



**Issue Date: 27 March 2019**

Case No: 2016-STA-00017  
OSHA No: 3-0050-12-077

*In the Matter of:*

**THEODORE HUANG,**  
*Complainant,*

v.

**GREATWIDE DEDICATED TRANSPORT II, LLC,**  
*Respondent.*

### **DECISION AND ORDER AWARDING DAMAGES<sup>1</sup>**

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (“STAA” or “Act”), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, and corresponding regulations found at 29 C.F.R. Part 1978.

### **PROCEDURAL HISTORY**

On September 23, 2012, Theodore Huang (“Complainant” or “Mr. Huang”) filed a complaint with the U.S. Department of Labor (“DOL”), Occupational Safety and Health Administration (“OSHA”), alleging that his employer, Greatwide Dedicated Transport II, LLC (“Respondent” or “Greatwide”), violated the STAA by terminating his employment in retaliation for reporting safety violations. After conducting an investigation, OSHA issued the Secretary’s Findings on January 8, 2016, dismissing the complaint. On February 16, 2016, Complainant objected to the Secretary’s Findings and requested a hearing before the Office of Administrative Law Judges (“OALJ”). ALJ 2.

On September 7, 2016, I denied Respondent’s Motion for Summary Decision. ALJ 3. On May 3, 2017, I denied Respondent’s Renewed Motion for Summary Decision. ALJ 7.

On September 19 and 20, 2017, I conducted a formal hearing in Arlington, Virginia. At hearing, ALJ Exhibits 1-9, Complainant’s Exhibits B-H, and Respondent’s Exhibits A-Q were

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<sup>1</sup> Citations are abbreviated as follows: Complainant’s Brief (“C. Br.”); Respondent’s Brief (“R. Br.”); ALJ’s Exhibits (“ALJ”); Complainant’s Exhibits (“CX”); Respondent’s Exhibits (“RX”); and Hearing Transcript (“Tr.”).

admitted into evidence. Complainant's Exhibit I and J were also admitted, but I left the record open for ten days after the hearing in the event that Respondent wished to file a motion to exclude. After ten days, Respondent did not file a motion to exclude.

During the formal hearing, four witnesses testified: (1) Mr. Huang, Complainant; (2) Richard Burnett, Former Greatwide Operations Manager; (3) Amy Price, Greatwide Regional Safety Director; and (4) Brian Scott, Greatwide Regional Vice President.

On October 3, 2017, a subsequent telephonic hearing was conducted in which Mr. Burnett testified after reviewing physical copies of Complainant's Exhibits I and J.

On January 19, 2018, I received post-hearing briefs from both Complainant and Respondent.

The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, the testimony and evidence submitted, applicable statutory provisions, regulations, and pertinent precedent. Although I do not discuss every exhibit in the record, I have carefully considered all of the testimony and exhibits in reaching my decision.

## **FACTUAL BACKGROUND**

### **Testimony of Theodore Huang**

#### **1. Direct Testimony**

Mr. Huang began working as a truck driver for Greatwide on September 11, 2006. Tr. at 27-28. After starting with Greatwide, he began to notice that there were a "select few drivers" who were friendly with Rich Burnett, Greatwide Operations Manager, and Triain Mirov, Greatwide Operations Center Manager, who engaged in illegal driving over hours. *Id.* at 28-30. Mr. Huang stated that there were roughly five or six drivers who engaged in these violations, including Mark Peters and Frank Orange. *Id.* at 30. He referred to these drivers as the "insiders," whereas he referred to himself as an "outsider." *Id.* In "early 2012," he decided that he should take action to investigate these violations. *Id.*

#### **A) Lockbox Incident on March 27, 2012**

On March 27, 2012, Mr. Huang observed a driver exceeding the allowable driving hours, and Mr. Huang obtained records from Greatwide's lockbox at the Upper Marlboro terminal in order to prove it. *Id.* at 31. In order to obtain these records, he reached into the lockbox and took them out. *Id.* at 38. He had previously reached into the box several times to retrieve records of his own, in situations where he forgot to include information on documents, etc. *Id.* at 38, 40. The opening of the box was approximately one inch wide, fourteen inches long, and he could fit his whole hand in. *Id.* at 38-39. It was made of "some pretty cheap fiberboard." *Id.* at 39. It had only been there for ten or eleven months, and before that there was an open file cabinet. *Id.* at 31. Mr. Huang did not observe damage to the box when he took the records out. *Id.* at 40. He was aware of no company policy that all drivers' records had to be placed in the

lockbox, and he had visited other Greatwide terminals and none of them had lockboxes. *Id.* at 43.

### **B) Mr. Huang's Anonymous Letters from April 2, 2012**

On April 2, 2012, Mr. Huang attached the driving records that he retrieved from the lockbox to an anonymous email sent to Brian Scott, Greatwide Regional Vice President. *Id.* at 40-41. In the letter, Mr. Huang alleged “rampant hours of service violations” among the “insiders” and that the managers were “in on it.” *Id.* at 43. When the managers found out about the letter, “they were not happy.” *Id.* at 44.

Also on April 2, 2012, Mr. Huang sent an anonymous letter to Amy Price, Greatwide Regional Director of Safety, that was “substantially the same” as the letter sent to Mr. Scott. *Id.* Mr. Huang made personal references in the letter, however, that might have given away that he was the author. *Id.* at 47. He requested that Ms. Price not show the letter to management. *Id.* at 46.

Mr. Huang became aware that Greatwide knew that he authored the letters when Rich Burnett started making “sarcastic comments” to him. *Id.* at 47. Mark Peters was terminated on May 7, 2012, in response to Mr. Huang's letters, and Mr. Burnett called Mr. Huang to sarcastically say that he was happy with what Mr. Huang did. *Id.* at 49. Mr. Burnett made another comment asking Mr. Huang to “at least” take Mr. Peters's things out of the truck— “meaning that since he's gone, could you at least do him a favor and take his belongings out of the truck.” *Id.* at 50. Mr. Huang had never been asked to do that for a terminated driver before. *Id.* Mr. Huang also testified that he was subject to a “possibly threat[ening]” call on May 8, 2012, in which the caller said “we've all kept our jobs and you'll be hearing from us . . . .” *Id.* at 87. He did not know for sure who the caller was, but he suspected who it was and even went to the police. *Id.*

Mr. Huang was openly acknowledged as the author of the letters on May 14, 2012. *Id.* at 50-51. In a conversation with Mr. Scott that same day, Mr. Huang offered to transfer to another Greatwide terminal but was told that “no harassment would be tolerated.” *Id.* at 52.

### **B) Alleged Dropped Trailer Incident on May 17, 2012**

Two weeks after being acknowledged as the author of the letters, Mr. Huang was assigned a run to Nordstrom<sup>2</sup> in New Jersey (“NJ”) with a double trailer. *Id.* at 52, 56. Previously, he had very sparingly been assigned runs with double trailers. *Id.* at 53. He had dropped a trailer<sup>3</sup> on the same run in NJ in the past, and he did nothing differently on this particular run. *Id.* at 56. After the run, he received notification that he should not have dropped the trailer, but heard nothing directly from Nordstrom. *Id.* In the past, Mr. Huang had dropped Nordstrom trailers and let them know, but never heard any complaints. *Id.*

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<sup>2</sup> Nordstrom is the client served by Greatwide's Upper Marlboro terminal.

<sup>3</sup> Later, on cross, Mr. Huang clarified that “dropping a trailer” simply refers to “detaching the tractor from the trailer, and leaving the trailer . . . .” Tr. at 117.

### **C) Greatwide's Investigation of Mr. Huang, Meeting with Mr. Huang on May 30, 2012, and Termination of Mr. Huang on May 31, 2012**

On May 21, 2012, Mr. Huang became subject to a Greatwide investigation. *Id.* He stated that he initially believed the investigation pertained to his hours of service violations related to the run in NJ. *Id.* at 58. On that day, May 18, 2012, he left two hours earlier than normal, and it ended up being the last day that he drove for Greatwide. *Id.* at 58, 63. He was suspended and told that management wanted to meet with him. *Id.* at 63.

Mr. Huang testified about RX K, which he recognized as the notes that Jeff Lester, "regional safety person," took at his meeting with management on May 30, 2012. *Id.* at 64, 357. The meeting took place at a hotel conference center in Linthicum, Maryland, with Ms. Price and Mr. Mirov attending in person, and Mr. Lester attending over the phone. *Id.* at 71.

Mr. Huang disputed the first summary point on Mr. Lester's notes, in which Mr. Lester wrote that Mr. Huang "admit[ed] to dropping the [first] trailer" and taking the second trailer for delivery to NJ. *Id.* at 66. Mr. Huang stated that he did not leave the first trailer at the store in New York City ("NYC"). *Id.* Instead, he brought both trailers to NJ. *Id.*

Mr. Huang agreed with the second summary point, being that he admitted to removing information from the lockbox. *Id.* However, the summary point notes that Mr. Huang removed "driver logs" from the lockbox, but he characterized those records as "delivery sheets." *Id.* at 67.

Mr. Huang disagreed with the third summary point from the notes, which stated that he "placed a recording device on his managers work phone without authorization" and that he did it "to protect himself." *Id.* at 69. Mr. Huang stated that "never happened." *Id.*

Mr. Huang disputed the fourth summary point from the notes, being that he accessed the "Nordstrom location at unauthorized times" and admitted to doing so in order to remove information from the lockbox and place the recording device on his managers' phone. *Id.* Mr. Huang testified that the facility is a "24/7 facility." *Id.*

Mr. Huang was never given a chance to rebut these summaries after the meeting, and did not recall making the assertions summarized as Mr. Lester reported them. *Id.* at 70. Mr. Huang stated that the meeting itself was very accusatory and hostile towards him. *Id.* at 71.

Mr. Huang testified about RX L, his termination letter from May 31, 2012, which stated no grounds for his termination. *Id.* at 73.

### **D) Events Post-Termination**

After his termination, Mr. Huang was "not able to obtain a job . . . [of] equal pay and benefits, but [he] was able to get something." *Id.* at 74. However, he stated that he was "attempting to" actively apply for jobs comparable to Greatwide in terms of pay and benefits, but was "sometimes unsuccessful." *Id.* at 75. He was not able to provide a reference from

Greatwide's managers because he was afraid that they would not provide him a positive reference after everything that happened. *Id.*

Mr. Huang was successful at landing some part-time jobs. *Id.* Mr. Huang testified that CX B-F, his personal tax returns, accurately reflected his income from 2010 through 2014. *Id.* at 77-83. At the time of the hearing, he was employed by UPS with pay and benefits equal to what he was earning at Greatwide, but he only got that job in August 2014. *Id.* at 74, 82. He stated that he reached the point of equal pay and benefits a "few months ago," during 2017. *Id.* at 83.

Mr. Huang testified that the events at issue in this case negatively affected him in non-monetary aspects of life. *Id.* at 87. He stated that, "[t]his has pretty much been the heaviest thing that's ever happened to me . . . I was very unhappy for a while, to put it mildly." *Id.* Although Mr. Huang was able to "function through life," he was "just totally bummed [with] no energy and just doing the basics." *Id.* at 87-88. Mr. Huang would not call his condition a "depression" per say, but he was just "serious bummed out and totally unhappy." *Id.* at 89. These feelings started "pretty soon after the termination," and lasted "at least six months." *Id.* at 90-91. Mr. Huang had much less energy, slept more, and felt sluggish. *Id.* at 91-92. However, he never contacted a professional for guidance. *Id.* at 92.

## **2. Cross-Examination**

### **A) Lockbox Incident on March 27, 2012**

Mr. Huang testified that on March 27, 2012, he reached into the lockbox and took Mr. Peters's and two or three other drivers' paperwork. *Id.* at 95. He did not copy the other drivers' paperwork, and put those papers back in the box. *Id.* He took Mr. Peters records back to his house to make a copy, and placed them back in the lockbox approximately two hours later. *Id.* at 96-97. He had no permission to remove any of the paperwork from the lockbox. *Id.* at 96.

Mr. Huang stated that he did not think confidential information was ever placed into the lockbox. *Id.* at 93-94. He stated that he could fit his hand into the top of the box, and that he had done it on many occasions prior to March 27, 2012. Mr. Huang was showed RX P, two photos, which he claimed did not show the lockbox that was in the Greatwide terminal. *Id.* at 94. He stated that the slot was much smaller on the lockbox in the photos than it was on the actual lockbox. *Id.* at 94-95. The lockbox in the photos was "much narrower width-wise and . . . much narrower . . . lengthwise . . ." *Id.*

Mr. Huang was questioned about RX E6, Mr. Peters's delivery sheet that Mr. Huang took from the lockbox. *Id.* at 103. Mr. Huang acknowledged that he would have needed to be at the terminal in the evening to get the sheet because it showed an 8:00 pm arrival and 8:50 pm departure time for Mr. Peters on March 27, 2012. *Id.* Mr. Huang acknowledged that his own run "probably" would not have put him back at the terminal in the evening time. *Id.* However, he believed that it was a 24-hour facility and had various permissible reasons to be at the terminal such as turning in paperwork, keys, etc. *Id.* at 103-04.

## **B) Mr. Huang's Recording of Greatwide Management's Conversations in Greatwide's Office on March 27, 2012**

Mr. Huang testified that on March 27, 2012, he placed a digital voice recorder on the outside of a Greatwide office cubicle wall for "possibly a few hours" in order to record management conversations. *Id.* at 97-98. He affixed the device to the wall "out of view" with duct tape, and did not remain with the device. *Id.* at 107-109. He stated that he did not think that he had previously recorded conversations in a similar fashion. *Id.* Mr. Huang recorded the conversations in order to "get a record of illegal actions." *Id.*

Prior to the recording, he believed that illegal running was going on at the Greatwide terminal on the basis of "observations," seeing drivers leave and come back at various points in time, and comments made by Frank Orange and other drivers stating that they were going to make illegal runs. *Id.* at 99. Mr. Huang did not ask for permission from anyone before recording, but he suspected that there would be safety discussions at the particular time that he recorded because he had previously "observed people doing illegal things." *Id.* at 105.

Mr. Huang testified that on a day-to-day basis, the office space where he placed the recorder was where he saw the managers. *Id.* at 107. He knew that the managers would "probably" discuss matters other than safety while the device was planted. *Id.* at 108.

Mr. Huang was asked about RX H, an email that he sent to Mr. Scott with the recording that he took at the terminal. *Id.* at 109. In the email, Mr. Huang noted that "[i]t is illegal in Maryland to tape another party without their knowledge or consent . . . ." *Id.* at 110. However, he testified that he was not actually certain that the taping was illegal, and he only wrote it because he was "trying to make small talk" and was "very nervous at the time." *Id.* The recording that he sent was approximately three-and-a-half minutes long, and he deleted the rest of what he recorded. *Id.* at 111.

## **C) Mr. Huang's Anonymous Letters from April 2, 2012**

Mr. Huang testified that one of his main goals in writing the anonymous letters to Mr. Scott and Ms. Price was to show the favoritism that he believed Mr. Burnett was acting on as it related to giving "insiders" illegal runs. *Id.* at 128-130. Mr. Huang was also upset that he was not getting the runs that he wanted. *Id.* at 130.

The first time he reported the hours of service violations was in these letters, despite the fact that the violations were ongoing for "at least three years." *Id.* at 131. Mr. Huang was asked about RX I, an email that he sent to Mr. Scott the day after sending another email that identified himself as the author of the anonymous letters. *Id.* at 133. In this email, Mr. Huang stated that he admitted to hours of service violations himself. *Id.*

Mr. Huang clarified that he believed Mr. Burnett was the source of the anonymous phone call that was made in the wake of the letters on May 8, 2012. *Id.* at 137. Mr. Huang looked into figuring out who made the call, but he was never able to confirm it. *Id.* at 139. He knew the phone numbers for Mr. Peters, Mr. Burnett, and Mr. Mirov, but it was not any of them. *Id.* He

checked the phone number against a directory of phone numbers for Greatwide drivers, but that was unsuccessful. *Id.* at 141. He also went to the police and filed a police report approximately two or three days after the incident. *Id.* at 142.

#### **D) Alleged Dropped Trailer Incident on May 17, 2012**

On either May 17 or 18, 2012, but most likely May 17, Mr. Huang testified that he was scheduled to go to both NYC and NJ. *Id.* at 112, 114. Mr. Huang testified to the following: (1) he left for his trip two hours early; (2) he went to NYC first; (3) the store was ready for him when he arrived; and (4) they unloaded the trailer upon his arrival. *Id.* at 112-113. He stated that he did not drop the trailer on the street in NYC so that he could leave to NJ to make the other delivery. *Id.* at 113. He did not know why Nordstrom told Greatwide otherwise. *Id.*

Mr. Huang testified that he had previously dropped trailers on the street in NYC before. *Id.* at 115. He testified that he was required to have security equipment in the truck for use when dropping trailers. *Id.* at 116.

#### **E) Greatwide's Investigation of Mr. Huang, Meeting with Mr. Huang on May 30, 2012, and Termination of Mr. Huang on May 31, 2012**

Mr. Huang testified that on May 29, 2012, Mr. Mirov told him that the investigation into his conduct actually related to "a security issue," and not his hours of service violations. *Id.* at 148. Mr. Mirov did not identify the particular "security issue." *Id.*

Mr. Huang was asked again about RX K, Mr. Lester's notes from Mr. Huang's meeting with management. *Id.* at 118. Mr. Huang stated that he said nothing during the meeting about placing a recording device on his managers' phone. *Id.* However, he did admit to recording conversations on his home telephone. *Id.* at 125. Although the recordings had nothing to do with Greatwide, he admitted to them because he was not sure what Mr. Lester was talking about when he referenced unauthorized recording of phone calls. *Id.* at 126.

Mr. Huang was asked about RX F, his written statement that he provided to his managers the next day after the meeting. *Id.* at 119-120. Mr. Huang would not concede that he admitted to violating company policies in his statement, but he said that he might have been "implying" that he did. *Id.* at 120. When Mr. Huang referenced that it might be a security concern to drop a trailer on the street in NYC, Mr. Huang testified that he was just "using [management's] words." *Id.* at 121. Moreover, he stated that when he wrote, "I am not trying to downplay any wrongdoing here . . .," he was also referencing management's words. *Id.*

Mr. Huang did not remember going to York, Pennsylvania after the meeting on May 30 or 31, 2012, and he "[did not] think that he contacted Ms. Price at her hotel in York." *Id.* at 123-125. However, he "may have contacted [Ms. Price] the next day" by phone to tell her that he had faxed her his written response. *Id.* at 123.

Mr. Huang knew generally of the Greatwide employee handbook's policy requiring the confidentiality of company information. *Id.* at 143-44. He testified that prior to the incidents in

question, he was aware that certain violations of the employee handbook could result in termination and other discipline, and that two of such policies were the prohibitions on disseminating confidential information and violating Greatwide customer policies. *Id.* at 145-46. Mr. Huang was told by Lisa Harvey, “HR person,” that he was terminated for violating company policy. *Id.* at 147. However, she did not identify the specific company policies that he was terminated for violating. *Id.*

#### **F) Events Post-Termination**

Mr. Huang started applying for jobs about two or three weeks after he was terminated. *Id.* at 149. He did not remember how long it took him to find a job, but he stated that it was probably within a month and that he probably applied to approximately five places. *Id.* at 150. Mr. Huang was employed concurrently with two or more employers “quite frequently” prior to getting his current job with UPS. *Id.* Many of the places he worked between the time of his termination and his employment with UPS were temporary, “off and on” jobs. *See id.* at 150-53.

### **3. Redirect Examination**

Mr. Huang stated that he self-reported an hours of service violation on himself in June 2009, and was not disciplined. *Id.* at 175-76.

Mr. Huang testified that the “bullpen” area where he recorded the calls was “kind of chintzy,” with just two tables surrounded by cubicle dividers. *Id.* at 169. He described the area as a “heavy traffic” area that was open and available to the public. *Id.* at 170. He stated that employees would have to walk past the area in order to get to the bathroom. *Id.* For more formal meetings, there was a meeting space upstairs in the facility that Mr. Burnett and Mr. Mirov could access on “special occasions.” *Id.*

Mr. Huang stated that he made the audio recording at the time that he did because he believed the dispatcher would be reviewing drivers’ hours and routes. *Id.* at 169. He figured that would happen because he had previously observed Nordstrom employees calling the dispatchers at that particular time. *Id.* Moreover, he stated that drivers were instructed to call in every morning during those hours to receive their dispatches. *Id.*

Referring back to his comments about the legality of the recording that he made in RX H, Mr. Huang stated that he thought he had done research as it related to the legality of the recording. *Id.* at 171. He thought he may have accessed a website that stated that Maryland law allows recording when there is no reasonable expectation of privacy. *Id.* He testified that he did not think anyone could expect privacy in the bullpen area. *Id.* at 171-72.

The device that he used to record conversations on his home phone connected directly into the phone using a wire. *Id.* at 173. In order to make these recordings, he would have to manually hit the “record” button. *Id.*

Mr. Huang was questioned again about RX F, the written statement that he submitted after his meeting with management on May 30, 2012. *Id.* at 163. He testified about how drivers



have to drop a trailer prior to making a delivery to the NJ location because there is an underground tunnel that makes it impossible to fit two trailers. *Id.* at 163-64. Mr. Huang stated that Greatwide has been servicing the NJ location since May 2009, and it has been known since that time that double trailers cannot fit through the tunnel. *Id.* at 164.

#### **4. Recross Examination**

Mr. Huang was questioned again about RX F, and his statement that drivers would be required to drop a trailer prior to arriving at the NJ location due to the underground tunnel. *Id.* at 176. He stated that drivers would ordinarily drop the trailer in a parking lot outside of the store location, which he thought might be owned by “the mall.” *Id.* at 177.

### **Testimony of Richard Burnett**

#### **1. Direct Examination**

Mr. Burnett has worked for Greatwide for fourteen years. *Id.* at 181. His current job title is truck driver, and he has held that position off and on for ten years. *Id.* Between 2010 and May 2012, he was a dispatcher. *Id.* at 182. As dispatcher, his general duties required coordinating runs and deliveries with drivers. *Id.* As a result of his role as dispatcher, he was familiar with the Upper Marlboro terminal and Greatwide’s policies and procedures as it relates to Greatwide customers. *Id.* at 184.

Mr. Burnett testified that drivers are paid differently, depending on the run. *Id.* Over-the-road drivers<sup>4</sup> are paid by the mile and the hour, and local drivers are paid by the hour. *Id.* Drivers are not guaranteed any number of runs per week. *Id.* If there were more available drivers than runs, the drivers that did not work last or had more hours available would be selected. *Id.* at 185.

Mr. Burnett stated that the bullpen area at the terminal was the only office space and “pretty much everything” would take place there. *Id.* It was the main place to conduct business in the office space, and any financial or personnel issues and paperwork would be addressed there. *Id.* at 186. Mr. Burnett stated that he considered the conversations that took place in that space to be confidential, and if there needed to be a confidential conversation, management would ask the appropriate parties to leave. *Id.* The only foot traffic in the area is drivers walking to and from their trucks. *Id.*

Mr. Huang never directly raised hours of service violations with Mr. Burnett. *Id.* at 200. Mr. Burnett never threatened Mr. Huang, and he never took any retaliatory action towards Mr. Huang. *Id.* at 201. However, he believed Mr. Huang’s behavior in general was “kind of strange.” *Id.* Mr. Burnett described various things that Mr. Huang had done that he thought was strange, such as: chaining his truck to a light pole; driving a car to work with all the windows taped with cardboard, except for a small portion of the driver’s window; and cleaning the “back room” floor on his hands and knees, with his sunglasses on, early in the morning. *Id.* at 202.

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<sup>4</sup> Mr. Burnett explained that an “over-the-road” run involves driving from “distribution center to distribution center” (for example, driving from a distribution center in Iowa to a distribution center in Florida). Tr. at 183.

Mr. Burnett was aware that John Kauffman made allegations of hours of service violations around the same time as Mr. Huang. *Id.* at 203. Mr. Kauffman raised those concerns with Mr. Burnett once, and Mr. Burnett told him that Greatwide encouraged such reporting of concerns. *Id.* at 204. Greatwide did not take actions against Mr. Kauffman in response to the allegations, although he was given a reprimand after drivers reported Mr. Kauffman for threatening behavior. *Id.* at 205. Mr. Kauffman was still employed at the time of the hearing. *Id.*

#### **A) Lockbox Incident on March 27, 2012**

Mr. Burnett testified that Greatwide's bullpen area had both a locked file cabinet with personal files and the lockbox which was used by drivers to drop off paperwork. *Id.* at 188. Mr. Burnett was in charge of taking documents out of the lockbox, and documents such as "pay sheets" and "anything else [Greatwide] needed" would be placed inside. *Id.* at 189. He also noted that if Greatwide needed to make copies of drivers' social security cards or medical cards, those would be placed in the box as well. *Id.* at 188. The lockbox was installed because Greatwide "didn't want anybody's personal information being able to have anyone else have access to it." *Id.* at 190.

Mr. Burnett noted that the slit on the lockbox was "maybe an eighth inch or sixteenth inch by four or five inches long." *Id.* at 189. He stated that somebody's hand could not fit through the slit. *Id.* at 190. The lockbox was made of out of particle board, "maybe a half inch to inch thick on the lid and the sides." *Id.* It was sturdy, with metal hinges and metal lined on the lid, sides, and bottom. *Id.* at 191.

Mr. Burnett testified that he arrived at work maybe sometime in 2012 and it looked like somebody had taken "a hammer or a maul hammer and punched a hole in the side or the side of the lid, about the size of maybe a softball," or maybe even bigger. *Id.* at 191-92. He further described the damage as towards the front of the box, near the slit used to drop paperwork. *Id.* When he discovered the damage, he checked to see if anything was missing. *Id.* He noticed nothing missing. *Id.* He reported the damage to Mr. Mirov, Mr. Burnett's supervisor, and Mr. Mirov ultimately purchased a new version of the exact same lockbox that morning. *Id.* at 192-93. Mr. Burnett was questioned about RX P, which he described as a photograph of the new lockbox, featuring a slit that is the same size as the original lockbox. *Id.* at 194.

Later on the same day that they discovered the damaged lockbox, Mr. Burnett stated that management had asked security to rewind the security tapes to see who damaged it. *Id.* However, the tapes had been taped over. *Id.*

#### **B) Alleged Damage to Greatwide's Office Phone in March 2012**

Mr. Burnett testified that on the same morning that he reported the damaged lockbox to Mr. Mirov, he found that the company phone on the desk in the bullpen "had been tampered with, the back of it was taken off." *Id.* Mr. Burnett was questioned about RX J2, which he described as a picture of the damaged phone that Mr. Mirov had taken. *Id.* at 195-96. When

asked about the “large thing that seems to be hanging down from the phone,” Mr. Burnett stated, “I believe that’s the plastic cover for the buttons and the back of the phone where it kind of sat on an angle prop so it wasn’t flat. All that . . . had been taken off.” *Id.* at 196-97.

### **C) Mr. Huang’s Recording of Greatwide Management’s Conversations in Greatwide’s Office on March 27, 2012**

Mr. Burnett did not give Mr. Huang permission to record any conversations in the Greatwide office. *Id.* at 197-98.

### **D) Alleged Dropped Trailer Incident on May 17, 2012**

Mr. Burnett was familiar with the dropped trailer incident. He stated that Mr. Huang had a run up north to NJ and NYC, pulling two separate trailers. *Id.* at 198. He stated that Mr. Huang dropped one in the street in NYC, unattended and unlocked, while he made the other delivery to NJ. *Id.* He noted that leaving trailers unattended is problematic because the trailers have “multimillion dollars worth of freight” in them. *Id.* Mr. Burnett thinks that he became aware of this incident when the receiver<sup>5</sup> called looking for the trailer. *Id.* The receiver proceeded to walk outside and find it in the street. *Id.* at 199. Mr. Burnett stated that Greatwide called Mr. Huang to ask where he was, and Mr. Huang told them that the store in NYC was not open yet so he went to NJ. *Id.* at 199-200.

## **2. Cross-Examination**

At the Upper Marlboro terminal, where the office bullpen is located, there are also warehouse workers employed by Nordstrom. *Id.* at 213-214. The office had two fences on each side that open at roughly 6:00 a.m., and close after 3:30 or 4:00 p.m. *Id.* at 214.

Mr. Burnett tried to be “fair across the board” as it related to the distribution of service hours for each driver. *Id.* at 232. Drivers were selected and assigned specific routes at Mr. Burnett’s discretion. *Id.* at 233. However, if a driver was taking a vacation or a new route was added, drivers would be selected on the basis of their hours of availability. *Id.*

Mr. Burnett testified that he thought that the lockbox came with the slit on the top when it was purchased. *Id.* at 219.

Mr. Burnett could not recall specifically, but he speculated that the lockbox replacement and the alleged dropped trailer incident both happened in the same week. *Id.* at 216.

Mr. Burnett did not personally observe that Mr. Huang failed to properly lock the dropped trailer. *Id.* at 210. Instead, the receiver told Mr. Burnett about Mr. Huang’s failure to lock after walking up to the trailer where it was located “on the curb in front of the loading dock” at the store. *Id.* Mr. Burnett did not remember whether there were photos of the trailer on the curb. *Id.* at 211. Mr. Burnett did not investigate who specifically made the report that the trailer was unsecured, but Mr. Mirov did. *Id.*

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<sup>5</sup> Mr. Burnett noted that the receiver’s job is to “receive” product deliveries at the store. Tr. at 199.

Mr. Burnett recalls no written complaints from Nordstrom about Mr. Huang. *Id.* at 228. He also did not recall taking pictures of the incidents in which Mr. Huang allegedly chained his truck to a light pole and taped cardboard to his car windows. *Id.* at 228-29. However, he orally reported the cardboard incident to Mr. Mirov. *Id.* at 230.

### **3. Redirect Examination<sup>6</sup>**

Mr. Burnett was questioned about CX I, and stated that the photo appeared to be “the original lockbox prior to the damage.” *Id.* at 379. He stated that he had personally seen the original lockbox in the office. *Id.* at 381. Mr. Burnett stated that the slit on the original lockbox looked a little longer than the replacement lockbox, but the width looked about the same. *Id.* at 380-81. He stated that the slit was not big enough to fit his hand into. *Id.* at 382. He described the lockbox as being made out of particle board, “like cheap furniture.” *Id.* However, he said that “it was hard . . . maybe a quarter inch thick or so . . .” *Id.* at 382. Referring back to CX I, he stated that the damage to the box was located around the “please” where the sign says “please place all paperwork inside box,” just below the slit. *Id.* at 383. He stated that there was a “big hole.” *Id.*

Mr. Burnett testified that he took the original lockbox out of use the day that the damage was discovered. *Id.* Mr. Burnett stated that he or Mr. Mirov “went down and got the covered box to replace it.” *Id.* He could not recall the precise date that the box was replaced, but it was while Mr. Huang was still employed. *Id.*

### **4. Recross Examination**

Mr. Burnett testified that the lockbox had existed in its damaged condition for “probably a few hours.” *Id.* at 384. Adjacent to the lockbox in CX I, Mr. Burnett described a stack of files on a table. *Id.* at 386. He stated that he thought the table was in the drivers’ trailer, but he was not sure. *Id.* It was possible that the photo in CX I could have been taken in the drivers’ trailer. *Id.* The drivers’ trailer does not exist anymore. *Id.* at 387. And today, the lockbox sits in the office. *Id.*

## **Testimony of Amy Price**

### **1. Direct Examination**

Ms. Price was employed by Greatwide from January 2009 through October 2012. *Id.* at 242. From January 2009 through October 2011, she worked as Regional Safety Manager. *Id.* From October 2011 through October 2012, she worked as Regional Safety Director. *Id.* As Regional Safety Director, Ms. Price was in charge of “everything east of the Mississippi” as it related to the Department of Transportation (“DOT”), OSHA, and federal motor carrier safety compliance. *Id.* She was involved in termination and discipline decisions when safety and

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<sup>6</sup> Redirect and recross were conducted on October 3, 2017, after Mr. Burnett had a chance to review color versions of the photos contained in CX I and CX J. Tr. at 377.

security was at issue. *Id.* at 243. She was also involved with issues relating to security of Greatwide's property and its customers' property. *Id.*

#### **A) Lockbox Incident on March 27, 2012**

Ms. Price testified that Mr. Huang damaged the lockbox. *Id.* at 244. She also stated that the lockbox was put into place "for the drivers to put their paperwork into." *Id.* at 244. She stated that "any communications" that the drivers would have had with terminal management "after hours" would be placed into the lockbox, in addition to paperwork for DOT and Nordstrom. *Id.* at 245.

Ms. Price was notified by terminal management about the damage to the lockbox. *Id.* The anonymous letter from Mr. Huang also notified her about the damage. *Id.* at 245-46. After Ms. Price found out that Mr. Huang sent the letter, she spoke with Mr. Huang on the phone about the lockbox. *Id.* She testified that Mr. Huang told her that "he had essentially broken into it and had gotten enough room to get his hand in to get documents out." *Id.* at 247.

Ms. Price installed the lockbox prior to the damage. *Id.* at 247. She testified that RX P, a picture of the replacement lockbox, looked exactly like the lockbox prior to the damage. *Id.* She stated that the slit was the same size, and that the slit was narrow so that only paperwork could fit. *Id.* Only a "finger . . . at best" could fit inside the slit, and there was no way a hand could fit. *Id.* at 248. She asked the "Nordstrom equipment people" to cut the slit in both the original and replacement lockbox. *Id.* Ms. Price testified that the damage to the lockbox involved the slit, and the slit was wide enough after the damage to fit "kind of like your hand or a couple of fingers . . . ." *Id.* at 249.

Ms. Price did not do an investigation into the damage to the lockbox, because Mr. Huang admitted to it. *Id.* at 250.

Ms. Price was asked about RX Q, Mr. Huang's anonymous letter to Ms. Price, and she stated that a photo attached to his letter was a picture of the damaged lockbox. *Id.* at 251. She stated that she thought that the lockbox in the photo had a sign on it noting the terminal number/location and instructing drivers to place documents inside. *Id.*

#### **B) Mr. Huang's Recording of Greatwide Management's Conversations in Greatwide's Office on March 27, 2012**

Ms. Price testified that prior to Mr. Huang's May 30, 2012 meeting with management, she never confronted him about his audio recordings. *Id.* at 261. Ms. Price had spent a significant amount of time in the Upper Marlboro terminal, and she testified that the only place for management to have personnel, security, or general business conversations was in the bullpen office space. *Id.* at 262. It was important to keep many of those conversations confidential, especially as it related to security measures. *Id.* at 262-63. Ms. Price did not know of any employees who had recorded conversations in the office space prior to Mr. Huang. *Id.* at 263.

### **C) Mr. Huang's Anonymous Letter from April 2, 2012**

Ms. Price did not know about Mr. Huang's hours of service allegations until she received his anonymous letter in April 2012. *Id.* at 263-64. Ms. Price acknowledged that she became aware that Mr. Huang was the author of the anonymous letter when Mr. Huang admitted to it her personally. *Id.* at 263, 267-68. After receiving the letter, she immediately went to the Upper Marlboro terminal to start an investigation into the alleged violations. *Id.* Ms. Price was taken aback by some of Mr. Huang's personal comments, but she was also motivated to start investigating the alleged violations. *Id.* at 264.

Ms. Price stated that it was very important for Greatwide to know about hours of service violations and that is why the company maintained an "open door policy" for reporting concerns. *Id.* at 265. She had even discussed the open door policy at a safety meeting and emphasized that there would be no retaliation for reporting. *Id.*

Ms. Price's investigation yielded only the issue with Mr. Peters, which she characterized as "minor." *Id.* at 265-66. Mr. Peters was not terminated for the violation. *Id.* at 266. Mr. Huang was not disciplined for making these allegations, and Greatwide has never terminated an employee for reporting such allegations. *Id.* at 267-69. Prior to Mr. Huang's letter, Ms. Price did not know of any hours of service allegations made by drivers at the Upper Marlboro terminal. *Id.* at 268.

### **D) Alleged Dropped Trailer Incident on May 17, 2012**

Ms. Price testified that Mr. Huang left a trailer unsecured, off of Nordstrom property, in the streets of NYC. *Id.* at 252. She stated that dropping a trailer referred to "disconnecting from a trailer," without any locks. *Id.* It was against Nordstrom's policy to leave a unit unattended unless you were on Nordstrom property. *Id.* Dropping trailers was a big issue for Nordstrom because of the very high value of the contents of their trailers, which could range from a couple hundred thousand dollars to five million dollars. *Id.*

Ms. Price became aware of the incident from Nordstrom security and "the terminal manager and assistant manager" at Greatwide. *Id.* at 252-53. Mr. Huang told her that he had done similar things before and did not think it was a big deal. *Id.*

### **E) Greatwide's Investigation of Mr. Huang, Meeting with Mr. Huang on May 30, 2012, and Termination of Mr. Huang on May 31, 2012**

Ms. Price testified that once Greatwide learned of the dropped trailer incident on May 17, 2012, Mr. Huang was suspended until his meeting with management. *Id.* at 254. The meeting took place on May 30, 2012. *Id.* Mr. Huang, Ms. Price, and Mr. Mirov attended in person, and Mr. Lester attended on the phone. *Id.* at 255. The meeting took place at a hotel because Nordstrom did not want Mr. Huang on their property due to security concerns. *Id.* Ms. Price testified that Mr. Huang admitted to the unauthorized trailer dropping during the meeting. *Id.*

Mr. Huang also admitted to audio recordings during the meeting. *Id.* at 260. She stated that there was nothing in RX K, Mr. Lester's meeting notes, that appeared to be inaccurate. *Id.* at 258.

Following the meeting, Ms. Price went to a hotel in York, Pennsylvania. *Id.* at 258-59. She did not mention to Mr. Huang that she was going to the hotel, and Mr. Huang had no other reason to know. *Id.* at 259. However, she received calls to her hotel room that night from Mr. Huang, and a note from Mr. Huang that was delivered by hotel workers. *Id.* at 259-60.

Ms. Price testified that the "main grounds" for Mr. Huang's termination was the dropped trailer incident. *Id.* at 244, 254. Mr. Huang's damaging the lockbox also played a role in his termination. *Id.* at 244, 250. In the absence of any other conduct, Mr. Huang would have been terminated for dropping the trailer. *Id.* at 253. Greatwide had no prior incidents of unauthorized trailer dropping without the drivers being terminated as a result. *Id.* at 254. In the absence of any other conduct, Mr. Huang would have been terminated for damaging the lockbox. *Id.* at 250.

Ms. Price did not handle "the actual termination" of Mr. Huang. *Id.* at 268. Mr. Lester and HR primarily handled the termination. *Id.*

## **2. Cross-Examination**

Ms. Price testified that only Mr. Lester was involved with responding to Mr. Huang's OSHA complaint. *Id.* at 270.

### **A) Lockbox Incident on March 27, 2012**

Ms. Price purchased the replacement lockbox herself and asked Nordstrom to cut a hole in it. *Id.* at 276. She asked Nordstrom to make the hole "long enough for a sheet of paper" and such that it was not possible to fit a hand or two fingers in to get "anything out." *Id.* at 279. She could not fit her hand into the slot. *Id.* Ms. Price did this for both the original and replacement box. *Id.* at 280. She did not remember whether the box was replaced the same week as the alleged dropped trailer incident. *Id.* at 280. She stated that she was looking for a box that was "sturdy." *Id.* at 278. Ms. Price was asked whether it was customary for Greatwide terminals at Nordstrom facilities to have lockboxes, and she stated that she was in charge of only one Nordstrom location. *Id.*

Ms. Price clarified that when she referred to Mr. Huang admitting to damaging the lockbox, she was referring to a photo that he had included with his letter that showed the slit's opening wider than it had been previously. *Id.* at 279.

### **B) Mr. Huang's Recording of Greatwide Management's Conversations in Greatwide's Office on March 27, 2012**

Ms. Price heard one or maybe two of Mr. Huang's audio recordings from Mr. Scott. *Id.* at 298.

### **C) Mr. Huang's Anonymous Letter from April 2, 2012**

Ms. Price was questioned about RX E6, Mr. Peters's delivery sheet that was included with Mr. Huang's letter to Ms. Price. *Id.* at 272-73. She testified that the delivery and arrival times listed on the sheet were confidential "because of the stuff that we were hauling." *Id.* at 272-73. In order to protect delivery and arrival times, Ms. Price stated that Greatwide instructed drivers not to stop at the same truck stops every day. *Id.* at 274. These instructions were given to the drivers orally, and there was no written policy. *Id.* Ms. Price was questioned about RX E7, Mr. Peters's delivery receipt that was included with Mr. Huang's letter to Ms. Price. *Id.* at 275. She testified that the dates and times of delivery, in addition to the "load codes," were confidential. *Id.* at 275-76.

Ms. Price was questioned about where in Mr. Huang's letter she got the impression that he admitted to damaging the lockbox, and she stated that she "guessed" it was from the photo that he included. *Id.* at 279.

### **C) Alleged Dropped Trailer Incident on May 17, 2012**

Ms. Price stated that Nordstrom reported the dropped trailer incident to Mr. Burnett or Mr. Mirov. *Id.* at 281. Mr. Burnett or Mr. Mirov then reported the incident to her. *Id.* She did not know whether Nordstrom issued any letters regarding the event, and it was probably not something she would have been made aware of because it would have been an "internal Nordstrom document." *Id.* Instead, it would have went to "someone like [Mr.] Scott," because "he was all over Nordstrom." *Id.*

Ms. Price stated that Mr. Huang told Greatwide in the meeting on May 30, 2012, that he had dropped the trailer unsecured and had done it in the past at the NYC location "to go get food . . . ." *Id.* at 287-88. Also, Ms. Price stated that in RX F1, Mr. Huang's post-meeting statement, Mr. Huang wrote that he had previously dropped trailers at the NYC location to get food and there "never seemed to be any serious safety concerns." *Id.* at 294. Ms. Price did not ask Nordstrom about any prior incidents of Mr. Huang dropping trailers because "it would have draw[n] attention to the fact that it's been done before and that we didn't notify them." *Id.* at 282.

Ms. Price did not inquire into the "means by which" Nordstrom claimed the trailer was unsecured because Greatwide was inclined to "believe the customer." *Id.* at 283. She stated that it would have been the glad hand lock<sup>7</sup> that was missing. *Id.*

Ms. Price acknowledged that she knew Mr. Huang would have to drop a trailer in order to make a delivery to the NJ location and avoid the tunnel, but it would not have been a problem because Mr. Huang could have dropped the trailer in a Nordstrom "parking lot." *Id.* at 289-90.

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<sup>7</sup> Mr. Huang would later explain that a glad hand lock is "a device that goes over the air receptacle on the truck" and is "roughly the size of two fists." Tr. at 369.



Ms. Price could not recall the section in the company handbook where it says that a driver cannot leave a trailer unattended. *Id.* at 291.

### **3. Redirect Examination**

Ms. Price testified that during regular safety meetings, drivers were given oral instructions not to stop at the same rest stops on a regular basis. *Id.* at 301-02.

Ms. Price stated that when she refers to an unsecured trailer, she is also referring to whether or not the trailer is located on customer property. *Id.* at 302. Drivers are to remain with their trailer “at all times” until it is on customer property, at which point the customer assumes responsibility. *Id.* at 304.

### **4. Recross Examination**

Ms. Price stated that she “assumes” the policy of not abandoning a trailer is written in the company handbook. *Id.* at 305. If not, she said that the policy would have been communicated orally in a safety meeting, “especially regarding the Nordstrom account.” *Id.*

### **5. Redirect Examination**

Ms. Price did not know of any company handbook specific to the Nordstrom account. *Id.* She believed that Nordstrom specific “stuff” would be handled by Mr. Scott. *Id.*

## **Testimony of Brian Scott**

### **1. Direct Testimony**

Mr. Scott has been employed by Greatwide for almost twenty-four years. *Id.* at 315. He has been Greatwide’s Regional Vice President for approximately eight years. *Id.* As Regional Vice President, he oversees six Nordstrom distribution centers throughout the country, including the Upper Marlboro terminal. *Id.*

Mr. Scott is familiar with Greatwide’s policies and procedures, including personnel and discipline policies. *Id.* He has been involved in personnel related disciplinary decisions. *Id.* Greatwide has a range of different disciplinary actions that it might take depending on the context of the infraction, from verbal warning to termination. *Id.* at 318-19. The intentional destruction of company property and “anything that’s harmful towards the business, [and] towards another employee,” are grounds for immediate termination. *Id.* at 320, 323. Leaving trailers unattended “in an area where they could be considered abandoned . . . not . . . necessarily at a dock or anything like that,” is also grounds for immediate termination. *Id.* at 321.

Mr. Scott said that leaving trailers unattended was an issue “many years ago” and one trailer was “actually stolen.” *Id.* at 322. The trailer policy was made at that time “in conjunction with Nordstrom.” *Id.* He estimated that the trailer policy change happened “somewhere in the mid-2000s,” before 2010. *Id.* at 324. Mr. Scott testified that policy changes are normally written

down and handed out to drivers. *Id.* Changes would also normally be added to the employee handbook or to the “orientation when new drivers [come] on board.” *Id.*

Mr. Scott stated that drivers are paid based on the runs that they do. *Id.* at 325. Typically, the pay is by miles, or if driving locally, on an hourly basis. *Id.* Drivers are not guaranteed a number of runs in a given week, but there is a schedule that Greatwide tries to keep to. *Id.* But, when a run is cancelled or there is an additional run, it can change on a daily or weekly basis. *Id.*

#### **A) Lockbox Incident on March 27, 2012**

Mr. Scott could not recall the specific damage to the lockbox, but he could recall from seeing a black and white picture that the lockbox was broken enough that somebody could physically remove the paperwork. *Id.* at 336-37. Prior to the damage, it was not possible to fit a hand in the lockbox. *Id.* at 337. Greatwide did not investigate the lockbox damage because Mr. Huang admitted to it. *Id.*

#### **B) Mr. Huang’s Anonymous Letter from April 2, 2012**

Mr. Scott was made aware of Mr. Huang’s hours of service allegations in the anonymous letter that was sent to him by Mr. Huang. *Id.* at 327. Upon receiving the letter, Mr. Scott discussed it with Ms. Price and an investigation was opened. *Id.* at 328. Mr. Scott stated that Greatwide has an open door policy for employee reporting and “absolutely rel[ies] on every employee to bring things to [management’s] attention.” *Id.* at 329.

Mr. Scott found out that Mr. Huang was the author of the letter “weeks later” during a phone call with Mr. Huang. *Id.* at 330. Mr. Huang called Mr. Scott and told him that he sent the letter and broke into the lockbox to get the documents. *Id.* Additionally, in either that phone call or “another phone call just after,” Mr. Huang noted that he had a recording of conversations in the office. *Id.* However, Mr. Scott could not say definitively whether there was one phone call or two. *Id.*

#### **C) Mr. Huang’s Recording of Greatwide Management’s Conversations in Greatwide’s Office on March 27, 2012**

Mr. Scott was questioned about RX H, which he identified as the email that Mr. Huang sent him with the recording that he made in the office. *Id.* at 333. Mr. Scott stated that his phone call with Mr. Huang took place before he received this email. *Id.* He assumed it would have been from the same day, or maybe a day or two prior. *Id.* at 334.

The recording was a concern for Greatwide because they wanted to keep privileged customer information confidential, such as rates, client lists, etc. *Id.* Mr. Scott did not investigate Mr. Huang’s recordings because he lived in Oregon at the time. *Id.* at 335. Ms. Price did an on-site investigation. *Id.*

Employees could be terminated for violating Greatwide's confidentiality policy, which includes the recording of confidential conversations. *Id.* Mr. Scott did not know of a situation where a Greatwide employee was not terminated after recording confidential conversations. *Id.* at 335-36.

#### **D) Alleged Dropped Trailer Incident on May 17, 2012**

Mr. Scott testified that Mr. Huang left the trailer unattended on an NYC street to go to NJ. *Id.* at 338. He stated that "the only times you're supposed [to] leave a trailer is either at a secured dock or in a secured area . . ." *Id.* at 338. Leaving the trailer unattended in an unsecured area is problematic because Nordstrom trailers can be worth millions of dollars. *Id.* Nordstrom called Greatwide to tell them about the incident, and Mr. Huang admitted to doing it. *Id.* at 339.

#### **E) Mr. Huang's Termination on May 31, 2012**

Mr. Scott "passed on all the information that [he] was provided" as it related to the decision to terminate Mr. Huang, and then it was discussed by Ms. Price and the Regional Safety Director. *Id.* at 327. After the safety team concluded their investigation, Mr. Scott was given an action recommendation and he agreed with that recommendation. *Id.*

The grounds for Mr. Huang's termination were: (1) recording of conversations; (2) destruction of the lockbox; (3) removing the paperwork from the lockbox; and (4) dropping the trailer in an unauthorized area. *Id.* at 336. Mr. Huang was not terminated for reporting hours of service violations. *Id.* at 341.

Mr. Scott testified that recording the conversations was grounds for termination alone. *Id.*

Mr. Scott testified that damaging the lockbox was grounds for termination alone. *Id.* at 337-38. No Greatwide employee had ever intentionally damaged property and not been terminated as a result. *Id.* at 338.

Mr. Scott testified that dropping the trailer was grounds for termination alone. *Id.* at 339. No Greatwide employee had ever left a trailer unattended and not been terminated as a result. *Id.*

## **2. Cross-Examination**

Mr. Scott stated that the "orientation checklist" contains both company-wide and local policies and procedures. *Id.* at 352-53. The company handbook is given to all drivers as far as "overall company items" are concerned, and "local things" are addressed with location-specific employees. *Id.* at 353. The employee handbook contains information about discipline and immediate grounds for termination. *Id.* at 353. Location-specific policies for the Upper Marlboro terminal are memorialized "at the location" itself, but Mr. Scott did not have confirmation that these policies were delivered to Mr. Huang. *Id.* at 354. "Depending on the policy," drivers would sign off on receiving policies and that information would be included in

their personnel files. *Id.* Mr. Scott had no confirmation that Mr. Huang signed for the disciplinary policy, the orientation checklist, or the Greatwide-Nordstrom trailer policy. *Id.* at 356.

**A) Lockbox Incident on March 27, 2012**

Mr. Scott testified that around May 12, 2012, Mr. Huang told him that he broke into the box. *Id.* at 345. He did not remember whether Mr. Huang said that he caused damage to the box. *Id.*

**B) Alleged Dropped Trailer Incident on May 17, 2012**

Mr. Scott did not know where, in relation to Nordstrom's facility, Mr. Huang dropped the trailer. *Id.* at 346. He was aware of Mr. Huang's route that day to the extent that he knew that Mr. Huang had to go to NYC and NJ. *Id.* at 347. He was aware that Nordstrom's NJ location had a delivery tunnel through which double trailers could not fit. *Id.* at 347-48. Mr. Scott stated that he thought he received an email from Nordstrom informing him about the trailer incident. *Id.* at 350. He did not recall whether any photos were attached to the email. *Id.*

Mr. Scott stated that there was a written policy related to the trailers, but he had no confirmation as to how and when Mr. Huang received that policy. *Id.* He said that employees would sign as a receipt "most of the time." *Id.* He stated that the trailer policy was delivered to drivers in written form, but he did not recall exactly how it was given to drivers. *Id.* at 351-52. Mr. Scott had no notes that the policy was provided to Mr. Huang, and he did not recall asking Mr. Huang's supervisors whether they gave Mr. Huang the policy. *Id.* at 352.

**C) Redirect Examination**

Mr. Scott stated that there were policies that Greatwide did not require drivers to sign off on, and it is possible that a driver could have received a written policy with no confirmation of receipt. *Id.* at 356.

Mr. Huang's termination was a group decision between Mr. Lester, Ms. Price, Mr. Scott, and human resources. *Id.* at 357.

**D) Recross Examination**

Mr. Scott did not investigate whether Mr. Huang's recording was illegal. *Id.* at 358-59. He was not sure whether anyone at Greatwide conducted an investigation. *Id.* at 359.

**E) Redirect Examination**

Mr. Scott testified that Mr. Huang had told him that there were other audio recordings that he did not include in the email. *Id.* at 359-60.

## **F) Recross Examination**

Mr. Scott did not hear any of Mr. Huang's recordings that were not contained in the email. *Id.* at 360. Mr. Scott did not ask Mr. Huang to provide him any of these other recordings. *Id.*

## **Rebuttal Testimony of Theodore Huang**

### **1. Direct Examination**

Mr. Huang testified that he had only one phone call with Mr. Scott. *Id.* at 367. He stated that he never admitted to installing a recording device on Greatwide's phone. *Id.* He stated that he "[did] not believe" that he dropped a trailer outside the Nordstrom facility in NYC unsecured. *Id.* at 367-68. He stated that there was a glad hand lock placed on the back door and that it was customary to carry a glad hand lock in his tool bag. *Id.* at 368-69. He also parked a "converter dolly"<sup>8</sup> in front of the trailer. *Id.*

## **ISSUES**

The issues to be decided in this case are:<sup>9</sup>

1. Whether Mr. Huang established by a preponderance of the evidence that he engaged in protected activity under the STAA;
2. Whether Mr. Huang established by a preponderance of the evidence that he suffered an unfavorable employment action from Greatwide;
3. Whether Mr. Huang established by a preponderance of the evidence that his protected activity was a contributing factor in Greatwide's unfavorable employment action;
4. If Mr. Huang met his burden, whether Greatwide established by clear and convincing evidence that it would have taken the same unfavorable employment action against Mr. Huang in the absence of his protected activity; and
5. If Greatwide did not meet its burden, what relief, if any, is Mr. Huang entitled to under the STAA?

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<sup>8</sup> Mr. Huang explained that a converter dolly is "a device used to haul double trailers . . . a very heavy vehicle weighing about 3,000 pounds, thus if somebody was going to try to steal the trailer, they would have to move that out of the way first . . ." Tr. at 368.

<sup>9</sup> *See id.* at 7-8.

## APPLICABLE LAW

### 1. STAA

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

The STAA employee protection provisions were enacted “to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles.” Congress recognized that employees in the transportation industry are often best able to detect safety violations and, yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting the violations.<sup>10</sup>

The current version of the STAA provides that whistleblower complaints shall be governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR 21), 49 U.S.C. § 42121(b)(2)(B)(i). 49 U.S.C. § 31105(b)(1). Under the AIR 21 standard, complainants must initially prove by a preponderance of the evidence that a protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. A “contributing factor” is “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.”<sup>11</sup> If a complainant makes this showing, an employer can avoid liability by demonstrating with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii).

Thus, in order to prevail in this case, Mr. Huang must establish the following by a preponderance of the evidence: (i) that he engaged in protected activity; (ii) that his employer, Greatwide, took an unfavorable employment action against him; and (iii) that his protected activity was a contributing factor in Greatwide’s decision to take the unfavorable employment action. If Mr. Huang meets this burden, Greatwide may avoid liability by establishing by clear and convincing evidence that it would have taken the same unfavorable employment action against Mr. Huang in the absence of his protected activity.

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<sup>10</sup> *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

<sup>11</sup> *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, at 11 (Jan. 6, 2017) (internal citations omitted).

## 2. Hours of Service Regulations

Federal Motor Carrier Safety (“FMCS”) regulations set limitations on hours of service for drivers. *See* 49 C.F.R. Part 395. FMCS regulations provide, in relevant part, that a driver begins a period of 14 consecutive hours after a period of 10 consecutive hours of off-duty time. A driver “may not drive after the end of the 14-consecutive-hour period without first taking 10 consecutive hours off duty.” 49 C.F.R. § 395.3(a)(1)-(2). During that 14-hour period, “[a] driver may drive a total of 11 hours.” However, “driving is not permitted if more than 8 hours have passed since the end of the driver’s last off-duty or sleeper-berth period of at least 30 minutes.”<sup>12</sup> 49 C.F.R. § 395.3(a)(3). Finally, if a driver spends at least eight but less than ten consecutive hours in his sleeper berth, that period of time is excluded from the calculation of the 14-hour period described above. 49 C.F.R. § 395.1(g)(1)(i)(D); 395.1(g)(1)(ii)(C). The 14-hour period may be reset if a driver accumulates “[t]he equivalent of at least 10 consecutive hours off duty,” by spending “[a]t least 8 but less than 10 consecutive hours in a sleeper berth” plus “[a] separate period of at least 2 but less than 10 consecutive hours either in the sleeper berth or off duty, or any combination thereof.” 49 C.F.R. § 395.1(g)(1)(ii)(A). If a driver opts for the “equivalent of at least 10 consecutive hours off duty” provision, the 14-hour period is “recalculated from the end of the first of the two periods.” 49 C.F.R. § 395.1(g)(1)(ii)(C).

### DISCUSSION

#### A. Complainant Has Shown that He Engaged in Protected Activity

The STAA protects employees who, among other activities, file complaints regarding commercial motor vehicle safety. *See* 49 U.S.C. § 31105(a)(1)(A). More specifically, the STAA prohibits an employer from disciplining an employee because:

(A)

(i) the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order . . . .

*Id.*

For a complaint to be protected under the STAA, the complaint must “relate” to a violation of a safety standard and a specific standard need not be expressly cited in the complaint. 49 U.S.C. § 31105(a)(1)(A)(i) (“ . . . filed a complaint . . . related to a violation . . . ”); *see also Ulrich v. Swift Transportation Corp.*, No. 11-016, ALJ No. 2010-STA-00041, slip op. at 4 (ARB Mar. 27, 2012). Furthermore, “a complainant must show that he reasonably believed he was complaining about the existence of a safety violation.” *Id.*, slip op. at 4. It need not be true that the complaint concerned an *actual* violation of the regulations. *Elbert v. True Value Co.*, No. 07-031, ALJ No. 2005-STA-036, slip op. at 3 fn.5 (ARB Nov. 24, 2010).

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<sup>12</sup> There are limited exceptions to this requirement that are not relevant in this matter.

An employee's internal complaint to management conveying his reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under § 31105(a)(1)(A). *Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201, 212 (4th Cir. 2009) (holding that "internal complaints to company management, whether written or oral, suffice to satisfy the complaint requirement of 49 U.S.C. § 31105(a)(1)(A)(i)"); *Dutkiewicz v. Clean Harbors Env'tl. Servs.*, No. 97-STA-090 (Sec'y Aug. 8, 1997, slip op. at 3-4) (citing *Stiles v. J.B. Hunt Transp., Inc.*, No. 92-STA-34 (Sec'y Sept 24, 1993, slip op. at 3-4)); *see also Moravec v. HC & M Transportation, Inc.*, No. 1990-STA-44 (Sec'y July 11, 1991); *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (holding that "[a] construction of the STAA that covers only complaints filed with courts or government agencies would narrow the mechanisms to achieve these policy goals, leaving unprotected employees who in good faith assert safety concerns to their employers, or who indicate an unwillingness to engage in such violations").

Mr. Huang engaged in protected activity on April 2, 2012, by writing anonymous letters to Mr. Scott and Ms. Price alleging that Mr. Burnett and Mr. Mirov engaged in "some pretty heavy illegal running" as it related to hours of service violations by Mr. Peters and other "insider" drivers at Greatwide's Upper Marlboro terminal. *See* RX E1-10; RX Q; Tr. at 43. Although the letters were sent anonymously, Mr. Scott testified that "a couple" or "few weeks" after receiving his letter, he became aware during a phone call with Mr. Huang that Mr. Huang was the author of the letter. Tr. at 330. Similarly, Ms. Price acknowledged that Mr. Huang had told her at some point after she received her letter that he was the author. *Id.* at 263, 267-68.

With his letters, Mr. Huang attached Mr. Peters's delivery sheet and receipt from March 26 and 27, 2012, and he explained in detail how he believed that Mr. Burnett and Mr. Mirov facilitated Mr. Peters's hours of service violations. *See* RX E1-10; RX Q. Mr. Huang, referencing Mr. Peters's delivery sheets, noted that Mr. Peters started driving at 9:00 p.m. on Monday March 26, made a delivery in NYC, and reported back to the Upper Marlboro terminal around 10:30 a.m. on March 27. *See id.* Mr. Huang noted that after driving 14 hours on duty, Mr. Peters waited 2 hours before making three more deliveries and returning back to Upper Marlboro around 5:45 or 6:00 p.m. on the night of March 27. *See id.* Mr. Huang then explained, "[s]o that's 22.75, almost 23 hours on duty with no 10 [hour] break. And driving after around 22 consecutive hours of being on duty . . . ." *Id.*

Further, in describing Mr. Burnett and Mr. Mirov's alleged "favoritism" towards Mr. Peters, Mr. Huang referenced the terminal's dispatch sheet from March 27, RX E10, which he also included with his letters. *See id.* Mr. Huang stated that after Mr. Burnett found out from Nordstrom that Mr. Peters's "regular run" would not go out that day, "[Mr. Burnett and Mr. Mirov] took the driver that was originally scheduled [John Martin] . . . off the run and gave it to [Mr. Peters] to run illegally." *See* RX E2; RX Q. Mr. Huang stated that from the dispatch sheet, "[w]e can see [Mr. Martin's] name crossed out and [Mr. Peters's] name penciled in—[t]his is clearly [Mr. Mirov's] handwriting." *See id.*

The letters from Mr. Huang relate to regulatory provisions regarding safety, and therefore sufficiently relate "to a violation of a commercial motor vehicle safety or security regulation, standard, or order." 49 U.S.C. § 31105(a)(1)(A)(i). Mr. Huang's allegations relate to Federal



Motor Carrier Safety regulations that set limitations on hours of service for truck drivers. *See* 49 C.F.R. Part 395. Mr. Huang’s allegation that Mr. Peters drove for “almost 23 hours on duty with no 10 [hour] break” relates directly to 49 C.F.R. § 395.3(a)(2), which states that, “[a] driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive-hour period without first taking 10 consecutive hours off duty.”

Furthermore, given that the delivery sheets, receipts, and dispatch logs that Mr. Huang included with his letters appear to show hours of service violations by Greatwide and Mr. Peters, I find that Mr. Huang reasonably believed that he was complaining about the existence of safety violations. The reasonableness of Mr. Huang’s belief is further reinforced by the fact that Mr. Peters, Mr. Burnett, and Mr. Mirov were disciplined and issued “corrective action memos” for facilitating and participating in hours of service violations on March 26 and March 27, 2012. *See* RX N; RX M; RX O. Mr. Huang’s complaints to Mr. Scott and Ms. Price were sufficient to constitute protected activity under 49 U.S.C. § 31105(a)(1)(A). *See Calhoun*, 576 F.3d at 212.

Greatwide fails to explain why these letters to Mr. Scott and Ms. Price do not constitute protected activity under the STAA. Instead, Greatwide contends that Mr. Huang’s “actions of copying and removing confidential information from the premises in violation of company policy” were not protected activity under the STAA. R. Br. at 29. Greatwide also argues that Mr. Huang’s “illegal recording” of Greatwide management was not protected activity under the STAA. R. Br. at 24.

In support of its argument concerning Mr. Huang’s copying and removing documents from the lockbox, Greatwide relies on *Michaud v. BSP Transport, Inc.*, No. 96-198, 1997 WL 16496 at \*5 (ARB Jan. 6, 1997). In *Michaud*, a truck driver was terminated after photocopying another driver’s time card, without permission, to support allegations of hours of service violations by the employer. *Id.* at \*2. The ARB held that the employer’s basis for terminating the employee was illegitimate, and found, “. . . there is no doubt that [the employee] engaged in protected activity when he copied time cards and his own manifest as evidence of hours of service violations. Gathering evidence to be used to support a protected complaint is itself protected under whistleblower provisions . . .” *Id.* at \*3. However, for reasons that remain unclear, Greatwide argues that this case held that “[the employee’s] copying of other drivers’ logs without the permission of the other drivers was not protected activity and was a legitimate basis for termination.” R. Br. at 29. As shown above, the ARB held the very opposite.

Furthermore, although Greatwide argues that Mr. Huang’s “illegal recording”<sup>13</sup> of management was not protected activity, the ARB in *Michaud* cited various cases that held tape recordings to be protected activity for the proposition that “[g]athering evidence to be used to support a protected complaint is itself protected under whistleblower provisions.” 1997 WL 16496 at \*3. Moreover, the Secretary of Labor has protected a broad range of employee conduct under whistleblower statutes, including the making of secret tape recordings. *See Lee v. Parker-Hannifin Corp.*, No. 10-021, 2012 WL 694496 at \*5 (ARB Feb. 29, 2012) (citing list of cases).

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<sup>13</sup> I have already found that there is insufficient evidence in the record to support a finding that Mr. Huang’s recording was illegal. *See* ALJ 7 at 6-7.

Given the discussion above, I find that Mr. Huang has established by a preponderance of the evidence that he engaged in protected activity when he alleged hours of service violations in anonymous letters to Mr. Scott and Ms. Price. Moreover, I find that Mr. Huang engaged in protected activity when he removed and copied documents from the lockbox and recorded management conversations in order to support his allegations.

### **B. Respondent's Termination of Complainant Was an Unfavorable Employment Action**

The STAA specifies that an employee's discharge constitutes adverse action. *See* 49 U.S.C. § 31105(a); 29 C.F.R. § 1978.102. It is undisputed that Mr. Huang was terminated by Greatwide. *See* C. Br. at 28; R. Br. at 32. Furthermore, Mr. Huang's termination letter from May 31, 2012, is included in the record before me. RX L. Accordingly, I find that Greatwide took adverse action against Mr. Huang when it discharged him on May 31, 2012.

### **C. Complainant's Protected Activity Was a Contributing Factor in His Termination**

Under the AIR 21 legal framework, the contributing factor standard is "broad and forgiving." *Deltek, Inc. v. Admin. Rev. Bd.*, 649 Fed. App'x 320, 329 (4th Cir. 2016) (*citing Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 350 (4th Cir. 2014)). The protected activity "need only play some role in the adverse action, even an '[in]significant' or '[in]substantial role suffices." *Palmer v. Canadian Nat'l Ry.*, No. 16-035, 2016 WL 5868560 at \*31 (ARB Sept. 30, 2016) (brackets in original); *see also Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Lockheed Martin Corp. v. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013). The complainant may satisfy this "rather light burden by showing that her protected activities tended to affect [her] termination in at least some way," whether or not they were a primary or even a significant cause of the termination. *Deltek, Inc.*, 649 Fed. App'x at 329 (*quoting Feldman*, 752 F.3d at 348) (internal quotation marks omitted) (brackets in original).

The complainant may satisfy his burden through direct or circumstantial evidence. *Palmer*, 2016 WL 5868560 at \*32. "Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation." *Feldman*, 752 F.3d at 348 (citation omitted); *see also Sharkey v. JP Morgan Chase & Co.*, 660 Fed. App'x 65, 67 (2d Cir. 2016) (noting that a "temporal proximity" of less than a month between the protected activity and the unfavorable personnel action could support a prima facie inference that the protected activity was a contributing factor) (*citing Zann Kwan v. Andalex Grp., LLC*, 737 F.3d 834, 845 (2d Cir. 2013)). Moreover, the ARB has held that a number of months may still be sufficient to establish an inference of causation. *Warren v. Custom Organics*, No. 10-092, ALJ No. 2009-STA-030, slip op. at 6 (ARB Feb. 29, 2012) (citing three cases which held that between thirty days and seven to eight months is sufficient to show temporal proximity).

If the complainant's protected activity and the employer's non-retaliatory reasons both play a role in the termination, "the analysis is over and the employee prevails on the contributing-factor question." *Palmer*, 2016 WL 5868560 at \*31. The employee does not need

to show that the employer's stated reasons were pre-textual, although doing so can be sufficient to show that protected activity was a contributing factor. *Id.*

Mr. Huang has shown through circumstantial evidence that his protected activity was a contributing factor in Greatwide's decision to terminate him. Mr. Huang's anonymous letters to Mr. Scott and Ms. Price were dated April 2, 2012. *See* RX E1-2; RX Q. Subsequently, just under two months after writing the letters, Mr. Huang was terminated on May 31, 2012. *See* RX L. Although the letters were sent anonymously, Mr. Scott testified that "a couple" or "few weeks" after receiving his letter, he became aware during a phone call with Mr. Huang that Mr. Huang was the author. Tr. at 330. Mr. Scott could not recall the precise date of the phone call, but noted that it had to be "weeks later" because he "remembered [Mr. Huang] saying something along the lines of it looks like you're not doing anything based on the letter that was sent . . . ." *Id.* at 330-31. Similarly, Mr. Huang testified that on May 14, 2012, he had a phone call with Mr. Scott in which he acknowledged being the author of the letter. *Id.* at 50-51. Mr. Scott's testimony that the phone call took place "weeks" after receiving the letter leads me to conclude that Mr. Huang is accurately remembering that the call took place on or around May 14, 2012. Therefore, I find that there were only a few weeks separating Greatwide becoming certain of Mr. Huang's protected activity and Mr. Huang's termination, between May 14 and May 31, 2012.

Accordingly, I find that the temporal proximity between Mr. Huang's protected activity and termination is more than sufficient to establish an inference of causation. Greatwide maintains that Mr. Huang's protected activity was not a contributing factor in his termination and that it discharged Mr. Huang for "numerous violations of company policy," including "recording confidential Greatwide communications, destruction of company property, removal of confidential Greatwide paperwork, and dropping a trailer in an unauthorized area and leaving it unattended." R. Br. at 32-33. However, at the contributing-factor stage of the analysis, Mr. Huang's "rather light burden" is merely to show that his protected activity "tended to affect" his termination in "at least some way." *See Deltek, Inc.*, 649 Fed. App'x at 329.

By establishing the temporal proximity between his protected activity and termination, Mr. Huang has met his burden.

#### **D. Respondent Has Not Shown that Complainant Would Have Been Terminated Absent His Protected Activity**

Should the complainant meet his or her burden of proof, the respondent may still prevail if it shows, by clear and convincing evidence, that it would have taken the same adverse personnel action in the absence of the protected activity. *Palmer*, 2016 WL 5868560 at \*31, 36. "It is not enough for the [respondent] to show that it *could* have taken the same action; it must show that it *would* have." *Id.* at \*33 (citing *Speegle v. Stone & Webster Constr. Inc.*, No. 13-074, 2014 WL 1758321 at \*7 (ARB Apr. 25, 2014)) (emphasis in original).

Clear and convincing evidence is the "intermediate standard" between mere preponderance of the evidence and beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 424 (1979). Clear and convincing evidence requires that "the ALJ believe that it is 'highly probable' that the employer would have taken the same adverse action in the absence of the

protected activity.” *Palmer*, 2016 WL 5868560 at \*33 (citing *Speegle*, 2014 WL 1758321 at \*6). Were the clear and convincing standard quantified, “the probabilities might be in the order or above 70% . . . .” *Id.* (quoting *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978), *aff’d*, 603 F.2d 1053 (2d Cir. 1979)) (omission in original).

Greatwide asserts that absent any protected activity, Mr. Huang would have been terminated for “numerous violations of company policy,” including “recording confidential Greatwide communications, destruction of company property, removal of confidential Greatwide paperwork, and dropping a trailer in an unauthorized area and leaving it unattended.” R. Br. at 32-33. Greatwide further asserts that, “[e]ach of the grounds for [Mr. Hung’s] termination was independently a reason for which Greatwide would have terminated [Mr. Huang], regardless of any other conduct in which he engaged.” R. Br. at 33.

However, despite what Greatwide asserts in its brief, the record is filled with inconsistencies as it relates to Greatwide’s justifications for Mr. Huang’s termination.

First, in Respondent’s Renewed Motion for Summary Decision (“RRMSD”), Greatwide included an affidavit from Jeffrey Stupp, Vice President and General Counsel for Greatwide. Mr. Stupp stated, “Huang’s termination was not retaliatory in nature and was due to his illegal activity of breaking into the lockbox, stealing its contents, and secretly recording Greatwide’s management’s telephone *and not due to any other reason.*” In fact, Greatwide had not mentioned the dropped trailer incident at all prior to the hearing. In Greatwide’s RRMSD, the section detailing “Events Leading to Complainant’s Discharge” does not even reference the alleged dropped trailer incident.

Second, Mr. Huang testified that he was told over the phone by Ms. Harvey, “the HR person at the time,” that he was terminated for violations of company policy. Tr. at 147. However, she did not specify the specific violations. *Id.* Ms. Harvey also signed Mr. Huang’s termination letter, and the letter cites no grounds for Mr. Huang’s termination. RX L.

Third, Ms. Price testified that she was involved in the decision to terminate Mr. Huang and was familiar with the reasons for his termination. Tr. at 244. She stated that the “main grounds for [Mr. Huang’s] termination” was the dropped trailer incident. *Id.* She also stated that damage to the lockbox played a role in his termination. *Id.* In the absence of any other conduct, Ms. Price testified that Mr. Huang would have been terminated for either incident. *Id.* at 250, 253.

Fourth, Mr. Scott testified that he “passed on all the information that [he] was provided” about Mr. Huang’s conduct to the Regional Safety Director and Ms. Price.<sup>14</sup> *Id.* at 327. He stated that the safety team recommended termination and that he agreed with that recommendation. *Id.* He testified that the grounds for Mr. Huang’s termination were: (1) recording of conversations; (2) destruction of the lockbox; (3) removing the paperwork from the lockbox; and (4) dropping the trailer in an unauthorized area. *Id.* at 336. He stated that each of the cited grounds was independently sufficient for termination. *Id.* at 337-39, 341.

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<sup>14</sup> Ms. Price is the Regional Safety Director. Tr. at 242. It seems likely that Mr. Scott was actually referring to Mr. Lester, who Mr. Huang described as “regional safety person.” *Id.* at 357.

After reviewing all of the testimony and the evidence before me, there is no consistent theory regarding Greatwide's grounds for Mr. Huang's termination. Mr. Stupp stated that Mr. Huang was terminated only for breaking into the lockbox, stealing its contents, and secretly recording management. Ms. Price's testimony cited damage to the lockbox, but then added the alleged dropped trailer incident as an additional justification. Ms. Price did not mention the removal of paperwork or recording of conversations. Mr. Scott's testimony combined all of the grounds cited by Mr. Stupp and Ms. Price, and Ms. Harvey's letter terminating Mr. Huang cited no grounds at all.

On the basis of Greatwide's inconsistent justifications for Mr. Huang's termination and the discussion outlined below, I find that Greatwide has not established by clear and convincing evidence that it would have terminated Mr. Huang absent his protected activity.

### **1) Alleged Destruction of the Lockbox**

Greatwide maintains that it would have terminated Mr. Huang "solely for his destruction of the lockbox." R. Br. at 33. In support of that assertion, Greatwide cites to Mr. Scott's testimony that damaging the lockbox was independent grounds for Mr. Huang's termination, as "intentional destruction of our company property could be grounds for termination." Tr. at 337-38. Similarly, Ms. Price stated that damage to the lockbox was grounds for Mr. Huang's termination alone because "[the lockbox] was company property that was intentionally damaged." Tr. at 250.

However, despite Mr. Scott and Ms. Price's testimony, I find that Greatwide has failed to show by clear and convincing evidence that Mr. Huang even destroyed the lockbox in the first place.

Mr. Huang testified that he did not damage the box when he retrieved the records. *Id.* at 40. He testified that the opening of the box was approximately one inch wide, fourteen inches long, and that he could fit his whole hand inside. *Id.* at 38-39. He stated that it was made of "some pretty cheap fiberboard." *Id.* at 39.

On the other hand, Mr. Burnett testified that he had arrived at work to find that somebody had taken "a hammer or a maul hammer and punched a hole in the side or the side of the lid, about the size of maybe a softball" or maybe even bigger. *Id.* at 191-92. He noted that the damage was towards the front of the box, near the slit. *Id.* He described that the slit was "maybe an eighth inch or sixteenth inch by four or five inches long," and that a hand could not fit through it. *Id.* at 189-90. Further, he testified that it was made out of "sturdy" particle board. *Id.* at 19

Ms. Price testified that she saw the lockbox in person after the damage. *Id.* at 249. She stated that the damage involved the slit, and that the slit was wide enough after the damage to fit "kind of like your hand or a couple of fingers and at least to be able to grab stuff out . . ." *Id.* at 249. She testified that prior to the damage, only a "finger . . . at best could fit inside the slit." *Id.* at 248.

After reviewing Mr. Burnett and Ms. Price's testimony, I am struck by the lack of consistency as it relates to the description of the alleged damage to the lockbox. Mr. Burnett said that the damage was the size of a softball or maybe even bigger, whereas Ms. Price said that the damage was maybe sufficient to fit a couple of fingers or a hand inside. Moreover, Mr. Burnett said that the damage was a hole in the side of the lid, whereas Ms. Price noted that the damage was to the slit and did not reference a hole or damage to the lid.

Mr. Scott testified that he could not speak to the specific damage to the lockbox. *Id.* at 336. However, he did view a "hard to see" black and white photo of the damaged lockbox, and was told that it was broken enough that somebody could physically remove paperwork. *Id.* at 338. This photo is almost certainly RX E11, a black and white photo of the lockbox that Mr. Huang included with his letter to Mr. Scott. The photo, as Mr. Scott describes, is "hard to see." Moreover, Greatwide did not submit any other photo that purports to show the original lockbox in its damaged condition.

Although RX Q, Mr. Huang's letter to Ms. Price, did not come with attachments for my review, Ms. Price also testified that Mr. Huang included a photo of the damaged lockbox with her letter. Tr. at 251. This is important because CX J was admitted into evidence as a color version of RX E11, and Mr. Huang confirmed in his testimony that CX J was accurately labeled a color version of RX E11.<sup>15 16</sup> *Id.* at 366, 378. CX J is not difficult to see, and it clearly shows two different photos of the lockbox collaged together in one image. Notably, the lockbox does not appear to be damaged. It certainly does not appear that someone used a hammer to inflict softball sized damage, as Mr. Burnett suggested.

Further, CX I, which very clearly appears to be an enlarged color version of the lockbox from RX E11 and CX J, was described by Mr. Burnett as showing the original lockbox, undamaged. *Id.* at 379-80. This suggests that either: (1) these are all photos of the damaged lockbox and Mr. Burnett greatly exaggerated the extent of the damage in his testimony, or (2) these are all photos of the original lockbox, undamaged, and Mr. Huang never sent any pictures of the damaged lockbox at all. The photos themselves support the proposition that Mr. Huang actually included photos of the original lockbox, undamaged. And if that is true, given Ms. Price's testimony that she perceived the photo as Mr. Huang admitting that he damaged the lockbox, there would be no evidence in the record to support the idea that Mr. Huang ever admitted to damaging the lockbox. Nowhere in Mr. Huang's testimony, letters to Ms. Price and Mr. Scott, emails to Mr. Scott, post-meeting written statement, or Mr. Lester's meeting notes, is there any reference whatsoever to an admission of damaging the lockbox.

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<sup>15</sup> A side by side comparison makes it clear that CX J is indeed a color version of RX E11. Although RX E11 is very difficult to see, I can make out the outline of various features of the lockbox as shown clearly in CX J. Moreover, RX E11 and CX J feature the same description typed immediately beneath the photos, and are labeled "Fig. 1" in what appears to be the same font.

<sup>16</sup> There is no reason to believe that the photo received by Ms. Price was any different than the photo received by Mr. Scott. Ms. Price testified that she recalled that the lockbox in her photo had signs attached to it, and the lockbox in CX J has multiple signs taped to it. Ms. Price speculated that the signs in her photo would have said "drivers' documents for [terminal] 699 or Upper Marlboro or something to that extent." Tr. at 251. The signs in CX J request that drivers "please place all paperwork inside box" and "please bring all trash inside the building . . ." Moreover, the letters included with Mr. Scott and Ms. Price's photos were both dated April 2, 2012, feature the same substantive content and allegations, and Mr. Huang testified that they were "substantially the same." *Id.* at 44.

To summarize, there are irreconcilable differences in the accounts of the lockbox damage offered by Mr. Burnett and Ms. Price, there are no photos clearly showing damage to the lockbox, and there is very good reason to believe that the photos included with Mr. Huang's letters to Ms. Price and Mr. Scott were actually photos of the lockbox in its original, undamaged condition. Moreover, if the photos provided to Ms. Price and Mr. Scott were of the original lockbox, undamaged, there is no evidence in the record to suggest that Mr. Huang admitted to damaging the lockbox.

In any case, given the uncertainty that I outlined in my discussion, I find that Greatwide has not established by clear and convincing evidence that Mr. Huang destroyed the lockbox. Accordingly, I cannot and do not find that Greatwide established by clear and convincing evidence that it would have terminated Mr. Huang for destroying the lockbox.

## 2) Removal of Paperwork from the Lockbox

Greatwide maintains that it would have terminated Mr. Huang "solely for his . . . removal of confidential paperwork" from the lockbox." R. Br. at 33. In support of that assertion, Greatwide cites to Mr. Scott's testimony that "removal of the paperwork from the lockbox" was independent grounds for termination. Tr. at 336, 341.

However, it is notable that Ms. Price did not state that removing paperwork from the lockbox was a justification for Mr. Huang's termination. *See id.* at 244. Moreover, although Mr. Stupp stated that one of the grounds for Mr. Huang's termination was "stealing" the lockbox's "contents," there is no evidence that Mr. Huang stole anything. Mr. Huang testified that he removed Mr. Peters's paperwork from the lockbox in order to make copies to send to Mr. Scott and Ms. Price. *Id.* at 96-97. Approximately two hours later, after making photocopies of the paperwork at his home, he returned to Greatwide and put the original copies of the paperwork in the lockbox. *Id.* The copies of the documents were then sent to Mr. Scott and Ms. Price. *See* RX E6-10; RX Q.<sup>17</sup> There is no evidence that he retained copies of these documents, and Mr. Huang's account of removing the documents is undisputed.

With that said, despite Mr. Scott's testimony, there is very little evidence that Greatwide would have terminated Mr. Huang for removing paperwork from the lockbox. Greatwide cites to various provisions in its employee handbook, updated in 2011. R. Br. at 21. Among those provisions are rules of prohibited conduct, which are prefaced by the following statement:

The following actions are examples of serious policy violations and are grounds for disciplinary actions ranging from a verbal warning to immediate termination of employment. . . .

CX G31.

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<sup>17</sup> Unlike RX E, RX Q did not include the attachments that were sent with Mr. Huang's letter to Ms. Price. However, it is clear that Mr. Peters's documents were attached because Mr. Huang noted in the letter, "[a]s you can see on delivery sheet #1 . . ." RX Q1.

Although not specifically linking any particular rules of prohibited conduct to Mr. Huang's removal of paperwork, Greatwide's brief notes that the employee handbook "sets out a non-exhaustive list of conduct that will result in termination," including:

Theft or inappropriate removal or possession of [Greatwide] or customer property or the property of another employee.

...

Unauthorized disclosure of proprietary business material or confidential information.

R. Br. at 21.

Interestingly, however, Greatwide appears to have misread its own employee handbook. As mentioned above, Greatwide's brief notes that engaging in the prohibited actions "*will* result in termination." R. Br. at 21 (emphasis added). On the other hand, as also noted above, the handbook itself notes that engaging in the prohibited actions are "grounds for disciplinary actions *ranging from* a verbal warning to immediate termination of employment . . ." CX G31 (italics added). Therefore, even if I were to assume that Mr. Huang's removal of paperwork is prohibited by one of Greatwide's rules of prohibited conduct, the handbook does not clarify what the appropriate level of discipline would be. It certainly does not, as Greatwide suggests, say that Mr. Huang would definitely be terminated.

Moreover, under the "Record Retention" heading of the employee handbook, Greatwide writes that, "[u]nder no circumstances may any employee selectively destroy [c]ompany records or maintain them outside [c]ompany premises or designated storage facilities." CX G33. Similarly, even if I were to assume that Mr. Huang's removal of paperwork falls within the scope of this policy, there is no indication of the discipline that would follow. In fact, it is even less clear than the rules of prohibited conduct because the Record Retention policy does not cite a range of possible discipline for violators.

To the extent that Greatwide maintains that Mr. Huang removed "confidential paperwork" from the lockbox, Greatwide suffers from similar issues related to the employee handbook. Greatwide cites to the "Confidential Information" policy in the handbook, which speaks of an employee's "obligation to treat information as confidential." CX G34. The handbook defines "confidential information" as including "all information that might be of use to competitors, or harmful to the [c]ompany or the customers [Greatwide] serve[s], if disclosed." *Id.* However, even if I were to accept the testimony from Ms. Price suggesting that the paperwork that Mr. Huang removed from the lockbox was confidential, there is no evidence that Mr. Huang disclosed any of that information to anyone outside of Greatwide. Furthermore, even if I were to find that Mr. Huang violated the confidentiality policy, the policy does not cite a range of possible discipline for violators.

Finally, Greatwide has not provided evidence that it has ever terminated someone for violating the record retention policy, nor has it provided evidence that it has ever terminated someone pursuant to a rule of prohibited conduct for the temporary removal of paperwork. Moreover, although Mr. Scott testified that to his "knowledge" no employee has ever not been



terminated after disclosing confidential information, there is no evidence that Mr. Huang disclosed the information to anyone outside of Greatwide management.

Accordingly, I do not find that Greatwide established by clear and convincing evidence that it would have terminated Mr. Huang for removing paperwork from the lockbox.

### **3) Recording Greatwide Management's Conversations**

Greatwide maintains that it would have terminated Mr. Huang “solely for his illegal recording of confidential communications in the Greatwide office.” R. Br. at 33. In support of that assertion, Greatwide cites to Mr. Scott’s testimony that recording the conversation was independent grounds for termination, as an “employee could be terminated” for breaching Greatwide’s confidentiality policy and recording confidential conversations. Tr. at 335-36. On the other hand, Ms. Price did not state that recording conversations was a justification for Mr. Huang’s termination. *See id.* at 244.

Mr. Huang testified that for “possibly a few hours” on the morning of March 27, 2012, he placed a digital voice recorder on the outside of a Greatwide office cubicle wall in order to record management conversation and “get a record of illegal actions.” *Id.* at 97-98, 169. At that time, he believed the dispatcher would be reviewing drivers’ hours and routes. *Id.* at 169. He had previously observed Nordstrom employees calling Greatwide’s dispatchers at that particular time in the morning. *Id.* Moreover, he stated that drivers were instructed to call every morning during those hours to receive their dispatches. *Id.* He stated that he affixed the device to the wall “out of view” with ducttape, and did not remain with the device. *Id.* at 107-09.

Greatwide suggests that Mr. Huang, rather than putting a recording device on the cubicle wall, actually planted the recording device on the office phone. R. Br. at 26. As evidence, Greatwide argued the following: (1) Mr. Huang admitted to recording conversations on his home phone with a recording device that attaches to the phone; (2) the phone in the Greatwide office was damaged around the same time that the recording was made; and (3) if the recording device was taped to the cubicle as Mr. Huang claimed, management would have noticed it. However, I note that whether or not Greatwide is correct, it is not relevant to my analysis because nobody at Greatwide, not Ms. Price, Mr. Scott, nor Mr. Stupp, stated that affixing a device to the phone or damaging the phone was grounds for Mr. Huang’s termination.

Mr. Scott testified that Mr. Huang’s recording was a concern for Greatwide, “[m]ainly due to . . . confidential information . . . regarding our customer on privileged information . . . [such as] our rates, client lists . . . anything that could be . . . made public, [or] could hurt the business . . . .” Tr. at 334. Mr. Scott also mentioned that managers are required to sign confidentiality agreements. *Id.* at 334-35. However, Mr. Huang was not a manager with Greatwide, so presumably he did not sign a confidentiality agreement. If employees, aside from managers, were required to abide by any confidentiality agreement or policy that was distinct from the general “Confidential Information” policy contained in the employee handbook, there is no evidence of that in the record.

Moreover, as discussed earlier, the “Confidential Information” policy in the employee handbook states that confidential information includes “all information that might be of use to competitors, or harmful to the [c]ompany or the customers [Greatwide] serve[s], if disclosed.” CX G34. In this case, however, there is no evidence that Mr. Huang disclosed his recording to anyone other than Mr. Scott. For that reason, the handbook’s rule forbidding the “unauthorized disclosure of proprietary business material or confidential information,” is also inapplicable. Additionally, I note that Mr. Scott could not recall if Mr. Huang’s recording even contained confidential information. *See* Tr. at 344.

Furthermore, even if I were to find that Mr. Huang violated the confidentiality policy or a rule of prohibited conduct, the handbook does not make clear any discipline that would follow.<sup>18</sup> Although Mr. Scott testified that no employee has ever not been terminated after disclosing confidential information, I note once more that there is no evidence that Mr. Huang disclosed the recording to anyone other than Mr. Scott.

Accordingly, for the reasons described above, I do not find that Greatwide established by clear and convincing evidence that it would have terminated Mr. Huang for recording management conversations.

#### **4) Alleged Dropped Trailer Incident**

Greatwide maintains that it would have terminated Mr. Huang “solely for leaving a Nordstrom trailer unattended on a public street.” R. Br. at 33. In support of that assertion, Greatwide cites to Mr. Scott’s testimony that “dropping the trailer in an unsecured area” was independent grounds for termination. Tr. at 336, 339. Additionally, Ms. Price stated that the “main grounds” for Mr. Huang’s termination was dropping the trailer unsecured in NYC. *Id.* at 244.

However, for the reasons discussed below, I do not find that Greatwide has established by clear and convincing evidence that it would have terminated Mr. Huang for the alleged dropped trailer incident.

First, Greatwide had not mentioned the alleged dropped trailer incident as grounds for Mr. Huang’s termination prior to the hearing. As discussed earlier, Mr. Stupp did not state in his affidavit that the alleged dropped trailer was grounds for Mr. Huang’s termination. Moreover, Greatwide’s Renewed Motion for Summary Decision did not discuss the alleged dropped trailer at all.

Second, the specific circumstances of the alleged dropped trailer incident on May 17, 2012, remain unclear. It is undisputed that Mr. Burnett and Mr. Mirov assigned Mr. Huang a double trailer run to NYC and NJ. It is also undisputed that Mr. Huang left for his run two hours early that morning. However, the clarity ends there.

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<sup>18</sup> *See* my analysis of the employee handbook in the “Removal of Paperwork from the Lockbox” section of the discussion.

Mr. Huang testified that he arrived at the NYC location first, and Nordstrom was ready when he arrived. *Id.* at 112. Upon his arrival, he testified that the NYC trailer was unloaded without delay. *Id.* at 112-13. He recalled that the NJ trailer remained “on the street,” while the NYC trailer was being unloaded. *Id.* at 112. He stated that he placed a glad hand lock on the back door of the dropped trailer, and parked a converter dolly in front of it. *Id.* at 367-68. He testified that he did not drop the NYC trailer on the street in order to make the NJ delivery. *Id.* at 113. Instead, he stated that he brought both trailers with him to NJ. *Id.* at 66.

In his post-meeting written statement, RX F, Mr. Huang wrote that in order to make deliveries to the NJ Nordstrom location and fit through the store’s delivery tunnel, Greatwide drivers have to drop any other trailers that they are hauling in an unattended parking lot. He argued, “[i]s this any different security-wise from dropping a trailer on the street in front of the dock at the other store [NYC]?” RX F1. Mr. Huang then noted that he had “parked a trailer at this [NYC location] many times . . . and went around the corner to buy food etc. . . .” *Id.*

Mr. Lester wrote in his post-meeting notes, RX K, that Mr. Huang was questioned about the incident and admitted to dropping the trailer. One note states that, “[Mr. Huang] admitt[ed] to dropping the trailer but claim[ed] that a [g]lad hand lock was put in place. He then stat[ed] that he took the second trailer and delivered it to the . . . [NJ] location.” At the hearing, Mr. Huang disputed the accuracy of this note, saying, “[i]t implies . . . that I left that trailer at the first store and went to [NJ], but I took both of the trailers to NJ.” Additionally, Mr. Lester’s notes reflect that Mr. Huang admitted to previously dropping a trailer in NYC in order to “get something to eat, etc.” Mr. Huang did not dispute that point at the hearing.

Mr. Burnett testified that Mr. Huang dropped a trailer in NYC and took the other trailer to NJ. *Id.* at 198. Specifically, Mr. Burnett said, “[Mr. Huang] dropped [one trailer] in the street in Manhattan and left to go to another store and left it unattended, unlit, and unlocked.” *Id.* Mr. Burnett stated that a Nordstrom receiver called Greatwide looking for the trailer, and eventually found it outside on the street. *Id.* at 198-99. Mr. Burnett’s testimony appears to reflect the fact that Mr. Mirov was the person from Greatwide to speak directly with the Nordstrom receiver. *See id.* at 211. The Nordstrom receiver noted that the trailer had no glad hand lock on it and was parked on the curb in front of the store’s loading dock. *Id.* at 210. Mr. Burnett and Mr. Mirov proceeded to call Mr. Huang, and Mr. Huang told them that the NYC location was not yet open and he went to NJ to make the other delivery. *Id.* at 199-200. Mr. Huang told them that he would return back for the trailer in NYC. *Id.*

Ms. Price testified that Mr. Huang dropped the trailer unsecured, off of Nordstrom’s property, in NYC. *Id.* at 252. She stated that Mr. Burnett or Mr. Mirov notified her about the incident, after Nordstrom notified them. *Id.* at 280-81. Ms. Price testified that Nordstrom told Greatwide that the trailer was unsecured because “of where it was left,” because it “shouldn’t have been left on the street in [NYC].” *Id.* at 285. She also testified that Mr. Huang had told her that he had “done it before so he didn’t think it was that big of a deal.” *Id.* at 253.

Mr. Scott testified that Mr. Huang dropped the trailer on a “public street” in NYC, “then left and drove to [NJ] with another trailer and left the [NYC] trailer unattended for that amount of time.” *Id.* at 338. He stated that Nordstrom called Greatwide to notify them about the

incident, and Mr. Huang eventually admitted to doing it. *Id.* at 339. He also said that he received an email from Nordstrom about the incident, in which Nordstrom “mentioned that the trailer was dropped on a public street.” *Id.* at 350.

Upon review of the testimony, it remains unclear whether Mr. Huang left a trailer in NYC in order to make the NJ delivery. In his testimony, Mr. Huang denied doing so. On the other hand, Mr. Burnett and Mr. Scott testified that he did. Ms. Price’s testimony is a little more unclear, as she never gets more specific than to say that Mr. Huang dropped the trailer unsecured, off of Nordstrom’s property, in NYC. She stated that Mr. Huang admitted to dropping a trailer previously, but it is unclear whether she meant that he admitted to doing so in order to make a delivery to NJ, or to grab food as suggested by Mr. Lester’s post-meeting notes. With that said, Mr. Lester’s notes are also unclear because although he wrote that Mr. Huang admitted to dropping the trailer and “then state[d] that he took the second trailer and delivered it to [NJ],” it is not clear whether that meant that Mr. Huang left the dropped trailer in NYC while he made the delivery to NJ. The fact that the next line in Mr. Lester’s notes discusses how Mr. Huang stated that he “ha[d] done this before” and “left [a trailer] to get something to eat,” suggests to me that perhaps Mr. Huang admitted to leaving the NJ trailer unattended in NYC while the NYC trailer was being unloaded at the store. That interpretation of the notes would be consistent with Mr. Huang’s testimony at the hearing that the NJ trailer remained “on the street,” while the NYC trailer was being unloaded. Moreover, Mr. Huang’s post-meeting written statement seems to support that version of events, as Mr. Huang stated that he had dropped a trailer at the NYC location “many times” in order to go “around the corner to buy food.”

Given the uncertainty described above, I find that there are insufficient facts in the record to establish by clear and convincing evidence that Mr. Huang even dropped the trailer in NYC and left for NJ. I find it notable that the only person that appears to have spoken over the phone directly with Nordstrom about the alleged incident, Mr. Mirov, did not testify at the hearing. Similarly, Mr. Scott noted that he exchanged an email back and forth with Nordstrom about the alleged incident, however proof of that email is not in the record. Although one could argue that it might be difficult to pull an email from over five years ago, Mr. Scott had no problem providing emails from May 14 and May 15, 2012, regarding Mr. Huang’s audio recordings.

There is no evidence in the record that Mr. Huang would have been terminated for merely leaving the NJ trailer unattended for a short time while Nordstrom unpacked the NYC trailer. Moreover, there is no evidence in the record that any driver would be terminated for leaving a trailer unattended for a short time in order to get food, as Mr. Huang suggested he had done many times before. In fact, as Mr. Huang points out in his brief, Greatwide notes in its employee handbook that, “[d]rivers are expected to take their meal break daily . . . .” CX G11. Although Ms. Price testified that drivers are to remain with their trailers “at all times,” she also testified that Greatwide instructs drivers not to stop at the same coffee places and truck stops on a regular basis due to security concerns. Tr. at 301. But, in saying that, Ms. Price is confirming that drivers are allowed to leave their trucks in order to visit truck stops and grab coffee, so it appears that drivers are not actually expected to stay with their trailers “at all times.”

Moreover, even assuming that Mr. Huang did drop the trailer in NYC while he traveled to NJ, I find that Greatwide has not established by clear and convincing evidence that it would have terminated Mr. Huang for that reason.

Mr. Scott testified that Greatwide and Nordstrom had a policy forbidding drivers from “leaving customer trailers unattended in an area where they could be considered abandoned, which means they’re not . . . necessarily at a dock or anything like that . . .” Tr. at 321. He stated that this policy was inspired by an incident in the “mid-2000s,” in which a driver left a trailer unattended and the trailer’s contents were stolen. *Id.* at 322-24. He testified that violation of this policy is grounds for “immediate termination.” *Id.* at 321. Mr. Scott stated that the policy would have been written down and handed out to drivers, added to the employee handbook, or added to new driver orientation.<sup>19</sup> *Id.* at 322.

However, there is no physical evidence in the record of this written policy. The employee handbook, updated in 2011, does not contain any policy related to dropped trailers. *See CX G.* Moreover, although Mr. Scott testified that it is “absolutely” Greatwide’s procedure “most of the time” to have drivers sign an acknowledgment in receipt of being given written policies, there is no written confirmation to “[Mr. Scott’s] knowledge” that Mr. Huang ever received the dropped trailer policy at issue. *Id.* at 351. He stated that the policy would have been given to drivers in written form, but he was not “exactly sure” how it was delivered. *Id.* at 351-52. Furthermore, aside from Mr. Scott’s testimony, there is no evidence in the record describing the new driver orientation, and there is definitely no evidence that the dropped trailer policy was handed out or discussed as part of the orientation’s “location-specific items.” *See id.* at 352-53.

Accordingly, for the reasons discussed above, I find that Greatwide has not established by clear and convincing evidence that it would have terminated Mr. Huang in connection with the alleged dropped trailer incident on May 17, 2012.

### **REMEDY**

As outlined above, Mr. Huang has met his burden of proof, and Greatwide has failed to demonstrate by clear and convincing evidence that it would have terminated Mr. Huang absent his protected activity. Accordingly, Mr. Huang is entitled to damages under the STAA. 49 U.S.C. § 31105(b)(3)(A). The regulations specifically explain that an ALJ may issue an order including:

Affirmative action to abate the violation; reinstatement of the complainant to his or her former position with the same compensation, terms, conditions, and privileges of the complainant’s employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant may have incurred); and payment of punitive damages up to \$250,000 . . . .

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<sup>19</sup> Mr. Scott noted an “orientation checklist,” which involves both the employee handbook for “company-wide written policy” and “location-specific items” for “local things.” Tr. at 352-53.

29 C.F.R. § 1978.109(d)(1).

In this case, Mr. Huang seeks \$83,673.56 in back pay, \$25,000 in emotional distress damages, and “not to exceed” \$250,000 in punitive damages. C. Br. at 49-50.

### **A. Reinstatement**

Under the STAA, reinstatement is an automatic remedy. *Dale v. Step 1 Stairworks, Inc.*, No. 04-003, 2005 WL 76133 at \*2 (ARB Mar. 31, 2005). However, circumstances may exist in which reinstatement is impossible or impractical. *Cefalu v. Roadway Express, Inc.*, No. 08-110, 2008 WL 5454142 at \*2 (ARB Dec. 10, 2008) (citing *Assistant Sec’y & Bryant v. Bearden Trucking Co.*, No. 04-014, ALJ No. 2003-STA-036, slip op. at 7-8 (ARB June 30, 2005)). For example, “reinstatement may be inappropriate where the parties have demonstrated ‘the impossibility of a productive and amicable working relationship.’” *Id.* (citing *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 1993-ERA-024, slip op. at 9 (Sec’y Feb. 14, 1996)).

Mr. Huang has not requested reinstatement. See C. Br. at 49-51. However, in light of the fact that reinstatement is an automatic remedy under the STAA, I note for the record that given the events that have transpired between Greatwide and Mr. Huang, I find that the possibility of an amicable working relationship between the parties is remote. Moreover, although front pay in lieu of reinstatement may be appropriate where the parties have demonstrated “the impossibility of a productive and amicable working relationship,”<sup>20</sup> Mr. Huang testified at hearing that the job he obtained in August 2014 had finally, “possibly a few months ago,” yielded pay and benefits equal to what he received at Greatwide. Tr. at 74, 82-83. Accordingly, there is no need for an award of front pay.

Therefore, I find that Mr. Huang’s reinstatement is impracticable, and front pay in lieu of reinstatement is unnecessary.

### **B. Back Pay**

Mr. Huang is entitled to back pay. 49 U.S.C. § 31105(b)(3)(A)(iii). “An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA.” *Jackson v. Butler & Co.*, Nos. 03-116, 03-144, 2004 WL 1955436 at \*6 (ARB Aug. 31, 2004) (citing *Assistant Sec’y & Moravec v. HC & M Transp., Inc.*, 90-STA-44 (Sec’y Jan. 6, 1992)). Back pay awards are to be calculated in accordance with the make-whole remedial scheme embodied in § 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* See *Dale*, 2005 WL 76133 at \*4.

To support his request for \$83,673.56 in back pay, Mr. Huang has submitted W-2 Wage and Tax Statements from 2010 through 2014.

In 2010 and 2011, Mr. Huang was employed by Greatwide and earned \$54,279.04 and \$55,398.00, respectively. CX B2; CX C5.

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<sup>20</sup> See *Dale*, 2005 WL 76133 at \*3.

In May 2012, Mr. Huang was terminated by Greatwide, and proceeded to work various temporary jobs to finish the year. *See* CX D. In total, he earned \$25,424.00. *Id.*

In 2013, Mr. Huang worked various temporary jobs and earned \$32,978.00. CX E1.

In August 2014, Mr. Huang was hired by his current employer, UPS,<sup>21</sup> and earned \$14,884.40 for his work from August through December. CX F4. In total, including wages from temporary jobs that he worked prior to August, Mr. Huang earned \$22,440.00 in 2014. CX F1.

Unfortunately, Mr. Huang has failed to provide W-2 Wage and Tax Statements or any other evidence of his earnings from 2015 through 2017. Mr. Huang testified that he started working full-time for UPS in August 2014 and maintained full-time employment with UPS through the hearing date in September 2017. Tr. at 82. Mr. Huang testified at the hearing that starting “possibly a few months ago,” he began to receive pay and benefits equal to what he received at Greatwide. Tr. at 74, 83. Although he also testified that he started out at a “lower pay grade” and “eventually move[d] up,” there is no evidence in the record to substantiate his earnings after 2014. I recognize that back pay awards do not need to be rendered with “unrealistic exactitude” and “uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the employer.” *See Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-61 (5th Cir. 1974). However, without any evidence in the record of Mr. Huang’s rate of pay or annual earnings from 2015 through “possibly a few months” before hearing in September 2017, I am unwilling to issue a speculative back pay award.

With that said, I find that Mr. Huang is only entitled to back pay from 2012 through 2014.

In 2012, Mr. Huang earned \$25,424.00. *See* CX D. Using his 2011 earnings, \$55,398.00, as the base value (his last full year of employment with Greatwide), Mr. Huang is entitled to \$29,974.00 in back pay from 2012 ( $\$55,398.00 - \$25,424.00 = \$29,974.00$ ).

In 2013, Mr. Huang earned \$32,978.00. *See* CX E. Using \$55,398.00 as the base value, Mr. Huang is entitled to \$22,420.00 in back pay from 2013 ( $\$55,398.00 - \$32,978.00 = \$22,420.00$ ).

In 2014, Mr. Huang earned \$22,440.00. *See* CX F. Using \$55,398.00 as the base value, Mr. Huang is entitled to \$32,958.00 in back pay from 2014 ( $\$55,398.00 - \$22,440.00 = \$32,958.00$ ).

In total, I find that Mr. Huang is entitled to \$85,352.00 in back pay damages from 2012 through 2014 ( $\$29,974.00 + \$22,420.00 + \$32,958.00 = \$85,352.00$ ).

To properly compute back pay in current dollars, Mr. Huang is also entitled to interest on his award. Interest will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and will be compounded daily. 29 C.F.R. § 1978.109(d)(1).<sup>22</sup>

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<sup>21</sup> *See* Tr. at 82.

<sup>22</sup> These regulations are the result of a revision effective in 2012. *See* 77 Fed. Reg. 44,121 (July 27, 2012). Prior to that revision, the regulations did not specify how often interest on back pay was to be compounded. *See* 53 Fed.

The Applicable Federal Rate for short term quarterly/monthly compounding periods is calculated by the Internal Revenue Service each month. *See* INTERNAL REVENUE SERVICE *Index of Applicable Federal Rates (AFR) Rulings*, <https://apps.irs.gov/app/picklist/list/federalRates.html> (last visited March 26, 2018). These interest rates can vary significantly depending on the date. *See id.* (compare RR-2018-30 *Applicable Federal Rates* (December 2018) with RR-2017-24 *Applicable Federal Rates* (Dec. 2017)).

To compensate Mr. Huang accurately, I apply daily compound interest using the average rates for each year. While this result may not be perfectly accurate, it is a reasonable way to account for the fluctuations in the interest rate. Upon determining that value, I then round the rate to the nearest full percent. *See* 26 U.S.C. § 6621(b)(3). Starting from the date of Mr. Huang's termination, I find that he is entitled to an additional \$22,588.07 in interest.

Therefore, with interest, I find that Mr. Huang is entitled to \$107,940.07 in back pay.

Greatwide argues that Mr. Huang failed to mitigate his back pay damages. R. Br. at 36. However, although the STAA complainant has a duty to exercise reasonable diligence to attempt to mitigate back pay damages, the employer bears the burden of proving that the complainant failed to mitigate. *Dale*, 2005 WL 76133 at \*5. In order to satisfy its burden, the employer must establish that: (1) substantially equivalent positions<sup>23</sup> were available to the complainant, and (2) the complainant failed to use reasonable diligence in attempting to secure such a position. *Id.*

In support of its argument that Mr. Huang failed to mitigate damages, Greatwide cites Mr. Huang's testimony that he did not start applying for jobs until "about two or three weeks" after his termination. *See* R. Br. at 36. However, Greatwide has not cited, and I have not found, any case law to support the contention that Mr. Huang's failure to apply for two or three weeks after termination is sufficient to show that he failed to use reasonable diligence in attempting to secure a position. Moreover, even if I were to find that Mr. Huang failed to exercise reasonable diligence, Greatwide has failed to establish that substantially equivalent positions were available to Mr. Huang. Greatwide argues that "there is, and has been for quite some time, a shortage of drivers in the trucking industry." *Id.* However, "the bald assertion that there was a need for drivers is not the sort of specific proof" that is sufficient "to show that there were substantially equivalent positions available." *Johnson v. Roadway Express, Inc.*, No. 99-111, 2000 WL 35593006 at \*11 (ARB Mar. 29, 2000) (citing *Kawaski Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 528 (9th Cir. 1988)).

Accordingly, I find that Greatwide has failed to prove that Mr. Huang failed to mitigate back pay damages.

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Reg. 47,676 (Nov. 25, 1988) (providing for back pay and not addressing interest); 75 Fed. Reg. 53,544 (Aug. 31, 2010) (providing for back pay with interest but not specifying compounding). The ARB applied quarterly compounding before the 2012 revision. *See Dalton v. Copart*, 1999-STA-046 (ARB July 1, 2005) (stating that "such interest is to be compounded quarterly").

<sup>23</sup> A "substantially equivalent position" provides for the same compensation, job duties, working conditions, promotional opportunities, and status, as the complainant's prior position. *See Dale*, 2005 WL 76133 at \*5.



### C. Emotional Distress Damages

Under the STAA, compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Ferguson v. New Prime, Inc.*, No. 10-075, 2011 WL 3882480 at \*5 (ARB Aug. 31, 2011). To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Id.*

In this case, Mr. Huang testified that for “at least six months” following his termination, he was “very unhappy.” Tr. at 87-92. He testified that the situation with Greatwide was “pretty much the heaviest thing that’s ever happened to me.” *Id.* at 87. Although he would not call his condition a “depression,” Mr. Huang noted that he had “much less energy,” was “less outgoing,” and experienced “lots of sluggishness.” *Id.* at 89-91. He stated that there was “no doubt” in his mind that these feelings were directly tied to his employment with Greatwide. *Id.* at 90.

Although Mr. Huang never contacted a medical professional in association with his condition, the Board has affirmed emotional distress awards based solely upon the complainant’s credible testimony. See *Hobson v. Combined Transport, Inc.*, Nos. 06-016, 06-053, 2011 WL 316024 at \*5 (ARB Jan. 31, 2008) (citing *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026, slip op. at 9 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095, ALJ No. 2002-STA-035, slip op. at 17 (ARB Aug. 6, 2004)).

Mr. Huang has requested \$25,000.00 in emotional distress damages, and I find that Mr. Huang testified credibly to his condition. However, awards for emotional distress are often based upon awards issued in similar cases. See *Ferguson*, 2011 WL 3882480 at \*5. With that said, given the condition described by Mr. Huang at the hearing, I find that the facts of this case and the case law support an award of \$5,000.00.

For example, in *Hobson*, the ARB affirmed an award of \$5,000.00 in emotional distress damages after the complainant, unsupported by medical evidence, testified that, “[w]hen I was terminated, I was terminated at a time when I was really stressed out and my nerves were messed up. My anxiety was real high. After I was terminated, the way I was, it just made it worse.” 2011 WL 316024 at \*5 fn. 35. Given Mr. Huang’s testimony that his termination was “pretty much the heaviest thing that’s ever happened to me,” I find that although he did not describe his condition as “anxiety” per se, he experienced substantially similar emotional distress for the purpose of awarding compensatory damages.

Although Mr. Huang requested \$25,000.00 in emotional distress damages, I find that the case law does not support such a high award. For example, in *Carter v. Marten Transport, Ltd.*, Nos. 06-101, 06-159, 2008 WL 2624769 at \*11 (ARB June 30, 2008), the ARB affirmed an award of \$10,000.00 in emotional distress damages, but the complainant testified that he felt “very depressed” and “worthless,” and the ALJ even ordered a recess at one point during the hearing because he noticed that the complainant was “struggling while testifying.” The severity of emotional distress described by Mr. Huang does not rise to the level described by the

complainant in *Carter*, and unlike the complainant in *Carter*, Mr. Huang did not appear to have a difficult time testifying about his condition.

Accordingly, I find that Mr. Huang is entitled to \$5,000.00 in emotional distress damages.<sup>24</sup>

#### **D. Punitive Damages**

Under certain circumstances, the STAA permits an ALJ to award punitive damages to an aggrieved complainant. 49 U.S.C. § 31105(b)(3)(C); 29 C.F.R. § 1978.109(d)(1). Punitive damages are warranted where there has been a callous or reckless disregard of the complainant's rights, as well as intentional violations of federal law. *Beatty v. Celadon Trucking Servs., Inc.*, Nos. 15-085, 15-086, 2017 WL 6572143 at \*8 (ARB Dec. 8, 2017); *Smith v. Wade*, 461 U.S. 30, 51 (1983) (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J., concurring and dissenting)). "The inquiry into whether punitive damages are warranted focuses on the employer's state of mind and does not necessarily require that the misconduct be egregious." *Carter v. BNSF Ry. Co.*, Nos. 14-089, 15-016, 15-022, 2016 WL 4238480 at \*4 (ARB June 21, 2016).

In this case, I find that the record does not sufficiently establish that Greatwide intentionally violated federal law. Although I found that Greatwide failed to demonstrate by clear and convincing evidence that it would have terminated Mr. Huang absent his protected activity, the specific circumstances and motives behind Mr. Huang's termination remain unclear from the record. While I recognize that Greatwide *may* have terminated Mr. Huang for any of its alleged justifications, it failed to provide the evidence that would be necessary to meet its clear and convincing burden.

Accordingly, without more clarity concerning the motives behind Greatwide's actions, I find that Mr. Huang is not entitled to punitive damages.

#### **E. Attorney's Fees**

Mr. Huang is entitled to reasonable costs, expenses, and attorney fees incurred with the prosecution of his complaint. *See* 49 U.S.C. § 31105(b)(3)(A). Counsel for Mr. Huang has not submitted a fee petition in this matter. Counsel for Mr. Huang is instructed to file and serve a fully supported application for fees, costs, and expenses (stating the work performed, the time

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<sup>24</sup> Greatwide argues that pursuant to 29 C.F.R. § 18.57(c), Mr. Huang is barred from receiving emotional distress damages because he revealed that he was seeking them for the first time at the hearing. R. Br. at 36. As I emphasized at the hearing when Greatwide cited 29 C.F.R. § 18.57(c) to contest Mr. Huang's ability to introduce evidence as to "any type of back pay or damages of any kind," Mr. Huang was a *pro se* complainant prior to hearing. *See* Tr. at 11-15. The ARB has held that *pro se* complainants are entitled to a "degree of adjudicative latitude" when it comes to court filings and procedural matters. *See Hyman v. KD Resources, Inc., et al*, No. 09-076, 2010 WL 1260209 at \*5 (ARB Mar. 31, 2010); *Self v. Jackson Rapid Delivery Service*, No. 98-110, 1998 WL 459658 at \*7 (ARB July 21, 1998). Furthermore, given that my award for emotional distress damages is based solely upon Mr. Huang's testimony at the hearing, unsupported by any medical evidence that could potentially be impeached or rebutted, I find that Greatwide was not prejudiced by Mr. Huang's failure to disclose his prayer for emotional distress damages.

spent on such work, and the reasonable basis for counsel's rate). Counsel for Mr. Huang is granted 60 days from the issuance of this order to provide a fee application, and Greatwide is granted 60 days thereafter to file an objection.

### **CONCLUSION**

Considering the foregoing and on review of the entire record, I find as follows: Mr. Huang engaged in protected activities when he alleged hours of service violations in letters to Mr. Scott and Ms. Price and gathered evidence to support his allegations; Greatwide took adverse action against Mr. Huang when it terminated him on May 31, 2012; Mr. Huang's protected activities were a contributing factor in Greatwide's decision to terminate him; and Greatwide failed to show by clear and convincing evidence that it would have terminated Mr. Huang absent his protected activities.

Thus, Mr. Huang is entitled to \$107,940.07 in back pay and \$5,000.00 in emotional distress damages.

### **ORDER**

Based on the foregoing:

1. Greatwide shall pay Mr. Huang \$107,940.07 in back pay;
2. Greatwide shall pay Mr. Huang \$5,000.00 in emotional distress damages;
3. Mr. Huang is granted 60 days from the date of issuance of this order to submit an application for attorney's fees; and
4. Greatwide is granted 60 days thereafter to file an objection to the fee application;

**SO ORDERED.**

**PAUL R. ALMANZA**

Associate Chief Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative

Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

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

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

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

been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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