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**Issue Date: 18 March 2013**

Case No. 2012-TSC-1  
2012-STA-46

In The Matter Of:

Jaquenette Dho-Thomas,  
Complainant

v.

Pacer Energy Marketing,  
Respondent

**DECISION AND ORDER**  
**DISMISSING CLAIMS**

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“the Act”), and implementing regulations set forth at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the discharge or discipline of, or discrimination against an employee in retaliation for the employee engaging in certain protected activity.

**PROCEDURAL BACKGROUND**

Jacquenette Dho-Thomas (hereinafter “Complainant”) was employed by Pacer Enterprises (hereinafter “Respondent”) from approximately July 2011, until she was terminated on or about December 28, 2011. On April 19, 2012, the Complainant filed a complaint with the Department of Labor’s Office of Occupational Safety and Health Administration (hereinafter “OSHA”) under the Toxic Substances Control Act, 15 U.S.C. § 2622, alleging that she had been discriminated against by the Respondent in retaliation for engaging in whistle blowing activities. On July 9, 2012, OSHA issued the findings of the Secretary on July 9, 2012, dismissing the Complainant’s complaint as untimely. The Complainant submitted her objections to this finding on August 14, 2012.

On June 12, 2012, the Complainant filed a complaint with OSHA under the Surface Transportation Assistance Act, 49 U.S.C. § 31105, alleging that the Respondent had retaliated against her in violation of the STAA. On July 12, 2012, OSHA issued the findings of the Secretary, dismissing the Complainant’s complaint for failure to make a prima facie allegation of retaliation, because she did not allege that she suffered a tangible employment action as a result

of the claimed protected activity. The Complainant submitted her objections to this finding on August 17, 2012.

These matters were assigned to me, and on August 28, 2012, I issued an Order consolidating the two claims, and directed the parties to submit argument on the timeliness issue in connection with the Claimant's TSCA claim.

On September 19, 2012, I issued my Order Regarding Timeliness, finding that the Complainant's complaints under both the TSCA and the STAA were timely, and scheduling her claim for hearing. The hearing was on November 27 and 28, 2012, in Nashville, Tennessee. At that time, the parties appeared and were given the opportunity to present evidence and arguments. At the hearing, I admitted Claimant's Exhibits ("CX") 3, and 4 through 9; Respondent's Exhibits ("RX") 1, 3, 4, 6, 7, 9-12, 14, 14A, 15-20, 22-23, and 27; and Administrative Law Judge Exhibits ("ALJX") 1 through 7 into the record.

On January 3, 2013, I issued an order closing the record and providing the parties time to submit written briefs. The Complainant submitted a written brief on February 26, 2013; the Respondent submitted a written brief on February 20, 2013. The Respondent submitted a reply brief on March 1, 2013; the Complainant did not submit a reply brief. I have based my decision on all of the evidence, the laws and regulations that apply to the issues under adjudication, and the representations of the parties, as well as the parties' arguments in their written briefs.

#### **HEARING TESTIMONY**

##### *Ms. Jacquenette Dho-Thomas*

Jacquenette Dho-Thomas, the Complainant, worked as a truck driver for three years before she went to work for the Respondent (Tr. 19). She previously worked in the real estate business, doing mortgage and credit consulting, for 16 years. After the real estate market collapsed, she was looking for a job in an industry that was economically sound; she took a course and obtained her CDL. She worked for Titan, driving a tractor with a dry-van, which carried goods that did not require refrigeration. She drove a truck with living quarters behind the driving section; she lived in the cab during the week, and was home on weekends (Tr. 20-21, CX 6).

When the Complainant went to work for the Respondent, she drove a crude oil tanker. Both of the types of trucks she drove were 18 wheelers, but an endorsement for a tanker's license, and hazmat certification were required to drive the crude oil trailer (Tr. 24). She identified a photograph of a tractor that was not attached to a trailer; the trailer was on legs (Tr. 25).

The Complainant was verbally hired in the first part of July (Tr. 27); she drove for the first time on July 22, 2011 (Tr. 26). As a driver for the Respondent, the Complainant sampled and tested oil before the decision was made to buy it.

The Complainant described the orientation that she attended in July 2011, which was run by Phillip Valois. She stated that on the first day, the new employees were shown movies about

what items not to wear, such as rings, and were shown ladders and tools that they would use, and what they could expect on the job; they primarily watched movies and power point presentations about what they could expect. They were shown an H2S awareness movie (Tr. 27, 33). The second day they met with people from human resources who talked to them about health and dental insurance, and benefits, and they were fitted with uniforms. They met with the president, the owner, and the operations manager. On the third day, they were fitted for special fire retardant uniforms, and went to a store where Mr. Valois paid for steel toed boots and interim coveralls to wear until the uniforms were ready (Tr. 28-30, 29, 33).

The Complainant did not recall what day they were issued H2S monitors, but thought it was probably the second day, when they were also issued goggles and helmets (Tr. 29, 34). The hands-on training with the truck was scheduled for Thursday. However, the Complainant had already been out with the person assigned to do the training, on the previous Friday and Saturday, and she was told that she did not need to attend the two days of training on Thursday and Friday. She continued riding with another driver on those days (Tr. 30).

According to the Complainant, Mr. Valois did all of the movie and power point presentations. He did not give the new employees any handbooks or training materials; the only things she left with were insurance binders, a couple of pages with “a little bit” about H2S, and fire retardant clothing (Tr. 35). The Complainant stated that she did not receive any instructions from Mr. Valois about where she could go to reference safety material, or any resources to further train her.

The Complainant recalled that the employees were required to attend a safety meeting once a month at breakfast. She attended two or three before they were discontinued. These meetings were orchestrated by Mr. Valois, and were usually on one topic. She recalled one meeting where Gary Reid, from Enterprise, spoke to them about what Enterprise expected of them when they entered the Enterprise facility. He told them that they needed to have their shirts tucked in, and their helmets and safety glasses on (Tr. 36-37).

The Complainant recalled that the breakfast safety meetings were about “things in general about safety.” (Tr. 37). She stated that at one meeting, the president, Mr. Nichols, came in, and new people were introduced. Mr. Nichols talked about the company buying new trucks (Tr. 37). The Complainant did not recall going over the subject of H2S, not in “anything that was applicable.” (Tr. 38). She stated that most of the H2S awareness training took place at orientation, where they were told that H2S was a dangerous gas that comes off the crude oil. They were told that the levels they would be dealing with were checked out by the company before they came in, and they would not be going to a well site that the company did not know. They were told that someone else went out there before them (Tr. 38).

When the drivers were issued the monitor at orientation, they were told that it would go off at 10 ppm (parts per million) concentration. If the monitor went off, it meant that they were in a danger zone; they were trained to run for their life, to run like hell upwind (Tr. 38-39). They were told not to turn the monitor off; it ran continually, and would run for about two years (Tr. 38). According to the Complainant, they were taught that H2S has a “settling effect,” and they needed to be conscious of the wind. They were told that H2S had a smell at very low levels, like

rotten eggs, and they needed to know which way the wind was blowing (Tr. 40). The Complainant stated that this segment, which lasted five to ten minutes, was presented by Mr. Valois; she did not recall if it was a power point or up on a screen (Tr. 40-41).

The Complainant stated that for three weeks, she went out with another driver, who walked her through what she could expect daily as a driver. Her primary trainer was Phillip Lang. When her trainer felt comfortable letting her go, he filled out a form stating that she was capable of performing the job (Tr. 31-32).

The Complainant testified that her supervisor was Wes Currier. She stated that she did not receive any performance evaluations; but she never received a report of a bad job performance from her supervisors or anyone in the company (Tr. 42, 44). The Complainant's last day of work was December 23, with an effective termination date of December 28, 2011 (Tr. 41).

On an average day, the Complainant hauled between one and four loads of oil. She got her site orders, directions, and did her pretrip; she then fueled up and went to the site, where she determined which tank to pull the oil from (Tr. 44-45). The Complainant went up a stairway on the tank to look in the hatch to see if the tank was full. She customarily set her tools on her left, and dropped temperature gauges and tools to calculate how much oil would be pulled out (Tr. 48). The Complainant explained that she used the diameter of the tank, and the measurement to the bottom, multiplied by a factor, to determine how many barrels were in a tank. Her tank could hold 200 barrels, although it was not filled up because it was necessary to have air space to account for the sloshing of the fluid (Tr. 49).

Once the Complainant loaded the oil, she transported it to the unloading location, which at least 85 percent of the time was the Enterprise pipeline. The unloading process was generally a reversal of the loading process. There were numbers on a selling meter that she had to write down, so that she had the amount being deposited. The Complainant was paid by the miles she drove, and the amount of barrels she transported. She typically worked six days a week, and sometimes seven (Tr. 51-52).

#### *Tiger Hutton Incident*

On December 15, 2011, the Claimant was attempting to pick up her second load of the day when her trailer became stuck in muddy roads. She was reassigned to pick up a load from the Tiger Hutton lease site in Seminole, Oklahoma (Tr. 53-54). However, the directions she was given took her a mile short of the entrance, and she turned in at a Sunoco deposit site and called dispatch. She tried the number she was given for a pumper, but got someone else's voice mail (Tr. 55).

The Complainant then called dispatch back, and realized that she had been given the wrong number for the pumper; she called him again. The Complainant stated that the pumper is the person who called the Respondent and told them when a tank was full, and that someone needed to come and pick up the oil. The pumper made sure that everything worked. He did not work for the Respondent, but for the owner of the well site (Tr. 56-57). James, the pumper,

talked her into the lease, which was an open field with a bunch of houses down a road (Tr. 57). According to the Complainant, the site was in a residential neighborhood. She went down a gravel road, with houses all through the area. James instructed her on how to turn around so that her equipment was facing the pumps (Tr. 58).

The Complainant testified that James asked her if she had been told about the pump. She had not heard of a pump before, and had never had to use one at a well site. James told her that she needed to go to a box that looked like an electrical box, with a knob that said “auto,” “off,” and “hand.” He told her to turn the knob to “hand,” and leave it on for ten minutes before she went up and did any work at the tank. The Complainant stated that she had received no special instructions from dispatch about this site; she had never been there before (Tr. 59). None of the sites where the Complainant worked used a pump (Tr. 59-60). According to the Complainant, as the tanks fill, there is a smaller air space at the top, where a high level of H<sub>2</sub>S forms. The pump evacuates the lethal levels of gas off the tank, so that it will not “swoosh” when the hatch is lifted (Tr. 61).

On the day she was sent to this site, the Complainant did not know anything about the function of pumps, nor had the Respondent given her any training on this process. After she got her monitor, she was told convincingly by Mr. Currier and Mr. Deshazer that it would be rare for anything to happen with the monitor, and it was only on for safety purposes. She was told that Mr. Deshazer went to the sites, and knew what they were sending her to. They might smell the gas once in a while at very low levels, but they should not even worry about the monitor going off (Tr. 61-62).

The Complainant identified a photograph of the Tiger Hutton well site (CX 4). This photograph only shows one of the two tanks. According to the Complainant, most sites have two tanks; some have eight tanks. It was her choice as to which tank to pull from unless specified otherwise (Tr. 46). The Complainant stated that some of the tanks have a central location for hooking up a hose, with a pipe to each of the tanks; some have to be hooked up directly to the tank. There is a valve at each tank, which needs to be opened after the hose is hooked up. It was the Complainant’s job to determine which tank she should pull from (Tr. 47).

The Complainant left her truck and walked over to the box to turn on the pump. As she walked through the gate, the smell of H<sub>2</sub>S was stronger than anything she had ever smelled. She was holding her breath; it did not feel right. She turned the knob, and walked back to her truck. As she got in, she realized that her phone had gone off several times; it was Jeff Ward trying to contact her. Mr. Ward had called her four times (Tr. 64). The Complainant called Mr. Ward to let him know she had gotten directions, and according to her, the first words out of his mouth were, “that lease will kill you.” Mr. Ward started to tell her about the pump, but she told him James had already told her about the knob, and she had gone to the box and turned it to “hand.” Mr. Ward wanted her to go back, so she took the phone with her and walked back to the box. She told Mr. Ward that she had turned the knob on the front, and he told her that knob did not work, and the only active knob was on the side (Tr. 67).

The Complainant stated that Mr. Ward was very concerned and emphatic; he asked her which way the wind was blowing. The Complainant thought it was unusual to have this

conversation about dangerous information with another driver. It was her understanding that Mr. Ward and Ronnie were the only ones who loaded at that well site (Tr. 68). The Complainant had not yet hooked up her hose or been up to the hatch. Mr. Ward told her that when she went up, there was a pipe that she should use to lift the hatch slowly, and evacuate the gases. He told her that the pump would not handle everything, and that was why they left the pipe up there (Tr. 69).

The Complainant left her phone in the truck. She was already feeling overwhelmed with the smell, and she took a scarf and wrapped it around her head for protection, thinking that it would filter whatever went into her lungs (Tr. 70). When she got to the top of the hatch, she was standing between the two tanks, trying to turn her head to the left, because the wind was blowing to the right. As she turned her head, she saw fumes coming out from beneath the hatch of the tank on the left (Tr. 70). This tank was ready to load. She tried to lift the lid gingerly, and prop the hatch open, when she realized she was hearing a sound, which was her monitor going off (Tr. 71). She dropped the lid and ran down the stairs, and then upwind (Tr. 71).

The Complainant stated that she had never heard the monitor go off before; it was not demonstrated in training. The monitors were taken into another room to activate them; they were told they would not have to mess with them, because they ran for two years. Nor was she trained about opening a hatch with a pipe, or using a pump (Tr. 72).

According to the Complainant, when the monitor goes off, that just means that the level is greater than 10. She stated that they were given no training about how to work with high levels; they were not supposed to be there if the monitor went off (Tr. 73).

When the Complainant heard the monitor go off, it scared the daylights out of her. She recalled her assumption that the Respondent would not send her to someplace that was dangerous. Her mind could not wrap around the conflict between the information from Mr. Ward versus her belief that the Respondent would not send her somewhere where her life was at risk (Tr. 75). The Complainant did not feel that the Respondent prepared her to go on the Tiger Hutton site. The oil at this site was not the type she “could do what I was trained to do.” She dealt with crude oil that was not high in H<sub>2</sub>S, and was told that they did not have to worry about it (Tr. 74).

When her monitor went off, the Complainant decided she was not going to load her truck; it was too scary, and she had not been trained; she was dealing with her life. She went back to her phone to call Mr. Currier; she told him that her monitor went off. He asked her what it read, and when she looked at it, it said 0000. Mr. Currier tried to explain to her that he worked as a gauger in environments with tanks while his monitor was going off. He told her that it was not going to be a big deal, and she could still load the trailer. The Complainant told Mr. Currier that her body was shaking, and there was no way she was going to do it. Mr. Currier told her that if she felt unsafe, she should evacuate; he asked if she was all right. The Complainant disconnected her hoses, and got her tools (Tr. 77).

The Complainant stated that Mr. Ward called her back to check on her, and asked if she was still alive. She told him that she had refused to do the load. According to the Complainant, Mr. Ward told her that he and Ronnie had been trying to get the Respondent to do something

about that site for a long time; they had sent emails to Mr. Valois about how the site should be handled, and that it should be handled by two people. Mr. Ward told her that he and Ronnie both detected 500 to 700 ppm on their monitors; there was supposed to be self contained breathing apparatus for the persons going up to the tank (Tr. 80-83).<sup>1</sup>

Mr. Ward asked her if she had put her monitor on her collar, and she told him she was trained to wear it on her hip. He told her the collar was the proper place to wear the monitor, because that was where you breathe, and where the H2S affects you (Tr. 84-85).

The Complainant went home. Nobody called to check on her.<sup>2</sup> The following day, about 1:00 or 2:00 in the afternoon, she was using the bathroom in the main building at Enterprise. She realized that there were some buttons to push on her monitor, and when she pushed them, they showed two numbers, 11.6 and 17. Mr. Reid was at the desk at the entrance, and she showed him the monitor, and asked him if he could tell her what the numbers meant (Tr. 89-90). Mr. Reid was concerned, and said that it was a greater level than what they would allow their employees to work with; they did not allow their employees to work over 10 ppm without breathing apparatus (Tr. 90). He told her that the 11.6 was the level of H2S, and the 17 was how many months were left on the monitor (Tr. 92, 97).

Mr. Reid asked the Complainant where the monitor had gone off, and if she was bringing in that oil to Enterprise. She told him that she was not, and that she had refused the load. Mr. Reid asked her where she would have taken the oil if she had hauled it (Tr. 176). The Complainant stated that Mr. Reid was concerned about the 11.6 reading, and wanted to know if that was what she was bringing into their site; he did not want to subject their employees to that level (Tr. 93). Mr. Reid asked her if she had told the Respondent about the monitor going off; she told him that she did, and she and Mr. Reid talked about what happened at the lease site (Tr. 94). The Complainant told Mr. Reid that Mr. Ward told her the site registered for them at 500 to 700 ppm, which caused Mr. Reid to be very concerned. Mr. Reid brought someone else over, the Complainant thought a person from safety, and told her that he had to go check something. The safety person told her that their employees would not be at a site with over 10 ppm without breathing apparatus; at over 50 ppm, they would have to have two people (Tr. 94).

The Complainant stated that she did not tell Mr. Reid that someone had reported a level of 500 to 700 ppm in oil shipped or hauled to Enterprise (Tr. 175). She told him that she had heard from other drivers that 500 to 700 ppm had registered in oil at that site. She did not say that this oil was delivered to Enterprise; that was his assumption. She was just expressing what she had been told (Tr. 176).

The Complainant was concerned about the levels that showed on her monitor. No one ever called her to ask her to read the monitor, or told her over the phone how to read it. She

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<sup>1</sup> The Complainant acknowledged that she never saw any documentation that there was a reading of 500 to 700 ppm at Tiger Hutton, but she had no reason to believe that a driver would lie to her. She agreed that a person exposed to those levels would lose consciousness after a short exposure, but stated that did not mean they did not use the monitor at the end of a stick to detect it. She had not heard of anyone losing consciousness at the Tiger Hutton lease (Tr. 169)

<sup>2</sup> The Complainant stated that she did not contact Mr. Valois with questions or concerns about her exposure because she did not believe she would have gotten a straight answer (Tr. 173).

acknowledged that Mr. Currier called her and asked her what it read, and she told him 0000. She had not spoken to Mr. Currier or Mr. Shea on that Friday; she stated that she did not trust them. She stated “If nobody’s going to even act like they care what I was exposed to, I wanted to feel like I was talking with someone that I felt might have a more caring attitude” (Tr. 97). Mr. Reid had been in their safety meetings, and she had talked with him before. She felt that he would have no reason to protect himself, and no conflict of interest. She wanted an honest answer about her safety (Tr. 98).

The Complainant stated that she did not call Mr. Currier, Mr. Valois, or Mr. Shea to tell them she had heard that H2S at 500 to 700 ppm was recorded at Tiger Hutton, because what kind of response was she going to get; look at how she was treated when she told them the first time (Tr. 176).<sup>3</sup> She wondered why no one got mad at Mr. Ward for telling her that (Tr. 176).

The Complainant stated that there was no way for her to know what her exposure was before the 11.6 reading; she was concerned about her exposure, and the fact that nobody seemed concerned about her. Mr. Reid told her that any reputable company would have patted her on the back for bringing it to their attention that the H2S level was too high. She told Mr. Reid that she had told Mr. Currier her monitor went off, but nobody ever asked her about it, so that was why she was asking him.

On December 16, 2011, Mr. Currier sent the Complainant an email telling her that she was suspended for releasing confidential information to trade partners (Tr. 101, RX 18). When Mr. Currier called to tell her about a scheduled meeting, he told her that she was suspended for three days (Tr. 105). According to the Complainant, no one told her what confidential information she was accused of sharing. It was her understanding that it was talking to Mr. Reid at all about H2S and her monitor. But she did not believe that she disclosed confidential information. The Respondent never provided her with any policy about sharing confidential information, or any rule of conduct. This was never discussed in safety meetings, and the term “confidential information” was never discussed with her before (Tr. 106).

The meeting took place on December 19, 2011, at the Drumright terminal, in Mr. Currier’s office (Tr. 105). It included Mr. Currier, Mr. Valois, and Mr. Shea (Tr. 105). The Complainant’s purpose for attending the meeting was to discuss her concerns about the Tiger Hutton lease site (Tr. 111). She recorded the meeting, stating that it got “worse and worse,” and she did not trust them (Tr. 108). She thought that there was something terribly wrong if her employers would send her to the site, and then treat her like that for talking to somebody else about something innocent. She did not feel comfortable, and did not think things would be honestly dealt with (Tr. 108).

The Complainant stated that no one at the meeting told her that she could speak with OSHA if she had a safety concern, but they “agreed” with her that she could go to OSHA if she had a concern (Tr. 174).

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<sup>3</sup> The only person the Complainant called was Mr. Currier, whom she told that her monitor had gone off. She did not tell anyone, other than Mr. Reid, about the information she claimed came from Mr. Ward regarding the 500 to 700 ppm levels.

According to the Complainant, they told her that she had told Mr. Reid that the Respondent was hauling oil with 500 to 700 ppms into Enterprise. She disputed that, stating that she did not know where the oil was being hauled, and she told Mr. Reid that she did not haul it in there. She was told by other drivers about the ppms; she never disclosed where they hauled it.

The Complainant stated that Mr. Shea insisted that this was “confidential information” (Tr. 109). He told her that she was not allowed to talk to anybody about anything that went on at Pacer with anyone but them, although not in those exact words. He told her that if she did, he would fire her on the spot (Tr. 107). Mr. Shea told her that there was an investigation for a day and a half, and that she wasted a day and a half of his time (Tr. 110). Mr. Shea told her that her conversation with Mr. Reid caused Enterprise to be concerned about a violation of their contract, which includes H<sub>2</sub>S content. He said that they could have been “stopped dead in their tracks” in being able to bring oil to Enterprise (Tr. 116). The Complainant did not think that she did anything wrong; she never signed a document talking about confidential information, and she disputed that this information was confidential (Tr. 110).

The Complainant stated that when she went into the meeting, her eye was half swollen shut as a direct result of her exposure (Tr. 111). She did not seek medical treatment (Tr. 174). She told them that she was concerned that the site was rusting out, and if the tanks came apart, the H<sub>2</sub>S would go everywhere in the area (Tr. 111). The Complainant stated that the lease site was right in the middle of a neighborhood, and if the tanks rusted out, it would be dangerous (Tr. 112).

There was also a conversation about whether H<sub>2</sub>S was flammable, because the truck has to be running to pump oil into the trailer. She asked how they could expect anyone to load the trailer when it could blow up, and they denied that H<sub>2</sub>S was flammable (Tr. 112). The Complainant was told that she was confusing H<sub>2</sub>S with condensate, which was different than oil, and which was also hauled by the Respondent. It was more like gasoline than oil. It was her understanding that a truck had already blown up and burned to the ground after the engine ignited the fire (Tr. 113). She stated that Mr. Shea was “basically inferring” that condensate would blow up, but H<sub>2</sub>S would not. She kept insisting that H<sub>2</sub>S was flammable, and Mr. Shea would not acknowledge that it was.

The Complainant also told them that Mr. Currier tried to convince her that she could load the oil and haul it, but she refused to do it (Tr. 115). She stated that Mr. Currier told her that if she felt it was unsafe she should evacuate, but she did not recall either Mr. Shea or Mr. Valois telling her that she did the right thing by leaving (Tr. 170-171).

The Complainant did not think that she had done anything wrong, and she fought for the whole hour about the fact that they could not fire her for doing something she did not know was wrong. She did not think there was any reason for her to be fired for talking with somebody about safety, which everyone is concerned about (Tr. 116). She stated that they never got to what part of the conversation with Mr. Reid was confidential (Tr. 117).

The Complainant stated that they basically agreed that the H<sub>2</sub>S at the site was at 500 to 700 ppm levels, but that was before the pump was installed. They were well aware of the levels

reported by Jeff and Ronnie (Tr. 117). According to the Complainant, Mr. Shea agreed to be respectful, and leave it at that (Tr. 110).

### Spill Incident

On December 23, 2011, the Complainant was working the Shamrock lease. She had been to that lease about three times before. On this date, on her first load it took 35 to 40 minutes to load 185 barrels. She was on load number two, and was sitting behind the drivers wheel, doing her shipping papers, when she looked in the rearview mirror and saw oil shoot out to the side of the pump (Tr. 118-119). According to the Complainant, this load filled up with 200 barrels in about 20 minutes. When the tank was full, it shot out to the bucket. She flipped the cruise control down to shut the pump to a lower level, jumped off, and turned the pump off (Tr. 120). The Complainant stated that the spray came from right behind the wheel, maybe 24 inches from her; less than two feet away. It took her about five seconds to get to the pump (Tr. 122-123).

The Complainant testified that the cruise control accelerates the pump flow. Once you get it going, you get in the cab and activate the cruise control; that was how she was taught. She stated that on this load, she set the cruise control to the same level as the first load. It only had one level, automatic. There was nothing different about this load as compared to her first load. The Complainant was absolutely surprised by the spill (Tr. 124).

The Complainant could not drive with a full tank, so she did the responsible thing by draining some of the oil back into the tank (Tr. 126-127). She tried to figure out how much oil was spilled by using the amount she started with, and subtracting the amount she ended up with; the variance would be what was on the ground. She estimated that she spilled somewhere in the neighborhood of a quarter to .66 barrels, based on her calculations (Tr. 125-126). She also drained the pot at the bottom of the stairs (Tr. 195).

The Complainant claimed that she had received no training on how to handle spills, other than to call somebody; basically, she was supposed to contact her manager (Tr. 127). She received no documentation or reference material on how to handle a spill (Tr. 127-128). According to the Complainant, the training on loading procedures was on Friday; Mr. Valois never discussed proper loading procedures, stating that they would learn this on the job as part of their training (Tr. 184). The Complainant acknowledged that they were shown movies at orientation on proper loading procedures, but questioned what part of the loading procedure was covered. She stated that they were taught how to do testing at the Indian reservation, and shown "other procedures" in the movies (Tr. 186).

The Complainant did not recall attending a meeting with a discussion about spill reporting procedures, or any details of the meeting in October 2011 where the subjects included spill reporting (Tr. 186). She identified her signature on the sign in sheet, but said that she never read the subject on the sign in sheet (Tr. 188). The Complainant claimed that they were having breakfast while the sign in sheet was being passed around, and all they did was sign it. Although she stated that she was "very attuned," she did not recall any discussion about spill reporting (Tr. 189).

It was 12:10 when the spill happened, and by the time she turned off the pump, let some of the oil out of her tank, sucked up the oil in the bucket, measured, and turned off all the valves, it was 12:35. She called Mr. Currier, but he did not answer (Tr. 128). She did not leave a message for Mr. Currier, because she usually did not leave a message with him. Mr. Currier's voicemail was very long, and in her previous experience, if she called him, he would call her back when he could; she always got a call back from him (Tr. 129). The Complainant stated that she left the site, to finish her job of unloading the oil, and to determine how much was delivered, so that when Mr. Currier called her back, she would be able to tell him the numbers (Tr. 129).

Mr. Currier called her back when she was almost finished unloading at Enterprise. After she finished talking with him, the Complainant went back to the site for her third load. When she got to the site, the maintenance manager and a mechanic were there, spreading dust on the oil on the ground (Tr. 130). The maintenance manager seemed upset, and told her to take her truck back, she was done. She asked him why he was the one telling her what to do, since she had just talked with Mr. Currier, who asked her how many loads she had left to do. Mr. Currier was her manager, not the maintenance manager; she expected to be able to come back and continue getting loads (Tr. 196).

The Complainant identified a photograph of the spill site, stating that it did not look like that when she got back, because the mechanics, who worked for the Respondent, had already started putting down dust, spreading it all over the ground (Tr. 131, RX 14A). According to the Complainant, the spraying of the oil began in the area at the bottom of the stairs; she did not recall it being as wide as the area of oil shown on the photo (Tr. 131). The Complainant remembered about three puddles under the trailer; there was some drainage, because the road was at a severe slant (Tr. 132).

The Complainant stated that she ran into Mr. Currier at the office, but he did not say a word to her. She got the impression that he was mad at her; he walked right by her and ignored her (Tr. 205). He had his coveralls on, and was heading to the spill site (Tr. 206). At that point she threw up her hands, and waited for them to tell her what to do; that was the way she left it with Ms. Carroll. She did not ask Mr. Currier if she needed to work the next day; she waited for a phone call to see if she needed to go to work on Saturday, and then turned her phone off after business hours (Tr. 200). The Complainant did not report to work the next day because she was told that she was done by the maintenance manager, who was not a supervisor (Tr. 198). She did not know if she had been scheduled to work on Saturday (Tr. 199).

The Complainant stated that her family was visiting for the holiday, and when she did not receive a response from Mr. Currier by 5:45 p.m. Friday, at her family's urging, she turned her phone off. Late Saturday she retrieved a voicemail from Mr. Currier, asking her to come in for a write up or disciplinary action; he would then send her out on the next load (Tr. 136-137).<sup>4</sup> Based on that voicemail, the Complainant expected that she would receive a write-up (Tr. 137).

On Tuesday, the Complainant received an email from Mr. Shea about a meeting scheduled for Wednesday. Mr. Shea asked her to drive to Tulsa for the meeting, but she told

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<sup>4</sup> This meeting was scheduled for Saturday morning; Mr. Currier and Ms. Carroll were there, and waited for the Complainant, who did not show.

them she did not have the money for gas, and asked that the meeting take place in Drumright. They ultimately agreed on a phone conversation (Tr. 139-140).

The phone call took place on Wednesday, and included Kathy Carroll, Wes Currier, Paula King from Human Resources, and David Shea. Mr. Shea stated that the purpose of the call was to talk about the spill (Tr. 140). According to the Complainant, after Mr. Shea kept pushing her for reasons why she did things wrong, he told her that she was discharged. The call did not last more than ten or fifteen minutes. The Complainant stated that when Mr. Shea told her that she was being discharged for moving away from the pump area, she told him that that was the way she was trained, and you don't just stand at the pump (Tr. 141).

The Complainant tried to explain to Mr. Shea that you could not possibly do the load and just stand at the pump, but he would not let her explain anything. She told him that was how she was trained, and Mr. Shea said he did not care how she was trained. The Complainant recalled some discussion about the fact that she did not "negate" her responsibility to make contact with her supervisor. She stated:

It's just what you consider in the timely manner because you're going to want to give him information that would be pertinent to his decision that that's how much is on the ground.

(Tr. 142). The Complainant stated that she tried to explain, but could not get much in (Tr. 142). She also tried to talk about other spills, but Mr. Shea would not let her talk, and kept saying let's get to the point (Tr. 143). She thought that Mr. Shea probably asked her for an explanation, but was basically saying that she had not done something right, and telling her what she did wrong. The call ended with Mr. Shea telling her she was fired; she never received any documentation (Tr. 143).

The Complainant was terminated because of the spill. She stated that she did something wrong, she did not stand there and hold the pump handle, or make contact with Mr. Currier, or call out the National Guard. The Complainant stated that she did not receive any training about different levels of spills; she learned later that this was a level 3 spill (Tr. 133). She provided a written statement, explaining that she felt the tank filled up faster than normal, and showing the numbers from her shipping papers (Tr. 134). She gave her statement to Kathy Carroll; she has not seen it since, and she did not keep a copy (Tr. 135).

The Complainant did not find another job until May 2012, as a trainer with CRST. She was there for only three days before she broke down. She then worked for Cook and Sons, and now works for a temp service called Superior Driving Source. These are all truck driving positions (Tr. 144, 146). The Complainant was not able to pay the rent on her house, which she had leased with the intention to buy (Tr. 144). She now earns about a third of what she earned at Pacer (Tr. 146). The Complainant had intended to work for Pacer for the next ten years; her things are in storage, and she is living with her daughter in Tennessee (Tr. 145). The Complainant applied for unemployment but did not get it; Pacer denied it (Tr. 147).

According to the Complainant, Pacer told the unemployment office that she flagrantly violated policies, was insubordinate, and spilled barrels of oil on the ground. They made things up that were not even comprehensible. She appealed the denial, but it was too late (Tr. 150).

The Complainant stated that she applied for probably a hundred jobs through the internet and mail, with mortgage and title companies, and every area in her field of expertise. She had a gap because of her trucking work, and the termination was killing her (Tr. 151).

The Complainant quit her jobs with CRST and Cook and Sons; she estimates that she has had \$10,000 in income since leaving Pacer.

Mr. Philip Valois

Mr. Valois has a degree in agricultural engineering, and has been working in occupational training for safety since 1979, when he started working for an independent oil company (Tr. 212). He has worked for Pacer for seven years, as the DOT and regulatory director. He is responsible for all safety issues; he writes the company's policies under the direction of management, and conducts quite a bit of training (Tr. 213). Mr. Valois is the writer and developer of three 40 hour training courses (Tr. 214). He has developed courses for the Department of Labor to retrain people for jobs in the oil business. He stated that the whole program was based on safety; he did this for about two years (Tr. 215). Mr. Valois has also conducted H2S awareness training for the Energy Training Council (Tr. 215).

According to Mr. Valois, hydrogen sulfide gas is created from the decomposition of plant and animal matter. It can appear in cellars, fishery situations, logging and pulp situations, and sewers and mines. It is very prevalent in the oil and gas business. You cannot predict where it will show up in the oil and gas business; it can show up anytime, anywhere (Tr. 216).

Mr. Valois described Pacer as a crude oil marketing and transportation company. Pacer purchases oil and markets it to various locations and companies. It is based in Oklahoma, but has operations in other states (Tr. 214).

At the time the Complainant worked for Pacer, the drivers were required to gauge and test the oil; load and unload the oil; and transport it from point A to point B safely (Tr. 216). The drivers go out to the oil leases, which are typically owned by someone else. It is possible a driver might encounter H2S at a lease site; it can appear at anytime. It could be the result of a work over with chemicals; it can crop up without the owner knowing. He stated that when acid is mixed with the iron sulfide in the pipe, it can create a hydrogen sulfide mixture (Tr. 217).

Mr. Valois stated that he conducted a two day orientation training session. The first hour covered human resources, and the drivers were told about insurance (Tr. 217-218). He then moved right into hazardous material training, which is required within 90 days of hiring a driver. He described this as function specific training, which involved security training, because the drivers would be hauling a Class 3 flammable combustible liquid. The training involved loading and unloading, and any function the drivers would have to do (Tr. 218). The training also

involved understanding the hazardous materials table, and the five required parts of the shipping papers. It took about five hours, and they then moved on to other subjects (Tr. 218).

Mr. Valois recalled seeing the Complainant at the orientation training. At that training, he talked about H<sub>2</sub>S, because he needed to make the drivers aware that it could be there at any point, and how they should react if they confronted it. He stated that it is an odorless, colorless, poisonous gas. In relatively low concentrations it has a slight odor of sulfur or rotten eggs; in higher concentrations, it affects the olfactory nerves and gets into the lungs; it is aspirated at higher concentrations. It is a very deadly gas. It is flammable at 46%, which is relatively high; it would have to be at a pretty high part per million to combust (Tr. 219, 220).

Mr. Valois stated that during the orientation, after they go through the hydrogen sulfide training, he issues every driver a brand new monitor. He writes the serial number in the driver's qualification folder, so they have a record (Tr. 220). The monitors are activated while the drivers are in class, so they understand how they are activated. He explains how the monitors are used, and what they are used for. The Complainant received a monitor, which she activated, and it went off, so she was aware of what it would do (Tr. 221, 307). Mr. Valois stated that the label over the screen is first removed, and the button is pressed and held for fifteen seconds while the monitor turns on and goes through its functions. It flashes red, vibrates and beeps, so the driver knows what the monitor will do if it gets a reading. It counts down from 20 parts per million to zero, and flashes red until it reaches zero, when it is set. The monitor has a lifetime battery of two years; it is never turned off (Tr. 221).

According to Mr. Valois, every driver in the company must go through orientation before he or she is released to drive on his or her own. There were several drivers at the Complainant's orientation from other locations. He used either video or powerpoint, or both, for the H<sub>2</sub>S training, and talked about the possible hazardous effects of H<sub>2</sub>S. Mr. Valois stated that the video was by Moxie Media, which creates videos for the oil field; it is a very good video, and the powerpoint mirrors it (Tr. 222). During the orientation, Mr. Valois talks about the exposures and dangers of H<sub>2</sub>S, where it comes from, and the possibility that it can show up at any location at any time. He talks about administrative and engineering controls, and advises the drivers if they have any questions they should contact him. He provides his business card. He also takes questions after his presentation; he did not recall any questions at the Complainant's orientation session (Tr. 223).

Mr. Valois identified Pacer's hydrogen sulfide gas awareness policy (RX 1), and stated that the matters covered in the policy, which he wrote, including the matters in Section F, were discussed at orientation. The policy lists him as the contact person (Tr. 224-225). Mr. Valois stated that the information about the levels of 500 to 700 ppm was in the policy because it was very important for the drivers to know the threshold limits for H<sub>2</sub>S. A person exposed to this level would pass out very rapidly, and more than likely fall. The drivers work alone, and the sites are very remote. The drivers do not typically wear respirators (Tr. 226). Once a person goes down, if they are not rescued and resuscitated very very quickly, they will die. He stated that no one has lost consciousness or died due to H<sub>2</sub>S exposure while he has been at Pacer (Tr. 227). He explains to all employees during orientation that the H<sub>2</sub>S awareness policy is in the corporate safety manual, which is available at any time, and is on the server (Tr. 301-303). He

did not recall giving the new employees a copy of this policy at the Complainant's orientation (Tr. 304).

Mr. Valois stated that H<sub>2</sub>S is heavier than air, and is a lot like gasoline vapors. He describes it in class as flowing like water; it will go to the lowest point and collect, unless it is dispersed by wind. Wherever it comes out, it will fall (Tr. 228). He stated that it was a good idea to have the monitor at the belt or waist, as long as the opening where the H<sub>2</sub>S is coming out is not over the head. Typically, tank drivers work at waist level or lower (Tr. 228). If H<sub>2</sub>S comes out of the tank, it will hit the monitor right at the waist, and let the driver know it is there (Tr. 229)

Mr. Valois stated that at orientation, he gave the drivers instructions about what to do if their monitor went off. They were to move upwind and uphill immediately. If they were downwind, they were to go crosswind and uphill as fast as possible. He discussed stories about people who were exposed or killed. The drivers were told that they should evacuate the area (Tr. 229).

According to Mr. Valois, it was not a part of training that the driver is supposed to check the monitor first and then decide to leave. It is like a fire alarm – you don't stop to see where the fire is. When the monitor goes off, you move out of the area; there is no question about it. If you stop to look for a reading, it might be late (Tr. 230).

Mr. Valois testified that there are other ways to mitigate against H<sub>2</sub>S exposure, including engineering controls (Tr. 230). These include venting systems, vacuum pumps, ventilation systems, and vent pipes; they are fairly standard in the industry. These systems vent the H<sub>2</sub>S away from the area. Sometimes it is vented back into the tank on a closed system, from the truck to the tank so the tank is never opened. This is in extreme cases, and Pacer does not typically deal with them. There are ventilation type vacuum pumps that pull the H<sub>2</sub>S out of the tank and disperse it. Once it hits the atmosphere, it disperses very readily; it does not take much of a wind, and is not as dangerous (Tr. 231). Mr. Valois talked about venting systems and engineering controls at orientation, on one of his power points (Tr. 232). He knows that certain tanks have H<sub>2</sub>S warning stickers (Tr. 232). Mr. Valois went to the Tiger Hutton site shortly after the Complainant left. He knows that there is a ventilation system at that site (Tr. 233).

Mr. Valois stated that Pacer has safety meetings every month, where he talks to drivers and asks for comments, and gives them the chance to speak with him. He stated that quite often the subject of monitors going off is brought up at the safety meetings. He also does regular vehicle inspections with the drivers, and meets them at the unloading sites, where they might mention monitors going off (Tr. 233). Mr. Valois did not know of any employee who was discharged or reprimanded for telling him that their monitor went off. The Complainant never called, emailed, or left a voicemail for him with any questions about safety matters (Tr. 234).

Mr. Valois discussed the ventilation system at Tiger Hutton, which was installed because a driver, Jeff Ward, reported H<sub>2</sub>S on the lease. The terminal manager notified him, and he notified the operator. Pacer refused to haul oil from the lease until the ventilation system was put in place. This was the typical protocol when Pacer becomes aware of H<sub>2</sub>S on a lease; they will

not haul until there is some type of engineering control (Tr. 235). Mr. Valois stated that this happened before the Complainant came to work. The operator of the lease was not with Pacer; the operator can be the owner of the well, or the contractor who operates the well, who is responsible for producing the oil, getting it out of the ground and into tanks, and selling it (Tr. 236). Mr. Valois stated that after the ventilation system was installed, Mr. Ward did not refuse to go to this lease (Tr. 237).

According to Mr. Valois, they sell about 70 percent of their oil to Enterprise, which is a purchasing company. The Pacer drivers go to the lease, and physically take possession of the oil when it is loaded on the truck; once the oil goes through the valve on the tank, it belongs to Pacer. The driver writes a ticket for the oil, and takes it to Enterprise and unloads (Tr. 237). The oil goes through the Enterprise meter, where Enterprise takes possession of the oil, and pays Pacer. Mr. Valois stated that Enterprise has its own rules about conduct at their facility, and they come to safety meetings to talk to drivers and make sure they are aware of any particular safety rules, such as chocking wheels, that apply at the Enterprise facility. Enterprise has nothing to do with drafting safety policies or procedures for Pacer, and no role in drafting loading procedures. Mr. Valois has never told an employee to contact Enterprise if they have safety concerns at a lease, or if their monitor goes off (Tr. 239).

Mr. Valois identified a photograph of the Tiger Hutton lease (CX 4). He stated that the tank has a stairway with a handrail, which the driver uses when taking the oil from the tank into the truck. It is about two feet from the landing area at the top of the stairs to the top of the tank; if a driver were bending over, the top of the tank would be below the waist. He stated that drivers are instructed to keep their face back and away, and upwind, when they open the hatch at the top of the tank (Tr. 261).

Mr. Valois stated that H<sub>2</sub>S is suspended in oil, and is produced along with the oil. It comes up through the oil, and collects in the top of the tank in the vacant space. As the tank fills up, since it is heavier than air, the H<sub>2</sub>S pushes the air out of the tank, and what is left in the vacant area will be a highly concentrated quantity of H<sub>2</sub>S as a vapor (Tr. 262).

Mr. Valois was at the meeting regarding the Complainant's monitor going off, with Mr. Shea and Mr. Currier. The Complainant stated that she panicked when her monitor went off, and she did not know what to do. She said that she was not sure how to operate it, which Mr. Valois stated she had been instructed to do in orientation. Her monitor went off, and the Complainant did exactly as she was instructed, and moved away from the area and called dispatch. She did the right thing by leaving without picking up the oil, which is what they instruct their drivers to do. Mr. Valois stated that driver safety is the most important thing, and they do not want to put their drivers in this situation (Tr. 264). They are instructed to move away upwind, and get the truck out if they feel safe enough to do so. If not, they are to get away and call. The videos show that, and he talks to them about rescue – you cannot safely rescue someone who has fallen from H<sub>2</sub>S. He tells the drivers that if they feel unsafe in any situation, they should not do it. He has absolutely no problem with that (Tr. 265).

At the meeting, Mr. Valois looked at the Complainant's monitor; the reading was 12 or 14 ppm. He put it in a calibration station, bump tested it, and gave it back to the Complainant in

case she was going back out, so they could make sure it worked properly (Tr. 266). Mr. Valois stated that he and Mr. Shea later went to the lease and looked at it, and took a sample. The lab report showed that there was 1 or 2 ppm in the oil, which was pretty low (Tr. 267). Mr. Valois stated that on the day he went to the lease, he read the air with his personal monitor at the hatch, and it read 20 ppm (Tr. 346). He stated that the reading will fluctuate depending on where the monitor is held. The 20 ppm was well within the OSHA permissible exposure limit for an eight hour time weighted average (Tr. 347). The pump was working, and the knob on the vacuum pump was in the on position. Mr. Valois could see vapors coming out of the vent line, and hear the electric motor running. He was not aware of another switch on the pump (Tr. 348).

Mr. Valois did not recall the Complainant mentioning any concerns about public safety during the meeting; she was concerned about her safety. She did not make any complaints or voice any worries about the neighborhood, or operating the vehicle (Tr. 273). Mr. Valois stated that it would be reasonable for the Complainant to believe that she was in great danger at the Tiger Hutton lease. But the belief that the public was in danger was not reasonable unless the public climbed on the tank battery and stuck its face in the hatch, because H<sub>2</sub>S disperses very readily in the air. It will disperse within feet from the time it hits oxygen, and is not harmful to the public. It is really dangerous when it is concentrated in confined spaces; people who die went into sewers, mines, cellars, and tanks (Tr. 290). Although the Complainant's belief that the H<sub>2</sub>S at the Tiger Hutton site was hazardous and dangerous to the public might be reasonable if he had never been on the lease, he went out there; it was on a farm, out in the country (Tr. 292).

Mr. Valois stated that the H<sub>2</sub>S awareness policy said that the first symptom of exposure is eye irritation. At the meeting, the Complainant complained of eye irritation, but she said nothing that morning during the Christmas party when they were passing out bonuses (Tr. 306).

Mr. Valois was aware that there was a knob on the pump at the Tiger Hutton site, but he had no idea if it was working that day. He does not typically test sites for H<sub>2</sub>S; the drivers are their key. Pacer has six to seven thousand oil leases in six states, and he cannot physically go to every one. He tries to go to the ones where there are hazards (Tr. 293). Mr. Valois stated that Mr. Ward and Mr. Everhart reported H<sub>2</sub>S at that site, but he did not recall the level. He knew it was over 20 ppm, because Mr. Ward and Mr. Everhart told him that their monitor went off at one of the safety meetings. They contacted the operator and told them they would not haul from the site until it was addressed. He recalled that this probably happened in the spring of 2011 (Tr. 294-295).

Mr. Valois acknowledged that it was risky to send a driver into a situation without knowledge of the pumping system, and the level of H<sub>2</sub>S (Tr. 298). He stated that the drivers are trained to understand the dangers when they go to a lease, and they have to make the decision themselves. He is in the best position to provide drivers with knowledge, if this is reported to him (Tr. 298). Mr. Valois knew that dispatch had notes on the computer that there was H<sub>2</sub>S on this lease, and a vacuum pump, but he did not know if dispatch told the Complainant about this (Tr. 299).

Mr. Valois recalled another incident in 2011 involving a monitor going off. The driver's monitor went off as he was loading, and he called Mr. Valois and reported it. According to Mr.

Valois, the driver's monitor, which he was wearing at his waist, went off at the stock tank, while the driver was standing next to the truck. The monitor read 59 or 60 ppm. The truck was loading, and the vent line from the tanker came out pretty close to where the driver was standing. The H2S came right out of the vent line and hit his monitor. It was a reasonably high reading. He left the lease, and they contacted the operator. Mr. Valois went out and spoke with the owner of the property, and gave him some ideas on how to control it. There were no readings after that (Tr. 310-311). The driver's monitor was bump tested for calibration just afterwards (Tr. 312).

Mr. Valois acknowledged that the Complainant's monitor was not bump tested until four days later, but he stated that as far as he knew, she had not hauled oil until then. The plan was to talk to her on Monday, before she hauled any more oil, speak to her about the exposure incident, and then bump test and calibrate her monitor (Tr. 312). Mr. Valois assumed that the Complainant's exposure happened on Friday or Saturday. Monday was the Christmas party, and the meeting was after that (Tr. 313).

Mr. Valois stated that different companies teach different things about where to wear the monitor. Some like them worn at the collar, some at the belt; some have the employees clip it to their hardhat. He does not agree with that (Tr. 313). He stated that he would not disagree with Mr. Ward that a driver should wear the monitor at the collar, if that is where they want to wear it. H2S is heavier than air, and the monitor should at least be between where the H2S is going to be, and the breathing zone. It is a difference of opinion, a personal preference (Tr. 314). Their people were responsible for their own safety, and he did not go out and check to see if they were wearing the monitor on the boot or waist (Tr. 314). He makes sure that the drivers have working monitors. Typically, most drivers adhered to the company policy, and if they do not, he looks at them on an individual basis (Tr. 315).

According to Mr. Valois, if the monitor goes off, and the driver leaves the area and the monitor resets, the driver can go back and finish the loading process if he felt safe to do so. But it is acceptable to leave the area.

Mr. Valois wrote the driver loading procedures (RX 3), which list the required personal protective equipment, including the monitor, and says if a driver suspects a potential threat, he should not proceed any further. It is part of the security plan required by DOT. Mr. Valois talks about the procedures at orientation, as part of the function and specific training, and hazmat training (Tr. 273-274). According to Mr. Valois, it is left up to the driver, who is the only one out there, to make the determination of whether there is a threat. The policy states that if there is a leak, to stop the loading procedure immediately and call appropriate personnel, and contain the leak with absorbent pads. However, not all drivers carry such pads or a bucket in the truck (Tr. 275).

Mr. Valois stated that once the loading process has begun, the driver must stay within reach of the controls throughout the entire loading process. Oil pumps at six barrels a minute on the hydraulic pumps, and it will make a pretty big mess pretty fast if the driver is not standing by the controls. The company policy is that the driver stays with the controls, where he can stop the pump immediately if something happens, such as a valve leak, a fitting leak, or something else (Tr. 276).

Mr. Valois was familiar with the tanker that the Complainant drove, and stated that the controls are a few feet behind the fender of the driver's side, on the trailer (Tr. 276). They are not in the cab of the truck. The only control that regulates the speed of the engine, and thus the pump speed, is the governor. This is set one time, before the driver gets out of the truck, and before the loading process is started; it should remain (Tr. 317). Pacer discourages drivers from staying in the cab while the oil is pumped, because they cannot shut the pump off if they are not very close to it. On this tanker (CX 7), the controls are about halfway down the tanker, which is where the driver is supposed to stay while the oil is being pumped into the truck. The driver loading procedures state that a driver cannot leave the area for any reason until the trailer is completely loaded (Tr. 277-278).

Mr. Valois stated that DOT regulations require drivers to stay within 25 feet of the vehicle during loading, but Pacer policy is more stringent, and requires the driver to stay within reach of the controls. This is due to spills in the past, where the drivers were not within reach of the controls. Mr. Valois stated that they do not like spills; they are not very friendly, and are expensive to clean up. They cost time and money, and do not give them a very good public image (Tr. 279).

Mr. Valois discussed a meeting in October 2011 with the drivers to discuss spill reporting procedures. The owner, Richard Nichols, was unhappy about a couple of spills, and asked him to write a spill reporting plan and communicate it to the drivers. Mr. Valois wrote the policy, and he and Mr. Nichols reviewed it and made changes, and reviewed it with management before putting it in front of the drivers. Mr. Nichols, as well as the president, Larry Durham, was at the meeting to express how important the procedures were to the drivers (Tr. 280).

The Complainant was at this meeting, where the plan was rolled out (RX 4). It explained what they expected drivers to do in reporting spills. The required communication went from the driver to the terminal manager, to the district manager, and the safety director (Tr. 281). The plan was given to the Complainant at this meeting (Tr. 328).

Mr. Valois stated that the driver loading procedure (RX 3) is a working document, which is in the driver's handbook. It includes a discussion of disciplinary procedures, and explains that the severity of punishment depends on the severity and level of the violation. The disciplinary steps are used to look for patterns, so that he can correct patterns in a group of drivers. He uses them in many cases to look for patterns of unsafe behaviors. The procedures are very clear that the severity of the discipline is based on the severity of the violation (Tr. 323-324).

Mr. Valois stated that discipline could vary, based on the severity of a spill. He did not agree that there were other employees who were not discharged for spills that were more serious than the Complainant's. He was very aware of the circumstances involving a spill by driver Bob Hodge; he was not discharged, but his spill happened before the policy was written (Tr. 325). Mr. Hodge's spill was less than two barrels, or a level two spill (Tr. 338-340). According to Mr. Valois, the difference was the quantity of oil; it was all about secondary containment and quantity. Mr. Hodge's spill was less than two barrels (Tr. 354).

Mr. Valois stated that it was unfortunate to receive an email on a Sunday morning with a photograph of a spill, when they had discussed the policy in great detail at the October 2011 meeting. This was a level three spill, which required the driver to report it to the district manager immediately (Tr. 282). That would be Wes Currier. The policy required the driver, if any kind of spill happened, to stop, stay calm, determine the size and source of the leak and stop it immediately, and use every means necessary to contain the oil (Tr. 283). The driver was to reach a responsible company official. The policy says nothing about taking the load of oil to a facility for unloading. It instructs drivers to stay with the vehicle and spill until someone arrives. Mr. Valois never got a call from the Complainant about a spill, although the policy lists the order of people to contact, including him (Tr. 284).

Mr. Valois stated that the driver's handbook, which he created, has a list of company officials in the front. It is a looseleaf notebook that is in every truck, and includes a copy of the spill report and loading procedures, gauging procedures, and corporate names and contact information. It is all the information needed for a vehicle. If a driver is pulled over, all he needs to do is give this handbook to the trooper. This handbook is in every cab, and at orientation, he shows a master copy to the drivers. Mr. Valois stated that he referred to the handbook at the Complainant's orientation. Mr. Valois does vehicle inspections to make sure the handbook is in the trucks (Tr. 286).

Mr. Valois reviewed RX 14, the photograph of the spill site. He stated that he has had 30 years of experience, and has seen a lot of oil on the ground. He is well aware of what a four barrel, three barrel, two barrel, one barrel, or 15 barrel spill looks like; he can determine the amount pretty readily just by looking at it. It was obvious to him where the oil came from. Mr. Valois has been to this lease, which he described as very well kept, many times. He stated that the leak would have come from a truck. He did not think it could have come from the bucket at the bottom of the steps; usually a check valve in the line prevents the oil from coming back through the line. He did not think it was possible that the oil was the result of the bucket overflowing (Tr. 332). Mr. Valois noted that the Complainant worked for five months hauling crude oil. He thought that he and Mr. Currier were better able to make a determination of the amount of oil spilled (Tr. 333).

Mr. Valois described a level two spill as two barrels or less, which is not in danger of getting into a navigable waterway, and is within secondary containment, or within a dike, where it will not wash into a creek if there is rainfall. A level three spill is more than two barrels, outside secondary containment, where it can travel (Tr. 335, 337). In Mr. Valois' estimation, this was a level three spill, not because of the ability of local or company personnel to clean up, but because of the scope of the spill and its location. There were no waterways in the photograph, but there was a creek not far away. The spill was outside the graveled diked in area. Anytime the spill is outside secondary containment, and is more than two barrels, it is a level three spill (Tr. 337-338).

Mr. David Shea

Mr. Shea is the Operations Manager for Pacer. He has been with the company for 12 years, and has been the Operations Manager for about 8 years. Mr. Shea is responsible for the

movement of 75 trucks every day, and the movement of oil to the correct place. When the drivers pick up oil, he is responsible for making sure that it gets to their different trade partners, and that the quality is what the trade partners requested (Tr. 363). Mr. Shea stated that a trade partner is actually a competitor; they are all crude oil transporters and gatherers. Some companies have pipelines that they control, and they hire Pacer to put oil into their pipeline. They are competitors as well as trade partners. Enterprise is a very large crude oil transporter and gatherer, one of the largest in the nation. Enterprise is a Pacer trade partner; they have trade agreements in West Texas and Oklahoma (Tr. 364).

Mr. Shea stated that Enterprise has nothing to do with managing any aspect of Pacer's business. It is not responsible for taking employee complaints, or directing or ensuring that safety procedures are followed, other than at their facility. Pacer typically picks up oil from the producer's lease site; the Pacer trucks deposit oil into the Enterprise pipeline, at delivery stations (Tr. 365).

#### *Tiger Hutton Incident*

Mr. Shea stated that in early 2011, their drivers reported at a safety meeting that their alarms had gone off at the Tiger Hutton lease. Pacer had been hauling this lease for four years, and the alarm had never gone off. He asked the drivers if there had been any work on the lease, such as redrilling or recompleting, and was told by Jeff Ward and Ronnie Everhart that there had been activity at the lease (Tr. 368). They told him that the monitors had just started going off the month before; this was the first safety meeting where Mr. Shea heard about it. He stated that they needed to contact the producer, and tell them that the monitors were going off, and they needed to get out there and find out why (Tr. 369). Pacer did not own the lease; it was producer leased. They could not direct the producer to do anything. But they could make sure that when their drivers got to the site, they were safe. The producer told them that he would go out and check, and install the necessary equipment. There was a gap of about a month when Pacer did not haul from the lease while this was done. When the producer told them they had installed a system, Mr. Shea sent Lloyd DeShazer, their most senior driver, field gauger, and field technician, to the site (Tr. 369).

Mr. DeShazer walked around the site, but did not get any readings on his monitor. There was an evacuation system set up, which seemed to be working. Mr. Shea sent Mr. Ward and Mr. Everhart out, and they reported that their alarms did not go off, and they were able to haul safely. Pacer has been hauling the lease six to eight times a month since then, for years; it is being hauled today safely. Neither Mr. Ward nor Mr. Everhart were disciplined; they left to work for a competitor (Tr. 370). Neither Mr. Ward nor Mr. Everhart ever said that they did not want to go out to the lease after the evacuation system was installed. Mr. Shea asked them every time he saw them if they had any additional readings or alarms going off, and they said no (Tr. 385).

Mr. Shea stated that Mr. Currier called him to report that the Complainant's monitor went off, and she panicked and left the site. He asked Mr. Currier if she hauled the oil, and Mr. Currier told him she had not. Mr. Shea responded that that was good, and the Complainant did what was required of her by leaving the site. He stated that if the Complainant was uncomfortable about safety, and did not know how to read the alarm, she needed to leave. He

was not upset with the Complainant at all (Tr. 371). He was kind of upset with the dispatcher, who was brand new. Mr. Shea did not think the Complainant was experienced enough to go to that lease, which was not the lease she was originally sent to. He stated that the dispatcher did not read the notes in the dispatch system, which showed it was an H2S lease, with an evacuation system that the producer would go out and turn on. He should not have assigned the Complainant to this lease (Tr. 372).

Mr. Shea stated that if the driver gets to the lease and the system is not turned on, they need to go to the panel, flip it on, and wait 15 minutes to evacuate the air on the top of the tank so it can be safely hauled (Tr. 373).

Mr. Shea stated that Mr. Currier completed an incident report listing the time at 2:00, and called him immediately afterward. Mr. Shea asked Mr. Currier what the reading on the Complainant's monitor was, but he did not know. The Complainant had other loads to haul on Friday, and Mr. Shea told Mr. Currier to make sure the dispatcher understood that only experienced drivers could haul that lease. He told Mr. Currier that he needed to get the monitor from the Complainant to find out the reading, and he assumed that Mr. Currier would do that on Friday. Mr. Currier told him that the Complainant refused to give him the monitor (Tr. 373, 375). Once he found out what the reading was, Mr. Shea intended to sit down with the Complainant and reassure her that her exposure was minimal. But he did not know what the reading was, and until he did, it was hard to give her any kind of reassurance without speculation (Tr. 373-374).

On Friday afternoon, Mr. Shea got a call from Mr. Currier, stating that the Complainant had been at Enterprise, and had told them that Pacer was hauling 500 to 700 ppm oil into their facility. This alarmed them, and caused Mr. Reid to get his safety person involved. Both of them called Mr. Currier and asked him if Pacer was really delivering oil like that into their facility. Mr. Currier had to reassure them that was completely outrageous, that they had never done that and never would. It was extremely damaging to Pacer's reputation to have a driver make that allegation; it went right to the heart of the business relationship with Enterprise. Enterprise trusted them, and Pacer has always delivered quality oil within the Enterprise specifications. But all of a sudden, Enterprise was told something wildly outrageous could be happening, and they were alarmed (Tr. 376).

Mr. Shea stated that a reading of 500 to 700 ppm closes in on invalidity; when he heard it coming from Enterprise, it really dumbfounded him. He could not believe that this number was being thrown around to a trade partner (Tr. 386).

Mr. Shea was very concerned, as this went to the very nature and heart of his job to ensure that their trade partners were happy with what Pacer did. His job was to make sure that the quality of the oil Pacer delivered was within guidelines and specification on contract. This was so egregious, he was stunned that a driver would say something like this to a trade partner. He was absolutely concerned that it might interfere with Pacer's ability to sell oil to Enterprise. The first question Mr. Shea asked Mr. Currier was whether he needed to go out to Enterprise right away. Mr. Currier told him that he had been able to talk with Mr. Reid, and assure him that

they were not doing that, and had never hauled that kind of oil into a facility. Because Mr. Currier and Mr. Reid had a 30 year relationship, they knew and trusted each other (Tr. 377).

Mr. Shea asked Mr. Currier if the Complainant was supposed to be hauling Saturday and Sunday, and Mr. Currier told him that she was off on the weekend. Mr. Shea told Mr. Currier to make sure that the Complainant did not go anywhere else or haul any more loads until after they sat down and talked on Monday. Mr. Shea wanted to see if the Complainant was maliciously trying to harm the company by making her statements. He thought that Mr. Currier related that to the Complainant; Mr. Currier sent him an email saying that the Complainant wanted something in writing. He told Mr. Currier to tell the Complainant that she was suspended for giving confidential trade information to partners (Tr. 378-379).

According to Mr. Shea, their trade partners are also their competitors, and any information they have is confidential. The only thing that Pacer is required to give their partners is a system where they can track how many loads are coming into their pipeline. Their drivers write the truck number, date, time, ticket, and ticket number on a sign in sheet. They do not list anything that could divulge the names of the producers they buy oil from, or anything else. Mr. Shea stated that Pacer had been hurt in the past by trade competitors using the sign in sheets to get a list of the customers Pacer bought from, and then sending representatives out to try to buy the oil. Mr. Shea considers any information on any load confidential, or close hold information. He stated that Pacer did not need to tell their trade partners anything about the oil but the amount of delivery, time and date, and truck (Tr. 380).

Mr. Shea stated that the Complainant's suspension had nothing to do with her monitor going off, or with her evacuation of the lease site or failure to haul the oil from that site. It had to do with her reporting flagrantly wild, inaccurate information to a trade partner. He did not know her purpose, and was trying to figure out why she would say something so egregious. He wanted to talk to her as soon as they found out the reading on the monitor (Tr. 381). But the Complainant refused to give her monitor to Mr. Currier (Tr. 382). Mr. Shea was not planning on saying a whole lot about the H2S incident; he was going to talk about the disclosure of inaccurate information to a trade partner. In his mind, the Complainant did the right thing in the H2S incident; she did not haul the oil because she did not feel safe, which is exactly the policy (Tr. 382).

Mr. Shea stated that a gathering had been planned to hand out Christmas checks, thank the drivers for being valued employees, and have the president shake hands. The Complainant called him before the Tiger Hutton incident to see if she could set up some type of a Christmas party. Mr. Shea told her that the company would shy away from endorsing any kind of company sponsored function, but if she wanted to put out some home baked goods that would be okay. The Complainant never called him about any concerns regarding the Tiger Hutton lease. She was at the party, and got her check and shook hands with the president (Tr. 383-385).

At the meeting, Mr. Shea told the Complainant that he was concerned that she had told a trade partner that she had heard oil with 500 to 700 ppm was shipped from the Tiger Hutton lease. In his view, this was the whole reason for the meeting, to talk about what she had told Enterprise. He stated that it was not until the Complainant turned over the monitor that day at

his direction that they were able to get a reading. No one knew what she was really exposed to, because she refused to turn the monitor in, yet she had told a trade partner an outlandish number (Tr. 388).

Mr. Shea assumed that the 500 to 700 referred to the liquid. He did not know the context that the Complainant said it in, but it had to come from her, because it did not come from anybody else. He did not know if Enterprise was misconstruing parts per million in air or oil. But either way, it was not true (Tr. 392).

According to Mr. Shea, the Complainant was very evasive at the meeting, and it was very hard to get her to admit to anything. At the end, she had to admit that the information came from her. Mr. Shea did not care if she was repeating something Mr. Ward or Mr. Everhart said; it came out of her mouth to Mr. Reid's ear. Mr. Reid would not have pulled the numbers out of thin air (Tr. 392). Mr. Shea was trying to convey this to the Complainant, and telling her that it had to come from her, and that was what caused Enterprise to immediately contact their safety people, and call Pacer and threaten to shut them down if that was the case (Tr. 393).

Mr. Shea stated that the Complainant wanted something in writing, so this was why he had put the suspension in writing. He was concerned that he had affected her income earning ability by telling her not to haul on Saturday and Sunday, but she was not scheduled for those days anyway. He suspended her because he did not want her calling in and asking for a load, going to another trade partner, and making the same outrageous statement that she admitted making at Enterprise (Tr. 439).

Mr. Shea stated that he considers information about all of their loads Pacer information, which is not to be divulged to their trade partners unless they are required to do so by contract. He conceded that "confidential information" might have been a poor choice of words, and he could have referred to it as divulging Pacer information. In his mind, all of this information is confidential. Mr. Shea stated that there is no written policy on this, but they have talked about it at safety meetings many times (Tr. 441). For example, they tell the drivers that when they tell them about Pacer's expansion plans, they do not want the drivers telling their competitors, because it gives them an unfair advantage. They could go in before Pacer, and lease up the land so Pacer could not build a facility (Tr. 442). Mr. Shea stated that the Complainant did not need to tell Mr. Reid that they were hauling a lease with some H<sub>2</sub>S; it was their information, and their lease. He agreed that at 500 to 700 ppm, he would be alarmed, but he knows that the lease is safe, and they haul it all the time (Tr. 442).

Mr. Shea did not know where the Complainant got the 500 to 700 ppm figures; he was sure that Mr. Ward said something to her. He did not think it was important to talk to Mr. Ward, because he had not gotten the Complainant's side of the story, and he was going to speak with her on Monday. At that time, she admitted to him where she got the information (Tr. 440, 443).

Mr. Shea stated that the Complainant had very minimal exposure at the Tiger Hutton lease. When she turned her monitor over to Mr. Valois, it read 11.6 or 11.7 (Tr. 388, 393).

Mr. Shea stated that he did not tell the Complainant she could not raise any concerns about safety with OSHA. He told her that he did not want her going outside the company and divulging trade information to anyone. The Complainant commented, so then I can go to OSHA, and they told her, absolutely (Tr. 393). The only time OSHA was mentioned was by the Complainant (Tr. 456).

Mr. Shea stated that at the meeting, he delineated specific examples of what he considered to be trade information. He was trying to convey to the Complainant that if she needed to discuss anything, there were people in the company with her interest in mind. He was specifically addressing his concerns that the Complainant made statements to trade partners with no basis (Tr. 454). Mr. Shea asked the Complainant several times why she did not go to her own company personnel, where there were many people who could have helped her. If she had gone to them and was unsatisfied, and then went to someone else, that would have been different. But she went outside the company first, and did not give them the chance to help her. Mr. Shea stated that it was the job of the safety department to help the Complainant (Tr. 457).

According to Mr. Shea, the Complainant did not express any worries about the public's exposure to H<sub>2</sub>S, but only about her own personal safety; she did not express any concerns about exposure to her coworkers (Tr. 394). While Mr. Shea thought that the Complainant's concern for her safety was reasonable, a concern for the public safety was not. He stated that this lease is not in a neighborhood, but is in a farming community. There is a home across the street, and a home further down; a driver has to drive past two homes within a mile to get to the property. The public should not be on the lease, which is private property (Tr. 448-450).

At the end of the meeting, Mr. Shea told the Complainant that he believed her when she said that her disclosure was inadvertent, and she was not maliciously trying to harm the company. He told her that he had the authority to write her up, and she asked him several times if he was doing so. He told her no, but she should not do it again; there was no disciplinary action. Mr. Shea wanted to make sure the Complainant understood that off the cuff statements like that to a trade partner could have severe repercussions for the company (Tr. 394). Even if Pacer was shut down for a day or two, they would have to figure out what to do with 6,000 barrels of oil. Mr. Shea thought that by the end of the meeting, the Complainant had the impression that she was not to say anything to trade partners about Pacer's business (Tr. 395). He told her that he would fire her on the spot if she did it again, referring to divulging Pacer company business to trade partners. His tone was pretty emphatic, and he wanted the Complainant to understand that what she did could have harmed the company, and the ramifications if she did it again (Tr. 456).

Mr. Shea stated that there had been other situations where a driver declined an assignment, or refused to drive because they felt unsafe. There was no disciplinary action, and they tell the drivers that they stand behind their decisions, even if they do not agree. The driver is the only person who can dictate safety (Tr. 396).

### Spill Incident

Mr. Shea stated that spills are very very bad, and indicate that something has happened that should not. There is oil on the ground, which is supposed to go from the tank into the tanker, and then into the tanker pipeline. Somebody is going to be mad (Tr. 397). It could be the producer who owned the lease: the oil was on the ground, not in the truck, so Pacer could not buy it. It could be the person at the station where the tanker was unloaded. Someone could be angry about the environment – spills are ugly, and cost a lot of money to clean up (Tr. 398).

Mr. Shea stated that Pacer did not even have a spill log until 2011, and the owners were unhappy with the amount of paperwork they were doing on spill reporting. They got copies of reports from drivers who came in and reported they spilled, but it was not a big deal. As the company began growing, it became a big deal, because young inexperienced drivers were having spills because they were not paying attention to what they were told. The owners, Richard and Orville Nichols, directed him and Mr. Valois to come up with a more definitive spill reporting policy, to keep track of spills, and to try to identify trends and stop the spills (Tr. 398).

A breakfast meeting was held in October 2011 to discuss these spill reporting procedures with the drivers. They went over the new policies in detail, discussing what was supposed to happen with a spill, and laying it out very distinctly. Mr. Shea recalled that one thing that was highlighted was communication, and the Complainant stood up and said that communication was key. They wanted to get the drivers to understand that any spill was reportable (Tr. 399). The drivers were told to contact them so they could get the right people there to clean the spill up. They went through the policy in detail. Richard Nichols was there, and Larry Durham, and Mr. Shea thought Mr. Orville Nichols was there. Every driver was there, including the Complainant (Tr. 400).

The Shamrock lease is owned by the Nichols Brothers. Orville Nichols happened to be at his production company offices, right up the hill, and saw the Complainant's transport pull off. He went down to the lease to see how much fluid was still in the tanks, and how many more loads were ready to haul. As Mr. Shea said, imagine his surprise when he turned the corner and saw this. Mr. Nichols took a photograph of the spill, and sent it to Mr. Shea (Tr. 401-403, RX 14). The email also went to Richard Nichols, who sent an email less than fifteen minutes later to him and Mr. Currier, asking if the spill was reported according to the policy, referring to the training they had just had two weeks earlier on reporting spills. This spill was not reported according to the policy, because the driver failed to report it. It was reported by the producer of the lease, who happened to be one of Pacer's owners (Tr. 404).

Mr. Shea had no idea this spill had occurred until Orville Nichols sent him the picture. As soon as he saw it, he knew it was going to be very bad. This was a big spill, on the owner's lease, and it was not reported according to policy (Tr. 405). Mr. Shea responded to the email, saying that there was no good reason for his driver not to have contacted them yet. At that point, he had not received any confirmation from Mr. Currier that the Complainant had contacted him and told him about the spill, which had happened just before 1:00 (Tr. 405-406).

According to Mr. Shea, Richard Nichols was irate that the driver did not report the spill according to policy, and wanted to know if they had contacted cleaning people to go out and start cleaning up, investigating, and mitigating (Tr. 407). Mr. Shea contacted Mr. Currier, who had

left the office and was at lunch, and asked him if he had heard anything or knew anything about the spill; he forwarded him the photograph. Mr. Shea asked Mr. Currier who was hauling the lease, and Mr. Currier said it was the Complainant. Mr. Shea told Mr. Currier to contact Mr. Maddox and the mechanic who usually responded to spills, because they were close, and get them out there with some sphag sorb to put on the ground and start soaking up the oil and keep it from spreading any further. Mr. Shea could see from the photograph that it was spreading (Tr. 408).

Mr. Shea stated that the photograph of the spill shows a slight decline, but it is nothing as severe as the previous loading position that Pacer requested be fixed. He stated that the slant influences the spread of oil on the ground, but it does not give the appearance of more oil than there actually was. This was a pretty big spill area. Mr. Shea stated that in determining how much oil is on the ground, the slant is taken into consideration. He could look at the photograph and tell that it was a big spill (Tr. 481).

Mr. Shea stated that Mr. Currier was having difficulty contacting the Complainant to get a statement from her, or talk to her about the spill. He could not reach her by cellphone, which kept going to voice mail. Mr. Currier was trying to set up a meeting for Saturday morning (Tr. 410). When Mr. Currier was unsuccessful in setting up the Saturday meeting with the Complainant, Mr. Shea told him to leave a final message. The next day was Christmas, and the offices were also closed on Monday December 26. On Tuesday, they were trying to reach the Complainant so she could come to Tulsa and they could get her statement, her side of the story on how the spill happened (Tr. 411).

Mr. Shea did not agree with the Complainant on her mathematical calculation of how many barrels of oil were spilled. He did not know what she was talking about when she said there were no specific notations in any paperwork from orientation, but he knew that they specifically talked about spill reporting policies with every driver two months earlier at the October meeting. As she stated at that meeting, communication was key (Tr. 413). Mr. Shea stated that the Complainant was comparing what she said she loaded on her trailer, versus what she said she delivered to Enterprise. But she left a few things out (Tr. 415).

According to Mr. Shea, oil will not come out of the trailer until it hits the 200 barrel mark. The vent line is at the very top of the crows nest in the trailer. The trailer must be full before the oil starts coming out of the vent, which is meant to stop the oil from coming out of the crows nest and spilling out the side of the vent. The oil was coming down the vent line and spraying right into the stairwell (Tr. 415).

Mr. Shea stated that the Complainant did not mention that once she shut the spray off, she engaged her pump and pumped oil from her trailer back into the tank. She could not know how much oil was on the trailer. She knew how much she delivered to Enterprise, but she did not know how much was on the trailer before she pumped some of the oil back (Tr. 415). Mr. Shea stated that you could not compare the end result with the beginning, because the actions in the middle negated the math (Tr. 416).

Mr. Shea thought that it was reasonable for the Complainant to remove some of the oil in her trailer so that she could drive, but her math did not make sense (Tr. 427). Mr. Shea stated that once the oil passed the loading valve, Pacer had bought it; the driver is not supposed to turn around and push it back into the tank, because it messes with the gauges. But a driver also has to use common sense. The Complainant had a full trailer, with oil coming out of the top. She could theoretically move it, but it would be spilling oil. He thought that it was probably a smart move to put some back, and not track oil down the road. But if she had followed loading procedures, she would not have been in that bind (Tr. 428).

According to Mr. Shea, the average spill costs \$3,000 to \$5,000 to clean up. This spill was over average, although he did not know the exact cost (Tr. 478). He stated that they paid about \$500 for an outside contractor for backhoe services, and they also had to pay the Nichols Brothers employees who helped with the cleanup (Tr. 476-477). Mr. Shea explained that the term "local" in the categorization of spill levels does not mean a geographical area; it refers to the producer, or local person who owns the lease. If this person has a tractor or backhoe they can use for cleanup, that is "local." (Tr. 476). If they have to go outside the company, that is outside the scope of "local" (Tr. 476).

Mr. Shea stated that at the meeting on Tuesday, he gave the Complainant a chance to explain what happened; he asked her if she was at the controls of the pump, and she said that she was in the cab (Tr. 416). Mr. Shea stated that during loading and unloading, the drivers must be at the pump controls, not the PTO control inside the cab that sets the power takeoff. He explained that the pump needs a source of power, which it gets from the engine. The set switch is inside the cab; it allows the pump to draw power from the engine. It is called the power takeoff. All that it does is allow power to go to the pump. The Complainant admitted that she was not at the pump controls (Tr. 417).

At the meeting, they also discussed reporting procedures, and he asked the Complainant why she did not contact someone according to the spill policy (Tr. 417). The Complainant said that she wanted to find out how much oil was on the ground by delivering the load. Mr. Shea knew that this was nonsensical, because it did not matter how much was on the trailer; the Complainant had already taken some out and put it back into the tank. She had no idea how much was originally on the trailer at that point, or coming out of the top. It is true that she delivered 180 barrels to Enterprise, after she pumped oil out of the trailer (Tr. 418).

Mr. Shea did not think the Complainant's account, that she tried to contact her supervisor, was an attempt to follow the process. He noted that at the October meeting, he specifically told the drivers that they had to talk to somebody (Tr. 469). Mr. Shea stated that, based on the photo of the spill, if the Complainant had a spill response kit in her truck, which he did not think she did, she could have put a boom across the road. But other than that, the spill was beyond her ability to control (Tr. 471). He acknowledged that the written policy did not state that the Complainant was supposed to wait at the site until someone came to help. But he stated that they went over this at the October meeting, where he told the drivers that somebody needed to stay with the spill, so the producer or someone else does not see it first (Tr. 472).

Mr. Shea stated that every crude oil tanker in Oklahoma was configured the same as the trailer shown on Claimant's Exhibit 7, except for bobtail trucks. They are rigged the same so if a driver goes from one piece of equipment to another, he does not need a lot of new training. The controls are 17 feet from the cab (RX 20; Tr. 418-419).

Mr. Shea stated that he made the decision to terminate the Complainant, for violating two company standard operating procedures, the loading and spill reporting procedures, which happened to be on a lease with high visibility (Tr. 420). He stated that some of his decision had to do with his interpretation of whether the Complainant was going to be a driver he would want in their trucks. The Complainant refused to take responsibility during the meeting. She admitted that she did not know what the spill reporting or loading procedures were. When Mr. Shea told her that they were in her truck book, she stated that she did not have time to read them. Mr. Shea had a driver who admitted she did not know their procedures, and had caused a serious violation of their policy, with two big violations on a lease of the highest imaginable visibility. He did not feel comfortable putting the Complainant back in one of their trucks, and felt that he would be remiss if he did. Mr. Shea stated that the Complainant was an employee who said that she did not know what she was doing (Tr. 421).

Mr. Shea stated that his decision to terminate the Complainant had nothing to do with her reporting that her monitor went off, or with evacuating the Tiger Hutton lease without moving the oil. This was a dead issue (Tr. 422). It was not his intention going into the meeting to discharge her. Not until the end of the meeting did he conclude that the Complainant was not a driver he wanted to put back in a Pacer truck. He stated that the Complainant refused to own up to anything, or to acknowledge that the spill was her responsibility, that she violated the company procedure, and that she did not get hold of anyone. She continued to claim that this was not a big deal. But Mr. Shea stated that it was a huge deal – it was a big spill, on the owner's property, with "humongous" visibility. At the end of the meeting, he decided that in good conscience he could not put the Complainant back behind the wheel of a Pacer truck (Tr. 468).

Mr. Shea discussed the spill by Mr. Hodges, which was in June 2011 at the same lease, but around the corner at a different loading site (Tr. 434). Mr. Hodges was written up for overloading his trailer and failing to notify a supervisor; he was not written up for violating the loading procedures; he was at the controls (Tr. 461). Mr. Hodges' spill was caused because his trailer was parked on an incline, and he misinterpreted the trailer gauge and overloaded the trailer (Tr. 479). Pacer asked the customer to change the loading spot to around the corner, and make it bigger and level (Tr. 480).

Mr. Shea stated that at that time, the spill reporting policies were ambiguous about whom to contact. This was why the policy was written, at the direction of the owner. It was very clear to Mr. Shea that a driver was to contact them immediately; the policy says to reach a responsible company official (Tr. 435, RX 4). According to Mr. Shea, all of the steps listed in the policy can be performed in one to two minutes. The drivers have a spill kit, which is just a few booms to stop the oil from running to a source of water (Tr. 436). It does not take that long, and the driver should be able to pick up a boom and call at the same time to tell somebody that he had a spill. He stated that at the October meeting, which the Complainant attended, they specifically said

that the driver should reach a company official immediately. Mr. Shea noted that every driver has a cell phone, and a means to communicate (Tr. 437).

According to Mr. Shea, a driver who has a spill just needs to make an estimate, is the spill big or small. He stated that the drivers know what a barrel of oil looks like, and how much oil is on the ground. When the pump is fully engaged, it pumps six to eight barrels a minute; that is why the driver stands next to the pump (Tr. 438).

### Charles Wesley Currier

Mr. Currier has worked in the oil and gas industry for 31 years, as a pipeliner, maintenance coordinator for a pipeline system, and in trucking. He now works for Coffeyville Resources, since April 2012, as a trucking manager. Mr. Currier worked for Pacer for about year as the terminal manager, responsible for overseeing crude oil blends for customers, and making sure that they blended the oil according to company specifications (Tr. 5-7). Pacer trucked oil from leases into stations, and Mr. Currier oversaw the drivers of the crude oil from the lease to the facilities and customers (Tr. 8). According to Mr. Currier, the drivers are the first line of contact with the pumpers and some of the producers; they are the first line of public relations. The drivers go to the lease and gather oil, and do an "oil inspection," taking samples and gathering data to see if the oil is merchantable (Tr. 9).

Mr. Currier stated that natural gas, sewage, and even the digestive tract can have H<sub>2</sub>S. It was company policy at Pacer to wear a monitor for personal protection, and the drivers were issued monitors (Tr. 11). Mr. Currier identified the H<sub>2</sub>S policy, which he received in his orientation program at Pacer (Tr. 12, RX 1). According to Mr. Currier, all of the drivers at Pacer are required to go through an orientation program, which includes information about hydrogen sulfide and H<sub>2</sub>S gas (Tr. 13).

Mr. Currier stated that he first met the Complainant over a year earlier, when she was hired to drive a transport. Mr. Currier recommended hiring the Complainant; she had driving experience, and he felt that she had the ability to learn the industry (Tr. 148). She was issued a monitor (Tr. 17).

### Tiger Hutton Incident

Mr. Currier recalled that on December 15, 2011, the Complainant called the office. The call was taken by Kathy Carroll, and he walked in while the call was on speakerphone (Tr. 18). The Complainant told him that her monitor had gone off; she stated that she had never heard it go off before, and it scared her. Mr. Currier stated that she was excited, which was not a bad thing, and they were trying to calm her down; she was scared. According to Mr. Currier, just because the monitor goes off, that does not put you in immediate danger. It is an alarm to alert you to that potential, but does not necessarily mean that there is a problem. Mr. Currier told the Complainant that if she did not feel safe, she should evacuate. According to Mr. Currier, safety is paramount to anything in the oil field. The only way he could enforce safety is for the drivers to take the initiative to protect themselves (Tr. 19).

Mr. Currier stated that he did not try to convince the Complainant to stay and finish loading oil on her truck, and to his knowledge, she did not do so. He did not criticize her for leaving without getting the oil, or for reporting that her monitor went off; she was not disciplined in any way for leaving the lease (Tr. 20).

Mr. Currier received a phone call from Gary Reid from Enterprise, who told him that the Complainant said Pacer had hauled in high H<sub>2</sub>S oil into their facility. Mr. Reid asked Mr. Currier if this was true, and he said no. According to Mr. Currier, during his time at Pacer, they never hauled any high H<sub>2</sub>S oil in there; he was very concerned. Mr. Reid told him that he was told that there was 500 ppm, or something like that (Tr. 22). Mr. Currier was not aware of any oil with that high of a level being hauled (Tr. 23).

Mr. Currier stated that the Complainant was suspended for reporting to Enterprise that their oil contained 500 to 700 ppm, which was not accurate. She was not disciplined for expressing safety concerns about H<sub>2</sub>S, and returned to work after the suspension (Tr. 27).

Mr. Currier acknowledged that the term “confidential” information was a little loose, and referred to things that they tried not to discuss with other companies. It referred more to confidential information that they did not release to other companies, such as the amount Pacer pays for a barrel of oil. The Complainant told Mr. Reid that they delivered 500 to 700 ppm hydrogen sulfide contaminated crude oil, and that was not the case. That was what Mr. Shea determined was a confidential matter (Tr. 74). Mr. Currier felt that this was not something that the Complainant should have discussed, and if she had an issue, she should have come in-house to talk about it. According to Mr. Currier, there are some things that are kept confidential within the company, which you just don’t say on the open market to customers or anyone else (Tr. 75). The Complainant disclosed false information to Enterprise (Tr. 76).

### Spill Incident

According to Mr. Currier, the Complainant overfilled her truck at the Shamrock lease. The first he knew about this was when Orville Nichols forwarded the photograph on his phone (Tr. 28). The spill was on the Nichols Brothers’ property. Mr. Currier stated that the photograph showed quite a bit of oil; it could have been due to a mechanical failure or driver error (Tr. 30). Mr. Currier was at lunch with his wife at the time, and after he received the photographs, he noticed that he had missed a call from the Complainant. Mr. Currier called her, and told her that he had seen the photographs; she told him that yeah, she made a mess. Mr. Currier asked her where she was, and she had already left the scene and gone to Enterprise to unload (Tr. 31, 154). He told her that she was supposed to be at the controls at all times (Tr. 61). According to Mr. Currier, the Complainant started to tell him that the pump was pumping faster than normal, and other things were happening. He stated that it was hard to do that on the phone, which was why he called her later to set up a time to meet. Mr. Currier wanted to go over it step by step and figure out what happened (Tr. 62).

Mr. Currier told his wife it was an emergency, because he saw some freestanding hydrocarbons on the photographs. As soon as he took his wife home, he went to the site. When he got there, David Maddox, the head mechanic at Pacer, and some of his mechanics were doing

cleanup (Tr. 33-34). The Complainant had told him that according to her calculations, she estimated that she released only a quarter barrel of oil. Mr. Currier thought that the photograph, as well as what he saw, definitely showed a lot more oil, at least five barrels, although it could have been three barrels. He was surprised that no one else had notified him about the incident when he saw the photograph (Tr. 35).

Mr. Shea received the photograph too. Mr. Currier stated that the Complainant should have contacted him about the spill. She was at the scene, the spill happened during her loading procedure, and she was the first responder; she should have been in contact (Tr. 36). Mr. Currier stated that she needed to get hold of somebody. The Complainant could have gotten hold of Mr. DeShazer, the field supervisor, Mr. Shea, Mr. Valois, or somebody in the company, or leave a voice mail (Tr. 36). The Complainant did not leave a voice mail for him (Tr. 37).

Mr. Currier made several attempts to contact the Complainant, and left messages, but got no response. He left her a voice mail on December 23, asking her to come into the office the next morning, and they would do a write up on a disciplinary action, and send her out to get her load (Tr. 59). He went to the office to meet with the Complainant on December 24 (Tr. 38, 40). Mr. Currier called the Complainant at 8:35 a.m., but the call went to voice mail; he left her a message to contact him by 9:00 (Tr. 66). When he had gotten no response from her by 9:20 a.m., he went home (Tr. 38, 40, 66). Mr. Currier never received a response or any message from the Complainant (Tr. 67). Mr. Currier stated that he did not go beyond phone calls to the Complainant, because he felt like he had exhausted everything he could, and if it was critical to the Complainant she would have responded. He stated that if it were him, he would have been in the office at 8:00 a.m. to talk about it (Tr. 161).

Mr. Currier described this spill as a level three spill, because it was more than two barrels. He identified the driver loading and unloading procedures, noting that the DOT requires drivers to stay within 25 feet of the truck, but Pacer exceeded this, because the response time can decrease the impact of a release. Pacer wanted the driver by the controls, so he could shut the valves off and deactivate the pump. These procedures were in place when the Complainant worked there (Tr. 42-43, RX 3).

According to Mr. Currier, the pump is mounted on the trailer, with control valves that engage and disengage the pump. Pacer wanted the drivers within reach of the controls, so if there were a mechanical failure, such as a hose rupturing, it would decrease the environmental impact because of the response time. The controls were not in the cab of the truck (Tr. 44).

Mr. Currier filled out the spill report form, and determined that this was a level three spill; it was more than two barrels (Tr. 151, 153). It was on land, and not near a navigable waterway. It was cleaned up by local and company personnel, and a backhoe contractor (Tr. 152).

According to Mr. Currier, the Complainant did not perform any "emergency response" to the spill, any kind of containment damage, such as building a berm out of the dirt with a shovel. He did not think that the Complainant complied with the directive not to leave the area for any reason until the trailer was completely loaded. When Mr. Currier talked to the Complainant, she

told him that she was in the cab doing paperwork. Mr. Currier stated that in any oil company that does transportation, no driver is allowed in the cab at any time while unloading and loading. That is why the policy says to stay at the controls of the pump (Tr. 46). The Complainant did not use whatever means necessary to contain the spilled oil; she left the scene (Tr. 48). She did not comply with the requirement to reach a responsible company official; the only person she tried to contact was him, and she did not leave a voice mail. She did not communicate the resources needed to clean and contain; she never told anyone they needed absorbent pads, booms, or somebody to come out and remediate (Tr. 49). Mr. Currier noted that the drivers have a looseleaf notebook in the cab, with everything they are supposed to have under company policy or as required by DOT (Tr. 51).

Mr. Currier was concerned about the Complainant not making any effort regarding the spill, and he was trying to contact her to sit down and evaluate everything (Tr. 53). He reviewed the Complainant's December 27, 2011 email to him, stating that he really did not understand where she was coming from. He thought that she was trying to explain that she was a hard worker, and had been working since she was very young. According to Mr. Currier, the Complainant presented herself as very professional, perfectionist, and detail oriented, but he did not always find that to be true, because it seemed like when something went wrong it either was someone else's fault, or due to a mechanical failure on the truck. Mr. Currier stated that the Complainant would never really assume her responsibility for anything that went wrong (Tr. 54, RX 18).

Mr. Currier noted that the Complainant calculated that a quarter of a barrel was spilled. He stated that when he had the chance to talk with her, he told her that there was no way it could be a quarter of a barrel; he saw it, and it was much more than that. He felt that the pictures pretty much told the story.<sup>5</sup> But the Complainant wanted to justify it, and told him that the pump pumped faster than normal, and all these variables were the cause of the spill, instead of saying that she made a mistake. Mr. Currier stated that we all make mistakes, but the Complainant never acknowledged that she made an error (Tr. 55).

Mr. Currier interpreted the last paragraph of the Complainant's email as a sense of denial of what actually transpired; it was as if it was not anything important (Tr. 56).

A meeting with the Complainant by teleconference was scheduled for December 28, 2011; the Complainant did not want to drive the 45 to 50 miles from Drumright to Tulsa, because of the economic impact (Tr. 53-54, 69).

Mr. Currier stated that no write up was done about the spill, because he never got to talk to her; that was the purpose of the Saturday meeting. Because he could not get a response from the Complainant, he could not talk to her about what happened, or proceed with a disciplinary action. Mr. Currier did not know what was actually going to happen at the Monday meeting; he did not talk with anyone about what Pacer would do to the Complainant because of the spill. He did not know ahead of time that she would be fired (Tr. 144-146).

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<sup>5</sup> Mr. Currier stated that the photograph showed much more than a half barrel, it showed three to five barrels (Tr. 169).

Mr. Currier stated that the Complainant was let go because of the spill; she did not follow spill or loading procedures (Tr. 57). Mr. Currier thought that it was a terrible tragedy that the Complainant had this incident, and did not get hold of someone before she left the scene. He felt that if she had just stayed until she contacted someone, someone could have come out, assessed the situation, and told the Complainant to take her truck and go unload (Tr. 187). Mr. Currier was not part of the decision to fire the Complainant. He did not think the decision was made just because she ran her truck over. It was because of the loading and unloading procedures, and being in the cab, and the procedures she knew she was supposed to follow (Tr. 157-158).

Mr. Currier stated that the Complainant never told him that she had been trained that it was okay to go to the cab to do paperwork while loading. He stated that the Pacer policy and procedures say to stay by the controls while loading and unloading. You can get in the cab as long as you disengaged, but as long as you are engaged, you cannot get in the cab (Tr. 167).

Mr. Currier discussed a previous spill by Mr. Griebel in June 2011. He stated that Mr. Griebel called Mr. DeShazer, the field supervisor, who notified Mr. Currier. Mr. Griebel followed procedures and did not leave the scene; because he reached someone immediately, he had the necessary resources to address the spill (Tr. 162-163).

## **ISSUES**

The Respondent does not dispute that it is an employer, and the Complainant was an employee, under the provisions of both the TSCA and the STAA. However, the Respondent disputes that the Complainant engaged in protected activity under the TSCA or the STAA, or that its alleged adverse actions were motivated by any such protected activity.<sup>6</sup>

## **DISCUSSION**

### *Statement Of The Law*

#### *The Complainant's Complainant under the STAA*

The employee protections of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105(a)(1) (“the STAA”), provide that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle regarding pay, terms or privileges of employment because the employee has engaged in certain protected activity. The protected activity includes making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order.” § 31105(a)(1)(A). Internal complaints to management are protected under the Act. *Reed v. National Minerals Corp.*, Case No. 1991-STA-34, (Sec’y., July 24, 1992), slip op. at 4. A “commercial motor vehicle” includes “any self-propelled . . . vehicle used on the highways in commerce principally to transport passengers or cargo” with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. App. § 2301(1).

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<sup>6</sup> The Respondent also argues that the Complainant’s claim under the TSCA was untimely filed; I dismissed this argument in an Order issued on September 19, 2012.

The Act further provides protection for employees who have a reasonable apprehension of serious injury to themselves or the public due to an unsafe condition. § 31105(a)(1)(B)(ii). Whether an employee's apprehension of serious injury is reasonable is subject to an inquiry of whether a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. *Id.*

To prevail under the Act, a complainant must prove that she engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sec'y v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003).

In her original complaint to OSHA, the Complainant alleged that the Respondent was involved in transporting hazardous materials without proper placarding, and that the Tiger Hutton well site was high in H<sub>2</sub>S, which required inhalation placarding.<sup>7</sup> She did not allege that she had engaged in any type of activity which could be characterized as "protected activity" under the STAA, such as making a complaint of a safety violation or reporting an unsafe condition, or refusing to drive under hazardous conditions.

In her objections submitted to the Office of Administrative Law Judges on August 17, 2012, the Complainant claimed that she was targeted because she started to ask questions. She speculated that the Respondent was recording or listening to her when she was in her truck, and because she was talking about taking "the issue" to an attorney or OSHA, she was terminated "within days of them being brought to the awareness that I was not happy with the dangers they were putting us in regarding the H<sub>2</sub>S levels at that site."

The STAA protects employees from discharge, discipline, or discrimination for filing a complaint about commercial motor vehicle safety, testifying in a proceeding on such safety, or refusing to operate a commercial motor vehicle when operation would violate a Federal safety rule or when the employee reasonably believes it would result in serious injury to herself or others. At the hearing, the Complainant presented absolutely no evidence that she made any complaint, internal or otherwise, about the safety of the truck she drove for the Respondent, or any of its other trucks. Nor did she refuse to drive her trailer on December 15, 2011, for safety or any other reasons.

In her brief, the Complainant speculates that, based on her "multiple references to OSHA" during the December 19, 2011 meeting, it is reasonable to conclude that the Respondent perceived that she would file a "complaint," although she does not indicate precisely what that complaint would be, or how it would implicate commercial vehicle safety. The Complainant points to Mr. Shea's "brazen" admission that he did not think the Tiger Hutton lease (which the Respondent does not own or control) was up to OSHA standards, and that he was aware that at one time that lease had dangerous H<sub>2</sub>S levels, to conclude that it was "reasonable that the

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<sup>7</sup> Although it is not entirely clear, it seems that part of the Complainant's complaint was that the tanker itself was not placarded as being high in H<sub>2</sub>S.

Respondent would perceive that the Complainant was about to make a complaint.” Complainant’s Brief at 14.

According to the Complainant, Mr. Shea was “erroneously under the impression that Complainant was required to address her safety concerns with the company first and only,” and therefore, “it can be reasonably concluded that Respondent perceived that Complainant was about to file a complaint related to a violation of a commercial motor vehicle safety or security regulation, standard, or order when she indicated she feared for her safety, complained of the hazardous conditions at the Tiger-Hunton lease, and that she was not properly trained or informed of dangers at the Tiger-Hunton lease.” Complainant’s Brief at 15.

I note that Mr. Shea, both in the December 19 meeting and in his testimony, clearly stated that the Complainant was free to go to OSHA with safety concerns. But at the same time, he made it emphatically clear that the Complainant was not to share company information with anyone outside the company, or she would be fired.

Finally, the Complainant points to the Respondent’s “lack of concern” for the injury she suffered to her eye as a result of her H2S exposure (for which she did not seek medical treatment) to support her claim that the Respondent perceived she would “furnish information to the proper authority about the Tiger lease situation and her resulting injury.” Complainant’s Brief at 16.

The Complainant has bootstrapped her speculation that the Respondent “perceived” she was about to file a “complaint,” to support her argument that her termination was not the result of her violation of the Respondent’s loading and spill reporting procedures, but was in retaliation for the “complaint” that the Respondent “perceived” she was going to file.

But the Complainant’s speculations are precisely that; they are based on no evidence or testimony, or supported by any rational inference based on the evidence or testimony.<sup>8</sup> More importantly, the Complainant has not indicated how this amorphous perceived complaint related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.

In short, the evidence in the record contains no allegation, much less any facts to support a finding that the Complainant engaged in any activity that could be characterized as “protected activity” under the STAA.

#### *Complainant’s Complaint under the TSCA*

Under the employee protection provisions of the Toxic Substances Control Act (“the TSCA”), an employee is protected if the employee: (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act; (2) testified or is about to testify in any such proceeding; or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of

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<sup>8</sup> While the Complainant is correct that a finding of protected activity can be based on the employer’s reasonable perception that a complainant intends to make a complaint, I find that in her case, a conclusion that the Respondent had such a perception, reasonable or otherwise, is wholly unsupported by the record.

this Act. 15 U.S.C. § 2622(a); 29 C.F.R. § 24.2(a); *see also Melendez v. Exxon Chemicals Americas*, ARB Case No. 96-051 (July 14, 2000).

The complainant's burden is to establish a prima facie case by showing that: (1) the complainant engaged in protected conduct; (2) the respondent employer was aware of that conduct; and (3) the employer took some adverse employment action against the complainant. *Zinn v. University of Missouri*, 93-ERA-34 and 36, slip op. at 6-8 (Sec'y Jan. 18, 1996). The complainant must also present evidence sufficient to raise at least an inference that the protected activity was the likely reason for the adverse action. The respondent may rebut the complainant's prima facie case by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason for the action. The complainant may counter the respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. *Dartey v. Zack Company of Chicago*, 82-ERA-2, slip op. at 6 (Sec'y April 25, 1983).

Internal complaints and steps that are preliminary to the filing of complaints with Federal or state environmental protection agencies are subject to protection under the employee provisions of the environmental protection acts.

The reasonableness of a whistleblower's belief regarding statutory violations by an employer is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." *Minard*, slip op. at 7 n.5 (quoting work refusal standard from *Pensyl v. Catalytic, Inc.*, Case No. 83-ERA-1, Sec'y Dec., Jan. 13, 1984, slip op. at 7).

To engage in protected activity, a complainant must report an act which he or she reasonably believes is a violation of a federal whistleblower statute, here the Environmental Acts. *See, e.g., Saporito v. Central Locating Services, Ltd.*, Case No. 05-004, at 5 (Feb. 28, 2006); *Devers v. Kaiser-Hill Co.*, Case No. 03-113, at 11 (Mar. 31, 2005). To be protected, safety and health complaints must be related to the requirements of the environmental laws or regulations implementing those laws; the employee protection provisions protect employees from retaliation only if they have reported safety and health concerns that the statutes address. *Mourfield v. Frederick Plass & Plass, Inc.*, Case Nos. 00-055, 00-056, at 8 (Dec. 6, 2002). But employees need not prove that the hazards they perceived actually violated the environmental acts. *Saporito*, at 6. Complaints restricted solely to occupational safety and health are not covered under the environmental whistleblower statutes unless the complaint also encompasses a concern for public safety and health or the environment. *Id.* at 10. The complaint "must be more than speculative or vague – it must inform the employer of the conduct that needs to be remedied." *Id.* at 11, quoting from *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op at 4 (ARB Apr. 8, 1997).

### Protected Activity

There is no dispute that on December 15, 2011, when the Complainant was dispatched to haul oil from the Tiger Hutton lease site, her H2S monitor went off as she was opening the hatch cover on the oil tank, and that she reported this incident to management, specifically, her

supervisor, Mr. Currier. The issue is whether the Complainant's report of this incident qualifies as "protected activity" under the TSCA.

I find that the Complainant's report of her monitor going off as she opened the hatch on the oil tank, and her subsequent expressions of concern about the potential consequences to herself and the surrounding area, are protected activities under the TSCA. The Complainant's first report to Mr. Currier clearly focused on her concern about her own safety, and her reluctance to remain at the site. But she was reporting the release of a toxic gas into the atmosphere, an occurrence that her employers had told her to "run like hell" if it happened.

Mr. Valois testified that H<sub>2</sub>S gas escaping from a tank poses no danger to the public, because it readily disperses in the air. He thought that the Complainant had reason to believe that she was in great danger when her monitor went off, although he did not necessarily agree that the public was endangered. Both Mr. Valois and Mr. Shea admitted that it was a mistake to send the Complainant to this particular lease site, which had had an evacuation pump installed after problems with high levels of H<sub>2</sub>S were detected at the site, and which required special procedures to operate the vacuum before pumping the oil.

One of the statutory objectives of the TSCA is to protect human beings and the environment from chemical substances which "may present an unreasonable risk of injury to health or the environment." 15 U.S.C.A. Section 2601(a). A complaint need only touch on subjects covered by the statute or regulation. *See Nathaniel v. Westinghouse Hanford Co.*, 1991-SWD-2, slip op. at 8-9 (Sec'y Feb. 1, 1995). Mr. Valois testified that, because he had been to the site, and knew it was safe, he did not think that it was reasonable to be concerned about any danger to the public from H<sub>2</sub>S gas at that site. But the Complainant had not been to that site, or any other site that required an evacuation pump to remove the concentrated H<sub>2</sub>S in the tanks, and her only point of reference was that H<sub>2</sub>S was extremely dangerous. Given her experience and training, I find that it was reasonable for her to believe, when she raised her concerns, that there was a threat, not only to her personal health, but to the environment or the public.

During the meeting on December 19, 2011, the Complainant raised concerns that the tanks at the Tiger Hutton site were rusting out, and could pose a hazard to the surrounding area if there were leaks of H<sub>2</sub>S. The Complainant has not explained why she thinks that these tanks are rusting out, or that they present a danger of H<sub>2</sub>S escaping into the atmosphere. I find that the Complainant's suggestions were speculative, without a shred of supporting evidence, and not based on a reasonable perception that the Respondent had violated environmental statutes, or was about to emit potentially hazardous gas into the atmosphere. I also note that the lease site is not owned by the Respondent, and the Respondent has no ability to change or correct any conditions on the site. I find that her suggestion that the condition of the oil tanks at the Tiger Hutton lease site possibly presented a hazard to the public did not constitute protected activity.

But I find that the Complainant's report that her monitor went off as she opened the hatch at the Tiger Hutton site, signaling the presence of H<sub>2</sub>S in the atmosphere, clearly touched on not only her own personal safety, but on the environmental and public health and safety concerns that are the focus of the TSCA.

However, I find that the Complainant's discussion with Mr. Reid the following day did not constitute protected activity under the TSCA. The Complainant clearly feels that she was treated badly when she reported her monitor going off, and that nobody at Pacer seemed concerned about her.<sup>9</sup> Although she acknowledged that Mr. Currier asked her what her monitor read, she claimed that no one ever called her to ask her to read the monitor, or told her how to do it. But she did not attempt to contact Mr. Currier, Mr. Valois, or Mr. Shea with any of her concerns, or for instructions on reading her monitor.

According to the Complainant, she just happened to be at the Enterprise facility when she pushed the buttons on her monitor, and when numbers appeared, she approached Mr. Reid to ask him about them. She stated that she told him she had informed Mr. Currier that her monitor went off, but no one had ever asked her about it, and that was why she was asking him.

The Complainant acknowledged that she told Mr. Reid that other drivers had told her they previously registered readings of 500 to 700 ppm at the Tiger Hutton lease site. She did not indicate why she said this to Mr. Reid. Indeed, it is not at all clear exactly why the Complainant gave any of this information to Mr. Reid. The most that can be gleaned from her testimony is that she wanted to ask him what the numbers meant that had just come up on her monitor. But although Mr. Reid's questions elicited the information that the numbers were recorded at the Tiger Hutton lease, there is nothing to indicate that by showing Mr. Reid her monitor, the Complainant intended to report her concern that hazardous gas was being released at that site.

Nor did the Complainant have a reasonable belief that H<sub>2</sub>S at the levels of 500 to 700 ppm, a level that Mr. Valois stated approached invalidity, were being released at the Tiger Hutton site. The Complainant claimed that she got this information from Jeff Ward, a former driver, who, according to her, told her that he had recorded those levels at the site previously.<sup>10</sup> I note that Mr. Ward's deposition testimony differs from the Complainant's in many respects; in particular, he did not testify that he told her he had hauled oil with levels of 500 to 700 at the Tiger Hutton site. These specific numbers do appear in the Hydrogen Sulfide Gas Awareness section of the Respondent's Corporate Safety Policy, for which the Complainant signed as receiving a copy at her July 2011 orientation (RX 1).

Mr. Valois testified that Mr. Ward and Mr. Everhart had reported to him that their monitors had gone off on several occasions at the Tiger Hutton site, but they did not indicate that they had recorded levels of 500 to 700 ppm. But even if, as the Complainant claims, Mr. Ward told her that he had recorded readings of 500 to 700 ppm at this lease site, the Complainant had no reason to believe that those levels of H<sub>2</sub>S, which cause loss of consciousness after a short exposure, were currently being released at this site.

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<sup>9</sup> The Complainant has not explained why she thought she was treated badly, or what she thinks that the Respondent should have done differently.

<sup>10</sup> Mr. Ward's deposition, which was marked as Joint Exhibit 2, was cited in the briefs by both sides, but I although I discussed the Joint Exhibits before we went on the record at the hearing, it appears that I did not formally admit them into the record. As both parties have referred to this deposition, I have considered it as part of the formal record.

Finally, Mr. Reid was not the Complainant's supervisor or employer, nor was he involved in any proceeding or other type of action under the Act. Thus, even assuming that the Complainant had a reasonable belief that levels of H<sub>2</sub>S of 500 to 700 ppm were being released at the Tiger Hutton site, her disclosure of such information to Mr. Reid does not constitute protected activity. *See, Simon v. Simmons Foods, Inc.*, 1995 U.S. App. LEXIS 3715 (8th Cir. 1995) (case below 1987-TSC-2) (Court noted that the Secretary concluded that the complainant's discussion with a contractor about the respondent's use and disposal of heptachlor-contaminated chicken feed was not protected activity because making health and safety complaints to a member of the general public (as opposed to a co-worker, employer/supervisor, union officer, or newspaper reporter), without demonstrating that the employee is about to file a complaint or participate or assist in a proceeding, is too remote from the remedial purposes of the relied upon whistleblower provisions to be a protected activity).

### Adverse Action

I find that the Complainant's "suspension" does not constitute adverse action. After he learned about the Complainant's conversation with Mr. Reid, Mr. Shea told Mr. Currier to make sure that she did not haul any loads until they could meet on Monday. According to Mr. Shea, the Complainant was not scheduled to work over the weekend, but he did not want her calling in for a load until they could speak with her. When Mr. Currier asked the Complainant to attend the meeting, she insisted on having something in writing. Mr. Currier, at the request of Mr. Shea, then advised the Complainant that she was suspended for disclosing "confidential Pacer Energy Marketing information to trade partners." (RX 11).

But there were no consequences to this "suspension," as the Complainant was not scheduled to work in the days between her conversation with Mr. Reid on Friday December 15, and the meeting that took place on Monday December 19. There is no evidence that any type of punitive action was taken, and indeed the incident was not written up. The Complainant suffered absolutely no adverse employment consequences from the "suspension," which was in name only, and was imposed only after she requested something in writing.

But even if the "suspension" could be characterized as an adverse action under the TSCA, I find that the evidence overwhelmingly establishes that it had no causal relationship to the Complainant's report of her monitor going off at the Tiger Hutton site. Mr. Currier, Mr. Shea, and Mr. Valois all testified that the Complainant unquestionably did the right thing when she left the Tiger Hutton lease without loading the oil after her monitor went off. Not one of them expressed any doubt that her actions were correct.

The Complainant has attempted to suggest that Mr. Currier pressured her to stay and load the oil on her truck when she reported that her monitor went off. I do not accept the Complainant's characterization. Mr. Currier's testimony, as well as the recording of the December 19 meeting, reflects that Mr. Currier attempted to reassure the Complainant that she was in no danger, and that it would be safe for her to go ahead and load the oil in her trailer. But when the Complainant continued to express her concern, he told her to evacuate without loading her oil. There is nothing to suggest that Mr. Currier attempted to coerce the Complainant into loading the oil despite her concerns, or that he faulted her in any way for failing to do so.

In short, there is absolutely no evidence to even suggest that the Complainant's report that her monitor went off, and her decision to evacuate without loading and hauling oil from that lease, resulted in her "suspension," or any type of adverse consequence.

The evidence does establish, however, that the Complainant's conversation with Mr. Reid was the trigger for her "suspension," and the almost ninety minute meeting with her supervisors on December 19, 2011. While the Complainant stated that she intended her focus to be on the safety of the Tiger Hutton lease at this meeting, her supervisors clearly intended the focus to be on her discussion with Mr. Reid.

During the meeting, the Complainant claimed that she had not received training on H2S safety, despite being reminded that it was part of her orientation training. She displayed a lack of knowledge about how her monitor worked, and about the characteristics of H2S gas. Nevertheless, her supervisors assured her that she had done the correct thing by evacuating the lease when her monitor went off.

But what concerned Mr. Shea was that the Complainant had made remarks to one of Pacer's trade partners that were unnecessary, and with respect to her comment about the 500 to 700 ppm concentration, unfounded. As Mr. Shea, Mr. Valois, and Mr. Currier testified, these comments could have lost Pacer its biggest customer, and they required Mr. Currier to spend a great deal of time reassuring Mr. Reid that Pacer was not bringing oil into their facility with these levels of H2S.

I have listened to the Complainant's tape recording of the December 19 meeting, and I agree with Mr. Shea that she was evasive. It took a great deal of effort to get the Complainant to admit that she was the source of the 500 to 700 ppm figure that Mr. Reid repeated to Mr. Currier. The Complainant finally admitted that she told Mr. Reid that another driver told her he had hauled oil from the Tiger Hutton site with 500 to 700 ppm, but she insisted that she did not tell him that this oil was delivered to Enterprise.<sup>11</sup>

The recording of this meeting, as well as the Complainant's testimony, indicates that she did not think she had done anything wrong by speaking with Mr. Reid. She took issue with the characterization of her conversation as "confidential information," a characterization that Mr. Shea and Mr. Currier admitted was not quite accurate. The Complainant insisted that she had never received any handbooks or written policies about the disclosure of company information to outsiders.

Mr. Shea clearly and emphatically expressed his concern, not only that the Complainant had shared company information with a trade partner, but that the Complainant took her concerns about safety, not to the Pacer safety department, but to an outsider. But he was satisfied that the Complainant did not make her comments to Mr. Reid out of a malicious desire to harm Pacer, and he accepted her at her word that she did not intend to do anything wrong. There was no write up or any form of discipline, and the Complainant returned to driving.

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<sup>11</sup> Of course, the majority of the oil that Pacer hauls is delivered to Enterprise.

There is no dispute that the Complainant was fired during the December 19, 2011 telephone conference, which was unquestionably an adverse employment action. But I find that although the Complainant has shown that she engaged in protected activity by her report of H2S at the Tiger Hutton lease site, she has failed to establish a *prima facie* case that this protected activity was a factor in the Respondent's decision to terminate her.

### Contributing Factor

It is the Complainant's burden to prove by a preponderance of the evidence that her protected activity was a contributing factor in the unfavorable personnel action. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Clark v. Pace Airlines, Inc.*, ARB No. 04-150 (Nov. 30, 2006), slip op. at 11. Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041 (Nov. 30, 2005), slip op. at 9. Where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that her protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No 04-056 (Apr. 28, 2006).

About a week after the incident at the Tiger Hutton lease site, the Complainant overfilled her trailer on December 23, 2011, when she was loading oil at the Shamrock lease. This lease is owned by Richard and Orville Nichols, who are also the owners of Pacer. Earlier in 2011, the Nichols brothers, who were unhappy about some spills that had happened (including the spill by Mr. Hodge), had asked Mr. Shea and Mr. Valois to come up with a more definitive spill reporting policy to keep track of spills, and to try to identify trends and prevent spills. Mr. Shea testified that as the company was growing, it was having problems with young, inexperienced drivers having spills because they were not paying attention to what they were told. They were asked to write a spill reporting plan and communicate it to the Pacer drivers.

Mr. Valois wrote this policy, which was presented to all of the drivers, including the Complainant, at a breakfast meeting in October 2011.<sup>12</sup> To stress the importance of these procedures, the president of the company, as well as one or both of the Nichols brothers, attended. During the meeting, these procedures were covered in detail; management talked about what was supposed to happen if there was a spill, laying out the required procedures distinctly. Communication was highlighted; Mr. Shea testified that they wanted to get the drivers to understand that any spill was reportable. In fact, Mr. Shea recalled the Complainant standing up and stating, "communication is key."

The Complainant has consistently denied that she was trained on or advised of these required procedures. She claimed, during the telephone conference on December 19, 2011 and in her testimony, that she was trained that it was acceptable to sit in the cab when loading or unloading. When it was pointed out to her during the telephone conference that the loading

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<sup>12</sup> Mr. Valois also wrote the driver loading and unloading procedures, which he talked about at the driver orientation (RX 3). These procedures are in the drivers handbook, a copy of which is in every truck. The policy specifically requires the driver to stay at the controls during loading and unloading, to be able to stop the pump immediately in the case of a spill.

procedures were set out in the driver's handbook in her truck, she stated that she did not read books. When it was pointed out to her at the hearing that her signature was on a sign-in sheet for the October 2011 meeting, she stated that the sheet was passed around while the drivers were eating breakfast and they were told to sign it; she would not acknowledge that the meeting included any discussion of loading and unloading procedures, or spill procedures. The Complainant testified that she had received no training on spills, other than that she was supposed to call a manager; she claimed that she was not provided with any documentation or reference material.

However, Mr. Shea, Mr. Valois, and Mr. Currier testified that the loading and unloading procedures, as well as the new spill procedures, were discussed at safety meetings, and with respect to the new spill procedures, specifically at the October 2011 meeting. They are also contained in the drivers handbook, which is in each driver's truck. Mr. Currier, Mr. Valois, and Mr. Shea testified that if a driver has a spill, of any size, she must report it to a supervisor immediately, and stay at the scene until help arrives to clean it up, and that this was explicitly discussed with the drivers at the October 2011 meeting.

When the Complainant saw the oil shooting from the valve in her side mirror, she went back, shut off the valves, pumped some of the oil back into the tank to avoid driving on the highway with a full trailer, emptied the bucket at the bottom of the stairs, and left. She called Mr. Currier, but she did not leave him a voice mail; she did not call anyone else. The Complainant drove her trailer to the delivery site, unloaded the oil, and headed back to Shamrock to pick up another load. By this time, about 25 minutes had elapsed.

In the meantime, Mr. Orville Nichols had driven around the corner as the Complainant was driving off, and seen the spill. He immediately contacted Mr. Shea, asking why the spill procedures, which had been implemented just two months earlier at his request, had not been followed. He also took a photograph of the spill, which he sent to Mr. Shea.

By the time the Complainant got back to the Shamrock site to pick up another load, Mr. Maddox, the maintenance person, and a helper were cleaning up the site, and she was told to leave. She went back to the office, and filled out a report.

There is no evidence, direct or circumstantial, to even raise an inference that the Complainant's report of her monitor going off at the Tiger Hutton site less than two weeks earlier had any causal connection to the Respondent's decision to terminate her employment.<sup>13</sup> The evidence clearly establishes that she violated the Respondent's loading procedures by remaining in her cab while loading, and the spill reporting procedures by failing to timely report the spill and remain with her trailer until assistance arrived. While the Complainant has consistently denied being trained or instructed in these procedures, I credit the testimony of Mr. Shea and Mr. Valois, that these requirements were made clear in her drivers handbook, as well as in her orientation and the October 2011 meeting that specifically addressed those issues.

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<sup>13</sup> Nor does the evidence raise an inference that her concerns about rusting tanks at the Tiger Hutton lease, or the flammability of H<sub>2</sub>S expressed during the December 19 meeting were a factor in the decision to fire the Claimant, even if those expressions of concern could be characterized as "protected activity."

The Complainant argues that a causal link or nexus is established by the “anger, frustration and ill will” exhibited by Mr. Shea toward her during the December 19 meeting, as she defended her concerns for safety. Complainant’s Brief at 23. I have listened to the tape recording of that meeting numerous times, and I had the opportunity to observe Mr. Shea testify at the hearing. There is no question that he was angry and frustrated by the Complainant’s comments to Mr. Reid, which were unfounded, and which almost destroyed the Respondent’s relationship with its biggest customer. But there is also no question that this anger and frustration were directed, not at the Complainant’s safety concerns, which Mr. Shea, Mr. Valois, and Mr. Currier addressed during the almost one and a half hour meeting, but at her statements to Mr. Reid.<sup>14</sup>

The Complainant relies on the proximity of her protected activity to her termination to establish that her termination was causally related to her protected activity. But even if the proximity of the Complainant’s protected activity to her termination, standing alone, were sufficient to raise an inference that her termination was related to her report of her H2S monitor going off, and thus shift the burden of proof to the Employer, I find that the evidence overwhelmingly establishes that the Respondent had a legitimate, non-pretextual reason for terminating her employment. There is no question that the Complainant violated the Respondent’s loading and unloading procedures, and the spill reporting procedures, which had been explained to her during safety meetings, specifically the October 2011 safety meeting, and which were set out in her drivers handbook.

The Complainant’s theory appears to be that she did not deserve to be fired, because the spill was not a big deal, and other drivers who had spills were not fired. Thus, because there was no legitimate reason to fire her, her termination must have been because she reported her H2S monitor going off two weeks earlier. Unfortunately, the evidence does not begin to support such a conclusion.

The Complainant has consistently downplayed the seriousness of her spill, stating that it was only a partial barrel, and that it did not require Pacer to “call out the National Guard.” In fact, as discussed above, the spill was much larger, and required significant resources to clean up. More importantly, it was first discovered by Orville Nichols, just two months after the implementation of the spill procedures written at his request, on his lease site. As Mr. Valois, Mr. Shea, and Mr. Currier testified, it was a huge deal.<sup>15</sup>

The Complainant has also consistently attempted to argue that her actions on that day were reasonable and justifiable. The Complainant quibbled with the term “immediately” in the

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<sup>14</sup> I do not agree with the Complainant’s claim that Mr. Shea exhibited “ill will” toward the Complainant at this meeting, or at any other time.

<sup>15</sup> The Complainant argues that the Respondent did not produce any “documentation” to show how it calculated that 3 to 5 barrels were spilled, how it was cleaned up, and the resources required to clean it up. Complainant’s Brief at 17. It is not clear what the point of this argument is; the Respondent presented the testimony of the persons in charge of taking care of the Complainant’s spill, as well as the testimony of persons with many years of experience as to the amount of oil she spilled. The Spill Report, completed by Mr. Currier, reflects that Mr. Mattox and Mr. Robinson performed clean up at the site, assisted by Mr. Currier, that an outside contractor, Burt’s Backhoe, was hired to haul in gravel, and that an employee of Nichols Brothers remained on the site during the cleanup process (RX 17).

spill reporting procedures, stating that if she were supposed to take whatever steps she could to contain the spill, she could not call a supervisor “immediately.” As Mr. Valois pointed out, the steps that a driver can take to contain a spill take only a few moments, and a call can be made while the driver is performing them. Moreover, the Complainant waited 25 minutes to call Mr. Currier, after she left the site, and she did not leave a voice mail; she did not attempt to contact anyone else.

The Complainant also argued that she had never been told that she must remain with the spill until help arrived. But Mr. Shea and Mr. Valois stated that this had specifically been discussed at the October 2011 safety meeting.

The Complainant claimed that she needed to know how much oil had been spilled before she reported it, and so she drove her trailer to the delivery site so she could calculate the amount of the spill. Mr. Shea and Mr. Valois pointed out that it did not matter how much was in the trailer when she made her delivery, because she had put some of it back into the tank at the Shamrock site. But not only were her calculations inaccurate, the spill reporting policy clearly required her to report a spill of any size.

Contrary to the Complainant’s suggestions, I credit the testimony of Mr. Valois, Mr. Currier, and Mr. Shea, who have significantly more experience in this area than the Complainant, and who testified that this was a big spill, at least three barrels, a level three spill. It was not, as the Complainant testified, a few puddles, or a quarter barrel.

Not only did the spill require Pacer to expend resources to clean up, it occurred on a highly visible lease site, owned by the owners of Pacer, who had specifically asked that the spill reporting procedures be put into place to address problems with spills. It was discovered and reported, not by the driver as required by these procedures, but by Mr. Nichols, as the Complainant drove off.

Mr. Valois, Mr. Shea, and Mr. Currier, all of whom I found to be completely credible witnesses, stated that the Complainant’s report of her monitor going off had nothing to do with the decision to terminate her; this was, as Mr. Shea stated, a “dead issue.” Mr. Shea did not make the decision to fire the Complainant, despite her violation of these procedures, until the December 27, 2011 teleconference, when he determined that she was not the kind of driver he wanted in the Pacer trucks. Mr. Shea stated that the Complainant refused to take responsibility for what happened, and admitted that she did not know what the spill reporting or loading procedures were. When he told her that they were in her truck book, she told him that she did not have time to read them. Mr. Shea had a driver who admitted that she did not know the company procedures, and who had had a serious violation of company policies on a very high visibility lease; she was an employee who said that she did not know what she was doing.

Nor has the Complainant established that other drivers in similar circumstances were not fired, thus suggesting that her dismissal was pretextual, and that the true motive for her dismissal was as retaliation for her protected activity. The Complainant argues that the Respondent’s proffered reason for her dismissal is pretext, because Mr. Hodge, who had a spill a few months

earlier at the same location, and failed to contact his supervisor, was not fired.<sup>16</sup> The Complainant takes issue with the Respondent's characterization of Mr. Hodge's spill as a Level 2 spill, arguing that Mr. Valois "reluctantly" testified that both spills were outside secondary containment, and thus according to the Complainant, under the spill policy, both were Level 3 spills. In fact, Mr. Valois testified that if a spill is outside of secondary containment, and is more than two barrels, it is considered a Level 3 spill. Mr. Hodges' spill was less than two barrels, and thus was considered a Level 2 spill.

The Complainant has also neglected to mention that Mr. Hodges did not violate the loading procedures – he was at the controls when the spill happened. Finally, as Mr. Valois testified, Mr. Hodges' spill occurred before the formulation of the formal spill reporting procedures that were presented to all of the drivers, including the Complainant, at the October 2011 safety meeting, to address just such occurrences.

Nor is pretext established or even inferred by the Respondent's "failure" to produce any document that showed that a Level 3 spill warranted termination of employment. Complainant's Brief at 17. The Complainant's argument that she should have received the same discipline as Mr. Hodge, a warning, is misplaced. Not only was Mr. Hodge's spill a Level 2 spill, it happened before the implementation of the formal spill reporting procedures. Even so, as discussed above, Mr. Shea testified that, despite the Complainant's violation of the loading and spill reporting procedures, he did not make the determination to fire her until it became clear to him that she was an employee who did not know what she was doing, and whom he could not in good conscience put back in a Pacer truck.

The Complainant argues that pretext is suggested because she received no warning that she would be fired, despite Mr. Currier's representation that she would only receive a write-up. Of course, Mr. Currier left her this voice mail message on the evening of December 23, after she had turned off her phone. This meant that the Complainant did not attend the meeting Mr. Currier asked her to come to so he could do a write-up. Mr. Currier signed off on the Spill Report after the Complainant did not show up for the meeting. But he did not prepare a write-up because he never got the chance to talk to the Complainant. The matter was then out of Mr. Currier's hands; Mr. Currier did not take part in any determinations regarding the Complainant, nor did he know what would happen to her at the December 27 meeting. Nor is it material that Mr. Shea did not recall reviewing any "document pertaining to the spill or in support of discharging the Complainant." Complainant's Brief at 24. Mr. Shea was clearly aware of what had happened.

The Complainant's argument that the "Respondent found opportunity to retaliate against Complainant for her complainants of exposing her and the public to hazardous conditions at the Tiger lease and in a rush seized the spill as a basis to fire her" is simply unsupported by the evidence, or any rational inferences therefrom. Complainant's Brief at 25.

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<sup>16</sup> Mr. Hodges' spill was also at the Shamrock lease site, around the corner from the location where the Complainant's spill occurred. As Mr. Valois and Mr. Shea testified, one of the reasons that Mr. Hodges' tanker overflowed was that the loading site was on a slant, which affected the gauges. The loading site was moved around the corner, where the ground was more level; this is where the Complainant's spill occurred.

The Complainant argues that pretext is established by the “suspicious” new spill reporting policy that “allegedly” became effective in October 2011. The Complainant hangs this argument on the fact that the sign-off sheet “purportedly” signed by the Complainant on July 27, 2011 did not match the policy it was attached to. Complainant’s Brief at 25.

The Complainant finds it to be relevant that the new spill reporting policy is the only policy produced by the Respondent without a date, and that the sign-off sheet attached to it predates the creation of the policy. At the hearing, when it was pointed out to Mr. Valois that the sign-in sheet for the new spill reporting policy predated the rollout of the policy, he stated that the sign-off sheet, which appeared to be from the Complainant’s orientation in July 2011, was mistakenly attached to this policy. But he stated that the document was given to the Complainant at the safety meeting. I find nothing suspicious about Mr. Valois’ explanation.

The Complainant then postulates that, because Mr. Valois testified that she was not given a copy of the H2S awareness policy despite his and her signed acknowledgement that she was given a copy, it was thus more likely that the Complainant never received any spill reporting policy. The Complainant stated “Evidently, Respondent was attempting to establish that Complainant was fired for violating a spill reporting policy they could not prove existed at the time of her discharge or even that she ever received it.” Complainant’s Brief at 26. I note that this convoluted logic rests on a misrepresentation of the record – Mr. Valois testified that he did not *recall* himself giving copies of the H2S policy to the drivers at the Complainant’s orientation, but they may or may not have been given a copy.

Apparently, the Complainant is arguing that the new spill reporting policy is a fiction created by the Respondent to justify firing her for making complaints about the safety of a lease site that was not owned by the Respondent, or under its control. Of course, this would require the Court to conclude that Mr. Valois and Mr. Shea conspired to lie about the preparation and existence of this new spill reporting policy, as well as its presentation to the drivers, including the Complainant, at the October 2011 safety meeting. The conspiracy would also have to include Mr. Orville Nichols, who discovered the spill and asked if it had been reported according to the policy, as well as Mr. Currier. I find nothing in the record that would compel me to make such conclusions.

I note that the Complainant has never disputed that she was at the October 2011 safety meeting, where these procedures were rolled out, or that she had the drivers handbook, which contained the loading and spill reporting procedures, in her truck.

The Complainant argues that in light of her previous satisfactory job performance, the Respondent’s failure to follow its step-by-step disciplinary policy, and discharge of the Complainant without warning, shows retaliation against the Complainant. The Complainant has not indicated what “step-by-step disciplinary policy” she is referring to. At most, the record includes the Step-by-Step Employee Warning Report prepared in connection with Mr. Hodge’s spill on June 9, 2011 (RX 6). But again, Mr. Hodges’ spill, which occurred on the Shamrock lease site just around the corner from the Complainant’s spill, was less than two barrels. Mr. Hodges was at the controls of his truck when the spill occurred; he did not notify a supervisor.

Mr. Shea testified that at that time, the spill reporting policies were ambiguous about whom to contact, which was why the new policy was written.

The Complainant argues that the Respondent told “three different stories” about how much oil was spilled, and arbitrarily called her spill a Level 3 to justify her discharge, and distinguish it from Mr. Hodge’s spill. There is no evidence in the record to identify the source of the statement in the Respondent’s prehearing submission report that about two barrels were spilled, or in the Respondent’s alleged response to the unemployment compensation claim that ten barrels were spilled. I rely on the testimony of Mr. Valois and Mr. Shea, who have decades of experience in the oil industry, that the Complainant’s spill was at least 3 barrels. As discussed above, the Complainant’s calculation that her spill was less than a barrel was based on faulty assumptions. There is no evidence to justify an inference that the Respondent incorrectly classified the Complainant’s spill so that it would have an excuse to discharge her, or so that it could distinguish it from Mr. Hodge’s previous spill.

### CONCLUSION

Based on the foregoing, I find that the Complainant has not met her burden to establish that she engaged in protected activity under the STAA. Although she has established that she engaged in protected activity under the TSCA, she has not established that her protected activity was a factor in the Respondent’s decision to terminate her employment for her violation of the loading and spill reporting procedures. The Respondent has established that it had a legitimate business reason for terminating the Complainant’s employment, and the Complainant has not shown that this reason was a pretext for retaliation for her protected activity.

Accordingly, the Complainant’s complaints under the employee protection provisions of the STAA and the TSCA are dismissed.

SO ORDERED.

LINDA S. CHAPMAN  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS - STAA:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is:

Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARBCorrespondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).

**NOTICE OF APPEAL RIGHTS - TSCA:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.