



Issue Date: 12 April 2012

Case No. 2011-STA-00027

In the Matter of:

SCOTT FREEAR
Complainant,

v.

TRANS-PAK, INC.
Respondent.

DECISION AND ORDER

This matter arises from a claim under the employee-protection provisions of amended and recodified Section 405 of the Surface Transportation Assistance Act (“STAA”) of 1982, 49 U.S.C. § 31105. The implementing regulations appear at Part 1978 of Title 29 of the Code of Federal Regulations (“CFR”). Section 405 of the STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee regarding pay, terms, or privileges of employment because the employee has undertaken protected activity.

Scott Freear (“Complainant”), a truck driver, filed this claim alleging that Trans-Pak (“Respondent”) terminated his employment in retaliation for refusing to drive the company’s defective truck called the “Big Red” and for bringing various safety concerns to Respondent’s attention. The undersigned held a duly noticed hearing on June 7, 2011 and August 18, 2011 in San Francisco, California. Complainant’s exhibits (“CX”) 1-4 were admitted into evidence. Tr. 35, 187. Respondent’s exhibit (“RX”) A-L, and Administrative Law Judge Exhibits (“ALJ”) 1-9 were also admitted into evidence. Tr. 24, 37, 104. Respondent filed its post hearing brief (“Resp. Br.”) on November 23, 2011. Complainant submitted his post hearing brief on November 8, 2011.¹ (“Cl. Br.”) Complainant also submitted a Supplemental Post-Hearing Brief on November 30, 2011. (“Cl. Brief Supp.”)

FINDINGS OF FACT

Complainant’s Hearing Testimony

Respondent has about six hundred employees worldwide. Tr. 14-15. Around two hundred of these employees are located in the Bay Area. *Id.* at 15. Complainant started working for Trans-Pak on January 16, 2008, and was terminated from the position in the middle of May 19,

¹ Complainant also attached a California Highway patrol citation dated 6/20/2008 and asked the undersigned to consider the document as an additional exhibit.

2008. *Id.* He worked for the company for about four months total. At the time of the hearing, Complainant resided in Los Gatos, California and was 47 years old. *Id.* at 46. Complainant obtained his Class A commercial vehicle license in 2006. *Id.* Before obtaining a commercial vehicle license, Complainant worked as a bar tender and a bar manager. *Id.* Complainant attended trucking school in Hayward, California for about a month and a half and took a few OSHA classes. *Id.* at 51. Complainant began working for CR England and drove cross country for about five months. *Id.* at 47. Around January of 2007, Complainant began working for Federal Express driving a truck. *Id.* at 48. Complainant worked for FedEx for about nine months before taking his next job with William Tank Lines driving gasoline. *Id.* at 49. Complainant switched jobs because Williams paid him \$8 more per hour. *Id.* at 50. He stayed with Williams for about two months before commencing his job with Respondent. *Id.* at 49.

Complainant worked out of Respondent's Santa Clara facility. Tr. 52. There were three other drivers who worked at the facility. *Id.* at 56. Complainant drove 53 foot trucks and made deliveries to the airport. *Id.* at 50-51. He generally commenced his shift around 4pm in the afternoon and made deliveries until midnight. *Id.* at 51. When Complainant reported to the yard each day, he would load the trucks and deliver the load. *Id.* at 53. Complainant was paid around \$18 per hour and generally worked 40 hours or more per week earning around \$850 per week. *Id.* at 54. Respondent also provided Complainant with medical and dental insurance. *Id.* at 55. Complainant testified that he received his instructions from Sam Stegman, the warehouse manager/dispatch supervisor, and Albert Pelayo. *Id.* at 55-56.

Complainant testified that the first mistake he made while working for Respondent was when he drove to Santa Cruz to a "house stop" where he picked up the paperwork but failed to pick up the freight. Tr. 62. As a result, Complainant had to return to Santa Cruz for the freight. Complainant suspects that Albert Pelayo was scolded by higher management because of this incident. *Id.* Pelayo was terminated about two weeks after Complainant for reportedly drinking on duty. *Id.* Complainant testified that the second incident occurred around March 20, 2008, when he was maneuvering the truck in Respondent's yard and got close to a safety pole. *Id.* When Complainant realized that he was getting close, he called Pelayo to assist him by signaling the distance between the pole and the vehicle. *Id.* at 61. Complainant testified that he never actually hit the pole. The following day, March 21, 2008, Pelayo handed Complainant an "Employee Warning and Corrective Action Notice" and asked him to sign it.² The notice states

that Complainant was previously cautioned to be careful after an accident when he backed up and hit a dumpster at Threshold. It goes on to state that on March 20, 2008, Complainant was "backing in to the dock at Transpak and got the truck stuck around the yellow caution pole on the curb of the driveway." RX B. The notice cautions Complainant to be more careful with company property and indicates that further incidents may result in a suspension or a termination depending on the severity of accident. *Id.*; Tr. 44. Complainant testified that the written warning caught him off guard because he did not think that what transpired was a big issue. Tr. 61.

² Complainant testified that the original document which he signed did not have a "notice of written warning (#1)" checked and there was no date next to the box. Tr. 94, *see* CX 1 at 8. According to Complainant, these additions were made by Mr. Pelayo after Complainant signed the document. *See* CX 1 at 9, 10.

According to Complainant, the incident with the dumpsters was also not a big deal because sometimes people pile the dumpsters into the bay, and it is common for drivers to slide the dumpsters over with the back of the truck rather than getting out and pushing them all over. *Id.* at 60. Based on his past experience, Complainant felt that it would be better to simply sign the statement instead of making a big deal out of it. *Id.* at 62. Complainant testified that in the trucking industry the moment you say “no” to the Respondent you are fired. *Id.* at 71.

The final incident which culminated in Complainant’s termination occurred on May 1, 2008. On this date, between the hours of 12:00am and 2:00am, Complainant was trying to drive a truck called the Big Red out of a customer’s yard at Forward Air in San Francisco. *Id.* at 63. This was the first time Complainant ever drove the Big Red.³ *Id.* at 86. Complainant was previously in the vehicle only a couple of times as a passenger. *Id.* at 59, 86. When Complainant pressed the gas pedal on the Big Red, the truck rolled back two feet and hit the right front fender on a big rock which was positioned in front of the building to avoid crashes. *Id.* at 63-64. The fender cracked. *Id.* at 63-64. According to Complainant, the accident would not have occurred if the transmission was working properly. *Id.* at 66. After the accident, Complainant inspected the truck and left a note for Albert Pelayo explaining what happened. *Id.* Complainant’s note dated May 2, 2008, states the following: “last night at American Line Haul ... the Red Truck, that we all know has problems with its transmission, caused an accident last night. I was maneuvering into position, I put it in drive and it rolled into a rock. The right fender was damaged. I’ve deadlined the vehicle.” CX 1 at 42.

On Friday, May 2, 2008, Complainant completed his trip for Forward Air and returned to Trans-Pak around 2:00am or 3:00am. *Id.* at 96. Complainant commenced his next shift at 4:00 p.m. *Id.* On this date, Complainant told his supervisor that he did not want to drive the Big Red. The supervisor told him to drive the truck, and Complainant drove it anyway without further protest. Tr. 100. He had the weekend off and returned to work on Monday, May 5, 2008. Complainant realized that the Big Red was used even though he left a note on May 2, 2008 indicating that the vehicle was in defective condition. Tr. 66, 97. Complainant felt that his complaints and vehicle inspection reports were ignored and he wrote a letter dated May 6, 2008.

Complainant’s letter states the following:

On Thursday 5/1/08, I expressed on the vehicle inspection report that vehicle #9, aka “Big Red” was unsafe to drive. It had caused an accident...

On Friday, 5/2/08, Transpak management directed me to drive the unsafe vehicle to SPECTRA and to move trailers in the yard. When I was finished I wrote in the vehicle inspection report:

“this vehicle is unsafe”

³ The first time Complainant tried to drive the Big Red he could not move it, and used another truck. Tr. 58.

“this vehicle is deadlined”

On Monday 5/5/08, I arrived at work to see the vehicle had obviously been used. It is a violation of both state and federal law to drive a “deadlined” or “unsafe vehicle”

When I first began working at Transpak I drove vehicle #25 for months without proper registration ...

CX 2 at 1-2. The report goes on to state that on May 2, 2008, the transmission on Big Red caused an accident and that Complainant “will not drive an unsafe vehicle.” Complainant further indicated that “Vehicle #9, Big Red is unsafe,” and that he “will not drive vehicle #9 Big Red,” until the transmission is fixed.” RX J; CX 1 at 7. According to Complainant, everyone at the yard had problems while driving the Big Red. The truck had a bad transmission and replaced clutch brakes which had to be adjusted every two months. Tr. 58. Another driver named BJ Singh usually drove the Big Red. *Id.* Sometimes he had to push the clutch two or three times before it would catch. *Id.* at 59. According to Complainant, when the driver presses the clutch down the vehicle should go right into gear if it is functioning properly. *Id.* Complainant didn’t realize that Mr. Singh also marked the clutch as defective the same day that he drafted his letter. Tr. 69.

Mr. Todd Coyne, the general manager, had a conversation with Complainant on May 7, 2008. Complainant told Coyne that no one should be driving the Big Red until it was fixed and informed him that he would not drive the truck until it was inspected and fixed. Tr. 68. Mr. Coyne reassured Complainant that he would not be required to operate the Big Red until it passed an inspection. *Id.* Mr. Coyne also told Albert to cease from using the truck with any of the team drivers until the inspection was performed by a certified mechanic. *Id.*; RX K. Between May 1, 2008 and May 19, 2008, the company did not ask Complainant to drive the Big Red again. Tr. 71. Complainant continued working his regular shift driving other trucks. *Id.* at 68. Complainant suspects that Respondent continued using the vehicle during this time period because the vehicle inspection reports show a 282 mile discrepancy between May 6, 2008 and May 14, 2008. *Id.* at 72.

On Thursday, May 15, 2008, Albert Pelayo asked Complainant to write an incident report describing what happened on May 1, 2008. Complainant was terminated when he came to work on Monday, May 19, 2008. Tr. 70. Ms. Dully and Mr. Stegman called Complainant in and handed him the termination paperwork. *Id.* Ms. Dully told Complainant that he was being terminated because he had three accidents; however, she could not identify the date of the first accident or the vehicles involved in any of the accidents. *Id.* at 71. Complainant believes that he was terminated for telling the company that he would not drive the Big Red. *Id.* In the course of his employment, Complainant also complained that Respondent was driving unregistered vehicles, (vehicles #25 and #21). *Id.* at 67.

Complainant was unemployed from mid May of 2008 until November of 2009 and collected unemployment during that time period. Tr. 73. From December of 2009 through February 2009, he worked for the Census Bureau. *Id.* Complainant was paid \$23.50 per hour and

put in about 50 to 60 hours of work per week. *Id.* He worked a total of eight to ten weeks. Tr. 74. Since his position with the Census Bureau ended Complainant tried to find a job by looking on-line, going to job fairs and writing letters. *Id.* Complainant has not received any job offers since February of 2009. *Id.* He almost secured a position as a lineman with PG&E. The company hired 40 individuals out of 2,000 applicants, but Complainant was number 50 on the hiring list. *Id.* at 75. Complainant was unemployed at the time of the hearing. *Id.* at 75. He has been subsisting on veteran disability benefits from the VA for his knee injury and borrowed funds. Tr. 75-76. Complainant sustained the injury while jumping out of a tank during training.

Summary of the Vehicle Inspection Reports for Big Red

Every driver must prepare a report in writing at the completion of each day’s work on each vehicle he operates. 49 CFR § 396.11(a).⁴ The parties submitted the following vehicle inspection reports for Big Red.

<i>Number</i>	<i>Driver</i>	<i>Date</i>	<i>Miles on Odometer</i>	<i>Exhibit #</i>
7746074	Singh	5/1/08	541,963.40	RX G
7746075 (post crash)	Freeear	5/1/08	542,080	RX H
7746076	Freeear	5/1/08	542,048	RX H at 2.
7746077	Singh	5/2/08	542,083.4	RX I
7746079	Singh	5/5/08	542,095.2	RX L
7746186 (clutch defective)	Singh	5/6/08	542,047.40	CX 2 at 3.
7746164	Singh	5/14/08	542,330.1	CX 2 at 12.

On May 1, 2008, Mr. Singh conducted a Vehicle Inspection Report (#7746074) for Big Red and indicated that the truck was in “satisfactory condition.” At this time, he did not mark any problems. RX G. Tr. 102.

On May 1, 2008, Complainant filled out Vehicle Inspection Report (#7746075). He marked the following items as defective: body, clutch, turn signal. RX H. In the remarks section, Complainant added that there was “hole/damage to drivers side of the roof, front fender is

⁴ “Prior to requiring or permitting a driver to operate a vehicle, every motor carrier or its agent shall repair any defect or deficiency listed on the driver vehicle inspection report which would be likely to affect the safety of operation of the vehicle.

- (1) Every motor carrier or its agent shall certify in the original driver vehicle inspection report which lists any defect or deficiency that the defect or deficiency has been repaired or that repair is unnecessary before the vehicle is operated again.
- (2) Every motor carrier shall maintain the original driver vehicle inspection report, the certification of repairs, and the certification of the driver’s review for three months from the date the written report was prepared.

49 C.F.R. § 396.11(c).

cracked, left front signal light housing unit cracked, passenger side steps dented/cracked, catwalk cracked, interior left signal light doesn't work." *Id.* Complainant added that it is difficult to put the vehicle in gear and that exterior driver view mirror is damaged. *Id.* On May 1, 2008, Complainant filled out another Vehicle Inspection Report (#7746076). He checked brakes, clutch and transmission as defective and indicated that the transmission will not stay in gear and that the vehicle is unsafe to drive. RX H. This report was filled out by Complainant after he hit the rock. Tr. 88; RX H.

On May 2, 2008, Mr. Singh filled out Vehicle Inspection Report (#7746077) where he indicated that the body of the truck is defective including a cracked bumper, cracked turn signal, right steps, trailer door is bent and does not close. RX I. On May 5, 2008, Mr. Singh once again indicated that the body of the truck is defective but noted that the truck is in "satisfactory condition." RX L. On this date, the odometer showed that the truck reportedly had 542,095.20 miles. RX L.

On May 6, 2008, Mr. Singh drove the Big Red and filled out the Driver's Daily Vehicle Inspection Report where he placed a small cross near the clutch thus indicating that it was defective. *See* CX 2 at 3 (Vehicle Inspection Report #7745186). He also noted that the bumper was crashed and the trailer door was defective. Singh otherwise signed off on the report and indicated that the vehicle was in satisfactory condition. At this time, the truck had 542,047.40 miles on the odometer. CX 1 at 7A.

On May 7, 2008, Mr. Singh wrote a statement describing his experience driving Big Red:

I never had a problem driving Big Red. Since it's automatic and has big engine. It takes time to catch the gear sometimes I have to press the clutch at least two or three times to make it to catch the gear. Other than that it doesn't have any problem with the transmission. Sometimes driver also complains because it's too big and not made to use it to much in the cities. And also has lots of blind spots ... I also drive these kind of trucks before so I think I have enough experience to handle a truck like Big Red...

CX 2 at 21. On May 14, 2008, Mr. Singh filled out Vehicle Inspection Report #7746164 for Big Red. At this time, the car reportedly had 542,330.1 miles on the odometer. Mr. Singh indicated that the body of the vehicle was defective including: "front bumper cracked, signal light on the left cracked; crack in the windshield; steps on the right side cracked; roof cracked." CX 1 at 12.

Previous Inspections of Big Red

On February 26, 2007, FJM Truck Center evaluated Unit #9 (License Plate: YAEN915; Number: 4V4ND3JH2YN793787, 2000 Volvo). FJM Truck Center is located at 1635 Industrial Ave., San Jose, CA 95112. CX 1 at 37. The reason for the inspection was that the vehicle reportedly "starts and runs but won't move." *Id.* FJM checked the transmission and the codes. CX 1 at 14. During the test, the truck would intermittently become inoperative and FJM identified five active fault codes in the ECM: 1) shift lever data link fault indicating that the

system manager EUC and Shift Lever are unable to communicate; 2) EPL Data link Fault indicating that transmission ECU and system manager are unable to communicate; 3) engine control failure indicating that auto shift failed to properly respond to throttle control during a shift command by engine data link; 4) transmission was unable to detect any lever positions; 5) transmission was unable to move front box to neutral. *Id.* The test also found three bad batteries. FJM installed new batteries, cleaned cables, and cleared the codes. *Id.* When the vehicle wouldn't shift, the mechanic performed electrical tests on all related circuits and fault isolation procedures for all codes. *Id.* He subsequently determined failure in the system manager and the shift lever. *Id.* He installed a system manager and a trans shift lever. *Id.* When the system was retested, all codes were cleared. *Id.* at 14. The total cost of the service was \$5,132.29. The invoice was produced on June 29, 2007. *Id.*

On June 27, 2007, FJM conducted a power unit inspection of Big Red and found that the wheel bearings, steering components, and transmission need repairs. CX 2 at 22. All of these things have been circled on the report thus presumably indicating that they were repaired. The report indicated that a checkmark =ok, X = needs repair, and circle = repaired. The vehicle passed the inspection on the same date but the "defect repair date" was left blank. The report goes on to indicate that the vehicle has been "inspected in accordance with CFR 49 and part 396.17, Appendix G. *Id.*

On September 8, 2007, Big Red (License # YAEN915) was reportedly towed because the clutch pedal froze. CX 1 at 15. FJM noted that the source of the problem was that the pressure plate failed. FJM removed and replaced the clutch, the leaking cooler lines, and the bad isolators on the transmission. *Id.* All the parts were reassembled and adjusted. *Id.* The total cost of the service including the new clutch brake was \$2,809.89. CX 1 at 15. The invoice was produced on September 28, 2007. The mechanic also performed the FJM PM inspection of the power unit, and the unit passed inspection. *Id.* at 15.

On February 7, 2008, FJM again conducted a Power Unit Inspection and found that there were problems with the rear window, "battery securement," transmission, fluid leaks, jack up front axle, air lines and electrical wiring. This time Big Red failed the inspection. CX 1 at 23. The form goes on to note that the defects were repaired on February 8, 2008.⁵ *Id.* All of the defects were circled, indicating repair, with the exception of the transmission. The mechanic did not find a problem with "brake operation." *Id.*

On April 8, 2008, Big Red (License: YAEN915) was brought to FJM Trucking Center because it would not go over 30 miles per hour. CX 2 at 16. The testing indicated that there was a "failed XY housing and range select solenoid." The mechanic removed the parts from the truck and confirmed failure. He then installed a new XY housing and solenoid, reassembled and test drove the vehicle. He did not identify further failures at that time. The mechanic also advised Sam to replace one of the tires. The total cost of this service was \$856.89. *Id.* at 16. The invoice was dated April 21, 2008.

⁵ Sammy Stegman testified that he "would assume it was fixed." Tr. 192

After Complainant's accident on May 1, 2008, Respondent had Big Red (Unit #9; License #: YAEN915, Make: Volvo, Vin. #: 4V4ND3JH2YN793787) evaluated at the FJM Truck Center. CX 2 at 38. The vehicle was brought in for an inspection on May 12, 2008, at 12 a.m. and inspected around May 13, 2008. The report indicates that the "driver stated transmission had problem-gearshift was put into drive and truck rolled into a rock." *Id.* An FJM mechanic reported that he "test drove the vehicle and performed numerous operational checks. Shifted through every gear from a stop and driving and had no problems. Checked for codes in ECM" but found "no current or history codes."⁶ *Id.* On May 13, 2008, Chris Gozza, a shop foreman at FJM, emailed Sam Stegman stating "we found no problems during our test drive." RX D. Sam Stegman asked Gozza to fax him a copy of the report and asked if the vehicle is "road safe" to be driven. *Id.* Gozza indicated that he is in the process of completing the invoice, and that Stegman can pick up the truck if he wanted to. Although the parties don't appear to dispute that Big Red was in fact the vehicle which was evaluated on May 12, 2008, the license plate for the car has been blacked out in Respondent's submissions to OSHA.

Following Complainant's accident Big Red underwent a series of other inspections and repairs. *Id.* at 17. On June 5, 2008, Big Red was repaired at ALL Cal Repair. The total bill was for \$2,078.02. CX 2 at 43. The body damage to the front right bumper was repaired along with right side step assembly and the left side upper air reflectors. The side was painted. CX 2 at 43. On June 26, 2008, All Cal Repair repaired an air line and installed a new turn signal indicator switch. The mechanic indicated that he test drove the truck for transmission complaints and also scanned the system for any codes. *Id.* He found that none of the codes were active and found no problem with the transmission shifting. *Id.* Interestingly, the serial number, the model, and the make were consistent with Big Red's information; however, the license number was now listed as 9B94599 instead of YAEN915 (Serial # 4V4ND35H2YN793787). Furthermore, the license plate for Big Red listed on other inspection reports also varies. Sometimes it's YAEN915 and sometimes it is 9B94599.

On August 26, 2008, the truck underwent basic maintenance and clutch adjustment. On August 19, 2008, All Cal Repair again inspected the Big Red, Vehicle #9 (License #: 9B94599), and found that the hood convex mirror was broke, the clutch did not meet the standard and had to be adjusted, the front turn signal was out, the brake system needed adjustment, the low coolant was broken, and there was also a problem with the frame. *Id.* at 19A. Complainant produced an exhibit, DMV Vehicle Registration Information, for vehicle YAEN915 which indicates that there was no record for this vehicle on September 8, 2008. CX 1 at 40.

On January 8, 2009, Respondent had one of its vehicles evaluated in Gilroy. The document titled "Re: axle Volvo" provides a \$1,500 total estimate for repairs, which include, repairing all damaged areas on the hood, repairing and painting the bumper as needed, and repairing both fiberglass air reflectors on the sides of the vehicle.⁷ CX 1 at 44.

⁶ Mr. Coyne testified that he did not black out the license plate number on the report. Tr. 164. The report notes that the last PM date was February 6, 2008.

⁷ Coyne testified that he does not recall hearing about another accident involving Big Red in 2008 or 2009. He also testified that he has not seen the damage assessment form from Gilroy. Tr. 166.

OSHA Findings

Complainant filed a complaint with the Secretary of Labor on July 2, 2008, alleging that Respondent discriminated against him in violation of STAA. CX 2 at 28. On March 10, 2011, OSHA issued a letter finding that there is no reasonable cause to believe that Respondent violated the STAA. *Id.* The Secretary found that although Complainant reported Big Red as unsafe, “the preponderance of the evidence shows that he did not have a reasonable basis for doing so. Big Red required maintenance and repairs, but the preponderance of evidence suggests that it was not defective or unsafe based on service records and other evidence. Respondent’s managers denied that Big Red was unsafe or even particularly troublesome. More crucially, no other drivers apparently complained about Big Red being unsafe; on the contrary, at least two drivers actually declared Big Red to be safe.” *Id.* at 29. Because Complainant lacked a reasonable basis in believing that Big Red was unsafe to drive, Complainant failed to engage in protected activity. *Id.*

Expired Registration Statements

On February 18, 2008, Complainant reported on his Vehicle Inspection Report for Tractor #25 (License Number: 9B35980) that the vehicle’s registration had expired. Tr. 196; CX 2 at 33. Complainant’s February 28, 2008, Vehicle Inspection Report for Tractor # 25 again indicates that the registration had expired and that the insurance card had expired. Complainant noted the same concern on March 13, 2008 and March 18, 2008, for Tractor #25. *Id.* at 34. Complainant produced records from the DMV indicating that the Registration Card for License Number 9B35980 (1HSRAGUN2JH97388) was valid from 01/31/2008 to 01/31/2009. CX 2 at 32. DMV received a fee on February 21, 2008 and issued a new sticker on March 20, 2008. CX 2 at 32. The DMV record also indicates that the previous expiration date was January 31, 2008. Complainant also produced a DMV record for License Number 5G70351 (Vehicle ID Number: 1FDWH81C1VVA11749, 2002). The registration card for this vehicle was valid from 6/30/2008 to 6/30/2009. The fee for this vehicle was received on 11/12/2008 and the sticker was issued on 11/12/2008. According to Complainant, the fee for the vehicle was received 21 days after it was due. Tr. 197. Sammy testified that to the best of his recollection, “this vehicle was registered ... they were waiting for some paperwork of some sort to release the sticker.” Tr. 197.

Respondent’s Letter to OSHA

On December 31, 2008, Ms. Patti Dully, Respondent’s Director of Human Resources, submitted a letter to the regional OSHA investigators, Josh Paul and Susan Kamlet, outlining the company’s position on Complainant’s termination. CX 2 at 8. The letter indicates that it is the Respondent’s position that Complainant was terminated on May 19, 2008 for the sole reason of excessive accidents involving damage to company property in less than four months of employment. *Id.* Complainant was hired by the company as a Class A driver on January 16, 2008. *Id.* At the time he was hired, Complainant was reportedly provided with an employee handbook and educated about the company’s policies and procedures. *Id.* The letter notes that in the first thirty days of employment in mid-February, Complainant was verbally cautioned by

Respondent's Warehouse Manager, Sam Stegman, to be more careful after hitting a dumpster while backing up at a customer site named Threshold. *Id.* The verbal conversation was reportedly not documented in writing, but subsequently referenced in a written warning issued March 21, 2008, after a second "incident causing damage to company property." *Id.* On March 20, 2008, Complainant was involved in a second accident where he got the "company truck stuck around a caution pole on the Company's property near the driveway curb." *Id.* The day after the accident Sam Stegman gave Complainant a written warning which Complainant signed. *Id.* Complainant did not refute the allegations outlined in the written warning or discuss the occurrence with management. *Id.* at 9. According to the letter, the third incident occurred on Thursday, May 1, 2008. *Id.*

Complainant left a hand written note on the dispatch supervisor's desk at the end of his shift on Friday May 2, 2008. *Id.* Albert Pelayo, Respondent's dispatch supervisor first saw Complainant's memo on Monday morning May 6, 2008, and alerted senior management. CX 2 at 9. Dully received a fax copy of the same memo and called Todd Coyne, Respondent's Logistics General Manager, to investigate Complainant's concerns. *Id.* Because Sam Stegman was out of the state on vacation, Todd Coyne met with Complainant the following day on May 7, 2008. *Id.* In this meeting, Complainant told Mr. Coyne that "his concerns would be resolved if he was not required to drive vehicle #9 until it was inspected and repaired." *Id.*

According to the report, Complainant was issued Truck #9 on May 2, 2008, before Respondent became aware of his concerns on May 6, 2008. *Id.* Complainant had made a notation of transmission issues on his vehicle inspection reports of May 1, 2008 and May 2, 2008, but did not bring the matter to his supervisor's immediate attention by engaging Mr. Pelayo in discussion about his concerns over Truck #9 and showing Mr. Pelayo those inspection reports." *Id.* Dully notes that even though Complainant "worked a late shift, he could have radioed or called Mr. Pelayo or Sam Stegman at any time, as drivers are instructed to do to convey any issues regarding their shift, their delivery schedules of their vehicles. *Id.* Although dispatch supervisor reviews the driver inspection reports regularly, he may not have reviewed them immediately, leaving Mr. Pelayo unaware of [Complainant's] concerns on those immediate dates." *Id.* at 9.

Truck #9 was driven by another Class A driver, Bikramjit Singh until Complainant had his meeting with Todd Coyne on May 7, 2008. *Id.* Subsequent to the meeting, Truck #9 was made inactive immediately and was sent for inspection upon Sam Stegman's return on May 12, 2008. *Id.* The inspection was performed by one of the certified mechanic shops that perform all maintenance on Respondent's vehicles. As part of the investigation into Complainant's May 1, 2008 accident, Respondent asked Mr. Singh if he had any safety concerns or experienced transmission problems with Truck #9. *Id.* According to the report, Mr. Singh, "a driver for the company since January 2008, expressed no safety issues or transmission problems with Vehicle #9. *Id.*

Mr. Dully goes on to note that Complainant had her contact information yet he never made an attempt to contact her during his employment to express any concerns related to employee or vehicle safety. *Id.* at 9. In summary, the report indicates that Complainant's "two prior incidents and corrective actions of February and March 2008 were significant events that,

combined with the last and final incident of [Complainant's] May 1st accident led to the decision to terminate [Complainant's] four month employment with the Company. *Id.* The termination decision was based on the three increasingly serious accidents: the extent of damage to vehicle #9 from the May 1 accident; the certified inspection report that documented truck #9 transmission was functioning properly with no issues found related to the transmission; and the information provided by Mr. Singh, [Respondent's] other Class A driver that expressed no issue or concerns in driving vehicle #9." *Id.*

In addition to the letter, Dully submitted eight addendum documents. *Id.* Notably, Complainant was not employed with the company long enough to receive a formal performance evaluation. *Id.* at 10. The letter indicates that Complainant's May 2, 2008 memo and copies of the May 1st and May 2nd Drivers Daily Inspection Reports, and Mr. Coyne's notes from the meeting on May 7th are the only documents where Complainant notes his concerns related to transmission or vehicle safety during his employment. *Id.* Dully also attached the Driver's Daily Vehicle Inspection Reports for vehicle #9 from Mr. Singh from May 1, 2, 5, 6, 14, 15, 16, 2008 that do not report any issues related to the truck's transmission. *Id.* The letter indicates that the "company does not have a formal policy for drivers for reporting motor vehicle safety concerns but all drivers are instructed and required to complete Driver's Daily Vehicle Inspection Reports." *Id.* Dully notes that Respondent took appropriate progressive discipline with Complainant. "Complainant was verbally counseled resulting from the first incident in February 2008; then received a written warning subsequent to his second accident in March 2008; then last and final accident resulting in extensive damage to the company truck. Investigation followed with findings that did not show the root cause to be anything other than driver error causing increasingly serious damage to company vehicles." *Id.* at 11.

Testimony of Rafael Zambrano

Mr. Zambrano is Respondent's Director of Human Resources in San Jose, California. Tr. 109. He replaced Ms. Dully and began working with the company on January 11, 2010. *Id.* at 117, 123. Zambrano has been doing HR work for seventeen years, and has knowledge in the area of employment law but not trucking law or driving regulations. *Id.* at 113, 117, 123. Mr. Zambrano could not recall seeing Complainant's May 22, 2008, letter requesting inspection reports and various documents from his personnel file. *See* CX 1 at 2; Tr. 114. He acknowledged that under the Labor Code the employee is entitled to view the documents surrounding his termination. Tr. 114. Mr. Zambrano was not working for Respondent when Complainant drafted the May 6, 2008, letter titled "Refusal of Transpak to Stop Driving Unsafe Vehicle." Mr. Zambrano also did not review the files of the individuals who were terminated on June 4, 2008, and has not heard anything about the termination. *Id.* at 122. He hasn't interacted with Mr. Pelayo since his termination.⁸ *Id.* Mr. Singh currently works part-time for Respondent and also serves as a truck driver for another company. *Id.* at 126-27.

⁸ Patty Dully submitted a list of employees to OSHA who were terminated on 6/4/08 for "possessing and/or consuming alcohol beverages on company property." Tr. 121. Pelayo was allegedly one of the employees who was terminated for possession of alcohol on company property. *See* CX 1 at 8; Tr. 121.

According to Mr. Zambrano, if the employee feels that he is being asked to do something that is unsafe, he can report it to management or HR. *Id.* at 116. This rule is outlined in the employee handbook. *Id.* Mr. Zambrano testified that the company currently has a policy which directs employees to report any equipment which is not functioning properly. Tr. 122. The manual has not been revised since Mr. Zambrano began working for the company. *Id.* at 123. He does not know what the manual looked like when Complainant was employed with the company.⁹ *Id.* at 122.

Testimony of Todd Coyne

Mr. Coyne is Respondent's general manager. Tr. 136. As the general manager, his job is to oversee the drivers and the dispatchers. *Id.* at 137. He is also in charge of the logistics and spends the majority of his time booking freight and coordinating freight movement. Coyne has been in logistics for around twenty years. *Id.* at 171. On May 7, 2008, Coyne met with Complainant to discuss the complaints outline in his letter dated May 6, 2008. Tr. 131. Following the meeting, Mr. Coyne drafted a letter documenting the discussion that took place. CX 1 at 36. According to Mr. Coyne, the Big Red was put out of commission immediately after the conversation. Tr. 132, 135, 145. Mr. Coyne testified that he did not see Mr. Singh's Inspection Report (#7746186) dated May 6, 2008, before the meeting with Complainant. Tr. 133. According to Coyne, all of the problems with the trucks are logged in the daily vehicle inspection report and subsequently reviewed; however, it is not uncommon for a vehicle inspection report to remain unchecked for five days. *Id.* at 139.

After Complainant's May 1, 2008, accident, Mr. Coyne discussed Complainant's termination with his subordinates Mr. Stegman and Patty Dully. Tr. 144. The decision to terminate Complainant was mutual. Coyne testified that he did not terminate Complainant because he refused to drive Big Red or because of the letter he wrote on May 6, 2008. *Id.* at 171. According to Coyne, the sole focus of the discussion was Complainant's driving record. *Id.* Complainant had three incidents over a short period of time that he was employed with the company. Coyne felt that Complainant was a risk and didn't want to continue retaining him as a driver. *Id.* at 145. Mr. Coyne testified that the fact that Complainant was refusing to drive Big Red was not an issue. The company had other equipment for Complainant to drive, and he was in fact given another truck after the accident. *Id.* After Complainant was terminated, the company probably hired another driver to replace him because it needs a certain number of drivers to handle the daily business. *Id.* at 146.

Coyne could not recall the dates of Complainant's previous incidents; however, at some point, Sam Stegman told him that the company's truck had markings or chipped paint because Complainant hit a dumpster in February of 2008. *Id.* at 141. Mr. Coyne never actually saw the damage in person. *Id.* Coyne testified that since he does not approve all of the expenditures, it is possible that the company paid for the repairs without his knowledge. *Id.* Mr. Coyne did not inspect the truck personally and could not recall when he had the conversation with Stegman. *Id.* at 143. In Mr. Coyne's experience, it has never been an acceptable practice to push the

⁹ "The company does not have a formal policy for drivers for reporting motor vehicle safety concerns but all drivers are instructed to complete Driver's Daily Vehicle Inspection Reports." CX 1 at 13

dumpsters out of the way with any part of the tractor or trailer. *Id.* at 171-72. Mr. Coyne previously witnessed Complainant backing into the dock at the Trans-Pak yard and “didn’t view him as being ...- a very good driver.” Tr. 172. Sometimes it would take Complainant multiple tries before he could get into the position that he needed to be in. Complainant did not have very good driving habits. *Id.* Coyne was worried that there was a potential risk for another accident and damage to company equipment. *Id.* at 177. Coyne testified that he was not aware that Complainant reported any safety violations to any law enforcement agency or government agency. *Id.*

On July 1, 2008, Respondent compiled a statement documenting the steps that were taken to investigate the May 1, 2008 accident. Mr. Coyne confirmed that the steps outlined in the document were taken even though he did not recall personally drafting the document. Tr. 161; CX 2 at 35. The following were reported: 1) picture evidence taken on May 2, 2008, of damage to truck; 2) Complainant was provided other trucks to drive after his 5/1/2008 and 5/2/2008, driver vehicle inspection reports indicated concerns regarding transmission; 3) “statement gathered on May 7, 2008 from other driver of truck #9 regarding no issues or concerns regarding the trucks transmission;” 4) Truck was sent to FJM Truck Center for transmission inspection on May 12, 2008. The Department manager was out of town the week of May 1st, and the truck was sent for inspection immediately upon his return; 5) picture evidence was taken at vendor site (Forward Air) parking lot showing distance that the truck was maneuvered before hitting rocks as reported by employee; 6) routing inspection on 6/26/2008 at All-Cal Repair of truck #9 for hose repair notes additional inspection of the truck’s transmission finding no problems with transmission shifting. CX 1 at 35; Tr. 160.

According to Coyne, FJM Truck Center employs certified mechanics. Tr. 173. Mr. Coyne indicated that it is not uncommon to have trucks with extensive mileage on them to receive periodic maintenance and repair. Tr. 174. Coyne testified that in 2008, the company did not have a camera on its premises even though there is one there now. Tr. 168-69. The company became a certified screening facility in 2009/2010. *Id.* at 169. Coyne is not aware of physical damage other than paint scraped off from Complainant’s previous accidents. *Id.* at 179. Coyne believes that a clutch adjustment is not a sign of a defective clutch. *Id.* at 174. Coyne acknowledged that he is not a certified mechanic and does not know what specific things mechanics check for during a transmission diagnostic. *Id.* at 180. Mr. Coyne testified that to his knowledge all of the vehicles were registered, but he does not know when the registration was actually paid. *Id.* at 158, 170. Coyne did not personally gather the evidence to respond to Complainant’s subpoena for records. *Id.* at 161. Mr. Coyne also has never seen the assessment form from the Gilroy mechanics shop and does not recall other accidents involving Big Red in 2008 or 2009. *Id.* at 166.

Testimony of Sammy Stegman

Sam Stegman is Respondent’s Warehouse Manager. When he returned from vacation, Mr. Coyne told him that the Big Red needed to be checked out and diagnosed. Tr. 212. In order to determine if there were any problems with the truck, Stegman sent the vehicle to FJM Truck Center. *Id.* at 213. He asked the mechanic to check the transmission for any problems. *Id.* On May 13, 2008, Mr. Stegman emailed Chris Gozza, the shop foreman at FJM, to confirm that the vehicle was “road safe.” Gozza indicated that FJM “found no problems during” the drive test. *Id.*

at 213-14. According to Mr. Stegman, the mechanics at FJM are certified mechanics. *Id.* at 215. Stegman believes that if the truck had problems which needed to be fixed, Gozza would have told him what needed to be repaired and the cost for the repairs. *Id.* FJM Truck Center has done work for Trans-Pak for a number of years. Tr. 215. Stegman testified that after Complainant had his accident he does not recall having a conversation with Complainant about the truck. *Id.* at 217. Stegman has worked with Singh for around two years. *Id.* at 220. He also does not recall Mr. Singh ever reporting any problems with the transmission of Big Red. *Id.*

Albert Pelayo came in one day and told Stegman that a customer, Threshold, called and complained about one of Respondent's drivers who had run into a dumpster. Tr. 218. When Complainant returned to the yard, Stegman personally looked at the truck and saw a four foot blue streak running down the side of the truck from the dumpster. *Id.* at 202, 218. He recalls taking a picture of the damage but does not know where it went. *Id.* at 202. Normally, Mr. Stegman would turn the pictures over to the HR director. *Id.* at 205. Since this was Complainant's first accident, Mr. Stegman did not see the need to write it up. *Id.* at 203. Since the truck didn't have a dent just a blue streak, he let it go. *Id.* Stegman also recalls the incident when Complainant jackknifed the company truck around the safety poles. *Id.* There are safety poles on each side of the driveway where the trucks back into the dock to load and unload. *Id.* Mr. Stegman saw a "huge jackknifed truck around the pole" and "could see where the pole had been hit – or the vehicle had been hit by the pole." Tr. 203-04. Mr. Stegman believes that there was also a picture of that, which he also no longer has. Tr. 203. According to Mr. Stegman, truck drivers don't usually get the vehicles jackknifed around the safety pole; however, without the damage the incident probably would not have been written up. *Id.* at 204.

Stegman was present at a meeting where Ms. Dully, Mr. Coyne and he himself made the decision to terminate Complainant. Tr. 221. They considered the fact that Complainant had three incidents in a short period of time. They did not want to be liable for any more accidents. It was Stegman's position that Complainant should be terminated. *Id.* at 222. They also didn't feel that Complainant's driving abilities and backing up capabilities were up to par. *Id.* Mr. Stegman would expect a Class A driver to have no problems backing up into a double wide driveway without jackknifing the truck. *Id.* Mr. Stegman had also never heard of a maneuver where a truck is used to move dumpsters out of the way by hitting them with a truck. *Id.* at 222. He had never seen it happen and would be concerned if someone told him that it is an acceptable driving maneuver. *Id.* at 223. Stegman did not terminate Complainant for refusing to drive Big Red, writing a letter dated May 6, 2008, or recording safety violations. *Id.* About a month and a half after Complainant's termination, Big Red was sent to a second mechanic shop called All Cal Repair. Tr. 224. Stegman told the mechanics at Big Red about Complainant's accident and asked them to check the transmission again. *Id.* All Cal also "test drove truck for transmission complaint" and scanned system for codes. They found "no codes active" and no problem with "trany shifting." *Id.* Stegman testified that he probably would not have voted to terminate Complainant if FJM found a problem with the truck. Tr. 225-26. Before deciding to terminate Complainant, Stegman did not see Mr. Singh's statement from May 7, 2008 which indicates that it takes him two or three times to hit the clutch before it becomes engaged. Tr. 227-28. He is not a driver and does not know the significance of this statement. Tr. 189. However, Stegman did not perceive it as a big problem because other drivers indicated that the Big Red just has a different type of transmission. *Id.* at 228. Mr. Stegman could not recall what other drivers he asked. Tr.

234. Based on Stegman's experience a clutch adjustment is normal routine maintenance for a heavy truck. Tr. 219. According to Stegman, if Respondent's employee feels a condition is unsafe he is supposed to mark it on the vehicle inspection report and bring it to the attention of the dispatcher. Tr. 219-20. Stegman testified that the vehicle inspection reports weren't always turned in directly to him but went to the dispatcher. Tr. 188. He is unfamiliar with the guidelines which should be used to review these reports. *Id.*

Complainant did not remember Big Red being in another accident. Tr. 193. Stegman did not recall sending any vehicle to Gilroy for an inspection and had never seen an invoice from Gilroy. *Id.* at 194. Stegman was not sure if Respondent still owned Big Red. The vehicle was turned over to another yard. *Id.* at 211. Stegman testified that he does not know what a complete transmission diagnostic is and acknowledged that he is not qualified to say what a certified inspection report looks like. *Id.* at 182. Stegman believes that all of the company vehicles were registered. *Id.* at 188.

FINDINGS OF LAW

Complainant's Argument

Complainant alleges that he was terminated, at least in part, because he complained about expired registrations for some of Respondent's vehicles and raised safety concerns with the truck called the Big Red.¹⁰ Tr. 10. Complainant refused to drive the truck and indicated that no one should drive the vehicle until it was examined and certified as safe. Tr. 11. Complainant requests back pay and punitive damages. He is also not opposed to reinstatement.¹¹ ALJ 3, Tr. 14.

Respondent's Argument

Respondent asserts that Complainant was terminated solely because of his poor driving record. He was involved in three separate accidents during his four month employment period. Respondent previously received a complaint from a customer that Complainant hit its trash cans with a truck. Complainant also had trouble maneuvering the truck in Respondent's driveway and got it "jackhammered" around the safety pole. Finally, Complainant ran the truck into a rock and notified the company that it was due to transmission failure. Respondent believes that Complainant began making complaints about the truck in order to focus attention away from his poor driving record. Tr. 44. Respondent took the truck out of service and sent it to a mechanic who evaluated the truck and found no problems with the transmission. A month and a half later

¹⁰ Complainant points out that during the unemployment hearing at the Employment Development Department, Judge Wong decided that the various accidents cited by Respondent were not Complainant's fault. CX 3at 43. The undersigned conducts this hearing *de novo* and is not bound by the decision of Judge Wong. Furthermore, because the Employer did not file a timely protest to Complainant's claim for benefits they were not allowed to present evidence at the unemployment hearing.

¹¹ In his pre-hearing statement, Complainant alleges that he has been unemployed for three years and was averaging \$3,595 per month while working for the Employer. Based on Complainant's calculations he is entitled to roughly \$120,000 in backpay. (\$3,595 x 36 months unemployment= \$129,420 minus \$8,000 he earned while working as a Census Crew Leader). Complainant also requests \$360,000 in punitive damages, a written apology, and an admission of guilt.

the truck was sent for an additional service at a different mechanic shop. Once again the mechanics did not detect any problems with the transmission. After the third accident, Respondent lost confidence in Complainant's driving abilities. According to Respondent, Complainant's safety complaints played no role in the decision to terminate him. Tr. 45. Because Complainant received a warning in the past, the company made a decision to terminate him due to a loss of production and revenue as a result of damage to the truck and the time expanded on getting the truck inspected and fixed.

STAA Framework

The 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266, amended the STAA to provide that STAA whistleblower complaints will be governed by the legal burdens set out in AIR 21, 49 U.S.C.A. § 42121(b). In order to establish the prima facie case, the Complainant must demonstrate the following by a preponderance of the evidence: 1) that his complaints about his truck were protected activity; 2) that respondent took an adverse employment action against him; 3) his protected activity was a contributing factor in the unfavorable personnel action. *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011), citing *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, ALJ Nos. 2008-STA-12 and -41 (ARB Sept. 15, 2011). Once the case is tried on its merits, the ultimate inquiry becomes whether complainant has proved by a preponderance of the evidence that the respondent discriminated against him because of his protected activity. *U.S. Postal Serv. Bd. of Governors v. Aiken*, 460 U.S. 711, 713-14 (1983); *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB Sept. 14, 2007). 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." *Williams*, ARB 09-092, slip op. at 5. If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Williams*, ARB 09-092, slip op. at 5 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams*, ARB 09-092, slip op. at 5, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing Black's Law Dictionary at 577).

A) Protected Activity

The complainant in an STAA proceeding bears the burden of proving that he engaged in protected activity. The STAA protects the following employee activities: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," 49 U.S.C.A. § 31105(a)(1)(B)(i); or "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition," 49 U.S.C.A. § 31105(a)(1)(B)(ii). Section §31105(a)(1)(A) is

commonly known as the “Complaint Clause,” and §31105(a)(1)(B) is called the “Refusal to Drive Clause.”

The “Complaint Clause” of the STAA protects an employee who has “filed a complaint or begun a proceeding related to a violation of a regulation, standard, or order, or has testified or will testify in such a proceeding.” *Id.* at §31105(a)(A)(i). The STAA prohibits an employer from discharging an employee for refusing to operate a vehicle in violation of a Federal regulation, 49 U.S.C. § 2305(b), including the hours-of-service regulations at 49 C.F.R. Part 395. *See Hamilton v. Sharp Air Freight Service, Inc.*, 91-STA-49, slip op. at 1-2 (Sec’y July 24, 1992). *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec’y Aug. 31, 1992). The statute covers internal complaints to supervisors as well as external complaints to government officials. *See Nix v. Nehi-RC Bottling Co., Inc.*, 84 STA-1 (Sec’y July 13, 1984); *Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec’y Mar. 19, 1987); *Harrison v. Roadway Express, Inc.*, 1999 STA 37 (ARB Dec. 31, 2002). Employee’s complaints cannot be too generalized or informal. *Calhoun v. U.S. DOL*, 576 F.3d 201, 213-14 (4th Cir. 2009). If the “internal communications are oral, they must be sufficient to give notice that a complaint is being filed.” *Jackson v. CPC Logistics*, ARB No.07-006, ALJ No. No 2006-STA-4 (ARB Oct. 31, 2008); *see Clean Harbor Env’t Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (finding that a driver “filed a complaint” when he sent letters to his superiors explaining various safety precautions he had been taking in an attempt to explain his slow pick-up times). All complaints, whether internal or external, must “relate to” safety violations. Courts have construed “relate to” broadly to encompass violations of both federal and state laws. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992). However, in order to qualify for protection, the complaint must be based on a “reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation.” *Calhoun*, 576 F.3d at 213.

Complainant argues that he put the Big Red “out of service” on May 2, 2008, when he left a note on Albert Pelayo’s, dispatch supervisor’s, desk stating that Big Red has transmission problems which caused the accident. Complainant argues that “being made to drive a vehicle that can weigh up to 80,000 pounds with a clutch that one has to press for at least two or three times to make it catch the gear is a condition any reasonable person would find troublesome, unsafe, and likely to cause serious damage.” Complainant points to 49 C.F.R. § 396.11(c)(1) which states that “[p]rior to requiring or permitting a driver to operate a vehicle ... (1) every motor carrier or its agent shall certify on the *original* driver inspection report which lists any defects of deficiency that the defect or deficiency has been repaired or that repair or that repair is unnecessary before the vehicle is operated again.” (emphasis added). Complainant points out that Respondent never signed off on the original reports where the transmission and the clutch were marked as defective and failed to indicate that the problems were either “corrected” or “need not be corrected.” Benjamin Singh’s report dated May 6, 2008 (#7746186), which has the clutch marked as defective, and Complainant’s report where the transmission is marked as defective have never been signed.¹² RX H, I, CX 2 at 13. Complainant testified that he saw that the vehicle

¹² Even though Complainant did not know about Singh’s May 6, 2008 Inspection Report where he marked the clutch as defective, Complainant knew that Singh has been having problems with the clutch. He was a passenger in the vehicle before and on one occasion tried to start the truck but could not get it to work.

was being used after he came to work on Monday after the accident. This prompted him to write another letter to management on May 6. The undersigned finds that Complainant engaged in protected activity when he complained about problems with the clutch and the transmission. The undersigned agrees with Complainant that at the very least it was reasonable for him to assume that Respondent was violating rule § 396 because he personally marked various items as defective on the Vehicle Inspection Reports, but Employer apparently continued to utilize the vehicle without addressing the complaints.¹³ Accordingly, Complainant engaged in protected activity under the Complaint Clause.

B) Knowledge of Protected Activity and Adverse Action

To succeed on his claim, Complainant must also prove by a preponderance of the evidence that Respondent's managers who decided to terminate his employment knew of the protected activity. *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-5 (ARB Sept. 28, 2007); *Osborn v. Cavalier Homes*, 89-STA-10, slip op. at 2 (Sec'y July 17, 1991). The parties do not seriously dispute that Respondent had knowledge of Complainant's complaints about Big Red. They also don't dispute that Complainant's termination constitutes an adverse action under the STAA.

C) Contributing Factor

The Complainant can prove that his protected activity was a contributing factor either through direct or indirect evidence of a discriminatory motive. *Williams v Domino Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan 31, 2011). "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." *Id.* In the absence of direct evidence, complainant can raise an inference of a discriminatory motive by "proving by a preponderance of the evidence that retaliation" was a contributory reason for terminating his employment. *Id.* For example, complainant may "discredit the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Id.*; *Riess*, ARB 08-137, slip op. at 6. If the complainant proves pretext, the court "may infer that the protected activity contributed to the termination," although it is not compelled to do so. *Williams*, ARB 09-092, slip op. at 5.

¹³ The undersigned does not reach the issue of whether Complainant engaged in protected activity under the "Refusal to Drive Clause." The Refusal to Drive Clause states that it is impermissible to take an adverse action against an employee for refusing 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. In order to receive protection under either 31105(a)(1)(B)(i) or (ii), Complainant must actually refuse to drive the vehicle. Complainant cannot seek protection for driving under protest. *Calhoun v. United States Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB Sept. 14, 2007); *Williams v. CMS Transportation Services, Inc.*, 1994-STA-5 (Sec'y Oct. 25, 1995). The employee must also notify the Respondent of a safety basis for the refusal to drive. *See, e.g., Smith v. Specialized Transportation Services*, 1991-STA-22 (Sec'y Apr. 20, 1992). In this case Complainant had refused to drive the vehicle; however, the Respondent also told him that he was not required to drive the Big Red, and Big Red was not his usual vehicle on the job. Furthermore, Employer obtained a report from FJM showing that the truck had no transmission problems. Complainant also brought the expired registrations to management's attention; however, an expired registration is not a complaint about safety.

An inference of causation may be raised if the adverse action is close in time to the protected activity. While not dispositive, the closer the temporal proximity is, the stronger the inference of a causal connection. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-30 (ARB Feb. 29, 2012); *see e.g., Bergeron v. Aulenback Transportation, Inc.*, 91-STA-38, slip op. at 3 (Sec'y June 4, 1992) (concluding that an inference was raised when the discharge immediately followed the protected activity); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991) (finding a causal connection where the employee was fired immediately after bringing the lawsuit). For example, temporal proximity alone “will not support an inference in the face of compelling evidence that [Respondent] encouraged safety complaints”. *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229-30 (6th Cir. 1987) (finding no causal link between protected activity and the adverse employment action where the record showed that Respondent periodically held sessions, during which complainant and other drivers were invited to air their safety concerns, and complainant testified that he felt free to call his superior to complain about vehicle problems); *see also Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005); *Riess v. Nucor Corp. Vulcraft-Texas, Inc.*, ARB No. 08-137, 2008-STA-11 (ARB Nov. 30, 2010). Further, an inference of causation may be negated by intervening events. *Johnson v. Rocket City Drywall*, ARB No. 05-131; ALJ No. 2005-STA-24 (ARB Jan. 31, 2007).

After examining all the evidence, the undersigned concludes that Complainant failed to demonstrate by a preponderance of the evidence that his safety complaints were a factor which Respondent weighed in making the decision to terminate his employment or that Respondent’s proffered reasons for the termination are merely pretext. Complainant acknowledged that he made several mistakes while he was employed with Respondent. Complainant testified that his first mistake involved driving to Santa Cruz to a “house stop” and failing to pick up the freight. Tr. 62. As a result, he had to make another round trip to Santa Cruz costing the Respondent time and gas money. Complainant suspects that Albert Pelayo, Respondent’s Dispatcher, was scolded by higher management because of this incident. *Id.* at 62.

Complainant’s second mistake involved hitting the dumpsters at a customer’s facility. Tr. 218. Albert Pelayo received a phone call from a customer complaining that one of his drivers hit a trash can with the truck. *Id.* Complainant testified that it’s a common practice for drivers to move the dumpsters out of the way by driving through them with a truck. Tr. 60. Complainant stated “I think the other driver, Mario, was the one who hit that truck ... I mentioned to [Stegman] that that happens all the time. Sometimes people pile their dumpsters into the bay. And so you just kind of slide it over with the back of your track rather than getting out and pushing them all over.” Tr. 60. Thus, even though Complainant denied hitting the dumpsters on that particular occasion he acknowledged that he also engaged in the practice. Both Sammy Stegman and Todd Coyne testified that in their experience, it has never been an acceptable practice to push dumpsters out of the way by driving a truck through them. Tr. 171-72, 222. Coyne heard about the incident from Stegman who told him that the company truck had markings where it made contact with the dumpster. Tr. 141. Stegman testified that he personally examined the truck after Pelayo brought it to his attention and saw a four foot blue streak running down the side of the truck where it made contact with the dumpster. Tr. 202, 218. Stegman believes he took a picture of the truck and sent it to HR, but Respondent could not

produce the picture as evidence. According to Stegman, since this was Complainant's first incident, and there was no actual damage to the truck, he decided to let it go. Tr. 203.

The next event which led to a written warning, involved Complainant maneuvering the vehicle in Respondent's yard. Complainant had a hard time backing up the truck into the dock. According to Complainant, he came very close to a caution pole and had to call Pelayo to assist him by signaling the distance. Tr. 44, 62. The following day Pelayo gave Complainant a written warning cautioning him to be more careful with company property. The written warning mentions the incident with the trash cans and notes that the next incident may result in a suspension or a termination. Since Pelayo did not testify at the hearing, it is not clear whether Complainant actually hit the pole or came very close to it. Mr. Stegman who allegedly saw the incident testified that he recalls seeing a "huge jackknifed truck around the pole" and "could see where the pole had been hit..." *Id.* at 203-04. According to Stegman, drivers generally don't get their vehicles jackknifed around the safety pole.¹⁴ *Id.* at 222. He noted that without damage the incident probably would not have been written up. *Id.* at 204. It is not clear whether Mr. Stegman was standing close enough to actually see what happened. However, regardless of whether Complainant actually hit the pole on that particular occasion, Mr. Coyne testified that he was not impressed by Complainant's driving skills and didn't view him as a good driver. *Id.* at 172. Coyne personally witnessed Complainant backing into the dock on other occasions and noticed that sometimes it would take Complainant multiple tries before he could get into the position he needed to be in. *Id.* Complainant was with the company for only four months and did not receive a formal evaluation during that time period. Complainant's brief employment history with Respondent paints a picture of someone with less than ideal driving skills. Although independently the incidents which played a part in his termination were relatively minor, taken together they would cause a reasonable Respondent to be concerned.

Complainant was involved in the final incident which culminated in his termination on May 1, 2008. On this date Complainant was driving Big Red for the first time and trying to maneuver it out of the customer's yard. Complainant's explanation of what actually happened on May 1, 2008 is somewhat ambiguous. At the hearing, Complainant testified that he was "doing some quick maneuvers, up-back, up-back ... And in one of [his] up-back maneuvers, [he] put it in gear" and pressed the "gas, and it just rolled back and just hit the rock that was sitting right there" causing the right front fender to crack. Tr. 63. According to Complainant, when he put the vehicle in gear and pressed the clutch, the car slowly rolled back about a foot hitting the rock because the transmission failed. *Id.* at 64. In the picture, which Complainant attached to the Incident Report¹⁵ dated May 15, 2008, Complainant drew a truck adjacent to the rock. From this picture, it is difficult to ascertain how the damage to the right fender could have been caused by the truck rolling down one foot. It appears that Complainant got extremely close to the rock. Complainant testified that there were hundreds of other drivers at the scene of the accident

¹⁴Stegman testified that to him jackknifed means that the tractor and trailer are pretty much wrapped around something where you can't move without hitting it. The undersigned agrees with this definition and understands the term to mean that the vehicle is in a position which resembles a pocket knife because the cab is facing in the opposite direction of the trailer and the vehicle is stuck. See <http://www.thefreedictionary.com/jackknifed>.

¹⁵ In the vehicle report, Complainant elaborates that "the transmission would not hold the gear, the vehicle is unsafe and has been repeatedly indicated as such on Vehicle Inspection Reports."

“circling the truck,” yet he failed to bring in a live witness who saw the accident to corroborate his story. Tr. 65. Complainant left a note for the company’s management dated May 2, 2008, stating “the Red Truck, that we all know has problems with its transmission, caused an accident last night. I was maneuvering into position, I put it in drive and it rolled into a rock. The right fender was damaged. I’ve deadlined the vehicle.” CX 1 at 42.

When Mr. Singh drove the truck on May 1, 2008, preceding Complainant’s accident, he did not mark anything as defective on the Vehicle Inspection Report (#7746074). On May 2, 2008, Mr. Singh filled out Vehicle Inspection Report (#7746077) where he indicated various problems with the body of the truck, including the cracked bumper, but did not mark anything else as defective. RX I. On May 5, 2008, Mr. Singh once again indicated that the body of the truck was defective but noted that the truck is in “satisfactory condition.” RX L. On May 6, 2008, Mr. Singh placed a small cross near the clutch thus indicating that it was defective. *See* CX 2 at 3 (Vehicle Inspection Report #7745186). Mr. Singh otherwise signed off on the report and indicated that the vehicle was in satisfactory condition. CX 1 at 7A. On May 7, 2008, Mr. Singh was asked to provide a written statement describing his experience driving Big Red. He indicated that he has “never had a problem driving Big Red. Since it’s automatic and has big engine. It takes time to catch the gear sometimes I have to press the clutch at least two or three times to make it to catch the gear. Other than that it doesn’t have any problem with the transmission.” Considering the size of the cross on Mr. Singh’s Report #7745186, the undersigned would not be surprised if the individual reviewing the report overlooked it.

Respondent’s senior management first became aware of Complainant’s accident on May 6, 2008, when Albert Pelayo, saw Complainant’s handwritten note on his desk. CX 2 at 8. Because Sam Stegman was out of the state on vacation, Todd Coyne, met with Complainant the following day to discuss his concerns. Coyne reassured Complainant that he would not be required to operate Big Red until it passed an inspection. Coyne also told Pelayo to cease from using the truck with any of the team drivers until the inspection was performed by a certified mechanic. Tr. 68; RX K. Complainant admitted that Respondent did not ask him to drive the truck again. Tr. 71. He continued to work his regular shift driving other vehicles. *Id.* at 68. When Stegman returned from vacation about a week later, Mr. Coyne told him that Big Red needed to be checked out by a mechanic. *Id.* at 212. Stegman sent the vehicle to FJM Truck Center and asked the mechanic to check the transmission for any problems. *Id.* at 213. The vehicle was brought in for an inspection on May 12, 2008 and inspected around May 13, 2008. CX 2 at 38. An FJM mechanic reported that he “test drove the vehicle and performed numerous operational checks. Shifted through every gear from a stop and driving and had no problems. Checked for codes in ECM” but found “no current or history codes.” *Id.* On May 13, 2008, Chris Gozza, a shop foreman at FJM, emailed Sam Stegman stating “we found no problems during our test drive.” RX D. Sam Stegman asked Gozza to fax him a copy of the report and asked if the vehicle is “road safe” to be driven. *Id.* Gozza indicated that he was in the process of completing the invoice, and that Stegman can pick up the truck if he wanted to. After Complainant was terminated, Big Red was evaluated on June 5, 2008 at ALL Cal Repair. At this time, the body damage to the vehicle was repaired. The mechanic also indicated that he test drove the truck for transmission complaints and also scanned the system for any codes. He found that none of the codes were active and found no problem with transmission shifting.

Respondent relies on the decision in *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987) to argue that it is Complainant's burden to show that the transmission was defective. In *Moon*, Complainant made various safety complaints but was terminated for allegedly incorrectly filling out his driver's log. *Id.* at 231. The Sixth Circuit rejected Complainant's claim that "since he can prove his logs are accurate, [Respondent's] reason for firing him must be fabricated" and noted that the "relevant inquiry is the Respondent's perception of his justification for the firing."¹⁶ *Id.* Here, it appears that Complainant did not become vocal about safety issues until after he crashed the Big Red. At the hearing, Complainant testified that in the trucking industry it's better not to say "no" to the Respondent or make a big deal out of things. Tr. 62. For example, he signed the warning statement without disputing the allegations even though he allegedly was not the one who hit a trash can at a customer's site. Tr. 62, 71. It is not clear if Complainant ever vocalized his concerns about the registration or only wrote them down on the Vehicle Inspection Reports. Although Complainant probably discussed his various concerns with the other drivers, there is no evidence that he ever brought safety issues concerning Big Red or any other vehicles to the attention of management before his accident. For example, Dully reported that Complainant never brought safety concerns to her attention. Because of this, it was reasonable for Respondent to believe that Complainant began making complaints about the transmission in order to focus attention away from his poor driving skills. Tr. 44. Respondent terminated Complainant only after it received a report from FJM showing that the vehicle had no problems.¹⁷ The undersigned concludes that Respondent could reasonably rely on a report from FJM to conclude that Big Red had no problems with the transmission around May 1. The report states that the vehicle was "checked for codes in ECM" but had "no current or history codes."

Although Complainant questions the validity and thoroughness of the testing performed at FJM, he fails to present any evidence that the vehicle was not evaluated by a certified mechanic. Respondent has been using FJM for an extended period of time to service its other vehicles. Although Big Red had periodic problems with various components and needed periodic upkeep, the invoices closest in time to the accident suggest that the vehicle was functioning properly. Tr. 223-24. Complainant relies on the report from FJM dated February 7, 2008, to argue that the transmission had never been fixed. On February 7, 2008, FJM found various problems with the truck, one of which was the transmission, and reported that the truck failed an inspection. CX 1 at 23. The form goes on to state that the defects were repaired the following day. From the form, it is not clear whether the transmission was repaired or replaced. All of the other defects, with the exception of the transmission, were circled. Nevertheless, on April 8, 2008, the XY housing and solenoid, a key component in the automatic transmission was replaced. The mechanic drove the vehicle and did not identify further failures. CX 1 at 16. The cost of the repair was \$856.89 thus presumably the transmission did not have other problems at that time. Complainant points to the fact that the clutch had to be adjusted several times and that sometimes it failed to catch the gear. Complainant does not elaborate on the significance of this

¹⁶ The court went on to note that "Without more, Moon's contention that his logs were accurate, if proven, could give rise to an inference, sufficient for a prima facie case ... On this record, however, the Secretary reasonably concluded that Moon failed to offer sufficient evidence that his logs were accurate. For Moon to receive the benefit of the inference at this stage of proof, he must do more than simply assert that his logs are accurate." *Id.*

¹⁷ Complainant argues that Respondent did not make an effort to consult with anyone who had pertinent knowledge. The undersigned does not find this statement completely accurate because the record is replete with reports from mechanics, especially for Big Red.

finding. In his pre-hearing material Complainant alleges that “Trans-Pak made a decision that it was cheaper to replace [him] than it was to replace Vehicle #9.” ALJ 4. However, based on the evidence presented, the undersigned does not have sufficient information to determine whether the vehicle was so old and defective that it was unreasonable for Respondent to continue utilizing it at all. None of the individuals who testified at the hearing, including Complainant, were certified mechanics.

Coyne testified that Complainant was not terminated because he refused to drive Big Red or because of the letter he wrote to management on May 6, 2008. Tr. 171. The company had other equipment for Complainant to drive. *Id.* at 145. The sole focus of the discussion was Complainant’s driving record. Coyne was concerned that Complainant might get into other accidents in the future. *Id.* at 171. Stegman also testified that during the meeting the management considered the fact that Complainant had three incidents in a short period of time, and they didn’t want to be liable for additional mistakes. *Id.* at 221. Stegman echoed Coyne and stated that Complainant was not terminated for refusing to drive Big Red, recording safety violations, or writing a letter dated May 6, 2008. Complainant admitted that when Dully handed him the termination paperwork she told him that he was being terminated because of the three accidents. Tr. 71.

Persuasiveness of Respondent’s Witnesses

Complainant tries to undermine Respondent’s credibility by raising various inconsistencies in Respondent’s records. First, Complainant argues that his warning letter was amended after he signed it, thus demonstrating the company’s flippant attitude towards record keeping and ethical behavior. Respondent counters that the discrepancy in signatures is readily explained. Complainant was given a copy of the warning letter. After he signed the original, Pelayo made two copies of the document and gave one copy to Complainant and put the second one in his file. HR made an additional notation on Respondent’s copy when the document was placed in Complainant’s file. The undersigned credits this explanation since Complainant’s signature and the substantive information documenting the reasons for the warning are identical on all documents. Complainant also implies that Pelayo’s reports should not be given weight because he was subsequently terminated for drinking on company premises around 4:00p.m. or 5:00p.m. in the afternoon. Tr. 201-02. According to Complainant, this was around four hours after Mr. Pelayo started his shift. Complainant states that “the only conclusion one can draw is that the alcohol played a role in [Pelayo’s] decision to alter the document, twice.” The undersigned finds this reasoning unpersuasive. The evidence surrounding Pelayo’s termination is unclear and occurred around a month after Complainant’s termination. Furthermore, Stegman corroborates the statements in Pelayo’s warning letter.

Complainant also argues that Respondent misrepresented the fact that Big Red was not being used between May 6, 2008, and May 14, 2008, because the Vehicle Inspection Reports between May 6, 2008, and May 14, 2008, document a 283 difference in mileage. Respondent represented to OSHA that “Truck #9 was driven by another Trans-Pak Class A driver, Bikramjit Singh until the May 7, meeting with Todd Coyne. Subsequent to that meeting, Truck #9 was made inactive immediately and was sent for inspection upon Sam Stegman’s return on May 12, 2008.” CX 1 at 9. Todd Coyne testified that he instructed the team not to use Big Red until it

underwent an inspection. CX 1 at 12. Tr. 148. The truck was evaluated by FJM, which is located around 10 miles from the yard, at 1635 Industrial Avenue in San Jose. Tr. 149. The vehicle was released from FJM around May 14, 2008. On May 6, 2008, Singh filled out the Driver's Daily Vehicle Inspection Report where he indicated that the vehicle had 542,047.40 miles on the odometer. CX 1 at 7A. On May 14, 2008, Mr. Singh reportedly resumed driving the vehicle and filled out Vehicle Inspection Report #7746164 for Big Red. At this time, the car had 542,330.1 miles on the odometer. Although the undersigned agrees with the Complainant that Singh's report is dated May 14 not May 16, the documents don't necessarily prove that the car was used between May 6 and May 14th.

It appears that Singh's report from 5/6/08 does not list the correct mileage. Vehicle Inspection Report from 5/5/08 (#7746079) lists 542,095.2 miles but the report for the following day (# 7746186) lists 542,047.40 miles (47.8 miles less). Complainant's reports seem to have the same problem. Report #7746075 for 5/1/08 lists 32 miles more than the next report #7746076. It's possible that instead of filling out the report after each trip, drivers occasionally filled out the report before the trip or made mistakes when recording the number. The undersigned does not have all of the vehicle inspection reports for Big Red between May 1 and May 14. After May 5, the numbers on the reports are not consecutive. It's also possible that someone drove the vehicle on May 7 before it was allegedly made inactive in the afternoon.¹⁸ The previous Vehicle Inspection reports show that it was not uncommon for the driver to make multiple long trips in the course of one day. Miles also accrued when Respondent drove Big Red to and from FJM. FJM test drove the vehicle which added extra miles. Thus, it is plausible that the vehicle was not used between May 7 and May 14.

Respondent's business records in this case are less than ideal. Complainant has produced strong evidence that at least one of Respondent's vehicles (#25) had an expired registration for almost a month. None of Respondent's witnesses could explain the reasons for the delay in paying the registration fees. Stegman indicated that "to the best of [his] recollection the vehicle was registered." Tr. 197. When he was confronted with evidence showing otherwise, Stegman added that "this was the only incident he could recall." In light of the fact that the incident occurred around three years ago, it is not clear whether Stegman's testimony concerning the late registration payments was intentionally vague or due to a faulty memory. Ironically, considering Respondent's lax standards in reviewing the Driver's Vehicle Reports it is not surprising that the registration issue came to management's attention around twenty days after Complainant submitted his reports. Complainant raised the issue in February and March of 2008, around two months before his termination. Because of this time lapse, the inference of causation is not very strong with respect to these complaints.

Mr. Stegman also had difficulties recalling whether Big Red was in another car accident soon after Complainant's termination and did not recall sending the vehicle to a mechanic shop in Gilroy. Tr. 194. The undersigned finds this testimony disingenuous. Respondent's Santa Clara facility is relatively small and has only three drivers. Based on Complainant's testimony there are only three or four vehicles at the yard. Tr. 53. Stegman was the warehouse manager/dispatch supervisor who should have been aware of the day-to-day problems with all the vehicles. Tr. 55-

¹⁸ Complainant had his meeting with Coyne at 3pm.

56. For example, the company had to wait for him to come back from vacation before Big Red was sent to FJM for an assessment. Nevertheless, the undersigned credits Stegman's testimony on the issue of termination. Stegman took the vehicle to FJM to check the transmission before voting to terminate Complainant. He specifically e-mailed an FJM foreman to confirm that the vehicle was safe. Stegman testified that he would not have voted to terminate Complainant if FJM found a problem with the truck.

Respondent's witnesses also could not explain why Big Red was constantly listed as having two different license plate numbers YAEN915 and 9B94559 on various documents. Respondent's attorney argues that FJM Truck Center incorrectly entered the license plate number in its computer system when it evaluated the vehicle. Respondent points out that FJM Truck Center invoice, dated June 29, 2007, which also has the same incorrect license plate number. However, this argument fails to explain why All Call Repair, a different mechanic shop, also listed the 9B94559 as the license number for the vehicle. *See CX 2* at 17. When FJM previously evaluated Big Red in 2007 and 2008, it listed the YAEN915 license number. *See Id.* at 22. Despite the discrepancy, the parties don't appear to dispute that Big Red was in fact the vehicle that underwent the inspection at FJM following Complainant's accident.

Likewise, none of the supervisors or managers at the yard could demonstrate basic familiarity with vehicle components or Federal Motor Carrier Safety Regulations. For example, Stegman testified that the Vehicle Inspection Reports weren't always turned in or in most cases, they were not turned in directly to [him]." Tr.188. He also wasn't familiar with the guidelines which specify how the defects listed in the reports should be reviewed and addressed. Tr. 188. Stegman acknowledged that he has never undergone formal training about how to comply with OSHA and the DOT guidelines. According to Coyne, all of the problems with the trucks are logged in the daily vehicle inspection report and subsequently reviewed; however, it is not uncommon for a vehicle inspection report to remain unchecked for five days. *Id.* at 139. Mr. Coyne also testified that he also never received training about the laws that govern the trucking industry. Tr. 168. Since Pelayo did not testify at the hearing it's not clear how much knowledge he had about the regulations or the proper way to check the Vehicle Inspection Reports. According to Complainant the company also did not have a mechanic on-site. All of this evidence demonstrates Respondent's ignorance of the law; however, it is insufficient to raise an inference of causation.

Conclusion

The undersigned takes into account all of the evidence, but remains of the opinion that Respondent terminated Complainant because of the various mistakes he made during his short period of employment. Complainant did not begin complaining to management about Big Red's transmission problems until after he got into an accident. Respondent had the truck evaluated at a mechanic shop, and the shop did not find problems with the transmission at that time. Accordingly, the undersigned finds that Complainant has failed to produce sufficient evidence to demonstrate, by a preponderance of the evidence, that Respondent's decision to terminate him was motivated, at least in part, by a discriminatory purpose.

Accordingly, the claims of Complainant herein are hereby **DISMISSED**.

A

Russell D. Pulver
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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 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).