U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 27 October 2021

CASE NO.: 2019-STA-00058

IN THE MATTER OF

SELENA RECTOR,
Complainant

v.

MCY CORPORATION dba SANDERSON PROPANE,
MARTHA JOHNSON,
Respondents

Appearances:

For the Complainant: Selena Rector
Self-Represented

For the Respondents: Martha Johnson
Self-Represented

BEFORE: ANGELA F. DONALDSON
Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This proceeding arises from a complaint filed under employee protection provisions of section 405 of the Surface Transportation Assistance Act ("STAA" or "the Act"), as amended, 49 U.S.C. § 31105, and the procedural regulations found at 29 C.F.R. Part 1978.

On July 12 and 13, 2018, Complainant, Selena Rector, filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") alleging that Respondent Sanderson Propane ("Sanderson Propane," "the Company," or "Employer") and Martha Johnson, as owner, violated the employee protection provisions of the Act when Ms. Rector's employment was terminated on July 31, 2018. Ms. Rector contends that her termination was in retaliation for reporting an unsafe commercial motor vehicle (CMV) and for her refusal to drive during extreme heat. After investigating, OSHA dismissed the complaint on May 24, 2019, finding no reasonable cause to believe that a violation of the Act occurred. Ms. Rector timely filed objections to the OSHA findings and requested a hearing before the Office of

Administrative Law Judges. A two-day formal video hearing was conducted on September 23 and 25, 2020, at which exhibits and testimony described in more detail below were admitted.

The parties filed closing briefs and reply briefs. I considered all the evidence of record, relevant controlling statutory and regulatory authorities, and case law and arguments of the parties. As explained below, I find that Ms. Rector did not prove that any activity protected under the STAA was a contributing factor in Respondents' decision to terminate her employment, and therefore, her complaint is denied. This case arose in the jurisdiction of the Fifth Circuit Court of Appeals.

I. CONTESTED ISSUES

1. Did Ms. Rector engage in protected activity within the meaning of the STAA when she made complaints to Respondents regarding issues affecting the operation of her propane delivery truck?

2. Did Ms. Rector engage in protected activity within the meaning of the STAA when she refused to drive her propane delivery vehicle?

3. Did Ms. Rector suffer any adverse employment actions?

4. Has Ms. Rector shown by a preponderance of the evidence that any protected activity was a contributing factor to any adverse employment action?

5. If Ms. Rector establishes the elements of her claim by a preponderance of evidence, have Respondents established by clear and convincing evidence that they would have taken the same adverse employment action in the absence of Ms. Rector's protected activity?

II. RELEVANT EVIDENCE

A. Exhibits

The following exhibits have been admitted:

Administrative Law Judge Exhibits ("ALJX") 1 through 3.[1]

Complainant's Exhibits ("CX") 1 through CX-14.[2]

Respondents' Exhibits ("RX") 1 through 7; RX-9; and RX-11 through 20.[3]

[1] ALJX-1 (Complainant's 14-page Pre-Hearing Statement); ALJX-2 (Respondents' 20-page Pre-Hearing Statement); and ALJX-3 (Joint Stipulations 1-7 signed by both parties).

[2] Respondents' continuing objection to the admission of pages 30 to 62 of CX-3 remains overruled for reasons stated at the hearing. (Hearing Transcript at 28-29). CX-13 and CX-14, a collection of audio and video recordings by Ms. Rector, were submitted on an SD card. To the extent that Complainant made handwritten notes on the documents she tendered as exhibits, which were not original to those documents, I have not considered these out-of-court, unsworn statements but, rather, relied on her sworn hearing testimony, and that of other witnesses, explaining the documents.

B. Joint Stipulations (ALJX-3)

1. Martha McLaughlin Johnson is the sole owner of MCY Corporation DBA Sanderson Propane Company;

2. MCY Corporation DBA Sanderson Propane Company's address is 315 W. Oak St., P.O. Box 88, Sanderson, TX 79848;

3. Martha McLaughlin Johnson lives in White Stone, VA 22578;

4. Selena Rose Rector lives in Sanderson, TX 79848;

5. Selena Rose Rector was hired part time as a CDL [commercial driver's license] driver, Hazmat driver for Sanderson Propane Company to ride with Jordan Gausepohl, who had a TX driver's license, a learner's permit for a CDL license and a Bobtail certificate from the Railroad Commission of TX. Ms. Rector was employed to deliver propane from December 1, 2017 to April 30, 2018;

6. Selena Rose Rector was employed full time as a propane delivery driver for Sanderson Propane Co. from May 1, 2018 to July 31, 2018, due to Jordan Gausepohl's failure to pass the CDL test; and

7. Selena Rose Rector was discharged from employment at Sanderson Propane Co. by Martha McLaughlin Johnson in a telephone conversation on July 31, 2018.

C. Hearing Testimony and Credibility Assessments

As the finder of fact in this matter, I am entitled to determine the credibility of witnesses, to weigh evidence, and to draw my own inferences and conclusions from the evidence, and I am not bound to accept the opinion or theory of any particular witness. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467, 88 S. Ct. 1140, 1145-46 (stating that part of witness's testimony may be accepted without accepting it all), *reh'g denied*, 391 U.S. 929, 88 S. Ct. 1800 (1968); *see also Farley v. Altasource, LLC*, ARB No. 16-091, ALJ No. 2015-FDA-1, slip op. at 5 (ARB Aug. 20, 2019) (considerable deference given to ALJ's credibility determinations unless inherently incredible or patently unreasonable). The credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). "Credible testimony is that which meets the test of plausibility." *Id.* at 52.

I assessed the witnesses' credibility based on the plausibility of their testimony, internal consistency of their statements, and consistency with other reasonable and plausible testimony and documents in evidence. For reasons stated below, more weight was given to the testimony of Ms. Johnson and Ms. Crumbley regarding Ms. Rector's work performance and reasons for her

[3] Exhibits RX-8 and 10 were not admitted. Respondents submitted RX-4 additional pages 12-15 and RX-11 additional pages 25-27 on 09/24/20. (Hearing Transcript at 250-51). Exhibit RX-20 (a visual aide used by witness Barry Blair during the hearing) was marked at the hearing and admitted post-hearing. (*Id*. at 412).

termination. In reaching findings and conclusions herein, I do not operate as a "super-personnel" department regarding the accuracy of the charges of discipline, investigation hearing findings, or conclusions. *See Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969-70 (8th Cir. 2017); *Eilam v. Children's Hospital Ass'n*, 1999 U.S. App. LEXIS 5880 at *10 (10th Cir. 1999). Rather, the analysis focuses on whether any protected activity by Ms. Rector was a contributing factor to an adverse employment action, and, if so, whether Respondents established the same adverse action would have been taken absent the protected activity.

The following are general summaries of the testimony received at the hearing, together with assessments of the witnesses' credibility. Relevant and credible portions of witness testimony have been incorporated into the Findings of Fact with citations to the record. *See* Section III, below.

Complainant Selena Rector

Selena Rector testified on her own behalf. Her testimony, in pertinent part, explained her dates of employment by Sanderson Propane, her job duties and work conditions, various complaints she raised during her employment, reasons she refused to drive the propane delivery truck at one point, and alleged acts of retaliation against her.

Ms. Rector's testimony was often very difficult to follow, in that she provided long, rambling narratives that frequently did not directly address the question at hand, despite the fact that she was afforded the opportunity to prepare her own direct examination.[4] I did not find Ms. Rector to be purposely evasive despite the fact that she had considerable difficulty conveying with clarity the facts relevant to her cause of action, even with the Court's occasional prompting for clarification. For example, I requested that Ms. Rector clarify whether onsite manager Carol Crumbley's demeanor toward her changed at some point or whether Ms. Crumbley's demeanor had been consistent throughout Ms. Rector's employment. (Hearing Transcript [Tr.] at 130). Ms. Rector replied, "Carol [Crumbley] was consistent in the fact that I was just working." (*Id.*). She continued,

> That I was just working there. I was there. I felt that it was a fake persona because I could drive for them. There was never kind of like sitting at a park and the bee keeps going around you. It's irritating you, but you haven't really snapped and swooped down on it. It's just that feeling you get, edgy and tense. She never made it warm and welcoming or anything.

(*Id.*). As such, Ms. Rector did not answer the question whether Ms. Crumbley's demeanor toward her had changed at any point in time. She appeared to suggest that there was always tension between them, but this requires an inference and is not entirely clear from her testimony.

[4] The self-represented parties were directed to submit questions to me before the hearing, to facilitate direct examinations at the formal hearing. They submitted questions (initially to the judge only) on September 9 and 24, 2020. At the hearing, I asked Ms. Rector and Ms. Johnson the questions they had each prepared, and in addition, I asked some questions of my own when the record required some clarification. (*See* Tr. at 54, 57-58, 251-52, 257).

Similarly, when asked whether Ms. Crumbley acted differently toward Ms. Rector after April 12, 2018, due to her other testimony that her complaints of truck defects began on or around that time, Ms. Rector testified,

> When I started, [I'm] going to say June, the beginning of June, she raised that, I don't know, not team work, but it's not like that team work attitude, "Hey, let me help you" or "Hey, this" or there's no help. "Pull over and get to the customers," but yet Martha is telling me that's what she's there for. She'll leave a copy of my check on the desk, but who doesn't? She says it's here, she says it's there. I have a lot of times that she lied and contradicts what either Martha had said or what Martha thinks or what I know or have been told and yes, she – I felt like it was a control thing and in some of her messages, "I'm not going to pay you for something I already told you to do" and the attitude really changed when I became full time.

(*Id*. at 139-40). Her testimony thus suggested that Ms. Crumbley's demeanor changed when Ms. Rector started working full-time for reasons that were not entirely clear.

By way of further example, when I asked Ms. Rector to clarify all dates on which she says she refused to drive, Ms. Rector testified that she "refused to train Barry Blair" on July 18, 2018, but also testified, "I didn't say 'I'm not going to drive' or 'I'm not going to get in the car because of Barry and his training.'" (*Id*. at 124, 145-148). Ms. Rector's difficulty answering a question succinctly and directly occurred throughout the hearing.

Ms. Rector also engaged in speculation regarding conversations she assumed had occurred between Ms. Crumbley and Ms. Johnson outside her presence. She also speculated that her managers knew about her complaints to the Railroad Commission of Texas. I gave no weight to speculative testimony.

Respondent introduced evidence of Ms. Rector's prior felony conviction on February 19, 2008, for obstruction (resisting service of process); her felony conviction on December 5, 2008, for passing bad checks; a judgement revoking probation on September 29, 2011, related to the conviction for passing bad checks; and her felony conviction on June 4, 2019, for credit card/debit card abuse. (RX-7; RX-9). Only one of the felony convictions occurred in the 10 years prior to the hearing. I consider the evidence of Ms. Rector's conviction in 2019 for credit card/debit card abuse to constitute impeachment evidence under 29 C.F.R. § 18.609(a), because it was a felony conviction within the past 10 years and also involved dishonesty. The other convictions in evidence are older than 10 years and thus have not been considered. 29 C.F.R. § 18.609(b).

Ultimately, despite impeachment by the 2019 felony conviction and the lack of clarity in Ms. Rector's testimony, I gave Ms. Rector's testimony great weight when it was supported by the reliable and probative testimony of other witnesses and/or documentary evidence. Primarily, such weight was given to her testimony regarding her complaints about propane delivery truck defects and how she communicated complaints to Respondents, because there was sufficient evidence to corroborate her testimony in this regard.

Lee Hoy

Ms. Rector called Lee Hoy as a witness. (Tr. at 211). He had been a Sanderson Propane customer since early 2016. His testimony generally addressed how the propane tanks were maintained at his own property and his own experience with the service he received from Sanderson Propane, which were not relevant to Ms. Rector's claims of discrimination or retaliation. (*Id*. at 211, 216).

Mr. Hoy could tell that Ms. Crumbley did not "care for" Ms. Rector; he, in fact, referred to Ms. Crumbley as having "zero love loss" for Ms. Rector, but he did not know why. (*Id*. at 218-19). Mr. Hoy stated only that "there was definitely a strong dislike and concern about how she [Ms. Rector] did her work" but he could not speak to "the validation of the safety issues." (*Id*.). As for how Ms. Rector performed her work, Mr. Hoy was aware of complaints that Ms. Rector preferred to work "later in the day." (*Id*. at 219-20). Mr. Hoy's testimony ultimately did not support Ms. Rector's claims of discrimination or retaliation under the Act, as he could not speak to any relationship between any protected activity by Ms. Rector and any adverse employment action she suffered.

Tara Boyd

Tara Boyd, a Sanderson Propane customer and neighbor to Ms. Rector for about seven years, was called as a witness to testify on behalf of Ms. Rector to corroborate Ms. Rector's testimony regarding her treatment by Sanderson Propane. (Tr. at 230, 232, 235, 237). However, it was clear that Ms. Boyd primarily obtained her knowledge of Ms. Rector's employment conditions second-hand from Ms. Rector and not from personal observation. (*Id*. at 232). Though Ms. Boyd agreed she had heard "negative remarks" by Ms. Crumbley about Ms. Rector, she never specified any particular negative comment or whether the comments reflected hostility toward Ms. Rector because of any protected activity. (*Id*. at 237). Therefore, her testimony was not probative on the issue of causation.

Ms. Boyd testified that she personally observed that the propane truck had taillights that did not work and were glued and "taped on." (*Id*. at 231-32). She thought it was not safe but did not make any complaints about the condition. (*Id*. at 231). Her testimony in this regard was given some weight as it was consistent with complaints made by Ms. Rector about damaged taillights and with the testimony of Barry Blair that he repaired damaged taillights.

Respondent Martha Johnson

Martha Johnson, self-represented, testified as the representative of Sanderson Propane and on her own behalf. (Tr. at 257). Ms. Johnson and her husband acquired Sanderson Propane 25 years ago; MCY Corporation owns the Company and Ms. Johnson is the sole owner, President, and Secretary. (*Id*. at 259). Ms. Crumbley is the onsite manager and has been with Sanderson Propane for the entire 25 years. (*Id*. at 261). Ms. Johnson testified that Ms. Rector's failure to follow Company rules and procedures led to her termination. She denied that it was motivated by retaliation because of any protected activity. Ms. Johnson was aware of some of

Ms. Rector's complaints about the Company truck before Ms. Rector's termination. She also described the Company policy to make all necessary repairs when defects were identified.

Ms. Rector submitted some audio recordings of conversations between her and Ms. Crumbley or her and Ms. Johnson, apparently made without the consent or awareness of anyone but Ms. Rector. (CX-13). I consider Ms. Rector to have had more incentive to make self-serving statements during the recorded conversations than others who were not aware of being recorded. Ms. Rector attempted more than once to elicit an admission from Ms. Johnson that safety-related issues raised by Ms. Rector played a role in the employer's frustration with Ms. Rector or the decision to terminate her. However, Ms. Johnson repeatedly denied any such suggestion. (CX-13, 14:10 minute recording). In fact, Ms. Johnson's statements during the recorded conversations were entirely consistent with other statements she made in writing in emails or texts around the same time, and also consistent with her later testimony that Ms. Rector's insubordinate conduct resulted in her termination. Further, Ms. Rector came across in the calls as argumentative and uncooperative, and intent on performing the job how she wanted to do it and not how her Employer had requested. For example, Ms. Rector expressly stated in the recorded conversations that her own style of communication (numerous emails and texts) was better than the method repeatedly requested by her employer, i.e., coming into the office daily to discuss issues in person. (CX-13, 14:10 minute recording). Ms. Rector argumentatively told Ms. Johnson, her employer, "That's not how you run a business." (*Id*.). I find that Ms. Rector's comments in the recorded conversations, and the tone in which she delivered them, corroborated Ms. Johnson's testimony.

Ms. Johnson's testimony was often clear, concise, and relevant to the claims or defenses. She succinctly outlined her role as owner of the Company and her relationship with Ms. Rector. I have given great weight to Ms. Johnson's testimony because she tended not to rely on speculation and she offered reasonable, rational explanations for important events during Ms. Rector's employment. Though at times exasperated by Ms. Rector's conduct in the proceeding, such as late evidentiary submissions or confusing or vague testimony, Ms. Johnson did not demonstrate personal animosity toward Ms. Rector. Her testimony was also helpful in establishing the timeline of events that led to Ms. Rector's termination. Overall, I found her testimony credible and reliable.

Carol Crumbley

Carol Crumbley testified as a witness for the Employer. Generally, Ms. Crumbley testified about her role as the onsite manager of Sanderson Propane for many years and her direct supervision of Ms. Rector. She confirmed the existence of certain work rules that Ms. Rector did not follow and also complaints that Ms. Rector made about the condition of the propane delivery truck, as well as Respondents' attempts to address all such complaints.

Like Ms. Johnson, Ms. Crumbley's statements during conversations recorded by Ms. Rector were consistent with her other statements made in writing around the same time and with her later testimony.

Ms. Crumbley's testimony was based on her personal observations and participation in events in question. I found Ms. Crumbley's testimony helpful in clarifying her role, or lack thereof, in the termination decision. It was also clear that tension existed between her and Ms. Rector, which was not caused by complaints related to the operation of the propane delivery vehicle. Ms. Crumbley did not attempt to portray the employment relationship as problem-free, and her testimony was plausible. Her testimony was also very consistent with that of Ms. Johnson without the appearance of being coached or contrived. For these reasons, I have afforded great weight to Ms. Crumbley's testimony.

Barry Blair

Barry Blair testified on behalf of Respondents. In pertinent part, his testimony described his employment as a propane delivery driver for Sanderson Propane and the daily tasks involved with being a driver. He also described his personal familiarity with the components of a propane delivery truck and any repairs made to the Company truck during his employment in 2018. Mr. Blair came across as particularly knowledgeable regarding the mechanical workings of the truck, its safe operation, and repairs that had been made to the truck driven by Ms. Rector (and later by him). His testimony was very helpful to understanding Ms. Rector's complaints about the truck and the Company's attempts to provide a vehicle in good working condition. For these reasons, I have given his testimony great weight.

III. FINDINGS OF FACT

Respondent MCY Corporation DBA Sanderson Propane Company is located in Sanderson, Texas, and is authorized by the Railroad Commission of Texas (RRC) to be a retail/wholesale dealer of liquefied petroleum gas (LPG), also referred to as propane. (Stipulation No. 2; Tr. at 283; RX-1).

At the relevant times, Complainant Selena Rector resided in Sanderson, Texas. (Stipulation No. 4). Respondent Martha Johnson, the sole owner of Sanderson Propane, resided in White Stone, Virginia. (Stipulation Nos. 1, 3). Ms. Johnson travels to Sanderson about once per year and otherwise communicates daily with the onsite manager, Carol Crumbley. (Tr. at 298). Ms. Johnson pays the Company's bills and writes the payroll checks. (*Id*. at 299).

Sanderson Propane tends to fix items in disrepair. (*Id*. at 261, 365). Typically, drivers tell Ms. Crumbley about repairs that are needed, and she works as needed with Ms. Johnson to get the repairs done. (*Id*. at 261, 302). Ms. Crumbley tries to accomplish repairs promptly, and the Company has had a "pretty good record with the Railroad Commission." (*Id*. at 387-88). The RRC has never revoked the Company's license to sell LPG. (*Id*. at 283). The Company posts OSHA and RRC regulations at the workplace. (*Id*. at 287).

Ms. Rector's Employment

Ms. Rector was initially hired to be a part-time CDL and hazardous materials ("Hazmat") driver delivering propane for Sanderson Propane. (Stipulation No. 5). She was hired to accompany another employee, Jordan Gausepohl, who had a Texas driver's license, a learner's

permit for a CDL license, and a Bobtail certificate from the Texas Railroad Commission. (Tr. at 77). Ms. Rector previously performed similar work for about one-year for West Texas Gas. (*Id*. at 80-81).

Ms. Rector's part-time employment at Sanderson Propane lasted from December 1, 2017 to April 30, 2018. (*Id*. at 77). After Ms. Gausepohl failed to pass the CDL test, Ms. Rector became a full-time propane delivery driver for Sanderson Propane from May 1, 2018 to July 31, 2018. (Stipulation No. 6; Tr. at 267). Ms. Rector made $15.00 per hour for full-time work. (Tr. at 166-167; CX-1 at 1). Sanderson Propane had three to four employees in 2018, including Ms. Rector. (Tr. at 274-75). Ms. Rector was the only driver except for the first months when she drove part-time and also later, when another part-time driver, Barry Blair, was hired in 2018 because of Ms. Rector's inability to complete a full-time schedule due to her absences. (*Id*. at 267, 286, 416).

Ms. Rector reported to Ms. Crumbley, the onsite manager. (*Id*. at 82-83, 105). Ms. Rector was expected to work from 10:00 a.m. to 7:00 p.m.[5] (*Id*. at 361). There were times she did not show up until 3:00 p.m. or 4:00 p.m., despite directions that she go to the office daily in the mornings to see Ms. Crumbley in person about any issues with the customers or with the truck. (*Id*. at 263-64, 361-62). Ms. Rector did not initially record her time on a formal timesheet until Ms. Johnson asked her to start coming to the office to complete a daily timesheet. (*Id*. at 82-83, 105; RX-12 at 13, 29). Sanderson Propane maintained a timesheet record of Ms. Rector's hours worked in a pay period. (*See* RX-11 at 5, 16-17; RX-17; CX-4 at 10).

After picking up delivery tickets at the office, the majority of Ms. Rector's work consisted of filling propane tanks at private or commercial residences with propane gas supplied by her employer. (Tr. at 80, 88). Propane gas is transported in a propane delivery tanker truck that is like a "miniature semi that delivers gasoline." (*Id*. at 93). When delivering propane, Ms. Rector backed up the truck to the customer's propane tank stored above or below ground. (*Id*. at 93, 96, 104). She brought a hose from the truck that she connected to the propane tanks. (*Id*. at 95). Ms. Rector kept a remote, emergency shutoff fob in her pocket. (*Id*.). Like her prior experience at West Texas Gas, Ms. Rector frequently checked whether customer propane tanks had leaks on the valves by spraying a solution that produced bubbles if the valve leaked. (*Id*. at 103-104). Any such leaks were associated with the tank itself on the customer's property and were not defects with the truck that Ms. Rector drove. (*Id*.).

Ms. Rector initially had a good relationship with her Employer. (*Id*. at 80, 84, 86). During her employment, Ms. Rector frequently texted or emailed Ms. Johnson and Ms. Crumbley. (*Id*. at 84). She wanted to keep Ms. Johnson informed of things because "she might not know" what was happening as an owner living out of state. (*Id*.). Ms. Rector acknowledged sending Ms. Johnson "repetitive" emails, but she believed Ms. Crumbley was not accurately conveying information to Ms. Johnson so she wanted to communicate directly her. (*Id*. at 84-86). Ms. Johnson ultimately told Ms. Rector to communicate directly and in person with Ms. Crumbley due to the excessive number of texts and emails. (*Id*. at 86, 268, 275). According to Ms. Rector,

[5] Ms. Rector was originally scheduled to work from 8:00 a.m. to 5:00 p.m., but the employer agreed to the modified schedule because Ms. Rector's rheumatoid arthritis made it harder for her to work the earlier hours. (CX-2 at 16; Tr. at 269).

her relationship with Ms. Crumbley was strained; she believed Ms. Crumbley did not want her working at Sanderson Propane. (*Id*. at 86-87).

Problems with the Propane Delivery Truck

Ms. Rector recorded her daily vehicle inspections on paper forms called Driver Vehicle Inspection Reports (DVIRs); the inspections ensured that the truck was safe to operate on public roadways. (Tr. at 105). Inspections were supposed to occur before and after operation of the vehicle. (*Id*. at 105, 115-16, 410-11). On the DVIR form, the driver noted the system checks for the bobtails and tractors, indicated whether the vehicle passed all checks, and noted any defects discovered during the inspection and the date defects were corrected. (CX-7). The driver could also indicate whether the vehicle was "safe to operate" despite defects noted. (*Id*.; Tr. at 115-16). When it came to turning in DVIRs and requesting truck repairs, Ms. Rector went directly to Ms. Crumbley; Ms. Johnson did not see Ms. Rector's DVIRs until they were submitted into evidence in this proceeding. (Tr. at 79, 105, 116-7, 121, 309, 311, 381).

Ms. Rector's testimony regarding the timing and content of all her of safety complaints related to operation of her truck was often scattered, confusing, and vague, and thus difficult to follow. Ms. Rector confirmed at the hearing that any safety issues she raised to her Employer about the operation of her propane truck were documented in the DVIRs, emails, and texts that she submitted as evidence. (*See id.* at 122). Accordingly, I gave great weight to the documentation of any truck defects on the DVIRs, as well as Employer's awareness of, and responses to, that documentation.

The DVIRs in evidence, which were signed by Ms. Rector and some also signed by a mechanic, reflect the dates and remarks set forth below. (CX-7). I have also noted in bold evidence of repairs by Respondents. (RX-4)

Date	Remarks
04/13/18	The DVIR notes that "this vehicle passes all checks below" while also noting a "leak inspection" under "Piping System." Under "Defects Noted": "Sent to Summit in San Angelo to check warranty work. Can't fix – diff. problem – advised to drive back" The condition of the vehicle was also marked "safe to operate although the above defects were noted." The defect was also noted as corrected on the same date (04/13/18).
04/14/18	On the DVIR "Oil pressure" is checked under "Bobtails and Tractors" and a handwritten note states "small leak front [illegible]." Comments under Defects Noted": "Taking back to office – mechanic"
	Respondents submitted proof of repairs to the truck's compressor on or about April 18, 2018. (RX-4 at 1). **Respondents paid for mechanical labor on May 9, 10 and 14, 2018 regarding the truck's clutch and an oil leak. (RX-4 at 2-4).** **On May 18 – 21, 2018, Respondents repaired or replaced various lights on the delivery truck, including replacing the dimmer switch for the truck's headlights, fixing a short in the high beams, replacing a left**

	brake light, replacing an orange side marker light on the driver's side of the tank, and replacing a right rear red marker light. The door handle on the driver's side was also repaired. (RX-4 at 5).
05/27/18	The DVIR notes that "this vehicle passes all checks below." Comments under "Defects Noted": "AC broken—not cold and break lights [sic]"
	Respondents submitted proof of repairs on May 30, 2018, to the left backup light, installation of a new license plate light, charging the air conditioner with Freon, and replacement of both brake lights and turn signal lights. (RX-4 at 6).
06/03/18	The DVIR notes that "this vehicle passes all checks below." Comments under "Defects noted": "No AC - so hot."
	On June 10, 2018, Respondents paid for mechanical work to take apart the truck's dashboard and rewire the blower motor for the air conditioner, after which "it works" was noted. (RX-4 at 7). **From June 10 – 14, 2018, Respondents repaired the truck's hose reel. (RX-4 at 9).**
06/17/18	The DVIR is cut off at the left side, unable to tell whether the vehicle passed all checks Comments under "Defects Noted": "No AC - extremely hot."
07/10/18	On the DVIR, comments under "Defects Noted": "leaks @ back" and "cable broken."
07/12/18	On the DVIR, comments under "Defects Noted": "leaks @ back" and "cable broken." The form also has a handwritten note of "No AC" and indicates "No reflective triangles."
	On August 2, 2018, Respondents' mechanic noted that he was still waiting on parts (unspecified) ordered for the propane truck and he had replaced a fuse again on the hose reel. (RX-4 at 10).

As noted on the DVIRs, on April 13 and 14, and July 10 and 12, 2018, Ms. Rector listed a problem with an oil leak. (Tr. at 114-15, 123, 139; CX-7 at 3). Ms. Rector noted that the air conditioning in her truck was not working on or about May 27, June 3 and 17, and July 12, 2018. (Tr. at 119).

Ms. Rector also complained that an emergency remote shutoff fob was missing or broken. (*Id*. at 123). The remote shutoff was supposed to be kept on the driver's person; for example, it could fit in Ms. Rector's pocket. (*Id*. at 94). The hose used to deliver propane from the truck to the customer's tank could be extended a long distance ("like half a football field"); the remote shutoff allowed Ms. Rector to stop propane delivery quickly without running to her truck to shut it down. (*Id*. at 94, 414). Ms. Rector said that the remote shutoff was "like the button at the gas station where anybody could run up and hit [it]" to stop the delivery of propane. (*Id*. at 94). In a phone conversation with Ms. Johnson, Ms. Rector described both the emergency shutoff fob that she kept in her pocket and the "backup" safety feature of the emergency shutoff cable with lever on the truck, which also served to shut off the flow of propane in the event of an emergency. (CX-13, 13:52 minute recording).

According to Ms. Rector, the biggest safety concern was the oil leak at the back of her propane vehicle, combined with the inability to shut off propane delivery remotely in the event of an emergency because of the missing remote shutoff fob. (Tr. at 114-15, 122-23).

Ms. Johnson recalled that Ms. Rector primarily complained about the air conditioning in the truck, the shutoff cable, and not being sent to the RRC's "service and installation class" that she wanted to attend. (*Id*. at 270, 289). Ms. Johnson "tried desperately to get [the air conditioning] fixed" and did not resent Ms. Rector for complaining about it. (*Id*. at 285, 300).

Additionally, though not reflected on the DVIRs, Ms. Rector complained about not having a satellite phone for emergency use when driving in remote areas. She admitted that Ms. Crumbley ordered her a new phone. (*Id*. at 175-176). Ms. Johnson expected Ms. Rector to come to the office in the morning, pick up the phone if needed, and bring it back in the afternoon. (*Id*. at 175-76, 307).

Ms. Rector presented some photos and video evidence of various truck conditions. (CX-14). One video shows the broken emergency shutoff and broken taillight taken on or about July 26, 2018, which Ms. Rector said (on the video) had been reported for two weeks. (CX-14, 2:37 minute video). Photos depict a leak at the back of the truck and documentation of inspections (hose, tanker test) and Hazmat certifications from 2011, 2016, and 2018. (CX-14). Ms. Rector also submitted photos of an undated and unsigned post-it note with a handwritten note stating "still sick from too much heat on Thurs." (CX-14, three photos labeled "heatex5" and "heatexhaustion 3"). In one photo, the note appears with a blurry receipt for diesel fuel dated July 14, 2018, at 10:34 p.m. (*Id*.). There is no indication of whether the note was given to anyone and, if so, whom and when. (*Id*.).

Ms. Rector acknowledged that Ms. Johnson told her "not to do things illegally." (Tr. at 87). Ms. Rector did not received any communication from Ms. Crumbley to ignore rules or regulations. (*Id*. at 199).

Complaints to Texas Railroad Commission

Beginning in early July 2018, Ms. Rector made complaints to the RRC, and she believed her identity as a complainant was not disclosed to Respondents, per her request for confidentiality. (Tr. at 149; *see* CX-3 at 8, 21, 24). Ms. Rector reported to the RRC that she refused to work for two days because the truck's "paperwork was expired." (CX-3 at 8). She also complained about the condition of underground tanks and an oil leak on the propane delivery truck. (*Id*. at 8-12, 16-29).

On August 7, 2018, Ms. Rector identified for April Richardson, Director of Alternative Fuels Safety with the RRC, a list of defects noted on the DVIRs between April 12 and July 12, 2018. (*Id*. at 12, 15). She notified Ms. Richardson that she had recently been fired. (*Id*. at 13).

Ms. Rector believes her employer knew about her complaint, explaining at the formal hearing in this matter as follows:

> Because I was the only [] employee so I'm assuming because I don't work for them, they got my complaint and probably called the office. I don't assume that they had Martha's cellphone number because the office is registered and that's when they'd talk with Carol. So. They sent the call to her and that's why I got the email saying I could call the Railroad Commission as many times as I want to and bad mouth the company which is CX-1, page 13 at the bottom which says, "Ms. Rector as well as Martha Johnson, July 18th at 4:30."

(Tr. at 149-150). She did not know, however, when the RRC first contacted anyone at Sanderson Propane. (*Id*. at 189-190).

Ms. Rector relied solely on email correspondence on July 18, 2018, as purported evidence that Ms. Crumbley and/or Ms. Johnson were aware that Ms. Rector reported safety concerns to the RRC. (CX-1 at 13-14). The email, however, concerned only Ms. Rector's request to take a particular class offered by the RRC ("service and installation"), not safety complaints. (CX-1 at 13-14; Tr. at 382, 439). Ms. Rector was upset because Sanderson Propane would not send her to the RRC class that Ms. Rector wanted to take. (CX-1 at 13-14; Tr. at 382). Ms. Rector and Ms. Crumbley exchanged a number of emails with one another over several days about whether Ms. Rector was approved and able to take this class. (CX-1 at 5-15).

On August 13, 2018, the RRC sent notice to Sanderson Propane of a complaint that a driver was "being made to fill leaky tanks and perform repairs without being certified to do so" and also that the "delivery truck is leaking and in need of repair." (RX-2). The RRC did not identify the complainant. (*Id*.). Ms. Johnson was not aware of the complaint before receiving RRC's letter dated August 13, 2018. (Tr. at 284-85; RX-1 at 1-4).

The complaint inspection on August 13, 2018, resulted in some citations for non-compliance but did not cause any loss of license for the business. (Tr. at 282-83; RX-2 at 2-7; RX-3 at 2). Citations are not unusual, and the Company is given 45 days to fix any minor issues. (Tr. at 283). The RRC cited Sanderson Propane for the expired VK inspection, the remote shutoff fob that was not working properly, and a "grade 2 leak pressure differential,"[6] and the truck was taken out of service for four days until completion of the repairs and renewal of the certification. (*Id*. at 262-63, 283, 288; RX-3 at 2; RX-11 at 8, 11).

Barry Blair Hired

Mr. Blair was hired as a part-time driver in mid-July 2018, to cover any shifts Ms. Rector missed when she was out of town. (Tr. at 416). Ms. Crumbley found that inconsistencies in Ms. Rector's schedule were making it difficult to accomplish propane deliveries because she was "never quite sure" of Ms. Rector's availability. (*Id*. at 362-63). The uncertainty of Ms. Rector's schedule caused Ms. Crumbley stress because she was unable to inform customers of their

[6] As a result of the August 13, 2018, inspection, the RRC inspector identified violations of DOT hazardous materials regulations at 49 C.F.R. § 173.315(n)(3)(emergency discharge control for cargo tank motor vehicles), § 180.407(a)(1)(inspection required for cargo tanks), and § 180.407(d)(2)(ii)(inspection and testing for cargo tank defects including leakage). (CX-3 at 3).

approximate delivery time. (*Id*. at 364). Mr. Blair had a CDL, certifications as a bobtail driver and in service and installation of LPG by the RRC, and a Hazmat endorsement by the Transportation Security Administration. (RX-15).

During the afternoon of Thursday, July 12, 2018, Ms. Crumbley sent an email to Ms. Rector asking her to be available at 10:00 a.m. on July 18, 2018, to "show Barry how to deliver gas[,] fill truck and print tickets." (CX-1 at 7). Ms. Rector responded that day, asking whether "training Barry is more important" than getting her certified to service tanks. (*Id*.). Ms. Crumbley replied the next morning that someone was needed to take care of customers when Ms. Rector took time off to visit relatives. (*Id*.).

The "Service and Installation" Class

On Friday, July 13, 2018, Ms. Rector directed an email to Ms. Johnson stating that she told Ms. Crumbley that she was registered for the "installation and service" class "on Tuesday." (CX-1 at 7). In another email on Sunday, July 15, 2018, Ms. Rector reiterated her intent to take the class on Tuesday, July 17, 2018 (I do plan to attend the class") and to take some days off after the class. (*Id*. at 7, 8). Ms. Rector also expressed frustration about customers' tanks leaking and driving a truck without air conditioning. (*Id*. at 7-8). In response, Ms. Crumbley advised Ms. Rector that she would not be allowed in the class without "approved and paid for paperwork," and she repeated her request that Ms. Rector arrive at work on Wednesday, July 18 at 10:00 a.m. (*Id*. at 8). Ms. Rector remained adamant about attending the class on July 17 but also stated agreement to "try and be" at the office by 10:00 a.m. the following day. (*Id*.). Ms. Rector had confirmation in writing of her enrollment in the "service and installation" class offered on July 17, 2018, in San Angelo, Texas. (CX-2 at 18).

Conflicts on and after July 16, 2018

A recorded conversation between Ms. Rector and Ms. Crumbley in the office on July 16, 2018,[7] concerned primarily calculations regarding Ms. Rector's recent work-related purchases and whether she owed some cash reimbursement to the office. (CX-13, 34:43 minute recording). During the discussion, Ms. Crumbley stated that Ms. Rector was being paid $15.00 per hour for 80 hour pay periods and thus should expect to receive pay of $1200.00 on the 1st and 15th of the month. Ms. Crumbley also described ordering a part for the truck that had not yet arrived; the part apparently concerned the air conditioning because Ms. Rector complained about driving a hot truck and Ms. Crumbley suggested that working earlier in the day was cooler. Ms. Rector insisted that she could not "do morning" due to her rheumatoid arthritis. Ms. Crumbley also mentioned several times that Ms. Rector worked past 7:00 p.m. and, in fact, signed out closer to 9:00 p.m. and 10:00 p.m. Ms. Rector did not deny working the late hours but presented excuses, such as having to fill up the truck on the way back from deliveries.

Conflicts between Ms. Rector and her employer escalated on or about July 17, 2018, as evidenced by ongoing email and other correspondence. (CX-1 at 9). On the morning of July 17,

[7] There is no evidence Ms. Crumbley consented to the recording of this call. Ms. Rector also submitted recordings of conservations with Ms. Johnson with no indication of her consent. (CX-13). Texas Penal Code § 16.02 and Virginia Code § 19.2-62 indicate that Texas and Virginia are one-party consent states.

Ms. Crumbley told Ms. Rector by email, "You are no longer welcome in the office when I am not here. You have gone through my paperwork and looked through things you have no business looking at[.]" (*Id*.). She asked Ms. Rector to return the satellite phone taken out of a box under Ms. Crumbley's desk, and she accused Ms. Rector of "snooping" and taking delivery tickets that did not belong to her. (*Id*.). In a response the same day, Ms. Rector did not deny taking items from the office. Rather, she complained about the heat in her truck because of the faulty air conditioning. (*Id*.). She also complained that the hours reflected in her check were not accurate. (*Id*.).

Ms. Rector refused to drive the propane truck on July 17, 2018, because of expired "paperwork" and due to the broken cable and leak in the back of the truck. (Tr. at 126-27, 128). Ms. Rector also prepared a handwritten note for Ms. Crumbley dated July 17, 2018, stating that "the truck's paperwork is out of date." (CX-2 at 17). Ms. Rector stated in the note, "I will not drive it illegal / or without up to date papers." (*Id*.).

The next day, at 8:23 a.m. on July 18, 2018, Ms. Crumbley reminded Ms. Rector that she would see her at 10:00 a.m. (*Id*. at 10). Ms. Rector responded at 9:32 a.m. and, among other things, told Ms. Crumbley that she had already been by that morning and "checked out the truck." She stated that "once again there are leaks," and "no remote for shutoff," which could result in "tickets" if driven. (*Id*. at 11). Ms. Rector stated, "I need these fixed please," because it would not pass "DOT inspection." (*Id*.).

Ms. Crumbley again asked Ms. Rector to be present at 10:00 a.m. in order to show her the leaks and return the emergency shutoff (asking "did you lose it too??"). She also asked Ms. Rector to return the tickets and satellite phone taken from the office. (*Id*.). The emails exchanged throughout that day included Ms. Rector's accusations that Ms. Crumbley had lied about calling the auto parts store for a truck part, and Ms. Crumbley's request that Ms. Rector apologize for same because Ms. Crumbley had spoken to an employee at the parts store more than once. Ms. Crumbley also continued to question Ms. Rector about the location of the satellite phone and emergency shutoff fob. (*Id*.). In response to Ms. Crumbley's request that Ms. Rector show her the leaks, Ms. Rector claimed to have shown her pictures of the leak "since May." (*Id*. at 12).

At 4:08 p.m. on July 18, 2018, Ms. Rector informed Ms. Crumbley and Ms. Johnson that she had a foot infection[8] and an out-of-town cousin that was not doing well, so she planned to be away for some days. (*Id*.). Ms. Crumbley responded that she was "not mad" but had only requested that Ms. Rector "come to the office like a normal employee and talk about the problems we need to fix." (*Id*. at 13). She noted that Ms. Rector had not returned the tickets, the phone, and other items as requested; she asked, "Are you avoiding the office for any particular reason?" (*Id*.). Ms. Rector said, among other things, that she was not avoiding the office but was "waiting to see if truck has been fixed, ain't going out into heat twice, and if it got fixed, I would go do the tickets." (*Id*.). She asserted that the tickets and the phone were in the truck. (*Id*.).

Ms. Rector and Ms. Crumbley continued to exchange emails throughout the evening of July 18, 2018, about whether Ms. Rector could take the RRC class she wanted and whether Ms.

[8] Other evidence indicates that on July 5, 2018, Ms. Rector had stepped on a nail that penetrated her foot. (CX-1 at 14; Tr. at 85).

Rector dressed appropriately and safely for the job. (*Id*. at 13-15). Ms. Rector stated that she had not "caused drama," contrary to Ms. Crumbley's assertion, but instead "brought up health concerns, safety concerns." (*Id*. at 14). Ms. Crumbley replied, "If at any time you thought we were non-compliant, why are you just now telling me," including issues regarding the missing emergency shutoff fob and truck leak. (*Id*. at 15). Ms. Crumbley stated in the email exchange that her own attitude was caused by "an employee who constantly does not follow direction and continues to work after dark," resulting in customer complaints. (*Id*.). She further stated that Ms. Rector improperly drove the propane delivery truck to the pool with her daughter as a passenger and parked it there. (*Id*.). Additionally, she stated that Ms. Rector was not trusted by customers who had called with concerns, and Ms. Rector had gone through paperwork on the office that did not belong to her. (*Id*.).

A subsequent, lengthy email from Ms. Johnson on the evening of July 18 described what was initially a good working relationship and the Company's attempts to accommodate Ms. Rector's later work hours because of her rheumatoid arthritis. (*Id*. at 16). However, according to Ms. Crumbley, Ms. Rector had not followed the Company's "very basic" requirement to discuss important business items in the office and not via text or email. (*Id*.). Ms. Johnson stated that Ms. Rector had been informed of this requirement by both Ms. Johnson and Ms. Crumbley, and that it was a feasible task given that Sanderson is a small town and Ms. Rector lived "two to three minutes" from the office. (*Id*.). Ms. Johnson reiterated that Ms. Rector was asked not to make deliveries after dark, not to take her child in the truck, to come into the office when Ms. Crumbley was there, and to service customers when Ms. Crumbley asked, but Ms. Rector had not complied. (*Id*.). Ms. Johnson also acknowledged that the "air conditioning is a real problem" and she believed repairs were underway but the first part ordered was wrong and the arrival of the correct part was delayed. (*Id*.). Ms. Johnson stated that the satellite phone was available for Ms. Rector's use when delivering "out in the country," and she needed only to "get it from Carol and return it at the end of the day" when it was needed. (*Id*. at 17). Ms. Johnson concluded by emphasizing that Ms. Rector needed to "GO TO THE OFFICE EACH MORNING, SIGN IN, TALK TO CAROL, DISCUSS ANY ISSUES SUCH AS LEAKS, A/C, DIRECTIONS, PAPERWORK YOU WANT FROM HER OR WHATEVER ELSE YOU ALL DEEM NECESSARY, MAKE YOUR PLAN FOR DELIVERIES AND GET THEM DONE PLEASE." (*Id*.).

Ms. Rector did not return to work to deliver propane again after July 17 and 18, 2018. (Tr. at 124, 278).

On Thursday, July 19, 2018, Ms. Rector told Ms. Crumbley and Ms. Johnson by email that she was headed out of town to help a cousin having surgery, and she stated agreement to talk to Ms. Crumbley in person when she returned. (CX-1 at 18). She indicated she would be returning to town Monday evening, July 23, 2018. (*Id*.). However, on Tuesday, July 24, 2018, Ms. Rector had not yet gone to the office, even though she had returned to Sanderson. (Tr. at 160, 281).

Ms. Rector was not again scheduled to drive, or asked to drive, a truck for Sanderson Propane. (*Id*. at 161-62). She indicated a willingness to drive, but Mr. Blair was driving the truck by that time. (*Id*. at 162). Instead of delivering propane, on or about July 24 and 25, 2018, Ms.

Rector used her own vehicle to drive around and identify customers who needed their tanks filled; she was not asked to perform this task by anyone at Sanderson Propane. (*Id*. at 161-62, 272, 281).

Ms. Johnson sent an email to Ms. Rector on July 24, 2018, asking Ms. Rector to bring to the office on Wednesday, July 25, 2018, the items she did not have permission to take from the office including a "CD with directions," "John's book of directions," a "black book with combinations,"[9] and "2 pages of check stubs with payroll info." (CX-1 at 18). Ms. Rector denied she had taken the items but admitted that she made copies; she said the CD and books were in the truck. (*Id*.). Ms. Johnson had the locks changed at the office because Ms. Rector had taken items she was not authorized to take. (Tr. at 348-49, 360-61). Ms. Johnson was not planning at this time to terminate Ms. Rector; she meant only to restrict her access to the office to times when others were present. (*Id*. at 349).

A recorded phone call between Ms. Rector and Ms. Johnson on July 26, 2018, reflects that Ms. Rector was upset that she presented at the office with the mechanic "Kevin" at 10:30 a.m. that day to find a note that Ms. Crumbley would be "in and out" all day for a personal reason. (CX-13, 13:52 minute recording; *see also* Tr. at 161). On the call, Ms. Rector complained to Ms. Johnson that there were still compliance issues because even if Mr. Blair had the Hazmat certification, it did not yet appear on his driver's license. Ms. Johnson disagreed and stated that Mr. Blair was "totally legal." Ms. Rector also mentioned the broken emergency shutoff cable on the truck, which she stated would prevent her from driving it. She also stated that she would still drive despite the "little bitty" leak in the back of the truck. Ms. Johnson stated that Kevin was called to come make these repairs. Ms. Johnson further stated that she wanted the repairs to the cable and the air conditioning completed because it was "very important" to her. She mentioned a delay in getting the right part from the auto parts store because Kevin was needed to verify which part to order after looking at the truck. Ms. Rector repeatedly interrupted Ms. Johnson during the conversation. (CX-13, 13:52 minute recording).

During another recorded phone call on July 27, 2018, Ms. Johnson asked Ms. Rector to return items to the office that she believed Ms. Rector had taken. Ms. Johnson stated, "I want my office in order." Ms. Rector replied that the lack of order was not her fault, nor was the truck's non-compliance. Ms. Johnson immediately replied that she was not referring to the truck but to the missing check stubs that could not be located since Ms. Rector was in the office and admittedly made copies of such things. Ms. Rector stated that she did not go into the office on the morning of July 27 because she heard that Mr. Blair was driving the propane truck. As during other calls, Ms. Rector was argumentative and repeatedly interrupted Ms. Johnson. (CX-13, 5:20 minute recording).

Repairs by Mr. Blair

Mr. Blair agreed that some repairs were needed to the propane truck, having found some problems during his first inspection, including a broken emergency cable, as well as taillights that were secured with Gorilla Glue and duct tape. (Tr. at 410). He ordered the replacement parts

[9] The "CD" contained a full list of customers. (Tr. at 92). The "black book" contained names of customers with addresses, phone numbers and instructions for delivery to that customer. (*Id*. at 91).

and, after a delay of a few days due to his own absence because of illness, he made the repairs, including the replacement of some marker lights on the tank itself. (*Id*. at 411, 415).

Mr. Blair found the remote emergency shutoff fob in a toolbox on the truck and replaced the battery in it. (*Id*. at 413). Before changing the battery, the emergency shutoff was working at 50 feet but not at greater distances like 75 feet. (*Id*. at 283).

Mr. Blair found a "very minor leak" on one of the valves outboard of the meter on the propane truck. (*Id*. at 414). The Company ordered a replacement diaphragm from a gas equipment company, which arrived in a few days. The truck was emptied and depressurized in order to install the replacement part. (*Id*. at 414, 283). The truck was then checked for leaks and none were found. (*Id*. at 414).

Mr. Blair was aware of the lapsed VK inspection that led to taking the propane truck out of service for four days. (*Id*. at 419).

Mr. Blair accomplished the repairs of every problem he found on the truck. (*Id*. at 415). He described all conditions that were repaired as "minor." (*Id*. at 422). There was a delay in repairing the air conditioner because of trouble locating the necessary parts. (*Id*. at 415).

At the hearing, Mr. Blair provided a visual aide, marked and admitted as RX-20, to describe certain mechanics of the propane truck such as the operation of the emergency cable. (*Id*. at 412).

Mr. Blair was never told by Ms. Crumbley or Ms. Johnson to ignore safety rules or issues. (*Id*. at 424). In his experience, problems with propane trucks were fixed immediately. In Mr. Blair's observation, this has been Sanderson Propane's consistent practice since he has been in the Company's employment. (*Id*.).

Wages and Other Work Conditions

Ms. Rector alleges that her pay and hours were docked and that she was ultimately terminated and suffered "defamation of character" after her employment was terminated in retaliation for her complaints. (Tr. at 151).

Ms. Rector noted that her timesheet in late July 2018 reflected "four things crossed off," indicating that some of her time had been stricken and thus not paid for. (*Id*. at 142). According to Ms. Johnson, the work at Sanderson Propane slows in the summer, which leads to the Company limit employees to no more than forty hours of work per week, or eighty hours in a two-week pay period. (*Id*. at 270). Her testimony was consistent with communication submitted by Ms. Rector. (CX-1 at 1, 3; *see also* RX-12 at 10). When Ms. Rector submitted timesheets for more than eighty hours of work in the summer of 2018, she was not paid for more than eighty. (Tr. at 270).

Ms. Rector testified that Ms. Crumbley discriminated against her when she "first started" working for Sanderson Propane, possibly due to the fact that Ms. Rector was a woman and "they

never had a woman work for them" and also because Ms. Crumbley purportedly found out that Ms. Rector was paid more than Ms. Crumbley. (*Id*. at 137, 142-43, 368). At other times, Ms. Rector also described Ms. Crumbley as increasingly "more defensive" during Ms. Rector's employment, which Ms. Rector attributed to Ms. Crumbley's response to Ms. Rector's various complaints. (*Id*. at 132, 151). Overall, Ms. Rector described Ms. Crumbley as "just difficult to work with" and stated that Ms. Crumbley was never "warm or welcoming" to her. (*Id*. at 136, 138). Ms. Rector was aware that Ms. Crumbley and Ms. Johnson worked closely together but was not privy to private discussions between Ms. Crumbley and Ms. Johnson, even though she assumed that Ms. Crumbley misinformed Ms. Johnson about Ms. Rector's work performance and concerns. (*Id*. at 133-34).

As noted above, Ms. Rector first raised safety concerns on or about April 12, 2018. *(Id*. at 139). She did not identify any change in Ms. Crumbley's behavior toward her, however, until Ms. Rector became full-time, which was on May 1, 2018. (*Id*. at 139-140; Stipulation No. 6). Ms. Johnson also noticed a change in Ms. Rector when she switched to full-time work. (Tr. at 264). Ms. Johnson observed that around this time, Ms. Rector was telling her manager and Ms. Johnson how she wanted to do her job, on matters that did not concern safety. Ms. Johnson said, "We wanted her to do our job our way not her way." (*Id*.). Ms. Johnson talked to Ms. Rector about her inability to follow direction, and she also had Ms. Crumbley talk to her as well. (*Id*.). Ms. Johnson asked Ms. Rector for "steady working 8 to 5 or 10 to 7 whichever works for you" but no working "until 10:30 p.m. or 1 am" and "no drama." (RX-12 at 15-16). Ms. Johnson also stated that she wanted Ms. Crumbley to "know of problems to get problems with trucks fixed as soon as possible." (*Id*. at 15). Ms. Johnson insisted on daily, in person, morning meetings between Ms. Rector and Ms. Crumbley so the two could review any problems and resolved them; she repeatedly asked Ms. Rector to speak with Ms. Crumbley in person in the office. (*Id*. at 11-12, 15-20; RX-14 at 7-8, 15; Tr. at 263-64). She found that Ms. Rector did not follow these directions. (Tr. at 264). Ms. Johnson did not consider emails and text messages "a proper way to run a business." (*Id*.).

Ms. Rector was asked on cross-examination whether she met with Ms. Crumbley each morning as requested by Ms. Johnson, to sign in, report any problems, and pick up her satellite phone. (*Id*. at 178). Ms. Rector acknowledged that even though she communicated with Ms. Crumbley, she did not always meet with her; she claimed Ms. Crumbley was not there every day. (*Id*. at 178-79).

Ms. Rector was instructed to take no passengers in the propane truck. (*Id*. at 359). Ms. Crumbley saw Ms. Rector allow her daughter to ride in the truck contrary to these instructions. (*Id*.). Mr. Blair personally observed Ms. Rector's child exiting the propane truck in May 2018. (*Id*. at 423). He also observed that day that Ms. Rector was wearing shorts, flip-flops, and a tank top when operating the propane truck. (*Id*. at 195-196, 423).

Ms. Rector's Termination

Ms. Johnson terminated Ms. Rector's employment by telephone on July 31, 2018. (Stipulation No. 7; RX-19 at 5). Ms. Johnson was the sole decision-maker for the decision to terminate Ms. Rector. (Tr. at 267, 274, 404). Ms. Crumbley, who has never fired an employee of

Sanderson Propane, provided information to Ms. Johnson about Ms. Rector's work at Ms. Johnson's request. (*Id*. at 274, 404-05). Ms. Crumbley told Ms. Johnson that Ms. Rector did not do her job, was never in the office, and was not "company-minded," instead she was "Selena-minded," but did not recommend or advocate for her termination. (*Id*. at 404-05).

Ms. Johnson does not have any progressive discipline practices in place such issuing verbal or written warnings before terminations. (*Id*. at 287). She made the decision to terminate Ms. Rector on July 30, 2018, and consulted the Company's accountant that day on issues of severance pay. (*Id*. at 350-51).

Ms. Johnson terminated Ms. Rector "because of her insubordination, not following instructions and she was very argumentative and uncooperative really and it didn't have anything to do with safety." (*Id*. at 267-68). Examples of Ms. Rector not following directions included delivering propane after dark; excessive communication by text, email, and phone; her refusal to go into the office; performing tasks she was not asked to perform like cutting grass and cleaning out the storage area; taking passengers in the propane truck after specific instructions against doing so; and removing papers from the office that she was not authorized to take. (*Id*. at 268-70, 273, 276, 392). Ms. Rector acknowledged that she was "probably overly communicative," which led to Ms. Johnson requiring Ms. Rector to talk directly with Ms. Crumbley. (*Id*. at 86). According to Ms. Johnson, the "crowning blow" was Ms. Rector entering the office after hours and taking items that did not belong to her. (*Id*. at 350-51). None of the instances of insubordination concerned a complaint about the safe operation of a commercial motor vehicle. (*Id*. at 300).

I reviewed the audio recording that Ms. Rector made of her phone call with Ms. Johnson on July 31, 2018. (CX-13, 14:10 minute recording; Tr. at 164-65). During the call, Ms. Johnson repeated that Ms. Rector was instructed many times not to text or email information. She stated, "I cannot handle it anymore." Ms. Rector prompted, "Handle what?" and asked if Ms. Johnson could not handle a truck out of compliance and Ms. Rector's safety complaints. Ms. Johnson denied any such suggestion and reaffirmed her observation that Ms. Rector refused to go into the office and meet with Ms. Crumbley daily as she had been instructed to do. Ms. Johnson further described Ms. Rector as "uncooperative." She denied that there was any plan to fire Ms. Rector merely because Mr. Blair had been hired; instead, Ms. Johnson stated that the original plan was to have them work together. When Ms. Rector referred to driving later in the day because of the hot truck, Ms. Johnson acknowledged the air conditioning problem and stated that she was trying to get it fixed by mechanic "Kevin." Throughout the conversation, Ms. Rector was the only person who mentioned compliance or safety issues. Ms. Johnson never indicated that any such issues were related to Ms. Rector's termination. Ms. Johnson also expressed no resistance or animosity toward fixing any truck defects. Ms. Johnson turned the discussion again to Ms. Rector "bombarding" her with texts and emails and refusing to discuss any issues with Ms. Crumbley in person. Ms. Rector disagreed and retorted, "That's not how you run a business." Ms. Rector informed Ms. Johnson that it was better to communicate the way that Ms. Rector communicated. Ms. Johnson attempted to thank Ms. Rector several times for her service and noted that the employment relationship began amicably. When Ms. Rector complained that the relationship changed because she began "pointing things out" regarding customer and safety issues. Ms. Johnson said, "I don't think so." Ms. Rector's tone was highly argumentative and

belligerent throughout the conversation. She constantly interrupted Ms. Johnson, who did not respond in kind. (CX-13, 14:10 minute recording).

After Ms. Rector's termination, Ms. Johnson became aware of Ms. Rector's claim with the Texas Workforce Commission filed on August 13, 2018, alleging unpaid regular and overtime wages. (Tr. at 292-293). After a hearing, the claim was denied on April 16, 2019, and re-hearing was also denied. (*Id*. at 294; RX-5 at 5, 17, 19). According to the Workforce Commission, Ms. Rector was not entitled to the claimed unpaid wages of $1,000.00 because the evidence indicated that Sanderson Propane had paid her the correct amount, and she was not entitled to overtime wages of $2,928.38 because her position was exempt. (RX-5 at 5).

Reports of Criminal Trespass and Credit Card/Debit Card Abuse

On July 31, 2018, Ms. Crumbley contacted local law enforcement and reported that Ms. Rector had been fired that day and was not wanted on the property. (CX-6 at 2). However, Ms. Rector was seated in a pickup truck on the property. Ms. Crumbley also wanted items belonging to the Company returned including a CD. A criminal trespass notice was issued to Ms. Rector. (*Id*.).

On August 8, 2018, Ms. Johnson reported to local law enforcement that the Company had discovered that Ms. Rector used a Company credit/debit card on two occasions to "refund money belonging to Sanderson Propane." (*Id*. at 3; RX-16 at 1-3). A transaction after business hours on July 17, 2018, totaled $448.98, and a second transaction after business hours on July 18, 2018, totaled $175.00. (CX-6 at 4). She also reported that Ms. Rector had taken propane tank parts and installed them on her own propane tank at her private residence. (*Id*. at 4). Ms. Johnson further reported a set of missing hand tools that were usually kept on the propane delivery truck and could not be located since Ms. Rector's termination, as well as missing check stubs for checks that had been written to Ms. Rector; also, Ms. Rector's personnel file was missing. (*Id*.). After Ms. Rector's bank account statements were obtained, it was confirmed that one of the debits from Sanderson Propane's credit/debit card appeared as a deposit into Ms. Rector's bank account. (*Id*. at 5). Ms. Rector was convicted of the felony of credit card/debit card abuse on June 4, 2019. (RX-7 at 1-2).

IV. THE PARTIES' POSITIONS

Complainant's Briefs

In her post-hearing brief, Ms. Rector argues that she was terminated from her position on July 31, 2018, for bringing up "numerous safety and health" concerns that were ignored by Ms. Crumbley. (Complainant's Brief at 1). She argues that she was "expected" daily to ignore federal and state laws, rules and regulations, and specifically, rules and regulations of the Texas Railroad Commission (RRC). (*Id*.). Ms. Rector states that all of this led her to report purported rules violations to the RRC on July 12, 2018. Ms. Rector contends that after she reported Sanderson Propane's "negligence" to the RRC, Ms. Crumbley described her as "an ignorant caller" and accused her of "bad mouthing the company and only causing drama." (*Id*. at 2). Ms. Rector alleges that Ms. Crumbley "abused her authority." (*Id*.).

Ms. Rector alleges that she was deemed "insubordinate" because she reported violations and "refused to ignore Laws, refused to drive a Propane Truck that had leaks for months, faulty lights, had expired paperwork since 2016," and lacked a satellite phone and operable "emergency shutoff valve." (*Id*. at 3-4). She also believes that she was retaliated against because she refused to drive on "numerous occasions" due to an "unsafe, noncompliant truck," and also due to the heat; she also contends she had a doctor's order restricting her from working. (*Id*.). Ms. Rector also argues that she found "22 leaks" (presumably, propane) at customers' homes in a two-week period of time. (*Id*. at 3). Ms. Rector states that she brought these varied complaints to the attention of Ms. Crumbley and the owner, Ms. Johnson, and that she also complained to the RRC. (*Id*.). According to Ms. Rector, the retaliation against her because of these complaints consisted of docked pay, improper tax withholdings, defamation of character, public humility, "false accusations" reported to local law enforcement, and termination. (*Id*. at 3-4).[10] In her reply brief, Ms. Rector essentially asserts the same arguments.

Respondents' Briefs

Respondents argue that Ms. Rector has not met her burden to establish retaliation. Respondents further argue that they have proven by clear and convincing evidence that Ms. Rector was "terminated for repeated acts of insubordination" and she would have "been terminated even in the absence of any protected activity." (Respondents' Brief at 2). Respondents argue that Ms. Crumbley and Ms. Johnson never received notice or had knowledge before her termination that Ms. Rector filed complaints with the RRC. (*Id*. at 3). Respondents thus argue that no evidence supports Ms. Rector's argument that she was terminated on July 31, 2018, because she submitted complaints to the RRC. According to Ms. Johnson, she was first notified of Ms. Rector's complaints to the RRC several days after Ms. Rector's termination, when informed by the RRC on August 13, 2018. (*Id*.). Respondents cite cases in support of their arguments that no retaliation occurred, due to Employer's lack of awareness of Ms. Rector's protected activity at the time of the adverse action, including *Watts v. Kroger*, 170 F.3d 505 (5th Cir. 1999), and *Miller v. Thermalken*, 94 F.2d 641 (4th Cir. 1996). (*Id*. at 4).

Respondents assert that Ms. Rector was terminated for several, cumulative, acts of insubordination, citing the following instances:

- Ms. Rector drove the propane delivery truck during the summer of 2018 with her minor daughter as a passenger, violating Company rules against taking passengers in the propane truck;
- Ms. Rector dressed inappropriately while operating the truck on the same date she was witnessed with her daughter in the passenger seat of the propane truck;
- Customers complained of night deliveries Ms. Rector made and she was instructed by the Employer to not make night deliveries due to safety issues;

[10] On February 23, 2021, the day after filing her post-hearing brief, Ms. Rector asked for an extension of time to "finish submitting closing argument," listing various reasons related to the passing of her father in January 2021. Respondents objected. Ms. Rector filed additional arguments on February 25, 2021, which have been considered herein.

- Ms. Rector refused to heed Ms. Johnson's instructions to meet with Ms. Crumbley in person to discuss Company deliveries and truck repairs;
- Ms. Rector entered Employer's office after business hours and removed employment records without permission, which was felonious conduct that resulted in her conviction in June 2019.

(*Id*. at 13-14). Respondents state that Ms. Johnson made the decision to terminate Ms. Rector because of her violations of Company policies. Respondents rely on the testimony of Ms. Crumbley, who explained how Ms. Rector violated Company policies during her employment. (*Id*. at 8-10). Respondents also rely on employee Barry Blair's testimony concerning work conditions to refute Ms. Rector's testimony that conditions such as heat were unsafe, and his personal knowledge of the Company's safety inspections by RRC and the Department of Transportation, which the Company passed. (*Id*. at 10-12). They also cite Mr. Blair's testimony regarding his observations of Ms. Rector's insubordinate conduct. (*Id*. at 12). Respondents contend that repairs related to propane delivery vehicles, and required inspections, were all promptly addressed by Ms. Crumbley. (*Id*. at 9). Respondents also argue that the "unclean hands" doctrine prevents Ms. Rector from obtaining any relief, due to her felony conviction in June 2019 for stealing from Employer. (*Id*. at 6-7, 15).

Respondents' reply brief was also considered. In the reply brief, Respondents note that Ms. Rector started as a "relatively good driver" who was commended for her work. (Respondents' Reply Brief at 2). Respondents believe, however, that Ms. Rector's history of self-employment led her to think she could give instructions to Ms. Crumbley and Ms. Johnson, rather than take instruction. (*Id*.). Respondents give examples of Ms. Rector doing things "her way" instead of in compliance with Company policies. (*Id*. at 2-3). Respondents reiterate their position that no adverse actions were taken for reporting problems and that Employer addressed any safety concerns brought to its attention. (*Id*. at 3). Respondents also assert that any knowledge of Ms. Rector's contact with the RRC before her termination was limited to a class Ms. Rector wanted to take regarding "service and installation" and thus was not concerning any issue related to safe operation of a commercial motor vehicle. (*Id*. at 6).

V. CONCLUSIONS OF LAW

A. Coverage under the Act

In pertinent part, the Act defines an "employer" as:

> [A] person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but does not include the Government, a State, or a political subdivision of a State.

49 U.S.C. § 31101(3)(A)-(B).

Further, a "person" is defined under the Act's implementing regulations as follows:

> [O]ne or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals.

29 C.F.R. § 1978.101(k).

I find and conclude that Respondent Sanderson Propane is an employer within the meaning of 49 U.S.C. § 31101, as it is engaged in a business that owns or leases a commercial motor vehicle,[11] or assigns an employee to operate the vehicle in commerce. Respondent Martha Johnson, the sole owner of Sanderson Propane and an individual with authority to hire, reprimand, and discharge Ms. Rector, is also an employer as defined under the Act. *See* 49 U.S.C. § 31101(3)(A); 29 C.F.R. § 1978.101(k); *Anderson v. Timex Logistics*, ALJ No. 2012-STA-011, ARB No. 13-016, slip op. at 8 (ARB Apr. 30, 2014); *Smith v. Lake City Enters, Inc.*, ARB Nos. 08-091, 09-033, ALJ No. 2006-STA-032, slip op. at 9 (ARB Sept. 24, 2010). Ms. Rector, a driver of a commercial motor vehicle, is a covered employee. *See* 49 U.S.C. § 31101(2). (*See* Tr. at 50-52).

B. Ms. Rector's Complaint of Prohibited Retaliation under the STAA

In relevant part, the employee protection provision of the STAA provides as follows:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because:
>
> > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; []
> >
> > (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[.]

49 U.S.C. § 31105(a)(1)(A)-(B).

STAA whistleblower complaints are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). *See* 49 U.S.C. § 42121(b)(2011); 49 U.S.C. § 31105(b)(1); *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-71 (ARB May 18, 2017).

[11] The parties did not dispute that Respondents' vehicles, which transport hazardous material, qualify as commercial motor vehicles under the Act. *See* 49 U.S.C. 31101(a)(C).

To prove a STAA violation, the complainant must show by a preponderance of the evidence that her safety complaints to her employer were protected activity, or that she refused to operate a vehicle for reasons recognized under the Act, that her employer was aware of the protected activity, that the company took an adverse action against her, and that her protected activity was a contributing factor in the adverse action. 49 U.S.C. § 42121(b)(2)(B)(iii); *see also Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); *Scott v. J.B. Hunt Transport Svcs., Inc*., ARB No. 03-038, ALJ No. 02-STA-001, slip op. at 3 (ARB July 30, 2004); 75 Fed. Reg. 53544, 53550 (Aug. 31, 2010) ("It is the Secretary's position that the complainant [in an STAA case] must prove by a 'preponderance of the evidence' that his or her protected activity … contributed to the adverse action at issue."). If a complainant does not prove one of these requisite elements, her entire claim fails. *West v. Kasbar, Inc./Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

In accordance with this legal framework, Ms. Rector must show by a preponderance of the evidence, i.e., that it was more likely than not, that she engaged in protected activity and that such protected activity was a contributing factor to the adverse employment action by the Respondents. If Ms. Rector meets her burden, the burden shifts to the Respondents to demonstrate by "clear and convincing evidence" that they would have taken the adverse employment action even absent the protected behavior. *See* 49 U.S.C. § 42121(b)(2)(B)(iv); 75 Fed. Reg. 53544, 53550 (Aug. 31, 2010). *See also Warren v. Custom Organics*, ARB No. 10-092, slip op. at 12 (ARB Feb. 29, 2012). Clear and convincing evidence is an intermediate burden of proof, falling in between preponderance of evidence and proof beyond reasonable doubt. The clear and convincing evidentiary standard requires "evidence indicating that the thing to be proved is highly probably or reasonably certain." *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (citation omitted).

Both Ms. Rector and Respondents in this case have been self-represented. An administrative law judge "must accord a party appearing *pro se* fair and equal treatment, but a *pro se* litigant cannot generally shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance." *Pike v. Credit Suisse, AG*, ARB No. 2011-0034, slip op. at 4-5 (ARB May 31, 2012). A litigant's *pro se* status is given some consideration on matters of procedure. *See e.g., Pike v. Public Storage Companies, Inc*., ARB No. 99-072, ALJ No. 98-STA-35 (ARB Aug. 10, 1999) (*pro se* litigants may be held to a lesser standard than legal counsel in procedural matters). However, *pro se* complainants do not have a lesser burden of proving the elements necessary to sustain a claim of discrimination. *See Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec'y Oct. 10, 1991). Given the parties' self-represented status, I ensured that they had adequate opportunity to proffer evidence and legal arguments to support their claims and defenses. I allowed the parties to prepare questions in advance for their direct examinations, so that I could ask the prepared questions at the hearing to assist with their testimonies. I also asked my own clarifying questions at times. During the hearing, I also reminded both parties as needed of their respective legal burdens.

While Ms. Rector's complaint did not specifically allege which provisions of the STAA apply to her allegations of protected activity, I have construed her complaints as referencing two types of protected activity under the Act. The first are the complaints Ms. Rector made orally and in writing about the condition of the propane delivery truck, as concerning a violation of a

commercial vehicle safety regulation, standard, or order. The second type of protected activity concerns her refusal to operate a vehicle.

Protected Activity – Complaints (§ 31105(a)(1)(A))

A complainant may engage in protected activity by making a complaint related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. 49 U.S.C. § 31105(a)(1)(A). Safety complaints under § 31105(a)(1)(A) may be made to management or a supervisor and may be "oral, informal, or unofficial." *Ulrich v. Swift Transportation Corp.*, ARB No. 11- 016, ALJ No. 2010-STA-041, slip op. at 4 (ARB Mar. 27, 2012). A complainant needs to demonstrate that she reasonably believed that there was a safety violation. *Id.*; *see also Gaines v. KFive Constr. Corp.*, 742 F.3d 256, 267-68 (7th Cir. 2014); *Guay v. Burford's Tree Surgeon's, Inc.*, ARB No. 06-131, ALJ No. 2005-STA45, slip op. at 6-8 (ARB June 30, 2008).

"Internal complaints to management about safety regulation violations constitute protected activity under this subsection." *See Hilburn v. James Boone Trucking*, ARB No. 04-104, ALJ No. 2003-STA-45, slip op. at 4 (ARB Aug. 30, 2005) (*citing Regan Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5 (ARB Sept. 30, 2004)); *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 5 (ARB Dec. 31, 2002) (An "internal complaint to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA."). *See also Barr v. ACW Truck Lines*, Inc., ARB No. 91- STA-42 (Sec'y Apr. 22, 1992) ("Any complaint 'related' to a safety violation made by an employee to his employer constitutes protected activity" under the STAA) (citations omitted).

"It is well-established that as long as the complaint raises safety concerns, the layman who usually will be filing it cannot be expected to cite standards or rules like a trained lawyer." *Maddin v. Transam Trucking, Inc.*, ARB No. 13- 031, ALJ No. 2010-STA-20, slip op. at 6 (ARB Nov. 24, 2014) (citation and internal punctuation omitted). "The statute requires only that the complaint 'relate' to a violation of a commercial motor vehicle safety standard." *Id.* "Uncorrected vehicle defects, such as faulty brakes, violate safety regulations and reporting a defective vehicle falls squarely within the definition of protected activity under STAA." *Id.*, slip op. at 6-7.

Ms. Rector claims that she made safety complaints about the operation of the propane truck to both her manager, Ms. Crumbley, and the owner, Ms. Johnson, throughout her employment with Sanderson Propane. According to the evidence of record, written complaints started in mid-April 2018. In support of her argument, Ms. Rector relies on her own testimony and documentary evidence of text messages, email and other written correspondence, DVIRs, and her complaint to the RRC. (CX-1, CX-2, CX-3).

Driver Vehicle Inspection Reports

A vehicle inspection report may serve as a complaint to an employer regarding a vehicle defect. *See Green v. Creech Brothers Trucking*, Case No. 92-STA-4, Sec'y Dec. 9, 1992); *see*

also Warren v. Custom Organics, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 7-8 (ARB Feb. 29, 2012) (complaint of unsafe vehicle conditions established by employee who verbally complained about the safety of vehicles and also completed checklist that the employer established as a procedure for employees to report safety complaints). However, the existence of a vehicle defect alone noted on an inspection report does not always constitute protected activity within the meaning of the Act unless a commercial motor vehicle safety violation is implicated. *See, e.g., Gage v. Scarsella Brothers, Inc.*, ARB No. 05-095, ALJ No. 05-STA-21 (ARB Aug. 31, 2006) (driver inspection report identifying bent bumper did not constitute evidence of complaint to employer about a violation of a commercial motor vehicle safety regulation, standard, or order and employee never refused to operate vehicle).

On April 13, 2018, Ms. Rector indicated on the DVIR that the truck had a leak in the piping system, but also that the condition of her vehicle was "safe to operate," which I find does not reflect that she held a reasonable apprehension of a safety violation at that time. (*See* CX-7 at 3).

I find, however, that Ms. Rector reported other defects on DVIR forms that qualify as protected disclosures under the Act, including oil pressure and leaks (April 14, July 10 and 12, 2018); a broken emergency shutoff cable[12] (July 10 and 12, 2018); and problems with brake lights (May 27, 2018). These defects appeared in the DVIR inspection checklist (i.e., the checklist for the bobtail and tractor chassis and piping system), which indicates that a defect in these operating systems affected the safe operation of the vehicle. (*See* CX-7). I have credited Ms. Rector's uncontradicted testimony that the inspections ensured that the truck was safe to operate on public roadways. (Tr. at 115). Therefore, I find that Ms. Rector had a reasonable apprehension of safety violations related to these DVIR reports.

Ms. Rector also noted on some dates that the air conditioner was "broken" or it was "so hot" or "extremely hot" due to a non-working air conditioner (May 27, June 3 and 17, July 12, 2018). The only indication that the condition potentially affected her ability to drive was the undated post-it note in photos submitted as part of CX-14, stating "still sick from too much heat on Thurs." (CX-14, three photos labeled "heatex5" and "heatexhaustion 3"). There is some indication that the note could have been made on or about July 14, 2018, but no indication that the note that was given to anyone and if so, to whom and when. (*Id*.). In other cases, a problem with a vehicle's air conditioner has been deemed not to qualify as protected activity under the Act. *See Carter v. GDS Transport, Ltd.*, ARB No. 08-053 (Feb. 27, 2009) (air conditioner problems during five- to ten-minute bus ride not a safety concern under the Act); *Watkins v. PBR Logistics, LLC*, 2015-STA-00071 (ALJ May 10, 2017) (no protected activity based on complaint of air conditioner problem when employee did not report difficulty driving due to heat); *Watt v. May Trucking Co*., 2012-STA-00041 (ALJ June 18, 2013) (report of air conditioner in cab that shut off frequently in the night and thus interrupted sleep was not related to a safety regulation).

[12] The DVIRs referred to a broken cable (July 10 and 12, 2018). At the hearing, the witnesses referred to the cable as the emergency shutoff cable. (Tr. at 154-55, 164). Ms. Rector did not clearly identify an issue with the safe operation of the vehicle as it concerned this cable; Mr. Blair explained that the cable provided one method of shutting off the delivery of propane in the event of an emergency. (*Id.* at 166-67). His testimony also indicated that the truck became "operational" due to repairs made to certain equipment including the "safety cables." (*Id*. at 167). The emergency shutoff feature also appears in the DVIR inspection checklist. For this reason, I have deemed the condition of the emergency shutoff cable to be relevant to the safe operation of the vehicle.

Cf. Dick v. Tango Transport, ARB No. 14-054, ALJ No. 2013-STA-060 (ARB Aug 30, 2016) (complaints of various kinds including inoperative air conditioner in truck deemed protected activity). In the absence of evidence that the inoperative air conditioner was affecting the safe operation of the vehicle in some way, I find that Ms. Rector's comments on the DVIRs about the broken air conditioner are not sufficient to qualify as complaints related to the violation of a commercial motor vehicle safety or security regulation, standard, or order. I do not find the undated and unsigned post-it note sufficiently reliable or probative on the question of any protected activity related to the function of the air conditioner. Notably, although Ms. Rector later complained to the RRC about the air conditioning and other truck defects, the RRC also did not identify any pertinent violation of a safety standard or regulation, which is consistent with my finding. (CX-3 at 3).

For these reasons, the vehicle defects noted in the DVIRs on April 14, May 27, June 3, June 17, and July 10 and 12, 2018, qualify as protected activity under the STAA, with the exception of comments about the broken air conditioner.

Though not reflected on the DVIRs, Ms. Rector complained about not having a satellite phone, but also admitted that Ms. Crumbley had ordered her a new phone. (Tr. at 175-176). It is not disputed that Ms. Johnson expected Ms. Rector to come to the office in the morning, pick up the phone if needed, and bring it back in the afternoon. (*Id*. at 175-76, 307). Ms. Rector did not establish that the manner in which the phone was made available to her involved any violation of a commercial motor vehicle safety or security regulation, standard, or order, or her reasonable belief in such a violation. Therefore, I find that this complaint does not constitute activity protected under the Act.

Text Messages and Emails

An informal, internal complaint such as a text message can qualify as protected activity under the Act. *See, e.g., Lloyd v. Thomas Petroleum*, 2018-STA-61, slip op. at 8-9 (ALJ Oct. 26, 2018).

I considered the text messages, handwritten notes, email correspondence, and social media posts submitted by Ms. Rector.[13] (CX-1; CX-2). There is little in the text messages to substantiate Ms. Rector's claims, because they contain few dates or indications about who was sending and receiving the messages. (CX-2). Further, most of the messages referenced aspects of deliveries, customer property, or equipment that Ms. Rector has not shown to concern operation of a vehicle, or they referred to other employment disputes not relevant to her STAA claim. (*Id*. at 1-12, 20). Despite these deficiencies with Exhibit CX-2, one message appeared to reflect Respondents' awareness of an issue with "leaks etc. on truck" on "07/10," which I assumed from context meant July 10, 2018. (CX-2 at 13). This coincided with Ms. Rector's complaint about an oil leak on her propane truck identified on a DVIR. (Tr. at 114-15, 123, 139; CX-7 at 3). I have already found that Ms. Rector engaged in protected activity on that date by reporting defects on the DVIR on July 10, 2018 ("leaks @ back" and "cable broken").

[13] Many texts have no time stamps or dates and some have handwritten notes and are not legible. (CX-2). If I was unable to read a document or determine its relevance, the document was not considered.

Most of the emails that Ms. Rector submitted concerned other work events or conditions unrelated to complaints about the safe operation of the truck. (CX-1 at 1-6). There were also references to leaks that concerned the customers' tanks and not the propane delivery truck. (*Id*. at 9). On July 13, 2018, Ms. Rector emailed Ms. Johnson about a class she was registered to take and also complained about her propane truck lacking air-conditioning. (CX-1 at 7-8). Ms. Rector stated, "I drove a hot flip n truck with no AC still!! For 13 hours…" (*Id*.). It appears that Ms. Rector sent this email to Ms. Johnson in response to emails Ms. Crumbley sent her about coming to the office on July 18, 2018. (*Id*.). Similar to my finding above regarding the DVIR notes about the inoperative air conditioner, I find that Ms. Rector's comment by email is not shown to be related to the violation of a commercial motor vehicle safety or security regulation, standard, or order. Ms. Rector's comment reflected instead that she was able to drive for 13 hours, longer than a typical 8-hour work day, in the condition despite the problem with the air conditioner. Therefore, I find that the comment does not qualify as protected activity under the Act.

Ms. Rector also conveyed concerns about the truck by email on July 17 and 18, 2018, which she raised in connection with her refusal to drive the vehicle and thus is a separate type of protected activity that is addressed separately below.

Complaints to RRC

Ms. Rector alleges that her relationship with her Employer, her pay, hours and her job duties were adversely affected because she made a complaints to the RRC starting in July 2018 and continuing into August. (Tr. at 149; *see also* CX-3 at 8, 21, 24). Ms. Rector made complaints to the RRC in early and mid-July 2018, before she was terminated, about customer tank leaks and the truck's oil leak, missing emergency shutoff remote, broken air conditioning, and expired documents. (CX-3 at 8-9). As it concerned the truck, the RRC cited problems with the VK inspection's expiration, the remote shutoff, and a leak, citing applicable transportation regulations. (*Id*. at 3). Although I find below that Respondents were not aware of the complaints to the RRC before any adverse employment action was taken, the complaints regarding truck defects were nonetheless protected activity.

Protected Activity - Refusal to Operate a Vehicle (§ 31105(a)(1)(B))

The Act prohibits retaliation by an employer where an employee refuses to operate a commercial motor vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). This is known as the "actual violation" provision of the STAA.

The Act also protects an employee from retaliation where the employee refuses to operate a vehicle because the employee has a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." 49 U.S.C. § 31105(a)(1)(B)(ii). This is known as the "reasonable apprehension" provision of the STAA, and I find that Ms. Rector's refusal to drive implicated this provision of the STAA rather than the "actual violation" provision.

As it concerns the "reasonable apprehension" provision, the standard for determining whether a complainant's belief is reasonable is both objective and subjective. For the subjective component, the complainant must show that she actually believed a violation occurred and for the objective component, complainant must show that a reasonable employee in the same circumstances would think that a violation occurred. *Garrett v. Bigfoot Energy Services*, ARB No. 16-057, ALJ No. 2015-STA-47, slip op. at 7 (ARB May 14, 2018).

Ms. Rector presented evidence that she refused to drive the propane delivery vehicle on July 17 and 18, 2018, in part due to her complaint of driving "miserably hot" with no air conditioning. (CX-1 at 9). For the same reasons outlined above that Ms. Rector's complaints regarding the air conditioning do not rise to the level of protected activity under the Act, I reach the same conclusion regarding this complaint in connection with her refusal to drive, i.e., it does not qualify as protected activity because Ms. Rector's belief in a safety violation was not objectively reasonable.

Ms. Rector also complained on July 17 that the truck's paperwork was "out of date," and refused to drive it in an "illegal" condition. (CX-2 at 17). On July 18, 2018, Ms. Rector continued to complain about the truck's "leaks" and missing emergency remote shutoff fob that she claimed could result in "tickets" if driven. (CX-1 at 11). When the RRC, an independent regulatory state agency, performed an inspection on August 13, 2018, it detected a "grade 2" leak pressure differential, expired paperwork, and a missing, emergency shutoff fob, and the inspector issued citations for these conditions that referenced transportation regulations that were violated. (CX-3 at 3). The RRC advised to remove the truck from service until the VK testing and remote shutoff were corrected. (*Id*.; Tr. at 419). There is no dispute that the truck's VK inspection had expired, and, when discovered, the truck was taken out of service for four days to remedy the default. (Tr. at 419). There is no evidence that the leak identified in the inspection required removing the truck from service. Mr. Blair also credibly testified that some repairs to the truck were necessary, and were made, including a "very minor" leak on one of the valves outboard of the meter on the truck. (*Id*. at 410-15). Although the leak was described as minor by Mr. Blair and Ms. Rector also indicated at one point that she would still drive the truck despite the "little bitty" leak in the back, I find that, consistent with other findings and conclusions herein, Ms. Rector's communication of these truck defects to the RRC qualifies as protected activity under the Act. I find that Ms. Rector reasonably perceived safety violations as defined under the Act in connection with her refusal to drive the truck. As such, I find that Ms. Rector engaged in protected activity under § 31105(a)(1)(B)(ii).

I further note that the communications between Ms. Rector, Ms. Crumbley, and Ms. Johnson for several days starting on July 12, 2018, revealed a conflict over the employer's expectation that Ms. Rector would appear in the office at 10:00 a.m. on July 18, 2018, to show Mr. Blair how to deliver gas, fill the truck, and print tickets. (CX-1 at 7). Ms. Rector displayed hostility toward this instruction because it somehow interfered with her plans to take the "service and installation class," that she registered to take on July 17, 2018, in San Angelo, Texas.[14] (*Id*.

[14] I take judicial notice that San Angelo is about 200 miles (or 3 hours by car) from Sanderson, Texas. https://www.google.com/maps/dir/San+Angelo,+TX/Sanderson,+Texas+79848/@30.9885803,-102.0012091,9z/am=t/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x8657e583a53b7191:0x827e3d0b3754c742!2m2!

at 7-8; CX-2 at 18). Between July 12 and July 17, Ms. Rector repeatedly insisted on taking the class on July 17 and on taking some days off afterward for personal reasons. (CX-1 at 7-8). For these reasons, it is not entirely clear that Ms. Rector truly refused to drive the Company vehicle for safety-related reasons on July 17 or 18, 2018, given her intent to participate in the class on July 17 and her reluctance to return to Sanderson to assist with Mr. Blair's training. Nonetheless, Ms. Rector's complaints about certain truck defects also occurred on July 17 and 18 in connection with her stated refusal to operate the truck, as noted above. For this reason, I have entered the above findings that it is more likely than not that Ms. Rector refused to drive the truck due to the defects she noted on July 17 and 18, and thus she established by a preponderance of the evidence that she engaged in protected activity.

There is no evidence that Ms. Rector continued to refuse to drive the Company vehicle when she returned to Sanderson after some days away for personal reasons. Instead, a conflict arose over Ms. Rector entering the office after hours, after which several office items could not be located. (CX-1 at 18). Also, when Ms. Rector learned that Mr. Blair was operating the propane truck, she did not appear at the office to make herself available for work. Any work she attempted at that time, by using her personal vehicle to drive around and identify customers needing their tanks filled, was not done at her Employer's request. (Tr. at 161-62, 272, 281).

Unfavorable Employment Action

The STAA provides that an employer may not discharge or otherwise retaliate against an employee with respect to the employee's *pay, terms, or privileges of employment* because the employee engaged in STAA-protected activity. 49 U.S.C. § 31105(a)(1); 29 C.F.R. § 1978.102(a). The Board "has long required complainants to prove a 'tangible employment action,' namely one that resulted in a significant change in employment status, such as firing or failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-02, slip op. at 7-8 (ARB Sept. 30, 2008) (holding that a warning letter without tangible job consequences like effect on hours, work assignments, pay, opportunities for advancement, or retirement benefits is not actionable discipline or discrimination) *(citing Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 7-12 (ARB Nov. 27, 2002); *Jenkins v. U.S. Env't Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 20-21 (ARB Feb. 28, 2003)).

I find and conclude that Ms. Rector experienced an adverse employment action when Ms. Johnson terminated her on July 31, 2018. Ms. Rector has not established, however, that she sustained other adverse actions involving pay or the terms or privileges of her employment. The Texas Workforce Commission found that she was not underpaid regular or overtime wages and was not owed any compensation. (RX-5 at 5). Ms. Rector did not present any evidence to the contrary in this proceeding. Any purported harassment after she was terminated is likewise not actionable discipline or discrimination under the Act.

1d-100.4370375!2d31.4637723!1m5!1m1!1s0x86f12320e19b7813:0x9adacbd8b741a2ee!2m2!1d-102.3940324!2d30.1424083!3e0

Contributing-Factor Causation

A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008). The contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity. *See, e.g., Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

The Board has observed that "proof of causation or 'contributing factor' is not a demanding standard." *Rudolph v. Nat'l RR Passenger Corp. (AMTRAK)*, ARB No. 11-037, ALJ No. 2009-FRS-15, slip op. at 16 (ARB Mar. 29, 2013). To establish that the protected activity was a contributing factor to the adverse action at issue, the claimant need not prove that his protected activity was the only, or the most significant, reason for the unfavorable personnel action. Indeed, the contributing factor need not be "significant, motivating, substantial or predominant;" rather, it need only play "some" role. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53, n.218 (ARB Jan. 4, 2017) (reissued with dissent). The claimant must establish by a preponderance of the evidence that the protected activity, alone or in combination with other factors, tended to affect in any way the employer's decision or the adverse actions taken. *Klopfenstein v. PCC Flow Tech.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006).

The contributing factor element may be established by direct evidence or indirectly by circumstantial evidence. "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." *Bruker v. BNSF Ry. Co.*, ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 10-11 (ARB July 29, 2016) (*citing Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 6 (ARB Sept. 18, 2014)). As such, evidence of proximity in time between protected activity and the adverse employment action can raise an inference of causation. An inference of causation may be broken by an intervening event. *See Dho-Thomas v. Pacer Energy Marketing*, ARB No. 13-051, ALJ Nos. 2012-STA-46, 2012-TSC-1, slip op. at 5, n. 12 (ARB May 27, 2015); *Abbs v. Con-Way Freight, Inc.* ARB No.12-016, ALJ No. 2007-STA-37, slip op. at 6 (ARB Oct. 17, 2012); *Wevers v. Montana Rail Link, Inc.* ARB No. 2016-088, ALJ No. 2014-FRS-00062, slip op. at 12 (ARB June 17, 2019)(per curiam)(causal inference based on temporal proximity diminished by intervening events showing a reasonable concern by employer that complainant was charging official time while engaged in personal activities).

I have found herein that Ms. Rector engaged in protected activity from mid-April through about mid-July 2018, by reporting and/or complaining of certain truck defects and refusing to drive the truck. She was terminated on July 31, 2018. I thus find some evidence of temporal proximity between the timing of Ms. Rector's protected disclosures or activity and her termination. Even so, other factors outweigh this evidence of timing.

The parties have different views, of course, as to the reasons for Ms. Rector's termination. Ms. Rector argues that she was terminated because she complained of vehicle safety defects and refused to drive her propane vehicle for safety-related reasons. She also alleges that her relationship with her Employer and her pay, hours, and job duties were adversely affected because she made a complaints to the RRC. (Tr. at 149; *see also* CX-3 at 8, 21, 24). Ms. Rector asserts that Ms. Johnson and Ms. Crumbley knew of her complaints to the RRC and relies on a statement in email correspondence from Ms. Crumbley on July 18, 2018, to support her assertion.

I find, contrary to Ms. Rector's assertion, that Respondents were not aware of her confidential complaints filed with the RRC in early and mid-July 2018, about leaks, broken air conditioning, and expired documents, before Ms. Rector was terminated on July 31, 2018. Ms. Johnson credibly testified that she was not aware of the RRC complaints, and no evidence contradicts her testimony. There is also no evidence that Ms. Crumbley was aware of these complaints. Ms. Rector's speculation to the contrary does not overcome the credible testimony of Ms. Johnson and Ms. Crumbley, which is more consistent with the documents in evidence. The RRC's first contact with the Company was correspondence dated August 13, 2018, which coincided with the onsite inspection that day and further corroborates the testimony of Ms. Johnson and Ms. Crumbley that they did not previously know about Ms. Rector's complaints to the RRC. Further, email correspondence between Ms. Rector, Ms. Crumbley and/or Ms. Johnson on July 18, 2018, in which Ms. Crumbley described Ms. Rector as "bad mouthing" the Company to the RRC, concerned Ms. Rector's contact with the RRC about taking the "service and installation" class that her Employer did not approve her taking at that time. (CX-1 at 13-14). The correspondence confirms that Ms. Rector had arranged to take the class through direct contact with the RRC, and she felt very strongly about taking it, despite her Employer's position that it was not necessary at that time. (CX-1 at 13-14; Tr. at 382). This communication does not reflect that Respondents were aware at that time of any safety-related complaints to the RRC about the propane delivery truck. Absent such awareness, Ms. Rector does not establish causation as it concerns this protected activity. An employer's knowledge of protected activity is not a separate element, but instead forms part of the causation analysis. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13, 16 (ARB June 29, 2011). *See also Scott*, ARB No. 03-038, slip op. at 3; *Toland v. Keystone Freight Corp*., ARB No. 03-151, ALJ No. 03-STA-25 (ARB Jan. 28, 2005). *See also Watts v. Kroger*, 170 F.3d 505 (5th Cir. 1999).

I further find that, as it concerns the remainder of Ms. Rector's protected activity—whether communicated by DVIR, text message, email correspondence, or other oral or written complaint—she did not establish that it was more likely than not that her protected disclosures played any role in her termination. I found the testimony of Ms. Johnson to be very reliable and credible that she alone was the decision-maker and terminated Ms. Rector for acts of insubordination, in that she did not follow her Employer's directions despite repeated guidance, and for being generally argumentative and uncooperative. (Tr. at 267-68). None of the instances of insubordination or uncooperative conduct cited by Ms. Johnson concerned protected activity under the Act. (*Id.* at 300). Having reviewed the written communications and listened to the audio recordings submitted by Ms. Rector, I find that Ms. Rector's tone was highly argumentative and uncooperative during conversations with Ms. Johnson and Ms. Crumbley.

(CX-13). She also persistently interrupted Ms. Johnson, who did not respond in kind. (CX-13, 5:20 minute recording and 14:10 minute recording). Overall, her behavior was consistent with Ms. Johnson's descriptions of Ms. Rector's uncooperative conduct.

Ms. Johnson identified several examples of Ms. Rector's failure to follow explicit directions regarding the performance of her work, including delivering propane after dark; communicating excessively by text, email, and phone; refusing to go into the office despite repeated instructions to handle matters in person with Ms. Crumbley; performing tasks she was not asked to perform like cutting grass and cleaning out the storage area; taking passengers in the propane truck, including her own child, after specific instructions not to do so; and removing papers from the office that she was not authorized to take. (Tr. at 268-70, 273, 276). According to Ms. Johnson, the "crowning blow" was Ms. Rector entering the office after hours and taking items that did not belong to her.[15] (*Id*. at 350-51).

Ms. Rector did not dispute that the underlying conduct cited by Ms. Johnson occurred, though she attempted to justify some of it. Ms. Rector acknowledged that she frequently texted or emailed Ms. Johnson and was "probably overly communicative," which led to Ms. Johnson requiring Ms. Rector to talk directly with Ms. Crumbley instead of relying on text and email communication. (*Id*. at 84-86). Ms. Rector also did not dispute that Respondents received customer complaints about her delivery of propane after dark, that she refused to go into the office, that she took passengers in the Company truck, and that she performed tasks that her Employer did not ask her to do. She admitted, for example, that she was not asked to drive around identifying customers that needed tanks filled in the days before she was terminated. She did so despite express instructions to appear at the office on the morning of July 25, 2018. Ms. Rector disputed that she took items from the office after hours, claiming instead that she only made copies. I need not resolve whether she, in fact, took items that did not belong to her because I do not operate as a "super-personnel department" regarding the accuracy of the disciplinary decisions. Ms. Rector did not dispute that she entered the office after hours on or about July 23, 2018, and Ms. Crumbley and Ms. Johnson credibly testified to their belief that Ms. Rector took items form the office that were not hers to take. They, in fact, repeatedly requested that Ms. Rector return specific items as soon as they discovered they were missing and they had the locks changed and reported theft to local law enforcement. Based on my assessment of the witnesses' credibility, Ms. Crumbley and Ms. Johnson sincerely believed that Ms. Rector wrongly took items from the office; the evidence does not indicate that they fabricated this event to terminate Ms. Rector.

I also find no evidence that Ms. Crumbley or Ms. Johnson ever responded negatively to Ms. Rector's protected activity. Instead, they repeatedly asked Ms. Rector to appear in the office to report problems, with the truck or otherwise, to Ms. Crumbley so the problems could be fixed. (Tr. at 263-64; RX-12 at 11-12, 15-20; RX-14 at 7-8, 15). In written communications and audio recordings in evidence, Ms. Johnson did not demonstrate hostility toward any of Ms. Rector's reports of safety-related concerns. (CX-13). Ms. Crumbley also demonstrated no hostility toward Ms. Rector's reports of truck defects or requests for repair. (*Id.*). Mr. Blair was never asked to ignore safety issues. (Tr. at 424). Ms. Rector's witnesses, Mr. Hoy and Ms. Boyd, did not have any personal knowledge or observations about interactions between Ms. Rector and her

[15] Ms. Johnson pursued a charge of criminal trespass against Ms. Rector. (Tr. at 373-74).

Employer, and they did not assist Ms. Rector with establishing a causal connection between her protected activity and her termination.

Respondents also presented evidence of timely attempts to repair problems with the truck once brought to their attention, whether leaks, lights (brake lights, taillights, and marker lights), air conditioning, hose reel, or cables, which does not indicate hostility toward reports of safety defects. (RX-4). When the expired VK inspection and other citations resulting from the RRC inspection were brought to Respondents' attention, Respondents again responded in a timely manner. (Tr. at 262-63, 283, 288; RX-3 at 2; RX-11 at 8, 11).

Ms. Rector also did not establish any shift in the Employer's attitude toward her as a result of her protected activity. She had difficulty identifying any point in time when Ms. Crumbley's demeanor toward her changed, suggesting instead that there was always tension between them. (Tr. at 130). Ms. Rector at other times suggested that discrimination against her began when she "first started" working for Sanderson Propane, possibly due to the fact that Ms. Rector was a woman and "they never had a woman work for them" and also because Ms. Crumbley purportedly found out that Ms. Rector was paid more than Ms. Crumbley. (*Id*. at 142-43, 368). She described Ms. Crumbley as "just difficult to work with." (*Id*. at 136). And Ms. Rector offered yet another theory that attitudes toward her changed after she began working full-time on May 1, 2018. Ms. Rector felt that Ms. Crumbley's behavior toward her became more defensive, and Ms. Johnson observed that Ms. Rector resisted performing her job the way that her employer wanted. (*Id*. at 139-140, 264). Conflicts due to gender, work performance, and general difficulty getting along are not actionable under the STAA.

I am cognizant that the contributing-factor causation burden is not demanding. Even so, I conclude that Ms. Rector failed to show that Respondents were motivated, even in part, to terminate her because of her protected activity. The preponderance of the evidence does not reflect that Ms. Rector's protected activity played any role in her termination, but, rather that she was terminated due to her repeated failure to follow her Employer's directives. Even if the Respondents reached the wrong conclusion about Ms. Rector's work performance and conduct, the STAA does not forbid unfair employment actions but, rather, forbids retaliatory ones. *See, e.g., Toy Collins v. American Red Cross*, 715 F.3d 994, 999 (7th Cir. 2013); *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1106 (7th Cir. 2012).

Because I find that Ms. Rector's protected activity did not contribute in any way to Employer's decision to fire her, Employer is not required to establish by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of the protected activity. In the alternative, the weight of the evidence discussed herein also satisfies Respondents' burden. Respondents' explanation that Ms. Rector's insubordinate, argumentative, and uncooperative conduct led to her termination is supported by the credible testimony of Ms. Johnson and Ms. Crumbley. Their statements are corroborated by reliable documentary evidence, such as contemporaneous text and email communications demonstrating the Employer's directives to Ms. Rector that it perceived Ms. Rector to ignore. For reasons noted herein, I did not give weight to speculation by Ms. Rector regarding discussions between Ms. Crumbley and Ms. Johnson in which she did not participate, or her speculation that Respondents must have known about her confidential RRC complaint before her termination. Ms. Rector's credibility

was impeached in part due to evidence of her 2019 felony conviction involving dishonesty. Even so, Ms. Rector's testimony regarding the fact and substance of her protected disclosures was given great weight, particularly when supported by the recollections of Ms. Johnson and Ms. Crumbley and also by other documentary evidence such as DVIRs and other reports of truck defects. The evidence, however, does not reflect antagonism or hostility by Respondents concerning Ms. Rector's protected activity, any change in demeanor due to protected activity, or shifting explanations for the adverse employment action. Respondents thus established by clear and convincing evidence that they would have terminated Ms. Rector for insubordinate acts and uncooperative conduct regardless of her protected disclosures.

Ms. Rector's complaint is denied because she did not establish that her termination was in retaliation for engaging in protected activity under the Act. In the alternative, Respondents established that they would have terminated Ms. Rector even absent her protected activity.

IV. CONCLUSION AND ORDER

Revisiting the issues in dispute, I have reached the following conclusions based on the findings of fact and conclusions of law herein:

1. Did Ms. Rector engage in protected activity within the meaning of the STAA when she made complaints to Respondents regarding issues affecting the operation of her propane delivery truck? Yes.

2. Did Ms. Rector engage in protected activity within the meaning of the STAA when she refused to drive her propane delivery vehicle? Yes.

3. Did Ms. Rector suffer any adverse employment actions? Yes (termination).

4. Has Ms. Rector shown by a preponderance of the evidence that any protected activity was a contributing factor to an adverse employment action? No.

5. If Ms. Rector establishes the elements of her claim by a preponderance of evidence, have Respondents established by clear and convincing evidence that they would have taken the same adverse employment action in the absence of Ms. Rector's protected activity? Not applicable. In the alternative, yes.

Therefore, Ms. Rector's complaint under the STAA is **DENIED** and her claim is **DISMISSED**.

So **ORDERED** this 27th day of October, 2021, at Covington, Louisiana.

ANGELA F. DONALDSON
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 the administrative law judge's decision.

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. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the Board has implemented a new eFile/eServe system ("EFS") which is available at https://efile.dol.gov/. If you use the Board's prior website link, dol-appeals.entellitrak.com ("EFSR"), you will be directed to the new system.

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Filing Your Appeal Online

Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at login.gov (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at https://efile.dol.gov/system/files/2020-11/file-new-appeal-arb.pdf and the video tutorial at https://efile.dol.gov/support/boards/newappeal-arb.

Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed. **You are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor
Administrative Review Board
ATTN: Office of the Clerk of the Appellate Boards (OCAB)
200 Constitution Ave. NW
Washington, DC 20210–0001

Access to EFS for Non-Appealing Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at: https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board issued documents by regular mail; however, on or after December 7, 2020, at 8:30 a.m., you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.