UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC

Issue Date: 13 June 2024

OALJ Case No: 2023-STA-00002
OSHA Case No.: 301002145

In the Matter of:

CHRISTOPHER COLON,
Complainant,

v.

EWG GLASS RECOVERY & RECYCLING CORPORATION,
EDWARD GOLEBIEWSKI III,

and

LOUIS VENTURA,
Respondents.

Appearances:

Paul O. Taylor, Esq.
Peter L. LaVoie, Esq.
Truckers Justice Center
Edina, Minnesota
For the Complainant

Brent R. Pohlman, Esq.
Mandelbaum Barrett PC
Roseland, New Jersey
For the Respondents

DECISION AND ORDER

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105, and the implementing regulations at 29 C.F.R. Part 1978.

The STAA employee protection provision provides that a person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because the employee engaged in STAA-protected activity.[1] To prevail on a STAA complaint, the complainant must prove by a preponderance of the evidence that: (1) the employee engaged in a protected activity; (2) the employer took an adverse employment action against the employee; and (3) the protected activity was a contributing factor to the adverse employment action.[2] If the complainant is unable to prove all three elements, the complaint fails.[3] If the complainant successfully meets this burden, the employer may avoid liability by demonstrating by clear and convincing evidence it would have taken the same adverse action in the absence of the protected activity.[4]

The most salient facts in this matter are largely not in dispute, with some exceptions, until the day that Complainant decided to engage in self-help to use a box truck rather than the assigned tractor-trailer because he was not sure a tractor-trailer was safe at the client's location. The parties disagree whether Complainant had permission to use the box truck. Respondents contend that Complainant's decision to use a different vehicle than the one assigned for the dispatch was insubordination and the sole reason for his termination. Complainant contends that the decision to use a different vehicle was protected activity and that the employer based its decision to terminate Complainant's employment on protected activity in the form of (1) refusing to operate a tractor-trailer in a possibly unsafe congested environment and (2) the employer's alleged cumulative distaste for Complainant's prior complaints about maintenance and operational issues, which although not subject to any adverse employment actions proximate to their voicing, could be inferred to have been in EWG's owner's mind when he decided to terminate Complainant's employment. For the reasons discussed in this Decision and Order, I find that Complainant did not carry his burden of proof to show by a preponderance of the evidence that protected activity contributed to the termination decision. Even if he did, Respondents established by clear and convincing evidence that Complainant's self-help solution—and the manner in which he effected that solution—was such a significant affront to the employer's basic operational

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[1] 49 U.S.C. § 31105(a)(1); 29 C.F.R. §1978.102(a).

[2] 29 C.F.R. § 1978.109(a); *Estate of Ayres*, ARB Nos. 2018-0006, -0074, ALJ No. 2015- STA-00022, slip op. at 6 (ARB Nov. 18, 2020) (2020 WL 7319283).

[3] *Coryell v. Ark. Energy Servs., LLC*, ARB No. 2012-0033, ALJ No. 2010-STA-00042, slip op. at 4 (ARB Apr. 25, 2013) (citation omitted) (2013 WL 1874822).

[4] 29 C.F.R. § 1978.109(b); *Blackie v. Smith Transp., Inc.*, ARB No. 2011-0054, ALJ No. 2009-STA-00043, slip op. at 8 (ARB Nov. 29, 2012) (2012 WL 6066522).

authority that Complainant would have been fired even if STAA protected activity had contributed to the termination decision.

FINDINGS AND FACT AND CONCLUSIONS OF LAW[5]

I. General Matters

This Decision and Order is based on the testimony and exhibits received into evidence, stipulations of the parties, applicable statutory and regulatory authority, and the arguments of the parties.[6] The hearing transcript is cited as "Tr," Complainant's Exhibits are cited as "CX," and Respondents' Exhibits are cited as "RX."[7] Mr. Colon will be referred to as "Complainant" or "Colon." The named Respondents will be collectively referred to as "Respondents."[8] Complainant's Employer, EWG Glass Recovery & Recycling Corporation, will be referred to as "EWG."

II. Procedural History; Exhibits; Witness Credibility

Complainant timely filed his STAA complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") on August 1, 2022, alleging he was terminated on June 28, 2022 in violation of the STAA. (Joint Statement of Stipulated Facts (hereinafter "Joint Stipulations"), No. 6). On October 14, 2022, OSHA issued "Secretary's Findings" upon the request of Complainant to terminate the investigation and issue a determination.[9] OSHA

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[6] In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13 (ARB Mar. 11, 2019) (per curiam) (2019 WL 3293924), the ARB noted that an ALJ need not include a summary of the record in the Decision and Order, as it is assumed that the ALJ reviewed and considered the entire record in making his or her decision. The ARB stated that what is more helpful for its review of whether the ALJ's findings of fact are supported by substantial evidence of record is a tightly focused set of findings of fact. I have considered the entire record, even if aspects of it are not mentioned in this Decision and Order.

[7] The Respondents' exhibits were e-filed in a single 85-page PDF document. Although there are Bates page numbering on some of the exhibits, it is easier to find items using the PDF page numbering, which is how pinpoint citations to these exhibits are cited in this Decision and Order.

[8] EWG, Golebiewski, and Ventura were named as Respondents in this matter. (*See* Complainant's Pleading Complaint (Feb. 28, 2023) and Respondents' Answer to Pleading Complaint (Mar. 20, 2023)). In his post-hearing brief, Complainant only asked that Golebiewski be held individually liable, and did not ask the same of Ventura. (Complainant's Post-Hearing Brief at 26-27). Accordingly, I dismiss Ventura as a Respondent in this matter.

[9] OSHA's Directorate of Whistleblower Protection Programs permits complainants to request that OSHA terminate its investigation and issue Secretary's Findings so they can pursue their claim more expeditiously before a DOL administrative law judge. *See OSHA Whistleblower Investigations*

determined, based on the information gathered at that point in the investigation, that it could not find reasonable cause to believe that a violation had occurred. OSHA thus dismissed the complaint. Complainant timely filed objections to the OSHA determination and requested a hearing before an Administrative Law Judge ("ALJ"). (Joint Stipulations, No. 8). The Office of Administrative Law Judges ("OALJ") docketed this matter on October 26, 2022. The hearing before the presiding ALJ is de novo, meaning that both questions of law and issues of fact are determined as if there had been no OSHA investigation.[10]

An OALJ mediator was appointed by request of the parties. Mediation was unsuccessful, and a hearing was scheduled for June 2023. The parties were granted additional time for prehearing development and a continuance of the hearing date. On September 26, 2023, I presided over a formal video hearing, admitting Claimant's Exhibits 1-13, Respondents' Exhibits A-J, and the parties' *Joint Statement of Stipulated Facts*. (Tr. 10-11).

Post-hearing briefing was completed on March 13, 2024.[11]

Four witnesses testified at the hearing: Christopher Colon, the Complainant; Edward Golebiewski III, Owner of EWG; Louis Ventura, Operations Manager for EWG; and Brian Irving, Dispatcher for EWG.

The testimony of all witnesses was fairly consistent about the sequence of events, but there were discrepancies about details. Where there are material discrepancies, I have indicated below why I found the preponderance of the evidence did or did not support the fact in question.

As to general credibility, I found that Golebiewski, Ventura and Irving testified consistently with each other and the documentation of record as to the essential events leading to Complainant's firing. I find that they all were credible witnesses. As the sole decisionmaker about Complainant's termination from employment, Golebiewski's credibility was crucial. He was unambiguous and frank about the reason for the firing. While the full record shows that he had sympathy for drivers, he also obviously suffers no fools and was blunt and direct in his testimony. I found no pretense to his testimony. His testimony was completely

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Manual, **OSHA Instruction** 80-81, https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-011.pdf.

[10] *Greenhorn v. Arrow Stage Lines*, ARB No. 98-118, ALJ No. 1997-STA-18 (ARB Aug. 20, 1998) (1998 WL 545332) (citing *Assistant Sec'y & Moravec v. HC & M Transp.,* 1990-STA-44, slip op. at 5 (Sec'y, Jan. 6, 1992) (1992 WL 752682)).

[11] The following references will be used in this decision: "C. Br." for Complainant's brief; "R. Br." for Respondent's brief; and "Rep. Br." for Complainant's reply brief.

credible that Complainant was fired for taking a box truck without authorization of the dispatcher, and for his disrespecting EWG's dispatcher. It was not pretext for some other motive.

Colon's testimony was also generally consistent with the other witnesses and the hearing exhibits, but there was a significant difference in the telling of some details, and particularly on whether he had permission to take the box truck for his final dispatch on the day he was fired. In this regard, I found that Colon's version of events failed to be convincing compared to the testimony of the other witnesses and the context of his employment and EWG's business operations. Also, in a few instances it appeared that Colon's hearing testimony jumbled up similar events and tended toward sweeping statements about motives and procedures. This is not surprising given how many dispatches a driver runs and the passage of time from when those events transpired until the date of the hearing; but conflating of events sometimes made it difficult to follow his testimony.

Finally, it cannot be ignored that at the hearing, Respondents elicited testimony from Colon about an incident in March 2021 in which he applied for unemployment benefits with the State of New York while still employed by EWG. In its post-hearing brief, Respondents argued that this incident reflects a credibility issue. (R. Br. at ¶¶ 12-14). Complainant explained that this happened during the COVID-19 pandemic when "they" were putting drivers in the position of working less or being let go. (Tr. 78-79; RX-J). Complainant stated: "[s]o since a lot of us didn't know what was going on with the COVID situation, I had applied for unemployment just in case they were going to let me go instead of working. So that was the reason for that." (Tr. 79). Ventura, who was in charge of staffing decisions at the time (about a year into the pandemic), testified that employees had not been advised that there may be a reduction in force, layoff, furlough, or termination related to COVID, nor had EWG earlier laid off, furloughed or terminated any drivers into response to the COVID public health emergency. Ventura also testified that Colon had never been told that his position was at risk because of factors related to COVID, and that he had no idea why Colon applied for unemployment in March 2021 while still employed by EWG. (Tr. 180).

In STAA proceedings, formal rules of evidence do not apply, but rules or principles designed to assure production of the most probative evidence will be applied. 29 C.F.R. § 1978.107(d). 29 C.F.R. § 18.608(b) reflects a principle allowing inquiry on cross-examination about specific instances probative of the truthfulness or untruthfulness of the witness. Thus, I find that the testimony about Complainant's filing of a claim for unemployment is probative regarding Complainant's general credibility. While I appreciate that employees may have had valid concerns about employment stability during the pandemic, it cannot be ignored that Complainant filed this claim while still employed. Complainant's

testimony was vague about where the concern about the stability of his employment came from. He did not state whether it was based on specific information or a general sense among drivers or some other source. Given Ventura's credible testimony that EWG drivers were not threatened with layoff, furlough, or being let go, it is not clear why Complainant would have believed that filing the claim was justifiable. While one incident of poor judgment may not be reflective of general propensity toward untruthfulness, it is a factor that compels viewing Complainant's testimony with caution, particularly where inconsistent with other testimony from credible witnesses and not supported by other testimony or evidence.

III. Findings of Fact

A. Introduction

The parties have done a commendable job of stipulating to the facts of the case that are not in dispute. Complainant presented 58 Proposed Findings of Fact in his post-hearing brief (C. Br. at 1-13) many of which had already been jointly stipulated to prior to the hearing. (Joint Stipulations filed Sept. 8, 2023, and received into the record at the hearing, Tr. at 10-11). Respondents helpfully identified in its post-hearing brief which of Complainant's proposed findings it admitted or stipulated to, and which it denied. (R. Br. at 18-20).[12] Respondents also provided a set of proposed findings in their post-hearing. Where the parties are not in agreement on a material point (or where the documentary evidence did not match the facts as agreed to in the parties' Joint Stipulations), I have made findings to resolve the matter. I have also added observations and clarifications, record citations, and additional findings, based on my independent review of the record. With these findings, observations, clarifications, and additions, I adopt the following as the findings of fact for this matter.[13]

[12] The numbering of Complainant's proposed findings of fact had some clerical errors. *See* R. Br. at 18 n.1, noting numbering discrepancies. Respondents admitted or had previously stipulated to most of the proposed findings but, based on the proposed findings as presented sequentially in Complainant's brief, Respondents denied proposed finding ¶ 13, admitted the facts but not the legal conclusions in ¶ 25, partially denied facts in ¶¶ 30 and 31, admitted the testimony but not the legal conclusions in ¶ 37, and denied proposed findings ¶¶ 47, 48, 50 and 53. See the Appendix to this Decision and Order for a complete list of Complainant's proposed findings and Respondent's responses.

[13] Much of the documentary evidence in this matter consists of text messaging, which can be disjointed and full of abbreviations, mistaken autocorrects, acronyms, misspellings, and so forth. When the texts are quoted below, it is as they appear in the cited exhibit(s). Similarly, when quoting from the transcript, I have not endeavored to correct the text or grammar.

B. General Background - EWG

EWG Glass Recovery and Recycling Corporation[14] is in the business of collecting glass bottles and selling recycled glass materials to manufacturers, mostly for creation of new bottles, but also for products such as glass aggregate for concrete and insulation. Ninety-five percent of the recycled glass goes to three customers. (Tr. at 169-79). EWG has over 500 pickup customers for reverse vending machines in New York. (*Id.* at 192). It maintains a business address in Jamaica, New York. EWG's headquarters, dispatchers, depot, and repair shop are at this location. It has other locations that process the recyclables as they come in, but the trucks are housed when not in use at the depot. (*Id.* at 163-64). EWG services upstate New York, Long Island, Staten Island, the Bronx, Queens and Brooklyn. It does not go into Manhattan. (*Id.* at 128). EWG has about 62 to 65 employees in total; it has 22 drivers, five of whom operate tractor-trailers. (*Id.* at 134, 138, 164). EWG regularly operates four box trucks and five tractors. It also has two spare tractors. It has 22 trailers, some 40 feet and some 48 feet. (*Id.* at 123, 127). A tractor-trailer unit can total around 55 feet long. (*Id.* at 135). Box trucks are about 30 feet in length and are a little shorter in height than tractor-trailers. (*Id.* at 135-36). Most of the fleet is relatively new. (*Id.* at 182-83; 207-08). A Commercial Driver's License ("CDL") is required for driving a tractor-trailer rig; box trucks may be driven with a regular driver's license but most of EWG's box truck drivers have a class B CDL. (*Id.* at 135, 213).

Edward Golebiewski has owned EWG for 35 years. He has held a CDL since he was 18 years old and personally drove routes when the company started. He still drives occasionally, mostly around the yard/depot. (*Id.* at 190-91).[15] EWG has grown into a substantial business operation, having six or seven facilities in South Jamica, Queens, and has annual revenue north of $20 million. In addition to the main office and depot, it has a processing center, a crushing facility, a rail yard, and a decasing facility. (*Id.* at 191, 222). Golebiewski remains very hands-on for even day-to-day business operations. (*See, e.g.*, *id.* at 49, 100, 168, 192-93). As will be discussed in more detail below, Golebiewski alone made the decision to fire Colon on June 28, 2022.

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[14] The parties stipulated that EWG is a motor carrier operating in interstate commerce and an employer subject to the employee protection provisions of the STAA and is a "person" as defined at 29 C.F.R. § 1978.101(k) and subject to liability under 49 U.S.C. § 31105. (Complainant's Proposed Findings of Fact, Admitted by Respondent; Joint Stipulations, No. 3).

[15] The parties stipulated that Golebiewski is a "person" as defined at 29 C.F.R. § 1978.101(k) and subject to liability under 49 U.S.C. § 31105. (Joint Stipulations, No. 4).

Louis Ventura is EWG's operations manager, a position he had held for about nine years at the time of the hearing. (*Id.* at 162).[16] Ventura supervises employees at all EWG locations and reports only to Golebiewski. He does not hold a CDL and his focus is on the business operations of EWG; Golebiewski is more familiar with the trucking aspect of the business. (*Id.* at 163, 184).

Brian Irving is a dispatcher at EWG, a position he has held since 2016.[17] (*Id.* at 122). He is responsible for communicating with customers, scheduling pickups, and dispatching and assigning routes to nine drivers. EWG has over 400 customers, whose needs vary. Some require dispatches weekly, while others only as needed. (*Id.* at 123-24). He does not have a CDL, has never worked as driver, and has only been to a few of the customer locations. (*Id.* at 124). He works at the headquarters in Jamaica, NY, which is where the depot is located. (*Id.* at 125).

EWG maintains a repair shop at the depot. Joey is the lead mechanic and is the owner's brother-in-law, and Alex is the second mechanic. (*Id.* at 37-38, 42, 186). Although Joey and Alex are referred to several times in the hearing transcript and exhibits, their last names were not provided. Irving indicated that EWG has three mechanics in total. (*Id.* at 129).

C. General Background - Complainant

Complainant is Christopher Manuel Colon, who, at the time of the hearing, resided in Kissimmee, Florida.[18] (*Id.* at 12, 115). He holds a CDL and has worked as a professional truck driver for ten years. He attended a truck driving school in Cedar Rapids, Iowa. (*Id.* at 12-13). Prior to his employment with EWG, Colon worked for seven or eight other trucking companies and has driven trucking dispatches throughout the country. (*Id.* at 13, 113-114). Colon worked for EWG during two separate periods.

Colon's first period of employment with EWG was from 2018 through 2021. (*Id.* at 17). He was hired as a Class A CDL driver and assigned to operate a rendering truck used to pick up shredded glass in supermarkets. Colon also occasionally drove a tractor-trailer set to pick up boxed cases of full bottles, aluminum cans, or plastic recycled bottles of various sizes. The recyclables were delivered to EWG's two facilities in Queens, NY. (*Id.* at 14-15). Colon was hired with a pay rate of $24 per hour. He received a raise to $26 per hour after about a

[16] The parties stipulated that Ventura is a "person" as defined at 29 C.F.R. § 1978.101(k)." (Joint Stipulations, No. 5). As noted above, although Ventura was named a Respondent, Complainant did not ask for Ventura to be held individually liable, and I therefore dismiss him as a Respondent.

[17] Irving was not named as a Respondent in this matter.

[18] The parties stipulated that Colon is an employee as defined at 49 U.S.C. § 31101(2). (Complainant's Proposed Findings of Fact, Admitted by Respondent; Joint Stipulations, No. 2).

year and a half, and his pay was eventually increased to $30 per hour. (*Id.* at 17, 116).

Colon's primary supervisors were Irving and Ventura. He received his day-to-day dispatches from Irving. Colon would sometimes to go to Ventura with issues he could not resolve with Irving. (*Id.* at 18, 162).

Colon resigned from EWG in 2021, moving to Florida to assist in caring for his father. (*Id.* at 23). Another factor for his decision to move was that around the time of his resignation, EWG was hiring new Class A drivers, and Complainant would have liked to be considered for such a position but was overlooked. (*Id.* at 24). After Golebiewski determined that Complainant indeed had a Class A CDL, he apologized for the oversight.[19] Golebiewski gave Colon some bonus money, including a week of salary, another $1,000 bonus, and $500 to cover travel expenses to Florida to care for his father. Colon considered one $4,000 bonus as being intended to compensate him for the misunderstanding about his eligibility for the Class A hiring.[20] Golebiewski told Colon that, regardless of whether he chose to continue working for EWG, the money was his to keep; that if he decided to return to EWG, he could keep the same rate of pay; and that if Colon decided to leave EWG for good, they wished him well. (*Id.* at 24-25).

While residing in Florida, Colon kept in contact with Irving, who told him that if he ever wanted to return to EWG, they had work for him. (*Id.* at 25-26, 82-83). Eventually, after discussing the matter with his fiancée, Colon decided to return to work for EWG in New York for another year. (*Id.* at 26, 83).

Complainant began his second term of service with EWG on or about May 3, 2022. (*Id.* at 27; Joint Stipulations, No. 1). He was rehired as a Class A driver at his prior $30 per hour rate, but this time he would primarily drive tractor-trailers. He was not required to fill out a new application when he was rehired. (Tr. at 27, 85; Joint Stipulations, No. 1). Colon was assigned to service some customer locations he had previously visited while working for EWG from 2018 to 2021, and some new locations. The supervisors were the same people with the same titles as during his prior work for EWG. (Tr. at 28-29).

During his first tenure with EWG, Colon had accompanied Joey on a trip with about three stops; Joey was checking whether Colon knew how to handle the

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[19] The evidence of record does not address why the new Class A hiring was preferrable, but in context, it is apparent that Complainant wanted to move from being considered a rendering truck driver to being considered a tractor-trailer driver, which was a better reflection of his possession of a Class A CDL.

[20] Complainant noted, however, that he was already due for raise at that time. (Tr. at 76).

truck. Colon was also assigned a helper who knew the routes – which streets to take and how to enter facilities. Complainant testified that there was no formal training, although he did get some training on roll-offs for a Connecticut route which involved an 18-wheeler set up like a rendering truck. (*Id.* at 15-16).[21] According to Complainant's initial testimony, when he returned in 2022, the only training was from a driver named David on how to do paperwork for specific jobs. (*Id.* at 27, 28). Additional testimony from Complainant and other witnesses, however, indicates that David had also trained Complainant about general driving conditions in Staten Island. (*Id.* at 53, 56-57, 105, 142, 205). Moreover, Golebiewski testified that EWG devotes two to three weeks of direct training with another driver, and that he is very picky about who drives his trucks and requires at least five years of experience to be hired as a tractor-trailer driver. (*Id.* at 213).

Colon continued to work for EWG until being fired on June 28, 2022. (Joint Stipulations, Nos. 1, 16). Thus, his second period of tenure with EWG was less than two months in duration.

Colon was never written up or disciplined or threatened by anyone at EWG during his first period of employment (Tr. at 17, 74, 78) including after an accident with a rendering truck (*Id.* at 75-76).[22] In his hearing testimony, Irving indicated that at the time Complainant went back to Florida to care for his father, EWG had not had any problems with Complainant's performance except for one accident with power lines and the rendering route, and that EWG was nonetheless willing to rehire him. (*Id.* at 149). Ventura also considered Complainant to be a good enough employee to be eligible to return to work for EWG. (*Id.* at 171).

Complainant did not have any disciplinary actions taken against him during his second term of employment prior to the firing.[23] Ventura did not recall any customer complaints about Complainant. (*Id.*). Ventura indicated that, even after the June 28, 2022 firing, he recognized that Complainant had been a valued employee at EWG. (*Id.* at 177). Similarly, Golebiewski indicated that he had fired Complainant only because he had disrespected the dispatcher and because Complainant's expectations about what dispatches he would take were not a good match for EWG; Golebiewski said that he had no problem with him as a driver. (*Id.*

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[21] The Connecticut route was later dropped. (Tr. at 128, 195, 206).

[22] Complainant testified that he had never been fired from any of his employers prior to working for EWG. When he left those employers, it was for a better opportunity or better pay. (*Id.* at 114).

[23] *See, e.g.*, Irving had never written up Complainant for disciplinary issues (*Id.* at 148); Golebiewski testimony that Colon was considered a good employee, and that he never had any prior reason to write up Colon (*Id.* at 200); Colon was in Golebiewski's "good graces" prior to the day of the firing (*Id.* at 207).

at 193). Complainant has not alleged that Respondents took, or threatened, any adverse employment action against him prior to the June 28, 2022 firing.

D. Dispatches and Routes

1. Assignments and Selection of Routes

For EWG's recyclables pickup operations, the dispatcher, Irving, assigns drivers to routes and provides the address; drivers are free to ask Irving questions, such as how to get to the location and the route. (Tr. at 124). To build a schedule, Irving has a whiteboard at his desk at EWG's headquarters/depot, where he tracks customer call-ins. After 2:00 pm each day, he fills in the driver stops for the next day. Most drivers will be assigned three stops a day, depending on the location; if the stops are distant, the driver may only be assigned two stops. Irving takes in feedback from drivers and customers that may be used for adjustments, such as the best timing for a pickup. Most stops have been to hundreds of times, so Irving already knows where and when to send the trucks. (Tr. 125-26). Golebiewski is very involved in scheduling. Every schedule is delivered to his desk the night before. (*Id.* at 192-93; *see also id.* at 202 (discussing RX-A, which is illustrative of the document Golebiewski receives for review of routes)). According to Golebiewski, there are rarely new routes; the scheduling sheets are based on EWG's experience and show the order the driver should follow. (*Id.* at 202-04). The order is based on the times the client is open; EWG times the routes for efficiency. (*Id.* at 203). Again, according to Golebiewski, if a new route is added, the driver will be given directions, the name of the person they need to talk to, the phone number, what time they open and close, and what the best time to pick up is. But for the most part, the routes are regular accounts serviced daily, and there is no need to provide drivers with directions or to consult a mapping application. (*Id.* at 203-04).

According to Complainant's proposed findings of fact, as admitted by Respondents, Complainant would receive his route assignments at the end of the workday in an envelope. The assignments did not provide any instruction on how to get to the customer locations. Complainant's testimony was that: "You just get the address and you try to Google it, or if you have a GPS, you GPS it to take you there." It was up to the driver to determine how best to get to each customer location. (*Id.* at 23). Complainant also testified that one of the main complaints he would bring up with Irving, Ventura, and Golebiewski was problems about routes: getting in and out from customer facilities; products not being ready when the driver arrived; truck equipment, and so forth. (*Id.* at 18-20). One specific complaint Complainant had was that the routes were not really given in order by the dispatcher – an inefficient way to proceed. Complainant testified that this problem was never really fixed. (*Id.* at 20-21).

Irving's testimony was that it was left up to the drivers to select the route as they are the most knowledgeable about the roads; but that he could be consulted if issues or questions arose. He agreed it was fair to say, that dispatch provides the driver with the address and the driver figures out the rest. (*Id.* at 136).

It is apparent that the testimony about routing was given from different perspectives, but it is not necessarily inconsistent. As noted above, Golebiewski's intimate familiarity with EWG trucking operations made it obvious to him that there's no reason to provide drivers with directions to locations they've been to many times. Irving and Complainant testified consistently that it was up to the driver to figure out the route, and I find credible Complainant's testimony that he would have to look up a route on a mapping application – at least for the first time a driver went to a location. The main discrepancy in the testimony is whether the assigned routes were given in the most efficient order.[24]

2. Protocol When Facility Is Not Accessible

According to Golebiewski, if a driver cannot get to a loading dock or encounters similar issues, the protocol is for the driver to call dispatch. Dispatch will call the customer. The driver will wait until the dispatcher calls back with instructions. If the problem cannot be resolved, the dispatcher will send the driver to another stop. Irving acknowledged in his testimony that there have been instances where drivers are unable to service a customer facility because they could not get the vehicle there. An example would be illegally parked cars. Consistent with Golebiewski's testimony, Irving stated that if there is a problem, the procedure is to stop and let the dispatcher know; the dispatcher will try to resolve the problem, and if unsuccessful, dispatch will re-route to another stop. (Tr. at 137).[25]

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[24] Although there is an obvious disconnect between Golebiewski's and Complainant's testimony on whether the routes were ordered in the dispatch assignments in the most efficient manner, efficiency of the order of assignments is not material to this STAA matter except to the extent that it may have caused Complainant to arrive at customer locations at a time when it would be dangerous to operate. That specific question was not raised by Complainant as one of the protected activities supporting his complaint. There was one incident on an upstate New York dispatch where the proprietor told Complainant that pickups needed to be made in the morning because by afternoon there were too many vehicles parked in the back entrance. It appears that this incident was put into evidence to show why Complainant was reasonably concerned on the June 28, 2022 dispatch to Staten Island about not having prior personal knowledge of the conditions around a customer's pickup location. It was not listed in Complainant's post-hearing brief of one of his alleged protected activities.

[25] For example, as discussed below, when Complainant could not get hooked to a trailer on the June 21, 2022 because the landing gear could not be jacked high enough, it was EWG dispatch that arranged for the customer to send a forklift.

3. Selection of Type of Truck for Dispatch

As relevant to the facts of this case, Golebiewski testified that "[t]here is no where we can't pick up a stop because of our truck size. We would not send a truck to a place that [the truck] couldn't get to it." He acknowledged that there are locations that an 18-wheeler cannot reach and that vehicle size is "100 percent" important when planning routes. (Tr. at 194). Irving testified that determining routes where a box truck must be used is based on both what customers tell EWG, and what EWG has learned. (*Id.* at 136-27). When asked who decides which type of vehicle will be sent to a specific customer location, Ventura testified:

> Well, Brian [Irving] really will do his diligence on the location. He'll speak to the owner, he'll get their volume, he'll get their location. He'll Google Earth it to make sure we can get in there. If we could obtain a key to the gate maybe, and do it late at night. There are all these aspects that come out, but Brian, along with Eddie and I, you know, we'll chime in. Eddie's been in the business over 35 years, so he knows the trucking aspect where I'm more guided towards the business end, so if there's a conversation that needs to happen with the customer, it's me or Brian kind of getting the nuts and bolts of the customer stop and how we should attack it.

(*Id.* at 184).

4. Mechanical Inspections and Repairs

Drivers are required to conduct pre-trip inspections and are expected to address issues with the mechanic before leaving the yard. (Tr. at 186). Where a routine mechanical issue is encountered or discovered during the dispatch, such as missing or defective mud flaps, the procedure is that the driver alerts the dispatcher, who alerts the mechanic. (*Id.* at 128). Mechanics will do a maintenance report once the trailer or truck arrives. (*Id.* at 129). EWG generally does its own maintenance unless the issue involves a recall or something that needs to go back to dealer. (*Id.*).

Drivers are usually assigned the same truck every day; if the truck is not available, EWG has spare trucks that the driver can "just jump in it and go. . . No downtime." (*Id.* at 218-19). EWG prided itself on having mostly new trucks (within two years old) that rarely have breakdowns on the road. (*Id.* at 195-96, 208, 217-18).

Complainant's testimony was consistent. He did pre-trip inspections at the yard, and could get a problem fixed before leaving, or be assigned to a different truck. (*Id.* at 97). If it was not a quick repair, there was always a spare truck and/or trailer around he could take instead. (*Id.* at 98). Complainant testified that he identified problems many times, and that an EWG mechanic would fix the

problem, or they would take it to a dealership to get serviced. (*Id.* at 97). Complainant, however, described how he had reported a problem with a mudflap on a trailer, and two weeks later he discovered that it still had not been fixed. (*Id.* at 97-98). This incident is discussed in more detail below regarding the June 10, 2022 dispatch. Generally, the mechanics would provide updates on how the fixes were going. (*Id.* at 113).

E. Alleged Protected Activity

This section of the Findings of Fact is organized based on the "Protected Activity" section of the proposed findings of fact from Complainant's post-hearing brief. In other words, it focuses on the protected activity as alleged by Complainant, and it provides a convenient means to describe the background to this case in chronological order.[26]

1. June 2, 2022 Dispatch (First Defective Mudflap Incident)

On or about June 2 or 3, 2022, Complainant was dispatched to receive a loaded trailer from a facility in Long Island, New York.[27] On his pre-trip inspection of the trailer, he observed that a mudflap was not properly secured and reported this defect to Irving. Irving replied that EWG would repair or replace the defective mudflaps later, after Complainant completed the dispatch. The record contains texted photographs of a defective mudflap from Complainant to Irving (as well a defective landing gear). The text indicates that this was trailer T406. In the text, Complainant stated that this was a "serious DOT violation" and requested that other drivers "learn how to do pre trip [inspections] on trailer[s]." (Tr. at 30-31, 35-

[26] I note that the June 17, 2022 text from Golebiewski to Complainant is not, itself, protected activity but was rather apparently intended by Complainant to establish Golebiewski's personal knowledge of the overheating incidents. This goes to the issue of contributing factor causation, but it is included in this section of the Decision and Order because it fits the chronology of key events.

[27] This was probably on June 2, 2022. *See* CX-5 at 4-5; RX-B at 42-44 (date of text with photo of mudflap). Moreover, although this finding was stipulated to and admitted by Respondent (Joint Stipulations, No. 10) it is not clear from the testimony and the record whether it occurred on Long Island or upstate New York or some other location. *See, e.g.*, Tr. at 30 (where Complainant, while talking about this incident, stated: "[s]o they wanted me to bring the truck from upstate New York to Queens"); *see also id.* at 34 (where Complainant appears to have confused the first mudflap report with a later one); *see also* RX-A at 18 and CX-4 at 17 (indicating that Complainant's dispatches that day were to two locations in Suffren, NY and to Budweiser (probably in Queens)). There were three separate reports by Complainant of mudflaps being damaged or missing, and it is possible that the attorneys and/or witnesses conflated or mis-remembered the details. Perhaps the tribunal is the one not following the sequence. However, whether it happened on Long Island or upstate New York or someplace else, does not change the point that Complainant was worried about the mudflap being a safety issue.

36; CX-5 at 4-6; RX-B at 42-44). Respondents admitted in their post-hearing brief that the above had happened but denied the conclusions of law.

It appears that Respondents' denial is about a legal conclusion that this was a D.O.T. violation. The objection is duly noted, but a complainant does not have to establish an actual D.O.T. violation for STAA protection. I note that CX-5 and RX-B show that Complainant said this was "a serious DOT violation" when conveying to Irving why other drivers needed to conduct better trailer inspections, and his concern that it would fall off and damage a car or cause an accident. The photograph shows a mudflap about half-way ripped away from the hanger. I note that the texting exchange shows that Irving agreed with Complainant that this was a problem, said that he was "on it," and asked if Complainant could possibly rip the mudflap off. Complainant could not because two screws were still attached. (Tr. at 30, 86). Although the remaining texts that day are cryptic, it appears that Irving told Complainant that they would not use this trailer the next day, to bring it to "joey or alex," (EWG's mechanics) and that Complainant could unload yesterday's trailer to have to use for the next day. Complainant agreed in his hearing testimony that he told Irving that he would bring the trailer back to the yard so it could be fixed. (*Id.* at 87). The immediate danger was resolved by Complainant using shrink wrap to temporarily secure the mud flap while the trailer was returned to the yard for servicing. (*Id.* at 30-31, 86-87). Complainant testified that he texted Ventura the trailer number – 114. (*Id.* at 31).

2. June 6, 2022 Dispatch (Improperly Stacked Pallets)

On June 6, 2022, Complainant picked up a load at Global Redemption – Manhattan Beer Distribution in New Windsor. (RX-A at 22; CX-4 at 22).[28] Complainant inspected the load and determined that the cargo was not properly stacked. He texted photographs to Irving, who agreed that it was bad, and instructed Complainant not to take pallets that were not properly stacked. (CX-5 at 13-14; RX-E at 59-63; Tr. at 81-82; Joint Stipulations, No. 11). Complainant acknowledged in his hearing testimony that Irving had directed him not to take pallets that were not properly secured. (Tr. at 82).

3. June 7, 2022 Dispatch (Improperly Secured Freight and First Overheating Incident)

On June 7, 2022, Complainant picked up a load at Manhattan Beer Distribution in Suffern, NY (RX-A at 23; CX-4 at 23) and observed that the cargo

[28] RX-A, p. 22 shows the dispatches as "Monday 6/5," but the next page, RX-A, p. 23 shows "Tuesday, 6/7," with a "6/6" date scored over. (*See also* CX-4 at 22-23). The calendar for June 2022 indicates that June 6 was a Monday, and the photos Complainant texted to Irving are dated June 6. Thus, I find that the date of this dispatch was Monday, June 6, 2022.

was not properly secured. He secured the freight himself to comply with federal motor carrier safety regulations. Complainant let Irving know that he had secured the load, and then proceeded to move the load. (Joint Stipulations, No. 12).

On the return trip from upstate New York to EWG's facilities in Queens, Complainant's assigned truck began to overheat. He pulled to the roadside and texted photos of the dashboard indicators to Irving. While he was pulled over waiting for the engine to cool, a state trooper stopped and asked Complainant if he needed a tow truck. Complainant said he was getting in contact with EWG to resolve the issue. The trooper said that the truck could not stay on the interstate intersection Complainant was at, but that he would give Complainant some time to resolve the situation. (Tr. at 38-40; CX-5 at 20; Complainant's Proposed Findings of Fact, Admitted by Respondents).

Complainant called Irving, who contacted Joey to see if EWG would service the truck or have it towed. Complainant testified that because this was in upstate New York, EWG would not want the truck towed from the interstate because it would cost more money. Complainant's testimony was that EWG's "concern was to try to get it to the next exit;" that they wanted him to wait for the engine to cool and try to drive it on. Complainant "tried [his] best, but the truck turned off on [him] about five times." Whenever it turned off, he would open the hood and try to let the truck cool down. Complainant "didn't feel safe being parked very close to the side of the highway." He finally was able to get the vehicle to a rest area along the highway, parked it in a safe location, then told Irving that he was refusing to drive the truck any further. The company arranged for a tow and Colon rode back to the EWG shop with the tow truck driver. (Tr. at 39-41). The texting indicates that EWG wanted Complainant to wait for the engine to cool and then try to drive to the next exit. But nothing on the face of the June 7, 2022 texts indicates that EWG conveyed to Complainant that it did not want the vehicle towed from the interstate because of the cost.

Complainant's belief that the reason for this request was to avoid the cost of an on-the-interstate tow, although possibly having a kernel of truth, appears to be speculation. I do not find sufficient evidence in the record to support a finding that Respondents was asking Complainant to doing something unsafe merely to try to save some money.

4. June 9, 2022 Dispatch (Second Overheating Incident)

On June 9, 2022, Complainant was assigned a dispatch to upstate New York, during which a second engine overheating incident occurred involving a different tractor. (RX-A at 25; CX-4 at 25; Tr. at 38, 96).

Complainant's assigned tractor that day began to overheat on highway I-278. He observed warning lights on the dashboard and the engine shut down. Colon pulled over to the Sloatsburg service area and sent a text to Irving informing that the vehicle was overheating. He also texted photos of the dashboard indicators. (RX-D at 49-58).

According to Complainant, Irving told him to continue transporting the load to upstate New York, and Complainant refused to operate the commercial vehicle until it was properly repaired. (C. Br. at 7 (citing Joint Stipulations, No. 13; Tr. at 36-37; CX-5 at 33)). In their post-hearing brief, Respondents denied this characterization and stated that CX-5 does not reflect that Irving directed Complainant to continue to transport the load upstate.

Review of the texts in CX-5 indicate that Complainant and Irving had been texting about the next day's schedule when Complainant sent Irving a photograph of the tractor's dashboard showing the engine overheating warning lights, to which Irving replied: "Not again." Complainant replied that there might be another issue with this truck; he was just getting on the highway; the warning lights came on; and the truck cut off. Irving asked if Complainant could add water. Complainant indicated that the radiator was full, and that he would let the engine cool down for a while to see if that worked.[29] Irving asked if it was low on antifreeze; sympathized with Complainant's bad luck with dispatches that week; and asked Complainant to keep him posted. Complainant replied that he was three miles from an exit, but that exit would take him to New Jersey, and that he had stopped at a service station. Irving and Complainant determined that Complainant had stopped at the Sloatsburg, NY travel plaza. Complainant texted Irving photos of where he had parked the rig, and Irving replied: "Joey said to wait." (CX-5 at 33-39). Complainant replied:

> You send me upstate again. I'm not taking no truck I'm coming out here in a box truck. Two times this week. I got stuck coming here in these trucks.

(CX-5 at 39). Irving apologized and agreed that Complainant would get in late, and thus should come into work later for the next day. Complainant indicated that he wanted to work the next day. There was then some discussion about what Joey said about when the tow truck would arrive; Irving said that if Complainant wanted to take an Uber back after the tow arrived, EWG would reimburse. They then had some banter about sports, and agreed to a time when Complainant could come in

[29] Complainant's testimony indicated that what he meant was to let the engine cool to see if the truck would restart and the run could proceed. (Tr. at 90-91).

the next day. Complainant, who had started worked at 5:00 a.m. that day, did not get back until around 11:00pm to 11:30 pm. (Tr. at 95).[30]

Nowhere in the texting did Irving come even close to suggesting that Complainant should continue to drive the rig to complete the upstate run. On the face of the texts, Irving was concerned, and even apologetic given this was a second breakdown within a few days, and clearly told Complainant to wait for the tow. At the hearing, Irving testified that they had not previously had breakdowns upstate, and that EWG did not want to put drivers in a position where they cannot complete a load because that costs the company money. (*Id.* at 131-32). At the hearing, Irving testified that there was never an incident where Complainant indicated that he believed a vehicle was unsafe and Irving nonetheless directed Complainant to continue to drive it. (*Id.* at 154).

At the hearing, Complainant testified with more detail about what he recalled about this incident. Complainant said that they asked if he could drive the rig to the nearest exit so they could get a tow truck (because it could cost more to get a tow from the interstate). (*Id.* at 91-92). Complainant recalled the next exit as being nearly 10 miles away; that they asked him to take it there; but the truck cut off five times and each time he pulled off it was getting more dangerous – there not being enough room to pull far enough off the highway and there being railings on both sides. (*Id.* at 92). He then saw that he could reach a rest area and parked the rig there. That is when he told EWG that he was not going to move the truck any further; it was safe there and could be worked on there – whether a tow or local mechanical fix – but he was not going to drive it further. (*Id.*).

Based on the foregoing, I find that the preponderance of the evidence is that Irving and/or Joey encouraged Complainant to attempt to get to an exit, that Complainant attempted to do so, but it was clearly unsafe to continue, and reasonably decided to pull off at the service area. Irving texted Complainant that the mechanic, Joey, said to wait. It was immediately after this text that Complainant informed Irving that he refused to drive the rig any further. There is no evidence that EWG directed Complainant to continue the dispatch after Complainant had parked the truck.

Irving testified that when Complainant sent the text about not going upstate again after the second overheating incident, he viewed it as an expression of frustration. (*Id.* at 130). Irving testified that he had understood Complainant's text as saying that next time he would only go upstate in a box truck. (*Id.* at 132-33).

[30] At the hearing, Complainant testified that he had started to arrange with a fellow driver to bring his car to the rest area and shuttle back before the offer by EWG to reimburse for an Uber. While looking up prices for an Uber or Lyft, he received a call that the tow was 45 minutes to an hour away, so Complainant decided to just ride back with the tow driver to EWG. (*Id.* at 94-95).

Irving also said, however, that when there is a breakdown, EWG has two spare trucks to assign, and that he and not the driver decides which spare truck to use. (*Id.* at 133). Golebiewski testified that the two trucks that had overheated were relatively new, that the overheating problem was a first (and had not happened again since), and that EWG has safety vehicles that can do minor fixes on the roadside. (*Id.* at 208).

Complainant conceded in his hearing testimony that Irving never put any blame on Complainant for this mechanical issue. (*Id.* at 93). When asked whether after either of the two overheating incident he was told to stop complaining, Complainant answered:

> A. Well, it was said to me in a joking manner, and even the tow truck, because when both vehicles got messed up, it wasn't told to me—I don't know if it was like joking or seriously, but they were saying that I was costing them a lot of money because the trucks kept breaking down in my possession. That was basically it.
>
> Q. But were you ever told to stop complaining?
>
> A. I'm going to say probably no.
>
> Q. Okay. At any point was your hourly rate or your compensation reduced?
>
> A. Never.
>
> Q. At any point were your hours reduced?
>
> A. When I worked with them in 2018 to 2021, yeah, it fluctuated. With the tractor trailer, no, because they had tons of work for me there.
>
> Q. But in 2022, was there any time where your hours were reduced or you were given less shifts?
>
> A. No.

(*Id.* at 96).

5. June 10, 2022 Dispatch (Mudflap Issue Revisited)

On or about June 10, 2022, Complainant bobtailed a tractor from EWG's facility in Jamaica, NY to Suffern, NY to pick up a loaded trailer.[31] On a pre-trip inspection of the trailer, Complainant observed that one of the mudflaps was only

[31] *See* RX-A at 26 and CX-4 at 26, showing dispatches to Budweiser and to "Bottles for Bucks (MB) (Bway)." The second dispatch appears to be the Suffern, NY run.

partially attached, and that the trailer's landing gear was defective. Complainant reported these defects to Irving and texted him photos.[32] Frustrated that the mudflap had not been repaired, as he had reported the same defect on trailer T114 on about June 2, 2022, Complainant asked that Irving check with Alex, an EWG mechanic, to ask what he had fixed on this trailer. (Tr. at 41-42, 97-98; CX-5 at 52-53; RX-C at 46-47; Complainant's Proposed Findings of Fact, Admitted by Respondents; *see also* Joint Stipulations, No. 14).[33]

6. June 17, 2022 (Text from Golebiewski to Complainant)

On June 17, 2022, Golebiewski texted Complainant the following message:

> Deal with this. We will fix this issue. Sorry about this. 3 years notb1 [sic] problem upstate. This is out of ordinary. Please jump on rendering tomorrow for brian if possible. Appreciate you working late hours the past 2 weeks. We have 2 new drivers starting in 1.5 weeks. We will get organized.

(CX-6 at 1-2).

Complainant understood this to mean that Golebiewski was trying to address the frequent breakdowns and other issues he had while driving upstate. (Tr. at 50-51). Complainant said that EWG had an open-door policy to address issues and that Golebiewski was hands-on and available. He said that this text was Golebiewski essentially saying "deal with this, and we'll try to get the issues fixed." It was basically a plea for Complainant to hold on for a week and a half; a request that Complainant do a favor by taking a rendering dispatch the next day; and an expression of appreciation for Complainant's having to work long hours. (*Id.* at 101). Complainant acknowledged that Golebiewski said all this after Complainant had brought up concerns about mudflaps, bottle stacking and engine overheating. (*Id.* at 101-02).

Golebiewski was asked at the hearing about whether it was unusual for him to text a driver about a mechanical issue. He replied:

> They told me he broke down upstate. He was upstate. It's late. As an owner of the company, I didn't want to let him feel stranded, so I text him on my own to deal with it. We'll fix the issue on the truck and

[32] CX 5 at 52-53 shows that the text had four photos; only the photo of the mudflap is visible on the exhibit.

[33] At the hearing, Ventura was asked if he heard Complainant's testimony about the mudflap not being timely repaired. Ventura stated that this was not the type of mechanical issue that would have been brought to his attention. Earlier, he had testified that EWG's in-house maintenance shop did not need Ventura's input or permission for routine maintenance. (Tr. at 186-87).

> jump on the rendering truck the next day because that truck was down. And thank you for working late hours. And we got another two drivers starting. And that's what I wrote, exactly what's there. Had nothing to do with any other issues. I have no idea where you guys got that from. This has to deal with the truck overheating.

(*Id.* at 209). Golebiewski said that putting Complainant on a rendering truck the next day was not a reassignment – it was just for one day while the tractor was being repaired. It was just a way to allow Complainant to continue to work when the tractor was down. (*Id.*). Complainant said that being reassigned to the rendering truck had happened a couple times before when needed, as he was experienced with the rendering truck; Complainant would agree to do this to help the company. (*Id.* at 51-52).

As noted above, this text was in the section of Complainant's post-hearing brief that detailed the proposed findings of fact on alleged protected activity. It is obviously not, however, an additional variety of protected activity by Complainant. Rather, it appears that Complainant proposed this as a finding of fact because it shows that Golebiewski knew about the tractor breakdowns due to overheating (and thus the alleged prior protected activity) before the date of the firing. But it is also further evidence showing that Respondents did not blame Complainant for reporting the overheating or for refusing to drive further once he got the rig to a service area.

7. June 20, 2022 (Long Island Redemption Center Overhead Line Incident)

On June 20, 2022, Complainant was dispatched to MEGA, and to Bottle Depot in Bethpage, NY on Long Island. (RX-A at 34; CX-4 at 34; Complainant's Proposed Findings of Fact, Admitted by Respondents).

According to Complainant this was his first time visiting the Long Island location. He testified that when nearing the customer location, he "knew something was wrong" because he "was going into a residential area, and with a tractor trailer, you're not allowed to go inside a residential area." Complainant testified that the residential area "was my first red flag that I saw when I got to this location." (Tr. at 42-43). Respondents admitted that this was Complainant's testimony but denied the conclusion of law (evidently that this was a residential area that did not allow a tractor-trailer).

Complainant texted Irving, asking: "Have you ever sent a 48 foot trailer to this place in Long Island to pick up[?]" Irving replied: "No but ive sent s (sic) box truck driver who says a trailer can fit." Complainant replied: "Really. So who the box truck driver know that the wires are low and a truck and trailer mite bring

down a wire." Complainant texted Irving a photo of the wires. (Tr. at 43; CX-5 at 64-65).

Complainant testified that a box truck has a maximum height of about 11 to 12 feet. An 18-wheeler, by contrast, is a longer vehicle with a height of thirteen feet and six inches. He also stated: "you can basically turn a box truck anywhere, but a tractor trailer, you have to do a wider turn. You need more space." (Tr. at 44) (Complainant's Proposed Findings of Fact, Admitted by Respondents).

Complainant testified that in his experience, tractor-trailers were usually dispatched to "big warehouses, like Budweiser, PQE," and that warehouse facilities usually featured a "huge parking lot" and "loading docks." The redemption centers, like the one Mr. Colon was assigned to service on June 20, 2022, are "little stores here and there" that do not have loading docks. "You have to park in an alley or in the back of the store, back of a convenience store. It's very difficult there." Complainant stated that many of the redemption centers are not in commercial areas, but "mostly residential areas," and that some residential areas have weight restrictions on commercial vehicles. (*Id.* at 45-48) (Complainant's Proposed Findings of Fact, Admitted by Respondents).

Complainant testified that he had to enlist his helper for assistance in backing up to the customer facility because there were "private houses, cars and everything" and he had to back up "blindside" as best he could to avoid "hitting fences, cars, mailboxes, driving over somebody's driveway." The helper had to stop traffic so that he could back up into the customer facility with his large commercial vehicle set. (*Id.* at 43-44). Complainant testified that after he backed into the customer facility, he noticed that he had struck an overhead line running over the street with his trailer. (*Id.* at 42; Complainant's Proposed Findings of Fact, Admitted by Respondents). Although he struck the wire, there was no damage to the trailer, and the customers did not lose power or phone service, so Complainant finished the job and left. (Tr. at 45-46).

Complainant testified that he called Irving about the wire, and that while they were on the phone, the owner also called Irving. Irving apologized saying that it had not happened before, and he had not known about it. (*Id.* at 99). At the hearing, Irving testified that this was a new stop for its customer Manhattan Beer using a tractor-trailer (although they had sent box trucks there previously for a different product). Irving stated that he had spoken to Manhattan Beer and to the drivers who had been there previously, and they all said that a tractor-trailer could go to this location.[34] Thus, he had sent Complainant to the location with a tractor-trailer in good faith thinking that it would be fine. (*Id.* at 130). Irving stated that

[34] Irving acknowledged that not all the box truck drivers had CDLs. (Tr. at 152).

although he had never personally been to the location, he looked at it on Google, and it looked pretty accessible. He also noted that EWG still goes there with tractor-trailers. (*Id.* at 131).

At the hearing, Complainant stated that this was the only time he experienced the challenge of backing a rig under low wires in a residential area. (*Id.* at 47). Complainant did not get written up by EWG over hitting the wire or hear any complaint from the customer about the incident; no one ever brought it up again. (*Id.* at 48).

8. June 21, 2022 (Trailer Landing Gear Incident; Third Mudflap Report)

On June 21, 2022, Complainant operated a truck-tractor to a Manhattan Beer Distribution facility in The Bronx, NY to complete a pick-up and drop-off. (RX-A at 35; CX-4 at 35). Complainant was unable to couple the trailer because the landing gear could not be cranked high enough. Complainant contacted Irving, who (*according to the Joint Stipulation of the parties*) arranged for a mechanic to repair the landing gear. (Joint Stipulations, No. 15; *see also* CX-5 at 66-79; Tr. at 88-89).

Possibly inconsistent with the Joint Stipulation, the texting traffic between Complainant and Irving on this dispatch show that, rather than a mechanic repairing the landing gear, what happened on site was that EWG arranged for the customer's facility to provide a forklift to lift the trailer, enabling Complainant to swap the trailers and complete the dispatch.[35] (CX-5 at 69; RX-F at 69-70). In his hearing testimony, Complainant stated that it was Chris (another of EWG's dispatchers) who made the arrangements. (Tr. at 89-90). The Joint Stipulation also indicated that this was a bobtailing dispatch for a pickup, but CX-5, p. 69 indicates that it was drop-off/pick-up.

During this stop, Complainant also noticed that a trailer had a missing mudflap at the rear and texted a photo to Irving. (CX-5 at 68; *see also* CX 12 at 14 (high resolution photo)). Complainant testified at the hearing that to the best of his knowledge, a mudflap is required equipment on a commercial vehicle trailer. (Tr. at 31). Complainant clarified in his hearing testimony that this was a different trailer than the one that had to be lifted to make the coupling. (*Id.* at 88).

9. June 28, 2022 (Final Assignment and Termination)

On June 28, 2022, Complainant was assigned to pick-up loads from a Budweiser facility in The Bronx; PQ, another warehouse facility; and J&B Redemption Center ("J&B") in Staten Island. (*Id.* at 52-53, 140; CX-4 at 40; RX-A at 40; Complainant's Proposed Findings of Fact, Admitted by Respondents).

[35] It is possible that Irving also arranged for the landing gear to be repaired later.

Complainant had been to the first two locations before, but the third one (J&B) was new to him. (Tr. at 53, 55, 56, 102, 142). Complainant and Respondents disagree about many of the details of what transpired that day.

Background – Complainant's Prior Bad Experiences in Customer Locations

Complainant testified that he was concerned about the safety of the trip to Staten Island because, on two prior occasions, he had run into trouble while servicing distribution centers with a tractor-trailer set, and he did not want another experience like that.[36] He did not want to put his license, his life, or anyone else's life in danger. The prior occasions included the June 20, 2022 incident in which Complainant struck an overhead line; and an incident in upstate New York where he arrived at a customer facility only to see signs that vehicles over 10 tons were prohibited, and was told by the proprietor that trucks were not allowed in the afternoon in the back of the store because there were too many vehicles, and that pick-ups needed to be early in the morning. (Tr. at 53-54; *see also id.* at 105).[37]

- Departure for J&B in a Box Truck

Complainant testified that when he began the day on June 28, 2022, he observed that one of the part-time drivers would be using a rental box truck, which was one of EWG's biggest box trucks. Complainant spoke to that driver and knew that he only had two assignments that day. Complainant was concerned about taking a tractor-trailer to a location in Staten Island and wanted more information. Complainant stated that he could not ask Irving for directions on how to get to the J&B location "because he doesn't have a CDL and wouldn't know how to get there." He also could not ask Ventura. Instead, he called two other drivers for directions, but they were not able to provide much help. (*Id.* at 53).[38]

Complainant testified that he thus asked Irving if he could take the box truck, but that Irving never agreed to it and "was trying to force me to do it," apparently meaning to drive a tractor-trailer to J&B. (*Id.* at 54; *see also id.* at 104 – Irving never authorized use of the box truck). According to Complainant, he then saw Ventura in the parking lot, explained his discomfort about the dispatch to an

[36] Complainant also testified that when he was being trained by David on paperwork, David had taken him to a different location in Staten Island, and had warned him that at other locations there, there would be issues getting to certain areas with certain size rigs, and that there could be obstacles like parked cars. (Tr. at 56-57; *see also id.* at 105-06).

[37] Complainant did not specify this incident as STAA protected activity in his post-hearing brief.

[38] Irving acknowledged at the hearing that he had not put Complainant in touch with other drivers about accessing the J&B location. He clarified that, because there had never been a single issue at this location, it was not something he thought was needed. (*Id.* at 159-60).

unfamiliar location, and asked Ventura if he (meaning Ventura) had ever sent a 48-footer to J&B before. Ventura said no, he had only sent box trucks. According to Complainant, Ventura asked if Complainant was still going to do the job. Complainant replied that he would with a box truck, to which Ventura said that he trusted Complainant's judgment, and that he would speak to Irving. That is when Complainant took his belongings from the tractor trailer and jumped in the box truck. (*Id.* at 55, 57).

Complainant's testimony indicates a distinct reluctance to accept Irving's authority and knowledge about dispatch locations. He initially indicated that he considered Irving to "just" be a dispatcher and not his supervisor, and that it was permissible to go to Ventura or Golebiewski if there was a problem. (*Id.* at 106). When pressed, he conceded that Irving was, in fact, both a supervisor and dispatcher, but made it clear that he knew that EWG had an open-door policy that permitted him to go the higher-level supervisors, Ventura and Golebiewski. (*Id.* at 105-06).[39] Complainant's testimony indicates that Irving had not given him a specific directive not to use the box truck, but also had not authorized it. Complainant testimony indicates that he took the box truck after Ventura, in Complainant's view, approved it. (*Id.* at 109).

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[39] Ventura's testimony was that he and Golebiewski were very hands-on, and that there was no employee at EWG afraid to talk to them. However, he also indicated that most drivers would not come to him about a mechanical issue or a route issue. He related that he had been involved in sorting out a problem with a stop and could bring a driver and dispatcher together. (*Id.* at 168).

Golebiewski's view on Complainant's opinion of Irving as a dispatcher and supervisor was grounded in a realistic view of the work environment. When asked if Complainant had given indication that he wasn't happy prior to the day of the firing, Golebiewski replied:

> A. Nothing drastic, just regular truck driver stuff.
>
> Q. And he chose to come back, right?
>
> A. Yeah. Truck drivers think they know how to run your company. So this is basic stuff, but I don't take it to heart.
>
> Q. Sure. It's not unusual to have a disagreement with a driver once in a while?
>
> A. No disagreement, but no drivers love dispatchers. Dispatchers give them their daily work. So someone's giving you work, you don't like it. Not everything goes perfect. Not every account is perfect. Not every place you back into is perfect. Not every place has a wide driveway. So, you know, this is truck driving . . . .

(*Id.* at 211-12). Golebiewski acknowledged that because EWG operates in the New York City area, driving is probably trickier than in a lot of places. (*Id.* at 212).

Complainant stated that even before he left the yard, Irving called to ask if he was really going to do the job with the box truck. Complainant testified that he said yes, and related that he spoke to Ventura. Complainant testified that his is when Irving said: ". . . well, you know, if you're scared to drive a truck in these areas, then I guess driving tractor trailers is not fit for you. We're just going to put you in the rendering trucks."[40] Complainant testified: "And I was like, that's fine. And then I proceeded to leave the yard and the facility. And I remember getting another call from him when I was in Staten Island to see if I was there and that the customer was going to be upset that I was bringing a smaller vehicle." (*Id.* at 57-58; *see also id.* at 104-05). Complainant testified: "And that's when I told him, I'm not going to put my life in danger, nobody else's life in danger, because I already experienced two situations where it wasn't fun." (*Id.* at 58).

Irving's testimony on what happened before Complainant left the depot puts a very different spin on what happened:

> A. Yes. So we had a part-time driver that day on a white rental box truck. He did two stops for me. He comes upstairs to the office and says, hey, someone's taking the box truck that I was just in. So we checked the cameras, or I realized it was Chris. So I call him and said, you know, what are you doing? You got to take a trailer to J&B. You know, they're expecting a trailer. He tells me, I'm not going to that location that I haven't been to in a tractor trailer. I'm only going to take a box truck. I tried to tell him, Chris, I've sent so many tractor trailers to this location. We go here all the time. Hundreds of trailers have been here. I even tried to pull up the street view and show him how wide and accessible it is. Never had any issues at this location. We've been doing business with them for over five years. I tried to explain that –
>
> Q. This is a phone call, right? This is not taking place in person.
>
> A. Right. Phone call. He's already in the box truck going to Staten Island.

[40] Complainant's testimony about when Irving told Complainant that they would put him back on rendering trucks if he was too scared to drive in certain areas is not clear. In one telling, it was after Complainant purportedly talked to Ventura (*Id.* at 57-58), while in another it is implied it was when Complainant purportedly asked Irving for permission to take the box truck which was impliedly before Complainant purportedly talked to Ventura. (*Id.* at 104).

(*Id.* at 142-43).[41] Irving said that Ventura never talked to him about Complainant wanting to take the box truck. (*Id.* at 144). Irving said that he tried to plead with Complainant and explain the stop was accessible for a tractor-trailer; explained that customer was going to be upset when Complainant arrived with a box truck and could not clean out his load; explained that EWG would have to come back to Staten Island that same week to clean up the rest of the load; and asked Complainant to trust him and to please take the trailer and that it would be OK. Irving then testified:

> He refused. He told me he's not doing that, he's taking the box truck. He's only going to the stops that he knows, and if he doesn't know a stop, he's going to take the box truck.
>
> Ed overheard the conversation, I believe. And I believe that after we hung up, I think that's when Ed had texted Chris to come back and that's it. But we had no prior knowledge that he was taking this box truck until the part-time driver came up to the office and informed us.

(*Id.* at 144-45). Irving testified that he believed that Complainant was wrong about having spoken to him about taking the box truck before leaving the yard; Irving testified that Complainant was already on the road when he called. (*Id.* at 155-156). Irving stated that Complainant had not asked him for permission to take the box truck before taking it, and that when they spoke on the phone, Complainant had not indicated that he had gotten permission from any other employee or representative of EWG to take the box truck instead of the tractor-trailer. (*Id.* at 156).

Ventura testified that he did not recall Complainant approaching him for a conversation about which truck Complainant would drive that day. (*Id.* at 172).[42] Rather, Ventura said that the first time he spoke to Complainant about the vehicle used for the J&B dispatch was when Complainant contacted him after being fired. (*Id.* at 179).

It appears that most of the conversation between Irving and Complainant on June 28, 2022 was by telephone. The record does contain, however, a text message from Irving to Complainant that appears to have been sent while Complainant was in route to J&B:

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[41] *See also id.* at 154-55 – Irving's testimony that EWG had been servicing the J&B location for about four years prior to the June 28, 2022 dispatch, twice a month, and that Irving had no reason to believe that a tractor-trailer could not access the J&B location.

[42] In later testimony, Ventura did not qualify his memory about this statement, and said that Complainant had not sought his prior permission to take the box truck. (*Id.* at 179).

> All u had to do was tell me u were afraid to go to staten island, figure if u started at 5 ud be there early. Sorry, but now u cant go upstate u cant go to Staten island
>
> And nobody once have told me theres an issue going to That stop in the afternoon
>
> That stop gonna be calling me saying why I sent a boxtruck

(CX-5 at 78). Irving was asked at the hearing to clarify the text. He stated that he was responding to Complainant's having taken the box truck on his own because he did not feel safe operating a tractor-trailer at a stop he had not been to. Starting at 5 meant that Irving thought that Complainant would be arriving before traffic got too bad on Staten Island. Irving also stated that too-many-cars was not an issue at this location. Irving clarified that he was saying to Complainant that you have already refused to go upstate because of breakdowns, and now he was refusing to go to Staten Island with a tractor-trailer, which basically means that Complainant was making Irving's "job harder because now I got to reroute you around these locations that we go to daily." (Tr. at 147-48). Irving was not sure whether this text occurred before or after he talked with Complainant on the phone. (*Id.* at 152-53).

According to Irving, Golebiewski overheard the telephone conversation between Irving and Complainant:

> Well, Ed overheard our conversation on the phone. He heard Chris screaming at me, refusing to do his job and duties. And I was pretty annoyed at the time, too, because it's just a lot of stress on my job as a dispatcher to fulfill the needs of customers. So I just knew this was going to cause a major issue with our customers. And EWG prides itself on customer service. Having your driver telling you who — you know, he was pretty much telling me what he's going to do, which is not how it works in trucking. So I was pretty upset. He said he was going to Staten Island in the box truck. I said, you know, I need you to take the trailer. He refused. We hung up the phone, and I left it at that. And I just believe Ed had texted him a little later on after that.

(*Id.* at 149-50). Irving testified that he did not talk to Golebiewski about what was taking place, as Golebiewski understood the conversation and took it from there. Golebiewski did not ask for Irving's recommendation on how to proceed.[43] Irving stated that although Ventura makes hiring decisions, Golebiewski has the overall

[43] *See also id.* at 153 – Irving testimony that he did not need to discuss the matter with Golebiewski as it was obvious that Complainant was refusing to go to certain locations, and how that causes trouble for dispatching and having to reroute drivers around certain areas.

say, including on firing decisions. (*Id.* at 151). Irving did not learn about Complainant being fired until about a half hour after Golebiewski sent the text. (*Id.* at 153).

Golebiewski's testimony was similar to Irving's in regard to overhearing the phone call and it being Golebiewski's sole decision to terminate Complainant. Golebiewski stated that he overheard the conversation because it was heated and was on a cell phone close enough to hear.[44] Irving told Golebiewski what had happened, but Golebiewski did not discuss with Irving what should be done about Complainant. (*Id.* at 206-07).

Irving testified that drivers at EWG do not get to decide which vehicle they are going to use on certain days. This was because "the driver doesn't know if a truck that's sitting there is going to be used by another driver later on in the day. They don't know if there's a safety issue with that truck. There's many reasons why they can't just take whatever truck they want. It just goes against the whole structure of the company." (*Id.* at 158). Irving acknowledged that drivers on the road are in the best position to decide how to stay in compliance with Federal motor carrier safety regulations. However, Complainant had been hired as a tractor-trailer driver, and even though he had not previously been to the J&B facility, he was eventually going to be dispatched to all EWG stops. Moreover, there had never been a problem with access to the J&B location. (*Id.* at 159-60).

Ventura's testimony about the impact if drivers got to decide which vehicles they will operate was similar to Irving's. Ventura said:

> Well, as you could imagine, I mean, it would be a total breakdown of our structure here. Our dispatchers work hard all week to basically get a picture of their week. When Brian comes in on Monday, he's thinking about Friday already and what drivers he needs. So the week is being planned well ahead of the night before. So it would be a total breakdown if a driver just decided to take a truck whenever he wanted to. And if we didn't have that structure and there wasn't a respect between the drivers and my dispatchers to say, hey, they're making a right decision here, and this is the truck I should take, and let me give him a call and ask for permission to take this truck. We need that structure. It's just with as many trucks as we have and over 400 stops, every stop has its own kind of granular activity, which is hours of operation, person that needs to fill out paperwork. There's just so

[44] When asked what caused him to move from his office to the dispatch area, Golebiewski explained: "It was a heated argument, and we don't have that in this office. So I jumped up and seen what was going on. And Brian was arguing with a driver, overheard it through his cell phone that they were arguing back and forth." (*Id.* at 216).

> many aspects to . . . that you need this structure. And if the structure is not there, our customer service would go away, and our customers would go away. We would not be in business if we didn't have the structure.

(*Id.* at 181-82).

- *The Pickup at J&B*

According to Complainant, when he arrived at J&B, the facility was small, did not have a loading dock, and required parking on the regular side of the street. (*Id.* at 58-59). He testified that he lined up the box truck toward the entrance, and that the customer's workers carried bags of recyclables from the store and threw them into the back of the box truck. (*Id.* at 58). Complainant testified that the owner told him that EWG had called to tell him that Complainant was coming with a box truck. (*Id.*).

Irving acknowledged that J&B was a smaller redemption center without a loading dock but clarified that Complainant's dispatch that day was just to pick up bags for which a loading dock was not needed. Such bags are not staged or palletized and are just thrown into the trailer. (*Id.* at 141-42). From Irving's perspective, Complainant had failed performance of the dispatch: "He didn't perform because he didn't pick up a trailer load. He did a box truck load. So he didn't perform what he was asked." Product was left behind which cost EWG "[t]ime, money, and customer satisfaction, not so great at the moment." (*Id.* at 150).[45]

- *Termination from Employment*

Complainant testified that when he was about 10 minutes away from arriving on the return trip, he received a text from Golebiewski saying that he had been terminated. (*Id.* at 58, 61). The text stated:

> Chris, ewg is not the company for you after hearing the requests and demands to do our daily routes and s counts.[46] Please park truck n

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[45] Irving testified that EWG later had to dispatch a second truck that week to pick up the remaining bags. According to Irving, a box truck could hold about 300 bags, whereas a 48-foot trailer could hold 500 to 600 bags, and that the J&B dispatch normally averages around 500 bags, or a little less. (*Id.* at 157). It was thus always assumed that J&B pickups needed a trailer. (*Id.* at 158).

Golebiewski noted that EWG had been able to dispatch someone out to J&B to pick up the next load after Complainant was terminated without any issues, and that the customer had not cancelled the account. (*Id.* at 215).

[46] Golebiewski testified that "s count" was a typographical error; what he meant to write was "our daily routes and accounts." (*Id.* at 197-98).

> trailer when you get back, you don't have to unload it. Sorry it didn't work out but you can't pick n choose what stops you go to. Hopefully you find a job that's better suitable for you. Don't want you to work at ewg if it causes stress for you. See dispatch to ease hand in all remotes, parking passes, keys.

(CX 6 at 1; RX-G at 72-73). At the hearing, Golebiewski was asked to explain what he meant by EWG not being the company for Complainant. Golebiewski replied: "He told dispatch Brian Irving that he's only going to go to the accounts that he wants to go to, and he's only going to take the trucks that he wants to, and he's not going to any accounts unless he's been there before with another driver." (Tr. at 198).

Golebiewski was also asked about what he understood what was happening when overhearing Irving and Complainant on the phone:

> Q. You understood that Mr. Colon was refusing to drive the 18-wheeler to this customer facility?
>
> A. No, I did not. I only know that he said that he was only going to do what he wanted to do and he didn't care what Brian told him. He was only going to go to the accounts that he wants to and take the truck that he felt was suitable for that account. How can I run my company after hearing how a driver's going to tell a dispatcher that . . . ?

(*Id.*). Golebiewski agreed that the driver is responsible for operating a vehicle in compliance with DOT regulations, and that a driver may be in a better position than the dispatcher to decide what's safe in particular circumstances—but did not accept that the J&B dispatch fell into that situation.

> A. J&B Redemption, we're talking about?
>
> Q. Yeah.
>
> A. That's a tractor trailer account, and we've been doing it for four years. He's never been there. So how can Mr. Colon make that assumption in South Jamaica, Queens, before he even went to the stop?
>
> Q. Now, where –
>
> A. I don't know what you mean by that. He never went to the stop before. You're making an assumption that he — he's made a decision he can't go there with a tractor trailer before he even went to the account.

(*Id.* at 199-200). Golebiewski noted that J&B is still a regular customer, and that EWG services it two to three times a month with a tractor-trailer. (*Id.* at 214).

Golebiewski was clear about why Complainant was fired:

> Q. It is fair to say that if Mr. Colon had not taken the box truck to Staten Island that day, that you wouldn't have fired him?
>
> A. Absolutely not. He would still have a job.
>
> Q. So the day before, on the 27th of January — or, sorry, the 27th of June, he was still in your good graces?
>
> A. Yes.
>
> Q. And you had no problem bringing him back to work after he'd been in Florida for a while?
>
> A. Not at all. I gave him money to go to Florida. He still got his yearly bonus. There was nothing. But you can't do what you want when you work for a company. As Louis Ventura said, we need structure.

(*Id.* at 207). Golebiewski elaborated on cross-examination.[47] He began by explaining what got his attention that day:

> A. It was a heated argument, and we don't have that in this office. So I jumped up and seen what was going on. And Brian was arguing with a driver, overheard it through his cell phone that they were arguing back and forth. He was disrespecting my dispatch, and then he said he's going to take whatever truck he wants to take, and he's going to do whatever account he wants, and he's not going to an account unless he went there before with another driver, which is, in the trucking business, unheard of. That's like a FedEx driver saying, I'm not going to go deliver to a house, I've never been there before. You just don't do that. And I could see how the heated argument, how Chris was heated, too. I can't have a driver that's frustrated with dispatch and frustrated with his job and driving a vehicle, a heavy truck on the road. And I feel for him. I didn't yell at him or nothing. It's just not for him.
>
> Q. If Chris Colon hadn't taken that truck without authorization, would he have been fired on June 28?

[47] Golebiewski was called as a witness by Complainant; thus, the cross-examination was conducted by Respondents' attorney.

A. No, he would not.

Q. What was the reason why Chris was fired on June 28, 2022?

A. He took a truck without permission after he was told to bring it back, and that's the only reason. I mean, God forbid, the truck had a flat. God forbid, the truck was a safety concern. He could have been on the road and he could have been driving a truck that was not safe to drive. He just took it upon himself to take a truck that's sitting in the lot. I mean, you just can't do what you want.

(*Id.* at 216-17). Golebiewski further explained that part of the issue with Complainant's behavior was as the way he was interacting with Irving.

> He was talking down to him, disrespecting him, and telling dispatch how he's going to do the route himself. So how can dispatch maintain structure, as Mr. Ventura said, in a company? And that's reflection on other drivers are going to – it's just snowball effect if they let – they'll be taking trucks. Anyone's going to take any truck they want. We keep our drivers on a designated truck every day. They drive the same truck every day unless there's a problem.

(*Id.* at 217-18).

Golebiewski also explained why Complainant's use of a vehicle inadequate to pick up the entire load was a problem. First, EWG had to send a second truck the next day to finish the job. "He went to JB with a box truck, picked them up, picked 300 bags. But they had 600 bags, so we have to send another truck the next day when it could have been done that day. And tolls, fuel, drivers." (*Id.* at 219). Thus, it cost the company money. Complainant's counsel then asked a series of questions about the size of trucks and capacity, which Golebiewski obviously considered to be missing the forest for the trees. According to Golebiewski, the point was not how many bags a particular vehicle could handle. The point was that Complainant "was supposed to go with a tractor-trailer." (*Id.* at 220). Golebiewski then elaborated that redemption center pickups are subject to New York State law and oversight. EWG only has so many days to pick up the whole load. When a redemption center calls for a pickup, EWG is required to clean out all of the product. (*Id.* at 221).[48]

[48] Earlier in his testimony, Golebiewski was obviously exasperated by detailed questions from Complainant's counsel about number of customers, box trucks, tractors, trailers of different sizes, which customers could be serviced by a box truck versus a tractor-trailer. To get to the point, he readily agreed that there are locations than an 18-wheeler could not reach, and agreed "100%" that vehicle size is important when planning routes. (*Id.* at 194). From a business operations standpoint, he would not send a box truck to a job when it cannot pick up the entire load, and he would not send a tractor-trailer to a site where only a box truck could get to:

Complainant testified that after receiving the text, he tried to call Golebiewski, but he did not answer. (*Id.* at 58, 59, 61, 107-08).

Ventura testified that when he arrived for work that day, he could see that something was up, as these kinds of things usually did not happen at EWG. He could see that Golebiewski was upset, and that Irving was bothered. He asked what had happened, and after a quiet discussion told Golebiewski that if firing Complainant was what he decided, that's what EWG had to do. Ventura stated that it was shortly after that, down in the garage, when Complainant spoke to him about the situation. (*Id.* at 173).

Complainant's testimony was that when he then caught Ventura, he said that "he spoke to Brian and Eddie, and Eddie was just tired and upset about the bickering back and forth" (*Id.* at 58) or that "there was nothing he could do, that Eddie was just tired of everything." (*Id.* at 59). Ventura testified at the hearing that what he told Complainant about Golebiewski's decision was: ". . . listen, Chris, this is what it is. This is how it happened. He's the boss. We can't have insubordination where you make these kind of decisions on your own." (*Id.* at 173). Ventura said that Complainant was not yelling or screaming but was just upset about what had happened. (*Id.* at 174). When asked at the hearing whether Complainant asked Ventura to intervene to try to get his job back, Ventura explained:

> I think I pretty much — at the beginning of the conversation, I knew that it was too far gone at that point. And I said, Chris, this is it. We're a structured organization. Trucking is an anomaly. You don't know what's going to happen tomorrow, whether it's your DEF or whether fuel cost or whether your customer calls. If structure breaks like this, it's almost like kind of a military, you got to act in that precision, because if you don't, then the truck gets caught up. Your next tour gets caught up. We can't have anyone making those kind of decisions. You don't know whether that truck is going in for regular preventive maintenance. You don't know if we had another driver

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> Q. So ideally you want to send the biggest equipment that you can that can fit to a site, right?
>
> A. Safely. Yes.
>
> Q. You want to be able to haul as much glass as possible.
>
> A. Yes.

(*Id.* at 196).

> scheduled for that truck. You don't know if the customer needs a bigger pickup, which in this case, it did. So there's a lot of aspects that affected this decision.

(*Id.*). At the hearing, Ventura acknowledged that the box truck Complainant had taken that day was not scheduled for another driver that tour; but explained that it was the wrong truck; that the customer needed a trailer-full pulled. Ventura further explained that redemption centers fill in three days, and if they do not get the correct switch, they cannot accept more redemption containers; so the wrong vehicle from EWG "not only will logistically it'll hurt us, it'll hurt our customers financially." (*Id.* at 175).[49]

> After talking with Ventura, Complainant texted Golebiewski the following:
>
> Well when I got back. There was no one there. So I put the keys to the trucks back we're I got them from. Parked your trucks. And left what ever was given to me in the key box. You can check your camera I left the trucks parked without any damages and nothing taken or stolen. And at the end of the day. Anything Brian asked me to do many favors I did them without ever saying. No. All I told him. Was he sending me to places I have never been. And two times he sent me to places. That put me in a tuff position. And I told him. If he has never sent me to a new place. That I wouldn't feel comfortable going unless I went with someone to show me how to get there. Or if I went in a box truck to figure out how a tractor can get there. He sent me last week to a place in Long Island that he never sent a trailer before only box trucks. And I had asked him if he ever send a trailer there and he said not but the box truck drivers told him a trailer said yea. When they wouldn't know if a truck can fit or know. And that's day. I hit a cable line or phone line and there was a residential area that I had to blindside to back into the parking lot. Then last week as well he sent me upstate to a place where I got there. I didn't know what street to turn down to. Called the owner. And the owner told me. Trailer can't fit in the back in the afternoon cause of the cars. I called him to tell him that. He told me he dind't know that. While on the phone. The owner of the store called him and told him and he apologized to me. Cause he didn't know that. So I didnt want to put myself in a situation we're I could have hit something and would have caused damage and would have went in my license. Those were the problems I was having with him.

[49] Ventura acknowledged that, although it is not the norm, there are circumstances in which they cannot make it to a customer facility due to the size of the vehicle. (*Id.* at 176-77). Ventura also acknowledged that he had never been to the J&B facility in Staten Island. (*Id.* at 178).

> Other then that he could have sent me we're ever he wanted to. But it's ok. I'm not going to argue and fight. Like I told him. If I never been to a store before and don't feel safe going alone. I wouldn't mind going with another driver or going in a box truck to get a feel for the stop. I'm not going to risk my license or someone life or property for anyone. But this is your Company. I've also respected you Lou and all the workers here. Then I guess I'm not a good driver for the company. Thank you for everything.

(RX-H at 75-78; *see also* Tr. at 59). Golebiewski testified that he saw and read Complainant's text; he did not recall whether he responded to it. (Tr. at 210). Complainant testified that Golebiewski never replied. (*Id.* at 63).

Complainant testified that he spoke to Golebiewski's brother-in-law, Joey, about what was going on and how hurt he was. Joey indicated that he would speak to Golebiewski after things cooled down. Complainant never heard back from Joey, and that's when he decided to contact an attorney because he felt the firing was unjust. (*Id.* at 59-60).

- *Credibility*

The general outline of what happened on June 28, 2022 is relatively consistent among all the witnesses and the underlying documentation. However, there are significant differences about details. Two of the differences are important enough to mandate a credibility finding.

First, Complainant's testimony suggested that he had sought, unsuccessfully, Irving's permission to use the box truck prior to talking to Ventura and prior to departing in the box truck. Irving's testimony was firm that he only learned about Complainant preparing to leave with the box truck with the prior driver came up to dispatch and let Irving know that something was up.

Second, Complainant's firm testimony was that he had sought, and obtained a second opinion from Ventura, and that Ventura had essentially approved Complainant's decision to take a box truck and assured Complainant that he would talk to Irving about it. Both Irving and Ventura denied that Complainant had done so.

As noted above in my general observations about witness credibility, Respondents' witnesses were generally consistent. There is nothing in the record to particularly question the accuracy of what they reported except for speculation that they might be motivated to try to defeat this STAA claim. I find, however, no doubt at all that Irving called and texted Complainant to make it clear that he did not have permission to use the box truck that day. If Ventura had overruled Irving and authorized use of the box truck, it seems implausible that that these

communications to Complainant would have been needed. Moreover, my review of the entire record, the testimony, and the documentation skews heavily toward a lack of animosity against Complainant or against his STAA protected activity. My clear impression is that EWG is a professional company that understands that safe operation of trucks and respectful and appreciative treatment of drivers only helps business operations. I do not sense any kind of culture of hostility to drivers bringing up maintenance or logistic problems. Irving and Complainant's texts prior to June 28, 2022 illustrate only typical banter between a driver and dispatcher. They in no way show any kind of hostility by Irving to Complainant's reports of maintenance or logistics problems. If anything, Irving comes across as supportive. EWG's overall relationship with Complainant prior to June 28 is that they respected his work and were trying to keep him on the payroll.

While I do not doubt that Complainant's recent experiences in tractor-trailer dispatches caused genuine anxiety about jobs at unfamiliar locations, he had a tendency in his testimony to confuse and conflate events. I also note a general tendency to make sweeping statements about Respondents' motives and business practices with little or no support. For example, Complainant maintained that EWG wanted him to get off the interstate before calling a tow truck because a tow from the interstate would be more expensive. This seems to be based on an assumption based on the tow truck driver's statement, during Complainant's hitched ride back to the depot, that Complainant was costing the company a lot of money (which Complainant acknowledged may have been a joke) rather than any kind of objective evidence or direct statement of EWG management personnel. Another example is where Complainant maintained that Irving was pressuring him to complete the run in a truck that had overheated; the texts from that day do not support that assertion. Irving wanted Complainant to try to get to an exit; but they do not show any attempt by Irving to convince Complainant to try to complete the entire dispatch. In other words, Complainant's testimony showed a tendency to exaggerate; a request to try to get to the next exit is hardly the same as pressure to complete the entire run.

There were no witnesses or documentation presented to support Complainant's version of what happened between the time he returned from the second run and departed for the third run with the box truck. And finally, although I have only given it limited consideration, the evidence of Complainant's having filed a false unemployment claim requires caution about the accuracy of his testimony, especially when assessing directly conflicting testimony.

I find that Complainant did not prove, by a preponderance of the evidence, that he had sought Irving's permission to take the box truck prior to departing for the J&B dispatch, and that Complainant did not prove, by a preponderance of the evidence that Ventura overruled Irving, gave Complainant permission to proceed on

the J&B dispatch using the box truck, or assured Complainant that he would talk to Irving.[50]

Most importantly for this case, it is crystal clear that Complainant did not have permission to use the box truck for the J&B run from EWG's dispatcher; and that Golebiewski – the company owner – overheard a phone conversation between Irving and Complainant in which Complainant ignored the dispatcher's clear displeasure that Complainant decided to proceed with a dispatch using the wrong kind of vehicle for the job. I credit Golebiewski's unambiguous testimony that he heard a driver disrespecting the dispatcher and attempting to dictate the terms of his employment. Thus, even if Complainant believed that Ventura gave him permission to use the box truck, that permission was not conveyed to the dispatcher, and Complainant went ahead with the run in the box truck knowing beyond a doubt that the dispatcher did not approve.

IV. Discussion

A. Overview

Complainant's burden is to establish by a preponderance of the evidence that he engaged in protected activity and that this protected activity was a contributing factor in the employer's decision to terminate his employment. Under a lenient burden-shifting contributing-factor framework such as found in the STAA, a complainant is not required to show retaliatory intent on the part of Respondents; rather, the complainant's only burden is to show an intent to take adverse action against the complainant because of protected activity.[51]

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[50] Even if Complainant actually had talked to Ventura and got his blessing to take the box truck and Ventura had indicated that he intended to intervene on Complainant's behalf, such an intended intervention clearly did not happen. It appears even under this alternative narrative that things had already escalated by the time Ventura reached the dispatch office. Golebiewski had already heard Complainant yelling at Irving and attempting to set parameters for how he would work. Thus, even if Ventura was lying about not talking to Complainant prior to Complainant's departure with the box truck (and I do not find that Ventura was lying), it is not at all clear that it matters because Golebiewski had already heard-what-he-had-heard and did not consult Irving or Ventura about his decision to fire Complainant on that basis.

[51] *See Murray v. UBS Securities, LLC*, 601 U.S. 23 (2024) (although *Murray* was decided under the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A(a), the burden-shifting framework of the STAA is materially the same). *See Dick v. USAA*, ARB No. 2022-0063, ALJ No. 2018-STA-00054, slip op. at 14, n.98 (ARB Apr. 16, 2024) (2024 WL 2285385) (ARB finding that *Murray*'s "easier-to-satisfy" contributing factor framework applies in STAA cases).

In his post-hearing reply brief, Complainant notes that Respondents appeared to rely on the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, and to not be aware that the STAA, as amended, uses instead the burden of proof framework set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121(b). *See*

If Complainant meets this burden, Respondents may avoid liability by demonstrating by clear and convincing evidence it would have taken the same adverse action in the absence of the protected activity.

B. Protected Activity

Complainant alleges that he engaged in STAA-protected activity under both the "filed a complaint" provision of 49 U.S.C. § 31105(a)(1)(A) and the "work refusal" prongs of 49 U.S.C. § 31105(a)(l)(B)(i) and (ii). He alleges that the termination on June 28, 2022 was the direct result of the protected activity of taking the box truck on that day, and that his prior protected activity was a factor taken into consideration by the sole decisionmaker, Golebiewski.

1. Complaint Clause

As pertinent to this case, an employee engages in STAA protected activity where the employee "has filed a complaint . . . related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. . . ." 49 U.S.C.A. § 31105(a)(1)(A).[52] The ARB in *Ulrich v. Swift Transportation Corp.*, ARB No. 2011-0016, 2010-STA-00041 (ARB Mar. 27, 2012) (2012 WL 1102542), stated in regard to "complaint" clause protected activity:

> Although it is not necessary that a complaint expressly cite the specific motor vehicle standard, which it is alleged has been violated, the complaint must "relate" to a violation of a commercial motor vehicle safety standard. While internal complaints about violations of commercial motor vehicle regulations may be oral, informal, or unofficial, they must be communicated to management. For a finding of protected activity under the complaint clause of the STAA, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation.

Slip op. at 4 (footnote citations omitted). In *Scott v. E.O. Habhegger Co.*, ARB No. 2023-0027, ALJ No. 2019-STA-00048 (ARB Mar. 14, 2024) (2024 WL 1619672), the ARB elaborated on how to determine a complainant's reasonable belief:

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49 U.S.C. § 31105(b). Complainant is correct. Respondent's post-hearing brief is largely based on the wrong burden of proof framework. *See Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20- 21, slip op. at 5-11 (ARB May 13, 2014) (2014 WL 2917587). In analyzing this case, I applied the AIR21 framework and not the *McDonnell Douglas* framework.

[52] It is common in legal briefs, judicial writings, witness testimony, and general conversation to compress the STAA's full description of covered violations to a few words, such as "safety standards" or "safety laws," among other short-hand phrasing, where in context it may be inferred that the reference includes the full range of the statutory language. In places, this Decision and Order follows that short-hand phrasing in the interest of brevity and readability.

> Under the complaint clause, the complainant does not need to "prove an actual violation of a motor vehicle safety regulation, standard, or order, but must have had a reasonable belief regarding the existence of an actual or potential violation." Thus, the complainant must demonstrate both a subjective and objectively reasonable belief of an actual or potential violation.
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> * * *
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> A complainant demonstrates a subjective belief by proving that he actually believed, in good faith, that the conduct complained of constituted a violation of law. * * *
>
> Objective reasonableness is evaluated based upon the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the complainant.

Id., slip op. at 10-12. *See also Dick v. USAA*, ARB No. 2022-0063, ALJ No. 2018-STA-00054, slip op. at 11 (ARB Apr. 16, 2024) (2024 WL 2285385).

Complainant contends that he engaged in protected activity when he raised concerns in May and June 2022 about his assigned commercial vehicle equipment and operational conditions, including unsecured loads; defective mudflaps on trailers; overheating tractors; routes that took the driver into residential areas with commercial vehicle weight restrictions; and defective landing gear.[53] Complainant contends that he engaged in protected activity when he raised concerns to Irving, orally and by text, about overhead wires near a customer site that were too low to safely operate a tractor-trailer. And Complainant contends that he engaged in protected activity when he told Ventura and Irving that he did not believe the tractor-trailer set could be safely operated to the J&B redemption location in Staten Island. Complainant argues that these complaints:

> [R]elate to violations of various commercial vehicle safety regulations. These include, but are not limited to, 49 C.F.R. §§ 392.1 (motor carrier must comply with regulations), 392.7 (equipment, inspection and use), 392.9 (cargo securement), 393.1(No motor carrier may operate a commercial motor vehicle. . . unless it is equipped in accordance with the requirements and specifications of this part), 396.3 (inspection, repair, and maintenance), 396.7 (unsafe operations forbidden); and

[53] The only STAA protected activity explicitly alleged by Complainant in his post-hearing brief occurred in June 2022.

> 15 NY Comp Codes Rules and Regs § 47.4 (mudflap/splash guard requirements).

(C. Br. at 17). Complainant further contends that these were reasonably perceived by him as violations of a commercial vehicle safety law or regulation for obvious reasons:

> An overheating tractor that shuts down on the highway puts other motorists at risk. A missing mudflap creates a risk of rocks being thrown at other vehicles. An unsecured pallet can shift during operation and create a hazard to the truck driver and to other motorists. A large tractor-trailer set operated in a residential area and on restricted routes creates a risk of striking overhead lines, obstructing traffic, and striking other vehicles in tight quarters not designed to receive tractor-trailer combinations.

(*Id*. at 18-19).

Respondents' post-hearing brief did not address whether Complainant's pre-June 28, 2022 complaints about mechanical and field conditions filed by Complainant were protected activity, except in voicing general denials to some of Complainant's proposed findings of fact. Its focus in briefing on these predicate events was on causation and culpability, noting that Complainant had never been directed to operate an unsafe vehicle and that Complainant had not suffered any temporally proximate adverse employment action because of raising concerns about equipment and conditions. Most of Respondent's post-hearing brief focuses on the June 28, 2022 incident in which Complainant took a box truck instead of the assigned tractor-tractor to J&B Redemption in Staten Island.

- *Pre-June 28, 2022 Complaints.*

Complainant's post-hearing brief identified reports of mechanical or operational safety issues to EWG, to include the June 2, 2022 identification of a defective mudflap; the June 6, 2022 report of improperly stacked pallets; the June 7, 2022 report of improperly prepared freight and of an overheated engine; the June 9, 2022 report of another overheated engine; the June 10, 2022 report that the previously reported defective mudflap had not been repaired; the June 20, 2022 report that the Long Island dispatch was in a residential area that had weight restrictions and was so tight that the trailer did not pass under overhead wires; and the June 21, 2022 report of a problem with the trailer landing gear and a missing mudflap.

The record made at the hearing and Complainant's post-hearing briefing does not go into detail about whether each of these pre-June 28, 2022 reports and complaints were related to violations of motor vehicle safety laws, or whether they were subjectively and objectively reasonably believed to be so. Rather, Complainant

largely relies on it being obvious that these were reasonably perceived safety concerns related to the coverage of a list of federal and state commercial vehicle regulatory provisions. Although this is a very minimal showing, Respondents did not make a meaningful attempt to challenge that Complainant's actions in this regard were safety-related reports to EWG's dispatcher and/or mechanics. I find that it was essentially undisputed that Complainant's reporting of the mudflap, unsecured pallets and loads, overheating tractor engines, and a low-hanging wire were STAA protected activity.[54]

To the extent that Respondents may be considered to have made a general denial that the pre-June 28, 2022 incidents were not protected activity, I find that the preponderance of the evidence is that Complainant subjectively believed he was reporting situations related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. Although there was scant evidence or testimony presented at the hearing about whether these reports were based on an objectively reasonable belief, Complainant's post-hearing brief did enumerate several federal and state laws that plausibly appear to support that a reasonable driver would hold an objectively reasonable belief that what Complainant reported was grounded in commercial motor vehicle safety standards or regulations. As Respondents did not attempt to argue otherwise, I find that the alleged protected activity enumerated in the findings of fact on June 2, 6, 7, 9, 10, 20 and 21 were proven to be STAA protected activity.

-- June 28, 2022 Dispatch to J&B Redemption

The linchpin of this case is the June 28, 2022 dispatch to J&B Redemption. Although in post-hearing briefing, Complainant asserts that the dispatch to J&B using a tractor-trailer would result in an *actual* violation of a commercial motor vehicle safety or security regulation, standard, or order, it is apparent from the totality of the testimony and documentation that his concern was more nuanced—that the client location might have conditions so subpar for use of a tractor-trailer that he reasonably believed there was a *potential* violation.

Complainant has presented sufficient evidence to show that he held a subjectively reasonable belief that the J&B dispatch could potentially result in a violation. In this regard, Complainant explained to the dispatcher Irving his recent two experiences taking tractor-trailers into congested and difficult-to-maneuver

[54] That neither party focused on whether these pre-June 28, 2022 mechanical and operational reports by Complainant were STAA protected activity is undoubtedly because (1) it is obvious that they were at least reasonably perceived to be so and it is not really in dispute that they were protected activity; and (2) Complainant suffered no adverse employment action for any of these reports and thus they are not actionable STAA complaints, in themselves, unless Complainant can establish that they contributed to Golebiewski's frame of mind when he decided to fire Complainant on June 28, 2022. The crux of the case is about the events of June 28, 2022.

residential areas that raised the potential for injury to Complainant or the general public, and possible violation of residential weight restrictions for commercial vehicles. The record supports a finding that Complainant's recent driving experiences were the basis for his subjective belief about first-time runs into congested areas of the New York City metropolitan area and upstate New York, and how such unfamiliarity ran the risk of encountering conditions unsafe for maneuvering a tractor-trailer. Although he had not been to the specific location in Staten Island, he had been generally trained on the hazards associated with driving a tractor-trailer on Staten Island, especially in regard to difficult areas of navigation.

I do not find, however, that Complainant's additional action of taking a box truck to the dispatch so that he could personally view the situation at the client location was supported by a subjectively reasonable belief that failure to allow a driver to select a vehicle to take for a prior viewing of the customer site would be a violation of a safety law. The record shows that this was arbitrary and unauthorized self-help; the record lacks evidence that Complainant would have believed that, without such an unauthorized action, a safety law would have been violated. He may have subjectively believed that because of EWG's open-door policy and the apologies he had received for the inconvenience he had experienced on recent dispatches that had not gone smoothly, that he would be forgiven for changing the terms of the J&B dispatch without permission, but I do not find it plausible that he subjectively believed that the mere fact that he was given the dispatch to J&B would result in a safety standard violation without a prior personal visit by him in a smaller vehicle.

Moreover, Complainant has not established the objective reasonableness of his complaint that going to the unfamiliar-to-him J&B dispatch in a tractor-trailer would potentially result in a motor vehicle safety violation. First, in assessing objective reasonableness, it is not sufficient for a complainant to merely speculate that something "could happen" or that the complainant "felt uncomfortable" about the dispatch. *See Dick v. J.B. Hunt Transport, Inc.*, ARB No. 10-036, ALJ No. 2009-STA-00061, slip op. at 8 (ARB Nov. 16, 2011) (driver's belief that backing into a dark parking lot would involve a safety violation was mere speculation insufficient to establish objective reasonableness). The evidence is that, while still at the depot, Complainant consulted with two drivers, who did not provide meaningful input about the conditions at the location. He did not consult with either the dispatcher, Irving, or the manager, Ventura, about the conditions because he felt that they would not have credible input because they did not have CDL licenses. All Complainant knew when he departed was that J&B was on Staten Island, which he knew to have congested areas with illegally parked cars and places that are difficult

to maneuver a large vehicle.[55] Outside that general knowledge that parts of Staten Island were difficult for tractor-trailer to maneuver, it was pure speculation on Complainant's part that there might be a safety issue at the J&B site.

Further, after speaking with Irving while on the phone on the way to the customer location, Complainant's speculation was no longer reasonably held as a valid concern.[56] Irving credibly testified that he told Complainant that J&B was a very familiar EWG customer and that he had dispatched hundreds of tractor-trailers over a period of five years to that location without incident. Irving also tried to show Complainant the online street view to establish how wide and accessible the location was. The record contains no objective evidence of any kind that the J&B customer location was unsafe to complete with a tractor-trailer. Although Complainant's testimony indicates that he did not trust Irving's judgment,[57] Complainant has not shown that Irving's judgment was so fundamentally lacking in credibility that a reasonable person in the same factual circumstances with the same training and experience as Complainant would conclude that driving a tractor-trailer to the dispatch for the first time without

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[55] Although Complainant testified that he discussed with Ventura whether he had sent 48-foot tractor-trailer combinations to J&B, and Ventura said that he had only sent box trucks, I found above in the findings of fact that the preponderance of evidence is that he did not have a conversation with Ventura prior to leaving the depot for J&B on June 28, 2022.

[56] Where a respondent sufficiently addresses a concern, or where the complainant fails to obtain objective information to support a subjective belief of a potential violation, the possible objective reasonableness of the belief may cease to be cognizable. *See generally Shactman v. Helicopters, Inc.*, ARB No. 11-049, ALJ No. 2010-AIR-4 (ARB Jan. 25, 2013) (complainant's continued work refusals and reiteration of prior complaints was no longer objectively reasonable and not protected activity once respondent sufficiently addressed the prior concerns); *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-13 (ARB June 30, 2010) (belief of air safety violation no longer reasonable once determination made that the FAA had flight approved the device that was the source of the concern). Thus, in this case, once Irving informed Complainant of the several reasons why use of a tractor-trailer was not a problem at the J&B site, it should have been clear to Complainant that his subjective safety concern probably was not objectively reasonable.

[57] As discussed above, Irving admitted to Complainant that he did not know about the low wires before sending Complainant on the June 20, 2022 dispatch on Long Island, and that this was the first time he had sent a driver with a tractor-trailer to that location. As discussed above, this incident supported Complainant's subjective concern about taking tractor-trailers to unfamiliar locations. However, the Staten Island J&B dispatch is distinguishable because EWG had previously sent tractor-trailers on that dispatch hundreds of times without incident. Moreover, Irving's explanation about the Long Island dispatch indicates that he had done his due diligence and had an honest belief that there were no site issues in sending a tractor-trailer to that location. The record indicates that Complainant was not blamed for hitting the wires, and that EWG has since been able to continue to send tractor-trailers to that customer location. Thus, the record before me does not show Irving to have been so negligent as to Complainant's Long Island dispatch as to show that his information about site conditions was generally untrustworthy.

independent driver verification of the operational viability of using a tractor-trailer would violate a commercial motor vehicle safety regulation, standard or order.[58]

Complainant's post-hearing brief argues that a "large tractor-trailer set operated in a residential area and on restricted routes creates a risk of striking overhead lines, obstructing traffic, and striking other vehicles in tight quarters not designed to receive tractor-trailer combinations," and that the June 28, 2022 dispatch involved "violations of various commercial vehicle safety regulations, including but not limited to 49 C.F.R. § 396.7 (unsafe operations forbidden) [which] would have occurred but for Mr. Colon's refusal to operate his assigned tractor-trailer combination." Complainant argues that this refusal would have resulted in an actual violation. But this seems to be nothing but a truism that it can be dangerous to drive a tractor-trailer in a congested metropolitan area. The fact that operating a tractor-trailer in the New York City area will inevitably involve heavy traffic, illegally parked vehicles, and tight maneuvering "does not intrinsically suggest a violation of any safety regulation, standard, or order" merely because a driver is dispatched to an unfamiliar location. *Dick*, ARB No. 2022-0063, slip op. at 13.[59] The fact that many other drivers routinely completed hundreds of dispatches over several years using tractor-trailers without issue is strong evidence that Complainant's complaint was not objectively reasonable. *Id.*[60] I note, however, that the briefing does not stitch this general concern to any kind of a commercial motor vehicle safety standard that mandates a commercial motor vehicle operator *to permit a driver to pay a personal visit to a customer location before agreeing to drive a tractor-trailer to that site*.[61]

Golebiewski credibly and persuasively testified that driving a tractor-trailer inherently involves sometimes encountering unique and unfamiliar locations, and a business would be untenable if employers had to permit test runs for each driver first. Golebiewski also noted that the J&B location was not an unknown to EWG. The record also shows that EWG had an established protocol if a driver arrived and

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[58] I note also that Ventura said that Irving was very good at his job. (Tr. at 173).

[59] In *Dick*, the complainant was unable to establish an objectively reasonable belief that use of an "ELD" system was unsafe, the ARB finding that the simple use of such a system to track a truck's location did not intrinsically suggest a violation of a safety regulation, standard, or order. *Dick*, ARB No. 2022-0063, slip op. at 12-13.

[60] In *Dick*, the fact that other drivers routinely used an ELD system without concern was cited as support for a conclusion that use of the system was not intrinsically a violation. *Id.* at 13.

[61] *See Ronnie v. Off. Depot, Inc.*, ARB No. 2019-0020, ALJ NO. 2018-SOX-00006 (ARB Sept. 29, 2020) (2020 WL 6117919) (finding that in a SOX case that it is not the adjudicator's responsibility to identify what federal law was violated to support finding of objective reasonableness; a complainant need not cite a code, but mere speculation is not enough).

discovered access issues: the driver should call dispatch, and dispatch will either arrange a fix or instruct the driver to reroute.[62]

I find that the evidence of record is overwhelming that the J&B dispatch using a tractor-trailer, even if it was the driver's first visit to that location, would not have been objectively considered violative of a commercial motor vehicle safety standard based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the complainant.

-- Summary

Based on the foregoing, I find that Complainant's pre-June 28, 2022 alleged protected activity enumerated in the findings of fact on June 2, 6, 7, 9, 10, 20 and 21 were shown by a preponderance of the evidence (or at least not seriously challenged) to be STAA protected activity. I find that Complainant's raising a general concern on June 28, 2022 about potential safety issues of a dispatch to an unfamiliar location in a possibly congested area was shown to be based on a good faith, subjective belief of Complainant, but was not shown to be objectively reasonable. I find that Complainant's action on June 28, 2022 of taking a smaller vehicle to the dispatch without authorization so that he could personally assess the safety of the location was not shown to be grounded in either a subjectively or objectively reasonable belief that had he not been allowed to do so would relate to an actual or possible violation of a commercial motor vehicle safety or security regulation, standard, or order.

2. Refusal to Operate Clause

The STAA protects drivers when they "refuse to operate a vehicle" under two situations. First, drivers are protected when they refuse to drive because operation of the vehicle would violate a commercial motor vehicle safety regulation, standard, or order. 49 U.S.C. § 31105(a)(1)(B)(i). Second, drivers are protected when they refuse to drive because they have a reasonable apprehension that operating the vehicle would cause serious injury to the employee or the public because of the vehicle's hazardous safety or security condition. 49 U.S.C. § 31105(a)(1)(B)(ii).

Complainant argues that he engaged in two refusal-to-operate actions. The first refusal occurred on June 9, 2022 when Irving purportedly encouraged Complainant to limp along in an overheating truck to save money on the tow truck,

[62] *See Dick*, ARB No. 10-136, slip op. at 6-7 (finding that substantial evidence supported an ALJ's decision to assess the objective reasonableness of a complainant's concern about the safety of backing into a dark parking lot when the employer had trained drivers how to deal that situation with a "Get Out and Look" program).

and Complainant refused to continue doing so.[63] The second refusal to operate was on June 28, 2022, when Complainant used a box truck instead of his assigned tractor-trailer for the J&B Redemption Center pick up.

i. Operation Would Violate a Safety Standard Prong

The STAA protects an employee who refuses to drive because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). In *Assistant Secretary & Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-00061, slip op. at 9 (ARB Sept. 30, 2011) (2011 WL 4915759), the ARB interpreted the protection afforded by this provision to ". . . include[] refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time [the employee] refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined." The ARB stated that "the 'subjective' component of the reasonable belief test is satisfied . . . by showing that the employee actually believed that the conduct he complained of constituted a violation of relevant law. . . . An objective reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant." *Id.* (footnote and citations omitted).

Turning first to the overheating incident on June 9, 2022, the initial question is whether Complainant engaged in a refusal to operate the vehicle *that was directed by EWG*. The record shows EWG encouraged Complainant to try to get to

[63] Complainant stated in his post-hearing brief that this point was undisputed, (C. Br. at 18, citing Joint Stipulations, No. 13). It is true that the pre-hearing joint stipulation indicated that Irving "told Complainant to continue transporting the load to Upstate New York." In its response to Complainant's Post-Hearing Proposed Findings of Fact, however, Respondents proffered a denial, stating that "CX-5 does not reflect that Brian Irving directed Complainant to continue to transport the load upstate." (R. Br. at 19) (*see* Appendix at ¶ 31). Based on the hearing testimony and CX-5, there was clearly a question of fact on whether Irving directed Complainant to continue driving once he pulled off, and Irving's motivation for asking Complainant to try to get to an exit was based on trying to avoid the added expense of a tow truck on the interstate highway as opposed to an off-highway location. Above, in the findings of fact, I found that the preponderance of the evidence is that EWG asked Complainant to try to make to the next exit but did not ask him to drive any further once he pulled into a service station, and in fact asked him to wait there. At the hearing, Complainant testified about his understanding that EWG would have wanted him to get to the next exit in order to save EWG the expense of an on-the-interstate tow, albeit in relation to the first, June 7, 2022 overheating incident. I found above that, although Complainant's belief about EWG's statement had a ring of truth, it was not supported by anything except Complainant's speculation. Complainant indicated in regard to the June 9, 2022 overheating incident that it was said to him, perhaps in a joking manner, that because trucks kept breaking down while in his possession, he was costing EWG a lot of money. Complainant did not identify who said this to him, although it may be implied that the tow truck driver said it. It is not clear that any EWG manager said this. I decline to extrapolate from this kind of banter that EWG's motive to ask Complainant to try to get to the next was to try to avoid the cost of an interstate tow at the expense of safety.

the next exit. Complainant did not refuse to try to get the truck to the next exit; rather he continued to drive until he found an opportunity to pull off at a service area. There is no indication in the record that EWG was upset that Complainant pulled off to a service area rather than trying to continue to a full exit from the interstate. EWG asked Complainant to wait there. It was *after he was asked to wait* that Complainant declared that he would not drive any further. There is no indication that EWG ever asked Complainant, after he pulled off at the service area, to still try to get to and exit completely off the interstate or to continue the dispatch to upstate New York. Thus, Complainant's declaration that he would not drive further after parking at the service area was not in response to a directive by EWG; it was merely a general statement that he was done for the day. That Complainant made this statement was, as the dispatcher Irving recognized, out of quite understandable frustration as this was the second overheating incident within days. But it was texted after he was told to stop and wait. The documentation then shows that arrangements were made for Complainant to return to the depot by Uber (although ultimately, he rode back with the tow truck driver). Nobody asked Complainant to continue driving the tractor-trailer. Thus, assuming it would have been a violation of a federal motor carrier safety law for EWG to direct Complainant to continue driving, there is no evidence that EWG did so. This was a general declaration; not a refusal to drive based on a direction to do so. Thus, I find that the preponderance of the evidence is that Complainant did not engage in STAA protected activity when he announced that he would refuse to drive further after parking the tractor-trailer rig at a service area.

As to the June 28, 2022 incident, Complainant has not proven that it would have violated a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security for Complainant to take the dispatch to Staten Island with a tractor-trailer. For the reasons addressed above in the "complaint" clause section, Complainant did not show that a reasonable person in the same factual circumstances with the same training and experience as Complainant would have held an objectively reasonable belief that taking a tractor-trailer to the J&B dispatch would violate a regulation, standard, or order. Notably, Complainant in this case was not asserting that he knew the J&B dispatch could not be run with a tractor-trailer without violating that safety law, but only that he should not be required to do so without first making a personal inspection of the customer's site. It was a sort of *provisional* refusal to drive the assigned vehicle based only on Complainant's subjective suspicion that there could be safety issues. Thus, I find that the June 28, 2022 incident does not fit within the protection of section 31105(a)(1)(B)(i).

ii. Reasonable Apprehension of Injury Prong

The STAA also protects an employee who refuses to operate a vehicle because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition[.]" 49 U.S.C. § 31105(a)(1)(B)(ii).

> [A]n 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. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

Id. § 31105(a)(2).

Although the "reasonable apprehension" clause of the STAA refers to "the *vehicle's* hazardous safety or security condition," (emphasis added) the ARB "has stated that this clause covers more than just mechanical defects of a vehicle— it is intended to ensure 'that employees are not forced to commit . . . unsafe acts.'" *Cielicki v. Soo Line R.R. Co.*, ARB No. 2019-0065, ALJ No. 2018-FRS-00039, slip op. at 8 (ARB June 4, 2020) (2020 WL 3722138).

As to the June 9, 2022 incident, attempting to continue to drive a vehicle with an overheating engine is something about which a driver would obviously have a reasonable apprehensive of serious injury to the employee or the public. However, as I found above, there is no evidence that once Complainant parked the rig at the service station, EWG asked him to drive any further. The fact is that Complainant did attempt to get to an exit, and thus did not refuse to operate the rig until he had parked it at the relative safety of the service stop. The record does not support a finding that once Complainant parked at the service stop that EWG expected him to continue-on to an exit completely off the interstate or to complete the entire run. Complainant cannot have refused to drive when he was not asked to do so.

As to the June 28, 2022 refusal to operate the assigned tractor-trailer, as found above, given Complainant's recent bad experiences in driving such a rig in unfamiliar urbanized areas, there is adequate evidence that he held a subjectively reasonable fear that the local conditions might be unsafe. However, for the same reasons found above that the record does not support a finding that a driver in the circumstances with the employee's training and experience would have objectively found that operation of a tractor-trailer to the J&B location without having personally viewed it would constitute a violation of a commercial motor vehicle safety or security regulation, standard, order – the record does not support that

Complainant's provisional refusal to drive a tractor-trailer to the J&B location would objectively support a reasonable apprehension of serious injury to the employee or the public.

Moreover, the preponderance of the evidence is that Complainant did not seek, and had been unable to obtain, correction of the hazardous safety or security condition from EWG prior to taking the box truck rather than the assigned tractor-trailer. Rather, the preponderance of the evidence is that Complainant did not consult with Irving about the conditions at J&B prior to taking it on himself to leave for the job with the box truck.[64] Although it may have been partly hyperbole, Irving did propose a solution for Complainant that if he was "scared" to drive tractor-trailers to unfamiliar locations in Staten Island or upstate New York, EWG could put him back on rendering trucks. At the hearing, Complainant indicated that this would have been acceptable to him. (Tr. at 58).

Every witness in this case acknowledged that EWG had an open-door policy, and that drivers could approach management about problems with dispatches. It is quite possible, given that the record shows that EWG generally respected Complainant's employment, that he could have discussed his concerns about EWG sending him in vehicles possibly too large for safe operation at the destination, and come up with a mutually agreeable solution, such as scheduling the J&B run early in the morning to avoid traffic. Irving's text to Complainant on June 28, 2022 indicates this was something he was open to. (CX-5 at 78 ("[a]ll u had to do was tell me u were afraid to go to staten island, figure if u started at 5 ud be there early.")). Because this was a provisional refusal to drive, it is possible that a compromise could have been that Complainant could drive to J&B, and then use EWG's protocol for solving local access conditions (essentially that the dispatcher would seek the customer's assistance in clearing the way, or would re-route the driver to a different dispatch), if it turned out to have potentially unsafe conditions. This is not to suggest that these would have been offered to Complainant, but only to illustrate that by not consulting with EWG about his concern about driving to an unfamiliar location in a tractor-trailer in a potentially congested location, Complainant denied Respondents the opportunity to address his concern.

To summarize, I find that Complainant has established that he engaged in protective activity under the STAA's "file a complaint" clause on June 2, 6, 7, 9, 10, 20 and 21. I did not find that Complainant's June 28, 2022 refusal to operate the assigned tractor-trailer was protected activity.

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[64] Although Complainant testified that he talked to Ventura, and essentially got his permission before leaving with the box truck, above I found that this testimony was outweighed by the credibly presented testimony of Respondents' management officials.

C. Unfavorable Employment Action

It is undisputed that Complainant was terminated from employment by EWG on June 28, 2022. The STAA specifies that an employee's discharge constitutes adverse action. 49 U.S.C. § 31105(a); 29 C.F.R. § 1978.102. Any discharge, including the termination of employment by an employer, constitutes an adverse action under the STAA. *Klosterman v. E.J. Davies, Inc.*, ARB No. 2012-0035, ALJ No. 2007-STA-00019, slip op. at 6 (ARB Sept. 30, 2010) (ARB No. in caption corrected Jan. 9, 2013) (2010 WL 3878518) (citing *Minne v. Star Air, Inc.*, ARB No. 2005-0005, ALJ No.2004-STA-00026, slip op. at 13-15 (ARB Oct. 31, 2007) (2007 WL 3286330)). Accordingly, the unfavorable employment action element of a STAA complaint is established.[65]

D. Contributing Factor Causation

To prevail on a claim under the STAA, the complainant must prove that the employee's protected activity was a contributing factor in the adverse employment action taken against the employee.[66] 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."[67] The ARB has noted that "this is a relatively low standard for an employee to meet—the activity need only play some role and "need not be 'significant, motivating, substantial or predominant.'" *Dick*, ARB No. 2022-0063, slip op. at 14 (quoting *Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 8 (ARB May 13, 2020) (2020 WL 314647); *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 53 (ARB Jan. 4, 2017) (2016 WL 5868560)).

-- June 28, 2022 Alleged, But Not Proven Protected Activity

In the instant case, the EWG's owner, Golebiewski, was the sole decisionmaker on Complainant's firing. He testified that the sole reason for Complainant's firing was insubordination in the form of his taking of the box truck without permission, and his disrespectful conversion with EWG's dispatcher, Irving, about the situation within Golebiewski's hearing. I found above that Complainant

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[65] In this proceeding it was suggested that, after Complainant had been fired, requests from potential employers for references or verification of employment from EWG were ignored or delayed. This is disputed. It was not addressed in Complainant's post-hearing brief, and therefore I will not address it.

[66] 49 U.S.C. §§ 42121(b)(2)(B)(iii); *see also Formella v. U.S. Dept. of Labor,* 628 F.3d 381, 389 (7th Cir. 2010); *Araujo v. N.J. Transit Rail Operations, Inc.,* 708 F.3d 152, 157 (3d Cir. 2013).

[67] *Palmer v. Canadian Nat'l Ry., IL Cent. R.R. Co.,* ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 53 (ARB Sept. 30, 2016) (reissued with full dissent, Jan. 4, 2017) (2016 WL 5868560).

did not prove by a preponderance of the evidence that during the June 28, 2022 incident, either the unauthorized taking of the box truck, or Complainant's explanation to Irving that his reasons for taking the box truck included a concern about potential safety issues at the J&B site, was based on an objectively reasonable belief under the complaint clause, or either prong of the refusal-to-drive clause. Thus, neither the taking of the box truck, nor the explanation that this action was grounded in a suspicion that a tractor-trailer may not be safe to navigate at this part of Staten Island, was STAA protected activity. Thus, this alleged but not-proven-to-be STAA protected activity did not contribute as a reason for the firing.

-- Pre- June 28, 2022 Protected Activity

As to Complainant's earlier STAA protected activity, Complainant relies on the drawing of inferences. The first inference Complainant would like this tribunal to make is based on words Ventura purportedly used when he and Complainant had a discussion after the June 28, 2022 firing:

> Mr. Colon testified that, when he asked Mr. Ventura if there was anything he could do to avoid termination, Mr. Ventura said that "Eddie just got tired of everything." Since Mr. Colon was never written up or disciplined prior to his termination, it is reasonable to infer that "everything" here refers to Mr. Colon's breakdowns, safety complaints, and refusals.

(C. Br. at 23 (internal citations omitted)).

Initially, I note that the words "just got tired of everything" were Complainant's memory of what Ventura said. There is no direct evidence of what Golebiewski said. When testifying about this post-firing conversation, Ventura did not use these words, and neither he nor Golebiewski were asked to clarify what Golebiewski meant by "everything" (assuming arguendo that is what he said). Moreover, I note that when first describing what Ventura told him about Golebiewski's thinking, Complainant stated: "And then Lou just told me he spoke to Brian and Eddie, and Eddie was just tired and upset about the bickering back and forth." (Tr. at 58). This initial characterization is more focused and seems to support an inference that Golebiewski's concern was about the nature of the interaction between the driver and the dispatcher. Thus, it is uncertain that Complainant's second version of what Ventura said is an accurate reflection of how Ventura explained Golebiewski's decision.

In contrast to Complainant's characterization, Ventura's testimony about his conversation with Complainant after the firing does not support an inference that

Golebiewski grounded the decision to fire Complainant on prior protected activity. Here, in pertinent part, is what Ventura said about this conversation:

> Q. What did you talk about with him?
>
> A. Chris asked me, and I told him, listen, Chris, this is what it is. This is how it happened. He's the boss. We can't have insubordination where you make these kind of decisions on your own. . . .
>
> Q. Did he ask you to intervene and try to get the job back?
>
> A. I think I pretty much -- at the beginning of the conversation, I knew that it was too far gone at that point. And I said, Chris, this is it. We're a structured organization. Trucking is an anomaly. You don't know what's going to happen tomorrow, whether it's your DEF or whether fuel 13 cost or whether your customer calls. If structure breaks like this, it's almost like kind of a military, you got to act in that precision, because if you don't, then the truck gets caught up. Your next tour gets caught up. We can't have anyone making those kind of decisions. You don't know whether that truck is going in for regular preventive maintenance. You don't know if we had another driver scheduled for that truck. You don't know if the customer needs a bigger pickup, which in this case, it did. So there's a lot of aspects that affected this decision.

(*Id.* at 173-74). Thus, Ventura's telling of the conversation is that it was an explanation to Complainant about stepping over the line; how making a bad decision to change how the job gets done was what caused the firing, and how EWG cannot tolerate insubordination.

The preponderance of the evidence is that EWG did not consider Complainant's reports of mechanical and operational issues as insubordinate at time they were made, and he was never disciplined or even criticized for the reports proximate to when they were made. It is not even clear that Complainant's reports of routine mechanical or operational issues would have made their way up to Golebiewski's level.[68] It was proven that Golebiewski was aware that Complainant had experienced two overheating engine incidents, but that same evidence (Golebiewski's text to Complainant on June 17, 2022), was in the form of an apology to Complainant for what happened and a pledge to do better, and not criticism of

[68] For example, EWG's operations manager, Ventura, testified that a report of defective mudflaps was not the sort of event that would have been brought to his attention, and that he had not heard about the complaints Complainant had brought up during the term of his employment at the time they occurred. He did not know about them until the instant STAA litigation. (Tr. at 188).

Complainant for what happened during the overheating incidents. It would be simply out of character from the testimony and documentation and context – showing that Complainant had been treated with deference and respect – and was considered a good employee prior to box truck incident – and evidence showing that EWG had a culture of trying to obtain and keep vehicles in good repair and not sending the wrong vehicle for a location's conditions – to support the drawing of a inference that Golebiewski harbored resentment of Complainant's pre-June 28, 2022 safety and operational reports, and therefore such resentment contributed to the decision to fire Complainant.

In my general findings about witness credibility, I explained why I found Golebiewski's testimony about his reason for firing Complainant to be completely credible. The decision to fire was based solely on Complainant's taking a box truck without authorization of the dispatcher, and for his disrespecting EWG's dispatcher. It was not pretext for some other contributing motive, such as an unexpressed resentment for Complainant being a too-frequent complainer.

Based on the foregoing, I decline Complainant's request to draw an inference that Golebiewski had in mind Complainant's frequent mechanical and logistics safety reports when he decided to fire Complainant.

Complainant also relies on the drawing of an inference based on the temporal proximity of the pre-June 28, 2022 protected activity to the June 28, 2022 firing.[69] It is true that Complainant's second term of employment with EWG was brief, and that his pre-June 28, 2022 safety reports were registered within that approximately two-month period. The reports that were specifically briefed and found to be protected activity all occurred in the same month as the firing, June 2022. Thus, although there were no adverse employment actions taken against Complainant immediately proximate to any of these reports, they were within the prior few weeks of the day Complainant was fired. Thus, there was no immediate proximity; but there was a "medium level" proximity based on Complainant's theory that they must have festered in Golebiewski's mind and had to have been part of his reason for firing Complainant.

I find, however, that Golebiewski's clear testimony for the sole reason for Complainant's firing easily defeats any inference that may be drawn by this medium-term proximity of the prior reports. An inference of causation may be broken by an intervening event or by lack of knowledge of the protected activity by

[69] *See, e.g., Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 21, slip op. at 12 (ARB May 13, 2014) (2014 WL 2917587) (inference of causation may be drawn based on the temporal proximity of protected activities to the adverse employment action). *But see Spelson v. United Express Sys.*, ARB No. 09-063, ALJ No. 2008-STA-39, slip op. at 3 n.3 (ARB Feb. 23, 2011) (2011 WL 729642) (temporal proximity is not a dispositive factor, but just one piece of evidence for the trier of fact to weigh).

the decision-maker. *See Dho-Thomas v. Pacer Energy Mktg.*, ARB No. 13-051, ALJ Nos. 2012-STA-46, 2012-TSC-1, slip op. at 5, n.12 (ARB May 27, 2015) (2015 WL 3643575) (Corchado, J., concurring); *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-37, slip op. at 6 (ARB Oct. 17, 2012) (2012 WL 5391429); *Wevers v. Mont. Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062, slip op. at 12 (ARB June 17, 2019) (2019 WL 4170439) (per curiam) (causal inference based on temporal proximity diminished by intervening events showing a reasonable concern by employer that the complainant was charging official time while engaged in personal activities). In other words, any temporal proximity is defeated by the intervening fact of Complainant's insubordination and verbal disrespect of Irving's authority within the earshot of EWG's owner immediately before the firing. I find that the immediate proximity of this insubordination to the firing (as compared to only-medium proximity of the prior reporting) indicates it more likely than not that it was exactly what Golebiewski said was the reason for the firing and not any hidden pretextual reason that caused the firing.

While the importance of a driver reporting mechanical and operational issues to a dispatcher or mechanic is obvious, it is also notable here that Complainant's mechanical and operational safety reports were of things like damaged or missing mudflaps, hitting an overhead wire without any apparent damage, and improperly stacked pallets that the dispatcher told Complainant not to take, which are typical issues that arise in trucking. The record in this case strongly suggests that EWG took such reports in stride and endeavored to address them in short order. There is no evidence that any of EWG's managers considered Complainant to be a problem employee prior to June 28, 2022, or took any actions to discipline or criticize Complainant for making these reports. The overheating incidents were obviously serious and potentially dangerous, but EWG management plainly did not blame Complainant for those mechanical breakdowns.

-- Summary

I find that the clear preponderance of the evidence is that Complainant was fired for getting too big for his britches. It was Complainant's insubordinate taking of the box truck despite clearly knowing that the dispatcher did not and would not authorize it and the disrespectful conversation with the dispatcher within hearing range of EWG's owner (including Complainant trying to dictate how his work would get done), rather than reports of safety matters that caused his firing. There is no evidence whatsoever that Golebiewski cared at all if Complainant raised a safety concern; his sole concerns were Complainant's disrespecting a supervisory employee and taking a box truck without permission.[70] Congress set a low burden for STAA

[70] Assuming arguendo that Complainant's actions on June 28, 2022 were protected activity, I find nonetheless that the preponderance of the evidence is that it was not Complainant's raising of a

complainants to only to have to show that STAA protected activity was a contributing factor to the adverse employment action taken by a complainant's employer to move the burden of proof to the employer to establish an affirmative defense under a clear and convincing evidence standard. But even a low burden of proof requires some sort of proof other than speculation about what the employer's reasons for the adverse employment action were.

In sum, Complainant failed to show by a preponderance of the evidence that STAA protected activity was a contributing factor in his being fired on June 28, 2022.

E. Same Action Defense; Respondents Proved That EWG Would Have Terminated Complainant's Employment Absent Protected Activity

Because Complainant did not prove that STAA protected activity contributed to the decision to terminate his employment, the STAA complaint fails. *Coryell v. Ark. Energy Servs., LLC*, ARB No. 2012-0033, ALJ No. 2010-STA-00042, slip op. at 4 (ARB Apr. 25, 2013) (citation omitted) (2013 WL 1874822). Moreover, the same considerations underlying my finding above that the sole reason for Complainant's firing was insubordination show that it was irrelevant to Golebiewski that a safety concern was expressed by Complainant during the unauthorized box truck incident. Golebiewski did not care what motivated Complainant. He fired Complainant because he heard Complainant tell the dispatcher that Complainant was only going to do what he wanted to do and did not care what the dispatcher had to say; that he only going to go to the accounts that he wanted to and take the truck that he felt was suitable for that account. Golebiewski's reason for finding this to be a fireable offense was that he could not run his company if he tolerated a driver trying to dictate such basic operational decisions or a driver talking down to and disrespecting the dispatcher. (Tr. at 198, 217-18). Golebiewski noted that dispatchers maintain structure, and – to paraphrase his testimony – that if drivers could decide for themselves which trucks they will drive each day, chaos would ensue. (*Id.* at 217-18). This is not about Golebiewski taking action against Complainant for having voiced safety concerns; it was about maintaining basic operational structure for his company. Because the reason for firing Complainant was clearly not based on protected activity, it is not strictly necessary to analyze whether Respondents met the clear and convincing evidence burden of proof for the "same-action" defense.

Nonetheless, assuming arguendo that Complainant met his burden of proving that STAA protected activity was a contributing factor in his being fired, I

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concern about safety that caused the firing, even as a contributory factor, but *solely* Complainant's insubordination and disrespectful interaction with a supervisor.

find that Respondents have shown by clear and convincing evidence that that it would have fired Complainant in the absence of the protected activity.

The STAA provides that if a complainant meets the burden of proving that protected activity was a contributing factor in the adverse action, an employer may avoid liability if it demonstrates by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity.[71] "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'"[72] *Williams v. Domino's Pizza,* ARB No. 2009-0092, ALJ No. 2008-STA-00052, slip op. at 6 (ARB Jan. 31, 2011) (2011 WL 327980). "It is not enough for the [respondent] to show that it *could* have taken the same action; it must show that it *would* have." *Palmer*, ARB No. 2016-0035, slip op. at 57 (citing *Speegle v. Stone & Webster Constr. Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014) (2014 WL 1758321)) (emphasis in original). The ARB has held that "an employer satisfies this burden when it shows that it is 'highly probable' it would have taken the action in the absence of protected activity." *Dick*, ARB No. 2022-0063, slip op. at 17 (citing *Simpson*, ARB No. 2019-0010, slip op. at 9; *Palmer*, ARB No. 2016-0035, slip op. at 52). The same-action analysis "does not require . . . that the adverse personnel action be based on facts 'completely separate and distinct from protected whistleblowing disclosures.'" *Murray v. UBS Securities, LLC*, No. 22-660, 601 U.S. 23, 38-39 (2024) (quoting *Watson v. Department of Justice*, 64 F.3d 1524, 1528 (1995)).

Here, if protected activity was a contributing factor in Golebiewski's decision to fire Complainant, it was clearly not Golebiewski's focus. Again, I fully credit Golebiewski's testimony that he fired Complainant for insubordination.

It is clear from the record, and the arguments of the parties, that if Complainant had not taken the self-help action of absconding with the box truck on June 28, 2022, he would not have been fired. Although Complainant would like this tribunal to find that the taking of the box truck was *ipso facto* STAA protected activity, caselaw has long recognized that although "employees are protected while presenting safety complaints," that protection "does not give them carte blanche in choosing the time, place and/or method of making those complaints." *Garn v. Benchmark Techs.*, No. 1988-ERA-021, slip op. at 4 (Sec'y May 18, 1995); *see also Yowell v. Administrative Review Board, USDOL*, 993 F.3d 418 (5th Cir. 2021) (in a

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[71] 49 U.S.C. § 42121(b)(2)(B)(iv); *Beatty v. Inman Trucking Mgmt., Inc.,* ARB No. 2013-0039, ALJ Nos. 2008-STA-00020, -00021, slip op. at 9 (ARB May 13, 2014) (2014 WL 2917587) (citation omitted).

[72] *Williams v. Domino's Pizza,* ARB No. 2009-0092, ALJ No. 2008-STA-00052, slip op. at 6 (ARB Jan. 31, 2011) (2011 WL 327980) (quoting *Brune v. Horizon Air Indus., Inc.,* ARB No. 2004-0037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006) (2006 WL 282113)).

FRSA case, the court held that an employee's engagement in protected activity is not insulation from what would otherwise be appropriate discipline for workplace misconduct); *Brousil v. BNSF Railway Co.*, 43 F.4th 808 (7th Cir. 2022) (holding in an FRSA case that an employee's refusal to operate a train was not protected due to the employee's unwillingness to seek a reasonable, safe alternative and thus employer could rightly discipline for the unprotected activity); *Formella v. U.S. Dept. of Labor*, 628 F.3d 381, 393 (7th Cir. 2010) (truck driver reported safety defects on assigned truck, but his manner of expressing these concerns was blatant insubordination supporting the same-action defense).

In *Lee v. Parker- Hannifin Corp., Advanced Products Business Unit*, ARB No. 14-018, ALJ No. 2009-SWD-3 (ARB May 22, 2015) (2015 WL 3539577), the ARB stated:

> The Secretary has concluded that the operative determination of whether intemperate or insubordinate (unauthorized) behavior may be eligible for protection requires a balancing of interests: "[t]he right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts." *Kenneway v. Matlack, Inc.*, No. 1988-STA-020, slip op. at 3 (Sec'y June 15, 1989). Determining whether conduct is protected can thus turn on the objective reasonableness of an employee's belief of a violation, which can be affected by the extent of his/her professional authority to even make such a decision. Even unauthorized conduct may be protected as long as it is lawful and "the character of the conduct is not indefensible in its context." *Id*. . . These analyses turn on the distinctive facts of each case.

Lee, ARB No. 10-021, at 11-12 (footnote omitted). Although this discussion in *Lee* related to the determination of whether the conduct was objectively reasonable protected activity, it is cogent in the context of a respondent's same-action defense. In *Lee*, the ARB affirmed the ALJ's determination that the complainant's conduct in shutting down and padlocking an evaporator was not protected by the Solid Waste Disposal Act, as the complainant knew that he did not have the authority to shut down the evaporator and there was no emergency or threat justifying these actions.

The circumstances in the *Lee* case are similar to Complainant's conduct in this STAA proceeding. Colon knew that he did not have the authority to address his concerns about not knowing the safety of taking a tractor-trailer to an unfamiliar customer location by taking a different vehicle. Moreover, there was no

evidence that Colon's taking a box truck without authorization was justified by some sort of imminent need to make the run in a box truck.[73]

The record in this case shows that EWG does not have much of a track record upon which to compare whether Complainant's firing was consistent with other firings. This is because EWG's managers credibly testified that EWG very rarely finds it necessary to terminate the employment of drivers, and that there was no prior incident where a driver took a vehicle the driver was not assigned or otherwise unauthorized to operate. (Tr. at 171, 181, 212, 214).

Despite this absence of comparative discipline, the record overwhelmingly shows a high probability that Complainant would have been fired absent the alleged protected activity. This evidence includes the credible testimony of EWG's managers and dispatchers (particularly Golebiewski's unambiguous and convincing testimony about why he fired Complainant); the testimony and texting showing that Complainant knew he was acting without authorization; evidence showing that it was not objectively reasonable for Complainant to believe that the J&B dispatch was unsafe with a tractor-trailer; the record as a whole showing that EWG had treated Complainant as a good employee that it wanted to retain up and until the date Complainant went rogue; and most importantly, that Complainant was overheard by EWG's owner ignoring the directions of the dispatcher and substituting his judgment for that of his supervisor. Any reasonable observer would conclude that a driver who took a vehicle for a dispatch without permission, and then was insubordinate and dictatory with the dispatcher (who was also the driver's immediate supervisor) within earshot of the company's owner was setting oneself up for getting fired.[74] The fact that the STAA provides protection for raising concerns about commercial motor vehicle safety does not immunize an employee from discipline for unjustified insubordination or authorize an employee to create self-help solutions that do serve any purpose other than perhaps to make a point.

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[73] *See also Jeanty v. Lily Transp. Corp.*, ARB No. 2019-0005, ALJ No. 2018-STA-00013 (ARB May 13, 2020) (per curiam) (2020 WL 3146471) (complainant did not act reasonably in refusing to drive based on the possibility that he could not finish the drive without violating the hours of service rules, where the record showed that he could have availed himself of a company policy to dispatch relief drivers to pick up and complete the run for any driver who requested one upon reaching his hours-of-service limit).

[74] *See Dick*, ARB No. 2022-0063, *supra*, slip op. at 17 (ARB affirmed ALJ's determination on the same-action defense, finding that: "The record contains ample evidence from which any reasonable observer could determine that CDS terminated Complainant's employment because Complainant failed to provide adequate, time-sensitive service to USAA.").

V. Conclusion

Although the record shows that Complainant had a good faith subjective belief that the J&B dispatch on June 28, 2022 had the potential for encountering unsafe conditions for use of a tractor-trailer, he did not establish by a preponderance of the evidence that such a belief was objectively reasonable as gauged by a person in the same factual circumstances with the same training and experience as Complainant. Nor did he show that he had a reasonable belief that it was protected activity for him to take a box truck to that dispatch over the clear directions of the dispatcher not to proceed. Thus, Complainant failed to establish protected activity for his actions on June 28, 2022 under either the complaint clause or the refusal-to-drive clause of the STAA.

There was sufficient evidence in the record to find that Complainant made several reports of safety concerns prior to June 28, 2022 that fit within the definition of STAA protected activity. None of that pre-June 28, 2022 protected activity, however, resulted in any direct discipline or even criticism by EWG managers. The relevance of the pre-June 28, 2022 protected activity was Complainant's theory that EWG must have concluded that he made too many safety complaints and that it could be inferred that this inferred conclusion contributed to the decision to fire Complainant on June 28, 2022.

Complainant, however, did not establish that the pre-June 28, 2022 protected activity contributed in any way to the decision to fire Complainant. Complainant's attempt to attribute contribution of this protected activity to the decision to fire depended on the tribunal drawing two inferences. However, I found that drawing the first inference was not supported by the evidence of record, and that the second inference based on temporal proximity was overcome by the record as a whole. Assuming arguendo that Complainant engaged in protected activity on June 28, 2022, the preponderance of the evidence is that the sole reason for his firing was insubordination.

Finally, assuming arguendo that Complainant established that protected activity contributed to the decision to fire Complainant, the record as a whole very clearly establishes a high probability that Complainant would have been fired on June 28, 2022 for insubordination even in the absence of the protected activity.

Accordingly, Complainant's STAA claim fails.

ORDER

IT IS ORDERED that Complainant's STAA complaint is **DENIED**.[75]

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

[75] The regulations at 29 C.F.R. 1978.109(d)(2) provide that "[i]f the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint." *Buie v. Spee-Dee Delivery Servs., Inc.*, ARB No. 2019-015, ALJ No. 2014-STA-00037, slip op. at 2 (ARB Oct. 31, 2019) (2019 WL 5866568) (per curiam).

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 issuance 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).

FILING AND SERVICE OF AN APPEAL

1. Use of EFS System: The Board's Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible interface. Use of the EFS system is free of charge to all users. To file an appeal using the EFS System go to https://efile.dol.gov. All filers are required to comply with the Board's rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at https://www.ecfr.gov/current/title-29/subtitle-A/part-26.

A. Attorneys and Lay Representatives: Use of the EFS system is **mandatory for all attorneys and lay representatives** for all filings and all service related to cases filed with the Board, absent an exemption granted in advance for good cause shown. 29 C.F.R. § 26.3(a)(1), (2).

B. Self-Represented Parties: Use of the EFS system is strongly encouraged for all self-represented parties with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case.

Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all required service automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

Self-represented parties who choose not to use the EFS system must file by mail or by personal or commercial delivery all pleadings, including briefs, appendices, motions, and other supporting documentation, directed to:

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

2. EFS Registration and Duty to Designate E-mail Address for Service

To use the Board's EFS system, a party must have a validated user account. To create a validated EFS user account, a party must register and designate a valid e-mail address by going to https://efile.dol.gov, select the button to "Create Account," and proceed through the registration process. If the party already has an account, they may simply use the option to "Sign In."

Once a valid EFS account and profile has been created, the party may file a petition for review through the EFS system by selecting "eFile & eService with the Administrative Review Board" from the main dashboard, and selecting the button "File a New Appeal - ARB." In order for any other party (other than the EFS user who filed the appeal) to access the appeal, the party must submit an access request. To submit an access request, parties must log into the EFS System, select "eFile & eService with the Administrative Review Board," select the button "Request Access to Appeals," search for and select the appeal the party is requesting access to, answer the questions as prompted, and click the button "Submit to DOL."

Additional information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as step-by-step User Guides, answers to frequently asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the "Support" tab at https://efile.dol.gov.

3. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

4. Service of Filings

A. Service by Parties

Service on Registered EFS Users: Service upon registered EFS users is accomplished automatically by the EFS system.

Service on Other Parties or Participants: Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

B. Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail (unless otherwise required by law). If a party unrepresented by counsel files their appeal by regular mail, that party will be served with Board-issued documents by regular mail. Any party may opt into e-service at any time by registering for an EFS account as directed above, even if they initially filed their appeal by regular mail or delivery.

5. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and manner of service. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

6. Inquiries and Correspondence

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of the Appellate Boards by telephone at 202-693-6300 or by fax at 202- 513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARB-Correspondence@dol.gov.

Appendix – Complainant's Proposed Findings of Fact Renumbered Sequentially

As stated in footnote 12 of this Decision and Order, Respondents pointed out clerical errors in the numbering of Complainant's Proposed Findings of Fact. This appendix shows Complainant's Proposed Findings of Fact as reformatted with sequential numbering. This appendix also shows Respondents' admissions, denials or partial denials, to Complainant's proposed findings. It should be noted that this list *is not this tribunal's findings*, although many have been adopted in the Decision and Order above. This appendix is provided for the parties, and any appellate tribunal should there be an appeal, for ease of reference and to eliminate any confusion as to citation.

A. Background Information

"1. Christopher Manuel Colon resides at . . . Kissimmee, Florida . . . .[76] Mr. Colon is the Complainant in this matter. Mr. Colon is an employee as defined at 49 U.S.C. § 31101(2)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent; Joint Stipulations, No. 2)

"2. Respondent EWG Glass Recovery & Recycling Corp. (Herein also "EWG") maintains a business address at PO Box 313005, Jamaica, New York 11431. Respondent EWG is a motor carrier operating in interstate commerce and an employer subject to the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105. EWG It is also a person as defined at 29 C.F.R. § 1978.101(k) and subject to liability under 49 U.S.C. § 31105."

(Complainant's Proposed Findings of Fact, Admitted by Respondent; Joint Stipulations, No. 3).

"3. Mr. Colon has been a professional truck driver for ten years. He holds a commercial driver's license ('CDL'). He attended a truck driving school in Cedar Rapids, Iowa. (Tr. 12-13)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"4. Prior to his employment with Respondent EWG, Mr. Colon worked for a 'seven or eight' other trucking companies and performed driving work all over the country. (Tr. 13)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"5. Mr. Colon worked for EWG during two separate periods. He was referred to EWG by a relative of his fiancée. Mr. Colon was hired as a Class A CDL driver. He 'was supposed to be a fill-in driver, basically to drive all the vehicles that they had there.' (Tr. 14)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"6. When Mr. Colon started working for EWG, they assigned him to operate a 'rendering truck, which is a smaller vehicle, picking up shredded glass in supermarkets.' He would pick up barrels of glass, roll them to the back of the rendering truck, then use a hydraulic lift to dump the glass into the trailer. (Tr. 14)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"7. When he was not operating the rendering truck, Mr. Colon would drive a tractor-trailer set. Depending on the location, this involved picking up boxed cases of full bottles, aluminum cans, or plastic recycled bottles of various sizes. (Tr. 14)."

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[76] Complainant's street address has been redacted by this tribunal because this Decision and Order will be posted online, and his exact address in Florida is not a material issue in this case.

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"8. Once Mr. Colon picked up the recyclable products from customer facilities, he would deliver the products to one of EWG's two facilities in Queens, NY. (Tr. 15)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"9. During Mr. Colon's first stint of employment with EWG, he mostly operated the rendering truck. When EWG wanted to give Mr. Colon overtime, he would drive the tractor-trailer. During a typical workday, he would stop to make pickups from approximately 12 to 18 different locations in the New York metro. Sometimes Mr. Colon would pick up products from customers in Connecticut. (Tr. 15-16)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"10. Mr. Colon was hired with a pay rate of $24 per hour. He received a raise to $26 per hour after about a year and a half. His pay was eventually increased to $30 per hour. (Tr. 17)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"11. Mr. Colon's primary supervisors were Brian Irving and Louis Venture. [sic] Mr. Irving was Mr. Colon's dispatcher and would provide him with day-to-day assignments. Mr. Ventura is Operations Manager for EWG. Mr. Colon would go to Mr. Ventura with issues he could not resolve with Mr. Irving. (Tr. 18, 162)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"12. Mr. Colon would sometimes go to his supervisors with issues that would occur on his assigned routes. For example, the customers may have placed recyclable product in the wrong containers, and they would need to be transferred from bins into collection barrels. (Tr. 20)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"13. On other occasions, Mr. Colon would go his supervisors if he had issues with the routes between customer locations. Mr. Colon would receive a list of customers to service on a particular workday, but these would not be in a particular order. Mr. Colon would need to figure out the most efficient way to complete the assignments. He raised this issue with his supervisors, including Mr. Ventura and Mr. Edward Golebiewski. (Tr. 21)."

(Complainant's Proposed Findings of Fact, Denied by Respondent)

"14. Mr. Colon would get an envelope at the end of his workday that would contain the route assignments for the following day. These assignments did not provide any instruction on how to get to the customer locations. 'You just get the address and you try to Google it, or if you have a GPS, you GPS it to take you there.' It was up to the driver to determine how best to get to each customer location. (Tr. 23)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"15. Mr. Colon's first period of employment with EWG was from 2018 through 2021. He was never written up or disciplined by anyone at EWG during this period. (Tr. 17)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"16. Mr. Colon resigned from EWG in 2021. Mr. Colon's father, a retired New York City police officer who resides in Florida, became ill. Mr. Colon decided to move to Florida to help care for his father. (Tr. 23)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"17. Additionally, Mr. Colon stated that, while he was only required to have a Class B license to operate the rendering truck, he in fact held a Class A license. EWG was hiring Class A drivers at the time of his resignation in 2021, and Mr. Colon explained that he would have liked for EWG to have made him a Class A driver. (Tr. 24)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"18. Mr. Golebiewski called Mr. Colon and apologized because EWG had forgotten that Mr. Colon held a Class A CDL. Mr. Golebiewski gave Mr. Colon some bonus money, including a week of salary, another $1,000 bonus, and $500 to cover travel expenses to Florida to care for Mr. Colon's father. Mr. Golebiewski told Mr. Colon that, regardless of whether he chose to continue working for EWG, the money was his to keep. Mr. Golebiewski told Mr. Colon that if he decided to return to EWG after traveling to Florida to care for his father, he could keep the same rate of pay; and that if Mr. Colon decided to leave EWG for good, that they wished him well. (Tr. 24-25)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"19. Mr. Colon moved to Florida for about six or seven months in 2021. (Tr. 25)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"20. While Mr. Colon resided in Florida, he kept in contact with Brian Irving. Occasionally, Mr. Colon would receive calls from EWG's customers asking for services. Mr. Colon would tell the customer he was not working for EWG at that time but would pass along the information to Mr. Irving. Mr. Irving told Mr. Colon that, if he ever wanted to return to EWG, they had work for him. (Tr. 25-26)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"21. Mr. Colon considered moving back to New York to work for EWG and discussed the matter with his fiancée. They agreed that he would leave Florida and return to New York 'to at least work for [EWG] for another year.' (Tr. 26)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"22. On about May 3, 2022, Mr. Colon was rehired by EWG as a Class A driver. He was paid $30 per hour. Mr. Colon did not fill out a new application when he was rehired. (Tr. 27; Stip. 1)."

(Joint Stipulations, No. 1)

"23. Upon returning to EWG, Mr. Colon did not receive any additional driver training. He was trained on some new paperwork procedures. Mr. Colon was assigned to service some customer locations he had previously visited while working for EWG from 2018 to 2021, and some new locations. His supervisors were the same in 2022 as when he previously worked for EWG. (Tr. 29)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

B. Protected Activity

"24. On or about June 2, 2022, Mr. Colon was dispatched to receive a loaded trailer from a facility in Long Island, NY. Mr. Colon performed a pre-trip inspection of the trailer and observed that the mudflaps were not properly secured to the trailer. Mr. Colon called his dispatcher Mr. Irving and reported the defect. Mr. Irving stated that EWG would repair or replace the defective mudflaps later, after Mr. Colon had completed his assigned load. (Stip. 10)."

(Joint Stipulations, No. 10).

"25. On June 2, 2022, Mr. Colon texted photographs of defective landing gear and the aforementioned defective mudflap to Brian Irving. Mr. Colon stated that this was a 'serious DOT violation' and requested that other drivers 'learn how to do pre trip [inspections] on trailer[s].' (Tr. 30-31; CX-5, p. 4-6)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent "as to the allegations of facts. Denied as to the conclusions of law.").

"26. EWG 'wanted [Mr. Colon] to bring the truck from upstate New York to Queens. And I was voicing my concerns about it, that it could fall off while I'm driving in the highway, cause an accident, cause some issues,' Mr. Colon used shrink wrap to temporarily secure the defective mud flap and returned the trailer to EWG's facility. (Tr. 30-31)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"27. On June 6, 2022, Mr. Colon picked up a load at (Global Redemption) – Manhattan Beer Distribution in New Windsor. Mr. Colon inspected the load and determined that the cargo was not properly secured. He filed a complaint with dispatcher Brian Irving, who instructed Mr. Colon not to take the pallets that were not properly stacked. (Stip. 11; CX-5, p. 13)."

(Joint Stipulations, No. 11).

"28. On June 7, 2022, Mr. Colon picked up a load at Manhattan Beer Distribution in Suffern, NY and observed that the cargo was not properly secured. Mr. Colon secured the freight himself in order to comply with federal motor carrier safety regulations. Mr. Colon filed a complaint with Brian Irving, let Mr. Irving know that he had secured the load, and then proceeded to move the load. (Stip. 12)."

(Joint Stipulations, No. 12).

"29. On or about June 7, 2022, Mr. Colon was operating his assigned tractor-trailer from Upstate New York back to EWG's facilities in Queens when his assigned truck began to overheat. He pulled over to the roadside and texted photos of the dashboard indicators to Brian Irving. While he was pulled over, a state trooper stopped and asked Mr. Colon is he needed a tow truck. Mr. Colon said he was getting in contact with EWG to resolve the issue. The trooper said that the truck could not stay on the interstate for long, but that he would give Mr. Colon some time to resolve the situation. (Tr. 38-40; CX-5, p. 20)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"30. Mr. Colon called Brian Irving to arrange for a tow. Mr. Colon testified that EWG did not want to have the vehicle towed from the interstate because it would cost more money. Instead, Mr. Irving instructed Mr. Colon to wait until the truck cooled down, then try to drive it again. Mr. Colon 'tried [his] best, but the truck turned off on [him] about five times.' Whenever it turned off, he would open the hood and try to let the truck cool down. Mr. Colon 'didn't feel safe being parked very close to the

side of the highway.' Mr. Colon operated the vehicle to a rest area along the highway, parked it in a safe location, then told Mr. Irving that he was refusing to drive the truck any further. The company arranged for a tow and Mr. Colon rode back to the EWG shop with the tow truck driver. (Tr. 39-41)."

(Complainant's Proposed Findings of Fact, Denied by Respondent "that EWG did not want to have the vehicle towed from the Interstate.").

"31. On June 9, 2022, Mr. Colon was assigned to transport a load in a tractor-trailer to Upstate New York. Mr. Colon's tractor began to overheat on highway I-278. He observed warning lights on the dashboard and the engine shut down. Mr. Colon pulled over to a service station and sent a text to Mr. Irving and told him that the vehicle was overheating. Mr. Colon sent photos of the dashboard indicators to Mr. Irving. Mr. Irving told Mr. Colon to continue transporting the load to Upstate New York. Mr. Colon refused to operate the commercial vehicle until it was properly repaired. (Stip. 13; Tr. 36-37; CX-5, p. 33)."

(Complainant's Proposed Findings of Fact, Denied by Respondent on the ground that: "CX-5 does not reflect that Brian Irving directed Complainant to continue to transport the load upstate.") (see also (Joint Stipulations, No. 13).

"32. Mr. Colon observed fluid leaking from the bottom of the radiator. He waited about three hours for mechanics from EWG to arrive with a spare truck. Mr. Colon swapped the trailer to the spare truck and continued his shift. (Tr. 37-38)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"33. On about June 10, 2022, Mr. Colon operated a truck-tractor 'bob-tailed' (without a trailer attached) from EWG's facility in Jamaica, NY to Suffern, NY to pick up a loaded trailer. While performing a pre-trip inspection of the trailer, Mr. Colon observed that one of the mudflaps was defective and only partially attached. Mr. Colon also observed that the trailer's landing gear was defective. Mr. Colon reported these defects to Mr. Irving and sent him photos of the defects via text message. (Stip. 14; Tr. 41-42; CX-5, p. 52-53)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent; Joint Stipulations, No. 14).

"34. Mr. Colon was frustrated that the mudflap had not been repaired, as he had reported the same defect on trailer T114 about June 2, 2022. Mr. Colon asked that Mr. Irving check with Alex, an EWG mechanic, to determine what if any service had been performed on the trailer after his previous report of the defect (Tr. 41-42; CX-5, p. 53)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"35. On June 17, 2022, Mr. Colon received a text message from Eddie Golebiewski. Mr. Golebiewski texted, 'Deal with this. We will fix this issue. Sorry about this. 3 years notb1 problem upstate. This is out of ordinary. Please jump on rendering tomorrow for brian if possible. Appreciate you working late hours the past 2 weeks. We have 2 new drivers starting in 1.5 weeks. We will get organized.' (sic). Mr. Colon understood this to mean that Mr. Golebiewski was trying to address the frequent breakdowns and other issues he had while driving upstate. (CX-6, Tr. 50-51)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"36. On June 20, 2022, Mr. Colon was assigned to service two customers: MEGA, and Bottle Depot in Bethpage, NY on Long Island. (CX-4, p. 34)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"37. This was Mr. Colon's first time visiting this location in Long Island, NY. When he arrived near the customer location, he 'knew something was wrong' because he 'was going into a residential area, and with a tractor trailer, you're not allowed to go inside a residential area.' Mr. Colon testified that the residential area 'was my first red flag that I saw when I got to this location.' (Tr. 42-43)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent "as to the testimony of the witnesses. Denied as to conclusions of law.").

"38. Mr. Colon texted Brian Irving to ask if he had previously dispatched a tractor and 48-foot trailer to that location. Mr. Irving replied that he had not, but that he had previously sent box truck drivers who told Mr. Irving that a tractor-trailer could fit. (Tr. 43; CX-5, p. 64-65)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

39. Mr. Colon testified that a box truck has a maximum height of about 11 to 12 feet. An 18-wheeler, by contrast, is a longer vehicle with a height of 13' 6". Additionally, 'you can basically turn a box truck anywhere, but a tractor trailer, you have to do a wider turn. You need more space.' (Tr. 44).

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"40. In Mr. Colon's experience, tractor-trailers were usually dispatched to 'big warehouses, like Budweiser, PQE.' Warehouse facilities usually featured a 'huge parking lot' and 'loading docks.' The redemption centers, like the one Mr. Colon was assigned to service on June 20, 2022, are 'little stores here and there' that do not have loading docks. 'You have to park in an alley or in the back of the store, back of a convenience store. It's very difficult there.' Mr. Colon noted that many of the redemption centers are not in commercial areas, but 'mostly residential areas.' Some residential areas have weight restrictions on commercial vehicles. (Tr. 45-48)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"41. Mr. Colon had to enlist his helper for assistance in backing up to the customer facility because there were 'private houses, cars and everything' and he had to back up 'blindside' as best he could to avoid 'hitting fences, cars, mailboxes, driving over somebody's driveway.' Mr. Colon's helper had to stop traffic so that he could back up into the customer facility with his large commercial vehicle set. (Tr. 43-44)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"42. After had backed into the customer facility, Mr. Colon noticed that he had struck an overhead line running over the street with his trailer. (Tr. 42; CX-5, p. 53)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"43. On about June 21, 2022, Mr. Colon operated a truck-tractor 'bobtail' to a Manhattan Beer Distribution facility in The Bronx, NY. Mr. Colon attempted to couple the trailer to his assigned truck-tractor but was unable to do so due to the trailer being too low to the ground. Mr. Colon attempted to crank the landing gear higher but could not raise the trailer sufficiently to couple it to the truck-tractor. Mr. Colon contacted Brian Irving to file a complaint about the defect. Mr. Irving arranged for a mechanic to repair the landing gear. (Stip. 15)."

(Joint Stipulations, No. 15).

C. Final Assignment and Termination

"44. On June 28, 2022, Mr. Colon was assigned pick up loads from three different customer facilities. These were a Budweiser facility in the Bronx; PQ, another warehouse facility; and J&B Redemption Center in Staten Island. Mr. Colon had never been to the J&B Redemption Center in Staten Island. (Tr. 52-53; CX-4, p. 40)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"45. Mr. Colon performed his first two trips of the day to the Budweiser and PQ, returning to EWG's facility after each trip to drop off the recyclable products he had picked up. Mr. Colon prepared to go to J&B Redemption. As he had never been to this location and knew that it was located in Staten Island, Mr. Colon called two other drivers, David and Jesus, to see if either of them could provide some details about directions and the location. Neither driver could provide any details. Mr. Colon did not seek directions from Mr. Ventura or Mr. Irving, as neither man holds a CDL or drivers tractor-trailers. (Tr. 53-54)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"46. Mr. Colon was concerned about the safety of the trip to Staten Island because, on two prior occasions, he had run into trouble while servicing a distribution center with a tractor-trailer set. These include the incident on June 20, 2022, detailed above, in which Mr. Colon struck an overhead line; and a separate incident in Upstate New York where Mr. Colon arrived at a customer facility only to discover that vehicles over 10 tons were prohibited behind the store. When Mr. Colon called the proprietor, he was told to come back in the early morning because there were too many cars around during the day and he could hit one of them. (Tr. 53-54)."

(Complainant's Proposed Findings of Fact, Denied by Respondent).

"47. When Mr. Colon arrived back at EWG's facility following the completion of his second assigned run, he observed that a rental box truck, on of EWG's biggest box trucks, was not being used anymore because its driver had completed his assigned loads that day. Mr. Colon proposed to Mr. Irving that he use the box truck to service J&B Redemption. Mr. Irving encouraged Mr. Colon to take the 18-wheeler. (Tr. 54)."

(Complainant's Proposed Findings of Fact, Denied by Respondent).

"48. Mr. Colon then spoke to Louis Ventura. He asked Mr. Ventura if he had ever sent a tractor with a 48-foot trailer to the J&B Redemption location before. Mr. Ventura told Mr. Colon that he had only sent box trucks to that location previously. Mr. Colon replied that he felt 'comfortable with the box truck.' Mr. Ventura responded that he was 'going to trust [Mr. Colon's] judgment. Don't worry, I'll speak to Brian.' At that point, Mr. Colon transferred his belongings to the box truck and prepared to drive to Staten Island. (Tr. 56-57)."

(Complainant's Proposed Findings of Fact, Denied by Respondent).

"49. Mr. Colon got a call from Mr. Irving, who asked him if he was really going to do the job with the box truck. Mr. Colon replied that he was planning to drive the box truck, and that he had spoken to Mr. Ventura about it. Mr. Irving told Mr. Colon, 'if you're scared to drive a truck in these areas, then I guess driving tractor trailers is not fit for you. We're just going to put you in the rendering truck.' Mr. Colon said that was fine, then left EWG's facility and drove to J&B Redemption in Staten Island, NY. (Tr. 57-58)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"50. While Mr. Colon was in Staten Island at the J&B Redemption facility, he got another call from Brian Irving. Mr. Irving wanted to know if the customer was upset that Mr. Colon was bringing a smaller trailer. Mr. Colon replied that he had already spoken to Louis Ventura, and that everything was fine. Mr. Colon stated that he was 'not going to put my life in danger, nobody else's life in danger' because of the two previous incidents where being in a tractor with a 48-foot trailer had created a dangerous situation. (Tr. 57-58)."

(Complainant's Proposed Findings of Fact, Denied by Respondent).

"51. Mr. Colon performed the pickup at J&B Redemption Center in Staten Island, NY. The facility was small and did not have a loading dock. Mr. Colon had to line up the box truck along the street and have workers from J&B Redemption load bags of recyclables into the back of the box truck. (Tr. 58)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"52. Mr. Colon completed his pickup and proceeded back to EWG. Shortly before arriving back at EWG, Mr. Colon noticed that he had received a text message from Eddie Golebiewski terminating his employment. (Tr. 58; CX-6)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

"53. Mr. Colon tried to call Mr. Golebiewski, but he did not answer. He called Mr. Ventura and spoke to him. Mr. Ventura said there was nothing he could do about the termination, and that 'Eddie just got tired of everything.' (Tr. 59)."

(Complainant's Proposed Findings of Fact, Denied by Respondent).

"54. Mr. Colon returned his keys to the keybox and left EWG. (Tr. 60)."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).

D. United States Department of Labor Proceedings

"55. On August 1, 2022, Mr. Colon filed a complaint with OSHA alleging that Respondents had discriminated against him and discharged him in violation of 49 U.S.C. § 31105. The Complaint was timely filed. (Stip. 6)."

(Joint Stipulations, No. 6).

"56. On October 14, 2022, OSHA issued a decision denying Mr. Colon's complaint. (Stip. 7)."

(Joint Stipulations, No. 7).

"57. On October 26, 2022, Complainant filed timely objections to OSHA's decision and requested a hearing *de novo* before an administrative law judge of the Department of Labor. (Stip. 8)."

(Joint Stipulations, No. 8).

"58. On September 26, 2023, the parties participated in a video hearing before Hon. Stephen R. Henley."

(Complainant's Proposed Findings of Fact, Admitted by Respondent).