U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 March 2016

Case No.: **2011STA00053**

In the Matter of:

MARTIN MCCRAY,
Complainant,

v.

AUTOMOTIVE COMPONENT CARRIER, LLC,
Respondent.

Appearances:

Robert Reilman, Esq.
Robert L. Reilman PLC
Kalamazoo, Michigan
For the Claimant

Christopher L. Terry, Esq.
Rutledge, Manion, Rabaut, Terry & Thomas, P.C.
Detroit, Michigan
For the Employer

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This proceeding arises from a claim of whistleblower protection under Section 405 of the Surface Transportation Assistance Act ("STAA"), as amended.[1] The STAA and implementing regulations[2] protect employees from discharge, discipline, and other forms of discrimination for engaging in protected activity, such as reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle because of its unsafe condition. In this case, the Complainant, Martin McCray, alleges that he was terminated from his position as a truck driver for the Respondent, Automotive Component Carrier, LLC ("ACC"), because he made complaints about the safety of the equipment he was assigned to drive.

[1] 49 U.S.C. § 31105 (2014).
[2] 29 C.F.R. Part 1978 (2015).

I. STATEMENT OF THE CASE

McCray called to make a complaint with the Occupational Safety and Health Administration ("OSHA") on March 15, 2011. The complaint was reduced to writing on March 17, 2011. CX FF. McCray alleged that he was harassed and fired from his position as a truck driver on March 11, 2011, because he filed complaints about the condition of a parking lot with MIOSHA (the Michigan agency which is the state counterpart to OSHA) in July 2010, and grievances about unsafe trucks. His written STAA complaint referenced a particular incident on August 16, 2010, when he reported that the brakes on a trailer were bad. The company denied that McCray was fired in retaliation for protected activity. It maintained that any legitimate complaints he made were promptly and properly addressed. It alleged that he was fired because he committed sabotage when he disconnected an air line to the brakes on the trailer of a truck being operated by another driver. CX Z, RX 1.

OSHA investigated, and on August 2, 2011, found that McCray's report of bad brakes on a trailer the previous August was not a contributing factor to his termination, and that the evidence supported ACC's defense that he was fired for joking or horse play because he disconnected the brake lines of another driver's trailer. McCray objected to OSHA's findings and requested a hearing before the Office of Administrative Law Judges ("OALJ") by letter dated August 22, 2011, received at OALJ on August 29, 2011. The claim was docketed for further proceedings at OALJ on August 29, 2011.

ACC filed two motions for summary decision. The first sought dismissal of the claim against it on the grounds that McCray would be unable to establish a *prima facie* case, and even if he could, ACC would be able to establish by clear and convincing evidence that it would have taken the same action against him even had he not engaged in protected activity. I denied the motion on August 30, 2012. The second motion sought dismissal of the claim on the ground that the claim was barred by the doctrine of claim preclusion or *res judicata* because a state court dismissed McCray's claims under Michigan's Whistleblower Protection Act. I denied the second motion for summary decision in an order issued on February 28, 2013. In the state case McCray alleged he was terminated because he filed a claim with MIOSHA. Tr. at 1150.

McCray filed for bankruptcy and then moved to substitute the personal representative of the bankruptcy estate as the Complainant in this action, or, in the alternative, to issue an order that the case continue in his name. I issued an order retaining McCray as the Complainant but adding the personal representative to the service list on February 28, 2013.

I conducted a hearing on this claim during three separate weeks, four days each week, between March and September 2014 in Lansing, Michigan. Both parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18.[3] At the hearing, I admitted Complainant's Exhibits ("CX") A–P, R–JJ, OO–RR, and UU–YY, Respondent's

[3] On May 19, 2015, the Department of Labor promulgated extensive revisions to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 C.F.R. Part18A. 80 Fed. Reg. 28767 *et seq*. (May 19, 2015). The revised rules became effective on June 18, 2015. 80 Fed. Reg. at 28768. This case was heard under the rules in effect before June 18, 2015. *See* 29 C.F.R. Part 18A (2014).

Exhibits ("RX") 1–26, 33, 37–44,49–52, 54–77, 79–86, 88–90, and 95–100, and two stipulations regarding admissibility of certain evidence, Joint Exhibits ("JX") 1 and 2, without objection, or over the other party's objection. I excluded CX KK and RX 94 from evidence; ACC then withdrew RX 94. CX Q was offered but later withdrawn. CX X, LL, MM, NN, SS, and TT, and RX 27–32, 34–36, and 45–48 were not offered by the parties. The witnesses were separated, and, therefore, did not hear other witnesses' testimony (except for McCray and Steve Capser, General Manager for Penske Logistics, ACC's parent company, as representative for ACC for the first two weeks of the hearing, and Jamie Barber, who replaced Capser as General Manager, ACC's representative for the third and final week of the hearing). The record was held open after the hearing to allow the parties to submit their designations of portions of the deposition of Pat Dinkins, designated as CX ZZ; to allow me to consider McCray's request that I take judicial notice of statistics published on an official government website; and, once all evidentiary matters could be resolved, for the parties to submit closing briefs. I issued an order denying McCray's request that I take judicial notice of statistics published on the government web-site on October 1, 2014, and denied reconsideration of that order on November 7, 2014. On November 3, 2014, counsel for ACC notified me that the parties had decided not to submit any portion of CX ZZ. Both parties submitted briefs, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at hearing and the arguments of the parties. ACC filed a motion to strike certain arguments in McCray's reply brief because they were based on evidence which was not in the record. In response to the motion, McCray withdrew the references ACC objected to, and filed an amended reply, rendering the motion moot. I have not considered the objectionable evidence or arguments based on it.

II. ISSUES

The issues in this case are whether ACC violated the STAA when it terminated McCray's employment and, if so, what remedies should be awarded.

III. APPLICABLE STANDARDS

The Employee Protection section of the STAA provides:

> § 31105. Employee protections
>
> (a) PROHIBITIONS.—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
>
> (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety 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;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

49 U.S.C. § 31105(a). This provision was enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations."[4]

STAA whistleblower complaints are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[5] In order to prevail on his case McCray must show that he engaged in a protected activity, he suffered an adverse action, and the protected activity was a contributing

[4] *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).
[5] 49 U.S.C. § 42121(b) (2014). *See* 49 U.S.C. § 31105(b)(1).

factor in the adverse action. If these elements are satisfied, the burden shifts to ACC to show by clear and convincing evidence that the adverse action would have been taken regardless of the protected activity.[6] Thus ACC can prevail if it demonstrates either that McCray cannot establish one of the three listed elements, or that ACC would have taken the action it did regardless of his protected activity.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. SUMMARY OF THE EVIDENCE

ACC transports automotive parts for General Motors, Ford, and Chrysler. Tr. at 2147. ACC is a division or subsidiary of Penske Logistics, which is a subsidiary of Penske Truck Leasing. Tr. at 2439, 2496. Some witnesses in the management hierarchy identified their employer as ACC, and others, as Penske Logistics. For purposes of this decision, all managers' actions are imputed to ACC.

McCray worked as a truck driver for ACC. Line employees such as truck drivers were sometimes referred to as "Associates" by managers who testified at the hearing. Truck drivers are represented by a union, the United Auto Workers (UAW). The collective bargaining agreement between ACC and the UAW from October 1, 2008, until September 30, 2013, (*see* Tr. at 582) can be found at CX DD; an excerpt is also found at RX 44. Truck drivers bid on routes or "lanes" by seniority. Some but not all routes came with an assigned tractor and/or trailer, depending on the needs of the customer. Tr. at 2226, 2257, RX 97 at 50. During the time period relevant to McCray's claim, truck drivers reported to Operation Managers, also known as Dispatchers; Dispatchers reported to Russell Hamilton, Senior Operation Supervisor; Hamilton reported to Jamie Barber, Operations Manager; Barber reported to Mark Ragnoli, Regional Manager; and Ragnoli reported to Steve Capser, General Manager. Tr. at 2148, 2249, 2587, RX 97 at 27.

McCray has been a truck driver for 35 years. He worked for ACC from April 2006 until he was terminated on March 11, 2011, except for a layoff from December 2008 to August 2009. Tr. at 300. While working at ACC, he was a member of UAW Local 659. Tr. at 336. During the first period of his employment with ACC, there were three groups of drivers in the union, differentiated by when they were hired: drivers in the Executive Business Unit (EBU), long-term drivers who originally worked for General Motors, which previously owned the company; the National Business Unit (NBU) drivers, hired later, brought in a lower pay rate than those in the EBU; and finally the Progressive Business Unit (PBU) drivers, brought in later at a still lower rate. Each group had different seniority rights and different benefits, in addition to different pay rates. McCray was a PBU. Tr. at 300–301, 664–665. McCray testified that the differing pay rates and seniorities caused tensions among the membership. He said in addition to higher salaries and longer vacations, EBU drivers were assigned the best equipment and got first bid on runs, all of which was determined by seniority. Tr. at 301–302. When he returned to work after the layoff, there was a new collective bargaining agreement which no longer distinguished among the EBU, NBU, and PBU drivers; all the drivers who remained got the same rate. But their seniority dates

[6] 49 U.S.C. § 42121(b)(2)(B); *Powers v. Union Pacific Railroad Company*, ARB Case No. 13-034 (FRS) (ARB March 20, 2015, reissued with full dissent, April 21, 2015), PDF at 10–11.

were unchanged. Tr. at 322, 665–667. McCray had no disciplinary history with ACC or Department of Transportation violations during the time he worked for ACC until the events which led to his termination. Tr. at 311, CX A. He received "Good" marks in all categories in his annual ACC driving evaluations in 2009 and 2010. Tr. at 317–320, 988–991, CX B.

McCray testified that he became interested in union politics when he returned to work after the layoff in August 2009. He believed that the Union was colluding with ACC, because his interests were not being represented equally with drivers with more seniority. Tr. 321, 336, 667–670, 679–680, 682, 683, 684, 687. When he first returned to ACC, the Lansing terminal was operating out of a hunting trailer in a gravel pit, a couple of miles from the office. The hunting trailer was in very bad condition. McCray complained to Dan Sain, the union committeeman, about the poor conditions. Tr. at 321. McCray was also dissatisfied that EBU and NBU drivers still exercised seniority in tractor assignments and bidding on runs. Tr. at 322. Because he was dissatisfied about how the union was operating, he decided to run against Pat Dinkins for the position of shop chairman. The election was held in January 2010. Tr. at 323. McCray testified that during the union campaign, he received physical threats and threatening voicemails (which included the sound of gunshots), and his equipment was tampered with. Tr. at 324, 723, 745–748, 754, 759–760. He said Scott Hansen, another driver (and Senior Operations Supervisor Russ Hamilton's brother-in-law), threatened to beat him with a two-by-four. Tr. at 324. He felt he was harassed by both ACC management (Jamie Barber and Russ Hamilton) and union officers and members (Sain, Dinkins, and former EBU drivers Todd Short, Scott Hansen, and Larry LaClear). Tr. at 335. McCray lost the election. Tr. at 336. Mark Ragnoli, the Regional Manager for ACC, testified that McCray told him he had been threatened but declined to identify who threatened him, so Ragnoli could not pursue it further. Tr. at 2354–2359, 2414; RX 3.

McCray believed there was a safety problem with how the company was applying the 16-hour rule which allowed drivers to exceed the limit of 14 hours when they encountered adverse conditions. Tr. at 635–636. On February 5, 2010, McCray had a run to Fort Wayne, Indiana, in a snow storm. He thought the conditions were too dangerous to continue the run, but the dispatcher would not authorize him to shut down. Tr. at 640–641. He had conversations with union representatives about this, but he did not identify any company representatives he talked to about this perceived safety violation other than unnamed dispatchers. Tr. at 637–642. There is no evidence that a grievance was filed over this incident.

In June 2010, Barber, the Operations Manager for Penske Logistics, had to step in to replace a third shift (overnight) Dispatcher, Dennis Cronin, who walked off the job without notice. Tr. at 2151, 2612. There was no one else available to cover that position, so for the next three months, Barber worked as the third shift supervisor as well as taking care of his regular duties as Operations Manager. Tr. at 2612–2613. During that period he generally came in about 9:30 p.m. to work overnight as a dispatcher, and then between 6:30 and 7:00 a.m., he went to his office for four to six hours to take care of his responsibilities as an Operations Manager. Tr. at 2615–2616. Dispatchers have multiple responsibilities requiring them to constantly take and receive calls on cell phones, and move back and forth between the office and the yard. During a typical third shift, there would be 30 to 35 drivers out on the road. Tr. at 2617. During the time Barber was working as a Dispatcher, McCray was starting late in the first shift, and working into the second shift. Tr. at 2620.

At that time, ACC was using two separate locations for its Lansing operations, an office for administrative work, and a gravel lot (sometimes referred to as the gravel pit) about three miles away where tractors and trailers were dispatched and stored. Tr. at 2612. McCray testified that the parking lot at the gravel pit was in "atrocious" condition. There were deep ruts, holes, standing water and snow, mud, and no lighting. Tr. at 423. He took pictures of part of the lot to show a washout ditch which crossed the lot to illustrate its general condition. Tr. at 431–436, CX D. When he raised these issues with the union, Sain told him the union was negotiating with ACC over the condition of the lot. Tr. at 423. On July 1, 2010, McCray wrote Sain a letter recounting two incidents in connection with the condition of the parking lot. CX C. He said on the night of June 16, in a conversation with Barber and Brad Dilts, another driver, Dilts asked when the parking lot would be fixed, and offered to write a letter about it. According to McCray, Barber responded by threatening to come after any letter writers with a baseball bat. Tr. at 428, 826. In the second incident, on June 21, 2010, McCray stepped in a hole in the lot and twisted his ankle. He said Barber was unconcerned about his possible injury. Tr. at 428–429. Barber testified, on the other hand, that the condition of the yard was a topic of conversation all of the time; he was working to find a new location, but had been unable to find anything suitable. He denied threating anyone, or hearing of McCray's twisted ankle until the lawsuit was filed. Tr. at 2651–2653. He said company policy requires injuries to be reported regardless of the severity. Tr. at 2653–2654, 2711–2717. There is no evidence that McCray filed an injury report about this incident. Capser agreed with Barber that ACC was aware of the problems with the gravel lot and looking for an alternative location. RX 97 at 20–23.

McCray wrote another letter to Sain, also on July 1, 2010, complaining about the condition of equipment he was driving. CX G, Tr. at 611–623, 1073–1083. He cited to specific examples of questionable equipment, including detailed descriptions of problems he had with the brakes and tires on trailer number 857405; an unsafe kingpin connection to the fifth wheel for tractor number 439396; brakes, clutch, transmission, defroster, and muffler problems for tractor number 814889; and steering for tractor number 453869. According to McCray, Barber accused him of trying to bring down the fleet. McCray emphasized that federal regulations and the collective bargaining agreement required safe equipment. Drivers are required to inspect their vehicles before and after completing an assignment. If a driver discovers a defect in the equipment, he is supposed to complete a driver's vehicle inspection report (DVIR) so the defect can be repaired. Tr. at 62–64. A sample book of DVIR forms is found at RX 50. It is a four-carbon form. The original (white) is for the motor carrier; page two (yellow) is for the service department; page 3 (pink) is for dispatch; and page 4 (goldenrod) is a copy which is supposed to remain in the book. A DVIR book is kept in each tractor. No particular DVIR book is associated with any particular trailer. McCray told Sain he thought Barber cared more about truck shortages and the cost of repairs than safety. He said slip seating trucks (sending a truck out with another driver as soon as it returned from a run, Tr. at 2257–2258) made it hard for the drivers to track DVIRs and make sure needed repairs had been made. He said he should not be subjected to unsafe equipment or a supervisor blowing up at him or creating a hostile work environment for doing his job by filing DVIRs. After receiving this letter, Sain filed two grievances based upon it. Tr. at 1120.

On July 7, 2010, Sain filed a grievance against Barber on behalf of McCray. The grievance charged Barber with using threatening, coercing, and abusive language in McCray's presence, and demanded that Barber refrain from such action in the future. Tr. at 436–437, CX E. Barber agreed not to do it again, and the grievance was closed. Tr. at 1851–1852. McCray testified that the grievance was related to the condition of the parking lot and to Barber's reaction to his filing DVIRs. Tr. at 437. He cited to an evening when Barber "blew up" at him for filing a DVIR. Tr. at 438. Barber did not recall the incident specifically but admitted that he swore at McCray, and said he regretted it. Tr. at 2621. He said he was working 14-hour days during that period, which may have been a contributing factor to his using colorful language. Tr. 2719–2720, 2723. McCray said Barber always blew up at him when he filed a DVIR, accusing him of trying to shut down the fleet. Tr. at 449. He believed that Barber intended to intimidate him to prevent him from writing up equipment. Tr. at 450. He said Barber continued reacting that way until the end of his employment. *Id*. But Barber testified that after the grievance was settled, he made an effort to avoid any sort of verbal confrontation with McCray, and was embarrassed by it, saying it was "unprofessional" to have done so; Barber was not aware that McCray had accused him of further abusive language until McCray filed his lawsuit. Tr. at 2622. Barber also said it would not make any sense for him to blow up at any driver over reporting safety issues, since he expects such issues to be reported, and preaches to the drivers why it is important to do so. Tr. at 2629. He testified that safety was the first priority at Penske. They wanted to make sure that all tractors and trailers were operating safely; that any defects were reported by the drivers and sent for repair; and that the preventive maintenance policy was followed. Drivers are required by federal regulations to perform a pre-trip and a post-trip inspection, and report any problems on a DVIR. Tr. at 2597. Tractors were to be brought to the shop for preventive maintenance service every three months or 3000 miles. Tr. at 2587–2588. Under federal standards, company safety performance was rated against other companies with similarly-sized fleets. Tr. at 2590. Results of roadside inspections and any reported accidents or injuries were monitored weekly in a conference call. Tr. at 2591. Proper maintenance and repair affects the bottom line because breakdowns on the road cost more to repair. Tr. at 2592–2593. Late deliveries could cause customers' assembly lines to shut down, which could affect the margin because downtime could be charged back to the carrier. Tr. at 2608–2609.

ACC maintains that the bonus system demonstrates that safety is a high priority. Drivers could earn a quarterly safety bonus of $300. Management bonuses, including Barber's, were based in part on the company safety record. Tr. 2607–2607, RX 97 at 237–239. Several other witnesses testified that safety was very important to ACC. *See, e.g.*, Stevens, Tr. at 1335–1338, 1383; Sain, Tr. at 1691; Short, Tr. at 2063; Hamilton, Tr. at 2149; Ragnoli, Tr. at 2250–2251; Gruebner, Tr. at 2450; Dinkins, RX 71 at 9–10; Capser, RX 97 at 7–13, 17. One truck driver who testified on behalf of McCray, Mark Campbell, agreed that DVIRs were not being handled properly, and said he had been required to drive unsafe equipment. Tr. at 176–177, 179–186, 188, 191, 202, 276. But he also agreed that equipment can malfunction even after careful pre-trip inspections, and said that when he reported a problem with a trailer, he did not encounter opposition from ACC about repairing it. Tr. at 197, 201. Another truck driver who worked for ACC from October 2009 until December 2013, Earnest Green, testified that when he first started working for ACC the equipment was in good condition, but it deteriorated over time, and by the time he left, mechanics would sign off saying problems had been repaired when they had not.

Tr. at 71–72, 77–78. But he did not identify any such instances occurring during McCray's tenure between 2009 and 2011.

Sain filed an additional grievance on July 7, 2010, based on McCray's report that DVIRs were being mishandled. RX 61, Tr. at 1112–1119. Sain charged management with violation of Department of Transportation regulation 396.11 and Articles 24, 25, and 27 of the collective bargaining agreement and demanded immediate action. Sain did not ask McCray to sign the grievance because Sain thought it could involve every driver in his jurisdiction. McCray agreed that Sain could file the grievance under policy as opposed to an individual grievance. Tr. at 1853. Sain investigated and learned that Cronin had been totally disregarding DVIRs. Tr. at 1853. Cronin had left the company, and Barber was temporarily covering Cronin's former duties on the third shift, as well as handling his normal responsibilities. Tr. 1854. Barber responded to the grievance that Management was not aware that DVIRs were being handled improperly, and that the issue was being addressed. Tr. at 1855. Barber assured Sain that going forward everything would be taken care of properly. Tr. at 1855. McCray said that Barber's response to the grievance was false, in that he was "very much aware" of the problems with the DVIRs and that trucks were not being repaired. Tr. at 1121–1126. Barber testified at the hearing that after he stepped in to replace Cronin, but before the grievance was filed, he learned that Cronin had been throwing away DVIRs. He said he made sure that any write-up of a trailer defect was being properly addressed. He said he agreed with Sain when Sain explained the issue to him. Tr. at 2624–2626. Barber testified that after he responded to the grievance, he had no reason to believe there was an on-going problem. Tr. at 2628. Barber said that he mistakenly believed that DVIRs for leased trailers (as opposed to trailers owned by ACC) did not need to be kept, and only learned to the contrary after he was no longer acting as a dispatcher. Tr. at 2634.

McCray thought the union was not taking sufficient action about the conditions at the parking lot, and complained to MIOSHA. Tr. at 423. MIOSHA investigated and recommended that ACC repair the lot and pay a fine. Tr. at 425, CX F. McCray tried to keep his identity as the person who made the complaint confidential, but he thought it was well known that he had contacted MIOSHA. Tr. at 425. Barber and Capser agreed that the lot was not in good condition; both testified that they had been looking for an alternative location. Tr. at 2650, 2728–2732, RX 97 at 20–21. Barber said as part of the MIOSHA investigation, he checked and found that no accidents or injuries had been reported due to the condition of the yard. But he agreed with MIOSHA's findings. By fall 2010, ACC had completed required repairs, and the MIOSHA inspector approved it. Tr. at 2657–2658, 2660. Barber testified that he did not learn that McCray had filed the complaint with MIOSHA until McCray's lawsuit was filed. Tr. at 2660.

On August 10, 2010, McCray had a confrontation with Scott Hansen. *See* CX M, CX N, CX CC, RX 92. McCray testified at length about the incident, and also described it in a letter to Ragnoli, CX CC. Tr. at 809–817, 844–881, 927–940. In essence, he said he was delayed in starting his run because the two available trucks were not in acceptable condition. He requested to use a truck assigned to another driver. While he was waiting, he saw Scott Hansen and Cary Wilkinson racing up and down the driveway. He thought they were driving too fast, deliberately raising dust. When he was assigned a truck, Hansen passed him on the right and blocked the front of McCray's truck. Hansen gestured to him, but when McCray refused to get out of his truck, Hansen got out of his truck, opened the door of McCray's truck, and yelled at McCray.

McCray said he was calling him names, spitting, and very angry, threatening to go to the union and get McCray fired for trying to bounce another driver out of a truck. McCray had to get out of the truck to get his belongings from his personal vehicle. After Hansen screamed at McCray and charged him, McCray told him to back up. McCray took Hansen's picture with his phone. RX 54. By the time he took the picture, Hansen was back in his truck. McCray was upset by the incident and called Sain to report it; Sain told him to take it up with Hamilton, and took statements from Hansen and Wilkinson. Tr. at 1865–1867, 1870–1872, 1878–1880, 1970– 1971, RX 85, RX 5, RX 6. On August 11, before he completed the detailed written statement, McCray wrote to Hamilton about the incident, stating that he was shaken by it, and considered Hansen to be capable of work place violence. McCray requested that Hamilton advise Hansen to refrain from any contact with McCray or making malicious statements about him. RX 92.

On the night of the incident, Hansen, Wilkinson, and another driver were moving trailers in the yard to make room for construction crews repairing the yard in response to citations by MIOSHA. Tr. at 2292, 2375, RX 4. Hansen's and Wilkinson's written statements about the incident obtained by ACC on August 11 (RX 5 and RX 6) and Hansen's testimony (Tr. 2292–2302, 2234–2335, 2338–2340) were fairly consistent with McCray's, in that they, too, said that Hansen initiated the confrontation over McCray taking another driver's truck; but they suggested that it was McCray who first became angry and out of control. Hamilton's memorandum, which was prepared at Ragnoli's request, suggests that when Hamilton looked into the incident, he concluded that McCray was unreasonable in his choice of tractor and caused unnecessary delay in his run. RX 4; *see also* Tr. at 2228. Wilkinson had called Hamilton to complain about McCray trying to take his tractor; Hamilton then suggested to the dispatcher that McCray should take another tractor which had just come in. Tr. 2157–2166, RX 4. McCray did not submit a statement until several days later. *See* RX 10, a letter to Hamilton stating he had not yet had time to prepare a written statement, but alleging a pattern of hostile behavior, threats, and harassment by Hansen. Eventually McCray wrote a statement about the details of the incident, CX CC, and met with Ragnoli and Hamilton. That meeting took place on August 20, and is described below.

Hansen testified that he thought McCray was going to start a fist fight during the August 10 confrontation. Tr. at 2298. He denied doing anything that would cause McCray to feel apprehensive for his safety. Tr. at 2303–2304, 2339. On August 18, 2010, Hansen wrote a letter to Barber accusing McCray of creating a hostile work environment and asking for protection. In the letter, Hansen said that he was not the only driver who felt that way. He said during the incident on August 10, he felt that his safety was in question. He said the drivers were all tired of walking on eggshells around McCray. RX 11; Tr. at 2304–2308.

McCray testified that on August 13, 2010, he completed two DVIRs regarding Trailer 857405 requesting that the brakes be adjusted. CX H, RX 7, CX I; *see also* CX G. He testified that he had had trouble with the brakes on that trailer, which he often took on the Parma run, for about three months, because they would not hold an adjustment. He spoke to the mechanics at Potpourri Trailer & Leasing, Inc., about the trailer. He was told the cam rollers needed to be replaced, which prevented proper brake adjustment. But ACC did not want to pay for repairing or replacing the cam rollers. Tr. at 341–346, 382–383. McCray copied the DVIR he gave to the mechanic (CX H) for himself and for Dan Sain. He also made some notes on his personal copy. Tr. at 346–350, 1161–1162, 1282. He agreed that because the first DVIR had been signed by a

mechanic, there was nothing on the DVIR that indicated that the trailer needed further service. Tr. at 1164, 1196. He said he turned in the second DVIR, CX I, to Barber because he anticipated that Barber was not going to do anything about it. Barber agreed that he probably told McCray to throw the DVIR away, because at that time, he mistakenly believed that repair records for leased trailers need not be kept. Tr. at 346–347, 1172, 1243, 2634, 2722. McCray said he discussed both DVIRs with Barber. Tr. at 1194, 1196, 1216. He said he told Barber that the trailer should not be on the road. Tr. 1197, 1214, 1223. He said he did not copy the second DVIR (CX I) at the time because he kept the pink and yellow copies instead. Tr. at 354–372, 1166–1169, 1227. He testified that he eventually made a copy in March 2011 to send to OSHA in connection with its investigation of his claim. Tr. at 370. McCray initially testified that he kept contemporaneous copies of all of his DVIRs, but he eventually destroyed them when he thought he did not need them anymore. Tr. at 380. Later he testified that he only started to keep copies when he discovered that the equipment was not being repaired and neither UAW nor ACC was doing anything about it. Tr. at 1095. He said it was normal for him to rip unused copies of DVIRS from the book, staple them to the manifests, and keep them at home. Tr. at 1096.

ACC contends that the second August 13 DVIR (CX I) was fabricated by McCray, because the original cannot be found in ACC records,[7] ACC never received a copy in discovery; the DVIR was not handled in the prescribed manner so as to provide a record of service performed; McCray referred to only one DVIR on other occasions; and McCray did not make notes in the margin as he did with other documents. Tr. at 373–376, 1199–1205, 1216, 1217–1218, 1219, 1221–1224, 1227–1232, CX K, RX 64, RX 97 at 101–105, 107–108, 255–257. Barber did not recall seeing either DVIR before the lawsuit was filed. Tr. at 2636, 2642. But upon reviewing the first DVIR, he said he would not have been concerned since a mechanic had signed indicating that repairs had been completed. Tr. at 2632–2633. He believed if he had seen the second DVIR, CX I, he would have raised questions about it. Tr. at 2637–2639, 2641. In addition, ACC suggested that McCray's testimony that he was having trouble with this trailer in August was contradicted by his letter to Sain on July 1, which said that Hamilton had approved replacing the cam rollers and the trailer was working correctly by the time he wrote the letter. Tr. at 1076–1080. An invoice from Potpourri shows that the trailer brakes were adjusted on August 5, 2010. Tr. at 1248, RX 9 at 2. McCray testified that he had been told the brakes were fine, but later figured out that the cam rollers had not been repaired after all. Tr. at 1080, 1083.

The controversy over whether the second DVIR was fabricated is not central to the issues in the case. But McCray's explanations of how he came to have copies of it do not make sense. ACC's position that repairs could not be made if the copies were not distributed as intended is well taken. I cannot determine exactly what happened with the second DVIR, but I conclude that McCray was not candid about it in his testimony.

McCray wrote a letter to Sain dated August 16, 2010, maintaining that the systemic problems with DVIRs had not been resolved despite the grievance filed by the union on July 27, 2010. He reported that tractor number 45389 had been written up on July 27, 2010, but was still being dispatched. McCray requested that the union file a second grievance over the handling of DVIRs. He also said that the situation caused him concern because he did not have an assigned truck, so he depended on dispatch to find him a safe, acceptable tractor. CX N. He

[7] But counsel later stated that the company is only obligated to keep DVIRs for three months. Tr. at 1086.

testified that no one was tracking the DVIRs. He said anytime anyone submitted a DVIR, Barber would be upset because ACC was short of trucks. Tr. at 408–409. He said nothing changed after Barber signed off on the grievances. Tr. at 412. McCray also called Dinkins that same day about DVIRs not being processed properly, and Jamie Barber allowing tractors and trailers to be dispatched with safety issues. According to Dinkins' notes, McCray mentioned that Sain was investigating these complaints. RX 37. McCray also told Dinkins he was being harassed. RX 71 at 15. Dinkins could not recall whether McCray was referring to harassment by management or other workers. RX 71 at 16. Dinkins advised McCray to give a written statement to management to document the harassment. RX 71 at 17, RX 37.

McCray testified that he submitted another DVIR referencing brake trouble with trailer number 857405 on August 17, 2010. Tr. 382, 1241–1242, CX J. He said there was no way to know the repair history because no DVIR books are attached to a trailer. Tr. at 384, 385–386. He also complained to the union about the condition of the trailer, alleging that it was a safety violation to dispatch it. Tr. at 392, 1241–1246, CX K. He testified that bills of lading dated August 14, 2010, showed that the trailer was dispatched after he reported problems with the brakes. Tr. at 402, CX L. Sain testified that another driver had also written up the brakes on that trailer on August 16, but McCray took it out on the Parma run before it could be repaired. Sain said McCray told him the brakes were all right when he did his pre-trip inspection, but they were not working later. Tr. at 1902–1911, RX 87. Sain told McCray to write it up and either lock it out, or see if Barber wanted it taken to Potpourri for repair. Tr. at 1913–1914, RX 87. An invoice from Potpourri shows that the parking brakes on the trailer were serviced again on August 18, 2010, at which time the brake chambers were replaced. Tr. at 1248–1249, RX 9 at 1.

Also on August 17, 2010, McCray wrote to Sain requesting that the union file a grievance on his behalf because he felt he was being harassed by Russ Hamilton and Jamie Barber, who were responsible for him being assigned dirty, unsafe equipment (tractor number 465889) when drivers with less seniority were assigned new trucks. Tr. at 405, CX M. During the hearing, however, he testified that the ex-EBU drivers (who had higher seniority than McCray) were being given the new equipment. Tr. at 415. Sain and Dinkins declined to file another grievance on his behalf. Tr. at 1254–1255, 1925. When Sain checked on the status of the tractor, he learned that everything had been fixed except for a problem with the ABS brakes, which could not be fixed immediately due to a lack of parts. According to Sain, the regulations did not require that the tractor be taken out of service for that problem. Tr. at 1917–1918, RX 87.

On August 20, 2010, McCray met with Ragnoli and Hamilton about the August 10 incident with Hansen. McCray thought he would just be submitting his written statement. Tr. at 883. But the meeting was a long one, and addressed several matters, including statements by other witnesses to the August 10 incident who disagreed with McCray's account. Tr. 886–889, 892–893. McCray did not recall many details of the meeting, but felt he was being intimidated by Ragnoli, who did not accept his version of what had happened. Tr. 887, 888, 889, 892, 893, 894, 1254. Hamilton did not participate in the meeting other than to observe; he did not recall the specifics of what took place. Tr. at 2173. Ragnoli took notes during the meeting. Tr. at 2381, 2384–2387, RX 12. Ragnoli testified that the meeting was intended to gather facts, but McCray reacted like he was being accused of something. Ultimately, Ragnoli determined that he did not have enough facts to issue discipline to anyone over the incident, and told McCray and

Hansen that they did not have to like each other, but they had to work together, and any further incidents would be dealt with swiftly. Tr. at 2395–2396, 2421. Ragnoli considered the matter resolved at that point, but he had not yet seen McCray's statement stating that he was having major anxiety since the incident. Tr. at 2396.

McCray wrote his statement in the form of a letter to Ragnoli dated August 20. In the letter, he recounted his negative experiences with Scott Hansen and other senior drivers going back to August or September 2009. CX CC; Tr. at 606–611. He said when he was running for office in the union election, he heard that some drivers (including Hansen) were threatening to beat him up. He said Hansen confronted him several times, challenging his right to run for office. He said he was relieved when the election was over. He said in February 2010 he was assigned one of the new trucks, but the EBUs complained about seniority, and the tractor was reassigned. He said his Log folder was tampered with, so he had to keep it in his personal car and personally turn in the completed logs. He said he generally tried to avoid contact and trouble with top seniority drivers. He said that in June 2010, 50 to 75 gallons of fuel were stolen from the truck he was assigned, #499466. He said Jeff Kaulnik told him he was following McCray around to watch him. He said Scott Hansen was advising other drivers not to give McCray the keys to trucks when he needed one. He was having trouble finding a truck to use when his assigned tractor was in for repair due to engine problems. He felt that new tractors were not being utilized as well as they could because they were only being used for one shift per day by senior drivers instead of being assigned for use around the clock. In July 2010, his assigned truck was sold; he said he had safety concerns about the truck because it was losing power, so he was not bothered when it was sold. He expressed satisfaction that a problem he had with another driver out of the Flint Terminal was resolved after a meeting initiated by Ragnoli on August 10. *See also* Tr. at 800–805, 1859–1865, 2359–2373. But after that meeting he had difficulty obtaining a truck to go on his run, and the confrontation with Scott Hansen ensued. McCray told Ragnoli in the letter that he was still stunned and had had major anxiety since that incident. Ragnoli responded by providing McCray with information about the Employee Assistance Program. Tr. at 2398, RX 14.

McCray called Dinkins after the meeting with Ragnoli, and followed up with a letter dated August 22. RX 71 at 18–20, RX 38. In the letter, in addition to complaining about the meeting with Ragnoli, McCray also said that he wanted to go ahead with pending grievances and asked what the union was going to do to protect him from Barber, whose mission was to destroy his job. RX 38. Dinkins called McCray in response to the letter and advised him that he should have stopped the meeting immediately when he became uncomfortable. RX 71 at 20–21, RX 39. Dinkins told McCray that the union would defend him, but he did not see any evidence that Barber was out to get McCray or that Sain was not following up McCray's grievances appropriately. RX 71 at 22–24, RX 39.

On August 26, 2012, McCray wrote to Hamilton (with a copy to Dinkins) to request that he be paid for the meeting with Ragnoli on August 20, and a vacation day. CX GG, Tr. at 629–630. He said he had been "sick" over the Scott Hansen incident, presumably referring to the incident on August 10.

On August 30, 2010, McCray wrote to Hamilton (copied to Sain and Randy Howard, Sain's assistant committeeman), giving a list of problems with tractor number 560825 which had recently been assigned to him. CX EE, Tr. at 624–625. He sent copies of the letter to Sain and Howard in their capacity as union representatives. He listed 19 different problems, 3 of which he specifically marked as safety issues.

Sometime in August 2010, after the MIOSHA investigation, McCray received a call from Capser suggesting that they meet away from the terminal. Tr. at 457. Capser testified that he offered to meet with McCray because Ragnoli had reported that McCray was under stress. RX 97 at 24–25, 112–114. Capser said he occasionally met with other drivers as well; it has always been his habit to engage in dialogue with line employees. RX 97 at 26, 118, 173–175. McCray met with Capser on September 1, 2010, at the Ohio Turnpike. Tr. at 498. During their initial meeting, McCray gave Capser an envelope of documents and talked to him about the problems McCray had been having. He talked about how DVIRs were being handled, bad equipment, parking lot issues, and Jamie Barber. Tr. at 459. According to McCray, Capser said something to the effect that he knew that McCray had called MIOSHA, and if he ever did anything like that again, he would not have a job; Capser said he was going to fix the problems. Tr. at 458, 459. Capser denied threatening McCray for reporting to MIOSHA; he said that McCray volunteered that he was the person who turned ACC in to MIOSHA, and Capser responded that he would maintain McCray's confidence. Capser said he told McCray the same thing that he tells all associates: they should feel comfortable going to their manager with problems, but if not, they could escalate the issue to the next higher level. Tr. at 30–31. Later that day McCray emailed Capser to thank him for meeting with him. CX S. He said the goal of the letters he had been writing were job safety and a pleasant work environment. He encouraged Capser to read the documents he had been given, which McCray said were important with respect to equipment safety. He expressed confidence in Capser's leadership and wished him success in problem solving. Tr. at 498. McCray testified that after that meeting he talked to Capser by telephone once a week or once every two weeks, and exchanged emails. Tr. at 479. The tone of the email does not support McCray's allegation that Capser threatened him during the meeting.

On September 3, 2010, McCray wrote a letter to Capser enclosing some additional documents. CX O. He said that neither management nor the union was fully disclosing information to the employees. He said that the drivers were dealing with fear and intimidation on a daily basis, and that Ragnoli, Barber, and Hamilton were retaliating against the drivers. As an example, he cited the incident between himself and Hansen, suggesting that Hansen and Barber were conspiring together. He said managers and union officers were ignoring company standards and safety. Tr. 459–460, 466, 470. Among the documents he provided to Capser either when they met on September 1, or in the packet he sent on September 3, or both, was his letter to Sain dated July 1, 2010, regarding unsafe equipment. He added some additional notes to the letter for Capser's attention. CX G, Tr. at 614–623.

Sometime after September 3, 2010, McCray took a photograph with his telephone of a desk or table-top littered with loose DVIRS (with a paper cup sitting on one group of DVIRs) which he emailed to Capser. On a printed copy of the picture, McCray wrote at the top, "This is the D.V.I.R. system in Lansing—A serious Failure! (Repairs) These vanish etc. No safety concerns." These entries were not on the photograph when it was emailed to Capser. Tr. at 475–

478, CX WW. Capser testified that he thought the picture showed an organized sorting stack. RX 97 at 141. Capser did not believe that the DVIR system was broken because problems did not show up in roadside inspections. RX 97 at 145–146, 248–249. A mechanic's signature on the DVIR and a service invoice for the trailer McCray complained about showed that the trailer had been repaired, which demonstrated that the system was working. RX 97 at 147–148.

On October 29, 2010, McCray and Sain had a conversation during which McCray asked Sain to file a grievance alleging that McCray was being harassed by being assigned dirty tractors. Sain declined because he did not think there was any basis for it. When McCray accused Sain of disliking him and refusing to represent him, Sain said he would never refuse to represent him, and had never told anyone that he did not like him. Sain testified that it was not a question of liking or disliking McCray; they had a professional working relationship. Tr. at 1930–1934, RX 98. Sain said he never saw any evidence that ACC intentionally violated the DVIR procedure or that Barber used abusive language toward McCray after the grievances on those issues were resolved. Tr. at 1949–1950.

Sometime in December 2010 McCray met again with Capser and gave him some notes entitled "The good and the bad and the ugly, State of Lansing Drivers ACC." In the notes he said that unsafe equipment was being brought to Lansing, where management did not want to fix problems, and drivers were being told to drive trucks which needed repairs. He listed several examples of trucks going without needed repairs, which he concluded showed a major problem with unsafe equipment. He also complained about a lack of information about holiday schedules, and said drivers were carrying guns. Tr. at 463–464, 471–475, CX VV. The meeting may have occurred on December 10, because on that date, McCray emailed Casper, thanking him for taking time that day to talk. CX Y, Tr. at 623–624. In the email, McCray suggested that Capser come to the trailer during night hours to get feedback from the drivers. McCray also reported that he was not happy about a new truck which had been assigned to him because it showed a loss of power between 45 and 55 mph, which could cause a safety issue. He complained of his frustration that local management did not make common sense safety decisions; he also said the DVIR system needed to be fixed to prevent safety issues from being swept under the rug. Capser said he asked who McCray thought was carrying a gun, but McCray would not tell him. RX 97 at 144–145, 264–265.

On December 11, 2010, McCray emailed Capser to report three incidents he heard about in which trailers had come apart from tractors, allegedly because the company was not fixing fifth wheels. CX HH, Tr. at 630–631. The fifth wheel is mounted on the back of a tractor above the axles. A kingpin on the trailer fits into a slot in the fifth wheel and is locked in to make a secure connection. It is subject to wear and tear, and sometimes needs to be rebuilt. Tr. at 632.

On December 14, 2010, in connection with an exchange of holiday greetings, McCray complained to Capser that being assigned different trucks to drive was stressful, because other drivers were not making sure they were in safe condition. He gave some specific examples of safety problems he had to report on a truck he had been assigned the previous day which another driver should have had taken care of. CX QQ.

Capser testified that after his initial meeting with McCray in September, he felt they had related well to each other. He liked McCray, but considered him a "contrarian" who could nonetheless provide valuable information. RX 97 at 34–35. Capser said the period from September to November was fairly quiet, with McCray raising few concerns. RX 97 at 42. After reviewing the documents McCray had provided, Capser asked whether he needed to follow up on anything, but McCray said his issues had been resolved. RX 97 at 43–45. Capser recalled that McCray complained about truck assignments; Capser's impression was that McCray wanted to circumvent the seniority system to obtain the best equipment for himself. RX 97 at 49. When McCray emailed Capser about problems with equipment, Capser followed up. For example, when McCray mentioned a problem of tractors losing power (*see* CX Y), the company put together training to make sure the drivers were aware of differences in operation between old and new equipment. RX 97 at 51–52. McCray's email about trailers coming apart from tractors (*see* CX HH) also led to additional training for drivers; in addition, ACC investigated the tractor and trailer in question and found no mechanical issue with the fifth wheel. RX 97 at 52–55, 136–137. Capser also talked to other drivers, who did not voice complaints about safety or how they were being treated by management or the union. Capser concluded that overall the morale of the drivers was good, except that everyone wanted to get out of the gravel pit. ACC received few grievances and typically they were resolved without going to arbitration. RX 97 at 137, 266–268.

On January 3, 2011, McCray complained to Sain that he was being shorted on hours. Sain followed up for him, and eventually he received a check for the time. Tr. at 1935–1939, RX 89.

On January 8, 2011, McCray emailed Capser telling him that a Penske sign which was supposed to be lit at night was half burned out. He thought Capser would be concerned about the company image projected by the ill-lit sign. He also mentioned he had been having payroll issues which he thought were intentional, indicating "someone's attitude against me." CX T. During his testimony at the hearing, he said he was referring to Barber, who continually and intentionally shorted his hours, requiring him to seek assistance from the union to sort out. Tr. at 499. He thought Barber disliked him because of his complaints about fear and intimidation by management at the Lansing terminal, union collusion, and unsafe equipment. Tr. at 500, 724. Barber denied deliberately shorting McCray's paychecks. He said it was common for drivers to dispute the amount they were paid. If they could not reach an agreement with the driver, then they would go to the union to reach an agreement. He had no specific recollection of any paycheck issues with McCray, but said if any were brought to his attention, he would have addressed them. Tr. at 2661–2663. Capser testified that although McCray complained about fear and intimidation, the only specific incident he identified was the time Barber cussed at McCray, when Barber admitted he was wrong and McCray's grievance was settled. RX 97 at 150–151.

On February 9, 2011, Barber and Hamilton met with McCray to inquire why he did not log a stop when he met with Capser. McCray viewed Barber's inquiry into his failure to log a stop as Barber being out to get him, but Barber denied it, saying that ACC had an open door policy, and McCray was free to talk to anyone. CX P. Capser concluded it was a legitimate inquiry. RX 97 at170–171.

Also on February 9, 2011, McCray encountered what he found to be a strong smell of diesel fuel in his truck which had been driven by Todd Short. McCray accused Short of

deliberately soaking his floor mat in fuel. He said it gave him a "massive headache" for which he went to a health clinic. He discarded the mat and drove with the windows open, but complained that the smell remained. McCray considered driving with diesel fuel in the cab to be unsafe because it would have a detrimental effect on his health, and it could have caused him to have a crash. Tr. 456, 479–486. McCray wrote several emails to Capser about the incident. CX P, CX R, CX U, CX V, CX JJ. At the hearing, McCray testified that when he wrote the February 15 email, CX R, he was frustrated and angry because things were getting worse and he was being harassed, and he did not know whether it was coming from union members or management. Tr. at 494–495. The following week McCray got sick with bronchitis, which he attributed to driving with his windows open in the cold. Tr. at 489, 493, CX AA, CX BB.

Capser said that he followed up McCray's complaint about the diesel fuel with Barber. RX 97 at 57–59, 156–157. Barber investigated the incident of the diesel fuel on February 11. McCray brought the truck to the fuel island. Barber, Hamilton, and Howard climbed into the truck, but none noticed any overwhelming odor of diesel fuel. McCray told them he had already cleaned it up, and accused Short of deliberately pumping fuel onto his floor mat. McCray also accused Short of stealing fuel. Tr. at 2668–2669. Short admitted that he had accidentally spilled fuel outside the cab when fueling the truck, but denied deliberately soaking the mat. Tr. at 2080–2084, 2103–2104. Barber investigated McCray's allegation that Short was stealing fuel and found there was nothing to it. Short was very upset by McCray's allegation that he was stealing fuel, and wrote a statement describing a series of incidents with McCray to management dated February 22, 2011. Short alleged that he was scared for his safety because of McCray. Tr. at 2670–2672, RX 23. No action was taken on Short's complaint because McCray had already been suspended over the Stevens incident described below. Tr. at 2672.

On the evening of February 15, 2011, McCray and Capser spoke by telephone. According to McCray, Capser said something to the effect that McCray was a problem employee, and he planned to turn over everything to Human Resources. McCray took this to mean that ACC was going to get rid of him. McCray said he reminded Capser that he had no disciplinary record. Tr. at 506. Capser said he took McCray's complaints about the diesel fuel as a "red flag." He said McCray talked as though everyone else was out to get him, which caused him concern. Capser said he asked McCray whether he himself could be responsible for any of the incidents, which McCray denied. Capser found it disconcerting, and began to feel he was out of his depth. It was in that context that Capser said he told McCray that he would go to Human Resources. RX 97 at 60–62. Capser again denied threatening McCray. Tr. at 63.

McCray was off sick the following week. CX AA. When he returned to work on February 22, 2011, he was suspended. Tr. at 507. On March 11, 2011, he was terminated. The union grieved the termination, which was denied at the first level and after an investigative hearing. The union decided not to take the grievance to arbitration.

ACC contends that McCray was suspended and then terminated because of an incident that occurred on January 20, 2011, in which someone disconnected an air line for the brakes on a truck driven by Jim Stevens. Stevens first reported the incident to Sain on February 17, 2011; Sain told Stevens that he could not do anything because he represented both Stevens and McCray, so Stevens should tell management about it. RX 72. McCray denies that he

disconnected the air line. CX Z, Tr. at 508, 510, 1139, 1141. ACC maintains that he did, and that this was sabotage and a major safety violation worthy of discharge under the work rules and the collective bargaining agreement.

There are two air lines between a tractor and a trailer which supply air for the brakes, one red, and one blue. The air lines are secured to the tractor and the trailer by a locking mechanism called a glad hand. Air releases the brakes, rather than applying them. If there is no air in the system the brakes are locked, and if both air lines are disconnected, the vehicle will not move because there is no air in the system. The red line supplies air to the emergency brake system. If the red line is not attached, the trailer will not move. The blue line supplies air to the tractor brakes. If the blue line is not connected, it is possible to move and stop the truck, because the tractor contributes to braking as well. If the brakes are applied with the blue line disconnected, braking will take longer time and distance. When the blue line is disconnected, there is a loud sound of air escaping the system. The gauges would show low pressure, and the driver would be able to feel the loss of air in his foot. Tr. at 84–85, 98–102, 113,150–152, 1371–1372, 1386–1387, 1446, 2427. In this case, the blue line on Stevens' rig was not securely locked, allowing him to pull his rig out of the dock and execute a sharp left turn before the line detached and he tried to apply the brakes. Ragnoli, who started his career as a diesel mechanic, gave a detailed explanation of how the brake lines are configured, how they work, and how the blue air line can be connected but not locked. Tr. at 2260–2278, 2423–2427. Pictures illustrating a truck dashboard, the air lines, the locking mechanism on a glad hand, the layout of the facility where the incident occurred, and angles of turn, can be found at CX OO, CX PP, CX YY, RX 66, RX 67, RX 68, RX 69, and RX 100.

Stevens testified that the night of January 20, 2011, was cold and snowy. Tr. at 1346, 1478. He parked his truck at the loading dock at Ryder, slid his tandems to the rear of the trailer, and opened the doors. Tr. at 1347. When he got out of the truck he left his company-issued Nextel phone/two-way radio in the truck. Tr. at 1348. He walked inside the facility, hung his keys on dock 11, and waited in the drivers' room for his truck to be unloaded. Tr. at 1350. After he had been there a while, McCray came into the room, turned in his paperwork, and waited for his assignment. Tr. at 1351. Stevens and McCray shared the same dock. When his dock was called, Stevens retrieved his keys and paperwork. Tr. at 1353. When Stevens went outside, McCray, who had been out of Stephen's sight for about half an hour, was outside as well. Tr. at 1355. Stevens put his paperwork in the bill box on the trailer, and got back into the truck. Tr. at 1356. He knew that McCray was waiting for the dock, so after he warmed up his truck he pulled out straight, and then turned left and drove about 200 yards, intending to park to slide his tandems forward and shut his doors. When Stevens got into his truck, McCray was also in his truck, sitting face to face about 50 yards apart. Tr. at 1357. As Stevens was turning left he heard something metallic hit the catwalk. When he put his brake on to slow down, he heard a big rush of air. Tr. at 1361, 1477, 1479. It was very hard to stop, because he had tractor brakes but no trailer brakes. Tr. at 1362, 1477, 1479. When he stopped he got out of the truck, and saw that the blue brake line was off the glad hand which locks the line from the tractor to the trailer. Tr. at 1370. Stevens testified that he was dumbfounded; he did not know how it got there. He reconnected the line with no difficulty. Tr. at 1372. He then slid the tandems forward, shut the doors, and got back into the truck. When he got back into the truck, McCray called him on his company phone. Stevens knew it was McCray who was calling, because his name came up on

the screen. Tr. at 1373. McCray asked him if he had trailer brakes. When Stevens replied that he did not have trailer brakes, McCray told him he had disconnected the line. McCray said he was joking around. Stevens was angry and told McCray it was not a smart thing to do. Tr. at 1374. When he got home that night he discussed what it happened with his wife, Amy. She was not happy, and asked whether he had reported McCray. Tr. at 1377. She asked Stevens if it was dangerous, and he replied that it was. Tr. at 1378; *see also* Tr. at 1479, 1532. Later, when Stevens saw McCray at the terminal at various times, McCray would say something to the effect that he was only joking when he disconnected the line. Stevens did not want to talk about it, but he did not intend to report the incident. Tr. at 1375–1377, 1481, 1507. Eventually, however, Stevens reported the incident to Sain because his wife insisted that he do so. Tr. at 1381, 1403–1404, 1483, 1484, 1486–1487. Stevens told Sain that McCray had disconnected the service air line, and called and told him after he left the dock. Sain stopped Stevens from talking to him, and told Stevens that he had to contact management, because Sain would be representing McCray. Tr. at 1382, 1485, 1488, 1667–1669, RX 72, RX 89. Sain's contemporaneous notes confirm that Stevens told Sain that McCray had told Stevens he had disconnected the brake line. RX 72. Stevens reported the incident to Hamilton, who asked him to write a statement. Tr. at 1384, 1489, 1492 . His written statement is found at RX 18, along with a corrected version found at RX 22. Hamilton and Stevens found a record of the phone call from McCray on Stevens' phone. A screen shot of that record is found in RX 15. When Stevens gave the initial written statement, he provided the wrong date for the incident, because he mistook the duration of the call (1:17, showing that the call lasted for one minute, 17 seconds), for the date of the call (1/20, showing the date, January 20) on the screen of his phone. Tr. at 1387–1388, 1390–1392, 1499, 1501–1502. Amy Stevens also testified at the hearing, and corroborated her husband in every significant respect. Tr. at 1399–1409. She also provided a written statement to ACC. Tr. at 1401–1402, 1404, RX 24. A record from Nextel showed that McCray called Stevens at 8:24 p.m. on January 20, 2011. RX 16. Stevens' and McCray's driver logs show that both were at Ryder at overlapping times on January 20, 2011. RX 33.

McCray testified that the night of January 20, 2011, was a typical work night from his point of view. He was assigned the same dock as Stevens, who was already parked there, so he waited for Stevens to pull away from the dock so he could use it. Tr. at 555. When the light on the dock turned from red to green, indicating that the lock had been disengaged, Stevens was not in his truck. Tr. at 556. McCray had a different explanation for the phone call to Stevens. He said he used the two-way radio to ask Stevens where he was; he said Stevens was angry with him. Tr. at 557, 1062. Stevens denied that McCray called him to ask him to move out of the dock, instead maintaining that McCray called and asked whether he had brakes. Tr. at 1469. Stevens conceded that McCray may have asked him when he was leaving the dock during their earlier conversation inside. Tr. at 1470–1471. McCray said that Stevens returned to his truck (after the call), pulled out, turned left, and stopped after 200 or 300 yards to shut his doors. McCray then swung around Stevens and backed in to the dock. Tr. at 557–558. Once loaded, McCray checked the condition of the trailer, and started the truck. Tr. at 559–562. He, too, pulled away from the dock to close the trailer doors. Tr. at 564.

On February 22, 2011, McCray was suspended pending investigation of Stevens' complaint. McCray was notified of the suspension during a meeting attended by Capser, Barber, Sherman, Hamilton, Sain (as McCray's union representative), and McCray. Tr. at 1676–1691,

RX 19, RX 73. McCray denied touching anyone's air line, and said he had no recollection of any such incident. Tr. at 1678–1679. Sain's testimony, Barber's testimony, and contemporaneous notes of what was said at the meeting are consistent with Stevens' testimony that he was reluctant to report the incident, but finally did so at his wife's urging. Tr. at 1683, 2678, RX 73. At some point during the meeting, Sain and McCray stepped outside into the parking lot to consult. Tr. at 1685. Sain testified that during their consultation, McCray admitted disconnecting Stevens' air line, saying "he did it as a joke." Tr. at 1686, 2001. Sain testified that he eventually revealed McCray's confession only because he was compelled to do so. Tr. at 1687, 1703, 1795, 1810–1812. Sain sensed that ACC management was taking the allegation very seriously. He said he had never seen that many management representatives involved in the process at that level before. Tr. at 1690–1691, 1692.

Sain took notes from phone calls from McCray he received on February 22 and February 23, after the meeting during which McCray was suspended. On February 22, McCray talked about why Stevens would report him, and suggested that other drivers put Stevens up to it. Tr. at 1702–1703, RX 74, RX 77. On February 23, McCray told Sain he thought he remembered calling Stevens on the night in question "to ask how things were running." He also said that Hamilton and Barber did not like him, that Capser set him up, and, again, that he thought Moody might have put Stevens up to it. Sain advised McCray to write down anything he had to help his case. Sain told McCray not to use Stevens' name. RX 75. Sain testified that he gave that advice because he was concerned since management had not identified Stevens during the suspension meeting, so if McCray used Stevens' name, it could be treated as an admission of guilt. Tr. at 1708–1719. Sain had no reason to believe that Stevens was lying about the incident. Tr. at 1729.

Management representatives testified that the decision to terminate McCray was made by Bruce Gruebner, Director of Field Human Resources for ACC's parent company, Penske Logistics; David Lerew, Director of Labor relations for Penske Truck Leasing, Penske Logistics' parent company; and Steve Capser. Tr. at 2447, 2506–2507, 2515; RX 97 at 79–80. They participated in several conversations between February 21, 2011 and March 10, 2011. Transcript at 2441–2442, 2448, 2472, 2507–2508, 2543; RX 20; RX 97 at 67–78. Barber was present and took notes of the initial conference call on February 21, during which it was decided that McCray would be suspended pending investigation. RX 17. The only topic discussed and the only documents considered during the deliberations related to the incident with Stevens' brakes; Capser, Gruebner and Lerew specifically denied that any of McCray's safety concerns or complaints to government agencies were alluded to or discussed in any of their conversations regarding the incident. RX 97 at 87–89, 217; Tr. at 2451–2454, 2514–2518. All agreed that tampering with a brake line raised serious safety considerations. Tr. at 2449–2450, 2469, 2501, 2518–2519, 2568, RX 97 at 69, 84, 195–196, 205. Barber investigated Stevens' complaint and gathered the evidence, but he testified that he did not participate in any way in the decision to terminate McCray, and that Capser, Lerew, and Gruebner did not communicate with him (Barber) during the course of their deliberations. Tr. at 2673–2382. Hamilton assisted Barber in the investigation. Tr. at 2195–2221, 2235–2243, RX 99. All decisions to terminate an employee are made by the General Manager in consultation with Human Resources and Labor Relations, based on whether the evidence obtained during an investigation shows there is just cause. Tr. at 2531–2535. In this case the starting point was Stevens' statement. They looked at the drivers' logs which placed McCray and Stevens at the same time. The cell phone records corroborated

Stevens' story. They discussed why Stevens delayed reporting the incident; that question was answered by Mrs. Stevens' statement. Stevens said that McCray had admitted having done it. McCray did not provide anything to suggest that the facts were other than as Stevens had portrayed them. They found no history of any animosity between McCray and Stevens, or any motive for Stevens to make a false accusation. They concluded that Stevens' allegation was true. Tr. at 2543–2549.

On instructions from Capser, Barber terminated McCray during an official disciplinary meeting on March 11, 2011, attended by McCray, Sain, and Barber. During the meeting, McCray and Sain were provided with copies of statements from Jim Stevens and his wife, a copy of the screenshot of Stevens' two-way radio/phone, and copies of Stevens' and McCray's driver logs on the date of the incident showing that they were both at the Ryder facility at the same time. Barber told McCray he was being discharged for violating work rules 23, sabotage, and 17, failure to follow safety rules. Tr. at 1724 –1737, 2024–2028, 2049–2050, 2686–2689, 2690–2691RX 25, RX 26, RX 76. The notice of disciplinary action stated that McCray was being discharged because "[o]n January 20, 2011 you deliberately committed an act of sabotage on Company equipment." RX 26. The notice was signed by Barber and, indicating receipt of the notice, by Sain. McCray did not sign the notice. Rules 23 and 17 are both Category 3 work rules, the most serious offenses, which could be subject to immediate discharge without progressive discipline at the option of management. For a Category 3 violation, Labor Relations had to be contacted before discipline could be assessed. RX 2, Tr. at 1737, 1739–1741, 1838–1839, 1956, 2448–2450, 2508–2509, RX 97 at 215–216. Barber testified that there was no discussion of any issues (e.g., DVIR procedures, the complaint to MIOSHA, or any other incidents with Barber or other truck drivers) during the meeting other than the incident with Stevens' air line. Tr. at 2690.

McCray recorded the meeting; although he denied having done so in 2011, eventually he acknowledged it, but only in 2014, shortly before the hearing commenced. Tr. at 513 and passim, RX 55, RX 56, RX 57. During his testimony, McCray said he did not understand how to work his recorder, could not find the recording, and thought he had failed to record the meeting. When he found the owner's manual near the end of 2013, he was able to find the folder with the recording. Tr. at 513–522, 945–983, 1289, 1291. I conclude that McCray's belated disclosure of the recording is another instance of a lack of candor during the proceedings on his claim. Copies of the recording were admitted into the record as RX 58 ("Raw Forensic Load") and RX 59 ("Forensic Enhancement"). A transcript prepared by ACC's expert was admitted as RX 60. ACC offered the recording solely for the purpose of establishing admissions by McCray, or impeachment of his testimony. Tr. at 994–995. I listened to the recording and compared it with the transcript. I found some errors and omissions in the transcription which are indicated by brackets in the following excerpts. Near the end of the meeting, McCray made a statement to Sain which could be viewed as an admission that he had done what he was accused of doing:

> Well don't beat yourself up. You're not the one that put me there, I put myself there and I don't want you to beat yourself up. I'm upset. I'm not happy about it. Definitely, is what it is—I didn't think it was gonna lead to termination but—I thought may[be] suspension, letter in my file…

RX 60 at 15. But he also said:

> … I still maintain that it would've never went this far or got to this point if it wouldn't've been me, y'know.…
>
> …
>
> … I've been vocal and I've pushed back and … I didn't stop pushing back and it is what it is. I was pissed off about the parking lot and I did file OSHA and that pissed off [Capser]
>
> …
>
> Yeah, I did, I told you that before. Yeah, they know that—[Capser] knows it.
>
> …
>
> [He] told me [he] knew it —[he] told me that.

RX 60 at 15–16. Given this context, depending on whether or not Sain's testimony that McCray confessed to him at the time of the suspension is credited, McCray's statement could have meant that he put himself in the situation either by having filed the OSHA complaint, or by interfering with the brakes. Another exchange during a telephone conversation at the end of the recording is similarly ambiguous:

> Voice 1 [McCray]: They terminated me.
>
> Voice 2 [Not identified in the record]:76A?
>
> Voice 1: 76A, termination, sabotage to equipment.
>
> Voice 2: Can they prove it?
>
> Voice 1: Well, he had a statement from Jim Stevens' wife, that was notarized, and he had a copy of the Telcom record that I [two-wayed him]. Dan thinks there's a lot more evidence that they didn't give out.
>
> …
>
> Voice 2: Is there gonna be a trial?
>
> Voice 1: Yeah.

RX 60 at 18. There was also some discussion of whether there could be security video showing what happened, and whether ACC was holding back evidence. *See* RX 60 at 10, 17. At the hearing before me, McCray testified to the effect that he was hoping video would be available because it would exonerate him rather than incriminate him. Tr. at 1039–1044. None of

McCray's statements on the recording of the disciplinary meeting constituted an unambiguous admission that he interfered with a brake line on Stevens' rig. McCray denied that he confessed having done so to Sain at any time. Tr. at 1045. But Sain testified that McCray had confessed to him on the day of the suspension, and that he (Sain) shared that information with Dinkins and the investigator for OSHA. Sain's testimony on that point is consistent with Dinkins' testimony.

Terry DePetro also testified that McCray admitted to him that he had played a joke on Stevens. DePetro is the committeeman for UAW local 659 in Flint Michigan. Tr. at 1553–1554. In 2011 he was the alternate or assistant committeeman. Tr. at 1562. DePetro spoke to McCray on a regular basis by phone for a three to four month period in 2010 or 2011. Transcript at 1556, 1571, 1578. During one of their conversations, McCray told him he had played a joke on Jim Stevens when he "cracked the air line" on Stevens' truck at Ryder. Tr. at 1557–1560, 1572. DePetro went on to say:

> When I asked him why, he just told me they'd been playing jokes on one another; that sometimes he found grease under his door handle, diesel fuel inside his truck, and so on and so on. They were just practical jokes.

Tr. at 1559. At first DePetro assumed that McCray meant he pulled the red line, in which case the truck would not move. He later learned that it was not the red line Tr. at 1560–1561. DePetro testified that if he had realized that McCray had disconnected the blue line, he would have had more conversation with McCray about it at the time. Tr. at 1562. Later when Pat Dinkins approached DePetro to advise him that the OSHA investigator wanted to speak to him, DePetro told Dinkins that McCray had called him and told him he had done it as a joke. Tr. at 1564. DePetro told Dinkins he was reluctant to reveal his conversation with McCray to anyone, but Dinkins said he should meet with the investigator and tell the truth. Tr. at 1565. Dinkins accompanied DePetro to the interview with the OSHA investigator at DePetro's request. Tr. at 1566. DePetro told the OSHA investigator that it was very unsafe to pull the blue line. Tr. at 1567. DePetro said McCray had told him twice that he had cracked the air line, but later changed his story; DePetro felt that McCray was lying to him. Tr. at 1568, 1569, 1575–1576. DePetro did not represent McCray during any of the disciplinary proceedings. Tr. at 1581, 1583–1584.

Sain filed a grievance on McCray's behalf on March 15, 2011. He and Dinkins consulted on how to state the grievance. In the grievance, the Union charged management with giving an excessive penalty and demanded that McCray be reinstated. The grievance did not state that McCray denied pulling the service line on Stevens' truck. RX 40, RX 71 at 28, Tr. at 1797. Hamilton denied the grievance the same day. Tr. at 1774–1776, 1791–1792, RX 77, RX 78. Sain also prepared a "Confidential Grievance Fact Sheet" describing the facts underlying the grievance. Tr. at 1793–1794, 2012, RX 40, RX 79. According to the fact sheet, the discharge violated article 21, section 4, paragraphs A and B of the collective bargaining agreement. It stated that McCray thought his discharge was retaliation for contacting MIOSHA to complain about the condition of the Lansing Yard, and that ACC had not discharged anyone due to sabotage before. It stated that the penalty was excessive and unjust, in that an employee could be discharged based on a possible false claim. It stated that management showed great concern about the incident during the initial suspension meeting. Once the grievance was filed and

denied, Dinkins became responsible for representing McCray in further proceedings on the grievance. Tr. at 41, 1784, 1841.

Dinkins testified that he first learned that McCray had admitted pulling the line from Sain during a recess in the disciplinary hearing held when McCray was suspended. RX 71 at 27. Dinkins confirmed that three other drivers also said that McCray had confessed to them: Mark Campbell, Terry DePetro, and Bob Oliver. Tr. at 37–40. According to Dinkins, Campbell and DePetro spoke about it directly to Dinkins; Bob Oliver was overheard talking about it by a committeeman, Tim Hawks, who in turn reported it to Dinkins. Tr. at 37, 76. McCray never told Dinkins personally that he did it; rather, he adamantly stood his ground that he did not do it. RX 71 at 29. Dinkins never told McCray that Sain or anyone else had reported McCray's admission to him. RX 71 at 30, 49. Dinkins testified that he believed that it was his job to represent McCray to the best of his ability to get McCray reinstated, and that was what he did. RX 71 at 31. Sain told the OSHA investigator that McCray had admitted pulling the air line, and that Dinkins was the only other person he had told about McCray's admission. Tr. at 1808 –1816, RX 41, RX 81. As noted above, DePetro agreed that McCray told him he "cracked" the air line on Stevens' truck as a practical joke. But Campbell denied that McCray ever made such an admission to him. Tr. at196. Campbell wrote a letter to Dinkins, which he also sent to Capser, taking the position that the charge against McCray was a pretext for getting rid of McCray because he was a whistleblower, and said the allegations did not support the decision to discharge him. Tr. at 195, 246–249, RX 88. Capser believed that Campbell wrote the letter because he thought the penalty was excessive, not because McCray was not guilty of disconnecting the line. RX 97 at 93–94, 218–230.

When Dinkins decided the grievance could not be successfully resolved, he proposed a last-chance agreement to management. Tr. at 44, 2521, 2522. Dinkins and ACC management reached an agreement on the wording of a last-chance agreement in August 2011. The agreement provided that McCray would have to admit the infraction. He would not receive back pay, and he could not commit any other safety infractions for a six-month period. Tr. at 45. He would be reinstated when he accepted the last chance agreement and returned to work. Tr. at 2526. Dinkins presented the last-chance agreement to McCray. Tr. at 46, RX 42. McCray responded that he would not admit to something he did not do; he never admitted to Dinkins that he had pulled the air line. Tr. at 47**,** 55, 66–67, 69, 1141, 1143. McCray continued to deny that he had pulled the air line at the hearing before me as well. Tr. at 1296. McCray never told Dinkins that he wished to accept the last-chance agreement. Tr. at 49. ACC concluded that McCray had rejected the offer of a last chance agreement, which it characterized as a "one-time-only, non-precedent-setting, opportunity." RX 43, RX 82, Tr. at 53–55. Capser testified that he authorized the offer of the last chance agreement, but emphasized that it was a one-time offer which would not be repeated if McCray rejected it. RX 97 at 97–98. Capser said if McCray had admitted pulling the air line and promised not to do anything like that again, he would still be employed by ACC. RX 97 at 99–100. Once McCray rejected the last-chance agreement, the next step in the grievance procedure would have been arbitration. Tr. at 57. The decision not to take the grievance to arbitration was made after Dinkins left ACC. Tr. at 58. Article 24, Section 3 of the collective bargaining agreement, "Safety equipment," provides that "[e]ach driver must not tamper with any safety-related equipment or devices." RX 44 at 3. Dinkins agreed that if McCray

disconnected the service line as alleged, he would be in violation of the that provision of the collective bargaining agreement. Tr. at 61.

Sain was named acting chairman of the local when Dinkins left ACC to take another job. Tr. at 1841. McCray's grievance was still open when Sain took over from Dinkins. Sain inquired about the last chance agreement, but was advised it was no longer available. Tr. at 1843–1844, RX 82. Sain learned that McCray had retained counsel in January 2012. Tr. at 1845. When that happened, Sain consulted with a representative from the international union who advised Sain to withdraw the grievance. Tr. at 1845–1846. Sain notified McCray that his grievance had been withdrawn and no further action would be taken by the union in a letter dated January 12, 2012. Tr. at 1846, RX 83. Sain's contemporaneous notes support his testimony that he considered McCray's retaining counsel to be a change in circumstances which contributed to the decision to withdraw the grievance. RX 83. Sain denied that the union colluded with ACC to harm McCray or other drivers. Tr. at 1948–1949.

In response to an interrogatory from McCray, Gruebner prepared a table listing 30 driver terminations by ACC for "safety, performance, misconduct and integrity violations" from 2008 to 2011. The list included only cases that resulted in termination; if an initial decision to terminate was modified after negotiation with the union, the case would not appear on the list. Tr. at 2454–2459, 2475–2476, RX 95. During the grievance proceeding, Sain was told that McCray was the first employee discharged for sabotage. Tr. at 1962. The reason given on the list for McCray's termination, "sabotage/safety," appears to be unique. The 29 other drivers listed were terminated for accidents or failure to report an accident (10), positive random drug tests or refusing a drug test after an accident (9), altercations and offensive remarks (6), speeding ticket/probation (2), license revoked/suspended (1), and, finally, one driver was terminated for an unknown reason because the supervisor was not available to provide the information when the list was prepared.

One driver who left ACC in 2008, Scott McKay, testified that someone had once switched his air lines so his truck would not move, but he never reported it to management, and no one was disciplined. Tr. at 120, 122,127, 128. There is no evidence that anyone in management knew about this incident. Hamilton testified that the Stevens incident was the first time that such a thing had happened. Tr. at 2209. Capser was not aware of any other similar incidents at ACC. RX 97 at 176–177.

Hansen testified about a series of incidents near the time of the union election in which someone put foreign objects in tractor fuel tanks, causing engines to break down on the road. Tr. at 2283–2290. But there is no evidence that anyone responsible was ever identified, and none of the management witnesses were asked about any investigation of those incidents.

McCray gave examples of three drivers who were fired and then rehired after the union intervened. Tr. at 591–594. But those incidents do not show different treatment by ACC. Rather, they show that ACC discharged employees for serious offenses, but sometimes the union successfully resolved such cases by having discharges set aside. McCray could have had the same outcome had he accepted the last chance agreement.

There was considerable evidence offered at the hearing regarding conflicts McCray had with other drivers, in particular, Scott Hansen, Larry LaClear, Mike Moody, Carl Ylitalo, Jeff Kaulnik, and Todd Short. The details of many of these conflicts, which were personal or union-related conflicts, and not related to McCray's protected activity, are not material to the issues in this STAA claim, so I have not described them all. But McCray reported the conflicts to the union and to management, maintaining that he was being harassed or even stalked by fellow drivers. In addition, McCray and other drivers accused each other of threatening or intimidating behavior, with cross-allegations that one side or the other might resort to physical violence. But there is no evidence that Stevens and McCray had any conflicts before the incident on January 20; indeed, Stevens testified that he considered McCray to be a friend. Tr. at 1334, 1510.

B. DISCUSSION

I find that McCray has met his burden to establish the three elements of his *prima facie* case for the following reasons.

McCray repeatedly engaged in protected activity between February 2010 and February 2011 by complaining about how the company was applying the Department of Transportation's 16-hour rule in adverse weather conditions, the safety of the equipment assigned to him, and the handling of DVIRs by which truck drivers reported that equipment needed repairs, and service personnel reported that service had been completed. McCray's testimony that he reported his concerns about driving in adverse weather conditions to Dispatchers, his first line supervisors, is not detailed, but is not contradicted in the record. It is undisputed that his concerns regarding the safety of equipment and flaws in the process for handling DVIRs were the subject of Union grievances in July 2010, as well as direct reports to immediate supervisors and higher management in July 2010 and thereafter, including Barber, Hamilton, Ragnoli, and Capser. McCray raised safety concerns directly with Capser in emails, telephone calls, and meetings between September 2010 and February 2011, right up until he was suspended.

McCray has also established by a preponderance of the evidence that his complaints about safety were a contributing factor to his termination. In the case of *Powers v. Union Pacific Railroad Company*, cited above in the section describing the standards applicable to this case, the Administrative Review Board recently explained at length the meaning of the "contributing factor" element in cases governed by the legal burdens set forth in AIR 21:

> A "contributing factor" to an adverse employment decision is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the [adverse employment] decision." … The "contributing factor" standard was employed to remove any requirement on a whistleblower to prove that protected activity as a "'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." … Consequently, "[a] complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected' activity." …

> The contributing factor element of a complaint may be proven "by direct evidence or indirectly by circumstantial evidence." … It is well established, in the context of various whistleblower statutes, … that in proving contributing factor "an employee need not provide evidence of motive or animus" by the employer. … "Regardless of the official's motives, personnel actions against employees should … not be based on protected activities such as whistleblowing." … Quite simply, "any weight given to the protected [activity], either alone or even in combination with other factors, can satisfy the 'contributing factor' test."[8]

The Board went on to state that "[s]ince proof of contributing factor does not require evidence of retaliatory motive … [a] complainant has no obligation to *disprove* evidence of a subjective non-retaliatory motive …"[9] to establish this element.

In this case, there is no direct evidence that McCray's safety-related complaints were a contributing factor to his discharge. But temporal proximity between an employee's protected activity and an employer's adverse personnel action may be circumstantial evidence that the protected activity was a contributing factor. McCray was suspended pending investigation on February 22, a week after his last conversation with Capser, and discharged on March 10, less than a month after that conversation. Moreover, Capser was one of three decision-makers who made the decision to terminate McCray, and of the three, he was the only decision-maker who knew McCray. It was Capser who made the ultimate decision that McCray should be terminated; based on Lerew's and Gruebner's testimony, which I credit, they played only an advisory role. I also credit Barber's testimony that he was not consulted on the decision. I conclude that Capser reached the decision to discharge McCray in the context of his previous interactions with McCray.

Safety issues were not the only topics of discussion between Capser and McCray; McCray also shared his view that he was being harassed by co-workers and management. Capser testified that after the fuel spilling incident with Short, even before he learned about the Stevens incident, Capser found McCray's inability to take any responsibility for any of the incidents he complained about disconcerting, and planned to contact Human Resources. I do not find any credible evidence that Capser threatened McCray for reporting safety-related issues to the company or any government agency, or had any retaliatory motive related to McCray's complaints about safety when he determined that McCray should be terminated. It is true that Capser did not always agree with McCray's complaints about safety. For example, he believed that the DVIR system was working because the company had a good safety record and problems were not being identified in roadside inspections. On the other hand, sometimes Capser agreed with and took action on McCray's reports of safety problems, as when he instituted new procedures to address McCray's December 2010 reports of tractors losing power and failing fifth wheel connections between tractors and trailers. Because McCray's complaints to Capser about safety were inextricably bound up with his complaints of harassment by fellow drivers and management, however, I conclude that the safety complaints were a factor contributing to Capser's decision-making.

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[8] *Powers, supra*, PDF at 11–12 (citations omitted).
[9] *Id.*, PDF at 26–27 (emphasis in original, citations omitted).

Although McCray has successfully established his *prima facie* case, I also find that ACC has established by clear and convincing evidence that it would have fired him even had he never engaged in protected activity.

ACC maintains that McCray was discharged because he interfered with Stevens' brake line, a category 3 offense subject to immediate discharge. McCray maintains that either the incident did not happen at all, or he was not responsible for it. McCray questioned various details about the incident, pointing out discrepancies among witnesses who referred to one "air line," or "air lines" in the plural; the distance Stevens was said to have driven before discovering the problem with his brakes, 100 or 200 yards; and whether McCray's call to Stevens was to tell him about the joke he had played or to ask him to move out of the way. McCray also questioned Stevens' delay in reporting the incident. McCray denied confessing his guilt to anyone, and denied that he did what he was accused of. The discrepancies McCray relies on relate only to minor details, such as would be expected in witness accounts of any similar incident. Witness accounts supporting ACC's position were uniformly consistent in all major respects, including testimony and written statements by Stevens and his wife, Sain's contemporaneous notes and later testimony, and testimony by Dinkins and DePetro. The consistency among ACC's witnesses is even more striking because the witnesses were separated during the hearing. The circumstantial evidence (drivers' logs and phone records) supporting the testimony that McCray was responsible for the incident is compelling. In some of his emails and testimony, McCray implied that the union did not fairly represent him because the union was in collusion with management. I find no credible evidence of that. The fact that ACC could have chosen a lesser penalty, a position taken during the grievance proceedings by the union and Campbell, as well as McCray, does not negate the fact that disconnecting the brake line was a safety hazard. To the extent that McCray argues that it was not dangerous, his own testimony undermines that position, because he testified that intermittent brake problems on a rig he was driving were a safety hazard. Finally, Dinkins testified that Campbell and DePetro both said that McCray had confessed to them. DePetro confirmed Dinkins' testimony, but Campbell denied that he heard a confession. I do not view that as a significant discrepancy in the evidence. I have focused on the credibility of the two principals in the incident, McCray and Stevens. Based on their demeanor, the consistency or lack thereof with other witnesses' testimony, and taking into account instances in which I have determined that McCray lacked candor, I conclude that Stevens was more credible than McCray.

I credit Stevens' account of the events on January 20, 2011, that McCray loosened the connection for the blue line as a joke, and told Stevens he had done so. I also credit Stevens' and his wife's testimony that he was reluctant to report the incident, but eventually did so because his wife insisted. I credit Sain's and DePetro's testimony that McCray confessed to them. I do not credit McCray's denials. I also credit the testimony of Capser, Lerew, and Gruebner that interfering with the air line was a dischargeable offense, and that the air line incident was the only subject addressed during the deliberations over whether discharge was the appropriate penalty. Thus McCray's protected activity was not a factor in Lerew's and Gruebner's recommendations to Capser that McCray could be discharged. Capser authorized a last chance agreement which would have allowed McCray to return to work if he admitted guilt and promised not to engage in such behavior again. He would not have authorized such an offer if he were intent on retaliating against McCray for his protected activity. McCray has not provided

any substantial evidence that he was treated differently than any other driver would have been for the same offense.

Given the seriousness of the offense, the provisions of the collective bargaining agreement and the work rules, and the credibility of ACC's witnesses, I conclude that despite McCray's good work record, ACC has shown by clear and convincing evidence that it would have fired McCray for interfering with Stevens' brake line even had McCray never engaged in protected activity.

C. CONCLUSION

For the reasons discussed above, I find that although McCray has established that protected activity was a contributing factor in his termination, ACC has established by clear and convincing evidence that it would have discharged him even absent his protected activity.

V. ORDER

Because ACC has established that it would have discharged McCray even absent protected activity, his complaint filed with OSHA on March 15, 2011, is **DENIED**.

Digitally signed by Alice Craft
DN: CN=Alice Craft, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

Alice M. Craft
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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid email address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).