UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

Issue Date: 03 March 2023

In the Matter of:

William Halliday
Complainant

v.

Transport Express, Inc.
and
Dan Piet
Respondents

CASE NO.: 2020-STA-00067
OSHA NO.: 5-0460-19-114

Appearances:

Peter LaVoie, Esquire
Truckers Justice Center
Edina, Minnesota
For the Complainant

Heather Erickson, Esquire
Meghan D. Childers, Esquire
Sanchez Daniels and Hoffman LLP
Chicago, Illinois
For the Respondents

Before: Honorable Francine L. Applewhite

DECISION AND ORDER DENYING COMPLAINT

This matter arises from the complaint of retaliation by William Halliday ("Complainant") against Transport Express, Inc. ("Transport Express") and Dan Piet ("Mr. Piet", and collectively "Respondents") under the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. § 31105, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The Act provides protection from discrimination to employees who report violations of

commercial motor vehicle safety rules or refuse to operate a vehicle when such operation would be in violation of those rules.

I. PROCEDURAL HISTORY

On September 27, 2019, the Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that the Respondents had discharged him in violation of 49 U.S.C. § 31105. The Complainant asserted that he was terminated after writing up mechanical defects regarding his motor vehicle and informing his supervisor that he would file a complaint with the United States Department of Transportation ("DOT"). On November 14, 2019, the Complainant amended his complaint to include an allegation that he refused to drive his vehicle for protected reasons. (CX-6).[1]

OSHA found the complaint timely filed and initiated an investigation into the allegations. On April 23, 2020, OSHA issued its' determination finding that the Complainant did report maintenance issues, but that the Respondents promptly fixed the issues; however, there was no evidence that the Complainant engaged in a protected work refusal. (OSHA Letter). As a result, OSHA dismissed the complaint, finding that the Respondents did not violate the STAA (*Id*.).

On May 14, 2020, the Complainant timely appeal to the Office of Administrative Law Judges ("OALJ"). (RX-23). Thereafter, I issued a Notice of Hearing and Prehearing Order informing the parties of my assignment to the case and setting the matter for a formal hearing.[2] On October 6, 2021, I granted the Complainant's unopposed motion for video hearing.

A video hearing commenced on May 10, 2022 and continued on June 9, 2022. The parties were afforded a full opportunity to present evidence and argument. The Complainant, Mr. Piet, and two other witnesses testified. Admitted into evidence were exhibits CX-1 through 13, RX-1 through 6, and JX-1 through 10. (Tr. at 8-9). Following the formal hearing, the parties submitted closing briefs.

The findings and conclusions that follow are based upon full consideration of the record, arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

II. STIPULATIONS

The parties submitted a Joint Stipulation of Agreed Facts ("Joint Stip.") stating the following:

[1] As used in this decision, the Complainant's exhibits are referred to as "CX," the Respondent's exhibits as "RX," the Joint exhibits as "JX," and the combined transcript of the May 10 and June 9, 2022 hearings as "Tr." In addition, "Com. Br." refers to the Complainant's Closing Brief, and "Res. Br." refers to the Respondent's Closing Brief.

[2] The hearing was rescheduled three times.

1. Complainant was an employee as defined at 49 U.S.C. § 31101(2). Complainant was not a member of a labor union, and his employment with Cargo Sales, Inc.,[3] was not subject to a collective bargaining agreement.
2. Transport Express, Inc. maintains a place of business at 7045 N. Hanley Road, Hazelwood, MO 63042. Transport Express, Inc. is a motor carrier operating in interstate commerce and a "person" subject to the employee protection provisions of STAA.
3. From July 8, 2019 to September 27, 2019 Cargo Sales, Inc. employed Complainant as a driver to operate commercial motor vehicles having a gross vehicle rating of 10,001 pounds or more on the highways to transport property in commerce.
4. On September 27, 2019, Complainant's employment was terminated.
5. On September 27, 2019, Complainant filed a complaint with OSHA alleging that Respondents had discharged him in violation of 49 U.S.C. Sec. 31105. The Complaint was timely filed.
6. On April 23, 2020, OSHA issued a decision denying Complainant's Complaint.
7. On May 14, 2020, Complainant filed timely objections to the OSHA's decision and requested a hearing de novo before an administrative law judge of the Department of Labor.
8. Complainant earned gross wages in the amount of $9,900.00 during his employment with Respondent Transport Express, Inc. in 2019.
9. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties.

III. ISSUES IN DISPUTE

1. Did Complainant engage in an activity protected under 49 U.S.C. § 31105(a)(1)(A) by filing complaints related to violations of various commercial vehicle safety regulations in July, August, and September of 2019?
2. Did Complainant engage in any activities protected under 49 U.S.C. § 31105(a) which contributed to his removal from service on September 24, September 25, and September 26 of 2019 and his discharge on September 27, 2019?
3. If any protected activity contributed to Complainant's discharge, will clear and convincing evidence show that Respondents would have discharged Complainant in the absence of any protected activity?
4. To what relief, if any, is Complainant entitled under the STAA?

[3] Cargo Sales, Inc. "hires employees to lease to other operating companies, such as [Respondent] Transport Express, Inc. Cargo Sales, Inc. pays its employees' wages, employee benefits, unemployment insurance, payroll taxes and workers' compensation insurance. [Respondent] Transport Express, Inc. owns or leases the tractors and trailers utilized for its operations between Chicago and St. Louis." (Employer's Counsel's email, February 21, 2023). I decline to address whether Cargo Sales, Inc. could be named a "joint employer" with Respondent Transport Express. *See Palmer v. Western Truck Manpower, Inc.*, 85-STA-6 (Sec'y Jan. 16, 1987). The Parties did not raise the issue, and Respondent Transport Express has stipulated that it is a "person" subject to the employee protection provisions of the STAA. Moreover, I find that Transport Express exercises a sufficient degree of control over the Complainant to be considered an "employer" under the STAA, including "the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant." *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 03-026, slip op. at 9 (ARB Sept. 29, 2004); *see also Feltner v. Century Trucking, Ltd.*, ARB No. 03-118 (ARB Oct. 27, 2004).

IV. SUMMARY OF EVIDENCE

A. Allegations of Protected Activity

1. Background

The Complainant began working with Transport Express on July 8, 2019 as a class A hazmat line driver with hours between 10:00pm and 6:00am. (Joint Stip. at 2; Tr. at 114, 139). The Complainant's task was to receive an assigned truck and trailer at Transport Express' facility in Wood Dale, Illinois, near Chicago, and drive it to the Dixie truck stop halfway between Chicago and Transport Express' headquarters in Hazelwood, Missouri, near St. Louis, where he switched trailers with a driver who had come from Hazelwood and drive the new trailer and its contents back to the Wood Dale/Chicago facility. (Tr. at 21). The Complainant testified that he was expected to note any problems with the equipment at the beginning or the end of his shift by notifying a supervisor and filling out a paper inspection report ("DVIR" or "P&D reports"). (*Id.* at 20, 126). He also recorded his mileage and on-duty hours in an electronic log-in device, or tablet. (*Id.* at 58).

The Complainant reports of equipment or other issues included:

- July 10, 2019: Diesel exhaust fluid ("DEF") tank warning light and buzzer was on. (*Id.* at 63, 175; CX-7 at 4). The Complainant's OSHA complaint also states that he reported directly to Respondent Piet that his tires had "exposed belting materials in violation of commercial motor vehicle safety regulations." (CX-6 at 5).
- July 19, 2019: Leak of the rear tandem oil seal. (JX-2 at 2). The Complainant's OSHA complaint states that on July 22, he reported that his tablet was malfunctioning, but the Respondent denies this. (CX-6 at 5; CX-9 at 6).
- July 23, 2019: Trailer with two bald tires. (JX-2 at 3).
- July 24, 2019: Tire had "sidewall puncture and belt showing." (*Id.* at 4).
- July 25, 2019: "Hazmat on side – not secured; bald tire." (*Id.* at 5).
- August 1, 2019: Claimant's OSHA complaint states that he asked Respondent Piet for paper logs due to his tablet malfunctioning. (CX-6 at 6; Tr. at 137).
- August 9, 2019: "Rear trailer tire, passenger side illegal," and rear door driver's side needs replacement, "cannot lock door." (JX-2 at 6-7).
- August 10, 2019: Inside tire "illegal." (*Id.* at 8).
- August 13, 2019: "Missing power divider toggle switch." (*Id.* at 9; Tr. at 138).
- Undated: "Right rear outside tire – less than 2/32. Illegal." (JX-2 at 10; Tr. at 128).
- August 16, 2019: "Trailer left door rod needs alignment, will not lock." Trailer has "no registration." (JX-2 at 11; Tr. at 75-76).
- August 21, 2019: Need windshield wipers; "weather strip the door, lic[ense] plate light out" on trailer. (JX-2 at 15; Tr. at 138-39).
- August 23, 2019: Reefer unit license plate light out. (CX-7 at 62; Tr. at 217).
- August 27, 2019: "Rear tandems on fire, both sides," right and left. Need fire extinguisher. (JX-2 at 17; Tr. at 140). "Possibly brake chambers. 2 flats." (CX-7 at 66).

- September 7, 2019: "Bad vibration, pulls to right at 53-65 mph." (JX-2 at 21; Tr. at 148).
- September 20, 2019: ABS warning light on, "front bumper not secured, protruding," "missing rig certification label." (JX-2 at 22-28; Tr. at 30, 145; CX-7 at 80-92).
- September 21, 2019: "Pre-existing bumper damage getting worse," "tire drivers side inside tread separating." (CX-7 at 94; JX-2 at 25).
- September 23, 2019: "Front bumper ext. not secured, protruding. Missing rig certification label." (JX-2 at 28).

On September 25, the Complainant filed a complaint with the Federal Motor Carrier Safety Administration ("FMCSA"), with the following allegations:

> 1) Commercial truck did not perform proper inspection, repair and maintenance,
> 2) Carrier placed a commercial truck into operation without one or more parts/accessories necessary for safe operation as defined under Part 393,
> 3) Carrier failed to correct Out- Of-Service defects listed by driver in a driver/vehicle inspection before the vehicle is operated again,
> 4) I was coerced to commit a violation related to Required Equipment, and
> 5) I was coerced to commit a violation related to Vehicle Condition or Maintenance. (CX-1).

The Complainant also noted, "[Respondents] refuse to follow federal regulations and make repair certifications as required under 396.11. Additionally, refuses to allow drivers to inspect prior inspection report prior to current day. This is an ongoing issue for the past 60 days. Company threatens driver with no work if driver refuses to operate equipment without DVIR review." (*Id.*).

2. Complainant's Testimony

The Complainant testified that he has been a commercial truck driver for approximately 35 years. (Tr. at 114). He has a Class A license with endorsements for tanker, hazmat, doubles, triples, and passengers. (*Id.*). He has never had an accident or received a moving violation. (*Id.* at 115).

Addressing the safety complaints, he testified that he was concerned about the light out on the license plate because it could lead to a DOT inspection, which could affect his "CSA record, driver's license. It would result in a ticket or a violation, a fine. A lot of things." (*Id.* at 129). He noted that a license plate light out can result in the loss of one or two Federal Motor Carrier points ("CSA points"), and a tire violation could result in ten points off his CSA record. (*Id.* at 130).

On July 25, 2019, he reported to Mr. Piet that the hazmat load was not secured and had shifted. He testified that Respondent Piet "shrugged," and replied "it was supposed to be secured." (*Id.* at 131). The Complainant stated that in his experience, hazmat loads should be secured with two-by-fours or load bars to prevent them from sliding around. (*Id.* at 133).

On August 27, 2019, while the Complainant was pulling into the Dixie truck stop another driver pointed to the back of his trailer, causing him to "pull[ ] over to see what was going on, and the wheels – the brake chambers – or the bearings were on fire." (*Id.* at 140). He "got a fire extinguisher and … extinguished the fire." (*Id.*). After exchanging the trailer, the "other driver … had to deal with the repairs." (*Id.*).

On September 20, 2019, the Complainant informed witness Javier Serrano that the anti-lock brake system ("ABS") malfunction indicator light was on. (*Id.* at 142). He testified that Mr. Serrano told him that "it was fixed, don't worry about it." (*Id.*). Three days later, on September 23, 2019, the Complainant asked Mr. Serrano if he could have a document that could confirm to any authorities that the ABS system had been repaired. He stated that he "never received anything from anyone that any of those repairs were completed or fixed." (*Id.* at 142).

On September 23, 2019, the Complainant reported that the front bumper was splitting concerned that "it could go into somebody's windshield or get sucked up underneath the engine compartment of a truck." (*Id.* at 144). He also reported that the rear impact guard certification sticker was missing. (*Id.* at 146). In addition, he told Mr. Piet that he "was getting anxious about having some type of documents with [him] that could prove that if these repairs were made that [he] could produce in case [he was] pulled over for an inspection." (*Id.* at 146). He also told Mr. Piet that he would file a complaint to the Federal Motor Carrier Safety Administration ("FMCSA") if "this stuff wasn't taken care of." (*Id.*).

In response to the Respondents' allegation that he called the company's equipment a "piece of shit," the Complainant testified that he had only used that term to refer to a truck that had previously been involved in a rollover accident and was violently shaking. (*Id.* at 148). The Complainant testified that he didn't recall ever saying he didn't need or want the job with Mr. Piet. (*Id.* at 152). In response to allegations that he repeatedly threatened to abandon his load and take an Uber home, the Complainant testified that he mentioned taking an Uber only in the hypothetical situation if the vehicle were to break down, or he ran out of service hours at the Dixie stop and couldn't drive back. (*Id.* at 153).

The Complainant testified, on September 24, 2019, he received a text message "work was cancelled tonight." (*Id.* at 149). He received similar messages the following two days.

On September 25, 2019, the Complainant filed a complaint with the FMCSA. (CX-1). Regarding his complaint, the Complainant testified that "there was an underlying current of coercion there regarding taking some of the equipment out. It was my understanding and my belief that if I pushed too hard with these issues, I would just be taken out of the truck. They'd have someone else work for me." (Tr. at 149).

Two days later, on September 27, 2019, Mr. Piet telephoned him and stated, "volume had decreased," they did not "need the second driver, and so they were going in a different direction." (*Id.* at 150). The Complainant stated that he "took it as a layoff" rather than a termination. (*Id.*). One or two days later, the Complainant received a termination letter by UPS signed by Mr. Piet. (*Id.* at 151-52; CX-2).

The Complainant testified that he enjoyed working with Transport Express and was disappointed when he was terminated. (Tr. at 152). He applied for several jobs after his termination and received an offer of employment, in December 2019, from TransChicago Truck Group delivering tractors. (*Id.* at 157; CX-8). However, TransChicago informed him "they couldn't verify the information that I had supplied to them from [Transport Express]." (Tr. at 159). Thereafter, he received an email informing him that anticipated work volume had decreased, thus he was not being hired. (*Id.* at 166).

The Complainant was then hired by Henderson Manufacturing, an "upfitter of commercial vehicles." (*Id.* at 155). He testified that he makes less money at Henderson and has had to spend some of his savings. (*Id.* at 160). The Complainant testified that he would take his job back at Transport Express if they offered it to him. (*Id.* at 156).

B. Other Witnesses' Testimony

1. Respondent - Dan Piet

Mr. Piet is the terminal manager and top management official at the Wood Dale, Illinois, terminal. (Tr. at 51). His schedule is 5:00 AM to 2:30 PM Monday to Saturday.

Addressing the Complainant's various complains, Mr. Piet testified as follows. Concerning allegations that the Complainant's hazmat load on July 25, 2019 was not properly secured, he stated "[t]hese cannisters themselves weigh 800 pounds apiece. Once they're in the truck, they're not going anywhere." (*Id.* at 61). On or around August 13, 2019, the Complainant reported that his truck was missing the toggle diverter. Mr. Piet testified that he felt the Complainant could safely operate the vehicle without the missing toggle diverter or switch, which was generally useful for traction in conditions like snow. (*Id.* at 100).

On September 7, 2019, the Complainant reported that there was a severe vibration in his truck, Mr. Piet stated that he asked the Complainant why he hadn't reported the vibration before, given that he had driven that truck for some time. Nevertheless, he switched the Complainant to another truck and took the first truck to the body shop for an alignment. (*Id.* at 221). Specifically, Mr. Piet denied that the truck had been in a rollover accident, as the Complainant had testified. (*Id.* at 220).

Mr. Piet testified that he recalled seeing the Complainant's vehicle inspection reports. In response to most, but not all, they "got it fixed that day." (*Id.* at 67). He stated that the Complainant requested certification for repairs, for the first time, in his September 24, 2019 email. (*Id.* at 227). He stated that he was not aware that the Complainant would file a complaint with a federal agency. (*Id.*).

Mr. Piet also testified that the Complainant "didn't want to work for us. He constantly complained about that he didn't need this job, plenty of jobs out there for a guy like him with his experience. He had an arrogance about him, that he was smarter than everybody else, that he knew more than everybody else." (*Id.* at 83). The Complainant threatened twice to leave his equipment at the Dixie truck stop. (*Id.* at 229).

Specifically, the Complainant reported that his fuel card had not worked, so he had to pay for fuel himself. Mr. Piet stated that he asked the St. Louis office "cut him a com check, which is normally a check you can cash at every truck stop." (*Id.* at 83). However, the Complainant was not able to cash it at the truck stop. As a result, the Complainant asked Mr. Piet to cut a regular check and informed him "if I ever have another issue with a trailer or with fueling a truck, I'm going to leave the rig right there, where it is, tractor and trailer, take an Uber home, F those guys in St. Louis. I don't need this s..." (*Id.* at 83-84).

Mr. Piet testified that he, owner Alan Redszus, and the human resources consulting service they used to hire people all took these comments and behaviors into account when they decided to "move on from" the Complainant at his 90-day review. (*Id.* at 87). He testified that the Complainant's inspection reports had nothing to do with his termination. He stated, "Well, actually, we encouraged [the Complainant] and all of the drivers to fill out P&D inspection reports. That way we can stay on top of our maintenance." (*Id.* at 231). The Complainant "had an ongoing attitude with our people. He didn't like our personnel. He didn't like our equipment. He didn't like our management. He didn't seem to get along with anybody. He didn't like doing normal truck driver responsibilities as far as fueling his truck or whatever." (*Id.* at 232).

2. Javier Serrano

Mr. Serrano is the second-shift operations manager at Transport Express, where he has worked since 2013. (Tr. at 15). He testified that his job entails supervising dock personnel with loading and unloading from 2:00pm to 10:30pm. Drivers reported issues directly to him and on a paper form. (*Id.* at 20). Drivers with issues in the middle of a shift would call him on his cell phone. (*Id.* at 23).

Mr. Serrano testified that the Complainant reported several complaints to him, including an indicator light on the dashboard, a cracked bumper, and trailer doors that wouldn't close. (*Id.* at 30). When the Complainant reported the cracked bumper, he offered him a different truck, but the Complainant did not take it. (*Id.* at 256). The Complainant telephoned him, as he had already left for the night, and told him that he was unable to close the doors of his trailer. (*Id.* at 256). He returned to the warehouse and asked the Complainant to pull onto a level surface to try to close the doors. The Complainant replied that "he's been doing this for many years, he knows what he's doing." (*Id.* at 257). After asking again and the Complainant pulling the truck onto level surface, Mr. Serrano was able to close the trailer door. The Complainant then stated, "if there's anything wrong with the trailer he's picking up at the line haul . . . so much as a license plate light out, that he was going to leave the equipment there and come back without the load." (*Id.*).

Mr. Serrano also testified that the Complainant made several statements to him including "if anything's wrong, he'll leave it there, F- St. Louis, and he wouldn't deal with it," and "our equipments [sic] are pieces of shit." (*Id.* at 260-61, 38). In addition, "on numerous occasions he did not need this job, he's been doing this for many years, he could get a job anywhere he wants by tomorrow." (*Id.* at 43). Mr. Serrano testified that the Complainant never told him he planned to file a complaint with a federal agency. (*Id.* at 264).

3. Alan Redszus

Mr. Redszus is the "general manager . . .secretary, treasurer, and owner" of Transport Express. (*Id.* at 268). He characterized the company as a specialized LTL carrier and local cartage company that operates in Chicago and St. Louis servicing the airfreight forwarding industry. (*Id.* at 269). Mr. Redszus stated that Transport Express is a TSA carrier, meaning that it's "governed by the TSA in terms of adhering to the formal procedures to handle cargo that could represent a danger to the general public." (*Id.* at 271-72).

Mr. Redszus stated, "The drivers are our last item of defense of making sure equipment is suitable to be on the highways. And so, what a driver gives us is critical to us." (*Id.* at 276). He testified that he had never terminated a driver for raising safety issues or refusing to operate equipment they felt was unsafe. (*Id.* at 277). He also stated that he never had any problems with Mr. Piet failing to address safety issues or make repairs.

Mr. Redszus testified that "no manager or supervisor is allowed to terminate an employee without [his] approval." (*Id.* at 279). Concerning the Complainant, he testified, "I was getting feedback relatively quick after [the Complainant's] hire date that the gentleman wasn't happy with his tenure at [Transport Express], and he was very vocal about it to the supervision. … [T]here was an attitude that was conveying that he was more knowledgeable in his responsibilities than anybody within management and supervision." (*Id.* at 281). He stated that at the Complainant's 90-day review, considering his "attitude, a behavior, and the message that he was conveying to the supervision that he may not show up that night to cover a load . . . it was decided that he wasn't a keeper and didn't fit our organization." (*Id.* at 281-82).

Mr. Redszus testified that he was not aware that the Complainant planned to file a complaint regarding violations of federal regulations, nor was he aware of the Complainant ever refusing to operate equipment he felt was not safe. (*Id.* at 282). He stated that had never met the Complainant, and he learned what he knew about the Complainant from Mr. Piet and Mr. Serrano. (*Id.* at 288). He also stated that he never spoke with the Complainant. (*Id.*).

C. Additional Documentary Evidence

The parties filed additional evidence, including printouts of the Complainant's electronic inspection reports (RX-1), the Employee handbook (RX-2), the Respondent company's maintenance calendar (RX-6), the Complainant's termination letter signed by Respondent Piet (CX-2), and TransChicago's offer of employment (CX-8) and withdrawal of offer (CX-10). Examining specific items:

1. Respondents' Response to Complaints

The Respondents provided answers to the Complainant's complaints as part of the discovery process. (CX-7). The response included notes and receipts showing when the Respondent company made responses or repairs in response to the Complainant's safety reports.

- July 10, 2019:
    - Complainant: Diesel exhaust fluid ("DEF") tank warning light and buzzer was on. (*Id.* at 63, 175; CX-7 at 4).
    - Respondent: "DEF tank needed to be filled: Driver responsibility." (CX-7 at 19).
- July 19, 2019:
    - Complainant: Leak of the rear tandem oil seal. (JX-2 at 2).
    - Respondent: No evidence of response.
- July 23, 2019:
    - Complainant: Trailer with two bald tires. (JX-2 at 3).
    - Respondent: No evidence of response.
- July 24, 2019:
    - Complainant: Tire had "sidewall puncture and belt showing." (*Id.* at 4).
    - Respondent: No evidence of response.
- July 25, 2019:
    - Complainant: "Hazmat on side – not secured; bald tire." (*Id.* at 5).
    - Respondent: No evidence of response.
- August 9, 2019:
    - Complainant: "Rear trailer tire, passenger side illegal," and rear door driver's side needs replacement, "cannot lock door." (*Id.* at 6-7).
    - Respondent: Invoice from August 9, 2019 shows tires were replaced. (CX-7 at 27).
- August 10, 2019:
    - Complainant: Inside tire "illegal." (JX-2 at 8).
    - Respondent: Invoice from August 13, 2019 shows tire repairs. (CX-7 at 33).
- August 13, 2019:
    - Complainant: "Missing power divider toggle switch." (*Id.* at 9; Tr. at 138).
    - Respondent: "Part ordered 8/13." (CX-7 at 38). Invoice from August 20, 2019 shows toggle was installed. (*Id.* at 40).
- August 14, 2019:
    - Complainant: Undated report: "Right rear outside tire less than 2/32 - Illegal." (JX-2 at 10).
    - Respondent: "Fixed 8/14/19." (*Id.*). Invoice from August 15, 2019 shows tire repairs. (CX-7 at 44).
- August 16, 2019:
    - Complainant: "Trailer left door rod needs alignment, will not lock." Trailer has "no registration." (JX-2 at 11; Tr. at 75-76).
    - Respondent: "Trailer needs to be on level ground." (CX-7 at 29).
- August 21, 2019:
    - Complainant: Need windshield wipers; "weather strip the door, lic[ense] plate light out" on trailer. (JX-2 at 15; Tr. at 138-39).
    - Respondent: "Fixed 8/21." (CX-7 at 56). Invoice from August 21, 2019 shows license plate light repairs. (*Id.* at 59). Invoice from August 27, 2019 shows windshield wipers purchased. (*Id.* at 60).
- August 23, 2019:
    - Complainant: Reefer unit license plate light out. (CX-7 at 62; Tr. at 217).

    - Respondent: Invoice from August 27, 2019 shows license plate light repairs. (CX-7 at 64).
- August 27, 2019:
    - Complainant: "Rear tandems on fire, both sides," right and left. Need fire extinguisher. (JX-2 at 17; Tr. at 140). "Possibly brake chambers. 2 flats." (CX-7 at 66).
    - Respondent: Replaced fire extinguisher on August 27, 2019. (CX-7 at 69). Invoice from August 26, 2019 showing call to inspect air leaks, none found. (*Id.* at 71). Invoice from August 29, 2019 showing "Possible brake problem. Unit has pulled two different trailers and both trailer had dragging brakes but no problems found on either trailer. Inspected trailer air supply system for any issues that could cause this. Service side exhausting properly and not passing air through trailer when not supposed to. It is possible the hand brake was pulled down slightly." (*Id.* at 73).
- September 7, 2019:
    - Complainant: "Bad vibration, pulls to right at 53-65 mph." (JX-2 at 21; Tr. at 148).
    - Respondent: Invoice from September 16, 2019 shows alignment repair. (CX-7 at 78).
- September 20, 2019:
    - Complainant: ABS warning light on, "front bumper not secured, protruding," "missing rig certification label." (JX-2 at 22-28; Tr. at 30, 145; CX-7 at 80-92).
    - Respondent: Invoice from September 20, 2019 shows repair of ABS sensor. (CX-7 at 87).
- September 21, 2019:
    - Complainant: "Pre-existing bumper damage getting worse," "tire drivers side inside tread separating." (CX-7 at 94).
    - Respondent: No evidence of response to inside tire.
- September 23, 2019:
    - Complainant: "Front bumper ext. not secured, protruding. Missing rig certification label." (JX-2 at 28).
    - Respondent: Invoice from September 27, 2019 shows bumper replacement. (CX-7 at 96).

2. August 27, 2019 Email

The Employer submitted a copy of an email, dated August 27, 2019, sent by Mr. Serrano to Mr. Piet and another person on August 27, 2019. (RX-5). The email states,

> "Hey Dan, once again [the Complainant] made me come back to work because he said trailer was too heavy that the doors will not close i told him get on solid pavement and it will line up because i know trailer was not loaded wrong because i helped enrique load it. He kept telling me he tried so when i got here i had him pull up some more and the door closed with no problem. All he said to say after that is Kenny is pulling the trailer with no license plate lights again and if Kenny does not fix it he will not be pulling the load back so lets [sic] see how that goes." (*Id.*).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Credibility

In deciding this matter, I will 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, I 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).

The testimony of Mr. Piet, Mr. Serrano, and Mr. Redszus were internally consistent. There was no indication that they fabricated or coordinated testimony. In addition, their testimony was corroborated by the evidence in the record. As a result, I find that they are all credible witnesses and afford great weight to their testimony.

Complainant's testimony was not fully corroborated. For example, the Complainant testified that he only mentioned abandoning his load if he hypothetically were to break down or run out of service hours at the Dixie truck stop. (*Id.* at 153). However, Mr. Piet and Mr. Serrano both testified that the Complainant had threatened to abandon his load on August 27, 2019 if the trailer from St. Louis had any problems. (Tr. at 229, 257). Moreover, the August 27, 2019 email sent to Mr. Piet by Mr. Serrano corroborates their testimony. (RX-5). Overall, I find the Complainant less credible and afford his testimony less weight.

B. Respondent, Transport Express, Inc., is a proper respondent under the Act, but Respondent, Dan Piet, cannot be held individually liable

The Act states that "a person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because" of his or her protected activity. 49 U.S.C. § 31105(a)(A)(i). The regulations define a "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals." 29 C.F.R. § 1978.101(k). The Act defines an "employer" as a "person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce." 49 U.S.C. § 31101(3); 29 C.F.R. § 1978.101(i)

The parties have stipulated that Transport Express, Inc. is a motor carrier operating in interstate commerce and a "person" subject to the Act, and that the Complainant was an employee as defined by 49 U.S.C. § 31101(2). (Joint Stip. at 1-2). Thus, I find that Transport Express, Inc. is a proper Respondent, and the Complainant a proper employee under the Act.

The Respondents argue that Dan Piet may not be held individually liable under the Act, because he did not have the authority to hire or fire employees. (Res. Br. at 21). The Act allows for individual liability, as "person" is defined as "one or more individuals." 49 U.S.C. § 31105(a)(A)(i). An integral factor for determining individual liability under the Act is whether an individual exercises control over the employee, as evidenced by "the ability to hire, transfer, promote, reprimand, or discharge the complainant . . . ." *Smith v. Lake City Enters., Inc.,* ARB Nos. 08-091, 09-033; slip op. at 9 (ARB Sept. 24, 2010) (citing *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 9 (ARB Jan. 31, 2001)).

Considering the exercise of control, Dan Piet is the terminal manager and top management official at the Wood Dale, Illinois, terminal. (*Id.* at 51). Mr. Piet testified that he supervises the drivers, including the Complainant, as well as the operations managers. (*Id.*). Mr. Piet drafted and signed the Complainant's termination letter.

Alan Redszus, general manager, secretary, treasurer, and owner of Transport Express testified that "no manager or supervisor is allowed to terminate an employee without my approval. (*Id.* at 279). In addition, Mr. Piet testified that he "answer[s] to the people in St. Louis, but the ultimate person is the owner, [Mr.] Redszus." (*Id.* at 50). He also testified that at the Complainant's 90-day review, he, Mr. Redszus, and their human resources consulting firm all decided to terminate the Complainant, but Mr. Redszus approved the decision. (*Id.* at 87).

Analyzing whether Mr. Piet influenced another employer, Mr. Redszus, to act against the Complainant, it is clear that he did. See *Smith*, ARB Nos. 08-091, 09-033. Mr. Redszus testified that he had never met the Complainant. (*Tr*. at 288). Javier Serrano also testified that Mr. Piet generally interviews applicants for hire. (*Id.* at 24).

However, the Board has clarified that whether an individual "influence(d) another employer to take such actions against a complainant" is only a factor in the context of determining if a person was a "joint employer" with another employer. *Anderson v. Timex Logistics*, No. 13-016, 2014 WL 1758319, at *7. Mr. Piet was the Complainant's supervisor, not his employer. Whether Mr. Piet "influenced" Mr. Redszus to terminate the Complainant is not probative of whether he is individually liable under the Act. Therefore, he is not a "joint employer" with Transport Express.

When an appellate body has found an individual liable under the Act, it generally has been an owner or sole shareholder, not a manager. *See Wilson v. Bolin Associates, Inc., 91-STA-4 (Sec'y Dec. 30, 1991)* (sole shareholder and CEO of a defunct corporate respondent); *Gagnier v. Steinmann Transportation, Inc.*, 91- STA-46 (Sec'y July 29, 1992) (president and the vice president of the respondent corporation); *Smith v. Lake City Enterprises, Inc.* ARB Nos. 08-091, 09-033 (president and sole shareholder); *Anderson v. Timex Logistics*, No. 13-016 (sole owner). In *Smith*, the Board found that while the respondent company owner's husband advised the respondent about her business, helped hire employees, and managed equipment issues, he exercised no control over the complainant's employment. *Smith*, ARB Nos. 08-091, 09-033. Likewise, I find, based on credible testimony, that only Mr. Redszus has the authority to hire and fire employees at Transport Express. Mr. Piet, while top manager of the Chicago facility, does

not have the power to hire and/or fire, thus does not exercise requisite control to make him individually liable under the Act. Therefore, I dismiss Mr. Piet as a Respondent in this matter.

C. Complainant's Case

To prevail in a STAA whistleblower complaint, a complainant must prove by a preponderance of the evidence that he or she engaged in protected activity and 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). A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Smith v. Duke Energy Carolinas*, LLC, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012).

Accordingly, I must determine whether the Complainant has established that he engaged in a protected activity and whether the protected activity was a contributing factor in the Respondent's adverse employment action against him. If the Complainant establishes these elements, I will turn to whether the Respondent has established by clear and convincing evidence that it would have taken the same adverse employment action against the Complainant even in the absence of his engagement of a protected activity.

1. Protected Activity

The Complainant must prove by a preponderance of the evidence that he engaged in a statutorily defined "protected activity." The STAA states that an employer may not discharge an employee who "has filed a complaint […] related to a violation of a commercial motor vehicle safety or security regulation, standard, or order…." 49 U.S.C. § 31105(a)(1)(A). The STAA also prohibits an employer from discharging an employee who refuses to operate a vehicle because "(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition…." 49 U.S.C.§ 31105(a)(1)(B).

It is well established that 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). An 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). However, 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). Whether the belief is objectively reasonable is "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).

The Complainant stated in his amended OSHA complaint that on September 23, 2019, he refused to operate his vehicle if Mr. Serrano did not give him written documentation of repairs. (CX-6). Refusing to operate a vehicle until documentation is provided does not constitute "reasonable apprehension of serious injury" or a belief that operation of the vehicle would violate safety regulations. The Complainant testified that he wanted the documentation so he wouldn't be penalized if pulled over for inspection. (Tr. at 142). Nevertheless, he did in fact operate his tractor-trailer set on the night of September 23. (*Id.* at 168). No evidence shows that that the Complainant refused to operate a vehicle for protected reasons.

The communication requirement of STAA section 2305(b) permits a timely correction of the hazard, thus promoting safety and reducing bad faith work refusals. *LeBlanc v. Fogelman Truck Lines, Inc.*, 89-STA-8 (Sec'y Dec. 20, 1989), slip op. at 12- 13. The Complainant reported safety concerns on numerous occasions, the first on July 10, 2019, two days after he started his job with Transport Express, and the last on September 23, 2019, the last day he drove for Transport Express. The evidence shows that Transport Express responded to and/or timely repaired the reported safety concerns. However, the evidence does not show that Transport Express responded to the safety reports of July 19, 23, 24, 25 and September 21, 2019, which constituted internal complaint to his managers related to the safety of his vehicle.

The Complainant also testified that on September 23, 2019, after he requested written assurances of repairs, he told Mr. Piet that he would file a complaint to the FMCSA if "this stuff wasn't taken care of." (Tr. at 146). The Complainant then filed a complaint on September 25, 2019, after he had been told on September 24 that his run had been cancelled, but before September 27, 2019 when he was terminated. (*Id.* at 150).

To qualify for protection under section 2305(b), the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition. I find that the Complainant safety concerns of July 19, 23, 24, 25 and September 21, 2019 were not corrected. In addition, I find that the complaint to the FMCSA also constituted protected activity under the Act.

2. Adverse Action

A complainant must also establish that he suffered an adverse employment action. 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. *See 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).

The parties stipulated that the Complainant was terminated on September 27, 2019. (Joint Stip.). This stipulation is supported by the record. The Complainant also insinuates that the Respondents may have retaliated against him by giving a poor review to or withholding information from his prospective employer, TransChicago. (Tr. at 159). However, he provides no evidence of such aside from his testimony, and the email withdrawing the offer of employment from TransChicago says only that the anticipated volume of work had decreased. (CX-10). Thus, I find that the Complainant suffered an adverse employment action in the form of termination only.

3. Contributing Factor to the Adverse Action

Even if the Complainant establishes his engagement in protected activity and an adverse employment action, the Complainant must also prove that his protected activity was a contributing factor to the adverse employment action. 49 U.S.C. §§ 20109(a), (b); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). The causal connection element under STAA is found using the "contributing factor" standard. *Blackie v. Smith Transport, Inc.*, ARB No. 11-054, ALJ No. 2009-STA-43, slip op. at 8 (ARB Nov. 29, 2012). A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Smith v. Duke Energy Carolinas,* LLC, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012).

An employee may prove that protected activity was a contributing factor through "indirect or circumstantial evidence, which 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. at11-12 (ARB Nov. 5, 2013); *Bobreski v. J. Givoo Consultants, Inc.,* ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). Circumstantial evidence that shows protected activity was a contributing factor may include evidence such "motive, bias, work pressures, past and current relationship of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices." *Citationshares,* ARB No. 12-029, slip op. at 12. The Board has emphasized that the contributing factor level of causation is "extremely low." *Palmer v. Canadian Nat'l Railway,* ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 16 (ARB Sept. 30, 2016). As the Board in *Palmer* explained, in a case of retaliatory dismissal under the Act, the administrative law judge must first answer the following question: "did the employee's protected activity play a role, *any* role, whatsoever, in the adverse action?" (*Id.* at 21).

The Complainant testified that he warned Mr. Piet that he would file a complaint with FMCSA on September 23, 2019, and he did file the complaint on September 25, 2019. He was terminated on September 27, 2019. Mr. Piet testified that he did not know that the Complainant would file a complaint with a federal agency. (Tr. at 227). Mr. Redszus testified that he was not aware that the Complainant planned to file a complaint regarding violations of federal regulations. (*Id.* at 282). However, the close temporal proximity between the complaint and the Complainant's termination, and the Complainant's testimony that he warned Mr. Piet of his plans, suffice to show causation under the Act. I find that the Complainant's protected activity contributed to his adverse employment action under the Act.

D. Respondent's Burden

If a complainant meets his/her 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). *See Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 21 (ARB May 13, 2014). Mr. Piet and Mr. Serrano both testified that the Complainant demonstrated arrogant behavior. Mr. Piet testimony was that the Complainant projected an "attitude" that he knew more than his peers or supervisors, and that he didn't like them. (*Id.* at 281). Mr. Serrano testified that the Complainant frequently stated that he didn't need his job with Transport Express, and that he could get another job any time he chose. (*Id.* at 43). In addition, they both testified that the Complainant twice threatened to abandon his tractor-trailer at the Dixie truck stop. Similarly, Mr. Piet and Mr. Redszus testified that they decided to terminate the Complainant because of his attitude and his threats to abandon his truck and trailer, not because of his safety complaints.

Considering the overall testimony and evidence of record, I find the decision to terminate the Complainant because of his attitude and threats to abandon his truck and trailer to be a legitimate and nondiscriminatory. Thus, I find that Transport Express has shown by clear and convincing evidence that it would have taken the adverse employment action against the Complainant even in the absence of his protected activity.

VI. CONCLUSION

Dan Piet is not a "joint employer" with Transport Express. The Complainant has demonstrated by a preponderance of the evidence that he engaged in a protected activity, and that his engagement in the protected activity contributed to his termination. However, Transport Express has proven by clear and convincing evidence that it would have taken the adverse employment action even in the absence of the Complainant's protected actions. Therefore, I find that Transport Express did not violate the employee protection provisions of the STAA.

ORDER

IT IS HEREBY ORDERED that Dan Piet is **DISMISSED** as a Respondent, and the complaint of William Halliday against Transport Express, Inc. is hereby **DENIED**.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).

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

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

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

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

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