

U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433



(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 01 April 2013

CASE NO.: 2012-STA-30

IN THE MATTER OF:

THOMAS J. GRAFF

Complainant

v.

CARGO EXPRESS, INC.¹

Respondent

APPEARANCES:

PAUL O. TAYLOR, ESQ.
For The Complainant

JIM GOH, ESQ.
For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment.

¹ During the formal hearing, Complainant moved to dismiss the complaints as to Dennis Schlegel, Bob Switzer, Steve Ball, John Doe and Mary Roe, individually. His motion was granted without objection. (Tr. 37).

On or about June 7, 2010, Thomas Graff (herein Complainant) filed a complaint against Cargo Express, Inc. (herein Respondent) with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), complaining of various unsafe acts under the STAA, including his termination on June 7, 2010. An investigation was conducted by OSHA and on May 24, 2012, the Regional Administrator for OSHA issued the Secretary of Labor's Findings concluding that Complainant's complaint lacked merit. (ALJX-1). Complainant subsequently filed a request for formal hearing with the Chief Administrative Law Judge, Office of Administrative Law Judges. (ALJX-2).

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a hearing in Phoenix, Arizona, on May 24, 2011. (ALJX-3). On June 25, 2012, Respondent filed a Motion to Change Venue and Date of Hearing. (ALJX-5). On July 31, 2012, a Notice of Hearing and Pre-Hearing Order was issued rescheduling the hearing for September 27, 2012, in Boise, Idaho. (ALJX-7). On August 13, 2012, in compliance with the Pre-Hearing Order, Complainant filed a formal complaint alleging the nature of each and every violation claimed as well as the relief sought in this proceeding. (ALJX-8). On September 4, 2012, Respondent duly filed its Answer to the Complaint. (ALJX-9). The parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.²

Post-hearing briefs were received from the Complainant on November 30, 2012, and the Respondent on January 28, 2013. Complainant filed a reply brief on February 14, 2013. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. ISSUES

The unresolved issues presented by the parties are:

1. Whether Complainant engaged in protected activity within the meaning of the STAA?

² References to the transcript and exhibits are as follows: Transcript: Tr.____; Complainant's Exhibits: CX-____; Respondent's Exhibits: RX-____; and Administrative Law Judge Exhibits: ALJX-____.

2. Whether Complainant was discharged in retaliation for his protected activities in violation of the STAA?
3. Whether Complainant is entitled to remedies?

II. STATEMENT OF THE CASE

The Testimonial Evidence

Complainant

Complainant testified he is a professional truck driver with 20 years of experience. (Tr. 330). He attended truck driving school and received a certification for truck driving. (Tr. 330-331). He has had a Commercial Driver's License (CDL) since 1992 with a Class A endorsement, including an air brake endorsement, double trailers endorsement, triple trailers endorsement and tanker endorsement. He previously held a Hazardous Materials endorsement. (Tr. 331). He has driven all 48 continental states, through mountains and flat land. (Tr. 332).

Complainant began working for Triple A Coast Express in 1992. He worked for U.S. Express for five years, which operated 3,500 trucks. (Tr. 332). He worked for Marten Transportation for five and one-half years and for KBR three times in Iraq, Afghanistan and Kuwait. He also worked for Market Transport and Frye Miller. He received safety awards from Triple A Coast Express, Direct Transit, U.S. Express and Marten Transport. (Tr. 333). He was a driver-trainer for Direct Transit, U.S. Express and Marten Transport. (Tr. 334).

Complainant also owns an internet company entitled GoTruckStop.com, which sells truck accessories and gifts online. He sells breezeway screens, bunk warmers, CB radios, custom steering wheels and GPS systems. All of his sales are conducted online. He spends three to five hours per week in his online business during his off time at truck stops or in his truck. (Tr. 334).

He called Respondent and spoke to Robert Switzer about a job and was offered employment. He went through two days of orientation and was assigned Truck Number 11150. (Tr. 335).

Complainant explained that there are a variety of things which affect miles driven such as long versus short dispatches, weather, hours of service regulations, traffic, road conditions and the amount of time a truck is in the shop for repairs. (Tr. 336-337). While working for Respondent, Complainant drove over 10,000 miles some months and under 10,000 miles other months. (Tr. 336).

Complainant testified that his supervisor, Steve Ball, and Mr. Switzer knew he had a side business. Mr. Ball never told Complainant he could not engage in a side business. (Tr. 336-337).

Complainant identified RX-3 as a repair order. On January 22, 2010, Complainant was unable to drive for a day due to truck repairs in McDonough, Georgia. He was down for a day with vibrations and shifting problems with his truck. (Tr. 337-338; RX-3, p. 3). He was also down a day in Atlanta, Georgia, on January 23, 2010. His airbags deflated due to a bad leveling valve. (Tr. 337-339; RX-3, p. 2). Complainant testified that a deflated airbag can affect the safe operation of a truck because it diminishes the rear suspension and puts undue strain on the fifth-wheel connection. (Tr. 339).

Complainant completed a driver vehicle write-up for repairs in Respondent's repair shop on February 1, 2010, for "six excessive oil leaks." (Tr. 340; RX-3, p. 5). Complainant had noticed excessive oil on the engine, and he spoke to Kelly Pecora about the issue. (Tr. 340). It was noted on the repair order that the batteries were replaced, and it also indicated "we fix oil leaks next time." (Tr. 340; RX-3, p. 5). Complainant did not know who made those notes on the repair order. He was told the oil leaks would be fixed next time, but he did not know if they were ever fixed. Complainant was down one day for those repairs. (Tr. 341).

Complainant's truck was down for one day on February 6, 2010, for a clutch adjustment. (Tr. 341-342; RX-3, p. 6). The truck went into a shop in Amarillo, Texas, on February 10, 2010 for an air compressor blow-out, which required the truck to be towed. Complainant was down for three days. (Tr. 342-343; RX-3, pp. 7-8). On February 13, 2010, Complainant was waiting to be dispatched, but his truck had to go back into the shop for several hours on February 14, 2010, for a flat trailer tire repair. (Tr. 344-345; RX-3, p. 9). On these occasions "relays" occurred, where other drivers picked up the load for delivery. Complainant also relayed for other drivers. (Tr. 344).

Complainant received a letter of concern in February 2010 about his mileage driven. (Tr. 345; RX-5, p. 1).

On April 19, 2010, Complainant's truck had a coolant leak which required Complainant to "limp" into Respondent's shop. (Tr. 346; RX-3, p. 11). On May 14, 2010, Complainant's truck was in a shop in Indianapolis, Indiana for vibration. He was down for four days and dispatched on May 18, 2010. (Tr. 346-347; RX-3, p. 13). From May 4, 2010 to May 7, 2010, Complainant was on "off time" which was approved by Mr. Ball. (Tr. 347-348). From May 1, 2010 to May 3, 2010, he drove locally. (Tr. 348). RX-17, p. 10 documents four local runs performed by Complainant. (Tr. 348; RX-17, p. 10).

Complainant typically drove 600 miles in a day. He estimated that he lost 3,000 miles of dispatches while waiting for repairs in Indianapolis. When he had a breakdown, he would contact Mr. Ball and receive instructions. (Tr. 349). He experienced excessive breakdowns with Respondent. His truck's odometer showed 650,000 miles. While employed by other employers, he did not experience compressor breakdowns or the type of transmission problems he experienced with Respondent. (Tr. 350).

On May 27, 2010, Complainant completed a repair order for an air leak. His air pressure lost 35 to 40 pounds within an hour. He was down for three days. (Tr. 350-351; RX-3, p. 15). During that time, Complainant stayed in a hotel in Boise, Idaho. Respondent would not allow him to stay in his truck while it was being repaired. (Tr. 351-352).

On May 27, 2010, Complainant spoke with Mr. Zahm, Mr. Anthony, Mr. Ball and Mr. Switzer in the office about Respondent buying "breeze way screens," which would allow fresh air into the windows preventing the trucks from having to idle. (Tr. 352-353). In early May, Mr. Switzer had sent out a Qualcomm message regarding excessive idle times. Complainant believed the screens could save Respondent money. (Tr. 353). Complainant called Mr. Switzer to inform him about the screens. On May 27, 2010, he approached Mr. Switzer, who told him to speak to Mr. Zahm. Complainant then told Mr. Zahm about the screens. Complainant claims he was not trying to sell the screens, but the manufacturer was trying to put together a deal for Respondent. (Tr. 354). Mr. Zahm's response was "why the F" should he do that. Complainant testified this upset him so he

turned around and left. He did not speak to anyone else about Mr. Zahm's behavior. (Tr. 355).

Complainant had a cell phone and communicated with Respondent (Mr. Ball and Mr. Switzer) by cell phone. He provided his cell phone number to Respondent when he was hired. (Tr. 356).

On May 28, 2010, Mr. Ball called Complainant by cell phone late in the afternoon to tell him his truck was ready and to give him a dispatch for May 29, 2010, to the St. Louis, Missouri area. (Tr. 357-358). RX-3, p. 15 showed Complainant's truck was ready on May 29, 2010. (Tr. 357; RX-3, p. 15). On May 29, 2010, Complainant performed an inspection of the truck, picked up the trailer load and began his trip. Within a few hours of the trip, Complainant noticed the air gauges fluctuating between 139 psi and 110 psi. He notified Mr. Anthony. (Tr. 358). They agreed it would be okay to drive, but to keep an eye on the pressure. Complainant delivered the load to Fenton, Missouri. He noticed an air leak and oil leak at the turbo area and requested Respondent repair the leaks. (Tr. 359). Respondent authorized Complainant to go to the Kenworth dealer in St. Louis. (Tr. 359-360).

Complainant spoke to the service writer at Kenworth. He did not believe Respondent called previously. Complainant explained that his air gauges were fluctuating from 130 pounds to 105 pounds on a "regular cycle." (Tr. 360). The compressor cycle was running every two to three minutes rather than every 15 to 30 minutes. (Tr. 360-361). Complainant testified he was trained on air leaks and audible air leaks. (Tr. 361). He testified that an audible air leak could potentially cause a major issue. (Tr. 361-362). A drastic drop in air pressure could render the service brakes ineffective and cause the emergency brakes to engage, which could possibly cause a jack knife of the unit. (Tr. 362).

On June 1, 2010, the service writer noted "inspect for air leak-noticed drop of 30 psi." (Tr. 362; CX-6, p. 2). Respondent told Complainant to go to Kenworth for service. (Tr. 363). Complainant checked into a motel until late afternoon when Mr. Ball called to report the truck had been repaired and dispatched. (Tr. 363-364). When Complainant arrived at the truck, the air gauges were at zero. He opined that the truck had not been properly repaired. The truck had been moved from the Kenworth shop to the parking area, and Complainant testified that there had to be air in the system to move the vehicle

because it had air brakes. He walked to the service area and reported he had no air pressure. The service center informed him that Respondent had instructed not to repair the turbo issue. (Tr. 365).

Complainant had asked Kenworth to inspect the turbo for possible passing oil. While employed by Marten Transport, Complainant's turbo actuator failed, causing a major loss of power. (Tr. 366). On another occasion, he was driving for Marten Transport and the turbo blew up, causing a rapid decrease of power. (Tr. 367).

Complainant tried to call Respondent, but the phone rolled over to Navajo Express night operations. He reported that the truck had not been repaired and he was refusing to drive the truck. (Tr. 367).

On June 1, 2010, Complainant sent a Qualcomm message to Respondent reporting that he was having difficulty shifting prior to driving to St. Louis. (Tr. 368; CX-1, p. 76). Complainant sent another Qualcomm message to Respondent indicating there was still an air and oil leak at the turbo. (Tr. 368; CX-1, p. 78). He sent the message after speaking to a representative at Navajo Express who asked him to send a breakdown message. (Tr. 368). He witnessed oil and air coming from the turbo diaphragm area. (Tr. 368-369; CX-1, p. 78). Complainant noted that Respondent instructed Kenworth to "just fix the minor leaks." (Tr. 369; CX-1, p. 78). Complainant sent another Qualcomm message to Respondent of June 1, 2010, stating his concerns were safety-related, and he refused to drive the truck. (Tr. 369; CX-1, p. 80). Complainant did not know what WINM meant, but STEB stood for Steve Ball. (Tr. 369; CX-1, p. 82).

On June 2, 2010, Complainant sent a pre-trip inspection report to Respondent through Qualcomm, indicating he had detected a significant air leak and oil leak at the turbo area. (Tr. 370; CX-1, pp. 84-85). Complainant also had phone calls with Mr. Ball after the truck was not fixed. (Tr. 370-371). He reported to Mr. Ball on June 2, 2010, that the truck had not been repaired and he was concerned. Complainant requested the needed repairs and reported he would not drive until the truck was repaired. Complainant testified that Mr. Ball tried to convince him it was safe to drive the vehicle. He also testified that Mr. Ball told him the truck would not be repaired and to "deal with it." (Tr. 371). He did not speak to anyone else at Respondent by telephone on June 2, 2010. (Tr. 371-372).

On June 2, 2010, Mr. Schlegel, Respondent's owner, contacted Complainant through a Qualcomm message. (Tr. 372; CX-1, p. 86). The message stated, "The truck has been repaired. A leaking turbo actuator is not a safety issue. If you do not wish to drive the truck back to Boise let's say so now and I'll send a recovery driver. Otherwise, quit the nonsense and let's get to work." (CX-1, p. 86). Complainant testified it was the first message he ever received from Mr. Schlegel, and he felt intimidated. Complainant felt if he did not drive the truck, he would be fired. Complainant proceeded to Illinois a few hours after receiving Mr. Schlegel's message to pick up a load. (Tr. 373). Mr. Switzer called Complainant and asked what his intentions were. (Tr. 373-374). Complainant reported he would pick up the load the next day as scheduled, but he was still concerned about the leaks. (Tr. 374).

Complainant took the load from Illinois to Loveland, Colorado. He was not given a load directly back to Boise. He passed weigh scales. The weigh scales were not always open, sometimes he was waived on and occasionally an inspection occurred. At the Fenton, Missouri weigh scale, Complainant explained his concerns about the leaks to inspectors. (Tr. 375). The truck was inspected and air leaks were found, but it was not enough to place the truck out of service. The inspector did not inspect for the oil leak even though Complainant asked him to do so. (Tr. 376). After dropping off the load in Loveland, Colorado, Complainant proceeded to Golden, Colorado, to pick up another load, which he delivered in Boise. (Tr. 376).

Complainant testified that he discussed repairs with other drivers. He also told other drivers about his Internet business. (Tr. 377). One driver stated he was talking to an attorney about a class action law suit. (Tr. 377-378).

On June 7, 2010, Complainant returned to Respondent's facility. (Tr. 378-379). He completed his write-up and noted problems with the "turbo actuator," the air leaks and oil leak. (Tr. 378-379; RX-3, p. 19). After leaving the terminal, Complainant received a cell phone call from Mr. Ball to return to the terminal. (Tr. 379-380). Complainant testified that this was an unusual request, but he complied. He went to the conference room with Mr. Switzer and Mr. Ball. (Tr. 380). Mr. Switzer told Complainant he was no longer needed and was fired. (Tr. 380-381). Complainant asked why he was fired. Mr. Switzer told Complainant he did not have to give a reason. Complainant

asked if his termination was related to his performance or raising safety issues, but Mr. Switzer refused to answer. Complainant asked if it was because of the safety issues he raised. Thereafter, Complainant returned to his truck to gather the rest of his belongings. (Tr. 381). He also took photographs of the oil leak. (Tr. 382-383; CX-2). Complainant identified the turbo in the photographs. (Tr. 383-384; CX-2). He also identified the frame rail, which runs the length of the truck. A black material was located on the frame rail, which Complainant identified as oil. He identified an orange area as the exhaust section of the turbo, with oil also present on that area. (Tr. 384; CX-2). He identified the air lines, and testified that air lines will run under pressure. (Tr. 384-385; CX-2). He identified wires as part of the electrical system. Oil was present on the wires. Complainant believed this was part of the brake mechanism. The turbo exhaust area was red. (Tr. 385; CX-2).

Complainant is not a mechanic, and he does not have any training as a mechanic. (Tr. 386-387). His knowledge of trucks comes from experience. He did not know exactly how a turbo worked. He refused to drive the truck because he knew the air and oil leaks were dangerous and a violation of the Federal Motor Carrier Safety regulations. (Tr. 387). He felt it was unsafe to drive the truck, but he drove it because he believed his job was threatened. (Tr. 388).

Complainant testified that he received a letter about his January miles at the end of February. (Tr. 388; RX-5, p. 1). He discussed the letter with Mr. Ball. (Tr. 388). Mr. Ball informed Complainant that discussing the mileage was a formality, and he understood Complainant's truck had been in the shop. 2010 was a bad year for the trucking industry. Complainant stated he never refused a load that was dispatched to him by Respondent. (Tr. 389). When Complainant received a second letter of concern about his February 2010 miles, he believed he talked to Mr. Ball by telephone, who assured Complainant not to worry because he had truck issues. (Tr. 389-390; RX-5, p. 2). Complainant explained that the operations room was busy and there was no time for "chit chat" with the drivers. (Tr. 391). When Complainant received his third letter of concern about his March 2010 miles, he was not sure whether he talked to Mr. Ball. (Tr. 391; RX-5, p. 3). Mr. Ball never called him to come in and discuss the mileage letter. Mr. Ball knew about Complainant's breakdowns and repairs through the Qualcomm system and by phone. (Tr. 391).

Respondent never offered Complainant a replacement vehicle to drive while his truck was in the shop. Complainant testified that his firing by Respondent was humiliating because he had never been fired before. (Tr. 393). He looked for work with other trucking companies through the Internet and Craig's List. (Tr. 393; CX-19, p. 4). He worked for CMS Transportation Company on a short term basis. (Tr. 392-393; CX-19, pp. 1-3). He received no job offers from his Internet applications. (Tr. 393). Gotruckers.com sent out applications on Complainant's behalf. (Tr. 393-394). He applied with Marten Transportation on three occasions. (Tr. 394). He applied to A to Z Transportation on August 11, 2010. (Tr. 395; CX-19, p. 5). His responses to job ads are reflected at CX-19, pp. 6-7. (Tr. 395-396).

Complainant began working for Navajo Express on May 9, 2012. (Tr. 396). He is earning more at Navajo than he did at Respondent. (Tr. 397). He had not seen the Respondent Driver's Policy until the day of the formal hearing. (Tr. 396; RX-2). Complainant's W-2 forms for 2009 and 2010 are reflected at RX-7. (Tr. 396-397; RX-7). Complainant earned \$10,778.83 from Respondent in 2009 and \$10,364.06 from Respondent in 2010. (RX-7). CX-13 is Complainant's IRS Form 1040 from 2010. (Tr. 397; CX-13). After being fired from Respondent, Complainant lived off of his personal savings. He testified that his lifestyle changed drastically because he could not take vacations or eat out at restaurants. He also had to cut back on his cellphone bill. He felt a loss of self-worth because of the termination. (Tr. 398). Complainant testified that as a remedy he wants reinstatement to his former job, back pay, punitive damages because of emotional stress, attorney's fees and costs and for Respondent to purge all adverse information from his employment record. (Tr. 398-399).

On cross-examination, Complainant testified he took a load to St. Louis on May 29, 2010. (Tr. 400). On May 23, 2010, Complainant identified some issues with his truck including a problem with the trans cooler and air leaks in the system when the brakes were set. Respondent replaced the trans cooler, fixed the leak and replaced two sets of brakes. (Tr. 400; RX-8).

Following these repairs, Complainant detected an air leak. (Tr. 400). The air gauge was fluctuating from 110 to 130 psi. The air gauge normally fluctuates from 105/115 to 125/130 psi. (Tr. 401). Complainant reported the problem to Respondent, and he agreed to monitor the air gauge en route to St. Louis. (Tr.

401-402). He delivered the load to St. Louis without incident. He brought the truck to Kenworth of St. Louis on June 1, 2010. (Tr. 402). A write-up completed at Kenworth indicated that the air leak was 30 psi when the engine was off and there was an oil leak in the turbo area. (Tr. 402-403; CX-6, p. 1). Complainant acknowledged that Kenworth found and repaired two leaks and determined "no further leaks were detected." (Tr. 403-404; CX-6, p. 2). The second issue was the turbo actuator with an air leak and an oil leak at the turbo area. (Tr. 404; CX-6, p. 2). Complainant informed Respondent that the air leak and oil leak was located at the turbo actuator. (Tr. 404-405; CX-1, p. 85). Kenworth inspected the turbo for passing oil, finding that the actuator was leaking air at the waste gate seal. There is no mention of an oil leak. (Tr. 405-406; CX-6, p. 2).

Complainant testified that he had no discussion with Kelly Pecora, Respondent's shop foreman. (Tr. 406). However, in deposition, Complainant testified that Kelly Pecora informed him that the Kenworth dealer had found the oil leak was not a safety related issue. (Tr. 406-407). Complainant testified he continued to believe the air leak was a safety problem. (Tr. 408). A new compressor was installed on the truck in February 2010. Complainant believed any air or oil leak is a safety hazard. (Tr. 408). He believed there is a potential for catastrophe if an air leak is not addressed. He does not contend that air leaks require the truck be put out of commission. He stated if the air leak is significant, the truck cannot be safely driven. (Tr. 409). Kenworth repaired three of the four air leaks, but not the leak at the turbo actuator. (Tr. 409-410). Complainant denied that the air leaks were more significant when he drove to St. Louis than when he left St. Louis. (Tr. 410). As of 5:00 p.m. on June 1, 2010, Respondent notified Kenworth no further repairs were authorized. (Tr. 411). Kenworth fixed the leaks, but did not repair the turbo actuator. (Tr. 413; CX-6). Complainant wanted Respondent to authorize the repair of the additional leak. (Tr. 413). On June 2, 2010, the air gauge was at zero. Complainant started the truck and allowed it to idle which caused the compressor to engage and the air pressure to build up. (Tr. 414-415). Complainant got the truck moving. If the psi was at an unsafe level, the brakes would not release. (Tr. 415).

Complainant had no communications with Mr. Zahm from May 29 to June 7, 2010. (Tr. 415-416).

In the early afternoon on June 7, 2010, Complainant talked to inspectors at the Forstall, Missouri weigh scale about the air and oil leaks. (Tr. 416-417). Complainant wanted the truck to be taken out of service. The inspectors determined that the truck did not meet the out-of-service criteria because the compressor was keeping up with the air leak. (Tr. 417). In his deposition, Complainant stated he did not know the specifics for taking a truck out of service under the Federal Motor Carrier Safety regulations. (Tr. 418). The inspectors did not inspect under the hood for oil leaks. They had the truck idle and had Complainant apply the brakes. (Tr. 420). Complainant asked the inspectors to look under the hood, but they refused because they were very busy. Complainant initiated the inspection. (Tr. 421). Complainant was able to make it back to Boise without incident. (Tr. 422).

Complainant stated he has been driving for 18 years and has driven trucks with air leaks. With Respondent, he was a full-time driver, but received no benefits. (Tr. 422). He was not aware of the 10,000 mile requirement. He believed the only consequence of not meeting the 10,000 mile requirement was loss of benefits. (Tr. 423). In his nine months of employment, he met the mileage requirement only three times. (Tr. 424). The letters of concern/warnings stated that the driver "must maintain 10,000 miles per month." The only exceptions to low miles were leaves of absence, medical problems and authorized paid vacation. (Tr. 424-425; RX-5). The letters also requested that Complainant meet with his dispatcher to discuss the problem. (Tr. 425-436; RX-5). Complainant met with Mr. Ball in early 2010 regarding a letter of concern. (Tr. 426). After receiving a second letter of concern in March 2010, he spoke with Mr. Ball on the telephone. He spoke to Mr. Ball on the telephone about the third letter of concern. (Tr. 427). They did not discuss the mileage requirements. Complainant explained that the truck had been in the shop and freight was slow. Mr. Ball told Complainant he understood the situation. (Tr. 428). Complainant did not receive an updated driver's manual in April or May 2010. (Tr. 428-429; RX-2).

Mr. Anthony, Mr. Ball and Mr. Switzer witnessed the confrontation between Complainant and Mr. Zahm. (Tr. 429). He testified he did not tell Mr. Ball that Mr. Zahm was an "asshole." (Tr. 430).

Complainant had raised safety concerns with Respondent in the past. (Tr. 430). In February 2010, Complainant was in Amarillo, Texas, when the engine blew a seal, causing oil to pour out and a loss of air pressure. His truck would not run, which was a safety hazard. He reported to Respondent, and Respondent had a new compressor installed. (Tr. 431; RX-12). Complainant was not fired or disciplined for reporting the need for repair. (Tr. 432). While in Chattanooga, Tennessee, he had a flat tire, which was a safety issue. The flat tire was repaired by Respondent. On March 17, 2010, Complainant noted about Respondent "you guys are the greatest." (Tr. 432; RX-13). He received no discipline for reporting the need for repair. (Tr. 433).

Complainant reported a vibration in his truck transmission on May 14, 2010. He did not feel safe driving the truck. (Tr. 433; RX-14). He was not disciplined for reporting the truck vibration. Mr. Ball allowed him to take the truck to a Kenworth dealer in South Bend, Indiana. (Tr. 434). Complainant stated the vibration was only partially fixed. (Tr. 435). Kenworth recommended repairs to the transmission, but only a "patch repair" was performed. (Tr. 435-436). He drove the truck back to Boise, Idaho, and did not refuse to drive the truck because of the partial repair. (Tr. 436-437).

When Complainant encountered the air leaks in June 2010, he stated he had had enough of the patch repairs. (Tr. 437).

Complainant testified that he did not fear he would lose his job when Mr. Zahm used the "F" word. (Tr. 437-438). He viewed Mr. Zahm as aggressive, heated and arrogant. He stated he was not setting the company up for a law suit. (Tr. 438).

Complainant testified he was not able to turn down loads unless he was out of driving hours, fatigued or ill. He stated the company had a "forced dispatch" system. (Tr. 439). He rarely turned down loads. (Tr. 440).

Complainant testified he never sought medical treatment after his termination for feeling a loss of self-worth, because he could not afford to do so. (Tr. 440). He never made any disparaging comments about Mr. Zahm. (Tr. 441).

On re-direct examination, Complainant stated the air fluctuation as he was driving the truck to St. Louis was more frequent than usual. It would normally take several days for air to bleed out to zero; it was unusual for the bleed out to occur within several hours. (Tr. 442).

Dennis Schlegel

Mr. Schlegel was called as an adverse witness. He has been the President of Respondent for 14 or 15 years. (Tr. 53-54). His wife Bonnie is a director of the company. Two of his son-in-laws also work for the company: Steve Ball, a dispatcher and Rob Zahm, the Vice-President. (Tr. 54). His daughter Alicia works part-time for the company, but he was unsure of Alicia's job duties. (Tr. 55). His grandson works part-time for the company. (Tr. 56).

In 2010, there were 15 office employees employed by Respondent. The dispatchers sit in cubicles. Mr. Zahm and Bonnie both had private offices. (Tr. 56). In 2010, Mr. Schlegel did not have use of his private office because it had been converted into a nursing station. (Tr. 56-57). He would "float around and use whatever desk and phone was empty at the time." In 2010, Respondent employed approximately 100 to 110 drivers. (Tr. 57).

Mr. Schlegel has never held a Commercial Driver's License (CDL). He drove a delivery truck occasionally before 1989, when CDLs were not required. He also owned a farm equipment dealership and truck dealership. (Tr. 57).

In 2010, approximately one-half of Respondent's fleet was comprised of Kenworth trucks. The truck engines were equipped with a turbo. Mr. Schlegel testified that the turbo is part of the fuel system that operates off of the exhaust. The turbo uses the energy from the exhaust to increase the flow of air pressure into the system to increase power. The turbo increases horsepower, which assists the trucks in climbing hills. The turbo also increases fuel economy. (Tr. 58). The turbo runs off the exhaust pressure of the engine. (Tr. 58-59). The turbo turbine is motivated by the turbo actuator, which is activated by air. Mr. Schlegel testified the air flow from the compressor did not keep the turbo actuator in proper working order. (Tr. 59). However, during his deposition, Mr. Schlegel testified that a Cummins representative informed him that the air source from the compressor keeps the turbo actuator working properly. (Tr. 59-60). The compressor is the source of air that feeds a

system of tanks which feeds the brakes, air suspension and actuator. (Tr. 60-61). Mr. Schlegel stated that all systems leak air, and "there are audible air leaks on a tractor all the time." (Tr. 61).

Mr. Schlegel testified that the "glad hand" connects to the air supply from the tractor to the trailer. If the "glad hand" disconnects, the brakes will activate. (Tr. 62). He did not know if multiple air leaks would produce the same effect. Tractor air systems have leaks, and sometimes those leaks can be heard. (Tr. 63).

Respondent has a maintenance department. Mr. Schlegel shared certain management responsibilities with Rob Zahm. (Tr. 63). He would investigate audible air leaks. (Tr. 63-64). He would have the air leak patched if needed. Repairs are not required on all audible air leaks. (Tr. 64). He was somewhat familiar with the out-of-service criteria of the Commercial Vehicle Safety Association. He could not recall whether his trucks were cited by Department of Transportation (DOT) for any audible leaks. The compressor that feeds air into the turbo actuator and suspension system is also used to release the brakes. A sudden loss of air could activate the emergency brakes. (Tr. 64). He was not familiar with the term "push rod." (Tr. 65).

Mr. Schlegel testified that after Complainant was fired the turbo of his truck was replaced. Respondent does not make repairs that are not necessary. (Tr. 65). It would have cost \$5,000.00 to replace the turbo on the road. Mr. Schlegel prefers to have repairs done in Respondent's shop because it is less expensive and easier to warranty the parts. Respondent tries to defer repairs until a truck is in the Respondent's shop. (Tr. 66).

Complainant's truck was equipped with a Qualcomm system. The Qualcomm system provides GPS and communication capability for the driver. Respondent shares the system with Navajo Express. (Tr. 66). Respondent is an agent for Navajo Express. Most of Respondent's freight is booked through Navajo Express. After work hours, Respondent's drivers communicate with Navajo Express. (Tr. 67).

CX-1 is a summary of the messages sent to and from vehicle 11150, which was Complainant's vehicle. (Tr. 68). "From: 11150 (2005 KW T-600)" indicated from where the message originated. "To: ICCINT (ICC Integration)" was the general mailbox that received the message. (Tr. 68; CX-1, p. 5). Mr. Schlegel, Mr. Zahm, Mr. Ball and the dispatchers all had access to the Qualcomm system. Dispatchers would communicate with drivers through the Qualcomm system or over the telephone. Drivers are given directions and delivery addresses through the Qualcomm system. (Tr. 69).

On January 22, 2010, Complainant sent a message indicating that he was delayed getting his truck started. (Tr. 69; CX-1, p. 5). George Ryan, the breakdown clerk for Navajo Express responded. (Tr. 69-70; CX-1, p. 6). If vehicles breakdown for an "abnormal amount of time," Respondent does not hold the breakdowns against the drivers in terms of meeting their mileage requirements. (Tr. 70-71). On January 23, 2010, Complainant sent a message indicating the airbags on the rear axle were not inflating. (Tr. 71; CX-1, p. 8). Mr. Ryan responded stating, "Check into the shop." (Tr. 71; CX-1, p. 9). Mr. Schlegel testified that air bags are powered by the air compressor. (Tr. 71). He stated, "If the air bags are deflated, the rear of the tractor will settle down." He testified that this would put an unusual amount of pressure on the drive train, but he was uncertain whether this would cause the load to shift. (Tr. 72).

On February 10, 2010, Complainant sent a message indicating that he blew an oil seal and had no air pressure. (Tr. 72; CX-1, p. 10). Mr. Ball responded, asking Complainant where he was in Amarillo. (Tr. 72-73; CX-1, p. 12). Mr. Schlegel identified CX-3 as a repair order for a main seal on the compressor of Complainant's truck on February 10, 2010. The repair was completed on February 11, 2010. (Tr. 73-74; CX-3). The repair order indicated that the air compressor had a hole in it. (Tr. 75; CX-3). Mr. Schlegel testified that a hole in an air compressor is problematic, and Respondent would not authorize a repair that was not necessary. (Tr. 75). On February 14, 2010, Complainant's truck required a flat tire repair. (Tr. 75; CX-4). Mr. Schlegel testified that down time due to a hole in an air compressor is not the fault of the driver. (Tr. 75-76).

On April 1, 2010, Complainant reported an alternator issue. (Tr. 80-81; CX-1, p. 31). Complainant reported a problem with fluctuating voltage that could have been related to belts. (Tr. 81; CX-1, p. 32). Mr. Schlegel testified that drivers are responsible for checking belts and connections as part of their pre-check of the vehicles. (Tr. 81).

On April 18, 2010, Complainant sent a message complaining of a coolant leak on his assigned truck. Complainant indicated he would keep water on it and check into the Boise shop the next morning. (Tr. 80; CX-1, p. 40). Mr. Schlegel opined that Complainant was acting cooperatively. (Tr. 80).

On May 14, 2010, Complainant reported a vibration issue. He reported that the vibration started at 30 miles per hour and increased in intensity at higher speeds. (Tr. 81; CX-1, p. 45). He also reported some vibrations while in idle. (Tr. 81-82; CX-1, p. 45). Mr. Schlegel opined that Complainant was doing a good job of reporting issues with his truck. (Tr. 82). Mr. Schlegel's son-in-law asked Complainant if he was "totally dead in the water." (Tr. 82; CX-1, p. 50). Complainant reported something was wrong with the engine drive line, and he did not feel safe driving the truck. (Tr. 82; CX-1, p. 51). Complainant was directed to a Kenworth dealer in South Bend, Indiana, for repair. (Tr. 82; CX-1, p. 52). Complainant reported that he was not near South Bend, Indiana, and he was then directed to Indianapolis, Indiana. (Tr. 82-83; CX-1, pp. 53-57). Mr. Schlegel testified that Complainant worked to get the truck to Indianapolis rather than having it towed, which he believed was what a good driver should do. (Tr. 83).

On May 15, 2010, Complainant's truck was put into the Kenworth shop in Indianapolis, Indiana, due to vibration. (Tr. 76; CX-5). Coolant was found in the transmission, which is not normal. (Tr. 76-77; CX-5). Transmission coolant keeps the transmission fluid cool. If the transmission overheats, there will be damage to the gears in the transmission. If the overheating is severe, the vehicle will not operate. Mr. Schlegel testified that transmission failure is rarely catastrophic. (Tr. 77). The transmission coolant should be separate from the transmission fluid. (Tr. 78). The repair order stated, "Customer does not want to remove main transmission at this time. They just want the unit back together to get back to their shop for repairs." (Tr. 78; CX-5). Mr. Schlegel assumed that the mechanical department elected to do a temporary repair on the transmission so that it could be

transported back to Respondent's facility. (Tr. 78). The coolant was not replaced because of the leak. (Tr. 78-79; CX-5). Mr. Schlegel testified this was a temporary repair to the transmission so that the truck could be driven back to Respondent's facility for repairs. (Tr. 79). The vehicle was down from May 18, 2010 to May 20, 2010, in Indianapolis, Indiana, which Mr. Schlegel testified was not Complainant's fault. (Tr. 79; CX-5).

On May 20, 2010, Complainant reported that the temperature gauge on the transmission was running hot after the truck was in the shop in Indianapolis. (Tr. 83-84; CX-1, p. 69). Complainant also reported that the transmission temperature was hot. (Tr. 84; CX-1, p. 71). Mr. Schlegel opined that a vehicle out of service on the highway due to a hot transmission could present a safety hazard to other vehicles if it is not pulled far enough onto the shoulder of the highway. (Tr. 85). Complainant continued to report transmission problems with his assigned truck. (Tr. 85-86; CX-1, pp. 73-74). Complainant indicated he had to pull over to allow the transmission to cool. (Tr. 86; CX-1, p. 74). Mr. Schlegel testified that he believed a driver would be given an excuse if he explained the reasons for his low miles. (Tr. 86-87). He stated that he has access to the Qualcomm system, and the "buck stops with him" with respect to overseeing the maintenance of equipment. (Tr. 87).

Mr. Schlegel noted Complainant reported an air and oil leak on June 1, 2010. (Tr. 87-89; CX-1, p. 76). At 6:21 pm on June 1, 2010, Complainant reported he had no choice but to refuse to drive the truck for safety-related reasons. (Tr. 89-90; CX-1, p. 80). Mr. Schlegel testified that a severe oil leak can lead to a breakdown, but he did not believe that an air leak could lead to failure of the turbo. During his deposition, Mr. Schlegel inconsistently testified that a significant air leak could cause the turbo to fail. (Tr. 90). He added, if the turbo fails due to an oil leak, the truck will lose significant power. (Tr. 91).

On June 2, 2010, Complainant reported to Mr. Ball that he had a significant air and oil leak on his truck at the turbo area. (Tr. 91-93; CX-1, pp. 84-85). During his deposition, Mr. Schlegel testified Complainant informed Mr. Ball that he did not believe the Kenworth dealership in St. Louis had properly repaired the truck. The Kenworth shop foreman was contacted and reported that the truck had been repaired and was safe to return to Boise. (Tr. 94). Mr. Schlegel noted that the repair invoice stated that the customer was advised of the repairs, "checked

turbo charger and advised the customer the actuator was leaking air at the waste gate seal." The MV3 valve was replaced, and no further leaks were detected. Mr. Schlegel testified that he was told the turbo actuator leak was minor and it was safe to drive the truck. (Tr. 96; CX-6, p. 2). Mr. Schlegel directed the truck be sent back to the shop on June 2, 2010. (Tr. 97-98).

Mr. Schlegel sent a message to Complainant on June 2, 2010, indicating that the truck had been repaired and there was no safety issue presented by the leaking turbo actuator. He asked Complainant to drive the truck to Boise, or he planned to send a recovery driver. (Tr. 99; CX-1, p. 86). He opined that drivers should report oil leaks, but whether an oil leak is a safety issue depends on where the leak is located. (Tr. 99). He is aware of DOT regulation 396.5 that states a vehicle should be "free of oil leaks." (Tr. 100). Mr. Schlegel testified that he does not expect a driver to drive in violation of DOT regulations, but in practicality, it occurs. (Tr. 100-101). He opined that DOT regulation 396.5 was not enforced on a regular basis. (Tr. 101). He testified that just because a vehicle is not placed out-of-service, does not mean that the vehicle was not in violation of DOT regulations. (Tr. 102).

Mr. Schlegel expected Complainant to drive the truck back to Boise because the actuator issue was not a safety issue. He described the "back and forth" as "nonsense." (Tr. 102). In deposition, Mr. Schlegel testified "it makes no sense to fix little things." (Tr. 103). He acknowledged that Kenworth was told not to repair the actuator air leak. (Tr. 103-104).

Mr. Ball reported to Mr. Schlegel that there was a driver trying to "sell stuff" and organize a class action lawsuit. He told Mr. Ball to tell Bob Switzer to go speak to the driver about ending the class action lawsuit. Mr. Schlegel stated he did not know Complainant was involved. (Tr. 105). He assumed the class action lawsuit was related to a change in wages. (Tr. 105-106). Mr. Schlegel identified CX-9 as a memorandum that he prepared related to the complaints made by Complainant in June 2010. (Tr. 106; CX-9). CX-11 is Complainant's employment history report. (Tr. 106; CX-11). CX-15 reflects the driver's pay scale as of January 1, 2011 at 40 cents per mile. (Tr. 108-109; CX-15). Complainant was paid by the mile. (Tr. 108). CX-16, pp. 2-3 defines full-time drivers. (Tr. 108-109; CX-16, pp. 2-3). Full-time drivers must achieve 10,000 miles per month. (CX-16, pp. 2-3). The policy notes that employees who fail to achieve 10,000 miles per month would receive a warning letter and be in jeopardy of losing their benefits. (CX-16, p. 3).

Respondent progressively disciplines drivers for poor performance. (Tr. 110). Warning letters are issued to discuss work performance issues. Prior to 2007, Mr. Schlegel monitored mileage reports. In 2007, he turned that duty over to Mr. Zahm. He reviews "watch lists" reports, which is a list of drivers with low miles. (Tr. 111). He stated Complainant had a history of troublesome problems beginning in January 2010. (Tr. 111-112). CX-7 is the watch list for May 2010. (Tr. 112; CX-7). Complainant received a warning for low miles in June 2010. (Tr. 112-113).

On cross-examination, Mr. Schlegel stated Respondent employed 100 to 110 drivers in June 2010. There were only five to six part-time drivers, the rest were full-time drivers. (Tr. 113). "Casual drivers" are DOT qualified, but they come and go and are not required to meet the mileage standards. (Tr. 113-114). Some full-time drivers reverted to part-time driver status. (Tr. 114).

In 2010, Mr. Schlegel removed himself from the day-to-day operations and management of the drivers and personnel department. He focuses on finance, accounting and insurance. He remained involved in over-the-road breakdowns because he "had more knowledge than anybody else there." (Tr. 114). Rob Zahm is executive Vice-President of Respondent and is in charge of day-to-day operations and personnel issues. Mr. Zahm deals with Navajo Express. (Tr. 115).

Mr. Schlegel stated that on an average day, three to five trucks breakdown. (Tr. 115). Respondent spends approximately \$1,000,000.00 a year on maintenance, of which \$300,000.00 is spent on the road and \$700,000.00 is spent in Respondent's shop. Drivers are required to inspect their trucks and report any deficiencies to Respondent. Complainant properly made complaints about deficiencies with his truck. (Tr. 116). Mr. Schlegel stated that if a truck and driver are not working, neither the driver nor the company is making money. Drivers make daily complaints. (Tr. 117). Mr. Schlegel stated he never forced a driver to drive if there was a concern with safety. He was not upset about the oil and air leak complaint made by Complainant. (Tr. 118). Mr. Ball did not want to lose a load he had obtained in Boise. (Tr. 119). He told Complainant to bring the truck back to Boise because the Kenworth report indicated all necessary repairs had been done and the truck could return to Boise. (Tr. 121).

Mr. Schlegel testified that the actuator is a minor part of the air system. He stated that Cummins engines actuators often leak. He would not require a driver to drive an unsafe vehicle because of the liability if there was an accident. (Tr. 122).

On June 2, 2010, Complainant was instructed to take the truck back to Kenworth. There was "back and forth" with Complainant. (Tr. 123-124; CX-1, p. 86). Kenworth reported the truck was safe to bring to Boise. (Tr. 124). Mr. Schlegel testified that his reference to "stop the nonsense" in his Qualcomm message was not intended to be intimidating. He wanted Complainant to make a decision as to whether he wanted to drive the truck. (Tr. 125). He would never force a driver to drive, and he would not fire a driver who refused to drive. He stated earlier this year a driver refused to drive his truck with an oil leak, without adverse action taken against him. (Tr. 126). Complainant agreed to drive the truck back to Boise. (Tr. 127).

Mr. Schlegel testified he was not directly involved in the decision to fire Complainant. (Tr. 127). On June 7, 2010, two drivers reported being agitated because another driver was trying to sell things and organize a class action lawsuit. Mr. Schlegel believed it was related to a previously announced wage cut. He asked Mr. Ball and Mr. Switzer to handle the situation. He did not tell Mr. Ball to fire anyone. (Tr. 128). Later that day, Mr. Switzer terminated Complainant because he had "other issues." (Tr. 128-129). Mr. Schlegel testified he did not talk to Mr. Zahm about the actuator, the truck problem or Complainant's refusal to drive the truck. (Tr. 129).

Mr. Schlegel testified that he developed the mileage requirements because productivity was the key to making money in an asset-based business. Productivity is measured by the miles driven by drivers. "Elite fleet" status is awarded to drivers who drive 10,000 miles per month. Those drivers receive a bonus. (Tr. 131). The watch list is drivers who do not meet the mileage standard. Mr. Schlegel developed this system in 1998. He believed 10,000 miles per month was a very achievable workload for a driver in a single-operation truck. 10,000 is the company's "break-even point." (Tr. 132). Mr. Schlegel opined that five to ten drivers have been fired over the years for failing to meet this standard. (Tr. 133).

Respondent's current Driver's Policy and Procedure Manual is dated April 30, 2010. (Tr. 134; RX-2, p. 1). Policy changes are disseminated to the drivers through the Qualcomm system, in a monthly newsletter or through a letter to the drivers. (Tr. 136). The policy mentions discipline for full-time drivers, but according to Mr. Schlegel it could not cover every situation. (Tr. 138; RX-2). No discipline for drivers with low miles was mentioned in the April 8, 2009 version of the policy. (Tr. 139; CX-16). Complainant received a copy of the April 8, 2009 version of the policy on August 25, 2009. (Tr. 139).

Respondent received a "satisfactory" rating on its DOT audit on May 25, 2010. (Tr. 139; RX-4). A DOT auditor audits the safety practices, drivers' logs, maintenance records and hiring practices. Respondent has had nine such audits since 2001 and received a satisfactory rating on all audits, which is the highest rating. (Tr. 140).

Respondent receives thousands of Qualcomm messages a day. Mr. Schlegel and his managers do not read each of the Qualcomm messages. (Tr. 141). A repair bill for Complainant's truck was produced from December 2009. (Tr. 142; RX-3, p. 1). Mr. Schlegel stated he would prefer to repair his trucks at his own shop because it is more reliable, easier to warranty the parts, faster and less expensive than having the work performed on the road. (Tr. 142).

Respondent reports to DAC Services the reasons drivers leave employment. Respondent reports 150 drivers a year to DAC Services. (Tr. 143).

On re-direct examination, Mr. Schlegel testified that drivers often raise safety issues. He handles each occurrence individually. He does not fire every driver that drives less than 10,000 miles a month. Typically, he works with drivers who do not meet the 10,000 miles a month requirement. (Tr. 144). Complainant received three prior warnings for low miles. (Tr. 145). Mr. Schlegel did not know whether employees signed for a copy of the policy manual. (Tr. 146).

Mr. Schlegel was recalled on rebuttal. He testified that he talked to other truck company owners about driver shortages and market conditions. (Tr. 562-563). If a DAC report stated that a driver was "terminated, not eligible to rehire," he would call the employer involved for a reason the driver would not be rehired. Red flags are DUIs, drug abuse and excessive accidents. He did not believe those factors were present on

Complainant's DAC report. (Tr. 564). A DAC report is common anytime a driver leaves a trucking employer. He stated he also uses DAC reports to hire drivers. In 2010, most of Respondent's drivers exceeded the 10,000 mile standard. He indicated 17 days of driving 600 miles a day would achieve in excess of 10,000 miles. (Tr. 565).

Mr. Schlegel identified CX-15 as Respondent's pay and benefits. Drivers were paid 40 cents per mile, 29 cents for wages and 11 cents for a per diem rate. A higher rate was offered to drivers to drive older trucks. (Tr. 566). This rate only applied to new hires, and Complainant would not have been eligible for the rate. (Tr. 567).

On cross-examination, Mr. Schlegel acknowledged that Complainant was making 32 cents per mile, including his per diem rate, at the time of his termination. Since June 2010, Respondent has given a penny per mile pay increase to some drivers. (Tr. 567). Most of Respondent's drivers were averaging 10,000 miles a month in 2010. Respondent does not fire all of the drivers who fail to meet the 10,000 miles per month standard. (Tr. 568).

On re-direct examination, Mr. Schlegel stated that in May 2010, Respondent cut driver's wages by 7 percent. (Tr. 568). Since June 2010, the mileage rate has increased by one cent per mile. (Tr. 569).

Robert Switzer

Mr. Switzer testified he was employed by Respondent from June 2007 to September 2011 as Vice-President of Safety and Personnel. (Tr. 147). He fired Complainant without providing a reason for the decision. He has fired other drivers, but typically with a reason for the discharge. (Tr. 148).

Mr. Ball later told Mr. Switzer that Complainant was fired for low miles. He worked across from Mr. Ball at Respondent's facility. Mr. Switzer testified that he does not recall Mr. Ball telling him to stop Complainant's activities in the yard. He could not recall how many conversations he had with Complainant on June 7, 2010, and none of those conversations stood out in his memory. (Tr. 149).

Mr. Switzer had access to the Qualcomm system, and safety issues were brought to him. He had no problems with Complainant. He liked Complainant. (Tr. 150).

Drivers were discharged for low miles. (Tr. 151). The dispatcher would typically initiate the dismissal of drivers for low miles. (Tr. 151-152). Mr. Ball was Complainant's dispatcher. (Tr. 152). During his deposition, Mr. Switzer testified he would typically review documents related to drivers' performance issues before discharging them, including a summary report of mileage. (Tr. 153). Rob Zahm instructed Mr. Switzer to fire Complainant. Mr. Switzer could not recall Mr. Zahm previously instructing him to fire a driver. (Tr. 154).

Mr. Switzer was familiar with commercial vehicle safety regulations and the Idaho commercial drivers manual. He took seminars concerning compliance with DOT regulations. Prior to working for Respondent, he was employed by Swift Transport as a fleet manager. He also previously worked as a commercial truck driver. He holds a commercial driver's license. (Tr. 155). He stated that any leaks on the air system are bad because the brakes could lock up. He stated he was not familiar with the turbo. (Tr. 156-157). He noted that leaks can get larger over time. (Tr. 157). He opined that an any air leak in the air system could lead to brake failure. He noted the turbo gives the engine more power. (Tr. 158). He could not recall whether Mr. Schlegel utilized a desk near his in June 2010. He stated that an oil leak could cause the engine to "seize up." He noted that oil leaks would be a concern, and an oil leak in an engine compartment could present the danger of fire. (Tr. 159).

Mr. Switzer testified that in the May 2010 DOT audit, 70 percent of the drivers checked had hours of service violations. (Tr. 161). He audited drivers' logs. (Tr. 162).

On cross-examination, Mr. Switzer stated Complainant called him in mid-August 2012 and left a message. Mr. Switzer was part of the complaint filed by Complainant, and Complainant stated he would drop Mr. Switzer from the complaint if he helped Complainant with his case. (Tr. 163-164).

Mr. Switzer noted that Respondent was assigned a satisfactory rating in the 2010 audit. He stated that individual violations are not unusual. (Tr. 164).

Mr. Switzer did not make the decision to fire Complainant. He typically fired drivers for safety issues under Respondent's policy. (Tr. 165). He did not know the reasons for Complainant's termination. (Tr. 165-166). Dispatchers could also fire drivers. (Tr. 166).

Mr. Switzer testified that he is not a mechanic and is not familiar with the Cummins engine actuator. (Tr. 166).

Respondent placed safety as its foremost concern. (Tr. 167). He could not recall a single instance where he thought Respondent did not care about driver safety. (Tr. 168). He was not aware of any driver fired because the driver complained about his truck. He did not witness Mr. Schlegel or Mr. Zahm expressing any hostility toward drivers. (Tr. 168).

On re-direct examination, Mr. Switzer acknowledged that sometimes drivers drove in violation of DOT regulations. (Tr. 169-170). He noted that a vehicle could be safe to drive but not be in compliance with DOT regulations. (Tr. 170).

Robert Zahm

Mr. Zahm is Vice-President of Respondent. (Tr. 172-173). He became Vice-President in 2010. Prior to becoming Vice-President, Mr. Zahm was the operations manager of Respondent. His immediate supervisor is Mr. Schlegel, but Mr. Schlegel does not micro-manage Mr. Zahm's activities. Five years ago, he and Mr. Schlegel divided responsibilities. (Tr. 173). Mr. Schlegel remained in charge of accounts payable and equipment financing. Mr. Schlegel wanted to "take a step away from the business," but he is a "hands-on owner." (Tr. 174).

Mr. Zahm testified that he knows Complainant. Mike Anthony was Complainant's supervisor; Steve Ball, Mr. Zahm's brother-in-law, was Complainant's dispatcher. Mr. Zahm is married to Mr. Schlegel's daughter, Alicia. (Tr. 174).

Mr. Zahm testified that Complainant was fired because of low miles, less than 10,000 miles per month. (Tr. 174-175). He agreed truck repairs reduce the number of miles a driver can drive. Drivers typically average 550 miles a day. Mr. Zahm was aware of Complainant's truck being down for four days in Indianapolis because of transmission problems. (Tr. 175).

Mike Anthony was Mr. Ball's immediate supervisor. Mr. Zahm was Mr. Anthony's immediate supervisor. On May 27, 2010, Mr. Zahm spoke with Complainant about Complainant trying to sell Respondent a product. (Tr. 176). He believed Mr. Switzer and Mr. Ball were also present. (Tr. 176-177). Complainant continued working following this meeting. (Tr. 177).

CX-7 is a May 2010 letter prepared on June 3, 2010, stating that Complainant needed improvement. Respondent prepared these letters in the regular course of business. Employees produced source documents which were used to determine whether a letter should be issued. (Tr. 178; CX-7). The letter listed each supervisor, the drivers who needed improvement, the number of months the drivers failed to achieve 10,000 miles and the average miles achieved for those months. (Tr. 179-180; CX-7). The abbreviation "NB" indicated that the driver was not receiving benefits. Mr. Zahm was unsure what the abbreviation "B/PL" indicated. Complainant had two concerns and a warning in March 2010. (Tr. 180; CX-7). RX-17 shows Complainant drove 11,205 miles in April 2010. (Tr. 181; RX-17). Mr. Zahm classified Complainant's improvement in April 2010 as an anomaly because Complainant was not consistently exceeding 10,000 miles per month. (Tr. 181-182). In May 2010, Complainant drove 6,954 miles. (Tr. 182; RX-17). Mr. Zahm did not know if Complainant's truck was in the shop in May 2010. (Tr. 182).

Mr. Zahm believed the May 2010 letter was written on June 3, 2010. (Tr. 183; CX-7). No other drivers were discharged for low miles while Complainant was employed. (Tr. 183-184). The letter was prepared by Alicia, Mr. Zahm's wife. (Tr. 184; CX-7). The letter indicates that Complainant drove 9,281 miles in May 2010. (CX-7).

The parties stipulated that no other drivers were discharged for low miles while Complainant was employed. (Tr. 184). Protocol required that Alicia issue a warning letter to Complainant in June regarding his low miles in May, but Mr. Zahm had the ultimate responsibility of deciding how to proceed from there. Respondent's turnover is approximately 100 people per year. (Tr. 185).

Troy Tolson took leave due to medical issues. (Tr. 187-188). Mr. Tolson drove 9,379 miles in June 2010, 3,536 miles in July 2010, 6,659 miles in August 2010, approximately 8,800 miles in September 2010 and approximately 9,500 miles in October 2010. (Tr. 188; RX-18, p. 2). Mr. Tolson was fired for poor performance. (RX-18, p. 1).

Respondent used a computer program called Rand McNally to calculate drivers' mileage. (Tr. 188-189). There are a number of factors that determine mileage, including whether a driver has turned down loads and the availability of dispatches. Mr. Zahm did not know if Complainant ever turned down loads. (Tr. 189).

John Johnson became a part-time driver on October 26, 2011. Part-time drivers were not required to meet the 10,000 mile standard. Part-time drivers are required to drive a certain number of days per month, and Mr. Johnson was fired because he failed to do so. (Tr. 190). In September 2011, Mr. Johnson drove 6,987 miles. (Tr. 190-191; RX-19, p. 2). Mr. Johnson drove 6,910 miles in October 2011 and 7,680 miles in November 2011. (Tr. 191; RX-19, p. 2). Mr. Johnson was fired for driving too few miles and for not returning to work on time. (Tr. 191). Mr. Zahm noted that Mr. Johnson's miles increased from October to November 2011, when he switched from full-time to part time. (Tr. 191-192). He noted that a driver's miles would not necessarily drop when he switched from full-time to part-time. (Tr. 192). Mr. Johnson was fired for poor performance. (RX-19, p. 1).

Bart Griffith drove for Respondent in 2004, but he voluntarily quit on January 30, 2004. (Tr. 192). He returned to work for Respondent in 2007, but did not drive the required miles and was late with loads. (Tr. 192-193; RX-20, p. 2). Mr. Griffith was fired for poor performance and late loads. (Tr. 195; RX-20, p. 1).

Mr. Zahm recalled having to "relay" Complainant multiple times because Complainant was running behind. Mr. Zahm could not recall the specific times when Complainant was late on a load. He did not dispatch Complainant. (Tr. 194). Complainant was not fired for late loads. (Tr. 195).

Mr. Zahm testified that "poor performance" refers to low miles and late loads, with low miles being the biggest factor. (Tr. 195-196). Mr. Zahm made the decision to fire Mr. Griffith, Mr. Johnson and Mr. Tolson. (Tr. 196).

Theron Peters was fired for "service issues," which Mr. Zahm testified referred to late loads. (Tr. 197; RX-22). Mr. Zahm did not believe Mr. Peters was fired for low miles. (Tr. 197). William Panzeri was fired in October 2008 for driving 6,000 miles that month. (Tr. 198; RX-23).

Mr. Zahm testified that typically a driver is not terminated until after he has low miles for five or six months. Breakdowns are not held against the drivers if they discuss the issue with Mr. Zahm. Drivers with low miles are given warning letters, which instruct them to speak to their dispatchers. (Tr. 199). Mr. Zahm did not handle breakdowns. (Tr. 199-200).

Mike Anthony looked at operations reports and determined which trucks were operational. (Tr. 200).

Mr. Zahm knew that Complainant's truck was in the shop in May 2010. He did not review the documents related to the breakdown. He was the direct supervisor of the operations department, through Mike Anthony. (Tr. 200). Drivers are not required to provide their cell phone numbers to their dispatchers. (Tr. 200-201). Mr. Zahm testified that 10,000 miles is a guideline. Warning letters are issued to drivers to encourage increased miles and counseling. (Tr. 201).

On further examination, Mr. Zahm testified his areas of responsibility in 2010 were ensuring that Respondent was reaching its goals, overseeing the personnel department and dealing with driver issues. (Tr. 202-203). He began overseeing personnel in 2007. He alone decided to terminate Complainant. He did not consult with anyone. (Tr. 203). When Mr. Zahm decided to fire Complainant, he had no information about Complainant refusing to drive his truck or the mechanical issues with his truck. (Tr. 203-204). He could not recall whether he was in the office on June 1 and June 2, 2010. Mr. Schlegel did not talk to him about those issues and neither did Mr. Ball. (Tr. 204).

The reasons for Complainant's termination were low miles, his side Internet business on the road, insubordination when he confronted Mr. Zahm in the office and Complainant's failure to come into the office for counseling. (Tr. 205). Complainant tried to sell Mr. Zahm bug screens for the trucks' driver side windows. (Tr. 205-206). Mr. Zahm did not want to buy the screens. (Tr. 206). Mr. Zahm testified that Complainant accused him of not caring about the drivers and not being a fit manager. (Tr. 206-208). He stated that the conversation "was a little heated." He went into his office and closed the door because he did not want to do something he would regret. Mr. Zahm stated he considered firing Complainant then. (Tr. 206). He did not want to fire Complainant because his emotions were too involved. (Tr. 206-207). He did not know the exact date of the altercation, but he believed it was in late May 2010. Following the altercation, Complainant left on a job, and Mr. Zahm has a policy of not giving drivers bad news when they are on the road. Mr. Zahm testified that Complainant became "red in the face" during the altercation. (Tr. 207). He did not swear at Complainant. (Tr. 208). He felt Complainant had acted disrespectfully. (Tr. 209).

Leah Wells, an auditor, overheard the conversation. (Tr. 209). She told Mr. Zahm that on Saturday, Complainant wanted Mike Anthony to buy screens. Leah Wells indicated that Complainant told Mr. Anthony that Mr. Zahm was not fit to be Vice President because Mr. Zahm had not driven a truck before. Mr. Anthony confirmed this occurrence, and indicated that Complainant told him Mr. Zahm did not care about the drivers. (Tr. 210).

Mr. Zahm testified he was upset with Complainant. He had two lists of drivers, the good drivers and the bad drivers. Complainant was on his list of bad drivers, and he decided Complainant "needed to go." Mr. Zahm stated the confrontation with Complainant was a factor in his decision to terminate Complainant. (Tr. 211).

Mr. Zahm testified that CX-7 and RX-6 are different documents. (Tr. 212). RX-6 was the May 2010 "needs improvement" list or "watch" list. (Tr. 212; RX-6). CX-7 was based on a "dispatch date." (Tr. 212; CX-7). RX-6 was based on an "empty date." (Tr. 212; RX-6). Respondent always uses an "empty date" to determine mileage in order to remain consistent. Mr. Zahm testified RX-6 is the authoritative document, and CX-7 was a preliminary draft. (Tr. 212). Mr. Zahm relied upon RX-6 in making the decision to terminate Complainant. (Tr. 213). CX-7 indicates Complainant drove 9,281 miles in May 2010, and RX-6 indicates Complainant drove 6,261 miles in May 2010. (CX-7; RX-6).

Complainant had three letters for low miles. (Tr. 213; RX-6). Mr. Zahm receives the reports a few days after the end of each month. (Tr. 213). Mr. Zahm decided to terminate Complainant after the confrontation about the screens; low miles was "just icing on the cake." (Tr. 214). Mr. Zahm did not give Complainant any reasons for his termination. (Tr. 215). Mr. Zahm deferred the decision until Complainant returned from his trip to St. Louis because he has a policy of not terminating drivers while they are out on a job. (Tr. 215-216).

Mr. Ball informed Mr. Zahm that Complainant was in the yard getting drivers "riled up" about a class action law suit. (Tr. 216). Mr. Zahm told Mr. Ball and Mr. Switzer to get rid of Complainant. No specific reasons were given to Complainant, and Mr. Zahm did not discuss his reasoning with Mr. Ball or Mr. Switzer. The reasons were low production and the confrontation with Mr. Zahm. Complainant never talked to Mr. Zahm about his low miles. (Tr. 217).

RX-17 is a movement display of miles driven monthly by Complainant from August 2009 to May 2010. (Tr. 218; RX-17). Complainant drove 3,723 miles in August 2009, 9,743 miles in September 2009, 11,539 miles in October 2009, 10,902 miles in November 2009, 9,028 miles in December 2009, 6,562 miles in January 2010, 7,585 miles in February 2010, 9,685 miles in March 2010, 11,205 miles in April 2010 and 6,958 miles in May 2010. (Tr. 219; RX-16). These numbers were a factor in Mr. Zahm's decision to terminate Complainant. He considers an employee's entire performance when making personnel decisions. (Tr. 219). Warning letters are sent to the drivers asking drivers to see Respondent to discuss their mileage issues. (Tr. 220-222; RX-5).

Mr. Zahm has fired other drivers because of low miles. (Tr. 222). He made the decision to fire Troy Tolson due to low miles. (Tr. 222; RX-18). Respondent attempts to keep copies of letters of concern issued to individual drivers. (Tr. 222). He assumed that Complainant had received letters of concern. (Tr. 223). Mr. Zahm made the decision to terminate John Johnson. (Tr. 224; RX-19). The termination form was inconsistent because it indicated that Mr. Johnson was eligible for rehire and that Mr. Johnson was not eligible for rehire. (Tr. 224; RX-19). Mr. Zahm opined this was a clerical error. (Tr. 225). The form also indicated that Mr. Johnson had voluntarily quit the position. (Tr. 225; RX-19). Mr. Zahm opined this was also a clerical error. (Tr. 225). He made the decision to terminate Bart Griffith and Shawn Wyant for low miles and performance issues. (Tr. 226; RX-19; RX-21). Mr. Wyant drove 10,600 miles in September 2007, 9,400 miles in October 2007 and 7,800 miles in November 2007. He was fired in December 2007. (Tr. 227; RX-21). Mr. Zahm made the decision to terminate Theron Peters. (Tr. 227; RX-22). He made the decision to terminate William Panzeri for low miles. (Tr. 227; RX-23).

Mr. Zahm has access to Qualcomm messages. (Tr. 227). On a daily basis Respondent receives thousands of messages. Mr. Zahm did not know about Complainant's truck issues when he made the decision to terminate Complainant. Qualcomm is an operations issue. (Tr. 228). Truck issues are commonplace and occur every day. (Tr. 229).

CX-7 indicates that the letter was a warning to Complainant, but Mr. Zahm testified this did not mean that Complainant could only be warned. (Tr. 229; CX-7). Mr. Zahm had the ultimate authority to discipline or terminate a driver who was given a warning. (Tr. 230).

Dispatchers do not have authority to fire drivers. Dispatchers have to consult with Mr. Zahm. Mr. Zahm has never fired a driver for raising safety issues. (Tr. 230).

On re-direct examination, Mr. Zahm testified that RX-6 is the final version of the watch list. (Tr. 232; RX-6). Duane Smith was issued a concern letter in March and April 2010, but he was not fired. (Tr. 233; RX-6). Tamie Proper and Steven Swafford both received three warnings. Complainant had one prior warning. (Tr. 234; RX-6).

Mr. Zahm did not call Complainant to return to the facility on May 29, 2010, because Complainant was in the company truck. He does not allow drivers in company trucks to return to the terminal. A driver could return to the facility with a mechanical issue. (Tr. 235).

Mr. Zahm noted that the mileage system was not perfect. He was concerned that Complainant was spending too much time at truck stops. (Tr. 235). He testified that drivers do not always come to him after receiving warnings for low miles or letters of concern. (Tr. 237). Typically the drivers speak to their direct supervisors. (Tr. 237-238). Respondent uses recovery drivers when breakdowns occur or when a driver is not fit to drive. (Tr. 238). He would never send out a recovery driver to fire someone. (Tr. 238-239).

On re-cross examination, Mr. Zahm testified Tamie Proper was not fired by Respondent for low miles because she had medical issues, which she discussed with her dispatcher and Mr. Zahm. (Tr. 239). He asked Mr. Ball whether Complainant had spoken to him, and Mr. Ball indicated he had not spoken to Complainant. (Tr. 239-240). Steve Swafford self-terminated and was not fired. (Tr. 240).

John Johnson

Mr. Johnson testified via telephone at the formal hearing. He worked for Respondent and became a casual driver in October 2011. (Tr. 241). On one occasion, Respondent requested that Mr. Johnson go out on a job, and he declined because his sister

