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Issue Date: 01 April 2013

CASE NO.: 2012-STA-30

IN THE MATTER OF:

THOMAS J. GRAFF

Complainant

v.

CARGO EXPRESS, INC.¹

Respondent

APPEARANCES:

PAUL O. TAYLOR, ESQ.
For The Complainant

JIM GOH, ESQ.
For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment.

¹ During the formal hearing, Complainant moved to dismiss the complaints as to Dennis Schlegel, Bob Switzer, Steve Ball, John Doe and Mary Roe, individually. His motion was granted without objection. (Tr. 37).

On or about June 7, 2010, Thomas Graff (herein Complainant) filed a complaint against Cargo Express, Inc. (herein Respondent) with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), complaining of various unsafe acts under the STAA, including his termination on June 7, 2010. An investigation was conducted by OSHA and on May 24, 2012, the Regional Administrator for OSHA issued the Secretary of Labor's Findings concluding that Complainant's complaint lacked merit. (ALJX-1). Complainant subsequently filed a request for formal hearing with the Chief Administrative Law Judge, Office of Administrative Law Judges. (ALJX-2).

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a hearing in Phoenix, Arizona, on May 24, 2011. (ALJX-3). On June 25, 2012, Respondent filed a Motion to Change Venue and Date of Hearing. (ALJX-5). On July 31, 2012, a Notice of Hearing and Pre-Hearing Order was issued rescheduling the hearing for September 27, 2012, in Boise, Idaho. (ALJX-7). On August 13, 2012, in compliance with the Pre-Hearing Order, Complainant filed a formal complaint alleging the nature of each and every violation claimed as well as the relief sought in this proceeding. (ALJX-8). On September 4, 2012, Respondent duly filed its Answer to the Complaint. (ALJX-9). The parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.²

Post-hearing briefs were received from the Complainant on November 30, 2012, and the Respondent on January 28, 2013. Complainant filed a reply brief on February 14, 2013. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. ISSUES

The unresolved issues presented by the parties are:

1. Whether Complainant engaged in protected activity within the meaning of the STAA?

² References to the transcript and exhibits are as follows: Transcript: Tr.____; Complainant's Exhibits: CX-____; Respondent's Exhibits: RX-____; and Administrative Law Judge Exhibits: ALJX-____.

2. Whether Complainant was discharged in retaliation for his protected activities in violation of the STAA?
3. Whether Complainant is entitled to remedies?

II. STATEMENT OF THE CASE

The Testimonial Evidence

Complainant

Complainant testified he is a professional truck driver with 20 years of experience. (Tr. 330). He attended truck driving school and received a certification for truck driving. (Tr. 330-331). He has had a Commercial Driver's License (CDL) since 1992 with a Class A endorsement, including an air brake endorsement, double trailers endorsement, triple trailers endorsement and tanker endorsement. He previously held a Hazardous Materials endorsement. (Tr. 331). He has driven all 48 continental states, through mountains and flat land. (Tr. 332).

Complainant began working for Triple A Cost Express in 1992. He worked for U.S. Express for five years, which operated 3,500 trucks. (Tr. 332). He worked for Marten Transportation for five and one-half years and for KBR three times in Iraq, Afghanistan and Kuwait. He also worked for Market Transport and Frye Miller. He received safety awards from Triple A Coast Express, Direct Transit, U.S. Express and Marten Transport. (Tr. 333). He was a driver-trainer for Direct Transit, U.S. Express and Marten Transport. (Tr. 334).

Complainant also owns an internet company entitled GoTruckStop.com, which sells truck accessories and gifts online. He sells breezeway screens, bunk warmers, CB radios, custom steering wheels and GPS systems. All of his sales are conducted online. He spends three to five hours per week in his online business during his off time at truck stops or in his truck. (Tr. 334).

He called Respondent and spoke to Robert Switzer about a job and was offered employment. He went through two days of orientation and was assigned Truck Number 11150. (Tr. 335).

Complainant explained that there are a variety of things which affect miles driven such as long versus short dispatches, weather, hours of service regulations, traffic, road conditions and the amount of time a truck is in the shop for repairs. (Tr. 336-337). While working for Respondent, Complainant drove over 10,000 miles some months and under 10,000 miles other months. (Tr. 336).

Complainant testified that his supervisor, Steve Ball, and Mr. Switzer knew he had a side business. Mr. Ball never told Complainant he could not engage in a side business. (Tr. 336-337).

Complainant identified RX-3 as a repair order. On January 22, 2010, Complainant was unable to drive for a day due to truck repairs in McDonough, Georgia. He was down for a day with vibrations and shifting problems with his truck. (Tr. 337-338; RX-3, p. 3). He was also down a day in Atlanta, Georgia, on January 23, 2010. His airbags deflated due to a bad leveling valve. (Tr. 337-339; RX-3, p. 2). Complainant testified that a deflated airbag can affect the safe operation of a truck because it diminishes the rear suspension and puts undue strain on the fifth-wheel connection. (Tr. 339).

Complainant completed a driver vehicle write-up for repairs in Respondent's repair shop on February 1, 2010, for "six excessive oil leaks." (Tr. 340; RX-3, p. 5). Complainant had noticed excessive oil on the engine, and he spoke to Kelly Pecora about the issue. (Tr. 340). It was noted on the repair order that the batteries were replaced, and it also indicated "we fix oil leaks next time." (Tr. 340; RX-3, p. 5). Complainant did not know who made those notes on the repair order. He was told the oil leaks would be fixed next time, but he did not know if they were ever fixed. Complainant was down one day for those repairs. (Tr. 341).

Complainant's truck was down for one day on February 6, 2010, for a clutch adjustment. (Tr. 341-342; RX-3, p. 6). The truck went into a shop in Amarillo, Texas, on February 10, 2010 for an air compressor blow-out, which required the truck to be towed. Complainant was down for three days. (Tr. 342-343; RX-3, pp. 7-8). On February 13, 2010, Complainant was waiting to be dispatched, but his truck had to go back into the shop for several hours on February 14, 2010, for a flat trailer tire repair. (Tr. 344-345; RX-3, p. 9). On these occasions "relays" occurred, where other drivers picked up the load for delivery. Complainant also relayed for other drivers. (Tr. 344).

Complainant received a letter of concern in February 2010 about his mileage driven. (Tr. 345; RX-5, p. 1).

On April 19, 2010, Complainant's truck had a coolant leak which required Complainant to "limp" into Respondent's shop. (Tr. 346; RX-3, p. 11). On May 14, 2010, Complainant's truck was in a shop in Indianapolis, Indiana for vibration. He was down for four days and dispatched on May 18, 2010. (Tr. 346-347; RX-3, p. 13). From May 4, 2010 to May 7, 2010, Complainant was on "off time" which was approved by Mr. Ball. (Tr. 347-348). From May 1, 2010 to May 3, 2010, he drove locally. (Tr. 348). RX-17, p. 10 documents four local runs performed by Complainant. (Tr. 348; RX-17, p. 10).

Complainant typically drove 600 miles in a day. He estimated that he lost 3,000 miles of dispatches while waiting for repairs in Indianapolis. When he had a breakdown, he would contact Mr. Ball and receive instructions. (Tr. 349). He experienced excessive breakdowns with Respondent. His truck's odometer showed 650,000 miles. While employed by other employers, he did not experience compressor breakdowns or the type of transmission problems he experienced with Respondent. (Tr. 350).

On May 27, 2010, Complainant completed a repair order for an air leak. His air pressure lost 35 to 40 pounds within an hour. He was down for three days. (Tr. 350-351; RX-3, p. 15). During that time, Complainant stayed in a hotel in Boise, Idaho. Respondent would not allow him to stay in his truck while it was being repaired. (Tr. 351-352).

On May 27, 2010, Complainant spoke with Mr. Zahm, Mr. Anthony, Mr. Ball and Mr. Switzer in the office about Respondent buying "breeze way screens," which would allow fresh air into the windows preventing the trucks from having to idle. (Tr. 352-353). In early May, Mr. Switzer had sent out a Qualcomm message regarding excessive idle times. Complainant believed the screens could save Respondent money. (Tr. 353). Complainant called Mr. Switzer to inform him about the screens. On May 27, 2010, he approached Mr. Switzer, who told him to speak to Mr. Zahm. Complainant then told Mr. Zahm about the screens. Complainant claims he was not trying to sell the screens, but the manufacturer was trying to put together a deal for Respondent. (Tr. 354). Mr. Zahm's response was "why the F" should he do that. Complainant testified this upset him so he

turned around and left. He did not speak to anyone else about Mr. Zahm's behavior. (Tr. 355).

Complainant had a cell phone and communicated with Respondent (Mr. Ball and Mr. Switzer) by cell phone. He provided his cell phone number to Respondent when he was hired. (Tr. 356).

On May 28, 2010, Mr. Ball called Complainant by cell phone late in the afternoon to tell him his truck was ready and to give him a dispatch for May 29, 2010, to the St. Louis, Missouri area. (Tr. 357-358). RX-3, p. 15 showed Complainant's truck was ready on May 29, 2010. (Tr. 357; RX-3, p. 15). On May 29, 2010, Complainant performed an inspection of the truck, picked up the trailer load and began his trip. Within a few hours of the trip, Complainant noticed the air gauges fluctuating between 139 psi and 110 psi. He notified Mr. Anthony. (Tr. 358). They agreed it would be okay to drive, but to keep an eye on the pressure. Complainant delivered the load to Fenton, Missouri. He noticed an air leak and oil leak at the turbo area and requested Respondent repair the leaks. (Tr. 359). Respondent authorized Complainant to go to the Kenworth dealer in St. Louis. (Tr. 359-360).

Complainant spoke to the service writer at Kenworth. He did not believe Respondent called previously. Complainant explained that his air gauges were fluctuating from 130 pounds to 105 pounds on a "regular cycle." (Tr. 360). The compressor cycle was running every two to three minutes rather than every 15 to 30 minutes. (Tr. 360-361). Complainant testified he was trained on air leaks and audible air leaks. (Tr. 361). He testified that an audible air leak could potentially cause a major issue. (Tr. 361-362). A drastic drop in air pressure could render the service brakes ineffective and cause the emergency brakes to engage, which could possibly cause a jack knife of the unit. (Tr. 362).

On June 1, 2010, the service writer noted "inspect for air leak-noticed drop of 30 psi." (Tr. 362; CX-6, p. 2). Respondent told Complainant to go to Kenworth for service. (Tr. 363). Complainant checked into a motel until late afternoon when Mr. Ball called to report the truck had been repaired and dispatched. (Tr. 363-364). When Complainant arrived at the truck, the air gauges were at zero. He opined that the truck had not been properly repaired. The truck had been moved from the Kenworth shop to the parking area, and Complainant testified that there had to be air in the system to move the vehicle

because it had air brakes. He walked to the service area and reported he had no air pressure. The service center informed him that Respondent had instructed not to repair the turbo issue. (Tr. 365).

Complainant had asked Kenworth to inspect the turbo for possible passing oil. While employed by Marten Transport, Complainant's turbo actuator failed, causing a major loss of power. (Tr. 366). On another occasion, he was driving for Marten Transport and the turbo blew up, causing a rapid decrease of power. (Tr. 367).

Complainant tried to call Respondent, but the phone rolled over to Navajo Express night operations. He reported that the truck had not been repaired and he was refusing to drive the truck. (Tr. 367).

On June 1, 2010, Complainant sent a Qualcomm message to Respondent reporting that he was having difficulty shifting prior to driving to St. Louis. (Tr. 368; CX-1, p. 76). Complainant sent another Qualcomm message to Respondent indicating there was still an air and oil leak at the turbo. (Tr. 368; CX-1, p. 78). He sent the message after speaking to a representative at Navajo Express who asked him to send a breakdown message. (Tr. 368). He witnessed oil and air coming from the turbo diaphragm area. (Tr. 368-369; CX-1, p. 78). Complainant noted that Respondent instructed Kenworth to "just fix the minor leaks." (Tr. 369; CX-1, p. 78). Complainant sent another Qualcomm message to Respondent of June 1, 2010, stating his concerns were safety-related, and he refused to drive the truck. (Tr. 369; CX-1, p. 80). Complainant did not know what WINM meant, but STEB stood for Steve Ball. (Tr. 369; CX-1, p. 82).

On June 2, 2010, Complainant sent a pre-trip inspection report to Respondent through Qualcomm, indicating he had detected a significant air leak and oil leak at the turbo area. (Tr. 370; CX-1, pp. 84-85). Complainant also had phone calls with Mr. Ball after the truck was not fixed. (Tr. 370-371). He reported to Mr. Ball on June 2, 2010, that the truck had not been repaired and he was concerned. Complainant requested the needed repairs and reported he would not drive until the truck was repaired. Complainant testified that Mr. Ball tried to convince him it was safe to drive the vehicle. He also testified that Mr. Ball told him the truck would not be repaired and to "deal with it." (Tr. 371). He did not speak to anyone else at Respondent by telephone on June 2, 2010. (Tr. 371-372).

On June 2, 2010, Mr. Schlegel, Respondent's owner, contacted Complainant through a Qualcomm message. (Tr. 372; CX-1, p. 86). The message stated, "The truck has been repaired. A leaking turbo actuator is not a safety issue. If you do not wish to drive the truck back to Boise let's say so now and I'll send a recovery driver. Otherwise, quit the nonsense and let's get to work." (CX-1, p. 86). Complainant testified it was the first message he ever received from Mr. Schlegel, and he felt intimidated. Complainant felt if he did not drive the truck, he would be fired. Complainant proceeded to Illinois a few hours after receiving Mr. Schlegel's message to pick up a load. (Tr. 373). Mr. Switzer called Complainant and asked what his intentions were. (Tr. 373-374). Complainant reported he would pick up the load the next day as scheduled, but he was still concerned about the leaks. (Tr. 374).

Complainant took the load from Illinois to Loveland, Colorado. He was not given a load directly back to Boise. He passed weigh scales. The weigh scales were not always open, sometimes he was waived on and occasionally an inspection occurred. At the Fenton, Missouri weigh scale, Complainant explained his concerns about the leaks to inspectors. (Tr. 375). The truck was inspected and air leaks were found, but it was not enough to place the truck out of service. The inspector did not inspect for the oil leak even though Complainant asked him to do so. (Tr. 376). After dropping off the load in Loveland, Colorado, Complainant proceeded to Golden, Colorado, to pick up another load, which he delivered in Boise. (Tr. 376).

Complainant testified that he discussed repairs with other drivers. He also told other drivers about his Internet business. (Tr. 377). One driver stated he was talking to an attorney about a class action law suit. (Tr. 377-378).

On June 7, 2010, Complainant returned to Respondent's facility. (Tr. 378-379). He completed his write-up and noted problems with the "turbo actuator," the air leaks and oil leak. (Tr. 378-379; RX-3, p. 19). After leaving the terminal, Complainant received a cell phone call from Mr. Ball to return to the terminal. (Tr. 379-380). Complainant testified that this was an unusual request, but he complied. He went to the conference room with Mr. Switzer and Mr. Ball. (Tr. 380). Mr. Switzer told Complainant he was no longer needed and was fired. (Tr. 380-381). Complainant asked why he was fired. Mr. Switzer told Complainant he did not have to give a reason. Complainant

asked if his termination was related to his performance or raising safety issues, but Mr. Switzer refused to answer. Complainant asked if it was because of the safety issues he raised. Thereafter, Complainant returned to his truck to gather the rest of his belongings. (Tr. 381). He also took photographs of the oil leak. (Tr. 382-383; CX-2). Complainant identified the turbo in the photographs. (Tr. 383-384; CX-2). He also identified the frame rail, which runs the length of the truck. A black material was located on the frame rail, which Complainant identified as oil. He identified an orange area as the exhaust section of the turbo, with oil also present on that area. (Tr. 384; CX-2). He identified the air lines, and testified that air lines will run under pressure. (Tr. 384-385; CX-2). He identified wires as part of the electrical system. Oil was present on the wires. Complainant believed this was part of the brake mechanism. The turbo exhaust area was red. (Tr. 385; CX-2).

Complainant is not a mechanic, and he does not have any training as a mechanic. (Tr. 386-387). His knowledge of trucks comes from experience. He did not know exactly how a turbo worked. He refused to drive the truck because he knew the air and oil leaks were dangerous and a violation of the Federal Motor Carrier Safety regulations. (Tr. 387). He felt it was unsafe to drive the truck, but he drove it because he believed his job was threatened. (Tr. 388).

Complainant testified that he received a letter about his January miles at the end of February. (Tr. 388; RX-5, p. 1). He discussed the letter with Mr. Ball. (Tr. 388). Mr. Ball informed Complainant that discussing the mileage was a formality, and he understood Complainant's truck had been in the shop. 2010 was a bad year for the trucking industry. Complainant stated he never refused a load that was dispatched to him by Respondent. (Tr. 389). When Complainant received a second letter of concern about his February 2010 miles, he believed he talked to Mr. Ball by telephone, who assured Complainant not to worry because he had truck issues. (Tr. 389-390; RX-5, p. 2). Complainant explained that the operations room was busy and there was no time for "chit chat" with the drivers. (Tr. 391). When Complainant received his third letter of concern about his March 2010 miles, he was not sure whether he talked to Mr. Ball. (Tr. 391; RX-5, p. 3). Mr. Ball never called him to come in and discuss the mileage letter. Mr. Ball knew about Complainant's breakdowns and repairs through the Qualcomm system and by phone. (Tr. 391).

Respondent never offered Complainant a replacement vehicle to drive while his truck was in the shop. Complainant testified that his firing by Respondent was humiliating because he had never been fired before. (Tr. 393). He looked for work with other trucking companies through the Internet and Craig's List. (Tr. 393; CX-19, p. 4). He worked for CMS Transportation Company on a short term basis. (Tr. 392-393; CX-19, pp. 1-3). He received no job offers from his Internet applications. (Tr. 393). Gotruckers.com sent out applications on Complainant's behalf. (Tr. 393-394). He applied with Marten Transportation on three occasions. (Tr. 394). He applied to A to Z Transportation on August 11, 2010. (Tr. 395; CX-19, p. 5). His responses to job ads are reflected at CX-19, pp. 6-7. (Tr. 395-396).

Complainant began working for Navajo Express on May 9, 2012. (Tr. 396). He is earning more at Navajo than he did at Respondent. (Tr. 397). He had not seen the Respondent Driver's Policy until the day of the formal hearing. (Tr. 396; RX-2). Complainant's W-2 forms for 2009 and 2010 are reflected at RX-7. (Tr. 396-397; RX-7). Complainant earned \$10,778.83 from Respondent in 2009 and \$10,364.06 from Respondent in 2010. (RX-7). CX-13 is Complainant's IRS Form 1040 from 2010. (Tr. 397; CX-13). After being fired from Respondent, Complainant lived off of his personal savings. He testified that his lifestyle changed drastically because he could not take vacations or eat out at restaurants. He also had to cut back on his cellphone bill. He felt a loss of self-worth because of the termination. (Tr. 398). Complainant testified that as a remedy he wants reinstatement to his former job, back pay, punitive damages because of emotional stress, attorney's fees and costs and for Respondent to purge all adverse information from his employment record. (Tr. 398-399).

On cross-examination, Complainant testified he took a load to St. Louis on May 29, 2010. (Tr. 400). On May 23, 2010, Complainant identified some issues with his truck including a problem with the trans cooler and air leaks in the system when the brakes were set. Respondent replaced the trans cooler, fixed the leak and replaced two sets of brakes. (Tr. 400; RX-8).

Following these repairs, Complainant detected an air leak. (Tr. 400). The air gauge was fluctuating from 110 to 130 psi. The air gauge normally fluctuates from 105/115 to 125/130 psi. (Tr. 401). Complainant reported the problem to Respondent, and he agreed to monitor the air gauge en route to St. Louis. (Tr.

401-402). He delivered the load to St. Louis without incident. He brought the truck to Kenworth of St. Louis on June 1, 2010. (Tr. 402). A write-up completed at Kenworth indicated that the air leak was 30 psi when the engine was off and there was an oil leak in the turbo area. (Tr. 402-403; CX-6, p. 1). Complainant acknowledged that Kenworth found and repaired two leaks and determined "no further leaks were detected." (Tr. 403-404; CX-6, p. 2). The second issue was the turbo actuator with an air leak and an oil leak at the turbo area. (Tr. 404; CX-6, p. 2). Complainant informed Respondent that the air leak and oil leak was located at the turbo actuator. (Tr. 404-405; CX-1, p. 85). Kenworth inspected the turbo for passing oil, finding that the actuator was leaking air at the waste gate seal. There is no mention of an oil leak. (Tr. 405-406; CX-6, p. 2).

Complainant testified that he had no discussion with Kelly Pecora, Respondent's shop foreman. (Tr. 406). However, in deposition, Complainant testified that Kelly Pecora informed him that the Kenworth dealer had found the oil leak was not a safety related issue. (Tr. 406-407). Complainant testified he continued to believe the air leak was a safety problem. (Tr. 408). A new compressor was installed on the truck in February 2010. Complainant believed any air or oil leak is a safety hazard. (Tr. 408). He believed there is a potential for catastrophe if an air leak is not addressed. He does not contend that air leaks require the truck be put out of commission. He stated if the air leak is significant, the truck cannot be safely driven. (Tr. 409). Kenworth repaired three of the four air leaks, but not the leak at the turbo actuator. (Tr. 409-410). Complainant denied that the air leaks were more significant when he drove to St. Louis than when he left St. Louis. (Tr. 410). As of 5:00 p.m. on June 1, 2010, Respondent notified Kenworth no further repairs were authorized. (Tr. 411). Kenworth fixed the leaks, but did not repair the turbo actuator. (Tr. 413; CX-6). Complainant wanted Respondent to authorize the repair of the additional leak. (Tr. 413). On June 2, 2010, the air gauge was at zero. Complainant started the truck and allowed it to idle which caused the compressor to engage and the air pressure to build up. (Tr. 414-415). Complainant got the truck moving. If the psi was at an unsafe level, the brakes would not release. (Tr. 415).

Complainant had no communications with Mr. Zahm from May 29 to June 7, 2010. (Tr. 415-416).

In the early afternoon on June 7, 2010, Complainant talked to inspectors at the Forstall, Missouri weigh scale about the air and oil leaks. (Tr. 416-417). Complainant wanted the truck to be taken out of service. The inspectors determined that the truck did not meet the out-of-service criteria because the compressor was keeping up with the air leak. (Tr. 417). In his deposition, Complainant stated he did not know the specifics for taking a truck out of service under the Federal Motor Carrier Safety regulations. (Tr. 418). The inspectors did not inspect under the hood for oil leaks. They had the truck idle and had Complainant apply the brakes. (Tr. 420). Complainant asked the inspectors to look under the hood, but they refused because they were very busy. Complainant initiated the inspection. (Tr. 421). Complainant was able to make it back to Boise without incident. (Tr. 422).

Complainant stated he has been driving for 18 years and has driven trucks with air leaks. With Respondent, he was a full-time driver, but received no benefits. (Tr. 422). He was not aware of the 10,000 mile requirement. He believed the only consequence of not meeting the 10,000 mile requirement was loss of benefits. (Tr. 423). In his nine months of employment, he met the mileage requirement only three times. (Tr. 424). The letters of concern/warnings stated that the driver "must maintain 10,000 miles per month." The only exceptions to low miles were leaves of absence, medical problems and authorized paid vacation. (Tr. 424-425; RX-5). The letters also requested that Complainant meet with his dispatcher to discuss the problem. (Tr. 425-436; RX-5). Complainant met with Mr. Ball in early 2010 regarding a letter of concern. (Tr. 426). After receiving a second letter of concern in March 2010, he spoke with Mr. Ball on the telephone. He spoke to Mr. Ball on the telephone about the third letter of concern. (Tr. 427). They did not discuss the mileage requirements. Complainant explained that the truck had been in the shop and freight was slow. Mr. Ball told Complainant he understood the situation. (Tr. 428). Complainant did not receive an updated driver's manual in April or May 2010. (Tr. 428-429; RX-2).

Mr. Anthony, Mr. Ball and Mr. Switzer witnessed the confrontation between Complainant and Mr. Zahm. (Tr. 429). He testified he did not tell Mr. Ball that Mr. Zahm was an "asshole." (Tr. 430).

Complainant had raised safety concerns with Respondent in the past. (Tr. 430). In February 2010, Complainant was in Amarillo, Texas, when the engine blew a seal, causing oil to pour out and a loss of air pressure. His truck would not run, which was a safety hazard. He reported to Respondent, and Respondent had a new compressor installed. (Tr. 431; RX-12). Complainant was not fired or disciplined for reporting the need for repair. (Tr. 432). While in Chattanooga, Tennessee, he had a flat tire, which was a safety issue. The flat tire was repaired by Respondent. On March 17, 2010, Complainant noted about Respondent "you guys are the greatest." (Tr. 432; RX-13). He received no discipline for reporting the need for repair. (Tr. 433).

Complainant reported a vibration in his truck transmission on May 14, 2010. He did not feel safe driving the truck. (Tr. 433; RX-14). He was not disciplined for reporting the truck vibration. Mr. Ball allowed him to take the truck to a Kenworth dealer in South Bend, Indiana. (Tr. 434). Complainant stated the vibration was only partially fixed. (Tr. 435). Kenworth recommended repairs to the transmission, but only a "patch repair" was performed. (Tr. 435-436). He drove the truck back to Boise, Idaho, and did not refuse to drive the truck because of the partial repair. (Tr. 436-437).

When Complainant encountered the air leaks in June 2010, he stated he had had enough of the patch repairs. (Tr. 437).

Complainant testified that he did not fear he would lose his job when Mr. Zahm used the "F" word. (Tr. 437-438). He viewed Mr. Zahm as aggressive, heated and arrogant. He stated he was not setting the company up for a law suit. (Tr. 438).

Complainant testified he was not able to turn down loads unless he was out of driving hours, fatigued or ill. He stated the company had a "forced dispatch" system. (Tr. 439). He rarely turned down loads. (Tr. 440).

Complainant testified he never sought medical treatment after his termination for feeling a loss of self-worth, because he could not afford to do so. (Tr. 440). He never made any disparaging comments about Mr. Zahm. (Tr. 441).

On re-direct examination, Complainant stated the air fluctuation as he was driving the truck to St. Louis was more frequent than usual. It would normally take several days for air to bleed out to zero; it was unusual for the bleed out to occur within several hours. (Tr. 442).

Dennis Schlegel

Mr. Schlegel was called as an adverse witness. He has been the President of Respondent for 14 or 15 years. (Tr. 53-54). His wife Bonnie is a director of the company. Two of his son-in-laws also work for the company: Steve Ball, a dispatcher and Rob Zahm, the Vice-President. (Tr. 54). His daughter Alicia works part-time for the company, but he was unsure of Alicia's job duties. (Tr. 55). His grandson works part-time for the company. (Tr. 56).

In 2010, there were 15 office employees employed by Respondent. The dispatchers sit in cubicles. Mr. Zahm and Bonnie both had private offices. (Tr. 56). In 2010, Mr. Schlegel did not have use of his private office because it had been converted into a nursing station. (Tr. 56-57). He would "float around and use whatever desk and phone was empty at the time." In 2010, Respondent employed approximately 100 to 110 drivers. (Tr. 57).

Mr. Schlegel has never held a Commercial Driver's License (CDL). He drove a delivery truck occasionally before 1989, when CDLs were not required. He also owned a farm equipment dealership and truck dealership. (Tr. 57).

In 2010, approximately one-half of Respondent's fleet was comprised of Kenworth trucks. The truck engines were equipped with a turbo. Mr. Schlegel testified that the turbo is part of the fuel system that operates off of the exhaust. The turbo uses the energy from the exhaust to increase the flow of air pressure into the system to increase power. The turbo increases horsepower, which assists the trucks in climbing hills. The turbo also increases fuel economy. (Tr. 58). The turbo runs off the exhaust pressure of the engine. (Tr. 58-59). The turbo turbine is motivated by the turbo actuator, which is activated by air. Mr. Schlegel testified the air flow from the compressor did not keep the turbo actuator in proper working order. (Tr. 59). However, during his deposition, Mr. Schlegel testified that a Cummins representative informed him that the air source from the compressor keeps the turbo actuator working properly. (Tr. 59-60). The compressor is the source of air that feeds a

system of tanks which feeds the brakes, air suspension and actuator. (Tr. 60-61). Mr. Schlegel stated that all systems leak air, and "there are audible air leaks on a tractor all the time." (Tr. 61).

Mr. Schlegel testified that the "glad hand" connects to the air supply from the tractor to the trailer. If the "glad hand" disconnects, the brakes will activate. (Tr. 62). He did not know if multiple air leaks would produce the same effect. Tractor air systems have leaks, and sometimes those leaks can be heard. (Tr. 63).

Respondent has a maintenance department. Mr. Schlegel shared certain management responsibilities with Rob Zahm. (Tr. 63). He would investigate audible air leaks. (Tr. 63-64). He would have the air leak patched if needed. Repairs are not required on all audible air leaks. (Tr. 64). He was somewhat familiar with the out-of-service criteria of the Commercial Vehicle Safety Association. He could not recall whether his trucks were cited by Department of Transportation (DOT) for any audible leaks. The compressor that feeds air into the turbo actuator and suspension system is also used to release the brakes. A sudden loss of air could activate the emergency brakes. (Tr. 64). He was not familiar with the term "push rod." (Tr. 65).

Mr. Schlegel testified that after Complainant was fired the turbo of his truck was replaced. Respondent does not make repairs that are not necessary. (Tr. 65). It would have cost \$5,000.00 to replace the turbo on the road. Mr. Schlegel prefers to have repairs done in Respondent's shop because it is less expensive and easier to warranty the parts. Respondent tries to defer repairs until a truck is in the Respondent's shop. (Tr. 66).

Complainant's truck was equipped with a Qualcomm system. The Qualcomm system provides GPS and communication capability for the driver. Respondent shares the system with Navajo Express. (Tr. 66). Respondent is an agent for Navajo Express. Most of Respondent's freight is booked through Navajo Express. After work hours, Respondent's drivers communicate with Navajo Express. (Tr. 67).

CX-1 is a summary of the messages sent to and from vehicle 11150, which was Complainant's vehicle. (Tr. 68). "From: 11150 (2005 KW T-600)" indicated from where the message originated. "To: ICCINT (ICC Integration)" was the general mailbox that received the message. (Tr. 68; CX-1, p. 5). Mr. Schlegel, Mr. Zahm, Mr. Ball and the dispatchers all had access to the Qualcomm system. Dispatchers would communicate with drivers through the Qualcomm system or over the telephone. Drivers are given directions and delivery addresses through the Qualcomm system. (Tr. 69).

On January 22, 2010, Complainant sent a message indicating that he was delayed getting his truck started. (Tr. 69; CX-1, p. 5). George Ryan, the breakdown clerk for Navajo Express responded. (Tr. 69-70; CX-1, p. 6). If vehicles breakdown for an "abnormal amount of time," Respondent does not hold the breakdowns against the drivers in terms of meeting their mileage requirements. (Tr. 70-71). On January 23, 2010, Complainant sent a message indicating the airbags on the rear axle were not inflating. (Tr. 71; CX-1, p. 8). Mr. Ryan responded stating, "Check into the shop." (Tr. 71; CX-1, p. 9). Mr. Schlegel testified that air bags are powered by the air compressor. (Tr. 71). He stated, "If the air bags are deflated, the rear of the tractor will settle down." He testified that this would put an unusual amount of pressure on the drive train, but he was uncertain whether this would cause the load to shift. (Tr. 72).

On February 10, 2010, Complainant sent a message indicating that he blew an oil seal and had no air pressure. (Tr. 72; CX-1, p. 10). Mr. Ball responded, asking Complainant where he was in Amarillo. (Tr. 72-73; CX-1, p. 12). Mr. Schlegel identified CX-3 as a repair order for a main seal on the compressor of Complainant's truck on February 10, 2010. The repair was completed on February 11, 2010. (Tr. 73-74; CX-3). The repair order indicated that the air compressor had a hole in it. (Tr. 75; CX-3). Mr. Schlegel testified that a hole in an air compressor is problematic, and Respondent would not authorize a repair that was not necessary. (Tr. 75). On February 14, 2010, Complainant's truck required a flat tire repair. (Tr. 75; CX-4). Mr. Schlegel testified that down time due to a hole in an air compressor is not the fault of the driver. (Tr. 75-76).

On April 1, 2010, Complainant reported an alternator issue. (Tr. 80-81; CX-1, p. 31). Complainant reported a problem with fluctuating voltage that could have been related to belts. (Tr. 81; CX-1, p. 32). Mr. Schlegel testified that drivers are responsible for checking belts and connections as part of their pre-check of the vehicles. (Tr. 81).

On April 18, 2010, Complainant sent a message complaining of a coolant leak on his assigned truck. Complainant indicated he would keep water on it and check into the Boise shop the next morning. (Tr. 80; CX-1, p. 40). Mr. Schlegel opined that Complainant was acting cooperatively. (Tr. 80).

On May 14, 2010, Complainant reported a vibration issue. He reported that the vibration started at 30 miles per hour and increased in intensity at higher speeds. (Tr. 81; CX-1, p. 45). He also reported some vibrations while in idle. (Tr. 81-82; CX-1, p. 45). Mr. Schlegel opined that Complainant was doing a good job of reporting issues with his truck. (Tr. 82). Mr. Schlegel's son-in-law asked Complainant if he was "totally dead in the water." (Tr. 82; CX-1, p. 50). Complainant reported something was wrong with the engine drive line, and he did not feel safe driving the truck. (Tr. 82; CX-1, p. 51). Complainant was directed to a Kenworth dealer in South Bend, Indiana, for repair. (Tr. 82; CX-1, p. 52). Complainant reported that he was not near South Bend, Indiana, and he was then directed to Indianapolis, Indiana. (Tr. 82-83; CX-1, pp. 53-57). Mr. Schlegel testified that Complainant worked to get the truck to Indianapolis rather than having it towed, which he believed was what a good driver should do. (Tr. 83).

On May 15, 2010, Complainant's truck was put into the Kenworth shop in Indianapolis, Indiana, due to vibration. (Tr. 76; CX-5). Coolant was found in the transmission, which is not normal. (Tr. 76-77; CX-5). Transmission coolant keeps the transmission fluid cool. If the transmission overheats, there will be damage to the gears in the transmission. If the overheating is severe, the vehicle will not operate. Mr. Schlegel testified that transmission failure is rarely catastrophic. (Tr. 77). The transmission coolant should be separate from the transmission fluid. (Tr. 78). The repair order stated, "Customer does not want to remove main transmission at this time. They just want the unit back together to get back to their shop for repairs." (Tr. 78; CX-5). Mr. Schlegel assumed that the mechanical department elected to do a temporary repair on the transmission so that it could be

transported back to Respondent's facility. (Tr. 78). The coolant was not replaced because of the leak. (Tr. 78-79; CX-5). Mr. Schlegel testified this was a temporary repair to the transmission so that the truck could be driven back to Respondent's facility for repairs. (Tr. 79). The vehicle was down from May 18, 2010 to May 20, 2010, in Indianapolis, Indiana, which Mr. Schlegel testified was not Complainant's fault. (Tr. 79; CX-5).

On May 20, 2010, Complainant reported that the temperature gauge on the transmission was running hot after the truck was in the shop in Indianapolis. (Tr. 83-84; CX-1, p. 69). Complainant also reported that the transmission temperature was hot. (Tr. 84; CX-1, p. 71). Mr. Schlegel opined that a vehicle out of service on the highway due to a hot transmission could present a safety hazard to other vehicles if it is not pulled far enough onto the shoulder of the highway. (Tr. 85). Complainant continued to report transmission problems with his assigned truck. (Tr. 85-86; CX-1, pp. 73-74). Complainant indicated he had to pull over to allow the transmission to cool. (Tr. 86; CX-1, p. 74). Mr. Schlegel testified that he believed a driver would be given an excuse if he explained the reasons for his low miles. (Tr. 86-87). He stated that he has access to the Qualcomm system, and the "buck stops with him" with respect to overseeing the maintenance of equipment. (Tr. 87).

Mr. Schlegel noted Complainant reported an air and oil leak on June 1, 2010. (Tr. 87-89; CX-1, p. 76). At 6:21 pm on June 1, 2010, Complainant reported he had no choice but to refuse to drive the truck for safety-related reasons. (Tr. 89-90; CX-1, p. 80). Mr. Schlegel testified that a severe oil leak can lead to a breakdown, but he did not believe that an air leak could lead to failure of the turbo. During his deposition, Mr. Schlegel inconsistently testified that a significant air leak could cause the turbo to fail. (Tr. 90). He added, if the turbo fails due to an oil leak, the truck will lose significant power. (Tr. 91).

On June 2, 2010, Complainant reported to Mr. Ball that he had a significant air and oil leak on his truck at the turbo area. (Tr. 91-93; CX-1, pp. 84-85). During his deposition, Mr. Schlegel testified Complainant informed Mr. Ball that he did not believe the Kenworth dealership in St. Louis had properly repaired the truck. The Kenworth shop foreman was contacted and reported that the truck had been repaired and was safe to return to Boise. (Tr. 94). Mr. Schlegel noted that the repair invoice stated that the customer was advised of the repairs, "checked

turbo charger and advised the customer the actuator was leaking air at the waste gate seal." The MV3 valve was replaced, and no further leaks were detected. Mr. Schlegel testified that he was told the turbo actuator leak was minor and it was safe to drive the truck. (Tr. 96; CX-6, p. 2). Mr. Schlegel directed the truck be sent back to the shop on June 2, 2010. (Tr. 97-98).

Mr. Schlegel sent a message to Complainant on June 2, 2010, indicating that the truck had been repaired and there was no safety issue presented by the leaking turbo actuator. He asked Complainant to drive the truck to Boise, or he planned to send a recovery driver. (Tr. 99; CX-1, p. 86). He opined that drivers should report oil leaks, but whether an oil leak is a safety issue depends on where the leak is located. (Tr. 99). He is aware of DOT regulation 396.5 that states a vehicle should be "free of oil leaks." (Tr. 100). Mr. Schlegel testified that he does not expect a driver to drive in violation of DOT regulations, but in practicality, it occurs. (Tr. 100-101). He opined that DOT regulation 396.5 was not enforced on a regular basis. (Tr. 101). He testified that just because a vehicle is not placed out-of-service, does not mean that the vehicle was not in violation of DOT regulations. (Tr. 102).

Mr. Schlegel expected Complainant to drive the truck back to Boise because the actuator issue was not a safety issue. He described the "back and forth" as "nonsense." (Tr. 102). In deposition, Mr. Schlegel testified "it makes no sense to fix little things." (Tr. 103). He acknowledged that Kenworth was told not to repair the actuator air leak. (Tr. 103-104).

Mr. Ball reported to Mr. Schlegel that there was a driver trying to "sell stuff" and organize a class action lawsuit. He told Mr. Ball to tell Bob Switzer to go speak to the driver about ending the class action lawsuit. Mr. Schlegel stated he did not know Complainant was involved. (Tr. 105). He assumed the class action lawsuit was related to a change in wages. (Tr. 105-106). Mr. Schlegel identified CX-9 as a memorandum that he prepared related to the complaints made by Complainant in June 2010. (Tr. 106; CX-9). CX-11 is Complainant's employment history report. (Tr. 106; CX-11). CX-15 reflects the driver's pay scale as of January 1, 2011 at 40 cents per mile. (Tr. 108-109; CX-15). Complainant was paid by the mile. (Tr. 108). CX-16, pp. 2-3 defines full-time drivers. (Tr. 108-109; CX-16, pp. 2-3). Full-time drivers must achieve 10,000 miles per month. (CX-16, pp. 2-3). The policy notes that employees who fail to achieve 10,000 miles per month would receive a warning letter and be in jeopardy of losing their benefits. (CX-16, p. 3).

Respondent progressively disciplines drivers for poor performance. (Tr. 110). Warning letters are issued to discuss work performance issues. Prior to 2007, Mr. Schlegel monitored mileage reports. In 2007, he turned that duty over to Mr. Zahm. He reviews "watch lists" reports, which is a list of drivers with low miles. (Tr. 111). He stated Complainant had a history of troublesome problems beginning in January 2010. (Tr. 111-112). CX-7 is the watch list for May 2010. (Tr. 112; CX-7). Complainant received a warning for low miles in June 2010. (Tr. 112-113).

On cross-examination, Mr. Schlegel stated Respondent employed 100 to 110 drivers in June 2010. There were only five to six part-time drivers, the rest were full-time drivers. (Tr. 113). "Casual drivers" are DOT qualified, but they come and go and are not required to meet the mileage standards. (Tr. 113-114). Some full-time drivers reverted to part-time driver status. (Tr. 114).

In 2010, Mr. Schlegel removed himself from the day-to-day operations and management of the drivers and personnel department. He focuses on finance, accounting and insurance. He remained involved in over-the-road breakdowns because he "had more knowledge than anybody else there." (Tr. 114). Rob Zahm is executive Vice-President of Respondent and is in charge of day-to-day operations and personnel issues. Mr. Zahm deals with Navajo Express. (Tr. 115).

Mr. Schlegel stated that on an average day, three to five trucks breakdown. (Tr. 115). Respondent spends approximately \$1,000,000.00 a year on maintenance, of which \$300,000.00 is spent on the road and \$700,000.00 is spent in Respondent's shop. Drivers are required to inspect their trucks and report any deficiencies to Respondent. Complainant properly made complaints about deficiencies with his truck. (Tr. 116). Mr. Schlegel stated that if a truck and driver are not working, neither the driver nor the company is making money. Drivers make daily complaints. (Tr. 117). Mr. Schlegel stated he never forced a driver to drive if there was a concern with safety. He was not upset about the oil and air leak complaint made by Complainant. (Tr. 118). Mr. Ball did not want to lose a load he had obtained in Boise. (Tr. 119). He told Complainant to bring the truck back to Boise because the Kenworth report indicated all necessary repairs had been done and the truck could return to Boise. (Tr. 121).

Mr. Schlegel testified that the actuator is a minor part of the air system. He stated that Cummins engines actuators often leak. He would not require a driver to drive an unsafe vehicle because of the liability if there was an accident. (Tr. 122).

On June 2, 2010, Complainant was instructed to take the truck back to Kenworth. There was "back and forth" with Complainant. (Tr. 123-124; CX-1, p. 86). Kenworth reported the truck was safe to bring to Boise. (Tr. 124). Mr. Schlegel testified that his reference to "stop the nonsense" in his Qualcomm message was not intended to be intimidating. He wanted Complainant to make a decision as to whether he wanted to drive the truck. (Tr. 125). He would never force a driver to drive, and he would not fire a driver who refused to drive. He stated earlier this year a driver refused to drive his truck with an oil leak, without adverse action taken against him. (Tr. 126). Complainant agreed to drive the truck back to Boise. (Tr. 127).

Mr. Schlegel testified he was not directly involved in the decision to fire Complainant. (Tr. 127). On June 7, 2010, two drivers reported being agitated because another driver was trying to sell things and organize a class action lawsuit. Mr. Schlegel believed it was related to a previously announced wage cut. He asked Mr. Ball and Mr. Switzer to handle the situation. He did not tell Mr. Ball to fire anyone. (Tr. 128). Later that day, Mr. Switzer terminated Complainant because he had "other issues." (Tr. 128-129). Mr. Schlegel testified he did not talk to Mr. Zahm about the actuator, the truck problem or Complainant's refusal to drive the truck. (Tr. 129).

Mr. Schlegel testified that he developed the mileage requirements because productivity was the key to making money in an asset-based business. Productivity is measured by the miles driven by drivers. "Elite fleet" status is awarded to drivers who drive 10,000 miles per month. Those drivers receive a bonus. (Tr. 131). The watch list is drivers who do not meet the mileage standard. Mr. Schlegel developed this system in 1998. He believed 10,000 miles per month was a very achievable workload for a driver in a single-operation truck. 10,000 is the company's "break-even point." (Tr. 132). Mr. Schlegel opined that five to ten drivers have been fired over the years for failing to meet this standard. (Tr. 133).

Respondent's current Driver's Policy and Procedure Manual is dated April 30, 2010. (Tr. 134; RX-2, p. 1). Policy changes are disseminated to the drivers through the Qualcomm system, in a monthly newsletter or through a letter to the drivers. (Tr. 136). The policy mentions discipline for full-time drivers, but according to Mr. Schlegel it could not cover every situation. (Tr. 138; RX-2). No discipline for drivers with low miles was mentioned in the April 8, 2009 version of the policy. (Tr. 139; CX-16). Complainant received a copy of the April 8, 2009 version of the policy on August 25, 2009. (Tr. 139).

Respondent received a "satisfactory" rating on its DOT audit on May 25, 2010. (Tr. 139; RX-4). A DOT auditor audits the safety practices, drivers' logs, maintenance records and hiring practices. Respondent has had nine such audits since 2001 and received a satisfactory rating on all audits, which is the highest rating. (Tr. 140).

Respondent receives thousands of Qualcomm messages a day. Mr. Schlegel and his managers do not read each of the Qualcomm messages. (Tr. 141). A repair bill for Complainant's truck was produced from December 2009. (Tr. 142; RX-3, p. 1). Mr. Schlegel stated he would prefer to repair his trucks at his own shop because it is more reliable, easier to warranty the parts, faster and less expensive than having the work performed on the road. (Tr. 142).

Respondent reports to DAC Services the reasons drivers leave employment. Respondent reports 150 drivers a year to DAC Services. (Tr. 143).

On re-direct examination, Mr. Schlegel testified that drivers often raise safety issues. He handles each occurrence individually. He does not fire every driver that drives less than 10,000 miles a month. Typically, he works with drivers who do not meet the 10,000 miles a month requirement. (Tr. 144). Complainant received three prior warnings for low miles. (Tr. 145). Mr. Schlegel did not know whether employees signed for a copy of the policy manual. (Tr. 146).

Mr. Schlegel was recalled on rebuttal. He testified that he talked to other truck company owners about driver shortages and market conditions. (Tr. 562-563). If a DAC report stated that a driver was "terminated, not eligible to rehire," he would call the employer involved for a reason the driver would not be rehired. Red flags are DUIs, drug abuse and excessive accidents. He did not believe those factors were present on

Complainant's DAC report. (Tr. 564). A DAC report is common anytime a driver leaves a trucking employer. He stated he also uses DAC reports to hire drivers. In 2010, most of Respondent's drivers exceeded the 10,000 mile standard. He indicated 17 days of driving 600 miles a day would achieve in excess of 10,000 miles. (Tr. 565).

Mr. Schlegel identified CX-15 as Respondent's pay and benefits. Drivers were paid 40 cents per mile, 29 cents for wages and 11 cents for a per diem rate. A higher rate was offered to drivers to drive older trucks. (Tr. 566). This rate only applied to new hires, and Complainant would not have been eligible for the rate. (Tr. 567).

On cross-examination, Mr. Schlegel acknowledged that Complainant was making 32 cents per mile, including his per diem rate, at the time of his termination. Since June 2010, Respondent has given a penny per mile pay increase to some drivers. (Tr. 567). Most of Respondent's drivers were averaging 10,000 miles a month in 2010. Respondent does not fire all of the drivers who fail to meet the 10,000 miles per month standard. (Tr. 568).

On re-direct examination, Mr. Schlegel stated that in May 2010, Respondent cut driver's wages by 7 percent. (Tr. 568). Since June 2010, the mileage rate has increased by one cent per mile. (Tr. 569).

Robert Switzer

Mr. Switzer testified he was employed by Respondent from June 2007 to September 2011 as Vice-President of Safety and Personnel. (Tr. 147). He fired Complainant without providing a reason for the decision. He has fired other drivers, but typically with a reason for the discharge. (Tr. 148).

Mr. Ball later told Mr. Switzer that Complainant was fired for low miles. He worked across from Mr. Ball at Respondent's facility. Mr. Switzer testified that he does not recall Mr. Ball telling him to stop Complainant's activities in the yard. He could not recall how many conversations he had with Complainant on June 7, 2010, and none of those conversations stood out in his memory. (Tr. 149).

Mr. Switzer had access to the Qualcomm system, and safety issues were brought to him. He had no problems with Complainant. He liked Complainant. (Tr. 150).

Drivers were discharged for low miles. (Tr. 151). The dispatcher would typically initiate the dismissal of drivers for low miles. (Tr. 151-152). Mr. Ball was Complainant's dispatcher. (Tr. 152). During his deposition, Mr. Switzer testified he would typically review documents related to drivers' performance issues before discharging them, including a summary report of mileage. (Tr. 153). Rob Zahm instructed Mr. Switzer to fire Complainant. Mr. Switzer could not recall Mr. Zahm previously instructing him to fire a driver. (Tr. 154).

Mr. Switzer was familiar with commercial vehicle safety regulations and the Idaho commercial drivers manual. He took seminars concerning compliance with DOT regulations. Prior to working for Respondent, he was employed by Swift Transport as a fleet manager. He also previously worked as a commercial truck driver. He holds a commercial driver's license. (Tr. 155). He stated that any leaks on the air system are bad because the brakes could lock up. He stated he was not familiar with the turbo. (Tr. 156-157). He noted that leaks can get larger over time. (Tr. 157). He opined that an any air leak in the air system could lead to brake failure. He noted the turbo gives the engine more power. (Tr. 158). He could not recall whether Mr. Schlegel utilized a desk near his in June 2010. He stated that an oil leak could cause the engine to "seize up." He noted that oil leaks would be a concern, and an oil leak in an engine compartment could present the danger of fire. (Tr. 159).

Mr. Switzer testified that in the May 2010 DOT audit, 70 percent of the drivers checked had hours of service violations. (Tr. 161). He audited drivers' logs. (Tr. 162).

On cross-examination, Mr. Switzer stated Complainant called him in mid-August 2012 and left a message. Mr. Switzer was part of the complaint filed by Complainant, and Complainant stated he would drop Mr. Switzer from the complaint if he helped Complainant with his case. (Tr. 163-164).

Mr. Switzer noted that Respondent was assigned a satisfactory rating in the 2010 audit. He stated that individual violations are not unusual. (Tr. 164).

Mr. Switzer did not make the decision to fire Complainant. He typically fired drivers for safety issues under Respondent's policy. (Tr. 165). He did not know the reasons for Complainant's termination. (Tr. 165-166). Dispatchers could also fire drivers. (Tr. 166).

Mr. Switzer testified that he is not a mechanic and is not familiar with the Cummins engine actuator. (Tr. 166).

Respondent placed safety as its foremost concern. (Tr. 167). He could not recall a single instance where he thought Respondent did not care about driver safety. (Tr. 168). He was not aware of any driver fired because the driver complained about his truck. He did not witness Mr. Schlegel or Mr. Zahm expressing any hostility toward drivers. (Tr. 168).

On re-direct examination, Mr. Switzer acknowledged that sometimes drivers drove in violation of DOT regulations. (Tr. 169-170). He noted that a vehicle could be safe to drive but not be in compliance with DOT regulations. (Tr. 170).

Robert Zahm

Mr. Zahm is Vice-President of Respondent. (Tr. 172-173). He became Vice-President in 2010. Prior to becoming Vice-President, Mr. Zahm was the operations manager of Respondent. His immediate supervisor is Mr. Schlegel, but Mr. Schlegel does not micro-manage Mr. Zahm's activities. Five years ago, he and Mr. Schlegel divided responsibilities. (Tr. 173). Mr. Schlegel remained in charge of accounts payable and equipment financing. Mr. Schlegel wanted to "take a step away from the business," but he is a "hands-on owner." (Tr. 174).

Mr. Zahm testified that he knows Complainant. Mike Anthony was Complainant's supervisor; Steve Ball, Mr. Zahm's brother-in-law, was Complainant's dispatcher. Mr. Zahm is married to Mr. Schlegel's daughter, Alicia. (Tr. 174).

Mr. Zahm testified that Complainant was fired because of low miles, less than 10,000 miles per month. (Tr. 174-175). He agreed truck repairs reduce the number of miles a driver can drive. Drivers typically average 550 miles a day. Mr. Zahm was aware of Complainant's truck being down for four days in Indianapolis because of transmission problems. (Tr. 175).

Mike Anthony was Mr. Ball's immediate supervisor. Mr. Zahm was Mr. Anthony's immediate supervisor. On May 27, 2010, Mr. Zahm spoke with Complainant about Complainant trying to sell Respondent a product. (Tr. 176). He believed Mr. Switzer and Mr. Ball were also present. (Tr. 176-177). Complainant continued working following this meeting. (Tr. 177).

CX-7 is a May 2010 letter prepared on June 3, 2010, stating that Complainant needed improvement. Respondent prepared these letters in the regular course of business. Employees produced source documents which were used to determine whether a letter should be issued. (Tr. 178; CX-7). The letter listed each supervisor, the drivers who needed improvement, the number of months the drivers failed to achieve 10,000 miles and the average miles achieved for those months. (Tr. 179-180; CX-7). The abbreviation "NB" indicated that the driver was not receiving benefits. Mr. Zahm was unsure what the abbreviation "B/PL" indicated. Complainant had two concerns and a warning in March 2010. (Tr. 180; CX-7). RX-17 shows Complainant drove 11,205 miles in April 2010. (Tr. 181; RX-17). Mr. Zahm classified Complainant's improvement in April 2010 as an anomaly because Complainant was not consistently exceeding 10,000 miles per month. (Tr. 181-182). In May 2010, Complainant drove 6,954 miles. (Tr. 182; RX-17). Mr. Zahm did not know if Complainant's truck was in the shop in May 2010. (Tr. 182).

Mr. Zahm believed the May 2010 letter was written on June 3, 2010. (Tr. 183; CX-7). No other drivers were discharged for low miles while Complainant was employed. (Tr. 183-184). The letter was prepared by Alicia, Mr. Zahm's wife. (Tr. 184; CX-7). The letter indicates that Complainant drove 9,281 miles in May 2010. (CX-7).

The parties stipulated that no other drivers were discharged for low miles while Complainant was employed. (Tr. 184). Protocol required that Alicia issue a warning letter to Complainant in June regarding his low miles in May, but Mr. Zahm had the ultimate responsibility of deciding how to proceed from there. Respondent's turnover is approximately 100 people per year. (Tr. 185).

Troy Tolson took leave due to medical issues. (Tr. 187-188). Mr. Tolson drove 9,379 miles in June 2010, 3,536 miles in July 2010, 6,659 miles in August 2010, approximately 8,800 miles in September 2010 and approximately 9,500 miles in October 2010. (Tr. 188; RX-18, p. 2). Mr. Tolson was fired for poor performance. (RX-18, p. 1).

Respondent used a computer program called Rand McNally to calculate drivers' mileage. (Tr. 188-189). There are a number of factors that determine mileage, including whether a driver has turned down loads and the availability of dispatches. Mr. Zahm did not know if Complainant ever turned down loads. (Tr. 189).

John Johnson became a part-time driver on October 26, 2011. Part-time drivers were not required to meet the 10,000 mile standard. Part-time drivers are required to drive a certain number of days per month, and Mr. Johnson was fired because he failed to do so. (Tr. 190). In September 2011, Mr. Johnson drove 6,987 miles. (Tr. 190-191; RX-19, p. 2). Mr. Johnson drove 6,910 miles in October 2011 and 7,680 miles in November 2011. (Tr. 191; RX-19, p. 2). Mr. Johnson was fired for driving too few miles and for not returning to work on time. (Tr. 191). Mr. Zahm noted that Mr. Johnson's miles increased from October to November 2011, when he switched from full-time to part time. (Tr. 191-192). He noted that a driver's miles would not necessarily drop when he switched from full-time to part-time. (Tr. 192). Mr. Johnson was fired for poor performance. (RX-19, p. 1).

Bart Griffith drove for Respondent in 2004, but he voluntarily quit on January 30, 2004. (Tr. 192). He returned to work for Respondent in 2007, but did not drive the required miles and was late with loads. (Tr. 192-193; RX-20, p. 2). Mr. Griffith was fired for poor performance and late loads. (Tr. 195; RX-20, p. 1).

Mr. Zahm recalled having to "relay" Complainant multiple times because Complainant was running behind. Mr. Zahm could not recall the specific times when Complainant was late on a load. He did not dispatch Complainant. (Tr. 194). Complainant was not fired for late loads. (Tr. 195).

Mr. Zahm testified that "poor performance" refers to low miles and late loads, with low miles being the biggest factor. (Tr. 195-196). Mr. Zahm made the decision to fire Mr. Griffith, Mr. Johnson and Mr. Tolson. (Tr. 196).

Theron Peters was fired for "service issues," which Mr. Zahm testified referred to late loads. (Tr. 197; RX-22). Mr. Zahm did not believe Mr. Peters was fired for low miles. (Tr. 197). William Panzeri was fired in October 2008 for driving 6,000 miles that month. (Tr. 198; RX-23).

Mr. Zahm testified that typically a driver is not terminated until after he has low miles for five or six months. Breakdowns are not held against the drivers if they discuss the issue with Mr. Zahm. Drivers with low miles are given warning letters, which instruct them to speak to their dispatchers. (Tr. 199). Mr. Zahm did not handle breakdowns. (Tr. 199-200).

Mike Anthony looked at operations reports and determined which trucks were operational. (Tr. 200).

Mr. Zahm knew that Complainant's truck was in the shop in May 2010. He did not review the documents related to the breakdown. He was the direct supervisor of the operations department, through Mike Anthony. (Tr. 200). Drivers are not required to provide their cell phone numbers to their dispatchers. (Tr. 200-201). Mr. Zahm testified that 10,000 miles is a guideline. Warning letters are issued to drivers to encourage increased miles and counseling. (Tr. 201).

On further examination, Mr. Zahm testified his areas of responsibility in 2010 were ensuring that Respondent was reaching its goals, overseeing the personnel department and dealing with driver issues. (Tr. 202-203). He began overseeing personnel in 2007. He alone decided to terminate Complainant. He did not consult with anyone. (Tr. 203). When Mr. Zahm decided to fire Complainant, he had no information about Complainant refusing to drive his truck or the mechanical issues with his truck. (Tr. 203-204). He could not recall whether he was in the office on June 1 and June 2, 2010. Mr. Schlegel did not talk to him about those issues and neither did Mr. Ball. (Tr. 204).

The reasons for Complainant's termination were low miles, his side Internet business on the road, insubordination when he confronted Mr. Zahm in the office and Complainant's failure to come into the office for counseling. (Tr. 205). Complainant tried to sell Mr. Zahm bug screens for the trucks' driver side windows. (Tr. 205-206). Mr. Zahm did not want to buy the screens. (Tr. 206). Mr. Zahm testified that Complainant accused him of not caring about the drivers and not being a fit manager. (Tr. 206-208). He stated that the conversation "was a little heated." He went into his office and closed the door because he did not want to do something he would regret. Mr. Zahm stated he considered firing Complainant then. (Tr. 206). He did not want to fire Complainant because his emotions were too involved. (Tr. 206-207). He did not know the exact date of the altercation, but he believed it was in late May 2010. Following the altercation, Complainant left on a job, and Mr. Zahm has a policy of not giving drivers bad news when they are on the road. Mr. Zahm testified that Complainant became "red in the face" during the altercation. (Tr. 207). He did not swear at Complainant. (Tr. 208). He felt Complainant had acted disrespectfully. (Tr. 209).

Leah Wells, an auditor, overheard the conversation. (Tr. 209). She told Mr. Zahm that on Saturday, Complainant wanted Mike Anthony to buy screens. Leah Wells indicated that Complainant told Mr. Anthony that Mr. Zahm was not fit to be Vice President because Mr. Zahm had not driven a truck before. Mr. Anthony confirmed this occurrence, and indicated that Complainant told him Mr. Zahm did not care about the drivers. (Tr. 210).

Mr. Zahm testified he was upset with Complainant. He had two lists of drivers, the good drivers and the bad drivers. Complainant was on his list of bad drivers, and he decided Complainant "needed to go." Mr. Zahm stated the confrontation with Complainant was a factor in his decision to terminate Complainant. (Tr. 211).

Mr. Zahm testified that CX-7 and RX-6 are different documents. (Tr. 212). RX-6 was the May 2010 "needs improvement" list or "watch" list. (Tr. 212; RX-6). CX-7 was based on a "dispatch date." (Tr. 212; CX-7). RX-6 was based on an "empty date." (Tr. 212; RX-6). Respondent always uses an "empty date" to determine mileage in order to remain consistent. Mr. Zahm testified RX-6 is the authoritative document, and CX-7 was a preliminary draft. (Tr. 212). Mr. Zahm relied upon RX-6 in making the decision to terminate Complainant. (Tr. 213). CX-7 indicates Complainant drove 9,281 miles in May 2010, and RX-6 indicates Complainant drove 6,261 miles in May 2010. (CX-7; RX-6).

Complainant had three letters for low miles. (Tr. 213; RX-6). Mr. Zahm receives the reports a few days after the end of each month. (Tr. 213). Mr. Zahm decided to terminate Complainant after the confrontation about the screens; low miles was "just icing on the cake." (Tr. 214). Mr. Zahm did not give Complainant any reasons for his termination. (Tr. 215). Mr. Zahm deferred the decision until Complainant returned from his trip to St. Louis because he has a policy of not terminating drivers while they are out on a job. (Tr. 215-216).

Mr. Ball informed Mr. Zahm that Complainant was in the yard getting drivers "riled up" about a class action law suit. (Tr. 216). Mr. Zahm told Mr. Ball and Mr. Switzer to get rid of Complainant. No specific reasons were given to Complainant, and Mr. Zahm did not discuss his reasoning with Mr. Ball or Mr. Switzer. The reasons were low production and the confrontation with Mr. Zahm. Complainant never talked to Mr. Zahm about his low miles. (Tr. 217).

RX-17 is a movement display of miles driven monthly by Complainant from August 2009 to May 2010. (Tr. 218; RX-17). Complainant drove 3,723 miles in August 2009, 9,743 miles in September 2009, 11,539 miles in October 2009, 10,902 miles in November 2009, 9,028 miles in December 2009, 6,562 miles in January 2010, 7,585 miles in February 2010, 9,685 miles in March 2010, 11,205 miles in April 2010 and 6,958 miles in May 2010. (Tr. 219; RX-16). These numbers were a factor in Mr. Zahm's decision to terminate Complainant. He considers an employee's entire performance when making personnel decisions. (Tr. 219). Warning letters are sent to the drivers asking drivers to see Respondent to discuss their mileage issues. (Tr. 220-222; RX-5).

Mr. Zahm has fired other drivers because of low miles. (Tr. 222). He made the decision to fire Troy Tolson due to low miles. (Tr. 222; RX-18). Respondent attempts to keep copies of letters of concern issued to individual drivers. (Tr. 222). He assumed that Complainant had received letters of concern. (Tr. 223). Mr. Zahm made the decision to terminate John Johnson. (Tr. 224; RX-19). The termination form was inconsistent because it indicated that Mr. Johnson was eligible for rehire and that Mr. Johnson was not eligible for rehire. (Tr. 224; RX-19). Mr. Zahm opined this was a clerical error. (Tr. 225). The form also indicated that Mr. Johnson had voluntarily quit the position. (Tr. 225; RX-19). Mr. Zahm opined this was also a clerical error. (Tr. 225). He made the decision to terminate Bart Griffith and Shawn Wyant for low miles and performance issues. (Tr. 226; RX-19; RX-21). Mr. Wyant drove 10,600 miles in September 2007, 9,400 miles in October 2007 and 7,800 miles in November 2007. He was fired in December 2007. (Tr. 227; RX-21). Mr. Zahm made the decision to terminate Theron Peters. (Tr. 227; RX-22). He made the decision to terminate William Panzeri for low miles. (Tr. 227; RX-23).

Mr. Zahm has access to Qualcomm messages. (Tr. 227). On a daily basis Respondent receives thousands of messages. Mr. Zahm did not know about Complainant's truck issues when he made the decision to terminate Complainant. Qualcomm is an operations issue. (Tr. 228). Truck issues are commonplace and occur every day. (Tr. 229).

CX-7 indicates that the letter was a warning to Complainant, but Mr. Zahm testified this did not mean that Complainant could only be warned. (Tr. 229; CX-7). Mr. Zahm had the ultimate authority to discipline or terminate a driver who was given a warning. (Tr. 230).

Dispatchers do not have authority to fire drivers. Dispatchers have to consult with Mr. Zahm. Mr. Zahm has never fired a driver for raising safety issues. (Tr. 230).

On re-direct examination, Mr. Zahm testified that RX-6 is the final version of the watch list. (Tr. 232; RX-6). Duane Smith was issued a concern letter in March and April 2010, but he was not fired. (Tr. 233; RX-6). Tamie Proper and Steven Swafford both received three warnings. Complainant had one prior warning. (Tr. 234; RX-6).

Mr. Zahm did not call Complainant to return to the facility on May 29, 2010, because Complainant was in the company truck. He does not allow drivers in company trucks to return to the terminal. A driver could return to the facility with a mechanical issue. (Tr. 235).

Mr. Zahm noted that the mileage system was not perfect. He was concerned that Complainant was spending too much time at truck stops. (Tr. 235). He testified that drivers do not always come to him after receiving warnings for low miles or letters of concern. (Tr. 237). Typically the drivers speak to their direct supervisors. (Tr. 237-238). Respondent uses recovery drivers when breakdowns occur or when a driver is not fit to drive. (Tr. 238). He would never send out a recovery driver to fire someone. (Tr. 238-239).

On re-cross examination, Mr. Zahm testified Tamie Proper was not fired by Respondent for low miles because she had medical issues, which she discussed with her dispatcher and Mr. Zahm. (Tr. 239). He asked Mr. Ball whether Complainant had spoken to him, and Mr. Ball indicated he had not spoken to Complainant. (Tr. 239-240). Steve Swafford self-terminated and was not fired. (Tr. 240).

John Johnson

Mr. Johnson testified via telephone at the formal hearing. He worked for Respondent and became a casual driver in October 2011. (Tr. 241). On one occasion, Respondent requested that Mr. Johnson go out on a job, and he declined because his sister

was in town. (Tr. 241-242). Prior to becoming a casual driver, Mr. Johnson was a full-time driver for Respondent. As a casual driver, his schedule fluctuated. While working as a casual driver, he was also working at his father's house. He did not regularly drive to Washington for Respondent. (Tr. 242).

Mr. Johnson testified he did not quit his employment with Respondent. (Tr. 242). He was on a load to Oregon when he encountered a wind and snow storm at Three Mile Hill. (Tr. 243). He had to shut down his truck. Mr. Johnson called the "safety guy" to report that he did not feel safe driving in those conditions. The "safety guy" indicated that he would let Mr. Johnson's dispatcher, Sandra Trondson, know about the situation. (Tr. 244). Mr. Johnson sent Ms. Trondson a Qualcomm message that he was too tired and did not feel safe driving in the weather conditions. She told Mr. Johnson that he had a full night's sleep the night before. She found a driver to replace Mr. Johnson. She told Mr. Johnson to take over the replacement driver's truck and return it to Respondent's facility. She also told Mr. Johnson to plan on not "getting dispatched for a while." (Tr. 245). She suggested he find another career and was not a good driver. (Tr. 246).

On cross-examination, Mr. Johnson testified that January 18, 2012, was his last day of work with Respondent. (Tr. 246). He received a message from Ms. Trondson telling him to return the empty trailer to Respondent's facility. (Tr. 247). Prior to this incident, he had received three or four warning letters for low miles, and he had several talks with individuals at Respondent about his production. He recalled receiving a letter of concern in September 2011, but he did not recall receiving a letter of concern in October 2011 or November 2011. (Tr. 248). He did not dispute that he drove 6,987 miles in September 2011, 7,680 miles in November 2011 and 1,309 miles in December 2011. (Tr. 249-250). After he dropped the truck off on January 18, 2012, he never heard from anyone at Respondent again. He stated no one told him he was fired. He believed the message Ms. Trondson sent him was clear. She told him "don't plan to be dispatched for a while" and to "find a new career." (Tr. 250). No one from Respondent ever told him that he was fired. (Tr. 251).

On re-direct examination, Mr. Johnson testified that he always cleaned out the trucks after he was done using them because he was not assigned a permanent truck. As a casual driver, he worked on an on-call basis, meaning he had to wait for a call before going in to work. (Tr. 252).

On re-cross examination, Mr. Johnson testified he reported mechanical issues to Respondent. (Tr. 252-253). He did not raise any safety concerns about Respondent's trucks. He raised safety as an issue in the snow storm. (Tr. 253).

Michael Millard

Mr. Millard testified via video conference. He was called by Complainant as an expert witness. (Tr. 254). Mr. Millard testified he was a truck driver from 1992 to 1996. From 1997 to 1999, he was employed as a safety inspector at the Cortez, Colorado scale. From 1999 to 2010, Mr. Millard worked for the Federal Carrier Safety Administration as a motor carrier safety specialist. In 2010, he began working for the Department of Energy as a transportation management specialist. He also owns a consulting business. (Tr. 255).

While employed at the Cortez scale, Mr. Millard was responsible for weighing trucks for size and weight violations. He also conducted level one inspections on vehicles throughout Colorado. As a motor carrier safety specialist for the Federal Carrier Safety Administration he performed compliance reviews at hazardous material shippers, motor carriers and repair facilities to insure they complied with haz-mat and motor carrier regulations. He also performed inspections ranging from level one to five. (Tr. 256).

Mr. Millard interviewed Complainant prior to the formal hearing about his vehicle repairs, his challenges to the level of safety and his termination. (Tr. 256-257). He also reviewed certain documentation and photos. He was told there was an air leak at the turbo actuator, which would cause a dramatic drop in air pressure, and an oil leak at the turbo of Complainant's vehicle. (Tr. 257).

Mr. Millard testified that oil lubricates an engine turbo. He stated that there are three components to a turbo, including the turbine, the lubrication/cooling system and the compressor. He stated excessive oil leaks onto the turbo could cause a fire of the engine. (Tr. 257). The flash point for oil is between 425 and 575 degrees Fahrenheit, depending on the weight and whether it is synthetic or non-synthetic oil. (Tr. 257-258). If an engine fire occurs, the entire cab could be engulfed with fire because the cabs are made of fiberglass. He also stated a failed turbo could shut down the engine. (Tr. 258).

Mr. Millard stated the actuator engages the turbine to allow more air into the cylinders and give the engine more power. Any audible air leaks should be written up. Mr. Millard testified that the Motor Carrier Safety Regulations do not allow for any oil leaks. (Tr. 259). He stated that some air loss occurs when a truck moves down the highway. The air compressor will turn on to deal with this issue. When the air pressure reaches an assigned pressure, a switch turns the air compressor on to charge. The compressor is cycling every 15 to 30 minutes; it is not running all the time. If the compressor were running constantly, this would indicate a serious air loss. (Tr. 260). Continuous cycling of the air compressor could cause premature failure of the compressor. Air leaks do not improve when they are left alone. Any air leak can present a hazard because the brakes are air operated and many trucks have air ride suspensions. Air leaks can also cause the brakes to lock up and can cause service brakes to be non-functional. (Tr. 261). Mr. Millard noted that small air leaks develop on a truck tractor due to constant vibration, loosened joints and air lines rubbing together. "Gladhands" can cause leaks as well. (Tr. 262).

Mr. Millard testified that several small leaks may collectively amount to a dramatic loss of air. The "out of service criteria" provides a specific test for ensuring that the compressor can keep up with the air loss in a system. (Tr. 262). The "out of service criteria" was developed by the Commercial Vehicle Safety Alliance to determine when safety violations reach unsafe levels. A vehicle can violate the Federal Motor Carrier Safety Regulations without being placed out of service. He added that twenty percent of the brakes can be out and the driver can still proceed, unless the failure is to the steering brakes. (Tr. 263). He opined that an oil leak can cause a vehicle to be placed out of service where a fire or breakdown is imminent. (Tr. 264).

Mr. Millard reviewed the photo of Complainant's vehicle, which revealed an oil leak in the oil line that feeds the coolant and lubrication system of the actuator. (Tr. 264). He noted there was a potential for fire because the oil leak was on the turbine side of the turbo. He concluded the biggest concern would be oil spraying and causing a fire. (Tr. 265).

Mr. Millard opined that when an air system is totally charged with air, the vehicle should retain the air for four or five days. He stated the loss of 100 pounds of air pressure in three hours is a significant air leak and a safety hazard, which should be repaired as soon as possible. (Tr. 265).

Mr. Millard noted that the maxi canisters are designed to set when there is not sufficient air pressure in the system. Unless the brakes begin to set, the vehicle will slow, and the service brakes may not operate because there is not sufficient air pressure in the system. The service brakes may not be operational, depending on how low the air pressure falls. The vehicle will come to a stop if the brakes are properly adjusted. (Tr. 266).

Based on the photo provided to him, Mr. Millard noted there was a possibility that there would have been some oil contamination on the brakes of Complainant's truck. When oil collects on the steer axle, the saturated lining will no longer grab the brake drum or disk. This causes the brakes to become inefficient. The vehicle will then begin to jerk. (Tr. 267).

Mr. Millard testified that if he found an air leak in the actuator, he would cite it as a violation. (Tr. 267).

On cross-examination, Millard admitted he was not a mechanic by training and not certified as a mechanic. (Tr. 268). He has seen the Cummins engine in a Kenworth 600T truck, but has not worked on such an engine. He noted that the turbo actuator on a Cummins engine is located on the passenger side almost level with the right steer tire. (Tr. 269). If air pressure falls below 60 psi, the warnings and alerts will go off if they are functioning correctly. (Tr. 269-270). Air loss could be caused by one large hole or many small holes. (Tr. 270). If there was only one hole in the turbo actuator, air loss may still, within a reasonable likelihood, be significant. (Tr. 271).

Complainant told Mr. Millard that the system lost air within 10 to 15 minutes, causing the compressor to turn on. (Tr. 271). Mr. Millard opined that this could evidence more than one air leak. Complainant did not tell him that he went through a weigh station in Missouri. He opined that he would not have pulled Complainant's truck out of service if he went through the inspection station in Missouri, pointed out the air and oil leaks and the compressor was keeping up with the air leak. (Tr. 272).

Mr. Millard is familiar with Regulation 396.9(3), which is a safety regulation dealing with "out-of-service" conditions. (Tr. 273-274). He noted that if an inspector conducted an inspection and did not find sufficient evidence to place the vehicle out of service, the vehicle would still be safe to operate. (Tr. 274-275).

Mr. Millard was not familiar with the turbo control valve. He did not know if the actuator was filled with air 100 percent of the time. (Tr. 275). He was not aware that when warnings go off, the air is diverted away from non-essential parts of the truck to the brake system. (Tr. 276).

On re-direct examination, Mr. Millard noted that because a vehicle is not declared out of service does not mean it is free of violations. When a vehicle is placed out of service, the out of service defects must be corrected. (Tr. 276). When safety violations are reported and the vehicle is not placed out of service, the violations must be repaired after the vehicle is unloaded and before it is placed back in service. (Tr. 276-277). He noted that vehicle inspectors are entitled to make judgment calls, but the out-of-service criteria is very detailed and specific. He opined that an oil leak is always a violation of the commercial vehicle safety regulations. He also noted that a turbo can affect the safe operation of a commercial vehicle. (Tr. 277). He opined that an air leak at the turbo violates Regulation 396.3. (Tr. 278).

Stephen Ball

Mr. Ball has been employed by Respondent for three or four years. He has never held a commercial driver's license. He is Mr. Schlegel's son-in-law. He previously worked as a fleet manager (dispatcher) for Respondent. He is presently an operations manager. (Tr. 279). He did not have any dispatching experience prior to going to work for Respondent. (Tr. 279-280).

Mr. Ball was Complainant's dispatcher. They got along well. Mr. Ball testified that Complainant turned down two to three loads a month. He did not write Complainant up for turning down loads. He was able to relay some of Complainant's loads. (Tr. 280). Respondent relays loads when a truck breaks down and when a driver runs out of available driving time. (Tr. 281).

In early June 2010, Complainant complained about air and oil leaks to Mr. Ball through the Qualcomm system or by telephone. (Tr. 281). On June 1, 2010, Complainant sent a message about an air leak and an oil leak in the turbo. (Tr. 282; CX-1, p. 76). Mr. Ball reads the Qualcomm messages from the drivers he supervises. (Tr. 282). In June 2010, Mr. Ball worked from 7:00 a.m. to 4:00 p.m. (Tr. 282-283). Mr. Ball read the Qualcomm message on June 2, 2010, where Complainant stated he refused to drive his truck. (Tr. 283; CX-1, p. 80). Mr. Ball asked Respondent's shop foreman to call Kenworth about Complainant's truck repairs. (Tr. 283). Mr. Schlegel overheard Mr. Ball's conversation with Complainant, and he may also have spoken to the foreman. (Tr. 283-284). Mr. Ball was aware that Mr. Schlegel sent a Qualcomm message to Complainant. (Tr. 285-286; CX-1, p. 86).

Mr. Ball testified that Navajo Express operates an after-hours breakdown department. When there is an issue Navajo Express leaves night notes for Respondent to review the following day. (Tr. 286).

Mr. Ball contacted Complainant in St. Louis, and sent Complainant a load to get him back to Boise. (Tr. 286-287). The certified mechanic told Mr. Ball the truck was safe to drive, and Mr. Ball informed Complainant. Mr. Ball was not upset that Complainant refused to drive. Drivers would refuse to drive a truck from time to time. If a driver refuses to drive, Respondent will try to find someone else to take the load or "talk the person into taking the load." There was no reason for Complainant to refuse to drive the truck. (Tr. 287). Complainant agreed to take the load. (Tr. 288).

Respondent distributes warning letters and concern letters monthly. Drivers receive the letters in their files, and they are also distributed to the dispatchers. Mr. Ball keeps the copies he receives. (Tr. 288).

RX-6 is a list of drivers who needed improvement from May 2010. (Tr. 289; RX-6). The list is placed in the drivers' files, and when the drivers come into the office they will talk to their supervisors about the list. The conversations take place in person, not by telephone. (Tr. 290). Mr. Ball agreed truck breakdowns affect mileage. He was aware of the four days of repair work which kept Complainant in Indianapolis in May 2010. A driver should average 600 miles a day to meet the 10,000 mile standard. (Tr. 291). Mr. Ball considers mechanical problems and factors them into the mileage. (Tr. 292). Drivers

must average 10,000 miles per month and have a haz-mat endorsement to become part of the "elite fleet." (Tr. 293, 315).

On June 7, 2010, Mr. Ball witnessed the meeting where Complainant was fired. (Tr. 293-294). He talked to Mr. Schlegel about another driver complaining that Complainant was trying to get drivers to join in a class action law suit. (Tr. 294). Mr. Schlegel told Mr. Ball to get Complainant into the office because he was harassing other drivers. Mr. Ball did not know what the class action lawsuit was about. (Tr. 294-296). Wayne Ellis was the driver who reported Complainant. (Tr. 296). Mr. Zahm told Mr. Switzer and Mr. Ball to fire Complainant. (Tr. 296-297). No reasons were given for the termination. Mr. Ball had no further conversations with Mr. Schlegel or Mr. Ellis. (Tr. 298).

Mr. Ball and Mike Anthony were present when Complainant tried to sell a product to Respondent. Most of the office staff witnessed the incident. Complainant had previously mentioned his side business to Mr. Ball, and Mr. Ball told Complainant to speak to Mr. Zahm. Mr. Ball believed the side business contributed to Complainant's low miles. Complainant ran his side business from truck stops. (Tr. 299). Complainant stated he was trying to make money to retire and move to Mexico. (Tr. 300). Mr. Ball understood that a driver was free to pursue whatever activities he wanted to when he was off duty. He was also familiar with a "34 hour restart." (Tr. 301). Mr. Ball believed Complainant was working rather than resting during his 10-hour rest period. He discussed his concerns with Mr. Zahm. Drivers could use a hands-free phone while driving. (Tr. 302). Mr. Schlegel did not tell Mr. Ball to have Complainant stop running his side business. (Tr. 303).

On cross-examination, Mr. Ball identified RX-5 as a letter of concern which asked Complainant to come see him about his low miles. (Tr. 304; RX-5). Complainant came in to discuss the miles issue the first time he received a letter of concern, but not thereafter. Complainant did not telephone Ball about his low miles. (Tr. 305). Mr. Ball testified that there is no incentive for drivers to have low miles. He presents all of his drivers with the opportunity to drive. (Tr. 306). Complainant turned down loads because he was fatigued consistently, two or three times a month. (Tr. 307). Mr. Ball did not recommend that Complainant be fired. Respondent does not force its drivers to drive. Mr. Ball did not believe Respondent ever used a forced dispatch system. (Tr. 308).

Mr. Ball did not witness the confrontation that occurred between Complainant and Mr. Zahm. Mr. Ball testified that Complainant came out of Mr. Zahm's office, stating Mr. Zahm should not be running the company and Mr. Zahm did not care about the drivers. (Tr. 309). Mr. Ball thought Complainant's actions were inappropriate. He told Mr. Zahm what Complainant stated. (Tr. 310). He believed the incident occurred in May 2010. (Tr. 311).

After Mr. Ball spoke to the mechanic and Complainant, Complainant agreed to take a load, and he did not say it was "under protest." (Tr. 311-312). Mr. Ball stated that five to six trucks are down daily. (Tr. 312). No one has fired a driver for complaining about a mechanical issue or expressing safety concerns. (Tr. 312-313). This was the first time Mr. Ball encountered a driver making such a claim. In this instance, a certified mechanic indicated the truck was safe to drive. (Tr. 313). Mr. Ball did not talk to Mr. Zahm about Complainant's truck. (Tr. 313-314).

Mr. Ball did not know the process for preparing the needs improvement reports. (Tr. 314; RX-6). He was unsure whether he mentioned Complainant by name during his discussion with Mr. Schlegel about the class action lawsuit. (Tr. 314). He did not know what the class action lawsuit was about. (Tr. 315).

On re-direct examination, Mr. Ball testified that Complainant initially refused to drive the truck, and later Complainant decided to drive. (Tr. 316). Five or six trucks are out of service each day, but not all of these trucks are broken down on the road. (Tr. 317). Mr. Ball only encountered a driver who refused to drive after being told the truck was safe on one occasion. (Tr. 318). Kelly Pecora told Mr. Ball the truck was safe to drive. Mr. Ball informed Complainant that the truck was safe to drive based upon his conversation with the certified mechanic. He did not know who certifies mechanics, but he believed certified mechanics are qualified. (Tr. 319). He testified that Complainant is a very cautious person. The truck required repairs when it returned to Boise. Mr. Ball stated the truck drove through 14 inspection stations on the way back to Boise and all stations passed the truck. (Tr. 320).

He opined that the problems with the truck were not safety issues. (Tr. 322). He did not know whether any inspections were performed at the inspection stations. (Tr. 323).

Complainant called Mr. Ball in March 2010 and informed him that a breakdown in Amarillo affected his miles. (Tr. 324).

Michael Anthony

Mr. Anthony is a fleet manager for Respondent, where he has been employed for 21 years. (Tr. 448-449). He began as a driver in 1991 and drove for eight years. In 1999, he began working in the office as a dispatcher. In 2003 or 2004, he became operations manager. In August 2011, he became a fleet manager, which was a step down from operations manager. (Tr. 449).

He is a high school graduate and has two years of Community College work towards an Associate degree. (Tr. 449). He drove trucks for 11 years. (Tr. 450).

In June 2010, Complainant was dispatched to St. Louis. (Tr. 450-451). Complainant called Mr. Anthony, and they discussed the mechanical issues Complainant was experiencing with air leaks. (Tr. 451-453). Mr. Anthony stated he discussed the parameters of the problems with Complainant as to whether it was a safety issue. (Tr. 451, 453). Complainant told Mr. Anthony there was no dire need to put the truck in the shop. (Tr. 452). Complainant did not mention an oil leak. He could not determine where the air leak was coming from. (Tr. 453). Mr. Anthony and Complainant determined it was "okay" to drive and have the truck looked at toward the end of the run. Mr. Anthony opined that an air leak in excess of three to four pounds per minute would cause a truck to be put out of service. Mr. Anthony had no other involvement with Complainant's mechanical issues on that dispatch. (Tr. 454).

Mr. Anthony recalled an exchange between Mr. Zahm and Complainant. (Tr. 454). He was on the phone in the office, but overheard some of the dialogue between Complainant and Mr. Zahm. Complainant was trying to sell window screens to Respondent. Mr. Anthony described the exchange as abrasive, defiant and boisterous. Complainant got upset and red-faced. Mr. Anthony overheard Complainant telling Mr. Zahm "what do you know, you have never drove before." (Tr. 455). Mr. Anthony also overheard Complainant telling Mr. Zahm he did not care about the drivers and their needs. Mr. Anthony thought it was an inappropriate

exchange in an open area of the office. (Tr. 456). Mr. Anthony heard Mr. Zahm tell Complainant that he did not want to purchase the screens. He did not hear Mr. Zahm use the "F word." (Tr. 457). Mr. Anthony described Complainant's demeanor as boisterous and defiant. He opined that Mr. Zahm wanted to "pull out" of the conversation. (Tr. 460).

Mr. Anthony testified that drivers earn him a paycheck, and safety has to be provided. (Tr. 458). He is not aware of any drivers being fired for bringing up safety issues. As a driver, he raised safety concerns. He felt comfortable doing so and was never disciplined for raising safety concerns. (Tr. 459).

On one occasion when Mr. Anthony was working alone on a Saturday, Complainant was in the office and stated Mr. Zahm had no experience in business and no feelings for the drivers. Complainant spoke negatively about Mr. Zahm. (Tr. 461). Mr. Anthony did not want to get involved. (Tr. 462-463). Mr. Anthony did not tell Mr. Zahm about Complainant's comments. "Leah," the auditor, was nearby, but he is not sure what she may have heard. Mr. Anthony did not know if Leah told Mr. Zahm about the conversation. (Tr. 463). Other drivers told Mr. Anthony they did not believe Mr. Zahm was qualified for the job. (Tr. 464).

Mr. Anthony is familiar with the turbo actuator. He has seen a turbo with an air leak. (Tr. 464). He would not consider the air leak a safety hazard. He experienced a turbo failure. It caused a loss of power, but he could still drive. (Tr. 465).

On cross-examination, Mr. Anthony stated that when his turbo lost power, he was able to continue driving and get it back to the shop for repairs. (Tr. 466). When his turbo went out, it caused blue smoke and an oil leak. He continued driving the truck for approximately 30 miles. (Tr. 467). He opined that the purpose of the turbo is acceleration and power. (Tr. 468).

Mr. Anthony noted that a major air leak can be a safety issue. (Tr. 468). The truck's air tanks must have air inside in order to release the emergency brakes. (Tr. 468-469). The air system must be charged to move a parked truck. There are many variables affecting whether a truck's air tank will maintain pressure over several days. (Tr. 469).

Mr. Anthony testified that it was common for drivers generally to complain about different issues. (Tr. 470-471). Respondent does not fire all drivers who complain. Mr. Anthony acknowledged he only overheard part of the exchange between Complainant and Mr. Zahm. (Tr. 471). Drivers come into the terminal when they are dispatched or require maintenance. The conversation occurred when Complainant returned from St. Louis. (Tr. 473). Mr. Anthony spoke to Complainant on the telephone on his return trip from St. Louis. (Tr. 474).

On re-direct examination, Mr. Anthony testified that Complainant was fired the same day he returned to Boise from St. Louis. The exchange between Mr. Zahm and Complainant occurred the same day that Complainant was fired. (Tr. 475-476).

Kelly Pecora

Mr. Pecora is Respondent's shop maintenance manager. (Tr. 477). He has held the position for three years. He was a driver for one year. His education includes a GED at age 16 and classes on wheel bearings and wheel installations. (Tr. 478). He was a mechanic for Respondent for two years, learned his trade on the job and has no certifications. (Tr. 478-479).

Mr. Pecora stated he was familiar with the list of repairs on the road for truck number 11150. (Tr. 479-480; RX-3). All repairs must go through Mr. Pecora or a dispatcher. (Tr. 480). Mr. Pecora testified the repairs to Complainant's truck appeared normal for the average truck. (Tr. 480, 492).

On February 10, 2010, a blown compressor on Complainant's truck was repaired in Amarillo, Texas. (Tr. 480; RX-3, p. 7). In June 2010, an air leak was repaired with replacement tractor protection valve. The turbo actuator also had a leak. (Tr. 481). A write-up noted "significant air leak in system when brakes are set." (Tr. 481; RX-8). Transmission cooler was replaced, an air leak was fixed, two sets of brakes were replaced and the air control valve was replaced. (Tr. 482; RX-8). Mr. Pecora would not allow a truck onto the road if there was a safety issue. (Tr. 482).

Mr. Pecora talked to Kenworth in St. Louis about the air leaks in Complainant's truck. (Tr. 482-483). He asked if the truck could make it back to Boise safely with the turbo actuator leak, and was told by Kenworth that the truck could make it back safely. Kenworth repaired two air leaks and the MV3 valve was changed, which releases the brakes. No other leaks were

detected. (Tr. 484-485; CX-6, p. 2). Mr. Pecora was told by Kenworth that the actuator was leaking air, but he was told it was not severe enough to require immediate replacement. Kenworth told Mr. Pecora it was not a safety issue. (Tr. 484). Mr. Pecora testified that the actuator leaking air is not a safety issue. Mr. Pecora stated the air compressor will pump enough air to keep up with the actuator leak. (Tr. 486).

When Complainant's truck returned to Boise, the turbo was replaced. The cross shaft was leaking oil at that time, and it could only be fixed by replacing the turbo. He does not agree that any leak is unsafe. (Tr. 486). Mr. Pecora testified that the turbo actuator only leaks air when the truck is running. Mr. Pecora recalled speaking to Mr. Schlegel about the turbo actuator issue, but he could not recall speaking to Mr. Ball or Mr. Zahm. (Tr. 487).

On cross-examination, Mr. Pecora testified that an air system must be charged to release the emergency brakes. He stated that if the air gauge is charged and loses air overnight while the engine is not running, a leak is present. He noted some air leaks are difficult to detect. A truck should not bleed more than 10 to 30 pounds overnight. (Tr. 488). The turbo on Complainant's truck was leaking air and oil when it left the Kenworth dealership in St. Louis. (Tr. 488-489).

The cross shaft opens the turbo to create boost. The cross shaft cannot be replaced. He stated engine oil cannot leak on the truck brakes. Mr. Pecora has witnessed a turbo fail, which causes the turbo to dump oil into the charger cooler. This causes oil to spread throughout the engine compartment. (Tr. 489). Mr. Pecora testified that an oil leak within the engine compartment cannot leak onto the brakes. (Tr. 490).

Mr. Pecora testified he would not let a truck on the road if there are safety issues present. An air leak is a safety issue. When Respondent's shop repaired Complainant's truck in May 2010, they believed all of the leaks were repaired, but leaks were discovered by Kenworth. (Tr. 490). The MV3 valve was replaced by Kenworth. The MV3 valve releases the emergency brakes on the trailer and truck tractor. Mr. Pecora testified that an oil leak is not a safety issue. An oil leak would not cause a fire in the engine. The engine does become hot. (Tr. 491). Mr. Pecora did not know what temperature is required for motor oil to ignite. He would not make repairs to a truck that

are unnecessary. He testified that the only danger imposed by an oil leak is that it could cause the truck's engine to shut down, which could present a safety hazard on the highway. (Tr. 492).

Kenworth of Indianapolis found that the transmission in Complainant's truck was full of coolant and the cooler was leaking. (Tr. 494; RX-3, p. 13). Mr. Pecora stated coolant leaking is not a safety issue, but it would cause the transmission to fail eventually. He acknowledged that transmission oil and coolant do not mix well. (Tr. 494). Kenworth of Indianapolis notified Respondent that the rear box needed repairs, but Respondent declined the repair. (Tr. 496; RX-3, p. 13). Mr. Pecora did not believe the Kenworth shops were always reputable, but Respondent preferred to have repairs performed at Kenworth shops when the trucks were out on the road. (Tr. 496). The repairs done were "patch repairs." Respondent prefers to perform repairs at its shop because Mr. Pecora can oversee the repairs and it is less expensive. (Tr. 497). If there is a safety issue that could cause a driver to become stranded on the side of the road, Respondent will order repairs. Mr. Pecora does not rely on DOT regulations to determine whether something is a safety issue. (Tr. 498). He was aware of a DOT regulation requiring that all vehicles be free of oil leaks. (Tr. 499).

A write-up from Respondent's shop indicated that oil leaks would be fixed "next time," which could have been because parts were not available or the leaks were not bad enough to repair. (Tr. 499-500; RX-3, p. 5).

On re-direct examination, Mr. Pecora testified that the operations department wants the truck out of the shop as quickly as possible. (Tr. 500). If the truck is unsafe, the operations department will find a different truck or load for the driver. (Tr. 500-501). Mr. Pecora usually decides whether to fix a truck on the road or bring it back to Respondent's shop. He stated in June 2010, Kenworth in St. Louis did not mention anything about oil leaks. He testified that an air leak in the turbo actuator cannot cause the turbo to fail. (Tr. 501).

Mr. Pecora noted that the cross shaft was leaking oil in the photograph taken by Complainant. (Tr. 502; CX-2). The photograph was taken prior to the cross shaft repair. (Tr. 502). Oil was present on the engine oil cooler. (Tr. 502-503; CX-2). Mr. Pecora opined this would not present a safety issue for the driver. (Tr. 503).

On re-cross examination, Mr. Pecora noted that the turbo gets hot. (Tr. 503). He testified that a damp area of oil on the right side of a frame rail was not an extreme oil leak. (Tr. 503-504).

Greg Dodson

Mr. Dodson is employed by Rush Truck Center as a service manager. He has held that position for one and one-half years. (Tr. 506). He was a light wheel vehicle diesel mechanic in the military for six years. He also worked for Masters International as a technician for four years and as a service writer for several years. He was a shop foreman warranty advisor at Lake City International for three years. He worked for Cummins Rocky Mountain for six years as a service manager. (Tr. 507).

As service manager Mr. Dodson's duties include working with technicians, service writing, warranty work and expediting work. He does no major repairs. (Tr. 508). He attended hundreds of hours of "virtual college for Cummins" and a "hands on" course for troubleshooting problems. He had an ASE medium-heavy duty truck certification, which expired in December 2011 because it is not required in his current position. He received advanced individual training for diesel mechanics in the military. He currently has a Cummins engine certification and an International truck and engine certification. (Tr. 509).

Mr. Dodson is familiar with the 2005 Kenworth truck with a Cummins engine driven by Complainant. He was also familiar with the turbo actuator on a Cummins engine. (Tr. 51). He testified the turbo actuator runs on air pressure. He stated that "just about everything" in newer trucks runs on air including the horn, the fan, the driver's seat air bag, air slides on the fifth wheel, and the transmission. (Tr. 511). He stated the normal psi reading for the air gauge is 80/85 to 120. (Tr. 511-512). When the air pressure is at 80/85, the governor tells the compressor to re-engage and the turbo control valve injects air into the actuator. (Tr. 512). Mr. Dodson stated the turbo actuator does not have air in it all the time, and it is very common for a Cummins actuator to leak air. (Tr. 512-514). Common complaints caused by actuator air leaks are poor fuel mileage and decreased engine power. There is no air in the actuator when the engine is shut down. (Tr. 514).

Mr. Dodson testified that it is difficult to detect a leak in the actuator. (Tr. 514). The engine has to be running at 50% or higher to activate the actuator, and the leak may not be heard. (Tr. 514-515). When a truck is moving down the highway, the compressor is constantly cycling due to all the air control features. Mr. Dodson stated some air leakage can be heard. Sometimes, a soap and water spray is used to find a leak. (Tr. 515). Mr. Dodson testified that an air leak in an actuator is not a safety factor. Ordinarily, a customer will defer to their own shop for repair of an air leak in the actuator. He has never told a customer it would be dangerous for a truck to be on the road with an actuator leaking air. (Tr. 516). The leak would not overcome the compressor. (Tr. 516-517). The psi may drop to 80/85, but the compressor would then come on to maintain pressure. (Tr. 517).

Mr. Dodson reviewed the photo of Complainant's truck engine. (Tr. 517; CX-2). He identified the turbo, the actuator shaft, the turbo cross shaft and the airline connecting the driver side over to the actuator. (Tr. 518). He stated that if the airline was taken off, the compressor would maintain air pressure. (Tr. 519). A warning light will activate when the air pressure drops between 75 and 60 psi. (Tr. 520). At that point, Mr. Dodson stated the non-essential components of the truck will shut down. (Tr. 522). He added that a major air leak will cause the brakes to lock within seconds, but this would not happen with an air leak in the actuator because the system would not receive air below 85 psi. The compressor is constantly pumping air. (Tr. 523). An air leak would not affect the compressor. (Tr. 523-524). A new air compressor was installed on Complainant's truck a few months before the June 2010 repair problems. The new compressor would have been better equipped to keep up with an air leak. (Tr. 524).

Mr. Dodson testified that the turbo is not affected by the actuator. The turbo will still operate if the actuator fails, and the actuator only enhances the turbo. Mr. Dodson testified it is not possible for the air gauge to read "zero" due to a leak in the turbo actuator because the turbo actuator does not have an air supply when the engine is not running. The actuator will not leak when the engine is off because no air is being fed into it. (Tr. 525).

Mr. Dodson testified that any air leak on the brake system would be a safety issue. (Tr. 526). Air leaks and oil leaks are common in all trucks. (Tr. 526-527). Mr. Dodson testified there would not be any trucks on the highway if a truck was

"grounded" for every oil leak. (Tr. 527). In Complainant's truck, oil was leaking onto the frame rail. (Tr. 528; CX-2). Some heat will transfer from the engine block to the frame rail, but the frame rail could be touched with a bare hand. The frame rail will not reach flash point. (Tr. 528).

Based on the photograph of Complainant's truck, Mr. Dodson opined that the oil leak was coming from the turbo cross shaft. (Tr. 528, 530). Typically, an oil leak from the turbo cross shaft is not a gushing leak, but seepage. (Tr. 531). Based on the build-up of oil in the photograph, Mr. Dodson opined that the oil leak had been going on for six to eight months, and was not severe enough to get onto the brakes. (Tr. 531; CX-2). For the oil leak to be severe enough to reach the brakes, he would expect there to be oil "blowing down the frame rail, not just going straight down." (Tr. 532; CX-2). He testified that this oil leak would not cause a loss of power to the truck. (Tr. 532). In the reasonable realm of likelihood, Mr. Dodson opined that such an oil leak could not cause the engine to catch on fire. (Tr. 533).

Mr. Dodson works as a service writer. He takes in repairs from customers and relays information to customers. (Tr. 533-534). If he encountered an oil leak that was significant enough to cause a fire, he would note it on the repair order. The oil leak would have to be pouring oil all around to cause a fire. (Tr. 534). Mr. Dodson testified that "most companies don't entertain the less significant leaks." (Tr. 535).

On cross-examination, Mr. Dodson testified that a turbo cross shaft oil leak is not significant enough to cause a loss of all of the oil reserve. If all of the oil was lost from the turbo cross shaft, the engine would shut off. (Tr. 535). Loss of oil causes an increase of friction and heat. (Tr. 535-536). He has not seen a turbo with a broken cross shaft. (Tr. 536).

Mr. Dodson noted that if an oil leak is significant, it would be a DOT issue. He acknowledged that any oil leak is prohibited by DOT regulations. In extreme cases, he has witnessed oil causing a damp area on the right side of the frame rail. (Tr. 536).

Mr. Dodson reiterated that air leaks are difficult to detect. There are not a lot of air lines near the turbo area because the area becomes hot. (Tr. 537). There is an "elbow on the turbo for the charged air system that pressurizes the charged air cooler." (Tr. 537-538). A charged air system air

leak could develop there. Air leaks can develop in the turbo actuator and the charged air side of the turbo. There is a hot side of the turbo and a compression side, which creates turbo boost pressure to enhance the burn of fuel in the cylinder. (Tr. 538). A charge air leak may develop inside the turbo compression housing. (Tr. 539). Air piping should be replaced if air noise can be heard, but this does not necessarily mean that the turbo charger needs to be replaced. (Tr. 539-540). Leaks can develop in the charged air piping. (Tr. 540). A Cummins service bulletin indicated that the turbo charger should be replaced if the air piping is not damaged and air noise is heard. (Tr. 540-541). This would apply to an ISB engine, which is a smaller engine. (Tr. 541). There is an air intake side and a suction side of the turbo charger. (Tr. 541-542). Loose connections or cracks in the suction side of the intake pipe allow debris to be ingested, causing rapid wear on the cylinders. Debris drawn into the air suction side can also damage the compressor blades causing an imbalance, resulting in bearing failure. Bearing failure can damage the turbo compressor. Excessive smoke and low power from a turbo charged engine can be caused by pressurized air leaking from loose connections or cracks in the crossover or intake manifold. (Tr. 542).

Mr. Dodson noted that if the actuator line is cut, it would affect the truck's ability to climb hills with heavy loads and maintain speed on the interstate when loaded. The compressor will turn on when air pressure is reduced to a certain level. When the vehicle is off the only air that will escape is through leaks. (Tr. 543). The compressor has a "duty cycle" and runs constantly. The compressor cycles so that the system is not over-charged with air. (Tr. 544). Mr. Dodson did not agree that high duty charges can cause conditions that affect the air brake charging system's performance. (Tr. 545).

The Allied Signal Bendix is an authority on air brake systems. It defines the duty cycle as "the ratio of time the compressor spends building air to the total engine running time." (Tr. 545; CX-12, p. 6). Air compressors are designed to build up air 25 percent of the time. (Tr. 545-546; CX-12, p. 6). Higher air cycles cause conditions such as higher compressor head temperature, which will affect the air brake charging system's performance. This could cause the need for additional maintenance and lead to a higher amount of oil vapor droplets being passed along into the air brake system. (Tr. 546; CX-12, p. 6). Oil vapor droplets can collect in the air dryer. Additional running time of a compressor will increase

the production of heat. (Tr. 546). This would heat the air within the air system. (Tr. 546-547). Mr. Dodson did not believe hot air would affect the rubber parts of the brake system. (Tr. 547). Oil residue can develop in the air system, but there are many safety systems in place to prevent it. (Tr. 548). Air suspension, additional air accessories, use of an undersized compressor, frequent stops and excessive leaks are factors that can add to the duty cycle. (Tr. 548; CX-12, p. 6). When the temperature of the compressed air that enters the air dryer is within a normal range, the air dryer can remove most of the charging system oil, but if the temperature is above a normal range oil vapor can pass through the air dryer and into the air system. (Tr. 548-549; CX-12, p. 6). Debris can enter the air system from the intake fresh air side. (Tr. 549).

The cross shaft does not spin inside the turbo. The turbo achieves boost pressure when exhaust passes through the turbine and the turbine begins to spin. The exhaust side of the turbo will get hot when running. (Tr. 550). The oil cooler cools the engine oil. (Tr. 551). There are coolant lines running next to the frame rail, which Mr. Dodson testified were most likely for the heater, sleeper or cab. (Tr. 551; CX-2).

Mr. Dodson stated, "The only items that would cause air to bleed completely to zero overnight would be directly fed from the air tanks on a truck's system." (Tr. 551). He has witnessed this, and it is not easy to detect the air leak. The air compressor on the Kenworth T-600 cannot be adjusted. The duty cycle is re-engaged between 80 and 90 psi. The check valve that supplies air to the turbo will cut in between 70 and 90 psi. (Tr. 552).

Mr. Dodson testified that air leaks can develop in the glad hand. The grommets inside the glad hand can wear out and cause leaks. (Tr. 553). Several small leaks can amount to a large air leak. This can cause a loss of air pressure and activation of the warning buzzer. How far a driver could drive with the warning buzzer on would depend on the significance of the air leak. (Tr. 554). Mr. Dodson testified that a significant loss of air could cause loss of the service brakes and activation of the spring brakes and the emergency brakes. (Tr. 554-555).

Mr. Dodson agreed that drivers are not qualified to adjust brakes. The DOT requires drivers to be certified to adjust brakes. (Tr. 555). The slack adjuster turns the s-cam to expand the brake shoes. A push rod on a brake chamber actuates the s-cam. Heat would be created by the brake shoe being pushed

by the push rod against the drum. The air suspension system is controlled by a check valve. (Tr. 556). The air suspension will not adjust if there is a significant loss of air. The turbo on Complainant's truck was liquid cooled. The photograph did not reveal oil on the exhaust turbine. The engine block will heat up to 180/190 degrees. The cooling system maintains an engine between 180 and 210/215 degrees. (Tr. 557).

On re-direct examination, Mr. Dodson testified that the charged air system is created by the turbo, and has nothing to do with the actuator leak. (Tr. 558). He opined that the photo depicting Complainant's truck showed nothing that would create a safety hazard. (Tr. 558; CX-2). He believed there was an air leak at the turbo actuator, not a group of air leaks. (Tr. 559).

On re-cross examination, Mr. Dodson testified that Complainant detected an air leak when the system was shut off. The Kenworth shop identified a leak at the actuator. Complainant found that the turbo actuator leak caused the air to bleed out overnight. Air leaks are difficult to detect. (Tr. 560).

Complainant's Personnel File

On June 7, 2010, Mr. Schlegel wrote a memorandum to Complainant's personnel file. He noted Mr. Ball informed him of a problem in the yard. Mr. Ball told him a driver was trying to sell products to other drivers and asking the drivers to join him in a class action lawsuit. Mr. Schlegel later learned that the driver was Complainant. Mr. Ball indicated that several drivers were complaining about Complainant's activity. Mr. Schlegel noted that Respondent had announced a wage reduction effective June 1, 2010, due to "rising fuel prices and the persistent recession." He noted that multiple drivers had complained, and four drivers had resigned. Ms. Schlegel asked Mr. Ball and Mr. Switzer to deal with the situation and "stop this nonsense." An hour later he was informed that Complainant was terminated. He agreed with this decision because of Complainant's "poor performance and generally troublesome behavior." (CX-8).

On June 8, 2010, Mr. Schlegel wrote another memorandum to Complainant's personnel file. He noted that Mr. Ball brought a problem to his attention concerning Complainant on June 2, 2010. Complainant had complained of an air leak on June 1, 2010. The truck was placed into the Kenworth shop, and severe air leaks

were repaired. Respondent instructed the shop not to repair the turbo charger or turbo actuator because it was "not a critical nor safety defect." They planned to inspect and repair those items when the truck returned to Boise. Mr. Ball told Mr. Schlegel Complainant was refusing to pick up a new load because the turbo or turbo actuator were not repaired. Mr. Schlegel noted Complainant was "essentially 'holding the truck hostage' until we did the repairs." Complainant was instructed to return the truck to the dealer. Mr. Schlegel instructed Mr. Pecora to call the dealer to determine if there was a critical or safety issue. The dealer indicated that the truck could safely return to Boise. Mr. Schlegel informed Complainant that it was not a safety problem, but Respondent would send another driver if Complainant did not want to drive the truck. He noted that Complainant elected to drive the truck. (CX-9).

The Contentions of the Parties

Complainant argues he engaged in protected activity when he filed complaints with Respondent reporting an air leak and an oil leak near the turbo area. He contends these internal complaints were related to reasonably perceived violations of various commercial vehicle safety regulations including 49 C.F.R. §§ 392.1, 392.7, 393.1, 393.52, 396.1, 396.3(a)(1), 396.5, 396.7 and 396.13. He asserts that the complaints need only be "related to" a reasonably perceived violation of a commercial vehicle safety regulation. He contends the reasonableness of his perception of a violation is supported by the testimony of Mr. Switzer and Mr. Millard that air leaks and oil leaks are safety concerns. He argues that he also engaged in protected activity when he refused to drive the truck because actual violations of 49 C.F.R. §§ 396.1 and 396.3 would have occurred and because he reasonably believed driving the truck established a real danger of accident or injury.

Complainant contends these protected activities were contributing factors in Respondent's decision to terminate his employment. He points to Respondent's knowledge of the protected activities coupled with the close temporal proximity of the protected activities and his termination. He also points to the disparate treatment of other drivers who also failed to meet the mileage requirement as evidence of pretext. He contends continuing to retain a difficult employee until he engages in a protected activity is evidence of pretext. He argues Mr. Schlegel exhibited animus toward Complainant's protected activity as evidenced in the Qualcomm message.

Complainant asserts Respondent has not shown by clear and convincing evidence that it would have discharged him in the absence of his protected activity. He argues it is not highly probable or reasonably certain that Respondent would have fired him absent his protected activity. Finally, he contends Respondent has not met its burden of showing that he failed to mitigate his damages. He argues Respondent offered no evidence that substantially equivalent jobs were available or that Complainant failed to make reasonable efforts in finding substantially equivalent employment. Complainant seeks reinstatement, back wages, emotional distress and mental pain damages, punitive damages, interest, attorney fees and costs. He also seeks abatement of the violation to include requiring Respondent to post a copy of the decision and order for 90 consecutive days, provide a copy of the decision and order to all present employees and employees who worked for Respondent during Complainant's employment and to expunge all references to Complainant's discharge from his personnel records.

Respondent argues Complainant met the mileage requirement only three times during approximately ten months of employment. It contends Mr. Zahm made the decision to terminate Complainant based on the May 2010 confrontation and Complainant's disparaging comments about Mr. Zahm. It asserts Complainant's failure to meet the mileage requirement and failure to discuss his low productivity with his supervisor were additional factors in Mr. Zahm's decision to terminate Complainant. It argues the decision to terminate Complainant was made by Mr. Zahm alone, and he did not consult anyone regarding the decision.

Respondent cites the Supreme Court's decision Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), in which the Court imposed a "but-for" standard of causation for claims under the Age Discrimination in Employment Act ("ADEA"). It contends the "but-for" standard applies to the instant case because the STAA contains "because of" language similar to the ADEA. Therefore, it argues Complainant must show that his protected activities were the "but-for" cause of his termination. Alternatively, under the "contributing factor" standard, Respondent contends Complainant has failed to provide any evidence that his alleged protected activity played a role in Mr. Zahm's decision to fire him.

Respondent does not dispute that Complainant filed internal complaints alleging an oil leak and air leak near the turbo of his truck. It argues Complainant failed to identify a single regulation, standard or order specific to air or oil leaks at

the turbo actuator. It relies on Mr. Dodson's testimony indicating there was not a reasonable likelihood the air leak or oil leak would cause an accident or other safety issue. It contends Complainant had failed to prove any actual violations of safety regulations. It also relies on the statements made by Kenworth of St. Louis, indicating the truck could be driven to Boise without creating a safety issue.

Respondent contends Complainant's termination was not related to his refusal to drive the truck. It argues Mr. Zahm had no knowledge of Complainant's refusal to drive when he made the decision to terminate Complainant. It asserts the temporal proximity between Complainant's alleged protected activity and his termination is not sufficient evidence of retaliation. It contends the mileage requirement was enforced, and other drivers were terminated for failing to meet the requirement. Further, it argues Complainant engaged in insubordinate and disrespectful behavior toward Mr. Zahm.

Respondent argues it has presented clear and convincing evidence that Complainant would have been fired absent any alleged protected activity. It relies on Complainant's consistent low miles, his failure to discuss his low miles with his supervisor and his altercation with Mr. Zahm. It contends Complainant failed to mitigate his damages, and Complainant failed to prove that he suffered any genuine emotional distress.

In his reply brief, Complainant argues the Supreme Court's decision in Gross does not trump the burdens set forth at 49 U.S.C. § 31105(b). He contends Respondent's argument that he did not engage in any protected activity is without merit. He argues he was not required to cite a regulation specific to air or oil leaks at the turbo actuator. He argues his complaints were based upon reasonably perceived violations of the commercial vehicle safety regulations. He asserts his termination was related to his protected activity, and Respondent failed to show by clear and convincing evidence that it would have fired Complainant in the absence of his protected activity. Finally, he contends he is entitled to an award of damages because Respondent offered no evidence showing that comparable jobs were available to Complainant and that he failed to make reasonable efforts to find substantially equivalent employment.

III. DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe ... Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

I found Complainant generally an impressive witness in terms of confidence, forthrightness and overall bearing on the witness stand. I found his testimony to be straight-forward, detailed and presented in a sincere and consistent manner.

B. The Statutory Protection

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

(a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --

(A)

(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because -

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

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

49 U.S.C. § 31105(a). Thus, under the employee protection provisions of the STAA, it is unlawful for an employer to impose an adverse action on an employee because the employee has complained or raised concerns about possible violations of DOT regulations. 49 U.S.C. § 31105(a)(1)(A). See e.g., Reemsnyder v. Mayflower Transit, Inc., Case No. 1993-STA-4 @ 6-7 (Sec'y Dec. and Ord. On Recon. May 19, 1994). Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to drive because operating a vehicle violates DOT regulations **or** because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C. § 31105(a)(1)(B).

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of enforcement through formal proceedings." (Emphasis added). Davis v. H.R. Hill, Inc., Case No. 1986-STA-18 @ 2 (Sec'y Mar. 19, 1987).

C. Burden of Proof

In 2007, Congress amended the STAA's burden of proof standard as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). Under the amendment, STAA whistleblower complaints are governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b)(AIR 21). Under the AIR 21 standard, complainants must show by a "preponderance of evidence" that a protected activity is a "contributing factor" to the adverse action described in the complaint. 49 U.S.C. § 42121(b)(2)(B)(i); see also 75 Fed. Reg. 53545, 53550. The employer can overcome that showing only if it

demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545, 53550; 49 U.S.C. § 42121(b)(2)(B)(i). Where, as here, a case is tried fully on the merits, it is not necessary to determine whether the complainant has established a **prima facie** case of discrimination under the STAA. Pike v. Public Storage Companies, Inc., Case No. 1998-STA-35 @ 2 (ARB Aug. 10, 1999).

Under the 2007 amendments to the STAA, to prevail on his STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity; that the respondent took an adverse employment action against him; and that his protected activity was a contributing factor in the unfavorable personnel action. Clarke v. Navajo Express, Inc., Case No. 2009-STA-18 @ 4 (ARB June 29, 2011) (citing Williams v. Domino's Pizza, Case No. 2008-STA-52 @ 6 (ARB Jan. 31, 2011)). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Id. The complainant can succeed by "providing either direct or indirect proof of contribution." Id. "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." Id. If direct evidence is not produced, the complainant must "proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating" the complainant's employment. Id. "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." Id. (citing Riess v. Nucor Corporation-Vulcraft-Texas, Inc., Case No. 2008-STA-11 @ 3 (ARB Nov. 30, 2011)). If the complainant proves pretext, an ALJ may infer that the protected activity contributed to the termination, but he is not compelled to do so. Williams, supra @ 6.

If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. Williams, supra @ 6 (citing 49 U.S.C. § 4212(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" Id. (citing Brune v. Horizon Air Indus., Inc., Case No. 2002-AIR-8 @ 14 (ARB Jan. 31, 2006)).

D. The Protected Activity:

1. Internal Complaints

An employee engages in STAA-protected activity where he files a complaint or begins a proceeding "related to a violation of a motor vehicle safety regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A)(i). Internal complaints to management are protected activity under the whistleblower provision of the STAA. Williams, supra @ 6. A complaint **need not** expressly cite the specific motor vehicle standard allegedly violated, but the complaint must "relate" to a violation of a commercial motor vehicle safety standard. Ulrich v. Swift Transportation Corp., Case No. 2010-STA-41 @ 4 (ARB Mar. 27, 2012). An internal complaint must be communicated to management, but it may be oral, informal or unofficial. Id. A complainant must show that he reasonably believed he was complaining about the existence of a safety violation. Id. This standard requires the complainant to prove that a person with his expertise and knowledge would have a "reasonable belief" that there was a violation of a commercial vehicle safety regulation. Calhoun v. United Parcel Serv., Case No. 2002-STA-31 @ 11 (ARB Sept. 14, 2007).

It is undisputed that Complainant reported the air leak and oil leak to his supervisor through the Qualcomm system. On June 1, 2010, Complainant sent a Qualcomm message to Respondent indicating there was still an air and oil leak at the turbo. The message stated that he witnessed oil and air coming from the turbo diaphragm area. He indicated that his concerns were safety-related, and he refused to drive the truck. On June 2, 2010, Complainant sent a pre-trip inspection report to Respondent through Qualcomm, indicating he had detected a significant air leak and oil leak at the turbo area.

Complainant testified that he knew the air and oil leaks were dangerous and a violation of the Federal Motor Carrier Safety Regulations. Complainant is not a mechanic, and he does not have any training as a mechanic. He is a professional truck driver with 20 years of experience. Therefore, under the standard set forth in Calhoun, Complainant must show that a driver with 20 years of experience would have a "reasonable belief" that there was a violation of a commercial vehicle safety regulation.

Complainant argues his complaints about the oil leak on his assigned truck were related to a violation of 49 C.F.R. § 396.5, which requires motor carrier's to ensure that the motor vehicles subject to its control are "free of oil and grease leaks." Complainant testified that he believed that oil leaks were a violation of the Federal Motor Carrier Safety regulations. Mr. Schlegel, Mr. Millard, Mr. Pecora and Mr. Dodson all corroborated Complainant's testimony that any oil leak is a violation of DOT regulations. Mr. Schlegel argued that 49 C.F.R. § 396.5 is not enforced on a regular basis. Mr. Dodson testified there would not be any trucks on the highway if a truck were "grounded" for every oil leak. Mr. Millard opined that he would not have pulled Complainant's truck out of service if he went through the inspection station in Missouri and pointed out the air and oil leaks. However, he also noted a vehicle can violate the Federal Motor Carrier Safety Regulations without being placed out of service. The presence of an oil leak was a violation 49 C.F.R. § 396.5. It is of no consequence that the oil leak was not severe enough to place the vehicle out of service. Based on Complainant's testimony and the testimony of the other witnesses, I find that it was reasonable for Complainant to believe that the oil leak was a violation of a commercial vehicle safety regulation. Accordingly, I find Complainant's internal complaints regarding the oil leak were related to a violation of 49 C.F.R. § 396.5.

Complainant contends that his complaints about the oil leak were also related to 49 C.F.R. §§ 396.1 and 396.7. 49 C.F.R. § 396.1 requires compliance with all of the regulations set forth in Part 396. 49 C.F.R. § 396.7 prohibits the operation of a motor vehicle "in such a condition as to likely cause an accident or a breakdown of the vehicle." He also relies upon 49 C.F.R. § 396.3, a catch-all provision requiring that any "parts and accessories which may affect safety of operation" be in "safe and proper operating condition at all times." Respondent relies on the testimony of Mr. Dodson and Mr. Pecora to support its position that the oil leak was not a safety issue.

Complainant believed that oil leaks were dangerous. Mr. Schlegel, Mr. Switzer, Mr. Millard, Mr. Pecora and Mr. Dodson all testified that oil leaks can lead to breakdowns. Mr. Switzer and Mr. Millard also noted that an oil leak in the engine compartment could present the danger of fire. Mr. Millard reviewed the photo of Complainant's vehicle, and noted there was a potential for fire because the oil leak was on the turbine side of the turbo. Mr. Dodson testified that the oil leak presented in the photograph taken by Complainant was not

severe enough to cause a loss of power to the truck. He also testified that the oil leak onto the frame rail would not cause a fire because the frame rail will not reach flash point. Mr. Pecora testified that an oil leak is not a safety issue, and an oil leak would not cause a fire in the engine. However, Mr. Dodson is a service manager with years of experience as a mechanic, and Mr. Pecora is also a mechanic. Therefore, I find they had more experience and knowledge regarding breakdowns and the possibility of fire than Complainant, who has no training as a mechanic. Based on Complainant's testimony and the testimony of the other witnesses, I find that it was reasonable for Complainant, a driver with no training as a mechanic, to believe that the oil leak could result in breakdowns and affect the safety of operation. Accordingly, I find Complainant's internal complaints regarding the oil leak were related to a violation of 49 C.F.R. §§ 396.1, 396.3 and 396.7.

Complainant argues his complaints about the air leak on his assigned truck were related to a violation of 49 C.F.R. § 392.7, which prohibits a driver from driving the vehicle unless he is satisfied that the service brakes, including trailer brake connections, are in good working order. 49 C.F.R. § 392.1 requires carriers and their employees to comply with the regulations listed in 49 C.F.R. Part 392. Respondent relies on the testimony of Mr. Dodson to support its position that an air leak at the turbo actuator was not a safety issue.

Complainant testified that he believed air leaks were dangerous. He believed a drastic drop in air pressure could render the service brakes ineffective and cause the emergency brakes to engage. Mr. Switzer opined that any air leak in the air system could result in failure of the brakes. Mr. Millard testified that air leaks can cause the brakes to lock up and can cause service brakes to be non-functional. Mr. Dodson testified that a significant loss of air could cause loss of the service brakes and activation of the spring brakes and the emergency brakes. He added that a major air leak will cause the brakes to lock within seconds, but this would not happen with an air leak in the actuator because the system would not receive air below 85 psi. Given Mr. Dodson's experience as a service manager, I find he had more experience and knowledge regarding the effects of an air leak at the turbo actuator on the braking system than Complainant, a driver without training as a mechanic. Nevertheless, based on Complainant's testimony and the testimony of Mr. Switzer and Mr. Millard, I find that it was reasonable for Complainant to believe that an air leak at the turbo actuator was a safety concern because it could render the

service brakes ineffective. Accordingly, I find Complainant's internal complaints regarding the air leak were related to a violation of 49 C.F.R. §§ 392.1 and 392.7.

Finally, Complainant contends his complaints about the oil leak and air leak were related to violations of 49 C.F.R. § 396.13(a), which states that before driving the driver shall "be satisfied that the motor vehicle is in safe operating condition." I find that Complainant's internal complaints regarding the air and oil leaks were related to a violation of 49 C.F.R. § 396.13(a). Complainant made the internal complaints because he was not satisfied his truck was in safe operating condition. He was trained that any air and oil leaks are safety concerns. Mr. Switzer and Mr. Millard, who were both also former truck drivers, testified that air leaks and oil leaks are safety concerns. Based on Complainant's testimony and the testimony of Mr. Switzer and Mr. Millard, I find that it was reasonable for Complainant to believe that the air leak and oil leak were safety concerns.

Based on the foregoing, I find and conclude that Complainant engaged in activities protected under 49 U.S.C. § 31105(a)(1)(A)(i) by filing internal complainants through the Qualcomm system alleging that his assigned truck had an oil leak and an air leak near the turbo area.

2. Refusal to Drive

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C. § 31105(a)(1)(B)(i), requires that Complainant show he refused "to operate a vehicle because—the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." The ARB has found that a refusal to drive constituted protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) where the driver's windshield wipers were not in good working order in violation of 49 C.F.R. § 392.7, even though rain was not imminent and there was no risk of a safety issue. Robertson v. Marshall Durbin Co., Case No. 2002-STA-35 @ 12-13 (Aug. 4, 2004).

Both Complainant and Respondent argue that under 49 U.S.C. § 31105(a)(1)(B)(i) a refusal to operate a commercial vehicle is protected under the STAA only if the operation would result in an "actual violation" of any commercial vehicle safety regulation. Respondent contends Complainant has failed to prove any actual violation of a regulation. Complainant

contends actual violations under 49 C.F.R. §§ 392.7, 396.13, 396.3, 396.5 and 396.1(a) would have occurred.

In Ass't Sec'y & Bailey v. Koch Foods, LLC, Case No. 2008-STA-61 (ARB Sept. 30, 2011), the ARB held that an actual violation of a regulation is not required under Section 321105(a)(1)(B)(i). The ARB concluded "that the protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined." Id. at 9. However, the ARB's decision was recently reversed by the Eleventh Circuit. In Koch Foods, Inc. v. Sec'y of Labor, Case No. 11-14850 (11th Cir. March 11, 2013), the court held that the phrase "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order," refers only to circumstances in which operation would result in an **actual violation** of law. Id.

Complainant argues that he refused to operate the truck because he was not satisfied that it was in safe operating condition. He relies upon 49 C.F.R. § 392.7, which prohibits a driver from driving the vehicle unless he is satisfied that the service brakes, including trailer brake connections, are in good working order. He also relies upon 49 C.F.R. § 396.13(a), which states that before driving the driver shall "be satisfied that the motor vehicle is in safe operating condition." As discussed above, Complainant testified that he believed a drastic drop in air pressure could render the service brakes ineffective, causing the emergency brakes to engage. Complainant believed that the air leak was in the turbo actuator. Mr. Dodson testified that an air leak in the actuator could not disable the service brakes because the turbo actuator would not receive air below 85 psi. Mr. Dodson's testimony calls into question the issue of whether an air leak in the turbo actuator could actually cause the service brakes to fail. However, this is inconsequential to the instant analysis because 49 C.F.R. §§ 392.7 and 396.13(a) concern whether the **driver** is satisfied that the truck is in safe operating order. Complainant clearly testified that he was **not satisfied** that the truck was in good working order when he made the refusal to drive. Therefore, I find an actual violation of 49 C.F.R. §§ 392.7 and 396.13(a) occurred when Complainant drove the truck. Accordingly, I find his refusal to drive was protected under 49 U.S.C. § 31105(a)(1)(B)(i).

Complainant argues that he refused to drive the truck because "parts and accessories which may affect safety of operation" were not in "safe and proper operating condition" as required by 49 C.F.R. § 396.3. Mr. Millard testified that an air leak at the turbo violates Regulation 396.3. Therefore, I find an actual violation of 49 C.F.R. § 396.3 occurred when Complainant drove the truck. Accordingly, I find his refusal to drive was protected under 49 U.S.C. § 31105(a)(1)(B)(i).

Complainant argues that he refused to drive the truck because of the oil leak. 49 C.F.R. § 396.5 requires motor carrier's to ensure that the motor vehicles subject to its control are "free of oil and grease leaks." 49 C.F.R. § 396.1(a) requires that drivers comply with the rules listed in Part 396. It is undisputed that there was an oil leak on Complainant's truck. Therefore, I find an actual violation of 49 C.F.R. §§ 396.1(a) and 396.5 occurred when Complainant drove the truck. Accordingly, I find his refusal to drive was protected under 49 U.S.C. § 31105(a)(1)(B)(i).

The second refusal to drive provision, 49 U.S.C. § 31105(a)(1)(B)(ii), focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury "to the employee or the public because of the vehicle's hazardous safety or security condition."

The STAA defines reasonable apprehension as:

[A]n employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. **To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.**

49 U.S.C. § 31105(a)(2) (emphasis added).

Complainant argues his refusal to drive the truck was also based upon a reasonable apprehension of serious injury and protected under 49 U.S.C. § 31105(a)(1)(B)(ii). He argues that although the air leak and oil leak did not result in an

accident, breakdown or serious injury, an objectively reasonable truck driver in Complainant's situation would reasonably conclude that driving the truck established a real danger of accident or injury. Respondent contends a reasonable driver in Complainant's situation would not reach such a conclusion because Respondent informed Complainant that Kenworth of St. Louis had assured them that the truck was safe to drive.

Complainant testified that he believed any air or oil leak is a safety hazard. Complainant testified that an audible air leak could potentially cause a major issue. He believed a drastic drop in air pressure could render the service brakes ineffective and cause the emergency brakes to engage, which could possibly cause a jack knife of the unit. He observed that all of the air in his truck's air system had leaked while it was parked overnight at the Kenworth facility. He previously experienced two turbo failures, one of which resulted in a breakdown. Accordingly, I find that Complainant believed the oil and air leaks were a safety concern, and this belief was subjectively reasonable.

Respondent argues that Complainant's belief was not reasonable because several representatives of Respondent informed Complainant that Kenworth of St. Louis had assured them that the truck was safe to drive. Complainant testified that Mr. Ball tried to convince him it was safe to drive the vehicle. He also received a Qualcomm message from Mr. Schlegel indicating that the leaking turbo actuator was not a safety issue. Complainant testified that he later spoke to Mr. Switzer. Complainant told Mr. Switzer that he was still concerned about the leaks. Further, Mr. Schlegel admitted that Kenworth was instructed not to repair the actuator air leak. Mr. Switzer and Mr. Millard, who were both also former truck drivers, testified that air leaks and oil leaks are safety concerns. Accordingly, I find Complainant's belief that the air and oil leaks were a safety concern to be objectively reasonable. Based on the foregoing, I find Complainant's refusal to drive was protected under 49 U.S.C. § 31105(a)(1)(B)(ii).

The Secretary of Labor has held that "[t]he fact that [the driver], because of the fear that he would be discharged, ultimately decided to take out the load-did not make this initial refusal to do so any less of an activity protected in section 2305(b) of the STAA." Palmer v. Western Truck Manpower, 1985-STA-6 (Sec'y Jan 16, 1987).

On June 2, 2010, Mr. Schlegel contacted Complainant through a Qualcomm message. The message stated, "The truck has been repaired. A leaking turbo actuator is not a safety issue. If you do not wish to drive the truck back to Boise let's say so now and I'll send a recovery driver. Otherwise, quit the nonsense and let's get to work." Complainant testified this was the first message he ever received from Mr. Schlegel, and he felt intimidated. Complainant felt if he did not drive the truck, he would be fired. Complainant also testified that Mr. Ball told him the truck would not be repaired and to "deal with it." Complainant testified that he felt it was unsafe to drive the truck, but he drove it because he believed his job was threatened. Respondent has offered no evidence showing it was unreasonable for Complainant to fear being fired if he did not drive the truck. Accordingly, I find his ultimately deciding to drive the truck did not make his initial refusal to do so any less of a protected activity.

E. Respondent's Adverse Action

The STAA states that an employer may not "discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment." 49 U.S.C. § 31105(a)(1). Thus, termination or discharge from employment is not required; rather demonstration of an adverse action by the employer is sufficient.

In Long v. Roadway Express, Inc., Case No. 1988-STA-31 (Sec'y Sep. 15, 1989), the Secretary held any employment action by an employer which is unfavorable to the employee, the employee's compensation, terms, conditions or privileges of employment constitutes an adverse action. Thus, regardless of the employer's motivation, proof that such a step or action was taken is sufficient to meet the employee's burden of establishing that the employer took adverse action against the employee. Id. In a case tried fully on the merits, the relevant inquiry is whether the complainant "established, by a preponderance of the evidence" that the employer "subjected him to adverse action in retaliation for protected activity." Walters v. Exel North American Road Transport, Case No. 2002-STA-3 @ 2 (ARB Dec. 10, 2004).

In August 2010 the Secretary of Labor issued new implementing regulations under the STAA that define the scope of discipline or discrimination actionable under the STAA's whistleblower protections. 29 C.F.R. § 1978.102. Those regulations make it a violation for an employer to "intimidate,

threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]” 29 C.F.R. §§ 1978.102(b), (c). The Administrative Review Board (ARB) has recognized that the regulations broaden prior interpretations of what constitutes an adverse action under the STAA. Strohl v. YRC, Inc., Case No. 2010-STA-35 (ARB Aug. 12, 2010).

Complainant bears the burden of showing that his protected activity was a contributing factor in Respondent’s decision to fire him. 49 U.S.C. § 31105(b). Complainant contends the close temporal proximity between his protected activities and his discharge supports a finding that the protected activities were a contributing factor in Respondent’s decision to fire him. Respondent contends Complainant has presented no evidence showing that his protected activities contributed to his termination. It contends Mr. Zahm made the decision to terminate Complainant with no knowledge of his complaints or refusal to drive.

Adverse action closely following protected activity “is itself evidence of an illicit motive.” Donovan v. Stafford Const. Co., 732 F.2d 954, 960 (D.C. Cir. 1984). The timing and abruptness of a discharge are persuasive evidence of an employer’s motivation. NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983), citing NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 465 (2d Cir. 1973). See NLRB v. RainWare, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984).

Complainant made internal complaints and refused to drive his truck on June 1, 2010 and June 2, 2010. It is undisputed Complainant was terminated by Respondent when he returned to Boise on June 7, 2010. The close temporal proximity between the protected activities and Complainant’s discharge is persuasive evidence of Respondent’s motivation.

Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. Bartlik v. TVA, Case No. 1988-ERA-15 @ 4 n.1 (Sec’y Apr. 7, 1993), aff’d, 73 F.3d 100 (6th Cir. 1996). However, “[C]onstructive knowledge of Complainant’s protected activities on the part of one with ultimate responsibility for personnel action may support an inference of retaliatory intent.” Frazier v. Merit Systems Protection Board, 672 F.2d 150, 166 (D.C. Cir. 1982). The Board has noted that while “knowledge of the protected activity can be shown by circumstantial evidence, that evidence must show that an

employee of Respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge of the protected activity." Bartlik v. Tennessee Valley Authority, Case No. 1988-ERA-15 (Sec'y Apr. 7, 1993).

Mr. Zahm testified that when he decided to fire Complainant, he had no information about Complainant refusing to drive his truck or the mechanical issues with his truck. There is no direct evidence indicating exactly when Mr. Zahm first learned of these actions. If Mr. Zahm's testimony were credible, it would be necessary to find that Complainant failed to establish one of the key elements of his **prima facie** case.

Based upon the testimony of Mr. Schlegel and Mr. Zahm regarding the operation of the company, it appears unlikely that Mr. Zahm had no knowledge of the complaints made by Complainant and his failure to drive. Mr. Zahm testified that he did not handle breakdowns. However, he deals with Navajo Express, through whom Complainant's original complaints were made. He is also the direct supervisor of the operations department, through Mike Anthony. Mr. Zahm had access to the Qualcomm system, and he noted that Qualcomm is an operations issue.

Mr. Zahm testified that he made the decision to terminate Complainant alone. However, the timing is suspect. On June 7, 2010, Mr. Schlegel asked Mr. Ball and Mr. Switzer to handle a situation regarding an alleged class action lawsuit that was brought to his attention. He testified he did not know which driver was involved, and that he did not tell Mr. Ball to fire anyone. In a memorandum, Mr. Schlegel wrote on June 7, 2010, he noted that he told Mr. Ball and Mr. Switzer to deal with the situation and "stop this nonsense." He indicated that an hour later he was informed that Complainant was terminated. Mr. Zahm testified that Mr. Ball informed him that Complainant was in the yard getting drivers "riled up" about a class action law suit. Mr. Zahm then told Mr. Ball (who knew about Complainant's complaints and refusal to drive) and Mr. Switzer to get rid of Complainant. Mr. Switzer could not recall Mr. Zahm previously instructing him to fire a driver. I find it improbable that both Mr. Zahm and Mr. Schlegel spoke to Mr. Ball and Mr. Switzer about the class action lawsuit and Complainant's attempt to make sales, yet none of them spoke about Complainant's internal complaints and his refusal to drive.

In addition, Respondent only employed 15 office staff in 2007, and at least five of those staff members were related to Mr. Schlegel. This leads me to conclude that Respondent is a small, family enterprise, which may be sufficient evidence by itself to warrant a finding that Complainant's protected activities were made known to Mr. Zahm before Complainant's termination. See Ass't Sec'y & Mulanax and Andersen v. Red Label Express, Case No. 1995-STA-14 @ 15 (ALJ July 7, 1995) (citing D & D Distribution Co. v. NLRB, 801 F.2d 636, 641 (3rd Cir. 1986)).

Based on the foregoing, I find that Complainant proved by a preponderance of the evidence that he engaged in protected activity, and that Respondent took an adverse employment action against him. I also find that Respondent had knowledge of Complainant's protected activity, and Mr. Zahm had constructive knowledge of Complainant's protected activity. The remaining issue to be decided is whether his protected activity was a contributing factor in the unfavorable personnel action. Complainant has not presented direct evidence that his protected activity was a contributing factor to his discharge. As discussed above, an ALJ may infer that protected activity contributed to the termination where the complainant discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation. Thus, the pivotal issue is whether Respondent's termination of Complainant was motivated **even in part** by his protected activities. I find Respondent's action was so motivated for the reasons below.

F. The Alleged Legitimate, Nondiscriminatory Reason for Termination

The Act does not prohibit an employer from discharging a whistleblower where the discharge is not motivated by retaliatory animus. See, e.g., Newkirk v. Cypress Trucking Lines, Inc., Case No. 1988-STA-17 @ 9 (Sec'y Feb. 13, 1989) (although a complainant engaged in protected activity, he was terminated by the respondent's managers who collectively determined to discharge the complainant for his failure to secure bills of lading); cf. Lockert v. United States Department of Labor, 867 F.2d 513, 519 (9th Cir. 1989) (an employee who engages in protected activity may be discharged by an employer if the employer has reasonable grounds to believe the employee engaged in misconduct and the decision was not motivated by protected conduct); Jackson v. Ketchikan Pulp Co., Case No. 1993-WPC-7 (Sec'y Mar. 4, 1996) (when a respondent's beliefs that

the complainants engaged in sabotage, which was not a protected activity, played a major role in its decision to terminate them, it needed to prove only that the managers who decided to fire the complainants had a reasonable and good faith belief the complainants engaged in the unprotected activity).

To prevail under the Act, the employee must establish that the employer discharged him because of his protected whistleblowing activity. Newkirk, supra @ 8-9. It is Respondent's subjective perception of the circumstances which is the critical focus of the inquiry. Allen v. Revco D.S., Inc., Case No. 1991-STA-9 @ 5-6 (Sec'y Sept. 24, 1991) (a complaint was dismissed when the respondent presented evidence of a legitimate business reason to discharge complainant -- falsification of logs of records - and the evidence permitted an inference that the employer believed that the schedule could be run legally and believed that complainant illegally and unnecessarily falsified his logs).

Respondent contends Complainant's consistent low miles, his failure to discuss his low miles with his supervisor and his altercation with Mr. Zahm contributed to Mr. Zahm's decision to terminate Complainant.

Respondent contends that Complainant was discharged due to low mileage. Disparate treatment of similarly situated employees may provide evidence of pretext. Douglas v. Skywest Airlines, Inc., Case No. 2006-AIR-14 @ 17 (ARB Sept. 30, 2009). The ARB defined "similarly situated" employees as individuals "involved in or accused of the same or similar conduct but disciplined in different ways." Id.

Respondent stipulated that no other drivers were discharged for low mileage while Complainant was employed by Respondent. Respondent argues that Troy Tolson, Bart Griffith, Shawn Wyant and William Panzeri were also terminated due to low miles. Mr. Schlegel testified that only five to ten drivers have been fired for failing to meet the mileage requirement since its implementation in 1998. Further, Mr. Zahm testified that typically a driver is not terminated until after he has low miles for five or six months. The June 3, 2010 "needs improvement list" indicated that Complainant only had two prior letters of concerns and one warning in March 2010. The record clearly indicates that there were other drivers with mileage issues who were not fired. In August 2010, Tamie Proper had received seven warning letters for low miles, but was not discharged by Respondent. Accordingly, I find this disparate

treatment of similarly situated employees to be evidence of pretext. I find that Respondent failed to demonstrate by clear and convincing evidence that it would have taken the same adverse action in any event based on Complainant's low mileage.

Respondent also contends Complainant was discharged due to his failure to discuss his low miles with his supervisor. Both Complainant and Mr. Ball testified that they discussed Complainant's low miles after he received his first letter of concern. Complainant further testified that Mr. Ball informed him that he understood Complainant's truck had been in the shop. Complainant also testified that he believed he talked to Mr. Ball by telephone about the second letter of concern. Respondent presented no evidence showing that it has a practice of firing employees who fail to meet with their dispatchers regarding a letter of concern. Accordingly, I find that Respondent failed to demonstrate by clear and convincing evidence that it would have taken the same adverse action in any event based on Complainant's failing to speak to his dispatcher.

Finally, Respondent contends that Complainant was discharged due to his insubordinate and disrespectful behavior toward Mr. Zahm. Mr. Zahm testified that he decided to terminate Complainant on May 27, 2010, after the confrontation about the screens, and Complainant's low miles were "just icing on the cake." Mr. Zahm indicated that he deferred the decision until Complainant returned from his trip to St. Louis because he has a policy of not terminating drivers while they are out on a job. However, the record indicates that Complainant's truck was in Respondent's shop from May 27, 2010 through May 29, 2010. In Pollock v. Continental Express, Inc., Case No. 2006-STA-1 @ 10-11 (ARB April 7, 2010), the Board affirmed an ALJ's finding that retention of a difficult employee until he engages in a protected activity is evidence of pretext. Complainant was in Boise for two days after the confrontation with Mr. Zahm. Mr. Zahm had an opportunity to fire Complainant, but he failed to do so. Accordingly, I find Mr. Zahm's failure to act to be evidence of pretext. I find that Respondent failed to demonstrate by clear and convincing evidence that it would have taken the same adverse action in any event based on Complainant's alleged behavior towards Mr. Zahm.

Based on the foregoing, I find that Complainant presented sufficient circumstantial evidence to discredit Respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation. Therefore, I also find that the protected activity contributed to Complainant's

discharge. Further, I find and conclude Respondent has failed to establish by clear and convincing evidence that it would have taken the adverse action against Complainant regardless of the June 1, 2010 and June 2, 2010 internal complaints and refusal to drive. Respondent's assertions appear to be conjecture not supported by the evidence presented. Temporal proximity between Complainant's protected activity and his discharge by Respondent is also persuasive in establishing a causal connection for Respondent's adverse actions and justifying a retaliatory motive. See Skinner v. Yellow Freight System, Inc., Case No. 1990-STA-17 @ 7 (Sec'y May 6, 1992).

G. Relief

A successful complainant under the STAA is entitled to affirmative action to abate the violation, reinstatement to his former position with the same pay, terms and privileges of employment, attorney fees and costs reasonably incurred, and may also be awarded compensatory damages.

Specifically, the STAA provides that:

(A) If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor shall order the person to

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and

(iii) pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(B) If the Secretary of Labor issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary of Labor may assess against the person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint. The Secretary

of Labor shall determine the costs that reasonably were incurred.

(C) Relief in any action under subsection (b) may include punitive damages in an amount not to exceed \$250,000.

49 U.S.C. § 31105(b)(3)(A)-(C). Considering the foregoing findings and conclusions, reinstatement, back pay, restoration of benefits, interest and attorney fees and costs are hereby ordered.

1. Reinstatement

Reinstatement provides an important protection for employees who report safety violations. "[T]he employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review." Brock v. Roadway Express, Inc., 481 U.S. 252, 258-250 (1987). These protections also extend to employees who refuse to drive vehicles because of safety concerns. 49 C.F.R. § 392.7. Reinstatement is an appropriate, statutory remedy under the circumstances of this case. See Clifton v. United Parcel Service, Case No. 1994 STA-16 @ 1-2 (ARB May 14, 1997) (no front pay where reinstatement is an appropriate remedy).

In the absence of a valid reason for not returning to his former position, immediate reinstatement should be ordered. Dutile v. Tighe Trucking, Inc., Case No. 1993-STA-31 (Sec'y Oct. 31, 1994). Accordingly, Complainant is entitled to immediate reinstatement to his former position with the same pay and terms and privileges of employment, or if his former job no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions and benefits. Respondent's back pay liability terminates upon the tendering of a **bona fide** offer of reinstatement even if Complainant rejects it. Id.

2. Back Pay

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Dutkiewicz v. Clean Harbors Environmental Services, Inc., Case No. 1995-STA-34 (ABR Aug 8, 1997). Back pay calculations must be reasonable and

supported by the evidence; they need not be rendered with "unrealistic exactitude." Cook v. Guardian Lubricants, Inc., Case No. 1995-STA-43 @ 11 (ARB May 30, 1997). Back pay is typically awarded from the date of a complainant's termination until reinstatement to his former employment. Any uncertainties in calculating back pay are resolved against the discriminating party. Kovas v. Morin Transport, Inc., Case No. 1992-STA-41 (Sec'y Oct. 1, 1993).

Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, the allocation of the burden of proof is reserved, i.e., it is the employer's burden to prove by a preponderance of the evidence that the back pay award should be reduced because the employee did not exercise reasonable diligence in finding other suitable employment. Polwesky v. B & L Lines, Inc., Case No. 1990-STA-21 (Sec'y May 29, 1991); See also Johnson v. Roadway Express, Inc., Case No. 1999-STA-5 @ 16 (ARB Mar. 29, 2000) (it is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages).

The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. Johnson v. Roadway Express, Inc., Case No. 1999-STA-5 @ 4 (ARB Dec. 30, 2002); See also Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527 (11th Cir. 1991).

Respondent contends Complainant is not entitled to back pay because he did not mitigate his damages and was not diligent in his search for a comparable job. Respondent argues that the trucking industry as a whole experienced a shortage of drivers during the time period after Complainant's termination. However, Respondent has produced no evidence establishing that substantially equivalent jobs were available or that Complainant failed to make reasonable efforts in finding other employment.

Complainant seeks back pay from June 7, 2010 through May 9, 2012, when he began working for Navajo Express. He does not seek back pay for the two month period he was employed by CMS Transportation. In brief, Complainant argues that he went to work at Navajo Express 75.4 weeks after Respondent fired him. I find this to be a miscalculation because there were 100.3 weeks between his termination and beginning work at Navajo Express. Thus, Complainant is entitled to back pay from the date of his discharge on June 7, 2010, until he began working for Navajo

express, less the two months (8.6 weeks) he was employed by CMS Transportation.

Complainant earned \$10,778.83 in wages and \$2,771.44 per diem from Respondent in 2009, and he earned \$10,364.06 in wages and \$5,132.49 per diem in 2010. (RX-7). Thus, he earned a total of \$29,046.82 while working for Respondent from August 26, 2009 through June 7, 2010 (40.5 weeks). Therefore, I find Complainant's weekly wages were \$717.20 ($\$29,046.82 \div 40.5 = \717.20). Complainant's back pay entitlement is \$65,767.24 (100.3 weeks - 8.6 weeks = 91.7 weeks) (91.7 weeks x \$717.20 per week = \$65,767.24) commencing on June 8, 2010 through May 9, 2012, less two months of temporary employment.

3. Compensatory Damages

Complainant contends he is entitled to damages for emotional distress and mental pain. Compensatory damages are designed to compensate for direct pecuniary loss and also such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. Hobby v. Georgia Power Co., Case No. 1990-ERA-30 (ARB Feb. 9, 2001). The complainant has the burden to prove that he has suffered from mental pain and suffering and that the discriminatory discharge was the cause. Crow v. Noble Roman's Inc., 1995-CAA-8 (Sec'y Feb. 26, 1996). The Board has held that a complainant's credible testimony alone can be sufficient to establish emotional distress. Ferguson v. New Prime, Inc., Case No. 2009-STA-047 (ARB Aug. 21, 2011).

Complainant testified that he lived off of his personal savings after being fired from Respondent. He testified that his lifestyle changed drastically because he could not take vacations or eat out at restaurants. He also had to cut back on his cellphone bill. He testified he felt a loss of self-worth because of the termination. Complainant cites Fink v. R&L Carriers Shared Services, LLC, Case No. 2012-STA-6 (ALJ Nov. 20, 2012). In Fink, the complainant testified that he was the major breadwinner in his family and was embarrassed to tell them he lost his job. Id. @ 20. He also testified that he lost his home due to his termination. Id. Complainant indicated that he was required to cut down on some non-essential expenses. He testified that he had a loss of self-worth, but he did not explain or substantiate the emotional impact it had on him unlike the scenario presented in Fink. Accordingly, I find Complainant is not entitled to compensatory damages in the instant case.

4. Punitive Damages

The STAA allows for an award of punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 31105(b)(3)(C).

The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law" Smith v. Wade, 461 U.S. 30, 51 (1983). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979).

Complainant seeks \$50,000.00 in punitive damages. He argues that he is entitled to punitive damages because high level management officials displayed animus toward activity protected under the STAA.

An ALJ recently found that \$50,000.00 in punitive damages was appropriate where a discharge in violation of the STAA was made by a high management official. Fink, supra. In the instant case, Mr. Schlegel directed Complainant to drive the truck even though he knew there were leaks which violated DOT regulations. However, I find Complainant has not shown a loss as egregious as the actions of the high management officials in Fink. Nonetheless, Complainant has established that Respondent's actions rose to the level of reckless or callous disregard for his rights. Therefore, I find it appropriate to award punitive damages in the amount of \$25,000.00.

5. Posting a Copy of this Decision and Order

The ARB has noted that it is a standard remedy in discrimination cases to require a respondent to notify its employees of the outcome of a case against their employer by posting a Notice of its violations. In Michaud v. BSP Transport, Inc., Case No. 1995-STA-29 (ARB Oct. 9, 1997), the ARB approved an order requiring the respondent to post a notice for 30 days. Accordingly, Respondent shall post a copy of the Order set forth at page 76 of the instant Decision and Order in all places where employee notices are customarily posted for 30 consecutive days.

H. Interest

Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Complainant's termination on June 7, 2010, until the instant order of reinstatement. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made. Moyer v. Yellow Freight Systems, Inc., [Moyer I], Case No. 1989-STA-7 @ 9-10 (Sec'y Sept. 27, 1990), rev'd on other grounds sub nom. Yellow Freight Systems, Inc. v. Martin, 954 F.2d 353 (6th Cir. 1992). The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a) (2010) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621. Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. Double R Trucking, Inc., Case No. 1998-STA-34 @ 3 (ARB Jan 12, 2000). The interest is to be compounded quarterly. Id.

I. Attorney's Fees and Costs

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 31105(b)(3)(B); Murray v. Air Ride, Inc., Case No. 1999-STA-34 (ARB Dec. 29, 2000). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted thirty (30) days from the date of the Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

IV. ORDER

Pursuant to the formal hearing conducted in this matter on September 27-28, 2012, and based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Respondent shall offer Complainant, Thomas J. Graff, reinstatement to his former position with the same pay, terms and privileges of employment that he would have received had he continued working from June 7, 2010, through the date of the offer of reinstatement.

2. Respondent shall pay Complainant, Thomas J. Graff, back pay at the weekly wage of \$717.20 for the period of June 8, 2010 through May 9, 2012, less 8.6 weeks, or \$65,767.24, less authorized payroll deductions, with interest thereon calculated pursuant to 26 U.S.C. § 6621.

3. Respondent shall expunge from the employment records of Complainant, Thomas J. Graff, any adverse or derogatory reference to his protected activities of June 1, 2010 and June 2, 2010, and his discriminatory termination on June 7, 2010.

4. Respondent shall cause all consumer reporting agencies to which it has made a report about Complainant, Thomas J. Graff, to amend their report to delete unfavorable work record information and show continuous employment with Respondent.

5. Respondent shall pay Complainant, Thomas J. Graff, punitive damages in the amount of \$25,000.00.

6. Respondent shall post a copy of this Order in all places where employee notices are customarily posted for 30 consecutive days.

7. Counsel for Complainant shall have thirty (30) days from the date of this Decision and Order within which to file a fully supported and verified application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

ORDERED this 1st day of April, 2013, at Covington, Louisiana.

LEE J. ROMERO, JR.
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, the Associate Solicitor, 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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).