**U.S. Department of Labor**

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**Issue Date: 29 August 2017**

Case No.: 2015-STA-00014

In the Matter of:

**SUSAN MARIE BERG**
Complainant

v.

**S&H EXPRESS**
Respondent

Appearances:

Paul O. Taylor, Esq.
For Complainant

Zachary E. Nahass, Esq.
For Respondent

Before: THERESA C. TIMLIN
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of 49 U.S.C. § 31105 of the Surface Transportation Assistance Act of 1982 ("STAA") and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978. These provisions empower the Secretary of Labor to investigate and determine whistleblower complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles. Susan Berg ("Complainant") alleges that S&H Express ("Respondent") terminated and blacklisted her in violation of the STAA. Complainant is represented by counsel.

## I. PROCEDURAL HISTORY

The undersigned conducted a split hearing in 2015 on June 12 and August 12–13. At the hearing, the parties submitted JX 1,[1] containing the following joint stipulations of fact, which detail the pre-hearing procedure history of this case:

1. Complainant is an employee as defined in 49 U.S.C. § 31101(2). Complainant resides at 72 Royal Court at Waterford, York, Pennsylvania, 17402. Complainant is not a member of a labor union, and her employment with S&H Express, Inc. was not subject to the terms of a Collective Bargaining Agreement.
2. Respondent, S&H Trucking ("S&H"), is an employer within the meaning of 49 U.S.C. § 31101(3) and 29 C.F.R. § 1978.101(i). S&H Express, Inc. is a person subject to 49 U.S.C. § 31105 and is located at 100 Mulberry Street, York, Pennsylvania, 17403.[2]
3. Respondent, Sharon Mergler, is a person subject to 49 U.S.C. § 31105.
4. From September 6, 2011 to November 12, 2012, S&H employed Complainant to operate commercial vehicles with a gross vehicle weight rating of 10,001 pounds or more on the highways in interstate commerce.
5. On November 8, 2012, Complainant was treated by her dentist, Kelly Hollis, D.D.S. Dr. Hollis removed her abscessed tooth and wrote a note asking that she be excused from duty for November 8 and 9, 2012.
6. On November 12, 2013, S&H, by Sharon Mergler, discharged Complainant.
7. Complainant's average weekly wage while working for S&H was $776.75.
8. On March 13, 2013, Complainant filed a timely complaint with the Regional Administrator for Region 3 of OSHA alleging, among other things, that Respondents had discharged her and retaliated against her in violation of the Employee Protection Provisions of the STAA, 49 U.S.C. § 31105(a).
9. On November 3, 2014, the Assistant Secretary of Labor, by the Regional Administrator for Region 3 of OSHA issued a preliminary decision and order pursuant to 49 U.S.C. § 31105(b)(2)(A) dismissing Complainant's complaint.
10. On November 11, 2014, Complainant, by counsel, filed a timely objection to the Assistant Secretary's findings and order and requested a hearing de novo before an Administrative Law Judge of the Department of Labor.
11. The United States Department of Labor, Office of Administrative Law Judges has jurisdiction over the parties and the subject matter of this proceeding.

(Tr. at 5–7.)

The undersigned admitted the following evidence at the hearing: JX 1, CX 1–10, RX 1 (pp. 1–61, 66–72, 77–85, 87–88), and RX 2–4. (Tr. at 3, 200, 415.)

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[1] This Decision uses the following abbreviations: "CX" refers to Complainant's Exhibits; "RX" refers to Respondent's Exhibits; "JX" refers to Joint Exhibits; and "Tr." refers to the transcript of the split 2015 hearing held on June 12, August 12, and August 13.

[2] As the alleged STAA violation occurred and all parties resided in Pennsylvania, the law of the U.S. Court of Appeals for the Third Circuit applies. See 49 U.S.C. § 31105(d).

After the hearing, by order dated October 30, 2015, the undersigned set the deadline for final briefs as November 9, 2015. Both parties submitted final briefs on November 9, 2015, which the undersigned has carefully considered in reaching her decision.

## II. ISSUES

At the hearing, the parties agreed that the following issues required adjudication:

1. Did Complainant engage in protected activity?
2. Did Complainant communicate the safety-related nature of her refusal to work to Respondent?
3. Did any demonstrated protected activity contribute to Respondent's adverse employment actions?
4. Assuming Complainant can meet her burden of demonstrating the above elements, would Respondent have discharged Complainant in the absence of any protected activity?
5. Is Complainant entitled to any relief?
6. Did Complainant attempt to mitigate her damages?
7. Are the individual named Respondents—Jeff Shellenberger and Sharon Mergler—individually liable for any retaliatory actions taken by them?

(Tr. at 7–9.)

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Evidence

#### 1. Documentary Evidence[3]

In support of her case, Complainant submitted CX 1–10:

- CX 1: Dental records from Dr. Kelly Hollis showing Complainant's tooth extraction on November 8, 2012.
- CX 2: A doctor's note from Dr. Kelly Hollis excusing Complainant's absence from work for November 8–9, 2012.
- CX 3: Complainant's 2012 IRS Form W-2 from Respondent.
- CX 4: Various documents showing Complainant's wages from 2013–2014.
- CX 5: Complainant's OSHA complaint.
- CX 6: Complainant's objections to OSHA's dismissal of her complaint.
- CX 7: A HireRight report of Complainant's work for S&H.
- CX 8: Complainant's driver logs dated September 1, 2012 to November 10, 2012.

[3] The witnesses explained the relevance and import of these documents during their testimonies. Accordingly, this decision only briefly summarizes the documentary evidence submitted by both parties.

- CX 9: A pharmacy report showing Dr. Hollis's November 8, 2012 prescription of hydrocodone for Complainant.
- CX 10: A record of Complainant's 2015 wages.

In support of its case, Respondent submitted RX 1–4:

- RX 1: S&H's dispatch records and disciplinary reports.
- RX 2: S&H's dispatch records and bills of lading.
- RX 3: S&H's company handbook.
- RX 4: An OSHA investigator's termination statement signed by Complainant on September 17, 2014.

2. Hearing Testimony

The following witnesses appeared at the hearing and testified as follows.

*Susan M. Berg*

Ms. Berg testified that she went to school for eight weeks to train to be a truck driver, receiving a certificate of completion in 2011. (Tr. at 342–43.) She subsequently received her commercial driver's license ("CDL") on August 26, 2011. (Tr. at 345.) Ms. Berg claimed that she started working for Respondent for fourteen dollars per hour, and Respondent never paid her by the mile. (Tr. at 346.) She also alleged that Respondent assigned her to operate two or three trucks; none of which were equipped with electronics that would allow her to send arrival, departing, or other messages to dispatch. (Tr. at 346–47.) Respondent did not provide Ms. Berg with a cell phone. (Tr. at 347.)

Ms. Berg initially drove short runs only, but joined the regional fleet in July of 2012. (Tr. at 348–49.) She testified that Ms. Mergler and Ms. Bailey always told her what time she needed to report to work, and assigned her daily dispatches when she arrived in the morning. (Tr. at 349, 386.) Sometimes they would give her the dispatches the day before, but that was rare. (Tr. at 349.) She stated that her normal procedure was to report to the dispatch office in the morning and find out what loads they had for her that day. (Tr. at 386.) Occasionally, Respondent would pin dispatch sheets for its drivers on a cork bulletin board—especially if the drivers had to report to work prior to when Ms. Bailey or Ms. Mergler would arrive. (Tr. at 434–35.) Ms. Berg alleged that her work on Saturdays for S&H did not have any appointments, such that she could come in a bit later in the day as long she completed the task before 10:00 p.m. (Tr. at 352.) Ms. Berg stated that Ms. Mergler assigned her Saturday work and told her of the relaxed schedule. (Tr. at 352.) She stated that she normally prepared her trucking logs at CX 8, filling them as she performed the work. (Tr. at 352.)

During her work for Respondent, Ms. Berg alleged that circumstances outside of her control delayed her loads. (Tr. at 353.) She gave examples of such circumstances, including unusually heavy traffic (*e.g.*, accidents or road construction), inclement weather (including a hurricane), faulty equipment (flat tires and engine failure), and delays at the shipper or receiver. (Tr. at 353–58.) Ms. Berg stated that she needed to have equipment fixed at least three times a

month, but did not specify how many of these equipment defects would have caused delays. (Tr. at 356.) Her shippers and receivers included food warehouses where it sometimes took an hour just to get through the gate. (Tr. at 357.) Ms. Berg testified that she did not have a cell phone, so she would wait until she arrived at the customer and use their office phone to tell dispatch if she had arrived late. (Tr. at 358.) Respondent permitted its drivers to use Bluetooth headsets while driving, but Respondent did not provide them and Ms. Berg did not own one. (Tr. at 358.) She stated that a pre-trip inspection normally takes about fifteen minutes if there are no issues. (Tr. at 359.)

Ms. Berg discussed her logbook driving entry for November 5, 2012. (Tr. at 359–67; EX 8, p 65.) She recorded that she arrived at her destination for a 9:00 live unload at 9:30, and had to wait until 15:00 to be unloaded. (EX 8, p. 65.) Ms. Berg indicated that traffic had been stopped on Route 695 to Route 95 South, which she thought noteworthy because the load took her from 6:00 to 9:30 to deliver. (Tr. at 361–62.) Ms. Berg testified that although company log books specified an 8:00 live unload delivery (RX 1, p. 60), Respondent did not tell her that this was the time for delivery. (Tr. at 362.) She stated that normally she could make this run in three hours. (Tr. at 363.) Ms. Berg called Ms. Bailey when she arrived at 9:20 to tell her that she arrived late because of traffic. (Tr. at 366–67.) Ms. Bailey said "it was fine," and no one asked why she was late or provided any sort of written discipline that week. (Tr. at 367, 391–93.) At the hearing, Ms. Berg acknowledged that she was late for this load, but maintained that it was not her fault. (Tr. at 363.) She noted that when she began as a regional driver she did not always allow herself enough time to get to a destination, but after a few weeks, she learned the routes and no longer had that problem. (Tr. at 364.) She also maintained that she always followed directions and never got lost. (Tr. at 364.)

Ms. Berg testified about her deliveries on November 7, 2012. (Tr. at 365.) She alleged that she started her day at 8:15 because Respondent told her to report to work at that time, and she maintained that she was not late to any of her deliveries that day. (Tr. at 365–67.) Ms. Berg averred that she had a mild toothache in the morning when she woke, so she took Tylenol, which alleviated the discomfort. (Tr. at 367.) The pain grew worse over the course of the day, and she called Ms. Bailey around 14:00 from a customer's facility to report that she needed to make a dentist appointment and return to the terminal due to her pain. (Tr. at 369–72.) Ms. Berg recalled informing Ms. Bailey that her pain was becoming unbearable and that it was becoming unsafe for her to drive. (Tr. at 372.) Ms. Berg had just dropped off a load and was then looking for an empty trailer to drive back to the yard, and she alleged that Ms. Bailey told her to continue looking for an empty. (Tr. at 372.) Ms. Berg agreed, and spent the next forty-five minutes unsuccessfully looking for a trailer. (Tr. at 373.) She testified that she then called Ms. Mergler, informing her that she had a really bad toothache, needed to return to the terminal and make a dentist appointment, and could not and would not finish her day. (Tr. at 373.) Ms. Berg recalled that Ms. Mergler told her to wait just a little longer to see if she could find an empty trailer to bring back to the terminal. (Tr. at 374.) Ms. Berg waited for another fifteen minutes and then called Ms. Bailey again. (Tr. at 385.) Ms. Berg testified that she told Ms. Bailey that she could not wait any longer, her tooth pain was excruciating, that it was unsafe for her to drive, and that she wanted to return to the terminal and go to the dentist.[4] (Tr. at 375.) She stated that neither

[4] Ms. Berg did not state how Ms. Bailey responded to her call.

Ms. Bailey nor Ms. Mergler directed her to speak with the safety department. (Tr. at 382, 522.) She never reported her tooth problem to Ms. Lyons. (Tr. at 484.)

Ms. Berg then drove back to the terminal—about a forty-minute drive. (Tr. at 375.) In response to a question of whether she believed it was safe for her to drive back to the terminal, Ms. Berg stated that she probably should not have done that, but she wanted to return so she could go to the dentist. (Tr. at 375.) She alleged that her condition was getting worse, and she believed it would have become more unsafe for her to drive if she had continued waiting to finish her workday. (Tr. at 375–76.) She explained that driving a massive vehicle demands complete mental attention and her tooth pain prevented her from focusing on driving. (Tr. at 376.) Ms. Berg believed that her increasing tooth pain would have caused a corresponding increasing degree of interference with her ability to drive safely. (Tr. at 376.) She also averred that it is more difficult to drive a truck with a trailer than it is to "bobtail" (drive without a trailer). (Tr. at 418.)

When Ms. Berg returned to the terminal, she spoke with Ms. Bailey and Ms. Mergler. She informed them that she had made a dentist appointment for the next morning (from a customer's telephone) and that she would be unable to work the next day. (Tr. at 377–78.) Ms. Berg recalled that they told her to let them know what the dentist said. (Tr. at 377.) She believed that Ms. Bailey and Ms. Mergler perceived her physical condition because her mouth was swollen, she could barely move her mouth, and she had a look of pain on her face. (Tr. at 378.) Ms. Berg then drove herself home because she did not have any other way to get there. (Tr. at 378.)

Ms. Berg visited her dentist the next day, who discovered an abscess and extracted one tooth at 8:20. (Tr. at 379; CX 1.) The dentist prescribed hydrocodone for pain for a couple of days, which made Ms. Berg feel drowsy. (Tr. at 381; CX 2.) She stated that she would have been unable to drive safely while on hydrocodone. (Tr. at 382.) Ms. Berg testified that following the tooth extraction, she called Ms. Mergler from the dentist's office to let her know that due to her medication she would be unable to return to work until Monday, November 12. (Tr. at 383, 486.) Ms. Berg explained that she called S&H because, although she booked off for her dentist appointment in the morning, she assumed she could have returned to work after visiting the dentist. (Tr. at 487.) Ms. Berg recalled that Ms. Mergler said she "would see her Monday." (Tr. at 383.) Ms. Mergler did not refer or transfer Ms. Berg to the safety department. (Tr. at 385.) Ms. Berg also noted that she never reported her prescription information to Ms. Lyons. (Tr. at 484.)

Ms. Berg testified that she called Ms. Mergler early Monday morning, and Ms. Mergler told her to report in at 9:00. (Tr. at 387.) At this point, she had already stopped taking hydrocodone, and did not believe that the medication was still impairing her ability to drive. (Tr. at 386, 494.) When she arrived at S&H, Ms. Berg stated that she was shown into a conference room. (Tr. at 387.) After fifteen to thirty minutes, Ms. Mergler, Ms. Bailey, and Jeff Shellenberger (one of S&H's owners) entered the room. (Tr. at 387.) Before Ms. Mergler spoke, Ms. Berg tried to give her dentist's note to her, but Ms. Mergler did not take it. (Tr. at 389–90.) Ms. Berg recalled Ms. Mergler stating, "we've been thinking it over and we've decided we need your truck for other things, and we think it's best that we part our separate

ways." (Tr. at 390.) Ms. Berg reviewed the counseling form at RX 1, p. 84, and stated that no one presented this document to her at the meeting. (Tr. at 390.) Ms. Berg also testified that no one told her that she was late on three loads during the week of November 5–9, 2012. (Tr. at 391.) Ms. Berg remembered that the meeting lasted just a few minutes and Ms. Bailey left the conference room before it ended. (Tr. at 389.) Ms. Berg recalled Mr. Shellenberger escorting her to her vehicle after the meeting concluded. (Tr. at 394.) She testified that she could not understand why Respondent was firing her, and she felt at the time that it might have been due to her taking time off to visit the dentist. (Tr. at 493.) Ms. Berg never contacted Ms. Lyons or anyone at S&H to discuss that concern because she felt that was not an option. (Tr. at 493.)

Following her termination, Ms. Berg applied for other trucking jobs. (Tr. at 401.) Ms. Berg alleged that she received and accepted job offers from Vitran and Crane Transport, but she testified that both companies declined to hire her after calling S&H for job references. (Tr. at 402.) Ms. Berg also testified that she did not receive any written or verbal reprimands for late loads between her recorded disciplinary incidents on July 10, September 24, and November 12, 2012. (Tr. at 417.) She stated that no one at S&H said anything to indicate that she had delivered late on any loads. (Tr. at 417.) She alleged that the first time she ever called off sick at S&H was November 8, 2012. (Tr. at 418.) Ms. Berg testified that despite company records showing that she delivered late loads on October 3, 2012, she performed her deliveries in accordance with the dispatch schedule assigned to her by S&H. (Tr. at 420–23; see also CX 8, p. 70; RX 1, pp. 51–52; RX 2, p. 5.) Ms. Berg also discussed her other driving records, offering a number of reasons why she may have arrived late to some loads, such as delays at facilities, getting repairs, and hours of service restrictions. (Tr. at 423–435.) She also believed that, based on discrepancies between her log and company records for November 1, 2012 (see CX 8, p. 70; RX 1, p. 58), the company's computer logging system was inaccurate. (Tr. at 431.)

On cross-examination, Ms. Berg acknowledged that a customer's comment to her on October 31, 2012 regarding a purported delivery time (and her late arrival) correlates to company records showing a scheduled delivery of 11:30. (Tr. at 436–37; see also CX 8, p. 60; RX 1, p. 67.) She also acknowledged that despite her recollection of experiencing about three mechanical failures per month, her driving logs only show one mechanical failure causing delay from September 1, 2012, to November 10, 2012. (Tr. at 437–46, 505.) Ms. Berg acknowledged that there were a number of corrected errors on her driving logs (CX 8), and that at least one additional uncorrected error had been discovered during the course of the hearing. (Tr. at 447–458.)

Ms. Berg discussed her various disciplinary reports. Regarding her signed disciplinary report dated February 13, 2012 for being a no call/no show to work (RX 1, p. 66), Ms. Berg stated that her car broke down, she was unable to call, she walked the rest of the way to work, and she reported to work three hours late that day. (Tr. at 458, 512.) Ms. Berg claimed that although she signed her disciplinary report dated February 19, 2012 for failing to check a trailer prior to being loaded (RX 1, p. 67), she had disputed this report by meeting with someone from the safety department. (Tr. at 458–59.) She explained her version of the events, and alleged that the woman she met with informed her that Respondent would remove this document from her record. (Tr. at 459, 498–502, 511.) Concerning another signed disciplinary report dated June 14, 2012 (RX 1, p. 68), Ms. Berg understood that Respondent had reprimanded her for failing to

report an on-the-job injury to safety department. (Tr. at 460–61.) Ms. Berg stated that she did not recognize a disciplinary report dated June 27, 2012 (RX 1, p. 69), which indicated that Respondent reprimanded her based on a customer complaint that she had been spreading rumors about a supervisor at the customer's facility.[5] (Tr. at 462.) She claimed Respondent had never counseled her for her interactions with customers. She had not reviewed this document in preparation for her trial. (Tr. at 462.) The disciplinary report stated S&H decided to change her delivery to remove her from that customer and Ms. Berg agreed that Respondent had transferred her to another route around that time, but she disclaimed that Respondent ever told her the reason for the move. (Tr. at 462–63.) Ms. Berg also acknowledged a signed disciplinary report dated September 14, 2012 for a preventable incident in which she got a trailer stuck while navigating a tight turn at the yard (RX 1, p. 71). (Tr. at 464–65.) However, she maintained that this incident was unpreventable because it occurred at 10:00 p.m. in the dark on a turn she had made a hundred times before. (Tr. at 471.)

Ms. Berg also testified concerning her three disciplinary reports for late loads. She agreed that that Respondent issued a written reprimand to her for late deliveries and a failure to communicate with dispatch on July 10, 2012 (RX 1, p. 70) and that she signed the form. (Tr. at 464.) Ms. Berg also acknowledged that Respondent had disciplined her on September 24, 2012 for delivering a late load (RX 1, p. 72). (Tr. at 465.) She concurred that she had signed the form and that she received and served a three-day suspension. (Tr. at 465–66.)

Ms. Berg agreed that she signed a document prepared by Department of Labor investigator Hillary Rivera (RX 4). (Tr. at 467, 499.) She further agreed that the allegations contained therein reflect what she told Ms. Rivera, and that she carefully read it before signing. (Tr. at 467, 498–99.) Though the document stated that she had "[n]o past disciplinary issues," Ms. Berg could not recall if she had told Ms. Rivera that she never had "any" past disciplinary issues. (Tr. at 467–68.) She explained that she affirmed this document as written because she did not understand why Respondent had fired her, since S&H did not provide her with a write-up at the time to explain her termination. (Tr. at 499.) Ms. Berg discussed a HireRight letter to S&H in response to her dispute of S&H's report to HireRight regarding her employment (RX 1, p. 77–79), which stated, "Customer states he [sic] did not have any Late Pick Up/Deliveries or Company Policy Violations and feels these should be removed." (Tr. at 468.) She could not remember what she told HireRight, but she did not think she would have said that she did not have any late pickup or deliveries. (Tr. at 470.) Ms. Berg stated that she did not feel at the time that she had committed any company policy violations, though she acknowledged that she had a number of disciplinary reports on her record. (Tr. at 470.) The HireRight letter also indicated that Ms. Berg contested her recorded incident on September 14, 2012 where Respondent disciplined her for getting a trailer stuck. (RX 4.) Ms. Berg alleged that this was not a preventable incident, and believed that she had heard of other drivers becoming stuck there before. (Tr. at 471–72.)

Ms. Berg reviewed S&H's company handbook, which provides in the "MEDICATIONS" section that drivers shall "Inform the Safety Dept. of any medication prescribed to you that may impair your driving ability." (Tr. at 485; RX 3, p. 5.) She acknowledged that she received this

[5] The disciplinary report is unsigned by the driver listed (Ms. Berg) and states that she refused to sign the form. (RX 1, p. 69.)

handbook, but understood that this requirement applied when a driver was on duty or reporting for duty, not when a driver was taking a day off. (Tr. at 484.) Ms. Berg alleged that on October 26, 2012, Ms. Bailey directed her to operate her vehicle in violation of the hour of service regulations. (Tr. at 497; CX 8, p. 55.) She believed that this happened on more than one occasion. (Tr. at 497–98.)

Ms. Berg testified that she did not recognize Mr. Heenan and that he was not present in her termination meeting. (Tr. at 562–63.) She maintained that Mr. Shellenberger was present and that at the conclusion of her meeting he asked her for her truck keys and walked her out to her vehicle. (Tr. at 563.)

*Sharon Mergler*

Ms. Mergler testified that S&H Express employer her as the Operations Manager during the time that Complainant worked for the company. (Tr. at 25.) She had worked for S&H for thirteen years. (Tr. at 26.) As operations manager, she supervised all six dispatchers in the terminal. (Tr. at 26.) Tina Bailey was one of those dispatchers, and her desk was right next to Ms. Mergler's. (Tr. at 26.) Ms. Mergler communicates with the dispatchers throughout the day. (Tr. at 27.) If the dispatchers have a problem with an employee—such as an employee struggling to make deliveries on time or calling off from work—they inform Ms. Mergler. (Tr. at 27.) Ms. Mergler stated that she and Ms. Bailey were two of the principle decision-makers in the decision to fire Complainant. (Tr. at 27.)

Respondent hired Complainant right out of truck driving school, and she operated a tractor-trailer during her work for Respondent. (Tr. at 28–29.) In July of 2012, Complainant became a regional driver for Respondent, making deliveries to Maryland, Pennsylvania, and New Jersey. (Tr. at 29.) Respondent has a policy of requiring its drivers to inform Respondent when they are taking medication that might influence their ability to drive, and Ms. Mergler testified that drivers have complied with this policy. (Tr. at 131.) When a driver informs Ms. Mergler about medications that might affect their ability to drive, she transfers the phone calls to the Safety Department. (Tr. at 131.)

Respondent generally uses a progressive discipline policy. (Tr. at 30.) When drivers fail to make deliveries on time, Respondent will bring them in for counseling, discuss why they were late, and in some cases order more training. (Tr. at 133.) On February 13, 2012, Complainant received discipline because she did not show up for work and failed to call in to report her absence. (Tr. at 31.) Respondent disciplined Complainant again on February 19, 2012, but Ms. Mergler was not familiar with the incident. (Tr. at 32–33.) Ms. Mergler was aware of other disciplinary reports filed against Complainant, but she did not prepare them. (Tr. at 33–34.) S&H normally disciplines its employees on the same day that an incident is reported. (Tr. at 35.) A July 10, 2012 discipline report (RX 1, p. 70) documented that Respondent issued a written reprimand to Complainant for making late deliveries, but Ms. Mergler could not recall the actual number of late deliveries that Clamant made. (Tr. at 36.) She agreed that the written reprimand did not reference the specific loads for which Complainant provided late delivery. (Tr. at 37.) She noted that Respondent has taken similar disciplinary steps with other drivers who were "no call/no show." (Tr. at 132.)

Ms. Mergler acknowledged that multiple factors could cause a driver to be late, such as traffic, weather, or mandatory pre-trip inspections taking longer than normal. (Tr. at 38–39.) When a driver runs into delays (such as traffic, weather, or mechanical problems), she is responsible for calling dispatch and letting them know. (Tr. at 91.) She agreed that Respondent first disciplined Complainant for late loads on July 10, 2012, issuing her a written reprimand (RX 1, p. 70). (Tr. at 39.) Based on the counseling papers, Ms. Mergler affirmed that Complainant did not receive discipline for late loads from July 10, 2012 to September 24, 2012. (Tr. at 40.)

Ms. Mergler explained that a "drop and hook" load involves driving a loaded or empty trailer, dropping it off at a destination, and picking up another trailer to drive to another destination. (Tr. at 55, 65.) By contrast, a "live load" requires a driver to either load the trailer herself or stay with the truck while it is being loaded. A "live unload" conversely requires a driver to stay with the truck while it is unloaded. (Tr. at 65.) Respondent pays some drivers by mileage and others by an hourly rate. (Tr. at 67–68.) Ms. Mergler testified that Complainant received payment by mileage. (Tr. at 68.) Ms. Mergler stated that she knows the basics of logbook rules, but never worked as a log auditor, held a CDL, or worked in S&H's safety department. (Tr. at 69–70.) Respondent pays its employees different rates, primarily based on experience. (Tr. at 74–75.)

Ms. Mergler testified that drivers usually receive their delivery schedule the day prior, and the drivers can set their own schedules according to the specified delivery times and their driving logs. (Tr. at 67.) She alleged that dispatchers assigned loads to drivers by calling them and sending the load to their truck's on-board computers. (Tr. at 77.) The truck's computer will then contain all the information the driver needs to complete the job, including the delivery and pickup times for specific loads. (Tr. at 77.) Ms. Mergler ensured that drivers had hours of service available to make deliveries by talking to the drivers; she has twenty years of dispatching experience. (Tr. at 142.) Most bills of lading do not state delivery and pickup times. (Tr. at 78.) The truck's on-board computer has a GPS unit that signals S&H when the trucks have arrived within a one-mile radius of their destination. (Tr. at 84–85.) The computer asks the driver if they have arrived, and when the driver pushes "yes," the computer sends that information to S&H's office computer. (Tr. at 85.) Sometimes the driver fails to indicate she has arrived by hitting the "yes" button. (Tr. at 86.) In those cases, the dispatcher would still see when the driver arrived within a one-mile radius and would enter the driver's time of arrival manually. (Tr. at 86.) Respondent does not use drivers' logs to calculate pickup and delivery times because it does not see the drivers' logs. (Tr. at 138.) S&H also uses a mileage GPS reference software package called "PC*Miler" to calculate routing and miles between two points. (Tr. at 90.)

Ms. Mergler reviewed S&H's computer records from June 28, 2012, and noted that Complainant delivered a load two and one-half hours late (RX 1, p. 29). (Tr. at 88.) Based on a PC*Miler estimate of the routing and distance between the load's departure and destination cites, Ms. Mergler estimated that the load should have taken about two hours to deliver (maybe a bit more for delays such as traffic, weather, etc.), not the four hours and forty-five minutes between Complainant's pickup and delivery. (Tr. at 91.) Ms. Mergler reviewed another record from June 29, 2012, showing that Complainant had been scheduled to deliver a load at 13:30 but did not arrive until 15:20 (RX 1, p. 31). (Tr. at 95–96.) Another company record (RX 1, p. 33) showed

that Complainant completed a late delivery on July 3, 2012, delivering the load at 13:30 rather than the scheduled delivery time of 12:00. (Tr. at 97–98.) Ms. Mergler averred that these documents formed the basis for Complainant's discipline issued on July 10, 2012 (RX 1, p. 70).

Ms. Mergler discussed the details of Complainant's disciplinary reports. The corrective action box on Complainant's disciplinary form dated July 10, 2012 (RX 1, p. 70) indicated that Ms. Mergler recommended that a "driver trainer" work with Complainant for a two-day evaluation. Ms. Mergler explained that she recommended this course of action to improve Complainant's communication with dispatch, since Respondent had needed to track her down on numerous occasions. (Tr. at 99–100.) S&H assigns driver trainers when there is a performance problem to help them succeed at the company and become better drivers. (Tr. at 104.) Ms. Mergler alleged that Complainant did not report any difficulties in complying with her schedule to Ms. Mergler prior to July 10, 2012. (Tr. at 103.) Ms. Mergler testified that Ms. Bailey—Complainant's direct supervisor—sits directly beside Ms. Mergler and would have informed her if any of the drivers were having trouble meeting their schedules. (Tr. at 103.) Ms. Bailey did not inform Ms. Mergler of any calls from Complainant prior to July 10, 2012 informing Ms. Bailey that Complainant was having trouble meeting her schedule. (Tr. at 103.) Ms. Mergler also testified that Complainant's disciplinary report dated September 24, 2012 (RX 1, p. 83) corresponds with Complainant's driver logs (CX 8, p. 23) and company records (RX 1, p. 49) showing Complainant's late delivery on September 22, 2012. (Tr. at 116–17.)

Ms. Mergler agreed that on November 7, 2012 Complainant called Ms. Bailey and advised her that she needed to leave work early due to pain in her tooth. (Tr. at 28.) Ms. Bailey spoke with Ms. Mergler about Complainant's call regarding her oral pain and difficulty doing her job that day. (Tr. at 72.) Ms. Mergler acknowledged that Complainant also called her and informed her that she was in pain due to an abscessed tooth. (Tr. at 28.) Ms. Mergler testified that Complainant did not mention anything about her inability to safely operate a vehicle due to tooth pain or medication, nor did anyone else so inform Ms. Mergler prior to Complainant's termination. (Tr. at 129–130.) After talking with Ms. Bailey, Ms. Mergler instructed her to bring Complainant back to the yard so she could go home early. (Tr. at 156.) If a driver finishes her deliveries early, Respondent will ordinarily put them to work on other tasks at S&H to fill out their eleven-hour days, such as moving empties and repositioning trailers. (Tr. at 132.) Complainant completed her deliveries for that day, but left the shop early because of her tooth pain. (Tr. at 132, 142.) The company records did not log the work she would have completed because she went home early. (Tr. at 143.) Since Complainant stated that she would try to schedule a dentist appointment, Ms. Mergler did not assign any work to her for the next few days. (Tr. at 143.) She expected Complainant to communicate with Respondent if she obtained a dentist appointment. (Tr. at 143.) However, Ms. Mergler testified that she did not have any communication with Complainant between her phone call on November 7, 2012, and the termination meeting on November 12, 2012. (Tr. at 129.) She claimed that S&H tried calling Complainant sometime after her dentist appointment to obtain her status and make sure everything was okay, but they received no communication from Complainant. (Tr. at 125.)

On the morning of November 12, 2012, Ms. Mergler met with Patrick Heenan, the Vice President of Operations, to discuss Complainant's termination. (Tr. at 125–26.) Ms. Mergler had discussed Complainant's problems with Mr. Heenan before, and he did not express any disagreement with Ms. Mergler's decision to fire Complainant. (Tr. at 126.) Ms. Bailey was also part of the group that ultimately decided to terminate Complainant. (Tr. at 145.) They made this decision on Monday morning, November 12, 2012. (Tr. at 145.) Ms. Mergler met with Complainant on November 12, 2012 to discuss the reasons for her termination—repeated lateness and lack of communication. (Tr. at 127.) Ms. Mergler recalled that Complainant cried at the meeting, but did not state any objection to Ms. Mergler's suggestion that Complainant had been late on numerous occasions and did not leave enough time to make timely deliveries. (Tr. at 128.) Complainant did not then state that she was unable to drive because of the medication she was taking. (Tr. at 128.) Ms. Mergler averred that her decision to terminate Complainant had nothing to do with taking time off for a tooth problem or any indication from Complainant that she could not drive safely. (Tr. at 139.)

Ms. Mergler testified that the company waited a month from Complainant's suspension in September to terminate her because Respondent spends a lot of money and time training its drivers and Respondent wanted Complainant to succeed. (Tr. at 124.) However, Complainant's tardiness created extra work for everyone involved in rescheduling her late loads and risked the loss of customers. (Tr. at 124.) Ms. Mergler had taken similar disciplinary measures with other drivers, but she had not experienced other drivers with such an extreme record of untimely deliveries. (Tr. at 125.)

Ms. Mergler testified that the dispatch records she reviewed did not contain communications from drivers to dispatch. (Tr. at 141.) Those communications are contained in another part of the software package, so Ms. Mergler did not know what kind of communications Complainant had with dispatch regarding the reasons behind her late deliveries. (Tr. at 141.) Ms. Mergler did not know if any situations beyond Complainant's control delayed her loads. (Tr. at 145.) She did not believe the times recorded in the dispatch records were incorrect, even when showing a travel time of three and one-quarter hours for sixty-five miles (RX 1, p. 44). (Tr. at 149.) She agreed that drivers sometimes have good reasons for being late, but sometimes they do not. (Tr. at 150.) Ms. Mergler testified that although Respondent did not issue formal written discipline to Complainant for every late load, her normal procedure was to have informal conversations with drivers concerning late loads. (Tr. at 151.) Since she wanted Complainant to succeed as a truck driver, she did not want to write Complainant up for every late load. (Tr. at 151.) Ms. Mergler could not recall specific dates that she spoke with Complainant about her late loads, but noted that she probably had conversations in passing with her during the periods in which Complainant delivered late loads but Respondent did not issue formal discipline. (Tr. at 151.)

Ms. Mergler stated that she wanted Complainant to succeed because Ms. Mergler had spoken with her personally and knew she was a single mother. (Tr. at 159.) She testified that when a driver is late, the customer might refuse the load and schedule a re-delivery, which is particularly disruptive for the Respondent. (Tr. at 160–61.)

*Anna Lyons*

Ms. Lyons testified that she has been the Safety Director for Respondent for nine and one-half years. (Tr. at 169.) Her duties include overseeing the safety and compliance of CDL and non-CDL drivers under the federal regulations and taking care of training and logs. (Tr. at 169.) Concerning training, Ms. Lyons completes paperwork and orients the drivers to company policies and federal regulations. (Tr. at 170.) Ms. Lyons stated that she was involved with the orientation process when Respondent hired Complainant, which involved training on hours of service, licensure, logging, and drug and alcohol requirements. (Tr. at 171.) Respondent gave Complainant its company policy handbook (RX 3). Page five of this handbook explains that drivers must report the taking of any medications that could impair driving ability to Respondent's safety department, which consists of Ms. Lyons and two assistants. (Tr. at 173, 187.) Ms. Lyons alleged that during Complainant's employment with Respondent, she never received notice from Complainant that she had received prescription medication that might affect or impair her driving ability. (Tr. at 174.) Respondent stores reports of prescription medications in the safety department's medical files, and Complainant's medical file does not contain anything indicating that Complainant reported a prescription medication. (Tr. at 175.)

Ms. Lyons stated that she issued two of the safety-related disciplinary reports to Complainant. (Tr. at 176–78.) The first involved Complainant's failure to report an on-the-job injury (RX 1, p. 68), and the second involved Complainant's failure to obtain available assistance before attempting to navigate a tight area in the company lot, resulting in a stuck trailer needing a tow truck (RX 1, p. 71). When Respondent terminated Complainant, Ms. Lyons handled the closing of Complainant's file, which ordinarily includes recording the reason for termination and forwarding that report to HireRight. (Tr. at 178.) HireRight is a third party independent company that Respondent uses to pull prospective drivers' records before hiring. (Tr. at 171.) As part of their contract with HireRight, Respondent also provides information of drivers who have left its employment. (Tr. at 171.) Complainant challenged Respondent's reporting of the circumstances of her termination, and HireRight wrote a letter to Respondent asking for a reinvestigation of Complainant's employment history with S&H. (Tr. at 179, 181; RX 1, p. 77–79.) Ms. Lyons testified that she had received this type of request in the past, and that Respondent responds to these challenges with supporting documentation to ensure accurate reporting and to prevent being labelled as a disreputable company. (Tr. at 179–81.) She responded to HireRight's request in a letter dated March 11, 2013 (RX 1, p. 80). (Tr. at 179–80.) Ms. Lyons alleged that she pulled all relevant documentation related to Complainant's employment with Respondent and provided responsive information to three areas of request: "eligibility for rehire," "late pickup/deliveries," and "accident/incident of 9/13/2012." (Tr. at 180; RX 1, p. 80.) Ms. Lyons averred that she provides this kind of information to HireRight in the ordinary course of her business with Respondent, and that the filing of this report was not in retaliation against Complainant or in an effort to blacklist her. (Tr. at 180.) Ms. Lyons stated that S&H would provide all accident/incident information to HireRight regardless of the reason for an employee's departure. (Tr. at 185.) Upon her review of Complainant's file, Ms. Lyons did not find any indication that Complainant reported taking prescription medication that could impair her ability to drive. (Tr. at 190.)

*Tina Bailey*

Ms. Bailey testified that she has worked for S&H as a dispatcher for eleven and a half years. (Tr. at 202–03.) She currently dispatches loads to almost fifty drivers, and did so for about thirty drivers when Complainant worked for Respondent. (Tr. at 278.) Her job involves scheduling the drivers' hours to complete loads; she considers the drivers' hours from the preceding days, mandatory time off under the Department of Transportation regulations, and the amount of time needed to make each delivery. (Tr. at 279.) Ms. Bailey was Complainant's direct dispatcher from the time Complainant became a regional driver to the time of her termination. (Tr. at 203–04.) Ms. Bailey stated that she sits right next to Ms. Mergler—her direct supervisor—and stays in communication with Ms. Mergler throughout the day. (Tr. at 205.)

Ms. Bailey testified that drivers are required to report any kinds of events that cause delays in pickups or deliveries (Tr. at 279), and she reports any driver problems or issues to Ms. Mergler. (Tr. at 206.) Drivers report such events via phone, through PeopleNet. (Tr. at 279.) If an event will cause delay, Ms. Bailey will contact customer service to alert the customer of the new estimated time of arrival, and will contact the safety department if the event is severe enough to warrant alerting the other drivers in the fleet. (Tr. at 280, 294.) Ms. Bailey stated that Respondent sometimes reschedules deliveries due to unanticipated events. (Tr. at 280.) When a severe event—such as a mechanical, weather, or traffic event—prevented delivery, Ms. Bailey would enter a note into the dispatch record that describes the event. (Tr. at 280.) Records that have accompanying notes show a darkened music note symbol in the upper-left-hand portion of the screen (see, e.g., RX 1, p. 57); records without accompanying notes show a clear music note symbol. (Tr. at 281–82.) Ms. Bailey would not enter notes for issues such as a driver leaving her house too late to make a timely delivery. (Tr. at 307.)

If drivers called to inform dispatch of a medical condition that rendered them unable to drive, Ms. Bailey alleged that dispatch would transfer the drivers to the safety department, which handles the rules and regulations involving health and safety. (Tr. at 290.) Although Ms. Bailey had transferred other drivers to the safety department due to medical conditions, she could not recall Complainant ever informing her that she was unable to drive based on a medical issue or that she was taking prescription medication. (Tr. at 290–91.) If Complainant had called with such information, Ms. Bailey would have transferred her to the safety department. (Tr. at 291.)

Ms. Bailey discussed Complainant's performance as a driver while under her supervision. Complainant was often late in making pickups or deliveries, called off work frequently, and had issues with her driving. (Tr. at 284, 312.) Ms. Bailey stated that in her experience a good driver would be late to a pickup or delivery once a month at most. (Tr. at 289.) She recalled that Complainant was late about once a week. (Tr. at 289.) To assist Complainant in improving her performance, Respondent assigned Complainant with shorter and easier runs, and tried to give her a more flexible delivery schedule. (Tr. at 289–90). Ms. Bailey recalled discussing Complainant's performance issues with her, but disclaimed being a decision-maker in Complainant's termination. (Tr. at 209, 286, 300.) She did not remember Complainant calling her to report an inability to complete her route due to tooth pain, nor did she recall Complainant informing her of a short-term narcotics regimen. (Tr. at 210.) If Complainant would have called

her with such information, Ms. Bailey stated that she would have put Complainant through to the safety department. (Tr. at 211.) She also would have informed Ms. Mergler. (Tr. at 211.) She recalled that Complainant had a toothache at some point, but did not remember whether Complainant went home early or any other details of the incident. (Tr. at 312–13, 316.) Ms. Bailey stated that she generally would not have referred someone to safety just for a toothache. (Tr. at 316.) She also alleged that a driver would have to go through the safety department if they took off work for a period due to taking narcotics. (Tr. at 316, 331.)

Ms. Bailey reviewed a record of Complainant's pickup of a hook load on November 5, 2012, which showed Complainant arriving at 6:15 and departing at 6:16. (Tr. at 214; RX 1, p. 60.) Ms. Bailey agreed a driver would not have been able to enter and exit that pickup facility in that amount of time, and noted that the company's GPS record-keeping software often needs correcting. (Tr. at 214–15.) She discussed other dispatch screens showing Complainant's arrival/departure times:

- RX 1, p. 61—a driver would be unable to leave within one minute of arriving at the yard because of required vehicle inspections (Tr. at 223–24), a driver could have dropped a load at Palmyra in ten minutes (Tr. at 225), a three-hour load time would affect delivery time[6] (Tr. at 227);
- RX 1, p. 51—it was impossible for a driver to arrive and leave the yard/facility at the same time. (Tr. at 228.)

Ms. Bailey acknowledged that factors such as delays getting through a facilities' gate, dock doors not being available, and extended live load times could cause delays out of a driver's control. (Tr. at 226.) With regard to starting times displayed on the load records, Ms. Bailey stated that drivers could enter both their starting time and their departure times at the same time—when they get in the truck to leave the yard. (Tr. at 291–92.) Ms. Bailey also agreed that other screens not included in RX 1 could show reasons for delay with a particular load. (Tr. at 220.) She averred that Respondent commonly gives its drivers their work the night before, and it would be unusual for a driver only to receive loads in the morning when they report. (Tr. at 223, 262.) By receiving their work in advance, drivers could then determine what time they needed to arrive at the terminal. (Tr. at 285.) Ms. Bailey could not remember whether Respondent ever simply gave Complainant a time to report to work and assigned her loads when she arrived. (Tr. at 222.)

Ms. Bailey could not remember if she recommended Complainant's suspension on September 24, 2012. (Tr. at 230.) In response to a question whether Complainant would have driven to a location to which she had not been dispatched, Ms. Bailey noted that Complainant had gone in the wrong direction before. (Tr. at 243, 256, 311.) She remembered Complainant driving about fifty miles in the wrong direction. (Tr. at 312, 331.) She stated that she often dispatched drivers to deliver multiple loads in a single day. (Tr. at 249–50.) If the assigned delivery times were unrealistic, she would instruct drivers to just do the best that they could. (Tr. at 250.) Ms. Bailey agreed that the dispatch screens at RX 1 only tracked a single load, not the driver's entire schedule for that day. (Tr. at 254–55.)

[6] Ms. Bailey did not discuss whether Complainant's late arrival to the Rohrbaugh live load by one hour related to the extended period that Complainant testified she waited at the facility.

Ms. Bailey reviewed RX 1, p. 57, showing an October 24, 2012 scheduled pickup time of 3:00 and Complainant's actual pickup time of 11:30. (Tr. at 264.) Although the screen showed a delivery time three days later, Ms. Bailey believed that occurred because delivery of this load was rescheduled due to a failed delivery. (Tr. at 265.) She acknowledged that the screen would indicate if delivery had been attempted and the customer rejected the load, but all she could tell from the screen was how late Complainant picked up the load. (Tr. at 266.) Ms. Bailey recalled the hurricane in late October 2012 causing late deliveries and pickups. (Tr. at 271.) She stated that she is not authorized to impose discipline on drivers. (Tr. at 273.) Ms. Bailey testified that drivers calling off work could cause disruptions because then Respondent needs to change the dispatch. (Tr. at 313.) Depending on driver availability, this can create service failures, which negatively impacts the Respondent's ability to attract and retain customers. (Tr. at 313–14.)

*Patrick Heenan*

Mr. Heenan testified that he serves as the Vice President of Operations for the Shellenberger Family Companies. (Tr. at 525.) As Vice President, Mr. Heenan oversees the day-to-day operations of all the asset-based companies, including S&H. (Tr. at 525.) He has worked for the Shellenberger Family Companies for four years, and assumed his role as Vice President eight months prior to the hearing. (Tr. at 525–26.) Mr. Heenan had previously served as the Director of Operations for S&H and Granite Transportation for about a year and a half. (Tr. at 526.) Before that, when he started at Shellenberger Family Companies in 2012, he worked as the Operations Manager for Granite Transportation. (Tr. at 526.) In this position, Mr. Heenan was responsible for the fleet managers, drivers, service levels, and financial profitability of Granite Corporation. (Tr. at 526.) Mr. Heenan testified that S&H is the parent company of the Shellenberger Family Company, while Granite Transportation is a spin-off of dedicated accounts and operations. (Tr. at 527.)

As a service company, S&H depends on timely deliveries to be successful. (Tr. at 527.) Mr. Heenan explained that S&H has a progressive service policy related to timeliness of deliveries, detailed in the company handbook. (Tr. at 527.) Drivers receive verbal counseling for their first offense, written counseling for their second offense, and suspension or termination for their third offense. (Tr. at 528.) S&H's policy considers a driver late if they arrive even one minute after the specified delivery time. (Tr. at 528.) When S&H become aware of a late delivery, it tries to determine the root cause; *e.g.*, driver-related, carrier-related, shipper-related, or weather-related. (Tr. at 528–29.) Depending on the underlying cause, S&H works to address the problem, meeting with the driver if it is driver-related. (Tr. at 529.)

Mr. Heenan stated that S&H's trucks are equipped with satellite tracking and total mail systems. (Tr. at 529.) The driver can send arrival times listed in the company logs at RX 1 through the total mail system or satellite tracking and the PeopleNet system input times automatically when the truck arrives within a certain distance of the customer. (Tr. at 532–33.) A dispatcher could also update the order based on verbal information received from drivers. (Tr. at 532.) Mr. Heenan stated that all of S&H's trucks were equipped with GPS tracking through the PeopleNet system, but not all trucks had the total mail system. (Tr. at 556.) In his experience, the GPS tracking is normally very accurate. (Tr. at 557.)

Mr. Heenan testified that he sat in on the termination meeting of Complainant in 2012. (Tr. at 542.) He alleged that the only other people at the meeting were Ms. Mergler, Ms. Bailey, and Complainant. (Tr. at 542). He recalled that they presented Complainant with the disciplinary action for the service failure from the week prior and informed her of their decision to terminate her. (Tr. at 543.) Mr. Heenan signed the disciplinary report at RX 1, p. 84 on November 12, 2012, and they presented it to Complainant during the termination meeting. (Tr. at 543–44.) He recalled a discussion with Complainant to review her repeated tardiness and to note that she was not improving. (Tr. at 544.) Mr. Heenan knew at the time of this meeting that Complainant had been absent from work for the past few workdays due to her dentist appointment and a tooth extraction. (Tr. at 557–58.) He and Ms. Mergler had talked sometime before her dentist appointment to review Complainant's service issues, and had concluded that they were going to terminate Complainant's employment with S&H. (Tr. at 558.) However, he stated that he would not have any reason to dispute Ms. Mergler's testimony that she made the decision to discharge Complainant on November 12, 2012. (Tr. at 559.) He clarified that Ms. Mergler discussed Complainant's service issues prior to her dentist appointment, at which time he believed that they had decided to terminate Complainant's employment. (Tr. at 560.) Mr. Heenan could not identify a specific time on November 7, 2012 that they made the decision, though he believed that they made it prior to her calling off. (Tr. at 560–61.)

Mr. Heenan acknowledged that a few reports in the company records at RX 1 showed impossible entry/exit and delivery times. (Tr. at 549–50.) He noted that S&H does not always strictly adhere to its progressive discipline policy and that S&H has made exceptions in the past. (Tr. at 551.)

B. Legal Standard

Congress enacted the employee protection provisions of the STAA to encourage employees in the transportation industry to report noncompliance with safety regulations governing commercial motor vehicles. Brock v. Roadway Express, Inc., 481 U.S. 252, 258 (1987). To effect this goal, the STAA provides that:

> (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 . . . 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 a proceeding; or
> . . .
> (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 motor vehicle safety or health; or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a).

To demonstrate unlawful activity under the STAA, a complainant must show: (1) that she engaged in protected activity, (2) that the employer knew of the protected activity,[7] (3) that the complainant suffered an adverse employment action amounting to discharge, discipline, or discrimination regarding pay, terms, privileges of employment, and (4) that the protected activity was a contributing factor in the adverse employment action. Clark v. Hamilton Haulers, LLC, ARB Case No. 13-023, ALJ Case No. 2011- STA-007, slip op. at 3–4 (ARB May 29, 2014); Ferguson v. New Prime, Inc., ARB No. 10-75, ALJ No. 2009-STA-47, slip op. at 3 (ARB August 31, 2011); Clarke v. Navajo Express, Inc., ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Araujo, 708 F.3d at 158 (quoting Ameristar Airways Inc. v. Admin. Rev. Bd., 650 F.3d 562, 563, 567 (5th Cir. 2011)). Accordingly, a complainant-employee need only show that the protected activity played some role in the employer's decision to take adverse action—any amount of causation will satisfy this standard. Palmer, ARB No. 16-036 at 14-15, 51-55. An ALJ may consider all evidence relevant to this issue, including the employer's proffered reasons for the adverse action. Id.

Should the Complainant succeed, the burden then shifts to the respondent-employer. In order to avoid liability, the employer must demonstrate by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1978.104(e)(4); Arjuno v. N.J. Transit Rail Operations, Inc., 708 F.3d 152, 157 (3d Cir. 2013); Beatty v. Inman Trucking Mgmt., Inc., ARB No. 13-039, ALJ Nos. 2008-STA-20 & 2008-STA-21, slip op. at 7–11 (ARB May 13, 2014). Clear and convincing evidence shows "that the thing to be proved is highly probable or reasonably certain." DeFrancesco v. Union R.R. Co., ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015). The burden of proof for clear and convincing evidence resides in between "preponderance of the evidence" and "proof beyond a reasonable doubt." See Araujo, 708 F.3d at 159 (citing Colorado v. New Mexico, 467 U.S. 310, 316 (1984); Addington v. Texas, 441 U.S. 418, 525 (1979)). Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when based on the evidence the proffered conclusion is highly probable. DeFrancesco, ARB No. 13-057 at 7–8.

C. Analysis

As explained below, Complainant has failed to demonstrate by a preponderance of the evidence that Respondent violated the STAA. While Complainant engaged in protected activity, the evidence fails to prove that Respondent's decision-making agents had any knowledge of that activity or that it played any role in their decision to terminate Complainant. Accordingly, Complainant's complaint must be dismissed.

Before beginning the analysis, the undersigned notes that Complainant's testimony demonstrated a lack of credibility on a number of issues, which casts doubt on her testimony in general. First, despite the fact that Complainant signed at least six disciplinary reports from

[7] Courts sometimes treat the employer-knowledge requirement as a separate element, and sometime subsume it into the contributing factor analysis. See Schindler v. Estenson Logistics, 2016-STA-69, slip op. at 3–4 (ALJ Dec. 7, 2016).

Respondent during her employment with S&H, Complainant signed a DOL investigative document stating that she had "no past disciplinary issues." (See RX 1, pp. 66–72; RX 4.) Complainant admitted that she read this document carefully before signing it, but stated that she affirmed this document as written because she did not understand why Respondent had fired her. (Tr. at 467, 498–99.) This tribunal finds Complainant's explanation for her false attestation unpersuasive. Complainant seemed to report similar false statements to HireRight when she disputed Respondent's employment report. In HireRight's letter to Respondent requesting that it review its report for accuracy, HireRight wrote, "[Complainant] states [s]he did not have any Late Pick Up/Deliveries or Company Policy Violations and feels these should be removed." (RX 1, p. 77–79.) Complainant could not explain this letter other than stating that she did not think she would have made such an assertion. (Tr. at 470.) However, HireRight's report of Complainant's statements in this letter align with her attested statements to the DOL, which together demonstrate that Complainant had misconstrued and/or dissembled the truth of her employment history with Respondent to at least two parties. This history of exaggeration or deliberate misleading impinges on Complainant's credibility as a witness.

Second, Complainant's testimony concerning some of her disciplinary reports appeared disingenuous. She stated that on February 11, 2012 her car broke down on the way to work, resulting in her walking the rest of the way and being four hours late. (Tr. at 458, 512.) She further alleged at the hearing that she was unable to call Respondent to inform them of her predicament. (Tr. at 458, 512.) However, the disciplinary report that Complainant signed states that Complainant was a "no call/no show" for work that day, and that "when called, she said she was having car trouble." (RX 1, p. 66.) Both stories cannot be true. If Respondent was able to call Complainant, then Complainant should have been able to call her supervisors. Complainant signed the disciplinary report, and did not explain why her hearing testimony conflicted with that attestation. By contrast, Respondent's written explanation in this disciplinary report accords with its agent's testimony regarding the issues that Respondent had with Complainant's lack of communication. (Tr. at 99–100, 127.) Moreover, this tribunal finds it implausible that an employer would discipline an employee for an event outside of her control that rendered her unable to communicate her status and caused her to arrive late. Since Complainant appears to have misrepresented the events surrounding her conduct on February 11, 2012, this tribunal views her testimony with suspicion. In addition, Complainant implausibly suggested that her incident on September 14, 2012 (getting a trailer stuck at the company lot) was not preventable. (Tr. at 471.) Though she testified that she had driven that corner "a hundred times before," Complainant maintained that the incident was unavoidable because it was dark. (Tr. at 471.) However, her signed disciplinary report states that the incident was preventable because other people were readily available to guide Complainant through the corner if she had asked. (RX 1, p. 71.) Complainant's retelling of this incident to paint herself in a better light raises questions about her testimony's objectivity and veracity.

Finally, Complainant's testimony regarding her late loads lacks internal cohesion. Complainant alleged that Ms. Mergler and Ms. Bailey always told her what time she needed to report to work, and would assign her daily dispatches when she arrived in the morning. (Tr. at 349, 386.) Complainant also maintained that she always followed directions and had never gotten lost. (Tr. at 364.) Based on this testimony, it is difficult to understand how Complainant could have ever been responsible for late loads, as her schedule appeared to be completely out of

her control. However, Complainant also noted that she had sometimes not allowed herself enough time to get to a destination when she began as a regional driver, but after a few weeks, she learned the destinations and that did not happen anymore. (Tr. at 364.) Contrary to the inference that flows from Complainant's earlier statements, this testimony seems to indicate that Complainant did have a degree of responsibility for setting her own schedule to meet her delivery obligations. In light of Complainant's other noted misrepresentations, this tribunal assumes that Complainant did bear some autonomy in setting her schedule and consequently bore some responsibility for the timeliness of her loads.

In summation, the undersigned finds numerous instances of exaggerations, distortions, or dissembling in Complainant's testimony. This impinges on the credibility of her testimony, particularly where it conflicts with the testimony of Respondent's witnesses. Accordingly, this tribunal generally credits the testimony of Ms. Mergler, Ms. Bailey, and Mr. Heenan over the testimony of Complainant in the analysis below.

1. Protected Activity

Complainant argues that her actions constituted "protected activities" under both 49 U.S.C. §§ 31105(a)(1)(A)(i) (complaint clause) and 31105(a)(1)(B) (refusal clause). The undersigned rejects Complainant's argument that her actions qualify as protected activity under the complaint clause, but agrees that Complainant has demonstrated that her actions constituted protected activity under the refusal clause.

"For a finding of protected activity under the complaint clause of the STAA, a complainant must show that he reasonably believed he was *complaining about the existence of a safety violation*." Ulrich v. Swift Transportation Corp., ARB No. 11-016, 2010-STA-4, slip op. at 4 (ARB Mar. 27, 2012) (emphasis added). Here, all of Complainant's purported communications with Respondent's agents concerned her refusal to drive *in the future*, not an existing safety violation. Complainant never testified that she drove in a condition that rendered her unfit to operate a motor vehicle; rather, she maintained that she refused to drive and cut short her day because of the possibility that her driving would become impaired. Such an allegation fits squarely within the language of the refusal clause. Since Complainant never raised a complaint about an *existing safety violation*, her actions do not constitute protected activity within the meaning of the complaint clause.

However, Complainant's actions do constitute protected activities under the "refusal" clause. The STAA refusal clause (§ 31105(a)(1)(B)) protects two categories of work refusals, which are commonly referred to as the "actual violation" and "reasonable apprehension" categories. See 49 U.S.C.A. § 31105(a)(1)(B)(i), (ii); Leach v. Basin Western, Inc., ARB No. 02-089, ALJ No. 2002-STA-5 (ARB July 31, 2003). Under the actual violation category, a refusal to drive is protected only if the record establishes that the employee's operation of a commercial vehicle would have violated a pertinent motor vehicle regulation. 49 U.S.C. § 31105(a)(1)(B)(i); see also Shields v. James E. Owen Trucking, Inc., ARB No. 08-021, 2007-STA-022, slip op. at 9 (ARB Nov. 30, 2009). Pertinent regulations to this case are 49 C.F.R. § 392.3, which prohibits drivers from operating motor vehicles when fatigue or illness so impairs, or is so likely to impair, a driver's ability or alertness as to make it unsafe for her to operate a

motor vehicle; and 49 C.F.R. § 392.4, which similarly prohibits drivers from operating motor vehicles while under the influence of narcotic drugs or any substance which renders a driver incapable of safely operating a motor vehicle. If a driver claims that she based a refusal to drive on her predicted impairment due to fatigue or illness, she must provide some proof that such fatigue or illness would have likely impaired her ability and alertness necessary to drive safely. See Stauffer v. Walmart Stores, Inc., ARB No. 99-107, ALJ No. 1999-STA-21, slip op. at 9 (ARB Nov. 30, 1999).

Here, Complainant's actions demonstrate two instances of protected activities under the actual violation category.[8] First, Complainant's refusal to wait at the customer's lot to receive an empty trailer based on her increasing tooth pain constitutes protected activity because Complainant perceived a legitimate concern that the pain would soon render her unable to drive safely. While Complainant's credibility is generally suspect for the reasons stated above, on this point her subjective testimony correlates with her medical records, showing an abscess and tooth extraction the day after she left work early on Wednesday, November 7, 2012. (See CX 1; CX 2.) Complainant reasonably explained that driving a massive vehicle demands complete mental attention and her increasing tooth pain was correspondingly decreasing her ability to focus on the road. (Tr. at 376.) Accordingly, the undersigned credits her testimony as to the nature of her increasing pain and her prediction that it may have eventually rendered her unfit to drive. This tribunal recognizes the imprecise prognostication that Complainant had to make in determining whether her tooth pain would permit her to drive safely back to the yard at some point in the future if and when she found a trailer. Finding protected activity here comports with the goal of the STAA in encouraging safe driving practices. While Complainant did bobtail her truck back to the yard and drive herself home from the yard, she reasonably alleged that driving with a trailer would have been significantly more difficult than bobtailing. (Tr. at 418.) Thus, her refusal to wait at the customer's facility to receive an empty trailer before she drove back constituted protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i) and 49 C.F.R. § 392.3.

Complainant's second instance of protected activity occurred when she called off work on November 8–9, 2012 due to Dr. Hollis's prescription of a short-term narcotics regimen for post-surgical pain. The regulations unambiguously prohibit drivers from operating motor vehicles while under the influence of such prescription drugs. See 49 C.F.R. § 392.4. Complainant testified that the hydrocodone made her feel drowsy, and she did not believe that she would have been able to drive safely. (Tr. at 381–82.) Accordingly, refusing to work on these grounds also constitutes protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i) and 49 C.F.R. § 392.4.

2. Employer Knowledge of Protected Activities

To prevail on her STAA claim, Complainant must also prove by a preponderance of the evidence that S&H knew about her protected activities when they took adverse employment action against her. Clarke v. Navajo Express, Inc., ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011). Where a refusal to drive constitutes the protected activity, a

[8] Complainant's allegations do not constitute protected activity under the reasonable apprehension category because the STAA limits that category to refusals due to "*the vehicle's* hazardous safety or security condition." See 49 U.S.C.A. § 31105(a)(1)(B)(ii). Here, Complainant's refusal to work did not relate to any hazardous vehicular condition.

driver's general references to being ill or fatigued are insufficient to apprise the employer of protected activity; rather, a driver must explicitly convey that her refusal to drive stems from her belief that driving in her condition would result in a danger to herself or to the public. Stout v. Yellow Freight System, Inc., 1999-STA-42 (ALJ Dec. 3, 1999), *aff'd* ARB No. 00 017 (ARB Jan. 31, 2003) (adopting and attaching the ALJ's Decision and Order). For the reasons explained below, Complainant has failed to prove by a preponderance of the evidence that she communicated the safety-related nature of her refusal to drive to S&H.

Regarding her first instance of protected activity on November 7, 2012, Complainant has not credibly demonstrated that she apprised Respondent of the safety concerns that motivated her refusal to stay and wait for an empty trailer before driving back to the yard. The only evidence that Complainant did inform S&H of her safety concerns comes from Complainant's testimony that she informed Ms. Bailey that it was becoming unsafe for her to drive. (Tr. at 372, 375.) Given Complainant's evident tendency to recast the details of her employment in a light most favorable to herself, her testimony standing alone is questionable. However, Respondent's witnesses also credibly refuted Complainant's narrative. Although Ms. Mergler recalled talking to Complainant on November 7 about her tooth pain, she testified that Complainant did not mention anything about an inability to drive safely. (Tr. at 129.) Ms. Mergler stated that after talking to Complainant and Ms. Bailey, she instructed Ms. Bailey to bring Complainant in so she could go home early and see a dentist. (Tr. at 156.) Ms. Bailey could not recall the details of November 7, but remembered that Complainant had tooth pain. Ms. Bailey stated that she had referred specific drivers to the Safety Department for medical issues during her employment for S&H, but that she would not have referred someone to the Safety Department for just a toothache. (Tr. at 314–16.) Complainant testified that neither Ms. Bailey nor Ms. Mergler directed her to speak with the Safety Department regarding her tooth pain when she spoke with them over the phone. (Tr. at 382, 522.) Based on this sequence of events, the undersigned finds that Complainant likely failed to apprise S&H of the safety-related nature of her toothache. Had Complainant informed Ms. Bailey that it was becoming unsafe for her to drive, Ms. Bailey would have likely put her through to the Safety Department. The fact that she did not—and instead directed Complainant to drive herself back to the yard—indicates that Complainant's communication did not sufficiently apprise Ms. Baily of her safety-related concerns.

Complainant stated the she believed that Ms. Mergler and Ms. Bailey perceived her physical condition when she returned to the shop due to the look of pain on her face and her swollen and immobile mouth. (Tr. at 378.) Complainant's suggestion lacks plausibility. Even if Ms. Mergler and Ms. Bailer recognized that Complainant was in pain, that would not have put them on notice that Complainant's driving ability was so impaired as to implicate safety concerns. Indeed, the fact that Complainant drove her truck back the yard and then drove herself home would have contraindicated such a conclusion. (Tr. at 375, 378.) Moreover, Complainant had finished her loads for the day by the time she left, and would have simply filled up her remaining hours for the day by working at the shop. (Tr. at 132, 142–43.) An early dismissal under such circumstances would not have suggested to Ms. Bailey or Ms. Mergler that Complainant's refusal to drive arose from a perceived inability to drive safely. Since there is no other evidence that S&H otherwise discovered that Complainant's refusal to wait for an empty trailer stemmed from her subjective safety concerns, Complainant has failed to establish that S&H knew of her protected activity on November 7, 2012.

A similar pattern of inferences can be drawn regarding Complainant's second instance of protected activity—taking off work on November 8–9, 2012 due to a hydrocodone prescription. Once again, the only evidence that S&H had knowledge of Complainant's narcotics regimen comes from Complainant's testimony. Complainant alleged that she called Ms. Mergler from the dentist's office following her tooth extraction on Thursday, November 8, informing Ms. Mergler that she would be unable to return to work until Monday due to her medication. (Tr. at 383, 486.) According to Complainant, Ms. Mergler told Complainant that she would "see her Monday" and did not refer Complainant to the safety department. (Tr. at 383.) However, Ms. Mergler testified that Complainant did not call S&H after her dentist appointment, and stated that S&H unsuccessfully tried to contact Complainant to make sure she was all right. (Tr. at 125, 129.) Ms. Mergler also stated that when drivers inform her about medications that could hinder their driving abilities, she refers them to the Safety Department. (Tr. at 131.) Moreover, Ms. Lyons—S&H's Safety Director—testified that she never received any indication from Complainant that she was taking medication that could impair her driving, nor did Complainant's personnel file contain any such records. (Tr. at 174–75.) Given Complainant's demonstrated credibility issues, this tribunal credits the testimony of Ms. Mergler and Ms. Lyons over Complainant's testimony and finds that Complainant likely never reported her prescription medication to S&H. While Respondent was certainly aware that Complainant was taking time off for some unresolved dental issue, at best, Ms. Mergler could have inferred that Complainant was not at work because she was still experiencing tooth pain. Such an inference would not have apprised Ms. Mergler that Complainant had a prescription for narcotic painkillers.

For these reasons, this tribunal finds that Complainant has failed to demonstrate by a preponderance of the evidence that Respondent was aware of her protected activities. Her claim under the STAA therefore fails. However, even if Respondent had knowledge of Complainant's protected activity, Complainant is unable to demonstrate that this knowledge was a contributing factor in Respondent's decision to fire her. Accordingly, this decision also discusses the elements of adverse action and contributing factor.

3. Adverse Action

By its own terms, the STAA includes "discharge" as a type of adverse employment action. See 49 U.S.C. § 31105(a)(1). Here, Respondent does not dispute that its termination of Complainant constitutes adverse employment action within the meaning of the STAA.

The STAA also prohibits blacklisting based on protected activity. Earwood v. Dart Container, Case No. 93-STA-0016, slip op. at 2 (Sec'y Dec. 7, 1994). Complainant argued in her OSHA complaint (CX 5, p. 4) and indicated in her opening statement (Tr. at 21) that she believed Respondent had blacklisted her in retaliation for her protected activity.[9] Complainant testified that two companies offered her employment, only to retract the offers after calling Respondent for job references. (Tr. at 402.) She also contested the accuracy of Respondent's employment report to HireRight following her termination. (Tr. at 171; RX 1, pp. 77–79.)

[9] Complainant did not argue in her brief that Respondent engaged in any blacklisting.

The undersigned finds insufficient evidence to support Complainant's blacklisting contention. Ms. Lyons credibly testified that S&H's regular practice is to provide HireRight with all employment information regarding its employees regardless of whether they left on good or bad terms. (Tr. at 180, 185.) The various disciplinary incidents reported to HireRight were substantiated by Complainant's signed disciplinary reports that Respondent had issued against Complainant. (See RX 1, pp. 66–88.) Accordingly, the evidence demonstrates that Respondent's report to HireRight was not "blacklisting" and bore no nexus to Complainant's protected activity. Complainant's testimony that two employers retracted employment offers following a reference call to S&H (Tr. at 402) also fails to establish that S&H engaged in any kind of blacklisting. S&H recorded all of its disciplinary reports during Complainant's employment, and there is no evidence that S&H reported any negative information to these potential employers beyond the disciplinary reports already in Complainant's file. Accordingly, Complainant's allegations of blacklisting are without merit.

4. Contributing Factor

To succeed on her STAA claim, Complainant must prove that her protected activity was a contributing factor in the adverse employment action. 49 U.S.C. § 31105(a)(1); Clark v. Hamilton Haulers, LLC, ARB Case No. 13-023, ALJ Case No. 2011- STA-007, slip op. at 3–4 (ARB May 29, 2014). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Araujo, 708 F.3d at 158 (quoting Ameristar Airways Inc. v. Admin. Rev. Bd., 650 F.3d 562, 563, 567 (5th Cir. 2011)). Accordingly, a complainant-employee need only show that the protected activity played some role in the employer's decision to take adverse action—any amount of causation will satisfy this standard. Palmer, ARB No. 16-036 at 14-15, 51-55. An ALJ may consider all evidence relevant to this issue, including the employer's proffered reasons for the adverse action. Id. Temporal proximity may be considered in determining whether a complainant has established causation by a preponderance of the evidence; however, temporal proximity alone is insufficient in the face of compelling contrary evidence. Spelson v. United Express Systems, ARB No. 09-063, ALJ No. 2008-STA-39, slip op. at 3, n.3 (ARB Feb. 23, 2011). Indeed, temporal proximity is "just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action." Clemmons v. Ameristar Airways, Inc., ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010).

Here, Complainant has failed to establish that her protected activity played any role in Respondent's decision to terminate her on November 12, 2012.[10] In support of her contention, Complainant primarily relies upon the temporal proximity between her protected activities on November 7–9, 2012 and her termination on November 12, 2012. The undersigned agrees that a temporal proximity of a few days is, standing alone, evidence of causation; however, here there is compelling evidence that Respondent terminated Complainant on grounds wholly unrelated to her protected activity.

[10] As explained in section III.C.2, *supra*, Complainant is unable to establish Respondent's knowledge of her protected activity. Logically, she is also unable to establish that her protected activity was a contributing factor to her termination.

Respondent initiated a series of disciplinary actions related to Complainant's lateness and lack of communication months in advance of her termination. In addition to four other disciplinary incidents in 2012, Complainant received three documented reprimands for being late and/or failing to communicate with dispatch. (See CX 1, pp. 66–88.) All of these incidents occurred prior to November 2012, and therefore had no causal relation to Complainant's protected activity. According to company policy, termination was simply the next step in the process for a driver who had received—as Complainant had—a verbal warning, a written reprimand, and a three-day suspension for late loads.[11] (Tr. at 527–28; RX 3, p. 18.) Clearly, Complainant had a history of late deliveries that S&H had been addressing months prior to her refusal to drive and calling off on November 7–9, 2012. Accordingly, when Complainant delivered late loads on the week of November 5–9, 2012, Respondent recorded that Complainant's termination was due to her repeated instances of lateness, for which Respondent had disciplined her on multiple times in 2012. (See RX 1, p. 84.)

Complainant's primary rejoinder to Respondent's stated reasons for her termination is a claim of pretext. (Complainant's Br. at 32–40.) She points out that her first written reprimand for late loads occurred on July 10, 2012. She also notes that despite S&H's contention at the hearing that Complainant had at least fifteen late deliveries between July 3, 2012 and August 22, 2012, Respondent did not discipline Complainant again until August 24, 2012. S&H also waited until Complainant had another purported eleven late loads before terminating her on November 12, 2012. Since Respondent did not more strictly adhere to its progressive disciplinary policy, Complainant argues that Respondent's actions suggest deliberate retaliation. The undersigned disagrees.

First, Mr. Heenan admitted that S&H does not always strictly follow its disciplinary policy. (Tr. at 551.) Ms. Mergler concurred, and explained that she did not issue formal discipline to drivers for every late load, preferring to have informal conversations with drivers about their late loads. (Tr. at 151.) Since Respondent spends a lot of money and time to train its drivers, Ms. Mergler testified that she wanted her drivers to succeed. (Tr. at 104, 124.) Even though Respondent did not follow company policy to the letter here, the undersigned finds credible the testimony of Mr. Heenan and Ms. Mergler that established company practice permitted a degree of disciplinary flexibility. Therefore, Respondent's failure to discipline Complainant for every late load is not indicative of pretext.

The timing of Complainant's disciplinary incidents for late loads also supports a finding that Respondent's stated reasons for termination are veridical. Respondent waited just over two months from the time of its first written reprimand for late loads on July 10, 2012 (RX 1, p. 70) before it suspended Complainant for three days due to repeated late loads on August 24, 2012.

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[11] Complainant correctly notes that Respondent's handbook specifies that drivers are to receive two written warnings for late deliveries prior to receiving a three-day suspension. (Complainant's Br. at 35.) Complainant only received one such written warning prior to her three-day suspension. (RX 1, p. 70.) However, this tribunal notes that Complainant had also received four reprimands for other issues, which may have accelerated the disciplinary process. However, regardless of whether Respondent followed its disciplinary policy to the letter, it is undisputed that Complainant received a three-day suspension on August 24, 2012 for late loads prior to any protected activity. Respondent's handbook clearly states that the next disciplinary step was termination. (RX 3, p. 18.)

(RX 1, p. 72.) Just under two months later, Respondent fired Complainant for another few documented instances of late loads. (RX 1, p. 84.) The similar time frames between subsequent disciplinary actions support the Respondent's contention that it terminated Complainant for lateness and lack of communication.[12] (Tr. at 127.)

Complainant also disputes Respondent's allegation that she actually delivered untimely loads during the final week of her employment. She reviewed her driver's logs and Respondent's delivery records, alleging that the late arrivals recorded that week related exclusively to elements outside of her control, such as traffic and the times Ms. Bailey directed her to report for duty. (Tr. at 359–67.) Accordingly, she claims that Respondent's proffered reasons for her termination are pretextual. The undersigned disagrees.

ALJs do not sit as "super-personnel departments" who second-guess an employer's decisions. Carney v. Price Transport, ARB No. 04-157, ALJ No. 2003-STA-48, slip op. at 7 n.3 (ARB May 31, 2007) (collecting cases). "To establish pretext, it is not sufficient for a complainant to show that the action taken was not 'just, or fair, or sensible . . . rather he must show that the explanation is a phony reason.'" Id. (quoting Gale v. Ocean Imaging & Ocean Res., Inc., ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 10 (ARB July 31, 2002)). Complainant's testimony could establish that Respondent's allegation of late loads is pretextual; however, given Complainant's evident lack of credibility, the undersigned hesitates to credit her testimony on this issue. Such a credibility analysis is also not necessary here, as the company logs that evidence Complainant's late loads during her final week of employment mirror the logs during other weeks in which Respondent disciplined Complainant for late loads. (Compare RX 1, pp. 59–61, with RX 1, p3. 33, 49.) Accordingly, this tribunal finds that Respondent likely *believed* that Complainant delivered late loads, which supports Respondent's contention that late loads were the reason for Complainant's discharge. Even if Complainant could establish that Respondent labored under a mistaken belief that her loads were untimely, such a finding would not establish pretext.

In summary, the evidence does not show that Complainant's protected activity causally contributed in any way to Respondent's decision to terminate her employment. Indeed, it appears that Respondent was already weighing a decision to fire Complainant on Wednesday, November 7, prior to Complainant's calling off for the next few days. Mr. Heenan testified that he discussed Complainant's service issues that day with Ms. Mergler, prior to Complainant's dentist appointment, at which time he believed that they made the decision to terminate Complainant. (Tr. at 560.) Ms. Mergler also testified that she had discussed Complainant's problems with Mr. Heenan prior to Complainant's termination meeting, and that Mr. Heenan did not express any disagreement with Ms. Mergler's decision to fire Complainant. (Tr. at 126.) For

[12] Complainant argues that Ms. Mergler's testimony that she fired Complainant for lateness and an alleged "lack of communication" (Tr. at 127) contradicts the termination memo, which states that Complainant was fired for being late for three loads that week (RX 1, p. 84). (Complainant's Br. at 36–37.) Complainant therefore contends that Respondent's "shifting reasons" for her discharge is evidence of pretext. The undersigned disagrees. Three prior disciplinary records state that Complainant had been disciplined for, among other things, failing to communicate with dispatch. (See RX 1, pp. 66, 70, 72.) Respondent clearly had concerns about Complainant's lack of communication far in advance of her protected activity.

all these reasons, and because the evidence does not show that Respondent knew of Complainant's protected activity, Complainant has failed to establish that her protected activity was a contributing factor in Respondent's decision to discharge her employment.

D. Corporate and Individual Liability

The STAA provides for both corporate and individual liability. See 49 U.S.C. § 31105(a)(1); Smith v. Lake City Enterprises, Inc., ARB Nos. 08-091 & 09-033, ALJ No. 2006-STA-32 (ARB Sept. 24, 2010). Since Complainant has failed to prove an STAA violation, neither S&H nor the individual respondents are liable for damages.

## IV. CONCLUSION

For the reasons explained above, the Complainant has failed to demonstrate that Respondents violated the STAA by taking adverse employment action against her on the basis of her protected activity.

## V. ORDER

Complainant is not entitled to relief under the STAA.

SO ORDERED.

**THERESA C. TIMLIN**
Administrative Law Judge

Cherry Hill, New Jersey

**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. § 19 78.110(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).