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Issue Date: 05 May 2006

In the matter of:
THERON CARTER,
Complainant,

v. Case No.: **2005-STA-00063**

MARTEN TRANSPORT, LTD.,
Respondent.

RECOMMENDED DECISION AND ORDER
Awarding Damages and Ordering Reinstatement

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter "the Act" or "STAA"), 49 U.S.C § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. This matter is before me on the Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA") after investigation of the complaint.

The Complainant in this case, Theron Carter, was employed as a truck driver by the Respondent, Marten Transport, from June 2, 2005 until June 14, 2005. During those twelve days, the Complainant made a variety of complaints to the Respondent about issues he had with the truck he had been assigned to operate, as well as some issues unrelated to the truck. The Complainant alleges that those complaints were protected activity and that he was discharged from his employment with the Respondent, in violation of the Act, for making those complaints.

A hearing was held in this matter in Grand Rapids, Michigan on January 10-13, 2006. The Complainant was represented by Paul Taylor, Esq. of the Truckers Justice Center in Burnsville, Minnesota, and the Respondent was represented by Robert C. Greene, Esq. of Foster, Swift, Collins, & Smith, P.C. in Grand Rapids Michigan.

At the hearing, testimony was received from the Complainant's witnesses Susan Deetz, Daniel J. Peterson, Theron Carter, Steve Coe, Stacia DeWitt, and Mitchell Goss. Tr. at 3, 326 & 804. Testimony was also received from the Respondent's witnesses David Jordan, John R. McNeilly, Brandon Smith, Michael W. Walter, Stacia DeWitt, and Susan Deetz. Tr. at 326, 804 & 1083. The Complainant's exhibits ("CX") 1-27 were received into evidence without objection. Tr. at 19-20, 58 & 956-957. The Respondent's exhibits ("RX") 1-12 and 14-28 were also admitted, some over the Complainant's objection that they were irrelevant to the issues in this proceeding. Tr. at 136-150. Additionally, joint exhibits ("JX") 1-6 & 8-15 were admitted without objection. Tr. at 11-12 & 808-810. Subsequent to the hearing, I left the record open for

the submission of post-hearing briefs. Both parties submitted post-hearing briefs, which included both proposed findings of fact and legal arguments.[1] Both also submitted reply briefs. Respondent's briefs were submitted by Stephen A. DiTullio, Esquire, DeWitt Ross & Stevens S.C., Madison, Wisconsin.

I. FACTUAL STIPULATIONS

The parties agreed to the following stipulations, all of which I accept, and they were entered into the record as JX-1 at the beginning of the hearing:

1. The Complainant is an individual residing at 4105 West Crane Road, Middleville, Michigan 49333.

2. The Respondent is engaged in interstate trucking operations and is an employer subject to the STAA, 49 U.S.C. § 31105.

3. As an employee of the Respondent, the Complainant operated commercial motor vehicles having a gross vehicle rating of 10,001 pounds or more on the highways in interstate commerce.

4. At all times relevant to this matter, the Respondent was an employer as defined at 49 U.S.C. § 31101 (3). The Respondent maintains its principle place of business at 129 Marten Street, Mondovi, Wisconsin 54755.

5. The Respondent is a person within the meaning of 49 U.S.C. § 31105.

6. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and the subject matter of this proceeding.

7. In May 2005, the Complainant submitted an application for employment o the Respondent.

8. From about May 30, 2005 to June 1 2005, the Complainant attended orientation at the Respondent's facility in Mondovi, Wisconsin. The Complainant passed the pre-employment controlled substance and alcohol tests as well as the Respondent's road test.

9. At the conclusion of the Complainant's orientation with the Respondent on June 1, 2005, Brandon Smith, an employee of the Respondent, offered the Complainant an assignment primarily transporting shipments for General Mills. The Complainant accepted this offer.

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[1] The following abbreviations will serve as citations to the parties' post-hearing briefs:
Resp't Post-Hearing Brief: Respondent Marten Transport, LTD.'s Post-Hearing Brief
Resp't Prop. Find. of Fact: Respondent's Proposed Findings of Fact
Resp't Response Brief: Respondent Marten Transport, LTD.'s Response to Complainant's Proposed Findings of Fact and Legal Argument
Com. Prop. Find. of Fact and Legal Arg.: Complainant's Proposed Findings of Fact and Legal Argument
Com. Reply Brief.: Complainant's Reply Brief

10. On or about June 2, 2005, the Complainant was officially hired by Marten Transport, Ltd. and assigned to operate truck 5730 for the Respondent. When the Complainant was assigned to the truck, it was located at Brayer's Auto Service in Scranton, Pennsylvania.

11. The Respondent made arrangements for the Complainant to fly from Saint Paul, Minnesota to Scranton, Pennsylvania to pick up truck 5730. The Complainant left Minnesota on June 2, 2005 and arrived at Brayer's Auto Service in Scranton, Pennsylvania on June 3, 2005.

12. After arriving at Brayer's Auto Service on June 3, 2005, the Complainant inspected truck 5730.

13. On June 3, 2005, the Complainant drove from Scranton, Pennsylvania to Bethlehem, Pennsylvania, where he needed to pick up an empty trailer.

14. On June 4, 2005, the Complainant picked up a shipment in Avenel, New Jersey going to Detroit, Michigan.

15. The Complainant delivered his load from Avenel, New Jersey to Detroit, Michigan on Monday, June 6, 2005.

16. On June 6, 2005, truck 5730 was placed in the shop of Dermody Peterbilt where it stayed until June 10, 2005.

17. On June 10, 2005, the Complainant was at his home when he was dispatched on a load to be picked up in Kalamazoo, Michigan on June 11, 2005 for delivery to Tomah, Wisconsin on June 12, 2005.

18. The Complainant picked up truck 5730 at Dermody Peterbilt on June 10, 2005.

19. On June 11, 2005, the Complainant picked up the shipment in Kalamazoo, Michigan for delivery to Tomah, Wisconsin.

20. The Complainant arrived at the Wal-Mart distribution center in Tomah, Wisconsin on the evening of June 12, 2005. After the shipment was unloaded from his assigned trailer, the Complainant drove to the Respondent's facility in Mondovi, Wisconsin.

21. Truck 5730 was placed in the Respondent's shop in Mondovi, Wisconsin on the morning of June 13, 2005.

22. The Complainant's separation from employment with the Respondent occurred on June 14, 2005.

23. The Complainant's rate of pay with the Respondent was 37 cents per mile. Distances are calculated using the Rand-McNally Milemaker, which uses the shortest possible truck

route between points. The Complainant would have earned $4,000 per month had his employment with the respondent continued after June 14, 2005.

24. On June 16, 2005, the Complainant filed a timely complaint with the Secretary of Labor alleging that the Respondent had discharged him and discriminated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105.

25. On or about September 14, 2005, the Secretary of Labor issued preliminary findings and an order pursuant to 49 U.S.C. § 31105.

26. On September 27, 2005, the Complainant, by his attorney, filed timely objections to the Secretary's Findings and Order.

JX-1; Tr. at 11.

II. FINDINGS OF FACT

After a complete review of the whole record, including the testimony at the hearing, the depositions and documentary evidence entered as exhibits, and the briefs of both parties, I make the following findings of fact:

1. The previous driver of truck 5730 struck a low bridge while pulling a trailer. Tr. 510-511.

2. The previous driver of truck 5730, David Jordan, had problems with securement of the fire extinguisher. Tr. at 520; RX-1 at 82 & 85. Jordan also testified that there was not a safety strap in the sleeper berth in truck 5730. Tr. at 533.

3. When the Complainant arrived at Brayer's on June 3, 2005 and completed his initial inspection of truck 5730, his inspection revealed the following defective items: windshield washer pump, wiper blades, passenger door, driver's side door knob, low fluid levels, vent louvers, unsecured fire extinguisher, sleeper berth matress, exhaust stack. JX-6 at 10-12, 50-51, 56, 62, 205, 207-208, 214, 217-218, 394; Tr. at 208-209 & 214-215. Richard Brayer also saw that the mattress was stained and dirty. CX-6 at 8 & 36-37.

4. During his inspection of truck 5730 on June 3, 2005, the Complainant could not find the previous driver's post-trip inspection report, or a book of blank inspection forms for use during his daily inspections. Tr. at 156, 184 & 210; JX-6 at 29 & 53.

5. The Respondent does not require its drivers to review the previous driver's post-trip inspection reports before operating a commercial motor vehicle. Tr. at 544-545 & 554-555. The Respondent does not require its drivers to prepare post-trip inspection report, in writing, on each vehicle operated, as required by federal regulation. Tr. at 535, 546-549 & 564; 49 C.F.R. § 396.11.

6. The Respondent's record of duty status (log) incorporates a vehicle inspection report. This form does not specify items to be inspected by the driver. CX-2; Tr. at 153-154. Some carriers provide their drivers with inspection forms separate from their records of duty status listing specific items to be inspected during a daily vehicle inspection on each vehicle operated. Tr. at 356-358, 1016; CX-12; CX-13; and, CX-14.

7. On June 3, 2005, the Complainant spoke with individuals in the Respondent's Road Service Department twice. He initially notified them of the problems he had discovered with the fire extinguisher. Tr. at 212-213. The Complainant then completed his inspection and discovered additionally that the windshield washer pump on truck 5730 was defective, wiper blades needed replacement, the passenger side door was broken, the driver's side door knob was missing, the passenger side exhaust stack was bent, the levels of coolant, washer fluid and oil were low, vent louvers were missing, the fire extinguisher was damaged and unsecured, and the sleeper berth mattress was soiled. Tr. at 212-220. After completing his inspection, he called back to tell the service personnel about the other problems he had discovered and to inform them that some of these other problems would need to be addressed before he could drive the truck. Tr. at 220.

8. On June 3, 2005, an employee of the Respondent told the Complainant that Brayer's would take the necessary steps to make the truck roadworthy. Tr. at 220; JX-6 at 6 & 63. The Complainant discussed the windshield washer pump, various low fluid levels, the unsecured fire extinguisher, and the soiled sleeper berth mattress with Mr. Brayer. JX-6 at 8-13. Brayer's replaced the fire extinguisher and supplied coolant and washer fluid to the Complainant. Tr. at 221 & 389-390; JX-6 at 6-7 & 10-12; and, JX-12 at 11. Mr. Brayer added engine oil and provided the Complainant with an extra gallon of oil. Mr. Brayer tested the windshield washer pump and found that it was defective. JX-6 at 11-12. He told the Complainant he could obtain a new mattress that day, and a new washer pump the next day. JX-6 at 8, 12, 30-31 & 37-38. The Complainant chose not to wait for either a new mattress or a new windshield washer pump because those defects would not result in the vehicle being placed out-of-service. Tr. at 385 & 387-388; JX-6 at 9 & 12.

9. On June 3, 2005, the Complainant spoke with Brandon Smith. The Complainant told Smith that there were defects on the truck but none that were serious enough to result in the vehicle being placed out-of-service. Tr. at 381, 1007 & 1018-1019.

10. From June 4, 2005, to June 6, 2005, The Complainant drove from Avenel, NJ, to Detroit, MI. CX-2 at 10-12. While en route, he observed that the engine would "heat up" in mountainous areas even activating an engine warning light once. Tr. at 225. The Complainant added oil at Barkeyville, PA and observed a leaking wheel seal. Tr. at 224-227.

11. At Barkeyville, PA, The Complainant called Road Service to report the leaking wheel seal. He also reported that the engine was losing oil and running hot. The person with whom he spoke asked him if he felt comfortable driving the truck. The Complainant replied that he did not think that there was a problem driving the truck at that time. The

Complainant continued the trip to Detroit because he did not feel there was an imminent safety hazard. Tr. at 226-228.

12. Truck 5730 is equipped with an electronically-controlled engine. The diagnostic codes for an overheated engine are triggered on the electronic control module when the high engine temperature warning light comes on for more than ten consecutive seconds and the engine has been running for at least thirty seconds. CX-27; Tr. at 957-958.

13. On June 6, 2005, the Complainant told his Fleet Manager, Kari Serum, that the Respondent had deceived him about the condition of the truck when he picked it up. JX-14 at 9 & 27-29. He also told her that the truck needed to be serviced at Dermody Truck Sales "Dermody". JX14 at 87. Serum transferred the call to Brandon Smith. The Complainant and Smith discussed the use of the Respondent's fuel card and procedures to obtain purchase orders. Smith transferred the Complainant to Serum who transferred him to Road Service. Tr. at 1011-1012; JX-14 at 30.

14. On June 6, 2005, the Complainant spoke with Alan Austin, the Respondent's Assistant Road Service Manager. JX-5 at 5 & 7; Tr. at 229. The Complainant told him that the sleeper berth mattress had a urine odor. He also complained that the truck had a leaking wheel seal, an oil leak, the windshield washer pump was defective, the bunk strap was missing, engine coolant was low, vent louvers were damaged and missing, the exhaust stack was bent, and the Qualcomm unit was not secured. Tr. at 229-237; CX-5. The Complainant stated that he did not think that the truck was roadworthy - or complied with DOT regulations. JX-5 at 8-15 & 20. Austin then asked the Complainant if he would be comfortable driving the truck to Dermody in Grand Rapids. The Complainant said that he would drive it to Dermody but no further. JX-5 at 12-13 & 19. The Complainant also stated that the inspection book was missing and that he needed one. JX-5 at 13. Austin said that he would arrange to have the truck repaired at Dermody in Grand Rapids. Tr. at 231-232; JX-5 at 18. Austin told the Complainant that replacement of the bunk strap would have to wait until he was at one of the Respondent's terminals. JX-5 at 13-14.

15. On June 6, 2005, Austin prepared a work order detailing the Complainant's complaints about truck 5730. CX-6; JX-5 at 18.

16. On Monday, June 6, 2005, after the Complainant delivered the load from Avenel, NJ, to Detroit, MI, he reported to Dermody where Austin had directed him to take the truck to be repaired. JX-14 at 31; CX-10 at 3.

17. Prior to the Complainant's arrival at Dermody on June 6, 2005, Austin spoke with John McNeilly, a service advisor at Dermody. McNeilly has been a service advisor at Dermody for 3 years. Tr. at 570. He was formerly a safety director for several motor carriers. Tr. at 571-572. McNeilly is not experienced as a Caterpiller engine mechanic. Tr. at 621. Austin told McNeilly that a truck that had hit a low overpass was coming in, that it needed the exhaust system inspected, it had a leaking wheel seal, the windshield washer pump did not work, and the sleeper berth mattress needed replacement. Tr. at 575, 590 & 625-626; RX-24 at 1 & 3.

18. On June 6, 2005, McNeilly prepared an "initial write-up sheet" as he inspected truck 5730 with the Complainant. RX-24; Tr. at 573 & 591. The Complainant listed items for McNeilly that he believed were defective including the following: wheel seal, passenger door, the fifth-wheel air switch, exhaust stack, engine oil leak, washer pump, headlamp, wiper blades, doorknob, sleeper berth mattress, bunk light, and dash vents. Tr. at 575-576. McNeilly thought the Complainant had unusually high standards concerning the condition of the truck. Tr. at 658-659.

19. McNeilly personally observed the bent exhaust stack, damaged driver's side door knob, a coating of oil and dirt on the engine, a hole in the high beam, the dirty mattress, the inoperative bunk light, the damaged vents, and the missing CB Antenna. Tr. at 576-585.

20. A leaking wheel seal results in loss of lubricant and can eventually cause wheel and/or brake failure. Tr. at 627 & 743-744; JX-5 at 33.

21. An engine oil leak could cause a fire if oil leaked on to an exhaust part. JX-3 at 27. Oil from a leak can collect on brake parts increasing stopping distances. JX-5 at 16 & 33. A loss of oil can cause an engine to shut down while a vehicle is in operation presenting a hazard on the highway. JX-3 at 28-29; JX-5 at 33. Sometimes an oil leak is difficult to locate. JX-3 at 65 & 72; JX-5 at 32.

22. The exhaust system on a truck is integrated. Pipes which disperse exhaust from the engine manifold run underneath the engine, cab, and sleeper berth to exhaust stacks on the sides of the sleeper berth. A bent stack could be a sign of an exhaust leak beneath or forward of the cab or sleeper berth. Tr. at 637-638 & 733-734; JX-3 at 25-26. A bent exhaust stack could also constrict the exhaust system which could cause exhaust to back up into the cab or engine compartment. Tr. at 109. Additionally, a bent exhaust stack could indicate that the stack is unsecured. An unsecured exhaust stack could fall off and burn air hoses. Tr. at 109-110; JX-3 at 25.

23. Although the high beam on truck 5730 was operating on June 6, 2005, the hole in the lens would have eventually caused the light burn out. Tr. at 745.

24. The Respondent authorized Dermody to repair all of the defects reported by the Complainant except for the inoperable sleeper berth light, and missing bulb covers. CX-7; Tr. at 587. The Respondent also authorized Dermody to check the truck for engine oil leaks. CX-7; Tr. at 594.

25. While truck 5730 was at Dermody, the Complainant went to his home. Tr. at 237. On June 7, 2005, Serum sent the Complainant a message via the Qualcomm unit in truck 5730 asking him if the truck was out of the shop. CX-10 at 4. The Complainant did not receive the message because he was at his home. Tr. at 238-239.

26. On June 7, 2005, Serum left a message on the Complainant's answering machine asking him to call her. JX-14 at 33-34. On June 8, 2005, the Complainant called Serum who

asked him why the truck was not ready. The Complainant told her he did not know when the truck would be ready to go. JX-14 at 34. He told Serum that the Respondent's maintenance department would let him know when the truck was ready. Tr. at 239. The Complainant began to convey to Serum his concerns about the truck. Serum asked him not to go over those issues again and, instead, to take them up with the road service personnel. JX-14 at 34-35.

27. At 5:00 p.m. June 7, 2005, the Complainant called Dermody to ask about the status of the truck. McNeilly told him that it would be at least two more days until the truck was ready. Tr. at 591; RX-24 at 4.

28. At 4:57 p.m., June 8, 2005, the Complainant called McNeilly about the status of the truck. McNeilly told him that it would be ready around noon the next day. Tr. at 592-593.

29. The wheel seal leak that the Complainant complained about was actually a leaking axle seal. Dermody replaced a gasket to correct this defect. Tr. at 590-591.

30. Dermody tested truck 5730 for engine oil leaks and found none. Tr. at 597-599; CX-7 at 2. Dermody replaced the bent exhaust stack, the latch on the passenger door, the broken high beam, the sleeper berth mattress, the CB antenna, the driver's door knob, and the missing vent louvers. Dermody provided The Complainant with an extra fuel filter and extra coolant . Tr. at 594-595 & 607-610; CX-7; and, RX-24 at 9-14.

31. Dermody did not find a defect with the fifth wheel switch. Tr. at 605-606.

32. On June 10, 2005, when the Complainant was dispatched on the load from Kalamazoo, MI on June 11, 2005, for delivery in Tomah, WI on June 12, 2005, Serum also dispatched him on a shipment from Mondovi, WI to be delivered in Bolingbrook, IL at 10:00 a.m. June 13, 2005. Serum told the Complainant to pick up the load to Bolingbrook after he delivered the first shipment to Tomah, WI. JX-14 at 41-44; CX-10 at 6.

33. When the Complainant arrived at Dermody to pick up truck 5730 on the morning of June 10, 2005, he spoke with McNeilly and asked for coolant. McNeilly reviewed the repair bill with the Complainant and described the repairs that had been made. He also told the Complainant that Dermody did not find any engine oil leaks. Tr. at 242 & 610-611.

34. Before leaving Dermody on June 10, 2005, the Complainant inspected truck 5730 and determined that there were no defects likely to affect the safety of its operation or result in a mechanical breakdown. Tr. at 240 & 246.

35. On June 11, 2005, when the Complainant picked up the shipment in Kalamazoo, MI going to Tomah, WI, the automatic fifth wheel switch did not work properly. Tr. at 243 & 254; CX-10 at 6. While en route from Kalamazoo to Tomah, the Complainant again observed that truck 5730 was running hot. Tr. at 258.

36. From the afternoon of June 11, 2005 until noon on June 12, 2005, the Complainant stopped in Portage, WI for a break. CX-2 at 17-18; Tr. at 257-258. The Complainant inspected the truck and observed that it was down about two quarts of oil. Tr. at 257.

37. On June 12, 2005, the Complainant spoke with an employee of of the Respondent he believes to have been named "Christine" and told her that truck 5730 needed to go to the Respondent's shop and that he could not meet the delivery appointment time in Bolingbrook, IL without violating federal hours of service regulations. Christine removed the Complainant from the dispatch to Bolingbrook, IL. Tr. at 258-259.

38. At 11:39 a.m. on June 12, 2005, the Complainant notified Road Service that truck 5730 needed to be serviced. JX-14 at 49-50; CX-10 at 9. The Complainant received a Qualcomm message from an individual in the Respondent's shop stating: "What do you need repaired? Keep in mind this is short notice and we are booked up. Be patient and wait your turn. Reply back to jrb in truck shop with what you need repaired, thanks, jrb shop." The Complainant replied with a message stating that he had "some issues for service" including repair of a bunk light, as well as some issues relating to reimbursement of expenses. Tr. at 274; JX-14 at 51; and, CX-10 at 9.

39. Upon his arrival at the Respondent's facility on the evening of June 12, 2005, the Complainant first stopped by the shop to provide notice of his arrival. Tr. 278-280; CX-10 at 9. After taking some damaged cases of yogurt to the office, he went back to the shop and spoke with two mechanics. Tr. at 280-283. He completed an inspection form noting that truck 5730 had a defective fifth wheel, a cut in a tire, and that there was oil "all over." CX-8; Tr. at 280. The Complainant told the mechanics that there was no safety strap in the bunk, the radiator was plugged, the engine had an oil leak, a steering tire was cut, and the automatic coupling device did not work. Tr. at 283-288. The Complainant asked where he could sleep. A mechanic told him he could sleep in the truck in the shop. The Complainant declined to sleep in the truck while it was in the shop. Tr. at 288-289.

40. Truck 5730 was placed in the Respondent's shop on the morning of June 13, 2005. Tr. at 289-290. The Complainant told Mitchell Goss, a mechanic, that the truck had been overheating, the radiator was plugged, a steering tire was cut, the truck had an oil leak, and was missing a bunk strap. Tr. at 290-291, 722-723 & 727; CX-8. The Complainant gave Goss a damaged fire extinguisher that had been in the truck when he picked it up and asked Goss to check the new fire extinguisher to make sure it complied with DOT regulations. Tr. at 736; CX-9. Even though all of the items that the Complainant mentioned orally to Goss were not on the inspection form that the Complainant had prepared, this was not uncommon for the Respondent's drivers. Tr. at 719.

41. If one of the Respondent's drivers has a repair or service issue with a truck that he brings to the attention of the Respondent's shop personnel, a work order is prepared setting forth the driver's complaints. Goss prepared a "Repair Work Order" setting forth the Complainant's complaints and indicating that truck 5730 had a cut steering tire, an inoperable bunk light, a plugged radiator, an inoperable fifth wheel air release, a

defective idler pulley, a maladjusted exhaust stack, and oil "all over engine compartment." The form also indicated that the truck should be checked for a proper fire extinguisher. CX-9; Tr. at 290 & 719-721.

42. Goss observed that the radiator on the engine of truck 5730 was badly plugged with dirt and oil and that there was a cut in the right front steering tire. Goss was not sure if the tire met DOT specifications so he had an employee of the Respondent who was experienced with tires examine the tire. The tire met DOT specificiations. Tr. at 722-727; CX-9 at 1.

43. Goss cleaned the radiator on truck 5730. He determined that the radiator was plugged, and "plugged badly," due to excess oil leaking from the "blow-by" tube on the engine and collecting on the radiator fins. Tr. at 727-728, 735 & 757. The engine in truck 5730 was prone to excessive blow-by. Tr. at 778-779, 785 & 1056-1057.

44. Blow-by is a form of waste oil. When a truck is idling, it does not run at a hot enough temperature to completely burn oil in the cylinders. The blow-by oil is ejected as a sludge or waste. Tr. at 603. When the vehicle is moving, some of the oil that leaks from the blow-by tube will collect, along with dirt, on the radiator fins. Tr. at 728. When the truck is idling, the oil will leak from the blow-by tube to the ground or mist into the atmosphere. Tr. at 621, 642 & 729. Blow-by causes a loss of oil. Tr. at 786.

45. A radiator that is plugged with oil and dirt can result in a vehicle overheating. Tr. at 730 & 774. If a truck overheated on the highway, its engine could shut down and the vehicle would not move under its own power from the highway. The vehicle could then present a hazard to other vehicles on the highway. Tr. at 730-731; JX-3 at 28-29.

46. Blow-by on Caterpiller engines collects on the radiator fins, which can cause the engine to overheat. The Respondent tries to clean the radiators on its Caterpiller engines every four months as a preventative measure to avoid overheating. Tr. at 1038 & 1049-1052. The Respondent had the radiator on truck 5730 cleaned on March 6, 2004, and July 1, 2004. The radiator was not cleaned again until June 13, 2005, when the Complainant had it placed in the Respondent's shop. Tr. at 1037-1038, 1051 & 1054; RX-1 at 30 & 120. Another one of the Respondent's drivers also had complained about truck 5730 overheating. Tr. at 1056; RX-1 at 52, 55, 57 & 61.

47. Truck 5730 continued to have problems with engine blow-by plugging the radiator after the Complainant's termination. Tr. at 778; RX-1 at 155. On November 30, 2005, the driver of truck 5730 complained of a problem with blow-by collecting in the radiator. Tr. at 778; RX-1 at 155. The cause was determined to be a blow-by tube that was too short. RX-1 at 155. The problem was addressed by adding onto the blow-by tube. RX-1 at 155.

48. On June 13, 2005, Goss also determined that the automatic fifth wheel/coupling device on truck 5730 did not work due to a leaking air cylinder. Tr. at 738-739; CX-9 at 2. The automatic fifth wheel/coupling device operates with air provided by the truck's air

compressor. The air system on a tractor/trailer combination is integrated and operates air brakes on the truck and trailer, the air ride seats and, in the case of truck 5730, the automatic fifth wheel/coupling device. Tr. at 643-644.

49. Goss found that the idler pulley that the Complainant had complained about did not need repair. CX-9; Tr. at 766. The idler pulley holds the alternator belt. A defective idler pulley could cause the alternator to fail resulting in a breakdown. JX-3 at 36-38.

50. Trucks with air brake systems have two air hoses on the back of the truck. One line is red and called the "emergency side line" or "supply line." The other hose is blue and is called the "service side" line. Tr. at 737-738. The system is designed for the supply line to constantly provide air to tanks at the rear of a semi-trailer. When the brake pedal is depressed air is drawn from the tanks at the rear of the trailer engaging the service brakes on the trailer. Tr. at 739-740 & 780.

51. On a commercial vehicle, emergency brakes engage automatically when air is purged from the brake system. A sudden loss of air pressure due to leaks while a commercial vehicle combination is operating on the highway can cause emergency brakes to engage resulting in a jackknife. Tr. at 644 & 738-739.

52. The air leak on the cylinder for the automatic fifth wheel/coupling device on truck 5730 was not sufficient alone to affect the operation of the brakes. Tr. at 739.

53. Smaller air leaks in air brake systems can occur in other areas including around glad hands which couple air lines from the back of trucks to the front or trailers. Tr. at 781. A combination of small air leaks can be sufficient enough to engage emergency brakes at highway speeds when the driver does not intend to engage them. Tr. at 644, 738 & 782.

54. In mountain driving where there is a frequent use of service brakes, an air leak can decrease the rate at which air tanks are replenished on a trailer. If service brakes are used heavily and there is an air leak in the system, there is a danger that the vehicle combination would be left without service brakes. Tr. at 740.

55. On June 13, 2005, the Complainant met with the following employees of the Respondent: Mitchell Goss, Diane Ashwell (Safety Supervisor), Daniel Peterson (Director of Safety), James Pendergast (Equipment Manager), Mike Ashwell (Road Service Manager), Kari Serum, Doug Petit (Director of Operations), Mary (Last Name Unknown) and Kristi Decker (Human Resources Generalist). Tr. at 289-305.

56. After meeting with Goss, the Complainant spoke with Diane Ashwell in the Respondent's Safety Department. The Complainant told her about problems with truck 5730 that should have been corrected before it was assigned to him. He stated that an oil leak still needed to be corrected, the bunk strap needed to be replaced, the idle adjustment and the automatic fifth wheel/coupling device needed repair. The Complainant also told her that he had been told by a mechanic the previous night that he could sleep in the truck while it was repaired. Tr. at 291-292. The Complainant also asked Diane Ashwell about

obtaining a spill kit which contains absorbent material that prevents a spill from spreading. Tr. at 123-124 & 421.

57. Ms. Ashwell directed the Complainant to Daniel Peterson's office at about 7:45 a.m., on June 13, 2005. Tr. at 104-105 & 293. The Complainant told Peterson that truck 5730 did not comply with DOT regulations when he picked it up in Scranton, PA. He stated that the truck had been involved in an accident. Tr. at 105 & 295-296. The Complainant told Peterson that there should have been a secured fire extinguisher in the truck when he picked it up. Tr. at 106, 114, 158-159, 189 & 295-296. The Complainant also told him that an exhaust stack on the truck had been bent, the safety strap in the sleeper berth was missing, the truck had an oil leak, and the passenger door did not open when he picked it up. Tr. at 106-109, 131 & 293-296. He also told Peterson that the sleeper berth mattress was soiled when he picked it up. Tr. at 161, 191.

58. The Complainant also told Peterson that the previous post-trip inspection report for the truck was not present when he picked it up. Tr. at 294. The Complainant asked Peterson for a copy of the report. The Complainant told Peterson that he should not have been assigned to the truck in the first place because it did not comply with DOT regulations. Tr. at 115. The Complainant also told Peterson that a mechanic had told him the previous night that he could sleep in the truck while it was in the shop being serviced. Tr. at 162 & 293.

59. On June 13, 2005, Peterson concluded his meeting with the Complainant by telling him that he would make sure the repairs were made to the truck. Tr. at 112. Peterson left for a staff meeting and directed the Complainant back to Ms. Ashwell. Tr. at 298. During the Respondent's staff meeting, Peterson spoke with Michael Walter, Director of Maintenance, about the Complainant's claim that he had been told he could sleep in the truck while it was in the shop. Tr. at 162. Peterson did not discuss the Complainant's complaints about the truck with anyone during the meeting. Tr. at 112-113.

60. The Complainant met briefly with Ms. Ashwell again and spoke with her about the defects with the truck. Tr. at 298.

61. On June 13, 2005, the Complainant also met with James Pendergast who assigns trucks to the Respondent's drivers. JX-10 at 5-6. The Complainant told him that truck 5730 was in the shop. JX-10 at 7. Pendergast told the Complainant that if the truck was in the shop "too long" the Respondent would assign him a different truck. JX-10 at 7. The Complainant asked Pendergast about obtaining reimbursement for repair bills. Pendergast told the Complainant that he was speaking with the wrong person and directed him to Mike Ashwell, Road Service Manager. JX-10 at 6-7.

62. Pendergast brought the Complainant to Mike Ashwell. JX-3 at 4. The Complainant told Mr. Ashwell he needed some purchase order numbers to obtain reimbursement for oil and for a motel. JX-3 at 15. The Complainant told Mr. Ashwell that the truck was not up to DOT standards when he picked it up. Tr. at 300. Mr. Ashwell also understood that the Complainant was not happy working for the Respondent. Mr. Ashwell told the

Complainant that he would have to speak with someone in the Human Resources Department about his concerns. JX-3 at 16-17.

63. The Complainant met with Ms. Serum on June 13, 2005. The Complainant told her that he wanted two sets of load locks. Tr. at 302; JX-14 at 56-57. Serum told the Complainant that he could have an extra set of load locks but that the Respondent would not pay for a second set. JX-14 at 60 & 75-76. She told the Complainant that if he had questions about that policy, he could speak with her supervisor, Douglas Petit. CX-14 at 60. The Complainant also talked with Serum about some issues he had about the conditon of the truck. Serum understood that the Complainant wanted the truck to be put into the shop to have some items checked out and some repairs made. CX-14 at 58-59 & 69. The Complainant also told Serum about some problems he had with the truck in the past. Serum told him that if he had equipment issues he needed to speak with Pendergast or the shop to get them resolved. JX-14 at 59-60.

64. Load locks are devices used to protect against shifting of cargo. Tr. at 303 & 557-558. David Jordan, like the Complainant, prefers to have four load locks so that he would have a set in his possession if he picked up an empty trailer. Tr. at 525 & 557-558.

65. After speaking with Kari Serum, the Complainant spoke with an individual named "Mary" who worked in the Respondent's payroll department. Tr. at 307.

66. Late in the morning on June 13, 2005, the Complainant spoke with Douglas Petit, Director of Operations for the Respondent. JX-11 at 5-7. The Complainant had been directed to Petit by Carolyn Thompson, Operations Manager. JX-11 at 16-17. The Complainant discussed some pay and equipment issues with Petit. JX-11 at 8-9. He also told Petit that he would like to be issued a second set of load locks. The Complainant voiced his concern to Petit that if he dropped a loaded trailer with his assigned load locks in it at a customer's facility, he might not have load locks if he was assigned an empty trailer without load locks. Petit explained the Respondent's load lock policy to the Complainant. Tr. at 305; JX-11 at 26-28.

67. During his meeting with Petit, the Complainant spoke about some personal matters with Petit. JX-11 at 17-18. It was not unusual for drivers to discuss personal matters with Petit, and Petit was not offended by the Complainant's remarks. JX-11 at 23-24. The Complainant also voiced his concerns about the condition of the truck when he picked it up in Scranton, PA. JX-11 at 26. Petit told him it was not the Respondent's policy to send drivers to pick up nondetailed equipment. The Complainant told Petit that he thought the Respondent had intentionally sent him for a piece of equipment that was not detailed. JX-11 at 10-11. The Complainant discussed with Petit that the truck had been routed to Mondovi, WI, to address maintenance issues. JX-11 at 15 & 26 .

68. On the afternoon of June 13, 2005, The Complainant was informed that truck 5730 was ready. He spoke with Goss who told him that the radiator on the truck had been clogged and that he had cleaned it. The Complainant thanked him for working on the truck. Tr. at 308 & 775. The Complainant then inspected the truck and saw that the bunk strap was

not replaced, the previous driver's post-trip inspection and an inspection book were not in the truck, and oil and dirt was caked was on the right rear drive axle indicating a possible leak. Tr. at 308-310.

69. The Complainant went to Diane Ashwell and told her that there were still problems with the truck that could result in an out-of-service order. Tr. at 309-310. Ms. Ashwell brought the Complainant to Kristi Decker in Human Resources. Tr. at 310-311; JX-4 at 5. The Complainant asked her about reimbursements. JX-4 at 8-9. The Complainant then "proceeded to explain to [Ms. Decker] that he had spoken with numerous individuals at Marten Transport regarding safety issues with his truck." Tr. at 311; JX-4 at 9. The Complainant told Decker that the truck had an oil leak, soiled mattress and damaged fire extinguisher when he picked it up. JX-4 at 9-10, 14-15 & 101. The Complainant said that he felt he was being passed around. JX-4 at 12. Decker told the Complainant that she would investigate his concerns and update him the next day. Tr. at 313; JX-4 at 20.

70. On June 13, 2005, Decker spoke with Pendergast about the condition of the truck. Pendergast stated that the Complainant had put the truck in a shop and incurred $1,200 in unauthorized expenses. JX-4 at 20-21.

71. On the evening of June 13, 2005, The Complainant left a voicemail message for Decker asking to meet with her the following morning at 8:00 a.m. JX-4 at 24. Decker told him that she could not meet with him until 10:00 a.m. JX-4 at 24-25.

72. On the morning of June 14, 2005, Serum sent the Complainant a Qualcomm message stating "your truck was out of the shop last night. Are you ready for dispatch this morning?" The Complainant responded "No." Tr. at 315; CX-10 at 11; and, JX-14 at 61.

73. Between 9:00 a.m. and 10:00 a.m. on June 14, 2005, Decker spoke with someone in the Respondent's shop who stated that truck 5730 was ready to go. JX-4 at 23. At 10:00 a.m. the Complainant met with Decker who told him that his truck was ready to go. The Complainant stated that it was not ready and that he needed a vehicle inspection book. JX-4 at 26-27.

74. At 2:00 p.m. on June 14, 2005, the Complainant had a second meeting with Decker. Decker told him that she had spoken with the Safety Department and they had indicated that the vehicle records were mailed to him. Decker stated that she "had not had a chance to get any further with any of the issues he had brought up" to her. Tr. at 316-317; JX-4 at 37-38. The Complainant told Decker that he was going to call the USDOT and FMCSA and file complaints against the Respondent regarding its safety practices. JX-4 at 38. Decker told the Complainant that that was his right. JX-4 at 38-39. He asked Decker for the telephone number to the Wisconsin Department of Transportation. JX-4 at 43.

75. During the June 14, 2005, meeting the Complainant told Decker "Why don't I just quit. That would solve your problems but not mine." Tr. at 851. Decker told the Complainant that she would accept his resignation, and she advised the Complainant to take as many

of his personal items with him as possible and that the rest would be shipped to him. JX-4 at 39. The Complainant stated that he would want to complete an exit interview if he resigned. Tr. at 327-328; JX-4 at 40-41. He appeared upset about the handling of his belongings. JX-4 at 41.

76. The Complainant told Decker that he wanted someone from the maintenance or safety departments to accompany him to the truck so that he could show them the defects about which he had been complaining. Tr. at 318-320.

77. While the Complainant was meeting with Decker on the afternoon of June 14, 2005, Peterson was meeting in his office with Stacia DeWitt, Director of Recruiting. Tr. at 115-116 & 167. During this meeting, Decker arrived looking for Susan Deetz. Decker indicated that she was having some problems with a driver who had chosen to resign. Tr. at 116 & 681-682. She told Peterson that the Complainant wanted the telephone number for the Wisconsin Department of Transportation because he was going to call the FMCSA and DOT on the Respondent. JX-4 at 43-44 & 136. Peterson asked her why he was going to call the FMCSA and DOT. Decker told Peterson that the Complainant did not believe the Respondent's equipment complied with DOT standards. JX-4 at 136-137. She also told Peterson that the Complainant wanted someone to inspect the truck with him so he could point out the areas of non-compliance with DOT regulations. Tr. at 117.

78. On the afternoon of June 14, 2005, Decker also told Peterson and DeWitt that the Complainant was concerned about the shipment of his personal possessions that were in the truck. Tr. at 682; JX-4 at 43-44.

79. On the afternoon of June 14, 2005, DeWitt left Peterson's office to meet with the Complainant. Tr. at 168. DeWitt and Decker met with the Complainant on the afternoon of June 14, 2005, in a conference room. Tr. at 329. DeWitt introduced herself to the Complainant and told him that Decker had spoken to her about his concern about his personal items. DeWitt stated that the Respondent would pay to ship his personal items home. She also told him that Decker wanted to proceed with an exit interview. Tr. at 682.

80. After DeWitt told the Complainant that Decker wanted to proceed with the exit interview, the Complainant began telling DeWitt of problems he had with truck 5730. Tr. at 331-333; JX-4 at 45. DeWitt was receptive to the Complainant's complaints. JX-4 at 93. The Complainant told DeWitt there was oil all over the the engine compartment, and the fire extinguisher was damaged and unsecured when he picked up the truck. DeWitt asked the Complainant if the fire extinguisher had been replaced before he left Pennsylvania. The Complainant said it had. The Complainant also told her that there was grease on the bumper of the truck, the radiator on the truck had been badly plugged, and there was no safety strap in the sleeper berth of the truck in violation of Department of Transporation Regulations. Tr. at 682-685.

81. The Complainant talked at length with DeWitt about maintenance and equipment issues including the missing bunk strap and plugged radiator. The Complainant stated that he

was having problems with the truck and that he was unhappy with the Respondent. Tr. at 683-685. The Complainant asked that someone from Maintenance or Safety accompany him to inspect the truck so that he could point out violations of DOT Regulations. Tr. at 686 & 698; JX-4 at 49-50. The Complainant also told DeWitt that there should have been an inspection report from the previous driver and an inspection book in the truck when he picked it up in Pennsylvania. Tr. at 332 & 685.

82. During the meeting with DeWitt and Decker on June 14, 2005, the Complainant told them that the Respondent was in violation of DOT regulations. Tr. at 689 & 710. DeWitt told the Complainant that the Respondent is very concerned about safety and maintaining its equipment. DeWitt understood the Complainant to be implying that the Respondent was not concerned about complying with the regulations of the Department of Transportation. Tr. at 709-710.

83. During the meeting the Complainant told DeWitt that she did not respect her elders or drivers. He also asked DeWitt how old she was. DeWitt told him that had nothing to do with the matters at hand. The Complainant said that he did not feel DeWitt was old enough to be in her job position. Tr. at 695-696; JX-4 at 46-47. The Complainant told DeWitt and Decker that he did not believe his resignation was voluntary. JX-4 at 48. He asked DeWitt "What if I don't resign?" Tr. at 692. DeWitt told the Complainant that if he did not resign he would be discharged. Tr. at 330, 697-698 & 710. DeWitt told the Complainant that they had to proceed with the exit interview. The Complainant responded "That's unacceptable." Tr. at 712. The Complainant indicated that he would be calling the U.S. Department of Transportation, the Federal Motor Carrier Safety Administration, and the Wisconsin Department of Transportation. Tr. at 334; JX-4 at 138.

84. DeWitt and Decker both left the conference room and returned to Peterson's office. JX-4 at 51. DeWitt told Peterson that the Complainant wanted to make some calls to the FMCSA and DOT to lodge some complaints against the Respondent. Tr. at 117-118, 176-177 & 191-192. Peterson replied that they needed to get the situation with the Complainant handled. Tr. at 117-118.

85. DeWitt returned to the conference room and told the Complainant that someone from maintenance would accompany him to inspect the truck so that he could point out issues of noncompliance to them. Tr. at 689. The Complainant told DeWitt that he wanted to make some telephone calls. Tr. at 64 & 686. He then went to a breakroom. Tr. at 337 & 699; JX-4 at 51-52.

86. DeWitt went to speak with Susan Deetz. She told Deetz about her conversations with the Complainant about the issues he had raised with her. Tr. at 713-714. Kristi Decker and Peterson also spoke with Deetz about their conversations with the Complainant before the Complainant was discharged. Tr. at 22-24; JX-4 at 124, 134, 137-138 & 143.

87. While in the Respondent's breakroom, the Complainant called governmental agencies including the Wisconsin State Patrol and the Federal Motor Carrier Safety

Administration. Tr. at 337-339. The Complainant had complained to the Mondovi Police Department earlier in the day that the Respondent had assigned him a substandard truck. Tr. at 41; JX-15 at 7.

88. The Complainant spoke with Officer Rita Garrison with the Wisconsin State Patrol. He described for her items that were wrong with the truck that he had been assigned to drive for the Respondent. JX-9 at 7-9. The items complained of were the type that would result in the vehicle being placed out-of-service. JX-9 at 18. Officer Garrison did not believe that the Complainant was stable. JX-9 at 9. She advised the Complainant to speak with law enforcement authorities who deal with commercial vehicles. JX-9 at 20-21.

89. The Complainant spoke with Chuck Lorenz of the Wisconsin State Police. He told Lorenz that the Respondent did not provide him a post-trip inspection or inspection book. Officer Lorenz referred the Complainant to Martin Gessler at FMCSA. Tr. at 337-338. The Complainant told Gessler that he was assigned a truck that did not comply with DOT regulations and had been in an accident. The Complainant described for Mr. Gessler items of noncompliance with the truck. Tr. at 338.

90. Meanwhile, Serum received a call from Officer Rita Garrison of the Wisconsin State Patrol about a complaint by the Complainant. Serum transferred the call to Susan Deetz. JX-14 at 64-65. Officer Garrison asked Deetz about the Complainant's complaints about the truck. Deetz told Garrison that the defects were corrected. Tr. at 42-43; JX-9 at 11, 14 & 24. Deetz also told Garrison that the Respondent was getting ready to fire the Complainant. JX-9 at 13 & 26. Officer Garrison advised Deetz to call the Buffalo County Police Dispatch. JX-9 at 16. Deetz called police dispatch who sent Officer Scott Smith to the Respondent's terminal. Tr. at 63.

91. On June 14, 2005, while the Complainant was speaking with governmental agencies, Peterson left his office to locate Deetz. Peterson assumed the Complainant was lodging complaints against the Respondent with government agencies including the FMCSA and USDOT. Tr. at 117-118.

92. Peterson located Deetz who told him the Complainant had called the FMCSA and U.S. DOT. Tr. at 118, 192. Deetz also told him that she had received a telephone call from the Wisconsin State Patrol and that the Complainant had contacted Officer Garrison about the Respondent's equipment. Tr. at 45 & 169. At that point Peterson was fairly certain that the Complainant had lodged complaints with FMCSA, USDOT, and the Wisconsin State Patrol alleging that the Respondent had not complied with certain commercial vehicle regulations. Tr. at 118-119. Peterson and Deetz discussed their belief that the Respondent was not going to be able to satisfy the Complainant's concerns with maintenance and repairs of the truck. Tr. at 169. They also determined that the Complainant would not be a good fit for the Respondent and discussed their desire to have the Complainant removed from the Respondent's property. Tr. at 118-119 & 195-196.

93. Peterson and Deetz determined that the Complainant "wasn't going to be a good fit" for the Respondent for the following reasons:

    a. The Complainant thought the Respondent's Safety Department should have had the truck inspected prior to the Complainant picking it up. Tr. at 119-120.

    b. In Peterson's view, the Complainant thought that the Respondent's Safety Department had not done its job because there was not a working secured fire extinguisher in truck 5730 when he picked it up, the bunk safety strap was missing, and the exhaust stack was bent. Tr. at 120.

    c. The Complainant had voiced repeated concerns about an engine oil leak, missing vehicle inspection book, and missing previous driver's post-trip inspection report. Tr. at 120.

    d. The Complainant had a difference of opinion with Road Service about whether certain defects that violated DOT regulations should be corrected by vendors or whether they should be deferred until the truck was at the Respondent's terminal. Tr. at 121-122.

94. While the Complainant was speaking with Mr. Gessler, Deetz approached him from behind with Peterson and Officer Smith. Tr. at 64-65, 171 & 339-341. Either Deetz or Peterson had already told Officer Smith that the Complainant was going to be fired. JX-15 at 12. Deetz told the Complainant that he had to leave the Respondent's property. The Complainant told Deetz that he was not ready to leave. Tr. at 88 & 171. Deetz again told him that he was going to be taken off the property. Tr. at 40 & 65. Someone - not Officer Smith - told the Complainant that he was terminated. JX-15 at 13. Officer Smith told the Complainant that he was leaving the property. Tr. at 65-66.

95. On June 14, 2005, the Respondent discharged the Complainant. Deetz made the decision to discharge the Complainant based on information provided to her by Peterson, Decker and DeWitt. Tr. at 22-24. Deetz knew that Peterson, Decker and DeWitt had all received information from the Complainant and that this information led her to conclude at that time that the Complainant was not happy with the Respondent's equipment. Tr. at 24 & 28-30.

96. The Respondent discharged the Complainant because of his "excessive complaints," which included complaints about the truck, other issues, and his unhappiness with the Respondent. Tr. at 74-75 & 1077-1079. Deetz knew from speaking with Peterson that the Complainant's complaints had to do with functionality of the equipment for operation on the highway. Tr. at 34. At the time the decision was made to discharge the Complainant, Deetz was aware that the Complainant felt the truck was unsafe to drive. Tr. at 35 & 44.

97. The Complainant's unhappiness with other employees of the Respondent played no role in the decision to discharge him. Tr. at 30-31.

98. Peterson and Officer Smith escorted the Complainant from the break room to truck 5730 where he removed some of his personal belongings. The Complainant told Peterson that the Respondent would be receving a telephone call from FMCSA. Tr. at 166-167.

99. After the Complainant removed some of his personal items from the truck, Officer Smith escorted him to the front of the Respondent's building to wait for a taxi. Tr. at 171 & 341; JX-15 at 11. The Complainant was unable to carry all of his personal belongings. Many of the personal items that he left behind were not returned including, but not limited to, vitamins, an heirloom afghan, health foods, tools, clothing, bedding, and jumper cables. CX-24; RX-15. These items have a value of approximately $717. Tr. at 345-349.

100. The Respondent arranged for the Complainant's transportation from Mondovi, WI, to Grand Rapids, MI. The Complainant had to stay overnight in Chicago, IL and incurred expenses of $120.65 for lodging and $11.50 for cab fare. Tr. at 369; CX-21. As he travelled home the Complainant felt depressed and worthless at having been discharged. Tr. at 343.

101. The Respondent regularly uses a form to document the separation of its drivers from employment with the Respondent. Tr. at 20-21 & 36. The purpose of the form is so that the Respondent has historical information regarding the reasons for a driver's separation. Tr. at 22.

102. On June 14, 2005, Decker prepared a "Company Driver Termination Form." JX-4 at 70-71; CX-15. The form indicated that the Complainant had been discharged effective June 14, 2005, because of "company policy issues," unhappiness with the Respondent's equipment, and overall unhappiness with the Respondent. CX-15. Decker reviewed the form with Deetz before filing it in the Respondent's personnel file in order to make sure the form accurately documented the reasons for the Complainant's discharge. JX-4 at 127-128.

103. Deetz testified that the reference on the Company Driver Termination Form to company policy violations referred to the Complainant's equipment complaints. Tr. at 27. Drivers for the Respondent were allowed to complain about equipment defects up to a point, but they are "expected to move on and do their job" once the company has "addressed the concern." Tr. at 48-53.

104. After discharging the Complainant, Deetz sent the Complainant a letter stating that he had been discharged "[d]ue to the violation of company policy, pertaining to not meeting expectations." Tr. at 25; CX-16; and, RX-2. The Complainant's violation of company policy for which he was discharged was his ongoing complaints stemming, in "large part," from his unhappiness with the Respondent's equipment. Tr. at 25-27, 48-53 & 60. The Complainant's unhappiness with the Respondent, as noted on the Company Driver Termination Form, was the Complainant's unhappiness with the Respondent's

equipment, i.e. truck 5730. Tr. at 27-28. Deetz knew the Complainant's complaints involved his concerns over the safety of the truck. Tr. at 44.

105. USIS Commercial Services ("USIS") maintains records on truck drivers. Subscribing carriers reports to USIS on drivers about such items as work records, dates of employment, and controlled substance test results. Subscribing carriers may obtain "DAC Reports" from USIS on prospective employees. JX-4 at 88; JX-10 at 17; and, Tr. 36 & 665.

106. The Respondent relies on DAC Reports when hiring truck drivers. Tr. at 36 & 667. Gainey Transportation, a motor carrier based in Grand Rapids, MI, also relies on DAC Reports when hiring drivers. Tr. at 264-265. Other large carriers also rely on DAC Reports when hiring drivers. Tr. at 670-671.

107. After Deetz discharged the Complainant, the Respondent sent a report to USIS indicating that the Complainant's work record with the Respondent included "excessive complaints" and a "company policy violation." CX-17; CX-18 at 15-16; and, Tr. at 40. According to Deetz, the "excessive complaints" that prompted that notation included, but were not limited to, the Complainant's complaints about the lack of a safety strap in the sleeper berth, the defective fire extinguisher, oil leaks, the broken headlight, the soiled sleeper berth mattress, and the bent exhaust stack on the truck. Tr. at 37 & 54-56.

108. After the Respondent discharged him, the Complainant sought work with various motor carriers including KLLM, Brooks Trucking, Transway, and Gainey Transportation. Tr. at 359-361 & 365. Brooks Trucking offered the Complainant a job but he declined the offer because it did not pay as well as the Respondent's job had. Tr. at 365-366. Transway initially offered the Complainant a job but did not respond to his inquiries about orientation. Tr. at 368. Gainey Transportation did not offer the Complainant a job because the recruiter thought that the Complainant had been discharged by the Respondent for safety violations. Tr. at 266-267.

109. The Complainant has remained unemployed since the Respondent discharged him. He has lived off of retirement savings since his discharge. Tr. at 373-374.

III. ISSUES

The issues remaining in this case are:

1. Did the Complainant engage in protected activity?
2. Did the Complainant's protected activity motivate, in whole or in part, the Respondent's adverse employment action?
3. Would the Respondent have taken the same adverse employment action against the Complainant if he had not engaged in protected activity?

V. DISCUSSION

The employee protection provisions of the STAA, 49 U.S.C. § 31105, prohibit discriminatory treatment of employees who have engaged in certain activities related to

commercial motor vehicle safety. To invoke the whistleblower provisions of the STAA, the Complainant has the burden of proof to establish that he engaged in protected activity and that he was subjected to adverse action. He must also present evidence that the Respondent was aware of the protected activity and took adverse action because of this awareness. ***Byrd v. Consolidated Motor Freight***, 1997-STA-00009 slip op. at 4-5 (ARB May 5, 1998).

In this case, I have already found, based on the record, that the Complainant was discharged, which satisfies the requirement that the Complainant have suffered adverse employment action because "discharge" is specifically listed as such an action in the STAA. 49 U.S.C. 31105(a)(1). Thus, I must now determine: whether the Complainant engaged in protected activity; if so, whether that protected activity formed part of the motivation for the adverse employment action; and finally, whether the Respondent would have taken the same adverse employment action regardless of whether the Complainant engaged in any protected activity.

A. Did the Complainant engage in protected activity?

The first determination that I must make is whether the Complainant engaged in activity protected by the STAA. For the following reasons, I find that the Complainant did engage in such protected activity.

1. Applicable Legal Standards

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. ***Yellow Freight System, Inc. v. Martin***, 954. F.2d 353, 356-57 (6th Cir. 1992); *see also* ***Lajoie v. Environmental Management Systems, Inc.***, 1990-STA-00031 (Sec'y Oct. 27, 1992). Moreover, a complaint is protected under the STAA even if the alleged violation complained about is proved ultimately to be meritless. ***Allen v. Revco D.S., Inc.***, 1991-STA-00009 slip op. at 6, n.3 (Sec'y Sept. 24, 1991). A complainant also need not mention any specific commercial motor vehicle safety standard to be protected under the STAA. ***Nix v. Nehi-R.C. Bottling Co.***, 1984-STA-00001 slip op. at 8-9 (Sec'y July 4, 1984). Protection under 49 U.S.C.§ 31105(a)(1)(A) requires only that a complaint be "related to" a perceived violation of a standard of regulation. ***Moravec v. HC & M Transportation, Inc.***, 1990-STA-00044 (Sec'y July 11, 1991); *see also,* ***Martin***, 954 F.2d at 357 (6th Cir. 1992).

The federal regulations applicable to commercial vehicle operation specifically incorporate state commercial vehicle regulations by requiring that "commercial motor vehicles must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated." 49 C.F.R. § 392.2. The STAA protects complaints related to such state commercial vehicle regulations in addition to those related to federal regulations. ***Chapman v. Heartland Express of Iowa, Inc.***, ARB No. 02-030, ALJ No. 2001-STA-00035 n. 9 (ARB Aug. 28, 2003).

Complaints to the Federal Motor Carrier Safety Administration or a state Department of Transportation are protected under the STAA. ***Davis v. H.R. Hill, Inc.***, 1986-STA-00018 (Sec'y Mar. 19, 1987); ***Gagnier v. Steinmann Transportation, Inc.***, 1991-STA-00046 (Sec'y July 29, 1992); ***Nix v. Nehi-RC Bottling Co., Inc.***, 1984-STA-00001 (July 13, 1984); ***Griffith v. Atlantic Inland Carrier***, 2002-STA-00034 (ARB Feb. 20, 2004). An employee's threats to notify officials of such agencies are also protected under the STAA. ***William v. Carretta Trucking, Inc.***, 1994-STA-00007 (Sec'y Feb. 15, 1995).

Under the STAA, an employee's complaints are also protected when made internally. ***Zurenda v. J & K Plumbing & Heating Co., Inc.***, 1997-STA-00016 (ARB June 12, 1998); *see also*, ***Yellow Freight System, Inc. v. Martin***, 954 F. 2d 353, 356-57 (6th Cir. 1992). A safety complaint made to any supervisor in the chain of command is deemed to be protected activity, and it does not matter where that supervisor falls in the chain of command. ***Zurenda v. J & K Plumbing and Heating Co., Inc.***, 1997-STA-00016 slip op. at 5 (ARB June 12, 1998).

Such complaints may be oral rather than written. ***Moon v. Transport Drivers, Inc.***, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors). If the internal communications are oral, they must be sufficient to give notice that a complaint is being filed. *See* ***Clean Harbors Environmental Services, Inc. v. Herman***, 146 F.3d 12, 22 (1st Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

Once an employer adequately addresses a safety concern, however, an employee's continued complaints or continued refusal to perform his or her assigned duties may be unreasonable and, therefore, unprotected under the STAA. ***Patey v. Sinclair Oil Corp.***, ARB No. 96-174, ALJ No. 1996-STA-00020 (ALJ Aug. 2, 1996).

2. Application to the Present Case

It is undisputed that the Complainant made numerous complaints during the twelve days of his employment with the Respondent. All of these complaints were oral, but as explained *supra*, that does not prevent them from being protected. Many of the Complainants complaints and conversations with his superiors specifically reference his concern about compliance with safety in general and DOT regulations specifically. For example, on June 6, 2005, the Complainant spoke with Alan Austin, the Respondent's Assistant Road Service Manager, and told him that he did not think that the truck was roadworthy - or complied with DOT regulations. (JX-5 at 8-15 & 20). On June 13, 2005, the Complainant also told both Peterson and Ashwell that truck 5730 did not comply with DOT regulations. (Tr. at 115 & 300). The Complainant also asked Goss to determine if the replacement fire extinguisher met DOT regulations. (Tr. at 736; CX-9).

Additionally, employees of the Respondent admitted at the hearing to knowing that the Complainant was concerned that truck 5730 did not comply with DOT regulations. Decker testified that she told Peterson that the reason that the Complainant wanted to telephone the Wisconsin Department of Transportation and the FMCSA was that the Complainant did not believe the Respondent's equipment complied with DOT standards. (JX-4 at 136-137). Decker also testified that the Complainant wanted someone to inspect the truck with him so he could point out the areas of non-compliance with DOT regulations. (Tr. at 117).

In light of the specificity of the Complainant's complaints as well as this testimony of the Complainant's superiors, the Respondent cannot seriously contend that the Complainant's complaints had not put the Respondent on notice that he was engaging in protected activity. Thus, I find that the Complainant's oral complaints were adequate in this case to put the Respondent on notice that the Complainant was filing complaints within the meaning of the STAA.

A review of the Complainant's specific complaints also makes it clear that the majority of his complaints were related to either actual or potential violations of specific federal and/or state regulations:

- The Complainant's complaints about the unsecured damaged fire extinguisher related directly to 49 C.F.R. §§ 392.8[2] and 393.95[3]. The Complainant's complaints about the unsecured, damaged fire extinguisher, as well as his inquiry to Goss about the suitability of the replacement fire extinguisher related not only to 49 C.F.R. §§ 392.8 and 393.95, but also to 49 C.F.R. §§ 392.1 and 393.1 which require compliance with the rules set forth in Sections 392 and 393 respectively.
- The Complainant's complaints about the soiled sleeper berth mattress in truck 5730, as well as his complaint about the missing bunk strap in the sleeper berth, were related to violations of 49 C.F.R. § 393.76[4]. Although the Complainant was a solo driver, 49 C.F.R. §393.76(h) contains no exemption for solo drivers. In any event, the Complainant's complaints about the bunk strap were "related to" a violation of 49 C.F.R. §393.76(h) as well as 49 C.F.R. § 393.1.
- While no regulation specifically prohibits operation of a commercial motor vehicle with a bent exhaust stack, such a condition arguably relates to a violation of 49 C.F.R. § 393.83[5]. McNeilly and Goss both testified that a bent exhaust stack could be an

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[2] 49 C.F.R. § 392.8 states as follows:
Sec. 392.8 Emergency equipment, inspection and use.
No commercial motor vehicle shall be driven unless the driver thereof is satisfied that the emergency equipment required by Sec. 393.95 of this subchapter is in place and ready for use; nor shall any driver fail to use or make use of such equipment when and as needed.

[3] 49 C.F.R. § 393.95 states in pertinent part as follows:
Sec. 393.95 Emergency equipment on all power units.
Except for a lightweight vehicle, every bus, truck, truck, and every driven vehicle in driveaway-towaway operation must be equipped as follows: (a) Fire extinguisher. (1) Except as provided in paragraph (a)(4) of this section, every power unit must be equipped with a fire extinguisher that is properly filled and located so that it is readily accessible for use. The fire extinguisher must be securely mounted on the vehicle. The fire extinguisher must be designed, constructed, and maintained to permit visual determination of whether it is fully charged. The fire extinguisher must have an extinguishing agent that does not need protection from freezing. The fire extinguisher must not use a vaporizing liquid that gives off vapors more toxic than those produced by the substances shown as having a toxicity rating of 5 or 6 in the Underwriters' Laboratories "Classification of Comparative Life Hazard of Gases and Vapors."

[4] 49 C.F.R. § 393.76 states in pertinent part as follows:
Sec. 393.76 Sleeper berths.
(e) Equipment. A sleeper berth must be properly equipped for sleeping. Its equipment must include: (1) Adequate bedclothing and blankets; and (2) Either: (i) Springs and a mattress; or (ii) An innerspring mattress; or (iii) A cellular rubber or flexible foam mattress at least four inches thick; or (iv) A mattress filled with a fluid and of sufficient thickness when filled to prevent ``bottoming-out'' when occupied while the vehicle is in motion.
***
(h) Occupant restraint. A motor vehicle manufactured on or after July 1, 1971, and equipped with a sleeper berth must be equipped with a means of preventing ejection of the occupant of the sleeper berth during deceleration of the vehicle....

[5] 49 C.F.R. § 393.83 states in pertinent part as follows:
Sec. 393.83 Exhaust systems.
(e) The exhaust system of every truck and truck tractor shall discharge to the atmosphere at a location to the rear of the cab or, if the exhaust projects above the cab, at a location near the rear of the cab.
***
(g) No part of the exhaust system shall leak or discharge at a point forward of or directly below the driver/sleeper compartment. The exhaust outlet may discharge above the cab/sleeper roofline.

indication of an exhaust leak beneath the cab. (Tr. at 635 & 733). Peterson also testified that a bent exhaust stack could indicate a constriction in the exhaust system, which could cause exhaust to back up into the cab or sleeper berth. (Tr. at 109). The Complainant's complaints about the bent exhaust stack were thus related to violations of 49 C.F.R. §§ 392.2[6], 393.1, and 393.83.

- Although. no regulation appears to specifically require the Respondent to provide its drivers with spill kits to use in the event of a hazardous materials or diesel fuel spill, the Complainant's complaint about needing a spill kit was still related to a violation of 49 C.F.R. § 177.854[7].
- The Complainant also complained about defective vent louvers which direct air on the windshield and side windows. (Tr. at 208). These complaints about the missing and broken vent louvers were related to a violation of 49 C.F.R. § 393.79[8].
- The Complainant's complaints about the doors on his assigned truck were directly related to 49 C.F.R. § 393.203[9]. The Complainant's complaints about the passenger door were also related to violations of 49 C.F.R. § 393.1 and violations of Wisconsin Administrative Code Section 305.19(1)[10].

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[6] *See* Pennsylvania Vehicle Code § 4523(b) which states "Compliance with exhaust requirements.--In addition to any requirements established under sections 4531 (relating to emission control systems) and 4532 (relating to smoke control for diesel-powered motor vehicles), every motor vehicle shall be constructed, equipped, maintained and operated so as to prevent engine exhaust gases from penetrating and collecting in any part of the vehicle occupied by the driver or passengers. *See also* Indiana Code § 9-19-8-2 and Wi. Stat. § 347.39.

[7] 49 C.F.R. § 177.854 states in pertinent part as follows:
Sec. 177.854 Disabled vehicles and broken or leaking packages; repairs.
***
(b) Disposition of containers found broken or leaking in transit. When leaks occur in packages or containers during the course of transportation, subsequent to initial loading, disposition of such package or container shall be made by the safest practical means afforded under paragraphs (c), (d), and (e) of this section.
***
(e) Disposition of unsafe broken packages. In the event any leaking package or container cannot be safely and adequately repaired for transportation or transported, it shall be stored pending proper disposition in the safest and most expeditious manner possible.

[8] 49 C.F.R. § 393.79 states as follows:
Sec. 393.79 Defrosting device.
Every bus, truck, and truck tractor having a windshield, when operating under conditions such that ice, snow, or frost would be likely to collect on the outside of the windshield or condensation on the inside of the windshield, shall be equipped with a device or other means, not manually operated, for preventing or removing such obstructions to the driver's view: Provided, however, That this section shall not apply in driveaway-towaway operations when the driven vehicle is a part of the shipment being delivered.

[9] 49 C.F.R. § 393.203 states in pertinent part as follows:
Sec. 393.203 Cab and body components.
(a) The cab compartment doors or door parts used as an entrance or exit shall not be missing or broken. Doors shall not sag so that they cannot be properly opened or closed. No door shall be wired shut or otherwise secured in the closed position so that it cannot be readily opened. Exception: When the vehicle is loaded with pipe or bar stock that blocks the door and the cab has a roof exit.

[10] Made applicable to heavy trucks by Wi. Admin. Code. § 305.485.
Trans 305.19 Doors, hoods, locks, latches and door handles.

- The Complainant's complaints about an engine oil leak, as well as his complaints about a leaky wheel seal relate directly to violations of 49 C.F.R. § 396.5[11]. The Complainant's complaints about an oil leak, low oil and a leaky wheel seal were also related to 49 C.F.R.§§ 396.1[12] and 396.7[13]. Goss and Austin testified that an engine oil leak could cause an increase of braking distance in the event oil collected on brake parts (Tr. at 744; JX-5 at 16 & 33), thus the Complainant's complaints about engine oil leaks also related to violations of 49 C.F.R. § 393.52 which prescribed minimum stopping distances. Additionally, Mike Ashwell testified that an engine oil leak could cause a fire if oil leaked on exhaust parts, and Austin and Mike Ashwell testified that an oil loss could cause a vehicle to breakdown on the highway. (JX-3 at 27-29; JX-5 at 33). Such a catastrophic situation would lead to a violation of 49 C.F.R. § 396.7. Both Goss and Austin testified that a leaking wheel seal could cause bearing failure resulting in loss of a wheel, a wheel fire, or brake failure. (Tr. at 743-744; JX-5 at 33).
- The Complainant's complaints about a plugged radiator, engine overheating, and a defective idler pulley related to violations of 49 C.F.R.§ 396.7 prohibiting unsafe operations. Goss and Mike Ashwell testified that engine overheating could cause a problem with a vehicle on the highway. (Tr. at 730; JX-3 at 29). Mike Ashwell testified that a defective idler pulley could cause a vehicle to shut down while on the highway creating a safety hazard. (Tr. at 36-38).
- The Complainant's complaints about a cut steering tire were related to violations of 49 C.F.R. § 393.75[14]. The Complainant's complaints about the cut in the steering tire also related to violations of 49 C.F.R. § 392.7[15], as well as 49 C.F.R. §§ 392.1 and 393.1.

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(1) Every door, hood and trunk lid of a motor vehicle shall be maintained in proper working condition and shall be equipped with sufficient hinges and latches so it can be opened and securely closed.

[11] 49 C.F.R. § 396.5 states as follows:
Sec. 396.5 Lubrication.
Every motor carrier shall ensure that each motor vehicle subject to its control is-- (a) Properly lubricated; and (b) Free of oil and grease leaks.

[12] 49 C.F.R. § 396.1 generally requires compliance with all of the regulations set forth in that Part 396.

[13] 49 C.F.R. § 396.7 states in pertinent part as follows:
Sec. 396.7 Unsafe operations forbidden.
(a) General. A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle.

[14] 49 C.F.R. § 393.75 states in pertinent part as follows:
Sec. 393.75 Tires.
(a) No motor vehicle shall be operated on any tire that (1) has body ply or belt material exposed through the tread or sidewall, (2) has any tread or sidewall separation, (3) is flat or has an audible leak, or (4) has a cut to the extent that the ply or belt material is exposed.
(b) Any tire on the front wheels of a bus, truck, or truck tractor shall have a tread groove pattern depth of at least \4/32\ of an inch when measured at any point on a major tread groove. The measurements shall not be made where tie bars, humps, or fillets are located.

[15] 49 C.F.R. § 392.7 states in pertinent part as follows:
Sec. 392.7 Equipment, inspection and use.
No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as

- The Complainant's complaints to about a hole in a headlamp lens were also protected because they related to a violation of 49 C.F.R. § 393.28[16]. Although, the headlamp functioned, the hole in the lens could lead to failure of the lamp. The hole in headlamp, with water observed by the Complainant inside the lens, caused a violation of 49 C.F.R. § 393.28 because the wiring for the headlamp was not protected from weather or "road splash." The Complainant's complaint about the hole in the headlamp also related to violations of 49 C.F.R. § 392.7[17].
- The Complainant's complaints about the need to replace the windshield wipers on truck 5730 related to violations of 49 C.F.R. § 392.7[18]. The Complainant' complaints about the defective windshield wipers on his truck also related to violations of 49 C.F.R. § 393.78[19]. The Complainant's complaints about defective wiper blades and washer pump were also related to violations of Section 305.35 of the Wisconsin Administrative Code[20].

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needed:
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Tires.

[16] 49 C.F.R. § 393.28 states in pertinent part as follows:
Sec. 393.28 Wiring to be protected.
(a) The wiring shall--
(1) Be so installed that connections are protected from weather, abrasion, road splash, grease, oil, fuel and chafing;
***
(b) The complete wiring system including lamps, junction boxes, receptacle boxes, conduit and fittings must be weather resistant.

[17] 49 C.F.R. § 392.7 states in pertinent part as follows:
Sec. 392.7 Equipment, inspection and use.
No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:
***
Lighting devices and reflectors.

[18] 49 C.F.R. § 392.7 states in pertinent part as follows:
Sec. 392.7 Equipment, inspection and use.
No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:
***
Windshield wiper or wipers.

[19] 49 C.F.R. § 393.78 states in pertinent part as follows:
Sec. 393.78 Windshield wipers.
(a) Every bus, truck, and truck tractor, having a windshield, shall be equipped with at least two automatically-operating windshield wiper blades, one on each side of the centerline of the windshield, for cleaning rain, snow, or other moisture from the windshield and which shall be in such condition as to provide clear vision for the driver, unless one such blade be so arranged as to clean an area of the windshield extending to within 1 inch of the limit of vision through the windshield at each side: Provided, however, That in driveaway-towaway operations this section shall apply only to the driven vehicle: And provided further, That one windshield wiper blade will suffice under this section when such driven vehicle in driveaway-towaway operation constitutes part or all of the property being transported and has no provision for two such blades.

[20] Made applicable to heavy trucks by Wi. Adm. Code § Trans. 305.485.

The Complainant's complaints about the defective wiper blades and defective washer pump were also related to violations of section 4524 of the Pennsylvania Vehicle Code[21]. The same complaints also relate to violations of the regulations of other state codes[22].

- The Complainant complained about the inoperable automatic fifth wheel, which is part of the vehicle's coupling device. The Complainant's complaints about the automatic fifth wheel switch related to a violation of 49 C.F.R. § 392.7[23]. Although the Complainant was able to uncouple the truck from a trailer manually without using the automatic fifth wheel switch, the defect was caused by an air leak. A loss of air pressure due to a leak could cause a loss of service brakes. Additionally, a severe loss of air due to a leak would cause the emergency brakes to engage possibly resulting in a catastrophic situation such as a jackknife. (Tr. at 644 & 738). Thus, the Complainant's complaint about the defective fifth wheel switch also related to violations of 49 C.F.R. § 396.7, which prohibits unsafe operations.
- The Complainant also complained to various management officials at the Respondent about his need for an additional set of load locks to secure cargo. These complaints related to potential violations of 49 C.F.R. §§ 392.9[24] and 393.100[25].

Trans 305.35 Windshield wipers.
(1) Every motor vehicle shall have a system of windshield wipers capable of clearing the windshield critical area.
(2) (a) The windshield wiper system of every motor vehicle shall be maintained in good working condition and in conformity with this section.(b) The windshield wiper switch, wiring and connections shall be in proper working condition. (c) Every windshield wiper blade shall be in good condition so as to adequately clear the windshield.
(3) Every windshield wiper shall be as large as practicable to adequately clear the windshield. If the windshield wiper system was originally equipped with multi-speed capability, the windshield wipers shall operate on at least 2 separate, constant speeds, one of which is at least 20 cycles per minute and the other which is at least 15 cycles per minute faster. Windshield wipers shall operate by use of an electric, hydraulic or vacuum device.
(4) Every motor vehicle manufactured after January 1, 1968, shall be equipped with a windshield washer system that is maintained in proper operating condition with adequate fluid available when the mechanism is activated.

[21] § 4524. Windshield obstructions and wipers.
(a) Obstruction on front windshield. --No person shall drive any motor vehicle with any sign, poster or other nontransparent material upon the front windshield which materially obstructs, obscures or impairs the driver's clear view of the highway or any intersecting highway except an inspection certificate, sticker identification sign on a mass transit vehicle or other officially required sticker and no person shall drive any motor vehicle with any ice or snow on the front windshield which materially obstructs, obscures or impairs the driver's clear view of the highway or any intersecting highway.
***
(d) Windshield wiper systems. --The windshield on every motor vehicle other than a motorcycle or special mobile equipment shall be equipped with a wiper system capable of cleaning rain, snow or other moisture from the windshield, and so constructed as to be controlled or operated by the driver of the vehicle.

[22] Indiana Code § 9-19-19-6(b) requires that windshield wipers "must be maintained in good working order." *See also*, Ohio Revised Code § 4513.24.

[23] 49 C.F.R. § 392.7 states in pertinent part as follows:
Sec. 392.7 Equipment, inspection and use.
No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:
***
Coupling devices.
[24] 49 C.F.R. § 392.9 states in pertinent part as follows:

- The Complainant's complaints about the unsecured Qualcomm unit were related to 49 C.F.R. § 392.9(a)[26]. The Complainant's complaints about the unsecured Qualcomm unit were also related to 49 C.F.R. §396.3(a)(1) which requires "parts and accessories which may affect safety of operation" to be "in safe and proper operating condition at all times."
- The Complainant's recurring complaints to the Respondent about the lack of a vehicle inspection book in the truck, as well as the missing post-trip inspection that the previous driver of the truck was required to prepare relate to violations of 49 C.F.R. § 396.11[27]. Because the Complainant was required by 49 C.F.R. § 396.13[28] to review the previous driver's report but was unable to do so due to its absence, a violation of that section was implicated as well.

Sec. 392.9 Inspection of cargo, cargo securement devices and systems.
(a) General. A driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless--
(1) The commercial motor vehicle's cargo is properly distributed and adequately secured as specified in Sec. Sec. 393.100 through 393.142 of this subchapter.
***
(b) Drivers of trucks and truck tractors. Except as provided in paragraph (b)(4) of this section, the driver of a truck or truck tractor must--
(1) Assure himself/herself that the provisions of paragraph (a) of this section have been complied with before he/she drives that commercial motor vehicle;

[25] 49 C.F.R. § 393.100 states in pertinent part as follows:
Sec. 393.100 Which types of commercial motor vehicles are subject to the cargo securement standards of this subpart, and what general requirements apply?
(a) Applicability. The rules in this subpart are applicable to trucks, truck tractors, semitrailers, full trailers, and pole trailers.
***
(c) Prevention against shifting of load. Cargo must be contained, immobilized or secured in accordance with this subpart to prevent shifting upon or within the vehicle to such an extent that the vehicle's stability or maneuverability is adversely affected.

[26] 49 C.F.R. § 392.9(a) states in pertinent part as follows:
§ 392.9 Inspection of cargo, cargo securement devices and systems.
General. A driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless-
***
(a)(2) The commercial motor vehicle's tailgate, tailboard, doors, tarpaulins, spare tire and other equipment used in its operation, and the means of fastening the commercial motor vehicle's cargo, are secured;
[27] 49 C.F.R. § 396.11 requires the preparation of an inspection report "at the completion of each day's work on each vehicle operated" and sets forth the minimum requirements for such a report."

[28] 49 C.F.R. § 396.13 which states as follows:
Sec. 396.13 Driver inspection.
Before driving a motor vehicle, the driver shall:
(a) Be satisfied that the motor vehicle is in safe operating condition;
(b) Review the last driver vehicle inspection report; and
(c) Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed. The signature requirement does not apply to listed defects on a towed unit which is no longer part of the vehicle combination.

As explained *supra*, it is irrelevant that some of these complaints related to present violations, some of them related to potential violations, and some of them related to conditions that were only tenuously related to a potential violation. The Complainant's initial right to raise these issues was protected by the STAA.

The Respondent is correct, however, that complaints made by an employee after a safety issue has been adequately addressed may no longer be protected activity. In this case, the Respondent did make many of the repairs requested by the Complainant. Consequently, the Complainant's complaints are a mix of protected and unprotected complaints:

- All of the complaints prior to each repair were protected, the complaints about issues that were never addressed (like the missing inspection form from the previous driver or the bunk strap) were protected, and the complaints about issues that were addressed but may not have been adequately resolved (like the problems with the oil leak, the plugged radiator, and the overheating observed by the Complainant[29]) were protected.
- The Complainant's complaints to his supervisors about equipment problems that had already been repaired were not protected.
- The Complainant also concedes in one of his post-hearing briefs that his complaints about the vehicle not being properly detailed, about the cigarette odor, about the bag of trash in the truck, about the bunk light bulb covers, and about the missing C.B. antennae were not protected activity. Com. Reply Brief at 29.

Even when the conceded complaints and the post-repair complaints are discounted, however, I still find that the Complainant made a significant number of protected complaints about the equipment and procedures of the Respondent.

In addition to the Complainant's protected complaints about the Respondent's equipment, the Complainant also told Decker and DeWitt that he would call the FMCSA and Wisconsin DOT, and these threats to notify officials of those agencies are protected by the STAA, as explained *supra*. The Complainant then did contact officials with the Federal Motor Carrier Safety Administration and the Wisconsin Department of Transportation to report safety violations by the Respondent, and these complaints were also protected under the STAA, as explained *supra*. The Respondent also concedes in its post-hearing brief that these calls were protected activity. Resp't Post-Hearing Brief at 33.

3. Conclusion

In conclusion, I find that the Complainant's complaints were specific enough and related closely enough to regulatory compliance to have put the Respondent on notice that he was engaging in protected activity. I also find that all of the complaints made by the Complainant prior to each repair were protected, the complaints he made about issues that were never addressed were protected, and the complaints he made about issues that were addressed but may not have been adequately resolved were protected. In addition, I find that the Complainant's

[29] Indeed, the evidence suggests that this set of problems had not been adequately resolved at the time of the Complainant's termination. Truck 5730 continued to have problems with engine blow-by plugging the radiator after the Complainant's termination. Tr. at 778; RX-1 at 155. On November 30, 2005, the then current driver of truck 5730 complained of a problem with blow-by collecting in the radiator, just as the Complainant had. Tr. at 778; RX-1 at 155. At that point in time, it was determined that the cause was that the blow-by tube was too short. RX-1 at 155. The problem was addressed by adding onto the blow-by tube. RX-1 at 155.

threats to notify officials of the FMCSA and the Wisconsin DOT were protected, as were his actual calls to those organizations and other authorities.

B. Did the Complainant's protected activity motivate, in whole or in part, the Respondent's adverse employment action?

Because I have found that the Complainant engaged in protected activity, the next determination that I must make is whether the Complainant's protected activity motivated, in whole or in part, the Respondent's adverse employment action. For the following reasons, I find that the Complainant's protected activity was part of the Respondent's motivation for taking adverse employment action against the Complainant.

1. Applicable Legal Standards

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

> (a) Prohibitions:
>
> > (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:
> >
> > > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

49 U.S.C. § 31105(a)(1)(A).

In cases arising under the STAA, the Administrative Review Board and the Secretary of Labor have applied the proof scheme for cases under Title VII of the Civil Rights Act of 1964. *See*, ***Eash v. Roadway Express, Inc.***, ARB Nos. 02-008 & 02-064, ALJ No. 2000-STA-00047, slip op. at 3. (ARB June 23, 2003). In Title VII cases, the United States Supreme Court has determined that causation may be proven either by direct evidence or inferentially, by indirect evidence. *Compare*, ***Price Waterhouse v. Hopkins***, 490 U. S. 228 (1989) with ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973).

The inferential analysis based on indirect evidence was articulated in ***McDonnell Douglas Corp. v. Green,*** 411 U.S. 792 (1973). Under that framework, the complainant must initially establish a *prima facie* case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. Once a *prima facie* case is established, the burden of production then shifts to the respondent to articulate, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. If the respondent is successful, the *prima facie* case is rebutted, and the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the respondent was a pretext for discrimination. ***Moon v. Transport Drivers, Inc.,*** 836 F.2d 226, 229 (6th Cir. 1987); *see also* ***Texas Dep't of Community Affairs v. Burdine,*** 450 U.S. 248, 253 (1981).

Alternatively, under the direct evidence analysis, a complainant may prove, by a preponderance of the evidence, that a respondent took adverse action in part because he or she engaged in protected activity. Direct evidence "if believed by the trier of fact will prove the particular fact in question without reliance on inference or presumption." ***Randle v. LaSalle***

Telecommunications, 876 F.2d 563, 569 (7th Cir. 1989). Direct evidence of discrimination "must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question." *Id.* For example, a respondent may admit that protected activity provided part of the motive for the adverse action. In this event, the burden of persuasion shifts to the respondent to demonstrate that the complainant would have been disciplined even if he or she had not engaged in the protected activity. ***Pogue v. U.S. Dep't of Labor***, 940 F.2d 1287, 1289-1290 (9th Cir. 1991).

In cases where there is direct evidence of discrimination, an employer "may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken" the employee's protected activity into account. ***Price Waterhouse***, 490 U. S. at 258. It is not sufficient for an employer to prove that it would have had a legitimate reason for making the same decision and taking the same adverse action; it must prove that it *actually would have made the same decision and taken the same action*. ***Johnson v. Roadway Express, Inc.***, ARB No. 99-111, ALJ No. 1999-STA-00005 slip op. at 13 (ARB Mar. 29, 2000),

The burden of persuasion shifts under the direct evidence model because the complainant has proved retaliation, i.e., that the respondent took adverse action, at least in part, because the complainant engaged in protected activity. 49 U.S.C. § 31105(a). A violator then must establish a form of affirmative defense in order to avoid liability. "The employer's burden in...a 'dual motive' case resembles an 'affirmative defense: the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another.'" ***Ass't Sec'y on behalf of Lansdale v. Intermodal Cartage Co., Ltd.***, OALJ No. 1994-STA-00022, 1995 WL 848152, at *3 n.1 (DOL Off. Adm. App. Jul. 26, 1995), *quoting* ***Price Waterhouse v. Hopkins***, 490 U.S. 228, 246 (1989).

2. Application to the Present Case

The testimony offered at the hearing by the Respondent's employee Susan Deetz, who was the individual who made the decision to discharge the Complainant, contains direct evidence that the Complainant's protected activity was part of the motivation for the adverse employment action taken against him. Tr. at 22. Deetz admitted at several points in her testimony to firing the Complainant specifically because of his complaints about the operability and safety of the Respondent's equipment. For example, the following exchange took place between Deetz and counsel for the Respondent:

> Q. Okay. The decision to discharge him though, exactly what was that based on?
>
> A. The decision to discharge him was basically based on the confusion between a resignation or not a resignation, and again I needed to make a decision on how we were going to classify that, and I made the decision to consider it a discharge, and *it was due to a majority of the complaints that he was making pertaining to the equipment* and not being able to perform his job.

Tr. at 74-75 (emphasis added). Two days later Deetz provided further direct evidence that the discharge was motivated by the Complainant's protected activity when she testified as follows in response to further questioning from counsel for the Respondent:

> Q. Now, what was the reason then for the discharge?…
>
> THE WITNESS: The excessive complaints.
>
> Q. Anything else?

A. No.
Q. And this was excessive complaints within Marten Transport?…
THE WITNESS: It was excessive complaints --…
Q. Can you explain further besides excessive complaints? What was the excessive complaints?
A. I used the reason of excessive complaints in a variety of areas, *including equipment* and other issues that he was having, and his unhappiness with the company.
Q. Is that it?
A. That was it.

Tr. at 1077-1078 (emphasis added). At another point in her testimony, Deetz confirmed that she had testified in her deposition that the Complainant's unhappiness with the company to which she was referring also stemmed from the fact that "he was unhappy with the equipment." Tr. at 27-28. Moreover, Deetz testified that she knew at the time of the discharge decision that the Complainant's complaints related to the "functionality" of the Respondent's equipment, that the Complainant's complaints were about the safety of the truck, and that the Complainant "still felt it was unsafe to drive" despite the repairs made up to the point by the Respondent. Tr. at 34-35 & 44.

Additionally, the Respondent prepared a termination report on the Complainant for submission to DAC Services, which compiles information from trucking companies about truck drivers. Tr. at 36-37. The Respondent's report on the Complainant noted that his work record included "Excessive Complaints" and a "Company Policy Violation." CX-17. Deetz confirmed at the hearing that the "Excessive Complaints" notation on that report refers to the Complainant's complaints about the Respondent's truck and that the "Company Policy Violation" notation also refers to the Complainant's complaints about the Respondent's truck. Tr. at 37.

3. Conclusion

The Respondent has argued in a post-hearing brief that there is no direct evidence in this case, but the Respondent cannot escape the clear implication of Deetz's testimony. Resp't Response Brief at 9. As explained *supra*, it is completely irrelevant to the determination of this issue what other factors, if any, played a part in the Respondent's decision to terminate the Complainant. The employee who made the discharge decision has admitted that at least one of the motives for that decision was the Complainant's equipment-related complaints, which I have already found to have been protected activity. Thus, I find that the Respondent's adverse employment action was motivated, at least in part, by the Complainant's activity.

C. Would the Respondent have taken the same adverse employment action against the Complainant if he had not engaged in protected activity?

Because I have found that the Complainant engaged in protected activity and that his protected activity was part of the motivation for the Respondent's adverse employment action, the burden now shifts to the Respondent to establish that it would have taken the same adverse employment action regardless of the Complainant's protected activity. For the following reasons, I find that the Respondent has not carried that burden.

1. Applicable Legal Standards

When a respondent admits, or direct evidence establishes, that protected activity provided part of the motive for an adverse employment action, the burden of persuasion shifts to the respondent to demonstrate that the complainant would have been disciplined even if he or she had not engaged in the protected activity. ***Pogue v. U.S. Dep't of Labor***, 940 F.2d 1287, 1289-1290 (9th Cir. 1991). As noted by the Seventh Circuit Court of Appeals in ***Randle v. LaSalle Telecommunications***, 876 F.2d 563 (7th Cir. 1989):

> Thus where a plaintiff is able to prove through direct evidence that the employment decision was based on an impermissible factor, he or she has carried the initial burden of proof. At that point, the analysis and burdens associated with the "pretext" inquiry outlined in McDonnell Douglas and affirmed in [***Texas Dep't of Community Affairs v.***] ***Burdine*** are irrelevant because the plaintiff has directly proved impermissible factors have come in to play.

Randle, 876 F.2d at 568. Since Carter has shown by direct evidence that his protected activity was a motivating factor in his discharge, I need not resort to the "pretext" inquiry set forth in ***McDonnell Douglas*** and its progeny.

The burden of persuasion shifts under the direct evidence model because the complainant has proved retaliation, i.e., that the respondent took adverse action because the complainant engaged in protected activity, which is expressly prohibited by 49 U.S.C. § 31105(a). A violator then must establish that it would have taken the same action irrespective of the employee's protected activity, which is essentially a form of affirmative defense. "The employer's burden in...a 'dual motive' case resembles an 'affirmative defense: the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another.'" ***Ass't Sec'y on behalf of Lansdale v. Intermodal Cartage Co., Ltd.***, OALJ No. 1994-STA-00022, 1995 WL 848152, at *3 n.1 (DOL Off. Adm. App. Jul. 26, 1995), *quoting* ***Price Waterhouse v. Hopkins***, 490 U.S. 228, 246 (1989).

2. Application to Present Case

The Respondent has argued that "[g]iven [the Complainant]'s conduct in his twelve day tenure with [the Respondent], the Company would have discharged [the Complainant] even if he had not lodged any safety-related complaints or called the DOT." Rep't Post-Hearing Brief at 52. In support of this argument, the Respondent has offered a variety of alternative justifications for the adverse employment action that it took against the Complainant. I will examine each of them to see if any of them establish by a preponderance of the evidence that the Respondent would have taken the same action absent the Complainant's protected activity.

First, the Respondent argues that Deetz "discharged [the Complainant] because he was an employee who repeatedly acted unprofessionally during his 12 days of employment." Resp't Post-Hearing Brief at 2. To support this proposition, the Respondent alleges a series of incidents of the Complainant's purportedly unprofessional conduct, including:

1. A conversation with Kari Serum on June 6, in which the Complainant told her that while he was at Brayer's he needed to urinate outside and that he had to "cut it off only half way done and pull it back in and put it in his pants" even though he had not finished.
2. A conversation in which the Complainant told Ms. Serum that the Respondent was aware of truck 5730's condition before he went to pick it up and had deceived him about it.

3. A conversation in which the Complainant told Ms. DeWitt that she did not respect her elders and did not respect truck drivers. The Complainant also asked Ms. DeWitt how old she was and told her that she was not old enough to be in the position that she was in with the Respondent.
4. During a conversation with Brandon Smith, Fleet Planner and Coordinator for the General Mills Collaborative Fleet, the Complainant became very defensive and raised his voice simply because Mr. Smith had indicated the Company would need to get him to the Respondent's terminal right away.
5. A conversation in which the Complainant stated to Kristi Decker that he felt his dispatcher Kari Serum was not cooperating with him and that she was rude. The Complainant told Ms. Decker he was upset at the fact that he had spoken with many different individuals, was not being treated fairly, and felt that the Respondent was blaming him with issues with the truck. When Ms. Decker advised the Complainant that she had confirmed his truck had been detailed in Scranton, Pennsylvania, he did not believe her and told her it had not been detailed. The Complainant also refused to believe that the Respondent had received the repair records from Dermody.
6. An incident in which the Complainant claimed that Qualcomm messages were deleted, even though it is allegedly not possible to change or delete Qualcomm messages.
7. A conversation in which the Complainant informed Mike Ashwell, the Respondent's Road Service Manager, that he was not being told the truth in regards to truck 5730.
8. The Complainant believed that the Respondent's employees had "let him down."

Resp't Post-Hearing Brief at 9-11. The problem with this argument is that, the Respondent has failed to introduce any evidence or testimony about how much weight these incidents of allegedly unprofessional conduct would have been given absent the Complainant's protected activity.

In a hypothetical past in which the Complainant had not engaged in any protected activity and Deetz had become aware of all of these alleged incidents, she may or may not have taken the same adverse action based on them; it is impossible to determine from this scant evidence. In fact, it seems most logical to infer that, if any of these alleged incidents had been adequate motivation for the Respondent to take adverse action against the Complainant regardless of his protected activity, some would have been taken. Some of these alleged incidents took place shortly after the Complainant was hired, so there was arguably plenty of time for his actions to be reported up the chain of command and result in adverse action of one kind or another.

Instead, Deetz testified that she was not even told about most of these incidents until the post-discharge investigation. Tr. at 32 & 70-73. This mitigates against a finding that these incidents were serious enough on their own to have caused the Complainant's discharge. As explained *supra*, the Respondent cannot simply show that it discovered *post facto* some grounds that hypothetically could have justified some adverse action. Rather, it must show that it would have actually taken the same action even if the Complainant had not engaged in any protected activity. On this record, I find that the Respondent has not established that it would have taken the same action based on the Complainant's allegedly unprofessional conduct absent his myriad protected complaints.

Second, the Respondent argues that Deetz discharged the Complainant because he "was unhappy with the Respondent's employees, policies and equipment." Resp't Post-Hearing Brief at 2. The Respondent emphasizes that the Complainant's "unhappiness with [the Respondent's]

employees…played a specific role in Ms. Deetz's decision to discharge [the Complainant]." Rep't Post-Hearing Brief at 4.

The problem with the "equipment" portion of the Respondent's "unhappiness" argument is that Deetz confirmed that the Complainant's unhappiness with the equipment related to the "functionality" of the Respondent's equipment, that the Complainant's complaints were about the safety of the truck, and that the Complainant "still felt it was unsafe to drive" despite the repairs made up to the point by the Respondent. Tr. at 34-35 & 44. Because this portion of the unhappiness referred to by the Respondent's argument stemmed from the Complainant's concerns about the safety and functionality of truck 5730, and because most of those concerns were protected as discussed *supra*, those portions of the Complainant's unhappiness must be discounted in this analysis.

The problem with the "employees" portion of the Respondent's unhappiness argument is that at the hearing, Deetz admitted that she had testified at her deposition – in response to a question from the Respondent's counsel – that she did not take the Complainant's unhappiness with the Respondent's employees into account when she made the decision to discharge him. Tr. at 31. As with the Complainant's allegedly unprofessional conduct, the fact that this was known but not actually taken into account in the Complainant's discharge mitigates against a finding that it was serious enough by itself to result in his discharge. Because of that fact, and because the Respondent has offered no other evidence from which I can determine the weight it would have given this unhappiness absent the Complainant's protected activity, I am not persuaded that the Respondent would have discharged the Complainant for it had he not engaged in any protected activity.

The problem with the "policies" portion of the Respondent's "unhappiness" argument is that the only policy – other than the Respondent's equipment and safety policies – that the record shows the Complainant was unhappy about was the Respondent's pet policy. Tr. at 60. As with the Complainant's unhappiness with the Respondent's employees, Deetz admitted that his unhappiness with the pet policy was not part of her motivation for discharging him:

> Q. Well, that covered all of the company policy issues didn't it, that for which he was discharged was his complaints about the equipment?
>
> A. Yes.

Tr. at 60. As with the "employees" portion of the Respondent's "unhappiness" argument, the fact that this was known but not actually taken into account in the Complainant's discharge mitigates against a finding that it was serious enough by itself to result in his discharge. The Respondent has also failed to offer any other evidence as to what weight it would have given this factor absent the Complainant's protected activity, and I am therefore unpersuaded that the Respondent would have discharged the Complainant based on his unhappiness with the pet policy absent his protected activity.

Third, the Respondent argues that Deetz discharged the Complainant "because he was not meeting Company expectations." Rep't Post-Hearing Brief at 4. Deetz elaborated at the hearing that the Complainant's failure to meet Company expectations stemmed from the Complainant's continued complaints about the equipment, unhappiness with the Respondent's employees, and unprofessional behavior. Tr. at 27-28. The Respondent offers the same explanation of what was meant by "failed expectations" in its response brief. Resp't Response Brief at 10-11. Since all three of these specific arguments have been discussed already *supra*, I need not respond to them again under the heading of "failed expectations."

Finally, the Respondent attempts to argue that Deetz discharged the Complainant because "[t]he Wisconsin State Police telephoned Ms. Deetz to recommend that [the Complainant] be escorted off the premises with the assistance of local law enforcement." Resp't Post-Hearing Brief at 50-51. The Respondent continues its argument:

> Before Ms. Deetz had ever even met [the Complainant], she received a telephone call from Wisconsin State Police Officer Garrison suggesting that [he] be removed from [the Respondent]'s facilities with the help of local law enforcement…Ms. Deetz was not aware of the details surrounding [the Complainant]'s telephone call to State Patrol Officer Rita Garrison, only that [his] conversation with Officer Garrison concerned the police enough to contact Ms. Deetz and urge her to remove [him] from the premises with local law enforcement authorities.

Resp't Post-Hearing Brief at 50-51.

The obvious problem with offering Deetz's conversation with Officer Garrison as a justification for the decision to discharge the Complainant is that Officer Garrison did not advocate discharging the Complainant or provide any specific information that would justify doing so. JX-9 at 13 & 26; Tr. at 41 & 62. In fact, Deetz had already decided to discharge the Complainant at the time that this conversation took place. JX-9 at 13 & 26; Tr. at 41 & 62. Officer Garrison merely advocated having a police officer present for the coming confrontation. JX-9 at 13; Tr. at 41 & 62. Moreover, Officer Garrison only became involved because the Complainant placed a call to her, which was part of his protected activity. JX-9 at 8. Thus, I am not persuaded that Deetz's conversation with Officer Garrison establishes that the Respondent would have taken the same adverse action against the Complainant absent his protected activity.

3. Conclusion

The Respondent has the burden to establish that it would have taken the same adverse employment action regardless of the Complainant's protected activity, and I find that the Respondent has not carried that burden. Although the Respondent has articulated several potential justifications for an employer to take adverse action against an employee, it has failed to offer persuasive evidence that any of those justifications would have led the Respondent to actually take the same adverse action against the Complainant in this case even if he had not engaged in any protected activity. Moreover, the evidence offered mitigates in favor of a finding that the Respondent did not actually care enough about these other problems to fire the Complainant over them. Thus, I find that the Respondent would not have taken the same adverse action against the Complainant absent his protected activity, and consequently, the Complainant is entitled to damages.

V. DAMAGES

The Complainant has requested "all relief available to him, including reinstatement, back pay, emotional distress damages, interest on the damage award, attorney fees and costs and nonmonetary relief." Com. Prop. Find. of Fact and Legal Arg. at 61.

Under the STAA, a successful complainant is entitled to an order requiring the respondent to reinstate him "to [his] former position with the same pay and terms and privileges of employment." 49 U.S.C. § 31105(b)(3)(A)(ii); ***Palmer v. Triple R Trucking***, ARB No. 03-109, ALJ No. 2003-STA-28, slip op. at 4 (ARB Aug. 31, 2005). Under the STAA, the issuance of an order of reinstatement is an automatic remedy and is not discretionary. ***Palmer***, ARB No.

03-109, slip op. at 4, *citing* ***Dale v. Step 1 Stairworks, Inc.***, ARB No. 04-003, ALJ No. 02-STA-30, slip op. at 4 (Mar. 31, 2005) (reinstatement under the STAA is an automatic remedy designed to re-establish the employment relationship) and ***Palmer v. Western Truck Manpower***, ALJ No. 85-STA-6, slip op. at 19 (Sec'y Jan. 16, 1987) (an order of reinstatement is not discretionary). Only where there is evidence that reinstatement would be impossible impracticable, or cause "irreparable animosity" between the parties can an order of reinstatement be omitted. ***Densieski v. La Corte Farm Equipment***, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 7 (ARB Oct. 20, 2004); *see further* ***Dale***, ARB No. 04-003, slip op. at 4.

The Complainant has requested reinstatement in this case, and neither party has made any showing that reinstatement would be impossible, impracticable, or cause irreparable animosity. Therefore, an order of reinstatement must be issued. The Respondent is ordered to reinstate the Complainant to the position from which he was fired with the same pay and other terms and privileges of employment.

A successful complainant is also entitled to an award of back pay, which is also mandatory once it is determined that an employer has violated the STAA. 49 U.S.C. § 31105(b)(3)(A)(iii); ***Moravec v. HC & M Transportation, Inc.***, 90-STA-44 (Sec'y Jan. 6, 1992), citing ***Hufstetler v. Roadway Express, Inc.***, 85-STA-8, slip op. at 50 (Sec'y Aug. 21, 2986), *aff'd sub nom.*, ***Roadway Express, Inc. v. Brock***, 830 F.2d 179 (11th Cir. 1987). Such a back pay award need not be calculated with "unrealistic exactitude." ***Pettway v. American Cast Iron Pipe Co., Inc.***, 494 F.2d 211, 260-61 (5th Cir. 1974). Any uncertainties as to the amount of the award should be resolved against the employer. *Id*. Back pay must be awarded from the date of the retaliatory discharge through the date on which the complainant receives an offer of reinstatement or gains comparable employment. *See* ***Polewsky v. B & L Lines Inc.***, 90-STA-21 (Sec'y May 29, 1991); ***Nelson v. Walker Freight Lines, Inc.***, 87-STA-24, slip op. at 6 n.3 (Sec'y Jan. 15, 1988); ***Earwood v. D.T.X. Corp.***, 88-STA-21, slip op. at 10 (Sec'y Mar. 8, 1991).

Additionally, a successful complainant is entitled to pre- and post-judgment interest on an award of back pay. ***Murray v. Air Ride, Inc.***, ARB No. 00-045, ALJ No. 99-STA-34, slip op. at 9 (ARB Dec. 29, 2000). Interest on back pay awards under the STAA is calculated using the rate applicable to underpayment of federal taxes. 29 C.F.R. § 20.58(a); 26 U.S.C. § 6621; ***Drew v. Alpine, Inc.***, ARB Nos. 02-044 & 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003). Moreover, the interest accrues, compounded quarterly, until the respondent pays the damages award. ***Assistant Sec'y & Cotes v. Double R. Trucking, Inc.***, ARB No. 99-061, ALJ No. 1998-STA-34, slip op. at 3 (ARB Jan. 12, 2000).

In determining the correct amount of the back pay award, it is the employer's burden to prove by a preponderance of the evidence that the employee did not exercise reasonable diligence in finding other suitable employment. ***Timmons v. Franklin Electric Cooperative***, ARB Case No. 97-141, 1997-SWD-2, slip op. at 11 (Dec. 1, 1998); *see also* ***Wheeler v. Snyder Buick, Inc.***, 794 F.2d 1228, 1234 (7th Cir. 1986). The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available and that complainant failed to make reasonable efforts to find substantially equivalent employment. ***Ass't Sec'y and Landsdale v. Intermodal Cartage Co., Ltd.***, Case No. 1994-STA-22, slip op. at 6-7 (July 26, 1995), *aff'd sub nom* ***Intermodal Cartage Co. Ltd. v. Reich***, 113 F.3d 1235 (6th Cir. 1997); *see also* ***U.S. v. City of Chicago***, 853 F.2d 572, 578 (7th Cir. 1988).

In order to sustain its burden the Respondent must prove two elements: (1) that comparable jobs were available; and (2) that complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. In this case, the Respondent

did not offer any evidence as to the Complainant's failure to mitigate, but the Complainant's own testimony establishes such a failure.

A substantially equivalent job offers "virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status." ***Rasimas v. Michigan Dep't of Mental Health***, 714 F.2d 614, 624 (6th Cir. 1983). At the hearing, the Respondent offered no evidence establishing, under the first prong, that substantially equivalent jobs were available, but the Complainant testified that he was offered a job by Brooks Trucking that was based out of Iowa, had comparable benefits, and paid 34 cents per mile, which is only about 8% less than the 37 cents per mile being paid by the Respondent. I find, therefore, that this position was substantially similar and that, consequently, the Complainant should have taken it to mitigate his damages.

The stipulations in this case establish that the Complainant would have made $4,000 a month working for the Respondent based on a rate of 37 cents per mile. JX-1; Tr. at 11. At a rate of 37 cents per mile, $4,000 represents approximately 10,800 miles. That many miles paid at a rate of 34 cents per mile totals $3,672 per month. Therefore, the Complainant's back pay award must be reduced to the $328 difference beginning at the point that he declined the Brooks Trucking job. Since the record indicates that Brooks Trucking pre-approved the Complainant in September 2005 I find that the Complainant likely could have begun mitigating his damages by October 2005. Therefore, the Complainant's award of back pay will be reduced from $4,000 per month to $328 per month starting in October 2005.

Thus, as of the date of this decision, the Complainant's back pay damages are approximately $14,296 - $12,000 for the months between the Complainant's discharge and the offer of employment made by Brooks Trucking and $2,296 for the months following that offer. Damages will continue to accrue at a rate of $328 per month until the date on which the Complainant receives an offer of reinstatement or gains comparable employment. The Complainant is also entitled to pre- and post-judgment interest on this award of back pay calculated at the specified rate and compounded quarterly. Interest will continue to accrue until the Respondent pays the back pay award.

In addition to back pay, a successful complainant is entitled to other compensatory damages under the Act. 49 U.S.C. § 31105(b)(3)(A)(iii). In this case, the Complainant was unable to carry all of his personal belongings home with him, and many of the personal items he left behind were not returned including: vitamins, an heirloom afghan, health foods, tools, clothing, bedding, and jumper cables. CX-24; RX-15. These items have an approximate value of $717. Tr. at 344-349. Additionally, the Complainant had to stay overnight in Chicago, IL on his way home after being discharged and incurred expenses of $120.65 for lodging and $11.50 for cab fare. Tr. at 369; CX-21. The Complainant is entitled to $717 to compensate him for his unreturned personal possessions as well as the $132.15 as reimbursement for his lodging and cab fare incurred in Chicago, IL.

Damages may also be awarded for emotional distress in a proceeding brought under the STAA. ***Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery***, 1995-STA-37 (Sept. 5, 1996). In this case, the Complainant has requested an award of $75,000 for emotional distress based on "the extent to which the discharge has disrupted his life." Com. Prop. Find. of Fact and Legal Arg. at 62. In this case, there is only limited evidence in the record of the Complainant's emotional distress.

For example, the Complainant testified that because of the discharge, "[i]t's very depressing for me because you fill out job applications; no one wants to hire me." Tr. at 373.

The Complainant also testified that it made him feel "[v]ery depressed," "worthless," and "[r]eal down" to lose his job and to have to tell his wife that he had lost his job. Tr. at 343-344. He still feels down about it. Tr. at 344. Additionally, the level of mental strain that these circumstances placed on the Complainant became so apparent during his testimony at the hearing that a break was necessary:

> JUDGE SOLOMON: Mr. Carter, are you having a tough time?
> MR. GREENE: I think so, Your Honor.
> JUDGE SOLOMON: Yeah. Stay on the record. I want to make sure this is on the record. Do I need to call 9-1-1?
> MRS. CARTER: Yes.
> MR. TAYLOR: I don't know.
> MRS. CARTER: (Approaches Mr. Carter) Are you okay?
> JUDGE SOLOMON: All right. We're going to take a break.
> MRS. CARTER: He'll be okay. He has to take a blood pressure; did you take your blood pressure medicine this morning?
> THE WITNESS: (Nods head affirmatively)
> MRS. CARTER: Okay. It's okay. It's okay. Come on.
> JUDGE SOLOMON: Okay. Let's go off the record.
> (Brief recess)
> JUDGE SOLOMON: Back on the record. Okay. Mr. Carter, you're feeling better?
> THE WITNESS: Yes.

Tr. at 825-826. Additionally, the Complainant testified that his discharge and difficulty in finding comparable employment forced him to live off of his retirement savings. Tr. at 373-374.

Although it's clear from these examples that the Complainant did suffer emotional and mental distress as a result of his experiences, the Complainant has not entered adequate evidence in the record to justify an award of $75,000. In comparable cases, a complainant will often offer evidence of adverse effects that psychological trauma has had on his or her life, such as damage to a relationship, an inability to function at work, or other disruption of the normal routines of life. [30] I also note that the Complainant failed to produce any medical "special damages" or

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[30] For examples, see:

- ***Hall v. U.S. Army, Dugway Proving Ground***, 1997-SDW-5 (ALJ Aug. 8, 2002) (awarding $400,000 in compensatory damages for mental anguish, adverse health consequence, and damage to professional reputation caused by "repeated and continuous discrimination and retaliation" that caused great mental suffering, compromised mental health, and destroyed professional reputation).
- ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003) (awarding no emotional trauma damages because the plaintiff failed to demonstrate both (1) objective manifestations of distress, e.g., sleeplessness, anxiety, embarrassment, depression, feelings of isolation, and (2) a causal connection between the violation and the distress).
- ***Creekmore v. ABB Power Systems Energy Services, Inc.***, Case No. 93-ERA-24, slip op. at 25 (Dep'y Sec'y Dec., Feb. 14, 1996) (awarding $40,000 for emotional pain and suffering caused by a discriminatory layoff after the Complainant showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company).
- ***Michaud v. BSP Transport, Inc***., ARB Case No. 97-113, ALJ Case No. 95-STA-29, slip op. at 9 (ARB Dec. Oct. 9, 1997) (awarding $75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist; evidence also showed foreclosure on Michaud's home and loss of savings).

evidence showing that any effects will be permanent. Consequently, I will reduce the Complainant's requested compensation for these emotional damages from $75,000 to $10,000. Interest is not awardable on compensatory damages. ***Smith v. Littenberg***, 92-ERA-52 at 5 (Sec'y Sept 6, 1995).

The Complainant has also requested that the Respondent be directed to post any decision favorable to him at all of its terminals for 90 consecutive days in all places where employee notices are customarily posted. Such non-monetary relief is appropriate in cases under the STAA. ***Scott v. Roadway Express, Inc.***, 1998-STA-8 (ARB July 28, 1999). The ARB has held that the "standard remedy in discrimination cases [is to] notif[y] a respondent's employees of the outcome of a case against their employer." ***Michaud v. BSP Transp., Inc.***, 1995-STA-29 at 9 (ARB Oct. 9, 1997), *rev'd on other grounds sub nom.* ***BSP Transp., Inc. v. United States Dep't of Labor***, 160 F.3d 38 (1st Cir. 1998). Therefore, I order the Respondent to post this decision at all of its terminals for 90 consecutive days in all places where employee notices are customarily posted.

The Complainant has also requested that the Respondent be ordered to take such action as is necessary to cause USIS Commercial Services to amend its report about his work record with Marten to delete any unfavorable work record information from his DAC Report and show continuous employment with Marten. The ARB commonly orders employers to delete all information pertaining to an employee's wrongful or discriminatory discharge from its personnel records. See ***Michaud***, *supra* at 9; ***Asst. Sec'y v. T.O. Haas Tire Co.***, 1994-STA-2 at 6 (Sec'y Aug. 3, 1994); ***Shamel v. Mackey***, 1985-STA-3 at 1 (Sec'y Aug. 1, 1985). Such relief is also appropriate in cases under the STAA. ***Griffith v. Atlantic Inland Carriers***, 2002-STA-34 (ALJ Oct. 21, 2003) *adopted by* ARB Case No. 04-010 (ARB Feb. 20, 2004). Therefore, I recommentd that the Respondent be Ordered to take such action as is necessary to cause USIS Commercial Services to amend its report about the Complainant's work record to delete any unfavorable work record information from his DAC Report and to show continuous employment with the Respondent.

Finally, a prevailing complainant is entitled to the expenses of pursuing his claim, including reasonable attorney's fees and costs. 49 U.S.C. § 31105(b)(3)(B). Accordingly, the Complainant's reasonable attorney's fees and costs will be assessed against the Respondent. Counsel for the Complainant shall submit a fee petition detailing the legal services rendered and litigation expenses incurred in representing the Complainant in this matter within twenty (20) days, and the Respondent shall submit any objections to those fees and costs within ten (10) days thereafter.

- ***Blackburn v. Metric Constructors, Inc***., Case No.1986-ERA-4, slip op. at 5 (Sec'y Dec. after Remand, Aug. 16, 1993) (awarding $5,000 for mental pain and suffering caused by discriminatory discharge where complainant became moody and depressed and became short tempered with his wife and children).
- ***Lederhaus v. Paschen***, Case No. 91-ERA-13, slip op. at 10 (Sec'y Dec., Oct. 26, 1992) (awarding $10,000 for mental distress caused by discriminatory discharge where the Complainant showed he was unemployed for five and one half months, foreclosure proceedings were initiated on his house, bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted).

VI. RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED THAT:

1. The Respondent be ordered to reinstate the Complainant to his former position with the same pay, terms, and privileges of employment that he had before his illegal discharge;

2. The Respondent be ordered to pay to the Complainant back pay calculated at a rate of $4,000 per month from June 14, 2005 until September 30, 2005 and at a rate of $328 per month from October 1, 2005 until the date on which the Complainant receives a bona fide offer of reinstatement or gains comparable employment;

3. The Respondent be ordered to pay to the Complainant pre- and post-judgment interest on that back pay award calculated in accordance with 29 C.F.R. § 20.58(a) and 29 U.S.C. § 6621;

4. The Respondent be ordered to pay to the Complainant $717 in compensation for the value of the Complainant's unreturned personal effects and $132.15 in compensation for the costs incurred by the Complainant in getting home after his discharge;

5. The Respondent be ordered to pay to the Complainant $10,000 in compensation for the emotional distress that the Complainant suffered as a result of his wrongful discharge;

6. The Respondent be ordered to post this decision at all of its terminals for 90 consecutive days in all places where employee notices are customarily posted;

7. The Respondent be ordered to take such action as is necessary to cause USIS Commercial Services to amend its report about the Complainant's work record to delete any unfavorable work record information from his DAC Report and to show continuous employment with the Respondent;

8. And the Respondent be ordered to pay to Complainant, all costs and expenses, including reasonable attorney fees incurred in connection with this proceeding. Counsel for Complainant will have twenty (20) days from the date of this Order in which to submit an application for attorney fees and expenses reasonably incurred in connection with this proceeding. A service sheet showing that proper service has been made upon the Respondents and Complainant must accompany the application. Respondent will have ten (10) days following receipt of the application to file any objections.

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DANIEL F. SOLOMON
Administrative Law Judge

Washington, D.C.

NOTICE OF REVIEW: The 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, 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 Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the 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 respondent. All other relief ordered in the Recommended Decision and