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

**Issue Date: 28 December 2023**

In the Matter of:

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| NAHUN GUTIERREZ,<br>Complainant,<br><br>v.<br><br>R.B. STEWART PETROLEUM PRODUCTS, INC.,<br>JUSTIN FREY, and SAM POGUE,<br>Respondents. | CASE NO.: 2022-STA-00043<br><br><br><br><br>ANGELA F. DONALDSON<br>Administrative Law Judge |

## DECISION AND ORDER

This proceeding arises from a complaint filed under employee protection provisions of section 405 of the Surface Transportation Assistance Act ("STAA" or "the Act"), as amended, 49 U.S.C. § 31105, and the procedural regulations found at 29 C.F.R. Part 1978.

The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities. Complainant requested a hearing based upon the findings made by the Secretary of Labor dated April 4, 2022, concluding that the agency did not have reasonable cause to believe a violation of the STAA occurred.

Complainant alleges that his termination by Respondent R.B. Stewart Petroleum ("R.B. Stewart" or "RBS") and the individual Respondents violated the Act because Complainant had engaged in protected activity that was a contributing factor to the adverse employment action. Respondents allege that Complainant has not established a causal connection between purported protected activity and his termination. Respondents further allege that they would have terminated Complainant in the absence of any protected activity.

Following review and consideration of all the evidence of record, relevant statutory and regulatory authorities, and case law and arguments of the parties, I find herein that Complainant did not prove that any activity protected under the STAA was a contributing factor to Respondents' decision to terminate his employment, and therefore, his complaint is denied. This case arose in the jurisdiction of the Fifth Circuit Court of Appeals.

## I. CONTESTED ISSUES

1. Whether Complainant engage in protected activity. 49 U.S.C. § 31105(a)(1)(A)(i)-(ii), (B).

2. Whether Respondents were aware of Complainant's protected activity before they decided to terminate him.

3. Whether Complainant established by a preponderance of the evidence that any protected activity was a contributing factor to his termination.

4. Whether Respondents established by clear and convincing evidence that they would have terminated Complainant in the absence of protected activity.

5. Whether Complainant is entitled to the relief he seeks under the Act.

## II. RELEVANT EVIDENCE

A formal hearing was held on January 11 and 12, 2023, at which the following exhibits were admitted:

Complainant's Exhibits ("CX") 1-2
Respondents' Exhibits ("EX") 1-2 (including amended RX-2)
Joint Exhibits ("JX") 1 through 37 (including JX-6b)

Transcript ("TR") at 8-9, 240, and 375. On January 13, 2023, Respondents submitted their Demonstrative Exhibit 1 ("Basic Timeline") and amended RX-1,[1] which are also ADMITTED. TR at 373-74. At the hearing, I received the testimony of Complainant Nahun Gutierrez and Respondents' witnesses Justin Frey, Bubacarr Fofana, and Sam Pogue. The parties timely submitted post-hearing briefs.

### A. Joint Stipulations

In his Pre-Hearing Statement filed December 21, 2022, Complainant identified twenty-four joint stipulations to which the parties confirmed agreement at the hearing (TR at 10):

1. Complainant was an employee as defined by 49 U.S.C. § 31101(2). Complainant was not a member of a labor union and his employment with R.B. Stewart Petroleum Products, Inc. was not subject to a collective bargaining agreement.
2. Respondent R.B. Stewart Petroleum Products, Inc. is a motor carrier operating in interstate commerce and a "person" subject to the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA").
3. From June 27, 2017 to February 21, 2022 Respondent R.B. Stewart Petroleum Products, Inc. employed Complainant to operate commercial motor vehicles having a gross vehicle rating of 10,001 pounds or more on the highways to transport property in commerce.
4. On February 21, 2022 Respondent R.B. Stewart Petroleum Products, Inc. terminated Complainant's employment

[1] Screenshots of the video submitted as JX-20 were marked and tendered as amended RX-1. *See* TR at 373-74.

5. On March 1, 2022, Complainant filed a complaint with OSHA alleging that Respondents had discriminated against him and discharged him in violation of 49 U.S.C. Sec. 31105. The Complaint was timely filed.
6. On May 2, 2022, Complainant filed timely objections to the OSHA's decision and requested a hearing de novo before an administrative law judge of the Department of Labor.
7. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and the subject matter of this proceeding.
8. RB Stewart is engaged in trucking operations in the state of Texas and several surrounding states.
9. On June 27, 2017, RB Stewart hired Complainant to drive a commercial motor vehicle with gross vehicle weight in excess of 10,000 pounds.
10. Complainant worked as a daily fuel hauler picking up and delivering loads exclusively within the State of Texas.
11. Complainant worked the night shift from 3:00pm to 3:00am at all-times relevant to the claims that form the basis of his Complaint.
12. On February 16, 2022 at 3:05am, dispatch emailed the District Operations Manager and requested he look at Complainant's route for the night because it took him almost 14 hours to deliver two loads.
13. The portion of FM 1301 where Complainant stopped is a two-lane highway (one lane in each direction) without any street lights.
14. The speed limit on the part of FM 1301 where Complainant stopped is 65 miles per hour.
15. Complainant did not put out three reflective triangles while he was stopped for a 33-minute break on February 16, 2022 at approximately 3:36am.
16. When Complainant returned to R.B. Stewart's terminal on February 16, 2022 for his 3:00 p.m. shift, he was assigned a Trainer Driver to accompany him.
17. Approximately two hours into his shift on February 16, 2022, Complainant told his Trainer Driver he started feeling fatigue symptoms.
18. The driver Trainer Driver drove Complainant back to the terminal, and Complainant went home for the day.
19. On February 16, 2022 at approximately 11:11 p.m., Complainant sent an email to his managers stating "I started feeling fatigue symptoms while driving and I decided to refrain from driving."
20. Complainant did not have any other communications with RB Stewart management about his decision to end his shift early that day.
21. On February 17, 2022 at approximately 2:59 p.m., Complainant texted dispatch "I'm sick and won't be coming in today."
22. On February 17, 2022 at approximately 3:31 p.m., Justin Frey emailed Complainant and told him not to report to work until Monday February 21, 2022 "due to an ongoing investigation."
23. R.B. Stewart terminated Complainant's employment on February 21, 2022.
24. Justin Frey and Sam Pogue told Complainant he was terminated Complainant for violating its safety policies and federal law, specifically, 49 C.F.R. § 392.22 and RB Stewart's Transportation Policies & Procedures Manual, effective date January 1, 2022.

### B. Hearing Testimony and Credibility Assessments

As finder of fact, I am entitled to determine the credibility of witnesses, to weigh evidence, and to draw my own inferences and conclusions from the evidence, and I am not bound to accept the opinion or theory of any particular witness. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467, 88 S. Ct. 1140, 1145-46 (stating that part of witness's testimony may be accepted without accepting it all), *reh'g denied*, 391 U.S. 929, 88 S. Ct. 1800 (1968); *see also Farley v. Altasource, LLC*, ARB No. 16-091, ALJ No. 2015-FDA-1, slip op. at 5 (ARB Aug. 20, 2019) (considerable deference given to ALJ's credibility determinations unless inherently incredible or patently unreasonable). The credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). "Credible testimony is that which meets the test of plausibility." *Id.* at 52.

I assessed the witnesses' credibility based on the plausibility of their testimony, internal consistency of their statements, and consistency with other reasonable and plausible testimony and documents in evidence.

In reaching findings and conclusions herein, I do not operate as a "super-personnel" department regarding the accuracy of the charges of discipline, investigation hearing findings, or conclusions. *See Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969-70 (8th Cir. 2017); *Eilam v. Children's Hospital Ass'n*, 1999 U.S. App. LEXIS 5880 at *10 (10th Cir. 1999). Rather, the analysis focuses on whether any protected activity by Complainant was a contributing factor to an adverse employment action, and, if so, whether Respondents established the same adverse action would have been taken absent the protected activity.

The following are general summaries of the relevant portions of testimony received at the hearing, together with assessments of the witnesses' credibility. Relevant and credible portions of witness testimony have been incorporated into the Findings of Fact with citations to the record. *See* Section III, below.

*Complainant Nahun Gutierrez*

Complainant Nahun Gutierrez testified in a clear and earnest manner. He recounted his experience as a Tanker Driver with R.B. Stewart, including his job duties and routes, and the events that resulted in his termination.

Complainant recalled his location and activity with respect to when he was driving, on duty, not driving, or off duty during the February 15-16 shift. His testimony was consistent with previous statements made and the records in evidence, e.g., his driver logs. For instance, his driver log during the February 15-16 shift shows that he drove a short distance from Buc-ee's to Love's truck stop, both of which have provisions and amenities. He explained that he made a ten-minute drive to Love's to purchase food because the provisions are more affordable. His explanation is plausible and reasonable. I find Complainant's testimony regarding the logistical information applicable to his shifts to be very credible.

Claimant also credibly described his actions and thought processes during the February 15-16 shift, which he was in the best position to know. He described his experience of fatigue,

such as symptoms of "tunnel vision" and his "eyes were real heavy," which caused him to stop driving. TR at 68. He thus provided insight into his reason for stopping on the shoulder and resting before resuming the rest of his shift. Complainant also credibly stated that he was not fatigued when he left his last step (Buc-ee's in Wharton) and became fatigued in the 38 minutes that followed. I find that Complainant's testimony regarding his actions and state of mind was credible. As discussed below, however, Complainant's reasons for stopping on the side of the road were not as important to the outcome here as his failure to follow certain safety procedures required by law and by RBS.

Complainant was generally forthright in his responses, even when the information may not be favorable to his position. He acknowledged the regulation that required him to be parked a certain distance away from traffic when pulled over, and he admitted not knowing the distance between his vehicle and the edge of the shoulder. He testified that he did not place the reflective warning devices (triangles) behind his vehicle because he believed that he would only be resting for a brief time, although he was aware of the regulation that required a driver to place the triangles within 10 minutes of stopping and he admitted that he had the devices in his vehicle. TR 182-83, 189-91. Complainant candidly admitted that when he first pulled the truck over, he expected to rest more than 10 minutes, that where he stopped was not a safe haven, and that he was terminated for not placing the reflective triangles. *Id*. at 96, 117, 191.

Complainant's statements of when and how he contacted dispatch or his supervisors to provide notice of an issue or request assistance are credible because they are supported by the testimony of other witnesses and internal documents. He described the several instances when he had to contact dispatch or his supervisors. He displayed no animus towards his former employer or his supervisors. Complainant had a hard time answering questions about the instance of prior discipline relating to his failure to report an accident involving property damage to other vehicles because of a tire blow-out. *Id*. at 102-11. He may have genuinely not understood the question at times, but he also appeared unwilling to admit that the reason for the discipline was his failure to follow procedures regarding the report of accidents, and he focused excessively on the method of his report of the blow-out (text versus phone call). Claimant appeared to reluctantly admit that his prior discipline was related to his failure to report damage to other vehicles from the blow-out and that he did not take any photographs of the damage. Id. at 111. Ultimately, however, the prior instance of discipline did not result in Complainant's termination and thus has little to no bearing on the outcome in this proceeding.

While Complainant's testimony is very credible, his assertion that the basis behind RBS's decision to terminate his employment is not supported by or corroborated by other witness testimony or documentary evidence.

*Justin Frey*

Justin Frey, R.B. Stewart's Regional Operations Manager in February 2022, and an indirect supervisor of Complainant, provided helpful information regarding the company's policies and operations generally and as they applied to Complainant's job duties. He was able to address the circumstances that led to Complainant's termination based on direct, personal knowledge. Mr. Frey provided credible testimony regarding his review of Complainant's driving logs and the video

of his activities during the February 15-16, 2022, shift, which led to his determination Complainant had engaged in unsafe conduct that was contrary to company policies. His testimony was consistent with documentary evidence of R.B. Stewart's policies, internally consistent, plausible, and evinced no animus toward Complainant's protected activity. He admitted that many of the work relationships were good and that RBS was fairly flexible with him up to his termination. *Id*. at 161. Overall, I found his testimony very credible.

*Bubacarr Fofana*

Bubacarr Fofana has worked as a driver and driver trainer for RBS for more than four years. TR at 342-43. At the time of the hearing, he was a driver. *Id*. at 343. In February 2022, he had been a driver trainer for about one year. *Id*. at 344. Mr. Fofana limited his testimony to facts within his personal knowledge, which mainly concerned his responsibilities as a driver and driver trainer for RBS, and a shift on February 16-17, 2022, when he was assigned to ride as a driver trainer with Complainant. He was cooperative, explained the events and his observations, did not speculate, and provided very credible testimony that was consistent with documents in evidence and other credible evidence regarding the timeline of events.

*Sam Pogue*

Sam Pogue was R.B. Stewart's Director of Safety at the time of the hearing. TR at 376-77. During his 8 years of employment with RBS, Mr. Pogue had been a driver, driver trainer, District Operations Manager, Regional Manager, and Director of Operations and Compliance. *Id*. at 377-78. As Director of Operations and Compliance, Mr. Pogue oversaw 7 managers (2 regional operations managers and 5 district operations managers), a training manager, and a safety coordinator; he had responsibility over daily operations. *Id*. at 379-80. Mr. Pogue testified regarding his supervisory role, the scope of training for drivers, his review of Complainant's driving logs and the video of his activities during the February 15-16, 2022, shift that led Complainant's termination, and in that regard, the reasons he believed termination was justified. Mr. Pogue was equally cooperative on direct- and cross-examination; his testimony was very consistent with Mr. Frey and Mr. Fofana; and his statements were supported by the documentary record of events. Mr. Pogue asserted that RBS encouraged safe conduct and gave specific examples to support his statements. I found his testimony to be very credible.

## III. FINDINGS OF FACT

As of the time of the hearing, Complainant had held a commercial driver's license ("Class A CDL") and had driven trucks for about 10 years. TR at 39, 41. He had not been cited for a moving violation by a Department of Transportation ("D.O.T.") officer or had a reportable accident. *Id*. at 41.

R.B. Stewart's main office is in Houston, Texas, and its main operations are conducted in Texas, though some are conducted outside Texas. TR at 244. The company employs about 175 drivers, whose direct supervisors are district managers. *Id*. at 243-44. At the Houston location, RBS had about 36 CDL drivers, including Complainant. *Id*. at 39-40, 257.

Per the parties' stipulation, Complainant was employed by R.B. Stewart from June 27, 2017 to February 21, 2022 (Stipulation no. 3). Complainant official title was "Tanker Driver." JX-34; TR at 42. He picked up loads, which consist of fuel from a wholesale terminal rack, and delivered the fuel to R.B. Stewart's customers. TR at 44-45, 247. The customers are typically Buc-ee's gas stations, and Complainant's routes were within a 2-hour radius from RBS' yard in Angleton, Texas, and primarily in the Houston area. *Id*. at 45, 49, 135, 249, 316.

RBS monitors fuel levels of its customers to determine when to schedule deliveries to keep supply levels adequate; the dispatch team assigns a load to a driver's company-issue iPad that contains load management software. *Id*. at 247, 262, 316.

Drivers are responsible for hooking up the necessary connections for fuel loading and unloading and monitoring the process. *Id*. at 248. Loading a truck with fuel can take anywhere from 20 to 40 minutes; unloading the fuel can take up to 45 minutes. *Id*. Each tanker typically carries around 9,000 gallons. *Id*. at 247.

The fuel that is transported is considered a Hazmat commodity. *Id*. at 261. Drivers like Complainant have a Hazmat endorsement permitted them to haul cargo classified as hazardous material. *Id*. at 39-40. An empty tanker containing fuel vapors is also combustible. *Id*. at 181-82.

RBS requires extensive training for its drivers, including initial and refresher training. *Id*. at 384-85. R.B. Stewart's drivers are trained on the company's Policies & Procedures Manual ("Manual") and Transportation Policies & Procedures Manual ("Transportation Manual"), and receive other courses such as Hazmat compliance, defensive driving, speed and space management, and other driving and company policies. JX-23; JX-24; JX-33; TR at 386. The manuals are available on the iPad issued to drivers, and a hard copy of the "green book," i.e., the Federal Motor Carrier Safety Administration book of safety regulations, is kept in the door of the truck. TR at 121-22, 391-92, 394. Complainant received the manuals and was trained on the policies and procedures. JX-16; JX-25; JX-26; TR at 122-24, 393. Complainant received training by RBS at the start of his employment. JX-33. He also was assigned to drive with trainers, who evaluated his driving, on several occasions throughout his employment. TR at 55-56. Complainant was aware of the green book from his years of truck driving experience. *Id*. at 121-22.

Drivers have either a day shift that lasts from 3:00 a.m. to 3:00 p.m. or a night shift from 3:00 p.m. to 3:00 a.m. *Id*. at 250, 314. At the relevant times, Complainant worked the night shift. *Id*. at 43.

At several times during his employment, Complainant notified dispatch and/or his supervisor that he would be late, unavailable to work as scheduled, or he requested to leave early. *Id*. at 146-47; JX-37 at 2-3. His text messages were often acknowledged with "thanks," "okay," or a similar short response, or with reminders to also notify his supervisor, and Complainant received no adverse action in response. TR at 146-54; JX-37 at 2-19. His requests to take leave were approved. JX-37 at 2-19.

Drivers are allowed to take 15-minute breaks during their shifts that typically last 12 hours. *Id*. at 250. A driver needing a break during a shift is expected to log their time in a driver's log; in

fact, any change in duty status must have a corresponding entry in the log. Id. at 250-51. Dispatch is not notified of breaks unless the driver needs a longer break of more than 25-30 minutes. *Id*. at 251. A driver is not penalized for taking breaks that the managers deem reasonable; there is no cap on the number of breaks. *Id*. at 251. Drivers are paid during breaks. *Id*. Drivers are expected to be in communication with dispatch any time the driver experiences a delay that will be long enough to affect operations. *Id*. at 262.

If a driver is unable to finish a shift due to fatigue or sickness, he is expected to call dispatch, who would then verify whether the driver is able to return to the yard. *Id*. at 257. If unable to return, dispatch sends a substitute driver or manager to pick up the driver. *Id*. Dispatch would send a CLD driver to complete the shift. *Id*. Driver trainers employed by RBS sometimes fill-in for drivers who are unable to work. *Id*. at 317.

As a driver, Complainant was limited to working no more than 15 hours at a time. TR at 51. On several occasions, Complainant had to notify the company's dispatch that he was going to "run out of hours" on his last delivery. *Id*. In that circumstance, dispatch sent a CDL driver to Complainant's location to take over driving the truck back to the terminal; Complainant drove the company car back. *Id*. at 51-52. RBS preferred that drivers complete their deliveries within their scheduled 12-hour shift, so that the truck was back at the yard for the next driver's shift. *Id*. at 138-41.

Vic Rivera, Director of Human Resources, sent an email on November 29, 2021, regarding "Ill or Fatigued Drivers." JX-4. Mr. Rivera addressed a question of "what should be done if a driver comes to work but says they are sick." Mr. Rivera cited law regarding "ill or fatigued" operators, stating that no driver shall operate a commercial motor vehicle while the driver's ability or alertness is impaired. *Id*. (citing 42 C.F.R. § 392.3). Mr. Rivera stated,

> [W]e have no choice but to send you home if you declare that you are sick. Saying that you are sick but can do 1 load before going home is not allowed. Per the legal team, if we were to allow you to drive after telling us you are sick and you get into an accident, the consequences could be devasting to the Company.

*Id*.; TR at 390. Complainant received the email. TR at 127.

Justin Frey was the Regional Operations Manager in February 2022 and had held the position for about 22 months. *Id*. at 243. Mr. Frey was based in San Antonio and Houston and typically worked from 6:00 a.m. until 4:00 p.m. *Id*. at 244, 246. He supervised three District Managers. *Id*. at 243-44. Mr. Frey reported to Mr. Pogue, who was at that time the Director of Operations and Compliance; Mr. Pogue reported to upper management. *Id*. at 244, 380. Prior to his promotion to Regional Operations Manager, Mr. Frey was Complainant's direct supervisor for about 14-15 months, from January 2020 until April of 2021. *Id*. at 263.

Mr. Frey was a former driver for RBS; he worked day and night shifts. *Id*. at 255-56. He experienced fatigue on occasion that required taking an additional break, which he logged into the driver's log. *Id*. Mr. Frey was not disciplined or counseled for taking breaks due to fatigue. *Id*. at 256.

During the time that Mr. Frey was a direct supervisor of Complainant, he was aware that Complainant required time off in May 2021 for a family emergency. *Id*. at 264; JX-17. Mr. Frey approved the time off and did not discipline Complainant. *Id*.

Mr. Frey gave Complainant a verbal coaching on May 5, 2020, about verifying customer locations. *Id*. at 265; JX-2. Mr. Rivera gave Complainant a warning on March 24, 2021, for which Mr. Frey was present, for not reporting an accident involving a tire blow-out that caused property damage to other vehicles. TR at 54-55, 265-67, 269; JX-1. Employer's policy requires immediate notification of accidents. TR at 267. Mr. Frey considered termination of Complainant at the time, and discussed it with him, due to the concealment of the accident but felt Complainant had made a mistake from which he could learn and improve. *Id*. at 267-68. Complainant was not blamed for the tire blow-out but rather for not reporting that other vehicles were damaged. *Id*. at 105-06, 318-19.

Mr. Frey discussed Mr. Rivera's November 29, 2021, email with his District Managers and asked them to discuss it with the drivers. *Id*. at 258-59. Mr. Fofana, a driver and driver trainer at the time recalled receiving the email and found it consistent with the company's policy on driving ill or fatigued. *Id*. at 350-51.

Mr. Frey was aware of the circumstance that led to Mr. Rivera's email, arising out of a driver's report on November 24, 2021, that he was sick and had not slept well so he informed his manager and dispatch that if he could not "do a 3rd load," they would "know why." JX-30. The email was sent to Mr. Frey, who called the manager and made sure the driver was told to stay home because he posed a safety risk. TR at 259. Mr. Frey also informed Mr. Rivera of the situation, which prompted Mr. Rivera's email. *Id*. at 260-61; JX-4 at 1.

If a driver needs to stop his commercial vehicle on the side of the road, he is required to stop "where it's safe and legal to do so," meaning the driver must be a certain distance from the travel portion of the roadway, and RBS requires the placement of reflecting warning devices (triangles) as soon as possible, i.e., within ten minutes. *Id*. at 261-62, 348.

On February 15, 2022, Complainant worked the night shift starting around 3:00 p.m. on February 15, 2022, and ending around 5:24 a.m. on February 16, 2022. *Id*. at 64, 269, 273; JX-6b at 4-5. Complainant was initially assigned truck no. 206, which was switched to truck no. 252 after Complainant did a pre-shift inspection. JX-6b at 5-6; TR at 273-74.

An Electronic Logging Device ("ELD") is a system in the commercial vehicle that automatically records when the driver is moving; a driver's status will record as either driving, on duty, not driving, or off duty. TR at 48-49, 60, 274, 310. The log also records the duration of the driver's activities, allows a driver to input remarks, records distances, and identifies the vehicle's location by GPS on the far right side of the log. JX-6b. The log will identify "driving (ELD)" when the system detected movement; the log identifies only "driving" when the driver has manually logged that he was driving. TR at 275; JX-6b. Manual changes are discouraged because it creates confusion in the logs; any manual change in driver's activities should be accompanied by an explanation. TR at 276-77.

*February 15 to 16, 2022 (Evening Shift)*

The following activities were recorded in Complainant's driving log during his shift from February 15 to 16, 2022, before and after a 32-minute stop at 3:46 a.m. that is important to the parties' contentions:

> At 4:17 p.m. on February 15, Complainant's ELD recorded that he drove for one hour and 9 minutes, arriving at his destination ("Love's McCarty Rd") at 5:26 p.m. TR at 274-75; JX-6b at 6.
>
> After stopping at the truck stop for more than 8 minutes, Complainant began driving again at 5:35 p.m. JX-6b at 6; *see also* JX-22.
>
> At 6:23 p.m., Complainant stopped at "HOUNOB," a fuel terminal formerly called Houston Noble Oil where he picked up fuel and performed a tire check, which was indicated by remarks stating "loading tc." TR at 277-78; JX-6b at 6; *see also* JX-22.
>
> After more driving, Complainant arrived at the Buc-ee's No. 30 store in Wharton, Texas, around 8:57 p.m. for unloading and another tire check. TR at 279; JX-6b at 6-7.
>
> Complainant left Buc-ee's No. 30 at 9:56 p.m. and drove about 10 minutes to a Love's truck stop ("Love's Hungeford") where he took a 26-minute break. TR at 279-80; JX-6b at 7.
>
> At 10:33 p.m., Complainant resumed driving for a little more than one hour and then stopped at 11:36 p.m. at "Exxon South" in University Place, Texas. JX-6b at 7-8. Complainant recorded activities of loading, tire check, and "midnight shutdown." *Id*. at 8. The remarks indicated that Complainant was unable to load fuel at Exxon South because of the usual shutdown from about 11:45 p.m. to 12:05 a.m. TR at 65, 280.
>
> At 12:00 a.m., Complainant loaded fuel and did a tire check at Exxon South until 12:45 a.m. JX-6b at 2. Complainant left Exxon South at 12:46 a.m. *Id*.
>
> Complainant drove for 48 minutes and then took an 11-minute break at 1:34 a.m. *Id*. He resumed driving and arrived back at his last stop at Buc-ee's No. 30 in Wharton at 2:10 a.m., where he unloaded fuel and performed a tire check. *Id*. at 2-3. He remained at this location for about one hour. *Id*. at 3.
>
> Complainant left Buc-ee's No. 30 at 3:08 a.m. *Id*. He drove for 38 minutes and at 3:46 a.m., he stopped for 32 minutes until 4:19 a.m. *Id*.; JX-36; TR at 70, 282.
>
> Complainant stopped because he began to feel fatigued while driving from Wharton back to the terminal. TR at 67. He pulled on to the shoulder of the two-lane highway; all of his truck and trailer fit onto the shoulder, and he turned on his truck's flashers. *Id*. at 67, 69. He did not measure the distance from the truck to the traveled portion of the road. *Id*. at

184. Complainant did not exit the truck; he rested at the controls until he felt it was safe to resume driving. *Id*. at 70.

Complainant stopped because he recognized that he was having symptoms of fatigue like "tunnel vision," and his eyes were heavy. *Id*. at 68. He felt he would have an accident due to fatigue if he did not stop. *Id*. at 67, 86, 195. When Complainant first pulled over to the shoulder of the road, he believed he would need to stop for "15 minutes, 30 minutes tops." *Id*. at 96, 191.

Complainant did not place reflective triangles behind the truck. *Id*. at 182. He was aware of Federal regulations that required the placement of triangles when his vehicle was pulled to the side of the road. *Id*. at 182-83.

The driving log showed the 32-minute stop as "on duty" time. JX-6b at 3. Complainant was required to explain the stop in the driver's logs remarks, but no comment was entered. JX-6b at 3; TR at 282-83.

The log showed Complainant was "driving (ELD)" again from 4:19 a.m. until 4:53 a.m., when he arrived back at R.B. Stewart and remained on duty for another 31 minutes until the end of his shift at 5:24 a.m. JX-6b at 3.[2]

*Investigation of Complainant's February 15 to 16, 2022, Activities*

Around 3:05 a.m. on February 16, 2022, RBS' dispatch requested that managers review Complainant's tracks that night because "it took him almost 14 hours to do 2 loads to Wharton," Texas, so dispatch questioned if Complainant was "milking the clock." *Id*. at 269-70; JX-7. The email was sent shortly after Complainant's shift would have normally ended. TR at 176.

Andre Allison, District Operations Manager and Complainant's direct supervisor at the time, was the first to receive the request from dispatch, and he forwarded it to Mr. Frey and Mr. Rivera. JX-7; TR at 271. Mr. Allison was out of the office on vacation, so Mr. Frey acted in his place. TR at 143.

Mr. Frey saw the forwarded request from dispatch when he arrived at work around 6:00 or 7:00 a.m. on February 16, 2022. TR at 271. He reviewed the driver's logs for any discrepancies and spoke to Mr. Allison and Mr. Pogue. *Id*. at 271-72, 322, 395-96.

When Mr. Frey and Mr. Pogue reviewed Complainant's logs that morning, they noted that there was a "duty status" entry that had no remark and the location associated with the entry was not in the vicinity of RBS' stores, so around 10:45 a.m., Mr. Pogue pulled the truck's video. *Id*. at 283-84, 322-23, 337, 396-97, 400-03; JX-20.

Mr. Frey and Mr. Pogue reviewed the video together to better understand Complainant's activities. TR at 283-84, 322-23, 337, 405-06; JX-20. The video reflected that Complainant rested in his vehicle during the 32-minute stop at 3:46 a.m. JX-20; JX-21. Mr. Frey was asked at the

[2] *See also* TR at 168-79, 179-; Respondents' Demonstrative Exhibit (timeline).

hearing whether Complainant "appeared to be tired." TR at 324. He answered, "He appeared to be sleeping in the video." *Id*.

Mr. Frey observed that Complainant was parked on the shoulder of a "very dark highway," and he was in a 65-mile-per-hour zone adjacent to fast-moving traffic. *Id*. at 284. Mr. Frey and Mr. Pogue never saw Complainant exit the vehicle to place required reflective warning devices; they also determined that Complainant was not far enough off the road to meet requirements of Hazmat transportation. *Id*. at 284, 414. The video from a camera mounted under the driver's side mirror shows that passing traffic crossed into the opposing traffic's lane when driving past Complainant's truck and that, from Mr. Pogue's personal observation, traffic was also navigating a curve in the road at that location. JX-20; TR at 407, 410-11. According to Mr. Pogue, this was "extremely dangerous" for the passing vehicles, the oncoming traffic, and Complainant. TR at 410-12.

Mr. Pogue had concerns that Complainant had not pulled his truck at least 5 feet off the road, which is a Hazmat requirement, and he noted the length of time Complainant was sitting at that location. TR at 406-07. Using the GPS noted in the logs, Mr. Pogue personally went to the shoulder of the road at issue and measured it. *Id*. at 407-08, 439. The distance from the inside of the white line to the outer edge of the gravel shoulder was 101 inches. *Id*. at 408, 440. Because a truck is 96 inches wide, Mr. Pogue determined that the truck could not have been at least 60 inches off the white line. *Id*.

The location where Complainant pulled over and rested on the shoulder of a highway was about 35 minutes away from the Wharton Buc-ee's that Complainant had left, about the same distance away from RBS' yard, and about 6.4 miles away from arriving at a safe location to pull over. *Id*. at 430-32.

After reviewing the video, Mr. Frey and Mr. Pogue discussed what they felt to be safety violations pertaining to the unsafe location of vehicle during Complainant's stop and the absence of reflective triangles, which resulted in danger to Complainant and the public. TR at 288-91, 325, 409. Per Mr. Frey, alternatives to Complainant's actions included notifying dispatch that he was fatigued so that someone could be sent out to relieve him, and dispatch could also remind him to place reflective safety devices.[3] *Id*. at 289-90. Complainant also could have stopped at a safe spot a few miles from the roadside where he stopped. *Id*. at 290; 409-10.

RBS' Transportation Policies & Procedures Manual states under General Safety:

> Reflective Triangles: There are three (3) reflective triangles in the cab of the truck located in a red plastic box. These triangles are to be used for mechanical breakdowns or roadside flat tire repairs, or any other time the vehicle is stopped on the traveled portion or the shoulder of a highway for any reason other than necessary traffic stops. These reflective triangles should be placed in accordance with Department of Transportation ("D.O.T.") regulations.

[3] Mr. Fofana stated that at times of fatigue as a driver, he pulled over to a safe place like a truck stop or rest area, called dispatch, and reported what was going on. TR at 347-48. Dispatch would advise not to drive fatigued. *Id*. at 348-49. If a driver remained fatigued after resting 30-60 minutes, dispatch would arrange for someone to come and pick up the truck. *Id*. at 349.

JX-24 at 7. RBS' witnesses testified that the D.O.T. requires the placement of reflective triangles within 10 minutes of stopping on the traveled portion or shoulder of a highway. TR at 331, 348, 359, 369, 388.

Complainant stated awareness that D.O.T. regulations required placement of reflective triangles in addition to flashers within 10 minutes of stopping a commercial vehicle on the shoulder of the road; he was also aware that the requirement was a company policy. *Id*. at 95, 127-30, 132-33. Complainant understood reflective triangles to be required when a truck is "on the side of the road for long periods of time or for, like example, if you break down and know you're going to be there for long periods of time." *Id*. at 95. Complainant also stated an awareness of D.O.T. regulations precluding the parking of a motor vehicle carrying hazardous materials within 5 feet of a street or highway "except for brief periods" and only when necessary and it is impracticable to park the vehicle in any other place.[4] *Id*. at 130-31.

Mr. Pogue corroborated Mr. Frey's testimony regarding RBS' expectation that a driver experiencing fatigue should immediately stop at a safe haven, i.e., a safe location "off of the road," and "call somebody and let them know that they're feeling fatigued"; the driver may opt to take a short break on the clock and if safe to do so, "continue on" driving. *Id*. at 382-83, 388. If the driver cannot safely continue, RBS will "start the process of going and picking them up." *Id*. at 383. The company's Manual states that a driver experiencing warning signs of fatigue, which are enumerated in the Manual, "should immediately get off the road and stop where safely and legally allowed to stop to get rest and awaken the body and mind." JX-24 at 32 (Section 18.9.13.9). Complainant was aware of the requirement to stop at a safe haven when experiencing symptoms of fatigue and that safe havens are typically truck stops and rest areas. TR at 124-26, 134.

In Mr. Fofana's experience as a driver, he would notify dispatch about feeling any fatigue, and dispatch advised not to drive fatigued. *Id*. at 348-49. If a driver remained fatigued after resting 30-60 minutes, dispatch would arrange for someone to come and pick up the truck. *Id*. at 349. As a driver, Mr. Fofana had reported having an episode of fatigue by notifying dispatch and then taking a rest break; he was not disciplined or counseled for reporting fatigue or taking the break. *Id*. at 349-50.

When he was a driver, Mr. Pogue also experienced fatigue during a period when he and other drivers were working a lot of hours due to the opening of a new market store. *Id*. at 381. He pulled into a truck stop, called dispatch, and waited about an hour and a half until another driver arrived in a personal vehicle and took over driving Mr. Pogue's truck; Mr. Pogue drove the personal vehicle back. *Id*. Mr. Pogue was not counseled or disciplined. *Id*.

RBS has made F-150 trucks available to employees in some new markets, which may be used to go pick up drivers who are unable to complete their loads. *Id*. at 382. The company vehicles were made available so that employees did not have to use a personal vehicle to relieve a driver and then have that personal vehicle returned by a different employee. *Id*.

[4] 42 C.F.R. 397.7.

Mr. Frey acknowledged that an episode of driver fatigue can happen "any time" due to extended periods of travel. *Id*. at 333. He expected a driver to be proactive to identify the early signs of fatigue, and he believed it was a legal requirement as well; he recognized that regulations also require that a driver not drive impaired because of fatigue. *Id*. at 333-34.

The record identifies no history of RBS punishing a driver for pulling over and taking a break from driving because the driver felt fatigued or ill. Mr. Pogue denied any awareness of a time that a driver was punished under such circumstances. TR at 389. RBS permits fatigued drivers to take naps on the clock with the objective of being refreshed enough to continue driving. *Id*. at 438.

Mr. Frey and Mr. Pogue found the safety violations to be egregious and dangerous to Complainant and the public; within an hour or two after reviewing the video on February 16, 2022, they determined that terminating Complainant was the only option. *Id*. at 291, 339, 415-16.

Due to the Hazmat cargo transported by RBS' drivers, the consequences of an accident can be significant. *Id*. at 71, 327-28. According to Mr. Fofana, "Because of the nature of the product we're transporting that is highly flammable[,] we are advised not to be parked on the side of the road." *Id*. at 348.

Mr. Frey's relationship with Complainant had been a good one up to the decision that Complainant should be terminated. *Id*. at 143, 331. Complainant felt Mr. Frey and Mr. Pogue had been good supervisors, and overall the company had treated him well. *Id*. at 144-45. Mr. Pogue did not have much previous interaction with Complainant, but he had observed him driving on one occasion and thought he did a good job and told him so. *Id*. at 434.

Mr. Pogue brought Mr. Rivera into the discussion about Complainant, but Mr. Frey and Mr. Pogue made the decision that Complainant's conduct warranted termination. *Id*. at 325-27. Termination required approval of upper management, so the recommendation to terminate Complainant was made to Vice President/General Manager Terry Tesch. *Id*. at 292, 326-27, 416-17.

*February 16 to 17, 2022 (Evening Shift)*

The decision on termination was not final when Complainant arrived for his shift on February 16, 2022, because upper management had not yet responded to the recommendation, so Complainant was placed with a drive trainer, Mr. Fofana, that day. *Id*. at 72, 292-93, 354, 417.

Complainant was not allowed to drive unsupervised because of the violations Mr. Frey and Mr. Pogue believed occurred during his last shift. *Id*. The decision to have Mr. Fofana drive with Complainant was made shortly before the beginning of Complainant's shift at 3:00 p.m. on February 16, 2022. *Id*. at 340, 417-18; JX-35.

Mr. Fofana's duties as a driver trainer involved being assigned to drivers for training; he was not a manager or supervisor of drivers.[5] TR at 345-46. Mr. Fofana was not usually told the reason for being assigned to train a driver and likewise was not told why he was assigned to ride with Complainant. *Id*. at 346, 354-55.

During the initial drive on February 16, 2022, Complainant told Mr. Fofana that he had worked about 14 hours the previous shift. *Id*. at 356. Complainant did not initially state that he was feeling any fatigue from the previous shift, but after about 35-40 minutes, Complainant pulled over into a side street, parked on the shoulder, and told Mr. Fofana has felt sleepy and would like Mr. Fofana to take over driving. *Id*. at 73, 355-57. Complainant admits that while he voiced a complaint of fatigue during this shift, he had not reported the fatigue he felt during the previous shift. *Id*. at 200-01, 207.

Mr. Fofana did not give Complainant any trouble about taking over driving due to Complainant's fatigue. *Id*. at 74. Mr. Fofana exited the truck and called to talk to the supervisor, Mr. Allison, who, after a pause, told Mr. Fofana to come back to the yard. *Id*. at 73, 358. Mr. Allison had contacted Mr. Pogue in the meantime, and Mr. Pogue had directed that Mr. Fofana drive the vehicle back because of RBS' policy that fatigued drivers should not be driving. *Id*. at 418-19.

Mr. Fofana did not find the shoulder of the road where Complainant had pulled over to be a safe place to stop and noted that they had just passed a truck stop that would have been safe. *Id*. at 358-59, 370. No warning devices were placed because the stop did not take more than 10 minutes. *Id*. at 359. The stop occurred between 4:00 and 5:00 p.m.; there was still daylight. *Id*. at 370.

Mr. Fofana took over as driver, and they returned to the yard. *Id*. at 359-60. Mr. Fofana also contacted dispatch and had the loads originally assigned to Complainant switched to Mr. Fofana's iPad so that he could complete the job. *Id*. at 360.

Mr. Fofana completed a daily report at the end of the February 16-17, 2022, as was his custom. TR at 363; JX-8. Mr. Fofana noted some favorable aspects of Complainant's driving that day, including good speed of positioning and following distance, good handling of equipment, meaning how Complainant positioned the truck on the road while driving, good Hazmat knowledge, and did a good 14-point inspection. *Id*. at 363-65, 368-69; JX-8 at 1-2. He did not identify a need for additional training for Complainant at that time. TR at 369.

At the end of his report, Mr. Fofana noted, "He [Complainant] was upset that he worked fourteen hours the previous night and wanting to do only two loads in order to get off early and I can't guarantee that nor am I calling dispatch is his second day from a reset and he showed no sign of fatigue or being sleepy." JX-8 at 3; TR at 365-66. Mr. Fofana perceived Complainant's belief that Mr. Fofana could limit him to 2 loads that shift, but Mr. Fofana advised he was not dispatch and could not do that. TR at 366. Mr. Fofana explained that he made the comment about seeing no

[5] Mr. Pogue explained that he oversaw Training Manager Thomas Cantu, who in turn supervised 6 senior driver trainers and about 16 to 18 trainers. TR at 380.

sign of fatigue in Complainant before Complainant abruptly pulled over and announced he felt sleepy. *Id*. at 357, 359, 366.

Around 11:11 p.m. on February 16, 2022, Complainant sent an email to Mr. Pogue, Barry Adams, Thomas Cantu, and copied Mr. Allison, stating that he "started feeling fatigue symptoms while driving" so he decided not to drive. JX-28 at 2; TR at 74-75, 202, 421. Complainant stated that safety was very important to him and he did not want to put himself and others at risk. JX-28 at 2. He stated that he and Mr. Fofana notified dispatch about his fatigue. *Id*.

At 6:15 a.m. on February 17, 2022, Mr. Allison forwarded the message to Mr. Frey and Mr. Rivera. At 8:20 a.m., Mr. Rivera responded and expressed the opinion that Complainant "would have driven fatigued like he did the previous day" if Mr. Fofana had not been with him. *Id*. at 1-2. Mr. Frey shared his opinion. TR at 297. Mr. Pogue saw the email when he arrived at work around 7:00 a.m. on February 17, 2022. TR at 421.

Mr. Frey's receipt of the forwarded email about Complainant's fatigue was his first awareness of the events of the February 16-17, 2022, shift that resulted to returning to the yard with Mr. Fofana. *Id*. at 296. Before receiving this email, the decision had already been made to recommend Complainant's termination. *Id*. at 297, 304. Mr. Pogue did not tell Mr. Tesch about Complainant's report of fatigue during the February 16-17 shift because "the decision was already made" to terminate Complainant. *Id*. at 419-20.

At 1:44 p.m. on February 17, 2022, Mr. Rivera sent to Mr. Allison, Mr. Frey, and Mr. Pogue a draft of the language for Complainant's notice of termination. JX-18; TR at 422-23. Mr. Allison was copied because of his managerial position, but he was out on leave and not part of the termination decision. TR at 298. The termination was for cause due to violation of a company policy. *Id*.; TR at 298. The circulation of the draft meant that termination of Complainant had been approved. TR at 298.

Jason Garcia, Lead Dispatch, notified Mr. Frey and others (i.e., Mr. Rivera, Mr. Pogue, and Mr. Allison) at 3:08 p.m. on February 17, 2022, that Complainant had texted dispatch at 2:59 p.m. to report that he was sick and would not be reporting to work that day. JX-9; JX-37 at 1; TR at 76-78, 299.

RBS asks that employees provide two hours' notice of unavailability to work, but the company can work with shorter notice depending on the circumstances. TR at 262, 314. Mr. Frey had not refused a request for personal leave based solely on receiving short notice. *Id*. at 315.

*Sunday, February 20, 2022 (Complainant on Leave)*

Complainant was next scheduled to work on February 20, 2022, which was a Sunday. TR at 300; JX-27. Corporate employees do not work on Sundays, so there would be no one available that day to inform Complainant that he was terminated. TR at 300, 425. Therefore, Mr. Frey notified Complainant that he should not report to work until February 21, 2022. *Id*. at 300. On February 17, 2022, Mr. Frey notified sent Complainant an email at 3:31 p.m. that he should not report to work on February 20, 2022, because of an "ongoing investigation." JX-29. Complainant

was provided 8 hours of stay-at-home pay for February 20 and asked to report to Mr. Rivera at the start of his shift on February 21, 2022. *Id*.; TR at 301.

*Monday, February 21, 2022 (Date of Termination)*

When Complainant arrived at 3:00 p.m. on Monday, February 21, 2022, he met with Mr. Frey and Mr. Pogue, who explained that Complainant's employment was terminated. TR at 80, 301; JX-11. The notice stated that a violation of RBS policy was the reason for termination. JX-11. Mr. Frey took into consideration that Complainant had been trained on the applicable company policies and Hazmat requirements. TR at 304. He also considered Complainant's disciplinary history that indicated a "pattern of hiding things and not being willing to do the right thing." *Id*. at 304, 329-30.

A three-paragraph narrative cited events on February 16, 2022, that included Complainant stopping his tractor and trailer on the side of a main road, where he took a break for about 33 minutes, after having taken 4 other breaks. JX-11. The notice stated, "Clearly Mr. Gutierrez' fatigued hindered his judgment." *Id*. at 1. The notice cited RBS policy and D.O.T. regulations[6] on the placement of 3 reflective triangles when stopping on the traveled portion or shoulder of a highway for any reason other than necessary traffic stops. *Id*. RBS' policy regarding night driving was also cited, which stated that a driver experiencing any signs of fatigue should immediately get off the road and stop where safely and legally allowed to stop for rest. *Id*. Additionally, the notice cited the company's policy on planning breaks and stops to take place at established truck stops or rest areas where other trucks are present. *Id*. Per the notice, "Where Mr. Gutierrez stopped was neither legal nor safe for himself, the public, and the Company's property." *Id*.

The notice incorporated the language drafted by Mr. Rivera and was signed by Mr. Frey and Mr. Tesch. *Id*.; TR at 302. During the meeting about his termination, Complainant stated that he pulled his vehicle over because he was tired. TR at 302-03. During the investigation into his conduct and up to the start of the meeting on February 21, Complainant was not contacted to give a statement. *Id*. at 79-80.

According to Mr. Pogue, during the meeting on February 21, Complainant stated he felt he had "made the right decision pulling over." *Id*. at 426. Mr. Pogue responded that he "really wish [Complainant] would have stayed at Buc-ee's and just called us or at least called" when he stopped. *Id*. In Complainant's recollection, Mr. Frey and Mr. Pogue told him that they believed he "was trying to do the right thing" and he was a "good driver," but they would have preferred that Complainant stop somewhere "like a truck stop or a rest area." *Id*. at 80, 97.

Complainant did not dispute that he did not place triangles behind the truck during the stop, but he felt it was not fair to be fired for stopping "for a brief time" without triangles. *Id*. at 81. Complainant was familiar with D.O.T. regulation 392.22, which states that the driver of a commercial vehicle that is stopped on a shoulder of a highway must immediately activate signal flashers until the driver places warning devices (triangles or flares) described in the regulations. *Id*. at 127.

[6] 49 C.F.R. 392.22.

Respondents' counsel asked Mr. Pogue at the hearing, "[H]ad [Complainant] stayed at Buc-ee's or called to say he was feeling fatigued, would you have terminated him?" *Id*. Mr. Pogue answered, "Oh, no, no." *Id*. Counsel also asked, "If [Complainant] had pulled over anywhere and put out the cones and pulled over to what you would have considered a safe distance off the road, would you have terminated him?" *Id*. at 426-27. Mr. Pogue answered, "No, ma'am." *Id*. at 427.

At 3:48 p.m. on February 21, 2022, Complainant texted Mr. Fofana, "They fire [sic] me today." JX-19. Mr. Fofana asked, "What they [sic] fire you for?," and Complainant stated, "For pulling over on the shoulder when I was coming back from Wharton to the yard." *Id*. Mr. Fofana was at home watching TV when he got the text; he did not know prior to Complainant's text that he was going to be fired. TR at 361-62. Mr. Fofana also did not know about the incident "coming back from Wharton" that Complainant referenced. *Id*. at 362.

## IV. CONCLUSIONS OF LAW

### A. Coverage under the Act

In pertinent part, the Act defines an "employer" as:

> [A] person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but does not include the Government, a State, or a political subdivision of a State.

49 U.S.C. § 31101(3)(A)-(B).[7] A driver of a commercial motor vehicle is a covered employee. 49 U.S.C. § 31101(2).

Here, the parties stipulated that Complainant was an employee as defined under the Act and that Respondent R.B. Stewart is a "person" as defined under the Act. *Stipulation* Nos. 1-3, 8. Their stipulations are consistent with the evidence and legal requirements for employer and employee coverage.[8]

The individual Respondents, who are individuals with the authority to hire, reprimand, and discharge Complainant, are also employers as defined under the Act. *See* 49 U.S.C. § 31101(3)(A); 29 C.F.R. § 1978.101(k); *Anderson v. Timex Logistics*, ALJ No. 2012-STA-011, ARB No. 13-016, slip op. at 8 (ARB Apr. 30, 2014); *Smith v. Lake City Enters, Inc.*, ARB Nos. 08-091, 09-033, ALJ No. 2006-STA-032, slip op. at 9 (ARB Sept. 24, 2010).

### B. Statutory Elements Applicable to Claim of Prohibited Retaliation or Discrimination under the STAA

In relevant part, the employee protection provision of the STAA provides as follows:

[7] A covered "person" under the Act is one or more "individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals." 29 C.F.R. § 1978.101(k).
[8] The parties did not present any dispute that Respondents' vehicles, which transport hazardous material, qualify as commercial motor vehicles under the Act. *See* 49 U.S.C. § 31101(a)(C).

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because:
>
> > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; []
> >
> > (B) the employee 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)(A)-(B).

STAA whistleblower complaints are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). *See* 49 U.S.C. § 42121(b)(2011); 49 U.S.C. § 31105(b)(1); *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-071 (ARB May 18, 2017); *Beatty v. Inman Trucking Mgmt*., ARB No. 13-039, ALJ No. 2008-STA-020 (ARB May 12, 2014).

To prove a STAA violation, the complainant must show by a preponderance of the evidence that his safety complaints to the employer were protected activity, or that he refused to operate a vehicle for reasons recognized under the Act, that his employer was aware of the protected activity, that the company took an adverse action against him, and that his protected activity was a contributing factor in the adverse action. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.104(e)(2)(complainant's prima facie showing requires evidence of engagement in a protected activity, that respondent knew or suspected the employee engaged in the protected activity, adverse action, and contributing-factor causation); 29 C.F.R. § 1978.109(a); *see also Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); *Scott v. J.B. Hunt Transport Svcs., Inc*., ARB No. 03-038, ALJ No. 02-STA-001, slip op. at 3 (ARB July 30, 2004).

The ARB has held that an employer's knowledge of protected activity is not a separate element but instead is considered as part of the causation analysis. *See Newell v. Airgas, Inc.,* ARB No. 16-007, ALJ No. 2015-STA-006, slip op. at 8 n. 34 (ARB Jan. 10, 2018) (citing *Bobreski v. J. Givoo Consultants, Inc*., ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13, 16 (ARB June 29, 2011)).

If a complainant does not prove one of these requisite elements, his entire claim fails. *West v. Kasbar, Inc./Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

In accordance with this legal framework, Complainant here must show by a preponderance of the evidence, i.e., that it was more likely than not, that he engaged in protected activity and that such protected activity was a contributing factor to the adverse employment action by the Respondents.

Complainant alleges that he engaged in activities protected under 49 U.S.C. § 31105(a)(1)(A)(i) and also under § 31105(a)(1)(B).

Protected Activity – Complaints (§ 31105(a)(1)(A))

A complainant may engage in protected activity by making 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). Safety complaints under § 31105(a)(1)(A) 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-041, slip op. at 4 (ARB Mar. 27, 2012).

A complainant needs to demonstrate that he reasonably believed that there was a safety violation. *Id*.; *see also Gaines v. KFive Constr. Corp.*, 742 F.3d 256, 267-68 (7th Cir. 2014); *Guay v. Burford's Tree Surgeon's, Inc.*, ARB No. 06-131, ALJ No. 2005-STA45, slip op. at 6-8 (ARB June 30, 2008).

"Internal complaints to management about safety regulation violations constitute protected activity under this subsection." *See Hilburn v. James Boone Trucking*, ARB No. 04-104, ALJ No. 2003-STA-45, slip op. at 4 (ARB Aug. 30, 2005) (*citing Regan Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5 (ARB Sept. 30, 2004)); *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 5 (ARB Dec. 31, 2002) (An "internal complaint to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA."). *See also Barr v. ACW Truck Lines*, Inc., ARB No. 91- STA-42 (Sec'y Apr. 22, 1992) ("Any complaint 'related' to a safety violation made by an employee to his employer constitutes protected activity" under the STAA) (citations omitted).

"It is well-established that as long as the complaint raises safety concerns, the layman who usually will be filing it cannot be expected to cite standards or rules like a trained lawyer." *Maddin v. Transam Trucking, Inc.*, ARB No. 13- 031, ALJ No. 2010-STA-20, slip op. at 6 (ARB Nov. 24, 2014) (citation and internal punctuation omitted). "The statute requires only that the complaint 'relate' to a violation of a commercial motor vehicle safety standard." *Id*.

Here, Complainant alleges that he filed internal safety complaints with supervisors raising concerns that he was too fatigued to safely operate his assigned commercial vehicle set, which he argues qualifies as protected activity. In this regard, he points only to his complaints filed with supervisors during the afternoon of February 16, 2022, when he "experienced fatigue symptoms that prevented him from safely operating a commercial vehicle." *Complainant's Post-Hearing Brief* at 15. He states the complaints were made to Mr. Fofana and conveyed over the phone to the dispatcher and later by email to Mr. Pogue, Barry Adams, Mr. Cantu, and Mr. Allison. *Id*. Complainant also asserts that his report on February 17, 2022, of being too ill to report to work

constituted protected activity. *Id*. at 15-16. He further contends that he reasonably perceived a violation of a commercial vehicle safety law or regulation when reporting he was fatigued on February 16 and ill on February 17, 2022. *Id*. at 16.

Reports of fatigue that affect the ability to drive safely qualify as protected activity. *See Beatty v. Celadon Trucking Servs., Inc*., ARB Nos. 15-085, 15-086 (Dec. 8, 2017). I find that Complainant's complaint of fatigue initially made to Mr. Fofana on February 16, which was relayed to supervisors, and his report of being too ill to work on February 17, 2022, constitute protected activity. TR at 201, 345, 357; JX-28. Because the complaints implicated an impaired ability to drive due to fatigue or illness, the complaints also related to a reasonably perceived violation of a commercial vehicle safety law or regulation.

Protected Activity - Refusal to Operate a Vehicle (§ 31105(a)(1)(B)(i), (ii))

The Act prohibits retaliation by an employer where an employee refuses to operate a commercial motor vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). This is known as the "actual violation" provision of the STAA.

A complainant's refusal to drive may be protected activity under subsection (1)(B)(i) if his operation of a motor vehicle would have violated a D.O.T. regulation that states:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3. This regulation, often referred to as the "fatigue rule," covers a driver who anticipates that his ability or alertness is so likely to become impaired that it would be unsafe to begin or continue driving. *See Eash v. Roadway Express, Inc*., ARB No. 04-036, ALJ No. 1998-STA-28, slip op. at 6 (ARB Sept. 30, 2005) (citing *Stauffer v. Wal-Mart Stores, Inc*., ARB No. 00-062, ALJ No. 1999-STA-21, slip op. at 5 (ARB July 31, 2001)).

"A complainant must prove that operation of the vehicle would in fact violate the specific requirements of the fatigue rule at the time he refused to drive–a 'mere good-faith belief in a violation does not suffice.'" *Eash*, ARB No. 04-036, slip op. at 6 (citing *Yellow Freight Sys. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993); *Cortes v. Lucky Stores, Inc*., ARB No. 98-019, ALJ No. 96-STA-30, slip op. at 4 (ARB Feb. 27, 1998)).

Therefore, a complainant must introduce sufficient evidence to demonstrate that his driving ability was so impaired that actual unsafe operation of a motor vehicle would result. *See Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 00-STA-48, slip op. at 6 (ARB July 31, 2003) (complainant who claimed sickness failed to produce sufficient evidence to demonstrate an actual violation of the fatigue rule).

The Act also protects an employee from retaliation where the employee refuses to operate a vehicle because 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)(ii). This is known as the "reasonable apprehension" provision.

The standard for determining whether a complainant's belief is reasonable is both objective and subjective. For the subjective component, the complainant must show that he actually believed a violation occurred and for the objective component, complainant must show that a reasonable employee in the same circumstances would think that a violation occurred. *Garrett v. Bigfoot Energy Services*, ARB No. 16-057, ALJ No. 2015-STA-47, slip op. at 7 (ARB May 14, 2018).

Here, Complainant alleges that he "ceased operating" his vehicle when he parked on the shoulder of the road around 3:30 a.m. on February 16, 2022. *Complainant's Post-Hearing Brief* at 17. He contends that his refusal to operate the vehicle is protected activity under § 31105(a)(1)(B)(i) because "actual violations would result" from continued operation of the vehicle and because he had a reasonable apprehension of serious injury to himself or others if he continued to drive while fatigued. *Id*. at 18.

The parties here cited the pertinent D.O.T. regulation that prohibits driving while impaired due to fatigue. *See* 49 C.F.R. § 392.3. I find that Complainant's refusal to operate a vehicle because of fatigue qualifies as protected activity. *See Beatty, supra*. Whether Respondents were aware of the protected activity is discussed in the causation analysis.

Unfavorable Employment Action

The STAA provides that an employer may not discharge or otherwise retaliate against an employee with respect to the employee's pay, terms, or privileges of employment because the employee engaged in STAA-protected activity. 49 U.S.C. § 31105(a)(1); 29 C.F.R. § 1978.102(a). The Board "has long required complainants to prove a 'tangible employment action,' namely one that resulted in a significant change in employment status, such as firing or failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-02, slip op. at 7-8 (ARB Sept. 30, 2008). The parties stipulated that Complainant was terminated on February 21, 2022. *Stipulation* No. 4. It is not disputed that his termination constitutes an adverse employment action.

Contributing-Factor Causation

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." *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008). The contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity. *See, e.g., Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

The Board has observed that "proof of causation or 'contributing factor' is not a demanding standard." *Rudolph v. Nat'l RR Passenger Corp. (AMTRAK)*, ARB No. 11-037, ALJ No. 2009-

FRS-15, slip op. at 16 (ARB Mar. 29, 2013). To establish that the protected activity was a contributing factor to the adverse action at issue, the claimant need not prove that his protected activity was the only, or the most significant, reason for the unfavorable personnel action. Indeed, the contributing factor need not be "significant, motivating, substantial or predominant;" rather, it need only play "some" role. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 53, n.218 (ARB Jan. 4, 2017) (reissued with dissent). The claimant must establish by a preponderance of the evidence that the protected activity, alone or in combination with other factors, tended to affect in any way the employer's decision or the adverse actions taken. *Klopfenstein v. PCC Flow Tech*., ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006).

The contributing factor element may be established by direct evidence or indirectly by circumstantial evidence. "Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity." *Bruker v. BNSF Ry. Co.*, ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 10-11 (ARB July 29, 2016) (*citing Cain v. BNSF Ry. Co*., ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 6 (ARB Sept. 18, 2014)); *Bechtel v. Competitive Techs*., ARB No. 09-052, ALJ No. 2005-SOX-033 (ARB Sept. 30, 2011)

Here, Complainant relies on the close temporal proximity between protected activity and the adverse action. *Complainant's Post-Hearing Brief* at 19-21. Evidence of proximity in time between protected activity and the adverse employment action can raise an inference of causation. An inference of causation may be broken by an intervening event. *See Dho-Thomas v. Pacer Energy Marketing*, ARB No. 13-051, ALJ Nos. 2012-STA-46, 2012-TSC-1, slip op. at 5, n.12 (ARB May 27, 2015); *Abbs v. Con-Way Freight, Inc.* ARB No.12-016, ALJ No. 2007-STA-37, slip op. at 6 (ARB Oct. 17, 2012); *Wevers v. Montana Rail Link, Inc.* ARB No. 2016-088, ALJ No. 2014-FRS-00062, slip op. at 12 (ARB June 17, 2019)(per curiam)(causal inference based on temporal proximity diminished by intervening events showing a reasonable concern by employer that complainant was charging official time while engaged in personal activities).

I find that Complainant did not establish by a preponderance of the evidence that the reason he was terminated was his protected activity under either § 31105(a)(1)(A) or (B).

Protected Activity February 16-17, 2022 (Complaints)

Complainant did not establish by a preponderance of the evidence that his protected activity on February 16-17, 2022, bore any causal relationship to his termination. As I have already found herein, the decision to terminate Complainant was made around 12:45 to 1:00 p.m. on February 16, 2022, after Mr. Frey and Mr. Pogue reviewed and considered video footage from Complainant's shift that ended in the early morning of February 16, 2022. The complaint of fatigue that Complainant made during his next shift (February 16-17, 2022) and calling in sick (February 17, 2022), thus occurred after the decision was made to terminate Complainant. TR at 207, 304, 419-20. In fact, the events of the February 16-17 shift were not even conveyed to Mr. Tesch, who had final approval over termination. Id. at 419-20. Nothing in the testimony of the decisionmakers

or the documents pertaining to their decision-making reflects that Complainant's complaints during and after the afternoon of February 16 came to have any bearing on the decision to terminate Complainant. Mr. Rivera's draft language of the termination document dated February 17, 2022, referenced only the activities during the February 15-16, 2022, shift. JX-18. The final termination document also focused solely on the events of February 15-16. JX-11.

I conclude that any complaints qualifying as protected activity under § 31105(a)(1)(A) were not a contributing factor to Complainant's termination.

Protected Activity February 15-16, 2022 (Refusal to Operate Vehicle)

Notably, consistent with Complainant's argument in his brief, the record reflects that he "ceased" driving his vehicle and rested for approximately 32 minutes around 3:46 a.m. during the February 15-16, 2022, shift. JX-6b at 3; *Complainant's Post-Hearing Brief* at 17. It is not disputed that Complainant did not communicate to his managers, supervisors, or even any co-workers that he was refusing to operate his vehicle. In fact, the only communication of fatigue that Complainant made prior to his termination concerned the events during the next shift (February 16-17, 2022) when Mr. Fofana was present with Complainant and took over driving.

Complainant asserts that "RBS became aware of Mr. Gutierrez's refusal [during the February 15-16 shift] when Respondents Sam Pogue and Justin Frey viewed the driver-facing camera footage" that recorded Complainant's activities during the morning of February 16, 2022. *Complainant's Post-Hearing Brief* at 19. He notes Mr. Frey's observation that Complainant "appeared to be sleeping" in the video footage. TR at 324. However, Complainant does not cite any evidence that Mr. Frey and Mr. Pogue became aware that Complainant had refused to drive *because he was experiencing fatigue that either made driving unsafe or Complainant believed it was not safe*. During their investigation into Complainant's activities in the hours immediately after the end of Complainant's February 15-16 shift, Mr. Frey and Mr. Pogue became aware that Complainant had stopped operating his vehicle and had rested or even slept during the stop, but as Complainant had not communicated any reasons for ceasing to drive his vehicle, Mr. Frey and Mr. Pogue obviously could not be aware of the reasons. Granted, Mr. Frey's observation that Complainant appeared to sleep may support a reasonable inference that Mr. Frey knew or suspected that Complainant was tired, but Mr. Frey did not admit having any such awareness. In fact, Mr. Frey was asked whether he observed Complainant to be "tired," and he answered only that Complainant appeared to be "sleeping." The fact that Mr. Frey observed video footage of Complainant sleeping does not automatically qualify as an understanding that Complainant was too fatigued to continue driving and thus refused to drive for that reason.

While I credit Complainant's testimony that he, in fact, felt so fatigued that it was not safe to continue driving, or he reasonably believed it was not safe, I find that there is insufficient evidence to attribute Respondents with awareness of the reason Complainant stopped driving. In other words, because Complainant did not communicate his experience of fatigue during the February 15-16 shift or afterward until the time of his termination, Mr. Frey and Mr. Pogue were left with only their after-the-fact observations of Complainant's activities, i.e., that Complainant ceased to drive and rested or slept. The record does not reflect that Respondents knew, suspected,

or otherwise surmised *why* Complainant engaged in these activities at the time that they determined Complainant should be terminated.

Within an hour or two after Mr. Frey and Mr. Pogue reviewed video footage from Complainant's February15-16, 2022, shift, they determined that Complainant's conduct had been unsafe to himself and the public and thus terminating Complainant was the only option. TR at 291, 339, 415-16. As such, they had made the determination around 12:45 to 1:00 p.m. on February 16, 2022, which was within about 2 hours of receiving the video footage around 10:45 a.m. TR at 283-84, 322-23, 337, 396-97, 400-03; JX-20. The evidence does not reflect that, by the time the decision was made to terminate Complainant and forward the recommendation to Mr. Tesch for his approval, Respondents had any awareness that Complainant had refused to operate his vehicle because of an actual safety violation or due to reasonable apprehension of serious injury. The decision had been made to terminate Complainant before he told Mr. Frey and Mr. Pogue at the meeting on February 21, 2022, that he had stopped driving because he was too tired to continue.

I thus find that Complainant did not prove by a preponderance of the evidence that Respondents were aware of his refusal to operate his vehicle because of an actual safety violation due to fatigue or because of a reasonable apprehension of serious injury to himself or others due to fatigue. Accordingly, before taking adverse action against Complainant, Respondents were not aware of Complainant's protected activity under § 31105(a)(1)(B) (refusal to drive), which . *See, e.g., Husband v. IMS Prods.*, 2022 U.S. Dist. LEXIS 212276 (S.D. Ind. 2022) (no evidence of employer's awareness of employee's refusal to drive in excess of hours-of-service limitations since employee did not report same).

Without awareness of Complainant's protected activity under § 31105(a)(1)(B), I find that Respondents did not discharge or discriminate against Complainant "because of" his protected activity, which prevents a finding of causation. *See* 49 U.S.C. § 31105(a)(1). I additionally find in the alternative that Complainant did not otherwise establish that any such protected activity was a contributing factor to his termination.

Mr. Frey and Mr. Pogue credibly testified that the video footage and timeline evidence from Complainant's driver's log during his February 15-16, 2022, shift reflected that Complainant had engaged in unsafe conduct that was significant enough to warrant his termination. Mr. Frey and Mr. Pogue identified the duration of Complainant's stop on the shoulder of the road (about 32 minutes between 3:46 a.m. and 4:19 a.m.), which was problematic because, after 10 minutes, reflective triangles should have been placed. JX-6b at 3; JX-36; TR at 70, 282. Complainant admitted knowing of this requirement, which is triggered by a stop of more than 10 minutes, admitted to having the triangles in his vehicle, and acknowledged that he failed to place the triangles, even though he planned to stop for more than 10 minutes. The requirement is regulatory and also required per RBS' policies and procedures. Thus, it did not strike the undersigned as unreasonable or arbitrary for Respondents to expect Complainant's compliance with the requirement.

Mr. Frey and Mr. Pogue also identified the location of Complainant's stop as problematic, because it violated the regulatory requirement that the vehicle rest at least 5 feet away from the traveled portion of the road. Mr. Pogue credibly testified from his personal knowledge regarding

the width of the shoulder where Complainant stopped his vehicle, and the width of the vehicle, and Complainant's inability to maintain a safe distance from the road. TR at 406-08, 439-40. Complainant was aware of the requirement. *Id*. at 130-31. Complainant did not exit his vehicle at the location of the stop, did not take any measurements, and otherwise did not refute the measurements or distances described by Mr. Pogue. *Id*. at 70, 184.

It is also not disputed that Complainant did not report to dispatch or any co-workers or managers that he felt symptoms of fatigue or that he had stopped driving because of fatigue during his February 15-16 shift. Complainant was aware from multiple sources of the ability to contact dispatch for assistance. Complainant had contacted dispatch in the past for various reasons affecting his ability to report to work or complete his shift. JX-37. He had never experienced a negative response to any such reports. Respondents established that when a driver reports fatigue affecting his or her ability to complete a shift, the usual practice of RBS is to send a driver to take over the operation of the vehicle and allow the fatigued driver to return to the yard, without negative consequences to the fatigued driver. TR at 257, 317. Complainant had used this assistance in the past to avoid working for more than the maximum 15 hours in a shift. *Id*. at 51-52. Other witnesses credibly verified RBS' practice of sending fresh drivers to substitute for fatigued drivers without retribution. TR at 348-50, 381. When Complainant told Mr. Fofana during the February 16-17 shift that he felt too fatigued to drive, Mr. Fofana took over driving and did not give Complainant any trouble because he had reported feeling tired. *Id*. at 73-74, 355-57, 418-19.

Mr. Frey credibly testified that he would not have recommended termination if Complainant had placed reflective warning devices during his unscheduled stop or had stayed at Buc-ee's for an additional 30 minutes to rest, and thus it was not Complainant's fatigue or rest break that led to the termination, but rather it was Complainant's unsafe conduct. TR at 305.

The record reflects that RBS' policies regarding the placement of reflecting triangles, the safe placement of a vehicle stopped on the shoulder of the road when reaching a safe haven is not possible, and substitution of fatigued drivers is plausibly based on its concerns over the serious consequences that may result from accidents involving the transport of hazardous materials, i.e., fuel and fuel vapors. *Id*. at 39-40, 71, 181-82, 261, 327-28, 348; JX-4. The evidence reflects that Respondents' expectation of compliance with safety procedures is consistent; they have a robust training program; they disseminate relevant safety information to their employees; and they do not merely give "lip service" to promoting safe driving but also provide support and assistance to drivers who report feeling too impaired to drive because of fatigue. The record does not contain evidence that Respondents harbor animus toward drivers who report feeling fatigued, who take breaks due to fatigue, or who feel unable to continue driving because of fatigue. I do not find support in the record for Complainant's assertion that "Respondents were motivated to fire a driver who they perceived to be overly concerned with the condition of the equipment." *Complainant's Post-Hearing Brief* at 21. To the contrary, the record shows legitimate management concern over preventing unsafe driving practices and that drivers are encouraged to report concerns and seek assistance.

For all of these reasons, any inference of causation due to the timeline of events, meaning the proximity of Complainant's protective activity to the adverse employment action, is overcome by evidence of Respondents' reasonable concern that Complainant's conduct during the February

15-16 shift was unsafe and contrary to Respondents' policies and safety regulations and law. I am mindful that contributing-factor causation is not a demanding standard, that protected activity need only play some role and need not be a significant factor leading to the adverse employment action. Even so, the documentary evidence and testimony of record does not reflect that any of Complainant's protected activity, whether reporting fatigue or illness or refusing to drive, played a role in his termination. Rather, Respondents repeatedly voiced reasonable concern over the unsafe practices by Complainant during the February 15-16 shift, primarily his failure to place reflective triangles and the unsafe location of his stop, particularly given the hazardous nature of his cargo.

In fact, Mr. Frey and Mr. Pogue credibly voiced their preference that Complainant had notified dispatch of his fatigue during the shift in question so that assistance could have been provided. Their position does not reflect hostility toward protected activity but instead reflects that Respondents are receptive and responsive to drivers' complaints of fatigue relevant to their ability to operate their vehicles. The undersigned did not discern any indications of pretext, inconsistent application of RBS' policies, shifting explanations for Respondents' actions, antagonism or hostility toward protected activity, or falseness in Respondents' explanation for terminating Complainant.

All parties describe an overall good relationship between Respondents and Complainant until the events of February 15-16, 2022. While there was a change in the employment relationship after Complainant's protected activity, Complainant did not show by a preponderance of the evidence that his protected activity played a role in that change. Instead, the credible evidence reflects that Complainant's unsafe conduct directly led to his termination.

I find in the alternative that, even if Complainant established that his protected activity was a contributing factor to his termination, Respondents established by clear and convincing evidence that they would have terminated Complainant absent protected activity.

Respondents' Burden

If Complainant meets his burden, the burden shifts to the Respondents to demonstrate by "clear and convincing evidence" that they would have taken the adverse employment action even absent the protected behavior. *See* 49 U.S.C. § 42121(b)(2)(B)(iv); 75 Fed. Reg. 53544, 53550 (Aug. 31, 2010). *See also Warren v. Custom Organics*, ARB No. 10-092, slip op. at 12 (ARB Feb. 29, 2012). Clear and convincing evidence is an intermediate burden of proof, falling in between preponderance of evidence and proof beyond reasonable doubt. The clear and convincing evidentiary standard requires "evidence indicating that the thing to be proved is highly probably or reasonably certain." *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (citation omitted).

Respondents met their burden of proving by clear and convincing evidence that Complainant's unsafe conduct, not his protected activity, was the reason for his termination. I adopt herein the above findings regarding the absence of causation.

Complainant asserts that Respondents fired Complainant "because his decision to discontinue operating the tractor-trailer and take a 30-minute rest break was unsafe and violated company policy." *Complainant's Post-Hearing Brief* at 21-22. However, Respondents did not focus on the stop or rest itself as unsafe or contrary to policy. Respondents' witnesses and documents describe the company's receptiveness to drivers' complaints of fatigue and the necessity of rest or even substitution of fatigued drivers when needed. The record reflects that Complainant's failure to make a safe stop for his rest break was the issue and was contrary to safety regulations and policies. Complainant did not dispute that his stop required the placement of triangles that he did not place. He did not dispute Mr. Pogue's testimony that the location of Complainant's stop was not safe because of its proximity to the traveled portion of the road.

Respondents presented consistent evidence that the basis for the termination lacked discriminatory or retaliatory intent, and the record is devoid of indications of pretext, animosity, or falseness regarding the basis for the adverse employment action. The consistency was apparent when comparing the testimony of the witnesses and also comparing their statements to documentary evidence like Respondents' policies and procedures, training, formal and informal internal communications, and the requirements of safety regulations and laws. Respondents' explanations did not shift. Although Complainant had a good record of employment with RBS until the investigation of the events of February 15-16, 2022, which led to his termination, Respondents reasonably explained the seriousness of Complainant's omissions during the February 15-16 shift. I find it entirely credible that, if Complainant had not engaged in protected activity but nonetheless failed to place reflective triangles and failed to stop his vehicle at a safe haven and safe distance from the road, Respondents would have terminated him.

Therefore, I conclude that Respondents met their burden of proving by clear and convincing evidence that they would have taken the complained-of adverse action in the absence of protected activity.

## V. CONCLUSION AND ORDER

Complainant's complaint is denied because he did not establish by a preponderance of the evidence that his termination was in retaliation for engaging in protected activity under the Act. In the alternative, Respondents established by clear and convincing evidence that they would have terminated Complainant even absent his protected activity. In light of the above findings of fact and conclusions of law, the additional issues presented for resolution are not necessary to reach, and the complaint is **DENIED**.

**SO ORDERED.**

**ANGELA F. DONALDSON**
**ADMINISTRATIVE LAW JUDGE**

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

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

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

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

**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. § 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.