U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 October 2019

CASE NO.: 2019-STA-19

IN THE MATTER OF:

GERRY MCDANIEL

Complainant

v.

D.G.CONSTRUCTION & HAULING, LLC
BRETT DESOTELS and JACE DESOTELS[1]

Respondents

APPEARANCES:

PETER L. LAVOIE, ESQ.

For The Complainant

CHRISTIAN B. LANDRY, ESQ.

For The Respondents

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

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), as amended by the Implementing Recommendations of the 9/11 Commission Act

[1] Jace Desotels testified his name is spelled "Jace" and not "Jase" as set forth in the Notice of Hearing, and thus the caption of this matter is hereby amended to reflect the correct spelling of his name. It is noted that the Respondent's name "Desotels" is spelled "Deshotels" at various places in the record and in exhibits received into evidence, however neither party requested that the caption be amended to reflect a different spelling.

of 2007, Pub. L. No. 110-53, and the regulations promulgated thereunder at 29 C.F.R. Part 1978 (2016). The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment. 49 U.S.C. § 31105(a)(1).

I. PROCEDURAL BACKGROUND

On or about May 16, 2018, Gerry McDaniel (herein Complainant) filed a complaint against D.G. Construction & Hauling, LLC, Brett Desotels and Jace Desotels (herein Respondents) with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), alleging Respondents terminated him as a truck driver on May 1, 2018, in reprisal for voicing safety concerns during Complainant's employment with Respondents and for refusing to operate his assigned vehicle, truck No. 17, due to mechanical defects and hours of service problems. An investigation was conducted by OSHA and on January 14, 2019, and the Regional Administrator for OSHA issued the Secretary of Labor's Findings at the request of Complainant to terminate the investigation and refer the case for formal hearing.[2] (ALJX-1). On January 14, 2019, Complainant filed a request for formal hearing with the Chief Administrative Law Judge, Office of Administrative Law Judges. (ALJX-2).

This matter was referred to the Office of Administrative Law Judges, Covington, Louisiana District Office for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a hearing in Lafayette, Louisiana, on June 4, 2019. (ALJX-3). On February 19, 2019, in compliance with the Pre-Hearing Order, Complainant filed a formal complaint alleging the nature of each and every violation claimed as well as the relief sought in this proceeding. (ALJX-4). On February 27, 2019, Respondent duly filed its Answer to the Complaint. (ALJX-5). Thereafter, on May 3, 2019, a Notice Stating Location of Hearing was issued in the instant case. (ALJX-7).

On June 4, 2019, the formal hearing was conducted in Lafayette, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs. The following exhibits were received into evidence at the formal hearing: Administrative Law Judge Exhibit Numbers one through seven;[3] Complainant Exhibits one through eight and

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

[3] The Administrative Law Judge Exhibits consist of an OSHA letter of referral dated January 14, 2019 (ALJX-1); Complainant's objections to the Secretary's findings and request for hearing dated January 14, 2019 (ALJX-2); the Notice of Hearing and Pre-Hearing Order dated January 31, 2019 (ALJX-3); Complainant's Complaint filed on February 13, 2019 (ALJX-4); Respondent's Answer and Defenses to Complainant's Complaint filed on February 27, 2019

eleven through fourteen; and Joint Exhibits one through five. Respondents marked for identification their exhibits, numbers one through six, which were not offered nor received into evidence.

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

II. STIPULATIONS

1. Complainant was employed by D.G. Construction & Hauling, LLC as a truck driver from March 13, 2018 to May 1, 2018. (Tr. 12).

2. In the course of his employment, Complainant operated commercial motor vehicles with a gross weight of at least 10,001 pounds in interstate commerce. (Tr. 12).

3. On May 16, 2018, Complainant filed a timely complaint against Respondents with the Secretary of Labor, through the Regional Administrator for OSHA Region 6, alleging that Respondents had retaliated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105(a). (Tr. 12-13)

4. On June 1, 2018, Complainant filed an Amended Complaint against Respondents with the Secretary of Labor, through the Regional Administrator for OSHA Region 6, alleging that Respondents had retaliated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105(a). (Tr. 13).

5. On January 14, 2019, Complainant, by counsel, filed a timely objection to the Secretary's Findings and requested a hearing de novo before an administrative law judge of the Department of Labor. (Tr. 13-14).

III. ISSUES

The unresolved issues presented by the parties are:

1. Whether Complainant engaged in protected activity when he filed complaints with his supervisors related to violations of commercial vehicle safety regulations within the meaning of the STAA? (Tr. 14).

(ALJX-5); an Order Denying Motion For Extension of Pre-Hearing Deadlines and Continuance of Hearing dated May 3, 2019 (ALJX-6); and a Notice Stating Location of Hearing dated May 3, 2019 (ALJX-7). (Tr. 7-9).

2. Whether any of Complainant's protected activities contributed to his discharge in violation of the STAA? (Tr. 14-15).

3. Whether Complainant suffered an adverse action, i.e. termination, from his employment with Respondents and the specific date of such action. (Tr. 15-16).

4. If Complainant meets his burden of entitlement to relief, did Respondents establish, by clear and convincing evidence, that they would have taken the same adverse action absent the alleged protected activity? (Tr. 16-17).

5. If it is determined that Complainant was terminated in violation of the Act, whether Complainant is entitled to any remedies to include attorney fees? (Tr. 16).

IV. STATEMENT OF THE CASE

The Testimonial Evidence

Complainant

Complainant testified at the formal hearing that he has been a commercial truck driver for two years, and he obtained his commercial driver's license (CDL) in October-November 2017. Before becoming a truck driver, Complainant worked in the oilfields as a welder-fitter. He has a ninth grade education. After leaving school, Complainant became an unlicensed engineer on a 125-foot crew boat that serviced rigs and production platforms in the Gulf of Mexico. (Tr. 164-65). He serviced rigs and production platforms for about two and one-half to three years, completing oil and filter changes and making minor engine repairs. (Tr. 165). As a child, Complainant worked on mechanical things and only has general mechanical knowledge. Thereafter, Complainant moved to Seattle, Washington, and began working with a fishing company on the Bering Sea on a "factory trawler." His job on the trawler required long hours processing fish. (Tr. 166). After leaving his trawler job, Complainant returned to the oil fields for work as a welder-fitter. (Tr. 167).

Complainant testified he is a recovering alcoholic and went through rehabilitation in 2010, and he will be sober for nine years on July 7, 2019. (Tr. 167).

Complainant stated he also worked as a tractor-trailer mechanic for about five years in Little Rock, Arkansas. (Tr. 167). He worked as a fleet service mechanic for Fruehauf Trailer Services, Hal Dodge Transportation, and Pro Transportation. (Tr. 167-68). As a service mechanic, Complainant changed out parts such as starters, fuse boxes and relays, tires, wheel bearings, tub seals, universal joints, and radiators on 18-wheel truck tractors and trailers. (Tr. 158-70). He

also performed a lot of welding on trailers. Complainant never received formal training to be a fleet service mechanic. (Tr. 169).

Complainant took a 24-hour refresher course for his practical CDL test and received his CDL. (Tr. 170). As a mechanic, Complainant had previous experience driving trucks in the yard, but did not drive on the roadways. (Tr. 171). His first truck driving job was with USA Trucks, who gave him a job despite holding a new CDL license and having three lifetime DWIs. (Tr. 171-72). He drove for USA Trucks for three months, driving primarily in the Eastern part of the United States. However, Complainant left USA Trucks because new drivers received high mileage trucks and he drove in four different trucks due to breakdowns. (Tr. 172). After working for USA Trucks, he applied for truck driving jobs online, but he had difficulty finding a new job. (Tr. 173). He applied online to work with Respondents, he interviewed with Brett Desotels, and began working for Respondents two to three days later after a pre-employment screen was completed. (Tr. 173-74). When he began working for Respondents, Complainant did not conduct a "ride-along" with another driver, but instead he "piggy-backed," following another driver to the pick-up location. (Tr. 174). He was also shown how to use a "tipper" on the top of a landfill to unload the trailer of trash. (Tr. 174-75).

When Complainant unloaded trash at the "tipper" he sometimes waited for one and one-half hours to two hours, depending on the number of trucks in line, before his arrival at the landfill. (Tr. 175-76). When working for Respondents, Complainant confirmed he was paid a percentage of each load he hauled. (Tr. 176). His first job working for Respondents was hauling Waste Management garbage for CEI. (Tr. 176; JX-2, p. 1). In completing his first driver's vehicle inspection report ("DVIR"), Complainant found the truck needed repair for the passenger side headlight and dim light. (Tr. 177-78; JX-5). He described his pre-trip inspection as checking fluid levels and belts, looking for oil and fluid leaks, missing bolts on tires, inspecting tires, checking lights, flashers and horns, and looking at brake liners and drums. (Tr. 179). On average, it took Complainant fifteen minutes to conduct a pre-trip inspection on the trucks. (Tr. 180). On March 14, 2018, Complainant conducted a pre-trip inspection on Respondents' truck No. 17, a 1989 Peterbilt truck, and found the city horn was inoperable, the running lights on the cab did not work, a headlight and dim light did not work, the right rear view mirror was loose, the defroster/heater did not work, and the windshield wipers were inoperable. (Tr. 180-82). In addition, the truck was missing a mud flap and the hanger to hold the mud flap was bent. In Complainant's opinion, truck No. 17 should not have been on the road. (Tr. 182).

On his first day of employment with Respondent, Complainant began working at the Waste Management yard. (Tr. 182-83). On his second run for the day, Complainant described an incident in which he had to make a narrow turn with the trailer while a garbage truck turned into the left lane, requiring him to pull the trailer forward to clear the

left lane and hitting a soft spot off the road. Consequently, the trailer went low into the soft ground, causing the trailer to lean over onto a pole. (Tr. 183-84). Complainant called Keela McMillan, Respondents' office manager, to report the incident. (Tr. 184). She told Complainant to call either Brett Desotels or Nick Guidroz, but he was then directed to speak with Jace Desotels. He spoke with Jace, who came to the scene of the incident and drove Complainant back to Respondents' yard. (Tr. 185). Complainant testified he did not receive a citation from the police who investigated the incident, and he did not drive the truck or trailer into a ditch; there was radiator fluid on the road. (Tr. 185-86). Following the incident, Complainant spoke with Brett Desotels, who asked him what could have been done differently to avoid the incident, and Complainant responded that he could have "held his ground" and not proceed to make the turn until the residential garbage truck moved out of his way. (Tr. 186).

According to Complainant, he was hired by Respondent to work the "Walker run" and haul trailers full of trash and dump them. (Tr. 187). Initially, Complainant went to the Waste Management yard to obtain a truck to drive for each workday, but eventually he started his workday at Respondent's yard in order to fill-up his truck with gas. (Tr. 188). On his first day of work, Complainant completed a DVIR and put it into the appropriate slot for "need repairs." (Tr. 188-89). Every single DVIR Complainant completed was placed in Respondents' box for "need repairs," except for any leased truck that he drove. Complainant was told to report any issues he had to Jace Desotels, who was the "go-to guy." (Tr. 189). Complainant informed Jace "many times" that "things needed to be done" on Respondents' truck No. 17. (Tr. 190).

Complainant identified JX-5, p. 2, as a DVIR for a leased truck which he drove that was missing a rear mud flap. (Tr. 190). At one point in time during his employment with Respondents, Complainant took a mud flap and turned it upside down so that he could drill holes in the flap to secure it to a truck he was driving. (Tr. 191). Complainant confirmed that Respondent had a "little closet" with some truck parts, but Respondent did not have many parts for the 1989 Peterbilt truck No. 17. (Tr. 191-92).

Complainant testified that Brett Desotels told him to report to Respondents' yard at 3:00 a.m. to begin each workday. (Tr. 192). Respondents expected Complainant to make three runs to haul trash, but he had to disobey the speed limit to do so. When Complainant arrived at the landfill the gates were closed and trucks would be waiting in line for the "fast pass" and trucks were also in line for the general public scale. (Tr. 193).

Complainant identified CX-3 as his pay stubs and corresponding time sheets while he was employed by Respondents.[4] (Tr. 194-95). He

[4] Complainant's Exhibit 3 was offered and received into evidence without objection. (Tr. 195).

also identified CX-4 as his W-2 form issued by Respondents.[5] (Tr. 196).

Complainant stated that the defects he identified on Respondents' truck No. 17, on his first day of work, were never fixed except the windshield wipers, which Complainant fixed. Complainant explained that due to truck No. 17 never being repaired, he informed Respondents on May 1, 2018, that he could no longer drive the truck. (Tr. 197).

While working for Respondents, Complainant had to drive (bobtail) from Lafayette, Louisiana, to the Waste Management yard in Lake Charles, Louisiana, which was approximately 80 miles. (Tr. 197). Seven to ten times, he also had to drive from Lafayette, Louisiana, to Newton County, Texas, which was more than 100 miles. (Tr. 198). Complainant stated there was no way to make three loads per day without going over the permitted amount of drive time, and speeding and driving in the left lane. (Tr. 199). Complainant always encountered "horrible" traffic when driving his assigned route for Respondents to Walker, Louisiana, on the other side of Baton Rouge, Louisiana. (Tr. 200).

Complainant was involved in a second incident during his employment with Respondents when he was hauling scrap to Port Allen, Louisiana, with no cover over the customer's trailer. The trailer Complainant had to use to haul scrap was not equipped with a cover. (Tr. 200). The driver of a pick-up truck flagged him down and the driver called the police because metal had allegedly fallen out of the trailer striking the pick-up truck. (Tr. 201). Nevertheless, Complainant did not receive any citations, there was no metal found, and no photos were taken of the incident. The company which loaded the scrap metal into the truck driven by Complainant was one of Respondents' customers. (Tr. 202). According to Complainant, Respondents did not own any of the scrap or garbage trailers he hauled. (Tr. 203).

When Complainant arrived at the CEI facility to pick up a trailer, he would back the truck up to the trailer and inspect the trailer. (Tr. 203). Complainant had a heated discussion with CEI's lead driver because Complainant would not drive a trailer with two flat tires. (Tr. 204). When Complainant inspected CEI's trailer he always checked the lights and tires. (Tr. 205). Complainant also spoke with Joe LaRocca, of CEI, who according to Complainant, was impressed with Complainant's reporting of defects or issues with trailers. (Tr. 207-08).

On April 30, 2018, Complainant met Respondents' new mechanic from Texas, and he was told by Jace Desotels to write down all of the truck's defects and give it to "Tony." (Tr. 209). Complainant prepared a DVIR on April 30, 2018, for truck No. 17, noting that a

[5] Complainant's Exhibit 4 was offered and received into evidence without objection. (Tr. 196).

fifth wheel was welded in such a way that it was inoperable, belts were loose, the windshield was cracked, the city horn was inoperable, the low beam light (from his first day on the job) was still inoperable, the left and right mid-marker lights were still inoperable, windshield wipers needed to be installed, the defroster did not work, the right mud flap was missing, and the tachometer and fuel gauge were inoperable. It was Complainant's understanding that some of the defects with truck No. 17 were considered out-of-service violations by the DOT.[6] (Tr. 209-12; JX-5, p. 22).

Complainant testified that April 30, 2018, was the last day he hauled garbage for Respondents. Complainant identified CX-11 as text messages between himself and Jace Desotels. (Tr. 215). Complainant confirmed that CX-11, pp. 2-4, are text messages he received from Keela McMillan.[7] (Tr. 216). Complainant stated that on April 30, 2018, he texted Jace Desotels at 9:00 p.m. to let him know that truck No. 17 needed oil. (Tr. 217). Complainant texted Jace again on May 1, 2018, at 3:42 a.m. to inform Jace he would not continue to drive truck No. 17 because it had not been repaired. Complainant explained that when he arrived to work on May 1, 2018, truck No. 17 remained hooked to a scrap trailer and the "lugs" were still loose, which led Complainant to believe that nothing on the truck had been repaired. (Tr. 218). Thereafter, around 8:00 a.m., Complainant received a call from Jace and Complainant stated "you all got [sic] to do something to that truck." (Tr. 219). At that moment, Jace told Complainant to hold on Joe LaRocca was calling and he would call Complainant back. A few minutes later, Jace called back and stated Brett had called, "we're going to have to let you go, man." Complainant became angry, and stated "you're going to let me go? Fire me for refusing to operate a vehicle that is not safe on the highway . . ." He informed Jace that Respondents would be hearing from the state troopers and the DOT, and Complainant ended the phone call. (Tr. 219-20). Later in the day, Jace called Complainant, stating he was terminating Complainant because he was told to do so, and Jace provided contact information of his cousin who wanted to employ a dump-truck driver. (Tr. 220). Complainant did not speak with Brett Desotels after his termination, and he did not receive a copy of his termination letter or any document stating he was fired. (Tr. 220-21). It was Complainant's understanding that Respondents terminated him because he refused to drive truck No. 17 until it was repaired. (Tr. 221).

Following his termination, Complainant went to one of the Louisiana State Troopers' offices, and reported to them Respondents' safety violations and presented copies of the DVIRs he completed while working for Respondent. (Tr. 221-22). Complainant did not have any

[6] In Complainant's opinion, the inoperable fifth wheel, the uninstalled windshield wiper, the missing mud flap and bracket, the inoperable low beam headlight, marker lights and defroster, and loose lugs on the tires would all constitute out-of-service violations per DOT regulations. (Tr. 213-14).

[7] Complainant's Exhibit 11 was offered and received into evidence without objection. (Tr. 216).

money saved when he was terminated by Respondents. Complainant performed yard work and sold some of his personal possessions to generate income after his termination. (Tr. 223). He identified CX-6 as receipts for expenses he incurred when he was no longer employed by Respondents, including costs for dog sitting (when he obtained a new job that did not allow pets to travel with him) and a list of personal belongings he sold for money. (Tr. 223-24). He identified CX-6, pp. 3-5, as receipts for payments he made for dog sitting when he obtained another job, items sold, and items pawned for money. He identified CX-6, p. 6, as a photograph of a sign he made which stated "everything for sale." Complainant further identified CX-6, p. 2, as estimated values he placed on items sold or pawned.[8] (Tr. 225-26).

Complainant testified he received medical treatment for chest pains, stomach problems and headaches, which he attributed to stress due to his termination from employment with Respondent. (Tr. 231). Complainant identified CX-8 as clinical reports from medical treatment he received on May 29, 2019, showing symptoms of nausea, loss of appetite, high blood pressure, and anxiety.[9] (Tr. 231-32).

Following his termination, Complainant searched for new employment using online job sites, as well as going to a local staffing company (Savard Staffing), and checking job leads. (Tr. 334-35). Complainant identified CX-5, pp. 1-3, as email confirmations of jobs for which he applied, and CX-5, pp. 4-6, as his handwritten notes about his employment search. (Tr. 235). On or around May 20, 2018, Complainant was hired by CW Transport, leaving Complainant unemployed for approximately three weeks.[10] (Tr. 236). Complainant identified CX-7 which shows his wages earned with CW Transport from May 20, 2018 to the end of the year, along with his W-2.[11] (Tr. 236-37). He enjoys his employment with C.W. Transport and he hauls liquid petroleum gases throughout Louisiana, Texas, and Arkansas. Complainant drives over-the-road, working five days per week. (Tr. 238).

While unemployed, Complainant fell behind in paying his monthly expenses such as rent and his electricity bill. He also discontinued his cable television services. Complainant fell behind in rent payments by at least one month, however, he was already behind in paying rent when he began working for Respondent. (Tr. 239).

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[8] The undersigned rejected CX-6, p. 1, which contained the amount of money paid by Complainant for dog sitting because the record is devoid of any testimony from the dog sitter regarding payment for services rendered. (Tr. 229). However, Complainant's Exhibit 6, pp. 2-7, was offered and received into evidence without objection. (Tr. 230).

[9] Complainant's Exhibit 8 was offered and received into evidence without objection. (Tr. 232-33).

[10] Complainant's Exhibit 5 was offered and received into evidence without objection. (Tr. 236).

[11] Complainant's Exhibit 7 was offered and received into evidence without objection. (Tr. 237).

On cross-examination, Complainant acknowledged that as a fleet service mechanic he had knowledge about repairing trucks like the ones he drove for Respondent, and he knew how to replace wipers, fix lights and lug nuts. (Tr. 240). Complainant agreed that some of the repairs he listed on the DVIRs were for items he knew how to repair. However, he did not make such repairs because he was not familiar with Respondent's mechanic shop, and although he tried to find lights in Respondent's parts room, it was a "mess." (Tr. 241). Complainant stated he was "hired to drive," and if he stopped to make repairs to his truck, it consumed his time he had to haul garbage. (Tr. 241-42).

Complainant testified he left his employment with USA Trucks after three months because the job was "not for him" in light of having to drive four different "high mileage" trucks. At USA Trucks, he reported mechanical issues using DVIRs filed in an e-log system. (Tr. 243). He drove five different trucks while working for Respondent, some of which were leased trucks. Nevertheless, he was not upset when he drove the leased trucks because they were well-maintained. He prepared DVIRs for the leased trucks as well. (Tr. 244). On one occasion, Complainant replaced a mud flap on a leased truck. (Tr. 245).

Complainant testified that he engaged in a verbal altercation with a CEI driver over flat tires on one of CEI's trailer. (Tr. 246). He never damaged CEI's equipment. However, Complainant had tires blowout that were on CEI's trailers, but he did not consider it to be his fault because CEI had equipment that was not properly maintained. Prior to transporting a load, Complainant inspected one of CEI's trailers and it had flat tires, which he refused to drive. (Tr. 247). Nonetheless, unbeknownst to Complainant, he later picked-up the same trailer and the tires eventually became flat. (Tr. 247-48). Complainant denied that CEI ever stated he was not inspecting trailers prior to hauling them. He was not required to complete a DVIR upon inspecting CEI's trailers. (Tr. 248). He inspected the CEI trailer that developed flat tires, but he did not know it was the previous trailer he refused to haul because CEI had simply aired up the tires and placed the trailer on the line to be transported. (Tr. 248-49). However, Complainant had a second incident where he had a tire blowout with another CEI trailer, but no one from Respondent's office or CEI addressed the issue with him. (Tr. 249).

On his first day of employment with Respondent, Complainant piggy-backed with co-worker Robert Trailor, who told him he would have to speed to make three runs in one day. (Tr. 249). According to Complainant, all the drivers, along with Brett Desotels and Jace Desotels knew he would have to speed to make three runs in one day. (Tr. 249-50). Respondent never told him to speed, only that he was expected to make three runs each day. (Tr. 250). Complainant made three runs per day by going over his driving hours, speeding, and using improper lanes. Due to traffic, Complainant did not believe that if he would have showed up at 3:00 a.m. for work each day that he would be able to complete three runs without speeding. (Tr. 251-52).

Complainant explained that even if he arrived at Respondent's yard at 3:00 a.m. and arrived at CEI's yard at 4:00 a.m., there were already four or five trucks waiting in line and inevitably he would hit traffic after leaving CEI's yard. (Tr. 252). No matter when Complainant would begin his workday with Respondent, he would have to work more than twelve hours per day. Brett Desotels told him the purpose of beginning the work day at 3:00 a.m. was to insure he would get a trailer when the Waste Management gate opened and to beat the traffic. (Tr. 253). Nonetheless, Respondent never instructed Complainant to work more than twelve hours each day and it was at his discretion to do so. (Tr. 253-54).

Complainant confirmed that JX-2, p. 11, reflects he only made one haul on March 24, 2018, starting at 9:00 a.m. and ending at 11:50 a.m. (Tr. 255). Complainant could not recall why he would have only completed one run, but he stated it could have been that there were not anymore loaded trailers or it was a holiday. (Tr. 255-56). Complainant also confirmed that JX-2, p. 21, reflects a "scrap run" he made for Respondent, which is entirely separate from Respondent's trash business, and he was paid more and by the hour for scrap runs. (Tr. 256). He stated that the monetary amount noted on each of the trip reports enclosed in JX-2 is his calculation as to what he was owed for each work day. (Tr. 257).

Complainant acknowledged he had previous experience as a fleet mechanic and he knew how to replace lights and circuit switches, but when he worked as a fleet mechanic it was on all the same tractors and trailers. (Tr. 258-59). However, while working for Respondent, Complainant stated there were several types of trucks and he was a driver, and as such, he was not responsible to look up parts or repair trucks. (Tr. 259). Of all the items listed on the DVIRs, Complainant had the most apprehension about the inoperable defroster, a missing windshield wiper, loose lug nuts, and inoperable dim lights. (Tr. 259-60). During an incident when the defroster was not working, Complainant stopped at Kenworth to have the truck repaired, but he was not paid by Respondent for any down time for repairs. (Tr. 261-62). Complainant did not know what the handwritten note found in CX-3, p. 14, indicated, and whether he hauled scrap for $112.50 at a rate of $15.00 per hour. (Tr. 262). Complainant speculated that he may have received an hourly rate from Respondent for "shuffling trailers," but he did not believe he was paid for time spent for truck repairs at Kenworth. (Tr. 263).

Regarding the March 14, 2018 incident, during which Complainant was hauling CEI's trailer that became stuck in the soft ground, Complainant stated he could have stopped at the stop sign, but the garbage truck could not pass and traffic would have backed up. (Tr. 264-65). Nevertheless, Complainant believed that if the ground had been hard, "everything would have been fine." (Tr. 265). He spoke to Jace Desotels about the radiator leak, but did not prepare a DVIR because it was in mid-trip. (Tr. 266). Complainant also spoke with Jace "a few times" to let Jace know he did not feel safe in truck No.

17 and preferred to drive a different truck. (Tr. 266-67). Other than on May 1, 2018, Complainant never refused to drive truck No. 17. Complainant stated of the seven to ten trips he made that were over 100 air miles, he completed the trips mainly with truck No. 17. (Tr. 267).

Regarding the April 2018 incident, when scrap metal fell out of the trailer Complainant was hauling, the trailer did not have a ladder to allow Complainant to inspect the load. (Tr. 268). Complainant is aware that litigation has been instituted as a result of the April 2018 incident, but he did not believe that he is being personally sued. (Tr. 268-69).

Complainant spoke with Jace Desotels about the fifth wheel being welded on truck No. 17. Depending on whether the truck was used for garbage or scrap, determined whether the fifth wheel had to be locked into place and allowed it to be multi-functional. (Tr. 269-70).

Complainant acknowledged that Jace Desotels did not tell him that he must drive truck No. 17 or he would be fired; no one from Respondent told him to do so or he would be fired. Rather, Complainant was simply told that he was being terminated. (Tr. 270). Complainant confirmed that Jace referred Complainant to his cousin who was looking for someone to drive a dump truck. (Tr. 270-71). Complainant stated Jace was a "decent guy, man," but he believes his termination was in retaliation for refusing to drive truck No. 17. (Tr. 271).

Complainant was not aware that CEI expressed any problems with Complainant's job performance. Complainant avers Joe LaRocca was glad Complainant was reporting issues with the trailers, and Mr. LaRocca was upset with his drivers because they told Complainant to drive a trailer with flat tires. (Tr. 272). Complainant confirmed that on May 1, 2018, no one was onsite at Respondent's yard, namely the new mechanic, to report the defects or ask why the repairs had not yet been completed. (Tr. 273). He further confirmed the Louisiana State Troopers have not contacted him regarding his complaints he made about Respondent and he has no knowledge that any investigation was conducted. (Tr. 273-74). Complainant testified that some of the medical conditions he attributed to stress due to his termination were in fact pre-existing conditions. (Tr. 274). Complainant has been cured of Hepatitis C and he does not know when his ulcer developed. (Tr. 274-75).

Complainant testified he enjoys his new job with C.W. Transport and he is making more money than when he was employed with Respondent. (Tr. 275). Complainant has also been able to catch-up on his monthly rent expenses and he has never been evicted. (Tr. 276).

On re-direct examination, Complainant testified when he was hired by Respondent he was not told that he was expected to do mechanical work on trucks. Complainant was not paid by Respondent to make mechanical repairs. (Tr. 276). Complainant stated that "loose lugs"

on a truck can "cause a major catastrophe" if they come loose from the truck being operated because a truck could lose a wheel. Inoperable windshield wipers or the windshield being frosted up could also cause a major catastrophe due to reduced visibility. (Tr. 277). Complainant also stated that missing mud flaps can cause a major catastrophe because the tires are more readily able to fling rocks and debris at other vehicles. Complainant believed these aforementioned issues were "major" safety issues. (Tr. 277-78). Complainant was never required by Respondent or CEI to "scale" the loads he carried, thus he had no way of knowing whether he was within DOT weight requirements. (Tr. 278-79). Complainant testified truck No. 17 could not be adjusted to re-distribute weight because of the fixed fifth wheel. (Tr. 280).

On re-cross examination, Complainant confirmed that Keela McMillan, Jace Desotels, Brett Desotels, and Nick Guidroz never told him that he would be terminated if he did not drive truck No. 17. (Tr. 281).

On examination by the undersigned, Complainant testified that aside from being paid a percentage of the load salary or hourly, he did not receive any other benefits such as health insurance. (Tr. 281-82).

Brett Desotels

Brett Desotels was called as an adverse witness by Complainant. He testified at the formal hearing that he owns D.G. Construction & Hauling, LLC. (Tr. 23). He founded the company four years ago and owns and operates the company. (Tr. 23-24). His education includes trade school in civil engineering. Mr. Desotels does not have a commercial driver's license ("CDL"), and he has not received training in the operation of commercial trucks or the DOT regulations that govern commercial trucks. (Tr. 24). He estimated Respondent typically has 25 employees, and one-half of the employees are truck drivers. (Tr. 24-25).

Mr. Desotels's company transports materials for construction sites, and waste (residential trash) to landfills for Custom Ecology Incorporated ("CEI"). (Tr. 25-26). Respondent owns fourteen to fifteen trucks, but in the past it has rented trucks when there was excess work. (Tr. 26). Respondents' new drivers go through administrative processing and a background check. (Tr. 26-27). Mr. Desotels testified Respondents do provide training to drivers about what they should do in the event a defect is detected on a truck. (Tr. 27). If a driver finds a defect, the driver must complete a driver's written inspection report ("DVIR") each day before and after hauling materials, and Respondents' mechanic has to sign off on the DVIR "to make sure that truck comes back in service." (Tr. 27-28).

Mr. Desotels confirmed JX-5 contains DVIRs with Respondents' name at the top of each document pertaining to truck No. 17. (Tr. 29).

Mr. Desotels testified that truck no. 17 is an older Peterbilt truck. He acknowledged JX-5, p. 1, is a DVIR that shows various issues with truck no. 17's air compressor, belts, and hoses. (Tr. 30). According to Mr. Desotels, when a DVIR notes issues with a specific truck and it is placed in the "repair box," Respondents' mechanic is supposed to examine the DVIR and fix "everything that is a problem that is going to stop the vehicle from being on the road." (Tr. 30-31). Respondents have in-house mechanics, but two of their prior mechanics, Tony and A.K., no longer work for Respondents. Respondents' mechanics make a lot of in-house repairs which include changing out transmissions, tires, clutches, and making minor engine repairs. (Tr. 31). Respondents have also used third party mechanics to make various repairs, including engine repairs, but Respondents have used in-house mechanics ever since it had more than two trucks. (Tr. 32).

Mr. Desotels testified he did not see Complainant's April 30, 2018 DVIR for truck No. 17 that is designated as JX-5, p. 22. He agreed that some of the needed repairs noted on the April 30, 2018 DVIR are similar to those repairs set forth in the March 14, 2018 DVIR, both of which relate to truck No. 17. (Tr. 33). Mr. Desotels identified JX-3 as third party repair bills for truck No. 17, none of which mention repairs for windshield wipers, lights, or electrical issues. (Tr. 33-34). Respondent keeps all receipts for each individual truck and the respective repairs, as well as drivers' DVIRs. However, if drivers do not turn in their DVIRs, Respondents do not receive a carbon copy of each DVIR. (Tr. 34). Some of Respondents' trucks have login devices with "E-logs," but Respondents is not required by the Department of Transportation ("DOT") to have E-logs because its trucks stay within 100 air miles of Respondents' "home base." (Tr. 34-35). Instead, Respondents provide paper logs so that drivers can document if they work over ten hours per day or if a truck is "shutdown." (Tr. 35-36). Mr. Desotels stated that in the State of Louisiana truck drivers who work in the construction industry are permitted by the DOT to drive more than twelve hours. Respondent keeps logs to show that its drivers who work over twelve hours are in fact sitting at a jobsite or at a plant, but they are not on duty. (Tr. 36). Respondents' drivers who work the construction side of the business haul asphalt, dirt, and other materials. Respondents also operate other heavy equipment such as dozers and excavators. (Tr. 37).

Mr. Desotels testified Complainant's primary job was to haul garbage, and he did not haul construction-related materials. Mr. Desotels explained that Respondents' employees "kind of do it all" when driving for the company, and the employees do not have to receive specialized training to drive dump trucks. Respondent's drivers do not haul hazardous materials. (Tr. 37).

Mr. Desotels stated that Respondents' employees who haul trash pick it up at CEI's yards in Lafayette and Lake Charles, Louisiana. Respondents' employees do not take trucks home with them, rather they park the trucks in Respondents' yard in Lafayette and CEI's yard in

Lake Charles. (Tr. 38). Respondents' drivers are each provided a company credit card for fuel, but Respondents have a bulk tank at its yard where the trucks can fill-up with gas. (Tr. 39). Mr. Desotels testified CEI owns the trailers that are hauled by Respondents' trucks, and most of Respondents' drivers "bobtail" from Respondents' yard to CEI's yard "mostly every morning" in order to pick up trailers. (Tr. 39-40).

Mr. Desotels recalled when Complainant began working for Respondents, however, he did not know whether Complainant applied for a job online or by telephone. Mr. Desotels makes some of the hiring decisions. (Tr. 40-41). Mr. Desotels' business partner, Nicholas Guidroz, also makes hiring decisions. (Tr. 41). Mr. Desotels testified that Mr. Guidroz does not drive trucks, but instead handles Respondents' business. Mr. Desotels and Mr. Guidroz collaborate when a decision is made to terminate an employee's employment. Respondents issues written warnings to employees when necessary. According Mr. Desotels, Jace Desotels works for Respondents as a "labor hand" for the construction aspect of Respondents' business, but he previously dispatched trucks. (Tr. 42). Mr. Desotels testified that when Respondents' trucks pick up trailers in Lafayette or Lake Charles, the garbage drivers will take the trash to a landfill in Walker, Louisiana. (Tr. 43).

Mr. Desotels testified he had conversations with Complainant about the mechanical condition of the truck driven by Complainant. However, Mr. Desotels did not recall ever discussing anything specific about truck No. 17. (Tr. 44). Instead, Mr. Desotels spoke with Complainant about the condition of "some of the rental trucks" because Complainant "loved" the rental trucks which were obtained by Respondents due to excess amounts of work. Mr. Desotels confirmed that truck No. 17 was repaired during Complainant's employment with Respondents. (Tr. 45).

Mr. Desotels confirmed Respondents pay its employees 20 to 25 percent of the amount received from its customers for each load transported by each driver. (Tr. 45). He explained that a driver's experience determines the percentage amount earned by a driver. Mr. Desotels further confirmed that if a truck is shut down or there is no work, then a driver will not be compensated. On average, he estimated that Respondent's drivers make three garbage runs per day. Drivers report to work at 3:00 a.m. and usually complete their work by 1:15 p.m. (Tr. 46). Mr. Desotels stated that Respondents' drivers work a ten-hour day when they complete three garbage runs. (Tr. 47).

Mr. Desotels identified CX-2 as an "employee warning/termination notice," which he would usually use to provide a "warning" to an employee.[12] (Tr. 48-49). He did not recall if a warning was issued to

[12] Complainant's Exhibit 2 was offered and received into evidence without objection. (Tr. 48).

Complainant prior to termination. (Tr. 49). However, Mr. Desotels testified that it is not uncommon to terminate drivers without a prior written warning, and Respondents terminate drivers "pretty often," sometimes once per month. (Tr. 50). Mr. Desotels stated Complainant was terminated for violating company policy when he failed to "pre-trip" a trailer at CEI, which required checking the air in tires, securing the load, and checking tarps. (Tr. 50-51). According to Mr. Desotels, CEI's trailers were damaged due to Complainant's alleged failure to follow its pre-trip policies and CEI did not want Complainant on the job anymore. CEI provided a written statement to Respondent memorializing the aforementioned details.[13] Mr. Desotels spoke with Complainant about CEI requesting that Complainant no longer be used for its runs, and on April 30, 2018, Respondent terminated Complainant's employment. Mr. Desotels testified he also received a telephone call from CEI one week before April 30, 2018, and he told them [Keela and Jace] to let him [Complainant] go one week before that." (Tr. 51-52). Mr. Desotels had Keela McMillan and Jace Desotels inform Complainant that his employment was terminated, but it was Mr. Desotel's decision to terminate Complainant. During Complainant's termination, Mr. Desotels did not speak with Complainant on the phone. (Tr. 52).

Mr. Desotels identified CX-12 as a report about Respondents from the Federal Motor Carrier Safety Administration's report ("FMCSA report") that is registered with the DOT, and states Respondents have four trucks registered with the DOT.[14] (Tr. 52-54). However, Mr. Desotels explained that Respondents are not registered with the DOT anymore because Respondents do not go outside the limit of 100 air miles or travel into other states. (Tr. 54). When Complainant worked for Respondents, the company still conducted business in Texas. (Tr. 55). Mr. Desotels identified CX-13 and CX-14 as additional reports about Respondents that were generated by the FMCSA, which show a list of violations.[15] (Tr. 55-57).

Mr. Desotels does not personally pull a prospective employee's "Drive-A-Check" report ("DAC") because Keela McMillan handles Respondents' administrative duties. (Tr. 58). He did not consult with anyone prior to making the decision to terminate Complainant's employment. Nevertheless, one week prior to actually terminating Complainant, Mr. Desotels informed Jace Desotels that Complainant should be terminated. Mr. Desotels stated that Jace is his older brother. (Tr. 59). He communicated with Respondents' drivers, including Complainant, "pretty often" about "all kinds of issues" and even gave employees money advances or money out of his own pocket. (Tr. 60-61).

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[13] Significantly, the record is devoid of any written statement from CEI noting its objection to Complainant's continued work on CEI's worksite.

[14] Complainant's Exhibit 12 was offered and received into evidence without objection. (Tr. 53).

[15] Complainant's Exhibits 13 and 14 were offered and received into evidence without objection. (Tr. 56-57).

Mr. Desotels confirmed Respondents' business is growing, but he believed the revenue was about "the same." He did not know if Respondents' drivers went to the Newton County Landfill in Texas. (Tr. 61). Mr. Desotels identified JX-2 as Respondents' ticket book, which is used to properly bill customers, identify each employee, and the truck utilized for each job. (Tr. 62).

Mr. Desotels had conversations with Complainant about his "start time" because Complainant requested that he be able to begin working at 9:00 a.m. rather than 3:00 a.m., so that Complainant would not have to wait in line at CEI to get a load or at the dump to unload. (Tr. 62-63). Some of Complainant's tickets showed he was beginning his workday at 5:00 a.m. or 6:00 a.m., which meant Complainant could only haul two loads. Mr. Desotels explained that a "fast pass" lets some trucks go to the backside of the station so the trucks can immediately drop off a load of garbage and skip the waiting line. (Tr. 63-64). To Mr. Desotels' knowledge, Complainant did not have a fast pass for the dump. (Tr. 64).

Mr. Desotels confirmed that all of Respondents' drivers must complete "trip sheets" on a daily basis like those contained in JX-2. Mr. Desotels expected the trip sheets to contain the identity of each customer, the truck number, the type of job, and the activity the employee is conducting. (Tr. 64). He explained that Respondents retain the trip sheets in order to provide customers with proof of the work completed and what to pay Respondents. Mr. Desotels confirmed that JX-2, p. 12, is one of Complainant's trip sheets showing it was a "3-load" day and that Complainant used truck No. 17, which Mr. Desotels agreed is a "typical" day. (Tr. 65). Mr. Desotels also agreed that on March 26, 2018, Complainant noted that he began work at 3:45 a.m. and completed his runs at 5:30 p.m., and on March 27, 2018, Complainant began working at 3:00 a.m. and stopped at 5:15 p.m. (Tr. 66; JX-2, p. 13). Mr. Desotels would inspect the trip sheets to ensure the forms were filled out correctly, and that the times recorded would match up with respect to when drivers began and completed their work. (Tr. 66-67). He confirmed that drivers may have picked up trucks, but time would pass before a driver was able to pick up a load at CEI. Other times drivers would come to work and enter a start time of 3:00 a.m., but they would drink coffee, eat breakfast, or wait on the mechanic prior to completing any work. (Tr. 67). Mr. Desotels stated that sometimes Respondents would pay employees their hourly rate if they were waiting on the mechanic to fix something on a truck. (Tr. 68).

Mr. Desotels testified that if Respondents' drivers wanted to begin their workday rather than waiting on a mechanic, the drivers could put on mud flaps themselves. (Tr. 68). He confirmed Respondents have a "parts room," and he expected employees to take care of their trucks, even if it meant putting on mud flaps themselves, of which Respondent had "stacks of [mud flaps] in the back." (Tr. 68-69). However, he did not expect employees to repair

electrical problems, fix oil leaks, or replace headlights. Mr. Desotels did not expect Respondents' drivers to have previous mechanic experience, and if a driver did not know how to troubleshoot a bad headlight, he would have Respondents' mechanic fix the headlight. (Tr. 69). Sometimes Mr. Desotels would help drivers to change mud flaps or a light bulb on trucks. (Tr. 70).

On occasion, Mr. Desotels was at Respondents' yard in the morning when drivers arrived to work. He does not work a set schedule each day; he "works every day, all day." Mr. Desotels stated that Respondents' mechanics determine whether mechanical work needs to be completed by a third party. (Tr. 70). On a daily basis, Respondents usually has two mechanics and a helper to tend to Respondents' trucks. (Tr. 71). Mr. Desotels testified that Respondents' yard is always open for the drivers, even overnight. (Tr. 71-72). He confirmed Respondents' mechanics do not work on bulldozers or excavators; they only work on 18-wheeler trucks. (Tr. 72).

On cross-examination by Counsel for Respondents, Mr. Desotels testified that when Respondents hire drivers they are told they will have to do repairs to the trucks like changing mud flaps and light bulbs. In the past, drivers have not informed Mr. Desotels that they object to making repairs to the trucks. (Tr. 73).

Mr. Desotels confirmed he expects employees to be at Respondent's yard by 3:00 a.m., and that JX-2, pp. 37-40, shows that Complainant arrived at work at various times such as 5:00 a.m., 4:30 a.m., and (on April 28, 2018) 6:30 a.m. (Tr. 73-74). Mr. Desotels spoke with Complainant about his failing to show up to work at 3:00 a.m. so he could be at the CEI yard when it opened, and complete a 3-load shift before afternoon traffic increased. However, Complainant informed Mr. Desotels that he did not want to show up early because he would have to wait in line at the CEI yard. (Tr. 74). One week before Complainant was terminated, Mr. Desotels asked Jace Desotels to terminate Complainant because he had received a call from Joe LaRocca, CEI's manager, stating Complainant was destroying CEI's equipment. (Tr. 75). Mr. Desotels does not recall directly speaking with Complainant about CEI's complaint, but he informed Jace that CEI did not want Complainant on the job anymore because he was tearing up CEI's equipment due to a "lack of pre-trip" reports. (Tr. 76).

Mr. Desotels explained that older trucks, such as the Peterbilt truck No. 17 that Complainant drove, were not equipped for use of e-logs, therefore paper logs were used instead. (Tr. 76). He testified that every employee is provided a paper log so that in the event trucks with e-logs malfunctioned, drivers would have a way to keep logs. (Tr. 77).

Mr. Desotels stated that Keela McMillan generated the Complainant's warning/termination notice set forth in CX-2, and Mr. Desotels simply signed the document. (Tr. 77). Mr. Desotels confirmed Complainant's April 30, 2018 termination notice was

backdated for the purpose of updating his employee file, but that Complainant was actually terminated on May 1, 2018. (Tr. 77-78).

Mr. Desotels testified Respondents kept "a lot" of parts at its yard, including mud flaps, extra lug nuts, and windshield wipers. Nonetheless, if drivers needed a part for one of Respondents' trucks, each driver had a company credit card to purchase truck parts at stores like Kenworth, Peterbilt, Volvo, Mac, Louisiana Truck Parts, NAPA, Central Truck Parts, and Mid-South Truck Parts. (Tr. 78). Mr. Desotels identified JX-3, p. 3, as an invoice from Mid-South Trucking for windshield wipers, and he stated that Respondents always provided a way for drivers to obtain parts for trucks. (Tr. 79).

Mr. Desotels recalled that on Complainant's first day working for Respondents, Complainant went into a ditch with a truck and a wrecker had to get the truck out of the ditch. Mr. Desotels told Complainant "to keep his head up, do not worry about it. Bad stuff happens to good people too." According to Mr. Desotels, Complainant was "a little disheartened" about the accident, but Mr. Desotels told him it was "not a huge deal." Complainant would also talk with Mr. Desotels about issues he had with his assigned truck, and Mr. Desotels spoke directly with the mechanic to ensure repairs were completed. Mr. Desotels confirmed Respondents' mechanics are certified. (Tr. 80).

Mr. Desotels testified the DOT would regularly come to Respondents' yard to ensure Respondents had proper time sheets, logs and DVIRs. (Tr. 80-81). He learned a great deal from the DOT audits, including the difference between in-service and out-of-service trucks, and regulations concerning the safety of trucks. (Tr. 81).

On re-direct examination, Mr. Desotels stated that drivers would call him while out on the road to inform him that a truck was broken down or there was an issue with a CEI trailer. (Tr. 82). If there was an issue with a CEI trailer, Respondents were not responsible for any repairs or maintenance; Mr. Desotels would call CEI, who in turn made arrangements for repair of the trailer. (Tr. 83).

Mr. Desotels testified that on March 14, 2018, Complainant was driving one of Respondents' trucks and made a sharp right turn that placed the trailer in the ditch and leaned upon a power pole. (Tr. 83). Upon learning of Complainant's accident, Mr. Desotels told Complainant to "keep your head up." (Tr. 83-84).

Keela McMillan

Ms. McMillan testified she presently works as an executive assistant for LHC Group, a home health group. (Tr. 87). From February 2017 to April 2019, she worked as the office manager for Respondents, and performed the "on-boarding" of new employees, which required ensuring new employees completed pre-employment paperwork and drug screening. Ms. McMillan stated she did not supervise employees. (Tr. 88).

Ms. McMillan testified she would check with the Department of Motor Vehicles to obtain driving records for Respondents' new drivers. (Tr. 89). Ms. McMillan was not responsible for hiring Respondents' new employees, rather she screened applications prior to giving them to the owners of the company. (Tr. 90). She had no responsibility or authority in making decisions to terminate Respondents' employees, and she was never directed by Respondents' owners to terminate an employee or tell an employee they were terminated. (Tr. 90-91).

Ms. McMillan identified CX-2 as Respondents' form for providing a written warning to an employee or terminating an employee. (Tr. 91-92). She explained that Respondents' employees may have received written warnings for an "incident" or arguing with another employee. During the time she worked for Respondents, Ms. McMillan recalled that a "handful" of Respondents' employees were issued written warnings. (Tr. 92). She testified that drivers come and go "quite often," due to being terminated. She completed the termination forms for Respondents' employees and signed them as a "witness." (Tr. 93). Ms. McMillan's understanding of being a "witness," is that she witnessed one of Respondents' owners sign the termination form. However, in Complainant's case, Ms. McMillan also witnessed Complainant violate some of the company's policies, but she was not his immediate supervisor. (Tr. 94).

Ms. McMillan confirmed she was a "point of contact" for Respondents' drivers, and that Complainant first called her on March 14, 2018, after he drove Respondents' truck into a ditch. (Tr. 94-95). She explained that Respondents did not have an office phone at the time of Complainant's accident, so Complainant called her on her cell phone. She instructed Complainant to call the owners of the company. (Tr. 95). Ms. McMillan does not hold a CDL license and has never driven commercial trucks. (Tr. 95-96).

In March 2017, while working for Respondents, Ms. McMillan received information from a DOT officer who came to Respondents' office to conduct a "pre-audit" and instructed them on what forms and documentation were required to pass a DOT audit. (Tr. 96). She recalled that eight to nine months later, the DOT returned and audited Respondents to ensure proper documentation was completed. (Tr. 97).

Ms. McMillan testified she signed Complainant's termination form on April 30, 2018. While working for Respondents, she did not process driver's vehicle inspection reports for major or minor repairs because that was to be reported directly to a mechanic. (Tr. 98). She identified JX-2 as one of Respondents' "load tickets," which was used to bill Respondents' customers. (Tr. 99-100). However, she testified that the majority of Respondents' billing is completed by the other owner, "Nick." Ms. McMillan did not ensure driver's times on each trip sheet comported with their actual time out in the field because she was in the office. Nevertheless, she processed Respondents'

payroll and ensured the drivers' trip sheets matched the time for which drivers were compensated. (Tr. 100).

On cross-examination, Ms. McMillan confirmed she took part in Complainant's hiring process and ran a "NDR" report to examine Complainant's driving record. (Tr. 101-02). She testified Complainant's driving report showed he had a previous DUI, which he disclosed to Respondents' owners. Ms. McMillan stated the majority of Respondents' drivers would leave their employment with Respondents for "greener pastures." (Tr. 102). She recalled Complainant had several incidents while working for Respondents, that being, when he drove one of Respondents' trucks into a ditch, when a piece of metal flew out of the back of a truck Complainant was driving and hit another vehicle, when Complainant failed to arrive on-time for work, and several instances when he was "pretty quickly" coming to the "lot," and when a customer requested Complainant not return to a job. (Tr. 103). She did not address any of the aforementioned issues with Complainant, but she heard Mr. Brett Desotels speaking with Complainant about the incident in which he drove the truck into the ditch. (Tr. 103-04). Ms. McMillan testified it was Respondents' policy to require an employee to reimburse Respondents for damages due to negligence, but Mr. Desotels did not require Complainant to reimburse Respondents for any damages. According to Ms. McMillan, Respondents' owners gave Complainant several chances in light of his previous driving record and the "incidents" that occurred during Complainant's employment with Respondents. (Tr. 104).

Ms. McMillan confirmed Respondents passed the DOT audit after the DOT officer visited their office and provided information about the audit. (Tr. 104-05). She further confirmed that she was the person to generate Respondents' termination forms like that of CX-2. (Tr. 106).

On re-direct examination, Ms. McMillan testified that an employee is not required to sign the termination form because sometimes an employee will leave the company and never return. (Tr. 106-07). In the case of a written warning, the form provides a place for an employee's signature, but in the event an employee refuses to sign, there is a place for a witness to sign the written warning form. On the other hand, she acknowledged Respondents' termination form does not have a place for an employee to sign the form. (Tr. 107).

On re-cross examination, Ms. McMillan recalled Complainant did not sign his termination form because he was not present at work on May 1, 2018. (Tr. 108).

On examination by the undersigned, Ms. McMillan could not recall if she was present when Complainant received his termination form and she is not sure Complainant was provided a copy of his termination form. (Tr. 108). She generated Complainant's termination form, and based upon her personal knowledge, she described Complainant's previous work "infractions" listed on the form. She spoke with both

of Respondents' owners, Brett Desotels and Nicholas Guidroz, about Complainant's violations of company policy. (Tr. 109). Mr. Brett Desotels informed Ms. McMillan that, via email, a customer requested Complainant no longer be used for its projects, but she did not see that customer's email. (Tr. 110). Ms. McMillan stated the account of Complainant's infractions that she summarized on his termination form were discussed between herself, Mr. Brett Desotels, and Mr. Guidroz. (Tr. 110-11). She did not know the day of the week upon which April 30, 2018 fell, nor did she know if Respondents compensated Complainant through May 1, 2018. (Tr. 111).

On further re-direct examination, Ms. McMillan testified that all of Respondents' employees are provided with a "safety plan" included in their employee paperwork, and that in her opinion, Complainant violated several safety policies during his employment with Respondents. (Tr. 111-12).

On further re-cross examination, Ms. McMillan confirmed that the reference to violation of "safety policies" on Complainant's termination form referred to two "wrecks," and being careless, as well as "inspection" issues at the CEI jobsite, receiving customer complaints, and "driving in the yard too fast." (Tr. 113-14).

Jace Desotels

Mr. Jace Desotels (herein "Jace") testified at the formal hearing that he is an equipment operator for Respondents, operating and maintaining equipment. (Tr. 116-17). He is not a truck driver, nor does he hold a CDL. (Tr. 117). Jace operates Respondents' construction equipment, including dozers, excavators, skid steers and rollers. (Tr. 117-18). He served as a mechanic for six months in Respondents' shop, but he is not a certified mechanic. (Tr. 118).

Presently, Jace is not responsible for supervising any of Respondents' employees, however, he did oversee employees when he worked as a dispatcher for Respondents. (Tr. 118). As a dispatcher, Jace received calls from customers for garbage and construction pick-up, and he sent Respondents' trucks to the appropriate jobsites. (Tr. 118-19). He confirmed that Respondents' only garbage customer is CEI and Respondents served CEI in Lafayette, Baton Rouge (60 miles from Lafayette), and Lake Charles (100 miles from Lafayette). CEI would call Jace and tell him how many trucks were needed, and the location of the job. (Tr. 119). Respondents' drivers would pick-up trash in Lafayette or Lake Charles and bring it back to a land fill in Baton Rouge. (Tr. 120). Respondents' drivers would average three loads per day from Lafayette to Baton Rouge, and try to get four loads from Lake Charles. (Tr. 120-21). CEI would request that Jace dispatch a certain number of trucks. (Tr. 121). Jace tried to be efficient by keeping Respondents' drivers on the same routes each day. He never rode along with new drivers, rather new drivers would ride with Respondents' most experienced drivers until they became comfortable with the route. (Tr. 122-23).

Jace testified he did not determine who to hire on behalf of Respondents, and usually he did not make the decision to terminate Respondents' employees. Instead, Jace was typically instructed to terminate an employee. (Tr. 123). He did not like terminating Respondents' employees because he did not "feel comfortable doing [it]." (Tr. 124).

Sometimes Respondents' drivers would tell Jace about mechanical issues with a truck, but the drivers were supposed to write the issues down on a ticket and place the ticket in the mechanic's box in order to obtain repairs. (Tr. 124). Nevertheless, Jace received calls from drivers who experienced mechanical issues while on the road, and he would assess the issue to determine what kind of assistance was required. (Tr. 124-25). The only issues Jace experienced with CEI's trailers is a couple of flat tires. (Tr. 125).

Jace confirmed CX-11 shows text messages dated Monday, April 30, 2018, at 8:42 p.m., and May 1, 2018, at 3:42 a.m., between himself and Complainant. (Tr. 126-27). Jace stated that 3:42 a.m. is the time when most drivers would be at Respondents' yard, getting ready for the work. On May 1, 2018, at 3:42 a.m., Complainant texted Jace to let him know Respondents' truck No. 17 should not be driven, but Jace could not recall his response to Complainant. (Tr. 127). It was not unusual for Respondents' drivers to inform Jace about mechanical issues, and depending on the issue he could help the driver or he would contact Respondents' mechanic. (Tr. 127-28).

Jace testified he had to inform Complainant that he was fired after receiving a phone call from Brett Desotels, who directed him to terminate Complainant's employment one week before. (Tr. 128-29). Jace explained that one week prior to Complainant's termination, Brett Desotels told Jace that Complainant had had a "few" accidents, and had pulled in the yard "real fast one time, almost flipped a trailer and almost hit a driver." In addition, CEI in Lake Charles requested that Complainant not come back to its yard. Consequently, Brett Desotels communicated to Jace "I need you to fire him. That's enough." (Tr. 129). Jace did not discharge Complainant the week prior because he felt "kind of bad" for Complainant, and he and Complainant were friends. (Tr. 129-30). Nevertheless, on May 1, 2018, Jace spoke with Complainant on the phone and terminated his employment. (Tr. 130-31). Complainant did not argue with Jace about his discharge, he simply asked when he could receive his paycheck. As Respondents' dispatcher, Jace spoke with Complainant every day and he liked Complainant. (Tr. 131).

Jace identified JX-2 as a trip sheet that shows the amount of mileage driven, how much fuel was used for the day, how many loads were completed by the driver, and the time when drivers clock-in and clock-out. (Tr. 131-32). Jace did not receive the trip sheets from drivers. (Tr. 132). Jace also identified JX-5, p. 1, as a DVIR for truck No. 17. Customarily, he read driver's DVIRs in the morning to

see if there is anything wrong with Respondents' trucks and he worked with Respondents' mechanics to ensure repairs were made. (Tr. 133). Jace sought to have safety and motor issues repaired immediately, but repairs to the air conditioning would be postponed for about one week. (Tr. 134). Jace recalled that in March 2018, Respondents had three mechanics, one of whom was "Atrell." (Tr. 134). However, presently Respondents have no mechanics because it has sold a lot of trucks and is transitioning more to the construction-side of its business. (Tr. 135). Respondents' construction equipment is brought to John Deere for servicing. (Tr. 135-36).

Jace testified he would tell Complainant what time to arrive at Respondents' yard each morning, depending upon the customer's needs for the day. (Tr. 136). Jace spoke with Complainant about his start time and having to wait in line at the landfill while other drivers skipped the line via the "fast pass." Consequently, Jace informed Complainant that Respondents did not have fast passes, and therefore Complainant was going to have to wait in line. Jace stated that Complainant was the only driver who ever had an issue with waiting in line at the landfill. (Tr. 137). Jace testified that Respondents' truck drivers were paid by the load and made a percentage of the revenue generated by the truck. (Tr. 137-38). Jace did not handle Respondents' payroll, and in May 2018, he stopped being Respondents' dispatcher. According to Jace, Nick Guidroz presently handles Respondents' dispatching. (Tr. 138).

Jace identified CX-1 as photographs he took with his cellphone of Respondents' truck No. 17 leaving the CEI yard where the trailer hit a soft area off the road and leaned against a pole. (Tr. 139). When Complainant called Respondents' office to report this incident, Jace was sent to CEI to take photographs. (Tr. 139-40). As far as Jace knows, Complainant did not hit another vehicle when the trailer leaned against the pole.[16] Jace confirmed that the picture of the truck in CX-1 is truck No. 17 and it has a typical CEI trailer attached to the truck. (Tr. 141). When the trailer to truck No. 17 became stuck in the mud, the police and a wrecker were called, and Jace drove Complainant back to Respondent's office. (Tr. 142). Jace recalled that the wrecker had to lift the trailer out of the mud, and the truck had to be towed back to Respondents' yard because radiator fluid was all over the ground. (Tr. 142-43). Jace believed the police wrote a report concerning the incident involving Complainant and truck No. 17, but he did not recall seeing the report. (Tr. 143). Jace examined JX-4, p. 4, and he did not recall ever seeing this document (i.e., the police report), which states there was no damage to truck No. 17, trailer, or pole. (Tr. 144).

On cross-examination, Jace confirmed the trailer shown in JX-4, p. 4, belongs to CEI, and that CEI never called him to report any

[16] Complainant's Exhibit 1 was offered and received into evidence without objection. (Tr. 140). The parties stipulated that the truck shown in CX-1 is the truck that was driven by Complainant. (Tr. 140-41).

damage to the trailer. Jace testified Respondents had to pay for the truck to be towed and to repair the radiator, and truck No. 17 could not be used for the rest of the workday on March 14, 2018. (Tr. 145). Jace stated he was friends with Complainant, and that Complainant was "not a good worker," but he was not a horrible worker either. (Tr. 145-46). Jace was not involved in hiring Complainant; he only became friends with Complainant after Complainant began working for Respondents. Jace was not familiar with Complainant's work or life history other than Complainant being a recovering alcoholic. (Tr. 146).

Jace testified that Complainant would report to him any issues Complainant had with his assigned truck, and Jace took steps to remedy the issues. (Tr. 146-47). Complainant also reported the issues to Respondents' mechanic. Jace never ordered Complainant to drive a truck Complainant believed was unsafe. (Tr. 147). Jace confirmed Complainant never told him that Complainant had apprehension about driving a truck or feared for the safety of other individuals if he drove truck No. 17. (Tr. 147-48). Jace was present on the last day that Complainant drove truck No. 17 and he did not understand why Complainant waited until April 30, 2018, to inform Jace that he did not want to drive truck No. 17. Jace testified he was "upset" because if Complainant had let him know the day before there were issues with the truck, Jace could have made sure truck No. 17 underwent repairs. (Tr. 148). On May 1, 2018, Jace received a phone call from Brett Desotels, asking the location of truck No. 17 and who was supposed to be driving the truck. (Tr. 148-49). Jace informed Brett that Complainant was still assigned to truck No. 17, to which Brett asked why Jace did not terminate Complainant the week before. Jace did not immediately terminate Complainant when told to do so because he "felt bad" and thought "there was going to be no more issues." (Tr. 149).

Jace recalled he had a "bunch of problems with him [Complainant] day after day," in that Complainant was never able to keep up with other drivers. Jace tried to find a special route for Complainant because each place Respondents sent Complainant to work there were problems. In particular, Jace sent Complainant to work at the CEI yard in Lake Charles and Lafayette, but Complainant had "problems" at each location. On one occasion, Complainant "pulled in real fast and almost hit that [sic] driver when he whipped in the parking lot," which is when Jace was told to terminate Complainant. Jace stated that on prior occasions, Complainant never refused to drive a truck because of mechanical issues. (Tr. 150).

Jace confirmed that JX-5 contains a DVIR dated April 30, 2018, that reflects issues identified by Complainant about truck No. 17 relating to loose belts, an inoperable horn and low beam light, a cracked windshield, and inoperable defroster/heater, a missing mud flap and bracket, and an inoperable tack and fuel gauge, among other issues. Nonetheless, Jace stated Complainant drove truck No. 17 on April 28, 2018, in the same condition and with similar notations on

the DVIR. (Tr. 151). Complainant never informed Jace that he felt unsafe driving truck No. 17. (Tr. 152).

Jace acknowledged CX-9 (paragraph 21), states that on April 27, 2018, Complainant was assigned truck No. 17, and in doing so, Complainant conducted a pre-trip inspection of the truck and submitted a DVIR, instructing the reader to "see previous week's work-up" about repair issues that were not being repaired. (Tr. 153-54). Jace confirmed that JX-5, p. 11, reflects that a March 27, 2018 DVIR states "see 3/26/18 earlier," which refers to previous issues with truck No. 17 that were identified by Complainant. (Tr. 154). Jace further acknowledged that JX-3, p. 6, shows an invoice dated April 27, 2018, that was generated after truck No. 17 was repaired. Consequently, Jace agreed that the Complainant's statement on his April 27, 2018 DVIR to "see previous week's write-up," which noted mechanical issues, would be impossible because the truck had been in the shop on April 27, 2018. (Tr. 155). Jace agreed that Complainant was "sloppy" in executing the DVIRs, stating that there were times Jace knew repairs were made, but Complainant continued to write them on the DVIRs.[17] (Tr. 155-56). He was aware of when Respondents' trucks were sent to third parties for repairs.[18] (Tr. 156-57). Jace confirmed that third parties like Kenworth or Peterbilt, who repaired Respondents' trucks, would not release a truck after making repairs unless the truck was back in service. Therefore, when Respondents' truck No. 17 was repaired by Kenworth and released on April 27, 2018, the truck was ready for service. (Tr. 157). Jace never informed Complainant that he must either drive Respondents' truck No. 17 or be terminated. (Tr. 157-58).

On re-direct examination, Jace confirmed JX-3, p. 6, shows that on April 26, 2018, Kenworth completed repair work on Respondents' truck No. 17, but the truck was not picked up from the repair shop until April 27, 2018. (Tr. 158). Jace testified Complainant never reported that Respondents' truck No. 17 was unsafe, rather it only became an issue until the last day when Complainant worked. (Tr. 159). Jace confirmed CX-11 shows a text message from Complainant to Jace on May 1, 2018, at 3:42 a.m., stating truck No. 17 needs repair work before anyone should drive the truck, "I can't do it anymore, it's the driver's record at stake." Later that day Jace fired Complainant. (Tr. 160).

The Contentions of the Parties

In brief, Complainant contends he engaged in protected activity when he complained about deficient mechanical conditions on truck No. 17 set forth on his DVIRs and reported the conditions to his

[17] Jace recalled that Complainant stated in a DVIR that a mirror needed to be placed on the truck, but according to Jace, the mirror was already repaired. (Tr. 156).

[18] The parties stipulated that JX-3 shows repairs made to Respondent's truck No. 17. (Tr. 156).

supervisors/managers, as well as when he refused to continue to operate truck No. 17 because the mechanical deficiencies were never corrected. He asserts these alleged deficiencies would violate various commercial vehicle safety regulations set forth in 49 C.F.R. §§ 390-393 and 396, which were identified on his first day of employment and were still present on April 30, 2018, the last time Complainant drove truck No. 17. Complainant contends he further engaged in protected activities when he filed complaints with Brett Desotels regarding his work schedule which at times could not be completed without violating federal hours-of-service regulations.

Complainant argues his complaints are protected because he reasonably perceived his repeated complaints constituted violations of commercial vehicle safety laws and regulations. He further argues his refusal to operate a commercial vehicle due to actual or perceived violations can be protected under either 49 U.S.C § 31105(a)(1)(B)(i), the "actual violation" clause, or under 49 U.S.C. § 31105(a)(1)(B)(ii), the "reasonable apprehension" clause, or under both clauses. On this basis, Complainant avers that a driver's refusal to operate a vehicle is protected where the refusal is based on a subjective and objective reasonable belief that the operation of the vehicle would violate commercial vehicle safety laws and regulations. Thus, he contends because actual violations of the above commercial vehicle safety laws and regulations would result from the operation of truck No. 17, he had a reasonable apprehension of serious injury to himself or the motoring public if truck No. 17 was to continue to operate.

Complainant avers that on May 1, 2018, Jace Desotels informed him that he was terminated, just hours after his refusal to drive truck No. 17, and upon Jace speaking with his brother, Brett Desotels, one of the owners of D.G. Construction & Hauling, LLC. Therefore, Complainant argues because of the temporal proximity of his protected activity and the adverse action taken by Respondents, considerable weight must be given to such timing in determining whether an inference of discrimination has been raised. Complainant also contends Respondents' proffered reason for its adverse action is unworthy of credence. Complainant asserts that despite Respondents maintaining a written warning disciplinary system, Respondents never issued Complainant any disciplinary warnings, and, despite CEI complaining about Complainant, Respondents never offered any proof of such complaints. Thus, Complainant contends Respondents' proffered reason for terminating him is clearly pretexual in nature.

Moreover, Complainant insists Respondents have not shown by clear and convincing evidence that it would have discharged him in the absence of his protected activities. He argues the record contains no evidence of customer complaints, disciplinary write-ups, counseling forms, internal communications or any other evidence that suggests Respondents contemplated discharging Complainant.

Consequently, Complainant seeks to find Brett Desotels individually liable as a Respondent since he acknowledged that he made the decision to end Complainant's employment. In addition, Complainant seeks reinstatement, compensatory damages, back pay, punitive damages, interest, and attorney fees and costs.

Conversely, in brief, Respondents contend that Complainant failed to prove there was a causal connection between his alleged protected activity and his termination. Respondents argue that Complainant was terminated due to his prior work history and "multiple events which disrupted D.G.'s operations." Respondents rely upon Complainant's brief employment of 49 days, involvement in two accidents, a verbal altercation with one of Respondents' customer's employees, and disobeying a directive to report to work at a specific time. Furthermore, Respondents contend Complainant "was supposed to be fired days before his actual termination date" as reflected in the testimony of Jace and Brett Desotels. Thus, Respondents claim Complainant "was going to be terminated," despite his alleged protected activity.

Respondents further argue that the repairs about which Complainant complained could have been fixed by Complainant by using spare parts provided by Respondent, purchasing items for repair with his company credit card, or by using outside mechanics. Respondents aver truck No. 17 was in the shop for extensive repairs "for most of April," which conflicts with Complainant's contemporaneous DVIR complaints about truck No. 17, and as a result, creates inconsistencies in his testimony and DVIRs.

Respondents rely upon the testimony of Jace and Brett Desotels, and Keela McMillan that Complainant was not threatened with termination if he refused to drive truck No. 17. It is Respondents' position Complainant inferred that his termination was based on his refusal to drive truck No. 17, which is not supported by the testimony of all other witnesses.

Alternatively, Respondents argue that if the undersigned finds Complainant was terminated for protected conduct, it would have terminated Complainant despite his protected activity under a "dual motive analysis" by establishing, through a preponderance of the evidence, that they "would have reached the same decision even in the absence of the protected conduct." In support of its contention, Respondents rely upon the testimony of its witnesses that Complainant had "employment issues" and was "supposed to be terminated prior to his refusal to drive truck No. 17."

V. DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all

witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tenn. Valley Auth., Case No. 1992-ERA-19, slip op. at 4 (Sec'y Oct. 23, 1995).

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

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

Id. at 52(emphasis added).

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

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

In the present matter, Complainant's burden of persuasion rests principally upon his testimony. I found Complainant to be generally credible, providing fairly straight-forward and detailed testimony. Where inconsistencies are alleged by Respondent, they are addressed below. I find no reason to discount in major part the credibility of Respondent's witnesses. That notwithstanding, inconsistencies are discussed below.

B. The Statutory Protection

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

(a) Prohibitions.

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
>
> > (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> >
> > > (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;
> >
> > (B) the employee refuses to operate a vehicle because
> >
> > > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
> > >
> > > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

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

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of enforcement through formal proceedings." (Emphasis added). Davis v. H.R. Hill, Inc., Case No. 1986-STA-018, slip op. at 2 (Sec'y Mar. 19, 1987).

C. Burden of Proof

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

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

preponderance of the evidence that retaliation was the true reason for terminating" the complainant's employment. Id. "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." Id. (citing Riess v. Nucor Corporation-Vulcraft-Texas, Inc., Case No. 2008-STA-011, slip op. at 3 (ARB Nov. 30, 2011)). If the complainant proves pretext, an ALJ may infer that the protected activity contributed to the termination, but he is not compelled to do so. Williams, supra, slip op. at 6.

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

D. The Protected Activity

1. Internal Complaints

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

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

1. Complainant prepared driver vehicle inspection reports (DVIRs) on each commercial vehicle he operated and submitted it to Respondents as required pursuant to 49 U.S.C. § 396.11. Complainant also verbally reported such safety defects to Respondents Brett and Jace Desotels.

2. Complainant averred such reports on the assigned truck No. 17, a 1989 Peterbilt tractor, were initially filed on his first day of employment, March 14, 2018, and continuously thereafter, and were related to an inoperable dome light, no right rear front mud flap, inoperable defroster, city horn, driver's side windshield wiper, right low beam headlight and mid-marker light.

    a. Complainant contends a defective or inoperable defroster is a safety violation of 49 C.F.R. §§ 392.1, 392.7, 393.1, and 393.79.

    b. Complainant contends an inoperable city horn is a safety violation of 49 C.F.R. §§ 392.1, 392.7, 393.1, 393.81 (horn), 396.1, 396.3 and 396.13.

    c. Complainant contends inoperable or defective windshield wipers or blades is a safety violation of 49 C.F.R. §§ 392.1, 392.7, 393.1 and 393.78 (windshield wiping system).

    d. Complainant contends an inoperable low beam headlamp is a safety violation of 49 C.F.R. §§ 392.1, 392.7 (equipment inspection and use), 393.1, 393.9 (lamps to be operable) and 393.24 (headlamps).

    e. Complainant contends inoperable mid-marker lights present a safety violation of 49 C.F.R. §§ 392.1, 392.7, 393.1(b), and 393.9.

3. On March 19, 2018, Complainant completed a DVIR on truck No. 17 noting the right rear front wheels were missing outer lugs and that the lugs on the left and right rear front wheels were loose. He also raised an issue with a loose right-side mirror, no mud flaps on the rear axle wheels and right rear front wheel, and an inoperable defroster, mid-marker lights and headlights.

4. Complainant contends the only repairs completed on truck No. 17 were replacing missing outer lugs on the right rear front wheels. The remainder of the safety issues and defects about which Complainant complained were never repaired throughout his employment with Respondents.

5. On March 20, 2018, Complainant completed a DVIR on truck No. 17 noting the defroster, horn and wiper blades were

inoperable, the right low-beam light remained unlit, the blind spot mirrors were unfixed, the mid-marker lights remained unlit, and the mud flaps were still missing.

6. On April 30, 2018, Complainant completed a DVIR on truck No. 17 which noted safety issues and defects of a loose fan belt, inoperable fifth wheel, a cracked windshield, and unresponsive fuel gauge and an inoperable dome light. Complainant also verbally reported the defects to Jace Desotels.

    a. Complainant contends loose lug nuts were defective and a safety violation of 49 C.F.R. §§ 392.1, 392.7, 393.1, and 393.78.

    b. Complainant contends a loose fan belt was a safety violation of 49 C.F.R. §§ 393.1(b), 393.9, 393.23, 396.1, 396.3 and 396.7.

    c. Complainant contends an inoperable fifth wheel is defective and a safety violation of 49 C.F.R. §§ 392.1, 392.7 (equipment, inspection and use-coupling devices), 393.1(b), 393.70, 396.1, 396.3, 393.7 and 396.13.

    d. Complainant contends a cracked windshield is a safety violation of 49 C.F.R. §§ 392.1, 392.7 (unsafe operation forbidden), 393.1(b), 393.60(c) and 396.7.

7. Complainant contends that Respondent Brett Desotels instructed and scheduled him in such a way that Complainant could only complete his assigned routes within 12 hours, applicable to short-haul drivers operating within a 100-mile radius of his home terminal, either by violating posted speed limit laws or by violating hours-of-service regulations.

8. Complainant contends he was scheduled to perform routes that exceeded a 100-mile radius from his home terminal when assigned routes to begin in Lafayette, Louisiana and travel to Newton County, Texas, which required Complainant to travel 158 miles from his home terminal.

9. On May 1, 2018, Complainant reported for work and noticed that the DVIR listed defects and issues had not been corrected. Complainant texted Jace Desotels that the repairs on truck No. 17 needed to be made before anyone drove the truck and that he could not do it anymore. Complainant refused to continue to operate truck No. 17. Complainant contends he engaged in protected activity when he refused to operate truck No. 17 because of Respondent's failure to repair defects which were safety issues identified in the DVIRs he had completed.

In the instant case, Respondent does not dispute that during Complainant's tenure with Respondent he prepared driver vehicle

inspection reports, but Respondent disputes that Complainant voiced concerns of violations of federal regulations in any of these alleged reports or that such reports were considered protected activity pursuant to the Act. (ALJX-5, p. 2).

Complainant testified he prepared and submitted DVIRs concerning defects in equipment as noted above. Moreover, the parties provided DVIRs submitted by Complainant which identify specific evidence of record demonstrating he reported the foregoing defects and issues with the aforementioned equipment. (JX-5). Additionally, Complainant testified that he reported to Jace Desotels "many times" that "things needed to be done" on Respondent's truck No. 17, as well as telling Jace a "few times" that he felt unsafe in the truck. Jace Desotels testified that Complainant reported to him any mechanical issues Complainant had with his assigned truck, and Jace took steps to remedy the issues. Brett Deshotels also acknowledged that Complainant spoke with him about issues he had with truck No. 17, and in turn, Brett Desotels spoke with the mechanic to ensure repairs were made. Thus, I find Complainant has provided evidence that verbal internal reports were provided to a manager or supervisor or dispatcher of Respondent.

Complainant further testified that in his opinion Respondent's truck No. 17 should not have been on the road and that the defects he identified on his March 14, 2018 DVIR were never fixed, except the windshield wipers, which is why he finally refused to drive the truck on May 1, 2018. It was Complainant's understanding that some of the defects with truck No. 17 were considered out-of-service violations by the DOT.[19] Complainant testified out of all the items listed on the DVIRs for repair concerning truck No. 17, that he had the most apprehension about the inoperable defroster, missing windshield wiper, loose lug nuts, and inoperable dim lights. Complainant testified he worked as a fleet service mechanic for five years, and in doing so, he changed out parts such as starters, fuse boxes, relays, tires, wheel bearings, tub seals, universal joints, and radiators on 18-wheel truck tractors and trailers. However, Complainant never received formal training as a fleet service mechanic, and only has general mechanical knowledge. In addition, Complainant only drove commercial trucks with USA Trucks for approximately three months before working for Respondents from March 14, 2018 through May 1, 2018. Therefore, under the standard set forth in Calhoun, Complainant must show that a person with five years of experience working as a fleet service mechanic (with no professional training), as well as less than six months experience driving commercial trucks would have a "reasonable belief" that there was a violation of a commercial vehicle safety regulation. Calhoun, supra, slip op. at 11.

Complainant argues his complaints about the inoperable defroster, city horn, low beam headlamp, mid-marker lights and fifth wheel, along with a cracked windshield, and loose lug nuts and fan belt on truck No. 17 were all related to a violation of 49 C.F.R. § 392.7, which

[19] See supra note 6.

prohibits a driver from driving the vehicle unless he is satisfied that the lighting devices/reflectors, tires, horn, windshield wipers, wheels/rims, and emergency equipment are in good working order. 49 C.F.R. § 392.1 requires carriers and their employees to comply with the regulations listed in 49 C.F.R. Part 392. Based on Complainant's testimony and his experience, I find that it was reasonable for Complainant to believe that the aforementioned issues with truck No. 17 were safety concerns because it could have **arguably** made the truck unsafe to drive, or inoperable due to not being able to see while driving, or having safety issues with tires due to loose lug nuts. Accordingly, pursuant to Calhoun, I find that it was reasonable for Complainant to believe that his internal complaints regarding the above-mentioned issues were related to a violation of 49 C.F.R. §§ 392.1 and 392.7. Calhoun, supra, slip op. at 11; see Williams, supra, slip op. at 6; Ulrich, supra, slip op. at 4.

Similarly, Complainant contends his complaints about the inoperable defroster, city horn, low beam headlamp, mid-marker lights and fifth wheel, along with a cracked windshield, and loose lug nuts and fan belt on truck No. 17 were all related to violations of 49 C.F.R. §§ 393.1, 393.9, 393.23, 393.24, 393.60(c), 393.70, 393.78, 393.79, 393.81. Specifically, 49 C.F.R. § 393.1 requires compliance with all of the regulations set forth in Part 393. Section 393.9 states that all lamps be capable of operation at all times, Section 393.23 requires that lamps must be powered by the electrical system of the motor vehicle, and Section 393.24 states that headlamps shall provide an upper and lower beam distribution of light. In addition, Section 393.60 addresses windshield condition, noting that each windshield shall be free of discoloration or damage in the area extending upward from the height of the top of the steering wheel and extending from a 25 mm border at each side of the windshield (panel). On the other hand, Section 393.70 discusses the requirements for fifth wheel mounting, locking, and location. While Sections 393.78, 393.79, and 393.81 require having operable windshield wiping and defrosting systems, as well as an operable horn on every truck. In light of the foregoing, I find that Complainant's internal complaints regarding the aforementioned issues were related to violations of the identified sections in Part 393. Complainant made the internal complaints because he was not satisfied that truck No. 17 was in safe operating condition. I find Complainant had sufficient knowledge even as an untrained fleet service mechanic and with his limited commercial driving experience to reasonably believe that issues with the truck's defroster, horn, headlamp, fifth wheel, windshield, and lug nuts are safety concerns. According to the standard set forth in Calhoun, I find it was reasonable for Complainant to believe that his internal complaints regarding the above-mentioned issues were related to violations set forth above regarding Section 393. Calhoun, supra, slip op. at 11; see Williams, supra, slip op. at 6; Ulrich, supra, slip op. at 4.

Finally, Complainant asserts that his complaints about the inoperable city horn, loose fan belt, inoperable fifth wheel, and

cracked windshield were also related to 49 C.F.R. §§ 396.1, 396.7, and 396.13. Section 396.1 requires compliance with all of the regulations set forth in Part 396. Furthermore, Section 396.7 prohibits the operation of a motor vehicle "in such a condition as to likely cause an accident or a breakdown of the vehicle," and Section 396.13 states in part that before driving a motor vehicle the driver shall be satisfied that the vehicle is "in safe operating condition." He also relies upon 49 C.F.R. § 396.3, a catch-all provision requiring that any "parts and accessories which may affect safety of operation" be in "safe and proper operating condition at all times." Complainant testified that he believed at the time he reported such conditions that they constituted out-of-service DOT violations. On May 1, 2018, when he saw the lugs were still loose on Truck No. 17, he concluded he could no longer operate the truck because it was not in safe operating condition. Complainant testified that he informed Brett and Jace Desotels of his safety concerns with truck No. 17 due to inoperable or broken parts. Based on Complainant's credible testimony, I find that his internal complaints regarding the aforementioned issues with truck No. 17 were related to a violation of 49 C.F.R. §§ 396.1, 396.3, 396.7, and 396.13. See Williams, supra, slip op. at 6; Ulrich, supra, slip op. at 4. I further find that it was reasonable for Complainant to believe that the issues with the horn, fan belt, fifth wheel, and windshield were safety concerns. Calhoun, supra, slip op. at 11.

Based on the foregoing, I find Complainant's allegations that he engaged in protected activity when he prepared and submitted driver vehicle inspection reports and made verbal internal reports of equipment defects and safety issues constitutes protected activity pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

2. Refusal to Drive

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C. § 31105(a)(1)(B)(i), requires that Complainant show he refused "to operate a vehicle because—the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." The Administrative Review Board ("ARB") has found that a refusal to drive constituted protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) where the driver's windshield wipers were not in good working order in violation of 49 C.F.R. § 392.7, even though rain was not imminent and there was no risk of a safety issue. Robertson v. Marshall Durbin Co., Case No. 2002-STA-035, slip op. at 12-13 (Aug. 4, 2004).

In Ass't Sec'y & Bailey v. Koch Foods, LLC, Case No. 2008-STA-61 (ARB Sept. 30, 2011), the ARB held that an actual violation of a regulation is not required under Section 321105(a)(1)(B)(i). The ARB concluded "that the protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a

vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined." Id. at 9. However, the ARB's decision was reversed by the U.S. Eleventh Circuit Court of Appeals. In Koch Foods, Inc. v. Sec'y of Labor, Case No. 11-14850 (11th Cir. March 11, 2013), the Court held that the phrase "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order," refers only to circumstances in which operation would result in an **actual violation** of law. Id.

Complainant contends that on May 1, 2018, after more than one month of regular complaints about truck No. 17 that went unaddressed, he refused to continue to operate the truck. In addition, he saw the lugs on the truck tires were still loose. On this basis, Complainant asserts that actual violations under 49 C.F.R. §§ 392.1, 392.7, 393.1, 393.9, 393.23, 393.24, 393.60, 393.79, 393.81, 396.1, 396.3, 396.7 and 396.13 would have occurred but for his refusal to operate truck No. 17 on May 1, 2018. Complainant testified that on his first day of work with Respondents he noted on a DVIR that truck No. 17 had an inoperable city horn, headlight, cab light, dim-lights and defroster/heater, as well as having a cracked windshield, a loose right rear view mirror, defective windshield wipers, and a missing mud flap. Complainant further testified that by May 1, 2018, with the exception of the windshield wipers, no other repairs were made to the items he identified on the DVIRs, which is why he refused to drive truck No. 17. Thus, Complainant argues that he refused to operate truck No. 17 because he was not satisfied that it was in safe operating condition.

As discussed above, Complainant relies upon 49 C.F.R. § 392.7, which prohibits a driver from driving the vehicle unless he is satisfied that the lighting devices/reflectors, tires, horn, windshield wipers, wheels/rims, and emergency equipment are in good working order. He also relies upon Sections 393.9, 393.24, 393.60, 393.79, and 393.81, which address the proper operation of headlamps, the condition of the windshield, and the proper operation of the defrosting system and city horn. Complainant asserts that issues with the inoperable city horn, loose fan belt, inoperable fifth wheel, and cracked windshield were not repaired on May 1, 2018, when he refused to drive truck No. 17, and were in violation of Parts 392 and 393. Further, Complainant argues actual violations would have occurred if he continued driving truck No. 17 pursuant to Section 396.7, which prohibits the operation of a motor vehicle "in such a condition as to likely cause an accident or a breakdown of the vehicle," and Section 396.13, stating in part that before driving a motor vehicle the driver shall be satisfied that the vehicle is "in safe operating condition." Lastly, he also relies upon 49 C.F.R. § 396.3, requiring that any "parts and accessories which may affect safety of operation" be in "safe and proper operating condition at all times."

Here, Complainant clearly testified that he was **not satisfied** that the truck was in good working order when he made the refusal to drive. Complainant explained that "loose lugs" on a truck can "cause

a major catastrophe" if they come loose from the truck being operated because the truck could lose a wheel. Likewise, Claimant testified that inoperable windshield wipers or a windshield being fogged/frosted could also cause a major catastrophe, as well as missing mud flaps because the tires are more readily able to fling rocks and debris at other vehicles. Moreover, the DVIRs of record, including the last DVIR dated April 30, 2018, show there were issues with loose belts, the city horn, low beam lights, mid marker lights, windshield, fan belt, defroster/heater, and mud flaps. Based on the foregoing, I find that if Complainant continued to drive truck No. 17 on May 1, 2018, actual violations of the aforementioned commercial motor vehicle safety regulations would have occurred. Accordingly, I find and conclude Complainant's refusal to drive was protected under 49 U.S.C. § 31105(a)(1)(B)(i).

The second refusal to drive provision, 49 U.S.C. § 31105(a)(1)(B)(ii), focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury "to the employee or the public because of the vehicle's hazardous safety or security condition."

The STAA defines reasonable apprehension as:

> [A]n employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. **To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.**

49 U.S.C. § 31105(a)(ii)(emphasis added).

Complainant argues his refusal to drive the truck was also based upon a reasonable apprehension of serious injury and protected under 49 U.S.C. § 31105(a)(1)(B)(ii). He contends that defects such as loose lug nuts, missing mud flaps, and an inoperable defroster could cause "major catastrophes" because the truck could have lost a wheel, thrown rocks or other debris into surrounding roadways and vehicles, or reduced his visibility while driving. Complainant testified that in his opinion the aforementioned issues were "major" safety issues. Complainant testified that he reported to Jace Desotels "many times" that "things needed to be done" on Respondents' truck No. 17, and told Jace a "few times" that he felt unsafe in the truck and preferred to drive a different truck. Further, Brett Deshotels acknowledged that Complainant spoke with him about issues he had with truck No. 17, and in turn, Brett Desotels spoke with the mechanic to ensure repairs were made. Nevertheless, Complainant testified that on April 30, 2018, he

completed a DVIR for truck No. 17 that shows the fifth wheel remained inoperable, there were loose belts and lug nuts, a cracked windshield, a missing mud flap, and an inoperable defroster and city horn that were never repaired.

In light of the foregoing, I find and conclude that Complainant believed that the issues with loose lug nuts and belts, a cracked windshield, a missing mud flap, and an inoperable city horn, defroster and fifth wheel were all safety concerns. I further find and conclude that his belief was subjectively reasonable, and objectively reasonable as a reasonable driver in Complainant's situation would have also concluded that the safety conditions established a real danger of accident or injury. See 49 U.S.C. § 31105(a)(ii). Moreover, I find Complainant credibly testified he informed both Jace and Brett Desotels about the aforementioned issues with truck No. 17, and he was unable to have Respondents correct the hazardous safety or security conditions. Accordingly, I find Complainant's refusal to drive was protected under 49 U.S.C. § 31105(a)(1)(B)(ii).

E. Respondent's Adverse Action

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court's Burlington Northern & Sante Fe Railway Co. v. White, 548 U.S. 53 (2006) decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the U.S. Department of Labor, including the AIR-21, incorporated into the STAA. Melton v. Yellow Transportation, Inc., ARB No. 06-052, ALJ No. 2005-STA-00002 (ARB Sept. 30, 2008). The Court stated that to be an unfavorable personnel action the action must be "materially adverse" meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington Northern, 548 U.S. at 57. Moreover, "adverse actions" refer to unfavorable employment actions that are "**more than trivial**, either as a single event or in combination with other deliberate employer actions alleged." Williams v. American Airlines, Inc., ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010))(emphasis added)(holding that a performance rating drop from "competent" to "needs development" was more than trivial and was an adverse action as a matter of law).

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

the evidence that Respondents took adverse action against him. 29 C.F.R. § 1978.109(a).

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

Here, Complainant asserts that he suffered an adverse action on May 1, 2018, when Respondent terminated his employment after making complaints about mechanical defects and refusing to drive truck No. 17 when mechanical repairs were not completed. On the other hand, Respondents concede that they terminated Complainant's employment on May 1, 2018, but Respondents aver it did so because Complainant failed to arrive to work on-time, he "wrecked" his assigned truck on March 14, 2018, he was in another work accident on April 15, 2018, and one of Respondents' customers requested that Complainant not be allowed to return to their place of business. (ALJX-5, p. 4; CX-2, p. 1). Notwithstanding the foregoing, I find and conclude that Complainant suffered adverse action when Respondents terminated his employment on May 1, 2018.

F. Contributing Factor

Complainant must prove by a preponderance of the evidence that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 31105(b); Williams v. American Airlines, Inc., ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010); Peters v. Renner Trucking & Excavating, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009); Sievers v. Alaska Airlines, Inc., ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 262-63 (5th Cir. 2014) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5th Cir. 2008)); accord Ameristar Airways, Inc. v. Admin. Rev. Bd., 650 F.3d 563, 567 (5th Cir. 2011); Palmer v. Canadian Nat'l Ry., ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53 (ARB Sept. 30, 2016)(en banc). A complainant can succeed by providing either direct or indirect proof of contribution. Id. Direct evidence is "smoking gun" evidence that conclusively links the protected activity and the adverse action and does not rely upon inference. Id. at 4-5. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the

falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. Brucker v. BNSF Ry. Co., ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 10-11 (ARB July 29, 2016)(noting that intent and credibility are crucial issues in employment discrimination cases). Whether considering direct or circumstantial evidence, an administrative law judge **must make a factual determination** and **must be persuaded that it is more likely than not** that the complainant's protected activity played **some** role in the adverse action. Palmer, supra, slip op. at 55-56.

1. Temporal Proximity

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

The timing and abruptness of a discharge are persuasive evidence of an employer's motivation. NLRB v. Am. Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983), citing NLRB v. Advanced Bus. Forms Corp., 474 F.2d 457, 465 (2d Cir. 1973); see NLRB v. RainWare, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984); see also Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (holding that a **three to four month** disparity between the statutorily protected activity and the adverse employment action is insufficient to create an inference of retaliation); Williams v. S. Coaches, Inc., 99-STA-044 (Sec'y Sept. 11, 1995)(stating that a lapse in **six weeks** between the protected activity and adverse action is not too distant to negate a negative inference); Bolden v. Distron, Inc., 87-STA-28 (ALJ Mar. 21, 1988), aff'd, (Sec'y June 3, 1988)(holding **15 months** too remote in time to create an inference of retaliation); Evans v. Wash. Pub. Power Supply Sys., ARB No. 96-065, ALJ No. 1995-ERA-052, slip op. at 4 (ARB July 30, 1996)(finding that a lapse of **approximately one year** was too much to justify an inference that protected activity caused the adverse action).

Determining what, if any, logical inference can be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a "fact intensive" analysis. Brucker v. BNSF Ry. Co., ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 11 (ARB July 29, 2016)(quoting Franchini v. Argonne Nat'l Lab., ARB No. 11-006, ALJ

2009-ERA-014, slip op. at 8-9 (ARB Sept. 26, 2012). Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. Jennings, supra at 1352; Robinson v. Northwest Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. at 9 (ARB Nov. 30, 2005). However, where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. Barber v. Planet Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

In the present matter, Complainant testified that over the course of his employment from March 13, 2018 through May 1, 2018, he made internal complaints to Jace Desotels "many times," about repairs that were needed on truck No. 17, and told Jace a "few times" that he did not feel safe in the truck. Indeed, Jace testified that Complainant would report to him any mechanical issues Complainant had with the assigned truck, and Jace took steps to remedy the issues. Brett Deshotels also acknowledged that Complainant spoke with him about mechanical issues he had with truck No. 17, and consequently, Brett spoke with the mechanic to ensure repairs were made. The record evidence shows that Complainant completed thirteen DVIRs beginning on March 14, 2018, and ending on April 30, 2018, that pertained to mechanical issues with truck No. 17 with regard to an inoperable city horn, defroster/heater, right low-beam light, right/left mid-marker lights and windshield wipers, as well as a missing mud flap and outer lugs on the right rear and front wheels, and loose belts. Ultimately, Complainant refused to drive truck No. 17 on May 1, 2018, when he sent a text message to Jace Desotels, stating "#17's repairs need [sic] made before anyone should drive it. I can't do it anymore. It's the drivers [sic] record at stake," and he was subsequently terminated on the same day.

In consideration of the foregoing, I find that not only is there temporal proximity between Complainant reporting mechanical deficiencies for truck No. 17 in the DVIRs, the last of which was completed on April 30, 2018, but there is undoubtedly close temporal proximity between Complainant's May 1, 2018 refusal to drive and his termination. Consequently, I find the close temporal proximity between Complainant's aforementioned protected activity and his discharge is persuasive evidence of Respondents' motivation, and as such supports an inference of retaliation. See Am. Geri-Care, Inc., supra at 60.

2. Respondents' Knowledge of the Protected Activity

Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. See Gary v. Chautauqua Airlines, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); Peck v. Safe Air Int'l, Inc., ARB

Case No. 02-028 (ARB, Jan. 30, 2004). The ARB has noted that knowledge of protected activity is a factor to be considered under the contributing factor analysis. See Hamilton v. CSX Transp., Inc., ARB No. 12-022, ALJ No. 2010-FRS-025 (ARB Apr. 30, 2013).

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

Here, Brett Desotels testified that during the duration of Complainant's employment with Respondents, he had conversations with Complainant about the mechanical condition of the truck driven by Complainant. Brett Desotels also acknowledged that Complainant spoke with him about issues he had with truck No. 17, and in turn, he spoke with the mechanic to ensure repairs were made. Brett Desotels testified that truck No. 17 was repaired during Complainant's employment with Respondent. According to Mr. Desotels, Respondents also kept all receipts for trucks pertaining to mechanical repairs, as well as copies of the drivers' DVIRs. He further testified that it was his decision to terminate Complainant's employment, and he did not consult with anyone prior to making the decision to discharge Complainant.

Based on the foregoing, I find that Brett Desotels had knowledge of Complainant's protected activity when Complainant reported to Mr. Desotels the mechanical and/or safety issues about truck No. 17. I also find that Brett Desotels was the decision maker who determined that Complainant should be terminated on May 1, 2018. Therefore, I find and conclude that Respondents had knowledge of Complainant's protected activity.

3. The Legitimacy Reasons for Employer's Actions

The Act does not prohibit an employer from discharging a whistleblower where the discharge is not motivated by retaliatory animus. See, e.g., Newkirk v. Cypress Trucking Lines, Inc., Case No. 1988-STA-17, slip op. at 9 (Sec'y Feb. 13, 1989)(although a complainant engaged in protected activity, he was terminated by the respondent's managers who collectively determined to discharge the complainant for his failure to secure bills of lading); Allen v. Revco D.S., Inc., Case No. 1991-STA-9 @ 5-6 (Sec'y Sept. 24, 1991)(a

complaint was dismissed when the respondent presented evidence of a legitimate business reason to discharge complainant -- falsification of logs of records – and the evidence permitted an inference that the employer believed that the schedule could be run legally and believed that complainant illegally and unnecessarily falsified his logs); cf. Lockert v. U.S. Dep't of Labor, 867 F.2d 513, 519 (9th Cir. 1989)(an employee who engages in protected activity may be discharged by an employer if the employer has reasonable grounds to believe the employee engaged in misconduct and the decision was not motivated by protected conduct).

The Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether the complainant has demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Palmer, supra, slip op. at 29, 55; Brune, supra at 14 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See Florek v. E. Air Cent., Inc., ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)). The complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. Douglas, supra, slip op. at 11. Furthermore, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employe[r] taking the alleged prohibited personnel action in order to establish that his [or her] disclosure was a contributing factor to the personnel actions." Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993).

In the instant case, Complainant argues Respondents' assertion that it terminated him for "violation of company policies" is unworthy of credence. Despite Respondents maintaining a written disciplinary policy, Complainant avers that he was never issued any written warning, formal or informal, during his employment with Respondents. In addition, Complainant contends that even though Respondents allege its customer, CEI, complained about his work performance, Respondents offered no evidence of the same. On this basis, Complainant asserts that Respondents never disciplined him or warned him about any policy violation. Thus, Complainant argues that Respondents' reasons for discharge are clearly pretextual.

Conversely, Respondents contend that it legitimately terminated Complainant's employment because of a culmination of factors including failure to arrive to work on time, "wrecking" his assigned truck on March 14, 2018, his April 15, 2018 "accident," and also due to a customer's request that Complainant be prohibited from returning to the customer's worksite. (ALJX-5, p. 4). Complainant's April 30, 2018 "Termination Notice" states that Complainant was terminated for "violation of company policies, lack of following safety procedures,

and customer requested that Gerry [Complainant] no longer be used on their projects."[20] (CX-2, p. 1).

In particular, Respondents allege that, in part, they terminated Complainant because he failed to arrive on time to work. Complainant admitted he did not always arrive to work at 3:00 a.m. because even if he arrived on time at Respondents' yard and reached CEI's yard at 4:00 a.m., there were already four or five trucks waiting in line and inevitably he would hit traffic after leaving CEI's yard. Complainant stated that no matter when he would begin his workday with Respondents, he would have to work more than twelve hours per day. Brett Desotels confirmed that he expected employees to be at Respondents' yard by 3:00 a.m., and that he had conversations with Complainant about his "start time" because Complainant requested that he be able to begin working at 9:00 a.m. rather than 3:00 a.m., so that Complainant would not have to wait in line at CEI. Brett Desotels confirmed that JX-2, p. 12, is one of Complainant's trip sheets showing it was a "3-load" day and that Complainant used truck No. 17, which he agreed is a "typical" day. He agreed that on March 26, 2018, Complainant noted that he began work at 3:45 a.m. and completed his runs at 5:30 p.m., and on March 27, 2018, Complainant began working at 3:00 a.m. and stopped at 5:15 p.m. (JX-2, p. 13). On the other hand, a portion of Complainant's trip sheets show that Complainant arrived at work at various times such as 5:00 a.m., 4:30 a.m., and (on April 28, 2018) 6:30 a.m. (JX-2, pp. 37-40).

Notwithstanding the foregoing, I find that Respondent's assertion that it, in part, terminated Complainant for failing to arrive to work at 3:00 a.m. is unworthy of credence. Florek, supra, slip op. at 7-8; see Brucker, supra, slip op. at 10-11. While it is undeniable that Complainant did not always arrive to work in a timely fashion, the record is devoid of any evidence that Brett Desotels, or any other employee, provided a written or verbal warning to Complainant advising him to comply with the 3:00 a.m. start time. Brett stated he had "conversations" with Complainant about the issue, but he did not expound on what was stated during the conversations (i.e., that he actually provided a verbal warning to Complainant). Further, as will be discussed below, Brett testified that he terminated Complainant not because of his failure to timely arrive to work, but for violating company policy when he failed to "pre-trip" a trailer at CEI, which required checking the air in tires, securing the load, and checking tarps. Thus, overall, I find and conclude that Respondents' assertion that it terminated Complainant due to his being late to work is unpersuasive.

[20] Ms. McMillan, who completed Complainant's April 30, 2018 Termination Form, explained the reference to Complainant violating "safety policies" concerned Complainant's two "wrecks" and being careless, as well as "inspection" issues at the CEI jobsite, receiving customer complaints, and "driving in the yard too fast." (Tr. 113-14).

Respondents also assert that Complainant was terminated because he "wrecked" his assigned truck on March 14, 2018, and was in an "accident" on April 15, 2018. Complainant explained that the March 14, 2018 incident occurred because he had to make a narrow turn with the trailer while a garbage truck turned into the left lane, requiring him to pull the trailer forward to clear the left lane, which resulted in the trailer hitting a soft spot off of the road and leaning over onto a pole. Complainant did not receive a citation from the police, who investigated the incident, and he did not drive the truck or trailer into a ditch, but there was radiator fluid on the road. Following the incident, Complainant spoke with Brett Desotels, who asked him what could have been done differently to avoid the incident, and Complainant responded that he could have "held his ground" and not proceed to make the turn until the residential garbage truck moved out of his way.

Brett Desotels recalled that on March 14, 2018, when Complainant had just begun working for Respondents, Complainant went into a ditch with a truck and a wrecker had to get the truck out of the ditch. Nevertheless, Brett Desotels told Complainant "to keep his head up, do not worry about it. Bad stuff happens to good people too." According to Brett Desotels, Complainant was "a little disheartened" about the accident, but Mr. Desotels told him it was "not a huge deal."[21] Jace Desotels, who was sent to CEI to take photographs of the March 14, 2018 incident, stated Complainant did not hit another vehicle when the trailer leaned against the pole. Jace recalled that a wrecker had to lift the trailer out of the mud, and the truck had to be towed back to Respondents' yard because radiator fluid was all over the ground. Jace believed the police wrote a report concerning the incident, however, he did not see the report which states there was no damage to truck No. 17, the trailer, or the pole. Jace also confirmed that CEI never called him to report any damage to its trailer that was involved in the March 14, 2018 incident. Jace testified that Respondents had to pay for the truck to be towed and to repair the radiator.[22]

With respect to the April 15, 2018 "accident," Complainant explained that he was hauling scrap to Port Allen, Louisiana, with no cover over the customer's trailer because it was not equipped with a cover. Complainant noticed a pick-up truck flagging him down who had called the police because metal had allegedly fallen out of the trailer striking the pick-up truck. Nonetheless, Complainant did not receive any citations, there was no metal found, and no photos were taken of the incident. Complainant testified that the company which

[21] Ms. McMillan testified it was Respondents' policy to require an employee to reimburse Respondents for damages due to negligence, but Brett Desotels did not require Complainant to reimburse Respondents for any damages. (Tr. 104).
[22] The record reflects that on March 14, 2018, Respondents paid Gerald's Towing $496.22 to tow truck No. 17 from the scene of the incident to Respondents' yard. There is also a receipt dated March 19, 2018, for "gladhand" seals for approximately $90.00, but it is unclear whether this pertained to any repair for truck No. 17's radiator. (JX-3, pp. 1-3).

loaded the scrap metal into the truck/trailer was one of Respondents' customers, and there was no ladder on the trailer to enable Complainant to inspect the load of scrap metal.

Based on the foregoing accounts of the March 14, 2018 and April 15, 2018 accidents, I also find these events do not provide evidence that Respondents had a legitimate business reason to terminate Complainant's employment. See Florek, supra, slip op. at 7-8; see also Brucker, supra, slip op. at 10-11. First, I find Brett Desotels' testimony that he told Complainant that the March 14, 2018 "wreck" was "not a huge deal" and "to keep his head up, do not worry about it," undermines Respondents' argument that Complainant was terminated for the accident. Second, the record reflects that Respondents issued a verbal "first warning" to Complainant about the March 14, 2018 incident that states the consequence of the infraction is "to be determined-depending on the infraction." (JX-1, p. 107). The record is devoid of any evidence that Complainant actually received a verbal warning or was even aware of the warning. Nevertheless, Respondents never took any formal action against Complainant, nor did Respondents request reimbursement from Complainant for towing/repair costs. Third, Brett Desotels testified that he did not terminate Complainant for any accident, rather he terminated Complainant for failing to pre-trip a CEI trailer, and in doing so, CEI requested Complainant not return to its premises. Finally, with respect to April 15, 2018 incident, the record is devoid of any evidence that Complainant received a verbal or written warning from Respondents. Indeed, Brett Desotels offered no testimony about the accident and whether it had any bearing on his decision to terminate Complainant. Moreover, based upon Complainant's testimony, the loading of the scrap metal and ensuring it was properly secured was beyond his control since there was no cover on the trailer, or a ladder to reach the top of the trailer. Complainant received no citation and there is no evidence that Respondents incurred costs due to the April 15, 2018 incident.

Respondent further avers that Complainant was terminated because its customer, CEI, requested that Complainant not return to its work premises. Brett Desotels stated Complainant was terminated for violating company policy when he failed to "pre-trip" a trailer at CEI, which required checking the air in tires, securing the load, and checking tarps. According to Brett Desotels, CEI's trailers were damaged due to Complainant's alleged failure to follow its pre-trip policies and CEI did not want Complainant on the job anymore. Mr. Desotels averred that CEI provided a written statement to Respondents memorializing the aforementioned details. He further testified that he spoke with Complainant about CEI requesting that Complainant no longer be used for its runs, and on May 1, 2018, Respondents terminated Complainant's employment. Brett Desotels stated he also received a telephone call from Joe LaRocca, CEI's manager, that Complainant was destroying equipment at CEI, one week before April 30, 2018, and thus Brett Desotels requested that Keela McMillan and Jace Desotels terminate Complainant's employment.

In contrast to Brett Desotels' testimony, Complainant testified that when he arrived at the CEI facility to pick up a trailer, he would back the truck up to the trailer and inspect the trailer's lights and tires. On one occasion, Complainant got into a heated discussion with CEI's lead driver because Complainant would not drive a trailer with two flat tires. Nonetheless, unbeknownst to Complainant, he later picked-up the same trailer and ended up with flat tires. He inspected the CEI trailer that developed flat tires, but he did not know it was the previous trailer he refused to haul because CEI had simply aired up the tires and placed the trailer on the line to be transported. Complainant had a second incident where he had a tire blowout with another trailer, but no one from Respondents' office or CEI addressed the issue with him. Significantly, Complainant avers that he spoke with Joe LaRocca of CEI, who according to Complainant, was impressed with Complainant's reporting of defects or issues with trailers. Complainant further avers that Joe LaRocca was glad Complainant was reporting issues with the trailers, and Mr. LaRocca was upset with his drivers because they told Complainant to drive a trailer with flat tires. Complainant stated he never damaged CEI's equipment even though tires were blown out on CEI's trailers, but instead it was due to the equipment not being properly maintained. Complainant was not required to complete a DVIR upon inspecting CEI's trailers, and he denied that CEI ever stated he was not inspecting trailers prior to hauling them. Complainant was not aware of CEI having problems with him on its jobsite.

Not unlike Respondents' other proffered legitimate business reasons for Complainant's termination, I also find Respondents' assertion that it terminated Complainant at the behest of CEI to be unworthy of credence. Florek, supra, slip op. at 7-8; see also Brucker, supra, slip op. at 10-11. Brett Desotels avers that CEI provided a written statement alleging that it no longer wanted Complainant to be used on runs for failing to "pre-trip" its trailers. However, Respondents presented no evidence of any written statement and/or email from CEI stating the same. Brett Desotels also testified that Joe LaRocca of CEI requested that Complainant not return to CEI. Nevertheless, Complainant provided uncontradicted testimony that he conducted pre-trip inspections of CEI's trailers and that Joe LaRocca appreciated Complainant's efforts in reporting issues with the trailers. Furthermore, Mr. Desotels stated he informed Complainant that CEI no longer wanted Complainant at its work premises, which contradicts Complainant's testimony that he was not aware of any issues related to his work performance for CEI.

Lastly, I also note there is conflicting testimony as to why Complainant was terminated on May 1, 2018. More specifically, Jace Desotels stated that on one occasion, Complainant "pulled in real fast and almost hit that [sic] driver when he whipped in the parking lot," which is when Jace was instructed to terminate Complainant. Jace testified that Brett Desotels made the decision to terminate

Complainant and requested that Jace inform Complainant that he was discharged from his employment. Nonetheless, as discussed above, Brett Desotels testified that he decided to terminate Complainant due to CEI's purported request that Complainant not return to CEI. Therefore, on this basis, I find the shifting explanations as to why Complainant's employment was terminated further detracts from Respondents' assertion that it had legitimate business reasons for Complainant's discharge.

In consideration of the foregoing, I find that Respondents' proffered reasons for terminating Complainant's employment are uncorroborated, and at times contradictory. Although Respondents averred that they terminated Complainant for failing to arrive to work on time, two accidents on March 14, 2018 and April 15, 2018, and due to CEI's request that Complainant be prohibited from returning to its jobsite, Brett Desotels testified he terminated Complainant solely on the basis of CEI's written demand that Complainant not make runs on behalf of CEI. That notwithstanding, the record is devoid of any evidence of CEI's written request. Therefore, I find that Complainant presented sufficient circumstantial evidence to discredit Respondents' proffered reasons for the termination, demonstrating instead that they were pretext for retaliation.

Considering the totality of the evidence, I find that circumstantial evidence of temporal proximity, Respondents' knowledge of Complainant's protected activity, and Respondents' uncorroborated, and unpersuasive business reasons for Complainant's termination support a finding that Complainant's protected activity contributed to his May 1, 2018 termination. Indeed, Complainant reported safety issues with truck No. 17 from March 14, 2018 through April 30, 2018, which largely went unrepaired, and he was terminated on May 1, 2018, just hours after he refused to drive truck No. 17 due to safety concerns.[23] Further, it is undisputed that Respondent had knowledge of Complainant's protected activity as Brett Desotels, one of Respondents' owners, testified that he spoke with Complainant about mechanical issues relating to truck No. 17. Moreover, Complainant demonstrated that Respondents' proffered reasons for termination were indicative of pretext. See Brucker, supra, slip op. at 10-11. Accordingly, I find and conclude Complainant has demonstrated through circumstantial evidence that his protected activity contributed to Respondents' decision to terminate his employment on May 1, 2018.

G. Same Action Defense

Where the complainant, as is the case here, demonstrates his protected activity contributed to his dismissal, the respondent may show by clear and convincing evidence it would have **taken the same**

[23] See infra note 29.

action absent the complainant's protected activity.[24] Sacco v. Hamden Logistics, Inc., ARB No. 09-024, ALJ Nos. 2008-STA-043, 2008-STA-044, slip op. at 4 (ARB Dec. 18, 2009); Jordan v. IESI PA Blue Ridge Landfill Corp., ARB No. 10-076, ALJ No. 2009-STA-062, slip op. at 2 (ARB Jan. 17, 2012); Palmer, supra, slip op. at 22. A respondent's burden to prove this step by **clear and convincing** evidence is a purposely high burden, as opposed to complainant's relatively low burden to establish a **prima facie** case. Id. Clear and convincing evidence that an employer would have disciplined the employee in the absence of protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. Id. (stating that step-two asks whether the non-retaliatory reasons, **by themselves**, would have been enough that the respondent would have taken the same adverse action absent the protected activity); see DeFrancesco, supra, slip op. at 8; Fricka, supra, slip op. at 5.

The "clear and convincing evidence" standard is the intermediate burden of proof, in between "a preponderance of the evidence" and "proof beyond a reasonable doubt." Araujo, supra, at 159. To meet the burden, Respondent must show that "the truth of its factual contentions is **highly probable**." Colorado v. New Mexico, 467 U.S. 310, 316 (1984)(emphasis added). Additionally, Respondent must present evidence of "unambiguous explanations" for the adverse actions in question. Brucker, supra, slip op. at 14.

In brief, Respondents assert it is clear according to Brett Desotels' testimony that there were "employment issues" with Complainant. Respondents argue that Complainant was only employed for forty-nine days, yet he was involved in two accidents, a verbal altercation with one of Respondents' customer's employees, and Complainant disobeyed a directive from Respondents about showing up to work on time. Further, Respondents contend that Brett Desotels' testimony also demonstrates Complainant should have been discharged one week before his refusal to drive truck No. 17 on May 1, 2018. On

[24] In brief, Respondents argue that under the "Dual Motive Analysis" it must only show by a **preponderance of the evidence** that it would have reached the same employment decision even in the absence of Complainant's alleged protected activity. Employer's Brief, pp. 4-5. Notably, complaints filed under the STAA are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). See 49 U.S.C. § 42121; see also 49 U.S.C. § 31105(b)(1). Thus, pursuant to AIR 21, once a complainant has shown by the preponderance of the evidence that he engaged in protected activity, that he suffered an adverse employment action, and the protected activity was a contributing factor to the adverse action, the employer may only escape liability by demonstrating by **clear and convincing evidence** that it would have taken the same unfavorable personnel action in the absence of protected activity. 49 U.S.C. § 42121; see Sacco, supra, slip op. at 4. Accordingly, in the instant STAA case, Respondents must show by **clear and convincing evidence** that it would have terminated Complainant's employment on May 1, 2018, absent his protected activity. Sacco, supra, slip op. at 4.

this basis, Respondents aver that both Brett and Jace Desotels' testimony confirm that Complainant was to be fired one week prior to Complainant's refusal to drive and subsequent termination. Moreover, Respondents aver that Complainant testified that Respondents (or any of its employees) did not threaten him with an ultimatum that if he refused to drive truck No. 17 he would be terminated. Thus, Respondents argue it has shown it would have made the same decision absent any alleged protected conduct.

Notwithstanding the foregoing, I find that Respondents have failed to show by **clear and convincing evidence** it would have taken the same employment action irrespective of Complainant's protected activity. While Complainant may have been involved in two accidents, Respondents have failed to provide any evidence that Complainant was indeed disciplined for such accidents. Rather, Brett Desotels testified that he told Complainant that the March 14, 2018 incident was "not a huge deal." Indeed, it appears Respondents completed a "first warning" form (indicating Complainant received a verbal warning) regarding the incident, but never provided the form to Complainant, nor was it signed by Complainant. In addition, Respondents incurred costs for towing truck No. 17 back to its yard, however, Respondents did not even seek reimbursement from Complainant, which according to Ms. McMillan, is usually required by Respondents in cases of employee negligence.[25] Similarly, there are no records of any disciplinary action or internal communications discussing proposed discipline regarding the April 15, 2018 incident when a piece of metal allegedly flew out of the trailer hauled by Complainant. Further, Respondents offered no evidence of any costs and/or damages it incurred due to the April 15, 2018 incident, nor did Respondents provide any evidence that the customer, to whom the trailer belonged, made any complaints about Complainant's job performance.

Likewise, Respondents argue that it provided clear and convincing evidence that they terminated Complainant not for any protected activity, but instead for failing to arrive to work on time. Nevertheless, while Brett Desotels testified he had "conversations" with Complainant about his arrival time, Mr. Desotels did not testify that he provided any kind of verbal warning to Complainant that he would be disciplined if he continued to arrive to work late. The record is also devoid of any written disciplinary action or internal communications discussing proposed discipline regarding this matter.

Lastly, Respondents contend that it discharged Complainant because he had an altercation with one of its customer's employees, as well as a complaint from CEI requesting that Complainant not return to its worksite for failing to "pre-trip" CEI's trailers. Nonetheless, as discussed above, Complainant testified that he did have a "heated discussion" with CEI's lead driver because Complainant refused to drive a trailer with two flat tires. However, Complainant testified that Joe LaRocca, of CEI, commended Complainant for reporting defects

[25] See supra notes 21 and 22.

and issues with the trailers, and that Mr. LaRocca was upset with CEI employees because they requested that Complainant drive a trailer with flat tires. Although Brett Desotels testified that CEI provided a written statement confirming it did not want Complainant on the job any longer, absent from the record is such a statement. Further, Brett Desotels testified that he informed Complainant about CEI's request, but Complainant testified he was not aware of CEI having problems with him on its jobsite. As with the other employment issues, Respondents have provided no evidence to contradict Complainant's testimony, nor has it provided documentation of verbal or written warnings concerning Complainant's alleged unsatisfactory behavior at CEI's jobsite.

Accordingly, I find and conclude Respondents have failed to demonstrate by **clear and convincing** evidence that it would have taken the same adverse actions absent Complainant's protected activities.

H. Damages and Mitigation of Damages[26]

A successful complainant under the STAA is entitled to affirmative action to abate the violation, reinstatement to his former position with the same pay, terms and privileges of employment, attorney fees and costs reasonably incurred, and may also be awarded compensatory damages.

Specifically, the STAA provides that:

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

[26] Respondent did not provide any discussion or arguments about Complainant's entitlement to damages or mitigation of damages. See Respondent's Brief, pp. 1-6.

person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint. The Secretary of Labor shall determine the costs that reasonably were incurred.

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

49 U.S.C. § 31105(b)(3)(A)-(C).

1. Individual Liability

Complainant asserts that pursuant to 49 U.S.C. § 31105, it makes clear that a "person" may be liable for violations under the Act. More specifically, Complainant argues that the STAA makes a "person" subject to liability only to the extent that the employer is "a person" within the meaning of § 31105. Furthermore, Complainant avers that under implementing regulations for the STAA applicable to the instant case, a "person" and "respondent" is defined as follows:

(k) Person means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals.

(l) Respondent means the person alleged to have violated 49 U.S.C. 31105.

29 C.F.R. § 1978.101. On this basis, Complainant contends that Brett Desotels meets the definition of "person" and "respondent" under the STAA's implementing regulations. Moreover, Complainant avers Brett Desotels testified he personally made the decision to terminate Complainant's employment. Therefore, Complainant asserts that as the person who made the decision to discharge his employment, Brett Desotels should be held individually liable.

In Wilson v. Bolin Associates, Inc., 91-STA-4 (Sec'y Dec. 30, 1991), the Secretary addressed individual liability under the Act, stating that the administrative law judge unnecessarily employed the doctrine of "piercing the corporate veil" to find the respondent's CEO personally liable for back wages in a STAA complaint because, as the person who discharged the complainant, the CEO was liable under the express language of section 2305. The Secretary noted that the statute provides that "[n]o person shall discharge" an employee for conduct protected by the STAA, and defines a person as "one or more individuals . . . ." 49 U.S.C. §§ 2305(a), (b) and 2301(4). The Secretary further noted that this approach was consistent with analogous employee protection provisions at Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c), and with other substantive law areas with similar statutory language, (i.e., Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §

9607). See Donovan v. Diplomat Envelope, Inc., 587 F. Supp. 1417, 1425 (E.D.N.Y. 1984), aff'd, 760 F.2d 253 (2d Cir. 1985) (unpublished); Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1541-45 (W.D. Mich. 1989).

Given the foregoing, I find and conclude that Brett Desotels is personally liable for his actions in violation of the Act. Brett Desotels did in fact testify that four years ago he founded D.G. Construction & Hauling, LLC, and that he owns and operates the company. In addition, Mr. Desotels confirmed that he was the sole decision maker in reaching the decision to terminate Complainant's employment with Respondents. Accordingly, pursuant to Wilson, I find that Brett Desotels is the "person" who discharged Complainant from his employment with Respondents, and thus, I find and conclude he is personally liable for violations under the Act.

2. Reinstatement

Reinstatement provides an important protection for employees who report safety violations. "[T]he employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review." Brock v. Roadway Express, Inc., 481 U.S. 252, 258-250 (1987). These protections also extend to employees who refuse to drive vehicles because of safety concerns. 49 C.F.R. § 392.7. Reinstatement for a prevailing complainant is not discretionary irrespective of the complainant's preference regarding reinstatement, rather it is the presumptive remedy in a whistleblower case to make the complainant whole. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); see also Dale v. Step 1 Stairworks, Inc., ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4 (ARB Mar. 31, 2005); see also Hobby v. Georgia Power Co., ARB Nos. 98-166, 98-169, ALJ No. 90-ERA-030, 2001 DOL Ad. Rev. Bd. LEXIS 10, slip op. at 7 (ARB Feb. 9, 2001). The purpose for reinstatement is to restore the complainant to a position equivalent to that which he "would have occupied but for the illegal action of the employer." Hobby, supra, slip op. at 6; see Dale, supra, slip op. at 4. The ARB has held that an employer is obligated to make a **bona fide** offer of reinstatement and any waiver of reinstatement by the complainant will be invalid when made prior to an employer's **bona fide** reinstatement offer. Cook v. Guardian Lubricants, Inc., ARB No. 97-055, ALJ No. 95-STA-043, slip op. at 3 (ARB May 30, 1997); see Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 150 (2d Cir. 1968)(remarks by a complainant indicating a disinterest in reinstatement are "of little value" when made before an employer has made an offer of reinstatement).

The complainant or employer may demonstrate "the impossibility of a productive and amicable working relationship or where reinstatement is otherwise not possible or impractical," but reinstatement should not be denied "merely because friction may continue between the complainant and his employer (or its employees)," nor should reinstatement be denied due to any inconvenience on behalf of the

employer. Dale, supra, slip op. at 5. Factors such as the source of alleged hostility or friction, its severity, and whether it would be impossible for the complainant and employer to reestablish a productive working relationship should be considered when determining if reinstatement is possible. Hobby, supra, slip op. at 9. However, reinstatement may not be possible when the employer no longer employs workers in the job classification held by the complainant, the employer has no positions for which the complainant is qualified, or where accepting a position with the employer would be economically impractical for the complainant. Dale, supra, slip op. at 5; Hobby, supra, slip op. at 8-13; see Clifton v. United Parcel Service, Case No. 1994 STA-016, slip op. at 1-2 (ARB May 14, 1997)(no front pay where reinstatement is an appropriate remedy).

Nevertheless, in the absence of a valid reason for not returning to his former position, immediate reinstatement should be ordered. Dutile v. Tighe Trucking, Inc., Case No. 1993-STA-031 (Sec'y Oct. 31, 1994). Accordingly, having found Complainant was discriminatorily terminated, I find Complainant is entitled to immediate reinstatement to his former position with the same pay and terms and privileges of employment, or if his former job no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions and benefits.

3. Mitigation of Damages and Back Pay

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Dutkiewicz v. Clean Harbors Environmental Services, Inc., Case No. 1995-STA-034 (ARB Aug 8, 1997). Back pay calculations must be reasonable and supported by the evidence; they need not be rendered with "unrealistic exactitude." Cook v. Guardian Lubricants, Inc., Case No. 1995-STA-043, slip op. at 11 (ARB May 30, 1997). Back pay is typically awarded from the date of a complainant's termination until reinstatement to his former employment. Any uncertainties in calculating back pay are resolved against the discriminating party. Kovas v. Morin Transport, Inc., Case No. 1992-STA-041 (Sec'y Oct. 1, 1993).

Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, the allocation of the burden of proof is reserved, i.e., it is the employer's burden to prove by a preponderance of the evidence that the back pay award should be reduced because the employee did not exercise reasonable diligence in finding other suitable employment. Polwesky v. B & L Lines, Inc., Case No. 1990-STA-21 (Sec'y May 29, 1991); see Johnson v. Roadway Express, Inc., Case No. 1999-STA-5, slip op. at 16 (ARB Mar. 29, 2000)(it is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages).

The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. Johnson v. Roadway Express, Inc., Case No. 1999-STA-005, slip op. at 4 (ARB Dec. 30, 2002); see Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527 (11th Cir. 1991).

In the present matter, Respondents did not address whether Complainant acted diligently to mitigate his damages or whether he is entitled to back pay. In failing to do so, Respondents have produced no evidence establishing that substantially equivalent jobs were available or that Complainant failed to make reasonable efforts in finding other employment. That notwithstanding, Complainant testified that he immediately began seeking work following his May 1, 2018 termination, and provided evidence of his online job search and notes about the same. (CX-5, pp. 1-5). Upon reviewing Complainant's evidence of his job search, I find he provided ample evidence of his job search, and that he exercised reasonable diligence in seeking new employment. I further find Respondents failed to meet their burden of demonstrating that Complainant did not properly mitigate damages. Accordingly, I find and conclude Complainant acted diligently to mitigate his damages.

Complainant seeks back pay in the amount of $2,529.40, but he provided no basis or explanation for his calculation. Upon reviewing the record evidence, Complainant received earnings from his employment with Respondent over the course of seven weeks and one day, and the number of days he worked each week varied from four days to six days, which includes working at various times on a Saturday or Sunday. (CX-3). However, on average, Complainant worked five days per week, and the record does not indicate that he earned premium pay while working weekends. His gross pay with Respondent was $6,197.15, and in total Complainant actually worked 36 days between March 13, 2018 and May 1, 2018, which results in a daily average wage of $172.14. Complainant was terminated on May 1, 2018 (receiving no earnings for that day) and did not find new employment until May 20, 2018, with C.W. Transport. Thus, Complainant is entitled to back pay from the date of his discharge on May 1, 2018, until he began working for C.W. Transport on May 20, 2018, for a total of fourteen workdays. Therefore, I find and conclude Complainant is entitled to $2,409.60 ($172.14 x 14 = $2,409.60) in back pay, commencing on May 1, 2018 through May 19, 2018.

4. Compensatory Damages

Complainant contends he is entitled to damages for emotional distress and mental pain. Compensatory damages are designed to compensate for direct pecuniary loss and also such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. Ferguson v. New Prime, Inc., ARB No. 10-075, ALJ No. 2009-STA-047, slip. op. at 7 (ARB Aug. 31, 2011); Smith v. Lake City Enters., Inc.,

ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 24, 2010). The complainant has the burden to prove that he has suffered from mental pain and suffering and that the discriminatory discharge was the cause. Crow v. Noble Roman's Inc., 1995-CAA-008 (Sec'y Feb. 26, 1996). The Board has held that a complainant's credible testimony alone can be sufficient to establish emotional distress. Ferguson, supra, slip op. at 8.

Complainant testified he did not have any money saved when he was terminated from his employment with Respondents. He did yard work and sold "stuff" to get by financially. While unemployed, Complainant fell behind in paying his monthly expenses such as rent and his electricity bill. He also had to discontinue his cable television service. Complainant stated he fell behind in rent payments by at least one month, but he was already behind in paying rent when he began working for Respondents. Complainant avers that he sold items he owned either on his own initiative or he pawned the items. Additionally, Complainant provided receipts for "dog sitting" since he could not take care of his dog during the week while working his new job with C.W. Transport. He also provided a list of items he sold or pawned, along with the estimated cost when he bought the item and the price for which the items were sold/pawned.

Complainant further testified he received medical treatment for chest pains, stomach problems and headaches, which he attributed to stress due to his termination from employment with Respondent. Nonetheless, Complainant admitted that some of the medical conditions he attributed to stress due to his termination were in fact pre-existing conditions. Complainant testified that he was cured of Hepatitis C and he did not know when his ulcer developed. Complainant provided a medical report from treatment he received on May 29, 2019, showing symptoms of nausea, loss of appetite, high blood pressure, and anxiety.

In sum, Complainant requests $25,000.00 in compensatory damages because his finances and health were adversely affected by his termination and period of unemployment. See Smith, supra, slip op. at 11 (where the complainant initially sought between $75,000.00 to $50,000.00 in compensatory damages, the ARB affirmed an award of $20,000.00 based on the complainant and his wife's testimony about emotional distress, marital stress, and loss of reputation); see also Ferguson, supra, slip op. at 7-8 (where the Complainant initially sought $100,000.00 in compensatory damages, the Board affirmed the administrative law judge's award of $50,000.00 because there was substantial evidence that the complainant suffered emotional injury as a result of discharge).

In consideration of the foregoing, I find that Complainant is entitled to $5,000.00 in compensatory damages. Complainant relies upon Smith and Ferguson to assert he is entitled to $25,000.00 in compensatory damages, but I find each case is factually distinct from the matter at hand. Specifically, in Smith, following the

complainant's termination, he suffered marital stress due to being irritable and short tempered, he fell behind in payments for a land contract and had to refinance the loan, the family minivan and computer were lost, he could not afford Christmas presents for his children, he was unable to obtain health insurance, and he was deprived of an opportunity to become an owner-operator for the employer. Smith v. Lake City Enters., Inc., ALJ No. 2006-STA-032, slip op. 144-45 (ALJ May 21, 2018). Similarly, in Ferguson, following the complainant's discharge from employment her home was about to be foreclosed upon, she lost medical insurance, a phone, internet service, and had to obtain food from a shelter. Ferguson v. New Prime, Inc., ALJ No. 2009-STA-00047, slip. op at 12 (ALJ Mar. 15, 2010).

Here, unlike Smith and Ferguson, Complainant did not experience marital distress, he did not lose a vehicle or health insurance, nor was his home being foreclosed upon. Indeed, Complainant stated he fell behind on his rental payments where he resided, but he admitted he was already behind on such payments before he was hired by Respondent. Further, Complainant testified he had to discontinue his television services, but this is a non-essential expense. Complainant provided a list of items he either sold or pawned, but he provided no receipts showing the amount he paid for each item, nor did he provide receipts showing what he sold items for, except those he pawned.[27] In addition, Complainant provided a medical treatment record for abdominal pain, high blood pressure, and "chronic" nausea, which noted that Complainant experienced abdominal pain two times per year. Complainant admitted that some of his medical issues he experienced following his termination were pre-existing issues. Thus, while his May 1, 2018 discharge may have aggravated some of his symptoms, I do not find it was the initial cause of Complainant's medical issues. Accordingly, I find and conclude that Complainant is only entitled to $5,000.00 in compensatory damages.

5. Punitive Damages

The STAA allows for an award of punitive damages in an amount not to exceed $250,000. 49 U.S.C. § 31105(b)(3)(C). The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . . ." Smith v. Wade, 461 U.S. 30, 51 (1983). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and

[27] Complainant's records only show receipts for the sale of a rifle for $100.00 and an Apple MacBook Pro for $150.00. (CX-6, p. 3). With respect to the other items he sold, Complainant noted that the "retail value" for all of the items he sold equaled $2,070.00, but he only received $545.00, leaving a deficit of $1,505.00. (CX-6, p. 2). Complainant also provided evidence of "dog siting" costs he incurred (CX-6, p. 1), but as discussed above, there is insufficient documentation to support an award for damages for such costs.

to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979).

Citing to Ferguson v. New Prime, Inc., ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011), Complainant seeks $25,000.00 in punitive damages, and argues that punitive damages are appropriate to deter the Respondents from future violations of the STAA.[28]

In Fink v. R&L Carriers Shared Servs., LLC, Case No. 2012-STA-006 (ALJ Nov. 20, 2012), the administrative law judge found that punitive damages were appropriate where a discharge in violation of the STAA was made by a high management official. In the present matter, Brett Desotels testified that during the duration of Complainant's employment with Respondents, he had conversations with Complainant about the mechanical condition of truck No. 17, and in turn, he spoke with the mechanic to ensure repairs were made. Nevertheless, absent from the record is any evidence that the issues identified by Complainant on his DVIRs, including an inoperable fifth wheel, loose belts, cracked windshield, an inoperable city horn, an inoperable right low beam light, inoperable left and right mid-marker lights, windshield wipers, and a missing mud flap were ever repaired. Rather, Respondents spent over $15,000.00 repairing truck No. 17, none of which included the issues identified by Complainant on his DVIRs.[29] However, Respondents continued to have Complainant drive truck No. 17.

Thus, just as in Fink, I find that punitive damages are appropriate in the present case because Complainant was discharged in violation of the Act, and he was terminated by one of Respondents' owners, Brett Desotels. Furthermore, I find that Complainant has established that Brett Desotels and Respondent's actions rose to the level of reckless or callous disregard for Complainant's safety and the safety of others because Brett Desotels had knowledge of Complainant's complaints about the mechanical deficiencies regarding truck No. 17, but he failed to ensure they were repaired. As such, I find that an award of punitive damages is also appropriate to deter Brett Desotels and Respondents from future STAA violations.

Complainant has sought $25,000.00 in punitive damages, which I find to be excessive given it is approximately ten times the amount awarded in back pay and five times the amount awarded in compensatory damages. Therefore, I find and conclude it appropriate to award punitive damages in the amount of $10,000.00, with Brett Desotels liable for $5,000.00, as well as Respondent D & G Construction &

[28] In Ferguson, the ARB vacated the award of $75,000.00 in punitive damages because the Board found that the administrative law judge did not discuss an evidentiary basis for his finding, nor did he consider whether the size of the award would have adequately deterred the employer from future violations. Ferguson, supra, slip op. at 8-9.

[29] The only documented repairs to truck No. 17 appear to be for "gladhand seals," brake repairs, the clutch, rear engine mounts, gasket-housing mounts, and transmission repairs. (JX-3, pp. 1-10).

Hauling, LLC being jointly and severally liable for $5,000.00. See Wilson, supra, slip op. at 1-2 (the Secretary agreed that sole shareholder and chief executive officer along with the respondent corporation were jointly and severally liable for Complainant's damages).

6. Posting a Copy of this Decision and Order

The ARB has noted that it is a standard remedy in discrimination cases to require a respondent to notify its employees of the outcome of a case against their employer by posting a Notice of its violations. In Michaud v. BSP Transport, Inc., Case No. 1995-STA-29 (ARB Oct. 9, 1997), the ARB approved an order requiring the respondent to post a notice for 30 days. Accordingly, Respondent shall post a copy of the Order set forth at pages 61 and 62 of the instant Decision and Order in all places where employee notices are customarily posted for 30 consecutive days.

VI. INTEREST

Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Complainant's termination on May 1, 2018, until he obtained employment with C.W. Transport on May 20, 2018. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made. Moyer v. Yellow Freight Systems, Inc., [Moyer I], Case No. 1989-STA-007, slip op. at 9-10 (Sec'y Sept. 27, 1990), rev'd on other grounds sub nom. Yellow Freight Systems, Inc. v. Martin, 954 F.2d 353 (6th Cir. 1992). The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a) (2010) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621. Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. Double R Trucking, Inc., Case No. 1998-STA-034, slip op. at 3 (ARB Jan 12, 2000); see Hobby, supra, slip op. at 40 (implementing 26 U.S.C. § 6621 to an award for pre-judgment interest on back pay). The interest is to be compounded quarterly. Id.

VII. ATTORNEY'S FEES AND COSTS

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 31105(b)(3)(B); Murray v. Air Ride, Inc., Case No. 1999-STA-34 (ARB Dec. 29, 2000). 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 thirty (30) days from the date of the Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondents shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

VIII. ORDER

Pursuant to the formal hearing conducted in this matter on June 4, 2019, and based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Respondent shall offer Complainant, Gerry McDaniel, reinstatement to his former position with the same pay, terms and privileges of employment that he would have received had he continued working from May 1, 2018, through the date of the offer of reinstatement.

2. Respondent shall pay Complainant, Gerry McDaniel, back pay at the daily wage of $172.14 for the period of May 1, 2018 through May 19, 2012, for a total of $2,409.60, less authorized payroll deductions, with interest thereon calculated pursuant to 26 U.S.C. § 6621.

3. Respondent shall expunge from the employment records of Complainant, Gerry McDaniel, any adverse or derogatory reference to his protected activities from March 13, 2018 through May 1, 2018, and his discriminatory termination on May 1, 2018.

4. Respondent shall pay Complainant, Gerry McDaniel, compensatory damages in the amount of $5,000.00.

5. Mr. Brett Desotels and Respondent are jointly and severally liable, and shall pay Complainant, Gerry McDaniel, punitive damages in the amount of $10,000.00.

6. Respondent shall post a copy of this Order in all places where employee notices are customarily posted for 30 consecutive days.

7. Counsel for Complainant shall have thirty (30) days from the date of this Decision and Order within which to file a fully supported and verified application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

ORDERED this 31st day of October, 2019, at Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge

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

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

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

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

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

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one

copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

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

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

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

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