UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
COVINGTON DISTRICT OFFICE

Issue Date: 22 August 2023

In the Matter of:

CHARLES BOYLE,
Complainant,

v.

MESILLA VALLEY TRANSPORTATION,
Respondent,

CASE NO.: 2018-STA-00084

Appearances:

Complainant: Charles Boyle, pro se
Respondent: Steven J. Blanco, Esq.

Hon. Tracy A. Daly
Administrative Law Judge

DECISION AND ORDER

1. <u>Jurisdiction and Procedural History.</u> The case originated from a complaint alleging violations of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "the Act") and the implementing regulations at 29 C.F.R. Part 1978. The Act and regulations include whistleblower protection provisions and a Department of Labor complaint procedure.

Complainant asserts Respondent retaliated against him in violation of the employee protective provisions of the Act. The Secretary investigated the allegations and issued findings and an order dismissing the complaint after concluding Respondent did not violate the Act. Complainant objected to the findings and order, and he filed a timely request for a formal hearing before an Administrative Law Judge (ALJ) with the Chief Administrative Law Judge, Office of Administrative Law Judges (OALJ), U.S. Department of Labor.

As the assigned presiding ALJ, the undersigned conducted a formal hearing in this matter. The

parties were afforded a full opportunity to adduce testimony and offer documentary evidence.[1] In compliance with deadlines ordered by the undersigned, Complainant and Respondent filed post-hearing briefs with legal analysis and factual arguments. Respondent also filed a rebuttal brief, and the record in this matter was complete on October 5, 2022.[2]

2. <u>Statement of the Case.</u>

Complainant's filings assert that he engaged in the following protected activity under the STAA: 1) he reported an unsafe condition when he informed Respondent that he had become too fatigued to continue driving a commercial motor vehicle; and 2) refused to drive because he had become too fatigued.[3] As a result of these actions, Complainant contends he suffered adverse action when Respondent deemed him to have committed a driver service failure and terminated his employment. (CB-1)

Respondent argues Complainant did not engage in protected activity under the Act. Respondent also contends that, even if Complainant's actions were protected activity under the Act, the activity was in no way a contributing factor in Respondent's decision to later terminate his employment. Respondent asserts Complainant engaged in argumentative conversations and unprofessional conduct with other employees, and these actions caused Respondent to terminate his employment. Additionally, Respondent further avows that, even if Complainant's conduct constitutes protected activity that was a contributing factor in his employment termination, it can establish by clear and convincing evidence that it would have taken the same unfavorable personnel action against Complainant. (RB-1)

3. <u>Contested Issues of Fact and Law.</u> Based on the parties' prehearing statements, opening statements, stipulations, evidence presented during the hearing, and the parties' post-hearing briefs, the undersigned shall resolve the following contested legal issues in this matter:

a. Whether Complainant engaged in protected activity covered under the STAA.

b. Whether Complainant suffered an adverse employment action.

c. Whether Complainant's alleged protected activity was a contributing factor in Respondent's decision to end his employment.

d. If Complainant proves that his alleged protected activity was a contributing factor in the adverse employment action taken against him, whether the evidence establishes by clear and convincing evidence that Complainant's employment with Respondent would have been

[1] The initial hearing session was conducted on December 10-11, 2019. To accommodate Complainant's pro se status and misunderstanding about submission of evidence, the undersigned scheduled a second hearing session for April 29, 2020. Because of COVID-19 pandemic restrictions, court room scheduling limitations, and the parties' adamant request for a full in-person hearing, the supplemental hearing session was not completed until June 21-22, 2022.

[2] Complainant's post-hearing brief is marked CB-1. Respondents' post-hearing brief is marked RB-1. Respondent's reply brief is marked RB-2.

[3] Complainant's pro se filings identify three protected activities: 1) reporting that he was too fatigued to drive; 2) refusing to drive; and 3) reporting an unsafe condition (his fatigue). In his pro se capacity, Complainant was unable to articulate, in a manner the undersigned could appreciate, a difference between the first and third protected activity.

terminated in the absence of his alleged protected activity.

e. If Complainant proves that Respondent violated the whistleblower protections of the STAA, what remedies are appropriate in this matter.

4. Relevant Evidence Considered. In making this decision, the undersigned reviewed and considered all reliable and material documentary and testimonial evidence presented by Complainant and Respondent.[4] This decision is based upon the entire record.[5]

a. ***Exhibits Admitted into Evidence.*** The undersigned fully considered the exhibits admitted at the hearing. As specifically provided in the Notice of Case Assignment and Prehearing Order, and as expressly articulated to the parties at the hearing, only exhibit content directly cited in a post-hearing brief by specific exhibit and page number was considered material and relevant evidence. All other information contained in the exhibits, but not specifically cited in the briefs, was regarded as non-relevant background information provided for chronological context to cited relevant evidence. However, given Claimant's pro se litigant status, the undersigned reviewed and considered all admitted evidence. The undersigned admitted eighty-four (84) joint exhibits into evidence. Joint Exhibit 83 is a stipulation of expected testimony for Louis Calvillo. (Tr. pp. 23-29)

b. ***Testimonial Evidence and Witness Credibility Determinations.*** The undersigned fully considered the entire testimony of every witness who appeared at the hearing. As the finder of fact in this matter, the undersigned is entitled to determine the credibility of witnesses, to weigh evidence, to draw his own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. *Becker v. West Side Transp., Inc.*, ARB No. 01-032, ALJ No. 00-STA-4, slip op. at 5 (ARB Feb. 27, 2003) (holding that ARB accords special weight to ALJ's demeanor-based credibility determinations); *see also Bank v. Chi. Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atl. Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

In weighing testimony in this matter, the undersigned considered the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor while testifying, and opportunity to observe events or acquire knowledge about a factual matter at issue. The ALJ also considered the extent to which the testimony of each witness was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). For the reasons noted here and later in this decision, which are illustrative and not all inclusive, the undersigned makes the following credibility assessments of the witnesses who presented testimony in this case:

[4] Joint and Appellate Exhibits are marked with designators JX and AX respectively. Reference to an individual exhibit is by designator and page number *(e.g.* JX-1, p. 4). Reference to the hearing transcript is by designator Tr. and page number (*e.g.* Tr. p. 3). The page numbering for the hearing transcript does not continue sequentially for the supplemental hearing. As a result, transcript page numbers are duplicated. For sake of clarity, the transcript covering the December 10 and 11, 2019 hearing session is cited as Tr. 1 and the transcript for the hearing session on June 21 and 22, 2022 is cited as Tr. 2.

[5] As the ARB previously clearly stated, ALJs should tightly focus on making findings of fact and "a summary of the record is not necessary" because the board assumes the ALJ reviewed and considered the entire record. *Austin v. BNSF Ry. Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13, slip op. at 2, n.3 (ARB Mar. 11, 2019) (per curium).

1) Ms. Krystal Gonzalez. The witness's testimony described her experience and job duties as a safety clerk for Respondent. She also specifically explained the events surrounding her interaction with Complainant on January 28, 2018, when he finished his first driving route for Respondent. Her narrowly focused testimony demonstrated a clear independent recollection of the events, and it was not materially contradicted by other evidence in this case. She displayed a sincere and unbiased demeanor and presented her testimony in a manner that conveyed an impartial and truthful recounting of her recollection. As a result, the undersigned gave her testimony considerable weight.

2) Complainant. Complainant testified about the nature of his work as a truck driver for Respondent and described the events that occurred during his first and only job with Respondent. He presented his testimony in an earnest and heartfelt manner. Claimant's demeanor as a witness was forthright and candid. For the most part, he demonstrated a clear memory of the events that he described, and he provided specific details of the relevant events in support of his claim. Complainant occasionally expressed frustration when answering questions and sometimes displayed difficulty in articulating descriptions of events. Overall, the undersigned found him to be a likeable gentleman who genuinely and candidly provided subjectively sincere testimony. While he did not demonstrate a completely accurate recollection of all material events in this matter, considerable portions of his testimony were corroborated by exhibits or testimony from other witnesses. His assertions regarding the sequence of events that led to Respondent's termination of his employment were also supported directly or circumstantially by other video or documentary evidence. Overall, his testimony regarding the material contested facts related to his complaint was accorded significant weight in some instances and partial weight as it related to other matters.

3) Mr. Ryan Elliott. The witness's testimony addressed his past truck driving experience and his job and duties as a driver dispatcher for Respondent. Generally, he explained the details of Respondent's drivers' duties for Walmart cargo loads that originate in Las Lunas, NM and are delivered to different locations in El Paso, TX. More specifically, he described his duties as the dispatcher coordinating and assisting drivers who work the route that includes the Las Lunas to El Paso leg. He also addressed the events and personal interaction he had with Complainant on January 28, 2018, pertaining to the last leg of a five-day pickup and delivery route that Complainant drove for Respondent. Mr. Elliot demonstrated a subjectively sincere effort to testify accurately but on occasion exhibited an incomplete recall of the subjects and details of his electronic communications and personal discussions with Complainant regarding the driving job assigned to Complainant. In sum, the undersigned accorded the witness's testimony substantial weight on some issues and moderate weight on others.

4) Mr. James Bashur. The witness's testimony described his roles as both a dispatcher and dispatch supervisor for Respondent. In pertinent part, he explained the duties he performed as a supervisor who managed dispatchers employed by Respondent during the time Complainant was a driver. He described Respondent's obligations regarding truck driver qualifications and safety certifications. His answers were consistent and supported by other testimony and documentary evidence. He displayed a sincere effort to accurately and truthfully convey his knowledge of the relevant events in this matter. His testimony was accorded appropriate weight.

5) Mr. Greg Ginger. As Respondent's Director of Human Resources, the witness generally addressed his work career and experience in the motor transportation industry. More specifically, he detailed driver training that Respondent conducts and the events, circumstances and factors that were considered when making the decision to terminate Complainant's employment. His explanation regarding the customer service and employee relationship concerns that he formed about Complainant were generally corroborated by other witness testimony and exhibit evidence. On several occasions, his testimony regarding driver conduct and policy standards was vague. Additionally, at times his account of the sequence of events and reasons leading to Complainant's employment termination contradicted more accurate and reliable witness testimony and exhibit evidence. Two key illustrative examples include: a) his testimony lacked clarity regarding the timing of termination; and b) his testimony about the Respondent manager who ultimately decided to terminate Complainant conflicted with other witness testimony. In sum, the undersigned found the witness's testimony only moderately persuasive.

6) Ms. Debra Garcia. The witness's testimony described her experience and job duties as a dispatcher, as well as her observations and interaction with Complainant on January 28, 2018, when he finished the last leg of his driving route. Her testimony demonstrated an independent recollection of the events, but some key details of her testimony were contradicted by other evidence in this case. Of note, her recollection of the time of day she interacted with the Complainant was significantly contradicted by other witness testimony and exhibits. Similarly, her recollection that Complainant used profanity while interacting with Mr. Elliott was not persuasively corroborated. Overall, while she displayed a sincere demeanor that conveyed a truthful recounting of her recollection, parts of her testimony were unpersuasive. The undersigned concluded that she unconsciously used verisimilitude memories when answering questions for which she did not have a distinct independent recollection. As such, her testimony was given considerable weight in part and minimal weight in other parts.

7) Mr. Royal Jones, III. As Chief Operations Officer for Respondent, Mr. Jones' testimony detailed the events, circumstances, and factors that he considered when making the decision to terminate Complainant's employment. He provided clear and thorough answers in response to questions, but he demonstrated a limited recall of the details of the events leading to his decision to terminate Complainant's employment. His explanations regarding the customer service and employee relationship concerns that he formed about Complainant were reasonably justified, but his explanation for the timing and way he reached the decision to terminate Complainant did not adequately explain how, and to what extent, he considered Complainant's safety concern about driving while fatigued. As a result, his testimony was given significant weight for some subjects and limited weight on others.

5. Relevant and Material Findings of Fact. Based on the parties' stipulations, documentary exhibits, and testimonial evidence presented, the undersigned makes the following relevant and material findings of fact in this case:[6]

[6] Citations to stipulations, exhibits, or testimony upon which the undersigned made factual findings are not all-inclusive. They simply reference some of the most illustrative and persuasive direct, indirect, and circumstantial evidence among everything in the record that the undersigned considered when making the related finding.

a. On January 16, 2018, Respondent hired Complainant as an "over the road" commercial motor vehicle driver. Complainant worked for Respondent as a designated "triangle" route driver and was responsible for pickup and delivery of cargo loads in the states of Texas, Oklahoma, Kansas, Colorado, and New Mexico. Complainant's total combined pay rate was $0.45 per mile. For this route, Complainant expected to drive an estimated 12,600 miles per month for an average monthly wage of $5,670.00. (JX-1, JX-3; JX-4; JX 5; JX-11; Tr. 1, pp. 24, 90, 84-85; 253-56; Tr. 2, pp. 34-37, 219)

b. Prior to his employment with Respondent, Complainant worked as a commercial motor vehicle driver for other companies and had more than 9 years of driving experience and a safety history without a traffic citation or reportable accident. He approached his driving duties with a highly conscientious and uncompromising commitment to compliance with safety regulations. During his prior employment as a driver, he also developed familiarity with using electronic communications systems in tractor commercial vehicles, which included the "PeopleNet" electronic driver log system used by Respondent in its tractor vehicles. For safety reasons, he did not read or respond to PeopleNet electronic messages received while he was driving. (JX-21; Tr. 1 pp. 80-83, 85, 87-88, 265, 288)

c. On January 23, 2018,[7] Respondent dispatched Complainant in a vehicle designated as number 1352 for his first driving job on his assigned "triangle" route, which commenced in El Paso, Texas. In the days immediately prior to starting his route, Complainant suffered from an illness, and he was still recovering from its effects. Before starting the route, Complainant learned he would be required to stop at multiple locations at various cities along his route; Complainant was unhappy about this and felt he had effectively been misled by Respondent as to the nature of the driving position that he had accepted. He believed he signed a contract with Respondent that required him to perform 3 to 4-day "triangle" routes that did not entail multiple stops at each city location. On the first day of the route, Complainant drove to Dallas, Texas, and between January 24 to 26, Complainant picked up and delivered loads to cities in Oklahoma, Kansas, and Colorado. (JX-5; JX-8; JX-9; JX-10; JX-13; JX-15; Tr. 1 pp. 92-97, 176, 253-255, 258; Tr. 2 pp. 37, 152-54, 218-22)

d. On January 27, Complainant drove from Colorado to Los Lunas, New Mexico, where he stopped and took a required 10-hour Department of Transportation rest period. Complainant ended his required rest period at 8:30 am on January 28, which was his fifth, and final, day on the route. Complainant picked up a cargo load from a Walmart in Los Lunas for a scheduled delivery to Respondent's headquarters location in El Paso, which was referred to as the "yard." This was the final leg of Complainant's triangle route, and it was referred to as "T-call" delivery in reference to the route ending with a delivery at Respondent's "terminal" or "yard." (JX-8; JX-10; JX-13; Tr. 1 pp. 20-24, 97-99, 108, 256, 259-261, 270, 291-92; Tr. 2. pp. 217-19)

e. While Complainant was in transit for the final leg, Respondent's dispatch section changed the trip plan to direct Complainant to make deliveries to separate Walmart customer locations in El Paso rather than Respondent's yard. This would have extended Complainant's driving time by approximately 3 to 5 hours. This change was made because Complainant's dispatcher, Mr. Elliott,

[7] All events relevant to this matter occurred in January 2018. The year citation is omitted from all following findings of fact.

concluded Complainant was running behind on his delivery time. Complainant learned of the trip change when he read a PeopleNet message upon arriving at a Pilot truck stop in Anthony, New Mexico, which is approximately 35 miles from Respondent's yard. (JX-12; JX-13; JX-84; Tr. 1 pp. 100, 106-08, 114-115, 189, 258, 266, 270, 292-300, 304, 310-12, 346, 351, 355-56; Tr. 2. pp. 218)

f. Upon learning of the change to the delivery location, Complainant contacted Mr. Elliott via a PeopleNet message and informed Mr. Elliott that he believed he was becoming fatigued and "likely to become impaired." Complainant did not indicate that he was too fatigued at that time to continue driving, but rather he informed Mr. Elliot via PeopleNet that he would not make the individual stops in El Paso. Claimant indicated that he would instead drive to Respondent's yard, which he believed he could safely do. After receiving the message, Mr. Elliott sent Complainant a PeopleNet message and later telephoned Complainant to inquire why Complainant was tired after he had driven only a couple of hours since concluding a 10-hour rest break. Mr. Elliott made his inquiries for the purpose of trying to ascertain why Complainant was fatigued and whether it was safe for Complainant to continue driving. Complainant felt Mr. Elliott's inquiries were improper and violated Department of Transportation regulations. Complainant responded to Mr. Elliott's questions by saying, "I don't have to tell you. DOT regulations say I don't have to tell you." Complainant also informed Mr. Elliott that he was too tired to make multiple stops and intended to deliver the load to Respondent's El Paso yard as originally planned. Mr. Elliott informed Complainant that he would notify Respondent's customer service section and that Complainant's inability to deliver the load to the Walmart location could be deemed a driver service failure. As a result of his discussion with Mr. Elliott, Complainant began making phone videos of the messages he received to document the events and soliloquies about why he felt Respondent's communications were illegal. (JX-8, JX-10, JX-13, JX-25; JX-26; JX-41; JX-58; Tr. 1 pp. 101, 104-11, 113-114, 211-13, 271-74; 346, 357, 361-63, 381, 388-91, 432; Tr. 2. pp. 229-35)

g. At 3:24 p.m. on January 28, Mr. Elliott sent an email with the subject line "1352/2142301 Walmart Driver refusal to load" to his supervisors and Respondent's customer service section. The email began by specifically noting in the first sentence that Complainant was ". . . stating he is too fatigued to complete his two stops on his Walmart load." When Walmart representatives were notified, they asked if Complainant could at least come to the first stop. As a result of this request, Mr. Elliott sent Complainant a PeopleNet message while he was driving to El Paso. The message said, "CHARLES, I TRIED CALLING BUT NO ANSWER. YOU ARE NOT AUTHORIZED TO DROP THIS LOAD AT THE YARD. PLEASE BRING IT TO THE FIRST STOP AND THEN WE WILL TAKE CARE OF IT THERE. THANK YOU." Mr. Elliott intended to have the load picked up at that location by another driver who would finish the remaining delivery stops. This Walmart delivery location was closer to the Complainant's location in Anthony, New Mexico and would have resulted in Complainant driving a shorter distance. Complainant received the message with the new directions while driving and did not read it because of safety concerns, so he did not become aware of the message until reading it upon arriving at Respondent's yard location. (JX-8; JX-9; JX-13; JX-19; JX-20: Tr. 1, pp. 116, 125, 189-190, 206-07, 259-60, 272-75, 305-07, 368, 372, 386, 437; Tr. 2. p. 260, 262)

h. Complainant arrived at Respondent's El Paso yard at approximately 4:30 p.m. After completing a post-trip vehicle inspection, he entered the Respondent's office building to drop off

truck cargo seals and bill of lading paperwork still in his possession. (JX-12; Tr.1 pp. 116, 120, 125, 179, 275-77)

i. The dispatch section of Respondent's yard office building consisted of a large, shared open space room with desk working stations for the dispatchers. Drivers interacted with the dispatch personnel through a counter window area on a side of the dispatcher's office that was open to a main hallway. This was Complainant's first occasion to directly interact with personnel at the Respondent's dispatch section office. He had never previously met any of the personnel working in the office, and they did not know him. (JX-9; Tr. 1. pp 50-51, 55-67, 125, 275-77, 423, 439; Tr. 2. pp 168-174)

j. Upon approaching the dispatcher counter window, Complainant observed dispatchers working on phone calls. Complainant asked Mr. Elliott, whose identity he did not know at that time, where to return the cargo seals. Mr. Elliott confirmed Complainant's identity as the driver of vehicle 1352, and he asked Complainant why he had not delivered the load to the first Walmart location as requested. Complainant asserted that Mr. Elliott had tried to make him operate the vehicle unsafely and began video recording their conversation with his phone.[8] The two men talked for approximately three to five minutes before Mr. Elliott requested that Complainant report to the safety department. Complainant initially remained at the dispatch counter window while Mr. Elliott answered a phone call to assist another driver. At that point, Mr. Elliott became uncomfortable and felt Complainant's behavior was disruptive, and he believed Complainant was angry and considered Complainant's demeanor to be hostile. He felt Complainant was speaking to him with a loud tone and raised voice volume that he believed other dispatchers and his supervisor, Mr. Bashur, could also hear. Conversely, Complainant was unhappy with Mr. Elliott's early communication, but Complainant did not feel that he yelled or shouted at Mr. Elliott. Complainant thought Mr. Elliott used a raised voice tone during their interaction. Neither Complainant nor Mr. Elliott used profanity during this exchange. (JX-9; Tr. 1 pp. 125-132; 136, 180-184, 188, 197-200, 277-82, 307-310, 393, 396, 399, 412-14; Tr. 2 pp. 174-187).

k. Mr. Bashur was on a phone call when the discussion between Complainant and Mr. Elliott occurred and was unaware of exactly what was occurring; but he was aware of a commotion, heard what he considered yelling, and observed Ms. Garcia leave the dispatch office and return. Mr. Bashur was aware that, while on the final leg of his route, Complainant had informed Mr. Elliott that he believed he was too fatigued to safely complete the entire route. Although he was aware of the details of the conversation, Mr. Bashur's personal management approach was to let the assigned dispatcher attempt to address driver complaints, and he refrained from intervening unless a driver or dispatcher requested his assistance. (Tr. 1 pp. 309-310, 408-11, 422-23, 432-34)

l. Ms. Garcia observed Complainant's interactions with Mr. Elliott and believed Claimant's comments were aggressive, unprofessional, and intended to make Mr. Elliott mad or instigate an argument. She obtained the cargo seals from Complainant and directed him to report to safety. (Tr. 1 pp. 137, 184-87, 199-205, 284-86)

[8] These videos are not part of the evidence submitted by either party. Similarly, while Respondent had a security camera system that covered the dispatcher section, the video of the interaction between Complainant and the dispatchers was not saved.

m. Respondent's safety section was located directly across the hallway from the dispatch office window counter. At the safety section window counter, Complainant spoke with Ms. Gonzalez, whom Complainant believed would have been able to see his interaction with Mr. Elliott. Ms. Gonzalez does not recall ever overhearing disruptive comments or a discussion coming from the dispatch office area that involved Complainant, and she does not recall ever meeting the Complainant. (Tr. 1. pp. 50-51, 56, 69, 131, 137)

n. Upon completing his check out with the safety section, Complainant returned to the dispatch counter and resumed video recording while talking to Mr. Elliott. Upon observing this, Ms. Garcia stepped into the hallway and requested that Complainant depart the area because she believed he was acting inappropriately and disruptively. Although Mr. Bashur could not observe the discussion between Ms. Garcia and Complainant, he heard what he considered to be yelling from someone. Ms. Garcia intervened again because she felt Complainant's conduct was unprofessional and distracting, but she did not believe he posed a threat of injury. After Ms. Garcia spoke to Complainant, he left the dispatch office. (JX-9; Tr. 1. pp. 284-88, 412-14, 430-431; Tr. 2. pp. 174-187)

o. Mr. Bashur talked with Mr. Elliott and Ms. Garcia about the incident and instructed them to send an email to senior management that described the incident. At 5:45 p.m. that day, Mr. Elliott forwarded his original email and an additional summary of his dispatch office interaction with Complainant to his supervisors. At 6:49 that day, Mr. Bashur added some observations about the incident to Mr. Elliott's initial email; he opined that Complainant had not displayed a sense of urgency to complete the final leg of his route and was considered to have "service failed on all 3 stops . . ." (JX-9; Tr. 1. pp. 284-88, 412-14, 430-431; Tr. 2. pp. 174-187)

p. As Mr. Elliott, Mr. Bashur, and Ms. Garcia sent emails about Complainant's report of impending fatigue and decision not to make any Walmart deliveries, Mr. Jones read them. After considering all the facts addressed in the emails, Mr. Jones concluded that Complainant had engaged in unacceptable and disruptive conduct at the dispatch office. In pertinent part, Mr. Jones specifically knew that Complainant believed he was "too fatigued to complete his two stops" and "did not want to continue on with the load." As a result, at 7:24 p.m. that day, Mr. Jones sent a two-word email response directing the other managers to "can him." Mr. Jones intended this direction to result in the termination of Complainant's employment. (JX-9; JX-26; Tr. 1 pp. 242, 245-46, 258, 285-87, 441; Tr. 2 pp. 211-212, 241-247)

q. The next day, Mr. Jones briefly discussed the events and Complainant's actions on the previous day and with Mr. Ginger, who informed Mr. Jones that he had verified the prior day's events with employees who witnessed Complainant's conduct. Mr. Jones concluded that his prior decision to terminate Complainant's employment continued to be justified. Complainant's Fleet Manager, Mr. Andrew Miller, informed Complainant that his employment was being terminated. Mr. Elliott was informed that Complainant was terminated because of his unprofessional interaction with Mr. Elliott. Although Respondent had a video security system that may have recorded Complainant's actions at the dispatch office, Mr. Jones did not arrange to view the recordings before ratifying his decision to terminate Complainant. Instead, he relied upon the representations of other employees who reported being upset by Complainant's conduct. No formal paperwork identifying Complainant as a driver responsible for a service failure was issued

or provided to Complainant. (JX-9; JX-13; Tr. 1 pp. 141, 258, 260-261, 286-87, 441-42; Tr. 2 p. 39, 46, 49, 244-247, 253-54, 257-262)

r. Complainant was unemployed until April 2018, when he accepted a driving position with Fox Express for a pay rate of $.35 per mile. On August 7, Mr. Javier Mendoza, a driver recruiter for Respondent, telephoned and emailed Complainant to offer him the opportunity to apply to return to work for Respondent as a driver. Complainant declined Respondent's offer because he did not want to drive the longer routes that Respondent had assigned to him. Complainant's job with Fox Express ended in April of 2019, and he subsequently pursued and obtained work outside the truck driving profession. (JX-4, JX-30; JX-32; JX-33; JX-71; JX-83; Tr. 1 pp. 152-57; Tr. 2 pp. 274-275; 277-78)

s. In filing his Complaint and pursuing it through a hearing on the matter, Complainant incurred a total of approximately $2,000 in costs. Included among these costs are payments for copies, paper, notary services, mailings, bindings, computer recovery services and travel fuel. Included in this figure is the purchase of an Acer Chromebook laptop computer.[9] (JX-82; Tr 2. pp 288-90)

6. <u>Applicable Law and Analysis.</u>

a. ***Elements of STAA Claim.*** No employer may discharge, discipline, or discriminate against any employee for disclosing or providing information related to any violation or alleged violation of a commercial motor vehicle safety or security regulation, standard, or order. 49 U.S.C. § 31105(a)(1)(A). Likewise, no employer may discharge an employee for refusing to operate a vehicle because the "operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security" or 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."[10] *Id.* at § 31105(a)(1)(B).

Congress amended the STAA on August 3, 2007, to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b), which provides whistleblower protection for employees in the aviation industry. *See* 49 U.S.C. § 31105(b)(1).

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the company took an adverse action against him, and that his protected activity was a contributing factor in the adverse action. *See Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-006, slip op. at 6 (ARB Jan. 10, 2018); *Williams v.*

[9] Exhibit 82 does not contain a purchase receipt for the laptop. The undersigned takes judicial notice that the cost for this make and model of laptop computer ranges from $250.00 to $650.00. See https://store.acer.com.

[10] An "employee's apprehension of serious injury is reasonable only if a reasonable individual, in the circumstances then confronting the employee, would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 U.S.C. § 31105(a)(2)

Domino's Pizza, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011). Failure to establish one of these elements requires denial of the complaint. *Luckie v. United Parcel Serv. Inc.*, ARB Nos. 05-026, 054, ALJ No. 2003-STA-039, slip op. at 6 (ARB June 29, 2007).

If a complainant proves by a preponderance of the evidence that the protected activity was a contributing factor in the adverse personnel action, the employer can avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected behavior. *See* 49 U.S.C. § 42121(b)(2)(B)(iv); *see also Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 12 (ARB Feb. 29, 2012). Clear and convincing evidence is the intermediate burden of proof, in between preponderance of evidence and proof beyond reasonable doubt. The clear and convincing evidentiary standard requires "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Williams*, ARB No. 09-092, slip op. at 9, n.6 (citation omitted).

b. ***Protected Activity.***

To engage in protected activity under the STAA, a complainant is not required to prove an actual violation of a federal safety provision. Instead, "a complainant need only demonstrate that he or she had a reasonable belief that the conduct complained of violated pertinent law or regulations." *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-006, slip op. at 10 (ARB Jan. 10, 2018). "This standard requires both a subjective belief and an objective belief." *Newell*, ARB No. 16-007, slip op. at 10. The subjective component is "satisfied by showing the complainant actually believed that the conduct he complained of constituted a violation of relevant law. The objective component "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Garrett v. Bigfoot Energy Servs., LLC*, ARB No. 16-057, ALJ No. 2015-STA-047, slip op. at 7 (ARB May 14, 2018)(quoting *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022 (ARB Nov. 28, 2012)).

In addition to the Act's complaint clause, a complainant may also prevail by showing that he suffered adverse action because he refused to operate the commercial vehicle in a manner that would violate 49 C.F.R. §392.3 (commonly called the fatigue rule); this regulation states: "[n]o driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." *Berg v. S&H Express*, ARB No. 2017-0075, ALJ No. 2015-STA-00014, slip op. at 3-4 (June 4, 2020); *Jeanty v. Lilly Transp. Corp.*, ARB No. 2019-0005, ALJ No. 2018-STA-00013, slip op. at 3 (May 13, 2020). As under the complaint clause of the STAA, "[t]o be protected, a complainant must show that he refused to drive based on a subjectively and objectively reasonable belief regarding the existence of an actual or potential violation." *Jeanty*, ARB No. 2019-0005, slip op. at 3.

In his pro se capacity, Complainant first asserts that he engaged in protected activity by "reporting an unsafe condition," which he identified as reporting fatigue that impaired his ability to drive. Respondent counters by arguing that the complaint clause of the STAA protects employes who complain about a condition or event based on a reasonable belief that the company was engaging in a violation of a vehicle safety regulation. Respondent maintains that, in applying that

standard to the facts of this case, Complainant's reports of fatigue do not constitute complaints concerning a violation of a vehicle safety regulation. The undersigned agrees.

Complainant did not "report" that Respondent was engaging in existing conduct that he believed constituted a violation of a vehicle safety regulation. Rather, he reported that he was approaching a level of fatigue that would, in his opinion, very soon result in an unsafe condition. However, as an experienced driver with a meticulous commitment to safety, Complainant continued to drive to Respondent's "yard" facility because he believed he could in fact do so safely. As such, there was no "unsafe condition" yet in existence for Respondent to violate and Complainant to report. However, this conclusion is not dispositive of the protected activity analysis in this matter.

Complainant also contends he should prevail under Section 31105(a)(1)(B)(i) or (ii)[11] of the Act because he refused to drive based on a subjectively and objectively reasonable belief that it would have been unsafe for him to continue driving to complete all the stops on the final leg of his route because he would have violated the fatigue rule or because he had a reasonable apprehension of serious injury to the employee or public.

Respondent asserts that Complainant cannot avail himself of the "refusal to drive" protection under the Act because, after reporting his fatigue to Mr. Elliott, Complainant continued driving and delivered his vehicle and load to Respondent's "yard" facility. This argument, however, ignores Complainant's initial and unchanged refusal to drive the entire route as modified by Respondent. Respondent modified the load delivery location of Complaint's final leg from its "yard" facility to several Walmart locations. Whether that modification included three or five stops is irrelevant. Complainant's load drop-off sites were modified, and he unequivocally informed Respondent that he refused to drive to any of those locations because he believed he would become too fatigued to do so safely. The fact that he ultimately drove to Respondent's "yard" facility does not diminish Complainant's subjective safety concern about refusing to continue to drive beyond that point. Indeed, the Administrative Review Board held that "a complainant who produces sufficient evidence in support of a future fatigue claim could establish that a refusal to drive was protected activity." *Stauffer, v. Wal-Mart Stores, Inc.*, ARB No. 1999-0107, ALJ No. 1999-STA-00021, slip op. at 7 (ARB Nov. 30, 1999).

To show that he engaged in protected activity, Complainant must prove by a preponderance of the evidence that he refused to drive based on a subjectively and objectively reasonable belief that his ability or alertness were in fact so impaired, or so likely to become impaired through an illness or fatigue, as to make it unsafe for him to continue to operate a commercial motor vehicle. Based on the totality of the evidence, the undersigned concludes Complainant did not meet this required burden of proof.

Complainant's position that Respondent was bound to accept his blanket assertion that he was too fatigued to drive without further explanation lacks legal support. *Wrobel v. Roadway Express*,

[11] The ARB has clearly held that Section (a)(1)(B)(ii) covers more than just mechanical defects of a vehicle – it is also intended to ensure "that employees are not forced to commit . . . unsafe acts." *Melton v. Yellow Transp. Inc*., ARB No. 2006-0052, ALJ No. 2005-STA-00002, slip op. at 5 (ARB Sept 30, 2008). Thus, Complainant's physical condition could cause him to have a reasonable apprehension that operating a motor vehicle would pose a risk of serious injury to him or the public if he drove in that condition.

ARB No. 01-091, ALJ No. 2000-STA-00048, slip op. at 3 (July 31, 2003) (holding that driver's refusal to drive after telling dispatcher he was "sick" without further elaboration does not communicate protected activity to employer); *see also Stout v. Yellow Freight Sys., Inc.*, 1999-STA-00042, slip op. at 8 (ALJ Dec. 3, 1999), *aff'd*, ARB No. 2000-0017 (Jan. 31, 2003) (holding "[i]t is not enough for the employee to simply state that he is not feeling well or that he is 'sick and tired.' The comments must be explicit enough to convey to Respondent that the refusal to continue to drive was because the complainant's ability to do so was impaired.").

Here, Complainant clearly harbored a reasonable subjective concern about a growing level of fatigue that he felt would, in the near future, impact his ability to complete all the scheduled stops on the last leg of his route. His testimony and the virtually simultaneous video recordings regarding his interaction and discussion with Mr. Elliott demonstrate that he sincerely believed that continuing to drive to multiple stops would result in fatigue and create an unsafe driving condition. Complainant's concerns about violating the fatigue rule or causing a serious injury were certainly subjectively reasonable. He commenced his triangle route on the heels of several days of being sick. The nature of the route and the multiple stops were – for Complainant – an unexpected and more complex type of driving than he expected. The assessment of when a person's level of fatigue starts to impact the ability to effectively function is inherently subjective by nature and different for every person.

Conversely, Complainant failed to demonstrate that his belief regarding his future fatigue is objectively reasonable. The record is devoid of any additional substantive evidence related to the nature, duration, and treatment of Complainant's illness prior to commencing his "triangle" run. Nor does the evidence establish that – despite taking rest breaks that complied with DOT requirements – Complainant's driving duties caused a cumulative effect that prevented him from becoming fully refreshed and alert after his rest breaks. As an example, the record does not establish the specific number of individual drops Complainant made at each city on his route and how much time and effort Complainant expended during these drops. Similarly, there is no persuasive evidence that identifies the nature and duration of Complainant's pre-trip illness, any medication and its effects on Complainant prior to or during his route, or how the illness impacted his rest breaks during the route. Without information of this nature, the undersigned cannot determine the objective reasonableness of Complainant's activity. If such supporting information had been presented, it may well be objectively reasonable to conclude that driving a strenuous multistate route with multiple cargo drops over the course of five days would have the cumulative effect of sapping the energy of a person still recovering from an illness and cause them to fatigue more quickly.

However, Complainant dogmatically refused to answer Mr. Elliott's inquiry about the reason and basis for his fatigue. This conduct denied Respondent important necessary information that would have clearly conveyed an objective basis for a protected activity and thus sufficiently put Respondent on notice of the reasons for Complainant's safety concern. To the contrary, Complainant's conduct wholly denied Respondent the ability to understand the reasons for his refusal to continue driving. As a result, it was rational for Respondent, through the actions of Mr. Elliott, to decide there was no objectively reasonable basis to believe that Complainant was on the verge of soon becoming too tired to complete his route. Respondent knew Complainant had observed all his required DOT rest periods and had very recently completed a 10-hour break when he informed Mr. Elliott of his concern over fatigue. Respondent also knew Complainant had only

been driving for a comparatively brief period on the last day of his route. Complainant conveyed none of his subjective exacerbating physical health factors to Mr. Elliott nor did he identify a medical basis to support his position. Accordingly, Respondent was not provided an explanation that would put it on notice of the reasons why Complainant was in fact engaging in protected activity by refusing to drive in a manner that he believed would soon result in him violating the fatigue rule in 49 C.F.R. § 392.3 or cause reasonable apprehension of serious injury. As such, Complainant has not satisfied the "sufficient evidence" standard as discussed by the Board in the *Stauffer* decision.

Consequently, the undersigned concludes Complainant's conduct and actions during the final leg of his driving route for Respondent does not constitute protected activity under either Section (a)(1)(B)(i) or (ii) of the Act.

Because Complainant did not engage in protected activity, it is unnecessary for the undersigned to address the other identified contested issues of law or fact.

7. Decision and Order. Based upon the above analysis, the undersigned makes the following decision and order:

a. Complainant failed to carry his burden to prove by a preponderance of the evidence that he engaged in protected activity under the STAA.

b. The Complaint in this matter is DENIED.

SO ORDERED this day.

TRACY A. DALY

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 the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See*

29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions, or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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

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).

FILING AND SERVICE OF AN APPEAL

1. Use of EFS System: The Board's Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible interface. Use of the EFS system is free of charge to all users. To file an appeal using the EFS System go to https://efile.dol.gov. All filers are required to comply with the Board's rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at https://www.ecfr.gov/current/title-29/subtitle-A/part-26.

A. Attorneys and Lay Representatives: Use of the EFS system is **mandatory for all attorneys and lay representatives** for all filings and all service related to cases filed with the Board, absent an exemption granted in advance for good cause shown. 29 C.F.R. § 26.3(a)(1), (2).

B. Self-Represented Parties: **Use of the EFS system is strongly encouraged for all self-represented parties** with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all required service automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

Self-represented parties who choose not to use the EFS system must file by mail or by personal or commercial delivery all pleadings, including briefs, appendices, motions, and other supporting documentation, directed to:

Administrative Review Board

Clerk of the Appellate Boards
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220
Washington, D.C., 20210

2. EFS Registration and Duty to Designate E-mail Address for Service

To use the Board's EFS system, a party must have a validated user account. To create a validated EFS user account, a party must register and designate a valid e-mail address by going to https://efile.dol.gov, select the button to "Create Account," and proceed through the registration process. If the party already has an account, they may simply use the option to "Sign In."

Once a valid EFS account and profile has been created, the party may file a petition for review through the EFS system by selecting "eFile & eService with the Administrative Review Board" from the main dashboard and selecting the button "File a New Appeal - ARB." In order for any other party (other than the EFS user who filed the appeal) to access the appeal, the party must submit an access request. To submit an access request, parties must log into the EFS System, select "eFile & eService with the Administrative Review Board," select the button "Request Access to Appeals," search for and select the appeal the party is requesting access to, answer the questions as prompted, and click the button "Submit to DOL."

Additional information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as step-by-step User Guides, answers to frequently asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the "Support" tab at https://efile.dol.gov.

3. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

4. Service of Filings

A. Service by Parties

Service on Registered EFS Users: Service upon registered EFS users is accomplished automatically by the EFS system.

Service on Other Parties or Participants: Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

B. Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail (unless otherwise required by law). If a party unrepresented by counsel files their appeal by regular mail, that party will be served with Board-issued documents by regular mail. Any party may opt into e-service at any time by registering for an EFS account as directed above, even if they initially filed their appeal by regular mail or delivery.

5. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and manner of service. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

6. Inquiries and Correspondence

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of the Appellate Boards by telephone at 202-693-6300 or by fax at 202-513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARB-Correspondence@dol.gov.