U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 May 2022

Case No.: 2020-STA-00054

In the Matter of:

KENNETH MCDOWELL,

Complainant,

v.

EAGLE INTERMODAL INC.,

Respondent.

Appearances: Kenneth McDowell
Self-represented Complainant

Jeffrey Bessent, lay representative
For Respondent

Before: MONICA MARKLEY
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case arises from a complaint filed by Kenneth McDowell ("Complainant" or "Mr. McDowell") with the Department of Labor's Occupational Safety and Health Administration ("OSHA") against Eagle Intermodal Inc. ("Respondent" or "Eagle") and M&J Intermodal Inc., 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 July 15, 2019, Mr. McDowell filed a complaint with OSHA, alleging that while working for Respondent, he suffered adverse employment action as a result of making safety complaints about his assigned truck. The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The Secretary's findings were issued on March 26, 2020. Complainant timely requested a formal hearing before the Office of Administrative Law Judges ("OALJ"). The case was docketed with OALJ on April 29, 2020, and was assigned to me on May 11, 2020.

On February 11, 2021, I held a *de novo* telephonic hearing, at which Complainant represented himself, and Respondent was represented by Jeffrey Bessent, a non-attorney who is employed as Respondent's Director of Safety and Recruiting. Complainant did not initially join the conference call on the day of the hearing, and Respondent moved to dismiss the complaint.[1] (TR at 5.) However, shortly thereafter, Complainant contacted my office, explaining that he thought the hearing was scheduled for central time and that he also experienced technical difficulties with the conference call line. *Id.* at 8-9. Therefore, I denied Respondent's motion to dismiss and proceeded with the hearing. *Id.* at 9.

The parties were afforded a full opportunity to present evidence and argument. At the hearing, Complainant's Exhibits 1 through 4 were admitted into evidence, over Respondent's objection. *Id.* at 23. In addition, I marked Mr. McDowell's complaint to OSHA in this matter as his Exhibit 5, and his objections to the Secretary's findings as Exhibit 6, and they were admitted into evidence without objection. *Id.* at 23-26. Respondent's Exhibits 1 through 20 were admitted into evidence, over Complainant's objection to Exhibit 10, and Respondent withdrew its Exhibit 21. *Id.* at 26-29. The record is now closed.

As a threshold procedural issue, I noted at the hearing that Respondent had reported in several pre-hearing filings that Complainant was employed by only Eagle Intermodal Inc., and not by the other entity against which his complaint was filed, M&J Intermodal Inc. *Id.* at 13. Complainant contended at the hearing that the companies are a "joint venture" and had merged. *Id.* at 14-15. However, Respondent indicated that Eagle Intermodal and M&J Intermodal are two separate entities, hiring drivers in different locations, paying different taxes and registration fees, etc. M&J Intermodal only hires drivers outside of the state of Illinois and Complainant never worked for that company. *Id.* at 14-15.

Unfortunately, Complainant's pay records are not in evidence in this matter. However, Respondent did submit a copy of a "Mandatory Escrow Withholding & Accident/Incident Deductible" document, which Complainant and a representative from Eagle Intermodal Inc. signed, in agreement that money would be deducted from his paychecks to build up an escrow balance to pay any potential insurance deductibles. (RX-4.) In addition, the termination letter that was issued to Complainant by Mr. Bessent indicated that his employment with Eagle Intermodal was being terminated, with no mention of M&J Intermodal Inc. (RX-3.) Finally, all of the maintenance orders for Complainant's truck, #510, were billed to Eagle Intermodal, only. (RX-12.) For these reasons, I find that Complainant was employed by Eagle Intermodal Inc., with no involvement of M&J Intermodal Inc. As such, the latter entity is dismissed from this matter, and the caption is amended as set forth above.

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.

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

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 in the adverse employment action.
5. Whether Respondent would have taken the same adverse action against Complainant absent his protected activity.
6. Whether Complainant is entitled to damages.

(TR at 11.)

PARTY CONTENTIONS

Complainant's Position

Complainant argues that his termination was retaliation for his attempt to take safety measures, and that he was coerced into driving when he did not wish to do so. The accident occurred because the other driver was speeding, following too close, and ran a red light. Respondent clearly engaged in retaliation because Mr. Bessent moved so quickly to make his decision to terminate, and acted like Complainant caused the accident entirely on his own.

Furthermore, Complainant argues that it was his duty to report that his truck was unsafe, and even though he reported that it needed regeneration, he was told he could not have another truck. This caused the accident; they could have placed him in another truck. Drivers cannot be coerced into violating commercial regulations, and Respondent should be held accountable for taking an adverse action against a driver that acts within the rules. Complainant believes he should receive at least a year's salary in damages, $45,000.00 to $50,000.00.

Respondent's Position

Respondent contends that Complainant has not provided any evidence to show that he was coerced to violate safety regulations or that he was retaliated against. Complainant was terminated because he was unwilling to cooperate with a safety review and confidence was lost in his ability to safely operate a vehicle on public highways.

SUMMARY OF RELEVANT EVIDENCE

I. Formal Hearing Testimony

A. Kenneth McDowell, Complainant (TR at 31-51)

Complainant testified that he wrote up his truck, #510, because the seatbelt was sticking. He explained the issue to the mechanic, and the mechanic got into the truck to examine it. The seatbelt was locking and prohibiting Complainant from leaning forward to use his driver's side mirror. (TR at 34.) Complainant also explained to the mechanic that the truck needed to be regenerated. If this did not happen, the truck would have safety issues; the truck kept cutting off on Complainant while it was in motion, without warning. Based on his experience, Complainant knew to put the truck in neutral and start it back up while it was rolling. *Id.* Complainant asked to use another truck, but his request was not honored. *Id.* at 35.

On the day of the accident, a vehicle was speeding behind Complainant and it was raining. He stated:

> And I was making a legal left-hand turn, and I know that I did because I was across the crosswalk, which Illinois says if the light is yellow, you can complete your turn. But during that time, that's when the gentleman behind me, I know he ran the light because the light was red. While I was in the intersection, it turned yellow. Then it turned red.
>
> You've got a 72-foot vehicle combined with a tractor and the trailer. And he drove over the median and struck the side of the trailer.

Id. After the accident, Complainant contacted Respondent to let them know what had happened, and told them he did not want to drive the truck. However, he was told that he had to complete his assigned load, or lose $10,000.00. Complainant again stated that he did not want to complete the load, and the dispatcher told him that if he did not do so, he would be terminated, at Mr. Bessent's direction. *Id.* at 35-36.

Therefore, Complainant completed his assigned load under duress. He did not feel safe driving the truck, because he had already reported the safety issues. *Id.* at 36. Later, Complainant watched a video of the accident with Mr. Bessent, Sean Fagan, and a Mr. Sykes. This was the day that he was told he was going to be terminated, because he ran a red light. He did not get a citation for running a red light; he was just told that he impeded the median. *Id.* at 36-37. However, the video of the accident shows that he never touched the median; the other driver did. When he went to court, this was proven and his citation was dismissed. *Id.* at 37.

Complainant does not feel that he caused the accident. The other driver was the one who slid into the wrong lane and hit Complainant's truck. Complainant stated, "And I got the blame, and I received an adverse action, termination for an incident that I had no involvement in, other than the driver hit me. I did not cause an accident because I was the lead driver with the right-of-way." *Id.*

Complainant was told that he would earn between $45,000.00 and $50,000.00 per year working for Respondent. He does not want to return to the job. *Id.* at 38. The evidence misled the investigator into believing that Complainant was terminated because he ran a red light. *Id.* Complainant believes that Mr. Bessent knew what he was doing with the adverse action, because he kept changing his mind, and he got upset when they viewed the video. Complainant stated during the viewing that he did not run the light, and Mr. Bessent said that a $10,000.00 deductible was still owed and that Complainant was terminated. In addition, Mr. Bessent declined to let Complainant go to court on the citation before he made a final decision. *Id.* at 41.

On cross-examination, Complainant testified that as a professional truck driver, he has driven various types of equipment, both older and newer trucks. *Id.* at 42. He has experience with trucks that require regeneration. *Id.* at 43. He is a better and more experienced driver than the general public. *Id.* at 44. However, it is impossible for him to know what another driver is going to do with his or her vehicle. *Id*.

Complainant did an online orientation with Respondent and passed all tests. He has taken defensive driving courses. However, it is not possible for him to be aware of all vehicles around him at all times, because they are not always in his view. *Id.* at 46. Complainant could not remember the date he submitted his accident kit to Respondent. *Id.* His experience in accident investigation involves taking pictures and calling the authorities. *Id.* at 47. Complainant was taken out of service after the accident, reinstated, and then terminated. *Id.* at 48.

During his redirect testimony, Complainant reiterated that he has taken a defensive driving course, but in the case of his accident, the other driver was so close that he could not always see the other car in the mirror. He is not responsible for the actions of other drivers who cause accidents. *Id.* at 49-50.

B. Sean Fagan, Safety Specialist, Eagle Intermodal Inc. (TR at 52-123)

Mr. Fagan testified that he processed Complainant's paperwork, and that he was hired under Eagle Intermodal. *Id.* at 52-53. The paperwork included a Mandatory Escrow Withholding and Accident/Incident Deductible form, which is filled out by all employees and lists only Eagle Intermodal. The form states clearly to drivers that they will build up an escrow in the amount of $500.00, in the event of complaints to the vehicle or their driving. *Id.* at 53-54. In the event of an accident, whether the driver is at fault or not and if a claim is filed, an insurance deductible of $1,000.00 is immediately taken from the driver's weekly settlement. *Id.* at 54.

On the morning of the accident, Complainant exited a ramp in rainy conditions and approached a stale green light at 38 miles per hour, meaning that it had turned green before it came into his view. His truck had entered the intersection when the light turned yellow and then red. *Id.* at 54-55. Complainant was trying to make his turn, and another vehicle came up behind Complainant's truck and also tried to fit through the turn lane. There was contact between the two vehicles. *Id.* at 55.

Mr. Fagan identified Respondent's Exhibit 6 as a company-mandated accident response guidebook. It is completed by all drivers who are involved in accidents, and they keep it in their truck. The drivers are supposed to fill it out at the scene of the accident or as near to it as possible. It is then submitted by the driver to Respondent's safety department, and serves as their statement to either the insurance company or Respondent. *Id.* at 55-56. The report is to be submitted by the driver immediately, if possible, or within 24 hours. However, Complainant submitted part of his report two days after the accident. *Id.* at 56. If a driver has not submitted a report, he is placed out of service until it is submitted. *Id.*

Mr. Fagan identified Respondent's Exhibit 7 as the citation issued to Complainant at the time of his accident, for improper lane usage and crossing lane boundaries. *Id.* at 57. The weather conditions on the report were described as rainy and wet, and the visibility was nighttime. *Id.* As a safety supervisor, Mr. Fagan would recommend that a professional truck driver operating in those conditions reduce speed. *Id.*

Mr. Fagan identified Respondent's Exhibit 8 as a Driver Vehicle Inspection Report, completed by the Illinois State Police at the time of the accident. It was a driver-only inspection, which cited Complainant for improper lane usage and lane roving. *Id.* at 58. Respondent's Exhibit 9 was an Illinois Traffic Crash Report, which cited both Complainant and the other driver. Complainant was cited for a lane usage violation and lane roving. *Id.* at 58-59.

Respondent's Exhibit 1 was a Driver Truck Repair Request form. This form is used by company drivers to request the service department to make truck repairs. *Id.* at 59. The request form in evidence was completed on May 13, 2019 by Complainant, and listed "check regen icon," but did not list any repairs that were required by the shop. *Id.* The second page of the exhibit did not include any comments pertaining to a seat belt; it listed only maintenance that was completed by the service department, including oil changes, filters, and other regular maintenance. *Id.* at 60.

Mr. Fagan identified Respondent's Exhibit 2A as a record listing Complainant's hours of service for the week of May 5, 2019 to May 11, 2019, and May 12, 2019 to May 18, 2019. *Id.* Exhibit 2B was the Driver's Daily Vehicle Inspection Report ("DVIR"), and is on the back side of the sheet that holds Exhibit 2A. The inspection report is where a driver lists any defects or issues with their truck that need to be addressed. For May 5, 2019 to May 11, 2019, Complainant did not note any issues. For the week of May 12, 2019 to May 18, 2019, Complainant noted on May 14, 2019 that the truck needed regeneration, and the mechanic and Complainant signed to indicate that all defects had been corrected. *Id.* at 61.

Mr. Fagan explained the regeneration process in trucks, indicating that when the filter becomes too clogged, an active regeneration is necessary. It is a process that takes about 45 minutes while the truck is running, and is expected to be performed by the driver. He would have to initiate the regeneration, put the truck in neutral, and stay nearby. Respondent's Exhibit 13 includes a description of regeneration. *Id.* at 62-63.

Mr. Fagan identified Respondent's Exhibit 10 as a warning letter that was prepared for Complainant, to notify him of the violations listed on the citation from his accident. It was prepared so that they could discuss the negative effects of the violation on his and Respondent's

safety scores, notify him that he was assigned safety training, and explain that once the training was complete, he would be returned to work. *Id.* at 64.

When they called Complainant in for the video review, they wanted to go over some troubling behaviors of his that they saw, to prevent an accident from happening again. *Id.* They wanted to issue a warning letter, put him on probation for six months, give him counseling, and do some safety training. They did not want to terminate him. *Id.* at 65. However, the circumstances changed when Complainant refused to sign the warning letter and accept any responsibility for the accident. *Id.*

Mr. Fagan identified Respondent's Exhibit 3 as Complainant's termination letter, from May 28, 2019, letting him go from his employment with Eagle Intermodal. *Id.* at 65-66. The determining factor in their decision to terminate Complainant was that they no longer felt confident that he was going to accept any training or responsibility for the accident, and that it was something that would occur again. *Id.* at 66.

Mr. Fagan testified that it can take two to three days to get started on an accident investigation, to gather all the facts. Investigations can last up to a year, depending on the nature of the accident and whether there are associated injuries or fatalities. *Id.* at 66-67. After a preliminary review, a driver is allowed to return to work if they can determine that he was not necessarily at fault or that an accident was not preventable. However, if there are driver behaviors that need to change, he will be taken off the road. *Id.* at 67. Preventable accidents are those where the driver failed to exercise every reasonable precaution to prevent the accident. *Id.* In Mr. Fagan's opinion, Complainant did not do everything in his control to avoid the accident at issue. *Id.*

On cross-examination, Mr. Fagan testified that he was not at the scene of the accident when it occurred, but they conducted a video review, including both inward and outward footage of the accident. *Id*. at 68. Based on the fact that there was a citation and a roadside inspection, as well as the video review, they decided Complainant engaged in troubling behaviors. They thought Complainant approached the intersection at a speed higher than what they considered safe, and that the green light was stale. They thought there were things Complainant could have done to prevent the accident. They did not determine that Complainant was at fault for the accident, but that it was preventable based on the above factors. *Id.* at 69.70. They also noted that Complainant did not list any vehicle defects that could have caused the accident. Regardless of all of this, they did not plan to terminate Complainant; they wanted to issue a warning letter and do safety training. However, once Complainant refused to accept these, they felt it was not in their best interests to keep him on as a driver, because they thought the situation would happen again. *Id.* at 70.

Mr. Fagan indicated that Respondent's findings were independent of the police findings. Respondent identified factors that were concerning, whether or not they were illegal. *Id.* at 70-71. Complainant going to court and getting his citation removed did not alleviate the concerning behaviors seen by Respondent. *Id.* at 72. Respondent determined that there were unsafe factors in this accident, and they tried to issue a warning letter to Complainant, but he refused to accept it. It is in their best interest as a private business to be a safe as possible, and they determined that Complainant was not as safe as he could have been. *Id.* at 72-73. Mr. Fagan conceded that

Complainant did not roll the truck. *Id.* at 73. However, he did not agree that this was the only determining factor in whether a driver is operating a truck safely. *Id.* at 74.

With regard to the logs at Respondent's Exhibit 2, Mr. Fagan testified that they are turned in by the driver once a week, because they cover seven days each. The copy of the logs submitted by Respondent into evidence were signed by the mechanic, with regard to noted truck defects. *Id.* at 75-76. Mr. Fagan also noted that the mechanic's signature should be present on Complainant's copies of the log, because they are carbon copies. *Id.* at 76. The logs at Respondent's Exhibit 2 are the ones that Complainant turned into the safety department; Mr. Fagan testified that he could not speak to any other logs maintained by the drivers and kept for themselves. He stated:

> I can't speak to any log that wasn't turned in, if the driver kept it in his back pocket or wherever he decided to keep it. The mechanics are given a log that needed to be kept for our records. That's all we can see. If the driver doesn't submit his own logs or doesn't even speak to the mechanic, we have no record of that, other than the mechanic signs our copy per our record-keeping requirement.

Id. at 78. Mr. Fagan testified that after a driver writes up a truck, it can return to the road without a mechanic's signature if the mechanic determines that no repairs are needed for safe operation. *Id.* at 82.

Mr. Fagan was unable to explain why Complainant was not permitted to return to the yard immediately after his accident, because the safety department was not notified of the accident until later. *Id.* at 82-83. However, he stated that if the vehicle did not sustain significant damage and Complainant was not injured, it is assumed that he can perform the safe, legal operation of the truck for the remainder of his shift. *Id.* at 83. After the safety department saw what happened with the accident, they decided to pull Complainant off the road. *Id.* at 84.

Respondent's Exhibit 2B was signed by Ken Fisher, the shop manager. *Id.* He is a certified mechanic, though Mr. Fagan did not know if Mr. Fisher's credentials were current. *Id.* at 85. The mechanics are responsible for maintaining their own certifications and Mr. Fagan is not required to maintain those records, nor does he. *Id.* at 85-86.

They were able to see a clear enough view of the accident through their internal video to make a determination to terminate Complainant. However, Mr. Fagan did not make that determination; it was the Director of Safety who did so. *Id.* at 87. They were able to independently identify, regardless of traffic evidence, factors showing that even if a law was not broken or even if Complainant's citation was overturned, that they did not need to maintain a relationship with Complainant as a driver. The factors included his speed, the stale green light, and the weather conditions. Mr. Fagan believes their decision was fair. *Id.* at 87-88.

Mr. Fagan further testified that the fact that Complainant received a citation and a roadside inspection was enough for them to begin an investigation. The material they saw on the video was enough, regardless of the citation being overturned. The roadside inspection was not overturned, and is still listed on Respondent's and Complainant's safety scores. This negatively affects

Respondent's ability to maintain business. *Id.* at 88-89. Mr. Fagan is not a certified mechanic and does not have a Class A commercial driver's license. *Id.* at 90.

On May 20, 2019, the day after the accident, Mr. Fagan noted in an e-mail at 12:32 p.m. that Complainant had not submitted an accident kit and could not receive another dispatch until they spoke with him. Then, Complainant was cleared via an e-mail on May 21, 2019 at 10:54 a.m., because he had submitted the kit. At that time, Respondent had not completed their review of all of the facts and all of the information. They also had not yet received the police report and the statements. It was not until they brought Complainant in for his counseling that they had decided how to address the situation, which was initially via a warning letter. *Id.* at 91-92. At the time Respondent took action against Complainant, he had not been convicted of the citation he received. *Id.* at 93.

On redirect examination, Mr. Fagan noted that in Respondent's Exhibit 16, an employee of Respondent, John Lopez, sent an e-mail in the early morning hours of May 19, 2019 to notify the safety group, dispatch group, and Mr. Bessent that Complainant had called to report his accident. Mr. Lopez gave a brief description of the accident, relayed that there was no damage, and indicated that Complainant was awaiting the police. He later sent a second message, noting that Complainant received a citation for improper lane usage and was given an inspection, as well as that Complainant planned to call Mr. Bessent to explain further. *Id.* at 98-100.

Mr. Fagan identified Respondent's Exhibit 18 as notes from their review of the video file of the accident. *Id.* at 101. In these notes, they observed that the first video showed a rainy night and wet roads. There was fresh rain falling on the roads at the time, which helped them determine that the weather conditions were not ideal. It was also noted that the accident occurred when it was dark outside. *Id.* at 101-102. At the time stamp on the first video of 2:34, based on the truck telemetry that is part of the video, they saw that before the accident, the truck was going 66 miles per hour, on I-55, which has a speed limit of 55 miles per hour. This showed the Complainant was speeding while there were two other negative driving conditions, raining and darkness. *Id.* at 102. At the time stamp of 3:53, they determined that the traffic light at issue was stale green, because at the earliest it was perceived by the driver, it was already green. At this point, Complainant was approaching the light at 54 miles per hour on the exit ramp. *Id.* at 104-105. At 4:09, the driver chose to make his left turn from the right-most turn lane. He was approaching the intersection at 43 miles per hour, which was 13 miles per hour over the posted speed limit for the ramp, and 23 to 28 miles per hour faster than a truck driver should approach an intersection, i.e. 10 to 15 miles per hour below the speed limit. *Id.* at 105. At 4:10, the light had changed to yellow and the truck had not yet entered the intersection. Once the truck entered the intersection, the light turned red. Complainant reduced his speed to 37 miles per hour, but he was still going 7 miles per hour faster than the posted limit, and 17 to 22 miles per hour faster than a truck should have been traveling in those conditions. *Id.* at 105-106. At 4:15, the truck was turning left from the right-hand lane, but the trailer was straying toward the inside of the turn. The truck crossed through the left lane to enter the right lane. When the trailer swung into the left lane, another vehicle was approaching from behind, and there was contact between the trailer and the other vehicle. *Id.* at 106.

Turning to the second video, which was inward-facing, at 1:19, they could see Complainant make contact with the night dispatcher, Mr. Lopez. *Id.* At 3:47, Complainant reported to dispatch that there was no damage to his truck. *Id.* at 107.

On the second page of Respondent's Exhibit 9, which is the police report for the accident, Mr. Fagan indicated that the officer reported that Complainant changed lanes improperly, causing his trailer to side swipe the other vehicle. The driver of the other vehicle reported that Complainant's truck came into his lane of traffic while he was turning, causing him to strike the center median to avoid going into oncoming traffic. Complainant stated that the other driver came on the side of his truck as he was already turning. *Id.* at 107-108. No vehicles were listed as visually damaged. *Id.* at 108.

On recross-examination, Mr. Fagan testified that the time stamps in Exhibit 18 were generated based on four videos they retrieved from the dash camera in Complainant's truck. It also has telemetry data, like GPS tracking. Therefore, the camera gives both visual imaging and extra data. *Id.* at 110. Mr. Fagan looked at the video footage and generated the notes himself. *Id.* at 111.

Mr. Fagan stated that Ken Fisher is in the service department at Lansing Truck Services. This is a different entity than M&J Intermodal Inc. and Eagle Intermodal Inc. Both of the latter two entities use Mr. Fisher as a contractor. *Id.* at 112-113. Mr. Fisher gets his mechanic certification on his own, so he can manage his staff more effectively, but he is not really hired as a mechanic. As a contractor/shop manager, it is his responsibility to keep maintenance records on the truck. *Id.* at 113-114. Mr. Fagan did not know all of Mr. Fisher's roles and duties with Lansing Truck Services. *Id.* at 115. He also did not know which people from Lansing Truck Services worked on Complainant's truck, or when. Respondent keeps records of when there are repairs or issues, but they do not know who does the work. They receive a record of all the work that is completed on each truck. *Id.* at 115-116.

With regard to Respondent's Exhibit 17, Mr. Fagan testified that it showed an e-mail exchange in which Respondent's general manager was ensuring that the safety department knew about Complainant's accident. *Id*. at 119. Dispatch did not call the safety department to let them know about the accident; the latter did not have contact with the former until after the accident, on Monday morning. *Id.* at 120.

Finally, Mr. Fagan testified that for commercial motor vehicles, the speed limit is 55 miles per hour, at most, on the interstate highway in Illinois. *Id.* at 122.

C. Jeffrey Bessent, Director of Safety and Recruiting, Eagle Intermodal Inc. (TR at 123-153)

Mr. Bessent testified that after the safety department became aware of Complainant's accident on Monday morning, they reviewed the information and began their investigation. Their investigation included the driver's report, the Illinois State Police Report, the Illinois State Crash Report, and the data from the truck's camera. *Id.* at 124-125.

Complainant submitted a repair request, via a form that is used by Respondent to notify the onsite maintenance facility that repairs must be made to a company vehicle. On the form, the only repair request made by Complainant was that the regeneration icon needed to be checked. That was a driver function, not a shop function; the driver is supposed to address the icon either while driving or during a parked regeneration. *Id.* at 125-126. The regeneration issue is not a defect and does not require a mechanic to fix. *Id.* at 126. It is evident that Complainant did not follow the regeneration procedures, instructions for which are located in the vehicle. *Id.*

On May 19, 2019, Complainant was involved in an accident at the intersection of an exit ramp off of I-55 and northbound Cicero Avenue. On I-55, the speed limit for trucks is 55 miles per hour, and the speed limit for the Cicero Avenue exit is 35 or 40 miles per hour. *Id.* The video of the accident showed that as Complainant entered the exit ramp, the traffic light at the intersection was green. As he attempted to make a left turn, he entered the intersection at approximately 37 miles per hour. When he entered the intersection, the light had changed to yellow, and he was making his turn from the right-most turn lane. The light turned red while he was in the middle of the intersection, and as he attempted to make the turn, his trailer encroached into the left-most turn lane and struck the other vehicle. *Id.* at 127. The other vehicle completed its turn after Complainant's truck was through the intersection, and then the other vehicle stopped his car ahead of the truck, and the person therein made contact with Complainant to exchange information. *Id.*

Complainant failed to recognize that he had any responsibility for the accident. *Id.* at 127-128. During the accident review, Respondent planned to work with Complainant. Mr. Bessent planned to issue a warning letter as to Complainant's citation for an improper lane change, which Respondent felt would negatively impact both its safety score and Complainant's safety score. The accident was considered to be a "major preventable accident," which is defined by the National Safety Council as one where the driver failed to do everything within reason to avoid the accident. In addition to warning the Complainant, the letter was to serve as notification that he would be placed on probation for six months and would be assigned corrective action retraining. *Id.* at 128-129. However, during the accident review, Complainant refused the warning letter and refused to take any responsibility for the accident. *Id*. at 129.

It normally takes several days to conduct an accident investigation. After the accident, Respondent felt it had enough information to take Complainant off dispatch. However, once they reviewed the accident information submitted by Complainant, they determined that he could continue to operate until the investigation was completed, since they did not yet have all the facts needed to make a final determination. *Id.* at 129-130.

Once Respondent received all of the information it needed for the investigation, they tried to review the information with Complainant once more. However, he became very combative during the interview and would not accept the video as a learning tool to correct his mistakes. He refused to accept responsibility for things like his speed and following distance, in light of the road conditions at the time of the accident. *Id.* at 130.

Based on all of the information, including Complainant refusing to accept responsibility for the accident, the state police report, the video footage, and Complainant's heated behavior

during their interview, Mr. Bessent made the decision to terminate Complainant's employment. He had lost confidence in Complainant as a professional driver. *Id.* at 130-131.

On cross-examination, Mr. Bessent testified that for an accident involving fatalities, the investigation can take years to complete. *Id.* at 132. However, in Complainant's case, he had all the evidence he needed within five days to make the determination that Complainant was an unsafe driver, based on his experience. *Id.* at 133. At first, he allowed Complainant to drive again, because he did not yet have all of the facts. Once he had all of the facts, his determination to warn/terminate Complainant was made. *Id.* at 134.

Mr. Bessent was not required to wait any length of time to terminate Complainant. During the accident interview, Complainant began screaming that they had altered the video evidence, which Mr. Bessent felt showed that he was not willing to accept responsibility or take corrective action to avoid future accidents. At that point, he made the decision, based on Complainant's driving speed, his behavior at the accident scene, and his behavior in the office, to terminate him. *Id.* at 134-135.

Within the city limits, the speed limit on the interstate is 55 miles per hour for all vehicles. Outside of the city limits, in rural areas, it is 70 miles per hour for passenger cars, and 60 miles per hour for trucks. *Id.* at 137. The speed limit on the exit ramp in question was 35 to 40 miles per hour, and Complainant entered the ramp at 11 miles per hour over the posted speed limit, approaching a stale green light. If he had been using driving skill, he would have already reduced his speed because of the wet conditions. He watched the light turn yellow and entered the intersection. His speed was the main contributing factor to the accident, because he failed to reduce speed in driving conditions that did not provide him with the opportunity to have complete visibility of his surroundings. If he had been using his defensive driving skills, the accident would not have occurred. *Id.* at 138. Based on the information provided by the state police, Complainant was at fault for the accident. *Id.* at 139.

When Complainant was at the scene of the accident and spoke to Mr. Lopez, Mr. Bessent was at home sleeping. Mr. Lopez did not call him at the time of the accident. *Id.* at 139-140.

Mr. Bessent is employed by M&J Logistics, the parent company of both M&J Intermodal and Eagle Intermodal. Mr. Fisher is a supervisor for Lansing Truck Repair, which contracts to perform the maintenance for M&J Intermodal and Eagle Intermodal trucks. *Id.* at 140-141. Mechanics employed by Lansing Truck Repair, Jose and Eduardo, report to Mr. Fisher. *Id.* at 142. As required, Mr. Fisher makes repairs. He also signs off on documents to indicate that repairs have been completed, based on information provided by his mechanics. *Id.* at 143. On a logbook, he can sign that a repair was made, or that there was no defect noted for repair. *Id.* Mr. Bessent did not know whether Mr. Fisher physically worked on Complainant's truck. However, he did sign off on the daily inspection report, indicating that all defects or deficiencies were corrected, based on the driver's condition report and the write-up that the mechanic provided. *Id.* at 144. Mr. Bessent did not know if Mr. Fisher signed all driver logbooks. *Id.* at 145.

Mr. Bessent did not feel he had to wait for the court's decision on Complainant's citation before deciding how to discipline him, because the ticket had no bearing on the accident or how

Complainant operated his vehicle. *Id.* at 146. He could not state that Complainant did everything within reason to prevent the accident; his actions contributed to the accident, and Mr. Bessent had enough information to terminate his employment. *Id.* at 146-147. Based on the video evidence he reviewed, Complainant forced the other vehicle into the median because he shorted himself on the turn. *Id.* at 147.

The video from the truck turns on within 30 seconds of detecting an event, and continues to record for up to two minutes after the event. *Id.* at 148. The camera is on at all times, but it records when triggered. Speed can trigger the camera to record, such as harsh accelerations or decelerations, or lane changes that cause the accelerometer to say that something is not right with the vehicle. *Id.* at 150.

II. Documentary Evidence

A. Truck #510 Paperwork

1. Monthly Maintenance

The record includes monthly maintenance reports, invoices, and checklists for Truck #510, from January 2019 through May 2019.[2] None of documentation associated with the truck for May 2019 shows an issue with regeneration. (RX-12.)

2. May 13, 2019 Driver's Truck Repair Request

On May 13, 2019, Complainant signed a Driver's Truck Repair Request form. The only information he put on the form was "check regen icon." (RX-1 at 1.)

3. May 14, 2019 Mechanic's Report

An invoice from Lansing Truck Service, dated May 14, 2019, indicates that 9.3 hours of labor were performed on Truck #510 on that date. The notes on the invoice and the attached mechanic's worksheet show that a low oil pressure issue was investigated and repaired. (RX-1 at 2-3.)

4. Complainant's Hourly Logs

Forms submitted by Respondent show Complainant's hours of work, driving Truck #510, in the two weeks prior to his May 19, 2019 accident. They show that he was off duty on May 14, 2019, when Truck #510 was undergoing the repairs referenced above. (RX-2A.)

5. Driver's Daily Vehicle Inspection Reports

Complainant's submission of these forms for Truck #510, for the week of May 12, 2019 through May 18, 2019, show that on each day, he checked the box showing "I detect no defect,"

[2] The May 2019 monthly report lists 2020 as the year, but this appears to be an error, particularly as the attached invoices are for May 2019. (RX-12 at 22.)

with the exception of May 14, 2019. On that date, he checked the box for "I detect the following defects" and stated "Needs regeneration. Black smokes coming out exhaust, and the truck doesn't accelerate properly." In the corresponding repair area of the form for this date, Complainant wrote "No corrections" and signed his name. The mechanic's signature line is blank. (CX-6 at 11.)

Complainant also submitted into evidence a DVIR form for the week of May 19, 2019 through May 25, 2019. For May 19, May 23, and May 24, 2019, he listed the same defect as noted above, and also indicated that the seat belt was sticking. For each date, he indicated that no corrections were made. *Id.*

Respondent submitted DVIR forms as well, showing that Complainant signed off on Truck #510 as having no defects on each day from May 5, 2019 to May 18, 2019, with the exception of May 14, 2019. On that date, Complainant checked the boxes for both "I detect no defect" and "I detect the following defects," and he listed "Needs regeneration" above his signature. In the corresponding repair area of the form for this date, the box is checked indicating that "all defect(s) or deficiency(s) has been corrected," and the form is signed by both Complainant and Mr. Fisher. (RX-2B.)

B. Complainant's Employment Paperwork

1. Mandatory Escrow Withholding & Accident/Incident Deductible

Complainant and a representative from Respondent signed this form on March 15, 2019. It represents an agreement that money would be deducted from Complainant's paychecks to build up an escrow balance to pay any potential insurance deductibles. (RX-4.)

2. Warning Letter

The record includes Respondent's warning letter to Complainant, undated and issued by Mr. Bessent. The letter notified Complainant of his improper lane usage citation, as well as the listing of this violation on his roadside inspection. It was noted that the violation would negatively affect Respondent's and Complainant's safety scores, and in turn, would affect Respondent's ability to secure and retain business.

The letter states that Complainant's accident was classified as "major preventable," and the standard penalty would be termination of employment. However, Respondent elected to place Complainant on a six-month safety probation and assign safety training, rather than terminate him, and the letter was to serve as a warning. There was a spot for Complainant to sign the letter, which was blank. (RX-10A.) A corresponding screenshot of a Microsoft Word document file appears to indicate that Respondent saved the warning letter on May 24, 2019 at 9:53 a.m. (RX-10B.)

3. Termination Letter

Respondent issued a "Termination of Contract Letter" to Complainant on May 28, 2019. The letter, signed by Mr. Bessent, indicates that Complainant's employment with Respondent was

terminated due to his "involvement in a major preventable accident, as well as a citation and a violation listed on a roadside inspection you were involved in on May 19, 2019." (RX-3.)

4. E-mail Correspondence

On May 20, 2019 at 12:32 p.m., Mr. Fagan sent an e-mail with a subject line of "510 Kenneth McDowell is out of service," indicating that Complainant had not submitted an accident kit, and that the safety department had to speak with him before he could receive further dispatches. (RX-5A.) On May 21, 2019 at 10:54 a.m., Mr. Fagan sent a follow up e-mail, stating that Complainant was again active for dispatch, pending the accident investigation. *Id.* A corresponding screenshot of a listing of PDF files appears to indicate that Respondent saved several such files on May 21, 2019 at 10:35 a.m., including the accident kit. (RX-5B.)

On May 24, 2019 at 10:38 a.m., Mr. Fagan sent an e-mail indicating that Complainant had been terminated for his involvement in a major preventable accident, and requested that he be removed from all necessary systems. (RX-11.)

C. Accident Documentation

1. Accident Report Kit

Complainant completed Respondent's Accident Report Kit for the May 19, 2019 accident. For the description of the accident, Complainant stated:

> I was traveling in the middle lane after getting off N/B exit from I-55. While I was in the middle lane a car impeded my lane travel heading North on Cicero after he ran the light. He was following too close, drove over the median in the South bound lane, lost control of his car and skidded into the turn signal of my driver side trailer, which caused damage to the turn signal on the trailer and his vehicle. The driver of the car has CDL(A) and was also following too close.

(RX-6 at 4.) He also noted that he had a green light as he entered the intersection, and that the other driver behind him refused to use the left or right lane. *Id.*

On the investigation section of the form, Complainant indicated that the accident was investigated by the Illinois State Police, and he was issued a citation for improper lane usage – cross lane boundary unsafely. He did not know if the other driver was cited. He stated again, "The other driver was behind me and ran the light (he didn't have the arrow) he made an illegal left turn on the southbound lane median as he tried to pass me in the left lane, he lost control and hit me in the middle lane in the rain." *Id*. at 5. He reported that his vehicle had no apparent mechanical defects at the time of the accident. *Id.*

Complainant provided a hand-drawn diagram of the accident. *Id.* at 6. He also provided additional details, stating that the other vehicle was following him off the exit ramp and was driving recklessly, trying to drive around Complainant, following too close, and not reducing his speed. The other vehicle impeded the middle lane in which Complainant was already traveling,

and this is what caused him to strike the trailer. Complainant further asserted that he was not responsible for how the other driver decided to maneuver his vehicle. *Id.* at 7.

2. E-mail Correspondence

On May 19, 2019 at 3:28 a.m., Mr. Lopez sent an e-mail to Respondent's safety department, reporting that at 3:00 a.m., Complainant had called to advise that he was in an accident. Complainant reported that he had been hit by the other vehicle while making a left-hand turn, and that there was no damage to either vehicle. At 3:20 a.m., Complainant called again to advise that police were at the accident scene and that they would not be issuing a citation to him, but would be issuing one to the other driver. Complainant would continue to drop off his load and pick up the next assigned load. (RX-16.)

On May 19, 2019 at 4:50 a.m., Mr. Lopez sent a follow up e-mail, indicating that Complainant had been given a citation for improper lane usage, as well as a level one inspection, which he passed. *Id.*

On May 20, 2019, Faris Husein, the general manager of Respondent, forwarded Mr. Lopez's first e-mail to the safety department, to ensure it had been seen. Mr. Bessent responded confirming that they had seen the e-mail, but would have preferred that the dispatch staff call to inform them after the accident happened. (RX-17.)

3. Traffic Citation

At the time of the May 19, 2019 accident, Complainant received a citation for improper lane usage/crossing lane boundary unsafely. Per the instructions on the form, Complainant was entitled to plead guilty and pay a fine, or plead not guilty and attend court. (RX-7.)

4. Driver/Vehicle Inspection Report

Also at the time of the accident, Complainant underwent a "driver only" inspection by the Illinois State Police. His violation on the report was listed as "improper lane usage – laned roadway." (RX-8.)

5. Illinois Traffic Crash Report

The official crash report for the May 19, 2019 accident included a narrative of the events as follows:

> Drivers Units 1 [Complainant] and Unit 2 were traveling I-55 N/B ramp to Cicero. Driver Unit 1 . . . traveled in the right lane (lane 2) and Driver of Unit 2 traveled in the left lane (lane 1). Driver of Unit 1 changed lanes improperly into the left lane, causing Unit 1 Rear Driver Side Trailer Turn Signal to side swipe Unit 2 Right Passenger side window and frame. Driver of Unit 2 stated Driver of Unit 1 came into his lane of traffic as he was turning causing him to strike the center median to

> avoid going into oncoming traffic. Driver of Unit 1 stated Driver of Unit 2 came on the side of his truck tractor semi-trailer as he was already turning.

The posted speed limit at the scene was 35 miles per hour. (RX-9.)

6. Timestamp Video Review

Respondent submitted written timestamp reviews of the dashboard camera footage from Complainant's truck, drafted by Mr. Fagan. Video 1 consisted of footage from before the accident and the accident itself. Per the review notes, the footage showed fresh rain falling and wet roads, and that it was nighttime. At the 2:34 timestamp, Complainant was driving on I-55 at 66 miles per hour. At 3:47 on the timestamp, he took an exit ramp off the highway at 57 miles per hour, and reduced his speed as he traveled along the ramp. The posted speed limit for the ramp was 30 miles per hour. At 3:53, the traffic light at the end of the ramp changed to green, and Complainant was traveling 54 miles per hour. At 4:09, Complainant had moved the truck into the right-most left turn lane, and was still traveling at 43 miles per hour. At 4:10, the light turned yellow before Complainant's truck entered the intersection, and he had reduced his speed to 37 miles per hour.[3] At 4:13, the tractor entered the intersection, but the trailer was not yet fully in the intersection. The light changed to red while the truck was completing the turn. Complainant had reduced his speed to 20 miles per hour. At 4:15, Complainant appropriately chose to enter the right lane as he turned, but the trailer strayed toward the inside of the turn and the truck crossed over into the left lane, making contact with the other car. (RX-18 at 1-2.)

Video 2 consisted of footage taken directly after the accident occurred. Per the timestamp notes, it showed interactions between Complainant and the driver of the other vehicle, as well as Complainant's first phone call to Respondent's dispatch staff, during which he was noted to report no damage to his truck. *Id.* at 2-3.

7. Order of Events

Respondent submitted this evidence as a written description of its exhibits and the events from May 13, 2019, when Complainant submitted a written repair request for his truck (referenced above), to May 28, 2019, when Respondent issued Complainant's termination letter. This description largely reiterates information otherwise shown in the documentary evidence described herein, with the exception of the description of a meeting between Complainant and other members of Respondent's staff on May 24, 2019.

At this meeting, Complainant reportedly spoke with Mr. Bessent and Mr. Fagan, and they reviewed the dash camera footage of the accident. Mr. Bessent "intended to show the driver the multiple unsafe behaviors that contributed to the preventable accident." However, Complainant maintained that the other driver was solely responsible for the accident, and there was a verbal argument. Furthermore, the description of this meeting states:

[3] The header for this timestamp note says "Light Change (Yellow)," while the note itself talks about a light change to red. It appears the reference to a red light was a typo, particularly as the next timestamp note documents the change from yellow to red.

> At this time, another company driver employed at Eagle, Ransom Scott, was walking by the office. Ransom Scott is a Driver Trainer at Eagle Intermodal, and has been trained by safety to be a defensive driver, and to be a safe driver. Ransom Scott was then called in to the office by Jeff Bessent. Jeff asked Ransom some of the same questions that were asked of Kenneth McDowell, and Ransom Scott answered the questions differently than Kenneth McDowell did.

After these events, Mr. Bessent decided that retraining Complainant as an employee was no longer an option, and he instructed Mr. Fagan to draft a termination letter. Complainant left without receiving the letter. (RX-19.)

D. Other Documents

1. Regeneration Description

Respondent submitted documentation into evidence that describes the regeneration process, as well as the types of regeneration, passive and active. (RX-13.) Additional documentation describes when and how to complete a parked regeneration. (RX-14.)

2. Complainant's Itineraries

The evidence shows Complainant's itinerary for the date of the accident, May 19, 2019. Other evidence shows that the accident occurred at approximately 3:00 a.m., after Complainant departed from picking up a load in Bedford Park, Illinois at 2:30 a.m. He then arrived to drop this load, after the accident, at a location in Chicago, Illinois, at 4:45 a.m. (RX-15A.)

On May 20, 2019 through May 22, 2019, Complainant did not receive any dispatches. (RX-15B; RX-15C; RX-15D.) He returned to driving on May 23, 2019 and May 24, 2019. On May 24, 2019, he completed his last trip at 9:04 a.m. (RX-15E; RX-15F.)

Complainant also submitted copies of trip logs, indicating that he worked on May 19, 2019, May 23, 2019, and May 24, 2019. (CX-6 at 9-10.)

3. Complainant's Exhibits 1-4

Complainant's first four exhibits are both handwritten and printed copies of certain legislative and statutory materials, pertaining to both retaliation and coercion of commercial drivers.

4. Complaint to OSHA

Complainant e-mailed his complaint under the STAA to OSHA on July 15, 2019. Therein, he stated that he requested repairs in writing for Truck #510 on May 14, 2019; the truck needed to be regenerated and the seatbelt was locking, preventing him from moving forward to use his windows and mirrors. Mr. Bessent told him to write up the issues and that the mechanic would make the repairs and sign his log book. Complainant requested to be assigned to another truck,

and Mr. Bessent said no. In addition, the mechanic was not permitted to sign Complainant's log book, per Mr. Bessent's instructions.

Complainant further stated that he was involved in an accident on May 19, 2019, during which the other driver ran a light, drove over the median, and drove into the side of his trailer. Complainant requested to be permitted to return to the truck yard after the accident, because he did not feel safe driving the truck. He was told by dispatch he had to complete his assignment or be terminated, so he did so.

A few days later, Complainant was summoned to the office to view the dashboard camera video of the accident. After he, a driver trainer, and Mr. Fagan watched the video, Complainant requested his own copy of it, and Mr. Bessent said no. He alleged that Mr. Bessent wanted him to sign documents to admit fault for the accident, and since he refused to do so, and because he refused to continue driving an unsafe truck, he was terminated. Mr. Bessent also told Complainant that he was going to deduct $1,000.00 from his pay for the accident, as further retaliation. Finally, Complainant stated:

> I felt his actions were retaliatory, why because, for one, he didn't put me out of service to earn money immediately after the accident, but yet and he had dispatch force/coerce me to complete the loads after the accident, then he waited days after the accident to put me out of service of which makes no sense other than retaliatory purposes.

(CX-5.)

5. Complainant's Objections to OSHA's Findings

On April 29, 2020, Complainant filed his objections to OSHA's determination in this matter via e-mail. Among other things, he stated that at the time of his traffic accident, he did not run a red light, but the other vehicle driver did. His citation for improper traffic lane usage was eventually dismissed in court. He also stated that the police officer at the accident only issued the citation to protect Complainant from the other driver, who was trying to cause Complainant harm and would not allow him to tell his side of the story. The officer told the other driver that Complainant had the right of way, since the other driver was traveling behind Complainant.

In addition, Complainant stated that the other driver was following him so closely that he could not see the other driver's headlights until he was turning, and he actually protected the other driver by not locking his brakes. He stated there is no video footage of Complainant running a red light or causing the accident. However, since the other driver knew the light might turn red, he should have stopped his own vehicle before entering the intersection, and doing so would have prevented the accident. Both Respondent and the OSHA investigator concealed the fact that a traffic camera at the exit ramp showed that the other driver was following too close, and that there were also two other cameras at the intersection where the accident occurred. These cameras showed the traffic court that Complainant did not run a red light, as does the dashboard camera. Complainant's truck was in the intersection before the light turned red, and his left turn was legal. Complainant provided photos of the referenced traffic cameras.

Complainant contended that Respondent did not issue a warning letter to him, and there was no conversation about additional safety training. Furthermore, Mr. Bessent admitted that they should have sent another driver to complete Complainant's assignment after the accident, instead of forcing him to drive an unsafe truck. The night of the accident, dispatch told Complainant that it was Mr. Bessent who told him he had to continue driving, and he would be terminated if he did not. Complainant had requested another truck before he left the yard that night, because his truck had not been properly repaired, but was denied, despite there being several trucks available to drive.

While Complainant was told that he had to sign a letter admitting his guilt for the accident, no documents were ever presented to him. He only had a verbal disagreement about Respondent making threats to terminate him, and he disagreed that he was at fault for the accident. During the video review meeting, Complainant and Mr. Bessent disagreed about the meaning of a yellow light, and Mr. Bessent called him an idiot. Mr. Bessent told Complainant that if the video showed he was not in the intersection before the light turned red, he would be terminated. If he was in the intersection before the light turned red, Respondent would only deduct $1,000.00 from his paycheck. The video showed that Complainant did not run the red light, and Mr. Bessent told him he would have to pay the deductible and sign some documents. He told Complainant that if he did not sign the documents, dispatch would be told not to give him any more assignments. He placed Complainant on leave without pay until May 23, 2019, and told him to come back that day to sign the documents.

Complainant stated that he wrote the truck up for needing a regeneration on May 14, 2019, May 23, 2019, and May 24, 2019, but the mechanic was told by Mr. Bessent not to assist and not to provide a different truck. On May 14, 2019, Complainant saw black smoke coming from the truck's exhaust and wrote it up, and the mechanic told him to leave the truck. However, he was not assigned another truck, and was told to go back home. The mechanic never signed his log book to show that Truck #510 was safe to drive. Respondent had 10 days to have the truck repaired and signed off on by the mechanic, or to take the truck out of rotation. Finally, Complainant noted that Respondent knew he was not at fault for the accident and that his truck had not been repaired, and refused to allow dispatch to assign him a safer truck. (CX-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," but 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 review and consideration of the entire 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. Primarily, many of his statements were entirely inconsistent with documentation contained within the written record. For example, Complainant testified that he wrote up Truck #510 because the seatbelt was sticking, as well as because regeneration was needed. (TR at 34.) However, the record includes only one Driver's Truck Repair Request form for the truck from Complainant, dated May 13, 2019, on which he wrote "check regen icon," but did not write anything about the seatbelt. (RX-1 at 1.) In addition, the DVIR forms, submitted into evidence by Respondent, for the period of May 5, 2019 to May 18, 2019, show only that Complainant wrote "Needs regeneration" on May 14, 2019, and recorded no other issues with the truck. (RX-2B.) Furthermore, while Complainant stated that the mechanic was not permitted to sign the log by Mr. Bessent, these forms show that a mechanic checked the box indicating that all defects had been corrected, and both Complainant and Mr. Fisher signed off. (CX-5; CX-6; RX-2B.)

Interestingly, Complainant also submitted a DVIR form for the week of May 12, 2019 through May 18, 2019, which was completely different than that submitted by Respondent. On Complainant's form, for May 14, 2019, Complainant wrote "Needs regeneration. Black smokes coming out exhaust, and the truck doesn't accelerate properly." Then, in the repair area of the form, Complainant wrote "No corrections" and signed his name, and the mechanic's signature line is blank. (CX-6 at 11.) It is unclear why there would be two versions of this form in existence, but Complainant's signature is on both versions of the form, so it is apparent that he participated in the drafting of both copies, contradicting himself, particularly as to whether corrections to the vehicle were made.

Complainant maintained on several occasions that on the night of the accident, he was told by dispatch that if he did not continue driving, Mr. Bessent had directed that he be terminated. (TR at 35-36; CX-6.) However, both Mr. Fagan and Mr. Bessent indicated otherwise. Specifically, Mr. Fagan testified at the hearing that the safety department was not notified of the accident until later, and they did not know why Complainant was not permitted to return to the yard right away. (TR at 82-83.) Similarly, Mr. Bessent testified that dispatch did not call him at the time of the accident. *Id.* at 139-140. This is further confirmed by Mr. Bessent's May 20, 2019 e-mail to Mr. Husein, in which he stated that he *wished* dispatch had called safety at the time of the accident. (RX-17.) Therefore, the weight of the evidence does not support Complainant's statements on this matter.

Complainant also testified that at the time of the accident, the other driver was the one who slid into the wrong lane and hit Complainant's truck, not the other way around. (TR at 37.) He also maintained that the light was green when he entered the intersection. (RX-6 at 4.) However, the timestamp review of the dashboard camera videos of the accident showed that the light turned yellow before Complainant entered the intersection, and that Complainant's trailer strayed into the left lane and made contact with the other vehicle, as he made the turn. (RX-18 at 1-2.) While

Complainant also testified that his citation was dismissed because traffic video showed that he did not impede the other lane, no evidence has been introduced to confirm this, and this creates another inconsistency issue that undermines his credibility.

Other ways in which Complainant characterized the accident were similarly unreliable and inconsistent. For example, in Complainant's initial telephone call to dispatch on the night of the accident, he reported no damage to either his truck/trailer or the other vehicle. (RX-16.) However, in the accident report kit, Complainant's description of the accident indicated that there was damage to the turn signal on the trailer and the other vehicle. (RX-6 at 4.) In addition, Complainant reported to dispatch on the evening of the accident that he had been given and passed a level one inspection. (RX-16.) However, the documentation of this incident indicates that it was a level three inspection, and that Complainant was found to have a violation of improper lane usage. (RX-8.)

Even the fundamental basis for Complainant's claim is not entirely credible. On the night of the accident, he testified that he did not want to continue driving, because he did not feel safe driving his truck with the reported "safety issues." (TR at 36.) However, the alleged issues had nothing to do with the accident. Regardless of who was at fault, the accident occurred when the two vehicles were making a turn and made contact. This had nothing to do with the alleged regeneration problem, and it is not credible that it was that alleged problem that made him reluctant to drive the truck after the accident.

Finally, Complainant's characterization of the level of his concern about the alleged safety issues with his truck is not consistent with the documentation in the record from the time prior to the accident. The evidence shows that Complainant submitted a repair request on May 13, 2019, on which he requested that the regeneration icon on his truck be checked. (RX-1 at 1.) Similarly, on the May 14, 2019 DVIR form, he noted the requested regeneration on both his and Respondent's submitted versions of the form. However, from May 15, 2019 through May 18, 2019, he represented on these forms that no defects were detected, and no further repair requests are in evidence. This failure to report any problems in the four days prior to the accident is inconsistent with Complainant's allegation that he felt the truck was unsafe to drive after his accident. (CX-6 at 12; RX-2B.)

For all of these reasons, I do not credit all of Complainant's testimony. Inconsistencies and exaggerations cast doubt on many of his allegations. In reaching my decision in this case, I will take into consideration the credibility assessment 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-37, 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-71, 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 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

Under the STAA, there are several different kinds of protected activity. Complainant did not specify under which provision he felt his activity was covered; therefore, all possibly relevant sections will be discussed below.

1. Complaint Provision

Under the STAA, the first type of protected activity involves safety complaints. In brief, an employer is prohibited from taking an adverse action against an employee because 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-41, slip op. at 4 (ARB Mar. 27, 2012); *see also Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-52, 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-47, 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]uncorrected vehicle defects, such as faulty brakes, violate safety regulations and reporting a defective vehicle falls squarely within the definition of protected activity under STAA." *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.

Here, in his OSHA complaint, Complainant stated that he requested repairs in writing for his truck on May 14, 2019, including regeneration and a seatbelt fix. (CX-5.) In his written objections to OSHA's findings, he also stated that on the night of the accident, May 19, 2019, he had requested to drive another truck, because his had not been properly repaired, but was denied. He also stated that he had written the truck up as needing regeneration on May 14, 2019, May 23, 2019, and May 24, 2019, but the mechanic was told by Mr. Bessent not to assist or provide a different truck. On May 14, 2019, when he saw black smoke coming from the truck's exhaust and wrote it up for repair, the mechanic told him to leave the truck and go home. The mechanic never signed Complainant's log book to show that the truck was safe to drive. (CX-6.)

In his hearing testimony, Complainant contended that he wrote up his truck because the seatbelt was sticking and because it needed regeneration. (TR at 34.) He testified that the seatbelt was locking and prohibiting him from leaning forward to use his mirror, and that the regeneration issue was causing his truck to turn off while it was in motion, without warning. He indicated that in addition to writing the truck up, he explained the issues to the mechanic. *Id.* at 34-35.

Mr. Bessent testified that the only repair request made by Complainant was that the regeneration icon on his truck needed to be checked. He noted that a regeneration is supposed to be performed by the driver, is not a defect, and does not require a mechanic to fix. (TR at 125-126.)

The documentary evidence includes a Driver's Truck Repair Request form, signed by Complainant on May 13, 2019, requesting only that the regeneration icon be checked. (RX-1 at 1.) On Complainant's submitted copy of his DVIR form for May 14, 2019, he stated "Needs regeneration. Black smokes coming out exhaust, and the truck doesn't accelerate properly." He then wrote "No corrections" and signed his name. (CX-6 at 11.) On Respondent's submitted copy of the same form for May 14, 2019, Complainant is shown to have written "Needs regeneration" above his signature, and then signed off on the defect/deficiency as having been corrected. (RX-2B.) The onsite mechanic's invoice shows that 9.3 hours of labor were performed on Complainant's truck on May 14, 2019, to repair and investigate a low oil pressure issue. (RX-1 at 2-3.) Then, no defects were identified on either copy of the DVIR form for May 15, 2019 to May 18, 2019. (CX-6 at 11; RX-2B.) On Complainant's submitted copy of the DVIR form for May 19, 2019 to May 25, 2019, he notated the alleged regeneration issue and a seat belt problem on May 19, 2019, May 23, 2019 and May 24, 2019. (CX-6 at 11.)

In considering the documentary evidence, I note that Complainant's copies of the DVIRs do not hold any weight here. Because Complainant and Respondent were in possession of two different versions of the form for the week of May 12, 2019, it is apparent that Complainant transmitted one version of the form to Respondent, which it submitted into evidence, and kept or recreated a different version for himself. Similarly, Complainant completed another DVIR form for the period of May 19, 2019 through May 25, 2019, but he was terminated on May 24, 2019, before this form could have been turned in. To the extent that Complainant was required to have *communicated* a safety complaint to Respondent to have engaged in protected activity, only the forms in Respondent's records are probative in determining the presence of such activity.

There is documentary evidence to confirm that Complainant complained of the regeneration issue to Respondent on two occasions. Specifically, Complainant completed the Driver's Truck Repair Request form on May 13, 2019, asking for the regeneration icon on his truck to be checked. (RX-1 at 1.) He also noted that the truck needed regeneration on Respondent's copy of the DVIR form for May 14, 2019. (RX-2B.) This is consistent with Mr. Bessent's testimony that the only repair request made by Complainant was for regeneration. Therefore, these two written requests for a fix of the regeneration issue can be considered as possible protected activity.

However, there is no evidence of there being a seatbelt-related request, aside from Complainant's testimony, which I do not credit. As set forth above, I find several inconsistencies and exaggerations in Complainant's testimony. In light of his lack of credibility, combined with the lack of any documentary evidence showing a seatbelt complaint was relayed to Respondent, I find no seatbelt-related complaint was made to Respondent here.

Complainant also stated in his written objections to OSHA's findings that on the night of the accident, May 19, 2019, he had requested to drive another truck, because his had not been properly repaired, but his request was denied. However, I do not credit this allegation for the purposes of establishing a protected complaint, because the DVIR form submitted by Respondent shows that Complainant signed off on the requested repair from May 14, 2019, and did not report any further defects with the truck from May 15, 2019 to May 18, 2019. (RX-2B.) I find Complainant's allegation inconsistent with the documentary evidence and not credible, and thus I find that this alleged "complaint" did not occur.

Pursuant to the applicable law, set forth above, Complainant's two written repair requests for the regeneration issue 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 here undermine the possibility that he actually believed there was a safety defect that violated the law. Most significantly, the evidence shows that despite Complainant requesting regeneration on the truck in writing on May 13, 2019 and May 14, 2019, he then continued to drive it on May 15, 2019 through May 18, 2019. (RX-2A; RX-2B.) This is completely inconsistent with him having an actual belief that there was a safety defect in the truck; at the very least, if he actually believed there was a safety defect, he

would have notated it on his DVIR form for those days. It is also significant that on his accident report, Complainant indicated that there were no mechanical defects apparent at the time of the accident. (RX-6 at 5.)

The manner in which Complainant was driving the truck when he had his accident on May 19, 2019, also weighs against a finding that he had an actual belief of an illegal safety defect. As noted above, he testified at the hearing that the regeneration issue was causing his truck to turn off while it was in motion, without warning. (TR at 34-35.) However, the video footage timestamp notes from the night of the accident show that Complainant was driving his truck significantly in excess of the speed limit in rainy and wet conditions. (RX-18 at 1-2.) This is entirely inconsistent with an actual belief that his truck might turn off at any moment.

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. Bessent, Complainant's alleged belief was not objectively reasonable. He testified that while Complainant made a repair request regarding the regeneration icon on his truck, there was nothing for the repair shop to do; it is the responsibility of the driver to handle a parked regeneration, if necessary. He specifically stated that the regeneration issue is not a "defect." (TR at 125-126.) This is generally consistent with the technical documents submitted by Respondent regarding the regeneration process, which indicate that it is required when the diesel particulate filter in a truck becomes obstructed by soot. In other words, it is a mechanical issue with the truck, not a safety defect that puts the truck in violation of relevant law. (RX-13; RX-14.) 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 he made a safety complaint to Respondent regarding a seatbelt problem or that he requested to drive another truck on May 19, 2019, due to a lack of proper repairs. Furthermore, I find Complainant has not shown by a preponderance of the evidence that his complaints regarding his truck's required regeneration 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). In this matter, Complainant has alleged that his refusal to drive the truck following his accident was because he did not feel safe doing so; therefore, his refusal potentially falls under the second subsection cited above. (TR at 36.)

The statute 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.*

It should be noted that while Complainant alleges he requested to be able to return to the yard and cease driving on the night of the accident, he did ultimately continue driving. Therefore, he did not fully refuse to drive. However, the ARB has offered some 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 the truck after his initial (alleged) refusal to do so does not categorically disqualify his behavior as 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).

In his initial OSHA complaint, Complainant stated that after his accident, he requested to be able to return to the truck yard, because he did not feel safe continuing to drive. (CX-5.) In his objections to OSHA's findings, Complainant further stated that Mr. Bessent admitted that they should have sent another driver to complete Complainant's assignment after the accident, instead of forcing him to drive an unsafe truck. (CX-6.) During the formal hearing, Complainant similarly testified that he when he contacted Respondent after the accident, he told them he did not want to complete his assignment, but he was told he had to do so. He continued driving "under duress" and did not feel safe operating the truck with its safety issues. (TR at 35-36.)

Assuming without deciding that Complainant made this request to return to the truck yard following the accident, the evidence does not support a conclusion that Complainant either actually had an apprehension of serious injury to himself or others because of the alleged safety problems with the truck, or that if he did have such an apprehension, it was reasonable, due to many of the same factors discussed above. Primarily, Complainant's contention that he did not feel safe driving his truck after the accident due to alleged safety problems is unlikely, because the alleged problems had nothing to do with the accident. Regardless of which party was at fault for the accident, the evidence shows that it essentially occurred when the two vehicles collided during a left-hand turn. This is not related to the alleged regeneration issue, and Complainant noted on his accident kit report that the truck had no apparent mechanical defects at the time of the accident. (RX-6 at 5.) As such, this evidence does not support the contention that Complainant actually had an apprehension of serious injury to himself or others when he refused to drive the truck.

Furthermore, the existence of Complainant's apprehension is undercut by his failure to report any issues with the truck after May 14, 2019. Complainant signed off on any defects in the truck as having been corrected on May 14, 2019. Then, as discussed in detail above, his DVIR forms for May 15, 2019 through May 18, 2019, indicated that he found the truck to have no defects.

(RX-2B.) Furthermore, the records show that he returned to driving the truck on May 23, 2019 and May 24, 2019. (RX-15E; RX-15F.) In general, he safely completed his driving shifts on all of these dates. This evidence, combined with the somewhat reckless manner in which he was driving on the night of the accident, is all completely inconsistent with him having a reasonable apprehension that driving the truck would result in injury.

Realistically, Complainant's failure to report any issues with the truck after May 14, 2019, is likely due to the hours of labor a mechanic performed on his truck that day. Complainant stated in his objections to the OSHA findings that on May 14, 2019, he saw black smoke coming from the truck's exhaust and wrote it up, and the mechanic told him to leave the truck. (CX-6.) Then, the mechanic's invoice for the work done that day shows that a low oil pressure issue was investigated and repaired. (RX-1 at 2-3.) It is entirely possible that this resolved the smoke issue that Complainant saw on the truck, as well as any icons on his dashboard, alleviating any apprehension of serious harm that he may have reasonably had, and further undermining his contention that he did not feel safe driving the truck after his accident several days later.

Finally, the reasonableness of any alleged apprehension of serious injury that Complainant possessed is also called into question by the evidence that the truck did not have any safety-related problems, even if it did need regeneration. As noted above, Mr. Bessent testified that a regeneration is a driver function, does not require mechanic involvement, and is not a safety defect. (TR at 125-126.) This was confirmed by the technical documents in the record. (RX-13; RX-14.) This tends to indicate that there was nothing occurring with the truck that presented an actual danger and that could or would 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 his truck after the accident 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 July 15, 2019 complaint must be dismissed.

ORDER

For the reasons set forth above, IT IS ORDERED that Complainant's July 15, 2019 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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