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Issue Date: 21 August 2008

CASE NO.: 2007-STA-00014

In the Matter of

GERALD LITT,
Complainant,

v.

REPUBLIC SERVICES OF SOUTHERN NEVADA,
Respondent.

Appearances: Dan M. Winder, Esq.
Melanie Ells, Esq.
For the Complainant

Kelly A. Evans, Esq.
Swen Prior, Esq.
For the Respondent

Before: Steven B. Berlin
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection or "whistleblower" provision of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. §31105, as amended 2007. Complainant Gerald Litt ("Litt" or "Complainant") is a former employee of Respondent Republic Services of Southern Nevada ("Republic," "Respondent," or "the Company"). He alleges that Republic terminated his employment in retaliation for making safety-related complaints, and that his making these complaints was protected activity within the STAA.

Respondent denies the allegation. It asserts that Complainant's conduct was not protected; that the Company was unaware of any complaints and therefore could not have been retaliating; and that it terminated the employment for a legitimate, non-retaliatory reason: namely, Complainant's gross negligence in driving a company truck in an unsafe manner, causing an accident in which the truck was a total loss, and in which there was risk of additional severe damage.

Complainant responds that Company managers were aware of his safety complaints. He argues that the Company's given reason for the termination is a pretext for retaliation in that no one was killed or injured; the truck was about to be salvaged and thus was of little value; other than the loss of the truck, there was negligible third-party property damage; he was not at fault in the accident but rather it resulted from an inadequately equipped truck or an equipment failure; and other similarly situated drivers who have not engaged in protected activity have had accidents without losing their jobs.

On March 18 and 19, 2008, I held a hearing in Las Vegas, Nevada. Both parties were present, represented by counsel of record. At the close of the hearing, I held the record open for the parties to submit photographs or other additional evidence concerning damage to the highway overpass that Complainant's vehicle struck.[1] I also allowed post-hearing briefing. The time having passed for these submissions, and some of them having been received, I now close the record and proceed to decide the case on the merits.[2]

Being fully informed, I will decide that Complainant has failed to meet his evidentiary burden, and that his claim is therefore without merit.

FINDINGS OF FACT

Republic operates commercial vehicles in interstate commerce as a solid waste collection, transfer, and disposal service in Nevada. It operates vehicles with weight ratings over 10,001 pounds and that affect interstate commerce. Complainant drove Respondent's vehicles over highways in interstate commerce, which directly affect commercial vehicle safety. Respondent does not dispute that its activities bring it within the scope of the STAA. Tr. 119-20. There is no dispute that Complainant timely filed this action.

I. Complainant's Work Prior to Being a Driver.

Republic hired Litt as a casual on July 28, 2004, and assigned him to work at its Cheyenne facility on a collection truck as a "pitcher." His duties involved riding either in the cab or on an exterior step toward the back of a collection truck. The driver would move the truck from stop to stop, and Complainant (helped by the driver) would collect refuse from residential customers at each stop. Tr. 148-49. Complainant's duties did not include driving, and he did not have a commercial driver's license as required for driving one of the Company's trucks. After he passed the requisite time, Complainant became a regular employee and union member.

In his testimony, Complainant stated that from early on he saw himself as an advocate for the company, for himself, and for his co-workers. Tr. 114. He complained numerous times about

[1] I also allowed Complainant to submit declarations in support of certain allegations of possible witness tampering, subornation of perjury, or other improper conduct on the part of Respondent or its attorneys. Complainant did not submit any such declaration. I will discuss this more in the text below.

[2] At the hearing, I admitted into evidence Complainant's Exhibits 1-41, inclusive, and Respondent's Exhibits 1-46, inclusive. I refer to them respectively as "C. Ex." and "R. Ex." Complainant submitted additional photographs post-trial, and I admit those as C. Ex. 42 and 43. I refer to the hearing transcript by page number as "Tr." "C. Br." refers to Complainant's Post-Hearing Statement.

such items as needed truck maintenance and worked with the foremen on these.[3] When he reported that a vehicle needed maintenance and it was not done that evening, he would raise his concern again. *See, e.g.*, Tr. 45.

One of Complainant's witnesses was former co-worker, Greg Jolly, who worked with him when he was still a casual. Jolly stated that Complainant would talk every morning to his co-workers about safety issues and urge them to write up anything that was not "right." He would inform the others about conditions that he viewed as unsafe. He would explain Department of Transportation policies. Tr. 97-98. Jolly's observation was that Complainant would complain anytime anything on a truck was not up to par. Tr. 93.

One of Complainant's concerns was the manner in which work was assigned to casuals. He believed that fairness demanded that the work be distributed on a rotation. He discussed this with Scott Schuler, one of the foremen, and offered to maintain a log to keep track of the rotation. Foreman Schuler liked the idea, got it approved, and implemented it. Tr. 235. Complainant testified that he also was able to work with the foremen on his safety concerns at this time.

Every indication is that the Company's management received these activities well. As Complainant testified: "I was the golden boy of Republic Services when I initially started . . .." Tr. 196. He said that the Company selected him to speak to the news media as an employee representative on various subjects, including safety. C. Br. at 7. Jolly concurred: he testified that management liked Complainant and told him that he had good management skills.[4] Tr. 95-96. When Complainant called him as a witness, Schuler described his relationship with Complainant as "friendly" and "cordial." Tr. 235, 247, 262.[5]

First disciplinary action. Complainant points to two events that occurred between the time of hire and the time of termination as evidence of a developing hostile animus on Respondent's part. The first incident occurred on or about July 22, 2005. C. Br. at 8. Complainant was working on a collection truck with driver Jose Amador. The two of them made a scheduled return to the truck yard and pulled up to the fuel pumps. They discovered that the truck they were using was leaking hydraulic fluid, and the fluid was pooling around the truck.

The General Manager, Joe Knoblock, happened to see the spill, considered it a safety hazard, and directed Complainant and Amador to clean it up. Tr. 465. Complainant disputed this instruction. He stated that there were low paid "yard boys" whose job it was to clean this up. Knoblock directed the two of them to do the cleaning. Amador left to comply, but Complainant

[3] At the hearing, Respondent admitted that the "foremen" were managers. Tr. 122. I therefore impute their knowledge and actions to Republic.

[4] The Company's positive reaction to Complainant's suggestions and reports apparently somewhat surprised Jolly. Jolly testified that he warned Complainant that he was only a casual and should not bring attention to himself by complaining. On cross-examination, however, Jolly admitted that he based this concern on his observations of Company management many years earlier, had not worked for Republic for about seven years, and had no basis to anticipate how management would respond to Complainant's suggestions. No useful inference can be drawn from Jolly's testimony on this point.

[5] Called as witness by Complainant, Schuler testified that he was unaware of any specific safety complaints that Complainant had made, either to himself or to others. Tr. 235-36, 247.

remained to argue. Knoblock gave him a direct order to do the cleanup. Complainant then complied, joining Amador on the clean-up. Tr. 414-16, 465. Foreman Schuler arrived and told Knoblock that he needed the two workers for a run. Knoblock said that he wanted them to finish the cleanup first.

Having completed the clean-up, Complainant and Amador left on the assignment Schuler had for them: picking up residential refuse that the regular collectors had missed on their rounds. These pick-ups were at widely-spaced locations, not next to one another as on regular residential pick-up. This required considerable driving between stops.

In Knoblock's view, the clean-up should have taken ten minutes and took forty-five. Tr. 465. When he arrived at work the next day, Knoblock checked and found that Complainant and Amador had taken as long to pick up one ton as Knoblock would generally expect to be enough to pick up perhaps three tons. Tr. 248-49. They also took overtime pay. Knoblock suspended both workers. Both were sent home before starting their work.

Later that day, Schuler explained to Knoblock that the run had been to pick up missed refuse from widely spaced locations; that it required additional driving time between stops; that this explained the lesser amount collected; and this was normal on such runs.

Knoblock accepted Schuler's comments. He withdrew the suspension and decided to pay both workers for the day they had missed. Tr. 251, 466-70. According to Amador, Knoblock personally apologized, stating, "I'm sorry. I apologize to you. I made a mistake."[6] Tr. 416. Knoblock testified, and it was undisputed, that the incident never came up again. Tr. 470.

Second disciplinary action. The second incident occurred about six weeks later, on or about August 8, 2005. Company safety inspectors routinely observe workers on their rounds. They select the workers for any given inspection at random.[7] Tr. 248. On this occasion, they chose to observe driver Cornelius James and Complainant, who was assigned to pitch for James. They discovered that Complainant was driving instead of James. As Complainant did not have a commercial driver's license, this was a violation of Company rules (and apparently State and Federal law).

When questioned, Complainant admitted that he did not have a commercial driver's license but stated that he did have a learner's permit. James stated that he thought it was permissible to allow someone to drive a Company truck on a learner's permit. Tr. 125. At the time, there had been other incidents of workers driving trucks without proper licenses, and the Company was

[6] It was Complainant who called Schuler as a witness, and it appears that Schuler was supportive to Complainant at the time of this incident. Still, Schuler agrees that the spill was a "big mess" and that, because it was at the fuel pumps, it might have presented safety issues. Tr. 251.

[7] Complainant testified that he did not know of other employees whom the safety inspectors had observed. He admitted, however, that he never asked any of his co-workers about it. Tr. 215. Still, he stated that since the Company knew that he "always followed safety procedures and performed the job in an exemplary manner, setting an example for everyone," it was inappropriate to select him for observation. Tr. 214-15. This does nothing to refute the evidence that the safety inspectors chose employees, including him, at random and did not single him out for discipline. It also does nothing to refute that Complainant was driving without a commercial license.

cracking down on this. Knoblock terminated the employment of both Complainant and James.[8] *See* R. Ex. 46.

Both filed grievances, which led to arbitration. On October 24, 2005, the arbitrator ordered both reinstated, albeit without back wages. C. Ex. 11. He decided that the progressive discipline provision in the collective bargaining agreement allowed only lesser discipline under the circumstances. As he stated, however, the reinstatement without back pay amounted to "an unpaid disciplinary suspension." *Id.* He added, "This application of 'progressive' discipline must be looked at as a potentially 'last chance,' after which further violations of the same rules would make the Grievants liable for termination for just cause."[9] *Id.* Following their return, both workers were restored to their former jobs. Tr. 146, 187-88.[10]

Knoblock's complying with Complainant's request for work as a driver. Just before returning to his job, Litt approached Knoblock. He requested a three-day training program so that he could get a commercial driver's license, after which, he wanted a driving job. He stated that his preference as a driver would be to continue doing residential runs, but that he would also do "roll off" work. Roll-off work involved delivering and picking up large refuse containers ("boxes") from commercial customers.

Having returned as a pitcher, Complainant undertook the Teamsters training program for commercial driving. By November 9, 2005, he was able to inform Knoblock that he had completed the training and received his commercial driver license. C. Ex. 6. Knoblock responded by promptly assigning Complainant to a driving job in the roll off department. Tr. 57-58.

Complainant's response was to object. *Id.;* 148. Now he did not want roll off driving; he wanted residential driving, and he told Knoblock as much. *Id.* Knoblock explained that Respondent needed drivers for roll off and had no other driving jobs. *Id.* He told Complainant that he could either take the driving job he was being offered or head back to the union to find other work. Complainant accepted the job he was offered. Tr. 148.

Once Complainant was in the job, Respondent provided the full three-day training and awarded Complainant a Certificate of Training in the 24-Hour Drivers Certification Course and a Certificate of Training under the mandatory requirements of the Federal Motor Carrier Safety Administration, both completed November 30, 2005. C. Ex. 19, 21; *see* R. Ex. 35 (evidence of attendance at training 11/28/05); R. Ex. 36 (written driver exam 11/30/05); R. Ex. 30-34 (training materials).[11] Complainant admitted that throughout the time he worked as a driver, Knoblock

[8] James testified that he worked with Complainant for about a month prior to this incident. As far as James knew, during that month, Complainant had no safety-related issues. Tr. 126.

[9] Respondent must have felt strongly about terminating the employment of workers who drove trucks on public streets without a proper license. It continued to discuss this with the Union, and on January 20, 2006, the Company and Union agreed that in the future any such conduct would result in "automatic termination." C. Ex. 18.

[10] James testified that during the one month he and Complainant worked together, no safety issues arose. Tr. 126.

[11] Respondent's Exhibits 34 and 39 are not specifically about the truck that Complainant was driving at the time of the accident. They were admitted for the limited purpose of detailing a general training program about how roll off trucks operate. Tr. 221-24.

"didn't say or do anything to [him] that made [him] think that [Knoblock] was somehow irritated with [him]." Tr. 194.

II. Complainant's Work As a Driver Prior to Termination.

In his testimony, Complainant admitted that from the time he took the driver job, Respondent did not write him up until six months later, when he had the accident that triggered his termination and this dispute.[12] Tr. 59. Complainant admitted that he had no safety-related problems with any of the trucks he operated as a driver (*i.e.*, from November 2005 through the termination in February 2006). Tr. 151.

Design and operation of the roll off truck. I now digress to offer some detail about the design and operation of a roll off truck. This is necessary as a context for a discussion of the accident and termination. I rely principally on the testimony of Respondent's in-house expert mechanic, Donald Tucker.[13]

As Tucker explained, the truck is designed to roll the boxes on and off by means of a cable that pulls the box and a boom that raises and lowers it. Both are operated hydraulically. Tr. 524 *ff*. Complainant's accident involved the boom. The hydraulic system raises the boom by pumping fluid into a pair of cylinders that link the trailer to the boom and extend as they are filled. As the cylinders extend, they raise the boom.

The driver controls the flow of the fluid into the cylinders in at least two ways. First, the pump is open to a so-called "power take off unit" ("PTO"). If the PTO is not engaged, there will be no flow of fluid. Tr. 531. The PTO is engaged by means of a manual lever in the cab of the truck. Tr. 525. To engage the PTO, the driver must have the truck at a stop, depress the clutch (as if to shift the transmission), and flip the switch. *Id.* Once the PTO is engaged and the pump running, the fluid flows to a set of valves located on the side of the truck. The driver's second control on the boom occurring by means of handles on the side of the trailer, which open and close the valves. Exiting the truck, walking back along its side, and pulling the control handles, the driver causes the valves to open, and the fluid is pumped into the cylinders, lifting the boom.[14] When the driver releases the lever, the boom stays where it is. Tr. 529.

Thus, if the PTO is not engaged, it is impossible to raise the boom because fluid cannot be pumped into the cylinders. Tr. 531. The boom is lowered using the same type of process. Unlike raising, the boom can be allowed to lower on its own by means of gravity if the valves are opened. Tr. 532. The system, however, is not intended for such use; it can result in "a mess" because the returning fluid will overflow the tank.[15] *Id.*

[12] The three disciplinary actions discussed in the text are the only disciplinary actions that Respondent took toward Complainant during the employment. Tr. 58-59.

[13] Mr. Tucker has worked with garbage trucks over the past 31 years in such capacities as regional, division, area, or shop maintenance manager. His training and experience is as a mechanic. I find him to be a qualified expert to testify generally about the design, operation, and maintenance of garbage trucks and in particular about the truck involved in this accident based on his inspection of the vehicle after the accident.

[14] If the valve is closed, the fluid merely passes through a filter and returns to the tank.

[15] At trial, Complainant testified that he had spoken to an employee at the manufacturer who told him that the boom could raise on its own "if the valve system had problems," an event known (according to Complainant) as an

III. The Accident, Investigation, Termination, and Grievance Process.

The truck accident. On February 4, 2006, Complainant started his shift at 9:00 a.m. Tr. 59. He was operating a truck on his regular roll-off driver job. He had not used this particular truck before. He found no problems with it at the time he began working, and in particular, found no problems with the boom. Tr. 181.

About 4:00 p.m., Complainant dropped off one of the large refuse boxes at a customer's location. Tr. 59-60. This was the only box on the truck; once Complainant dropped it, the truck was empty. Complainant had one pick-up left on his schedule. Tr. 60-61. He drove back out onto the street, made a right turn and a left, and then proceeded under an overpass of Interstate 15. While under the overpass, the truck suddenly and unexpectedly came to a complete stop. Tr. 81. As Complainant testified: "It was something that was instantaneous where the vehicle just stopped." *Id.*

At first, Complainant was stunned. *Id.* He finally calmed down enough to understand that the vehicle was stopped. *Id.* Wondering what happened, he got out of the cab to find the boom "sitting behind [the] truck." *Id.* His back, shoulders, and neck hurt, but he set out safety devices to warn oncoming traffic, and he called his dispatcher to let the Company know. Tr. 81. Paramedics arrived and took Complainant to a medical center, where he was treated and released. He was diagnosed with left trapezius pain/shoulder pain, rule out rotator cuff injury,

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"uncommanded extension." Admitting that he was not an expert in hydraulics, Complainant attempted to explain in detail how this could happen. Respondent objected, based on hearsay. I noted the objection and did not rule at the time. I now sustain the objection.

The hearsay rule applies in administrative hearings under the Surface Transportation Assistance Act. *Calmat Co. v. U.S. Dept. of Labor*, 364 F.3d 1117, 1123 (9th Cir. 2004), *citing* 29 C.F.R. §§ 18.801(c), 18.802, and 1978.106(a), which cites §18. At the time of the hearing, I was under the mistaken impression that formal rules of evidence do not apply, as this is correct in whistleblower complaints under other statutes. I stated as much when ruling on a hearsay objection. See, e.g., Tr. 50-52 (hearsay can go to the weight of the evidence but is admissible if there are indicators of trustworthiness).

I do not believe that my ruling discouraged the attorneys from making continuing hearsay objections. Attorneys know that they are responsible to make an adequate record of objections to preserve evidentiary issues for appeal. In addition, I expressly made clear at trial that the parties should make whatever hearsay objections they chose to make: When Complainant objected that Respondent's counsel was making hearsay objections, I overruled that objection and stated, "I leave it to counsel to decide when he wants to object." Tr. 52. There were additional hearsay objections as the hearing continued, such as the objection that is the subject of this footnote.

As it was, Complainant made no hearsay objections, and this present objection is the only one related to anything substantive. *Cf.* Tr. 95 (objected hearsay testimony was simply that witness had no knowledge). Thus, sustaining the objection, as I now do, fully addresses the hearsay issue.

As an aside, I add that I would have placed little to no weight on Complainant's testimony even under the informal rules that we follow under other whistleblower statutes. By his admission, Complainant has no expertise in hydraulics. His attempt to offer the testimony of an expert through the filter of his own lay understanding lacks trustworthiness: a layperson's explanation of an expert's opinion presents too great a possibility of error.

and allowed to return to work, restricted to no use of his left arm and no lifting until cleared by a medical doctor.[16]

Meanwhile, the Company responded. A safety employee notified Knoblock. He said that the driver was okay but that the boom had been ripped off in the accident. Tr. 471-78. Knoblock said to involve the safety director and be sure the driver was okay. The Company suspended Complainant pending investigation and review by the General Manager (Knoblock). R. Ex. 11.

The investigation and termination. Loss Prevention Department employee Stanley Thorns went directly to the accident site, arriving at 4:40 p.m. R. Ex. 9. He filed an Incident Investigation Report, dated the same day (February 4, 2006) with the Company. *Id.* The report details his checking with Complainant about his medical condition and Complainant's telling him that he was okay; the arrival of the fire department, police department, and paramedics; and the paramedics taking Complainant to the medical center. *Id.*

As to the specifics of the accident, Thorns reported that the fire department examined the truck for fuel leaks (and apparently found none); that a (Nevada) Department of Transportation supervisor did a maintenance check on the overpass and found no structural damage; that leadman Edwin Lightfoot made a report to the Safety Department; that there was damage to the vehicle boom system, tarping system, hydraulic system, and vehicle A-frame; and that the police officer stated that Complainant would be cited for failing to secure the load. He learned and reported that Complainant had been discharged from the medical center and sent for drug testing. Finally, he noted that the vehicle was towed to Cheyenne Transfer Station. *Id.* The report reflects a conclusion, apparently from leadman Lightfoot, that Complainant failed to secure the boom, and that this resulted in its hitting the overpass. *Id.*

When the truck arrived at the yard, three mechanics (James Raney, Donald Branson, and another) examined it and reported. Tr. 275-76. Tucker also inspected. He was asked to determine what shape the truck was in: what worked and what did not work.[17] Tr. 535. He determined that the truck could not be usefully repaired. Tr. 501. In addition to reporting his findings, he also advised managers (including Human Resources Director Hank Vasquez) that the boom could not rise without the PTO engaged.[18] Tr. 533-34, 560.

On the following Monday, February 7, 2006, Knoblock convened an "Accident Review Committee" to look at the truck, consider the facts, decide if discipline were appropriate, and if so, what discipline. *Id.* The committee was composed of Knoblock, Vasquez, and Safety Director Dave Hefner. Knoblock, who has mechanical expertise (Tr. 485), and Hefner personally inspected the truck. As Knoblock testified:

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[16] Uninvolved in any discipline, the Workers' Compensation Manager offered Complainant modified duty on February 7, 2006. R. Ex. 12. As discussed in the text below, Complainant was terminated from employment before he could return to modified duty.

[17] Tucker did not perform an in-depth, minute mechanical investigation. For example, he did not take apart the control handles that operate the valves; he pulled the handles to see whether they operated and found that they did. Tr. 535-39.

[18] Tucker confirmed the same opinion in response to an inquiry related to Complainant's claim for unemployment insurance. Tr. 544, R. Ex. 25.

> I looked at actually the whole truck. The whole truck was demolished. The boom was ripped off. They had to cut off the cylinders to move it. So we checked the valves. We checked everything on the truck, and we checked inside. I jumped up inside the cab, looked down at the little console they have there. They have a switch for the hydraulics to work. It's a PTO.

Tr. 472. He continued, stating that the PTO was in the "off" position and describing how he grabbed the handles to be sure they and the valves operated correctly. Tr. 472-74. He asked Thorns about the PTO, and Thorns confirmed that the PTO was in the "off" position immediately after the accident as well. Tr. 474-75.[19] Knoblock valued the pre-accident the truck at $70,000, and he concluded that the truck had been totaled.[20] Tr. 477.

As Human Resources Director, Vasquez testified that the factors considered when determining discipline concerning an accident are the severity of the accident, the extent to which the driver was negligent (or "preventability"), and the driver's length of service. Tr. 558. Knoblock was aware that not every accident led to a termination; he pointed to the same factors as did Vasquez as the criteria for setting discipline. Tr. 478. The committee discussed the factual findings and decided to terminate Complainant's employment. Tr. 476-78.

Ultimately the decision was Knoblock's, and he confirmed the termination. Tr. 480. As he explained at trial, he concluded that Complainant had failed to lower the boom and that it was Complainant's fault. *Id.* Vasquez explained that he agreed with the termination, not only given the severity of the property damage, but also the potential for much worse injury or damage.

On February 8, 2006, Vasquez wrote to Complainant, notifying him that his employment was terminated. R. Ex. 13. He cited, among others, two major rules under the collective bargaining agreement: (1) "Refusal or intentional failure to comply with safety, driving and parking laws and Company rules of which the employee has been informed"; and (2) "Unauthorized possession, use, or intentional misuse of company equipment, vehicles or other property resulting in property damage or personal injury, which requires treatment at a medical facility, are cause for discharge in and of itself." He stated that Complainant had not lowered the boom, that this created a dangerous situation on a public roadway that resulted in extensive damage to company equipment, and that this amounted to gross negligence. *Id.*

[19] At trial, Complainant testified that he had never been trained when to disengage the PTO and that it was okay to drive and not disengage the PTO. Tr. 157-58. He added, however, that on this occasion, he did disengage the PTO. The Accident Review Committee reached the same conclusion. Leaving the PTO in the "off" position when driving was operationally correct. Accordingly, the training is irrelevant: there is no dispute that Complainant disengaged the PTO immediately prior to the accident.

[20] Complainant contends that Knoblock told him the truck was going to be salvaged even before the accident. Knoblock states that he told Complainant that, as a result of the damage sustained in the accident, the truck was going to be salvaged – not that it would have been salvaged anyway. Tr. 486-87. I give greater weight to Knoblock's testimony. The truck was seven years old and, according to Tucker, the Company generally kept these trucks ten to fourteen years. There is no evidence of any pre-existing damage to the truck (although Complainant's counsel repeatedly asked witnesses whether there had been any such damage). There would have been no reason to salvage the truck at that time, absent the accident.

The grievance. The Union had been involved from when the accident first was reported. Its then-business agent Jerome Lewis went to the scene.[21] As Lewis testified, "This was a major accident," with the truck torn in half and "considerable" damage to the bridge with scrapes and concrete missing from above. Tr. 265, 269. Repair workers had to sever the boom so that it could be removed; for a time, it was simply a "big object in the street." Tr. 270. They needed a safety truck, a utility truck, and a tow company. Tr. 269. The highway patrol and police officers were needed to block traffic. Lewis took photographs. He also spoke with Complainant that evening. Tr. 263.

Lewis returned later to the accident scene with Complainant. Tr. 274. They traced the route from the previous drop off and discussed what happened. *Id.* As part of his investigation, Lewis relied on a shop steward who is a chief mechanic as well as three other mechanics that had worked on the truck when it was brought in from the accident site. Tr. 275, 298. Lewis might have done some other investigation.[22]

On February 9, 2006, the day following the termination, Lewis filed a grievance on Complainant's behalf. R. Ex. 14. In it, the Union asked that Complainant be returned to work and made whole. *Id.* As a second step, Lewis discussed this with the Company. As a third step, a meeting was arranged to include Complainant, Lewis, the Union's other business agent Derrick C. Cardwell, and President of Las Vegas Operations Robert Coyle for the Company.[23]

Coyle, Lewis, and Cardwell all describe the meeting essentially as the union's pleading for Complainant to get his job back (even if without back pay). Tr. 296-97, 452, R. Ex. 44. For example, Lewis suggested that Complainant be retrained and then returned to work. Tr. 296-97. Complainant, however, undercut that approach by stating that he was a perfectly capable driver and did not need retraining. Tr. 297, 456.

What was most crucial at the Step 3 meeting, however, was that Complainant two or three times admitted either that he had left the boom up or that he could not remember. Coyle, Lewis, and Cardwell concur in this. Cardwell's contemporaneous notes include Complainant's description of the events, including that "to his memory [he] did not know if he lowered the boom." According to the notes, when Complainant began to discuss the accident itself, Coyle directed him back to the boom operation, and "Mr. Litt acknowledge[d] that he may have left boom up and he has struggled w/ the idea he may have left the boom up." R. Ex. 44. Finally, the notes include: "Mr. Gerald Litt stated he was in violation." *Id.*

Lewis' testimony was that Complainant wanted to debate the point, asserting that he was not at fault "as much as he admitted that he may have left the boom up in the air." Tr. 297. Coyle's

[21] Lewis worked as the business agent for five years and throughout Complainant's employment. Tr. 258.

[22] At trial, Lewis testified that while investigating, he found an employee at the previous drop location who said that he saw Complainant drive away with the boom up. Lewis said that he never disclosed this. I place little weight on this, given Lewis' evident frustration with Complainant as a result of the grievance process described in the text below. More to the point, however, is that it is irrelevant. The relevant question is the decision-maker's reasonable belief after a fair and appropriate investigation, not whether Complainant in some ultimate sense was factually at fault. As Lewis never disclosed this information, it could not have been a factor in the Company's decision to terminate the employment.

[23] According to Cardwell's notes, Henry Vasques was also present for the Company. R. Ex. 45.

recollection of the meeting was the same: "He could not remember, but he might have left the boom up." Tr. 456.

In his testimony, Complainant denied making any acknowledgement that he might have left up the boom, but when questioned about the specifics, his testimony was closer to that of the others who were at the meeting. Tr. 162-63, 226-27. When he was asked whether he said at the Step 3 grievance meeting that he could not remember if he lowered the boom, he answered that he was giving the same response that he has given "every time [he has] ever explained" this. This response was that he had:

> "followed a normal course of procedure on a daily basis . . .. If you want me to go back and you want to recall what you did at every step of the day while you're performing a given task, sometimes you can't recall specifically that that happened. But if it's a task that you perform on a regular basis, daily, as I did, there's only one way to perform that job, and I did that job the same way every day."

Tr. 162-63. On a written statement on his unemployment compensation claim, Complainant asserted the same: that he knew that he had lowered the boom "because I had performed these procedures numerous times in the past and on this very day." *See* R. Ex. 27.

Considering all of this evidence, I conclude that Coyle's recollection that Complainant could not recall whether he left up the boom was a reasonable inference that he could have drawn from what Complainant said at the meeting. Complainant's statement amounts to an admission that he had no specific recollection. All he really could do was to present an argument: since he routinely lowered the boom during the six months he had been driving, he must have acted consistent with that this time.

What this neglects is that something different happened this time. Within minutes after leaving his last drop off, Complainant was driving beneath an overpass with the boom raised. One possible explanation for this singular event is that Complainant did not do what he usually did. In short, a good driving record does not, standing alone, prove that a driver in an accident was not at fault, especially when the record is only six months long.

Second, I place heavy reliance on Cardwell's notes. It was the local Union's general practice to take notes at Step 3 meetings, and it was Cardwell who generally took them. Tr. 512. These were routine business records written contemporaneously with the event. Unlike Respondent, the Union had no reason to be biased in its perceptions, and in fact had represented Complainant well enough a few months earlier to get his job reinstated after a disciplinary termination.

Third, the surrounding circumstances support Lewis and Cardwell's testimony. Lewis testified that after Complainant made his admissions about not knowing whether he had left up the boom, Lewis got upset and walked out, telling Complainant that he had just "incriminated [himself] in front of the company." Tr. 297. Cardwell testified that he had never seen Lewis walk out before, and that is why, in addition to his notes, Cardwell independently recalls Complainant's

admissions.[24] Events such as those that Cardwell described, especially given that they were unique in the experience of both him and Lewis, can readily be remembered two years later.

Fourth, Coyle concurs.

Having heard from Complainant and the Union, Coyle denied the grievance at Step 3, leaving open only the last grievance step: arbitration. The Local reviewed the matter with Union counsel, and on counsel's advice, decided not to pursue the grievance. Tr. 301. Counsel advised that Complainant's conduct was gross negligence and that the termination was correct.[25] Tr. 515. On March 20, 2006, the local Union informed Complainant that it would not pursue the grievance because, having investigated and conferred with legal counsel, "It is our determination that your grievance lacks merit."[26] R. Ex. 15. On April 21, 2006, the Union Local notified Respondent that it would not pursue the grievance. R. Ex. 14.

Nevada vehicular citation. The State of Nevada Traffic Accident Report file on February 4, 2006, by the Las Vegas Metropolitan Police Department on the accident states: "For reasons unknown the boom on [the truck] was raised causing it to be an unsafe load. The boom of [the truck] struck the underpass which is I-15 southbound. The boom struck against the bottom of I-15 for 62 feet. The boom then hit a raised concrete section of the underpass. The boom was torn to the rear and [the truck] traveling east for an additional 57 feet before coming to a stop." R. Ex. 25. "Driver of [the truck] was cited for unsafe load." *Id.* Complainant testified, however, that the citation was dismissed, which I accept as Respondent offered nothing to refute it.

IV. Complainant's Other Complaints during His Employment, Including Alleged Safety Complaints.

As discussed above, throughout his employment, Complainant filed reports when vehicles needed maintenance. *See* C. Ex. 16. As a casual, he had discussions with co-workers, urging them to report safety issues and telling them of his own safety concerns. Respondent reacted positively to these. After being terminated from employment for driving without a commercial license, Complainant made essentially three other complaints.

A. Exhaust Fumes and the Nevada OSHA Complaint.

Beginning at least by early 2004 (*i.e.*, before Complainant's employment), Respondent discovered that the new trucks on which it was taking delivery had their exhaust stacks configured differently from those in the past. Tr. 462-64. Stacks on the older trucks went straight up; the new trucks' exhaust went to the ground. Pitchers riding on the outside of the trucks reported that they could smell exhaust fumes. *Id.; see also*, Tr. 237 (at Cheyenne). Respondent began buying new exhaust stacks configured as the earlier trucks had been and

[24] Cardwell testified that Complainant also admitted that he could have looked in his mirrors and did not. Tr. 516-17.

[25] Apparently Complainant chose not to pursue the matter further along this route, for example, through a district court action under section 301 of the Labor Management Relations Act. Instead, he filed this action, which is narrower in scope.

[26] On March 24, 2006, Complainant sought executive board review of the decision not to arbitrate. R. Ex. 16. The record does not suggest that the board allowed him any relief.

replacing the exhaust on the new trucks. *Id.* This process was ongoing at each of Respondent's facilities by 2004.[27] *Id.*

The complaint. Complainant testified that he and others had repeatedly complained to the foremen about the exhaust. Tr. 47. He had told a foreman that the exhaust configuration was such that it "that blew when you're driving up underneath the truck that pushed the fumes from the exhaust directly into the face of the pitcher riding on the back of the vehicle." *Id.* But, according to Complainant's testimony, it was when he was told that he personally would have to ride on one of these vehicles that he decided to complain to OSHA. *Id.;* 115-16. Complainant testified that he complained in writing to OSHA about the exhaust on August 15, 2005.[28] R. Ex. 5; Tr. 46-47, 135. The complaint was anonymous. Tr. 136. From OSHA's response it is evident that Complainant alleged that "employees riding the back of (pitcher) haul trucks are standing directly over the truck exhaust." R. Ex. 5.

According to Complainant, he told the Operations Manager and at least two foremen about the OSHA complaint, but not until some time *after* filing it. Tr. 116-17, 205. He told co-workers that he wrote complaints to OSHA, including one about the exhaust; he recalled telling co-workers about the complaint before he made it. *See, e.g.*, Tr. 104-06 (Jolly), 205 (per Complainant), 384 (Hicks), 436 (Hardison).[29]

Complainant's statements that the exhaust blew "directly into the face of the pitcher" and that pitchers "are standing directly over the truck exhaust" are exaggerated. According to Respondent's measurements and consistent with photographs that Complainant introduced, the exhaust to the ground was 15 feet 5 inches in front of the step where the pitcher stood on the outside of the truck. C. Ex. 3. This would explain, as Knoblock testified, why pitchers were reporting that they could smell exhaust, but it would not be consistent with the exhaust being

[27] For example, Knoblock testified that these retrofits were ongoing at the Henderson facility before he transferred to Cheyenne in 2004. *See* Tr. 495-96.

[28] At his deposition, Complainant testified that he never complained to OSHA in writing; it "was all verbal statements." Tr. 231. If he did complain in writing, it is peculiar that he did not produce a copy; he produced a great many other records, and if unable to locate his own copy of the complaint, he could have obtained one from OSHA. Regardless, this question is inconsequential: there is no requirement that a complaint be in writing to find protection under the STAA. *See Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (oral complaints to supervisors sufficient).

Although Complainant has attempted to bring into question whether he filed the complaint before the Company terminated his employment for driving without a commercial license, I reject this and find to the contrary. Complainant never denied that he first contacted OSHA after the termination, nor did he affirmatively testify that it was before. He said that he talked with an OSHA employee prior to filing the complaint, but he could not recall how much prior. Tr. 204. He agreed with his lawyer's argument that, since the OSHA document states that the complaint was *received* at OSHA on August 15, 2008, it would have been impossible for him to have prepared it on that date. *Id.* This argument, however, neglects that documents can be sent by fax and email. Even were I to credit the argument, it still does not place the complaint before the termination: there was a full week between the termination and OSHA's receipt of the complaint.

[29] Hardison testified that he knew of the OSHA complaint, and I accept that. He also testified that the foremen knew about it. I reject his testimony on this point because his responses to further direct examination showed that he had no basis for this testimony. *See* Tr. 436-38.

blown "directly into the face of the pitcher."[30] To the extent that Complainant told co-workers that he had made complaints (plural) to OSHA, he was exaggerating: Complainant testified that the complaint about exhaust was the only one he made to OSHA. Tr. 165-66.

OSHA's follow-up. On August 16, 2008, Nevada OSHA wrote to Respondent's safety representative Hefner, requesting that Respondent investigate the alleged conditions. The Company responded later that month that there were four trucks with this configuration at Henderson, all modified; two at Sloan, both modified; and ten at Cheyenne, five modified and three to be completed that week. C. Ex. 3. OSHA did not follow up with anything further.

There is no evidence that the people involved in the decision to terminate knew that a complaint from Complainant had instigated Nevada OSHA's inquiry. As he is the person who received OSHA's request for an investigation, Hefner knew there had been a complaint about the exhaust configuration. There is no evidence, however, that Hefner knew it was Complainant who filed the complaint.

Knoblock denied ever learning that Complainant had filed an OSHA complaint, denied that at the time of his decision to terminate the employment he knew of any kind of safety complaint that Complainant had made, and denied that any of his subordinates told him that Complainant had made any complaint about a safety issue. Tr. 464, 478-79.

Knoblock also stated that, even if there had been a complaint, it would not have been problematic. As he explained, when he was working at the Henderson facility prior to transferring to Cheyenne, OSHA had come out to the site on this issue and advised the Company that it was doing nothing wrong. Tr. 464-65. Knoblock thus knew, not only that the Company was retrofitting the trucks already, but also that, in OSHA's opinion, the exhaust configuration was not a violation.[31]

Similarly, Coyle testified that at the time of his involvement, he did not know that Complainant had made any safety-related complaints, nor had any managers complained to him about Complainant as being troublesome. Tr. 452-53.

Vasquez testified to the same; he did not even know that there had been an OSHA complaint about exhaust. Tr. 557.

For his part, Complainant offered no direct evidence of any decision-maker's knowledge of the exhaust complaint. He offered no evidence of anyone telling any decision-maker that Complainant made a complaint about the exhaust. Apparently, he offered no more than the argument that, if foremen and the Operations Manager knew, they would have told at least one of

[30] It is also consistent with Hardison's testimony. *See* Tr. 436 (describing subject of Complainant's OSHA complaint as about trucks without smokestacks, "so the fumes would discharge underneath the cab. [Complainant] claimed that they would roll back to the back of the truck.")

[31] Complainant testified that he was unaware at the time of his OSHA complaint that the Company had been retrofitting the trucks. Tr. 189. Nor did he become aware later. Tr. 220. But he did not deny the ongoing retrofitting or offer any evidence to refute it.

the decision-makers; or that his co-workers knew and thus word somehow was bound to have gotten to a decision-maker.

B. Allegations that Knoblock Mistreated Employees.

On September 28, 2005, Complainant wrote an anonymous email to Republic's corporate offices in Florida. R. Ex. 6; Tr. 136. He wrote:

> We the employee's at the Cheyenne Station continue to receive threats, verbal abuse and disrespect from your GM: Joseph Knoblock. This is to the point that since Republic Services has failed to respond to these issues of unfairness and continued violations of the Collective Bargaining Agreement, we have no choice but to contact the media's to support our efforts of employee abuse.

R. Ex. 6. Ken Baylor, Vice-President of Employee Relations, responded and asked the anonymous author to contact him. *Id.* On October 3, 2005, Complainant replied without identifying himself. He stated that he had to write anonymously because he could not otherwise guarantee that he would not be terminated. *Id.* He repeated some of the same allegations. He added, "We as workers are being terminated daily for issues that we have not been informed of and if there is any support as a discussion to mention to management others are targeted for termination." *Id.* Also: "The GM: Joseph Knoblock and staff is out of control and corporate is allowing them to kill workers morale, work ethic, loyalty and dedication to Republic Services." *Id.* Baylor responded the next day, asking for examples that corporate could investigate "to ensure that our local team is conducting our business appropriately." *Id.* Complainant did not respond.

These emails are misleading in that the author refers to himself, not just as an employee, but as a representative of the employees. At the time he wrote, Complainant had been terminated from employment with his arbitration pending, and there is nothing to suggest that any other employee asked Complainant to represent him to the Company.

C. Complaints to Las Vegas Councilman Weekly.

From contacts before hire at Republic, Complainant knew then-Las Vegas Councilman Lawrence Weekly[32]; in fact, Weekly had helped him get the job at Republic. Tr. 258. Some time shortly before the termination on August 8, 2005, Complainant called Weekly, mentioned concerns about his employer, and asked for a meeting. Tr. 546. He did not explain on the phone what his concerns were but waited for the meeting. *Id.* Weekly asked his chief-of-staff Rickie Barlow to call Complainant and see what he could do. Tr. 71. Barlow called Complainant and reported back to Weekly. *Id.* Weekly then agreed to meet with Complainant.

[32] In or around June 2007 (after the events relevant to this case), Weekly was elected as a local Commissioner. Tr. 546.

The meeting was after the termination for driving without a license.[33] Present were Weekly, Barlow, Complainant, and Complainant's co-worker who had been terminated along with him, Cornelius James. Tr. 127, 549. After some discussion and with everyone still in his office, Weekly called Coyle, apparently on a speakerphone.

The evidence about what was said in the phone conference is disputed and inconsistent in two areas: (1) whether there was any discussion of a safety issue, and (2) whether Weekly identified Litt as the person complaining. I will conclude that, more likely than not, there was no discussion of a safety issue, and Weekly did not identify Litt.[34]

At trial, Complainant testified that when he met with Weekly and the others, he complained about working conditions and alleged violations of the collective bargaining agreement. Tr. 140. With respect to safety, he said that he did not mention that he had made an OSHA complaint (*see, infra*), but that he told Weekly "about the problems that we were experiencing . . . of safety with the trucks." *Id.* He characterized this as a "generalization" about safety problems with the trucks, and said that it was this generalization that Weekly communicated to Coyle.

As to identifying the employees complaining, Litt testified at trial that he could not recall whether Weekly identified him. Tr. 141-42. At his deposition, however, Complainant's memory was better: he testified that during the call with Coyle, Weekly did not mention that Complainant was in his office or use his name in any way. Tr. 144, 145.

Cornelius James testified that the reason he and Complainant went to Weekly was because they had both been fired and because their co-workers were being mistreated on the job. Tr. 130. He said nothing about any safety-related purpose. In fact, he stated that Complainant never complained to him about safety issues, neither when they worked together nor at any other time. Tr. 126-27.

James described the meeting with Weekly as, "Basically talked about the way the guys was being mistreated at the job." Tr. 127. When Weekly called Coyle, "He was asking Bob Coyle about what was going on with the guys at the job, and the guys was – I mean, [Complainant] was saying the guys was being mistreated. And that's as far as that." *Id.* As of that time, it was James' understanding that Coyle did not know that Litt was making the complaint. Tr. 128. His recollection was that Weekly never mentioned Litt's name to Coyle but just said that some people had complained. *Id.*

Coyle testified that when Weekly called, he said that he had received a report that Knoblock was not treating people well. Tr. 449-50 (not "very nicely"). Accordingly to Coyle, Weekly did not raise anything else and did not identify Litt. *Id.* Coyle said that after the call, he remembered that union steward Tony Andrews had recently told him that since Knoblock had arrived at the

[33] As Complainant testified, he began the phone calls with Weekly and Barlow before the termination, but he did not meet in person with Weekly until after the termination. Tr. 139, 207. James recalled the meeting as after the termination and before they got their jobs back. Tr. 130-31, 132. Coyle placed the call in September 2005, also after the termination and before the reinstatement. Tr. 451-42. Weekly and Barlow could not recall the dates involved other than that they were in 2005. Tr. 73, 547-48.

[34] As there was only one meeting with Weekly, all of the evidence relates to that meeting. Tr. 139.

end of 2004, things had improved at the Cheyenne station. Tr. 450-51. Coyle knew that Andrews knew Weekly. He told Knoblock to ask Andrews if he would let Weekly know about improvements under Knoblock. *Id.* Knoblock reported back that Andrews said he would call Weekly. Tr. 451. A couple days later, Coyle called Weekly. Weekly said that Andrews had told him that things at Cheyenne were going very well. Tr. 452. Coyle never heard from Weekly about it again. Tr. 451-52.

The two remaining witnesses to the phone conference, Weekly and Barlow, had at best weak memory of the events. Their testimony was almost always vague, even when led on direct. When asked what he and Complainant discussed when Complainant came in for the meeting, Weekly answered:

> A. I think we talked about – and I'm just trying to just kind of think in terms of what happened on that day. We talked about some of the concerns as it related to management and the treatment of employees there. I think it just kind of centered around a lot of that that we talked about, just kind of management concerns and employee relations type concerns that he was having, and others for that matter.

Tr. 546-47. As Weekly had not mentioned safety, Complainant's counsel turned to a leading question:

> Q. Did Mr. Litt have any conversations about any safety concerns that he had?
> A. I'm going to say probably because we talked about a whole lot of – with me not having any knowledge of what goes on on a day-to-day basis there, I'm probably sure we did cover a lot of things as it relates to relationships from management, safety. I would probably say yes.
> Q. Do you have any specific recollection of something that he would have told you?
> A. I don't. No, Ma'am, I don't.

Tr. 547.

As to the substance of the phone conference, Weekly's testimony was:

> Q. Could you please describe the phone call?
> A. I placed a phone call to Mr. Coyle, and I shared with him – and that's the relationship that I have with him. Any kind of concerns I ever get, whether it be from a residential standpoint or if I hear any concerns from any of the employees there, the first thing I do is I will call Mr. Coyle and share my concerns with him because we just have a pretty good working relationship like that.
>
> * * *
>
> Q. Did you have any other conversations with Mr. Coyle after this telephone call?
> A. [Still referring to the first call] You know what, when we spoke, I shared with him what was brought to my attention, the conversation that we were having and the concerns. As a matter of fact, he was – he was actually on his way out of

town. So we spoke about it. After that, he just said I'll look into it, and that's where we left it. It wasn't a matter of I'll get back with you because it didn't need to get back to me.
Q. Did you ever follow up with him?
A. I didn't.

Tr. 548-49. Nonetheless, Weekly testified that he told Coyle he had Litt and James in his office for the call. Tr. 548. He explained that he did this because the call was on a speakerphone, and he wanted Coyle to know who was present. *Id.*

Barlow was just as vague, even when being led on direct examination. He testified that at Weekly's request he called Complainant to see if they could help him. Tr. 70. Much as the other witnesses, without being led, his recollection of his discussion with Complainant focused on personnel matters. He described the call as follows:

A. I returned the call and spoke to Mr. Litt who explained to me that he had some concerns and some issues that were taking place at his place of employment and was wondering if, in fact, Councilman Weekly could assist he and some of the gentlemen who were working at their place of employment due to some ongoing issues that surrounded around, I believe, some personnel matters.
Q. Okay. Do you remember the specifics of Mr. Litt's complaints, what they regarded, what type of issue he was complaining about?
A. It was more so something to do with something surrounding I recall – something having to do with a truck, one of the disposal trucks.

Tr. 70-71. Given Barlow's testimony that the call was about personnel matters and somehow related to one of the trucks, Complainant's counsel turned to leading questions and still got generally vague responses:

Q. And was this some type of safety issue that he was referring to about this truck, do you recall?
A. He mentioned that there were some trucks that had issues, and something about something in the area of safety. I'm going off recall because it's been a long time since I had a conversation regarding this item. But something in relation to the safety of the trucks, and he and other members of the company having made complaints, and they felt that their complaints were falling on deaf ears or just basically being taken for granted.

Tr. 71. On redirect, Complainant's counsel sought further detail:

Q. Councilman Barlow, if I were to tell you that Mr. Litt called to discuss an issue regarding an exhaust system on the truck, does that in any way refresh your recollection as to something he may have talked to you about?
A. No, I don't recall an exhaust conversation at all.
Q. So you just recall that it was some issue with a truck, that he was involved in some type of safety issue or –

> A. What I do recall is safety issues surrounding the garbage truck, and pretty much a misunderstanding, if you will, between the higher-ups and the employees. It was almost like a union versus management type push that I took out of the conversation.

Tr. 79.

As to Weekly's call to Coyle, he vaguely described the substance as Weekly's explaining to Coyle "the message he received in the office, and Mr. Coyle told him that he would look into it and get back to the councilman in an appropriate amount of time." Tr. 72. Still, when asked whether Weekly identified to Coyle who had made the complaints, Barlow stated, "I believe so." Tr. 72.

On cross-examination, Barlow testified that he only recalled Weekly and himself being in the room for the conference call with Coyle; he specifically did not recall Complainant being there, and he never mentioned anything about Cornelius James. Tr. 75.

Reviewing this testimony, I place very little weight on the testimony of Weekly and Barlow. When asked open-ended questions, both tended to describe the meeting with Complainant and the call with Coyle as related to personnel matters, employee relations, or labor/ management issues. This is consistent with what Coyle and James said.

Even when led, Weekly could only say that his conversation "probably" included safety and that he had no specific recollection in that regard. His answers about his conversation with Coyle were vague and non-responsive, focused more on his relationship with Coyle and Coyle's travel plans than anything else. Barlow's testimony was no better. Barlow did not even recall Complainant being present and seemed to have no recall of James at all.

I therefore credit the testimony of Coyle and James, together with the deposition testimony of Complainant, over that of Weekly and Barlow. On the question whether Weekly identified to Coyle who had complained, I find that he did not.

On the safety issues, it is possible that in some general way Complainant mentioned safety to Barlow in their conversations before the termination. But again crediting Coyle and James, and noting that the meeting with Weekly, Complainant, and James (and the call to Coyle) came after the termination, I find that Weekly's call to Coyle was not about safety, but was about the treatment of employees at Complainant's workplace (and perhaps violations of the collective bargaining agreement). This is consistent with Complainant's choice of subjects about which to complain to Republic's corporate offices at that same time (*see* above). It is consistent with Complainant's change in focus after his termination to discrediting Knoblock and involving James concerning the termination, rather than continuing any focus on safety. Even Complainant admits that what he told Weekly about safety at the meeting was no more than a "generalization," nothing specific. Surely, neither Weekly nor Barlow remembers anything about any specific safety complaint.

V. Respondent's Treatment of Others Similarly Situated.

The evidence of how the Company disciplined other drivers who had been in accidents was anecdotal. Complainant's witnesses offered comments on and examples of other accidents at the Cheyenne facility:

Schuler testified that, in his experience as a foreman, the extent of discipline for drivers in accidents is determined on an individual (case-by-case) basis. Tr. 244. He said that is why there is an investigation. *Id.* He estimated that in the accident cases in which he has been involved, about 25 percent result in termination. Tr. 25. He said that the Company considers factors such as how severe the accident was, whether there were past accidents, whether the employee was careless, and whether he followed proper procedures. Tr. 25-26.

Then-union business agent Lewis testified that in his five years in that position, he handled hundreds, probably thousands, of grievances. Tr. 311. He also had twelve years as a Republic employee. *Id.* He had seen every kind of accident from fender-benders to fatality accidents. Tr. 311-12. On questioning, Lewis confirmed ten specific examples from 2006 and 2007 in which the Company terminated employees at the Cheyenne facility for being in an accident. Tr. 313-18. He stated that he was familiar with these accidents in that he either conducted or was "privy to" an investigation in each. Tr. 319. In his opinion, Litt's accident was the worst. Tr. 318. In terms of discipline, Lewis also pointed to Complainant's being a short-term employee. Tr. 319.

Kevin Hardison worked for Republic from January 1994 to July 2001, became a business agent representing Republic employees from then until February 2005, and then returned to Republic as an employee. Tr. 420. He remains currently employed at Republic. *Id.* For his first five years he did residential collection; in about 2000 and 2001, he did rural pick-ups; and since he has returned to Republic he has been doing residential runs. Tr. 421.

Addressing the nearly four years that he was a business agent, Hardison could recall three examples of workers terminated for accidents on whose behalf the Union filed grievances and got the workers reinstated (without back pay). Tr. 431-33. These cases involved property damage from about $50,000 to $100,000. *Id.*

He also knew of two fatality injury cases in which the driver's employment was not terminated. Tr. 433-34. One involved a car with three teenagers who had been drinking and turned directly in front of the employee's truck. The employee struck the teenagers' car, killing two of them. *Id.* In the other case, the employee was turning his truck at an intersection when a vehicle approaching from behind at a high rate of speed never stopped, ran right underneath the rear of the truck, and was killed. Tr. 434. Hardison could recall only one other fatality injury accident, and the Company terminated the employment on that occasion. Tr. 434-35.

Finally, Complainant called Timothy Hicks. Hicks worked for Republic from 1999 until he was terminated from employment in 2006. He was a shop steward for about three years, including part of the time that Complainant was working there, until the Union removed him from the position. Tr. 376-77. Hicks testified that hundreds of employees have been terminated from employment because they were in accidents. Tr. 404-07. He estimated that this occurred in

about five to ten percent of accident cases, usually when the employee had had multiple accidents.

In 2005, Hicks was in an accident himself. The brakes went out and the truck went into a ravine. Tr. 386. The Company terminated his employment. Tr. 406-07. He testified, however, that he was able to document that the brakes had gone out two weeks earlier, and in view of the documentation, Knoblock reinstated him. Tr. 386-87. Hicks was also in one earlier accident (2003 or 2004): he backed into another truck in the yard, broke off a mirror, and "kind of like dented the radiator." Tr. 388-89. He was not disciplined. Otherwise, Hicks had only vague recollections about accidents.[35]

APPLICABLE LAW

Section 405 of the Surface Transportation Assistance Act "was enacted to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles." *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). "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 to express protection against retaliation for reporting these violations." *Id.*

The STAA's whistleblower protection provision provides in pertinent part:

(a) Prohibitions. (1) A person may not discharge an employee . . . because –

> (A)(i) the employee . . . 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 . . ..

49 U.S.C. §31105.

An STAA complainant's "proof of unlawful retaliation is established using the same framework used to prove discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2. *Calmat Co. v. U.S. Dep't. of Labor,* 364 F.3d 1117, 1122 (9th Cir. 2004). This requires adapting the test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),[36] to the STAA. *Id.* It means that a complainant

[35] Hicks recalled an accident he witnessed where the driver backed into a truck and "damaged that truck pretty much." Tr. 389-90. The police cited him. Tr. 390. He was allowed to finish the day but was sent off after that until the accident could be evaluated. *Id.* Hicks did not know what discipline was assessed, but recalled that the employee was not terminated from employment. Tr. 390-91. When asked what was the worst accident he could recall after which the person was allowed back to work, he mentioned an accident about five years earlier in which Scott Scarborough was involved. He could not offer anything more specific than that Scarborough "did some pretty bad damage at one time." Tr. 391-92.

[36] The Court has further developed the test in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); and *Raytheon v. Hernandez*, 540 U.S. 44 (2003).

> has the initial burden of establishing a prima facie case by raising an inference that protected activity was likely the reason for the adverse employment action. Once the [complainant] has established a prima facie case, the burden of production shifts to the [respondent] to articulate a legitimate, non-retaliatory reason for the adverse employment decision. If the [respondent] advances reasons to rebut the inference of retaliation, the [complainant] bears the ultimate burden of demonstrating by a preponderance of the evidence that the reasons articulated were pretext for retaliation.

Calmat, supra, 364 F.3d at 1122 (citations omitted).[37]

A. Prima Facie Case[38]

Establishment of a *prima facie* case requires a complainant to show: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the employer. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

Protected Activity. The complainant need not mention a specific commercial motor vehicle safety standard. *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-00001, slip op. at 8-9 (Sec'y July 4, 1984). He need not prove an actual violation of a vehicle safety regulation. *Yellow Freight System, Inc. v. Martin*, 954. F.2d 353, 356-57 (6th Cir. 1992); *see also Lajoie v. Environmental Management Systems, Inc.*, 1990-STA- 00031 (Sec'y Oct. 27, 1992). His belief that there is a violation, however, must be reasonable. *See Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-5, slip op. at 3 (ARB July 31, 2003) (apprehension that an uncomfortable seat is an unsafe condition is unreasonable); *Harrison v. Roadway Express*, ARB No. 00-048, ALJ No. 1999-STA-37, slip op at 6 (ARB Dec. 31, 2002) (same). The complaint need not be to a governmental agency; it may be internal, from employee to employer. *See Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (case below 95-STA-34) (DOL Secretary's policy to protect internal complaints "eminently reasonable") (citing cases).

Whether written or oral, the complaint must be sufficient to give notice that a complaint is being filed about regulatory compliance and safety. *Id.* (oral complaints adequate when they made respondent aware that the complainant concerned maintaining regulatory compliance). A communication by an employee to a supervisor that a truck has a mechanical defect that would inhibit safety is a safety complaint within the STAA. *See Schulman v. Clean Harbors Environmental Services, Inc.*, 1998-STA-24 (ARB Oct. 18, 1999) (filing vehicle inspection reports protected although an ordinary part of complainant's job duties). There is a point,

[37] Different burdens apply on other theories of discrimination or retaliation, such as in mixed motive cases. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The present case, however, is asserted on a pretext theory.
[38] As a general proposition, once the case is at formal hearing on the merits, a *prima facie* analysis is no longer appropriate, particularly once the respondent has articulated a non-discriminatory reason for any adverse action. The burden falls on the complainant to establish, by a preponderance of the evidence, that the reason for his discharge was his protected activity. *Luckie v. United Parcel Service, Inc.*, 2003-STA-39 (ARB June 29, 2007); *Pike v. Public Storage Companies, Inc.*, 1998-STA-35 (ARB Aug. 10, 1999); *Shute v. Silver Eagle Co.*, 1996-STA-19 (ARB June 11, 1997).

however, at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id.*

Adverse action. The STAA includes discharge in its express list of covered adverse actions. 49 U.S.C. § 31105(a).

Causal link. A causal link requires a showing that the people who acted on the employer's behalf knew of the complainant's protected activity.[39] *Moon v. Transport Drivers, Inc.*, 836 F.2d at 229 n.1; *Baughman v. J. P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-00005 (Oct. 31, 2007), slip op. at 4, 6; *see also,* Title VII retaliation cases: *Mulhall v. Ashcroft*, 287 F.3d 543, 552 (6th Cir. 2002) (when decision makers denied knowledge, a retaliation claim fails in the absence of evidence to rebut this); *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1156 (11th Cir. 2002) (same); *Mato v. Baldauf*, 267 F.3d 444, 450-52 (5th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002) (same).

Another factor on causation is temporal proximity. "The proximity in time between protected activity and adverse employment action may give rise to an inference of a causal connection." *Moon*, at 229 (citing cases). A gap of only days between the protected activity and the adverse action supports an inference of causation; a lag of months may negate such an inference; a lag of a year will almost always negate it. *See* Lindemann & Grossman, EMPLOYMENT DISCRIMINATION LAW, v.1 at 1030-32 (nn. 178-181); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (termination within 30 days sufficient to establish *prima facie* causal link); *White v. The Osage Tribal Council*, ARB No. 99-120, slip op. at 4 (Aug. 8, 1997) (close proximity in time can be considered evidence of causation). Countervailing considerations include evidence of intervening events that give a legitimate, nondiscriminatory reason for the adverse action. *See Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6 (Apr. 28, 2006) (temporal proximity relevant but not necessarily dispositive); *Moon, supra*, at 230 ("temporal proximity alone will not support an inference in the face of compelling evidence that [respondent] encouraged safety complaints.").

B. Rebutting the Complainant's Prima Facie Case

If the complainant carries the burden of establishing a *prima facie* case, the burden shifts to the respondent. To rebut the *prima facie* case, the respondent need only articulate, through the introduction of admissible evidence, a legitimate, non-retaliatory reason for its employment decision. It is a burden of production, not persuasion: The employer "need not persuade the court that it was actually motivated by the proffered reasons," but the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.*

C. Complainant's Showing of Pretext.

[39] The employer's awareness of the protected activity sometimes is viewed as a separate and fourth prong of the *prima facie* case. *See, e.g., Moon v. Transport Drivers, Inc., supra*, 836 F.2d at 229 n.1; *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB September 14, 2007). Whether considered separately or as a required showing to prove causation, the result is the same.

If the respondent successfully rebuts the *prima facie* case, complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the respondent was a mere pretext for discrimination. *Id.* at 255-256. That is, the complainant must prove that the proffered reason was not the true reason for the adverse action, and that the protected activity was the reason for the action. *See Byrd v. Consolidated Motor Freight*, 97-STA-9 (ARB May 5, 1998); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

DISCUSSION

This claim fails because Complainant has not shown that he engaged in protected activity of which Respondent's decision-makers had knowledge and that can be linked causally to the termination. Given that Respondent has produced sufficient evidence that the vehicular accident motivated the termination, the claim also fails because Complainant has not shown that the termination was a pretext for retaliation. In all, Complainant has not shown by a preponderance of the evidence that the reason for his discharge was his protected activity. *See* fn. 38, *supra*.

I. Complainant Failed to Prove a Prima Facie Case.

Protected activity. Complainant introduced evidence from which it could be possible to find protected complaints that fall into two categories: (1) the complaint about exhaust on the residential garbage trucks blowing into the workers' faces; and (2) various unspecified vehicle condition reports.[40]

His other complaints, on their faces, were insufficiently related to a violation of safety regulations or standards. Complainant admitted that the most he told Councilman Weekly about safety were "generalizations." The complaints to Republic's corporate offices related to Knoblock's management of Cheyenne Station, not anything about safety.

As to the exhaust complaints, there is some question whether Complainant reasonably believed that the condition violated a safety regulation or standard. When he complained, he exaggerated the exposure to exhaust that he and the other workers were experiencing. He stated that the exhaust was blowing directly into their faces or that they were standing directly over it. That, however, was not the case: the exhaust was coming from more than 15 feet away, dispersing under the truck as it either was stopped or moving slowly.[41] If Complainant believed that the conditions as they existed violated safety regulations, he need not have exaggerated.[42]

[40] Complainant's failure to connect any complaint to a particular regulation does not negate his claim. *See* text, *supra.* The fact that Complainant was not an employee when he made the OSHA complaint does not exclude him from the covered class. He was a former employee, after he initiated the complaint was reinstated, and later was terminated, allegedly based on this complaint. *See also, Robinson v. Shell Oil Co.,* 519 U.S. 337, 345-46 (1997) (former employee within protected class for Title VII purposes under certain circumstances).

[41] Employees were not permitted to stand on the outside of the truck unless the truck was moving very slowly.

[42] Respondent has attacked Complainant's credibility as generally limited by a felony conviction and alleged misrepresentations about his criminal history. There was other impeachment evidence as well.

On the other hand, it is possible that Complainant believed that the actual conditions violated safety regulations, and he exaggerated out of pique. Knoblock had just terminated his employment, and Complainant was trying to get reinstated through arbitration. At this time, he made the complaints to Republic corporate and to Councilman Weekly, both attacking Knoblock's management. He might have exaggerated the exhaust condition to embarrass Knoblock.

The question is close. As it is, I will recommend denying the claim on other grounds. For these purposes, I will therefore assume without deciding that, although Complainant exaggerated the

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In particular, Complainant pled guilty to a felony embezzlement/grand theft on November 7, 1997. Credited for time served, he served an additional eighteen months and was released in Sept 1999. He applied to Republic on July 24, 2004. The application required a disclosure of any felony convictions during the preceding seven years. Complainant's conviction was 6 years and 8 months earlier, and he did not disclose it.

The conviction itself is irrelevant. Although it goes directly to truth and veracity, it occurred more than ten years before Complainant testified in this case, and there is no record of any more recent conviction. This is too remote in time for impeachment purposes.

The absence of any disclosure on the application form is a more difficult question. Complainant knew his conviction record would present a problem on any application to Republic. As Jerome Lewis testified, he first met Complainant before Complainant applied to work at Republic. Complainant had been in touch with Councilman Weekly, and Weekly had asked Lewis if he could help Complainant get a job. According to his testimony, Lewis could not get Complainant hired at Republic at the time because of "a problem in his background." Lewis' recollection was that Republic was changing policies. Tr. 258.

At the hearing, Complainant testified first that his conviction did not come up at the time of application because no one asked. Tr. 219. He explained further that he did disclose the conviction to the Company human resources representative involved in the application process ("Hope") and was told that it was sufficiently close to 7 years that he did not need to disclose it.

Given what appears to be Complainant's knowledge that Republic would not hire applicants with felony convictions, it is possible that Complainant's explanation for the conviction's not appearing on his application lacks veracity. Republic offered nothing, however, to dispute that its representative told Complainant at the time of application that he did not need to list the conviction on the form.

Next, there was evidence that Complainant had misrepresented his criminal history in his testimony and in a statement to a government agency, the Veteran's Administration. Complainant testified that his incarceration was for eight months. Tr. 219. It was for eighteen. *See*, *supra.* It also appears that, when trying to get the Veteran's Administration to help him get work, he told the VA that he pled to grand theft as a reduced charge from embezzlement. R. Ex. 2. The criminal court record is to the contrary.

This record shows that Complainant has been less than fully candid about his criminal history. In an effort to get work, he has minimized and perhaps might even have failed to disclose it. Looking at the record as a whole, I find examples in which Complainant has exaggerated representations, such as in an effort to get reinstated after the first termination. Given that this present action is also aimed at reinstatement, it would appear that Complainant would have the same motivation as in these other instances to be careless with the truth. Still, Complainant made numerous admissions against his interest, which suggests truthfulness, and it is possible that he simply misunderstood, for example, whether he was pleading to embezzlement as well as grand theft. I conclude from this and from my observation of Complainant's demeanor that Complainant is less than fully credible on the pertinent issues, but not to the extent that his testimony should be rejected wholesale or at all unless there is convincing evidence bringing it into question.

facts when he complained about the exhaust, he had a reasonable belief that the actual conditions related to a violation of safety regulations or standards.[43]

As to the vehicle condition reports, there is no direct evidence that any of them related to violations of safety regulations or standards. Complainant introduced a number of these reports dated from December 2005 to February 4, 2006, the date of the accident. C. Ex. 16. Each report appears to bear his signature. Unfortunately, the copy quality on the admitted exhibit pages is so poor as to make them illegible. The blank report form calls for the employees to list "items found needing repairs," a category far broader than safety concerns related to a violation or a regulation or standard. Schuler knew that Complainant was submitting vehicle condition reports, yet he testified that he was unaware of Complainant's having any safety issues; reconciling this suggests that Schuler did not view any of the vehicle condition reports as safety-related.

Most important is that Complainant does not point to any particular report or group of reports (except the exhaust issue) that he contends is either safety-related or motivated the termination. Instead, he admitted that he had no safety-related complaints about the trucks during the entire time he was working as a driver. All of the vehicle safety reports on the record fall within that time interval. I must therefore conclude that none of the admitted reports were safety-related. It also means that, excepting two weeks at the end of October and beginning of November 2005 when Complainant had returned to his work as a pitcher and not yet started as a driver, any safety-related vehicle condition reports would have to have been from before August 8, 2005, when he first was terminated. There is nothing specific on the record about any safety-related vehicle condition reports at that earlier time.[44]

Except the exhaust complaint, Complainant thus has shown no more than generalized complaints that a number of vehicles needed maintenance, none specifically addressed to safety. This is insufficient to bring these complaints within the STAA's protections. It negates any claim grounded on the vehicle condition reports. Nonetheless and in the alternative I will continue to address the vehicle complaint reports below and conclude that, even were they protected, Complainant's claim still fails.

Adverse employment action. Complainant has established that Respondent terminated the employment. That constitutes an adverse action under the STAA. Complainant does not contend that there were any other adverse actions.

Causal link. Complainant failed to show by a preponderance of the evidence a causal link between his complaints and the termination. First, he failed to prove that the decision-makers had knowledge of the complaints. Second, the distance in time, together with intervening events, negate a causal link.

As to knowledge, the question is the knowledge of the decision-makers: Knoblock, Hefner, and Vasquez. Coyle had an opportunity to reverse the decision at Step 3 of the grievance procedure; he must therefore be seen as ratifying the decision, which also places him as a decision-maker.

[43] The fact that, unbeknownst to Complainant, Nevada OSHA had found to the contrary is insufficient to show that no reasonable layperson could think there was a violation.
[44] Also, anything on the record will have to date from at least six months before the termination.

There is no evidence that any of the decision-makers had any knowledge of any vehicle condition report that would be protected under the STAA. It would be reasonable to infer that Knoblock and Hefner, if not all four, were generally aware that employees filled out these forms; that some maintenance problems implicate safety regulations or standards; and that as a pitcher and then a driver Complainant likely did fill out some of the forms: it was one of his job duties. But there is no proof of anything more. This can support no more than a finding that the decision-makers, had they thought about the vehicle condition reports, might have had a generalized impression that at least on some occasions Complainant likely would have made a safety-related complaint, just as would all of the employees with similar jobs. At most, this would amount to knowledge of complaint(s) too generalized to be protected.

Turning to the exhaust issue, Complainant filed the OSHA complaint anonymously. This implies a concern about possible retaliation. Consistent with this, his complaint to the corporate offices at about the same time was also anonymous, and in it, Complainant expressly stated that he feared identifying himself because he thought it would lead to termination.

Complainant testified that he told the Operations Manager and some foremen that he had complained to OSHA. I give this little weight: Soon after Complainant's making the OSHA complaint, the grievance arbitrator returned him to his job. It is difficult to reconcile that when Complainant had been fired and was without a job (although with his grievance pending), he would insist on anonymity out of fear of termination, and yet when he had his job back, he would risk termination to identify himself to foremen as the person who complained to OSHA. At the least, it would seem that Complainant would make such a disclosure only to a foreman whom he believed he knew well enough that he could trust not to pass the information upward.

Even assuming, however, that Complainant told managerial employees that he had complained to OSHA, there is no evidence that anyone told any decision-maker of this. Given that the decision-makers each denied knowledge of Complainant being the person to have filed the complaint,[45] this is not enough circumstantial evidence to prove, by a preponderance, that any decision-maker knew that Complainant made the OSHA complaint or knew that he had complained about the exhaust at all.

Moreover, the timing on the OSHA complaint strongly tends to negate causation. Complainant filed the OSHA complaint in August 2005. The termination was not until February 2006. That six-month interval, standing alone, brings causation into question. Here, however, there is more: Knoblock gave Complainant an opportunity for better work in November 2005, after Complainant had asked for the driver training and job. Providing an employment opportunity for preferred work is diametrically the opposite of retaliating.[46] The same analysis applies to the

[45] Three of the four denied knowing that any OSHA complaint had been filed, not to mention who was the filer.
[46] There is another factor: I credit Knoblock's testimony that a complaint about the exhaust configuration would be of little concern to him because Nevada OSHA already had inspected and found no violation, and because he knew the Company had been reconfiguring the trucks since 2004. There is no evidence to rebut this, and in fact OSHA did not pursue the matter.

vehicle condition reports: as discussed above, it is very unlikely that any of these was safety-related after August 8, 2005, making these reports equally remote in time.

The absence of a causal link requires that the claim be denied. Nonetheless, I will continue the analysis to offer an alternative rationale.

II. Respondent Met Its Burden to Produce Evidence of a Legitimate Cause for Termination.

Respondent offered extensive evidence that it terminated the employment as a result of the accident. This included involving several people in investigating the accident, forming an accident review committee to evaluate, supplying Complainant with a written statement of the reasons for the termination, and stating in the grievance process that the impetus for the termination was the accident. Respondent's executive manager Coyle ratified the termination, stating the same reasons in the grievance procedure. Respondent has also shown an immediate juxtaposition in time between the accident and the termination. Together, this satisfies Respondent's burden of production to articulate a legitimate, non-retaliatory reason for the termination.[47]

III. Complainant Failed to Carry His Burden on Pretext.

Complainant has failed to show by a preponderance of the evidence that the Company's articulated reason for the termination (the accident) is a pretext for retaliation.

Others similarly situated. Complainant did not show that similarly situated employees who had not engaged in protected activity were treated better. The witnesses whom Complainant called who would have knowledge of the Company's discipline of employees who have accidents included one foreman and three business agents (Schuler, Lewis, Hardison, and Hicks). These witnesses established that the Company's practice has been to terminate the employment in anywhere between five and twenty-five percent of accident cases. I place somewhat greater weight on the twenty-five percent than the lower amounts, given the source of the respective

[47] The termination letter, R. Ex. 13, cites two provisions of the collective bargaining agreement, the violations of which are said to justify the termination. The letter states that Complainant "failed to operate [his] company assigned truck #6082, in a safe manner by not lowering the boom, creating a dangerous situation on a public roadway that resulted in extensive damage to company equipment." This plainly refers to the vehicular accident on February 4, 2006, and is consistent with all of the other evidence by which Respondent is showing what its reason for the termination was.

Complainant takes issue, however, with the applicability of the specific provisions that Respondent cites from the collective bargaining agreement. These provisions relate to (1) a refusal or intentional failure to comply with safety and driving laws and rules, and (2) "unauthorized possession, use, or intentional misuse of company . . . vehicles . . . resulting in property damage or personal injury, which requires treatment at a medical facility." Complainant argues that his conduct was not intentional, nor did it involve unauthorized use of a company vehicle.

Complainant's argument is misdirected. This is neither a grievance proceeding nor a direct action under the collective bargaining agreement per Labor Management Relations Act, §301. I cannot evaluate the meaning that the parties attach to the contract language; that depends on the history of bargaining, past practice, and other factors extraneous to the written agreement. (The Union, on advice of counsel, concluded that the termination did not breach the collective bargaining agreement.) I simply find that all of the evidence points to the accident as the stated reason for the termination, and the termination letter is not to the contrary.

figures.[48] It appears that over the last few years there have been perhaps hundreds of accident-related terminations. Whatever the precise figures, Complainant has established only that Respondent does indeed routinely impose termination as discipline in some – but not all – accident cases.

Despite the many terminations, Complainant was unable to offer evidence of employees with similar or worse accidents who were not terminated from employment. Hardison had nearly four years as a Union business agent. Asked for cases in which the Company terminated and a grievance arbitrator reinstated, Hardison could recall three examples. None involved personal injury; all involved property damage from about $50,000 to $100,000. *Id.* Assuming Knoblock's estimate that Complainant's accident caused property damage of $70,000 that would place his accident squarely into a group accidents that also led to terminations.

Complainant pointed to fatality accidents, asserting that they were more serious; while such accidents surely are more serious, Complainant neglects that in the two fatality accidents cited, the drivers were not at fault and could have done nothing to avert the accidents or reduce their severity. When a drunk driver turns directly in front of an oncoming truck, or when a driver fails to slow a rapidly oncoming car and drives directly into the rear of a truck (and underneath it), the result is not something the truck driver could have prevented.

Lewis had five years as a business agent, was involved in hundreds of accident cases, and said this was the worst of them. Lewis exaggerated: there have been fatality accidents at the Company. Still, I credit Lewis' opinion to the extent that it grouped Complainant's accident in with the more severe property damage cases: this was not one of the many fender benders inside the Cheyenne truck yard. Hicks himself had lost his employment because of an accident, and he could not recall any examples of less severe accidents than Complainant's not leading to termination. Schuler gave no specific examples.

Respondent's safeguards to assure a fair process. The collective bargaining agreement together with Respondent's policies and practices regarding discipline in accident cases established safeguards in the disciplinary process. The Company's practice of carrying out an investigation into the facts and then forming a committee to review the facts and recommend discipline assured a considerable degree of fairness and objectivity. This is because it involved managers of different experience, skill, training, and responsibility. The decision was not that of a single person, who might have any number of biases or prejudices. By including the Director of Human Resources, there should be information about how and on what criteria the Company has disciplined employees in other accidents; it also should include a person professionally trained and experienced to be sensitive to discrimination. By adding the Director of Safety, there should be information about whether the employee followed his safety training, how dangerous the accident was in terms of risk of further injury or damage, and whether the accident could have been prevented had the employee been performing safely. The grievance procedure opened an

[48] As I discuss in the text below, Hicks has an axe to grind with the Company, which had terminated his employment in 2006. Hicks is the source of the estimate that 5% to 10% of the accidents have led to termination. I place greater weight on Schuler, who estimated 25%. Although Schuler is a Company manager, it was Complainant who called him to the stand, seeking supportive (not hostile) testimony. There is no indication that Schuler is biased.

avenue of review by an executive-level manager, who should be removed enough from the day-to-day operations to provide additional objectivity.

Respondent's criteria for discipline. The Company also had established non-retaliatory criteria for determining discipline in such settings. All of the management witnesses stated the same list: severity of the accident, preventability, and longevity of employment. Another factor mentioned was driving history.

Application of the process. In the present case, there was an appropriate investigation. At least three mechanics examined the truck and reported after it was returned to the yard. A supervisory mechanic with 31 years' experience with garbage trucks examined the truck and advised management. He also explained to management the particulars of the boom and whether it could rise on its own. The General Manager, who has mechanical expertise, and the Safety Manager personally inspected the truck. All of the findings were the same: the truck was totaled; the valves and valve control handles were in full operating order; the PTO was left in the "off" position; the boom could not rise on its own and could not be raised with the PTO in the "off" position; and thus that Complainant must have left the boom in a raised position and driven off after the last drop-off.

Having completed the investigation, the committee looked to the established criteria for decision. First, the accident was severe. Complainant had to go to a medical center, where he was returned to work with restrictions on any use of his left arm and on lifting. The truck had been totaled at a loss of approximately $70,000. The frame was affected. According to the police, the boom scraped along the underpass for some 60 feet before the truck came to a halt. Although no structural damage had been done to the Interstate overpass, there had been a real risk of that happening. The boom was knocked off and could have hit anything behind the truck.

Second, Complainant was a relatively short-term employee, having worked for Republic for less than two years.

Third, the committee determined that the accident could have been averted had Complainant not been grossly negligent. As Knoblock explained, with the PTO off and with the impossibility of the boom rising on its own, Complainant must have left the boom up when he left his last drop-off. An application of the criteria thus supported the decision to terminate.

Finally, the decision-making process was not concluded until Coyle denied Complainant's grievance at Step 3. Complainant's admission at that point that he could not recall whether he had raised the boom gave Coyle an additional *bona fide* reason to ratify the termination.

Complainant's challenges to the process. Complainant introduced evidence and argued that the Company's investigation and decision-making were lacking:

- He undertook his own investigation. There were traffic signals at the intersection at which Complainant turned just before approaching the underpass. He measured their height. He got a height for the underpass. Comparing the figures, he argued that, if the boom was high enough to strike the overpass, it was also high enough to hit the traffic

signals if the truck's path through the intersection happened to coincide with the places where the signals were hanging. There was no evidence of that happening. The suggestion is that the boom might have been going higher on its own as Complainant drove, suggesting an equipment malfunction.

- Because the cylinders had to be severed to remove the truck from the public street, Complainant argued that this impeded an appropriate investigation: there could have been a malfunction in the cylinders, and that could not be determined once the cylinders were severed.

- Complainant elicited admissions from the Company's in-house expert mechanic that the mechanic did not take apart each portion of the apparatus down to each valve, nut, and bolt, but instead simply checked to see if, for example, the valve mechanism was functioning correctly. The implication was that this was too superficial.

- Complainant offered his hearsay report of what the manufacturer told him about how the boom could go up on its own. Although the evidence was inadmissible, the fact of Complainant's call suggests that the Company should have made its own inquiries from the manufacturer.

To some extent, this evidence is misdirected. The question is whether the articulated reason for the termination was pretextual, not whether the Company can prove that Complainant was "at fault" as in a personal injury case. As the Sixth Circuit explained, the relevant inquiry is not whether the employer's factual basis for the termination ultimately proves true; it is whether the employer's perception justifies the firing. *Moon, supra,* 836 F.2d at 230.

Thus, to be relevant, Complainant's challenges would have to be sufficient – not simply to raise a question about whether Complainant ultimately was at fault – but to bring into question the *bona fides* of the investigation and decision to terminate and to raise an inference that the decision was pretextual. Complainant's challenges here do not come close to that standard.

First, Complainant did not raise these arguments at any time when they could have affected the Company's decision whether to terminate; they all came later, as part of the litigation. It is not as though Complainant asked the Company to include something in the investigation, and the Company failed to do so. It is not as though the Company was aware of these facts and ignored them. That means that they weigh in the balance only to the extent that one can infer that any reasonable employer seeking a fair result in good faith would have taken the steps that Complainant has listed.

Second, the Accident Review Committee had every reason to trust the opinions and advice that they were receiving from Tucker and that Knoblock and Hefner confirmed with their own inspection. Tucker was a very experienced mechanic, thoroughly familiar with the hydraulic system on the truck. He was in touch with the mechanics who had first inspected the truck. With Tucker's opinion that the boom could not rise on its own, the Committee had no reason to confirm with the manufacturer. Having tested the valve system by pulling the control handles and finding them operational, there was no need to take the system apart, down to its smallest

individual components: the valve system was working as a whole, and that is what mattered. The cylinders were working minutes before the accident, when Complainant raised the boom at the last drop-off site. Even now, Complainant has given no evidence as to how a failure in the cylinders would result in the boom's rising on its own. Regardless, it is undisputed that the truck could not be removed from the accident site without severing the cylinders, and I find it entirely reasonable that the Company severed the cylinders promptly, rather than leave the truck in the middle of the road, blocking traffic and requiring police presence. That no one at the Company thought of measuring the height of the traffic signals does not render the investigation a sham; it is not an obvious step, and in any event, Complainant admitted that he could have made the turn with the boom up and not hit one of the signals.

Third, I have rejected factually Complainant's assertion that the truck was about to be salvaged anyway. I have credited Knoblock's testimony over Complainant's on this point. Knoblock said that he told Complainant that, *given the accident*, the truck was about to be salvaged. At the least, I conclude that this is what Knoblock thought and meant, regardless of what Complainant might have heard. Given that the Company generally operates these trucks for ten to fourteen years and does not write them off the books for ten to twelve years, Tr. 539, given that the truck was only seven years old, and given that witness after witness testified that he was unaware of any previous damage to this truck, it is difficult to imagine that Knoblock thought anything other than that the Company was required to salvage the truck only as a result of the accident. Thus, even if Knoblock was mistaken (and there is no evidence that he was), his consideration of this factor was not pretextual.

Fourth, I have also rejected Complainant's assertion that the boom could have gone up by itself, but more to the point is that Knoblock reasonably believed, based on what Tucker told him, that this could not happen. That is inconsistent with pretext.

Finally, Complainant argues that he was not at fault because the truck was not properly equipped with safety devices that would have alerted him that the boom was still raised. The record shows that the truck was built in 1999 and lacked some of the safety features that newer model trucks had. Tr. 541. There is nothing on the record, however, to suggest that the Company excuses employee negligence because newer safety devices would have alerted the employee so that he could correct his failure before it caused injury or damage.

To the contrary, the testimony is that when the Company bought new trucks, it bought them with the new safety devices, but it continued to use the old trucks through their ordinary service lives without retrofitting them. It follows from this incremental approach that the Company expects its drivers to operate the vehicles safely as equipped for their normal twelve to fourteen years of service.[49] Perhaps a safety device would have alerted Complainant of his failure to lower the boom, but that is not the question. The question is whether the Company honestly held

[49] Obviously, if the manufacturer or employer discovered a safety risk so hazardous and difficult for a driver to avoid that the trucks could not be driven safely without the condition being corrected, the Company's obligation to update would be compelling. Complainant here offered nothing to show that the risk of driving without a warning signal in the cab was of that level of concern. There was no evidence that any accident of this nature happened before or since with any of the Company's older trucks.

Complainant responsible for not lowering the boom, or rather that it would have excused the failure had he not made safety-related complaints. There is nothing to support the latter.

Parallel independent investigations. Respondent's *bona fides* are further supported by the independent findings of the local union and the police officer on site at the accident. Both found that Complainant was driving with the boom raised and that this was negligent. This is because similar findings in two parallel, independent investigations imply that reasonable investigators and evaluators could reach honestly and in good faith the conclusions that the Company reached.[50]

Hostile animus. Perhaps his most oblique argument, Complainant asserts that Respondent's attitude toward him, starting with his being a "golden boy," deteriorated over time. To be relevant, this would have to be linked to a safety-related complaint. Essentially, Complainant's argument must be that because he was making safety related complaints over time, the Company became increasingly hostile until it was looking for an excuse to terminate his employment, found one in the accident, and took advantage of it.

The evidence, however, is entirely to the contrary. The confrontation and suspension concerning the spill at the fuel pumps was a one-day incident. It is undisputed that Knoblock put both Complainant and his co-worker back to work with back pay for the missed day and apologized. It is undisputed that Knoblock never mentioned the incident again. The termination for driving without a commercial license arose out of a inspection for which the Safety Department selected Complainant at random. There is no question that discipline was appropriate: although the arbitrator reinstated the workers, he imposed what amounts to nearly a three-month suspension without pay and a warning that any repetition would justify termination; the only reason for reinstatement was that the arbitrator found termination too harsh under the progressive discipline policy.

There is no link either between the two disciplinary events. Knoblock had nothing to do with the decision to do a safety inspection, and the safety department had nothing to do with the suspension concerning the spill at the fuel pumps. That Complainant encountered two unrelated disciplinary events during more than a year of employment does not change his treatment from "golden boy" to the object of hostility.

More to the point is how Knoblock treated Complainant after he returned following the arbitration. Knoblock transferred Complainant into a driver job as Complainant had requested, and he provided training that got Complainant needed certifications. Complainant concedes that during the entire time he was working as a driver, Knoblock never said or did anything that made

[50] The Company did not know (and thus could not have considered) the union's conclusions by the time of the decision to terminate and Coyle's ratification of that decision. Thus, the relevance of union's conclusions is not as another factor that the Company considered in deciding to terminate, but rather as an indication that reasonable people reviewing the available facts could have decided to terminate. It argues against pretext.

The police officer's decision to cite Complainant is relevant for similar reasons. The citation was dismissed and does not establish in some ultimate sense that Complainant failed to lower the boom. What the officer's decision implies is that a reasonable, trained investigator could conclude that Complainant left the boom up and was driving the truck negligently.

Complainant think Knoblock was irritated with him. This is inconsistent with a hostile manager laying in wait month-after-month for an excuse to terminate, not to mention doing this in retaliation for some unidentified safety complaint. Nothing about this suggests that the termination was pretextual.

Conclusion on pretext. I conclude that the Company's decision to terminate the employment was not a pretext for retaliation. Accordingly, the claim must be denied. This is all the more the required when considering, based on all of the evidence, whether Complainant proved by a preponderance of the evidence, that the reason for his discharge was his protected activity. *See* fn. 38, *supra.* This requires inclusion of such factors and the distance in time between the complaints and the termination and the decision-makers' lack of knowledge that Complainant was the person who had complained.

IV. Complainant's Counsel's Allegations of Attorney Misconduct.

From the beginning and throughout the two-day trial Complainant's counsel, Ms. Ells, repeatedly accused Respondent's counsel and managers of misconduct, including attempted witness tampering and subornation of perjury. These allegations are without foundation. I find nothing unethical or in any way improper about the conduct of Respondent's counsel or managers concerning the preparation for and conduct of the trial.

Before reaching allegations of witness tampering and the like, Ms. Ells began by complaining that she was having some difficulty getting witnesses to testify because "some of our witnesses have been called in to Republic Services' office by Mr. Knoblock putting a little pressure on them regarding testifying here today." Tr. 16. She referred specifically to pressure on Jose Amador. Tr. 17. Complainant had a different take on Amador. He said that Amador was going through a divorce, was emotionally upset, for that reason had not worked on the day before trial when the process server was trying to serve him, had been moved out of his house, and was therefore difficult to reach. Complainant had called him and left a message, asking him to come to the hearing. Tr. 23-24.

Despite her client's explaining why Amador was difficult to reach, counsel persisted in alleging that Republic had pressured him not to testify. Tr. 24. As evidence, she offered Complainant's report to her that "since the subpoenas have been served, they were called in again to the office [at Republic] and told, you know, not to come testify at this hearing, that they're employees of Republic Services, and that they need to be careful what they say." Tr. 24-25. Of course, Complainant had said nothing of the kind when he addressed the same subject seconds before. I asked counsel to submit a declaration from Complainant. Tr. 25. She never did.

Counsel also had some more general accusations about obtaining witness testimony. She accused Republic of "not allowing us to serve [its employees] to testify here at the hearing." *Id.* She reported that when her process server went to Republic, there were "some misrepresentations made . . . regarding whether or not people are actually at the office." *Id.* She asserted, "we're having some difficulty getting some of our witnesses . . . probably due to the fact that it is a whistleblower matter." *Id.* She complained that Republic told the process server that one of the employees (Andrews) would be out-of-town on both days of trial, adding: "We have nothing

to corroborate whether or not he's actually out of town or if they're just preventing him from – you know, giving him time off work or just asking him not to come in so that he can't be served." Tr. 19-20.

Complainant never offered any evidence to support any of these allegations.[51] Moreover, an accusation that, by its terms, is based on "nothing to corroborate" what happened is improper. Complainant's counsel should investigate sufficiently to have a good faith basis to advance allegations before making them. *Cf.* Rule 11, F.R.Civ.P.[52] An employer has no obligation to make available its non-managerial employees to be served with process (although it is helpful when employers cooperate and ask their non-managerial employees to accommodate a complainant by testifying).[53]

Complainant's counsel raised additional allegations. She asserted that opposing counsel Prior had told Jerome Lewis that he had to change his testimony, Tr. 287; that Human Resources Director Vasquez was going out into the hall and telling the Company's witnesses what the testimony was as it came in, Tr. 290; that mechanic Don Branson had been talking about changing his testimony from what he had told Complainant "because Republic Services had talked to him"; Tr. 291-92; and that a witness whom Complainant was trying to serve with a subpoena had extended his vacation by a day because Respondent asked him to stay away, Tr. 293.

The subsequent testimony did not support these allegations:

- Knoblock denied urging Andrews to be unavailable for the duration of the trial. Tr. 480. There was no evidence to the contrary.

- Lewis testified that Company counsel Prior had never asked him to change his testimony or lie, nor had anyone at Republic. Tr. 306-07. He had only met one of the Company's attorneys on the first day of trial; they shook hands; they did not discuss the case. *Id.;* Tr. 343. Having left his job as a business agent, Lewis stated that he had had essentially no contact with anyone at the Company in about a month. Tr. 307. Cardwell had called him

[51] As it worked out, Republic agreed at my request to make available even non-managerial employees if possible, and in the end, all of the witnesses whom Complainant wished to call were able to appear.

Some improper conduct did emerge in this opening colloquy; however, it was Ms. Ells' conduct, not Respondent's counsel. Ms. Ells admitted that after I signed, issued, and returned to her for service several trial subpoenas at her request, she altered them by changing the return dates. Had Ms. Ells called this Office, I would have allowed her to change the dates. But she chose to alter the documents that I had signed without asking me. I advised counsel that it was unacceptable for attorneys to alter court documents after the judge had signed them. Tr. 14.

[52] Although this Office has no enforcement authority under Rule 11, F.R.Civ.P, and that Rule would be inapplicable because counsel did not sign any pleadings, the general requirement of an appropriate pre-filing investigation is instructive.

[53] An employer must produce any managerial employee to testify on the simple request of the opposing party. As to non-managerial employees, however, it is arguably inappropriate for an employer to direct such an employee to leave her work station and go (for no work-related reason) to a location where she can be served. This could cause considerable friction, for example, when an employee is involved in a child support dispute.

from time to time (such as to play golf), but they never had discussed the case. Tr. 307-08.

- Cardwell testified that he was present when counsel Prior spoke to Lewis, that there was nothing about asking Lewis to lie, and that all Mr. Prior asked was how Lewis was doing. Tr. 509-10. As to himself, Cardwell said that neither of the two Company counsel asked him to lie and that he would not have lied even if asked. *Id.*

- On questioning from Complainant's counsel, Schuler denied that anyone at Respondent had talked with him about the possibility that he would be testifying or had talked with him about his being subpoenaed to testify at trial. Tr. 253. When asked if he had talked to anyone about the case since the day Complainant was terminated, Schuler answered that his only conversation had been with one of the Company's attorneys.

- Hardison reported that when Knoblock arrived at the courthouse and saw the union's business agents, he "gave them hugs," saying, "Good to see you." Tr. 418. He also said of Coyle's arrival: "I don't recall if he gave them a hug, but he embraced[54] them and said that it was good to see you. And he asked him about how he was doing, and Jerome said that there was no more stress since he resigned as a business agent." Tr. 418-19.

- Hicks offered the only testimony that supported any of the allegations, and even he offered support only for the allegation concerning Prior's influencing Lewis. Hicks testified that he heard Company counsel Prior talk to Lewis during a break, saying, "I need you to change your testimony." Tr. 363. Beyond that, Hicks could offer only that Lewis and Cardwell then joined Mr. Prior to talk. Hicks said he knew this because he walked into the area where they were talking and saw the end of the conversation; he could not hear them. *Id.* Hicks testified that he saw Vasquez talk to Cardwell, Lewis, and Branson in the hall, but he was unable to hear them. Tr. 368-69.

- As to his observations of Don Branson, Hicks said that he overheard Branson "pretty much" talking with everyone, saying, "'I'm just going to tell it like it is . . . There's no way that's going to happen, the way that boom went up'"; and talking into a telephone, saying, "'If it was me, I'd have fired him myself,'" and "'There's no way this guy should be back to work. I don't know what we're here for. It doesn't make any sense.'" Tr. 365. At no point did Hicks suggest hearing Branson say anything about changing his testimony because Republic had talked to him.

- About the threats from a business agent, Hicks accused Cardwell of making threats. Tr. 366. The specifics of the exchange between them, however, had nothing to do with the present litigation; it was about the mutual hostility between them about how the union handled the arbitration of Hicks own termination from employment in 2006. Tr. 366-67.[55] Hicks admitted on cross-examination that at his termination arbitration it was the

[54] Hardison's use of the word "embrace" is vague. He seems to imply that an embrace is somehow less intimate than a hug, but it is unclear just what he meant.

[55] Essentially, Cardwell was saying that the only reason the union took Hicks' case to arbitration was that he has 12 children. Hicks was saying that Cardwell and the union "laid down on [his] case." Tr. 366-67. The threat to which

same attorney Prior who had represented Republic as was now representing Republic in the present case, and whom Hicks was accusing of trying to influence Lewis. Tr. 371. The arbitrator on the Hicks matter had sustained the termination. Tr. 372.

Reviewing this testimony, I begin with the observation that there is nothing unethical about an attorney interviewing a non-party witness, and there is nothing improper about Company counsel's interviewing a Company manager.[56] Statements by a non-managerial witness that he was going to "tell it like it is" and that he would have fired Complainant himself in no way indicate anything improper about the conduct of the Company or its attorneys. There was no evidence that Vasquez was talking to any prospective witnesses about how the testimony had been coming in, and in any event, neither party had asked that the witnesses be sequestered until they testified, and I had not invoked the rule.

I do not infer anything inappropriate from the fact that when a union business agent who worked with the Company and its employees for five years leaves for other work, Company managers who run into him a month later would greet him warmly and ask how he is doing. I reject Hicks' testimony that Mr. Prior asked Lewis to change his testimony: Lewis and Cardwell were parties to the conversation and denied it, while Hicks was listening in from some distance.[57] Moreover, Hicks had an axe to grind with all three of them (Prior, Lewis, and Cardwell) about his termination and grievance arbitration, and he had just been involved in an angry exchange with Cardwell about it.

Finally, I note that Complainant's counsel requested at the end of the trial an opportunity to submit additional evidence to support the allegations of attorney misconduct. I allowed it. Counsel did not submit anything.

Accordingly, I find all of Complainant's counsel's allegations concerning the misconduct of Republic, its representatives, and its counsel unfounded.

CONCLUSION

For the foregoing reasons, I recommend that Complainant's claim be DENIED.

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Administrative Law Judge

Hicks apparently referred was Cardwell's response to Hicks' allegation, "You all don't represent any of us properly, and that's the problem with you all. That's why we're here today." According to Hicks, Cardwell got angry and said, "'You keep on talking and it's going to be something. Just keep on talking. Keep opening your mouth." Hicks stated that his response was: "'You don't know anything about scrambling eggs.'" Tr. 367.

[56] On the contrary, if a non-party witness is likely to know anything of importance, it is arguably of considerable importance that a zealous representative interview (or depose) the witness before trial.

[57] Hardison testified that the union employees sat on one bench, and the business agents sat on a bench on the other side. Tr. 418.

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.