UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Pittsburgh, PA

Issue Date: 28 August 2023

OALJ CASE NO. 2022-STA-00014

OSHA NO. 8-0740-21-140

In the Matter of:

DARIN LOCCARINI,
Complainant

v.

MARKET EXPRESS, LLC, JIM DINGMAN, DAN KISNER, NICK CAMPOS, GEORGE SKELLS and APRIL VIGIL
Respondents

Appearances:

For the Complainant:
Paul Taylor, Esq.
Truckers Justice Center
Edina, MN

For the Respondent:
Raymond Perez, Esq.
Jackson Lewis
Atlanta, GA

Before;
Honorable Patricia J. Daum
Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105, and the regulations published at 20 C.F.R. Part 1978. The STAA prohibits an employer from retaliating against an employee for engaging in

a protected activity. Complainant alleges that Respondents terminated him in violation of the STAA.

I. BACKGROUND & PROCEDURAL HISTORY

On August 4, 2021, Mr. Darin Loccarini (Loccarini or Complainant) filed a complaint alleging that Market Express, LLC et al, terminated him on July 6, 2021 in violation of the whistleblower protection provisions of the STAA. When OSHA failed to complete its investigation after 60 days, at the request of the Complainant, OSHA issued a determination dismissing the complaint on the basis that the investigation to date failed to establish reasonable cause to believe that Respondent's termination of him violated the STAA. Complainant timely objected to these findings and requested a hearing before an Administrative Law Judge. This matter was thereafter assigned to me for adjudication and decision.

With the agreement of the parties, the hearing in this matter was held virtually by videoconference over five days from August 22, 2022 to August 24, 2022 and September 1, 2022 to September 2, 2022.[1] Complainant and Respondent were represented by counsel and able to present testimony, exhibits and cross-examine witnesses. Over the course of the hearing, I admitted into the record ALJX 1-3 (TR 9), CX 1-10, CX 13-14, RX 1-11, RX 14 and JX 1-8 (TR 1186-1189).[2]

A. DESCRIPTION OF EMPLOYER

Market Express, LLC (Employer or Respondent) is a motor carrier engaged in the interstate transportation of goods with its corporate headquarters located in Portland, Oregon and other facilities located in Millersburg, Oregon; Puyllup and Pacific, Washington: Commerce City, (also referred to as the Denver facility), (Stipulation #1, TR 214). Respondent was founded in July 2016. Peter Stott is the recognized owner of the company and is assisted by Nick Campos, Senior Executive during July 2021 and Chief Operating Officer as of the date of his testimony (TR 212), Jim Dingman, Vice President of Operations TR 341); Denise Rugh Director of Safety and Compliance (TR 220), Dan Kiser, Manager – Portland (TR 67) and George Skells, Maintenance Manager -Denver, Colorado (TR 157). The Denver facility was acquired in 2017 (TR 236).

During the relevant time period, Respondent employed approximately 40 to 50 drivers at its Denver facility with 10 to 15 of those dedicated to local driving, like Complainant, and the remaining drivers assigned to over-the-road routes (TR 236). Although the over-the-road drivers were dispatched from the Portland, Oregon facility, the 10-15 local drivers were dispatched from the Denver facility (TR 236-7). During Loccarini's employment period (8/2019 to 7/2021), the Denver facility employed two different dispatchers. Sara Martinez was the dispatcher until about

[1] The five volumes of the hearing transcript are sequentially paginated, and references thereto appear as TR/page. Administrative Law Judge exhibits are identified herein as ALJX number, Complainant's exhibits as CX number/page, Respondent's exhibits as RX number/page and joint exhibits as JX number/page.

[2] Throughout the course of the hearing these exhibits were admitted and at the conclusion, all parties reviewed the summary of all exhibits admitted and rejected. I have cited to the transcript covering the summary for purposes of this decision, noting that the documents were formally admitted at various times throughout the record. I rejected CX 11 -12 RX 12, and RX 13 was marked but not offered (TR 1187-1188).

April 2021 when she left Respondent's employment. Martinez was replaced by April Vigil, who had been working for Respondent primarily as a customer service representative but occasionally assisting Martinez with dispatching. (TR 11)

Respondent's principal customers serviced from the Denver facility consist of Niagara Water and Pepsi whose products are transported from their respective warehouses or bottling locations to local retailers, including SA.M.'s Club and Costco. (TR 94) Niagara is located approximately 12 miles from Respondent's terminal which Vigil estimated was a 20-minute drive. (TR 855, TR 30) Denise Rugh testified Niagara's secondary warehouse is located about four miles from Niagara's bottling plant and twenty miles from Respondent's terminal. (TR 358, TR 364) Vigil estimated that it would also take about 20 minutes for a driver to travel from Pepsi to Niagara. (TR 140-141) Complainant Darin Loccarini testified that Chep, where Respondent obtained packing crates, was about three or four miles distant from Niagara; Niagara was about 12 miles distant from Respondent's terminal and 47miles distant from Longmont and Pepsi was about 12 miles distant from Niagara. (TR 604, TR 855, TR 643, TR 832) Respondent also apparently stages a hostler at the Niagara facility where an assigned driver spends the entire shift jockeying trailers on the premises from door – to – door or lot. The hostler is not rated for street use, and drivers assigned to this work record their work on a "hostling report". (TR 380-381) Respondent tracks local drivers and over-the-road drivers' location, driving time and non-driving time by means of an on-board system, known as the ELD, electronic log device or ECM, electronic control monitor. (TR 229 -230, TR 262)

B. COMPLAINANT'S BACKGROUND

Complainant, Mr. Darin Loccarini, was employed by Respondent from August 13, 2019 to July 6, 2021 as a driver operating a tractor-trailer and thus, protected under the STAA. (Stipulation #1). Loccarini worked exclusively from Respondent's Denver, Colorado facility as a local driver except for a possible rare time when he drove an over-the-road route delivering product to Pennington Seed, in Nebraska. (CX 13) Loccarini testified that he has held a commercial driver's license since 2006 after having received it through his employment with Schneider National, a large size domestic trucking company. (TR 522) Since then, he worked on and off as truck driver and estimated that he had about 10 years of cumulative truck driving experience. (TR 524) He testified that he has never been cited for an out-of-service violation and has attended specific safety training related to commercial driving. (TR 528, TR 532) Loccarini had met and remained friendly with Mike Savage, Respondent's former Safety Manager at the Commerce City location. At some point, Savage suggested that Loccarini come to work for the Respondent noting that he could bring his dog too. (TR 534) He testified that when he started working, he was paid $22 an hour, worked five days a week starting usually at 4 or 5 A.M. and worked on average 11 to 14 hours a day. He was almost always scheduled to work weekends. (TR 541-542) At the relevant time herein, Loccarini typically worked a four-day work week consisting of Wednesday, Thursday, Saturday and Sunday (TR 582) and drove a sleeper tractor even though he was not assigned to routes that required overnight stays. (TR 486)[3]

[3] There is some evidence that Mr. Loccarini's work schedule and assignment to a sleeper-truck was to address his complaints regarding back pain (TR 286). He was also permitted to take his dog with him in the truck but the reasons his dog accompanied him, if any, are unknown (TR 286).

As noted above Loccarini was hired in August 2019 at a time when the dispatcher was Sara Martinez, whom he considered his supervisor. (TR 542) Although Loccarini described a relationship where the two "butted heads a little bit," he attributed the discord to difficulties with Respondent's Niagara account, one of its largest customers. He also testified that after a few months, the two developed a good working relationship. (TR 542) According to Loccarini, at some point in a conversation with Nick Campos, in either late winter or early spring 2021, Campos mentioned that Martinez reported he was a great worker and that she liked working with him (TR 542).

Sometime late in 2020 or early 2021, when Martinez was the dispatcher, she and Loccarini had an exchange of text messages regarding his work. When Martinez asked for his trip sheet from Saturday, Loccarini explained that he called off that Saturday to someone in the Portland office. Loccarini texted Martinez, asked for his schedule and she responded that she did not have him on the schedule because he reported that he was tired and had called off twice in two weeks. Loccarini responded that he had not called off twice in two weeks and that he was filing an FMCSA retaliation complaint and sending all his texts to his attorney. (CX 2/60, TR 544-547) Martinez reiterated her claim that he had called off twice which he disputed via text message, "No Havana, not abusing myself in this garbage truck until I am practically incapacitated[4]". (CX 2/64-65, TR 550) He explained that the truck he was driving, a Freightliner, was not comfortable and caused him back pain and fatigue. (TR 552) Martinez indicated that calling off each weekend put the company in a bind and thus, she was giving him time off as he requested. She further explained that work was busy Thursday to Monday and warning him not to call off when the other drivers had no hours left on their seven days (to presumably cover the deliveries Loccarini was expected to make). (CX 2/65, TR 552)

Martinez was replaced in April of 2021 by April Vigil. Before becoming the dispatcher, Vigil worked in customer service and would at times back-up or assist Martinez. (TR 92-93) Although Vigil had only been working for Respondent for 18 months as of Loccarini's discharge, she had 17 years of experience working for another trucking company where she divided her duties between customer service (80%) and dispatch (20%). (TR 11) Vigil explained that when she took over as the dispatcher from Martinez, there was in place a pattern for the driver's schedules and routes that she generally followed. (TR 102) Thus, when she assumed the dispatcher role, she tried to observe those schedules; although the schedules were set daily, the patterns remained the same. She factored into the schedule anticipated drive time, traffic expectations, loading and unloading times, possible delays and the driver's hours of service limitations. (TR 103-4) Because unloading time varies, she explained that she tried to base it from range of 30 minutes to two hours. (TR 105) Vigil also factored in pre-trip inspection times of about 15 to 30 minutes, noting that each time a new trailer is picked-up, the driver was required to perform an inspection. (TR 105-6)

As explained by Respondent's Safety Director, Denise Rugh, the service hours rules for a local driver provide that a driver can drive 11 hours in a 14-hour period and can once a week drive after the 14th hour up to the 16th hour. (TR 453-454) Rugh explained that the ELD system in the trucks provides a warning to drivers if they are approaching being out of service or out of hours by changing from a green status to orange and if out of hours to red. (TR 454) She clarified that

[4] Havana refers to a delivery location.

typically when a driver raises a concern about his service hours, the system has alerted the driver and she has to either find a place for them to stop or get somebody dispatched to pick them up. She noted that there have been situations where the day driver was out of driving time and they have had to get them a hotel. If they were close enough to the yard, another driver was dispatched to pick them up and bring the load back with the original driver sitting as a passenger. (TR 456-457)

As the dispatcher, Vigil was familiar with Loccarini but until the day of events leading to his discharge, had limited interactions with him. Notably, on about May 13, 2021, shortly after she became the dispatcher, he complained to her that she scheduled him again on his regular day off. (TR 21-22)[5] As shown in text message exchanges, Vigil requested confirmation of his scheduled days and explained that she was overwhelmed with work. (CX 2/1-4) For his part, Loccarini offered a suggestion that she create a "word" document for each day of the week which included the drivers' availability for each day that could be altered as needed. (CX 2/5) In the context of the same text message exchanges, in a message sent at 5:55 A.M. the following morning, Loccarini explained that he was unable to work because he had not slept, was extremely tired, nauseous and could not eat because the day before he was "thrown under the bus and being told that I was wrong for doing the company a favor" by delivering an extra early load the week before "and then viscously verbally assaulted by a deranged customer" for doing his job "safely as always but not with a magic wand as she apparently expected." He continued explaining that he tried to keep the peace by not filing a complaint with Costco corporate against the customer . The message further stated that he had a photograph of her name on the BOL (bill of lading) with a time stamp that day to prove his intent to file a charge due her outrageous behavior but let it go because of the business account. Loccarini further referenced that the customer filed a complaint against him alleging that the complaint contained lies and exaggerations because he "refused to work UNSAFELY mx (Market Express) threatens" his job. He complained that this was "horrific injustice" and why he could not sleep or eat. He expressed regret that this occurred when Vigil was "running the show" because they got along great and that he "loved" working with Vigil. He also noted that he had already spoken with his attorney that handled his CFI lawsuit about the current situation advising that this was going to be addressed and remedied "one way or another."[6] (emphasis in original) (CX 2/6-12) Most significantly in this lengthy text message, he wrote:

> Like every other driver here I've turned a blind eye to all the regularly occurring FMCSA violations at mx considering them "normal" and "just the way things are" to get along and to keep my job only to be treated like expendable piece of crap by Nick who apparently considered termination before even hearing what really happened with that customer and these issues have got to be addressed because drivers shouldn't have to take on these potential violations and civil liabilities running illegally just to keep their job. […] I will not allow any company to ILLEGALLY RETALIATE against me for REFUSING TO WORK UNSAFFELY without defending myself and my legal rights as defined by

[5] The record contains documentary evidence of a complaint by a COSTCO employee regarding Loccarini. However, that incident occurred in October 2020 (RX 2). Thus, these text messages are not related to the incident referenced in the email complaint from that Costco employee.

[6] There is no evidence in this case regarding any action brought by Loccarini against CFI, which is likely a reference to Contract Freighters Inc., a trucking company with its principal headquarters in Joplin, Missouri.

FMSCA regulations and the Surface Transportation Assistance Act put in place to protect drivers from retaliation for putting SAFETY first (emphasis in original) (CX 2/14-15).

He closed this text message by assuring Vigil that after a full day of rest, food and sleep, he should be able to work Sunday and offered to help her sort out any scheduling difficulties she had; that he was open to discussing his flexibility to help her out with the scheduling. (CX 2/16-17) In response, Vigil wrote: " MSG received, thank you Darin". (CX 2/17) Loccarini responded again reiterating the reasons he was unable to work, noting that he had worked 14 hours Wednesday and was on track for a great paycheck but due to the day before and that day, the "deranged" Costco employee had cost him $400 or more, and apologized for rambling. (CX 2/21-22). The next message exchange between the two seems to show that Vigil revised the Sunday schedule to give him an additional or substitute delivery presumably to help alleviate the alleged loss of time worked. (CX 2/22-23)

When asked about the above email exchange, Vigil believed that it occurred in April shortly after she assumed the dispatcher position from Martinez. (TR 22) When questioned concerning the messages reference to illegal retaliation, Vigil did not recall receiving that message. (TR 25-26) She was not asked whether she shared this message exchange with any manager or supervisor or whether she verbally informed a manager or supervisor that Loccarini alleged non-specific safety violations and/or threats to file complaints with FMSCA. (TR 22-26) Vigil explained that the messages were sent to a Market Express phone that was used by her and other supervisors. (TR 91) For his part, Complainant was asked about the portions of the exchange showing his efforts to help Vigil with the scheduling and the alleged difficulties of dealing with the Employer's customer Niagara but was not asked about his comments regarding the problem he had with the Costco employee, safety complaints or threats to file FMSCA complaints associated with this text messaging string. (TR 581-588)

On May 1, 2021, Loccarini sent an email to a representative of the Colorado State Police asking for information about the weight limits for a Class 8, Five Axle truck on non-interstate roads. (CX 1/1) In so doing, he asserted that there was a motor carrier and "ship or" (sic) potentially committing long-term illegal activity within Adams County. He characterized the offending parties as "a rogue trucking company and shipper taking advantage of them (drivers)" and asserted that his fellow drivers were not as educated as him and therefore without the capacity to take action and also concerned about their jobs. (CX 1/1) On May 4, 2021, a representative of the Colorado Department of Public Safety provided a response detailing the weight limits and permits allowing for oversized or overweight loads on non-interstate roads. On May 20, 2021, by email, Loccarini sought a clarification and now alleged that his company has been hauling loads well in excess of 80,000 (pounds) but under 85,000 (pounds) on the interstate and hauling loads in excess of 80,000 (pounds) but under 85,000 (pounds) on non-interstate roads when using a day cab but in excess of 85,000 pounds when using a sleeper cab. (CX 1/5) On that same day, the representative provided a clarification.

There is no evidence that Loccarini filed a formal complaint with any state or federal agency regarding the alleged overweight loads.[7]

In a second incident possibly on July 1, 2021[8], Loccarini and Vigil again exchanged emails regarding the schedule. He wrote in pertinent part:

> That schedule isn't going to work and I'm telling you right now I'm not taking that load to Colorado Springs; I am in the process of contacting the Teamsters because this company is out of control it's not your fault but it's Portland problem (sic) and I'm gonna make them deal with it I'm not putting up with this crazy shit anymore this company needs to be sued because that's the only thing trucking companies understand.
>
> I've been here almost 2 years now and this place is so out of control I filed two FMCSA complaints already against this company… (RX 4/6).[9]

At 8:40 P.M., Vigil responded that she was sorry he felt that way and asked what was wrong with the schedule; that they had been delivering to the same places from when she first started and asked if he needed a set schedule to be transfer driver as well as suggested that a night schedule might work better for him.

The following morning Loccarini replied with an apology, noting that he had snapped the day before. He reported that he drafted numerous emails addressed to Respondent's "safety and Peter" but deleted them without sending. He explained that he chose not to send the communications because they were so long, and he thought he would be perceived as crazy. He reported that he drafted an email that day that he would send and turned to describing that he was at his breaking point because "things that go on here are not normal." He continued with the statement that no company in the country is buying leafspring trailers because the roads are horrendous and there was no way his back was going to take another trip with one of those; that he had already used his "16 illegally several times" but noted that Vigil was not the problem. (RX 4/8)

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[7] There is evidence in that on June 30, 2021, Niagara Bottling loaded a Market Express truck with product weighing 49,745 pounds according to the bill of lading and when weighed at a certified automated truck scale registered a gross weight of 83,600 pounds (CX 4/1).

[8] Vigil testified that she believed this email exchange occurred on July 1, 2021, the same day of the events leading to his discharge (TR 14-15). However, I am not convinced that this date is correct since the text message exchanges show that she responded to Loccarini's complaint about the schedule at 8:40 P.M. that night. Vigil also testified that she stopped communications with Loccarini sometime early afternoon on July 1 and handed off all communications with him to the only manager/supervisor at that location, George Skells. Additionally, Loccarini references a trip to Colorado Springs the preceding day but his schedule for June 30, 2021 does not show that he had any deliveries to Colorado Springs on that day (CX 3/21). Colorado Springs is one of two Pepsi locations that Respondent's drivers' deliver to (TR 35)

[9] He proceeded to assert that he was sure other drivers would agree with him; that they needed to get the Teamsters to represent the drivers and unionize (RX 4/6). As to the 2 FMCSA complaints, there is no evidence that Loccarini filed any FMCSA complaints before he filed the instant matter protesting his discharge.

C. JULY 1, 2021 EVENTS LEADING TO DISCHARGE

Loccarini was scheduled for four loads on July 1, 2021. The first load appointment time was between 1:00 A.M. and 10:00 A.M. requiring Loccarini to pickup a loaded trailer at Respondent's yard and deliver it to Pepsi in Greeley, Colorado. The second load required him to take a trailer from Respondent's yard to CHEP in Aurora with an appointment time of 11:00 A.M..[10] The third load had a delivery window from 4:00 A.M. to 2:00 P.M. taking a load from Niagara to Kings Tower Road.[11] His last load for the day was to take a product from Niagara to the SAM's Club in Longmont with a deliver time of 4:00 P.M.[12] (CX 3/22) The delivery schedule bears a notation directing Loccarini to check-in for additional help between his third and fourth loads since there was a gap in appointments. (CX 3/22) The third load appearing on the schedule had already been shipped and thus, Loccarini was no longer responsible for making that delivery from Niagara to Kings Tower Road. (CX 3/22, TR 843)

His driver log for July 1, 2021 shows that he started on duty at 4:59:25 A.M. (JX 1/4, TR 588) He conducted a pre-trip inspection from 5:09:07 to 5:56:24 A.M. at which time he started driving from the terminal at Commerce City and drove without any significant stoppages for about an hour and 10 minutes (1:10.57). (JX 1/4) Loccarini explained that his first load that day was to pick-up a Pepsi Bottling load that was already in the yard and deliver it to the beverage distribution center in Greeley, Colorado which shows as Millikin on the driver logs. (TR 589, JX 1/4) Loccarini conceded that loads were frequently left in the yard to be picked-up and delivered by another driver to the end destination. (TR 589) According to his driver log, he left the beverage distribution warehouse in Millikin at about 7:56 A.M. driving for about an hour before reaching his next destination in Aurora (the Niagara site) at about 9:07 A.M. (JX 1/4) He resumed driving reaching 3 miles east of Aurora (Pepsi) at 9:46 A.M., leaving there around 10:00 A.M. until reaching the Commerce City terminal at about 10:30 A.M. According to the ELD driving log, he left Commerce City about 10:36 A.M. and arrived back at Pepsi (3 miles east of Aurora) approximately 21 minutes later at about 11:00 A.M. The log shows that he spent a total time of about an hour and a half at that location before leaving at about 12:30 P.M., driving a little more than an hour (12:28 to 13:48) and a point reaching 7 miles east of Aurora (Niagara) at 1:48 P.M. He remained at that location for nearly three hours with his log showing a total of about 2 hours and forty minutes attributed to on-duty (not driving time).[13] He left that location at 16:39 (4:39

[10] Chep refers to a location where the drivers pick-up empty pallets which are used in loading to secure products.

[11] Loccarini testified that when he checked-in at Niagara to take the load scheduled for delivery to Kings Tower Road, he learned that this delivery had already been taken by someone else (TR 684). It is not clear from the record when he learned that he no longer had to make this delivery.

[12] Loccarini testified that the CHEP location would likely show on the ELD generated driver log as a few miles east of Aurora, Colorado and the Niagara location would show as about seven miles east of Aurora, Colorado. Thus, the two locations are three or four miles apart from each other. (TR 603-604)

[13] Rugh explained that the ELD system used is typically programmed to automatically switch to an on-duty status from driving if the truck is idle for five minutes. Drivers can override the system and record on-duty more quickly but only if the vehicle is stopped when they make the switch from driving to on-duty (TR 425). Accordingly, where the ELD shows intermittent driving and off-duty, this can be indicative of a driver moving up in a line waiting to be loaded or repositioning trailers (TR 423-424).

P.M.) arriving at the yard (1 mi SSE Commerce City, CO) about 50 minutes later at 17:30 (5:30 P.M.). It was not until 17:41 that he began his post trip inspection, and he went "off duty" at 18:09 (6:09 P.M.). His ELD driver log recorded that he drove a total of 6 hours 39 minutes and 16 seconds and was on duty but not driving for 6 hours, 30 minutes and 17 seconds. (JX 1/4)

Loccarini explained that based on his understanding of the Hours-of-Service Rule, on July 1, he had to stop all driving by 18:59 P.M. or 6:59 P.M. (TR 589)

According to the text message exchanges with Vigil that day, Loccarini reported that he dropped an empty trailer at Niagara at 10:00 A.M. At 10:09 A.M., Vigil asked if he was doing CHEP now, requested that he keep her informed of any delay and to touch base with her before he delivered his last load (to possibly receive another assignment). (CX 2/26-27) Loccarini confirmed that he was working on the CHEP load at 10:19 A.M. He testified that as early as his CHEP delivery, he was becoming concerned that about the "efficiency and compliance" (to be able to complete his last scheduled delivery at Longmont). (TR 591) It was not until 12:06 P.M. that Loccarini texted Vigil asking what load she had for him before his last delivery of the day. She responded that she just needed him to drop an empty trailer at Pepsi. At 12:19 P.M., he responded that this was good, noting that it was about all the time he had time and inserted an emoji with a monocled eye, furrowed brow and frown. seemingly conveying some level of frustration. Ten minutes later he texted again asking whether Pepsi would accept an empty trailer, noting that the yard was full, and their policy was not to take an empty trailer unless a loaded trailer left the premises. Vigil immediately responded that Pepsi had asked for the empty trailer and noted that they, meaning Market Express, had picked-up several loads. At 12:59 P.M. when Loccarini asked her to confirm whether his Longmont delivery was ready at Niagara, Vigil agreed to check. (CX 4/30-31) Loccarini testified that he believed at this time he was at Pepsi and had six hours "to the minute" to finish his driving. (TR 594, TR 595) She also asked Loccarini if he would stop at the office to get transfer sheets and daily sheets to deliver to Niagara for use by the night drivers and reported that his load was not ready at Niagara. Loccarini explained that the Commerce City office was reasonably on the route between Pepsi and Niagara which would allow him to stop along the way to Niagara to pick-up the blank daily sheets. (TR 594) Vigil offered that he could go to Niagara, check in his empty trailer to be loaded, grab a loaded trailer from the Niagara yard and bring it back to the Commerce City terminal yard. Loccarini explained that he understood Vigil was asking him to go to Niagara and check-in his trailer to be loaded for the Longmont delivery, leave the trailer there and take another loaded trailer at Niagara back to the Commerce City yard where it would be staged for another driver to take to its final delivery destination. This would relieve that driver from having to go to Niagara to pickup the load. (TR 600) He understood Vigil was trying to keep him productive and efficient. (TR 596) She wrote: "[S]ince we have time to kill" as the explanation for the additional duties she was asking him to perform. (CX 2/32-33) Five minutes later, Loccarini responded as follows:

STOP IT THERES NO TIME TO KILL!!!!! (emphasis in original) (CX 2/33).

Loccarini explained at hearing that as of this time, 1:05 P.M., he had less than a three hour window to travel to Niagara which he estimated would take a half hour from the Pepsi location, get live-loaded, which he believed could easily take between an hour and a half to three hours and

that this timing would push the threshold of being able to make the appointment in Longmont. (TR 601) It was this thought process that led him to conclude that there was in fact no time to kill.

> Vigil texted a minute later at 1:11P.M., "[Y]our spot is at 4 Lol gotta keep u busy. (CX 2/34)

Loccarini immediately responded asserting that the roads were complete gridlock; holiday traffic started the day before and that even without holiday traffic he had already used his 16-hour exemption the day before. He wrote:

> …I am freaking pissed off I'm about to email Peter (Stott) again and this time; I'm really going to go off they just rejected my trailer of Pepsi like I told you they would so I'm leaving right now. (CX 2/35-36)

Vigil asked him not to leave noting that she informed Pepsi that he was coming. Loccarini again complained that he just drove from across town in gridlock traffic for "absolutely nothing!" (emphasis in original). (CX 2/37) When Vigil asked who told him no noting that she wanted to call Pepsi, Loccarini reported that it was the guy who runs the yard and that this person told him it doesn't matter what anyone else says; that he runs the yard and nobody drops an empty without pulling a load this time of the year, especially on a Thursday, their busiest day. (CX 2/37-38)

At this point, Vigil advised Loccarini that she was aware of the traffic situation since she also lives there and that all the drivers were in the same situation. She asked again that he wait, reported that Pepsi did not have any loads ready to take. (CX 2/38-39)

Loccarini responded:

> I knew before I came over here; I should have said no but I'm always a nice guy and I screw myself and for two years I've been putting up with this and now I'm ready to snap. (punctuation added). (CX 2/39-40)

It is at this point that the messaging between the two becomes more intense with Vigil responding that he could not tell her no; this is his job; that she could not have him sitting for 5 hours. (CX 2/40-41) Loccarini retorted in his next text that he knew his job and "[W]hat are you talking about setting (sic) for five hours ?!?!?". (CX 2/41) Vigil responded that she was not playing games with him and warned that she would get Portland involved. (CX 2/42)

In his next response, three minutes after Vigil's warning to get Portland involved, Loccarini texted:

> You do that April because I'll get the FMCSA involved. A minute later, he continued, "[Y]ou just burned a bridge you're going to regret". (CX 2/42)

Vigil responded that Pepsi had a trailer for him to pick-up, asked him to pick it up and take it to the yard and advised that she would talk to George (Skells) to get with him; that she would

not be treated like this; that other drivers don't get to be like this, so she was taking the issue above their heads. (CX 2/42-43)

Three minutes later at 1:23P.M., Loccarini texted:

> Congratulations you just got your first FMCSA complaint and I've already emailed Peter and Nick you are going to lose because I have all the evidence you screwed up now admit it well I'm going to take you down(.) (CX 2/44-45)

In her last message to Loccarini at 1:25 P.M., Vigil wrote:

> I called them and they said they have a load for you to pull back to the yard your appointments not till 4 o'clock we have time still, and I will have George give you a call I'm gone for the rest of the day. (CX 2/44-45)

As to the email referenced by Loccarini, at 1:21 P.M. that day, he sent an email to Respondent's general email address used for safety related issues, Respondent's President Peter Stott, and Nick Campos. In pertinent part, he wrote:

> You better teach April how to do her job because she is currently violating the law and trying to get me to run illegally and I have proof and now she's threatening me and I am dealing this retaliation for the previous whistleblowing activity and the current whistleblowing activity that I am involved in right now against this company. This is right now! I have an email drafted telling you how are you (sic) (I) have already been in contact with the Colorado Department of Transportation because of the things this company is doing but I was going to edit one more time before I send it off so you can prepare yourself for that and you will tell April right now that she will stop her attack and stop trying to tell me it's my job to run illegally!!!!!! (JX 2/4)

Vigil testified that she knew based on his early start time of 4:59 A.M., Loccarini's workday must end no more than 11 hours later. (TR 30) Thus, based on her assessment, Loccarini had to complete his driving by 7 P.M. (TR 39) She acknowledged that she understood he was suggesting that he was likely going to exceed his legal driving hours if his last load to Longmont was pushed back. (TR 46) Nonetheless, based on her estimate of his schedule that day, if he were not given intervening deliveries, he would be idle for four hours. (TR 63-64) She viewed his text that he was getting ready to snap indicating that he was getting very angry but not to the point where she believed the police should be called. (TR 57-59) She explained that she was upset by comments that she had burned a bridge that she would regret, and it was at this point that she informed her manager Dan Kiser in Portland about the perceived threats and forwarded the text messages to him. (TR 70)

Vigil testified that she believed she talked with Kiser once or twice on July 1 and then again on July 2 after she received more messages from Loccarini that she also perceived as threatening. (TR 81-84) She received the final text message from Loccarini on July 6, in which he wrote that Respondent better provide her a good attorney that she was going to need one. (RX 10/1)

Specifically, Vigil perceived Loccarini's statements that Respondent better get her a good attorney and that he was going to take her down as particularly threatening. (TR 85-86, RX 4/4) Indeed, up to the point where he threatened to take her down, she considered his remarks to be "blowing off steam." (TR 81-182)

She elaborated that she became scared when Loccarini referenced taking her down in light of her experience at a former employer's trucking company where a driver held the driver leader hostage in his office and that experience caused a red flag to her when he threatened to take her down. (TR 153-154) After she reported her interaction with Loccarini that day, she was directed to block Loccarini's number from the phone she was using so that she would not receive any further messages from him. She then requested that the entry codes for the office door locks be changed because some drivers had the current codes and could access the office. (TR 158)

Nick Campos (Campos) testified that he was familiar with Mr. Loccarini before the events on July 1. He described that there were instances before that day, when he intervened with Loccarini to deescalate tension and situations involving him. Campos described that he used a process of establishing some common ground, allowing Loccarini to share his version of whatever person or event was causing friction and then come back the core issue with some suggested resolution or coaching. (TR 240, 258-259) Before July 1, 2021, Campos had been advised by the former Operations Manager at Commerce City of an altercation between Loccarini and then dispatcher Martinez; that Loccarini was prone to be difficult if things did not go his way and was "hot headed. (TR 252-253) Campos testified that he talked to Martinez directly about one incident with Loccarini where she contacted him directly. Martinez described her frustration with Loccarini's communication style where he singled her out and attacked her in a way that no other drivers did. (TR 252-253) Martinez reported that she made some schedule changes that Loccarini did not appreciate, and his reaction was to swear at her which she found offensive and then stormed out of the office. Campos perceived Martinez to be noticeably upset recounting the interaction with Loccarini. He concluded the call with her by reassuring her that he would take care of the problem and then spoke with Loccarini. In his conversation with Loccarini, he talked about how to communicate with others and to deal with emotions properly.

He was also aware of two incidents involving Loccarini and customers in which Loccarini was accused of inappropriate behavior. (TR 260-271) In one instance, Costco at Westminster, Colorado sent an email to the general dispatch box that was forwarded to him in which Costco advised that they did not want Loccarini sent back to that location. (TR 260) Respondent received an email dated October 1, 2019 from Niagara Water drafted by Niagara employee Marissa Merlin whom Campos believed was in customer service. The email shows that Merlin reported their customer's complaint to another Niagara employee, Wendy Arias. In that email. Merlin reported that their customer at the Westco location called to request that the delivery driver on October 1 "never set foot in their location again". (RX 3) Merlin explained that she received a complaint about Loccarini's actions where he purportedly continued to walk in front of forklift drivers creating a safety issue and when asked to use the entry door agreed to do so but told the Costco employee he felt belittled and warned that the next person who said anything to him would get a punch in the face. (TR 261) When he was told that he could not do that (i.e., punch someone), he retorted, watch me and returned to his truck. Due to safety concerns, Costco had a policy that

required drivers to wait in the building while being offloaded and thus by returning to his truck, he then delayed the offloading. Upon receipt of the email complaint, Campos contacted Costco and asked to see the check-in sheet so that he could identify the specific driver involved. The signature on the sheet was not legible and thus, he used the ELD information to identify the driver. Loccarini was the only driver to deliver to that Costco on that day. Campos testified that he did not personally handle the issue with Loccarini; that this was handled locally at that time. (TR 264) However, Campos believed that this was the instance referenced by Vigil where Loccarini was "banned" for a time from delivering to that location. (TR266)

A year later, Campos personally handled another situation between Loccarini that transpired at a different Costco location. On that occasion, Costo receiving clerk at the Thornton, Colorado site, sent an email in which she reported that there had been issues with his driver in the past, acknowledged that Costco policies regarding COVID 19 safety protocols had been changing but as of July 24, Costco reinstituted the policy of having drivers wait inside and leave their truck keys. (RX 2/1) She described that on October 28, the driver was held up at his first stop causing him to arrive 2 hours later at Costco, Thornton. He was asked to move quickly but it took him some time to back into the loading dock door and when after another 15 minutes, he did not come inside, she went to get him so that the truck could be safely unloaded. She then asserted that this is when things got "ugly" with the driver raising his voice, becoming aggressive, grabbing his coat and mask and locking his doors. Upon grabbing his mask, he said you want me to wear this; I'm hourly; I don't care when you unload me. (RX 2, TR 264-265) Campos personally talked with the Costco receiving clerk working with her to ban Loccarini from delivering to that site for a specified period. (TR 266) Campos recalled that this was just one of multiple occasions that when confronted with an issue, Loccarini threatened to file a FMSCA complaint. Regardless, he decided that no formal disciplinary action would be issued because as acknowledged by the Costco employee, the policies were in flux creating uncertainty for the drivers. Nonetheless because the real issue was how Loccarini responded, he redacted the name of the Costco employee who sent the email and forwarded it to Loccarini so that he could see what had been reported. In that forwarded email, Campos wrote:

> [T]here is a change in process at Costco that they should have made us aware of so we could have made you aware. Give it a read and let me know how you are feeling on the matter and we can go from there. (RX 2/2)

When he spoke with Loccarini about this, Campos advised Loccarini that his conduct reflected on the company and provided some guidance on how to respond in the future. Loccarini purportedly admitted to some of the conduct alleged. As to the threat to file an FMCSA complaint, Campos testified that Martinez had reported to him that Loccarini said he was filing an FMSCA complaint. However, Campos did not raise that issue with Loccarini since it was unrelated to his conduct at Costco-Thornton. (TR 269-271)

Loccarini testified that portions of this email were not accurate; that he had no idea what issues he had in the past with Costco's changing COVID policies but acknowledged that COSTCO's policies did change. (TR 555) He asserted that as to the specific claims about his conduct on October 28th, he did not refuse to wear a mask as claimed but he agreed that he originally did not want to stay in the building while being unloaded because he was "extra tired"

from having agreed to start early that day and could have used the time in his truck during offloading to recover instead of standing on a concrete floor. (TR 557) He offered that he did not recall being asked to move quickly and denied that it took him 15 minutes to back the trailer into the loading bay/dock. (TR 559-560) He claimed that her reference to getting ugly was initiated by her and described that as he was making his way to the main door to go to the receiving desk, she met him about halfway and started screaming, yelling and gesturing to him saying "Let's go." (TR 562) He conceded that he raised his voice in response to her but that was to overcome the ambient noise and her raised voice. He agreed that it took him additional time to get his coat explaining that he left the truck, was about 15 feet away when he realized that he left his coat in the truck, and then had to go back to get it. (TR 562) He confirmed that when he grabbed his mask he asked her if she wanted him to wear it, noted that she may have asked him to move quickly but he did not hear her and agreed that he commented something about being on the clock but intended it to reflect back to other situations where the receiving party was unable to get him unloaded because their personnel were on break or otherwise unavailable. (TR 563-564) Loccarini denied that he was ever banned from delivering to that location. (TR 564)

He described that following this email within a day or two, he attended a meeting with Martinez and possibly/probably George Skells to address the situation. According to Loccarini, he advised that the complaining party left out where she was screaming, yelling and gesturing at him, and explained that he raised his voice in response. He testified that in this meeting, Martinez advised that a follow-up email was received from Laura Bowen indicating that she did not want to get Loccarini in trouble and that ultimately, he was not disciplined. (TR 565-566)

Loccarini also testified about the other customer complaint where he was alleged to have acted unsafely by using the wrong entrance and walking in front of forklift drivers at the dock door. He denied repeatedly walking in front of forklift drivers noting that this would be very unsafe. He explained that when he was told to use the walk-in door (not the roll-up door), he perceived the tone of voice to be "awful excessively nasty for what seems like a not very egregious of a policy violation" (sic). (TR 568) He offered that at that time he explained that he had just been "bitched at" the other day for using the walk-in door even though it is safer because using it requires someone to give you access after you press a buzzer and the worker (at a different location) chided him for making him grant access when he could have just walked-in through the roll-up door entry. However, he denied telling anyone that he felt belittled. As to the assertion that he warned he would punch someone, Loccarini recounted his actual statements were:

> I got bitched at for doing the right thing and bitched at for doing the wrong thing. That guy that bitched at me for doing the right thing, if he keeps it up someone might punch him in the nose. (TR 569)

He conceded that he was "somewhat banned" from this location that he had a meeting with Martinez and there was an intent to honor the customer's request, so he was not scheduled to make deliveries to that location for about three weeks. (TR 571-572) Loccarini claims that when he was scheduled to return to that location, he said to Martinez, "Hey, you know, you got me going to Costco, Havana."[14] To which she replied that she had no choice. (TR 572)

[14] This is the second conversation with Martinez where Loccarini referred to "Havana." Loccarini testified that this was a mistake that he was actually identifying the Costco facility located in Westminster and not Havana (TR 572).

On July 1, Campos first learned of an issue with Loccarini while it was occurring where he was being told that Loccarini was becoming aggressive. He attempted to call Loccarini a few times that day leaving messages for him to call back and believes that Safety Manager Rugh also tried to reach Loccarini. Neither were successful. A voice message recording submitted into evidence reveals that Campos relayed that he knew that Loccarini had sent an email from Denise and that he was trying to figure out what was going on; that he had looked at his log and averred that they had always had a pretty good relationship to work through things. He noted that this was the second one "you know where whistleblower and all this other stuff; we'd like to have a relationship where you can just talk and communicate and figure things out;" I'm not sure where this is coming from but I am interested in figuring it all out and find a path forward more so because we have always had a good working relationship and that's what I'd like to have continue. Anyway, not sure what is happening today; there is not a lot of information in either email about what exactly occurred but I am interested in knowing about it." (CX 7) Campos closed the message noting that he was calling from his cell phone that Loccarini called before and asked him to call back to "chat to figure it all out". (CX 7)

Denise Rugh, Respondent's Director of Safety and Compliance since February 2020 started working for Market Express in November 2016. Before February 2020, she was the Safety Manager primarily responsible for the Portland, Oregon terminal. When she was promoted, she became responsible for the entire company's safety performance and compliance and in this capacity dealt with the Respondent's operations in Denver, Colorado as well as the other terminals. (TR 402-403) Denver at one time also had a Safety Manger, Mike Savage, but as of her testimony that position was vacant. (TR 404) In July 2021, Rugh was generally responsible for driver logs, answering driver questions about loads or routes and being a resource for drivers and the office to answer compliance questions. (TR 405) As part of her duties, she personally audits driver logs on both a random basis and if there is a reason to believe a violation has occurred. She explained that she does not have enough time to audit all 350 driver logs every day but that the ELD system can generate a report showing whether a violation has occurred. She noted that sometimes the report may be inaccurate where the driver may have forgot to indicate he was taking a "16-hour day" or failed to indicate off duty time for a break and/or a long post-trip. (TR 405-406) She explained that the ELD system allows drivers to edit everything but driving time and that only the safety department individuals can edit drive time. (TR 406) When there are any changes made by the office, a driver is required to sign off on those changes.

Rugh described that on July 1 she was working in the Portland office and first became aware of a problem between Vigil and Loccarini when she saw an email sent at 1:21 P.M. from Loccarini to the Safety email group bearing the subject line of "illegal BS". (TR 408-409) She read the email at or near the time it was sent and understood from it that Loccarini was claiming that there was something illegal transpiring and could imply from his statement that Vigil was trying to get him to run illegally that this might be an hours-of-service situation. (TR 409-410, TR 446) Rugh testified that after receiving the email, she pulled Loccarini's driver log and about a half hour after receiving the email she called Vigil to find out what she had asked Loccarini to do, then she tried to reach Loccarini to hear his side of what occurred. (TR 410, TR 447) Based on her review of his log, she determined that Loccarini was still within his hours of service, had not exceed his 14 hours, had not exceeded his 11 hours and still had time on his 8-hour day before

requiring him to take a break. (TR 410-411) She elaborated that as of the time that the email was sent, when she pulled a live view of his ELD, she first looked to see if he had already used his 16-hour exemption and he had, she saw that Loccarini started his work day 4:59 A.M. and thus, had until 18:59 to complete his driving, and he had driven for a total of about four hours as of that time. This left Loccarini seven hours of driving time to be completed by 18:59 (6:59 P.M.). (TR 457) Rugh testified that although drivers might foresee that a delivery might cause a violation of service hours 3 or 4 hours in advance, she did not agree that drivers had a better view of the situation that would cause a violation, noting that dispatchers have a greater base of information from a number of drivers who may perform the same delivery run. (TR 411)

Rugh explained that when she was unable to speak to Loccarini, she contacted Campos because she knew that Campos had a good relationship with Loccarini. The following day, she checked Loccarini's log again and determined that he had not exceeded his hours-of-service. (TR 414)

Rugh also had some limited interaction with Loccarini before the events on July1, 2021. Specifically, in her capacity as the Safety Manager she reviewed an email from Loccarini expressing some concern about equipment which she passed along to maintenance, George Skells. (TR 431-432, TR 435) She also had a conversation with him where he was raising concerns about driving multiple days in a row being very had on his body and thus, she discussed the possibility of making changes to his schedule to accommodate his needs. Although she was unable to recall exactly when the scheduling conversation occurred, she believed it was about a year before the events on July 1, 2021. (TR 431-432) Rugh testified that at no time before July 2021 had Loccarini raised any complaints or concerns about trailer or load weights. She explained that typically weight problems on loads are handled by Operations since that group must contact the customer to advise that they have overloaded the trailer and get it adjusted so that the tailer is legal to pull. She also noted that she had never been contacted by the Colorado State Patrol or Department of Transportation with respect to a complaint having been filed. She explained that drivers are subject to random inspections and drivers are expected to turn in any inspection report they receive. If an inspection report shows no violations, the driver is acknowledged and if there is a violation, she makes sure that appropriate training and coaching occurs depending on the nature of the violation. (TR 437) She testified that as part of her duties she makes a daily check of the FMCS portal to check for inspections performed on Respondent's vehicles. (TR 438) She explained that in situations where a driver becomes aware that the load is overweight, the driver is expected to return to the customer to have the load reworked. (TR 439) All Respondent's drivers are required to use the ELD, and the only work not required to be recorded on the ELD is the hostling work that is performed. However, drivers that perform both hostling work and short-haul or long-haul work, will use the ELD. Loccarini, as a short-haul driver who also performed some hostling work, was required to use an ELD for all his work. (TR 442-443)

On July 1, Loccarini sent a second email at 4:17 P.M. to the Safety email address with the subject identified as "Denise" to specifically address the email to her. The email begins by thanking Rugh for attempting to reach out to him and asking that they continue to communicate by email because he was "still int the process of trying to wind down from the attack and exchange with April." He asserted that he had so much evidence against Vigil including texts, logs, schedule and photographs showing the time of day with his location and the remaining time on his 14 hours

of legal operating time that he almost felt sorry for her but noted that he and other drivers had warned her not to let "this" happen. He asserted that he had been proven correct that the load in question would not be delivered because there was "not a chance in hell" that he could do so legally and complained that Vigil wanted him to do a bunch of stuff before this (i.e., the delivery) that he estimated would have taken in the "neighborhood of an hour and a half to two hours!!!" He complained that Vigil often contacted him during his off-duty hours to ask questions even though she also repeated that she had 18 years trucking experience and acted like she did not need help. Loccarini asserted that Vigil was "clueless." He continued that Vigil had burned this bridge to the ground; he was not sure it could be spanned again but he needed the job/paycheck was drained from two years of chaos and could not muster sufficient energy to look for another job noting that the trucking industry work was "crap" anyway. Then he wrote:

> So what I'm saying is that I'll be filing an FMCSA complaint against April for trying to force me to run illegally. There's not much to worry about it's mostly administrative and for the record because so far there was no retaliation except for her attack today and attempting to get Portland involved as if I was wrong and would get in trouble. (JX 2/5)

He alleged in the email that he would include with his FMCSA complaint copies of texts from several weeks before where Vigil purportedly "went down the same path" and refused to listen to him when he reported he was unable to do a load.[15] He continued that someone needed to talk to Vigil and explain to her that she was now in a "precarious position" because he would not hesitate to file an OSHA whistleblower retaliation complaint. He claimed that he had been pushed past his breaking point long ago when Martinez was the dispatcher but that Martinez grew into her position and learned to respect the drivers, their knowledge and limitations. He blamed the ongoing issues on an "impossible account that was unmanageable." He claimed that once Martinez respected his limitations and worked with him, he worked with her and nearly always agreed when she asked for a favor but warned that all of that (his cooperation) was now gone. He alleged that the company continually booked more freight than could be handled based on driver capacity and this forces the dispatcher to try to put a square peg in around hole (sic) and that she (Vigil) was trying to clear her screen, get stuff done and refused to listen to "someone with his experience, personality caliber and intelligence" when he told her what has now been proven to be true "1,000" times over. He claimed that he started the day thinking it would be a good day, the first in months, since his schedule looked to be reasonable. He claimed it had been at least five months since he had a decent day at work because of the "outlandish" thing the drivers deal with and again referenced the Niagara account as being out of control, unmanageable, impossible and ridiculous. He closed the lengthy email noting that he was going home miserable again, suggesting that he might buy some lottery tickets on his way home and remarking, "(y)ou should all be praying that I win because wouldn't it be great for me to be gone?" (JX 2/5)

Campos testified that he knew from Loccarini's email(s) that he was alleging that he was being asked to run illegally and thus, he asked Denise Rugh to get the data from their computer system to check his hours of duty and to contact April to provide her some guidance on the hours

[15] The record in this matter does not include texts from weeks earlier showing that Vigil forced Mr. Loccarini to take a load for delivery that resulted in a violation of hours-of-service rules. A computer-generated report covering the six-month period before his discharge did not return any instances of hours-of-service violations (RX 6, TR 470-471).

of duty allowances. (TR275-276)[16] Once he had that information he placed the call to Loccarini described above. Rugh for her part informed Campos that Loccarini was not in any imminent threat of violating an hours-of-service issue. (TR 276) Based on their assessment of his driving log at 1:21 P.M. that day, Loccarini would have been between Pepsi about 3 miles north of Denver and Niagara about 7 miles east of Aurora.

Loccarini sent a third email on July 1 at 5:27 P.M. to Campos, and the safety email box. (JX 2/3) In this lengthy email, Loccarini first thanks Campos for the voicemail and noted that "as usual your de-escalation skills shine through." He next asserted that there were serious problems and issues that had been completely ignored for the two years he had been working and that coupled with the "chaos" of the Niagara account, horrific traffic, construction and infrastructure in the Denver area together with "all the other crap" that drivers endure, he was operating past his "breaking point" for over a year. He noted that Sara (Martinez) eventually orchestrated the chaos and insanity to where it was almost tolerable but between her leaving and people quitting "in droves" at Niagara there were resultant delays, yet drivers were being asked to make the same number of deliveries. He offered that he preferred not to speak to "her" over the phone and requested that he honor that request because "I'm very worked up right now" and trying to finish his work. Loccarini reported that despite the situation that day, he was still going to try to work 14 hours and try to get a Pepsi load to bring to the yard for April despite the roads being almost a complete gridlock. He offered that if he could find an empty (trailer) he might try to get a Pepsi load but there were severe lightning strikes in the immediate area that were "very concerning." He noted that he sent an email to Denise that might help provide greater insight into the situation. He offered that he was a big fan of the saying that you have already crossed the Rubicon but offered that nothing was set in stone; that he just needed to go home and get some rest. He reported that he had the following day off (July 2) and did not want to deal with work problems over the day off suggesting that they just put things on hold until the following week. He further suggested that Campos have April forward the text exchange to him, claiming that April would not listen (to him) or acknowledge that he had knowledge as a veteran driver generally and for the company in that market area. He asserted that as he told Denise he was correct at the time and ensuing events proved him correct "1000" times over; it was a situation where she (April) was trying to push too hard and force things to get them off her computer screen and that this was the problem since he started; that it was systemic modus operandi for the company in Denver. Loccarini asked how long Campos thought people were going to take being pushed beyond their limits before lashing out as a natural response.

Loccarini asserted that Campos' description of the Denver division as chatty was accurate in part due to their being the largest division but also warned that it was time upper management learned exactly why that was the case (referring to being chatty). He explained that this was because there were "outlandish Ludacris (sic) process problems" that were never addressed or resolved and asserted there were a lot of illegal stuff going on that he claimed Respondent had convinced its workforce to think was normal and "that's what broke the camel's back." He agreed that some issues bothered him more than other drivers and vice versa but that he was smart enough not to go out on a limb or willingly put his head in the guillotine, knowing full well that other drivers agreed with him to one degree or another. He again expressed his extreme frustration

[16] Rugh confirmed that Campos asked her to pull Loccarini's log which showed no imminent threat of a violation (TR 457-458)

claiming to have written an email to Peter Stott last Saturday with no response, describing that email as pretty crazy but with little to no reservations about its content because he knew "for a fact that if a random selection of Americans were put into this position" that he experienced for the last two years "writing a crazy email like that would be the least of their actions."[17] He continued to allude to a number of problems, recognizing that not all could be resolved but claiming that there were some "low hanging fruit" that was rotting on the ground and that it was unreasonable that none of it was even being discussed. He closed the email echoing Campos desire to resolve (the issues) and move forward and claimed that other drivers and he thought Campos and Stott should make an in-person visit to Denver to meet individually with drivers and learn their grievances. He cautioned that while he knew that not everything could be resolved, Respondent could not just ignore the workforce "especially when they have legitimate bona fide issues." He ended the email with three emojis with the statement he was probably repeating himself. (JX 2/3)

Campos believed that it was not until July 2, after he had an opportunity to read the email sent by Loccarini and the text message exchanges with Vigil that he spoke directly with Vigil. She told him that she was worried over the text messages; that she did not know how Loccarini was going to behave from one day to the next and did not know what he was capable of doing. (TR 284-285)

Campos requested all the information, including the texts and the emails be sent to a Human Resources agency but ultimately, he alone made the decision was to discharge Loccarini. Rugh testified that Campos asked her to pull Loccarini's driver logs for the six months before and including July 1, 2021 on July 2, 2021 (TR 419). Campos believed that he had Loccarini removed from service effective sometime on July 1 but because he could not reach him on the phone that decision was not communicated to Loccarini until days later. Nonetheless, to effectuate his decision, he directed local maintenance manager George Skells to remove the ELD from Loccarini's truck which would render it non-operational. Campos also verified through Respondent's Omnitracks system that Loccarini was not scheduled to work the following day. (TR 289)

As to the deliveries on July 1, Loccarini ended up taking the Longmont load from Niagara and dropping it off in the yard to be rescheduled for delivery. (TR 184) A video recording with audio narration by Complainant shows the trailer still being loaded at Niagara at 4:06 P.M. with 2 hours and 52 minutes of hours of service remaining and then fully loaded at 4:18 P.M. with two hours and 41 minutes of hours of service remaining. (CX 8) In his narration, Loccarini remarks that he was completely right that he would be unable to make the Longmont delivery within the remaining hours of service and that as a result, he would have to drop the loaded trailer in the Respondent's yard to be rescheduled for delivery. As originally planned, Loccarini would have picked up the load at Niagara, delivered it to Longmont and then returned with an empty trailer to complete his day. (TR 185) His driver log for July 1 shows that he stopped driving at 17:41 or 5:41 P.M., conducted a post trip inspection from 17:41 to 18:08:58 (6:08 P.M.) when he went off duty for the day. (JX 1/5-6) The driver log summary shows that he drove a total of 6 hours, 39 minutes and 17 seconds with another 6 hours, 30 minutes and 33 seconds in non-driving but on duty time for a total of 13 hours, 9 minutes and 33 seconds of on duty time. (JX 1/4) His total on duty hours for the week as of the end of his work on July 1 was 27 hours, 32 minutes and 33

[17] If there was an individual email sent to Stott, that email is not in the record of this proceeding.

seconds. (JX 1/4) There is no contention that Loccarini exceeded his legally allowed drive time or work hours.

Despite Campos' understanding that Loccarini did not work after July 1, Complainant submitted a transfer sheet dated July 3, 2021 purporting to show that Loccarini worked from 6:07 to 19:35 that day using tractor 2185. (CX 12) His assigned tractor was a sleeper tractor numbered 2185. The transfer sheet shows hand time entries with shipments exclusively for Niagara to NO2 which is a secondary warehouse for Niagara located such that reaching it requires the tractor to leave Niagara's property and use public roads. All but two of the six transports shown on the transfer sheet took no more than fifteen minutes to complete with the remaining two taking about 45 minutes and an hour and a half. (CX 12) Loccarini testified that he also worked on July 4 using his regular assigned tractor (number 2185), recorded his work on the transfer sheet and took pictures of the sheet before he left work at that time. (TR 699)[18] The document submitted by Complainant to show his work on July 4, 2021 differs from the July 3 record in that this sheet is titled as a "hostler daily report". (CX 11) This record purports to show that Loccarini started working at 6:30 A.M. and stopped at 19:05 (6:05 P.M.). The document includes handwritten notations in red indicating 12.5 hours (of work that day) and 53.25 hours of work for the pay period as of that day. Included with this document is the metadata associated with the document. Although the metadata purports to show that the photograph was taken on July 4, 2021 at 7:00 P.M., the information also shows that the document was "created" on August 22, 2022 at 6:03 P.M. and yet modified on July 7, 2021 at 11:30 A.M. (CX 11/2) The electronic log submitted in this matter was generated on July 2, 2021 at 8:07 A.M. Pacific Time and thus, does not show any driving activity or off duty status after the end of his work on July 1, 2021. (TR 415) However, the payroll record for the pay period from June 28 to July 4, 2021 shows that Loccarini was paid for 53.90 hours of work. (JX 4/13) Rugh agreed that for a driver to accrue 53.9 hours of work over two days of work, the driver would have to violate the hours-of-service rules. (TR 418) Rugh further explained that yard moves typically refer to repositioning of trailers on one property, are not considered driving time for FMCSA hours of service and do not count towards a driver's 11 hour driving time limitation. (TR 419)

As noted above, while he consulted with Jim Digman and Dan Kiser as well as the HR agency used by Respondent, Campos testified that he alone made the final decision to discharge Loccarini. He noted that Dingman and Kiser recommended termination. Campos considered the statements made to Vigil in the context of the three prior incidents and determined that the threatening nature of the texts compounded by his history of poorly controlled responses to situations which seemed to show a pattern of targeting women and noting that Denver had an office full of women, he would have been remiss if he did nothing because there could be a moment when Loccarini really did snap and react physically. He specifically viewed the texts to be threatening where Loccarini reported he was ready to snap. (TR 289-291) He later considered Loccarini's threat that Vigil better get a lawyer for things she did in the context of her employment to be a significant threat noting that dispatchers make less than drivers and Vigil had a family to support. Campos also noted that Loccarini's last text to Vigil warning her to get a lawyer came

[18] The transfer sheet was not disclosed to the Respondent before the hearing. Loccarini testified that he first located the document when after hearing Respondent witnesses testify that he did not work after July 1, he culled through an electronic file folder on his computer titled "MX Lawsuit" (TR 700).

after Campos purportedly informed Loccarini to stop all communications with everyone but him. (TR 295)

As of July 6, Campos had still not talked directly to Loccarini. On that day, Jim Dingman with Dan Kiser and George Skells placed a call to Loccarini and left a message which was admitted into evidence. (CX 7) Dingman opened the call noting that all three were on the call and requested that Loccarini call one of them back as soon as possible; that they had some information they needed to communicate to him and that when he called they would let him know their path. (CX 7)

As pf 6:20 P.M. on July 6 Loccarini still had not returned the call. Thus, at that time, Campos sent an email to him with copies to Dingman and Mike Olson to communicate the decision to terminate him. The email reads:

> You were terminated following review of threatening text messages sent to a female coworker. You have already messaged this employee again today threatening her. Please cease all communication with the Denver facility and direct all communication through myself or Jim. Both of us are in copy. (JX 3)

II. PARTIES' ARGUMENTS

A. SUMMARY OF COMPLAINANT'S ARGUMENT

Complainant contends that the complaints to Vigil regarding his ability to complete the delivery to Longmont within his hours-of-service limitations constituted internal complaints related to violations of safety regulations and thus, protected. They were "filed" because they were made to a supervisor, Ms. Vigil. In support of the contention that Loccarini reasonably perceived violations of the service of hours limitations, Complainant argues that the fact the Longmont load was not completed until 4:39 P.M. with an expected round-trip drive and unloading time of "several hours" evidenced that his perception was reasonable. Additionally, Complainant argues that Loccarini's threats to file FMSCA complaints which related to reasonably perceived violations of the FMCSA safety rules were also protected. With respect to Respondent's coercive conduct, Complainant argues that Vigil's threat to get "Portland" involved was coercive. Noting that it was likely Respondent would rely on the fact that there was no imminent violation, Complainant cites to the Secretary's decision in *Boone v. TEE Inc.*, 1990-STA-7 (Sec'y July 17, 1991) where the Secretary wrote in pertinent part:

> The operation of a vehicle may 'constitute' a violation either presently or, as under the facts here, over time prospectively where it is inevitable that a violation must occur. …
>
> I agree with the ALJ that Section 405(b) should not be read so narrowly that it would protect an employee who refused an order to violate motor vehicle safety regulations only if the violation exists at the time the order is given. (citation omitted). Where, as here, a violation of DOT driving time regulations, 49 C.F.R. § 395.3, is necessarily contemplated in the order, albeit at a somewhat later time, the order requires the operation of a motor vehicle contrary to federal rules and regulations, and the driver's refusal is protected under

> the 'when' clause of the statue. To hold otherwise would undermine the intent of the statute to promote highway safety and permit an intolerable result. If drivers are required to accept dispatch orders that cannot possibly be completed without violating DOT driving regulations, they will not only be encouraged, but coerced, to drive in a fatigued condition, thereby greatly exposing themselves and the general public to serious injury.
>
> *Boone v. TEE Inc.*, 1990-STA-7 (Sec'y July 17, 1991).

The Complainant argues that there is strong circumstantial evidence that Mr. Loccarini's protected activity was a contributing factor in the decision to discharge him. Specifically, Complainant relies on Campos' email relaying the decision to discharge Loccarini "following review of threatening messages to a female coworker" and claims that the only threat to Ms. Vigil was made in the context of a threat to file an FMCSA complaint. Thus, this shows direct evidence of animus. Complainant also relies on the temporal proximity of Loccarini's actions on July 1 regarding the ability to complete the Longmont delivery and his threat to file FMCSA complaints to his discharge. Complainant contends that Ms. Vigil's threat to escalate the dispute to higher management demonstrates animus and that any contention that Respondents reasonably feared that Loccarini would engage in some form of violence is undermined by the fact that Respondent allowed him to work after July 1.

Finally, Complainant submits that although it is true that Loccarini engaged in some incivility, Respondent cannot reasonably parse out those statements or actions from the context of the threats to file FMCSA complaints to support a claim that Loccarini would have been discharged even in the absence of his protected conduct.

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent argues that the complaint should be denied because Complainant has failed to show by a preponderance of the evidence that he subjectively and objectively believed that a violation of the FMCSA hours-of-service regulations existed or would occur when he complained about his work assignments on July 1. Respondent notes that there is no evidence that Respondent or its dispatcher on that day or any other day required or sought to coerce Complainant to violate his service of hours limitations. Instead, the record shows that the dispatcher simply sought to issue additional assignments during gaps in his schedule which was a routine occurrence.

III. LEGAL STANDARD AND BURDEN OF PROOF

To prevail on his STAA whistleblower complaint, Loccarini must initially demonstrate by a preponderance of the evidence that:

a) his complaints were protected activities;

b) Respondent took adverse action against him, and

c) the protected activities were a contributing factor in the adverse personnel action.[19]

To demonstrate that his protected activities were a contributing factor, he need not show that a retaliatory motive, pretext or that the protected activity was the only or even motivating factor. Instead, Complainant need only show that his protected conduct, alone or in combination with other factors, tended to affect in any way the outcome of the discipline or other adverse action.[20] To establish that the protected conduct was a contributing factor, Complainant may do so by providing either direct proof of contribution or indirect proof of contribution, i.e. circumstantial evidence.[21] Direct evidence is "smoking gun" evidence that conclusively links the protected activity and the adverse action without relying upon any inference. Circumstantial evidence relies upon inferences to link the protected activity and adverse action and can include proximity in time, demonstrable pretext, disparate treatment, shifting or contradictory explanations, expressions of antagonism or hostility toward protected conduct and/or a change in an employer's attitude toward the complainant after he/she engages in protected conduct.[22]

If Complainant proves by a preponderance of the evidence that his protected activities contributed to the adverse actions taken against him, Respondent may still avoid liability if clear and convincing evidence demonstrates that the adverse actions would have occurred even in the absence of the protected activities. The clear and convincing standard is met when the evidence establishes that it is "highly probable" or "reasonably certain" that Respondent would have taken the same action in the absence of the protected conduct.[23]

For the reasons explained below, I find that Mr. Loccarini has not demonstrated by a preponderance of the evidence that he engaged in protected activities. I further find that even if I considered his complaints about being directed to perform additional routes before his last scheduled route of the day protected and a contributing factor in the decision to discharge him, Respondent has demonstrated by clear and convincing evidence that Complainant would have been terminated even in the absence of that conduct.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. PROTECTED ACTIVITIES

[19] 49 U.S.C. § 42121(b)(2)(B)(ii); *Poulter v. Central Cal Transportation, LLC*, ARB No. 2018-0056, slip op. at 4 (August 18, 2020), 2020 WL 5407893; citing *Buie v. Spee-Dee Delivery Serv., Inc.*, ARB No. 2019-0015, ALJ No. 2014 STA-00037, slip op. at 3 (ARB Oct. 31, 2019); *Tocci v. Miky Transport*, ARB No. 15-029 slip op. at 4 (May 18, 2017); 2017 WL 2838085.

[20] *Tocci*, ibid at 6.

[21] *Beatty v Inman Trucking Management, Inc.*, ARB No. 13-039 slip op at 8-9 (May 13, 2014).

[22] *Beatty*, ibid at fn 55.

[23] *Tocci*, ibid at 4.

As to Loccarini's "protected conduct" I do not find his belief that he was being coerced or forced to violate the hours-of-service rule objectively reasonable, even if he subjectively believed it to be true. In this regard, although Loccarini's schedule included a final delivery to Costco located in Longmont of product from Niagara with a delivery time of 4:00 P.M., at no time during the text message communications between Loccarini and Vigil did Vigil suggest, insist or threaten Loccarini that he must make that final delivery to Longmont, regardless of whether to do so would violate the hours-of-service regulations. To the extent that Vigil warned that she would get Portland involved, she did so in the context of Loccarini's remark that he should have refused to perform the unscheduled assignments. Thus, his suggestion that he should have refused those assignments was not because to do so would force him into an hours-of-service violation in the performance of those tasks but that it might lead to his inability to complete the delivery to Longmont.[24]

I also cannot find as argued by Complainant that at that time, Loccarini reasonably believed that his performance of those duties would inevitably cause a violation of the hours-of-service limitations. Although the Longmont delivery was on his schedule for that day, Loccarini acknowledged that it was not uncommon for drivers to drop a loaded trailer in the yard which would then be rescheduled for delivery by another driver. This is exactly what happened in this case when Loccarini's "Longmont" load was not ready at the Niagara facility until a little after 4:00 P.M. and based on his assessment that he would be unable to drive to Longmont, get unloaded and return to the Commerce City yard in the remaining 2 hours of service that he had, he dropped the trailer in the yard and it was rescheduled for delivery by another driver. In the absence of any direct evidence that Vigil was going to force Loccarini to complete the delivery to Longmont, and considering Loccarini's admission that it was common for drivers to leave a loaded trailer in the yard to be delivered later, I do not find his claim that he was being coerced into violating the hours-of-service rules reasonably held.

I further find Loccarini's specific claim that Vigil's threat to get Portland involved constitutes a coercive action designed to compel him to violate the hours-of-service rules unpersuasive. First, although as the dispatcher Vigil had the authority to schedule deliveries for drivers and to give them other tasks within the hours-of-service limitations, she had no independent authority to enforce those assignments or to discipline any employee. Second, she threatened to get Portland involved in the context of Loccarini asserting that he should have refused the interim assignments at a time when he had at least five hours of legal operating time available to him. More importantly, Vigil's threat to get Portland involved was inextricably tied to her contention that Loccarini's treatment of her was unacceptable, conduct which he now acknowledges was not civil. Under these circumstances, her threat to get Portland involved is more appropriately viewed as one employee seeking supervisory intervention to resolve a dispute with another employee.

At its core, the dispute between Loccarini and Vigil is really whether Vigil, not Loccarini, had the discretion and authority to make changes to his delivery schedule by requiring him to perform other non-scheduled deliveries in a gap period even if those actions might result in causing a reassignment of his last scheduled delivery to avoid a service of hours violation. Vigil's last text

[24] It is equally true that at no time did Loccarini refuse any assignment that day, including the non-scheduled assignments given to him by Vigil. Because Loccarini was not discharged for refusing to accept an assignment, this fact is not of any relevance to the issues in this matter.

message asserting that he had time to perform the additional tasks demonstrates that she was not demanding, coercing or threatening him to compel him to violate the hours-of-service regulations. Rather this text message demonstrates that Vigil was aware of the hours-of-service limitations and fully intended to stay compliant with those regulations believing that additional assignments would not adversely affect his ability to perform the Longmont delivery while staying compliant. That Vigil's calculations may have been erroneous does not transform her requests to perform the additional tasks into some sort of threat or coercive action.

This underlying tension between Loccarini and Vigil is fully demonstrated in the text message exchange where only after Loccarini texted that he should have said no (to the additional non-scheduled activities), Vigil pointed out that he could not tell her no; that she could not have him sitting idle for five hours and then also messaged that she was not playing games with him that she would get Portland (higher ranking managers) involved. Additionally, when Loccarini responded that the empty trailer drop at Pepsi was all he had time to do before his 4:00 P.M. Longmont delivery, it was 12:19 P.M.. Thus, Respondent correctly notes that as of that time, Loccarini had over six hours of drive time and seven hours of total on-duty hours available to him under the regulations. Moreover, all the additional tasks he was asked to perform were all within a few miles' radius of the terminal yard and from each other. Thus, his alleged concern about being forced to complete his final scheduled delivery within the hours-of-service limitations was not reasonably at issue and ultimately never realized. I further find that Loccarini's email messaging that day rather than answer telephone calls from Rugh and Campos, each with the clear authority to discuss and immediately address his claim that he was being pressured into a possible hours of service violation further demonstrates that he did not reasonably believe this to be true. Loccarini's focus on his last scheduled delivery and his prioritization of that delivery was simply not within his authority to make. Had he reasonably believed that he was being pressured to operate illegally, he would have and should have simply answered either Rugh or Campos' calls to him. He chose not to do so. He chose instead to send an email to the safety group, Respondent's President Stott and Executive Campos at 1:21 P.M. or 2:21 P.M. that day.[25] Although in that email he complained that Vigil was *currently* violating the law and trying to get him to run illegally, this is not borne out by any of the text messaging between Vigil and Loccarini. As noted above, the non-scheduled assignments Vigil asked Loccarini to perform did not put him in jeopardy of violating the hours-of-service rules imminently. Given Respondent's established practice of allowing drivers to drop loaded trailers into the yard to be rescheduled for delivery, it is equally clear that performance of those interim tasks would not inevitably cause of a violation of the hours-of-service rules. Loccarini's contemporaneous narration of the video taken when Niagara completed the Longmont load shows that he focused on whether he correctly anticipated that he would not be able to make this scheduled delivery. His narration does not reflect any concern that the decision to drop the trailer in the yard and not make the delivery to avoid an hours-of-service violation would result in any discipline or was in derogation of any directive given to him by Vigil or any other of Respondent's managers or supervisors.

I find his focus on whether he was right or not about timing of being able to make that delivery window to the exclusion of any claim that he was being coerced or compelled to violate

[25] It was unclear whether the time sent shown on the email was based on Mountain Time at the sender's location or Pacific Time at the recipients' location. If the time reflected the recipient's time zone, Loccarini sent the email at 2:21 P.M., about an hour after Vigil's last text message communication with Loccarini.

his hours of service again demonstrates that he was not reasonably concerned that he was being forced or coerced into violating the hours-of-service rules. To reach that conclusion, I would have to find evidence that Respondent either routinely required all drivers to complete all scheduled deliveries regardless of the hours-of-service limitations or in this instance, insisted that Loccarini complete the Longmont delivery even if that meant to do so would violate the hours-of-service regulations. The record is devoid of either circumstantial or direct evidence of such.

B. ADVERSE ACTIONS

Section 31105 of the Act also prohibits adverse action because the employer "perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of the motor vehicle safety or security regulation or standard or order." 49 U.S.C. § 3115 (a)(A)(ii). It is clear that on July 1, 2021, Loccarini threatened to file future FMSCA whistleblower complaints and claimed to have already filed FMCSA whistleblower complaints and that Campos and other managers knew of these threats before the decision to terminate him was made. Thus, Loccarini's threat to file a complaint and Respondent's knowledge of that threat is established. However, I find that Complainant failed to establish a nexus between these threats and the decision to discharge him. Close proximity in time can be considered circumstantial evidence of a causal connection between the protected activity (i.e., threats to file a complaint) and the adverse action (i.e., termination). *White V. the Osage Tribal Council*, ARB No. 99-120, slip. op. at 4 (August 8, 1997). Nonetheless, temporal proximity is not necessarily dispositive. *Barber v. Plant Airways, Inc.* ARB No. 04-056, slip. op. at 6 (April 28, 2006). When contradictory evidence is present, inferring a causal connection may be inappropriate. Here, the record shows that Loccarini's threat to file FMSCA complaints was not new. In this regard, Loccarini also threatened to file an FMSCA complaint in October 2020 and Campos was informed of the threat in the context of a second customer complaint about Loccarini's conduct. Yet, Campos never discussed the threat with Loccarini, and no adverse action was taken even though the customer complaint provided an opportunity to take some form of disciplinary action. Campos credibly testified he had no real concern about Loccarini's July 1 references to prior FMSCA complaints as well as threats to file future complaints because there was a pattern of making these types of threats when Loccarini was upset that never came to fruition and/or were considered to be without merit such as his current claim that he was being coerced into violating the hours-of-service rules. Campos' phone message to Loccarini on July 1 when he knew that Loccarini was claiming to have filed or going to file complaint reveals that Campos was trying to find a path forward with Loccarini and to address his claims that Respondent was violating FMCSA regulations. It was not until after Campos reviewed the text message exchanges and learned of Vigil's reaction to those exchanges that he determined, after consulting with others that Loccarini should be terminated. Thus, there was an intervening event that undermines any inferred connection between the protected threats to file complaints and the adverse action. To the extent that Vigil's reaction and expressed concern about the possibility of Loccarini engaging in some violent action might be considered unwarranted based on a reading of those text messages, I found her explanation for that perception to be persuasive.[26] While testifying about the hostage situation

[26] Although Vigil dismissed much of Loccarini's charged language as just blowing off steam, once he threatened to take her down, she became so concerned that Loccarini's threats might turn into a physical threat that she terminated any further communications with him, left work early and asked that the door keycodes be changed to prevent drivers from obtaining access to the office area where she worked.

at her former employer, Vigil was visibly upset, and her voice trembled slightly. The event clearly had a lasting impact on her that possibly predisposed her to react more to what others may have disregarded as heat of the moment hyperbole. For his part, Campos' explanation of why threats directed at Vigil, and not the threats to file FMSCA complaints, were a significant factor in the decision to discharge Loccarini was also persuasive. As of July 1, Campos was aware of three or four other instances where Loccarini's statements and conduct were directed at women where his language can be reasonably characterized as aggressive in nature. As detailed above, the email customer complaints and Loccarini's text messages and emails support Campos' perception that Loccarini had a propensity to unleash his frustration on women using aggressive language. Given the seemingly endless news stories of workplace violence, Campos concern is not so wholly unreasonable to be considered a pretext. Although Loccarini credibly testified in this proceeding that the report of his threat to punch someone was a misstatement, this does not alter the fact that from Campos' position, the assertion existed and could have been accurate. Under these circumstances, I find the temporal proximity of Loccarini's threats to file FMSCA complaints and the decision to discharge Loccarini insufficient to support an inference that his protected conduct played a role in the decision to discharge him.

I also considered whether the fact that Loccarini may have continued to work after he engaged in this conduct was evidence that Respondent did not view his conduct as warranting discharge. However, the delay in effectuating the decision to discharge stems from Loccarini's failure to respond to multiple attempts to contact him by Respondent's managers. Campos testimony that he directed that the ELD log be removed from Loccarini's tractor on July 1 or 2 to prevent him from using it was credible. That the only evidence of having worked after July 1 is handwritten entries on sheets used to record yard moves suggests that Loccarini may have been able to work after July 1 without the ELD having been removed or that the ELD was not removed as promptly as Campos believed it to have been. The undisputed record shows that between July 1 and July 6, Respondent's managers were actively attempting to speak with Loccarini to advise of the decision to discharge him without success which then compelled Campos to advise of the decision via email.

C. PROTECTED ACTIVITIES CONTRIBUTING TO ADVERSE ACTIONS

Noting that there is a low threshold of proof placed on a complainant, even if I were to find that Loccarini's threats to file FMCSA complaints played a role in the decision to terminate him, I find the Respondent has established by clear and convincing evidence that the same adverse action would have been taken in the absence of his protected conduct. In this regard, as noted above, Loccarini's claims that he had filed or would file FMCSA complaints was not new. Yet, no adverse action had been taken even where there was an opportunity to retaliate under the cover of a plausible business reason. Also not new were repeated instances of Loccarini's outbursts of anger or frustration directed at other of Respondent's employees and Respondent's customers requiring the intervention of Campos using his "de-escalation skills" and counseling Loccarini. Thus, the July 1 instance was not an isolated instance of "incivility" but was consistent with a pattern of inappropriate conduct that, despite counseling, continued unabated. Loccarini's threats to file FMSCA complaints were also reasonably dismissed as idle threats giving greater credibility to Respondent's claim that they did not factor into the decision to discharge Loccarini. Notably, even after Loccarini threatened to file whistleblower complaints regarding his treatment by a

customer, Respondent provided him with a sleeper tractor and accommodated his request not to work more than two consecutive days. Had Respondent sought his removal from the workforce, they could have refused to make these special accommodations as a mechanism to encourage him to leave Respondent's employment. They did not.

IV. CONCLUSION

Based on the foregoing, although the Complainant engaged in protected conduct and suffered an adverse action when he was terminated effective July 6, 2021, the Complainant failed to establish a casual connection between the protected activity and his discharge. Even if I were to conclude that the Complainant met the low threshold of proof that his protected activity was connected to the decision to discharge him, Respondent has demonstrated by clear and convincing evidence that the same adverse action would have been taken in the absence of the protected conduct for non-discriminatory reasons and there is no evidence to demonstrate that the non-discriminatory reasons were a pretext.

ORDER

Complainant's complaint alleging his termination violated the whistleblower protections of the STAA is hereby **DISMISSED**.

PATRICIA J. DAUM
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 EFSSystem, 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.

3. Decision & Order where reinstatement is ordered

- Notice of Appeal Rights (Word)

- Notice of Appeal Rights (text)

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

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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 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 EFSSystem, 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.