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

Issue Date: 16 May 2023

In the Matter of:

BRYANT STEVENSON,
Complainant,

v.

NFI INTERACTIVE LOGISTICS, LLC, D/B/A NFI TRANSPORTATION,
Respondent,

CASE NO.: 2019-STA-00060

OSHA NO.: 6-1730-19-032

Appearances:

For Complainant:
Bryant Stevenson, Pro Se

For Respondent:
Steven R. McCown, Esq.
Barbi McClennen Lorenz, Esq.

Hon. Tracy A. Daly
Administrative Law Judge

DECISION AND ORDER

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

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

The undersigned conducted two sessions of a formal hearing in this matter – the first by telephone and the second by video. 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 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 June 27, 2022.[1]

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

To accommodate Complainant's pro se status, the undersigned provided Complainant with a written explanation of the required burdens of proof he must satisfy in order to prove the elements of a complaint, which includes proof as to damages.[2] *Kennedy v. Advanced Student Transp.,* ARB 09-145, ALJ 2009-STA-049 (Apr. 28, 2011). Complainant acknowledged this explanation and indicated he understood the information contained in the order.[3] The undersigned also allowed Complainant to submit a Pleading Complaint and Supplemental Pleading Complaint[4] to ensure he identified his alleged protected activity. Taken together, Complainant's filings assert that he engaged in the following protected activity under the STAA: 1) he complained on two occasions to an unidentified Respondent management employee regarding his hours of service and a malfunctioning electronic logging device used to track his hours of service; and 2) he gave Respondent notice that he would not work due to inclement weather and icy conditions predicted for the following workday. As a result of these actions, Complainant contends he suffered adverse action when Respondent suspended and later terminated his employment.[5] (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, Complainant failed to demonstrate it had knowledge of the alleged protected activity. Finally, Respondent argues Complainant has not demonstrated the alleged protected activity was a contributing factor in Respondent's decision to suspend and later terminate his employment. Rather, Respondent asserts Complainant was terminated for refusing to pick up a backhaul and insubordination. (RB-1)

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

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

b. Whether Complainant suffered an adverse employment action.

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[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] *Order Providing Complainant Notice of His Burdens and Directing Filing of Receipt* (Sept 15, 2020).

[3] *Complainant Notice of His Burdens and Filing of Receipt* (Sept 28, 2020); Tr-1, pp. 9-10.

[4] These filings are: 1) Pleading Complaint filed October 23, 2019; and 2) Supplemental Pleading Complaint filed December 26, 2019.

[5] Complainant also initially raised as protected activity that he was paid for a scheduled workday – January 9, 2019 – in which Respondent alleged he failed to report for work. He also initially raised as adverse action that Respondent alleged Complainant failed to report to work without prior notice on two occasions and refused to pick-up two assigned loads. Based on Complainant's subsequent submissions including his post-hearing briefs, the undersigned interprets these allegations as argument regarding the shifting nature of Respondent's reasons for his termination.

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

d. 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.[6] This decision is based upon the entire record.[7]

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 fact.[8] (AX-1, Tr-1, pp. 12-16)

b. ***Exhibits Admitted into Evidence.*** The undersigned fully considered the exhibits admitted at the hearing. As expressly articulated to the parties at the hearing, only exhibit content directly cited in a post-hearing brief by specific exhibit and page number was considered material and relevant evidence. All other information contained in the exhibits, but not specifically cited in the briefs, was regarded as non-relevant background information provided for chronological context to cited relevant evidence. However, given Claimant's pro se litigant status, the undersigned reviewed and considered the Complainant Exhibits in their entirety.

1) Complainant Exhibits. Complainant offered twenty (20) exhibits for identification. The undersigned overruled Respondent's objections to CX-3, CX-5, CX-11, CX-20 and admitted CX-1 through CX-20 into the record as substantive evidence. (Tr-1, 17-19)

2) Respondent's Exhibits. Respondent offered thirteen (13) exhibits for identification. With no objection from Complainant, the undersigned admitted RX-1 through RX-13 into the record as substantive evidence. (Tr-1, pp. 20-21)

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. Chi. Grain Trimmers Ass'n, Inc.*, 390 U.S.

[6] 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.* CX-1, p. 4). Reference to the hearing transcript is by designator Tr-1 for the first preliminary hearing session and Tr-2 for the second hearing session, followed by page number (*e.g*. Tr-1, p. 3).

[7] 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).

[8] Respondent filed stipulations on November 4, 2020. Although Complainant did not agree to Respondent's stipulation at the time it was filed, the undersigned reviewed each stipulation at the preliminary hearing session and Complainant indicated his agreement at that time. (Tr-1, pp. 12-16)

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) Complainant. (Tr.-2, pp. 59-216) Complainant testified about the general nature of his work as a commercial motor vehicle driver for Respondent and the events that occurred in relation to several assigned delivery jobs, including his final delivery route and back haul assignment immediately prior to his suspension and termination. He also testified about his experiences in using his driver trip sheets and Respondent's electronic logging device to track his hours of service. Finally, Complainant testified about the discrepancy he perceived in his total mileage reflected on his payroll settlement sheets from Respondent.

Complainant presented his testimony in a clearly sincere and heartfelt manner, but portions of his testimony were premised on his unsupported subjective assumptions about the events, facts and actions in this case. For example, Complainant's factual testimony regarding the back haul incident just prior to his suspension and termination is consistent with that of the other witness and the documentary evidence. However, his assertions regarding the basis, purpose or intent behind Respondent's decision to suspend and terminate his employment are not supported or corroborated directly or circumstantially by other witness testimony or documentary evidence.

Additionally, Complainant displayed a recurrent inability to provide specific, detailed relevant information about critical events related to his alleged protected activity either because of poor recollection or personal feelings. In fact, much of his testimony presented incomplete, confusing or inconsistent information. For instance, Complainant unequivocally testified that his electronic driving log for the date he contends he first lodged an hours-of-service complaint reflected incorrect information – specifically that he was off duty for any period during the return trip of his assigned route. He testified that this return trip – that should have taken 2 to 2.5 hours – took him approximately six hours. Nevertheless, he was unable to recall even basic details to explain his actions or account for his time during this six-hour period, other than stating that his return trip was "stop and go." He could not explain what he meant by "stop and go" or recall how many times he stopped, or if he drove for extended or short periods followed by breaks.

Additionally, Complainant was unable to recall any specific facts or details regarding his alleged hours-of-service complaints and could not articulate how the exhibits he offered supported his claim that he violated his hours of service. For example, Complainant was unable to explain how his payroll settlement sheets supported his claim that he was violating his hours of service on his longer assigned routes. To the contrary, his testimony regarding his settlement sheets was confusing and contradictory. At times, Complainant acknowledged that his settlement sheets reflected twice his driving miles on an assigned route because he was compensated with two

mileage-based line items. At other times, Complainant testified that these settlement sheets represented falsified mileage by Respondent that should have caused hours-of-service violations. He also could not recall who he complained to regarding hours-of-service issues or who he called and informed that he would not work due to predicted icy road conditions.

Overall, his testimony regarding the material contested facts relating to his complaint was accorded only partial weight.

2) Mr. Alejandro Mendoza. (Tr. pp. 222-306) The witness explained that he is currently employed by Respondent as Transportation Manager but worked as Respondent's Operations Manager during the time of Complainant's employment. He testified regarding his primary duties as Operations Manager, including his knowledge of Respondent's safety policies regarding its drivers and the regulations impacting a driver's driving and on duty hours of service. Mr. Mendoza also testified regarding how Respondent tracks its drivers' hours of service through an electronic logging device located on each commercial motor vehicle, and Respondent's procedures for a driver who believes he will exceed his hours of service before completing an assigned delivery. Finally, he testified regarding events that occurred during Complainant's last assigned delivery route prior to his termination, including the decision to suspend and terminate Complainant's employment with Respondent.

Mr. Mendoza's testimony was consistent with and supported by documentary evidence. He testified in a forthright manner and displayed no animus or personal bias. In fact, he was particularly forthright in admitting that the electronic logging devices used by Respondent to track hours of service are computers and, as such, can malfunction. He was also forthright in admitting when he had no knowledge regarding an event or documentary evidence presented.

His description of the events during Complainant's last assigned delivery and Respondent's communications with Complainant regarding his suspension and termination was corroborated by Complainant's testimony and the documentary evidence. His testimony regarding the reasons for his supervisor's decision to terminate Complainant and his concurrence in that decision were clearly identified and fully explained. His testimony was reliable, well-supported and given considerable weight.[9]

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:[10]

a. Respondent is a transportation company that operates a facility in Terrell, Texas, which serves as a Walmart Distribution Center. Respondent transports refrigerated and frozen food to

[9] In his post-hearing reply brief, Complainant raises multiple objections of "hearsay" and "speculation" to Mr. Mendoza's testimony. The undersigned ruled on all objections properly raised during the witness's hearing testimony, and Complainant's untimely objections will not be considered at this late stage. Nonetheless, in light of Complainant's *pro se* status, the undersigned did also consider these untimely objections as argument that the testimony should be accorded less weight.

[10] 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.

Walmart and Sam's stores by commercial motor vehicle from this facility. (AX-1; Tr-2, p. 225)

b. On August 31, 2018, Respondent hired Complainant as a commercial motor vehicle delivery driver who would work out of its Terrell facility. Complainant's job duties consisted of transporting and delivering products on an assigned route from the Terrell facility to designated Walmart and Sam's stores and on occasion, picking up products or "back hauls" from stores or suppliers and delivering them to the Terrell facility. Complainant reported directly to one of four shift supervisors, who in turn reported directly to Alejandro Mendoza, Respondent's Operations Manager. Mr. Mendoza reported directly to the Transportation Manager, Josh Rhodes. (Tr-2, pp. 60-61, 222-25, 272-73)

c. Respondent required all drivers to utilize a computerized Electronic Logging Device (ELD) located on each truck to track the driver's hours of service through electronic driver logs. The ELD required a driver to log in with a unique driver identification number and password and tracked a driver's driving hours, on duty hours, off duty hours, and sleeper berth hours. The ELD provided alerts or warnings regarding the number of hours driven and existing or potential impending violations of the hours-of-service restrictions. The driver was responsible for monitoring the accuracy of the ELD and, in the event of an ELD malfunction, switching from the ELD to a paper log to record hours of service. Respondent's shift supervisors were required to report to Mr. Mendoza any failures or malfunctions in the ELD reported by a driver. (Tr-2, pp. 232-33, 239-40, 283, 285-87; RX-2; RX-3)

d. For each assigned route, Respondent required its drivers, including Complainant, to complete a driver trip sheet, including information used to process a driver's weekly pay. Respondent also required its drivers to record on the driver trip sheet arrival and departure times for each delivery and back haul completed. Respondent used these times in the event its customer – Walmart – raised an issue with the time a driver left the customer's facility gate. Respondent did not use the times recorded on the driver trip sheet to track a driver's hours of service, either manually or as source information for its electronic logging system. (Tr-2, pp. 282-85; CX-6)

e. Complainant's per mile wage compensation was reflected on a settlement sheet generated by Respondent for each pay period. For each leg of his assigned routes, Complainant's settlement sheet reflected an identical number of miles under two separate line items – route pay and experience bonus. The settlement sheet also reflected a total of all miles for an assigned route, which was twice the actual miles driven on that route because the total included duplicate miles for the two line items. Complainant was also eligible for a $1,200 weekly compensation guarantee if he worked all assigned days and performed all work legally required by Respondent. (Tr-2, pp. 240-47; CX-7)

f. On September 11, 2018, Complainant's assigned route began at the Terrell facility at 22:11, included three delivery stops and returned to the Terrell facility on September 12, 2018, at 11:45. Complainant's settlement sheet reflects Complainant drove 528 miles on this assigned route. This was Complainant's first longer route that took him through the Houston area. Complainant did not complain to Respondent regarding his hours of service or the ELD malfunctioning on this route.[11] (Tr-2, pp. 66, 69; CX-7, p. 1; CX-10, p. 1)

[11] Complainant's electronic logs are for this route were not included in the parties' exhibits.

g. On September 18, 2018, Complainant was compensated for a 75-mile assigned route. Respondent's dispatcher documented on a driver trip sheet dated September 18, 2018, that the dispatcher called Complainant around 8:30 p.m. and he refused a 2:00 a.m. load. Respondent paid Complainant a $1,200 weekly guarantee for completing all work assigned during the week including September 18, 2018. (CX-7, p. 1; CX-9; CX-12)

h. On September 19, 2018, Complainant's assigned route began at the Terrell facility, included two delivery stops and returned to the Terrell facility. Complainant's settlement sheet reflects Complainant drove 508 miles.[12] (CX-7)

i. On October 12, 2018, Complainant was issued a first occurrence written warning for violation of Respondent's cell phone policy. (CX-3; Tr-2, pp. 84-84)

j. On October 30, 2018, Complainant departed the Terrell facility on his assigned route at 17:53, traveled 204 miles and arrived at his first delivery stop in Conroe, Texas at 22:50. Complainant departed Conroe at 23:00, traveled 58 miles and arrived at his second delivery stop in Stafford Meadows at 00:58 on October 31. Complainant departed Stafford Meadows at 2:13, traveled 6 miles and arrived at his third delivery stop in Sugarland at 2:30. Complainant departed Sugarland at 3:39, traveled 263 miles and arrived at the Terrell facility at 11:21. Complainant recalled the return trip from Sugarland to the Terrell facility as being "stop and go" so he could rest, but he could not recall how many times or how long he stopped, although he did not stop and rest at a hotel. Complainant's electronic driving log reflects that on October 30, Complainant drove a total of 36 minutes and was on duty a total of 7.06 hours. On the following day, Complainant's electronic driver log reflects he drove a total of 2.25 hours and was on duty a total of 2.46 hours. (CX-8; CX-17, pp. 1-3; Tr-2, pp. 88, 107-09, 135-36, 234-35)

k. During his October 30 route, Complainant began to believe he was violating his hours of service and the ELD was malfunctioning. When he returned to the Terrell facility from his October 30 route, he complained to an unidentified individual in management – "someone in the office" – about his hours of service and ELD not functioning properly. Complainant could not recall who he complained to but had no direct assigned manager he would coordinate with in the dispatch office. This was the first time Complainant complained to Respondent regarding his hours of service or the ELD not functioning properly. (CX-8; CX-17, pp. 1-3; Tr-2, pp. 88, 109-110, 135-36)

l. On November 1, 2, 3, and 4, 2018, Complainant completed his assigned routes. These routes did not extend to the Houston area and covered less miles. Complainant's driver trip sheets and e-logs for these routes accurately reflect Complainant's on duty and driving times and intervals. (Tr-2, pp. 111-14; CX-6; CX-13; CX-14; CX-15; CX-16)

m. On November 21, 2018, Complainant departed the Terrell facility at 16:31 on his assigned route, made three delivery stops and returned to the Terrell facility at 8:35 on November 22, 2018. He drove 530 miles on this assigned route, which extended into the Houston area.[13]

[12] Complainant's driver trip sheet and electronic log are not included in the parties' exhibits for this route.
[13] Complainant's electronic log for this date was not included in the parties' exhibits.

When he returned to the Terrell facility, Complainant told an unidentified individual in management – "someone in the office" – that he had completed a route on that day that had taken him over his allowable hours of service. Complainant viewed this violation as a "big deal" but could not recall to whom he complained. After this complaint, Complainant was not assigned what he viewed to be longer routes that took him through the Houston area. (CX-10, p. 2; Tr-2, pp. 129-36)

n. On December 14, 2018, Complainant was issued a written employee warning notice by Mr. Mendoza for failing to report to work or call to report his absence on December 13, 2018. Complainant refused to sign the notice as unwarranted because he believed he properly reported his absence, and his absence was justified by icy conditions predicted by weather authorities. On his December 12 driver trip sheet, Complainant reported that he was available to work on December 13 "[i]f weather permits." Respondent received no other report from Complainant that he would not work on December 13 due to weather issues. The weather on December 13, was not as bad as predicted, and Complainant was the only driver for Respondent that failed to report to work on that day. Respondent's dispatch office placed three telephone calls to Complainant on December 13, at 16:13, 19:53, and 21:31.[14] (RX-7; CX-2; CX-10, p. 3; CX-11; CX-20; Tr-2, pp. 137-54, 253, 256-57)

o. On a driver trip sheet dated January 9, 2019, Respondent's dispatcher documented that Complainant was called for an assignment but failed to answer. On the following day, someone from Respondent's office called Complainant and informed him of this no call/no show violation. Complainant explained to this individual that he did not receive a call for work on January 9 from Respondent. Sometime after this conversation, Complainant contacted Josh Rhodes who agreed to pay Complainant the $1,200 weekly guarantee for the week including January 9, 2018, if he finished the remainder of his work schedule "strong." Although Respondent initially failed to pay Complainant the $1,200 weekly guarantee for this week, Respondent subsequently paid Complainant an additional amount for this week for "missed pay." (CX-8, p. 3; CX-9, p. 1; CX-12, p. 2; Tr-2, pp. 160-64)

p. On January 15, 2019, Complainant completed two assigned deliveries to Walmart stores in Longview, Texas, and arrived at a Cal-Maine Eggs facility in Pittsburg, Texas at approximately 19:50 to pick up a back haul trailer of eggs for transport to the Terrell facility. The Cal-Maine facility was closed, and Complainant was unable to locate the trailer or paperwork for his assigned back haul. Complainant contacted Respondent's dispatch office for assistance and spoke with shift supervisor Dorothy Church. After multiple unsuccessful attempts at assisting Complainant in locating the paperwork, Ms. Church informed Complainant she would contact Wal-Mart for assistance and call him back. While Ms. Church was on the phone with Walmart, Complainant contacted the dispatch office again and informed a dispatch office employee that he would depart the Cal-Maine facility in ten minutes. At approximately 21:45, Complainant departed the Cal-Maine facility without the assigned load. A short time later, Ms. Church spoke with Complainant by phone, informed him that the Cal-Maine plant manager was at the facility with the paperwork and instructed him to return to the facility to pick up the load. Complainant refused to return to pick up the load, disagreement ensued and both Complainant and Ms. Church yelled. Ms. Church contacted another driver to pick up the Cal-Maine load. (RX-10; RX-11; RX-12; Tr-2, pp. 165-69,

[14] Complainant's phone records are not included in the parties' exhibits.

187-93, 260-62, 267)

q. At approximately 00:09 on January 16, 2019, Complainant arrived at the Terrell facility. Upon his arrival, Ms. Church informed Complainant that he was suspended at the direction of Mr. Mendoza. Later in the same day, Mr. Mendoza sent an email to Mr. Rhodes and Mr. Rhodes' supervisor – Van Carter – recounting the events at the Cal-Maine facility and seeking their assistance. (RX-10; RX-11; RX-12; Tr-2, pp. 260-61, 265)

r. On January 18, 2019, Mr. Mendoza and Mr. Rhodes met with Complainant and terminated his employment for failing to transport the Cal-Maine load and for insubordination in relation to his conversation with Ms. Church, including his refusal to follow her instructions to return to pick up the Cal-Maine load. Mr. Rhodes made the decision to terminate Complainant's employment; Mr. Mendoza concurred in that decision. Prior to terminating Complainant, Mr. Mendoza spoke with Complainant, the Cal-Maine plant manager and Ms. Church. Complainant and Ms. Church provided substantially similar accounts of the events and activities at the Cal-Maine facility, their subsequent telephone conversation and Complainant's suspension. Complainant raised no safety issues regarding his truck or concerns about his hours of service in this conversation. Ms. Church confirmed to Mr. Mendoza that Complainant was not in jeopardy of exceeding his allowable hours of service on this route. The Cal-Maine plant manager confirmed to Mr. Mendoza that a Cal-Maine employee failed to provide the appropriate paperwork associated with Complainant's load prior to Complainant's arrival on January 15 and further confirmed that Complainant was no longer at the Cal-Maine facility when he arrived with the paperwork that evening. (AX-1; RX-10; Tr-2, pp. 60, 165-68, 175-76, 225, 261, 267-68)

s. Walmart complained to Respondent regarding the Cal-Maine incident. Mr. Rhodes and Mr. Mendoza viewed Complainant's failure to return with a back haul as a severe issue – something that could cause them to lose their customer or their jobs. (Tr-2, pp. 267, 268-69)

t. Approximately three to four months prior to Complainant's termination, Respondent terminated another driver out of Houston for refusing to pick up a back haul load. (Tr-2, p. 270)

u. At the time Mr. Mendoza participated in the discussion and decision to terminate Complainant, Mr. Mendoza was unaware of any complaints by Complainant related to his driving hours, hours of service, or malfunctioning of his ELD. (Tr-2, pp. 234-35, 270-71)

v. Respondent assigned all drivers traveling to the Houston area a commercial motor vehicle with a day cab because these trips did not require an overnight stay. Other than Complainant, no driver had a problem completing an assigned Houston area route within the allotted hours of service. Complainant never informed Mr. Mendoza during his employment that he felt the Houston area routes were causing him to exceed his allowable hours of service. (Tr-2, pp. 257-58)

w. At the time of Complainant's employment, Respondent's procedure for a driver operating a commercial motor vehicle with a day cab who would not complete his assigned job before reaching the allowable hours of service was for the driver to call Respondent, who would locate and pay for a hotel room for the driver. Complainant never called Respondent to report he would run out of hours before completing his assigned delivery route. (Tr-2, pp. 227, 233-34, 273-

75)

x. During his employment with Respondent, Complainant's electronic driver logs never showed a violation of his hours of service. (Tr-2, pp. 206-08)

y. During his employment, Complainant never refused to operate a commercial motor vehicle for any reason or believed that the condition of a commercial motor vehicle or other equipment used by Respondent posed a safety hazard to the traveling public. (Tr-2, pp. 206-07)

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

a. ***Elements of STAA Claim.*** No employer may discharge, discipline, or discriminate against any employee for filing a complaint or who is perceived to file a complaint "related to a 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."[15] *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).

Complaints under the STAA are governed by the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b), which provides whistleblower protection for employees in the aviation industry. *See* 49 U.S.C. § 31105(b)(1).

To prevail on a STAA claim, 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. *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).

1) <u>Protected Activity.</u>

For a complaint to be a protected activity under the STAA, a complainant is not required to prove an actual violation of a federal motor vehicle safety provision. Instead, "a complainant need only demonstrate that he or she had a reasonable belief that the conduct complained of violated

[15] 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).

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)).

"Covered safety complaints include oral, informal, or unofficial 'internal complaint[s] to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation." *Holovatyuk v. Em Cargo, LLC*, ARB No. 2021-0046, ALJ No. 2020-STA-00071, slip op. at 9 (ARB Jan 12, 2022). "Therefore, the 'filed a complaint' language of STAA § 31105 (a)(1)(A) protects from discrimination an employee who communicates a violation of a commercial motor vehicle regulation, standard or order to any supervisory personnel." *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 99-STA-037, slip op. at 6 (ARB Dec. 31, 2002).

Complainant argues that he engaged in protected activity under the STAA when on October 31, 2018, and November 22, 2018, he complained to someone in management that he believed he had just completed routes that caused him to exceed his hours of service. Complainant admits that he is unaware of the identity of the persons to whom he complained – he simply argues he told someone in the office who he characterized as "management."

Complainant did not testify with detail or specificity regarding the nature of his complaints; however, he argues that 1) Respondent's "longer" delivery routes through the Houston area resulted in Complainant exceeding his allowable hours of service; and 2) Respondent's ELD system malfunctioned on these longer routes by improperly adding hours of service to prevent Complainant from reaching or exceeding his limits.

Complainant alleges the longer routes occurred on September 11, September 19, October 30, and November 21, 2018. For each of these routes, Complainant alleges that Respondent falsified his "loaded"[16] miles as twice the actual miles driven, which would be impossible to travel without violating the hours-of-service regulations. However, Complainant contends that he never received hours-of-service warnings from the ELD system[17] because Respondent intentionally disabled his ELD on these longer routes. Additionally, Complainant argues his driver trip sheets from these dates demonstrate he exceeded his hours of service measured from the time he departed to the time he returned to the Terrell facility. (CB-1, pp. 1-6)

Respondent argues that Complainant failed to meet his threshold burden of demonstrating by a preponderance of the evidence that he made a complaint to Respondent. Respondent argues

[16] Complainant provides no explanation for the term "loaded" miles. However, read as a whole, the undersigned interprets this term to refer to the sum total of miles reflected on Complainant's settlement sheets.
[17] Complainant does not specifically argue he violated his hours of service on the September 19 route but includes this route among the longer Houston-based routes.

Complainant failed to prove he engaged in any protected activity because his testimony lacked specific details of his alleged complaints, and he offered no corroborating evidence of these alleged complaints. Respondent asserts Complainant testified that he never refused to operate a commercial motor vehicle during his employment, even though he believed the ELD was malfunctioning, and he was violating his hours of service. Respondent also points to Mr. Mendoza's testimony that he was aware of no such complaints by Complainant. (RB-1, pp. 13-14)

Complainant offered no documentary evidence that he made a complaint to Respondent; the evidence in this regard is limited to Complainant's testimony. Complainant testified that when he returned from his October 30 and November 21 assigned routes, he believed he had just completed routes that caused him to violate his hours of service, and he verbally complained to "someone in the office" of this belief. Regarding the November complaint, Complainant testified that "I just made another verbal complaint about … going and doing these routes, going up that far." Complainant testified that he could not recall who he complained to on either occasion, other than to describe the individuals as "management."

In the absence of evidence to the contrary, the undersigned finds that Complainant has met his burden of demonstrating he raised complaints to Respondent management on two occasions regarding the longer routes causing him to exceed his hours of service and the ELD not reflecting these violations.[18] Although Complainant testified that he could not recall to whom he complained, he also testified that he had no direct assigned manager he would coordinate with in the dispatch office. And it is circumstantially persuasive that after Complainant's November complaint, Respondent did not assign Complainant to a longer route.

The evidence also demonstrates that Complainant held a subjective belief that he had exceeded his hours of service on the longer routes and the ELD failed to log a violation. This subjective belief is supported by Complainant's driver trip sheets for these routes, which show Complainant was over his allowable on duty and driving hours, as calculated from his time of departure to return to the Terrell facility. Complainant's driver trip sheet for his October 30 route, for example, supports Complainant's subjective belief that he had exceeded his on-duty time by roughly 5 hours and his driving time by roughly 5 to 8 hours simply based on the difference between the time he left the Terrell facility to when he returned. Additionally, Complainant's subjective belief regarding the ELD system is supported by conflicting data reflected on Complainant's driver trip sheet, electronic driving log, and settlement sheet for this same route. Complainant's trip sheet demonstrates that he drove from the Terrell facility to his first stop in Conroe on October 30. His settlement sheet from this date attributes 204 miles to that leg of his route – a 2 to 2 1/2-hour trip, according to Complainant. However, his electronic log reflects a total driving time of 36 minutes for this date. [19]

While Complainant's belief that he was exceeding his hours of service on his longer routes and the ELD was malfunctioning by not showing violations may have been subjectively sincere, the undersigned concludes it was not objectively reasonable. Complainant's testimony demonstrates

[18] While the undersigned is unpersuaded by Respondent's argument at this stage, Complainant's inability to identify to whom he complained is certainly relevant in evaluation of Respondent's knowledge in the causation analysis.
[19] The only documentary evidence presented in support of the ELD malfunctioning was in relation to Complainant's October 30-31 delivery route, as discussed above.

a fundamental and significant misunderstanding of the purpose of his driver trip sheets and settlement sheets and his responsibility as a driver of a commercial motor vehicle.

Mr. Mendoza clearly and credibly testified that the driver trip sheet is used for payroll purposes and as back up documentation in the event its customer challenges the time a driver arrives or departs the customer gate. As such, the driver trip sheet does not reflect driving or on-duty time – it simply shows arrival and departure times for each leg of a route and other information needed to properly process a driver's pay. According to the uncontradicted testimony of Mr. Mendoza, the driver trip sheets are in no way used to track a driver's hours of service, either directly or as source information for the ELD. To the contrary, the ELD – or a paper log in the event of an ELD malfunction – is the exclusive method used to track a driver's hours of service. Mr. Mendoza explained that a driver is required to monitor the ELD to ensure it is properly functioning and to switch immediately to a paper log to track hours, if not. And Mr. Mendoza clarified that the driver trip sheet is not a substitute for the required paper log in the event of an ELD malfunction. In fact, Mr. Mendoza persuasively testified that a DOT officer would issue a citation to a driver who attempted to produce a driver trip sheet as a written log in lieu of the required paper log, if the ELD was malfunctioning. Finally, Mr. Mendoza credibly testified that Complainant failed in his obligation to monitor the ELD to ensure it was properly functioning and to switch to a paper log if not and likewise failed to follow Respondent's policy of contacting Respondent to obtain a hotel room prior to exceeding his hours of service.

Likewise, Mr. Mendoza testified that settlement sheets reflect a driver's pay and are not used in any way to track hours of service. This is directly supported by the data reflected on the settlement sheets that shows duplicate mileage entries for each leg of an assigned route and a mileage total for the route that is twice the actual miles driven. The fact that these settlement sheets reflect inflated mileage figures for compensation purposes does not support an objective belief that Complainant violated his hours of service or that the ELD was malfunctioning.

And, although Complainant asserts that the simple mileage of the longer Houston area routes alone results in a driver exceeding his hours of service, this argument is unsupported by the evidence and contradicted by Mr. Mendoza's testimony that all other drivers for Respondent traveling to the Houston area used a day cab truck and had no problem returning within the allotted hours of service. For these reasons, the undersigned concludes Complainant's belief that he was violating his hours of service on the longer Houston area routes and the ELD was malfunctioning by not showing a violation was not objectively reasonable.

Complainant also argues he engaged in protected activity on December 12 and 13, 2018, when he informed Respondent that he would not work on the following day due to predicted inclement weather and icy conditions. The undersigned finds Complainant's argument unsupported by the evidence and unpersuasive.

The evidence related to this event does not demonstrate that Complainant complained to Respondent or refused to operate a commercial motor vehicle because of a safety concern. Instead, the evidence demonstrates that Complainant informed Respondent in writing that he was *available* to work on December 13, "if weather permits" and failed to later contact Respondent to report his subsequent unavailability. On the following day, Respondent's dispatch office attempted

unsuccessfully to contact Complainant by phone on three occasions over a five-hour period when Complainant did not report for work on this day. The evidence also establishes that the weather on December 13 was not as severe as predicted, and Complainant was the only driver who failed to report for work on that day. The undersigned assigns no weight to Complainant's testimony that he contacted the dispatch office once by phone on December 13 to inform Respondent that he was not working due to icy weather. Complainant presented no corroborating evidence of this call, and his testimony is undermined by Respondent's three documented calls to Complainant over a five-hour period, which would have been unnecessary if Complainant had already contacted Respondent.

Consequently, the undersigned concludes Complainant failed to meet his burden of demonstrating by a preponderance of the evidence that he engaged in conduct that satisfies the definition of protected activity under the Act. As a result, Complainant's claim fails and is denied. However, the undersigned will analyze, in the alternative, 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 (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 N. & Santa Fe Ry. Co,* 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). "A whistleblower must prove by preponderance of the evidence that the employer's action was a 'tangible employment action' that resulted in a significant change in employment status, such as firing or failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Luckie v. United Parcel Serv., Inc.*, ARB No. 05-026, 054, ALJ No. 03-STA-039, slip op. at 17 (ARB June 29, 2007).

As supported by the findings of fact, the facts of this case clearly demonstrate Complainant suffered adverse action when Respondent suspended and then terminated his employment. 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 v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011).

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 Complainant was suspended and terminated for two reasons: 1) failing to transport the Cal-Maine load, and 2) insubordination in relation to his conversation with Ms. Church, including his refusal to follow her instructions to return to pick up the Cal-Maine load.

Complainant offers no direct evidence that his protected activity was a contributing factor in the adverse action. Instead, Complainant points to circumstantial evidence that 1) Respondent's reasons for his termination asserted before OSHA included not only the Cal-Maine incident but also allegations of an additional load refusal on September 18, 2018, and two no call and no show incidents on December 13, 2018, and January 9, 2019,[20] and 2) the discipline imposed for these additional incidents was inconsistent with Respondent's attendance policy. Respondent offers no explanation for the narrowing of its reasons for Complainant's termination. Instead, Respondent argues that Mr. Mendoza testified that the two reasons for Complainant's termination related only to the Cal-Maine incident. Consequently, any other disciplinary action taken against Complainant during his employment is irrelevant.

Respondent's position regarding Complainant's termination and the events that occurred at the Cal-Maine facility on January 15, 2019, are essentially undisputed and consistent with the undersigned's factual findings. Complainant left the Cal-Maine facility without his assigned backhaul because he could not locate the appropriate paperwork. A short time after he left the facility, he spoke with Ms. Church by phone who told him that the plant manager was at the facility with the paperwork and instructed that he return to pick up the back haul. Complainant refused to return to pick-up the backhaul and was suspended immediately upon his return to the Terrell facility and terminated subsequently. At no time during these events did Complainant raise a safety concern or issue regarding his hours of service or a malfunctioning ELD and was not in jeopardy of exceeding his hours of service.

Additionally, the evidence clearly demonstrates that, prior to concurring in the decision to terminate Complainant's employment, Mr. Mendoza never received any information that suggested Complainant had expressed concerns or made previous complaints about his hours of service. Furthermore, Complainant has not argued or put forth evidence demonstrating that Mr. Rhodes had any knowledge of any such complaints. And Mr. Mendoza testified that the only conversation that occurred between he and Mr. Rhodes in relation to Complainant's termination was the seriousness of a back haul refusal. Although Mr. Mendoza was aware of Complainant's alleged no call and no show incident in December 2018, Complainant offered no evidence that this incident in any way contributed to his suspension and termination roughly one month later. To the contrary, temporal proximity in this case supports Respondent's asserted reasons for the adverse

[20] In its response to Complainant's OSHA complaint, Respondent's attorney stated that Respondent made the decision to terminate Complainant after considering the Cal-Maine incident, "as well as the fact that he had previously refused a load and no called/no-showed on 2 occasions." (CX-1)

action. It is also persuasive that Mr. Mendoza testified that Respondent terminated another employee a few months prior to Complainant's termination for failing to pick up a back haul.

Considering the evidence as a whole, the undersigned concludes that Complainant's circumstantial evidence of Respondent's shifting reasons and failure to follow policy does not outweigh the undisputed evidence of the events at the Cal-Maine facility and the temporal proximity of the adverse action to these events. The evidence demonstrates that Mr. Rhodes and Mr. Mendoza decided to terminate Complainant's employment based on non-retaliatory reasons directly related to Complainant's failure to return with the backhaul and insubordination. As such, Complainant's protected activity played absolutely no role in him being suspended and 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 Suspended and Terminated 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 suspension and 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).

Respondent presented no argument or analysis regarding the same action defense or the clear and convincing standard. Consequently, the undersigned concludes Respondent waived its arguments in this regard and will not address whether Respondent met its burden.

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 he engaged in protected activity under the STAA;

b. Alternatively, even if Complainant engaged in protected activity, Complainant failed 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.

c. The Complaint in this matter is DENIED.

SO ORDERED this day.

TRACY A. DALY

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

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

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

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

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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.

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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.

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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.

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Administrative Review Board
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200 Constitution Avenue, N.W., Room S-5220,
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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:

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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.