

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
San Francisco

Issue Date: 20 December 2022

OALJ No.: 2020-STA-00070

In the Matter of:

MARVIN WASHINGTON,
Complainant,

v.

TETON PETROLEUM TRANSPORT,
Respondent.

Appearances:

Edward E. May, II, Esq.
May Legal Group, Birmingham, Alabama
For the Complainant

Dione C. Wrenn, Esq. and Robert E. Schumacher, Esq.
of Gordon Rees Scully Mansukhani, LLP, Las Vegas, Nevada
For the Respondent

DECISION AND ORDER DENYING COMPLAINT

This matter arises under the employee protection provisions of 49 U.S.C. § 31105 of the Surface Transportation Assistance Act of 1982 (STAA) and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978. I held a video hearing July 19, 20, and August 6, 2021.

At the hearing, I admitted into evidence Administrative Law Judges Exhibit (“ALJX”) 1, the five stipulations listed below, Joint Exhibits (“JX”) 1 through 29, and Respondent’s Exhibit (“RX”) 30 through 114. Complainant withdrew Complainant’s Exhibits (“CX”) 7, 8, 16, and 17. I excluded Joint Exhibit 5-A. HT 512-13. The remainder of Complainant’s Exhibits 1 through 37 were duplicates of Joint or Respondent’s exhibits.¹

¹ Complainant’s exhibits were duplicates of other exhibits as follows: CX 1 is RX 45, CX 2 is RX 46, CX 3 is RX 34, CX 4 is RX 40, CX 5 is RX 41, CX 6 is RX 44, CX 9 is RX 48, CX 10 is JX 2, CX 11 is

For the reasons explained below, Complainant's complaint is denied.

ISSUES FOR HEARING

1. Did Complainant engage in protected activity within the meaning of the STAA when, after being hired, Josh Ralphs asked him to drive in excess of the daily allowable hourly limits and the falsify driving logs imposed by the Federal Motor Carrier Safety Regulations (FMCSR), and during a phone conversation on March 10, 2020, when he complained about safety violations?
2. Did Complainant suffer an adverse action on March 10, 2020, when he was terminated for refusal to commit safety violations under the FMCSR?
3. Has Complainant shown by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged? 29 C.F.R. § 1978.109(a).
4. If Complainant establishes the elements of his claim by a preponderance of the evidence, then has Respondent established by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity? 29 C.F.R. § 1978.109(b)(1).
5. If Complainant prevails, is he entitled to specific damages in the amount of \$1,500,000.00.
6. Complainant also seeks attorney fees and costs in an amount to be determined.

STIPULATIONS

1. On or about February 21, 2019, Complainant was hired as a driver with Teton.
2. Teton's Employee Handbook addresses unprofessional conduct and behaviors that could lead to disciplinary action up to and including termination of employment.
3. Over the course of his employment, Complainant received verbal coaching and written discipline for performance issues including speeding, unprofessional behavior towards a client, and damaging company property.
4. On March 10, 2020, Complainant contacted Mr. Ralphs regarding his working conditions and pay via telephone.
5. Complainant was terminated as a driver with Teton on March 10, 2020, during the course of the telephone conference.

RX 49, CX 12 is RX 55, CX 13 is RX 58, CX 14 is RX 59, CX 15 is JX 5, CX 18 is RX 70, CX 19 is RX 71, CX 20 is RX 68, CX 21 is JX 6, CX 22 is RX 72, CX 23 is RX 97, CX 24 is RX 98, CX 25 is RX 99, CX 26 is RX 100, CX 27 is RX 101, CX 28 is RX 102, CX 29 is RX 203, CX 30 is RX 106, CX 31 is Joint 17, CX 32 is Joint 18, CX 33 is RX 110, CX 34 is Joint 21, CX 35 is Joint 22, CX 36 is Joint 23, and CX 37 is Joint 24.

FACTUAL FINDINGS

Complainant's Work Prior to Teton

Complainant completed trucking school in 2005. JX 17 at 13. He worked for several trucking companies out of Alabama and Louisiana. *See* JX 17 at 6-13. In 2015, Complainant quit a driving job with Penn Tank Lines after he got into an argument with a dispatcher.² JX 17 at 7. In 2018, he moved to Las Vegas, Nevada, and on August 20, 2018, he took a job driving fuel for Pacific Tank Lines. JX 17 at 5.

Mr. Kelly Harchis was Complainant's supervisor at Pacific Tank Lines³ and was involved in disciplining Complainant there. HT 519: 4-5; 520: 9-14. Pacific Tank Lines warned Complainant in writing and verbally for his speeding, tardiness, and inability to work with dispatch, including yelling at dispatch. HT 522: 21-25; 523: 1-5. On November 11, 2018, following Complainant's refusal to work, a logistics manager at Pacific Tank Lines, stated, Complainant had a slight attitude problem; it was "[h]is way, his start time, his unit, his order or else." RX 108 at 112. At Pacific Tank Lines, Complainant did not start when asked to and "a lot of times the loads would be getting late or just missed all together because he wouldn't have enough time to get them all in." HT 531: 2-7.

On December 27, 2018, Complainant was cited for not following Pacific Tank Lines protocol. RX 108 at 110. Complainant ran out of hours, refused a rescue driver, and drove back to the yard, contradicting the direction of his supervisor, Mr. Harchis. RX 108 at 110; HT 528: 19-25; 529:1-6. When he ran out of hours, Complainant contacted dispatch and stated he logged out, but was driving back the yard. The dispatcher told him a driver was on the way to pick him up, but Complainant said he would not wait and would park the truck by a Shell station and walk home. The dispatcher instructed Complainant that he was not allowed to leave the truck, but Complainant said he was tired and did not care. RX 108 at 110. Complainant drove the truck back to the yard, thus exceeding his hours. RX 108 at 110; HT 528: 19-25; 529:1-6. Pacific Tank Lines wrote him up and suspended him for driving over his legally allowed hours in violation of the FMCSR. HT 394: 4-25. Mr. Harchis asked Complainant to sign the write-up, but Complainant refused. HT 521: 13-14.

On January 9, 2019, Pacific Tank Lines wrote Complainant up for refusing to haul local loads when there were no long-haul loads available. RX 108 at 109. The

² According to Complainant, he quit because "they had problems with the management." HT 480: 17-25.

³ Mr. Harchis was also one of Complainant's supervisors at Teton. At the time of the hearing, Mr. Harchis had been a dispatch manager at Teton for one year and three months. HT 517: 9-25. Prior to joining Teton, Mr. Harchis was a driver and terminal manager at Pacific Tank Lines. HT 518: 4-25.

notes regarding the incident stated that Pacific Tank Lines “did not have the long haul for him today, and dispatch explained to him “we cannot promise he will have long hauls every day.” *Id.* It further noted the phone call was attached. *Id.* Complainant claimed he did not want to drive that day because the truck he was assigned had a defective trailer and the brakes were locking up. HT 411: 10-20. He claimed they had him on a “long haul daily” but that he didn’t mind doing locals. *Id.*

On January 18, 2019, Complainant went 86 miles per hour in a 55 miles per hour zone. RX 108 at 107. During his tenure with Pacific Tank Lines, Complainant had 112 speeding violations, which was a very large number and considered excessive. RX 108 at 106; HT 522: 21-22. Complainant’s speeding endangered the public and himself, and on January 30, 2019, following an investigation, Pacific Tank Lines terminated his employment. RX 108 at 106; HT 391: 2; 392: 14-15. Complainant alleged the speed monitoring equipment was faulty, and he disputed the 86 miles per hour violation. HT 409: 6-14. Mr. Harchis was not surprised Complainant disputed the accuracy of the write-up because Complainant “dispute[d] pretty much everything I present[ed] to him.” HT 523: 23-25. Pacific Tank Lines did not have faulty machinery to monitor speeding. HT 524: 13.

Complainant’s Work at Teton

Mr. Joshua Ralphs hired Complainant as a driver for Teton Petroleum in February 2019. HT 58: 1-10. Before Mr. Ralphs was promoted to Regional Manager, he was Complainant’s direct supervisor. HT 61: 1-6. At Teton, Complainant also worked under Mr. Rejino (Jino) Gonzalez,⁴ a driver and Teton terminal manager; Mr. Kelly Harchis,⁵ a dispatcher manager at Teton; and Mr. Thomas Albert Bryant,⁶ a driver and terminal manager at Teton. JX 6 at 3-4; HT 631: 7-17; HT 517: 9-25.

When Complainant started working for Employer, they were understaffed, and Mr. Ralphs encouraged Complainant to do as many runs as possible. HT 322: 23-25 (Complainant). Mr. Brad Hall one of the company owners told Complainant

⁴ Mr. Gonzalez has worked for Teton since July 13, 2016. HT 631: 21. He started as a driver and was promoted to terminal manager of Las Vegas approximately 2 years ago. HT 631: 7-17. Mr. Ralphs, whom he worked for in a prior job with Big Mouth Transport, is his direct supervisor. HT 634: 1-2; 634:10-12. As terminal manager he does a bit of everything, including, coaching, hiring, contracts, ordering equipment, and dispatching. HT 632: 21-25; 633: 1-8.

⁵ Mr. Harchis supervised Complainant at Pacific Tank Line and Teton. At the time of the hearing, he had been working for Teton for one year and 3 months. He heard about the job at Teton through Tyrone Ravenal, a former driver at Pacific Tank Lines, who worked at Teton. HT 518: 4-25. Complainant played no role in recruiting Mr. Harchis to join Teton. HT 519: 18-19.

⁶ Mr. Bryant started working for Teton as a driver on December 1, 2014. About a year and a half later he was promoted to terminal manager, but he also continued to drive. JX 6 at 4. Mr. Bryant trained Mr. Ralphs as a co-manager. JX 6 at 5. In 2019, Mr. Bryant left Teton because he found the management work stressful and wanted to return to just driving to care for himself and his ill wife. JX 6 at 16.

that they were a growing company, and it was going to be long hours and long days because they were trying not to turn down any jobs. HT 328: 10-21.

Performance Issues at Teton

Mr. Gonzalez, Mr. Bryant, and Mr. Harchis advised Mr. Ralphs to fire Complainant prior to March 2020. From April 2019 to March 2020, Mr. Gonzalez handled disciplinary matters related to Complainant. HT 635: 15-19. Mr. Gonzalez twice recommended that Mr. Ralphs and an owner of Teton fire Complainant due to his performance issues, altercations with customers, exchanges with teammates, loading the wrong product, taking it upon himself to choose the gallons to load on a particular situation, and speeding. HT 654: 1-14; 656: 7-16. Based on Complainant's pre-loading of trucks, Mr. Harchis advised Mr. Ralphs to fire Complainant because he was not following company rules and safety regulations. HT 532: 1-5.

Mr. Bryant also recommended firing Complainant prior to March 2020 due to his absenteeism, excessive tardiness, and failure to complete assigned loads. JX 6 at 11-12 (Bryant Depo 44: 20-25; 45: 1-14). One evening, for example, Complainant completed 3 of 4 loads and went home. *Id.* Mr. Bryant had to complete the final load. *Id.* If Complainant had been over his hours, it would have been ok for him to roll the load to another driver, but Complainant had remaining work hours, he just stopped delivering. JX 6 at 12 (Bryant Depo. 45: 21-25, 46: 1-13). Mr. Bryant also noted Complainant's speeding issues. JX 6 at 10 (Bryant Depo 37: 18-25).

Despite Complainant's performance issues and the incidents described below, Mr. Ralphs wanted to give Complainant another chance and take more time to help Complainant become a better teammate and driver. HT 656: 18-22; HT 532: 18-22.

Damaging Company Property

On April 28, 2019, Mr. Gonzalez wrote-up Complainant for "wrecking company equipment." RX 34 at 1. Complainant was parking a truck and trailer in the yard after his shift, and he hit another Teton truck. Complainant failed to report the accident. His supervisors reviewed the video surveillance and asked him about it the next day. *Id.*

From the video footage of the incident, it seemed that Complainant was rushing, and when a driver is not sure they have room to make a maneuver, they must get out of the truck and check. HT 639: 1-5. Mr. Gonzalez told Complainant his impression of what caused the accident and asked Complainant to be accountable and to learn from it, but Complainant refused. HT 639: 1-9; HT 639: 7-9. In response to the prompt "what could have been done to prevent this incident?" Complainant took no responsibility and wrote "Get a bigger yard!" RX 34 at 2. Mr. Gonzalez concluded Complainant's inattention caused the accident, and he issued a

written discipline and suspended Complainant for three days for damaging company equipment and more importantly for not reporting the incident. RX 34 at 1, 4; HT 636: 19-25; 637: 6-7.

Unprofessional Conduct with Customers

On December 2, 2019, Mr. Gonzalez wrote up Complainant for an altercation with a store clerk at Parowan. RX 37 at 1. Complainant was rude to a store clerk at a Parowan gas station when he grabbed the keys for the locks outside of the tanks without saying anything to her. HT 338: 12-25. The clerk complained to her manager, and the manager contacted Employer. HT 340: 2-5. Employer told Complainant they had to write him up for the incident. HT 340: 2. Complainant disagreed with the description of the infraction in the written Employee Warning Notice that Mr. Gonzalez drafted, so Mr. Gonzalez allowed Complainant to draft the warning. HT 640: 19-25. Complainant was disciplined because he handled the situation unprofessionally. HT 642: 5.

Speedee Mart 102 also banned Complainant from delivering to them after he got into an argument with one of their customers about where she was parked. RX 40 at 1. Complainant had issues delivering there because the clerks always blocked the drops with their parked vehicles, and they were slow to move their cars, which caused Complainant to fall behind schedule. HT 445: 7-25. The manager of the store intervened, and Complainant was rude to him as well. Speedee Mart 102 banned Complainant from making deliveries to their store. *Id.*

Tardiness

Complainant had numerous other performance issues, including tardiness. He would show up to work 1.5 to 2 hours late and then pre-load several trucks with loads that he should have loaded hours earlier if had he showed up on time. HT 650: 12-21. Complainant characterized this practice as saving the company money because the price of fuel increased at 6:00 pm or midnight. Mr. Gonzalez clarified that Teton committed to deliver a certain amount of fuel, at a certain price to a customer. The fuel was committed and sold, and Teton had to deliver the fuel. If Teton agreed to a price before midnight, and the fuel did not get pulled before midnight, Teton would lose money. HT 699: 5-12. Complainant would get the job done, but Mr. Gonzalez explained to Complainant that he was hindering the Company's safety and success. HT 650: 21-25. Complainant was not saving the company money by preloading, instead he was preventing the company from losing money due to his late start times. Preloading was his way of making up for being late to work. HT 699: 1-19; 700: 1-11.

Complainant would jump from truck to truck and most of the time would get his work done, but in his way. HT 531: 14-20. This tied up trucks so Mr. Harchis

could not get them offloaded before the next driver needed a truck. Other drivers had to wait for Complainant, which slowed down the entire operation. HT 552: 1-6. Mr. Harchis told Mr. Ralphs that Complainant pre-loading the trucks was a problem, and Mr. Ralphs said he would discuss it with Complainant. HT 553: 3-10.

Regarding his inability to start work on time, Complainant stated he did not start on time because the equipment was not available in the yard for him to drive. HT 446: 24-25. There were only two occasions on record in which equipment was not immediately available for Complainant. On January 10, 2020, for example, Mr. Gonzalez texted Complainant to alert him that a truck had a blow out and that he was working on finding a truck for Complainant to drive. RX 67 at 1. There was subsequent back and forth in which Complainant balked at Mr. Gonzalez not spending more time on the phone with him. *Id.* 30 minutes after the initial text alerting Complainant that a truck had had a blowout, Mr. Gonzalez texted Complainant directing him to head to the yard because a truck would be there in 30 minutes. *Id.* at 2. Complainant's start time would have been delayed one hour at most. On January 3, 2020, the unavailability of equipment delayed Complainant's start time, but he was not ready to work even when equipment was available. Complainant texted, "I just saw that the truck was 30 mins out." RX 68 at 1. Mr. Gonzalez replied, "I texted that to you 35 min ago. Truck is at yard." *Id.* The truck may have been delayed, but it ended up sitting at the yard unused because Complainant was not ready to work. *Id.* Approximately ten minutes after Mr. Gonzalez told Complainant the truck is at the yard waiting for him, Complainant texts,

"But in the future Jino I love ya to death but I can't start this late again. I appreciate you looking out for me when you do but if I got to start this late again i rather stay home with no pay. I'm definitely not hard up for the cash when I know I been up since 7:30am."

Id. And approximately 12 minutes after Complainant chided Mr. Gonzalez for his late start, Complainant admitted he could not get to work because "[his] girl took [his] car" so he would have to wait until she returned. *Id.* at 2.

Speeding

In the last three months of Complainant's employment, Mr. Ralphs coached him on his speeding issues. HT 151: 12-25; RX 71 at 3. Complainant would improve with respect to speeding but then struggle again. HT 150: 22-25, 151: 1. Mr. Gonzalez also noted Complainant's speeding issues. HT 651: 18-22. Complainant would improve immediately after receiving a verbal warning, but a week later he would be speeding again. HT 651: 18-22. On December 18, 2019, Employer drafted a disciplinary action that it ultimately did not issue to Complainant. RX 42. The

letter documented that Complainant's speeding percentage was down in October 2019 to 3.6 percent, which was acceptable. In November 2019, it climbed to 8.7 percent and in the first two weeks of December 2019, it was 11 percent and 13.5 percent, respectively. RX 42 at 1. Complainant was "well aware" his speeding was not acceptable. *Id.*

Complainant's Interactions with Other Drivers

Complainant also had several verbal exchanges with co-workers. HT 651: 1-16; 655: 15-21. The exchanges were not written up because Mr. Gonzalez was learning how to manage the business. Mr. Gonzalez stated that not writing Complainant up was a "weak point" and he subsequently came to understand how important write-ups are to get things done. HT 651: 7-16. The exchanges left other Teton employees feeling "upset at times, mad, concerned." HT 690: 11-13. In one exchange, a lead driver and trainer noticed that Complainant was struggling with the equipment. When the driver tried to give Complainant a few pointers and tips, Complainant told the driver that he had it and to get back in his truck. HT 655: 6-14. Mr. Ralphs noted that Complainant generally made other drivers feel inferior and would tell them he was way beyond their skill level if they ever tried to help him. RX 40 at 1. When asked about his negative effect on other drivers, Complainant indicated he never needed help. Complainant said, "that's ridiculous [...] You know a lot of them called me for support, you know, they knew my background in fuel. Even Josh called me on occasions of whatever. So, this is ridiculous." HT 459: 1-4.

Drivers reported to Mr. Gonzalez that Complainant confronted them and said if Teton did not give him his raise, he was "going to do this or that" because he had "all these recordings." HT 705: 12-19 (Gonzalez).

Complainant's Personal Vehicle

Complainant recorded a conversation between himself and Mr. Ralphs in which they discussed his G-Wagon and an incident between Mr. Gonzalez and Complainant. JX 24. Complainant brought up the subject of his personal vehicle and stated that half the crew, including Mr. Ralphs, asked him how he got a car like that. Mr. Ralphs replied, "it's my job, listen, I'm not discriminating. Because listen, I don't care, it doesn't bother me, it doesn't affect my life, that's my job to try to find out what's going on. That's my job." When Complainant stated that he was insulted when Mr. Ralphs asked him how he got a car like that, Mr. Ralphs did not deny asking Complainant that. Instead, he stated, Complainant could be insulted. He further stated that Complainant's personal vehicle, "becomes his business, to make sure that normal guy in an industry like what we do, when drivers come here making between 60 and 100 thousand dollars a year, driving a car that's 200-something thousand dollars, that is suspicious, so we need to make sure, that we're

hiring someone that we're legally allowed to hire." JX 24 at Minute 1:35. Mr. Ralphs stated he looked into it, and "the only thing that's happened wrong is how it makes other people feel. But it's not because of the car it's because of the person saying that he doesn't have to work, that he doesn't have to have the job...." JX 24 at Minute 2:30. The conversation then switched to an unexplained conflict between Complainant and Mr. Gonzalez.

Employer Login Systems

The FMCSR allow drivers to drive 11 hours in a 14-hour shift. JX 6 at 7 (Bryant Depo. 27: 8-14); HT 176: 9-10 (Mason Hardy); RX 49 at 12 (49 C.F.R. § 395.3). A driver can "use a 16-hour day once every seven days, as long as [they] are home," i.e., every day of that period the driver must return to their terminal. JX 6 at 7 (Bryant Depo. 27: 8-14); RX 49 at 7-8 (49 C.F.R. § 395.1(o)(1)-(3))

Employer maintained two types of driver logs to track their hours: digital and paper. HT 109: 6-13. Drivers would use a paper log if the electronic device failed, or if they were driving a rental truck. HT 110: 16-18.

Use of Others' Logins to Exceed Legally Allowed Hours

At Teton, when a driver ran out of hours, there were several options. First, dispatch could send a rescue. That is, someone could drive to the driver's location and drive the truck back to the lot. Second, the driver could activate the 16-hour option, which a driver could use once every seven days. Third, the driver could sleep in the truck. HT 644-45. A final option was to log out and log in under someone else's credentials, which violates the FMCSR.

If drivers were close to going over their allowed driving hours, they would have to log out of the digital system, but sometimes drivers stayed logged in and exceeded their hours. HT 113: 17; 114:6-10. On occasion, Teton management instructed drivers to go over their hours to drive back to the terminal if they were only 15 or 20 minutes away from the terminal. JX 6 at 8 (Bryant Depo. 3-8). There was usually some "leeway with the Department of Transportation to return home." *Id.* Mr. Bryant was unaware of any falsification of the driving logs. JX 6 at 9 (Bryant Depo. 36: 1-5.)

Mr. Ralphs, in contrast, knew that drivers falsified logs with his consent. While Mr. Ralphs did not direct drivers to log out and then log in under someone else's credentials, he did allow drivers to use his login to avoid exceeding their hours. HT 113: 21; 114:11-14; 159: 5-8. Mr. Ralphs, for example, gave Complainant his login information. HT 322: 23-25; 323: 1-5. Mr. Hardy also used other drivers'

login credentials when he exceeded his hours. HT 182: 14-19. He used the logins of Mr. Ralphs or Steven,⁷ the company mechanic. HT 183: 5-6; HT 188: 1-4.

Every time Complainant used Mr. Ralphs' login, Complainant asked Mr. Ralphs if he could use his login. HT 159: 1-5. On March 24, 2019, for example, Complainant texted Mr. Ralphs and stated, "I don't have any drive time but I'll log in yours and handle it." RX 110 at 1. Mr. Ralphs responded, "How long till you can get back to the yard" *Id.* When Complainant responded that he was 25 minutes away, Mr. Ralphs texted, "K let's do it" and "Do a paper log." *Id.* In this instance, Mr. Ralphs did not initiate the use of falsified logs to circumvent FMCSR, but he acceded to it and told Complainant to do a paper log instead of using the login of Mr. Ralphs. *See id.*

Mr. Ralphs believed this was a violation of the FMCSR, and he believed the correct procedure would be for another employee to drive in a personal vehicle to meet the driver who had run out of hours and then switch vehicles. HT 115: 10-17; 120: 10-25.

Mr. Gonzalez never told Complainant that he was expected to violate the FMCSR. HT 643: 2-7. Mr. Gonzalez never told Complainant that he was expected to drive beyond his allotted hours of service nor did he direct Complainant to run over his hours. HT 643: 8- 14. On one occasion, however, Mr. Gonzalez allowed Complainant to use his login to return to the lot when Complainant had run out of driving hours. On January 4, 2020, Complainant texted Mr. Gonzalez at 7:00 am, "Send me your log in so I can get back home" RX 68 at 4. One hour and 40 minutes later, Mr. Gonzalez sent Complainant his username and password. *Id.* He did not direct Complainant to use his login. Instead, Complainant requested to use Mr. Gonzalez's login. HT 643: 21-25; 644: 1-10. They discussed other options, but Complainant was very persistent and kind of demanding and finally at the end of the discussion Mr. Gonzalez gave him his sign in password.⁸ HT 644: 5-10.

On another occasion, Complainant asked to use Mr. Gonzalez's login, and Mr. Gonzalez directed him to activate his 16-hour option. On February 28, 2020, Complainant alerted Mr. Gonzalez that he might run over his hours unless another driver could make a last run to drop of a load at Maverik [sic]. JX 2 at 4. He texted, "I'll run it but I'll need a log in." *Id.* Mr. Gonzalez checked to see if a day driver could run it, and asked Complainant if he had activated his 16-hour exemption option. *Id.* at 5. Complainant said he did not know how to activate his 16-hour option and stated that Mr. Ralphs had informed him it could only be used for local

⁷ No last name was provided for Steven, the company mechanic, but Mr. Hardy was likely referring to Steven Hardwick, who was in charge of maintenance for Teton. JX 6 at 22 (Bryant Depo. 85: 6-8).

⁸ The text log for January 4, 2020, supports Mr. Gonzalez's characterization of the exchange. The initial text message shows Complainant demanding Mr. Gonzalez's login, and the 1.5-hour time delay supports Mr. Gonzalez' testimony that he tried to present other options.

runs. *Id.* Mr. Gonzalez confirmed Complainant could use the 16-hour option and sent him instructions for how to activate the 16-hour option instead of giving him a log-in of another driver as Complainant had requested. *Id.*

March 10, 2020, Phone Call

Mr. Ralphs terminated Complainant's employment with Employer for insubordination during a phone call on March 10, 2020. HT 64: 15-20. Prior to the March 10, 2020, phone call, Mr. Ralphs did not intend to fire Complainant. HT 74: 22-25.

Mr. Ralphs called Complainant to discuss his annual evaluation and his one cent per mile raise. HT 76-77. In consultation with Mr. Gonzales and Mr. Harchis, Mr. Ralphs determined that given Complainant's numerous performance issues, he should not receive the maximum 2 cents per mile raise. HT 76. Mr. Harchis suggested giving Complainant a 1 cent raise if he could show up to work on time and reevaluating the matter in 6 months if he made improvements. RX 71 at 3; HT 534: 12-16. Complainant's tardiness and speeding influenced the size of his raise. HT 150: 1-7; 149: 3-6. Considering his uneven improvement on the speeding issue, Mr. Ralphs gave Complainant a 1 cent raise, but he wanted to see sustained improvement to warrant an additional raise. HT 149: 3-6; 152: 10-16.

During the call, Mr. Ralphs explained why Complainant would receive a 1 cent rather than a 2 cent per mile raise. HT 153: 3-20. Complainant was disappointed with the 1 cent raise and became irate, disrespectful, and insubordinate HT 77: 2-6; 79: 9. Complainant raised his voice, said that the Las Vegas terminal did not know what it was doing, and that he knew better. HT 154: 1-9. At that point, Mr. Ralphs brought up the other performance issues, i.e., Complainant arguing with a customer, arguing with dispatchers, and loading the wrong products. HT 154: 12-17. Complainant was not receptive to Mr. Ralphs' feedback and argued and made excuses. HT 154: 19-25. Complainant inaccurately stated that Jino, "[felt] that, you know, I'm well on my agreement, you know, that we had, you know, that I get the raise." HT 345: 20-25. Mr. Gonzalez was not satisfied with Complainant's work performance and told him any agreement regarding a raise was between Complainant and Mr. Ralphs and he needed to discuss it with Mr. Ralphs. HT 649: 17-25; *see* HT 650: 10-25.

Mr. Ralphs fired Complainant for insubordination because he was "constantly arguing." HT 88: 3-6. During the call Complainant made derogatory comments interspersed with profanities stating that he could do a much better job, and he should be a dispatcher. HT 155: 20-25, 156: 1-7. Mr. Ralphs could not remember specifics but stated that Complainant used explicit language but did not "curse him out." HT 156: 6-7; HT 163: 21-25, 164: 1-2. During the call, Complainant never stated that he did not want to continue to exceed his allowed hours in

violation of FMCSR for a one cent raise. HT 78: 4; 156: 12-15.^{9, 10} The only FMCSR violations discussed on the call were Complainant's speeding issues. HT 157: 6-13.

On March 10, 2020, Complainant texted Mr. Bryant and asked him to call. Mr. Bryant texted Complainant the contact information for Cole Hall and Jed McMillan, both owners of Teton. JX 15 at 1; JX 16 at 1. Mr. Bryant also spoke to Complainant on the phone. Complainant told him there was a disagreement about Complainant's raise, which led to Mr. Ralphs firing Complainant. Complainant wanted two cents, and Mr. Ralphs only gave him one cent based on his past performance. JX 6 at 22 (Bryant Depo. 88: 22-25).

The Termination Detail states that Complainant was fired on March 10, 2020. JX 46 at 1. The notes state:

“Went over review. Speeding better. Didn't like penny raise. Said he deserved more. Said we didn't know what we were doing and I should just let him come in the office and fix it. He knew how to everything better [sic]. Derrogatory [sic] comments like that do not belong on Teton team. Issues in the past.” *Id.*

March 10, 2020, Phone Call Aftermath

Mr. Ralphs fired Complainant on March 10, 2020, and Mr. Glenn Yearsley, the vice president of Human Resources for Teton, called and spoke with Complainant the following day. HT 290: 12-25; 236: 17-20. Mr. Yearsley has worked for Employer for five years where he oversees onboarding, recruitment, talent acquisition, some performance management, some employee relations, some safety items, and anything to do with human capital” generally. HT 214: 9-12; 215: 15; 214: 9-12.

⁹ Complainant alleged he “told [Mr. Ralphs] that [he] wouldn't be coming back in, you know, working late hours after [his] 12, you know, and falsifying logs, [he was] not going to do that anymore, because [he] felt like [Mr. Ralphs] just used [him], you know. So, [he] was like, [...] not going to do that.” HT 347:3-7 (Complainant). He then claimed that Mr. Ralphs responded “well, if you're not going to do it, then you no longer work for Teton.” HT 347: 10-11. Mr. Ralphs allegedly told him that he needed somebody willing to work more than 12 hours per day and over hours because the demand was still extremely large. HT 347: 19-22.

¹⁰ Complainant also alleged that they did not discuss his unprofessional behavior with customers, his tardiness, wrecking company property, his speeding, his preloading of trucks, improper prechecks, or his attitude problem during the March 10, 2020, phone call. HT 498: 17-20; *see* RX 40. As discussed in greater detail below, I did not find Complainant credible and gave his testimony little weight. Mr. Ralphs was credible, and I gave greater weight to his testimony regarding the substance of the March 10, 2020 call. Mr. Yearsley corroborated the call information based on his investigation, and Mr. Bryant's testimony supported based on his call with Complainant shortly after Mr. Ralphs fired him.

Most of the conversation with Complainant focused on Complainant's complaints of alleged discrimination. HT 231: 19-21. Complainant told Mr. Yearsley he was fired for the argument over the two cents and issues related to him driving a Mercedes G-Wagon. HT 292: 21-22. Complainant did not tell Mr. Yearsley that Mr. Ralphs instructed him to commit FMCSR violations, nor did Complainant report to Mr. Yearsley that he had refused to commit further FMCSR violations during the call with Mr. Ralphs. HT 292: 15-25.¹¹ Complainant did tell Mr. Yearsley he had gone overweight and over hours. HT 293: 9-15; 235: 20-21. Mr. Yearsley stated Complainant made one statement about those FMCSR violations, but the violations were not reported to him as part of the termination conversation. HT 236: 3-8, 11. During his conversation with Mr. Yearsley, Complainant "said a lot of things that were outside of just the termination," including his comments about FMCSR violations, which were not "part of the termination." HT 237: 1-4; 236: 11.

Mr. Yearsley offered Complainant his job back. Complainant refused, but Mr. Yearsley asked him to think about it. Mr. Yearsley called him one or two days later, and Complainant again declined the offer of reinstatement. HT 239: 19-25; 240: 11-17; 242: 1-4; 299: 1-25; 300: 4-5.¹²

Following his phone call with Complainant, Mr. Yearsley discussed Complainant's allegations that he had gone overweight and over hours with Mr. Ralphs who admitted that "there had been instances that he had people go over hours or use the logs differently," but Mr. Ralphs had not directed them to do so. HT 293: 9-15; 293: 20-21. Mr. Yearsley also discussed Complainant's allegations of discrimination and his FMCSR comments with Mr. Jed McMillan. HT 250: 2-7.

On March 24, 2020, Mr. Yearsley emailed Mr. Ralphs and one of the owners of Teton, Jed McMillan, a summary of his review of Complainant's termination. RX 72 at 1. He found Complainant's claims of discrimination related to his vehicle and being singled out due to his vehicle were unfounded. Instead, it appeared that Mr. Ralphs had investigated whether Complainant owned a fuel hauling company and stopped rumors among the crew that Complainant was engaged in illegal activity to afford his vehicle. HT 304: 20-15; RX 72 at 1. Mr. Yearsley noted that Complainant did not want his job back, and he thought this was for the best. He noted that patterns of performance issues, like Complainant's tardiness, use of multiple trucks, and general argumentative attitude, should be documented. *Id.* Finally, he advised Mr. Ralphs and Mr. McMillan to suspend an employee rather than terminating them to allow for further review. *Id.*

¹¹ Complainant claimed he told Mr. Yearsley that Mr. Ralphs directed him to drive over hours and overweight. HT 351:14-17. Complainant also claimed that he told Mr. Yearsley that he was fired after he complained about going over hours and overweight. HT 351:18-21.

¹² Complainant claimed he only spoke to Mr. Yearsley once and that Mr. Yearsley never offered him his job back and never called him back. HT 352; 6-20.

Complainant's Applications to Other Employers

On March 12, 2020, Complainant filled out an application to drive for Mohsen Transportation, Inc. He listed “company at fault” as his reason for leaving Teton, and “conflict” as his reason for leaving Pacific Tank Lines. JX 19 at 1-2. Complainant also submitted an application to Reddaway for a “Local City Driver” position. JX 23 at 1. On March 20, 2020, Complainant filed out an application to drive for Offen Petroleum. JX 17 at 24. In his application to Offen Petroleum, Complainant stated he was terminated from Teton because, “I had a conversation over the phone with terminal manager Josh Ralphs about running me over my 12 hr shift and not allowing my 10hr reset along with several violation of the FMCSR and in fear of our conversation he terminated me over the phone. I filed a complaint with the FMCA.” JX 17 at 4. In his application, he inaccurately listed Pacific Tank Lines as his current employer and did not give a reason for termination.¹³ JX 17 at 5. On March 23, 2020, Complainant filled out an application to drive for Saia LTL Freight in which he listed the same reason for being fired from Teton. JX 18 at 3.

Mr. Ralphs did not receive calls from Moses, Offen, Saia, or LTL Freight regarding Complainant's work with Employer. HT 157: 19-25, 158: 1-6. There was no credible evidence Respondent has attempted to tarnish Complainant's reputation to other potential employers or in any way thwarted his subsequent search for employment in the trucking industry.

CREDIBILITY DETERMINATIONS

In deciding this matter, the administrative law judge (“ALJ”) is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. 29 C.F.R. § 18.12; *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 8 (ARB Aug. 1, 2002). In weighing the testimony of witnesses, the ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Ass't Sec'y & Mailloux v. R & B Transportation, LLC*, ARB No. 07-084, ALJ No. 2006-STA-12, slip op. at 9 (ARB June 16, 2009); *Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ No. 2003-STA-54, slip op. at 6, n.3 (ARB Sept. 30, 2005).

There was no reason to question or discount the testimony of Mr. Jino Gonzalez, Mr. Thomas Bryant, Mr. Kelly Harchis, Mr. Glenn Yearsley, or Mr. Khalid Elsubai. These witnesses answered questions in a forthright manner and appeared to be credible, believable witnesses. There was no indication of bias or

¹³ Complainant listed his end date with Pacific Tank Lines as February 2019 but stated Pacific Tank Lines was his current employer as of March 20, 2020. *See* JX 17 at 5.

that they fabricated or coordinated testimony. No credible evidence was offered to counter or question the information they provided. Thus, I gave significant weight to their testimony.

Complainant

Complainant was not credible, and I gave his testimony no weight, unless it was supported by other evidence. Documentary evidence or testimony contradicting Complainant's narrative demonstrated that his testimony was self-serving and inaccurate. Complainant challenged nearly every disciplinary action taken against him with an improbable explanation intended to deflect responsibility. Complainant's testimony contradicts that of nearly every other witness, and I am not persuaded that Mr. Ralphs, Mr. Yearsley, Mr. Bryant, Mr. Harchis, and Mr. Gonzalez are all lying or mistaken in their understanding of the facts. His willingness to dissemble on numerous points, large or small, as discussed below, generally discredited him, and I gave his testimony no weight.

Complainant's Characterization of Disciplinary Actions Prior to Teton

At Pacific Tank Lines, Complainant was disciplined for speeding, driving over hours, and refusing to take loads he did not want to take. Complainant alleged he did not drive 86 miles per hour in a 55 miles per hour zone. Instead, Pacific Tank Lines had poorly calibrated equipment on that truck. Complainant presented no evidence to establish that the equipment was poorly calibrated, nor did he explain his other 112 speeding violations. Furthermore, if the equipment was faulty, one would expect other employees to have a similar number of speeding violations. Instead, Mr. Harchis noted that Complainant had an unheard-of number of violations. Mr. Harchis also stated that Pacific Tank Lines did not have faulty equipment.

Complainant also claimed his write-up for refusing a rescue at Pacific Tank Lines was inaccurate because Pacific Tank Lines never told him someone was coming to rescue him. HT 398: 19-21. He stated Mr. Harchis instructed him to drive back to the yard, and he never said, "he didn't care he was tired." HT 399: 1-2, 21-25. It is not credible that dispatch would have fabricated the detail about Complainant saying he didn't care because he was too tired. Furthermore, Mr. Harchis disciplined Complainant for failing to follow protocols. Based on Mr. Harchis' forthcoming and credible testimony, I am not persuaded he would have directed Complainant to drive home and then disciplined him for following orders. The record established that Complainant often believed he knew better and would fail to follow his supervisors' directions.¹⁴ Thus, I do not credit Complainant's testimony on this point.

¹⁴ As noted by a logistics manager at Pacific Tank Lines, it was "[h]is way, his start time, his unit, his order or else." RX 108 at 112.

Complainant also denied that he refused to take local hauls at Pacific Tank Lines. HT 411: 10-20. He alleged he refused to drive that day because the truck to which he was assigned had a defective trailer and the brakes were locking up. HT 411: 10-20. He claimed they had him on a “long haul daily” and that he didn’t mind doing locals. *Id.* Again, I am not persuaded there would be no record of needed repairs and that dispatch would fabricate details of the conversation.

Recruiting Mr. Harchis

Complainant also claimed he recruited Kelly Harchis and “instructed [Teton] to hire” Mr. Harchis. HT 344: 11-13. Both Mr. Harchis and Mr. Ralphs contested this, and stated Complainant had nothing to do with recruiting Mr. Harchis. I give Mr. Harchis’ recollection of who recruited him to Teton greater weight than Complainant’s self-aggrandizing testimony.

Complainant’s Characterization of Disciplinary Actions at Teton

Complainant claimed that Mr. Ralphs encouraged him to speed because they had to get the loads done and loaded by a certain time. HT 333: 3-5. He alleged that when corporate noticed his speeding and it became a problem, Mr. Ralphs instructed him to stop speeding and they would “figure something else out.” HT 333: 3-18. Complainant was fired from his prior job for speeding. At Pacific Tank Lines, he blamed his speeding on faulty equipment. At Teton, he blamed his speeding on his supervisors. While Mr. Ralphs may have encouraged him to work quickly, this is not the same as directing him to speed to deliver more loads. The more credible explanation is that Complainant had trouble following speed limits and sped to compensate for showing up late to work.

I also find it more credible that Complainant preloaded trucks to make up for his tardiness. Complainant alleged that he preloaded trucks to save Employer money because the cost of fuel may or may not increase after 6:00 pm or midnight. HT 323: 6-25 (Complainant). According to Complainant, to save the company money he would load a truck, bring it back to the yard, take another truck, load it, and bring it back to the yard, and so on until there were no more available trucks to load. *Id.* Complainant alleged Mr. Ralphs and Mr. Gonzalez instructed him to do this and approved it, and he did it until Employer was properly staffed up. HT 324: 2-7. Mr. Gonzalez and Mr. Harchis, however, explained that this practice tied up trucks and burdened dispatch. Mr. Gonzalez clarified Complainant was not saving the company money by preloading, instead he was preventing the company from losing money due to his late start times, i.e., preloading was his way of making up for being late to work. HT 699: 1-19; 700: 1-11. Pre-loading allowed him to show up

to work whenever he wanted and avoid costing Employer money by doing so. Complainant's characterization of the practice was not forthcoming.

Complainant claimed that he came in late because equipment was not available in the yard. HT 446: 24-25. There were only two occasions on record in which equipment was not immediately available for Complainant, and on one occasion, Complainant was not ready to work. On January 10, 2020, Complainant's start time would have been delayed one hour at most. RX 67. And on January 3, 2020, Complainant complained about a delayed start time, but the truck was at the yard waiting for him and *he* was not ready to work. RX 68. Complainant's explanation for his habitual tardiness is not credible or supported by the record.

Finally, regarding his unprofessional behavior with customers, Complainant claimed he was forced to write up the incident at Parowan so that Respondent could keep the Parowan account. HT 435: 1-7; 436: 21-25. He also claimed that Mr. Ralphs and Mr. Gonzalez counseled him that they only wrote him up to appease the customer to keep the account, that it would not go in his file, and that it would not be used against him. HT 340: 17-25. Complainant's version of this event does not address his unprofessional behavior with the customer and furthermore, I do not find it credible that his supervisors were so nonchalant about him nearly costing the company a customer. I do not credit his version of this event. His various excuses and explanations for his performance issues generally undermined his credibility.

Use of Others' Logins to Circumvent Driving Time Limits

I do not credit Complainant's narrative regarding the use of others' logins to run over hours. Complainant alleged that Mr. Ralphs directed him to use Mr. Ralphs' login when he ran out of time. HT 326: 4-5. According to Complainant, he was always **instructed** to fabricate the log or log into one with others' login credentials. HT 328: 1-3. The only two documented records of these exchanges, however, show that Complainant initiated the requests to use Mr. Ralphs or Mr. Gonzalez's logins. *See* RX 110 and 68. Furthermore, Complainant recorded evidence against Employer in anticipation of his annual review for a 2 cent per mile raise. It is telling that Complainant presented no evidence demonstrating that anyone directed or instructed him to use others' logins.¹⁵

Complainant argued Mr. Ralphs must have initiated the practice and directed him to use others' logins because it was illegal, and he could have gotten fired. HT 377: 3-6. I am not persuaded, however, that Complainant would not have suggested or requested the logins of other drivers simply because it violates the

¹⁵ Drivers reported to Mr. Gonzalez that Complainant confronted them and said if Teton did not give him his raise, he was "going to do this or that" because he had "all these recordings," but Complainant had no evidence demonstrating that management directed him to violate the FMCSR. *See* HT 705: 12-19 (Gonzalez)

FMCSR and he could be fired. The record demonstrated that Complainant had a history of speeding and driving over hours. He had also refused to follow the direction of management and dispatchers to avoid violations because he believed he knew better. Mr. Ralphs and Mr. Gonzalez both testified that they did not direct Complainant to use others' logins and that Complainant always requested to use their logins. Their testimony was supported by text messages showing Complainant asking for logins and was more credible than Complainant's. Thus, I give no weight to Complainant's claim that he was directed to violate the FMCSR.

Complainant also alleged drivers would use the paper logs to circumvent weekly hour limits. For example, if a driver ran out of hours, and Employer needed the driver to work an extra day, then they would use the paper logs. HT 180: 14-18. Complainant's testimony was not corroborated by evidence in the record, and I gave it no weight.

March 10, 2020 Phone Call

I found Mr. Ralphs more credible than Complainant and credited his account of the March 10, 2020, phone call over Complainant's. Mr. Ralphs account of the phone call was further supported by Mr. Yearsley's testimony regarding his discussion with Complainant following his termination.

Complainant's version of events almost never aligned with that of other witnesses or the documentary evidence. Given the demonstrated pattern of unreliable testimony, I do not credit Complainant's testimony regarding this event. Complainant alleged he "told [Mr. Ralphs] that [he] wouldn't be coming back in, you know, working late hours after [his] 12, you know, and falsifying logs, [he was] not going to do that anymore, because [he] felt like [Mr. Ralphs] just used [him], you know. So, [he] was like, [...] not going to do that." HT 347:3-7 (Complainant). He then claimed that Mr. Ralphs responded "well, if you're not going to do it, then you no longer work for Teton." HT 347: 10-11. Mr. Ralphs allegedly told him that he needed somebody willing to work more than 12 hours per day and over hours because the demand was still extremely large. HT 347: 19-22. Mr. Ralphs maintained that Complainant did not state that he did not want to continue to exceed his allowed hours in violation of FMCSR for a one cent raise. HT 78: 4; 156: 12-15. And that the only FMCSR violations discussed on the call were Complainant's speeding issues. HT 157: 6-13.

Complainant also alleged that they did not discuss his unprofessional behavior with customers, his tardiness, wrecking company property, his speeding, his preloading of trucks, improper prechecks, or his attitude problem during the March 10, 2020, phone call. HT 498: 17-20; see RX 40. I do not find it plausible that Mr. Ralphs would not discuss Complainant's performance issues with him on a call discussing his annual raise. It is more likely than not that Mr. Ralphs would raise

the performance issues with Complainant when Complainant challenged the amount of his raise.

I credit Mr. Ralphs testimony over Complainant's and find that Complainant did not raise safety issues or refuse to commit FMCSR violations during the March 10, 2020, phone call in which he was fired. Mr. Ralphs fired Complainant for insubordination because he was "constantly arguing." HT 88: 3-6. During the call Complainant made derogatory comments interspersed with profanities stating that he could do a much better job and he should be a dispatcher. HT 155: 20-25, 156: 1-7. Mr. Ralphs stated that Complainant used explicit language but did not "curse him out." HT 156: 6-7; HT 163: 21-25, 164: 1-2. Complainant stated he made no derogatory comments and never raised his voice or used explicit language during the March 10, 2020, phone call with Mr. Ralphs. HT 378: 20-22; 379: 3-10. Mr. Ralphs testimony that while Complainant used unprofessional language, he did not "curse him out," was measured and added to the credibility of his testimony.

Based on their conversations with Complainant shortly after he was fired, both Mr. Bryant and Mr. Yearsley stated that the disagreement was about Complainant's raise and Complainant's allegations of discrimination. Mr. Bryant stated Complainant told him there was a disagreement about Complainant's raise, which led to Mr. Ralphs firing Complainant. Complainant wanted two cents, and Mr. Ralphs only gave him one cent based on his past performance. JX 6 at 22 (Bryant Depo. 88: 22-25). Mr. Bryant made no mention of Complainant's refusal to violate safety regulations. Mr. Yearsley stated that Complainant said he drove overweight and over hours, but that the statement was not related to Complainant's recounting what happened during the phone call in which he was terminated. HT 292: 15-25; HT 293: 9-15; 235: 20-21. Based on the testimony of Mr. Ralphs, Mr. Bryant, and Mr. Yearsley, I credit Mr. Ralphs' account that Complainant did not raise safety concerns or refuse to commit FMCSR violations during the March 10, 2019, call.

Communications with Mr. Yearsley

I also do not credit Complainant's account of his interactions with Mr. Yearsley. Following the call with Mr. Ralphs, Complainant contacted Mr. Hall, who told him that he would have Mr. Yearsley reach out and investigate. HT 350: 5-10. Complainant testified at that point he wanted to keep his job. HT 350: 13. He claimed he only spoke with Mr. Yearsley once, and that Mr. Yearsley never offered him his job back. HT 352: 6-20. I credit Mr. Yearsley testimony and the email documenting that Complainant did not want his job back over Complainant's testimony. In the email sent March 24, 2020, Mr. Yearsley stated "Marvin said he doesn't want his job back and I don't think we want him back, so this termination is likely a good thing overall..." RX 72 at 1. Complainant attempted to argue that by saying "and I don't think we want him back" Mr. Yearsley demonstrated that

Employer did not offer him his job back. Mr. Yearsley's comment, however, does not establish that he did not offer Complainant his job. Instead, from the context it seems he offered Complainant reinstatement, and when Complainant refused, Employer was relieved. I found Mr. Yearsley's testimony clear and truthful, and I credit his account over Complainant's.

Mr. Mason Hardy, Former Teton Driver

I gave Mr. Hardy's testimony very limited weight because his testimony was unclear, and it was not established that he had any reliable basis for some of his testimony. Furthermore, he may have been motivated to testify against Employer because he believed Employer wrongfully terminated his own employment. Employer fired Mr. Hardy and at one point he had contacted Complainant to see if Complainant's attorney could represent him in litigation against Employer. JX 21 at 1. Mr. Hardy claimed that he was fired for refusing to drive a load. HT 196: 1-5.

While I credit Mr. Hardy's testimony that he used Mr. Ralphs' and Steven's logins when he ran out of driving hours, I did not credit his statements regarding the prevalence of the practice or Complainant's character as he had little basis for these statements.

Mr. Hardy estimated about once a week or twice a week drivers used other logins to complete shipments. HT 187: 18-21. It was not established how Mr. Hardy would know this. Furthermore, it was unclear whether he meant each driver would use someone else's login once or twice a week or companywide it happened once or twice a week. Thus, I gave this statement little weight and made no factual finding about the prevalence of the practice.

I also did not credit Mr. Hardy's testimony that none of the other drivers had a problem with Complainant. HT 202: 13-14; 208: 10-16. Mr. Hardy worked the day shift and Complainant worked the night shift. Thus, Mr. Hardy would have little basis to assess Complainant's character or whether drivers on the night shift had problems with Complainant. By his own admission, he did not speak with other drivers about Complainant. HT 209: 6-9. Mr. Hardy claimed if anyone had a problem with Complainant it would have been aired out on a mass text thread. I find this logic unpersuasive and do not credit Mr. Hardy's testimony that none of the other drivers had a problem with Complainant.

Mr. Josh Ralphs, Regional Manager

I found Mr. Ralphs testimony clear and consistent and gave it substantial weight. Mr. Ralphs' testimony was consistent with other supervisors and consistent with documentary evidence in the record. He consistently stated he never instructed Complainant to commit violations and that Complainant never evinced any

concerns about committing FMCSR violations. JX 5 at 52, Ralphs Depo. 199: 2-6; 15-19. As stated above, I credited Mr. Ralphs testimony that Complainant never expressed safety concerns on March 10, 2020, or refused to commit FMCSR violations.

Although Mr. Ralphs gave unclear responses regarding his concerns about Complainant's personal vehicle, this did not undermine his overall credibility. In his deposition, Mr. Ralphs said he was concerned about the type of car that Complainant drove, and he talked to him about it. JX 5 at 54; Ralphs Depo. 209: 11-25. He stated the only issue was a possible conflict of interest if Complainant owned a fuel transport company. *Id.* He claimed he had never asked Complainant how he could drive a particular car to work and stated he never asked Complainant to drive a different car to work. JX 5 at 55, Ralphs Depo. 211-12. These responses were seemingly inconsistent with a recorded conversation between Complainant and Mr. Ralphs in which Mr. Ralphs did not deny asking Complainant how he could afford his car and did not deny that he suggested that he drive something else to work. JX 24. Mr. Ralphs did not give clear, forthright testimony in response to questions about Complainant's personal vehicle. This issue, however, was not integral to Complainant's complaint. Mr. Ralphs otherwise gave clear, forthright testimony that was consistent with the record, and I gave his testimony substantial weight.

LEGAL STANDARD

To prevail in a STAA whistleblower complaint, the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, suffered an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 31105(b)(1) (adopting the legal burdens of proof at 49 U.S.C. § 42121(b)(2)(B)(iii)); 29 C.F.R. § 1978.109; *Buie v. Spee-Dee Delivery Serv., Inc.*, ARB No. 2019-0015, ALJ No. 2014-STA-00037, slip op. at 3 (ARB Oct. 31, 2019). If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C. § 42121(b)(2)(B)(iii), (iv).

Regarding protected activity, the STAA protects employees who file complaints related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. *See* 49 U.S.C. § 31105(a)(1)(A). Internal complaints are protected, and a complaint may be oral, informal, or unofficial, but must be communicated to management. *Irwin v. Nashville Plywood Inc.*, ARB No. 16-033, ALJ No. 2014-STA-61, slip op. at 8-9 (ARB Sept. 27, 2017). The employee "need not prove an actual violation." *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011). But to be protected, the employee's belief of an actual or potential violation must be both objectively and subjectively reasonable. *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-6, slip op. at

10 (ARB Jan. 10, 2018). The employee’s belief is subjectively reasonable if the employee “actually believed that the conduct he complained of constituted a violation of relevant law.” *Gilbert v. Bauer’s Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012). An ALJ assesses whether the belief is objectively reasonable “based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *See Garrett v. Bigfoot Energy Servs., LLC*, ARB No. 16-057, ALJ No. 2015-STA-047, slip op. at 7 (ARB May 14, 2018).

The STAA provides that an employer may not discharge, discipline, or discriminate against an employee regarding pay, terms, or privileges of employment, because of an employee’s protected activity. 49 U.S.C. § 31105(a)(1); 29 C.F.R. § 1978.102(a). Employment termination constitutes an adverse action under the STAA. *Id.*; *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-071, slip op. at 6, n.15 (ARB May 18, 2017). A negative notation in a driver’s employment report also constitutes an adverse action. *See Beatty v. Inman Trucking Management, Inc.*, ARB No. 15-064, 15-067, ALJ Case Nos. 2008-STA-020, 2008-STA-021 (June 27, 2016).

The “causal connection” element under STAA is judged using the “contributing factor” standard. *Blackie v. Smith Transport, Inc.*, ARB No. 11-054, ALJ No. 2009-STA-43, slip op. at 8 (ARB Nov. 29, 2012). A contributing factor is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012). An employee may prove that protected activity was a contributing factor through “indirect or circumstantial evidence, which requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee’s claim that his protected activity was a contributing factor.” *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 11-12 (ARB Nov. 5, 2013); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). Circumstantial evidence that shows protected activity was a contributing factor may include evidence such “motive, bias, work pressures, past and current relationship of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices.” *Citationshares*, ARB No. 12-029, slip op. at 12. The Administrative Review Board has emphasized that the contributing factor level of causation is “extremely low.”¹⁶ *Palmer v. Canadian Nat’l Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 16 (ARB Sept. 30, 2016).

¹⁶ “Any factor really means *any* factor. It need not be significant, motivating, substantial or predominant—it just needs to be *a* factor. The protected activity need only play some role, and even an [in]significant or [in]substantial role suffices.” *Palmer*, ARB No. 16-035, slip op. at 56 (internal citations omitted, emphasis in original).

Complainant Did Not Engage in Protected Activity under STAA

Complainant failed to demonstrate by a preponderance of the evidence that he engaged in any protected activity within the meaning of the STAA. Because there was no credible evidence that Complainant raised safety concerns or refused to commit violations during the March 10, 2020, phone call with Mr. Ralphs, I do not reach the question of whether Complainant had a reasonable subjective and objective belief that there was a violation. Nor do I reach the question of causation.

The STAA states, an employer may not discharge an employee who “has filed 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). The STAA also prohibits an employer from discharging an employee who refuses to operate a vehicle because “(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition....” 49 U.S.C. § 31105(a)(1)(B).

As stated above I gave Complainant’s testimony no weight unless it was corroborated by objective evidence or supported by another’s credible testimony. On March 10, 2020, Mr. Ralphs fired Complainant during the phone call due to Complainant’s arguments and excuses regarding his performance issues and comments about company management. Regarding what transpired during the March 10, 2020, phone call, I credited Mr. Ralphs testimony that Complainant did not raise safety concerns or refuse to commit further FMCSR violations. The first credible evidence that Complainant mentioned driving overweight and over hours occurred the following day in a conversation with Mr. Yearsley, the VP of Human Resources. At this point, however, Complainant had already been fired. Complainant did not communicate internal complaints to management while he was employed by Respondent. *See Irwin v. Nashville Plywood Inc.*, slip op. at 8-9. And Complainant could not refuse to drive based on subjectively and objectively reasonable beliefs of a violation or unsafe conditions, because he was no longer an employee of Respondent.

Complainant and Respondent violated the FMCSR.¹⁷ Only after he was fired, did he attempt to expose these violations or voice any concern. While employed, he did not make internal complaints or refuse to drive, and his conduct does not fall within the scope of activity protected by the STAA. I conclude Complainant failed to demonstrate by a preponderance of the evidence that he engaged in protected activity. “It is axiomatic that without protected activity, there can be no causal relationship between the Respondents and any claim of adverse action.” *Poulter v.*

¹⁷ The record demonstrated Complainant initiated violations, but Employer’s management assented to them.

Central Cal Transportation, LLC et al., ARB No. 2018-0056, ALJ No. 2017-STA-00017 (ARB August 18, 2020). Complainant here suffered the alleged adverse action—his termination during the March 10, 2020, phone call—**before** he engaged in the alleged protected activity. The alleged protected activity consequently could not have contributed to the adverse action.

Complainant did not engage in protected activity, and his complaint fails. For the reasons stated above, Complainant’s complaint is denied.

ORDER

1. Complainant failed to establish by a preponderance of the evidence that he engaged in protected activity. All requests for relief under the STAA are denied.
2. Complainant’s request for attorney fees and costs under the STAA is denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge