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Issue Date: 29 December 2015

Case No.: 2013-STA-00047

In the Matter of:

FERNANDO D. WHITE, *pro se*,

Complainant,

v.

SCHNEIDER NATIONAL BULK,

Respondent.

DECISION AND ORDER
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
AND
ORDER DISMISSING COMPLAINT

This matter arises from a complaint filed under the provisions of Section 31105 of the Surface Transportation Assistance Act of 1982, U.S. Code, Title 49, § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA") and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1978. Pursuant to 29 CFR §1978.107, this proceeding is subject to the procedural rules set forth in federal regulations at 29 CFR Part 18, Subpart A (29 CFR §18.1 to §18.59).

By Order issued February 25, 2014 a formal hearing was scheduled to commence on June 24, 2014, in Atlanta, Georgia. By Order of June 4, 2014, the formal hearing was cancelled upon Complainant's affirmation that he was currently employed and the Parties were attempting to resolve the issues in the case. Subsequently the Parties engaged in contested discovery proceedings requiring judicial intervention such that settlement of the issues appeared unlikely. By Order issued January 5, 2015, a formal hearing was scheduled to commence at 8:30 AM, Tuesday, May 12, 2015 in Atlanta, Georgia.

On April 14, 2015, Respondent's counsel filed "Respondent's Motion for Summary Decision" with extensive attachments seeking that the complaint be dismissed. The May 12, 2015 hearing was cancelled and the Complainant ordered to file a response, if desired. The Complainant filed

his response in opposition on May 11, 2015 and filed additional material referenced in his response on May 26, 2015.

STATUTORY FRAMEWORK

"Congress amended the STAA on August 3, 2007[1] to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. §42121(b)" *Smith v CRTS International, Inc*., No. 11-086, 2013 WL 2902809, *2 fn 1 (ARB June 6, 2013); 49 U.S.C. §31105(b). Since the complaint was filed on August 11, 2011, the post-2007 standards of proof apply.

To establish a prima facie case of unlawful retaliation under STAA at the adjudication level, the Complainant must prove by a preponderance of the evidence (1) that he engaged in protected activity, (2) that the employer had knowledge of the protected activity, (3) that he was subjected to an adverse employment action with respect to his compensation, terms, conditions, or privileges of employment, and (4) that the protected activity was a contributing factor in the adverse employment action. *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51, 2014 WL 5511070 (ARB Oct. 9, 2014) citing *Bechtel v. Administrative Review Board, U.S. Dept. of Labor*, 710 F.3d 443 (2nd Cir.2013); *Gale v. U.S. Dept. of Labor*, 384 Fed. Appx. 926 (11th Cir. 2010) *unpub*; *Stone v. Webster Engineering Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997) Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 76 FR 68087 (Nov. 3, 2011),[2] *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013) "If the employee does not prove one of these elements, the entire complaint fails." *Coryell v. Arkansas Energy Services, LLC*., ARB No. 12-033, ALJ No. 2010-STA-042, 2013 WL 1934004, *3 (ARB Apr. 25, 2013)

When evaluating if protected activity is established as a contributing factor in the Complainant's prima facie case, Respondent's evidence of lawful, non-retaliatory reasons for taking adverse employment action are not considered as rebuttal evidence; however, Respondent's evidence otherwise rebutting Complainant's evidence on the issue of causation is relevant and considered. This is because at the evidentiary stage of formal hearing on the merits of the case, the Complainant is required to prove the elements of a prima facie case by a preponderance of evidence and not by merely alleging circumstances sufficient to raise an inference that the protected activity was a contributing factor to an adverse employment action. See *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014) citing *Bechtel v. Administrative Review Board, U.S. Dept. of Labor*, 710 F.3d 443 (2nd Cir. 2013); Coryell v. Arkansas Energy Services, LLC, ARB Case No. 12-033, ALJ Case No. 2010-STA-042 (ARB Apr. 25, 2013) [no contributing factor where evidence established managers deciding to fire employee did not know of protected activity.] *Ferguson v. New Prime, Inc*., No. 10-75, 2011

[1] Pub.L. 110-53, 9/11 Commission Act of 2007, 121 Stat.266 §1536

[2] In *Fordham* the majority held that the ALJ erred in considering evidence the Respondent had introduced in support of its contention of legitimate, non-retaliatory reasons for taking the adverse personnel action during the decisional process on whether the complainant had met her burden under SOX of proving 'contributing factor' causation. The ARB has elected to readdress this rationale *en banc* in the case of *Powers v. Union Pacific Railroad Co*., No. 13-034, ALJ No. 2010-FRS-30, 2014 WL 5511088 (ARB Oct. 17, 2014)

WL 4343278 (ARB Aug. 31, 2011); *Clarke v. Navajo Express, Inc*., No. 09-114, 2011 WL 2614326 (ARB June 29, 2011).

If the Complainant proves a prima facie case under the STAA, the Respondent will not be held to have violated the STAA if it establishes by clear and convincing evidence that the adverse employment action was the result of events and/or decisions independent of the protected activity. "Clear and convincing evidence is 'evidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Coryell v. Arkansas Energy Services, LLC*., ARB No. 12-033, ALJ No. 2010-STA-042, 2013 WL 1934004, *3 (ARB Apr. 25, 2013) quoting *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, ARB No. 12-035, ALJ No. 2007-STA-019, 2013 WL 143761 (ARB Dec. 18, 2012)

Summary decision is appropriate in a proceeding before an Administrative Law Judge "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d); *see also Williams v. Dallas Indep. Sch. Dist.*, No. 12-024, 2012 WL 6849447 (ARB Dec. 28, 2012). "At the summary decision stage of a STAA case, the ALJ assesses the evidence for the limited purpose of deciding whether it shows a genuine issue as to a material fact ... If the complainant fails to establish an element essential to his case, there can be 'no genuine issue as to a material fact' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Coates v. Southeast Milk, Inc*., No. 05-050, 2007 WL 4107740, *3-4 (ARB Jul. 31, 2007)

For whistleblower complaints, the Administrative Review Board has held that the papers filed by a pro se party must be read liberally and interpreted in a manner that raises the strongest argument suggested therein. *Coates*, supra at *7. In this case, the Complainant continues to proceed without representation.

In evaluating whether the Respondent is entitled to a Summary Decision, all facts and reasonable inferences therefrom are considered in the light most favorable to the non-moving Complainant. *Battle v. Seibles Bruce Ins. Co*., 288 F.3d 596 (4th Cir. 2002) citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986) "However, even when all evidence is viewed in the light most favorable to the non-moving party, the non-moving party cannot defeat a properly supported summary judgment motion without presenting 'significant probative evidence.'" *Pueschel v. Peters*, 340 Fed. Appx 858, 860 (4th Cir. 2009), *unpub*, citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986) When the information submitted for consideration with a Motion for Summary Decision and the reply to the Motion demonstrates that there is no genuine issue as to any material fact, the request for summary decision should be granted. Where a genuine question of a material fact remains, the request for summary decision must be denied. 29 CFR §§18.40 and 18.41

The first step of the analysis is to determine whether there is any genuine issue of a material fact. If the pleadings and documents that the parties submitted demonstrate the existence of a genuinely disputed material fact, then summary decision cannot be granted. Denying summary decision because there is a genuine issue of material fact simply indicates that an evidentiary

hearing is required to resolve some factual questions and is not an assessment on the merits of any particular claim or defense." *Johnson v. WellPoint Cos., Inc.*, No. 11-035, 2013 WL 1182309, *7 (ARB Feb. 25, 2013).

As the ARB has earlier explained,

> Determining whether there is an issue of material fact requires several steps. First, the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial. Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact. When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the non-moving party, the complainant in this case. The moving party must come forward with an initial showing that it is entitled to summary decision. The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim.
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> In responding to a motion for summary decision, the non-moving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts that could support a finding in his favor. *See* 29 C.F.R. § 18.40(c). If the moving party presented admissible evidence in support of the motion for summary decision, the non-moving party must also provide admissible evidence to raise a genuine issue of fact.

Williams, supra at *4, quoting *Hasan v. Enercon Servs., Inc.*, No. 10-061, 2011 WL 3307579, *3 (ARB Jul. 28, 2011).

COMPLAINT FILED

On August 11, 2011 the Complainant alleged he was terminated on June 17, 2011 in reprisal for the following events:

(1) On or about April 14, 2011 reported to T. Johnson he had been asked to falsify his logbook and truck computer had been tampered with resulting in inaccurate mileage being reported;
(2) On June 5, 2011 reported to L. Melancon that cargo tanker #28386 was leaking chemicals in violation Part §393.100 and the left brake pads were too thin in violation Part §393.47 and refused to drive cargo tanker from Pilot Truck Stop to Meridian, Mississippi; and,
(3) On June 11, 2011 reported computer had been tampered with.

On October 4, 2011 the Complainant filed a supplemental affidavit alleging the following events:

(1) On or about April 5, 2011 reported to L. Melancon supervisors were attempting to force him to falsify daily logs by indicating off-duty when time was on-duty / not driving;

(2) On or about April 5, 2011 reported to L. Melancon and T. Johnson that on-board computer would not permit entries to be made while vehicle was at rest pursuant to Part §395.16, thereby generating falsified and inaccurate hours of duty status records;
(3) On or about April 15, 2011 reported to T. Johnson, B. Rosenthal and two other individuals present that on-board computer was not working properly in violation of Part §395.16, thereby generating falsified and inaccurate hours of duty status records;
(4) From April 2011 through June 2011 placed truck on-board computer in repair center for not working properly in violation of Part §395.16, thereby generating falsified and inaccurate hours of duty status records;
(5) On June 6, 2011 reported cargo tanker incident to Respondent's Corporate Safety Department which resulted in a Hazmat team for chemical leakage and mobile truck repair of brakes on cargo tanker #28386;
(6) On June 14, 2011 retaliated against by L. Melancon and supervisors by being forced to take 34-hour off-duty period immediately after completing a 34-hour off-duty period from midnight June 12, 2011 through 1:00 PM June 13, 2011;
(7) On June 16, 2011 reported to L. Melancon, the corporate personnel manager and two others that Respondent violated Part §395.16 by tampering with assigned on-board computer;
(8) On June 17, 2011 in reprisal for reporting on-board computer was generating falsified and inaccurate hours of service assigned new driver manager, C. Maloy; instructed to sign discipline document without comments to upper management; and, denied copies of records of duty status required to be maintained by Part §395.8; and,
(9) On June 17, 2011 terminated in response to using camera and audio recorder in effort to gather facts surrounding violations of rights under the STAA.

POSITION OF THE PARTIES

Position of Respondent

Respondent submits that the Complainant was terminated by Driver Business Leader Charlie Maloy on June 17, 2011 for insubordination based on repeated refusals to stop video recording computer-based training and that C. Maloy had no knowledge at the time of termination of Complainant's alleged protected activity of complaints made in April through June 2011 regarding the Qualcomm electronic onboard recorder (EOBR) in his assigned tractor and refusal to transport a chemical tanker on June 5, 2011. Respondent argues that the Complainant's otherwise alleged protected activity was not a contributing factor to the termination decision of C. Maloy and therefore the Complainant has failed to establish that the alleged protected activity was a contributing factor to his employment termination on June 17, 2011.

Respondent submits that the Complainant's activity of video recording Respondent's confidential and proprietary training material was not protected activity under the plain language of the STAA, was not related to any objectively reasonable safety complaint or refusal to operate a motor vehicle, and did not further the STAA purpose of encouraging objectively reasonable complaints. Respondent argues that the Complainant's insubordinate behavior towards C. Maloy does not constitute protected activity, the STAA does not permit a complainant to pilfer an

employer's proprietary documents in violation of employee contracts[3] and the Complainant's video activities did not relate to his earlier EOBR malfunction complaints and refusal to drive the chemical tanker.

The Respondent requests that the complaint be dismissed in its entirety.

The Respondent attached declarations from L. Melancon, C. Maloy and D. Leishman[4] to the Motion for Summary Decision. The "Leishman" Declaration contained the following attached exhibits:

A. Copy of the Complainant's original complaint to OSHA filed on August 8, 2011
B. Copy of "Mutual Non-disclosure Agreement" between Respondent and Instructional Technologies, Inc.
C. Copy of FEDEX delivery from Respondent to Complainant
D. Copy of excerpts pages from Complainant's deposition taken on March 23, 2015
E. Copy of screenshots from Complainant's disclosed evidence made in discovery

Position of the Complainant

In his response the Complainant submits that C. Maloy was aware of his prior protected activity involving complaints about the EOBR and refusal to drive the chemical tanker from his presence in a June 17, 2011 meeting with L. Melancon, the Reserve, Louisiana Terminal Manager. The Complainant acknowledges that C. Maloy told him "to stop using my camera and audio recorder" and that he responded by saying he "was using my camera and audio recorder to gather the facts surrounding [Respondent's] violations of my rights which are protected by the [STAA]." The Complainant stated "Mr. Maloy terminated my employment with respondent about that point in response to my refusal to stop using my camera and audio recorder to gather the facts." The Complainant alleges that his camera and audio recorder use was protected activity under STAA based on another event unrelated to this complaint.

The Complainant seeks to have the Motion for Summary Decision denied.

The Complainant attached the following documents to his response:

A. Transcript of recorded telephone conversation involving Complainant and T. Johnson without date
B. Copies of photographs involving chemical tanker #28386
C. Copy of Respondent's September 9, 2011 response to OSHA inquiry
D. Copies of hotel receipts for June 11 to 13, 2011
E. Transcript of recorded conversation involving the Complainant and "Charlie" without date
F. Transcript of recorded conversation involving the Complainant and "Lynn" without date

[3] Citing *JBG Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 697 (E.D. VA. 2007)
[4] Declarant is Respondent's counsel of record. The "Declaration" is given no weight beyond that provided for in 29 CFR §18.72(c)(1)(ii)

G. Transcript of recorded conversation involving the Complainant and C. Maloy without date
H. Copy of Secretary's Findings of April 15, 2013
I. Copy of "Complainant's First Request for Admissions with Accompanying Interrogatories" of April 1, 2014
J. Copy of "Complainant's First Request for Production of Documents to Respondent" of April 1, 2014
K. Copy of Complainant's objection to Secretary's Findings and request for hearing dated May 21, 2013
L. Copy of Complainant's affidavit sent to OSHA on September 20, 2011
M. Transcript of recorded conversation involving Complainant and OALJ paralegal personnel without date
N. Transcript of March 24, 2015 deposition of C. Maloy, Jr

SUMMARY OF DOCUMENTS RELEVANT TO MOTION FOR SUMMARY DECISION

March 24, 2015 Deposition of C. Maloy, Jr. [Claimant's Exhibit "N"]

On March 24, 2015 C. Maloy was called by the Complainant in deposition and testified that he was employed as a Driver Business Leader with Schneider National Bulk Carriers, Inc. with duties to monitor and manage his driver force to ensure the drivers complied with DOT regulations. He reported to L. Melancon who in turn reported to G. Goffinet. T. Johnson was a Driver Business Leader in the Savannah, Georgia facility.

C. Maloy testified that as a Driver Business Leader he was responsible, on occasion, for bringing in drivers to go through the company training program for various topics, such as logging, driving and DOT regulations pertaining to drivers. For driver logs, the company primarily used electronic logging when installed in the assigned trucks. If a driver was undergoing initial training or not associated with a truck with electronic logging capabilities or the electronic logging system was not working, paper driver logs were used. He reported he was aware of times the electronic logging equipment would malfunction and the driver would use paper driver logs available at any of the company's operating centers in the country. If a paper log was used, the driver could submit a paper log to the company by using a scanner at any company operating center, or any "Pilot" facility, that would send a copy of the paper log electronically to the company office, "like a fax machine that goes directly to Schneider."

C. Maloy testified that he was aware that the Complainant reported his electronic logging system did not work on June 17, 2011, which was the date he became the Driver Business Leader for the Complainant. Prior to that point T. Johnson, who has since died, had been the Complainant's Driver Business Leader. He stated that when a driver reports the QUALCOMM is not working he normally sends an operating support representative or member of the training staff to make sure the QUALCOMM is working properly or he has the driver call the support team in Green Bay to look at the unit through the logging department. He testified that he has very little familiarity with the logging device but understands the driver has to log onto the unit with name and password to start the day's logging, has to put himself out of service, and has to log off the unit at the end to complete the day. The driver is able to manually update the driver log, though

the unit automatically keeps the driver's hours of service in drive time while in motion and will take the driver "out of service" when the truck stops and show off duty, to his knowledge.

C. Maloy testified that on June 17, 2011 when the Complainant was assigned to him, his "first assignment was to get [the Complainant] through the training program … so I had no past history of knowing anything that you were doing. I had no responsibility in monitoring anything that [the Complainant was] doing." The training "was standard training concerning the logging program … for our drivers." He testified that the four areas for hours of service were driving, on-duty not driving, off-duty in sleeper berth, and off–duty not driving. The company required 10 hours of sleeper berth time in a 24 hour period, though DOT regulations at the time of the Complainant's employment permitted 2 of the 10 hours to be out of the sleeper berth in an off-duty status. The company permitted drivers to drive 11 hours in a 24 hour period.

C. Maloy testified that the Complainant was hired as a company driver. He reported company drivers are responsible for driving on the road with a commercial vehicle and commercial property; responsible for the safety of the equipment; responsible for maintaining a safe environment when delivering a load; responsible to maintain a safe environment while on premises; responsible for all paperwork to be correct for the delivery load; responsible for pre- and post-inspections of the truck and trailer; and responsible for inspecting the truck and trailer if driver feels that there is anything wrong, such as a flat tire. If there are safety issues, the driver is to call the Driver Business Leader. Drivers operate in snowy conditions and if the driver feels it is unsafe for himself or the rig to drive, the driver is to find a safe location, pull over, take care of himself first, then take care of the rig and then let the Driver Business Leader know what the conditions are and why stopped. It is the driver's responsibility to check the route and ensure there is plenty of time and location for breaks and pull-off, well before the 11 hour driving time has elapsed. He testified that the company did not permit drivers to operate "once you incur ice … driving on ice is not an option … you should never be surprised that you're on ice." He reported he was unaware of any law or DOT guideline that a driver could drive over 11 hours.

C. Maloy testified that J.R. Rodriquez had been a maintenance shop manager for Respondent at one time but was no longer employed by Respondent. He was unaware of what responsibilities J. Rodriquez had as a shop manager other than overseeing the mechanics who did upkeep and repairs on trucks.

C. Maloy identified two photographs as being from the computer-based training program "we use with Instructional Technologies … to help with our drivers on similar areas such as logging." "ITI" on the photographs indicates Instructional Technologies, Incorporated. He testified that the messages in the photographs do not pertain to training but are related "directly to the program and to the safety of Instructional Technologies, as far as the contract [the company has] with them to keep the program safe from, say tampering or having someone that wanted to take the program, film it, do whatever, as far as any trade secrets or anything of that nature. So this is a disclaimer for that program."

C. Maloy testified that the company has quarterly training involving safety on several levels with protection and care of the vehicle, the driver, and road conditions. There is a logging computer-based training program and a backing computer based training program. The quarterly training

was computer-based training that the drivers could complete at a computer in a company operating center. With the computer based training, the driver would sign on for the course, view the course which may contain videos, and answer questions at the end of the course. He testified that he was unaware of anything in the computer based training sessions that could hurt or injure the driver taking the course. He testified that the second photograph had a paragraph stating "However, Instructional Technologies Inc. (ITI) cannot guarantee … the adequacy, completeness, accuracy, or appropriateness of the Pro-TREAD material and is not responsible for any omissions or inaccuracies obtained from our services or caused by human error. ITI shall not be liable for any loss, injury, or damage that may result from any such omission, errors or inadequacies." He testified that a driver could not be injured while taking the computer-based training and that he was unaware of any omissions in the computer based training program.[5] He testified that the logging computer-based program had adequate information that the company provides drivers. He reported that drivers are expected to agree to the ITI disclaimer before they can take the computer-based training program. He stated the company has no problem if a driver chooses to talk to an attorney before agreeing to the ITI disclaimer.

C. Maloy testified that the top two photographs on the third page looked like electronic logging units used by Respondent. He stated he was familiar with the "approved," graph" and "summary" features of the electronic unit but not the other functions. He reported "the driver has to approve the logs each day to make sure there are no errors in the logs. If he doesn't approve them, the status that he's in will continue." A driver has to be on-duty to do a pre-trip inspection. Once a driver gets to the delivery location he would be on-duty not driving while making the actual delivery. He stated "It's up to the driver to inform the DBL or Safety of anything that would keep him from following the rules of hours, getting to his destination, calling his DBL to reschedule the appointment, if in fact he is running up on his hours." He agreed that the "approved" function is where the driver looks at a series of logs and is okaying that the logs are accurate and within the guidelines of the company and DOT. He was unaware of any limits on how long a driver could go without approving his electronic logs.

C. Maloy testified upon Complainant's questioning that "On June 17, 2011 [the Complainant] was asked on … three occasions in the conference room, not to videotape and record, and he was also asked three times out in the computer room and the driver's lounge [not to videotape and record] and so because of his insubordination, he was terminated from Schneider. … The direction that was given was that you were not to record or tape anything while you're on Schneider property. You are not to record anything concerning their training, which you refused to do on multiple occasions, and you were terminated for insubordination, as far as not following those rules … You were asked on several occasions in the conference room not to tape and not to record, that Schneider does not allow that. You were also asked on three different occasions in the drivers' lounge not to tape or record, and because of your insubordination to that, you were terminated with Schneider."

C. Maloy testified that he was part of a conference in the conference room the morning of June 17, 2011 with the Complainant, L. Melancon and C. Clark present and the Regional Safety

[5] During examination of C. Maloy concerning the ITI statement on the second photograph the Complainant stated: "Well, the disclaimer seems to say that this third party wants to be held harmless in case there's an injury or some of the data's omitted or inaccurate, inadequately, or something of that nature." At page 49.

Manager B. Gerl present by speakerphone, though later stated that L. Melancon could have been on speakerphone. The topic was to be logging issues and logging training. He testified that he showed the Complainant logbook infractions during the conference; but did not recall the exact number of logbook infractions, and that the Complainant responded that that was not correct, that those were not his violations, and that his QualComm was malfunctioning. He testified that three times in the conference room the Complainant was told that recording and taping was not allowed. The first two times were by L. Melancon and the third time was by C. Maloy. The first time L. Melancon asked if the Complainant was recording and videotaping and stated to the Complainant that was something that Schneider did not allow on its premises to which the Complainant stated it was his right to do so under DOT regulations and he was going to continue recording. The second time L. Melancon restated the same things and the Complainant responded the same that it was his right to record and he was going to continue to do so. He testified that the third time he told the Complainant taping and recording was not allowed on Schneider or customer property and that Schneider has to keep individuals and training programs safe and as a heads-up, he told the Complainant that if he continues to record "we'll have no choice but to terminate you from employment" and the Complainant responded he had every right to do that and that he was going to continue to do it. He testified that during the June 17, 2011 meeting in the conference room the Complainant did not state that someone, or any specific individual, went into his truck, got on his computer and falsified his logs. He reported that the Complainant had stated that his QualComm was not working properly. He testified that at some point in the conference room the Complainant might have used words that he was using the audio and video recording to gather facts under the STAA. He testified that other paperwork at the conference involved the CTE – Commitment to Excellence document which lays out the issues at hand, the training that will occur and what steps that would be taken to correct the issues being looked at. The issues being looked at were logging and hard braking issues only. He stated that he did not recall hard braking being discussed during the June 17, 2011 conference and forgot about it until the CTE was brought up during the deposition.

C. Maloy identified Claimant's deposition exhibit 2 as the "Commitment to Excellence" letter that was signed by the Complainant and him on June 17, 2011; but was prepared on June 16, 2011. The CTE was focused on the Complainant's logging and the logging issues with QualComm and did not mention hard braking. He testified that the Complainant was argumentative during the discussion of the CTE and his signing of the document, but that the Complainant signed the CTE at some point after understanding what the training was there for. He reported that the Complainant tried to write a statement on the CTE before signing to the effect his STAA rights were being violated and that the matter was probably going to the Department of Labor. He testified that the CTE was a legal document and property of Schneider and could have the Complainant's signature and date to state the Complainant understood and would comply with the training that was being done. The Complainant was free to submit any concerns about discrimination or grievances about the June 17, 2011 conference and had "aired your grievances very well" with L. Melancon and C. Maloy during the conference.

During the deposition the Complainant stated that he had a pen camera in his pocket and tape recorder that he used to record the meeting in the conference room on June 17, 2011. He identified Complainant's deposition exhibit 3 [Complainant's Exhibit E] and 4 [Complainant's Exhibit F] as transcripts of those recordings.

C. Maloy testified that he and the Complainant were present in the drivers' lounge with the Complainant "sitting at the kiosk machine, where you were taking the [computer-based training]. I had asked you if you were recording and taping, and you said yes, and I informed you that again that Schneider does not allow that on any of their premises or customers'. They do not allow that at all, as far as taping and recording, to stop, and that you understand that if, in fact, you continue this, you will be terminated from Schneider. You said yes. I asked you at this point, are you going to continue to tape and record. You said that was your right. And I said, okay, Fernando. I said, I want to make sure I get this clear, that you understand that if you continue to tape or record, that it is not something that Schneider allows. They do not allow it on any of their premises, and especially with their training programs. Do you understand that you will be terminated? And you said yes. And I said, are you going to continue to do that. And you said yes, that's my right. So I tried one more time, and I said I want you to be specifically clear that if in fact, you continue to tape and record, you will be terminated with Schneider. It is not something that they allow. And I said, do you understand that you are not supposed to be taping? And you said yes. Do you understand you are not to be recording? You said yes. Do you understand that you will be terminated from Schneider, that that was the consequence behind that? You said yes. And I asked, are you going to continue to tape and record and videotape? And you said, yes, that's my right; I'm going to continue to do it. And I terminated your employment.

C. Maloy identified Complainant's deposition exhibit 5 [Complainant's Exhibit G] as an incomplete recording of interaction with the Complainant in the drivers' lounge after the Complainant had been terminated by him.

C. Maloy testified that he did not recall the Complainant mentioning anything about a June 5th to 6th incident involving transporting a tank of leaking chemicals to places to get the tank cleaned and breaks fixed. He testified that he did not recall any mentioning by the Complainant he was being retaliated for protected activity or refusing to transport a leaking tanker. C. Maloy testified that he did not overhear any conversations involving the Complainant saying he was being retaliated against for not hauling the chemical tanker or an individual being sent to his truck to falsify logs. He stated the Complainant directed a statement to L. Melancon that the Complainant thought someone had tampered with his QualComm during a meeting involving logging violations. C. Maloy testified that he did not investigate that statement because "through our discussion as far as the training program, we were going to find out the reasons, whether it was behavior or whether it was training or any other. So basically, at that point I had not had the opportunity to do so … That's part of the training program … to make sure that you understand how [the QualComm] works and follow through and making sure of that. That was part of our follow-through as well, to follow your logs for the next couple of weeks to see what actually was the problem and to follow through … if, in fact, that there were any instances where the QualComm was not working. That was part of our program and training going forward … Once the training was completed on June 17, 2011, there would be a determination of whether there was anything that was lacking as far as training or your knowledge, was there anything lacking as far as the equipment. The follow-up would monitor your logs basically on a daily basis for the next couple of weeks to see if … there [were] issues with your QualComm, or what the exact issues were so we could get it corrected immediately."

C. Maloy testified that the Complainant was terminated for "the insubordination that I had asked you three times, that you were told three times not to tape and not to record anything on Schneider [property] and that the results of that could lead to termination. And while I was out at the driver lounge, I specifically asked you three times, and you continued to do it, even after I termed you … you continued to videotape." He did not recall who was present in the drivers' lounge at the time, though someone was present.

C. Maloy testified he had no knowledge of the Complainant's qualifications; did not remember having a discussion with the Complainant on June 5, 2011; and, was not aware of anyone telling the Complainant to transport a tank while it was leaking chemicals to get it cleaned and brakes repaired. He testified he did not have knowledge of trailers and tractors to which the Complainant was assigned; and has no knowledge of the Complainant's pay and benefits while employed by Schneider. He testified that he had no knowledge and was not involved with any tractors or trailers that the Complainant may have written up for violations of DOT regulations. He testified that he could not cite each e-mail sent to the Complainant by Schneider or by the Complainant to Schneider. He testified that he was unaware of the Complainant's training score with Schneider. He was also unaware of the Complainant's health benefits, any inquiries about Complainant's work quality, or handwritten logs. He stated that "besides electronic logs, we did have paper logs available for the drivers."

C. Maloy testified that the computer-based training concerning quarterly training, logging and backing were confidential materials.

April 13, 2011 Declaration of C. Maloy [Employer's Exhibit]

C. Maloy stated that he was a former driver business leader for Schneider and met with the Complainant on June 17, 2011 at the request of L. Melancon to administer Logging Performance Enhancement Training and to review a Commitment to Excellence document with the Complainant. He stated that he had not met the Complainant prior to June 17, 2011 and "was not aware of any complaints [the Complainant] may have made to others at Schneider, nor was I aware whether he had ever refused to operate a commercial motor vehicle or transport a tanker for Schneider."

C. Maloy stated that the purpose of the June 17, 2011 meeting was to ensure that the Complainant was using his EOBR to record hours correctly in compliance with DOT regulations and to obtain the Complainant's commitment to understand DOT hours of service regulations and "the proper operation of his EOBR to reduce or eliminate his logging errors and/or hour of service violations." He reported that during the June 17, 2011 meeting the Complainant demanded to see a list of every hours-of-service violations attributed to him, which he provided to the Complainant. He stated that after being provided the list of violations the Complainant "alleged that he did not commit any hours of service violations and that his EOBR must have malfunctioned and/or been tampered with."

C. Maloy stated that after the Complainant signed the Commitment to Excellence document, he had another co-worker show the Complainant to a computer terminal to complete the computer-based Logging Performance Enhancement Training. Subsequently he was advised that the

Complainant was refusing to accept a disclaimer displayed on the computer monitor. C. Maloy stated he returned to the training area and noticed the Complainant was using a video recording device to record the computer screen. He informed the Complainant he was not permitted to record the training and that continuing to do so could lead to his termination, to which the Complainant indicated he would continue to record. The Complainant also stated he would not accept the disclaimer displayed on the computer screen. He stated the Complainant would not turn off the recording device, was again advised that recording of the training was not permitted, and he refused to turn off the recording device.

C. Maloy stated that "I then terminated [the Complainant] for his refusal of multiple direct instructions to stop recording his training, including attempts to video record Schneider's confidential computer-based training. I, and I alone, made the decision to terminate [the Complainant]. At the time I made the decision to terminate [the Complainant's] employment on June 17, 2011, I had no knowledge of any complaints that he made about his EOBR prior to June 17, 2011. … I did not speak to [the Complainant] or anyone else on June 5, 2011 about [the Complainant's] refusal to transport a tanker. I knew nothing about [the Complainant's] activities on June 5, 2011 until after I terminated his employment. In my decision to terminate [the Complainant], I did not consider his claim to me on June 17, 2011 that his hours of service violations were caused by an EOBR malfunction. Whether or not [the Complainant] had made such a claim to me on June 17, 2011, I would have terminated him for his refusal of multiple requests to stop recording his training."

C. Maloy stated that "Schneider's computer-based Logging Performance Enhancement Training is developed by a third-party vendor, Instructional Technologies, Inc. ("ITI"). The content of Schneider's computer-based Logging Performance Enhancement Training is confidential and proprietary to Schneider and [is] prevented from unauthorized disclosure by a Mutual Non-Disclosure Agreement between Schneider and ITI." He also stated that Schneider does not permit audio and video recording on its property without Schneider's consent.

Employer's Exhibit "C" to the April 13, 2015 Declaration of D.D. Leishman

This one page exhibit is titled "Commitment to Excellence" and indicates it was prepared by someone on June 14, 2011 and was discussed and signed on June 17, 2011 by the Complainant (driver) and C. Maloy (DBL).

The document indicates, under the heading: "Specific, Observed Actions or Behaviors", that "Excessive hours of service violations are a concern. [The Complainant] doesn't log off duty to allow for a full 10 hour break [and] He also drives the truck when he doesn't have hours against his 70 (example: he drove twice on June 14 without having hours against his 70)." The document also indicates the Complainant had 8 "over 11" violations, 9 "over 14" violations and 7 "over 70" violations and that "Four or more log violations in a calendar month is considered out of compliance with Schneider policy … [The Complainant has been on duty for many days at a time doesn't complete his 10 hour, he has been driving without hours on 70 latest example is today [6/14/11] he drove with no hours."

The document lists the "Issue(s) to be Improved" as "4 or more log violations in a calendar month." "Possible Solutions" included "1. Driver associate understands the DOT Hours of Service regulations; 2. Driver turns in hours correctly via Macro 17; [and] 3. Driver does recap each day and sends in via Macro 17 or during service call to verify appropriate hours to run."

The document provides for an "Excellence Plan" that "is completed when there are <2 violations in a calendar month." The "Plan" required the Complainant to "1. conduct Logging Performance Enhancement Training to understand DOT Hours of Service regulations; 2. recap completed each day; 3. sends in hours daily via macros …; [and] 4. works with leader to ensure all loads are safe and legal." The "Plan" required C. Maloy, as the Complainant's driver business leader, to "1. schedules Logging Performance Enhancement Training; 2. reviews reporting weekly for any violations; 3. sets up monitoring process and message driver with any violations that occur after logging training; 4. reviews logs for violations. If a violations is verified, reviews error with driver so driver understands logging expectation. If not a violation, works with Regulatory Dept to remove violations from driver's record; [and] 5. works with driver to ensure all loads are safe and legal." In the "Follow-up Plan," C. Maloy would "review weekly results and identify any further HOS violations with driver. Leader will discuss any violations with Driver."

The document provided "Possible Outcomes" as "Any further log violations after the date of this discussion may lead to termination from Schneider National Bulk Carriers." It also provided that signature "signifies your Commitment to Excellence and accepting the terms and conditions stated above. Understanding that failure / refusing to comply may result in termination of your employment."

Complainant's Exhibit "E"

This document appears to be an incomplete transcript from an audio portion of a 30 minute audio/video recording which C. Maloy identified in deposition as an incomplete transcript of a June 17, 2011 meeting in the conference room.

The document indicates the Complainant was brought into the meeting that morning concerning logging issues and the way he managed his hours and to discuss a plan developed to address specific areas. C. Maloy was directed to review the developed plan with the Complainant. The Complainant requested to have his copy to make notes on during the discussion.

C. Maloy explained the plan document noting that the Complainant had four or more logging violations in a calendar month and the company had concern about over hour of service violations related to not logging off duty to allow for a full 10 hour break and driving truck without appropriate hours remaining, and getting hours up to 70. He noted that professional behavior is considered out of compliance with 4 or more log violations in a month and that hours of service standards must be maintained to keep the company's satisfactory rating with the DOT. He noted that the more important core value is safety, first and always, and there is an obligation to associates and the motoring public to always conduct business in the safest manner and in accordance with rules and regulations. He noted that several days when the Complainant had been on-duty without taking 10 hour breaks and driving without hours authorized, such as June 17, 2011 when he drove with no hours available. He noted that in the previous 6 months' time

the Complainant had 8 violations of the 11-hour rule; 9 violations of the 14-hour rule; and 7 violations of the 70-hour rule. He noted that the plan called for "covered associate understand the possible solutions here is that you understand the D.O.T. hours [of] service regulations; driver turns in his hours correctly via macro-17; driver does recap each day and sends in his macro-17 or during service call to verify appropriate hours to run."

C. Maloy advised the Complainant that copies of his logs related to violations of hours of service were available and he could get the documentation for up to 6 months prior. The Complainant stated that the hour of service violations were because his on-board computer had been tampered with, the computer was faulty; and his computer said one thing and the company's computer said something else. The Complainant denied committing the hour of service violations and that the information he is putting into the computer system is being deleted or altered. The Complainant stated that the logs he approves in the truck aren't the logs actually being sent up to the company. The Complainant stated he discussed the problem with Lynn, Tony and Brian and people in Smyrna but they have not been able to get it alleviated.

C. Maloy advised the Complainant that the company went back and looked at the computer system and there was no tampering of any kind and any time; the logs show hour of service violations. He explained the plan was to conduct logging performance enhancement training for the driver to understand the hour of service regulations; recapping completion each day; sending hours of service each day via macros; working with leader to ensure all loads are safe and legal; and for the leader to provide scheduled logging proponent enhancement training; review reporting weekly for any violations; monitor, meet and review with the driver any violations that occur after logging training so the driver understands logging expectations; and to work with the driver to remove violation notations from the driver's record if the event is not a violation. He noted that if there were 2 violations in a calendar month after logging training, the risk to the company is too great to continue employment of a driver falsifying any driving logs, and that any further log violations after June 17, 2011 may lead to termination of employment. He explained that the Complainant's signature at the bottom of the performance plan "signifies your commitment to excellence in accepting the terms and conditions [of the plan and] understanding that failure [or] refusing to comply may result in termination of your employment."

The Complainant asked for time to talk to an attorney before signing the plan document. He wrote comments 'on the paperwork to go up and it's probably going to go before the Department of Labor, so I'm putting notes to the Judge." C. Maloy replied that the Complainant was told he could write on his copy of the paperwork but he could only sign and date the company's copy. The Complainant restated his intent to place remarks next to his signature that his rights under the STAA were being violated because he was being refused the right to place a statement on the "Commitment to Excellence" document next to his signature "that my rights are being violated." C. Maloy advised the Complainant he could "put anything you want to on a separate piece of paper and send it to wherever you want to; we have no problem with that" but the document to be signed "is an official signing document … [that] says we have agreed to the terms above and then you can either agree to them or not. Agreeing to them means that you sign the piece of paper, you date it, that's it. If you do not agree to it, you don't have to sign it."

The Complainant agreed to sign a copy of the "Commitment to Excellence" document if C. Maloy would bring the offered copy to him to sign. Subsequently the Complainant appeared to make comments to himself as recording notes that he was "gathering facts" for mistreatment during the explanation and signing of the document. He appeared startled when L. Melancon asked several times over the speakerphone, "are you taping this conversation?" and "were you doing it without our permission?" The Complainant replied "there's no law that says that I can't do that ma'am. I'm gathering my STA facts ma'am and I will be gathering … the STA facts. So I mean if you're telling me that I can't gather these facts, then I can't agree to that and I won't agree to that." C. Maloy subsequently noted his return to the room and was directed by L. Melancon to provide Complainant "EOBR training as well as the performance enhancement training for his logging issues." She advised C. Maloy that the only paperwork needed from the Complainant was the signed "Commitment to Excellence.

The Complainant reported to L. Melancon that he considered the manner in which C. Maloy had him sign the "Commitment to Excellence" to be harassment. C. Maloy reported that the Complainant "has tape and video on our meeting today without our knowledge, which is against the law." The Complainant then signed and dated the document.

L. Melancon directed C. Maloy to start the necessary training and ensure the Complainant received a copy of the policies involving logs and hours of service he should have received in initial training.

The Complainant asked L. Melancon "why is my computer showing one thing in Green Bay and something else in my truck?" She replied "it's not the EOBR, the logging is fine; there is nothing wrong with your computer. The reason why we're putting you through performance enhancement training is to show you what you may, or may not, be doing wrong. We need to make sure that you understand the full use of the EOBR and to be sure you understand that when you log something you know it's got to be done in a certain way … to help you."

Complainant's Exhibit "F"

This exhibit appears to be an incomplete transcript of conversation between the Complainant and L. Melancon immediately after the Complainant had signed the "Commitment to Excellence" document, which C. Maloy identified in deposition as incomplete transcripts of a June 17, 2011 meeting in the conference room. During the purported 8 minute conversation the Complainant repeatedly stated his position that the driving logs he approved while in the truck did not contain the same information the company was reporting and that there must have been tampering or computer malfunctioning involved in the transmission by the EOBR of the driving logs from the truck to the company. L. Melancon explained the company position that the EOBR was operating correctly and had been operating on the truck in a consistent manner before the Complainant came to work and used the truck. She also expressed concern that tape recording her conversations without her knowledge was illegal, but that she would check with the legal department on that matter.

The Complainant asked about the ability to use daily paper driving logs until the EOBR was operating correctly "because I have to say at this point, I will not approve any more logs on that

truck because I can't, because the system is flawed …" L. Melancon relied that she could not make the decision to accept paper driving logs and that the Safety Department would have to make that decision and that she would check with the Safety Department.

The Complainant alleged being forced to sign the "Commitment to Excellence" document under threat of being terminated. L. Melancon replied that he was not being forced to sign anything; but he was being asked to review the document and indicate whether he was willing to commit to the training, review and monitoring plan set forth in order to identify and correct logging issues that had been indicated. She indicated he was being asked to go through "Performance Enhancement Training for Logging" to ensure he knew how to use the EOBR, how to do logs in the system and then for the Complainant to use the EOBR each day and see afterwards if the driver logging problems continue and/or the cause of the logging problems.

Complainant's Exhibit "G"

This document appears to be an incomplete transcript from an audio portion of a two minute video recording, which C. Maloy identified in deposition as incomplete transcripts of a June 17, 2011 meeting in the driver's lounge. The conversation is after a point where the Complainant has refused to stop recording the computer screen for the computer-based training program involving use of the EOBR for driver logging of hours of service.

The Complainant declared that by accepting the initial on-screen program disclaimer he has to give up his rights under the STAA if he is subsequently injured and that requirement is a violation of the STAA. The Complainant stated that he understood that "once you mash the decline [box on the initial computer software screen disclaimer page], it would not let you take the [driver logging] lesson. So I have to admit to that I won't then take the lesson."

C. Maloy advised the Complainant that he is not authorized to record the computer training program and that by declining the computer training disclaimer statement "at this point in time you are deterred from signing in [to the training program] so you are no longer employed [and the issue of continued video recording is] not an issue at this time." The Complainant was then offered boxes for his personal belongings and a cab, at company expense, to take him to a rental car location.

Complainant's Affidavit dated September 19, 2011 [Complainant's Exhibit "L"]

In the relevant portions of this exhibit the Complainant reports –

"As reprisal for my safety complaints, on June 17, 2011, while still located at the Respondent's Louisiana facility, I was called into a meeting with a still angry Ms. Melancon and her staff members including Charlie Maloy who I was told during this meeting, was my new driver manager. During this meeting, an angry Mr. Maloy, while acting in a pretexual manner, communicated to me that I was now going to be discipline for Richard and the Respondent's repair center's personnel actions, which took place from April 2011 through to June 2011, where they carried out unlawful actions by using the Respondent's truck-tractor number 27150's faulty EOBR's only operational feature and transmitted the unlawful, falsified, and inaccurate duty statuses records to the Respondent, in violation of the D.O.T.'s Part §395.16 under its electronic on-board recording device's heading.

"Mr. Maloy instructed me to sign a document to reference the discipline, so I attempted to write a statement on this document in my efforts to communicate to upper management my rights which were being violated, that were protected by the Surface Transportation Assistance Act, but he angrily denied me the opportunity, while stating I could only sign my name on the document.

"I attempted to adhere to the D.O.T.'s highway safety regulations Part §395.8, under "Driver's Record of Duty Status." Section (k) retention of driver's record of duty status, which states: (2) the driver shall retain a copy of each record of duty status for the previous 7 consecutive days which shall be in his/her possession and available for inspection while on duty, but the angry Mr. Maloy would not allow me to follow the regulations. I was then directed to sit in front of a computer screen and to follow its instructions, while Mr. Maloy and three others of the Respondent's angry staff stood over me with their hands balled up into fist and their faces very red in color. The Respondent's staff then attempted to get me to agree to a disclaimer which I communicated that I would not hold Respondent's agents liable for any loss, injury or damage that may result. I felt my life threatened, so I used a camera and audio recorder to gather facts surrounding the ongoing violations of my rights which were protected by the Surface Transportation Assistance Act.

"Mr. Maloy communicated to me to stop using my camera and audio recorder. I communicated to him that I was using my camera and audio recorder to gather facts surrounding their violations of my rights which were protected by the Surface Transportation Assistance Act. Mr. Maloy terminated my employment with the Respondent about that point, in response to my refusal to stop using my camera and audio recorder in my effort to gather the facts surrounding the Respondent's angry staff's actions of violating my rights which were protected by the Surface Transportation Assistance Act."

Complainant's March 23, 2015 Deposition [Employer's Exhibit "D" to the April 13, 2015 Declaration of D.D. Leishman]

This exhibit is composed of select pages and exhibits from the Complainant's March 23, 2015 deposition.

The Complainant identified an entry-level driving training certificate awarded to him by Respondent on March 10, 2011, though he was unsure of when he actually received the certificate. He stated he thought he was already driving when he was in training.

The Complainant testified that he was aware of hours of service rules and regulations under the Department of Transportation before he began working for Respondent. He stated he understood that the 11-hour rule permitted him to drive 11 hours before he was required to take a consecutive 10 hour break. He also stated he understood the 14-hour rule to prohibit him from driving after he has been on-duty for 14 hours. He stated that when he worked for Respondent there wasn't a policy that drivers could not work after they had been on duty for 60 hours in a seven day period, "because when I was there I accumulated way over 70 hours at times, and after they terminated me, they tried not to pay me for the hours that I accumulated over the 70 hours, and the Department of Labor Wage and Hour Division forced them that they had to pay me." The Complainant testified that a driver "could work indefinitely, until you were relieved of duty. That's in the DOT manual. Any time waiting at a shipper, or waiting for a load, or waiting to be dispatched you have to be on-duty not driving. If you are at your sixth hour and they still had you waiting, haven't relieved you of duty, then you would be on-duty not driving until you're relieved of your duty. … you have to be on-duty if you're waiting for a load, I don't care if it's 60 hours. If you're waiting for a load, it's 60 hours, they have not relieved you from duty, you're waiting for a load, you're on the shipper's property waiting for a load, your truck is in the

shop and you're sitting waiting for it to come out of the shop, you could be on duty waiting for three weeks and you would be compensated by the Wage and Hour Division by minimum wage.

The Complainant testified that he understood the 70-hour rule prohibited a driver from driving after they had been on duty 70 hours in a consecutive eight day period and understood that a carrier could be stricter in service hours, as long as they did not break the law. He argued that there could not be a rule limiting duty time to 60 or 70 hours because if there were, then the company would not have had to pay the additional money Wage and Hour directed to be paid.

The Complainant testified that on or about April 14, 2011 he complained to T. Johnson that he had been asked to falsify his logbook and that his truck computer had been tampered with. He stated T. Johnson sent "Richard" to the truck to see if the computer was faulty. He testified that "Richard" "manipulated my computer and was unable to operate it properly hisself (sic). And the only way he got it to operate properly, he had to falsify the logs and send them in to Schneider, send the logs up the chain-of-command to Schneider on my behalf, without my authorization or my notice; therefore, he got on my truck and tampered with my computer with [T. Johnson] knowing…"

The Complainant testified that he was not certain it was June 11, 2011 or not; but that he had made a complaint about his computer being tampered with to his manager "Lynn." He testified that around June 5th through the 6th, Schneider made him sit at the Pilot truck stop with the tanker truck he refused to drive for over 24 hours with no pay and the tanker leaking chemicals on the property. He testified the Louisiana EPA came and cleaned the vehicle and TA Truck Stop sent someone over to fix the breaks before he could legally move the truck.

The Complainant testified that in addition to the complaint involving T. Johnson and the truck computer on April 14, 2011; the events of June 5 and 6 2011 involving the leaking tanker truck; and the termination of June 17, 2011, other protected activities leading to his termination, "they ultimately terminated me because I gathered facts. When they stopped allowing me to put statements on my documents to complain to upper management what was happening to me, which was my protected right, they refused to allow me to write statements with my signature on documents to report the happenings to upper management. They refused to allow me to do so." He stated "I would not have had to resort to videotaping and recording in that depth until after they refused to allow me to make internal complaints and they started putting me in situations where I could be physically injured, and I needed to gather facts in case something happened. They weren't going to let me have my attorney on the phone while I sit there, sit there and undergo training that could result in my death … I'm supposed to be protected to gather facts by use of pictures, tape recordings, videotape, whatever it took to gather the facts, which I did."

The Complainant testified that T. Johnson was his driver business leader during his entire employment with Schneider.

The Complainant disagreed that the purpose of the June 17, 2011 meeting was to review his hours of service violations but that "the purpose of the meeting was to harass me and terminate me, harass me and try to get me into a situation so they could terminate me."

The Complainant testified that it was his testimony that his life was in jeopardy and he could have been physically harmed by conducting the computer-based training program on hour of service rules and regulations and that was another reason for him "gathering facts, in case I was killed or something, for my family."

April 10, 2015, Declaration of L. Melancon [Employer's Exhibit]

L. Melancon stated that she is a Division Manager for Respondent and that the Complainant was hired by Respondent on or about March 10, 2011 as a commercial motor vehicle driver. The Complainant received training on compliance with DOT hours of service regulations and was subsequently assigned to a truck equipped with a QualComm Electronic On-Board Recorder (EOBR). She reported the EOBRs "enable drivers to conveniently and accurately log their hours of service and allow Schneider to monitor driver compliance with hour of service regulations.

She stated that in the Spring of 2011 the Complainant reported to driver business leader T. Johnson that his EOBR was not functioning properly and that inspection of the unit by Schneider mechanics indicated on April 19, 2011 that no problem could be found with the EOBR, a copy of the work order being appended to the Declaration. L. Melancon also stated that on or about June 5, 2011 the Complainant refused to transport a tanker with hardened chemicals on the outside and communicated his concerns directly to her and others at Schneider. She stated that on or about June 11, 2011, the Complainant stated to her his EOBR was not functioning properly. L. Melancon then asked shop leader J.R. Rodriguez to determine if there was a problem with the EOBR. She received the report from J.R. Rodriquez that there was no history of problems with the unit from other drivers which caused her to escalate the issue to Schneider's Engineering Department which reported the unit functioned properly.

L. Melancon stated that after being told there was no problem with the Complainant's EOBR, she reviewed the Complainant's "log history and observed that he had accumulated four hour of service violations between June 13 and June 14, 2011, which she attached as Exhibit B. Exhibit B lists 38 hour of service violations between April 8, 2011 and June 14, 2011. There were no hour of service violations noted for April 12, 13 or 14, 2011; or for the period from May 2, 2011 through June 12, 2011, inclusive.

L. Melancon stated "As a result of [Complainant's] four hour of service violations in June 2011 and his complaints about his EOBR, I required [Complainant] to come in for Logging Performance Enhancement Training to assist him in logging his hours correctly and to ensure he understood DOT requirements and the proper use of his EOBR … [and] to review and sign a Commitment to Excellence as part of his remedial training." She stated "I asked Driver Business Leader Charlie Maloy to administer the Performance Enhancement Training to [the Complainant]. At no time prior to [the Complainant's] termination did I inform Mr. Maloy of [the Complainant's] previous reports of problems with his EOBR or of [the Complainant's] refusal to transport a tanker in June 2011."

Schneider Logging Performance Enhancement Training Computer Disclaimer Screen-shot [Employer's Exhibit from Complainant's March 23, 2015 Deposition]

This exhibit has been identified as the "Disclaimer" page seen at the start of the computer-based Logging Performance Enhancement Training program that requires a selection of "Accept" or "Decline" at the end of the page. As stated by the Complainant, if 'Decline" is "mashed", you cannot continue with the computer-based training.

The Disclaimer reads as follows –

"The information used in preparing these Pro-TREAD lessons has been obtained from sources believed to be reliable and current. Every effort has been made to produce the finest and most reliable truck driver lessons available today.

However, Instructional Technologies, Inc. (ITI) cannot guarantee the adequacy, completeness, accuracy or appropriateness of the Pro-TREAD material, and is not responsible for any omissions or inaccuracies obtained from our sources or caused by human error.

ITI shall not be liable for any loss, injury or damage that may result from any such omissions, errors or inaccuracies. Any questions that a driver has as a result of the Pro-TREAD lessons should be addressed to the driver's school or company.
Accept Decline"

Claimant's Exhibit "A"

This exhibit appears to be a transcript from partial recordings made by the Complainant when he met with T. Johnson for discussion of Schneider driver expectations, policy and requirements. The date of the conversation is not identifiable, though conversation content places the recording as being made on April 13, 2011. T. Johnson was treating the Complainant as an older experienced driver who received initial training quickly. There was general discussion about the Complainant's earlier experience while in Reserve. T. Johnson stressed safety of the motoring public and to avoid bulk and slow-maneuver accidents and discussed an accident scene he saw while in Reserve. He addressed driver safety getting into and out of the truck and climbing on a bulk load.

T. Johnson addressed dispatching out of the central location in Green Bay and installation of QualComm systems six months previously that permit electronic logging. The Complainant demonstrated his own computer systems of "Co-Pilot" and "Eclipse" that he uses for his own personal logging system. He considered himself a "high-tech man" who turns on his system so "when I leave the house it keeps up with everything I do period." The Complainant reported "I'm using the Schneider system because that's what I'm supposed to be doing." The Complainant discussed problems at his prior trucking company and CSA scores, to which T. Johnson advised he reviewed drivers' CSA scores and if they were high he met with the driver over the issues involved. T. Johnson stressed pick-up and delivery on scheduled times for customer service and keeping customers; trip plans prior to getting in the truck with a load; and sending the MAC-17 in before 10:00 Central time every day, though in the next two weeks the frequency may change to every time you need or finish a load. T. Johnson stressed that sending in the MAC-17 report "it's important because you have to tell them when you're available for a load. Because if you don't send a MAC-17 with it, Dispatch ain't going to know. They ain't going to know when you got hours." He stated the MAC-17 report could be sent no earlier than 8:00PM the night before but no later than 10:00AM each morning. T. Johnson addressed

preventive maintenance notice when the assigned vehicle would be required to be taken in based on the mileage of the truck maintained by maintenance. He explained that the Complainant would get 6 days off each month and would be on 10-14 day rotations before he could have the off days in either three 2-day periods or two 3-day periods; but days off not used in a month were lost. He directed the Complainant to obtain fuel at a designated Schneider operation hub; but Pilot could be used if necessary because Schneider had an account with them, though any location in the field could be opened up by the company.

T. Johnson explained the "over speed policy" to mean the driver should use cruise control as much as possible and that more than 5% over the speed limit was considered driving "over speed." The Complainant discussed how cruise control is not usable at certain times such as hills and mountains where manual control is necessary so as not to impede the flow of traffic or stall the engine. T. Johnson explained being "over speed" or involvement in an avoidable accident, or exceeding the over-idle policy, hard braking events, and service issues can prevent a driver from receiving a bonus. T. Johnson explained that hard breaking is recorded in the QualComm system and indicates the driver decreased speed by 9 MPH in a second. He explained that Schneider looks at hard breaking events to determine if there is a pattern, such as an aggressive driver or a driver who follows to closely, that needs to be addressed. The system also reports activation of the anti-rollover device which might indicate taking curves to fast; but is considered as a "critical" event in the tractor and T. Johnson will then come to the tractor and discuss the "critical" event with the driver. The system will pinpoint the exact location and time hard breaking and activation of the stability controls take place.

T. Johnson explained that the number of miles that a driver could expect every week was not 3000; but 2500 to 2700 miles. He stated he was aware that the Complainant had a "breakdown the other day." The Complainant noted an air conditioner repair the previous day, having a check engine light fixed and "the OBC won't let me edit anything and … it got a bunch of stuff with the on-board computer going on … But, you know, so I mean, I've got my paper logs to back everything up in case DOT stop me. I keep it real tight so I can show them those."

T. Johnson reviewed a March 2011 pay issue being resolved and noted that the Complainant's miles were not good the prior week and even worse the two weeks prior to that. T. Johnson indicated that when the Complainant returned to work after going home, he would "check and make sure that we got you rocking and rolling … we need to get you to a good point where you can make some money."

T. Johnson retrieved the Complainant's computer-based driver log on a computer to discuss it with him. The Complainant noted the one viewed on the computer was from Livingston, Alabama on April 6, 2011 and was false and not the same as the written driver's log he had from his "clip system" because his system placed him in Cuba, Alabama instead. T. Johnson called on R. Koenig , the residential logging expert, to look at the differences in location indicated in the systems. The Complainant stated that Livingston was 17 miles from Cuba, Alabama. R. Koenig stated "because the Schneider logs are approved by the DOT, whatever goes in there as to where you are, that's legal. The DOT says you have to enter your location as best as you are aware of it, not exactly where you are." The Complainant stated that on April 6, 2011 he was aware he was in Cuba and that the logging system saying he was in Livingston was "falsifying my log."

The Complainant stated he had received a ticket while driving for another company because he did not accurately put where he was and that "now we got a problem." R. Koenig advised the Complainant again that "the Schneider logs are approved by the DOT, whatever it says on the Schneider logs is legal … when you stop for the night and you do your post-trip or getting ready to put yourself off-duty, just right in the note [on the QualComm system]. Like in this instance, you could have just typed Cuba, you know." The Complainant replied that his QualComm would not let him edit. R. Koenig advised the Complainant that the Schneider logging was the legal log and that if he were stopped and showed the other log, he would receive a ticket because he cannot run two log books at the same time. The Complainant requested R. Koenig go with him to his truck and edit the logging information into what he though it should be using his personal log program result. R. Koenig instructed the Complainant "What I need you to understand, man, is that just go with the Schneider log book … [which] QualComm is using. Don't mess yourself up by trying to … overcorrect it and stuff, because the DOT says 'Schneider, if you're using this system, it's legal' … what I'm telling you is the QualComm is in the truck, that's what the DOT wants to see, okay. If they ever pull you over, all you have to do is hand them that thing. You don't have to show 'em paper logs or anything else because the DOT has said, 'Schneider, if you're using this system, it's legal.'" The Complainant replied that he would check that directive out. (At some unclear point in time, the conversation had moved to the Complainant's assigned motor vehicle.)

While in the motor vehicle, R. Koenig asked the Complainant if he was using the QualComm to "go on and off duty and all that stuff," to which the Complainant replied "I'm using it to do whatever I'm supposed to do." The Complainant asked R. Koenig to edit the QualComm to show "I got in last night at 1:00. I'd like to see you edit that for me so I can see what you do to understand it." R. Koneig explained that when a driver writes the log "you're supposed to write down where you're at. You knew you were in Cuba, you put in Cuba." He explained that the system used cell towers and that the cell towers used may be physically in Cuba but actually have a Livingston address, so QualComm would show Livingston for the location which cannot be changed by the driver where it's recorded. R. Koenig instructed a driver can change "hours and status and when you're in the sleeper berth and all that stuff, but you can't change where you are. [The QualComm] records where you are without any input from you, whatsoever. So whatever this thing says is going to be legal. You'll never get a ticket. When 'the man' pulls you over and he wants to see your logs, you just hand him [the unit] and Schneider will back you up 100%." The Complainant replied "Well I couldn't do it right now because this is – it's a violation and you can't edit nothing." R. Koenig then began reading the QualComm log and noted that the Complainant was out of hours because the QualComm showed the Complainant had not entered "off-duty" into the QualComm for some time; stated the Complainant was in violation of hours of service limits "all the way back"; and asked the Complainant "is there a reason you stopped using this?" The Complainant responded, "because this malfunctioned, sir."

R. Koenig asked the Complainant how many hours he had at the time of the conversation; to which the Complainant responded he had 62 hours left of the 70 limit. R. Koenig demonstrated how to use the QualComm by going to April 5, 6 and 7, 2011 to edit the Complainant's duty status in the system. He explained that he was going to enter off-duty from 8:30am, April 5 through the 7th. The Complainant asked if that would be a falsification, to which R. Koenig responded it would not be falsification because the Complainant had Schneider paper logs that

coincide with the edits and he would have the Complainant send the paper logs into Schneider and the QualComm would be set to use from yesterday "and then, starting yesterday, we will start editing this so it shows your actual" status. R. Koenig tried to make entries in the QualComm for the Complainant's trip back from Troy, Montana beginning April 12, 2011. As the editing progressed the Complainant agreed that he didn't have 11 hours and 37 minutes on-duty that day as indicated by the system, but "it wouldn't let me change it." The Complainant stated "Well they told us in class to just go ahead and run a paper log. Go on and do a paper log so you're going down the road …" After several entries R. Koenig stated the system summary had the Complainant back to 62:45 hours to which the Complainant stated "Yeah, that's where I'm supposed to be." R. Koenig directed the Complainant to change his on-duty / off-duty status whenever he got somewhere when he wasn't driving, because when driving the QualComm will put you in that on-duty driving status automatically and that can't be altered. He directed the Complainant to go through his QualComm entries when he shuts down for the day, edit the day's log every day and approve the logs when satisfied with the entries. He reminded the Complainant that when a log is approved by the driver, the approval is for everything up to the timeframe the driver is in at the time of approval.

R. Koenig explained to the Complainant that he had edited the QualComm entries for the Complainant during their session in the truck, had placed the Complainant off-duty for 11 hours and had had left the Complainant as on-duty for the session they were in the truck, and had sent an approval of the prior log entries in QualComm. He explained to the Complainant that his daily paper driver's log that he created were going to be used with the company for the prior logging time reported in QualComm send by R. Koenig while updating and training the Complainant on the QualComm on April 13, 2011. He assured the Complainant that the April 13, 2013 QualComm transmission was not going to be used against the Complainant. R. Koenig advised the Complainant that Schneider would not ask the Complainant to do anything illegal and that if he thought that had occurred to send in a message of what he was told to do with the name of the individual involved, even if the name appeared bogus, and let Schneider deal with it, "do not ever do anything illegal … just remember you don't have to verify what [the QualComm] does. Okay. If you think it's wrong, just start a paper log, okay. It's got to be a Schneider log by the way." R. Koenig advised the Complainant that he did not have to print his QualComm logs at this time; but to give T. Johnson the completed paper logs and tell him that the logs are now caught up with the QualComm. He then explained to the Complainant how to make QualComm entries to come on-duty, enter pre-trip in the note and when he starts driving QualComm will put him on-duty driving. R. Koenig attempted to give additional QualComm training to the Complainant and to recalibrate the QualComm unit before he concluded that the unit "needs to go to the shop" and directed the Complainant to use paper logs until the unit was "fixed." R. Koenig then advised T. Johnson that the Complainant understood he was to use Schneider paper logs until the QualComm was fixed and that if he is ever stopped and the cops "wants to see his logs after he gets the QualComm is fixed, he can hand them the QualComm and Schneider will back him." R. Koenig advised T. Johnson that Schneider would have to set the Complainant up with paper logs and that he had "approved the logs that [the Complainant had in the QualComm since April 5, 2011] even though they were wrong … just so that we could see if the QualComm worked because it wouldn't respond at all with everything that was in there … [the Complainant] can't edit the log, so that's got to change." T. Johnson acknowledged the QualComm issues, including that there would be errors in the QualComm logs R. Koenig

approved since April 5th, and directed the Complainant to put his past driver logs on paper and scan them up, continue to use paper logs so he can get back on the road, and when he was next in Atlanta "we'll get you into a shop." T. Johnson explained the driver mentor program, identified the Complainant's mentor as D. Bausch, provided a telephone number, and explained that if there was a question or something he wanted to discuss without involving the driver business leader, he could call his driver mentor. The Complainant then departed to pick up his next tractor and trailer load assignment.

Claimant's Exhibit "C" and Claimant's Exhibit "I" Attachment

This exhibit contains Respondent Employer's response to the complaint at the OSHA level. The Respondent indicates:

"Schneider is a transportation and logistics company. Schneider operates as an intrastate and interstate motor carrier throughout the United States and Canada, holding Certificates and Permits issued by the United States Interstate Commerce Commission and Department of Transportation (DOT), the Canadian Ministry of Transportation, and various state and provincial agencies.

Complainant was hired on March 10, 2011 as a commercial motor vehicle driver for Schneider. … Complainant was trained in, and expected to be compliant with, all DOT regulations. This included Hours of Service (HOS) requirements. Furthermore, Complainant was trained in the use of electronic driver logs as Schneider tractors are equipped with an on-board computer system for such purpose. …

[On June 17, 2011] Complainant arrived at the Schneider operating center at 8:00 a.m. to attend his mandatory training session. The training session had been arranged because Complainant had accumulated excessive HOS violations … If a driver has four or more HOS violations; it is Schneider policy to prescribe a Commitment to Excellence (CTE) training session as well as a Performance Enhancement Training (PET)."

The exhibit also contains the following information:

"**Hours of Service - Definitions**

11 Hour Rule
D.O.T. Policy: A driver is only allowed to drive 11 hours before they must take a consecutive 10 hour break.

14 Hour Rule
D.O.T. Policy: A driver is not permitted to drive after they have been on duty 14 hours. A driver may continue to log 'on duty, line 4 time', but cannot drive until they complete a consecutive 10 hour break.

SNI Policy: A driver is not permitted to DRIVE OR WORK after they have been on duty 60 hours in a 7 day period.

60 Hour Rule
D.O.T. Policy: A driver is not permitted to drive after they have been on duty 60 hours in a consecutive 7 day period. A driver may continue to log 'on duty, line 4 time', but cannot drive until their hours refresh.

SNI Policy: A driver is not permitted to DRIVE OR WORK after they have been on duty 60 hours in a 7 day period.

70 Hour Rule
D.O.T. Policy: A driver is not permitted to drive after they have been on duty 70 hours in a consecutive 8 day period. A driver may continue to log 'on duty, line 4 time', but cannot drive until their hours refresh.

- A Motor Carrier may choose to be more strict on the Hours of Service (HOS) rules for their drivers. Schneider National chooses to be more strict on the 60 and 70 hour rules due concern regarding fatigue and driver's safety.
- Currently, the Federal Motor Carrier Safety Administration is considering a number of options regarding the HOS Rulemaking Process.

STL's need to have a discussion with the driver who has incurred an HOS violation. D.O.T. officials check driver logs during roadside inspections for HOA violations.

SNI Policy: A driver is not permitted to DRIVE OR WORK after they have been on duty 60 hours in a 7 day period."

Claimant's Exhibit M

This exhibit appears to be partial transcripts of three separate telephone calls made by the Complainant. The first indicates a recorded voice message belonging to an office not connected with the U.S. Department of Labor, Office of Administrative Law Judges. In the second telephone call the Complainant left a short voice message for this presiding Judge's paralegal involving a case between the Complainant and Carl Perry Enterprise, Inc.. The third telephone call was between the Complainant and this presiding Judge's paralegal concerning an Order sent to the Complainant in the same case of *White v. Carl Perry Enterprise, Inc.*, ARB No. 14-024, ALJ Case No. 2013-STA-00013 (ARB Dec. 10, 2015) affirming dismissal of complaint.

STATUTORY FRAMEWORK

Review of the administrative file and filings by the Parties reveals that this cause of action arose during the Complainant's employment as an over-the-road truck driver out of Georgia and Louisiana. All relevant activity was within the jurisdictional area of the U.S. Court of Appeals for the Eleventh Circuit. Accordingly, the precedent of the Eleventh Circuit and the Administrative Review Board (ARB) governs this decision.

Whistleblower Protection under the STAA

"Congress amended the STAA on August 3, 2007[6] to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. §42121(b)" *Smith v CRTS International, Inc.*, No. 11-086, 2013 WL 2902809, *2 fn 1 (ARB June 6, 2013); 49 U.S.C. §31105(b). Since the complaint was filed on August 11, 2011, the post-2007 standards of proof apply.

To prove unlawful retaliation under the STAA, the Complainant must show by a preponderance of the evidence (1) that he engaged in protected activity, (2) that he was subjected to an adverse employment action amounting to discharge or discipline or discrimination regarding pay, terms, or privileges of employment, and (3) that the protected activity was a contributing factor in the

[6] Pub.L. 110-53, 9/11 Commission Act of 2007, 121 Stat.266 §1536

adverse employment action. *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, 2014 WL 2917587 (ARB May 13, 2014); *Coryell v. Arkansas Energy Services, LLC*, ARB No. 12-033, 2013 WL 1934004 (ARB Apr. 25, 2013) Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 77 FR 44127 (July 27, 2012); *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013) "If the employee does not prove one of these elements, the entire complaint fails." *Coryell* id at *3.

If the Complainant establishes a prima facie case under the STAA, the Respondent will not be held to have violated the STAA if it establishes by clear and convincing evidence that the adverse employment action was the result of events and/or decisions independent of protected activity. "Clear and convincing evidence is 'evidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Coryell* supra. quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013); *Beatty* supra.

Standard for Awarding Summary Decision

Summary decision is appropriate in a proceeding before an Administrative Law Judge "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d); *see also Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, 2012 WL 6849447 (ARB Dec. 28, 2012). "At the summary decision stage of a STAA case, the ALJ assesses the evidence for the limited purpose of deciding whether it shows a genuine issue as to a material fact ... If the complainant fails to establish an element essential to his case, there can be 'no genuine issue as to a material fact' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Coates v. Southeast Milk, Inc*., No. 05-050, 2007 WL 4107740, *3-4 (ARB Jul. 31, 2007) For whistleblower complaints, the Administrative Review Board has held that the papers filed by a pro se party must be read liberally and interpreted in a manner that raises the strongest argument suggested therein. *Coates*, supra at *7.

In evaluating whether the Respondent is entitled to a Summary Decision, all facts and reasonable inferences therefrom are considered in the light most favorable to the non-moving Complainant. *Battle v. Seibles Bruce Ins. Co*., 288 F.3d 596 (4th Cir. 2002) citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986) "However, even when all evidence is viewed in the light most favorable to the non-moving party, the non-moving party cannot defeat a properly supported summary judgment motion without presenting 'significant probative evidence.'" *Pueschel v. Peters*, 340 Fed. Appx 858, 860 (4th Cir. 2009), *unpub*, citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986) When the information submitted for consideration with a Motion for Summary Decision and the reply to the motion demonstrates that there is no genuine issue as to any material fact, the request for summary decision should be granted. Where a genuine question of a material fact remains, the request for summary decision must be denied. 29 CFR §§18.40 and 18.41. Denying summary decision because there is a genuine issue of material fact simply indicates that an evidentiary hearing is required to resolve some factual

questions and is not an assessment on the merits of any particular claim or defense." *Johnson v. WellPoint Cos., Inc.*, No. 11-035, 2013 WL 1182309, *7 (ARB Feb. 25, 2013).

As the ARB has earlier explained,

> Determining whether there is an issue of material fact requires several steps. First, the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial. Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact. When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the nonmoving party, the complainant in this case. The moving party must come forward with an initial showing that it is entitled to summary decision. The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim.
>
> In responding to a motion for summary decision, the nonmoving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts that could support a finding in his favor. *See* 29 C.F.R. § 18.40(c). If the moving party presented admissible evidence in support of the motion for summary decision, the nonmoving party must also provide admissible evidence to raise a genuine issue of fact.

Williams, supra at *4, quoting *Hasan v. Enercon Servs., Inc.*, No. 10-061, 2011 WL 3307579, *3 (ARB Jul. 28, 2011).

DISCUSSION

I. Complainant's actions in refusing to move chemical tanker on or about June 5, 2011 was protected activity under the STAA.

The evidence submitted for consideration demonstrates that the Complainant was dispatched on June 5, 2011 to move a chemical tanker. When the Complainant arrived at the location he inspected the tanker and reported chemicals present on the outside of the tanker and on the ground. He also reported that the brake pads were thin and needed replacement. Manager L. Melancon was aware of the tanker situation and the Complainant's refusal to move the tanker until the issues were corrected. Hazardous material handlers arrived to decontaminate the tanker and adjacent area. Mechanics arrived to change the brake pads on the tanker. After the issues had been corrected, the Complainant moved the tanker.

Refusal to operate a vehicle because such action would violate a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or there is a reasonable apprehension of serious injury to the driver or the public because of the vehicle's hazardous safety or security condition is protected activity under the STAA.

After deliberation on the administrative file and all documents submitted by the Parties, this presiding Judge finds that the Complainant's refusal to transport the chemical tanker because of deficient brake pads and exterior chemical condition was protected activity under the STAA.

II. *Complainant's actions regarding the Electronic On-Board Recorder (EOBR) were not protected activity under the STAA.*

In comments on revised rules dealing with "Hours of Service by Drivers; Driver Rest and Sleep for Safe Operations" 68 FR 22456 (April 28, 2003), the Federal Motor Carrier Safety Administration (FMCSA) recognized that "on-board recording devices have been in use since 1985, when the agency granted a waiver to Frito-Lay, Inc. (50 FR 15267, April 17, 1985) to allow their use as a substitute for handwritten records of duty status [RODS]." 68 FR 22485 The FMCSA stated that full voluntary compliance by drivers with the HOS rules is unlikely and reiterated that motor carriers have the responsibility to police employees to ensure drivers comply with HOS requirements and that there must be a system in place that allows it to effectively monitor compliance with FMCSA regulations aimed at the issue of driver fatigue. 68 FR 22488 to 22490

At the time of the underlying events, both automatic on-board recording devices (AOBRD) and electronic on-board recorders (EOBR) were permitted to record drivers' HOS under 45 CFR Part 395. Indeed, 45 CFR §395.15(a)(1) provided "a motor carrier may require a driver to use an AOBRD to record the driver's hours of service in lieu of complying with the requirements of §395.8" for paper HOS and RODS and may install an EOBR that conforms with 45 CFR §395.15. Additionally, 45 CFR §395.15(a)(2) provided "every driver required by a motor carrier to use an automatic on-board recording device shall use such device to record the driver's hours of service."

In discussing the final rule dealing with EOBRs set forth at 75 FR 17208 through 17252 (Apr. 5, 2010),[7] the FMCSA and the U.S. Department of Transportation (DOT) stated at 75 FR 17209 that –

> "Today's final rule allows motor carriers to use Electronic On-Board Recorders (EOBRs) in their commercial motor vehicles (CMVs) to document drivers' compliance with the HOS [hours of service] requirements; requires some noncompliant carriers to install, use, and maintain EOBRs for this purpose; and updates existing performance standards for on-board recording devices. … The HOS regulations are designed to ensure that driving time – one of the principal 'responsibilities imposed on operators of commercial motor vehicles' – does 'not impair their ability to operate the vehicles safely.' (49 U.S.C. 31136(a)(2)). EROBs that are properly designed, used, and maintained will enable motor carriers to track their drivers' on-duty driving hours accurately, thus minimizing regulatory violations or excessive driving, and schedule vehicle and driver operations more efficiently. Driver compliance with the HOS rules helps ensure 'the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely' (49 U.S.C. 31136(a)(3)). To assist in enforcement of the HOS regulations generally, FMSCA is requiring EOBR use by motor carriers with the most serious HOS compliance deficiencies. ('threshold rate violations'), as described elsewhere in this rule. … **The requirements in 49 U.S.C. 31136(a)(1) concerning motor vehicle maintenance, equipment, and loading are not germane to this final rule, as EOBRs influence driver operational safety rather than vehicular and mechanical safety**. … However, to the limited extent 49 U.S.C. 31136(a)(1) pertains specifically to driver safety and

[7] At the time of the events alleged, the 2010 Final Rule on EOBRs was under review and pending decision by the U.S. Court of Appeals for the 7th Circuit. On August 26, 2011, the Court vacated the April 5, 2010, Final Rule on EOBRs. *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 656 F3d 580 (7th Cir. Aug. 8, 2011) On December 10, 2015, the Federal Motor Carrier Safety Administration and U.S. Department of Transportation provided notice of intent to publish a revised rule on EOBRs in the Federal Register with the revised rules being effective 30 days after publication.

safe operation of commercial vehicles, the Agency has taken this statutory requirement into account throughout the final rule." [emphasis added]

While AOBRDs had been in use for many years to monitor HOS and RODS for driver-based safety, the FMCSA stated that the April 5, 2010 rule on EOBRs was directed towards mandating installation and use of EOBRs in vehicles of the most severe and most chronic violators of HOS rules as identified based on a pattern of HOS violations of 10% or greater during a 1-year review period. The final rule was also designed to provide incentives to encourage EOBR use by all motor carriers. 75 Fed. Reg. 17210-17211. The EOBRs were required, among other things, to automatically record the CMV's location at each change of duty status and at intervals while the CMV was moving, reduce the time a CMV is stationary before the EOBR defaulted to on-duty not driving status, and provide that drivers could add information to the EOBR by annotation while ensuring the EOBR maintains the original recorded information and tracks driver annotations. CMVs manufactured after June 4, 2012 were required to install EOBRs. Operators of CMVs manufactured prior to June 4, 2012 were encouraged to install EOBRs by incentives including "elimination of the requirement to retain and maintain supporting documents related to driving time as this information will be maintained and accessible from the EOBR." 75 Fed. Reg. 17212 The FMCSA discussed automatic on-board recording devices (AOBRDs) then in use by many companies and drivers, and noted that the AOBRDs recorded the same key information regarding HOS and used the same duty-status codes as EOBRs; but that the Final Rule only required EOBR installation and use by those companies identified by the 10% or greater HOS violations in a 1-year review period. The Final Rule provided for –

"The HOS information recorded on EOBRs will be examined by Federal and State enforcement personnel when they conduct compliance reviews or roadside inspections. Motor carriers will not be required to upload this HOS information into Federal or State information system accessible to the public. Furthermore, enforcement agencies will request and retain copies of HOS information to document violations and will not disclose private personal or propriety information. The final rule maintains current uses of HOS data to determine compliance with the HOS regulations. … The only information FMCSA is requiring EOBRs to collect is that information necessary to determine driver and motor carrier compliance with HOS regulations. … The Agency's interest in records of duty status is based on its need to reconstruct the sequence of events for trips to determine compliance with the HOS regulations, including whether the driver was provided an off-duty period that could be used to obtain restorative sleep."

As clearly stated by the FMCSA, the functioning and use of AOBRDs and EOBRs are not commercial motor vehicle safety or mechanical safety issues under the STAA. AOBRDs and EOBRs deal with driver operational safety and driver compliance with HOS regulations. Accordingly, all of the complaints related to the functioning and/or malfunctioning of the Complainant's onboard computer system to record and report his HOS and RODS electronically relate to his personal operational safety and is not protected activity under the STAA.

As to the Complainant's allegations that he was asked to falsify his log book on or about April 5, 2011 and/or on or about April 14, 2011, the uncontradicted evidence submitted on the issue established that on April 13, 2011 T. Johnson was with the Complainant discussing various expectations of Schneider drivers and when the Complainant stated he was using "paper logs to back everything up in case DOT stop me", T. Johnson directed R. Koenig to look at differences in the onboard computer system reports and the Complainant's own driver's logs. R. Koenig reviewed the use of the onboard computer system for the period from April 6, 2011 through

April 13, 2011 with the Complainant and tried to demonstrate the features of the unit. R. Koenig confirmed the onboard recorder had not functioned properly and needed repair. During the course of instruction R. Koenig approved onboard computer system logs from April 5, 2011 and informed T. Johnson of that fact. T. Johnson directed the Complainant to submit his paper logs for scanning and use by Schneider as the Complainant's HOS and RODS for that period. The Complainant was directed to continue using Schneider paper logs for reporting HOS and RODS anytime he questioned the veracity of the onboard computer system. T. Johnson then arranged for the Complainant to have the onboard computer system repaired at a Schneider facility on April 19, 2011. The Complainant's numerous allegations of being asked to falsify logs is entirely without supporting evidence and merely an unsupported allegation that does not rise to the level of protected activity under the STAA.

After deliberation on the administrative file and all documents submitted by the Parties, this presiding Judge finds that the Complainant's allegations related to the functioning and/or malfunctioning of the onboard computer system in his assigned tractor, as well as to allegations of falsification of log books did not rise to the level of protected activity under the STAA.

III. Complainant's use of video and audio recording devices during directed computer-based logging training was not protected activity under the STAA.

The Respondent's agents first became aware of the Complainant's practice to audio and/or video record while on Schneider Bulk Freight property the morning of June 17, 2011 at the close of a meeting in a conference room with the Complainant, L. Melancon (by speakerphone), and C. Maloy in attendance. The topic of the meeting were the issues involving the Complainant's logging infractions and refresher EOBR logging training. Near the end of the meeting, while C. Maloy had left the room to obtain copies of logging violations for the Complainant, L. Melancon suspected the Complainant was tape recording the meeting from the manner the Complainant was talking to himself. When she asked if he was tape recording her, the Complainant stated he was. L. Melancon informed the Complainant twice that audio and video recording by employees on Schneider Bulk Freight property without permission was forbidden and directed the Complainant to stop recording conversations. The Complainant responded that he had a right to record the conversations under the STAA and that he would continue to record the conversations. After C. Maloy returned to the conference room, he also directed the Complainant to stop recording on Schneider's premises.

Subsequently, C. Maloy and the Complainant moved to the driver's lounge where the computer-based training for EOBR logging was located. At a point after the Complainant was seated at the computer terminal, C. Maloy asked the Complainant if he was recording the training session and the Complainant responded that he was. C. Maloy again informed the Complainant he was not authorized to record on Schneider property or the property of its customers and if he did not stop recording he could be terminated from employment. The Complainant acknowledged he understood and would continue to record because that was his right under the STAA. C. Maloy again told the Complainant he could not record on the premises and especially could not record the training programs and again asked if the Complainant understood that continued recording will lead to termination of employment. The Complainant again stated he understood but that he had a right to record under the STAA and would continue to do so.

The Administrative Review Board (ARB) has held that a complainant's selective tape recording of activities that are protected under the whistleblower statutes is also protected activity. *Mosbaugh v Georgia Power Co.*, Nos. 1991-ERA-001, -011 (Sec'y Nov. 20, 1995); *Melendez v. Exxon Chems. Am.*, ARB No 96-051, ALJ No. 1993-ERA-006 (ARB Jul. 14, 2000); *Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-007, 2011WL1247208 (ARB Mar. 24, 2011) recon denied 2011WL1663615 (ARB Apr. 13, 2011) However, the Administrative Review Board has stated that none of their prior decisions are "meant to convey that we condone the surreptitious audio recording of co-workers." *Benjamin v. CitationShares Management, LLC*., ARB No. 12-029, ALJ 2010-AIR-001, *7, FN6 (ARB Nov. 5, 2013)

In *Hoffmann*, supra, the complainant stated he began recording discussions and conversations with employees, managers and representatives out of a concern for aviation "safety issues"; however, numerous recordings did not relate to aviation safety issues or otherwise protected activities. Additionally, complainant's employer had a company policy that prohibited the recording of co-workers without company consent when the conversations did not relate to event protected under whistleblower statutes. The company policy was based, in part, on the concern that propriety business information and financial information shared with employees would become public knowledge. The company policy provided that the company could grant consent to recording and that unauthorized recording activity could result in discipline up to and including termination of employment. The Administrative Review Board found that the complainant's "indiscriminate and excessive recording of topics unrelated to air safety, including the company's business strategy and finances, created an independent and legal basis for the [adverse employment actions]." *Hoffmann*, supra at *4.

Here the Complainant submitted transcripts of surreptitious audio recordings of his Driver Business Leader T. Johnson on April 13, 2011 concerning general expectations of drivers, the company's "over speed policy" and hard-braking events, mileage expectations, and a pay issue. When the Complainant raised problems with the EOBR with T. Johnson, R. Koenig was assigned to assist the Complainant and the Complainant continued to surreptitiously record conversations with co-worker R. Koenig. As noted above, none of the recorded conversations were related to activity protected under the STAA and all of the April 13, 2011 recordings happened nearly two months prior to the Complainant's June 5-6, 2011 protected activity in refusing to haul a tanker with thin brakes and leaking chemical cargo. The Complainant also submitted transcripts of surreptitiously recording conversations with legal personnel from this Office and in a case involving a totally unrelated trucking company.

The Complainant's surreptitious recording of co-workers came to light the morning of June 17, 2011 when he made comments to himself after C. Maloy left the conference room to retrieve copies of the Complainant's driver violations; and he was overheard on the speakerphone by L. Melancon. The Complainant was instructed numerous times in the conference room that Respondent Schneider did not permit recording on its premises or the premises of its customers with permission and directed numerous time to cease recording, which the Complainant refused to do. It is specifically noted that the June 17, 2011 meeting was to address the Complainant's failure to properly record his hours of service and change in driver status with the EOBR, which had been found to be in proper working order since April 19, 2011. The meeting involved Respondent's monitoring Complainant's driver safety which is not whistleblower protected

activity under the STAA. The meeting presented a plan for re-training on the EOBR and post-training review, mentoring, and corrections of EOBR reported driver hour of service violations.

Subsequent to the conference room meeting, the Complainant reported to a computer terminal for completion of a computer-based EOBR logging training session. Again the Complainant recorded conversations and the initial screen of the computer-based proprietary training. During that period C. Maloy again repetitively told the Complainant that recording of the logging training was not permitted without permission, continued recording would result in termination, directed the Complainant to stop recording, and asked the Complainant if he would stop recording and if he understood the ramifications if he did not stop recording. The Complainant acknowledged he understood the policy and ramifications of continued recording without Schneider permission, but that he would continue his recordings.

The Complainant provides no justification or legal basis for his assertion that he had the right under the STAA to audio and/or video record people or computer-based training on Schneider's premises without prior permission to do so, other than his bold assertion to do so.

After deliberation on the administrative file and all documents submitted by the Parties in a light most favorable to the Complainant, this presiding Judge finds the evidence establishes that the Complainant engaged in indiscriminate surreptitious audio and video recording of supervisors, co-workers and Court personnel unrelated to the protected activity of refusing to transport the chemical tanker June 5-6, 2011; that the Complainant was aware of Respondent Schneider's company policy prohibiting recording on its premises and the premises of its customers without prior permission no later than the June 17, 2011 morning meeting in the conference room; that the Complainant video recorded the initial portion of the proprietary computer-based EOBR logging training after being made aware of Schneider policy on recording on its premises; that the Complainant refused direct orders from C. Maloy to stop audio and video recording while in the driver's lounge for computer-based EOBR training; that the Complainant was aware of the ramifications of failing to comply with the order to stop audio and video recording in the driver's lounge; and that the Complainant's actions of audio and video recording on June 17, 2011 did not rise to the level of protected activity under the STAA. Accordingly, the Complainant's assertions he had a right under the STAA to audio and video record on Respondent's premises without prior permission is found to be without merit.

IV. Complainant failed to establish that his prior protected activity on June 5-6, 2011 was a contributing factor in the adverse employment action on June 17, 2015.

The uncontradicted testimony of C. Maloy is that he was unaware of the Complainant's June 5-6, 2011 protected activity of refusing to transport a chemical tanker until a chemical spill was cleaned and brakes replaced until after the Complainant's employment was terminated. It is uncontradicted that the decision to terminate the Complainant's employment was made and delivered by C. Maloy in the driver's lounge on June 17, 2011 after the Complainant acknowledged he understood Schneider policy prohibited him from recording on the premises without permission, acknowledged that his employment would be terminated if he refused to

stop audio and video recording, and refused to comply with C. Maloy's order to stop audio and video recording the computer-based training program.

The Complainant submitted a transcript of portions of conversation with C. Maloy in the driver's lounge where he argued that by accepting the initial on-screen developer disclaimer of liability for training content he would be giving up his rights under the STAA if he was subsequently injured and that violated the STAA. He also stated that by declining to accept the disclaimer he would not be taking the computer-based EOBR logging training. The Complainant's argument that he would be giving up future rights under the STAA for potential issues yet unknown by accepting the general disclaimer on the computer-based training as indicated above is without any merit. Indeed the Complainant stated, during his March 24, 2015 examination of C. Maloy in deposition, "Well, the disclaimer seems to say that this third party wants to be held harmless in case there's an injury or some data's omitted or inaccurate, or something of that nature."

After deliberation on the administrative file and the documents submitted by the Parties, when viewed in the best light of the Complainant, this presiding Judge finds that the Complainant has failed to demonstrate that his activity protected under the STAA was a contributing factor to his termination of employment on June 17, 2011; a required element of a prima facie case under the STAA.

V. Respondent is entitled to Decision and Order Dismissing Complainant.

The Complainant established that he engaged in protected activity on June 5-6, 2011 by refusing to transport a chemical tanker until after the tanker brakes were replaced and leaking chemicals were cleaned from the tanker and surrounding area. However, the Complainant failed to establish that activity protected by the STAA contributed to the adverse action on June 17, 2011. The evidence established, when considered in the best light to the Complainant, that his employment was terminated for insubordination based on a refusal to stop recording while on Schneider premises during computer-based EOBR logging training in the driver's lounge and failure to complete the logging training.

Since the Complainant failed to establish all the elements of a prima facie case under the STAA, the Respondent is entitled to a Decision and Order dismissing the complaint. See *Coryell*, supra.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following Findings of Fact and Conclusions of Law are hereby entered:

1. The Respondent Employer is a commercial motor carrier within the meaning of the STAA.
2. The Complainant was hired by Respondent Employer on or about March 10, 2011, as a driver of commercial motor vehicles with a gross vehicle weight rating of 10,001 pounds or more.
3. C. Maloy was employed by Respondent Employer as a Driver Business Leader on June 17, 2011 when he became Complainant's immediate supervisor.

4. The Complainant engaged in protected activity under the STAA on June 5-6, 2011 when he refused to transport a chemical tanker until a chemical spill was cleaned from the tanker and surrounding area and the tanker brakes were replaced.
5. The Complainant's reports of a malfunctioning EOBR and falsified driver logs were not protected activity under the STAA.
6. The Complainant engaged in indiscriminate, surreptitious audio recording of co-workers and supervisors on Respondent Employer's premises without prior permission of Respondent Employer.
7. Respondent Employer had a policy prohibiting audio and video recording on company premises and on customer premises without prior approval of the Respondent Employer.
8. No later than the morning conference room meeting on June 17, 2011, the Complainant was aware that Respondent Employer's policy prohibited audio and/or video recording on company premises and on customer premises without prior approval of the Respondent Employer and that employment could be terminated for violation of that policy.
9. During the morning conference room meeting on June 17, 2011, the Complainant was directed on multiple occasions by supervisors to stop recording on company premises.
10. Subsequent to the morning meeting in the conference room on June 17, 2011, C. Maloy directed the Complainant to stop audio and video recording on multiple occasions while in Respondent Employer's driver's lounge in Reserve, Louisiana, for computer-based EOBR logging training on June 17, 2011.
11. The Complainant refused to stop audio and video recording while in Respondent Employer's driver's lounge in Reserve, Louisiana, on June 17, 2011.
12. C. Maloy terminated the employment of Complainant while in Respondent Employer's driver's lounge in Reserve, Louisiana, on June 17, 2011, for failure to follow direct orders to stop audio and video recording in the driver's lounge on June 17, 2011.
13. At the time C. Maloy made and communicated to Complainant the decision to terminate the Complainant's employment with Respondent Employer, C. Maloy was unaware of the Complainant's protected activity under the STAA.
14. The Complainant has failed to establish that there is a genuine issue of a material fact that activity protected under the STAA contributed to his adverse employment action.
15. The Complainant has failed to establish a prima facie case under the STAA.
16. The Respondent Employer is entitled to a Decision and Order dismissing the complaint based on the Motion for Summary Decision filed April 14, 2015.

ORDER

The Complaint filed August 11, 2011 and amended on October 4, 2011 is hereby **DISMISSED**.

Digitally signed by Alan L. Bergstrom
DN: CN=Alan L. Bergstrom, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

ALAN L. BERGSTROM
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 may be found to have waived 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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(b). 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(b).