continuous employment, posting by Schwan's of any favorable decision in a conspicuous workplace location for 90 days, and a copy of any favorable decision sent by Schwan's to all present employees and all employees who were working with the Complainant at the time he was discharged. (JX 16.)

[6] Although not previously admitted, I am marking and admitting Judge Henley's Order Appointing Mediator as Administrative Law Judge Exhibit 4, for procedural purposes only.

[7] Although not previously admitted, I am marking and admitting Judge Henley's Order Concluding Mediation as Employer's Exhibit 5, for procedural purposes only.

Administrative Law Judges. At the hearing, the following witnesses were examined: the Complainant Jerry Jones, William Edward Vollmer (Safety Director of Schwan's), and Matthew Holbrook (formerly Area Manager at the Salt Lake City facility). Of note, the named Respondents Ingold and Hickson did not appear and were not represented at the hearing. Both were no longer employees of Schwan's and their addresses unknown, despite the efforts of the parties and the undersigned to determine their present whereabouts. Attempts to serve notice of the hearing on them were unsuccessful. (Tr. 5.)

In reaching a decision, the undersigned has reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at hearing, and the arguments of the parties. Where applicable, I have made credibility determinations concerning the testimony.

ISSUES

The issues contested by the Complainant and Respondents are as follows:

1. Whether the Complainant engaged in activities protected under Section 31105(a)(1)(B)(i) by refusing to operate a commercial vehicle in violation of commercial motor vehicle safety regulations.

2. Whether the Complainant engaged in activities protected under Section 31105(a)(1)(B)(i) by refusing to operate a commercial vehicle based on a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety condition.

3. Whether the Complainant engaged in activities protected under Section 31105(a)(1)(A)(i) by filing complaints related to violations of commercial motor vehicle safety regulations.

4. Whether the Respondents took any adverse job action against the Complainant.

5. Whether the Complainant's protected activities contributed to the Respondents taking an adverse job action against him.

6. Whether the Respondent can show by clear and convincing evidence that it was highly probable that it would have taken the same action in the absence of his protected activities.

7. Whether the Complainant took reasonable steps to mitigate his damages.

8. The relief, if any, to which the Complainant is entitled under the STAA.

I. Stipulations

The parties stipulated on the record that the STAA applies to the business conducted by Schwan's; that Schwan's is a covered employer under the Act; that the Complainant timely filed a complaint with Occupational Safety and Health Administration ("OHSA") under the Act; that the Complainant timely filed objections to OHSA's findings adopted by the Secretary; and that the United States Department of Labor {"Department") has jurisdiction to hear this matter. (Tr. 21-22.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTUAL BACKGROUND

I. The Complainant's Testimony and Complaints

The Complainant identified himself as a truck driver with a commercial driver's license ("CDL") issued by the state of Ohio in 1992. (Tr. 27-28.) At the time of the hearing, he estimated that he had worked as a commercial truck driver for a total of twenty-five years. (Tr. 28-29.) He testified that he had never had his CDL revoked or suspended. (Tr. 30.) He explained the importance to him, as a holder of a CDL, of the CSA score. He described the CSA score as a point system, used by all the states, in which points are assessed against a commercial driver when they are stopped at a roadside inspection and determined to be driving a vehicle that is non-compliant with Department of Transportation ("DOT") safety regulations. (Tr. 33.)

The Complainant described how, in October 2018, he sought and obtained employment as a route sales representative ("RSR") with Schwan's Home Delivery Service at one of the company's facilities in Salt Lake City, Utah. (Tr. 38-39, 45.) He testified that the job paid a fixed amount per day ($160), but RSRs were able to earn extra money based on the income they generated with sales. (Tr. 46-47.) In other words, the job did not simply involve driving a truck, but involved both delivery and sales. The Complainant's job, as he described it, was to deliver the company's frozen-food products to customers and increase sales. (Tr. 53, 58.) Sales and deliveries involved parking the company's truck curbside and knocking on the customer's door. (Tr. 54-55.)

After a brief period of training, the Complainant stated, he was assigned a delivery route. (Tr. 60-62.) He worked out of a facility that had approximately eight drivers or RSRs. (Tr. 64.) In addition to other RSRs, the Salt Lake City facility had an area manager and other employees who worked in the "freezer building." (Tr. 63.)

Before a day of deliveries, the Complainant described how he would perform a pre-trip inspection of his assigned vehicle.[8] (Tr. 64.) As part of the inspection process, the Complainant

[8] The best description of the type of vehicles Schwan's operates is found in the company's position statement filed below. (JX 15.) According to Schwan's, the vehicles in question were "refrigerated

was required to fill out a "Daily Vehicle Inspection Report" ("DVIR") on a handheld computer ("HHC"). (Tr. 65-66.) According to the Complainant, the DVIR was unique in his experience, and required a portion to be filled out at the beginning of the day (the pre-trip inspection), and another portion to be filled out at the end of the day (the post-trip inspection). (Tr. 66.) He stated that, if he found that the vehicle had passed the pre-trip inspection, he would enter "satisfactory" into the HHC assigned to that particular truck, which, in turn, would cause to appear the name of his first customer for delivery. (Tr. 67.)

The Complainant testified that he found the job "hard" but "stimulating," and he valued the relationships he built with customers, finding them enjoyable. (Tr. 69.) However, he stated that from the outset of his employment, he felt "frustration" with management, specifically over the way Hickson deferred making necessary vehicle repairs. He stated that Hickson had been an "excellent trainer," but made it "difficult" for him, the Complainant, to maintain a "defect[]-free truck." (*Id*.) As an example, he explained that he found it difficult to get a wiper blade or light fixed. (*Id.*) Moreover, he asserted that he was "instructed" to do things on the DVIR that he knew were "not legal." (Tr. 69-70.) He claimed that "instead of fixing my truck, [Hickson] would encourage me to put my defect on the DVIR as a piece of paperwork to be sent to management, and they would schedule a time they would get to fixing my truck." (Tr. 70.) He stated that he would attempt to accelerate this process by insisting that parts be scavenged off other trucks in order to have a truck that was "defect-free." (*Id*.) He stated that he got some "pushback" for doing this, but that Hickson accommodated his efforts. (Tr. 72)

The post-trip inspection, he testified, was performed at the end of the day when the truck was returned to the facility. (Tr. 74.) Whenever he was assigned a new vehicle the following day, he made it a point to review the prior DVIR post-trip inspection report prepared by the previous driver, as well as "all the paperwork on the truck." (*Id.*) Whenever he was assigned a new truck, the Complainant admitted that he gave it a "very, very close inspection" since he was unfamiliar with it. (*Id*.)

The Complainant recounted his experience with the first truck assigned to him. The truck was plagued with stalling and failing-to-restart problems, according to the Complainant, but Hickson, who was then still charge before Holbrook took over as AM, was determined to keep it in service. (Tr. 70-78.) The Complainant recounted that his complaints regarding the truck became "a really contentious point" between the two men. (Tr. 80.) According to the Complainant, Hickson told him that a mechanic would look at the truck, but, meanwhile, they had to get "that product off to the customer." (*Id*.) He stated that the mechanical problems persisted for several days. (*Id.*) He described how he viewed the temporary solution proposed by Hickson to keep the truck from stalling, which was parking it in gear with the engine running, tires pointed to the curb, and the emergency brake engaged, as dangerous. (Tr. 81.) He explained that he feared the parking brake failing and the unattended truck either jumping the curb or wandering into traffic. (*Id*.)

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trucks over 10,000 pounds GVW ("trucks"), making them regulated by the US DOT and similar state agencies." *Id*. at 2.

Finally, on January 9, 2018, the truck, after stalling and refusing to start, had to be towed back to the facility. The Complainant testified that at that point he began to feel frustrated by the tension between maintaining deliveries and operating what he considered an unsafe vehicle. (Tr. 85.) He described Hickson as being caught in the middle, wanting to keep deliveries on schedule even when there were not enough "safe" trucks available. (Tr. 86.)

The following day, January 10, 2018, the truck was not yet repaired, and Hickson allowed the Complainant to perform administrative work at the facility. (Tr. 90). The next morning, on January 11, the Complainant was assigned a new truck.[9] When he started the engine as part of his pre-trip inspection, the Complainant recounted hearing "a very loud metal-on-metal squeal or whistling or squeaking sound that was ear-piercingly loud…." (Tr. 94.) He described the sound as "terrifying," as if the truck was "going to blow up." (*Id*.) He testified that he was forced to plug his ears, and those with him, the previous operator, Moyle Mills, and the Complainant's supervisor on that date, Matt Holbrook, who had just assumed the role of AM that week, had to yell to hear each other above the din. (*Id.*) According to the Complainant, the sound emanated from the engine compartment, near the turbo. (Tr. 95.) The Complainant stated that Mills told him that he was familiar with the problem and suspected it was the turbo or a bearing that was going out. (Tr. 96.) Confronted by a written statement by Mills that he had advised the Complainant that the noise would abate, and that he revved the engine to demonstrate it abating, the Complainant replied that the sound came back after Mills revved the engine. (Tr. 96-97.)

According to the Complainant, in his experience at Schwan's, repairs were not made unless the trucks were undriveable. (Tr. 97.) He stated that the metal-on-metal sound suggested that a bearing might be going out. He recounted how he had once experienced a fire in his truck caused by a bearing producing friction. (Tr. 97-98.) He testified that he told both Mills and Holbrook, "That truck is broke." (Tr. 99.) According to the Complainant, the sound from the engine was such that if you heard it, you would "turn just out of fear of your own life," wondering if it was a "threat to your existence." (Tr. 100.)

The Complainant acknowledged that Holbrook[10] told him that he had driven the truck a week before and it was "fine." (Tr. 101.) He stated that, as he proceeded to complete his pre-trip inspection, Holbrook told him, "Just stop," and walked away when he asked why. (Tr. 101.) He stated that he nonetheless went ahead and completed the inspection because he considered the problem a safety risk and wanted "to let management understand that trucks with defects cannot be driven until the defects are resolved." (Tr. 102.) He testified that, in his view, being aware that a bad bearing could cause a fire, the truck was not safe to operate. (Tr. 103.) Consequently, he testified, after choosing the "unsatisfactory" box on the DVIR form on HHC screen, he added the words "out of service" on the form and signed his name. (Tr. 104.)

[9] The truck was a "compact Isuzu-model refrigerated freezer truck." (JX 15.)

[10] Although the Complainant said that Holbrook told him that he had driven the truck, he may have meant to say Hickson or Mills. *See infra*.

The Complainant also testified to getting into a verbal and near-physical altercation with a co-worker, Jared Dunn, whom he accused of butting into the conversation and challenging his decision not to drive the truck "in a very confrontational manner." (Tr. 107.) The Complainant later complained to HR that Holbrook was slow to intercede and separate the two. (CX 7 at 16.)

According to the Complainant, he was then assigned another truck, but while performing a pre-trial inspection on that truck, he discovered upon opening the driver's door a "loose and defective" fire extinguisher on the floor. (*Id*.) Additionally, he remembered the nozzle of the extinguisher being present, but broken off. (*Id*.) The Complainant also observed an expired license tag, as well as a lack of current insurance papers. He therefore refused to drive the new truck, deeming it unsatisfactory to use. (Tr. 114-115.) On the DVIR, he did not check off a box to indicate that the vehicle was either satisfactory or unsatisfactory. Instead, he left both spaces blank. However, he wrote "OUT OF SERVICE" in large capital letters across a large swath of the form. He added: "No current insurance papers. License tag is expired. Inspection not complete." (JX 6 at 3.)

The Complainant recalled that, by this point, he felt rattled, the victim of a hostile work environment, and wanted to speak to someone in the company above Holbrook. (Tr. 114-116.) He stated he went back into the meeting room with Holbrook, who showed him a laminated card with a list of defects, asking him to identify which one applied to the first truck. (Tr. 119.) Thinking that the noise came from the turbo, the Complainant testified that none of the listed defects applied. (*Id.*) Moreover, the Complainant testified that he continued to request to speak to Holbrook's supervisor, who he considered to be Mike Lepore. (Tr. 120.)

Conversation with Mark Wortman

Instead of Lepore, Holbrook connected the Complainant via telephone with Mark Wortman.[11] (RX 2.) Wortman was put on speaker, and the Complainant recorded the conversation with his cellphone. A transcript of the conversation is found at RX 2.

At the start of the conversation, the Complainant explained to Wortman that he was "a CDL driver in good standing with an up-to-date certification" and would not do anything to put his license in jeopardy. (*Id.* at 2.) He then explained the situation with the truck with the loud noise, and the pressure and hostility he felt from his co-workers. (*Id.* at 5-7.) He described a "pattern" of "guys driv[ing] trucks with all kinds of problems" and "think[ing] they [will] fix them when they get the time." (*Id.* at 7.)

Wortman assured the Complainant that he had "the right" to stop any "unsafe work." (*Id.* at 10.) Indeed, he stated that if the Complainant deemed something unsafe, "we've gotta

[11] Later that day, the Complainant spoke to Ingold in HR, who identified Wortman as the logistics manager. (CX 7 at 27.) In their brief, the Respondents refer to Wortman as a "Regional Operations Manager." Resp. P.-Hg. Bf. at 8.

get something fixed, Jerry." (*Id*. at 12.) Wortman then explained the system Schwan's had in place. (*Id.* at 16.) He explained that a level-one defect required that the vehicle be taken out of service immediately; however, a level-two defect, which was considered less serious, allowed the vehicle to remain in use for fourteen days until it was repaired. (*Id.*) However, he emphasized that if the Complainant felt that the source of the loud noise on the truck was the turbo, or even a "squealing muffler," and deemed it unsafe to drive on his pre-trip report, then Schwan's had to get the truck repaired immediately. (*Id.* at 16.)

The Claimant responded positively to Wortman's comments.[12] He observed, though, that having to protect his CDL license, he was not comfortable with a system that allowed him to continue to operate a vehicle with a level-two defect for any length of time. He stressed that as a bearer of a CDL license, the DOT could "ding" him even for a level-two defect, such as "even a light out." (*Id*. at 17.)

Wortman asserted that the system of designating defects as level one and level two "comes" from the DOT, with whom Schwan's was in communication. (Id. at 19.) He stated that the DOT were "the ones that have set this in place of what should be a level one and what is a level two." (*Id*.) He stated that the system was "not anything" that either he or the Complainant could change, and that it was "something DOT has agreed upon with Schwan's." Moreover, Wortman assured the Complainant that the DOT would not deem a truck with a level-two defect inoperable at a DOT inspection if it were still within the 14-day window for repair. (*Id.* at 20.)

The Complainant did not further argue with the system as it had been explained to him, but he told Wortman that the reason he was still planning on "going to HR" to report what had happened was the reaction of his co-workers, which he deemed hostile. He remarked that Dunn had "chewed [him] out" in front of his manager, Holbrook. (*Id*. at 24.) He expressed his concern that although he felt that Wortman was exonerating him in a private conversation, his behavior would not be "cleared" among his coworkers. (*Id*.)

After the phone call, the Complainant testified that he requested leave from Holbrook to take off the rest of the day because he felt "threatened by the escalation." (Tr. 125, 140.) He explained that he would be the last person leaving on his route, and therefore the last to return, and that he feared that, while he was on route, his tires might be slashed on his personal vehicle parked at the facility. (*Id.*) He also referred again to an incident earlier in the morning, in which he suspected that the chocolate powder he put in his morning drink had been tampered with. (*Id*.)

[12] At the hearing, the Complainant expressed that he would have been satisfied with Wortman as his manager since Wortman acknowledged that he was "in the position of responsibility in determining what was safe about the vehicle and what was not safe." (Tr. 268.) He drew a distinction between Wortman and Holbrook the latter of whom he suspected of trying to "influence" his view as to what was safe and not safe. (*Id*.))

Holbrook granted the Complainant leave for the rest of the day. (Tr. 140). The Complainant denied ever resigning his position on that morning. (Tr. 131, 142.) He testified that after leaving a voicemail with HR, he spoke to Ingold of the HR Department on his way home. (Tr. 136. 141.) The Complainant recorded this conversation as well, and the audio file is found at CX 1, and the transcript of the conversation is found at CX7.

Conversation with Monique Ingold

The Complainant began his conversation with Ingold by advising her that he had experienced "a pretty dramatic escalation…at my workplace" and that he was "afraid of going back to work." (CX 7 at 2.) Ingold responded, "Oh, my goodness," and asked him to tell her what had happened. (*Id*.) The Complainant explained that his "replacement truck," by which he was referring to the truck with the loud noise, did not "meet [his] qualifications as a roadworthy truck." (*Id*. at 3.) Ingold then asked if the vehicle "fell short of a level one," referring to the Schwan's inspection protocol, to which the Complainant replied, "Yeah." Ingold responded, "Okay, then that's it. Level one is level one." (*Id.*) Asked by Ingold to describe the level-one defect, the Complainant answered that it was a "persistent loud squealing sound at the turbo…." (*Id*.) Ingold remarked, "Okay. So that sounds dangerous to me." (*Id.* at 3-4.) The Complainant also advised that the truck had an amber light illuminated on the dashboard, indicating that the truck required service. (*Id*. at 4.)

Pressed on whether the sound and amber light indeed constituted a level-one defect, the Complainant replied differently, this time stating that he did not know. He described the truck as a "spare vehicle, got this loud noise, so no one uses it until it has to be pressed into service because your vehicle is out of service." (*Id.* at 6.) He told Ingold about the altercation he had with Dunn, complaining that neither Holbrook nor Hickson had intervened to separate them, and that he suspected that his morning drink had been earlier tampered with. (*Id* at 6-8.) He also reported that he found the next vehicle assigned to him unroadworthy because it had expired insurance information, an expired state tag, and a "broken and loose fire extinguisher." (*Id* at 8.)

The Complainant then volunteered that, in his view, the depot was "truly run" by Hickson, not Holbrook, because Holbrook was "brand new" and did not "know very much of anything." (*Id*. at 23.) He stated that because of Hickson's experience with the vehicles he was the person who kept the depot running, describing him as a "MacGyver guy" who could "make a bomb with toothpaste." (*Id*.)

After listening to the Complainant's version of events, Ingold told him, "I'm very interested. And I want to apologize to you because, no, you're—no, you did nothing wrong." (*Id*.) She asked if the Complainant had felt intimidated when Dunn confronted him. The Complainant replied, "Well, not physically. I can stand up for myself. (*Id*.)

Ingold then asked if the Complainant had "put the [truck with the loud noise] out of service," to which the Complainant responded, "Yes." (*Id*. at 10.) He then stated that he felt

that he could not mark the truck as satisfactory, but that Hickson had done so, after commandeering the HHC, "so that he could make that truck available to himself." (*Id.* at 11.) He described Hickson as performing a "self-breach" of the HHC "in order to log me off on that computer so he could use it to complete the route for the day." (*Id*.) Ingold then asked if Hickson proceeded to complete that route, and the Complainant responded that he had not because "I talked [Holbrook] out of that." (*Id*. at 12.)

The Complainant then told Ingold that Holbrook next attempted to get the Complainant to classify the problem with the truck with the loud noise as a level one or a level two. (*Id*. at 13-14.) He added, "And I said to him, I said you don't understand that." (*Id*.) "The truth is when the driver says it is out-of-service, and he signs a form that it is out-of-service, a mechanic must come and say it is now serviceable. It has to be signed off by a mechanic." (*Id*. at 14.) The Complainant next asserted that even if he determined that the truck had "too much dirt in the cab" or made up something "baloney," the mechanic would still have to come and "certify that it's drivable." (*Id*.)

The Complainant next told Ingold that the purpose of Holbrook wanting to get Hickson involved before he completed the DVIR was that Hickson would come and talk him into driving the truck despite the loud noise. (*Id*.) He then recounted to Ingold how he said, "I'm a truck driver. I have a CDL. I quit being a truck driver to take this job. I know this truck has a failing turbo. I am not going to certify it. I don't care who we talk to. It's out of service. I wrote out of service on the piece of paper." (*Id*. at 14-15.)

The conversation then turned to the second truck with the broken fire extinguisher. (*Id*. at 18.) The Complainant told Ingold that on inspection of this truck, he discovered that it had expired tag from "a state other than a state it's registered with," expired insurance papers, and a "loose and damaged and broken fire extinguisher." (*Id*. at 18-19.) Ingold responded that she agreed with the Complainant that "you can't drive an expired vehicle." (*Id*. at 19.) She added, "Anybody can see if there's a broken and damaged fire extinguisher, I can't take that vehicle out. It's kind of crazy." (*Id*. at 19-20.)

Finally, Ingold stated, "I'm going to believe in my heart of hearts that we're going to be able to get you back to work in a proper truck and that we're not going to have any issues." (*Id*. at 21.) She added, "That would be my belief and hope. (*Id*. at 22.) She instructed the Complainant not to go back to work that day, and that she would "follow up" on the matter. (*Id*.) She stated that she did not know "what the heck happened," and that she was "just going to say maybe" it was "the pressures of having a new manager" or "just the pressure of not having trucks and having to run routes…." (*Id.*)

The conversation concluded with Ingold assuring the Complainant that safety was first at Schwan's, and that she would reach out to him again later that day. (*Id*. at 25.) She advised him that she intended to speak to Holbrook, the area manager. (*Id*. at 26.) She told him that her goal was to have a conversation with Holbrook about "how are going to fix these things so you can come back to work and feel safe and right in your environment." (*Id*. at 30.) She closed

by telling the Complainant, "Relax the rest of the day. It is a paid day. And let me take care of this." (*Id*.)

Meeting with Ingold and Mike Lepore

As noted, because of his phone call to Ingold on the 11th, the Complainant was placed on paid leave while HR looked into the matter. Written statements were obtained from his co-workers on the 11th. On the 16th, the Complainant reported to the facility and found himself speaking to Lepore in person and Ingold on the phone. (Tr. 143-145.) Once again, the Complainant clandestinely recorded the conversation, after Ingold expressly told him not to, and the audio file is found at CX 4, and the transcript at CX 6.[13]

After first discussing the incident of alleged tampering, the conversation turned to the Complainant's allegation of a hostile work environment. It was clear from Lepore and Ingold that management's perception of the events on the 11th had changed based on the information they had obtained as part of their own investigation. Ingold first advised the Complainant that he should have "stepped back" and let Holbrook "get some answers," instead of adopting an attitude of "just follow[ing] what I say." (*Id*. at 9.) Lepore emphasized that Holbrook was "not saying don't shut the truck down, Jerry," but was merely stating that he wanted to get Hickson's thoughts on the matter, and asking for the Complainant to wait until he did. (*Id*. at 12.) According to Lepore, "We were saying, let's see if this falls within level one or level two and we will make a decision together." (*Id.)*

Ingold then informed the Complainant that she understood that the truck with the loud noise "came down to potential level two." She then remarked that there was "a certain amount of time in which you could…run that truck because of the issue that may have been identified." (*Id.*) She then observed, however, that the truck was taken out of service, and that "all the right decisions were made in the end." (*Id*.) She reminded the Complainant, though, that he was "taking directions from the company and this manager is speaking on behalf of the company…. (*Id*.)

After remarking that "we could have avoided a lot of this," Ingold stated that the Complainant had a discussion with Holbrook and "told them that you weren't going to be here after the next week anyway." (*Id*. at 15.) She stated, "You had given them, I guess, your verbal resignation from the job, you know, because you had these concerns." (*Id*.) The Complainant quickly interjected, "Absolutely not true." (Id.)

[13] Of note, Ingold instructed at the beginning of the conversation that the Complainant put away his cell phone and not engage in any unauthorized recording of the conversation, which was against company policy. (CX 6, Tr. at 3.) The Complainant indicated that he would comply and would only take notes with a pen. (*Id*.) At the hearing, both the audio file and the transcript were admitted without objection. The Complainant testified that, notwithstanding Lepore's instructions, he recorded the conversation because he thought he might be fired. (Tr. 146.)

The Complainant then turned the conversation back to the inspection protocol. He asked about the situation where he did not know if something was a level 1 or a level 2, such as with the loud noise coming from the truck. (*Id.* at 16.) Lepore replied by first stating that the company had the classifications posted on a wall, but he then conceded that there were "a number of items that could fall under level one or level two." (*Id*.) Ingold, though, suggested that all the necessary classification information was printed on the DVIR. (*Id.* at 16-17.) She then commented that if, in filling out the DVIR, a driver identified a "serious concern," the proper course was to bring in the manager so the manager "could validate that for you." (*Id*. at 17.)

Ingold then suggested that the Complainant's unwillingness to engage in such a dialogue with Holbrook before completing the DVIR was where the Complainant had gone wrong on January 11. (*Id*.) She chastised him for not engaging with Holbrook "[i]nstead of being so strong and saying nope." She characterized his attitude as, "This is what I believe it is and I have the right to do this," and "I'm right, you're wrong." (*Id.* at 17-18.)

The Complainant then informed Lepore and Ingold that he had just sent them an email on his phone. The email is found at JX 13. In it, the Complainant described the difference between a level-one and level-two defect. He stated that he had learned this distinction in company presentations and discussions with management. He then added, "But the following law presentation shows the folly of such a strategy." (*Id*.) He then added, "**Schwan's is wrong, BIG TIME**." (*Id*. at 3.) (Emphasis in original.)

The email continued by hyperlinking to a law review article. According to the Complainant, the article showed that "defects cannot be legally noted on the DVIR with the vehicle in operation and the defect not corrected and signed off as such." Moreover, the Complainant asserted that "DVIR's [sic] are not required by law," and provided a hyperlink to the Federal Motor Carrier Safety Administration and the Code of Federal Regulations. He stated that the purpose of his providing this information was to show that there "really is no PURPOSE for the DVIR but to have a platform for drivers who demand that their vehicles are fixed IMMEDIATELY."

The Complainant next suggested that a complete DVIR on board a vehicle during a roadside inspection was a liability for a driver "as they only raise suspicion of a defect, not demonstrate compliance or safe operation." (*Id*.) The Complainant then cited to the STAA as a government-added "layer of protection for drivers concerned they are driving an unsafe vehicle…." He quoted an excerpt of the employee-protections of the STAA, and then noted: "A Schwan's manager is vulnerable to a lawsuit even if they may have been doing only what they were told."

The email closed with an observation that all Schwan's RSRs who drove a truck with a level-two safety defect were "in violation." Ingold then attempted to steer the conversation back to the Complainant's behavior toward his manager on the 11th. She asked the Complainant if he had allowed Holbrook time to consult with Hickson. (*Id*. at 25.) The

Complainant responded, "No," and again asserted that the company's approach to DVIRs was done "in violation of the law." (*Id*.)

At this point, Ingold remarked that she detected from the Complainant "a resistance" to "work with Schwan's." (*Id*. at 26.) The Complainant insisted that he had never said that about himself. (*Id*.) Ingold remarked that the company went through a lot of "legal vetting" to make sure it was "compliant," and she then accused the Complainant of demonstrating "an absolute resistance to us trying to run our business." (Tr. 26-27.) She expressed her view that "this is going to be a continuous issue." (*Id*.)

Ingold next stated that she understood that the Complainant had informed Hickson and Holbrook that he was "not going to be here past next week," to which the Complainant again protested that was not the case. "That's not what I said. I disagree with that. That's not what I said." (*Id*.)

The Complainant then referred again to the STAA, asking Lepore and Ingold if they were familiar with it. (*Id*.) Ingold told the Complainant that he "wasn't a cultural fit for us," and that Schwan's needed someone willing to listen to the employee's management team. (*Id*. at 29.) She advised the Complainant that they were going to "go ahead and accept your resignation," and that he could pick up his final check on Friday. (*Id*.) The Complainant responded, "I have absolutely not submitted my resignation…." (*Id.*) Paradoxically, Ingold replied*, "*I am not challenging that, Jerry." (*Id.*) She added, "And we're not firing you." (*Id*. t 32.) When the Complainant insisted, though, that he had not offered his resignation, Ingold responded that he had offered his resignation and Schwan's was "just accepting" his previous offer to resign. (*Id.*) The Complainant replied that he had "certainly not" offered his resignation in the past and was not offering it now. (*Id*.) Nonetheless, Ingold stated that Schwan's was "accepting your resignation effective today." (*Id.* at 33.) The conversation then concluded with the Complainant being asked to gather his belongings and then escorted off the premises. (*Id.* at 34-35.)

THE COMPLAINANT HAS SATISFIED HIS INITIAL BURDEN

The STAA protects an employee from discrimination because of the employee engaging in certain enumerated protected activity while employed by an individual, partnership, association, corporation or other business entity, including a group of persons, which is engaged in interstate commerce. 29 C.F.R. § 1978.100(a).

On August 3, 2007, President Bush signed "The Implementing Recommendations of the 9/11 Commission Act of 2007," designated as Public Law No: 110-053, 121 Stat. 266. This law significantly amended the STAA employee protection provision, broadening the definition of protected activity, harmonizing the legal burdens of proof with the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") model, and providing for punitive damages up to $250,000, among other changes.

The Administrative Review Board ("ARB" or "Board"), in *Palmer v. Canadian Nation Railway, Illinois Central Railroad Company*, ARB Case No. 2014-FRS-154 (September 30, 2016), clarified the proper analysis under AIR-21's burden-of-proof provisions. The Board outlined a two-step analysis.

> The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.
>
> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

(*Id.* at 52.) Although the excerpted analysis assumes that the employee engaged in protected activity, the Board also clarified, in a footnote, that "[t]he complainant must also of course prove that he engaged in protected activity and that the respondent took an adverse action against him." (*Id*. at n. 215.) This issue will be turned to first.

I. Whether The Complainant Engaged in Protected Activity

The Right to Complain About and Refuse to Drive Unsafe Vehicles

The STAA provides protection for an employee who refuses to operate a vehicle in two instances, both of which, the Complainant alleges, apply here. First, the Act protects an employee who refuse to operate a vehicle because "operation [of the vehicle] violates a regulation, standard, or order of the United States related to commercial motor vehicle safety,

health, or security." *See* 49 U.S.C.A. § 31105(a)(1)(B)(i). This is the so-called "actual violation" provision.[14]

Second, the Act protects an employee who refuses 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." *See* 49 U.S.C.A. § 31105(a)(1)(B)(ii). This section does not require an actual safety violation so long as, under the circumstances, the Complainant's apprehension was reasonable based on the information he possessed at the time. 29 U.S.C.A. §311105(a)(1)(B)(2). *See Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000).

Moreover, the STAA provides protection for employees who merely file "a complaint," provided that the complaint is "related to a violation of a commercial motor vehicle safety regulation, standard or order." *See* 49 U.S.C.A. § 31105(A). Board precedent makes clear that complaints under (A) are protected even though they might eventually prove meritless. *See Allen v. Reco D.S., Inc*. 91-STA-9 (Sec'y Sept. 24, 1991) slip op. at 6, n.3. The Sixth Circuit, in whose jurisdiction this claim arises, agrees. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992).

In his amended complainant and prehearing statement, the Complainant alleged the following instances of protected activity:

> 1. Complaints about the first vehicle assigned to him, which the parties do not appear to dispute had a stopping and failing-to-start problem, the origin of which the record does not identify;
>
> 2. Complaints about, and his refusal to drive, the first replacement vehicle assigned to him on January 11, 2018, which produced a loud whistling noise, apparently from the area around the turbo, but the cause of which the record does not identify;
>
> 3. Complainants about, and his refusal to drive, the second replacement vehicle assigned to him on January 11, 2018, which the record establishes had a broken nozzle on the fire extinguisher; and
>
> 4. Complaints about Schwan's inspection protocol, which he claimed operated in contravention of federal commercial-vehicle regulations regarding pre-trip vehicle inspection.[15]

[14] The Board has made clear that, in order for a refusal under 49 U.S.C.A. § 31105(a)(1)(B)(i) to be protected, there must be a finding by the administrative law judge that driving the vehicle would have constituted a violation. *See Minne v. Stair Air, Inc*., 2004-STA-26 (ARB Oct. 31, 2007) , slip op. at 10-11.)

[15] In his amended complaint, the Complainant pleaded that he complained about the inspection protocol without specifically identify those complaints as part of his protected activity (JX 16.) However,

(JX 16.; ALJX 2.)

Each will be discussed in turn.

The Truck with the Starting Problem

As outlined previously, the Complainant never refused to operate this truck. Rather, he drove it until it had to be towed back to the depot. However, he testified that he made numerous complaints about its failure-to-start problem with Hickson, who kept encouraging him to drive it, and offered advice on how to circumvent the problem which, in the Complainant's view, did not solve the problem but only compounded the safety risk to the public. According to the Complainant, he was told by Hickson to allay the truck's problem by leaving it running, in gear, with the emergency brake on, with the tires pointing toward the curb, while making deliveries. The Complainant asserts that the complaints he made regarding the continued operation of this truck related to a violation of 49 C.F.R.§ 396.3. That section states, in pertinent part:

> (a) General. Every motor carrier and intermodal equipment provider must systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles and intermodal equipment subject to its control.
>
> (1) Parts and accessories shall be in safe and proper operating condition at all times. These include those specified in part 393 of this subchapter and any additional parts and accessories which may affect safety of operation, **including but not limited to**, frame and frame assemblies, suspension systems, axles and attaching parts, wheels and rims, and steering systems.

(Emphasis added.) Comp. P.-Hg. Bf. at 24. The Complainant further argues that his complaints regarding this truck related to 49 C.F.R. § 396.7(a), which states that "A motor vehicle shall not be operated in such a condition as to likely cause an accident or breakdown of the vehicle." He

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in his pre-hearing statement, the Complainant made clear that he was raising the issue of whether his complaints concerning the protocol were protected activity under the Act. He first phrased the issue as, "Did Complainant engage in an activity protected under 49 U.S.C. § 31105(a)(1)(A) by filing complaints related to violations of commercial vehicle safety regulations?" He then stated his position as, "On January 11, 2018, Complainant filed internal complaints about non-compliance with commercial vehicle safety regulations, including vehicle inspection rules. During a meeting with Monique Ingold on January 16, 2018, Complainant also filed complaints stating, among other things, that he would not operate in violation of commercial vehicle safety regulations, and stating that Respondents' criteria for placing vehicles into service with violations was improper and violated the law. These complaints were related to, 49 C.F.R. §§392.1, 392.7, 393.1, 393.9, 396.1, 396.3, 396.7, 396.11, 396.13." ALJX 2, Comp. Pre-Hg. Statement at 2.

also cites to 49 C.F.R. § 396.13, which states, in part, that "[b]efore driving a motor vehicle, the driver shall: (a) Be satisfied that the motor vehicle is in safe operating condition."

The Respondents do not argue in their brief that complaints regarding the operation of this truck do not "relate[] to a violation of a commercial motor vehicle safety regulation, standard or order." Rather, they argue that the Complainant did not engage in any protected activity because he admitted on the witness stand that he never made any notation of the defect, which the Respondents describe as an "ignition problem," on the DVIR. Resp. P.-Hg. Bf. at 13. According to the Respondents, unless the Complainant informed management about "the specific nature of the vehicle's defects by completing the required DVIR, Schwan's could not address the issue or call a mechanic to remedy the defect." *Id*.

While the Complainant testified that he never noted the failing-to-start problem of this truck on the DVIR (Tr. 192), the STAA's protection is not limited to only written complaints. *See* 49 U.S. C. §31105(a)(1)(A)-(B). In this regard, the Board has held that, "Internal complaints about violations of commercial motor vehicle regulations may be oral, informal, or unofficial." *Jackson v. CPC Logistics*, ARB No. 07-006, slip op. at 3 (Oct. 31, 2008), *citing Calhoun v. United Parcel Serv*. ARB No. 04-108, slip op. at 14 (Sept. 14, 2007).

The Complainant testified, without contradiction, that he and Hickson were engaged in a running debate over whether this truck should be kept on the road until finally it would not restart and had to be towed back to the facility. He stated that he asked Hickson "many times…please don't put [the truck] into service." (Tr. 252.) He explained, with some remorse, that he did not list the defective nature of the truck on the DVIR because he allowed Hickson to talk him out of it. (Tr. 253-254.) Moreover, he indicated that the problem with the truck would only manifest itself once he was already out on the road, but not during his inspection. (*Id*.)

Regarding the merits of the Complainant's complaints about the truck, the Board has held that "a complainant need only demonstrate that he or she had a reasonable belief that the conduct complained of violated pertinent law or regulations. This standard requires both a subjective belief and an objective belief." *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA6, slip op. at 10 (ARB Jan. 10, 2018). The employee's belief is subjectively held if the employee "actually believed that the conduct he complained of constituted a violation of relevant law." *Gilbert v. Bauer's Worldwide Transp*., ARB No. 11-019, ALJ No. 2010-STA-022, slip op.at 7 (ARB Nov. 28, 2012). Significantly, the Board has also held that a complaining employee "need not expressly describe an actual violation of law," rather it is sufficient if the employee "reasonably believed that the conduct complained of violated pertinent law or regulations." *Newell* at 10.

In this regard, there can be no doubt that the Complainant subjectively believed his complaints about the truck. The reasonableness of his belief cannot be seriously argued, either. The truck did break down. Schwan's Director of Safety, Vollmer, testified that the Complainant's complaints about the truck were justified, stating that he agreed "[a[bsolutely" that the truck should have been taken of service, that it's continued use for deliveries to

customers "should not have been allowed to happen," and, finally, that the truck's defect should not have been "tolerated." (Tr. 310.)

Of note, the record does not make clear what actually was wrong with the truck. In his amended complaint, the Complainant identified the problem with this truck as a "failed alternator." (JX 16.) The Respondents characterized it an "ignition problem." Resp. P.-Hg. Bf. at 13. As noted, however, the missing information is not critical to the protected nature of the complaint, as a complaint is protected even if the safety concern proves meritless. *See Allen*, *supra*. Moreover, even the company's own Safety Manager concurred that the condition of the truck gave rise to a concern over its safety.

I therefore make the following findings:

1. Although the Complainant never indicated on the DVIR that the truck with the failing-to-start problem had a defect, he nonetheless engaged in several conversations with Hickson in which he complained both about the problem and the workaround Hickson suggested of leaving the engine running while the truck was driverless and unattended.

2. The Respondents have not refuted the allegations the Complainant made in his complaint and brief that his complaints about the condition of the truck, as well as the manner in which it was employed, related to several commercial vehicle safety regulations.

3. The internal verbal complaints that the Complainant made to Hickson about the truck constituted protected activity under the STAA, specifically 49 U.S.C.A. § 31105(A), since they related to commercial vehicle safety regulations.

The Truck with the Loud Noise

The Complainant alleges that he engaged in protected activity regarding this truck when he complained about it making the noise, asked not to drive it, and then took it out of service on the DVIR. As far as his complaints relating to "a violation of a commercial motor vehicle safety regulation, standard or order," he cites to the same safety regulations he cited previously regarding the truck with the starting problem. Moreover, he argues that his refusal to drive the truck with the loud noise was protected not only because operation of the truck would have violated those safety regulations, but also because he had "a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's hazardous safety or security condition." *See* 49 U.S.C.A. § 31105(a)(1)(B)(ii). Comp. P.-Hg. Bf. at 30-35.

Conversely, the Respondents argue that the Complainant did not engage in any protected activity regarding the truck with the loud noise because "he did not have an

objectively reasonable belief that safety violations existed." Respondents' P.-Hg. Bf. at 13. Moreover, the Respondents assert that the Complainant's behavior with respect to this truck should be viewed solely as an act of insubordination. Specially, they ask that I focus not on the Complainant's refusal to drive the truck, but on his refusal to pause filling out the DVIR when requested to do so by Holbrook. (Tr. 255.) They also note that the Complainant conceded to deferring to management previously, in similar situations, but deliberately chose not to in this instance. (*See* Tr. 201-202.)

Initially it should be noted that, similar to the problem with the first truck, the record does not establish why the truck was making the loud noise. (Tr. 357.) In other words, the record does not shed light on what, if anything, was mechanically wrong with the truck. On this record, therefore, the only known defect was the noise itself. The parties do not dispute the existence of the loud noise, and the Claimant has submitted a video recording of the noise to confirm it. (JX 8.)

Without knowing what was causing the loud noise, however, it is not possible to know whether the condition of the car violated any commercial vehicle safety regulations. As previously noted, the Board has interpreted language of the Act protecting a person's right to refuse to drive a vehicle "because" to do so would violate a safety regulation as requiring proof of an actual violation. *Minne v. Stair Air, Inc*., 2004-STA-26 (ARB Oct. 31, 2007), slip op. at 10-11. Given the absence of any detailed information regarding the source of the loud noise, I find that the record does not support a finding of an actual violation under 49 U.S.C.A. § 31105(a)(1)(B)(i).

The question arises, therefore, whether the Complainant can prove that his refusal to drive the loud noise was protected because he had "a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's hazardous safety or security condition" under 49 U.S.C.A. § 31105(a)(1)(B)(ii). As noted, the Complainant testified at the hearing that he felt that the metal-on-metal sound might be related to a bearing going bad. (Tr. 97-8.) In fact, he stated that Mills told him that the sound was either the turbo or a bearing; however, in his written statement, Mills did not indicate that he proffered either explanation, but only told the Complainant that the truck had a new turbo and the sound would go away and that he had driven it "just the other day." (Tr. 96, RX 1.) In his written statement, Hickson stated that the "turbo had started to squeal," but he did not indicate what, if anything, he told the Complainant about the cause of the noise. (JX 26.) Dunn, however, stated in his written statement that Hickson first explained to Holbrook that the noise was that of the turbo calibrating and would subside, and that later, when all three returned to the bay, both Hickson and Holbrook attempted to explain to the Complainant "how the turbo/calibration works," but the Complainant "quickly escalated and failed to allow [Holbrook and Hickson] to further explain the details." (JX 25 at 2.) Dunn did state, however, that even though the noise had subsided, the Complainant had stated that he was "scared it would happen again…." (*Id*.)

The language of the Act requires that the employee's apprehension of serious injury be "reasonable." The question is, therefore, whether it was "reasonable" for the Complainant to

disagree with Mills, who had just driven the truck, and Hickson, who claimed he knew that the noise that of the new turbo calibrating and posed no harm. The STAA's "reasonable apprehension" standard is objective in nature; thus "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 unsafe condition establishes a real danger of accident, injury, or serious impairment to health." 29 U.S.C.A. §311105(a)(1)(B)(2). *See Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000).

Although Hickson, Holbrook, Mills, and Dunn attempted to explain to the Complainant why the truck with the loud noise was still safe to drive despite the noise it was making, given his experience with the previous truck assigned to him, I cannot say it was unreasonable for the Complainant to suspect that they were minimizing the risk. That is not to say that Hickson, Holbrook, Mills, and Dunn were wrong in their explanation – as noted, the record sheds no light on what, if anything, was wrong with the truck. Holbrook, Mills, and Dunn might have been correct – the noise could have been harmless and transitory. However, the question here is simply whether, under the circumstances at the time, it was reasonable for the Complainant to believe that the truck, making a loud noise of unsure origin, posed a risk of serious harm to himself or the public. The Complainant testified that he was afraid the noise was caused by a bearing going bad and, based on his own experience, he knew that a bad bearing could cause a fire. (Tr. 98-99.)

The Complainant's lengthy experience as a commercial truck driver is a factor that I must consider in weighing his judgement against those of others. *Murray v. Air Ride, Inc.*, *supra*. The record does not establish whether Hickson, Mills, or Dunn had any experience as trained mechanics or truck drivers, or whether any of them held a commercial driver's license. Hickson claimed the most familiarity with the noise, describing it the sound of a new piece of equipment calibrating; however, as noted, his background and qualifications as someone capable of diagnosing a mechanical problem are not in the record[16], and, in any case, he appears to have erred on the side of keeping the truck with the stalling and failing-to-start problem on the road long after it should have been repaired. Holbrook, the Complainant's manager, was just days on the job as area manager, and appeared to defer to Hickson in such matters. The record establishes that Holbrook had very little commercial-vehicle experience. He testified that he became the area manager for the Salt Lake City facility on January 8, 2018, the Monday before the Thursday during which the incident with the truck with the loud noise occurred. (Tr. 312-313.) He stated that he had never had a CDL. (Tr. 313.) Prior to becoming an area manager at Schwan's, he testified, he had been a District Operations Trainee for Bed, Bath and Beyond. (Tr. 313.) Although he testified that he had received training from Schwan's on commercial-vehicle safety regulations, he disclaimed any knowledge of Part 393 of the

[16] When the Complainant spoke to Ingold on the 11th, he gave as a reason for not trusting Hickson's view of the truck as safe to drive the fact that he was not a mechanic. (CX 7at 14-15.) In their briefs, the Respondents acknowledge that there was no mechanic on the premises during the discussion of what was wrong with the truck with the loud noise.

Commercial Vehicle Safety regulations. (Tr. 314.) He agreed that prior to working for Schwan's, he had no experience in operations with commercial motor vehicles. (Tr. 315.)

I have also taken into consideration that Hickson, the SOS, and Mills, another RSR, had driven the truck recently and found that the noise abated. I give this fact significant weight; however, the noise was still there when the Complainant gave it a pre-trip inspection, as demonstrated by the video recording. (JX 8.) Moreover, Schwan's own Director of Safety, Vollmer, testified that he "[a]bsolutely" agreed with the Complainant that the truck should have been taken out of service. (Tr. 304.) Although Vollmer was not present to hear the explanations of Mills, Hickson, and Dunn, he testified that he would not have driven the truck, either, if he were in the Complainant's position, until the noise was diagnosed. (Tr. 304-305.)[17] I give Vollmer's opinion on the matter great weight. Therefore, unless Schwan's is prepared to argue against its own Director of Safety, it cannot seriously debate whether the Complainant reasonably believed that the noise emanating from the truck made it unsafe to drive.

It should be noted that under this provision of the Act, an employee with a reasonable apprehension that a vehicle poses a risk of serious injury is required to communicate this belief to management and seek correction of the unsafe condition. *See generally Hadley v. Southeast Cooperative Service Co.,* 86-STA-24 (Sec'y June 28, 1991), slip op. at 3-4. The purpose of this requirement is to promote safety by permitting timely correction of safety hazards, as well as thwarting bad-faith refusals. *Mace v. Ona Delivery Systems, Inc.,* 91-STA-10 (Sec'y Jan. 27, 1992). The requirement is not absolute, however, and is subject to qualification when it would be futile or simply not feasible to seek correction from management. *LeBlanc v. Fogleman Truck Lines, Inc*., 89- STA-8 (Sec'y Dec. 20, 1989).

Here, the Complainant identified the loud noise, marked the vehicle as unsatisfactory, and attempted to take the vehicle out of service to make sure the noise was investigated by a mechanic. I find, therefore, that he tried to correct what he perceived as an unsafe condition.

As to the argument that the Complainant acted insubordinately on the 11th by failing to pause and listen to Hickson and Holbrook, analysis of that question will be reserved for the larger question of whether Schwan's had legitimate non-discriminatory reasons for terminating the Complainant's employment. It will also be discussed later whether the Complainant had any authority to take the truck out of service in addition to refusing to drive it. For now, however, the question is solely whether aspects of his behavior fell within the employee-protection provisions of the STAA. The Complainant's refusal to pause filling out the DVIR at the request of his manager, Holbrook, is just one aspect of his behavior on the 11th. His behavior

[17] According to Vollmer, the source of the noise had to be properly "dissected and diagnosed," and if there was no one on-site capable of doing that, the proper course was to call in a mechanic "to diagnose whether that truck was worthy to go on the road. (Tr. 301.) He testified that the truck should "absolutely" have not been utilized until somebody could tell what the issue was. (Tr. 302.) He was not asked whether he considered anyone at the depot qualified to make that diagnosis without calling in a trained mechanic.

also included objecting to operating the truck because of the noise it was making, and then refusing to drive the truck. Vollmer, Schwan's Director of Safety, testified that he had "zero issue" with his decision not to operate the truck, stating that he would have done the same.

I therefore make the following factual findings:

1. The Complainant verbally complained to management about the safety of the truck with the loud noise while standing around and listening to the noise with Holbrook, his manager.

2. The Complainant made written complaints about the safety of the truck when he marked it as "unsatisfactory" on the DVIR.

3. The record does not establish what was causing the loud noise or how serious the problem that caused it.

4. The Complainant's verbal and written complaints about the truck with the loud noise were protected under the STAA, specifically 49 U.S.C.A. § 31105(A) since they related to commercial vehicle safety regulations.

5. The loud noise emanating from the truck, and its unknown source, were sufficient to give rise to a reasonable apprehension that operating the truck posed a risk of serious injury to the driver and the public because of the truck's hazardous or unsafe condition.

6. The Complainant's refusal to drive the truck was protected under *See* 49 U.S.C.A. § 31105(a)(1)(B)(ii) because the loud noise emanating from an unknown source gave rise to a reasonable apprehension that driving it could lead to serious injury either to the Complainant or the public.[18]

The Truck with a Broken Fire Extinguisher

The Complainant further alleges that his complaints and refusal to drive the replacement truck with a broken fire extinguisher was protected activity because the lack of a fire extinguisher in proper working order violated 49 C.F.R. § 392.8, which states:

> No commercial motor vehicle shall be driven unless the driver thereof is satisfied that the emergency equipment required by § 393.95 of this

[18] Because I have found that the Complainant's refusal to drive the truck with the loud noise was protected under *See* 49 U.S.C.A. § 31105(a)(1)(B)(ii), I will not address whether it was also protected under 49 U.S.C.A. § 31105(a)(1)(B)(i), the "actual violation" provision. As noted, the record does not make clear what was actually wrong with the truck.

subchapter is in place and ready for use; nor shall any driver fail to use or make use of such equipment when and as needed.

The Complainant notes 49 C.F.R. § 393.95 required the truck to be equipped with a fire extinguisher, and 49 C.F.R. § 396.3 required the fire extinguisher to be "in safe and proper operating condition.'' Comp, P.-Hg. Bf. at 28.

In response to this allegation, the Respondents do not argue that the fire extinguisher was not broken; indeed, they appear to concede that the nozzle was missing. Resp. P.-Hg. Bf. at 14. Nonetheless, they assert that a fire extinguisher with a nozzle was not an objectively reasonable basis for the Complainant to believe that "safety violations existed." *Id*. In the Respondent's view, "No real safety issues existed with [this truck], especially issues significant to remove it from service." *Id*. The Respondents further observe that they did nothing to influence or affect his decision not to drive the truck. They argue, "All of these issues were fixed a few days later on January 16, 2018. (JX-6, Tr. 333.) No reasonable person in Complainant's circumstances would conclude that vehicle's condition established a real danger of an accident or serious injury." *Id*.

Weighing these arguments, I note that the Respondents' argument that no "safety violations existed" because of the broken fire extinguisher fails to address the applicability of the safety regulations cited by the Complainant, making clear that the truck was required to have a fire extinguisher in proper working order. It is self-evident that a vehicle without a properly functioning fire extinguisher is without the means to combat a fire should it break out in the cabin or the rest of the truck, and therefore poses a risk to the driver and the public, should the fire spread or cause an explosion. I find no merit, therefore, in the Respondents' argument that the Complainant's complaints and refusal to drive this truck were not related to a commercial vehicle safety regulation, or that his refusal to drive was not based on a reasonable fear of serious harm to himself or others. Finally, the fact that the Respondents took no action to influence the Complainant's decision-making does not negate that he engaged in protected activity.

In sum, I find:

1. A broken fire extinguisher is a violation of 49 C.F.R. § 392.8, 49 C.F.R. § 393.95, and 49 C.F.R. § 396.3, all of which are commercial vehicle safety regulations.

2. The Complainant made verbal and written complaints on the DVIR about the truck with the broken fire extinguisher.

3. The Complainant's verbal and written complaints about the truck with the broken fire extinguisher constituted protected activity under the STAA, specifically 49 U.S.C.A. § 31105(A), since they related to commercial vehicle safety regulations.

4. The broken fire extinguisher was sufficient to cause the Complainant a reasonable apprehension that driving the truck could cause serious physical harm to himself or the public.[19]

5. The Complainant's refusal to drive the truck was protected by the STAA under 49 U.S.C.A. § 31105(a)(1)(B)(i), the "actual violation" provision, and (B)(ii.), the "reasonable apprehension" provision.

Complaints about Schwan's Inspection Protocol

As noted, the Complainant also alleged that his complaints about Schwan's pre-trip inspection protocol constituted protected activity. (JX 16; ALJX 2 at 2.) Prior to analyzing this issue, and in order to understand the Complainant's complaints, an examination of the protocol is warranted.

The Protocol

The record does not contain a full explication of how the protocol is supposed to work. However, the parties submitted as a joint exhibit entitled "2017 Home Service and Vehicle Maintenance Safety Issues," and which the parties have jointly labeled "Pre-trip checklist." (JX 4.) Right under the title, this document states:

> Level 1= Any safety or DOT-related issues must be **repaired immediately** before putting the vehicle in service.
>
> Level 2=Any issue or concern, which is not DOT or safety related, must be repaired with 14 days. Turns into Level 1.

(*Id*. at 1.) (Emphasis in original.)

The document contains a checklist of items, classified as level 1 or level 2. The document then instructs drivers that they are to indicate whether the vehicle is in "safe operating condition by indicating satisfactory or unsatisfactory." (*Id*. at 7.) However, if the driver has "identified a level 1 service issue as identified in the Out of Service job aid,"[20] the driver is not given any discretion; rather, the driver is instructed **not** to mark the "'satisfactory' box." Instead, the driver is instructed to, "Mark the truck as 'unsatisfactory,' sign and date the

[19] *But see Robin v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095 (Aug. 6, 2004), in which the Board held that broken windshield wipers did not create a reasonable apprehension of serious injury. Presumably, though, the driver could pull over until the rain stopped if his vehicle did not have working windshield wipers. With a broken fire extinguisher, however, in the case of a fire the driver cannot just pull over, exit the vehicle, and then watch his truck burn.

[20] This document, the "Out of Service job aid," is not among the joint exhibits and was not submitted by either party.

form, indicate the deficiencies on the back, and notify your manager right away for further direction." (*Id*. at 8.) As noted, this direction appears to apply only when the driver can identify the defect on the "Out of Service job aid." When a defect cannot be identified on the job aid, the protocol has a separate provision: "If you have any vehicle concerns that you do not see on the level 1/level 2 job aid, contact your manager to discuss further before completing the DVIR form." (*Id*. at 8.)

In sum, if a driver identifies a defect classified on the job aid as level 1, the driver is instructed to mark the vehicle as "unsatisfactory" and seek further direction from management. If he has a defect which is not on the job aid, the driver is to consult management "before completing the DVIR form."

On the other hand, if the driver detects only a "level 2 service issue," the driver is granted discretion: they are told only that they "**can** mark the vehicle as 'satisfactory,' sign and date the form, and put the defects on the back of the form in as much detail as you can." (*Id*.) (Emphasis supplied.) In other words, the form does not mandate that the driver mark the vehicle as satisfactory even if the defect is only designated a level 2. The form then states that, "A maintenance professional should assist to validate the level 2 deficiency does not require further review to ensure the vehicle remains in satisfactory condition."

The form continues:

> **If** you mark the truck as being satisfactory, your next step is to sign the form using legible handwriting, including your employee number and date. By signing the form you are stating that you've competed the inspection properly, you believe the truck condition is safe to operate on public roadways and meets Schwan's and DOT standards.

(*Id*.) (Emphasis supplied.)

For a level 2 issue, therefore, drivers are told that they "can" mark the vehicle as "satisfactory" but are not instructed to do so. A "maintenance professional"[21] is supposed to validate the issue as a level 2. This suggests that even when a level 2 defect is identified, a mechanic is supposed to review that determination. Moreover, if the driver cannot find the problem on something called the "level 1/level 2 job aid,' the driver is directed to discuss the matter "before completing the DVIR."

[21] A "maintenance professional" presumably refers to a certified mechanic. The record establishes that a full-time mechanic was not kept at the Salt Lake City, depot. Holbrook testified that Schwan's did not keep onsite a full-time mechanic but relied on outside vendors. (Tr. 345.) According to Holbrook, the mechanic that the depot "relied on…would generally come in most mornings really early before the RSRs got there, in an effort to correct any defects or anything that was noted on the DVIRs." (Tr. 345-346.) He stated that a mechanic was not at the depot every day but was there "most days." (Tr. 346.) Asked who determined whether the mechanic would come to depot or not on a given day, Holbrook replied, "Good question. The mechanic, generally." (*Id*.)

At the end of the document, the following language appears:

> Once you have completed the inspection and form, indicate on the bottom of your DVIR whether or not the truck is in safe operating condition by indicating satisfactory or unsatisfactory. You should refer to the out of service Job aid at your depot location to assist you with determining whether any deficiencies identified are Level 1or Level 2.

(*Id*. at 7.)

Accordingly, I make the following findings regarding the protocol.

1. The protocol does not expressly require a driver to mark as satisfactory a vehicle with a level-2 defect. This finding is consistent with the testimony of Holbrook, Wortman, and Vollmer, all of whom testified that Schwan's would never force a driver to drive a vehicle that the driver deemed unsafe. (Tr. 342; CX 2 at 16, Tr. 303-305.)

2. Despite language to the contrary, the protocol allows for vehicles to be driven with DOT defects. As noted, the protocol explicitly states that level 2 equates to "[a]ny issue or concern which is not DOT or safety related…." However, this does not appear to be the case. For example, one of the defects on the checklist designated a level 2 is an inoperative backup light. (JX 4 at 2.) An operating backup light, however, is required by DOT for all trucks, presumably because their absence creates a safety risk. *See* 49 C.F.R 393.11. Vollmer, the Director of Safety, testified at the hearing that even a level-2 infraction "potentially could be something that a DOT official would make a notation of on a roadside inspection." (Tr. 289.)

3. Even if a truck has a DOT-related defect, Schwan's expects and prefers its drivers to drive it so long as the defect can be classified as level 2. Vollmer agreed that Schwan's allows it drivers to operate vehicles with level-2 infractions regardless of whether they violate DOT regulations. (Tr. 289-90.) His testimony contradicts the language of the protocol, which states that by marking the vehicle as "satisfactory" the driver is certifying that meets "DOT standards." (JX 4 at 8.) If drivers are allowed to knowingly drive vehicles with DOT violations, as Vollmer testified, then they are being allowed to mark vehicles as satisfactory which fail to meet DOT standards in contravention of the protocol. He agreed, further, that drivers were expected to undertake the risk of receiving a citation for driving a vehicle with a level-2 defect before they were repaired. (Tr. 301.) Although he testified that Schwan's did not require drivers to operate vehicles they deemed unsafe, Holbrook testified that he still "would prefer" that a driver operate a vehicle with a level-2 infraction. (Tr. 342.)

The Complainant's Objections to the Protocol

At the hearing, the Complainant expressed his staunch opposition to the protocol. Asked if he accepted Schwan's inspection protocol categorizing defects as level 1 or level 2 and allowing a truck with a level-2 infraction to remain in service for a period of fourteen days, the Complainant did not mince words: he stated that he did not accept it "one bit." (Tr. 265.) He stated that in his years as a licensed truck driver, he had never been exposed to such a system "for good reason" because it was "unlawful." (Tr. 267.) Indeed, he stated that even if he were to be reinstated in his previous position with Schwan's, he would not adhere to the protocol. (*Id.*)

In addition to allowing vehicles with defects to be kept on the road for fourteen days, risking a citation, the Complainant objected to another aspect of the protocol—that management was given a consultative role to play in the inspection process. (*See, e.g.*, Tr. 150.) As noted, the protocol requires that if a driver detects a level-1 defect, he is to mark the vehicle as "unsatisfactory" on the trip report and then "notify your manager right away for further direction." (JX 4 at 1.) Moreover, if the particular defect does not appear on the "Out of Service" job aid, the driver is supposed to consult with management before completing the DVIR form." (*Id*.) The "job aid" to which the protocol refers is apparently a laminated poster, a copy of which was hung in Holbrook's office, and to which he wanted the Complainant to refer when classifying the defect on the truck with the loud noise. (Tr. 119.)

According to the Complainant, however, a driver has a right to fill out the DVIR without interference, so that only his judgement—and not a "team" judgment—is reflected on the DVIR. According to him, this right is absolute, and does not allow management any role to try to influence his judgment. In his conversation with Wortman, moreover, he made clear his view that his freedom in filling out the DVIR included the authority to take a vehicle out of service, even over management's objection:

Initially, it should be noted that the STAA has no provisions specifically regarding vehicle inspection, or the role of management in that inspection process. Even if it did, it is doubtful that asking that management be consulted at some point in the inspection process would be considered an adverse job action actionable under the Act.[22] Moreover, the Act contains no provision conferring upon an employee the authority to take a vehicle out of service as

[22] The STAA's whistleblower protection provisions and statutes require the Complainant to prove retaliatory "discipline" or "discrimination" regarding "pay, terms, or privileges of employment," and, thus, the Board has long required complainants to prove a "tangible employment action," namely one that resulted in a significant change in employment status, such as firing or failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *See, e.g.*, *Calhoun v.United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 7-12 (ARB Nov. 27,2002) (holding that an employer's instructions, monitoring practices, break restrictions, and written criticism did not constitute adverse actions); *Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 20-21 (ARB Feb. 28, 2003) (deciding under environmental whistleblower statutes that employment evaluation without material disadvantage (i.e., reduced pay increase), removal from an assignment, and transfer to another section with no change in performance standards, title, grade, or pay were not actionable).

opposed to complaining or refusing to drive it. In fact, there is case law holding just the opposite: that the STAA does not convey to a driver to take equipment out of service. The United States Court of Appeals for the Second Circuit has stated:

> The STAA prohibits employers from disciplining employees in retaliation for filing safety complaints; it also authorizes employees to refuse to drive unsafe vehicles. See 49 U.S.C. § 31105(a)(1). But it does not guarantee to employees the entitlement to use their own judgment to determine when to take equipment out of service.

Harrison v. Administrative Review Boar, 390 F.3d 752, 758, No, 03-4428 (2d Cir. Nov. 30, 2004) (case below ARB No. 00-048, ALJ No. 1999-STA-37).

In sum, the STAA protects an employee's personal right to complain or refuse to drive a vehicle, but the Act does not deputize the employee to be a worksite safety marshal and take vehicles out of service over the objection of management.[23]

The Complainant's Complaints to Management about the Protocol are Protected Activity Under the STAA

The Complainant's complaints about Schwan's inspection protocol relate to "a violation of a commercial motor vehicle safety regulation, standard or order." *See* 49 U.S.C.A. § 31105(A).[24] The regulations identified by the Complainant have been previously cited. As noted, an employee's complaints (as opposed to a refusal to drive) are protected activity even if they later prove to be meritless. *See Allen v. Reco D.S., Inc*., *supra*, and *Yellow Freight System, Inc. v. Martin*, *supra*. Moreover, the Board has held that a complaining employee "need not expressly describe an actual violation of law," rather it is sufficient if the employee reasonably believes that the conduct complained of violated pertinent law or regulations. *Newell*, *supra*, at 10. The Complainant must have both a subjective and objective belief. *Id*.

Some of the Complainant's criticisms of the protocol might have been overblown, such as denying to management any role whatsoever in the inspection of a truck. However, based on the record before me, his central thesis was objectively correct. Vollmer confirmed that the protocol allowed for a vehicle to be driven with a defect that would earn the driver a citation for a DOT-related violation. Moreover, the Complainant's criticism of the level-1 and level-2 classification system was objectively based on his experience at the Salt Lake City depot. The

[23] In his brief, the Complainant relies on numerous federal regulations concerning commercial vehicle safety inspections to buttress his complaints against Schwan's inspection protocol: 49 C.F.R. §§ 392.1, 392.7, 393.1, 396.1, 396.3, 396.7 and 396.9. Having reviewed each of the regulations the Complainant has cited, however, none of the cited regulations contain any express provision strictly forbidding management from engaging with the driver during the inspection process.

[24] Of note, in their brief, the Respondents' argument that the Complainant did not engage in protected activity addresses only his complaints about, and refusal to drive, the trucks on January 11. Resp. P.-Hg. Bf. at 11-17. The Respondents did not address whether the Complainant engaged in protected activity by complaining about the protocol itself.

Complainant criticized the vagaries of the two-tiered classification system as providing too much leeway for management to keep unsafe vehicles in service in order to maintain deliveries. The Complainant's relatively short tenure at the depot confirmed this. He did not make up that he was assigned three vehicles at the depot, all of which had mechanical problems or defects that should have kept them out of service until they were repaired or the problem adequately diagnosed. Still, under the two-tiered classification system, management expected or preferred that he drive all three.

Finally, the record establishes that the Complainant complained about the inspection protocol not only to Holbrook, but also to Wortman, and then to both Ingold and Lepore right before he was dismissed. Most of these complaints were protected activity under the Act since they related to commercial vehicle safety regulations, were reasonable based on his experience, and were both subjectively and objectively held.

In sum, I find that:

1. The Complainant's verbal complaints about Schwan's inspection protocol protected under the STAA, specifically 49 U.S.C.A. § 31105(A) since they related to commercial vehicle safety regulations.

2. Based on his experience at the depot, his complaints, on the whole, were both subjectively held and objectively reasonable, specifically his view that, under the protocol, drivers were expected to continue to drive vehicles even if they had a DOT-related defect, putting the driver at risk for a citation during the 14-day repair period, and that the vagaries of the level-1 and level-2 classification system gave management too much leeway to keep unsafe vehicles on the road, as demonstrated by his experience at the Salt Lake City depot.

Conclusion

The Complainant has demonstrated that he engaged in protected activity when he 1) complained about the condition of the truck with the failing-to-start problem, 2) complained about, and then refused to drive the truck with the loud noise and the truck with the broken fire extinguisher, and 3) complained about Schwan's inspection protocol as written and as applied.

II. Whether Schwan's Knew of The Complainant's Protected Activity

The Complainant must demonstrate that the Respondents were aware of his protected activities, such that they could have contributed to his termination. Here, there is no dispute that management at the Salt Lake City facility was aware on January 11th of his protected activity that took place that same day, since that activity took place in the presence of management; that Hickson was earlier aware of the Complainant's complaints about the truck with the failing-to-start problem because they were made to him over multiple conversations;

and that by January 16, 2018, the date upon which Schwan's purported to formally accept the Complainants' resignation, Wortman, Ingold, and Lepore were all aware of his protected activity because, not only had they heard of it secondhand, they had experienced it directly when the Complainant complained to them about Schwan's safety protocol. Additionally, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has made clear that it is necessary for the purposes to show that the decision makers had knowledge of the protected activity. *Mangold v. Norfolk Southern Railway Co*., No. 21-3059, 2021 Fed. App. 0584N (6th Cir.), 2012 U.S. App. LEXIS 37193, 2021 WL 5904091 (6th Cir. Dec. 14, 2021)(unpub.) Here, Ingold actually dismissed the Complainant, and she had both first- and second-hand knowledge of his protected activity.

In sum, I find that the Respondents were aware of the Complainant's protected activity.

III. Whether the Complainant Suffered an Adverse Job Action

In his post-hearing brief, the Complainant continues to assert that he never quit his job. "[The Complainant] submitted no resignation, nor did he tell anyone at Schwan's that he quit. This was uncontroverted by any evidence at the hearing. Respondents' choice to consider Complainant's actions as a quit violated the STAA." Comp. P.-Hg. Bf at 35-36.

The Respondents, on the other hand, allege that there is "simply no evidence that Complainant's employment ended for any other reason except for his resignation." Resp. P.-Hg. Bf. at 18.

The question, therefore, is whether the evidence presented supports the Respondents' argument that the Complainant resigned on January 11, 2018, or whether it supports the Complainant's assertion that he never actually quit his job. If the Complainant did not actually quit, but Schwan's simply decided to interpret his actions as such, the Board has held that Schwan's effectively discharged him. *See Minne v. Star Air, Inc*., ARB No. 05-005 (Oct. 31, 2007.)

Holbrook was the only person who claimed to hear the words that the company chose to treat as a resignation. In his view, the Complainant did resign. (Tr. 324-325.) Importantly, however, when asked if the Complainant said to him, "I resign," he replied, "Not exactly in those words." (Tr. 324.) As outlined previously, after the Complainant refused to drive the truck with the fire extinguisher, there were apparently no other trucks to drive, and the Complainant, who testified that he feared retaliation from his co-workers, requested administrative leave for the rest of the day. Holbrook testified that though he granted the requested leave, he then asked the Complainant if he would be interested in making up his missed route on Saturday. According to Holbrook, the Complainant turned down the offered make-up route, stating that it was "more than likely" he had just spent his last week with Schwan's. (Tr. 326-327.) Elsewhere, Holbrook paraphrased the Complainant as saying it was unlikely that he would be working after the following day, which was a Friday. (Tr. 356.)

Significantly, Holbrook agreed that the Complainant never actually said, "I quit," "Saturday will be my last day," or "I'm done." (Tr. 327.) Moreover, he agreed that, at the time he proposed the Saturday make-up route, the Complainant was still upset from his altercation with Dunn and busy inspecting the second replacement truck, discovering it had a broken fire extinguisher. (Tr. 327-328.)[25]

The Complainant spoke with Holbrook and Wortman, the Zone Manager, later the same day, before he left the depot, and a transcript of that conversation is of record. (CX 2.) Noteworthy, during the entire conversation, the Complainant never stated that he was resigning or quitting. He only questioned his "fit" with the company given his CDL licensure and unwillingness to drive vehicles he deemed unsafe or unable to pass a DOT inspection. (*Id*. at 17.) Wortman gave no indication that he interpreted the Complainant's misgivings about his fit with the company as tantamount to a resignation; rather, he simply told the Complainant that whether he was a fit with Schwan's was a decision he had to make for himself. (*Id.*)

Holbrook also gave a written statement in which he offered the following version of what the Complainant had told him:

> When [the Complainant] walked out to inspect the next truck [with the broken fire extinguisher] I returned to Patrick to discuss how we would handle the route issue. We both agreed to put the initial truck [with the loud noise] out of service since he marked it that way on the pre[-]trip form. We decided to ask Jerry if he would be willing to make up the route day on Saturday. I approached Jerry while he was doing the inspection of the second truck and proposed the idea of Saturday. He didn't want to be bothered while he was doing his inspection[,] but I asked him to stop so we could talk for a minute. He said that he wouldn't do the Saturday run because this was more than likely his last week with Schwan[']s. I let him know I was glad that he was so passionate about safety but just wanted to make sure we communicate before making the final decisions.

[25] For his part, the Complainant testified that he did not recall Holbrook offering him a Saturday route to make up for the missed Thursday route. (Tr. 241.) He stated that he remembered Saturday "a topic" that Holbrook was discussing as he inspected the third truck, but he did not remember Holbrook specifically offering him a Saturday make-up route. (*Id*.) He stated, "I was trying to inspect the truck." (*Id*.) He denied ever declining such an offer and making any statement that it was unlikely he would still be working past the week. (*Id.*) As even Holbrook allowed that the Complainant was still upset with his confrontation with Dunn and busy inspecting the third truck when he offered the Saturday make-up route, I accept, although with a large amount of skepticism, the Complainant's testimony that he could not recall such an offer being made. On the other hand, I found credible Holbrook's testimony, supported by his written statement (EX 27), that he made such an offer. Moreover, I found credible Holbrook's testimony, again corroborated by his written statement, that the Complainant denied the offer by uttering words to the effect that it was unlikely that he would still be working on Saturday. My analysis assumes, therefore, that the offer of a Saturday make-up route was offered and declined with words indicating that the Complainant was considering that Friday **might** be his last day.

> After the call [with Wortman] was over[,] I again thanked [the Complainant] for his concern of safety and apologized if he felt I didn't handle the situation correctly. I let him know we could talk more tomorrow if needed. He mentioned that he wanted to air his grievances in front of the group tomorrow. I told him that was not a good idea but if he wanted to have some conversations with me and some of the RSRs together that we could do that, but it were not necessary to involve everyone in the depot. He said he wanted to leave before anyone came back. I said goodbye and let him know we could talk again tomorrow.

(JX 27 at 3-4.) As can be seen, nowhere in the written statement does Holbrook unambiguously state that the Complainant quit or resigned. To the contrary, Holbrook was proposing that the two men speak the following morning. He was not necessarily opposed to having a meeting with the Complainant and the other RSRs to discuss the day's events.

In his separate written statement, Hickson stated after his phone call with Holbrook and Wortman on January 11th, the Complainant "came out and said that he was planning on being here in the morning [Friday] and he was leaving." (JX26.) Furthermore, on the drive home on that same day, the Complainant spoke to Ingold, in the Respondent's HR Department. The transcript of that call is of record. (CX 7.) At no time during his conversation with Ingold did the Complainant express that he had resigned or was thinking about resigning. Instead, at the end of the call, Ingold informed the Complainant that he was on paid leave. She told him that her goal was to have a conversation with Holbrook about "how are we going to fix these things so you can come back to work and feel safe and right in your environment." (*Id*. at 30.)

The following day, according to the Complainant, he spoke to Ingold, and she asked that he come to the depot on January 16, 2018, which would have been a Tuesday. There is no indication that anyone spoke to the Complainant between January 11 and January 16 to clarify his statement that the previous week was most likely his last. The Complainant did not testify that anyone called him to seek clarification, and Holbrook testified that he did not know if anyone had reached out to the Complainant to ask him specifically if he had, in fact, resigned. (Tr. 364.)

On the 16th, speaking to Lepore and Ingold, who told him that they were accepting his resignation, the Complainant denied having resigned multiple times. (CX 6 at 15, 27, 30, 32.) Although the Complainant kept insisting that he had not resigned, Ingold and Lepore treated it as something that had already happened. Ingold assured the Complainant that the company was not firing him, but she clearly had no interest in allowing him to continue to work at Schwan's.

In sum, the Complainant's words and actions on January 11th were ambiguous as to whether he intended to continue his employment. In other words, whether he quit is a matter of interpretation and not a foregone conclusion. Objectively viewed, he only questioned his continued employment while still upset from his altercation with Dunn and his displeasure with management. As for his disinterest in discussing a Saturday make-up route, nothing in the

record indicates that a decision had to be made then. Indeed, according to Holbrook's written statement, the Complainant requested a meeting the next day, on Friday, to return to address his fellow RSRs to "air out his grievances." If that had happened, and the meeting proved successful, it is entirely possible that the Complainant may have accepted the offered make-up route.

Such a meeting never happened, however, because, after speaking to Ingold on the 11th (and saying nothing about quitting or resigning), Ingold told the Complainant to stay away from the facility and that he was on paid leave. (CX 7 at 30.) The next morning, according to the Complainant's uncontradicted testimony, Ingold called and told him to return to the facility the following Tuesday. Consequently, it appears that a make-up route was not even an option after the 11th.

In conclusion, I find:

1. The Complainant never made clear his intent to quit or resign on January 11, 2018, nor at any time afterward.

2. Viewed in their entirety, the Complainant's words and actions on January 11th do not lead invariably to the conclusion that had quit or resigned; rather, it was the interpretation that Schwan's chose to give to his words and actions, not the words and actions themselves, that resulted in his termination.[26]

3. Schwan's decision to interpret his words and actions as him quitting, when that interpretation was less than certain, constituted a discharge, and hence an adverse action, under Board precedent.

IV. Whether the Complainant's Protected Activity Played a Role in his Termination

As made clear by the Board in *Palmer*, *supra*, the first step of analysis in a case of retaliatory dismissal under the STAA "involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action?" *Palmer, supra,* at 52. The Board also made clear that the Complainant has the burden of proof to persuade the administrative law judge "based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action."

[26] As the Board made clear in *Minne*, "except where an employee actually has resigned, an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee." *Id*., *supra*, slip op. at 14. This is exactly what happened here. The company's decision to treat the Complainant's words and actions as a resignation was a decision that management did not have to make but chose to make in order to end the Complainant's employment.

The ARB has described a contributing factor as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008). A complainant can succeed by providing either direct or indirect proof of contribution. (*Id.*) Direct evidence is evidence that conclusively links the protected activity and the adverse action. (*Id.*) at 4-5. Alternatively, the complainant may provide circumstantial evidence by proving by a preponderance of the evidence that retaliation was the true reason for terminating his or her employment. For example, the complainant may show that the respondent's proffered reason for termination was not the true reason, but instead "pretext." *Riess v. Nucor Corp.,* ARB 08-137, 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010). If the complainant proves pretext, it may be inferred that his or her protected activity contributed to the termination. (*Id.*)

In his brief, the Complainant argues strong circumstantial evidence exists to show that his protected activity contributed to Schwan's decision to treat his actions on January 11th as him voluntarily quitting. First, the Complainant cites to temporal proximity, noting that the decision that ended in his termination came only days after the 11th, when he refused to drive two vehicles assigned to him. Comp, P.-Hg. Bf. at 37-38. Second, the Complainant asserts that his protected activity on the 11th gave Schwan's a strong motive to terminate his employment because it demonstrated that he rejected the central premise of its inspection protocol: that trucks with level-two defects were still safe to drive and should be allowed to remain in service until fixed. According to the Complainant, he had made clear to the company, both verbally and by his conduct on the 11th, that he "would refuse to operate any truck that was not compliant with commercial vehicle safety regulations, even if the truck only had a Schwan's Level 2 violation." Comp. P.-Hf. Bf. at 37-38. By insisting on safety, he argues, he was disrupting the system in place at the Salt Lake City facility, which allowed unsafe vehicles to remain on the road in order to maintain deliveries. (*Id*.)

That his protected activity played a role in his separation, the Complainant further argues, is demonstrated by his discussions with management on and after the 11th, in which Ingold, Lepore, and Wortman continued to address the protocol, stressing the difference between a level-one and level-two defect. (*Id*. at 38-39.) According to the Complainant, that they continued to stress the protocol demonstrated an animus toward his protected activity. Noting that Ingold told him on January 16, the day that he was effectively fired, that she agreed that "culturally" he was not a "good fit" at Schwan's, the Complainant asserts that she only said this because he was "unwilling to operate vehicles that did not comply with commercial vehicle safety regulations, including violations that were listed on Schwan's inspection criterion (JX-4) as Level 2 defects." (*Id*. at 39.)

Noteworthy, the Respondents do not address whether a causal relationship existed between the Complainant's conduct and an adverse job action because, in their minds, he neither engaged in the former nor suffered the latter.

I find that the Complainant has shown by a preponderance of the evidence that his protected activity was "more likely than not" a factor in the adverse job action taken against

him, including Schwan's decision to treat his ambiguous statements on January 11th as a voluntary quit. This finding is based upon temporal proximity and the chain of events that led from the Complainant's protected activity, his conversations with management and HR on the 11th and the 16th, and his subsequent discharge.

V. Affirmative Defense

Once a complainant has demonstrated that a causal connection between their protected activity and an adverse job action is "more likely than not," the Board in *Palmer* outlined the next step in the analysis:

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

Palmer, *supra*, at 52.

The Respondents' burden is therefore much higher than that of the Complainant, who only has to show that it is "more likely than not" that his protected activity led to his dismissal. To succeed in their defense, the Respondents have to show by clear and convincing evidence that it is "highly probable" that they would have dismissed the Complainant even had he never engaged in protected activity.

As discussed, the Respondents have argued that the Complainant voluntarily resigned from the company. They do not acknowledge that they took any adverse action with respect to his employment. Nor do they recognize that he engaged in protected activity. Having taken these two positions, they do not argue, even in the alternative, that they would have taken the same adverse action against him even in the absence of the protective activity.

Nonetheless, in their brief, the Respondents indirectly suggest that, had they dismissed the Complainant (which they did), they would have had grounds independent of his protected activity. As discussed, the Respondents assert that the Complainant acted insubordinately when he failed to pause filling out the DVIR and took the vehicle out of service. Resp. P.-Hg. Bf. at 14-15. Moreover, they cite to cases to portray the Complainant as a disgruntled employee who sought to impose additional inspection measures which were not necessary. As argued by the Respondents in their brief:

> Schwan's Level 1/Level 2 Policy and its manner of addressing issues raised in the DVIR were more than reasonable to address any legitimate safety concerns, and Complainant

was not entitled to raise additional issues in order to try to set forth a true "complaint" when the facts never supported his contentions. *Calhoun v. U.S. Dept. of Labor*, 576 F.3d 201, 211, 213 (4th Cir. 2009)("where an employer's prescribed inspection methods are themselves reasonable, an employee's additional inspection measures will typically not be reasonably necessary to satisfy him that his vehicle is safe to drive"); *Brink's, Inc. v. Herman*, 148 F.3d 175, 180 (2nd Cir. 1998)(employee's presentation of his case as a matter of safety concerns was a "restructured scenario" and that "in actual fact he was merely a somewhat disgruntled overly complaining individual," who was properly fired "solely on the basis of [his] insubordination"); *Rodriguez v. Land-O-Sun Dairies, LLC,* No. 6:08-cv-03230-GRA, 2010 WL 598692, at *4 (D.S.C. Feb. 17,2010) ("Plaintiff cannot become a protected whistleblower merely by performing his job poorly enough to violate DOT regulations").

Resp. P.-Hg. Bf. at 14-15.

Before analyzing why the Complainant was ultimately dismissed, some background facts are worth noting.

No Adverse Action Until January 16

First, the Complainant has not proven that Schwan's took any action against him until January 16. Indeed, as noted earlier, in his closing brief the Complainant does not argue that he suffered any adverse action until January 16, when Schwan's purported to accept his "resignation" even though he insisted that he had not resigned. Although the Complainant, during the hearing, maintained that his morning drink on the 11th tasted like it had been tampered with, the record does not contain any evidence to verify this.[27] Moreover, even after the incidents later that day, when matters became heated and the Complainant refused to drive the two trucks assigned to him, there is no evidence that management took any job action adverse to him as a result. In particular, nothing in the record supports that management had anything to do with Dunn confronting the Complainant.[28]

[27] Even if tampering did occur, there is no evidence that anyone connected to Schwan's management was involved, and this perhaps explains why the Complainant in his brief does not argue that, if it did occur, it was traceable to management. The Complainant suggested that he had learned that Dunn had done it, apparently out of some sort of loyalty to Hickson as a result of the complaints the Complainant had been lodging against the truck with the failing-to-start problem. But there is no proof of this, and even if Dunn did tamper with his drink out of some misguided loyalty to Hickson, there is no proof that Hickson knew or had anything to do with it.

[28] Although the Complainant implied that Holbrook was not neutral and deliberately chose not to intervene quickly to separate the two, there is no basis upon which I can find that Holbrook intentionally stood by to watch the two argue. According to Holbrook, both men were going after each other verbally, with the Complainant being the more aggressive and confrontational of the two. Holbrook's testimony is corroborated by Dunn's statement, in which he described the Complainant as the one chest-thumping him, not vice-versa.

Written Statements

After the Complainant talked to Ingold on the 11th, statements were obtained from Holbrook, Hickson, Dunn, and Myles, which the parties have admitted jointly. These statements are noteworthy, as they provided HR with multiple perspectives regarding the events on the 11th. Significantly, in the narrative provided by his co-workers, it was the Complainant who had been volatile and acted hostilely, not vice-versa. Therefore, to fully understand the mindset of the participants of the January 16th meeting between the Complainant, Ingold, and Lepore, which led to his firing, consideration must be given to the written statements obtained by HR.

With respect to the Complainant's altercation with Dunn, Holbrook stated that the Complainant, not Dunn, lost his temper and was physically aggressive. Specifically, he wrote the following in his written statement

> [The Complainant] had marked the vehicle [with the loud noise] out of service[,] letting me know that it didn't matter what we thought, that the vehicle would not be leaving the depot…
>
> At this point [Dunn] got involved since he was around the conversation. [Dunn] approached [the Complainant] and pointed out that he had two managers advising of what they thought was best and he was ignoring their advice. [The Complainant] got extremely heated and got right in [Dunn's] face and confronted him about what he had just said. [The Complainant] was raising his voice and yelling at [Dunn] asking him why he was getting involved. He even asked [Dunn] what he was going to do about it in a manner suggesting he was ready to fight. At this point I stepped in and attempted to separate the two. [The Complainant] continued to yell and I finally got them to pull apart. I asked [the Complainant] to settle down because he was extremely agitated. I finally had to ask him to stop talking so I could communicate what we needed to do to resolve the route and truck situation. [Dunn] walked away at that point.

(JX 27 at 1.)[29]

[29] Holbrook's testimony at the hearing was consistent with his written statement. He stated that it was the Complainant who "got right up, literally chest to chest" with Dunn, and that it was the Complainant who was "really yelling and screaming, asking [Dunn] what he was going to do" and why he was involving himself in the situation. (Tr. 363.) Holbrook testified that the interaction between Dunn and the Complainant was "[a]bsolutely" an altercation, and he feared that it might turn physical. (Tr. 361.) He described the Complainant as becoming "extremely upset, screaming and yelling at [Dunn], and in his face." (*Id*.) He added, "In fact, it got to the point where [the Complainant] asked [Dunn] what he was going to do about it, in a manner that really made me feel that it had come to a point where it was going to come to blows." (*Id.*) He stated the demeanor of the Complainant was "[a]bsolutely" more confrontational than that of Dunn. (*Id*.)

In his written statement, Dunn also portrayed the Complainant as combative and confrontational, not him. (JX 21 at 2.) He stated that Hickson was already in the bay, and that Hickson explained to the Complainant that the noise was sound of a computer calibrating on a newly installed turbo. (*Id*.) Dunn stated that he then "interrupted" to try to make the point that Holbrook and Hickson were trying to make. (*Id.*) "I said that if your boss is willing to drive it then it is not a risk for you to take your truck." (*Id*.) He stated that he pointed out that both of the Complainant's managers were telling him that the truck was safe to drive. Dunn stated that the Complainant responded by approaching him so closely that their chests were touching and yelling at him to "stay out of it" and that it was none of his business. He stated that the Complainant "fronted" him again, "chests touching." He stated that the Complainant then "does this action" to Holbrook, who is trying "over and over" to calm the Complainant down. He stated that the Complainant was displaying a "demanding, disrespectful tone" to Holbrook. (*Id*.)

The investigation also produced a statement from Hickson. (JX 26.) According to Hickson, the noise from the first truck the Complainant refused to drive on January 11th did indeed come from the turbo, but he considered the sound to be classifiable as a level-two defect, meaning that the truck could still be safely operated. He stated that he offered to drive the truck to "diffuse the situation." (*Id*. at 1-2.)

Insubordination

As noted, the Respondents suggest in their closing brief that the Complainant was insubordinate. Resp. P.-Hg. Bf. at 14-15.) In his written statement, Holbrook spoke of his frustration with the Complainant for not pausing, as he asked him, before filling out the DVIR for the trust with the loud noise. Specifically, he wrote:

> I let [the Complainant] know that I was frustrated that I had asked him to wait while I got [Hickson] involved, yet he marked the pre[-]trip form as inoperable. I then asked him to go to the Home Service Maintenance and Issues form and let me know where he felt the issue on the truck would be classified. He resisted doing this a couple times but finally pointed to the Muffler Noisy line which is a level 2 issue. He said that it didn't matter what level it was because the truck was unsafe according to him.

(JX 27 at 2.)[30]

At the hearing, the Complainant agreed that Holbrook had managerial authority over him on January 11th. (Tr. 255.) Moreover, he agreed that part of that authority included asking

[30] Asked at the hearing if he considered the Complainant to have acted in a way that was insubordinate toward him, Holbrook was noncommittal. He testified, "I don't know that I would consider it insubordinate, but it was an interesting way that it came about." (Tr. 365.) He stated that it was "a little frustrating that he wouldn't partner with me on that, but I don't know if I would have said that was for sure insubordination." (Tr. 365-366.)

him to pause before completing the DVIR for the truck with the loud noise. (*Id*.) Asked if he thought he was being insubordinate by not pausing, the Complainant candidly replied, "Yes." (*Id*.) Asked to explain why he would not allow his manager, Holbrook, time to gather information before completing the DVIR, the Complainant responded that, based on experience, he was being asked to pause filling out the DVIR for "nefarious reasons." (*Id*.)

Dissatisfaction with the Protocol

Holbrook's statement that the Complainant was dismissive toward the two-tiered inspection protocol classification system echoes another argument made by the Respondents in their brief, which is that the Complainant unreasonably objected to Schwan's inspection protocol. Resp. P.-Hg. Bf. at 15. As noted, the Respondents cited to case law suggesting that the Complainant was a disgruntled employee trying to add additional safety-inspection measures to those in place which were already adequate. *Id*. The Complainant's opposition to Schwan's inspection protocol became a very large part of the discussion between he, Ingold, and Lepore during their meeting on the 16th that eventually led to his dismissal.

In sum, the Complainant engaged in many different behaviors on January 11, some of which clearly involved protected activity and some that did not. Some of his behaviors were well motivated and concerned with his own personal safety and that of the public. Some of his behaviors, however, overstepped. In this regard, the Board has recognized that a whistleblower is entitled to certain "leeway for impulsive behavior" when voicing a safety complaint. *See, e.g*., *Formella v. Schnidt Cartage, Inc.*, ARB No. 08-050, slip op. at 5 (March 19, 2009), citing *Kenneway v. Matlack, Inc*., 1988-STA-020, slip op. at 6 (Sec'y June 15, 1998). Certain intemperate behavior, after all, is not totally unexpected when a driver disagrees with management that a vehicle is safe to drive, especially when taking the vehicle out of service threatens deliveries. In such case, the whistleblower's "leeway for impulsive behavior" is "balanced against employer's right to maintain order and respect in its business by correcting insubordinate acts; [the] key inquiry is whether [the] employee has upset the balance that must be maintained between protected activity and shop discipline . . ..". *Id*. In *Formella*, the Board affirmed the administrative law judge's finding that the employee had "crossed the line of permissible behavior" by becoming "provocative, intemperate, volatile, and antagonistic…" *Formella*, slip op. at 6. The shop manager there described the employee as becoming "vehement, angry, upset, and threatening."[30] Another employee described the employee as "being in my face." *Id*.

Certainly, HR's investigation into the matter turned up evidence that the Complainant had become "provocative, intemperate, volatile, and antagonistic." Holbrook testified that the Complainant and Dunn almost came to blows, with the Complainant as the aggressor, until he stepped between them. Such behavior clearly constituted a breach of shop discipline.

The Meeting on January 16

Before making any specific findings with respect to the reasons Schwan's dismissed the Complainant following the meeting, there are several noteworthy aspects of the meeting which require clarification.

First, the evidence does not show that Schwan's protocol was developed in conjunction with, or approved by, DOT. Both Ingold and Lepore (and Wortman earlier) indicated that Schwan's inspection protocol had been "worked on with DOT," been "developed in consultation with DOT," and had been legally vetted, presumably with the DOT. (CX 6 at 18, 27, 29; CX 2 at 18-19.) However, this appears to be no more than a popular company myth. According to Vollmer, the company's Director of Safety, who helped develop the protocol, the idea that the protocol had been developed in conjunction with the DOT is simply not true. During his testimony at the hearing, Vollmer refuted the notion that the protocol had been developed by Schwan's in conjunction with the DOT, or that the protocol had received DOT approval. (Tr. 285.) I find, therefore, that the record does not support that the inspection protocol has been vetted and approved by the DOT.[31] Rather, I find Vollmer more authoritative on this issue, and find that the record supports that the DOT was not involved in development of the protocol and has neither vetted nor approved it.

Second, the Complainant had not resigned and was still on paid leave. Ingold made several contradictory statements regarding the Complainant's resignation, both insisting that he had resigned and purportedly "not challenging" his denial that he had resigned. Obviously, these two things cannot both be true.

Third, unfortunately for such a key witness, Ingold did not testify. Although named as a party, she was no longer with the company and could not be found. According to her written statement, after discussing the alleged drink-tampering evidence, she attempted to address the Complainant's allegation of a "hostile work environment." It was here, she stated, that she felt that the meeting took a downward turn. She stated that her attempt to provide "an update" was thwarted when the Complainant became, in her words, "very combative and unwilling to listen to my findings and/or find common ground to continue our discussion." (JX 28 at 2.) She wrote, "I finally had to discontinue the meeting and remind Jerry that he had given his verbal resignation to his AM Matt and we were going to honor his resignation and accept it immediately…." (*Id*.)

[31] In their briefs, the Respondents first perpetuate the notion that DOT was involved in the development of the protocol. They state, "The Level 1/Level 2 categorizations come from Schwan's 2017 Home Service Vehicle Maintenance and Safety Issues Policy, *which was formulated in conjunction with the Department of Transportation.*" Resp. P.-Hg. Bf. at 4 (emphasis supplied). Conspicuously, they offer no citation in the record to support their assertion that the DOT helped formulate the level-1 and level-2 classifications. Moreover, elsewhere, in their brief, they state, "Schwan's Level-1/Level-2 policy was developed by the company's Fleet Team, Compliance Team, and Safety Team in conjunction with Schwan's legal counsel. (Tr. 291, 299.)" Resp. P.-Hg. Bf. at 5. The second statement, omitting the DOT from any involvement in the protocol's development process, correctly states the record.

Ingold then noted that, when she attempted to address coworkers "butting heads" on the 11th, the Complainant cast blame on Holbrook for not deferring to his judgement in matters regarding vehicle inspection. She stated that when she and Lepore attempted to explain the company's procedures, guidelines, and policies, the Complainant "would not listen" and was "just talking over us." (*Id*.)

Ingold referred to the email that the Complainant sent to her and Lepore during the conversation, presumably from his smart phone. She stated that she concluded that the Complainant was "consumed with his agenda and not willing to listen to our findings and began threats of retaliation." (*Id*.) She indicated that the "hostile work environment"—the "butting heads," as she called it—could have been avoided, or at least ameliorated, if the Complainant had allowed Holbrook to simply "dialogue" with him. (*Id*.)

Schwan's Has Not Sustained its Burden

As previously noted, it's the Respondents burden to prove by clear and convincing evidence that Schwan's would have dismissed the Complainant even absent his protected activity. The Respondents, however, relied on their position that the Complainant had resigned and did not present a single witness to testify at the hearing to explain why the Complainant would have been dismissed even if he had not resigned.[32] The Respondents only called one witness, Holbrook, who testified that he had no role in the Complainant's termination other than to convey to Ingold his impression that the Complainant had quit. Indeed, it is not even entirely clear who made the decision to fire the Complainant and at what level. Ingold appears to have been the one, but the record does not establish whether she was simply a messenger or made the decision on her own.

Even so, I have strongly considered whether it is possible to separate out the Complainant's protected activity from those elements of his behavior that are not protected. As noted, there are elements of the Complainant's behavior on January 11—his refusal to follow instruction and pause filling out the DVIR, his altercation with Dunn in which there is persuasive evidence that he was the more aggressive of the two, and his efforts to take vehicles out of service over the objection of management—that are not protected by the Act. Although granted certain leeway for impulsive behavior, simply because employees engage in protected activity does not mean that they cannot be legitimately disciplined for insubordination and disruptive behavior. *Logan v. United Parcel Service*, 96-STA-2 (ARB Dec. 19, 1996). The STAA does not sanction insubordination, nor does it condone physically aggressive behavior toward co-workers.

However, even if it is possible to distinguish between aspects of the Complainant's behavior which are protected under the Act and those which are not, the record does not

[32] As noted previously, the Complainant's argue in their brief, "There is simply no evidence that Complainant's employment ended for any other reason except for his resignation." Respondent's P.-Hg. Bf. at 18.

support that Ingold made such a distinction when she declared that he was not a good cultural fit with Schwan's. Without her testimony, it is impossible to know what was going through her mind when she came to that conclusion. She did not specify why she decided to end the January 16 meeting or Complainant' employment. She did not single out any particular reason or reasons. Her explanation to the Complainant during the meeting hinted at several factors, including the Claimant's protected activity:

> And again, Jerry, I appreciate the information. And, again, this is something where I hope that you can see that we are trying to give you some—we are trying to work with you and help you understand our policies. And you are going to situations and you're giving us information **and it's not following Schwan's way of doing business with DOT.** And I just want to make sure I am clear with about that. We will put all of this in your file and make sure that it is all there. But at this time, Mike. I just want to make sure that we are clear with Jerry that this isn't a cultural fit for us. We are need someone who is going to come in and run our business, and be able to listen to direction given by our management team, and we are going to do the right things for the right reasons. You know, we've audited our (inaudible) and we have gone through and we have done many things, Jerry, because you came forward and I thank you for that. But as this time we are going to go ahead and accept your resignation and you're going to be paid through today and it will be on your final check Friday**. But we need someone who is going to be here, be prepared to work, be prepared to take direction, and follow Schwan's way of doing business with guidelines—using guidelines from the federal DOT.** So Mike, do you have anything you want to add to that?[33]

(CX 6 at 28-29) (Emphasis supplied.)

As can be seen, Ingold specifically referred to Schwan's "way of doing business with DOT" to justify why the Complainant was not a good cultural fit with the company. The clear implication is that at least part of Ingold's reason for determining that the Complainant was not a good cultural fit with the company were his criticisms of the protocol, specifically its allowance for DOT non-compliant vehicles to be driven, as well as his actions on January 11 and January 16 when he took a stand against the way the protocol was being implemented at the Salt Lake City depot.

Even if it assumed, for argument's sake, that the Complainant's non-protected activity also played a role in his dismissal, the Respondents would still not have met their burden. As previously articulated, the burden is on the Respondents to show by clear and convincing evidence that it is highly probable that they would have fired the Complainant even absent his protected activity. *Palmer*, *supra* at 52; *see also Estate of Ayres v. Weatherford US, LP*_ARB Nos. 2018-0006 2018-0074, slip op. at 6 (Nov 18, 2020.) That the issue is not simply whether the Respondents are able to articulate, after the fact, a non-retaliatory rationale for the Complainant's dismissal. Rather, the ultimate issue is why, on January 16, 2018, the

[33] Lepore replied that he did not. (CX 26 at 9.)

Respondents dismissed the Complainant from his employment. Here, the Respondents have identified "potential" reasons for taking adverse action against the Complainant. However, I do not find sufficient evidence to conclude that they would have acted on those reasons absent the Complainant's protected activity on January 11 as well as January 16 when he continued to criticize the protocol.[34]

Indeed, even the supposedly non-retaliatory reasons the Respondents offer as potential reasons for dismissing the Complainant are not entirely separate from his protected activity. As pointed out, the Respondents suggest that the Complainant was disgruntled. This argument probably comes closest to why Ingold finally decided to "accept" the Complainant's resignation that he never gave. Incorrectly believing that the protocol had been developed in conjunction with the DOT, and thus could not be validly criticized, she did not want to listen to (or read) any more of the Complainant's complaints about Schwan's inspection protocol, especially couched in terms of veiled legal threat. The Complainant was disgruntled—very disgruntled, but he was disgruntled with a reason, given the way the Respondent applied the protocol. As for the suggestion that he was "overly complaining," most of his complaints were about the safety of the vehicles he was asked to drive, and those complaints were validated by Schwan's Director of Safety, Vollmer. As far as the allegation that the Complainant was insubordinate, Ingold never used that word on January 16. She spoke of "butting heads" and refusing to dialogue with Holbrook, but this could have been a reference to the Complainant's protected conduct or to his unprotected conduct.[35]

In sum, I find that although there were several aspects of the Complainant's behavior for which he **might** have been dismissed, the Respondents have not shown that he **would** have been absent his protected behavior. What's more, they have not shown that his protected activity was not a basis, at least in part, for Ingold's opinion that he did not fit within the company's culture.[36]

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[34] *See Carter v. Marten Transport, Ltd*., ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63 (ARB June 30, 2008).

[35] Of note, the subject of the Complainant's confrontation with Dunn, which may have been the strongest reason for firing him, never came up at the January 16 meeting.

[36] It should be noted that I have also considered whether the record might support a finding that Ingold acted in a mistaken but good-faith belief that the Complainant had resigned, having simply adopted Holbrook's impression as her own. The difficulty, again, is that she did not testify, and without her testimony it is not possible to make a credibility determination whether she honestly believed that the Complainant had resigned or was using it as an excuse to fire him. As discussed, the truest measure of good faith would have been for Ingold or someone in management to have contacted the Complainant after January 11 to clarify the ambiguous statements he made before departing the depot. Ingold was also the one who put the Complainant on paid leave on the 11th so she should have known that on January 16 he was still a paid employee. Finally, it is difficult to find that Ingold was acting in good faith when, during the meeting on January 16 , she claimed to accept that he had not resigned and yet still insisted she was not firing him.

VI. CONCLUSION

The evidence establishes that the Complainant engaged in protected activity by complaining and refusing to drive certain vehicles on January 11 and complaining about Schwan's protocol on January 11 and January 16 when he met with Ingold and Lepore. While he would not have suffered any adverse job action had he not elevated the matter to HR, he did. When he continued to complain about the inspection protocol when he met with Ingold and Lepore, his complaints (as well as Ingold's mistaken belief that the protocol had been approved by the DOT) convinced them that he was not a good cultural fit with the company. Although Ingold claimed to be accepting his verbal resignation on January 11, the evidence does not support that he had resigned. Rather, the Respondent put the Complainant on paid leave, pending an investigation by HR, and I find that when Ingold claimed to be accepting his resignation on January 16, she was effectively firing him. Finally, the Respondents have failed to show by clear and convincing evidence that their reason for firing the Complainant can be factually and legally separated from his protected conduct.

VII. PERSONAL LIABILITY OF INDIVIDUAL DEFENDANTS

As reflected in the amended complainant and caption of this case, the Complainant has named as respondents not only Schwan's, but Ingold, Hickson, and Holbrook.

The STAA prohibits any **person** from discharging, disciplining, or discriminating against an employee regarding the pay, terms, or privileges of employment for engaging in protected activity. 49 U.S.C. § 31105(a). Significantly, a "person" is not exclusively restricted to an employer. *Somerson v. AIL Contractors of America, Friday, Eldredge, & Clark, and Oscar Davis, Esq.*, ARB No. 2003-0042, ALJ No. 2003-STA-00011 (ARB Oct. 14, 2003); *Cawthorn v. U.S. Postal Serv.*, ARB No. 2008-0083, ALJ No. 2008-STA-00028 (ARB May 7, 2009). Rather, the Act defines a "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals." 29 C.F.R. § 1978.101(k).

For a non-employer to be liable under the Act, the Board has noted the following:

> An integral factor for determining individual liability under the Act is whether an individual exercises control over the employee. *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033; ALJ No. 2006-STA-032, slip op. at 9 (ARB Sept. 24, 2010). The requisite control over an employee for purposes of individual liability includes "the ability to hire, transfer, promote, reprimand, or discharge the complainant . . .." *Id*. (citing *Williams v. Lockheed Martin Energy Sys., Inc.,* ARB No. 98-059, ALJ No. 1995- CAA-010, slip op. at 9 (ARB Jan. 31, 2001)).

Anderson v. Timex Logistics, ARB No. 13-016, slip op. at 8, ALJ No. 2012-STA-11 (ARB Apr. 30, 2014.

There is no evidence in the record to show that Hickson or Holbrook had any authority to discharge the Complainant. Holbrook denied that he had any involvement in the decision other than to relay to Ingold his impression that the Complainant had resigned. (Tr.368.)

As for Ingold, I find that she had the authority to accept the Complainant's resignation under the false impression that he had had given it. However, the record does not make clear whether she had the authority to unilaterally fire the Complainant if he had not resigned, as was the case. As discussed earlier, the record does not even make clear whether the decision to accept the Complainant's "resignation" was something that she had discussed earlier with her superiors or was hers alone to make. The record does not delineate the limits of her authority when it came to hiring, transferring, promoting, reprimanding, or discharging the Complainant. The record only demonstrates that she had the authority to conduct a meeting investigating the Complainant's complaints of a hostile work environment, and that when the meeting did not go as planned, to remind him that her manager said he had resigned and to hold him to that. I do not necessarily equate Ingold's authority to accept what she thought was the Complainant's resignation with the express authority to fire him in the absence of a resignation.[37] I find, therefore, that the record does not support a finding that Ingold is individually liable under the Act.[38]

Consequently, the only respondent liable under the Act is Schwan's.

VIII. REMEDIES

Regarding remedies under the STAA, the Board has stated:

> A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. §31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc*., 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002), citing *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 418-421 (1975). Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988). *Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 760 (6th Cir. 2004). *See, e.g.,*

[37] Of note, the record does not fully elucidate Lepore's role in the meeting on January 16. It is unclear whether his authority was the same as Ingold's, or whether it was greater or lesser in personnel matters. In their brief, the Respondent's identify Lepore as Holbrook's Zone Manager. Resp. P.-Hg. Bf. at 8

[38] Although the Board may choose to disagree, I note that my finding in this regard will probably have very little practical effect as apparently Ingold, who no longer works for the company, could not be located at the time of the hearing.

Polgar v. Florida Stage Lines, ARB No. 97-056, ALJ No. 94-STA-46, slip op. at 3 (ARB Mar. 31, 1997).

Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. *Polewsky v. B&L Lines, Inc.,* 90-STA-21, slip op. at 5 (Sec'y May 29, 1991). While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc*., ARB No. 97-005, ALJ No. 95-STA-43, slip op. at 14 n.12 (ARB May 30, 1997), citing *Pettway v. Am. Cast Iron Pipe Co., Inc*., 494 F.2d 211, 260-61 (5th Cir. 1974).

(*Ass't Sec'y & Bryant v Mendenhall Acquisition Corp*., ARB No. 04-014, ALJ No. 2003-STA-36, (ARB June 30, 2005)).

Back Pay Plus Interest Until Reinstatement

Regarding back pay, the Board has stated:

A wrongfully terminated employee is entitled to back pay for the period after the termination of employment. 49 U.S.C.A. § 31105(b)(3) (2004). The employee has a duty to exercise reasonable diligence to attempt to mitigate damages. *Griffith v. Atl. Inland Carrier*, ARB No. 04-010, ALJ No. 02-STA-034, slip op. at 70 (ARB Feb. 20, 2004). However, the employer bears the burden of proving that the employee failed to mitigate. *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1101 (3d Cir. 1995). The employer can satisfy its burden by establishing that "substantially equivalent positions were available [to the complainant] and he failed to use reasonable diligence in attempting to secure such a position." *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 90-ERA-30, slip op. at 50 (ARB Feb. 9, 2001). A "substantially equivalent position" provides the same promotional opportunities, compensation, job duties, working conditions, and status. *Id.*

(*Roberts v. Marshall Durbin Co*., ARB Nos. 03-071, 03-095, ALJ No. 02-STA-35 (ARB Aug. 6, 2004)).

The Respondents presented no evidence that the Complainant had failed to mitigate damages. Nor do they make any such argument in their closing brief. I find that the Respondents have failed to make any showing that the Complainant failed to mitigate his damages.

In his brief, the Complainant asks for back pay in the amount of $115,854.35. Comp. P.-Hg. Bf. at 46. According to the Complainant, at the time of his separation from Schwan's he was earning an average weekly wage of $1,454.68, based on total earnings of $3,462.15 from

January 1-16, 2018. My calculation, however, is that this equates to earnings of $288.51 per workday ($3,462.15 divided by 12 workdays), or $1,442.56 per five-day work week, or $75,013.25 per year. From January 1, 2018, to the date of his brief, which was January 12, 2022, or roughly four years, the Complainant would have earned a total of $300,053.00 (4 x $75,013.25) plus $2,308.08 (8 workdays x $288.51), for a total of $302,361.08. Of that, he was paid $3,482.15, so the actual amount of income loss during this period was $298,878.93.[39]

The record also shows that during this period, the Complainant's lost income was offset by the following earnings from Pro-Drivers: in 2018-$27,063.38; in 2019-$24,725.68; in 2020-$26,733.36; and from 1/1/21 to 8/8/21-$17,862.99. Based on his earnings in 2021 up until August 8, 2021, the Complainant posits that his average weekly wage was $562.62,[40] calculated by taking his total earnings of $17,682.99 and dividing it by 31.43 weeks. Using $562.62, he proposed that in the remainder of 2021 and up until January 16, 2022, which was twenty-three weeks, he would have earned an additional $12,940.26. Therefore, his total earnings until January 16, 2022, was $109,145.65. This results in total loss of earnings, through January 16, 2022, of $189,733.28 ($298,878.93 – $109,145.65).

This calculation only covers from the date of the Complainant's discharge to the date of the Complainant's brief. The Board has held, however, that, "Back pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement or, in very limited circumstances, when the employee rejects a bona fide offer, *not when the ALJ decides the case*." *Shields v. James E. Owen Trucking, Inc*., ARB No. 08-021, slip op. at 12. ALJ No. 2007-STA-22 (ARB Nov. 30, 2009) (emphasis supplied). Therefore, as the Board held in *Shields*, the employer remains liable for back pay past the date of the decision, using a formula of the average weekly wage ($1,442.56) reduced by any amount of money that the Complainant continued to earn from other sources (unknown), until Schwan's makes a bona fide offer of reinstatement. (*Id*.)

Furthermore, the Complainant is entitled to pre-judgment and post-judgment interest on the back pay owing according to the rate used for underpayment of federal taxes. *See* 26 U.S.C.A. § 6621(a)(2), *Doyle v. Hydro Nuclear Servs*., ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000) (outlining the procedures to be followed in computing the interest due on back pay awards).

Emotional Distress

[39] In his brief, after stating estimating that he was earning $75,000.00 per year from Schwan's then stated that he would have earned $225,0000 from Schwan's from January 17, 1018, to the date of his brief, which was served on January 12, 2022. Instead of multiplying $75,000.00 by four years, the Complainant appears to have only multiplied it by three.

[40] The AWW in 2021 rounds up to $562.62 rather than $562.61, which is what Complainant stated in his brief.

When adequately shown, a complainant may also be entitled to compensation for mental harm caused by the employer's retaliatory conduct[41]Although the Complainant bears the burden to prove compensatory damages, that burden may be accomplished by the complainant's uncontradicted testimony, when found to be persuasive. For example, in *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), the ARB affirmed the ALJ's award of $4,000.00 for emotional distress based on the testimony of the Complainant and his wife, even though that testimony was not supported by evidence of professional counseling or other medical evidence, where the testimony was unrefuted by the respondent.

In his brief, the Complainant "suggests" an award of $200,000.00 to compensate him for mental pain and emotional distress. Comp. P.-Hg. Bf. at 47. In support of his claim, he acknowledges that he received no therapy or medical treatment for any mental pain or emotional distress caused by his firing. *Id*. at 48. Nonetheless, he argues that such an award is justified since he "undoubtedly" experienced mental pain and emotional distress as a result of his dismissal from Schwan's, which forced him to take a job that paid less and move back home with his parents at the age of fifty-four.

Regarding his testimony, Complainant, testified that he felt sick and "disgusted by what had happened" after he left the meeting on the January 16, having been escorted off the premises. He described his feelings as, "Terrible, terrible." (Tr. 154.) Other than that, however, he did not testify to any chronic depression or mental strain. He did not testify to any sleeplessness, anxiety, extreme stress, depression, excessive fatigue, or other emotional problems. Furthermore, there was no evidence of physical manifestations such as ulcers, gastrointestinal disorders, headaches, or panic attacks.

The Complainant did testify to some loss of self-esteem and career enthusiasm. He stated that the loss of income affected the quality of the vehicle he drove, as well as his ability to engage in favored hobbies, such a paragliding. He implied that the loss of income was a burden on his social life and made harder any plans to settle down and get married. He testified that he had lost his enthusiasm for over-the-road trucking and had viewed his job at Schwan's as an opportunity to make a significant career move. He spoke of his desire to develop sales skills, and his regret at losing such an opportunity. (Tr. 166-167.) He compared the job of an over-the-road trucker as "a dark career choice compared to Schwan's. (Tr. 167.) I found his testimony sincere and believable.

Although the Complainant did not submit any corroborating evidence of medical or psychological treatment to support an award for emotional harm or mental anguish, his credible testimony alone, is sufficient to establish emotional distress. *Jackson*, *supra*; *see also Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007). The Complainant cites *Ferguson v. New Prime, Inc*., ARB No. 10-075, ALJ No. 2009-STA-

[41] *See Simon v. Sancken Trucking Co*., ARB No. 06-039, -088, ALJ No. 2005-STA-40 (ARB Nov. 30, 2007).

47, at 8 (ARB Aug. 31, 2011), for the proposition that an award of emotional damages may be based on awards in similar cases. In this regard, he cites to *Fink v. R&L Carriers Shared Service, LLC,* 2012-STA-6 (ALJ Nov. 20, 2012) and *Bishop v. United Parcel Service*, 2013-STA-4 (ALJ Nov. 15, 2013), as two cases which should be used for comparison purposes. In each of these cases, the administrative law judge awarded $100,000 damages for emotional distress and mental pain. The Complainant notes that in *Fink* and *Bishop* the complainants had been fired for ten years or more before their protected activities were vindicated. The Complainant argues that there is "similarity between the mental pain suffered by [himself], and that suffered by the complainants in *Fink* and *Bishop*, and the passage of time since *Fink* and *Bishop* were decided." Comp P.-Hg. Bf. at 47-48. The Complainant also notes that in both those cases the complainants "received no therapy or medical treatment for [their] mental pain and emotional distress caused by [their] firing." *Id*. at 48. Therefore, the Complainant "suggests" an award of $200,000 for himself.

Weighing the Complainant's suggestion of $200,000 in damages for mental pain and emotional distress, I note initially that his length of time to legal vindication is only half that of the complainants in *Fink* and *Bishop* and yet he asks for twice their reward. Furthermore, there was more compelling evidence in each of those cases of emotional distress and mental harm. In *Fink*, the complainant needed state support, had to move into a mobile home, had to borrow money from family members, had to find another job, could not afford to participate in hobbies, and had difficulty sleeping. *Fink*, *supra*, at 4-5. In *Bishop*, the administrative law judge noted that the following evidence supported the award of $100,000: the complainant was depressed, embarrassed, stopped having hobbies, became dependent on family members, was no longer the major breadwinner, lost health insurance, gained weight, and had to declare bankruptcy. *Bishop*, *supra* at 18.

In comparison to the record of emotional distress and mental harm in *Fink* and *Bishop*, the record here is meagre. The Complainant did not have to sell the family home, declare bankruptcy, borrow money, experience or marital problems. Nor did he claim to lose sleep. The only similarity appears to be a dependence on family members (his parents), an inability to afford certain hobbies (paragliding), and a loss of self-esteem. I do not find these points of similarity sufficient to say that since Fink and Bishop were awarded $100,000, the Complainant should be given $200,000 or even $100,000.

On the other hand, I find that the Complainant is entitled to more than a nominal award, since he was fired in such a way that must have been particularly galling and depressing—the insistence that he had resigned a job he seemed to genuinely cherish, when in fact he had not. This unfair characterization had to have been extremely difficult to live with over the years. Combining this factor with his loss of income and the negative effect on his domestic situation and career possibilities, I find that $50,000 is an appropriate award for his mental and emotional suffering.

Reinstatement

Generally, a successful litigant under the STAA is entitled to an order requiring his former employer to reinstate him "to [his] former position with the same pay and terms and privileges of employment." 49 U.S.C.A § 31105(b)(3)(A)(ii). 29 C.F.R. § 1978.109(b). However, there are situations in which the general rule is set aside.

> While reinstatement is the statutory remedy, circumstances may exist in which reinstatement is impossible or impractical. *Assistant Sec'y & Bryant v. Bearden Trucking Co*., ARB No. 04-014, ALJ No. 03-STA-36, slip op. at 7-8 (ARB June 30, 2005), appeal docketed, No. 05-1965 (4th Cir. Sept. 6, 2005). *See Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 93-ERA-24, slip op. at 9 (Sec'y Feb. 14, 1996) (front pay in lieu of reinstatement may be appropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship").

*Palmer v. Triple R Trucking***,** ARB No. 06-072, slip op. at 3-4, ALJ No. 2003-STA-28 (ARB Aug. 30, 2006).

Here, the Complainant seeks reinstatement. Comp. P.-Hg. Bf. at 45. As previously noted, he also testified that if were reinstated, he did not intend to adhere to the Schwan's inspection protocol. (Tr. 267.) To emphasize this point, he stated that he preferred to believe that the protocol's two-tiered classification system was no longer in use. (*Id*.) Vollmer, though, testified that indeed it was. (Tr. 303.) He stated, "We are still using the current Level-1, Level-2 process. It is still in place." (Tr. 304.)

In other words, the question arises whether reinstatement is impractical given that the Complainant remains opposed to Schwan's inspection protocol and Schwan's still employs it. I do not believe, however, that it is impossible or impractical for the Complainant to work within the framework of the protocol so long as it understood, as previously explained, that the protocol does not require the driver to mark any vehicle as "satisfactory," even with a level-2 defect. Notwithstanding what might be the "expectation" or "preference" of management, it remains the prerogative of the driver not to drive any vehicle which the driver feels is unsafe to drive. Therefore, even a driver as safety-conscious as the Complainant could function at Schwan's provided that no undue pressure is brought to bear on his or her decision regarding whether a vehicle is safe to drive. As noted, the Complainant spoke highly of Wortman and indicated that he would be comfortable with him as a manager because Wortman told him that he had a right, under the protocol, not to drive any vehicle he personally deemed unsafe, even if the defect was only classified or classifiable as a level-2, such as a loud muffler. (Tr. 268-269.) This appears to be the primary source of the Complainant's opposition to the protocol—that it produced an expectation, a collective pressure, to overlook Level-2 violations even if they presented legitimate safety concerns. As he testified, when asked about his understanding of the inspection process versus the law, the Complainant stated: "I understood that according to the law, that if I felt unsafe as a driver of the truck that I was obligated to not drive a truck, whatever truck I was not safe driving; I shouldn't move the truck." (Tr. 274.) In other words, I think it is possible that with a fresh start, under different management, with an understanding of the protocol similar to Wortman's, the issues may not arise.

I therefore find that the Complainant is entitled to reinstatement, with the same seniority, status, and benefits he would have had but for the Respondents' unlawful discrimination.

Punitive Damages

In the amendments effective August 2007, the STAA provides that "relief in any action under subsection (b) may include punitive damages in an amount not to exceed $250,000." 49 U.S.C.A. § 31105(a)(3)(C). Punitive damages are to punish unlawful conduct and to deter its repetition. BMW v. Gore, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate for cases involving "reckless or callous disregard for the [complainant's] rights, as well as intentional violations of federal law . . .." Smith v. Wade, 461 U.S. 30, 51 (1983), quoted in Ferguson, ARB No. 10-075, PDF at 8-9. The Board further requires that an administrative law judge weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

In his brief, the Complainant requests that he be awarded $250,000 in punitive damages because Schwan's acted with reckless disregard for Mr. Jones's rights under 49 U.S.C. § 31105." Comp. P.-Hg. Bf. at 50. He adds, "Schwan's expected its drivers to assume the legal and personal risks associated with operating commercial vehicles out of compliance with DOT regulations. … Its management team ignored his protestations about its illegal inspection regime and his rights under the STAA." *Id*. Further, he argues, "Schwan's is a large company. A punitive damages award is necessary to deter Schwan's management from future retaliation against drivers who exercise their rights under the STAA. Schwan's maintained an illegal inspection regime and expected its drivers to risk citations for violations of commercial vehicle safety regulations." *Id*. at 49.

Leaving aside the legality or illegality of Schwan's inspection protocol, the Salt Lake City depot vehicles were being assigned to RSRs that were not in a condition to drive safely. The company's Director of Safety admitted as much. Moreover, there was a clear expectation that RSRs would continue to drive them until they were fixed. Included in this expectation was that the RSRs, whom the company describes in their brief as "DOT regulated,"[42] would bear the risk of any citation should the vehicles undergo a DOT roadside inspection. If the driver had a CDL, a did the Complainant, the driver was also expected to bear the risk of points against it. Although neither the protocol nor management appeared to require drivers to drive a vehicle that the driver deemed unsafe, if a driver took that position with respect to a truck with a

[42] Resp. P.-Hg. Bf. at 3.

defect that was not expressly spelled out as level-1, the driver risked being perceived as a pariah. Moreover, if one complained or balked at driving a vehicle with only a level-2 defect, one was confronted, as the Complainant was multiple times, with management-level employees espousing the fiction that the DOT had reviewed the protocol and even developed it along with the company. The message was clear: the RSRs should drive the vehicles because the DOT had expressly authorized their use, which was simply not true.

The Complainant began his employment at the Salt Lake City depot with a lengthy background in commercial trucking and a CDL. He had a strong commitment to safety, preferred to drive a "defect-free" truck and furthermore considered it his legal obligation to do so. He was not willing to risk a DOT citation and marks against his CDL that would negatively affect his CSA score. There is no evidence that he was ever told that acceptance of such a risk was part of his job duties. In many respects, Ingold was right when she concluded that the Complainant was not a good cultural fit with the company, he wasn't.

I find that an award of $150,000 in punitive damages is warranted in this case. I find it egregious that the Complainant was made to feel that he had sabotaged his own career at Schwan's by resigning when he had not. I find that the Respondents acted with callous disregard when they failed to contact the Complainant to confirm whether he had voluntarily quit on January 11, but instead chose to hang him on his own words, which were ambiguous as to his intentions. A simple telephone call to the Complainant asking if he indeed had resigned would have made clear his intentions. The Complainant had to live with that unfair characterization of his actions for several years. I can understand why Ingold was frustrated with the Complainant's singular focus on the protocol during the meeting on January 16, when she wished to discuss other aspects of what happened on January 11. However, she was obliged not to retaliate against him for his complaints about the protocol, since such complaints were protected under the Act. Her mistaken conviction that the DOT had vetted the protocol appears to have led her to believe that the protocol was sacrosanct and not subject to any criticism, which shortened her patience. When the Complainant persisted, she effectively fired him.

I have considered the roles that Ingold, Hickson, and Holbrook all played in the events leading to the Complainant's dismissal, and I am aware that they are no longer with Schwan's. However, the level-1/level-2 classification system was still in use at the time of the hearing, according to Vollmer. Moreover, Vollmer appeared to articulate present company policy when he testified that that RSRs are expected to drive trucks with identified defects that could subject them to a DOT citation. Moreover, Vollmer testified that having read the transcript of the meeting with Ingold, Lepore, and the Complainant, he was aware that Ingold had incorrectly advised the Complainant that the classification system had been developed in coordination with the DOT. (Tr. 284-285.) To his credit, he made it a point to dispel this notion at the hearing. However, he did not indicate that the company had taken any affirmative steps to put an end to it among company management. It is quite possible that other RSRs who complain about the inspection protocol are still being falsely told they have no basis to

complain because the protocol was developed along with the DOT. Hopefully this decision and award will provide an incentive to put an end to that myth.

Abatement

Finally, the Complainant asks that I order the Respondents to: (1) post a copy of this decision for 90 consecutive days in all places where employee-notices are customarily posted, not limited to the Salt Lake City depot; (2) send by first-class mail a copy of the decision to all employees who worked for Schwan's since January 16, 2018; (3) expunge all references to the Complainant's discharge from its personnel, labor, and human resources files. Comp. P.-Hg. Bf. at 51.

With the exception of individual notice by first-class mail, which strikes me as unnecessary and wasteful in light of the posted notices, I find that the Complainant is entitled to the measures he has requested.

Attorney Fees and Costs

The Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C.A. § 31105(a)(3)(B). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted twenty (20) days from the date of this Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

I encourage the parties to e-file using the eFile/eServe System ("EFS"), available at https://efile.dol.gov/. Alternatively, the parties may file motions, responses, and briefs by e-mail to OALJ-Cincinnati@DOL.gov. Please include the following information, in the following order, in the subject line of the e-mail: (1) the presiding judge's name; (2) the case name; (3) the case number; and (4) the filing name. Unless otherwise directed, do not copy BALCA's staff on any e-mail filings.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and the entire record, I enter the following Order:

1. Schwan's will pay the Complainant $189,733.28, with both pre- and post-judgment interest, for back pay from January 16, 2018, to January 16, 2022.

2. Schwan's will pay the Complainant back pay at the rate of $1,442.56 per week from January 16, 2022, until the date Schwan's made, or makes, the Complainant a bona

fide, unconditional offer of reinstatement to his former position with the same pay, terms, and privileges of employment that he had before he was discharged, with the same seniority, status, and benefits he would have had but for the Respondents' unlawful discrimination. The back pay due to the Complainant will be reduced by any money the Complainant earned between January 16, 2022, and the date that Schwan's made or makes a bona fide offer of reinstatement. Interest on the back pay will accrue until paid.

3. Schwan's will pay the Complainant $50,000.00 for emotional harm.

4. Schwan's will pay the Complainant $150,000.00 in punitive damages.

5. Schwan's will reinstate the Complainant with the same seniority, status, and benefits he would have had but for the Respondents' unlawful discrimination.

6. Schwan's shall expunge negative information regarding the Complainant's protected activity and its role in his termination from his personnel file, post this Decision and Order for ninety consecutive days on its premises where workplace notices are normally posted, not limited to the Salt Lake City depot.

7. Schwan's shall pay attorney's fees and litigation costs as to be determined.

8. Counsel for the Complainant shall have twenty (20) days from the date of the Decision and Order within which to file a fully supported application for fees, costs, and expenses. Thereafter, Schwan's shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

SO ORDERED.

JOHN P. SELLERS, III
ADMINISTRATIVE LAW JUDGE