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

Issue Date: 02 September 2022

In the Matter of:

CURTIS DICK,
Complainant,

v.

USAA AND CONTRACTED DRIVER SERVICES,
Respondents,

CASE NO.: 2018-STA-00054

Appearances:

Complainant: Curtis Dick in a pro se capacity
Respondent (Contracted Driver Services): David Selden, 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 Respondents USAA and Contracted Driver Services (CDS) 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 Respondents 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. The undersigned ALJ was assigned to preside over a formal hearing in this matter.

Prior to the formal hearing, the undersigned granted summary decision in favor of

Respondent USAA and dismissed Complainant's claim against it with prejudice. Complainant filed an interlocutory appeal of this decision with the Administrative Review Board (ARB). For the sake of judicial efficiency, the undersigned stayed all proceedings against Respondent CDS until the ARB addressed Complainant's interlocutory appeal. That appeal was dismissed by the ARB, and the case was returned to the undersigned to conduct a formal hearing and render a decision in the case against Respondent CDS on its merits.

The undersigned conducted a formal hearing in this matter by video conference. The parties were afforded a full opportunity to adduce testimony and offer documentary evidence. In compliance with deadlines ordered by the undersigned, Complainant and Respondent CDS filed post-hearing briefs with legal analysis and factual arguments. Both parties also filed reply briefs, and the record in this matter was complete on November 20, 2021.[1]

2. Statement of the Case.

To accommodate Complainant's pro se status, the undersigned allowed Complainant to submit a Pleading Complaint and two amendments to ensure he fully identified his alleged protected activity.[2] Taken together, Complainant's filings assert that he engaged in the following protected activity under the STAA: 1) he informed an employee of USAA, one of Respondent CDS's clients, that he did not want to utilize an electronic truck location tracking program in a commercial motor vehicle because he believed to do so would cause him to misrepresent his prior driving hours; 2) he was directed to perform job duties during a mandatory Department of Transportation work break; 3) he refused to answer phone calls or texts while driving on a job for USAA; and, 4) he reported defective equipment on a commercial motor vehicle while driving for a company named Thunder Ridge.[3] As a result of these actions, Complainant contends he suffered adverse action when Respondent 1) removed him from an assigned truck driving job; and, 2) subsequently 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 remove him from an assigned job and later terminate his employment. Respondent further maintains it had no knowledge of any activity that Complainant considered to be a report of unsafe driving conditions or a regulatory violation that would be protected activity under the Act. Rather, Respondent asserts Complainant committed service failures and engaged in argumentative conversations and unprofessional conduct with its clients and other employees, and these actions caused Respondent to remove Complainant from a driving job assignment and later terminate his employment. Additionally, Respondent further avows that, even if Complainant's conduct constitutes protected

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

[2] These are: 1) Complaint of Curtis C. Dick, Pursuant to 49 U.S.C. §31105 dated June 11, 2018; 2) Amended Complaint of Curtis C. Dick, Pursuant to 49 U.S.C. §31105 dated August 7, 2018: and, 3) Amended Final Pleading Complaint of Curtis C. Dick, Pursuant to 49 U.S.C. §31105 filed August 21, 2018.

[3] Paragraphs 13 to 19 of Complainant's Amended Pleading Complaint fall under the title heading "Protected Activity." The undersigned considered Paragraphs 16 and 17 as an assertion of ongoing protected activity related his reports of vehicle equipment safety concerns. Rather than asserting specific protected activity, paragraphs 18 and 19 contain legal argument by the Complainant related to regulatory requirements.

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. Contested Issues of Fact and Law. 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 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. ***Stipulated Facts.*** Respondent proposed written stipulations to Complainant regarding a number of uncontested facts in this case. The undersigned reviewed each stipulation with Complainant at the hearing and Complainant agreed to each stipulation. Accordingly, the undersigned accepted these stipulations as uncontroverted facts in this matter, and they are included in the undersigned's relevant and material findings of facts.[6] (AX-1, Tr. pp. 10-14)

b. ***Exhibits Admitted into Evidence.*** The undersigned fully considered the exhibits admitted at the hearing. However, as specifically provided in the undersigned's 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

[4] Exhibits are marked as follows: CX for Complainant Exhibits, RX for Respondent Exhibits, and AX for Appellate Exhibits. Reference to an individual exhibit is by party 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).

[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 curiam).

[6] Prior to the hearing, the parties entered into written Joint Stipulations (marked AX-2) that are a subset of the stipulations affirmed at the hearing. Respondent did not agree to stipulate to the proposed written stipulations of Complainant. (Tr. p. 16)

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.

1) Complainant Exhibits. Complainant offered thirty-two (32) exhibits for identification. The undersigned sustained Respondent's objection to CX-19 and overruled Respondent's objections to CX-29 through CX-32. The undersigned admitted CX-1 to CX-18 and CX-20 to CX-32 into evidence and considered them as substantive evidence. (Tr. pp. 23-29)

2) Respondent's Exhibits. Respondent offered fifty-four (54) exhibits for identification. Complainant did not file the required written objections to any of Respondent's exhibits; however, at the hearing he stated generally he had objections but was unable to identify his objections by exhibit number due to an issue with his computer. Accordingly, the undersigned admitted RX-1 to RX-54 into evidence and considered them as substantive evidence. However, because of Complainant's pro se status, the undersigned accorded him the opportunity to raise his untimely objections in his post-hearing brief and request reconsideration of the undersigned's ruling on specific exhibits. In his post hearing brief, Complainant objected to Respondent's Exhibits 1 through 38 "due to irrelevant content. . ." (Tr. pp. 29-36; CB p. 6) Claimant's objections lack merit, and the undersigned denies the request to reconsider the admission of those exhibits into evidence.

c. ***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. *See generally Bank v. Chicago Grain Trimmers Assoc., 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). The undersigned makes the following credibility assessments of the witnesses who presented testimony in this case:

1) Mr. Calvin Schlafke. (Tr. pp. 57-238) The witness's testimony addressed his job and duties as a Contemporary Fleet and Logistics Coordinator for USAA. Generally, he explained his job duties related to oversight and compliance with Department of Transportation (DOT) rules and regulations applicable to commercial motor vehicles owned by USAA. More specifically, he described the action he took to coordinate with Complainant and arrange for Complainant to pick up a USAA commercial motor vehicle and drive it to a location near a wildfire in Ventura, California in early December 2017. Mr. Schlafke's testimony showed a good recall of the subjects and details of his discussions with Complainant regarding the driving job assigned to Complainant and the instructions and expectations CDS had for Complainant's performance on this job. During his testimony, Mr. Schlafke displayed a forthright demeanor, and he provided answers that

contained specific details and were a genuine effort to present an accurate recounting of his involvement with Complainant. Nothing in the record suggested that he harbored a personal interest in the outcome of this matter or animus toward Complainant. Of particular note, Mr. Schlafke's testimony regarding his conclusions that Complainant had committed driving service failures was corroborated by written communication he sent to CDS immediately after the relevant events occurred. His testimony was highly credible and corroborated by other evidence received at the hearing. The undersigned accorded the witness's testimony significant weight.

2) Ms. Lydia Eschler. (Tr. pp. 283-349) The witness's testimony described her past experience and job duties as a Compliance Specialist for Respondent. She also specifically explained the events surrounding a phone call she received from Complainant after he was removed by Respondent as a driver for USAA jobs. Her 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 a truthful recounting of her recollection. Her testimony was given considerable weight.

3) Complainant. (Tr. pp. 354-439) Complainant testified about the nature of his work as a driver for Respondent and described the events that occurred during a job in which he drove a commercial motor vehicle for USAA. He presented his testimony in a clearly sincere and heartfelt manner, but the majority of his testimony was premised on his unsupported subjective assumptions about the events, facts and actions in this case. Some portions of his testimony relating to the central events supporting his claim are consistent with information provided by other witnesses or corroborated by exhibits. However, his assertions regarding the basis, purpose, or intent behind Respondent's decision to terminate his employment are neither supported nor corroborated directly or circumstantially by other witness testimony or documentary evidence.

His testimony also demonstrated a recurrent inability to clearly identify and explain key facts and details about critical events related to Respondent's decision to terminate his employment. Complainant routinely and repeatedly exhibited either an inability or unwillingness to directly answer specific and pointed questions related to relevant events about his job performance and employment termination. On a number of occasions, he provided contradictory answers. While the undersigned recognized the challenges Complainant faced as a pro se litigant in a formal hearing, his answers were often compound in nature, largely difficult to follow, and lacked specificity and details. During his testimony, Complainant displayed an abrupt and occasionally dismissive demeanor toward the people who asked him questions. In general, he demonstrated a communication style that seemed confrontational in nature although the undersigned concluded this may well have been unintentional. Overall, his testimony regarding the material contested facts related to his complaint was accorded partial weight.

4) Ms. Cecilia Fernandez. (Tr. pp. 439-470) The witness's testimony described her role as Respondent's Director of Safety and Compliance, which included the primary duty of managing truck drivers employed by Respondent. She described Respondent's obligations regarding truck driver qualifications and safety certifications. Her answers were consistent and supported by other testimony and documentary evidence. She displayed no bias and demonstrated a sincere effort to accurately and truthfully convey her knowledge of the relevant events in this matter. She was

consistently credible in her answers, and her testimony was accorded significant weight.

5) Mr. Justin Clarke. (Tr. pp. 471-541) As the owner and chief executive officer of Respondent, Mr. Clark's testimony detailed the events, circumstances and factors that were considered when making the decision to terminate Complainant's employment. He provided clear and thorough answers in response to questions. His explanation regarding the customer service and employee relationship concerns he formed about Complainant were fully detailed, persuasively justified and directly corroborated by other witness testimony and exhibit evidence. With a few minor exceptions, his testimony demonstrated no internal inconsistencies. His description of the reasons why Respondent's senior managers decided to terminate Complainant's employment were clearly identified and fully explained. His testimony was reliable, well supported, and it was given considerable weight.

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:[7]

a. CDS is a personnel staffing firm that provides intermittent, on-demand commercial motor vehicle drivers to client companies, including United Services Automobile Association ("USAA"), on an as-needed basis. USAA is a unique client for CDS; and as part of its contract with USAA, CDS is obligated to have drivers on standby for USAA jobs. In particular, CDS was responsible for providing drivers to transport a specialty commercial motor vehicle (hereinafter referred to as "disaster CMV") to natural disaster sites so USAA agents could provide relief assistance. This contractual obligation required CDS to dispatch a driver in one of USAA's disaster CMVs within a 24-hour period after USAA requested a driver for a job. Drivers employed by CDS to perform USAA jobs were obligated to notify USAA representatives of circumstances causing a delay in arriving at the disaster CMV departure location. (AX-1; RX-14; RX-34, p.1; Tr, pp. 11, 205-206, 477-82)

b. In February 2017, CDS hired Complainant as a commercial motor vehicle driver who would work out of the company's Texas branch office. Complainant was an at-will employee, and his work duties consisted of driving commercial motor vehicles on an intermittent basis for any of Respondent's clients. Complainant was free to accept or decline any driving job assignment offered by CDS as he desired. Conversely, CDS was not obligated to offer Complainant a certain number or type of driving jobs. Pursuant to its contract with USAA, CDS identified drivers it believed were qualified to be assigned as standby drivers for USAA driving jobs. USAA then screened and approved the driver nominee for assignment to its jobs if it was satisfied with the driver's qualifications. USAA approved Complainant as one of the standby drivers authorized for its jobs. As a designated USAA standby driver, when Complainant accepted a USAA driving job assignment he was expected to travel to a designated location, pick up a USAA disaster CMV and commence the assigned driving job within 24 hours. (AX-1, RX-15; RX-23. P.3; Tr. pp. 11-12, 205-206. 270-72, 496-98)

[7] 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.

c. On December 5, 2017,[8] USAA requested that CDS provide a driver to transport a disaster CMV from San Antonio, TX to Southern California. CDS contacted Complainant, who accepted the job. It was the fifth driving assignment Complainant would perform as an intermittent CDS driver for USAA, but the first one in which he would not be accompanied by a USAA employee. At 1:32 p.m. that day, Complainant was notified he would be required to travel from his residence in Cedar Hill, TX, a suburb of Dallas, to San Antonio within 24 hours to commence the driving job. Mr. Jeff Durante, an Operations Specialist for CDS, discussed the time-sensitive nature of the job with Complainant and advised him to be ready when USAA's travel department contacted Complainant to make flight arrangements. Mr. Durante informed Complainant that he was expected to arrive in in San Antonio as quickly as possible. However, when Complainant was later contacted by a scheduler in USAA's travel department, he indicated he was not able to depart on the earliest available flight and could only make a flight from Dallas to San Antonio that arrived at 9:58 pm on December 6, which would have been after the required 24-hour deployment schedule. (RX-1; RX-23, p. 3; RX-24, RX-38, RX-39, RX-42; Tr. pp. 73-75, 82, 109, 423)

d. In response to Complainant's failure to travel to San Antonio as required, Mr. Schlafke made the unprecedented decision to drive USAA's disaster CMV from San Antonio to El Paso, Texas to prevent a delay in transporting it to the destination in Southern California. Mr. Schlafke considered this arrangement to be a highly unusual and necessary adjustment because CDS was not providing USAA with its contracted driver service. As a result, Complainant's flight arrangements were modified so that he could meet Mr. Schlafke in El Paso to pick up the disaster CMV and continue driving it to the Southern California destination. Ms. Fernandez considered these events to be a significant service failure, and she requested that Mr. Durante arrange to have Complainant receive "at least a verbal warning for putting us on the spot with his customer." (RX-1; RX-6; RX-16, RX-30, RX-42; Tr. pp. 75, 83, 121, 208)

e. While discussing the adjusted travel schedule with Complainant, Mr. Schlafke informed Complainant the job was highly time sensitive, and he expected Complainant to start driving between 6:00 and 7:00 a.m. on the morning of December 7. To this end, during this conversation and other communications, Mr. Schlafke reminded Complainant to ensure he arrived with his required hours-of-service form complete. USAA requires the CDS drivers to have the form completed prior to arriving to pick up a vehicle for a driving job; this ensures USAA can confirm the drivers are complying with DOT hours-of-service limits. (RX-22; RX-30, p. 1; RX-42; Tr. pp. 76, 86, 104-06, 127, 520-21)

f. During the course of changing his flight arrangements, Complainant informed USAA travel department personnel that he could only be booked on the last departure flight from Dallas to El Paso. As a result, he was booked on a flight scheduled to land in El Paso at 9:15 p.m, but Complainant missed that flight. At approximately 9:00 p.m., Mr. Schlafke arrived in El Paso with the disaster CMV. However, he was unable to contact Complainant, and Complainant did not notify USAA that he had missed his flight. Complainant eventually arrived at El Paso, TX, airport around 1:00 a.m. on December 7, and Complainant reached his designated hotel at approximately 1:30 a.m. – nearly 36 hours after accepting the job. (RX-1, pp.1-2; RX-42; RX-43; Tr. pp. 12-13, 83, 124)

[8] All events relevant to this matter occurred in December 2017. The year citation is omitted from all following findings.

g. Upon meeting Mr. Schlafke at the hotel, Complainant did not have his required hours-of-service form. As a result, Complainant and Mr. Schlafke worked together to prepare the form with complete and accurate information, and they finished at approximately 2:30 a.m. CDS drivers for USAA jobs are required to have their hours-of-service forms prepared in advance, and Mr. Schlafke considered Complainant's failure to do so to be an unnecessary service delay. During this same time period, Mr. Schlafke explained an Electronic Logging Device (ELD) application installed on a tablet computer in the disaster CMV. USAA uses an ELD in its disaster CMV to track vehicle location, route of travel and the time periods during which the vehicle moves. While Mr. Schlafke explained how to operate the ELD, Complainant expressed opposition to using the ELD. Complainant told Mr. Schlafke that it was Complainant's obligation to track and record his driving hours. Mr. Schlafke endeavored to clarify that the ELD was a redundant and different system to the primary driver individual hours-of-service log used by Complainant and that the ELD tracked the vehicle's hours of operation and location. On several occasions, Complainant reiterated that he did not want to use the system and would personally track his driving hours. Complainant believed Mr. Schlafke wanted Complainant to input his past seven day driving history in an incorrect manner. Mr. Schlafke concluded that Complainant fundamentally failed to understand the purpose for the ELD system. Prior to that, Mr. Schlafke had not experienced problems with other CDS drivers using and operating the ELD system for USAA driving jobs. Complainant did not say he believed the ELD posed safety issues or that Complainant was being asked to engage in conduct that would be a safety regulation violation. Complainant had driven only 11 hours over two days during the past seven-day time period. He did not assert that he was being asked to drive in a manner that would violate regulations on hours of driving service limits. (RX-1, p.2; RX-22, p. 2; RX-29; Tr. pp. 84-86, 99-101, 104-06, 126-29, 140, 206-08, 376)

h. At the conclusion of their conversation about the ELD, Mr. Schlafke thought Complainant, as a driver for Respondent, had committed service failures; he felt Complainant had failed to furnish the timely driver service USAA had contracted with CDS to provide. (RX-1, p.2; RX-22, p. 2; Tr. pp. 85-86, 99, 128-29, 140, 206-08, 376)

i. Mr. Schlafke also did not hear Complainant say anything during any of their conversations that Mr. Schlafke interpreted as an expression of a safety concern by Complainant. (RX-1, p.2; RX-22, p. 2; Tr. pp. 84, 128-29, 140, 179-80, 206-08)

j. Complainant ultimately departed El Paso at approximately 8:25 a.m. on December 7, approximately 19 hours after CDS's required 24-hour dispatch time under the contract with USAA. His planned destination for that day was Palm Desert, CA, where he would need to stop for his required hours-of-service driving break. Because of the fluid nature of the wildfire, USAA informed Complainant that he would be provided the exact final delivery location for the disaster CMV as he got closer to the wildfire area. (RX-1, p. 2; Tr. pp 13-20, 129-33)

k. At approximately 8:37 p.m. on December 7, Complainant called USAA to report heavy traffic and inform them that he needed to stop in Blythe, CA, approximately 108 miles short of Palm Desert, for his required driving break. Complainant had not earlier advised USAA of any potential traffic delays, and his late notice that evening forced USAA to cancel the Palm Desert hotel reservation for Claimant, incur a late cancellation charge and make new hotel reservations.

(RX-1, p. 2; Tr. pp 13-20, 129-33)

l. Although he was scheduled to depart Blythe at 6:00 a.m. on December 8, Complainant did not leave Blythe with the disaster CMV until approximately 7:14 a.m. Around 11:05 a.m., Complainant arrived at a truck wash in Fontana, CA. He believed USAA wanted the disaster CMV to arrive at the destination location with a clean, well-maintained appearance, so he decided to get the vehicle washed. He spent more than three hours at the truck wash before leaving at 2:23 p.m. A portion of the time was caused by Complainant deciding that the disaster CMV had not originally been washed thoroughly, and as a result, he obtained a second truck wash. (RX-29, p. 10; RX-45; Tr. pp. 132-33, 166-69)

m. After leaving Fontana, Complainant drove for approximately 26 minutes before stopping at a truck stop in Ontario, CA to take a mandatory hours-of-service driving break. He resumed driving more than two hours later at 5:14 p.m. (RX-29, p. 10; Tr. pp. 132-33, 137, 166-69)

n. Complainant did not inform USAA personnel of his decision to stop at the truck wash and split that stop from his upcoming required hours-of-service driving break. Mr. Schlafke was unaware of Complainant's decision to stop until Mr. Schlafke contacted Complainant to inquire about Complainant's lack of progress toward the wildfire destination area. Mr. Schlafke considered Complainant's time spent at the truck wash excessive and a driving service failure. He felt Complainant should have taken his hours-of-service break at the Fontana truck wash rather than briefly continuing the route before again stopping. (RX-1, pg. 2; RX-45; Tr. p. 131-33, 137, 161-63, 175-76)

o. Upon departing at 5:14 p.m., Complainant took a route contrary to the directions and map Mr. Schlafke had provided to Complainant in El Paso. Mr. Schlafke expected Complainant to follow the route mapped for him. In tracking the vehicle's route, Mr. Schlafke realized Complainant was driving toward a portion of highway impacted by fire activity. On several occasions, he called Complainant or sent him a text message to inform him of the problem, and he felt Complainant argued with him. (Tr. pp. 135-37)

p. On December 8, in a telephone call with Mr. Durante, Mr. Schlafke informed CDS that USAA required that Complainant be removed from service as a driver for the USAA program "due to the multiple service failures by Complainant over the last three days." In a follow-up e-mail to this conversation, Mr. Schlafke provided CDS with a list of specific reasons why USAA required that Complainant be removed as a program driver. Mr. Schlafke identified the factors that formed the basis for USAA's decision. These included: 1) a number of driver deployment failures that resulted in Complainant not commencing the driving job within the required 24-hour period; 2) in route driving failures over the course of December 6 and 7 that delayed delivery of the disaster CMV to the destination location; 3) failure to communicate with USAA to inform it of delays to delivery of the disaster CMV; and, 4) interacting with USAA travel personnel in an argumentative manner. Mr. Schlafke supported each of these general reasons with specific examples. Although the examples noted Complainant was argumentative when they discussed the ELD system, Mr. Schlafke's communications did not identify or mention any interaction or discussions during which Complainant expressed safety concerns. (CX-1, RX-1, RX-2; RX-3; RX-16; Tr. pp. 92-95, 108-11, 118-21, 139, 208)

q. In response, Mr. Durante arranged for CDS to replace Complainant with another driver, and the new driver assumed the driving responsibilities for the remainder of the USAA disaster CMV deployment to the California fire location. Changing drivers resulted in CDS incurring approximately $767.00 in additional expenses. (RX-1, RX-2, p. 2-3; RX-3; RX-7 pp. 10-20; Tr. pp. 92-95, 208)

r. After being removed as the driver on the USAA wildfire job, Complainant telephoned Ms. Eschler at approximately 4:40 p.m. When Ms. Eschler answered his call, Complainant requested that she listen to him and not speak. He gave her his opinions about his performance for USAA and spoke uninterrupted for approximately 15 minutes until Ms. Eschler ended the conversation by telling Complainant she had to leave work. During his soliloquy Complainant told Ms. Eschler he felt it was unsafe for him to answer USAA's calls or respond to text messages while he was driving; but he did not report any specific safety concerns to Ms. Eschler, and she never took anything Complainant said to be a request that she report a safety concern to CDS's senior management. (Tr. pp. 162-63, 270-75, 503)

s. On the morning of December 9, Complainant sent Mr. Durante a detailed one-page, seven paragraph single spaced e-mail with the subject line "Ventura Fire Deployment / USAA / Curtis C. Dick." In the e-mail he recognized there were "timelines concerns regarding my performance." The e-mail contained detailed explanations regarding the stops he made while driving USAA's disaster vehicle. Complainant endeavored to rebut what he felt was USAA's opinion that he "was wasting time at the truck stop." He provided an extensive explanation of the events that occurred on December 8 and observed that USAA obviously had "the ability to (sic) where the bus is at all times." Complainant also specifically noted that he had an excellent safety record and stopped driving to respond when he was called or received a text from USAA personnel, and he noted this hindered his driving progress. He further asserted that he "put forth a 100% in my efforts." The e-mail contains no reference to a safety concern or report of efforts by USAA representatives to have him violate driving regulations. (RX-4)

t. On the morning of December 11, Complainant sent a follow-up three paragraph, single spaced e-mail to Mr. Durante with the subject line "USAA Deployment/Curtis Dick." He observed that "for some reason USAA got mad at me about something," and he postulated that "there are only two reasons for USAA's unhappiness with me." Complainant first identified what he described as his "wrong understanding" about USAA's 24-hour standby policy. Secondly, he noted that he made comments about receiving phone calls and texts to provide progress updates while he was driving, but ultimately, he noted that since USAA is "so safety cautious, that would seem not to be the reason." He concluded the e-mail with a paragraph that indicated he remained interested in driving for USAA. The e-mail contains no reference to a safety concern or report of efforts by USAA representatives to have him violate driving regulations. (RX-5, RX-7 pp. 15-20)

u. Between December 12 and 13, Complainant telephoned CDS's Texas Branch Manager, Ms. April Walker, Mr. Durante and CDS dispatchers to inquire about assignment to other driving jobs. During these phone calls, he alleged that Ms. Walker was being "idle," "can't help with nothing," and "can't usually do too much." Complainant opined that Mr. Durante was "putting him on the back burner." (RX-47; RX-48)

v. On December 14, Respondent assigned Complainant another driving job for a company named Thunder Ridge that ended on December 16. During and after the performance of this driving assignment, Complainant observed what he believed were safety hazards. These hazards included a truck with a cracked mirror and an inoperable headlight. Complainant notified a supervisor of Thunder Ridge of these issues by telephone text and contacted Ms. Eschler regarding these concerns. She believed Complainant wanted contact information for Thunder Ridge to inform it of his observations. She reached this conclusion based on a follow up conversation in which Complainant told her he was "good" with his text to the Thunder Ridge management as sufficient notice for his safety concerns. She did not interpret anything Complainant said as a request to inform CDS management of a safety concern, and she did not believe he wanted her to take specific action. As such, she took no action on the matter. Complainant did not submit a written summary of his concerns to CDS managers until December 20, after his employment termination. (RX-18, RX-19; RX-51; Tr. pp. 276-78; 281-82)

w. During his performance of truck driver duties on the contract jobs for USAA and Thunder Ridge, Complainant never refused to operate a commercial motor vehicle because he believed doing so would present a safety concern. Additionally, he never informed his CDS supervisors that representatives for either USAA or Thunder Ridge asked him to perform driver duties in an unsafe manner. (RX-1, RX-2, RX-3, RX-4, RX-5, RX-6, RX-7, RX-8)

x. On the evening of December 15, Mr. Durante forwarded an e-mail chain to Ms. Lydia Evanston, a human resources contract provider for CDS, with the subject "Curtis Dick." Mr. Durante indicated he wanted to bring the situation to Ms. Evanston's attention and explained that Complainant was removed from a USAA assignment due to "performance issues." One part of the forwarded e-mails noted that Complainant made a comment about filing a complaint against USAA for calling him while he was driving. In another e-mail, Mr. Durante noted that Complainant had filed a lawsuit against a different CDS client. Other than Complainant's comments about being called by USAA, they contain no reference to Complainant making a safety concern or report of efforts by USAA representatives to have him violate driving regulations. (RX 7 pp. 1-20)

y. Mr. Clarke first learned of USAA's dissatisfaction with Complainant's job performance on December 8, when he was informed that USAA required Complainant be removed as driver of their disaster CMV. This was a particular concern for Mr. Clarke because the USAA was a relatively new and important client for CDS at that time. Mr. Clarke reviewed Mr. Schlafke's e-mail itemizing the reasons why he felt Complainant had committed service failures and provided unacceptable customer service. Mr. Clarke consulted with Victoria Anderson, Operations Manager for CDS, who informed him that she believed Complainant engaged in unprofessional communications with other CDS employees. With Ms. Anderson's input, Mr. Clarke ultimately concluded that Complainant did not accept responsibility for what Mr. Clarke considered poor job performance and client interaction. He believed Complainant and Ms. April Walker, the CDS Texas branch manager, were "not getting along." Mr. Clarke determined that Complainant was "not listening to our team" and his communication with other CDS employees had been unprofessional and demonstrated a refusal to listen and work with other employees. Mr. Clarke considered whether senior management could "coach and counsel" Complainant to improve his

client service performance, but Mr. Clark decided those efforts would likely be unsuccessful and possibly lead to customer service problems in the future. As a result, Mr. Clarke believed Complainant would not work well as a driver for other clients in the future. At the time Mr. Clarke decided to terminate Complainant's employment he had reviewed Mr. Schflake's e-mail and some additional e-mails from his managers about Complainant's performance for USAA. However, Mr. Clarke was unaware that Complainant had been resistant to Mr. Schflake's request that Complainant use the disaster CMV's ELD system; as the CEO of CDS, Mr. Clarke is not normally involved in safety-related matters, and he relies on his managers with more driving safety experience to handle those matters. (Tr. pp. 485-86; 488-91, 495, 501-03, 508-09, 521, 531)

z. Mr. Clarke decided on December 14 to terminate Complainant's employment with CDS based upon advice from his senior managers and consultation with his business partner. At the time he made this decision, Mr. Clarke was unaware of any assertion by Complainant that USAA or CDS had requested he perform his job assignment in an unsafe manner, nor was Mr. Clarke aware of any safety concerns Complainant may have developed during the performance of his driving assignment for Thunder Ridge. Mr. Clarke did not learn that Complainant had expressed safety equipment concerns about a Thunder Ridge vehicle until after his decision to terminate Complainant. Mr. Clarke decided to terminate Complainant based solely upon his conclusions that Complainant failed to perform his job satisfactorily, interacted with other CDS employees and managers in an unprofessional and disrespectful manner and demonstrated a disregard for customer service. Complainant's termination became effective on December 19. (AX-1, RX-1, RX-8; RX-11; Tr. pp. 235, 491, 495-96, 508-10, 515-17, 520, 531-32, 535-537)

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.[9] *Id.* at § 31105(a)(1)(B). Finally, no employer may discharge, discipline, or discriminate against an employee for accurately reporting hours on duty pursuant to chapter 315. *Id.* at § 31105(a)(1)(C).

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).

[9] 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)

To prevail on a STAA claim, the 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. 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 the complainant proves by a preponderance of the evidence that his 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 v. Domino's Pizza*, ARB No. 09-092, slip op. at 9, n.6 (citation omitted).

1) Protected Activity.

For a complaint to be a 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)).

First, Complainant asserts that he expressed concerns to Mr. Schlafke about the disaster CMV's EDL system, and Complainant considered them to be notice of a safety concern and therefore a protected activity. Similarly, Complainant contends he engaged in protected activity when he reported equipment damage on the Thunder Ridge commercial motor vehicle to CDS employees. The evidence related to use of the ELD system in the disaster CMV demonstrates a fundamental misunderstanding by Complainant as to the function and purpose of the system. However, Complainant's testimony regarding his interaction and discussion with Mr. Schlafke about the ELD system credibly demonstrates that, despite his misunderstanding of the system's purpose, he sincerely and subjectively believed Mr. Schlafke wanted Complainant to use the system in a manner that could inaccurately record his past driving hours of service and that such conduct would somehow violate the requirements for a driver to accurately record his driving

hours of service.

However, while Complainant's belief may have been subjectively sincere, the undersigned concludes it was not objectively reasonable. Mr. Schlafke specifically explained the purpose and manner of operation for the system. He clearly conveyed to Complainant that USAA utilized the ELD system to accurately monitor the vehicle's use and location to better promote driver and vehicle safety. Additionally, Mr. Schlafke clearly acknowledged that Complainant was independently obligated to retain his own driving history record. Notably, other than repeatedly asserting that the system would misrepresent his recent driving history, Complainant said nothing that Mr. Schlafke considered to be an allegation that using the system would be a safety risk or a violation of a driving safety regulation. Stated another way, Mr. Schlafke interpreted Complaint's comments as expressing a reluctance to use the system but also a concession that to do so did not pose any safety concerns if Complainant maintained his own independent driving log. Additionally, Complainant took no action to contact his CDS managers and inform them that Mr. Schlafke, a USAA client representative, had requested he misrepresent his driving history or operate the disaster CMV in way that was unsafe or violated a safety regulation. A belief that using the ELD constituted a safety concern or violation is also not objectively reasonable in light of the fact that other drivers routinely operated the system while driving the disaster CMV without any concern that doing so violated the requirement to track their driving hours of service.

Similarly, the preponderance of evidence in this case demonstrates that – while performing driving duties on the USAA job – Complainant never clearly articulated any violation or alleged violation of a commercial motor vehicle safety regulation, standard, or order to any CDS employee or manager. As such, Complainant's asserted protected activity related to being ordered to work during a break and refusing to answer phone calls or texts lacks convincing evidentiary proof. Among other things, persuasive support for this conclusion comes from the two detailed, extensive e-mails sent by Complainant in the days immediately following his removal from the USAA driver job. Other than observations that he felt calls and texts from USAA personnel required him to stop driving to safely respond, neither e-mail contains any effort by Complainant to provide specific notice to CDS management of a safety violation. Indeed, the evidence demonstrates that Complainant abided by safe driving requirements and found a location at which to stop driving and respond to Mr. Schlafke's phone inquiries. Complainant presented no evidence that Mr. Schlafke demanded he respond to calls or texts in an unsafe manner or in a way that violated a safety regulation. Complainant's e-mails do not identify or refer to a regulatory restriction or a safety policy, nor do they describe action by USAA personnel that the Complainant felt constituted a request to engage in unsafe driving conduct. Given the immediate temporal proximity to one of the adverse actions Complainant suffered, it is reasonable to expect he would describe with particularity any prior safety concerns he believed resulted in his removal from that assigned driving job. This is particularly true given the extensive and detailed nature of his e-mails. Furthermore, no witness testified that – at any time before, during or after his work as a driver on the USAA job – Complainant made any effort to provide CDS notice of, or request action on, a safety concern or violation. Nor did Complainant ever at any time notify USAA or CDS managers that he refused to operate the disaster CMV.

Conversely, however, the evidence related to Complainant's actions during the Thunder Ridge driving assignment do demonstrate both a subjective and objective belief that demonstrates

he engaged in protected activity. Complainant believed a Thunder Ridge commercial vehicle was unsafe because of faulty equipment, and he informed a CDS manager of this concern. Unquestionably, Complainant saw a vehicle with a broken mirror and inoperable light; this was a compelling basis for him to believe the vehicle posed safety concerns and possibly violated safety regulations. However, simply possessing such an opinion is insufficient to constitute protected activity; qualifying action by Complainant is required, and he took such action. Specifically, he personally notified Ms. Eschler of his observations and safety concerns. He also initially asked for her assistance in ensuring Thunder Ridge managers were notified of the vehicle safety problems. Ultimately, Complainant later told Ms. Eschler that he was satisfied his own actions had sufficiently communicated his concerns to the Thunder Ridge managers. As such, she did not believe she needed to act on his reports. While this is relevant to the issue of whether his safety reports were a contributing factor to the adverse action he experienced, it does not change the fact that Complainant demonstrated a reasonable subjective and objective belief that he had observed a vehicle safety violation and informed a CDS manager about his concerns.

Consequently, the undersigned concludes Complainant did not engage in conduct – as it relates to his work on the USAA driving job assignment – that satisfies the definition of protected activity under the Act. However, his conduct during the Thunder Ridge driving job constitutes protected activity under the Act. As a result, the undersigned will analyze the additional required proof elements of a complaint under the Act.

2) Unfavorable or Adverse Personnel Action.

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court's *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006) decision addresses what constitutes an adverse employment action and is applicable to the employee protection statutes enforced by the U.S. Department of Labor. *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sept. 30, 2008). To be an unfavorable personnel action the action must be "materially adverse" meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 57.

Moreover, "adverse actions" refer to unfavorable employment actions that are "more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015) (citing *Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010)(holding performance rating drop from "competent" to "needs development" was more than trivial and was adverse action as matter of law).

The facts in this case clearly demonstrate Claimant suffered two forms of adverse action. First, he was removed from the USAA wildfire driving job and thereby deprived of additional income. Second, CDS terminated his employment as an intermittent driver. Consequently, Complainant established the adverse action element of a complaint under the Act.

3) Protected Activity as a Contributing Factor.

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams,* ARB 09-092, slip op. at 6.

A complainant must prove as a matter of fact that the protected activity was a contributing factor in the adverse personnel action. *Palmer v. Canadian Nat'l R.R.,* ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53-56 (ARB Sept. 30, 2016). The ARB also specifically noted that this is a relatively low standard for an employee to meet. A complainant does not have to prove that a factor was "significant, motivating, substantial or predominant - it just needs to be a factor." *Id.* at 53. "The protected activity need only play some role, and even an '[in]significant' or '[in]substantial' role suffices." *Id.*

In order to determine if a protected activity contributed to the adverse decision, an ALJ must consider all relevant evidence, including evidence of the employer's non-retaliatory reasons for the unfavorable action. The ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action. *Id.* at 56. A complainant can show that his protected activity was a contributing factor in an unfavorable personnel action using either direct or indirect evidence. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (June 24, 2011). As such, a complainant may meet his burden with circumstantial evidence. *Speegle v. Stone & Webster Constr., Inc.* ARB No. 11-029, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Jan 31, 2013); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012); *cf. Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 17 (Aug. 29, 2014) (noting that "[c]ircumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other evidence.").

The temporal proximity of a protected activity to an adverse employment action is a common type of circumstantial evidence that demonstrates the protected activity was a contributing factor, but the ARB has specifically rejected "any notion of a per se knowledge/timing rule." *Palmer,* ARB No. 16-035, slip op. at 52. However, "an ALJ *could* believe, based on evidence that the relevant decision maker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action." *Id.* (emphasis in original). "The ALJ is thus *permitted* to infer causal connection from decision maker knowledge of the protected activity and reasonable temporal proximity." *Id.* (emphasis in original).

"[P]roof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone." *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 16 (ARB Mar. 29, 2013). "Proof of a contributing factor may be established by evidence demonstrating 'that at least one individual among multiple decision makers influenced the final decision and acted at least partly because of the employee's protected activity.'" *Id.* (citing *Klopfenstein v. PCC Flow Techs. Holding, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006)). *See Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 9 (ARB Sept.

30, 2003) (imputing to company official responsible for employment decision knowledge of protected activity of employees having substantial input into personnel action); *Bartlik v. T.V.A.*, No 1988-ERA-015, at n. 1 (Sec'y, Apr. 7, 1993) ("[W]here managerial or supervisory authority is delegated, the official with the ultimate responsibility who merely ratifies his subordinates' decisions cannot insulate a respondent from liability by claiming bureaucratic ignorance.")

Respondent asserts that both Complainant's removal from the USAA job assignment and his employment termination occurred for two primary reasons: 1) service failures and job performance insufficiencies as a driver; and 2) unacceptable personal interaction with other CDS and USAA employees. This position is consistent with the undersigned's factual findings.

As to the first basis for Respondent's adverse action, Mr. Schlafke sent CDS written correspondence with specific enumerated examples of what USAA considered to be Complainant's service failures, substandard job task performance and argumentative personal interaction. None of those examples touched on a topic related to safety. Additionally, during his performance as a driver on the USAA job, none of Respondent's employees with whom Complainant interacted in person or by phone construed any of his statements as an effort to convey some type of specific or general safety concern.

Although Complainant did express safety concerns that qualified as protected activity while he worked on the Thunder Ridge job, there is no persuasive evidence that links it to his employment termination. Complainant reported his safety concerns about the Thunder Ridge vehicle to Ms. Eschler. Of particular importance, however, he later unequivocally indicated to her that he felt his telephone text to Thunder Ridge management about his concerns was sufficient notification. He did not request that Ms. Eschler inform CDS senior management about his report and concerns, and he plainly indicated that he did not believe any additional action on the matter was necessary. As a result, Ms. Eschler concluded Complainant felt his concerns had been satisfactorily addressed, and she took no action to notify senior management about Complainant's report and concern.

Considering the above, the evidence clearly demonstrates that, prior to deciding to terminate Complainant's employment, Mr. Clarke never received information from his managers that suggested Complainant had expressed safety concerns or made reports of safety violations. Mr. Clarke decided to end Complainant's employment based on non-retaliatory reasons directly related to Complainant's unacceptable job service performance and unprofessional interaction with CDS clients and employees. As such, Complainant's protected activity played absolutely no role in him being removed from the USAA wildfire driving job, nor was it considered when his employment as an at-will, intermittent driver for CDS was terminated.

Consequently, the undersigned concludes Complainant failed to demonstrate as a matter of fact that he engaged in protected activity that was a factor in the adverse actions taken against him by Respondent.

b. ***Clear and Convincing Evidence that Respondent Would Have Ended Complainant's Employment Absent Protected Activity.***

Although the undersigned concluded otherwise, if Complainant had met the burden of proving by a preponderance of the evidence that protected activity contributed to his employment termination, Respondent could still avoid liability in this matter if it demonstrates "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b); 49 U.S.C. § 31105(b)(1); 29 C.F.R. § 1978.109(b). In interpreting the "clear and convincing" burden of persuasion imposed upon an employer, the ARB quantified this evidence standard in the following way:

> The standard of proof that the ALJ must use, "clear and convincing," is usually thought of as the intermediate standard between "a preponderance" and "beyond a reasonable doubt"; it requires that the ALJ believe that it is "highly probable" that the employer would have taken the same adverse action in the absence of protected activity. Quantified, the probabilities might be in the order of above 70%.

Palmer, ARB No. 16-035, slip op. at 57 (internal citations omitted).

The evidence presented by Respondent satisfies the "clear and convincing" evidentiary burden required for this defense. The protected activity alleged by Complainant was not a factor in Respondent's decision to ultimately take adverse employment action against Complainant.

First, CDS removed Complainant as a driver for USAA after Mr. Schlafke informed CDS managers that he believed Complainant failed to provide time-sensitive driver service that USAA expected from CDS. Mr. Schlafke also felt Complainant argued and interacted with USAA employees in an unacceptable manner, which he viewed as poor client support by CDS. None of Mr. Schlafke's communications with CDS employees directly preceding Complainant's removal as a USAA driver addressed or referenced concerns or complaints from Complainant about driving hour restrictions, vehicle safety conditions or any other regulatory safety requirements. As such, the evidence clearly demonstrates that Mr. Schlafke's communications with CDS conveyed nothing more than a significant dissatisfaction with Complainant's performance – a conclusion Complainant himself reached in e-mail communication after his removal as a USAA driver. Complainant contends that, by directing him to use the disaster CMV's electronic driving log system, Mr. Schlafke tried to coerce Complainant into engaging in a safety violation by inaccurately tracking his driving hours. This argument lacks merit.

Uncontradicted testimony from Complainant and Mr. Schlafke clearly establishes that both men understood the regulatory driving hour restriction limits, and they agreed it is an individual truck driver's obligation to accurately track that information. The evidence shows that Mr. Schlafke never asked Complainant to drive in a manner that would violate driving hour limits. To the contrary, at the end of his interaction with Complainant, Mr. Schlafke believed Complainant failed to understand the fundamental purpose of the ELD system, which Mr. Schlafke views as a complementary vehicle tracking system that is separate and distinct from the required individual truck driver hours-of-service logs. Support for this conclusion is evident in the repeated requests by Mr. Schlafke and Mr. Durante that Complainant arrive at the disaster CMV pick-up location with his completed hours-of-service log paperwork. If USAA intended to use the ELD system to somehow revise and reduce Complainant's recent driving hours history, as Complainant contends,

it would have been highly detrimental to such a plan to direct the Complainant to verify and produce independent documentation of his accurate driving history.

Secondly, for the same reasons discussed in the contributing factor analysis of this claim, the evidence also establishes that Respondent would not have continued Complainant's employment any further. The undersigned is fully convinced that Respondent would have taken the exact same action regarding Complainant's employment regardless of any possible safety concerns Complainant believes he made. Mr. Clarke persuasively testified that he considered Complainant's interactions and conduct toward Mr. Schlafke, a CDS client representative, and other more well-tenured CDS employees to be combative, unprofessional and unacceptable. This conclusion formed the basis for Mr. Clarke's decision to terminate Complainant's employment. Mr. Clarke credibly explained that – at the time he decided to terminate Complainant's employment – he was unaware of any of Complainant's alleged concerns about the CMV driver's ELD system. At the time he decided to terminate Complainant's employment with CDS, Mr. Clarke had also never been told Complainant considered Mr. Schlafke's attempts to call and text Complainant to be unsafe conduct. Similarly, Mr. Clarke was unaware at the time of his decision that Complainant had expressed possible equipment safety concerns with the vehicle he drove for the Thunder Ridge job. Indeed, Complainant did not even submit his written concerns about possible safety hazards with the Thunder Ridge vehicle until six days after Mr. Clarke decided to terminate Complainant's employment. The undersigned's conclusions are well supported by the witness testimony and statements – none of which indicate that anyone informed Mr. Clarke that Complainant expressed safety concerns.

7. <u>Decision and Order.</u> 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 his protected activity under the STAA was a contributing factor to the adverse action he suffered.

b. Alternatively, even if Complainant's protected activity was a contributing factor to the adverse action he suffered, Respondent demonstrated by clear and convincing evidence that it would have taken the same personnel action regarding Complainant in the absence of his protected activity.

c. The Complaint in this matter is DENIED.

SO ORDERED this day.

TRACY A. DALY
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 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).

IMPORTANT NOTICE ABOUT FILING APPEALS:
The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact. If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail
Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

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. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.