

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 February 2012

Case No. 2011-STA-00004

In the Matter of:

EDWARD WASHBURN
Complainant,

v.

STONY RUN ENTERPRISES, INC.
and **PATRICIA MILLER,**
Respondents.

Appearances:

Paul O. Taylor, *Esq.*
Truckers Justice Center
Burnsville, MN
For the Complainant

David A. Turano, *Esq.*
Shoemaker & Howarth, LLP
Columbus, OH
For the Respondents

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER

This matter arises from a claim under the employee-protection provisions of amended and recodified Section 405 of the Surface Transportation Assistance Act (“STAA”) of 1982, 49 U.S.C. § 31105. The implementing regulations appear at Part 1978 of Title 29 of the Code of Federal Regulations (“CFR”). Section 405 of the STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee regarding pay, terms, or privileges of employment because the employee has undertaken protected activity by 1) participating in proceedings relating to the violation of a commercial motor vehicle safety regulation or 2) refusing to operate a motor vehicle when the operation would violate these rules.

PROCEDURAL HISTORY

On June 23, 2010, Edward Washburn (the “Complainant”) filed a complaint under the STAA, alleging that Stony Run Enterprises, Inc. and Patricia Miller (the “Respondents”) discriminated against him and terminated his employment on April 2, 2010, in retaliation for filing complaints with the Respondents about applicable weight laws and refusing to drive in violation of commercial vehicle safety regulations. An investigation conducted by the Occupational Safety & Health Administration (“OSHA”) of the Department of Labor (“DOL”) followed. On September 29, 2010, the OSHA Area Director found a preponderance of the evidence supported the Respondents’ position that the Complainant attempted to organize a work stoppage or slowdown, such that his protected activity was not a contributing factor to his termination. The complaint was dismissed.

The Complainant’s request for a formal hearing was received by this Office on October 15, 2010. On October 21, 2010, the undersigned issued a Preliminary Order, requesting that the parties select mutually agreeable hearing dates. Pursuant to a Notice of Hearing and Prehearing Order issued December 7, 2010, the undersigned conducted a hearing on this claim on June 7, 2011, in Cincinnati, Ohio. The parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges.¹ At the hearing, the following witnesses were examined: Patricia Miller, individual Respondent and co-owner and officer of corporate Respondent (Tr.² 25-47; Tr. 187-222); Amy Updike, office manager and dispatcher for Respondents (Tr. 49-80; Tr. 222-37); Complainant (Tr. 81-128; Tr. 155-86); and Harry Hutchinson, former employee of Respondents. (Tr. 132-55).

In reaching a decision, the undersigned has reviewed and considered the entire record, including all exhibits admitted into evidence,³ the testimony at hearing, and the arguments of the parties. Where applicable, I have made credibility determinations concerning the testimony.

ISSUES

The issues contested by the Complainant and Respondents are as follows:

1. Whether the Complainant engaged in activities protected under Section 31105(a)(1)(B)(i) by refusing to operate a commercial vehicle in violation of legal weight restrictions;
2. Whether the Complainant engaged in activities protected under Section 31105(a)(1)(A)(i) by filing complaints related to violations of highway weight laws;

¹ 29 C.F.R. Part 18A (2008).

² “Tr.” refers to the transcript of the hearing.

³ Joint Exhibits (“JX”) 1-13, and ALJ Exhibits (“ALJX”) 1-3 were proffered into evidence at the hearing without objection. Claimant’s Exhibit (“CX”) 2 was offered into evidence at the hearing, and the Respondents objected to the first page on grounds of incompleteness. The objection was overruled by the undersigned, and CX 2 was admitted.

3. Whether the Complainant's allegedly protected activities contributed to the Respondents' decision to terminate the lease agreement and thereby discharge him;
4. Whether the Respondents can show by clear and convincing evidence that they would have discharged the Complainant absent his protected activities;
5. Whether the Complainant took reasonable steps to mitigate his damages;
6. Whether the Respondents are proper parties to a proceeding under Section 31105; and
7. Whether the Complainant is entitled to relief under the STAA;

(ALJX 2; Tr. 15-16).

STIPULATED FACTS

The Respondent Stony Run Enterprises, Inc., is a commercial motor carrier within the meaning of 49 U.S.C. § 31105. (Tr. 11-12). The Respondents are engaged in the transportation of property on the highways via commercial motor vehicles that have gross vehicle weight rating of 10,001 pounds or more, and that transportation is in interstate commerce. (Tr. 11-12). The Respondents' principal place of business is in the State of Ohio. (Tr. 11-12). The "Equipment and Service Agreement between [Helen Washburn] and [Respondents]" was terminated in early April 2010. (JX 13; *Id.*) The Complainant timely filed a complaint with the DOL on June 23, 2010, alleging the Respondents discriminated against him in violation of the STAA. (JX 5; Tr. 11-12). The OSHA Area Director issued a preliminary decision dismissing the Complainant's complaint on September 29, 2010. (JX 9; Tr. 11-12). The Complainant filed objections and a request for formal hearing on October 7, 2010. (JX 9; Tr. 11-12).

FACTUAL BACKGROUND

The Complainant has been a truck driver for approximately thirty-five years. (Tr. 81; 155). The Complainant has hauled "van, general commodities freight, flatbed freight, oversize loads, and hazardous loads with tanker." (Tr. 81-82). The Complainant testified that he first met the Miller family over five years ago when he was working for a transportation company named Slay Transportation ("Slay"). (Tr. 86). Patricia Miller, the individual Respondent, testified that her husband, Larry Miller, had previously operated a terminal for Slay. (Tr. 189). In 2001, Patricia Miller and Larry Miller created Stony Run Enterprises, Inc., the corporate Respondent, as a carrier company. (Tr. 187-90).

The Respondent testified that Stony Run Enterprises, Inc. is co-owned by her and her husband, Larry Miller. (Tr. 26-27). Ms. Miller is the President. (Tr. 187). Larry Miller serves as the terminal manager. (Tr. 193). Their daughter, Amy Updike, is employed as the dispatcher and office manager. (*Id.*; Tr. 49). Brett Updike, the Respondent and Larry Miller's son-in-law, is the safety director and a driver. (Tr. 192). Also, the Respondent and Larry Miller's son, Adam Miller, is employed as a mechanic. (Tr. 193).

On August 31, 2006, the Respondents entered into an “Equipment and Service Agreement Between Contractor and Carrier” with Helen Washburn, the Complainant’s wife. (JX 13). The lease agreement provided that Mrs. Washburn would either drive or furnish and pay a driver for the truck. (*Id.*). The Complainant testified that he was the sole driver and maintainer of the truck; his wife owned the truck for financial reasons only. (Tr. 84-85; 156). The Complainant testified that he hauled chemicals, herbicides, and fungicides for the Respondents. (Tr. 82).

Hearing Testimony of the Complainant

The Complainant testified that he met the Miller family when he was working as a driver for Slay. (Tr. 86). As to his relationship with the Miller family, the Complainant said he would visit with Adam Miller, on weekends, and Larry Miller had taken him to his houseboat once. (Tr. 87-88). The Complainant testified that he maintained a professional relationship with Amy Updike. (Tr. 88). The Complainant denied ever “blow[ing] up,” “holler[ing],” “rais[ing] his voice,” or “threaten[ing]” either Ms. Updike or Ms. Miller. (Tr. 88-89). “It was like a happy family,” testified the Complainant of his relationship with the Respondents. (Tr. 120). The Complainant said he voluntarily plowed snow for the Respondents during the winter. (*Id.*).

The Complainant testified that he had been named driver of the year and driver of the month by the Respondents. (Tr. 121). Next to him, the Complainant believed there was only one other employee who had worked for the Respondents longer than him, and only by one week. (*Id.*). Further, the Complainant did not believe he ever picked up a load late or refused a “run.” (Tr. 113).

On March 22, 2010, the Complainant was dispatched by Ms. Updike to Syngenta Crop Protection, Inc. (“Syngenta”), the Respondents’ shipper, to pick up Gramaxone. (JX 6-4; Tr. 90). The Complainant testified that Gramaxone is an herbicide, containing some of the same chemicals as Agent Orange. (Tr. 91). According to the Complainant, he arrived at Syngenta’s facility in St. Gabriel, Louisiana, where he was directed to a loading spot and drove his truck onto a platform scale to be weighed. (Tr. 92-93). Next, the Complainant reportedly told the loaders to load 4,500 gallons of Gramaxone, but, according the Complainant, the loaders at the Syngenta facility told him that they were supposed to load 5,000 gallons. (Tr. 95). The Complainant further testified that the loaders made a call to the office for instruction as to the volume discrepancy and returned to the Complainant, telling him they would have to load more than 4,500 gallons. (*Id.*). The Complainant told the loaders that his truck would be overweight with more than 4,500 gallons, but he told the loaders he would not “argue with a customer” and allowed them to proceed. (*Id.*).

Once loaded, the Complainant went to a weigh station across the street from Syngenta’s facility. (*Id.*). The scale ticket reflected that the Complainant’s truck was overweight by 520 pounds on axle two. (JX 11; Tr. 95-97). The Complainant testified that he called Ms. Updike to report the overweight and inform her that he’d be returning to Syngenta to unload some of the Gramaxone. (Tr. 98; 166). According to the Complainant, the Respondents do not run overweight as a matter of practice. (Tr. 166). The Complainant further testified that the phone conversation with Ms. Updike was limited to the overweight issue and she said she’d call

Syngenta about his return. According to the Complainant, he did not argue, threaten not to deliver, refuse to return to Syngenta, nor raise his voice. (Tr. 98; 167).

The Complainant testified that, once he returned to the Syngenta facility, he returned to the same platform scale where he had previously loaded, and now waited to be unloaded. (Tr. 99). The Complainant testified that “the unloader seemed agitated with that, he just didn’t like that at all. So I didn’t say nothing. And then another guy comes out and he starts saying you can move the fifth wheel forward and make it legal.” (*Id.*). The Complainant told the loader that would not solve the overweight problem. (Tr. 102). The Complainant described the loader’s reaction:

He was just blowing up and saying you can do this, you can do that, you can run so much weight on the front axle and go different states this weight and that weight and that weight, and that’s not true. But I didn’t say anything because, you know, I just let him talk. And then he asked me, he says, if you don’t move that fifth wheel I got to call Levi.

(*Id.*). The Complainant explained that Levi [Wright] was a “big wig” at Syngenta. (Tr. 102). The Complainant steadfastly refused to move the truck’s fifth wheel. (Tr. 103). The loader allegedly walked away from the Complainant and then returned, telling the Complainant to park off to the side and wait. (Tr. 104).

According to the Complainant, after about fifteen minutes elapsed, another loader came to him and asked him how much product he wanted taken off of the truck. (Tr. 105). The Complainant stated that he told the loader the appropriate number of gallons to remove, and he and the loader unloaded the Gramaxone. (Tr. 105-06). Next, the Complainant returned to the platform scale, where the recorded weight was 4,509 gallons. (JX 6-9; Tr. 106). The Complainant also returned to the weigh station across from Syngenta where he reweighed his truck. (JX 11-2; Tr. 106; 167). The Complainant testified that he then called Ms. Updike again to notify her that he was within legal weight and would be making the scheduled deliveries. (Tr. 107). At that point, “everything was usual.” “Everything seemed fine.” (Tr. 168). The Complainant stated he had had overweight loads at Syngenta before, but they were slight, such that he could burn off enough fuel in about one hundred miles to be within the legal weight range. (Tr. 168-69).

After making to deliveries in Pennsylvania on March 24, 2010, the Complainant testified that Ms. Updike asked him to drive to Greensburg, Indiana to reload. (Tr. 109). The Complainant explained that while in Greensburg on March 29, 2010, “everything was normal. All the drivers talk, like...small talk. And then there was one driver there that was kind of loud.” (*Id.*). The Complainant identified this loud driver as Harry [Hutchinson], but Complainant testified that he did not speak to Mr. Hutchinson at Greensburg. (Tr. 110; 169-70). Also present according to the Complainant was Marty [Proctor] and Greg Pickett. (*Id.*). The Complainant testified that he did not threaten to hide loaded trailers nor did he threaten a work stoppage. (*Id.*). Instead, the Complainant testified that Mr. Hutchinson was complaining about his pay and threatening not to deliver his load until the Respondents straightened out a pay discrepancy. (Tr.

170). The Complainant further testified that he was not aware of a rate cut from Syngenta. (Tr. 89; 110; 162). According to the Complainant, any allegation by Mr. Hutchinson that he knew of the rate reduction or threatened a slowdown was a lie. (Tr. 162). The Complainant stated that he did not “bad mouth” the Respondents to the other drivers or to any customers. (Tr. 110-11; 113).

After being loaded in Greensburg, the Complainant delivered in Georgia and called Ms. Updike for further direction. (Tr. 113; 170-71). During this call, the Complainant testified that Ms. Updike asked him to return to the Respondents’ facility and told him he could not stop home first; the trailer had to be back. (Tr. 113-14; 171). The Complainant said it was unusual for Ms. Updike to disallow him to stop home. (Tr. 114). Nevertheless, the Complainant returned home for several hours before returning to the Respondents’ facility on April 2, 2010. (Tr. 114-15; 171).

The Complainant testified that he parked his truck and entered office. (Tr. 115). He handed paperwork to Ms. Miller, who was standing behind a glass window. (Tr. 116). According to the Complainant, Ms. Miller next told him that “we’re going to have to fire you because it was a choice between Syngenta or you and we chose Syngenta.” (*Id.*; 172). The Complainant was reportedly speechless; he returned his fuel card, asking for a receipt, and Ms. Miller gave him one and left. (Tr. 116; 173). The Complainant testified that he was not questioned about his conversations with drivers in Greensburg, whether he threatened a shutdown, whether he threatened to hide trailers, or whether he had bad mouthed Syngenta or the Respondents. (Tr. 116-17; 174). Nor, did the Complainant ask why Syngenta would want him to be fired. (Tr. 173). Once Ms. Miller walked away, the Complainant reportedly told Ms. Updike it was nice working with her, and “she said, I talked to Levi for a half hour trying to get your job back.” (Tr. 117). The Complainant testified that he just said “okay,” and went to gather his things from the shop. (Tr. 117-18).

While the Complainant was at his truck, having gathered his things, Ms. Miller reportedly approached him asking for permits and other paperwork. (Tr. 118). The Complainant said Ms. Miller repeated “it was nice working with you but we had to choose between Syngenta and ... you and that we got to get rid of you because of what happened in St. Gabriel.” (Tr. 118; 173). The Complainant testified that he told Ms. Miller that it was nice working with her, too, and returned the paperwork and drumming valve to her. (Tr. 119). Before leaving, the Complainant walked to the shop and told Adam Miller it was nice working with him, too. (*Id.*).

On April 16, 2010, Syngenta received an emergency call from an anonymous caller regarding Gramoxone spills and illegal hauling. (JX 4). The caller told the representative he had worked for Larry Miller Trucking, Stony Run Enterprises or Stony Run Logistics which hauled chemicals for Syngenta. (*Id.*). The anonymous caller stated that he was fired because he would not transport an overweight truck, and that Syngenta made an example out of him. (*Id.*). Further, the caller said that drivers are not properly trained to transport Graxomone and spills were occurring. (*Id.*). The called claim that Levi [Wright] was aware of this problem. (*Id.*). The caller named three instances in which there were alleged Graxomone spills. (*Id.*). The Complainant testified that he made a similar call, but he didn’t think he made the call on April 16, 2010. (Tr. 181). The Complainant believed he made a call in May. (Tr. 182). Also, the Complainant stated that when he called Syngenta, he did not say he was fired for refusing to haul

an overweight truck. (Tr. 183-85). Instead, the Complainant testified that the reason for his call was to complain about the lack of proper training regarding the handling of Graxomone and Graxomone spills. (Tr. 185).

Following his termination of employment with the Respondents, the Complainant testified that he called Wynne Transport (“Wynne”) to see if they were hiring. (Tr. 121). Wynne hired the Complainant and he was in Omaha, Nebraska, the following week. (*Id.*). Though the Complainant stated he made a little more money working for Wynne than the Respondents, he could not easily go home, and he did not see his wife for seven months. (Tr. 122; 175). The Complainant testified that he “didn’t want to go to the other side of the earth to haul freight, and [the Respondents were] like a family.” (Tr. 123). His termination from the Respondents was humiliating, testified the Complainant. (Tr. 124). The Complainant eventually quit Wynne to return home. (*Id.*). The Complainant reportedly was denied employment by Liquid Transport but was hired by Quality Carriers. (Tr. 125; 176-77). The Complainant did not stay with Quality Carriers for more than three to four months because “their pay was terrible.” (*Id.*). The Complainant returned to Slay, where he was employed at the time of the hearing. (*Id.*; Tr. 177).

Ultimately, the Complainant is seeking back pay for the weeks he was unemployed following his discharge from the Respondents. (Tr. 126). The Complainant testified that he would like to be reinstated to his position. (*Id.*). The Complainant seeks damages for emotional distress and mental pain, though he did not seek any medical attention. (Tr. 126; 176). The Complainant also seeks punitive damages. (Tr. 126).

Hearing Testimony of Patricia Miller

The individual Respondent, Patricia Miller, a co-owner and officer of the corporate Respondent, explained that the Respondents are engaged in commercial trucking. “We do tanker work, liquid chemicals, ... some dry bulk.... And then we have two flatbed trailers that we bought specially for a customer because they had business delivering totes with chemicals in big plastic containers.” (Tr. 192). The Respondents reportedly have always enjoyed a satisfactory safety rating with the U.S. Department of Transportation. (Tr. 191). Ms. Miller testified that they have about fifteen over-the-road tractors, but that qualified drivers are hard to find. (Tr. 193-94).

According to Ms. Miller, the Complainant’s wife, Helen Washburn, provided the Complainant as a driver to the Respondents, pursuant to their lease agreement. (JX 13; Tr. 201). Ms. Miller testified that she had never spoken to Mrs. Washburn. (Tr. 201). She testified that the Complainant had been a driver for the Stony Run for about five years and that the Complainant had not always been pleasant. (Tr. 28). According to Ms. Miller, the Complainant liked to “have his way.” (Tr. 29). However, Ms. Miller confirmed that the Complainant had once been named driver of the year and given a \$500.00 cash award and jacket. (Tr. 29; 40).

While the Complainant was working for the Respondents, Syngenta comprised about 63% of the Respondents’ business. (Tr. 30; 208). According to Ms. Miller, Levi Wright was their main contact at Syngenta. (*Id.*). The Respondents shipped herbicides, including Gramoxone, for Syngenta, she testified. (Tr. 31). According to Ms. Miller, Syngenta never asked the Respondents for special treatment or to overlook an overweight load. (Tr. 219).

In order to get business from Syngenta, Ms. Miller testified, the company would bid once a year for their freight. (Tr. 195). This bidding process typically occurred between February and April each year. (Tr. 195; 209). The new rates would not become effective until about April 5, 2010. (Tr. 209). However, Ms. Miller testified that the drivers were informed prior to April 5, 2010, that the rates would be decreasing. (Tr. 212). The last two years, she stated, the rates from Syngenta had decreased. (Tr. 195-96). Ms. Miller did not personally notify the drivers, but believed Amy Updike or Larry Miller had. (Tr. 213). Further, Ms. Miller testified that she had prepared a memorandum informing the drivers that the rates were decreasing and put it in the drivers' mailboxes. (Tr. 214). She testified that she discovered that the memorandum was incorrect and removed it from the mailboxes, though one driver had received it, so she explained that it was wrong. (*Id.*). Ms. Miller did not recall a specific conversation about the rate change with the Complainant, but believed they had spoken about it. (Tr. 216).

As to Stony Run's overweight practices, Ms. Miller testified that Driver's Manual included a provision that prohibited running overweight loads. (JX 2-6; Tr. 198). The Complainant signed a document on January 3, 2005, acknowledging that he had received the Driver's Manual. (JX 2-1; Tr. 197). Ms. Miller testified that the company "strictly enforce[d] [the overweight policy] because if you run overload it's not good on your equipment, plus you could lose your good rating. And we have a business, and it's not worth it." (Tr. 198). Because the Respondents are paid by the mile, Ms. Miller explained, as opposed to by the pound, there is no advantage to running overweight. (Tr. 198-99).

With respect to the Respondents' policies regarding driver conduct, Ms. Miller confirmed that the Driver's Manual outlined types of behavior that the Respondents would not tolerate. (JX 2-10; Tr. 199). Ms. Miller agreed she'd be concerned if a driver engaged in prohibited conduct. (*Id.*).

Ms. Miller testified that she made the decision to terminate the lease agreement between Respondents and Mrs. Washburn. (Tr. 27). She did not give Mrs. Washburn the opportunity to furnish another driver before terminating the lease agreement. (*Id.*). She testified that on April 2, 2010, Ms. Updike asked the Complainant in the dispatch room whether he had said what he had been accused of saying in Greensburg, and "he said yes proudly that he did." (Tr. 32; 41). While still behind the glass partition in the dispatch room, Ms. Miller terminated the Complainant and asked him to return his fuel card. (Tr. 32; 35; 41). Ms. Miller stated that she never told the Complainant that they were choosing between him and Syngenta or that he was being discharged to make an example of drivers who did not want to transport overweight loads. (Tr. 203-04). According to Ms. Miller, the loaders at Syngenta did not complain to Respondents about the overweight issue with the Complainant on March 22, 2010. (Tr. 219-20).

Further, Ms. Miller testified that she did not take the Complainant to the general offices on April 2, 2010, because she was afraid of him. (Tr. 41). According to Ms. Miller, the Complainant was angry and threatening, such that she was not sure what he would do. (Tr. 41). As for the reason she feared the Complainant, Ms. Miller stated that Ms. Updike had told her the Complainant refused to return to St. Gabriel to have the excess product removed from his truck. (Tr. 43; 46). He allegedly screamed on the phone to Ms. Updike, threatening to not deliver. (Tr. 204). Also, Ms. Miller testified that the Complainant wouldn't answer phone calls from the

dispatcher. (*Id.*). Ms. Miller testified that she felt physically threatened by the Complainant, though he never directly physically or verbally threatened her. (Tr. 43-44).

Ms. Miller testified that she walked with the Complainant to his truck and talked to him, but denied ever telling the Complainant that Mr. Wright wanted him terminated. (Tr. 33-34). She further denied ever speaking with Mr. Wright about the Complainant about the events on March 22, 2010. (Tr. 34; 44). On April 2, 2010, “the word overweight and the word scale never came up,” she testified. (Tr. 203). She testified that she believed that Mr. Wright was only notified of the Complainant’s termination on or after April 2, 2010, so he would be aware there was one less truck for deliveries. (Tr. 44; 220). According to Ms. Miller, though an internal investigation regarding the Complainant’s actions in St. Gabriel was conducted, Mr. Wright was not consulted, and she never spoke to Mr. Wright personally about the Complainant’s employment. (Tr. 45-46; 220).

In summary, Ms. Miller explained why the Complainant was terminated:

[H]is threats were suggestions that he was going to hide product around, he was going to take the trailer home with him, he might deliver the load, he might not deliver the load, it was just – you know, it was not a good situation, and who knows what it was leading up to. And it was getting worse.

(Tr. 206). The Complainant was not warned, disciplined, or counseled prior to termination, because according to Ms. Miller, he was beyond counseling and “was a danger.” (Tr. 207-08). Ms. Miller stated she would be terrified if the Complainant was reinstated, but the Respondents have work available. (Tr. 217).

Hearing Testimony of Amy Updike

Amy Updike testified that she worked as the office manager and dispatcher for the Respondents. (Tr. 49). Ms. Updike confirmed that the Complainant worked for the Respondents for about five years and occasionally stayed with her brother, Adam, when he was ill. (Tr. 49-50). The Complainant had been named both driver of the year and driver of the month by the Respondents. (Tr. 50; 57).

Ms. Updike recalled notifying drivers at the end of February 2010 of the impending rate reduction. (Tr. 224; 226). She and Larry Miller called drivers to inform them of lower rates so the drivers could decide whether to continue working for the Respondents, though the drivers were not told of the exact rates yet. (Tr. 224; 227; 230). As a result of the rate decreases, the Respondents lost all their owner operators. (Tr. 235). Ms. Updike testified that she personally called the Complainant to notify him of the rate change. (Tr. 225). She did not remember the Complainant’s reaction, but explained all the drivers were unhappy. (Tr. 225; 230; 232). Ms. Updike later testified that she remembered the Complainant to be disappointed and upset by the news. (Tr. 231). In future conversations with the Complainant, Ms. Updike testified that he remained unhappy about the rate reduction and felt he was being cheated. (Tr. 237).

On March 22, 2010, the date the Complainant arrived at the Syngenta facility in St. Gabriel, Ms. Updike received a call from the Complainant. (Tr. 53; 57). The Complainant was reportedly at a truck stop and his truck was overweight. (Tr. 53). Ms. Updike testified that she told the Complainant to return to Syngenta and have some of the product removed, because company policy is not to drive overweight. (*Id.*; Tr. 57). Ms. Updike characterized the Complainant's response to her request to return to Syngenta. (Tr. 57). "He was extremely agitated that it had happened. He was agitated with me because I told him that he had to go back, that we didn't have a choice. It was the underlying attitude that I had been dealing with for a couple weeks." (Tr. 57-58). Ms. Updike clarified that the Complainant seemed agitated because of the rate change and wanted to "take it out" on her; Ms. Updike did not think the Complainant was agitated about the overweight issue. (Tr. 60). According to Ms. Updike, the Complainant was yelling on the phone that he didn't want to go back to Syngenta because it would "mess up his time schedule." (Tr. 64). Ms. Updike testified that she attempted to talk to the Complainant about his attitude during that call. (Tr. 65).

Ms. Updike next called Syngenta to let them know the Complainant was returning; she stated that Syngenta did not seem to have a problem with the Complainant returning. (Tr. 53; 58). Ms. Updike further testified that she was not aware of anything that occurred between Complainant and anyone at the Syngenta facility once the Complainant returned for unloading. (Tr. 53-54). Ms. Updike did not discuss the Complainant's return with Mr. Wright anytime between March 22, 2010, and April 2, 2010. (Tr. 54).

On March 29, 2010, while the Complainant was in Greensburg, Ms. Updike testified that a loader, whose identity was unknown, called her to report that he overheard the Complainant telling drivers that he was planning to hide loaded trailers and encouraging other drivers to do the same. (Tr. 66-67; 73). Ms. Updike testified that she did not make a follow-up call to Syngenta about this allegation, nor attempt to learn the caller's name. (Tr. 67). Nor, she testified, did she call the Complainant on March 29, 2010, to ask him about his alleged statements; rather, the Complainant continued driving the load. (Tr. 68; 73-74). Ms. Updike testified that she received a second call from Harry Hutchinson, a driver for the Respondents, complaining about the Complainant's actions in Greensburg. (Tr. 68). Ms. Updike testified that she understood the Complainant's reason for making the alleged threats to other drivers because he was upset about the rate cuts. (Tr. 69). However, Ms. Updike further testified that she was not aware how or if Syngenta's rate cuts would affect drivers for other companies. (Tr. 70).

Ms. Updike stated that she was involved in the decision to terminate the Complainant, following the calls regarding the Complainant's actions in Greensburg on March 29, 2010. (Tr. 51-52; 75). Ms. Updike said that Mrs. Washburn was not given an opportunity to provide another driver prior to the termination of the lease between her and the Respondents. (Tr. 52). She and the Respondent were behind a glass partition and locked door in the dispatch office on April 2, 2010, the date the Complainant was terminated. (Tr. 55; 59). Ms. Updike testified that she had the Respondent join her in the office because she was afraid of the Complainant, though admittedly, he had never struck nor threatened to strike her. (*Id.*). Ms. Updike testified as to the basis of her fear of the Complainant:

Ed is a very happy guy as long as he's getting his way. When [h]e doesn't get his way—and we had had a rate change—he became extremely agitated and had been screaming at me on the phone. He just had an attitude that he didn't want to work with me. And it was escalating. And the angrier he got and the more it escalated, the more I was afraid of him.

(Tr. 58). This period of agitation had started in February 2010 when drivers were notified that the rates were changing, testified Ms. Updike. (Tr. 64). Prior to this, the Complainant could be difficult when he didn't get his way, but it had not escalated. (*Id.*).

Ms. Updike explained that the Respondent told the Complainant he was “going to be let go,” and Ms. Updike told the Complainant that “you can't go to our customers and threaten them and threaten to hold their product and expect us to keep our jobs.” (Tr. 55). The reason Ms. Updike made this statement is because she “had just had the discussion with [the Complainant] about the phone call that I had gotten about his behavior [at Greensburg], and he admitted to it.” (Tr. 56; 73). At Greensburg, Ms. Updike testified that he Complainant was doing the following in front of loaders, unloaders, and other people in the office:

He was going around to other drivers, trying to convince them to load Syngenta product and hold it and not deliver it. He was also trying to convince them to hide trailers, which the trailers that we haul this product with are special trailers and we cannot haul this product any other way.

(Tr. 63).

Ms. Updike testified that she gave the Complainant an opportunity to defend himself, and deny the allegations made, but he confirmed that he had said what he was accused of saying, and that he admitted to planning a slowdown and/or work stoppage. (Tr. 59; 75-77; 226). In summary, the Complainant was not terminated because of the events on March 22, 2010, testified Ms. Updike, because she was trying to overlook the events that day. (Tr. 70-71). Ms. Updike testified that she did not speak to Mr. Wright about the Complainant until after he was terminated. (Tr. 228). Instead, she testified, the Complainant was terminated because of his behavior on March 29, 2010, and his admittance to making the alleged threats. (Tr. 71). “It was escalating and we could no longer tolerate it. And I felt unsafe to have him under my dispatch. I had put up with the harassment for so long.” (*Id.*).

Hearing Testimony of Harry Hutchinson

Harry Hutchinson testified that he has been a truck driver for twenty-one years. (Tr. 133). He worked as a company driver for the Respondents from about January through October 2010. (Tr. 134).

Mr. Hutchinson testified that he was present at Greensburg on March 29, 2010, having arrived around 8:30 AM. (Tr. 136). Mr. Hutchinson testified that he encountered the Complainant who said, “we’re all planning on taking a blue flu, we’re planning on loading our trucks and not delivering it.” (Tr. 137; 144). The slowdown was planned for that Thursday, stated Mr. Hutchinson. (Tr. 145). Mr. Hutchinson reportedly asked the Complainant why, and the Complainant said something about the rates and two or three other drivers were participating in his plan. (Tr. 137). Mr. Hutchinson testified that he refused to join the Complainant, but the Complainant encouraged him to participate along with the other drivers. (*Id.*). Mr. Hutchinson recalled telling the Complainant, “not here in my customer, he ought to take it outside, this is our customer, this is where I make my money.” (Tr. 152). Further, Mr. Hutchinson denied speaking to the Complainant about any issues related to his own pay. (Tr. 147-48). Mr. Hutchinson testified that he was paid by the mile, so he was not facing a pay cut due to the rate reduction, and he did not know why the Complainant asked him to join the slowdown. (Tr. 153).

Also present, according to Mr. Hutchinson, was Mark (last name unknown) and Craig Pickett. (Tr. 137; 142-44; 146). Prior to March 29, 2010, Mr. Hutchinson could remember encountering the Complainant only three times. (Tr. 145). Mr. Hutchinson testified that after he left the Greensburg facility, when he was about thirty to forty miles away, he called Amy Updike and Larry Miller. (Tr. 138-39). He told Mr. Miller what the Complainant had said and Mr. Miller asked him to come in and talk. (Tr. 138).

Mr. Hutchinson testified that he never spilled Gramoxone on himself, falsified log book fuel records, nor hauled an overweight load for the Respondents. (Tr. 149-50; 152).

APPLICABLE LAW

The Surface Transportation Assistance Act provides for employee protection from discrimination because the employee has engaged in protected activity while employed by an individual, partnership, association, corporation or other business entity, including a group of persons, which is engaged in interstate commerce. 29 C.F.R. § 1978.100(a). The Act prohibits against discharge, discipline, or discrimination against an employee for refusal to operate a commercial motor vehicle with a gross weight rating in excess of 10,000 pounds in violation of Federal Rules or Regulations because of apprehension of serious injury due to unsafe conditions or health matters. 49 U.S.C. § 31105; *Id.*

On August 3, 2007, President Bush signed “The Implementing Recommendations of the 9/11 Commission Act of 2007,” designated as Public Law No: 110-053, 121 Stat. 266. This law significantly amended the STAA employee protection provision, broadening the definition of protected activity, harmonizing the legal burdens of proof with the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”) model, and providing for punitive damages up to \$250,000, among other changes.

On August 31, 2010, OSHA published an interim final rule implementing the changes to the STAA whistleblower provision from the 9/11 Act, and making the regulations more consistent with the other whistleblower regulations. Procedures for the Handling of Retaliation Complaints under the Employee Protection Provision of the STAA, 75 Fed. Reg. 53544 (Aug.

31, 2010) (codified at 29 C.F.R. pt. 1978). One significant amendment was to change the nature of the ALJ decision from “recommended” to “initial” and to discontinue automatic Administrative Review Board (“ARB”) review of all ALJ STAA decisions. Rather, parties must now petition for ARB review and the ARB must accept the petition. *Id.*

DISCUSSION

According to the new provisions effective August 3, 2007, an administrative law judge may find a STAA violation to have occurred only where the complainant has demonstrated by a preponderance of the evidence that the protected activity or perceived protected activity was a contributing factor in the adverse action alleged in the complaint. 29 C.F.R. § 1978.109(a). However, relief may not be ordered if the respondent can show by clear and convincing evidence that it would have taken the same adverse action absent any protected activity or perceived protected activity. 29 C.F.R. § 1978.109(b).

Thus, in order to prevail on his claim under the STAA, the Complainant must prove the following by a preponderance of the evidence: (1) that his refusal to operate a commercial vehicle in violation of legal weight restrictions and/or filing complaints related to violations of highway weight laws was protected activity; (2) that his employer, the Respondents, took an adverse employment action against him by terminating his employment; and (3) that his protected activity or activities was/were a contributing factor in the adverse employment action. If the Complainant satisfies this burden, the Respondents may avoid liability by demonstrating, by clear and convincing evidence, that the Complainant would have been terminated absent his refusal to operate a commercial vehicle in violation of legal weight restrictions and/or after filing complaints related to violations of highway weight laws.

Employer- Employee Relationship

At the outset, I note that the Respondents have stipulated that they engaged in the transportation of property on the highways via commercial motor vehicles and that transportation is in interstate commerce. (Tr. 11-12). Further, the Respondents entered into a lease agreement with Mrs. Washburn, whereby they leased a commercial motor vehicle in connection with their business, such that they meet the definition of “employer” under the Act. 20 C.F.R. § 1978.101(i); (JX 13). The Respondents have not disputed that the Complainant is an employee for the purposes of the Act, as the regulations explicitly include independent contractors within the meaning of “employee” under the Act. 20 C.F.R. § 1978.101(h). Therefore, I find the Respondents and the Complainant to be an employer and employee within the meaning of the Act.

Elements of a *Prima Facie* Claim

To satisfy his *prima facie* burden under the STAA, the Complainant must prove by a preponderance of the evidence that he engaged in protected activity, his employer was aware of his protected activity, he was subjected to an adverse employment action, and his protected activity was a contributing factor in the unfavorable personnel action. *Williams v. Domino’s Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (citing *Williams v. American Airlines*,

Inc., ARB 09-018, 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010); *Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008)).

1. Protected Activities

The STAA protects employees from retaliation for filing a complaint or beginning a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order or for refusing to operate a vehicle in violation of a regulation, standard, or order. 49 U.S.C. §§ 31105(a)(1)(A) and 31105(a)(1)(B). The Complainant has alleged that he engaged in two protected activities: (1) refusing to operate a commercial vehicle in violation of legal weight restrictions and (2) filing complaints related to violations of highway weight laws.

As to the Complainant's refusal to operate an overweight vehicle, neither party has disputed that national and state weight standards apply to commercial vehicles operating on the Interstate Highway System. The Complainant and Ms. Updike both testified that the Complainant called Ms. Updike after leaving Syngenta's St. Gabriel facility on March 22, 2010, to inform her that his truck was overweight. (Tr. 53; 98). The Complainant further testified that he told Ms. Updike that he would have to return to Syngenta's facility; he could not drive overweight. (Tr. 98). Because the Complainant did return to Syngenta to have some of the product removed from his truck, he effectively refused to operate his vehicle in violation of weight restrictions. Further, once at Syngenta, the Complainant allegedly refused to move his fifth wheel in order to redistribute the weight, because he believed he would still be overweight; the only solution was to remove some gallons of product from his truck. (Tr. 99-100). Therefore, this activity constitutes a refusal to operate a vehicle in violation of a regulation, standard, or order pursuant to Section 31105(a)(1)(B) and is properly characterized as protected activity under the STAA.

Next, the Complainant argues that his phone call to Ms. Updike regarding the overweight on March 22, 2010, was a complaint related to violation of highway weight laws. In *Harrison v. Roadway Express, Inc.*, ARB No. 00 048, ALJ No. 1999 STA 37 (ARB Dec. 31, 2002), the ARB reviewed the case law relevant to what constitutes "filing a complaint" for purposes of establishing protected activity under the STAA. The ARB determined that "[T]he 'filed a complaint' language of STAA § 31105(a)(1)(A) protects from discrimination an employee who communicates a violation of a commercial motor vehicle regulation, standard or order to any supervisory personnel." Here, Ms. Updike is employed by the Respondents as office manager and dispatcher. (Tr. 49). Because she directed the Complainant's schedule, she can reasonably be deemed supervisory personnel in relation to the Complainant. (Tr. 51). Thus, the Complainant's phone call to Ms. Updike on March 22, 2010, for the purpose of reporting the overweight was communication of a violation of a commercial motor vehicle regulation, standard, or order to any supervisory personnel and is protected activity.

As the Complainant has established that he engaged in protected activities, he must next demonstrate that the Respondents were aware of such activities.

2. Awareness of Protected Activities

The Complainant must demonstrate that the Respondents were aware of his protected activities, such that they contributed to his termination. As previously discussed, Ms. Updike was made personally aware of the Complainant's complaint by a phone call from him, indicating that he refused to drive overweight and had to have some product unloaded. (Tr. 53; 98). Ms. Updike is office manager and dispatcher for the Respondents, such that her familiarity with the overweight problem on March 22, 2010, involving the Complainant is sufficient to impute awareness on the Respondents. I find the Respondents were aware of the Complainant's protected activities.

3. Adverse Employment Action

It is clear from the testimony that the Complainant suffered adverse employment action when he was terminated from his employment with the Respondents. On August 31, 2006, the Respondents entered into an "Equipment and Service Agreement Between Contractor and Carrier" with Mrs. Washburn, the Complainant's wife. (JX 13). The lease agreement provided that Mrs. Washburn would either drive or furnish and pay a driver for the truck. (*Id.*). The Complainant testified that he was the sole driver and maintainer of the truck; his wife owned the truck for financial reasons only. (Tr. 84-85; 156). The Respondents have not disputed that the Complainant was the only driver furnished pursuant to the lease agreement.

The Complainant was employed by the Respondents as a driver for over three years until early April 2010, when the Respondents terminated the lease with Mrs. Washburn, thereby discharging the Complainant. (Tr. 11-12). Such a discharge from employment is an adverse employment action under the Act.

As the Complainant has established the first three elements of a *prima facie* claim of retaliation under the STAA, the Complainant must next show that his protected activities were a contributing factor in his termination.

4. Contributing Factor

The ARB has described a contributing factor as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Sievers*, slip op. at 4. A complainant can succeed by providing either direct or indirect proof of contribution. *Id.* Direct evidence is evidence that conclusively links the protected activity and the adverse action. *Id.* at 4-5. Alternatively, the complainant may provide circumstantial evidence, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his or her employment. For example, the complainant may show that the respondent's proffered reason for termination was not the true reason, but instead "pretext." *Riess v. Nucor Corp.*, ARB 08-137, 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010). If the complainant proves pretext, it may be inferred that his or her protected activity contributed to the termination. *Id.*

Direct Evidence

Under the first approach, the Complainant must produce evidence that directly links his protected activities and termination. The ARB has described direct evidence as “smoking gun” evidence that “conclusively links the protected activity and the adverse action and does not rely on inference.” *Williams v. Domino’s Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011). The only direct or “smoking gun” evidence of retaliation is the Complainant’s hearing testimony that Ms. Miller told him he was discharged due to the events at St. Gabriel on March 22, 2010. The Complainant testified that Ms. Miller told him, “[W]e’re going to have to fire you because it was a choice between Syngenta or you and we chose Syngenta.” (Tr. 116; 172). According to the Complainant, Ms. Miller repeated this as he left the Respondents’ premises, stating that “it was nice working with you but we had to choose between Syngenta and ... you and that we got to get rid of you because of what happened in St. Gabriel.” (Tr. 118; 173).

However, whether this “smoking gun” conversation occurred is strongly disputed by the alleged declarant, Ms. Miller. Ms. Miller denied ever stating that Complainant was terminated in order to preserve a relationship with Syngenta, which she denied was the case. (Tr. 203-04). Ms. Miller testified that although she walked with the Complainant to his truck and talked to him, she never told the Complainant that Syngenta wanted him terminated. (Tr. 33-34).

The sharp conflict between the testimony of the Complainant and Ms. Miller requires that I determine their credibility. The degree of conflict is disturbing because both witnesses were placed under oath and obviously if one is telling the truth the other is not, thus violating that oath. The Complainant, as noted, has the burden of establishing the elements of a *prima facie* case by a preponderance of the evidence. *See Williams*, ARB No. 09-092, slip op. at 6 (citing *Williams v. American Airlines, Inc.*, ARB 09-018, 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010); *Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008)).

In assessing the Complainant’s demeanor at the hearing, I found him to be very well mannered and respectful and apparently sincere in his testimony, at one point becoming tearful when he described his relationship with Stony Brook as being like that of family. (Tr. 126). In many respects, he appeared just the opposite of the intemperate personality described by Ms. Miller and Ms. Updike. Indeed, he seemed very likeable. Even so, there were aspects to his testimony that did not, to use a phrase, “add up.” He testified that he considered the people at Stony Run as family and wished to return to his old employment. (*Id.*) However, it was clear that Ms. Miller and Ms. Updike were genuinely fearful of his nature. Ms. Miller testified that, during the time period in question, the Complainant’s behavior had become “elevated to the point we felt he was a danger.” (Tr. 208). Ms. Miller also stated that if she was ordered to reinstate the Complainant, she would be “terrified.” (Tr. 217). Similarly, Ms. Updike testified that, although the Complainant had never struck or threatened to strike her in the past, she was afraid of him. (Tr. 55). She described the Complainant as “a very happy guy as long as he’s getting his way,” but that, if he did not, he would become “extremely agitated” and begin to scream at her on the telephone. (Tr. 58). I found both Ms. Miller and Ms. Updike credible in their testimony.

Furthermore, rather than downplaying his reaction to the Syngenta rate decreases that Ms. Miller and Ms. Updike claimed made him disgruntled, the Complainant disavowed all knowledge of the rate decreases. (Tr. 162). However, Ms. Updike testified that she contacted all the drivers about the Syngenta rate decreases, and that she informed the Complainant directly. (Tr. 225; 231). She testified that his reaction was one of disappointment, like all the drivers. (Tr. 231-232). Given the testimony of Ms. Updike and the obvious interest of the drivers in the rate decreases as a topic of general discussion, I find it very difficult to accept that the Complainant would not have known anything at all about them, as he claimed at the hearing. Such ignorance seems highly unlikely. Although Mr. Hutchinson was not the most agreeable witness, his testimony that he personally overheard the Complainant complaining about the rate decreases and suggesting a work slowdown was not seriously impeached. (Tr. 137). Likewise, I found the Complainant to be patently disingenuous when discussing the anonymous telephone call to Syngenta he seemed to both admit to and disown at the same time. (Tr. 181). Although this telephone call occurred after his termination, the Complainant's testimony regarding this telephone call was evasive and dealt a blow to his credibility.

As for the alleged statements from Ms. Miller stating that she had to choose between the Complainant and Syngenta, they strike me as words more likely to be put into another's mouth rather than to come out of it. Ms. Updike, whom I found to be credible, witnessed the Complainant's discharge by Ms. Miller and testified that Ms. Miller simply told the Complainant that he was "going to be let go." According to Ms. Updike, she then spoke to the Complainant, telling him "you can't go to our customers and threaten them and threaten to hold their product and expect us to keep our jobs." (Tr. 55). Ms. Updike directly refuted the Complainant's testimony that Ms. Miller told him that he was being terminated due to Syngenta. I have no reason to doubt the credibility of either Ms. Updike or Ms. Miller, both of whom did well on cross-examination and struck me as honest. Their testimony was consistent and corroborated one another's history of events, despite sequestration during the hearing.

Finally, it must be noted that even the Complainant testified that the Respondents did not run overweight as a matter of practice. (Tr. 166). He testified that when he initially reported the overload to Ms. Updike, rather than objecting or otherwise instructing or suggesting that he overlook the overload because Syngenta was such a big customer for whom the company was willing to overlook safety, Ms. Updike simply said "okay" and told him to go back and get some of the overload taken off. (Tr. 98). Indeed, there is absolutely no evidence that the Complainant met any resistance from Stony Run to returning to the dock, or that he was expected to have overlooked the overload to accommodate Syngenta. This being the case, it does not follow that, having met no resistance at the time, he would then later be severely punished for simply acting in accordance with the Respondents' practice of not running overweight.

For all these reasons, I find that the Complainant has not shown by a preponderance of the evidence that the "smoking gun" conversation in which Ms. Miller allegedly admitted to a retaliatory dismissal ever took place.

Circumstantial Evidence

Absent direct evidence, the Complainant can prove unlawful discrimination by circumstantial evidence. Under such an approach, the Complainant must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for his termination. *See Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (citing *Williams v. American Airlines, Inc.*, ARB 09-018, 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010); *Peters v. Renner Trucking & Excavating*, ARB No. 08-117, ALJ No. 2008-STA-030, slip op. at 4 (ARB Dec. 18, 2009); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008)).

The proximity in time between protected conduct and adverse action alone may be sufficient to establish circumstantially the element of causation. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)). The case law has identified periods of six days, one week, two months, and even ten months as sufficient to raise an inference of causation. *See Newkirk v. Cypress Trucking Lines*, 88-STA-17 (Sec'y Feb. 13, 1989); *Stiles v. J.B. Hunt Transportation, Inc.*, 92-STA-34 (Sec'y Sept. 24, 1993); *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan 17, 1995); *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995).

Here, the Complainant's protected activities occurred on March 22, 2010, when he called Ms. Updike to report the overweight after leaving the Syngenta facility in St. Gabriel and otherwise refused to drive overweight. The parties have stipulated that the lease agreement was terminated early April 2010, and the hearing testimony confirmed a termination date of either April 1, 2010 or April 2, 2010. (Tr. 34-35; 58; 115). Thus, the period between the protected activities and adverse action was eleven to twelve days. I find the Complainant's termination eleven to twelve days after his protected activities to be in close proximity, thereby raising the inference that protected activity was likely the reason for adverse action.

However, the ARB has held that although an inference of causation based on temporal proximity is decisive, it is not dispositive, as the complainant is required to prove each element of a *prima facie* claim by a preponderance of the evidence. *Spelson v. United Express Systems*, ARB No. 09-063, ALJ No. 2008-STA-39 (ARB Feb, 23, 2011). Further, an inference of causation may be negated by intervening events. *Johnson v. Rocket City Drywall*, ARB No. 05-131; ALJ No. 2005-STA-24 (ARB Jan. 31, 2007). For example, where a complainant violated the respondent's safety rules on the day of his termination, the ARB held that the intervening safety rule violation had negated the inference of causation raised by temporal proximity. *Id.*

In this case, there is extensive hearing testimony as to the events on March 29, 2010, which were situated between the Complainant's protected activities on March 22, 2010, and his termination on April 1, 2010 or April 2, 2010. According to the Complainant, he arrived at Greensburg on March 29, 2010, to load his truck. (Tr. 109). The Complainant reported that everything was normal, though Harry [Hutchinson] was "kind of loud." (*Id.*). The Complainant denies ever complaining about the rates or the Respondents to other drivers or employees at the Greensburg facility. (Tr. 110-11). Later, the Complainant testified that any allegation by Mr. Hutchinson that he had overheard the Complainant threaten to hide trucks was a lie. (Tr. 162).

Mr. Hutchinson's testimony is markedly different from the Complainant's testimony. Mr. Hutchinson stated that when he arrived at Greensburg, he walked inside to find the Complainant threatening to load trucks but not deliver. (Tr. 137). Mr. Hutchinson reportedly asked the Complainant why he was planning to do this, and "he said something about the rates and that he's got two or three other drivers that is going to do the same thing." (*Id.*). Mr. Hutchinson testified that he refused to agree with Complainant's scheme. (*Id.*). After leaving the Greensburg facility, Mr. Hutchinson testified that he called Ms. Updike and Mr. Miller to report what the Complainant had said. (Tr. 138-39).

Ms. Updike testified that she did receive a call from Mr. Hutchinson on March 29, 2010, about the Complainant's conduct in Greensburg. (Tr. 68). Ms. Updike also received a second phone call from someone working at the Greensburg facility. (Tr. 66). The loaders had overheard the Complainant tell drivers that he was going to load trailers and hide them. (Tr. 66-67). The Complainant was allegedly trying to organize other drivers, not employed by the Respondents, to participate in the slowdown too because the Syngenta rate cuts affected many companies and drivers. (Tr. 69).

When evaluating the competing testimony, I again find reasons to doubt the credibility of the Complainant. The Complainant testified that he did not "bad mouth" the Respondents or threaten a slowdown on March 29, 2010. (Tr. 110-11; 113). He said he did not even know about the rate cuts on March 29, 2010. (*Id.*). According to the Complainant, nothing unusual happened at Greensburg on March 29, 2010. (Tr. 109). This is in direct conflict with Mr. Hutchinson's testimony, as well as Ms. Updike's testimony. Mr. Hutchinson stated that he overheard the Complainant threatening to hide trucks because of the rate cuts; Ms. Updike testified that she received calls from both Mr. Hutchinson and a loader from Greensburg on March 29, 2010, reporting the Complainant's threats. In addition, Ms. Updike testified that she recalled personally notifying the Complainant that the rates would be cut in late February 2010, such that he was definitely aware of the rate cut. (Tr. 231-34). I have no reason to doubt the credibility of Ms. Updike, whose testimony aligns with Mr. Hutchinson's account of March 29, 2010. And, although Mr. Hutchinson was somewhat disruptive during the hearing, I have no reason to doubt his credibility as a witness either. Conversely, as discussed earlier, I do have reservations regarding the overall credibility of the Complainant.

Ultimately, I find that a preponderance of the evidence supports the conclusion that there were intervening events on March 29, 2010, that negate the inference of causation established by the temporal proximity of the Complainant's protected activities and termination.

The ARB has also held that another type of circumstantial evidence under the STAA is that which "discredits the respondent's proffered reasons for the termination, demonstrating instead they were pretext for retaliation." *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011). According to the Board, "If the complainant proves pretext, [the fact finder] may infer that his protected activity contributed to his termination, although [the fact finder is] not compelled to do so." *Id.*

As discussed in greater detail *infra*, the Respondents' proffered reasons for terminating the Complainant were his escalating agitation; his combative, argumentative behavior, which caused them fear; and evidence obtained that the Complainant was threatening to hide loaded trailers and had begun encouraging other drivers to engage in a work slowdown in response to rate decreases. The Complainant argues, conversely, that he was terminated for refusing to operate a commercial vehicle in violation of legal weight restrictions and filing complaints related to violations of highway weight laws. The Complainant testified that his refusal to drive overweight on March 22, 2010, upset the loader at Syngenta's facility in St. Gabriel. (Tr. 102). Furthermore, he testified that when he refused to adjust the fifth wheel on his truck, the loader threatened to call Levi [Wright], who was in a supervisory position at Syngenta. Finally, he testified that when he was terminated on April 1, 2010, or April 2, 2010, Ms. Miller did not conceal her motives, but told him directly that the company had been put in a position where it had to choose between him and Syngenta. (Tr. 116; 172). Ms. Miller strongly denied that such words ever came out of her mouth or that Syngenta had forced her to terminate the Complainant because of what happened at St. Gabriel. (Tr. 118; 173).

I have already found that the preponderance of the evidence does not support the Complainant's "smoking gun" testimony that the Respondent told him he was discharged in order to appease Syngenta. Further, Ms. Miller testified that the loaders at Syngenta did not complain to Respondents about the overweight issue with the Complainant on March 22, 2010. (Tr. 219-20). Ms. Miller denied ever speaking with Mr. Wright about the Complainant about the events on March 22, 2010. (Tr. 34; 44). On April 2, 2010, "the word overweight and the word scale never came up," according to Ms. Miller. (Tr. 203). Ms. Miller believed that Levi Wright was only notified of the Complainant's termination on or after April 2, 2010, in order to advise him that there would be one less truck for deliveries. (Tr. 44; 220).

Again, assigning greater credibility to the Respondents than the Complainant, I find that the evidence supports the Respondents' assertion that the true reason for terminating the Complainant was due to his attitude, threats of hiding trailers, and his encouraging other drivers to engage in a work slowdown. The Complainant has not shown by the preponderant weight of the circumstantial evidence that the Respondent's proffered reason for his discharge was pretext. Therefore, I find that the Complainant has failed to prove by a preponderance of the evidence, either direct or circumstantial, that his protected activity was a contributing factor in the unfavorable personnel action. The Complainant has not carried his burden of presenting a *prima facie* case of retaliation.

Same Adverse Action Absent Protected Activities

Under Section 1978.109(b), relief may not be ordered if the respondent can show by clear and convincing evidence that it would have taken the same adverse action absent any protected activity or perceived protected activity. 29 C.F.R. § 1978.109(b). In other words, even where a complainant has proven discrimination by a preponderance of the evidence, liability does not attach if the employer can demonstrate clearly and convincingly that it would have taken the same adverse action in any event. *Williams*, ARB No. 09-092, slip op. at 6. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or

reasonably certain.” *Id.* (citing *Brune v. Horizon Air. Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip. op. at 14 (ARB Jan. 31, 2006) (citing Black’s Law Dictionary at 577)).

Even assuming *arguendo* that the Complainant had successfully presented a *prima facie* case of retaliation under the STAA, the Respondents point to the Complainant’s negative attitude and increasing hostility, as well as his threats at the Greensburg facility, as sufficiently convincing evidence that it would have taken the same adverse action absent any protected activity. (Respondents’s Brief at 18-19). For the sake of appellate review, I agree.

Ms. Updike testified that the Complainant had been exhibiting a pattern of agitation since February 2010 when the rate change occurred. (Tr. 64; 71).

When [the Complainant] doesn’t get his way – and we had had a rate change – he became extremely agitated and had been screaming at me on the phone. He just had an attitude that he didn’t want to work with me. And it was escalating. And the angrier he got and the more it escalated, the more I was afraid of him.

(Tr. 58). Ms. Updike testified that the Complainant was agitated when he called to report the overweight on March 22, 2010. (Tr. 60). “I think that he was just upset about the rate change and that he wanted to be a problem any way he could and he was going to take it out on me.” (*Id.*). Ms. Updike reported that the Complainant was yelling and screaming at her on the phone on March 22, 2010. (Tr. 64). She testified that she attempted to address his attitude on the phone that day. (Tr. 65). However, Ms. Updike stated she hoped that the Complainant would “get over it,” as everyone was upset about the rate change. (*Id.*; Tr. 71).

In addition to his abrasive attitude, Ms. Miller testified that the Complainant had threatened not to deliver the product to the customer. (Tr. 43). Ms. Updike was notified by both Mr. Hutchinson and a loader that the Complainant was allegedly “going around to other drivers, trying to convince them to load Syngenta product and hold it and not deliver it. He was also trying to convince them to hide trailers....” (Tr. 63). Ms. Updike testified that she told the Complainant he “can’t go to our customers and threaten them and threaten to hold their product.” (Tr. 55). She testified that the Complainant, in fact, “proudly” admitted to her that he “had done these things over in Greensburg,” and that it was his difficult behavior and his insubordinate conduct that was the reason he was terminated. (Tr. 32, 71-73; 75; 77-78; 226). “It was escalating and we could no longer tolerate it. And I felt unsafe to have him under my dispatch. I had put up with the harassment for so long.” (Tr. 71).

As previously mentioned, I have no reason to doubt the credibility of either Ms. Miller or Ms. Updike, other than the Complainant’s temperate and well-mannered behavior at the hearing. Both Ms. Updike and Ms. Miller testified that they feared the Complainant, arranging to discharge him while situated behind a locked door and glass partition. In *Frausto v. Beall Concrete Enterprises, Ltd.*, the ARB affirmed an administrative law judge’s recommended dismissal where overwhelming and credible evidence supported the respondent’s contention that the complainant was terminated due to his bizarre and disruptive behavior. ARB No. 05-122,

ALJ No. 2005-STA-9 (ARB Aug. 24, 2007). Therefore, even assuming *arguendo* that the Complainant had established a *prima facie* case of retaliation, I find the testimony regarding the Complainant's escalating agitation to the point that the Respondent and Ms. Updike feared him, to be sufficient to satisfy the Respondent's burden of showing by clear and convincing evidence that the Complainant was terminated for behavior and conduct unrelated to his protected activity.

Furthermore, even putting aside the Complainant's escalating temper, the Respondents had another grounds for terminating the Complainant: complaints from the Respondents' customer and employee about the Complainant's threats to hide loaded trailers and his attempt to orchestrate a work slowdown. In *Polchinski v. Atlas Bulk Carriers*, two different customers had called to complain about the complainant, creating a justifiable reason to terminate the complainant. 95-STA-35 (Sec'y Mar. 7, 1996). Similarly, I find the calls from Mr. Hutchinson and the unidentified loader at Greensburg were sufficient to show by clear and convincing evidence that the Respondents would have taken the same adverse action in any event, regardless of the Complainant's protected activity.

In conclusion, even assuming *arguendo* that the Complainant had presented a *prima facie* case of retaliation, the Respondents can show by clear and convincing evidence that they would have taken the same adverse action absent any protected activities by the Complainant. The Respondents have demonstrated that the Complainant was terminated due to his attitude and confirmed threats of a work slowdown/stoppage, not because he reported an overweight load and refused to drive overweight. It was reasonable to terminate the Complainant for threatening to hide loaded trucks, particularly given his recent agitated disposition. Therefore, even if the Claimant had successfully established a *prima facie* case of retaliation, which he did not, the Respondents satisfied their burden of rebutting the case against them.

CONCLUSION

The Complainant has proven by a preponderance of the evidence that his refusal to operate a commercial vehicle in violation of legal weight restrictions and filing complaints related to violations of highway weight laws were protected activities, that the Respondents were aware of his protected activities, and that the Respondents took an adverse employment action against him by terminating his employment. However, the Complainant has failed to demonstrate, by a preponderance of either direct or circumstantial evidence, that his protected activities were a contributing factor in the adverse employment action. Even if the Complainant had satisfied his *prima facie* burden, the Respondents have demonstrated by clear and convincing evidence that the Complainant would have been terminated absent his protected activities because of his negative attitude and corroborated threats of a work slowdown/stoppage. In sum, the Complainant has failed to prove that his protected activities were the true reason for his termination and that the Respondents' proffered reason for his discharge were pretextual.

ORDER

IT IS HEREBY ORDERED that the claim of the Complainant, Edward Washburn, for unlawful discrimination under the STAA is **DISMISSED**.

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JOHN P. SELLERS, III
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party’s legal brief of points and authorities in

opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).