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Issue Date: 09 May 2019

CASE NO.: 2018-STA-00081

In the Matter of:

JASON ENGLISH,
Complainant,

vs.

CARDINAL LOGISTICS MANAGEMENT,
Respondent.

APPEARANCES:

JASON ENGLISH,
Complainant, in propria persona

LAURA E. KRUSE, Esq.
For the Respondent

Before: Christopher Larsen
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This is a claim under the employee-protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. section 31105.

I held a hearing in this matter on February 20, 2019, in Seattle, Washington. The Complainant, Jason English, appeared on his own behalf as a self-represented litigant. Attorney Laura E. Kruse appeared for Respondent. I heard testimony from witnesses Jason English, the Complainant; Jaime Hansen, Operations Manager for Respondent; Jason West, the manager of the Home Depot store in Bothell, Washington; William Nye, Senior Operations Manager for Respondent; Rafael Martinez, a driver, driver trainer, and dispatcher for Respondent; and Leilani Heinicke, Operations Supervisor for Respondent. I received in evidence Claimant's Exhibits ("CX") 1-4 and Respondent's Exhibits ("RX") 1 through 5. The findings and conclusions which follow are based on a complete review of the entire record in light of the

arguments of the parties, applicable statutes and regulations, and pertinent precedent. Although I do not discuss every exhibit in the record below, I carefully considered each in arriving at this decision.

Additionally, I considered Respondent's Post-Hearing Brief. Mr. English did not file a Post-Hearing Brief.

Mr. English was employed by Respondent Cardinal Logistics Management. He contends Respondent terminated his employment because he complained about the unsafe condition of a load he was assigned to carry. Consequently, in his view, his termination was prohibited under 49 U.S.C. section 31105, subsection (a). Respondent contends it terminated Mr. English's employment after a principal customer, Home Depot U.S.A., Inc., notified Respondent that Mr. English was no longer welcome on its premises. Originally, Mr. English named Home Depot U.S.A., Inc., as a Respondent in this case, but by Order issued February 5, 2019, I granted Home Depot's Motion for Summary Decision, based on its showing that Mr. English was never an "employee" of Home Depot. *See* 49 U.S.C. section 31105, subsection (a).

Under the 2007 amendments to STAA adopted as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (Aug. 7, 2007), Mr. English

. . . is initially required to show by a preponderance of the evidence that protected activity was a "contributing factor" in the alleged adverse personnel action. Should the complainant meet the "contributing factor" burden of proof, the burden shifts to the employer who is required, in order to overcome the complainant's showing, to prove by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected conduct.

Beatty v. Inman Trucking Management, Inc., ARB No. 13-039, ALJ No. 2008-STA-20 (ARB May 12, 2014), *8 (footnotes omitted).

Respondent agrees, citing 29 C.F.R. section 1978.109, subsection (a) ("A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a *contributing factor* in the adverse action alleged in the complaint") (emphasis added) (Respondent's Post-Hearing Brief, p. 7, lines 11-15). But, as the Administrative Review Board explains,

[This] burden of proof framework is far more protective of complainant-employees and much easier for a complainant to satisfy than the [former] *McDonnell Douglas* standard. As the Federal Circuit explained in *Marano v. Dept. of Justice*, the "contributing factor" standard was "intended to overrule existing

case law, which requires a whistleblower to prove that his protected conduct was a significant, motivating, substantial, or predominant factor in a personnel action in order to overturn that action.” The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent’s reason for the unfavorable personnel action was pretext, or that the complainant’s activity was the sole or even predominant cause. The complainant “need only show that his protected activity was a contributing factor in the retaliatory discharge or discrimination.” A “contributing factor,” the ARB has repeatedly noted, is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision.” Thus, for example, a complainant may prevail by proving that the respondent’s reason, “while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant’s] protected activity.” Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence.

If the complainant proves that his/her protected activity was a contributing factor in the unfavorable personnel action, the burden shifts to the respondent, in order to avoid liability, to prove “by clear and convincing evidence” that it would have taken the same adverse action in any event. “The clear and convincing evidence standard is the intermediate burden of proof, in between preponderance of the evidence and proof beyond a reasonable doubt. To meet the burden, the employer must show that the truth of its factual contentions is highly probable.” Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.”

Id., * 8-9.

With these principles in mind, I turn to the evidence presented at the hearing.

Mr. English’s Testimony

Mr. English testified he began working for Respondent as a truck driver in August, 2017 (TR 20:9-17). At that time, he had four years of experience as a truck driver, and held a commercial truck driver’s license (TR 20:18-21:3). He was fired

on or about January 3, 2018. The person who fired him was Jaime Hansen.¹ Mr. Hansen told him Home Depot wanted Mr. English fired (TR 21:16-20). Asked if Mr. Hansen had told him why Home Depot wanted him fired, Mr. English replied

A: I don't remember exactly what he said. He just used the terminology it was Home Depot, and kind of only referenced, you know, the last couple of days of what could have happened. So, my entire knowledge of being fired was based off a couple of days, the 29th of December and the 30th of December.

Q: Okay. Did he tell you who at Home Depot wanted you fired?

A: No. But I did make a call to Home Depot, because if they were, you know, kind of saying I was acting in such a way, I wanted to make sure that I wouldn't, you know, that I could go on Home Depot property, you know. I haven't been on Home Depot property since, but I wanted to make sure that, you know, I wasn't captured on camera going into a Home Depot and that I wasn't kind of 86ed out of Home Depot, from what was told to me.

Q: Well, I want to go back to what Mr. Hansen told you. Can you remember anything – I'm going to ask if you remember, maybe you do, maybe you don't – do you remember exactly what he said to you?

A: Not verbatim, but I only remember him saying that Home Depot was the problem of me staying with Cardinal Logistics.

Q: But he didn't tell you why Home Depot was unhappy with you?

A: No. He just said it was Home Depot. And it could have only been the last couple of days in question.

Q: Right now I'm just asking you what he said.

A: Yes, Home Depot.

Q: Okay. Did he tell you he was unhappy with you?

A: No.

¹ Mr. Hansen testified later, identifying himself as Operations Manager of Respondent (TR 68:16-69:3). In his testimony, Mr. Hansen agreed he was the person who terminated Mr. English's employment with Respondent (TR 72:9-11), as discussed more fully below.

Q: Did he tell you Cardinal Logistics Management had some problem with you?

A: No, he didn't.

Q: How long did the conversation last?

A: It lasted maybe 30 minutes, and I walked to the house to get the phone and a farewell.

Q: And in 30 minutes, the only reason he gave you for your termination was that Home Depot didn't want you working there?

A: Yes, sir.

Q: Do you know of any other driver who had been terminated because, supposedly, Home Depot didn't want them there?

A: I pretty much, while in Seattle, stayed to myself. I pretty much, for the last, maybe, five, 10 years, stayed to myself to keep out of trouble, so. So, no, I didn't really know anyone who said something.

Q: So, as you sit here today, do you know the cause of Home Depot's supposed unhappiness with you?

A: It was a total surprise to me, like it was so surprising, because we did have an extra long episode on the 29th, which, you know, to me could have been avoided, because of weather related problems.

(TR 21:21-23:25.)

In this cited testimony, Mr. English explains that Mr. Hansen told him his employment with Respondent was terminated because Home Depot wanted it terminated. He agrees "the only reason" Mr. Hansen gave for the termination "was that Home Depot didn't want [Mr. English] working there." But in a very oblique fashion, Mr. English also refers to events taking place on December 29 and December 30, a few days earlier. He says Mr. Hansen "kind of only referenced, you know, the last couple of days of what could have happened." Mr. English testified his own "entire knowledge of being fired was based off a couple of days, the 29th of December and the 30th of December." And he volunteers "we did have an extra long episode on the 29th, which, you know, to me could have been avoided, because of weather related problems." The idea that events on December 29 and 30, 2017, had anything to do with Mr. English's termination appears to be speculation on Mr.

English's part, since he acknowledges Mr. Hansen did not explicitly refer to those events as justifying termination.

Ambiguities likewise abound in Mr. English's description of the events of December 29, 2017. According to Mr. English, he was assigned to pick up a load at a Home Depot store in Redmond, Washington (TR 24:13-24). He expected Home Depot employees would load the truck (TR 25:15-18). Observing the cargo before it was loaded, Mr. English concluded "the material was not properly prepared for loading on the truck" (TR 25:2-3):

A: It was fencing and the bundle was 13, they pulled maybe six from the bundle and it made the bundle like really unstable. And I just asked them could they, you know, kind of re-stabilize the load.

Q: Okay

A: And when they re-stabilized the load, it kind of, you know, kept asking the question of what was wrong with the load, you know. And I kept saying, you know, look at it, I mean if you can't sit here and look at this load is, you know.

(TR 25:5-14). He went on to explain,

A: This is the – drivers – we have had loads like that, where we just had to sit down and fix them. You know, most of the times we'll sit down and we'll fix the loads. It will start a bit of a fuss, but you know, we'll get the load fixed. That day it was more than other days. I believe it took maybe three hours. And I did leave the store at one point, left the store. And then called William and Jaime² to, you know, circle around and go back to the store to pick the load up.

Q: All right.

A: When they told me that I had to load it and I had to take this, I re-stabilized it myself.

Q: Okay.

A: I went in the store and, you know, got nails and a hammer and I put the nails and the hammer in the material.

Q: Okay.

² "William," whom Mr. English describes as a Cardinal Logistics manager in Sacramento (TR 24:1-12), would appear to be Mr. Nye (TR 47:13-24).

A: To make sure that it was safe to ride on the road for the public.

Q: So, you loaded it, ultimately?

A: Yes.

(TR 26:9-27:3). Later, Mr. English testified the telephone conversation with Messrs. Nye and Mr. Hansen also included two Home Depot employees (TR 28:8-19). In that conversation, either Mr. Hansen or Mr. Nye told Mr. English to return to the store and pick up the load (TR 28:8-22). Mr. Hansen “was just really concerned about the customer, so he wanted to figure the best way to get the load out. So, he was kind of, you know, pressing the situation, pressing Home Depot to fix the situation and just trying to get the load prepared and delivered to the customer” (TR 28:25-29:4).³

In further testimony, Mr. English acknowledged two other episodes on December 29, 2017, in which he purposely made Home Depot employees “uncomfortable.”

In the first such episode, Mr. English asked a woman, Eileen Richmond, whether she had children, and whether her children had “special needs” (TR 30:20-31:12):

Q: Okay. And when you asked her that question, you admitted that you knew that you made her uncomfortable, correct?

A: I don't know if she was uncomfortable, but she could have possibly been uncomfortable, yes.

Q: Do you recall admitted that in your deposition, that you believe that she was uncomfortable?

A: Yes.

Q: Okay.

A: She could have possibly been uncomfortable. I'm not sure if she was uncomfortable or not. I'm going to take her word that she was uncomfortable, because she wrote a statement of being

³ Mr. English also testified he drove the load through a storm in fifty-mile-per-hour winds, a fact which also delayed delivery of the material. But he admitted he never told William or Mr. Hansen anything about the weather that day (TR 29:4-30:2). He also expressed the opinion, at one point, that had he not “re-stabilized” the load before leaving the Redmond store, it would likely have fallen off the back of the truck when he drove up a hill (TR 27:5-28:4)

uncomfortable. So, if you're saying that she was uncomfortable, because she wrote a statement of being uncomfortable, then – but she could have been here, to figure out – figure that she was uncomfortable or not.

Q: Okay. So you recall seeing that statement that she wrote?

A: Yes.

(TR 31:13-32:5).⁴

The second such episode involved a cashier, Barry Thompson:

Q: Okay. Why don't you tell me what you did, actually, why don't you say in your own words – you bought something, right, from Barry Thompson?

A: Yes.

Q: And then he handed you a receipt for that purchase, is that correct?

A: Yes.

Q: And then you put that receipt in your pocket, correct?

A: Yes.

(TR 35:19-36:5).

Q: In that interaction you had with Barry Thompson, you admitted in your deposition that you told him that you did not have – you did not obtain a receipt from him, even though you put the receipt in your pocket, is that correct?

A: Yes.

⁴ In her statement (RX 2), Ms. Richmond recites, "I work in the computer room at store 4712 and was at the Tool Rental desk early in the morning fixing a computer. I was alone at the desk as the tool rental tech was in the back. A gentleman walked in dressed in a yellow rain suit and just stood there. I told him I would get the tech to help him as I was just fixing the computer. He said, 'I don't need him' and just stood there staring at me. The tech came out of the back and asked if he could help him. He said, 'I don't need you' and continued to stand and stare at us. Finally he asked if there was a loader and the tech recognized him as a Cardinal driver and went to find a lot associate. When the tech left, the gentleman asked me if I had any children. I said, 'Yes, 3.' He said, "Do they need special help? It seems that associates around here need special help.' It was very bizarre and uncomfortable." In his January 7, 2019, deposition (RX 5), Mr. English testified he knew it was impolite to ask someone if their children had special needs (RX 5, 150:23-25), and that he knew the question made Ms. Richmond uncomfortable (RX 5, 151:17-24).

Q: And you admitted then, in your deposition, that you also acknowledged that that probably made Barry uncomfortable, as well. Does that sound familiar?

A: I don't know if it made him uncomfortable. I know it confused him a bit.

(TR 34:11-20).⁵

⁵ In his January 7, 2019, deposition (RX 5), Mr. English describes his conversation with Mr. Thompson thus:

Q: What did you say to him and what did he say to you?

A: Well, I said something – I said something that was pertaining to how I was being treated, and he reacted in the way of confusion, like – oh, it was about a receipt. So he was – he was – he was saying, hey – I said, 'Hey, man' – you know, like, 'Where is my receipt?' And he was like, 'I gave you a receipt.' I was like, 'No, you didn't give me my receipt.' He was like, 'I gave you a receipt.' I was like, 'No, you didn't give me my receipt.' And I'm sitting here – in my mind, I know he gave me the receipt.

Q: You knew that he did?

A: Yes.

Q: Then why did you tell him that he didn't?

A: Because it was getting to the point of me trying to explain to anyone at the time that something was going on. And this is the feeling that I have when someone is telling me, no you can't – you know, this is not the way. This is what's going on – you know. So when they kept sending this kid out –

Q: So what you're telling me is – I want to make sure I understand you, because I wasn't sure I understood the last answer. Is what you're saying that you told him that he didn't give you a receipt even though you knew he had, because you were upset about what was going on with the loader?

A: No. I wasn't in an upset mind, so I wasn't in an upset mind state.

Q: Here is my question:

A: Kind of knowing how someone would react is kind of knowing how this guy would react. So if he's totally blind to what's going on, nothing violent is going to happen, and he can explain, 'Hey, Jason just did something like really weird, he just told me that' – something as simple as a receipt, then I can have something to play on, like right now, like to explain to you that I told him, 'No' – I told him, 'No, you didn't give me a receipt.'

Because this is how – if the manager's reaction after he explains that Jason is saying – then I can explain to him, this is how – this is what I was trying to explain

Mr. English acknowledged he had called Respondent on occasions before December 29, 2017, with complaints about Home Depot loads, and may even have refused to drive a load. He acknowledged Respondent had never disciplined him for so doing (TR 39:18-40:25).

Mr. West's Testimony

Jason West is the Store Manager of Home Depot's Bothell, Washington, store. He acknowledged "a multitude of encounters" with Mr. English (TR 53:9-12), and specifically described four of them.

In the first, Mr. English entered Mr. West's office, "very frustrated" and "very aggressive," complaining he couldn't find a place to park his truck. He wanted to park to the rear of the building, which according to Mr. West would block a fire lane. Eventually they agreed on a suitable parking arrangement (TR 53:14-54:11).

In the second, Mr. English approached an assistant store manager, who was speaking to a customer at the customer service desk, to complain that Home Depot was sending him on circuitous delivery routes. Mr. English "was very loud, very animated, very aggressive, displaying how frustrated he was that we were sending him kind of all over the map, so to speak." The assistant store manager excused herself from the customer she was helping, "kind of pulled Mr. English off of the sales floor and said, you know, hey, let me explain something to you, we don't route your deliveries, you know, we take a delivery from the customer, we input it into our system, that goes directly to Cardinal Logistics and they come up with your route." Mr. English then "left in a very aggressive, you know, kind of frustrated manner" (TR 54:12-55:2).

to you, the entire time. And I've explained to him many times over, like many times, you can't send this kid out here, because either he's not ready, he's emotionally unattached. You cannot send him out here, because something – like something is really wrong with him.

Q: Let me try it again. Let me try the question again.

The person who was ringing up your purchase for the gloves and the cookies gave you a receipt, then you asked him for it even though you knew you already had it, and you told him he didn't give you a receipt even though you knew he did. Why did you do that?

A: To try and explain the situation that had been occurring in the store. Similar situations.

(RX 5, 144:20-147:1). Mr. English further testified he later explained to Mr. Thompson why he had lied about not getting a receipt, but could remember nothing of what he had said by way of explanation (RX 5, 147:2-148:13).

In the third, Mr. West conducted an exit interview with a part-time associate in the order fulfillment department who quit her job. She had “had a few interactions with Mr. English, of which once he did, you know, caused */sic/* her to come to tears.” In the exit interview, the employee told Mr. West “the main reason for wanting to leave immediately was that she just didn’t feel safe having to work with Mr. English as the driver that she was having to load” (TR 54:12-55:15).

Finally, on a date late in December, 2017, one of the loaders told the assistant store manager that he had been trying to load Mr. English’s truck “for about 45 minutes,” and Mr. English “was getting increasingly aggressive and frustrated with the situation.” After a few minutes, the assistant store manager called Mr. West, asking Mr. West “to please come out and witness” Mr. English’s aggressive behavior (TR 56:12-57:9). Mr. West testified,

I went out and started talking to Mr. English – hey, what’s going on, you know, what can we do, how can we make this work? And he’s explaining – look, I’ve had to load it, unload it. I’m not understanding, you know, if you’re telling us to load it a certain way and we load it a certain way, how is it that a minute later you’re determining that it’s an unsafe load? He’s getting more increasingly frustrated the more that I speak with him, you know, fists clenched, getting towards my face to the point where I said – hey, don’t worry about it, right, we’ll either reschedule the loads or we’ll get another driver here, I no longer want you on my property, I don’t feel safe, my associates don’t feel safe.

At that point we called Cardinal Logistics, after Mr. English left, dispatch – I believe know */sic/* who it was who answered – to kind of explain the situation. Said, look, we’ll reschedule if you can get another driver, great, that would definitely be of benefit to us. However, we do not want Mr. English back on the property. We don’t feel safe, it’s not good for our associates, we don’t want him to service our location anymore.

(TR 57:10-58:16). At this time, Mr. West personally knew nothing about Mr. English’s conversations with Eileen Richmond or Barry Thompson, described above (TR: 59:1-4). According to Mr. West,

I made that call just off the previous incidents. I mean clearly, there was a pattern of behavior, you know, and it had nothing to do with – my associates – and I’m going to be quite candid – they get paid by the hour, so if it takes them two or three hours to load a truck, they get paid the same as whether or not it takes them 15 or 20 minutes, you know. Ultimately, at the end

of the day, we want the driver to be safe, we want the people on the roads to be safe, we want our customers to get their products, you know, in a good condition. So, they take the lead from the driver. So, whether it takes them 45 minutes, or an hour, that wasn't the issue. The issue was the pattern of behavior and the increase in aggression, and the erratic behavior that kind of led to that ultimate situation.

(TR 59:4-18).

Later that day, or possibly the next day, Mr. West learned of Ms. Richmond's and Mr. Thompson's encounters with Mr. English. He spoke to both of them and asked them to describe those encounters in writing, resulting in the creation of RX 2 and RX 3, the written statements from Ms. Richmond and Mr. Thompson received in evidence (TR 60:4-61:6). Mr. West testified,

Q: Okay. And with respect to these statements, did you do anything after you received the statements, or knowledge of these incidents, did you do anything with respect to Cardinal, like advise Cardinal of them?

A: So, we had a logistical team that works in partnership with Cardinal Logistics, they oversee, you know, flatbed deliveries, box car deliveries, so on and so forth, so they work with our various logistical partners, whether it's for a customer delivery, you know, products coming into the store with our vendors, so on and so forth. I advised them of the situation, what had taken place at the store, as well as the statements, and just said, look, you know, I've already contacted Cardinal, I spoke with them yesterday, understanding due to the potential safety issue, the uncomfortability *[sic]* of the associates, we do not want Mr. English to service our location any longer.

(TR 61:7-22.)

Mr. Hansen's Testimony

Mr. Hansen is an Operations Manager for Cardinal Logistics Management. He is responsible for operations in Seattle, Washington; Spokane, Washington; Portland, Oregon; and Boise, Idaho. In the State of Washington, Cardinal serves only three customers, Home Depot among them (TR 68:16-69:15).⁶

⁶ The other two customers are Metrie, a molding and millwork supplier, and AMI, a glass manufacturer (TR 73:4-12). Mr. Hansen testified Mr. English had a "prior incident" with Metrie, as a result of which Mr. English was no longer welcome on Metrie's premises. But that "incident" occurred be-

Mr. English was working for Cardinal as a driver when Mr. Hansen began work as Operations Manager (TR 69:19-23). Mr. English served only Home Depot stores (TR 69:16-18). Mr. Hansen testified that Mr. English, before December 29, 2017, had called to express concern with his assigned loads on occasion:

Q: Okay. And then prior to December 29th, had you received calls from Mr. English with respect to loads?

A: Yes, I had.

Q: Okay. And do you remember the content of those calls or how those – in general – how those calls proceeded?

A: Yeah. Mr. English would have details of his opinion of loads that were not ready for delivery. What I remember is they were lengthy conversations, usually.

Q: Does Cardinal train its drivers to call dispatch or call you when they have concerns with their loads?

A: Yes. They're trained to call dispatch first, to coordinate and work through that. And then also reach out to management, as well.

Q: It is unusual for a Cardinal driver to call dispatch or call you if they have concern with their loads?

A: No, it is not.

Q: Okay. So Mr. English calling you with respect to any load, that's standard practice for any Cardinal driver?

A: Correct.

Q: Okay. During the period of time that you received calls from Mr. English, prior to December 29th, to your knowledge did you ever discipline or reprimand Mr. English for calling with respect to loads or having concerns with safe loads?

A: No.

Q: Has he ever refused to drive a portion of the load or a load entirely during that period of time?

fore Mr. Hansen's employment, and he could not recall the substance of Metrie's complaint, although he had read another manager's written statement about the incident at one time (TR 72:18-23; 73:4-74:16; 74:21-75:16).

A: From my recollection, yes, he had.

Q: Okay. Was he ever disciplined or reprimanded or adversely – his employment adversely affected from that?

A: No.

Q: In your title, do you have any knowledge – would you need a person to actually discipline him or reprimand him, if that was the case?

A: Yes, along with the guidance from my senior operations manager.

Q: Okay. And you had no – to your knowledge, no one has disciplined Mr. English or reprimanded him or having concerns with respect to the safety of loads?

A: No.

(TR 69:24-71:14).

On December 29, 2017, Mr. Hansen spoke with Mr. English by telephone. Mr. Hansen testified “we discussed the load and we had a long conversation about the delivery, and my recollection of the last that [Mr. English] explained to me is that [he] had secured the load by getting some material to brace it, to make that load” (TR 45:24-46:6). He acknowledged having asked Mr. English to send photographs of the load, taken on Mr. English’s telephone, to help Mr. Hansen visualize the load (TR 46:24-47:24). Mr. Hansen denied “there would have been consequences for not running the load that day” (TR 46:21-23). According to Mr. Hansen, his conversation with Mr. English that day lasted about thirty minutes, although Mr. English had previously spoken with Mr. Nye by telephone as well (TR 49:9-16).

Regarding Mr. English’s termination, Mr. Hansen received “word from our dispatch that Jason West, store manager, had reached out and contacted them, asking that Jason⁷ no longer service their store. And also received documentation from – via Jason West – through the logistics team, sent to myself and a senior manager, with the statements that we’ve discussed from Eileen [Richmond] and Barry [Thompson]” (TR 71:17-23). After authenticating RX 2 and RX 3 as the statements received from Mr. West, Mr. Hansen testified,

Q: And what was the basis for your termination of Mr. English?

⁷ Thus, one “Jason” (Mr. West) complains about another (Mr. English).

A: With the determination from Home Depot with the direction, via the phone call, and by the e-mails received, that he could no longer service those stores, we terminated him after that fact.

(TR 72:12-17.)

Mr. Nye's Testimony

William Nye has been Senior Operations Manager for Respondent for about ten years. He is located in Sacramento, California. He oversees day-to-day operations of five markets: Seattle, Portland, Spokane, Boise, and the Central Valley of California. He supervises the operations and the dispatch office, and is responsible, in tandem with Mr. Hansen in the four markets outside of the Central Valley, for discipline of the drivers (TR 80:8-81:21).

According to Mr. Nye, when a driver calls with a concern about a potentially unsafe load,

. . . we team with the driver and the store to ensure the safety first of the public. We're never going to force the driver to take a load that he deems unsafe. Ultimately, it's his call and we rely on him as a professional driver to ensure that he's taking into consideration that we're running freight on a flatbed and we're vulnerable to product, you know, falling off or being damaged, and putting the general public in danger. So, we always team up with the driver and ensure that he's comfortable with hauling the freight, along with the Home Depot, to ensure – if there's availability – to re-palletize or secure product, that we go that direction.

(TR 83:4-19).

Mr. Nye has never disciplined a driver for complaining about an unsafe load (TR 84:20-23). To his knowledge, no Cardinal driver has ever been disciplined or fired for complaining about an unsafe load (TR 84:20-85:14).

Mr. Nye did not dispute Mr. English's assertion that the two of them had spoken by telephone on December 29, 2017, about a load of fencing Mr. English was supposed to transport (TR 91:13-92:9).

With respect to Mr. English's termination, Mr. Nye testified,

Q: . . . Did you have any role in the decision to terminate Mr. English?

A: There was a combination of a few folks, Jaime Hanse, myself and our HR Department.

Q: Okay. Why did you terminate Mr. English?

A: Ultimately, there was – I don't know if this is something we should bring into it, I'm not sure, but there were some issues with one of the Home Depots, and they had requested that we no longer have Jason service the Home Depot account.

...

Q: Did Home Depot tell you why they didn't want Mr. English back?

A: Yes. They sent an e-mail in regards to some – an altercation, if you will, between a few employees and Jason.

Q: Okay. Now, have you ever had any other employee have that kind of a problem with a customer, where employees of the customer complained about the driver's behavior?

A: Not in that depth of an e-mail. We do get concerns from the Home Depot saying, you know, a driver may be, you know, arguing with a loader, and we address it and they move on and we never hear about it. Nothing to this extent where the customer and store had actually requested his – a driver to be removed.

Q: Other than Mr. English, have you ever had a driver, about whom a customer complained in that way, that is where the customer said I don't want that driver to come back?

A: Not in the Seattle market.

Q: He's the only one?

A: Correct.

Q: Have you had any drivers in any other markets who have been the subject of that kind of complaint, do you know?

A: Not that I am aware of.

...

Q: Did Mr. English's insistence on securing a load from Home Depot on December 29th, [2017], play any role in his termination?

A: No.

[TR 88:6-90:2).

Mr. Martinez's Testimony

Rafael Martinez works for Respondent in Sacramento, California, "the main dispatch for the five call centers" in the Central Valley, Seattle, Portland, Boise, and Spokane. He has been a driver for eight-and-a-half years, a driver trainer for seven years, and a dispatcher for six years (TR 96:14-98:3).

As a driver, Mr. Martinez has never felt Respondent expected him to transport a load that he felt was loaded unsafely or improperly (TR 99:15-18). He has never felt that if he refused a load, because of safety, that his job would be in jeopardy (TR 99:24-100:2). He has never felt pressured to take an unsafe load because of time constraints (TR 100:3-5). He has never felt he should not report an unsafe load to dispatch (TR 100:6-8). He has personally never called dispatch with a concern over an unsafe load and then suffered any discipline as a result (TR 100:9-11).

Mr. Martinez remembered Mr. English calling with concerns about potentially-unsafe loads. Mr. Martinez typically responded by "try[ing] to troubleshoot the situation," suggesting for example, that the store might wrap the load, or band it, or rebuild or even reduce it. He advised Mr. English to refuse loads if Mr. English thought them unsafe (TR 101:3-25). On no occasion did he ever advise Mr. English differently (TR 102:1-5).

No one has ever asked Mr. Martinez whether Mr. English ought to be terminated because of his phone calls to dispatch over concerns about unsafe loads (TR 102:6-10). Cardinal Logistics has never disciplined Mr. English in any way for calling dispatch with respect to unsafe loads from Home Depot locations (TR 102:11-14). To Mr. Martinez's knowledge, no Cardinal driver has ever been disciplined for calling in to dispatch over unsafe or unsecured loads (TR 102:15-19).

Mr. Martinez also testified Cardinal drivers were required to take pictures of every load after delivery (TR 106:15-20).

Ms. Heinicke's Testimony

Leilani Heinicke is an Operations Supervisor at Respondent's Sacramento, California, location. She has worked for Respondent for eight years. Along with Mr. Martinez, she acts as dispatcher in the Sacramento office (TR 109:2-110:1).

She testified she has received calls from Cardinal drivers concerned about transporting potentially-unsafe loads. In such situations, she “troubleshoot[s] the situation to try to figure out what that state is of the load, to see if there’s any time to fix it, secure the load or portions of it that the driver thinks is unsafe. We get together with the driver and the store to reposition and repackage the load, to determine if it needs to be rescheduled or can go out” (TR 110:2-13). She has had calls from Mr. English about potentially-unsafe loads, and handled them in the same manner (TR 110:19-111:4). She never advised him any differently (TR 111:5-9).

No one at Cardinal Logistics ever asked her if Mr. English’s employment should be terminated because of his calls about potentially-unsafe loads (TR 111:18-22). So far as she knows, Cardinal Logistics never disciplined Mr. English in any way for such calls (TR 111:23-112:2). No Cardinal driver has ever been disciplined for calling about potentially-unsafe loads (TR 112:3-5).

She remembers a call coming in from someone at Home Depot saying they had asked that Mr. English not come to their store again. She transferred that call to her manager⁸ (TR 112:6-20).

DISCUSSION

This case includes an uncommon feature: the relationship between Respondent Cardinal Logistics Management and its customer, Home Depot U.S.A., Inc., against whom Mr. English unsuccessfully tried to assert a claim under STAA. Yet, although Home Depot was not Mr. English’s employer, it is beyond dispute that Home Depot’s dissatisfaction with him led directly to Mr. English’s termination. If Mr. English’s own testimony, Mr. West’s testimony, Mr. Hansen’s testimony, and Mr. Nye’s testimony were not sufficient on that point – and they are – CX 1 leaves little room for misunderstanding. A letter dated January 11, 2018, from Respondent to Mr. English, it recites:

Dear Mr. English:

The purpose of this correspondence is to advise you that the Appeal Committee has concluded its review of your termination. A thorough investigation was conducted, considering the information provided by you, Cardinal management staff and the Human Resources department, on which basis a final decision was rendered.

After careful review of all the documents submitted, we regret to inform you that a decision was made to uphold your dismissal from the Company. The Appeal Committee determined that the complaints received from the customer justified the

⁸ Apparently, Mr. Nye (TR 114:10-16).

manager's decision to terminate your employment. While you believed your work performance was satisfactory, the customer held a different opinion and requested that you no longer provide service to their account.

The outcome of this appeal represents the Company's final position on the matter. Please note that a copy of this decision letter and your submitted appeal documents will be placed in your personnel file.

Sincerely,

CARDINAL LOGISTICS MANAGEMENT CORPORATION

The relationship between Respondent and Home Depot has the potential greatly to complicate matters. STAA prohibits Respondent from, for example, firing Mr. English for making a good-faith safety complaint. STAA does not necessarily prohibit Respondent from firing Mr. English because an important customer refuses to work with him. But suppose the important customer were to refuse to work with Mr. English because Mr. English made a good-faith safety complaint. A host of troublesome issues would immediately appear. *See Tamosaitis v. URS Inc.*, 781 F.3d 468, 482 (9th Cir. 2015), a case decided under the Energy Reorganization Act. Fortunately, as discussed more thoroughly below, this case is considerably simpler.

Mr. English Engaged in Protected Activity

First, the evidence shows Mr. English engaged in protected activity on December 29, 2017. The testimony at the hearing, combined with Mr. English's deposition testimony, also permits an inference that he engaged in protected activity on or about December 30, 2017. Under 49 U.S.C. section 31105, subsection (a), "protected activity" includes any "complaint . . . related to a violation of a commercial motor vehicle safety or security regulation, standard, or order." A complaint is protected if it is "related" to a safety violation. *Monteer v. Milky Way Transport Company, Inc.*, 90-STA-9 (Sec'y July 31, 1990), slip op. at 8. A complaint is protected even if ultimately determined meritless. *Jackson v. Protein Express*, 95-STA-38 (ARB Jan. 9, 1997); *Barr v. ACW Truck Lines, Inc.*, 91-STA-42 (Sec'y Apr. 22, 1992).

Mr. English testified he spoke on the telephone on December 29, 2017, both with Mr. Hansen and Mr. Nye about a load he felt he could not safely transport without further "stabilization." Mr. Hansen expressly acknowledged such a conversation had taken place on that date, and Mr. Nye does not dispute it. Mr. Hansen, Mr. Martinez, and Ms. Heinicke all recalled telephone conversations with Mr. English about potentially-unsafe loads. The hearing testimony shows Mr. Hansen, at least, was aware of some of the events which Mr. English, in his deposition, described as having taken place on December 30, 2017. It makes no difference that Mr. English did not refer to a specific regulation or standard when he made his

complaint. *Nix v. Nehi-RC Bottling Company, Inc.*, 84-STA-1 (Sec’y July 13, 1984), slip op. at 8-9. Such activity is protected even if reporting safety concerns is part of the employee’s regular duties. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-30 (ARB Feb. 29, 2012; *see also* RX 1, p. 1).

Respondent Knew of the Protected Activity

As discussed above, Mr. Hansen and Mr. Nye both appear to have spoken directly by telephone with Mr. English on December 29, 2017, about the Home Depot load he had been assigned to carry on that date. They both appear to have known of at least some of the events Mr. English describes in his deposition as having taken place on December 30, 2017. Mr. Hansen, Mr. Martinez, and Ms. Heinicke testified they had participated in such conversations with Mr. English on other occasions as well.

A Preponderance of the Evidence Does Not Show The Protected Activity Was a Contributing Factor to Mr. English’s Termination

As set forth above, Mr. English must show, by a preponderance of the evidence, that his protected activity was a “contributing factor” to Respondent’s decision to terminate him. He need not show a retaliatory motive, he need not show Respondent’s stated reason for the termination was mere pretext, and he need not show it was the sole or proximate cause of the termination. He may rely entirely on circumstantial evidence. But he must show the protected activity, either alone or in combination with other factors, tended to affect the decision to terminate his employment in some way. And he must show it by a preponderance of the evidence.

Mr. English has shown he engaged in protected activity on December 29, 2017, and possibly on December 30, 2017; that Respondent knew of that protected activity; and all parties agree he was terminated on or about January 3, 2018. “One of the common sources of indirect evidence is ‘temporal proximity’ between the protected adverse activity and the adverse action. The closer the temporal proximity is, the stronger the inference of a causal connection. Such indirect evidence can establish retaliatory intent. [Citations omitted.] A temporal connection between protected activity and an adverse action may support an inference of retaliation, but it is not necessarily dispositive.” *Reiss v. Nucor Corporation-Vulcraft-Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010), *5. In an appropriate case, then, the temporal proximity might carry the day in Mr. English’s favor at this stage of the analysis. But in this case it does not.

It does not because, first, Mr. English’s testimony is inherently troubling. As demonstrated above, when asked direct questions, he often dissembles or changes the subject, which reflects poorly on his credibility. His January 7, 2019, deposition testimony likewise reflects poorly on his credibility. On that occasion, just over six

weeks before the hearing, when asked if he had reviewed any documents or notes to prepare, he replied,

No. I wanted to be as rawfully *[sic]* truthful as possible. So I bring nothing except everything from the top of my head that I can answer on paper, *without going and getting facts and details, you know, until, you know, even maybe the hearing or something – until the hearing* (emphasis added).

(RX 5, 10:5-13). Asked later in the deposition how many deliveries were on his schedule from a particular store on a particular day, he answered, “Either two or three. *But I’ll have a firm answer for you when we get to the hearing*” (emphasis added) (RX 5, 126:1-5). It sounds to me as if Mr. English were trying to assert some kind of “King’s-X” privilege that would allow him to contradict or embellish his deposition testimony at the hearing, then only forty-four days away. But the oath Mr. English took at deposition is the same oath he took at the hearing: to tell the truth, the whole truth, and nothing but the truth. Declining to give “facts and details” at deposition – that is, failing to tell the *whole* truth – suggests Mr. English did not take his oath at deposition very seriously. One cannot help but wonder whether he took his oath at the hearing any more seriously.

Second, Mr. English’s deposition testimony not only contradicts his hearing testimony in important respects, but, like his hearing testimony, omits crucial details. This further impairs his credibility. In his hearing testimony, Mr. English describes a December 29, 2017, incident arising from his concerns about a load of fencing materials he ultimately delivered to a customer from the Redmond, Washington, store. But in his deposition testimony, he talks about *two* loads, and admits he has nothing to offer but speculation that those loads had anything to do with his termination:

Q: Did Jaime tell you what led up to the decision that you were not going to be allowed to make deliveries for Home Depot any more?

A: Yes. I think he said, “They say that you can’t work there anymore because of something you did the other day.”

Q: Did he say what that something was?

A: *No. But I knew what it was.*

Q: What was it? What is your understanding of what happened that wasn’t going to – I’m sorry.

Let me ask the question this way. Let me get the question clear on the record. It's getting later in the day and my questions are less clear.

Based on the conversation that you had with Jaime, what was it that you believed was the incident that led to the decision that you couldn't do deliveries for Home Depot anymore?

A: *You know, that is a question where you don't have the answer.* Like some of the questions that you're asking, like you kind of know the answer. *But there was two days involved.* So I took one day. And when he said what he said, I'm sitting down and I'm saying, you know what? Well, *I guess* I'm fired for taking this – not taking this load up that hill, and then I can protect myself, but that wasn't it. The next day, I went to the Bothell store. So these are two different stores, Redmond store and Bothell store. The first day –

Q: Can I just interrupt you for a second and ask you, when you said, at first, you thought about a load that you didn't want to take up the hill, that was for the Redmond store?

A: That was the Redmond store, yes.⁹

Q: And that was the day before. And you said – you concluded – this was your own thinking – that that wasn't the incident, that it was something that happened at the Bothell store instead?

A: Yes.

Q: And what happened at the Bothell store?

A: *I denied a load.* This had happened before where I'm pressured. Right? So this is one day and then the next day. It's one day and then the next. So they tried to put a load on my truck that was unstable, unfit for – and this was the very next day. I got – it got all the way to, "You were trying to fight the store manager," is what the store manager put on the piece of paper that was sent from, I believe, OSHA or wherever it was (emphasis added).

⁹ This appears to be the load of fencing material from the Redmond store about which Mr. English testified at the hearing (see TR 25:19-28:5).1

(RX 5, 118:20-120:16). According to his deposition testimony, Mr. English never delivered the Bothell load (RX 5, 121:14-20) – a cargo of wooden beams, rather than fencing material (RX 5, 128:1-11). What is more, in the deposition account, Mr. West – Home Depot’s store manager – tells him “If you don’t run this load, you don’t deliver from this store anymore” (RX 5, 121:1-3). In fact, in the deposition, there is a conversation – perhaps more accurately, a telepathic exchange – between Mr. West and Mr. English:

Q: Okay. And he’s the one who brought Jason West out to the loading area?

A: Yes.

Q: Okay. And then what did you *say* to Mr. West?

A: I just started pointing – you know, kind of pointing like – like he will know. Like, “You’re the manager.” You know, *kind of implying that*, “You know this can’t ride like that? *I’m not saying it, but I’m kind of pointing like*, “You see this. Right?” And he’s like, you know, “What’s wrong with it? You ready to go?” *Or whatever he said. He acted* like he couldn’t – *or it was implied that he thought* that it was stable to go down the road, you know, as well. And I’m sitting here, like, “No.” I’m feeling pressure from the previous day and this had happened before. I’m feeling pressure from the previous day.

Q: The previous day was a different store. Right?

A: With the Redmond store. It happened in that same – it happened in that same sequence before. It was Redmond, Bothell. It was Redmond, Bothell (emphasis added).

(RX 5, 129:16-130:17). And again:

Q: So when the loader went to get Jason and brought Jason West out to that area, at some point, did you tell him, “I’m not going to make this delivery because it’s not safe?”

A: (No response).

Q: What did you say to Jason West?

A: *I showed him what was wrong* (emphasis added).

(RX 5, 131: 10-16). I have read the deposition testimony several times, and it is still not clear to me that Mr. English ever told Mr. West, in so many words, why he was

concerned about the cargo of wooden beams. Mr. English implies and infers, but is unhelpfully vague about what he and Mr. West actually *said* to each other – except, of course, for Mr. West’s alleged threat, which, for reasons I can only imagine, Mr. English failed to mention when he testified at the hearing, or when he questioned Mr. West there.

Likewise, at the hearing, Mr. English acknowledged complaining to the Home Depot loaders about a load, and acknowledged their efforts to fix it to his satisfaction; but he did not specifically say what he told them. They “kept asking the question of what was wrong with the load, you know. And I kept saying, you know, look at it, I mean if you can’t sit here and look at this load is, you know” (TR 25:10-14). So far as the testimony at the hearing goes, this is as explicit as Mr. English ever was to the loaders who were trying to follow his instructions. It is hardly surprising, under those circumstances, that it took, by Mr. English’s estimation, three hours to complete the loading. At one point in those three hours, Mr. English testified he left the store, “[a]nd then called William and Jaime to, you know, circle around and go back to the store to pick the load up” (TR 26:13-17). All of this may well “relate” to a safety violation, and therefore qualify as protected activity under the statute. But this testimony much more readily suggests Mr. English has problems communicating clearly to other people than that his employer considered his concern for safety excessive.

Neither in his deposition, nor at the hearing, did Mr. English deny his conduct toward Home Depot employees, or Home Depot customers, was inappropriate. In the cases of Ms. Richmond and Mr. Thompson, he expressly admitted it.

Third, both Mr. Hansen and Mr. Nye testified it was not Mr. English’s concern for a potentially-unsafe load or loads which convinced them to terminate his employment. The testimony of Messrs. Hansen and Nye in this regard is bolstered by the uncontradicted testimony of their own, and of Mr. Martinez and Ms. Heinicke, that Cardinal drivers in general, and Mr. English in particular, had complained of potentially-unsafe loads before December 29, 2017, and were never disciplined or terminated for so doing. Mr. English admitted this was true in his case (TR 39:18-40:25). Mr. Hansen’s and Mr. Nye’s testimony is further bolstered by Respondent’s Hazardous Conditions Policy, RX 1, which encourages Cardinal drivers and other employees encountering potentially-unsafe conditions to contact a manager or dispatch immediately, identify any potentially-unsafe condition, and work with their manager or dispatch to determine the safest course of action (RX 1, p. 3) – exactly what Mr. English testified he did on December 29, 2017.

Fourth, Home Depot did not complain to Respondent about Mr. English’s concern for safety, but only about his manner of dealing with other people. Mr. West testified he told Respondent, “[W]e do not want Mr. English back on our property. We don’t feel safe, it’s not good for our associates, we don’t want him to service our location anymore” (TR 58:2-5). Later, Mr. West told his logistical team he had

told Respondent that Home Depot did “not want Mr. English to service our location any longer” because of “the potential safety issues, the uncomfotability [*sic*] of our associates” (TR 61:18-22). Someone apparently forwarded Ms. Richmond’s and Mr. Thompson’s statements, RX 2 and 3, to Respondent as well. Mr. West’s testimony is supported by his uncontradicted statements of other disruptive conduct, including Mr. English’s entering Mr. West’s office to complain loudly there was no place for him to park his truck; Mr. English’s interrupting an assistant store manager, who at the time was helping a Home Depot customer, to complain about his route, over which she had no control; and Mr. English’s bringing an order-fulfillment associate to tears, so that she would later tell Mr. West she didn’t feel safe around Mr. English and cited having to work with Mr. English as one of the reasons for quitting her job at Mr. West’s store. On all of these occasions, according to Mr. West, Mr. English was “aggressive” and “angry,” causing others to fear for their safety. At the hearing, Mr. English, representing himself, asked Mr. West “what was really wrong that morning” (on December 29, 2017), and Mr. West replied,

Your behavior was the issue, Mr. English. It was a pattern of behavior that had been established since your inception into our building. It continued on, over almost a four-month period, and at that point, with myself, my management team and my associates not feeling safe around you, it was long overdue not to have you back on the premises.

(TR 67:3-9). Significantly, at no time in the hearing did Mr. English ever deny Mr. West’s testimony about his conduct on any of these occasions. He expressly admitted his conduct towards Ms. Richmond and Mr. Thompson, offering preposterous explanations for why he behaved as he did.¹⁰

Fifth, not only did Home Depot complain to Respondent only about Mr. English’s manner and conduct, but there is no evidence Respondent ever considered any other reason for terminating him. There is no evidence to suggest Respondent ever disciplined or terminated any employee for complaining about a potentially-unsafe load. Neither is there any evidence to suggest any other Cardinal Logistics employee had ever annoyed a customer to the extent Mr. English had annoyed the people at Mr. West’s store (although Mr. West appears to believe Mr. English had previously annoyed a different customer, Metrie, more or less to the same extent¹¹). Mr. English testified Mr. Hansen had told him he was fired because Home Depot did not want to work with him.

For all of these reasons, I conclude a preponderance of the evidence does not show Mr. English’s concern about the safety of his load on December 29, 2017 – or

¹⁰ See also TR 42:22-44:8.

¹¹ At the hearing, Mr. English never denied that episode, either.

on any other occasion – played any role in, or tended to affect in any way, Respondent's decision to terminate him.

There is No Evidence of Bad Faith

In this case, there is no evidence to suggest Home Depot's complaints about Mr. English's conduct were anything other than genuine. The only evidence to suggest Respondent used Home Depot's complaints as an excuse to fire Mr. English for engaging in protected activity is Mr. English's deposition testimony that Mr. West threatened him he would not be able to deliver for the Bothell Home Depot store ever again unless he carried a load of wooden beams which he refused to carry. As discussed above, that testimony is not credible, and there is no evidence whatever to show Respondent had any inkling such a threat had ever been made.

Someday, there may be a case with evidence that an employer subject to STAA has taken advantage of a customer complaint to discipline an employee in a way that STAA prohibits. On the record before me, today is not that day.

ORDER

Mr. English's complaint under the Surface Transportation Assistance Act is **DENIED**, and I award no relief.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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, 800 K Street, NW, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

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

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

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

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