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Issue Date: 05 April 2016

Case No.: **2015-STA-00008**

In the Matter of:

THOMAS C. MCCAFFREY, III,
Complainant,

v.

FEDEX FREIGHT,
Respondent

Appearances:

Luther Sutter, Esq., and Lucian Gillham, Esq., Sutter & Gillham, P.L.L.C, Benton, AR
For the Complainant.

Jeffrey Greer, Esq., FedEx, Memphis, TN
For the Respondent.

Before: Stephen R. Henley
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case involves a claim under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "Act"), with implementing regulations at 29 C.F.R Part 1978.[1] The STAA prohibits an employer from retaliating against an employee because the employee engaged in protected activity. In addition, the Act protects employees who refuse to operate a commercial motor vehicle when such operation would violate a Federal safety regulation or because the employee has a reasonable apprehension of serious injury to himself or the public due to the vehicle's unsafe condition.[2] Thomas C. McCaffrey, III ("Complainant"), alleges that FedEx Freight ("Respondent") terminated him in violation of the STAA.

[1] The STAA was amended on August 3, 2007 by Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007) and the implementing regulations were amended on August 31, 2010, 75 Fed. Reg. 53544 (Aug. 31, 2010). References in this decision are to the current version of the statute and regulations.

[2] As amended on August 3, 2007, the STAA was amended to include three other categories of protected activity: (1) accurately reporting hours on duty; (2) cooperating with a safety or security investigation by certain federal entities; and (3) furnishing information to federal entities relating to an accident or incident resulting in injury, death, or property damage. Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007).

STATEMENT OF THE CASE

On September 19, 2013, Complainant filed a timely complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") office in Dallas, Texas. (CX 14).[3] He alleged that Respondent terminated his employment with them in retaliation for his refusing to drive a commercial motor vehicle ("CMV") with unsafe equipment, for refusing to cover up unsafe equipment, and for insisting on a safe work environment. OSHA investigated the complaint and, on October 3, 2014, concluded that there was no reasonable cause to believe that Respondent violated the STAA and dismissed the complaint. Specifically, OSHA determined that Respondent terminated Complainant for violating safety and security policies, and that the evidence did not substantiate that Complainant's engagement in protected activity was a contributing factor in his termination. On October 16, 2014, Complainant filed a timely objection and requested a hearing before an administrative law judge.

A hearing was held before the undersigned on May 5, 2015 in Memphis, Tennessee. At the hearing, Complainant's Exhibits 1 through 15 (CX 1 through CX 15), Respondent's Exhibits 2 through 9 (RX 2 through RX 9), and ALJ Exhibits 1 and 2 were admitted. The parties were allowed sixty (60) days to submit post-hearing briefs, which was subject to extension by stipulation. (Tr. 162). Employer's post-hearing brief was received on August 20, 2015. This case is now ready for a decision.

ISSUES

Did Complainant engaged in protected activity on September 12, 2013? If so, has Complainant proven by a preponderance of the evidence that his protected activity contributed, in part, to Respondent's decision to take adverse action against him, i.e. was it a factor which, alone or in connection with other factors, tended to affect in any way the outcome of the decision? If so, has Respondent shown by clear and convincing evidence that it would have taken the adverse action even in the absence of the protected activity? If not, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate?

CONTENTIONS OF THE PARTIES

Complainant

On September 12, 2013, Complainant filed a maintenance report on the fifth wheel of his truck. The following day Complainant was terminated. Complainant argues that the temporal proximity between the protected activity and the unfavorable personnel action establishes that Respondent retaliated against Complainant in violation of the employee protection provisions of STAA. Complainant contends that he is entitled to lost wages, attorney's fees, and reinstatement.

Respondent

Respondent contends that on September 5, 2013, an operations supervisor at the FedEx facility in Jonesboro, Arkansas, observed Complainant returning to the service center with the

[3] Complainant's and Respondents' exhibits will be referred to as "CX" and "RX," respectively, followed by the exhibit number. "Tr." followed by a page number refers to the transcript of the hearing in this case.

door to the trailer unit he was driving open. Since operating a trailer with the door open is a safety and security violation, Complainant was asked about the matter. Respondent asserts that Complainant said that he had opened the door only after he had returned to the yard. After Respondent reviewed security video footage that showed Complainant's trailer door was open prior to returning to the facility, Complainant was again asked about the incident and again repeated that the door was only opened after returning to the yard. After learning there was video footage of the incident, Complainant admitted that he had actually left the door open prior to arriving at the facility. Respondent asserts that Complainant was subsequently terminated on September 13, 2013 because of his dishonesty about the events involving the door.

Respondent further asserts that Complainant could not have filed a safety complaint on September 12, 2013 because he was not working that day. Although Complainant may have raised similar safety issues on May 17, May 20, and July 30, 2013, Respondent submits that none of these complaints were causally connected to adverse activity. Respondent also objects to Complainant amending his complaint to include these earlier dates as potential protected activities.

Finally, even if Complainant met his burden in establishing that he was retaliated against for engaging in protected activity, Respondent argues that there was a legitimate, non-discriminatory basis for its action. Respondent avers that Complainant's lies during the investigation represented a lack of integrity and honesty in the workplace justifying termination.

SUMMARY OF THE EVIDENCE[4]

Lance Pierce (Tr. 10-37, 73-123)

Lance Pierce is employed by FedEx Freight as a service center manager. (Tr. 10.) Mr. Pierce testified that he is familiar with the policies of FedEx and the Department of Transportation regulations to which FedEx is subject. Although Mr. Pierce has never been a safety manager at FedEx, he has been trained in safety matters and understands that driving with the back door of a trailer open is a serious safety concern. (Tr. 12.) Mr. Pierce explained that if a FedEx driver is doing something unsafe, he would take that driver out of service. (Tr. 13.)

Mr. Pierce's testified that, under FedEx policies, Complainant was engaged in an unsafe activity when he operated a trailer with an open door on September 5, 2013. (Tr. 14-15.) Mr. Pierce had seen video evidence of Complainant entering the service yard with the trailer door open; this evidence was brought to his attention by Operations Supervisor Tom Dooley on September 5, 2013. (Tr. 15, 74.) Mr. Dooley related that he had asked Complainant if he realized the trailer door was open. (Tr. 74.) Complainant had responded that he opened the trailer door to retrieve a strap after he got back to the yard. (Tr. 74-75.)

Following his conversation with Mr. Dooley and his review of the video showing Complainant drove into the yard with the door open, Mr. Pierce called Complainant into his office. (Tr. 75.) Mr. Pierce asked Complainant whether he had his trailer door open when he

[4] The summary of the evidence is not intended to be an exhaustive analysis of each exhibit or a verbatim transcript of the hearing but merely to highlight certain relevant portions.

entered the yard. Complainant responded that he did not open it up until after he drove onto the yard to find a strap. (Tr. 76.) Mr. Pierce asked Complainant to write a statement, which Complainant refused to do. At that point, Mr. Pierce showed Complainant the video of him driving onto the yard with the door already open. Complainant then responded that he "must have left [the] door open." Mr. Pierce believed that Complainant lied to him about driving in the yard with the trailer open, even though Complainant said that he had simply been mistaken about what happened. (Tr. 107-108.)

Respondent's Exhibit 2 is an email from Mr. Pierce to Mr. Steve Phillips on Friday, September 6, 2013, seven days before Complainant was terminated. (RX2; Tr. 76-77.) In the email, Mr. Pierce discussed his conversation with Complainant regarding the open trailer incident. (Tr. 77.) Mr. Pierce relayed that Complainant "asked why it mattered because it was not a big deal," and that "he opened the door when he got on the yard looking for a strap." (Tr. 78.) When Mr. Pierce further questioned Complainant on when he opened the door, Complainant asked whether Mr. Pierce was "trying to get [him]."

Before he can pull a driver out of service, Mr. Pierce is required to contact an HR representative, which is what he did after seeing the video evidence on September 5, 2013. (Tr. 21, 23, 80.) Mr. Pierce also contacted a FedEx Safety manager. (Tr. 24, 79-80.) However, Operations Supervisor Dooley, not Mr. Pierce, initiated the investigation into Complainant. (Tr. 82.)

Complainant continued to drive for FedEx following the incident on September 5, 2013, although Mr. Pierce could not recall the exact dates on which he worked. (Tr. 36.) Mr. Pierce recalled that on September 13, 2013, Complainant was discharged. (Tr. 25.) Mr. Pierce was not aware of Complainant reporting a safety issue the day before he was discharged. In order to report a safety issue, Complainant would have to complete a maintenance issue report to Operations Supervisor Tom Dooley, who was Complainant's direct supervisor along with Mark Needham. Mr. Pierce indicated he probably had a conversation with Mr. Dooley regarding Complainant's termination prior to September 13th; however, Mr. Pierce did not recall having a conversation with Mr. Dooley regarding Complainant's refusal to drive a truck. (Tr. 26.)

Mr. Pierce testified that Complainant had reported that a truck had a defective fifth wheel, which can cause a truck to drop a trailer, and could potentially kill someone. (Tr. 28, 29.) When Complainant reported this issue, FedEx did not require him to drive it. (Tr. 28, 29, 118.) Instead, a fleet maintenance technician would have to inspect the truck and clear it for service. Respondent's Exhibit 8 is a statement dated December 5, 2013 that Complainant submitted to OSHA regarding the defective fifth wheel. (RX8; Tr. 83-84.) In this statement, Complainant detailed that he had complained about the defective fifth wheel and refused to drive the truck, but that FedEx "had another driver drive without telling him the risk." (RX8; Tr. 84.) When the second driver encountered issues with the fifth wheel, Complainant detailed that FedEx "told him he didn't have to fill out any paperwork because they knew there was a problem with it," and that "this is a DOT violation and violates FedEx policy."

Mr. Pierce testified that he was familiar with the incident referred to in RX8. Another driver had had the same issue with the truck's defective fifth wheel and had a trailer come unhitched from the fifth wheel. (Tr. 29, 85.) This other driver had discussed the incident with

Mr. Dooley, and Mr. Pierce relayed that Mr. Dooley "misunderstood what he said" and "didn't realize that [the driver] had actually dropped the trailer." (Tr. 85.) The other driver did not deny or falsify what had happened. (Tr. 121.) A few days later, Complainant raised the situation with Mr. Pierce, at which point Mr. Pierce formally investigated the incident. (Tr. 86.) Mr. Pierce testified that FedEx management would not have known about the incident if Complainant had not raised it with him. (Tr. 102.) The other driver is still employed with FedEx.

Mr. Pierce was also familiar with another dropped trailer incident that occurred with Complainant in June 2013. According to Mr. Pierce's memory, Complainant's truck dropped a trailer as he was pulling out of a dock, and Complainant reported the incident to the safety department. (Tr. 86-87.) Complainant later appealed the judgment of the Accident Review Committee, who classified that the accident was "driver preventable." (CX7; CX10.) Mr. Pierce stated that the appeal was decided before Complainant's termination on September 13. (Tr. 95-96.) Respondent's Exhibit 6 is the fleet maintenance record of a piece of equipment for July 3 through October 30, 2013, and includes two entries documenting repairs on the fifth wheel. (RX6; Tr. 87-89.) These repairs were documented as completed on July 29 and September 12, 2013. (Tr. 97-98.) Mr. Pierce testified that he would not have been surprised if Complainant filed safety complaints with the Department of Labor or Department of Transportation. (Tr. 100-101.)

Mr. Pierce could not recall whether the cited reason for Complainant's termination was misconduct or dishonesty. (Tr. 29.) He did recall that prior to September 2013, Complainant had been performing his job satisfactorily. The only other issue Complainant had been investigated for was for grabbing Mr. Dooley because he was upset that a door was not open. (Tr. 30.) This incident and a resulting investigation took place in November of 2012. The investigation determined that the incident did not constitute workplace violence.

Safety issues that have previously occurred at Mr. Pierce's facility include drivers failing to wear seatbelts, failing to turn trucks off, and leaving trailer doors open. (Tr. 31.) In Complainant's case, Complainant was returning to the facility with the trailer door open. (Tr. 32.) Typically, FedEx takes written corrective action where there has been a safety violation, but in Complainant's case, there were additional concerns about dishonesty on Complainant's part.

Mr. Pierce has had other drivers commit the safety violation of driving through the city or other locations with their truck's door open. (Tr. 32, 92.) In those situations, Mr. Pierce will talk to the driver to determine what level of corrective action FedEx will pursue. (Tr. 33, 92.) The initial options for corrective action include coaching, a written warning, and a critical written warning. Mr. Pierce could not remember precisely whether FedEx treated Complainant's case more seriously because of Complainant's conduct or because of his dishonesty. (Tr. 34.) FedEx termination procedures do not allow for one single individual to terminate an employee; instead, a variety of individuals from HR, management, the safety department, and the legal department may be involved. Mr. Pierce therefore stated that he would not have had the ability to terminate Complainant.

Complainant – Thomas C. McCaffrey, III (Tr. 37-68)

Complainant Thomas McCaffrey worked for FedEx as a driver for almost thirteen years. (Tr. 37.) The last day he worked for FedEx was on September 6, 2013, the day after the incident on September 5th. (Tr. 38.) During his time at FedEx, Complainant was trained in safety, integrity, and performance. Complainant testified that he has seen every FedEx driver drive with the trailer door open at least once; yet, to his knowledge, no disciplinary action ever resulted from these previous incidents. (Tr. at 38-39). On the other hand, Complainant testified that if an employee lies at FedEx, the employee will be terminated.

Complainant confirmed that on September 5, 2013, he was driving with his trailer door open. (Tr. 40.) Complainant stated that Tom Dooley first approached him to ask him about the open trailer door, at which point Complainant made a mistake in how he responded and indicated the door was not open. Complainant stated that he did not intentionally lie to Mr. Dooley during this conversation, but simply was mistaken. (Tr. 41.) Complainant was later approached by Lance Pierce, who informed him that the company had the incident on video, which showed that the trailer door was open. At that point, Complainant acknowledged that the door was open, provided a written statement concerning the incident, and then went back to work driving trucks. (Tr. 41-42; RX3.)

Complainant stated that a week later, he reported that the truck he was driving was unsafe to operate due to the fifth wheel not latching properly. (Tr. 42-43.) He made his report to Mr. Pierce, at which point he informed Mr. Pierce that he refused to drive the truck. (Tr. 43.) Complainant further stated that the day after he made his report and refused to drive the truck, he was terminated. (Tr. 44.) When Complainant was terminated, Mr. Pierce explained that it was for dishonesty, but Complainant believed it was because he refused to drive the unsafe truck. He testified that if the reason for his termination had truly been dishonesty, then he should have been terminated immediately on September 5th, rather than on September 13th.

Complainant clarified that September 6, 2013 was the last day that he drove for FedEx, and that he therefore did not file his complaint about the unsafe truck on September 12 as he originally testified. (Tr. 47-48, 70.) Complainant was placed on leave between September 6 and September 13. (Tr. 68.) Complainant stated that he reported the unsafe truck at least three times prior to his last day of work on September 6th, and prior to the event of September 5th. (Tr. 48, 51, 68.) By his recollection, the dates of his three reports were on or about May 17, 2013; May 20, 2013; and July 30, 2013. (Tr. 69.) Complainant had also filed an anonymous complaint about another driver, whom he felt was receiving special treatment. (Tr. 63.)

In the previous instances where Complainant had complained about the fifth wheel of the truck, FedEx did not reprimand, counsel, suspend, or take any kind of disciplinary action against Complainant. (Tr. 70.) FedEx management did have the truck inspected, but Complainant testified that the truck was never fixed properly. (Tr. 51.) Two other drivers had continuing problems with the vehicle after Complainant's report. (Tr. 52.) Complainant believed that Mr. Dooley was "out to get [him]" "to try to cover up the fact that [Mr. Dooley] didn't do anything about the incident prior." (Tr. 61-62.)

Steve Lowe (Tr. 124-155)

Steve Lowe has been a Human Resources Advisor for FedEx for the past sixteen years. (Tr. 124-125.) He has been in his current position since 2006. (Tr. 125.) The main focus of his duties is employee relations, and in this role he interacts with both management and employees to try to resolve concerns, issues, and complaints. He is also involved with corrective action for policy violations, and is familiar with company policies and procedures. In HR investigations, Mr. Lowe will typically be notified either by phone or email that something occurred, at which point he will collect statements to begin the investigation. Certain infractions will usually lead to automatic termination, including falsification of company records and dishonesty. (Tr. 125-126.) Between 2012 and 2015, 660 FedEx employees were terminated for some form of falsification. (Tr. 126.)

Mr. Lowe became involved with Complainant's incident at the end of the investigation, as he had been out on vacation, and his colleague Thomas Duncan was working on the issue while he was out of the office. Mr. Duncan sent Mr. Lowe a recap of what occurred. (Tr. 127.) Respondent's Exhibit 5 is an email from Mr. Duncan to Mr. Lowe, sent on September 11, 2013. (RX5; Tr. 127.) The email reads:

> "Hello Steve,
>
> Here is a recap of the conversation I had on Friday with McCaffrey. Also SCM Lance Pierce was present.
>
> McCaffrey was not able to explain why he told the supervisor that he stopped in the yard to look for a strap in the yard when asked about his trailer door was open. McCaffrey was also not able to explain why he told Pierce the same story and why that story changed only when Pierce mentioned that security footage showed that his door was open when he pulled into the yard. The only answer that McCaffrey came up with is that he must have been wrong and that he wouldn't lie about that.
>
> Thomas."

(RX5; Tr. 128.)

Respondent's Exhibit 4 is a corrective action recap prepared by Mr. Lowe. (RX4; Tr. 129.) The purpose of the corrective action recap is to document the issue that was being investigated, and then move it up to be reviewed by Mr. Lowe's manager Rob Leach. In the recap, Mr. Lowe recommended that Complainant be terminated for dishonesty, and Mr. Leach agreed with this recommendation. (RX4; Tr. 129.) Mr. Lowe testified that management does not decide the disciplinary action. (Tr. 130.)

Prior to the incident of September 5, 2013, Mr. Lowe had dealt with Complainant for another incident. (Tr. 131.) In that case, Complainant and Mr. Dooley had gotten into an argument over whether freight was placed in the right place. The argument resulted in the Security Department investigating the incident as a workplace violence incident; although the Security Department ultimately concluded that it was not workplace violence. Complainant had otherwise never approached Mr. Lowe about safety issues or about Mr. Pierce. (Tr. 132.)

FedEx has a process called Alert Line, which starts with a phone call regarding safety or security issues to the Alert Line number. (Tr. 133.) This number is posted in the break room that is accessible to all employees. The phone call is received by a third party company, and then sent in email form to Mr. Lowe to review and begin an investigation. Callers have the right to remain anonymous. Mr. Lowe did not recall receiving any Alert Line calls about Complainant's service center, or about Mr. Pierce. (Tr. 134.)

Mr. Lowe did recall another incident where a driver was operating a unit on the road with the door open. That driver was not terminated because he was honest about what had happened. (Tr. 135.) Mr. Lowe testified that the driver "told us what happened, filled out a statement admitting to it and he was issued a critical written warning." Had Complainant been honest during the investigation of his incident, Mr. Lowe testified that he would have been issued the same or similar disciplinary action. (Tr. 135, 148.)

Mr. Lowe is not always informed when drivers make complaints about safety issues. (Tr. 136.) He was not aware of whether Complainant had made complaints about the fifth wheel on a particular truck. (Tr. 138.) He was also not aware that Complainant refused to drive a trailer over some safety issues.

The decision to terminate Complainant was not made by one individual, but the Legal Department gave final approval for his termination. (Tr. 153.) The decision to terminate was made September 11, 2013, when Mr. Lowe and his boss received approval. (Tr. 153-154.)

DISCUSSION AND ANALYSIS

The employee protection provisions of the STAA prohibit covered employers from discharging or otherwise retaliating against employees because of their participation in protected activity. 49 U.S.C. § 31105; 29 C.F.R. § 1978.102. Specifically, STAA prohibits retaliation against employees who have filed a complaint or participated in a proceeding related to the violation of commercial motor vehicle safety or security regulations, and STAA also protects employees who are believed to be engaged in such activity. 49 U.S.C. § 31105(a)(1)(A); 29 C.F.R. § 1978.102(b), (e). Similarly, the Act protects employees who refuse to operate a vehicle either because operation of the vehicle would violate motor vehicle safety regulations or because they have a reasonable apprehension of serious injury to themselves or others due to the vehicle's hazardous condition. 49 U.S.C. § 31105(a)(1)(B); 29 C.F.R. § 1978.102(c)(1).

STAA provides that whistleblower complaints shall be governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). 49 U.S.C. § 42121(b) (2011); 49 U.S.C. § 31105(b)(1). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must initially make a *prima facie* showing by a "preponderance of the evidence" that a protected activity was a "contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(i), *see also,* 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) ("It is the Secretary's position that the complainant [in a STAA case] must prove by a 'preponderance of the evidence' that his or her protected activity . . . contributed to the adverse action at issue."); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, ALJ

Nos. 2008-STA-012, 2008-STA-041, slip op. at 8 (ARB Sept. 15, 2011). Thereafter, a respondent can only rebut a complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant suffered an unfavorable personnel action,[5] and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

Consequently, in order to meet his burden of proving a claim under STAA, Mr. McCaffrey must prove by a preponderance of the evidence that: (1) he engaged in protected activity by reporting to FedEx Freight a safety concern impacting his ability to safely operate a motor vehicle, (2) FedEx Freight knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action.[6] *See Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007). A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).[7] If Complainant satisfies his *prima facie* case by a "preponderance of the evidence," the burden shifts to Respondent to demonstrate by "clear and convincing evidence" that it would have terminated Complainant even absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii); *see also* 75 Fed. Reg. at 53,550; *Salata*, ARB Nos. 08-101, 09-104, slip op. at 9. For the reasons discussed below, I find that Complainant has not established that he engaged in protected activity on September 12, 2013 or that his refusal to drive a truck with a defective fifth wheel on or about May 17, 2013, May 20, 2013 and July 30,

[5] An adverse employment action must actually affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l Railroad Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009). *See also Simpson United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

[6] Although I list the knowledge requirement as a separate element, I note the ARB has reiterated that there are only three essential elements of an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis. *See Hamilton v. CSX Transportation, Inc*., ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013).

[7] In *Araujo v. New Jersey Transit Rail Operations, Inc*., 708 F.3d 152, 158 (3rd Cir. 2013), the court held that the employee "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination, not the sole or even predominant cause." In addition, an employee "*need not* demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed.Cir.1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit)*; see also Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) ("A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive."); *Menendez v Halliburton, Inc*., ARB Nos. 09-002,-003; ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011), at 31-32; *Kuduk v. BNSF Railway Company*, 768 F. 3d 786 (8th Cir. Oct. 7, 2014)("[a] prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity").

2013 was a contributing factor to his being terminated by Respondent. Accordingly, I find Respondent has not violated the STAA.

Prima Facie Case

The Act protects employees who have filed a complaint or participated in a proceeding related to the violation of commercial motor vehicle safety or security regulations, and those who refuse to operate a commercial motor vehicle when he reasonably believes to do so could cause serious injury to the employee or the public. 49 U.S.C. § 31105(a)(1)(A); 49 U.S.C. § 31105(a)(1)B)(ii) Under the Act, a complaint need not explicitly mention a commercial vehicle safety standard to be protected. The statute requires only that the complaint relate to a violation of a commercial motor vehicle safety standard. *Nix v. Nehi-RC Bottling Co*., Inc., 84-STA-1 (Sec'y July 13, 1984). Furthermore, internal complaints to management are protected activity under the whistleblower provision; the complainant, however, must prove by a preponderance of the evidence that he actually made such an internal complaint. *Williams v. CMS Transportation Services, Inc.*, 94-STA-5 (Sec'y Oct. 25, 1995).

Complainant also must prove by a preponderance of the evidence that Respondent took adverse action against him. Respondent's termination of Complainant's employment on September 13, 2013 was clearly such an adverse action.

In his original complaint to OSHA in this matter, Complainant asserted that he engaged in protected activity on September 12, 2013, when Complainant filed a maintenance report on the fifth wheel of his truck. Testimony at hearing, however, revealed that Complainant could not have engaged in the alleged protected activity on this date, as he did not work on September 12, 2013. (Tr. 47-48, 68, 70.) Indeed, Complainant's last day of work was September 6, 2013. I therefore find that Complainant did not engage in protected activity as alleged in his complaint.

In his pre-hearing statement before this office, Complainant stated that he submitted similar issues to Respondent regarding the truck's defective fifth wheel on July 30, May 17, and May 20, 2013. (Compl. Pre-Hearing Statement at 2.) Complainant repeated this assertion in his testimony at hearing and, after identifying the mistake regarding the September 12, 2013 date, made an oral motion to amend his complaint to add the three instances of alleged protected activity occurring on these three other dates. (Tr. 69, 160-162.) Respondent objected to this motion at hearing, and again in his post-hearing brief. (Tr. 161; Resp. Post-Hearing Brief at 3-4.)

The applicable regulations at 29 C.F.R. 18.36 provide that an administrative law judge may allow parties to amend and supplement their filings after the matter is referred to the Office of Administrative Law Judges. 29 C.F.R. 18.36; *see also* 29 C.F.R. § 1978.100(b). While I instructed Complainant to include any formal motions for amendment in his post-hearing brief, he has not submitted any such motion. Furthermore, as stated at hearing, Respondent's post-hearing brief details its opposition to amending the original complaint at this late hour in the proceedings. Respondent argues that Complainant relied exclusively on the September 12, 2013 activity in requesting a hearing before OALJ, and that the Federal Rules of Civil Procedure 15(b) was not designed to allow parties to change theories mid-stream. (Resp. Post-Hearing Brief at 3.)

The fundamental elements of procedural due process are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950). Courts have found that "it offends elemental concepts of procedural due process to grant enforcement to a finding neither charged in the complaint nor litigated at the hearing." *N.L.R.B. v. H. E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962). Congress has incorporated these notions of due process in the Administrative Procedure Act (hereinafter referred to as the "APA"). Under the APA, "persons entitled to notice of an agency hearing shall be timely informed of . . . matters of fact and law asserted." 5 U.S.C. § 554(b). To satisfy the requirements of due process, an agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, "an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Id*. (quoting *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968)). These due process requirements, while expressly applying to federal agency action, also apply to actions and representations of the parties themselves. *See Wallace v. Brown*, 485 F. Supp 77, 79 (S.D. N.Y. 1979) (A party "should not be allowed to jettison a losing argument, perform legal legerdemain, and switch horses in midstream by presenting a novel legal argument that they had ample opportunity to present during the trial"); *see also Daves v. Payless Cashways, Inc*., 661 F.2d 1022, 1025 (5th Cir. 1981) ("While we must give a party a fair chance to present claims and defenses, we must also protect 'a busy district court (from being) imposed upon by the presentation of theories seriatim.'").

While I recognize that a complainant's initial complaint should not be construed as a formal legal pleading which may serve to strictly limit a suit, *see Richter v. Baldwin Associates*, 84-ERA-9 (Sec'y Mar. 12, 1986), it is evident that Complainant relied on a single act of protected activity occurring on September 12, 2013 and its one-day temporal proximity to his termination to argue a violation of the Act in this case. At no point, other than after the mistaken nature of the September 12, 2013 date was revealed, did Complainant argue that previous activities contributed to his termination. Courts have struck down similar attempts by other parties to change theories where they have "reassessed the field, decided [their] old argument was lame, and now seek to ride a fresh mount in a new direction." *U.S. v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992).

Applying the foregoing due process standards to the facts in this case, I find that Respondent would be unfairly prejudiced if I considered Complainant's new instances of alleged protected activity at this point. Respondent was entitled to a clear statement of the theory on which Complainant intended to proceed. I also find that Complainant had ample opportunity to cure any perceived deficiencies in his case by amending the complaint, but has not done so. *See Stephenson v. NASA*, 94-TSC-5 (ALJ June 27, 1994); *see also Daves v. Payless Cashways, Inc*., 661 F.2d 1022 (5th Cir. 1981) ("liberality in pleading does not bestow on a litigant the privilege of neglecting [his] case for a long period of time"). Thus, I conclude that the only issue for determination in this case is whether Complainant engaged in protected activity on September 12, 2013, and whether such activity contributed to his unlawful termination under the Act.

As discussed above, the testimony at hearing revealed that the alleged complaint on September 12, 2013 did not take place. (Tr. 47-48, 68, 70.) Furthermore, I find no reason to strike the September 12, 2013 protected activity and replace it with the activities of May 17, May

20, and July 30, 2013. Therefore, I find that the Claimant has not established by a preponderance of the evidence that he engaged in protected activity.

However, even if I were to credit Complainant with engaging in protected activity on May 17, May 20, and July 30, 2013, I find that any such protected activity was not a factor in Respondent's decision to terminate Complainant's employment. Complainant presented insufficient evidence to prove such a causal connection between the three previous reports and Complainant's termination. Complainant testified that in each of the previous instances where Complainant had complained about the fifth wheel of the truck, Respondent did not reprimand, counsel, suspend, or take any kind of disciplinary action against him. (Tr. 70.) Each time, FedEx management had the truck inspected in response to Complainant's concerns. (Tr. 51, 87-89; RX6) Though Complainant testified that the truck was never fixed properly, and that he believed that management was "out to get [him]" "to try to cover up the fact that [Mr. Dooley] didn't do anything about the incident prior," I do not find that this testimony alone establishes contributing factor. (Tr. 51, 61-62.)

Furthermore, there is abundant evidence for this court to conclude that the only reason Respondent discharged Complainant was because Respondent believed Complainant was dishonest to management about driving his truck with the trailer door open. I credit the testimony of Lance Pierce and Steve Lowe regarding the series of events following Complainant's driving onto the yard with an open trailer door on September 5, 2013. Mr. Pierce detailed numerous conversations with Operations Supervisor Tom Dooley, Complainant, and other FedEx management personnel, all of which focused exclusively on the safety concerns related to driving with a trailer door open and Complainant's perceived dishonesty about the incident. While Mr. Pierce was aware that Complainant had reported safety issues in the past, there was no evidence to connect this knowledge with the eventual decision to terminate Complainant. Mr. Lowe, for his part, was not even aware that Complainant had made safety complaints about the fifth wheel or refused to drive a trailer over safety issues in the past. (Tr. 138.) In fact, the evidence shows that Mr. Lowe specifically recommended that Complainant be terminated for dishonesty. (RX4; Tr. 129.)

Conclusion

For the reasons discussed above, I find that Complainant has failed to establish his prima facie case. The evidence does establish that Complainant was subject to an adverse employment action when Respondent discharged him on September 13, 2013. However, the evidence also does not establish that Complainant engaged in protected activity that contributed to the employer's adverse employment action. In other words, Complainant has not proven by a preponderance of the evidence that protected activity was a contributing factor in Respondent's decision to terminate his employment.

ORDER

The complaint for whistleblower protection under the Surface Transportation Assistance Act filed by Thomas C. McCaffrey, III, with the Occupational Safety and Health Administration on September 19, 2013 is hereby DISMISSSED.

SO ORDERED:

Digitally signed by STEPHEN R. HENLEY
DN: CN=STEPHEN R. HENLEY, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

STEPHEN R. HENLEY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.