



Issue Date: 22 April 2021

CASE NO.: 2019-STA-00014

In the Matter of:

KEITH TAYLOR,
Complainant,

v.

COMBINED TRANSPORT, INC. AND
VFP INDUSTRIES, INC.,
Respondents.

DECISION AND ORDER DENYING CLAIM

This matter arises under the employee protection provisions of 49 U.S.C. § 31105 of the Surface Transportation Assistance Act of 1982 (STAA) and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978.¹ Attorney Krista Le Roux represented Complainant. Attorney Matthew Denley represented Respondent Combined Transport, Inc. (“Respondent” or Combined”).

At the hearing, I admitted Complainant’s exhibits 1 to 21, 22 (pages 19 and 20), 24, 26, 27 (pages 1 to 10), 28 to 31, 34 to 35, 38, 40, 41 (pages 1, 3 to 5, 7 to 9, 12 to 14, and 16 to 21), 43, 44, 45, 47 to 49, and 51; Respondents’ exhibits 101 to 104; joint exhibits: 25², 33, 43, 44, and 46;³ and stipulated facts, marked as Administrative Law Judge Exhibits (ALJX), “a” to “z” and “aa” to “hh.” I excluded Complainant’s exhibits 23, 32, 36, 37, and 42.

The parties submitted written closing briefs and reply briefs in lieu of oral closing arguments.^{4,5}

¹ On September 12, 2019, I was informed that Complainant and VFP settled their issues. On September 13, 2019, Complainant and VFP submitted a signed settlement agreement, which I approved by separate order issued on September 13, 2019.

² Joint exhibit 25 are plans for the VFP communication shelter. JX 25. Because the reproduction is so small, the dimensions and notes are largely illegible. JX 25 appears to indicate that the width of the shelter is 140 inches and the width of the shelter at the roofline is 144 inches. All other notes and dimensions were illegible and not considered. *See* JX 25.

³ I cite Complainant’s, Respondents,’ and Joint Exhibits as CX, RX, and JX (exhibit number) at (page number), respectively.

⁴ Citations to Complainant’s Closing Brief and Employer’s Closing Brief are referenced as CCB at “page number” and RCB at “page number,” respectively. Complainant’s and Respondents reply briefs are cited as CRB and RRB, respectively.

ISSUES

1. Did Complainant engage in protected activity within the meaning of the STAA on or about September 26, 2016, when he reported issues with permits while at VFP industries, and on October 28, 2016, when he reported issues with permits while at VFP industries and Virginia Department of Transportation was present?
2. Did Complainant suffer an adverse action on October 28, 2016, when he was banned from VFP properties, and on November 2, 2016, when Combined terminated his independent contractor agreement^{26, 7}
3. Has Complainant shown by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged? 29 C.F.R. § 1978.109(a).
4. If Complainant establishes the elements of his claim by a preponderance of the evidence, then has Combined established by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity? 29 C.F.R. § 1978.109(b)(1).
5. If Complainant prevails, is he entitled to: 1) Back pay in the amount of \$100,000, plus interest from October 28, 2016, to date of filing (PHC); 2) Front pay in the amount of \$275,000 for a period of 5 years; 3) Pecuniary damages in the amount of \$216,500 for losses incurred by the repossession of his truck; 4) emotional distress and pain and suffering damages in the amount of \$250,000; 5) punitive damages in the amount of \$250,000; 6) non-monetary remedies including expungement of negative statements in Complainant's personnel file, correcting false statements to Combined current and former employees and owner-operators, i.e. Complainant did not steal the Peterbilt Truck, updating CTT's DAC entry in respect to Complainant's driving history with rehire status and removal of any ambiguous or vague statements leading future employers to view Complainant in a negative light, positive or neutral employment references, posting a notice of the OSHA order for Combined personnel to view, and requiring Respondents to provide employee and manager training regarding the rights afforded by OSHA's whistleblower statutes; 7) Interest on back pay to be computed by compounding daily the IRS interest rate for underpayment of taxes; and, 8) Attorney fees and expenses to be submitted after hearing.

⁵ On June 10, 2020, my office received a letter from Complainant's counsel dated June 1, 2020, requesting a decision as soon as possible, updating counsel's contact information, and enclosing a Hire Right letter and report from April 28, 2020. On June 23, 2020, Respondents replied to Complainant's June 1, 2020 letter objecting that the record was closed, and the report was unverified. When Complainant submitted the letter, the record was closed, and Complainant's counsel did not request to reopen the record. Accordingly, I did not consider the Hire Right report. *See* 29 C.F.R. § 18.90.

⁶ Based upon the settlement of its case, I withdrew the agreed-upon VFP issue: Can VFP be liable under STAA for any relief if it did not employ Complainant in any capacity, had no direct contractual relationship with Complainant, and did not direct or request any disciplinary action be taken against Complainant?

⁷ In his closing brief, Complainant alleged he suffered additional adverse actions when Combined (1) gave him a negative DAC rating, which interfered with his ability to find work as a truck driver; (2) aggressively repossessed his truck; and (3) terminated the employment of his friend, Bruce Nelson. CPB 11.

STIPULATED FACTS

The stipulated facts are as follows:

- a) Respondent Combined Transport, Inc. (“Combined”) entered an Independent Contractor Agreement with Complainant on November 11, 2015.
- b) Respondent Combined engages in the transport of products on highways via commercial motor vehicle, i.e. a vehicle with a gross vehicle weight rating of 10,001 pounds or more. As such, Respondent Combined is covered under the STAA by virtue of 49 U.S.C. § 31105.
- c) Complainant was an “employee” of Combined for purposes of the STAA as defined in 49 U.S.C. 31101.
- d) Complainant was not an employee of Respondent VFP Industries, Inc. (“VFP”).
- e) Respondent Combined terminated the Independent Contractor Agreement with Complainant on November 2, 2016.
- f) Each state establishes its own regulations for permitting shipment of loads by carriers within its borders.
- g) Respondent VFP manufactures equipment and utility shelters in Duffield, VA.
- h) As an Owner Operator, Complainant can accept or reject loads offered by Respondent Combined.
- i) As an Owner Operator, Complainant can determine the route he would travel to deliver loads he accepted from Combined.
- j) Complainant transported a shelter manufactured by Respondent VFP from its facility in Duffield, VA to its customer in Grimes, IA on September 26, 2016.
- k) Complainant called Respondent Combined’s employee Jim Welch, Sales Manager-Southeast USA, three times on September 26, 2016.
- l) During the second call to Jim Welch on September 26, 2016, Mr. Welch acknowledged speaking to his contact at Respondent VFP.
- m) During a third call to Mr. Welch on September 26, 2016, Complainant told Mr. Welch that he had Roger Gillenwater with him and Mr. Gillenwater would call David Brammer, VFP’s Transportation Manager about Complainant’s measurements of the shelter.
- n) On October 26, 2016, Respondent Combined Dispatcher Sue Liska called Complainant to offer him a Caterpillar load out of Athens, Georgia, which Complainant declined.
- o) After Complainant declined the Athens, Georgia, load, Ms. Liska then offered Complainant a load from Respondent VFP in Duffield, VA to Grimes, IA, which Complainant accepted.
- p) In another call with Ms. Liska on October 26, 2016, Complainant mentioned he wanted to drive the same route as the September 26, 2016 load. During that call, Complainant told Ms. Liska that his route was quicker than the route selected by Combined for its employee drivers.
- q) On October 27, 2016, Complainant called Respondent Combined’s Permit Technician, Faith Whiteman about his Virginia and Tennessee permits. Ms. Whiteman said that she had already sent them. Complainant stated that he had not yet received them and to send them again.

- r) Complainant arrived to pick up a shelter manufactured by Respondent VFP from its facility in Duffield, VA on October 28, 2016.
- s) On October 28, 2016, Complainant had at least three telephone calls with Ms. Liska. Complainant notified Ms. Liska that “DOT” was sitting outside Respondent VFP’s gate. Complainant reported the width of the building as being greater than 12 feet. Ms. Liska stated that Respondent Combined would call Respondent VFP.
- t) During that same call with Ms. Liska on October 28, 2016, Complainant stated, “rounds of trucks, they all were over 12 foot and nobody wants to say anything because they don’t want to get in trouble with Combined, but I don’t want to get in trouble with DOT.”
- u) In Complainant’s final call to Ms. Liska on October 28, 2016, she handed the call over to Joshua Colby, Respondent Combined’s employee with the Heavy Haul Team and Dispatcher who stated, “We’re working on it, dude. Stop calling. We’re getting it taken care of and we’ll get back to you, okay?”
- v) Ms. Whiteman called Complainant at approximately 8:35 AM PST on October 28, 2016. Ms. Whiteman asked for dimensions of the load. Complainant stated: “Probably 12. I don’t know yet, they’re in the middle of it. Don’t order no more permits yet because they’re in the middle of trying to measure the roof and see if I’m incorrect; which, I know I’m not.”
- w) During Complainant’s 9:16 a.m. PDT telephone call with Mr. Colby on October 28, 2016, Mr. Colby directed Complainant to, “get with Roger again on site and convince him that it’s oversized so that I can get approval for your... money to get you... escorted and permitted correctly.” Mr. Taylor stated: “Right. He does, he doesn’t want to hear it. He says, well, we’ve been hauling them at 12 foot all our life.” Mr. Colby responded: “get him to put that on paper and I will go to... back to his boss and say we’re not hauling it at 12 foot because he--he admitted to me over the phone that there’s gonna be a quarter to half-inch gradients on some of these.”
- x) In the 9:32 a.m. PDT telephone call on October 28, 2016, between Mr. Colby and Complainant, Complainant stated that one of Respondent VFP’s employees threatened to take the load off of Complainant’s truck three times. Mr. Colby responded: “Well stick to your guns. I don’t give a –a rat’s butt. Let him know because he knows don’t get involved ahead of time.”
- y) Robert Abel, Respondent Combined’s employee for Northeast Heavy Haul, called Complainant at approximately 10:48 AM PDT on October 28, 2016. Mr. Abel stated that he had just got a phone call from “David down there.” In this call, Mr. Abel asked if they were down to 12 feet yet by removing the door handles and other items from the shelter. Mr. Taylor stated: I’m fed up. I’m frustrated. I’ve sat here and argued with them.” Mr. Abel went on to state: David down there. Our customer. One of our customers. You obviously know – he’s—he’s frustrated as well and hoping this can stop. You know? As far as— you know—he doesn’t want to argue no more.”
- z) During this telephone call on October 28, 2016, Complainant stated, “Well, they’re upset because they want it hauled for under width and I’ve tried to explain nicely. It’s not just the ticket. It’s the CSA. It’s the shutdown. It’s the waiting for new permits. Waiting for escorts and it can get really expensive...”
- aa) During the October 28, 2016, call with Robert Abel, Complainant stated: “and I’m— They’re waiting for Josh to call me back so I can tell him I’m just gonna go with it.” Mr. Able stated: “yeah, I’ll let him know. He’s gone at lunch but I’ll let him know.” Mr. Taylor stated: “Well, you can let him know I was just waiting for the word to go because

last I heard was to wait until I got back hold of Josh.” Mr. Abel responded: “Okay. So, go ahead and go. Go ahead and go. I think all the rest of the guys are gonna go as well because they’re all – they’re all at 12. The same width.”

- bb) Complainant called Faith Whiteman at 10:54 a.m. PDT on October 28, 2016 and requested she order the rest of his permits for 12 feet wide.
- cc) In a 1:42 p.m. PDT call between Mr. Colby and Complainant on October 28, 2016, Mr. Colby informed Complainant that Respondent Combined did not yet have a permit needed for the State of Kentucky. Complainant responded that he could take the route the other truckers were taking. At that time, Complainant was at a truck stop in Tennessee waiting out curfew.
- dd) At 2:27 p.m. PDT on October 28, 2016, Mr. Colby called Complainant and told him that Respondent Combined did not have the Kentucky permit or a revised Tennessee permit. Mr. Colby told Complainant that he had advised VFP of the situation. Mr. Colby advised Complainant that VFP and Combined would look at the situation again and make a decision on Monday, October 31, 2016.
- ee) On October 28, 2016 at 1:53 PM PST, Dispatcher Joshua Colby sent an email to Scott Waggoner, a Sales Manager and Jake Wells, Operations Manager for Heavy Haul. Mr. Colby stated that Respondent VFP asked that Complainant no longer load at their facility. Mr. Colby also asserted that Complainant had been banned by three customers.
- ff) Complainant picked up a transportation shelter from the VFP facility in Duffield, Virginia on September 26, 2016, for delivery to Grimes, Iowa.
- gg) Complainant picked up a transportation shelter from the VFP facility in Duffield, Virginia on October 28, 2016, for delivery to Grimes, Iowa.
- hh) Complainant returned the transportation shelter he picked up on October 28, 2016, to the VFP facility in Duffield Virginia on October 31, 2016.

FACTUAL FINDINGS

Complainant’s Background

From 1997 to 1999, Complainant owned a truck escorting business. HT 216 at 1. From 2008 to 2012, Complainant worked as an owner/operator with Green Transport. HT 175 at 15-20. He stayed on as a company driver with Green Transport for four months after he sold his truck. *Id.* From 2012 to 2015 Complainant worked for C&L Towing, and during that period he attempted to also start a pressure washing business with his brother. HT 175 at 8-11. On November 11, 2015, Complainant signed an independent contractor agreement with Combined. ALJX a.

In 2015, Complainant drove a 2008 Peterbilt 388 Heavy Haul truck, which he leased from Combined’s sister company—Cardmoore Trucking by way of his friend and a former Combined employee, Bruce Nelson.⁸ HT 40 at 16-20; HT 321 at 20. Mr. Nelson owned the 2008 Peterbilt for three months before Complainant. During that time Mr. Nelson spent approximately \$4,000 dollars on repairs, but it kept “bleeding [him];” every 9,000 miles the oil filter would plug up and need to be replaced. HT 329-30. Complainant was aware of the issue. HT 330 at 6.⁹ In February 2016, Mr. Nelson learned that the Peterbilt motor was “burnt up.” HT 333-34.

⁸ Mr. Nelson worked for Combined for 23 years.

⁹ Complainant testified, “There were emissions issues. The oil filter filled up every 9,000 miles, full of soot. The emissions issues were an ongoing thing that I didn’t know about when I bought the truck. It was supposed to be road

Combined's Policies and General Procedures

Combined divided its geographical territory into regions, which different sales managers/dispatchers managed. HT 47 at 10-14. Complainant routinely worked with the following dispatchers and sales managers: Josh Colby (Midwest South), Jim Welch (Southeast), Robert Abel (Northeast), and John Anderson (North Midwest). HT 47 at 10-15. He also regularly worked with Faith Whiteman, a permit tech, who would order permits, including permits for over-sized loads. *Id.* at 19.

The terms of Complainant's Independent Contractor Agreement required him to operate the equipment in a safe and prudent manner at all times to avoid endangering the public, himself, or the property he transported. CX 35 at 5. The agreement also required Complainant to meet commercial safety assessment (CSA) safety standards and maintain a rating that would enable him to operate without Federal Motor Carrier Safety Administration (FMCSA) intervention. *Id.* If a driver was caught with a load that had dimensions that exceeded the permit, a driver could get a ticket, which would result in fines and CSA points against the driver.

As an owner operator, Complainant received 83 percent of the value of the shipping contract and was reimbursed in part for the cost of fuel. HT 179 at 7-25; HT 215 at 12. He could not haul loads for other companies. HT 42 at 2-5. But Complainant had the right to refuse loads and choose his route. HT 48 at 15-20. Combined policy dictated that once a driver accepted a load, the driver was obligated to take it. HT 93; HT 481 at 4-5.

Typically, a driver arrived at the shipper location, gave the shipper his load number, the shipper loaded the item, and the driver measured the load to verify the dimensions. HT 54-55. A driver would measure the widest, tallest, and longest points of the load, and call the permit technician at dispatch who would then order the permits. HT 55 at 15-25. If Combined pre-ordered permits and the load was larger than what the permits allowed, Combined would order new permits. Mr. Wells testified that such discrepancies happened weekly. HT 596 at 14. It was reasonable for a driver to pre-order permits going into a weekend. Typically, Combined would not ask a driver to get something in writing regarding disputed dimensions; that is, it was Combined's responsibility to get the proper permits for a load to haul it legally. HT 88 at 18-21. However, Combined would ask drivers to make sure someone on-site agrees that the dimensions are over-width, so Combined can talk to the customer to get the rates fixed. HT 614 at 9-12.

Mr. Welch said when there is a load that is outside of the permitted dimensions, Combined will normally "contact [their] contact at the shipper that we got the information from and say, hey it looks like there might be a discrepancy, and then kind of follow their lead as to, you know checking it out and, you know, just trying to discern what the problem is or what the discrepancies at." HT 363 19-24. Generally, the easiest remedy was to remove things from the load to reduce the size. HT 364 1-4.

ready truck and within literally 7,200 miles of starting to drive it was in the shop getting an oil change, because my oil pressure had dropped." HT 42-43. Mr. Nelson's testimony contradicted Complainant's; as described further below, I find Mr. Nelson's testimony more credible on this point.

Joshua Colby—a salesperson and dispatcher responsible for contacting potential new clients and selling them Combined’s services, as well as scheduling and coordinating hauls with the drivers—needed to re-permit loads on a daily basis due to discrepancies between the load and the permit. HT 504 at 11; HT 500 at 5-17. His strategy for resolving discrepancies was to speak with the shipper, collaborate with the driver whether there is indeed a variation, and order a new permit if needed. HT 504 at 3-6.

A driver needs a permit for each state on a route. HT 49 at 1-6. An oversized load increases the cost. HT 56 at 8-12. In Virginia, a truck must have one front and one rear escort on non-interstate routes when the permitted load exceeds 12 feet in width, and on interstates, one rear escort is required when the permitted load exceeds 12 feet in width.¹⁰ An escort is a pilot vehicle with yellow lights, flags, and “oversized” signs that travels with the truck to warn other drivers of a potential safety issue. HT 53 at 18-22. Because Complainant received 83 percent of the cost of a load, he would receive more money if a load was more expensive. HT 215 at 12.

Personnel Policies and Human Resources

In 2016 Combined had a Human Resources department to investigate performance issues, but Mr. Wells did not consult the department when deciding whether to terminate Complainant. HT 609 at 9-14. There was no evidence that Combined has a non-retaliation policy. HT 636 at 19.

Drivers are the “face of Combined” and it is important for business that they represent the company well. *See* HT 593 at 16-17. When a driver did something wrong or a customer complained, Combined would “event,” or write up, the driver. HT 447 at 3-6. But there was no clear system for writing up a driver or tracking performance. *See* HT 450. Customers could ban drivers from their facilities. If a driver was banned from three sites he or she would likely have to look for another job. HT 475 at 14-15. Combined did not have a standard operating procedure for documenting when a customer banned a driver, but preferred to get something in writing from the customer. *See* HT 608 at 14-15.

Safety issues were terminable offenses. HT 606 at 3. Combined would fire a driver for multiple safety violations, accidents, any violation involving drugs or alcohol, or something extreme. HT 606 at 3-6. Repeat issues with attitude, for example, if a driver was not getting along with a dispatcher, could also result in termination if there were multiple offenses. HT 606 at 9. In such circumstances, Combined would try to understand the driver and the dispatcher’s version of the event. *Id.* In the trucking industry, however, “people don’t always get along,” and “heated conversations” are not always terminable offenses. HT 607 at 22-25.

Alleged Inconsistency with Combined’s purported policies

A Combined driver, David Retzlaff, had a reputation for being difficult. HT 607-08. Mr. Retzlaff challenged a dispatcher to a physical fight by telling the dispatcher to meet him in the parking lot to settle their dispute. HT 608 at 1-8. Combined did not terminate his employment. HT 607-08.

¹⁰ I took judicial notice of 24 VAC20-81-180 General Escorting Guidelines. CX 22 at 19.

VFP Oversize Load on September 26, 2016

Combined had a valuable contract with VFP. *See* HT 79 at 25. On September 26, 2016, Complainant picked up a load from VFP that measured over 12 feet by 0.5 to 0.75 inches and would require escorts. HT 62 at 18-21; CX 14; CX 13. Complainant called Jim Welch,¹¹ the southeast Heavy Haul dispatcher, before discussing the measurements with anyone at VFP. CX 14 at 2; HT 360 at 13-25. Complainant told Mr. Welch that another driver in Truck #3200 measured 12 feet 0.5 inches, and Alvin Harry, a company driver¹² also known as “Porkchop,” had a load that measured 12 feet 0.25 inches, but Complainant doubted the accuracy of Mr. Harry’s measurement. CX 14 at 2; HT 261-62. During the call, Complainant relayed to someone on-site at VFP that Jim was on the phone with the customer, but “we’re probably still gonna ride with it...” *Id.*

On September 26, 2016, Mr. Welch, called Complainant. CX 12 at 2. He told Complainant the contact at VFP—who was not on-site at Duffield—was surprised the shelter was over 12 feet, and that “normally they shouldn’t be over 12 foot.” *Id.* (cleaned up).¹³ Mr. Welch instructed Complainant to get a VFP employee on-site to re-measure it with him, and Complainant assented. CX 12 at 2. Complainant re-measured the load with Roger Gillenwater—a VFP crane operator who he misidentified as the yard supervisor—and called Mr. Welch. CX 13 at 2. Mr. Gillenwater confirmed Complainant’s measurements and was going to call David Brammer of VFP to let him know the load was 12 feet 0.5 inches to 12 feet 0.75 inches. CX 13 at 2.

Complainant expressed concern to Mr. Welch, that he would get a citation if he was caught driving an oversize load without proper permitting and escorts. HT 66 at 13; CX 13 at 2. Combined had a large contract with VFP,¹⁴ and Complainant felt “a lot of pressure, but [...] did not want a ticket.” HT 67 at 7-10. Mr. Brammer wanted Complainant to haul the load a half inch over 12 feet because they did it all the time. HT 68 at 1-12.

Mr. Harry, a company driver, confirmed the communications shelters on September 26, 2016, were “just a little bit over 12-foot” when he and Complainant measured them. HT 263-64. He also thought Complainant was being a bit irrational, arrogant, and loud on September 26, 2016. HT 264 at 17. Complainant was yelling at people that the loads were a lot wider than what they were supposed to be, and “they needed to do shit now.” HT 272 at 12-17. Mr. Harry left when Complainant started talking like that. HT 272 at 12-17. Despite Complainant’s behavior, Mr. Harry invited Complainant to a barbeque in Grimes, Iowa. HT 264 at 17. Mr. Harry had VFP employees remove the “handle or a little box or something on the side” and when he re-measured it was at 12 feet or under 12 feet. HT 267 at 5-20.

¹¹ In 2016, Mr. Welch had the same position and reported to Scott Wagner and Jake Wells—the manager of the heavy haul division. HT 362 at 1-7.

¹² Combined required company drivers to take assigned loads and follow Combined’s chosen routes. HT 48, 365, 654, 466.

¹³ To enhance readability, I adopt use of a single parenthetical—“(cleaned up)”—to signal when I have: removed internal quotation marks, brackets, ellipses, internal citations, and footnote reference numbers; omitted parenthetical citations to original sources of quotations within quotations; and/or changed capitalization without adding brackets. I made these alterations solely to enhance readability and the quotation otherwise faithfully reproduces the quoted text. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. APP. PRAC. & PROCESS 143 (2017); *see also Brownback v. King*, 141 S. Ct. 740, 748 (2021).

¹⁴ Complainant stated the contract was to haul 86 buildings, but counsel did not establish how Complainant would know the terms of the contract between VFP and Combined.

According to an email from Mr. Brammer to Jenny Bellamy of VFP sent after June 8, 2017, Complainant hauled the communication shelter on September 26, 2016, and delivered it on September 29, 2016, without removing anything. CX 29.

Mr. Welch did not revisit the VFP contract after Complainant told him that the shelters were over 12 feet because “after talking with my people at VFP and going through this process, this load was within the guidelines needed [...] to transport it.” HT 388 at 14-23. Based on the history of “every building that [he] did” and the fact that Complainant hauled the load in September, Mr. Welch did not revisit the VFP contract. Mr. Welch did not renegotiate new rates or escorts. HT 390 at 4-12.

Accepting the VFP Load on October 26, 2016

On October 26, 2016, at 6:11 am, Complainant accepted a second job hauling a communication shelter for VFP. CX 8. Combined was to pay Complainant \$2,863.50 to haul the load from Duffield, Virginia on Friday, October 28, 2016, and deliver it to Grimes, Iowa on Monday, October 31, 2016. HT 180 at 2-6; CX 8 at 2. The load was supposed to be “eighteen-seven long, twelve wide and ten-seven high.” CX 8 at 2. Ms. Liska—a dispatcher at Combined who was filling in for Jim Welch—confirmed she would get Complainant’s permits submitted to Faith Whiteman—a permit tech with Combined. CX 8 at 2. Several hours later on October 26, 2016, Complainant called Ms. Liska and asked if VFP had redesigned the shelters because on his previous September 26, 2016 job for VFP the shelters were wider than the permit allowed. CX 10 at 2. Complainant reported to Ms. Liska that on September 26, 2016, the shelters were 12 feet 2.125 inches to 12 feet 3.0 inches wide including the door handle. CX 10 at 2. He noted there had been some variability in width between the shelters, but he had measured it with the yardmaster, and Porkchop could also verify it. CX 10 at 2-3. Ms. Liska said she did not know whether the shelters had been redesigned, but that Jim Welch had the shelters listed at 12 feet. *Id.* She instructed Complainant to go to VFP, load the shelter, call her if it was too wide, and they would “go from there.” CX 10 at 2-3. Complainant did not bark at Ms. Liska during this conversation. HT 461 at 4.

At some point on October 26, 2016, Complainant told Faith Whiteman—the Combined permit technician who regularly procured permits for him—that he did not want to haul the VFP load to Iowa via Missouri. CX 15 at 2; *see* CX 16. Instead, Complainant wanted to travel through Kentucky. *Id.* Although Ms. Whiteman was getting Missouri permits for approximately five other drivers through Missouri, she agreed to route Complainant through Kentucky. *Id.* On October 27, 2016, Ms. Whiteman sent Complainant permits for Virginia and Tennessee. CX 17 at 2.

VFP Oversize Load on October 28, 2016

On October 28, 2016, at 7:14 am, Complainant called Ms. Liska and told her there were two DOTs sitting outside the gate of the VFP facility. CX 9 at 2. Complainant was concerned his load was over 12 feet wide, and stated last time he hauled a communication shelter for VFP “Jim didn’t want to hear it. He wanted us to haul them.” CX 9 at 2. Complainant stated the “roof edge, which is supposed to be the widest part of the building, is 12 feet 0.5 inches. Now, if that was it fine, but the door handle sticks out another inch [...] I am twelve-one and almost seven eighths inch, so you have to call it two.” CX 9 at 2. Ms. Liska told Complainant she would call the customer, and that

he should not go anywhere. CX 9 at 2. Complainant told Ms. Liska that the VFP load he had picked up in September 2016 was also over 12 feet wide. CX 9 at 2. The yardmaster had measured it at twelve feet two inches, “they saw it and knew it,” so VFP would be aware the loads were over 12 feet. *Id.* Complainant told other drivers not to leave, and Ms. Liska told him that she had already called the other drivers. *Id.* Complainant told Ms. Liska “nobody wants to say anything because they don’t want to get in trouble with Combined, but I don’t want to get in trouble with DOT.” *Id.* Complainant told Ms. Liska he was worried about the CSA, and Ms. Liska told him Josh was on the phone with the client and one of them would call him back. *Id.* at 3.

At 8:35 am on October 28, 2016, Complainant told Ms. Whiteman to stop ordering his permits because they were in the middle of re-measuring the communication shelter to determine whether it was over 12 feet. CX 18 at 2. Ms. Whiteman said she would wait to hear back from Complainant. *Id.*

VFP employees disputed Complainant’s measurements and stated that they always hauled the communication shelters “this way.” HT 87 at 23-24. The VFP employee told Complainant he was measuring it incorrectly; he was a truck driver not a carpenter and threatened to remove the load from his truck three times. HT 87-88.

At 9:16 am on October 28, 2016, Complainant called Mr. Colby to inform him none of the loads were at 12 feet. CX 2 at 2. Mr. Colby asked why VFP was saying they could get the communication shelter loads down to 12 feet by removing the door handles. *Id.* Complainant told Mr. Colby the roof edge was 12 feet 0.5 inches, and that the door handle stuck out more than an inch past that. CX 2 at 2. Mr. Colby asked him to find Roger and convince VFP that the load was oversized. *Id.* Complainant explained that VFP did not want to hear it because they have “been hauling on that 12 foot all [their] life.” CX 2 at 2. Mr. Colby informed Complainant that VFP stated there would be a 0.25 to 0.5 inch gradient on the communication shelters; he then instructed Complainant “you gotta talk to him again and get him to do something.” CX 2 at 2. Mr. Colby continued, “I can’t -- David Brammer called me and -- so get the door handle off and then call me with an accurate width. You know, I’ll go back after it.” *Id.* Complainant asserted with the door handle off; the width was 12 feet 0.5 inches. CX 2 at 2. VFP measured it at 12 feet 0.25 inches. *Id.*

At the end of the call, Complainant said he was not “trying to be a hardball...” CX 2 at 3. Mr. Colby interrupted him, said “you’re good,” and again, “just give me your accurate width.” *Id.* (cleaned up). Mr. Colby ended the call stating he did not “have time to sit there and BS about it or listen to anymore explanation.” CX 2 at 3. He would make a call to see if he could get Complainant on the road. *Id.*

On October 28, 2016, around 9:00 or 9:15 am¹⁵, Ms. Crystal Ainstrop—a Safety Coordinator for VFP—came to the Duffield yard. HT 274 at 18-22; HT 282 at 5. Mr. Jacey Radford—a production coordinator at VFP’s Duffield facility —called her and asked her to come out because he was afraid Complainant “was going to get hurt, because he was upset and was trying to take measurements of the shelter.” HT 282 at 15-18. Mr. Radford wanted Ms. Ainstrop to witness any safety violations of Complainant climbing on the communication shelter. HT 282 at 19-22; HT 289 at 16-19. Mr. Radford oversaw production and was responsible for ensuring the shelters were ready

¹⁵ This time is based on Ms. Ainstrop’s estimate of how long she observed Complainant in the facility (1.5 to 1.75 hours) and when Complainant left the facility (around 10:48 am while he was speaking to Mr. Abel.)

to ship. HT 275 at 18-20. On October 28, 2016, Mr. Radford said to get the permits redone, VFP would have to unload the shelter. HT 278 at 7-9. Mr. Radford also brought out employees to “remove what he felt was making the measurements incorrect.” HT 278 at 9-12.

On October 28, 2016, Ms. Ainstrop observed Complainant at the VFP facility taking measurements and attempting to reduce the load width. HT 276 at 2-9. Ms. Ainstrop did not observe Complainant the entire time he was at VFP facilities, but while she observed him, he was composed. HT 276 at 10-12. Ms. Ainstrop could tell that he was upset, but never observed him communicating angrily with anyone. HT 288 at 12-17. She was typically five to 10 feet away during her observations, but lost sight of him several times. HT 283 at 14-25. Ms. Ainstrop observed VFP employees remove a door handle and receptacle box from the communication shelters. HT 284 at 7-12. In total, Ms. Ainstrop observed Complainant for approximately 1.5 to 1.75 hours. HT 285 at 1-5. Complainant was on site for approximately 3.5 hours. *See* CX 9; *see also* CX 1.

On October 28, 2016, David Harris—an independent contractor for Combined from 2016 to 2019—also picked up a communication shelter from VFP’s Duffield facility and observed Complainant from a distance. HT 570 at 5-9; HT 573 at 3-4. Complainant arrived before Mr. Harris. By the time Mr. Harris was loaded and measured, Complainant had already loaded and was speaking to VFP employees. HT 573. Mr. Harris observed Complainant talking to some of the guys who loaded them in a very aggressive stance. HT 572 at 23-25. From his body language, Mr. Harris thought Complainant was being unprofessional, but he could not hear what was said. HT 573 at 2-5. After dealing with Complainant, the VFP employees were angry with Complainant and told Mr. Harris that Complainant was being rude, “being an ass,” and “demanding that this be done and that be done, and that we can’t do this and we can’t do that, and not giving them time to figure out what we needed to do.” HT 573 at 12-15; HT 580 at 1-4; HT 581 at 22-25 to HT 582 at 1. It is possible VFP employees thought Complainant was being an ass because his complaints increased their workload. HT 582 at 7. Complainant spoke to other drivers to convince them not to leave, and not to haul their loads. HT 574 at 20. After Complainant spoke with VFP employees, they removed the door handles. HT 579 at 9-10. Mr. Harris told the VFP employees his width, and eventually VFP removed the door handles from his load. HT 573-74. Ultimately, VFP removed the door handles and power boxes from all of the communication shelters. HT 220 at 14. Mr. Harris carried another communication shelter load for VFP after October 2016. VFP was by now aware of the width issue and they also removed the door handles. HT 576 at 10-12; 581 at 4-8.

James Courtney—another independent contractor who drove for Combined from 2016 to 2019—hailed a VFP communication shelter from Duffield, Virginia to Grimes, Iowa on October 28, 2016. HT 467 at 15. Mr. Courtney was one of the last drivers to arrive at the Duffield facility. HT 474 at 7-10. When Mr. Courtney arrived, Complainant was walking around telling other drivers the loads “weren’t right.” HT 471 at 7. Mr. Courtney stated Complainant was aggressively telling people what to do, but he shut the conversation down. HT 471 at 20-21. While he could not hear what was being said, Mr. Courtney said Complainant was mouthing off at the VFP employees. HT 473 at 11-17. By the time Mr. Courtney arrived and loaded, VFP came by to tell him that someone would come by and take the doorknobs off. HT 474 at 7-10. When VFP employees arrived to remove the handles from his load, they were not happy with Complainant. HT 473 at 11-17. Once they removed the doorknobs, Mr. Courtney was comfortable taking the load, even with DOT waiting outside of the facility. HT 482 at 2.

Although his interaction with Complainant on October 28, 2016, was brief, Mr. Gillenwater did not witness Complainant being rude to him or anyone else at VFP. HT 294 at 17-22. Mr. Gillenwater was responsible for loading and unloading objects onto truck trailers. HT 302 at 16-18. On that day, Mr. Gillenwater interacted with Complainant for approximately 10 to 15 minutes on the north end of the facility while he loaded the communication shelter onto Complainant's truck. HT 303 at 11-17. Complainant went to the south end of the facility, approximately 800 feet away, while Mr. Gillenwater remained at the north end and continued loading shelters onto trucks. HT 303.

Complainant Decides to Haul the Load because he can "bluff" it

Mr. Colby said that the VFP unit was a bit over what VFP had initially quoted, VFP offered to remove items to bring the load "within gauge," but Complainant insisted it was still over the quoted width. HT 503 at 3-9. VFP admitted to Mr. Colby that the size of the shelters varied by 0.25 to 0.5 inches, thus with the door knob and power box removed, some shelters could be at 12 feet and some could be over 12 feet. *See* HT 540 at 8; *see also* HT 615 at 13-15. Mr. Colby wanted Complainant to involve VFP in the measurements, so if it was truly out of gauge, they could sort it out. HT 507 at 8-18. According to Mr. Colby, VFP "was adamant that the shelter was under 12 foot with the adjustments that they were offering to make and the rest of them turned out that way...." HT 539 at 7-10.

At 9:32 am on October 28, 2016, Complainant and Mr. Colby spoke on the phone again. CX 3 at 2. Complainant informed Mr. Colby that VFP was removing the door handle and power box and that would make him "close enough to legal" to "fudge it." CX 3 at 2. Complainant stated VFP had threatened to take the load off of his truck three times. *Id.* Mr. Colby told Complainant to "stick to his guns" and to give him a new measurement when they get the stuff off of the communication shelter. CX 3 at 2.

Complainant could not find the bill of lading, and he told Combined that VFP employees climbed into his truck and stole it; he asked Mr. Colby to confront VFP, but he later found the bill of lading in his truck. HT 240-41.

On October 28, 2016, David Brammer called Robert Abel—another Combined dispatcher who was covering for Jim Welch—to complain that Complainant was upset and "addressed it towards [VFP's] loaders." HT 660 at 9-13. Complainant and the loaders were arguing and it was escalating. HT 660 at 19-20. According to Mr. Abel, Mr. Brammer stated Complainant was "becoming aggressive with [VFP's] loaders." HT 673 at 1-4.

At 10:48 am on October 28, 2016, Mr. Abel, contacted Complainant because VFP had called him to complain. HT 90 at 9. Mr. Abel asked Complainant to confirm that the communication shelters were 12 feet 0.25 inches without the power box and door handle. CX 1 at 2. Complainant replied that the shelters were actually just under 12 feet one inch due to the door hinge and plastic covers on the driver's side, but he was going to leave with the load as is. *Id.* Mr. Abel confirmed, "I think we're all fine. I think we're all good to go." *Id.* Moments later, Mr. Abel stated again that the shelters were down to 12 feet 0.25 inches. *Id.* at 3. Complainant again corrected him. *Id.*

Complainant stated that he was “fed up,” frustrated, and tired of arguing with them [VFP]. CX 1 at 3. Complainant tried to rephrase that he had not argued, but Mr. Abel cut him off. CX 1 at 4. Mr. Abel stated that the customer was “frustrated” and was “hoping this can stop.” *Id.* VFP “didn’t want to argue no more,” and “want[ed] a solution.” *Id.* Robert Abel told VFP “our guys are not gonna go when we know we can get, we can get in trouble” and that was why they were trying to get “everything down as possible.” *Id.* At this point Mr. Abel stated again that at 12 feet 0.25 inches, “I think we are okay.” CX 1 at 4. Complainant again tried to clarify that the load was at 12 feet and 7/8 inches. *Id.* To which Mr. Abel replied, “So, I think we’re good.” *Id.*

Complainant assented that he would leave with the load and stated that he had stayed polite and did not go “all Keith.” *Id.* at 5. Mr. Abel replied the customer, VFP, was pretty upset. *Id.* Complainant stated the customer was upset because they wanted the load hauled for under width; he tried to explain if he was caught it would affect his record, but it would also be expensive for the customer because he would have to wait for new permits and escorts. *Id.* Complainant thought he was supposed to wait for Josh Colby to call him before departing, but Robert Abel clarified that he should leave. *Id.* Complainant asked Mr. Abel to let Mr. Colby know that he was “just waiting for the word to go because last [he] heard [he] was to wait until [he] got back hold of Josh.” CX 1 at 6. Mr. Abel told him twice “go ahead and go.” *Id.*

Mr. Abel now stated that all of the other truckers were “gonna go as well because they’re all—they’re all at 12. The same width.” *Id.* at 6.¹⁶ Complainant again asserted he was just under 12 feet, one inch and the other loads were the same. *Id.* Complainant noted that he had a clean license because he did things right. *Id.* Robert Abel replied that he was following up because he got a call [from VFP] but Combined had the truckers’ backs. *Id.*

Mr. Abel stated, “twelve or under – under that inch. I mean, come on.” *Id.* at 7. He continued, “[t]here’s always different ways you can measure stuff. You know what I mean?” *Id.* Complainant stated when he was over 12, he looked for things he could bluff. The runner caps he could bluff because they were not hard material, which he had told Josh, but he could not bluff the power box or door handle. CX 1 at 7; CX2 at 3. Mr. Abel inquired whether VFP had removed the door handles and the power box; Complainant confirmed VFP had removed the power box and door handle, and he departed from VFP’s facility during the call. *Id.* at 8.

DOT near the Duffield facility

The DOT did not inspect any Combined trucks leaving the Duffield facility on October 28, 2016. HT 287 at 17. No other Combined truckers refused to leave the facility with the communication shelter. HT 217 at 17.

VFP Shelters were over 12 feet

On October 26, 2016, the VFP communication shelter load was over 12 feet even after VFP removed the door knobs and power box. Exterior elevations of the communication shelter show that the width of the shelter was 140 inches (11’8”) and the width of the shelter at the roofline was 144 inches (12’). JX 25. Stucco added to the width so the structure exceeded 12 feet. HT 53-54. Dave Phillips—a mechanic in Tennessee—helped Complainant measure his VFP load on October

¹⁶ Previously Mr. Abel had asked whether the shelters were “down to 12 and a quarter, right?” CX 1(b).

29, 2016, and found that the load was 12 feet 0.25 to 12 feet 0.5 inches. HT 355 at 10-11. On October 28, 2016, David Harris—another Combined driver—told Mr. Colby the shelters were a little larger than 12 feet and they were taking steps to reduce the width. HT 517 at 6-9.

Mr. Courtney remembered the dimensions of the shelter were a little bit wider than what was on the permit. HT 469 at 9. But after VFP removed the doorknob, the shelter was within the 12 feet. HT 470 at 2.

In early November 2016, Mr. James Gigeure—a former company driver for Combined—hailed VFP shelters from Duffield to Grimes and testified that his load was exactly 12 feet and VFP had already removed the doorknobs and outlet covers. HT 491 at 11-13. Robert Huffman—a former Combined company driver—credibly testified that he had hauled shelters for VFP out of a different facility in Louisiana, and they were all over 12 feet. HT 337. VFP and Combined would use the blueprints to generate the dimensions for the permits, but they were off by 3 or 4 inches. HT 337 at 3-12. Around November 4, 2016, VFP sent seven more communication shelters to Grimes, Iowa via Combined trucks. *See* JX 46. For two of the communication shelters, the Iowa permit listed a width of 12 feet 5 inches in Iowa. JX 46 at 27 and 94.

Complainant felt pressure from Combined to accept the 12 foot permits. HT 93. If he refused to take the load or insisted on permitting the load over 12 feet, Combined could have terminated him, or “sat him with no freight.” HT 94.

Combined is unable to get permits for Complainant

On October 28, 2016, at 10:54 am—approximately two hours and twenty minutes after he told her to stop ordering his permits—Complainant asked Ms. Whiteman to resume ordering his permits. CX 21 at 2. On October 28, 2016, Complainant had a permit to travel from Duffield, Virginia to the Tennessee state line, from Tennessee to the Kentucky state line, and from the Kentucky state line through Illinois to Iowa. CX 43. On October 28, 2016, Complainant did not have a permit to travel through Kentucky. *Id.* At 12:59 pm on October 28, 2016, Ms. Whiteman told Complainant that she still did not have a Kentucky permit for him. CX 20 at 2. She stated she was going to call the permitting office back again. *Id.*

At 1:42 pm on October 28, 2016, Mr. Colby called Complainant because Combined had not received Complainant’s Kentucky permit. CX 4 at 2. Complainant stopped in Dandridge, TN to observe a no driving curfew, and said he would go the other route (via Missouri). *Id.* He told Mr. Colby that he thought a VFP employee had taken the bill of lading from his truck cab. *Id.*

At 2:27 pm on Friday, October 28, 2016, Mr. Colby called Complainant and told him they did not get a revised Tennessee permit—which would enable Complainant to drive to Iowa via Missouri—and they did not get the Kentucky permit. CX 5 at 2. VFP had instructed Mr. Colby they would decide Monday morning whether to have Complainant deliver the load or turn back to the Duffield, VA site. CX 5 at 2. Complainant again accused VFP employees of taking the bill of lading from his truck cabin. *Id.* Mr. Colby disagreed and stated that he would not convey that concern to the customer. CX 5 at 3. Mr. Colby ended the call by telling Complainant to wait in Dandridge, TN until Monday to see what VFP wanted to do. *Id.*

On Friday, October 28, 2016, Kentucky's permitting office approved Complainant's permit at 2:21 pm local time, and faxed the permit to Combined at 8:35 pm Pacific time. *Id.* If someone in the 24-hour customer service department, which started in 2016, had gone to the fax after hours to look for the permit, they could have sent it to Complainant, but no one sent Complainant the permit. HT 621-22.

Complainant Returned the Communication Shelter to Duffield, VA

On October 28, 2016, VFP shipped seven communication shelters to Grimes, IA; Combined drivers hauled five of the trailers and another carrier took two. CX 34. The customer in Grimes, IA planned to unload the shelters on Monday, October 31, 2016, using one crane. CX 34 at 1. In the afternoon of Friday, October 28, 2016, Combined contacted VFP to inform them that Complainant did not have permits to travel through Kentucky. *Id.* Because he would be unable to obtain permits until Monday morning, he would miss the delivery time. *Id.* The customer in Iowa did not want to hire a second crane to unload one shelter on Tuesday or Wednesday, so VFP requested that Complainant return to Duffield, and VFP would ship the shelter with another batch on November 4, 2016. *Id.*

On October 31, 2016, Complainant returned the communication shelter load to the VFP Duffield facility and appeared angry and upset. HT 295 at 4-11. Mr. Gillenwater and Complainant spoke twice on October 31, 2016. HT 311-314. The second time, Mr. Gillenwater voluntarily returned to the area where Complainant was and continued speaking with him. HT 314 at 10-12. Complainant recorded his conversation with Mr. Gillenwater without his knowledge. CX 7 at 2; CX 26 at 1.

During their conversation, Complainant seemed frustrated, he was "getting up in Mr. Gillenwater's face," raising his voice, and he might have been a bit red in the face. HT 295 at 21-23; HT 296 at 2-5; HT 308 at 14 (cleaned up). Mr. Gillenwater was uncomfortable and was trying to get Complainant to leave, but Complainant followed Mr. Gillenwater around the VFP yard while he continued working. HT 296 at 2-5; HT 296 at 18-21. Other people were passing by as Complainant and Mr. Gillenwater spoke. HT 301 at 16-20. Complainant said he was not upset about the allegedly stolen bill of lading. HT 307 at 25.

In the process of unloading the communication shelter, Complainant asked Mr. Gillenwater why VFP did not just permit the loads properly when they know they are over 12 feet. CX 7 at 2. Mr. Gillenwater—who had nothing to do with measuring the communication shelters in October 2016—stated he "had no clue" and all he could do is tell them, which he did. HT 306 at 18; CX 7 at 2. Mr. Gillenwater agreed that the door handle and "GFI box" put the load over 12-2. CX 7 at 4. He estimated that the door handle was three to 3.5 inches and the box was three inches. *Id.* He wondered why VFP did not permit them at the actual width or downsize the shelters. CX 7 at 3.

On October 31, 2016, in some instances, Mr. Gillenwater agreed with Complainant in an attempt to "get [Complainant] to move on," but also volunteered more detailed and longer statements. HT 306 at 15; *see* CX 7.

Ms. Ainstrop reviewed a transcript of Complainant and Mr. Gillenwater's conversation on October 31, 2016, and she believed the incident on October 28, 2016, should have been handled differently. HT 289 at 3-8. Ms. Ainstrop believed VFP did not have appropriate personnel available

on-site at Duffield to address Complainant's concerns. HT 278 at 17-25; HT 286 at 5. No one at the Duffield site directly dealt with permitting. HT 286 at 19-22. Additionally, in 2016, VFP did not have a policy protecting employees from retaliation for reporting safety concerns. HT 281 at 10-12.

VFP bans Complainant from its Facilities

After Complainant left VFP's Duffield facility, Mr. Colby spoke to "a big wig" at VFP. HT 519 at 25. The VFP manager expressed "they had experienced this behavior with Keith prior to that occasion ... and that they had had enough and they would prefer that Complainant not ever come back to their facility in Duffield." HT 520 at 1-4.

On October 28, 2016, at 1:53 pm, Mr. Colby emailed Scott Waggoner regarding Complainant's interactions with VFP. CX 47. According to Mr. Colby's email, Complainant "barked" at Sue Liska "something about being forced to bootleg the last load out of VFP by Jim and that he would be sure not to do this again." CX 47. Ms. Liska listened to the recorded conversations and testified that contrary to Mr. Colby's email, Complainant did not bark at her in either call. HT 461 at 4. He stated in the email that Complainant argued the September VFP load was 12'3" and he was forced to run at 12'. *Id.* Mr. Colby wrote that Complainant went into this job loaded and ready to fire. *Id.* According to the other Combined drivers, Complainant loaded first and "immediately started raising a stink about the width of the shelters" and used his plumb bob and level to show that VFP's measurements were incorrect. CX 47 at 1. Mr. Colby wrote that Complainant was "confrontational, unprofessional, and just an all-around jerk, which Combined contractor, Mr. David Harris, could confirm. *Id.*

Mr. Colby's email noted that Complainant had "actually caused problems at offloading in Grimes, IA as well." CX 47 at 1. Mr. Colby later testified he knew nothing about that and his email was "going off of the conversation with David Brammer or whoever [he] spoke with" informing him that Complainant was banned from VFP. HT 521 at 6-8.

Mr. Colby wrote that VFP asked Combined to not send Complainant back to their facilities. CX 47. He also noted Complainant had been banned from two other sites, including Clayton, NC—Combined's largest account with Caterpillar. *Id.* Mr. Colby did not know the details of the incident in Clayton, NC. HT 522 at 25. Mr. Colby testified the other event was in Southern California or Nevada, and Complainant was also asked not to return to their site because of his behavior. HT 523 at 3-9.

Mr. Colby stated that VFP called him and complained that Complainant started raising a fuss when he entered the yard, and was acting unprofessionally. HT 506 9-14. Mr. Colby said Mr. Harris, a Combined contractor, called about Complainant's demeanor. HT 517 at 1. Mr. Harris stated Complainant came in "guns loaded" and "looking for a fight." HT 517 at 3. Mr. Colby misidentified crane operator, Mr. Gillenwater, as the on-site manager and testified that it was probably Mr. Gillenwater who told him that Complainant had been confrontational and unprofessional. HT 517 at 19-25. With further prompting, Mr. Colby stated the words confrontational, unprofessional, and all-around jerk "[came] out of many people's mouths, including probably the supervisor." HT 518 at 17-19.

Combined Terminates Complainant's Lease

On November 1, 2016, Complainant called Mr. Colby to see if there were any loads to haul. CX 6 at 2; HT 105-06. During that phone conversation, Complainant said he was standing right next to another owner operator at VFP who called Mr. Colby and told him that his load was 12-4. CX 6 at 2. Mr. Colby said the other owner operator called him back and said, “the entire reason that the uproar was out there was because of Keith Taylor. And he goes, ‘we’re – we were good.’” CX 6 at 2. Mr. Colby accused Complainant of raising an uproar and going in “guns firing” because he was pissed off from the last time he went to VFP’s Duffield facility. *Id.* Mr. Colby stated, “I – it was mishandled on your end and that’s all I’m going to say.” *Id.* Complainant insisted he was professional, and stated that VFP did not want him back on site because he would show them “where it’s over 12 foot again.” CX 6 at 2.

In 2016, Mr. Wells was the operations manager for the heavy haul division. HT 584-87. In that capacity, he led the dispatch team and would help when there were issues with dispatchers. HT 586 at 14-22. Complainant acknowledged his temper to Mr. Wells several times and even mentioned it during the November 1, 2016 call. HT 587 at 18; CX 49.

On November 2, 2016, Jason Card—a Combined customer service representative and driver manager, Jake Wells—the operations manager for heavy haul, and Complainant spoke on the phone. CX 49; HT 585. Complainant had asked Melissa Dockery to check phone calls to demonstrate that he did not get angry at the VFP facility. CX 49 at 3. Complainant stated if he had been angry at the VFP site, he would have sounded angry on the calls to Combined. *Id.* at 2. When VFP removed the door knobs and power boxes, Complainant was willing to haul them even though they were oversized and improperly permitted, but he stated “it needed to be addressed that these things [were] anywhere between twelve-two and twelve-four ... [Combined was] running on illegal permits. *Id.* Complainant stated he made a deliberate effort to maintain his composure and communicate with the customer through dispatch. *Id.* at 3. Mr. Card stated that the phone call recordings would not “prove anything one way or another.” *Id.* Mr. Card stated, “the only thing we have to go on right now is the customer saying you’re not – you’re not allowed to come back and it’s the third one and that’s where we are coming from.” CX 49 at 3.

Mr. Card mentioned two other incidents in which Complainant was banned from the customers’ property: one in Clayton, NC at the Caterpillar Keen yard, and another in where he was speeding with a Delta Star load from California. HT 121-22. At the Caterpillar yard, Complainant explained that he reacted when a yard employee nearly ran Complainant over and rammed his truck with a loader. HT 122 at 2-8; CX 49 at 4. Complainant was removed from Delta Star’s account because he traveled 80 mph or faster with a transformer. *See* HT 123 at 23-25; CX 49. Complainant explained that if he had traveled at 80 mph, it must have been in Wyoming, where such speeds are legal. CX 49 at 4.

Mr. Card told Complainant he was going to continue to investigate and would get back to Complainant. *Id.* at 4. Mr. Card stated the situation “raises red flags” and it’s “not part of our culture.” *Id.* at 4. Neither Mr. Card nor Mr. Wells listened to the recording that Complainant had of the conversation with Mr. Gillenwater. HT 636 at 12. The following day, November 3, 2016, Mr. Card called Complainant and terminated his lease because he had been “bossy” and the VFP site and two other companies had complained about him. HT 123 at 17-20.

Prior Issues with Complainant's Work for Combined

During his time at Combined, Complainant was known for being difficult, and having a temper with customers and Combined employees. HT 587. Mr. Wells had conversations with Complainant about staying cool and calm, and maintaining a collected demeanor with customers. HT 593 at 14-16. The November 2016 phone call was not the first conversation Mr. Wells had with Complainant about drivers being “the face of Combined” and “wanting to represent the company well in front of customer.” HT 593 at 16-19.

Complainant's Driver Event History has two entries noting discourtesy to customers entered on November 2, 2016, and November 28, 2016. CX 41. One entry describes, “Discourtesy to customers. Third instance of Keith being rebuked by customers. We are terminating his lease today.” The other states, “Discourtesy to customers. Keith has been banned from VFP for being difficult to work with. This is the third customer Keith has been banned from. One of which was Caterpillar in Clayton, NC. Result is termination of lease.” CX 41 at 9.

(1) Delta Star

On February 16, 2016, Complainant picked up a transformer for Delta Star in San Carlos, California and delivered it to Eau Claire, Wisconsin on February 23, 2016. CX 45 at 1. During that trip, Complainant logged speeds exceeding 60 miles per hour. *See* CX 45. The fastest speed recorded was 81 mph in Wyoming. CX 45 at 30. Delta Star had speed limits for its loads that were below state speed limits, Combined was not aware of the speed limits, and thus Complainant also was not aware of them. HT 632 at 5-6.

On March 3, 2016, Gary Dockery—an employee of Combined—sent an email to Jeffrey Spencer at Delta Star and copied Scott Waggoner and Jake Wells of Combined. CX 28 at 1. In the email, Mr. Dockery informed Jeffrey Spencer that the following corrective actions had been taken to ensure that no Combined driver would speed with a future Delta Star load: (1) the driver who sped (Complainant) would not be sent back to Delta Star; and (2) moving forward, dispatchers would tell drivers not to exceed 60 miles per hour and would monitor them on GPS. CX 28 at 1.

Jake Wells clarified that Complainant had not been banned from Delta Star, instead he had been removed from the account. HT 598 at 23. There was no credible evidence in the record that Delta Star initiated Complainant's removal from its account. HT 598 at 23; CX 28.

(2) Caterpillar Clayton, NC: Keen yard incident

On August 19, 2016, Ms. Liska emailed “Customer Service,” Jake Wells, and Jim Welch about an incident involving Complainant at the Keen Caterpillar yard in Clayton, North Carolina. CX 41. Caterpillar reported to Ms. Liska that Complainant had tried to instruct Caterpillar employees how to load the trailer and had been argumentative. *Id.* Caterpillar alleged that while a Caterpillar employee loaded the trailer, Complainant threw up his hands, the Caterpillar employee thought Complainant wanted him to raise the bucket. *Id.* When the Caterpillar employee raised the bucket he scraped Complainant's outrigger. *Id.* Complainant alleged the employee ran into his outrigger boards, busted through them, and hit his rear ramp. He threw up his hands and turned away so they could not see his facial expressions, and called dispatch. HT 134 at 2-12. Complainant

became upset and threw tools and a small object. CX 41. Complainant stated he did not require any tools “to do chains and binders, they’re ratchet binders [...] you don’t need any tools in your hand.” HT 137 at 4-9. Complainant was aggressive and had an attitude, and Caterpillar asked him to leave without a load. *Id.* Caterpillar asked that he never return to the Keen yard again. *Id.*

Mr. Welch testified it was very rare for a driver to be banned from a yard. HT 380 at 7-9. He believed that he spoke with Complainant about the Keen yard incident but could not recall. No record of a conversation with Complainant was documented, and Mr. Welch thought he probably told someone at Combined that he had talked to Complainant about the Keen yard incident, but could not remember with whom he spoke. HT 381.

Combined made no record of the Keen yard incident other than the email from Ms. Liska. There was no log entry of Complainant’s interaction with Keen yard employees at Caterpillar in North Carolina. *See* CX 41.

(3) TMS

After Combined terminated Complainant’s lease, and he lodged a complaint with OSHA, Combined stated he was also fired because he ran a stop sign on private property and per his dispatcher’s advice, refused to surrender his license to private security in Alabama. HT 124-26. Although Mr. Wells was aware of this incident, it was not discussed by Jake Wells and Mike Card before they decided to terminate his lease. HT 630 at 22-23.

On May 23, 2016, Complainant picked up a TMS load in Pennsylvania and delivered it to Alabama on May 24, 2016. *See* CX 48. On May 26, 2016, Sara Thompson of TMS International emailed Combined dispatcher Robert Abel to complain about Complainant’s delivery. CX 48 at 2. While delivering the load, Complainant ran two stop signs at the TMS facility and exited out of the wrong gate. *Id.* An internal security guard pulled him over, and Complainant was confrontational and refused to give his name or show his license. *Id.* The security guard told Complainant he was banned from the yard. HT 185 at 1-7. The customer was “VERY unhappy.” *Id.* TMS banned Complainant from all TMS properties—there were four—and asked Combined to make a note in their file and address the issue with the driver. CX 48; HT 657 at 19. Mr. Abel sent an email to Jake Wells and Scott Waggoner in which he identified Complainant as the driver, asked whether he should address it, and if so, how. CX 48 at 1. No response was admitted to evidence. Mr. Abel subsequently forwarded the email thread to Jake Wells on April 28, 2017. *Id.* Mr. Abel did not recall how he followed up on the event, and he did not memorialize any communication with Complainant. HT 670.

Following the incident at TMS with Complainant, Combined did not get any more business from the company. HT 668 at 6-8.

(4) Other Issues

In addition, to the events in Alabama, Combined stated Complainant was fired because he had 30 log violations in 30 days, and he damaged a CAT machine. HT 127 at 1-15. Combined had not mentioned the 30 log violations to Complainant before or during the investigative call. HT 127 at 5-25.

After Combined Terminated Complainant's Lease

On November 16, 2016, Complainant and Jason Card spoke on the phone. RX 103 at 2. Complainant believed management was discussing his situation with other drivers or dispatchers. *Id.* Jason Card stated Complainant was fired because he was kicked off of three sites. *Id.* Complainant stated he had spoken to an attorney and felt he had been fired for refusing to haul an illegal load. *Id.* at 3. Complainant claimed he had evidence that the shipper and the dispatcher admitted that the load was over 12 feet and they were “going to do it anyway.” *Id.*

Complainant's DAC record listed his employment with Combined Transport, Inc. from November 2015 to November 2016, and stated he was discharged or the company cancelled his lease. CX 24 at 2. Under the category “Eligible for Rehire” it stated, Review Required Before Rehiring.” *Id.* Under “work record” the document stated “Personal Contact Requested.” CX 24 at 2; HT 156.

After Combined terminated his lease, Complainant did not work as a trucker again. HT 160 at 19. He applied to approximately 15 trucking jobs with Warner, Beyel Brothers, and Snyder from approximately January to March of 2017. HT 161 at 10-22. A prospective employer at Beyel Brothers declined hiring him in part because when he called to verify Complainant's employment, he was told that Complainant stole a truck. HT 154 at 22; see CX 38. Complainant stopped making truck payments to Combined in November 2016. HT 182 at 16-25. When he stopped making payments, Combined wanted Complainant to return the truck and he refused. HT 182 at 11-12. Combined had to hire lawyers to retrieve the truck. HT 182 at 18.

When Complainant could no longer afford to make the payments, Mr. Nelson drove to Florida and picked up his trailer. HT 322 at 18-22. While Mr. Nelson was in Florida, Mike Card called to ask whether Mr. Nelson had found Combined's Peterbilt truck. 323 at 5-9. Mr. Nelson offered Jason Card \$30,000 to purchase the Peterbilt truck that Complainant had leased. Initially, Combined accepted the offer, but then required Mr. Nelson or Complainant bring the truck to Medford, Oregon, before the sale. HT 328. Mr. Nelson said that Mike Card fired him because he did not locate the truck that Complainant had leased from Combined. HT 324.

Mike Card informed Complainant's insurance companies that Complainant's truck had been stolen. CX 38; HT 164 at 19-22. A claims adjustor, Scott Spencer, from Great American Insurance Company found that Complainant's truck, a 2008 Peterbilt VIN 1XPWD40X68D768572, had not been stolen. CX 38. Complainant was in possession of the truck, he was aware of Combined's efforts to repossess it, and his attorney was in communication with Combined to negotiate return of the truck. CX 38 at 1.

After failing to find employment in trucking, Complainant worked for a towing company, worked part-time as a plumber with his brother, did some tree work, and some mechanics. HT 160 at 20-25. At the time of the hearing he worked as a repossession agent. HT 161 at 2-3.

CREDIBILITY DETERMINATIONS

In deciding this matter, the administrative law judge (“ALJ”) is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. 29 C.F.R. § 18.12; *Germann*

v. Calmat Co., ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 8 (ARB Aug. 1, 2002). In weighing the testimony of witnesses, the ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Ass't Sec'y & Mailloux v. R & B Transportation, LLC*, ARB No. 07-084, ALJ No. 2006-STA-12, slip op. at 9 (ARB June 16, 2009); *Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ No. 2003-STA-54, slip op. at 6, n.3 (ARB Sept. 30, 2005).

There was no reason to question or discount the testimony of Crystal Ainstrop, Roger Gillenwater, Dave Phillips, Faith Whiteman, Bruce Nelson, Sue Liska, James Courtney, James Gigeure, David Harris, Jacob (Jake) Wells, or Jason Card. These witnesses answered questions in a forthright manner and appeared to be credible, believable witnesses. No credible evidence was offered to counter or question the information they provided. Thus, I gave significant weight to their testimony.

Complainant

I do not credit all of Complainant's testimony. Several inconsistencies and incidents cast doubt on his testimony. First, Complainant demonstrated a willingness to make definitive statements without evidence. On multiple occasions, Complainant accused VFP employees of climbing into his truck and stealing his bill of lading, and he wanted Combined dispatchers to broach the alleged theft with the customer. Complainant later discovered the document in his truck. While I believe Complainant genuinely believed this at the time, and I credit him for acknowledging that the bill of lading had in fact slipped between the seats in the cabin of his truck, the accusation showed that he was distrustful, and willing to quickly make a definitive accusation against a customer without evidence.

Second, Complainant gave contradictory testimony or was not forthcoming. Complainant testified that a guard on the TMS property informed him in May 2016 that he was banned from the property. HT 185 at 1-7. Later Complainant testified that he, "never heard about anything until my termination, because I was on the phone with John Anderson and he heard the entire thing, so he had my back." HT 210 at 22-25. Complainant further testified, "I do not know what did or did not happen. I never heard anything about it until my termination. HT 211 at 3-4. Notably, during the November 2, 2016 call with Jason Card and Jake Wells, they did not discuss the TMS International incident. CX 49(b).

Third, on occasion Complainant's testimony contradicted the record and testimony of other witnesses. Complainant alleged that he had a permit to drive through Tennessee to the Missouri state line, which would have enabled him to drive to Iowa via Missouri, but the phone transcript conversations and exhibits show no evidence of a Tennessee permit. *See* HT 206. Despite not having the permits, Complainant testified that there were missing calls in which Ms. Whiteman told him she had a permit for him to travel through Tennessee. HT 206-07. Complainant insisted he could have delivered the load on time. *See id.* Ms. Whiteman testified she did not have a permit that would let him travel from Tennessee to Missouri and that it would have been in the files. HT 405 at 16-25. Ms. Whiteman's straightforward testimony was supported by the phone call transcripts in the record, and she had less incentive to lie. Thus, I found her more credible on this point.

Complainant also testified that there was nothing wrong with the Peterbilt truck when he purchased it, but his friend, Mr. Nelson, testified that Complainant knew of all of the issues with the truck when he purchased it. While this fact does not affect the outcome of the case, Complainant testified that he did not know about the issues with the truck when his friend sold it to him, but there was contradictory evidence in the record. I was more inclined to believe Mr. Nelson on this point.

Finally, I did not credit Complainant's testimony regarding whether he threw tools or small items during the incident at Keen yard. Counsel asked him whether he *had* any tools, to which he responded he did not need tools "to do chains and binders." HT 137 at 4. This response does not preclude the possibility that (1) Complainant threw tools belonging to Caterpillar; (2) threw tools that he had but that were not *necessary* for him to load hauls; or (3) threw or slammed around other small items. The line of questioning did not expressly deny that aspect of the story. Thus, I credited Caterpillar's version that after they hit his truck, he became aggressive and threw things.

While each of these events or portions of testimony undermined Complainant's overall credibility, I found his testimony that the VFP shelter was over 12 feet credible. Combined's attempt to demonstrate that Complainant fabricated an over-width load issue to increase the cost of the job, and correspondingly his payment for the job, was unpersuasive. On October 28, 2016, Mr. Abel called Complainant and asked, "they've got you down to 12 feet and a quarter, right?" CX 1(b). This demonstrated that Combined believed the shelters were slightly over 12 feet. While I did not find Complainant to be completely trustworthy and found his testimony suspect on points, regarding the width of the VFP shelters on September 26, 2016 and October 28, 2016, I found Complainant to be credible and gave his account of the measurements weight when I reviewed the matter.

Robert Huffman

Because of his history with Combined, I gave Mr. Robert Huffman's testimony less weight than other witnesses. Combined accused Mr. Robert Huffman of fraud and he resigned following an alleged work-related injury and worker's compensation claim. HT 340 at 10-17. Mr. Huffman testified that he was fired, but on cross examination he admitted that he actually resigned his position with Combined as part of a settlement agreement. HT 345-46. However, on redirect Mr. Huffman clarified that Combined did not give him any light-duty work and "starved" him out. HT 348 at 15. Mr. Huffman testified that when he questioned a permit, Mr. Colby would sit there and haggle with him, or tell him there was no money left in the bid to reissue the permits and that Mr. Huffman would just need to go with it. HT 339 at 4-7; HT 337 at 10. Josh Colby would ask him, "How do you like your regional salaried position?" HT 337 at 17-22. Yet Mr. Huffman testified that he liked Combined and would still be working there. HT 350 at 22-25. While it is possible Mr. Huffman would want to return to a workplace that required him to risk his license by running out of permit loads, Mr. Huffman's employment with Combined ended under strained circumstances, and I find that reason to give his testimony less weight. However, I found Mr. Huffman's testimony about the size of VFP shelters credible and consistent with other credible evidence in the record. Overall, I did not find completely credible and gave his testimony limited weight.

David Phillips

Employer cited Complainant's long-term friendship and business relationship with Mr. Phillips as reasons to give his testimony less weight. Combined also questioned which end of the measuring tape he was holding when he measured the shelter with Complainant. RR 3. I am not persuaded that Mr. Phillips gave untruthful testimony simply because he and Complainant are friends or because Complainant occasionally pays him to fix or maintain his truck. Furthermore, if Complainant was inclined to overstate the size of the load he could do that holding either end of the measuring tape. I gave Mr. Phillips testimony significant weight.

Robert Abel

Mr. Abel was not forthcoming in his testimony and contradicted himself. Thus, I gave his testimony limited weight. Mr. Abel testified that he believed they were down to 12 feet after the doorknobs and other pieces were removed. The telephone transcript shows that Complainant repeatedly told him he was not down to 12 feet, and Mr. Abel actually stated it was fine to drive a little over. CX 1. Mr. Abel testified that he told the customer how driving an illegally permitted load could affect the company, and that a ticket for an illegally permitted load could affect the company's scores and that a ticket issued to the driver was issued to the company as well. HT 664 at 9-12, 16-19. On cross examination he admitted he was not "100 percent positive on exactly how it works, on the CSA." HT 682 at 4-6. On redirect examination, he changed his testimony and described indirect effects on the company such as a customer being upset a load is late, rather than points against the CSA. HT 683. Mr. Abel's contradictory responses and the phone transcripts in which he encouraged Complainant to drive with an illegally permitted load, undermined his credibility. Thus, I gave his testimony limited weight.

Joshua Colby

Overall, I found that Mr. Colby's testimony demonstrated he did not have a clear memory of the events leading to Complainant's termination, thus I gave his testimony limited weight. Mr. Colby left Combined voluntarily in October 2018. HT 501 at 1. In October of 2016, Mr. Colby was covering his own assignment and the Southeast division while Jim Welch was on vacation. HT 502 at 6-10.

Throughout his testimony, Mr. Colby stated he did not remember, but would also state a probable version of events, which were vague and imprecise. Mr. Colby "partially" remembered a conversation with Mr. Brammer to inform VFP that Combined likely would not deliver all of the shelters by Monday. HT 512 at 6-10. When counsel asked him whether he had discussed Complainant's behavior at the Duffield site with Mr. Brammer, Mr. Colby responded, "in speculation I would imagine that that would have been part of the deal." *Id.* at 14-15.

Notably, Mr. Colby could not identify the sources for his October 28, 2016 email to Scott Waggoner and Jake Wells. Mr. Colby stated he did not recall, but imagined that Ms. Liska relayed the comments regarding Complainant barking at her. HT 515. He stated that he did not know Jacey Radford and that Roger Gillenwater was "probably" the VFP contact who told him that Complainant had been "confrontational, unprofessional, and an all-around jerk." HT 517 at 19-22;

HT 518 at 6. Yet based on Mr. Gillenwater's credible testimony regarding his interactions with Complainant, it is unlikely that he was the person Mr. Colby spoke to prior to drafting the email. When asked if the person who described Complainant as confrontational, unprofessional, and an all-around jerk was likely a supervisor, Mr. Colby testified, "Those words did come out of many people's mouths onsite that day, including probably the supervisor, yes." HT 518 at 17-18. Despite Mr. Colby's imprecise memory of the event, he credibly testified that someone at VFP stated that based on his behavior Complainant should not return to VFP's Duffield facility. HT 520. Mr. Colby's email noted that Complainant had "actually caused problems at offloading in Grimes, IA as well." CX 47 at 1. Mr. Colby later testified he knew nothing about that and his email was "going off of the conversation with David Brammer or whoever [he] spoke with" informing him that Complainant was banned from VFP. HT 521 at 6-8.

Additionally, there were instances in which the record contradicted Mr. Colby's memory. Mr. Colby initially remembered that Complainant had wanted to travel to Iowa via Missouri, when he had actually tried to get permits to travel to Iowa via Kentucky. HT 509 at 18-19, HT 510 at 18-22. Regarding one of the incidents in which Complainant was banned from hauling for a customer, Mr. Colby testified the event was in Southern California or Nevada, and Complainant was asked not to return to their site because of his behavior. HT 523 at 3-9. Actually, as clarified by Mr. Dockery's email and Mr. Wells' testimony, Combined removed Complainant from the Delta Star account. There was no credible evidence that Delta Star requested his removal due to his behavior.

All of this information combined lead me to view Mr. Colby's testimony with caution. I gave his testimony limited weight.

Jacob Wells

Overall, I found Mr. Wells' testimony credible. As operations manager for the heavy haul division, Mr. Wells helped decide whether to terminate Complainant's lease. When Combined terminated Complainant's lease, Mr. Wells knew of the Delta Star and the Keen yard incidents. HT 598 at 22-25. Mr. Wells also credibly testified that he knew of the TMS Gradall incident, but he did not believe they discussed it during the call with Complainant. *Id.* Notably, Mr. Wells acknowledged nuance surrounding Complainant's ban from the Delta Star account. HT 598 at 23. Mr. Wells clarified that Delta Star did not ban Complainant from its facility, instead Combined removed him from the account. HT 598 at 23.

Mr. Wells' testimony regarding the decision to terminate Complainant's lease, however, was inconsistent with Mr. Jason Card's testimony. While there was no written policy in place to deal with a situation in which an owner operator interacts badly with customers, Mr. Wells credibly testified that Combined's unwritten policy was to get both sides of the story. HT 590 at 24-25. If there was any issue that required corrective action, someone would speak with the driver and the other party to get both sides of the story. HT 591 at 2-16. Mr. Wells stated the process was followed in Complainant's circumstance. HT 595 at 8-11. However, Mr. Card testified he had decided to terminate Complainant's contract before he spoke with Complainant and heard his explanation of the VFP Duffield incident. Mr. Wells may not have known that Mr. Card had already decided to terminate Complainant's lease, thus the inconsistency does not undermine the credibility of Mr. Wells' testimony. Overall, I found Mr. Wells to be credible and gave his testimony significant weight.

LEGAL STANDARD

To prevail in a STAA whistleblower complaint, the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, suffered an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 31105(b)(1) (adopting the legal burdens of proof at 49 U.S.C. § 42121(b)(2)(B)(iii)); 29 C.F.R. § 1978.109; *Buie v. Spee-Dee Delivery Serv., Inc.*, ARB No. 2019-0015, ALJ No. 2014-STA-00037, slip op. at 3 (ARB Oct. 31, 2019). If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C. § 42121(b)(2)(B)(iii), (iv).

The STAA provides that an employer may not discharge, discipline, or discriminate against an employee regarding pay, terms, or privileges of employment, because of an employee's protected activity. 49 U.S.C. § 31105(a)(1); 29 C.F.R. § 1978.102(a). Employment termination constitutes an adverse action under the STAA. *Id.*; *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-071, slip op. at 6, n.15 (ARB May 18, 2017). A negative notation in a driver's employment report also constitutes an adverse action. *See Beatty v. Inman Trucking Management, Inc.*, ARB No. 15-064, 15-067, ALJ Case Nos. 2008-STA-020, 2008-STA-021 (June 27, 2016).

Complainant and Respondents agree that Respondents terminated Complainant's employment on November 2, 2016. ALJX (e). Accordingly, Complainant suffered an adverse action when Combined terminated his lease. In his closing brief, Complainant asserted Combined also retaliated against him by giving him a negative DAC rating, aggressively attempting to repossess his truck, and terminating the lease of Complainant's friend, Bruce Nelson. CPB at 11. Combined countered that Complainant failed to establish these facts. RRB at 5.

Complainant established Combined took adverse action against him in its negative DAC review and by terminating his friend, Mr. Nelson. Complainant's DAC record listed his employment with Combined Transport, Inc. from November 2015 to November 2016, and stated he was discharged or the company cancelled his lease. CX 24 at 2. Under the category "Eligible for Rehire" it stated, Review Required Before Rehiring." *Id.* Under "work record" the document stated "Personal Contact Requested." CX 24 at 2; HT 156. A prospective employer declined to hire Complainant after contacting Combined. *See* HT 154 at 22. Complainant established through his testimony and a HireRight report that Combined took an adverse action by giving him a negative DAC report, which interfered with his finding subsequent work. *See Beatty*, ARB No. 15-064, 15-067 (June 27, 2016). When he stopped making payments, Combined wanted Complainant to return the truck and he refused. HT 182 at 11-12. Mr. Nelson drove to Florida and picked up the trailer. HT 322 at 18-22. While Mr. Nelson was in Florida, Mike Card called and asked whether Mr. Nelson had found Combined's Peterbilt truck; Mike Card fired Mr. Nelson while he was in Florida. HT 323 at 5-9; HT 324.

Complainant failed to establish that Mike Card further retaliated against him by aggressively attempting to repossess the Peterbilt truck. Complainant stopped making truck payments to Combined in November 2016. HT 182 at 16-25. Combined had to hire lawyers to retrieve the truck. HT 182 at 18. Mike Card informed Complainant's insurance companies that Complainant's truck had been stolen. CX 38; HT 164 at 19-22. A claims adjustor, Scott Spencer, from Great American Insurance Company found that Complainant's truck, a 2008 Peterbilt VIN

1XPWD40X68D768572, had not been stolen. CX 38. Complainant was in possession of the truck, he was aware of Combined's efforts to repossess it, and his attorney was in communication with Combined to negotiate return of the truck. CX 38 at 1. Combined's attempts to recover the truck were not adverse actions against Complainant, rather simply attempts to recover its property when Complainant refused to make payments or return the truck.

Thus, Combined took adverse action against Complainant when it terminated his lease, gave him a negative DAC review, and terminated a friend and coworker. The remaining issues are whether Complainant can show by a preponderance of the evidence that he engaged in protected activity, and if so, whether the protected activity contributed to the adverse actions. Combined can then avoid liability by showing by clear and convincing evidence that Complainant would have been terminated regardless of the protected activity.

Protected Activity

The first issue is whether Complainant engaged in protected activity by filing internal complaints with Combined related to violations of applicable vehicle permit width limits on September 26, 2016 and October 28, 2016. Complainant argued he engaged in protected activities by reporting to Combined that the permits for the VFP shelters were unlawful. CCB 8. Respondents contended that Complainant did not engage in any protected activity under the STAA because Complainant's belief that there was a commercial motor vehicle safety violation was not objectively reasonable. RCB 13; *see Christopher Buie v. Spee-Dee Delivery Service, Inc.* ARB case. No 2019-0015.

The STAA protects employees who file complaints related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. *See* 49 U.S.C. § 31105(a)(1)(A). Internal complaints are protected, and a complaint may be oral, informal, or unofficial, but must be communicated to management. *Irwin v. Nashville Plywood Inc.*, ARB No. 16-033, ALJ No. 2014-STA-61, slip op. at 8-9 (ARB Sept. 27, 2017). The employee "need not prove an actual violation." *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011). But to be protected, the employee's belief of an actual or potential violation must be both objectively and subjectively reasonable. *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-6, slip op. at 10 (ARB Jan. 10, 2018). The employee's belief is subjectively reasonable if the employee "actually believed that the conduct he complained of constituted a violation of relevant law." *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012). An ALJ assesses whether the belief is objectively reasonable "based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *See Garrett v. Bigfoot Energy Servs., LLC*, ARB No. 16-057, ALJ No. 2015-STA-047, slip op. at 7 (ARB May 14, 2018).

Analysis

Based on the record, Complainant had a subjectively and objectively reasonable belief that the VFP shelters were over 12 feet wide and thus hauling them on a 12 foot wide permit would violate a commercial motor vehicle safety or security regulation, standard, or order. *See* 49 U.S.C. § 31105(a)(1)(A). Thus, Complainant's internal complaints to Combined were protected under the STAA. *See id.*

Respondents argue that Complainant did not engage in protected activity under Section 31105(a)(1)(A) because the record showed that the shelters were 12 feet or less, and Complainant ultimately hauled the shelters on two occasions.¹⁷ Employer argued the shelters were 12 feet because the schematics of the VFP shelters showed that they were 12 feet in width. RPB at 13; *See* CX 25. Furthermore, Complainant was the only driver who said the shelters were over 12 feet even after VFP removed the door knobs and power box. *Id.* Employer contended a driver who took a shelter on November 4, 2016, hauled the same shelter that Complainant picked up on October 28, 2016, and reported it was less than 12 feet. RPB 14. Employer argued because Complainant ultimately hauled shelters on September 26, 2016, and October 28, 2016, he did not have a subjective belief that the shelters were over-width. *Id.*

First, Complainant had a subjective belief that the shelters were over 12 feet before and after VFP removed attachments to reduce its width. On October 28, 2016, before VFP removed anything, Complainant stated the “roof edge, which is supposed to be the widest part of the building, is 12 feet 0.5 inches. Now, if that was it fine, but the door handle sticks out another inch [...] I am twelve-one and almost seven eighths inch, so you have to call it two.” CX 9 at 2. Later, Complainant informed Mr. Colby that VFP was removing the door handle and power box and that would make him “close enough to legal” to “fudge it.” CX 3 at 2. On a call with Mr. Abel, Complainant clarified that he was just under 12 feet one inch due to the door hinge and plastic covers on the driver’s side, but he was going to leave with the load as is. CX 1 at 2.

Combined argued that Complainant’s willingness to depart with the load demonstrated that he did not have a subjective belief that the shelters were greater than 12 feet. Yet the record showed that Complainant was fed up, frustrated, and tired of arguing with the customer. CX 1 at 3. Complainant testified that he felt pressure from Combined to accept the 12 foot permits. HT 93. If he tried to get an amended permit and escorts, VFP would likely have to unload the shelter. *See* HT 278 at 7-9; HT 87-88. Complainant’s acquiescence to hauling the load on a 12 foot permit did not demonstrate that he did not subjectively believe the shelter was greater than 12 feet.

Second, it was also objectively reasonable for Complainant to believe the shelter on his truck was greater than 12 feet before and after VFP removed items to reduce the width. While exterior elevations of the communication shelter show that the width of the shelter was designed to be 140 inches (11’8”) and the width of the shelter at the roofline was 144 inches (12’). JX 25. Stucco added to the width so the structure exceeded 12 feet. HT 53-54.

Multiple drivers and dispatchers testified that the shelter was over 12 feet with the door knobs and power boxes. On September 26, 2016, Mr. Harry confirmed the communications shelters were “just a little bit over 12-foot when he and Complainant measured them. HT 263-64. On October 28, 2016, Mr. Harris told Mr. Colby the shelters were a little larger than 12 feet and they were taking steps to reduce the width. HT 517 at 6-9. Mr. Courtney also remembered the

¹⁷ Employer also references the Virginia Department of Motor Vehicles regulation 24 VAC 20-81-180 which states that two escorts are required when a load exceeds 12 feet in width on a non-interstate route. Employer alleged the Agency interprets its own regulation to mean that such escorts are required when the load is 12 feet one inch or wider. Employer vaguely references 24 VAC 20-81-180 and “Virginia DMV escort guidelines” but submitted no exhibit and presented no testimony to support this assertion. The Virginia regulation of which I took judicial notice makes no mention of 12 feet and one inch. Rather, it clearly states escorts are required for loads exceeding 12 feet. Thus, I was not persuaded by Employer’s argument.

dimensions of the shelter were a little bit wider than what was on the permit. HT 469 at 9. Finally, Mr. Huffman testified that he had hauled shelters for VFP out of a different facility in Louisiana, and they were all over 12 feet by three or four inches. HT 337; HT 337 at 3-12.

After VFP removed the door knobs and power boxes it was still objectively reasonable for Complainant to believe the shelters were over 12 feet. After speaking to Mr. Brammer, Mr. Abel asked Complainant, “they got you guys, by taking off the handles and everything, down to 12 and a quarter, right?” CX 1(b). Mr. Abel and Combined believed that the shelters were slightly over 12 feet. It is reasonable to infer VFP also believed the shelters were at 12 and a quarter.

Although Mr. Harry and Mr. Courtney testified that their shelters were at 12 feet after VFP removed the doorknobs and power boxes, VFP acknowledged there was 0.25 to 0.5 inches variation in size. CX 2 at 2. Thus, Complainant’s load could have been slightly over 12 feet even if the other shelters were at 12 feet. Additionally, Mr. Phillips measured Complainant’s load and testified that it was 12 feet 0.25 to 12 feet 0.5 inches. HT 355 at 10-11.

Finally, around November 4, 2016, VFP sent seven more communication shelters to Grimes, Iowa via Combined trucks. *See* JX 46. For two of the communication shelters the Iowa permit listed a width of 12 feet 5 inches in Iowa. JX 46 at 27 and 94. Mr. Gigeure hauled one of these VFP shelters from Duffield to Grimes and testified VFP removed the doorknobs and outlet covers and his load was exactly 12 feet. HT 491 at 11-13. Combined alleged this was the exact same shelter that Complainant hauled but did not show serial numbers or any other evidence to corroborate the assertion. VFP shipped multiple shelters in early November, and the shelter that Mr. Gigeure hauled could have been any of those.

It was subjectively and objectively reasonable for Complainant to believe the load violated a commercial motor vehicle safety or security regulation, standard, or order. *See* 49 U.S.C. § 31105(a)(1)(A). Thus, Complainant’s internal complaints to Combined were protected under the STAA. *See id.*

Contributing Factor

Complainant must prove by a preponderance of the evidence that his protected conduct was a contributing factor in the adverse employment action—i.e., that it tended to affect the decision in some way. *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019)(cleaned up). A contributing factor may be quite modest—it is any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the unfavorable personnel action. *Frost*, 914 F.3d at 1195; *see Palmer v. Canadian Nat’l Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53 (ARB Sept. 30, 2016)(reissued with full dissent Jan. 4, 2017). Complainant need not conclusively prove retaliatory motive or animus; “the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a “contributing factor” in the resulting adverse employment action.” *See Frost*, 914 F.3d at 1195.

To rule for an employee at this step, the ALJ must be persuaded that it is more likely than not that the protected activity played any role in the adverse action, and the ALJ may consider any relevant, admissible evidence in making this determination. *Palmer*, ARB No. 16-035, slip op. at 17-18, 52. The ARB has emphasized that the standard is low and “broad and forgiving;” the protected

activity need only play some role, and even an “insignificant” or “insubstantial” role suffices. *Id.* at 53 (cleaned up).

A complainant may establish that the protected activity was a contributing factor by direct or circumstantial evidence. *Blackie v. Smith Transp., Inc.*, ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 9 (ARB Nov. 29, 2012). Circumstantial evidence may include temporal proximity, 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. *Id.* (cleaned up).

Proving causation through circumstantial evidence “requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee’s claim that his protected activity was a contributing factor.” *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 11-12 (ARB Nov. 5, 2013). An ALJ must consider the circumstantial evidence as a whole and not in discrete pieces when asking whether the evidence establishes contribution. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op at 17-18 (ARB Aug. 29, 2014). Generally, “the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation.” *Blackie*, ARB No. 11-054, slip op. at 9 (cleaned up). However, temporal proximity is not always dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005) “Where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action.” *Id.*

Finally, so long as a rule is lawful, an employer is entitled to its disciplinary rules even if the rules are unwise, counterproductive, or arbitrary. *Thorstenson v. BNSF Ry. Co.*, ARB No. 2018-0059, 2018-0069, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019). “Courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions.” *Id.* (cleaned up.)

Analysis

Complainant alleged the temporal proximity of his firing just six days after his last objections to VFP’s oversized load established a causal connection between his protected activity and the termination of his lease. CCB 11. Complainant also argued that Combined’s justification was not credible and should be eliminated. CCB 13. Thus, Complainant reasoned, unlawful discrimination was the likely explanation for his termination. *See* CCB 13; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).

Employer contended that Complainant’s reports that the loads were over-width played no role in Combined’s decision to terminate his lease. RPB at 15. Instead, Complainant was fired because of multiple confrontations involving Combined’s customers, which resulted in him being banned from multiple facilities. RPB 14. Employer noted that Complainant objected to the VFP load in September 26, 2016, and between September 26 and October 28, 2016 there is no evidence that Combined denied Complainant any loads or imposed other adverse actions against Complainant. *Id.* Employer alleged there was no evidence that Combined punished drivers for refusing to drive illegally permitted loads. *Id.* Finally, Employer argued that Complainant produced no evidence that Combined had taken such adverse actions in the past. *Id.* at 15.

I find that Complainant proved by a preponderance of the evidence that his objections to the oversized load on October 28, 2016, contributed to Combined terminating his lease. Complainant, however, failed to establish by a preponderance of the evidence that his protected activity contributed in any way to his negative DAC review and the termination of Bruce Nelson.

Complainant demonstrated that it was the content of his objections, not only the manner in which he voiced his objections, which led to the dispute with VFP and Complainant's ban. Ultimately, Combined considered Complainant's work history—including his banning from VFP—and decided to fire him. Complainant and the VFP loaders argued over the measurement of the load. VFP employees disputed Complainant's measurements and stated that they always hauled the communication shelters "this way." HT 87 at 23-24. The September 2016 shipment which was also oversized, supported that fact. The VFP employee told Complainant he was measuring it incorrectly; he was a truck driver not a carpenter and threatened to remove the load from his truck three times. HT 87-88. According to VFP, they would have to unload the shelter to re-permit it. HT 278 at 7-9. Although VFP complained Complainant was unprofessional, Mr. Harris said it was possible VFP employees thought Complainant was being an "ass" because his complaints increased their workload. HT 582 at 7.

VFP contributed to the escalation of the incident by its inability to respond appropriately to Complainant's protected objections. Ms. Ainstrop believed the incident on October 28, 2016, should have been handled differently. HT 289 at 3-8. She believed VFP did not have appropriate personnel available on-site at Duffield to address Complainant's concerns. HT 278 at 17-25; HT 286 at 5. No one at the Duffield site directly dealt with permitting. HT 286 at 19-22.

Complainant insisted that VFP did not want him back on site because he would show them "where it's over 12 foot again." CX 6 at 2. Mr. Abel's statement that the shelters were down to 12 and a quarter confirmed that at least some of the shelters were still over 12 feet. *See* CX 1. The customer was tired of arguing and wanted a solution, but according to Ms. Ainstrop, VFP was unprepared to re-permit the load on site, and Jim Welch said Combined had not budgeted for escorts in the bid. Thus, when Complainant objected to the oversized load, neither VFP nor Combined was able to address his concerns.

Finally, Combined considered Complainant's protected activity when it decided to terminate his lease. In the email memorializing the incident at VFP's site in Duffield, Mr. Colby noted Complainant's protected objections to the load size on September 26, 2016. Mr. Colby stated in the email that Complainant argued the September VFP load was 12'3" and he was forced to run at 12'. *Id.* He also noted Complainant's objections on October 28, 2016. Mr. Colby reported that other Combined drivers stated that Complainant loaded first and "immediately started raising a stink about the width of the shelters" and used his plumb bob and level to show that VFP's measurements were incorrect. CX 47 at 1. Later in a phone call, Mr. Colby stated that another driver told him, "the entire reason that the uproar was out there was because of Keith Taylor. And he goes, 'we're – we were good.'" CX 6 at 2. According to Mr. Abel, by removing exterior items the shelter was down to 12 feet and a quarter and was good to go. CX 1. Due to the size variation between the shelters, some of the drivers may have been at 12 feet, and some of them may have been comfortable driving 0.25 to 0.5 inches over the permit, as Complainant ultimately did. Combined knew of Complainant's objections to the VFP shelters, and that there was some merit to his objections.

I do not sit as a “super-personnel department” re-examining Employer’s disciplinary decisions, but Combined’s poorly kept personnel records undermined its arguments. *See Kudruk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014). There was not a clear disciplinary process or policy, and disciplinary records were inconsistently maintained. Combined is free to apply any lawful rule in its hiring and firing processes, but without more documentation, I did not find credible Combined’s assertions that the protected activity was not a factor in Complainant’s termination. The protected activity need only play some role, and even an “insignificant” or “insubstantial” role suffices. *Palmer*, ARB No. 16-035, slip op. at 17-18 at 53.

Taken as a whole, the circumstantial evidence established that Complainant’s objections to the width of the shelters contributed to some degree in Combined’s decision to terminate his lease. *See Frost*, 914 F.3d at 1195. While not dispositive, temporally, the events were days apart. Although evidence showed the shelters were slightly over 12 feet, the customer explicitly disputed Complainant’s measurements and acknowledged it was not able to adequately address the concerns. Another driver said that the customer may have been upset because Complainant’s objections created more work for them. Finally, Combined explicitly described Complainant’s protected activity in an email that Mr. Wells and Mr. Card considered before deciding to terminate his lease. In sum, I find Complainant showed by a preponderance of the evidence that his protected activity contributed to the adverse action terminating his lease.

Complainant, however, failed to demonstrate by a preponderance of the evidence that his protected activity contributed in any way Combined’s negative DAC review and Mr. Nelson’s termination. “Where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action.” *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005). Here, Complainant’s unprofessional behavior and his refusal to return the truck to Combined could have independently caused Combined to give him a negative DAC review and reference and terminate Mr. Nelson. As stated above, Complainant was banned from at least two other sites and removed from one account. These circumstances, independent of Complainant’s interactions with VFP, would negatively influence any reference Combined would give other prospective employer’s. Furthermore, Complainant testified that Beyel decided not to hire him because Combined alleged he had stolen a truck. HT 154 at 22; see CX 38. Complainant stopped making truck payments to Combined in November 2016. HT 182 at 16-25. When he stopped making payments, Combined wanted Complainant to return the truck and he refused. HT 182 at 11-12. Combined had to hire lawyers to retrieve the truck. HT 182 at 18. Complainant’s refusal to make payments or return the truck independently could have led Combined to give him negative references. Complainant failed to demonstrate by a preponderance of the evidence that his protected activity influenced these negative references.

Additionally, Mr. Nelson stated Combined fired him because he failed to locate Complainant’s truck. Complainant did not show by a preponderance of the evidence that Mr. Nelson’s termination was related to Complainant’s protected activity. Instead, the only testimony alleged it was due to Complainant’s refusal to make payments or return the leased truck, and his friend’s failure to convince Complainant to return the truck. *See* HT 324. Complainant’s attenuated and vague allegation of retaliation failed to establish Mr. Nelson’s termination was due in some way to Complainant’s protected activity.

Affirmative Defense

To avoid liability where a complainant has established that his or her protected activity was a contributing factor in an unfavorable personnel action, the employer must show by clear and convincing evidence that it would have taken the same personnel action absent the protected activity. 49 U.S.C. § 42121(b); 49 U.S.C. § 31105(b); 29 C.F.R. § 1978.109(b)(1). It is not enough to show that the employee's conduct constituted a legitimate independent reason justifying the adverse personnel action, or that the respondent *could have* taken the personnel action in the absence of the protected activity. See *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014); *Pattenaude v. Tri-Am Transport, LLC*, ARB No. 15-007, ALJ No. 2013-STA-37, slip op. at 15-16 (ARB Jan. 12, 2017). Instead, the employer must show that it *would have* taken the same adverse action absent the protected activity through either direct or circumstantial evidence. *Speegle*, ARB No. 13-074, slip op. at 11.

The employer's affirmative defense "is a fact-intensive assessment that requires a determination, on the record as a whole, how clear and convincing the respondent's lawful reasons were for the unfavorable personnel action." *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-033, ALJ No. 2014-STA-61, slip op. at 12 (ARB Sept. 27, 2017)(cleaned up). Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)(cleaned up).

The employer can meet its burden through direct or circumstantial evidence; circumstantial evidence can include evidence of the temporal proximity between the non-protected conduct and the adverse actions, the employee's work record, statements contained in relevant office policies, evidence of other similarly situated employees who suffered the same fate, and the proportional relationship between the adverse actions and the bases for the actions. *Speegle*, ARB No. 13-074, slip op. at 11. "A company may reasonably choose not to impose on its customers to appear as witnesses at trial about complaints they made, but it does so at its own risk where the customer complaints may give the appearance of being based on the employee's refusal to violate the law." *Clean Harbors Env't Servs., Inc. v. Herman*, 146 F.3d 12, 23 (1st Cir. 1998).

Analysis

Here, after reviewing the evidence, I find that Respondent produced clear and convincing evidence that it would have terminated Complainant's employment absent his protected activity.

Complainant argued Employer's reasons for firing him were pretextual and not credible. CCB 16, 13. Complainant analogized his termination to the employee in *Clean Harbors* where a customer complained to the employer that the employee's compliance with STAA was too time consuming and costly. Despite having two favorable performance reviews, the employer terminated the employee because he was allegedly rude to customers. The Court of Appeals upheld the ARB's finding that in the absence of customer testimony, "there was no basis to conclude that customer complaints unrelated to the employee's enforcement of the STAA would have been sufficient to otherwise justify his termination." *Clean Harbors*, 146 F.3d at 23. The Agency was not required to believe the accounts of the customer complaints from the customer service manager. *Id.* In *Clean*

Harbors, the employer seemed less concerned with the allegations of STAA violations than with the satisfaction of their customers. *Id.*

While there are similarities, Complainant's case is distinct from *Clean Harbors*, particularly because instead of having two positive reviews, there were at least two other instances in which customers complained that Complainant was unprofessional or aggressive. Additionally, Combined had already spoken to Complainant about being the face of Combined and representing Combined professionally. Complainant argued that only two VFP employees testified and both stated they did not witness Complainant being unprofessional. CCB 18. Complainant suggested VFP complained about Complainant's behavior because changing the permits or the shelters would be costly. Similarly, Complainant suggested Combined did not address the oversized VFP shelters in September or October of 2016 because it would increase costs. CCB 18. While direct testimony from David Brammer or VFP loaders likely would have strengthened Combined's position, declining to impose on its customers does not inevitably lead to a finding that the customer complaints were pretextual or actually based on Complainant's protected objections. *See Clean Harbors*, 146 F.3d at 23. The evidence established that Combined took customer satisfaction seriously, and that Complainant had, over a period of time, caused issues with clients.

Combined gave clear and convincing testimony that it would have taken the same personnel action absent the protected activity due to Complainant's problematic unprofessional interactions with customers. On multiple occasions, customers complained that Complainant was aggressive and unprofessional, Complainant himself acknowledged his temper, and several Combined drivers credibly established that he was unprofessional at the VFP facility in September and October of 2016. Given the record, I found that in the absence of Complainant's protected activity, Combined still would have terminated Complainant's lease.¹⁸

Complainant had a history of upsetting customers, which was becoming a habit and seemed unlikely to change. HT 599 at 12-15. Although, Combined initiated the process to renew Complainant's contract prior to October 28, 2016, I found this to be a minor, rather than wholesale, endorsement of his work. Combined's personnel documentation and recordkeeping is lacking, but again, my role is not to second guess the employer's business model. Mr. Wells credibly described that Combined had issues with Complainant's attitude and he had a reputation for being difficult. HT 587. During the November 2, 2016 phone call Complainant acknowledged he had a temper that he had trouble controlling. See CX 49. And during his conversation with Mr. Abel on October 28, 2016, he stated he had not gone "all Keith." CX 1. I found Mr. Wells account to be credible and consistent with the other evidence in the case.

Complainant's interactions with customers were becoming a problem. Typically Combined saw about one driver banned from a site every six months. But Complainant had an unprecedented number of issues with customers in one year. HT 588; HT 590-91. In the past, Mr. Wells had conversations with Complainant about staying cool, calm, and maintaining a collected demeanor

¹⁸ Complainant failed to establish by a preponderance of evidence that Combined aggressively repossessed Complainant's truck, gave him negative DAC reviews, or terminated Mr. Nelson in some way due to his protected activity. Even if Complainant had been able to establish a causal connection between his protected activity and these adverse actions, Respondents demonstrated by clear and convincing evidence that it would have taken the same actions in the absence of Complainant's protected activity. Complainant's unprofessional behavior and refusal to make payments or return the truck made it highly probable Combined would have taken the same measures even in the absence of Complainant's protected behavior.

with customers. HT 593 at 14-16. The November 2016 phone call was not the first conversation Mr. Wells had with Complainant about drivers being “the face of Combined” and “wanting to represent the company well in front of customer.” HT 593 at 16-19.

Mr. Wells and Jason Card were involved in the decision to terminate Complainant’s lease and considered some past incidents before making the decision. Most notably, the Keen yard incident demonstrated Complainant’s problematic interactions with customers. On August 19, 2016, Ms. Liska emailed “Customer Service,” Mr. Wells, and Mr. Welch about an incident involving Complainant at the Keen Caterpillar yard in Clayton, North Carolina. CX 41. Caterpillar reported to Ms. Liska that Complainant had tried to instruct Caterpillar employees how to load the trailer and had been argumentative. *Id.* When the Caterpillar employee raised the bucket he scraped Complainant’s outrigger. *Id.* Complainant threw up his hands and turned away so they could not see his facial expressions, and called dispatch. HT 134 at 2-12. Complainant became upset threw tools and a small object. CX 41. Complainant was aggressive and had an attitude, and Caterpillar asked him to leave without a load. *Id.* Caterpillar requested that he never return to the Keen yard again. *Id.*

The TMS incident was not discussed with Complainant during the termination call, but Mr. Wells was aware of the incident when he advised Jason Card to terminate Complainant’s lease. *See* CX 48. On May 23, 2016, Complainant picked up a TMS load in Pennsylvania and delivered it to Alabama on May 24, 2016. *See* CX 48. On May 26, 2016, Sara Thompson of TMS International emailed Combined dispatcher Robert Abel to complain about Complainant’s delivery. CX 48 at 2. While delivering the load, Complainant ran two stops signs at the TMS facility and exited out of the wrong gate. *Id.* An internal security guard pulled him over, and Complainant was confrontational and refused to give his name or show his license. *Id.* The security guard told Complainant he was banned from the yard. HT 185 at 1-7. The customer was “VERY unhappy.” *Id.* TMS banned Complainant from all four TMS properties and requested that Combined to make a note in their file and address the issue with the driver. CX 48; HT 657 at 19. Mr. Abel sent an email to Jake Wells and Scott Waggoner in which he identified Complainant as the driver, asked whether he should address it, and if so, how. CX 48 at 1. No response was admitted into evidence. Mr. Abel subsequently forwarded the email thread to Jake Wells on April 28, 2017. *Id.* Mr. Abel did not recall how he followed up on the event, and he did not memorialize any communication with Complainant. HT 670. After the reported incident, Mr. Abel said that Combined did not get any more business from the company after TMS expressed unhappiness with Complainant’s conduction and it banned Complainant from its worksites. HT 668 at 6-8.

As stated above, the incident was not discussed during the November 2, 2016 call with Complainant. However, the email recipient list corroborated Mr. Wells’ testimony that he knew of the event, and it further illustrates the types of clashes Complainant caused with customers. Combined did not establish how long TMS had been a customer, and TMS may have chosen not to do business with Combined for other reasons, but Mr. Abel convincingly stated that Combined did not get any more business from the company after the incident with Complainant. HT 668 at 6-8.

I did not find the Delta Star incident to be supportive of Respondent’s position that Complainant was rude, aggressive, or unprofessional with customers, to the extent Respondent claimed. First, based on the email and Mr. Wells’ testimony, Complainant was not banned from Delta Star’s facilities. Rather, he was removed from the account. HT 598 at 23. Delta Star had speed limits for its loads that were below state speed limits, Combined was not aware of the speed

limits, and thus it is highly likely that Complainant also was not aware of them. HT 632 at 5-6. Combined produced no communication from Delta Star requesting that Complainant be removed from the account. Instead Mr. Dockery seemed to have volunteered that remedial measure. See CX 28 at 1. Thus, this incident did not further support Combined's argument that Complainant's rude, aggressive, and unprofessional attitude was an issue with customers. I gave that incident no weight here.

VFP Incident

According to other drivers, Complainant was unprofessional at VFP. Mr. Colby wrote that Complainant was "confrontational, unprofessional, and just an all-around jerk, which Combined contractor, Mr. David Harris, could confirm. CX 47.

Two VFP employees said they did not see Complainant communicating angrily with anyone, but they had limited interactions with Complainant that day. Mr. Gillenwater only interacted with Complainant for approximately 10 or 15 minutes while he loaded the truck. HT 303 at 11-17. Ms. Ainstrop observed Complainant for the last 1.5 to 1.75 hours he was at the site; he was on-site for approximately 3.5 hours. HT 285 at 1-5; See CX 9; see also CX 1. Furthermore, while Ms. Ainstrop did not hear Complainant speaking angrily to anyone, she could see he was upset. HT 288 at 12-17.

Similarly, Mr. Harris observed Complainant talking to some of the VFP loaders in a very aggressive stance. HT 572 at 23-25. From his body language, Mr. Harris thought Complainant was being unprofessional, but he could not hear what was said. HT 573 at 2-5. After dealing with Complainant, the VFP employees were angry with Complainant and told Mr. Harris that Complainant was being rude, "being an ass," and "demanding that this be done and that be done, and that we can't do this and we can't do that, and not giving them time to figure out what we needed to do." HT 573 at 12-15; HT 580 at 1-4; HT 581 at 22-25 to HT 582 at 1.

Mr. Courtney also stated Complainant was aggressively telling people what to do. HT 471 at 20-21. When VFP employees arrived to remove the handles from his load, they were not happy with Complainant. HT 473 at 11-17. Mr. Harry said that Complainant was being a bit irrational, arrogant, and loud on September 26, 2016. HT 264 at 17. Complainant was yelling at people that the loads were a lot wider than what they were supposed to be, and "they needed to do shit now." HT 272 at 12-17. Mr. Harry left when Complainant started talking like that. HT 272 at 12-17.

Employer argued that it is significant that all of the other Combined drivers observed the same initial width issues, but they were not aggressive and confrontational with VFP employees. RPB 17. Complainant, however, noted that Mr. Harris and Mr. Courtney arrived later to the Duffield facility. By the time they arrived, Complainant had already argued with VFP loaders and convinced them to remove items from the load to reduce the width. Thus, the drivers who arrived later benefited from Complainant's efforts to get the load width reduced. Even though the drivers who arrived later encountered less resistance from VFP loaders, drivers reported Complainant was still aggressive, confrontational, and unprofessional when they interacted with him and saw him on site.

Ultimate decision

To show that Combined's reasons were pretextual, Complainant argued that Combined did not punish a driver who threatened to fight a dispatcher. The two scenarios, however, are distinct. Mr. David Retzlaff threatened a dispatcher, whereas Complainant upset customers. *See* HT 608 at 1-8. It may seem imprudent, but Combined can choose to tolerate more discord among its staff than between customers and drivers. And the record demonstrated that Combined was more concerned about upsetting customers than dispatchers. Mr. Card said that listening to the tapes would not make a difference because the issue was how Complainant interacted with VFP, not how Complainant interacted with the dispatchers.

During the November 2, 2016 call, Mr. Card stated, "the only thing we have to go on right now is the customer saying you're not – you're not allowed to come back and it's the third one and that's where we are coming from." CX 49 at 3. Mr. Card stated the situation "raises red flags" and it's "not part of our culture." *Id.* at 4.

Mr. Wells said that if Complainant was unprofessional and confrontational and ultimately removed from VFP for a reason unrelated to the load's dimensions, Combined still would have terminated his lease. HT 603. Mr. Wells credibly established that dimensional issues are common with loads and stated, "it is all about how you communicate them and how you handle them." HT 601 at 6-9. Drivers were not disciplined for calling in permit size discrepancies because it was part of their job. HT 602 at 8-18; HT 602 at 17. Mr. Wells was concerned Complainant would continue to upset customers and "end up costing [Combined] a really large account for the company." HT 601-02.

After consideration of all the evidence, I find that Respondent has shown by clear and convincing evidence that it would have terminated Complainant's lease even if he had not engaged in the protected activity. Clear and convincing evidence is evidence that shows "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015) ("*DeFrancesco IP*") (citing *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)). "For employers, this is a tough standard, and not by accident." *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

Here, there are no disputes that Complainant was a difficult person, a trait that he acknowledged himself which he described as going "all Keith." Respondent was concerned about his conduct with customers and particularly what occurred at VFP. VFP was an important customer and had asked that Complainant not haul for them anymore. Respondent had counseled Complainant about his conduct with customers, and that his behavior was a direct reflection on Respondent. The evidence demonstrated that Respondent would have terminated Complainant in light of his behavior regardless of any protected activity. While Respondent's burden to show by clear and convincing evidence that it would have terminated Complainant in the absence of the protected activity is high, I find that here Respondent has demonstrated that exacting standard. Accordingly, I find that the complaint filed by Complainant should be denied.

ORDER

1. Complainant established by a preponderance of the evidence that his protected activity contributed to Respondent's adverse action terminating his lease.
2. Respondent, however, has shown by clear and convincing that it would have taken the same adverse action in the absence of the protected activity. Therefore, Complainant's complaint under the STAA is denied. All requests for relief under the STAA are denied.
3. Respondent's request for attorney fees and costs under the STAA is denied.

SO ORDERED.

RICHARD M. CLARK
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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(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. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at

<https://efile.dol.gov/> EFILE.DOL.GOV. Before April 12, 2021, all parties may elect to file by mail rather than by e-filing.

Filing Your Appeal Online

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/>.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at <https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf> and/or the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account 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. During this transition period, **you are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

Self-represented litigants (and all litigants prior to April 12, 2021) may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other 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 EFS account, and then following the written directions and/or via the video tutorial 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 e-filers 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, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.