

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 31 May 2013**

CASE NO: 2011-STA-00055

In the Matter of:

GEORGE B. BLACKIE, JR.,  
Complainant,

v.

D. PIERCE TRANSPORTATION, INC.,  
DAVE PIERCE, SR., DAVE PIERCE, JR.,  
SHAWN PIERCE, ERIC WEYANDT, et al.,  
Respondents.

APPEARANCES:

*Pro se*

For the Complainant

Timothy G. Wojton, Esq.

For the Respondent

**DECISION AND ORDER**

This matter arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. §31105, *et seq.* and the implementing regulations promulgated at 29 C.F.R. Part 1978.100. George B. Blackie, Jr. (“Complainant”), a truck driver formerly employed by D. Pierce Transportation, Inc. (“Respondent”), now alleges that he was the target of retaliation in violation of the STAA when he was laid off by Respondent, allegedly for engaging in safety-related activities protected by the STAA.

**PROCEDURAL BACKGROUND**

Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”) of the Department of Labor (“DOL”) on March 4, 2011, alleging that Respondent violated the STAA by terminating him in retaliation for the many safety reports he had made.

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The “Secretary’s Findings” were issued on September 14, 2011. OSHA determined that there was not reasonable cause to believe Respondent violated the STAA.

By letter dated September 21, 2011, Complainant filed his objections to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

The parties engaged in discovery, running into a number of disputes, and a telephonic conference was held and transcribed on July 23, 2012 to hear argument on the numerous issues that had arisen surrounding Complainant's motions to compel and the interrogatories that had been exchanged. These issues were ultimately resolved in a September 12, 2012 order by the undersigned Administrative Law Judge (ALJ).

A *de novo* hearing was held in Pittsburgh, PA on January 7 and 8, 2013. The following exhibits were received into evidence: ALJX 1; CX 1-4, 6, 12-20, 22-23, 25-27, 30, 33-40; and RX A, B1, B2, and C through L.<sup>1</sup> (Tr. 8, 10-15, 17-32, 35, 38-41, 46-49, 54-55, 378, 391, 433-447). Post-hearing briefs were received from Respondent on February 8, 2013, and from Complainant on February 11, 2013.

### **FACTUAL BACKGROUND**

#### *Before Employment with Respondent*

In 2008, Complainant was terminated from a previous trucking job with Smith Transport. He soon filed a complaint with OSHA over this termination. He claims that he discussed the termination with his neighbor, Erick Weyandt, and that he gave Weyandt a copy of the STAA protections at that time. Weyandt testified that he never read it, and that he did not know about Complainant's action against Smith until late May, 2010. (Tr. 148-151). Complainant claims that Weyandt asked David Pierce, Sr., owner of Respondent, about the possibility of a job for Complainant at that time. Weyandt did not testify to this, and Pierce could not recall any such conversation. (Tr. 350-351). The parties are similarly in disagreement over whether Weyandt made such a request in January or February of 2010, leading to a phone interview. (Tr. 351).

In May of 2010, Weyandt heard from his wife, who was friends with Complainant's wife, that Complainant was still having trouble finding a job. He asked Complainant if he would be interested in running a flatbed hauling steel, even though he had only ever hauled freight in a van; ostensibly, Complainant said yes, because Weyandt then spoke to Pierce about hiring Complainant. Weyandt told Pierce that he would help Complainant learn the basics of steel hauling as much as he could. (Tr. 148, 291-292). Pierce, who was looking for a new driver at the time, was hesitant because of Complainant's lack of experience hauling steel, but because of Weyandt's offer to help train Complainant, Pierce agreed to have Complainant come in for an interview. (Tr. 291-292). At this time, Weyandt still had no knowledge of Complainant's action against Smith, and was, he said, "just trying to be neighborly." (Tr. 148-150).

At Complainant's interview, Complainant asked Pierce if "running legal would be a problem." Pierce responded that "running legal," which is a term common in the transportation industry and which means "running according to federal and state law," would be fine, and

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<sup>1</sup> References to the record are as follows: Trial Transcript, Tr. \_\_; ALJ Exhibit, AX \_\_; Complainant's Exhibit, CX \_\_; and Respondent's Exhibit, RX \_\_. Additionally, references to the closing briefs are as follows: Complainant's Post-Hearing Brief, CB at \_\_, and Respondent's Post-Hearing Brief, RB at \_\_.

indeed, expected. (Tr. 252-253, 294). Pierce testified that during this interview, Complainant asked whether Pierce was familiar with the CS-2010 book, a book of regulations affecting chaining and securement which he had with him at the interview. Pierce responded that he was, though a lot of it had yet to go into effect, and that he was working on updating chaining and other safety violations. (Tr. 292-294). Pierce testified that at this time, he knew nobody personally or professionally from Smith Transportation, and that he did not hire Complainant with the intention of influencing his case against Smith. (Tr. 294-295). He testified that Complainant mentioned during the interview that Complainant had “a situation with” Smith, though he did not go into detail, and that he might have to miss work to deal with it. He also “showed [Pierce] some pictures and the reason behind everything.” (Tr. 295, 354). Pierce testified that he was not concerned about this, because it “wasn’t [his] business,” and moreover, “it seemed like [Complainant] had everything under control.” (Tr. 295, 354).

### *Training with Weyandt*

The first day Complainant drove for Respondent was May 13, 2010, when he picked up a truck known as the PG 470 and drove it to Export, PA that evening so it could be taken to the shop the next morning. (Tr. 233). The next day, Pierce told Complainant to follow Weyandt for training purposes, because of his lack of steel hauling experience, and told Weyandt “to make sure [Complainant] was tying his stuff down properly and wasn’t going to have an issue on the highway.” (Tr. 63, 135). Weyandt said that he did indeed help Complainant and teach him how to secure and chain loads. (Tr. 135). Shortly thereafter, Complainant told Weyandt about his case against Smith, which was still pending at the time. (Tr. 149). Weyandt testified that he told Complainant that that case was “like kicking a dead horse,” because “it was going nowhere.” According to Weyandt, this was “just conversation,” and he certainly, he said, never told Complainant to drop the case on pain of some sort of punishment. (Tr. 147, 149-150). Complainant said only that Weyandt told him during those first two weeks with Respondent that he ought to drop the case against Smith. (Tr. 65).

Over the course of the time Complainant was following Weyandt for training purposes, he claims, he observed Weyandt violating many safety rules and regulations. Complainant reported these violations to Pierce, as well as to other members of management at Respondent and to Mary Ann Sarver, who was responsible for Respondent’s books and paperwork. (Tr. 286, 307-310, 312). Broadly, he said that Weyandt exceeded the speed limit, violated rules pertaining to hours of service, refused to stop to perform load checks along the way, and did not give Complainant time to complete his driving logs before they left for their runs. (Tr. 64-66, 232-236, 257-262).

Weyandt denied the speeding Complainant alleged: he agreed that there might have been times when he left a shipper or receiver before Complainant, but that this had more to do with the longer time Complainant took, being new to steel hauling, to tie down his load, and according to Pierce’s testimony, Weyandt told him at one point that Weyandt occasionally reached and passed traffic lights while they were still green, while Complainant would not arrive at the light until it had turned red, and so Complainant would have to wait and catch up later. (Tr. 139, 308). Pierce recalled Complainant saying he could not keep up with Weyandt, but he could not recall whether Weyandt had any speeding violations on his record. (Tr. 307-308, 363).

Regarding the hours of service violations, Pierce noted that Weyandt's logs had never showed a problem with hours of service violations, and Weyandt said that he never violated hours of service or suggested or compelled that Complainant do so. (Tr. 133, 153-154, 376). Weyandt admitted that he sometimes took four hours, rather than eight and two, or all ten together, as his break, but he said that he knew this to be acceptable, because a DOT representative had allegedly gone through his log book recently without having a problem with that break length. (Tr. 153-154). Complainant himself admitted that his own logs did not show any such violations, but he explained that he had "fudged" the numbers, because "you can't show you're violating your hours of service and be running down the road in a commercial truck," because if "you get pulled over or DOT'd, you're going to get violated." (Tr. 237).

Weyandt also denied that he ever suggested or compelled that Complainant skip load checks. (Tr. 133). He averred that he secured and checked his own load, and noted that he would typically check his load when he stopped to fill up his gas tank. (Tr. 134). He said he could not think of any reason why Complainant might think he did not secure or check his own load, except perhaps the times when he would leave a shipper or receiver before Complainant. (Tr. 136, 139). Pierce recalled this complaint from Complainant, and admitted that he had no personal knowledge of whether Weyandt conducted load checks, but said that he would assume, based on Weyandt's "years of experience," that he "knows what's involved," including the risk of potential injury to the driver if the load is not secured, and that he would therefore indeed conduct load checks. In addition, he said, there has never been an incident of loose cargo with Weyandt involved. (Tr. 308-310, 312, 363). (Complainant claimed, on the contrary, that Weyandt used to "brag about...losing things and things rolling around on the trailer deck on a regular basis.") (Tr. 261). Complainant said that he knew from being Weyandt's neighbor that he "never checks loads," though he agreed that it was possible that Weyandt had checked his own load quickly and without Complainant noticing while the two fueled up at the same station during the training period, given that Complainant took extra time doing load checks to be cautious, and that there were dividers between each truck at the gas station. (Tr. 259-262).

On the subject of the driving logs, Complainant said that even though he didn't have time to do his logs, he would do his best to start, "but if [Weyandt] took off, I had to follow him," so he would fill them out in the next place they stopped, in violation of a rule that they were supposed to be filled out before leaving. (Tr. 257-259). Weyandt said that he never meant to prevent Complainant from completing his driving logs before a trip: when he asked Complainant whether he was ready to go, Complainant, from the other truck, would say "yeah," without ever requesting more time to start or complete his logs. He said that it was Complainant's responsibility to start his logs and tell Weyandt when he was ready to go. (Tr. 133). Similarly, Complainant said that "the whole time [he] was following Weyandt," he was "forbidden" from performing a pre-trip inspection, in that Weyandt's way of conducting a pre-trip inspection was insufficient to truly constitute one. (Tr. 232). However, he then admitted that all of his logs during his first two weeks included a pre-trip, because "every time we stopped, I did a pre-trip or en route trip inspection on my own," even though Weyandt was "already flipping out and wanting to leave without me and stuff." (Tr. 233-236). Weyandt argued that "everybody does their pre-trips different. It doesn't state you have to open the hood. It states you have to do a complete walk-around visual." (Tr. 130). He said that "even when you take your CDL test, they

don't require you to open the hood. They require you to do a visual check of the unit...which doesn't require opening anything." (Tr. 154).

Complainant alleges that he was compelled to commit these violations to keep up with Weyandt due to the fact that he was not given directions from one place to another. (Tr. 64-66, 232-236, 257-262). Complainant said that, to the extent possible, he attempted to print his own directions from Mapquest and similar websites, based on the addresses provided on the bills of lading, but he noted that the bills of lading sometimes list the address of the shipper's or receiver's headquarters, rather than the relevant pick-up or drop-off location. (Tr. 244-246). He said that he called Weyandt, Pierce and his sons, and Sarver repeatedly asking for his own directions, contrary to Weyandt's testimony that he had never called him. (Tr. 246). Pierce testified that the way drivers typically get directions is by speaking with David Pierce, Jr., who is more computer savvy than Pierce and who prints, or else reads over the phone, directions from the office's records. (Tr. 286-288, 289-290). Pierce said that he typically hears Pierce, Jr. ask new drivers if they want directions, or else drivers will ask Pierce, Jr. to leave directions out for them if they are loading in the evening; he said that he "would assume" Pierce, Jr. complies with these requests, though he has occasionally heard a driver complain, "you didn't leave my directions out" or similar. (Tr. 288-289). Pierce also said that occasionally, when they receive phone calls requesting directions, the office staff has the driver call another driver who is more familiar with the area: every driver, he said, is provided with a list of the phone numbers of all of the drivers in the company. (Tr. 289-290). He said that he could not say for sure whether Complainant had such a list, as Sarver was in charge of developing and distributing them, but that he "assumed" Complainant did. (Tr. 352-353). Finally, Pierce said that though he was not the person to ask about directions at the company, he would never deny a driver an address or directions, and he never denied Complainant such a request. (Tr. 312-313). He may well have, he said, told Complainant to just follow Weyandt. (Tr. 313-314).

Complainant said that he was still employed after all this and suffered no pay cut in response to these complaints. (Tr. 262-263). Weyandt said that the authority to fire Complainant or reduce his pay rested solely with the owners; Weyandt himself had no authority. (Tr. 140). He said that he did not even call Complainant to suggest that he stop complaining, and he did not remember ever receiving a call from Pierce about the conflicts arising between Weyandt and Complainant. (Tr. 145-146). For Pierce's part, he said that his typical response to Complainant's reports during this time period was to call Weyandt and ask whether it was true, out of a desire to "try to get both sides of the story." (Tr. 308, 312). He said that he did not reduce Complainant's pay, fire him, threaten to do either, or tell Complainant to stop complaining or that he "didn't want to hear it" in response to these reports. (Tr. 310, 312-313).

### *After Training*

Shortly thereafter, Complainant began retaining sign-in and sign-out sheets from the shippers and receivers, as well as toll and fuel receipts. (Tr. 70, 114; CX 27; CX 29). He claims that Pierce and Weyandt knew that he was retaining these documents, and that this knowledge discouraged them from trying to get him to violate hours of service. (Tr. 70, 114). There is, however, no evidence in the record that they knew of this document retention, or that they had ever encouraged him to violate hours of service in the first place.

There were several incidents described in the record which did not correspond to specific dates. First, Complainant said, and Pierce seemed to corroborate, that Complainant confronted Pierce at one point to discuss Respondent driver Robert Snare using a cross-chain pattern and getting cited for it. Pierce and Snare both ultimately had to pay fines for this incident, and Pierce testified that he had spoken with Snare about why this conduct was wrong and illegal. (Tr. 323-324). Pierce testified that he did not impose any adverse employment action on Complainant as a result of Complainant's discussing the Snare incident with him. (Tr. 325-326). However, Pierce also said he could not remember exactly how Complainant was involved in talking to him about Snare's misconduct, and later testified that he did not remember ever discussing that situation with Complainant. (Tr. 325-326, 372).

Complainant also noted that Respondent's safety manuals were out of date: all of the copies of the Federal Motor Carrier Safety Regulations Pocketbook which Pierce distributed to his employees during Complainant's 2010 tenure with Respondent, he said, were 2006 editions. (Tr. 324-325). Pierce said that he did not know if this was true, but that he would believe Complainant's word on this question. He admitted to fault in not checking the date, but said that "somewhere along the line, someone brought it to my attention again...so I threw all those away and put the new ones in." (Tr. 324-325).

According to Complainant, sometime before mid-October 2010, he was with Matthew Allison, another Pierce driver, while their trucks were being loaded, and Allison told him Allison was in a competition with another driver to see who could deliver the most loads in a pay period. When another driver raised a concern about this, Allison allegedly replied that he would not get in trouble unless someone looked at his logs – to which Complainant replied that if Allison had an accident and someone got hurt, his motions were going to be backtracked, and if they didn't match the logs perfectly, he'd be in serious, possibly criminal, trouble. (Tr. 84-87). When asked at the hearing whether he would have had anything to do with the setup of such a contest, Pierce vehemently denied it. (Tr. 303).

Complainant also testified that roughly five times during his tenure at Respondent, while driving from AK Steel in Butler, PA to a drop-off location in New Jersey, he had no choice but to violate hours of service, because it would have been impossible for him to reach the "pull-off spot right outside of Harrisburg to where [he] could take [his] 10-hour break," as there was no other place along 322 East to pull off a big truck, so he was always 15-45 minutes late. (Tr. 72, 114-119). Allegedly, he told Pierce about this and argued with him about Pierce's purported insistence that the load arrive first thing in the morning. (Tr. 116, 267-268, 277-279). However, Complainant admitted that he never logged these violations because a driver must keep seven days of logs on him at all times, and "if you put on something that looks like a violation, it's going to raise a red flag, and they are going to pull you in, and they're going to want to look at everything." (Tr. 279-280). Complainant also agreed that if a driver could make it to his destination in the time remaining in his hours of service, but then gets caught in traffic due to, for example, an accident, which would put him over his hours of service (though "not excessively"), "you can legally drive far enough to get that truck safely off the road and out of the way of other people." (Tr. 278-279). Weyandt contradicted Complainant's testimony about the AK Steel run, which he said he had traveled frequently, arguing that it was entirely possible to make that run within 12 hours, and there was a Milroy truck stop ten miles east of the pull-off where a driver

could stop to avoid violating hours of service. (Tr. 125-137, 142). Weyandt said that there was never any pressure to violate hours of service. Neither Pierce nor his sons ever suggested that he cheat on his logs or run over hours, and they had never suggested that he had to reach his destination by the end of the day. (Tr. 142).

Finally, there was testimony that, throughout Complainant's employment, he experienced difficulty backing his trucks up, both at S&R Garage and at AK Steel. (Tr. 143-145, Tr. 151-153, 179-181).

*Requests to See Safety Director, Maintenance of Trucks, and Pierce Interview with Dave Thompson, May-September, 2010*

On May 27, 2010, Complainant brought the PG 470 to S&R Repair, Sam Ray's garage, for maintenance and repairs, including repair of an engine oil leak. This was the first time he used PG 482, which was his "loaner" truck, i.e., the truck that he would borrow to complete his run if the PG 470 had to go into the shop while under a load. (Tr. 171, 209, 212-213). At this time, he said, the PG 482 was not a new truck. He said that it was missing a tire, it looked worn out, and "the interior of the dash was completely ripped out," although "the body wasn't in bad shape." (Tr. 228-229). The next day, May 28, Complainant took the PG 482 back to S&R Repair and picked up the PG 470. (Tr. 214). He mistakenly marked down the 482 as having had its leak fixed, whereas what he really meant was that the 470 had had its leak fixed. (Tr. 214-216; RX C). On June 21, 2010, there was yet another problem with the engine of the PG 470, and he took it to be fixed at S&R Repair, where he again picked up the PG 482. (Tr. 217). There was some evidence that Complainant perceived air leaks in the 482 on that day (Tr. 239; RX E), but he failed to mark it on his log because "you don't want to mark stuff down and then be out on the road with the same truck." (Tr. 218). The following day, Complainant brought the 482 back to S&R Repair and picked up the 470, the engine of which had been fixed. At this time, Complainant marked down that the 482 was having trouble with its tires, wheels, rims, and horns. (Tr. 218).

Shortly thereafter, on June 28, 2010, the PG 470 had trouble with its cooling system, and Complainant brought it back to S&R Repair and picked up the PG 482 as a loaner. (Tr. 219-220). The next day, June 29, Complainant reported to Pierce air leaks in the PG 482, which he said he had noticed before, but had now worsened to the point that the red air warning light had turned on. (Tr. 100-101, 212-213). Complainant happened to be near the office at the time, and so Pierce asked him to open up the hood so Pierce could hear the leak, then he told Complainant to bring it to Weaver's Garage in Export, PA to be fixed well enough to bring back to S&R Repair in Milesburg. (Tr. 101-102, 174, 240). Complainant did so, and once he got it back to Milesburg, he told Ray that he would not drive the 482 again until he knew it was fixed. (Tr. 122, 273, 275-276). Complainant got the PG 470 back from Ray, with its cooling system now fixed, and drove it away. (Tr. 220-221).

Ray testified that on June 29, the air dryer of the PG 482 was hanging on an angle, and that it was leaking out the bottom of the purge valve. He said that the only problem was that the bracket had broken, and so they put a new bracket onto the truck, thereby fixing the air leak; however, he said, even if it had not been fixed, it would not have posed a danger to the motoring

public or affected the brakes, even though the sound of the air leak may have been annoying to the driver. (Tr. 174-176). Some time later (the date is not clear from the record), Complainant returned to S&R to have repairs done on the 470, and was allegedly told by Ray that “they’re not putting any more man hours or money into trying to find...two audible air leaks” in the 482 because he didn’t think they posed a threat, and they had looked for them multiple times without finding them. “He said specifically he knew the leaks were there, they can’t find them”; and in Complainant’s initial complaint, which he reaffirmed at the hearing, he alleged that Ray had told him Pierce was “not concerned about these multiple air leaks so he was not going to continue looking for them at that time.” (Tr. 121, 221-224; CX 1). Ray allegedly then told Complainant that “if [he] didn’t feel safe driving it, [he] didn’t have to drive it.” (Tr. 122, 273, 275-276). Ray testified that another driver came to pick up the PG 482 after that. (Tr. 177). Thereafter, Complainant went out of his way to avoid driving the PG 482. Apart from one incident when Complainant had been “stranded” and without another truck to drive, he never drove it again. (Tr. 229). He said that if he went to S&R Repair to get the 470 fixed while it was under a load, he would simply take his break there in Milesburg rather than use PG 482. Ray corroborated this, saying that Complainant “pretty much stayed there for a 10-hour break” whenever he came to S&R for repairs on PG 470. (Tr. 122, 182-183, 277). Allegedly, this irritated Mr. Pierce, “but he never pushed the issue,” according to Complainant. (Tr. 122, 231). There is no evidence that Pierce cared one way or another about this practice, or even knew about it. Complainant also said that he was never again pressured to use the PG 482. He claimed that the reason for this lack of pressure was that “they knew I was going to pre-trip it before I got in and drove it away,” but again, there is no evidence that “they” would have pressured him to drive it if “they” had believed he would not check the truck for unsafe conditions. (Tr. 122).

On July 1, 2010, Respondent held a 90-day review of Complainant’s probationary period at the Murrysville office, which was early, but Complainant said that “legally they’re allowed to hold the review early.” (Tr. 112). Respondent offered no evidence of what took place at this review. Complainant alleges that, at that meeting, Pierce said that focusing on the case against Smith had been slowing Complainant down at work. Complainant said that his slowness had nothing to do with the case, but rather was due to his concern for safety, as he took the time to clean up the truck (as he said is required by law), while other drivers did not. (Tr. 112). Pierce allegedly then handed Complainant a piece of paper and says he could either quit, drop the case against Smith, or sign the paper, agreeing to an additional 90-day probation without the customary pay raise and medical benefits. (Tr. 112-113). Complainant said that because he needed the job, he “didn’t argue about it, didn’t say anything about it. I just reached over and signed the paper” agreeing to an additional 90-day probation period. He claimed that this “irked [Pierce] pretty good,” but gave no objective evidence to support this assertion. (Tr. 113).

The record contains several receipts from S&R Repair for work done on the PG 470 between July 2 and August 18, 2010, and Complainant testified that indeed, S&R was a reliable mechanic for his vehicle, repairing all of its issues as needed. (Tr. 225-228).

On July 6, 2010, Complainant received a log violation letter, saying that he was missing logs from May 7 and 12, 2010; this was of course in error, as these dates were prior to the beginning of Complainant’s employment. (CX 12). He spoke to Pierce and to Sarver about this, and they resolved the issue for him, though he never spoke to the log auditor. (Tr. 254-255). A

few weeks later, Complainant received another log violation letter, dated July 20, 2010, informing him that his June 30, 2010 mileage description was missing or illegible. Complainant admitted that he did forget to input his mileage for that date, and responded to that log violation letter with a correction. (Tr. 255; CX 12). Complainant's third log violation letter, dated August 3, 2010, involved duplicate logs, and he responded by asking for the safety director's name in writing on the letter, having the letter notarized, and sending it back on August 21, 2010. (Tr. 89; CX 12). Pierce says that he then told Michael Musiak, the independent contractor safety director for Respondent, that Complainant wished to speak with him, and that Musiak had told Pierce to have Complainant call him to set up an appointment; Pierce testified that he told Complainant that Complainant would have to make the appointment. (Tr. 400, 402). Pierce testified that Musiak's business card, including his phone number, was on various desks throughout Respondent's office, as well as the gray door next to Sarver's desk that served as the company's "poster board because everybody is always right there. When you walk in the doorway, you can't help not seeing it right there." (Tr. 88-89, 321-322).

Complainant testified that this August 21 written request was the culmination of an ongoing campaign on his part to get in touch with the safety director. He said that between May and October 2010, he had made oral requests for information on CSA 2010 (new FMCSA initiative) from safety director "as an excuse to get ahold of him," but "that didn't work." (Tr. 83). Pierce said that he does not set up meetings between Musiak and the drivers, "because [Musiak] is in every other Friday," and that drivers make specific date-and-time appointments to meet with Musiak themselves. (Tr. 321-322). Pierce said that he assumed everyone was told which day Musiak came into the office. (Tr. 358). Pierce also said that he had mentioned Complainant's questions about CS 2010 to Musiak during one of their Friday conversations, and that Musiak had responded, "have him call me, we'll get it worked out." (Tr. 373). Pierce said that he had assumed Complainant would be provided with the phone number, though he did not give any indication that he had taken steps towards having Complainant call Musiak. (Tr. 373). While Pierce did not recall Complainant making any requests for review with the safety director himself, he did remember Sarver coming into his office and reporting that Complainant had asked to talk to "the inspector or safety man," to which, she told Pierce, she had responded, "George, there it is right there on the door," referring to Musiak's business card on the gray door three feet from her desk. (Tr. 320-321). Pierce said he simply could not believe that Musiak's name, number, and business card had never been pointed out to Complainant, because "everyone" knew about it. (Tr. 374-375). (Pierce testified that he did not dock Complainant's pay, remove any privileges of employment, or threaten to fire Complainant when Sarver told him of these requests). (Tr. 322). Complainant, however, testified that there was never a post on Sarver's office door with the name of the log auditor or safety person on it throughout his employment, even though he saw the door several times a week. (Tr. 256). Complainant testified that he did not hear the name Musiak until November 2010, and that he never saw business cards for a person by that name in spite of having been in the office a good deal. (Tr. 88-89). He argued that his ongoing requests, both oral and written, to be put in contact with the safety director were evidence that he had never been given this information. (Tr. 374-375).

Finally, at some point between August 20 and 30, 2010, David Thompson applied for a job with Respondent. (Tr. 330-331). Pierce interviewed him and told him that while Pierce

would have no problem hiring him, nothing was available, and so Pierce advised him to remain at his current job, but “if anything comes up,” Pierce would call him. (Tr. 331).

*Air Leaks, Clashes with Weyandt and Pierce, and Sale of the PG 470 Truck, October 2010*

Throughout the fall of 2010, the PG 482 was still being used as a loaner truck by Respondent, and was kept at S&R Repair. Pierce never heard any complaints from either Ray or any of the other drivers using the PG 482 that there was anything wrong with the truck. (Tr. 345-346). Relatedly, Complainant never contacted Ray during this time period to ask whether the PG 482’s purported air leaks had been fixed, nor did he contact him to ask for permission to come inspect the PG 482. (Tr. 177-178).

On October 4, 2010, Complainant asked Ray to set the speed governor of the PG 470 to 67 miles per hour (MPH), as opposed to the 75 MPH it had been set at previously. (Tr. 393-396; RX B1; CX 36). Complainant said that he had made this request because without a lower governor, it was hard to keep the truck at a reasonable speed going downhill in 55 MPH zones, even when trying to control the truck with the accelerator, brake pedal, and gear shift. (Tr. 393). As Pierce testified, however, the governor must be set at multiples of 5, and so 67 MPH would not have been possible; Ray set the governor to 70 MPH that day. (Tr. 393, 396). Pierce agreed that some trucks run up to 5 MPH faster than the speed at which their governors are set. (Tr. 395-396). He said that Respondent’s trucks run through Pennsylvania, Ohio, New Jersey, and Maryland, and that he believed that the highest speed limit in those states was 70 MPH. (Tr. 396-397).

On October 17, 2010, Complainant was set to drive the PG 470 to Baltimore. Before leaving for Baltimore, he conducted a pre-trip inspection at home and noted that the bolts on either side of the tractor motor were both tight and in place – indeed, he said, they were never loose. (Tr. 75). He then drove to Baltimore. When he arrived, he found that Weyandt was there as well, and the two had a conversation on Complainant’s trailer. (Tr. 74-75, 143, 156). According to Complainant, Weyandt told Complainant to quit, said that he did not want to hear any more about Complainant making complaints about safety violations, and threatened that if Complainant did not quit, Weyandt himself or one of the other drivers would convince him to do so by tampering with his tractor or trailer. (Tr. 74-75). Complainant said that Weyandt also mentioned the conversation between Complainant and Allison about Allison’s “contest.” (Tr. 74-75). Weyandt agreed that he had told Complainant that “if he didn’t like his job, he should quit,” but he fervently denied ever having threatened to tamper with Complainant’s truck. (Tr. 143). He said that the reason he had climbed onto Complainant’s trailer to have this conversation was because “it’s 48 foot long. I didn’t feel like yelling,” and that it seemed like a convenient time to talk to Complainant because they were stopped in the same place, “spur of the moment.” (Tr. 156). He said he would never tamper with Complainant’s truck, “because my family runs on these roads, too.” (Tr. 156). He said that the impetus for the conversation was that Weyandt “figured if [he] didn’t like [his] job, [he] should move on, because all you hear is a bunch of whining.” (Tr. 156).

The following day, October 18, while they were both still in Baltimore, Complainant noticed that Weyandt was parked across the street from him. (Tr. 75). Complainant did his pre-

trip inspection and did not notice anything wrong, but when he pulled into the parking lot, the engine “sort of took off,” and he had to use more pressure on the air brakes to slow the truck down. Soon, he pulled over and opened the hood in order to investigate the source of the “start/stop stuff,” as he put it, and saw that the metal gasket usually attached to the air compressor by two bolts had “blown completely off.” (Tr. 75-76). He admitted that he did not know enough about engines to be sure that the truck’s problems were being caused by the air compressor intake, but that the loose gasket was the only anomaly apparent in the truck’s engine, and that the gasket had not been loose the night before. (Tr. 78-79). Complainant called Pierce from the road and told him about the gasket, and said that he suspected Weyandt of taking the bolts out of the engine sometime in the night of the 17<sup>th</sup> or the morning of the 18<sup>th</sup>. He told Pierce that Weyandt had threatened to tamper with Complainant’s truck. (Tr. 77-78, 268-269). Pierce asked about getting it fixed, and Complainant came up with a temporary solution with the materials on hand, then went on driving back to Respondent’s office with many stops to check on the status of his engine. (Tr. 77-78). When he reached Respondent’s office, Pierce told Complainant to proceed to S&R Repair, where they replaced the bolts and the metal filter, after which the truck no longer presented the “start/stop” problem. (Tr. 79-80). Complainant’s log from this day contains a note that says “Reported to Dave Pierce and Shawn Pierce I believe Eric Wyant [sic] took bolts out of airline going to intake manifold. This is not the first time + place he has tampered with my equipment.” (CX 25).

Ray and Weyandt both testified about this incident and the engine problem. Ray, a mechanic with a good deal of experience with this type of truck, testified that this type of engine (Caterpillar 6NZ) has “a bad design,” such that when one bolt on the air compressor comes loose, it will fall off, then the other bolt will also fall out. (Tr. 172-173). He said that he sees “at least a couple [engines] per year” that have suffered from this design flaw, and that now, one of the services S&R mechanics perform when checking the trucks is checking those bolts. (Tr. 172-173). He said that, without more information, the mere fact of two of these bolts missing on such an engine does not suggest to him tampering of any sort. (Tr. 173-174). In line with this, Weyandt denies ever having tampered with Complainant’s truck. (Tr. 127). He said that he had experienced those bolts coming loose on his own trucks due to the engine’s vibrations two or three times in the five years he has been driving trucks with those engines, that other drivers have experienced it too, and that when the bolts fell out for him, they caused the same problems Complainant reported having in driving the vehicle. (Tr. 128-129). He said that it wouldn’t be unusual for both bolts to come out at the same time, given that if one falls out, “the vibration automatically works on the other one.” (Tr. 131). He said that the process or procedure when a driver with Respondent has an air leak is “most[ly]...up to the driver,” but that he personally has the phone numbers for several garages that are usually in his vicinity when he is driving, including Weaver and S&R. (Tr. 131-132).

Soon after, Complainant alleges, Pierce told Complainant to stay away from Weyandt, because Weyandt had a bad heart and was upset with Complainant. Complainant interpreted this conversation as Pierce implying that, if Weyandt had tampered with Complainant’s truck, Complainant had brought it on himself. Complainant claimed that Pierce said Complainant “had made Mr. Weyandt look bad by reporting him personally [to Pierce] when [Complainant] was following him around as a trainer.” He alleges that Pierce told him that Pierce himself would try

to keep Complainant and Weyandt apart as much as possible, but that it was a small enough company that the two were bound to run into each other. (Tr. 80-82, 269-270).

On October 22, 2010, Complainant began to write a complaint letter of “past and present safety violations and illegal activity.” (Tr. 81; CX 13). Soon after, he had this letter notarized and sent it through certified mail to Pierce and to his sons, who would later receive it on November 1. (Tr. 84, 87-88; CX 13). He testified that he did this because he was concerned that there should be a record of his complaints “in case I would end up having a convenient accident, you know, in the next couple weeks going down the road.” (Tr. 84). In other words, building on his conviction that Weyandt had tampered with his truck and Pierce had condoned this reckless and nigh murderous behavior, Complainant believed that either Weyandt, Pierce, another driver for Respondent, or perhaps someone from his former employer, viewed him and his safety complaints as enough of an inconvenience that they were likely to, at some point in the near future, “take him out” and make it look like an accident.

On October 25, Complainant alleges, Pierce “yelled at” Complainant for turning down loads and making shippers remove some of the weight from loads he believed to be overweight. Allegedly, during this conversation, Pierce told Complainant to stop turning down loads and to just take what is put on the truck. (Tr. 72-73). Pierce denied having told Complainant not to argue with the loaders or not to have them unload weight; he said that the most important thing to him was that Complainant’s truck be at a legal weight after he was loaded. (Tr. 366-367, 371). He testified that he did not reduce Complainant’s pay, threaten to terminate him, or tell him to stop complaining or whining. (Tr. 320).

At some point between October 24 and 29, 2010, Pierce told Complainant that he might sell the PG 470. Pierce testified that, from time to time, he sells trucks from his fleet or buys new ones, and this is not an unusual practice. (Tr. 88, 332-333, 408). Pierce testified that he told Complainant that, if the buyer came up with the money, he would sell the truck to the buyer, and that once they signed the agreement to sell the truck, the PG 470 would not be in operation for Respondent, lest some damage be caused before the title transfer. (Tr. 333-334, 408). Between October 26 and 27, Pierce agreed to a selling price for the PG 470 with a Thomas Hawn and signed the paperwork of intention to sell the truck. (Tr. 332-333, 408). On October 30, 2010, Hawn came to Complainant’s house, as had been pre-arranged, to look at the PG 470, and told Complainant that there was some “give” on one of the drive axles. (Tr. 88).

#### *Overweight Violation and End of Employment, November 2010*

On November 1, 2010, several relevant events happened. First, Complainant told Pierce about Hawn’s reaction to seeing the PG 470 two days earlier. (Tr. 88). Then Pierce called Complainant later in the day, while Complainant was on the road, after Pierce received the October 22 notarized letter, and allegedly told Complainant he was not happy about it. At that time, Complainant said, Pierce told him that the safety director’s name was Mike Musiak, and that Musiak’s business cards were on various desks all throughout the office. Complainant testified that he had never heard this name before and had never seen business cards for a person by that name in the office, in spite of having been in the office frequently. (Tr. 88-89). Complainant testified that he then told Pierce that he wanted to stop in and see those cards, as the

office was on his way, but allegedly Pierce first responded that he could not come by because there was a business meeting in progress – and then changed his story to say he should not stop by because Complainant had “peev[ed] everybody off pretty good with the letter, and he couldn’t guarantee [Complainant’s] safety if [he] were to stop by at the...office.” (Tr. 89, 270-271). This statement by Pierce is not in the complaint, and Pierce said nothing about it during his testimony. Pierce said that he did remember skimming this letter, and said he did not threaten to fire Complainant, did not “ream him out” over the phone, and did not demote him, cut his pay, or remove any privileges of employment. (Tr. 329-330). He said that once he had “scanned” the letter, he contacted his attorney, Mr. Wojton, about it. (Tr. 427). It is not clear whether he contacted Mr. Wojton before or after calling Complainant.

Second, Thompson may have begun working for Complainant on this day. His first log in the record is dated November 2, 2010, but Respondent’s response to Complainant’s initial complaint states that Thompson began work on November 1. (Tr. 104-105; CX 37; CX 2 at 17-18). Complainant claims that Thompson was hired to replace Complainant, though Respondent alleges that the timing of Thompson starting on the same day they received Complainant’s notarized letter was a mere coincidence. (Tr. 104). Complainant believes that Thompson’s pre-hire qualifications were destroyed, lost, or withheld in bad faith in order to conceal evidence of his allegation. (Tr. 104).

The third and final relevant event of November 1, 2010 was that Complainant picked up a load and decided to just “take whatever they put on the truck,” leaving with a quarter tank of fuel, which he said Pierce had told him on October 25 to do going forward. (Tr. 89, 91-92). At the time he took his empty weight, it was 31,200 pounds without his equipment, then he took a 47,000 load, drove away, and got 50 gallons of fuel, which he logged. (Tr. 90). He said that he loaded this way because he believed this is what Pierce wanted his drivers to do so they could haul more and make more money. Complainant said that if he had been doing it his own way, he would have moved things around in the truck in order to avoid being overweight on any axles. (Tr. 93). He said he chose it to do it “Pierce’s way” this time because he “was already in trouble for arguing with the shippers and loaders” and “had been reamed out about it.” (Tr. 93). Pierce denies ever having told Complainant to load in this fashion, and said that “taking whatever they put on the truck” is not “his way.” (Tr. 371). Weyandt testified that he arrives at shippers “light” on his fuel “all the time” to maximize the weight of his load, because all mills make the drivers scale out and do not let them proceed if they are over a certain weight, so, he said, there was no danger of exceeding regulatory limits. (Tr. 140-141). He said that the intention here is to stay within regulation, which provides only that fuel must be logged, not that the truck must be at full fuel every time it is loaded. (Tr. 141). He said that there was no threat of reduced pay or termination if a driver could not go to a shipper light on fuel; Pierce “just finds you different loads you can scale.” (Tr. 142). Pierce corroborated Weyandt’s testimony. (Tr. 314, 316-317).

The following day, November 2, 2010, Complainant was pulled into a scale house on his way to Baltimore, and found that the truck was 1,700 pounds overweight over the back axle. (Tr. 90, 93). Pierce said that he paid the fine for this citation himself and did not reprimand Complainant at all because Complainant was “relatively new.” (Tr. 319-320). He said that his encouraging drivers to go in light on fuel would not explain this citation, because the citation was not for the gross weight, which was legal in this case, but was rather for the distribution over

the back axle; Complainant himself, Pierce said, must have loaded it incorrectly. (Tr. 317-318). Weyandt had testified that it is the driver's responsibility to tell the shipper where to place the load on the truck, and that "every place...ask[s] you where you would like it." (Tr. 139-140).

On the night of November 2, Complainant was told to drop the PG 470 off at Respondent's Murrysville office. (Tr. 94). Thompson's first wage statement, from this day, shows that he was assigned to the PG 482 on November 2, 2010. (Tr. 104-106, 411; CX 37). Complainant believes that this was necessarily a permanent assignment, because Complainant himself was assigned the PG 470 at the beginning of his employment with Respondent and used the same truck throughout the course of that employment; he only ever used a different truck as a loaner. (Tr. 109). There was no other evidence of Respondent's typical practice of how assigning trucks, or whether the PG 482 was meant to be a permanent assignment for Thompson.

On November 3, 2010, Complainant unloaded in Homer City and started for the Murrysville office, then got a phone call from Pierce to take the PG 470 to Milesburg instead, followed by yet another call from either Pierce or Weyandt telling him to just bring the truck to his own house, where a Respondent driver would come to pick up both the truck and the trailer. (Tr. 94-95, 271-271). Complainant then missed a number of calls from Weyandt, which he had failed to pick up because, he said, "I didn't make a habit of answering the cell phone while I was driving." When they spoke, he said, Weyandt was angry because he "didn't have all day to wait on [Complainant]" to bring the truck to Complainant's house, and an argument ensued. (Tr. 95). Complainant then called Pierce, asking why he had sent Weyandt to Complainant's house. Pierce said he had not, and that Weyandt may have been there to show Allison where Complainant lived. (Tr. 95-96). (Complainant doubted this, as, he said, Allison frequently visited Weyandt at home, and would wave good-bye to Complainant while leaving if Complainant were sitting outside his house). (Tr. 96).

When Complainant reached his house, he saw that Weyandt, Weyandt's son, Allison, and Thompson were all there. (Tr. 96-97). Complainant said that it is unnecessary to send four men to pick up a single truck. (Tr. 96-97). He said that Weyandt's son stayed on the other side of his creek with his cell phone while the other three began to cross the bridge, and that Complainant's wife then told Mr. Weyandt not to come any further, causing him to stop on the bridge, and that the remaining two men proceeded to get into the PG 470 and drive away. (Tr. 96-97). He testified that he exchanged some words with Allison, then told Allison to make sure to use a bungee cord to keep the defective driver's side door closed, lest he fall out of the truck, but that Allison ignored him, got into the truck, and drove off. (Tr. 98-99). According to Complainant, Allison and Thompson had no log book, and did no pre-trip inspection on the PG 470 before driving away in it, even though both were on duty at the time. (Tr. 97). After this, Complainant called Pierce to tell him about the incident with the four men. (Tr. 274). Mr. Pierce told Complainant he had no idea what had been going on. In this conversation, he "guaranteed [Complainant]...that [he] would be getting a truck upgrade," then when Complainant asked him which truck, Pierce said he did not know yet. (Tr. 274-275). Complainant testified that he was ordered off duty November 3, 2010, and Pierce testified that he could not recall why he ordered Complainant off duty on that day. (Tr. 99, 334-335).

Between November 4 and November 9, 2010, Complainant did no driving for Respondent. (Tr. 99). At one point during this time, Pierce called Complainant and asked if he had been recording conversations between them. Complainant refused to answer and asked why he wanted to know, though Complainant testified that he did not know, at the time of that conversation, that he had in fact accidentally recorded one of their conversations. (Tr. 99-100). On November 6, Complainant mailed a complaint letter to five federal and state agencies: the Department of Transportation Inspector General in Washington, D.C.; the Federal Motor Carrier Safety Administration in D.C.; the FMCSA in Harrisburg, PA; the FMSCA in Maryland; and the manager of the Pennsylvania Public Utility Commission. (Tr. 109-110). He did not inform any of Respondent's representatives of this letter, and indeed, Pierce testified that he did not recall receiving any copies of this letter, nor did he recall receiving any communications from those agencies about it. (Tr. 110, 327-329).

November 9, 2010 was the first day of the hearing in Complainant's claim against Smith Transport. Complainant did not mention his November 6 complaint letter at that hearing. (Tr. 110). Complainant's prior claim against Smith had its second day of hearing on November 10, 2010. (Tr. 110). At 10:27 a.m., once the hearing was over, he made a call to Respondent's dispatch number, as he said Pierce had told him to do after the hearing to get his next truck and load assignment. (CX 17). He called that number back at 3:09 p.m., and was told by "one of the boys" to call back after business hours. (CX 17; Tr. 100, 273). Thus, Complainant called Respondent back at 4:02 and spoke to Pierce. (Tr. 273).

The contents of this conversation were a matter of much debate at the hearing. According to Complainant, Pierce told him that the PG 482 was going to be Complainant's upgrade truck, but that he had found air leaks and something causing the oil analysis to come back yellow in that truck. He was not sure whether he would keep and fix the truck or just get rid of it, and had no other truck for Complainant to drive, and so Complainant was to be laid off. (Tr. 100, 273). Complainant says that he asked for how long, and Pierce said permanently. However, Complainant also testified that he was only being laid off until Pierce determined what to do with the truck. (Tr. 100-104, 110). Complainant repeatedly asserted that the PG 482 was not actually offered to him that day; moreover, he said, if Dave Thompson's pay stubs from November 1 say he was assigned the PG 482, it does not make sense for Respondent to say it was being offered to Complainant on November 10. (Tr. 103-104, 109). (See *supra*). He pointed out that he would have had no way of knowing whether the truck had air leaks or a "yellow" oil analysis in November, given that he had not driven the PG 482, and thus had no reason to check or pre-trip the truck, since June, which was corroborated by Ray's testimony that Complainant had never asked to do so. (Tr. 415, 275-276). Thus, he said, there was no way for him to have had this information unless Pierce had given it to him. (Tr. 415).

Pierce's story conflicts directly with this testimony. He agreed that he had spoken with Complainant near the beginning of November, 2010 – though he was unclear on the exact date, the two seem to agree that there was a conversation in which Pierce told Complainant he was going to sell the PG 470, after which there was some discussion about the PG 482 and Complainant was laid off. (Tr. 335-340, 405-408, 430). Pierce testified that in this conversation, he never told Complainant that there were air leaks on the truck, because he was unsure of the truck's condition. (Tr. 338-339, 344). He said that he relies on Sam Ray to tell him whether a

given truck in his fleet does or does not have defects. (Tr. 339). He said that he did not recall telling Complainant that the truck was unavailable because it was under repair or needed to be repaired, because, he says, the truck was not “under repair,” but was rather “sitting up at S&R Repairs.”<sup>2</sup> (Tr. 341-343). He said that it was Complainant who said that the oil analysis was yellow (though it is not clear when Complainant told him this), but that Pierce had told Ray to check it out, and that Ray had said that “it’s an alert, nothing serious.” (Tr. 343). Pierce clarified that a “yellow” reading on an oil analysis means “caution,” as opposed to green, which would be good, or red, which would indicate the presence of water. (Tr. 413). He said that the yellow analysis was probably done before November 10. (Tr. 414). He said that he offered the PG 482 to Complainant in this conversation, but that Complainant responded that it was unsafe, and refused to drive it, even after Pierce assured him that the truck would be roadworthy coming out of the garage, as Ray would not allow it to leave otherwise, and that Pierce himself would make sure it was roadworthy. (Tr. 335-338, 340, 348). “He still said it wasn’t safe. He wasn’t going to drive 482. That was a direct statement. He would not drive 482 because [he said] it wasn’t safe for the road because of all the air leaks that he complained about.” (Tr. 340). Consequently, Pierce called Thompson to say that there was a truck available, sitting up at S&R Repairs with no defects, referring to PG 482. (Tr. 335-338, 340, 403-405). He said that until this conversation in which Complainant turned down the 482 for perceived safety defects (such as air leaks), there was still no truck available for Thompson to drive in Respondent’s fleet, and so Thompson was “pretty much on hold until [Pierce] had a truck available for him.”<sup>3</sup> (Tr. 337, 340-341). Pierce said that if Complainant had agreed to drive the 482, he would have given Complainant the 482 to drive. (Tr. 341). Regardless of the dates, he said that he offered the 482 to Thompson only after Complainant refused it. (Tr. 430). He said that there was no truck other than the 482 available to Complainant on this date. (Tr. 343-344). Pierce said that Ray would not allow a truck with known defects to go without fixing. He trusted that if Ray let the truck on the road, it would not be harboring any mechanical defects, or in violation of any rules. (Tr. 346-348). He therefore considered Complainant’s perceived refusal to drive 482 to be unreasonable. (Tr. 347). He said that when Complainant and Respondent “severed ties,” Complainant’s complaining about safety violations did not come into his decision-making at all. (Tr. 348).

November 21, 2011 was the date of the official title transfer of the PG 470 from Pierce to Hawn. (Tr. 408). On November 22, 2011, Respondent received notice of Complainant’s unemployment application, which stated that the reason for separation of employment was “lack of work.” (RX G; Tr. 249). Complainant said that he was unsure whether he had written or reported that “lack of work” himself. (Tr. 249, 251). He said that if he had, it was likely because he believed that “in dealing with unemployment, that if you’re laid off, [as opposed to discharged or terminated], you can collect, and one of the main reasons people are laid off is due

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<sup>2</sup> This may have been a misunderstanding: if Pierce had accurately stated that the PG 482 was “at the garage,” Complainant may have very reasonably misinterpreted this to mean that the PG 482 was *in* the garage, for repairs.

<sup>3</sup> It is worth noting that Pierce’s testimony that there was no truck available for Thompson until this conversation, conflicts with Thompson’s log records showing that he had begun work on November 2. It is possible that Pierce has conflated in his mind the conversation in which they first discussed Complainant’s truck upgrade on November 3 after Allison picked up the PG 470, and the November 10 conversation in which Complainant was ultimately laid off. However, even if Pierce’s testimony is that he offered Complainant the 482 as his new permanent truck on November 3, and only after Complainant’s refusal had a truck for Thompson to drive, this conflicts both with Complainant’s testimony that Pierce did not know what his upgrade truck would be on November 3, and with the fact that Thompson apparently started work with Respondent the day before that, on November 2.

to most companies claim lack of work.” (Tr. 249-251). In other words, if the “lack of work” statement was of Complainant’s choosing, he admits that it would have been motivated by the desire to say whatever was necessary to get benefits, rather than to tell the truth about why he was terminated – or else he believed that at the time, but has since decided that this was not the true reason why his employment was terminated.

#### *Post-Employment Events, January 2011 through August 2012*

On February 23, 2011, Complainant filed his complaint with OSHA in this present case. In November 2011, Thompson ended his employment with Respondent, and the PG 482 went back to being a loaner or temporary truck. (Tr. 348-349). In March 2012, discovery began in the present case; Pierce says that he usually keeps qualification records and pre-hiring paperwork for ex-employees (such as Thompson) for a period of time before disposing of it, but he did not say how long he keeps such documents. (Tr. 417-419). Finally, between June 15 and August 7 of 2012, Complainant worked at Corle Transport Commercial Driving, and was fired on charges of overweight fines, one of which was the fine from November 2010, and the other of which was an August 6 fine that he said was ultimately found to be unjust. (Tr. 193-198).

### **GOVERNING LAW**

The STAA prohibits commercial motor vehicle transportation employers from disciplining or otherwise discriminating against employees who engage in certain protected activities. “The purpose of the employee protections that the Labor Department administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public.” *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-0002 at 20 (ARB Sept. 30, 2008).

#### *Applicable Provisions*

Complainant alleges that Respondent violated 49 U.S.C. §31105(a)(1)(A)(i), (A)(ii), (B)(i), and B(ii), which provide, in pertinent part:

**(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)

- (i) the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or
- (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(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; or
- (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

### *Elements of STAA Violation and Burdens of Proof*

“The 9/11 Commission Act amended paragraph (b)(1) of 49 U.S.C. 31105 to state that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR21 at 49 U.S.C. 42121(b). . . . Under AIR21, a violation may be found only if the complainant demonstrates that protected activity was a contributing factor in the adverse action described in the complaint. 49 U.S.C. 42121(b)(2)(B)(iii). Relief is unavailable if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv).” 77 Fed. Reg. 44,122 (July 27, 2012)(internal citations omitted).

The ARB further clarified the legal burdens under the 2007 amendments to the STAA in *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, ALJ Nos. 2008-STA-12 and -41 (ARB Sept. 15, 2011). The ARB explained that, to prevail in an STAA claim, a complainant must prove by a preponderance of the evidence that his safety-related actions constituted protected activity, that his employer took an adverse employment action against him, and that his protected activity was a contributing factor in that adverse employment action. *Id.*, citing *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011) and *Williams v. Domino’s Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action even absent the protected activity. *Id.*, citing *Williams*, ARB 09-092, slip op. at 5, 49 U.S.C. 42121(b)(2)(B)(iv), and 29 C.F.R. 1979.109(a). “Clear and convincing evidence” is defined as “evidence indicating that the thing to be proved is highly probable or reasonably certain.” *Id.*

### **STIPULATIONS AND ISSUES PRESENTED**

OSHA found that Respondent was a “person” and a “commercial motor carrier” within the meaning of the STAA, and that Complainant had been hired as a truck driver by Respondent to drive Respondent’s trucks over highways in commerce, in the course of which employment Complainant directly affected commercial motor vehicle safety. Respondent did not object to these findings, and no evidence to the contrary was introduced at the hearing. Thus, it is deemed to be established by stipulation. As a commercial motor carrier, Respondent is responsible for compliance with the employee protection provisions of the STAA. As an employee of Respondent, Complainant enjoys the protections of the STAA. The parties also stipulated that Pierce was an owner and president of Respondent, that the other named respondents are employees of Respondent, that Complainant formerly worked for Smith Transport, Inc., that Complainant made multiple oral and written safety complaints to Respondent during his employment, and that neither party had initiated settlement negotiations. (ALJX 1).

At issue here is whether Complainant met his burden of showing that his safety-related reports over the course of his employment, which constituted protected activity under the STAA, contributed to the adverse employment actions he suffered.

## DISCUSSION AND CONCLUSIONS OF LAW

### **I. Protected Activity**

Protected activities under the STAA include filing a complaint related to a violation of a commercial motor vehicle safety or security regulation/standard/order, beginning a proceeding related to such a rule, testifying (or planning to testify) at a proceeding related to such a rule, refusing to operate a vehicle for safety reasons (subject to certain constraints), accurately reporting hours on duty, cooperating with a safety or security investigation by certain national bodies, and furnishing information to any Federal, State, or local regulatory or law enforcement agency regarding an accident or incident resulting in injury, death, or property damage occurring in connection with commercial motor vehicle transportation. (It is also unlawful for an employer to retaliate against an employee if the employer *perceives* that the employee is performing or going to perform certain of these protected activities). 29 C.F.R. §1978.102(a)-(f).

In the present case, Complainant has shown that he engaged in protected activity on several occasions. Before his employment with Respondent, he began a proceeding relating to commercial motor vehicle safety rules (viz. his claim against Smith); he testified at this proceeding in November of 2010; and he filed many safety-related complaints, in that he repeatedly reported concerns about Weyandt during training, he confronted Pierce about Snare's cross-chaining violation, he reported to Pierce and Pierce's son Shawn his concerns over Weyandt on October 18, and he sent the notarized, certified letter (received at Respondent November 1) enumerating the "illegal, unsafe activities" he believed he had witnessed during his employ with Respondent. There were also several safety-related activities which do not qualify as protected activity.

Complainant points out that he retained sign-in and sign-out sheets and toll and fuel receipts, in order to dissuade Pierce from encouraging him to violate hours of service. However, simply retaining these documents does not necessarily equate to accurately reporting hours of service; indeed, Complainant admitted in his testimony that he falsified his hours of service on more than one occasion in order to avoid penalty in the event that he was pulled over with logs showing violations. Thus, he did not engage in this particular protected activity.

The final potential protected activity that took place before Complainant's termination was his mailing of a complaint letter to five federal and state agencies on November 6; however, he did not prove that any of Respondent's owners or managers was aware of this letter, and Pierce denied any knowledge of it. Thus, while this was protected activity under the STAA, there was no knowledge shown.

Complainant has shown that he engaged in protected activity on the above-enumerated occasions. He has therefore proven this element of his case by a preponderance of the evidence.

### **II. Adverse Employment Action**

An "adverse employment action" under the STAA is defined as an action by an employer which could dissuade a reasonable worker – i.e., a reasonable person in the complainant's

position – from engaging in protected activity. The employer action “must be such that it ‘could well dissuade a reasonable worker from making or supporting a charge of discrimination.’” *Melton*, ARB No. 06-052 at 20, citing *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). *But see Strohl v. YRC, Inc.*, ARB No. 10-116, ALJ No. 2010-STA-35 (acknowledging regulations promulgated subsequent to *Melton* broadening the definition of “adverse employment action” under the STAA).

Complainant has asserted that he was subject to no adverse employment action until he was ordered off duty on November 3, 2010, and then laid off “permanently” on November 10.<sup>4</sup> The record shows that on November 3, Complainant completed a run for Respondent; then some of Respondent’s drivers took his usual truck away, as it had recently been sold and had to be taken off the road; and then he had no further work for Respondent. There is no hard evidence that Complainant was “ordered off duty” on November 3. Even if I take at face value Complainant’s assertion in his complaint that Pierce told him on November 3 to “go off duty until the end of his current STAA hearing is over on 11/10/2010” (i.e., until the end of the hearing in Complainant’s case against Smith), this implies only that Pierce had asked Complainant to go off duty *temporarily*, fully expecting him to return to work after the hearing was over. Respondent did nothing, it seems, that was truly adverse to Complainant until Pierce laid him off during their November 10, 2010 phone conversation.

Pierce agreed, and Respondent does not contest, that Pierce laid Complainant off during that conversation. I find that Complainant has proven by a preponderance of the evidence that Respondent did in fact lay him off on November 10, 2010, and that this layoff constituted an “adverse employment action” under the STAA.

### **III. Contributing Factor**

#### *A. Prima Facie Case*

To establish a prima facie case, Complainant must present evidence to raise an inference that his protected activity was likely a contributing factor in Respondent’s decision to take the adverse employment action against him. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). 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.” *Salata, supra*, citing *Williams*, ARB 09-092, slip op. at 5. Contribution can be shown through either direct or indirect proof, the former being “‘smoking gun’ evidence that conclusively links the protected activity and the adverse action and does not rely upon inference,” and the latter being “inferential” or “circumstantial” evidence. *Id.* In this case, there is no “smoking gun,” only circumstantial evidence from which an inference of retaliation may be drawn. There are three major facts from which Complainant asks the court to infer that Complainant’s protected activity was at least one factor in Respondent’s decision to lay him off.

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<sup>4</sup> Complainant also alleged that an adverse employment action arose at the time of Complainant’s 90-day probation review in early July 2010. This alleged adverse employment action, however, is time-barred, as it occurred on July 1, 2010, and Complainant’s complaint was not filed until February: the regulations implementing the STAA provide that a complaint alleging retaliation must be filed within 180 days of the alleged violation. 29 C.F.R. 1978.103(d).

## 1. Temporal Proximity

First, the layoff took place on November 10, in close temporal proximity with a handful of Complainant's protected activities. The layoff occurred the same day Complainant finished his testimony in the case against Smith, and a mere nine days after Respondent became aware of the "notarized, certified letter" received on November 1. Moreover, this letter was not only its own, independent protected activity, but also served as a reminder of Complainant's prior protected safety reports. Thus, in a sense, the layoff was in close temporal proximity with all of these earlier reports as well. I find that Complainant has shown that the adverse employment action occurred in close temporal proximity with a number of his protected activities.

## 2. Disregard for Safety

Second, Complainant alleges that Respondent had an overall disregard for safety. The Eleventh Circuit Court of Appeals and several ALJs have held that, under other Whistleblower statutes such as the Energy Reorganization Act and Federal Railroad Safety Act, "a supervisor's disregard for safety procedures" may constitute circumstantial evidence that protected activity was a motivating factor for an adverse personnel action. *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 935 (11th Cir. 1995); *Pfeifer v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-00038 (July 11, 2012) (unpub.); *Hoffman v. FPL Group, Inc.*, ALJ No. 2010-ERA-00011 (March 27, 2012) (unpub.); *see also Capalbo v. Kris-Way Truck Leasing, Inc.*, 821 F.Supp.2d 397, 421-422 (D.Me., 2011). This rule does not seem to have been applied yet to an STAA case, but the Sixth Circuit has held that the causation element in an STAA case can be *defeated* by evidence that the employer was particularly *conscientious* about safety concerns. *Moon*, 836 F.2d at 229, *supra*.

In this case, the evidence of Respondent's attitude towards safety rules and regulations is mixed. From Pierce's familiarity with the CS-2010, his statement during Complainant's interview that "running legal" would be both fine and expected, his hesitation to hire Complainant due to his lack of steel-hauling experience, and Sam Ray's testimony<sup>5</sup>, it could be inferred that Respondent cares very much for the safety of his operation, especially when it comes to the maintenance of his trucks. There was no evidence of retaliation against any other drivers who had safety concerns, nor was there evidence that Respondent's management or drivers were particularly ignorant of or confused by safety rules and regulations, as was the respondent in *Capalbo*, *supra*.

However, Complainant did present evidence that Respondent took something of a *laissez-faire* attitude towards safety concerns. Pierce himself testified that he has heard other drivers complain to Pierce, Jr. about not getting directions, and that he had merely "assumed" Complainant had the cell phone numbers of all of the other drivers in case he needed directions.

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<sup>5</sup> Ray testified that "[A]ll I know is that gentleman [Mr. Pierce] fixes everything properly." (Tr. 163-164). "Nothing leaves our shop that ain't DOT approved"; though he can't force customers to pay for a repair they can't afford, he can and does withhold the approval sticker. (Tr. 164). He said that Mr. Pierce provides him with a "really thorough" checklist of repairs and maintenance that must be done on Respondent's vehicles every 5,000 miles. (Tr. 165-166). He also said that Complainant kept the PG 470 up to date on mechanical upkeep and pre-trips, as "all Dave's drivers do." (Tr. 182-183).

Pierce also admitted that one of his employees had a violation for cross-chaining during the time of Complainant's employment, and that he discovered subsequent to Complainant's employment that the safety manuals in the trucks were over four years out of date. In addition, Weyandt testified that he "went in light on fuel" frequently, and Pierce corroborated that this was an acceptable practice, even though it could ostensibly lead to running on the roads overweight. Complainant's governor in the PG 470 was also set at 75 MPH, 5 MPH above the highest speed limit on roads on which Respondent trucks run. Finally, it seems that Pierce – and other members of Respondent's management and office staff – were less than assiduous about putting Complainant in contact with Musiak. Pierce never set up a meeting between the two, never told him Musiak's phone number, never told him when Musiak would be in the office, and never even told him where to find the phone number after allegedly telling Musiak Complainant wanted to see him. Pierce said that he had assumed Complainant knew when Musiak would be in the office, and that Sarver had told Pierce she'd pointed out Musiak's card to Complainant – but, as Complainant argues, if Sarver had indeed pointed out the card, or if he had indeed been told when Musiak would be in the office, he would not have persisted in his requests for Musiak's name and contact information. From all this it can reasonably be gathered that Respondent was, at the time of Complainant's employment, somewhat lax about keeping up with the applicable safety rules and regulations.<sup>6</sup>

Therefore, Complainant showed that Pierce's, and by extension Respondent's, attitude towards safety rules and regulations was, at best, informal. However, it is worth noting that there was no evidence of irritation with or hostility against safety rules, the safety director, or employees with safety concerns.

### 3. Conclusion Regarding Prima Facie Case

In support of his contention that his protected activity was a contributing factor in Respondent's decision to lay him off, Complainant has shown that the layoff occurred in close proximity with protected activities, and that Respondent had an informal or laissez-faire attitude towards the applicable safety rules and regulations. Under the circumstances of this case, I

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<sup>6</sup> There were several other allegations which I do not take as evidence of Respondent's lassitude on issues of safety. Complainant alleged many violations by Weyandt during the training period as well as a statement by Weyandt that he should quit if he did not like his job, but these do not necessarily reflect on Respondent's attitude towards safety. He also said that Respondent would have encouraged him to violate hours of service and drive the PG 482 if Pierce wasn't aware that Complainant was assiduous about his records and pre-trip inspections – but there was no evidence to back up this assertion. He said that the AK Steel run could not be completed within legal hours of service, but Weyandt contradicted this allegation and gave a detailed, uncontradicted description of how the run could be made legally. He alleged that Pierce told Complainant during his 90-day review that the Smith case was slowing him down, but there was also no corroboration of this statement, and even if it really happened, it is not necessarily evidence of a lax attitude towards safety rules, and may simply be a criticism of Complainant's time management skills. He said that Pierce told him to stay away from Weyandt after Complainant's allegations of tampering, which Complainant interpreted as a condoning of that tampering. I do not share this interpretation, particularly because it presupposes that Weyandt actually did tamper with Complainant's truck, which was not proven. The fact that Allison and Thompson did not pre-trip the 470 or have log books with them when they picked it up does not necessarily reflect on Respondent. Finally, there was only flimsy evidence of the following safety-related allegations: that Allison bragged about an unsafe "contest" he was in with another Respondent driver, that Pierce had told Ray he was not concerned about the PG 482 air leaks, that Pierce "yelled at" Complainant for arguing with shippers, and that Pierce called Complainant and "reamed him out" over the November 1 letter. I therefore take none of these allegations as evidence of Respondent's attitude towards safety.

consider Respondent's attitude towards safety to be only weak evidence of a retaliatory intent, as there was no evidence of hostility or active disregard for the safety rules, merely informality and, perhaps, mild negligence. Even without this evidence, though, temporal proximity is dispositive on the issue of causation for purposes of a prima facie whistleblower case. *Spelson v. United Express Systems*, ARB No. 09-063, ALJ No. 2008-STA-00039 (ARB Feb. 23, 2011). Accordingly, Complainant has established his prima facie case, and the burden of production now shifts to Respondent to articulate a legitimate, non-discriminatory motive for Complainant's termination.

### *B. Articulation of Legitimate, Non-Discriminatory Motive*

Once a complainant in a whistleblower case has established prima facie evidence of retaliation, the burden of production shifts to the respondent to articulate a legitimate, non-discriminatory reason why it took the adverse employment action. This is a burden of production, not of proof. *Salata, supra*; *Byrd v. Consolidated Motor Freight*, ARB No. 98-064, ALJ No. 97-STA-00009 (ARB May 5, 1998). If no such reason is articulated, then the complainant will prevail. *Zessin v. ASAP Express, Inc.*, 92-STA-00033 (Sec'y Jan. 19, 1993). If a respondent does satisfy this burden of production, the complainant must bear his ultimate burden of persuasion and prove causation by a preponderance of the evidence. *Moon*, 836 F.2d at 229, *supra*; *Schulman v. Clean Harbors Environmental Services, Inc.*, ARB No. 99-015, ALJ No. 1998-STA-00024 (ARB Oct. 18, 1999).

In this case, Respondent has repeatedly articulated that it laid Complainant off due to "lack of work," in that "there was no truck for Complainant to drive." On its face, a lack of work is certainly a legitimate and non-discriminatory reason to lay off an employee, and since it is not Respondent's burden to produce evidence in support of its alleged rationale, the articulation of this motive shifts the burden back to Complainant to establish that this asserted rationale is pretext.

### *C. Pretext*

Once a respondent has articulated a legitimate, non-discriminatory motive for an adverse employment action, the complainant may prevail if he produces "sufficient evidence to find that the employer's asserted justification is false." *Vieques Air Link, Inc. v. U.S. Dep't of Labor*, 437 F.3d 102, 109 (1st Cir. 2006). Again, evidence of causation may be either direct or circumstantial. It is worth noting that, "[w]hile not ineluctable, the circumstances of a given case may support a factfinder's conclusion that the temporal proximity between protected activity and adverse action establishes that the adverse action was motivated by the protected activity." *Simon v. Sancken Trucking Co.*, ARB No. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007, citing *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 1996-ERA-034, 036, slip op. at 6 (ARB Mar. 30, 2001)). In addition, "one type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Salata, supra*, citing *Riess*, ARB 08-137, slip op. at 6.

In the present case, Complainant did, in fact, show that Respondent's repeatedly articulated reason for laying him off on November 10 was pretext. Respondent's alleged reason for laying Complainant off was "lack of work," in that "there was no truck for Complainant to drive" after he allegedly refused to drive the PG 482, but Complainant asserts that the truck was never offered to him, and so he never refused it.

Both Pierce and Complainant offered testimony regarding the contents of the conversation in which, Respondent alleges, Complainant refused to drive the PG 482. Complainant testified that Pierce stated that the PG 482 had been set to be Complainant's upgrade, but that due to the air leaks and something turning the oil in that truck yellow, Pierce was unsure whether to keep and fix it or just "get rid of it," and that because there was no other truck for Complainant to drive, he would be laid off. Complainant said Pierce told him this layoff would only be until Pierce figured out what to do with the truck, but when Complainant asked Pierce how long he would be laid off, Pierce said "permanently." Pierce's memory of the dates, and even order, of events was very unclear throughout his testimony, and so he was unsure of which day he had this conversation with Complainant, but he said he did remember a phone call in which Complainant was laid off after the two men discussed the PG 482 and the sale of the PG 470. During this conversation, Pierce said, he did tell Complainant that the PG 482 was set to be his upgrade, and he may have mentioned that the oil analysis had come back yellow, but then Complainant told him he would not drive the 482 because it was unsafe; Pierce said that he responded by assuring Complainant that the 482 would be roadworthy when it left the garage, but that Complainant continued to say that he would not drive the 482, in spite of those assurances.

One of these accounts must be wrong. At the risk of stating the obvious, if Complainant's account of this conversation is the true reflection of what was said that day, then Respondent's stated reason for its adverse employment action – that Complainant refused to drive the only truck available to him – is necessarily false, and so Complainant would prevail, having shown pretext.

Deciding which account is correct based only on the credibility of the witnesses would be tenuous at best. Pierce's memory of events from that time period, as noted above, was very shaky, and so he could be conflating conversations or forgetting what he did and did not say on November 10. Complainant's story, by contrast, was very consistent and precise; however, some of his more outlandish and unsubstantiated assertions, such as his allegations of conspiracy between Pierce and Smith and of (probably criminal) equipment tampering threats by Weyandt, have been no less consistent and no less precise. I therefore hesitate to find that Complainant's credibility alone makes his account of the November 10 conversation worth a preponderance of the evidence.

However, I find that Complainant's account is the one that accords best with the objective evidence of record, specifically, with the timing of Thompson's work for Respondent. Pierce sold the PG 470 to Hawn in late October, and promised Complainant an upgrade, though he did not say which truck it would be. At that time, by Pierce's own testimony, Thompson was still with his former employer *for the sole reason that Pierce had no truck available for him to drive*. Shortly thereafter, on November 1, Pierce received Complainant's certified, notarized

complaint letter memorializing all of his prior complaints and asserting new ones. Thompson began work for Respondent *the next day*, November 2, and at the time, he was driving the PG 482. Pierce knew, when he had Thompson begin work that day, that the PG 470 had been sold, and that his typical practice when a truck has been sold is to stop using it. The argument that the PG 482 was not meant as a permanent assignment for Thompson does not square with Pierce's assertion that the only reason he had not hired Thompson after the interview is because there was no truck for him to drive. If Pierce called Thompson in to begin work November 2, it must have been because the PG 482 was considered to be more "available for him to drive" than it had been in late August when Thompson was interviewed – at which point it was already being used as a communal loaner truck for Respondent's drivers – and the only way this could be so is if Pierce had, as of November 2, no real intention of giving it to Complainant as his upgrade truck (indeed, without this fact, the PG 482 would be even *less* "available" to Thompson than in August, due to the PG 470 being sold).

Thus, the only logical conclusion from the objective evidence is that, beginning on November 2 when Thompson started work, Pierce had no intention of giving the PG 482 to Complainant as his upgrade. Pierce's testimony that he offered Complainant the PG 482 on November 10 therefore cannot be true, based on the objective evidence of record and his own contradicting testimony; therefore, whatever Respondent's rationale was for laying off Complainant, it was *not* Complainant's refusal to drive the 482, as the 482 was never offered to him. The "lack of work" was not due to Complainant refusing to drive, and it was not organic: it was manufactured, for one reason or another, by Pierce's decision to call Thompson in to drive the suddenly available 482.<sup>7</sup>

Complainant did not prove specifically *why* Pierce may have fabricated this reason to lay him off; merely showing that Pierce never offered the 482 as he says he did only proves how, not why, Pierce effected the adverse employment action. However, "evidence that discredits the respondent's proffered reasons for the termination" may be considered as evidence of a retaliatory intent. *Salata, supra*, citing *Williams*, ARB 09-092, slip op. at 5, citing *Riess*, ARB 08-137, slip op. at 6; *Vieques Air Link*, 437 F.3d at 109, *supra*. The ALJ is not compelled to infer that the protected activity contributed to the adverse action simply because the complainant proves pretext, but he or she may infer as much. *Williams*, ARB 09-092, slip op. at 5.

Combined with the striking temporal proximity of the adverse employment action (the November 10 layoff, but also the first step towards that layoff: Thompson's beginning work November 2) to the November 1 protected activity, this show of pretext constitutes a preponderance of evidence that the layoff was a retaliation against Complainant for his safety complaints. Therefore, I find that Complainant has shown by a preponderance of the evidence that his protected activity was a contributing factor in Respondent's decision to take an adverse employment action against him, and that he is therefore entitled to compensation under the STAA.

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<sup>7</sup> Thompson's work logs from November 4, 2010 indicate that he drove a PG 463. There is no evidence about this truck, whether it was a loaner like the 482, the "usual" truck of another driver who was off that day, or perhaps just the product of a typographical error. The inferences from Pierce's testimony and Thompson's logs from November 2 and 3 stand, regardless.

## DAMAGES

The STAA allows for damages awards as follows:

- (A) If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor shall order the person to—
  - i. take affirmative action to abate the violation;
  - ii. reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
  - iii. pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
- (B) If the Secretary of Labor issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary of Labor may assess against the person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint. The Secretary of Labor shall determine the costs that reasonably were incurred.
- (C) Relief in any action under subsection (b) may include punitive damages in an amount not to exceed \$250,000.

49 U.S.C. 31105(b)(3). In the present case, Complainant has requested front pay with interest rather than reinstatement, back pay with interest, litigation costs and attorney's fees, reinstatement of his and his wife's health insurance, compensation for emotional distress, and punitive damages. He has also requested that respondents be ordered to immediately abate all "illegal unsafe activities," post the outcome of this matter in the workplace, post a copy of the STAA protections in the workplace, and provide to its employees all materials necessary to keep drivers aware of all safety rules and regulations.

### *Reinstatement or Front Pay*

Complainant asserts that Respondent should be ordered to pay him \$250,000 in front pay, with interest. He stated that he would not seek reinstatement, as he did not feel safe returning to work with Respondent for three reasons: first, because Respondent did nothing to address Complainant's safety concerns during his employment; second, because, Complainant alleges, he was "denied access" to the safety director throughout his tenure with Respondent; and third, because Respondent did nothing to address Complainant's allegations that he was being physically threatened and his equipment tampered with.

Reinstatement is a mandatory remedy in an STAA case, even where a complainant testifies that he is not seeking reinstatement, as long as the record does not contain substantial evidence that the complainant's reinstatement would cause "irreparable animosity" between the parties. *Densieski v. La Corte Farm Equipment*, ARB No. 03-145, ALJ No. 2003-STA-00030 (ARB Oct. 20, 2004). "If there is such hostility between the parties that reinstatement would not be wise because of irreparable damage to the employment relationship," or "if reinstatement would cause a dysfunctional work environment because of hostilities between the parties," then front pay may be substituted for reinstatement, though reinstatement remains the preferred

remedy. *Id.*, citing *Dutile v. Tighe Trucking, Inc.*, 93-STA-00031 (ALJ July 1, 1994), modified on recon on other grounds (ALJ Aug. 6, 1994) and *Nolan v. AC Express*, 92-STA-00037 (Sec’y Jan. 17, 1995). See Also *Palmer v. Triple R Trucking*, ARB No. 06-072, ALJ No. 2003-STA-28 (ARB Aug. 30, 2006).

While Complainant has made it clear that he mistrusts Respondent, it does not appear from the record that “there is such hostility between the parties” as to constitute “irreparable damage to the employment relationship.” I find that there was not substantial evidence in the record that Complainant’s reinstatement would cause “irreparable animosity between the parties” or a “dysfunctional work environment.” Therefore, Complainant is entitled to reinstatement, the preferred remedy under the STAA, rather than the requested front pay.

#### *Reinstatement of Health Insurance*

Complainant requests that his and his wife’s Highmark BlueShield/Blue Cross medical, vision, and dental insurance be reinstated. There was unrefuted testimony that Complainant and his wife actually received their insurance cards in the mail on the date of his termination; it seems therefore that Complainant had begun receiving benefits from Respondent’s health insurance program on that date, and so he would be eligible for benefits from that program once he is reinstated according to my order above. Respondent is thus ordered to reinstate Complainant’s and Complainant’s wife’s health insurance once he is reinstated to his former position.

#### *Back Pay*

Complainant requested back pay with interest in the amount of \$700 per week beginning November 10, 2010 “until this matter is over.”

An award of back pay is not a matter of discretion, but is mandatory once an STAA violation has been found. *Ass’t Sec’y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-00036 (ARB June 30, 2005), citing *Assistant Sec’y & Moravec v. HC & M Transp., Inc.*, 90-STA-00044, slip op. at 10 (Sec’y Jan. 6, 1992). Back pay is typically awarded from the date of the discriminatory discharge until the complainant is reinstated or receives a bona fide offer of reinstatement. *Bryant*, ARB No. 04-014, *supra*. If a complainant finds employment subsequent to his unlawful discharge, this subsequent employment tolls the respondent’s liability for back pay; the award is offset by interim earnings in positions the complainant could not have held had his or her employment with the respondent continued. *Ass’t Sec’y & Mulanax & Andersen v. Red Label Express*, 95-STA-00014 and 15 (Sec’y Nov. 1, 1995); *Nolan v. AC Express*, 92-STA-00037, *supra*. However, if the subsequent employment has also ended, and the record *clearly indicates* that the complainant failed to exercise reasonable diligence to retain that position, the respondent may not be liable for back pay for the period following the termination of that subsequent employment. *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-00026 (ARB Aug. 31, 2004); *Johnson v. Roadway Express, Inc.*, ARB No. 01 013, ALJ No. 1999-STA-00005 (ARB Dec. 30, 2002); *Cook v. Guardian Lubricants, Inc.*, 95-STA-00043 (ARB May 30, 1997). Unemployment compensation is not to be deducted from back pay awards. *Assistant Sec’y & Moravec v. HC & M Transp.*,

*Inc.*, 90-STA-00044, slip op. at 10 (Sec’y Jan. 6, 1992). Calculations of back pay are based on the complainant’s average weekly wage during his employment with the respondent. *Ass’t Sec’y & Bailey v. Koch Foods, LLC*, ARB No 10-001, ALJ No. 2008-STA-61 (ARB Sept. 30, 2011).

In the present case, Complainant presented documentation of his wages earned during his employment with Respondent in the form of pay stubs and an IRS W-2 form for the year 2010. (CX 19; CX 30). His W-2 showed a total of \$18,551 earned in 2010 from Respondent over the 24 weeks (May 13 to November 10) when he was employed there; this averages to \$772.96/week. (CX 19). His pay stubs reveal an average gross weekly pay of \$744.1108/week. (CX 30). I will trust to Respondent’s reporting to the IRS and accept the W-2 figure of a \$772.96 average weekly wage for Complainant during his tenure with Respondent.

As for any deductions that must be made for earnings after Complainant’s unlawful termination, Complainant’s unemployment will not be deducted. *Moravec*, 90-STA-00044, *supra*. Complainant was employed by Corle Transportation between June 15 and August 7, 2012. There is no evidence of his salary during his employ with Corle, and since I cannot guess at this amount to deduct it from Complainant’s back pay award, I find simply that Respondent’s liability for back pay is tolled for the 7.5 weeks between June 15 and August 7, 2012, when Complainant was employed with Corle Transportation. Respondent will be liable for back pay after that period: although Complainant’s employment with Corle ended prematurely after damage to Corle’s property due to Complainant’s negligence, the Pennsylvania Unemployment Compensation Board of Review held that Complainant’s negligence did not constitute willful misconduct, and I therefore find that the record does not “clearly indicate” that the complainant failed to exercise reasonable diligence to retain his position with Corle.

Thus, Respondent is liable for back pay in the amount of \$772 per week between November 10, 2010 and June 15, 2012 (83 weeks, for a total of \$64,076), and then further back pay in the same amount from August 7, 2012 until the date on which Respondent either reinstates Complainant or makes to Complainant a *bona fide* offer of reinstatement. Back pay will continue to accrue until that date.

Pre- and post-judgment interest must also be paid. *Bryant*, ARB No. 04-014, *supra*; *Johnson*, ARB No. 01-013, *supra*; *Ass’t Sec’y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34 (ARB Jan. 12, 2000); *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000). The interest rate shall be the rate charged for underpayment of federal taxes, as specified in 26 U.S.C. §6621. *Bryant*, ALJ No. 2003-STA-00036; *Ass’t Sec’y & Kerrick v. JLC Industries, Inc.*, 94-STA-00033 (ALJ Oct. 13, 1994).

### *Emotional Distress*

Complainant has requested that Respondent pay \$250,000 to compensate him for emotional distress suffered as the result of his unlawful termination. A compensatory award of this kind may be based solely on a complainant’s “unrefuted, credible, and persuasive” testimony regarding his depression or emotional distress due to losing his position, his insurance/fringe benefits, or his retirement savings. *Barnum v. J.D.C. Logistics, Inc.*, ARB No. 08-030, ALJ No.

2008-STA-6 (ARB Feb. 27, 2009; see also *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004). Emotional damages may be proven, but cannot be presumed: it is the complainant's burden to produce documentary evidence of loss of reputation or mental anguish. *Simon v. Sancken Trucking Co.*, ARB No. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007).

In this case, Complainant has presented no evidence, whether documentary or testimonial, that he has suffered any kind of emotional distress as the result of his unlawful termination. While there is ample evidence of his financial difficulties (CX 40), I cannot presume emotional stress or mental anguish from this documentation alone. Without even testimony from Complainant regarding the mental and emotional repercussions of his unlawful termination, I find that an award for emotional distress would be inappropriate.

### *Punitive Damages*

Complainant asserts that he is entitled to punitive damages in the amount of \$250,000. Punitive damages may be awarded in complaints filed after the effective date of the 2007 amendments to the STAA that permit such damages. See *Smith v. Lake City Enterprises, Inc.*, ARB Nos. 08-091 and 09-033, ALJ No. 2006-STA-32 (ARB Sept. 24, 2010).

The punitive damages analysis in STAA cases consists of two steps. First, the ALJ must consider whether punitive damages are warranted at all; second, if they are warranted, the ALJ must then consider how much to award. *Youngerman*, ARB No. 11-056 (ARB Feb. 27, 2013). Punitive damages are warranted where "Respondent acted with callous disregard for Complainant's rights" by continuously instructing him to drive a vehicle in violation of the regulations – even when those instructions were based on the respondent's misinformation that it was not a violation to drive that truck in its condition – and where the respondent "at the very least...showed a complete disregard for the safety of C and the public by continuously instructing C to drive the truck after he repeatedly stated he did not feel it was legal to do so." *Id.* at 8. "[T]he focus is on the character of the tortfeasor's conduct – i.e., whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Id.* Even where a respondent's manager has demonstrated a "total disregard" for safety in pressuring the complainant to drive unsafely, the ALJ must "consider whether [the manager's] behavior reflected a corporate policy of STAA violations [and] whether punitive damages are necessary in this case to deter further violations." *Ferguson v. New Prime, Inc.* ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011), slip op. at 8-9. "Deterrence is widely recognized as the principal objective of punitive damages." *Youngerman, supra*. "Although a respondent's wealth alone cannot provide a basis for an otherwise unwarranted punitive damage award, it may be considered in determining the size of a suitable award." *Id.*

In the present case, the evidence of STAA violation was not overwhelming, and it was not based on conduct that belied a "callous disregard" for the rights or safety of Complainant or of the general public. In addition, Respondent's overall attitude towards safety was, as described above, laissez-faire at worst, and it has neither the size nor the wealth of a company like UPS, which would be "unaffected by a small compensatory award"; the compensatory award granted in this case is sure to be a sufficient "wake-up call" to Respondent that safety and the protections

afforded by the STAA, are not to be taken lightly. I therefore find that punitive damages would be inappropriate in this case, and that the deterrent aims of the statute will be effected by the compensatory award alone.

#### *Litigation Costs and Attorney's Fees*

Complainant has asked the court to award litigation costs and attorney's fees. A pro se complainant is not entitled to an attorney fee award, but the ALJ may award repayment of the complainant's costs in bringing his case, such as witness fees and registered mail fees, if documented. *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, 95-STA-00034 (ARB Aug. 8, 1997); *Nolan v. AC Express*, 92-STA-00037 (Sec'y Jan. 17, 1995); *Dutile v. Tighe Trucking, Inc.*, 93-STA-00031 (ALJ July 1, 1994), modified on recon on other grounds (ALJ Aug. 6, 1994).

In the present case, there is a dearth of documentation of Complainant's litigation costs. However, as it is customary to allow represented parties a window of time following a decision and order in which to present an attorney's fee petition, I will grant to the pro se Complainant thirty days from the date of this decision and order to submit to the court documentation of his expenses in preparing and litigating this case, to be ruled upon at a later date. *See Youngerman, supra*.

#### *Penalties for Conduct of Litigation*

Complainant has requested that penalties be assessed for what he refers to as Respondent's "obvious willful bad faith negligent intentional spoliation," and for Respondent's "willful bad faith intentional malicious perjury," for which he cites the Pennsylvania code section pertaining to unsworn falsification to officials. I find that there is no evidence in the record to support these serious allegations against Respondent and Respondent's counsel. I therefore assess no penalties for spoliation, perjury, or unsworn falsification against them.

#### *Other Orders*

Complainant requested three other orders. First, he asked that Respondent be ordered to immediately abate all "illegal unsafe activities." Second, and relatedly, he asked that Respondent provide to its employees all materials necessary to keep drivers aware of all safety rules and regulations. Because Respondent is already under legal obligations to both run safely and according to the law, and to provide up-to-date safety information to its drivers, it may be redundant for me to order them to do so. However, it is worth noting once again that the outcome in this case was influenced in part by Respondent's manifestly lackadaisical attitude regarding running overweight, obeying speed limits, making its safety director available to employees, and updating safety manuals. Respondent is ordered to obey its legal obligations in these and all other areas.

Second, he asked that Respondent post the outcome of this matter and a copy of the STAA protections in the workplace. These are standard remedies, even where a good deal of time has passed since the STAA violation. *Scott v. Roadway Express, Inc.*, ARB No. 99-013,

ALJ No. 1998-STA-00008 (ARB July 28, 1999); *Park v. McLean Transportation Services, Inc.*, 91-STA-00047 (ALJ Mar. 26, 1992), *aff'd* 91-STA-00047 (Sec'y June 15, 1992); *Michaud v. BSP Transport, Inc.*, 95-STA-29 (ARB Oct. 9, 1997). I grant this relief, and hereby order Respondent to post a written notice in an area of the workplace readily accessible and frequently accessed by its employees. This notice shall communicate clearly that Complainant has prevailed in this complaint against Respondent for retaliatory termination in violation of the STAA, and shall list the applicable provisions of the STAA at 49 U.S.C. §31105.

ALJs in previous STAA cases have ordered respondents to expunge the adverse employment action, along with any derogatory reference to the complainant's protected activity, from the complainant's work record. *See, e.g., Self v. Carolina Freight Carriers Corp.*, 91-STA-00025 (Sec'y Aug. 6, 1992); *Shamel v. Mackey*, 85-STA-00003 (Sec'y Aug. 1, 1985). I find that this remedy would be very much appropriate in the present case, in accordance with the "make-whole" rationale of damages assessments under the STAA. In order to truly restore Complainant to the position he would have been in but for the unlawful termination, Respondent is ordered to expunge from Complainant's work record all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination, as well as any reference indicating that Complainant was discharged for cause.

### **CONCLUSION**

For the foregoing reasons, I find that Complainant has shown by a preponderance of the evidence that he engaged in protected activity within the meaning of the STAA, that Respondent took an adverse employment action against him, and that the former was a contributing factor to the latter. He is therefore entitled to damages in the amount described above.

### **ORDER**

Respondent shall pay immediately to Complainant:

1. Back pay in the amount of \$64,076 for the period of November 10, 2010 through June 15, 2012;
2. Back pay at the rate of \$772.00 per week for the period of August 7, 2008 until the date on which a bona fide offer of reinstatement is made;
3. Prejudgment and postjudgment interest on the back pay award, calculated in accordance with the underpayment rate specified by 26 U.S.C. 6621;

In addition, Respondent shall:

4. Extend to Complainant a *bona fide* offer of reinstatement;
5. Reinstatement Complainant's and Complainant's wife's health, dental, and vision insurance upon his reinstatement as an employee of respondent;

6. Obey its legal obligations in all areas, particularly regarding the safety rules and regulations governing its operations;
7. Post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of thirty (30) days following receipt of this Decision and Order, advising its employees that the disciplinary action taken against Complainant has been expunged from his personnel record and that Complainant's complaint has been decided in his favor; and
8. Immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination.

Complainant shall have thirty (30) days from receipt of the Decision and Order in which to file a fully supported petition for costs incurred as a result of litigating this case, with simultaneous service on opposing counsel. Thereafter, Respondent shall have thirty (30) days from its receipt of the fee petition to file a response.

**SO ORDERED.**

THOMAS M. BURKE  
Administrative Law Judge

**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. 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. § 1978.110(a). 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 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. § 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). 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. §§ 1978.109(e) and 1978.110(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. §§ 1978.110(a) and (b).