



Issue Date: 21 August 2013

In the matter of
ZACHARY JOYNER,
Complainant

v. CASE NO.: 2011-STA-00042

COACH AM GROUP HOLDINGS CORP. doing business as MIDNIGHT SUN TOURS
Respondent

Appearances:

Complainant, *pro se* and Michael Yusim, Personal Representative
For the Complainant
Kevin Vance, Esquire
For the Respondent

Before: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER
DISMISSAL OF CLAIM

This proceeding arises from a claim brought under the employee protection provisions of the Surface Transportation Assistance Act (“STAA”), 49 U.S.C. § 31105, filed by Zachary Joyner (“Complainant”) against Midnight Sun Tours (“Respondent”).

Appellate jurisdiction of this matter lies with the 11th Circuit Court of Appeals.

PROCEDURAL HISTORY

On November 22, 2010 Complainant filed a complaint against Respondent. After conducting an investigation of the complaint, the Occupational Safety and Health Administration (“OSHA”) found that there is no reasonable cause to believe that Respondent violated 49 U.S.C. § 31105. Complainant filed an objection to OSHA’s findings and requested a hearing before an Administrative Law Judge.

A hearing was held in West Palm Beach Florida from December 6-7, 2011. Complainant’s Exhibits (“CX”) 1-21, 25, 27, 35, 51-60, 79-80, 82-98 were admitted into evidence. Tr. at 132, 413-414, 417-418, 524. Respondent’s Exhibits (“RX”) 1-42 were admitted into evidence. Id. at 23. At the hearing, the following witnesses provided testimony: Complainant, Don Redden, Dorothea Moore, Bret Brittenum, Jerry Pouncey, and Delroy White.

On February 24, 2012 Complainant submitted a document entitled “Findings of Fact and Conclusions of Law.”

On January 3, 2012, Coach Am Group Holdings Corp. and certain of its affiliates and subsidiaries including Respondent filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code with the United States Bankruptcy Court for the District of Delaware. Under section 362(a) of the Bankruptcy Code, the filing of the petition operates as a stay applicable to all entities of any litigation, proceeding or other action against the Debtors to recover on any claim. Section 362 also mandates a stay of any act to obtain possession of or exercise of control over, any of the Debtors’ property. Complainant requested relief from the stay, but the Bankruptcy Court denied relief. However, on or about August 2, 2013 the stay was lifted. Both of the parties have commented.

FACTUAL BACKGROUND AND TESTIMONY

Don Redden

Don Redden testified that he is a bus driver for Midnight Sun Tours. Tr. 23. He has worked for MST since 2002. Id. at 25. He was the Operations and Safety Manager from December 8, 2008 to February 9, 2011. Id. He recommended that Mr. Joyner be hired, about five years ago. Id. at 26.

He ultimately recommended that Mr. Joyner be terminated because of “Multiple safety issues and also some customer service issues” but “the bulk of it was the safety.” Id. An incident when Mr. Joyner damaged two buses in the Midnight Sun bus yard by driving one bus against another bus that was parked, an incident in which he received a traffic ticket for blocking a lane in front of American Airlines Arena, and an incident in which he made a scene in front of a customer were “part of the overall picture” in his decision to recommend the termination of Mr. Joyner. Id. at 28-30. He wrote a memorandum dated September 16, 2010, at RX-36, because in his opinion “Mr. Joyner was so unsafe that he should be terminated from employment.” Id. at 30-31. The date of Mr. Joyner’s termination was September 22, 2010, the date of an employee disciplinary action form signed by him. Id. at 31.

He described several incidents that raised safety and customer service concerns. RX-10 was created as a result of a complaint from a citizen that Mr. Joyner had been involved with in an accident and because Mr. Joyner’s bus had fresh damage that was consistent with the complaint. Id. at 31-32. RX-11 is a memorandum dated March 19, 2009 that was precipitated by his request that Mr. Joyner prepare an incident report about the damage to the bus and the citizen complaint, and it was not done. Id. at 32. Incident reports are company procedure. Id. He wrote a notice of reprimand dated May 22, 2009 (RX 13) because Mr. Joyner had driven a bus with one hand while talking on his cell phone with the other hand, two safety officers from another company were present in a vehicle which he felt was in the way, so he laid on his horn until they moved the vehicle, and he drove away “at a fairly rapid rate of speed.” Id. at 33. He observed this personally. Id. He concluded that it “was highly unsafe behavior.” Id. Talking on a cell phone while driving violated company regulation, which is in exhibit RX-19. Id. at 34. When he received a copy of the cell phone policy on 2/24/2009 he placed copies in each driver’s mailbox and posted it near the door in the driver’s room, which is where the drivers receive and turn in

their paperwork and have their mailboxes and lockers. Id. at 34-35. This occurred before the cell phone incident. Id. The situation was not an emergency, when cell phone use is allowed. Id. at 35-36. Using a cell phone then was unsafe because it was dark out, extremely congested with coaches moving in multiple directions, and there were children walking in the area. Id. at 36. RX 14 is a memorandum dated May 22, 2009 he wrote because he was informed by the maintenance department and sales department that Mr. Joyner had driven from Orlando with the bus in the lowered position, and when this happens the “ride becomes extremely harsh, and it also adversely affects the handling of the motor coach.” Id. at 37. This is both a customer service issue and a safety issue. Id. at 37-38. RX 16 discusses an incident in which Anna Lindley called him and told him that a citizen complaint had been received by her and that a motor coach operated by Mr. Joyner was being operated recklessly, the bus was weaving, speeding and cutting people off. Id. at 40. Mr. Joyner met with him and confirmed that he may have been going too fast but didn’t know if he cut anyone off or not. Id. He did not view Mr. Joyner’s response as acceptable because a commercial driver “should know where that bus is and what that bus is doing at all times.” Id. This incident was part of the picture that led him to recommend termination. Id. at 41. The air bag incident and cell phone incident were part of the picture too. Id. Regarding RX-23, an employee disciplinary action form dated April 16, 2010, Mr. Joyner, who was driving a bus full of children and teachers one second behind the vehicle in front him, struck the rear of an SVU that braked, as he could not stop in time. Id. at 41-42. This distance is “far too close” as the company standard “is at least five seconds and at night “another second would be added” and at 70 miles per hour, which is what Mr. Joyner was doing, another second would be added. Id. at 42-43. He had recommended to his superior that Mr. Joyner be terminated for unsafe driving but the recommendation was not followed. Id. at 43. Instead, he had to retrain Mr. Joyner and give him a five day suspension. Id. A client or customer sent a letter about this incident stating that Mr. Joyner did everything he could to avoid the collision but he felt that Mr. Joyner put himself and his passengers and the people in the SUV in a very unsafe position by following so closely. Id. at 43-44. Four people were injured as a result of this incident. Id. at 46. This incident was part of the picture for recommending termination. Id.

RX 36 contains a memorandum that was written because Mr. Joyner had “three serious incidents” in the span of a month. Id. at 48. First, Mr. Joyner “ripped open the back portion of a bus on a sign post.” Id. Second, he struck woman’s parked car, causing significant damage to the car, and denied the incident, although videotape showed that his bus struck the woman’s car. Id.

Third, Mr. Joyner continued to drive a bus although there was a leak in the air system, resulting in the brake shoes becoming partially actuated against the brake drum. Id. at 48-49. Mr. Joyner should have pulled over immediately at the first safe place and called for assistance. Id. at 50. Mr. Joyner told him that the bus shut down in the middle of Route 80 and the tires and wheels were smoking. Id. at 51. There are “a number” of warning signs that there is an air leak. Id. at 52. There are air gauges that show the level of air in that system. Id. There would have been a red light coming on if the pressure in the brake system dropped below 60 pounds and “I do not believe it did until the bus stopped in the middle of Route 80.” Id. at 54. Also, the “feel of the bus” would have shown that the breaks were on; the bus would not be as responsive in turns, the accelerator would be pressed down far more heavily, the engine noise would be much louder, and the engine would vibrate much stronger. Id. at 54. And the engine temperature would be going up rapidly, as shown by the temperature gauge. Id. at 55. When a driver continues to drive

a bus with the air brakes partially engaged, a bus will come to a complete stop in a travel lane subjecting it to a collision; the friction would create “tremendous heat” that would ignite the tire and “Once a tire ignites, the bus is going to completely be consumed by flame” and there “is no way of putting out a bus fire once a tire gets going short of a complete fire engine or maybe even two fire engines pumping away to put out the fire.” Id. at 55-56. The interior of a bus is “highly combustible” so a fire would have produced gases “sufficient to kill the people onboard.” Id. at 56. He inspected the brake shoes and brake drums, which had to be removed because they were damaged beyond repair, “deeply scarred and burned,” and he saw them removed by the mechanics the following Monday. Id. at 57.

He met with Mr. Joyner on September 15. Id. at 58. He wrote a memorandum (RX -36) to his supervisor and had Mr. Joyner “limited to local runs pending review by the upper management.” Id. He considered Mr. Joyner to be “the least safe of any of the drivers.” Id. at 59. When asked whether logging practices were part of the reason for his recommendation to terminate Complainant, he stated “it was a safety-based memorandum. I didn’t want anyone to be killed.” Id. at 60.

On cross-examination, he testified, when asked whether he personally observed Mr. Joyner driving with low pressure, that he was not present, and that he went on “what I had gained from my own observations and from the observations of the responding mechanic who found low air pressure.” Id. at 61-62. He never asked Mr. Joyner to see Ms. Moore when he called him in to his office tell him that he was being fired. Id. at 62. It’s possible that the red light did not come on if Mr. Joyner was driving between 60 and 90 psi, which would have induced partial application of the breaks. Id. at 64. When asked whether it’s possible that if there was a drag it would have been so slight that Mr. Joyner would not have been able to notice it, he responded:

Not under the circumstances that were apparently present.

The engine was laboring mightily so that it eventually shut itself down. The computer system overrode everything and shut off the engine in the middle of Route 80 because the engine was grossly overheated. In addition, the bus would have handled very differently than normal. The engine would have been screaming with noise because of the great effort that was needed to push the bus forward up to the point where the brakes actually locked solid in the middle of Route 80. The vibrations from the engine would have been terrific.

Id. at 66. In addition, Mr. Joyner saw the tires smoking or could have seen the tires smoking by looking at the mirrors. Id.

They are supposed to follow the Coach America policies at Midnight Sun Tours, and Coach America has a logging off duty policy that drivers should follow the Federal Motor Carrier Safety Administration regulations and the law. Id. at 70-71. He was asked if, in accordance with Coach America policy, he “always gave a driver a written statement that told that driver which of the non-driving segments would be the off duty segments” and he responded that:

Every year, I gave the drivers a memo setting forth FMCSR 95 as relates to logging off duty during a tour of duty, and we also -- on most of our runs where there would be a substantial break -- put it directly on the work ticket. In addition, each driver was directly provided with a copy of the federal regulations for hours of service.

Id. at 75. He was aware of the guidance that “the duration of the relief from duty must have been made known to the driver prior to the driver’s departure in written instructions from the employer.” Id. at 77. When asked how Midnight Sun Tour’s log policy satisfied the provision requiring that the duration of the time off must be made known ahead of time in writing, he responded:

To the extent that it would be during the duration of an event -- for example, a football game, it would be for the duration of the football game. During a space launch, it would be for the duration of the space launch. It would be for as long as the event was continuing, and then when the people came back out to go to back to where they wanted the driver would be back on duty.

Id. at 81. When asked if he agreed that 4 conditions must be met to log off duty during a tour of duty according to the guidance, he responded “Not to go around and around, but there are four paragraphs, and they can be seen as being individual or multi-part.” Id. at 82.

RX 30, although it was written on an employee disciplinary action form, is actually a memorandum, just a recording of a meeting. Id. at 88. He wrote down Mr. Joyner’s name indicating he was present at the meeting, and testified that the document would be signed by the employee only if action was taken. Id. at 89. RX 33 is an employee disciplinary action form that was written for Mr. Joyner on the day of his termination. Id. at 92-93.

On redirect examination, he testified that the warning light probably was not on. Id. at 100. However, even if the warning light wasn’t on, the driver would still have been able to determine the drop in pressure by monitoring the pressure gauges. Id. Any driver would be expected to monitor the gauges. Id. He illustrated the logging off duty policy by giving an example: if passengers were brought to a baseball game, and once they are dropped off and safe and inside the venue, the driver would be asked to shut the coach down and log off duty during the game as he has no responsibilities to the people or their possessions during that time period. Id. at 101. When the people come out of the venue, he is expected to go back on duty. Id. Midnight Sun cannot know precisely how long the driver is going to be off duty because a game has a varying time period and it may go into overtime or be rained out or a space lunch may be delayed. Id. at 102. A driver will get a work ticket which will tell the driver that he would be off duty during the period of the event. Id. at 103. He believes that this practice is consistent with federal regulations. Id.

There is progressive discipline at the company. Id. at 104.

Regarding the September 12 air brake incident, he added that the “bus was normally driven by Zachary Joyner. He knew that bus better than anyone else. So, when the brakes were on, it would have -- or, it should have been apparent.” Id. at 105.

On re-cross examination, he testified that there could be reasons other than loss of air pressure for partial application of the brakes. Id. at 107. If all of the conditions in the guidance are satisfied except provision 3, “In Midnight Sun's case, yes [a driver can log off duty], because the driver has received a memorandum about this in hand, and we also put it on the work ticket.” Id. at 110-111.

Mr. Joyner did not complain to him about the trip tickets or the hours that he was performing his duty or the form that he had to fill out. Id. at 113-114. Regarding the July 30 log at CX 31, he testified that he could not explain how Mr. Joyner logged off duty for four hours, that he was ultimately responsible for accepting the log, that whoever accepted the log should not have accepted it because it is wrong for Belle Glade. Id. at 120-123. He does not know if this was the original log or a corrected copy and he does not know if there is anything on the log that would indicate whether it is the original or a corrected copy. Id.

Kevin Drummond

Kevin Drummond testified that his occupation is state law enforcement, highway patrol. Id. at 127.

On direct examination, he testified that he investigated a complaint against Midnight Sun tours and interviewed Mr. Joyner. Id. at 128-129. Mr. Joyner “called and complained about filing different interpretations of the log books, and that’s what the original complaint was.” Id. He also recalled talking about the company “making him false, file a different type of log book.” Id. at 129.

On cross-examination, he testified that CX 58-60 is the incident report resulting from his investigation. Id. at 130-131. He found that Midnight Sun was in compliance with the federal regulations. Id. at 131. He added: “One thing with federal regulations, they are not technically laws. There are regulations, so they are always up for interpretation. When they showed me all the information that they provided to me at the time of the audit, everything looks in compliance.” Id.

On re-direct examination, when asked whether he questioned Midnight Sun on whether drivers who logged off duty were actually off duty, he replied “I never actually questioned them on it. I believe what you're talking about is there was a discrepancy between you and Mr. Redden in understanding what constitutes off duty.” Id. at 133. He explained that Mr. Redden “instructed me when I talked to him about that and your opinion on that that you guys were released from your duty and responsibility because they were in a parked area . . . and the vehicles were secured, and you guys were able to leave the vehicle freely . . . So that, under the federal regulations, constitutes off duty.” Id. at 133-134. If an Employer tells an employee that they can leave the vehicle but not go too far, “If you have no responsibility over that commercial vehicle, yes, you can actually do that.” See id. at 136.

Anna Linley

Anna Linley testified that she works at Midnight Sun Tours as a Terminal Manager. Id. at 138. She has been a terminal manager for about three years and has been with Midnight Sun since 2002. Id. at 139. As terminal manager, she oversees the daily operations of the company, supervises the department heads, and reports to the general manager, Bret Brittenum. Id.

Mr. Joyner was a “fair employee” but had safety-related problems. Id. at 140. She was directly involved in his termination: “I was probably the single most person that made the decision to terminate him” although she did consult with the general manager, which is the policy. Id. She decided to terminate him because:

I felt at the time, as I do now, that Mr. Joyner -- in relation to the incident at LaBelle, I felt that he had acted in a manner that he had exhibited such poor judgment at the time that the bus had, indeed, almost gone up in flames. And I felt at the time that it had presented such a danger to the passengers, and it also had created damage to the bus. And, quite frankly, it concerned me and alarmed me. I felt at the time that in good conscience I could not continue to keep him employed. I did not feel that he was a safe driver.

Id. at 141. She was not in LaBelle when this incident occurred, is not a driver or a mechanic, and she relied on discussions with Don Redden and Vesa Nikunen in deciding to terminate Mr. Joyner. Id. She reviewed Don Redden’s memo from September 16, 2010, which was “very key” in helping her to reach a decision as to whether to terminate Mr. Joyner. Id. at 142.

One of the passengers on the bus from the LaBelle incident, the coach, called her a couple of days later to speak on behalf of Mr. Joyner, although this did not influence her decision. Id. at 143-144. She discussed the incidents with Bret Brittenum and told him that “it was time to terminate Mr. Joyner” and he, reviewing the incidents, agreed and told her to go ahead with the termination. Id. at 144-145. Her main reason given to Mr. Brittenum was that “I felt that what had happened at LaBelle -- I felt that we had had a near bus fire and that we had had passengers in danger, and I felt -- I have seen buses that have gone up in fire, and it's very alarming, and I just felt that he was not a safe driver anymore.” Id. She informed Mr. Joyner personally, in a meeting with Don Redden, that he was being terminated. Id. The September 22 termination notice is consistent with the reason she gave to Mr. Joyner for his termination. Id. at 146. The manner in which Mr. Joyner recorded his hours of service on his driving logs did not have anything to do with her decision to terminate his employment. Id.

On cross-examination, she testified that she does not know if Mr. Joyner saw anybody else, including Dorothea, before the meeting with Don. Id. at 147. Respondent stipulated that Mr. Joyner had a tour of duty on July 21 and that he couldn’t have signed the document on July 21. Id. at 148. She doesn’t know when Mr. Joyner signed the notice. Id. She believes she got a call from someone complaining about his driving recklessly on the turnpike and that she disciplined him for it. Id. at 152-153. She learned that Mr. Bunting held the wheel from Brett, but she doesn’t know how Bret learned about it. Id. at 155. Mr. Bunting told her that he was sorry about what happened and that he hoped Mr. Joyner would not get into trouble. Id. at 156. She read Mr.

Bunting's statement to refresh her memory, although it did not change her testimony. She was told that Mr. Joyner pushed the bus beyond its limits and it almost went up in flames because there was an air leak, the brakes locked, and he kept the bus going and burned the breaks. Id. at 161-163. It was decided that Jerry would drive the bus back because the bus had been repaired. Id. at 164.

Mr. Joyner never complained to her about his hours of duty or the fact that he had to turn in the forms. Id. at 168. She's not aware of whether he complained to anybody else in the company about this. Id. She's aware of the company's policy that drivers cannot use phones while driving and she never called him while he was driving. Id. at 169-170.

Vesa Nikunen

Vesa Nikunen testified that he is the director of maintenance for Midnight Sun Tours. Id. at 171. On direct examination, he testified that he has been the director since March 1984. See id. at 172. He oversees all the repairs and maintenance of the fleet. Id. About 34 of the vehicles are large motor coaches with air brake systems. Id. He has been working with air brake systems since 1980. Id. He has been a mechanic for 31 years and he was also a driver. Id.

On September 12, 2010 he was called, although he can't remember by whom, and was told that the bus had stopped and there was smoke coming from the dual wheels, which are the drive wheels in the rear. Id. at 173. On a bus, there's "two axles in the rear, and your drive wheels is your four tires, and you've got a single set of tires behind it." Id. The bus is similar to the bus pictured in RX 4 and the dual wheels he's referring to are the front set in the back. Id. at 174.

He spoke to Mr. Joyner directly, and Mr. Joyner told him that the bus shut off and there was smoke coming off the wheels. Id. at 174. Mr. Nikunen learned that the bus had lost air pressure, that the rear tires were smoking, and he concluded, with certainty, that the brakes had come on and that the bus was driven with the brakes on. Id. at 175. He asked Mr. Joyner to build up air pressure, but it could not go up because the brakes had locked up and wouldn't release. Id. at 176. This told him that the bus developed a leakage in the system and that the safety device came on because once air pressure is lost in the brake system, the safety comes on to lock the bus brakes "so you don't get a runaway bus on you." Id. They couldn't move the bus because it wouldn't restart. Id.

He called Donna to let her know that they needed a replacement bus. Id. at 177. The emergency release would not release the brakes either. Id. Jerry Pouncey took a replacement bus out to transfer the passengers onto it and bring them home. Id. He called Delroy White, who is also known as Steve, and asked him to bring his service truck to the bus and repair it so it could be moved. Id. at 178. He called Steve "a few hours, three hour probably" later for an update, and was told that "you could smell these brakes bad, that they had smoked." Id. at 179. Steve also told him that he found that the quick release relay valve was leaking air, and the valves were replaced. Id. at 180.

Mr. Nikunen testified: "The air leak was sufficient enough where the compressor cannot maintain the pressure in the system, that it was not able to -- the safety feature on the bus is, once you start losing air pressure the brakes slowly start coming on, and when you reach a certain

point they just lock on.” Id. at 172. Although the leak itself was not Mr. Joyner’s fault, he should have recognized by doing proper panel scanning,” which involved:

you watch your mirrors, you look at your dash, your instrumentation. And, again, you’re looking at your road. It’s all -- your eyes are rotating constantly, watching everything. And he should have started noticing that he was losing air pressure, that the system was not able to keep up. As he was going down State Road 80 where it is stop-and-go with lights, he should have noticed it.

Id.

He subsequently inspected the bus and found that “The next morning when it came in . . . [e]ven after it got driven back, it still smelled of the brake shoe being burned.” Id. at 182. He observed the brake shoes “a day or two later” and “[w]e ended up pulling all the tires and the brake drums off, and we had to do a brake job on the bus.” Id. The brakes “were glazed over, the brake shoes, and you could see the discoloration in them. And also the brake drums too were -- a lot of extreme heat cracking and coloration in it.” Id. The air pressure gauges were working and he was not able to find anything wrong with the functioning of the instrument panel that would have alerted Mr. Joyner to a problem. Id.

Given his experience as a driver and mechanic, Mr. Joyner should have noticed the following signs in order to realize there was a problem with the brakes as he was driving down Route 80:

That it wasn't rolling as freely and as normally as it should because the brakes, as he was losing air pressure, was slowly being applied. Every pound you lose of air, that S-cam turns, pushes those roller wheels against the brake shoes against the lining. And you have to keep putting more throttle to make it go. And it got to the point where the engine overheated. Because he was giving so much throttle to keep the thing moving, the engine overheated and then it shut itself down. The computer shut itself down because of overheating.

Id. at 183-184. In his opinion, during that incident, there was a danger to the passengers on the bus because “You do not want to subject the brakes to high heat. You can catch a bus on fire, and it's wood, fiberglass, rubber, and it can catch very easily on fire” and “when it catches on fire we can endanger the passengers onboard, you know, because it can happen fast. A bus catches fire real fast, and it was fully loaded with 59 children on there -- oh, and a few adults also on there.” Id. at 184.

Jerry Pouncey drove the bus back to the garage because the bus was “still drivable, in that sense” but it’s “empty, no passengers in the bus, doing the brake test it still would stop. But for being loaded down with full passengers, full heaviness, and to me feel comfortable with that bus to roll down we have to do a brake job, we cannot -- .” Id. at 185. By the time Jerry drove the bus back Steve had replaced the valve so there was no longer a problem in the pressure of the air brake system, so the brakes were no longer rubbing as one drove the bus. Id. at 185-186. The bus still had the front and tag brakes, and the heating problem was on the drive brakes. Id. The bus had also cooled down sufficiently and “It had even rained.” Id.

He told Anna Linley that “the driver should have recognized this problem earlier, that we could have had a major fire with the bus loaded with children onboard” and “that he should have noticed the dragging and the air loss, air loss gauges and the dragging of the brakes to cause a load onto the engine, harder to push that bus down the road.” Id. at 178. He told her he believed Mr. Joyner was negligent and told her he felt that its “risky having a driving that cannot recognize the problem” as “this particular episode was - - we endangered passengers.” Id.

On cross-examination, when asked why he would try to move a bus with no air or with a warning light on, he responded “To get it off the road. . . [b]ecause it’s a two-lane heavy traffic road” and “we could have got rear-ended by cars going by us” but the bus never moved. Id. at 190. He does not know exactly when the bus started leaking air and when asked how long, “an hour or half an hour or 15 minutes, a few seconds,” Mr. Joyner was driving with locked brakes, he testified that he does not know as “I’m not there. I’m not the driver.” See id. at 191. It is not possible for the drag in the vehicle to be so slight that Mr. Joyner would not have felt it “because the air pressure would have - - he was losing too much air pressure then at the end because, for the brakes to come on, to be that low an air gauge reading.” Id. at 191-192. He testified that “it depends on the severe leakage, how fast it flows . . . you can blow a hose and immediately the brakes come on, or you get a slow leak and it just takes a little bit of time for it to come on.” Id. at 192. If it’s a slow leak and the brakes take time to come on, “eventually you would” feel the drag. Id. He smelled the brakes the next day and the brakes “actually smelled for a week after they had been removed . . . even outside out shop.” Id. It was okay to have Jerry drive the bus by himself even though the brakes were damaged because “No luggage, no cargo, no passengers, very light load” and “if the bus would not have been able to brake, the bus would have been towed the rest of the distance home.” Id. at 198. Once before he saw brakes come on: “the tow truck was towing a bus back and he didn’t hook up the air line to the bus, and we had to do a brake job on that too because the tow truck was pulling the bus. There were no air lines hooked up to it, and the bus was not running” but he couldn’t remember who had the bus that got towed. Id. at 199-200. He does not remember a September 15 meeting with Mr. Joyner and Don. Id. at 201-202.

On redirect examination, he testified that it his understanding that the engine had shut off when the bus broke down in Labelle and that it shut down due to the water temperature being too high and “The computer on the engine itself, the sensors detected too hot a water, and it shuts off the fuel source.” Id. at 204. When asked what caused the heat buildup in the engine to shut down, he responded: “It had to be the extra pulling. It’s an older engine. It was huffing and puffing to pull that bus along down the road with those brakes slightly being on.” Id. at 205. Although he doesn’t know how long the brakes were partially engaged, it was long enough for the engine to heat up and it didn’t happen instantaneously as it took some period of time for Mr. Joyner to be driving with the brakes partially engaged in order to build up heat in the engine. Id. A driver “should be able to know [how to detect drag in his bus], even as soon as he gets a CDL license. He has a special test that he has to pass for the state which gets into the air brake systems to recognize. They specifically talk about the brakes coming on and the drag developing.” Id. at 206. He told Anna that Mr. Joyner drove the bus with the brakes on because “he did not recognize that there was a situation of the brakes coming on” and because of “the get-home syndrome,” which is “you’re so focused on how you just got to get home, get home, that you’re

not paying attention to what you're doing.” Id. at 206-207. Although “he would not know” for a fact that’s what was going on in Mr. Joyner’s mind, he based his opinion on his own driving experience. Id. at 207.

On re-cross examination, he testified that he cannot recall whether or not Mr. Joyner ever complained about anything involving safety prior to his termination by Midnight Sun. Id. at 209. Mr. Joyner never told him that the air pressure gauges were at 120. Id. at 210.

Zachary Joyner

Mr. Joyner testified that he drives coach for a living. Id. at 211.

On direct examination, Mr. Joyner testified that on the day he was fired, Don called him and told him to come in and see Dorothea. Id. at 212. He went in and she told him to make a new log, showing him herself what she wanted him to do. Id. He refused, and she told him to sign “some kind of paper, the thing she have there, the writ-up thing,” and he looked at the paper and saw that it was dated July 21. Id. at 212-213. He signed the paper, and Don told him to see him in his office. Id. at 213. Anna and Don told him he was terminated; Anna said the decision “came from corporate” and Don said “he don’t have to give me a reason.” See id. at 213. He signed the paper because he was afraid of getting terminated. Id. at 214. He asked for a copy of the piece of paper Dorothea gave him, and he went in the room next door and wrote down today’s date on it. Id. She wanted him to change the Camp Blanding log, dated July 18. Id. at 215. In July they were ordered to do their logs, and Dorothea

tell us what she want put down on our log and how she want to do it. And she take the original one and she shred it. But what happened here, I had a bunch of logs with me. And she gave me a bunch of logs that she want me to change. And she had a little yellow sticker on it, come and see me, whatnot. And she gave them logs to me, the one that she want me to change. And the ones that she want me to change, I took them over to the side and told – especially about Camp Blanding, Camp Binding I think it was, I said I can’t do it, whatnot. So she made up a diagram and told me. She wrote a piece of paper and told me what put down, the time I come in. And like I started work that night about 3:00 in the morning, and she want me to put down 3:30. And I explain to her I couldn’t do it as I was trying to make it out for her, and I told her the time’s not right, whatnot. So she told me, here, do this here and do this here, and once I did that there I handed to her, and I don’t know when, how soon it was, I went and told Anna – day after or maybe the same day, I’m not for sure – but I went and told Anna what’s taking place, what’s going on. And she told me, Zachary, do not make no – do not lie on your logs. I said, okay, but I already made up one already, whatnot, I explain to Anna. And I told you Anna this here three times that Dorothea got us change the logs whatnot.”

Id. at 215-216. He was then asked to make a corrected copy of the July 18 log. Id. at 218. Dorothea was shredding some of the original logs and he found this disturbing so he kept the original. Id. at 219. There was a written notice about recording the 10/15 hour violation, at CX 30, but he did not sign it on July 21, 2012. Id. at 220. Instead, Dorothea made him sign it on

September 22, 2010, the day he was fired. Id. at 221-222. He was asked to compare the original log for Camp Blanding and the corrected copy:

Q -- and the corrected copy of the original log that Dorothea asked you to make, okay? And, if you do a comparison and you look at them, in the original log you do the trip from Brooksville to Lake Worth in one, two, three, four -- in four and a half hours.

A Yes.

Q In the corrected copy of your original log for the Camp Blanding tour of duty, you do the trip from Brooksville to Lake Worth in three hours.

A Yes.

Q You saved an hour and a half.

A Yes.

Id. at 224-225. Dorothea asked him to make a corrected copy and then a second corrected copy on September 22. Id. at 226-227. And when he refused to make the second corrected copy, she asked him to sign the notice and then he was fired. Id. at 228. He thinks he was fired “because I refuse to follow Dorothea order to make out another log for her. And the first time I refuse do something like that, that’s why I got fired . . . because I always went along every time they tell me do something, went along every time they told me do something.” Id. at 230.

Dorothea wrote a big X on a July 30, 2010 log because “something . . . wasn’t acceptable . . . something about me driving out there and about my hours, my 10 hours out there or not” and she asked him to make a corrected copy of that log. Id. at 229-230. In the original log he logged off duty for half an hour but in the corrected copy of the log he was logging off duty for four hours. Id. at 232. According to the schedule for the Belle Glade Bus Service he’s supposed to be logging off duty on the regular schedule for half an hour. Id.

On cross examination, he testified that Dorothea Moore was attempting to cover up the 10/15 hour violation. Id. at 234. When asked about a memorandum from Dorothea, RX 26, documenting the 10/15 hour violation, which stated that “A copy of this is placed in the driver’s file as well as on-hand in the logging department,” he testified that “it’s untrue” because the only time he saw the paper was in September when he was terminated. Id. at 235-236. When asked why, if Ms. Moore was trying to cover up a 10/15 hour violation, she would document the violation, he replied that he “can’t answer why she did it.” Id. at 238-239. He admitted that he sometimes made arithmetic errors in his logs and sometimes Ms. Moore asked him to correct them. Id. at 239

Regarding the turnpike incident, he testified that he was seven car lengths behind the SUV in front of him, which he stated is sufficient distance to keep between him and the car in front of him. Id. at 239-240. He was about 50 feet or 50 yards behind the car in front of him. Id. at 241. He hit, or “nipped,” the car that was in front of the car in front of him because the car in front of him swerved. Id. at 243. There was “not really” any damage, expect for damage to a yellow taillight on the bus. Id. The only injury from the accident was a girl on his bus scraped her leg. Id. at 244. He sideswiped a parked bus in a parking lot, which Vesa also did. Id. He admitted that he was written up in June 2009 because a motorist complained that his bus was

weaving and speeding and he cut a person off. Id. at 246. Anna told him he was speeding, but he disagreed with this. Id. at 246-247.

He received training on pre-trip inspections, including air pressure. Id. at 250. He received instructions on the proper use of air brakes during a meeting in a class at Midnight Sun Tours. Id. He was driving along Route 80 going east and the engine shut off. Id. at 251. When asked whether the heat buildup in the engine caused the engine to shut off, he replied that “the engine was hot, but the gauge didn’t show the engine was hot. The gauge read at 180. So that’s - - to me, that’s normal.” Id. at 252. As he was driving the bus “I never lost air.” Id.. He “really couldn’t answer” whether it was the heat build up in the engine that shut off the engine because “I didn’t see the problem with the engine shutting off according to the gauge.” Id. at 253. He never saw the temperature gauge lose pressure. Id. at 256. The bus “turn itself off at that time I already had pulled the bus over to the side of the road whatnot.” Id. He testified:

I’m just saying that I don’t remember. I do remember one important thing. What I do remember is that when I start the bus up the temperature gauge at 120 – I mean, the air gauge at 120. The water gauge is at 180. I drove the whole time. Now, when the engine start taking place, I don’t actually remember what the gauge was because it shocked me because the bus was moving slow across the intersection. So, when you were asking me about losing the air pressure, the answer to that question was the bus was never losing air pressure while I was driving the bus.

Id. at 257-258. When asked whether he knows what caused the bus to shut down, he replied “I guess the bus overheat.” Id. at 258. When he pulled the bus to the side of the road, he got out and saw that water had come out of the release valve, but the gauge stayed at 180. Id. He clarified “Now, did a bus water temperature overheat I was driving it? I would say yeah, but the gauge didn’t say that.” Id. at 260. He did ask Mr. Bunting to hold the steering wheel but the bus was already pulled over on the side of the road. Id. at 264. Mr. Bunting was not strapped in when he was holding the steering wheel and he was past the line passengers are supposed to cross. Id. at 265.

Although he testified that he always signed employee disciplinary action forms, he was shown a form from October 2, 2009 which indicated that he refused to sign it, although he didn’t remember the form. Id. at 267. He admitted to lying on an employment application to another tour or coach operator after he was terminated from Midnight Sun in which he indicated that he had never been discharged or forced to resign, that he was not disciplined in the last 12 months of active employment, and that he had not been involved in any accidents, preventable and non-preventable, as a driver in the previous three years. Id. at 268-274.

On Redirect Examination, Mr. Joyner testified that he is not a mechanic, he was not trained to change belts on bus or tires or about the internals of the engine. Id. at 285. The air conditioning was on at the breakdown although air condition cannot be run at 60 psi because “what’s going to happen is, the compressor is not pulled back tight enough and the belt be jumping around on the back of the bus whatnot” and “[w]hen you get at 120, then you can turn on the air conditioning and then you won’t have no problem hearing that belt screaming and all

that kind of stuff in the back of the bus whatnot.” Id. at 286-287. When he says “one car length” he means he says “one Mississippi.” Id. at 288.

He lied on his logs in order to keep his job. Id. at 295-298. He complained about working more hours than legally allowed and for being given only part-time work:

In other words, she's aware -- if you look at my paperwork, it's obvious you not allowed to drive no more than 10 hours a day whatnot, and to work 15 hours a day or not. But in her case she'll give you work knowing the fact that you're breaking the law and you're working back-to-back. And I brung this to her attention before and to Anna, and for some reason they kept on doing it. So, by me complaining, I'm punish by sitting at home, maybe work once a week, maybe twice a week. And then sometimes I got to go in and complain to her about it whatnot.

Id. at 299. He told Travelynx everything that happened at Midnight Sun and they still hired him. Id. at 302. Comparing the two logs for July 18, 2010 for Camp Blanding or the two logs for July 30, 2010 for Belle Glade, he cannot tell which the original is and which the corrected copy is. Id. at 308.

He can think of other drivers at Midnight Sun who caused accidents in which there was damage to the bus and/or injuries to people yet did not get fired, such as Jorge, who had two accidents that led to people getting hurt, at a gas station on a turnpike and another accident in Orlando, in which he got a ticket. Id. at 311. Vesa got into an accident like his accident:

And another accident was with Vesa. Like they stated earlier, did I get in a accident in the yard with the buses, moving the buses out, and did I hit and cause two accidents with the buses? Yes, and Vesa did that same thing, the exact same thing a month later and that there was witness there. And I talked to Anna about it, and she chuckled it off, said, yeah, that what happen, things like that happen. But yet he wasn't suspended for three days. And he didn't lose no lost way pages [sic] as well, but I did. Did exactly the same thing that I did whatnot.

Id. at 312. He testified that: “And far as those logs concerned, when DOT inspection come to look at them logs, they don't realize that they looking at a lie because there's no way that they can tell that that's the original log what they really have whatnot because the company stated that they shredded the logs month after whatnot.” Id.

In the September meeting with Vesa and Don he told them he never said there was smoke coming from the brakes. Id. at 315-316. Also, the bus did not shut down in the middle of the street. Id. at 315-316. He told Visa smoke was coming off the engine and water was coming from the release valve. Id. at 316. When he was called into the office, Vesa never talked to him about burned brakes. Id. at 317. He testified to further inaccuracies in the other witnesses' testimony:

So I'm trying figure out where they getting stuff. And another thing that hurt me was when you was present with me, we went and see Mr. Bundy, they said Mr. Bundy, you was riding the bus whatnot. Zachary, that's a lie. I call Anna up and

told her everything what took place. So, when Anna sit here and tell this story, oh, I didn't tell Mr. Bundy, you know, and we say just this little bit, that was a lie. So, when they say I walk in the room and talked to them, they fabricate the whole thing. When they said to me that I didn't see Dorothea about the logs, that was a lie also because they know I saw Dorothea, yeah, because they call me back to work on the 20th or the 22nd to see Dorothea. They want to hear a story? I told them a story.

Id. at 318-319.

He and Anna got into an argument two or three weeks before the meeting in September. Id. at 319. He testified that in one incident he got off work around 10:30/11:00 and was told by Dorothea to

to come to work at 4:00, Don want me to come to work at 6:00. I take it all that there. I get my sleep while I'm up there whatnot. Even though I know for a fact that they know for a fact that I'm breaking the law, I got change my logs because this happen too many times, a lot of times. I leave my house at 3:00, got to my job at 3:00, took off, and next thing know I get a phone call from Donna, Zachary, just we got a problem here. What's the problem, Anna? It's just a clock out, Don had on your paper that you supposed to come to work at 6:00 but you supposed to be there at 8:30. Oh, 8:30? I know it's a five-hour-ride-and-a-half. But it's 6:00 right now and you can't make it there within two hours. I said -- I was chuckle. I said, well, Don, I be there in half an hour. You be in half an hour? Yeah, I be in half an hour. I left the house early whatnot. Now, the thing about that, what's disturbing to me about that again, Anna threatened me -- not so much threatened. She said to me one time, if you're ever late for a job again you're fired. So I find it kind of strange that Dorothea is giving me work knowing that I ain't supposed to do the job because I be out of hours. Well, she would ignore that there. And I reject the job she won't give me work. So now I'm stuck. If I do the job, be late, I'm fired automatic because Anna told me this is it, this is it, you're fired. Now I'm afraid of losing my job, so I got there.

Id. at 320-21. He never had write-ups before Don and he has “tons” of positive write ups for Midnight Sun Tours. Id. at 331. Don’s statement regarding the turnpike incident that the kids in the bus were “all cut up and three people in the other car got hurt” was a lie. Id. at 335. After this incident, Don wanted to fire him but Anna said no. Id. at 336. He never abandoned the job. Id. at 336.

He testified that he got into an argument with Dorothea and Don because while they said he had to sign off duty he said he was on duty while dropping off a band at a stadium as it was not necessarily true that he was allowed to leave the bus and lock it up, because it had kid’s instruments on it and they had to return to the bus to change their clothes or kids get sick and stay on the bus. Id. at 341-342. This situation – when he still could not leave the bus -- also happened at the Kennedy Space Center. See id. at 343. They wanted the drivers to log off duty in such situations, and therefore they had to falsify their records. Id. He complained about incidents in which “our hours are all ate up. We can't go home. But they expect us to drive all the way

back home. Then we start complaining about, hey, we have no hours, time 11:00 comes, we're heading back home, you want us to drive back home, we've been here since 3:00 in the morning” Id. at 344-345. There was an incident where Don had him driving back to back and a state trooper discovered that drivers were exceeding hours and instructed them not to. Id. at 343. A friend of his worked back to back and got into an accident in which “he was thrown I think about a hundred feet or 50 yards off the bus.” Id. at 346. He testified that other drivers were told to make up phony logs, and that Midnight Sun has guys sign their name while Midnight Sun will fill out the rest of the logs; Eric Lane stated that Midnight Sun had him make up logs, Burnette just had to sign his name and Dave DuBose was shown a log that had him log off duty and he said “I don’t know where that come from.” See id. at 345-350.

He testified that logging off duty extends how long a driver can be on the tour of duty:

What it does it that it shows that you wasn't working, and it cuts your hours back, and then all of a sudden you're working. Like perfect example, Belle Glades. I took their vehicle and drove from the yard to Belle Glades. That's an hour itself. And I worked 12 hours out there, driving, with a 30-minutes break, and then an hour back home. That's 14 hours driving in the whole day. But they turn around and want me to put down work only eight hours, I'm following the schedule, and only off duty four hours, which happens to be a lie. And they had me changing the logs around.

Id. at 351-352. When he drives the company van from the yard to Belle Glades he’s working but “if you look at my logs, she’s got me changing them all the time. And, like I said, I brung it to Anna’s attention, and she ignores it.” Id. at 351. When asked if he can put himself off duty, he responded that he can’t because:

I have -- they have a paper there, and they give a paper saying they give you permission with the locate -- with the job detail and when you can be off duty and on duty whatnot. Unless they give that piece of paper to you or if you got a call you and let you know that you're off duty. So, if there's no one there to tell you that there, then you're still on duty driving or still working unless you got that paper from them.

Id. at 358-359. There is a bus route that tells the driver all the locations he has to go to and times he has to stop and take his lunch break and start working again; “so we actually got a bus route we got to follow” and “she gave us a sheet . . . [which] would tell you the times you got to stop and take your lunch break and the time you start back to work again whatnot.” Id. at 359.

On re-cross examination, he testified that no customer has ever complained about him; however, Respondent’s counsel stated that NASA complained about a violent video being shown on the bus monitor, although Mr. Joyner said he doesn’t consider NASA a customer and the movie was a children’s movie. Id. at 366-368. He was informed that a customer did complain about him being late to an assignment but he testified that, although he was supposed to be there at 3:45 spot time and he was not there he was there at the boarding time at 4:00. Id. at 369. He does not know why James Edgerton or Eric Lane were fired, but he does know that James said

he was written up because of the logs and although he heard Eric was fired for stealing a bicycle it was all a misunderstanding as Eric was not stealing the bike. Id. at 370-372. Regarding the September 12 air brake incident, he testified that the pressure was always at 120 except when he put it into gear. Id. at 372-373.

On further redirect examination, he testified that while he was driving the bus:

No, no, there was no squeaking at all. There was no shaking, no violence on the bus at all. Like I said, I ran that bus all day from the ice skating rink all the way down to I-75, no problem whatsoever, no losing air whatever, no smoking from the brakes whatever. Coming up going east I stopped at least about eight lights, traffic lights, no problem until I got the last traffic light. I got the last traffic, I'm sitting there, everything's okay whatnot. When time to take off, all I had to do is take my foot off the brakes. I took my foot off the brakes, the bus start moving very slow cross the intersection. Mr. Bundy noticed the same thing, is having problem? I don't know, the bus moving awfully slow. Time the bus passed the intersection, the bus turn itself off. When it turn itself off, I called Vesa. I told him what was going on, got the kids off the bus, walk in back of the bus, open the bus up, water is coming out the release valve, which confuse me. I say release valve, off the radiator.

Id. at 389-390.

On further recross examination, he was asked when he drove to Belle Glade in the company Van was it because he didn't have a personal vehicle he testified "So I'm like this here, when I come to work I'm at work taking their vehicle to work because I'm at work." Id. at 393.

On further redirect examination, he testified that he lost money as a result of the action of the company. Id. at 397. His license was suspended because of lack of insurance on the vehicle as a result of the April accident and he was out of work for two weeks. Id. at 397-398. He guessed that he lost \$2000 for the two weeks. Id. at 399. He could not tell when he was demoted to part-time work for complaining about hours but knew that it happened before July 2010. Id. at 402. He complained to George Moore and corporate when he was out of hours when making the NASA launch trips. Id. at 403. He told the DOT what took place. Id. at 404.

On further recross examination, he testified that he is seeking lost wages. Id. at 405.

Dorothea Moore

Dorothea Moore testified that she works at Midnight Sun Tours as an Operational Manager/dispatch – a position she has held for 13 years. Id. at 413-414. She has the following duties: "set the board for the following day; I notify the driver; I print paperwork. If there's any incoming calls related to what I do, I answer those calls. I answer all of sales calls -- or, questions, I should say, sales questions if they need to know traveling distance, location, that kind of thing." Id. at 414. She had been the log manager and it was her practice to write memos like the one in RX 26 if the driver had a 10/15 hour violation to "let the driver know that he have a violation." Id. at 414-415. A copy was placed in the driver's file as well as on hand in the logging department. Id. at 415. It was customary to date the memo on the date that she wrote it.

Id. It was customary to have the driver sign the notice. Id. at 416. There was no reason to wait two to three months give the notice to the driver. Id.

She did not know that Mr. Joyner would be terminated. Id. She had no input into the decision to terminate Mr. Joyner. Id. at 417-418. She had never prior to Mr. Joyner's termination complained to Anna Linley that Mr. Joyner logged his time incorrectly and she did not recommend that he be terminated. Id. at 418. She did not ask him on that date to falsify his log. Id. She never complained to anyone else in upper management about Mr. Joyner prior to his termination. Id. Mr. Joyner never complained to her about logging issues. Id.

On cross-examination, she testified that she did not have a meeting with Mr. Joyner before he was fired. Id. at 419. The July 21 notice would have been signed in a seven day period, but she could not recall the exact date it was signed. Id. at 423. The notice would have been placed in Mr. Joyner's file and his log file. Id. at 424.

Regarding Mr. Joyner's log for July 30, 2010, the copy on page 31 of the exhibit, "apparently" is the one she scanned and is the log that was done on the Belle Glade shuttle and was done properly. Id. at 427. Comparing the weekday schedule for the blue and orange route for the Belle Glade shuttle, which would be the same schedule for July 30 if it was a weekday, it would appear that Zachary is logging off duty while he's scheduled to be driving the bus. Id. at 428-429. Sometimes a driver gets thrown off on times "depending on the traffic," "depending on the conditions of the road . . . that they're traveling on." Id. at 429. The schedule shows "suggested times." Id. at 431. There's no dispatcher telling the driver when he can go off duty; the driver tries to stay as close to the schedule as he can. Id. She testified:

Authorization for on-duty/off-duty driving is when a driver has no care for the bus, no passengers on the bus, no cargo on the bus, he can get out of that driver's seat and go to the bathroom. If he's in a motor coach, he can go sit in the back of the bus. If he's out of that driver's seat with no care and responsibilities of that bus, he is off duty. If he wanted to go to the mall and shop at Sears or Wal-Mart, he's free to do that.

Id. at 435-436. She acted as the log manager on July 30. Id. at 437.

Although regulations list 4 conditions that must be met before a driver can record meal and other routine stops during a tour of duty as off-duty time, she testified that if only the first condition is satisfied the driver can log off duty. See id. at 440-442. When Mr. Joyner is logging off duty in the July 30, 2010 log, he is logging off duty because he satisfied condition 1. See id. at 443. The log on page 31 was scanned but not the log on page 5. Id. at 445.

Regarding the July 18 log for Camp Blanding and the July 21, 2010 notice for a 10/15 hour violation, she didn't recall asking Mr. Joyner to make a corrected copy of the original log. Id. at 453. Regarding the Camp Blanding work order, she explained that she listed 4am as his start time even though according to his schedule from the night before he worked until 10pm, leaving him only 6 hours of off duty time, because arrival and leave times are estimated, they "are not written in stone." Id. at 462-63. She put 4am in order to give him enough time to do all

of his “pre-steps before moving that bus out of the yard.” Id. at 463-464. He needs 8 hours of off duty time in order to set his 10 and 15 hour clock. Id. at 465-66. She testified:

I can't force him to do a job. We don't work -- we don't operate like that. If he don't have enough hours off or enough hours to do the job, it's his responsibility to let dispatch know, hey, I don't have enough hours, I can't do that job. I can't run him down and say, Zachary, do you have enough hours, Zachary, can you do this? I can't do it. It's his responsibility to let dispatch know if he have enough hours.

Id. at 471. She never shreds logs that are less than six months old. Id. at 473. When asked who dispatches drivers, she responded:

I set the board. I notify the drivers. I call the drivers and notify them or either text and notify them of their next day's job assignment. After they have confirmed with me, there is a symbol that I put on their work ticket. And at the close of the day before me going home I put those work tickets into the drivers' lockers. Therefore, once the office is closed, they have rear-end entrance to the drivers' room. They go pick up their work tickets.

Id. at 473-474. She also worked on the logs. Id. at 474. She has never told a driver to fix their logs or if they didn't fix their logs they wouldn't get work. Id. Sometimes the driver's addition was off, so she had them correct that. Id. The note at CX 22 was not written for Mr. Joyner to write a log according to it. Id. at 477. It was written because she and Zachary had a conversation but she can't remember what it was about or when it took place, whether before or after Camp Blanding. Id. at 478. This document was written for her own benefit, not for Mr. Joyner's benefit because “I might want to go to Camp Blanding one day.” Id. at 480. She prepared the document at CX 30. She did the dispatching herself. Id. at 485. It was not her responsibility or department to put a person in full-time or part-time status. Id. at 485-86. After a log is scanned they are put in the driver's file and kept there for 6 months. Id. They have had two DOT inspections and two peer review inspections and “got a hundred on all of them.” Id. at 487.

Bret Brittenum

Mr. Brittenum testified that he is the vice president and general manager of Midnight Sun Tours and also the vice president and general manager of American Coach Lines of Miami. Id. at 488-89. He testified “I'm ultimately responsible for everything that goes on in the company, primarily the safe operation of the company and fiscal and financial responsibility.” Id. at 489.

He knew Mr. Joyner and found him to be a “fair employee.” Id. at 489. He was a “pretty unsafe operator, from what I read” in in his safety record. Id. at 490. He approved of Mr. Joyner's termination. Id. He took recommendations from Don, Vesa and Anna. Id. He was terminated because of “the incident with 459 in Labelle. That was the ultimate decision. Upon reviewing his entire employment history, and upon learning of the situation with the coach on the bus, that added to an already bad and mishandled unsafe situation that he caused.” Id. Don told him that Mr. Joyner was a very unsafe bus operator. Id. He found that Mr. Joyner's actions showed “gross negligence,” in particular

What Zachary did wrong was, Zachary failed to monitor his gauges. . . [it] his fault for not recognizing the problem when you've got your dashboard lit up like a Christmas tree and it's telling you something is wrong. And, if you're not paying attention to that, you should be noticing that -- and, for the record, I'm pushing my hand all the way down -- that your pedal is having to go all the way to the floor just to keep the bus powered going across.

Id. at 495-96. Mr. Joyner should have felt the difference. Id. at 497. Drivers are trained on how to detect drag on the bus. Id. at 497. When Mr. Bunting told him Mr. Joyner had him hold the wheel, he felt:

okay, we've got a disastrous safety record, we've got a near fire on the bus, and we have a passenger touching the steering wheel of the bus, standing forward of the white line, that's it, case closed, done deal. This needs to be a terminable offense because there's no coming back from this. You have showed that much lapse of judgment, there's nothing more I can do.

. . .

What if the bus -- what if Mr. Bunting went through the windshield? What if Mr. Bunting's left arm or right arm went one way, hit Zachary in the face, broke his nose? What if the other arm went the other way and hit the wrong switch and the bus lowered to the ground and all the air dumped out? Any array of reasons that that's just bad news. That's just bad to have a passenger -- from a safety perspective and a customer service perspective -- having a passenger assist you in the operation or mechanical repair of the bus? I mean, our insurance company would have a heart attack.

Id. at 509. Mr. Bunting had to have been standing across the line passengers are allowed to cross by law. Id. at 510. He reviewed the memorandum by Don Redden to Anna Linley at RX 36 and that is how learned the facts of the incident. Id. at 511. He discussed the termination with Anna Linley, who was in favor of terminating Mr. Joyner. Id. at 511-512. He also discussed the termination with Vesa Nikunen, who also had the opinion that Mr. Joyner should be terminated. Id. at 512. Dorothea Moore did not have any input in the decision to terminate; "At that point, she was not a manager, so we would have never involved her." Id. He did not know at the time of Mr. Joyner's termination that he had received an hours of service violation on July 18 nor of the alleged conflict between Mr. Joyner and anyone else regarding how he logged his Belle Glad route. Id. The manner in which Mr. Joyner recorded his hours of service had nothing to do with the decision to terminate Mr. Joyner's employment. Id. at 513. He does not know why James Edgerton or Eric Lane were terminated. Id.

On cross-examination, when asked about Zachary's claim that the air conditioning was on, he testified: "So something in Zachary's take on this is wrong. It doesn't add up. You couldn't have all the air pressure and have an overheated bus and have the air conditioning still working." Id. at 517-518. He never asked what the source of Don and Vesa's information was, but he did hear from Delroy that the rear wheels and tires were smoking. Id. at 520. The driver would be asked to change a log "If the driver made a mistake . . . But we're not going to change the facts." Id. at 526.

They have an internal audit process to check whether the logs reflect the actual routes that the drivers are taking; they compare SunPass records and compare GPS records. Id. at 519-20. Midnight Sun's most recent safety audit was this past summer and they scored 100 percent. They had federal, state, safety and military Department of Defense audits and none has found any critical or acute violations. Id. at 520. At that time they didn't have software that tracked the device to measure against the logs. Id.

Jerry Pouncey

Mr. Pouncey testified that he has been a driver for Midnight Sun for about seven and a half years. Id. at 535. He had to go to Labelle, Florida on September 2010 because Mr. Joyner's Midnight Sun bus had broken down there. Id. It took him about an hour and 30/45 minutes. Id. at 536. When he got out of the bus he smelled a foul odor, like something burned. Id. He loaded the passengers from Mr. Joyner's bus onto his bus, got something to eat, and then went on Mr. Joyner's bus. Id. Mr. Joyner took his bus and left. Id. He stayed and waited for the mechanic. Id. at 537. The mechanic arrived 45 minutes after he arrived. Id. The mechanic told him the problem was with some valves. Id. It took the mechanic "a while" to fix the valve problem because it was raining, but at some point he told him that he had fixed it. Id. Then he drove the bus back, without any incidents, to the yard at Lake Worth. Id. at 538.

On cross-examination, he testified that he could not characterize the smell. Id. at 538-539. He mentioned to Mr. Joyner that he smelled the smell. Id. Mr. Joyner told him the bus wouldn't move and that the brakes were locked. Id. at 539. He does not recall what the air pressure was when he got on the bus and did not try to move the bus. Id. at 540. The bus, when he arrived, was parked on the eastbound side of the road. Id. at 541. The bus was running when he arrived and he doesn't know if they were watching a movie or if the air conditioning was on. Id. at 541-542. The mechanic did not say anything to him about the brakes. Id. at 543. He did not notice any smoke coming from the brakes. Id. While the mechanic was working on the bus, he was sitting on the bus. Id. The mechanic did not tell him the brakes were burned. Id. at 544. After the mechanic fixed the air leak and there was no longer a problem with the brakes, he had no reason to believe the brakes were burned because he wasn't informed of it. Id.

Delroy White

Delroy White testified that he works at Midnight Sun Tours as a diesel mechanic. Tr. at 548. He has been with American Coach and Midnight Sun for about 25 years. Id. He started working as a mechanic "at an early age" in Jamaica. Id. at 549. He does repairs for Midnight Sun. Id. He was sent by his supervisor, Vesa, to LaBelle, Florida to repair a bus in September 2010. Id. It took him an hour and a half to drive from his home to LaBelle. Id. at 551. By the time he arrived Mr. Joyner had already left on the bus Jerry Pouncey was driving, and Mr. Pouncey was waiting at Mr. Joyner's bus. Id.

When Mr. White exited the service truck he smelled burning brake. Id. at 552. The smell of burning brakes indicates that "the brake was dragging or never release. It was locked up, you know." Id. at 553. It indicated that the bus had been driven for some period of time, but he couldn't say for how long. Id. He built up the air to 90. Id. The air pressure gauge went down on the drive axle gauge when he tried to release the brake, which indicated that there was an air leak in the back. Id. at 554. He then discovered that the R-14 valve, which is located underneath, on

the body in front of the drive axle, had come apart. Id. at 555-556. He replaced the valve and the quick relief valve. Id. at 556.

Notwithstanding the burned brakes, he felt it was safe enough to drive without passengers but “I wouldn’t put passenger in the thing.” Id. at 558. Jerry drove the bus back and he followed the bus for part of the way. Id. at 559. There were no incidents with the bus on the way back to the shop. Id. When he took the brakes apart at the shop the following Monday, he discovered that the brake was burned and the drum was “scorched” and “cracked,” so he replaced them. Id. at 560-61.

He replied “I could say yes” when asked whether, in his experience as a mechanic, based on his observation, he believes that Mr. Joyner should have realized there was a problem before the brakes burned and the engine shut off. He explained “Because if you have a car and you park your car tonight and you put emergency brake on, and tomorrow morning you come to move your car and you going to feel it kind of sluggish. How long you going to take to find out that your emergency brake was on?” Id. at 562. Furthermore, when asked whether the gauges would have also told, he testified “yeah, you could see the gauges.” Id. The bus stopped because “the bus was pushing too much, then it would be overheat. And once it overheats it’s going to be shutting down.” Id.

On cross-examination, he clarified that when he arrived in a service truck the bus was in the right lane, in the road. Id. at 564. He didn’t see any smoke. Id. at 565. The brakes were locked up, and he does not know how long Mr. Joyner would have been driving with locked breaks. Id. The accessory gauge could have reached 120 psi while Mr. Joyner was waiting on the bus for help to arrive, but the drive brake gauge would get to 90 but not to 120 psi due to the leak. Id. at 572-573. He felt that even though he smelled burning brakes, the bus was safe to drive back to the shop because “you have two more axles with brakes.” Id. at 574. Jerry himself smelled the brakes, which “you can smell it from a mile away.” Id. at 574. He can distinguish between the smell of burning brakes and smell of other things because “you can tell when it – the smell of the brake is – it’s made out of asbestos, like some burning.” Id. at 581. The brake drum was “heat cracked.” Id. at 581. The brake shoe was “crystallized, it’s shining, shining. Because it was rubbing, it’s shining, black and shiny, burned and shiny.” Id. at 582.

ISSUES

Was complainant terminated in violation of employee protection provisions of the STAA?

DISCUSSION AND ANALYSIS

The employee protection provisions of the STAA provide, in part:

- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because -
 - (C) the employee accurately reports hours on duty pursuant to chapter 315;

49 U.S.C. § 31105.

Section (b)(1) of STAA states that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR21, 49 U.S.C. 42121(b). Under AIR21, a violation may be found only if the complainant demonstrates that protected activity was a contributing factor in the adverse action described in the complaint. 49 U.S.C. 42121(b)(2)(B)(iii). Relief is unavailable if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv); see *Vieques Air Link, Inc. v. Dep't of Labor*, 437 F.3d 102, 108–09 (1st Cir. 2006) (per curiam)(burdens of proof under AIR21); see also *Formella v. U.S. Dep't of Labor*, 628 F.3d 381, 389 (7th Cir. 2010) (explaining that because it incorporates the burdens of proof set forth in AIR21, STAA requires only a showing that the protected activity was a contributing factor, not a but-for cause, of the adverse action.).

Protected Activities

Complainant alleges that he was terminated in violation of the STAA because, instead of falsifying his work log for a July 18, 2010 tour of duty, he accurately reported his hours. There is nothing in the record showing, and there is no dispute, that Mr. Joyner accurately recorded his hours on July 18, 2010. Therefore, Complainant has established that he engaged in protected activity.

Employer Knowledge of Protected Activities

Complainant must establish that the person making the adverse employment decision had knowledge of the protected activity. See *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). There is no dispute that the relevant decisionmakers had knowledge that Complainant accurately recorded his hours on July 18, 2010.

Adverse Employment Action

§ 31105 prohibits discharge of an employee for engaging in protected activity. Here, the evidence establishes and the parties do not dispute that Complainant was discharged. Accordingly, the adverse action element is satisfied.

Contributing Factor

It is Complainant's burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in his termination. A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). In proving contributing factor, a complainant can show "either direct or circumstantial evidence" of contribution. *Speegle v. Stone & Webster Construction, Inc.*, ARB 11-029-A, ALJ 2005-ERA-006 (ARB Jan. 31, 2013).

According to Complainant, on September 22, 2010 Don Redden instructed him to come into the office and see Dorothea Moore, MST's Log Manager and Dispatcher. Complainant's Findings of Fact and Conclusions of Law at 14. When Complainant met with Ms. Moore, she ordered him to alter his July 18, 2010 work log, as he had logged only 6 hours of off duty time

between his July 17 and 18 tour of duties when he should have been allowed at least 8. *Id.* at 10, 14. He refused, so she ordered him to sign a written warning to Complainant about his 10/15 hour violation, backdated to July 21, 2010. *Tr.* at 212-219. He signed this letter because he was afraid of getting terminated. *Id.* at 212. Don told him to see him in his office, and Anna Linley and Mr. Redden told him he was terminated. *Id.* at 213. Ms. Linley said the decision “came from corporate” and Mr. Redden said “he don’t have to give me a reason.” See *id.*

Complainant argues that the temporal proximity between Mr. Joyner’s protected activity, his refusal to alter his July, 18, 2010 work log, and Midnight Sun Tour’s decision to terminate him “is just too close to disregard.” One source of indirect evidence of contribution is “temporal proximity” between the protected activity and the adverse action. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030 (ARB February 29, 2012). While not dispositive, the closer the temporal proximity is, the stronger the inference of a causal connection. *Id.*

The parties dispute whether the meeting with Ms. Moore and Complainant actually took place, and whether Complainant was ordered to falsify his July 18 work log. At the hearing, Don Redden testified that he never asked Complainant to see Ms. Moore on the day he called Mr. Joyner in to terminate him, and Ms. Moore denied meeting with Complainant on September 22, 2010 before he was terminated. *Tr.* at 62, 418. Ms. Moore also denied asking him on that date to falsify his log, and testified that the notice about the work hour violation, dated July 21, would have been signed either the day it was written or within a week of that date, although she does not know the exact date it was signed. *Id.* at 418. Although the notice is dated July 21, 2010, Anna Linley testified that Respondent stipulated that because Complainant had a tour of duty on July 21 he couldn’t have signed the document on July 21. *Id.* at 148. Complainant submitted what he alleges to be a copy of the original written notice he signed on September 22, 2010. This exhibit includes the following notation, which Complainant alleges he made on that date: “Sep.22.2010.” CX 15.

It may be true that MST’s officials had Complainant falsify his logs to cover up work-hour violations.¹ As discussed below, however, even if Complainant could establish that his protected activity was a contributing factor in the decision to terminate him, I find that Respondent has demonstrated that it would have terminated him even if he had not engaged in the protected activity.

Same Adverse Action Absent Protected Activities

Clear and convincing evidence that an employer would have fired the employee absent protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. *Clark v. Airborne, Inc.*, ARB No. 08-133, ALJ No. 2005-AIR-27 (ARB Sept. 30, 2010). Thus, Respondent must establish, by clear and convincing evidence, that it would have terminated Complainant even if he had not engaged in the protected activity. Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. *DeFrancesco v. Union Railroad Company*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012).

¹ Complainant alleges that MST’s officials also had him correct his July 30 work log to cover up a violation related to off duty time.

Respondent argues that it would have terminated Complainant for his unsafe driving, as reflected in the September 12, 2010 incident and his prior disciplinary action, even if Complainant had not engaged in the protected activity. Complainant argues that the September 12 incident and the prior disciplinary action are mere pretext.

RX 33 contains an Employee Disciplinary Action Form dated September 22, 2010, signed by Mr. Redden, Ms. Linley and Mr. Joyner. It indicates that Mr. Joyner was terminated for “repeated instances of unsafe driving” including “two DOT-reportable accidents” with personal injuries from 2008-2010 and the September 12, 2010 incident in which he operated a motor coach while its brakes were partially on, damaging the car and subjecting the bus to danger of a bus fire. RX 33.

Ms. Linley testified that she “was probably the single most person that made the decision to terminate” Complainant, although she did consult with the General Manager. Tr. at 140. “[V]ery key” in helping Ms. Linley reach the decision to terminate Complainant is a memo dated September 16, 2010 from Mr. Redden to Ms. Linley, which describes the September 12, 2010 incident in more detail, Complainant’s failures to avert the incident, and his safety record with Midnight Suns. Id. at 142; RX 36. Specifically, the memo states that while Mr. Joyner was driving a bus carrying a hockey team towards Lake Worth, the bus developed a severe air leak, the air brake system pressure dropped, and the air brakes came on partially, causing the brake shoes to drag on the brake drums and the bus wheels and tires to heat up. RX 36. Complainant continued to drive the bus, pressing harder on the accelerator, and eventually the bus’s engine turned off due to overheating from driving against the brakes and the bus stopped in the middle of Route 80’s travel lane in Labelle, its rear wheels and tires smoking. Id. Although Complainant told Mr. Nikunen and Mr. Redden he had done a pretrip inspection, a competent pretrip inspection would have disclosed belts that were close to failure and the proper thing would have been to be assigned a different bus. Id. Complainant denied that the air gauges showed any problem, that the air brakes were on and that he used more accelerator to keep going, but this was contrary to the physical evidence of the failed air system components, the condition of the brakes, and the gauges when Mr. White saw them. Id. Complainant, when questioned, did not show how the air brake system worked on the bus, how to check bus brakes on a pretrip inspection, and did not know the air gauges on the bus, even though he was taught this last April. Id. The memo further states that under the MST policy termination is the appropriate penalty for serious accidents or serious traffic violations. Id. The September 12 incident subjected the passengers to danger with a potential ignition and will result in “significant actual loss to Midnight Sun Tours from refunds and the replacement of mechanical parts that were unnecessarily damaged.” Id. Ultimately, Mr. Redden recommended the termination of Complainant because Complainant’s “lack of safety has become manifestly clear,” and “[h]e will clearly cause a major loss to Midnight Sun Tours,” which “nearly happened Sunday, September 12, 2010.” Id.

This reason for terminating Complainant was reiterated at the hearing by MST’s officials. Don Redden testified that he ultimately recommended that Mr. Joyner be terminated because of “Multiple safety issues and also some customer service issues” but “the bulk of it was the safety.” Tr. at 26. Bret Brittenum, the general manager of Midnight Sun Tours, testified that

Complainant was terminated because of “the incident with 459 in Labelle. That was the ultimate decision. Upon reviewing his entire employment history, and upon learning of the situation with the coach on the bus, that added to an already bad and mishandled unsafe situation that he caused.” Id. at 490. Anna Linley testified that she decided to terminate him because:

I felt at the time, as I do now, that Mr. Joyner -- in relation to the incident at LaBelle, I felt that he had acted in a manner that he had exhibited such poor judgment at the time that the bus had, indeed, almost gone up in flames. And I felt at the time that it had presented such a danger to the passengers, and it also had created damage to the bus. And, quite frankly, it concerned me and alarmed me. I felt at the time that in good conscience I could not continue to keep him employed. I did not feel that he was a safe driver.

Id. at 141.

Complainant argues that Respondent “has not offered ‘substantial indication’ that Zachary was at fault for burning the brakes” on September 12, 2010. Complainant’s Findings of Fact and Conclusions of Law at 29. Complainant claims that he had no problem with the bus until the bus was stopped at the light at LaBelle, and the air pressure gauges were reading normal at 120 psi.

There is overwhelming testimony, however, demonstrating that Complainant was aware or should have been aware that the bus was losing air pressure, yet he continued to drive the bus.

Mr. Nikunen, MST’s director of maintenance, testified that although the leak itself was not Mr. Joyner’s fault, he should have recognized it by doing proper panel scanning,” which involved:

you watch your mirrors, you look at your dash, your instrumentation. And, again, you’re looking at your road. It’s all - - your eyes are rotating constantly, watching everything. And he should have started noticing that he was losing air pressure, that the system was not able to keep up. As he was going down State Road 80 where it is stop-and-go with lights, he should have noticed it.

Tr. at 172. He testified that when he later inspected the bus he found that the air pressure gauges were working and he was not able to find anything wrong with the functioning of the instrument panel that would have alerted Mr. Joyner to a problem. Id. at 174.

Mr. Redden did admit that the warning light for low air pressure probably did not come on while Complainant was driving, because the psi probably dropped below 60, thereby triggering the light, only when the bus came to a stop in the middle of route 80. Id. at 95. On the other hand, he testified that there are a “number” of warning signs that there is an air leak, and even if the warning light wasn’t on, Complainant would still have been able to determine the drop in pressure by monitoring the pressure gauges. Id. Any driver would be expected to monitor the gauges. Id. at 96. And the engine temperature would be going up rapidly, as shown by the

temperature gauge. Id. at 52.

The witnesses also testified that Complainant should have noticed the bus dragging as a result of the loss of air pressure. Mr. Nikunen testified that, given his experience as a driver and mechanic, Mr. Joyner should have noticed:

That it wasn't rolling as freely and as normally as it should because the brakes, as he was losing air pressure, was slowly being applied. Every pound you lose of air, that S-cam turns, pushes those roller wheels against the brake shoes against the lining. And you have to keep putting more throttle to make it go. And it got to the point where the engine overheated. Because he was giving so much throttle to keep the thing moving, the engine overheated and then it shut itself down. The computer shut itself down because of overheating.

Id. at 183-184. On cross-examination, he testified that it is not possible for the drag in the vehicle to be so slight that Mr. Joyner would not have felt it "because the air pressure would have - - he was losing too much air pressure then at the end because, for the brakes to come on, to be that low an air gauge reading." Id. at 191-192. He testified that "it depends on the severe leakage, how fast it flows . . . you can blow a hose and immediately the brakes come on, or you get a slow leak and it just takes a little bit of time for it to come on." Id. at 193. If it's a slow leak and the brakes take time to come on, "eventually you would" feel the drag. Id. Although he doesn't know how long the brakes were partially engaged, it was long enough for the engine to heat up and it didn't happen instantaneously as it took some period of time for Mr. Joyner to be driving with the brakes partially engaged in order to build up heat in the engine. Id. at 205.

When asked whether it's possible that if there was a drag it would have been so slight that Mr. Joyner would not have been able to notice it, Don Redden responded:

Not under the circumstances that were apparently present.

The engine was laboring mightily so that it eventually shut itself down. The computer system overrode everything and shut off the engine in the middle of Route 80 because the engine was grossly overheated. In addition, the bus would have handled very differently than normal. The engine would have been screaming with noise because of the great effort that was needed to push the bus forward up to the point where the brakes actually locked solid in the middle of Route 80. The vibrations from the engine would have been terrific.

Id. at 66. The "feel of the bus" would have shown that the breaks were on; the bus would not be as responsive in turns, the accelerator would be pressed down far more heavily, the engine noise would be much louder, and the engine would vibrate much stronger. Id. at 54-55.

Mr. White testified that "I could say yes" when asked whether, in his experience as a mechanic, based on his observation, he believes that Mr. Joyner should have realized there was a problem before the brakes burned and the engine shut off. He explained "Because if you have a car and you park your car tonight and you put emergency brake on, and tomorrow morning you

come to move your car and you going to feel it kind of sluggish. How long you going to take to find out that your emergency brake was on?" Id. at 562.

Mr. Brittenum, in finding that Mr. Joyner's actions showed "gross negligence," echoed their testimony:

What Zachary did wrong was, Zachary failed to monitor his gauges. . . [it] his fault for not recognizing the problem when you've got your dashboard lit up like a Christmas tree and it's telling you something is wrong. And, if you're not paying attention to that, you should be noticing that -- and, for the record, I'm pushing my hand all the way down -- that your pedal is having to go all the way to the floor just to keep the bus powered going across.

Id. at 495-96. Mr. Joyner should have felt the difference. Id. at 497. Drivers are trained on how to detect drag on the bus.

Complainant claims that he was not trained to detect drag as an indicator of lost air pressure. Mr. Nikunen, however, testified that a driver "should be able to know [how to detect drag in his bus], even as soon as he gets a CDL license. He has a special test that he has to pass for the state which gets into the air brake systems to recognize. They specifically talk about the brakes coming on and the drag developing." Tr. at 206. Mr. Brittenum also testified that Mr. Joyner should have felt the difference as drivers are trained on how to detect drag on the bus. Id. at 497.

Ultimately, the testimony demonstrates that Complainant drove the bus with low air pressure until the brakes burned.² Mr. White, the company's mechanic, testified that he smelled the brakes burning upon exiting the service truck. This indicated that "the brake was dragging or never release. It was locked up, you know" and that the bus had been driven for some period of time, but he couldn't say for how long. Id. When he took the brakes apart at the shop the following Monday, he discovered that the brake was burned and the drum was "scorched" and "cracked," so he replaced them. Id. at 560-61. The brake drum was "heat cracked." Id. at 581. The brake shoe was "crystallized, it's shining, shining. Because it was rubbing, it's shining, black and shiny, burned and shiny." Id. at 582.

Mr. Nikunen testified that when he later inspected the bus he found that "The next morning when it came in . . . [e]ven after it got driven back, it still smelled of the brake shoe being burned." Id. at 182. He observed the brake shoes "a day or two later" and "[w]e ended up pulling all the tires and the brake drums off, and we had to do a brake job on the bus". Id. at 183. The brakes "were glazed over, the brake shoes, and you could see the discoloration in them. And also the brake drums too were - - a lot of extreme heat cracking and coloration in it." Id. If it's a

² According to Mr. Redden, Mr. Joyner saw the tires smoking or could have seen the tires smoking by looking at the mirrors. Id. at 63. Jerry Pouncey also testified that when he got out of the bus he smelled a foul odor, like something burned, but he did not know what the smell was from. Id. at 523, 526. Mr. White testified that he can distinguish between the smell of burning brakes and smell of other things because "you can tell when it - the smell of the brake is - it's made out of asbestos, like some burning." Id. at 581.

slow leak and the brakes take time to come on, “eventually you would” feel the drag. Id. He smelled the brakes the next day and the brakes “actually smelled for a week after they had been removed . . . even outside out shop.”

Mr. Brittenum, in particular, stressed that Complainant erred in having Mr. Bunting hold the steering wheel while he attempted to release the brakes:

okay, we've got a disastrous safety record, we've got a near fire on the bus, and we have a passenger touching the steering wheel of the bus, standing forward of the white line, that's it, case closed, done deal. This needs to be a terminable offense because there's no coming back from this. You have showed that much lapse of judgment, there's nothing more I can do.

What if the bus -- what if Mr. Bunting went through the windshield? What if Mr. Bunting's left arm or right arm went one way, hit Zachary in the face, broke his nose? What if the other arm went the other way and hit the wrong switch and the bus lowered to the ground and all the air dumped out? Any array of reasons that that's just bad news. That's just bad to have a passenger -- from a safety perspective and a customer service perspective -- having a passenger assist you in the operation or mechanical repair of the bus? I mean, our insurance company would have a heart attack.

Id. at 509. He added that Mr. Bunting had to have been standing across the line passengers are allowed to cross by law. Id. at 510. Although Complainant points out that Mr. Bunting held the wheel only for a quick moment and the bus never moved, Mr. Brittenum, as his testimony demonstrates, disapproved in general of Complainant's having Mr. Bunting assist him. See Complainant's Findings of Fact and Conclusions of Law at 19.

Complainant's history of involvement in safety-related incidents and customer complaints is also well-documented. The record contains multiple letters of reprimand, written warnings, and Employee Disciplinary Action forms:

- A January 19, 2009 reprimand for complaining and “making a scene in front of our Customers, RX 8;”
- A February 18, 2009 reprimand for sideswiping and causing damage to a motor coach and getting a traffic ticket which led to a three day suspension and a final written warning, RX 9;
- A March 19, 2009 notice of suspension for failing to provide an incident report related to damage to a motor coach and a citizen complaint as directed, RX 11;
- A March 22, 2009 reprimand for using a cell phone while driving, which led to a one day suspension and a warning that “Any further violation of this policy may result in the termination of your employment with Midnight Sun Tours, RX 13;”
- A March 31, 2009 final written warning for showing a violent video on the bus monitors while at the Kennedy Space Center, RX 12;
- A May 22, 2009 reprimand for driving a bus lowered with its air bags deflated, giving the customers a bumpy ride, RX 14;

- A June 22, 2009 final written warning for a telephone complaint about a bus weaving, speeding and cutting someone off. The warning states “next violation will result in termination, RX 16;”
- An October 2, 2009 written warning for arriving late to a work assignment, which resulted in a 3 day suspension, RX 21;
- An April 19, 2010 final written warning for crashing a bus into an SUV causing “significant damage and minor injuries,” which resulted in a five day suspension and complete driving retraining, RX 23;
- A July 23, 2010 reprimand for using the wrong bus, RX 27;
- A July 27, 2010 memorandum to Mr. Joyner informing him of his failure to call in mileage numbers to dispatch, RX 28.

This evidence supports Respondent’s contention to a clear and convincing standard that the September 12 incident was the last straw.

Moreover, I find that Complainant is “not credible” as to the events relating to the La Belle, Florida incident. Although management alleged that he admitted that the brakes were smoking and that the fumes were obvious in the September meeting with management, in testimony, he allegedly never admitted that there was smoke coming from the brakes. Tr. at 315-316. He also denied that the bus did not shut down in the middle of the street.³ Id. at 315-316. He alleged that any smoke was coming off the engine and water was coming from the release valve. Id. at 316. Clear and convincing evidence shows otherwise. I credit the opposing testimony of Redden, Pouncey and White.

CONCLUSION

I find that Respondent has established, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the Complainant’s protected activity. Accordingly, the complaint is DISMISSED.

³ Mr. White testified that when he arrived on the scene the bus was “in the road, not on the side of the road.” Tr. at 564.

ORDER

Based on the foregoing, the complaint in this matter is **DISMISSED WITH PREJUDICE**.

**DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE**

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. 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 may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

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(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1978.110(b).