U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 April 2022

Case No.: 2020-STA-00004

In the Matter of:

MILTON CLAYTON,

Complainant,

v.

R.S. THOMAS HAULING, INC.,

Respondent.

Appearances: Cherie A. Parson, Esq.
Parson Law
For Complainant

Michael L. Donner, Sr., Esq.
Setliff Law, P.C.
For Respondent

Before: MONICA MARKLEY
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case arises from a complaint filed by Milton Clayton ("Complainant" or "Mr. Clayton") with the Department of Labor's Occupational Safety and Health Administration ("OSHA") against R.S. Thomas Hauling, Inc. ("Respondent" or "R.S.") under the provisions of the Surface Transportation Assistance Act of 1982, U.S. Code Title 49, Section 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA").

PROCEDURAL HISTORY

On May 9, 2016, Mr. Clayton filed a complaint with OSHA, alleging that while working for Respondent, he suffered an adverse employment action as a result of making safety complaints and asserting that he would file a report regarding his concerns. The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The Secretary's findings were issued on August 28, 2019. Complainant timely requested a formal hearing before

the Office of Administrative Law Judges ("OALJ"). The case was docketed with OALJ on October 15, 2019, and was assigned to me on October 24, 2019.

On November 16, 2019, I held a *de novo* telephonic hearing, at which Complainant and Respondent were represented by counsel. Cherie A. Parson, Esq. appeared on behalf of Complainant, and Michael L. Donner, Sr., Esq. appeared on behalf of Respondent. The parties were afforded a full opportunity to present evidence and argument. At the hearing, Complainant's Exhibits A-K and Respondent's Exhibits 1-17 were admitted into evidence without objection.[1] (TR at 5-6.) Subsequent to the hearing, the parties each submitted a closing brief. The record is now closed.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES PRESENTED

The contested issues are as follows:

1. Whether Complainant engaged in protected activity under the STAA.
2. Whether Respondent had knowledge of the protected activity.
3. Whether Complainant suffered an adverse employment action.
4. Whether Complainant's protected activity was a contributing factor to the adverse employment action.
5. Whether Respondent would have taken the same adverse personnel action against Complainant absent his protected activity.
6. Whether Complainant is entitled to damages.

(TR at 5.)

PARTY CONTENTIONS

Complainant's Position

Complainant asserts that he engaged in protected activity under the STAA when he initially refused to drive his assigned vehicle based on his reasonable apprehension of serious injury, as well as when he articulated an intent to file a safety report with the Department of Transportation. After he engaged in this activity, and more specifically, two days after Complainant expressed his plan to report the safety issues with his assigned vehicle to the Department of Transportation ("DOT"), Respondent terminated his employment. The proximity in time between the protected activity and the termination gives rise to an inference of causation. Furthermore, Respondent did not show clear and convincing evidence that Complainant's employment would have been terminated absent his protected activity, particularly as Respondent never communicated to Complainant any concerns with his attitude or behavior, the alleged reason for the termination,

[1] The following abbreviations are used in this Decision: CX – Complainant's Exhibits; RX – Respondent's Exhibits; and TR – transcript of hearing.

prior thereto. Complainant contends that because he suffered an adverse employment action after he engaged in protected activity, Respondent violated the STAA and he is entitled to compensatory and punitive damages, as well as attorney's fees.

Respondent's Position

Respondent argues that Complainant is unable to establish a case under the STAA. He did not establish protected activity under the statute's provisions for refusing to drive, in that he did not actually refuse to drive, but instead drove his assigned truck on a gravel route, instead of a sand route. In addition, Complainant's successful operation of the truck on the gravel route showed that any alleged apprehension of serious injury was not reasonable, and in response to Complainant's concerns, Respondent serviced the truck. Because Complainant has not established that he engaged in protected activity prior to his termination, his claim fails.

SUMMARY OF RELEVANT EVIDENCE

I. Formal Hearing Testimony

A. Milton Clayton, Complainant (TR at 13-14, 29-90)

Complainant testified that he began his employment with Respondent on March 25, 2014. He has over 30 years of truck driving experience, and had a Class A license before seeking employment with Respondent. He considers himself to be "strong on safety." (TR at 13.) He is knowledgeable about DOT regulations and safety has been his primary focus over the course of his career. *Id.* Complainant's job duties while working for Respondent included transporting loads from a rock quarry to another location. *Id.* at 14. His direct supervisor was Mr. Hembrick. *Id.* at 29.

Prior to Complainant's employment with Respondent, he had two driving accidents, in 2012 and 2014. He was seriously injured in one of the accidents. For the 2012 accident, fault could not be proven, but the state trooper recognized that Complainant could not have caused it. The 2014 accident was not his fault. *Id.* at 30.

While working for Respondent, Complainant had three accidents. For two of them, a camera in his truck cab showed that he was not at fault, because he was cut off. *Id.* With regard to the third accident, he stated:

> The second one happened – I mean the third one happened around from the shop, which it was at a stoplight and the hood of my truck was kind of tossed. So I don't know if he came around, but we was going no more than five miles per hour and I hit his bumper.

Id. This accident occurred in 2015. He considers his driving record to be pretty good, and over 30 years of driving, has had only one accident that was his fault. *Id.* at 31. However, he was flagged by the insurance company. They allowed him to continue to work, after being put on a probation for one year, during which he could not be involved in any moving violations or at-fault

accidents. *Id.* He believed that being involved in any accident would result in his termination. *Id.* at 31-32.

Complainant was aware that the Respondent's policies and procedures required him to follow all safety rules at all times. He was also aware of the policies that any at-fault accident would be grounds for termination, drivers were responsible for maintaining their CDL licenses, excessive points on driving records or not paying fines could result in problems with insurance coverage, and incidents resulting in damage to company, private, or public property could result in termination. *Id.* at 32-33.

When Complainant was approved by the insurance company on a probationary basis, he became more aware of his environment, and he felt pressured into being a "top notch" driver. He felt that if anything happened, no matter how small, he would lose his job. *Id.* at 33. The 2015 accident, described above, occurred after Complainant was put on probationary status, but he was not terminated for the accident, and he does not think Respondent reported it to the insurance company. He was also not written up or disciplined for the accident. *Id.* at 33-34.

Complainant was asked by Respondent to operate a snow plow without previous training, while he was on probation, and he believed this would compromise his employment. He refused to operate the snowplow because of this lack of training. He stated:

> Well, considering road conditions, which is already hazardous, you know, with snow, and to add the extra weight of the snow plow and the same bucket on the back to spread the salt, I didn't understand how to drop the plow or when to drop the plow, at what speed. I wasn't comfortable operating something I had no experience in.

Id. at 34-35. When Complainant refused to operate the snow plow, Mr. Hembrick became a little aggressive. Complainant had to remind Mr. Hembrick of the probationary status and the fact that he did not have any experience operating a snow plow. *Id.* at 35.

Complainant had also complained to Mr. Hembrick about Truck #7. He told Mr. Hembrick that the truck had a significant clutch issue, was older, and should probably be taken out of service. *Id.* Historically, Truck #7 was always in the shop for the clutch issue, and in a matter of a few days, it would be back to doing the same thing. *Id.* Complainant had complained to Mr. Hembrick about Truck #7 prior to March 2015. *Id.* at 36.

In general, Mr. Hembrick was aggressive toward Complainant. He did not like the fact that Complainant would do his best to follow DOT regulations and stay safe. *Id.* When Complainant brought safety issues to his attention, Mr. Hembrick seemed to get angry for no reason. *Id.* Complainant also had conflicts with him regarding the timing of runs at the end of the day. He stated:

> Mostly when I would come back on the yard from the rock quarry, I came back earlier than others because I chose to follow DOT regulations, and understood that I could not make another legal run. And so that would put me back in the company

> yard around about 4:30 or 4:15. And they would get somewhat upset. Mr. Hembrick would definitely get upset with me and told me I could've did another run. Then I would try to explain to him what's normally about a hour's round trip at the end of the day because of the traffic, heavier traffic flow from Rockville to Richmond, they would extend it out to a hour and a half just on that route. Then I would still have a 30 to 45-minute drive home. So legally I could not make another complete round. And so he would get upset, you know, and wanted me to go against DOT regulations.

Id. at 36-37. Complainant felt that Mr. Hembrick cared more about money than safety. *Id.* at 37.

Complainant believed that he and Mr. Hembrick also had a communication issue. Complainant felt that Mr. Hembrick did not provide enough notice of required Saturday work. In accordance with company policy, they were supposed to notify drivers by Tuesday if Saturday work was going to be required. However, Mr. Hembrick did not normally tell them about Saturday work until Thursday or Friday. *Id.* at 37-38. Sometimes, Complainant refused to work on Saturday, because he would incur a fee for moving his scheduled ankle therapy appointments. *Id.* at 38.

On March 14, 2016, Complainant came into work and his truck was in the shop. *Id.* Mr. Hembrick told him to drive Truck #7 instead. When Complainant was assigned Truck #7, he first thought about its safety issues, and knew it had not been fixed. *Id.* at 39. Complainant responded that he did not want to drive that truck, and without asking any questions, Mr. Hembrick immediately told him to go home and not come back. *Id.* at 38-39. On that day, Complainant also informed Mr. Hembrick that he wanted the truck to be repaired, but he did not allow this, or offer another truck for Complainant to drive. *Id.* at 40.

Complainant considered the clutch issues with Truck #7 to be pretty dangerous. The truck would stall, and had electronic brakes. If it lost brake power, it would roll out. In addition, it had power steering, so with the engine not running, it was difficult to steer. *Id.* Complainant felt he could have killed himself or somebody else while driving the truck. In addition, if he had an accident, his job would be terminated. *Id.*

When Mr. Hembrick told Complainant to go home and not come back, he interpreted that to mean termination. *Id.* at 40-41. Another person, Patrick Oliviera, was present when Complainant complained to Mr. Hembrick about Truck #7. A lot of drivers knew about the problems with the truck's clutch. *Id.* at 41.

After Mr. Hembrick told Complainant to go home and not come back, Complainant requested to drive another truck or do a different route. He had been assigned to drive the Wal-Mart dirt route, but he felt that Truck #7 was unsafe on that route.[2] The route had a higher volume of traffic, more aggressive drivers, a stoplight where he would have to cross over traffic, and lots of blind curves and private driveways. *Id.* at 41-42. In his opinion, driving Truck #7 on that route

[2] The parties refer to this route alternately throughout testimony as the "dirt route" or "sand route." Both terms reference the same route.

would definitely have resulted in some type of accident. He had previously driven the sand route. *Id.* at 42. He further described the route:

> It was like driving in, I guess parts of Richmond compared to going to D.C. It was extremely a lot of traffic. You had a lot of private driveways. There's a couple of times I had to cross over traffic at a stop light. The entrance of where we would drop the dirt off, it was a blind curve probably less than a half – less than a mile in front of me where oftentimes, I have to stop at the entrance to the opening. And if the truck stalled out there, we had loggers, big trucks coming that route. So they probably wouldn't have enough time to stop, if I would've stalled in the middle of the road.

Id. at 44.

Complainant proposed that he take Truck #7 on the rock quarry route instead, since he believed he was going to be fired.[3] *Id.* at 42-43. He knew it was a safer drive, because even though it is longer, the sight lines were better, with better visibility of others on the road. In addition, it was a straight route from both plants, in Rosserville and Rockville. He had previously driven this route, more times than he could count. *Id.* at 43. Mr. Hembrick allowed him to switch to the gravel route later that morning, and Complainant was able to complete the route with Truck #7 that day. The drive was tough, but manageable. *Id.* at 44. When he returned to the yard, he wrote the truck up for having problems with the clutch. He had done this kind of report for other trucks in the past. The report form includes the company name, truck number, odometer reading, date, and time, and has check boxes to designate the problems. In the process of submitting a report, he was able to request the repair, but he was not able to talk to a mechanic at that time. *Id.* at 45.

On Tuesday, March 15, 2016, Complainant reported to work and drove the gravel route with Truck #7 again. The driving conditions were the same as the previous day. He did not directly report the clutch issues that day, but on his inspection report, he did not check the box asking if all conditions were satisfactory. *Id.* at 46. He did not report the issue to Mr. Hembrick that day. *Id.* at 47.

On Wednesday, March 16, 2016, he was assigned to the sand route. His regular truck, #20, was available, but he was not allowed to use it; he was told to drive Truck #7 again. He inquired as to whether Truck #7 had been repaired, and Mr. Hembrick told him that nothing was wrong with it. Complainant reminded him of the clutch issue, and Mr. Hembrick became aggressive and told him to take his things out of Truck #20 and put them in Truck #7. Complainant mentioned that he was going to report the issue to the DOT, because he felt pressured into driving an unsafe vehicle, and so Mr. Hembrick changed Complainant's assignment to the gravel route, instead. *Id.* at 47-48.

Complainant felt that by Mr. Hembrick telling him to move his things to Truck #7, he was being demoted and punished. He stated:

[3] The parties refer to this route alternately throughout testimony as the "rock quarry route," "rock route," or "gravel route." Again, all of the terms reference the same route.

> If you're hauling the rock quarry route, they would pay by tonnage. And so truck seven didn't haul that much compared to truck 20. So it took me over a year, I think to get to haul – get to drive truck 20, you know, my employment till I got a raise. So he was trying to take me out of that truck and let me stay in truck seven, even before the truck was repaired.

Id. at 48. As noted above, on March 16, 2016, he refused to drive Truck #7 on the sand route because he thought it was unsafe. However, he performed his new assignment of driving it on the gravel route. *Id.* at 48-49. He also spoke to the night mechanic directly about the truck, and they pulled it into the shop. *Id.* at 49.

On Thursday, March 17, 2016, Complainant reported to work, but Truck #7 was in the shop, and according to Mr. Hembrick, Truck #20 was not available. Therefore, he did not work and was only paid for two hours of "show-up time." *Id.*

On Friday, March 18, 2016, Complainant reported to work and was assigned to the gravel route, in Truck #7. He asked Mr. Hembrick whether the clutch had been repaired, but he did not recall getting a response. However, as he drove, he could feel that the clutch was operating better, and it did not stall out at all. *Id.* at 49-50. Complainant identified his Exhibit D, a repair report for Truck #7, dated March 17, 2016, which indicated that the clutch had been adjusted. *Id.* at 50. This removed his reservations regarding driving the truck. *Id.* at 50-51.

Complainant only refused to drive Truck #7 on March 14, 2016. He did not refuse to drive it on the sand route on March 16, 2016. He never refused to work or drive. *Id.* at 51. Complainant identified his Exhibit E, which showed that for the week of March 14, 2016, he hauled to the rock quarry every day except March 17, 2016, when both Truck #20 and Truck #7 were unavailable. *Id.* at 51-52.

Prior to March 18, 2016, Complainant was never issued any type of written disciplinary action or reprimand by Respondent. He was also never warned about any behavioral or conduct issues. *Id.* at 52. He had been accused of "sand bagging," which meant sitting away from the yard and hiding out. However, he never engaged in this activity. *Id.* at 53.

On Friday, March 18, 2016, after Complainant completed his route in Truck #7, he reported to Mr. Hembrick to determine his route for the following Monday. However, he was called into Mr. Hembrick's office and terminated, instead. Mr. Hembrick told Complainant that the termination was due to his attitude, but Complainant believes he was terminated because of the safety issues involving Truck #7, and his statement that he was going to report those issues to the DOT. *Id.* at 53-54, 56-57.

Complainant filed for unemployment benefits after his termination, and on Exhibit F, the Virginia Employment Commission's "Employer's Report of Separation and Wage Information," he indicated that the final incident that led to his discharge was identified by Respondent as being when Complainant told Mr. Hembrick that the truck was unsafe to drive on the dirt route, but okay to drive to the quarry. *Id.* at 54-55. There was also a notation on the form that Complainant did not feel safe driving Truck #7. *Id.* at 55.

Complainant considered Truck #7 to be drivable, but he felt it was a risk, because of the clutch problems that were causing it to stall. *Id.* at 56. He had previously had incidents when he needed to have a truck repaired, and he was given a different truck or had to wait. He felt this incident was different, because he stated he was going to report Respondent to the DOT. *Id.* at 56-57. In refusing to drive Truck #7 on the sand route, he hoped that Respondent would have at least repaired the truck, but he would have preferred that it be taken off service; it was a horrible truck. *Id.* at 57.

After his termination, Complainant was unemployed for about a year. *Id.* at 58. The experience has made him even more conscious of safety, and though he loves driving, he does not want to go through this experience again. *Id.*

On cross-examination, Complainant testified that he did not remember the problem with Truck #20 that caused it to be in the shop on March 14, 2016. *Id.* at 59. On that date, there was another truck available for him to use, aside from Truck #7, but he could not recall the number. He also could not recall if he asked to drive another truck. *Id.* at 60. He refused to drive Truck #7 on the sand route before he had even gotten into it; another driver had reported it as being bad, and it never went into the shop after that report. In addition, even after the clutch on the truck was adjusted, it would go back to having the same problems. It was a problematic truck. *Id.* at 60-61. He knew that as of March 14, 2016, it had been a couple of months since Truck #7 had had its clutch adjusted. His knowledge of this was based on talk amongst the drivers and mechanics, and he thought he received the information from Mr. Oliviera and a few other drivers. *Id*. at 61.

On March 14, 2016, Complainant refused to drive Truck #7 on the sand route. He also did not want to drive it on the gravel route, but given the option of driving the truck or losing his job, he did not have a choice, and agreed to do so. *Id.* at 61-62. He thought the gravel route was safer because it was a straight shot and had fewer driveways, about four. *Id*. at 62.

Looking at Respondent's Exhibit 16, he did not consider it to be an accurate representation of his drive from Luck Stone/Rockville to Luck Stone/South Richmond, because he was scared to take the listed route, but it was correct regarding the portion on Interstate 64. *Id.* at 63. He would merge onto Interstate 64 East at some point west of Richmond, and then remain on the interstate as it merged with Interstate 95 South. While progressing on this route, the speed limit drops from 65 or 70 miles per hour, to 60 miles per hour, and then to 55 miles per hour. The traffic on Interstate 64 East through Richmond is pretty heavy, and the road is three lanes wide for most of the travel. Merging onto Interstate 95 South involves about a 90-degree turn to the south, and the drive then proceeds through downtown Richmond and over a bridge crossing the James River. The traffic sometimes got heavy, but most of the time, it was fairly light. To get off the highway, he took Exit 69, on which the speed limit was 25 miles per hour. He was able to shift between speeds while driving the truck without using the clutch. At the bottom of the exit ramp, he made a right turn, with just a yield sign and merged into traffic. After that, there were two lights that worked in unison, and really seemed like one light to him. On the portion of the drive after getting off the interstate, he passed a few driveways; after going through the two lights, he would make a right turn, go under a bridge, and come out on a road that was pretty open, allowing him to see well. Overall, the drive is at least 20 miles long. *Id.* at 63-69.

Looking at Respondent's Exhibit 17, Complainant testified that it did not accurately reflect the route he would drive for the sand haul.[4] It depicted a traffic circle that was not there when Complainant drove the route, and it did not include his last turn, by which he would have to cross over traffic into the driveway where he would drop the sand/dirt. In place of the traffic circle, there was an intersection with stoplights. *Id.* at 70-71. He considered it to be a short route. There were four traffic lights, and it involved no interstate travel, other than returning to Respondent's site. *Id.* at 71-72.

On the rock quarry route, Complainant was paid by the tonnage that he hauled. On the dirt haul, he was paid by the hour. He possibly could have been paid more on the dirt haul, despite the hourly pay, because he sometimes had to sit and wait for a load at the rock quarry. *Id.* at 72-73. He did not work the sand/dirt route long enough to do an actual comparison between the two routes. *Id.* at 73.

When Complainant drove the gravel route on March 14, 2016, he had problems with the clutch, but continued to drive, because he was afraid of losing his job. *Id.* at 73-74. On that day, when he initially told Mr. Hembrick that he did not want to drive Truck #7 on the dirt route, Mr. Hembrick told him to go home and not come back. *Id.* at 74. In response, Complainant asked if he could do the rock route, and Mr. Hembrick agreed and let him drive. *Id.* at 75. Complainant recalled that it may have been raining that day, which could have contributed to Mr. Hembrick's decision to let him drive a different route; the dirt route might have been shut down. *Id.* at 75-76.

Complainant put in a service request for clutch repairs on Truck #7 after he drove it on March 14, 2016, but the request is not part of his exhibits. Complainant is unsure what happened to it. *Id.* at 76.

On March 15, 2016, Complainant drove Truck #7 only on the gravel route, and had the same clutch issues as the day before. That day, he filled out a driver vehicle inspection report for the truck, and he did not check the box indicating that conditions were satisfactory. However, he had been instructed by Mr. Hembrick not to submit additional work orders after a first work order. *Id.* at 77-78. Therefore, he did not otherwise report the clutch issues in writing that day. *Id.* at 78. He again felt forced to drive Truck #7 that day, for fear of losing his job. *Id.* at 79.

Other than Mr. Hembrick's comment on March 14, 2016, telling Complainant to go home and not come back, nobody else with Respondent told him that if he did not drive Truck #7, he would lose his job. *Id.* at 79-80.

On Complainant's March 16, 2016 vehicle inspection report for Truck #7, he again did not mark the "satisfactory" box, but he did not complete another work order for the clutch, since he had been told not to do so. At the end of the day, he went directly to the night mechanic. *Id.* at 80.

[4] While this exhibit was identified as RX-17 at the hearing, in the documents actually admitted into evidence, the shorter sand route, with a traffic circle, is labeled as RX-15. Therefore, it will otherwise be referred to as RX-15 herein.

Between March 14, 2016 and March 16, 2016, Complainant inquired as to the status of the repair on Truck #20, but Mr. Hembrick did not answer him. He did not talk to any of the mechanics about it. *Id.* at 80-81. It was his understanding, from talking to other drivers, that Truck #20 had been repaired. He asked Mr. Hembrick about it because he was the supervisor; the mechanics would not be able to give him permission to drive the truck again. *Id*. at 81-82. When he told Mr. Hembrick that he was going to report the problems with Truck #7 to the DOT, Mr. Hembrick told him to remove his things from Truck #20 and put them in Truck #7, and never answered him about whether Truck #20 had been repaired. *Id.* at 82. Between March 14, 2016 and March 16, 2016, Truck #20 was physically in the mechanic's shop, but it was not in the repair bay. *Id.* at 82-83.

On March 17, 2016, Truck #7 was with the mechanics for repairs and adjustments. Complainant did not talk to the mechanic that day. When he went to work on March 18, 2016, he was assigned Truck #7 again, and he had no problems with the clutch that day. Mr. Hembrick had assigned him to the gravel route. *Id.*

After his termination, Complainant was unemployed for a year, and eventually ended up finding a job with Hill Phoenix, as a brazer. *Id.* at 84. He did not apply for any trucking jobs after his termination; he was somewhat devastated. He did not seek mental health treatment, but decided to get back into manufacturing. *Id.* at 84-85. He made his first applications for employment a month after his termination from Respondent, with quite a few companies. *Id.* at 85-86. He did look for driving opportunities, but nobody was hiring. *Id.* at 86.

On redirect examination, Complainant testified that the core of the issue that he had with Respondent was safety, and dealing with a truck that was unsafe. When Mr. Hembrick told him to drive the truck, or go home and not come back, he felt that he had to either drive the truck or be terminated. *Id.* at 87.

On the gravel route, Complainant had better visibility, because there were no curves in the road. *Id.* In addition, the route had less traffic, as compared to the sand route. More traffic posed a higher risk of accidents with others. *Id.* at 88.

For March 14, 2016 through March 16, 2016, Complainant did not check the "satisfactory" box on the vehicle inspection reports. He did check the box on March 18, 2016. *Id.* at 88-89.

Complainant believes that he was terminated because he stated that he was going to make a complaint to the DOT. He had refused to drive trucks before, but had never before been told to go home and not come back. *Id.* at 89. When he had refused to drive trucks in the past, he had been offered another truck, or offered an opportunity to wait for the truck to be repaired. *Id.* When Complainant was terminated for alleging a safety issue, he was turned off from the idea of continuing to file safety complaints with trucking companies. *Id.* at 90.

B. Robert C. Foster, Former Employee, R.S. Thomas Hauling, Inc. (TR at 15-28)

Mr. Foster testified that he is a former truck driver for Respondent. He was employed with them from approximately April 2014 to March/April 2016. He has worked as a commercial truck driver for about 23 years. He has known Complainant since 2014. (TR at 15.)

Mr. Foster never observed Complainant interacting with Mr. Hembrick in a negative way. He never observed Complainant being disrespectful or defiant toward Mr. Hembrick. He also never observed Complainant being insubordinate; he usually did anything asked of him. *Id.* at 16.

Complainant fulfilled his duties, with regard to safety. He always inspected his trucks to ensure they were in working order. If he felt a truck was unsafe, he reported it as soon as possible to a mechanic. *Id.* at 16-17. Mr. Foster had known Complainant to report safety issues with trucks to the mechanics a few times. *Id.* at 17.

Mr. Foster had previously driven Truck #7 and was familiar with its issues. He stated:

> It had bad clutch issues. A lot of times, you have to give it a lot of gas to try to get the truck in motion. And it would just stall out on you, and you have to try to grab the brake as soon as possible so it wouldn't roll out on you.

Id. at 18-19. He further testified:

> Well, if you – if it stalls out, it's going to keep rolling. And a lot of times when the engine cuts off, you have to mash the brake real hard to try to get it to stop because it's electronic. So you have to hit the brake. And sometimes when you mash the brake, it'll still keep on rolling on you. So it would roll out, you know, into an intersection if you're not careful.

Id. at 19. The drivers were usually assigned Truck #7 if their own truck was broken down. They referred to it as the "punishment truck" because there was always something wrong with it, most often the clutch problem described above. Mr. Hembrick assigned the truck while knowing that it had the clutch issue. *Id.*

Mr. Foster recalled Mr. Hembrick assigning Truck #7 to Complainant in March 2016, and Complainant's response was that it was unsafe to drive and that he could not do so. *Id.* at 19-20. Mr. Foster was not familiar with the route to Respondent's Wal-Mart site, but he was familiar with the rock quarry route. *Id.* at 20. He also would have refused to drive Truck #7, knowing about its clutch issues. *Id.* He and other drivers had made complaints about Truck #7 being unsafe to drive because of the clutch. *Id.* at 25.

On cross-examination, Mr. Foster testified that he drove Truck #7 approximately two times. He last drove it at the end of 2015 or beginning of 2016. *Id.* at 25-26. After driving the truck, he reported the problem with the clutch, which resulted in the truck being inspected, but it was not repaired and fixed. *Id.* at 26. He testified that he knows that the truck was not repaired between January 2016 and March 2016, because he knows a person that bought the truck and finally fixed it, by tearing down and rebuilding the transmission. *Id.* at 27.

Mr. Foster testified that drivers would have to use Truck #7 when their usual trucks broke down. There might have been one other spare truck, but Mr. Foster could not specifically recall. *Id.* at 28. Mr. Foster quit his job with Respondent to take an over-the-road position. *Id.*

C. Randy Thomas, Owner and President, R.S. Thomas Hauling, Inc. (TR at 91-99)

Mr. Thomas testified that his office manager produced Respondent's Exhibits 16 and 17, and he physically drove the routes. He wrote down every stoplight, turn, and yield, in order to be able to do an exact comparison of the routes, and did not feel there was a lot of difference, in terms of their safety for truck driving. (TR at 92.)

Mr. Thomas did not agree that the gravel route was a straight shot, without a lot of stoplights and side streets. He reported that the route had five stoplights, three or four of which were after taking Exit 73 for Maury Street. If taking the exit used by Complainant, for Bells Road, there are two lights. *Id.* at 92-93. When leaving Rockville/Luck Stone, the route goes down Route 623 for about one mile, and there are multiple driveways and a couple of businesses in the area. There is a traffic light, more straight driving down Route 623, and then a left onto Interstate 64 East. *Id*. at 94. Mr. Thomas also noted that using the Bells Road exit is about three to four miles longer than using the Maury Street exit off the highway. *Id.*

Mr. Thomas testified that both the gravel route and sand route have driveways thereon. He would not characterize the gravel route as a "straight shot." He would also not consider it to be a more relaxed drive, because there is a lot of heavy traffic on Interstates 64 and 95 through Richmond. *Id.* at 95-96.

On cross-examination, Mr. Thomas testified that the sand haul is a shorter term job for the company, and that he is more familiar with the stone haul, because they have been doing it for years. However, he ran a cycle time on the dirt haul, in order to be able to give a price for the work they do, and ran it again to get the information for this action. *Id.* at 98. He has never driven Truck #7 on either route, so he does not have personal knowledge of any issues driving the truck in 2016. *Id.*

D. Russell Hembrick, General Superintendent, R.S. Thomas Hauling, Inc. (TR at 99-117)

Mr. Hembrick testified that during the week of March 14, 2016, he had to put Complainant's truck, Truck #20, in the shop. The only spare truck on the yard for him to drive was Truck #7. (TR at 100.) Truck #20's lift axle bushings and orca pin bushings in the back of the truck had to be replaced. The truck was out of commission from March 14, 2016 to March 18, 2016 for these reasons. It was not returned to service at any time during that period. *Id.* at 101.

After Mr. Hembrick assigned Truck #7 to Complainant, he told Mr. Hembrick that he did not feel comfortable driving the truck on the dirt job. *Id.* Complainant said that he did not feel comfortable with the clutch on the truck. Mr. Hembrick stated, "I told him that I needed him on the dirt job. He said he didn't want to go. So I gave him the option of going to the gravel job for this day." *Id.* at 102. Mr. Hembrick denied telling Complainant that if he did not drive Truck #7, he should go home and not come back. He said, "No. That wasn't quite the case. I told if he did

not want to drive truck number seven, he had to go home. I had nothing else for him to drive." *Id.* at 103. He did not indicate to Complainant that he would be terminated if he did not drive Truck #7. *Id.*

After their conversation, Complainant decided that Truck #7 was safe enough for him to go to the gravel job. Complainant had not driven Truck #7 on March 14, 2016, before he claimed it had a problem with the clutch. When Complainant started his job with Respondent, he first drove Truck #7 as his assigned truck. He probably drove it after that too, because it was the spare truck that was used whenever a truck broke down. *Id.* at 103-104. The company did not have any other spare trucks in March 2016. *Id.* at 104.

After Complainant drove the gravel route on March 14, 2016, Mr. Hembrick gave him an assignment for the next day. Complainant did not say anything to Mr. Hembrick about the clutch issues with Truck #7 until Mr. Hembrick assigned him to the dirt haul with Truck #7 the next day. *Id.* at 104-105. Mr. Hembrick responded to Complainant that he did not think there was anything wrong with the clutch. In his testimony, he described how to use the clutch on that truck and indicated that a good truck driver knows how to handle it. In addition, Mr. Hembrick looked on the truck inspection sheet from that day, and saw that Complainant had not listed anything as being wrong with the clutch. *Id.* at 106. Respondent has no documents showing that on March 14, 2016, Complainant made a written report requesting clutch repairs on Truck #7. *Id.* at 107. Further, Mr. Hembrick did not tell Complainant not to mark problems with the truck on the daily inspection report because he had already reported the issues. *Id.*

On March 15, 2016, Complainant drove the gravel route; Mr. Hembrick did not force him to do the dirt route. *Id.* That day, when Complainant filed his driver inspection report, he did not list any clutch problems with Truck #7, nor did he have any discussion with Mr. Hembrick about it, either before or after his shift. *Id.* at 107-108.

All drivers were assigned to the gravel haul on March 16, 2016, because the dirt haul was rained out. *Id.* at 108. That evening, Complainant told Mr. Hembrick that he had spoken to the mechanic and told him that Truck #7 had clutch problems. Mr. Hembrick told the mechanic to put the truck in the shop, check it from front to back, and let him know if anything was wrong with it. Complainant could not work the following day, because Truck #7 was in the shop the whole day. *Id.* at 109. Mr. Hembrick did not threaten to take any adverse employment action against Complainant for reporting the clutch issue that day. *Id.* at 109-110.

Truck #7 came out of the shop on the evening of March 17, 2016. The mechanic report indicated that the clutch was loosened. The mechanic did not report any other issues with the clutch of the truck. *Id.* at 110.

On March 18, 2016, Mr. Hembrick assigned Complainant to the dirt haul, but he refused the assignment. He said the truck was unsafe to drive on that route. Therefore, Mr. Hembrick let him go back on the gravel route. *Id.* at 111. When Complainant returned at the end of the day, Mr. Hembrick called him into his office, and told him that they could not use his services anymore. At that time, Mr. Hembrick did not provide a reason for the termination, and Complainant got up and walked out. *Id.* at 111-112. The actual reason Mr. Hembrick terminated Complainant was

because he would not do what was asked of him, including his assigned jobs. *Id.* at 112. The termination was not related to the issues that Complainant raised with the clutch on Truck #7 that week. *Id.*

On cross-examination, Mr. Hembrick indicated that Respondent keeps a copy of the daily vehicle inspection reports, and would have copies of the reports for Truck #7 from March 14, 2016 through March 18, 2016. *Id.* at 113. During the time period at issue in this matter, Mr. Hembrick was supervising about 30 truck drivers. He has accurate recall regarding the assignments for all 30 drivers each day in 2016. *Id.* at 113-114.

In addition to adjusting the clutch on Truck #7 on March 17, 2016, the mechanic also replaced two tires and put on a hard pan gasket. *Id.* at 114.

Mr. Hembrick provided information to Respondent's office manager regarding the reason for Complainant's termination. *Id.* He did not otherwise document anything regarding Complainant during the week of March 14, 2016. *Id.* at 115-116. He reported information about the termination to the office manager or Mr. Thomas after it occurred; he did not report anything to them about Complainant's safety complaints before making the decision to terminate him. *Id.* at 116.

II. Written Statements

A. Correspondence to Complainant from Mandy Davenport, Office Manager, R.S. Thomas Hauling, Inc., dated May 24, 2016

Ms. Davenport sent correspondence to Complainant, in response to a letter Respondent received from the Department of Labor in connection with this claim. In her letter to Complainant, Ms. Davenport responded to Complainant's allegations and requested certain information. Her responses included the following account of the events on March 14, 2016:

> You were told by Russell Hembrick that if you could not drive RST 7 that you would have to go home because there were not any additional trucks available for you to drive that day. After telling Russell Hembrick that you were not going to drive RST 7, you pulled the truck in the shop and told Ray Hamilton, Shop Foreman, that the seat would not go all the way back. Russell Hembrick sat in the seat and Ray Hamilton found there was a bolt hung in the seat. After fixing the seat, you drove RST 7 to Luck Stone and hauled 5 loads.

(CX-H at 1.)

Ms. Davenport referenced an Exhibit 2 to her letter (which was not admitted into evidence), showing that Complainant drove Truck #7 on March 15, 2016 and March 16, 2016, as well. She stated that this exhibit also included a copy of a vehicle inspection report with Complainant's signature, stating that the condition of the vehicle was satisfactory. *Id.* Exhibits 3, 4, and 5 to her letter included copies of a paycheck stub for Complainant, a March 17, 2016 repair order for Truck #7, and documentation that Complainant drove the gravel haul again on March 18, 2016. *Id.* at 2.

Finally, Ms. Davenport stated:

> You stated that upon your return to the office on March 18, 2016 you were informed by Randy Thomas that you were being let go due to your attitude. Exhibit 6, which consists of 5 pages, is a printout from Apple Vacations showing that Randy Thomas was in Mexico until March 18, 2016 with a return flight to Dulles International Airport at 4:10 pm. You have made a false statement about Randy Thomas.

Id.

B. Correspondence to Ms. Davenport from Complainant, dated July 6, 2016

Complainant sent this correspondence to Ms. Davenport in response to her May 24, 2016 letter. With regard to March 14, 2016, he stated:

> On 3-14 when I came to work, I discovered my usual truck (truck 20) was in the shop and was told to drive truck 7 by Russell Hembrick. I was leery about driving truck 7 on that particular route (which was not my usual route) because it had a clutch issue (the clutch would cause the truck to stall). I told him I did not want to drive that truck on that route due to safety concerns but before I could give him specifics, he told me that if I did not want to drive that truck to "go home and don't come back." I asked another driver (Patrick Olivier) to verify what was wrong with truck 7, as other drivers knew the situation also. Patrick told Mr. Hembrick that he did not like to drive truck 7 either.

(CX-I at 1.) Complainant represented that around 4:45pm on that day, he wrote up the clutch issues for Truck #7. *Id.*

In his letter, Complainant next addressed March 16, 2016, stating the following:

> On 3-16 Mr. Hembrick told me to drive truck 7 and I told him I would not drive it on that route due to the unsafe clutch. I asked him if it had been repaired and he responded "no, nothing is wrong with the truck." He then told me to take my things out of truck 20 (my normal truck) and put them in truck 7. This was seen by me as a "punishment" because it was a demotion for me—only because I verbalized the safety factor. My response was that I would call DOT and report him.

Id. Complainant further stated that after his experience with Mr. Hembrick that day, he reported the problems with Truck #7 to the head night mechanic. Another driver walked up during that conversation and verified the issues. He found out the next day that the truck had been taken out of service to be repaired. *Id.*

Complainant stated that he did not recall saying that he was "forced" to drive Truck #7, but that he felt pressured to choose between driving an unsafe vehicle and losing his job. Also, he

never told Mr. Hembrick that he would not drive Truck #7 at all, but told him that he would not drive it on a particular route. *Id.* at 2. He stated:

> That route has more traffic lights, blind curves, drive ways people pull out of, school buses, narrower roads and a heavier flow of traffic, which concerned me with the unsafe clutch. The route to the Luck Stone Boscobel Quarry is a much wider road, less traffic, much fewer lights, straight shot, no hidden curves or hidden driveways, and a wider view, making it safer because I did not have to use the clutch as much.

Id.

Complainant agreed that Truck #7 was repaired on March 17, 2016, and indicated that when he drove the truck on March 18, 2016, he noticed that it was in better condition. He stated that he had not been asked to take Truck #7 on the route in question again, and he would have done so, since it had been repaired. Instead, he was terminated and was told the grounds were his attitude. *Id.* Finally, with regard to speaking with Mr. Thomas, Complainant stated:

> In my OSHA form, I did not use the date of March 18, as far as speaking with Mr. Randy Thomas. I wrote March 2?, symbolizing the 20 (something). I did not remember the exact date but it was in the 20's.

Id.

C. Statement of Mr. Foster, Undated

Among other various assertions in his written statement, Mr. Foster represented that he had known Complainant since 2014, when they were both employed by Respondent, and that he had never heard about or observed Complainant being defiant, disrespectful, or inappropriate in his communications or behavior. (CX-K at 1.)

During Mr. Foster's own employment with Respondent, he had seen numerous incidents where Respondent would delay in making truck repairs or responding to work order requests. *Id.* He stated that it was well-known among the drivers that Truck #7 had clutch problems that caused it to stall, and he had experienced the problems with Truck #7 himself, while driving it on one occasion. He had reported the clutch issue to the mechanic. *Id.* Mr. Foster indicated that there were numerous work orders and inspection reports for Truck #7 noting the clutch issue. *Id.*

Mr. Foster reported that Complainant brought safety and communication issues to Mr. Hembrick's attention during his employment, including Mr. Hembrick not providing enough notice for Saturday scheduling. Mr. Foster also stated that when Mr. Hembrick was annoyed with Complainant, he would speak to Complainant in a demeaning fashion. *Id.*

Mr. Foster stated that when Mr. Hembrick assigned Truck #7 to Complainant in March 2016, there were other trucks available to drive, and that the assignment was made as a punishment for Complainant's comments about the schedule and response to safety issues. The drivers referred

to Truck #7 as the "Punishment Truck", and it usually remained unassigned, unless there was full staff working for the day or Mr. Hembrick wanted to reprimand a driver. *Id.*

Complainant wished to remain in strict compliance with driving regulations, including the number of hours for driving, and Mr. Hembrick would sometimes be upset with Complainant for returning early to the yard, even if had completed his quota of loads for the day. *Id.* at 2. When Complainant felt a truck was unsafe, he made a verbal report and refused to drive it. In most cases, this was not an issue because another truck would be assigned. *Id.*

With regard to the very specific incidents at issue in this matter, Mr. Foster stated:

> 20. In the last week of his employment, Mr. Clayton expressed that Truck #7 was unsafe based on the clutch issue described in paragraphs 7 and 8.
>
> 21. He agreed to drive Truck #7 if he was assigned transport to the rock quarry. I support Mr. Clayton's rationale in agreeing to drive Truck #7 to the rock quarry rather than the Walmart site based on the route conditions and frequency in having to engage the clutch.
>
> 22. In driving to the Walmart site, the driver would exit Interstate 64 West and immediately need to ascend a hill and pass three or four lights before reaching the work site. There is high traffic along this route.
>
> 23. In driving to the rock quarry, the driver would exit 295 on flat terrain and only encounter one traffic light prior to reaching the quarry. This route involved significantly less use of the truck's clutch. There is less traffic along this route.
>
> 24. I attest that if made to drive Truck #7, driving to the quarry was much safer than driving to the Walmart site with respect to the clutch issue.

Id. Mr. Foster concluded that Complainant's termination was due to his complaints about Truck #7. *Id.*

III. Documentary Evidence

A. R.S. Thomas Hauling, Inc. Company Policies and Procedures

Complainant signed a copy of Respondent's policies and procedures on April 4, 2014, agreeing to comply with them during his employment. (CX-A at 2.) These policies and procedures include, in pertinent part, the following:

> 3. All employees will follow their supervisor's instructions. Insubordination or failure to follow a supervisor's instructions will not be tolerated.

7. All safety rules will be followed at all times. This includes but is not limited to speed limits, proper lane changes, and following distances.

13. All drivers will obey the laws of the state in which they are driving and will report any traffic violation and/or citations received immediately.

16. Any "at-fault" accident is grounds for termination.

17. You are responsible for maintaining your CDL license. Excessive points on your driving record, not paying fines, etc. could result in our insurance company not being able to "insure" you. If this happens, you will not be eligible to work here.

Id. at 1. The policies and procedures further provide that written and/or verbal warnings would be given for rule violations, and that serious or repeated violations may result in immediate suspension or discharge, at the supervisor's discretion. *Id.*

B. Insurance Correspondence

On June 9, 2015, Joby Webb, from Nansemond Insurance Agency, send an e-mail to a representative of Respondent, with subject "Driver Clayton." Mr. Webb indicated that Complainant had been approved by the insurance company on a probationary basis. He stated, "He is okay to drive for you he just cannot get any moving violations or be involved in any at-fault accidents." (CX-B.)

C. Truck #7 Repair Order

A repair order was completed for Truck #7 on March 17, 2016. A total of six items were requested, and they included checking the truck over and repairing as needed, as well as adjusting the clutch. There is no signature on the order. (CX-D.)

D. Complainant's Hauling Records

Complainant's pay records from the week of March 14 through March 20, 2016, show that he completed hauls designated as "Luck Stone – Transfer from Rockville" on March 14, 2016, March 15, 2016, March 16, 2016, and March 18, 2016. (CX-E.)

E. Virginia Employment Commission Documents

On April 6, 2016, Respondent's office manager, Mandy Davenport, completed Employer's Report of Separation and Wage Information, which was sent to Respondent by the Virginia Employment Commission, due to Complainant's claim for unemployment compensation. On the form, Ms. Davenport stated that "his attitude" was the reason given to Complainant for his discharge. She stated that he had been warned about his conduct on April 11, 2018[5] and January

[5] This date is presumably a typo, since the form is dated 2016. Possible correct dates, given the term of Complainant's employment, are April 11, 2014 and April 11, 2015.

21, 2016, and specifically, that he had been warned about not wanting to work on Saturdays and not wanting to push snow. (CX-F at 2.)

Ms. Davenport further indicated that the final incident leading to Complainant's termination was as follows: "Mr. Clayton told Russell Hembrick that the truck was unsafe to drive on a dirt haul but was ok to drive to the quarry." *Id.* She stated that Complainant was discharged for a violation of a company rule/policy. *Id.* In terms of additional comments, Ms. Davenport said, "Mr. Clayton did not want to push snow either – told Russell Hembrick that he couldn't push snow because it may cause him insurance problems with his CDL." *Id.* Finally, she notated that Complainant did not feel safe driving Truck #7. *Id.*

On April 19, 2016, the Commission issued its determination on Complainant's unemployment compensation claim. The determination letter stated the following:

> The Claimant last worked for R S Thomas Hauling Inc on 3/18/16. The Employer discharged the Claimant citing his attitude.
>
> Section 60.2-618(2) of the Virginia Unemployment Compensation Act provides that an individual shall be disqualified if it is found that he was discharged as a result of misconduct in connection with work. Misconduct exists when it is shown that there was a willful or substantial disregard of the employer's interests or standards of behavior that the employer has the right to expect of its employee.
>
> In this instance, the information presented does not establish that the Claimant was discharged due to misconduct in connection with work. Therefore, the Claimant is qualified for benefits.

(CX-G at 1.)

F. Complainant's Driving Record

1. January 22, 2014 Accident

On a Police Crash Report, dated January 22, 2014, Complainant was noted to have been in an accident in his personal vehicle. The diagram of the accident indicates generally that Complainant was not at fault, as the other driver turned into his lane of traffic and collided with him. The other driver was issued a summons for the incident, while Complainant was not. (RX-11.)

2. Complainant's Driver History Transcript, dated March 21, 2014

Complainant's transcript from the Virginia Department of Motor Vehicles, dated March 21, 2014, indicates that on July 26, 2011, he had an offense in his commercial vehicle for having a logbook that was not current. He was convicted of this offense on October 21, 2011. There was no associated accident listed. (RX-12 at 3.)

In addition, this transcript shows that he was convicted of an improper equipment offense for his commercial vehicle in January 2013, with an offense date of December 7, 2012. There was also an accident noted for this date. *Id.* at 2.

3. Complainant's Driver History Transcript, dated January 20, 2015

Complainant's updated driving transcript shows that on January 22, 2014, October 24, 2014, and December 8, 2014, he was involved in accidents in both his personal and commercial vehicles, but there were no tickets or convictions associated with these accidents. (RX-12 at 6-7.)

4. October 28, 2015 Accident

Complainant's daily attendance record shows a notation that on October 28, 2015, he had an accident, when he ran into the back of a car at an intersection. (RX-8 at 2.)

G. Documentation of Gravel Route and Sand Route

Respondent submitted Google Maps printouts of three routes. Respondent's Exhibit 15 is labeled Eastgate Town Center, and based on testimony, apparently depicts the current "sand route."

Respondent's Exhibit 16 depicts a route from Luck Stone Rockville to Luck Stone South Richmond, which is presumably the gravel route that Complainant drove during the week at issue, based on his pay records for the week. (CX-E.) Respondent's Exhibit 17 also depicts a route to Luck Stone South Richmond, but from Luck Stone Boscobel.[6]

CREDIBILITY DETERMINATIONS

The factfinder is entitled to determine the credibility of witnesses, to weigh evidence, and to draw her own inferences from evidence, and the factfinder is not bound to accept the theories or opinions of any particular witness. *See, e.g.*, *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968). In weighing testimony, an administrative law judge may consider the relationship of the witnesses to the parties, the interests of the witnesses, and the witnesses' demeanor while testifying. An administrative law judge may also consider the extent to which the testimony is supported or contradicted by other credible evidence. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan. 31, 2006). Additionally, the Administrative Review Board ("the ARB" or "the Board") has held that an administrative law judge may "delineate the specific credibility determinations for each witness," although such delineation is not required. *See, e.g.*, *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-8 (ARB July 2, 2009) (noting that the ARB prefers such delineation, but does not require it). My findings set forth in this Decision and Order are based on my perceptions while receiving the witnesses' testimony in this matter, and my review and consideration of the entire

[6] Ms. Davenport and Complainant each referenced Complainant driving the Boscobel gravel route during the week at issue in their May 24, 2016 and July 6, 2016 correspondence, respectively. (CX-H; CX-I.) However, as noted herein, Complainant's pay records for the week show that he drove the Rockville route, and this was also the route on which he was questioned during the hearing. (CX-E; TR at 63-69.)

record in this case, including my findings as to the demeanor of the witnesses and the rationality or internal consistency of the witnesses' testimony in relation to the evidence as a whole.

There are a number of factors here that generally undermine the veracity of Complainant's statements in this matter. First, Complainant seemed to have a tendency to engage in exaggeration during his testimony. For example, he portrayed himself as having a primary focus on safety over the course of his 30-year career, as well as being very knowledgeable about DOT regulations. He also stated that of several vehicle accidents he had had over the years, only one was his fault. (TR at 13, 31.) However, Complainant's official driving records show that he was convicted of offenses in his commercial vehicle on October 21, 2011 (logbook not current) and January 2013 (improper equipment), and there was an accident associated with the second offense. (RX-12 at 2-3.) Then, he had three additional vehicular accidents in 2014, though there were no convictions associated with these incidents. *Id.* at 6-7. In addition, Complainant had an accident in his commercial vehicle on October 28, 2015, when he rear-ended a car at an intersection. (RX-8 at 2.) Therefore, the evidence actually shows a relatively excessive record of accidents in recent years, as well as at least two convictions for violations and an accident in October 2015 that was clearly and admittedly his fault. This accident and violation history, as well as the fact that Complainant was flagged by Respondent's insurance company and placed on probation, do not support his allegations regarding his focus on safety.

Second, I found much of Complainant's testimony during the hearing to be vague. For example, on cross-examination, he could not remember why his regular truck, #20, was in the shop during the week at issue. He remembered there being another alternate truck, aside from #7, available to use, but could not recall the number. He could not recall if he asked to drive this other truck. (TR at 59-60.) He refused to drive Truck #7 on March 14, 2016 before even trying it out, and testified that his knowledge of the problems was based on talk amongst the drivers and mechanics. However, he did not have any specific information to support this, other than saying than an unidentified driver had reported the truck as having problems, and it had never gone into the shop after that. *Id.* at 60-61.

Third, I also found Complainant's testimony to be inconsistent on a number of points. For example, he testified that he did not apply for trucking jobs after his termination, because he was "devastated" by the situation with Respondent. *Id*. at 84-85. However, he then stated that he looked for driving opportunities, but no one was hiring. *Id.* at 86. Similarly, on direct examination, Complainant stated that he never refused to work or drive, but this is inconsistent with his testimony and arguments that he refused to drive Truck #7 on March 14, 2016, when requested to take the sand route. *Id.* at 51. Also, Complainant initially testified that during the course of his employment, he and Mr. Hembrick had negative interactions about his refusal to operate a snow plow, Complainant coming back early from the rock quarry, and Complainant not wanting to work on Saturdays. *Id.* at 34-38. These conflicts were reflected on Respondent's filing with the Virginia Employment Commission. (CX-F at 2.) However, later in his testimony, Complainant reported that he had never been warned about any behavioral issues or other conduct. (TR at 52.) These examples show shifts and changing facts in Complainant's story, and have a tendency to undermine his overall credibility.

In addition, Complainant testified multiple times regarding written reports that he claims to have made about the alleged clutch problems with Truck #7 during the week at issue. However, none of these reports are in evidence. He stated that on March 14, 2016, he completed a report asking for a repair to Truck #7's clutch, but when asked why it was not a part of his evidentiary submissions in this case, he stated that he had moved and was unsure what happened to it. *Id.* at 45, 76. Mr. Hembrick testified that when he looked on the truck inspection sheet from that day, Complainant had not listed any problems with the clutch on Truck #7. In addition, he stated that Respondent does not have any documents showing that on March 14, 2016, Complainant requested repairs on Truck #7. *Id.* at 106-107. Therefore, the evidence as a whole does not support Complainant's contentions regarding his written report of the alleged clutch issue on March 14, 2016.

Similarly, Complainant testified that after driving the truck on March 15, 2016 and March 16, 2016, he did not check the box on his inspection report that asked if all conditions were satisfactory. *Id.* at 46, 80, 88-89. However, again, Mr. Hembrick stated that at least on March 15, 2016, Complainant did not note any clutch problems with Truck #7 on his inspection report. *Id.* at 107-108. Ms. Davenport similarly noted in her May 24, 2016 letter to Complainant that he had marked the vehicle as being satisfactory on these inspection reports. (CX-H.) The statements of Mr. Hembrick and Ms. Davenport, combined with the lack of supporting evidence (such as the reports themselves) for Complainant's contentions, tends to indicate that the reports are not consistent with his testimony, and Complainant is not credible on this point.

Complainant's contentions as to the severity of the alleged clutch problems in Truck #7 and his view that driving the truck was a "demotion" also do not garner much support from the totality of the record. Mr. Hembrick testified that there was nothing wrong with the clutch on the truck; he reported that it has a computer-controlled fuel injection, which means that the computer would automatically feed fuel to the engine when the driver let out on the clutch. (TR at 106.) Therefore, Mr. Hembrick's testimony indicates that Complainant's and Mr. Foster's description of the truck as stalling after being put in motion was due to them not knowing how to utilize the fuel injection in the truck, rather than a problem with the clutch. Furthermore, when Truck #7 finally went into the shop on March 17, 2016 to be checked, the clutch was merely loosened, and it did not require significant repair. *Id.* at 110. All of this certainly refutes the allegations in the record of this truck as being assigned for "punishment" purposes.

In addition to this, Complainant's own actions and testimony show that he likely did not actually believe the clutch problems were as severe as alleged. Specifically, he agreed to drive the truck on the gravel route instead of the sand route, alleging that he felt the gravel route was safer, but the evidence does not fully support his allegations about the nature of the routes. He testified that the sand route had more traffic, more aggressive drivers, a stoplight requiring him to cross over traffic, and many blind curves and private driveways. *Id.* at 41-42, 44. Alternatively, he portrayed the gravel route as having better visibility and being a straight shot. *Id.* at 43. However, he also admitted that the gravel route was over 20 miles long on a major highway through downtown Richmond, whereas the sand route was much shorter. *Id.* at 63-72. Furthermore, Mr. Thomas testified that the gravel route was not a straight shot, it also involved traffic lights and driveways, and it was not relaxed, because there was a lot of heavy traffic on the interstates. Complainant's version of the route, which involved taking the Bells Road exit instead of the Maury

Street exit, was even longer than the typical drive, by another three to four miles. *Id.* at 92-96. As such, the evidence does not clearly support Complainant's contentions that he only felt comfortable driving Truck #7, with its alleged clutch issues, on the gravel route. This route was not objectively "safer" than the sand route, and was actually longer and involved driving for a length of time on major interstate highways. If Complainant truly felt that the clutch issues in Truck #7 presented a significant safety issue, he would not have felt comfortable taking the truck on the gravel route, either.

Mr. Foster's statements on many of these points are similarly questionable. While he made allegations about Truck #7 having clutch issues, some of his related statements were quite vague. He stated that he had driven the truck and made complaints about it, but failed to provide any specifics, such as to whom he made the complaints and when they were made, nor was any supporting documentation introduced. *Id.* at 25-26. He also said that he knows the truck was not repaired by March 2016, because he knew a person who had bought it and rebuilt the transmission. However, given the convenience of this allegation, it is not credible without further detail or documentation. *Id.* at 27. Finally, Mr. Foster indicated in his written statement that he supported Complainant's rationale in not wanting to take Truck #7 on the sand route, due to the conditions of the drive, but he admitted at the hearing that he had never driven the sand route himself. (CX-K at 2; TR at 20.)

For all of these reasons, I do not credit all of Complainant's testimony, or Mr. Foster's testimony. Inconsistencies, vagueness, and exaggerations all cast doubt on many of Complainant's allegations. In reaching my decision in this case, I will take into consideration the credibility assessments discussed above.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. STAA Legal Framework

To prevail in a STAA whistleblower complaint, the complainant must prove by a preponderance of the evidence that he 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); 20 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-20, 2008 STA-21 (ARB June 27, 2016).

II. Complainant's Prima Facie Case

As set forth above, to establish a case for retaliation, Complainant must show by a preponderance of the evidence that (1) he engaged in protected activity, (2) he suffered an unfavorable personnel action (adverse action), and (3) his protected activity was a contributing factor in the adverse action.

A. Protected Activity

1. Complaint Provision

Under the STAA, there are several different kinds of protected activity, the first of which is commonly referred to as the "complaint provision." In brief, an employer is prohibited from taking an adverse action against an employee if the employee has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, is perceived to have done so, or is perceived as being about to do so. 49 U.S.C. § 31105(a)(1)(A).

Safety complaints under this provision may be made to management or a supervisor and may be "oral, informal, or unofficial." *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-041, slip op. at 4 (ARB Mar. 27, 2012); *see also Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 7 (ARB Jan. 31, 2011). For a tribunal to consider a complaint to be protected activity, a complainant needs to demonstrate that he reasonably believed that there was a safety violation. "The reasonableness of a complainant's belief is assessed both subjectively and objectively, with the 'subjective' component satisfied by showing that the complainant actually believed that the conduct he complained of constituted a violation of relevant law." Then, the "objective" component is evaluated based on a "reasonable person" standard, asking whether such a person in the same circumstances and with the same training and experience as the complainant would think that a violation occurred. *Garrett v. Bigfoot Energy Services, LLC*, ARB No. 16-057, ALJ No. 2015-STA-047, slip op. at 7 (ARB May 14, 2018).

The complaint need only "relate" to a violation of a commercial motor vehicle safety standard and "[u]ncorrected vehicle defects, such as faulty brakes, violate safety regulations and reporting a defective vehicle falls squarely within the definition of protected activity under STAA." *Maddin v. Transam Trucking, Inc.*, ARB No. 13-031, ALJ No. 2010-STA-20, slip op. at 6-7 (ARB Nov. 24, 2014). In other words, protection under the complaint clause is not dependent on actually proving a violation of a federal safety provision. *See Yellow Freight System, Inc. v. Martin*, 954 F.2d 535, 357 (6th Cir. 1992). Rather, it is sufficient to show a reasonable belief in a safety hazard.

It is well-reported by both Complainant and Mr. Hembrick that Complainant made a safety complaint regarding Truck #7's clutch on March 14, 2016, when he was assigned to but declined to drive the truck on the sand route and was thereafter assigned to the gravel route, instead. (TR at 39-44; 101-105.) In addition, Complainant argues in his post-hearing brief that on Wednesday,

March 16, 2016, when he voiced his plan to Mr. Hembrick of filing a complaint with DOT because of being forced to drive an unsafe truck, he engaged in protected activity, in that he was perceived as being about to file a complaint. (Complainant's Br. at 10-11.) This is also the date the Complainant testified to speaking to the night mechanic about the truck after his shift, and Mr. Hembrick confirmed that after Complainant related this conversation to him, he told the mechanic to put the truck in the shop and give it a thorough check. (TR at 49, 109.)

Pursuant to the applicable law, set forth above, these oral complaints by Complainant can constitute protected activity, so long as Complainant can also demonstrate that he reasonably believed that there was a safety violation. Under the subjective component of the test, he must show that he actually believed that the issue of which he complained constituted a violation of relevant law. As noted above, uncorrected safety defects do violate safety regulations. However, Complainant's credibility issues undermine the possibility that he actually believed there was a safety defect that violated the law.

Specifically, as discussed above, Complainant had not yet even tried to drive Truck #7 when he first complained about the clutch, on March 14, 2016. To the extent that he was relying on talk amongst his co-workers about the truck to conclude that it had a problem, this is not sufficient to give rise to an actual, reasonable belief on his part that there was a safety defect that violated the law.

Furthermore, there is no written evidence in the record to support Complainant's contentions that he completed a repair order and inspection reports for the truck reflecting a problem with the clutch, and to the contrary, Mr. Hembrick and Ms. Davenport indicated that these written documents do not exist. (TR at 106-108; CX-H.) Therefore, it appears that Complainant drove the truck on Monday, Tuesday, and Wednesday of the week at issue without making a written report of the alleged problems, which further indicates that he did not have an actual belief of an illegal safety defect.

Finally, Complainant's alleged actual belief in a safety violation is significantly undermined by his agreeing to drive Truck #7 on the gravel route, as a purported alternative to the sand route. As discussed in detail above, it is not clear that the gravel route was "easier" than the sand route, as evidenced by its longer distance and its use of major interstate highways with traffic, as well as by the testimony of Mr. Thomas regarding the characteristics of the routes. At the very least, the differences between the two routes were not so marked as to make the gravel route so much safer that Complainant could actually believe that a genuine clutch problem would not affect him on the gravel route. In addition, for practical purposes, a safety violation due to an uncorrected vehicle defect would be in existence regardless of the road conditions in which the vehicle is being used, and it could not be cured by taking the truck on a purportedly safer route. This further undermines Complainant's actual belief in such a violation.

The evidence also does not support a finding that the objective component of the "reasonable belief" test is satisfied here. Again, this test pertains to whether a reasonable person in the same circumstances and with the same training and experience as Complainant would think that a violation occurred. Based on the testimony of Mr. Hembrick, Complainant's alleged belief was not objectively reasonable. As noted above, he reported that the truck had a computer-

controlled fuel injection, which accounted for Complainant's (and Mr. Foster's) difficulty with the clutch. *Id.* at 106. In addition, the fact that the truck did not have a serious clutch issue, and particularly one that would rise to the level of an illegal safety defect, is supported by the "repair" that was eventually undertaken on March 17, 2016, during which the clutch was simply loosened. *Id.* at 110. This evidence, combined with Complainant's questionable credibility in this matter, leads to my conclusion that the objective component of the test has not been met.

For all of these reasons, I find that Complainant has not sufficiently shown, by a preponderance of the evidence, that his complaints regarding Truck #7's clutch problems constituted protected activity under the STAA.

2. "Refusal to Drive" Provision

The second category of protected activity under the STAA is typically referred to as the "refusal to drive" provision. This part of the statute prohibits an employer from taking an adverse action against an employee if the employee refuses to operate a vehicle either because (1) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security, or (2) the employee has a reasonable apprehension of serious injury to himself or the public because of the vehicle's hazardous safety or security condition. 49 U.S.C. § 31105(a)(1)(B). The statute further provides that "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health." 49 U.S.C. § 31105(a)(2). In addition, for the employee's activity to be protected, he has to seek correction of the hazardous safety or security condition from the employer, and be denied. *Id.*

Complainant argues that his initial refusal to drive Truck #7 on March 14, 2016 was borne out of his fear of causing injury to himself or others, which was reasonable given the truck's known clutch issues. He argues his reasonable apprehension was also confirmed by Mr. Foster's testimony. When faced with possible termination, he asked for another vehicle to drive, and eventually settled for driving the gravel route, which he considered less hazardous. (Complainant's Br. at 11-12.)

In response, Respondent argues that Complainant did not actually refuse to drive Truck #7, and instead just drove it on a different route than was originally requested; as such, his activity is not protected under the applicable provision of the STAA. However, even if his activity was considered a refusal to drive, his decision to drive the truck on the gravel route, which was more "precarious," showed that he did not truly have a reasonable apprehension of harm. Finally, Respondent notes that it did repair the truck on March 17, 2016, so Complainant cannot show that it failed to address the alleged safety issue. (Respondent's Br. at 5-6.)

In support of the first prong of its argument, Respondent cites a Fourth Circuit case, *Calhoun v. U.S. Department of Labor*, in which the court affirmed the ARB's finding that the complainant did not "refuse to drive" within the meaning of the statute when, on one day, he drove his vehicle but stated that he was working under protest, and on another day, he drove his vehicle despite concerns about a dolly brake issue. 576 F.3d 201, 209 (4th Cir. 2009). However, more

recently, the ARB has offered further guidance on this issue. Specifically, in *Maddin v. Transam Trucking, Inc.*, the Board noted that "certain refusals or insubordinate acts arising out of the complainant's employment as a truck driver may be covered under the 'refusal to operate' clause even where the activity does not strictly constitute a refusal to operate the vehicle." ARB No. 13-031, ALJ No. 2010-STA-20, slip op. at 8 (ARB Nov. 24, 2014). Instead, "a 'refusal to operate' may encompass actually operating a vehicle in a manner intended to minimize danger of harm or violation of law." *Id.* at 9.

Therefore, in the instant matter, the fact that Complainant ultimately operated Truck #7 on four days of the applicable week in March 2016 does not categorically disqualify his behavior from being a refusal to drive under the STAA. Under *Maddin*, this activity is still eligible to be considered protected under 49 U.S.C. § 31105(a)(1)(B).

However, the evidence does not support a conclusion that Complainant either actually had an apprehension of serious injury to himself or others because of the clutch issue, or that such apprehension (if shown) was reasonable. First and perhaps most significantly, though Complainant testified that he feared getting into an accident while driving due to his probationary status with the insurance company, this is not the equivalent of having an apprehension of causing injury to himself or others. More accurately, his apprehension was of losing his insurance coverage and job.

In addition, the existence of Complainant's apprehension is undercut by his willingness to drive Truck #7 on the gravel route. Again, Complainant's credibility regarding the relative safety of the gravel route is not consistent with the totality of the record, as discussed above, and if Truck #7 had such a serious clutch problem that driving it would be hazardous to Complainant or others, this hazard would have been present on either route. In addition, it is significant that Complainant did not have any actual issues operating the truck on Monday through Wednesday of the applicable week. Though there could certainly still have been an apprehension of harm even if such harm did not ultimately occur, the reasonableness of the apprehension is further called into question by Complainant's admission that he was able to safely complete his routes that week.

Furthermore, Complainant's allegations of a reasonable apprehension of harm are undermined by the fact that he did not report any issues with Truck #7's clutch in writing or directly to the mechanics until after his shift on Wednesday, March 16, 2016. As discussed in detail above, his testimony regarding completing a repair order on March 14, 2016 and making notations of unsatisfactory conditions on his truck inspections reports on March 15, 2016 and March 16, 2016 are not credible. Per the confirming testimony of Mr. Hembrick, the first time Complainant actually took any action pertaining to the alleged clutch problems on the truck was when he spoke to the mechanic after his shift on Wednesday night, which is completely inconsistent with him having a reasonable apprehension that driving the truck would result in injury.

Finally, the reasonableness of any alleged apprehension of serious injury that Complainant possessed is also called into question by the evidence that there was nothing significant actually wrong with the clutch on Truck #7. As discussed in detail above, Mr. Hembrick's testimony that the truck simply had a different kind of fuel injection is consistent with the fact that when it was ultimately "repaired" on Thursday, March 17, 2016, the only adjustment necessary was a loosening

of the clutch. This tends to indicate that there was nothing occurring with the truck that presented an actual danger and that could support a reasonable apprehension here.

For all of these reasons, I find that Complainant has not successfully shown, by a preponderance of the evidence, that his refusal to drive Truck #7 constituted protected activity under the STAA.

III. Conclusion

In summary, I find that Complainant has not established the first element of his *prima facie* case under the STAA, that he engaged in protected activity, by a preponderance of the evidence. Therefore, Respondent is not liable under the STAA, and Complainant's May 9, 2016 complaint must be dismissed.

ORDER

For the reasons set forth above, IT IS ORDERED that Complainant's May 9, 2016 complaint is DISMISSED.

SO ORDERED.

MONICA MARKLEY
Administrative Law Judge

MM/RC/jcb
Newport News, VA

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).

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

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