U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 February 2017

Case No.: 2014-STA-00033

In the Matter of:

KENNETH KOWALCZYK,

Complainant,

v.

UPS GROUND FREIGHT, INC.,
d/b/a UPS FREIGHT, FELIX GERSTER, TROY NARRON,
ANTHONY RADNOTI AND JOHN DOE AND MARY DOE,

Respondents.

APPEARANCES: Paul O. Taylor
Attorney for Complainant

Glenn G. Patton
R. Steven Ensor
Attorneys for the Respondent

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER – DENYING AND DISMISSING COMPLAINT
AND
ORDER DISMISSING INDIVIDUALLY NAMED RESPONDENTS FROM THE CASE

This matter arises from a complaint filed under the provisions of Section 31105 of the Surface Transportation Assistance Act of 1982, U.S. Code, Title 49, § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA") and is governed by the implementing Regulations found in the Code of Federal

Regulations, Title 29, Part 1978. Pursuant to 29 CFR §1978.107, this proceeding is subject to the procedural rules set forth in federal regulations at 29 CFR Part 18, Subpart A (29 CFR §18.1 to §18.59).

By Order issued July 31, 2014 a formal hearing was scheduled to commence on October 21, 2014, in Atlanta, Georgia. By Order of September 24, 2014, the formal hearing was cancelled and continued to February 24, 2015. A formal hearing was held on February 24 and 25, 2014 in Atlanta, Georgia, at which time the parties were afforded full opportunity to present evidence and argument as provided by STAA and applicable regulations. Upon commencement of the formal hearing the Complainant withdrew his complaint against the individuals Felix Gerster, Troy Narron, Anthony Radnoti, John Doe and Mary Doe and those Parties were dismissed as Respondents in the case (TR[1] 5)

At the hearing, Administrative Law Judge exhibit 1 through 9; Joint exhibits[2] 2 to 6; Complainant exhibits 1through 4 and 7; and Respondent's exhibits 1 through 4, 6, 7, 10, 13, 14, 17, 19, 20, 23, 24, 25, 27, 28, 32, 41 and 42 were admitted without objection (TR 8-10, 15, 16, 179). CX 5 was not admitted due to lack of relevancy (TR 10). CX 6 was admitted after it was authenticated by testimony (TR 10, 287). Claimant's objections to RX 5 and RX 26 were sustained in part as to statements made by Respondent's agents though the attachments were admitted (TR 14-16). Claimant's hearsay objections to RX 11, 12, 21, 26, and 27; as well as his relevance objections to 15, 16, 18, 21, 22, 26, 29, 30, 31, and 33 through 40 were overruled and the documents admitted (TR 11-15). Claimant's authentication objection to RX 5 was overruled and the documents submitted (TR 449). Official notice was taken of the Federal regulations of the Federal Motor Carrier Safety Administration as set forth in the relevant version of 49 CFR Sections: §392.7 "Equipment, inspection and use"; §392.9 "Inspection of cargo, cargo securement devices and systems"; §393.100 "Which types of commercial motor vehicles are subject to the cargo securement standards of this subpart, and what general requirements apply"; §393.106 "What are the general requirements for securing articles of cargo"; §396.1 "Scope" of Inspection, Repair and Maintenance; §396.3 "Inspection, repair and maintenance"; §396.7 "Unsafe operations prohibited"; and §396.13 "Driver inspection." (TR 8).

The findings of fact and conclusions which follow reflect the complete review of the entire record, the argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The parties stipulated to, and this Administrative Law Judge finds, the following as facts in this case (JX 1, TR 6):

1. At all times material hereto Complainant was an employee of UPS Freight as defined in 49 U.S.C. §31101(2) and 29 C.F.R. §1978.101(h). [The Complainant] resides [in] Woodstock, Georgia.

[1] The following exhibit notation applies: TR – transcript page; JX - joint exhibit; ALJX – Administrative Law Judge exhibit; CX – Complainant exhibit; RX – Respondent exhibit

[2] JX 1 contained written stipulations of the Parties and is included separately herein.

2. From May 22, 2007 to September 25, 2013, IPS Freight employed Complainant at its facility located at 850 Cobb International Blvd. NW in Kennesaw, Georgia (referred to by Respondents as "the Marietta Service Center"). Complainant was employed to operate commercial motor vehicles having a gross vehicle weight rating of 10,001 pounds or more on the highways to transport property in interstate commerce.
3. The Complainant was formerly a member of the International Brotherhood of Teamsters, Local 728. His employment with UPS Freight was subject to the terms of a collective bargaining agreement.
4. Respondent UPS Ground Freight, Inc. transacts business as UPS Freight and is an employer within the meaning of 49 U.S.C. §31101(3) and 29 C.F.R. §1978.101(i).
5. UPS Freight has its principal place of business at 1000 Semmes Avenue, Richmond, VA 23218-1216.
6. At all times material, Felix Gerster was a service center supervisor for UPS Freight. Until mid-August 2013, Gerster managed UPS Freight's Marietta Service Center.
7. Since February 13, 2013, Troy Narron has been the Regional Director of Operations for UPS Freight's SE/E District; his area of responsibilities includes the Marietta facility.
8. Anthony Radnoti transferred to UPS Freight's Marietta facility in mid-August 2013 and was Complainant's immediate supervisor between approximately August 19, 2013 – September 25, 2013.
9. In February of 2013, Complainant reported that his assigned trailer was damaged and marked that it needed to be repaired at the end of his work day.
10. On March 1, 2013, Complainant filed a complaint with the Regional Administrator for the Occupational Safety and Health Administration, OSHA Region IV alleging that the Respondents were neglecting to repair a defective trailer door and that operation of the trailer would be hazardous.
11. On May 14, 2013, UPS Freight discharged the Complainant.
12. On May 16, 2013, Complainant filed a complaint with the Regional Administrator for the Occupational Safety and Health Administration, OSHA Region IV alleging that the Respondents had discharged him and discriminated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105. The complaint was timely filed.
13. Complainant's filing of the complaint with OSHA on May 16, 2013 was protected under 49 U.S.C. §31105(a)(1)(A).
14. Complainant timely filed a grievance over his May 14, 2013 discharge under the contractual grievance processes provided for in his collective bargaining agreement between UPS Freight and the Teamsters Union.
15. On July 18, 2013 after a Joint UPS Freight/Teamsters Panel Hearing, Complainant's termination was reduced to a suspension without back wages. On July 22, 2013, Complainant returned to work for UPS Freight.
16. On September 25, 2013, UPS Freight again discharged the Complainant.
17. Thereafter, Complainant filed a complaint with the Regional Administrator for the Occupational Safety and Health Administration, OSHA Region IV alleging that the Respondents had discharged him and discriminated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105. UPS Freight received notice of this amended complaint by the Atlanta Regional Officer's October 22, 2013 letter to Respondent's counsel.

18. On September 27, 2013, Complainant timely filed a grievance over his September 25, 2013 discharge under the contractual grievance processes provided for in his collective bargaining agreement between UPS Freight and the Teamsters Union.
19. On November 21, 2013 after a Joint UPS Freight/Teamsters Panel Hearing, Complainant's grievance was denied and his termination was upheld.
20. During 2012, Complainant's weekly gross wages from UPS Freight averaged $1,276.46. During the 29 weeks Complainant worked for UPS Freight during 2013 (January 1 – May 9 and July 22 – September 25), his weekly gross wages averaged $1,294.40.

ISSUES

The issues remaining to be resolved are (TR 6-8):

1. Did the Complainant engage in protected activity under the STAA as alleged in the complaint during the period from February 2013 through September 25, 2013, concerning vehicle safety, vehicle equipment malfunctions, a trailer door, red-tagging, and the OSHA complaints filed March 1, 2013 and April 2, 2013, as amended ?
2. Did the Complainant suffer adverse employment action as alleged in the complaint of having his employment terminated on May 14, 2013 and September 25, 2013, and by workplace harassment from the immediate supervisor, Felix Gerster ?
3. If so, was the protected activity a contributing factor to the alleged adverse employment actions ?
4. If so, did the Respondent have a clear and convincing basis for the alleged adverse employment action(s) not related to activity protected by the STAA ?
5. Is the Complainant entitled to appropriate relief under the STAA, such as reinstatement, back pay, comp pay, restoration of employment benefits and seniority, interest, attorney fees and legal costs ?

PARTY POSITIONS

Complainant's Position:

Complainant's counsel submits that it is undisputed that Complainant filed internal complaints with F. Gerster and T. Narron alleging trailers that had been "red-tagged" for equipment defects were placed back in service without repair as related to violations of 49 CFR §§ 392.1, 392.9, 393.1, 393.100, 393.104, 396.1, 396.7 and 396.13 and made an internal complaint with the UPS compliance hotline. He asserts that the Complainant was concerned about the defective trailer door on Trailer #255028 because there was a danger that product could fall onto the highway if the door was stuck open or the product broke through the broken door panels and present a danger to the motoring public. He also notes that the Complainant filed similar complaints with OSHA under the STAA.

Complainant's counsel submits T. Narron made the decision to terminate the Complainant's employment on two occasions. He argues that the temporal proximity in time of the internal complaints to F. Gerster and T. Narron and UPS hotline and the May 14, 2013 initial termination of employment supports a finding that the protected internal complaints were a contributing

factor in the decision to fire the Complainant. He submits that there was no workforce violence on May 14, 2013 involving the Complainant and F. Gerster warranting termination of employment and that line of reasoning is not worthy of credence. He argues that the incident with the manager of Dollar General during a September 2013 delivery is not credible as an "extreme seriousness" offense when the testimony and video recording are evaluated and that the event warranted no more that progressive discipline for a "serious" customer complaint. He submits that the Complainant was denied progressive discipline and had his employment terminated on September 25, 2013 by T. Narron based in part on the protected activity during the proceeding seven months known to T. Narron.

Complainant's counsel submits that the evidence does not establish by "clear and convincing" evidence that the Respondent would have discharged the Complainant on May 14, 2013 nor September 25, 2013. He submits that it is not unusual for bargaining unit members to become upset or challenge supervisors without being fired for such actions and that most customer complaints do not lead to employment termination. He asserts that the Complainant promptly followed UPS procedure in reporting the Dollar General customer complaint to UPS and that Respondent engaged in an unordinary delay of 13 days to commence an investigation with the Dollar General manager, did not apply the usual progressive discipline for the customer complaint, and refused to negotiate with the Union representative over the September 25, 2013 employment termination grievance. He argues that Respondent's actions and T. Narron's involvement disprove Respondent's affirmative defense.

Complainant's counsel argues that the Complainant should be reinstated to his previous job with UPS Freight; awarded back pay in the amount of $13,500.59 for the period from May 10, 2013 through July 21, 2013; awarded back pay in the amount of $25,808.00 for the period from September 26, 2013 through January 20, 2014; awarded back pay at the rate of $513.00 per week for the period from January 21, 2014 until UPS makes a bone fide offer of reinstatement; awarded $100,000.00 in compensatory damages for emotional distress and mental pain; awarded $250,000.00 in punitive damages; and awarded attorney fees and legal costs as may be determined by the presiding Judge upon submission of a fee petition. He requests that Respondent be directed to post a copy of a favorable "Decision and Order" in "all places at all its terminals where employee notices are customarily posted" and "to provide a copy of any decision favorable to [the Complainant] to all its present employees and those employees who worked for it when [the Complainant] was discharged." He also requests that Respondent be directed to expunge all references to the discharges from Complainant's personnel records and "cause all consumer reporting agencies to which it has made a report about [the Complainant] to amend their report to delete unfavorable work record information and show continuous employment with UPS Freight."

Respondent's position:

Respondent's counsel submits that the Complainant's inability to control his temper and emotions led him "to act insubordinately and make a physically aggressive move toward Marietta Terminal Manager Felix Gerster during a routine counseling session about continued problems with excessive on-property time" which led to termination on May 14, 2013 for workplace violence, later reduced to a two month suspension without pay. He submits this same

lack of control led to the outburst and General Dollar customer complaint in September 2013 that resulted in the September 25, 2013 employment termination.

Respondent acknowledges that the collective bargaining agreement affecting the Complainant "provides that Complainant could only be discharged for 'just cause' and provides for progressive discipline, except in circumstances where an employee engages in an 'offense of extreme seriousness.'"

Respondent submits that the Complainant filed a Daily Equipment Condition Report (DECR) upon return to the facility after his February 25, 2013 deliveries that reported the trailer lift gate was hard to open. He submits that the trailer was out-of-service until the on-site mechanic made adjustments to rollers and certified the trailer as safe to use. The trailer was used on February 27, 2013 without a negative DECR. After use on February 28, 2013, the trailer door was again reported by another driver in a DECR as hard to open and cracked. On-site repairs were made and the trailer certified as safe to use. After use on March 4, 2013, the trailer door was again reported by yet another driver in a DECR as hard to open and close. It was taken out of service and sent to the Atlanta repair shop for extensive repairs to the door panels. No further safety issues were reported after returning to service following the March 5, 2013 repairs in Atlanta. He essentially argues that no adverse actions were taken involving the Complainant or the other two drivers for reporting the defective trailer door; such that the Complainant's initial trailer door "red-tagging" was not a contributing factor to either the May 14, 2013 nor the September 25, 2013 employment termination decision.

Respondent argues that supervisor F. Gerster properly accompanied the Complainant to a doctor on March 19, 2013 for an on-the-job back injury and properly consulted with the doctor on the suitability of the light duty job of shuttling trailers without lifting or movement of freight, then the light duty job of sweeping the dock area, and lastly an assignment involving yard observations while drivers returned to the yard at the end of the workday. He argues that F. Gerster tried to accommodate the Complainant's back limitations but that the Complainant refused to work a non-day shift and took sick days until returning to work on March 25, 2013. He argues that the actions taken were proper and not harassment of the Complainant.

Respondent submits that in February 2013 T. Narron took over as Southeast East Director of Operations and instituted a policy of weekly off-property observations of drivers by supervisors and reduction of excessive on-property time by drivers. The Complainant was observed in off-property driving by supervisor J. Strickland on March 25, 2013 and by supervisor P. Nelson on March 28, 2013. Supervisor F. Gerster observed the Complainant in off-property driving and delivery on April 2, 2013, which included use of a "go-pro" recorder. Respondent's counsel argues that the Complainant was counseled by F. Gerster on April 3, 2013 on how to properly lift and bend his knees and that no disciplinary actions resulted for the Complainant from any of the three off-property observations by supervisors. He notes testimony that F. Gerster conducted off-property observation and "go-pro" recording of at least four other drivers and that one of the drivers was terminated for using a cellphone while driving.

Respondent's counsel submits that F. Gerster met with the Complainant on May 9, 2013 to administer a written warning notice to the Complainant for excessive on-property time following

multiple verbal counselling sessions on the issue and the Complainant's repeat of excessive on-property time on May 8, 2013. He argues that the Complainant was insubordinate in conduct by refusing to sign the disciplinary notice, comments while exiting the office, and comments and actions directed towards F. Gerster upon recall into the office. He submits that the Complainant admitted to the conduct in the presence of T. Norton on May 10, 2013 and was taken out of service at that time pending an investigation. He submits the investigation was conducted and the Complainant's employment was terminated by T. Narron on May 14, 2013 for violating the company's zero tolerance of workplace violence policy. He submits that the union grievance procedure was used by the Complainant and it resulted in a Joint UPS Freight/Teamsters Labor Panel Hearing which reduced the termination to a two month suspension without pay because such action is consistent for an employee upon their first appearance before the Joint Panel.

Respondent's counsel submits that on September 17, 2013 Marietta Terminal Manager A. Radnoti was notified that the local manager of national account customer Dollar General had complained about a delivery driver on September 4, 2013 and that the Complainant had reported the customer dispute incident to his supervisor on September 4, 2013. He submits that A. Radnoti conducted a proper investigation of the incident, took statements from those concerned, reviewed surveillance video, discussed the matter with Labor Manager M. Cohen and Regional Manager R. Gannon, and discussed the matter with the Complainant in the presence of his union representative. He argues that R. Gannon instructed A. Radnoti to inform the Complainant that his employment was terminated for an offense of extreme seriousness. He submits that the union grievance procedure was used by the Complainant and it resulted in further investigation of the September 4, 2013 incident, the Local 728 Union representative apologizing to the manager of the local Dollar General store, and the Joint UPS Freight/Teamsters Labor Panel finding Respondent had just cause to terminate Complainant's employment.

Respondent's counsel acknowledged that the Complainant's March 1, 2013 report to OSHA involving a defective trailer door was protected activity but there is no direct evidence that such activity contributed to the May 14, 2013 employment termination and that the direct evidence presented by F. Gerster and T. Narron is that such action was not considered in making the decision to terminate the Complainant's employment on May 14, 2013. He also argues the time period involved from March 1, 2013 to May 14, 2013 is to extensive to establish an inference of temporal proximity being an existing contributing factor and that the Complainant's insubordination toward F. Gerster on May 9, 2013 is an intervening act by Complainant that severs any possible causal connection between the March 1, 2013 protected activity and the May 14, 2013 termination of employment by T. Narron. He submits that the evidence demonstrates that the Complainant was treated the same as other drivers by F. Gerster and that no retaliatory animus has been established by the Complainant. He argues that the Complainant has failed to establish a prima facie case of retaliation by a preponderance of the evidence as to the May 14, 2013 termination of employment and that the Respondent has established by clear and convincing evidence that the Complainant's employment would have been terminated on May 14, 2013, even if he had not engaged in previous activity protected under the STAA.

Respondent's counsel argues that the Complainant did not provide any direct evidence that his March 1, 2013 or May 16, 2013 OSHA complaints were contributing factors in the September 25, 2013 termination of employment and that the Complainant's September 4, 2013 actions

during a customer delivery at Dollar General on September 4, 2013 and words and actions during the investigation of the incident by A. Radnoti demonstrate the absence of any causal connection between protected activity and the adverse employment action. He argues that A. Radnoti was not aware of the prior OSHA complaints by the Complainant and that he investigated the September 4, 2013 customer complaint but did not make the decision to terminate the Complainant. He submits that T. Narron made the decision to terminate the Complainant's employment based only on the information surrounding the Complainant's conduct at Dollar General on September 4, 2013 and his investigatory statements, several of which were contradicted by store witnesses and surveillance video. He argues that the Complainant has failed to establish a prima facie case of retaliation by a preponderance of the evidence as to the September 25, 2013 termination of employment and that the Respondent has established by clear and convincing evidence that the Complainant's employment would have been terminated on September 25, 2013, even if he had not engaged in previous activity protected under the STAA.

Respondent's counsel argues that the interactions between the Complainant and F. Gerster in early 2013 did not rise to the level of harassment due to Complainant's March 1, 2013 protected activities as alleged.[3] He submits the evidence establishes that F. Gerster's interactions with the Complainant were similar in nature and conduct by F. Gerster with all other drivers and employees and did not constitute harassment but at most were "ordinary tribulations of the workplace," were similar in nature to other interactions Complainant's had with supervisors prior to F. Gerster, and are therefore not actionable. He argues that the evidence of record does not demonstrate a causal connection between Complainant's protected activity and the alleged harassment; and, that the Complainant has failed to establish by a preponderance of the evidence a prima facie case.

Respondent's counsel seeks to have the Complainant's STAA claims dismissed in its entirety and judgement be entered in favor of the Respondent.

SUMMARY OF RELEVANT EVIDENCE

Complaint & Amended Complaint (ALJX 4, 5; CX 6, 7; RX 25)

The Complainant filed his initial complaint under the STAA on April 2, 2013 which was acknowledged by the Atlanta Regional Office of OSHA by letter dated April 10, 2013. The Complainant alleges that he engaged in protected activity by (1) "red-tagging" equipment for repairs; (2) confronting his supervisor, J. Strickland, on March 1, 2013, about removing the "red-tags" prior to equipment repairs being made; (3) filing a complaint with OSHA about "red-tagged" equipment having the "red-tag" removed and being placed in service without the necessary repair being completed; and (4) filing a complaint about "red-tagged" equipment having the "red-tag" removed and being placed in service without the necessary repair being completed with the Respondent through its UPS compliance hotline. The Complainant alleged he was being harassed by his supervisor including being written up for being one minute over lunch, assigned work duties inconsistent with work restrictions related to a March 18, 2013 work-related low back injury, being assigned to night shift duties and varying reporting times

[3] Respondent's position that "harassment" is not encompassed by the STAA is in error. Such clarification is set forth in STAA implementing regulations at 29 CFR §1978.102(b) and (c).

while under medico-vocational work restrictions, being followed, filmed and harassed by his supervisor on April 2, 2013 while making assigned delivery trips.

OSHA added the adverse action of termination of employment on May 14, 2013 to the original complaint as an amendment since the Complainant's employment was terminated during the OSHA investigation.

The Complainant filed written notice with the OSHA investigator alleging harassment by supervisor T. Narron in the form of being required to attend four days of "new hire" training following his return to work on July 22, 2013; delay in reinstatement of his health insurance until September 16, 2013; and, being placed out of service on September 24, 2013.

The Complainant filed an amended complaint on September 25, 2013. In the amended complaint the Complainant alleges retaliation in the form of the adverse employment actions of termination of employment on May 14, 2013 and September 25, 2013. He alleged the protected activity of (1) "red-tagging" his assigned trailer in February 2013 for a defective roll-up door that would not secure properly; (2) reporting to supervisors F. Gerster and T. Narron that the trailer was placed in service without the "red-tagged" roll-up door being repaired; (3) filing a complaint with OSHA on March 1, 2013, that Respondents were neglecting to repair a defective trailer door such that operation of the trailer was hazardous; and (4) filing an STAA complaint on May 16, 2013.

The Complainant seeks, reinstatement to his previous position as a truck driver with UPS, back pay, compensatory damages for emotional and mental pain, punitive damages in the amount of $100,000.00, expungement of adverse information from his employment file with UPS Freight, Inc. and HireRight, Inc., posting of a favorable "Decision and Order" for 90 days in all places Respondent customarily posts employee notices, and payment of legal costs and attorney fees incurred in the case.

May 14, 2013 Discharge Letter (JX 4)

On May 14, 2013, Regional Director of Operations, T. Narron issued a letter for "Discharge Notice – Just Cause Offenses of Extreme Seriousness; Classification – Local Cartage PUD." The letter stated –

"On 05/14/2013. A meeting was held in the Marietta Freight building. Present were: you, Troy Narron, Felix Gerster, and Union representative Al Churchwell and Veronica Norton.

Discussed at this meeting were your offenses of extreme seriousness on 5/9/2013. Therefore, due to the serious nature of your offenses, you have given UPS Freight just cause to discharge you from your employment.

This is an Official Notice of Discharge, as outlined in Article 6 of the current labor agreement between UPS Freight and IBT Local 728."

September 25, 2013 Discharge Letter (JX 5)

On September 25, 2013, Regional Director of Operations, T. Narron issued a letter for "Discharge Notice – Just Cause Offense of Extreme Seriousness." The letter stated –

"On 09/25/2013. A meeting was held in the Marietta Freight building. Present were: you, Jermaine Strickland, Anthony Radnoti, Al Churchwell and Veronica Norton.

Discussed at this meeting was your offense of extreme seriousness. Therefore, due to the serious nature of your offense, you have given UPS Freight just cause to discharge you from our employ.

This is an Official Notice of Discharge, as outlined in Article 6 of the current labor agreement between UPS Freight and IBT Local 728."

Testimony of Complainant (TR 215-368)

The Complainant testified that he has lived in Woodstock, Georgia for 28 years, graduated high school and has held a commercial driver's license for 22 years with no chargeable DOT accidents. He has CDL endorsements for tankers, hazardous materials, double and triple trailers. He obtained his CDL in 1993, drove for Overnight Transportation for the first year, drove for Averitt Express for over two years, drove for USF Holland for five years, Roadway Express for a year, and was an owner-operator driver for Waste Management. He began work with UPS Freight at the Marietta facility in May 22, 2007 and became shop steward in April 2008. The first terminal managers he dealt with as shop steward were S. Harkins and R. Toney. He stated he had union disputes and got loud with both of the terminal managers.

The Complainant testified that a typical day in January or February 2013 involved him clocking in, going to a meeting if there was one, going to the truck to see if it was loaded or to finish loading it, get the tractor and hook up the trailer, get the delivery receipt paperwork for the route, and then start the route for the day. The start of the day varied from 9:00 AM to 10:00 AM, but always in the morning. The delivery receipt was a paper trail for the customer to sign and to turn back in at the end of the day. His vehicle was a combination 40-foot tractor-trailer with a left gate. It was smaller than the normal 48-foot trailer with a lift gate. The trailer was always full and deliveries started with the packages at the back. He stated that "as you progressed through the day, the general idea was that your trailer would start full and as you progressed through the day, it would get less full and be more empty until you're completely empty at your last delivery. No load securing straps were provided to the driver by UPS.

The Complainant testified that most of the issues he had with trailers involved door issues, tire issues and lighting issues. "Doors would be off the track, missing rollers, missing straps, missing handles, that general nature. The tires would be bald or it would be flat. Lights weren't working properly." If there was a trailer issue he would verbally tell management or dispatch. He stated vehicle inspection involved closing the trailer door, moving the tractor-trailer forward about 10 feet from the dock, turn on the lights and hazard flashing lights, check the condition of the tires, condition of the mud flaps, lighting on the back, lighting on the sides, lighting on the front, ICC bumpers and the similar items on the tractor.

The Complainant testified that "red-tagging" is a two-part form that is filled out and torn in half. On part goes to management and the other part was placed on the front or rear door strap of the trailer so dock workers would not load the trailer. The red tag would have the unit number, what

was wrong, location, and general description of the problem so it would get fixed. He would red tag equipment if it couldn't be fixed quickly at the facility or "if you deemed it unsafe or dangerous to the public." Otherwise he would verbally tell management or dispatch of the smaller problems.

The Complainant testified that he complained verbally to F. Gerster in mid-February 2013 that he suspected the red tags he placed on his trailer were being taken off and the trailer moved to another loading area for another driver to pull. He stated he based this complaint on putting a red tag on the trailer door at the loading dock at least three times when he left work at the end of the day and returning to work the next day and the trailer would be at another loading dock door, loaded, and without the red tag. He stated that most of the times he never saw a mechanic come in a make the red tag repairs. He state his Trailer #255028 was tagged for broken door panels that were cracked halfway through a one-inch panel where freight had hit it once already and cracked the panel. He stated the broken panels would flex from moving and either bind a door roller in the track or pop it out. He stated the door would be fine for him at one stop and then at another stop down the road the door would jam because a door panel flexed. He considered the broken door panels to present an unsafe condition to the public because "if freight was to move up against those door panels , and they're already cracked halfway through, and you got two panels out of eight that are cracked halfway through, my opinion that it weakens the structure from holding the freight in and it would fall out with a good hit of anything hitting it over 100 pounds. He stated that he has had loads shift while driving for UPS from the grades, driveways, uphill, downhill and around curves because he ran mostly rural areas in the mountains.

The Complainant testified that F. Gerster responded to his complain about the trailer being used without repairs after being "red-tagged" by stating that he and the mechanic had inspected the "red tagged" door and deemed it safe to operate. The Complainant reported he again complained to F. Gerster that "you can take [the trailer] down the road one mile and [the door] will jam on you; just because it operates here, you open it down once or twice on a level surface, doesn't mean it's not going to bind a mile down the road on an unlevel surface." He stated that driver J. Holt was also having lots of problems shutting the trailer door because the broken panels were binding the rollers in the track and had "red-tagged" the trailer also. He stated that J. Grostefon was having door problems with the trailer and had written it up once and one time "red-tagged" it. He stated he brought up the door panel at the monthly safety meeting with F. Gerster, A. Churchill, and V. Norton and requested the trailer be taken out of service so the broken wood on the door could be replaced and that if it was not going to be fixed he would resign from the safety committee. F. Gerster asked him to work with him on the issue.

The Complainant testified that he called T. Narron on March 1, 2013 to complain about fixing the broken trailer door panel and that he felt red tags were being misused or taken off trailers before they were really fixed, that the red tags were being ignored, and that he had discussed the matter with F. Gerster, that it was still being done after the conversation with F. Gerster, and that he was resigning from the safety committee "because it was bluff to try to pacify the problem." He testified that he next complained to OSHA over the telephone later the same day, March 1, 2013. The Complainant testified that his complaint to OSHA is stated in RX 1, page 2 letter from OSHA dated March 5, 2013. He reported that a notice was posted by UPS that was a general outline of the trailer noting some of the drivers that had written it up and mentioning the

mechanic also. He identified RX 5, pages 45 to 47 as the complaint he made using the UPS compliance hotline.

The Complainant testified that after he filed the OSHA complaint he noticed F. Gerster "really started to take notice in my daily activities and was nitpicking about everything I did, and anything I tried to explain to him why, the reasons I was doing something, was not to his satisfaction." He stated that F. Gerster had not "nitpicked his work" prior to filing the OSHA complaint about the trailer.

The Complainant identified CX 6 as a letter from OSHA acknowledging receipt of his April 2, 2013 complaint of retaliation under STAA and OSHRC. He reported filing the STAA complaint verbally "immediately after I was followed and videotaped by [F. Gerster] and then he confronted me … in my lunch hour when I was out on my route." He testified that pages 4 through 6 are his written statement about what had occurred up to the time he had called in the STAA complaint.

The Complainant testified that he reported to OSHA that outbound G. Strickland had followed him on his route and that he signed an on-road observation form acknowledging that on March 12, 2013. He indicated that F. Gerster was G. Strickland's immediate supervisor. He stated that he may have been observed on-property before March 1, 2013; but never being followed off-property. He stated that no one complained to him about being followed on route while he was the shop steward.

The Complainant testified that on March 15, 2013 he was called into G. Strickland's office and verbally counselled about being one minute over the lunch period on March 14, 2013. It was not discipline under the CBA. He reported that this was the first time he had been so counseled or warned. He stated that his "personal experience, the way I do it, is that I park the vehicle in a safe area … and then I go to where I'm eating lunch and when I walk in and I begin to hit lunch."

The Complainant testified that on March 19, 2013 he was making a residential delivery of "Sunsetter" roll-out awnings and he was carrying a roll probably 1 foot in diameter and 20 foot long "and when the customer let go of his end and put all the weight on my end and I felt a pinch in my back." He reported the injury to F. Gerster who drove him to the doctor. He did not consider it normal practice for a supervisor to take an employee to the doctor like that. He stated that doctor placed him on light-duty restrictions. He came back out and handed the written restrictions to F. Gerster who began shaking his head when he read it and then stated he had to talk to the doctor. When he came back out he had a new set of restrictions. He testified that "the first work restrictions were no lifting or pulling or pushing anything over, I think 10 to 20 pounds. [The amended work restrictions said] that I'd be able to shuttle trailers back and forth from the terminal to customers." He stated he knew that the shuttle driver job duties could increase the injury but that he "attempted them first. Did one run and it was bothering me, so then I called the doctor and told him, you now, to describe to her what I was doing … getting out of the vehicle, pulling the fifth wheel, unhooking the glad hands, rolling down the dolly unit and everything else." He indicated the doctor was under the impression only driving would be involved. To unhook a trailer you have pull on the fifth wheel release handle really hard. A

handle is used to crank the dolly or landing gear of a trailer up and down. He stated he told F. Gerster about the problems he had trying the shuttle driver job and that the doctor would sent over revised restrictions. He stated he was then put on temporary alternate work at the loading docks as sweeper. He reported that his back was aggravated by the sweeping after two hours and that he and the shop steward went back to F. Gerster and asked to answer phones or to hand out bills to drivers or run bills back and forth to dispatch and loading dock like he had seen done in the past. F. Gerster sent him home before he got full hours that day and called him later three times about changing his starting time for the next work day.

The Complainant testified that on March 28, 2013 he signed an off-property observation form for dispatcher P. Nelson, who is supervised by F. Gerster. He stated he was called into F. Gerster's office on April 1, 2013 about communication. He stated F. Gerster "was nitpicking at me about communication and I informed him I did communicate with my dispatcher, [P. Nelson]; that I called him on a regular basis throughout the day to relay messages to him, more than what we can do on a DIAD on a message board in a text [where] you're only allowed up to like 10 to 15 words." He reported communication with dispatch is "either through DIAD in texting or on a physical phone." He stated F. Gerster's "response was that that's not what he wants, he wants it all done by DIAD and that's the way it's going to be."

The Complainant testified that on April 2, 2013, as he was getting out of his truck for lunch, F. Gerster drove up and told me he was following me and filming me and asked me to recite the "5 and 10." He stated "5" is for the five safe seeing habits for UPS drivers and "10" is the ten safe driving habits for UPS drivers. F. Gerster said he was speeding and following to close. He questioned F. Gerster on how could he tell he was speeding or following to close and that he felt F. Gerster was harassing him about his driving. He denied speeding or following too closely. He stated telling F. Gerster he was out following and videotaping because of his call to OSHA and it was his way to get even. He denied calling dispatch to get help to back out of a location and stated that the reason he called dispatch was to let F. Gerster know that "I was in a tight situation and it could possibly take me more than the 15 minutes we're allowed to make a stop."

The Complainant testified that he was called into F. Gerster's office with shop steward V. Norton about performing delivery duties at Chili's Restaurant on April 2, 2013. He stated that the video did not show his knees during the Chili's delivery and that he was accused of not bending his knees properly during the delivery. The video also covered driving that day in traffic behind a cop car. He stated F. Gerster accused him of speeding and following too close again. They "discussed" those allegations also.

The Complainant identified CX 6, page 7 through 11 as another written complaint he gave to OSHA after he was fired the first time. He denied ever giving anyone the middle finger. He stated F. Gerster accused him of giving the middle finger at a PCM and that led to he and V. Norton being removed from the May 8, 2013 PCM. He met with F. Gerster and V. Norton about giving the middle finger where he denied giving F. Gerster the middle finger, refused to sign a statement that he did do so, and V. Norton refused to sign because she didn't see it happen. He stated that the PCM meeting is held in a break room where the drivers sit in a "U" shape and F. Gerster stands in front of the bulletin boards during the PCM.

The Complainant testified that on May 9, 2013 he was called into F. Gerster's office by V. Norton and that the purpose was to discuss being over on-property time on May 8, 2013. F. Gerster stated it was "for being on property for over one hour on-property time," to which he replied "well 10 minutes of that was being here with you of you accusing me of giving you the finger" and that the remaining time was due to the DIAD not booting, about which he had called dispatcher P. Nelson. He stated that 20 minutes is the normal on-property time. He stated that he had problems with DIAD like other drivers. He could not "enter our information in the DIAD until dispatch entered information into the computer system, meaning our route, our deliveries … as long as the paperwork we have on us and the freight inside the trailer, okay … if we waited on [dispatch to load the computer and the computer to load the DIADs] that would be an hour later down the road. They don't want us sitting there for an hour waiting for them to get caught up with computer work in the office … I explained to him that even after my first stop it still wasn't up, it didn't actually come up to my next one. I was already at my third stop … if I was still sitting there for an hour [the GPS on our trucks] would show me sitting there for an hour, not three stops down the road … [F. Gerster] didn't want to consider that. He said I'm going off the Telematics…" He reported that prior to being counseled for over on-property time if there was a question about time, he would explain what happened to F. Gerster who would take that into consideration. The Complainant testified, "At this time I was becoming very agitated by the whole situation, and no matter what I said to [F. Gerster] made him happy … so I asked him 'Are we done, I would like to start my day so tomorrow I'm not back in here being written up for this time that I'm in here trying to explain myself; and he said 'Yes, we're done.' That's when I put my hands on the table and stood up and turned and walked out … I put my hands on the desk to help myself stand up." He denied threatening or moving towards F. Gerster while standing up. He stated he had not yelled at that point and that the discussion had not been hot to that point. He testified that when he turned to go out the door F. Gerster stated "you have a nice day and be safe, and that's when I was frustrated and got smart with him and said, 'Not for you I won't.' … I was frustrated and just being a smart ass. That's when he became loud and started yelling. He yelled for me to get back in the office … I turned to him and said 'I thought you said we were done. He said no, I want you to come back in the office. I came back in the office and sat down. That's when he started drilling me about what did you mean by that … I think I replied I didn't mean anything by it, I was just being – I'm frustrated and I'm tired of you harassing me. All this is about is OSHA, you're coming after me and it is nothing but bullshit … I was sitting when I used the word bullshit. … I explained to him, no matter what I said to you it's not going to make you happy; and at that time I felt my blood pressure was elevated and I was starting to feel sick to my stomach, and he just kept badgering me and saying explain yourself; and that's when [V. Norton] got up and shut the door." He denied being loud at that point. He testified "At this point I was starting to get irritated and I think my voice – I probably started raising my voice out of frustration, but also I could feel myself being worked up, my blood pressure and everything else, and I was getting sick to my stomach, because I probably had been sitting there probably going on 20 minutes now … at that point I told [F. Gerster] I was going home sick and I was removing myself from the situation, that situation, and I'm not fit to drive a commercial vehicle at this time." He denied having elevated blood pressure from time to time but stated "I could feel my heartbeat in my neck, my vein" and acknowledged that he did drive his car home. He reported he left the room and V. Norton came out and he told her "you're my witness, he was provoking me; and that I'm unfit to drive; and that I'm going home sick." He reported telling G. Strickland on the way out that he going to clock out sick.

The Complainant testified he came back to work on May 10, 2013 and was brought to F. Gerster's office by shop steward V. Norton. T. Narron was also present in the office. They asked me questions about the day before and I was put out of service pending discharge for extreme seriousness. He identified CX 6, pages 7 to 11 as his written statement to the OSHA investigator about the events of March 9 and 10, 2013.

The Complainant testified that there was a local level hearing on the discharge with M. Cohen, T. Narron, F. Gerster, S. Webber and V. Norton present. He reported that he returned to work with UPS Freight on July 22, 2013. He stated that while off work from May 10, 2013 to July 22, 2013, he had made on-line applications for work to four of UPS Freight's competitors but did not get any job offers. The Complainant testified that when he returned to work T. Williamson was the service center manager for a short time, maybe three weeks.

The Complainant testified that he made a delivery to Dollar General on September 4, 2013. He reported driving to the back of the building for the delivery, knocking on the door with no response, unloading the freight, and knocking on the door again because there was no doorbell. He stated he notified the dispatcher G. Strickland that the delivery would take a little longer because he would have to go around to the front to get someone to open the back door. He left the freight of shelving at the back door and drove to the front of the building, walked to the cash register and asked for the manager. The cashier, an older gentleman, took him to the manager who he followed to the back door. He opined that the store was over 60 feet from the front to the back. He testified the manager "opened the back door. She walked out. I walked out. She looked at the freight and she turned around and looked inside the storeroom and said 'I'm going to have to make a spot for you where I want you to set the freight. I said okay. Then she began to walk in there and clear out the area. There were some boxes and maybe a shopping cart that were in the area she wanted me to put it. And then I tilted the skid up on the side, because the skid was wider than the door … and then I dragged the skid through the door, approximately 10 feet, to the area she wanted me to put it … and I actually pushed it up against the wall. She looked at it and then asked me if I could take it off the skid for her so she could dispose of the skid; and I explained I couldn't, it was shrink wrapped and not only was it shrink wrapped, it was banded to the skid with an inch and a half metal banding." He stated he did not have tin snips or pliers to remove the metal banding. He testified the manager walked to the other side of the storeroom and back again. He stated that when she walked back "She said 'with that F'ing attitude I'm surprised you have a F'ing job.' I was kind of taken back by it, shocked because it was out of nowhere. She began to curse me again and she said 'I want your F'ing boss' number, I'm going to have your F'ing job.' I said 'Ma'am … all I'm responsible for doing is bringing it inside the door for you … we're not responsible for taking it off. If we want to take it off, there's an extra charge for that. She began to say 'I'm not paying extra for anything,' and I said 'well, then you can refuse the freight and I can take it back and we can redeliver it and charge a redelivery charges and storage charges,' because that's the way we're told to tell the customer if they refuse freight. … She said 'that's not my F'ing problem, that's your problem' and I said 'well if you want to refuse it, then I will get the truck and come back and turn around. I began to turn and walk out – back towards the store then through the door we came in … because at that time she was refusing [the freight]." He reported "she followed me out and kept talking, saying I know what you drivers make and it's ridiculous, you should do anything I ask you to do … then as I was walking through the middle door going into the storage, she said 'stop, I'll take it; I'll

take it." He stated he turned around and followed her back into the storage room and that the manager refused to sign the delivery receipt until "I gave her my boss' name and number." He stated he went to the counter and wrote his dispatcher's name, P. Nelson, and his phone number on the manager's portion of the delivery bill. He testified the manager was at the back door looking at him when he started writing the information on the delivery receipt and then walked out the back door. He stated that after he wrote the information down, "I turned around. I seen she wasn't standing there. I didn't know she went outside, and in my normal voice, but a little elevated, I said 'Ma'am,' because I didn't know where she was at, I said 'here's your receipt with the information you wanted,' and then I heard her voice come out from the back door when she was standing outside, 'You go to F'ing hell.' Then I started walking towards the back door where the freight was and where she was standing outside, she still wasn't back in the building. She was standing outside; couldn't visibly see her. I said 'have a nice day' and that's when she used the F-word again to me, and at that time I had the bill in my right hand and as I was walking up to the freight, I went to toss it on the freight and I immediately turned right and walked out of the building." He stated that the videotape showed the delivery bill landed on the floor directly in front of the skid. He testified that he left the building, did not holler at all when he addressed the manager, and did not raise his voice. He stated that he left the store, called G. Strickland, and reported he was leaving the store and had a confrontation with the customer and had left P. Nelson's name and number with the customer and "that you'll probably be getting a call in the next 30 minutes with a complaint." He testified that he followed up with dispatcher P. Nelson the next morning who told him he knew from G. Strickland and not to worry about it.

The Complainant testified that when he was shop steward and customer complaint was made, the driver would be called into the office within a few days to talk about what happened with the driver, manager and shop steward present. He stated that most customer complaints do not result in discipline.

The Complainant testified that V. Norton told that terminal manager, A. Radnoti, needed to talk with them in the office. The discussion was about the Dollar General delivery. He stated "I began to explain to him that when I was attempting to make a delivery, she was unhappy … I couldn't unload the freight off the skid, she began to cuss at me, and then she did ask for my supervisor's name and number, and I gave it to her."

The Complainant testified that he was asked to fill out a written statement at the September 24, 2013 meeting, which he completed in another room, and then gave it to A. Radnoti. He identified RX 30, page 7, as his September 24, 2013 written statement. He stated that the handwritten notations in the margins are not his handwriting. He testified that he viewed the videotape and he did not hand the delivery receipt to the Dollar General manager. He stated the time in the storage room with the Dollar General manager lasted 9 to 10 minutes. He stated that when A. Radnoti put him out of service, A. Radnoti told him "he would have to put me out of service and he felt he shouldn't have to put me out of service because he never had a problem with me but he was just doing what he was told by his boss." He stated that September 24, 2013 was his last day of work for UPS Freight and did not return to work until January 20, 2014 with FedEx Freight. He reported that he made on-line applications to half a dozen truck lines between September 25, 2013 and being hired by FedEx.

The Complainant testified that while unemployed he was depressed and uneasy about being fired, was unable to pay bills, had to take a loan from his retired parents, and ran about 6 months behind in his bills. He testified that "I have a lot of judgments against me for … financial bills I already established … against me for furniture, credit cards [and] medical bills for my children." He reported four people in his household; he, his wife and two stepdaughters. He reported financially supporting his two step daughters as well as his own children. He reported he was unable to go on family vacations, movies, dinners or gym like he could when working. He reported his starting salary with FedEx as $23.08 per hour when it was $26.00 per hour at UPS Freight. He stated he averaged 45 hours per week with UPS Freight and has to struggle to get 40 hours in a week with FedEx. He stated with UPS Freight he had full medical, dental and eye benefits with co-pays and has to pay more for medical attention with FedEx. He reported having a defined benefit plan with UPS Freight that was based on your years of service and that FedEx has an optional 401(k) plan only. He reported there was no health insurance while he was fired. He identified CX 1, page 1, as his W-2 form from UPS Freight for 2013 and that it reflected all 2013 income because he only worked at UPS Freight that year. He identified CX 1, page 2, as his W-2 form from FedEx Freight for 6 months work in 2014 and that he also had another week's paycheck for about $800.00 from a temporary driver leasing company in 2014. He stated CX 2 indicates his 2015 gross income through January 17, 2015 in the amount of $3,249.51.

The Complainant reviewed the "Response of UPS Freight" to OSHA contained in RX 5, pages 10 through 12. He testified that it was not uncommon for drivers to have incident of minor property damage. He reported the July 8, 2009 concerned disagreement about safety rules and issues about wanting a copy of the union contract with K. Turman and denied verbally confronting K. Turman and stated K. Turman had confronted him and was found at fault. He stated that the January 25, 2008 preventable accident of backing into another vehicle involved a scrape on a boat hitch and that he was parked and someone hit him. He stated that October 7, 2008 concerned a customer complaint from Jos. A. Bank and he was not disciplined for it. He reported many drivers delivered to Jos. A. Bank and received complaints but no one was suspended or disciplined over the complaints. He reported he was unaware of any other drivers receiving warning letters because of customer complaints while he was shop steward.

The Complainant identified RX 5, pages 45 to 47, contains the complaint he made to UPS Freight over the compliance hotline in October and November 2009. The complaint involved two trailers being written up by drivers for door and lift gate problems and then being moved to other loading docks for use by other drivers without being repaired. He stated there was no on-property mechanic in October and November 2009. He reported that T. Glover was a former Service Center manager who started the safety committee and totally turned around the repair system and repair of equipment in a timely manner.

The Complainant acknowledged that he wanted reinstated to his job with UPS Freight, back pay damages, emotional distress damages, punitive damages attorney fees, and an order to UPS Freight directing posting a copy of the decision in this case.

On cross-examination, the Complainant testified there were no more trailer red-tagging problems after he called OSHA in March 2013. He reported there was a point in time he was asked to drive a trailer he felt was unsafe and that he has refused to drive a trailer in the past; but he has

no notes of documents about such refusal and such refusal was not during March 2013. He reported that he never refused to drive Trailer # 255028 though there was one day he brought it in when "we couldn't get the door shut – I believe the mechanic fixed it right there on the spot. It was just a roller." He stated he never refused to drive a truck that he believed was unsafe in February or March 2013. He testified that G. Strickland said to him that F. Gerster had instructed he was to follow the Complainant for off-property supervision and that later he signed forms acknowledging the two off-property observations by G. Strickland.

The Complainant testified that the temporary alternate work (TAW) first assigned was to shuttle trailers during his normal work hours and when that did not work out he was given a sweeping assignment during normal work hours. He acknowledged that F. Gerster attempted to find other TAW for the Complainant to perform. He testified that F. Gerster never told him what the TAW was to be, just calling him with start times. He denied recalling he was asked to come to work and perform employee observations.

The Complainant testified that the conversation with F. Gerster on April 1, 2013 about using DIAD to communicate other than a cellphone did not result in discipline. He also stated that the off-property videotaping incident and failure to follow safe work procedures did not result in discipline. He reported he had made an audiotape of the April 2, 2013 meeting and had given it to his attorney.

The Complainant testified that between April 3, 2013 and May 8, 2013 "I was being harassed basically every day … [by F. Gerster] complaining about production, complaining about on-property time;" but could not recall any specific dates of occurrence. He stated he recalled his testimony about putting his hands on the desk to get up during the May 8, 2013 meeting with F. Gerster and acknowledged that he had been back to full duty as a driver for almost two months after the back injury at that time. He denied ever seeing a doctor or being treated or taking medication for high blood pressure.

The Complainant testified he applied for unemployment benefits after discharge in May 2013 and September 2013 and both times the company disputed unemployment benefits and both times he was denied unemployment benefits.

The Complainant testified that he reported the incident at Dollar General on September 4, 2013 to G. Strickland by telephone and not DIAD because "calling is more easier (sic) and more efficient. You can actually explain in more detail what you're doing than a text. You're only allowed so many words in a text … The policy is if you're going to be there greater than 15 minutes, you are to call and notify dispatch," you're not supposed to use your DIAD board. He stated "I've been warned and counseled about communicating with dispatch per the DIAD" and did not use it on September 4, 2015. He testified that he did not mention the metal bands or the Dollar General manager demanding that he unband the freight in his written September 24, 2013 statement because he didn't recall it at that time. He stated he had seen the videotape recording from Dollar General and his memory was refreshed about metal banding because "it shown clearly that I could tilt it up on its side and the freight stayed intact on the skid; shrink wrap would not allow metal shelving to stay intact." He stated he did not put anything in the written statement about the manager declaring she knew what drivers make and he remembered it after

the fact. He reported the Dollar General manager was a small women and that the September 4, 2013 delivery was the first time he ever made that stop and the first time he met the manager. He stated the Dollar General manager lied in her written statement but he had no idea why she lied. He stated that he had seen the statement given by the Dollar General clerk working the cash register and he lied also "because his statement says I was complaining about the doorbell and there was no doorbell [and] I would assume he was being directed by his boss; his job would be in jeopardy if he didn't."

The Complainant testified that as shop steward between 2008 and July 2012, he was aware that the company has to take disciplinary action against an employee within 10 days and that timeliness was raised in the September 2013 disciplinary action but he didn't recall anything in the union files about that.

The Complainant testified he recalled his written statement saying he handed the delivery receipt to the Dollar General manager and that he didn't think he told A. Radnoti after his written statement on September 24, 2013 that he placed the deliver receipt on the pallet. He testified that A. Radnoti treated him well and never did anything of retaliation.

The Complainant reviewed RX 40 and agreed that he had been called into F. Gerster's office on February 1, 2013 and given a disciplinary warning about not signing the DECR and then the warning being withdrawn by F. Gerster on February 5, 2013 because he had signed the wrong sheet in the folder that had multiple sheets. He reported that subsequently the supervisors were responsible for removing prior DECRs so only the current dated DECR was in the folder. He indicated he filed a union grievance about the disciplinary warning on February 7, 2013 in case it wasn't remove as F. Gerster had indicated on February 5, 2013.

The Complainant testified that he had been scheduled to perform sweeping as TAW in 2010 following a back injury and that he declined to do the sweeping and had rescheduled his doctor's appointment about his back because that was "my own business – the company doesn't determine when we go see a doctor or we don't. We can reschedule an appointment if we have to." He identified RX 37 as the May 17, 2010 warning letter from that event.

The Complainant identified RX 38 as a disciplinary warning letter he received from Service Center manager V. Sexton for not filling out a DECR in April 2011. He stated that the warning letter "was also withdrawn with about ten others warning notices because there was no policy in effect for the DECRs."

The Complainant testified that he had received a copy of the company's "Professional Conduct and Anti-Harassment Policy and Honesty in Employment Policy and understood that the policies applied to him as an employee.

The Complainant testified that he knew V. Torres as a clerical worker in the office who sat approximately 10 feet away from the manager's office. "She was the person I would call if I had damage or a shortage, things like that." He considered V. Torres to be generally honest with no reason to dislike him. He stated the V. Torres was sitting at her desk the morning he met with F. Gerster in May 2013

The Complainant testified that he could not recall if he had about 8 on-the-job injuries during his employment with UPS Freight and that "it's company policy to report every injury no matter how minor, scratch, bump." He stated he had three accidents and that all three were when he was parked and someone hit him. He stated he was familiar with the term "most to gain" and that related to safety and where those in the company "feel like they could help the employee improve on areas where maybe they're lacking skills." He reported that he had been designated as "most to gain" for injuries. He reported "space and visibility" rides were done yearly in 2012 and 2013. He reported that he had never been notated on a "space and visibility" ride for having a major problem. He reported he did not recall R. Russell doing a "space and visibility" ride on February 20, 2013, though he did recall R. Russell notating he was not in compliance with the space and visibility requirements.

The Complainant testified that he was not with G. Maynard the day the mall security guard made a complainant and his knowledge of the event was from attending meetings as shop steward and that he was not involved in the investigation. He stated he had no firsthand knowledge of the Coloplast situation involving K. Turman. He stated he had no firsthand knowledge about the customer complaint involving J. Stringfield.

The Complainant testified that he never went to a doctor about emotional distress after being fired a second time by UPS Freight and was never prescribed medication or formally diagnosed with depression and did not have insurance for a doctor and could not afford to see a doctor. He stated his wife did not maintain health insurance through her job because "I have always maintained our insurance" and that he was familiar with COBRA and that there are options to enroll in health insurance outside of enrollment periods. He stated he opted not to take COBRA extension through UPS Freight because of the cost and that he was told they would have to wait until the beginning of the next year enrollment period in October 2014 to enroll under his wife's company health insurance plan. He stated his insurance plan was reinstated by UPS Freight following the first firing and that the reinstatement came about one week before he was fired the second time. He stated that $5,000 hospital expense incurred for treatment of a step-daughter was in July 2013 and denied after the September 2013 firing.

On re-direct examination, the Complainant testified that he went back to the Dollar General store with counsel and observed the dock area and that there was no doorbell at the dock. He also stated he had a good relationship with F. Gerster at the time he withdrew the February 2013 warning on the DECR.

Upon examination by this presiding Judge, the Complainant testified that he did not perform temporary alternate work in the form of observations of other drivers outside of his normal work hours and took two days of sick leave "because I didn't want to miss time with my family at night."

September 24, 2013 Written Statement of Complainant (RX 30, page 7; RX 26, page 50; RX 29, page C4)

On September 24, 2013, the Complainant made the following written statement concerning his September 4, 2013 delivery to Dollar General –

On 9-24-13 I arrived at dollar general back door for a delivery. I knocked on the door and no one answered the door. I had on skid around 100 lbs, I unloaded the skid at the back door off the trailer, then drove around to the front of the store in the shopping center. I told an employee I had a delivery at the back door. The employee "He" went and got a woman and she and I walked to the back door, she open the door and I pulled the skid in the door by hand. I pulled it thru the door over 15 feet where she asked me to put it. Then she didn't like where it was and asked me move it another 50 feet on the other side of the back room, I said I couldn't because I had nothing to move it with and I'm only responsible for bringing it thru the door. She look at me and said "with that Fucking attitude I'm surprised you have a Fucking Job !! I said, I just need a signature and she said "I want your boss name and number, I said sure. I wrote it on her copy of the DR and I handed it back to her and said have a nice day. And she said "go to Hell." I turned and walked out of the store and called [G. Strickland] and told him what happened.

Testimony of Troy Narron (TR 34-57, 485-516)

T. Narron testified that he is employed for 11 years by Respondent has served as Regional Director for Southeast East since February 2013. He supervises 11 terminals in South Carolina and Georgia and was the supervisor of F. Gerster in February and March of 2013 and supervisor of A. Radnoti in September 2013.

T. Narron testified that he received a telephone call from Complainant in early March 2013 reporting that F. Gerster was trying to use a trailer with a damaged door. He stated that "red-tagging" is a procedure where a driver places part of the tag on equipment needing repair to warn others not to use the equipment and turns the other part into management to notify them repair is needed. He stated that on or about March 5, 2013, he became aware that the Complainant had filed an OSHA complaint alleging UPS was allowing equipment that had been "red-tagged" to go back on the street without repairs being made. He reported F. Gerster called him about the Complainant's OSHA complaint about "red-tagging" and he directed him to contact L. Kerr, the HR supervisor with the compliance team in Richmond, Virginia, to prepare a proper response to the OSHA notice. He testified that company trailers are augmented by rental trailers and that "we're not short on equipment in Marietta … We have two major customers there, Coloplast and PlayNation that require trailers above and beyond to pull. So the trailer inventory is not an issue; never has been an issue in my tenure at Marietta" and that they still rent trailers for the Marietta facility.

T. Narron testified that on or about March 9, 2013 he was told by F. Gerster that the Complainant had walked off the job and had been invited to come back to the office and sit down. He discussed with F. Gerster appropriate discipline for the incident as an offense of extreme seriousness.

T. Narron testified that learned from supervisor A. Radnoti on the Monday or Tuesday morning before the 4:38 PM, September 17, 2013 e-mail from A. Radnoti (RX 26) that the manager from Dollar General had called and made a customer complaint involving the Complainant but was unaware that the Complainant had reported the incident the day it occurred. He agreed that the normal procedure is for the employee to report a customer dispute so management can get on it right away and investigate the dispute. He stated he directed A. Radnoti to go to Dollar General, visit Ms. Manzanares in person, and report back in an e-mail recapping what she had to say during the visit.

T. Narron testified whether the driver has to sort and segregate a product delivery depends on the customer contract. He stated if there would be a need for the driver to unband product with tin snips on delivery for a customer, management would make the driver aware of that unusual requirement. He stated that UPS charges customers an extra fee for inside delivery beyond the loading dock doors, as well as sorting and segregating product on delivery. He did not recall talking to the Complainant about the customer complaint. He testified that "after our investigation with the customer, she was obviously felt threatened and intimidated and that was the reason I decided to terminate [the Complainant]." He stated that Complainant's prior work record had nothing to do with the decision to terminate in this particular case involving the customer complaint. "I mean, it's extreme seriousness. I mean, obviously [the Complainant's] pattern of aggressive behavior earlier in the year with [F. Gerster] was in my mind. I'm not going to sit here and say that. But I mean, it didn't matter if it would have been you; if you'd have done that [with] the customer, I'd have terminated you for the same reason." He testified that he watched the security video taken on September 4, 2013 showing the Complainant's delivery. He reported there was no sound to the video and that "there was nothing I observed in that video from a customer standpoint that I felt warranted the way [the Complainant] acted … You could tell in the video he was agitated. He wailed his arms around. … there was some verbiage between the two and [the Complainant] flipped the bill of lading, the DR, and based on the statement we had from [the manager], that lined up with, again, another instance of aggressive behavior." He testified that he could tell from the security video that the manager was upset and that the proper thing for a driver with the Complainant's experience to do is not to agitate the customer more and seek permission from the supervisor to perform the customer's request if beyond normal delivery procedures.

T. Narron testified that he was aware that a customer dispute involving UPS Freight driver K. Turman and Coloplast and that K. Turman still worked for UPS Freight. He stated he was unaware of a customer dispute involving J. Stringfield, a UPS Freight employee. He was aware of a complaint being made by a security guard involving delivery driver G. Maynard in which the customer supported G. Maynard and that G. Maynard still works for UPS. He reported he was unaware of any customer complaints involving V. Norton who is a UPS Freight employee.

T. Narron testified that he was aware that F. Gerster observed and videotaped drivers in Atlanta after his assignment there; but was unaware of the drivers observed by F. Gerster while he was at Marietta. He reported driver observations is something management does. He stated he has "followed drivers and done on-road observations."

On examination by this presiding Judge, T. Narron testified that the termination letters were delivered by F. Gerster in May 2013 and by A. Radnoti in September 2013. He testified "I had the final decision on the termination. I use the labor manager and HR and any resources I have at my disposal for investigation; and then, at the end of the day, I'm going to talk to labor and HR and get their recommendation; but the termination piece at the end of the day falls in my lap." He reported he made the final decision on termination in both May 2013 and September 2013.

On examination by Respondent's counsel, T. Narron testified that he relocated from the South Holland, Illinois hub to his position as Southeast East Region Director of Operations in February

2013 and had no personal knowledge of the Complainant prior to taking the Director of Operations position. He reported he had not discussed the Complainant with his predecessor. He stated F. Gerster was the Service Center manager in Marietta. He described F. Gerster's management style as a "process manager" who is firm and fair and a "by the book, black and white process" manager who did not come up through the business. He considered a "relationship manager" as one who came up through the business and knowledgeable about what a driver or dock worker is going through. He stated that relationship manager often times have an easier time relating to the employees buy they don't always get results. It takes the right mix of technology and relationship to be successful. He testified that F. Gerster followed the same approach with all his employees and "he doesn't change the way he goes about his business" and it sometimes causes friction with employees.

T. Narron testified that he was successful in reducing road driver crashes in the South Hub, Illinois center by implementing on-road observations. He testified that when he became Director of Operations he wanted to beef up on-road observations and depth of knowledge of the employees and reduce the 35 to 40 hours per day of on-property time that was keeping the Marietta Center from hitting performance goals. He also began scrutinizing the lunch period because some employees were not showing a lunch at all and looking for ways to better utilize the space on the docks. He stated he followed up on the safety initiative and on-property time initiative with the supervisors on the daily staff call. He stated "depth of knowledge" was to make sure the drivers knew the methods and procedures, the leads, backing and safe work methods. He also assigned every manager a UPS university course for personal development related to an area of identified weakness. T. Radnoti was assigned a course on managing people and F. Gerster was assigned a course on emotional intelligence. Another supervisor was assigned a contract class.

T. Narron testified that he had a "safety tracker" for on-road observations that he would use to ask managers questions and hold them accountable for conducting on-road observations during the daily staff calls. He also had a report giving the on-property time for drivers at each terminal he managed and he would use that during the staff calls to ask managers why a particular driver had so many hours on the property. He testified that he required his managers to follow-up, investigate, and take disciplinary action if there was a problem. He required managers to log discipline discussions and warning letters in the discipline log and fax him a copy so he could validate that it was being done across the board.

T. Narron testified that F. Gerster called him in May 2013 and could not wait for a call-back. He took the call and F. Gerster "commenced to telling me he was bringing [the Complainant] in for an on-property discussion and it escalated out of control to the point he felt threatened. He asked [the Complainant] to come back in to discuss it, [the Complainant] refused [and] went home sick. He stated that F. Gerster was noticeably upset and was a little taken aback to the point he was questioning what he could do. He directed F. Gerster to get with M. Cohen or R. Gannon on the labor side and B. Shafer in HR. He stated he would contact E. Morrow, the Vice President of Security and Claims involved to determine what had to be done for a meeting with the Complainant the next day. M. Horn was provided from the small package side of security who was present in case things escalated during the meeting with the Complainant. T. Narron testified that during the meeting with the Complainant and F. Gerster, the Complainant was

asked if there were any additional details that would change management's mind about imposing discipline for the May confrontation with F. Gerster. The Complainant did not apologize for his behavior to F. Gerster and did not take any ownership of his actions. At the end of the meeting the Complainant was taken out of service. He testified that after the meeting he talked to V. Norton separately to ensure F. Gerster had maintained professionalism and self-control in the May meeting with the Complainant and was told F. Gerster had not raised his voice but she would not make a written statement as a union steward. He reported that V. Torres overheard part of the meeting between the Complainant and F. Gerster and reported in two written statements that he reviewed during the investigation that the Complainant "was out of control or loud." He reported that the UPS labor section gets involved to ensure the managers are following procedure, being timely, and following the collective bargaining agreement. He stated that "anytime you have something that escalates to possible workplace violence or somebody's civil rights have been violated or somebody's safety is in jeopardy, you have to get HR involved … to make sure we have done everything possible , that there is no hostile work environment, workplace violence, nobody's civil rights had been violated." He testified that he made the decision to terminate the Complainant because he violated the workplace violence policy and the employees in Marietta and the manager were not comfortable with the Complainant crossing the line. He reported he had a similar experience with a P&D driver being out of control and hollering during a meeting involving extended lunch times and terminated the driver for his behavior. He stated that he attended the May 2013 termination meeting with the Complainant and F. Gerster since F. Gerster was new and the Complainant had proven to be challenging at best.

T. Narron testified that the Complainant followed Union grievance procedures on the May 2013 termination. He stated that part of his duties require him to participate in the Joint Labor Panel that addresses grievances. He reported participating in panels all over the country as a regional director and that from his experience "seldom do you get a termination on first time to a panel" and the panel has the option to reduce termination to paid or unpaid suspension; if it is an unpaid suspension the panel is sending a strong message. He stated that when the Complainant returned to work in July 2013, F. Gerster had been promoted and relocated to Atlanta hub and T. Williamson became the interim Service Center manager.

T. Narron testified that the Complainant's name came up again when A. Radnoti reported an incident at the Dollar General and that the manager was upset and he wasn't sure what to do. He directed A. Radnoti to visit the Dollar General manager, 'smooth it over … protect the brand, protect our business and get all the details." He was told during that initial contact that the Complainant was the driver involved. He testified that A. Radnoti visited the Dollar General store, met with the store's employees and obtained statements, which he reviewed. He also reviewed a security video of the incident which "lined up pretty well with what she had described" – "the wailing of the hands is there, the flipping of the bill is there." He stated that he was concerned about the delay between the incident and the time management took to address the incident. T. Narron testified the he made the decision to terminate the Complainant's employment because of the event at Dollar General, after consulting with M. Cohen and M. Gannon from UPS labor. He reported that during the local level hearing with the Complainant and the union representative a break was taken so that M. Gannon and union representative S. Webber could visit Dollar General at which time the union representative apologized to the

Dollar General manager. He stated that the Complainant did not acknowledge that he had done anything wrong, did not apologize to the Dollar General manager or for his behavior.

T. Narron testified that he was aware, from F. Gerster, that the Complainant had filed a complaint with OSHA involving issues with a trailer. He reported his only involvement was to tell F. Gerster to contact L. Kerr of the compliance team to walk him through the OSHA response. He stated he is responsible for enforcing the company's anti-retaliation policy. He testified that the Complainant's filing of an OSHA complaint played no part in his discharge, the Complainant was treated the way he would treat anybody in that circumstance.

On cross-examination, T. Narron testified that he did not remember the filing of an OSHA complaint being brought up at either of the two local level discharge hearings for the Complainant. He stated that the balance scorecard metrics for managers does not include any consideration of OSHA complaints. He reported that UPS has regulatory compliance audits that are done quarterly during which OSHA and DOT violations would be found in those audits. He testified that a supervisor being challenged by a member of the bargaining unit is not uncommon; "but being unprofessional and raising your voice and slapping your hands on the desk and trying to intimidate is uncommon in any workplace. Bargaining unit, non-bargaining unit, we are not going to tolerate it." He reported that he has experienced challenges before but hasn't fired anyone before for it. He reported he does not tolerate it "when I started in this business, [it was] a different time than it is now."

Testimony of Felix Gerster (TR 58-94, 369-447)

F. Gerster testified that he has been employed by UPS Freight since 2006, is currently the Atlanta Assistant Hub Manager, and was the Service Center Manager at the Marietta facility during the Complainant's time there. He reported that he had worked in sales, been a dock manager, a dispatcher, and assistant terminal manager prior to becoming the Service Center Manger in Marietta in February 2012. He reported having a good working relationship with the Complainant until sometime before he had "red-tagged" a trailer for its door in February 2013. He stated that on several occasions in February 2013 the Complainant had "red-tagged" a trailer and complained that it was being put back on the road without repairs being made. He reported that both he and the Complainant were on the safety committee at the Marietta facility. He reported that Complainant resigned from the safety committee but he did not recall why he resigned or the exact timeframe of the resignation.

F. Gerster testified that he received a fax from OSHA indicating that the Complainant had filed a complaint and identified RX 1 as a copy of the OSHA fax sent directly to him. He stated that the shop steward, V. Norton, had told him that the Complainant had filed an OSHA complaint concerning trailers being "red-tagged" and being placed back on the street prior to receiving the OSHA fax. He stated that the fourth page from the back in RX 4 was the notice posted at OSHA's request in the breakroom at the Marietta terminal.

F. Gerster testified that the Marietta terminal was not short of lift gate trailers in February 2013, they were renting 53-foot and 48-foot trailers from Extra Lease and Metro. He testified that the statement in RX 5 was a typographical error and should read he "does not discourage the

mechanic from repairing equipment because he doesn't want to be short equipment." He stated that whether the trailer in question was dead-lined or not, Marietta was not short on equipment. He testified that he disagreed with the Complainant's assertion that equipment was being sent back onto the road without repair after being "red-tagged". He testified that M. Christopher is a contract mechanic and that he and M. Christopher tested the trailer door numerous times on March 1, 2013, after the Complainant had "red-tagged" the trailer for being hard to open and close, and it was found safe to drive by the mechanic who signed off on the red-tag. He acknowledged that a broken door on a trailer would affect the safe operation of the trailer. He did not recall any broken door panels on the trailer but did recall that the door was hard to open and close because of warped welds on the door tracks, which were fixed by M. Christopher. He reported that the trailer door concerned was repaired three times: on March 1, 2013 by M. Christopher, another time in the Marietta facility, and on March 5, 2013 in Atlanta.

F. Gerster testified that the Complainant was a pick-up and delivery driver who used a tractor trailer. The Complainant would pick up a loaded vehicle in the morning, deliver to customers and does pick-ups. He stated the drivers do not usually load a trailer; it is normally loaded by dock workers, though a driver may have to break down a load from time-to-time so it doesn't slide all over the trailer. He acknowledged that loose freight could shift and go out the back door onto the streets if the door was damaged. He stated he did not remember any holes in trailer doors because he would not have allowed any trailer with any holes in the doors to leave the terminal.

F. Gerster testified that there was a time in March 2013 when he reviewed lunch break time with the Complainant. He reported that Telematics is a computer on vehicles which records driver time for pay and performance purposes and for DOT audit purposes. He stated that he had an official discipline meeting with the Complainant for going over the lunch time. He did not discipline or verbally remand anyone else for being over lunch time in March 2013.

F. Gerster testified that in March 2013 the Complainant was placed on temporary alternative work due to a work-related injury. He reported that employees normally perform work inside their job scope during temporary alternative work. For drivers, that would not include filing or answering telephones. The drivers are kept on their normal work schedule if the temporary alternate work found for them allows for that. He testified that the Complainant usually started his day as a driver around 9:00 AM. As a union member driver, the temporary alternate work found for the Complainant involved on-property observations of other drivers. The complainant's work restrictions made available work very limited. Only one good on-property observation could be made at 9:30 AM when drivers are leaving the property, but the city drivers returned at random times every single day after 6:00 PM "so [the Complainant] could do multiple observations on different drivers during that timeframe" beginning at 6:00 PM. He stated that he had taken the Complainant to the doctor at Century who wrote up a slip with certain work restrictions. He denied asking the doctor to change the work restrictions and stated he had asked to "review the document with the doctor to ensure I was working within [the Complainant's] restrictions." He stated he had "asked for clarification on his restrictions and he notated that on the paperwork." He testified that he always talks to doctors about medical restrictions on employees "to make sure I work the employees within their restrictions."

F. Gerster testified that he did not ask either "Germain" (G. Strickland) or P. Nelson to follow the Complainant on March 26 or March 28, 2013. He stated that he did follow the Complainant on April 3, 2013 after the dealership delivery. He stated that he routinely used video cameras when following an employee for labor reasons. He testified that the collective bargaining agreement permitted surveillance and videotaping of union members. He stated he met with the Complainant and union steward V. Norton after the April 3, 2013 observation to go over UPS's prescribed work methods including bending knees during work. He reported that it was evident to him that you could see the Complainant's whole body during the video, even though the Complainant stated his knees could not be seen on the videotape. He stated that he believed he also addressed the Complainant not following the 4 to 6 second following distance practice when over 30 MPH. He reported that when you are stopped, UPS policy is to let one car length in distance remain and when you start up you are supposed to count to three before moving in order to maintain proper driving distance in stop and go traffic.

F. Gerster testified that he met with the Complainant and union steward V. Norton on May 9, 2013 to discuss his excessive on-property time on the morning of May 8, 2013. The Complainant claimed the time was due to his DIAD not coming on right away and a meeting he had with F. Gerster that morning. He agreed that the DIAD not coming on would skew the amount of on-property time that a driver has and that it is not the process to talk to dispatch about on-duty time. He testified that the Complainant absolutely exhibited threatening conduct towards him, but not verbal threats, at the May 9, 2013 meeting; but he did not call security or the police or the company hotline. He testified that after the Complainant "yelled, stood up and did physical motion toward me and screamed 'this is bullshit'" and then stated his blood pressure was up and he didn't feel safe to drive. He reported the physical motion towards him by the Complainant being hunched over the desk and slapping his hands down, fast and hard. He stated that he asked the Complainant to come back into the office and sit down after the incident. He reported that Complainant left the building.

F. Gerster testified that he never had fired an employee for a customer complaint. He stated that Coloplast requested K. Turman be removed from his duties for not marking hazardous materials correctly, but he was not fired. He reported remembering that there had been some issues on where UPS drivers were parking and accessing trailers at Jos. A. Banks, which was a limited access area.

On examination by Respondent's counsel F. Gerster testified that he was the Service Center manager at Marietta for roughly 16 months before becoming the assistant hub manager in Atlanta in June 2013. As Service Center manager he was responsible for the day-to-day operation of the entire terminal including aspects of production, safety and customer facing. He reported he considered is management style to be firm and fair based on being detail-oriented, process-driven, and analytics. He looked at key performance indicators at the terminal on a daily basis. One main tool is Telematics which "essentially is a GPS system inside the tractors that lets us observe drivers' behaviors from a standard standpoint, production standpoint." He reported that the terminal was working well when he took over operations and "it was harder to tell a good employee that he needed to do better … you have a good employee who has been good on average; but again my goal was to get to great, and … I asked the group in general that they need to step on it." The approach did create some employee relations issues.

F. Gerster testified that drivers are required to sign off on a daily equipment conditions report (DECR) on trailers they bring back to the terminal every day. He stated the DECR is "probably one of the most important safety documents we have from a liability standpoint. So I guess I would give a situation where if a road driver returns with a trailer and he writes it up on a DECR for having an issue with it, and the mechanic does not repair it, if that equipment leaves that day for the day into the city operation with a driver and it's involved in an accident, it's found that it was faulty, that's a serious liability on the company. So it's extremely important to us to make sure that the DECRs are recorded every day and that the appropriate mechanic is looking at it and signing off on it." Some drivers had to be disciplined for not signing off on the DECRs. He stated that, because of the nature of the consequences that a DECR could have, not signing off on a DECR when returning a trailer to the terminal is an automatic written warning in the company. He identified RX 40 as the DECR written warning he gave to the Complainant on February 1, 2013 for not signing off on a DECR as required. He stated the Complainant was not happy about the written warning and filed a grievance. During the grievance process he found out additional information and rescinded the written warning.

F. Gerster testified that the Complainant made additional complaints about the trailer door on the lift-gate trailer being hard to open and close and that he and on-site mechanic M. Christopher looked to fix the reported problem. He stated that M. Christopher is responsible to make local repairs that can be fixed without sending the trailer to the trailer shop. No equipment can be allowed taken out of the terminal unless M. Christopher signs off on it. He reported "not at all" as to the existence of any structural cracks or breaks in the door panels on the trailer door reported by the Complainant. He stated that his inspections of the door did not appear to present any risk of freight flying out of the back of the truck and that he "would never have let it go into the city that day if I thought so. Unfortunately I've had a certain incident like that before in the past where freight had fallen out, so I was very sensitive to that matter." He reported M. Christopher was an approved mechanic for Marietta and "I felt if he signed off on it, it's deemed safe to operate and I trusted his judgement." He stated that the particular trailer involved had the door repaired the first time reported, operated in the city without problem and was reported as having an issue subsequently where it was again repaired in Marietta. When the issue came up the third time, the trailer was sent to Atlanta for repair. He reported that he was not short of lift-gate trailers when the trailer in question was out of service, and there was no impact on trailer availability when the trailer was sent to Atlanta for repairs. There was no shortage of trailers in Marietta at all.

F. Gerster testified that V. Norton had told him that the Complainant had filed an OSHA complaint about "red-tagging" the trailer for the door several days before he received a fax from OSHA involving the complaint about Trailer #255028. He reported he was disappointed the OSHA complainant had occurred "simply because we felt like we handled the matter correctly internally and it didn't need to be escalated to OSHA." He reported that this was his first OSHA complaint so he called T. Narron immediately for advice and to explain the facts of what happened. He was advised to contact L. Kerr who "handles all the OSHA complaints for the UPS Freight." He sent a copy of the complaint to L. Kerr and began collecting the documentation needed to send to OSHA. He identified RX 2 as containing a copy of the OSHA complaint, copy of the requested OSHA complaint posting, and a timeline he prepared highlighting how Trailer #255028 was used and repaired from the DECR log. He testified that

Trailer #255028 was driven into the city February 22, 2013 by G. Holt with no exceptions noted on the DECR and okay to drive. The Complainant took the trailer on February 25, 2013 and noted safety-related issues on the DECR and the trailer was taken out of service that day. He identified the DECRs in RX 2. He reported that he logged the concerns on the CHSP for the safety committee. He stated he worked with L. Kerr to prepare the company's response to OSHA, that he had final say on the response, and that RX 3 is the company's response to OSHA. He reported he did not receive any official document from OSHA but was told that the OSHA complaint was determined to be unsubstantiated.

On cross-examination, F. Gerster testified that his performance evaluation is not impacted in any way by an OSHA complaint being filed and he has never been criticized or disciplined because of an OSHA complaint. He stated that he did discuss the "red-tag" procedures with B. Shafer who handles company hotline complaints. He reported "I never removed a red tag. I never instructed my supervisors to remove a red tag, so we thought it was necessary to review the policy with the group, so … that's what [B. Shafer] instructed me to do was PCM the group on "red-tagging" procedure and process for Marietta" because "we thought there was maybe some confusion among the group from the drivers' standpoint." The group PCM on "red-tagging" was done the following day.

F. Gerster testified he was aware that the Complainant alleged he was subject to "nitpicking and over-supervising his performance as a driver" after he filed the OSHA complaint. F. Gerster denied ever making attempts to harass or over-supervise the Complainant because he had filed an OSHA complaint and that he had legitimate business reasons for the discipline he administered to the Complainant.

F. Gerster testified that he was given an employee observation report by G. Strickland concerning the Complainant. He reported there is an on-road observation of employees and an on-property observation of employees. A supervisor or manager is required to perform five on-property observations every week, of which three each week have to be of "most-to-gain" employees. On-road observations are done once per week for four times a month. Since there are four managers, each manager does one a week. He stated that new employees and those drivers who have been injured are placed on the "most-to-gain" list by someone in HR. The Complainant was identified by HR as a "most-to-gain" driver in March 2013 and the related observation was assigned to G. Strickland.

F. Gerster testified that on March 15, 2013 the Complainant was counseled for taking a 31 minute lunch break as reported by his DIAD Telematics. He stated that Telematics showed the Complainant had physically taken a 41 minute lunch period instead of the allowed 30 minutes so he was not just 1 minute over the lunch period. He testified that what the Complainant's "Telematics showed us for that day was that he arrived, he sat there for four or five minutes beforehand, then jumped on lunch, took a 31 minute lunch which to me again wasn't an issue, and then he sat there for another four to five minutes afterwards before he left. Combine that together was a 41-minute lunch and that is what he was disciplined for." He reported that Telematics prepares a list of drivers that have excessive time on-property and non-travel/stop time, which he reviews on a daily basis.

F. Gerster testified that it was standard procedure for managers to accompany their employee to the doctor when there is a work-related injury. This is done to make sure the employee is properly taken care of and to get a full understanding of the employee's work restrictions. He stated when he went to the doctor with the Complainant, the Complainant saw the doctor and came out with very vague work restrictions and did not list anything about the Complainant being unable to drive. He stated he wanted clarity from the doctor since one of the jobs for the Complainant could be as a shuttle driver moving full or empty trailers without loading or unloading duties, which is a much easier job physically than pickup and delivery driver. The doctor said he could shuttle trailers and put that on the work restrictions paper. He testified that the Complainant was assigned to shuttle trailers during his normal workhours; but that didn't go too well. The Complainant was sent to a customer site to pick up an empty trailer and complained about back pain about an hour into the work. He reported talking first with the Complainant and then with the doctor about the increased pain and the doctor restricted the Complainant from driving and provided a revised work restriction paper by fax. The day the Complainant tried shuttle driver, he worked the minimum 4 hours and was able to go home for the rest of the day. The Complainant returned the next day for normal duty hours and was assigned duties including sweeping, which also did not go well. The Complainant again complained about increased back pain. He stated he assigned the Complainant duties as a safety observer on the P.M. shift because you can observe more drivers for safety activity on the yard than in the two morning start times. The Complainant's job was set up so he would sit at the covered fuel bay with a notepad and observe drivers returning from the bay into the terminal. It never got to the Complainant refusing to do the safety observer work because he called out sick the next two days and then reported cleared for full duty on March 25, 2013.

F. Gerster identified page 5 of CX 6 as a March 25, 2013 on-road observation form from G. Strickland that he was given on March 26, 2013. He stated he did not tell G. Strickland to do the observation and that it is fairly customary for an observation to be done on an employee returning from an injury. He acknowledged that P. Nelson also did an on-property observation on the Complainant on March 28, 2013. In an off-property observation "you observe the behavior in their natural element … where they're not being observed … the point is to observe their behavior out on the streets." Off-property observations had been with the company for years but not pushed the way T. Narron wanted it done as a key element for success – set up a schedule, have a timeline, and try to complete the observations timely. He stated the observations began after T. Narron arrived from the Chicago terminal in February 2013. He reported that the off-property observations typically focused on "most to gain" employees. He stated he did not instruct G. Strickland to observe the Complainant and surmised that since G. Strickland is the in-bound supervisor who ends his day when the Complainant starts his and the Complainant's morning run was in the direction of G. Strickland's living area, I think he basically, naturally, followed [the Complainant] out of the building and started an on-road observation." No discipline was imposed from the March 25 and 28, 2013 observations of the Complainant.

F. Gerster testified that he changed past practice of drivers reporting delays in deliveries to their supervisor by cellphone to entering delays in the DIAD. It was unfair to the drivers to use their own cellphone to make delay calls and unfair to the supervisors to remember a specific delay call among the 150 calls they would receive each day. By entering delays in DIAD he could "pull

the data out of the records and prove on a piece of paper that, yes, in fact there is a delay." The change to reporting delays through DIAD was rolled out in a PCM with the drivers.

F. Gerster testified that he received a call on April 2, 2013 that the Complainant was having difficulty getting out of a car dealership and he decided to go and assist the Complainant get out of the dealership without backing into a $60,000 truck; but by the time he got there the Complainant had made the delivery and was pulling out. He stated he decided to complete an on-road observation of the Complainant and video record the observations, which is standard practice for him so the employee can see the footage from a labor standpoint. He reported having a meeting with the Complainant and V. Norton the next day. One issue was properly bending at the knees when closing the rear door to avoid another back injury. Both the Complainant and V. Norton disputed whether the Complainant's full body could be seen in the video. No discipline was imposed as a result of the on-road observations. He reported that he has done other on-road observations of employees and on one occasion terminated an employee for dishonesty after being observed using a cell phone while driving which he denied when confronted in the office and shown the video taken during the on-road observation.

F. Gerster testified that he starts every day holding a PCM (pre-shift communications meeting) with the drivers which addresses safety first before covering other topics. He reported that at the morning PCM on May 8, 2013 the Complainant was "being very loud, obnoxious, yelling hell no, and interrupting me" at which time the Complainant was asked to refrain from comments and he "flicked me off." He reported he called the Complainant and V. Norton to his office and talked about interrupting the PCM and flicking him off. He identified RX 39 as a report of the May 8, 2013 incident.

F. Gerster testified that "a driver is allowed a specific amount of on-property time every single day, whether it be on the start, finish or turn, so the company and I found that Marietta [in] general had excessive on-property [time] as a group … excess on-property essentially is the extra time that a driver spends on-property for the day." He stated on-property time was a key metric that T. Narron had emphasized. He stated that he reviews an on-property report each morning showing drivers' time on-property for the previous day. He identified RX 18 as the on-property report reviewed May 9, 2013 for May 8, 2013. RX 18 showed the Complainant with the highest on-property time in the building for May 8, 2013. The Complainant's on-property time for May 8, 2013 was 1.4, which is one hour and 20 minutes. He stated the Complainant had been counseled several times prior to May 8, 2013 about excessive on-property time. He identified RX 15 as counseling for the Complainant on April 1, 2013 for excessive on-property time during the month of March 2013 as shown in RX 16. He stated that he had not counseled V. Norton for excessive on-property time because as union shop steward she is expected to sit in on reviews every single day and have higher on-property time. He identified RX 17 as the Complainant's trip summary report for April 17, 2013 which shows the Complainant delayed departure until 10:50 which is an excess of 30 minutes on-property time. That excessive time was reviewed with the Complainant by P. Nelson.

F. Gerster identified RX 14 as the document he prepared from the May 9, 2013 discipline meeting with the Complainant with V. Norton present. RX 14 was the warning notice for excessive on-property time since it had been addressed with the Complainant previously

verbally. He testified that the collective bargaining agreement requires action within specific periods of time "so my approach is to gather all the facts possible that I can at the time, present the discipline document with information at hand, review this, and then issue the discipline; and from there the employee is supposed to file a grievance … and then we work through the labor process to review facts that might come into play after the fact." He stated the Complainant indicated his DIAD went down but there was no time to check that out since the meeting quickly escalated. He reported he and the union steward signed RX 14 but the Complainant "refused to sign it, which he's entitled to. [V. Norton] signed it as shop steward and [the Complainant] was very unhappy with that, claiming I was micro-managing the group, over-managing them, micromanaging were the terms used. At that point he stood up, proceeded to walk out of my office. Like I do with most employees, I tell them to have a safe day, 'be safe today.' … when I told him that, [the Complainant] made the comment, 'Not for you, I won't.'" He asked the Complainant to return to the office. The Complainant "was very combative, you know, becoming more I guess emotionally raised, claiming again I'm harassing him and that we're being micromanaged and I asked him to elaborate on that comment. He failed to do so – he would not elaborate. And it ended up with him standing up very quickly, hunched forward over my desk, screaming 'This is bullshit' in a very loud, physically threatening manner." He stated he asked the Complainant to "sit back down. He failed to do so. [The Complainant] then claimed that he was sick, high blood pressure, and he had to leave for the day. And then he proceeded to walk out of my office. At that time I yelled, hey Ken, hey Ken, hey Ken, I need you to come back. Ken failed to comply and kept walking." He asked V. Norton to go after the Complainant and let the Complainant know the consequences for leaving for the day. F. Gerster testified that he was shocked by the incident and had never had a situation like that happen and it was far beyond anything he could have imagined. He reported the Complainant "never verbally threatened but it was a very physically threatening demeanor of which he rolls up and moved forward towards me and with the motion of his hands slapping onto the table." He reported calling T. Narron and "walked him through what took place." T. Narron directed him to call the labor manager because it was a serious event. F. Gerster identified RX 10 as his statement about the event and RX 12 as his subsequent statement to B. Shafer of HR. He reported that clerk V. Torres prepared RX 11 as her statement of what took place on May 9, 2013 and RX 12 as her statement about the Complainant in general. He identified RX 9 as a timeline he prepared for the period leading up to May 9, 2013.

F. Gerster testified that he and T. Narron met with the Complainant May 10, 2013 with a person from small package security present. The purpose of the meeting was to take the Complainant out-of-service (suspend) pending an investigation. The Complainant stated he did not see a doctor for high blood pressure after he left F. Gerster's office on May 9, 2013. He stated the decision to terminate the Complainant's employment was told to him by the labor manager. The Complainant was terminated. He filed a grievance through the union and the termination was later reduced to a two month suspension without pay by the joint labor/union panel.

F. Gerster testified he was promoted to Assistant Hub Manager and left the Marietta facility before the Complainant returned from his suspension. He stated T. Williamson replaced him as terminal manager at the Marietta facility and that he never discussed the Complainant with T. Williamson. He reported he was aware that the Complainant was subsequently terminated but had no role in that event.

F. Gerster testified that he reviewed the company's anti-harassment and retaliation policy as part of annual training and assisted in the review of the policy with his employees frequently.

On cross-examination, F. Gerster testified he agreed with the decision to discharge the Complainant in May 2013 but did not know exactly who made the decision to terminate the Complainant's employment. He agreed that the Complainant "had gotten angry and loud" with him at the May 9, 2013 meeting and that some employees in the past had raised their voice to him in the past but "at that level of escalation of that demeanor, yes, few and far beyond anything I had to deal with" but the Complainant was not the first to raise his voice in a meeting.

F. Gerster testified that the standard time for a driver to "get out the gate" to start the day is 20 minutes. The 20 minutes is not in the union contract nor is it a posted work rule. He reported discussing the 20 minute time expectation in several PCMs with the employees. PCM meetings are done each morning, are included in on-property time, and "should take less than three to four minutes." The 20 minute period starts at punch-in to start the workday. If the driver has to wait for freight in the morning they are instructed to make an entry in DIAD that takes them out of on-property time. The time a driver uses to inspect the tractor, trailer and freight is included in on-property time. He agreed it was fair to say that some drivers have different standards to satisfy themselves that their tractor and trailer are in safe operating condition.

F. Gerster testified that he believed the Complainant was the only driver he had videotaped while at the Marietta facility. He stated that driver lunch time was 30 minutes but that up to an hour for lunch could be approved by management. He reported he wanted each supervisor to perform one on-road observation each month, but that did not happen because sometimes it was hard to get out of the building or someone was absent. He reported G. Strickland and P. Nelson were supervisors who reported to him and that G. Strickland performed an on-road observation of the Complainant March 12, 2013; P. Nelson subsequently did an on-property observation of the Complainant; and then there was another on-road observation of the Complainant by G. Strickland. He stated that the supervisor who did the observation fills out a specific observation form and discusses the observation with the employee.

F. Gerster testified that the Complainant was offered temporary alternative work on the night shift as a safety observation. Managers and hourly employees can conduct the safety observations. A schedule is set up for safety observations each week. He acknowledged that a driver is free to refuse temporary alternative work. He stated that he considered the Complainant's doctor's restriction vague at first, as to the scope of the job.

F. Gerster testified that he expected each driver to do a walk-around inspection of his tractor-trailer when he leaves and that it can take time for the driver to build the air system when he enters the truck. He stated that the policy for "red-tagging" of equipment remained the same at the Marietta facility and did not change after the Complainant filed his March OSHA complaint. There was a PCM to ensure everyone knew and was clear on the procedure for "red-tagging" equipment.

F. Gerster testified that the only person who would sign off on equipment as being safe to operate in Marietta was the mechanic. He agreed with the mechanic that the trailer was safe to

operate but did not sign off on the equipment. He reported that the mechanic had signed off on the trailer issues twice before the trailer was sent to Atlanta for a full inspection and repair.

F. Gerster testified that he was terminal manager for the Marietta facility for 16 months and that the Complainant was no problem the first 12 months. He stated that the warning letter to the Complainant for not signing a DECR was rescinded because it was discovered that the Complainant had actually signed the DECR but had done so with either a wrong date or wrong form. He stated he was disappointed the Complainant had filed an OSHA complaint involving the trailer in March 2013 "because we had handled the matter internally … I thought we had done our due diligence and repaired the trailer as needed." The trailer had been finally repaired in Atlanta before the OSHA complaint was even received.

F. Gerster testified that his off-property observation of the Complainant included his stop at Chili's restaurant and that he made the observation from his parked car.

May 8, 2013 Statement of F. Gerster (RX 39)

In this exhibit F. Gerster describes events at the May 8, 2013 pre-shift communication meeting (PCM) and notes that the Complainant and shop steward refused to sign the counseling document –

[The Complainant] continuously interrupted the PCM meeting. He was instructed to not interrupt meeting. He gave middle finger with the left hand. Then he replied back in a loud voice "Hell No." This behavior is not tolerated and this also serves as a documented discussion to not interrupt a PCM. Furthermore, behavior that is disrespectful towards any member of management is not tolerated and is subject to discipline up to & including termination.

May 9, 2013 Statement of Felix Gerster (JX 3, RX 10)

In this exhibit F. Gerster reported the events of his May 9, 2013 warning letter meeting for high on-property time with the Complainant, in the presence of V. Norton, in a manner consistent with his testimony under oath.

May 10, 2013 Statement of Felix Gerster (RX 5, page 81; RX 20)

On May 10, 2013 F. Gerster addressed the following statement to "Brandon" –

During my meeting on 5/9/2013 with [the Complainant] and [V.] Norton, I remained calm throughout the entire meeting. At no time did I raise my voice or conducted myself in a manner that was unprofessional. I treated [the Complainant] with respect and dignity like every employee at Marietta.

May 10, 2013 Statement of Felix Gerster (RX 9)

F. Gerster composed a "Timeline leading up to [the May 9, 2013] incident" on May 10, 2013 in which he stated –

He arrived at 6:00 AM, May 9, 2013; pulled various reports and indicators from May 8, 2013 for review; reported review of on-property time (OPT) indicated OPT had spiked to 31 minutes per driver on a plan of

10 minutes per driver; and that the Complainant had the highest OPT for May 8, 2013 and it occurred at the start of the day.[4]

He recorded, "I made the decision to handle the meeting given [the Complainant's] aggressive nature and attitude and I wanted to protect my supervisors from that. At that time I pulled the necessary documentation in order to issue progressive discipline. [The Complainant] was issued a PTG form on 4/1[5] for having the highest OPT time for any driver in the [Marietta] terminal in the month of March including the shop steward, who spends a lot of time at the facility representing other members of the union. [The Complainant] had another discussion with [P.] Nelson on 4/18[6] discussing again his unacceptable OPT. Once I had the documentation pulled, I waited until the start of the shift. When the PCM finished, I asked to see both [V. Norton] and [the Complainant] in my office."

Testimony of Anthony Radnoti (TR 96-119, 449-484)

Mr. A. Radnoti testified that he has 20 years seniority with the company, has been at the Marietta Service Center in Kennesaw, Georgia, as freight manager since August 2013, and been back in the Atlanta, Georgia area for 8 years. He had talked to the Complainant on occasion during the initial period when he was splitting time between the Marietta facility and training his replacement at the Gainesville facility. He reported "I never knew him well enough to say if I liked him."

Mr. A. Radnoti testified that he had not had a problem with the Complainant until the customer complaint involving Dollar General in September 2013. He stated that the Complainant had reported the customer was not happy to a supervisor when the incident happened. He identified RX 26, Tab C3, as his September 17, 2013 e-mail to T. Narron and that he learned of the complaint on that date from a note left on his desk saying "the manager from Dollar General had called and she was upset about an altercation with our driver" and included a "pro-number" for tracking the delivery. He stated he first got background before calling the customer. He reported receiving the delivery receipt involved from the dispatcher and that the Complainant was identified on the receipt as the driver involved in the delivery. He testified he then followed standard procedure by doing a phone interview, apologize for any infraction an employee may have done, and repair any damage or whatever happened. He stated that he called the manager for Dollar General, apologized for the situation, advised that we take customer service matters very seriously, and asked for a few details about what happened. He sent the e-mail to T. Narron after speaking with the customer. He did not speak with the Complainant at first.

Mr. A. Radnoti testified that drivers are required to provide customer service and explain that some requests have an extra charge which the customer has to acknowledge on the delivery receipt with a signature. Inside delivery, sorting and segregating the freight are extra charges. He reported drivers are not generally provided the tool to remove metal banding from the freight, though they have tools to accomplish their job.

Mr. A. Radnoti testified that he observed a video tape of the delivery at Dollar General. He reported observing the Dollar General manager sliding or shoving boxes by a wall out of the way in order to make room for the Complainant's delivery. He observed the manager point to where

[4] Supported by RX 18
[5] Supported by RX 15 and 16
[6] Supported by RX 17

the freight should be placed but did not hear anything said because there was no voice recording. He stated he observed the Complainant write on a delivery receipt towards the very end of the tape recording while it appeared the manager was closing the door and locking up. He stated the manager "didn't say nothing about refusing the product and there wasn't enough product to sort and site." He thought the pallet was shrink-wrapped and did not have metal banding, but he'd have to look at the video again before he could say there was metal banding. He stated that when interviewed, the Complainant stated the customer had asked for his boss's name and phone number and that was what he was writing on the delivery receipt as seen on the video. The Complainant did not report the customer was refusing the product.

Mr. A. Radnoti testified that Coloplast and Dollar General are national accounts for UPS Freight. He stated Coloplast is a customer for outbound freight and Dollar General is a customer for inbound freight. He reported that J. Springfield is a driver assigned to Coloplast and that he was removed from the account for a short period because of a customer complaint, but is back on the Coloplast account.

Mr. A. Radnoti testified that he was directed to gather the facts involved with the Complainant and Dollar General's complaint by his boss T. Narron and both labor managers, M. Cohen and R. Gannon. He completed the phone interview of the customer, typed up the e-mail in RX 26, at C3, and sent it to T. Narron, who forwarded it to M. Cohen and R. Gannon. M. Cohen called him and sent him to Dollar General to interview the manager and any witnesses, get handwritten signed statements and fax them to T. Narron, M. Cohen and R. Gannon. During the store interviews, he discovered Dollar General had a video tape of the delivery and it took the manager several days to get someone from corporate to download it for UPS. He identified RX 26 C2 and C1 as statements he received during the visit to Dollar General. He stated R. Gannon later gave him instructions to bring in the Complainant, speak with him and get his statement. He testified that the Complainant "made mention to the customer wasn't happy; [he] informed [G. Strickland] the day it happened; she was cussing me." The Complainant then wrote a statement and was asked to step out of the office. A. Radnoti testified he conferred with R. Gannon who was in Tampa, Florida, and was told to verify certain parts of the Complainant's statement "where he said that he wasn't upset or flailing his arms or anything like that, she was doing all the confrontational stuff … and that he handed her the bill back and said 'have a nice day.'" He stated the Complainant indicated he did not flail his arms and that he tried to give the manager the bill back but she wouldn't take it "so I placed it on the pallet." He stated from his review of the video it did not look like the Complainant had tried to place the bill on the pallet, "he threw it, period. The pallet wasn't six inches off the ground. If he tried to put it on the pallet he would have bent down and laid it on the pallet." He report receiving the Complainant's statement after the store manager's statement. He testified that "after I asked [the Complainant] those series of questions, I was told [by R. Gannon] to let him know that he's terminated for ground of extreme seriousness." He identified JX 5 as the discharge letter given the Complainant on September 25, 2013. He stated he had no recall of meeting with the Complainant and union steward V. Norton on September 24, 2013 and saying "you're just coming off a suspension, I told my boss I'm not having a problem with this guy, but this is coming from my boss when [referring] to the discharge."

Mr. A. Radnoti testified that he attended a local level hearing concerning the Complainant's discharge on or about October 10, 2013.

On examination by Respondent's counsel, A. Radnoti testified that during the period from August to October 2013 he was covering the manager position in both Marietta and Gainesville. He replaced T. Williamson at the Marietta facility and had not discussed the Complainant with T. Williamson. He did not have any negative interactions with the Complainant prior to the Dollar General incident and considered him a decent driver.

Mr. A. Radnoti testified that he came into his office about mid-day on September 17, 2013 and found the note stating that the manager of Dollar General was upset and wanted to speak with the manager. He stated the first point of order was to talk with the inbound supervisor G. Strickland who reported the Complainant had made the delivery involved and remembered the Complainant reporting that the customer was upset. He reported he was upset with the situation involving a national account, that two weeks had passed, and he was just then finding out about the problem. He then called his supervisors in and instructed them to tell him whenever a customer complaint comes in. He reported calling the Dollar General manager the same day because it was a pretty big account, to diffuse the situation, and to repair any damage that had been done. He stated E. Manzanares was the manager; "she was very concerned and she made it a specific point that she did not want any other interaction with our driver." She was shaken and nervous and worried. She was "still upset about it enough to call in and let us know; and it's an altercation with our driver that made her feel that way, and it's a national account, so for a manager, there's not many worse cases that you can go through when you get a customer complaint than that." He identified RX 29, page C3[7], as the e-mail he prepared setting forth the statement E. Manzanares made over the telephone to him and that he sent the e-mail to T. Narron. He reported "with the nature of this seriousness of an altercation and our driver being involved with a national account customer, I wanted to let [T. Narron] know immediately before he got a call from the national account manager at his level." He was told to follow protocol, document the event, and contact M. Cohen for further directions. He reported being told by M. Cohen to obtain signed and dated written statements from witnesses. He stated he subsequently went to Dollar General to repair any customer service issues, put the manager at ease and let her know it was serious, it would be investigated, and she would be told the final outcome.

Mr. A. Radnoti testified he was introduced to the E. Manzanares by a Dollar General clerk, apologized for the incident and asked to speak with her in a room there. He reported she was cordial at first but as the incident was discussed she became very upset, very distraught, and "frightened to the point where she said … I'm afraid for your driver to come in here." He reported being extremely embarrassed, ashamed, and humiliated by the incident because "we treat our customers with respect and dignity and it's humiliating to go and have to apologize for how we treated a customer. We take steps to make sure our people never do that because our customer is our lifeline. Our customer is what we live off of. We provide a service to our customers and if we can't do that, how are we going to have our business? We can't do that, it's impossible." He reported that E. Manzanares delayed calling UPS because of an issue with a grandchild and scheduled vacation. He stated he was not skeptical of E. Manzanares' statements because "here we are in a two-week period went by and she was still upset and afraid enough to

[7] This is the same exhibit as RX 26, page C3

call in and be extremely diligent about not having interactions with our driver. Now that's, I mean, this is not some horror movie you forget in a day; this is something that had a lasting effect on her mind." He identified RX 27 as the statement from D. Corptan, a clerk at Dollar General who had witnessed some of the incident. He stated that D. Corptan reported he had apologized to Dollar General customers for how the driver was acting. He identified JX 2 as the statement of E. Manzanares. He testified that he viewed video footage of the incident in the store and walked through the footage with E. Manzanares at that time. He reported that E. Manzanares is a small woman and very courteous, very polite, a pretty soft-spoken woman. He stated a copy of the video could not be made then and that someone from corporate would come and make a copy for UPS. When he received the video copy, he again reviewed the video and stated the events followed right along with E. Manzanares' statements.

Mr. A. Radnoti testified that the video tape showed the Complainant came into the stockroom behind E. Manzanares after she unlocked the door and he had been gesturing with his hands, moving his hand up and down at the beginning. The Complainant dragged the pallet in and placed it right in the path they just walked over. They both looked at the pallet and then E. Manzanares pointed towards the wall and moved boxes out of the way as the Complainant moved the pallet. He reported seeing E. Manzanares pointing to the delivery receipt and words were exchanged before the Complainant pointed towards the door. There were some more excited words exchanged, she walked to the other side of the room and came back when more words were exchanged. She wrote down on the delivery bill and then the Complainant wrote down on the delivery bill while E. Manzanares went to close a door. While she was shutting the door, the Complainant "tore the bill in half, threw it and walked out the opposite direction." He reported the Complainant 'definitely ripped [the delivery bill] and like he didn't care where it was going to go" threw it on the floor. He reported that E. Manzanares was closing the door within three or four feet of the Complainant when he threw the delivery bill and left the stockroom.

Mr. A. Radnoti identified the last page of RX 30 as the written statement made by the Complainant on September 24, 2013 during his meeting with the Complainant about the Dollar General delivery incident. He testified that the Complainant never stated during the September 24, 2013 meeting that the customer wanted the pallet unbanded, stacked or moved. He reported that Complainant initially had stated he handed the delivery bill to the manager but later, when again questioned, said he had placed the bill on top of the pallet, neither version consistent with the video tape. "He was trying to deflect the attention to [E. Manzanares] and blame her for all the altercation and he tried to say he remained calm and professional at all times, and that was the furthest from the truth." He testified he thought he notified the Complainant after his statement on September 24, 2013 that he was being terminated. He stated he agreed with the termination decision because "this was clearly out of the lines of our policy and procedure and how we treat our customers. We have cardinal sins where there's no turning back, and this is one of them. You can't do that." He reported telling the Complainant "that termination decisions do come from people at a higher level than me" but did not suggest to the Complainant that he did not support the termination decision or that he was just doing what he was told by his boss.

Mr. A. Radnoti testified that the Complainant filed a grievance over his September 2013 termination and that he was present at the local hearing where the Complainant again said he was professional at all times. He reported M. Cohen presented the company's case at the joint panel hearing on the discharge grievance and that he answered a few questions at the hearing.

Mr. Radnoti testified that he is aware of the company policy on retaliation and that it is reviewed annually with employees. He identified G. Maynard as a local city driver who had a complaint raised by mall security during a delivery to Clark Shoe Store at the outlet mall. Security wanted him to back into a specific location but the driver backed up a lot shorter because he deemed it safer to do so. He stated he visited the mall to investigate the call-in complaint as normal and discovered the driver and security guard had a verbal altercation outside while trying to deliver freight. The driver kept moving freight from the truck and the guard was following the driver arguing about it. Witnesses, from Clark Shoe Store, reported the driver delivering the freight, was very professional, thanked them for their service, had them sign the delivery bill and went on his way. He stated he examined the area and determined the driver parked in the spot that security designated but did so in a safer manner than the security guard had wanted. He reported that when G. Maynard was interviewed he owned up to the verbal altercation with the security guard, said he should have handled the situation differently, and that the reason he backed into the parking spot was because of safety concerns with outlet mall traffic. He stated his belief that the driver received discipline in the form of some time off that was served.

Mr. A. Radnoti testified that J. Springfield was an on-site driver at Coloplast and instead of flagging shipments and loading them on the truck with his manual jack one at a time as they are ready for loading, "he would let them pile up and then say he's behind and ask to use [a Coloplast] electric pallet jack, which left one of their employees without one." He stated Coloplast sent an e-mail that they were unhappy with [J. Springfield's] production and how he was doing things, and they wanted to switch out drivers." He testified "Coloplast [is] another large account, so to appease them and make them happy, we took [J. Springfield] out for a short period of time." He reported J. Springfield was a senior driver and he returned to Coloplast after Coloplast made a specific outline of what they expected of our driver" and J. Springfield signed off on the outline and agreed to follow their direction.

On cross-examination, A. Radnoti testified that J. Springfield had filed a grievance over being removed from Coloplast and while he won the grievance, he was going to return to Coloplast after they outlined their rules for the driver. He stated that G. Maynard owned up to the verbal confrontation but did not know if cuss words were used. He stated that the customer reported the driver did a professional job and there was no conflicting story between the driver and security guard.

Mr. A. Radnoti testified that he did not provide the Complainant with a copy of the video tape from Dollar General or tell him in advance about the video tape because "I wanted to see if he was lying." He agreed that there was no sound on the video tape recording so he could not hear what was being said by the Complainant and the Dollar General manager on September 4, 2013; but he could clearly see conflict. He reported that T. Narron asked if the Complainant was terminated would he agree with that decision and he agreed with that decision

Mr. A. Radnoti testified that when he said the Complainant ripped the bill in half at the Dollar General store he meant that the Complainant separated the store's copy from the company's copy of the delivery bill. He stated "You could see in the video where she asked [the Complainant] to slide [the pallet] over and move it out of the way and [the Complainant's] shaking his head no." He reported that UPS sometimes have difficult customers for specific drivers. He reported that when there's a dispute with a customer "it's investigated and based on the seriousness and who's at fault … [if the driver's at fault] then it would go forward with our progressive discipline policy."

Mr. A. Radnoti testified that from viewing the video he would not think the Complainant was discussing extra charges for an inside delivery or moving the pallet because the pallet was already delivered inside the stockroom. He stated that he was with E. Manzanares for three to four hours during his investigation of the September 4, 2013 incident, with talking to her, viewing the video tape and obtaining her written statement. He testified that when he first met E. Manzanares "she was calm and soft-spoken. During my interview with her, oral interview when she was telling me what was going on, she got upset and very concerned. She then wrote out her statement. During the video when we were talking to each other, trying to get [the video] pulled up and work things out, again she went back to soft-spoken, a little bit."

On re-direct examination, A. Radnoti testified that D. Corptan was another witness to the September 4, 2013 incident. He stated D. Corptan's statement supported E. Manzanares' version of the incident.

On Re-cross examination, A. Radnoti testified that D. Corptan could be seen on the video going in and out of the stockroom. He stated D. Corptan reported "that [the Complainant] was loud enough where you could heard him throughout the whole store."

September 17, 2013 e-mail from A. Radnoti to T. Narron (RX 26, page 45; RX 29, page 7; RX 30, page 6)

In this exhibit A. Radnoti reported his discussions with Dollar General manager E. Manzanares concerning the September 4, 2013 delivery incident involving the Complainant as follows –

> Ms. Manzanares stated the driver walked in the front door on the building right behind her as she was arriving for the day's work. The driver stated he had a delivery for her and could she open the back door? She replied yes and proceeded to open the back door. When the door was opened the driver asked where she would like the freight and she replied near the rest room the driver pushed the freight inside and dropped it in the walk way. She asked if he could move it as she had other deliveries. The driver yelled angrily that he had been knocking and ringing the doorbell for over seven minutes, it's hot out here and you need to fix the door bell, and "no I will not move the freight I am done," the driver stated I need you to sign the bill, and threw it on the ground in front of her. She asked for this supervisor's name, and the driver told her no, so she said she would not sign the bill and the driver stated he would take the freight back and she would not get it. She signed the bill and the driver left. She has a witness that heard the driver yelling and came back to make sure the manager was ok.

October 16, 2013 e-mail from A. Radnoti to M. Cohen (RX 26, page 49; RX 29, page 9)

In this exhibit A. Radnoti describes what he observed on the September 4, 2013 Dollar General security video of the stockroom as –

I see a man/clerk entering the store room, right after him, I see the manager and UPS driver enter. The manager unlocks the back door and opens it, she proceeds to move some boxes out of the way for the UPS driver to deliver his skid, and she point to the wall where she would like the freight. The driver brings in the skids and sets it in the walk path to the back door. The manager and driver both stand and look at the freight then it looks like they disagree on something, the driver seems upset and is waiving his arms toward the back door and looks to be pointing out a problem, the discussion escalates. The driver tries to hand her the bill and she points like she would like something written on the bill and would not take the bill. The driver walks away with the manager saying something to him and following him. They both come back and it seems she agrees to sign the bill when she is done she hands it to the driver and he writes something on the bill while he is doing that she goes to close the back door and the driver finishes and turns around tears off her copy and throws it on the floor and walks in the other direction of the manager.

Testimony of Veronica Norton (TR 119-175)

V. Norton testified that she has been employed by UPS Freight at the Marietta facility for 14 years and is currently a city pickup and delivery driver. Prior to the name change UPS Freight was known as Overnight Trucking. She report having a commercial driver's license and having driven trucks for 28 years, including as an owner-operator running cross-country.

V. Norton testified she knew the Complainant who joined the company after her and served as union steward for a time. She reported having disputes with the Complainant over the interpretation of provisions in the collective bargaining agreement and once on a misunderstanding of why her truck was already hooked up when she came to work about six years ago. She stated that she has been the union steward for drivers at the Marietta facility for two years.

V. Norton testified that in February 2013 she examined Trailer #255028 one morning with the Complainant. She observed that the door had two broken panels, one missing roller and would not open more than halfway up. She considered the broken panel doors a safety issue because broken door panels "jam the rollers, so they keep getting hung when they're opening and closing." She reported that Trailer #255028 had been her trailer for almost two years before the door issue came up with the Complainant. She stated the Complainant told her he had "red-tagged" the trailer, later she learned the Complainant had also filed an OSHA complaint about the trailer.

V. Norton testified that as union steward she keeps notes on all disciplinary meetings concerning drivers. She stated that there was a quick meeting with the Complainant, her and inbound supervisor G. Strickland March 15, 2013 concerning the Complainant's production time and being over lunch one minute. She stated that there was another short meeting on March 19, 2013 with the Complainant, her and manager F. Gerster about the Complainant's work injury while unloading 200 pound "Sunsetter" tubes. There was another meeting on March 20, 2013 where the Complainant refused to sign a temporary alternate work (TAW) assignment related to the injury. The Complainant stated he was still feeling dizzy. She stated that "pre-UPS" drivers were allowed to answer telephones as a TAW assignment. She reported that there were two

drivers on TAW, one for maybe two weeks and another for three weeks and they were both assigned to sweep the dock area as their TAW during their normal working hours.

V. Norton testified she has been over lunch a few minutes when she forgets "to take it off the DIAD sometimes." She reported she was unaware of any driver being disciplined or verbally reprimanded for going over lunch by one minute.

V. Norton testified that there was a meeting with the Complainant, her and F. Gerster on April 1, 2013 where the Complainant was given a verbal warning ("Pittsburgh" warning) "for having the highest on-property time that was the worst on-property time. The Complainant attributed "having problems with his DIAD and he notified dispatch through the phone but [F. Gerster] wanted [the Complainant] to note that through the DIAD." The Complainant and F. Gerster argued a little bit about using DIAD vice the phone. She reported she makes such reports in the DIAD and by phone to dispatch. She reported the DIAD can send text messages to supervisors by selecting who the message is for and then typing in the message and hitting "send".

V. Norton testified there was a meeting with the Complainant, herself and F. Gerster on April 3, 2013 involving an on-road observation made of the Complainant April 2, 2013. F. Gerster had videotaped the observation. The Complainant was upset about being followed and wanted to know how many times he had been followed. She stated she was aware of two other drivers being followed. The issue concerned the Complainant closing the latch and failing to bend his knees following company procedure. She stated that on the video you could see the Complainant bend over the latch but could not actually see his knees because of parked cars blocking that view. She reported she didn't remember anything from that meeting about distance from the vehicle in front of the Complainant while driving. She was aware that the Complainant had resigned from the safety committee.

V. Norton testified that she attended a meeting involving the Complainant with F. Gerster on May 9, 2013 about the Complainant's on-property time again. The complainant received a warning letter for being on the property in the morning in excess of 20 minutes. The Complainant argued that his DIAD did not come up until his third stop. She stated that the DIAD comes up after the driver puts in an ID number and then the driver's entire route comes up in the DIAD and you can't route yourself until the DIAD boots. She stated that the DIAD not booting before a driver leaves the yard happens pretty regularly. She reported that it would be not necessarily unusual to be in the yard for 20 minutes; it could happen depending on how long the morning PCM goes, trailers being cut, road drivers getting back, and trailers not being loaded or loaded incorrectly. If there is a loading problem drivers are supposed to log the time to the loading dock and not city pickup and delivery time.

V. Norton testified that at the May 9, 2013 meeting F. Gerster was giving the Complainant a detailed breakdown of his time, like his load being ready at 10:15. Both were becoming upset; but "Telematics reviews upset everybody … you kind of feel like you went on trial." The Complainant "said this is bullshit and that he felt ill and that he was being harassed." V. Norton testified that the Complainant came back into the room and sat down while she shut the door "and they were just arguing, bickering back and forth, and when the meeting was over the Complainant put his hands on the desk to stand up and [F. Gerster] said something about having

a safe day and [the Complainant] said, 'Not for you I won't' and he walked out of the meeting. [F. Gerster] asked me to go get him and try to talk to [the Complainant] about not leaving. [The Complainant] said he was unsafe to drive, because I told him they were going to get him for work abandonment." She stated that management fired the Complainant for work abandonment.

V. Norton testified that there was a meeting on May 14, 2013 with road steward A. Churchill, the Complainant, F. Gerster, T. Narron and herself to talk about the extreme seriousness of the Complainant's actions of the Complainant's May 9, 2013 actions being unprofessional and aggressive behavior. She stated she did not observe the Complainant behave in a manner to put F. Gerster in fear for his safety.

V. Norton testified she attended a long local level discharge notice hearing on June 24, 2013 with union local 728 business agent S. Webber, the Complainant, M. Cohen, T. Williamson, F. Gerster and T. Narron. She stated her impression that F. Gerster was concerned that the Complainant's response to 'have a safe day' comment on May 9, 2013 was an indication that the Complainant would go out and get hurt that day and that he was in fear for his safety when the Complainant was over his desk. Also discussed was on-property time, trouble with DIAD, hotline calls, Telematics and other stuff that had been covered with the Complainant in earlier meetings.

V. Norton testified that over 14 years she probably had about 5 customer complaints and had never been suspended or fired because of that. She reported that there were five road drivers at the Marietta terminal in 2013 and the terminal was now up to 8 road drivers. She reported one driver had an altercation with a mall security guard and he was taken out of service, no drivers fired at the Marietta terminal for customer complaints other than the Complainant.

V. Norton testified that there was a meeting on September 24, 2013 for a customer complaint against the Complainant involving a September 4, 2013 delivery. She stated terminal manager A. (Tony) Radnoti, the Complainant, and G. Strickland were present. G. Strickland stated he had taken a call from the Complainant reporting the customer complaint. She stated her recollection was the customer was in fear of the driver coming back and her supervisor made her call UPS; the Complainant made the delivery to the back door and pulled the skid inside; the customer wanted the skid somewhere else; and the Complainant had informed her that he only had to get the delivery inside the building. V. Norton reported inside delivery work, moving the delivery to another spot, and removing and segregating product from a pallet has to be agreed to on the delivery bill because there are additional charges involved. It is not normally part of the delivery job for drivers.

V. Norton testified that on September 25, 2013[8] there was a meeting with the Complainant, herself, A. Churchill, A. Radnoti, and G. Strickland. Questions were asked and the Complainant indicated that the customer was abusive towards him and he twice denied yelling at the customer. She reported that the Complainant said the customer was being untruthful to say he was yelling at her and "that she just wanted my boss' name and number, I wrote it on the back and put her copy of the bill on top of the skid and told her to have a nice day [then] walked out of the front of

[8] The evidence demonstrates that the Complainant made these statements on September 24, 2013 and that the September 25, 2013 meeting was to deliver the written termination letter.

the building [and] didn't have a conversation with anybody else." She reported the Complainant was asked to step out of the meeting, she and A. Churchill were asked to sign a statement about what the Complainant had said and we refused. A. Radnoti asked for a Pittsburgh form and was told the form could not be used on an attempt to terminate and that a letter had to be used. A. Radnoti indicated that the Complainant was going to be terminated for extreme seriousness and that the customer had a witness to the incident, a clerk who had gone to the back of the store to check on the manager, and that the manager was afraid of the Complainant. The Complainant came back into the meeting and was told he was being terminated due to extreme seriousness. She testified that A. Radnoti told the Complainant he did not have any problems with him but that he had to do what his boss T. Narron said.

On cross-examination, V. Norton testified that V. Torres is a clerk in Sales and Operations who was sitting outside F. Gerster's office during the May 9, 2013 meeting involving the Complainant and his interaction with F. Gerster. She stated she had never seen V. Torres' written statement about the May 9, 2013 events that was in RX 11. She reported that V. Torres gave a verbal statement on May 9, 2013 to S. Webber in which indicated she heard the Complainant say "This is fucking bullshit."

V. Norton testified that she did not become personally familiar with any of the efforts to repair Trailer #255028. She identified M. Christopher as a vendor on-property mechanic at the Marietta facility, typically twice a week. He works on the equipment and services the equipment. She stated that the main repair shop for equipment is at the Atlanta hub.

V. Norton testified that when an employee is injured the terminal managers take them to the doctor. She reported that she is not involved with the work injuries because "there's no discipline involved."

V. Norton testified that she did not know if there was a written procedure for a driver to follow when they pull into a lunch spot for lunch. She stated her practice is go in and get lunch, or if she takes her lunch to sit somewhere, eat lunch, return to the truck, and do a walk-around the equipment checking for kids and stuff before you jump in and take off. She stated it took 2 to 3 minutes to do a walk-around for a 48-foot trailer and maybe 60 to 80 seconds around a 40-foot rig, though she had never timed it. She stated at the March 15, 2013 meeting with the Complainant and G. Strickland, G. Strickland noted that the Complainant was sitting still in the truck 6 minutes before going off for lunch in the DIAD and there were 4 more minutes on the back end before he clocked out of lunch. She indicated that the 6 minutes before and 4 minutes on the back end were considered on-property time. She reported that when work is slow in the winter time on-property time is a metric that management focuses on. She indicated that the Complainant attributed the 6-minute period to being parked a distance from where he was going to have lunch and that the 4-minute period on the back end was when he was inspecting his equipment.

V. Norton testified that she had been counseled in the past about excessive on-property time and though it might have been by F. Gerster, but "we had so many terminal managers right there." She indicated that she is given some slack on her on-property time because she is the union steward. She indicated that T. Glover was the terminal manager before F. Gerster and that G.

Barnes and P. Nelson filled in sometimes as terminal manager. She reported F. Gerster was using Telematics to try an improve the performance of the people who were "most to gain" in areas of on-yard time, production, deliveries per hour, and time of stops - which is to be in and out in 12 minutes, something tough with freight. She testified that F. Gerster indicated in the April 3, 2013 meeting that the Complainant was "most to gain" and had videoed the Complainant. She indicated that F. Gerster was a big proponent of Telematics to hold drivers accountable and had presented the pre-Telematics training in Marietta before he came from Atlanta to Marietta as terminal manager. She stated that during the April 3, 2013 meeting, F. Gerster was trying to describe the Telematics situation as a win-win for both the Complainant and the company. She opined that F. Gerster was "pretty much on the numbers whether we're good or not … [A. Radnoti] is a little more laid back, until things start going wrong with the terminal or we're not meeting our numbers."

V. Norton testified that during her time at the Marietta facility she understood the Complainant had an altercation with service center manager R. Toney in the past. She reviewed RX 35 and indicated that she had no knowledge if that was the altercation she was told happened.

On redirect examination, V. Norton testified that V. Torres did not tell her she was stressed from the Complainant's actions during his May 9, 2013 discipline meeting with F. Gerster, denied being told by V. Torres that it was difficult for her to concentrate on her work during that meeting or that she had witnessed the Complainant being abusive to drivers and management at other times.

V. Norton testified that it is part of the company safety protocol to perform a walk-around the vehicle every time we stop the vehicle. She reported that some of the older trucks bleed off air and take time after lunch stops to build the air pressure for the breaks back up.

Testimony of Scott Webber (TR 176-213)

S. Webber testified that he has been employed by Teamsters Local Union 728 for 11 years and is currently the secretary/treasurer and business agent of Local 728 shops at three UPS locations and two ABF Freight locations.

S. Weber identified JX 6 as a copy of the "UPS Freight Agreement covering Over-The-Road and Local Cartage Operations" for the period April 7, 2008 through July 31, 2013. He stated that the current Agreement has "some language changes, not very much." He indicated that pay, pension contribution and health and welfare contributions have increased over time.

S. Weber testified that he knew the Complainant from the period he was the local union steward for UPS. The Complainant was a steward up to 2012 where he was to deal with issues on the floor and make sure management and the union business agent were aware of the issues. He reported that it would not be unusual for a steward or business agent to have arguments that became heated in that capacity. When a grievance is filled out by a union member the steward takes the grievance to the manager to see if it can be rectified. If it is not rectified, management signs off on the grievance and it is sent to Local 728 to address.

S. Weber testified that the Collective Bargaining Agreement (CBA) permitted videotaping employees for disciplinary purposes if it is for theft or some type of investigation, theft of company time. He stated he talked briefly with the Complainant about being watched and videotaped by F. Gerster in 2013 but could not "recall the conversation that we had on it." He was not aware of other employees being followed at the Marietta terminal. He stated that it would not be unusual for management to remove an employee from PCM meetings, which "are instructional and tells the employees what the company is looking for that day and just telling them to be safe."

S. Weber testified that when temporary alternate work (TAW) is assigned an employee, "they normally stay on their regularly scheduled work times. They cannot do bargaining unit work … that's basically what it is, just giving them a chance to make some money while they're out."

S. Weber testified that he attended the June 24, 2013 local level discharge hearing for the Complainant with T. Narron, F. Gerster, and steward V. Norton. The discharge reason was for offenses of extreme seriousness because the Complainant was aggressive toward F. Gerster. He reported that under the CBA offenses of extreme seriousness are not subject to progressive discipline and do not have to have a warning letter prior to the discipline. He was aware of some employees at the Marietta facility allegedly fired for raising their voice to management. He expressed the opinion that using the word "bullshit" was something said while the person is excited and should not result in a discharge. He reported that UPS Freight has a zero tolerance policy for workplace violence. He stated that F. Gerster read off a statement he wrote that he was actually in fear of his life or great bodily harm from the Complainant during the incident.

S. Weber testified he attended the October 10, 2013 local level discharge hearing for the Complainant for an offense of extreme seriousness involving a customer complaint. He stated that a customer complaint would normally be addressed with progressive discipline. He reported K. Turman had a customer complaint involving labeling and he was taken off the account, but not disciplined. J. Strickland had a customer complaint that he could not remember and he was not disciplined. G. Maynard had a customer complaint that was settled at the local level. He stated that he guessed 10 to 15 employees at the Marietta facility had been discharged while he was a business agent and that all but three returned to work there and that he is usually able to negotiate a resolution of grievances with the company in the form of a suspension or a suspension with time served, and the employee goes back to work.

On cross-examination, S. Weber testified that a grievance over discipline is "always open until we've settled it locally or it goes to the regional board." Terminations are not final until the joint panel makes a determination on the termination grieved.

S. Weber testified that he and M. Cohen met with the manager of Dollar General, E. Manzanares, after the local discipline hearing; he questioned her; and she "said [the Complainant] was very irate and would not move the shipment to where she wanted it … [and] was astonished at what he was hollering and screaming and they could hear it over the store … she feared for her life. That's all I could get out of it." He stated he told E. Manzanares that "Teamsters Local 728 apologizes for coming and interfering with business of your company, but we are here investigating a complaint with one of our members and we just want to make sure

everything is done properly." He reported E. Manzanares also stated the Complainant "was waving his arms and was loud."

S. Weber testified that in discharge cases the Joint Panel is composed of two union representatives, two company representatives and an arbitrator. He stated that a written record is prepared for the Joint Panel and is read into the record. The company presents its case then the union follows. He stated that the Joint Panel goes into executive session to decide if there is just cause to discharge and then calls the parties back in and announces the decision. He would not know the vote or whether the arbitrator was required to break a voting tie. He identified RX 22 as the written case he prepared with the Complainant for his first discharge Joint Panel hearing. He stated that there was never a grievance filed against F. Gerster about how he talked to the employees but that he had met with F. Gerster about talking down to the employees like children. He identified RX 21 as the company's case prepared for the Joint Panel. He testified that there was one case he had taken to the Joint Panel where the discharge of the driver was upheld on the employee's first trip to the Joint Panel where the driver turned where he was not supposed to and rolled his trailer.

S. Weber identified RX 29 as the company's brief to the Joint Panel on the Complainant's second discharge hearing before the Joint Panel and RX 30 as the union brief he prepared with the Complainant for the Joint Panel.

S. Weber testified that he did not recall the specific customer complaint involving G. Maynard or J. Strickland. He stated the customer complaint involving K. Turman was related to his efforts to get the customer to put proper labels on the freight. He did not recall the Complainant apologizing for his interaction with F. Gerster or offering to apologize for the interaction with the Dollar General manager. He testified that as the union representative he is always going to fight for progressive discipline in customer complaint cases.

On re-direct examination, S. Weber testified that he viewed the video from the Dollar General involving the Complainant. He reported seeing the manager kick a box and gesturing with her hands in a non-flailing manner. He reported seeing the manager turn her back on the Complainant and go outside at the time the Complainant was trying to give her the delivery receipt which the Complainant "tried to pitch it onto the pallet."

S. Weber testified that witnesses at Joint Panel hearings are sworn in. Questions cannot be asked of the other Party and have to be directed through the chair of the Joint Panel. The Joint Panel does not issue a written ruling and their ruling is final with no further appeal.

September 17, 2013 Statement of Eva Manzanares (JX 2; RX 26, page 47; RX 29, page 5; RX 30, page 4)

This exhibit is signed by E. Manzanares and states –

On September 4th, 2013 I arrived to work and the U.P.S. delivery driver followed me in. He stated he had a delivery, so I opened the back door for him. He asked where I wanted the pallet and I asked him to set it next to the restroom door. He pushed it in and laid it flat. I asked him to set it up against the wall and he said "No." My job is to push it inside, then he proceeded to tell me he had been waiting outside the back

door for seven minutes and that I should fix the door. (He was yelling at that point and my cashier came to see what was going on.) I asked him for his supervisor's name, he said sign it or I will take it back. I signed it and he threw the paperwork at me. It landed on the floor and he walked away.

I am worried and a little apprehensive now when we have a U.P.S. delivery. I don't want it to be this driver.

September 17, 2013 Statement of D. Corptan (RX 26, page 46; RX 27; RX 29, page 6; RX 30, page 5)

This exhibit is signed by D. Corptan and states –

On September 4, 2013 I was working lead register and this man came in the store saying he's been out back of stockroom with delivery no one would answer. He then proceeded to tell me we needed a doorbell back there. I did my best because he was pitching a fit in front of customers. I told him I apologize no one was back there. And he then asked to see the manager. She had just gotten back from the bank 2 minutes earlier so she had no idea what she was walking into. I then proceeded to walk him to the back to the stockroom where the manager's office is. As I explained to my manager, the man interrupted me and started yelling at Eva. Eva did open the back door for him to deliver his product which happened to be on a pallet. She asked him nicely if he could make it to the right of the stockroom so it wouldn't block the back door and he replied No. After that I went back to the register to wait on customers.

May 9, 2013 Statement of V. Torres (RX 5, page 71; RX 11)

V. Torres made the written statement as follows –

Today on May 9, 2013 I was a witness to an outburst by a city driver [the Complainant]. While in the office of the SCM [F.] Gerster he was yelling some profanities (this is bullshit) regarding the reason why he was brought in. Then he said he had to go to work. He then opened the office door still yelling. While walking out the door he then turned back around he said now I'm going home I'm sick you got me all worked up. SCM [F.] Gerster in (sic) just kept saying his name, Ken, Ken never reacting in a negative fashion to his antics. But [the Complainant] just stormed out and walked into dispatch and said I'm going home. [V.] Norton while walking out of SCM [Gerster's] office said I'm going to try to talk to him, she then asked me where did he go and I told her. A while later she came back and said I tried but he's going home.

May 10, 2013 Statement of V. Torres (RX 5, page 80; RX 12)

V. Torres made a written statement on May 10, 2013 as follows –

I [V.] Torres, would like to give my statement regarding my experience working in what I believe to be a hostile environment when it comes to [the Complainant's] outburst. I have made this known to several management and supervisors in the past five years. I have experienced stress and chest pains and worried about my safety. I've witnessed him being verbally abusive to drivers and management in a cocky, bully fashion. I've expressed this to past management and supervisor that I felt very uncomfortable working in this environment. I've have (sic) resolved to taking anti-anxiety medication to subside these feelings. On May 9, 2013 once again I have been subjected to another one of his belligerent outburst. While in our SCM office [F.] Gerster, he [the Complainant] was yelling and swearing in a treating (sic) manner. I stressed about him coming back and harming me or anyone here. It was difficult for me to concentrates (sic) on my work because of this. I informed Brandon today that I fear retaliation from him or his close coworkers. I don't want to feel threatened by him on the job or outside of work. I've seen this in the past with other worker and heard him make comments about getting supervisors/managers fired. For the past

five years I've witnessed his antics and outburst and honestly feel this has to be addressed. It's not fair for me to have to come to work in a hostile environment.

Trailer # 255028 Equipment Condition and Event Reports February 22, 2013 to March 4, 2013 (RX 2, RX 3)

The Daily Equipment Condition Reports (DECR) for Trailer #255028 reflect the following entries for the dates indicated –

Friday	2/22/13	G. Holt	Equipment condition OK
Monday	2/25/13	Complainant	Deadline door broken
		M. Christopher	OK to run
Wednesday	2/27/13	J. Springfield	Equipment condition OK
Thursday	2/28/13	J. Grostefon	Door hard to open. Roller Out. Door cracked
		M. Christopher	Installed roller
Monday	3/4/13	G. Holt	Trailer door very hard to close. Hard to open trailer door.
		M. Christopher	Gone to shop

The Equipment Event Trace for Trailer #255028 reflects the following entries for the dates indicated –

Friday	2/22/13	10:55 Loaded at Dock door 000
		11:19 Dispatched on Route 001
		18:15 Arrived from Route 001
		18:40 Unloaded at Dock door 007
Wednesday	2/27/13	8:31 Dispatched on Route JEF
		14:51 Arrived from Route JEF
		16:00 Unloaded at Dock 007
Thursday	2/28/13	10:30 Loaded at Dock door 004
		10:55 Dispatched on Route 004
		18:00 Arrived from Route 004
		18:45 Unloaded at Dock door 007
Monday	3/4/13	6:30 Loaded at Dock door 010
		9:43 Dispatched on Route 010
		10:49 Arrived from Route 010
		10:50 Trailer transferred to Atlanta for repair
Tuesday	3/5/13	(in Atlanta) Replaced two broken intermediate door panels and replaced damaged hardware. Repaired helper spring assembly on lift gate platform.
		16:00 Load for Marietta only
19:29 Dispatched on Route KEL		

CHPS Committee Concern Log (RX 2, page 16; RX 3, page 15)

This exhibit indicates that that door on Trailer #255028 was raised as an employee concern on March 4, 2013 and that F. Gerster was assigned to take action on the issue in the form of "sent to Atlanta for repair" to be completed by March 8, 2013.

Statements related to prior threats by Complainant (RX 33, 34, 35)

These exhibits were submitted to demonstrate complaints reported against the Complainant in the remote past. They are given no weight.

(RX 33) July 9, 2008 complaint filed by K.W. Turman about being physically threatened by the Complainant during workhours on UPS property.

(RX 34) October 7, 2008 customer complaint about the Complainant being "very threatening and rude," throwing boxes on the ground, refusing to move the boxes "along with other verbal words."

(RX 35) February 11, 2009 report made by SCM R. Toney concerning the Complainant being insubordinate and making a verbal threat towards him while union shop steward during working hours on UPS property.

STATUTORY AND REGULATORY FRAMEWORK

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

"Congress amended the STAA on August 3, 2007[9] to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. §42121(b)" *Smith v CRTS International, Inc.*, No. 11-086, 2013 WL 2902809, *2 fn 1 (ARB June 6, 2013); 49 U.S.C. §31105(b). Since the complaint was filed on May 16, 2013 and amended on December 31, 2013, the post-2007 standards of proof apply.

The STAA at 49 USC §31105, provides in pertinent part:

(a) PROHIBITIONS –

(1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms or privileges of employment, because –

(A)(i) the employee, or a person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because –

(i) the operation violates a regulation, standard, or order of the United States related to commercial vehicle safety, health, or security; or

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

(ii) 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;

(C) the employee accurately reports hours of duty pursuant to Chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

(E) The employee furnishes, or the person perceives that the employee is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor carrier vehicle transportation.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

(b) Filing Complainant and Procedures - … All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b) [AIR-21, supra] …

(f) No Preemption – Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.

(g) Rights Retained by Employee – Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

(j) Definition – In this section, "employee" means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle) a mechanic, a freight handler, or an individual not an employer, who –

(1) directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and,
(2) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

Implementing federal regulations applicable to STAA at 29 CFR Part 1978 were revised effective July 27, 2012.[10] The regulations provide, in pertinent part:

§1978.102 Obligations and prohibited acts.

(a) No person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in any of the activities specified in paragraphs (b) or (c) of this section. In addition, no person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because a

[10] 68 Fed. Reg. 14100-14111 (Mar. 21, 2003)

person acting pursuant to the employee's request engaged in any of the activities specified in paragraph (b).

(b) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee or a person acting pursuant to the employee's request has:
   (1) Filed orally or in writing a complaint with an employer, government agency, or others or begun a proceeding relating to a violation of an commercial motor vehicle safety or security regulation, standard, or order; or
   (2) Testified or will testify at any proceeding related to a violation of an commercial motor vehicle safety or security regulation, standard, or order or.

(c) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee:
   (1) Refuses to operate a vehicle because:
      (i) The operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
      (ii) He or She has a reasonable apprehension of serious injury to himself or herself or the public because of the vehicle's hazardous safety or security condition;
   (2) Accurately reports hours on duty pursuant to Chapter 315 of Title 49 of the United States Code; or
   (3) Cooperates with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or
   (4) Furnishes information to the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board, or any Federal, State or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(d) No person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the person perceives that the employee has engaged in any of the activities specified in paragraph € of this section.

(e) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employer perceives that:
   (1) The employee has filed orally or in writing or is about to file orally or in writing a complaint with an employer, government agency, or others or has begun or is about to begin a proceeding relating to a violation of an commercial motor vehicle safety or security regulation, standard, or order; or
   (2) The employee is about to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or
   (3) The employee has furnished or is about to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board, or any Federal, State or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(f) For the purposes of this section, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

§1978.109 Decision and orders of the administrative law judge.

(a) … A determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant or the Assistant Secretary has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

To prove unlawful retaliation at a formal hearing under STAA, the Complainant must prove by a preponderance of the evidence (1) that he engaged in the described protected activity, (2) that the employer had knowledge of the described protected activity, (3) that he was subjected to an adverse personnel action amounting to discharge or retaliation with respect to compensation, terms, conditions, or privileges of employment, and (4) that the protected activity was a contributing factor in the adverse employment action. 49 U.S.C. §42121(b)(2)(B)(iii); *Palmer v. Canadian National Railway*, ARB Case No. 16-035, 2016 WL 6024269, ALJ Case No. 2014-FRS-00154 (ARB Sep. 30, 2016);[11] *Brune v. Horizon Air Industries, Inc.*, ARB Case No. 04-037, 2006 WL 282113, ALJ Case No. 2002-AIR-8 (ARB Jan. 31, 2006); *Continental Airlines, Inc. v. Administrative Review Board*, 638 Fed. Appx. 283 (5th Cir. 2016). Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." *Sievers v. Alaska Airlines, Inc.*, ARB Case No. 05-109, 2008 WL 316012, ALJ Case No. 2004-AIR-028 (ARB Jan. 30, 2008) citing *Marano v. Dep't of Justice*, 2 F3d 1137 (Fed. Cir. 1993). If the employee does not prove any one of the required elements by a preponderance of the evidence, the complaint warrants dismissal. *Coryell v Arkansas Energy Services, LLC.*, ARB No. 12-033, ALJ No. 2010-STA-042, 2013 WL 1934004 *3 (ARB Apr. 25, 2013).

Additionally, relief under STAA may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.[12] 49 U.S.C. §42121(b)(2)(B)(iv); *Palmer*, supra; *Formella v. U.S. Dept of Labor*, 628 F.3rd 381 (7th Cir. 2010) "'Clear' evidence means the respondent has presented evidence of unambiguous explanations for the adverse action in question. 'Convincing' evidence has been defined as evidence demonstrating that a proposed fact is 'highly probable.' … 'clear and convincing evidence' [is] evidence that suggests a fact is 'highly probable' and immediately tilts' the evidentiary scales in one direction." *Speegle v. Stone & Webster Construction, Inc.*, ARB Case No. 13-074, ALJ No. 2005-ERA-006, 2014 WL 1870933 *6 (Apr. 25, 2014) citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). See also *Coryell*, supra, quoting *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, 2012 WL

[11] In *Palmer* the ARB reversed *Fordham v. Fannie Mae*, ARB No. 12-061, 2014 WL 5511070, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014) and restated it had previously vacated *Powers v. Union Pacific Railroad Co.*, ARB Case No. 13-034, 2014 WL 5511088, ALJ No. 2010-FRS-30 (ARB Oct. 17, 2014), reissued *remand en banc*, 2015 WL 1876029 (ARB April 21, 2015), remand *vacated en banc*, 2016 WL 4238457 (ARB May 23, 2016). The ARB declared that it is legal error to follow the *Fordham* and *Powers* decisions.

[12] Renamed the "same-action defense" by the ARB in *Palmer*, supra

759335 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, ARB No. 12-035, ALJ No. 2007-STA-019, 2013 WL 143761 (ARB Dec. 18, 2012).

DISCUSSION

I. The Claimant has established by a preponderance of the evidence that he engaged in protected activity under the STAA on February 25, 2013 by reporting equipment safety deficiencies involving Trailer #255028 through use of the DECR; from February 25, 2013 to March 4, 2013 by reporting safety concerns involving the operation of Trailer #255028 to his supervisors; on March 4, 2013 by reporting safety concerns involving the operation of Trailer #255028 to the UPS compliance hotline; on March 1, 2013 by reporting safety concerns involving the operation of Trailer #255028 to OSHA; on April 2, 2013 by filing an STAA complaint with OSHA; and on May 16, 2013 by filing an amended STAA complaint with OSHA.

The Complainant alleged in his STAA complaint filed April 2, 2013, that he engaged in protected activity by "red-tagging" Trailer #255028 for safety issues involving a broken rear door in February 2013; notifying supervisor J. Strickland on March 1, 2013 of safety "red-tag" being removed from Trailer #255028 before repairs were completed; by reporting safety concerns involving the operation of Trailer #255028 after being "red-tagged" to OSHA on March 1, 2013; and by reporting safety concerns involving the operation of Trailer #255028 to the UPS compliance hotline.

The Complainant alleged in his amended STAA complaints filed September 25, 2013, that he engaged in protected activity on May 16, 2013 by filing an STAA complaint with OSHA.

The testimony of the Complainant, Marietta Service Center Manager (SCM) F. Gerster, Regional Director of Southeast-East T. Narron, union shop steward V. Norton, equipment condition and event reports, and safety committee entries, are consistent for the operation, report of safety deficiencies and repair of Trailer #255028.

That consistent evidence established that the Complainant drove Trailer #255085 on February 25, 2013, experienced difficulty in the operation of the trailer's rear cargo door during his delivery day, and upon returned to the Marietta facility reported the defective door in the Daily Equipment Condition Report (DECR). SCM F. Gerster and on-site mechanic M. Christopher inspected the cargo door on February 25, 2013, found issues with the rollers and track welds, repairs were made, and the trailer returned to service as safe to operate. The trailer was not reused until operated by different drivers on Monday, February 27, 2013; Tuesday, February 28, 2013; and Monday, March 4, 2013. The driver on February 28, 2013 reported the trailer door as cracked and hard to open. M. Christopher installed a roller to correct the problem. The driver on March 4, 2013 reported the door as hard to open and close. The trailer was taken out of service and sent to the UPS repair facility in Atlanta, Georgia where two broken door panels were replaced, lift gate helper spring was repaired and damaged hardware was replaced on March 5, 2013.

The consistent evidence established that the Complainant discussed his concerns involving broken door panels and opening/closing issues involving Trailer #255028 during the February 25, 2013 through March 4, 2013 timeframe with his SCM F. Gerster, Regional Director T. Narron and union shop steward V. Norton. The credible evidence established that the UPS CHPS safety committee received an employee complaint on March 4, 2013 concerning the safety deficiencies of the cargo door on Trailer #255028 and that SCM F. Gerster was assigned to investigate and resolve the issue by March 8, 2013. RX 5 at pages 55 to 57 document that the Complainant reported the issues involving Trailer #255028 over the UPS complainant hotline and that the complaint was investigated by HR safety supervisor B. Shafer. This presiding Judge finds that the actions of the UPS CHPS safety committee were precipitated by the Complainant's actions of reporting his door safety concerns to the "UPS compliance hotline" and not from a separate additional complaint.

The Parties have stipulated that the Complainant filed a safety complaint involving Trailer #255028 with OSHA on March 1, 2013. The consistent evidence established that the Complainant filed the safety complaint involving Trailer #255028 with OSHA on March 4, 2013 (RX 1; testimony of Complainant, SCM F. Gerster, RD T. Narron). However, stipulated facts which are accepted are binding on the Parties and on the courts. Accordingly, March 1, 2013 is found to be the effective date that the Complainant filed the safety complaint involving Trailer #255028 with OSHA.

The Parties also stipulated that the Complainant establish that the Complainant filed an STAA complaint with OSHA on May 16, 2013 involving the May 14, 2013 termination of Complainant's employment. This is not inconsistent with the documentary evidence that the Complainant filed his initial STAA complaint alleging harassment on April 2, 2013.

After deliberations on the credible evidence of record, this presiding Judge finds that the Claimant has established by a preponderance of the evidence that he engaged in protected activity under the STAA on February 25, 2013 by reporting equipment safety deficiencies involving Trailer #255028 through the use of the DECR; from February 25, 2013 to March 4, 2013 by reporting safety concerns involving the operation of Trailer #255028 to his supervisors; on or about March 4, 2013 by reporting safety concerns involving the operation of Trailer #255028 to the UPS compliance hotline; on March 1, 2013 by reporting safety concerns involving the operation of Trailer #255028 to OSHA; on April 2, 2013 by filing an STAA complaint with OSHA; and on May 16, 2013 by filing an amended STAA complaint with OSHA.

II. <u>The Claimant has established by a preponderance of the evidence that he was subject to adverse employment actions on May 10, 2013 by the conditions of his employment being adversely impacted by being placed out-of-service pending investigation; on May 14, 2013 by the term and conditions of his employment being terminated/suspended without pay; on September 24, 2013 by being placed out-of-service at the end of his shift; and on September 25, 2013 by the term of his employment being terminated</u>.

The Parties have stipulated that Respondent discharged the Complainant on May 14, 2013 and again on September 25, 2013. The evidence of record established that the May 14, 2013

discharge was later changed through the union grievance procedure to a suspension without pay for the period ending on July 22, 2013. Whether the event of May 14, 2013 is termed a rumination of employment or suspension from employment without pay, the Claimant has established that he suffered change in his term of employment and conditions of employment on May 14, 2013 and September 25, 2013 such that the termination/suspension of May 14, 2013 and termination/discharge of September 25, 2013 are adverse employment actions under the STAA.

The Complainant testified that he was taken out-of-service during a meeting with T. Narron, F. Gerster and shop steward V. Norton, on May 10, 2013. The meeting addressed the Complainant's actions in F. Gerster's office the morning of May 9, 2013. The out-of-service status was for the period ending on May 14, 2013 when the Complainant's employment was terminated for the events of May 9, 2013. T. Narron testified that he prepared for the May 10, 2013 meeting by having security present during the meeting with Complainant and F. Gerster. He stated that the Complainant was taken out-of-service at the meeting. F. Gerster testified that at the May 10, 2013 meeting with Complainant the Complainant was taken out-of-service pending investigation about the May 9, 2013 event. Being placed out-of-service under these circumstances was an adverse employment action.

Testimony from the Complainant, V. Norton, and A. Radnoti established that the Complainant was confronted after his shift on September 24, 2013 and taken out-of-service for an offense of extreme seriousness arising out of his actions during the September 4, 2013 delivery at Dollar General and his statements that were deemed inconsistent with witness statements and the surveillance video. The formal letter of discharge was delivered the next day, September 25, 2013. Being placed out-of-service under these circumstances was an adverse employment action.

III. The Claimant has failed to establish by a preponderance of the evidence that he was harassed by being written up for one minute over lunch; by being assigned work duties inconsistent with work restrictions related to a March 18, 2013 work-related low back injury; by being assigned to night shift duties and varying reporting times while under medico-vocational work restrictions; by being followed and filmed on April 2, 2013 while making assigned deliveries; by being required to attend four days of "new hire" training following his return to work on July 22, 2013; and by having his reinstatement of health insurance delayed until September 16, 2013.

The Complainant alleged in his STAA complaint filed April 2, 2013, that he was harassed by his supervisor by being written up for one minute over lunch; by being assigned work duties inconsistent with work restrictions related to a March 18, 2013 work-related low back injury; by being assigned to night shift duties and varying reporting times while under medico-vocational work restrictions; and by being followed, filmed and harassed on April 2, 2013 while making assigned deliveries. OSHA added termination of employment on May 14, 2013 as an additional alleged adverse employment action. It is noted that the May 14, 2013 termination was reduced to a period of suspension through the union grievance procedure.

The Complainant alleged in his amended STAA complaint[13] filed September 25, 2013, that he was harassed by supervisor T. Narron following his return to work on July 22, 2013 by being required to attend four days of "new hire" training; by having his reinstatement of health insurance delayed until September 16, 2013; and by being placed out-of-service on September 24, 2013.

"Harass" is set forth as a prohibited activity in implementing regulation 29 CFR §1978.102(b) and not as a listed statutory prohibition. "Harassment"[14] is considered to be a verbal, written or physical act directed towards an employee without lawful purpose, where the employee subjectively perceives intimidation or humiliation for raising concerns under the STAA, physical or mental harm for raising concerns under the STAA, changes in the conditions or the terms of employment for raising concerns under the STAA, or similar "chilling" effects on voicing future concerns under the STAA; provided that the employee's subjective perception of the hostile or abusive act is objectively reasonable. Multiple acts of harassment may result in an abusive or hostile work environment. Whether a pattern of harassing activity arises to a hostile or abusive work environment depends on the totality of the circumstances in establishing whether the continuing activity was pervasive and regular, the continuing activity detrimentally affected the employee, and the continuing activity would have detrimentally affected other reasonable whistleblowers in that position. See: *Miller v. Kennworth of Dothan, Inc.* 277 F.3d 1269 (11th Cir. 2002); *Mendoza v. Borden, Inc*., 195 F.3d 1238 (11th Cir. 1999); *Allen v. Tyson Foods*, 121 F.3d 642 (11th Cir. 1997); *Calhoun v. UPS*, ARB Case No. 00-028, ALJ Case No. 99-STA-00007 (ARB Nov. 27, 2002); *Pickett v. Tennessee Valley Authority*, ARB 00-076, Fn 5, ALJ Case No. 2000-CAA-00009 (ARB Apr. 23, 2003); *Williams v. Mason & Hanger Corp*., ARB No. 98-030, ALJ Case No. 97-ERA-14 et al. (ARB Nov. 13, 2002); *Overall v. Tennessee Valley Authority*, ARB Case No. 04-073, ALJ Case No. 99-ERA-00025 (ARB Jul 16, 2007); *National Railroad Passenger Corp. v. Morgan*, 356 U.S. 101 (2002)
In this case neither the Claimant nor his counsel alleged in a timely manner that the Claimant was subjected to a hostile work environment. Accordingly, only the discrete acts timely identified by the Claimant in his complaints to OSHA are addressed.

(a) The Complainant has failed to establish by a preponderance of the evidence that he was harassed by supervisors when counselled for being one minute over lunch while making deliveries on March 14, 2013.

The Complainant alleged he was called into G. Strickland's office on March 15, 2013 and verbally counseled for being one minute over lunch on March 14, 2015. He testified he parked his vehicle and went to the area he was having lunch and then "hit lunch." He stated this was the first time he was counseled or warned and that no discipline was imposed.

[13] For purposes of this Decision and Order both the matters set forth in the Complainant's written statement to the investigator and the more formal written complaint amendment are considered as an amended complaint filed on September 25, 2013.
[14] 18 U.S.C. §1514(d)((B) defines "harassment" of a victim or witness in a federal criminal trial, or of their family members, as "a serious act or course of conduct directed at a specific person that (i) causes substantial emotional distress in such person; and (ii) serves no legitimate purpose." "serious act" is defined as "a single act of threatening, retaliatory, harassing, or violent conduct that is reasonably likely to influence the willingness of the victim or witness to testify or participate in a Federal criminal case or investigation."

V. Norton testified that as shop steward she was present during a short meeting with the Complainant and G. Strickland concerning production time and being over lunch by 1 minute. She reported that she was unaware of any driver being disciplined or verbally reprimanded for being over lunch by 1 minute. She reported that she had been over lunch a few minutes when she forgets to make the DIAD entry.

F. Gerster testified that Telematics is a computer system on the vehicles which records a driver's time for pay and performance purposes as well as for DOT audit purposes. He stated he reviewed Telematics reports for his drivers daily. He testified that he had an official discipline meeting with the Complainant in March 2013 for being over lunch time. He stated that the DIAD Telematics for the Complainant's trip on March 14, 2013 indicated that the Complainant stopped his truck and sat there for 4 to 5 minutes, then jumped on lunch for 31 minutes, and then sat in his truck another 4 to 5 minutes before departing on his route. F. Gerster testified that the 31 minute lunch was not a problem but the combined time of 41 minutes was a problem which was addressed with the Complainant. He testified that he reviews the Telematics daily for on-property and non-travel time and that a driver is allotted 30 minutes for lunch but can get up to an hour for lunch with the permission of management. He denied ever making attempts to harass or over-supervise the Complainant because he had filed an OSHA complaint.

T. Narron testified that he became the Southeast East Regional Director of Operations in February 2013 and implemented on-road observations to reduce road driver crashes and employee knowledge, wanted to reduce the 30 to 40 hours per day on-property time that was keeping UPS Marietta from hitting performance goals, began scrutinizing employee lunch time, and looked for ways to better utilize the space on the loading docks. He reported he held daily staff calls where he followed-up with the supervisors on the initiatives. He reported that he had time reports on each driver at each terminal he managed.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant was counselled for a lawful purpose concerning proper transitioning from duty-status into lunch status and back into a duty status by his supervisor on March 15, 2013; that the Complainant was treated similar to other drivers and not disciplined for being over lunch time on March 14, 2013; and that the March 15, 2013 counseling given to the Complainant on March 15, 2013 was for a lawful purpose related to use of timekeeping equipment and lunch periods during delivery runs. Additionally the Complainant failed to establish by a preponderance of the evidence that a reasonable driver, such as V. Norton, would consider the March 15, 2013 counselling as intimidation, humiliation, physically harmful, mentally harmful, a change in a term or condition of employment, or an act which would chill a driver from voicing safety concerns under the STAA.

Accordingly, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that he was harassed by supervisors when counselled on March 15, 2013 for being over the allotted lunch time on March 14, 2013.

(b) The Complainant has failed to establish by a preponderance of the evidence that he was harassed by being assigned work duties inconsistent with work restrictions related to a

March 18, 2013 work-related low back injury and by being assigned to night shift duties and varying reporting times while under medico-vocational work restrictions.

The testimony of the Complainant and supervisor F. Gerster are consistent in that the Complainant was accompanied by F. Gerster on a trip to the doctor for low back injury during delivery of a 20-foot long awning on Tuesday, March 19, 2013. The Complainant was examined and issued light-duty work restrictions on lifting, pushing and pulling. Upon questioning by F. Gerster, the physician permitted the Complainant to perform shuttle driver of trailers to and from customers during his normal working hours without handling freight. The Complainant attempted to perform the "temporary alternate work" as a shuttle driver but the bending, pulling and stooping aggravated his back so that additional work restrictions precluding driving were given by the physician. The Complainant worked the minimum 4-hour day trying the shuttle driver work on March 20, 2013. The Complainant was assigned non-driver duties of sweeping the UPS facility loading docks during his normal working hours as "temporary alternate work" upon his return to work Thursday, March 21, 2013. The Complainant attempted the sweeping work but reported it also aggravated his back condition and left work before obtaining the minimum 4-hour day. The Complainant was then taken off sweeping duties.

The Complainant testified[15] that after sweeping the dock area for two hours his back was aggravated and that he and shop steward V. Norton went to F. Gerster where he requested to have his duties changed to answering telephones or hand deliver documents to drivers, dispatch and the loading dock. He stated he was denied the requested work and went home where F. Gerster called him three times about when to start work the next day, Friday, March 22, 2013. He denied that he was told what the third form of "temporary alternate work" would be and denied being asked to come to work and perform on-property observations. He also testified that he did not think it normal for a supervisor to accompany an employee to the doctor's office for an injury at work. In his May 1, 2013 statement (CX 6, RX 22, page 8) the Complainant stated that he stopped sweeping the dock area after two hours and went to F. Gerster's office at 10:00 AM, March 21, 2013, at which time he was sent home in a non-pay status to await a start time for the next day. He reported receiving three calls from F. Gerster setting his start time as noon, then 4:00 PM and then 2:00 PM. He indicated that on the third telephone call setting the 2:00 PM start time that he told F. Gerster that he would take sick leave for that day and the next.

F. Gerster testified that "temporary alternate work" is usually work performed within the employee's job scope and during the employee's normal work hours if possible. For drivers answering telephones and filing are not with their job scope. He stated the work restrictions placed on the Complainant made available work very limited and that seated, on-property safety observations of peer drivers was appropriate for the Complainant as a union driver. He stated that only one on-property safety observation could be performed of drivers leaving in the morning but that multiple on-property safety observations could be made of peer drivers when the city drivers began arriving at random times in the afternoon and evening, beginning around 6:00 PM.. He reported the "temporary alternate work" performing on-property safety observations involved the Complainant sitting at the facility's covered fuel bay with a note pad and observe drivers returning from the bay into the terminal area. He testified that a schedule to

[15] The Complainant's testimony is generally consistent with the information reported to the help-line and the assigned investigator in Case Nos. 1303-UPS-1002 and 1303-UPS-10286 at RX 5, pages 55-61.

conduct safety observations is set for each week and that both managers and hourly employees can conduct the safety observations. He reported that a driver is free to decline "temporary alternate work" that is proposed. He testified that the Complainant did not perform the "temporary alternate work" as a shift safety observer on-property; but, called in sick for Friday March 22, 2013 and Saturday, March 23, 2013, and then returned "cleared for work" on Monday, March 25, 2013.

V. Norton testified that she accompanied the Complainant to a meeting with F. Gerster to a short meeting on March 19, 2013 to discuss his on-job injury while delivering 200-pound "sunsetter" awning tubes. She reported also attending a meeting on March 20, 2013 where the Complainant refused to sign "temporary alternate work" papers and stated he was still feeling dizzy. She reported that "pre-UPS", i.e.: pre-collective bargaining agreement, drivers were allowed to answer telephones as "temporary alternate work" and that she was aware of two drivers who were assigned to sweep the loading docks as "temporary alternate work" during their normal working hours. She also testified that when an employee is injured the terminal managers take them to the doctor.

S. Webber, Union Local 728 business agent testified that when "temporary alternate work" is assigned to an employee they normally stay on their regular schedule but they cannot do bargaining unit work.

After deliberation on the credible evidence of record, this presiding Judge finds that the sequential "temporary alternate work" provided to the Complainant of shuttle driver, then sweeper, and then on-property safety observer were each within the Complainant's medico-vocational restrictions existing at the time of the work assignment being made by F. Gerster; that the Complainant had the right as a union driver to decline "temporary alternative work"; that the Complainant properly exercised that right by declining "temporary alternate work" during the second shift on March 22 and 23, 2013; that the sequential assignment of "temporary alternate work" was for a lawful purpose; and that the Complainant was not treated in a manner different from other union drivers. Additionally the Complainant failed to establish by a preponderance of the evidence that a reasonable driver, such as V. Norton or union Local 728 business manager S. Webber, would consider the sequential assignment of the "temporary alternate work" to Complainant as intentional intimidation, intentional humiliation, intentional physical harm, intentional mental harm, an unwarranted change in a term or condition of employment, or an intentional act which would chill a driver from voicing safety concerns under the STAA.

Accordingly, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that he was harassed by supervisors during the March 19 to 23, 2013 timeframe by being assigned sequentially limiting "temporary alternate work" within his known medico-vocational restrictions.

(c) The Complainant has failed to establish by a preponderance of the evidence that he was harassed by being followed and filmed on or about April 2, 2013 while making assigned deliveries.

The testimony of the Complainant and supervisor F. Gerster are consistent in that the Complainant was making a scheduled delivery on or about April 2, 2013 at a car dealership. The Complainant called dispatch to report a situation at the car dealership. The Complainant extracted himself from the situation and then drove to Chili's restaurant where he made another delivery. F. Gerster followed the Complainant from the dealership to Chili's and videotaped the Complainant making the delivery at Chili's. The Complainant met with F. Gerster the following day with shop steward V. Norton present.

The Complainant testified that when he stopped for lunch on April 2, 2013 F. Gerster approached and told him that he had been following the Complainant, filming his actions, and considered the Complainant to have been driving too fast and following to close. He stated F. Gerster asked him to recite the "5" safe seeing habits for UPS drivers and the "10" safe driving habits for UPS drivers. He denied calling dispatch to ask for help in backing out of a tight situation at the car dealership. He testified that he had a meeting with F. Gerster in the presence of shop steward V. Norton where they discussed F. Gerster's allegations that the Complainant was not lifting correctly with his knees during the Chili's delivery and was speeding and following too close in traffic. He reported viewing the videotape made by F. Gerster during his observation for his vehicle. The Complainant testified that he had been followed on his route by G. Strickland two times previously, with one being on March 12, 2013; that he acknowledged the on-road observations with G. Strickland in writing; and that no discipline was involved.

T. Narron testified the Marietta facility became one of his responsibilities in February 2013 and that he instituted on-road observations in his facilities because of his prior success in reducing road crashes through on-road observations in an Illinois hub. He used a "safety tracker" in daily staff calls to ask managers questions and hold them accountable for conducting on-road observations of the drivers. He stated he wanted to beef-up on-road observations and driver depth of knowledge.

F. Gerster testified that the company had been doing on-road observation of drivers for years; but driver observations were not pushed hard until T. Narron arrived and wanted observations done as a key element for success. He reported that a manager or supervisor had to perform 1 on-road safety observation each week with 4 completed each month. He stated there were 4 managers so each manager did a separate week of on-road safety observations. He reported that an on-road observation was made of the Complainant by G. Strickland on March 12, 2013 and again on March 25, 2013; but that he had not directed G. Strickland to do the on-road observation and that it was customary to do on-road and on-property observations of employees after they return from an injury. He reported that there was no discipline taken as a result of the March 25 on-road safety observation. He stated that someone in the Human Resources department classifies new hires and employees returning after injury as "most to gain" employees and that on March 25, 2013 the Complainant had been designated as a "most to gain" employee and assigned to G. Strickland for observation.

F. Gerster testified that he conducted an on-road observation of the Complainant April 2, 2013 as an opportunity since he had traveled to the car dealership to assist the Complainant's exit but arrived as the Complainant was exiting the property. He testified that he videotaped the Complainant as he conducted the on-road observation; that the union contract permits

videotaping union employees; and that he routinely uses videotaping when following an employee for labor reasons, though the Complainant was the only driver he videotaped at the Marietta facility. He stated that he met with the Complainant and shop steward V. Norton to discuss the Complainant not using proper work methods that included bending knees during work and not observing the 4 to 6 second following distance practice in stop and go traffic. He stated it was plain to him on the videotape that the Complainant's entire body could be seen during the observed delivery, though the Complainant argued his knees could not be seen.

V. Norton testified that she was present as shop steward when F. Gerster discussed the April 2, 2013 on-road observation he made of the Complainant on April 3, 2013. She reported the Complainant was upset about being followed and wanted to know how many times he had been followed. She reported that she was aware of two other drivers being followed. She stated viewing the videotape and the conversation involved the Complainant closing the door latch and failing to bend his knees. She stated that the Complainant's knees were not really visible on the video tape because of parked cars blocking the view. She did not recall a discussion about following distance while driving but did recall F. Gerster indicating that the Complainant was a "most to gain" employee.

S. Webber testified as Union Local 728 business agent that the collective bargaining agreement permits videotaping employees for disciplinary purposes such as theft or investigation.[16] He stated he was unaware of other drivers from the Marietta facility being followed.

After deliberation on the credible evidence of record, this presiding Judge finds that the off-property observations of the Complainant was done under an established company program designed to reduce on-road accidents; that managers and supervisors were required to submit at least one on-road safety observation each week as part of the company program; that F. Gerster conducted an on-road safety observation of the Complainant on April 2, 2013; that F. Gerster addressed perceived safety issues of not bending knees, following too close and excessive speed in stop-and-go traffic with the Complainant immediately following his observations; and that the Complainant was treated no differently than other drivers at the Marietta facility. Additionally the Complainant failed to establish by a preponderance of the evidence that a reasonable driver, such as V. Norton or union Local 728 business manager S. Webber, or member of management, such as T. Narron or G. Strickland, would consider on-road observation of drivers as intentional intimidation, intentional humiliation, intentional physical harm, intentional mental harm, an unwarranted change in a term or condition of employment, or an intentional act which would chill a driver from voicing safety concerns under the STAA. Accordingly, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that he was harassed by supervisors during the April 2, 2013 on-road safety observation or the related post-observation meeting.

(d) The Complainant has failed to establish by a preponderance of the evidence that he was harassed by being required to attend four days of "new hire" training following his return

[16] Article 22, Section 3 of the Collective Bargaining Agreement (JX 7) permits installation and operation of video cameras in the public areas of the Service Center for the safety and security of employees. Off-property videotaping is not addressed other than stating any video tape being used for a disciplinary purpose must be provided to the local union prior to such use.

to work on July 22, 2013 and by having his reinstatement of health insurance delayed until September 16, 2013.

The Parties have stipulated that the Complainant had his employment terminated on May 14, 2013 and returned to work on July 22, 2013 after his termination for disciplinary reasons was reduced to a period of suspension served, following a hearing on the Complainant's grievance by the Joint UPS Freight/Teamsters Panel. The period of suspension was without back pay.

The Complainant testified that he did not have health insurance after he was fired in May 2013 until it was reinstated shortly before he was fired again in September 2013. He reported incurring a $5,000.00 medical expense in July 2013 for treatment of his step-daughter; that the insurance company had denied the expense after he was fired in May 2013; and that he did not submit a claim to the health insurance company for the $5,000.00 medical expense after the insurance was reinstated or after being fired in September 2013. He also testified that the $5,000.00 medical expense was incurred in July 2013 and he did not learn that it had been denied by the insurance company until after he was fired in September 2013. He stated he did not file an appeal of the health insurance company's denial of the claim.

On August 26, 2013 the Complainant contacted W. Welstead in the UPS Human Resources department to report his health insurance coverage was cancelled due to "insufficient hours" and that the Complainant understood his coverage should have been reinstated with no gaps. W. Welstead contacted the health insurance provider (BSC) and confirmed that the Complainant's health insurance had been cancelled for "insufficient hours" effective July 31, 2013. W. Welstead then inquired of Labor Relations Manager, R. Gannon, as to what was the correct status so he could notify A. Hewitt to make an appropriate adjustment. R. Gannon reported, 48 minutes later, that the Complainant "should have been re-instated with benefits." Within two minutes of R. Gannon's reply e-mail W. Welstead directed A. Hewitt to correct the Complainant's insurance account. The Complainant was advised of R. Gannon's response and W. Wilstead's direction to correct the insurance account by copy of the respective August 26, 2013 e-mails. (RX 24, RX 26, pages 38 and 39) Respondent's in-house counsel confirmed to the OSHA investigator in a September 11, 2013 e-mail that the Complainant returned to work on July 22, 2013 with no further issues "apart from a technical snafu regarding his insurance coverage which has since been corrected (RX 26, page 21). Such prompt corrective action by Respondent when the Complainant brought the issue to its attention demonstrates a lack of retaliation. The Complainant failed to submit further evidence to establish that this clerical error that was promptly corrected amounted to an act of harassment or retaliation.

Within the period from September 25, 2013 and October 22, 2013, the Complainant submitted a letter to the OSHA Regional Investigator assigned to the STAA complaint (RX 25, pages 3 and 4); RX 26, pages 35 and 36). In the letter the Complainant alleged, "My first week back, [T.] Williamson the new Service Center Manager made me go through four days of New Hire training, which the company has never done before on any employee brought back to work." No evidence has been submitted on this allegation. Respondent's in-house counsel responded to the allegation in Respondent's November 27, 2013 response to the OSAH investigator with the words "Even if [the Complainant] was administered training upon his return to work in July 2013 …" (RX 26, page 16). This is not evidence that the event took place as alleged.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant has failed to establish the allegation of retaliation and harassment by attending four days of training upon return to work on July 22, 2013; that the Complainant was without health insurance coverage from August 1, 2013 through September 15, 2013; that the lack of insurance coverage from August 1, 2013 through September 15, 2013 was due to a determination of third party BCS insurance company and not intentional and unlawful actions of Respondent; that Respondent took prompt and appropriate steps to reinstate the Complainant's health insurance coverage when notified by the Complainant of the problem on August 26, 2013; and that the Complainant had failed to establish the allegation of retaliation and harassment due to lack of health insurance coverage from August 1, 2013 through September 15, 2013. Additionally the Complainant failed to establish by a preponderance of the evidence that a reasonable driver would consider the events involving the lack of health insurance coverage from August 1, 2013 through September 15, 2013 as intentional intimidation, intentional humiliation, intentional physical harm, intentional mental harm, an unwarranted change in a term or condition of employment, or an intentional act which would chill a driver from voicing safety concerns under the STAA. Accordingly, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that he was harassed by supervisors by experiencing a lack of health insurance coverage from August 1, 2013 through September 15, 2013.

IV. The Claimant has failed to establish that his protected activity on February 25, 2013; March 1, 2013; March 4, 2013 and April 2, 2013, as amended, were a contributing factor to the adverse employment actions of May 10, 2013, May 14, 2013, September 24, 2013 or September 25, 2013.

During adjudication at the Office of Administrative Law Judges level, the Complainant must establish by a preponderance of the evidence that his protected activity was a contributing factor to the adverse employment action. There is no limitation on the evidence that may be considered; however, "where the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of no retaliatory reasons in order to determine whether protected activity was a contributing factor in the adverse action." *Palmer*, supra at 15. "A complainant is not automatically immune to adverse action after engaging in protected activity … an employer may discipline the employee for insubordination." *Grey v. Buford's Tree Surgeon*, ARB Case No. 06-131, ALJ Case No. 2005-STA-00045 (ARB Jun. 30, 2008) and cases cited therein.

a. The Claimant has failed to establish by a preponderance of the evidence that his protected activity was a contributing cause to the adverse employment action of May 10, 2013 or May 14, 2013.

JX 4 is the discharge letter that implemented termination of the Complainant's employment on May 14, 2013. It states "Discussed at this meeting [on May 14, 2013] were your offenses of extreme seriousness on 5/9/2013. Therefore, due to the serious nature of your offenses, you have given UPS Freight just cause to discharge you from your employment." Article 6, Section 1 of the collective bargaining agreement (JX 6) provides that an employee may not be disciplined, suspended or discharged without just cause and that offenses of "extreme seriousness" do not

require imposition of progressive discipline or an advance warning notice. An employee may use union grievance procedures under Article 7 to challenge suspensions and discharges.

The credible evidence of record establishes that on May 9, 2013 the Complainant was notified by shop steward V. Norton to see F. Gerster in his office to discuss being over "on-property time" on May 8, 2013. On-property time is the period between the time a driver goes into a duty status and subsequently departs the Marietta facility on the driver's delivery route. During that on-property time a morning pre-shift communication meeting (PCM) is held by management with the drivers and the drivers inspect their respective tractor, trailer and freight. The daily PCM covers safety reminders and other areas of concern, such as observing on-property time. The normal on-property time is 20 minutes. On-property time does not include waiting for a trailer to be loaded because drivers are instructed to change status while waiting for freight to be loaded. Excessive driver on-property time is recognized to delay deliveries and increase operating costs. *Calhoun v. United Parcel Services*, ARB Case No. 04-018, ALJ Case No. 2002-STA-00031 (ARB Sep. 14, 2007) Regional Director T. Narron became responsible for the Marietta facility and several other regional facilities in February 2013 and stressed to the service center managers the need to reduce excessive on-property time. He reported that there was a need for the Marietta facility to reduce the 35 to 40 hours per day of on-property time in order for the Marietta facility to achieve performance goals. The Telematics reports for on-property time were reviewed daily by the Regional Director and each of his facility managers and discussed in their daily staff calls.

Telematics report for May 8, 2013, (RX 18) established that of the 12 drivers that morning, the Complainant had the longest period of on-property start time at 64 minutes. The Complainant attributed 10 minutes of the May 8, 2013 on-property time to meeting with F. Gerster following the May 8, 2013 morning PCM to address allegations of insubordination involving being verbally disruptive and giving F. Gerster the finger at the morning PCM and a portion of the remaining on-property start time was due to his DIAD not being on-line until his third stop that morning. Neither Party submitted the Complainant's "Driver Trip Summary" for May 8, 2013 which would identify the Complainant's location and time while making deliveries and also clarify the operational status of his DIAD and the time and location of the vehicle when it became operational the morning of May 8, 2013. The Complainant testified that when F. Gerster expressed concerns about the on-property time on previous occasions, he would provide an explanation and the issue would be dropped, thus establishing the Complainant's knowledge of the importance of observing on-property time and the practice of management monitoring driver on-property time. Additionally, the Complainant had discussed excessive on-property time with G. Strickland on two prior occasions.

RX 14 and testimony of F. Gerster, V. Norton and the Complainant establish that the purpose of the May 9, 2013 meeting was to address the Complainant's high on-property time on May 8, 2013, which was a lawful purpose. The credible evidence of record established that the meeting between the Complainant and supervisor F. Gerster, in the presence of V. Norton, started with the Complainant declaring the meeting was "bullshit" and that he had to get on the road. The Complainant reported he was agitated at that point. He refused to sign the warning notice in RX 14 for excessive on-property time and V. Norton signed RX 14 as union representative "under protest." The Complainant stood up from the chair and began his exit from F. Gerster's office

when F. Gerster wished him a nice day and to be safe. The Complainant testified he was frustrated and being a smart ass when he replied he wouldn't for him. F. Gerster called the Complainant back into the office and the Complainant did so and sat down. The Complainant testified he complained about the way he was being treated; used the term "bullshit"; became loud; and raised his voice out of frustration when told to explain what he meant by his comment, at which time V. Norton closed the office door. He testified he believed his blood pressure was rising and he became sick to his stomach. He then told F. Gerster he was not fit to drive and was going home sick. He stated he then left the office. He testified that when V. Norton came out of the office he told her she was his witness and then he left after telling dispatch he was going home sick.

Shop steward V. Norton testified that at the May 9, 2013 meeting the Complainant was given a warning letter about excess on-property time (RX 14). She reported the Complainant and F. Gerster were bickering back and forth and she shut the door when the Complainant came back into the room after exiting the first time. She reported that it was during the first exiting that the Complainant put his hands on the desk while standing up. She stated she was asked to talk to the Complainant after the first exiting and not have him leave work. She reported she did observe the Complainant act in a manner which should have put F. Gerster in fear for his safety. V. Norton testified that she understood from the May 14, 2013 meeting that the Complainant was being terminated for extreme seriousness of the Complainant's unprofessional and aggressive actions on May 9, 2013.

The clerk sitting outside F. Gerster's office during the May 9, 2013 meeting with the Complainant, V. Torres, made a written statement of the events the same day. She stated that the Complainant was yelling profanities regarding why he was brought into the office and used the term bullshit. She reported that the Complainant was still yelling profanities when he opened the office door and told F. Gerster he was going home because he was all worked up. She reported the Complainant stormed out of the office walked into dispatch and said he was going home. She reported F. Gerster never reacted in a negative way to the Complainant's antics. She stated that V. Norton then came out of the office and asked, which way did the Complainant go? V. Torres also reported on May 10, 2016 that she feared retaliation from the Complainant or one of his coworkers and that the May 9, 2013 event was one of several outbursts by the Complainant that she has witnessed over five years that contribute to her stress, chest pains and worry about her safety and have resulted in her taking anti-anxiety medication.

F. Gerster testified that the Complainant attributed the excessive on-property time to a post-PCM meeting with F. Gerster on May 8, 2013 concerning his conduct at the May 8, 2013 PCM, his truck not being loaded until 10:15, and his DIAD not coming on-line until his third stop the morning of May 8, 2013. He reported that he did not have time to check the DIAD out during the meeting and gave the Complainant the prepared warning letter for excessive on-property time on May 8, 2013 (RX 14). The Complainant exercised his right not to sign the warning letter, though the shop steward did sign the letter. The Complaint got up and stated walking out of the office when he told him to "be safe today" to which the Complainant made a reply and he asked the Complainant to return to the office and explain what he meant by his reply. F. Gerster testified that the Complainant became combative and stated he was being micromanaged. He stated the meeting ended with the Complainant standing up quickly, hunching over the desk and

screaming "this is bullshit" in a very loud and physically threatening manner. He asked the Complainant to sit back down, which the Complainant did not do. The Complainant then claimed to be sick and he had to leave for the day, at which time he left the office. He called for the Complainant to come back into the office and the Complainant continued to walk away. He stated he then asked the shop steward to talk to the Complainant. He reported he remained calm and professional throughout the meeting with the Complainant and did not raise his voice. He reported the events to his supervisor, T. Narron, that same day.

T. Narron testified he discussed the May 9, 2013 events involving the Complainant with F. Gerster. He reported that he arranged for security to be present on May 10, 2013 when the Complainant was taken out-of-service pending completion of an investigation. He testified he made the final decision to terminate that Complainant's employment for serious offenses and that F. Gerster delivered the discharge notice.

Local 729 business agent, S. Webber, testified that he was aware of union members being terminated for raising their voice to management and that an offense of extreme seriousness is not subject to progressive discipline and does not have to be preceded by a warning letter. He reported the Complainant's local level appeal of his May 14, 2013 discharge was held on June 24, 2013. He identified RX 21 and RX 22 as the written case presented to the Joint Panel for the May 14, 2013 discharge. He testified that the Joint Panel does not announce their vote nor issue a written ruling; though their decision is final as to grievances.

The evidence is consistent that the May 10, 2013 suspension pending investigation and May 14, 2013 discharge were reduced by the Joint Panel to suspension without pay for the period of time served and the Complainant returned to work on July 22, 2013. (RX 23)

The May 9, 2013 meeting was called by F. Gerster for the lawful purpose of addressing the Complainant's excessive on-property start time and presenting a warning notice under the required progressive disciplinary plan with union members. The meeting escalated to yelling by Complainant directed towards his supervisor F. Gerster and leaving the office a second time with refusal by the Complainant to return to the office, even when shop steward V. Norton recommended to the Complainant to do so. Both F. Gerster and V. Torres testified to being placed in fear by the Complainant's actions on May 9, 2013, though V. Norton testified she saw no reason why F. Gerster should have been fearful of the Complainant. Management's concern about personal safety was, however, sufficient to warrant the presence of a security officer the following day when the Complainant was informed by T. Narron that he was being taken out of service pending investigation of his actions in F. Gerster's office.

Based on the findings set forth above, all of the Complainant's protected activity before being discharged on May 14, 2013 involved his actions between February 25, 2013 and April 2, 2013 related to red-tagging Trailer #255028. The record established that the trailer was taken out of service and repaired by March 5, 2013 with no other operational or safety complaints. The April 2, 2013 complaint to OSHA was made after all repairs had been done to Trailer #255028 the month earlier.

After deliberation on the credible evidence of record, and considering the directive on equipoised evidence set forth in *Director, OWCP v. Greenwich Colliers*, 512 US 267, 281 (1994) and *Schaffer v. Weast*, 546 US 49 (2005),[17] this presiding Judge finds that the Complainant was called into a May 9, 2013 meeting by F. Gerster for a lawful purpose unrelated to the Complainant's earlier protected activity; that the Complainant engaged in loud, abusive, insubordinate conduct and demeanor directed toward his supervisor F. Gerster during the meeting; that the Complainant was taken out-of-service on May 10, 2013 pending an investigation into his misconduct in the office of F. Gerster on May 9, 2013; that the Complainant was discharged by Respondent on May 14, 2013 based on his misconduct in the office of F. Gerster on May 9, 2013; and that the Complainant has failed to establish by a preponderance of the evidence that his prior protected activity was a contributing factor in the May 10, 2013 suspension pending investigation or his May 14, 2013 termination of employment due to his May 9, 2013 actions of an extremely serious offense, events of close temporal proximity, totaling five days in May 2013.

Since the Complainant has failed to establish by a preponderance of the evidence that his prior protected activity was a contributing factor to his May 10, 2013 being taken out-of-service pending investigation and his May 14, 2013 discharge, he is not entitled to relief under the STAA for his May 10, 2013 being taken out-of-service pending investigation or his May 14, 2013 discharge.

b. The Claimant has failed to establish by a preponderance of the evidence that his protected activity was a contributing cause to the adverse employment actions of September 24, 2013 and September 25, 2013.

JX 5 is the discharge letter that implemented termination of the Complainant's employment on September 25, 2013. It states "Discussed at this meeting [on September 25, 2013] was your offense of extreme seriousness. Therefore, due to the serious nature of your offense, you have given UPS Freight just cause to discharge you from our employ."

The consistent evidence of record established that on September 4, 2013 the Complainant made a scheduled delivery at Dollar General. He first parked his vehicle at the rear loading dock to the store and did not get a response when he knocked on the door. He off-loaded metal shelving that was banded to a pallet and then drove his vehicle to the front of the store. He entered Dollar General through the front door and was greeted by cashier D. Corptan, who escorted the Complainant to the store manager, E. Manzanares. E. Manzanares escorted the Complainant into a storeroom and opened the back door to the loading dock. The Complainant dragged the pallet with the shelving into the storeroom and placed the pallet on the floor. E. Manzanares requested the shelving be moved and the Complainant declined. After words were exchanged between E. Manzanares and the Complainant, E. Manzanares signed the delivery receipt. The Complainant added the name and telephone number of his dispatcher, P. Nelson to the delivery receipt and left the customer copy of the receipt in the storeroom. The Complainant then exited Dollar General

[17] Where the credible evidence of record is in "equipoise", that is evenly balanced, the party proponent with the burden of proof (persuasion) must loose.

and called his supervisor, G. Strickland to report an upset customer. The events in the storeroom were videotaped by a security camera without sound recording.

On September 17, 2013 Marietta service center manager A. Radnoti received written notice that the manager from Dollar General, E. Manzanares, had called to complain about the driver who made the delivery on September 4, 2013 and wanted to speak with him. A. Radnoti obtained the identity of the driver from G. Strickland as the Complainant and was told that the Complainant had notified G. Strickland earlier that the customer was upset. A. Radnoti then followed standard procedure for addressing customer complaints by calling E. Manzanares to address her concerns, understand the events that occurred, assure her that customer service was important to UPS Freight, apologize for any infraction by the driver, and repair any damage that may have occurred. After talking to E. Manzanares he notified the Regional Director, T. Narron, of the complaint as expressed by E. Manzanares (RX 26, page 45). A. Radnoti was directed by M. Cohen from Labor Relations to visit Dollar General and obtain signed statements from E. Manzanares and any witness to the events of September 4, 2013. A. Radnoti went to Dollar General, discussed the matter with E. Manzanares and D. Corptan, obtained written statements from them, learned of the existence of the security video tape of the storeroom, viewed the video tape and requested a copy of the video tape. A. Radnoti sent copies of the witness statements and a report of his findings to the Regional Director and Labor Relations. Pursuant to instruction from R. Gannon of Labor Relations, A. Radnoti interviewed the Complainant in the presence of shop steward, V. Norton on September 24, 2013, and obtained the Complainant's written statement of the September 4, 2013 events. After discussing the Complainant's interview and written statement with R. Gannon, A. Radnoti asked the Complainant specific questions regarding the events and reported the results to R. Gannon who then directed A. Radnoti to notify the Complainant his employment was being terminated for an offense of extreme seriousness.

The Complainant testified that the manager of Dollar General opened the back door to the storeroom, looked at the delivery pallet and then cleared an area for the Complainant to place the freight delivery. He stated he dragged the pallet into the storeroom about 10 feet and placed the pallet in the location the manager indicated and pushed it against the wall. He reported the manager asked him to remove the shelving from the pallet but he declined because it was shrink-wrapped and banded to the pallet with metal bands which he did not have tools to cut or remove. He stated the manager began cussing at him for not removing the shelving from the pallet and demanded his supervisor's name and number. He stated he explained it was an extra charge to take freight off a pallet, that she could refuse delivery, and that she would be charged for redelivery of refused freight. He testified he considered the manager was refusing the delivery and the manager followed him as he exited the storeroom to get his vehicle and drive to the back loading dock to reload the pallet and shelving. He stated the manager agreed to take the freight but would not sign the delivery receipt until he included his supervisor's name and number. He testified he went to the counter, wrote dispatcher P. Nelson's name and number on the manager's portion of the delivery receipt, walked back towards the freight, and tossed the delivery receipt on the freight because the manager was outside the door and not visible. He told the manager to have a nice day, turned right and exited the store through the front door to get back to his vehicle, where he called G. Strickland and reported a confrontation with a customer and leaving P. Nelson's name and number with the customer.

The Complainant testified that he made a verbal statement about the September 4, 2013 Dollar General delivery on September 24, 2013 to A. Radnoti in the presence of shop steward V. Norton. He then made a written statement of the events as set forth in RX 30, page 7. He testified that he did not include statements about removing metal banding because he did not recall it at the time and only after he viewed the video tape which showed him tilting the pallet without the freight moving in the shrink-wrap did he recall the metal banding and the request to remove the banding. He claimed the manager was lying in her written statement and that D. Corptan was also lying because there was no doorbell at the back door loading dock. The Complainant testified stating that he handed the manager the delivery receipt and didn't think he told A. Radnoti he placed it on the pallet. He stated he was placed out-of-service by A. Radnoti on September 24, 2013 and that was the last day he worked for UPS Freight.

In his September 24, 2013 written statement to A. Radnoti the Complainant stated he pulled the pallet about 15 feet into the storeroom to where the manager asked it to be placed and then she asked it to be moved about 50 feet to the other side of the storeroom. He indicated he declined to move it because he did not have anything with which to move it and that the manager used cuss words about his attitude and having a job. The Complainant indicated the manager wanted his supervisor's name and number, he wrote the information on the delivery receipt and handed the receipt to the manager and said "have a nice day" to which the manager cussed him again. He wrote he then exited the store and called G. Strickland and told him what happened.

Marietta Service Center manager A. Radnoti testified that he talked to Dollar General manager E. Manzanares over the telephone on September 17, 2013, before traveling to the store to speak with her in person and obtain her written statement and that of cashier D. Corptan. He described E. Manzanares as a very polite, soft-spoken small woman.

A. Radnoti testified that Dollar General is a national account and he wanted to diffuse the situation at the store and repair any damage that may have been done and he followed normal procedure by calling the customer on September 17, 2013 when he learned of the customer complaint from Dollar General. He stated his impression was that the manager, E. Manzanares was upset and very concerned about the Complainant and wanted no further interaction with the Complainant. He reported that when he met with E. Manzanares that afternoon she was cordial at the beginning of his visit but became very upset and distraught and frightened to the point she stated she was afraid about the Complainant coming back to the store. He indicated that as the visit progressed and the video was reviewed, E. Manzanares went back to being soft-spoken. He testified that the video tape was provided sometime after his visit to the store. A. Radnoti testified he did not show or tell the Complainant about the security video tape from Dollar General in order to see if the Complainant would be truthful in his statements. He reported the Complainant first stated on September 24, 2013 that he handed the delivery receipt to the Dollar General manager and later stated he had placed the delivery receipt on the pallet and that both versions are inconsistent with the video tape which shows the Complainant throwing the delivery receipt on the floor while the manager is closing the back door and locking up a few feet away. He testified that the video also showed the manager had moved boxes to make room for the delivery and asked the Complainant to move the pallet out of the way and the Complainant responded by shaking his head no. A. Radnoti testified that after the Complainant made a written statement on September 24, 2013, the Complainant stepped out of the office while he

discussed the Complainant's statement with R. Gannon and was directed to verify a few statements with the Complainant. The Complainant came back into the office and stated he had tried to hand the delivery receipt to the manager but she would not take it and he then placed the delivery receipt on the pallet. A. Radnoti stated in an October 16, 2013 e-mail to M. Cohen that the storeroom security video tape showed the Complainant dragged the pallet into the storeroom and placed it in the walk path to the back door and refused to move it. At the time of the discussion the Complainant is waiving his arms at the back door and appears upset. At one point the Complainant tried to hand the manager the delivery receipt to sign and she pointed to the delivery receipt. The Complainant walks away and the manager follows while saying something. The two came back into view and the manager signed the delivery receipt and the Complainant wrote on the delivery receipt. The manager goes to close the back door and the Complainant finishes writing, tears off the customer's copy of the delivery receipt, throws the delivery receipt on the floor, turns and walks away.

The Dollar General manager, E. Manzanares made a verbal statement to A. Radnoti over the telephone on September 17, 2013 and in person later that same day when A. Radnoti visited the Dollar General, as well as a written statement while A. Radnoti was present in the store. E, Manzanares reported that she opened the back door for the Complainant, who then pulled the pallet into the storeroom and laid it flat. She asked him to set it next to the wall but he refused and stated it was his job to push it inside. She reported the Complainant proceeded to complain about being at the back door for seven minutes and was yelling to the point her cashier came back to see what was going on. She asked for the Complainant's supervisor's name and was told sign the delivery receipt or he would take the freight back. She stated she signed the delivery receipt and the Complainant threw it at her and it landed on the floor. Then the Complainant walked away. She stated in her written statement and verbal statement to A. Radnoti that she did not want the Complainant to make any more deliveries to her store. E. Manzanares reported she did not call UPS Freight immediately following the September 4, 2013 event because she was distracted by needs of a grandchild and scheduled vacation. She expressed that she was afraid of the Complainant coming back and that her supervisor told her to call UPS Freight and follow up on the September 4, 2013 incident.

Dollar General cashier D. Corptan made a written statement on September 24, 2013 that the Complainant came into the store and was pitching a fit in front of the customers saying he had been at the backdoor with a delivery and no one would answer his knocking and we needed a door bell back there. He escorted the Complainant to the storeroom where the manager's office was located and the Complainant interrupted him when he tried to explain what was going on to the manager. The Complainant started yelling at the manager. The manager opened the back door and asked for the deliver to be placed to the right so it would not block the backdoor but the Complainant refused. D. Corptan indicated that he left the storeroom to wait on customers at that time. In a verbal statement to A. Radnoti on September 24, 2013, D. Corptan stated the Complainant was loud enough to be heard throughout the store and that he apologized to the store's customers for the actions of the Complainant.

Shop steward V. Norton testified that she attended a meeting with the Complainant, A. Radnoti and G. Strickland on September 24, 2013 in which G. Strickland stated he had taken a call from the Complainant reporting a customer complaint. She stated the Complainant indicated that the

customer had been abusive towards him and he twice denied yelling at the customer. The Complainant indicated that the customer was untruthful if she said he was yelling at her. She reported the Complainant saying he wrote the supervisor name and number on the delivery receipt and placed the receipt on the pallet, told her to have a nice day, turned and walked out of the store. V. Norton testified that the Complainant was asked to leave the room and that she refused to sign a statement as to what the Complainant stated verbally. When the Complainant was called back into the room he was told by A. Radnoti that he was being terminated for an offense of extreme seriousness. She reported A. Radnoti stating he had no problems with the Complainant but had to do what his supervisor T. Narron directed.

Local 728 business representative S. Webber visited Dollar General manager E. Manzanares in the store with M. Cohen on October 13, 2013 as part of the Joint Panel hearing the Complainant's grievance over being discharged for an offense of extreme seriousness arising out of the September 4, 2013 delivery to Dollar General. He testified that E. Manzanares feared for her life from the Complainant and that the Complainant was irate, would not move the shipment to the location she indicated, and was hollering and screaming so it could be heard throughout the store. He reported his review of the video tape showed the manager gestured with her hands where she wanted the pallet placed and that the Complainant tried to pitch the delivery receipt onto the pallet. He stated he apologized to the manager on behalf of the Union for the actions of the Complainant.

Regional Director T. Narron testified he became aware of the Dollar General customer complaint on September 17, 2013 from A. Radnoti and that he directed A. Radnoti to visit manager E. Manzanares at the Dollar General store, protect the brand, protect UPS Freight business and report back in an e-mail on the visit. He testified that the investigation of the September 4, 2013 incident established that E. Manzanares "obviously felt threatened and intimidated and that is why I decided to terminate [the Complaint.]" He stated he reviewed the statements for the manager and store employee as well as the security video tape. He stated the video tape lined up with the statement of E. Manzanares and showed the Complainant was agitated; he wailed his arms around and flipped the delivery receipt. It showed the customer was upset. He testified that the video tape and the customer statements lined up with another instance of aggressive behavior by the Complainant. He indicated that he considered the Complainant's actions with F. Gerster in May also aggressive behavior by the Complainant, but he would have terminated any driver based on the September 4, 2013 acts alone. He stated the correct action for a driver with the Complainant's experience was to not further upset the customer, call the supervisor and request permission to do what the customer asks.

After consideration of all the evidence of record, this presiding Judge finds that the Complainant is not credible as to his personal interactions with the Dollar General manager on September 4, 2013. His statement and testimony of not being loud, denying yelling at E. Manzanares, placing the pallet against the wall, not waving his arms around, not being agitated, handing the delivery receipt and then attempting to hand the receipt to the manager then placing the delivery receipt on the pallet, as well as stating that E. Manzanares was outside the building and not visible when he put the customer copy of the delivery receipt on the pallet; are contradicted by that of E. Manzanares and D. Corptan as well as the various statements of what was viewed on the security

video tape by A. Radnoti, T. Narron and S. Webber. The Complainant's statements and testimony are given less weight.

Greater weight is given to E. Manzanares, D. Corptan, A. Radnoti, T. Narron, V. Norton and S. Webber. Their testimony indicates that the Complainant acted in a loud and threatening manner towards E. Manzanares during the September 4, 2013 delivery such that E. Manzanares was traumatized and feared the Complainant and again being exposed to the Complainant and that the Dollar General environment was disrupted during his short time in the store. The Complainant's actions did not comport with those expected of delivery drivers and required the interaction of UPS Freight and Local 728 to apologize for Complainant's actions and resolve the customer concerns of a national account. The Complainant's September 4, 2013 actions and conduct at Dollar General violated the standards the Complainant had received in training related to customer service policies and were of extreme seriousness under the Union contract as evidenced by the Joint Panel denying the Complainant's grievance and the Local 728 business representative taking corrective actions on behalf of the Union with the customer.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant engaged in loud, abusive, aggressive conduct and demeanor directed toward the manager of Dollar General during a delivery on September 4, 2013; that the manager of Dollar General was placed in fear for her present and future safety by the Complainant on September 4, 2013; that the Complainant was taken out-of-service on September 24, 2013 after making statements about his actions during the September 4, 2013 delivery at Dollar General; that the Complainant was discharged by Respondent on September 25, 2013 based on his adverse conduct and demeanor directed toward the manager of Dollar General on September 4, 2013; and that the Complainant has failed to establish by a preponderance of the evidence that his prior protected activity was a contributing factor in the September 24, 2013 suspension or his September 25, 2013 termination of employment due to his September 4, 2013 conduct and demeanor of an extremely serious offense, events of close temporal proximity totaling eight days in September 2013 from the time the Dollar General manager called UPS Freight with the customer complaint.

Since the Complainant has failed to establish by a preponderance of the evidence that his prior protected activity was a contributing factor to his September 24, 2013 being taken out-of-service his September 25, 2013 discharge, he is not entitled to relief under the STAA for his September 24, 2013 being taken out-of-service or his September 25, 2013 discharge.

V. <u>The Claimant is not entitled to relief under the STAA based on his complaint filed April 2, 2013 and as amended on May 16, 2013, and as further amended on September 25, 2013</u>.

In that the Complainant has failed to establish by a preponderance of the evidence the required element under the STAA that his protected activity was a "contributing factor" to the alleged adverse employment actions, his complaint under the STAA fails and must be denied. See *Coryell v. Arkansas Energy Services, LLC*, supra.

Since the Complainant has failed to establish a required element for relief under the STAA, there is no reason to address whether the Respondent would have taken the same adverse employment

actions even without the Claimant's protected activity. See *Palmer v. Canadian National Railway*, supra.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation on the credible evidence of record and argument of the Parties, this presiding Judge enters the following Findings of Fact and Conclusions of Law –

1. At all times material hereto Complainant was an employee of UPS Freight as defined in 49 U.S.C. §31101(2) and 29 C.F.R. §1978.101(h) and resided in Woodstock, Georgia.
2. From May 22, 2007 to September 25, 2013, IPS Freight employed Complainant at its facility located at 850 Cobb International Blvd. NW in Kennesaw, Georgia (referred to as "the Marietta Service Center"). Complainant was employed to operate commercial motor vehicles having a gross vehicle weight rating of 10,001 pounds or more on the highways to transport property in interstate commerce.
3. The Complainant was a member of the International Brotherhood of Teamsters, Local 728, such that his employment with UPS Freight was subject to the terms of a collective bargaining agreement.
4. Respondent UPS Ground Freight, Inc. transacts business as UPS Freight and is an employer within the meaning of 49 U.S.C. §31101(3) and 29 C.F.R. §1978.101(i).
5. UPS Freight has its principal place of business at 1000 Semmes Avenue, Richmond, VA 23218-1216.
6. At all times material, Felix Gerster was a service center supervisor for UPS Freight and until mid-August 2013, Felix Gerster managed UPS Freight's Marietta Service Center.
7. Since February 13, 2013, Troy Narron has been the Regional Director of Operations for UPS Freight's SE/E District; his area of responsibilities includes the Marietta facility.
8. Anthony Radnoti transferred to UPS Freight's Marietta facility in mid-August 2013 and was Complainant's immediate supervisor between approximately August 19, 2013 and September 25, 2013.
9. In February of 2013, Complainant reported that his assigned trailer was damaged and marked that it needed to be repaired at the end of his work day.
10. On March 1, 2013, Complainant filed a complaint with the Regional Administrator for the Occupational Safety and Health Administration, OSHA Region IV alleging that the Respondents were neglecting to repair a defective trailer door and that operation of the trailer would be hazardous.
11. On May 14, 2013, UPS Freight discharged the Complainant.
12. On May 16, 2013, Complainant filed a complaint with the Regional Administrator for the Occupational Safety and Health Administration, OSHA Region IV alleging that the Respondents had discharged him and discriminated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105. The complaint was timely filed.
13. Complainant's filing of the complaint with OSHA on May 16, 2013 was protected under 49 U.S.C. §31105(a)(1)(A).
14. Complainant timely filed a grievance over his May 14, 2013 discharge under the contractual grievance processes provided for in his collective bargaining agreement between UPS Freight and the Teamsters Union.

15. On July 18, 2013 after a Joint UPS Freight/Teamsters Panel Hearing, Complainant's May 14, 2013 termination was reduced to a suspension without back wages and on July 22, 2013, Complainant returned to work for UPS Freight.
16. On September 25, 2013, UPS Freight again discharged the Complainant.
17. On September 26, 2013, the Complainant filed a complaint with the Regional Administrator for the Occupational Safety and Health Administration, OSHA Region IV alleging that the Respondents had discharged him and discriminated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105. UPS Freight received notice of this amended complaint by the Atlanta Regional Officer's October 22, 2013 letter to Respondent's counsel.
18. On September 27, 2013, Complainant timely filed a grievance over his September 25, 2013 discharge under the contractual grievance processes provided for in his collective bargaining agreement between UPS Freight and the Teamsters Union.
19. On November 21, 2013 after a Joint UPS Freight/Teamsters Panel Hearing, Complainant's grievance was denied and his termination was upheld.
20. During 2012, Complainant's weekly gross wages from UPS Freight averaged $1,276.46. During the 29 weeks Complainant worked for UPS Freight during 2013 (January 1 – May 9 and July 22 – September 25), his weekly gross wages averaged $1,294.40.
21. The Claimant has established by a preponderance of the evidence that he engaged in protected activity under the STAA on February 25, 2013 by reporting equipment safety deficiencies involving Trailer #255028 through use of the DECR; from February 25, 2013 to March 4, 2013 by reporting safety concerns involving the operation of Trailer #255028 to his supervisors; on March 4, 2013 by reporting safety concerns involving the operation of Trailer #255028 to the UPS compliance hotline; on March 1, 2013 by reporting safety concerns involving the operation of Trailer #255028 to OSHA; on April 2, 2013 by filing an STAA complaint with OSHA; and on May 16, 2013 by filing an amended STAA complaint with OSHA.
22. The Claimant has established by a preponderance of the evidence that he was subject to adverse employment actions on May 10, 2013 by the conditions of his employment being adversely impacted by being placed out-of-service pending investigation; on May 14, 2013 by the term and conditions of his employment being terminated/suspended without pay; on September 24, 2013 by being taken out-of-service at the end of his shift; and on September 25, 2013 by the term of his employment being terminated.
23. The Claimant has failed to establish by a preponderance of the evidence that he was harassed as alleged by being written up for one minute over lunch; by being assigned work duties inconsistent with work restrictions related to a March 18, 2013 work-related low back injury; by being assigned to night shift duties and varying reporting times while under medico-vocational work restrictions; by being followed and filmed on April 2, 2013 while making assigned deliveries; by being required to attend four days of "new hire" training following his return to work on July 22, 2013; and by having his reinstatement of health insurance delayed until September 16, 2013.
24. The Claimant has failed to establish that his protected activity on February 25, 2013; March 1, 2013; March 4, 2013 and April 2, 2013 were a contributing factor to the adverse employment actions of May 10, 2013 or May 14, 2013.

25. The Claimant has failed to establish that his protected activity on February 25, 2013; March 1, 2013; March 4, 2013; April 2, 2013; and May 16, 2013 were a contributing factor to the adverse employment actions of September 24, 2013 or September 25, 2013.
26. The Claimant is not entitled to relief under the STAA based on his complaints filed on April 2, 2013, and as amended on May 16, 2013, and as further amended on September 25, 2013.

ORDER

It is hereby Ordered –

1. Individuals F. Gerster, T. Narron, A. Radnoti, J. Doe and M. Doe **are dismissed as named Respondents** in this matter.

2. The Complainant's **claim for relief under STAA is DENIED** and the **complaints filed on April 2, 2013, and as amended on May 16, 2013, and as further amended on September 25, 2013, are hereby DISMISSED.**

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

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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