



Issue Date: 02 May 2014

Case No. 2012-STA-00023

In the Matter of:

BEAUFORD SALYER,  
Complainant,

v.

SUNSTAR ENGINEERING,  
Respondent.

**DECISION AND ORDER DENYING  
SURFACE TRANSPORTATION ASSISTANCE ACT CLAIM**

On March 16, 2012, Complainant, Beauford Salyer (“Complainant”) filed a complaint with the Department of Labor, Occupational Safety and Health Administration (“OSHA”), alleging that Sunstar Engineering (“Respondent”), his former employer, discriminated against him in violation of the Surface Transportation Assistance Act (“STAA”), 49 U.S.C. § 31101 *et seq.* On April 4, 2012, an OSHA investigator determined that Respondent did not violate the STAA and dismissed the complaint. On April 16, 2012, Complainant objected to the OSHA investigator’s determination. Thereafter, the claim was transferred to the Office of Administrative Law Judges (“OALJ”) for a hearing.

On June 7, 2012, I issued an Order notifying the parties that the case had been assigned to me and of my intent to schedule a telephone conference. On July 26, 2012, I issued a Notice of Hearing and Prehearing Order notifying the parties of a hearing scheduled on January 28, 2013, in Dayton, Ohio. The parties were given until October 29, 2012, to file dispositive motions. On October 23, 2012, the Respondent filed a Motion for Summary Judgment. On October 29, 2012, the Complainant submitted a letter in response to the Respondent’s motion. On December 13, 2012, I denied Respondent’s motion. On April 17, 2013, I issued a Notice of Hearing notifying the parties of a formal hearing scheduled on May 14, 2013, in Dayton, Ohio.

At the time of the hearing, the parties appeared and were given the opportunity to present evidence and arguments. At the hearing, Complainant testified on his own behalf. The Respondent presented testimony from Kelly Coleman, Respondent’s former Environmental and Safety Coordinator; Ralph “R.C.” McLaughlin, Respondent’s Manufacturing Director; Ronnie Jones, Respondent’s Maintenance Supervisor; and Amy Settich, Respondent’s Human Resources Director. At the hearing, I admitted Respondent’s Exhibits (“RX”) 1-14.

Complainant submitted an Ex Parte letter on May 29, 2013. I issued a Notice of Ex Parte Contact to the parties on July 22, 2013. Respondent submitted a Post-Hearing Brief on

July 22, 2013. Complainant submitted another Ex Parte letter on December 3, 2013. I issued another Notice of Ex Parte Contact to the parties on December 5, 2013. On December 12, 2013, Respondent filed a Motion to Strike Written Ex Parte Communications.<sup>1</sup> I have based my decision on all of the evidence, the laws and regulations that apply to the issues under adjudication, and the representations of the parties.

## **EXHIBITS**

### **Respondent's Exhibits**

- RX 1: Resume of Beauford Salyer, Jr.
- RX 2: Employment Application dated August 15, 2011
- RX 3: Offer of Employment dated October 2, 2011
- RX 4: Job Description – Driver/Warehouse Operator dated September 2011
- RX 5: Acknowledgement of Receipt of Employee Handbook dated October 18, 2011
- RX 6: Sunstar Engineering Employee Handbook
- RX 7: Employee Orientation Materials
- RX 8: Work Instruction – DOT Daily Inspections
- RX 9: Vehicle Inspection Reports
- RX 10: Memo re Salyer Resignation dated January 17, 2012
- RX 11: Memo re Salyer Resignation dated January 19, 2012
- RX 12: Memo re Details of Warehouse Position as Explained to Salyer dated February 28, 2012
- RX 13: Sunstar Audit – DOT dated February 29, 2012
- RX 14: Sunstar Audit – DOT dated May 11, 2012

## **HEARING TESTIMONY<sup>2</sup>**

### **Beauford Salyer**

Complainant was hired by Respondent in October 2011 as a Driver/Warehouse Operator at its Springboro, Ohio location (Hearing Testimony Transcript (“Tr.”) at 12-13). Complainant hauled material for Respondent for approximately nine years while working for another company (Tr. at 32). Respondent sought to hire Complainant after it decided to in-source its trucking operation (Tr. at 33). Complainant was informed that he was being hired as a driver and that he would be required to drive, load, or unload trucks (Tr. at 12). Before he began driving, Complainant helped research a truck purchase for Respondent (Tr. at 13). Complainant test drove the truck and determined it was not unsafe to drive (Tr. at 33). Complainant made it known that the truck had a bad tandem tire before the truck was purchased (Tr. at 15, 29, 33).

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<sup>1</sup> The Complainant’s correspondence contains non-evidentiary statements and allegations. My decision is not based on any unproven, alleged facts from these letters, and to this extent I am granting Respondent’s Motion to Strike. However, when considering Complainant’s *pro se* status I have attempted, wherever possible, to interpret these statements as arguments Complainant is asserting on his own behalf.

<sup>2</sup> The following are summaries of the testimony taken at the time of the hearing and are not my findings of fact or conclusions.

Once Complainant began driving, safety issues arose and Complainant stated that he became concerned that there was no log book for him to write the results of what he believed were mandatory pre-trip inspections (Tr. at 14). Because Respondent did not obtain a log book for several weeks after he began driving, Complainant spoke directly to Mr. Jones, the Maintenance Supervisor, regarding any issues with the truck (Tr. at 14-15). In addition to the bad tandem tire,<sup>3</sup> the Complainant asserted that the truck had other issues, including fuel mixing in with the oil, a faulty clutch, a faulty grease seal, and a faulty dimmer switch (Tr. at 15-16).<sup>4</sup> On several occasions, Complainant presented these issues directly to Mr. Jones (Tr. at 14). Complainant never drove the truck when it presented safety issues and did not consider it unsafe to drive when he was behind the wheel (Tr. at 16, 34). Whenever Complainant determined that the truck was unsafe to drive, Respondent would take it out of service for it to be repaired (Tr. at 44). If the truck was in for repair, Respondent leased an alternative truck for Complainant to drive (Tr. at 16). This occurred on two or three occasions (Tr. at 23). At one point, Complainant was approached by Mr. Coleman, the Environmental and Safety Coordinator, and instructed that he needed to start “writing up” his issues with the truck rather than reporting them directly to Mr. Jones (Tr. at 18). At that time, Complainant felt as though Respondent’s employees began acting in a way that suggested that they no longer wished to employ him (Tr. at 18).

After working for Respondent for a few weeks, Complainant was asked to perform other duties within the plant that were unrelated to driving (Tr. at 12-13). Complainant asserts that he had not agreed to perform any other work as part of his job duties (Tr. at 34-35). Complainant testified that he was under the impression that he would be paid for forty hours even if there was not enough time driving time to fulfill his forty hours (Tr. at 34-35). When he was not driving, Complainant was assigned to sweep parts of the plant (Tr. at 40). Complainant argued that he should not be required to sweep, as he only considered himself a driver (Tr. at 41-42).

At some point during his tenure with Respondent, Complainant states he noticed that water was leaking into truck trailers from the building’s awning at the Franklin sprocket plant (Tr. at 17). Complainant asserts that he became concerned because he was hauling white lime and believed that if the white lime came in contact with water, it would ignite (Tr. at 17). Complainant testified that, while Mr. Coleman and Mr. Jones were present, Complainant had a conversation with Mark, an employee in shipping and receiving, about the leak (Tr. at 17-18). Complainant stated that Mr. Coleman and Mr. Jones told him that he needed to “write up” any issues (Tr. at 18).

Additionally, Complainant believed Respondent was carrying toxic materials: “just about everything that goes into their warehouses, their sprocket plant and their warehouse in Dayton is hazardous [,] [i]t’s all placarded” (Tr. at 24). Most of what Complainant believed to be hazardous materials were allegedly corrosive materials (Tr. at 25). Complainant thought that the hazardous or toxic materials were not placarded when sent out and that Respondent had falsified bills of lading (Tr. at 24). Complainant stated that he feared being caught transporting a load that

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<sup>3</sup> According to Complainant, the bad truck tire was not repaired until the end of his tenure, nearly three months after the truck was purchased (Tr. at 15, 28, 33). Furthermore, Complainant testified that he had to re-fill the tire with air every two to three days (Tr. at 15, 28, 33).

<sup>4</sup> To the best of Complainant’s knowledge, all necessary repairs were made with the exception of the grease seal (Tr. at 16).

was not placarded with a wrong bill of lading (Tr. at 25). However, Complainant admitted that he never refused to drive because he thought doing so would violate a safety regulation or because he had a reasonable apprehension of danger because the vehicle was in an unsafe condition (Tr. at 26). Despite his concerns, Complainant testified that he never made an effort to determine whether the material he was carrying for Respondent was actually hazardous (Tr. at 44). Furthermore, Complainant admitted that he never filed a complaint or spoke to any managing employee regarding his concerns about transporting hazardous or toxic materials during his employment (Tr. at 45).

Claimant averred that, toward the end of his employment, Ms. Settich, Mr. McLaughlin, and Nick Stewart had several office meetings with him to discuss Complainant's work hours and duties (Tr. at 20). The last meeting occurred two weeks before Complainant left his position in January 2012 (Tr. at 20-21). During the office meetings, Complainant asserted that Ms. Settich, Mr. McLaughlin, and Mr. Stewart discussed his performing shop work and maintenance of the truck he was given to drive (Tr. at 22, 28). Ms. Settich, Mr. McLaughlin, and Mr. Stewart allegedly informed Complainant that the truck was Respondent's responsibility and that it would be repaired when needed (Tr. at 21). During the last meeting, Complainant resigned after being told that his probationary period was being extended:

A. I can't remember but it was like I told them, you know, I said you guys have done everything illegal. I just don't want to work with you no more, you can get somebody else.

Q. All right. So at the third meeting you quit your job?

A. I don't know if it was the second or third or what, but one of the meetings when they extended my probationary period, what they done.

Q. Okay. But you – they didn't fire you? You quit, correct?

A. Yeah.

(Tr. at 27).

Complainant asserts he was not given any reason for the extension of his probationary period (Tr. at 48). After his tenure ended, Complainant states that he filed complaints with Public Utilities Commission of Ohio and the Environmental Protection Agency regarding his concerns about transporting hazardous materials (Tr. at 27).

Kelly Coleman

Mr. Coleman was employed by Respondent for 20 years (Tr. at 52). When employed by Respondent, Mr. Coleman was responsible for compliance as the Environmental Health and Safety Coordinator (Tr. at 52). Mr. Coleman states that he did not participate in the decision to hire Complainant, but performed orientation training with Complainant based on the job description for a driver/warehouse operator (Tr. at 53-55).

Mr. Coleman testified that he had several conversations with Complainant regarding Respondent's expectation in terms of the vehicle inspection reports (Tr. at 59). Complainant

voiced some strong concerns about not having a log in which to report them<sup>5</sup> (Tr. at 59). There were several instances where Mr. Coleman had to reference printed Department of Transportation (“DOT”) materials to show Complainant that Respondent was actually in compliance and that Complainant misunderstood the actual DOT requirements (Tr. at 60). At some point during Complainant’s tenure, a plant supervisor informed Mr. Coleman that Complainant was concerned that repairs were not being completed on the truck he was driving (Tr. at 60). Mr. Coleman stated that he sought a written inspection report so that he could follow up with the repair with Mr. Jones and Mr. McLaughlin (Tr. at 60). Mr. Coleman was informed there was no written inspection report for the repairs Complainant mentioned (Tr. at 60). Complainant had not documented his complaint due to his fear of making Respondent “look bad” in case of an inspection (Tr. at 60). Mr. Coleman stated that he immediately notified management and attempted to correct the issue of the missing documentation (Tr. at 61). At that time, Mr. Coleman had another discussion with Complainant where he asserts that he informed Complainant that his failure to document issues was keeping Respondent from complying with DOT requirements (Tr. at 61-62). He also stated that Complainant agreed to correct the issue (Tr. at 61). Mr. Coleman testified that there were no issues with the truck that were not repaired, and all repairs were completed as soon as reasonably possible (Tr. at 72). Throughout Complainant’s tenure with Respondent, Mr. Coleman averred that he had six to ten conversations with Complainant to follow up with any issues he had, including repairs to the truck (Tr. at 54).

Mr. Coleman further testified that, on several occasions during his employment, Complainant informed him that he was concerned with the requirement that he perform duties other than driving (Tr. at 62). Mr. Coleman told Complainant that he should express his concern to Human Resources (Tr. at 62). Eventually, Mr. Coleman went to Ms. Settich and Mr. McLaughlin to explain the situation (Tr. at 63). Mr. Coleman averred that Respondent expected employees to “fill in” wherever they are needed once they have performed their initial job duties and that Respondent’s employees receive cross-training for that specific reason (Tr. at 63-64).

Mr. Coleman testified that Complainant never spoke to him about any allegations regarding the transport hazardous or dangerous material. Mr. Coleman did state that he learned of concerns about a damaged dock seal which might allow water to enter the back of the truck and interact with its contents from a dock worker (Tr. at 64, 70). He further acknowledged that, while DOT does not consider white lime to be a hazardous material, the white lime could generate heat if it became wet (Tr. 69-70). However, Mr. Coleman stated that the dock seal was repaired after it was reported without incident (Tr. 70).

Mr. Coleman was not involved in the decision to extend Complainant’s probationary period but knew that the decision was based in part on Complainant’s inability or unwillingness to properly complete vehicle inspection reports (Tr. at 65-66).

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<sup>5</sup> Mr. Coleman believed that Complainant’s previous employment caused Complainant some confusion with regard to vehicle inspection reporting requirements due to the differences between “short-haul” and “long-haul” trucking (Tr. at 59).

Ralph "R.C." McLaughlin

Mr. McLaughlin has been employed by Respondent for nine years (Tr. at 74). As a Manufacturing Director, Mr. McLaughlin is responsible for shipping, receiving, order entry, production control departments, manufacturing departments, and the manufacturing management of Respondent's motorcycle branch (Tr. at 74). Mr. McLaughlin was involved in the hiring of Complainant after Respondent decided to in-source its trucking operation (Tr. at 74-75). Respondent had known Complainant for many years from previous work and had a good history with him (Tr. at 75). Complainant had worked for a company that shipped in and out of Respondent's facility since before Mr. McLaughlin was employed (Tr. at 75). Respondent's management knew Complainant and felt very comfortable with hiring him (Tr. at 75).

At Mr. McLaughlin's request, Complainant helped research a truck purchase (Tr. at 76). Complainant had great influence on which truck to purchase because no other employee had experience with trucking (Tr. at 76). During the truck purchase process, Complainant reiterated that he was not receiving forty hours where he had been employed and that full time employment was his biggest concern with going forward with a position with the Respondent (Tr. at 76). Mr. McLaughlin agreed to hire Complainant for forty hours per week but states that he told him that he was unable to guarantee how many hours would be spent driving (Tr. at 77). Mr. McLaughlin testified that he recalled frank conversations with Complainant specifically about not knowing how many of the forty available hours would be spent driving (Tr. at 77). Mr. McLaughlin stated that he did not indicate to Complainant that if he did not have driving work to do that he would still be paid without performing any other work (Tr. at 77). Mr. McLaughlin testified that, despite the possibility of the non-driving duties, Complainant was eager to work for Respondent because he was looking for a secure job even if all forty hours might not be driving (Tr. at 77).

Mr. McLaughlin asserted that he spoke to Complainant specifically about things that Complainant might be expected to do as part of his non-driving job duties (Tr. at 78). Complainant would be expected to sweep, clean, paint, drive a forklift, and load and unload his loads (Tr. at 78). Complainant did not give any objection during the conversations about that description of duties before he was hired (Tr. at 78). However, at some point during Complainant's tenure, Mr. McLaughlin witnessed the Production Supervisor assigning Complainant to sweep the dock area while he waited for his truck to be unloaded and Complainant being unhappy about it (Tr. at 79). Complainant protested that he was a driver and that he was not "a sweeper or painter or cleaner or anything else" (Tr. at 80). Complainant had disputes with his supervisor about it not being "his mess" and that he did not understand why he had to clean it up (Tr. at 80). Mr. McLaughlin stated that Complainant was never assigned duties in retaliation and his duties were never changed because of his actions (Tr. at 79). Mr. McLaughlin asserted that the two individuals hired to replace Complainant have the same additional non-driving job duties that Complainant was assigned during his employment (Tr. at 87-88).

Mr. McLaughlin testified that Respondent requires drivers to fill out a daily vehicle inspection report so that they have a record of "anything and everything" with regard the vehicle, to facilitate communication between the driver and maintenance, and to make sure that

everything is “all good” when repairs are made (Tr. at 80-81). Mr. McLaughlin recalls two conversations with Complainant regarding the daily vehicle inspections (Tr. at 81-82). Complainant would either not complete the reports or fail to properly fill them out (Tr. at 81). Instead of completing the reports as asked, Complainant was verbally reporting issues with the truck to Mr. Jones (Tr. at 81-82). When Mr. McLaughlin had conversations with Mr. Coleman about Complainant’s vehicle inspection reports he became aware of the importance of the properly filled out reports and passed this information along to the Complainant (Tr. at 81-82).

Mr. McLaughlin stated he was involved in the decision to extend Complainant’s probationary period (Tr. at 83). He stated that the probation extension was not meant to be punitive; it was meant to be an opportunity to improve because Respondent wanted to keep the employee (Tr. at 83). Mr. McLaughlin recalled that the Respondent had used a probation period extension in the past that had served them well (Tr. at 83). Mr. McLaughlin testified that the reasoning behind the extension of Complainant’s probation period was the vehicle inspection reports issue and Complainant’s attitude regarding performing non-driving duties (Tr. at 83). Respondent intended to extend the probationary period by thirty days (Tr. at 83). However, Complainant resigned upon hearing of the proposed probation extension, but agreed to continue his employment until Respondent found a replacement driver (Tr. at 84). Mr. McLaughlin asserted that, any concerns the Complainant had regarding transporting hazardous materials were not brought to his attention before the decision to extend his probationary employment period (Tr. at 84).

Ronnie Jones

Mr. Jones is employed by Respondent as a Maintenance Supervisor and is responsible for all maintenance of Respondent’s business (Tr. 90). Mr. Jones has been employed by Respondent since 2006 (Tr. at 90). When the Respondent was looking for a truck to purchase, Mr. Jones accompanied Complainant on an inspection and “test drive” of the truck that was eventually purchased (Tr. at 91).

According to Mr. Jones, after the Complainant was hired, he was required to do a walk-around inspection of his truck and record any issues in the daily vehicle inspection log (Tr. at 92). If a repair or maintenance issue was written on the daily inspection log, Mr. Jones would repair it unless it was beyond his capabilities (Tr. at 92). If the issue was beyond his skills to remediate, Mr. Jones would send the vehicle to a certified mechanic for repair (Tr. at 92). Mr. Jones testified that he would sign off on the vehicle log regarding the status of the repair (Tr. 93). Mr. Jones stated that, at some point during Complainant’s tenure, he had conversations with Mr. Coleman about Complainant’s failure to fill out daily vehicle inspection reports (Tr. at 96). Mr. Coleman brought the issue of the daily inspection reports to the attention of Mr. McLaughlin and Mr. Jones (Tr. at 96). At that time, Mr. Jones and Mr. Coleman spoke to Complainant about the issue (Tr. at 96). Regarding the issue of the “bad tire” the Complainant had noted, Mr. Jones asserted that the Complainant first raised this issue in the daily inspection log of January 4, 2012 (Tr. at 98; RX 9). Once Mr. Jones became aware of the issue with the tire, he asserts, it was repaired immediately (Tr. at 98; RX 9).

Mr. Jones stated that Complainant made comments in passing about his unhappiness with being asked to sweep (Tr. at 97). Mr. Jones felt that Complainant did not think that sweeping was part of his job duties (Tr. at 97). Mr. Jones testified that Respondent is a “small shop” where

everyone has to “chip in” and do whatever needs to be done (Tr. at 97). Complainant was replaced by two drivers who perform the same job duties that Complainant did, including non-driving activities (Tr. at 99-101).

Mr. Jones testified that the Complainant never complained to him regarding his concerns about transporting hazardous material or the water leak at the docking area in the Franklin facility (Tr. at 97-98).

### Amy Settich

Ms. Settich testified that she has been Respondent’s Human Resource Manager for six years (Tr. at 103). In her position, Ms. Settich is responsible for all human relations activities, including hiring, firing, benefits, and counseling (Tr. at 103). Ms. Settich stated that she was one of the decision makers regarding extending Complainant’s probationary period (Tr. at 104). Ms. Settich averred that Complainant’s probationary period was extended based on Complainant’s failure to properly complete the truck’s maintenance reports/log books and because of Complainant’s attitude in performing duties other than driving (Tr. at 104, 109). Ms. Settich was not aware of any complaints made by Complainant regarding hazardous substances being transported in the truck or about an issue with the truck that was not repaired (Tr. at 107). Ms. Settich stated that, during management’s discussion of extending Complainant’s probationary period, no issues regarding his affirmative complaints about the safety of the truck or the nature of the materials that were being carried were raised (Tr. at 109).

Ms. Settich stated that she wanted to extend Complainant’s probationary period for thirty days because, while Complainant’s performance had not been up to par, she wanted to give him the benefit of the doubt and an opportunity to improve (Tr. at 108-109). Complainant needed to better cooperate with the requirements of properly completing the vehicle inspection reports and performing non-driving duties (Tr. at 104-105). Ms. Settich asserted that, if Complainant had shown great improvement regarding his maintenance reports and his attitude, the probationary extension would have ended before the full thirty days expired (Tr. at 109). Ms. Settich stated that she had successfully used this type of extended probationary period with other employees in the past (Tr. at 109).

## **THE SURFACE TRANSPORTATION ASSISTANCE ACT**

“Congress enacted the STAA to combat the increasing number of deaths, injuries and property damage resulting from commercial trucking accidents.” *Roadway Express, Inc. v. United States Dep’t of Labor*, 495 F.3d 477, 480 (7th Cir. 2007) (citing *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 282 (1987) (internal quotations omitted)); see also *Brinks, Inc. v. Herman*, 148 F.3d 175, 179 (2d Cir. 1998) (“Congress sought to assure that employees are not forced to drive unsafe vehicles or commit unsafe acts and to provide protection for those employees who are discharged or discriminated against for exercising their rights and responsibilities.”) (internal quotations omitted). Section 31105 of the STAA prohibits covered employers from retaliating against employees who engage in certain protected activities relating to commercial motor vehicle safety and security. The STAA contains a whistleblower protection provision and a refusal to drive provision. The whistleblower protection provision provides that

a person may not “discharge, “discipline,” or “discriminate” against an employee because the employee has made a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order.” 49 U.S.C. § 31105(a)(1)(A). The refusal to drive provision provides that an employer may not discharge, discipline, or discriminate against an employee because the employee refuses to drive a vehicle because (1) such operation violates a commercial vehicle regulation, standard, or order; or (2) the employee has a reasonable apprehension of serious injury to himself or the public because of the vehicle’s unsafe condition. *Id.* § 31105(a)(1)(B).

The STAA was amended in 2007. The STAA currently in effect provides that complaints shall be “governed by the legal burdens of proof set forth in [49 U.S.C. §] 42121(b),” the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”). The STAA, as amended by incorporating the burden of proof from AIR 21, is “more favorable to the complaining employee.” *Formella v. U.S. Dep’t of Labor*, 628 F.3d 381, 389 (7th Cir. 2010) (stating “We have noted that the STAA prohibits an employer from taking adverse action against an employee ‘because’ he has engaged in a form of activity that the statute protects. Standing alone, that language would require the complaining employee to show that his protected conduct was a but-for cause of the discharge or other penalty imposed on him. However, the statute was amended in 2007 to incorporate the legal burdens of proof set forth in the Whistleblower provision of [AIR 21]. Under the AIR 21 framework, an employee must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. 49 U.S.C. § 42121(b)(2)(B)(iii); *Reiss v. Nucor Corp.*, ARB No. 08-137, slip op. at 4 (ARB Nov. 30, 2010). If the employee establishes these four elements, the employer may avoid liability if it can prove “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of that [protected] behavior.” 42 U.S.C. § 42121(b)(2)(B)(iv); *Reiss, supra*).

## ISSUES

The issues for decision in this case are:

1. Are the Complainant, Respondent and the Vehicle covered by the STAA?
2. Did Complainant engage in protected activity as contemplated under the STAA?
3. If so, did Respondent have knowledge of this protected activity?
4. Did Complainant suffer an unfavorable personnel action?
5. If so, was the protected activity a contributing factor to that unfavorable personnel action?
6. If so, did Respondent show by clear and convincing evidence that the unfavorable personnel action would have been taken regardless of the protected activity?

## DISCUSSION

### A. The Parties' Arguments

Respondent contends that Complainant has failed to meet his burden of proof with regard to the prima facie elements of protected activity and contributing factor. Respondent argues that there is a lack of evidence that Complainant engaged in protected activity and that the protected activity was a contributing factor for Complainant's extended probationary period. Further, Respondent contends that, even if Complainant proved the elements in question, the evidence confirms that Respondent's action was an appropriate response based solely on Complainant's undisputed performance deficiencies rather than his engaging in a protected activity.

Complainant contends that Respondent extended his probationary period and assigned him additional duties because of his safety complaints regarding the truck he was given to drive and his concerns about the illegal transport of hazardous materials.

### B. Analysis

#### 1. *Commercial Motor Carrier and Commercial Motor Vehicle Driver*

I find that the evidence shows that Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101 and falls under the Surface Transportation Assistance Act. A "commercial motor vehicle" includes "any self-propelled . . . vehicle used on the highways in commerce principally to transport passengers or cargo" with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. App. § 2301(1). The vehicle the Complainant helped purchase and drove fits this profile and definition. Further, I find that the Complainant is a "commercial motor vehicle driver" within the meaning of 49 U.S.C. § 31101.

#### 2. *Protected Activity*

The whistleblower provisions of the STAA protect employees in two circumstances: (1) where they make a complaint related to safety regulations, and (2) where they refuse to drive either because doing so would violate a safety regulation or out of a reasonable apprehension of danger because of the vehicle's unsafe condition. 49 U.S.C. § 31105(a)(1)(A)-(B). "Section 31105 was enacted to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987). Although many employers have seized on the STAA's "filing a complaint" language in arguing that the STAA requires an employee to make a formal complaint to a court or government agency, *see, e.g., Stiles v. J.B. Hunt Transp., Inc.*, 92-STA-34 (Sec'y Sept. 24, 1993), it is well settled that an "internal complaint to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA." *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, slip op. at 6 (ARB Dec. 31, 2002). Although a complaint may be oral or written, informal or official, *it must be communicated to management. Id.* (emphasis added).

a. *Refusal to Drive*

In this matter, the evidence of record, including Complainant's deposition and hearing testimony, demonstrate that he never refused to drive Respondent's truck because he thought doing so would violate a safety regulation or because he had a reasonable apprehension of danger due to the vehicle's unsafe condition (Tr. at 44; Complainant's Deposition at 34-35). He therefore cannot prevail under the refusal to drive provision of the STAA.

b. *Complaints Related to Safety Regulations*

Complainant alleges that he made several safety complaints to management with regard two issues: 1) the purportedly dangerous materials he transported for the Respondent in its truck; and 2) repairs which he felt needed to be conducted on the truck.

In this case, the issue of the transport of dangerous materials cannot serve as the basis of his whistleblower complaint as, by his own admission, Complainant did not disclose this information to Respondent's management personnel (whether verbally or by filing a report) during the term of his employment (Tr. at 45). Regardless of whether the load being transported was actually dangerous, or Complainant merely perceived it to be, he has failed to provide credible evidence that this apprehension was actually communicated to the Respondent's management.

I do not find the Claimant's assertion credible that Mr. Coleman and Mr. Jones were present when he had discussions with an employee in shipping/receiving department at the Franklin loading dock about his concerns regarding water leaking from a poor dock seal into his truck while he was hauling white lime. While Complainant averred that Mr. Coleman and Mr. Jones told him he needed to "write up" any issues at the time of the dock water leak, conversely, Mr. Coleman credibly testified that it was the dock worker who had informed him of the transom leak and potential safety issue, not Complainant. Mr. Jones also testified that Complainant never informed him of any issue regarding a loading dock leak into the truck. Furthermore, Complainant admitted that the dock worker was responsible for the "write up" of the leak. Internal complaints to management are protected activity under the STAA; the Complainant, however, must prove by a preponderance of the evidence that he actually made an internal complaint. The Complainant fails to carry that burden where there was no credible evidence or written documentation supporting the Complainant's allegations that he made an internal complaint on the toxic materials issue. *See Williams v. CMS Transportation Services, Inc.*, 94-STA-5 (Sec'y Oct. 25, 1995). The same is true with regard to external complaints the Claimant made to the EPA and State Public Utilities Commission, which Complainant testified occurred *after* he had stopped working for the Respondent (Tr. at 26).

Nevertheless, the evidence does show that Complainant made several other reasonable safety complaints about the truck he was given to drive by means of oral reports, pre-trip vehicle inspection reports and log books (RX 9). Complainant testified that he notified Mr. Jones and Mr. Coleman about the repairs needed for the truck. A safety-related complaint to any supervisor, no matter where that supervisor falls in the chain of command, can be protected

activity. *Zurenda v. J&K Plumbing and Heating Co., Inc.*, 97-STA-16 (ARB June 12, 1998). Both Mr. Coleman and Mr. Jones corroborated Complainant's testimony. Complainant also testified that he confronted Ms. Settich, Mr. McLaughlin, and Mr. Stewart in their group meetings about the repairs and maintenance of the truck. Ms. Settich and Mr. McLaughlin testified that they discussed repairs and maintenance of the truck with Complainant in the context of his vehicle inspection reports. Furthermore, Complainant also testified that he brought the bad tire to the attention of Mr. McLaughlin before the truck was purchased. It is clear from the testimony that several safety objections about the truck were communicated to varying levels of management on several occasions. These are sufficient communicated internal safety complaints to constitute protected activities for purposes of the STAA.

### 3. *Knowledge of Protected Activity*

Having shown that he engaged in protected activity, Complainant must demonstrate that Respondent had knowledge of the protected activity. Here, the evidence indicates that, at some point during Complainant's tenure, many of Respondent's management-level employees had knowledge of the safety complaints made by Complainant regarding the company truck. Mr. Coleman testified that he discussed Complainant's vehicle inspection reports and the requested repairs with Mr. McLaughlin. Mr. McLaughlin testified that he also had conversations with Complainant regarding the necessary repairs and the vehicle inspection reports. As stated previously, Complainant also testified that he challenged Ms. Settich, Mr. Stewart, and Mr. McLaughlin about the necessary repairs during more than one office meeting. Undoubtedly, Mr. McLaughlin discussed the complaints with Ms. Settich when assessing Complainant's vehicle inspection reports and logs. Because both oral and written complaints regarding the safety of the truck were communicated to several management-level employees, I find that Respondent had knowledge of Complainant's protected activity for purposes of the STAA.

### 4. *Unfavorable Personnel Action*

The STAA provides that an employer "may not *discharge an employee, or discipline or discriminate against an employee, regarding pay, terms, or privileges of employment, because*" the employee engaged in protected activity. 49 U.S.C. § 31105(a)(1) (emphasis added). The regulations implementing the STAA state: "It is a violation for any employer to *intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate* against an employee because the employee" engaged in protected activity. 29 C.F.R. § 1978.102(b) (emphasis added). The standard under the STAA as to what amounts to an unfavorable personnel action is currently in some degree of flux. In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052 (ARB Sep. 30, 2008), the Board adopted the "materially adverse" standard adopted by the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), for retaliation cases arising under Title VII. Under the *Burlington Northern* "materially adverse" standard, as applied to whistleblower complaints adjudicated by the Department of Labor, "the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity." *Melton*, ARB No. 06-052, slip op. at 19-20. However, in *Strohl v. YRC, Inc.*, ARB No. 10-116 (ARB Aug. 12, 2011), the Board rejected *Melton*, finding that it had been superseded by the 2010 amendments to the STAA regulations. The Board declined to adopt a new standard, and instead remanded the case to the

ALJ because the parties in the case had not had an opportunity to be heard on the issue. The Board did, however, comment that the test articulated in *Williams v. American Airlines, Inc.*, ARB No. 09-018 (ARB Dec. 29, 2010) (AIR) “has persuasive value.” In *Williams*, the ARB interpreted similar regulatory language under AIR 21, *compare* 29 C.F.R. § 1979.102(b) with 29 C.F.R. § 1978.102(b), and held that the prohibitory language was “quite broad” and referred to “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” ARB No. 09-018, slip op. at 15. Accordingly, I am compelled to try and navigate the standards, finding that an employer’s action constitutes an unfavorable employment action at least where it is “more than trivial” under *Williams* and potentially to the point where it is “materially adverse” under *Burlington Northern*.<sup>6</sup> Fortunately, this does not pose a substantial hurdle in this case as, for the reasons set out herein; I find the Respondents actions would meet either test.

Here, there is no dispute that the Complainant voluntarily left his employment with the Respondent. He admitted during both his testimony and during his deposition that he voluntarily quit (Tr. at 27). However, the record also demonstrates that prior to his decision to quit, the Complainant was informed that his probationary period was being extended by thirty days. (Tr. at 26-28). The Complainant stated that this was one of the reasons he quit. The extension of the Complainant’s probationary period had tangible consequences on the privileges, terms, and conditions of the Complainant’s employment with the Respondent. For example, according to the Respondent’s employee handbook, “Employees are not eligible to receive leaves of absence or the other benefits received by regular full time employees during this time [the probationary period].” (RX 6). The lack of leave and benefits amounts to much more than a trivial event and are materially adverse to Complainant’s employment with the Respondent. Therefore, I find that regardless of which test is applied—that is, *Burlington Northern* or *Williams*—the extension of the Complainant’s probationary period was an unfavorable personnel action.<sup>7</sup>

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<sup>6</sup> Of note, the *Strohl* case itself was dismissed by the ALJ on remand when the Complainant withdrew objections to the Secretary’s findings. In *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-9 (ARB Jan. 31, 2012), an AIR21 case, the ARB noted that the ALJ’s use of the materially adverse standard without suggestion of error. However, In *Guitron v. Wells Fargo Bank, N.A.*, No. C 10–3461 CW, 2012 WL 2708517 (N.D.Cal. July 6, 2012), relying principally on the Fifth Circuit’s decision in *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n. 2 (5th Cir. 2008), which applied the Title VII *Burlington Northern* standard for adverse action to a SOX complaint, the defendants argued that Plaintiff Guitron failed to offer sufficient evidence showing that she suffered a materially adverse employment action. The court stated that the ARB’s decisions in *Williams v. American Airlines, Inc.*, ARB Case No. 09–018 (2010) and *Menendez v. Halliburton, Inc.*, 2011 DOL Ad. Rev. Bd. LEXIS 83 set the standard for adverse action in SOX cases, and “adverse actions” refers to “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Guitron* at 16.

<sup>7</sup> I do not, however, find that the extension of the Complainant’s probationary period is sufficient to rise to the level of constructive discharge. To achieve this status, the extension of the probationary period would have to make the Complainant’s working condition “so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign.” See *Watson v. Nationwide Ins. Co.*, 823 F.2d 360 361- 362 (9th Cir. 1987). The thirty day extension, and consequential benefits ramifications, clearly do not meet this level.

## 5. Contributing Factor

Under the AIR 21 framework which is applicable to this STAA claim, the employee's protected activity must be a "contributing factor" in the employer's decision to take the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii). The ARB defines "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, slip op. at 6 (Feb. 29, 2012) (FRSA). A complainant may satisfy the contributing factor element by direct or circumstantial evidence. *Id.* at 6-7. "Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent applications of employer's policies, shifting explanations for its action, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the [unfavorable personnel] action taken, and a change in the employer's attitude toward the complainant after he or she engages in protect activity." *Id.* at 7. Temporal proximity with relation to protected activity and an unfavorable personnel action alone is not necessarily enough to raise an inference of causation. *See Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 21, 2006) (stating "where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.").

Based on the evidence of record, the Complainant has failed to show that his protected activity of complaining about maintenance conditions regarding the truck were a "contributing factor" in the determination of the Respondents to extend his probationary period. Mr. Coleman, Mr. McLaughlin, Mr. Jones and Ms. Settich all credibly testified that the eventual decision to extend the Complainant's probationary period was as a result of his failing to consistently and adequately document his complaints about the truck, and not because of the safety complaints that he had actually expressed. While Complainant testified that his limited reporting was an attempt to avert some level of trouble or scrutiny on the employer, I can find no indication in the records or testimony that this was what the Respondent requested that he do. On the contrary, Respondent's witnesses Mr. Jones testified credibly that, upon discovering the Complainant was not always writing up safety issues he found with the truck, he had conversations with Complainant to enforce that this was not acceptable. (Tr. at 96).

Further, Complainant has no direct evidence of contribution, nor does he have any compelling circumstantial evidence linking his safety complaints about the truck and the extension of his probationary period. In fact, Ms. Settich and Mr. McLaughlin testified that no safety complaints actually made by Complainant were mentioned before the decision to extend his probationary period. Although the truck may have had safety issues, which Complainant complained about, the evidence showed that Respondent was reactive to his complaints and would provide a rental truck when necessary. Complainant testified that Respondent provided him with a rental truck on 2-3 occasions.<sup>8</sup>

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<sup>8</sup> Complainant also testified that the truck had a tire that went flat all the time, which Respondent never fully fixed. Yet, Mr. Jones credibly testified that the flat tire was fixed immediately after he became aware of the issue, which was not until near the time that Respondent resigned (RX 9).

The only plausible piece of circumstantial evidence to consider is the timing between Complainant's safety complaints and the extension of his probationary period. Because the Complainant was only employed for approximately three months, the temporal proximity between his safety complaints and the extension of his probationary period might raise an inference of causation. However, the inference raised by a temporal proximity is not always dispositive, and in fact may be dispelled by rational and credible explanations of the sequence of events leading to the adverse action. I can find no temporal link between safety complaints the Complainant made throughout, if not consistently, during the duration of his employment and the subsequent decision to extend his probationary period. Instead, I find credible the Respondent's asserted gradual rising discontent with the safety complaints *not* being made in accordance with DOT requirements, and displeasure with Complainant's wish to only drive.

Furthermore, Complainant's burden is not to establish temporal proximity but discrimination because of protected activity. *Wainscott v. Pavco Trucking, Inc.*, ARB No. 05-089, ALJ No. 2004-ATA-54 (ARB Oct. 31, 2007). In fact, in a case such as this, where Respondent has established two legitimate reasons for its unfavorable personnel action against Complainant, I find that temporal proximity alone is not enough to raise an inference of causation. For that reason, I find that Complainant has failed to show that his protected activity was a contributing factor for the unfavorable personnel action taken by Respondent.

#### 6. *Unfavorable Personnel Action Justification*

Even if Complainant were to prove all of the requisite elements of his case, Respondent may avoid liability under the STAA if able to prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected activity. In this instance, Mr. McLaughlin and Ms. Settich testified that there were two reasons for extending Complainant's probationary period: (1) his failure to properly complete the pre-trip inspection reports and accurately complete the vehicle inspection reports and logs; and (2) his poor attitude regarding having to perform miscellaneous tasks around the warehouse when he was not driving. Complainant affirmed in his testimony that he was not filling out the pre-trip inspection reports initially and only reporting issues to Mr. Jones. Mr. Coleman testified that he had several discussions with Complainant regarding how important it was to complete the inspection reports when there was a problem with the truck after Complainant kept failing to do so. Further, Mr. Coleman testified that Complainant told him that he was falsely filling out the pre-trip inspection reports because he feared Respondent would "look bad" in a DOT inspection (Tr. at 60). Mr. Coleman's testimony is corroborated by the fact that the vast majority of the written vehicle inspection reports completed by Complainant were lacking any substance despite Complainant's oral safety complaints about the truck (RX 9).

All Respondent's witnesses testified that the job duties Complainant had to perform beyond driving were required due to the structure of the operation. Mr. Coleman testified that Complainant was always complaining about having to perform miscellaneous duties in the warehouse. According to Mr. Jones, Complainant would make comments in passing about how certain duties were not part of his job. Mr. McLaughlin testified that Complainant said things like, "I'm a driver, I'm not a sweeper or painter or cleaner or anything else" and "It's not my mess so I shouldn't have to clean it up". Ms. Settich testified that due to management's concern

about Mr. Salyer's 'it's not my job' attitude, the Company decided to extend his probationary period for an additional thirty days. Complainant testified that he expected to drive the amount of time required and he did not agree to perform any other duties. Based on those reasons, it is clear that Respondent had an expectation of Complainant to perform job duties beyond driving and Complainant was reluctant and vocal about not wanting to perform these duties. In sum, I find that the evidence substantiates Respondent's rationale for extending Complainant's probationary period was unrelated to his safety complaints and was not merely a pretext.

### **CONCLUSION**

Based on the foregoing, I find that Complainant established that he engaged in protected activity when he made safety complaints about the truck he was given to drive. I also find that Respondent had knowledge of said safety complaints. Furthermore, I find that Complainant suffered an unfavorable personnel action when his probationary period was extended. However, I find no evidence to indicate that the extension of Complainant's probationary period was motivated by Complainant having made safety complaints about the truck he was given to drive. Complainant has failed to establish that the extended probationary period was motivated by any reason other than Respondent's concerns about his failure to properly and accurately complete the truck inspection reports/log-books and his complaints with regard to performing miscellaneous tasks around the warehouse when he was not driving. In sum, Complainant has not demonstrated by a preponderance of the evidence that his protected activity contributed to the unfavorable personnel action taken against him.

Moreover, I find that Respondent established by clear and convincing evidence that it would have imposed the lengthened probationary period absent Complainant's safety complaints. Therefore, even if there was some evidence connecting the safety complaints to the extension of Complainant's probationary period, I find that Respondent proved, clearly and convincingly, that it would have extended Complainant's probationary period regardless of any protected activity as the evidence presented substantiates Respondent's reasons for the extension.

**THEREFORE**, it is **HEREBY ORDERED** that Complainant's claim for relief under the STAA is **DENIED**.

PETER B. SILVAIN, 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 ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARBCorrespondence@dol.gov.

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

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of

Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1978.110(a) and (b).