

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 18 April 2012

CASE No: 2011-NTS-0004

In the Matter of:

MICHAEL BEN GRAVES
Complainant,

v.

MV TRANSPORTATION, INC.,
Respondent,

Appearances: Michael Ben Graves
For himself

Mark A. Lies, Esq.
Todd Christopher Hunt, Esq.
For the Respondent

Decision and Order

The Complainant, Michael Ben Graves, works as a bus driver for MV Transportation (“MV”), which contracts with the City of Carson, California to operate its public bus system. The Complainant alleges that MV retaliated against him for telling supervisors that it wasn’t safe for drivers to back buses up between other buses parked at the yard after the day’s routes were completed. He filed this whistleblower protection claim under 6 U.S.C. § 1142 of the National Transit Systems Security Act of 2008 (“NTSSA” or “the Act”) and the regulations of the Secretary of Labor published at 29 U.S.C. Part 1982.

MT concedes the Complainant engaged in activity the Act protects. It disputes that he suffered any adverse employment action; even if he did, it says there was no casual relationship between his whistleblowing and any adverse action. It also argues that he has no damages, so there is nothing to remedy.

I find the Complainant suffered an adverse employment action in the form of harassment from yard supervisor Jesus Zamora, and

that Graves' protected activity contributed to that harassment. I agree with MV that the Complainant suffered no compensable monetary damages. Nonetheless, he is entitled to "affirmative relief"¹ that requires MV to "abate the violation;"² MV must post this decision in a prominent location, in order to show its employees it violated the Act and that any future violations can be addressed through the legal process.

I. Summary of Findings

The Complainant works as a bus driver for MV. When drivers returned from their shifts and parked their buses in the lot, MV provided spotters only upon a driver's request, and the evidence shows spotters weren't always available. Every witness agreed backing up a bus between other buses without a spotter was unsafe, because the driver has a blind spot. The Complainant "blew the whistle" twice to his superiors, once on January 4, 2011 and once on January 14, 2011 about this unsafe practice. On the second date, he also filed a complaint with OSHA.

The Complainant alleges he suffered retaliation three times for telling managers it was unsafe to back his bus between other parked buses without a spotter. First, on January 5, 2011 he was penalized with 4 "safety points" for a collision he had on December 30, 2010 while backing up his bus between other buses without a spotter. Second, on January 6, 2011, he was ordered to back up his bus without a spotter by Jesus Zamora, the yard supervisor on duty, and that this too was retaliatory. Finally, he says Jesus Zamora harassed him a second time in early February 2011, by ordering him again to back up his bus, even though he had refused to do so on January 6 and even though the company had issued him a memorandum instructing drivers not to back up the buses in that situation.

Management imposed safety points because of his December 30 accident, not for his January 4 safety violation report. I agree with the Complainant, however, that he was harassed twice by Jesus Zamora, on January 6 and in early February. This harassment was motivated at least in part by the Complainant's objections to the unsafe practice of backing up a bus without a spotter. Accordingly, it was retaliatory.

The Complainant proved no damages. His safety points were rescinded to resolve a related collective bargaining grievance, and he suffered no other disciplinary action. For two days after the February 5 incident he chose not to work; no one forbade him to work, so he isn't

¹ 29 C.F.R. § 1982.109(d)(1).

² *Id.*

entitled to be paid for those days. Finally, he asks for the statutory maximum of \$250,000 in punitive damages, but no punitive damages are due.

Accordingly, I find that although the Complainant was harassed because of his protected activity, he suffered no monetary damages. The relief he is entitled to is publication of this decision in a prominent location at MV, so that he and other employees can see violations of whistleblower protection laws can be remedied through the legal process.

II. The Record

This case came to trial on October 31, 2011, in Long Beach, California. The record includes trial testimony from the Complainant,³ Gloria Huff,⁴ Yesenia Garcia,⁵ and Jesus Zamora.⁶ Direct testimony for Huff, Garcia, and Zamora was pre-filed by MV.⁷ Both the Complainant and MV submitted exhibits, which were admitted into evidence.⁸ The parties also submitted posttrial briefs.⁹

III. Factual Findings

A. The Complainant's Job at MV

The Complainant, Michael Ben Graves, works as a night shift bus driver in the City of Carson, California.¹⁰ Before October 2010, he worked for First Transit, the company that administered the public transit contract at the time.¹¹ The Complainant received safety training from First Transit, including general training on how to back up his bus into a parking spot.¹² First Transit didn't train drivers to

³ Tr. at 14–32. This Decision and Order cites to the record this way: citations to the trial transcript are abbreviated as Tr. at [page number]; citations to the Complainant's exhibits are abbreviated as C. Ex.-[exhibit number] at [page number]; citations to the Respondent MV's exhibits are abbreviated as R. Ex.-[exhibit number] at [page number].

⁴ Tr. at 33–53.

⁵ Tr. at 54–67.

⁶ Tr. at 67–95.

⁷ Pre-Filed Testimony of Respondent's Witness Yesenia Garcia [hereinafter "Garcia Pre-filed Testimony"]; Pre-Filed Testimony of Respondent's Witness Gloria Huff ["Huff Pre-filed Testimony"]; Pre-Filed Testimony of Respondent's Witness Jesus Zamora ["Zamora Pre-filed Testimony"].

⁸ C. Ex.-1–13; R. Ex.-A–S.

⁹ Complainant's Final Argument [hereinafter "Complainant's Posttrial Brief"]; Respondent's Post-Trial Brief [hereinafter "Respondent's Posttrial Brief"].

¹⁰ Tr. at 9; Huff Pre-filed Testimony at 2.

¹¹ Huff Pre-filed Testimony at 1–2.

¹² *Id.*

back up their buses into a parking spot when there were buses parked on either side, however.¹³ First Transit's policy did not permit drivers to back up their buses between other parked buses without the use of a spotter.¹⁴ Spotters were not generally available, so bus drivers didn't back up their buses between other buses at the yard.¹⁵

In October 2010, MV took over the Carson City contract from First Transit.¹⁶ MV changed the backing policy for drivers—unlike First Transit, MV allowed drivers to back up their buses between other buses without the use of a spotter.¹⁷ In pre-filed testimony, MV Safety Manager Gloria Huff testified that under MV's policy spotters were to be provided "where needed."¹⁸ Yet spotters were not provided—the only person available to spot for drivers was the yard supervisor, who was frequently busy checking in other buses and attending to other duties, so many times he couldn't act as a spotter.¹⁹

MV's employee handbook lists "insubordination" as one of a number of "major violations" that can "result in termination or other serious discipline."²⁰ Insubordination is defined as "the refusal and/or failure to follow a directive to perform assigned work or encourage others to do either."²¹ Accordingly, any time an MV employee refuses to obey an order from a superior, he or she risks employment termination.²²

The first day the Complainant worked for MV after MV took over the contract, he learned of the new policy when he arrived at the yard to park his bus after completing his route.²³ He objected and left his bus in the yard without parking it.²⁴ The yard dispatcher informed him that in future he would be required to park the bus, so he began to do so, although he thought it was unsafe.²⁵ He didn't report his objections to Safety Manager Huff or any other senior management then.

¹³ Tr. at 40.

¹⁴ Tr. at 19, 55.

¹⁵ Tr. at 55–56.

¹⁶ Huff Pre-filed Testimony at 1–2.

¹⁷ Tr. at 60; Huff Pre-filed Testimony at 6.

¹⁸ Huff Pre-filed Testimony at 6.

¹⁹ Tr. at 39, 50, 60, 64–66, 73–76.

²⁰ Tr. at 48–49; R. Ex.-1 at 40.

²¹ R. Ex.-1 at 40.

²² Tr. at 48–49.

²³ Tr. at 16.

²⁴ Tr. at 16–17.

²⁵ Tr. at 17.

B. The December 30, 2010 Accident

On December 30, 2010, at about 10:30PM, the Complainant hit another bus when trying to back his bus up between other buses without a spotter at the end of his shift.²⁶ The accident caused no injuries and minor damage to the buses.²⁷ Jesus Zamora was the yard supervisor that day.²⁸ Zamora was also supposed to be available to serve as a spotter, but he was checking in other buses (coaches) at the time, and the Complainant didn't ask him to spot.²⁹ An accident report the Complainant and Zamora filled out was sent to Huff for evaluation, along with photographs of the damage.³⁰ Huff determined the incident was "preventable" sometime after December 30, 2010 and before January 5, 2011.³¹ She arranged to meet with the Complainant on January 5, 2011, to tell him her conclusions.³²

C. The Complainant's First Safety Protected Disclosure

I believe the Complainant's trial testimony that on the night of January 4, 2011, he faxed Huff a memorandum objecting to the practice of backing buses up between other buses.³³ He also hand delivered the memorandum the next day when he met with Huff.³⁴

I believe that the Complainant faxed this memorandum to Huff before their meeting, and gave her a copy.³⁵ In the memorandum, the Complainant objected generally to the practice of backing up buses between other buses as unsafe.³⁶

²⁶ Tr. at 17–18, R. Ex.-G at 2.

²⁷ R. Ex.-G at 2.

²⁸ Tr. at 75; R. Ex.-G at 4.

²⁹ Tr. at 75.

³⁰ Huff Pre-filed Testimony at 4–5; R. Ex.-G, -H.

³¹ Huff Pre-filed Testimony at 4; R. Ex.-I at 1. It isn't clear when exactly this initial determination happened.

³² Huff Pre-filed Testimony at 4–5.

³³ Tr. at 18.

³⁴ Tr. at 18. Rather inexplicably, this memorandum isn't actually part of the trial exhibits. Nor did the Complainant ask Huff at trial whether she read the document, much less whether she read it before she determined his accident was preventable. Nonetheless, the Complainant *did* submit what appears likely to be his January 4 memorandum as an exhibit to his objection to MV's pre-filed testimony. It became part of the case file, although not a trial exhibit.

³⁵ The Complainant has been nothing if not persistent in filing objections. Although MV didn't have a chance to respond to this document at trial, and the Complainant didn't question Huff about it, MV had an opportunity to respond to the Complainant's testimony that he faxed the disclosure. It is his testimony I ultimately credit, rather than relying on the document.

³⁶ Tr. at 18.

D. The January 5, 2011 Meeting with Safety Manager Huff

Huff met with the Complainant on January 5, 2011, to explain her conclusion that the accident that damaged two buses was “preventable.”³⁷ Huff emphasized at trial the incident was preventable because the Complainant shouldn’t have backed up without a spotter if he thought it was unsafe.³⁸ As no spotter was available, I don’t know what Huff thought the Complainant should have done.

Because she found the incident preventable, Huff levied 4 “Safety Points” against the Complainant.³⁹ The point system Huff used, as per MV’s collective bargaining agreement with the union, assigns safety points for specific types of accidents, with more severe accidents resulting in more points assessed.⁴⁰ Under this system, the 4 points issued to the Complainant—2 points for a “backing incident” and 2 points for a “minor preventable incident”—would have meant the Complainant would lose his job if he were assessed 2 more points in the next 18 months for another violation.⁴¹ Huff testified it was normal to combine points under the system when an accident fit more than one category,⁴² and no contrary evidence was presented. The Complainant objected to the points levy and the determination his accident was preventable, and convinced the union to begin the grievance procedure to contest the decision.⁴³ Perhaps the unavailability of a spotter at the time the Complainant tried to back up his bus led MV to rescind the safety points later.

As part of the safety assessment, Huff required the Complainant to have “re-training” on how to back up his bus between other buses.⁴⁴ The Complainant never had been trained to back his bus between two parked buses, so it was initial training, not re-training.⁴⁵ The “re-training” took about 15–20 minutes on January 6.⁴⁶

³⁷ Huff Pre-filed Testimony at 4–5.

³⁸ Tr. at 36–38.

³⁹ Huff Pre-filed Testimony at 4–5.

⁴⁰ *Id.* at 3–4.

⁴¹ R. Ex.-A at 46–47.

⁴² Tr. at 52.

⁴³ Huff Pre-filed Testimony at 4–5.

⁴⁴ *Id.* at 5.

⁴⁵ Tr. at 39–40.

⁴⁶ Tr. at 39–40.

E. The Incident on the Night of January 6, 2011 and the January 7, 2011 Memorandum

On the night of January 6, 2011, the Complainant finished his shift and went to park his bus in the yard as he had in the past.⁴⁷ Zamora was the yard supervisor, and Zamora ordered the Complainant to park his bus by backing it between other buses.⁴⁸ The Complainant objected, saying it was unsafe.⁴⁹ Zamora repeatedly ordered the Complainant to back into the parking spot, without offering to serve a spotter, and the Complainant repeatedly refused.⁵⁰ The Complainant left his bus in the yard without parking it.⁵¹ Zamora wrote up and submitted an incident report,⁵² but the parties agree the report was never acted upon.

In response to the situation, on January 7, 2011, MV issued the Complainant a memorandum instructing him to leave his bus in the yard without parking it until the union grievance on the topic had been resolved.⁵³

F. The Complainant's Second Protected Disclosure

On January 14, 2011, the Complainant wrote a second memorandum that objected to backing his bus between other parked buses.⁵⁴ This time, he faxed the memorandum to OSHA as well as to Huff.⁵⁵ He objected to the practice particularly without spotters at night in "extreme weather conditions."⁵⁶ He alleged MV retaliated against him for his objections,⁵⁷ without giving details of the retaliation. He said he was being forced to continue to park his bus unsafely, without mentioning that after January 7 he was not required to do so.⁵⁸ The memorandum doesn't mention his January 6 incident with Zamora.

⁴⁷ Tr. at 21; Zamora Pre-filed Testimony at 2-3.

⁴⁸ Tr. at 21; Zamora Pre-filed Testimony at 2-3.

⁴⁹ Tr. at 21; Zamora Pre-filed Testimony at 2-3.

⁵⁰ Tr. at 21; Zamora Pre-filed Testimony at 2-3.

⁵¹ Tr. at 21; Zamora Pre-filed Testimony at 2-3.

⁵² R. Ex.-M at 1.

⁵³ R. Ex.-O at 1.

⁵⁴ C. Ex.-1 at 1-2.

⁵⁵ *Id.* at 1, 4.

⁵⁶ *Id.* at 1.

⁵⁷ *Id.* at 1-2.

⁵⁸ *Id.* at 2.

G. Resolution of the Union Grievance Procedure

As a step in the union grievance process, the Accident Review Committee met on January 18, 2011, and reviewed the Complainant's December 30, 2010 damage to his bus.⁵⁹ It determined by a vote of 3 to 2 that the collision was preventable and upheld Huff's determination.⁶⁰

On February 3, 2011, after an extended process, the union and MV agreed to resolve the grievance amicably.⁶¹ As part of the "complete resolution," MV agreed to remove the 4 safety points assigned to the Complainant, and erase all record of the December 30, 2010 accident from his file.⁶² MV also agreed to provide spotters for "all required backing in the MV yard."⁶³

H. The Incident in Early February, 2011 and the February 9 Memorandum to All Drivers

Shortly after the resolution of the union grievance about backing between parked buses—probably on the night of the 4th or the 5th—the Complainant returned to the yard at the end of his shift.⁶⁴ Yesena Garcia, the dispatcher that night, announced over the radio that all the drivers were to park their buses as normal, using a spotter if they had to back up.⁶⁵ The Complainant said he had just been involved in a grievance that was resolved by prohibiting drivers from backing up buses between other buses.⁶⁶ Garcia confirmed he was to back his bus up between other buses, which the Complainant refused to do.⁶⁷ Zamora was the yard supervisor, and he also ordered the Complainant to back up his bus and park it between the other buses, without offering to spot.⁶⁸ The Complainant repeatedly refused to back up his bus, and ultimately left it in the yard.⁶⁹ He decided to take two days off work to contact his union to complain about "harassment and retaliation," which he did.⁷⁰

⁵⁹ R. Ex.-Q at 1.

⁶⁰ R. Ex.-P at 1–5.

⁶¹ R. Ex.-R at 1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Tr. at 25.

⁶⁵ Tr. at 25, 62–63, Garcia Pre-filed Testimony at 2.

⁶⁶ Tr. at 25.

⁶⁷ Tr. at 25.

⁶⁸ Tr. at 25.

⁶⁹ Tr. at 25.

⁷⁰ Tr. at 25–26.

On February 9, MV sent out a company-wide memorandum, instructing all drivers on the night shift to leave their buses in the yard without parking them.⁷¹ The Complainant returned to work, and has continued to work for MV up to the present. He complains of ongoing “harassment, intimidation, blacklisting and retaliation” continuing through the present, but those accusations are not part of this proceeding.⁷² The Complainant has submitted further complaints to OSHA regarding these allegations, which are currently being investigated.

I. Results of the OSHA Investigation

On July 23, 2011, OSHA completed its investigation,⁷³ determining there was “no reasonable cause to believe that [MV] violated” the NTSSA.⁷⁴ The Secretary found that because MV agreed to withdraw the safety points issued to the Complainant, any possible retaliatory motive in the issuance of those points was moot.⁷⁵ The Secretary further found that the other retaliation the Complainant alleged was unconnected to his protected disclosures.⁷⁶ The Complainant objected to OSHA’s findings and requested a hearing, leading to this proceeding.

IV. Witness Credibility Determinations

A. General Witness Credibility

Almost all of the above facts are not seriously contested by the parties, and, with the exception of Jesus Zamora, I find all witnesses provided generally credible testimony. The Complainant’s unfocused narrative testimony was difficult to follow in places. I am confident, however, of the basic accuracy of his testimony, which largely is corroborated by the testimony of witnesses for MV.

B. Zamora’s Testimony is Unreliable and Inaccurate

The significant factual disagreement revolves around Jesus Zamora’s behavior during incidents in January and February 2011 where the Complainant was ordered to back up his bus between other buses after his initial objections. Jesus Zamora claims not to remember

⁷¹ R. Ex.-S at 1.

⁷² The OSHA investigation determination the Complainant challenges in this proceeding related only to events up until the change of policy on February 9, 2011. *See* Secretary’s Findings at 1–2.

⁷³ Secretary’s Findings at 1.

⁷⁴ *Id.* at 1.

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

the February incident at all, and insists he was always available to serve as a spotter had the Complainant only asked. I don't believe Zamora actually was available to serve as a spotter; I also believe he ordered the Complainant to back up his bus between other buses without offering to spot on both occasions, even though he knew the Complainant believed doing so wasn't safe.

1. Zamora Claimed He was Available to Spot for the Complainant, but the Evidence Shows He Wasn't Most of the Time

Zamora testified at trial that he was available to spot for the Complainant at any time at the Complainant's request.⁷⁷ He also wrote in his January 6, 2011 incident report that he offered to spot for the Complainant on January 6, 2011 but the Complainant refused.⁷⁸

However, Zamora admitted that he wasn't actually available to spot for the Complainant on December 30, 2010, because he was checking in other buses.⁷⁹ Close to 40 to 60 buses came into the yard that night.⁸⁰ Bus drivers are allowed only five minutes to complete the entire check-in and parking process, from the time they enter the yard until the time they leave their vehicle.⁸¹ He claims he spotted for about 80% of those drivers on that day.⁸²

I don't find this credible. Even if Zamora really was willing to spot for the Complainant, he was busy dealing with other buses. Given the tight schedule, I don't find it likely he could have spotted for 80% of the drivers without causing delays. Moreover, Zamora admitted by implication that he couldn't spot for all the buses when he explained that he spotted for about 80% of the buses because "they don't all come at the same time," and sometimes there would be "two buses at a time" but sometimes "no buses for 30 minutes."⁸³ This information wouldn't be relevant to answering how many buses he spotted for if he really was available to spot for all of them upon request.

I find it more likely that Zamora actually spotted for drivers only when he had nothing else to do. I don't think he was available and willing to spot for the Complainant on December 30, January 5, or in

⁷⁷ Tr. at 75.

⁷⁸ R. Ex.-M at 1.

⁷⁹ Tr. at 76.

⁸⁰ Tr. at 77.

⁸¹ C. Ex.-1 at

⁸² Tr. at 77.

⁸³ Tr. at 77.

February. I find his testimony is unreliable when it comes to what he did or did not ask the Complainant to do.

2. Zamora Doesn't Remember the February 2011 Incident

Zamora testified at trial that he didn't remember ordering the Complainant, in February 2011, to back up his bus between other buses, with or without a spotter.⁸⁴

Garcia, however, testified that she remembered an incident "early in 2011" where she was asked to announce to all bus drivers they should "continue parking their buses in the yard, using a spotter if they had to park in reverse."⁸⁵ More likely than not this was the February incident, because MV had just reached an agreement with the drivers' union on the 3rd to provide spotters for all drivers who had to back up their buses.⁸⁶ Garcia agreed she made the announcement on February 4.⁸⁷ Garcia also testified Zamora was the yard supervisor on duty that day,⁸⁸ as did the Complainant.⁸⁹ I have no reason to doubt the accuracy of this testimony.

At trial, Zamora repeatedly asserted he didn't remember the February incident. At the very least, this shows Zamora has a poor memory for relevant events. At worst, Zamora feigned not remembering the February incident, because he didn't want to testify about what happened. I don't find his testimony reliable or accurate.

3. The Incident Report Zamora Filed on January 6, 2011 and Zamora's Pre-filed Testimony Paints a Different Picture of His Actions Than His Trial Testimony

At trial, Zamora testified that he wouldn't force the Complainant to do anything the Complainant thought was unsafe.⁹⁰ He also testified the Complainant should have said on January 5, 2011 that he felt backing his bus up was unsafe, and that he should have refused to do so.⁹¹

However, in Zamora's pre-filed testimony, he admitted the Complainant objected on safety grounds to backing up his bus, but that

⁸⁴ Tr. at 86–88.

⁸⁵ Garcia Pre-filed Testimony at 1.

⁸⁶ *See* R. Ex.-R at 1.

⁸⁷ *See* Tr. at 62.

⁸⁸ Garcia Pre-filed Testimony at 2.

⁸⁹ Tr. at 25.

⁹⁰ Tr. at 83–84.

⁹¹ Tr. at 84.

he ordered the Complainant to back up the bus again anyway, because Zamora didn't agree it was unsafe.⁹² Furthermore, Zamora's incident report states that he repeatedly ordered the Complainant to back up his bus, despite the Complainant's objections that it was unsafe and that the union said he didn't have to.⁹³

Zamora's incident report also claimed he offered to spot for the Complainant on January 6,⁹⁴ but he didn't mention this in either his pre-filed or his trial testimony. The pre-filed testimony is worded to affirm the incident report offered as an exhibit is the one he wrote and submitted, without actually attesting that what he wrote in it is accurate.⁹⁵ In his pre-filed testimony, he states he was available to spot "upon request," not that he actually offered to spot for the Complainant on January 6.⁹⁶

These inconsistencies reinforce my decision not to rely on Zamora's testimony. If he had offered to spot for the Complainant on January 6, as the incident report states, presumably Zamora would have testified to that effect at trial and in his pre-filed testimony. But he evaded testifying under oath that he had offered to spot for the Complainant or that the incident report truthfully reflected that night's events.

4. Conclusion

I don't find Zamora credible. He either truly doesn't remember the relevant events, or gave multiple versions of what he did. Either way, I discount his evidence unless it is corroborated by other witnesses.

V. Elements of a Complaint under the NTSSA

The National Transit System Security Act, codified at 6 U.S.C. § 1412, prohibits retaliating against employees because they engage in certain protected activities.⁹⁷ Activities protected include "reporting a hazardous safety or security condition"⁹⁸ to "a person with supervisory authority over the employee."⁹⁹ Implementing regulations define

⁹² Zamora Pre-filed Testimony at 3.

⁹³ R. Ex.-M at 1.

⁹⁴ *Id.* at 1.

⁹⁵ *See* Zamora Pre-filed Testimony at 3 ("I completed an Incident Report to document my conversation with Mr. Graves A true and correct copy of the Incident Report I completed related to this incident is attached hereto")

⁹⁶ *Id.* at 2.

⁹⁷ 6 U.S.C. § 1412 (2010).

⁹⁸ 6 U.S.C. § 1412(b)(1)(A).

⁹⁹ 29 C.F.R. § 1982.102(a)(1)(C).

discrimination broadly, to encompass not only self-evident actions like demotion or firing, but also “reprimand[ing], or in any other way discriminat[ing] against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee.”¹⁰⁰ Forbidden discrimination is a remediable adverse action.

The Act’s implementing regulations set out four elements a complainant must prove by a preponderance of the evidence to prevail on a claim of whistleblower retaliation:

- i. The employee engaged in a protected activity;
- ii. The employer knew or suspected that the employee engaged in the protected activity;
- iii. The employee suffered discrimination (an adverse action); and
- iv. The circumstances lead the judge to conclude that the protected activity was a contributing factor in the adverse action.¹⁰¹

The Complainant must demonstrate by a preponderance of evidence that his protected activity was a “contributing factor” to the discrimination.¹⁰² The Complainant can meet this prong of his case by showing temporal proximity between his protected activity and MV’s adverse action.¹⁰³ MV can avoid liability if it “demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant’s protected activity.”¹⁰⁴ Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.”¹⁰⁵ The burden of proof

¹⁰⁰ 29 C.F.R. § 1982.102(a)(2)(i).

¹⁰¹ 29 C. F. R. § 1982.104(e)(2)(i–iv).

¹⁰² The term “contributing factor” often appears in employment discrimination law, but infrequently is defined. Showing retaliation was a “contributing factor” is easier than showing it was the “motivating factor” for discrimination. *See Lopez v. Serbaco*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. 4 n.6 (Nov. 29, 2006) (citing *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5–7 (ARB Sept. 30, 2003); *Vander Meer v. Western Ky. Univ.*, ARB No.97-078, ALJ No. 1995-ERA-38, slip op. at 3 (ARB Apr. 20, 1998); *see also Dierkes v. West Linn-Wilsonville Sch. Dist.*, ARB No. 02-001, ALJ No. 2000-TSC-002, slip op. at 6–7 (ARB June 30, 2003) (distinguishing between “motivating” factor and the lower “contributing” factor burden).

¹⁰³ 29 C.F.R. § 1982.104(e)(3).

¹⁰⁴ 29 C.F.R. § 1982.104(e)(4).

¹⁰⁵ *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004); BLACK’S LAW DICTIONARY at 577.

always remains with the Complainant to prove by a preponderance of the evidence that “the protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint.”¹⁰⁶ The preponderance standard is met when “it is more likely than not that a certain proposition is true.”¹⁰⁷

VI. The Complainant Proved by a Preponderance of the Evidence His Protected Activity Contributed to Discrimination Against Him

A. The Complainant Engaged in Protected Activity

MV doesn’t seriously dispute the Complainant engaged in protected activity on January 14, 2011.¹⁰⁸ It does, however, dispute the Complainant engaged in protected activity on January 4, 2011, because the Complainant’s January 4, 2011 disclosure isn’t part of the trial record.¹⁰⁹ Although it’s true the Complainant—probably inadvertently—neglected to include his January 4, 2011 disclosure in his trial exhibits, he testified to what he disclosed, and I believe that testimony.¹¹⁰ MV doesn’t contest the January 14, 2011 disclosure constitutes a report of a “hazardous safety” condition, so it has no basis to contest the January 4, 2011 disclosure either, now that I have found the Complainant made it. Moreover, each MV trial witness testified that backing up a bus between other parked buses without a spotter is unsafe.¹¹¹ All evidence supports the idea that the Complainant reasonably believed he was reporting an unsafe condition.¹¹² The Complainant engaged in protected activities on both January 4 and January 14, 2011.

¹⁰⁶ 29 C.F.R. § 1982.109(a). A similar burden is imposed for the Assistant Secretary to grant the employee preliminary relief before trial, although in that case, the Complainant need only raise an inference of causation. *See* 29 C.F.R. § 1982.105(a) and (a)(1); *Zinn v. Am. Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 11 (March 28, 2012).

¹⁰⁷ *Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir. 1997).

¹⁰⁸ Respondent’s Posttrial Brief at 7.

¹⁰⁹ *Id.* at 6.

¹¹⁰ As described above in fn. 33–34, the January 4, 2011 disclosure was attached as an exhibit to one of the Complainant’s pretrial motions. I credit the Complainant’s testimony that he faxed the document to Huff, and not the document itself, so its absence in the trial record doesn’t preclude finding the Complainant sent it as he testified.

¹¹¹ Tr. at 34 (Huff), 57 (Garcia), 67 (Zamora).

¹¹² A complainant must subjectively believe he is engaging in protected activity and the belief must also be objectively reasonable. *See, e.g., Van Asdale v. International Game Technology*, 577 F.3d 989, 1000–01 (9th Cir. 2009) (dealing with the elements of an employment retaliation claim under the Sarbanes-Oxley Act, an employee protection law with elements similar to this claim); *Zinn*, slip op. at 7 (dealing also with the elements of a claim under the Sarbanes-Oxley Act).

B. Huff and Zamora Were Aware the Complainant Engaged in Protected Activity

MV suggests in its posttrial brief there is no evidence that Jesus Zamora was ever aware that the Complainant had reported an unsafe condition to management.¹¹³

Zamora testified the Complainant personally told him on January 6 that he was refusing to park his bus because it was unsafe to do so.¹¹⁴ Zamora also testified the Complainant told him he had already reported the situation to his union and “Tracie”¹¹⁵ and been told he didn’t have to do anything.¹¹⁶

Zamora is a yard supervisor, and has authority to order the Complainant to take actions.¹¹⁷ Therefore, even if Zamora never became aware of the Complainant’s January 4 and 14 disclosures—which I don’t believe—the Complainant personally reported to Zamora an unsafe condition, and told Zamora he had spoken to the union about it. Zamora is himself a supervisor, so these disclosures alone would be enough to put him on notice. MV’s contention Zamora was never aware of the Complainant’s objections is without merit; he became aware on January 6, 2011 at the latest.

Huff was also aware of the Complainant’s reports. He faxed her the January 4 disclosure, and gave her a hard copy of it when they met on January 5.¹¹⁸ The Complainant also sent Huff the January 14 disclosure.¹¹⁹

C. The Complainant Suffered Adverse Actions

1. The Safety Points

MV doesn’t dispute the safety points issued to the Complainant were an adverse employment action.¹²⁰ It argues the points were expunged, however.¹²¹ Although MV does not explicitly argue the

¹¹³ Respondent’s Posttrial Brief at 12.

¹¹⁴ Tr. at 82–83.

¹¹⁵ This appeared to mean something to the witnesses, but it isn’t clear from the record who “Tracie” is.

¹¹⁶ Tr. at 83.

¹¹⁷ Tr. at 90.

¹¹⁸ Tr. at 18.

¹¹⁹ C. Ex.-1 at 5.

¹²⁰ MV’s Posttrial Brief at 8.

¹²¹ *Id.*

safety points aren't an "adverse action" because they were voluntarily revoked, it implies it.¹²²

The facts relating to the safety points are similar to the situation in *Burlington Northern & Santa Fe RR. Co. v. White*.¹²³ In *Burlington*, a female forklift operator was suspended from work for 37 days without pay for reporting sexual harassment, but she was ultimately reinstated with back pay to resolve a union grievance.¹²⁴ The Supreme Court affirmed that the suspension was actionable under the anti-retaliation provision in § 704 of Title VII, even though White had later been reinstated, because a contrary holding would undermine the intent of Congress to provide meaningful relief for retaliation victims.¹²⁵

MV's decision to expunge the safety points from the Complainant's record bears on what relief to order should I determine MV retaliated against the Complainant, but it doesn't negate the adverse action itself.

2. Harassment by Zamora

The Complainant alleges he was harassed by Jesus Zamora on two occasions, on January 6, 2011 and in early February, 2011, when Zamora ordered him to back up his bus without a spotter, despite the Complainant's repeated objections that doing so was unsafe. MV argues nothing Zamora is alleged to have done rises to the level of actionable harassment under the Act. I conclude the Complainant was harassed.

The Act states a covered employer shall not "discharge, demote, suspend, reprimand, or in any other way discriminate against" an employee for prohibited reasons.¹²⁶ The implementing regulations for the Act clarify that forbidden discrimination includes "reprimand[ing], or in any other way discriminat[ing] against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee."¹²⁷

I have found that Zamora repeatedly ordered the Complainant to back up his bus between other buses, when Zamora knew the

¹²² *See id.*

¹²³ *Burlington Northern & Santa Fe RR. Co. v. White*, 548 U.S. 53 (2006).

¹²⁴ *Burlington*, 548 U.S. at 58–59.

¹²⁵ *Burlington*, 548 U.S. at 72–73. Although Title VII's anti-retaliation provisions are not identical to those in the NTSSA, Title VII jurisprudence is often relied upon in interpreting anti-retaliation provisions of other statutes in the absence of contrary statutory language or regulations.

¹²⁶ 6 U.S.C. § 1412(a).

¹²⁷ 29 C.F.R. § 1982.102(a)(2)(i).

Complainant had objected to the practice as unsafe. The Complainant had been issued 4 safety points for the December 30, 2011 collision, on the theory that the Complainant shouldn't have engaged in any behavior he thought was unsafe and therefore the accident was "preventable." Under the points system MV used, any further preventable backing accidents would have resulted in the Complainant losing his job.¹²⁸

Furthermore, Zamora knew the Complainant's failure to follow orders could be "insubordination" and potentially result in the Complainant's termination. By repeatedly ordering the Complainant to do something he knew the Complainant thought was unsafe, Zamora put the Complainant in a catch-22 position, where no matter what the Complainant did, he was in jeopardy of being fired. If he followed Zamora's orders, and had another accident due to his blind spot, he would be terminated for accruing too many safety points; if he didn't follow Zamora's orders, he could be terminated for insubordination. When the Complainant refused to back up his bus on January 6, Zamora made an incident report about the Complainant's failure to obey his orders. Although the report wasn't acted on, it could have been had cooler heads not prevailed.

These actions are enough to constitute discrimination under the Act, assuming for the moment a causal relationship between the actions and the Complainant's protected activity. Zamora himself testified at trial that bus drivers shouldn't do anything they thought was unsafe—so did Huff. Zamora's repeated orders placed the Complainant in a situation where no matter what course of action he chose, he was risking his job. This fits the implementing regulation's description of intimidation, coercion or threatening behavior. The January 6 incident report could also be described as a reprimand of the sort prohibited by the Act.

MV contends that Zamora's actions don't violate the Act because they were not continuous and pervasive enough to constitute a hostile workplace claim.¹²⁹ The Complainant didn't make a hostile workplace claim; he claimed discrimination under the plain language of the regulations, which prohibit intimidation, coercion or threats.¹³⁰ MV's brief doesn't address these regulations.

Additionally, the Respondent's brief cites to an outdated Administrative Review Board decision that held adverse activity must have "tangible job consequences" to be actionable as a discrete act as

¹²⁸ See R. Ex.-A at 41–42.

¹²⁹ Respondent's Posttrial Brief at 9.

¹³⁰ 29 C.F.R. § 1982.102(a)(2)(i).

opposed to a hostile workplace claim.¹³¹ The ARB now rejects this approach, recognizing that the implementing regulations of each whistleblower statute provide “clear mandate[s]” that obviate the need to rely on that standard.¹³² The ARB’s current position is that the implementing regulations prohibit unfavorable employment actions “that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.”¹³³

Zamora’s repeated orders to the Complainant left the Complainant in a position where his job was at risk for whatever he did. Those orders weren’t trivial, and satisfy the threshold for an adverse employment action under the Act’s regulations.

3. The Twenty Minute “Re-training” on January 5, 2011

The Complainant originally asserted the “re-training” he had to undergo on January 5, 2011 was also retaliatory. I don’t find this argument has any merit – a single, 15–20 minute training, which had no adverse effect on the Complainant’s employment in any way, is the sort of “trivial” unfavorable employment action the ARB finds does not violate the Act.¹³⁴

D. The Complainant’s Protected Activities Were a Contributing Factor in Jesus Zamora’s Retaliation Against Him, but Did Not Contribute to Huff’s Decision to Issue Him Safety Points

Circumstantial evidence can prove that an employer retaliated against a whistleblower. For example, taking an adverse action on the heels of an employee’s protected activity can be seen as evidence of intentional retribution. Although it isn’t dispositive,¹³⁵ timing in itself can be enough for an adjudicator to find a causal relationship between

¹³¹ Respondent’s Posttrial Brief at 9.

¹³² *Brian Williams v. American Airlines, Inc.*, ARB Case No. 08-019, ALJ Case No. 2007-AIR-004, slip op. at 7 (December 29, 2010). *Williams* is an AIR21 case, but the implementing regulations employ very similar language to the implementing regulations of the NTSSA. *See* 29 C.F.R. § 1979.102(b), § 1982.102(a)(2)(i).

¹³³ *See., e.g., id.* at 8.

¹³⁴ *See Williams*, slip op. at 7; *see also Burlington*, 548 U.S. at 68 (noting a supervisor’s refusal to invite an employee to lunch is the sort of trivial act of spite not normally actionable absent unusual circumstances).

¹³⁵ *Barker v. Ameristar Airlines, Inc.*, ALJ No. 2004-AIR-00012, ARB No. 05-058, slip op. at 7 (ARB Dec. 31, 2007); *see also Keener v. Duke Energy Corp.*, ALJ No. 2003-ERA-00012, ARB No. 04-091, slip op. at 11 (ARB July 31, 2006) (finding the inference of causation less likely where an intervening event itself could have lead to the adverse employment action).

a complainant's protected activity and an employer's adverse employment action.¹³⁶

1. Weighing the Evidence as a Whole, the Complainant's January 4, 2011 Protected Activity Didn't Contribute to Huff's Decision to Issue Him 4 Safety Points

Huff levied 4 safety points against the Complainant just one day after he submitted his first protected disclosure to her. This close temporal proximity initially suggests that the points were in some measure causally related to his protected disclosures.

However, the Complainant doesn't contest Huff's authority to levy safety points against drivers involved in preventable accidents. The Complainant's accident occurred because he backed into another bus he couldn't see while he was backing. Huff's determination this accident was preventable was reasonable, and this conclusion is reinforced by decision of the Accident Review Committee to uphold the points.¹³⁷

Little evidence indicates Huff did anything out of the ordinary by combining the points violations for a "backing incident" and a "minor preventable incident." I am not persuaded she assessed the 4 points, even in part, because the Complainant said that backing without a spotter was unsafe, as I discuss below. One can question the common sense of her literal implementation of the point system—which effectively punishes a minor backing accident like this one with severity equal to a "major" incident that seriously endangers passengers, as long as it don't involve backing.¹³⁸ But because the points weren't assessed as retribution for raising a safety issue, the rest is a matter for the union and MV to negotiate.

The Complainant appears to rely heavily on the temporal proximity between his first protected activity and the safety points Huff imposed. This evidence is not particularly compelling, for the following reasons.

First, the Complainant was scheduled to meet with Huff on January 5, 2011 before he submitted his January 4, 2011 protected

¹³⁶ See, e.g., *Vieques Air Link, Inc. v. U.S. Dep't of Labor*, No. 05-01278, 2006 WL 247886 (1st Cir. Feb. 2, 2006) (per curiam), *aff'g Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-00010 (holding the ALJ permissibly found that the temporal proximity between the complainant's protected reports and his suspension supported a finding that the protected activity contributed the air carrier's adverse employment action).

¹³⁷ See R. Ex.-P at 1–6.

¹³⁸ According to the employee handbook, any "major incident" resulting in less than \$25,000 of property damage and no serious injuries or deaths is punishable by 4 safety points. See R. Rex.-1 at 46.

disclosure.¹³⁹ The Complainant's disclosure therefore couldn't have prompted Huff to *initiate* any disciplinary procedures; she had already begun the process. In the usual state of affairs, close temporal proximity between a protected disclosure and an adverse employment action raises the possibility of causation because the disclosure might have prompted the adverse action; here, disciplinary proceedings were already in the works before the Complainant ever made a safety objection.

Second, the Complainant faxed his first protected disclosure to Huff only the day before their meeting. Moreover, the time stamp on the fax the Complainant submitted as an attachment to a pre-trial objection shows the Complainant sent the fax at 2:39 AM.¹⁴⁰ They met at 8:00am the following day,¹⁴¹ and the Complainant gave her a hard copy of his objection at that time.¹⁴² There is no testimony in the record Huff had read the Complainant's objection before she issued him the 4 safety points, and I don't think she did. No testimony suggests Jesus Zamora (or anyone else) knew what the Complainant had disclosed before the safety points were issued. Having had at best a brief time to glance at the Complainant's disclosure, I doubt Huff would have given it any thought before she issued the safety points in her ordinary manner. In the circumstances, I don't think the Complainant's disclosure had any effect on Huff's decision.

2. Weighing the Evidence as a Whole, I Find it More Likely than Not the Complainant's Protected Activities Contributed to Zamora's Actions

Zamora harassed the Complainant on two occasions, first on January 6, 2011 and then again early in February, 2011. Zamora knew on both occasions the Complainant thought backing his bus up between other buses without a spotter was unsafe, but ordered him to do so anyway.

The January 6, 2011 incident immediately followed the Complainant's first disclosure to management and the 4 safety points he was issued for engaging in an unsafe act, at a time Zamora himself was on duty and supervising the Complainant. Thus, Zamora's harassment was not just close in time to the Complainant's disclosure.

¹³⁹ Tr. at 18.

¹⁴⁰ See Complainant's Rebuttal to Respondent's 10-25-2011 "prefiled testimony", Ex. 1 at 3. The faxed disclosure itself isn't part of the record, as described above. Having submitted it himself as an attachment to a previous motion, however, no party is prejudiced if I refer to it.

¹⁴¹ Complainant's Rebuttal at 1.

¹⁴² Tr. at 18.

Zamora also was potentially embarrassed by the Complainant's disclosures that Zamora hadn't served as a spotter when Zamora should have.

The February 2011 incident immediately followed the grievance settlement that required spotting for any backing between other buses. This settlement required Zamora to spot for most buses entering the yard, increasing his job duties, and implicitly rejected Zamora's casual attitude that he would only spot when specifically requested to do so.

MV doesn't explain why Jesus Zamora ordered the Complainant to back up his bus between other buses, not once but twice, even after the Complainant objected it was unsafe. All witnesses on the issue testified that backing between parked buses without a spotter was unsafe, including Zamora. Zamora's orders came after the initiation of the union grievance process, and the February incident came after management resolved the grievance with an agreement that MV would provide spotters to assist drivers in backing up their buses. The February incident may have been prompted by Yesena Garcia's radio announcement that bus drivers were to back up their buses using spotters, but that doesn't explain why Zamora would persist in ordering the Complainant to back up his bus, without serving as a spotter, after the Complainant objected and said he thought he didn't have to back up the bus at all based on the resolution of his grievance.

I find no legitimate reason for Zamora's actions, especially in February. At trial, Zamora himself asked rhetorically: "Why would I ask [the Complainant to back up his bus] again, if it wasn't safe?"¹⁴³ Indeed.

There were no legitimate reasons for Zamora to repeatedly order the Complainant to back up his bus between other buses without a spotter, after the Complainant had objected. It is theoretically possible, of course, that Zamora might have tried to put the Complainant in a problematic situation for some other illegitimate but not retaliatory reason. I find this unlikely, however.

Testimony at trial showed the Complainant's objections highlighted that Zamora was not actually available or willing to spot for bus drivers when he should have been. Zamora had to fill out an incident report on January 6. Zamora never testified to the accuracy of the contents of this report while under oath, and his trial testimony revealed he wasn't as conscientious about asking to spot for the Complainant as his incident report seemed to indicate. I find it likely

¹⁴³ Tr. at 84. Of course, Zamora denies any memory of the February incident at all. However, as described above, I find he did order the Complainant to back up his bus between other buses again in early February. As Zamora himself admits, there was no plausible legitimate reason for him to do so.

Zamora's animosity towards the Complainant partially was motivated by the Complainant's protected disclosures, which embarrassed Zamora and showed he wasn't doing his job correctly.

Accordingly, I find the Complainant's protected activities were a contributing factor to Zamora's actions against him.

VII. MV Has Not Shown by Clear and Convincing Evidence It Would Have Taken the Same Action Even Absent the Complainant's Protected Activity

When a protected activity plays even a small role in adverse action against a complainant, the Act requires an employer to prove by clear and convincing evidence it would have taken the same action absent any protected activity in order to avoid liability.¹⁴⁴

In this case, MV offers no such evidence. Instead, it relies on disputing the Complainant's version of events, and denying Zamora's behavior was retaliatory at all.

MV hasn't met its burden to produce clear and convincing evidence Zamora would have behaved towards the Complainant in the same way even if the Complainant hadn't engaged in protected activity. MV is liable under the Act for Zamora's retaliation.

VIII. Damages and Equitable Relief

Having determined the Complainant was retaliated against under the Act, I now turn to what damages and/or equitable relief he is due.

A. Damages

1. Compensatory Damages

The Act authorizes compensatory damages to degree required to "make the employee whole."¹⁴⁵ Here, the Complainant asks for the following compensatory damages: (1) two days back pay for time he took off work after the February incident with Zamora in order to contact his union, and (2) "litigation costs totaling approximately \$300."¹⁴⁶

a. Back Pay for Time Off

The Complainant didn't submit any evidence at trial he was required to take two days off following Jesus Zamora's second episode of harassment in early February 2011. He says he took the days off to

¹⁴⁴ 29 C.F.R. § 1982.104(e)(4).

¹⁴⁵ 6 U.S.C. § 1142(d)(1), (d)(2)(B)–(C); 29 C.F.R. § 1982.109(d)(1).

¹⁴⁶ Tr. at 26; Complainant's Posttrial Brief at 4; Complainant's Narrative Statement of the Case at 3 (August 27, 2011).

“touch bases” with his union.¹⁴⁷ He decided to take the time off.¹⁴⁸ He didn’t explain why not or how MV compelled him to take this time off. In these circumstances, I find the Complainant voluntarily took two days off work, and MV doesn’t owe compensation for that time.

b. Litigation Costs

The Complainant never presented any evidence about his actual litigation costs. Without such evidence, I can’t grant him costs, especially when his last (unsupported) estimate of such costs is from August 27, 2011, well before the actual trial.¹⁴⁹

2. Punitive Damages

The Complainant also requests “punitive damages in the amount of \$250,000.”¹⁵⁰ Relief under the Act “may” include punitive damages up to \$250,000.¹⁵¹ At trial, the Complainant never actually asked for nor proved entitlement to a specific dollar amount, despite prompting to address the issue.¹⁵²

Punitive damages are appropriate where “there has been ‘reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law’”¹⁵³ Reviewing the facts, the harassment by Jesus Zamora did not amount to reckless or callous disregard for the Complainant’s rights, or intentional violations of federal law.¹⁵⁴ Punitive damages are not warranted.

B. Equitable Relief

In addition to monetary damages, the Act authorizes “all relief necessary to make the employee whole.”¹⁵⁵ The implementing regulations make clear this encompasses equitable relief to “abate the violation.”¹⁵⁶

The Complainant had no compensatory damages, but he was nevertheless retaliated against and he and other employees have an interest in knowing that retaliation by their employer can be

¹⁴⁷ Tr. at 26.

¹⁴⁸ Tr. at 26.

¹⁴⁹ See Complainant’s Narrative Statement of the Case at 3 (August 27, 2011).

¹⁵⁰ *Id.* at 3.

¹⁵¹ 6 U.S.C. § 1142(d)(3).

¹⁵² See Tr. at 27–28.

¹⁵³ *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-47, slip op. at 8 (August 31, 2011) (quoting *Smith v. Wade*, 461 U.S. 30, 51 (1983)).

¹⁵⁴ *Smith*, 461 U.S. at 51.

¹⁵⁵ 6 U.S.C. § 1142(d)(1).

¹⁵⁶ 29 C.F.R. § 1982.109(d)(1).

addressed through the legal process. The overarching principle that others at the work site should know that whistleblower claims can be effective relief can be partially honored by requiring MV to prominently post copies of this decision at every location where it posts other notices to employees related to employment law (*e.g.*, wage and hour, civil rights in employment, age discrimination). MV must take all reasonable steps to ensure that no copy of the decision is altered or defaced during the 60 days the decision is posted.¹⁵⁷

IX. Conclusion

The Complainant proved he was retaliated against by Jesus Zamora, his supervisor, for reporting it was unsafe to back up his bus between other buses without a spotter. He proved no damages, however, and is therefore entitled only to have this decision prominently posted by MV, so other employees can see that whistleblower retaliation is impermissible and can be addressed through the legal process.

Order

MV must prominently post copies of this decision at every location where it posts other notices to employees related to employment law (*e.g.*, wage and hour, civil rights in employment, age discrimination). MV must take all reasonable steps to ensure that no copy of the decision is altered or defaced during the 60 days the decision is posted.

So Ordered.

A

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

¹⁵⁷ Ordering a decision be posted prominently mirrors a common practice of the Secretary when she finds an employer has violated a whistleblower protection statute. *See* Sample Secretary's Findings and Order or Preliminary Order (Merit), Whistleblower's Investigation Manual at 5-21, (*available at* http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf).

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 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. § 1982.110(a).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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