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**Issue Date: 06 December 2018**

OALJ Case No. 2014-STA-00037
OSHA Case No. 7-3620-13-065

*In the Matter of*:

**CHRISTOPHER L. BUIE**,

*Complainant,*

*v.*

**SPEE-DEE DELIVERY SERVICES, INC.,**

*Respondent.*

## DECISION AND ORDER DISMISSING COMPLAINT

This is a case arising under the Surface Transportation Assistance Act, 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053 ("STAA"), and the applicable regulations issued thereunder at 29 C.F.R. Part 1978. On July 19, 2013, Christopher Buie ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") of the U.S. Department of Labor contending he was terminated from his employment with Spee Dee Delivery Services, Inc. ("Respondent" or "Spee Dee") in violation of the STAA. OSHA dismissed the complaint, and Complainant requested a hearing before the Office of Administrative Law Judges.

I held a formal hearing in this matter on August 30 and 31, 2016 in Des Moines, Iowa. At the hearing, the record was kept open for Complainant to submit additional evidence. Following a recorded post-hearing telephonic conference call with the parties, on February 3, 2017, I issued an order admitting additional exhibits into the record and bifurcating this case to consider only the issue of liability at this time. Should I have concluded that Respondent terminated Complainant in violation of the STAA, then the issue of damages would have been addressed.[1] The February 3, 2017 order is admitted into evidence as ALJ Exhibit 8.

[1] The record contains medical reports concerning stress Complainant has allegedly suffered due to raising safety issues while employed by Respondent. This evidence has no relevance to whether Complainant was terminated in violation of the STAA. Accordingly, it will not be discussed in this decision.

Subsequently, both parties filed proposed findings of fact, conclusions of law, and briefs, the last of which was received on April 4, 2017.

Preliminarily, there are two motions filed by Complainant that must be addressed. First, Complainant filed a motion to strike in part Respondent's proposed findings of fact. That motion is improper since parties may propose any findings they wish, and it is denied. However, I will consider Complainant's motion as a rebuttal to Respondent's proposed findings, and it will be considered. Second, Complainant moved to amend the transcript, contending that it contains errors. One of the errors Complainant alleges is a mistake he made in his testimony that he wants to change.[2] In other instances he believes the court reporter added words to his testimony,[3] which I find highly unlikely. He also states that on page 403, line 24, and at other unspecified places in the transcript, it is reported that he said "5:00 and – 5:00 p.m." He denies repeating "5:00." That he states this occurs several times in the transcript makes it doubtful that these are transcription errors. In alleging that he did not say Mr. Warman (Complainant's emphasis) at page 418, line 15, he does not state whose name he believes he did say. Complainant's other objections are either immaterial or, based on the context, are not supported. Accordingly, his motion to correct the transcript is denied.

The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, the testimony and evidence submitted, applicable statutory provisions, regulations, and pertinent precedent. Although I do not discuss every exhibit in the record, I have carefully considered all of the testimony and exhibits in reaching my decision. Based on the evidence contained in the record of this proceeding, I conclude that Complainant was not terminated from his employment in violation of the STAA.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW[4]

*Findings of Fact*

Respondent is a Minnesota corporation engaged in the package delivery business. Its principal place of business is in St. Cloud, Minnesota. It has facilities in seven states in the Midwest, including one in Omaha, Nebraska. Respondent is a commercial motor vehicle carrier within the meaning of the Act. *See* 29 C.F.R. § 1978.100(i), (k). The Omaha branch is supervised by a regional office located in Des Moines, Iowa.

Complainant, as a driver for a covered employer, is a covered employee under the STAA. *See* 29 C.F.R. § 1978.100(h). He is a high school graduate and military veteran. He had been going to school part-time before he started working for Respondent, and subsequent to his employment by the Respondent went back to school full-time. He received an Associates Degree in applied sciences and legal studies, but has not taken the test to become certified as a paralegal. TR 528-30.

[2] Page 435, line 8.
[3] Page 407, line 24; Pages 437-38, lines 25 and 1 respectively.
[4] Citations to the record of this proceeding will be abbreviated as follows: CX – Complainant's Exhibit: RX – Respondent's Exhibit; JX – Joint Exhibit; TR – Hearing Transcript.

Complainant began working for Respondent as a route driver in Omaha, Nebraska, on October 31, 2005, and remained in that position for his entire employment with Respondent. TR 402-03. He always drove the same route, 22020. As a route driver, he had a route where he delivered and picked up packages. At the start of the day he was required to load his truck at the company's facility (also referred to as the "branch" or "shop") with packages to deliver, deliver those packages, pick up packages at scheduled stops, and return to the shop. He started work at 7:30 a.m. and worked until all his packages were delivered, his pick-ups completed, his truck was fueled, and returned to the shop. Most drivers usually worked 10-15 hours of overtime each week.

In several ways, Complainant was a good employee. His performance reviews note that the customers liked him, he looked professional, and he generally followed company policies. RX 14. Other than criticism regarding the timeliness of completing his route, his performance reviews were usually very positive. He received raises of varying amounts following each of his performance reviews. *See* JX 1, at Stipulation 21. But there were also some hitches. On March 12, 2007, Complainant caused a minor accident that resulted in $345.00 in damages to a stationary vehicle. RX 28. There was no damage to his truck. While driving his route on March 17, 2009, Complainant received a ticket for driving 52 miles per hour in a 35 mile per hour zone. RX 29. Company policy forbids speeding, and Complainant was reprimanded for it. *See* RX 24, at 226; JX 1, at Stipulation 23.[5] On June 27, 2012, Complainant's truck incurred $1,000.00 in damages when he backed it into a loading dock with too much force. RX 38. He also was reprimanded and/or given verbal warnings four times for tardiness in 2010 and 2011. RX 19, at 88-91. None of these incidents led to more significant disciplinary actions than the aforesaid reprimands.

Complainant's performance reviews from October 2008 until his termination in 2013 consistently note problems with completing his route on time. *See, e.g.*, RX 14, at 8-22. Particularly problematic were excessive times between stops which he could not explain. *See id*., at 8-12. Timothy Zuehlke, Respondent's Regional Manager who supervises Respondent's operations in Nebraska (TR 231), testified that the delivery schedules for Complainant's route from October 6-9, 2008 show gaps of up to 52 minutes between deliveries to places that were not far apart, and Complainant had no explanation for the gaps. TR 346-48. Complainant did not contradict this testimony. Notes in Complainant's company file written by Mr. Zuehlke and Alex Lehning, the Omaha Branch Manager, point out problems with Complainant not completing his route on time in 2009. RX 40-42. He was told on June 15, 2009, that if he did not improve there would be disciplinary action which could ultimately include termination. RX 42. On February 11, 2010, Mr. Zuehlke met with Complainant specifically to counsel him on his time management issues. RX 32. Mr. Lehning also attended that meeting. On August 24, 2011, Zuehlke again met with Complainant. Mr. Zuehlke wrote that Complainant had no explanation for his lateness in returning to the shop, and he was told this was unacceptable. RX 37.

To ameliorate Complainant's lateness problems, Respondent twice reduced his route to make it shorter. The first time was in February 2012. Complainant testified that at that time, a zip code was removed from his route and pick-ups scheduled at or after 5:00 p.m. were

[5] Moreover, Ronald Watson, Respondent's State Operations Manager, testified that Respondent's vehicles have governors that don't allow them to go over 60 mph. TR 195.

eliminated. TR 423. Nevertheless, Complainant still had difficulty returning to the shop by 5:00 p.m. So Mr. Zuehlke and Mr. Lehning came up with a new plan, removing another zip code from Complainant's route and eliminating his last six pick-ups, making his last scheduled pick-up at 3:30 p.m. These changes were put into effect on November 7, 2012. TR 240; CX 14, at 5. By implementing these reductions to Complainant's route, it was anticipated that he would be back at the shop by 4:30 p.m. without exception. TR 241; CX 19.

Due to Complainant's continued failure to complete his route on time despite these reductions, Mr. Lehning and Mr. Zuehlke met with him on February 27, 2013, and informed him that he was expected to complete his route by 4:30 p.m. "every day no matter what." CX 19. Yet that day Complainant did not clock out until 4:54 p.m., and the following day he did not clock out until 5:13 p.m. *See* RX 15, at 19; TR 388. Having failed to complete his route by 4:30 p.m. on the two days following this meeting, Complainant was suspended without pay on March 1, 2013. TR 388-89; RX 5. Since Complainant was not available to run his route on March 1, his immediate supervisor, Jake Tomcak, the Group Leader, ran the route in his place. Normal route drivers such as Mr. Buie were expected to get on the road by approximately 8:00 a.m. each morning. TR 391. Because of his other duties as Group Leader, Mr. Tomcak left the shop later than the Complainant would have, and made this first delivery that day at 9:32 a.m. TR 391. Nevertheless, he completed the route by 4:10 p.m. TR 391-93. In other words, Mr. Tomcak started the route an hour and a half later than a route driver would have been expected to, but still returned twenty minutes before the 4:30 p.m. deadline. TR 393. Mr. Tomcak also ran Complainant's route on March 12, 13, 14, and 18, 2013, while Complainant was on vacation. Although Mr. Zuehlke stated in an undated note that Mr. Tomcak completed the route every day despite not making his first delivery earlier than 9:25 a.m. and as late as 9:43 a.m. (RX 7), the timesheets from those days indicate that Mr. Tomcak clocked out from the route at 5:09 p.m., 5:05 p.m., 6:13 p.m., and 4:49 p.m., respectively. CX 12(a), at 33-36; *see also* TR 128-29. Nevertheless, that Mr. Tomcak left the shop later than Complainant would have had he been working on those days diminishes the relevance of Mr. Tomcak's return times. Complainant speculates that the reason Tomcak finished the route so quickly on March 1 was because Mr. Lehning accompanied him on the route. But at an earlier hearing concerning Complainant's unemployment benefits, Mr. Zuehlke testified that Mr.Lehning was there just for observation and did not help run the route. RX 19, at 61. It was not unusual for supervisors to accompany drivers who are unfamiliar with the route they were driving. RX 19, at 61.

Complainant returned to work following his suspension on March 4, 2013. Mr. Zuehlke testified that, from that day forward, Complainant did not clock out by 4:30 p.m. TR 389. On the days Complainant worked from March 4, 2013, until March 29, 2013, Respondent's time and attendance report shows that he clocked out at 4:39 p.m., 4:41 p.m., 5:14 p.m., 5:05 p.m., 5:05 p.m., 5:22 p.m., 5:23 p.m., 4:34 p.m., 5:06 p.m., 4:49 p.m., 4:58 p.m., 5:15 p.m., 5:03 p.m., 4:49 p.m., and 4:41 p.m. RX 15, at 19. Due to Complainant's failure to clock out on time even once following his suspension, there was discussion among Mr. Zuehlke; Aaron Lynch, the Human Resources Safety Director in Des Moines; Ronald Watson, the State Operations Manager; and Bill Warman, the Corporate Liaison and a member of Respondent's Board of Directors who is Mr. Zuehlke's and Mr. Watson's boss. Mr. Zuehlke made the ultimate decision to terminate Complainant. TR 294; JX 1, at Stipulation 33. On April 1, 2013, Complainant was handed a letter signed by Mr. Lynch and Mr. Lehning that immediately terminated his employment. RX

45. The letter stated that Complainant was being terminated for his failure to meet Respondent's expectations regarding his return times.

Complainant testified that the first time he complained about having to speed to complete his route was in March 2009, that the last time he made that complaint was on March 1, 2013, and that he raised the same complaint multiple times during that four-year period. TR 453. Mr. Zuehlke testified that he recalled Complainant saying in the last 2-3 years of his employment that he could not complete the route in the time allotted. TR 283. Mr. Zuehlke also testified that he was not aware of Complainant making any complaints to any manager or supervisor at Respondent that he was not going to speed in order to complete his route on time. TR 397.

The record is both confusing and contradictory regarding when Complainant was expected to complete his route in the years prior to November 7, 2012. There is testimony from Complainant that he was expected to complete his route by 5:00 p.m. TR 403; CX 19.[6] Pick-up itineraries for February 9, 2009, June 19, 2012, and August 2, 2012, however, list pick-ups at 5:00 p.m., which would have precluded Complainant from returning to the shop even by 5:15. *See* CX 14. On the other hand, a pick-up itinerary for August 28, 2009, lists the last pick-up at 4:20. *Id*. There are also pick-up itineraries dated November 7, 2012, and July 8, 2013, in CX 14, but by July 8, 2013, Complainant no longer worked for Respondent. Complainant testified that the August 2, 2012 itinerary was in effect through November 7, 2012, and the November 7, 2012 itinerary was in effect through his termination. TR 425-26. The last pick-up listed on the November 7, 2012 itinerary is at 3:30 p.m. There is no evidence regarding how long the other itineraries were in effect. Since those are the only pick-up itineraries in evidence, it is impossible to draw any conclusions from them regarding Complainant's overall pick-up schedule prior to August 2, 2012. What is clear, however, is that Respondent consistently faulted Complainant for the untimely completion of his route.

Complainant testified that when he received the speeding ticket on March 17, 2009, he showed it to his supervisor, Mr. Lehning, as company policy required. As was pointed out above, Spee Dee's Policy Manual specifically admonishes drivers not to speed. At that time Complainant states he told Mr. Lehning that if he wanted him back at 5:00 p.m. every day they had to eliminate his pick-ups that were scheduled for that time or later. TR 403-05.

Complainant's testimony is inconsistent regarding why he was late returning from his route. His principal contention is that he could not return on time without speeding. But he also states that he could not return on time because he had pick-ups scheduled at or after the time he was supposed to be back at the shop. *E.g*., TR 461. Complainant's testimony that Respondent expected him to be back at the shop at a time when he still had scheduled pick-ups to complete is illogical. Mr. Zuehlke testified that if Complainant had 5:00 p.m. pick-ups there would have no expectation that he would return to the shop at 5:00 p.m. as Complainant could not be at two places at once. TR 259. Rather, he testified that Spee Dee's expectation was for Complainant to get his pick-ups done in a timely manner. *Id*. Mr. Zuehlke also pointed out that pick-up schedules on routes are not inflexible. He stated that "[p]ickups can move, pickups can leave, new ones can get added." TR 254.

[6] A June 15, 2009 note states he was expected to clock out by 5:15 p.m. RX 42; *see* TR 372.

Complainant testified that on June 8, 2009, Mr. Lehning rode with him to do an on-route evaluation. Complainant testified that Mr. Lehning told him "come on, let's go, we're running behind." TR 406. Complainant stated he interpreted this as Mr. Lehning telling him to speed, even though he initially thought Mr. Lehning was joking, and he replied that "I'm not getting another speeding ticket." *Id*. He testified that Mr. Lehning then told him "there are no cops around." *Id*. But Complainant admits that Mr. Lehning did not directly tell him to speed. *Cf*. TR 445. Other than Complainant's testimony, there is no evidence of this conversation in the record. Nor is there any evidence of anyone else at Spee Dee telling Complainant to speed. In fact, Complainant testified that no Spee Dee manager other than Mr. Lehning ever told him to speed. TR 422. Complainant testified to other times where he told Mr. Zuehlke, Mr. Lehning and/or Mr. Warman that he was not going to speed, including on March 1, 2013, when he was suspended. TR 418, 422 (Complainant testified that Mr. Zuehlke had not instructed him to speed), 424, 453-54. Complainant also testified that he wrote a rebuttal to a performance review stating that he could not return from his route by 5:00 p.m. without speeding, but it was not in his personnel file. TR 439.

On November 25, 2009, Complainant was called into the office by Mr. Zuehlke and David Staley, then the Branch Manager at the Omaha Branch. TR 103; TR 407. Mr. Staley asked Complainant why he was not returning by 5:00 p.m. each day. After some discussion, Complanant started walking out of the office. Mr. Staley then moved to stand in front of the door and, when Complainant reached for the door handle, Mr. Staley put his hand on the doorknob. Complainant then yelled at Mr. Staley to get out of the way. TR 407-08. Complanant described this as a crime because Mr. Staley prevented him from leaving when he wanted to leave. TR 411. Complainant was kept from leaving the office for "maybe 5 seconds." TR 414. Complainant testified he called the corporate office to complain about Mr. Staley's conduct that same day (Nov. 25, 2009). TR 413. Complainant stated he was being hounded to get back by 5:00 p.m. every day, and he would have to speed to make the deadline. TR 414.

Despite his complaints, Complainant never refused to drive his route. Since he did not speed, he was able to do his job safely. And despite Respondent's problems with Complainant's failure to complete his route in a timely fashion, no disciplinary action was taken against Complainant until his suspension on March 1, 2013. When asked why Complainant was not fired sooner, Mr. Zuehlke testified that Respondent "is not in the practice of getting rid of drivers, you know. We have a hard enough time finding them, so when we have them, we like to keep them if we can." TR 368.

*Issues*

The issues to be decided in this case are:

1. Whether Complainant established by a preponderance of the evidence that he engaged in protected activity;

2. Whether Complainant established by a preponderance of the evidence that he suffered an unfavorable personnel action;

3. Whether Complainant established by a preponderance of the evidence that the protected activity was a contributing factor in the unfavorable personnel action; and

4. If Complainant established the first three issues by a preponderance of the evidence, whether Respondent established by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity.

TR 15-16 (at the hearing, I also listed a fifth issue in the event that Respondent violated the STAA, namely, what remedy is appropriate).

*Applicable Law*

The employee protection provisions of the STAA provide, in general, that a covered employer may not take adverse employment action against an employee because the employee: (i) has filed a complaint or testifies about "a violation of a commercial motor vehicle safety or security regulation, standard, or order," 49 U.S.C. § 31105(a)(1)(A); (ii) "refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," *id.* § 31105(a)(1)(B)(i); (iii) "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition,"[7] *id.* § 31105(a)(1)(B)(ii); or (iv) "accurately reports hours on duty pursuant to chapter 315," *id.* § 31105(C), 29 C.F.R. § 1978.102(c)(2).

The STAA employee protection provisions were enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles." "Congress recognized that employees in the transportation industry are often best able to detect safety violations and, yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting the violations." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

The current version of the STAA provides that whistleblower complaints shall be governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b)(2)(B)(i). 49 U.S.C. § 31105(b)(1). Under the AIR 21 standard, complainants must initially prove by a preponderance of the evidence that a protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. 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." *Powers v. Union Pac. R.R. Co.*, No. 13-034, ALJ No. 2010-FRS-030, at 11 (ARB Jan. 6, 2017) (internal citations omitted). If a complainant makes this showing, an employer can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii).

Thus, in order to prevail in this case, Complainant must establish the following by a preponderance of the evidence: (i) that he engaged in protected activity; (ii) that Respondent took

[7] There is no contention by Complainant that any of the vehicles he drove for Respondent were unsafe.

an unfavorable employment action against him; and (iii) that his protected activity was a contributing factor in Respondent's decision to take the unfavorable employment action. If Complainant meets this burden, Respondent may avoid liability by establishing by clear and convincing evidence that it would have taken the same unfavorable employment action against Complainant in the absence of his protected activity.

*Discussion*

As discussed in more detail below, while Complainant suffered an unfavorable personnel action, he did not engage in protected activity. Complainant thus did not meet his burden. Moreover, even if Complainant had met his burden, Respondent established by clear and convincing evidence that it would have taken the same unfavorable personnel action against Complainant regardless of his protected activity. Accordingly, the complaint in this matter must be dismissed.

*Complainant Has Not Established that He Engaged in Protected Activity*

Under the STAA, a complainant can engage in protected activity by filing a complaint or by refusing to operate a vehicle. "The plain language of § 31105(a)(1)(B) makes clear that to qualify for protection under the 'Refusal to Drive Clause,' an employee must have "refuse[d] to operate a vehicle." *Calhoun v. U.S. Department of Labor*, 576 F.3d 201, 212 (4th Cir. 2009) (*aff'g Calhoun v. UPS*, No. 04-108 (ARB Sept. 14, 2007). Driving a vehicle under protest is not a refusal to operate a vehicle. *Id.* There is no evidence that, in the over seven years Complainant worked for Respondent, he ever refused to operate his vehicle. Accordingly, Complainant has failed to establish he engaged in protected activity under the "refusal to work" clause.

As Complainant did not refuse to operate his vehicle while working for Respondent, the issue becomes whether his activity falls under the "Complaint Clause" of Section 31105(a)(1).

Under this clause, for a complaint to be protected under the STAA, the complaint must "relate" to a violation of a safety standard and a specific standard need not be expressly cited in the complaint. 49 U.S.C. § 31105(a)(1)(A)(i) (". . . filed a complaint . . . related to a violation . . ."); *see also Ulrich v. Swift Transportation Corp.*, 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." *Id.*, slip op. at 4. The Administrative Review Board has stated:

> The reasonableness of a complainant's belief is assessed both subjectively and objectively, with the subjective component satisfied by showing that the complainant actually believed that the conduct he complained of constituted a violation of relevant law. The objective component is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.

*Garrett v. Bigfoot Energy Svcs, LLC*, No. 16-057, ALJ No. 2015-STA-047 (ARB May 14, 2018) (footnotes and internal marks omitted). The complaint need not concern an *actual* violation of

the regulations. *Elbert v. True Value Co.*, No. 07-031, ALJ No. 2005-STA-036, slip op. at 3 fn.5 (ARB Nov. 24, 2010).

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 49 U.S.C. § 31105(a)(1)(A). *Calhoun*, 576 F.3d at 212 (holding that "internal complaints to company management, whether written or oral, suffice to satisfy the complaint requirement of 49 U.S.C. § 31105(a)(1)(A)(i)"); *Dutkiewicz v. Clean Harbors Envtl. Servs.*, No. 97-STA-090 (Sec'y Aug. 8, 1997, slip op. at 3-4) (citing *Stiles v. J.B. Hunt Transp., Inc.*, No. 92-STA-34 (Sec'y Sept 24, 1993, slip op. at 3-4)); *see also Moravec v. HC & M Transportation, Inc.*, No. 1990-STA-44 (Sec'y July 11, 1991); *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (holding that "[a] construction of the STAA that covers only complaints filed with courts or government agencies would narrow the mechanisms to achieve these policy goals, leaving unprotected employees who in good faith assert safety concerns to their employers, or who indicate an unwillingness to engage in such violations").

Under the STAA, scheduling a run in a manner that requires the driver to exceed applicable local speed limits is a violation of a Federal motor carrier safety regulation. *Nolan v. AC Express*, No. 92-STA-37 (Sec'y Jan 17, 1995). An employee's stated refusal to drive over the speed limit in the future, in a situation where the carrier's policies required drivers to violate applicable speeding regulations, is protected activity under the STAA. *McGavock v. Elber, Inc.*, No. 86-STA-5 (Sec'y July 8, 1986).

A driver's complaint about an employer's scheduling a run in a way that it can only be completed by speeding can be protected activity, and a driver's refusal to speed in the future when an employer requires him or her to speed can also be protected activity. Under the facts of this case, however, Complainant did not establish that he engaged in protected activity under either approach. This is because he did not establish that Respondent scheduled his run in a manner that required him to speed and also because he did not establish that Respondent required him to speed.

Complainant did not file a complaint with a governmental agency or begin a proceeding regarding safety related to his employment at Spee Dee until he initiated this proceeding subsequent to his termination. However, he did complain to his supervisors that he would have to speed in order to complete his route on time. Complainant contends that "his complaints to management about return time expectations that he believed required him to speed were a contributing factor in Respondent's decisions to suspend him and then to terminate his employment." Complainant's Proposed Findings of Fact and Conclusions of Law at 17.

Complainant did not establish that his route was scheduled in a way that speeding was necessary to complete it on time. While Complainant repeatedly asserted that speeding was required to complete the route on time, the evidence establishes that on March 1, 2013, Mr. Tomcak ran the route and returned to the shop at 4:10 p.m., twenty minutes before the 4:30 p.m. deadline, even though due to his supervisory duties he started the route approximately an hour and a half later than a route driver would have (the route drivers were expected to leave the shop around 8:00 a.m.). TR 391-93. Moreover, had Mr. Tomcak left the shop at around 8:00 a.m. and

taken the same amount of time to complete the route as he actually did that day, he would have returned at approximately 2:40 p.m., well before the 4:30 p.m. deadline established for Complainant to return to the shop. There is no evidence that Mr. Tomcak had to speed to accomplish this.

Mr. Tomcak also ran Complainant's route on March 12, 13, 14, and 18, 2013. The evidence shows that Mr. Tomcak made his first delivery on those four days between 9:25 a.m. and 9:43 a.m., indicating that each day he left the shop between approximately one and a half hours and approximately one and three-quarters hours later than the route drivers would have. The evidence shows that on those four days Mr. Tomcak returned to the shop between 4:49 p.m. and 6:13 p.m., returning by 5:09 p.m. on three of the four days. *See* RX 7; CX 12(a), at 33-36; TR 128-29. In other words, the evidence shows that on those four days Mr. Tomcak left the shop beween one and a half and one and three-quarters hours later than a route driver would have, and returned to the shop at the latest approximately one and three quarters hours after the 4:30 p.m. deadline established for Complainant, while he returned on the other three days at most thirty-nine minutes after the 4:30 p.m. deadline. As with Mr. Tomcak's March 1, 2013 run, there is no evidence that Mr. Tomcak had to speed to accomplish this.

In short, when accounting for the fact that Mr. Tomcak departed the shop significantly later than Complainant as a route driver would have, the evidence shows that the 4:30 p.m. return time established for Complainant was reasonable. Complainant thus did not establish that Respondent scheduled his route in a manner that it could only be completed by speeding.

Moreover, the fact that there is no evidence Mr. Tomcak had to speed to complete Complainant's run in March 2013 indicates that Complainant did not have a reasonable belief that Respondent was violating a commercial motor vehicle regulation, standard, or order in scheduling his run in a way that it could only be completed by speeding. As outlined above, Respondent's policy prohibited speeding and Complainant had been reprimanded for speeding in 2009. The fact that Respondent reprimanded Complainant for speeding indicates that its policy against speeding was not merely for show. As shown by the fact that Respondent took appropriate action when the policy was violated, Respondent enforced its no-speeding policy. Moreover, Respondent had governors on its vehicles that limited their speed to 60 mph. While there is no evidence in this case that Complainant's speed while driving for Respondent was ever limited by a governor, the fact that Respondent took a concrete step to ensure that its vehicles would never speed on roads where the speed limit was in excess of 60 mph also indicates that Respondent took appropriate steps to minimize violations of its no-speeding policy.

Complainant has failed to establish that he had a reasonable belief that speeding was necessary to complete his assigned route. As outlined above, whether a belief is reasonable is assessed both subjectively and objectively. While I find that Complainant has established his belief was subjectively reasonable, he has not established that his belief was objectively reasonable.

There is no evidence in the record that Complainant did not actually believe that speeding was necessary to complete his route. On the contrary, the record establishes that Complainant repeatedly stated that speeding was necessary to complete his route. In the absence of persuasive

evidence to the contrary, I find that Complainant has established by a preponderance of the evidence that he actually believed speeding was necessary to complete his route and thus that his belief was subjectively reasonable.

While Complainant has established that his belief was subjectively reasonable, he has not established that his belief was objectively reasonable because an experienced driver employed by Respondent in the same factual circumstances as Complainant would know the following three facts: (1) Respondent had an explicit policy against speeding; (2) Respondent took appropriate action, such as issuing reprimands, against employees who violated that policy; and (3) Respondent took appropriate action, such as having governors on its vehicles to limit them to a speed of 60 mph, to minimize its employees' ability to violate that policy. These three facts, taken together, would indicate to any experienced driver employed by Respondent that Respondent not only had a no-speeding policy, but that, far from being an empty policy, it was appropriately enforced and that Respondent, by placing governors on its vehicles, did what it could to prevent its drivers from speeding on roads where the speed limit was 60 mph or greater. It simply does not make any sense for an employee who knew these three facts to believe that Respondent, which obviously had a no-speeding policy and took that policy seriously, would nevertheless schedule a driver's run so that it could only be completed if the driver were to speed. Any such belief would be patently unreasonable based on these three facts alone. Moreover, as outlined above, in March 2013 Mr. Tomcak repeatedly ran Complainant's route in a timely fashion and there was no evidence that speeding was necessary for him to accomplish this. Accordingly, I find that Complainant has failed to establish that his belief was objectively reasonable.

Moreover, Complainant did not produce credible evidence that he was ever told to speed by a manager at Spee Dee. The only evidence supporting Complainant's position is his testimony that on June 8, 2009, when Mr. Lehning rode with him, he believes Mr. Lehning implied, without specifically stating, that he should speed on his route in order to complete it on time. But there is no evidence corroborating Complainant's testimony that Mr. Lehning implied that he should speed. Complainant did not document this incident in writing, either in a separate note or in the place for his comments on his performance evaluations. Nor did he report this conversation to anyone else. Although Mr. Lehning was no longer working for Spee Dee at the time of this STAA hearing and apparently was unavailable to testify, he did testify at Complainant's unemployment insurance hearing, which occurred only a few months after Complainant was terminated. Mr. Lehning testified at that hearing, and Complainant had the opportunity to question him. But Complainant did not ask Mr. Lehning whether he had instructed Complainant to speed or implied that Complainant should speed when Mr. Lehning rode with Complainant on June 8, 2009. *See* RX 19. Moreover, Complainant testified that no Spee Dee manager other than Mr. Lehning ever told him to speed. Further, as outlined above, speeding is against Respondent's policy, and Complainant was reprimanded when he received a ticket for speeding.

Thus, Complainant's argument that, in complaining about being required to speed, he filed a complaint satisfying the complaint clause of the STAA comes down to this: he reasonably believed that speeding was necessary to complete his run on time and complained that he was refusing to commit a violation of safety standards, *i.e.*, speeding, that Respondent never

instructed him to do and that was against company policy. Under these facts, Complainant has not established by a preponderance of the evidence that his belief that speeding was necessary to complete his route was reasonable and that his complaints to Respondent concerned a violation of a commercial motor vehicle regulation, standard, or order.

Additionally, Complainant's complaint to Respondent's corporate office about Mr. Staley's conduct on November 25, 2009, in keeping him from leaving the office did not constitute protected activity under the STAA for two reasons. First, that complaint did not involve refusal to operate a vehicle. Second, that complaint focused on Mr. Staley's conduct in very briefly keeping Complainant from leaving the office when he wanted to leave. While Complainant stated his complaint to corporate on November 25, 2009, included the fact that he would have to speed to make it back to the shop by the 5:00 p.m. deadline, I find this does not rise to the level of a complaint about a violation of a motor vehicle regulation, standard, or order for the same reasons as outlined above – Complainant alleges he was complaining about refusing to speed even though his belief that speeding was necessary to complete his assigned run was neither subjectively nor objectively reasonable, Respondent never told him to speed, and speeding was against Respondent's policy.

Therefore, Complainant has failed to meet either the refusal to operate clause or the complaint clause of the STAA, and the Complainant has failed to establish by a preponderance of the evidence that he engaged in protected activity.

*Complainant Established that He Suffered an Unfavorable Personnel Action*

It is undisputed that Complainant suffered an unfavorable personnel action, as he was suspended and then his employment was terminated.

*Complainant Did Not Establish that His Complaints Contributed to the Unfavorable Personnel Action*

Even if Complainant had engaged in protected activity by complaining about having to speed to complete his route on time (and recognizing that Complainant has established that he suffered from an unfavorable personnel action, *i.e.*, the suspension and subsequent termination of his employment), Complainant has failed to establish by a preponderance of the evidence that such protected activity contributed to the unfavorable personnel action.

There is no dispute that Mr. Zuehlke made the decision to terminate Complainant's employment. JX 1, at Stipulation 33.

There is no dispute that at least for the last 2-3 years of Complainant's employment, Mr. Zuehlke was aware of Complainant's complaint that he could not complete his route in the time he was given. TR 283 (Mr. Zuehlke testified that he recalled Complainant saying in the last 2-3 years of his employment that he could not complete his route in the time allotted).

Complainant testified that the first time he complained about having to speed to complete his route was in March 2009, that the last time he made that complaint was on March 1, 2013,

and that he raised the same complaint multiple times during that four-year period. TR 453. Complainant also testified that he told two of Respondent's managers that he would not speed for Respondent – Mr. Lehning and Mr. Zuehlke. TR 422. Mr. Zuehlke testified that he was not aware of Complainant making any complaints to any manager or supervisor at Respondent that he was not going to speed in order to complete his route on time. TR 397.

There is a dispute as to whether Mr. Zuehlke, the person who made the decision to terminate Complainant, was aware of Complainant's complaints that he would not speed in order to complete his route on time at the time he made that decision. I observed both witnesses testifify. Throughout his testimony, Mr. Zuehlke's answers to questions were direct, straightforward, and without hesitation. In contrast, Complainant (who has an Associate's Degree in legal studies and applied science, TR 529-30, and who, as I noted at the outset of the hearing, had submitted quality written filings, TR 9-10), often avoided answering questions directly and was often evasive in his answers. *See, e.g.,* TR 417-18.

Complainant's credibility further suffers by the fact that, when asked at his unemployment hearing why he was terminated, he merely stated, "[w]ell, I know it wasn't for performance, I, I would say that, you know, I look at it, I tried to honor their demands, although I thought once they got to the 4:30 [p.m. return time] they were being unreasonable. . . . But I still attempted to honor their demands, but it was a bar that was set that I, I felt was high, too high, but I still tried to honor their demands. I did the best I could." RX 19 at 27. Complainant also testified at that hearing that Respondent wouldn't accept "anything dealing with safety" as being an acceptable reason for delay on his route. RX 19 at 72. But nowhere in that hearing did Complainant say that his complaints about having to speed to complete his route on time contributed to his termination in any way. Indeed, Complainant admitted at the hearing that his explanation for why Respondent fired him was not the same explanation he gave the administrative law judge presiding over his unemployment hearing. TR 518, TR 518-522.

Having observed both witnesses testify, I find Mr. Zuehlke the more credible witness. I thus find that Mr. Zuehlke did not know of Complainant's complaints that he would not speed for Respondent at the time he made the decision to terminate him. Accordingly, even if Complainant's complaints that he would not speed for Respondent constituted protected activity, there is no causal connection between such complaints and Complainant's termination because the person who decided to terminate Respondent's employment had no knowledge of such complaints at the time he made the termination decision.

Even if Complainant's complaints that he could not complete his route in the time alloted (as opposed to his complaints that he would not speed for Respondent) constituted protected activity, Complainant still has failed to establish that they contributed to the unfavorable personnel action. The most compelling reason he has been unable to do so is this: Mr. Zuehlke was aware, for two or three years before Complainant's termination, that Complainant said he could not complete his route in the time allotted. Indeed, according to Complainant's testimony, Respondent was aware since March 2009 that Complainant said he could not complete his route in the time allotted without speeding. Complainant's contributing factor argument is that Respondent waited for years after the alleged protected activity before taking adverse action. This argument is fatally undercut by Respondent's response to Complainant's statements that he

could not complete his route in the time allotted: Respondent twice made the route shorter, first in February 2012 and then in November 2012. TR 423; TR 240-41; CX 14; CX 19.

I asked Complainant about this directly at the hearing. Specifically, I asked Complainant: "If Spee-Dee wanted you to run a route that could only be done by speeding and breaking the law, why would they twice shorten your route?" TR 460. Complainant first answered that they did so because he complained, then he stated that his issue "had never been with the amount of zip codes" on his route (in other words, the length of his route), but rather was with the scheduling of his pick up times at the end of the day. TR 460-61. Complainant was unable to provide a satisfactory answer to my question asking if Respondent "was so concerned with efficiency and getting everything done super fast to the extent that they wanted you to speed to get your work done, if that's the company you worked for, why would they twice curtail your route?" TR 460.

It simply does not make sense that Complainant's complaints about being required to speed to complete his route on time would be a factor, any factor, in his suspension and subsequent termination when Respondent twice shortened his route to help make it possible for him to complete his route on time. Accordingly, I find that Complainant has not established that his alleged protected activity was a contributing factor in Respondent's suspension and subsequent termination of his employment.

*Respondent Established that It Would Have Taken the Same Adverse Action in the Absence of Complainant's Complaints*

Even if Complainant had established by a preponderance of the evidence that he had engaged in protected activity under the STAA and that such protected activity was a contributing factor in the unfavorable personnel action he suffered, he would still not prevail in this matter because Respondent has established by clear and convincing evidence that it would have taken the same adverse action in the absence of any such protected activity. Simply put, Respondent has established by clear and convincing evidence that the suspension and subsequent termination of Complainant's employment had absolutely nothing to do with his complaints that his route required him to speed to complete it on time and he would not speed.

As noted above, Complainant's performance reviews from before he first alleges having complained in 2009 that he would not speed to complete his route through his termination in 2013 consistently noted problems with his completing his route on time. Until March 1, 2013, no disciplinary action had ever been taken against Complainant for consistently taking longer to complete his route than Respondent expected. This was true despite Respondent's belief that Complainant was wasting time on his route. Nor has Complainant alleged that he was ever not paid for all the time he worked. Instead, Respondent frequently counseled Complainant regarding his late return times and tried to accommodate him by twice cutting down the size of his route and scheduling his last pick-ups earlier.

Respondent has shown by clear and convincing evidence that it suspended and then terminated Complainant because even with these substantial accommodations, he still did not complete his route by the expected time. Respondent's witnesses provided credible testimony,

supported by contemporaneous documentary evidence, regarding Complainant's work performance and the reason he was terminated. Respondent gave Complainant numerous chances to improve his performance, and finally reached the point where, despite Respondent's reluctance to fire drivers, it could no longer tolerate his consistent inability to complete his route on time.

*Conclusion*

For the above-stated reasons, I find that Complainant has failed to meet his burden under the STAA. Although there is no dispute that Complainant suffered an unfavorable personnel action, Complainant did not establish by a preponderance of the evidence that he engaged in protected activity, nor did he establish by a preponderance of the evidence that any such protected activity was a contributing factor in that unfavorable personnel action. Moreover, even if Complainant had met his burden, Respondent established by clear and convincing evidence that it would have taken the same unfavorable perssonel action in the absence of any such protected activity. Accordingly, the complaint in this matter is dismissed.

## ORDER

The complaint by Christopher Buie against Spee Dee Delivery Service, Inc., under the Surface Transportation Assistance Act is **DISMISSED.**

**SO ORDERED.**

**PAUL R. ALMANZA**
Associate 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 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).

When 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).**