



Issue Date: 18 June 2013

CASE NO: 2012-STA-00041

In the Matter of:

KENNETH WATT,

Complainant

v.

MAY TRUCKING COMPANY,

Respondent

DECISION AND ORDER
DISMISSING CLAIMS

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“the Act” of “STAA”), and implementing regulations set forth at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the discharge, discipline of, or discrimination against an employee in retaliation for the employee engaging in certain protected activity.

PROCEDURAL BACKGROUND

Kenneth Watt wanted to drive a truck all his life. Finally, in his late 50s he went to truck driving school and got his commercial driver’s license. On May 19, 2011, he started with May Trucking Company (“May”), his first job after truck driver school. On November 28, 2011, May discharged Mr. Watt. On May 15, 2012, Mr. Watt filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that May violated the employee protection provisions of the STAA. Specifically, Mr. Watt alleges that he was terminated in retaliation for making complaints to management about unsafe vehicle equipment and improperly working equipment on vehicles he was required to operate. On July 31, 2012, the Regional Administrator of OSHA, acting on behalf of the Secretary of Labor, found that there is no reasonable cause to believe that May violated the STAA. On August 6, 2012, Mr. Watt filed his objections to the Secretary’s decision with the Chief Administrative Law Judge seeking a hearing.

The case was assigned to me and on January 23, 2013, I conducted a hearing in Denver, Colorado. During the hearing three witnesses testified, Complaint Kenneth Watt, May Trucking

Vice President Scott Smith, and Denver Operating Center Manager Robin Smith.¹ Entered into evidence were Complainant Exhibits (CX-#) one through four, Respondent Exhibits (RX-#) one through six and Joint Exhibits (JX-#) one through three.

HEARING TESTIMONY

Mr. Watt's Testimony

Mr. Watt was 59 years old working for a bad debt collection business when he decided to fulfill his long held desire to become a truck driver. Mr. Watt had never driven a manual transmission vehicle. He paid \$8,000.00 for an 18 week course that taught him "from A to Z on trucking." (Tr. at 68). He went to a school that gave him "a lifetime guarantee that if [he] ever needed employment, they could get [him] employment," as long as he had no criminal charges and a good record. He passed his Commercial Driver's License test on the first try. His first job was with May because they paid him five cents more per mile and a friend told him May provided newer trucks. (Tr. at 70.) Mr. Watt attended the May driver orientation, passing "all the tests." (Tr. at 74.) For the first two weeks, Mr. Watt went out with a trainer. On Mr. Watt's first training trip they traveled "up and over Loveland Pass" which he described as "very scary." (Tr. at 75.)

Mr. Watt went to pick up his first truck with his wife and son, an Arizona State Patrolman. Although he was expecting a newer truck, he was assigned a 2007 truck with 565,000 miles that was "filthy." (Tr. at 79). Mr. Watt's son told him the truck was not legal because of a crack in the windshield. Mr. Watt showed the crack to Jose, a Safety Manager, who indicated the windshield was supposed to be fixed onsite. Mr. Watt said "Well, it looks like this will delay it and then they'll come out Monday and then I'll get a different run." Jose told him "it doesn't work that way. . . You don't want to start out not making your first run. . . What I can get you, I can get you down there and have them fix the window." When Mr. Watt questioned driving the truck, Jose responded: "It's only two miles." Mr. Watt inquired what would happen if he didn't get the windshield fixed and make the run to which Jose responded "I can't promise you you'll have a job. I don't know what they'll do. You know, it's your first run, you need to make it on time. Nobody else -- they can't get another driver that quick." Mr. Watt's son indicated that he would follow Mr. Watt to the windshield repair facility and "handle it" if Mr. Watt was pulled over. (Tr. at 81). Mr. Watt testified that he wrote on the truck inspection form that he gave to Jose: "I can't drive this truck, it's illegal." (Tr. at 84"). Mr. Watt drove the truck to the repair facility, had the windshield repaired and started his first trip as a truck driver.

Mr. Watt's next problem with this truck occurred about a month later. He noticed the clutch was catching and slipping, "it was too loose." Mr. Watt contacted "Breakdown"² and

¹ Mr. Smith and Ms. Smith are not related.

² "Breakdown" is a department at May Trucking that drivers contact when there is a mechanical problem while on the road. Breakdown evaluates the problem and instructs the driver what to do which could be to take the truck to a repair facility, wait for a mechanic to repair at the breakdown location, or drive the truck to a May facility as well as other options.

informed them he was concerned because he was going into San Francisco, where there were many pedestrians and tight maneuvering. Breakdown instructed him, that as long as the clutch was working, to make the delivery and then bring it to the May facility in Brooks, Oregon. Mr. Watt testified that when backing up to the dock at the delivery location, the clutch locked. Breakdown instructed Mr. Watt to call a specific maintenance company. They responded and worked two hours on the vehicle. The mechanic told Mr. Watt "All I can do is, I can lock it into first gear, you'll be able to drive it around the building, get off of their dock area and park out front, and then you're going to need a tow." Mr. Watt indicated that the defective clutch was a safety issue, not when he was driving in a high pedestrian area with low speed, but on the highway.

If it locks up, it does, because you're going to jackknife. Your tail is going to start going around one way or the other, and then you're just going to wipe out cars or anybody coming up beside you. But going down a hill, you can't get in -- you're supposed to be in the gear you're going to go down the hill in, when you start down. And I always was. But if right at that moment I tried to shift that, and I was going down Loveland Pass, and I couldn't get into the low gear, I would have lost it.

(Tr. at 86-89.)

After the problems with his first truck, Mr. Watt asked for and received a different truck. (Tr. at 94). Less than 30 days after getting the new truck, this truck developed a problem with the air conditioner in the cab. The air conditioner in the sleeping area worked, but the idle cut-off override did not function properly, causing that air conditioner to shut off frequently during the night. (Tr. at 96). He testified that he did not sleep soundly without the air conditioner causing him to be less alert when driving. (Tr. at 97.) He complained to his Driver Manager (or "DM") every week about the faulty air conditioner. His Driver Manager instructed him to go to the May facility in Brooks, Oregon to have the air conditioner fixed. While waiting for the truck to be repaired he received a random drug test and was notified that because of a realignment of drivers, he would operate out of May's Denver facility. (Tr. at 98).

On another occasion, Mr. Watt was waiting for his truck to be unloaded and was "running out of hours." He called his night Driver Manager who unsuccessfully tried to obtain permission for him to sleep in the cab overnight inside the fence at the delivery location. (Tr. at 106-08.) She then instructed him "to stay with the truck so I don't have to -- you're not cited for abandonment. I want you, when you're done, to drive the truck off the lot. Then I want you to call your DM, in the morning. Call your DM and tell them why you violated the hours tomorrow." (Tr. at 109.) During his testimony, Mr. Watt was asked if it would have been an hours violation to drive the truck off the lot, he stated:

Well, yeah, definitely. When she told me to drive the truck off the lot, she was telling me to break the law. Oh, yeah. And her point was, drive to the safest place, closest safest place and shut down. And they had, already, told me -- they didn't say it was safe, but they said the police don't bother you, if you park on the road outside in front of the plant. So, I, literally, only had

to drive -- if I drove a quarter of a mile, it probably was -- it doesn't matter, though, I broke the law.

(Tr. at 109-10).

Mr. Watt testified about Qualcomm, the computer device used to communicate between the driver and dispatch. Qualcomm also created the driver's log. Mr. Watt said that he talked with his Driver Manager who, he said, indicated that it was possible to alter the logs and record of communications. (Tr. at 113-14). There is no credible evidence that May Trucking ever altered any record.

On another occasion, while in California, an "exhaust overheating" warning light illuminated. Breakdown instructed Mr. Watt to take the truck to "a TA center" "have them inspect it and tell you what's wrong." (Tr. at 128). A vehicle diagnostic report was generated. (CX-3). The mechanic stated, "You've got 19 things wrong. None of them are like going to cause you life and death by themselves, but with 19 little things like this, just like the engine overheating, if you don't get that addressed and it continues overheating, you accidentally park somewhere, where there's dry grass, that could cause a fire, blow you up and anybody around you." (Tr. at 129). Despite Mr. Watt's description of potential catastrophic results from driving with these deficiencies, (see also Tr. at 134), when asked if he viewed these items as being severe, Mr. Watt responded, "No." (Tr. at 134). The mechanic told Mr. Watt "None of these, by themselves, at the state they're in, would present an immediate danger to you. But left unfixed, any number of them would continue to get worse." Breakdown instructed Mr. Watt to bring the truck to May's maintenance facility "as long as you can drive it, get it back here and we'll fix whatever it is." After the repairs, Mr. Watt was not informed of the repairs made to the truck, "But when I took the truck back out, the engine heating light never came back on." (Tr. at 135).

Mr. Watt had two interactions with his Driver Manager concerning adverse weather. The first interaction was when he refused a trip to South Carolina. The weather forecast indicated "horrible weather, tornadoes and twisters . . . for the next day, when I would have got there." In addition, Mr. Watt believed he could not get to the location on time. (Tr. at 127). The other weather incident took place in November, 2011. Mr. Watt picked up a load in the Atlanta area for delivery in Ft. Collins, Colorado. Routing was on Interstate highways through Wyoming. In Wyoming, it started to rain, eventually changing to freezing rain and snow. Mr. Watt pulled into a truck stop before the roads got too bad to continue. In the morning, his truck was covered with snow and ice. Dispatch contacted him by the Qualcomm, asking why he was not moving. He told the Driver Manager that the police closed the highway. When Mr. Watt tried to clear the windshield, he discovered that the defroster fan was not working. He contacted Breakdown who told him "Well, you got to get moving. Can you -- can you see if you wipe the window off, could you see? If it heats up enough to melt, could you wipe the window off?" Mr. Watt responded, "Are you telling me, you want me to heat the cab up until it melts the windshield, and then you want me to wipe it off and drive?" Breakdown said "Yeah, then you use your windshield wipers when you're out." Mr. Watt objected, "It's freezing here. It's more likely to freeze up, again, not be slush on my windshield." Breakdown informed him that he had "to get moving." Mr. Watt responded, "I'm not moving until that works." (Tr. at 153-55). Mr. Watt hit the dashboard with his fist "as hard as I could ever hit anything, and the thing kicked on."

Mr. Watt testified he was upset with the call and thought to himself “they're getting ready to fire me, the way they're talking. I said, I'm going to get moving, I think it's safe enough with my defroster. Don't want to take that chance. And then I thought, you know what, no, I'm not going to do that. I'm not going to be talked to like this anymore.” (Tr. at 155). He called his Driver Manager, who heard about the defroster issue, and said to her:

I got talked to like a child. I'm sick of it, so I'm coming – I'm resigning, I'm done. I'm resigning. I called my wife and as bad as I need the work, she agreed and I'm resigning. So, what do you want me to do with your truck? I'm still at the truck stop.

(Tr. at 155). According to Mr. Watt, she said to bring the truck to Denver and told him that Robin Smith, the Denver Operating Center Manager, would be waiting with the necessary paperwork. The Driver Manager reminded him he would need to pay his own way home because he was resigning. After further discussion, Mr. Watt agreed to make the delivery to Ft. Collins and then bring the truck to Denver.

When he arrived at May's Denver facility, the Driver Manager told him that Ms. Smith was not present because she forgot she had a luncheon scheduled. The Driver Manager offered:

Well, hear me out. When Robin heard all these problems you're having, she said to tell you, if you won't quit, if you'll drive the load we got in Gold City, Colorado, down to Fontana, California, and take a load from there and go home for Thanksgiving you do not -- and drop your truck off at Rush Peterbilt -- you do not have to go back out, if that truck is not 100 percent satisfactory, when you get on it to go out on your route the following week.

(Tr. at 158). Mr. Watt called his wife and decided to stay with May Trucking. Mr. Watt went home for Thanksgiving. He was scheduled to take a load on Tuesday. The Driver Manager called on Saturday to assign a load for Sunday, Mr. Watt reminded her that he was not to be scheduled before Tuesday. She apologized and told him he would get a call on Monday. (Tr. at 160).

The call he received on Monday was not from the Driver Manager to give him Tuesday's trip but was a call from Robin Smith notifying him that because of the three accidents he was being fired. (Tr. at 161).

Mr. Watt did not find other employment until early February. At his new job he makes more money. The job was temporary, scheduled to end in April 2013. (Tr. at 171-72). Mr. Watt had difficulty finding employment because his DAC³ report showed three accidents. Even the truck driving school that promised him a job could not get him employment. According to Mr. Watt, one Human Resources manager told him May “blackballed” him from the trucking

³ The DAC report, also called Hire Right, is an informational clearing house used by trucking companies to report and receive information on potential drivers. (Tr. at 26-27).

industry. She told Mr. Watt that May could have put down a different reason for termination such as, that he “didn’t comply with company policy,” rather than the safety issues. (Tr. at 168).

Mr. Watt’s Testimony Regarding the Accidents

The Tire

Mr. Watt was assigned a pickup in the Atlanta area and received directions from “Logistics”⁴ through Breakdown on the Qualcom. Following the directions he received, he turned on to “Industrial” after having seen another truck there, in his mind putting “two and two together.” (Tr. at 119). The street was a dead end with a “big cul-de-sac that you could tell multiple trucks had made a big circle turnaround,” in front of a hotel. (Tr. at 119). He circled through the cul-de-sac and stopped at the hotel where he was told “you want Industrial Parkway Boulevard, this is Industrial Parkway Street. You wanted to go one more light.” (Tr. at 119). He obtained permission to park in front of the hotel to sleep but determined it was not safe so he drove 25 miles to a truck stop. When he got up the next morning, his tires were mud covered because the cul-de-sac was “all mud.” When he returned to the delivery location, the tires had cleared from rain on the road. He noticed a “big spider crack, a spider web crack.” (Tr. at 121). Another driver who saw the crack suggested he should not drive the truck with that tire. Mr. Watt contacted Breakdown who told him to send them a picture. Upon receipt of the picture somebody from Breakdown called and asked, “What did you hit?” Mr. Watt responded that he “didn’t hit anything.” (Tr. at 122-23). Breakdown indicated that they would have the tire repair facility go to Mr. Watt’s location to repair the tire, but that they would report it to “Safety.”⁵

Mr. Watt was next contacted by someone in the Insurance Claims department who said, “I hear you hit something. What did you hit, describe what happened?” to which Mr. Watt responded, “I’m going to tell you guys, again, I didn’t hit anything. What I did do, was I turned down the wrong road, because of the directions I got, and I did a turn in a muddy cul-de-sac and if I rubbed up against anything, I didn’t feel it, I didn’t see it, period.” The person from Insurance Claims indicated that she was “putting it down as an accident.” (Tr. at 123). Mr. Watt was then informed that the tire repair facility would not go to his location and he needed to drive back to the truck stop where he spent the night because there was a facility there that would repair the tire. “Can you drive it, from where you’re at, to [the truck stop], because we have a tire contract with them and they’ll fix it and you’ll be on your way.” Mr. Watt responded “Let me get this straight. I just told you I don’t feel it’s safe to drive the truck and you’re asking me if I can.” Breakdown said “Yeah, I’m asking you, do you think you can drive it?” Mr. Watt answered “Well, to be honest with you, yeah, I suppose I could drive it.” (Tr. at 124-25). Mr. Watt asked that the instructions to drive on that tire be put in writing on Qualcom to cover himself “in case something happened or it came up.” (Tr. at 125). At the truck stop, Mr. Watt asked the repairman what he thought happened and the repairman stated, “you can’t tell what happened”

⁴ “Logistics” is another division that provides approved routing to the drivers.

⁵ “Safety” is the division that keeps track of drivers’ safety records, including accidents. Safety also investigates accidents and when appropriate suggests that a driver be terminated for being unsafe.

but indicated that the person who authorized the repair told the mechanic, "it's something friction," but he "really can't tell." According to Mr. Watt, the mechanic said, "when you were at the truck stop, somebody could have rolled by you and rubbed your tire, you could have hit a piece of dervish in the road and not even known you hit it." (Tr. at 126).

The Broken Hinge

While still in training, Mr. Watt's trainer cautioned him about the Tharco facility in Salt Lake City during a stop there. "This is a very nasty place. . . . First of all, look at all these pillars. . . . It's very tight. . . . Be very careful when you're backing here." (Tr. at 137). On July 19, 2011, Mr. Watt had a trip to Tharco. When he arrived, Mr. Watt was told "You're not backing up against the dock. You're going to back up against the building." (Tr. at 138). Mr. Watt testified:

He was telling me to bump the brick. And I wasn't real comfortable, but I felt, at the same time, I could do it. . . . So, I did it and I hit a little hard. I mean I admit it. It wasn't the nice gentle I thought it would be, it was like -- and I go -- oh, I said, please, don't -- I didn't knock his wall down. So, I get out of the truck. The yard dog guy is sitting there, watching me. He gets out, we go back -- oh -- I pulled the truck up about eight inches, just so I could see. We look at the trailer, the whole frame, see nothing wrong.

(Tr. at 138-39). Mr. Watt left the trailer away from the wall. The company had a tractor (yard dog) and driver to maneuver the trailers in the yard. Three days later, Mr. Watt received a call from his Driver Manager, who after some confusion on trailer numbers, confirmed that Mr. Watt delivered the trailer to Tharco. The Driver Manager informed Mr. Watt that Tharco said he "pulled into their building, went around the corner and the top of the trailer hit the building. You damaged their building and you damaged the trailer." Mr. Watt responded, "Well, I hope they got that on film, because I'm telling you the truth. I didn't hit any building, I didn't go around a corner or nothing. I backed up a little bit too hard. I admit that." (Tr. at 140-41). Mr. Watt was interviewed by Safety. Mr. Watt stated, "first of all, I want you to know, I looked at the end, I didn't see anything that looked like it was bent, but then, again, I didn't go climb up there, so maybe it was bent, maybe I did do it." He continued, "The yard dog did it, actually, did it again, and hit the building, when I left. He said he was going to do it. How do we know he didn't do it? . . . I'm going to tell you right now, I'll agree that there's a 50 percent chance I did it and there's a 50 percent chance he did it, after I left." (Tr. at 142).

The Bumper

On November 1, 2011, Mr. Watt was driving through Wyoming to deliver a load. A heavy snow storm suddenly developed causing Mr. Watt to leave the highway and pull into a truck stop.

all the trucks, that were on the freeway, were right behind me. Everybody was going -- some guys were going pretty fast. I was going at, I felt, a safe speed. When I pulled in, I saw a parking spot between two trucks.

Normally, what I would do is, I'd back into that spot. There was no -- there was no way I could stop and back in, with all these trucks trying to get in and get parked. So, the second choice would have been to go around the trucks and come in, and come up beside them, but instead -- which guys do a lot -- not a lot, but enough -- you can like -- picture two tractors pointing at me and there's a space between them. So, I take my tractor and I try to go between them, so when I come to a stop, the rear-end of my trailer is beside their doors, and my tractor is at the end of their trailers.

Anyhow, as I made the turn in, I mean it just went totally white. I could not see anything. I couldn't see -- I couldn't see the mirrors on my truck. And at the same time, I had looked -- just before I made that move to get into there, and the guy behind me was laying on his horn, because I was taking so long to turn, and he was going at a high rate of speed -- and this was almost ice, already, on the parking lot -- so I thought, yeah, when I last looked, I had it cleared, I'll be all right. So, I proceeded with a slow speed and I felt friction on my right rear tires. I know I was rubbing something. Well, I caught the truck, beside me, bumper and it snapped it off, it snapped it in half.

(Tr. at 146-47). Mr. Watt exchanged information with the driver of the damaged truck and reported the accident to Safety.

Scott Smith's Testimony

Scott Smith is Vice President of May Trucking. His responsibilities include Human Resources and the Driver Services Department. The Driver Services Department has responsibility for the Operating Centers, the Operating Center managers, driver managers and driver recruitment. May Trucking is a family owned business started in 1945. It operates approximately 1000 trucks in the lower 48 states and has approximately 220 non-driver employees.

Mr. Smith discussed the Driver's Reference Manual explaining that it is given to all drivers during orientation. He explained it is a "guidebook for drivers to do their job." (Tr. at 236). It contains required regulations as well as company-specific policies and procedures. When asked, Mr. Smith acknowledged that there was an accident policy in the manual but it does not contain any term identifying the number of accidents for which a driver at May Trucking will automatically be fired. (Tr. at 24.) Mr. Smith explained his understanding of a DOT reportable accident as an accident "in which there is an injury, a fatality or a tow, a vehicle is towed from the scene of the accident." He was not aware of a dollar threshold for determining if an accident was DOT reportable. (Tr. at 25).

Mr. Smith also explained the Qualcomm system which is a "rugged-ized tablet" with a keyboard connecting the company and driver through a satellite communication system. (Tr. at 220). The Qualcomm also generates the driver's log and maintains the Hours of Service records.

Part of Mr. Smith's responsibility is to make sure there are sufficient drivers for all the trucks. He indicated there is a shortage of drivers in the industry. Throughout Mr. Smith's testimony he indicated that there are numerous factors in determining whether to hire a driver. These include whether the applicant has a commercial driver's license and valid medical card, the driver's safety record, current employment record and drug and alcohol test history. (Tr. at 27-30). Furthermore, Mr. Smith testified that he "would consider Mr. Watt's application, if Mr. Watt applied, which he's certainly welcomed to do." (Tr. at 28). Mr. Smith looked at Mr. Watt's DAC report and testified that it would not necessarily preclude Mr. Watt from being invited to orientation for May Trucking. (Tr. at 30). Mr. Watt's counsel presented Mr. Smith the following hypothetical record:

- the DAC report resulting from Mr. Watt's termination (RX-2 at 7-8),
- employed as a truck driver since February of 2012,
- no safety issues at his present employer
- no accidents since leaving May,
- no positive controlled substance or alcohol tests (or refusal to take a test), and,
- a current commercial driver's license and valid medical card.

Counsel then asked Mr. Smith would Mr. Watt be hired with this record. Mr. Smith responded "Barring anything else coming up, [Mr. Watt], most probably, would be qualified to come to our orientation." (Tr. at 31).

Mr. Smith discussed May's Safety Department and the process for dealing with accidents. Drivers are required to report all accidents within a reasonable period of time. Safety will then investigate the accident by talking to the police, witnesses and the driver. If appropriate, Safety will make a recommendation to terminate a driver. That recommendation would be made to the Operating Center Manager who would forward it to Mr. Smith. Mr. Smith would review the criteria used by Safety and then make the determination himself whether to terminate the driver or not. (Tr. at 33).

At the time May terminated Mr. Watt, May was having difficulty hiring sufficient drivers to fill all trucks. Because of this shortage, Mr. Smith did not want any drivers terminated unless it was absolutely necessary. Therefore, at that time, Mr. Smith reviewed all termination recommendations and made all termination decisions. (Tr. at 223).

When asked why Mr. Watt was terminated, Mr. Smith responded:

Mr. Watt was terminated based on my review of Mr. Watt's accidents. I spoke with Ms. Smith, regarding Safety's recommendation and, per my instructions to her, she brought that information to me. I then reviewed his safety record, looked at the three accidents that had occurred, and looked at the circumstances surrounding those accidents, and I made a determination, based on that information, that May Trucking Company should not retain Mr. Watt, for safety reasons.

(Tr. at 224). Mr. Smith discussed the three accidents that resulted in Mr. Watt's termination. Mr. Smith testified that each was, in the company's view, a preventable accident, even though May reported the tire accident as non-preventable.

That's, generally, done when it's done, for the driver's benefit, because we could not definitively say that it was a preventable or not preventable accident, or we believe it was, we couldn't -- there was no witnesses, nobody actually saw this happen. What we believe, we don't, necessarily, want to report and, quite frankly, we don't want to report something that's inaccurate on the DAC.

(Tr. at 230). Mr. Smith noted that there were three accidents within four months, and each accident demonstrated a lack of understanding of the amount of space the truck occupied. "And based on that, I made my determination that there was a risk here that was unacceptable for May Trucking Company. And I couldn't, in good conscience, ignore the recommendation of Safety that he be terminated." (Tr. at 231). Mr. Smith acknowledged that he never met or talked with Mr. Watt before terminating him. Furthermore, Mr. Smith testified that he "was unaware of any of Mr. Watt's complaints about his tractor, for any maintenance issues or any breakdown issues, or any refusals to drive or weather issues, or anything else." He stated that he first knew about these complaints when he received a copy of Mr. Watt's complaint filed with OSHA. (Tr. at 233).

Robin Smith's Testimony

Robin Smith has worked for May Trucking for approximately 20 years. She currently serves as Operating Center Manager for May's Denver Terminal. (Tr. at 46). She has seven employees working in the office at the Denver Terminal and she has approximately 120 drivers assigned. Driver Managers work directly with the drivers and report to Ms. Smith. (Tr. at 46-47). Ms. Smith had never met Mr. Watt before the hearing, but she had talked with him. In fact, she is the individual who informed Mr. Watt that he was fired. (Tr. at 48-49). She was unaware of any of the complaints Mr. Watt made about the equipment at the time she notified him that he was fired. (Tr. at 199).

Ms. Smith discussed her interaction with the Safety Department and the interaction with drivers. She believes that "more often than not" the driver is interviewed when there is a safety issue. Her understanding is that Safety follows up on every accident with the driver. Ms. Smith testified that there is no policy on number of accidents that will result in an automatic termination. "Each accident is reviewed, individually, so we don't have a set policy on how many accidents. But rule of thumb has been three accidents." (Tr. at 51). It is Ms. Smith's understanding that Safety reviews how the accident happened, based on driver and witness accounts, including the severity of the accident, in considering whether to recommend termination for a driver. (Tr. at 52).

Ms. Smith is involved in the recruiting of drivers and explained her understanding on the DAC report. She testified that the industry suffers from high turnover. She indicated that May hires many entry level drivers who “don’t know what over-the-road truck driving really entails.” (Tr. at 193). This contributes to the high turnover rate. Because May has a high safety standard, there are certain factors that would disqualify a driver from being hired at May. Recruiters are provided with the criteria and they forward appropriate applications to Ms. Smith who reviews them for additional factors such as employment history and number and types of tickets on the driving record. She indicated that a notation on the DAC report of “Work record unsatisfactory safety record” would not necessarily disqualify an applicant. (Tr. at 55). Ms. Smith was asked if she would take Mr. Watt back “right now” assuming

that he's been continuously employed since February 4th, 2012, has had no accidents, no incidents, no refused drug or controlled substance test, no positive controlled substance tests, and his DAC report, basically, looks like -- the only information in there is the information showing on Exhibit RX-2, pages 7 and 8.

(Tr. at 55). She responded “I probably would not, with three accidents on the record.” (Tr. at 56). She testified that if there was a borderline case she would discuss it with Scott Smith. (Tr. at 60).

Ms. Smith also discussed the procedure when Safety informs her that a driver is, in its view, unsafe. She indicated that each case is reviewed individually and based on the Safety recommendation would either have the driver routed to a terminal or removed from the truck immediately. (Tr. at 58-59). Which approach to take could be based on the severity of the accident. (Tr. at 199).

ISSUES

May Trucking does not dispute that it is an employer, and Mr. Watt was an employee, under the provisions of the STAA. Furthermore, the May Trucking acknowledges that Mr. Watt engaged in protected activity under the STAA. However, May Trucking disputes that its alleged adverse actions were motivated by any such protected activity.

DISCUSSION

Statement Of The Law

The Complainant’s Complainant under the STAA

The employee protections of the Surface Transportation Assistance Act, 49 U.S.C. § 31105(a)(1) (“the STAA”), provide that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle regarding pay, terms or privileges of employment because the employee has engaged in certain protected activity. The protected activity includes making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order.” § 31105(a)(1)(A). Internal complaints to management are protected under the Act. *Reed v. National Minerals Corp.*, Case No. 1991-

STA-34, (Sec’y., July 24, 1992), slip op. at 4. 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. § 2301(1).

The Act further provides protection for employees who have a reasonable apprehension of serious injury to themselves or the public due to an unsafe condition. 49 U.S.C. § 31105(a)(1)(B)(ii). Whether an employee’s apprehension of serious injury is reasonable is subject to an inquiry of whether a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. *Id.*

To prevail under the Act, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sec’y v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003).

As noted above, the STAA prohibits discharge, discipline, or discrimination against an employee because the employee has filed a complaint related to a violation of commercial vehicle safety or security regulations. 49 U.S.C. § 31105(a). In an STAA proceeding, the general burden of proof is on the Complainant, who must establish by a preponderance of the evidence that the employer discriminated against him for engaging in protected activity. *U.S. Postal Service Board of Governors v. Aiken*, 460 U.S. 711, 713-14 (1983); *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 8 (ARB Sept. 14, 2007). The protected activity need only be a contributing factor to the employer’s decision to terminate the Complainant. 29 CFR Part 1979.109(a) (“A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.”). Thus, at this stage of the proceedings, Complainant must show (1) that he engaged in protected activity; (2) that Respondent took an adverse employment action against him; and (3) that his protected activity was a contributing factor in the adverse personnel action. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at p. 6; *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008- STA-052, slip op. at 5 (ARB Jan. 31, 2011). If he does so, the Respondent may escape liability only by showing by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant’s protected activity. *Warren, supra*, slip op. at 12 (ARB Feb. 29, 2012).

Specific prohibitions include:

- (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 or security 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; *see* 29 C.F.R. § 1978.102.

Under 49 U.S.C. § 31105(a)(1)(A)(i), “[p]rotected activity has two elements: (1) the complaint itself must involve a purported violation of a regulation relating to commercial motor vehicle safety, and (2) the complainant’s belief must be objectively reasonable.” *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011). Likewise under 49 U.S.C. § 31105(a)(1)(B)(i), a complainant is required to show only that he had a reasonable belief that operation of the vehicle would violate a regulation, order, or standard relating to commercial motor vehicle safety, health, or security. *Brown v. Wilson Trucking Co.*, ARB No. 96-164, ALJ No. 1994-STA-054, slip op. at 1 (ARB October 25, 1996). The ARB has recently held that “the reasonableness of [a refusal to drive under (a)(1)(B)(i)] must be subjectively and objectively determined.” *Ass’t Secy’ & Bailey v. Koch Foods, LLC*, ARB No. 10-101, ALJ No. 2008-STA-061, slip op. at 9 (ARB Sep. 30, 2011).

The language of the refusal-to-operate provision differs slightly from that of the safety complaint provision. The refusal-to-operate provision involves a driver who refuses to operate a vehicle “because” operating the vehicle would violate a federal regulation, standard, or order. The safety complaint provision involves a driver who files a complaint “related to” a violation of a federal regulation, standard, or order. The different language ultimately makes no difference in the standard to be applied to assess the objective reasonableness of a complainant’s belief. Indeed, because the language of the safety complaint encompasses a broader range of conduct, it would be appropriate to assess it under the *Koch Foods* standard that the reasonableness of a complainant’s belief that his complaint is related to a violation of a federal regulation, standard, or order must be subjectively and objectively determined. Put another way, “he must have actually believed that the employer was in violation of [a federal regulation, standard, or order] and that belief must be reasonable for an individual in [the employee’s] circumstances having his

training and experience.” *Sylvester v. Parexel International, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039 and 2007-SOX-042, slip op. at 14 (ARB May 25, 2011); *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000).

Protected Activity

Mr. Watt alleges numerous “events” that fall under the “protected activity” rubric. These include the reporting of the following mechanical deficiencies:

- Cracked windshield,
- Defective clutch,
- Defective air conditioner,
- “Exhaust overheating” warning light,
- Damaged tire,
- Defective defroster.

In addition, Mr. Watt alleges two hours-of-service violations:

- Tracy, California hours-of-service violation,
- Washington Courthouse, Ohio hours-of-service violation.

Finally, Mr. Watt alleges two refusal to drive violations:

- Refusal to drive -- tornado forecast,
- Wyoming ice and snow stop.

May Trucking acknowledges that “Mr. Watt generally engaged in protected activity” (May Brief at 1 n.1) , although May disputes whether the windshield crack, air conditioning problems, and tire damage were violations of safety regulations. For the purposes of this discussion, considering Mr. Watt’s overall inexperience, lack of mechanical knowledge, and unfamiliarity with trucks, I find his belief that the windshield crack and tire damage were violations of safety regulations was reasonable. Therefore, I find Mr. Watt’s reporting of these problems to be protected activity. However, the problems with the air conditioner are not related to a safety regulation and the reporting of this problem is not protected activity. Therefore, based on May Trucking’s acknowledgement that “Mr. Watt generally engaged in protected activity,” I find that Mr. Watt engaged in protected activity when he reported the cracked windshield, the defective clutch, the “Exhaust overheating” warning light, the damaged tire, and the defective defroster. I also find that Mr. Watt engaged in protected activity when he complained about the two “hours-of-service” violations and when he refused to drive because of potential or existing adverse meteorological conditions.

Adverse Action

May Trucking discharged Mr. Watt on November 28, 2011. This is an adverse action under the STAA.

Was There a Causal Connection between Mr. Watt's Protected Activity and May's Decision to Terminate Him?

For the reasons discussed below, I find that there is no causal connection between Mr. Watt's protected activity and May Trucking's decision to terminate him. In reaching this decision, I rely extensively on the testimony of the three witnesses and their credibility.

Mr. Watt testified at length about his perception of the events. While I believe Mr. Watt was being truthful, as he perceived it, I found his testimony colored by inexperience, naiveté, and emotion, resulting in testimony that was not necessarily reliable. Ms. Smith's and Mr. Smith's testimony I found to be factual and credible.

The ultimate question is: did Mr. Watt's complaints play a role in his termination? I find there is nothing in the record to indicate they did. Mr. Watt had numerous valid complaints, there is no disputing that. However, even his own testimony indicates that May Trucking was responsive and made an effort to solve the problems. Starting with his first day on the job, when his first truck had a cracked windshield, May made an effort to fix the problem. Mr. Watt perceived the requirement to drive the truck approximately two miles to get the windshield fixed as a violation. May disputes this, arguing there is an exception for cracks that do not intersect other cracks. (May Br. at 5 n.4.) While I found that for the purposes of this discussion, that the complaint about the crack was protected activity, I need not determine if it was actually a violation of safety regulations. Each of the maintenance complaints was addressed, perhaps not to Mr. Watt's total satisfaction or with the speed he would have liked, but each was addressed. In fact, because of the complaints, Mr. Watt was assigned to a newer truck.

Mr. Watt presented no evidence that the decision to fire him was related to his complaints. His complaints were made to either Breakdown or his Driver Manager. These were the appropriate contacts for the complaints he had. There is no evidence that either the Driver Manager or Breakdown informed Scott Smith, who made the decision to terminate Mr. Watt, or Robin Smith, of these problems. As Ms. Smith testified complaints are common from drivers. It depends on the type of complaint as to how they are handled.

Drivers complain all the time and I can't say that we sit and write everything down and type everything up. I'd say almost -- okay -- so if a complaint came as a truck related, you know, we needed to fix something on the truck, that conversation would happen either verbally or via Qualcomm, between the driver and our Breakdown Department. Our Breakdown Department is going to make notes of the items that are wrong with the truck. They're going to make an evaluation if it needs to be fixed right then and there. They may even have the driver take a picture, so that they can evaluate that. Or, if it's a minor thing, that they feel can wait until the service, then the

record is entered in the system, where when the driver comes in to get his truck serviced, they can get that issue addressed.

Your just day to day dispatch, complaining about the loads, complaining about, you know, the type of loads they're getting, they're not getting the miles, they're not getting this, you know, they're not going in the direction they want to go to -- we don't -- we don't make any notes on that.

(Tr. at 213). Furthermore, Ms. Smith testified that at the time she and Mr. Smith were discussing Mr. Watt's termination she was unaware of the refusals to drive and the complaints. (Tr. at 201).

Mr. Smith's testimony was very credible. He testified about May Trucking and its policies. He discussed the hiring and firing of drivers. He testified that a "big part" of his job was to see that there were sufficient drivers employed by May to operate all of its trucks.

Part of my responsibilities are to oversee the recruiting and the retention of drivers and try to minimize those costs and maintain as many drivers as possible.

There is a shortage of qualified drivers in our industry. It's very well publicized. It's not a May Trucking Company problem, it's an industry issue. And that is something that we struggle with, as well as everybody else.

(Tr. at 222.) He continued that when Mr. Watt was fired May was "struggling" to fill trucks. "I didn't want anybody terminated, unless it was absolutely necessary. And I wanted to review all of the terminations, as they came through, because I have a vested interest in not terminating drivers." (Tr. at 223). Mr. Smith would receive termination recommendations from the Safety department with which he would not always agree. Mr. Smith testified that:

Mr. Watt was terminated based on my review of Mr. Watt's accidents. I spoke with Ms. Smith, regarding Safety's recommendation and, per my instructions to her, she brought that information to me. I then reviewed his safety record, looked at the three accidents that had occurred, and looked at the circumstances surrounding those accidents, and I made a determination, based on that information, that May Trucking Company should not retain Mr. Watt, for safety reasons.

(Tr. at 224). Mr. Smith agreed that none of the accidents would be classified as "severe." However, he looked at three accidents in four months, noting a fairly short period of time as well as Mr. Watt's inexperience and lack of understanding about the size of the truck and the space it occupies.

We have an individual who is showing a pattern of not understanding the spacial vehicle and what can drive him through safely. [sic] And based on that, I made my determination that there was a risk here that was

unacceptable for May Trucking Company. And I couldn't, in good conscience, ignore the recommendation of Safety that he be terminated.

(Tr. at 231). When asked if, prior to making the decision to terminate Mr. Watt, he was aware of any of Mr. Watt's complaints, Mr. Smith responded, "I was unaware of any of Mr. Watt's complaints about his tractor, for any maintenance issues or any breakdown issues, or any refusals to drive or weather issues, or anything else." Mr. Smith stated that he was first aware of the complaints when he received Mr. Watt's complaint served by OSHA. (Tr. at 233.)

Mr. Watt correctly noted that he has the burden to prove that his protected activity contributed to May's decision to terminate him. (Watt Br. at 28). Mr. Watt failed to meet his burden. There is no evidence that Mr. Smith, the individual at May that decided to terminate Mr. Watt, even knew of Mr. Watt's protected activity. With no direct knowledge of the protected activity by the decision maker, Mr. Watt argues that the "close temporal proximity of the protected activity and the adverse employment activity raises an inference of discrimination." (Watt Br. at 29). Again, the facts underlying Mr. Watt's argument fails to support his position. Mr. Watt was in Wyoming when his defroster malfunctioned. After a discussion with Breakdown, he decided to resign and notified his Driver Manager of his decision. She convinced Mr. Watt to take the load to Ft. Collins, CO. He then went to the Denver office. His Driver Manager convinced him to take a load to Fontana, California and another load to Phoenix, Arizona. In Phoenix he took his truck to the Peterbilt maintenance facility on November 23rd⁶ and then he went home. He was home over the weekend and on Monday he received the call terminating him. (Tr. at 155-61). The length of time from when he complained to Breakdown about the defroster, while in Wyoming, until the time he was terminated was not "close temporal proximity" such that an "inference of discrimination" is raised.

CONCLUSION

Mr. Watt's termination was based solely on Mr. Watt being involved in three accidents. Even though these accidents were not severe, nor were they Department of Transportation reportable, they were sufficient for May to terminate him for being an unsafe driver. I find that none of his maintenance complaints, refusal to drive complaints or hours of service violations/complaints contributed in any way to the decision to terminate him. Accordingly, Mr. Watt has failed to meet his burden to show that any protected activity contributed to the adverse employment actions.

⁶ Mr. Watt testified that it was Wednesday the 23rd but also indicated he was not sure and he might have gotten home on Friday November 25th. (Tr. at 160).

ORDER

For the foregoing reasons, the complaint of Kenneth Watt is **DISMISSED**.

SO ORDERED.

STEPHEN M. REILLY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points

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

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

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