**U.S. Department of Labor**

Office of Administrative Law Judges
800 K Street, NW
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

**Issue Date: 25 February 2019**

Case No: 2014-STA-00022

*In the Matter of:*

**ALFRED BARR,**
*Complainant*

*v.*

**CTL TRANSPORTATION, LLC,**
**COMCAR INDUSTRIES, INC.,**

*and*

**HIRERIGHT SOLUTIONS, INC.**
*Respondents.*

Appearances:

*For Complainant:*
Alfred Barr, pro se; Tampa, Florida

*For Respondents CTL Transportation, LLC and Comcar Industries, Inc.:*
Tammie L. Rattray, Esquire; FordHarrison; Tampa, Florida

*For Respondent HireRight Solutions, Inc.:*
Edward C. Reddington, Esquire; Williams & Connolly LLP; Washington, DC

Before: Stephen R. Henley
*Chief Administrative Law Judge*

## DECISION AND ORDER
## DISMISSING THE COMPLAINT

### Background and Procedural History

This case arises under the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), 49 U.S.C. § 31105, and the implementing regulations at 29 C.F.R. Part 1978. It began on or about December 31, 2012 when Complainant Alfred Barr filed a complaint with the Occupational Safety and Health Administration, U.S. Department of Labor ("OSHA") alleging Respondents CTL Transportation and Comcar Industries (jointly "CTL"), violated the whistleblower protection provisions of the Act when they fired him in retaliation for reporting hazardous safety conditions in the trucks he was assigned to drive, refusing to drive unsafe vehicles, and refusing to exceed the limitations on hours of service. Complainant subsequently amended his complaint on February 13, 2013 to include an allegation of blacklisting and adding Respondent HireRight Solutions, Inc. ("HireRight").

After investigating, OSHA dismissed the complaint on November 22, 2013, finding no violation of the Act. Complainant filed an objection and request for hearing with the U.S. Department of Labor, Office of Administrative Law Judges ("OALJ" or "Office") and the matter was assigned to Judge Richard T. Stansell-Gamm. Judge Stansell-Gamm issued a number of orders relating to, among other issues, judicial disqualification, motions for summary decision, discovery disputes and sanction requests, and held a preliminary hearing on January 6, 2015. Given Judge Stansell-Gamm's then-impending retirement from federal service, I reassigned the case to myself on February 10, 2015. 29 C.F.R. §§ 18.12, 18.15.

On February 19, 2015, counsel for Respondent HireRight filed a *Suggestion of Bankruptcy* advising this tribunal that HireRight had entered Chapter 11 bankruptcy proceedings[1] and obtained a stay of pending litigation and claims. Accordingly, on June 18, 2015, I ordered the proceeding before the OALJ associated with the above-captioned complaint against HireRight stayed for the duration of Chapter 11 bankruptcy. In the interests of judicial economy, I further ordered the instant matter against the remaining Respondents held in abeyance pending completion of bankruptcy proceedings against HireRight and required HireRight to provide periodic status reports to the tribunal and the other parties.

On September 16, 2015, Respondent HireRight filed a *Notice of Discharge, Release, and Permanent Injunction Relating to Claims Asserted Against HireRight Solutions*, advising the tribunal that the U.S. Bankruptcy Court for the District of Delaware entered *Findings of Fact, Conclusions of Law, and Order Under Section 1129 of the Bankruptcy Code and Bankruptcy Code 3020 Confirming Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* on August 14, 2015. Respondent asserted that any claims Complainant may have had against HireRight have been discharged and the bankruptcy code prohibited Complainant from continuing any action against HireRight pursuant to 11 U.S.C. § 524(a)(2), which provides, in part, that a discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover, or offset any such debt as a personal liability of

[1] A number of affiliated cases were being managed sub nom., *In re Altegrity*, No. 15-10226 (Bankr. Del.).

the debtor." Respondent HireRight requested that Complainant's action against it in this proceeding be dismissed.

Although statutory exemptions to the operation of the bankruptcy code exist, it appeared that none were applicable in this case.[2] Accordingly, on June 29, 2016, I issued an *Order to Show Cause Why Complainant's Action Against HireRight Solutions Should Not Be Dismissed and Order Holding Case in Abeyance Against Remaining Respondents Lifted*. The order gave the parties thirty days to file responses. On August 15, 2016, I extended Complainant additional time. I did not receive a response.

On December 6, 2016, HireRight filed a status report alerting the undersigned that the U.S. Bankruptcy Court for the District of Delaware ruled on a motion filed by Complainant requesting an order allowing Complainant to proceed against HireRight despite the discharge injunction. HireRight reported that the Bankruptcy Court denied Complainant's "motion to proceed against HireRight for any form of monetary relief, allowing him to continue, as it pertains to HireRight, only with regard to the potential prospective modification of his DAC report."

On December 12, 2016, I issued *Order Lifting Stay, Notice of Hearing, and Prehearing Order*. While I denied HireRight's request to be removed as a named respondent in these proceedings, and advised Complainant he was free to pursue non-monetary relief against them, I ruled that the Bankruptcy Court had foreclosed any award of monetary relief against HireRight. I further ruled that HireRight's continued participation was no longer required. I advised the parties that a hearing would commence on May 23, 2017 in Tampa, Florida. In preparation for the hearing, the parties were instructed to exchange certain prehearing information on or before April 24, 2017. Respondent complied; Complainant did not.

On May 23, 2017, I convened the hearing in Hillsborough County Criminal Courthouse Annex, Tampa, Florida. Both Complainant, representing himself in this matter, and Respondents CTL and Comcar appeared, as well as their counsel. Neither HireRight nor their counsel were present.

At the hearing, Complainant renewed a request for a continuance to seek counsel and presented and subsequently withdrew a written *Motion for Disqualification of the Administrative Law Judge Stephen R. Henley*. Over Respondent's objection, I granted Complainant's motion for a continuance to seek legal representation and, on May 25, 2017, issued an order memorializing my rulings made in the May 23, 2017 hearing. The order also rescheduled the hearing to July 27, 2017; instructed any counsel retained by Complainant to file a notice of appearance with this Office and serve a copy on opposing counsel by June 6, 2017[3]; and

[2] The exemption under 11 U.S.C. § 362(b)(4) for governmental units enforcing police and regulatory powers does not apply to cases where the employee, as here, is the sole prosecuting party. The Secretary of Labor must have a prosecutorial role for the exemption to apply. *See Davis v. United Airlines*, ARB No. 02-105, ALJ No. 2001-AIR-00005 (ARB May 30, 2003).

[3] Complainant was not required to retain counsel. Additionally, I informed Complainant he could retain counsel after June 6, 2017, but such counsel must file a notice of appearance within 14 days of being retained and in accordance with 29 C.F.R. § 18.22.

instructed Complainant, not later than June 13, 2017, to serve Respondents, with copies to this court, his prehearing submission and complete responses to the discovery requests submitted by CTL on December 30, 2016 and required by my April 5, 2017 and May 11, 2017 orders.[4] Complainant did not serve or file his prehearing submission.

On June 26, 2017, I issued an order denying a motion by Complainant to strike certain pleadings filed by Respondents and deferring a ruling on the admissibility of witnesses and evidence to the formal hearing. The order also instructed Complainant to provide his prehearing submission and discovery responses, as previously ordered, within seven days. He did not.

On June 29, 2017, CTL and Comcar filed a *Second Motion for Sanctions and Dismissal of Respondents CTL Transportation, LLC and Comcar Industries, Inc.* ("Motion for Sanctions"). On July 5, 2017, Complainant filed *Complainant's Motion for Summary Decision Against CTL Transportation, LLC, Comcar Industries, and HireRight Solutions, Inc.* ("Motion for Summary Decision"). Both motions were denied by written order on July 10, 2017.

On July 17, 2017, Complainant filed *Request for Sanctions Against Tammy (sic) Rattray*, counsel for Respondents CTL Transportation, LLC and Comcar Industries, Inc. ("Motion"). On July 25, 2017, Ms. Rattray filed a response to Complainant's Motion. The motion was denied by written order issued on August 21, 2017.

I convened a third hearing session on July 27, 2017 in Tampa, Florida. Three witnesses, including Complainant, testified.[5] The hearing was subsequently recessed due to an emergency and rescheduled to January 30, 2018, but continued to March 13, 2018 due to a potential lapse in funding for the federal government.

On March 12, 2018, the day before the scheduled hearing, Complainant provided *Notice of Intent to File a Petition for Interlocutory Review with the Administrative Review Board*, and asserted that action automatically stayed further proceedings in the case until the Administrative Review Board ("ARB") ruled. I disagreed and noted that under, 28 U.S.C. § 1292, interlocutory appeals do not stay trial court proceedings absent an order from the trial judge or reviewing court. As I did not intend to certify any issues for interlocutory review and neither the ARB nor a superior court had issued a stay, I issued *Preliminary Order Denying Certification for Interlocutory Review and Denying Stay* on March 12, 2018 and informed the parties by email the same day that we would proceed as scheduled on March 13, 2018. (Tr. 311-12).[6] Respondent

---

[4] I did order that Complainant's responses must be in writing and specifically respond to each request for discovery or prehearing information regardless of whether Complainant previously provided documents or filings that might be responsive.

[5] I use the following abbreviations in this decision: "Tr." For the official hearing transcript; "CX" for a Complainant's Exhibit; "RX" for a Respondent's Exhibit; and "ALJX" for an Administrative Law Judge's Exhibit.

[6] The ARB did issue an *Order to Show Cause* ("Order") on March 28, 2018, instructing Complainant "to **SHOW CAUSE** no later than **April 23, 2018** why the board should not dismiss his appeal as interlocutory and not subject to review at this time." (emphasis in original). However, the Order did not stay the proceedings before the OALJ.

CTL appeared, and was represented by counsel. Complainant failed to appear and the hearing concluded in his voluntary absence. One witness testified for Respondent.

By Order issued May 16, 2018, I set a briefing schedule and allowed the parties until June 28, 2018 to simultaneously file post-hearing briefs, and until July 10, 2018 to file responses. On June 28, 2018, Respondent CTL/Comcar filed its post-hearing brief ("Resp. CTL Brief"). On June 28, 2018, Respondent HireRight filed *HireRight, LLC's Joinder in Post-Hearing Brief of CTL Transportation, LLC and Comcar Industries, Inc*. ("Resp. HireRight Brief"). Complainant did not file a closing brief, instead filing *Complainant's Motion to Strike Respondent CTL Transportation, LLC, Comcar Industries, Inc., and HireRight Solutions, Inc., Post Hearing Briefs* ("Comp. Mot. Strike") on July 10, 2018. In this July 10, 2018 filing, Complainant submits that, as "this matter is currently under appeal/Writ of Mandamus, as accepted by the Administrative Rules [sic] Board (ARB), and by the ARB accepting the Notice of Appeal, stays this matter until such time as a ruling is issued by the ARB," … the "briefs are prohibited filings with the OALJ."[7]

I base my decision on all of the evidence admitted,[8] relevant controlling statutory and regulatory authority, and the arguments of the parties.[9]

---

[7] For the reasons set forth in the March 12, 2018 Order, Comp. Mot. Strike is DENIED.

[8] At the July 27, 2017 hearing session, Respondent offered RX 1-26, 28-30 and 36 into evidence. (Tr. 189, 256-257). As the session was called into recess unexpectedly, the Court did not formally admit them at that time. I do so here. RX 1-26, 28-30 and 36 are admitted into evidence. RX 39, 45 and 48 were offered and admitted into evidence at the March 13, 2018 session. (Tr. 321-22; 324-25). Complainant marked several exhibits for identification at the July 27, 2017 session. (Tr. 202, 232, 246). CX 1 is Complainant's CTL medical examiner's certificate, used to cross examine Gary Hill, and CX 3 is a copy of Gary Hill's February 22, 2013 Declaration, used to refresh his recollection. Complainant did not offer either CX 1 or CX 3 into evidence. The exhibit marked CX 5 appears to include, among others, a map of Tampa and several CTL posttrip trailer inspection reports prepared by Complainant. Complainant did not refer to CX 5 at the hearing, use it to cross examine any witness or offer it into evidence. Complainant did not reference any other CX during direct or cross examination, to include CX 2 or 4, and neither was provided to the court. I did not consider CX 1, 3 or 5 for identification in deciding the merits of this case.

As part of his Motion to Strike, Complainant attached four (4) exhibits. Exhibit A appears to be copies of Respondent CTL's Post Hearing Brief and Hireright's Joinder and a March 13, 2018 email from Complainant to OALJ. Exhibit B appears to be a copy of a Stipulated Judgement in *United States of America v. Hireright Solutions, Inc*., Case 1:12-cv-0513 (D.D.C. Aug. 29, 2012). Exhibit C appears to include a map of the greater Tampa area, copies of post trip vehicle inspection reports and driver vehicle inspection reports Exhibit D is a declaration of Gary Hill, dated February 22, 2013. A cover page to these Exhibits provides that Exhibits A-D are to support the Motion to Strike. Complainant did not and has not requested I consider Exhibits A-D in deciding the merits of this case.

[9] The admitted exhibits include: RX 1 - Barr CTL Application, dated 8/13/2012; RX 2 and 3 - Barr Hazardous Materials Training Certificate; RX 5 - Barr Entry Level Driver Training Certification; RX 18 - Barr Mosaic Site Specific Procedures for Hauling/Loading/Unloading Hazardous Materials; RX 19 - Barr Driver Statement - 9/30/12; RX 20 and 21 - Witness Statements - 10/7/12; RX 22 - Barr Driver Statement - 10/7/12: RX 23 - Personnel Action Statement from Gary Hill to Alfred Barr on 10/8/12 – written warning about 10/7/12 accident; RX 24 - Barr Driver Statement - 11/14/12; RX 25 - Witness statement - 11/14/12; RX 26 - Barr Statement About Spill @ Gulf Sulfur on 12/6/12; RX 28 - Barr Termination Record; RX 29 – Barr CTL Personnel Separation Form; RX 30 - Final Written Warning; RX 36 - Declaration of Sarah LaChappel; RX 39 – HireRight Services Agreement;

## Issues

Did Complainant engage in protected activity? If so, did Respondents take adverse employment action(s) against him? If so, was the protected activity a contributing factor to the adverse employment action? If so, would Respondents have taken the same adverse action even in the absence of the protected activity? As explained in greater detail below, because I find that any protected activity engaged in by Complainant was not a contributing factor in any adverse action, I dismiss the complaint.

## Summary of the Evidence[10]

*Hearing Testimony*

Alfred Barr. (Tr. 73-200). I was hired by CTL in August 2012 as an at-will employee. (Tr. 97, 99). After driver training, I was eventually approved to drive by myself in the first or second week of September 2012. I examined the truck and trailer each day and filled out Driver Vehicle Inspection Reports (DVIRs) detailing the problems with the particular piece of equipment. Some of the items were defective equipment. Sometimes the truck would break down. Others referenced safety concerns. I would submit them to the mechanic on duty. Gary Hill told me my reports were too detailed and that I needed to summarize them. (Tr. 78). Sometimes I was told to drive even though I was at my hours of service limits. I never refused to drive a truck while I worked for CTL.

I was suspended because of an incident involving a sulfur spill and eventually fired in early December 2012. I filed an application with Dillon Transportation for a truck driver position. In late December 2012 or early January 2013, I was told by Dillon I had passed all my tests but would not be hired because my HireRight DAC report reflected I was an unsafe driver and had two incidents/accidents on my record. I contested the report but no changes were made and I was not hired.

I was not involved in an incident at the terminal on September 30, 2012, in attempting to park my vehicle. (Tr. 132). I do not agree that on October 7, 2012, I hit a stationary yellow pole while trying to refuel on the lot. (Tr. 135). I do not admit that on November 14, 2012, I hit parked vehicles on the lot. I do not admit to hitting trailers on the lot. I did not hit anything on the lot on November 14. (Tr. 143-44).

A trailer that I was assigned was involved in a sulfur spill on December 6, 2012. Sulfur is a hazardous material. I was the driver that set up the trailer for loading the sulfur. One of the steps was to secure a clamp from the loading arm to the trailer. I was not responsible for ensuring the loading arm was properly secured to the trailer. (Tr. 153-54). After the spill, I

---

RX 45 – HireRight Reinvestigation and DAC report; and RX 48 - Emails between HireRight and Comcar on DAC report.

[10] The summary of the evidence is not intended to provide a comprehensive account of all the evidence.

contacted the dispatcher for further instructions. I did not contact CTL's safety department. I then drove the truck back to the terminal and spoke with Randy Dieter on the phone.

I don't know who made the decision to terminate me. (Tr. 164).

A Drive-A-Check (DAC) report on me was published by HireRight. The report was submitted to Dillon Transport. The DAC report reflected that my period of service with CTL was from August 2012 through December 2012 and that my reason for leaving was "discharged or company terminated lease." I disputed that my safety record was unsatisfactory. The "Zero DOT recordable accidents" is accurate. The DAC report lists two non-DOT recordable accidents: the first on December 6, 2012 involving hazardous material and the second on November 14, 2012 for backing into a parked vehicle and grazing its mirror. (Tr. 89-92, 172-6, 179).

I called HireRight and disputed the report. (Tr. 91, 181). Nothing was done.

Gary Hill. (Tr. 204-256). Between August and December 2012, I was manager of CTL's Tampa and Mulberry terminals. I reported to CTL President Ken Bauer. After successfully completing orientation and training, Mr. Barr became a CTL driver. (Tr. 208). I would have reviewed the driver statement prepared by Mr. Barr in September 2012 after the incident. I gave him a verbal warning on October 1, 2012 for the September 30 incident. I gave Mr. Barr a written warning for the October 7, 2012 incident. After the second incident, Mr. Dieter and I decided Mr. Barr would benefit from additional driver training.

After the November 14, 2012 incident, Dieter and I again met with Barr. I told him that his job was in jeopardy. If he had another incident, spill, accident, injury, he would be subject to immediate termination. (Tr. 215). This was his final warning.

The December 6, 2012 sulfur spill was a big deal. Cleanup was our responsibility and very costly. (Tr. 218-9). I told Mr. Barr he was suspended pending investigation. Our safety department did the investigation and determined it was driver error and not due to faulty equipment or machinery. The decision was made to terminate Mr. Barr's employment. (Tr. 220). The decision was mine, along with Randy Dieter. The decision was reviewed by Comcar to ensure it met legal obligations.

I then told Mr. Barr that based on his safety record and number of incidents, we had to terminate his employment. I filled out the paperwork. I believe Mr. Barr had an unsatisfactory safety record. I checked "not eligible for rehire" because of the number of incidents and accidents that transpired in a short amount of time. (Tr. 222).

I am familiar with Driver Vehicle Inspection Reports or DVIRs. Drivers fill them out each day. I have no involvement with them. They were never submitted to me. They are turned in along with the other paperwork to dispatch. I would not have reviewed Mr. Barr's DVIRs. I was unaware of what he put on his DVIRs. I don't remember any DVIRs being brought to my attention. (Tr. 256). I was not aware whether Mr. Barr was making complaints of any type. The

only issue I remember was a pay complaint that arose after he finished his initial training that was resolved.

Mr. Barr never refused to drive or operate a truck for any reason, to include safety concerns. (Tr. 224).

Mr. Barr was never insubordinate or disruptive while working for CTL. There were four incidents he had involving trucks. Three were on the yard and then the spill. I don't know if you call them incidents or accidents but the end result was equipment damage due to human error. (Tr. 227). I would not hire a driver with a history of unsafe driving and preventable accidents. (Tr. 237). Lazaro Ibarra was also a hazardous-chemical driver. I don't know if he had a spill while employed at CTL.

Randy Dieter. (Tr. 259-306). I am the safety and training manager for CTL. I held that position in August through December 2012. Mr. Barr was provided sufficient training on the procedures for chemical loads at Gulf Sulfur. (Tr. 263). I had asked Mr. Carter to do some follow-on training with Mr. Barr after the first two accidents. I wanted to see if the problem was skills-based or behavior-based. His skills turned out to be fine. So it was behavior. Was he rushing, attentive, complacent? RX 24 is the statement Mr. Barr prepared after the November 14 incident. I met with Mr. Barr and Gary Hill. Following company policy, we told him that three accidents in less than two months was excessive. I then became aware of the sulfur spill in December 2012. Several hundred gallons were spilled. The dispatcher informed me. Mr. Barr did not latch the spout. (Tr. 270). Company policy is after a spill, the driver is to contact the dispatcher, then safety. Mr. Barr left the premises without authority. He did not follow proper procedures. (Tr. 301). Our primary concern was to mitigate the damage. Here, it was 12 hours later when we informed the customer. Mr. Barr should not have driven the truck back to the yard. Friction from the brakes could have caused the tires to heat and catch fire. The chemical spill was a preventable accident. It was driver error. CTL paid a lot to clean up.

I was part of the decision to terminate Mr. Barr's employment with CTL. (Tr. 274). He was let go for the three preventable incidents in the parking lot and the spill. His safety record was unsatisfactory. He never came to me and complained about the safe operation of any vehicle.

DVIRs are between the driver and the maintenance department. I was not aware of any issues with Mr. Barr's DVIRs. I never looked at them. I was not even aware of them so they were not a consideration in the decision to terminate Mr. Barr.

Troy Ankley, another CTL driver, was also terminated for a sulfur spill. (Tr. 276).

Kenneth Wieck. (Tr. 315- 328). I am the Executive Director of Human Resources for Comcar Industries, Inc. Bruce Carrington, Randy Dieter, John Ferman, Gary Hill, Lazaro Ibarra and Steve Johnson never worked for Comcar. Comcar is a holding company and CTL is a wholly-owned subsidiary of Comcar. Comcar provides administrative services to CTL, to include driver recruiting and human resources; it has no operating authority over CTL and is not involved in the day-to-day operations of CTL. Comcar does not own any of CTL's assets, to include trucks and

trailers, and is not responsible for CTL's liabilities. Comcar does not pay taxes on behalf of CTL and does not employ any drivers. Comcar did not employ Mr. Barr in August through December 2012, CTL did. While Comcar provided administrative support to ensure it was legal, the decision to discharge Mr. Barr would have been CTL's to make.

HireRight provided a service to Comcar and CTL. When a driver was terminated, we would provide HireRight a form. RX 45 is the information we would get from HireRight about a prospective driver. It is dated February 4, 2013 and pertains to Complainant Alfred Barr. RX 48 are copies of communications with HireRight regarding Mr. Barr's dispute. The information on the documents is accurate. Mr. Barr's overall safety record was unsatisfactory. Both incidents were properly reported as non-DOT recordable.

## Findings of Fact

Comcar Industries is a transportation and logistics holding company. One of Comcar's subsidiary carriers is CTL Transportation, LLC. CTL Transportation specializes in the hauling of chemicals with terminals throughout the United States, to include Tampa, Florida. Complainant Alfred Barr drove trucks for CTL beginning in late August 2012 in and around Tampa, Florida. Barr reported to CTL's Tampa terminal manager, Gary Hill, and Hill reported to CTL president, Ken Bauer.

After finishing approximately a week-long CTL orientation program, Barr began on-the-job driver training on or about September 3, 2012. CTL replaced Barr's initial driver trainer after Barr complained the trainer was abusive and alleged the trainer was altering driver logs. Complainant was not disciplined for requesting a new trainer. Instead, Complainant was assigned a new trainer, who approved Barr to drive on his own without a trainer on or about September 25, 2012.

On September 30, 2012, the truck Barr was driving hit a stationary object on the terminal yard. In a written statement, Barr said "I thought I cleared both tractor and trailer #25216" and "[t]he evidence demonstrates that I lost sight of my trailer (#25276) hitting trailer #25216." Hill gave Barr a verbal counseling for this incident.

On October 7, 2012, the truck Barr was driving hit a stationary object on the terminal yard. In a written statement, Barr said "the trailer rear fender clipped one of the yellow posts at the fueling station – bending the fender into the tire – where the rig hit the yellow post at the fueling station." At least two individuals witnessed Barr hit the pole. Hill issued Barr a written warning for this incident. After a period of additional driver training, Barr was determined to possess the skills necessary to be a safe driver and continued driving.

On November 14, 2012, the truck Barr was driving hit a stationary object on the yard. In a written statement, Barr said "in parking, I grazed tractor #1468 driver mirror, moving mirror but no damage. In a second movement I hit trailer LT913 rear driver side light box." At least one individual witnessed Barr hit the mirror. Hill issued Barr a final warning for this incident.

At approximately 0058 hours on December 6, 2012, a truck Barr was operating was involved in a major chemical spill. Barr did not inform CTL of the spill until returning to the terminal and completing his written driver statement about the incident. In the statement, Barr said "I went out to the trailer, walking around the spill to the back of the trailer, and climbed up the ladder to the top of the trailer. I noticed the loading arm clamp was covered with cold sulfur and was "FROZEN OPEN" and not closed. This meant to me that I connected the load arm clamp, but that the clamp spring did not close the clamp, leaving the clamp as just a hook, and not a closed clamp." Barr met with Gary Hill and Randy Dieter at about 1100 hours on December 6, 2012. Hill informed Barr he was suspended pending investigation.

A CTL investigation determined the spill was preventable and caused by driver error, not faulty equipment or machinery. Specifically, Barr failed to properly latch a clasp on the loading spout, resulting in a molten sulfur spill. Clean up costs for the spill exceeded $10,000.

Hill called Barr to tell him he was fired.

Hill and Dieter made the decision to fire Barr based on four driving incidents in less than a three-month period, the three on the terminal yard and the one major spill. All four incidents were considered by CTL to have been preventable and caused by driver error.

HireRight is a consumer reporting agency. One of the products provided to customers is the Employment History Product, also referred to as a "Drive-A-Check" or "DAC report." On December 13, 2012, one of HireRight's customers, CTL Transportation, submitted information concerning Alfred Barr. The information reported was: Mr. Barr had worked for CTL from August 2012 to December 2012; Barr had been discharged by CTL; Barr's safety record was characterized as unsatisfactory; and Barr had been involved in two non-DOT recordable incidents while working at CTL – Incident #1 – December 6, 2012, a hazardous cargo spill and Incident #2, November 14, 2012 hitting mirror of a parked vehicle. Both were characterized as preventable events. Barr's DAC report did not assign blame for the incidents reported by CTL.

After his release from CTL, Barr applied to Dillon Transportation for a driver position. Dillon requested Barr's DAC report. Barr was told he was not hired because of his DAC report.

On January 29, 2013, Barr contacted HireRight and initiated a dispute with regard to the information provided by CTL on his DAC report by calling HireRight's customer service telephone number. All individuals calling HireRight's customer service number are informed by a recording at the beginning of the call that the call may be monitored or recorded. Barr was so informed on January 29, 2013. During the call, Barr reported the basis for his dispute was that he did not have any accidents while employed by CTL. While the dispute reinvestigation was in progress, HireRight annotated Barr's DAC report to reflect the driver had entered a statement and initiated a dispute on the reason for leaving and the accident/incident record. However, as the information on it was subsequently determined to be accurate, Barr's report was not changed and he was not hired by Dillon, or any other company.

CTL, Comcar and HireRight did not conspire to put false, incorrect or misleading information on Barr's DAC report.

Department of Transportation regulations require a truck driver to inspect his or her vehicle before a trip and record its condition on a Driver Vehicle Inspection Report ("DVIR"). A report is generated at the conclusion of the trip and used to notify CTL's maintenance department of alleged defects in CTL equipment driven by CTL employees.

Barr filled out DVIRs each day he took a vehicle out and turned them into dispatch, who forwarded them to maintenance. Barr's DVIRs during the period he worked for CTL detail issues with the trucks he was dispatched to drive. Neither Hill nor Dieter, nor anyone involved in the decision to fire Barr, were aware of what was on Barr's DVIRs. They did not look at them, did not review them and were never told what was on them. Hill did not tell Barr that his DVIRs were too detailed.

At CTL safety meetings, Barr would occasionally ask general questions about the do's and don'ts of driving but did not raise specific safety complaints. No one involved in the decision to fire Barr recalled any specific safety complaints made by Barr at these meetings.

Comcar provides human resources support and driver recruitment assistance to CTL but CTL makes the decision whether to hire an applicant. Comcar has no day-to-day involvement in CTL's operations and does not employ drivers nor own any commercial tractors or trailers. Comcar reviewed CTL's decision to terminate Barr for legal compliance but did not participate in the decision to discipline and ultimately terminate Mr. Barr. These decisions were made by CTL employees.

Complainant did not formally or informally report any safety concerns or issues to a government agency prior to his termination on December 6, 2012. Barr never reported or planned to report to a government agency violations of motor vehicle safety and health regulations.

Complainant never refused to drive or operate a truck while working for CTL because of safety concerns.

CTL did not force, require, tell, or instruct Barr to drive in violation of hours of service limitations. Barr did inadvertently exceed his hours of service limitations on October 24, 2012. Complainant did not complain. The excess hours were discovered by CTL's monitoring system. Barr was not disciplined for this incident. At the time the decision to fire Barr was made, neither Hill nor Dieter, nor anyone involved in the decision to fire Complainant, were aware that Complainant had exceeded his hours of service limits on this one occasion.

Another CTL driver was discharged on January 13, 2012 for failing to secure a safety chain on a loading spout resulting in a major spill. CTL reported to HireRight that this driver had an unsatisfactory safety record and was ineligible for rehire.

## DISCUSSION

### Legal Burdens of Proof

The Administrative Review Board summarized the legal burdens of proof in an STAA whistleblower case in *Mauldin v. G & K Services*, ARB No. 16-059, ALJ No. 2015-STA-54 (ARB June 25, 2018):

> Under the STAA, an employer may not discharge, discipline, or discriminate against an employee because the employee has engaged in certain protected activities. STAA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).
>
> To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action. If the employee does not prove one of these requisite elements, the entire claim fails. The employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

*Mauldin*, ARB No. 16-059, slip op. at 4 (footnotes omitted).

### Protected Activity

#### *File a Complaint*

The STAA protects an employee if the employer perceives that the employee has filed or is about to file a complaint or begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation. 49 U.S.C. § 31105(a)(1)(A)(ii). Filing a complaint includes writing or speaking orally with an employer or a government agency. 29 C.F.R. § 1978.102(b)(1).

For a complaint to be protected activity under the STAA, the complaint must "relate" to a violation of a safety standard; however, a specific standard need not be expressly cited in the complaint. 49 U.S.C. § 31105(a)(1)(A)(i); *see also Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-00041, slip op. at 4 (ARB Mar. 27, 2012). Furthermore, "a complainant must show that he reasonably believed he was complaining about the existence of a safety violation." *Ulrich*, ARB No. 11-016, slip op. at 4. It need not be true that the complaint concerned an *actual* violation of the regulations. *Elbert v. True Value Co.*, ARB No. 07-031, ALJ No. 2005-STA-00036, slip op. at 3 n.5 (ARB Nov. 24, 2010). The fact that reporting safety issues is part of a truck driver's duties does not prevent such reports from being

protected activity. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-30 (ARB Feb. 29, 2012).

An employee's internal complaint to management conveying his reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under § 31105(a)(1)(A). *Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201, 212 (4th Cir. 2009); *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998). An employee's raising of a concern, either formally or informally, that is related to commercial motor vehicle safety standards constitutes protected activity. *Assistant Sec'y and Freeze v. Consolidated Freightways*, ARB No. 99-030, ALJ No. 1998-STA-00026, slip op. at 5 (ARB Apr. 22, 1999).

Here, while Complainant never made a formal written or oral complaint to any government agency, he did make informal complaints to CTL in the form of written Driver Vehicle Inspection Reports ("DVIRs") alleging deficiencies with the trucks he was driving. Complainant also asked questions at mandatory company safety meetings. Complainant avers that his safety meeting complaints and the information contained on the DVIRs constitute protected activity under the Act as he was informing management of unspecified violations of a commercial motor vehicle safety or security regulation, standard, or order. I find the DVIRs do reflect an honest belief that, on occasion, the truck(s) Complainant was assigned to drive, though fully operational, were not fully compliant with applicable motor vehicle safety regulations. Therefore, I find that Complainant established by a preponderance of the evidence that when he submitted DVIRs that reported potential commercial motor vehicle safety violations, he engaged in protected activity as defined by § 31105(a)(1)(A)(i).

I find that any questions posed by Complainant at CTL safety meetings were too generalized and informal to constitute "complaints" under the STAA. *See Bucalo v. United Parcel Service*, ARB No. 08-087, ALJ No. 2006-TSC-2 (ARB July 30, 2010) (concurring opinion; merely asking questions does not establish that complainant filed a complaint or began a proceeding within the meaning of § 31105(a)(1)(A)(ii)).

*Violate a Regulation*

The STAA prohibits an employer from taking an adverse employment action against an employee when an employee refuses to operate a vehicle because such operation would violate a regulation of the United States related to commercial motor vehicle safety, health, or security. 49 U.S.C. § 31105(a)(1)(B)(i). In order to prevail under this section of the STAA, a complainant must prove that an actual violation would have occurred. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-26 (ARB Oct. 31, 2007). Here, Complainant presented no evidence of an actual violation of a motor vehicle regulation or standard. Moreover, Complainant never refused to operate a vehicle. Thus, I find that Complainant has not established protected activity under § 31105(a)(1)(B)(i).

*Refusal to Operate*

The STAA protects an employee who refuses to operate a vehicle because he has a reasonable apprehension of serious injury to the employee from the vehicle's hazardous safety

condition. *See* 49 U.S.C. § 31105(a)(1)(B)(ii). Here, Complainant never refused to operate an assigned vehicle, and therefore he has not established protected activity under § 31105(a)(1)(B)(ii).

*Accurately Report Hours of Service*

The STAA prohibits an employer from taking an adverse employment action against an employee because the employee accurately reported hours on duty. 49 U.S.C. § 31105(a)(1)(C). Here, CTL never told, required, forced or instructed Complainant to drive in violation of the hourly limitations on driving or to not accurately report his hours of duty. Complainant did not establish that any adverse action was taken against him for accurately reporting hours of service, and therefore I find that he has not established protected activity under STAA § 31105(a)(1)(C).

On one occasion, Complainant mistakenly, and inadvertently, exceeded his hours of service limits. *See* 49 C.F.R. Part 395 (Federal Motor Carrier Safety regulations setting limitations on hours of service for drivers). Complainant did not complain and it was discovered by CTL's monitoring system. No action was taken against Complainant for this single violation and he had no further issues with hours of service limits. I find this event does not constitute activity protected under STAA § 31105(a)(1)(C) or any other provision of the STAA.

**Adverse Action**

The STAA specifies that an employee's suspension and discharge constitute adverse actions. *See* 49 U.S.C. § 31105(a); 29 C.F.R. § 1978.102. Thus, I find that CTL took adverse employment actions against Complainant when it suspended and then discharged him on or around December 6, 2012.

The STAA regulations also provide that "it is a violation for any person to …**blacklist** … an employee" for engaging in activity protected under the Act. 29 C.F.R. § 1978.102(b) (emphasis added). In *Beatty v. Inman Trucking Management, Inc.*, ARB No. 11-021, ALJ Nos. 2008-STA-20 and 21 (ARB June 28, 2012), the ARB found that a complainant's burden to establish blacklisting is simply to show by preponderance of the evidence that the respondent(s) "disseminated damaging information … that would or could prevent [the complainant] from finding employment." USDOL/OALJ Reporter at 6. Here, Complainant alleges the information in his DAC report was false and resulted in blacklisting, limiting his ability to obtain gainful employment. The record shows that the DAC report reflected that Complainant's period of service with CTL was from August 2012 through December 2012 and that his reason for leaving was "discharged or company terminated lease." It showed that Complainant had two non-DOT recordable accidents – one involving hazardous material and one for backing into and grazing a mirror on a parked vehicle. The DAC report stated that Complainant was not eligible for rehire. The DAC report thus contained damaging information[11] – that Complainant was accident-prone and was not eligible for rehire – that actually did prevent him from obtaining employment with

[11] *Compare Dick v. Tango Transport*, ARB No. 14-054, ALJ No. 2013-STA-60, slip op. at 10 (ARB Aug. 30, 2016) (listing on DAC report of "other" as reason for leaving employment found not to be "damaging information" in the context in which it appeared and thus was not blacklisting).

Dillon Trucking. Accordingly, I find that Complainant did establish that the DAC report meets the broad definition of blacklisting contained in the ARB's *Beatty* decision.[12]

## Contributing Factor Causation

Complainant has the burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in his suspension and firing. "A contributing factor is *any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision. It just needs to be a factor; the protected activity need only play some role, and even an 'insignificant' or 'insubstantial' role suffices. If the ALJ believes that the protected activity and the employer's non-retaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question." *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-00030, at 11 (Jan. 6, 2017) (internal citations omitted).

### *DVIRs as a Contributing Factor*

CTL contends that even if Complainant's safety complaints and DVIRs qualify as protected activity as contemplated under the Act, such alleged protected activity played no role in the decision-making process to discharge Complainant. ARB precedent instructs that the decision maker's "knowledge" and "animus" are factors to consider in the causation analysis, which requires a review of the entire record of the case. *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-00006 (ARB Jan. 10, 2018). *See also Beatty v. Inman Trucking Management, Inc.*, ARB No. 11-021, ALJ Nos. 2008-STA-20 and 21 (ARB June 28, 2012) (supervisor's motivation critical to analysis of whether protected activity contributed to decision to make entry on DAC report).[13]

---

[12] The ARB's decision in *Beatty* was focused on whether the reporting of disparaging information in a DAC report was an adverse employment action. The ARB's characterization of this as "blacklisting" at this stage in the analysis of an STAA claim, however, may be misleading, as the term "blacklisting" implies that the provision of the negative information was improper and violative of the STAA. I construe *Beatty* to mean that reporting negative information in a DAC report is in the nature of blacklisting, and whether that action is violative of the STAA requires further analysis into whether protected activity contributed to the decision to include the negative information in the DAC report. It is at the contributing factor stage of the analysis that the propriety of, and the motivation for, providing negative information for the DAC report is analyzed to determine whether the DAC report constituted actionable "blacklisting."

[13] The Federal Railway Safety Act (FRSA) case law on this approach is more fully developed in FRSA relational cases. *See, e.g., Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013); *Coates v. Grand Trunk Western Railroad Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015); s*ee also Mercier v. U.S. Dep't of Labor*, 850 F.3d 382, 391 (8th Cir. 2017) (noting in an FRSA case that, although ALJ had not made a finding on the "knowledge prong," in regard to contributing-factor test, the plaintiff likely did not meet it because the decision to terminate had been made by the EEO department and there was no evidence connecting the safety department with the EEO department). It is noted, however, that federal court FRSA precedent tends to view the decision maker's knowledge of the protected activity as a distinct element of a whistleblower claim. *See, e.g, Lincoln v. BNSF Ry. Co*., 900 F.3d 1166, 1213 (10th Cir. 2018), joining "those courts that have concluded an FRSA plaintiff advancing a retaliation claim must demonstrate the decision maker had knowledge of the protected activity." (citing *Conrad v. CSX Transp., Inc*., 824 F.3d 103, 107-08 (4th Cir. 2016); *Kuduk v. BNSF Ry. Co*., 768 F.3d 786, 791 (8th Cir. 2014); *Koziara v. BNSF Ry. Co*., 840 F.3d 873, 878 (7th Cir.

The record supports CTL's contention that the officials who made the decision to suspend and fire Complainant were not aware of protected activity by Complainant. Knowledge of protected activity by a respondent's decision makers on adverse employment action may not be simply imputed or assumed. *See Conrad v. CSX Transportation, Inc.*, 824 F.3d 103 (4th Cir. 2016). Here, the DVIRs were not a contributing factor in Hill and Dieter's decision to terminate Complainant as neither was aware of what was on the DVIRs, they had not reviewed or seen them, and were not informed what Complainant had said. Although DVIRs are to be completed at the close of each shift, at the time the decision to suspend and fire Complainant was made, Hill and Dieter were not aware what Barr had actually submitted, if any, and certainly had no knowledge of any safety concerns raised by Complainant in them. The only complaint either Hill or Dieter was aware of was a pay issue, which had been satisfactorily resolved. In sum, no one involved in the decision to fire Complainant was aware of any specific safety concerns or complaints raised by Complainant.

Additionally, there is no evidence CTL harbored any animus towards Complainant. Instead, the evidence demonstrates CTL invested extensive time and resources into training Complainant, and even gave him additional training after the second accident to ensure the accidents were not skills-related. The evidence amply demonstrates that CTL took reasonable and measured responses to Complainant's escalating pattern of poor performance. There was a verbal counseling after the first accident, followed by a written counseling after the second accident and a final warning after the third.

In sum, Complainant was fired because of four accidents that CTL considered to have been preventable driver error within a three-month period, and any information provided by Complainant in the company safety meetings or the DVIRs played absolutely no role. CTL suspended Complainant because it needed to investigate a serious sulfur spill, and terminated Complainant's employment thereafter because of his unsatisfactory driving record. While there was temporal proximity between the date of suspension and termination and some of the DVIR submissions, that circumstance is substantially outweighed by the fact that the decision makers in this case were not aware of anything Complainant may have included in the DVIRs. Viewing the record as a whole, I find that Complainant did not establish by a preponderance of the evidence that his DVIRs contributed to CTL's decision to suspend or fire him.

*Blacklisting as a Contributing Factor*

As noted above, under the broad definition articulated by the ARB in *Beatty*, the fact that the DAC report contained damaging information that could (and in fact did) prevent Complainant from finding future employment as a driver was sufficient to show an adverse employment action in the nature of blacklisting. Complainant's remaining burden is to show by a preponderance of the evidence that his protected activity was a contributing factor in CTL's decision to provide the damaging information to HireRight, and HireRight's posting of the information.

---

2016); *Head v. Norfolk S. Ry. Co*., 2017 WL 4030580, at *16 (N.D. Ala. Sept. 13, 2017) (citing in turn, an 11th Circuit decision); *Cyrus v. Union Pac. R.R. Co*., 2015 WL 5675073, at *10 (N.D. Ill. Sept. 24, 2015)).

Here, the information submitted by CTL to HireRight was true and accurate. Complainant did work for CTL from August 2012 to December 2012. Complainant did have incidents/accidents in November 2012 and December 2012. They were not DOT reportable. Complainant did have an unsatisfactory safety record. Complainant was not eligible for rehire. Because there is no evidence in the record linking reporting of true and accurate information for a DAC report and Complainant's protected activity, Complainant's allegation that the Respondents conspired to prevent future employment as a truck driver by falsifying his DAC report is not actionable blacklisting under the STAA. *See Su v. M/V S. Aster*, 978 F.3d 462, 475 (9th Cir. 1992) (where seamen did not dispute that entry in seamen's books of reasons for their discharge were accurate, claim of blacklisting under the Seaman's Wage Act failed); *Estate of Braude v. United States*, 35 Fed. Cl. 99, 114 (1996) ("remarks that honestly describe a worker's prior history generally are to be encouraged rather than deemed wrongful and tortious"); *Barlow v. United States*, 51 Fed. Cl. 380, 395 (Court of Federal Claims 2001) (an employee cannot claim under the Whistleblower Protection Act that he has been blacklisted if the information disseminated about him is truthful).

I find that the cases of *Timmons v. CRST Dedicated Services, Inc*., ARB No. 14-051, ALJ No. 2014-STA-9 (ARB Sept. 29, 2014) and *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 21 (ARB May 13, 2014) are distinguishable. In *Timmons*, there was evidence that disparaging information about the complainant had been placed in a computer system used by the respondent for employment verification. This information was removed upon the complainant's report to the respondent that it violated a non-disparagement clause of a settlement agreement relating to an earlier STAA whistleblower complaint. However, the disparaging information had been returned to the system at the direction of respondent's HR director, and that respondent provided no adequate explanation why the information had been added to the computer system in the first place or why the HR director had insisted that it remain in the system.

Thus, in *Timmon*s, the respondent's HR manager clearly knew about the protected activity when she directed that damaging information remain in the computer system. Here, in contrast, there is no evidence in the record that CTL's decision makers knew about Complainant's protected activity. The fact that HireRight did not modify the DAC report as requested by Complainant was based solely on a finding that the report of accidents had been accurate. There is no evidence in the record tending to show that HireRight took into consideration whether Complainant had engaged in protected activity in deciding not to amend the DAC report.

In *Beatty*, several factors led the ARB to find that a preponderance of the evidence proved that the complainants' protected complaints about exhaust leaks and faulty mufflers were a contributing factor in their employer's decision to enter negative information in their DAC reports, including temporal proximity; testimony showing that the employer believed the complainants "9 out of 10 times" complained about the cleanliness of the trucks and not about safety – meaning that respondent had admitted that at least one tenth of the time the complaints were about truck safety; and the fact that upon learning that the exhaust leak complaints were valid, employer's safety director (who had thought the complainants were lying) apologized and removed the offending entries from their DAC report -- which was tacit acknowledgment that the

complainant's exhaust leak complaints were a factor in the decision to submit the negative entries.

Here, there was temporal proximity between the DAC report and some of Complainant's DVIR submissions, but as I found above, the circumstance of temporal proximity is clearly outweighed by the fact that CTL decision makers did not have knowledge of protected activity by Complainant. Moreover, in *Beatty*, there was strong testimonial circumstantial evidence linking the complainant's protected activity to the decision to include damaging information in a DAC report. Here, other than temporary proximity, there is simply no circumstantial or direct evidence to show that protected activity contributed in any way to either CTL's decision about what to submit in the DAC report or HireRight's decision to post that information or to decline to modify it. Finally, in *Beatty*, there was evidence that the negative information contained in the DAC report was inaccurate. Here, the record establishes that the DAC report information was completely accurate.

In sum, I find that the record considered as a whole fails to show that Complainant established by a preponderance of the evidence that his protected activity was a contributing factor to the inclusion of damaging information in the DAC report.

## Affirmative Defense

Assuming arguendo that Complainant met his burden of showing by a preponderance of the evidence that protected activity contributed to the adverse employment actions taken by CTL and the "blacklisting" in the form of a negative DAC report, Respondents may still prevail if they show by clear and convincing evidence that they would have taken the same adverse personnel action in the absence of the protected activity. *Palmer v. Canadian Nat'l Ry.*, No. 16-035, 2016 WL 5868560 at *31, 36 (ARB Sept. 30, 2016) (reissued Jan. 4, 2017). Clear and convincing evidence requires that "the ALJ believe that it is 'highly probable' that the employer would have taken the same adverse action in the absence of the protected activity. . . . It is not enough for the [respondent] to show that it *could* have taken the same action; it must show that it *would* have." *Id.* at *31, 33 (*citing Speegle v. Stone & Webster Constr. Inc.*, No. 13-074, 2014 WL 1758321 at *6-7 (ARB April 25, 2014)) (emphasis in original).

Respondent fired Complainant because Complainant had an unsatisfactory safety record as a driver—a condition that would have existed even if Complainant had never engaged in his protected activity. Respondent took the same action against another driver who was involved in spill, without protected activity. There is no evidence in the record rebutting these facts. Thus, I find Respondent has established by clear and convincing evidence that it would have terminated Complainant based on his job performance even in the absence of Complainant's protected activity.

## Conclusion

In sum, the record demonstrates that Complainant's protected activity of filing DVIR submissions sometimes reporting deficiencies with the trucks he was driving was not a contributing factor in Respondent's decision to terminate his employment. Rather, the record

establishes that the decision to fire Complainant was based solely on his poor driving record of four driver errors within a three-month period. Respondent gave Complainant sufficient opportunity to improve his driving skills, to include additional training, but he continued to hit stationary objects. The last straw was a lack of attention to detail resulting in a major sulfur spill. While there is no evidence the cause of these events was rooted in anything but simple negligence, Respondent made a business decision that, given Complainant's record of making what it viewed as preventable driving errors, the benefit of retaining and retraining Complainant as a driver was outweighed by the risk attendant with the next incident. Whether this tribunal would have made the same decision to fire Mr. Barr is not the issue as adjudicators "do not sit as a super-personnel department that re-examines" employment decisions. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014); *Gunderson v. BNSF Railway Co.*, 850 F.3d 962, 969 (8th Cir. 2017) (if the discipline was unrelated to protected activity, whether it was fairly imposed is not relevant to the FRSA causal analysis).[14] What is clear is that any protected activity engaged in by Complainant was not a factor in CTL's decision to terminate his employment.

Finally, given the four driver error incidents within a three-month period including one involving a serious sulfur spill, and the undisputed evidence that Respondent fired a different driver who was not engaged in protected activity and who was involved in a chemical spill, I find that Respondent would have fired Complainant whether or not he engaged in the protected activity.

## ORDER

Based on the foregoing, it is ORDERED that the complaint in this matter is DISMISSED.

**STEPHEN R. HENLEY**
Chief 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

[14] The STAA does not forbid unfair employment actions; it forbids retaliatory ones. *See, e.g., Collins v., Am. Red Cross*, 715 F.3d 994 (7th Cir. 2013); *Brown v. Advocate S. Suburban Hosp*., 700 F.3d 1101, 1106 (7th Cir. 2012).

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, 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).