**UNITED STATES DEPARTMENT OF LABOR**
**Office of Administrative Law Judges**
**Newport News, VA**

**Issue Date: 07 June 2023**

Case No.: 2021-STA-00011

*In the Matter of*:

HORANDO GATES,
*Complainant*,

v.

UPS FREIGHT,
*Respondent*.

Appearances: Horando Gates
*Self-represented Complainant*

Raymond Perez, Esq.
*For Respondent*

Before: MONICA MARKLEY
Administrative Law Judge

## DECISION AND ORDER DISMISSING COMPLAINT

This case arises from a complaint filed by Horando Gates ("Complainant" or "Mr. Gates") with the Department of Labor's Occupational Safety and Health Administration ("OSHA") against UPS Freight ("Respondent"), under the provisions of the Surface Transportation Assistance Act of 1982, U.S. Code Title 49, Section 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 ("STAA").

## PROCEDURAL HISTORY

On June 1, 2017, Mr. Gates filed a complaint with OSHA, alleging that while working for Respondent, he suffered an adverse employment action after reporting an unsafe trailer. The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The Secretary's findings were issued on December 16, 2020. Complainant timely

requested a formal hearing before the Office of Administrative Law Judges ("OALJ"). The case was docketed with OALJ on January 4, 2021, and was assigned to me on January 26, 2021.

On November 5, 2021, I held a *de novo* telephonic hearing, at which Complainant was self-represented and Respondent was represented by Raymond Perez, Esq. The parties were afforded a full opportunity to present evidence and argument. At the hearing, Complainant's Exhibits 1 through 32 were admitted into evidence, after Respondent's objections to their late submission and relevance were overruled. (TR at 15-17).[1] Respondent's Exhibits 1 through 13 were also admitted into evidence, after Complainant's objection as to the relevance of Respondent's Exhibit 3 was overruled. *Id.* at 19-20. Both parties presented oral closing arguments at the hearing. The record is now closed.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

## ISSUES PRESENTED

The contested issues are as follows:

1. Whether Complainant engaged in protected activity under the STAA.
2. Whether Respondent had knowledge of the protected activity.
3. Whether Complainant's protected activity was a contributing factor in the adverse employment action.
4. Whether Respondent would have taken the same adverse action against Complainant absent his protected activity.
5. Whether Complainant is entitled to damages.

(TR at 5.)

## PARTY CONTENTIONS

Complainant's Position

Complainant argues that the evidence shows Respondent retaliated against him for participating in the grievance process and raising a safety issue. He requests reinstatement and reimbursement for medical bills and debt.

[1] The following abbreviations are used in this Decision: CX – Complainant's Exhibits; RX – Respondent's Exhibits; TR – transcript of hearing.

Respondent's Position

Respondent argues that to the extent Complainant engaged in protected activity by red-tagging a trailer, it had no connection to his ultimate termination. Complainant had an extensive history of misconduct, dishonesty, and failing to follow proper procedures and protocols, for which he had received previous discipline. He was terminated for continued dishonesty after he left merchandise outside a customer's home without authorization, resulting in water damage to the material, and falsified the customer's signature on the delivery receipt. Respondent also contends that the official who terminated Complainant's employment was not even aware that he had red-tagged a trailer, and that fact was unrelated to the investigation that led to his termination.

## SUMMARY OF RELEVANT EVIDENCE

### I. Formal Hearing Testimony

#### A. Horando Gates, Complainant (TR at 21-37, 104)

Complainant testified that he was summoned to a meeting at the UPS Freight facility by his union steward on October 24.[2] Les Seibert, the terminal manager, and Anel LeClus, a dispatcher, also attended the meeting. Mr. Seibert asked Complainant a series of questions that he attempted to answer, with limited knowledge of the subject of the meeting. Complainant was told during the meeting that he was being discharged "for offenses of extreme seriousness and an indication of a forgery by leaving a customer's freight unsigned at his residence." (TR at 23.)

Respondent held a local-level hearing regarding Complainant's discharge, at which Complainant provided copies of his phone records to prove that he called for delivery authorization. The labor manager told Complainant that he could have one chance to admit that he was lying. *Id.* at 23-24. Complainant was distraught and after he spoke to his representative, he admitted that he was lying. He was given the opportunity to resign or appeal and he decided to appeal. *Id.* at 24. After the hearing, Complainant told his representative that the infraction for which he was terminated occurred on the same day that he made a complaint about an unsafe trailer. *Id.* His representative proceeded to pass this information to the labor manager. *Id.*

At the arbitration hearing in Birmingham, one of Respondent's management representatives tried to "fight" him. *Id.* In that hearing, Complainant's representative stated on the record that Complainant was terminated on the same day that he reported an unsafe trailer. Complainant testified:

[2] I assume that Complainant misspoke here and was referring to the February 24, 2017, discipline meeting, at which his employment was terminated.

> And the last thing I heard was that I was no longer -- well, in so many words, he said that he -- doing this was not going to be able to save my job. And that they were going to rule on this. I then proceeded out of the room. I proceeded to my car. And that's when I was informed by my representation that I was no longer employed by UPS Freight.

*Id.* at 25.

Thereafter, Complainant waited a couple of days to collect his thoughts. He informed OSHA that he thought his termination was based on safety concerns he had raised. Additionally, he was then informed that he was not terminated for indication of forgery, as originally stated by Mr. Seibert. He was terminated for lying about getting the delivery authorization. *Id.*

On cross-examination, Complainant indicated that he tagged a trailer for a safety violation on January 17, 2017. The incident during which he allegedly dropped off a delivery without a signature took place on February 21, 2017. Respondent terminated his employment on February 24, 2017. *Id.* at 29. After he was terminated, Complainant filed a grievance through his union representative. A local-level hearing on his grievance took place first, and then the case went to a panel arbitration. *Id.* at 30.

Complainant first began raising issues about a problem with a vehicle on January 10, 2017, or January 12, 2017, in the daily vehicle inspection report. He "red-tagged" the vehicle because he determined that it was unsafe and needed to be serviced, and a safety violation occurred on January 17, 2017, because the vehicle was put in service after it had been red-tagged. *Id.* at 31-32.

This action is the first complaint that Mr. Gates has filed with OSHA. However, he previously filed complaints with the National Labor Relations Board ("NLRB") and the Equal Employment Opportunity Commission ("EEOC"). *Id.* at 32. Regarding this termination, he filed a complaint with the EEOC, but not the NLRB. *Id.* at 33. In the EEOC complaint, he alleged that his termination was retaliation for his grievance and union participation. *Id.* The EEOC gave him a right to sue within six months, but he did not bring further action. *Id.*

Complainant had red-tagged other equipment prior to the January 2017 incident. Doing so is part of his job as a driver. Prior to driving, he did pre-trip inspections of equipment, as required by the Department of Transportation. *Id.* at 35-36.

During his rebuttal testimony, Complainant stated:

> Looking back on it, I may have made a mistake by not exhausting all means of communication at the time of that incident with Mr. Louw. But with the impending discipline that I was facing, I thought that was the best course of action. And, unfortunately, it looks like now I chose poorly. And I just wanted to state that for the record that that may not have been the best course of action at the time.

*Id.* at 104.

**B. Les Seibert, Terminal Manager (TR at 37-89)**

Mr. Seibert testified that he is the Service Center Manager for Respondent's Lawrenceville, Georgia location. He has been in the position for nine years, including in 2017. (TR at 39.) His division utilizes semi-tractors with trailers, from 32 to 53 feet long. They do pickups from customers and make deliveries to customers. *Id.* at 39-40. Mr. Seibert's duties include managing the service center to ensure all employees work safely and provide timely service; he is responsible for all the employees at his location. *Id.* at 40. He is also responsible for investigating and resolving all customer complaints. *Id.* at 40-41. He is tasked with making sure all employees are following company processes and policies and is involved in corrective actions. *Id.* at 41. He makes the ultimate decision in the case of an employee termination. *Id.* The drivers at the Lawrenceville location are represented by a union, Local 718. *Id.* at 41-42.

Regarding his involvement with Complainant's employment, Mr. Seibert stated:

> I was involved in Mr. Gates for several years managing his actions while conducting his job where he was not following the processes that was in place. And he was in our office on several occurrences and occasions over the years for talk-withs, retraining discussions, which led into progressive discipline, including documented Pittsburgh conversations where we record the actions that he did to try to get him to correct his activity in performing his job, which then progressed to warning letters, suspensions and discharges . . . on multiple occasions over the years.

*Id.* at 43.

Complainant was disciplined for an infraction on September 29, 2015, involving multiple route inefficiencies. He was given a "working discharge" and signed the applicable paperwork under protest. *Id.* at 44-45. Complainant's discipline was ultimately resolved through the union process; he was given a second chance to correct his actions. *Id.* at 45-46. In January 2017, Complainant again went through the progressive discipline process for the same types of problems and was given a suspension for five days. *Id.* 46-47. The supervisors who managed Complainant during the day saw that he was not doing his job correctly. Mr. Seibert stated:

> He's taking extra time to get off the property and go out and start his route for the day. He's going off route. In other words, he's not driving directly to his location. He's stealing company time by driving to other locations before he goes to where he's supposed to be going to. And then he's driving past stops, going to other stops, coming back to stops, which cause excessive delays, which later in the day, causes service failures to the customers by either bringing back freight unsuccessfully, not delivering it, or missing pickups from the customer and not servicing.

*Id.* at 47-48. During a meeting with Complainant on January 18, 2017, Mr. Seibert continued to explain that Complainant needed to do his job correctly and honestly. *Id.* at 49. During the meeting, Complainant was given time to respond to questions and give explanations. *Id.* at 50. However, he did not give any explanation, nor did he raise any issues regarding red-tagging trailers or other safety concerns. *Id.* at 50-51. At the time of this meeting, Mr. Seibert was not aware that Complainant had tagged a trailer out of service; he is not involved in the equipment maintenance. *Id.* at 51. Complainant served at least one day of the suspension. *Id.*

On February 21, 2017, Complainant reported that he had made all his deliveries, as well as some pickups. Mr. Seibert then received a customer complaint concerning a delivery made by Complainant that day. *Id.* at 52-53. Complainant was scheduled to make a delivery of three boxes to Andrew Louw, between the hours of 12:00 p.m. and 6:00 p.m. *Id.* at 55. Complainant's log indicated that he arrived at the appointment at 6:59 p.m. and departed at 7:12 p.m. *Id.* at 55-56. This was an extremely fast time for a residential delivery, given that the freight is not just being delivered to a loading dock. *Id.* at 56. The delivery in question was to be delivered inside the customer's garage and the customer had the right to inspect the shipment for damage. *Id.* at 58-59. The delivery paperwork had the customer's name signed on the signature line. *Id.* at 59.

Mr. Louw complained because he waited until 6:00 p.m. for the delivery at his vacation home, and when the delivery did not show up, he returned to his regular home. *Id.* at 60-61. When he tracked his shipment later, he saw that the product had been delivered and signed for by him. *Id.* at 61. Mr. Seibert met with Mr. Louw on February 24, 2017, and got his written statement on the matter. *Id.* The signature on Mr. Louw's written statement did not match the signature on the delivery receipt. *Id.* at 63. The delivery was left out over the weekend and was damaged by rain; Mr. Louw did not move it from the driveway and Mr. Seibert personally observed the damage. *Id.* at 64-65.

Mr. Seibert then met with Complainant later that day. Ms. LeClus, the dispatch supervisor, and Payne Holsey, the union representative, were also present at the meeting. Mr. Seibert started the meeting by asking Complainant to explain his process for making a delivery. *Id.* at 68. This was to ensure that Complainant knew how to do his job correctly. *Id.* He asked if

Complainant ever signs for a delivery for a customer and Complainant denied doing so. Mr. Seibert repeated the question and Complainant again denied signing for a customer. *Id.* at 69. He asked Complainant if he had ever forged a signature on a delivery receipt and Complainant refused to answer. *Id.*

Mr. Seibert next asked Complainant if his entries in the Delivery Information Acquisition Device ("DIAD") for February 21, 2017, were accurate and Complainant said yes. *Id.* at 70. Complainant confirmed that he completed Mr. Louw's delivery and got his signature. *Id.* at 70-71. Complainant stated that he followed the usual delivery process and did not forge Mr. Louw's name. *Id.* at 71. Complainant did not bring up any complaints or safety issues during the meeting or allege that the investigation had anything to do with him red-tagging a trailer on January 17, 2017. *Id.* at 72-73. At the time he was doing the investigation, Mr. Seibert did not have any vehicles or trailers out of service that he was having to manage and did not recall that Complainant had red-tagged a trailer in January. *Id.* at 73. Complainant also did not claim during the meeting that he had supervisory approval to leave the packages in front of Mr. Louw's property, and two supervisors completed written statements indicating that they did not communicate with Complainant about the delivery or give him such approval. *Id.* at 76-78.

After the meeting, Mr. Seibert determined that he would immediately discharge Complainant for dishonesty. *Id.* at 74. Mr. Seibert has been involved in other investigations for dishonesty and to the extent the offenses were like the ones involved in Complainant's case, they also led to driver termination. *Id.* Mr. Seibert explained the termination to Complainant during the February 24, 2017 meeting. *Id.* In making the decision to terminate Complainant's employment, Mr. Seibert reviewed the case with the company labor manager, Mike Cohen, who was not present in the meeting, but with whom he communicated on the phone. *Id*. at 75. Mr. Cohen signed off on the termination decision. *Id.*

Complainant filed a grievance over the termination. During the grievance process, the employee is represented by the union and Respondent is represented by a labor manager. *Id.* at 79. A local level hearing first took place, during which Complainant did not bring up any safety-related issues. *Id.* at 80. However, he did present different facts generally, including stating that he tried to get permission to make the delivery without signature and that he tried to get a neighbor to sign for the delivery. *Id.* at 81.

When Complainant was not given his job back after the local hearing, his case next went to an arbitration panel. The panel consisted of two labor managers from Respondent, two union representatives, and the arbitrator. None of the panel members had any affiliation with the Lawrenceville facility and were not aware of Complainant or any other kind of employment issues he had. *Id.* at 82-83. On May 25, 2017, the panel denied Complainant's claim and he remained terminated. *Id.* at 83-84. At the time of the decision, Mr. Seibert was not aware that Complainant had ever filed a safety or whistleblower complaint with OSHA. *Id.* at 84.

On cross-examination, Mr. Seibert testified that he does not have a commercial driver's license, but he has spent time in the tractors. *Id*. at 85-86. When Complainant was disciplined in 2015 for route inefficiencies, their knowledge of his route inefficiencies was based on the information he entered into the DIAD system. *Id.* at 87. They use a software program, Telematics, to process the information entered into DIAD. The software also uses information about the status of the truck's ignition (on, off, stopped, or moving) in providing data. *Id.* at 87-88.

### C. Ed Millwood, Mechanical Vendor (TR at 90-102)

Mr. Millwood testified that he is a self-employed mechanical vendor at the terminal in Lawrenceville, Georgia. Though the facility is now operated by a different company, he was working with Respondent when they operated the facility. (TR at 92.) He performed all onsite equipment repairs of forklifts, tractors, and trailers. *Id.* He has worked at the facility for 14 years. *Id.* at 93. He is aware of a driver's responsibilities, including performing pre-trip inspections of tractors and trailers to look for safety violations or anything that could be wrong with the equipment. *Id.* at 93-94. Drivers wrote up any problems with the tractor in the "Daily Vehicle Inspection Report," and any problems with the trailer in the "Daily Equipment Condition Report." The clerks then forwarded the information to Mr. Millwood. *Id.* at 94. If he was unable to repair the equipment onsite, he would "tag it out" to a shop in Atlanta. *Id.* at 95.

In describing the red tag process, Mr. Millwood stated:

> Well, the red tag is just something that we put on to let everyone know that a piece of equipment is not to be used. Generally, because it's something safety or like -- or unless it's like a non-functioning door or something like that. It could be, you know, a number of things. On trailers, I mean, it could be a faulty liftgate that doesn't work. It can be a number of things.

*Id.* at 96. Respondent encouraged people to tag equipment out, especially for safety reasons, and Mr. Millwood had never seen anyone disciplined for doing so. *Id.* In 2017, a red tag or service issue with equipment would not have been reviewed by Mr. Seibert. *Id.* at 97.

Mr. Millwood knew Complainant as a city driver at the Lawrenceville facility but did not recall him specifically identifying safety issues or equipment problems with trucks or trailers. *Id.* at 98. He reviewed his computer records and found that on January 17, 2017, Complainant wrote up a broken pin for the spring that holds the liftgate platform in place. He stated, "And what I wrote on my invoice is that I inspected the liftgate, found the broken pin, and asked the driver to tag it out to be repaired in Atlanta." *Id.* at 99. Therefore, the trailer was red-tagged and sent to Atlanta for repair. *Id.* Mr. Millwood did not tell Complainant that he had to use the trailer or discuss the issue with Mr. Seibert. *Id.* Mr. Millwood was not involved with Complainant's subsequent discipline or termination in any way. *Id.* at 100.

On cross-examination, Mr. Millwood testified that at the time of Complainant's employment, he was certified by the Department of Transportation as a mechanic. *Id.* at 101. He was a self-employed contractor and reported to someone at UPS Automotive. *Id.* at 102.

## II. Relevant Documentary Evidence

### A. Complainant's Prior Grievances and Complaints

On June 24, 2013, Complainant filed a union grievance after Mr. Seibert followed him for a safety observation on June 18, 2013. Complainant alleged that Mr. Seibert used safety as a shield to harass him. (CX-32.)

On July 21, 2016, Complainant filed a union grievance because he had not received FMLA compensation for certain dates that he was out of work in 2015. (CX-30.)

On September 22, 2016, Complainant filed a discrimination complaint with the EEOC against Respondent. He noted that he had been written up on August 12, 2016, for an improper DIAD entry and alleged that this was retaliation for him having filed a previous EEOC complaint. (CX-28.)

### B. October 1, 2015 Discipline Meeting Documentation

On October 1, 2015, Complainant received a "working discharge" for an infraction that occurred on September 29, 2015. The meeting document indicated that on September 29, 2015, Complainant had multiple route inefficiencies, including passing stops, excess non-travel stop time, excess unreported delays, DIAD entry errors, and taking indirect routes between stops. (RX-3.)

### C. Red Tag Documentation

On January 17, 2017, Complainant filled out a red tag for car number 928546, reporting that it had a broken support spring. (CX-21.)

### D. January 18, 2017 Discipline Meeting Documentation

On January 18, 2017, Complainant received a five-day suspension for infractions on the day prior. Specifically, the meeting document states that in the morning, he had excessive on-property time of 29 minutes, which exceeded the allowed 20 minutes. In addition, while on his route the day, he drove excessive miles back and forth between stops, taking an extra 84 minutes, and had 26 minutes of non-travel stop time. The meeting document further noted

that Complainant had been subject to past discussion and discipline for this behavior, including discharge. (CX-26; RX-4.)

On January 23, 2017, Respondent issued a written notice of Complainant's suspension. The notice stated that Complainant had been spoken to on several occasions about his failure to follow instructions and had received a warning letter as recently as October 7, 2016. It further stated, "in the future, should you fail to follow company instructions, procedures or methods, further disciplinary action will be taken up to and including discharge." (CX-27.)

### E. February 21, 2017 Delivery Documentation

The delivery receipt for the February 21, 2017 delivery was addressed to Andre Louw, in Cumming, Georgia. It reflected a delivery appointment time that day between 12:00 and 18:00 and specified inside delivery. (CX-2; RX-8.)

A typewritten printout of Complainant's trip summary for February 21, 2017, showed the same appointment time for Mr. Louw. It further showed that Complainant arrived at the stop at 6:59 p.m. and departed at 7:12 p.m. (RX-5.)

Tracking information for Mr. Louw's shipment showed that it was delivered on February 21, 2017, at 6:59 p.m. and signed for by "Louw." (CX-3; RX-9.)

Complainant submitted cell phone records into evidence reflecting that he made a call on February 21, 2017, at 7:00 p.m. to an Atlanta telephone number that lasted for two minutes. (CX-20.)

### F. Statements of Andre Louw

On February 22, 2017, Mr. Louw called Respondent to report property damage. Per notes, Mr. Louw reported that he did not personally receive or sign for the freight, despite the statements on the tracking information. He reported that the freight was left outside and unattended. (RX-7 at 1.)

On February 24, 2017, Mr. Louw signed the following handwritten statement, attached to the delivery receipt described above:

> We waited for delivery until 6:40 but it did not arrive and we received no call. We had to leave after 6:40 to Atlanta. The next morning I checked on UPS website and it indicated the package was delivered and signed for, which I did not. I did not authorize anybody to leave the package at the address and also did not authorize anyone to sign on my behalf. Package was left out in the rain and merchandise got wet.

(CX-2; RX-6.)

### G. February 24, 2017 Discipline Documentation

A Discipline Meeting Document shows that on February 24, 2017, Complainant was discharged for the following:

> Forged Customer acknowledge signing of deliver of freight, Andre Louw. Mr. Gates stated he had customer acknowledge delivery of shipment and entered His Last Name into the DIAD to acknowledge the delivery of the shipment. Customer stated he did not receive the freight and no driver came to deliver the freight. No driver ever showed up at the appt window for his inside delivery of his shipment.

The document was signed by Ms. LeClus, Complainant, Mr. Holsey, and Mr. Seibert. (CX-1.)

Mr. Seibert's notes from the February 24, 2017 meeting show that Complainant denied ever signing to accept delivery for a customer and refused to answer whether he had ever forged a signature on a delivery receipt. (RX-10 at 2.) He stated that Mr. Louw signed for the delivery and denied forging the signature. *Id.* at 2-3. Mr. Seibert explained to Complainant that Mr. Louw reported that he did not sign for the delivery. He notated that he was discharging Complainant from service for just cause, an offense of extreme seriousness. *Id.* at 4.

Also on February 24, 2017, two of Respondent's supervisors completed written statements pertaining to the February 21, 2017 incident. Chris Hancock stated, "On 2/21/2017 at no time did Horando Gates call me for a bring back or to see if it was okay for him to leave customer Andrew Louw delivery without a signature. I had no contact that day at all from Horando Gates about this delivery." (RX-12 at 1.) James Pickelsimer stated, "On Tuesday Feb 21st 2017 Horando Gates made a delivery without a signature from customer. Mr. Gates never called me or let me know he was making delivery without customer approval to deliver without being present." *Id.* at 2.

Respondent issued a written discharge notice to Complainant, also dated February 24, 2017. The notice stated that because of the serious nature of his offense, Respondent had just cause to discharge him from employment. (CX-19; RX-11.)

### H. Union Grievance

Complainant filed a union grievance regarding his termination on March 8, 2017. He stated that he was protesting his termination as unjust, unfair, and improper. He requested

that his discharge letter be removed from his file, that he be made financially whole, and that he not lose any seniority. (CX-18.) The grievance was denied on May 25, 2017. (RX-13.)

### I. OSHA Complaint

Complainant filed his complaint with OSHA on June 1, 2017. (RX-1 at 5). Regarding the adverse action dates, he stated, "The incident occurred on February 21, 2017. I was put out of service (terminated) on February 24, 2017. The safety violation occurred on January 17, 2017. I was told to use an unsafe trailer that was red tagged for service. It was loaded for service on January 18, 2017." *Id.* at 6.

## CREDIBILITY DETERMINATIONS

The factfinder is entitled to determine the credibility of witnesses, to weigh evidence, and to draw her own inferences from evidence, and the factfinder is not bound to accept the theories or opinions of any particular witness. *See, e.g.*, *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968). In weighing testimony, an administrative law judge may consider the relationship of the witnesses to the parties, the interests of the witnesses, and the witnesses' demeanor while testifying. An administrative law judge may also consider the extent to which the testimony is supported or contradicted by other credible evidence. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan. 31, 2006). Additionally, the Administrative Review Board ("the ARB" or "the Board") has held that an administrative law judge may "delineate the specific credibility determinations for each witness," but such delineation is not required. *See, e.g.*, *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-8 (ARB July 2, 2009) (noting that the ARB prefers such delineation but does not require it). My findings set forth in this Decision and Order are based on my review and consideration of the entire record in this case, including my findings as to the demeanor of the witnesses and the rationality or internal consistency of the witnesses' testimony in relation to the evidence as a whole.

The record shows that Complainant had a history of not executing his job duties in an honest or efficient manner. On October 1, 2015, he was disciplined for passing stops, having excessive stop time/delays, and taking indirect routes between stops. (RX-3.) Similarly, on January 18, 2017, he was disciplined for driving excessive miles between stops and having excessive stop time. (CX-26; RX-4.) Though these infractions were not overly indicative of dishonesty, they do suggest that Complainant attempted to abuse his working hours in some way.

It is Complainant's dishonesty regarding the delivery to Mr. Louw that primarily undermines his credibility in this matter. The tracking information for the February 21, 2017 delivery clearly reflects that Mr. Louw signed for the merchandise, and Mr. Seibert's notes from the February 24, 2017 discipline meeting show that at that time, Complainant maintained that

Mr. Louw had signed for the delivery personally. (CX-3; RX-10 at 2-3.) However, his statements are in direct contravention to Mr. Louw's telephone call and written statement. (CX-3; RX-7 at 1). Furthermore, two supervisor statements from February 24, 2017, confirmed that Complainant had not received permission to make the delivery without a customer signature. (RX-12.) Complainant testified that at his local-level hearing, following his termination, he admitted that he had been lying about the incident. (TR at 24.) In addition, during his rebuttal testimony at the formal hearing, while Complainant did not expressly concede to lying, he recognized that he had made mistakes and chosen poorly that day. *Id.* at 104. Complainant's initial inclination to lie about the incident until presented with definitive, contradicting evidence generally undermines his credibility.

Complainant also testified during the formal hearing that in January 2017, he red-tagged a trailer that needed to be serviced and that a safety violation had then occurred, when the vehicle was returned to service without being repaired. (TR at 31-32.) Similarly, in his initial OSHA complaint, he stated that he was told to use an unsafe trailer that had been red-tagged for service. (RX-1 at 6.) However, the record is devoid of any evidence to support Complainant's allegations on this point. While the red tag for car number 928546 was submitted into evidence, Mr. Millwood testified that he had asked the driver to tag the trailer out after inspecting it, it was red-tagged and sent to Atlanta for repair, and he did not tell Complainant that he had to use the trailer. (TR at 99-100.) The record lacks any evidence to confirm Complainant's allegation, and instead contains evidence from Mr. Millwood that directly contradicts Complainant's account. This further erodes his overall credibility.

For these reasons, I give little credit to Complainant's statements and testimony in this matter, and more weight to the statements of Mr. Seibert and Mr. Millwood. Complainant's lack of credibility generally casts doubt on his allegations, while the latter individuals were generally consistent in their statements. In reaching my decision in this case, I will take into consideration the credibility assessments discussed here.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I. STAA Legal Framework

To prevail in an STAA whistleblower complaint, the complainant must prove by a preponderance of the evidence that he 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-37, 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).

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); 20 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-71, 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 Nos. 2008-STA-20, 2008 STA-21 (ARB June 27, 2016).

## II. Complainant's Burden

As set forth above, to establish a case for retaliation, Complainant must show by a preponderance of the evidence that (1) he engaged in protected activity, (2) he suffered an unfavorable personnel action (adverse action), and (3) his protected activity was a contributing factor in the adverse action.

### A. Protected Activity

Under the STAA, there are several different kinds of protected activity. Complainant did not specify under which provision he felt his activity was covered; however, his allegations indicate that the application of the complaint provision is appropriate in this matter. In brief, an employer is prohibited from taking an adverse action against an employee because the employee has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, is perceived to have done so, or is perceived as being about to do so. 49 U.S.C. § 31105(a)(1)(A).

Safety complaints under this provision may be made to management or a supervisor and may be "oral, informal, or unofficial." *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-41, slip op. at 4 (ARB Mar. 27, 2012); *see also Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-52, slip op. at 7 (ARB Jan. 31, 2011). For a tribunal to consider a complaint to be protected activity, a complainant needs to demonstrate that he reasonably believed that there was a safety violation. "The reasonableness of a complainant's belief is assessed both subjectively and objectively, with the 'subjective' component satisfied by showing that the complainant actually believed that the conduct he complained of constituted a violation of relevant law." Then, the "objective" component is evaluated based on a "reasonable person" standard, asking whether such a person in the same circumstances and with the same training and experience as the complainant would think that a violation occurred. *Garrett v. Bigfoot Energy Services, LLC*, ARB No. 16-057, ALJ No. 2015-STA-47, slip op. at 7 (ARB May 14, 2018).

The complaint need only "relate" to a violation of a commercial motor vehicle safety standard and "[u]uncorrected vehicle defects, such as faulty brakes, violate safety regulations and reporting a defective vehicle falls squarely within the definition of protected activity under STAA." *Maddin v. Transam Trucking, Inc.*, ARB No. 13-031, ALJ No. 2010-STA-20, slip op. at 6-7 (ARB Nov. 24, 2014). In other words, protection under the complaint clause is not dependent on actually proving a violation of a federal safety provision. *See Yellow Freight System, Inc. v. Martin*, 954 F.2d 535, 357 (6th Cir. 1992). Rather, it is sufficient to show a reasonable belief in a safety hazard.

Here, Complainant alleges that he engaged in protected activity by making a safety complaint via a red tag. Notably, Respondent does not substantially dispute this contention. Complainant testified that he began raising issues about the trailer in January 2017 in a Daily Vehicle Inspection Report, and then red-tagged it because it was unsafe and required service. (TR at 31-32). Mr. Millwood confirmed that on January 17, 2017, Complainant wrote up a trailer for having a broken pin for the spring that holds the liftgate platform in place. Mr. Millwood found that the pin was broken and asked Complainant to tag out the trailer. It was sent to Atlanta for repair. *Id.* at 99. As noted above, the record includes a copy of the red tag. (CX-21.)

Therefore, the evidence generally shows that Complainant made the alleged safety complaint. Mr. Millwood's concurrence in the liftgate defect, based on his written records, also confirms the reasonableness of Complainant's belief in the safety violation. I find Complainant has shown by a preponderance of the evidence that his complaint regarding the broken pin on the liftgate spring for his trailer constituted protected activity under the STAA.

**B. Adverse Action**

Having established that he engaged in protected activity, Complainant must also prove that he was the subject of an adverse action taken by Respondent. There is no dispute here that Complainant was terminated by Respondent on February 24, 2017. Therefore, he has shown by a preponderance of the evidence that Respondent took adverse action against him.

**C. Contributing Factor**

Complainant must prove, by a preponderance of the evidence, that protected activity was a contributing factor in the adverse action taken. *Tocci*, ARB No. 15-029, slip op. at 6. 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." *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11 (ARB Jan. 6, 2017) (internal citations omitted). The trier of fact is to consider all relevant evidence in determining whether there was a causal relationship between a complainant's protected activity and the adverse employment action alleged. *See id*. at 9; *Austin v. BNSF Ry. Co*., ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip

op. at 8-9 n.37 (ARB Mar. 11, 2019) (emphasizing that the *Powers* decision allows the trier of fact to consider all relevant evidence at the contributory factor causation stage). To rule for an employee at this step, the ALJ must be persuaded that it is more likely than not that the protected activity played any role in the adverse action. The standard is low and "broad and forgiving," and the protected activity need only play some role; even an "insignificant or insubstantial" role suffices. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 52-53 (ARB Sept. 30, 2016) (internal marks and citations omitted).

Contribution may be proven with circumstantial evidence. "Circumstantial 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 types of evidence." *Bobreski v. J. Givoo Consultants, Inc*., ARB No. 09-057, ALJ No. 2008-ERA-00003, slip op. at 13 (ARB June 24, 2011.)

The ARB has held that an employer's knowledge of protected activity is not a separate element, but instead forms part of the causation analysis. *Id.* at 13-14, 17 ("The issue of knowledge is a necessary part of the single question of causation and similarly requires that the evidence be considered as a whole."). *See also Moon v. Transp. Drivers, Inc*., 836 F.2d 226, 229 (6th Cir. 1987) (citing three elements for a whistleblower claim under the STAA).

The primary evidence in this matter tending to show a connection between Complainant's protected activity and the adverse action is temporal proximity. The evidence confirms that Complainant red-tagged a trailer for a broken support spring on January 17, 2017. (CX-21.) On the following day, Complainant received a five-day suspension for infractions that also occurred on January 17, 2017, including excessive on-property time in the morning, excessive driving between route stops, and excessive non-travel stop time. (CX-26; RX-4.) Just over one month later, on February 24, 2017, Complainant was terminated after the incident with Mr. Louw. (CX-19; RX-11.)

However, there is little other circumstantial evidence in the record to support a conclusion that Complainant's protected activity was a contributing factor to the adverse action. Complainant had a prior history of being disciplined for various violations. In October 2015, he was given a "working discharge" for route inefficiencies that included excessive non-travel stop time and taking indirect routes between stops. (RX-3.) Additionally, in October 2016, he received a warning letter for failing to follow instructions. (CX-27.) Mr. Seibert confirmed in his testimony that he had been involved in managing Complainant's job conduct on multiple occasions over the years, and that Complainant had been subject to retraining, warning letters, suspensions, and discharges. (TR at 43.) This shows both that Complainant had had these issues before and that Respondent was consistent in disciplining him for these problems. Furthermore, to the extent that Complainant was ultimately terminated on February 24, 2017, for dishonesty surrounding the delivery to Mr. Louw, Respondent was similarly

consistent; Mr. Seibert testified that he had been involved in dishonesty investigations for other employees that also led to driver termination. (TR at 74.)

Additionally, there is no indication in the record that Respondent discouraged employees from reporting safety issues with trucks or trailers. Complainant admitted that he had red-tagged other equipment prior to January 2017 and that doing so was part of his job. *Id.* at 35-36. Indeed, Mr. Millwood testified that Respondent encouraged drivers to tag equipment out, especially for safety reasons, and he had never seen anyone disciplined for doing so. *Id.* at 96.

Furthermore, I find it significant that Complainant did not allege that his discipline in either January 2017 or February 2017 was in retaliation for red-tagging a trailer until well after his termination. Complainant testified that he did not tell his union representative about the red tag until *after* the local-level hearing. (TR at 24.) Similarly, Mr. Seibert testified that Complainant did not raise the red-tag issue at the January 18, 2017 meeting, the February 24, 2017 meeting, or the local-level hearing. *Id.* at 50-51, 72-73, 80. In fact, Complainant presented alternative facts regarding the situation with Mr. Louw's delivery at the local-level hearing, including stating that he tried to get permission to leave the delivery without a signature and that he tried to get a neighbor to sign for the delivery. *Id.* at 81. However, even at that late stage, Complainant's purported explanations for the situation did not include any mention of the red tag.

Finally, as noted above, the issue of Respondent's knowledge of the red tag is a necessary consideration in this causation analysis. Mr. Seibert made the ultimate decision regarding Complainant's termination, and he testified that he was not aware that Complainant had red-tagged a trailer at the time of the January 18, 2017 meeting or the February 24, 2017 meeting. (TR at 51, 73.) Mr. Millwood confirmed in his testimony that at the time of these incidents, Mr. Seibert would not have reviewed or been informed of the red tag. *Id.* at 97. He also affirmatively stated that he did not discuss the red tag with Mr. Seibert. *Id.* at 99.

Complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action taken. Though the Board has held that the contribution can be insubstantial or insignificant, the evidence in this matter does not rise even to this low standard. Complainant's history of being disciplined for job performance issues and the lack of evidence showing that red-tagging was ever discouraged or punished by Respondent weigh against a finding in Complainant's favor. Furthermore, Complainant did not even allege that the red tag was related to his discipline until after two discipline meetings and a local level hearing had taken place, which indicates that he was simply searching for a way to remedy the situation, however far the reach. Finally and most significantly, it is evident that neither Mr. Seibert nor anyone in a position of authority with regard to discipline decisions had any knowledge of the red tag when Complainant was terminated. For all of these reasons, I find

that Complainant has not shown by a preponderance of the evidence that his protected activity contributed to the adverse actions taken against him.

## III. Affirmative Defense

Even if Complainant had proven by a preponderance of the evidence that he engaged in protected activity, suffered an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action, Respondent can still avoid liability in this matter if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B)(iii), (iv). 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 56-57 (internal citations omitted).

Here, it is Complainant's prior disciplinary history, combined with the egregiousness of his conduct during the incident with Mr. Louw's delivery, which provides clear and convincing evidence that he would have been disciplined even in the absence of his protected activity. As discussed in detail above, Complainant received a working discharge for route inefficiencies in October 2015, he received a warning letter for failing to follow instructions in October 2016, and Mr. Seibert testified to being involved in efforts to remediate Complainant's job conduct on multiple occasions over the course of his employment. The five-day suspension that he received on January 18, 2017 was consistent with his past discipline, particularly the nature of the cited violations. Furthermore, Mr. Seibert's investigation into Complainant's delivery to Mr. Louw revealed that his actions on February 21, 2017 were dishonest, as confirmed by Complainant himself, resulting in his immediate termination. This history provides more than enough evidence to persuasively establish that Respondent would have taken the same adverse action against Complainant for the February 2017 delivery misconduct, regardless of the red-tag situation.

## III. Conclusion

In summary, I find that Complainant has not established the third element of his case under the STAA—that his protected activity was a contributing factor in the adverse action taken against him—by a preponderance of the evidence. In the alternative, Respondent has

shown, by clear and convincing evidence, that it would have taken the same adverse action against Complainant in the absence of his protected activity. Therefore, Respondent is not liable under the STAA, and Complainant's June 1, 2017 complaint must be dismissed.

## ORDER

For the reasons set forth above, IT IS ORDERED that Complainant's June 1, 2017 complaint is DISMISSED.

**SO ORDERED.**

MONICA MARKLEY
Administrative Law Judge

MM/RC/jcb
Newport News, VA

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

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

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary

of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).

**FILING AND SERVICE OF AN APPEAL**

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

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

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

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

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

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

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

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

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

### 3. Effective Time of Filings

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

### 4. Service of Filings

### A. Service by Parties

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

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

### B. Service by the Board

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

### 5. Proof of Service

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

### 6. Inquiries and Correspondence

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