U.S. Department of Labor

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Issue Date: 21 May 2008

Case No. 2006-STA-32

In the Matter of

HARRY SMITH,

Complainant,

v.

LAKE CITY ENTERPRISES, INC.,
CRYSTLE MORGAN,
DONALD MORGAN,

Respondents.

APPEARANCES:

Richard R. Renner, Esq.
Dover, Ohio
For the Complainant

Brent L. English, Esq.
Cleveland, Ohio
For the Respondents

BEFORE: LARRY S. MERCK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim under the Surface Transportation Assistance Act ("STAA" or "the Act"), 49 U.S.C. § 31105[1] and the implementing regulations found at 29 C.F.R. Part

[1] The Act was most recently amended by Section 1536 of the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. No. 110-053, 121 Stat. 266 (Aug. 3, 2007) (the "9/11 Commission Act"). The 9/11 Commission Act broadened the definition of employees covered by the STAA; added to the list of protected activities; adopted the legal burdens of proof found in Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; provided for awards of special damages, and punitive damages not to exceed $250,000.00; and, provided for *de novo* review

1978.[2] Harry Smith ("Complainant") alleges that he "was fired promptly after, and because of, his protected complaint about the condition of the company's trailer and his threat to contact the Department of Transportation ("DOT")." Comp. Br. at 1.[3] Lake City Enterprises ("LCE" or "Lake City"), Crystle Morgan, and Donald Morgan (collectively referred to hereinafter as "Respondents") contend that Complainant was not fired, but instead resigned from his job with LCE. Resp. Br. at 40-49. Alternatively, Respondents argue that had they known about Mr. Smith's work policy violations and the damage that he caused to their trailer in an unreported accident, they would have fired Mr. Smith, notwithstanding any alleged protected activity. Resp. Br. at 40-49.

Mr. Smith filed complaints with the Occupational Safety and Health Administration ("OSHA"), United States Department of Labor ("DOL"), on or about November 15, 2005, alleging he was an employee of Lake City from September, 2005 to November 9, 2005, and "his work for . . . Lake City [] was through an assignment or other arrangement with . . . CRST International, Inc. ("CRST")." ALJX 1, 3. Complainant averred that he was terminated from his employment for "reporting information and objecting to unsafe equipment and driving conditions, refusing to drive unsafe equipment, and reporting to management that he intended to report unsafe equipment to the Department of Transportation." *Id.*

OSHA initiated an investigation against Lake City and CRST, case number 5-8120-06-003 and case number 4-0350-06-008, respectively. By letter dated March 21, 2006, an OSHA Deputy

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by a U.S. District Court if the Secretary of Labor does not issue a final decision on the complaint within 210 days of its filing. Mr. Smith filed his complaint with OSHA on November 15, 2005; therefore, the 2007 Amendments are not applicable in this case.

[2] Unless otherwise noted, all references are to Title 29, Code of Federal Regulations (C.F.R.).

[3] The following abbreviations will be used as citations to the record: "ALJX" for Administrative Law Judge Exhibits which were offered and admitted as ALJX 1-52 Tr. 6; "JX" for Joint Exhibits; "CX" for Complainant's Exhibits; "RX" for Respondents' Exhibits; "Ex" for Exhibits attached to a deposition; "Tr." for the hearing transcript; "Comp. Br." for Complainant's Post-Hearing/Closing Brief; "Resp. Br." for Respondents' Post-Hearing/Closing Brief; "Comp. Reply Br." for Complainant's Post-Hearing Reply Brief; and "Resp. Reply Br." for Respondents' Post-Hearing Reply Brief.

Regional Administrator concluded that it was not reasonable to believe that CRST violated 49 U.S.C. Section 31105; and by letter dated May 12, 2006, an OSHA Deputy Regional Administrator concluded that it was not reasonable to believe that Lake City violated 49 U.S.C. § 31105. ALJX 1-2. On May 24, 2006, Complainant, by counsel, filed his objections and request for a hearing in the cases discussed. ALJX 4. On September 5, 2006, the undersigned issued a Recommended Order of Dismissal of the complaint against Respondent CRST because the Complainant's objections to the Secretary's findings were untimely. ALJX 18.

On January 16, 2007, Respondents moved for a Continuance of Adjudicatory Hearing. On January 19, 2007, an Order of Continuance was issued by the undersigned, setting the hearing to commence on April 16, 2007. ALJX 45. A formal hearing was held in this case on April 16-17, and May 9, 2007, in Canton, Ohio, at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations.[4] At the hearing, both parties offered Joint Exhibit

[4] In *Calmat Co. v. DOL*, the Ninth Circuit Court of Appeals stated:

> STAA administrative hearings are conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings. *See* 29 C.F.R. § 1978.106(a)(citing 29 C.F.R. § 18). Under these rules, which conform to the Federal Rules of Evidence, hearsay statements are inadmissible unless they are defined as non-hearsay or fall within an exception to the hearsay rule. 29 C.F.R. § 18.802. 'Hearsay' is a statement, other than one made by the declarant while testifying at the hearing, offered to prove the truth of the matter asserted by the out-of-court declarant. 29 C.F.R. § 18.801(c).

Calmat Co. v. DOL, 364 F.3d. 1117, 1123 (9th Cir. 2004)(case below ARB No. 99-114, ALJ No. 1999-STA-15).

> During the hearing, the ALJ believed that formal rules of evidence do not apply to STAA hearings because they do not apply in administrative hearings for whistleblower complaints under other statutes. However, her decision states that she was 'mindful to screen out objected to evidence admitted based on this error.' Slip op. at 5117. The Respondent contended that the ALJ improperly admitted and relied upon hearsay evidence. The court, however, found that much of the objected to testimony was not hearsay (mostly on the ground that the statements were not admitted to establish the truth of the matter asserted, but rather that the statements had been made), and that any hearsay admitted in error had not been prejudicial. The court also observed that prejudice from hearsay is less likely when an ALJ rather than a jury weighs evidence, that the ALJ had expressly stated that she had not relied on hearsay evidence omitted over the Respondent's objections, and that there was other corroborating evidence

1, which was admitted into evidence. Tr. at 218. Complainant's Exhibits 1 through 36 and Respondents' Exhibits A through FF were also admitted into evidence at the hearing. Tr. at 738. As discussed above, Complainant continued to object to RX LL-OO, and the parties were directed to discuss their positions on the objections in their post-hearing briefs. *Id.* Complainant filed a post-hearing brief on August 1, 2007. Respondents subsequently filed its post-hearing brief on August 6, 2007, and Complainant filed his Objections to Respondents' Post-Hearing Brief on August 10, 2007. Respondents filed a Motion for Leave to File Reply Brief *Instanter*[5], and the reply brief itself, on August 22, 2007, and their Reply to Complainant's Objections to Respondents' Opening Brief on August 23, 2007.[6]

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in the record to support the ALJ's finding of disparate treatment.

Calmat Co. v. DOL, 364 F.3d (9th Cir. 2004)(case below ARB No. 99-114, ALJ No. 1999-STA-15); *Compare Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, 1995-STA-34 (ARB June 11, 1997) (ARB ruling that ALJ had properly admitted hearsay testimony and rendered judgment on the weight it was due).

Similar to the ALJ in *Calmat Co. v. DOL*, I believed that formal rules of evidence did not apply to STAA hearings, because they do not apply in administrative hearings for whistleblower complaints under other statutes. Although I admitted some hearsay evidence over the objection of the parties, I have been careful to screen out evidence that should not have been admitted based on that error.

[5] Having carefully considered Respondents' reasons for their delay in submitting their reply brief, their motion to file their reply brief *instanter* is hereby GRANTED.

[6] On January 8, 2007, Complainant's attorney filed an Objection to Respondents' Witness and Exhibit Lists and Motion to Strike. ALJX 39. Complainant stated that Respondents' untimely addition of witnesses would be prejudicial to Complainant, and that the testimony and exhibits submitted by Respondents was irrelevant to the issues in this case. ALJX 39. On January 18, 2007, Respondents filed a Memorandum in Opposition to Complainant's Objection and Motion to Strike, stating that the witnesses and exhibits were identified in its pre-hearing statement and declaring that Mr. Clausen's proffered testimony is relevant and proper in order to refute Complainant's "bogus" assertions regarding the inadequate DOT-inspection of the trailer. ALJX 43. In addition, Respondents argued that Mr. Clausen's testimony is relevant for the purpose of evaluating Complainant's deposition testimony. ALJX 43.

In *Roadway Express v. U.S. Dept. of Labor, Administrative Review Board*, No. 06-1873 (7th Cir. July 25, 2007), the complainant alleged that he had been fired in retaliation for his support of a co-worker in a grievance hearing in which the co-worker had been accused of falsifying his driving log. The complainant filed a statement in the proceeding asserting that the respondent had asked him to falsify his driving log. The respondent fired the complainant the same day on the stated ground that he had falsified his

employment application regarding his driving record. When the complaint reached the ALJ level, the complainant sought in discovery the identity of all persons who had provided information about his driving record. The respondent refused, claiming that revealing its source would put the informant at risk of retaliation and hurt its business operations. The ALJ rejected this argument and granted a motion to compel, noting that the respondent had not invoked any recognized privilege. The complainant requested entry of default judgment, but the ALJ chose the lesser sanction of precluding the respondent from presenting any evidence that arose from the confidential source. The respondent had no other evidence to support its claim that the discharge was not retaliatory, and therefore the sanction, as a practical matter, was fatal to its defense. The ARB affirmed the ALJ.

On appeal to the Seventh Circuit, the respondent argued that the discovery sanction deprived it of fundamental due process and was disproportionate to the discovery violation. The Seventh Circuit found that the ALJ had the authority to impose reasonable rules to structure the proceeding before him, and that under the facts no due process violation had occurred. In regard to the proportionality of the sanction, the court recognized that it had an enormous impact on the respondent's case, but that the respondent's noncompliance made it impossible for the complainant to present his case, and for the ALJ to resolve the claim on the merits. Thus, the ALJ's leveling of the playing field as best he could through a sanction was not an abuse of discretion.

The court, however, then considered whether the sanction should have extended to prevent presentation of evidence relevant to the issue of reinstatement. The court noted that the STAA frames reinstatement as an absolute requirement, but recognized that there were practical limits to reinstatement as a remedy. The court wrote:

> If, for example, Cefalu were now blind, we would not require Roadway to reinstate him as a truck driver. If Roadway no longer existed, we would not force it to reincorporate for the purposes of reinstating Cefalu. In short, if the premise behind the statutory remedy, that the status quo ante can be restored, fails, then the Board is entitled to adopt a remedy that is the functional equivalent of the one prescribed by the statute.

Roadway Express v. U.S. Dept. of Labor, Administrative Review Board, No. 06-1873 (7th Cir. July 25, 2007), slip op. at 12.

The court found that although the ALJ's sanction was appropriate for the merits' stage of the hearing, the respondent should have been permitted to present evidence on whether it was impossible to reinstate the complainant because of his driving record.

In the present case, the witnesses at issue testified at the hearing, and the exhibits were marked for identification but were not admitted in the record. Having considered Complainant's arguments and motion to strike and Respondents' explanation for not producing the exhibits and details about the witnesses during discovery, I find that Complainant's arguments have merit. However, I find the testimony and documentary evidence presented by Complainant and Complainant's witnesses to be more consistent and credible

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

I. STIPULATIONS

The parties have stipulated and I find that:

1) Complainant filed his complaint in this matter within the required time limit;

2) Complainant filed his objections to the OSHA determination and his request for a hearing in this matter within the required time limit;

3) LCE is an employer as defined by the Act;

4) LCE employed Complainant to drive a commercial vehicle that has a gross weight of over 10,000 pounds, from on or about September 4, 2005, until November 9, 2005;

5) Respondents issued a tractor and a 1997 Transcraft trailer, VIN 1TTF48204V1053526, to Complainant during his employment with LCE;

6) On February 20, 2006, LCE traded in the 1997 Transcraft trailer, which it had previously issued to Complainant, for a trade-in value of $2,000.00;

7) On February 20, 2006, Trailer One, Inc., sold a 2002 Reitnouer trailer to LCE for $24,900.00; and,

8) Complainant's exhibits 1-21 are authentic.

JX 1.

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when evaluated in light of the other evidence of record. Accordingly, Complainant's objection to Respondents' evidence is noted, but his motion to strike is **DENIED.**

II. ISSUES

The following unresolved issues were presented by the parties:

1) Whether Complainant engaged in activity protected by the Act?

2) Whether Respondents had knowledge of any alleged protected activity?

3) Whether the alleged adverse employment action taken by Respondents against Complainant was causally related to any putative protected activity in which Complainant engaged?

4) Whether Respondents Crystle Morgan and Donald Morgan are properly named parties in this case?

5) What are the appropriate remedies, pursuant to subsection (b)(3) of the Act, for any violations which are found to have occurred?

ALJX 35, 44.

III. STATEMENT OF THE CASE

Summary of the Evidence

Testimonial Evidence and Credibility:

The undersigned has carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence analyzing and assessing its cumulative impact on the record. *See e.g., Frady v. Tennessee Valley Auth.*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995)(*citing Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3rd Cir. 1979)); *Indiana Metal Prod. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971).

Credibility is that quality in a witness which renders his or her evidence worthy of belief. For evidence to be worthy of credit:

> [it] must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal Prod., 442 F.2d at 51.

An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 15 n.5 (3rd Cir. 1975).

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

The transcript of the hearing in this case is comprised of the testimony of eleven witnesses: Michelle Smith, Jacob McNutt, Brad Thomas, Harry Smith, David Pund, Lawrence Cassell, Al Clausen, Robert Liuzzo, Kenneth Morrison, Crystle Morgan, and Donald Morgan. Tr. at 61-737. In addition, the depositions of Harry Smith, Jacob McNutt, Robert Liuzzo, Kenneth Morrison, Crystle Morgan, and Donald Morgan, were also admitted into evidence. (TR 738; RX AA-BB; CX 8-11).

Testimony of Michelle Smith

Michelle Smith, Complainant's wife, testified at the hearing. Tr. at 61-141. She has been married to Mr. Smith since May 11, 1993. *Id.* at 63. She works in a factory, sewing flags and has a ninth grade education. *Id.* She testified that they have two children, a son, Nathanial, who is twelve and a half years old, and a daughter, Samantha, who is sixteen. *Id.* Samantha has a serious health condition that requires constant medical care and supervision. *Id.* at 64. Mrs. Smith testified that she met the Complainant when he was nineteen and at the time that they were married, he worked for Phil Pines Trailer Company, assembling trailers and semi-trailers on the factory line. *Id.* Mr. Smith also has a ninth grade education, and

although he has basic reading and writing skills, he has trouble comprehending what he reads. *Id.* After working for Phil Pines Trailer Company, Mr. Smith worked in the construction industry. *Id* at 65.

During a slow period in the construction business, Mr. Smith was unable to get enough work to pay his bills, so the Smiths applied for public assistance. As part of the program, Mr. Smith learned of an opportunity to go to school to become a truck driver. Tr. at 66. On March 13, 2002, shortly after receiving his certification, Mr. Smith began driving for Trans Service Logistics, out of Stockton, Ohio. *Id.* He drove as part of a team with his brother, David Smith, for about four and a half months before he began to drive on his own. Tr. at 66-67. Mr. Smith worked for Trans Service Logistics for about six months altogether. *Id.* at 66. Mr. Smith also worked for Coshocton Trucking for about two to three months before he went to work for Respondents. *Id.* at 67. In addition, Mr. Smith worked as a truck driver for Tab Leasing, Victoria Fisher, and Sutton Motor Lines prior to working for Respondents. In 2005, when his daughter was diagnosed with a tumor, he stopped driving long distances so that he could be at home more to help take care of his children, because Mrs. Smith had to go back to work in order to cover all of the family's bills. *Id.* at 69-70. During that period of time, Mr. Smith was hired by Manpower, a temporary employment agency, to drive for Plymouth Phone. *Id.* at 70. He worked on a temporary basis for about thirty days before he was hired by Plymouth Phone as a permanent employee. *Id.* He worked in that capacity for about ninety days. *Id.* After that, Mr. Smith drove a truck for Priority Trucking, but left after about a month because he was required to be away from home frequently. *Id.* Mr. and Mrs. Smith first became aware of a job opportunity with CRST while searching for truck driving jobs on the Internet. CRST referred Mr. Smith to Lake City. *Id.* at 70-71.

Mr. Smith brought his wife and children with him to the Respondents' place of business on the day that he was hired. Tr. 71. Respondent Donald Morgan was out by the trucks when the Smiths pulled into the parking lot. After taking a look inside the truck that Mr. Smith would be driving, they were escorted to meet Respondent Crystle Morgan in the office, where Mrs. Smith helped her husband fill out his pre-employment paperwork and tax forms. *Id.* at 72.

During their conversation with Mrs. Morgan, Mr. and Mrs. Smith informed her that the reason that he was looking for

another job was because he wanted to be able to spend more time at home, that he wanted to keep a clean driving record, and that he wanted to keep moving in order to drive more miles and make more money. Tr. at 73. Mrs. Morgan responded by saying that she didn't see a problem with any of those issues. *Id.* Mrs. Morgan informed Mr. Smith that she was looking for responsible drivers. *Id.* at 74. She also told Mr. Smith that if he had any problems with the equipment, to notify the company immediately. *Id.* Mrs. Smith testified that Mrs. Morgan did not mention the company's policy about "dropping trailers" during their initial meeting, but she did give Mr. Smith a list of telephone numbers that he could call to reach her, Lake City, or the Dispatcher, Ken Morrison, as needed. *Id.* Mrs. Smith testified that she did not recall Mrs. Morgan telling her husband that he should note maintenance issues in writing; only that he should contact the company if there was a problem with his equipment. *Id.* Mrs. Morgan told Mr. Smith that he would receive a one hundred dollar bonus if he made over four thousand dollars a week. *Id.* at 74-75. Mrs. Morgan also informed him that he would have to attend CRST orientation before he could begin driving for Lake City. *Id.* at 75. Mrs. Smith testified that she did not recall whether Mrs. Morgan told her husband to not allow CRST to inspect the equipment; however, she did recall that she told him that Lake City has its trucks inspected by an independent inspector. *Id.*

During the initial meeting with Mrs. Morgan, Mr. Smith signed his employment application, his tax forms, and an inventory sheet. Tr. at 76. After the paperwork was completed, Mrs. Morgan issued a hard hat, two-way radio, etc., to Mr. Smith, and they went outside to look at the truck that he would be driving. *Id.* Mrs. Smith testified that her husband looked at the truck and inventoried the equipment with Mr. and Mrs. Morgan. *Id.*

Mrs. Smith testified that when she was helping her husband clean his truck during one of his visits home, he pointed out the problem with the supports under the trailer. Tr. at 79. She testified that they "looked like they had been cut out and rewelded back in." *Id.* She testified that after he had shown her the support on the trailer, her husband had a meeting with Respondent Donald Morgan, during which they discussed the problem with the trailer. Tr. at 81. Mr. Smith told her that Mr. Morgan was looking into getting some new trailers. *Id.*

Mrs. Smith recalls receiving a phone call from her husband after the trailer twisted at the Petro Station in Effingham, Illinois. Tr. at 81-82. She was worried for his safety and was

upset because Mr. and Mrs. Morgan failed to do anything about the trailer, even after her husband had informed them about the problem. *Id.* at 82. Mrs. Smith testified that her husband was delivering a steel coil at the time of the accident and that he was dispatched back to Ohio with a return load. *Id.* He planned to deliver that load and then to go back out with another load. *Id.*

On the night that Mr. Smith delivered the return load in Cuyahoga Heights, Ohio, he called his wife to let her know that he was heading back to the yard at Lake City "to switch out trailers." Tr. at 83. After meeting with Mrs. Morgan, Mr. Smith called his wife again and told her that he had "some bad news." *Id.* He told his wife that "[the Respondents] fired him because he did not want to drive unsafe equipment and he was going to report it to the DOT." *Id.* Mrs. Smith testified that her husband was fired from Lake City, and did not resign as the Respondents have alleged.

> If he would have quit he would have brought his stuff to the house and dropped it off. He had all his clothes, his game, his TV, his VCR. All that stuff in there. If he would have quit, I mean, he would have brought that stuff to the house instead of hauling it all the way up to Cleveland to haul it clear back.

Tr. at 84.

Mrs. Smith also testified that her husband "was very upset" when he called her to inform her of the situation, and "[h]e was hurt." Tr. at 84. She also testified that Mr. Smith called her a second time on his way home that day. Tr. at 85. He told her that "[he didn't] feel this [was] right. [He] shouldn't have been let go like this." *Id.* During the conversation, he stated that they "need to get a lawyer." *Id.* She testified that her husband became "distant, upset, hurt ... kind of distraught" after his employment with Lake City ended, and their marriage has suffered from the stress related to their financial problems. *Id.* She also stated that her husband's attitude has not improved since 2005. *Id.*

About a week and a half after his employment ended with Lake City, Mr. Smith went back to work for Coshocton Trucking, where he worked for about a month or less. Tr. at 67, 87. He then went to work for Ameristate Transport out of Fresno, Ohio.

Id. at 87. He is buying his own truck through that company, and continues to work there as a lease/purchase operator. *Id.*

Mrs. Smith testified that her family suffered from financial hardship after her husband lost his job. Tr. at 88. They fell behind on their land contract payments and had to refinance in order to keep their home. *Id.* At the time of the hearing, they were still unable to obtain health insurance. They needed to replace their worn furniture, but could not afford to do so. *Id.* She also testified that they had to return their family minivan because they were unable to pay the payments. *Id.* In addition, the Smiths took loans from check-cashing stores to pay their daughter's medical bills, and still have not been able to repay the loans to date. *Id.* Furthermore, Mrs. Smith was unable to pursue her plans to go back to school because she had to continue working when her husband lost his job with Lake City. *Id.* at 91.

Mrs. Smith testified that she did not recognize the trailer in RX V-1 to V-4 to be the trailer that her husband had been assigned when he drove for Respondents. Tr. at 89-90. She stated that her husband's trailer had straps on the side of it that were not visible in the photographs submitted by Respondents, and it was also much shinier than the trailer that was in the photos. *Id.* at 90.

On cross-examination, Mrs. Smith testified that she had met with her husband's attorney one time to discuss the case and that she had read parts of her husband's deposition transcript. Tr. at 92-93. She also testified that she had read parts of Mr. McNutt's deposition transcript on the day of the hearing while she had been waiting outside that morning. Tr. at 93.

On cross-examination, Mrs. Smith reiterated the history of how her husband had become a commercial truck driver, and his subsequent work history. Tr. at 95-98. She recalled how she and her husband had come across the advertisement for CRST while looking for truck driving jobs online. Tr. at 98. She also recalled that her husband had spoken to Don and Crystle Morgan several times before he was hired by Lake City. Tr. at 98-99. When the Smith family arrived at the yard on Labor Day of 2005, Mr. Morgan was in the yard by the trucks. *Id.* at 100. After introducing himself, he took the family upstairs to meet his wife. *Id.* at 101-102. Mrs. Smith testified that Mrs. Morgan discussed the details of the job with her husband, including parts of the Lake City employee handbook, and gave Mr. Smith a copy of it. *Id.* at 104. Mrs. Smith testified that Mrs. Morgan

gave her husband several different papers to sign while they were upstairs in the office, including tax paperwork, policy papers, and an inventory sheet. *Id.* She recalled that her husband signed the inventory sheet before he went downstairs to go over the equipment with Mr. Morgan. *Id.* at 105. Mrs. Smith also testified that she recalled that her husband received only two tarps with his trailer. *Id.* at 106-107. She testified that she remembered that Mr. Morgan had told her husband that "...there's two tarps. If you would happen to need another one, we can get you one." *Id.* at 107.

Mrs. Smith testified that after Mr. Morgan finished reviewing the inventory with her husband, he was offered and accepted the job and was told that he would need to drive the truck to Rockport, Indiana, where CRST would be conducting its new driver orientation. Tr. at 107-108. Mrs. Smith testified that she did not have any further contact with the Morgans after the day that her husband was hired. (TR 108-109). However, her husband did befriend Jacob McNutt, another driver for Lake City, whom the Smiths later had over to their home. *Id.* at 109.

Mrs. Smith testified that her husband often complained that his trailer was not handling properly. *Id.* "He said that it twisted and shifted when it had a coil on it." Tr. at 109-110. She further recalled that her husband first brought the issue with the trailer to her attention about two or three weeks after he started working for Lake City. *Id.* at 110. She stated that her husband pointed out the problem while she was helping him clean his truck. Tr. at 110.

Mrs. Smith testified that a week or two after her husband first pointed out the problem with the trailer, he told her that he had discussed it with Don Morgan, whom he referred to as "the big boss[.]" Tr. at 113. She testified that her husband said that Mr. Morgan "had said bear with us, we're in the process of getting new trailers. We're looking into it." *Id.* at 114.

Mrs. Smith testified that her daughter had surgery on April 7, 2005, while her husband was working for Sitten Motor Lines, but they had qualified for Medicaid because they were making less money than they were after he had been hired by Lake City. Tr. at 118-120. Mrs. Smith stated that she had glanced over her husband's employee manual and was aware that he would become eligible for health insurance on December 5, 2005, but she was unaware of how much insurance coverage would have cost. *Id.* at 120-122. She testified that her husband "was bringing home almost eleven hundred a week...[a]fter taxes." *Id.* at 122-123.

Mrs. Smith had intended to quit her job to go back to school, but was unable to do so because her husband lost his job. *Id.* at 123. In addition, she testified that Mr. Smith made "only like 500 dollars a week" when he went to work for Coshocton Trucking driving a flatbed truck about one week after he lost his job at Lake City. *Id.* at 124). Mr. Smith quit his job with Coshocton Trucking about a month after taking it, and he then went to work for Ameristate Trucking, where he made "...between seven and eight [hundred dollars a week]." *Id.* She explained that she guessed that her husband had made more money working for Respondents because he was driving more miles. *Id.* at 125. Now that he is working as an owner/operator for Ameristate, he is making less money because he is responsible for paying the expenses associated with operating the truck. *Id.* He chose to be an owner/operator in order to achieve more financial stability. *Id.* at 125-126. Mrs. Smith testified that her husband's mood did not improve when he got another job a week after losing his job with Lake City, because he was making a lot less money. *Id.* at 126. She testified that her husband was very happy working for Lake City. Tr. at 127. She also testified that her husband has always blamed the incident that occurred in Illinois on the trailer, and has never suggested that the incident occurred due to his driving. *Id.*

On cross-examination, Mrs. Smith was asked why she didn't believe that the trailer in the photographs (RX V at 1-4) was her husband's trailer. Tr. at 129-130. She responded that the trailer in the photograph was not silver, like her husband's trailer was, and the trailer in the photos did not have straps on it like her husband's did. *Id.*

Mrs. Smith testified that Mrs. Morgan had told her husband that he would get a hundred dollar bonus if he earned four thousand dollars in a given week, even though the employee handbook stated that drivers would receive a fifty dollar bonus for reaching the four thousand dollar target. Tr. at 130-131.

On re-direct, Mrs. Smith reviewed her husband's paystubs and testified that he had earned more than eleven hundred dollars during weeks that he was employed by Respondents. Tr. at 133-135; CX 33. She also testified that her husband had complained several times about how badly his trailer flexed when he was hauling steel coils. Tr. at 136.

On re-cross, Mrs. Smith testified that she and her husband decided to return their van to the dealership because they could no longer afford to make the payments, but they were able to get

"a little blue car" from a family friend. Tr. at 139. She also stated that they had returned their computer to Rent-way because they could not afford to pay the payments. *Id.* at 140. Additionally, she stated that they refinanced their land contract in order to get caught up on the payments, although they were behind on the payments since before her husband took the job with Lake City. *Id.*

Testimony of Jacob McNutt

Jacob McNutt, Complainant's friend and former co-worker, provided a written statement to the OSHA investigator on December 16, 2005, and he testified by deposition on December 23, 2006, and at the hearing on April 16, 2007. CX 36; RX AA; Tr. at 141-211. Mr. McNutt has been a truck driver for about seven years. Tr. at 142. He drove for Lake City on two occasions. *Id.* He testified that he was first hired in about 2001 or 2002, and again in 2005, and was a driver there at the time that Complainant was hired in September 2005.[7] *Id.* at 143, 166.

Mr. McNutt testified that he pulled the trailer at issue one time in the past, when he hauled a load of machines from Strongsville, Ohio, to Indiana. Tr. at 143. He recalled that "the trailer flexed a lot. A lot more than it should....every curve you made, the trailer just swayed. You could look behind you and the trailer was flexing as in moving side to side a lot more than what it should." Tr. at 143-144. When asked if he had reported the problem with the trailer to anyone, Mr. McNutt responded that he informed Mr. Morgan. Mr. McNutt testified that Mr. Morgan "said he would look into it and investigate it." *Id.*

Mr. McNutt wasn't sure if Mr. Morgan ever looked at the trailer or not. He stated:

> I don't know if he did. But when I got, when I looked when I was moving a lot, I pulled over and checked it out and there was a lot of cross members that was weak, as in rusted. They weren't solid like they should be.

Tr. at 144.

[7] On cross-examination, Mr. McNutt clarified that he was hired in 2003, when Lake City was incorporated. Tr. at 166.

Mr. McNutt reported the condition of the cross members to Mr. Morgan, but Mr. Morgan never followed up to let him know if anything had been done to correct the problem. Tr. at 144.

Mr. McNutt testified that he didn't remember the exact date that Complainant started driving for Lake City, but they "met up about two days later and ... started running together ever since." Tr. at 145.

Mr. McNutt testified that it was his understanding that Don and Crystle Morgan were the owners of Lake City. Tr. at 145. He was aware that they were married and that he should contact Don Morgan if he had any problems with his truck or trailer, because "[h]e was in charge of the equipment." *Id.* Mr. McNutt stated that Don Morgan told him so when he was first hired by Lake City. He had known the Morgans since he worked for Falcon, his first truck driving job. *Id.* Mr. McNutt testified as follows:

> The first time that I was hired, his wife, Crystle was with Alco Transportation. She was a broker, I guess you'd call it. Or an agent for Alco Transportation. And Don took me, asked me if I'd be interested in going with him to drive for him, and I said, yes, I would from Falcon.

Tr. at 146.

Mr. McNutt testified that if his truck made over four thousand dollars a week, he received a one hundred dollar bonus. Tr. at 146-147. He also testified that Lake City wanted its drivers to turn in legal logs, but "as far as we were running low on hours, they wanted us to go ahead and do your job, deliver your load." *Id.* at 147. He stated that in that situation, the drivers would back up their logs to appear legal to inspectors, which meant that they would not be reliable indicators of the drivers' whereabouts. *Id.*

Mr. McNutt recalled a meeting with Mr. Smith and Mr. Morgan in October 2005. Tr. at 147-148. He testified that they met Mr. Morgan after he had gotten a ticket for being overweight at the weighing station on I-71 north of Columbus to help him move his fifth wheel back into position so that he had a more comfortable ride. *Id.* Afterwards, Mr. Morgan took Mr. McNutt and Complainant to "the Duke at the 151 exit", where they "ate breakfast and talked about equipment." Tr. at 148. When asked what Mr. Smith said to Mr. Morgan over breakfast that day, Mr. McNutt testified

that "Harry said that his trailer that he was pulling needed to be replaced. And he said that he would look into it." *Id.*

Mr. McNutt testified that he recalled overhearing a telephone conversation between Complainant and Ken Morrison, Lake City dispatcher.

> I remember hearing a conversation. I was on the passenger side of his truck. Standing up on the step on the fuel tank. And I remember him stating on the Nextel, you need to replace this trailer or you're going to replace the truck and the trailer and the driver. It was going to kill him or injure him. Because the trailer being so weak.

Tr. at 150.

Mr. McNutt testified that he was familiar with the Federal Regulations that require truck drivers to conduct a pre-trip inspection of their vehicles each day.

> [Drivers] are supposed to inspect [their] light, to make sure they're all operational. Your coupling devices, which is your air lines, your pigtail, your fifth wheel to make sure it's correct, make sure it's connected. You check out to make sure there's nothing unsafe about the vehicle you're driving so you can be seen to make sure your brakes are working correctly.

Tr. at 151.

He also testified that the Federal Regulations do not require drivers to make any inspection of the structural security of the equipment on a daily inspection, stating that "[t]here's nowhere on the logbooks for it." Tr. at 151-152. During direct examination, Complainant's counsel went over CX 34, which is a daily vehicle inspection report form, and Mr. McNutt confirmed that the form does not require the driver to inspect and report problems with the cross members of the trailer on the daily inspection report form. *Id.* at 153.

Mr. McNutt testified that after Complainant was let go, Respondents called him into the office and he went out to lunch with Crystle Morgan and Ken Morrison, where he was informed that Complainant had been let go "because he was complaining about his equipment. He was stating that his equipment needed to be

replaced." Tr. at 153-154. Mr. McNutt also testified that Complainant had told him that he ultimately hoped to become an owner/operator through CRST, and that Crystle Morgan "doesn't like it" when CRST talks directly to her drivers about working with them. *Id.* at 155.

> Milton got in trouble, the guy we were talking to, the guy that was going to give Harry and I our trucks. She made phone call and Milton got three days off because she talked to him.

Tr. at 155.

Mr. McNutt testified that he had a couple of issues with tires after Complainant was let go, and he reported the problems to Mr. Morgan, who told him that he would investigate. Tr. at 155-156. He testified that he "was in fear...[and he] was hoping he wouldn't lose his job about it." *Id.* at 156. He testified that in August 2006, when he was working for Buddy Moore Trucking, he was in Atlanta, Georgia, and tried to get a load to bring back so that he would not have to deadhead back almost three hundred miles to get another load. *Id.* The load that he picked up was a CRST load, but it had a bad phone number on it. He knew Ken Morrison's phone number, so he called to find out if they had a number for the client in Atlanta so that he could pick up the load from them. *Id.* at 157. He testified that when he called, "Mrs. Morgan answered the phone and she told [him] to never call there again and hung up on [him]." *Id.* Mr. McNutt testified that he saw Mr. Morgan one time since he left Lake City about two weeks prior to the hearing, driving a Lake City truck out on Intrastate 80. He testified that, from what he could see from a distance, the truck and trailer both looked new. *Id.* at 158-159).

Mr. McNutt and Complainant have remained friends since Mr. Smith lost his job with Respondents. Tr. at 159. He testified that Mr. Smith was affected "very badly" by the ordeal. *Id.*

> It was around Christmas time, if my memory serves me correctly. And it brought a lot of distraught to his family. Because he could not, he couldn't get his kids Christmas presents and it hurt him financially.

Tr. at 159.

Mr. McNutt also testified that the way Lake City pays for fuel "you don't have to log it." Tr. at 159. He stated that this arrangement is advantageous to Respondents "[b]ecause there is no paper trail. There's no way to document where you were at...." *Id.* at 159-160. The contract effectively prevents the cross-checking of fuel receipts against logbooks to see if they are correct.

On cross-examination, Mr. McNutt testified that he was told by Crystle and Don Morgan that he was to "turn in legal logbooks to CRST." Tr. at 167. He was also "told to have [his] loads there on time." *Id.* at 169. When asked if he interpreted these statements together to mean that if his hours of duty were greater than what the regulations provided, he was to falsify his logbooks, Mr. McNutt responded, "[w]ell, Sir, in order to turn in legal logbooks, Sir, you can run over your hours, as long as you make the changes, make them legal to turn in. You're okay." *Id.* at 168-169. Mr. McNutt acknowledged that falsifying logbooks was illegal. *Id.* He also acknowledged that he was never disciplined or told that he would be disciplined if he did not deliver a load. *Id.*

Mr. McNutt testified that the regular route that he and Complainant followed was from Cleveland to Granite City, Illinois, where they delivered steel to Heitmann Steel. Tr. at 169. Heitmann accepted deliveries twenty-four hours a day, so the drivers were able to stop and sleep if necessary without worrying about not being able to deliver their loads. *Id.* at 169-170. Customarily, Mr. McNutt and Mr. Smith would haul return loads from Alton Steel in Alton, Illinois, to Painesville, Ohio. *Id.* at 170. Mr. McNutt testified that in order to get loaded, they had to pick up their return load from Alton Steel by 3:00 p.m. *Id.*

Mr. McNutt testified that the 1997 Transcraft trailer at issue had rust on the cross beams and that the trailer did not handle like other trailers that he has pulled, including the 1993 Transcraft trailer that he currently pulls. Tr. at 171-173. He stated that when he pulled the 1997 trailer, he did not report any safety problems on his daily inspection report because he had informed Mr. Morgan of his concerns. *Id.* at 174-175). While pulling the trailer, he determined that the cross members were weak.

> And all my driving time, my experience, the way a trailer is made, if a trailer is weak, the cross

> members are weak, the trailer will sway a lot, will flex. Will have a lot of give to it.

Tr. at 175.

Mr. McNutt recalled the breakfast meeting with Mr. Morgan and Complainant. Tr. at 175-176. He remembered that Mr. Morgan told them that "[h]e was looking into getting us some new trailers." *Id.* at 176. Mr. McNutt testified that he "heard [Complainant] say that his trailer swayed a lot and he, and it moved a lot on him and that made him uncomfortable." *Id.* When asked if Complainant told Mr. Morgan that his trailer was unsafe, Mr. McNutt responded, "[n]ot to my recollection." *Id.*

Mr. McNutt testified that on November 8, 2005, he was following Complainant when he turned into the Petro Station in Effingham, Illinois, which is about seventy to eighty miles to the east of Granite City, Illinois. Tr. at 176-178. They had stopped there to get something to eat and drink. *Id.* at 177. Mr. McNutt testified that he did not accurately log the stop in his logbook. *Id.* at 178. He stated that he does not recall exactly what time it was, although it was at nighttime and the lights were on in the truck stop. *Id.* at 179. Mr. McNutt testified that he was right behind Complainant when he made a left-hand turn. *Id.* at 179-180. They "were just creeping along, just pulling into a fuel island." *Id.* at 198. They "were in fourth gear. Maybe five, six miles an hour." *Id.* at 199. The trailer flexed and the steel coil that Mr. Smith was hauling went to the right and the trailer gave way and twisted. *Id.* at 181. He testified that there were seven chains holding the coil in place, and that it did not move when the trailer flexed. *Id.* at 181, 197. He stated that he did not know exactly what angle the trailer was in relation to the truck after the incident occurred and he was unable to see the position of the fifth wheel until he came around the side of the trailer to help out. *Id.* at 182.

Mr. McNutt testified that Mr. Smith had the idea of unhooking the trailer from his [Mr. McNutt's] truck, taking the chains on Mr. McNutt's truck and to try to hook them onto the coil to pull it back into position so that they could right the trailer. Tr. at 183. He also testified that he did not follow Lake City's policy that requires prior approval before a driver can unhook his trailer from his truck. *Id.* at 184. Mr. McNutt testified that they did not call for a tow truck because they were trying to save the company money. *Id.* at 185. It took Mr. McNutt and Mr. Smith about an hour to get the trailer and coil sufficiently moved so that they could get the dolly legs put

down in order to right the trailer. *Id.* at 185-186. Once the legs were down, Mr. Smith was able to unhook his trailer from his truck, pull forward to straighten up the truck, and to back up to reattach the trailer. *Id.* at 187-188.

Mr. McNutt testified that after the incident, he and Mr. Smith both inspected the truck and trailer for damage. Tr. at 186, 188. Mr. McNutt did not notice any damage to the trailer or wench track that goes around the trailer. *Id.* Mr. McNutt also testified that none of the straps were cut and that he did not see any grease from the fifth wheel on any of the straps. *Id.* at 187. Mr. McNutt stated that he "crawled underneath there and looked at it to make sure nothing was broke" and he "checked to make sure nothing was damaged underneath the trailer." *Id.* at 188.

Mr. McNutt testified that although he did not remember exactly what time they were able to get the trailer straightened out, it was light outside at the time. Tr. at 189. He did not personally contact the company to report the incident, but he testified that Mr. Smith contacted Lake City to report the incident "[o]nce we got rolling, once we got his trailer straightened back up. Once we got everything straightened around, got him ready to go again." *Id.* Mr. McNutt never talked with anyone at Lake City about the incident on November 8, 2008. *Id.* at 199. Mr. McNutt testified that he remembers Mr. Smith calling Ken Morrison and telling him that "you need to replace this trailer or you're going to replace the truck, trailer and driver because it's going to kill him or it's going to injure him." *Id.* at 189-190. However, Mr. McNutt was not present when Crystle Morgan called Mr. Smith back, because they were already on their way to Granite City to deliver their loads. *Id.* at 190. He testified that there were no safety problems with the trailer during the eighty mile drive to Granite City, nor were there any problems during the return trip from Alton, Illinois, to Paintsville, Ohio, during which they were both hauling a load of steel bars. Tr. at 190-191. Mr. McNutt stated that they might have gone through one station in Indiana on the way to Granite City, although they did not always have to stop at a weigh station because sometimes they were all closed. *Id.* at 191-192. He also acknowledged that the trailer had never been stopped by an inspector because there was an indication that the truck was unsafe. *Id.* at 192.

On cross-examination, Mr. McNutt was asked to explain the discrepancy between his testimony at the hearing and his

deposition. Tr. at 193-195. When Mr. McNutt was deposed on December 23, 2006, he testified as follows:

> After Harry was terminated they told me to come to the office. So I went to the office and we went to lunch....[Mrs. Morgan] told me that Harry was no longer employed there, and I didn't ask any questions. I just said okay. She wouldn't – she didn't go into any details or any specifics that I can recollect.

Tr. at 194; RX AA.

However, at the April 16, 2007, hearing, Mr. McNutt testified that during lunch, he learned from Mrs. Morgan and Mr. Morrison that "[t]he reason they let him go is because he was complaining about his equipment. He was stating that his equipment needed to be replaced." Tr. at 154. When asked to explain why he had a different response when he was deposed, Mr. McNutt stated that he "wanted it noted that [he] was also, [he] was also under doctor's care and [he] was under a lot of medication" at the time of his deposition. *Id.* at 193. At the hearing, he testified that he did not remember the conversation when asked about it during his deposition, but that he had remembered it on the day of the hearing. *Id.* at 195.

On cross-examination, Mr. McNutt acknowledged that he didn't know the specifics of the Smiths' financial situation, but that he was aware that they have been struggling financially since Mr. Smith lost his job with Lake City. Tr. at 196-197. He testified that Mr. and Mrs. Smith had told him that they were unable to buy their children Christmas presents that year. *Id.* at 197.

On redirect, Complainant's counsel submitted Complainant's Exhibit 36, the statement that Mr. McNutt provided to the OSHA investigator on December 16, 2005, approximately five weeks after Mr. Smith was let go by Respondents. Tr. at 202; CX 36. Mr. McNutt reviewed the statement and confirmed the authenticity of his signature on the document. Tr. at 202. He testified that he recalled making the statement and that his account of events was more likely to be accurate at the time that he provided the statement to OSHA than it was at the time of his deposition or at the hearing, since more than a year had passed at the time he gave his deposition on December 23, 2006, and more than seventeen months had passed by the time he testified at the

hearing on April 16, 2007. *Id.* at 201. Mr. McNutt read the following portions of his OSHA statement into the record:

> I was present at the meeting with Harry Smith and Don Morgan. At this meeting, we discussed getting new trucks and trailers. I remember Harry telling Don that the trailer he was pulling was junk and it was unsafe. And that it needed to be replaced. Harry did not refuse to pull the trailer and kept hauling loads with it. Don stated that he was trying to get new trailers.
>
> ....
>
> I was not present when Crystle Morgan let Harry go. However, after Harry was fired, Crystle called me into the yard and told me that she let Harry go because Harry threatened to call the DOT.

Tr. at 203; CX 36.

Mr. McNutt clarified his earlier response that he did not notice any damage to the truck or trailer when he inspected them after the incident, stating that he had understood Respondents' counsel's question as referring to new damage. Tr. at 203. He testified that the trailer still had the same structural problem with the cross members after the incident in Effingham, Illinois. *Id.* at 204. He also testified that he had never seen Mr. Smith drive unsafely, and that he did not remember seeing Lake City use the trailer again after Complainant's separation from the company. *Id.*

Mr. McNutt testified that he did not recognize the trailer photographed in RX V at 1-4 as the trailer that was assigned to Mr. Smith. Tr. at 205. Specifically, he stated that the turn signals were different and that Mr. Smith's trailer did not have the "Swiss Cheese" effect, with holes on the side. *Id.* In addition, he stated that Mr. Smith's trailer did not have the red and white "DOT tape" on it. *Id.* Mr. McNutt testified that no one from Lake City has ever asked to interview him about what happened to Mr. Smith's trailer. Mr. McNutt was never disciplined by Lake City for his participation in righting the trailer. *Id.* In addition, Mr. McNutt testified that he never received any formal discipline from Lake City for any reason, and neither CRST nor Lake City had ever audited his driver logbooks to check their accuracy. *Id.*

Mr. McNutt was asked by Respondents' counsel to explain why there were discrepancies in his testimony at his deposition and the hearing and the statement that he gave to the OSHA investigator. Tr. at 206-211. Mr. McNutt responded by stating, "[t]hat was to the best of my recollection. And then I remember, then you have things in front of you, Sir, and you have a bad memory like I do, Sir, it's kind of hard to remember everything, Sir." *Id.*

On April 17, 2007, Mr. McNutt was recalled to the stand by Complainant's attorney. Tr. at 245-248. Mr. McNutt testified that he does not recognize the trailer in the photograph in RX V-5. *Id.* at 246. He stated that it is not the 1997 Transcraft trailer that was assigned to Mr. Smith, because "[o]n Mr. Smith's trailer, the rail did not stop past the kingpin. The rail went from the back of the trailer the whole way to the front of the trailer." *Id.*

Testimony of Brad Thomas

Brad Thomas, Vice President of Trailer One, testified at the hearing. Tr. at 227-247. Mr. Thomas has worked in the trucking business for eighteen years. *Id.* at 227. He described his function within the company as like that of a comptroller. *Id.* His work does not involve evaluating the market value of trucks, trailers, or other equipment, although he has done that type of work before. *Id.* Mr. Thomas testified that Trailer One has done business with Lake City, although he did not have any personal interaction with Crystle or Don Morgan. *Id.* at 228.

Mr. Thomas testified that Lake City traded in the 1997 Transcraft trailer for credit towards the purchase of a 2002 Reitnouer trailer. Tr. at 229-230; CX 18, 29. He stated that the Transcraft trailer was resold to Rodney Dingus on February 22, 2006, for $1,195.00, which he believed to be an accurate estimate of its market value. Tr. at 231. Mr. Thomas testified that, using the normal research process for evaluating the value of a trailer, a 1997 Transcraft in roadworthy condition has a normal market value of $8,950.00. *Id.* at 231-232. He also estimated that a set of eight roadworthy tires for the trailer would cost about $640.00. Tr. at 233. However, Mr. Thomas was not sure whether or not the tires on the 1997 Transcraft were in good condition when the trailer was traded in. *Id.* at 234, 241. Mr. Thomas testified that the value of the trailer would not be affected if there was paint on the tires. *Id.* at 236. Mr. Thomas opined that the trade-in value of the trailer reflects its scrap

value, and not the market value of roadworthy equipment. Tr. at 236-237.

On cross-examination, Mr. Thomas acknowledged that David Pund, the Trailer One salesperson who conducted the transaction involving the trailer, would have personal knowledge of the condition of the trailer because he would have examined the equipment when it was traded in. Tr. at 237-238. He also testified that his testimony regarding the market value of a 1997 Transcraft trailer, in road-condition, is based on his review of the sales orders, research done on the Internet at www.truckpaper.com, and a conversation with his partner. *Id.* at 241. He also stated that he did not have any personal knowledge about the trailer's condition when it was traded in. *Id.* at 240-243. Mr. Thomas explained that the market value of $8,950.00 for a 1997 Transcraft was the current market value of the trailer in early 2006. *Id.* at 243. He testified that, although it is difficult to determine the variance in market value of a trailer from one year to another because of varying market conditions, typically market values do not change dramatically from one year to the next. *Id.* at 244.

Testimony of Harry Smith-Complainant

Mr. Smith testified by deposition on December 23, 2006, and at the hearing on April 17, 2007. RX BB; Tr. at 249-370. Mr. Smith quit school after repeating the ninth grade, when he was forced to move out of his family's home, due to an abusive family relationship; and he had to work in order to support himself. RX BB at 18-19; Tr. at 249, 255. In his deposition, Mr. Smith testified that before he obtained his commercial driver's license ("CDL") and began driving a truck he did several kinds of jobs, including working as a day laborer, working in a basket factory, and in construction. RX BB at 21-26. In 1991, Mr. Smith worked for Phil Pines Trailer Corporation, which made semi-trailers. *Id.* Shortly thereafter, he began working with his brother, who was a subcontractor who built houses, primarily for Trinity Homes in Columbus, Ohio. *Id.* For approximately five to six years, he assisted his brother in cutting and carrying materials and other general carpentry tasks. *Id.*

Mr. Smith participated in a six-week program through American Professional Driving School in Port Washington, Ohio, beginning at the end of 2001, and he obtained his CDL license in February 2002, passing the exam on his first attempt. RX BB at 19-20, 40. Mr. Smith testified that he drove trucks for several companies – including Trans-Service, Coshocton Trucking, Sitton

Motorways, Plymouth Foam, and Tab Trucking – before he was hired by Lake City in September 2005. *Id.* at 33-50.

Mr. Smith testified that he learned about the job with Lake City after he and his wife responded to an ad posted online by CRST, which stated that they were looking for new owner-operators to join their company. RX BB at 51; Tr. at 250. They posted his CDL credentials on a truck driving recruitment website, which allows prospective employers to review the driver's credentials and records before contacting the driver about an open position. RX BB at 52. A recruiter from CRST contacted Mr. Smith, but because he had never heard of the company before, he was uncomfortable committing to an owner-operator agreement at that time. *Id.* at 51-52. The CRST recruiter told him that there was a small owner-operator fleet that worked with them, and that he could possibly drive for them to get a better understanding of CRST's operations before entering into a lease option with CRST. *Id.* at 50. Mr. Smith testified that about a week before he started working for Lake City, the CRST recruiter called Crystle Morgan while he was on the line, to explain that while Mr. Smith likely wanted to enter CRST's lease-purchase program, he preferred to learn more about the company before doing so. *Id.* at 51. He also testified that he had never heard of Lake City or Jacob McNutt before the conversation with the recruiter. *Id.*

Mr. Smith testified that he entered into an agreement with CRST and Crystle Morgan that allowed him to drive Lake City's trucks for a period of time while he determined whether or not he wanted to become an owner-operator for CRST; and "if [he] made the decision to go into CRST's lease purchase program that [he] would be allowed to do it." RX BB at 53. Mr. Smith stated that Don Morgan was the first person from Lake City to contact him after the initial conference call took place with Mrs. Morgan and CRST. Tr. at 261. Mr. Morgan asked Mr. Smith questions about his training and experience, and although he never expressly said that he was "the big boss" at Lake City, "[h]e didn't tell [Mr. Smith] that he wasn't either." *Id.*

On the day that Mr. Smith was hired, he and his wife and children drove up to Lake City to meet Mr. and Mrs. Morgan. While the Smiths went up to Crystle Morgan's office to fill out Mr. Smith's initial employment paperwork, Don Morgan was in the yard preparing his truck and trailer. RX BB at 55; Tr. at 256. After completing the paperwork, the Smiths accompanied Mrs. Morgan down to the yard, so that Mr. Smith could go over his equipment inventory with Mr. Morgan, who told him that a few

missing items would be replaced over time. RX BB at 59. Mr. Smith asserts that he was required to sign the inventory sheet while he was upstairs in the office filling out his other tax and employment paperwork with Mrs. Morgan, before Mr. Morgan went through the equipment with him in the yard. *Id.* at 57-58. Mr. Smith testified as follows regarding the inventory of the equipment and the missing tarp:

> Don was at the backside of the toolbox on the driver's side looking for another tarp. There was supposed to be three tarps on the vehicle. There was only two, which he noted as we walked up that there was only two tarps, but the two tarps would cover the trailer if needed; that if I needed the other one we would get it as we go.

RX BB at 59.

Mr. Smith asserts that Mr. Morgan made these statements in front of Mrs. Smith, his two children, and Mrs. Morgan. RX BB at 59. Mr. Smith also testified that Mr. Morgan acknowledged that some other items of equipment were missing, including some ratchet straps and edge protectors, but that he assured Mr. Smith that they would be replaced over time. *Id.* at 62-63. Mr. Smith did not have enough time to thoroughly go over the inventory sheet and equipment, because he had to drive approximately four hundred miles to Rockport, Indiana, that night to be able to attend CRST's orientation program the next morning. RX BB at 63-64; Tr. at 259.

After going over the equipment with Mr. Morgan, Mr. Smith put his things in the truck and completed his pre-trip inspection. RX BB at 64. He found no problems with the tractor, but he noticed a "big patch in the middle of the trailer of new wood, which indicates that something had been wrong with the trailer." *Id* at 65. The patch of wood was approximately two feet by four feet in area and was located "just off from dead center of the trailer towards the rear. It would be within the center of the trailer." *Id* at 66. Mr. Smith did not ask Mr. or Mrs. Morgan about it at that time, because he "hadn't had time to crawl under the trailer to see what the actual damage was to the trailer." *Id.*

Mr. Smith did not record any maintenance or safety issues in his logbook that day. RX BB at 67. He testified that when he told Mrs. Morgan on the phone that his daughter was sick and that he may need to come home on weekends or on short notice,

Mrs. Morgan told him that "if [he] worked with her, she'd work with [him]." *Id.* at 71. He testified that the reason that he had not written up the problems with the trailer was that he had interpreted Mrs. Morgan's comment to mean that he was to contact her before he wrote up any issues regarding her equipment. *Id.* Furthermore, he testified that he understood her to mean that "if I wanted her job I have to turn around and do what she wants me to do." *Id.* 72. He also asserts that he "did not give her a hassle about what she wanted because [he] needed a job." *Id.* He also recalled the following conversation with Mrs. Morgan:

> In my recollection of what she had to say about CRST, that did not need no bad equipment write-ups or out of service because it would hurt her. I would recall like it would be her employment or her arrangement with CRST.

RX BB at 73.

Mr. Smith testified that he did not report this to anyone because he needed the job.

> I wanted a job. I had a daughter to take care of. I had no financial help with nobody, and my daughter required doctor visits that I had to pay for with cash money, so I had to basically go with what the employer wanted me to do.

RX BB at 73.

At the hearing, Complainant testified that although he received a drivers' manual and a copy of the DOT Regulations, he understood Mrs. Morgan's comments to mean that he should do whatever she wanted, regardless of what was stated in the drivers' manual. Tr. at 264-265. He testified that he understood that Mrs. Morgan wanted him to "run" in violation of his legal requirements. *Id.* at 270. In fact, he did not make any entries in his logbook that indicated that his trailer was unsafe, until his final entry on the day he was let go by Respondents. *Id.* at 285.

Mr. Smith drove to Rockport, Indiana, on the evening of the day that he was hired, and he spent the next few days participating in CRST's orientation program. RX BB at 77. While he was there, he inspected the truck and trailer more thoroughly and noted that several pieces of equipment were missing; however, he did not report this to Mr. or Mrs. Morgan because

Mr. Morgan had already acknowledged the missing equipment when he went over the equipment inventory with Mr. Smith. *Id* at 78. At the hearing, Mr. Smith testified that CRST did not emphasize regulatory compliance during its orientation program, but instead told the drivers that they should turn in legal logs and use "com checks" for fuel. Tr. at 266, 282. Mr. Smith began driving Lake City's truck full-time soon after completing CRST's orientation program. RX BB at 77. He testified that he was required to send CRST a weekly trip pack, including his log reports. Tr. at 275.

In his deposition, Mr. Smith described the problem with the trailer as follows:

> Q. Okay. And what safety complaints did you have about the trailer?
>
> A. That it swayed more than it should.
>
> Q. Swayed more. What else?
>
> A. It flexed back and forth.
>
> Q. What do you mean by flexed back and forth?
>
> A. When I hauled coil on it, it would roll to the right and to the left when – in a trailer that's – that would have been in good shape would not do.
>
> Q. When you say swayed more, is that the same as flexed back and forth?
>
> A. In about the same sense. It's not exactly. It could sway, but it could flex, and by flexing it could be from the front of the trailer, it could be the center of it, flexing from left to right.
>
> Q. Well, which was it?
>
> A. It did just about all of it.
>
> Q. Okay. And the first time you put a coil on that trailer you felt that?
>
> A. Correct.
>
> Q. Who did you report that to?

A. Crystle Morgan.

RX BB at 79-80.

Mr. Smith testified that he had reported the problem with the trailer to Mrs. Morgan over the two-way phone provided by the company, but he could not remember exactly when he first reported it. RX BB at 80. He stated that "[t]he first time [he] hauled a coil with that trailer I could tell the trailer was unsafe to haul coils with." *Id.* at 81. When Mr. Smith informed Mrs. Morgan about the problem with the trailer, she asked him where he had positioned the coil. *Id.* at 84. He responded by explaining how the coil had been positioned. *Id.* at 85. However, he did not report the issue in his logbook "because [he] was instructed by Crystle not to." *Id.* He testified that he talked to Crystle about replacing the trailer "[o]n numerous occasions....Possibly once a week....[starting] about the first or second week of [his] employment with [Lake City]." *Id.* at 105, 106-107. He recalled that Mrs. Morgan responded on occasion by saying that they were working on it. *Id.* at 107-108. Mr. Smith testified that he could never get a straight answer out of her about when the trailer would be replaced. *Id.* Mr. Smith testified that after the incident in Effingham, Illinois, he "told her when I reported the trailer rolling up on its side that she needed to replace the equipment or she would need to replace the driver because it was going to get me killed and somebody else." *Id.* at 108.

Mr. Smith testified that he also reported his concerns about the trailer's safety to Don Morgan. RX BB at 86-87. He recalled discussing the trailer with Mr. Morgan over breakfast at Duke Truck Stop. *Id.* at 86-90. He testified that he perceived the breakfast meeting to be a meeting with his boss, since he believed that Mr. and Mrs. Morgan jointly owned Lake City. *Id.* Mr. Smith recalled that Mr. Morgan acknowledged that there were problems with the trailer and that it had been repaired in the past. *Id.* Specifically, Mr. Smith remembered the discussion at breakfast as follows:

> I remember stating to Don that the trailer had moved around more than it should and everything, and he acknowledged that the trailer had a bunch of work done to it and he knew that it was not up to par to what it should be. He [had] also made a comment to me that him and Crystal were both looking to buy a new trailer, and that if they got

> it, they would turn around and put it behind me and take the trailer they had out of service.

RX BB at 90.

Mr. Smith testified that he believed what Mr. Morgan had told him at breakfast about trying to replace the trailer, because he had done everything that Respondents had asked him to do, even though some of the things they had asked him to do were illegal.

> They asked me to take – I was asked to take loads when I had no hours. I was required to deliver loads and log them falsely, which I did.

RX BB at 91; TR 268.

Mr. Smith could not recall exactly where he was when he was required to continue driving when he was out of hours, but he stated that he complained to Ken Morrison "numerous times" but Mr. Morrison told him, "[y]ou got to deliver freight." RX BB at 93-94.

Mr. Smith also testified that Respondents told him not to have their truck inspected by CRST when he was at their orientation. RX BB at 95; Tr. at 259. Instead, he was told to go to a repair shop in Cleveland called A&H to have the truck inspected after he had returned from orientation. *Id.* He testified that the inspector did not do a complete DOT inspection:

> I recall him getting under the hood. I recall him checking tires, depths. The gentleman had taken some VIN numbers out from underneath the hood and some numbers off from the door post, and then went into his office and come back out and put stickers on the trailer and sent me on my way.

RX BB at 96.

Mr. Smith did not report the inadequate inspection because he "wanted to keep [his] job. [He] did not want to be fired by going against what Crystle Morgan had [him] doing." RX BB at 97. He also testified that he had not taken the trailer to be inspected by the DOT but did not do so because he believed that Respondents were trying to get another trailer for him to haul. *Id.* At 101

Mr. Smith testified that he "had more than one conversation with [Mr. Morgan] about the trailer." RX BB at 103; Tr. at 286-288. He recalled discussing the trailer with him over their two-way phones. He recalled telling Mr. Morgan that the truck was unsafe to operate. *Id.* at 104-105. However, he could not remember when the conversation took place or whether it occurred before or after they talked about the trailer at breakfast. *Id.* No one else overheard the conversation, because Mr. Smith was alone at the time. *Id.* at 103.

At the hearing, Mr. Smith remembered stopping at the truck stop to get something to drink or eat. Tr. at 305. At his deposition, Mr. Smith testified regarding the incident with his trailer that night at the truck stop as follows:

> I was pulling into Effingham, Illinois, into a truck stop, and turned to go into a fuel island, and when I turned, the trailer had flexed and the coil that I had eight chains on had rotated to almost an upright position and had tilted the truck down to the ground. The rear wheels on the right side of the trailer were almost off the ground but the center of the trailer had twisted and turned almost vertical. I seen it in my mirror, I stopped real quick. I turned around, I tried to contact Crystle; no answer. I tried to get ahold of Ken Morrison; no answer. I hollered at Scooter [Mr. McNutt] on the radio, on the CB, to come over and help me.

RX BB at 109.

He further explained that the coil was still secured to the trailer by the chains, and there was nothing wrong with the chains or with the way that he had secured the coil. RX BB at 115-116. Mr. Smith testified that "the coil never moved off the trailer. The whole trailer and the coil where [he] had secured it twisted." *Id.* at 116.

Mr. Smith testified that he was approximately three or four hundred feet from the fuel island at the time. RX BB at 110. He stated that he was making a normal left-hand turn into the fuel island, but could not recall exactly how fast he was going at the time. *Id.* at 110-111. He remembered that it was dark at the time, but could not recall exactly what time the incident occurred. *Id.* at 111. He testified that Mr. McNutt was hauling a

load and was at the truck stop with him, and was either driving behind him or parking his truck. *Id.* at 111, 114. However, Mr. Smith could not recall how long it took Mr. McNutt to show up to help him. *Id.* at 120-121. Mr. Smith could not recall exactly where he had picked up the coil or where he was delivering it to, but he believed that he may have been hauling it from the ISG plant in Cleveland, Ohio, to General Motors Corporation, just outside of St. Louis, in Illinois. *Id.* at 112. Mr. Smith testified that he did not keep an accurate logbook on the day that the incident took place, "[b]ecause [of] the requirements of how Crystle had required [him] to run. [He] could not keep an accurate log." *Id.* at 112-113. Mr. Smith could not recall how long he had been driving that day or whether he was within his hours as allowed by Federal Motor Carrier Safety Regulations. *Id.* at 113.

Mr. Smith explained that he asked Mr. McNutt to help him with righting the trailer because he did not have enough money to pay for a tow truck and he was unable to contact Mr. or Mrs. Morgan or Ken Morrison. (RX BB at 116-117; Tr. at 322. After being unable to contact anyone from Lake City, Mr. Smith and Mr. McNutt decided to correct the problem themselves. RX BB at 117, 123; Tr. at 324.

> [W]e took the initiative to turn and take [Mr. McNutt's] truck and took chains to it to pull the coil back over to right the trailer. And once we righted the trailer, I had turned around and pulled out from underneath the trailer and rehooked it in a straight position and made a big circle in the parking lot to leave to deliver the load.

RX BB at 117.

Mr. Smith could not recall what angle Mr. McNutt's truck was at in relation to his own truck, but he knew that it wasn't a sharp angle, because he "would not make a sharp turn with a spread axle trailer with no dump valve." RX BB at 124. Mr. Smith testified that he needed to unhook his trailer from his truck in order to right the trailer.

> The angle that the truck was in, the – when it tilted the trailer over, the rail that holds the straps, it come down and caught the frame of the truck. So I needed to pull out from underneath the trailer to back underneath the trailer straight

> with the truck so we could get underneath it and see how bad it was; if something was broke underneath there or what was going on with it.

RX BB at 125.

Mr. Smith testified that he was too scared to crawl all the way under the trailer to inspect it for damage, but he and Mr. McNutt "looked at it from the outer edges to make sure nothing was hanging down." RX BB at 125. Mr. Smith found nothing wrong with the trailer, other than the supports that had been repaired incorrectly. *Id.* at 126.

> There's – there's possibly six, seven – seven, that I can recall, of supports that run from side to side of the trailer that was cut out when they done their repairs that the repair was done incorrectly. By cutting the supports out, it took away from the structure of the trailer.

RX BB at 126.

Mr. Smith recalled discussing the problems with his trailer with Mrs. Morgan "throughout [his] employment" at Lake City. RX BB at 127.

Mr. Smith stated that he tried to contact Mrs. Morgan again after he and Mr. McNutt had righted the trailer and he was back on the road, but he was unable to reach her. RX BB at 117. After being unable to contact her using all of the emergency numbers that he was given, he "beeped Don [Morgan] because Don's beeper number was programmed in [his] phone." *Id.* at 118. He then contacted Ken Morrison on his two-way phone. (RX BB at 119; Tr. at 333-336.

Mr. Smith testified that he did not take any photographs of the trailer, and he did not have enough money to buy a camera from the store in the truck stop in order to document the incident in the parking lot. RX BB at 121. Mr. Smith did not approach anyone else at the truck stop to help him in righting the trailer, and he is unaware of whether anyone else witnessed the incident. *Id.* at 122-123.

Mr. Smith testified that he reported what had happened in the early morning hours of November 8, 2005, to Mrs. Morgan the "following morning when [he] could contact her." RX BB at 132. At the hearing, Mr. Smith testified that he was first able to

reach Ken Morrison to report what happened at the truck stop at about 7:15 to 7:30 EST, after Mr. Smith had almost arrived in Granite City, Illinois, to deliver the steel coil he was hauling at the time of the incident. Tr. at 331. After speaking to Mr. Smith, Mr. Morrison contacted Crystle Morgan, who called Mr. Smith back about twenty to thirty minutes later. *Id.* at 334-335. Mr. Smith could not recall how much time elapsed between when he had righted the trailer and when he spoke to Mrs. Morgan to inform her about the incident. RX BB at 132. He could not recall whether or not he even slept at all that night. *Id.* at 132-133. He remembered that he was sitting in his truck when he finally spoke to Mrs. Morgan, but he could not recall whether he had already delivered his load by that time. *Id.* at 133-134. He did not know where Mr. McNutt was when he talked to Mrs. Morgan, "he could have been behind [him] or he could have been delivering himself, [he did] not know." *Id.* at 134.

Mr. Smith recalled telling Mrs. Morgan that "she needed to replace the trailer or she would end up replacing a driver because it would get [him] killed and somebody else." Tr. at 137. Mr. Smith testified that he "did not resign" from Lake City when he made that statement to Mrs. Morgan. *Id.* at 136-137. Mr. Smith recalled that after he made the statement to Mrs. Morgan, her primary concern was whether he could get the trailer back to Cleveland. RX BB at 139; Tr. at 335-336. He did not remember her asking him if the truck needed to be evaluated or if it needed any mechanical work. *Id.* He remembered telling Mrs. Morgan that he would "reload [the trailer] with flat steel, but [he] would not haul another coil on the trailer again." RX BB at 139-140. However, he did not request to "bob-tail" back to Cleveland without the trailer. Tr. at 342. Mr. Smith stated that he plainly told Mrs. Morgan that "at no time would [he] haul another coil on her trailer." RX BB at 143. He also testified that nine times out of ten, his regular return load to Cleveland was flat steel from Alton Steel, which is about seventeen or eighteen miles from where he delivered the coil. *Id.* at 141-143. At the hearing, Complainant testified that he believed that adverse action would be taken against him if he complained. Tr. at 339.

Mr. Smith testified that he "was reloaded at Alton Steel and was told after [he] off-loaded the load in Cleveland [he] was to come to the yard and switch the trailer out." RX BB at 141. Mr. Smith had no trouble with the trailer on the return trip through Illinois and Indiana to Ohio. *Id.* at 143. Mr. Smith recalled his conversations with Mrs. Morgan and Mr. Morrison

about bringing his trailer back to Lake City's yard. RX BB at 144; Tr. at 344.

> Crystle Morgan had told me to return after I had off-loaded, to return to the yard. And Ken Morrison also called me on my two-way and told me after I off-load to come to the yard, they was going to replace my trailer.

RX BB at 144.

After he finished unloading, Mr. Smith called Ken Morrison for directions to the yard, because he had only been there one time before, on the day that he was hired. RX BB at 144. When Mr. Smith arrived in the yard and did not see another trailer, he called Mr. Morrison to ask where it was. Mr. Morrison told him that "[i]t's at another yard, we need you to come up here." *Id.* at 144-145. Mr. Smith went upstairs, went inside the office, and introduced himself to Mr. Morrison, whom he had only spoken to over the phone prior to that. *Id.* at 145. Mr. Smith described the events that transpired in the office as follows:

> I walked up to Crystle Morgan, the first words she asked me, 'Where's your phone?' And I replied to her, 'They're in the truck.' Then I asked her, 'Where's the trailer?' She goes, 'I need your phone to reconfigure it.' So I went to the truck, I got the phone, I come back up, I handed the phone to Crystle Morgan, and when I handed the phone to Crystle Morgan she set it to the side of her desk, slid back in her seat and said she was getting rid of me for these reasons.

RX BB at 145.

Mr. Smith testified that Ken Morrison was about fifteen to twenty feet across the room at his desk dispatching trucks during the conversation with Mrs. Morgan. RX BB at 146; Tr. at 345. He also remembered that Robert Liuzzo, who he did not know at that time, was sitting on a couch to the side of Mr. Smith and Mrs. Morgan. RX BB at 146.

Mr. Smith recalled Mrs. Morgan "making a complaint to [him] that he threatened her company by saying that [he] would take her trailer to the DOT. She did not like that." RX BB at 146-147; Tr. at 349-350. Mr. Smith testified that he "had made comments that [he] should take [Mrs. Morgan's] trailer to DOT to

see what they would say about it" to "numerous people", including Mr. McNutt and Mr. Morrison, and to a CRST representative named Milton, among others. RX BB at 147; Tr. at 348-350. Mr. Smith testified that he was fired because Mrs. Morgan considered him to be a threat to her company. Tr. at 254, 350-351. At his deposition, Mr. Smith recalled that when he was fired, Mrs. Morgan voiced a couple of other complaints about him, although he could not remember what they were specifically. RX BB at 147. He remembered that Mrs. Morgan was persistent in characterizing what had taken place as her having accepted his resignation, rather than Mr. Smith's employment being terminated involuntarily. *Id.* However, he "told her repeatedly that [he] was not resigning, [he] did not quit, that [he] was not quitting." *Id.* at 148. He also stated that "[Mrs. Morgan] was trying to get [him] to admit ... that [he] resigned. [He] kept saying I do not resign. I do not resign....[H]e told her from the time [he] was there to the time [he] left, I do not quit." Tr. at 352. Respondents' attorney asked Mr. Smith why he had not quit, to which he replied:

> Because I wanted my job. I wanted Crystle Morgan to stand on what they said they was going to replace the trailer. I wanted the trailer replaced. If they called me in the yard and said they was going to replace the trailer I expected that day for them to replace the trailer when they said they was going to do. I did not know they was going to pull me in, take me out of the truck and put me in a van that I did not know who it was to take me home. If I'd known that I was going to quit or if I was going to quit I would have went home and would have cleaned my vehicle out and taken their vehicle to them. I would not expected them to make arrangements to take me home when I could have done it myself.

RX BB at 148.

Mr. Smith testified that Mr. Morgan was not present, and neither Mr. Liuzzo nor Mr. Morrison said anything during his thirty to forty-five minute conversation with Mrs. Morgan. RX BB at 149-150; Tr. 344-345. Mr. Smith testified that he "asked [Mrs. Morgan] how she could justify saying that she was going to replace the trailer and then she's going to keep the trailer in service, and get rid of a good driver." RX BB at 151. She did not verbally respond to his question, but "her eyes [got] really big with her eyebrows up." *Id.* Mr. Smith recalled that at that

point Mrs. Morgan "turned around and told [him] to get [his] stuff out of the truck. I don't think she was going to let a truck sit." *Id.*

Mr. Smith recalled being upset when he went downstairs to clean out his truck. RX BB at 152. Mr. Liuzzo went down to the truck with him to do the post-employment inventory. Tr. at 353. Mr. Liuzzo looked at the inventory sheet and noticed that the sheet did not match the vehicle, but was for a covered trailer instead. *Id.* Mr. Smith contends that not all of the writing on the inventory sheet was Mr. Liuzzo's, and that the notations about the tires being painted, etc., were written on the inventory sheet by someone else after the fact. *Id.* at 354.

Mr. Smith testified that he had only painted the lettering on the tires, and that he did not cut the wiring to his CD player when he removed it from the truck, but had simply reached in and unplugged them. RX BB at 153. It took him about a half-hour to forty-five minutes to clean out his truck. *Id.* at 153. Mrs. Morgan instructed Mr. Liuzzo to take Mr. Smith home. *Id.* Mr. Smith testified that on the way home, he and Mr. Liuzzo "discussed a few things about the trailer, about it being unsafe and how owner-operators were about getting everything they can out of a piece of equipment before they get rid of it." *Id.* at 154. Mr. Smith also testified that Mr. Liuzzo disclosed information to him about previous driver's experience hauling the trailer.

> Mr. Liuzzo had turned around and said to me that there was another driver that pulled it and had complained about it and they've just keep switching it around to driver to driver.

RX BB at 154.

Mr. Smith called his wife on the way home, telling her that he "was wrongfully fired and that [he] was not going to take it and [he] wanted her to contact an attorney for [him]." RX BB at 155. His wife contacted an attorney who referred her to Mr. Renner. *Id.* Mr. Smith contacted Mr. Renner either sometime that evening or first thing the next morning. *Id.*

At the hearing, Mr. Smith testified that the trailer shown in the photographs submitted by Respondents in RX V is not the trailer that he drove for Lake City. Tr. at 359-361. He gave the following reasons for rejecting the legitimacy of the photographs:

Q. B(1) and (B)2, do you recognize those as damage to the wench track?

A. There's damage to that wench track, but that wench track, that style of wench track was not on my trailer.

Q. And B(3) you do not recognize this being your trailer?

A. No, that was not, my trailer did not have this stripping on the frame and the frame was all rusty and you could see the rust like the paint was bubbling on the frame. The rub rails was all rusted out on it too.

Q. So you think that somebody just slipped this photograph in. It's not a photograph of your truck[?]

A. I don't believe that to be my trailer I was pulling, no.

Q. And these B(4), this is what your truck looked like but it didn't have all these holes, is that what your saying?

A. I don't believe it had all them holes or that, I know it didn't have this stripping or this, what they called elbow light on it, on the driver's side of the trailer.

....

Q. B(5), you looked at, you saw a wench track that's along the driver's side, Correct?

A. Correct.

Q. So you assume because a piece of it is now missing, whenever the photo was taken that this is not your trailer. Is that correct?

A. Correct.

> Q. B(6). This is the strap that was broken that you can see it's broken. Correct?
>
> A. I[t] don't look like to be the strap that was broken. If it was broke, the way the strap was broke that I had, it's frayed more on the edges where it's pulled apart. This looks like it's been just, somebody took something and cut it in half.

Tr. at 359-360.

Mr. Smith stated that he suffered:

> . . . as a result of what Crystle had done, and with her wrongfully firing me and wrongfully saying things that I did that I did not do, that it has outed me in certain job opportunities. It required me from the time the money I was making to what I am making now to turn around and refinance my home. It hurt me financially.

RX BB at 156-157.

At Lake City, he made between eleven to twelve hundred dollars a week, with his bonus. RX BB at 157. He received a bonus every week except for one or two weeks that he worked for Respondents. He stated that "the very last week that [he] was there, that [he] was fired, [he] did not get a bonus." *Id.*

Mr. Smith testified that his termination from Lake City also affected his ability to secure a position as an owner-operator with CRST. RX BB at 157; Tr. at 252. A day or two after he lost his job, Mr. Smith had already lined up an investor to purchase a truck for him to drive as an owner-operator with CRST. RX BB at 157, 159. Under the verbal agreement he made with the investor, Mr. Smith would drive the truck while he was making payments on it. *Id.* at 158-159. Mr. Smith had a written agreement with CRST, stating that he would operate the truck as an owner-operator, but CRST would send payment to the investor, who would deduct the truck payment and then forward the difference to Mr. Smith. *Id.* Mr. Smith asserts that Respondents "falsely told CRST that [he] did not report an accident that [he] did report." *Id.* at 162. Mr. Smith contends that the trailer was only minimally damaged during the accident at the truck stop in Illinois. "Only damage there was, was the – there a rail that holds the straps, it was bent down, that all it needed was bent back up and a bolt put in." *Id.* at 163. When

he attempted to explain what had happened at Lake City to a representative of CRST, Mr. Smith was told that they would have to talk to Mrs. Morgan before moving forward with the owner-operator agreement. When the CRST representative called back, he told Mr. Smith that he "would not be working for CRST because it was a privilege and if [he] wanted anything past that [he] had to subpoena him to get an answer." *Id.* at 163-164.

Mr. Smith testified that he did not complain about Lake City taking too much money out of his paycheck in tax deductions, but he recalled asking Mrs. Morgan to explain what taxes were being deducted from his paycheck, because he thought it seemed high considering how much money he earned. RX BB at 168-169; Tr. at 279. Another time, he contacted Mrs. Morgan because he did not receive his check on Thursday that week, like he usually did. Tr. at 358. He was unaware that Respondents used a payroll service to process payroll. *Id.* Mrs. Morgan told Mr. Smith that she would look into it for him, and he received his check the following Monday. *Id.* He testified that he was always paid everything he was entitled to be paid, with the exception of his last paycheck. *Id.* at 359. He stated that he was not paid for his delivering his last load, because Respondents took his whole paycheck as reimbursement for missing and damaged equipment. *Id.* at 367.

On another occasion, Mr. Smith recalled complaining to the dispatcher, Ken Morrison, because he arrived on schedule for an appointment to pick up a load from Majestic Steel, but was forced to wait while fifteen to twenty drivers with later appointment times were loaded before him. RX BB at 169. He called Mr. Morrison to complain and to ask him to contact them to find out what was going on. *Id.* Mr. Smith told Mr. Morrison that if he was not loaded within an hour or two, he was going to go down to the truck stop and they would have to dispatch him with a different load. *Id.* Mr. Smith contends that his statement was not meant as a threat; rather, it was him "letting [his] employer know where [he] was taking their equipment because [he] was getting to the end of [his] hours and [he] would not be able to drive down the road." *Id.*

Mr. Smith testified that he did not inform anyone at CRST about what happened with Lake City until after his employment had been terminated, when he contacted CRST about leasing a truck. RX BB at 170-171. During that conversation, Mr. Smith stated that he believed he was wrongfully discharged because of Lake City's equipment. *Id.* at 171. Mr. Smith never contacted any governmental agency to complain about the way that he was

treated by Respondents while he was still employed by Lake City. *Id.*

Mr. Smith acknowledged that he has a copy of the Federal Motor Carrier Safety Regulations. RX BB at 172. He also acknowledged that over the term of his employment with Lake City, he had read their employee handbook, and he understood that it applied to him. *Id.* at 173. Mr. Smith acknowledged that he falsified his logbook, but believed that he had to in order to deliver the loads that were dispatched to him by Respondents. Tr. at 268. He stated that he was aware of Lake City's policy forbidding drivers from unhooking their trailers from their trucks without obtaining permission from Lake City or CRST. RX BB at 173. However, Mr. Smith explained that he thought that the policy was intended to address a problem with drivers who were "bob-tailing home without their trailer[s]." *Id.* at 174.

Mr. Smith testified that after he lost his job with Respondents, he got another job with Coshocton Trucking within about a week and a half. Tr. at 253; RX BB at 9. However, he quit after a very short period of time, because the company refused to repair faulty equipment and he refused to drive it in that condition. RX BB at 9-10. He complained to his supervisor about the unsafe condition of the fifth wheel on his trailer, but nothing was ever done to resolve the problem. *Id.* at 16. He testified that he did not, and does not intend to, file any complaints about his supervisor or Coshocton Trucking for their failure to repair their equipment, as he does not contend that adverse employment action was taken against him. *Id.*

Mr. Smith could not recall exactly how long it took him to get his next job with Ameristate Transportation, but it was "possibly" a very short period of time. RX BB at 11. Mr. Smith started out working as a company driver for Ameristate, but later signed on as an owner-operator. *Id.* at 11-12. As a company driver, Mr. Smith was paid by the mile, starting at thirty-four cents per mile, with an additional two cents per mile bonus at the end of the month if he drove more than 11,000, which he only received twice. *Id.* at 12. Sometime around April 2006, about three months before Mr. Smith became an owner operator, his mileage compensation rate was increased to thirty-six cents per mile. *Id.* at 12-13. Mr. Smith became an owner-operator with Ameristate in July 2006. *Id.* at 13. Mr. Smith is leasing a tractor, but the fifty-three feet long dry van that he hauls belongs to Ameristate. *Id.* at 14. He hauls various types of commodities, but has never hauled any type of steel or metal for Ameristate. *Id.*

Mr. Smith testified that his paychecks were for between nine and eleven hundred dollars a week when he worked for Lake City, but he made less working as a company driver for Ameristate. RX BB at 164. He recalled making twelve to thirteen hundred per week in gross pay, before any deductions were made for taxes, etc. *Id.* at 166. Currently, as an owner-operator, he makes an average of about one thousand dollars a week. *Id.* He also has a life insurance policy that the company provides to its employees. *Id.* at 167. Mr. Smith testified that he has lost money since Respondents terminated his employment. At the time of his deposition, Mr. Smith was unsure as to the exact amount of money he had lost to date, but he noted lost wages for the week following his termination and for the two days that he was required to attend the deposition. *Id.* at 167-168.

Testimony of David Pund

David Pund, an employee of Trailer One, testified at the hearing on April 17, 2007. Tr. at 372-393. Trailer One is in the business of selling and leasing semi-trailers, and Mr. Pund has twelve years of experience working in the field, and he averred that he is knowledgeable about Transcraft trailers and in the semi-trailer business in general. *Id.* at 372-373. Mr. Pund testified that, on behalf of his employer, he participated in the February 2006, transaction involving the trade-in of the 1997 Transcraft trailer that Mr. Smith had driven for Respondents. *Id.* at 373. Mr. Pund had no previous knowledge about the trailer before this transaction took place. *Id.* Mr. Pund explained that the 1997 Transcraft has different handling characteristics than other trailers.

> [A] Transcraft's made out of T-1 steel. T-1 is a flexible steel. So compared to high tensile steel which some other manufacturers use which is more rigid steel. So Transcraft's noted for being more flexible. Meaning that when it goes down the road it will bounce a little bit. And they also, in those years and still presently will snake around turns. The nature of T-1 steel is that it is flexible. It's light and strong is what they claim on the steel.

Tr. at 374.

Mr. Pund testified that he had "a pretty good recollection" of the trailer that Respondents traded in for credit on a newer trailer in February 2006. Tr. at 373.

> As I remember the trailer, basically it was rusty which a lot of those trailers at the time had a lot of rust, mainly in the side rails area. A quite of bit of surface rust just on the trailer in general.
>
> It was a trailer that was used and at no point in time would I say that it ever had any kind of paint or anything put on it since its original paint job.

Tr. at 375-376.

Although he remembered that the trailer had quite a bit of rust on it, Mr. Pund did not recall that it had any structural problems. Tr. at 377. Mr. Pund testified that the rust and poor paint job played a part in the trailer's trade-in value, as did the low demand for this particular make, model, and width of trailer, as well as poor general market conditions for trailers in the Cleveland area in 2006. Tr. at 375-376, 380.

Mr. Pund testified that the document previously admitted as CX 18 was not an accurate reflection of the trade-in value of the trailer. Tr. at 378-379. He contends that the sales order is used to obtain credit approval from a bank based on the estimated market value of a trade-in, oftentimes before anyone from Trailer One has even seen the equipment. *Id.* at 378. Mr. Pund stated that the sales order essentially serves as a pre-approval form, and the deal referenced in a sales order is always subject to change after the trade-in is inspected. *Id.* at 379.

Respondents submitted the original trade-in document, which Mr. Pund personally prepared in February 2006, which contains the trade-in details for the 1997 Transcraft trailer at issue in this case. RX GG; Tr. at 377. The document shows that the 1997 Transcraft trailer was given a trade-in value of one thousand dollars, which was applied to Loch Trucking's purchase of an aluminum Reitnouer trailer. *Id.* at 381. The trailer's value was affected by the market factors and condition of the truck, as discussed above, as well as Trailer One's lack of enthusiasm about investing money in a trailer that was not in demand. *Id.* Mr. Pund testified that Brad Thomas, one of the owners of

Trailer One who testified earlier at the hearing, was not involved in day-to-day business of the trade-in of trailers. *Id.* at 383.

Mr. Pund asserted that one thousand dollars was a fair trade value for the 1997 Transcraft trailer, considering all relevant factors. Tr. at 383. He stated that he was personally familiar with the transaction in which the trailer was sold to a company called Rodney Dingus, Inc. for one thousand one hundred and ninety-five dollars. Tr. at 384; CX 28. Mr. Pund was involved with the transaction and his name appears on the sales order. Tr. at 384. Mr. Pund testified that, to the best of his knowledge, Rodney Dingus's business buys trailers for parts to reconstruct some of his own trailers. *Id.* at 385. Mr. Dingus is an established customer of Trailer One who has bought a lot of trailers from them over time. *Id.*

On cross-examination, Mr. Pund testified that he dealt with Mike Loch from Loch Trucking on the trade of the 1997 Transcraft. Tr. at 386. Mr. Pund had dealt with Mr. Loch before, but he was unsure as to his interest in Respondents' business, other than the fact that he has financed equipment for them. *Id.* Mr. Pund recalled that Mr. Loch wanted to trade in the trailer because Respondents were looking to get into a trailer that was more adaptable to their particular business. *Id.*

Mr. Pund asserted that he only assesses the value of a trailer based on its value on the road, and never considers its scrap value. Tr. at 386-387. Mr. Pund is not aware of there being a standard market value for trailers in good roadworthy condition. *Id.* at 387. Mr. Pund stated that the trailer's supports were all steel, and were rusting. *Id.* He personally evaluated the trailer to determine its trade-in value and noticed "nothing abnormal" when he looked underneath the trailer. *Id.* at 388. Mr. Pund explained that the two thousand dollar trade-in value stated on the sales order was an estimate that was done before he actually saw the trailer. *Id.* He lowered the trade-in value to one thousand dollars when he saw that the trailer had a fair amount of rust on it, although he also lowered the sale price of the Reitnouer trailer by one thousand dollars, so the deal with Mr. Loch was not affected by the Transcraft trailer's lowered value. *Id.* at 389.

Mr. Pund acknowledged that he never drove the Transcraft trailer to determine how it handled on the road, explaining that "we never drive the trailers." Tr. at 389. Mr. Pund was unaware that Complainant had subpoenaed all documents about the

Transcraft trailer in January 2006. *Id.* He only became aware of the proceeding when Mike Loch, of Loch Trucking, called him a couple of weeks prior to the hearing to inform him about a lawsuit that centered around the condition of the trailer that he had traded in with him. *Id.* at 390. Complainant's attorney showed Mr. Pund the photographs contained in RX V-3 and V-4, and asked if he recognized the trailer shown in the photographs, and if he could identify the trailer in the photographs as being the one that Mr. Loch and Respondents traded to Trailer One. *Id.* at 390-391. Mr. Loch responded as follows:

> There would be absolutely no way for me to recognize. That looks like every other Transcraft on the road. To be honest with you. There would be no way for me to know whether what, I mean, it's a Transcraft. I can tell you that just by the design of the main beam.
>
> ....
>
> There would be no way to do it. You can look at 20 different Transcrafts. They all look exactly like that.

Tr. at 390-391.

On re-direct, Mr. Pund testified that there was no tool box on the trailer when he evaluated its value, and he could not specifically remember anything about the condition of the tires, but he always checks them in determining trade-in value. Tr. at 391-392. He stated that he could identify the trailer in RX V-3 and V-4 as a Transcraft, because they are designed with holes in the frame. *Id.* at 392. The trailer traded-in by Respondents did not have a wench track on it. *Id.* Mr. Pund also explained that the trailer in the photos had an optional turn signal, but not all Transcraft trailers have that option. *Id.* He contends that the location of the turn signal is not an option, but only whether the buyer wants one or two turn signals installed. Tr. 292-293.

Testimony of Lawrence Cassell

Lawrence Cassell, the shop foreman for A&H Trucking, testified at the hearing on April 17, 2007. Tr. at 393-416. Mr.

Cassell testified that A&H Trucking has a fleet of ten trucks and a repair shop, which has been certified by the DOT to do annual inspections since 2000. *Id.* at 394-395. Mr. Cassell has been a mechanic in the trucking industry since 1985, and was a truck and heavy equipment mechanic in the Army from 1985 to 1989. After he got out of the Army in 1989, he did not work as a mechanic again until 1993, when he began a three-year stint working as a mechanic for West Point Truck, which is no longer in business. *Id.* at 395-396. From there, Mr. Cassell went into business with a partner, forming K Truck Repair. *Id.* at 396. In 1998, K Truck Repair merged with Cleveland Fleet Management, which thereafter split up. *Id.* Mr. Cassell joined another owner and merged their assets with A&H Trucking, which employed about twenty-five employees at the time of the hearing. *Id.* at 396-397. Mr. Cassell testified that A&H has five DOT-certified mechanics, including himself. *Id.* at 397.

Mr. Cassell testified that he knows Don and Crystle Morgan, and he is familiar with Lake City and CRST. Tr. at 397. CRST has a contract with A&H to do DOT inspections for its owner-operators. *Id.* Mr. Cassell described the procedures followed by A&H when DOT inspections are performed. *Id.*

> The vehicle is brought in by the owner or the driver and we keep the forms there at our facility. Which CRST provides us. Forms and stickers. One of the certified mechanics goes out, does the inspections, measures the brakes, measures the tire tread depth, checks all the lights, checks the frame stability, the floor on the trailer. We also do the trucks too....But they're two separate inspections.

Tr. at 398.

Mr. Cassell testified that the DOT requires that its certified inspectors have at least one year experience working for a commercial facility in the maintenance field. Tr. at 398. Mechanics are not required to take or pass an examination to obtain certification, but they must keep DOT forms on file at their facility. *Id.*

Mr. Cassell testified that DOT-certified inspectors are required to follow Federal Regulations when conducting a trailer inspection.

> Really it's similar to doing a pre-trip inspection as a driver. You check your tires, you check your brake thicknesses on these inspections. Which they're annotated on the sheets that we dill out. It has the thickness of the brakes, the tread depths of the tire, the movement of the actual brake chambers themselves. All the lights properly work. Any main beams or anything that are damaged or corroded. That's pretty much about it on a trailer.

Tr. at 399. He also testified that the inspection includes a structural assessment of the cross members on a trailer. *Id.*

Mr. Cassell stated that he is familiar with the 1997 Transcraft trailer, as he has personally done inspections on them in the past. Tr. at 399-400. A&H also owned two 1997 Transcraft trailers in the past. *Id.* at 400. Mr. Cassell identified the inspection report in RX F as the inspection report for the 1997 Transcraft trailer that is at issue in this case. Tr. at 400-401; RX F. Harvey Malin, a DOT-certified inspector who works as a mechanic for A&H and directly reports to Mr. Cassell, completed and signed the DOT inspection report on September 9, 2005. Tr. at 401; RX F.

Mr. Cassell testified generally about how slack adjusters work. Tr. at 403. He also opined that Respondents' trailer probably had self-adjusting slack adjusters, which could explain why the amount of movement reported for the trailer's four slack adjusters were all reported on the inspection report as one inch of movement. Tr. at 403-404. He explained that if the measurement is at one inch, it's within adjustment and does not need to be readjusted. *Id.*

Mr. Cassell stated that the inspection report was faxed to CRST, who paid for the inspection of Respondents' 1997 Transcraft trailer. Tr. at 405. Looking at the report, Mr. Cassell testified that he had no reason to believe that the inspection was not done in accordance with Federal Regulations. *Id.* Mr. Cassell testified that Mr. Malin is a competent mechanic with no work performance problems who has worked for A&H for over five years. *Id.* at 406. Mr. Cassell testified that a trailer inspection should take approximately twenty minutes to complete, and that the trailer at issue in this case passed its inspection on September 9, 2005. *Id.* at 407.

Mr. Cassell explained that other parts of the trailer's frame were inspected besides the slack adjusters, including the following:

> The suspension. You had U-bolts, spring hangers or springs, axle positioning parts. Torque rods and radiuses. On the frame, you'd have frame and cross members, the tire and wheel clearance, the headboard or headache rack if it was on the vehicle and adjustable axles and the floor condition.

Tr. at 408.

Mr. Cassell confirmed that all of these items were checked off on the inspection report, and none were found to be in disrepair. Tr. at 408; RX F. Mr. Cassell acknowledged that he does not have any personal knowledge about the trailer at issue, but explained that Federal Regulations permit the welding of cross-members on a commercial trailer. Tr. at 409. However, nothing on the inspection report indicates that any welding was done underneath Respondents' trailer. *Id.* Mr. Cassell, who also has a CDL, testified that he had only pulled vans, or containers, himself, and had never pulled a flatbed trailer with a load before. *Id.* at 410.

On cross-examination, Mr. Cassell testified that the majority of his company's business comes from truck repairs, and is not dependent on annual Federal inspections. Tr. at 411. Mr. Cassell was first approached by Don Morgan about testifying at the hearing. *Id.* He has known Mr. Morgan for about five years. *Id.* Mr. Cassell recognized Mr. Morgan as the owner of the 1997 Transcraft trailer at issue in this case, because Lake City owned the trailer, and because he knew that Don Morgan was the owner of Lake City. *Id.* at 412. He knew that Mr. and Mrs. Morgan had control over who would haul the trailer and where it would be inspected. *Id.* Mr. Morgan had talked to Mr. Cassell about testifying "months ago" and he contacted him again about a week prior to the hearing to confirm when he needed to be there. *Id.*

Mr. Cassell was familiar with the requirements of a driver's pre-trip inspection, which do not expressly require checking the trailer for structural problems. Tr. at 413-414; CX 34. However, in his opinion, the driver should check all structural parts of a trailer and truck during a pre-trip inspection because the list of items on the pre-trip report is a minimum guideline. *Id.* Mr. Cassell acknowledged that there is no way to check the structural integrity of a trailer, unless the

inspector got underneath the trailer. Tr. at 415. However, contrary to Complainant's attorney's assertions, Mr. Cassell testified that it is possible to test the slack adjustment without releasing the brakes, if the inspector pulls on the adjustors, which is a common procedure for testing the slack adjustors. *Id.* A&H normally measures the movement of the slack adjustors in quarter-inch increments. *Id.* When asked what he thought the odds were that a used Transcraft trailer that's a couple of years old, and that had just come off of road service, would have the same measurement of movement on all four slack adjustors, Mr. Cassell responded by stating that "[he] couldn't answer that." *Id.* at 415-416.

Testimony of Al Clausen

Al Clausen, a truck driver called by Respondents as an expert witness, testified at the hearing on April 17, 2008. Tr. at 416-467. Mr. Clausen is a high school graduate and has been a truck driver since 1976, and has hauled commodities made of steel, mostly steel coils, since 1980. Tr. at 417, 448; RX HH, II. He currently drives a Peterbuilt tractor and an aluminum Ravens Magnum trailer, which is forty-five feet long. *Id.* Mr. Clausen owned a Transcraft trailer for approximately two years and, as an owner-operator, he drove for six years for a company that owned sixty of them. *Id.* at 417-418. Mr. Clausen is familiar with the handling characteristics of the 1997 Transcraft trailer, testifying as follows:

> A Transcraft trailer made after 1994 particularly a TL-2000 model is a flexible trailer. There are no interframe cross members on this trailer. There're strictly no cross members that go from side rail to side rail. The steel that the main rails are made of are made to be flexible. That's the nature of the trailer. And its handling characteristics are such that a single coil placed on it, it will flex.
>
> ....
>
> They bounce. That's the way they're made.

Tr. at 419.

Mr. Clausen testified that he has been recognized as an expert in various courts, and acknowledged that he has provided Respondents' attorney's office with expert opinions on truck

safety and truck handling in the past, and he has testified either by deposition or at trial in "well over a hundred cases[.]" Tr. at 419-420.

Mr. Clausen considered several pieces of information in preparing his expert report, including the depositions of Harry Smith and Jacob McNutt, taken on December 23, 2006; the depositions of Crystle and Don Morgan, taken on November 22, 2006; the complaint filed in this case; various photographs of damaged Lake City equipment; Mr. Smith's daily driver logs, dated from September 5, 2005, to November 9, 2005; a copy of Lake City's handbook; a copy of CRST's no trailer drop policy; a copy of the DOT inspection report for the trailer from September 9, 2005; and a copy of a statement showing a trailer repair done on August 14, 2004. Tr. at 421-422; RX HH, II.

Having read Mr. Smith's deposition, Mr. Clausen gave the following opinion:

> My opinion is that the handling characteristics described by Mr. Smith are the normal handling characteristics of a TX-2000 1997 Transcraft. They flex. They bounce as they go down the road. And that's their normal handling characteristics.

Tr. at 423.

Respondents' attorney gave a model of a truck and trailer to Mr. Clausen to demonstrate, based on his review of Mr. Smith's and Mr. McNutt's depositions, what happened at the Petro truck stop in Effingham, Illinois, on November 8, 2005. Tr. at 424. Mr. Clausen confirmed that he was familiar with the truck stop where the incident occurred, having been there "at least 25 times" when he used to drive between St. Louis and Cleveland, although he has not been there since 2002. *Id.* Based on aerial photographs of the truck stop obtained online, he confirmed that the truck stop "appears unchanged" since he was last there in 2002. Tr. at 424-425; RX JJ. Mr. Clausen testified that due to the configuration of the truck stop's store and fuel islands, it is not possible for a truck to turn around inside the fuel area to go back out the same way it came in without putting the truck and trailer in a jackknife position, so there are entrance and exit roads that drivers must use to avoid jackknifing their trucks. Tr. at 426-429.

Mr. Clausen reviewed the diagram based on Mr. Smith's recollection of the incident at the truck stop on November 8,

2005, which Respondents' attorney had created during his earlier cross-examination of Mr. Smith at the hearing. Tr. at 429; RX FF. *Id.* Mr. Clausen testified that the configuration of the tractor and trailer in the diagram was not a jackknife situation. *Id.* In addition, he noted that Mr. Smith testified in his deposition that the back wheels of the trailer were "almost off the ground", but at the hearing he testified that they were off the ground. Tr. at 430; RX BB at 109-110. Based on the circumstances described in Mr. Smith's deposition, Mr. Clausen used the model truck to demonstrate how the conditions would affect the truck and trailer; he explained his opinion as follows:

> The trailer wheels and this type of tractor/trailer could and would not have been able to come off the ground unless that tractor were at a 90 degree position. And the reason that is, is because the fifth wheel has a fulcrum, a hinge in the center. And it allows the trailer to pivot.
>
> ....
>
> This fifth wheel has a hinge, a fulcrum, and it will not hinge sideways allowing the trailer wheels to come off the ground if the trailer is somewhat straight or a 60. This angle. It won't pivot the back tires off the ground unless the trailer is in approximately this position.
>
> ....
>
> About a 90 degree position, the fifth wheel will pivot forward on its fulcrum. And it will allow ... the trailer to flex and twist. It will allow those wheels to come off the ground.

Tr. at 431-432; RX FF.

Mr. Clausen opined that the incident at the truck stop was not caused because Respondents' trailer was defective. Tr. at 433. "This is a driver error in this occurrence. There's a very simple reason for it happening, and that is the fifth wheel pivots from too sharp a turn." *Id.* He testified that an experienced driver could have remedied the situation using a series of maneuvering techniques, without resorting to the method employed by Mr. Smith and Mr. McNutt. *Id.* at 432-433.

Mr. Clausen believes that the wench track was damaged when the tractor was unhooked from the trailer at the angle that they were positioned at in relation to one another. Tr. at 435. He opined that "the leading edge of the fifth wheel rubbed across the bottom of the first track getting wheel grease on the strap as depicted in the picture [in RX V-6]." *Id.*

Mr. Clausen does not believe that the physical condition of the trailer was related to the trailer having flexed in the manner that it did during the incident. Tr. at 435. He explained that if the trailer was not structurally sound, the damage would have remained and the trailer would not have been able to be reattached and hauled without incident for forty or fifty more miles, or at anytime after that. *Id.*

> Had there been any structural problems, either prior or caused by this jackknifed position or by the trailer leaning, pivoting on the wheel, likely every turn that he made from the truck stop to [Granite City] there would have been similar problems.

Tr. at 436.

Mr. Clausen has been a DOT-certified inspector for twenty years, and is familiar with Federal requirements on trailer inspections. Tr. at 437. He testified that it is a truck driver's duty to maintain his truck. Tr. at 437. Having reviewed the inspection report for Mr. Smith's trailer, Mr. Clausen testified that there would be no reason for the inspector to look under the hood when inspecting the trailer. Tr. at 437-438; RX F. He also stated that he has inspected trailers in the past and found the slack adjuster measurements to be the same on all four tires, particularly if the trailer received regular maintenance, so it was not unusual that all four slack adjuster measurements reported on the inspection report were identical. Tr. at 438-439; RX F. Federal Regulations require that all trailers manufactured after 1992 must have automatic slack adjusters, so he is not surprised that the measurements were the same. Tr. at 441; RX F.

Mr. Clausen testified that Federal Motor Safety Regulation 396.13 applies to pre-trip inspections, and imposes an obligation on the driver to do a walk around inspection his or her truck and trailer. Tr. at 441-442. Generally, the inspection can be done without crawling underneath the truck, and the log sheet should be completed at the end of work each day. *Id.* at

442. Mr. Clausen asserts that when a driver notices that something is wrong structurally with his or her truck or trailer, Federal Regulations require that he or she notate the problem on the log sheet under the section for "driver's daily maintenance, vehicle inspection". *Id.* at 443. The "other" section on log sheet gives the driver the option of reporting any defects that are not specifically delineated on the log sheet, or the driver can check a box confirming that he or she did not find any defects during the inspection. *Id.*

Mr. Clausen testified that, in preparing his expert report, he compared Mr. Smith's and Mr. McNutt's daily log sheets on the day of the incident to their testimony in their depositions and noted that the logs did not match their testimony. Tr. at 421-422, 444; RX HH, II. Mr. Clausen stated that "[e]very truck driver is responsible for maintaining an accurate record of his or her daily activity." Tr. at 444.

On cross-examination, Mr. Clausen testified that Respondents' attorney retained him as an expert on March 7, 2007, and that he had interviewed Mr. and Mrs. Morgan to learn more about the trailer at issue, including information about repairs to the repairs that Mr. Morgan had affected to the trailer's floor. Tr. at 446-447. Mr. Clausen acknowledged that Mr. Morgan talked to Mr. Smith about hiring him, completed the inventory with him on the first day, and fielded complaints about the equipment, all of which are normal management functions. *Id.* at 448.

Mr. Clausen testified that Mr. and Mrs. Morgan told him that they had traded in the trailer as a down payment on a lighter aluminum trailer. Tr. at 448. He believed that they had received three thousand five hundred dollars for the trailer, which he thought was reasonable considering the width of the trailer and that they had removed several items from the trailer before trading it in, including a set of good tires, the wench track, and the tool box. *Id.* at 449. He was not certain, but he believed that it was Mr. Morgan who had removed the tires from the trailer. *Id.* at 450.

Mr. Clausen testified that he had never seen the photographs contained in RX V-3 and V-4. Tr. at 451. He also acknowledged that he never actually saw the trailer at issue in this case, and he has not attempted to locate it. *Id.* Mr. Clausen stated that he had never heard of a broken cross member causing an accident, although a cracked main rail would create an accident risk. *Id.* at 452. Although a magnaflux test could

determine whether there were cracks in the trailer's mainframe rails, Mr. Clausen did not know if the test was ever done on Respondents' trailer, and testing the trailer is no longer an option because it is not available to be tested. *Id.* at 453-454.

Mr. Clausen was aware that the truck had been sandblasted and painted in 2004, and a small section of the wood floor had been replaced. Tr. at 454. He also thought that a cross member may have been "section repaired and welded as well," although he did not have a photograph of that. *Id.*

Mr. Clausen opined that the bounce that Mr. Smith reported was just a normal handling characteristic of a Transcraft trailer, although he acknowledged that there is no way to measure the bounce in the trailer to determine whether or not it was normal. Tr. at 454-455. He also acknowledged that he did not know when the aerial photograph of the Petro truck stop, which he obtained on the day of the hearing from Yahoo Maps, was actually taken. Tr. at 455; RX JJ. He was unaware that an installation was put in for "Idle Air" at the truck stop. Tr. at 455.

Mr. Clausen testified that he has had trailers with structural problems, but "[t]hey just don't return to normal. They just stay bent and stay broken." Tr. at 456. Mr. Clausen stated that, assuming the Morgan's had the financial ability to do so, they could have purchased the new trailer and kept the old trailer for the purpose of using it as evidence in this case, because the new trailer was not available until 2006, but he did not know what their financial situation was like. *Id.* at 457.

Mr. Clausen testified that an inspector would need to release the brakes on the truck in order to measure the slack adjustors. (TR 457-458). He also asserts that a normal pre-trip inspection should take about ten minutes to do, about five minutes for the tractor and five for the trailer. *Id.* at 458. A normal DOT-inspection of a trailer should take about ten to fifteen minutes. *Id.* Mr. Clausen testified earlier that Regulation 396.13 requires drivers to note any defects on their daily log, but on cross-examination, he was presented with CX 34, which contained Regulation 396.11, driver vehicle inspection reports. *Id.* at 441-442, 459. He stated that 396.13 also covers drivers' pre-trip and post-trip reports, but acknowledged that 396.11 contains a list of minimum requirements for pre-trip inspections, which does not include any requirement that a driver get underneath the trailer to look for structural

problems. *Id.* at 459-460. Complainant's counsel also presented Mr. Clausen with CX 35, which contains Regulation 396.13. *Id.* at 460. He acknowledged that this Regulation does not cover any requirement that drivers notate defects on their daily log. *Id.*

Mr. Clausen testified that Transcraft trailers have an average lifespan in comparison to other steel trailers, although the amount of flexing they endure can affect their durability and is dependent on the commodity hauled on the trailer. Tr. at 460-461.

Mr. Clausen could not speculate as to the percentage of truck drivers in the United States who keep honest logs. Tr. at 462. He stated that DOT inspectors who monitor and examine log sheets during routine DOT audits pick up on any large amounts of falsification and fine the motor carrier accordingly. *Id.* He did not know if Lake City's logs have ever been audited by the DOT, or if they had any program to monitor driver logs for accuracy. *Id.* at 462-463. Mr. Clausen contends that fuel com-checks are time-dated transfers that can be checked against a driver's logs to confirm its accuracy. *Id.*

Mr. Clausen testified that Apetong is the hardest wood available for trailer floors and is the standard wood used in the industry for making permanent repairs to a section of a trailer's floor. Tr. at 463.

Mr. Clausen opined that the trailer at issue would have handled completely differently when Mr. McNutt hauled heavy machinery than it would when it was used to haul steel coil, because the machinery's weight would be more evenly distributed, causing considerably less bounce and flex action. Tr. at 464; RX AA. He also stated that the 1993 Transcraft composite trailer that Mr. McNutt currently pulls would also handle completely differently than the trailer at issue in this case because there is considerably less flex action on a composite trailer. Tr. at 465.

Mr. Clausen clarified that his earlier testimony about a cross member section being repaired was based on Mr. Smith's testimony, and not on anything that Mr. or Mrs. Morgan told him. Tr. at 465-466. He stated that a section repair is quite common and poses no safety risk as long as it's welded in properly; it is also consistent with Federal Motor Carrier Regulations. *Id.* at 466. He acknowledged that if the repair was done incorrectly, there could be a structural problem, and the amount of bounce and flex reported by Mr. McNutt when he drove the trailer would

tend to be an indicator that there was a structural problem. *Id.* at 466-467. He noted that if one cross member section was repaired or broken that it would not contribute to the up and down flex of the frame rail, but he did not really know what, if any, problems the trailer had. *Id.* at 467. Mr. Clausen asserts that Apetong wood would strengthen the structural security of the trailer, but only in the area in which it was used for the section repair. *Id.*

Testimony of Kenneth Morrison

Kenneth Morrison, who is the Terminal Manager for Lake City provided a signed written statement to the OSHA investigator on December 21, 2005, testified by deposition on November 22, 2006, and testified at the hearing on May 9, 2007. CX 10; CX 10 at Ex. B; Tr. at 476-517.

Mr. Morrison has been Lake City's Terminal Manager, or dispatcher, for approximately two and a half years. Tr. at 477; CX 10 at 5. Crystle Morgan is his immediate supervisor. Tr. at 477; CX 10 at 12. Prior to working at Lake City, Mr. Morrison was a Terminal Manager for CRST. He testified that CRST and Lake City agreed to do business with each other. He and Crystle Morgan agreed that she would take him on as an employee for a one-year term, after which she could decide if his services were needed or up to her standards. CX 10 at 10. He explained that CRST had decided to eliminate its own facility in the area and to contract Lake City as an agent. *Id.* at 11. His job duties include coordinating movements between the drivers, the logistics between moving freight for Respondents' customers, and to make sure that the operation of the terminal runs smoothly. Tr. at 477; CX 10 at 12. Lake City has its own trucks and owner-operators that are leased to CRST, and Mr. Morrison provides dispatching services for all of these trucks. Tr. at 477-478. Mr. Morrison reviewed his OSHA statement and deposition transcript before testifying at the hearing. *Id.* at 478.

Mr. Morrison testified that Mr. Smith began working for Lake City in September 2005, and was assigned to drive a white Freightliner tractor with a straight Transcraft flatbed trailer without a side kit. Tr. at 478-479. If any problems with the equipment are brought to his attention by the drivers or in regular scheduled inspections, as Terminal Manager, Mr. Morrison is responsible for reporting the problems to Mrs. Morgan. Tr. at 479; CX 10 at 13. Mr. Morgan did not meet Mr. Smith on the day he was hired, but he testified that he met him "probably about three times" prior to November 9, 2005, as most of their

conversations were by phone. Tr. at 479. He stated that he had no personal problems with Mr. Smith. *Id.* at 480.

Mr. Morrison disputed Mr. Smith's testimony that the two had met for the first time on the day that Mr. Smith was fired. Tr. at 480. In his deposition, Mr. Morrison testified that he was present on the day that Mr. Smith was hired, and that he believed that Mr. Liuzzo had done the inventory with Mr. Smith at the time. CX 10 at 27. He stated that he did not see them do the inventory himself though. *Id.* "My office is upstairs; the trailers are out in the yard. But I was on the property." *Id.* At the hearing, Mr. Morrison stated that he had never met Complainant's wife, Michelle Smith, and he was off on Labor Day weekend in 2005. Tr. at 504.

Mr. Morrison testified that Mr. Smith never told him that there was any kind of safety or operational defect or problem with his trailer. Tr. at 480. He spoke to Mr. Smith by two-way Nextel phone "[p]robably four times a day" and he never called in to complain about his equipment. *Id.* at 481. If he had done so, Mr. Morrison would have reported the issue to Crystle Morgan immediately, although he would not have documented the complaint in writing. *Id.* Mr. Morrison testified that Mr. McNutt never called in any equipment complaints on behalf of Mr. Smith either. *Id.* He had no reason to believe that there was a safety problem with Mr. Smith's trailer prior to November 8, 2005, when Mr. Smith called him to report the accident. *Id.* at 481-482.

Mr. Morrison testified that he is obtainable twenty-four hours a day, and that if a driver needed his assistance he could call the toll-free number for the office, which is forwarded to his cell phone, or he could reach him using the two-way phone. Tr. at 482. On November 8, 2005, at about 7:30 in the morning, Mr. Smith called Mr. Morrison on his cell phone while he was driving to work. Tr. at 483; CX 10 at 17-18. Mr. Morrison recalled the conversation as follows:

> I was on my way to work. It was a little after 7:00. Harry had called me on my cell phone, because we are available 24 hours a day. He sounded a little distraught or angry and said, 'Tell Crystle Morgan to replace the equipment or myself.'
>
> And I said, you know, 'What's wrong?' He goes, 'I lost – I almost lost the coil and the truck.' And I said, 'Well, what happened?' And he didn't

> explain. He said, 'Just tell Crystle Morgan to replace myself or the equipment,' and he didn't elaborate what happened.
>
> I asked him, I said, 'Do you need a tow truck or any assistance?' And he goes, 'No, everything's all right. I'm going to go on and deliver.' And that was basically it. And I hung up immediately with him and called Crystle at her home and informed her of the situation.

CX 10 at 17-18.

During the conversation, Mr. Smith did not indicate that he had tried to reach him earlier that day, and there was no indication on his cell phone that he had missed any calls and he did not have any voice mail either. Tr. at 484-485. Mr. Morrison described Mr. Smith as sounding upset or angry during the call, and he would not tell him what happened, and commented about replacing "himself or the equipment." *Id.* at 485.

In his OSHA statement, Mr. Morrison reported his response to Mr. Smith's incident report as follows:

> [Mr. Smith] told me that he was going on for the delivery so I assumed he had taken care of it. He did not ask for any assistance. If it had been too bad, he would have needed a tow truck or crane to upright the steel and trailer. Since he said he was completing the delivery, I assumed that there was no damage to the trailer and Harry did not say that the trailer was damaged or needed repaired. After dropping off the coiled steel, Harry picked up a load of bar steel in Illinois and delivered it to Cuyahoga Heights, Ohio.

CX 10, Ex. B.

At the hearing, Mr. Morrison testified that when he got off the phone with Mr. Smith, he immediately called Mrs. Morgan on her cell phone to report what had happened, and she told him that she would check into it. Tr. at 485. At his deposition, he testified that he called her at home to report the incident. CX 10 at 18. He was still in his car at the time, so he does not know what she did at that point. Tr. at 485-486. Mr. Morrison testified that he reported the incident to Mrs. Morgan, not because he was asking her to take any disciplinary action

against Mr. Smith, but because "[a]nything safety related [he] report[s] to Crystle." Tr. at 505-506; CX 10-19. In his OSHA statement, Mr. Morrison stated: "On November 8, 2005, at approximately 8:00 a.m., I told Crystle Morgan about my conversation with Harry. I interpreted Harry's statement to mean that he was quitting." CX 10, Ex. B. Mr. Morrison explained that he interpreted Mr. Smith's statement to "replace the equipment or himself" to be a resignation because he knew that Respondents would not replace the equipment because nothing was wrong with it. CX 10 at 36.

Later that day, after delivering the steel coil in Granite City, Illinois, Mr. Smith called in to ask about picking up his next load. Tr. at 486-488. Mr. Morrison asked him, "Does the trailer need to be looked at before it is moved?" *Id.* Mr. Smith informed him that it did not and that he was ready to reload. *Id.*

Mr. Morrison testified that he has been dispatching for CRST for thirteen years and that an incident described the way that Mr. Smith had described it to have occurred was "usually either an unsecured load or abrupt movement by the driver." Tr. at 486. However, Mr. Morrison testified that, at the time of the incident, he was not able to form an opinion as to whether Mr. Smith had done something improper, because when he tried to talk to Mr. Smith about what happened he would not elaborate. Tr. at 486; CX 10-19.

Mr. Morrison dispatched Complainant to pick up a load of steel bars from Alton Steel in Illinois, for delivery in Cuyahoga Heights, outside of Cleveland, Ohio. Tr. at 487-488. Mr. Morrison spoke to Complainant one more time that day, when he called in to get a fuel advance after he had picked up his load in Illinois, before returning to the Cleveland area. *Id.* at 487. When Mr. Smith arrived in Cuyahoga Heights, he called Mr. Morrison asking to be dispatched. *Id.* at 488. Mr. Morrison told him that he was instructed to come back to the yard. *Id.* Mr. Smith asked why he was not able to re-load to go back to Granite City with Mr. McNutt, who had already been dispatched. *Id.* at 489. Mr. Morrison testified that he directed Complainant to return to the yard, "[p]er instruction of Crystle Morgan." Tr. at 489; CX 10 at 24-25. Mr. Morrison testified that Mrs. Morgan had told him the previous day that "she was going to accept his resignation on the comment that he made to [them]." Tr. at 489; CX 10 at 25.

Mr. Morrison was present on the morning of November 9, 2005, when Mr. Smith returned to the yard somewhere between ten and eleven o'clock. Tr. at 490. Mr. Smith parked the truck and came upstairs to the office where he met with Mrs. Morgan, who informed him that she was going to accept his resignation. Tr. at 490; CX 10 at 29. Mr. Morrison was in the office at the time, but "was on the other side of the room on the phone." *Id.* At the hearing, Mr. Morrison estimated that he was probably ten to fifteen feet away and could hear "bits and pieces" of their conversation, but he was "on the phone quite a bit because that is the busiest time of the morning." Tr. at 490-491. At his deposition, he stated that he could "hear the majority of [the conversation]." CX 10 at 29. Specifically, he recalled hearing Mrs. Morgan tell Mr. Smith that she accepted his resignation. Tr. at 491; CX 10 at 29. Although he couldn't precisely recall Mr. Smith's response, he did hear him say "something about the issue of the equipment, about replacing him over an issue over equipment." Tr. at 491. He did not hear what Mrs. Morgan said after that, but he remembered that the conversation was "[p]retty much amicable." *Id.* He recalled that when Mrs. Morgan asked Complainant to do an inventory of the equipment, he got a little angrier at that point. *Id.* at 491-492.

Mr. Morrison did not hear Mrs. Morgan ask Mr. Smith for his Nextel phone, but it is part of the inventory of equipment issued to Lake City's drivers. Tr. at 492; CX 10-29. As Terminal Manager, he is not responsible for inventorying the equipment. Tr. at 492. Mr. Morgan played no roll in inventorying the equipment and was not present that day. *Id.* Mrs. Morgan and Robert Liuzzo inventoried the equipment. *Id.* Mr. Morrison thought that Mr. Liuzzo was downstairs with the equipment, and not present, during the conversation between Mrs. Morgan and Complainant, although "he may have been up there for a moment or two when he came up to get the inventory sheet." *Id.* at 493. Mr. Morrison does not remember how long Mr. Liuzzo was in the office, and does not know if he heard or said anything. *Id.* Mrs. Morgan "had called [Mr. Liuzzo] to do an inventory of the trailer ... when it came in". CX 10 at 27. She had made the call before Mr. Smith arrived at the yard. *Id.* Mr. Morrison did not hear any discussion between Mrs. Morgan and Mr. Smith about the DOT. Tr. at 494. He also stated that he did not have any conversation with Mr. Smith when he came into the office that morning, and he did not say anything during the conversation between Mrs. Morgan and Mr. Smith. *Id.*

Mr. Morrison testified that he is aware of the Federal Regulation requiring truck drivers to accurately log their

activities and Lake City did not impose a requirement on anyone to create a false log. Tr. at 494-495. At no point did Mr. Smith complain to him about being asked to work more hours than he should have. Drivers are required to personally fill out their own logbooks, which are provided by CRST. *Id.* at 495. CRST requires all drivers to scan their log sheets and paperwork into the Pegasus System, which is available at truck stops. *Id.* As Terminal Manager, Mr. Morrison does not see the drivers' logs "unless there is an issue with missing logs or something and then [he] can call up Pegasus and ... see what is missing for the drivers." *Id.* at 496.

Mr. Morrison was presented with a copy of a driver's log and the relevant pages were marked and admitted as RX LL. Tr. at 496-499. He was familiar with the logbook and he confirmed that it is assigned to all Lake City drivers. *Id.* at 499. He testified that Mr. Smith, like all truck drivers, was required to fill out a daily log sheet and a monthly maintenance form, which are included in the logbook. *Id.* Mr. Smith's logbook contained the same instructions as those found in RX LL, and he never asked any questions about his responsibility to comply with the logging requirement. *Id.* at 500. Mr. Morrison testified that Mr. Smith never complained to him about any violation of DOT Regulations pertaining to him or Lake City or CRST. *Id.*

From his experience as Terminal Manager, Mr. Morrison stated that in November 2005, Heitman Steel, the customer to whom Mr. Smith was delivering the steel coil when the incident occurred, received deliveries twenty-four hours a day. Tr. at 500-501. In November 2005, drivers could pick up loads from Alton Steel up until eight o'clock at night. *Id.* at 501. The typical trip was from the Cleveland area to Heitman Steel in Granite City, Illinois, with a return trip from Alton Steel to the Cleveland area, unless the time frame precluded the driver from picking up a load from Alton Steel. *Id.* In that situation, drivers were also able to re-load out of Heitman Steel or U.S. Steel in Granite City instead. *Id.*

Mr. Morrison testified that he never directed Mr. Smith to ignore Federal Regulations that limit truck drivers to a maximum of ten hours driving and fourteen hours on duty each day, nor did he dispatch Mr. Smith to deliver a load that would have resulted in his noncompliance with the Regulations. Tr. at 501-502. He contends that a driver can legally make the ten hour drive from Cleveland to Granite City, Illinois, in a twenty-four hour period. *Id.* at 502.

Mr. Morrison testified that on one occasion, Mr. Smith threatened to leave Majestic Steel without being loaded because he had to wait too long to be loaded. Tr 502-503; CX 10 at 13-14. He estimated that Mr. Smith had been waiting about a half hour to forty-five minutes from his appointment time. *Id.* at 14.

> I explained to Harry, you know, that's not the procedure, that is not good business practice and that he needed to stay in the mill to pick up a load.

Tr. at 503.

Mr. Morrison reported the incident to Mrs. Morgan, but he was not sure if Mr. Smith was actually disciplined for it or not. CX 10 at 15.

Mr. Morrison testified that on another occasion Mr. Smith voiced concerns about the deductions that were coming out of his paycheck and Mr. Morrison directed the complaint to Mrs. Morgan. Tr. at 503; CX 10 at 15-16. He did not report Mr. Smith's complaint about pay because he thought that he should be disciplined for it, but because they want to keep all employees happy and quickly resolve any issues that they may have. CX 10 at 15-16. He testified that if Mr. Smith complained about anything, he directed it to Mrs. Morgan, because he understood it to be her responsibility to deal with Mr. Smith about those matters. Tr. at 503; CX 10 at 12.

Mr. Morrison testified that, in his business dealings with Mr. Smith as a driver, he thought he was honest. Tr. at 504-505; CX 10 at 13. He also believed that he did a good job for the company. *Id.* He stated that Mrs. Morgan decided that Mr. Smith would be separated from his employment at Lake City, "[a]fter his conversation". Tr. at 505; CX 26. Mr. Morrison acknowledged that he had never heard of the STAA before this case arose, although he regularly talks to the drivers and deals with drivers' complaints. Tr. at 505; CX 10 at 7.

Mr. Morrison testified that Mrs. Morgan told Mr. Smith that she accepted his resignation when he first arrived at Lake City's office on November 9, 2005. Tr. at 506. He was asked to explain why he stated in his earlier testimony that the conversation between Mrs. Morgan and Mr. Smith had started out amicably, when in his deposition he testified as follows:

> 'He came up to the office. Crystle told him you know what the decision was and Harry got a little upset, you know, and Crystle told him that it was the best thing that she accepted his resignation.'

Tr. at 507-508; CX 10 at 27-28.

Mr. Morrison acknowledged that he was on the phone most of the time after Mr. Smith's job was terminated. Tr. at 508. When asked whether Mr. Smith was upset because he wanted his trailer replaced and not his job terminated, Mr. Morrison responded, "At no point in time did he specifically say what. He said equipment. He never mentioned trailer or tractor. He said equipment." Tr. at 508; CX 10 at 30. Mr. Morrison acknowledged that Mr. Smith was clearly not happy about his job coming to an end. Tr. at 509.

Mr. Morrison testified that Mrs. Morgan wrote up a statement about what happened after Mr. Smith left that day. Tr. at 509-510; CX 10 at 22, CX 10 at Ex. B. She showed him the statement and asked him to confirm that it was accurate, but she did not ask him to make his own statement. Tr. at 510; CX 10 at 22-23. Complainant's counsel asked Mr. Morrison about the following passage in Mrs. Morgan's statement: "I also told him I was aware he had made a threat that he was going to take our equipment to DOT." CX 1; CX 10 at 23, Ex. B-3. He confirmed he was not the source of this information, and Mr. Smith never told him that he might take the trailer to the DOT for inspection. CX 10 at 21.

Mr. Morrison was aware that Mrs. Morgan had received a letter from Complainant after November 9, 2005. Tr. at 510; CX 10 at 32. Although he did not read the letter and could not confirm its exact contents, Mr. Morrison was aware that Mr. Smith stated that he had not quit and that he was ready, willing, and able to return to work. *Id.* However, Mrs. Morgan did not want Complainant to come back to work, because "[t]here was already a replacement driver going through recruiting." Tr. at 510-511; CX 10 at 32. The replacement driver never actually started working for Respondents, but Mrs. Morgan did not rehire Mr. Smith. Tr. at 511.

Mr. Morrison verbally reported all incidents and complaints to Mrs. Morgan, so there is no written record of their conversations. Tr. at 511. He clarified his earlier testimony regarding his phone call to Mrs. Morgan on November 8, 2005, by stating:

> I informed her of the issue per Harry's conversation; the tractor and trailer almost tipping or flipping and his comment about replacing himself or the equipment.

Tr. at 511-512.

Mr. Morrison testified that Mr. Smith called back after delivering the steel coil on November 8, 2005, and asked to be dispatched because he wanted to keep working. Tr. at 512. He testified that CRST's safety department checks driver log entries against their dispatches to determine whether logs are accurate. *Id.* When this check reveals a discrepancy or that a driver has exceeded his time limitations, the driver receives a letter informing him of the violation. *Id.* at 513. Lake City receives a report of the violation from CRST, but does not independently check the logs against the dispatches. *Id.*

Mr. Morrison confirmed that Mr. Smith had mentioned to him that he wanted to be part of CRST's lease-purchase program, and earlier in his employment, had stated that he wanted a trailer with a side kit. Tr. at 515. He also confirmed that CRST and Lake City both have policies requiring drivers to report all accidents. *Id.* Mr. Morrison testified that Mr. Smith did not specifically tell him that he was involved in an accident on November 8, 2005, as he would not elaborate when asked for details. *Id.* at 516. Mr. Smith also did not report that the trailer had sustained damage during the incident. *Id.* He also stated that no one at Lake City had ever directed him to not have the trailer taken to a garage to be evaluated. *Id.* at 517. "At no point in time would [he] ever send anything down the road that was unsafe for anybody." Tr. at 517; CX 10 at 31-32.

Testimony of Robert Liuzzo

Robert Liuzzo provided a statement to OSHA on January 6, 2006, and testified by deposition on November 22, 2006, and at the hearing on May 9, 2007. CX 6, 11; Tr. at 518-551.

Mr. Liuzzo testified that he permanently leased his truck through CRST, and is dispatched by Lake City. Tr. at 519. He also served as the Safety Director for Lake City for about a year and a half, and held that position at the time Mr. Smith worked for Respondents. *Id.* As the Safety Director, his duties required that he "[c]heck equipment out to make sure that it was safe, all chains, binders, tarps. Check equipment in, check

equipment out." Tr. at 520; CX 11 at 14. Mr. Liuzzo testified that he was a full-time administrative employee of Lake City and did not drive a truck at that time. Tr. at 520. He left the position in March 2006, to become an owner-operator leased to CRST, because he could make more money. *Id.*

Mr. Liuzzo met Mr. Smith for the first and only time on November 9, 2005, the day that Complainant lost his job. Tr. at 520. He testified that he was not aware of any of the circumstances that transpired prior to that day. *Id.* at 521. He was cleaning out the storage shed when Mr. Smith drove into the yard that day. *Id.* Mr. Liuzzo previously examined Mr. Smith's truck and trailer in September 2005, and determined that they were safe to operate. *Id.* Mr. Smith never complained to him about any safety problem with the trailer, nor had anyone at Lake City informed him that Mr. Smith had complained. *Id.* at 522. During his deposition, Mr. Liuzzo acknowledged that Mr. Smith complained that the trailer was unsafe when he drove him home on November 9, 2005. CX 11 at 21-22. He stated: "[Mr. Smith] said it was unsafe; something was wrong with it. I checked it out and I couldn't find nothing wrong with it." *Id.* at 22). Mr. Liuzzo asserts that he got underneath the trailer and checked the structural supports, but that "[e]verything was intact." *Id.*

Mr. Liuzzo testified that he was present, but did not participate in the conversation between Mrs. Morgan and Mr. Smith on November 9, 2005. Tr. at 523; CX 11 at 6-7. Mr. Liuzzo noticed that there was damage to the wench track rail on the trailer, so he went up to the office to find out what happened. *Id.* at 523. He did not see any other damage to the truck. *Id.* Mrs. Morgan was already involved in a "heated conversation" with Mr. Smith when Mr. Liuzzo entered the office. *Id.* at 524. Mr. Liuzzo recalled the following exchange:

> I heard Crystle say that she wanted to know what happened to the trailer.
>
> Harry Smith was getting very irritated and said that we didn't want to see him get violent.
>
> I was concerned about what was happening in the office there at that time.
>
> ....

> He got very irritated and he started walking out and then he came back and got more madder and then finally he did walk out.

Tr. at 524-525.

Mr. Liuzzo sat on the couch in the office for about five minutes, but never heard any discussion about Mr. Smith's resigning or being fired, about him going to the DOT, complaining about safety, or what actually happened to the trailer. Tr. at 525; CX 11 at 7. Mr. Liuzzo went back downstairs to try to figure out what happened to the trailer and noticed that one of the tarps was missing. Tr. at 525. In his deposition, Mr. Liuzzo recalled that Mrs. Morgan repeatedly asked Mr. Smith what happened to the tarp during their conversation in the office. CX 11 at 10-12. However, at the hearing, he testified that Mr. Smith was still in the office when Mr. Liuzzo went back downstairs to begin inventorying the equipment. Tr. at 526. When Complainant came down from the office, he refused to participate, although Mr. Liuzzo testified that it is not customary for drivers to do so. *Id.* It is unclear from his testimony how Mrs. Morgan would have known that the tarp was missing during her conversation with Mr. Smith, if Mr. Liuzzo had not begun to inventory the equipment yet. Besides the missing tarp, Mr. Liuzzo also noticed that a lock was missing. *Id.* He also noticed that "it looked like [Mr. Smith] had painted [the tires] with some kind of white marking." *Id.* At his deposition, Mr. Liuzzo did not recall asking Mr. Smith about the missing lock, or that Mr. Smith accounted for all of the chains and then locked them with the lock after the inventory had been completed. CX 11 at 21.

Mrs. Morgan arranged for Mr. Liuzzo to drive Mr. Smith home after he removed his personal property from the truck. Tr. at 527. Mr. Liuzzo remembered the drive as follows:

> At first, he didn't want to talk. He was on the phone calling his wife. He then started talking to me. I wanted find out what happened to the trailer. He just changed the subject on me and started talking about how he wanted to be a owner/operator.

> Basically, I asked him what he was doing all these years and everything and he just said that he wanted to get in his own truck.
>
> ....
>
> I asked him what was wrong with the trailer and he couldn't tell me. I went over that whole trailer and I see nothing wrong with that trailer.
>
> ....
>
> I went over the trailer in the yard. I was looking up under the trailer when I seen that winch track bent. I was trying to figure out how it got bent.

Tr. at 527-528.

Mr. Liuzzo testified that Mr. Smith did not respond when asked about what happened to the trailer. Tr. at 528; CX 11 at 13. Although at the hearing Mr. Liuzzo contended that Mr. Smith did not talk about what was wrong with the trailer, at his deposition, he stated: "[Mr. Smith] said it was unsafe; something was wrong with it. I checked it out and I couldn't find nothing wrong with it." Tr. at 527-528; CX 11 at 22. He recalled Complainant's phone calls to his wife during the drive.

> His wife called him several times. He called his wife several times. He said, "Get the lawyer, let's go after these people."
>
> ....
>
> He was telling his wife that he was fired.

Tr. at 529; CX 11 at 13.

Mr. Liuzzo testified that he asked Complainant about the missing tarp while he was driving him home, but Mr. Smith told him that he did not know what happened to it. Tr. at 529. At the time Mr. Liuzzo was doing the inventory, Mr. Smith told him that he was using the wrong inventory form, and that he was never given the third tarp. *Id.* at 530. Mr. Liuzzo told Mr. Smith that the form had his signature on it. *Id.* Mr. Liuzzo reviewed the inventory form, which was admitted as RX W and verified that it contained his handwriting and signature on it. *Id.* He testified

that all of the handwriting on the form was his, but later qualified that someone else, presumably Mrs. Morgan, had written on the form that four tires were painted and the trailer and wench track were damaged. *Id.* at 531-532.

When Mr. Liuzzo was completing the inventory check, Mr. Smith told him that the inventory form was inaccurate because he was forced to sign the form before he looked at the truck to confirm that all of the equipment was there. Tr. at 533. Mr. Liuzzo testified that he was not present on the day Mr. Smith was hired, but the normal procedure is for the driver to look at the equipment before signing the form indicating receipt of the equipment listed on the form. *Id.* at 534. Mr. Smith refused to sign the inventory form which detailed the final inventory of his equipment. Tr. at 534; CX 11 at 17-18; RX W.

Mr. Liuzzo testified that he was familiar with the Freightliner tractor and Transcraft trailer assigned to Mr. Smith. Tr. at 534-535. He testified that the trailer photographed in RX V-3, V-4, V-5, and V-6, is the Transcraft trailer at issue here. *Id.* at 535. In regards to RX V-4, he testified that "[w]e put these reflective tape on the bottom of this rail also." *Id.* He noted that all of the other trailers only have reflective tape on the rub rail. *Id.* at 535-536. He acknowledged that he did not put the tape on the trailer himself, but he was aware that it was done. *Id.* at 536. Although they were hard to see because they were out of focus, Mr. Liuzzo testified that the photographs in RX V-1 and V-2 appeared to be pictures of the trailer's damaged wench track. *Id.* Mr. Liuzzo identified the photograph in RX V-6 to be the part of the wench track that he later found in the truck, tucked in under the bunk side box. *Id.* at 537-538. He stated that RX V-7 is a photograph of the other part of the strap that he found in the vehicle. *Id.* at 538. He did not take the photographs, but attested that they accurately depict the condition of the wench track and the strap after he inventoried Mr. Smith's truck. *Id.*

On cross-examination, Mr. Liuzzo recalled that he had testified during his deposition that he worked for Don Morgan part time at Lake City Malone, which is the same company as Lake City. Tr. at 540; CX 11 at 4-5. He testified earlier at the hearing that he worked full-time at Lake City. Tr. at 520. He explained the discrepancy by stating, "I was part time, but before that I was full time and then broke into part time and now as a driver." *Id.* at 540. When he was asked during his deposition about how he got the job, he testified that he was just working for Don, part time at the time. Tr. at 540; CX 11

at 5. He responded, "Referring to Lake City Malone, I worked off and on for Don for years." Tr. at 540. Mr. Liuzzo testified that he was always present for the inventory checks, but acknowledged that Don Morgan did the inventory of Mr. Smith's equipment when he was hired. *Id.* at 541.

At the time of his deposition, Mr. Liuzzo did not know how many trucks Lake City operated. Tr. at 541; CX 11 at 14. At his deposition, Mr. Liuzzo testified that he did the Safety Director work without pay, but at the hearing he testified that he was paid for his work. Tr. at 520, 541; CX 11 at 16. He explained this discrepancy by stating that he "owed Don at the time" because "[t]hey did a lot of work on [his] truck." Tr. at 541. At his deposition, Mr. Liuzzo told Complainant's counsel that he worked for a salary. Tr. at 542; CX 11. At the hearing he explained that after he worked enough to pay off his debt to Mr. Morgan, he made fifteen dollars an hour, which he acknowledged was an hourly rate rather than a salary. Tr. at 542.

Mr. Liuzzo confirmed that he just happened to be at Lake City cleaning out the shed on November 9, 2005, and no one called him to request that he be there that day. Tr. at 542. When asked if he could explain why Mrs. Morgan testified that she had called him in to be there that day, he responded:

> To check that truck out. I seen the truck come in damaged and I checked it out. I just automatically checked it out. I was in the yard. Maybe she didn't know that I was coming that day, okay, I don't know. I don't stay in contact with the office. I just take care of everything out in the yard.
>
> ....
>
> I received no phone call. I was in the yard.
>
> ....
>
> Nobody called me. They may have called down to the yard.

Tr. at 543.

Mr. Liuzzo recalled that Mr. Smith was irritated during the conversation with Mrs. Morgan. Tr. at 543.

> He said that he quit. He got irritated and he said that he quit and walked out. That's what I took it as. I mean, he walked out and that is a quit to me.

Tr. at 543.

Mr. Liuzzo acknowledged that he walked in after Mr. Smith and Mrs. Morgan had begun their conversation. Tr. at 544. He asked if he knew what Mrs. Morgan claims about how and when Mr. Smith quit his job, Mr. Liuzzo responded, "He got irritated. He didn't want to answer any more questions and walked out." *Id.* It was his understanding that Mr. Smith made the decision to quit during his conversation with Mrs. Morgan in the office on November 9, 2005. *Id.* "I was there when it happened. He walked out. I walked out with him." *Id.* He testified earlier that he had begun inventorying the equipment before Complainant walked downstairs at the end of his conversation with Mrs. Morgan. *Id.* at 525-526.

Mr. Liuzzo never asked Mr. Morrison what Mr. Smith had told him about the accident. Tr. at 545. Although Mr. Liuzzo testified that he noticed the damage to the trailer before he went up to the office to find out what happened, he acknowledged that, in his statement to OSHA, he reported the following: "Harry and I walked down to the truck and trailer to conduct the inventory. I saw damage to the trailer." Tr. at 546-547; CX 11 at 9, CX 11 at Ex. F.

Mr. Liuzzo denied that he told Mr. Smith while he drove him home that other drivers had complained about the same trailer, that Lake City had assigned it to a driver until that driver refused to continue driving it, or that Respondents were most likely going to sell the trailer to a lumber company that does not haul such heavy loads. Tr. at 547; CX 11 at 18-19. He testified that he did not know what Respondents did with the trailer after Complainant returned it to them on November 9, 2005. *Id.* He also denied telling Mr. Smith that he had made enough money for Respondents to be able to buy two or three trailers. Tr. at 548. Mrs. Morgan instructed him to take Mr. Smith home, but he did not tell Mr. Smith that he would not take him home until he made a written report of the accident, because he assumed that he had already given a report to Mrs. Morgan. *Id.* Mr. Liuzzo acknowledged that he was aware that there was a dispute between Mr. Smith and Respondents about the trailer's safety, but he did not take any photographs of the trailer. *Id.* at 548-549. He assumed that Mrs. Morgan took the photographs

contained in RX V, because she told him about a week later that she had taken some pictures of the trailer. *Id.* at 549. Mr. Liuzzo asserted that it was not his job to be aware of the repair records of the equipment, but it was the responsibility of the drivers and Mrs. Morgan. *Id.* He also stated that he was not familiar with using sandblasting as a repair technique, and was not aware that Respondents had the trailer sandblasted. *Id.* at 550. Mr. Liuzzo acknowledged that he first testified that Mr. Smith told him that he did not know what happened to the missing tarp, but later stated that he told him that he never got the tarp; he recognized that those are two different explanations. *Id.*

On re-direct, Mr. Liuzzo clarified that he only became aware of the dispute about the safety of the trailer when he walked into the office and overheard Mrs. Morgan's conversation with Mr. Smith. Tr. at 551. He also stated that he does not know whether Mr. Morgan owns Lake City. *Id.*

Testimony of Crystle Morgan

Respondent Crystle Morgan, President of Lake City, testified by deposition on November 22, 2006, and at the hearing on May 9, 2007. CX 8; Tr. at 552-688.

Mrs. Morgan testified that she is the President and sole shareholder of Lake City, which was incorporated in Delaware in 2003. Tr. at 553. She is married to Respondent Donald Morgan, but he has no role or title at Lake City and has never owned any share in the company. *Id.* At her deposition, Mrs. Morgan described her role as President of Lake City as follows:

> I wear many hats: Bookkeeping, human resources, dispatch when I need to, maintenance if I need to, Workers' Comp., hospitalization, you know, all duties. Anywhere I'm needed, that's where I pitch in.

CX 8 at 24. She testified that no other employee has managerial authority, and she is the beginning and end of Lake City's chain of command. *Id.* at 24, 42. She has a high school education and some college experience, but did not complete her degree. *Id.* at 25. She also received various levels of workers' compensation training, haz-mat training, and claims training, from the various companies that she worked for through the years. *Id.*

At her deposition, Mrs. Morgan testified about Mr. Morgan's role at Lake City as follows:

> He was a driver for the company, and that was pretty much it. He drove for the company or he would help me inventory equipment with the drivers, and he doesn't even do that anymore. That's about it.
>
> You know, I might ask him – if something was wrong with one of the pieces of equipment that needed serviced someplace, he might tell me if it needed to, like, a transmission dealer or if it needed to go to just a regular shop or it needed to go to a Freightliner dealer, if it needed commuter(sic) work.
>
> He would try to help me decipher that, but other people would help me out with that, too. That's about it.
>
> CX 8 at 22-23. Mrs. Morgan testified that her husband was paid by Lake City in the past, but has not been paid since September 2006. *Id.* at 24. Mr. Morgan now drives as an owner-operator and gets loads dispatched through TL Express. *Id.*

Mrs. Morgan's experience in the trucking industry dates back to the 1980's, when she started with "LTL", or less than a truck load, carrier doing billing in the evenings. Tr. at 554. She was promoted to OS&D Supervisor, supervising the review of claims for overages, shortages, and damages to freight. *Id.* She held the same position with another company, USF Holland. *Id.* From there, Mrs. Morgan went into sales. *Id.* Her entire career has been in the transportation business. *Id.*

In 2001, Mrs. Morgan, as a result of medical problems, was having trouble keeping up with her job. Tr. at 555. Her husband suggested that she start up her own agency, working from the basement of their home in Brunswick, Ohio. *Id.* Mrs. Morgan described her business as follows:

> An agency is where I go out, because I had a sales background it was kind of easier, to go out and gain customers for a larger motor carrier and then they contract through you your loads or your customers and you provide those loads for their

> drivers or their trucks, company trucks, and/or owner/operators that are leased on with them. So, that is what I did. I went out and found customers and then when their drivers or their trucks or their owner/operators came through the Cleveland area, I would dispatch them loads.

Tr. at 555-556.

Lake City first operated as an agent for Alco Transportation, before becoming an agent for CRST in May or June of 2004. Tr. at 556. At that point, Mrs. Morgan had already purchased one truck, which she had leased with Alco, and later to CRST. *Id.* Over time, Lake City grew in terms of the number of trucks and trailers it owned. *Id.* Loch Trucking financed its equipment, which Lake City will own outright after all of the payments are made. *Id.* at 557.

Mrs. Morgan testified that she hired Complainant after another driver was "let go" for failing a random drug test. Tr. at 557. He was assigned the same equipment. *Id.* at 558. Lake City had purchased the 1997 Transcraft trailer for a fair market value of "around $3600" in late 2004 or early 2005, although Mrs. Morgan could not recall the man's name who sold her the trailer. *Id.* The driver whom Complainant replaced never reported any problems with the trailer. *Id.* at 558-559.

Mrs. Morgan did not remember whether Mr. Smith called her from an ad that she had placed or if CRST referred him to her. Tr. at 559. She recalled speaking to Mr. Smith prior to his hire date in September 2005, to explain Lake City's benefits and pay structure and his start date. *Id.* Mr. Smith was vetted by CRST, who checked his driving record and employment history, before he was hired. *Id.* at 559-560. Mrs. Morgan recalled that she asked her husband to speak to Mr. Smith before she hired him, to give him directions and "to ask him about his knowledge of equipment and his driving experience because [Mr. Morgan] has a thorough background with drivers." *Id.* at 560-561.

Mrs. Morgan testified that she thought that she hired Mr. Smith on Labor Day weekend in 2005, but she believed that it was on Monday, since CRST would not have held its orientation program in Rockport, Indiana, on Labor Day. Tr. at 561. Mrs. Morgan testified that her husband was present at Lake City's facility that day because it was a holiday and no one else was there. Mrs. Smith was with her husband when he came upstairs to

the office. *Id.* at 562. Mrs. Morgan described Lake City's facilities as follows:

> I lease an office on the second floor of the building.
>
> ....
>
> There is a yard in the back which would pretty much be a parking lot for truck parking. I lease the back lot and our equipment is parked there when it is in. We have a 53 foot storage trailer, 53 foot van, back there that we keep all of our equipment, supplies. There is also a rail container car with equipment in it.

Tr. at 562-563. The storage trailer and rail container car contain tools and everything that they need for the trucking business. *Id.* at 563.

Mrs. Morgan testified that she thought that Mr. Smith had already completed his application before arriving at her office that day, because he was already pre-qualified by CRST and registered to attend orientation in Rockport, Indiana, the following day. Tr. at 563.

From her experience working in the trucking industry, her relationship with CRST and her experience as the owner of Lake City Enterprises, Mrs. Morgan testified that she is familiar with the Federal Motor Carriers Regulations. Tr. at 564.

> Any issues or questions or concerns that I might have, I could look it up in the Federal Motor Carrier Regulations Book. One of the reasons that I chose to lease on my trucks with a motor carrier is so that I was always kept in compliance, that there was somebody there available to me, a safety department that could handle those issues for me as well, if there was anything that I wasn't knowledgeable in. I feel that someone who has driven a truck for five, ten, fifteen, thirty years, obviously has a lot more knowledge than I do about the Regulations. It was absolutely beneficial for me to make sure that [CRST's Safety Department was] taking care of those things.

Tr. at 564. Mrs. Morgan testified that CRST's Safety Department was available to her twenty-four hours a day, seven days a week. *Id.*

Mrs. Morgan recalled spending about an hour going over Lake City's policies and procedures with Mr. Smith on the day that he was hired, which she does with every new driver she hires. Tr. at 565-567.

> I teach a personnel policy, read it word for word to them. I go over their benefits with them, which everything is in the personnel policy, make sure that they understand it. I then have them sign, you know, for the policy while they are there. I issue them their cell phones, show them how it works. Everything else is; I go over our emergency contacts. Everything that is in the policy; how to contact us, make sure they know how to use the phones. I record their emergency contact phone numbers in case there is an emergency with them. I contact their wife or mother or whoever, just make sure that everything is in order. I issue them Worker's Compensation ID cards.
>
> ....
>
> It is in our personnel policy and, yes, I did go over it with him because that is CRST's by-law, too, that the tractor and trailer are never to be disconnected at any time. They must contact dispatch before doing so. If there ever is any accident or any incident -. If there is even the slightest, any indication of an accident whatsoever, they are to call immediately.
>
> ....
>
> [A series of contact numbers are] also listed in the manual and CRST hot line numbers are listed on the front of their log book and their manual that [Mr. Smith was] given and [had] to sign for.

Tr. at 565-566, 572; CX 15; CX 8 at 41-43.

Mrs. Morgan asserted that she never instructed Mr. Smith not to comply with Federal Regulations that day, nor did she

instruct him to contact her before writing up a maintenance or safety issue in his logbook. Tr. at 566-567. She disputes Mr. Smith's testimony that she had suggested that he falsify his logbooks. *Id.* at 567, 576. She explained that any comment she made regarding being cooperative with him if he was cooperative with her was in regards to him being able to be home on weekends because of his daughter's illness, and not a suggestion that he falsify his logbook. *Id.* She stated that she does not cover logbook entries in her one-hour orientation, since CRST covers that information in its orientation program. *Id.*

During her deposition, Mrs. Morgan could not remember if her husband had done the inventory check with Complainant, or if someone else had done it. CX 8 at 9. Mrs. Morgan also disputes that she required Mr. Smith to sign the inventory sheet prior to looking at the equipment. Tr. at 567.

> The processes that I go through are the personnel policy with the drivers and after completion of that, whoever I have down in the yard will inventory the equipment with them. They go down and that is the last part of the orientation. They go through the equipment check list, sign off on the equipment received. Everything is counted out with them and then they are given the keys.

Tr. at 567-568. She confirmed that she followed the same procedure when Complainant was hired. Mr. Morgan was down in the yard preparing the equipment while Mrs. Morgan went over Lake City policies and procedures with Mr. Smith. *Id.* at 568. She stated that she would not have had the equipment list with her in the office, because her husband would have had the form with him while he was preparing the equipment downstairs in the yard. *Id.* She testified that all of the equipment listed on the form was in the truck, and that Mr. Smith signed the form on September 5, 2005. *Id.* at 568-569.

> There are certain requirements that you have to have through CRST. You have to have so many chains, binders. You need a minimum of three tarps on a straight flat bed to make sure that you could haul all kinds of commodities on the road, so that you are versatile. Yes, I am sure that everything was out there and I know what was purchased for that truck and I know how it came in the last time that it came in.

Tr. at 569. She was certain that the equipment was accounted for when the previous driver returned the truck and trailer. *Id.*

When asked if she was present when the inventory check was done by her husband, Mrs. Morgan testified as follows:

> I am trying to remember. I think I ended up -. They were just finishing up when I went down with his wife and two kids. They were just finishing up. I believe that is when he signed it. I think his wife started loading his stuff into the truck.

Tr. at 570. At her deposition, Mrs. Morgan stated that she was not present when the inventory check was completed. CX 8 at 8. She also asserted that Mr. Smith went down to do the inventory with Mr. Morgan, while she stayed in the office with Mrs. Smith and her children. *Id.* at 10. She also stated that Mr. Smith and Mr. Morgan came back up to the office after the inventory was completed. *Id.* At the deposition, she claimed that she was in the office "50 feet away" when Mr. Smith signed the inventory sheet. *Id.* She testified at her deposition as follows:

> He could have come upstairs with [Mr. Morgan] and signed it up there or he could have signed it downstairs after they completed the inventory. There were down there together. I don't remember. Okay?

CX 8 at 10. At the hearing, Mrs. Morgan reported that she had no problems with Mr. or Mrs. Smith on the day that he was hired. Tr. at 570-571.

Mrs. Morgan denied that she ever told Mr. Smith not to have his truck inspected by CRST when he went to orientation in Rockport, Indiana; she testified that the subject never came up. Tr. at 569-570.

> To be honest with you, I'm sure that they looked at that truck. They look at every piece of equipment that comes in there. Now, the difference is, they wouldn't have done a DOT inspection on it because it wasn't due or it would pop up in their computer as due. They would look at all of the equipment up there.

> If I were to refuse for them to, you know, inspect my equipment, they would cancel me as an agent immediately. There would be a major issue.

Tr. at 569-570.

Mrs. Morgan testified that the following day, Mr. Smith attended CRST's orientation program, which she described as follows:

> I know that they watch a lot of safety videos. They go over logs, hours of service for the drivers. They go through the securement training to make sure that the guys or ladies can secure loads correctly. They look at the equipment that they have. They make sure that they understand Federal Motor Regulations and they hand them out books on that. They give them a CRST Manual. They talk to them about securement of loads, any accidents, who to call. In the front of the CRST Manual, they are given hotline numbers for any accidents, any problems, securing who to call. They go over the whistleblower while with them. I am trying to think. I think that would be about it.

Tr. at 571.

Mrs. Morgan testified that the logbook that CRST requires all drivers to use contains the express instruction that all drivers must report all accidents immediately, twenty-fours a day, seven days a week. Tr. at 573; RX LL. The log sheet also contains logging procedures, which require every driver to "complete a pre-trip inspection of the vehicle of [his or her] work days, post trip inspection at the conclusion of [his or her] work day." Tr. at 573-574; RX LL. The following instruction is included on the back of the log book:

> Note all defects and the repairs listed on DOT inspections. Must also be listed on the driver's vehicle inspection report and owner/operators must list on monthly maintenance recap.

Tr. at 574; RX LL. If Mr. Smith had failed to complete his daily log, CRST's computer system would have blocked him from being assigned a delivery. Tr. at 575. Lake City would have received a spreadsheet from CRST's safety department notifying them that

Mr. Smith was not in compliance with the Federal Motor Carriers hours of service rules. *Id.*

Mr. Smith was also required to complete a monthly maintenance recap at the end of the month or "he would have been put on stop dispatches in the system and he couldn't pick up or deliver any loads until it was completed." Tr. at 574-575; RX LL. Mrs. Morgan stated that the dispatcher would have been unable to dispatch a load or give a fuel advance to Mr. Smith if he had failed to complete the recap, because the computer system would not have allowed it. Tr. at 575; RX LL.

Mrs. Morgan testified that she received notification from RAIR Technologies, who tracks CRST's drivers' log records, stating that Mr. Smith had violated Federal hours of service rules. Tr. at 576-578, 580; RX MM. She testified that she believed that she received monthly alerts of driver violations, unless there was a major issue. Tr. at 577).

> [CRST's] safety department would send [the driver] a letter in the mail listing their – whatever their violation may be, maybe send them their log back or copies of the logs, thereof, asking them to explain or correct the logs. CRST's actual policy is – if you have a missing log or incorrected log – I want to say that they have ten days or fourteen days outstanding, they will put you on stop dispatch immediately.

Tr. at 577.

Mrs. Morgan testified that all Lake City drivers are required to scan their daily log sheets, bills, and fuel receipts into the Pegasus system, which is available at Pilot's and Love's commercial truck stops nationwide, for CRST to download and save in their own system. Tr. at 578-579.

> Anytime that they scan a load -. The requirements are a trip sheet, which explains where they picked up, where they delivered, what time, the date and the miles that they drove in each State have to be on there, their bill of ladings or shipping orders, their fuel receipt and the logs corresponding with that pick up or delivery.
>
> ....

> In order to be paid for the loads -. You can't be paid for it until they have all the documentation.

Tr. at 579. Mrs. Morgan testified that she could view her drivers' daily log sheets through RAIR Technologies, which had log sheet records for Mr. Smith from September 5, 2005, through November 9, 2005. *Id.* at 579-580.

Mrs. Morgan disagrees with Mr. Smith's contention that he reported problems with the trailer prior to November 8, 2005. Tr. at 580. She testified that "the only thing that he said about the trailer was that he didn't want to throw tarps anymore. He wanted a side kit trailer like the rest of the drivers." *Id.* at 581. At her deposition, she testified that she did not recall Mr. Smith complaining about the trailer's lights in October 2005, or that he reported a problem with the mud flap, stating "No, but you know, I have guys calling me all day long. I can't remember." CX 8 at 56-57.

In late October or early November 2005, CRST Recruiting informed Mrs. Morgan that Mr. Smith wanted to join CRST's lease purchase program. Tr. at 581. Mrs. Morgan testified that it was at that time that she began looking for a replacement for Mr. Smith. *Id.* at 581-582.

> I knew that I was probably going to lose a driver and then he was complaining about his paycheck and taxes and not getting paid. So, I knew that it was time. So, yes, I started looking for a driver. I actually started working a driver for his replacement but he went to lease purchase the day before the incident happened on the 8th.

Tr. at 582.

Mrs. Morgan testified that sometime in the couple of weeks prior to her testifying at the hearing on May 9, 2007, she found Samuel Peterson's report online, which was time-stamped to show that she had actually requested his file on November 7, 2005, the day before the incident in Effingham, Illinois, occurred. Tr. at 582. She could not recall if CRST told her about Mr. Peterson, or if he had answered an ad that she had posted. *Id.* at 583. She knew that Mr. Smith intended to enter the lease purchase program. *Id.* He would lease a truck from CRST and not be driving her truck any longer, although he could still be dispatched by Lake City, which was to his advantage because of where he lived. *Id.*

Mrs. Morgan testified that Mr. Smith had made other complaints about Lake City. Tr. at 583.

> I want to say that it started on the 1st or 2nd of November or maybe the 3rd. I started hearing reports -. He was telling people at CRST and I believe -. I think Kenny brought it up to me at first, that he was complaining that we were withholding too many taxes out of his pay.

Tr. at 583-584. Mrs. Morgan stated that she has an independent company do the payroll for Lake City, and that she immediately addressed Mr. Smith's concerns with a phone call, followed up by letter, to explain how the number of dependents and deductions he claimed could have an impact on his take home pay. *Id.* at 584-585.

Mrs. Morgan testified that Mr. Smith also complained to Mr. Morrison and Mr. McNutt that Lake City was not paying him. Tr. at 586. She contends that the payroll company automatically pays her drivers each week, either by direct deposit or by mailing a check, so that the drivers receive their pay by Friday each week. *Id.* Mrs. Morgan signs the paychecks and declared that there was never a time that Lake City was late in paying Mr. Smith. *Id.* at 586-587. At her deposition, Mrs. Morgan testified that she was unhappy about Mr. Smith telling other drivers that he did not get paid because "it causes dissension and maybe puts other ideas in other people's heads that maybe shouldn't be there." CX 8 at 44. She did not impose any formal discipline on Mr. Smith for discussing his pay with Mr. McNutt, but "just verbally [asked] him to discuss any pay issues with [her] and not the other drivers." *Id.* at 45.

Mrs. Morgan was aware that Mr. McNutt had driven the trailer at issue in this case. Tr. at 587. She denies that he ever complained to her about the trailer, and she testified that she was not aware of any structural problems with the trailer while Mr. Smith was driving it, other than what he may have told her on November 8, 2005. *Id.* at 587-588.

Mrs. Morgan obtained all of Mr. Smith's daily logs and confirmed that Mr. Smith had not reported any problems with the trailer, until his last day. Tr. at 588. On his log sheet for November 8, 2005, the day of the incident in Effingham, Illinois, Mr. Smith did not report any problems with the trailer, but on his November 9, 2005, log sheet, his final daily

log, Mr. Smith checked a box indicating that the vehicle condition was satisfactory, but wrote "unsafe to operate on roadway" at the bottom of the page. Tr. at 589. Mrs. Morgan testified that "[t]here is an email ... from [RAIR] technologies stating that this November 9th, the day that Harry left, he didn't even hand his log in until, I want to say, eighteen days later...[on] November 18th." Tr. at 590; RX N. She testified that she did not scan or send the log sheet to RAIR Technologies herself. Tr. at 590.

Mrs. Morgan recalled being concerned after finding out about the incident at the truck stop on November 8, 2005, which involved her equipment. Tr. at 590. At her deposition, she testified that she recalled Mr. Morrison testifying that Mr. Smith told him that the coil caused the trailer to nearly roll over. CX 8 at 14. She also testified that Mr. Morrison had not testified to anything that she believed was incorrect. *Id.* at 13-14. At the hearing, she testified about what happened on the morning of November 8, 2005, as follows:

> I was first notified by Ken Morrison about 7:45 that morning that Harry had notified him that he had almost flipped the tractor and the trailer over.
>
> ....
>
> I asked Kenny if he was all right, you know, was anybody hurt, is the equipment damaged. Ken said that it didn't sound like it, I believe is what he told me. I then called Harry right away.
>
> ....
>
> I asked him what happened. He said that he had almost flipped the tractor and the trailer over. I asked him, 'How did you do that?' He says, 'I didn't do anything. It is this trailer.' I said, 'What is wrong with the trailer?' He said, 'The same thing that has been wrong with it since you issued it to me.' Then I asked him to help me to understand what the issue was. I asked him if we should get it in someplace, should I have a tow truck come, what do you need from me to do? And he was just pretty angry.
>
> ....

> He said he was pulling out of a fuel stop after getting fuel in Granite City and when he was turning out he almost flipped over. He said it was because of the trailer. I think I asked him what he had on the trailer. He said, 'A quail.' I said, 'Where did you have the quail loaded?' He said, 'In the middle.' He indicated that everything was fine and that he could go on and keep working. I asked him several times, you know, if everything was okay. He said, 'Yes.' He wouldn't explain to me what happened. He just said that he almost turned it over, you know, after getting fuel.

Tr. at 590-592.

Mrs. Morgan testified that Mr. Smith never actually made the comment to her about replacing the equipment or him; he made that comment to Mr. Morrison. Tr. at 592. She asked him if he needed to have the trailer repaired, and had no problem having it examined at a DOT-certified location because it had just passed a DOT inspection a few weeks earlier. *Id.* In the Employee Incident Report, which is contained in CX 1, Mrs. Morgan stated that Mr. Smith reported that the incident in Illinois was caused by "faulty equipment". CX 1. Mr. Smith told her that the equipment had been faulty since it was assigned to him. *Id.* At the hearing, Mrs. Morgan testified that she did not instruct the DOT-certified inspector to ignore safety problems with the trailer. Tr. at 593. She doubted the veracity of Mr. Smith's account of the DOT inspection that took place on September 9, 2005. *Id.*

> I have to believe that people aren't going to jeopardize their entire business and livelihood over Harry Smith's truck. I'm sorry. I have a hard time believing that somebody is going to ignore the DOT Regulations, Federal Regulations, and absolutely want faulty equipment to go out there on the road after being in their garage or their facility.

Tr. at 593.

Mrs. Morgan testified that there are three facilities that CRST has contracts with to do DOT inspections in the Cleveland area, and she selected A&H to inspect the trailer because Mr. Smith was picking up or delivering to Middle Steel, which is closest to A&H. Tr. at 593.

> If there was something that would have been needed to be corrected, it would have been done right there, you know, at [A&H].
>
> The reason that you would probably want your equipment to be inspected in your area at somebody's who services your trucks; number one would be the hourly rate, number two, they are not going to take advantage of you like they do out on the road.
>
> [A&H's] hourly rate or like a TA Service Center or something like that, their hourly rates are going to be a lot less than if you were to take it in to a dealer out on the road, obviously, if you needed something towed. You want to take care of the things that you own, you know, centrally to your home or your place of business. A Freightliner dealer, on the road, would probably charge you anywhere from $85.00 to $98.00 an hour, whereas, [A&H's] hourly labor rate would be more like $65.00.

Tr. at 594-595. Despite the cost difference, Mrs. Morgan testified that she was willing to have the trailer inspected at a garage in Illinois after the incident on November 8, 2005. *Id.* at 595.

Mrs. Morgan testified that she checked the cell phone records for Mr. Morrison and herself, Mr. Morgan's two-way Nextel summary, and Lake City's business phone records, and Mr. Smith had not attempted to call anyone before he called Mr. Morrison at about 7:30 a.m. on November 9, 2005. Tr. at 595. "Had [Mr. Smith] got voice mail, it would have shown the call still coming in because he would have connected with our voice mails." *Id.* at 595-596.

> I was unclear whether or not -. Still throughout all of these depositions and their testimonies, I still could not determine whether it happened on the 7th, late at night or early morning on the 8th. I still couldn't tell, so I went back to the 7th and up to, you know, later on that morning on the 8th and there was never – past the 7:45, when Kenny called me, there was no contact whatsoever.

Tr. at 596. Mrs. Morgan asserts that Mr. Morrison told her that Mr. Smith had "verbally threatened him ... either replace [him]

or replace this equipment." *Id.* She claims that even after talking to Mr. Smith on the phone, she was unable to determine what happened to the trailer until Mr. Smith was deposed. *Id.* at 596-597. Mr. Smith never told her that he damaged the equipment during the incident. *Id.* at 597. She did not speak to Mr. Smith again on November 8, 2005. *Id.*

Mrs. Morgan described her perception of her November 8, 2005, telephone conversation with Complainant as follows:

> I believe that after he told me that everything was okay and, you know, he was pretty angry and stuff. I wasn't sure where that was coming from because he had been complaining all along about, you know, his payroll and different issues that he was having with us. He caused us problems with our customers or he could have with Majestic Steel.
>
> I had some major concerns there. I knew that I had an unhappy employee. I knew that he wanted to leave and get his own truck. I knew all of those things. I was concerned why he wasn't telling me what happened with the equipment.
>
> When he told me that it didn't need service, that I didn't need to get it in anywhere and that everything was okay and he was going to go ahead and, you know, pick up and deliver. That was it for that day.

Tr. at 597.

At the hearing, Mrs. Morgan was asked by her attorney when she decided to accept what she thought was Mr. Smith's resignation and whether the incident with the trailer on November 8, 2005, played a role in her decision. Tr. at 598.

> Q. When did you make the decision that you were going to accept what you thought was his resignation?
>
> A. I actually started looking, like the document showed you, the day before. I knew, prior to that, that Harry was not happy and he wanted to leave. I knew that he wanted to go on the lease/purchase program. He was just becoming more and more disgruntled. He did not want to be there. So, I would say, prior to that I knew that

> it was going to happen, but on the 7th, the day before is when I actively started looking for someone.
>
> Q. So, on the 8th, right after you had this conversation, did whatever happen in Illinois play a role in your decision that you needed to terminate this relationship?
>
> A. When he threatened to replace him or the equipment, yes, absolutely. I just figured that if you want to go, just go.
>
> Q. At that point, did you have any idea that there was anything wrong with your equipment, either the tractor or the trailer?
>
> A. No, I did not. The only thing that he said was that he almost flipped them over. He never said, 'I actually flipped them over.'

Tr. at 598.

In her deposition and in the Management Overview, Mrs. Morgan stated that she called CRST to look for a replacement driver after she had spoken to Mr. Smith on the morning of November 8, 2005. CX 8 at 71-78; CX 1. Mrs. Morgan recorded the following information in the Management Overview:

> November 8, 2005 later in the morning around 9:00 a.m. est. (10:00 a.m. cst.) after I got to the office (awaiting the Verizon bill for exact time), I phoned Milton Parks to tell him that we needed to re-seat the truck that Harry gave us an ultimatum and told us to find another driver for the truck because we had faulty equipment. I was bringing Harry in. I asked for him to help us find a driver to replace Harry. Milton told me he had just received a call from Harry Smith stating that he was going to take our trailer and have it DOT inspected. I told Milton I spoke to Harry earlier and asked if the equipment was safe to bring to the yard and Harry had told me yes.
>
> November 8, 2005 later in the morning Milton gave me a driver's name and said that he would be calling me to discuss coming to work for us.

CX 1.

Mrs. Morgan recalled that she told Mr. Morrison to have Mr. Smith come in to Lake City's office on November 9, 2005. Tr. at 599. She thought that Mr. Liuzzo was in the office when Mr. Smith arrived, but he could have been downstairs and then came up. *Id.* At the hearing, she testified that she could not remember if she had called Mr. Liuzzo to be present that day or not, but after listening to Mr. Liuzzo's testimony earlier that day, she thought that he was already there that day. *Id.* She remembered the meeting with Complainant on November 9, 2005, at which Mr. Morrison and Mr. Liuzzo were also present, as follows:

> When he got there, he came upstairs and we were going to do the exit interview. I always try to make sure that there is two or three people present when a driver comes in ... for safety purposes for myself, number one, and number two, just so there are witnesses to the events that are happening.
>
> ....
>
> I started talking to Harry. I told him, I said, you know, I have accepted your reservation [sic].
>
> Then I went over the things with him about, you know, making statements like we are not paying him, that we are withholding too many taxes.
>
> I went over the issue with him with Majestic Steel where he threatened to pull out of our customer. Back then, we shipped quite a bit of material with them. I mean, jeopardizing an account like that would not be a very good situation.
>
> I just told him that we just aren't a good fit for you. We are not a good fit for each other. I need people who are going to be loyal and be respectful to the company.
>
> Towards the end, I did bring up the fact that I was aware that he was going to take our trailer to be DOT inspected.
>
> My reasoning for that was, you know, if there was an issue, why wouldn't you tell me? And if you didn't do anything wrong -.

> The problem that I had with the whole thing was, if there was something wrong, why wouldn't you let us get it fixed? Why would you take it to DOT? Why wouldn't you just ask my request to take it in to have it fixed?

Tr. at 599-601.

When asked who had informed her about Mr. Smith's claims that he was going to take the trailer to be inspected by the DOT, Mrs. Morgan testified that "CRST had told her that morning ... or the day before that [Mr. Smith] had made that threat." *Id.* Later in her hearing testimony, Mrs. Morgan clarified her response, stating that she first learned on November 8, 2005, that Mr. Smith was threatening to take the trailer to be inspected by the DOT. *Id.* at 607-608.

> I want to say that it was later on in the morning. I had called up there to tell them that, you know, when I finish getting Sam Peterson pre-qualified or, you know, find another driver.
>
> At that point, I think that someone up there told me that he had called there inquiring about the lease/purchase program again and that he was going to take our trailer and get it [inspected by] DOT.
>
> That is how I found out about it.

Tr. at 608.

When asked if she had any problem with Mr. Smith having the trailer inspected, she replied, "No, because I didn't understand that either because he would have passed through, I think, two, if not three scales between Ohio and Granite City. So, at any given time, he could have been put through a DOT inspection." Tr. at 600.

Mrs. Morgan testified that her comments to Mr. Smith about knowing that he threatened to take the truck to DOT were made in the context of trying to understand why he had not been up front with her about what happened. Tr. at 602.

> And that was really the only issue. I just wanted to know why. My issues were – I [already] knew that he wanted to go on the lease/purchase program and he was making complaints about the company. He obviously didn't like what he was doing. He wanted

> to leave and go into his own truck. Just go and don't demean the company and discredit us in any way. If you want to go, just go.
>
> He never said that he wasn't quitting during the exit interview, not once did he say that.
>
> When I just asked him about the trailer and the DOT inspection, that is when he started focusing all on that. That is not what it was about. It was about his threat; replace me, and that is the way that I took it. It was just another threat and another issue that he was having with the company. That is all that it was.

Tr. at 602.

Mrs. Morgan testified that she did not take any adverse employment action against Mr. Smith because he allegedly made safety complaints about the trailer. Tr. at 626.

Mrs. Morgan recalled the rest of the exit interview as being fairly short. Tr. at 602.

> [It did not last] too long, because he was getting kind of angry and getting kind of mean. He stood up and kind of like puffing out his chest and stuff. Bobby came up -. I think Bobby was all ready up there and he said that he needed to see me downstairs because there were some issues with the equipment.

Tr. at 602-603.

Mrs. Morgan contends that Mr. Smith refused to tell her what happened to the truck on November 8, 2005, and never told her that the trailer had been damaged. Tr. at 603. After going downstairs, she saw the damage for herself. *Id.*

> Bobby [Luizzo] told me that the trailer was damaged on the other side. So, I walked around the side of the trailer and I saw the damages about three or four feet of the winch tracking, you know, was bent off. At that point, I was real concerned because he hadn't told us that he had an incident, you know, he actually had something physical happen with the equipment. I was getting kind of nervous about it because as a commercial

> motor vehicle that is, obviously, involved in an accident.
>
> I walked back around and Bobby told me that one of the tarps was missing and I noticed on the tractor that the tires, he had defaced them.
>
> I asked Harry what happened to the trailer. He said that he did it the other day pulling out after getting fuel in Granite City. I said, 'Well, what happened?' He refused to tell me. He was getting really angry.
>
> So, I was standing by him and Bobby wanted to finish the inventory with him and then I started asking him about the tarp. When I asked him about the tarp missing, he started getting all red in the face and he told me that – his exact words were, 'I'm leaving. I am getting really mad and you don't want to see me get this mad at you.' At this point, I was pretty much done.

Tr. at 603-604.

Mrs. Morgan arranged for Mr. Luizzo to take Mr. Smith home "so that he wouldn't be stranded in the yard" because she "knew that his wife worked" and "was just being kind." Tr. at 604.

She testified that Mr. Smith called her later in the evening of November 9, 2005, to apologize for getting angry, and that he was trying to get a handle on his anger problems. Tr. at 604. He told her that he was getting his own truck and would be participating in CRST's lease purchase program. *Id.* He also told her that "he had securement equipment stored up in his garage." *Id.* She testified that securement equipment includes "probably [tarps], binders, chains[]. It was securement equipment and for a full set it would probably cost you anywhere from $2300 to $2800." *Id.* at 605.

Mrs. Morgan testified that Mr. Smith called her again the following week to find out why she "blocked him from CRST". Tr. at 605. She told him that she "didn't have anything to do with him and CRST." *Id.* She claims that Mr. Smith hung up on her at that point. *Id.* Mrs. Morgan testified that she had reported to CRST that Mr. Smith had stolen a tarp and that he had an unreported accident. Tr. at 605; CX 8 at 38-39. She explained

her reasoning for claiming that Mr. Smith had not reported the accident on November 8, 2005, as follows:

> He damaged the equipment. At that point, I wasn't sure if he had hit a family, a building. I didn't know if it was going to come back on CRST or myself if he had been under dispatch under a load and hit somebody or hurt someone, you know, there is a lot of liability there or not under a load with our equipment. I didn't know what happened. He refused to tell us. I actually thought at that point – I personally thought that he had damaged something or someone else because he wasn't telling us. He was refusing to tell us what happened.

Tr. at 605-606.

Mrs. Morgan confirmed that she did not fully understand what happened on November 8, 2005, until Mr. Smith was deposed on December 23, 2006, assuming that he testified accurately. Tr. at 606.

At the hearing, she testified as follows regarding her understanding about what happened that day at the truck stop in Illinois:

> Well, from listening to the -. Well, when Bobby found the grease all over the straps and the cut strap and then listening to their deposition and stuff and the expert witnesses, it appears that he jackknifed the tractor and the trailer and probably was going too fast and making too sharp of a curve. It was a driver error. That would maybe explain why he didn't want to tell us, tell me what happened, because it was a driver error. If it wasn't a driver error and he did have an issue, I didn't understand why he just wouldn't let us get the issue fixed. It wouldn't have been his problem. Why he would go to all that trouble to pull another driver into his situation, break the law, break the policies of Lake City and CRST's and separate the tractor and trailer. I mean, none of it made any sense.

Tr. at 606. She explained that Mr. Smith broke the law by not reporting the accident. *Id.*

> It could have been a hit and run. Also the policy violations, CRST's own about never unhooking the tractor from the trailer as well as Lake City's policy of never unhooking a tractor and trailer.

Tr. at 606-607.

She testified that after Mr. Smith was no longer employed, she hired Mr. Peterson to take his place. Tr. at 608; CX 8 at 46. She paid for him to attend CRST's orientation at its corporate office in Birmingham, Alabama, and bought him a bus ticket to get him to Ohio to pick up the truck and trailer from Lake City's office. Tr. at 608-609; CX 8 at 46. At the hearing, she testified that Mr. Peterson went through the entire orientation, but never showed up for work. Tr. at 609). At her deposition, Mrs. Morgan testified that "[Mr. Peterson] was sent to orientation, which [she] paid for, but he never showed up. CX 8 at 46. At the hearing, Mrs. Morgan testified that her husband drove the trailer for awhile after that. *Id.*

> That was the only straight flatbed that Lake City owned. We actually wanted all side kit trailers. The market was kind of – you either bought a brand new trailer at the time, which was way too much money, or you waited for a used one to come available, you know, depending on the market. We had kind of had feelers out to different trailer companies, you know, what we were looking for. We wanted another side kit – something a little wider because, I believe, his was only 96 wide and we wanted a 102 wide. Obviously, you could haul more material, lighter weight. So, there is more revenue on the trailer. You can utilize the trailer more.

Tr. at 609-610.

Mrs. Morgan testified that her husband knew of someone who was looking to trade in a trailer that better fit Lake City's needs, and that she was pretty sure that the man who owned it dealt exclusively with Trailer One. (TR 610-611). Because of this opportunity, she traded in the Transcraft trailer that Mr. Smith had hauled for two thousand dollars credit toward a newer trailer. *Id.* at 611. The Transcraft trailer cost three thousand six hundred dollars when Lake City bought it. *Id.*

Mrs. Morgan removed the relatively new tires, toolbox, and the remaining forty-five feet of undamaged wench track, prior to trading in the Transcraft trailer. Tr. at 611-613. The wench track was put on the forty-five foot trailer that her husband personally owns. *Id.* at 613-614. She explained that she stripped the trailer because some parts of it were worth more if sold separately than if they would be as part of the trade-in. *Id.* at 614. She thought that she probably would have gotten more money for the trailer if they had sold it to someone else, but "[t]he time frame wouldn't allow us that time because the trailer that I wanted was available and it wouldn't stay available because of the market." *Id.*

She testified that she did not trade in the trailer for any reason related to this case. Tr. at 614-615.

> The only reason that I got rid of that trailer and used it as a down payment on the Ridenour, the trade in, was because it was the only piece of equipment that Lake City owned a clear title on. I didn't have any other collateral and there was really no tax advantage to keeping it.

Tr. at 615.

Mrs. Morgan testified that she took the photographs submitted as RX V-3, V-4, and V-5, and those photographs are true and accurate depictions of the 1997 Transcraft trailer that Mr. Smith drove for Lake City. Tr. at 615-616. She testified that the area circled on RX V-5 was the area damaged at the wench track, and that she circled it to zero in on it. *Id.* at 616. She also testified that her husband put the tape underneath the trailer that is pictured in RX V-3 and V-4. *Id.* She testified that the pattern of the tape on the trailer is Lake City's "signature" because no other trucking company puts tape on the under body of the trailer. *Id.* at 617. A receipt showing the purchase of reflective tape, which bears Don Morgan's signature and was issued to Loch Trucking on May 20, 2005. RX OO. She explained that she got Loch Trucking to purchase the tape because they had a tax exempt certificate on file with the State of Ohio, and Mr. Morgan signed for it because he picked it up. *Id.* at 617-618. Mrs. Morgan testified that she took the other photographs contained in RX V-1, V-2, V-6, and V-7, "within the week" of having taken the other photographs, noting that the ground was not green and that it was starting to get cold. *Id.* at 618.

Mrs. Morgan testified that she prepared the document entitled "Management Overview" based upon her interactions with Mr. Smith, and that it accurately describes what happened from her standpoint. Tr. at 618-619, 622; CX 1.

> It was just the events, anytime, including when an employee quits over anything, even with the drug testing and stuff like that. I always take notes and keep them in the files so if there were ever any questions by CRST or anyone else, I would always have documentation as to what transpired.

Tr. at 621. She had Mr. Morrison and Mr. Liuzzo sign the document because they were present for Mr. Smith's exit interview. *Id.* at 622.

Mrs. Morgan learned that Mr. Smith had filed a claim against her for alleged violations of the STAA on November 15, 2005, when CRST called to inform her that they had received notice from Complainant's attorney. Tr. at 622-623. She cooperated with the OSHA investigation, and supplied the investigator with a list of employees who were involved in any way. *Id.* at 623. She testified that she was not present during the OSHA Investigator's interviews with her employees and that she did not keep anything from him. *Id.* at 623-624.

> He walked in in the middle of the afternoon. I wasn't prepared. Actually, I wasn't there. Kenny called me back to the office. I was out delivering baskets for our customers. Then when I got back I gave him everything that I had on hand at that time.

Tr. at 624. She gave the investigator some additional information later on, including the "logs ... [and] things like that." *Id.*

Upon review of Mr. Smith's log sheet for November 8, 2005, Mrs. Morgan testified that his version of events does not match what he recorded in his log, to include his physical location at the time of the incident. Tr. at 625.

> Actually, Harry told me that he was fueling when it happened in Granite City. And I believe that Harry told me that it had happened that morning - or Kenny did. I assumed it did because he was so upset still. But anyways when I looked at the log

> it showed that he was in his sleeper. He was sleeping up until 10:30 that morning.
>
> If you go to the day prior to the 7th it shows he shut his truck down at 7:00 that night. So, the truck wasn't running from 7:00 p.m. the night before until 10:30 the morning of the 8th. His log also shows he wasn't in Granite City like he had told me in the yard, he was in Highland, Illinois ... [which is] [f]orty (40) miles away. It doesn't show that he was in Granite City until 12:00 noon.

Tr. at 625. Mrs. Morgan also reviewed Complainant's log sheet for November 9, 2005, and asserted that the activities recorded in the log are not consistent with events that she knew had taken place that day, because while the log shows that Mr. Smith was in Cleveland at 11:00 a.m., it does not show that he was in Lake City's yard. *Id.*

Mrs. Morgan also reviewed Mr. McNutt's log sheet for November 8, 2005, and found it different from his testimony as to what occurred at the truck stop that day. Tr. at 626; RX K.

> On November 8th Jacob McNutt shows at 6:00 he was in Granite City doing a pre-prep ... and then he - by 6:45 he was in Alton, Illinois loading. Then by 11:00 noon he was fueling in Knightstown, Indiana.

Tr. at 626; RX K. She testified that she never told Mr. McNutt to falsify his logbook. Tr. at 626.

Mrs. Morgan explained why she made several deductions to Mr. Smith's final paycheck from Lake City. Tr. at 627.

> I deducted off for the tarp that he took from the company. I deducted fifty dollar ($50.00) fuel money that he took from the company, that he withheld from one of the fuel advances. I charged him for my time to clean the tires that he defaced, cleaned those off and the supplies that it took me to clean them up with.
>
> ....
>
> Yeah, eighty-seven ($87.00). The radio wires he cut out. Instead of unplugging the radio he cut

> the wires to the system and they fell down into the dash.
>
> I didn't charge him for any radio because the radio was kind of old anyway. So, I put a new radio in it and the only part I charged him back for was what the radio shop charged me to troubleshoot all the wiring, because it had all separated that he dropped down in there. I think they charged me thirty-five ($35.00) or forty dollars ($40.00). That was the only part that I charged back to Harry.
>
> So, the tarp, the radio, the money that he took out of the fuel and I think he had a carryover balance still going where other money that he took out of the fuel money for his personal use.

Tr. at 627-628. Mrs. Morgan testified that Mr. Smith had used some of the money from a fuel advance for himself, although he was not supposed to do that. *Id.* at 628.

On cross-examination, Mrs. Morgan testified that she does not recall learning about the STAA's whistleblower protections when she voluntarily went through CRST's orientation and read the CRST manual. Tr. at 629. She was asked to explain why she had testified differently at her deposition. Tr. at 629-630; CX 8 at 26.

> What I'm seeing is the whistleblower part, the Surface Transportation Act probably was in there in 2004, but specifically I never seen the page that Harry signed in the CRST manual when I read it in 2004. I did not find that part of it until after the fact when I started reading the manual to get documentation on Harry Smith.
>
> ....
>
> Yes, it would have been after his separation, because you requested the CRST manual, I believe, and that's when I started finding signature pages and stuff that he had signed for at orientation.

Tr. at 630-631. She was also asked to explain why she testified in her deposition that she had learned about the STAA's employee protection provisions from reading Complainant's attorney's web

page the day before she was deposed on November 22, 2006, to which she replied:

> I learned more about it the day before, yes. Specifically what this is all about is what I read on your website. I mean, there's other federal regulations, too. I also told you that if I had a question or somebody had a question that I would either go look it up. And, also, that CRST is available to me for those specific things.

Tr. at 631; CX 8. She testified that on November 8, 2005, she "absolutely" knew that it was illegal to fire drivers for engaging in certain protected activities. Tr. at 631. She testified that she recalled writing in Mr. Smith's "Management Overview" that she had learned about his threat to have the trailer inspected by the DOT. Tr. at 632; CX 1-3. She explained that she had informed Mr. Smith that she knew about the threat at the end of the exit interview, after she had talked about other issues with him. Tr. at 632.

Mrs. Morgan testified that she knew that it was illegal to fire a driver for saying he wanted to have his equipment inspected by the DOT was illegal, and explained that her reason for writing about her knowledge of the threat in the "Management Overview" as follows:

> Because of the conversation with Harry was why would you even threaten that when you told us there was nothing wrong with the equipment?
>
> I did what I was supposed to do as employer and as a company that runs commercial motor vehicles. I did my inspections. I kept my equipment nice. I maintained them. I purchased new tires to make sure that everything was okay. I even signed on with a larger motor carrier to make sure that my equipment and my drivers were all in compliance with the Federal Motor Regulations.
>
> I couldn't understand why he would even make the statement other than the fact that he wanted - I already knew that he wanted to become his own lease purchase owner-operator.

Tr. at 633; CX 1.

Mrs. Morgan explained that she found Mr. Smith to be dishonest over the course of his employment. Tr. at 634-635. She explained that she believed that Mr. Smith's conduct of stealing a tarp and defacing tires demonstrated his dishonesty. *Id.* at 635. She explained that she went into greater detail about why she believed Mr. Smith is dishonest on pages 8 and 9 of her deposition. Tr. at 635; CX 8 at 8-9. She also explained that she had testified in her deposition that she said that she had no idea whether Mr. McNutt was honest, but later qualified that by stating that "[t]here are various instances where I doubted [his honesty]." Tr. at 636-637; CX 8 at 7.

Mrs. Morgan was asked on cross-examination to explain why she testified earlier that she had contacted CRST to find a replacement for Mr. Smith on November 7, 2005, although she testified in her deposition that she had contacted CRST on November 8, 2005. Tr. at 637; CX 8. She answered as follows:

> Yeah. Yeah, but I had talked to Milton the day before, too. I'd been talking to Milton all along. If you look at my notes, the Recruiting Department is the one who - you know, they were telling me, too, that Harry was going into the lease purchase program along with Harry. So, I talked to the Recruiting Department on a daily basis. If you look at the time stamp for Samuel Peterson, I had already started on Harry's replacement prior to the incident because I already knew that Harry was leaving to go into the lease purchase program.

Tr. at 637-638; RX NN; CX 8.

Mrs. Morgan was also asked to explain why she stated in her deposition that CRST told her that Mr. Smith threatened to take the trailer to DOT for inspection at the time that she called them to find a driver, but in her Management Overview she stated that she had called CRST to let them know that she was bringing Mr. Smith in and that she wanted them to help her find a replacement. Tr. at 639; CX 1; CX 8 at 70. She acknowledged that she had written this comment in the Management Overview, but offered no explanation about the discrepancy between the comment and her subsequent testimony at her deposition and at the hearing. Tr. at 639-640; CX 1; CX 8 at 70-71. She also acknowledged that she did not know that Mr. McNutt went by the nickname Scooter. Tr. at 640.

Mrs. Morgan testified that she knew that Mr. Smith had received his last paycheck, because she had produced the paystub during discovery. Tr. at 640. Also, if he had not cashed the check, she would have noticed the discrepancy in her check reconciliation and the payroll company would have notified her. *Id.* She stated they can go back and get a copy of the cancelled check if necessary. *Id.* at 640-641.

Mrs. Morgan testified that she was present at the end of the equipment inventory that her husband did on the trailer on September 5, 2005, but that it was Mr. Morgan who went over the equipment with Mr. Smith that day. Tr. at 641.

Mrs. Morgan testified that "if [her drivers] have any problems with anything, they're supposed to call us. We're available to them 24/7." Tr. at 642. She explained the full company policy as follows:

> Yeah, they're given our numbers and then CRST's numbers are available to them. I even give them Great West Insurance. In their packet they get a Great West Insurance hotline number and they - Great West hands out for us to hand out to our employees a little portfolio if they are ever involved in an accident. Gives little diagrams and stuff that they can draw out and get very detailed about it.

Tr. at 642. Mrs. Morgan acknowledged that the company policy of having drivers call in their problems does "not necessarily" result in there not being a written record of what the communication from the driver was, because "any of the dispatch goes into the system immediately. Any of the inspections go into the system immediately. Any repairs, that's documented, too." *Id.* at 642-643.

Mrs. Morgan also acknowledged that Lake City has a company policy that any verbal resignation should be done in front of two members of Lake City's management team. Tr. at 644. Mrs. Morgan disputes that it has been Lake City's customary practice, with one exception, to not use any form of written discipline. Tr. at 644. Mrs. Morgan asserts that she gave a written reprimand to another driver who had taken money from a fuel advance for his own use, although she could not recall exactly when that had taken place. *Id.* at 645. She also contends that it was CRST, and not her, who terminated the employment of the driver who failed his drug test. *Id.* at 645-646. At the hearing, she explained that during her deposition she had testified that

she had only disciplined one driver prior to Mr. Smith because she thought that Complainant's attorney was referring to safety related discipline when he asked her how many times she had formally disciplined her drivers. *Id.* at 646-648.

Mrs. Morgan stated that she consults with her husband "[w]hen it has to do with where I'm going to have the truck serviced or repaired", but Mr. Morgan "doesn't help [her] operate [Lake City]." Tr. at 648. She explained Mr. Morgan's initial contact with Mr. Smith as follows:

> I don't know that there were any equipment issues when Don talked to him. I think Don was giving him directions to where our office was and asked him how much trucking experience he might have had and who he had worked for, because I wasn't real familiar with all the different flatbed carriers.
>
> ....
>
> No, I interviewed Harry Smith on the phone and went over a list of questions that I probably had for him. He was mainly to see how much experience the different companies he worked for and give him directions to the office.
>
> ....
>
> I don't know what questions Don asked him on the phone, to be honest with you.
>
> ....
>
> I actually think he was giving him directions to the office. I don't know what questions he asked him.

Tr. at 648-649.

Mrs. Morgan testified that she instructed Mr. Morgan to conduct the inventory of the equipment before it was assigned to Mr. Smith. TR 649-650. Mr. Morgan also helped her with other equipment issues, such as picking up the reflective tape for her. *Id.* at 650.

She explained that she must have bought the trailer before the tape, which was purchased in August 2004, although she testified earlier that she bought the trailer in late 2004 or

early 2005. Tr. at 651; RX N. She also confirmed that she removed the wench track from Complainant's trailer and gave it to her husband to use on his own personal trailer. Tr. at 651.

Mrs. Morgan testified that her husband hauled the 1997 Transcraft trailer "a couple of times" after Mr. Smith returned it to Lake City. Tr. at 651-652. Lake City paid Mr. Morgan for his services.

> Off hand – I'm trying to think. I think he started driving - I honestly don't remember, I mean, how much money. I don't know because he wasn't even there like a full year before he, you know, went out and did his own thing. I honestly don't remember.

Tr. at 652.

At the hearing, she testified that she did not consult with Mr. Morgan about her decision to accept Mr. Smith's resignation. Tr. at 652. She also did not consult with Mr. Morgan when she received the certified letter from Mr. Smith about taking him back as a driver. *Id.* She explained, "Oh, I knew I wasn't going to take him back. He'd already threatened me." *Id.* Mrs. Morgan was asked in her deposition whether she had ever imposed any formal discipline on Mr. Smith, to which she replied, "No." CX 8 at 45. However, at the hearing, she responded:

> Well, Harry Smith stated that he wanted to go into lease purchase. All of his intentions were to leave Lake City. That's obvious. He's even testified to that several times. That was his intentions. To be honest with you, Mr. Renner, if he wouldn't have resigned after seeing the condition of my equipment and what he did he would have been fired and having an unreported accident in a commercial vehicle.

Tr. at 652-653.

When asked at her deposition whether she had grounds to discharge Mr. Smith, Mrs. Morgan testified that she was not going to answer the question "[b]ecause [she] was not sure how [she] would answer that and [she did not] want to incriminate [herself]." Tr. at 653-655; CX 8 at 60. At the hearing, she clarified her response as follows:

> I think I felt like you were leading me to answer the way you wanted me to answer you. To answer you, I had no reason to discharge him. What I'm telling you is - and I didn't and I didn't discharge him. After I seen the way he left the equipment and had an unreported commercial vehicle motor accident I absolutely would have discharged him on the spot. But Harry Smith was already getting in the van to leave to go home, after threatening me that he was getting angry with me.
>
> Did I have a reason prior? Absolutely not. He was leaving to go into a lease purchase program. We all know that. He testified to that. But after he left and I was looking at this equipment - or he was getting ready to leave - I have an issue there. I have an issue and I have an obligation to the people that drive the motorways every day. I have an obligation to CRST, to Lake City Enterprises to ensure to find out what happened in this accident. And it was obviously an accident, he damaged the equipment.
>
> You can't - you know, this is eighty thousand (80,000) pounds of steel going down the road. I mean, you don't bend a piece of metal on the side of a forty-eight (48) foot trailer and something didn't happen. You have to find out what's wrong and you have to be concerned.

Tr. at 655-656.

At her deposition, Mrs. Morgan testified that she had not had any complaints about Mr. Smith's work while he was employed for Lake City. Tr. at 656; CX 8 at 51. At the hearing, her response to the same question differed, for which she offered the following explanation:

> Q. I asked you if you ever had any complaints about Harry's work and you told me you did not, correct?
>
> A. Other than what I listed.
>
> Q. If you would, turn to page 51 of your deposition.

> On line 15 I asked: Did you ever receive any information from anyone complaining about Harry Smith's work.
>
> And your lawyer said: People saying Harry had not done a good job or done something wrong from third parties.
>
> Answer: No.
>
> A. I think there's also in this deposition where I listed about where he was complaining about payroll issue, not getting a paycheck, taxes. And there's also in this deposition where Kenny informed me that he was threatening pull out [on] one of our customers.
>
> So, I did receive information.
>
> Q. Those first items were items of Harry complaining about other things, not other people complaining about Harry, correct?
>
> A. Other than Kenny complaining about Harry pulling out of our customers, I think that would be coming from another person. And that would have to do with [h]is work and work ethic.
>
> Q. Are you saying that when you answered no to my question at page 51, line 19 you had forgotten about Kenny Morrison --
>
> A. I don't know, I'd have to find the other part in here where people were telling me about him complaining about not getting paid, getting his checks, about the taxes and about Kenny telling me about him threatening to pull out of our customers and leave. I don't know where all this falls, if it's prior to that conversation or - those questions - or after.

Tr. at 656-657; CX 8 at 51.

On cross-examination at the hearing, Mrs. Morgan was asked to explain why she had the trailer sandblasted. Tr. at 657. She responded, "Because when we purchased the trailer it had surface rust on it and we wanted the equipment to look nice and make sure it was well maintained." *Id.* She confirmed that Mr. McNutt

had hauled a load of machinery to Chicago on the trailer before it was assigned to Complainant. *Id.*

Mrs. Morgan testified that the tractor's tires were still functional after she had cleaned the white paint off of them, and confirmed her deposition testimony that "each tire is worth between three hundred ($300.00) and four hundred and fifty ($450.00)". Tr. at 657-658; CX 8 at 11. She explained in the "Management Overview" that she charged $25.00 per hour plus $12.00 for shop supplies to clean the tires. CX 1. She computed her rate by taking her weekly salary of $1,000.00 and dividing it by the 40 hours that she works each week. *Id.* She did not take any pictures of the tires. Tr. at 658.

Mrs. Morgan testified that she knew that Mr. Smith reported the accident to Mr. Morrison, who called her to inform her about it. Tr. at 658. However, she qualified her response by stating, "He didn't say he had an accident, he said he almost tipped the tractor and the trailer over. That's not an accident, that's almost tipping something." *Id.* She asserts that it was Mr. Smith's conversation with Mr. Morrison that she interpreted as a resignation.

> Ken Morrison called me and told me that Harry Smith had an incident with the equipment and he almost flipped the tractor and the trailer both over and that either to replace him or replace the equipment. Kenny or I neither knew if it was just the tractor or just the trailer that he was having an issue with or both.

Tr. at 659. Mrs. Morgan took Mr. Smith's statement to Mr. Morrison as a threat and as an ultimatum. *Id.* She believed that Mr. Smith was unhappy and said things that were demeaning and untrue about her company, including that Lake City was not paying him and had taken too many deductions from his paycheck. *Id.* at 659-660. She asserts that he made these statements to Mr. McNutt, Mr. Morrison, and to CRST. *Id.* at 660. She believed that Mr. Smith's statements were verbal threats against the company. *Id.* at 660-661.

> Well, it was verbal threats. There was dissension and it was obvious he wasn't happy. If you get one complaint, fine, but if you start getting two and three and that he's complaining about wait times at your customers. He already said he was going into a lease purchase program. You knew that

> the person was leaving. He was not happy. He wanted to leave.

Tr. at 661.

Mrs. Morgan also testified that she considered Mr. Smith's statement about taking the trailer to DOT to be inspected, which he made to CRST, to be a verbal threat against her company. Tr. at 661.

> It was a verbal threat. I didn't understand because I had just got off the phone with him an hour or two before he said everything was fine. I didn't take it as a threat, I just took it as - why would you even say that if you had told me everything was fine? I don't think it was a threat, I just didn't understand.

Tr. at 661. Mrs. Morgan was asked to reconcile her explanation with her deposition, in which she stated that she "took the equipment issue and whatever happened as just another verbal threat against the company." Tr. at 661-662; CX 8 at 63. She responded, "I guess. Maybe that's how I was feeling the day you asked me the question. He wasn't happy. He wasn't happy with being there. He wanted out." Tr. at 662. She also denied that she knew that Mr. Smith wanted the equipment replaced after talking to Mr. Morrison on November 8 and Mr. Parks on November 8 or 9. *Id.* at 662-664. "Again, I didn't know whether he was talking about the tractor, the trailer or both or if he was talking about a side-kit, because he wouldn't explain what was going on." *Id.* at 664. Mrs. Morgan testified that if Mr. Smith had taken the trailer to get inspected, any repairs would have been paid for by Lake City. *Id.* at 687. She also contends that she could have gotten a replacement trailer for Mr. Smith immediately if the trailer was taken out of service. *Id.*

On cross-examination at the hearing Mrs. Morgan was asked when she decided that Mr. Smith's last day with Lake City would be on November 9, 2005. Tr. at 666. She testified that it was either on November 8, 2005, or the following morning that she made the decision. *Id.* She was asked to reconcile her testimony to her deposition, in which she testified that she made the decision to replace Mr. Smith on November 8, 2005. Tr. at 666-667; CX 8 at 63.

Mrs. Morgan testified that although Mr. Smith resigned from her company, she would have terminated his employment anyway after she saw the damage that he had done to her equipment. Tr.

at 672. She acknowledged that she had not written that in her Management Overview. *Id.*

On cross-examination, Mr. Smith's attorney asked Mrs. Morgan to explain her deposition testimony regarding the "threat" made by Mr. Smith about taking the trailer to be inspected by DOT, in which Mrs. Morgan testified as follows:

> Q. The reason Harry's suggestion about taking the equipment to DOT was upsetting to you was because you wanted him to raise that concern directly to you so you could fix the equipment issue instead of having the issue raised to outside parties, is that correct?
>
> A. No, that is not correct.
>
> Q. If you would, look at page 74 of your deposition. At line 4 I asked: Now, on page 3 - this is of your management overview about two-thirds of the way down - do you see the sentence in which you say, "I also told him I was aware that he made the threat that he was going to take our equipment to DOT?"
>
> Answer: I asked him about that for the simple fact that I was - I didn't understand why he would do that. If he did have an issue with the equipment, why wouldn't he just tell us and let us get it into the shop up there, or - I mean, why would you just do that? I mean, if you had never had an issue and all of a sudden you have this issue and this accident, you know, why wouldn't you tell us to give us the opportunity to correct and help you?
>
> And that is where I was going with that. I just wanted to understand why, you know, why wouldn't you give us the opportunity to help you out. If it did need work, why wouldn't you tell us?
>
> Do you see that?
>
> A. Yeah.
>
> Q. This shows your concern that Harry should have raised the concern with you instead of threatening to go outside agency, correct?

A. No.

Q. It doesn't do that? All right, are you familiar with the concept of chain of command?

A. No, sir.

Q. Are you saying that you did not understand why Harry made the threat to go to the Department of Transportation?

A. That's what I'm saying.

Tr. at 673-675; CX 8 at 74-75; CX 1.

Mrs. Morgan described the phone call that she received from Mr. McNutt in August 2006, as follows:

> Jacob McNutt called the office. Jacob McNutt never said why he was calling the office. Jacob McNutt was told not to call the office again. Jacob McNutt would not be pulling a CRST load if he didn't work for CRST. So, I don't even know what that's about or where that came from.

Tr. at 675. At the hearing, Mrs. Morgan testified that she was aware that he was a witness in this case when she told him not to call back. *Id.*

Mrs. Morgan testified that Mr. Smith's pay was computed as follows:

> [Mr. Smith] received twenty-five (25) percent of the gross revenue that the truck earned, the line haul.
>
> ....
>
> If there's detention time, the shipper pays it, the drivers get paid, you know, on that as well. But on the norm a shipper doesn't start paying - you know, and that's industry-wide – doesn't start paying for detention until - if they pay it - until after three hours. Harry had only - he wasn't [at Majestic Steel] that long at all. He wasn't even there three hours. I think he was only there an hour or two.

Tr. at 678. Mrs. Morgan testified that she sometimes pays her drivers for down time when they have had to have their equipment serviced on the road, but Mr. Smith's truck was never down. *Id.* at 679.

On cross-examination, Mrs. Morgan was asked to explain exactly where Lake City's handbook states that drivers are responsible for reporting structural problems during their pre-trip inspections. Tr. at 679-682. Her explanation is as follows:

> Q. I wouldn't mind doing this after the break, but I would like it if you could go through Complainant's Exhibit 15, the handbook, and tell us where that is.
>
> A. You want to hand me the handbook?
>
> That would be page 7. Do you want me to read it out loud?
>
> Q. I would like you to point to it.
>
> ....
>
> THE WITNESS: It's under Maintenance. Starts midway down where it says, 'Oil changes and other PM procedures may be scheduled on the road.'
>
> Then it goes on to say, 'Check your air pressures every day, drivers and steerers for 100 psi during your pre-trip inspection. Failure to perform this check could lead to tire failure or premature wear. Driver will be responsible for negligent behavior including the tire pressures. Always purge your air tanks two to three times daily, especially in the winter months October through May.'
>
> Q. There's nothing in that part of the handbook that says drivers have to make a note of any structural defects in the truck, is that correct?
>
> A. Yeah, there is. It's in this – 'Damage. When a driver is given a Lake City's tractor...'
>
> ....
>
> 'When a driver is given a Lake City's tractor or trailers they are responsible for those units and

> any damages incurred. An exception to this policy is if the damage was not preventable, such as another truck or trailer hitting Lake City's unit due to no fault of the driver.'
>
> And structural would be the no drop trailer policy which is on page 4. Never drop a trailer for any reason. As far as the maintenance on the equipment we ask them, on page 4 again up above drop trailer policy, to make sure that they keep the units clean and that we reimburse them. I think that pretty much covers it as far as the equipment.
>
> Q. None of those provisions say that the driver has to --
>
> ....
>
> Q. None of those provisions say the driver has to check for structural defects for the -- inspection, is that right?
>
> A. Oh, here it is. A structural defect I personally would call that an emergency. I personally would. I don't know if anybody else would comprehend the structure of a trailer or a tractor falling apart an emergency, but I would. Those are what emergency numbers are listed for, which is what your monthly maintenance is for, it's what your daily logs are for. Does that answer your question?
>
> Q. I'm ready to move on.

Tr. at 679-682; CX 15.

Mrs. Morgan testified that she received regular updates from CRST, such as the one shown in RX MM, which detailed her drivers' log reports. Tr. at 682; RX MM. She described CRST's reporting policy, including how often the reports are received, as follows:

> Anywhere from - I think they have a policy, I think it's in here, for fourteen (14) days. Anything that's missing under fourteen (14) days. So, I would say about thirty (30) days maybe, because you have to have a chance for the drivers - you know, like if they're delivering this week

> obviously they're not going to get all their bills scanned in this week. The work they've done, probably not till the following week or towards the end of the following week. And all their logs and stuff and then you've got to figure people have got to go through them. I would say twenty (20) to thirty (30) days after - probably monthly, monthly we'll get log violations. They'll give them so much time to get those corrected. If they haven't gotten them corrected, they immediately go on stop dispatch.

Tr. at 682-683; RX MM. Mrs. Morgan testified that she did not receive a copy of the hours' violation that Mr. Smith was sent by RAIR Technologies in September 2005, but instead received a recap. Tr. at 684. Mrs. Morgan explained that she did not take any specific action against Mr. Smith after the violation occurred. *Id.* She described the process as follows:

> Q. You didn't take any - once you got notified that Harry Smith had this hour of service violation on September 15 or thereafter you didn't take any action in response, correct?
>
> A. How it works is - yes. If he had - whatever the issue was, if CRST needed more information they would have put on the monthly notification. If Harry Smith needed [to] get logs in or correct logs, then he would have been on that list and he absolutely been told to correct it, get it scanned in or whatever the problems is fix it because he would have been put on stop dispatch. I don't have a choice as to whether or not to approach him or not approach him regarding an hours of service, you have to.
>
> Q. Harry was never put on do not dispatch, correct?
>
> A. I couldn't tell you that, he may have. I mean, I don't know.
>
> Q. Well, from September 5 until November 9 your company continued to dispatch him throughout that time, correct?
>
> A. Let me help you understand. CRST's computer system is where the bills get put in, where you

> dispatch the loads that he's picking up and delivering and where you can advance fuel many of com data checks. If Harry Smith had a long violation that CRST needed, they would have sent me a spreadsheet listing any driver that needed to fix what was wrong. If Harry didn't do it, he would have been put on stop dispatch. It may have been due yesterday and today he still didn't get a chance to go in there and scan it. He would be put on [no] dispatch until he pulled into the truck stop and sent in his corrected log.
>
> I don't have any way of remembering if he did or not, but that would be the process.

Tr. at 684-685.

At her deposition, Mrs. Morgan explained how Lake City receives its revenue from CRST and the various owner-operators that it utilizes. CX 8 at 27-31. As an agent, her trucks are leased to CRST. *Id.* at 27. CRST pays Lake City for Lake City-owned equipment "seventy-five percent of the gross earnings, minus any advances for fuel that were taken, minus permits and licenses, things like that, for the trucks." *Id.* For the owner-operators, Lake City receives "eight percent of all loads that [they] book. *Id.* at 28.

Mrs. Morgan testified that she does not know what percentage of her company's income comes from revenue generated by owner-operators, and what percentage comes from her lease with CRST. CX 8 at 28-29. "I would have to check with my accountant. I don't know." *Id.* at 29. At her deposition in November 2006, Mrs. Morgan testified that at that time, she leased three trucks to CRST, and estimated that she worked with thirteen to fifteen owner-operators. *Id.* at 29-30. Mrs. Morgan explained that she does not book the owner-operators every day so she would have to check with her accountant to confirm how much revenue owner-operators generate for Lake City. *Id.* at 30-31. Mrs. Morgan confirmed that Lake City does not have any other sources of income besides its leases with CRST the percentage it receives from owner-operators. *Id.* at 31.

Mrs. Morgan testified that Lake City has a liability insurance policy through Great West Insurance, but at the time of her deposition, she had not submitted a claim to them regarding this case. CX 8 at 36-37.

Lake City has the following employee evaluation policy:

> After they are – after 90 days, I give them a one-percent raise and I list the requirements and the personnel policy in order to get that raise, and then, after a year, you know, they would be evaluated. I've never really had anybody there over a year, so it's never really come up.

CX 8 at 46. Mrs. Morgan testified that Mr. Smith's compensation was in line with her policy, as he started out at twenty-five percent and thereafter would have been taken to twenty-six percent after ninety days if he met all the requirements; i.e., no damage to the equipment, no late pickups or deliveries, etc. *Id.* at 51.

Lake City provides its drivers with hospitalization insurance, vacation pay, a bonus program, life insurance, and retirement. CX 8 at 47. Lake City pays for the driver's hospitalization coverage, but does not contribute to family coverage if the driver elects that level of coverage. *Id.* Drivers receive one week of vacation after one year of service, and two weeks after three years. *Id.* A fifty-dollar bonus is paid weekly if a driver grosses four thousand dollars or more that week. *Id.* at 48. Fifteen thousand dollars in life insurance is included if the driver elects hospitalization coverage. *Id.* Lake City matches a certain percentage of a driver's contribution to a retirement account, although Mrs. Morgan could not recall what percentage. *Id.* The driver must be a plan participant to qualify for the matching employer contribution, and must work at least six months for Lake City to qualify for the plan. *Id.* at 48-49.

During her deposition, Mrs. Morgan was asked about the deductions she made to Mr. Smith's final paycheck. CX 8 at 87-89. She was unable to confirm Complainant's attorney's calculation of seven hundred seventy-nine dollars and forty-one cents ($779.41) without referencing her records, but she confirmed that the charge should include deductions for the steel tarp, defacing the tires, and repairing the wires that he cut when he removed his radio. *Id.* She claims that Mr. Smith received a credit in his final paycheck for the fuel advance that had been deducted because he later turned in the fuel receipt. *Id.* at 87. She got an estimate from CRST for replacing the tarp with a new one, and charged Mr. Smith the full cost of the new tarp, although she "might not have replaced it then and there" because she bought a new trailer with a side kit shortly thereafter. *Id.* at 88-89. She only charged Mr. Smith for the amount of time and shop supplies that she used to clean the paint off of the tires herself. *Id.* For the cut wiring, she only

charged Mr. Smith the amount charged to her by the vendor for troubleshooting the problem. *Id.* at 88-89.

Testimony of Donald Morgan

Respondent Donald Morgan, Crystle Morgan's husband, provided a statement to OSHA on January 6, 2006, he was deposed on November 22, 2006, and he testified at the hearing on May 9, 2007. CX 7, 9; Tr. at 688-737.

At the hearing, Mr. Morgan testified that he has been married to Crystle Morgan for six to seven years. Tr. at 689. He has been in the trucking industry for twenty-seven years. *Id.* He has worked as a company driver and as an owner-operator and has held various management positions with companies with fleets as large as twelve hundred trucks, including Terminal Manager, Regional Manager, Director of Capacity Development, Business Development, and Vice President of Operations. *Id.* at 689-690. Mr. Morgan is familiar with the Federal Motor Carrier Safety Regulations and is currently involved in the trucking industry as an owner-operator leased on with TL Express. Tr. at 689-690; CX 9 at 4).

Mr. Morgan testified that he is not now, and never has been, an owner of Lake City. Tr. at 690. He had nothing to do with the corporation's formation in Delaware, nor does he hold any shares of the corporation, and no one holds any shares in trust for his benefit. *Id.* He also testified that he has never exercised any management role at Lake City. *Id.* at 691. When asked during his deposition if he has a title with Lake City, he replied, "Yeah ... Crystle's husband." CX 9 at 10. Mr. Morgan testified that his wife is the sole owner of Lake City because "[a]t the time [of Lake City's formation], [he] had some other interest in some other employment that [he] didn't want there to be any appearance of a conflict of interest." CX 9 at 5.

Since he began working as an owner-operator for TL Express in August 2005, he has done some work for Lake City; he "probably rolled some tarps, inventoried some equipment, things of that nature, took the garbage out a few times." CX 9 at 9. Mr. Morgan has been paid by Lake City for his work, although he could not recall when he was paid for the first time, how much he was paid, or when he received his last paycheck. CX 9 at 9. He acknowledged that he received a W-2 Form from Lake City the year before, but he did not know how much income was reported. *Id.* At the hearing he stated, "Lake City Enterprises paid me for some of my services. Lake City could never possibly repay me for all the services I've rendered." Tr. at 736. Mr. Morgan reported

that he pays Lake City to park his trailer at its facility and, when necessary, to work on his trailer in the yard. *Id.* at 695. Mr. Morgan did not know Complainant before he started working for Lake City. *Id.* at 691.

Mr. Morgan knew some of the salespeople who sold trucks for Select Trucks of Cleveland, which is owned by the Freightliner Corporation, so he recommended that his wife purchase used trucks from them. Tr. at 691. He did not sign for the trailer at issue in this case, but "steered Crystle in that direction." *Id.* at 692.

Mr. Morgan is familiar with Transcraft trailers, and at the time of the hearing he hauled one himself. Tr. at 692. Mr. Morgan described the difference between the handling characteristics of a Transcraft trailer and other trailers as follows:

> Going down the road you kind of feel like you're in a boat a little bit. They sway more than, say, a Dorsey trailer. You can have a Dorsey trailer or a Ritenour trailer side by side with a Ritenour - they just handle completely different.

Tr. at 693-694. He stated that, while not as ideal as an aluminum trailer that allows a driver to haul a greater payload, Transcraft trailers are "economical" and "good" trailers that "hold up over the long haul." *Id.* at 694.

Mr. Morgan recalls speaking to Complainant on the phone at the request of Mrs. Morgan, before he was hired by Lake City. Tr. at 694-695.

> I recall speaking to Harry Smith prior to his employment with Lake City. Crystle had asked me to give him directions to our yard from where he lived. He lives down in the Coshocton, Newcomers Town area and she knew I knew the area and I could get him into our yard probably than she could without looking up Map Quest or something. If I recall, she was busy with some other things that day. I believe Harry called in and I happened to be there. She asked me to talk to him. While talking to Harry I kind of felt him out on what his experience was and what his background was in trucking. Not because I was requested to, probably because I'm a little nosy and I still have that management mentality.

Tr. at 694-695. Mr. Morgan asserts that he played no role in deciding whether Lake City should hire Mr. Smith. *Id.* at 696.

Mr. Morgan described his involvement with preparing the equipment for Mr. Smith on the day that he was hired as follows:

> Crystle had told me that this driver was coming in and going to prepare to go to orientation the next - had to be at an orientation the next morning in Rockport, Indiana. So, I went in - being as it was a holiday weekend - and I prepared the inventory for the truck, make sure everything was on the tractor and the trailer so the individual would be ready to go.

Tr. at 696.

Mr. Morgan testified that he did not personally do any maintenance to the floor of the trailer; however, he went with his wife to Transport Services in North Royalton, Ohio, to purchase Apetong wood and hauled the trailer to a yard to be repaired. Tr. at 697. He is not sure who actually repaired the trailer. *Id.*

Mr. Morgan is certain that there was no structural problem with the trailer at issue when it was assigned to Mr. Smith. Tr. at 698. He based his opinion on the following reasoning:

> Because if there would have been a structural problem with the trailer when the wood was replaced it would have been discovered. Individuals have to get underneath that trailer as well as on top of it to replace the wood. Also, I know that that truck had passed the DOT inspection and that would have been part of a DOT inspect[ion], getting up and looking at different areas of that trailer.

Tr. at 698. He also stated that part of the driver's responsibility in completing his or her pre-trip and post-trip inspections is to check the structural integrity of the trailer. *Id.* at 698, 731-732.

Mr. Morgan described his initial meeting with Mr. Smith as follows:

> I was in the yard - I was in the Lake City yard when Harry and his family pulled up in their van.

> From what I recall Crystle was up in the office. Like I said, I was getting things - making sure everything was in place on this tractor and trailer so it could go out. So, I assumed when they pulled up that was the driver. I introduced myself as Don Morgan. I took Mr. Smith up into the office. His wife waited in the vehicle.
>
> Then a little while later his wife came up, from what I recall. Then I went about my business because I know Crystle's orientation is long. I had other things I needed to do.
>
> ....
>
> I went back out to the tractor/trailer to finish up what I was doing.

Tr. at 699-700.

Mr. Morgan inventoried the equipment before it was assigned to Mr. Smith, but disputes Mr. Smith's allegation that some of the equipment listed on the inventory sheet was missing when Mr. Smith took possession of the trailer from Respondents. Tr. at 701, 735. He asserts that he went through every item of equipment himself and then walked through the inventory item-by-item with Mr. Smith and nothing was missing. Tr. at 701-702; CX 9 at 16. Mr. Smith did not sign the inventory form until Mr. Morgan had gone over each and every piece of equipment with him in the yard. *Id.* at 702.

Mr. Morgan testified that he helped load the heavy equipment that Mr. McNutt hauled on the same Transcraft trailer that is at issue in this case. Tr. at 703-704.

> That equipment was no heavier than twenty thousand (20,000) pounds. It was three different machines that had to be strapped on versus chains because of the delicacy of the computerization on the equipment. We had to make sure that every piece was tarped and there wasn't anything exposed to the weather.

Tr. at 704. Mr. Morgan disputes Mr. McNutt's assertion that he spoke to him about the trailer's handling upon returning from Chicago. *Id.*

Mr. Morgan testified that no one ever contacted him about any alleged deficiencies with the trailer at issue in this case. Tr. at 705. He supported his testimony by stating, "I would have got hold of Crystle right away and suggested that she get the trailer off the road and into a facility and have it repaired." *Id.*

Mr. Morgan believes that A&H Truck Repair's work is "superior". Tr. at 705. He testified that "from the testimony" he was aware that CRST uses A&H for its DOT inspections. *Id.* Mr. Morgan confirmed that he did not influence the A&H inspector to overlook problems with the trailer when it had its DOT inspection. *Id.* at 706. He never told his wife to call A&H about the trailer's inspection either. *Id.*

Mr. Morgan testified that Mr. Smith never complained to him about the trailer's safety. Tr. at 707. He acknowledged that Mr. Smith and Mr. McNutt met him at the Flying J on October 13, 2005, to get something to eat, but he disputes that the men had any conversation related to truck safety or replacing any of the equipment owned or leased by Lake City, or about the trailer at issue in this case. *Id.* at 707-710, 736-737. He also testified that he had no authority to make commitments for Lake City in regards to the replacement of its equipment. *Id.* 710-711.

At the hearing, Mr. Morgan recalled the conversation as unremarkable, other than were Mr. Smith's statement that he had never had an omelet before and that he had a fifty-two inch television in his bunk. Tr. at 711; CX 9 at 18-19. At his deposition, Mr. Morgan testified as follows:

> Harry had mentioned that he had a 36-inch screen television set in the back of the truck, and another driver verified that, and I later found out it was a 13-inch TV, so either he's got a bad ruler or he wasn't telling the truth.
>
> CX 9 at 14.

Mr. Morgan also recalled that both Mr. Smith and Mr. McNutt told him that they wanted satellite radios in their trucks. CX 9 at 19. He told them, "Well, I'll pass the word to Crystle, you know, maybe she could do something for you guys." *Id.* Mr. Morgan does not recall ever having a conversation with Mr. Smith about anything after that meeting, and he was not present on November 9, 2005, when Mr. Smith's employment with Lake City ended. *Id.* at 712.

Using a demonstrative model, Mr. Morgan described in detail how the trailer's straps are connected to winches that ride along a winch track to hold the trailer's payload in place. Tr. at 714-718). Mr. Morgan also reviewed the photographs in RX V. Tr. at 718-721. Judging from the edges of the strap photographed and shown in RX V-7, Mr. Morgan testified that a shifting load would not have cut the strap so cleanly. *Id.* at 718. In his opinion, the strap was cut deliberately by a knife or some other sharp object. *Id.* Mr. Morgan testified that the photographs in RX-V are true and accurate photos of the trailer at issue in this case, because he personally put the extra tape on the trailer. *Id.* at 719-721. He acknowledged that he did not personally take any photographs of the trailer. Tr. at 737; CX 9 at 21.

Based on his sixteen years experience as a truck driver, his familiarity with the truck and trailer that Mr. Smith was driving, and his consideration of Mr. Smith's and Mr. McNutt's testimony during their depositions and at the hearing, Mr. Morgan opined that the incident at the truck stop in Effingham, Illinois, was caused by driver error and not by faulty equipment. Tr. at 713-714, 722-727, 736.

> [I]n everything I looked at on that trailer when it came back after the winch track - or the winch itself - was fouled and the amount of grease that had been on the winch I determined that the only place that grease could have came from was from the fifth wheel of the tractor. The only way to get that much grease on a winch – there's no way that the winch should ever come in contact in any other situation with the fifth wheel than if this truck was in a jackknife position and/or that this tractor had been dropped from this trailer in the jackknife position.
>
> ....
>
> A jackknife position can be in either position left or right. The jackknife position is where the tractor would be a hard left from the trailer in an L-shape, the tractor actually being the top of the backwards L for lack of better verbiage in this situation.
>
> ....

> My view on how this whole thing occurred is I believe that the driver was traveling too fast in a parking lot situation, made too sharp of a turn. It was testified by Mr. Smith, from what I recall and, also, Mr. McNutt that the freight in question was mounted directly dead center of this trailer. On single coils and especially on a Transcraft trailer you never dead center a coil. It should always be at least one foot back from center.
>
> Number one, you're allowed more weight on a spread axle trailer. You're allowed forty thousand (40,000) pounds on that rear configuration, so you want to favor that. Also, it will ride better and it's in a better position stability-wise if it's one foot back from dead center.
>
> I worked for company, Falcon Transport, would fire a driver for dead centering a coil trailer.
>
> ....
>
> You're going to cause the trailer to sway more. You're going to cause the trailer to flex more.

Tr. at 722-724.

Mr. Morgan agreed with Mr. Clausen's testimony that driver error caused the incident in Effingham, Illinois, on November 8, 2005, and that if Mr. Smith had used appropriate technique, he could have righted the trailer. Tr. at 724.

> [A]ctually what I believe happened I believe that Harry got into situation and he panicked, he was scared. And that'll happen and I don't fault him for being scared. If he would have got a more experienced driver on the phone, he could have got himself out of it a lot easier, you know, without any problems.
>
> You start hooking chains to things and, you know, chains are strong, but they're only good at - you never [know]. He could have killed somebody, could have killed whoever was standing by the trailer with the chains. I mean, you could have pieces of

> chain flying all over this truck stop. They put a lot of folks, in addition to themselves, at risk.

Tr. at 725-726.

Mr. Morgan testified that his radio is on twenty-four hours a day, seven days a week. Tr. at 726. If need be, Mr. Smith and Mr. McNutt could have contacted him. *Id.* at 734. He checked his telephone records and confirmed that neither Mr. Smith nor Mr. McNutt ever attempted to call him for advice about what to do when the incident occurred. *Id.* at 726. Mr. Morgan also stated that the fact that Mr. Smith continued driving for eighty miles, without incident, to deliver the coil supports his assertion that driver error caused the incident with the trailer. *Id.* at 727.

Mr. Morgan declared his testimony at the hearing to be consistent with what he told the investigator in his statement to OSHA. Tr. at 727; CX 7; CX 9 at 21-22. Mr. Morgan hauled four or five loads without encountering any problems with the trailer at issue after Mr. Smith was no longer employed by Respondents. Tr. at 728-729. He reported that aside from the damage caused during the incident on November 9, 2005, there was no other damage to the trailer. *Id.* at 728. At his deposition, Mr. Morgan testified that he "never inspected the trailer after it came back." CX 9 at 20. It wasn't [his] duty to inspect the trailer. *Id.* At the hearing, he confirmed that the trailer's structural supports had never been welded or repaired in any way. Tr. at 729.

Mr. Morgan acknowledged that, on behalf of Lake City, he took the trailer to be sandblasted in Newbury, Ohio. Tr. at 730. Mrs. Morgan paid for this repair, but his name appeared on the receipt, "because [he was] the one that dropped the trailer off and picked it up." *Id.* Mr. Morgan confirmed that drivers have an obligation to report any safety problems on their daily logs. *Id.* at 731-732. He stated that no one at Lake City, including him, ever directed Mr. Smith or Mr. McNutt to falsify their logs. *Id.* at 732. Mr. Morgan has hauled freight for Lake City customers, and has never been told by anyone at Lake City to falsify his logs, although as an independent owner-operator he dispatches himself. *Id.* at 733-734.

Mr. Morgan testified that the trailer at issue in this case was sold or traded after Mr. Smith's employment ended, although he could not recall when or why Respondents disposed of it. CX 9 at 17.

Mr. Morgan testified that he is familiar with the employee protection provisions of the STAA, through his "years in management, various companies. Also, [he] was a labor negotiator....[i]n Cleveland, for the Construction Employers Association." CX 9 at 10-11. He described his understanding of the STAA's employee protection provisions as follows:

> Okay. My understanding is that, if an individual has an issue with an employer, he can take that issue to the Department of Labor and try and resolve it.
>
> ....
>
> My understanding is, and you might want to look into this, that the Federal Highway Safety Administration covers truck drivers, and they supersede anything any other department of the government will come up with, and truck drivers have an obligation to follow those rules to the T or face imprisonment or fine.
>
> ....
>
> Rules 397 are perfectly clear, and every driver has a copy of that handbook, as provided by the Federal Highway Safety Administration.
>
> ....
>
> Protected activity would be those activities for which employees are protected from retaliation.
>
> ....
>
> I'd have to read the Act again to really be clear [as to what activities are protected under the STAA].

CX 9 at 10-13. Mr. Morgan has been aware of the STAA's employee protection provisions and the complaint process for "a number of years", but he has never discussed the STAA with his wife and does not know what her understanding of the law is. *Id.* at 13.

IV. DISCUSSION

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a

commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C. § 31105(a)(1)(A). Protected activity includes filing a complaint or beginning a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order." Id. The Act further provides that an employer may not retaliate against an employee-driver if "the employee refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C. § 31105(a)(1)(B)(i)-(ii).

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity under the Act, (2) the respondent was aware of the activity, (3) he suffered adverse employment action, and (4) there was a causal connection between the protected activity and the adverse action.[8] *See Coxen v. United Parcel Service*, ARB No. 04-093, ALJ No. 2003-STA-13, slip op. at 5 (ARB Feb. 28, 2006)(*citing Regan v. National Welders Supply*, ARB No. 2003-117, ALJ No. 2003-STA-14, slip op. at 4 (ARB Sept. 30, 2004)); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys. Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 2002-122, ALJ No. 2001-STA-33, slip op. at 8-9 (Oct. 31, 2003).

In this case, as will be discussed below, Complainant has demonstrated by direct evidence that LCE discharged him due to his protected activity. Respondents first argue that Complainant resigned from his position; in the alternative, they argue that LCE had already begun looking for a replacement before Mr. Smith resigned, and that he would have been fired anyway for his numerous complaints about LCE, as well as his conduct on November 8-9, 2005, had he not resigned. Resp. Br. at 45-47. The dual-motive analysis is therefore implicated

[8] Where the case is fully tried on the merits, as it has been here, it is unnecessary to determine whether the complainant presented a prima facie case and whether the respondent rebutted that showing. Rather, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If he or she did prevail, it is irrelevant whether a prima facie case was presented. *Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia*, 97-STA-30 (ARB July 8, 1998).

here.[9] *See Smith v. Yellow Freight System*, Inc., 1991-STA-45 (Sec'y Mar. 10, 1993).

> Where there is direct evidence that the adverse action is motivated, at least in part, by the protected activity, the respondent may avoid liability only by establishing that it would have taken the adverse action in the absence of the protected activity.

Caimano v. Brink's, Inc., 1995 STA-4, slip op. at 23-24 (Sec'y Jan. 26, 1996)(citation omitted). In such cases, a respondent "bears the risk that 'the influence of legal and illegal motives cannot be separated . . . .'" *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984)(quoting *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983).

Protected Activity under the Act and
Employer's Knowledge of Such Activity

Complainant alleges that he engaged in protected activity while he was employed by LCE, by making multiple complaints to several key employees of LCE and CRST about structural problems with the trailer. *See*, Complainant's Post-Hearing Brief at 35-40. Complainant contends that Respondents were aware of his complaints and Mrs. Morgan even acknowledged as much when she completed Mr. Smith's "Management Overview" and "Incident Report". CX 1.

Respondents deny that Complainant engaged in any protected activities alleged in his complaint, as he "never made a 'complaint or started a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order.'" Resp. Br. at 40 (quoting 49 U.S.C. § 31105(a)(1)(A)). Furthermore, Respondents argue that Complainant never put

[9] In STAA cases where the dual motive analysis is not an issue, a different burden-shifting regime is used. *See Moravec v. HC & M Transportation, Inc.*, 1990-STA-44, p. 14 (Sec'y Jan. 6, 1992). The complainant must establish that adverse action was taken due to protected activity; the respondent can then prove by clear and convincing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. *See Moravec v. HC & M Transportation, Inc.*, 1990-STA-44, p. 14 (Sec'y Jan. 6, 1992). The burden then shifts back to the complainant to prove that the proffered reason was not the true reason for the adverse action. *Byrd v. Consolidated Motor Freight*, 1997-STA-9, p. 4-5 (ARB May 5, 1998), (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993)).

anything in writing, so Complainant's testimony is the only proof of his allegations. *Id.* at 41.

As mentioned above, protected activity includes filing a complaint in relation to a violation of a commercial motor vehicle safety regulation. The Board has established that "the 'filed a complaint' language protects from discrimination an employee who communicates a violation of a commercial motor vehicle regulation, standard or order to any supervisory personnel." *Harrison v. Roadway Express, Inc.*, ALJ No. 1999-STA-00037 (Mar. 30, 2000) (*aff'd*, ARB No. 00048 (Dec. 31, 2002); *See also Clean Harbors Environ. Serv. Inc v. Herman*, 146 F.3d 12 (1st Cir. 1998) (internal complaints are covered under the STAA).

Moreover, protection under the Act for raising a complaint does not depend on proving an actual violation of a commercial vehicle safety regulation; the complaint need only relate to such a violation. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).[10] A complaint need not explicitly mention a commercial motor vehicle safety standard to be protected under the STAA's whistleblower provision. The Secretary has stated:

> As long as the complaint raises safety concerns, the layman who usually will be filing it cannot be expected to cite standards or rules like a trained lawyer. The statute requires only that the complaint 'relate' to a violation of a commercial motor vehicle safety standard. Finally, the plain language of section 2305(a) protects all complaints, whenever filed relating to any commercial motor vehicle safety standard. There is no basis in either the Act or its legislative history to read the limitation of section

[10] Protected activity also includes refusing to operate a vehicle because such operation would violate a law related to commercial motor vehicle safety or health, or if the driver has a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition. 49 U.S.C. § 31105(a)(1)(B). To qualify under this provision, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health, and the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. § 31105(a)(2). Because Mr. Smith filed his complaint under § 31105(a)(1)(A), the "refusal to drive" provision and its associated legal analysis are not relevant in this case.

> 2305(b)(refusing to operate a vehicle when doing so would violate a Federal safety standard) into subsection (a).

Nix v. Nehi-RC Bottling Company, Inc., 84-STA-1 (Sec'y July 13, 1984), slip op. at 8-9.

Where the complainant in an STAA action makes complaints to his supervisor "relating to" alleged violations of Department of Transportation regulations, these complaints constitute protected activity under the STAA. *Hernandez v. Guardian Purchasing Co.*, 91-STA-31 (Sec'y June 4, 1992). The Secretary has held that a complainant need only show that he reasonably believed he was complaining about a safety hazard to be protected by the Act.[11] *Schuler v. M & P Contracting, Inc.*, 1994-STA-14 (Sec'y Dec. 15, 1994). A complaint related to a safety violation is protected under § 31105(a) of the STAA even if the complaint is ultimately determined to be meritless. *Barr v. ACW Truck Lines, Inc.*, 91- STA-42 (Sec'y Apr. 22, 1992); *Moyer v. Yellow Freight System, Inc.*, 89-STA-7 (Sec'y Sept. 27, 1990). A complainant's motivation in making safety complaints has no bearing on whether those complaints are protected activity. *Nichols v. Gordon Trucking, Inc.*, 1997-STA-2 (ARB July 17, 1997).

Complainant testified that he complained to Ken Morrison "on a daily basis" about the trailer. Tr. at 286-287. He also alleged that he complained to Mr. Morgan about the trailer at the breakfast meeting on October 13, 2005, and that they had other "[g]eneral conversation[s] about the trailer" over the two-way radio, during which Mr. Smith was "complaining about the trailer to him. Wondering when he was going to replace the trailer." Tr. at 287-288. During these conversations, Mr. Morgan "acknowledge[ed] the trailer had problems" but told Mr. Smith to "[j]ust bear with him, they're trying." *Id.* at 288. Mr. McNutt also testified that he complained about the trailer to LCE in the past, and that he was present on the day that Mr. Smith complained to Mr. Morgan about the trailer. *Id.* at 148-149. Mr. Smith testified that he informed CRST that he was considering taking LCE's trailer to be inspected by the DOT because it was unsafe prior to the incident on November 8, 2005. *Id.* at 347-349. Mrs. Morgan testified that she was the beginning and end of

[11] By contrast, a complaint brought under 49 U.S.C. § 31105(a)(1)(B)(i) requires that a complainant show an ***actual*** violation of a commercial motor vehicle safety regulation; it is not sufficient that the driver has a reasonable good faith belief about a violation. *Cook v. Kidimula International, Inc.*, 95-STA- 44 (Sec'y Mar. 12, 1996).

LCE's chain of command, although she acknowledged that "[a]ny time there is an issue with the equipment, they are to contact" either Mrs. Morgan or Mr. Morrison. CX 8 at 41. In addition, she testified that LCE's policy about reporting safety issues allows drivers to report any concerns about the safety of their equipment to CRST. *Id.* at 41-43.

Mr. Morrison, Mr. Liuzzo, Mrs. Morgan, and Mr. Morgan all deny that Mr. Smith ever complained about the trailer to any of them at any time prior to November 8, 2005, the day that the incident occurred at the truck stop in Effingham, Illinois. Tr. at 480, 522, 581, 711. Mrs. Morgan also testified that Mr. Smith did not indicate any problem with the trailer on his daily logs. *Id.* at 589-590. Mr. Morrison and Mrs. Morgan both acknowledge that Mr. Smith reported that he had almost flipped the tractor and trailer, but testified that Mr. Smith would not explain anything else to them. Tr. at 483, 658. However, Mrs. Morgan also described her telephone conversation with Mr. Smith as follows:

> Q. Let's return now to November 8, could you please tell the Administrative Law Judge what conversations that you had with Harry Smith and what actually transpired during those conversations with Mr. Smith on that day?
>
> A. I was first notified by Ken Morrison about 7:45 that morning that Harry had notified him that he had almost flipped the tractor and the trailer over.
>
> Q. Was this of concern to you?
>
> A. Absolutely.
>
> Q. So, what all did you do?
>
> A. I asked Kenny if he was all right, you know, was anybody hurt, is the equipment damaged. Ken said that it didn't sound like it, I believe is what he told me. I then called Harry right away.
>
> Q. How did you reach him?

A. I don’t remember if I actually phoned him on the cell phone or talked to him on the two way radio.

Q. Tell us about the conversation, what was said by you, what was said by Mr. Smith.

A. Let me think. I asked him what happened. He said that he had almost flipped the tractor and the trailer over. I asked him, ‘How did you do that?’ He says, ‘I didn’t do anything. It is his trailer.’ I said, ‘What is wrong with the trailer?’ He said, ‘The same thing that has been wrong with it since you issued it to me.’ Then I asked him to help me to understand what the issue was. I asked him if we should get it in someplace, should I have a tow truck come, what do you need from me to do? And he was just pretty angry.

Q. Did he tell you what had actually transpired?

A. He said he was pulling out of a fuel stop after getting fuel in Granite City and when he was turning out he almost flipped over. He said it was because of the trailer. I think I asked him what he had on the trailer. He said, ‘A quail.’ I said, ‘Where did you have the quail loaded?’ He said, ‘In the middle.’ He indicated that everything was fine and that he could go on and keep working. I asked him several times, you know, if everything was okay. He said, ‘Yes.’ He wouldn’t explain to me what happened. He just said that he almost turned it over, you know, after getting fuel.

Q. Was there any statement that he made about replacing the trailer or the equipment or replacing him?

A. No, he did not make that comment to me.

Q. Was there any discussion about taking the trailer to a garage for the purposes of either having it inspected or repaired, if it needed it?

A. Yes, I asked him if it needed to be repaired.

Tr. at 590-592.

In the "Management Overview", Mrs. Morgan stated that Mr. Smith reported that he "almost flipped the tractor and trailer both." He stated that it was because Lake City had "faulty equipment." CX 1. She also testified that Mr. Smith was "pretty angry" when she spoke to him after the incident on November 8, 2005. Tr. at 591.

Mrs. Morgan claims that Mr. Smith never complained about the trailer's safety to her before the accident took place, and that CRST's knowledge of Mr. Smith's complaints about the trailer should not be imputed to LCE. However, according to Mrs. Morgan, LCE's policy allows drivers to report safety concerns to CRST. CX 8 at 41-43.

Mrs. Morgan acknowledged on numerous occasions in her testimony and in other documentary evidence that Mr. Smith complained about the trailer's safety during his conversation with her on November 9, 2005. CX 8 at 15-16; Tr. at 590-592; CX 1. Moreover, Mrs. Morgan also documented that she told CRST that she planned to terminate Mr. Smith's employment because he "gave [LCE] an ultimatum and told [them] to find another driver for the truck because [LCE] had faulty equipment." CX 1. She also recorded that Mr. Milton, the CRST representative that she called to find a replacement for Mr. Smith, reported to her that he had received a call from Complainant informing him that "[Mr. Smith] was going to take [LCE's] trailer and have it DOT inspected." *Id.* Furthermore, when asked if she recalled other complaints that Mr. Smith had made about the trailer, Mrs. Morgan replied, "No, but, you know, I have guys calling me all day long. I can't remember." CX 8 at 56-57. Mrs. Morgan's admission that she does not recall all of the complaints that she receives from her drivers calls into question her testimony that Mr. Smith never complained about his trailer prior to November 8, 2005.

When viewing Mrs. Morgan's testimony with the entirety of the record, I do not find her testimony to be as credible, because she has not adequately reconciled the numerous factual inconsistencies found in her deposition, hearing testimony, and the "Management Overview" and "Incident Report". In addition, her testimony is not supported by the more credible testimonial and documentary evidence of record.

Mr. Smith has consistently argued throughout this proceeding that he complained about the safety of the trailer since shortly after he started hauling it for Respondents. Having weighed the conflicting evidence on the issue of whether Complainant engaged in protected activity and whether Respondents had knowledge of any protected activities, I find Complainant's account of events to be more credible. Furthermore, I find that Mr. Smith had a reasonable good-faith belief that his complaints about the trailer were related to safety violations, as evidenced by his credible testimony, which is supported by the other credible evidence of record. In sum, I find that Complainant has established by a preponderance of the evidence that he engaged in protected activity and that Respondents were aware of it.

Adverse Employment Action in Violation of the Act

Complainant contends that he was discharged on November 9, 2005, because he engaged in protected activity. *See*, *e.g.*, Comp. Br. at 41. Prior to submitting their closing brief, Respondents consistently argued that Mr. Smith was not fired, but resigned when he made the statement to Mr. Morrison to replace the equipment or to replace him. ALJX 20; CX 8 at 59-61; Tr. at 600-602, 626. In their closing brief, Respondents made the following argument:

> Given [Complainant's desire to enter CRST's lease-purchase program and his other numerous complaints about LCE], Lake City made a reasonable and intelligent assessment that he would quit before long, and thus started to find a replacement driver *before* (albeit by just one day), the infamous November 8, 2005[,] incident occurred.

Resp. Br. at 45 (emphasis in original).

The relevant case law clearly establishes that Complainant suffered an adverse employment action under the Act. Any employment action by an employer which is unfavorable to the employee, the employee's compensation, terms, conditions, or privileges of employment constitutes an adverse action. *Long v. Roadway Express, Inc.*, 1988-STA-00013 (Sec'y Mar. 9, 1990). While an employer may have a non-discriminatory reason for taking the action and, therefore, ultimately prevail against a charge of illegal retaliation, that does not alter the fact that the employer took some step or action which adversely affected the employee's compensation, terms, conditions, or privileges of

employment. *Id.* Thus, regardless of the employer's motivation, proof that such a step or action was taken is sufficient to meet the employee's burden to establish that the employer took adverse action against the employee. *Id.*

In *Hollis v. Double DD Truck Lines, Inc.*, 84-STA-13 (Sec'y Mar. 18, 1985), there was conflict in the testimony about whether Complainant quit or was fired. The ALJ concluded that Complainant quit and therefore there could be no violation of § 2305(b). The Secretary, however, concluded that Complainant was constructively discharged. A constructive discharge occurs where "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Held v. Gulf Oil Co.,* 684 F.2d 427, 434 (6th Cir. 1982); *NLRB v. Haberman Construction Co.,* 641 F.2d 351 (5th Cir. 1981); *Cartwright Hardware Co. v. NLRB,* 600 F.2d 268 (10th Cir. 1979). *See also Seven Up Bottling Co. of Bridgetown, N.J., Inc. and Teamsters Local 676,* 235 NLRB 93 (1978), 1978 CCH NLRB 19, 261 (assigning employee to outdoor work in very cold weather constitutes a constructive discharge); *Interstate Equipment Co. and Teamsters Local 135,* 172 NLRB 145 (1968, 1968-2 CCH NLRB 20,084 (assigning a truck driver fewer loads, according him less seniority and assigning him older, less road-worthy trucks amounts to constructive discharge). Furthermore, it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions. *Junior v. Texaco, Inc.,* 688 F.2d 377 (5th Cir. 1982); *Bourque v. Powell Electric Mfg. Co.,* 617 F.2d 61 (5th Cir. 1980). An employer telling an employee that the employee's refusal to drive an assigned cab because he considered it unsafe was equivalent to the employee's "voluntarily quitting [his] job" may be a discharge under the circumstances. *See Dutile v. Tighe Trucking, Inc.,* 93-STA-31 (Sec'y Nov. 29, 1993).

In *Hollis,* the complainant sought correction of what he thought was an unsafe condition several times, but was asked to continue to drive the same truck, and respondent refused to repair the condition. Finally, complainant saw the only way out was to have the truck inspected by state inspectors, and when his fears about its lack of safety were confirmed, to resign. The Secretary concluded that this was a constructive discharge.

In *Phillips v. MJB Contractors,* 1992-STA-22 (Sec'y Oct. 6, 1992), the Secretary found that the ALJ had correctly applied the law of constructive discharge to find that the respondent effectively fired the complainant when the supervisor told the

complainant either to drive the unsafe vehicle or turn in his keys and go home. The ALJ cited *NLRB v. Champ Corp.,* 933 F.2d 688 (9th Cir. 1990), for the proposition that no set words are required to constitute a discharge but words or conduct which would logically lead an employee to believe that his tenure has been terminated can be sufficient to establish a discharge. The ALJ continued, stating that the test depends on the reasonable inferences that the employee draws from the statements and conduct of the employer. Each situation is to be scrutinized on the examination of the particular facts. *Phillips v. MJB Contractors,* 92- STA-22 (ALJ Aug. 11, 1992).

Here, Respondents dispute that Complainant was discharged on November, 9, 2005, but instead argue that he resigned. In the alternative, Respondents contend that Mr. Smith would have been fired in any event for his conduct on November 8, 2005. Tr. at 653; Resp. Br. at 47. Complainant testified that upon his arrival at Lake City's yard on November 9, 2005, Mrs. Morgan informed him that she was accepting his resignation. RX BB at 45. Other documents in the record attest to Complainant's account. *See, e.g.,* CX 1 ("Management Overview" and "Incident Report"). In addition, Complainant's and Respondents' other witnesses testified that Mr. Smith became angry and upset when Mrs. Morgan told him that she was accepting his resignation, a fact that indicates that he never intended to quit his job with LCE. Tr. at 84, 491-492, 524.

Having reviewed the conflicting evidence presented by both parties and the relevant case law on the issue, I find that Complainant did not resign from his position with LCE. His statement that Respondents should replace the equipment or replace him was, in and of itself, another complaint about what he perceived to be an unsafe trailer. Even if Respondents interpreted Mr. Smith's statement as a resignation, I find that the law of constructive discharge is applicable under these circumstances, as Mr. Smith had repeatedly complained about the trailer and asked that it be replaced on numerous occasions, only to be told to bear with Respondents a little longer. Accordingly, I find that Complainant has established by a preponderance of the evidence that he suffered an adverse employment action when he was discharged by LCE on November 9, 2005.

Causal Relationship between Alleged
Adverse Action and Protected Activity

As noted above, to be successful in a STAA case, a complainant must prove a causal relationship between a protected activity and the employer's adverse employment action. Here, Complainant has done so through his own testimony, the testimony and direct evidence provided by Mrs. Morgan, and by way of temporal proximity.

Because I grant greater probative weight to Mr. Smith's testimony that he repeatedly complained about the trailer to Respondents after hauling a couple of loads with the trailer, the fact that Mrs. Morgan claims that she began searching for Mr. Smith's replacement on November 7, 2005, is inconsequential in determining the outcome in this case. Furthermore, Mrs. Morgan's testimony that Complainant's statement to CRST that he was considering taking the trailer to be inspected by the DOT played a role in her decision to terminate his employment further demonstrates that Mr. Smith's protected activity was causally-related to the adverse action. Mrs. Morgan's testimony and statements bolster Complainant's account of his discharge from LCE.

Finally, temporal proximity, combined with the direct evidence of retaliation, supports a finding of causation. Close proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)).

In this case, I have found that Complainant engaged in protected activity on several occasions prior to, and continuing until, November 9, 2005, the day that he was discharged. No intervening events occurred between the last time that Mr. Smith engaged in protected activity by reporting his safety concerns about his trailer to Mrs. Morgan and Complainant's discharge. In fact, Mrs. Morgan reported in the "Management Overview" that she called CRST to find a replacement after Mr. Smith reported the incident to LCE. CX 1. As such, I find that this close proximity in time between Complainant's safety-related complaint and his discharge supports a finding of a causal relation between Complainant's protected activity and the adverse action taken against him.

Employer's Burden to Show That it Would Have Taken the Same Action Even in the Absence of the Protected Activity

As mentioned above, once the complainant puts forth direct evidence that the adverse action is motivated, at least in part, by the protected activity, the respondent can prevail only by establishing it would have taken the adverse action in the absence of the protected activity. *Caimano v. Brink's, Inc.*, 1995 STA-4, slip op. at 23-24 (Sec'y Jan. 26, 1996)(citation omitted). The respondent must make such a showing by a preponderance of the evidence. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 5 (ARB Mar. 29, 2000)(giving accord to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989)).

Here, Complainant presented direct evidence that LCE terminated him after he engaged in protected activity; i.e., his repeated complaints regarding the safety of his trailer, his "threat" to take the trailer to the DOT to be inspected, and for having reported that "faulty equipment" caused the incident at the Effingham, Illinois, truck stop on November 8, 2005. Although Respondents first argued that Complainant resigned, I have found this argument to be without merit. Respondents then argued that, even if his resignation is determined by the Court to be a termination, LCE would have fired Complainant anyway. Tr. at 653-655. At the hearing, Mrs. Morgan testified as follows:

> [I]f he wouldn't have resigned after seeing the condition of my equipment and what he did he would have been fired and having an unreported accident in a commercial vehicle.

Tr. at 653. Mrs. Morgan was asked by Complainant's attorney to reconcile her hearing testimony with what she had stated during her deposition. *Id.* at 653-656.

> Q. If you would, turn to page 45 and 46 of the deposition.
>
> A. Okay.
>
> Q. You see on page 45, line 25, the very last line I asked: Did you ever impose any formal discipline on Harry? On the first line of the next page your answer was: No. Can you see that?

A. Yes, sir.

....

Q. Do you recall also that during the deposition I asked you if you had any grounds to discharge Harry? Do you remember that?

A. Where are we at?

Q. Page 60 looking at line 8.

A. Okay.

....

Q. On page 60, line 12 I asked you: You agree that there were no grounds to discharge, correct? Then you see your lawyer put in an objection: That calls for a legal conclusion. You may answer if you know.

Answer: I'm not going to answer it.

I asked: Why not?

Your answer was: Because I'm not sure how I would answer that and I don't want to incriminate myself. I'd have to think about that.

A. I think I felt like you were leading me to answer the way you wanted me to answer you. To answer you, I had no reason to discharge him. What I'm telling you is - and I didn't and I didn't discharge him. After I seen the way he left the equipment and had an unreported commercial vehicle motor accident I absolutely would have discharged him on the spot. But Harry Smith was already getting in the van to leave to go home, after threatening me that he was getting angry with me.

Did I have a reason prior? Absolutely not. He was leaving to go into a lease purchase program. We all know that. He testified to

> that. But after he left and I was looking at this equipment - or he was getting ready to leave - I have an issue there. I have an issue and I have an obligation to the people that drive the motorways every day. I have an obligation to CRST, to Lake City Enterprises to ensure to find out what happened in this accident. And it was obviously an accident, he damaged the equipment.
>
> You can't - you know, this is eighty thousand (80,000) pounds of steel going down the road. I mean, you don't bend a piece of metal on the side of a forty-eight (48) foot trailer and something didn't happen. You have to find out what's wrong and you have to be concerned.

Tr. at 653-656.

In *Johnson v. Roadway Express, Inc.*, a factually similar case, respondent attempted to establish, by a preponderance of the evidence, that it would have taken the adverse action of terminating complainant's employment for his reporting in as too ill to drive even if complainant had not engaged in protected activity (refusal to drive when too ill). Respondent thus produced a great deal of evidence to show that complainant had an abysmal attendance and disciplinary record (which, in fact, had been sufficient to convince the ALJ that respondent had dual motives in discharging complainant). Respondent also presented evidence that it had a long standing policy to look at an employee's entire work record when determining whether to terminate that employee's employment. The Administrative Review Board ("ARB"), however, agreed with the ALJ that there was no evidence to establish that respondent would have discharged complainant even if he had not reported as too ill to drive. The ARB noted that "[u]nder the dual motive analysis it is not sufficient for an employer to prove that it had good reason to take adverse action against an employee. Rather, the employer must prove by a preponderance of the evidence that it actually would have taken that action, even if the employee had not engaged in protected activity." ARB No. 99-111, ALJ No. 1999- STA-5 (ARB Mar. 29, 2000) Slip op. at 13.

In the instant case, as discussed, *supra*, I have found that Mr. Smith did, in fact, report the accident that occurred on November 8, 2005. Mrs. Morgan testified that Mr. Smith informed her that while pulling out of a fuel island at a truck stop, he

had almost flipped the tractor and trailer because of a problem with the trailer. Tr. at 591-592. He told her that he was hauling a steel coil at the time. *Id.* at 592. Upon arriving at Lake City's office on November 9, 2005, Mrs. Morgan immediately informed Mr. Smith that he was no longer employed, giving him little incentive to report the details of the accident or any related damage to the trailer. After becoming upset with what was transpiring, he chose to walk away from what had turned into a "heated conversation". Tr. at 524.

Accordingly, because his repeated complaints about the trailer's safety were not addressed by Respondents and the trailer eventually caused the accident, I find that the accident and related damage to the truck are related to Mr. Smith's protected activities in this case. In addition, after having weighed all of the credible evidence and testimony, I credit Mr. Smith's account of what transpired during the inventory of his equipment. Accordingly, I find that the trailer was assigned to him with only two tarps, as he has consistently stated throughout these proceedings.

Respondents also argue that they would have also fired Mr. Smith for falsifying his logs and breaking LCE's and CRST's policies by unhooking his trailer and then trying to right it on his own, and then lying to and stonewalling Respondents about what took place on November 8, 2005. Resp. Br. at 48-49. However, prior to the incident, Mr. Smith never received any formal written discipline while he was employed by LCE. CX 8 at 45, 49; TR at 653. As discussed above, I have given little probative weight to Mrs. Morgan's testimony, so her averment that she would have fired Mr. Smith even if he had not engaged in protected activity is not persuasive. In addition, Mr. McNutt also admits that he also broke LCE's and CRST's policy against unhooking his trailer without permission, and also took part in righting Mr. Smith's trailer after the accident, but he continued working for Respondents after Mr. Smith was fired and never received any written discipline or was ever even asked to provide a report about what took place that day. Tr. at 183, 205-206. I find that Respondents' actions in regard to Mr. McNutt after the accident undercut their argument that they would have fired Mr. Smith irrespective of his protected activity.

In sum, under the circumstances discussed above, I find that Respondents are unable to prove by a preponderance of the evidence that they would have discharged Complainant in the absence of his protected activity. Based on the foregoing

reasons, I find that Complainant has established that he was discharged in violation of the STAA. As a result, Complainant is entitled to relief pursuant to the Act.

Individual Liability

Respondents argue that in the event that LCE is found liable in this case, Respondents Crystle Morgan and Donald Morgan are not individually liable under the Act, because a corporation is a legal entity that exists separate and apart from its officers, directors, and shareholders. Resp. Br. at 49-50. More specifically, Respondents argue that Mrs. Morgan acted "within the course and scope of her employment by Lake City and as an officer thereof" and "not in her individual capacity"; thus, "to the extent that Lake City is held liable to Harry Smith, she cannot be." *Id.*

Regarding the individual liability of Mr. Morgan, Respondents argue the following:

> At *no time* was he *ever* an officer, agent, shareholder, or manager at Lake City. He played no role in the alleged adverse employment decision, whether or not it pertained to protected activity. The mere fact that he interacted with Harry Smith on three occasions (initially by telephone before he (Harry) was hired, on September 5, 2005, and a third time over 'breakfast' at a truck stop on October 13, 2005) does not make him liable for any of the alleged acts or omissions of Lake City.

Resp. Br. at 50.

The Secretary has addressed individual liability under the Act. In *Wilson v. Bolin Associates, Inc.*, 91-STA-4 (Sec'y Dec. 30, 1991), the ALJ unnecessarily employed the doctrine of piercing the corporate veil to find the respondent's CEO personally liable for back wages in a STAA complaint because, as the person who discharged the complainant, the CEO was liable under the express language of section 2305. The Secretary noted that the statute provides that "[n]o person shall discharge" (emphasis added) an employee for conduct protected by the STAA, and defines a person as "one or more individuals . . . ." 49 U.S.C. §§ 2305(a), (b); 2301(4). She also noted that this approach was consistent with an analogous employee protection provisions at Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c), and with other

substantive law areas with similar statutory language, i.e., Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9607. *See Donovan v. Diplomat Envelope, Inc.,* 587 F. Supp. 1417, 1425 (E.D.N.Y. 1984), *aff'd,* 760 F.2d 253 (2d Cir. 1985) (unpublished); *Kelley v. Thomas Solvent Co.,* 727 F. Supp. 1532, 1541-45 (W.D. Mich. 1989).

In *Palmer v. Western Truck Manpower, Inc.*, the Secretary interpreted the STAA as not requiring a joint employer to knowingly participate in a violation committed by another joint employer for liability to accrue to the non-participating employer. *Palmer v. Western Truck Manpower, Inc.,* 85-STA-16 (Sec'y Mar. 13, 1992). In reaching such an interpretation, the Secretary relied on the broad definition of "person" under the Act, and on the balance of interests sought to be achieved by Congress in enacting it. The Secretary recognized that the Act's objective of substantially reducing economic loss to employees was essential for promoting safety on highways. Permitting an employee to recover against a joint-employer without showing that such employer knowingly participated in the violation furthered the Act's overall policy objectives. *Id.*

In accordance with the settled cases in this area and the express language of the Act, I find that Crystle Morgan is liable for her actions in violation of the Act.

Complainant has presented evidence that other LCE employees, including Mr. McNutt and Mr. Liuzzo, and Mr. Cassell from A&H Trucking, were under the impression that both Mr. and Mrs. Morgan owned LCE. Tr. at 145, 261, 412, 539-540. However, Respondents have presented evidence that Mrs. Morgan is the President and sole shareholder of the company. Tr. at 553; RX D. In addition, there is no evidence that Mr. Morgan played any role in, or had any knowledge of, Mr. Smith's termination. Therefore, because I find that Mr. Morgan's relationship with LCE is too tenuous to be considered as co-ownership, I find that Mr. Morgan is not liable for any of his wife's actions that are in violation of the Act.

Relief

Under the STAA, a prevailing complainant is entitled to relief including abatement, reinstatement and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A)(i)-(iii). Complainant contends that such relief is appropriate in the instant case. Comp. Br. at 57-66. Respondents argue that

Complainant adduced insufficient evidence to establish compensatory damages and attorney's fees and costs in this case. Resp. Br. at 49-52.

Reinstatement

The STAA expressly provides that a prevailing complainant is entitled to reinstatement. 49 U.S.C. § 31105(b)(3)(A)(ii). Complainant has indicated that he desires to be reinstated to his former position with LCE. Comp. Br. at 57-58. Since Respondents have offered no reason as to why reinstatement is inappropriate in this case, I find that Complainant is entitled to reinstatement into his former position as a driver with LCE.

Back Pay

The ARB has provided the following summary regarding back pay awards in STAA whistleblower cases:

> A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). 'An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA.' *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 1990-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him.
>
> Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000, *et seq*. (West 1988) . . . . Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement . . . . While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with 'unrealistic exactitude.'

Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp., ARB No. 2004-STA-14, ALJ No. 2003-STA-36 (ARB June 30, 2005), Slip op.

at 5-6 (some citations omitted). However, this does not mean that damages alleged by Complainant can be based on pure speculation.

Uncertainties in calculating back pay are resolved against the discriminating party. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993). Back pay liability ends when the employer makes a bona fide unconditional offer of reinstatement or when the complainant declines such an offer. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005).

Respondents contend that Mr. Smith's total W-2 earnings of $9,535.42, divided by the nine weeks that Mr. Smith worked for LCE, "equates to a gross income of $1,059.49 per week." Resp. Br. at 51. Respondents argue that Complainant provided no evidence as to whether his post-LCE wages were before or after taxes. *Id.* In addition, Respondents assert that Complainant presented "no tax returns, no W-2s, and no competent witnesses to establish his claimed losses." *Id.* In sum, Respondents argue the following:

> Given these facts, this tribunal cannot compute his alleged losses even if it were to conclude that Harry engaged in protected activity under the STAA, that he suffered an adverse employment action, and that the adverse employment was, by a preponderance of the evidence, related to his alleged protected activity.

Resp. Br. at 51.

Under the STAA, 49 U.S.C. app. § 2305(c), the respondent, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. *Hadley v. Southeast Coop. Serv. Co.*, 86-STA-24 (Sec'y June 28, 1991). In addition, when an employer is found to have violated the STAA, 49 U.S.C. app. § 2305, and the complainant is found to be entitled to an offer of reinstatement to his or her former position and to back pay, the burden of showing that complainant failed to make reasonable efforts to mitigate damages is on the employer. *Polwesky v. B & L Lines, Inc.*, 90-STA-21 (Sec'y May 29, 1991), *citing Carrero v. N.Y. Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) and *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614 (6th Cir. 1983).

In *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), the ARB held that respondents have the burden of proving by a preponderance of the evidence that the employee did not exercise reasonable diligence in finding other suitable employment. A respondent may prove that the complainant did not mitigate damages by establishing that comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. The ARB also held that "an employer must meet both prongs of [this] test before the burden of going forward with evidence that he or she exercised due diligence shifts back to the employee." Slip op. at 16 n.14.

LCE terminated Complainant on November 9, 2005. According to Mr. Smith's W-2 form, Complainant earned $9,535.42 from LCE, between September 5, and November 9, 2005. CX 32. However, this time period also included time that he was required to attend CRST's orientation program. Mrs. Morgan testified that she made several deductions from Mr. Smith's final paycheck, but could not confirm an exact amount. CX 8 at 87-89. Complainant argued that he did not receive a final paycheck. The deductions negated any pay that he would have received. Tr. at 367. Although she thought that he had, Mrs. Morgan did not confirm with documentary evidence that Complainant received his last check.

The Act provides back pay from the date of retaliatory discharge through the date that a complainant receives an offer of reinstatement or gains comparable employment, so any back pay award in this case must begin on November 9, 2005. *See Polewsky v. B&L Lines, Inc.*, 1990-STA-21 (Sec'y Jan. 15, 1988). However, since Respondents presented no documentary evidence that Complainant ever received a final paycheck, I find it reasonable under the circumstances to only consider the paystubs submitted by the parties in the record in determining Complainant's average weekly wage. CX 33; RX CC.[12]

[12] RX CC was identified and admitted at the hearing; however, the exhibit was not in the evidentiary record when this case was considered. On March 17, 2008, my legal assistant contacted both parties to obtain a copy of this exhibit. Complainant's counsel did not have RX CC in his file, and after searching his records for several days, Respondents' counsel provided a copy of CX 33 in response to the request. Upon reviewing Complainant's paystubs, I find that he was paid through November 4, 2005.

Based on his paystubs, his average weekly wage paid by LCE in 2005 was approximately $1,187.00. CX 33. Complainant found another job driving a truck for Coshocton Trucking about a week and a half after he was fired by LCE. Tr. at 124, 253; BB at 9. Accordingly for this period of time Complainant was unemployed, he is entitled to $1,630.50 (one and one/half x $1,087.00) in back pay. He earned approximately $500.00 per week for the month he worked for Coshocton Trucking. *Id.* Therefore, for this period of time he is entitled to $2,348.00 ($1,087 x 4 - $2,000.00) in back pay. Mr. Smith then went to work for Ameristate Transportation, where he first worked as a company driver for about twenty-eight weeks, before becoming an owner-operator. Tr. at 87, 124, 253; RX BB at 165-166. While working for Ameristate, Mr. Smith earned, after taxes, between $700.00 and $900.00[13] per week as a company driver. Tr. at 124; RX BB at 166. Accordingly, I find that Claimant is entitled to $8,036.00 ($1,087.00 X 28 – 28 x $800.00). Mr. Smith as an owner operator averaged about $1,000.00 per week. Tr. at 124; RX BB at 166. At the time of the hearing, Complainant still worked, as an owner-operator, for Ameristate, but has since ended this employment relationship "on terms that were less than profitable for [him]."[14] Comp. Br. at 59, n. 53, 62. Because Complainant has offered no evidence as to when his job with Ameristate ended, I am unable to determine what his damages would be from the date of the hearing without resorting to pure speculation. Accordingly, I will award back pay for forty weeks and three days. Therefore, Complainant for this period of time, is entitled to $3,532.20 ($1,087.00 X forty weeks and three days - $1,000.00 x forty weeks and three days).

Complainant submits that he would have been eligible for family health insurance coverage beginning on December 1, 2005, so he should be reimbursed for the cost of those benefits as well which amount to $142.48 per week. Comp. Br. at 58-59; CX 8 at 47; CX 4.

In *Dutile v. Tighe Trucking, Inc.*, 1993-STA-31 (ALJ July 1, 1994), the ALJ concluded that it is now well-settled that the

[13] The average wage for this period of time after taxes was $800.00. Because Complainant provided no evidence of deducted amounts from his pay to include taxes, I will not resort to speculation as to the amount, but, instead will use the figure $800.00 in determining back pay owed by Respondents.

[14] Complainant's brief states that he no longer works for Ameristate. However, the Court is left to speculate as to when the Complainant ended his employment; and, who, if anyone else he worked for and at what pay. Accordingly, I will base my back pay calculations on the last date of the hearing.

Complainant, in addition to his award of back pay and interest thereon, is also entitled to restoration of the pension contributions and the health and welfare benefits of which he has been deprived as a result of the discriminatory and illegal actions of the respondent. *See also Hufstetler v. Roadway Express, Inc.,* 85-STA-8 (Sec'y, Aug. 21, 1986)(dealing with the restoration and payment of all pension contributions and lost medical benefits).

In a motion for reconsideration, however, *Dutile v. Tighe Trucking, Inc.,* 1993-STA-31 (ALJ Aug. 6, 1994), respondent presented evidence that complainant was not entitled to those benefits as he rejected the employer's medical insurance plan as his rights had not vested in the employer's retirement and pension plan. The ALJ concluded that the complainant was entitled only to be restored to the *status quo ante* he enjoyed on his last days of employment and on that day he did not participate in the medical insurance program offered by the employer and his rights in the retirement and pension plan had not vested.

However, the ARB has held that where a complainant has been discharged in violation of the STAA, the complainant is entitled to retroactive seniority and retroactive health benefits status to the extent that it would affect current or future entitlement to benefits. *Hamilton v. Sharp Air Freight Service, Inc.,* 91-STA-49 (Sec'y July 24, 1992)(citing *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 399-400 (1982); *Hufstetler v. Roadway Express, Inc.,* 85-STA-8 (Sec'y Aug. 21, 1986), slip op. at 49, *aff'd sub nom., Roadway Express, Inc., v. Brock,* 830 F.2d 179 (11th Cir. 1987)).

Accordingly, because Mr. Smith was not yet eligible for health insurance benefits at the time his employment was terminated by Respondents in violation of the Act, his back pay award cannot be based on the lost value of health benefits that he was not yet eligible for on the day that he was fired. However, after reinstatement, Respondents shall restore Complainant's pay and benefit status to include the sixty-five (65) days that he has already worked for LCE, when determining his future eligibility for health benefits and pay increases after his first ninety days. *Hamilton v. Sharp Air Freight Service, Inc.,* 91-STA-49 (Sec'y July 24, 1992). Accordingly, Complainant is entitled to an additional amount of back pay of $5,784.69 ($142.48 x forty weeks and three days). In sum, I find that Complainant is entitled to an award of back pay in the amount of $17,799.19.

Interest

Complainant is entitled to pre-judgment and post-judgment interest on his back pay award, calculated in accordance with 26 U.S.C.A. § 6621(a)(2). *See Dale v. Step 1 Stairworks, Inc.*, ARB No. 04- 003, 2002-STA-30 (ARB Mar. 31, 2005); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), slip op. at 17-18 (citations omitted).

Other Compensatory Damages

Mr. Smith has requested between $50,000.00 and $75,000.00 in compensatory damages for emotional distress and loss of reputation, which he avers is an amount that is just for the emotional distress and loss of reputation he suffered. Comp. Br. at 61-63. Respondents did not make any arguments against the award of compensatory damages for emotional distress or loss of reputation in this case. *See*, *generally*, Resp. Br. at 50-51. In support of his request, Complainant presented the following evidence in his post-hearing brief:

> Harry suffered emotionally from the discharge. He was upset and hurt from how he lost his job. T. 84. He became irritable and short tempered and suffered marital stress; it affected his eating and sleeping. T. 85. The discharge affected him 'Very badly.' T. 159, line 11 (McNutt). He knew that it was wrong and thought it should be illegal to fire truck drivers for this reason. He asked his wife to start looking for a lawyer. T. 85. He fell behind in his land contract payments and had to refinance. T. 88. They were 'financially strapped.' T. 139; *see also* T. 196. They lost their family minivan. T. 88, 136. They lost their computer. T. 140. The Smiths could not afford Christmas presents for their minor children. T. 159. They still do not have health insurance. T. 88. His emotional symptoms have not yet abated. T. 86, line 5.
>
> The discharge also deprived Mr. Smith of a business opportunity to become an owner-operator for CRST. T. 251-53. After a few months as a driver for Ameristate, he became a lease owner-operator for Ameristate. He became responsible for his own expenses and equipment maintenance. T.

> 125. Since the hearing, this opportunity has fizzled out under the excess expenses compared to income. If he could have pursued the owner-operator option with CRST, he could have enjoyed the business opportunities of owning his own business.

Comp. Br. at 61-62.

For the purpose of comparison, Complainant cited several cases in which other complainants who were unlawfully discharged from their employment were awarded compensatory damages for emotional distress and loss of reputation in amounts ranging from $40,000.00 to $500,000.00, including cases in which the complainants never sought professional psychological counseling, and, in some cases, did not call an expert witness to testify regarding the extent of emotional harm. Comp. Br. at 61-64 (citing *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery*, 95-STA-37 (ARB Sept. 5, 1996); *Blackburn v. Martin*, 982 F.2d 125, 132, 133 (4th Cir. 1992); *Blackburn v. Metric Constructors, Inc.*, 1986-ERA-4, Final Order on Compensatory Damages by Sec'y of Labor, p.3 (August 16, 1993); *Marcus v. U.S. EPA*, 1992-TSC-5, R. D&O of ALJ, pp. 29-30, adopted by Sec'y of Labor (Feb. 7, 1994); DeFord v. Sec'y of Labor, 700 F.2d 281, 288 (6th Cir. 1983); *Brocklehurst v. PPG Industries*, 865 F.2d 1253, 1266 (E.D. Mich. 1994); *Kietzy v. McDonnell Corp.*, 990 F.2d 1051 (8th Cir. 1993); *Lilley v. BTM Corp.*, 958 F.2d 746, 754 (6th Cir. 1992); *Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 915 F.2d 201, 210 (6th Cir. 1990); *Simon v. Shearson Legman Bros., Inc.*, 895 F.2d 1304, 1319-20 (11th Cir. 1990); *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006)(per curium)(available at 2006 WL 247886)(case below ARB No. 04-021, ALJ 2003-AIR-10); *Hall v. U.S. Army, Dugway Proving Ground*, 1997-SDW-5 (ALJ Aug. 8, 2002); *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 1993-ERA-24, slip. op. at 25 (Dep'y Sec'y Dec. Feb. 14, 1996); *Michaud v. BSP Transport, Inc.* ARB Case No. 97-113, ALJ No. 1995-STA-29, slip op. at 9 (ARB Oct. 9, 1997).

Comp. Br. at 61-64.

In *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery*, the ARB noted that courts have awarded compensatory damages for emotional distress caused by wrongful discharge in amounts greater than the amount requested by the prosecuting party, and held that it is "appropriate to review other types of wrongful termination cases to assist in the analysis of the appropriate

measure of compensatory damages in whistleblower cases." *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery*, 95-STA-37 (ARB Sept. 5, 1996). The Board cited three Court of Appeals decisions in which the amount of $50,000.00 was discussed. *Id.* (citations omitted). It then stated that it had reviewed the relevant evidence and considered the facts in light of awards in the appellate court decisions as well as other whistleblower decisions involving emotional distress, and concluded that Complainant should be awarded $20,000.00 in compensatory damages. *Id.*

In a more recent case, the ARB gave the following guidance on the availability of compensatory damages for emotional distress in an STAA award:

> An employer who violates the STAA may be held liable to the employee for compensatory damages for mental or emotional distress. 49 U.S.C.A § 31105(b)(3)(A)(iii); *Jackson v. Butler & Co.* ARB Nos. 03-116, 144, ALJ No. 2003-STA-026, slip op. at 009 (ARB Aug. 31, 2004). Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Hobby v. Ga. Power Co.,* ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 33 (ARB Feb. 9, 2001) (citations omitted).
>
> Emotional distress is not presumed; it must be proven. *Moder v. Village of Jackson, Wis.*, ARB Nos. 01-095, 02-039, ALJ No. 00-WPC-005, slip op. at 10 (ARB June 30, 2003). 'Awards generally require that a plaintiff demonstrate both (1) objective manifestation of distress, *e.g.*, sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress.' *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993-SWD-001, slip op. at 17 (ARB July 30, 1999) To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Gutierrez v. Univ. of Cal.,* ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 9 (ARB Nov. 13, 2002).

> Simon was a veteran truck driver with a clean record. TR at 22-23. While the record contains unrefuted evidence of Simon's inability to find a permanent job, TR at 76-82; CX 13, 21, Simon did not testify about any emotional distress or humiliation he suffered. Nor did he seek any compensatory damages. *See* TR at 82-83. There is no documentary evidence in the record supporting any loss of reputation or mental anguish. Therefore, we must reverse the ALJ's award of compensatory damages as unsupported by substantial evidence.

Simon v. Sancken Trucking Co., ARB No. 06-039, -088, ALJ No. 2005-STA-40 (ARB Nov. 30, 2007).

Unlike the complainant in *Simon*, in the present case, Mr. Smith has presented testimonial evidence that he has demonstrated objective manifestations of his emotional distress, including irregular sleeping and eating patterns, and anxiety and marital stress. Tr. at 84-86, 88, 159; RX BB. In addition, Mr. Smith testified how Respondents' actions following his termination prevented him from entering the owner-operator program with CRST. Tr. at 250-253.

I have reviewed the relevant evidence in light of the awards made by other courts in similar cases, and I find that the evidence of record supports an award of $20,000.00 in compensatory damages for Complainant's emotional distress and loss of reputation due to Respondents' actions in violation of the Act. *Waechter v. J.W. Roach & Sons Logging and Hauling,* 04-STA-167, 04-STA-183 (ARB Jan. 9, 2006); *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery*, 95-STA-37 (ARB Sept. 5, 1996); *Blackburn v. Martin*, 982 F.2d 125, 132, 133 (4th Cir. 1992); *Blackburn v. Metric Constructors, Inc.*, 1986-ERA-4, Final Order on Compensatory Damages by Sec'y of Labor, p.3 (August 16, 1993); *Marcus v. U.S. EPA*, 1992-TSC-5, R. D&O of ALJ, pp. 29-30, adopted by Sec'y of Labor (Feb. 7, 1994); DeFord v. Sec'y of Labor, 700 F.2d 281, 288 (6th Cir. 1983); *Brocklehurst v. PPG Industries*, 865 F.2d 1253, 1266 (E.D. Mich. 1994); *Kietzy v. McDonnell Corp.*, 990 F.2d 1051 (8th Cir. 1993); *Lilley v. BTM Corp.*, 958 F.2d 746, 754 (6th Cir. 1992); *Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 915 F.2d 201, 210 (6th Cir. 1990); *Simon v. Shearson Legman Bros., Inc.*, 895 F.2d 1304, 1319-20 (11th Cir. 1990); *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006)(per curium)(available at 2006 WL 247886)(case below ARB No. 04-021, ALJ 2003-AIR-10); *Hall v.*

U.S. Army, Dugway Proving Ground, 1997-SDW-5 (ALJ Aug. 8, 2002); *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 1993-ERA-24, slip. op. at 25 (Dep'y Sec'y Dec. Feb. 14, 1996); *Michaud v. BSP Transport, Inc.* ARB Case No. 97-113, ALJ No. 1995-STA-29, slip op. at 9 (ARB Oct. 9, 1997).

Punitive Damages

Complainant also requests punitive damages in the amount of $160,000.00 Comp. Br. 64-65.

At the time Mr. Smith filed his complaint, punitive damages were not authorized under the STAA. 49 U.S.C. § 31105(b)(3)(A) and (B); *Nolan v. AC Express,* 92-STA-37 (Sec'y Jan. 17, 1995).

The Act was most recently amended by Section 1536 of the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. No. 110-053, 121 Stat. 266 (Aug. 3, 2007) (the "9/11 Commission Act"). The 9/11 Commission Act broadened the definition of employees to be covered by the STAA; added to the list of protected activities; adopted the legal burdens of proof found in Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; provided for awards of special damages, and punitive damages not to exceed $250,000.00; and, provided for *de novo* review by a U.S. District Court if the Secretary of Labor does not issue a final decision on the complaint within 210 days of its filing.

In *Elbert v. True Value Co.*, No. 07-CV-03629 (D.Minn. Dec. 11, 2007)(case below ALJ No. 2005-STA-36), the plaintiff filed an action in federal district court asserting that the court had original jurisdiction pursuant to 49 U.S.C. § 31105(c) because the ARB had not issued a final decision within 210 days after the filing of the complaint. The rule conferring jurisdiction on federal district courts where the ARB has not issued a final decision within 210 days after the filing of the complaint was a 2007 amendment to the STAA. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1536, 121 Sta. 266, 464-67 (Aug. 3, 2007). The Plaintiff's STAA complaint was pending before the ARB when the STAA amendments at issue were signed into law by President Bush. The district court granted summary decision to the defendant, finding that the STAA amendments were not retroactive.

Accordingly, because Complainant's case was filed before the 2007 Amendments to the Act became effective, and the 2007

Amendments are not retroactively applied, punitive damages are not available in this case.

Abatement

As previously noted, the Act expressly provides that successful complainants in STAA cases are entitled to abatement. 49 U.S.C. § 31105(b)(3)(A)(i).

In this case, Complainant seeks the following orders:

1. Requiring [R]espondent[s] to abate and refrain from any further violations of the whistleblower provisions of the Act.

2. Requiring [R]espondent[s] to prohibit harassment of those who engage, or are suspected of engaging, in protected activity.

3. Requiring [R]espondent[s] to take prompt and effective actions against any reported violations.

4. Expunging Mr. Smith's discharge, and ordering [R]espondent[s] to remove any records of discharging Mr. Smith, to preserve them only in files of its legal counsel, to correct his DAC file, and to use them only for purposes of defending its rights in this proceeding.

5. An order prohibiting [R]espondents from disclosing any disparaging information about Mr. Smith to prospective employers, or otherwise interfering with any applications he might make in the future.

6. Mr. Smith requests an order requiring [R]espondent[s] to issue a notice for 90 days, and provide copies to all its employees that the Department of Labor has found that [R]espondent[s] violated the rights of a whistleblower, Mr. Smith, and ordered that he be made whole, describing the laws protecting whistleblowers, setting out the ALJ's orders to [R]espondent[s] as policies of the [R]espondents, providing the name and address where complaints of violations may be sent, and

> informing employees of the 180 day time limit to file complaints.

Comp. Br. at 60-61.

In *Michaud v. BSP Transport, Inc.*, the Board affirmed the ALJ's order to expunge from complainant's personnel records "all derogatory or negative information contained therein relating to complainant's protected activity and that protected activity's role in complainant's termination." 95-STA-29 (ARB Oct. 9, 1997). The employer had objected to the order, arguing that it was vague. *Id.* The ARB, however, found the order to be sufficiently clear, and stated that it would not place the burden on complainant to identify the specific documents to be expunged. *Id.*

Since I have similarly found in the instant case that Complainant was wrongfully terminated as a result of his protected activity and have ordered reinstatement, I further find it appropriate for LCE to remove from Complainant's personnel file "all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination." *Michaud v. BSP Transport, Inc.*, *supra*. In addition, LCE shall be prohibited from disclosing any disparaging information about Mr. Smith to prospective employers, or otherwise interfere with any applications he might make in the future.

The ARB also held in *Michaud* that it is a standard remedy in discrimination cases for an employer to post written notice advising that the disciplinary action taken against a complainant has been expunged and that the complainant prevailed in his complaint. *Michaud v. BSP Transport, Inc., supra*. In the instant case, Complainant has requested that Respondents provide written notice of the outcome in this case. Comp. Br. at 61. Because most of Respondents' drivers are not regularly present at LCE's office, I find that written notice is the most reasonable method of informing Respondents' employees of the outcome.

In addition, I find that Complainant's request that Respondents be required to post information regarding the scope of protections provided under the Act is also reasonable under the circumstances in this case. I do not, however, find that it is necessary for LCE to adopt the findings in this Recommended Decision and Order as company policy, as LCE's policies are required by law to be in compliance with the Act.

Attorney Fees and Costs

Complainant has requested leave to file a petition for attorney fees and costs. Under the STAA, a prevailing complainant is entitled to litigation expenses including attorney fees and costs. *See, e.g., Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004); *Eash v. Roadway Express, Inc.*, ARB Nos. 02 008, 02 064, ALJ No. 2000 STA 47 (ARB Mar. 9, 2004). Thirty (30) days will thus be allowed to Complainant's counsel for the submission of a petition for attorney fees and costs. Respondents' counsel will be allowed twenty (20) days thereafter to file any objections thereto.

RECOMMENDED ORDER

For the foregoing reasons, I **HEREBY RECOMMEND** that Complainant, Harry Smith, be awarded the following remedy:

1. Respondent, Lake City Enterprises, Inc., shall reinstate Complainant, Harry Smith, with the same seniority, status, and benefits he would have had but for Respondents' unlawful discrimination;

2. Respondents shall remit to Complainant:

    A. Back pay in the amount of $17,799.19;

    B. Compensatory damages for emotional distress and loss of reputation in the amount of $20,000.00;

    c. Interest on the entire back pay award, calculated in accordance with 26 U.S.C. § 6621;

3. Respondents shall restore Complainant's pay and benefit status to include the sixty-five (65) days that he has already worked for LCE, when determining his future eligibility for health benefits and pay;

4. Respondents shall immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination, including records that Respondents posted on the DAC system;

5. Respondents shall be prohibited from disclosing any disparaging information about Mr. Smith to prospective employers, or otherwise interfering with any applications he might make in the future;

6. Respondents shall contact each and every consumer reporting agency or prospective employer to whom it furnished a report about Complainant, and request that any such reports be amended with respect to Complainant's termination, in the manner described above;

7. Respondents shall provide a written notice to all of Respondents' employees within thirty (30) days, advising them that the disciplinary action taken against Complainant has been expunged from his personnel record and that his complaint was decided in his favor; and,

8. Complainant's attorney shall have thirty (30) days from the date of this Order within which to file a petition for attorney fees and costs, and Respondents shall have twenty (20) days thereafter to file a response to such petition.

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LARRY S. MERCK
Administrative Law Judge

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, 200 Constitution Avenue, NW, Suite S-5220, 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.

The order directing reinstatement of the Complainant is effective immediately upon receipt of the decision by the Respondents. All other relief ordered in the Recommended

Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).