U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THOMAS GATTO,

COMPLAINANT,

v.

GENERAL UTILITIES,

RESPONDENT.

ARB CASE NO. 2019-0008

ALJ CASE NO. 2018-STA-00003

DATE: JUN 19 2019

Appearances:

***For the Complainant*:**
Russell E. Adler, Esq.; *Law Offices of Russell E. Adler PLLC*; Katonah, New York; and Lauren G. Gatto, Esq.; New York, New York

***For the Respondent*:**
Thomas B. Wassel, Esq.; *Cullen and Dykman LLP*; Garden City, New York

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges.*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended. 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2018) (the STAA's implementing regulations).

Thomas Gatto was a seasonal driver for General Utilities who delivered fuel to customers during the winter months. Decision and Order (D. & O.) at 2. On December 23, 2016, Gatto noticed fuel oil leaking from his truck's tank and he notified his supervisor, Frank Cassella. Cassella directed him to take a spare truck,

Truck 96, to finish the deliveries. D. & O. at 2, 5. Gatto refused to drive Truck 96 as he stated it was unsafe, based on his prior experience when he was unable to open the doors or windows of the truck and similar complaints of other drivers. *Id.* Cassella told Gatto to discuss his complaint with the chief mechanic, who determined that Truck 96 was safe to drive. D. & O. at 2. Gatto nonetheless continued to refuse to drive the truck. D. & O. at 6. Because Truck 96 was the only truck available to complete the deliveries, Cassella told him to go home. On December 27, 2016, Gatto's employment was terminated for abandoning his job. D. & O. at 3.

Gatto filed a complaint pursuant to the employee protection provisions of the STAA with the Occupational Safety and Health Administration (OSHA) claiming retaliation for engaging in protected activity. The STAA protects drivers who, among other things, refuse to operate a vehicle based on a reasonable belief that doing so would constitute a serious risk of injury to themselves or the public. 49 U.S.C. § 31105(a)(1)-(2). OSHA dismissed the complaint, finding no reasonable cause to conclude that General Utilities violated the STAA. Gatto objected to OSHA's findings, and the case was assigned to an Administrative Law Judge (ALJ).

The ALJ held a hearing and thereafter found that Gatto did not engage in protected activity under the STAA. For a refusal to drive to be protected under the STAA, the complainant must demonstrate a subjectively and objectively reasonable belief of a violation. *Mauldin v. G & K Servs.*, ARB No. 16-059, ALJ No. 2015-STA-054, slip op. at 8 (ARB June 25, 2018). Because the ALJ found that an objectively reasonable person would not believe that the operation of Truck 96 would cause a serious risk or injury to themselves or the public, Gatto did not meet his burden of proving that he engaged in protected activity. D. & O. at 19-24. Specifically, the ALJ found that Gatto based his perception on his prior experience with Truck 96. D. & O. at 23-24. It is undisputed that Gatto did not conduct a pre-trip examination of Truck 96, enter Truck 96, or try its door or windows for problems before claiming that it was unsafe and refusing to drive it on December 23, 2016. *Id.* In finding Gatto's refusal unreasonable, the ALJ cited the truck's maintenance history. Truck 96 had been repaired in March 2016. D. & O. at 21. In October 2016, before the December 23 refusal, the truck passed a New York safety inspection. D. & O. at 22. Finally, after Gatto's complaint, General Utilities had the chief mechanic inspect the truck. The mechanic found no safety problems. Another driver drove Truck 96 to complete the fuel delivery and found the truck safe to drive. Truck 96 was also used within a week of December 23, 2016, without report of safety problems. D. & O. at 23. Because engaging in protected activity is a required element of a successful STAA claim, the ALJ dismissed Gatto's complaint for failing to prove that he engaged in protected activity. D. & O. at 24; *Harris v. C & N Trucking*, ARB No. 04-175, ALJ No. 2004-STA-037, slip op. at 2 (ARB Jan. 31, 2007).

Gatto petitioned the Administrative Review Board (ARB or Board) for review of the ALJ's decision.[1] Upon review of the ALJ's D. & O., the pleadings, and the record, we conclude that the ALJ's factual findings are supported by substantial evidence and his conclusions of law are correct and well reasoned. Accordingly, we adopt and attach the ALJ's decision and we **DENY** Gatto's complaint.

SO ORDERED.

[1] The ARB has jurisdiction to review the ALJ's STAA decision pursuant to Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. Part 1978. The ARB reviews questions of law de novo and is bound by the ALJ's factual determinations if the findings of fact are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.110(b).

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Issue Date: 01 November 2018

OALJ Case No.: 2018-STA-00003
OSHA Case No.: 2-6010-17-014

In the Matter of:

THOMAS GATTO,
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GENERAL UTILITIES,
Respondent.

Appearances:

Russell E. Adler, Esq.
Law Offices of Russell E. Adler, PLLC
Philadelphia, Pennsylvania

and

Lauren Gatto, Esq.
New York, New York
For Complainant

Thomas B. Wassel, Esq.
Cullen and Dykman, LLP
Garden City, New York
For Respondent

Before: Morris D. Davis, Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

The above-captioned case arose under the "whistleblower" protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, and the applicable regulations issued thereunder at 29 C.F.R. Part 1978. These provisions empower the Secretary of Labor to investigate and determine whistleblower complaints filed by employees

of commercial motor carriers who were allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles. Thomas Gatto ("Complainant") alleges that General Utilities ("Respondent") terminated his employment for refusing to operate a truck he reported to management was unsafe to operate in violation of the STAA.

PROCEDURAL BACKGROUND

Complainant filed his initial complaint with the Occupational Health and Safety Administration ("OSHA") on January 30, 2017. After waiting more than 60 days and receiving no written findings as to whether there was reasonable cause to believe a violation of the STAA had occurred, Complainant asked OSHA to terminate its investigation and issue a determination. OSHA dismissed the complaint on October 5, 2017. Complainant objected and, on October 25, 2017, submitted a request for a de novo hearing before the Office of Administrative Law Judges. The case was filed and docketed in the Office of Administrative Law Judges ("OALJ") on October 26, 2017. The case was assigned to me and on November 28, 2017, and I issued a Notice of Hearing and Pre-Hearing Order setting this case for hearing on January 29, 2018. The hearing date was continued twice and the hearing was finally held on May 17, 2018, in New York, New York. (ALJX 1-3, TR 6).[1]

Both parties attended the hearing and were represented by counsel. Both parties had a full opportunity to offer evidence, to call and to cross-examine witnesses, to present arguments and to submit final post-hearing briefs. The parties offered joint exhibits (JX 1-4). Complainant offered three additional exhibits that were admitted without objection. (CX 5-7; TR 7). Respondent offered one exhibit, which was marked RX 1 and admitted without objection. (TR 8). The parties stipulated prior to the hearing that Complainant was employed by Respondent as a driver and his employment was terminated on December 27, 2016. Complainant testified at the hearing, as did Chris Vandenberg, Tony Speruta, Frank Cassella, David Stitt and Kenneth Minicozzi. The evidentiary record is now closed. I received the parties' post-hearing briefs on September 4, 2018.

FACTUAL SYNOPSIS

Complainant was employed as a seasonal driver for Respondent and delivered fuel oil to customers during cold weather months. On December 23, 2016, Complainant started his delivery route using truck number 87, which was the truck Respondent assigned him to use for the season. During a stop to make a delivery, he noticed fuel oil leaking from the truck's tank and he reported it to Respondent. After returning to the terminal in truck number 87, Complainant was directed by Respondent's oil delivery manager to use the spare truck, truck number 96, to complete his deliveries. Complainant told the oil delivery manager that truck 96 was unsafe and he refused to drive it. He was directed to speak with Respondent's chief mechanic about truck number 96. The mechanic said the truck was safe to operate. The oil

[1] Administrative Law Judge Exhibits are designated "ALJX," Complainant's Exhibits are designated "CX," Respondent's Exhibits are designated "RX," Joint Exhibits are designated "JX," and citations to the hearing transcript are designated "TR" and accompanied by the relevant page number(s).

delivery manager directed Complainant to go home because there was no other truck available for him to use. In a letter dated December 27, 2016, Respondent notified Complainant that by refusing to work on December 23, 2016, he had abandoned his job and his employment was terminated.

SUMMARY OF THE LAW

Congress enacted the employee protection provisions of the STAA in order to encourage transportation industry employees to report noncompliance with safety regulations governing commercial motor vehicles. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987). In order to achieve that objective, at 49 U.S.C. § 31105, the Act states:

> (a) Prohibitions. –
>
> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
>
> (A) the employee ... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety ... regulation, standard, or order, or ...
>
> (B) the employee refuses to operate a vehicle because –
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security;
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition ...
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. 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.

To establish unlawful activity under the STAA, a complainant must show: (1) that he engaged in protected activity, (2) that the employer knew of the protected activity, (3) that the complainant suffered an adverse employment action amounting to discharge, discipline, or discrimination regarding pay, terms, privileges of employment, and (4) that the protected activity was a contributing factor in the adverse employment action. *Clark v. Hamilton Haulers, LLC*, ARB Case No. 13-023, ALJ Case No. 2011- STA-007, slip op. at 3-4 (ARB May 29, 2014); *Ferguson v. New Prime, Inc.*, ARB No. 10-75, ALJ No. 2009-STA-47, slip op. at 3 (ARB

August 31, 2011); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)). Accordingly, a complainant need only show that the protected activity played some role in the employer's decision to take adverse action and any amount of causation will satisfy this standard. *Palmer*, ARB No. 16-036 at 14-15, 51-55. An administrative law judge may consider all evidence relevant to this issue, including the employer's proffered reasons for the adverse action. (*Id.*).

If a complainant satisfies these requirements, the burden shifts to the employer to establish by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1978.104(e)(4); *Arjuno v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 2008-STA-21, slip op. at 7-11 (ARB May 13, 2014). Clear and convincing evidence "denotes a conclusive demonstration, *i.e.*, that the thing to be proved is highly probable or reasonably certain." *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015). The burden of proof for clear and convincing evidence rests between "preponderance of the evidence" and "proof beyond a reasonable doubt." *See Araujo*, 708 F.3d at 159 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 525 (1979)). Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when, based on the evidence, the proffered conclusion is highly probable. *DeFrancesco*, ARB No. 13-057 at 7-8.

SUMMARY OF THE TESTIMONY AND EVIDENCE

Thomas Gatto – Complainant

Mr. Gatto ("Complainant") began working for Respondent in January 2008. Prior to that, he worked for the Veterans Administration for more than 20 years and for the Army for four years. He worked as an engineer and as a driver at the Veterans Administration where he also served as a safety officer for 10 years. (TR 47-48). Complainant worked for Respondent as a fuel oil delivery driver. His supervisor was Frank Cassella. Complainant was paid on an hourly basis and at the time his employment was terminated he was earning about $33 per hour. (TR 49). He typically started work for Respondent around the middle of November and continued working until about April, depending on the weather. (TR 50). When he encountered maintenance problems with a truck that he was assigned, he would write it up at the end of his shift and submit the maintenance request form to his supervisor. In a typical season, he would submit 10 to 20 such forms. (TR 51). Claimant testified that prior to December 23, 2016, he never refused to drive a vehicle that Respondent assigned to him. (51-52).

Claimant was assigned truck number 87 for the 2015 and 2016 seasons. When he had a problem with that truck, he was assigned truck number 64 or truck number 96 until his regularly assigned truck was repaired. Truck number 96 was a spare, not one that was assign to a driver to use on a regular basis. He said he had a number of problems with truck number 87, including the

truck stalling out in the middle of intersections, directional aids that did not work properly, inadequate braking, and leakage from both the engine and the fuel oil tank. He would report the problems to Respondent and the problems would be fixed, but only for a short time. He also had problems with truck number 64, which he said was difficult to stop, hard to steer, and lacked proper heating and defrosting. He described truck number 96 as "a rolling disaster." (TR 52-53). He said the doors would not open or at times would fly open while driving. In addition, the brakes did not work properly, it was difficult to steer, and the floor was rotted out and allowed water to come into the cab from beneath the truck. (TR 54).

In February 2016, truck number 87 broke down and Claimant was temporarily assigned truck number 96. He testified that when he pulled truck number 96 beneath the rack to load it with fuel oil, he was unable to open the driver's side door. When he tried to open the door on the passenger side of the vehicle, the door handle came off in his hand and when he tried to roll down the windows, they were stripped and would not open. He estimated that he was locked inside the vehicle for 10 to 12 minutes until he called the manager and she sent a mechanic, Paul Weinz, who pried a door open. Claimant said he is claustrophobic and was terrified when he was trapped inside the truck. Other employees thought it was a joke and laughed about it, which humiliated Complainant. Complainant said other drivers talk constantly about the doors on truck number 96 coming open while out on the road and another driver got stuck inside the vehicle similar to the incident he experienced. He said that he submitted a written report in February 2016 following the incident, but his report was not included in the documents Respondent produced during discovery. (55-56).

The last day Complainant worked for Respondent was December 23, 2016. He started his route that day in truck number 87, but while he was stopped to make a delivery he noticed fuel oil leaking from the truck's tank. He notified his supervisor, Mr. Cassella, who sent Mr. Weinz to try and fix the problem. Complainant and Mr. Weinz took the truck to two different repair shops, but neither one could stop the leak. They elected to take the truck back to the terminal in St. James and they placed a pot beneath it to catch the fuel oil leaking from the tank. Claimant said at that point he was told to take truck number 96 and complete his route. The following exchange took place between Complainant and his counsel concerning the chain of events:

> Q. Who told you to drive truck 96?
>
> A. Frank Cassella told me to drive. Frank told me to drive truck 96.
>
> Q. And what did you – did you respond?
>
> A. I said truck 96 is an unsafe truck. Could you give me another truck?
>
> Q. And did Frank – what was Frank's response?
>
> A. He said go talk to the mechanic, the head mechanic Tony Speruta, who was [at] the terminal at that time.

Q. Did you then talk to Mr. Speruta?

A. I talked to Mr. Speruta, yes.

Q. And what was your conversation with Mr. Speruta?

A. I said Frank told me to talk to you about driving 96.

Q. And Tony's response?

A. Tony's response was he didn't say it was a safe truck. He said – because he was my friend, he said tell – make an excuse that your hip is bothering you and you can't drive 96, because of your hip.

Q. What was your response to Tony?

A. I said Tony, I don't like to lie. It's a lie. I can't do that. Truck 96 is an unsafe truck. So he said well, go back and talk to Frank. I went back and talked to Frank. I told him what – that Tony said that 96, that – what I just said. And then Frank – I said I can't drive 96 and Frank told me to go home.

Q. Did you respond, when he told you to go home?

A. I said can you not issue me another truck?

Q. And his response?

A. Said no, go home.

Q. And at that point did you go home?

A. I went home.

Q. And after you went home, when was the next time you spoke with anybody at General Utilities?

A. I called Frank that evening, and asked him for work for the next day and he said no.

Q. And did you ever return to work?

A. No. I texted him and he – I said Frank, do you have another truck for me tomorrow? He said, no I do not.

Q. At some point you found out you were terminated, correct?

A. A few days on I got a letter from them right after Christmas saying that I was terminated for job abandonment.

(TR 57-58).

Complainant testified that he earned about $40,000.00 a year working for Respondent, plus he had union benefits that included life insurance, medical insurance, vacation time and a pension plan. He believed he had between $8,000.00 and $8,500.00 in his pension plan at the time he was terminated; however, he was not vested in the pension plan and he did not receive any of the funds from his account. He normally got six days of vacation time per season, which he was never able to use because of the busy schedule, so he was paid for those days instead. He typically received about $1,000.00 for his unused vacation time each year, but he did not get any pay for vacation time when he was terminated in December 2016. (TR 59-60). Complainant found a job driving for another fuel oil company about six weeks after he was terminated by Respondent. That job pays about $24.00 an hour, which is nine dollars per hour less than he was earning when he last worked for Respondent. At the time of the hearing, Complainant was working for a wholesale plant distributor where he earned $22.00 an hour. He estimates that he earns $20,000.00 to $25,000.00 per year less now than he did when he worked for Respondent. Additionally, he does not receive vacation time or life insurance and he does not have a pension plan. (TR 60-61).

Complainant said he was traumatized by his termination from his job as a driver for Respondent. He said he was depressed and it caused friction in his family life. He was embarrassed, became withdrawn, gained weight and had trouble sleeping at night. His doctor prescribed Prilosec to treat acid reflux and Ambien to help him sleep. Complainant said that he was 70 years of age at the time of the hearing and he had intended to retire after four or five more years of working for Respondent at a point when his pension had vested. Now, he was not sure if he would ever be able to retire. (TR 62-63).

On cross-examination, Respondent's counsel asked Complainant to read portions of the Driver's Manual/Expected Code of Conduct, which said:

> Drivers are expected to notify the fleet department in writing any item on the truck which may need attention. If it is a safety situation, the problem will be handled immediately. If parts need to be ordered the fleet manager may take the vehicle out of service until a time he sees the vehicle fit. Any and all requested repairs are expected to be put in writing the day in which they are noticed. If a driver's "normal" truck is down for repairs, a working spear truck will be assigned by the fleet manager and the driver is expected to drive that truck.
>
> There is no such thing as "MY" truck. Trucks are assigned by the company and as long as the garage certifies that the truck is road-worthy we expect you to use it.

(TR 64-67; JX 3 at 16, 23).

Complainant described truck number 96 as "a rolling disaster." (TR 68). One of his complaints was the turning radius. He claimed the arc of a turn was restricted, which he said was a defect with this particular truck, not an issue with how the truck was manufactured. (TR 68-69). Complainant acknowledged that the last time he had been in truck number 96 was in February 2016 and that he had not seen the report he submitted following the February 2016 incident in any of the documents provided during discovery. (TR 72). Respondent's counsel showed Complainant a document entitled "General Utilities Vehicle Maintenance Request Form." (TR 73; JX 4 at 688). Complainant agreed that the vehicle listed on the form was truck number 96 and that his name was written in the upper right-hand corner. (TR 73). The document was dated February 24, 2016 and in it Complainant identified the problems with truck number 96 that day as the left door does not work, the seat does not move, an unspecified issue with cooling, and a broken window handle. Below where Complainant wrote in the problems with the truck, the form asked, "Is the repair ___ A safety violation ___ A danger to the health and safety of the driver." Neither item was marked. On the lower part of the form it indicates that repairs were completed on March 25, 2016 and that the name of the mechanic who completed the form was Paul. The description of the work performed indicates that the mechanic adjusted the hinges and the doors, repaired the seat release rod and replaced a window handle. It also indicates that the driver said he could not remember what the problem was with the cooling, but the mechanic indicated that he conducted a pressure test and found no problems with the truck's cooling or heating systems. (JX 4 at 688).

The following exchange took place between Respondent's counsel and Complainant concerning truck number 96:

> Q. And so according to this document, those repairs were made well before December of 2016; is that correct?
>
> A. According to this document.
>
> Q. And you hadn't been in vehicle 96 between 2014 and December 23rd 2016, correct?
>
> A. Other drivers were.
>
> Q. I didn't ask you that question, sir. Try and answer my questions.
>
> A. Okay.
>
> Q. You hadn't been in that vehicle, had you?
>
> A. I hadn't been in that vehicle, no.
>
> Q. Thank you.
>
> JUDGE DAVIS: Are you finished with that exhibit?

MR. WASSEL: Yes, Your Honor.

BY MR. WASSEL:

Q. Now, on December 23rd 2016 you were driving truck 87 and that had problems, which you previously described, correct?

A. Yes, sir.

Q. And so you came back to the terminal and were told to drive the spare truck, which was truck 96?

A. Yes.

Q. Now, did you inspect truck 96?

A. Visually I inspected it.

Q. What did you see from the outside of it?

A. I saw a truck leaning to the left with the fender flapping and it was green.

Q. Did you get in the truck?

A. No. I didn't get in the truck.

Q. So then I presume you didn't test drive the truck, which would be hard to do if you didn't get in, right?

A. You assume properly.

Q. Did you check the door to see if it opened?

A. No.

Q. Did you check the window to see if it rolled down?

A. No. I didn't check the window to see if it rolled down.

Q. In fact you didn't check anything about that vehicle that day, did you?

A. No.

Q. You just simply refused to drive it?

A. I refused to drive it.

Q. Based on your experience of 10 months prior?

A. And other drivers that drove it after me.

Q. You hadn't been in the vehicle for 10 months and you refused to drive it without inspecting it, is that correct?

A. I visually inspected it, yes. I didn't get into the truck. I didn't roll the windows down, which you've already established.

Q. You were told that truck 96 was the spare truck and that was the only truck that was available to drive, were you not?

A. I was told to drive 96. None of that was mentioned to me at that point in time, no.

Q. And you refused to drive truck 96?

A. I said I don't want to drive 96. It's an unsafe truck. I never refused. I'm too proud. I'm too proper. I said truck 96 is not a safe truck to drive.

Q. And on what basis did you make the statement that it was unsafe?

A. My previous experience and other drivers who've driven the truck.

(TR 75-77).

Complainant acknowledged that late December is a busy time of the year for fuel oil deliveries and he did not know whether any trucks were available for him to use other than truck number 96. (TR 78). He said that he contacted his union representative, Dave Stitt, after he was terminated, but the union did not take any action to contest his termination. (TR 79-80).

On redirect examination by his counsel, Complainant said that when he spoke with Mr. Speruta on December 23, 2016, Mr. Speruta never certified verbally to him that truck number 96 was road worthy and he did not offer to test drive the vehicle with Complainant. Instead, Complainant said Mr. Speruta told him to make an excuse and say he that he had a bad hip and could not drive truck number 96. (TR 81-82). Complainant testified that no one ever showed him the maintenance form he submitted after the incident in February 2016 outlining the repairs that were done on truck number 96. (TR 82-83).

In response to questions from me, Complainant said that on December 23, 2016, other trucks were on the terminal yard, but he could not specify exactly which ones. (TR 84). He agreed that the fuel oil delivery season from November to April was roughly half of a year of work. He said that at the end of a season when he would stop working for Respondent he would go to work for another company delivering plants. (TR 85-87).

Chris Vandenberg – Former Seasonal Driver for Respondent

Mr. Vandenberg worked as a seasonal fuel oil delivery driver for Respondent from the summer of 2005 through the season ending in May 2016. (TR 14-15). He and Complainant were coworkers and Frank Cassella was their supervisor. (TR 15). Mr. Vandenberg was normally assigned truck number 119. (TR 15-16). He said it was a 10-wheel truck with a maximum capacity of 4,400 gallons of fuel oil. He had power steering issues during the final season, which required him to accelerate and wrestle the truck in order to make a turn. He reported the problem, but he said that he learned to adapt to the steering problem rather than driving another truck that was in even worse condition. (TR 16).

Mr. Vandenberg kept a journal where he recorded events that happened at work. His journal was marked Complainant's Exhibit 7. (TR 16-17). He said it was the usual course of business to change trucks if the truck he normally drove experienced a mechanical problem. (TR 21). As an example, on October 22, 2015, he drove trucks number 119, 137 and 109, and then on October 23, 2015, he drove trucks number 109, 138 and 103. (TR 23). He also testified about a number of other incidents involving mechanical problems with the trucks Respondent assigned to him. The normal procedure was to write up the problem so it could be repaired and then wait to be assigned another truck to complete the delivery route. (TR 28).

On cross-examination, Mr. Vandenberg said that he had worked as a driver for other fuel oil companies and it was a common occurrence for delivery trucks to break down. When that happened, he was assigned another truck to use until the problem was fixed. (TR 30). Mr. Vandenberg testified that there were no entries in his notebook for truck number 96 and that he was not working for Respondent in December 2016 when Complainant was terminated. (TR 32-33). He said the last truck he drove, truck number 119, was not safe because of a recurring problem with the power steering. That truck was about 20 years old and, for the most part, all of the trucks in Respondent's fleet were old. (TR 33). He acknowledged that he had never reported to OSHA or his union that any of the trucks he was assigned to drive were unsafe. (TR 34). Mr. Vandenberg complained to David Stitt, the shop steward for the union, about the poor condition of the trucks, but to his knowledge the union never raised a safety complaint to management. (TR 35). He said that the hours when he was unable to drive and deliver fuel oil because of problems with trucks was paid time and he did not suffer any financial loss because of break downs. (TR 35-36).

Mr. Vandenberg stated there were no production bonuses, so not being able to deliver fuel oil because of a problem with a truck did not cause him to lose money. (TR 37-38). Aside from the problem with his power steering, which he considered to be a safety issue, all of the other problems he experienced were mechanical in nature – belts, hoses and flat tires – and did not cause safety concerns. (TR 38). Mr. Vandenberg testified that delivering fuel oil is seasonal work – usually November to May – and that most drivers worked in landscaping or in other jobs in their six months off from delivering fuel oil. (TR 41-42). When there was a problem with a truck, the normal practice was to write it up at the end of the day and describe the problem and hand it over to a mechanic. (TR 43-44). Mr. Vandenberg said when he got his truck back after

he turned it in for power steering problems, it would work fine for a period of time and then the power steering would start to go out again. (TR 44).[2]

Tony Speruta – Former Mechanic and Supervisor for Respondent

Mr. Speruta has been employed by Respondent for 29 or 30 years. He is a working supervisor and a mechanic. (TR 96). He is responsible for insuring that Respondent's trucks are safe to operate and he testified that "[w]e don't send unsafe trucks out." (TR 97). Every truck is inspected every 300 hours of operation and any problems that are identified are fixed or the truck is taken off the road. He was at work on December 23, 2016 and described his interaction that day with Complainant:

> Q. I want to focus now on the events of December 23rd 2016. Did there come a point in time where you were contacted and advised that Mr. Gatto had a problem with truck 96?
>
> A. No. I was working in the garage at the time when Tommy came in. And he wanted me to say the truck was unsafe. And I told Tom I can't say the truck is unsafe if it's not. And then that was the end of the conversation.
>
> He went to see Frank or Kenny. I don't know what happened after that. But then I found out that Paul went [on] a road call for him with his truck. They dropped it off at the tank place, and then they came back he had to use the spare. That's as far as I know about that.
>
> Q. All right. Let me just take you back over that –
>
> A. Yeah.
>
> Q. – to make sure we all understand it. Paul would be Paul Weinz was it?
>
> A. Weinz, yeah.
>
> Q. Weinz. His name has been mentioned earlier. So Mr. Gatto had a problem with truck 87, and came back and was told to use the spare. Is that correct?
>
> A. Well, I think Paul went on a road call for him. They took it to the tank place. He brought Tommy back and I guess Frank or whoever told him to use 96, the only spare at the time probably, because it was busy in the winter time. That's as far as I know.
>
> Q. Were there any other spare vehicles available that day?

[2] Complainant rested his case following his testimony and the testimony of Mr. Vandenberg. (TR 89). Respondent moved to dismiss the case at that point alleging that Complainant failed to establish a prima facie case under the STAA. (TR 89-90). After hearing arguments from both sides, the motion to dismiss was denied. (TR 94).

A. I don't recall. I don't recall.

Q. Did you look at truck 96 on –

A. Yes, I did.

Q. And when I say look at, what – how did you look at it? What did you do?

A. I jacked it up, I checked the kingpins, I checked the steering, I looked at the exhaust. I couldn't find anything wrong with the truck. And then I had Dave Stitt, the shop steward, take it for a ride and he couldn't find anything wrong with it. So –

Q. Did Mr. Gatto ask you – on December 23rd, did he ask you to see any sort of repair records on the truck?

A. No.

Q. Did he ask you if the truck had been repaired since the last time he had driven it?

A. No.

Q. Did he get into the truck that you noted, that you saw?

A. Not that I saw.

Q. In your opinion, on December 23rd 2016 was truck 96 safe to drive?

A. Yes, it was.

(TR 98-100).

Mr. Speruta said that afterwards, David Stitt and Joe Prechtl both drove truck number 96 and neither one reported experiencing any problems. (TR 100). With regard to Complainant's concern about the vehicle's turning radius, Mr. Speruta said there was nothing mechanically wrong with the truck and that the way it turns is the way it was manufactured. (TR 104-105). Mr. Speruta denied telling Complainant to lie and say he had a hip problem to avoid driving truck number 96. Instead, he said he told Complainant, "I couldn't say the truck was unsafe if it wasn't," and in his opinion the truck was safe to drive. (TR 105).

On cross-examination, Mr. Speruta said that each truck is inspected every 300 hours of use to check the springs, brakes, tires and anything safety related. A service report is prepared documenting the inspection. (TR 108). He did not recall the time in February 2016 when Complainant got trapped inside truck number 96 because he was working at a different terminal and was not involved in the incident. (TR 110). He said there is a mechanic on duty at each

terminal. He agreed that he would not drive a truck if the doors and windows would not open and that he would not send a truck out on the road if it was in that condition. (TR 111, 113). He also agreed that he would not send a truck out if it could not stop adequately, the floor was rotted and allowed exhaust to leak in, the gas pedal stuck to the floor or if the door came open while the truck was in motion. (TR 113). He said he was unaware that those things happened with Respondent's trucks. (TR 113-114). He said he reviewed the safety forms that were sent to him, but in the normal course of events he did not see all of the forms that were generated. The forms go to the company's office where there are filed. Steve Minicozzi, one of the owners, would be the person who saw all of the forms. (TR 114-115). Mr. Speruta inspected truck number 96 on December 23, 2016 and Dave Stitt took it out and test drove it. That was likely after Complainant had gone home. He did not inform Complainant that truck number 96 was inspected and deemed to be safe. (TR 117-119). Mr. Speruta said Respondent had a total of about 50 trucks at the time. (TR 123).

Frank Casella – Former Oil Delivery Manager for Respondent

Mr. Casella said that in December 2016, he was the oil delivery manager for Respondent. He was responsible for the Hampton Bay and St. James drivers and delivery routes. Mr. Casella was responsible for hiring Complainant and thought that they had a good relationship. (TR 125). He also helped Complainant secure additional work fueling buses at night for the county on an as-needed basis. (TR 126).

On December 23, 2016, Complainant called Mr. Casella on the telephone and notified him of the problem with truck number 87 leaking fuel oil. He told Complainant to contact the mechanic and to keep him posted. Eventually, a decision was made to take truck number 87 off the road. When Complainant asked him which truck he should take, Mr. Casella told him the spare for the day was truck number 96. Complainant said he did not want to drive truck number 96. When Mr. Casella asked him why, Complainant said it was because the truck was unsafe. Mr. Casella told him to go talk to Tony Speruta and if Mr. Speruta said the truck was unsafe they would not use it. Complainant did not specify why he believed the truck was unsafe and at the time Mr. Casella was unaware there was an incident in February 2016 where Complainant got stuck inside truck number 96. (TR 127). Mr. Casella spoke with Mr. Speruta and was advised that the truck was safe to operate. Mr. Casella told Complainant that Mr. Speruta said truck number 96 was safe to drive and that he needed to use it, but Complainant refused. There were no other trucks available, so Mr. Casella sent Complainant home. (TR 128). Mr. Casella did not believe Complainant inspected truck number 96 before he refused to drive it. (TR 129).

At 10:17 a.m. on December 23, 2016, Mr. Casella sent an email to Ken Minicozzi, with copies to Steve Minicozzi and Tony Speruta, recounting what had transpired with Complainant. At 10:29 a.m., Ken Minicozzi emailed Mr. Casella and said, "We need to see the vehicle write up with the safety concerns checked off. If he does not have that, FIRE HIM[.]" (JX 1 at 5). Mr. Casella responded at 10:33 a.m., "He didn't write it up. He said it doesn't turn well in intersections." (*Id.*). At 3:02 p.m., Mr. Speruta sent an email to Ms. Laura Cantiello, Respondent's Payroll and Human Resources Manager, saying no one had submitted a maintenance request form noting health of safety concerns with truck number 96. (*Id.* at 3). At

4:12 p.m., Mr. Stitt, the shop steward for the union, emailed Ms. Cantiello and said he test drove truck number 96 and found it to be safe to drive and deliver fuel oil. (*Id.* at 4; TR 128-130).

On cross-examination, Mr. Casella said he was unaware of an incident several weeks prior to Complainant's termination where the door came open while truck number 96 was in operation. He acknowledged that when Complainant said truck number 96 was unsafe he did not ask him for specific details. (TR 131). Respondent's fuel oil delivery operation was bought out by Petro and Petro determined that there were too many trucks and decided to get rid of 20 to 30 trucks, including truck number 96. (TR 132).

Mr. Casella said there is no typical season in the fuel oil delivery business, but he would estimate that on average a driver would work about 10 hours of overtime during a week and perhaps work a Saturday as well, which would also be paid at an overtime rate. (TR 136). He said that after he received the email from Ken Minicozzi at 10:29 a.m. on December 23, 2016, saying to check the vehicle write ups for safety concerns and if there were none to fire Complainant, and that it was his understanding that Complainant would be terminated as a result of the incident. (TR 138).

David Stitt – Former Transporter for Respondent and Union Steward

Mr. Stitt had worked for Respondent for about 30 years as of December 2016. His job at the time was delivering bulk fuel to the terminals. On December 23, 2016, he was asked to make a delivery to the St. James terminal and to take truck number 96 out for a test drive. He had never driven that truck before. (TR 140). He drove truck number 96 and found it to be safe to operate. (TR 141). He contacted Complainant later on and told him that he test drove truck number 96 and it was fine and that Complainant should have used the truck and not just left work. (TR 142). The collective bargaining agreement has a provision on reviewing a decision to discharge an employee. Mr. Stitt contacted the union because he wanted to put in a grievance for Complainant. He spoke with Mr. Vincent Dippolito, who said Complainant had abandoned his job and there was nothing the union could do for him. (TR 143).

On cross-examination, Mr. Stitt said he filed many grievances on behalf of drivers, including a number of grievances related to terminations. The normal procedure is for the individual to fill out a grievance form that is sent back to Mr. Stitt to add a comment and then they arrange to meet. (TR 144-145). He did not give Complainant a grievance form since the union had already said it was not going to take it up because he abandoned the job. (TR 145). Mr. Stitt's recollection is that he test drove truck number 96 between 10:00 a.m. and 11:00 a.m. on December 23, 2016. (TR 147). He believes Mr. Speruta called him and asked him to come to the St. James terminal and conduct the test drive. (TR 148).

Kenneth Minicozzi – Former Oil Delivery Manger for Respondent

Mr. Minicozzi worked side-by-side with Mr. Casella and they shared the same responsibilities. (TR 151). As of December 2016, he had been working for Respondent for 30 or 35 years. He has a commercial driver's license and years of experience driving trucks. (TR

152). Mr. Minicozzi said he and Mr. Casella decided mutually to terminate Complainant. (TR 153).

On cross-examination, Mr. Minicozzi said he did not know whether Complainant worked for Respondent for nine years or whether he had any prior disciplinary problems. (TR 155). He did not speak with Complainant the day of the incident or prior to Complainant's termination. (TR 155-156). He did not review any records concerning truck number 96 before making the decision to terminate Complainant. He testified that he believed Respondent's trucks are safe and that they rely on the drivers and the routine inspections to insure safety. (TR 158). Complainant's counsel had Mr. Minicozzi review annual inspection checklists for truck number 64 and Mr. Minicozzi admitted that there were several years where there were no records, yet he believed the truck was in operation during those years. (TR168-170). Respondent's counsel stated for the record that except for 2007, there were no annual inspection checklists for truck number 96. (TR 164).

Documentary Evidence[3]

The parties introduced into evidence two three-inch binders of documents contained approximately 900 pages of records. They only referenced a few of the document during the hearing and in their post-hearing briefs. The documentary evidence is summarized below and key items are discussed in more detail in the analysis.

Joint Exhibit 1 (Bates No. 0002 to 0009)

JX 1 consists of a series of emails beginning with the email Mr. Casella sent to Mr. Minicozzi at 10:17 a.m. on December 23, 2016, informing him of the incident with Complainant and ending with an email from Mr. Casella to Ms. Cantiello and Edward Tini at 11:24 a.m. on December 26, 2016, forwarding the entire email thread. It also contains a Discipline Documentation Form prepared by Mr. Casella describing the incident and stating that he would not be calling Complainant back to work.

Joint Exhibit 2 (Bates No. 0011)

JX 2 is a memorandum from Ms. Cantiello to Complainant dated December 27, 2016 informing him that his employment was terminated for job abandonment.

Joint Exhibit 3 (Bates No. 0013 to 0036)

JX 3 is entitled "Your Driver's Manual/Expected Code of Conduct" and is from Ed Minicozzi, Respondent's Vice-President, to all drivers. It states, in pertinent part:

> Drivers are expected to notify the fleet department in writing of any item on the truck which may need attention. If it is a safety situation, the problem will be

[3] The parties had agreed in advance of the hearing on the documents that would be introduced into evidence. The documents were placed into three-ring binders and the pages were marked with Bates stamp numbers. Their effort is noted and greatly appreciated.

> handled immediately. If parts need to be ordered the fleet manager may take the vehicle out of service until a time he sees the vehicle fit. Any and all requested repairs are expected to be put in writing the day in which they are noticed. If a driver's "normal" truck is down for repairs, a working spare truck will be assigned by the fleet manager and the driver is expected to drive that truck.

(Id. at 016).

Joint Exhibit 4 (Bates No. 0608 to 0839)

JX 4 consists of maintenance records, repair invoices, state inspection certificates, title documents, a lien release form, various other records and photographs of truck number 96 dated between November 27, 2001 and October 1, 2017. The records show that truck number 96 is a 1990 Ford F-800 diesel truck with an empty weight of 13,890 pounds and a gross weight of 33,000 pounds.

Complainant's Exhibit 5 (Bates No. 0038 to 0322)

CX 5 consists of similar records for truck number 64.

Complainant's Exhibit 6 (Bates No. 0324 to 0606)

CX 6 consists of similar records for truck number 87.

Complainant's Exhibit 7 (Bates No. 0841 to 0870)

CX 7 is the handwritten journal prepared by Mr. Vandenberg.

Respondent's Exhibit 1 (28 pages, no Bates No.)

RX 1 is the contract between United Service Workers Union, Local 355, IUJAT, and Respondent for the period October 1, 2014 through September 30, 2018.

DISCUSSION AND ANALYSIS

The STAA prohibits a covered employer from terminating an employee for refusing to drive a vehicle if "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). Section (a)(2) further clarifies the "reasonable apprehension" requirement:

> Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. 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.

The outcome of this case turns on whether Complainant's apprehension of serious injury was reasonable. That point is made clear by the fact that both parties focused primarily on the issue of reasonableness in their final briefs. The evidence was clear and unequivocal that Complainant told Respondent he would not drive truck number 96 because it was unsafe and he suffered an adverse action for refusing to drive the truck and complete his fuel oil deliveries. Thus, if the evidence establishes that Complainant's apprehension was reasonable he prevails and if the evidence does not establish his apprehension was reasonable, Respondent prevails.

In *Treur v. Magnum Express, Inc.*, ARB No. 15-001, ALJ No. 2014-STA-00002, slip op. at 6 (ARB July 26, 2016), the Administrative Review Board said, "[a]ll the circumstances surrounding a refusal to drive – including but not limited to existing conditions, weather forecasts, timing, the condition and nature of the vehicle, and the driver's experience – must be considered in determining the reasonableness of the driver's refusal and whether the refusal constitutes protected activity." In that case, the complainant was terminated after he refused to drive because the weather forecast predicted blizzard conditions along his route during the time he was scheduled to be out on the road. The administrative law judge found that "reasonable apprehension" was not established because there was no blizzard at the time complainant was to start driving, only a prediction that there would be blizzard conditions at some point in the future. The Board vacated the judge's decision saying, "[t]o demonstrate that a refusal to work is protected under the 'reasonable apprehension' clause, a complainant must show not only that he had a subjective apprehension of serious injury but also an objectively reasonable apprehension; that is, that a reasonable person in his position given the information available at the time of the refusal would have concluded that operation of the vehicle would pose a risk of serious injury." *Id.* at 9. The Board said a driver is not required to drive into a blizzard before determining the blizzard conditions are too hazardous and it is not his responsibility to establish that there was no possibility he could drive safely.

To establish a violation, however, it is not sufficient for a complainant to demonstrate a good faith subjective opinion alone. Instead, a complainant must prove that his assessment of the condition is reasonable. *Brame v. Consolidated Freightways*, 1990-STA-00020 (Sec'y June 17, 1992) (complainant's refusal to drive a truck was improper because the only evidence of faulty brakes was his own subjective opinion). In *Harris v. C & N Trucking*, ARB No. 04-175; ALJ No. 2004-STA-00037 (ARB Jan. 31, 2007), the complainant refused to drive a truck because he believed the front end of the vehicle was unsafe and the wheels might come off. The pivotal issue was whether the complainant's apprehension was objectively reasonable. While a complainant is not required to prove the existence of an actual safety defect, he must provide sufficient evidence to establish that the assigned vehicle could reasonably be perceived as unsafe by a reasonable person. The administrative law judge found the complainant failed to meet his burden of proof because the only evidence he offered was his own subjective opinion that he believed the wheels were likely to come off if he drove the truck.

Respondent concedes that Complainant had a subjective apprehension of serious injury, but disputes that a reasonable person in the same position and with the same information would

have reached the same conclusion. (Resp. Brief at 9-10). The burden is on Complainant to prove by a preponderance of the evidence that he engaged in protected activity under the STAA. *Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 054, ALJ No. 2003-STA-00039, slip op. at 5 (ARB June 29, 2007) *aff'd Luckie v. Administrative Review Bd.*, 321 Fed. App'x. 889 (11th Cir. 2009) (unpub) (in a trial on the merits the issue is not whether complainant established a prima facie case, it is whether he proved by a preponderance of the evidence that respondent took adverse action against him because of protected activity).

For the reasons set forth below, I find that Complainant has not established by a preponderance of the evidence that a reasonable person in the circumstances he confronted would conclude that there was a hazardous safety condition that created a real danger of an accident or injury; therefore, he did not engage in protected activity under the STAA.

Complainant contends that the mechanical problems with truck number 96 were "well documented in vehicle maintenance forms submitted to the company by its drivers," and he cited specific documents from JX 4:

Bates No. 248 – "driver's door don't close right."

Bates No. 639 – "driver's door binding."

Bates No. 670 – "Both doors don't close."

Bates No. 688 – "Door (L) does not work ... window handle broken."

Bates No. 667 – "gas pedal sticking to floor."

Bates No. 690 – "check problem with accelerator pedal sticking."

Bates No. 811 – "Throttle pedal sticking."

(Compl. Brief at 3-4).

Complainant's contentions are not entirely accurate and do not provide the complete context of all of the reports. Bates No. 248 addressed problems that occurred in 2005 with truck number 64, not truck number 96. Bates No. 639 shows that a mechanic repaired the problem in December 2007 with the doors binding on truck number 96 by adjusting the doors. Bates No. 670 shows that the problem "Both doors don't close" in December 2009 was further clarified by the driver writing the word "rattling" immediately after the quoted language and the record shows that the mechanic remedied the problem by lubricating and adjusting the doors. Bates No. 688 is the record for the incident in February 2016 where Complainant alleges he was trapped inside the truck and it shows the mechanic corrected the problem on March 25, 2016 by adjusting the hinges and the doors. Bates No. 667 shows the mechanic replaced a spring and checked and lubricated the linkage to repair a sticking problem with the accelerator pedal in November 2009. Similarly, Bates No. 690 shows that the same problem occurred in August 2016 and was repaired by replacing the pedal return spring. In June 2010, a sticking accelerator

pedal was repaired by straightening the pedal bracket and applying lubrication. (Bates No. 811). The records Complainant cited show that a mechanic adjusted the hinges and doors on truck number 96 three times between December 2007 and December 2016 and repaired the accelerator pedal three times between November 2009 and December 2016. Except for adjusting the doors in March 2016 and repairing the accelerator pedal in August 2016, none of the other problems were due to incidents that occurred within five years of the date Complainant refused to drive truck number 96.

I reviewed all of the documents in JX 4 – which extend from Bates No. 608 to 839 – and they describe routine maintenance, inspections and repairs on truck number 96. I also reviewed the documents in JX 5 – which extend from Bates No. 038 to 322 – and JX 6 – which extend from Bates No. 324 to 838 – which describe similar maintenance, inspection and repair information for trucks number 64 and 87, respectively. The records show that truck number 96 was a 1990 Ford F-800 with an empty weight of 13,890 pounds and a fully loaded weight of 33,000 pounds. (JX 4 at 708, 716). Truck number 64 was a 1985 Mack R685T with an empty weight of 11,000 pounds and a fully loaded weight of 45,600 pounds. (CX 5 at 309, 314). Truck number 87 was a 1992 Ford L-8000 with an empty weight of 14,000 pounds and a fully loaded weight of 43,000 pounds. (CX 6 at 602, 605). The records show that as of the latter part of 2016 and shortly before the date Complainant refused to drive truck number 96, the odometer registered less than 85,000 miles (JX 4 at 726) while the odometers for trucks number 64 and 87 had each registered over 280,000 miles. (CX 5 at 269, CX 6 at 347). In comparison to the maintenance and repair records for trucks number 64 and 87, there is nothing unique about the maintenance history of truck number 96.

When asked if trucks used in the fuel oil delivery industry often needed mechanical repair, Mr. Vandenberg said, "Absolutely. Things break down." (TR 30). He testified that the last truck he was assigned, truck number 119, had power steering problems that would be repaired briefly and then the problem would return. Mr. Vandenberg considered that a safety issue, but otherwise the problems he encountered with Respondent's trucks were mechanical issues like belts, hoses and tires, which he did not consider to be safety issues. (TR 38, 45). He testified that his journal (CX 7) did not contain any references to truck number 96 and that he was not working for Respondent in December 2016 and had no personal knowledge of the events on December 23, 2016 that led to Complainant's termination. (TR 32). Mr. Vandenberg's account of his experience as a driver for Respondent was consistent with the testimony of the other witnesses, including Complainant, and the documentary evidence that was introduced. His testimony reflected was appears to be customary practices in the fuel oil delivery business in that area of New York.

Complainant testified that the doors on truck number 96 would fly open – which he said the drivers talked about constantly – and that the problems with the truck were documented many times on vehicle maintenance requests. (TR 54-55). There were no vehicle maintenance requests or other documents in JX 4 indicating that there were instances where drivers reported the doors on truck number 96 opening while the truck was in motion. Complainant's counsel asked Mr. Speruta, Mr. Cassella and Mr. Minicozzi if they were aware of an incident where the doors on truck number 96 opened when another driver was operating the truck a few weeks prior to Complainant's termination. All three testified that they were unaware that such an incident

took place. (TR 113, 131, 156). Mr. Vandenberg was not working for Respondent in mid to late 2016 and Mr. Stitt was not asked about the alleged incident. Neither Complainant nor his counsel identified a date when such an incident occurred or the name of any driver who operated truck number 96 when the doors opened while the truck was in motion. I attach no weight to the vague and unsupported allegation that the doors on truck number 96 came open on one or more occasions while the truck was in motion.

Complainant testified that in February 2016 he became trapped inside truck number 96 while loading it with fuel oil at the terminal. He said both doors and both windows would not open and he had to call the dispatcher for help. He said a mechanic, Mr. Weinz, physically pried a door open to free him from the truck. He said he is claustrophobic and was terrified while he was trapped inside. He testified that "[e]verybody thought it was a joke" and "they laughed at it," and the experience was humiliating. (TR 54-55). Mr. Speruta, Mr. Cassella and Mr. Minicozzi testified that were unaware of the incident prior to Complainant's termination. (TR 110, 127-128, 156). Neither Mr. Vandenberg nor Mr. Stitt was asked about the incident. The only reference to the incident in the record is the vehicle maintenance request form that Complainant filled out and submitted on February 24, 2016. Complainant acknowledged that the upper portion of the form was his write-up of the incident. (TR 82). Complainant described the nature of the problems with truck number 96 as "door (L) does not work" and "window handle broken." (JX 4 at 688). The truck was repaired on March 25, 2016 by a mechanic named Paul – presumably Paul Weinz – who wrote that he adjusted the hinges and doors, and he replaced a window handle. (*Id.*).

There is no evidence that corroborates Complainant's testimony at the hearing about the nature and intensity of the February 2016 incident despite the fact that he said multiple people were present and thought the incident was a joke. The only related evidence is the vehicle maintenance request form in which neither Complainant's description of the problems he experienced with the truck nor the mechanic's description of the repairs he made thereafter suggest that someone was trapped inside a vehicle and had to be forcibly extracted. I find that Complainant did experience a problem with a door and a window handle on truck number 96 on February 24, 2016 as he described in the vehicle maintenance request form, but I do not find that the nature and intensity of the incident were as severe as Claimant described in his testimony.

Complainant testified that there was a mechanical defect in truck number 96 that restricted the arc of a turn and the turning radius. (TR 54, 69-71). Mr. Speruta testified that he drove truck number 96 and turned the steering wheel as far as it would go in both directions. He said the truck steers the way it was manufactured to steer and that there was nothing mechanically wrong with the steering. (TR 104-105, 117). Mr. Stitt drove truck number 96 on December 23, 2016, and reported that it was safe to operate. (TR 141). Mr. Speruta testified that another driver, Joe Prechtl, used truck number 96 shortly after Complainant was terminated and he did not report experiencing any problems. (TR 100). There were no vehicle maintenance request forms or other documents in JX 4 indicating that there were instances where drivers reported problems with the turning radius of truck number 96. Truck number 96 remained in Respondent's fleet until the winter of 2017 when the company was purchased by Petro who

made a business decision to reduce the fleet by 20 to 30 trucks and got rid of truck number 96.[4] (TR 132).

On October 31, 2016, Rapid, Inc., in Rocky Point, New York, conducted a "New York State Heavy Safety Inspection," a "New York State Diesel Emissions Inspection," checked the fluids, lubricated the chassis and adjusted the brakes on truck number 96. The invoice indicates that New York State inspection sticker number 3184756 was issued to truck number 96. (JX 4 at 726). The safety inspection and certification was done 53 days prior to the date Complainant refused to drive the truck.

There was consensus on what transpired initially between Complainant and Mr. Cassella after Complainant returned to the terminal on December 23, 2016. Mr. Cassella said truck number 96 was the only spare truck available, Complainant said he did not want to drive it because it was unsafe, and Mr. Cassella told him to go talk to Mr. Speruta and if Mr. Speruta said it was unsafe they would not use it. There were differing accounts of what transpired when Complainant talked with Mr. Speruta. According to Complainant, after he told Mr. Speruta that Mr. Cassella had sent him to talk about driving truck number 96, which Complainant believed was unsafe, Mr. Speruta told him to make up an excuse and tell Mr. Cassella he could not drive truck number 96 because his hip was bothering him. Complainant said Mr. Speruta told him to make up an excuse "because he was my friend." (TR 57, 81). According to Mr. Speruta, Complainant wanted him to say that truck number 96 was unsafe, but he told Complainant, "I can't say the truck is unsafe if it's not." (TR 98). He denied telling Complainant to lie and make up an excuse not to drive the truck. In any event, Complainant went back to see Mr. Cassella, refused again to drive truck number 96, and Mr. Cassella sent him home. According to Mr. Cassella, "I had no other trucks for him." (TR 128). That was consistent with Mr. Speruta's testimony that truck number 96 was probably the only truck available because late December is a busy time of year for fuel oil deliveries. (TR 99). Complainant acknowledged that on December 23, 2016 he did not tell Mr. Cassella, Mr. Speruta or anyone who worked for Respondent what he believed needed to be repaired on truck number 96. (TR 83-84). Recounting the chain of events, Complainant testified on cross-examination:

> Q. Did you get in the truck?
>
> A. No. I didn't get in the truck.
>
> Q. So then I presume you didn't test drive the truck, which would be hard to do if you didn't get in, right?
>
> A. You assume properly.
>
> Q. Did you check the door to see if it opened?
>
> A. No.
>
> Q. Did you check the window to see if it rolled down?

[4] The record contains a surplus equipment report for truck number 96 dated October 3, 2017. (JX 4 at 734-735).

A. No. I didn't check the window to see if it rolled down.

Q. In fact you didn't check anything about that vehicle that day, did you?

A. No.

Q. You just simply refused to drive it?

A. I refused to drive it.

(TR 76).

Weighing all of the evidence, I find that objectively it does not establish that truck number 96 was unsafe to drive on December 23, 2016. The truck had been inspected less than two months earlier by a third party authorized to perform New York State safety inspections on heavy vehicles and it was certified as safe to operate. Mr. Speruta testified that he jacked the truck up and inspected it the day of the incident and he drove the truck, and he determined it was safe to operate. Mr. Stitt drove the truck the day on the incident and determined it was safe to operate. The truck remained in Respondent's fleet and was used a few days after the incident by Mr. Prechtl who did not report experiencing any problems.

The issue, however, is not whether truck number 96 was safe to drive on December 23, 2016; the issue is whether a reasonable person in Complainant's position and aware of the information available at the time would have concluded that operation of the vehicle posed a risk of serious injury. Weighing all of the evidence, I find that objectively a reasonable person would not come to that conclusion.

Complainant was in his ninth season as a driver for Respondent and he testified that he submitted 10 to 20 maintenance request forms per season. (TR 51). If a driver's regularly assigned truck was under repair, he was assigned another truck to use until the repair was completed. Complainant testified that was company policy and a customary policy in the industry, which was consistent with the testimony of Mr. Vandenberg. (TR 67). On February 24, 2016, Complainant had a problem with a door and a window handle while using truck number 96 and he submitted a vehicle maintenance request form. On December 23, 2016, ten months later, Complainant was assigned truck number 96 again while his regularly assigned truck was being repaired. Complainant refused to drive truck number 96 and told Mr. Cassella it was unsafe, but he did not articulate the basis for his conclusion. Mr. Cassella told Complainant to discuss it with Mr. Speruta, who was Respondent's fleet supervisor and Complainant's friend. Complainant saw truck number 96 parked on the terminal lot, but he did not inspect it. (TR 76). Mr. Speruta did not say that truck number 96 was unsafe to drive. Nonetheless, Complainant still refused to drive the truck. Mr. Cassella did not have another truck available to assign to Complainant, so he sent him home.

By Complainant's estimation, he had submitted between 80 and 160 maintenance request forms during his tenure as a driver for Respondent. There was no evidence that when he did so the problems he identified were ignored. His former fellow driver, Mr. Vandenberg, testified

that when he experienced problems with the power steering in truck number 119, which he considered to be a safety issue, he submitted vehicle maintenance requests and the problem was addressed, even though it would recur again later. There is no objective reason for a person in Complainant's position to reasonably believe that the problems with truck number 96 he identified in February 2016 were ignored and persisted in December 2016, ten months later. Any doubts he may have had could have been quickly and easily resolved by simply walking over to the truck and checking to see if the door and the window worked properly. That is true even if the February 2016 incident had been of the nature and intensity Complainant described in his testimony.

I find Complainant's purported apprehension of serious injury to himself or to the public on December 23, 2016 was not objectively reasonable given the totality of the circumstances. As such, Complainant did not meet his burden of proving he engaged in protected activity. Accordingly, I find Complainant's activity on December 23, 2016, was not protected under the STAA. Since I find Complainant did not prove he engaged in protected activity, I do not need to address whether he suffered an adverse action or whether his alleged protected activity was a contributing factor in the adverse action taken against him where those are non-dispositive issues. *See Prior v. Hughes Transport, Inc.*, ARB No. 04-044, ALJ No. 2004-STA-00001, slip op. at 2-3 (ARB Apr. 29, 2005) (affirming decision where administrative law judge refused to determine whether activity was protected because issue was non-dispositive). Given that Complainant's activity was not protected, the burden does not shift to Respondent to prove it would have acted the same regardless.

ORDER

Based on the record as a whole, I find Complainant does not have a valid STAA complaint as he did not meet his burden of proving he engaged in protected activity.

Accordingly, it is hereby **ORDERED** that Complainant's complaint is hereby **DENIED** and the complaint is **DISMISSED**.

SO ORDERED.

Digitally signed by MORRIS D. DAVIS
DN: CN=MORRIS D. DAVIS, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

MORRIS D. DAVIS
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

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, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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).