UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Cincinnati, Ohio

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Issue Date: 20 December 2023

OALJ Case No.: 2022-STA-00068
OSHA Case No.: 5-1470-21-034

In the Matter of:

CLIFTON VOLLENDORF,
Complainant,

v.

BLUE NORTHERN DISTRIBUTING,
Respondents.

Appearances:

Clifton Vollendorf,
Complainant Pro Se
Eau Claire, Wisconsin
For Complainant

Stephen L. Weld,
Weld Riley, SC
Eau Claire, Wisconsin
For Respondent

Before: Hon. Willow Eden Fort
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protective provisions of the Surface Transportation Assistance Act (STAA) and its implementing regulations. 49 U.S.C. § 31105; 29 C.F.R. Part 1978.

I. Procedural History and Evidence

Complainant filed a Complaint with the Occupational Safety and Health Administration (OSHA) on April 23, 2021. Complainant alleged that Respondent retaliated against them in violation of the STAA. OSHA dismissed the Complaint on August 1, 2022. On August 23, 2022, Complainant appealed the dismissal.

This matter proceeded to a de novo hearing on August 7 and 8, 2023.[1] Tr.[2] at 1, 189. 29 C.F.R. § 1978.107(b). I considered only the testimony and evidence presented by the parties; I did not look at or consider OSHA's findings or determination.[3] 29 C.F.R. § 1978.109(c).

II. Issues in Dispute

Respondent does not dispute that it is a covered employer or that Complainant is a covered employee. Tr. 6. Respondent contests whether Complainant engaged in protected activity and whether its firing of Complainant constitutes adverse action. *Id*. at 7-9; *Respondent's Brief* at 1-2.

In the case that I find protected activity and adverse action, Respondent also contests whether Complainant's protected activity was a contributing factor in its adverse action and it argues that it would have fired Complainant notwithstanding their protected activity. Tr. at 7-9, *Respondent's Brief* at 1-2.

III. Testimony

Complainant presented their own testimony, as well as testimony from Michael Alberts and Ricky P. LaChance, Jr. Respondent presented testimony from Willem Stoman, Timothy O'Donnell, and Andrew L. Pritchard.

a. Michael Alberts

Michael Alberts testified that they previously worked for Respondent as a delivery route driver for Respondent for three years. Tr. 68, 82. In their experience, equipment issues are common at trucking companies. *Id*. at 66. Alberts testified that Respondent fixed some things on the spot, but its general policy was to have a worker write down equipment issues on a piece of paper and then drop the paper in a box for the proper supervisor. *Id*. The supervisor would then check their mailbox at the end of the day and "deal with things accordingly." *Id*. at 66, 80. Alberts

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[1] The hearing was conducted remotely, via Microsoft Teams. Tr. 4. Respondent was represented by counsel and chose to attend with video. Complainant was pro se and chose to attend via telephone. *Id*. at 2, 5. Microsoft Teams afforded me the ability to visualize the participants and ensure that they remained in attendance throughout the proceeding. *Id*. The parties presented testimony and exhibits, and they conducted cross examination and lodged objections. After review of the record, the evidence, and the hearing transcript, I find that each party was afforded a full opportunity to present evidence and argument, as provided for by the Administrative Procedure Act, the STAA, and the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges. 5 U.S.C. § 701, *et*. *seq*.; 49 U.S.C. § 31105; 29 C.F.R. Part 1978; 29 C.F.R. Part 18A.

[2] "Tr." cites to the transcript of the hearing conducted August 7 and 8, 2023. The transcript is paginated sequentially. The last page of the August 7 transcript is numbered as 188 and the first page of the August 8 transcript is numbered as 189.

[3] Respondent argues that "OSHA got it right" in its post-hearing brief. *Respondent's Brief* at 2. Despite this averment, I have not reviewed or considered OSHA's findings and I do not credit Respondent's recitation of the actions and decisions made by OSHA.

testified that, in their opinion, this system was "not good" because it caused delay between the time issues were reported and the time they were fixed. *Id*. at 80.

Alberts testified that they were once told to go home even though their shift had started because the trailer they were supposed to haul wasn't ready. Tr. 69. They testified that they had been asked to work over hours. *Id*. at 70-71. Alberts also testified that they heard through the grapevine that a couple of workers got into accidents due to Respondent pressuring them to drive faster. *Id*. at 72-73, 75-76.

b. Ricky P. LaChance Jr.

Ricky P. LaChance Jr. testified that they worked for Respondent approximately three years ago for two to two and a half years. Tr. 85. LaChance stated that Respondent "didn't care about the drivers, and basically they just wanted the job done at all cost." *Id*. at 95. La Chance testified that Respondent did not timely repair equipment. *Id*. at 85-86. They testified that drivers got yelled at for complaining and the owner, Andy Pritchard, would tell drivers "just to drive it," even if equipment needed repairs. *Id*. at 85-86.

LaChance testified that drivers did not want to report safety issues because "they didn't want to lose their jobs because we were seeing drivers being reprimanded and being yelled at, and we were also seeing people in the warehouse that were complaining about stuff, being fired for apparently no reason at all." Tr. 86-87. LaChance stated that Steve[4] told them that "if we refused to do a job because of something going on with the trailers and stuff, that we could be terminated," and Steve had the drivers sign some sort of paperwork to that effect. *Id*. at 99-100.

LaChance testified that they suffered an on-the-job injury while working for Respondent due to faulty landing gear[5] that they were "scared to report."[6] Tr. 91. They testified that the spring on the landing gear would "pop back" and injure people. *Id*. The landing gear injured LaChance's left wrist. *Id*. LaChance knew that other workers were also injured by the landing gear.[7] *Id*. at 91-92.

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[4] LaChance did not state Steve's last name. After review of the hearing transcript, Complainant's Complaint, and the exhibits offered by the parties, I find that LaChance was talking about a former employee who acted in a supervisory capacity. *See* Tr. 87 ("the first time I brought the safety issue was when Steve was working there. He was our -- he was under Andy. He was like our general manager at the time.").

[5] "Landing gear" is the mechanism by which trucks are separated from trailers. Tr. 101. It supports the trailer so that the truck can unhitch and pull away from it. *Id*. 101-102. LaChance testified that "[n]ormal landing gear will just roll down pretty smoothy, but this landing gear was just defective" such that when LaChance attempted to roll it down, "it sprung back like at a high rate of speed." *Id*. at 101. When LaChance attempted to grab it, it hit him and injured his wrist. *Id*.

[6] LaChance stated that they did, however, report the injury they sustained as a result of the faulty equipment. Tr. 91.

[7] During LaChance's testimony, Complainant offered that they reported the landing gear prior to LaChance's injury, as this same piece of equipment broke Complainant's finger. Tr. 92.

LaChance also testified that they were "asked numerous times" to work over hours. Tr. 88. LaChance was aware that at least one other driver also drove over hours; the other driver unplugged their eLogs in order to do so. *Id*. 102-103. The other driver told them that "people in the office" coached them on how to do this. *Id*. at 102-103.

LaChance stated that Steve told drivers that they could find another job if they did not want to work over. Tr. 89-90. LaChance also testified that their hours were dependent upon the equipment being ready to operate. *Id*. at 93, 94. Drivers were paid by the hour and so sometimes Respondent would call and tell LaChance to stay home until the equipment was ready, so Respondent wouldn't waste money. *Id*. Other times they would show up when their shift started and have to sit in their truck or go get something to eat while they waited for their equipment. *Id*.

LaChance was aware that Complainant talked to other drivers about the "crazy hours," but they were unaware that Complainant "was writing a complaint about it." Tr. 103-104.

LaChance denied applying to work for Respondent after initially ending their employment. Tr. 98. Respondent presented documentation showing that LaChance applied via an electronic application site, however. *Id*. at 200-202; EX 18.

c. Clifton Vollendorf (Complainant)

Complainant testified that Respondent began retaliating against them after they began putting vehicles out of service and complaining about safety issues. Tr. 109-110, 116. Complainant stated that the other drivers were "worried to say anything there about equipment issues," so they began making complaints. *Ia*. at 116. Management told Complainant that they were the only person who told them when equipment needed repair. *Id*.; CX 9 at 50. They testified that their performance appraisals were excellent up until they began putting vehicles out of service, and they were complimented for always being on time. Tr. 118-119, 124; CX 17 at 71.

Complainant argues that they were retaliated against for making safety complaints and putting vehicles out of service. Tr. 109-110, 112, 119. Complainant also testified that someone in management attempted to edit their eLog to show that they drove a truck without doing a pre-trip on it, and they believed this was also an act of retaliation for making safety complaints, since driving a truck without a pre-trip can result in immediate termination. *Id*. at 117-118, 145.

Schedule Adherence

Complainant testified that requiring them to show up when their shift started was a departure from Respondent's usual practice of asking drivers to wait and show up when their equipment was ready. Tr. 109-110, 129. Complainant explained that a driver's working day is limited to fourteen hours, and if "you're sitting in the yard for two hours" waiting on equipment, you would lose two hours of potential drive time. *Id*. at 129. For this reason, Respondent preferred to have drivers wait and show up when their equipment was ready. *Id*. Complainant testified that the show-up-when-scheduled rule began being enforced against them only days before

they got in trouble for being six minutes late, and they were unaware of the new rule until they got in trouble. *Id*. at 109-110, 113; CX 8 at 45.

Reporting Safety Issues

Complainant explained that a driver is required to inspect their truck prior to starting a route; this inspection is called a "pre-trip". Tr. 143-144. If the pre-trip reveals safety issues that aren't that serious, a driver should write the issue(s) down in the eLog so the driver can show law enforcement that they are aware of the issue if they get stopped for it. *Id*. at 143-144. Respondent also had drivers write up non-serious safety violations on a piece of paper and place the paper in a manager's box. *Id*. at 145.

If the pre-trip disclosed a serious safety violation, however, the driver should put the equipment out of service. Tr. 143-144. Complainant explained that if law enforcement stops a driver and finds equipment with a serious safety issue, the driver will be "red flagged" and given a fine. *Id*. at 144. Complainant testified that Respondent had them drive equipment that should have been put out of service, and, in their opinion, this put the public in danger. *Id*. (describing driving a truck with a loose piece of steel trim that "could have went through somebody's windshield").

Complainant provided documentation of several of their safety complaints. Tr. 131-136, 138-142; CX 19 at 81-85, 87, 89, 91-94. Complainant stated that they were not terminated immediately upon reporting these issues and in most, but not all, cases they were afforded the use of different equipment when they placed equipment out of service. Tr. 131-134, 138-142. Complainant believed that the issues they reported were violations of safety standards, and in the end Respondent repaired the equipment. *Id*. Complainant testified that Respondent was forced to incur the cost of renting a truck when Complainant put a truck out of service and there were no other trucks for Complainant to drive and Respondent made it known that they did not appreciate Complainant requiring them to incur this cost. *Id*. at 137-138.

Slowness

Complainant testified that Respondent hired a consultant to assist Respondent in evaluating driver performance some six months or so prior to their termination. Tr. 121; CX 11. The consultant created driver rankings that established benchmarks and then ranked drivers by their ability to meet them. CX 11. Complainant stated that they were upset at the consultant's rankings because, in their opinion, a driver would have to "speed and/or skip post and pre-trips" to meet the route times required. Tr. 121, 123. Complainant testified that they told Pritchard that they would not speed to meet the benchmarks. *Id*. at 121-122, 123.

Complainant disputed Respondents' assertion as to the length of time it took them to drive certain routes. Tr. 123. Complainant introduced Google Maps printouts which showed the time it took them to drive their routes during the ten days they worked in March of 2021. *Id*. at 205; CX 24. Complainant also disputed being the last trailer back to the warehouse and averred that the warehouse personnel would not be waiting on them because "[t]here would still be several shuttles coming out of Woodbury, Minnesota." Tr. 123-124.

Termination

Complainant believed that Respondent decided to fire them some time prior to March 31, 2021. Tr. 117. On March 31, 2021, Respondent's owner, Andy Pritchard, contacted counsel and solicited advice about how to go about doing so in a way "that would mitigate any negative consequences back onto us." *Id*.; RX 1. The days after Pritchard contacted counsel, Respondent cut Complainant's hours. Tr. 119; CX 17 at 71 (bottom left corner). Complainant testified that they did not see the document that purported to notify them of the reduction in hours until they were given a copy of their personnel file in discovery. Tr. 124-125.

Complainant testified that they had a meeting with Pritchard on April 12, 2021.[8] Tr. 126. At the meeting Pritchard told Complainant something along the lines of "I don't need you making these other drivers get the idea that they can just put stuff out of service whenever they feel like it which is why you have to go." *Id*. at 137-138. They were thus asked to sign a "Last Chance Agreement," and they were given one week "to give Andy [Pritchard] a quit date or he would terminate me." *Id*. at 126-127. Complainant told Pritchard that the last chance agreement was illegal, and they would not sign it. *Id*. at 126. They also told Pritchard that they would not quit and that Pritchard would have to fire them. *Id*. Pritchard then scheduled another meeting for April 20, 2021. *Id*. at 127. Complainant believed that they were going to be fired at the April 20 meeting, and they sent Pritchard an email "explaining to him that firing me was illegal." *Id*. Complainant testified that they worked that day and went to the area outside of Pritchard's office, but did not go in. *Id*. at 127-128. Complainant said that they were worried that the meeting "would have turned into a shouting match, and I would have probably left. I mean, I would have went home probably." *Id*. at 128. Instead, they sent Pritchard a text and asked Pritchard to read the email they sent. *Id*. at 127-128. Pritchard declined to do so. *Id*.

d. Willem Stoman

Willem Stoman testified that they became Respondent's Assistant Second Shift Foreman in May of 2019. Tr. 150. Prior to working as Assistant Second Shift Foreman, Stoman worked as a First Shift Driver, a First Shift Foreman, and Second Shift Foreman. *Id*. As Assistant Second Shift Foreman they were Complainant's direct supervisor. *Id*. They remained Complainant's supervisor until Complainant was terminated. *Id*.

Stoman testified that Complainant was "a really good employee and we got along great" until Respondent brought in a consultant and changed their operating procedures. Tr. 150. The consultant put processes in place by which Respondent could evaluate their drivers based on metrics such as speed, idle time, schedule adherence, and total miles driven. *Id*. at 152.

Slowness

In Stoman's view, the metrics showed that Complainant "always took too long with his routes." Tr. 152-153. Complainant told Stowman that they took longer because they were paid by the

[8] The meeting date was erroneously referred to as April 12, 2020. Tr. 126. The meeting in question was scheduled April 12, **2021**.

hour and wanted to earn more money. *Id*. Stoman explained that Complainant's delay caused Respondent to have to pay warehouse personnel to have to sit and wait on Complainant "for three, four hours not having anything to do because they're waiting on that last trailer to get back." *Id*. at 153-154.

Stowman explained that after the workplace changes, drivers were assigned a score for "Schedule Adherence." Tr. 180; CX 11 at 64. Schedule Adherence measured the amount of time a driver took to complete a route. Tr. 180. If a driver finished a route in exactly the amount of time allotted, their schedule adherence would be 100%. *Id*. If they finished their route sooner, they would receive a score under 100; if they took longer to finish the route, their score would be over 100. *Id*. Drivers with scores over 100% were not disciplined. Tr. 185. Instead, Stoman "talked to them and tried improving them." *Id*. Drivers who sped to meet the route times were also talked to. *Id*.

Tardiness

With regard to schedule adherence, Stoman testified that while drivers were expected to show up when their shifts started, but they were not always required to remain on site if their equipment was not ready. Tr. 161-162. Stowman would sometimes permit them to stay home if their equipment wasn't ready. *Id*. Respondent began requiring drivers to show up on time and recording their tardiness after it began working with the consultant. *Id*. at 165-166. After Respondent began enforcing the rules, Complainant was late three times. *Id*. at 165; RX 5 at 10, 12. Complainant told their supervisor they would be late prior to two of their late arrivals, however, and because they gave prior notification, they did not receive any discipline or warning. RX 5 at 10, 12.

Once the equipment was ready, drivers were permitted "about half an hour to do their pre-trips, make sure they have the right trailer and truck before leaving." Tr. 162, 163. With regard to the DePere route, Stoman testified that the drivers were afforded nine and a half hours to do it, not six. *Id*. at 154. Stoman stated that they "tried getting him to speed up on that truck [on the DePere route], not speeding, but still doing it legally within the time that it should take that I had other drivers do it as well." *Id*. at 160. When that failed to work, Stoman changed Complainant's route so that warehouse personnel wouldn't have to wait on them. *Id*. at 159-160.

Reporting Safety Issues

Stoman testified that Respondent maintained a service agreement with Penske. Tr. 154-155. The agreement provided that issues arising from normal wear and tear would be repaired at no cost. *Id*. The Penske agreement also specified a maximum number of miles that each truck could be driven in a month, and as Respondent became busier it started assigning trucks to drivers so that trucks would not be over-driven. *Id*. at 157-158. This change occurred around February 2021. *Id*. at 158-159. Drivers were previously able to choose the truck they preferred, provided that it was available. *Id*. at 169-170. Stoman believed that Complainant began reporting safety concerns as a manner of protest after the changes were implemented. *Id*. at 161.

Stoman denied retaliating against Complainant for reporting needed repairs, however, stating that they "encourage every single driver that works for Blue Northern to do that." Tr. 161, 166-167, 171. They agreed that they told Complainant they were the only one who reported safety issues, however, and Complainant was in fact the only one who reported safety issues. *Id*. at 170-171, 172. They further agreed that because other drivers did not report safety issues, the issues were likely to build up and Complainant would be required to report them when they were assigned to drive a truck that they hadn't driven in some time. *Id*. at 172-173.

Stoman did not dispute that many of the safety issues Complainant reported were legitimate and that many of the trucks Complainant put out of service "needed to be put out of service." *Id*. at 174, 178-179; CX 1 at 3.

Workplace Changes/ Insubordination

Stoman testified that Complainant did not like having a truck assigned, and they also did not like it when Stoman changed their route. Tr. 159, 161. Stoman was of the opinion that Complainant preferred it when "I just let him do what he wanted." *Id*. at 166. After the changes were put in place, Complainant "kept going over my head to Andy [Pritchard] to the point where I just gave up and let Andy [Pritchard] deal with it." *Id*. at 150, 166. Stoman felt that Complainant did not respect them as a manager and wouldn't listen to their direction. *Id*. at 150-151, 183-184. They characterized this as insubordination and talked to Pritchard about it. *Id*. at 183-184.

e. Timothy O'Donnell

Timothy O'Donnell testified that they worked for Respondent for four years as Second Shift Warehouse Lead. Tr. 208-209. Prior to working as Warehouse Lead, they were a warehouse worker. *Id*. at 208.

O'Donnell and Complainant texted about work and in 2019 and 2020, prior to the workplace changes, Complainant and O'Donnell would text about when trucks were ready and when Complainant would be showing up. Tr. 214; CX 6. O'Donnell and the warehouse crew needed to be present when trucks arrived back from their routes. Tr. 209-210. O'Donnell testified that they worked out a system with Complainant where either of them could show up whenever they wanted on Sundays, within reason. *Id*. at 222. Drivers adhered to their schedules about ninety percent of the time after the workplace changes. *Id*. at 221.

O'Donnell knew Complainant to be "very thorough" in their pre-trips and post-trips. *Id*. at 216.

O'Donnell testified that Complainant took longer to drive the DePere route than other drivers, such that they would "plan on staying later if he was doing the DePere run." Tr. 210, 219. Management was also aware that Complainant took longer to drive that route. *Id*. at 211. O'Donnell testified that "it seemed like [Complainant] didn't have a whole lot of respect for [Stoman] as a manager." *Id*. at 211.

O'Donnell also admitted that they sent Complainant a good many extremely offensive and remarkably inflammatory texts while they were both employed by Respondent. *Id*. at 212; CX 5.

f. Andrew L. Pritchard

Andrew L. Pritchard testified that they have owned Respondent for twenty-one years. Tr. 224. They began with two trucks, and expanded as the work permitted. *Id*. at 224-225.

Pritchard testified that Complainant worked for Respondent as a driver for eight years. *Id*. at 225. Pritchard also drove at the time, and Pritchard and Complainant were friends outside of work. *Id*. at 225, 226.

Schedule Adherence

Pritchard testified that "if a truck is late, it puts the warehouse crew late," and "[t]hat might put the first shift about a day late. It's a domino effect" Tr. 234. Pritchard explained that sometimes the delays would be on the customer side, but mostly they knew when a driver needed to go out." *Id*. at 234-235.

Pritchard denied that Respondent maintained an "open schedule" but they agreed that scheduling and equipment issues could result in a driver not being able to leave at the required time. *Id*. at 234-235. Pritchard also explained that prior to the workplace changes, they were "very lenient," and "wanted to make sure that the drivers were not wasting their time or wasting my time and me paying them either." *Id*. at 235. As their business grew, however, Respondent "had to be a little more strict on when our start times were," though "I was never, you know, one minute late and you're tardy kind of thing, you know. Half an hour late, I'd start getting concerned." *Id*. Pritchard acknowledged that Complainant was, however, written up for being six to ten minutes late, but Pritchard explained that the write up came "after he was counseled for basically a week to show up when he was supposed to." *Id*.; RX 5.

Insubordination

Pritchard testified that Complainant had a contentious relationship with their supervisor, Willem Stoman, and Complainant told Pritchard that "he could do Willem's job from the seat of a truck" on more than one occasion. Tr. 233. As a result of this contentiousness, Complainant came to Pritchard with their concerns instead of addressing them to Stoman. *Id*. 233-234.

Workplace Changes

Pritchard testified that they began having problems with Complainant after they enacted workplace changes recommended by a consultant who was hired to help them reorganize their business. Tr. 227, 231-232. The consultant was hired in September of 2020. *Id*. at 232. Pritchard stated that the consultant helped them create driver scorecards so Respondent could see how drivers were performing in various areas. *Id*. at 228. The rankings let them know that some drivers were speeding, for example. *Id*. at 228-229. Pritchard explained that they didn't know drivers were speeding before the workplace changes, because they weren't correlating their

speed with global positioning system (GPS) locations.[9] *Id*. Pritchard stated that the rankings did not affect the drivers' pay and "[w]e weren't issuing any warnings or any sort of – anything detrimental at all. They were simply rankings." *Id*. at 228, 230. Respondent did use the rankings to identify and correct problems, however. *Id*. at 229. The rankings were also used to identify which drivers spent the most time idling, which wasted fuel, and to measure the drivers' "schedule adherence," which was a measure of how long the drivers took to drive routes. *Id*.

The rankings did not accord much weight to a driver's safety, however. Tr. 229. Pritchard explained that when they hired a driver, "I'm expecting that driver to operate the vehicle safely in the first place. So ranking on something they should be doing Seemed redundant to me." *Id*. Respondent did build in thirty minutes for pre and post-trip inspections, however, when they developed the "schedule adherence" metric. *Id*. at 229-230.

Reporting Safety Issues

Pritchard testified that Complainant knew the rules about safety and compliance, though Complainant's "application of them weren't [sic] always practical." Tr. 233. Prichard described Complainant as "a very thorough individual," and a "safe driver," though "[p]ractical is not a word I would use with him." Tr. 233, 240.

In Pritchard's opinion, Complainant began a "campaign of super inspections" because they were unhappy. *Id*. at 238-239, 265-266. Pritchard testified that when Complainant reported something that was a "genuine safety concern, we got it fixed immediately." *Id*. at 253, 254, 265-266; RX 6. Pritchard felt that "the vast majority of his complaints were small and should have been repaired at the next scheduled preventative maintenance time." Tr. 253, 268-269; RX 3. Instead, Complainant wrote it in the "ELD program,"[10] which required Respondent to repair it "at our next soonest or next available attempt, which we did." Tr. 267. Respondent agreed, however, that defects noted on a pre-trip are supposed to be noted in the ELD, "[i]f it's a safety violation." *Id*. at 267-268. If Complainant didn't write up the issues, Respondent "would have to rely upon the next driver to do a proper pre-trip inspection and let us know about it." *Id*. at 298. The other option was for a driver to hand write a note about the issue and give it to a manager so that the manager could take care of it. *Id*. at 298-299.

Respondent agreed that burned out light bulbs were supposed to be noted in the ELD if they were found on a pre-trip, even though doing such would require Respondent to give Complainant a different piece of equipment. Tr. 268-269, 299-300. Pritchard noted, however, that a driver stopped for a light issue would not be red flagged or put out of service. *Id*. at 299. Instead, the patrolman would "issue a fix it ticket and tell us to get it repaired, and we have fifteen days to get it fixed." *Id*. If the patrolman found a serious issue, however, such as an

[9] Pritchard explained that "half the time" the speeding occurred when a driver was "coming into town and the speed limit changed from 55 to 45 to 35 … there was a lot of that." Tr. 229.

[10] If a driver noted a defect in the ELD program during their pre-trip, "the computer system actually sends a message right to the Penske shop" so that Penske would know that it was something to be fixed. Tr. 298.

inoperable brake, they would write an "out of service violation," which would require the truck to "sit there until a wrecker comes and either tows it away or it gets repaired on the site." *Id*. at 300.

Pritchard testified that they were told that Complainant put a truck out of service because it had a rusty shock. Tr. 264-265; RX 3. Pritchard testified a "loud" power steering pump might be a legitimate safety concern "[i]f it was in imminent danger of failing," but "[b]ecause it was loud doesn't mean that it was imminently going to fail." Tr. 261; CX 19 at 81. They also testified that "a loose strap on the bottom air tank causing the tank to shake," might be a legitimate concern "[i]f it was in imminent danger of falling." Tr. 262-263; CX 1 at 2. Pritchard noted, however, that "[t]here are two straps on that tank, and it if was just long enough to get it to Penske, it's perfectly safe." Tr. 263. Pritchard also testified that a short in the electrical cable that caused trailer lights to flicker could be a safety concern, but it was "subjective." *Id*. at 272; CX 1 at 2. They didn't know whether a truck with a broken hood latch should have been put out of service, since trucks have two hood latches, but they agreed that it should have been repaired at the next scheduled preventative maintenance. Tr. 277-278. They later stated that the hood latch was "a legitimate issue." *Id*. at 297.

Pritchard admitted that the repair records showed that the shock Complainant reported was broken, not rusty. Tr. 265; CX 19 at 93. Pritchard also testified that Complainant's power steering claim was addressed in the end, because "Penske apparently agreed that it needed to be replaced and they replaced it." Tr. 261; CX 19 at 81. Penske also agreed that the tank strap needed to be repaired, as did the short in the electrical cable. Tr. 264, 272-273; CX 19 at 94.

Pritchard testified the Complainant also wrote up "[a] door that squeaked," and a lumpy seat,[11] and trucks that were not as clean as Complainant wanted them to be. Tr. 297.

Pritchard believed that Complainant conduced regular inspections on trucks they liked, and "super inspections" on trucks they didn't like. *Id*. at 303. Pritchard testified that when Complainant put a truck out of service and there were no more trucks available under Respondent's lease agreement with Penske, Respondent would have to rent a truck for the day which caused "financial consideration." *Id*. at 253-254. Pritchard explained that Respondent leased their trucks from Penske and Penske would repair the defects when their schedule permitted. *Id*. Penske preferred to wait and fix all the small things at once. *Id*. at 254. Additionally, the Penske lease had a 10,000 mile a month drive limit for most of the trucks. *Id*. at 248-249. As the business grew, Respondent started "bumping up against that 120,000 or 10,000 mile a month limit" and so they began to assign trucks in a way that ensured that Respondent maximized the leased miles on each truck and didn't "have one truck at 130,000 another at 70,000." *Id*. at 249. Pritchard did not dispute that Respondent advised Complainant that refusal to drive a legal, safe truck could result in a "detrimental effect to your pay." *Id*. at 284.

[11] Pritchard acknowledged that Complainant had a back issue and, though Respondent disagreed that the seat was a safety issue, it fixed the seat. Tr. 297.

Complainant's Firing

On March 31, 2021, Pritchard drafted an email to counsel, in which they described Complainant as "becoming increasingly difficult and belligerent." RX 1. Pritchard noted that, among other things, Complainant "writes up the slightest irregularities as out of service violations on our equipment. When told that his violations don't rise to the level of being out of service, he claims safety violations." *Id*. The letter also referenced Complainant's "constant tardiness, and unsatisfactory work (being excessively slow and milking the clock)." *Id*.

On April 12, 2001, Pritchard scheduled a meeting with Complainant to "set a date for his termination." Tr. 237, 242. Pritchard came to the decision after noting that "all right, he's unhappy. Everybody else around him was unhappy. So let's make a plan and move on, you know." *Id*. at 237, 242, 302-306. Pritchard noted that "[m]ost of the incidents revolve around Clif [Vollendorf] putting trucks out of service for very minor offenses, i.e., rusty shock, lumpy seat, dirty windshield, or mis-aligned headlights." RX 3. Pritchard wanted Complainant to feel that they could leave with dignity, so they offered a severance and "several things to soften the blow." Tr. 237-238, 242. Complainant declined to offer a date upon which they would leave. *Id*. at 242. Pritchard scheduled another meeting with Complainant eight days later, on April 20, 2021 at 6:00 p.m. *Id*. 242-243. Pritchard's meeting notes from April 12, 2021 state that "[a]t our next meeting, I will put a date on his departure." Tr. 240; RX 3 at 6. Complainant did not appear at the April 20 meeting. *Id*. at 243-244. Instead, Complainant sent Pritchard an email at 5:52 p.m. *Id*. at 244. Pritchard had his counsel send a response and when Complainant showed up for his next shift on April 22, 2001, Pritchard "requested his timecard and informed him he was no longer employed." *Id*. at 245-246.

IV. Analysis

To prevail in a STAA whistleblower claim, a complainant must prove by a preponderance of the evidence that: (1) they engaged in protected activity; (2) the employer took adverse employment action against them; and (3) their protected activity was a contributing factor in the adverse employment action. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a)-(b); *Johnson v. Norfleet Transp.*, ARB No. 2020-0037, ALJ No. 2019-STA-00022, slip op. at 5-6, 2021 WL 423987 (ARB Jan. 29, 2021). If a complainant succeeds in making these showings, a respondent may rebut by showing that it would have taken the same adverse action in the absence of the complainant's protected activity. 29 CFR § 1978.104(e)(4). Respondent must show this by clear and convincing evidence. 49 USC § 31105(b) (referring to the burdens of proof at 49 USC § 42121(b)(2)(B)(ii) and (iv))).

a. Timeliness

A complainant must file a complaint within 180 days of the alleged adverse action. 49 USC § 31105(b); 29 CFR § 1978.103(d). Respondent formally terminated Complainant on April 22, 2021. Tr. 245-246; RX 6.

Complainant timely filed their complaint on May 9, 2021.

b. Protected Activity

Complainant argues that they engaged in protected activity when they voiced safety concerns by "putting dangerous equipment Out of Service" and by "doing my legally required fifteen minute pre and post trip inspections." *Complainant's Brief* at 1, 2; *Complainant's Responsive Brief* at 1.

Complainant argues that they made their first out of service complaint on February 26, 2021, after they returned from medical leave for an on-the-job-injury caused by faulty equipment. Tr. 92 (faulty landing gear broke Complainant's finger), 237 (Complainant returned from medical leave in February of 2021); *Complainant's Responsive* Brief at 1; CX 1 at 1.

Respondent does not dispute that Complainant voiced safety concerns to management or put equipment out of service. Tr. 7; *Respondent's Responsive Brief* at 3. It does dispute whether Complainant engaged in "protected activity" as that term is defined by the STAA and its implementing regulations. *Respondent's Brief* at 2. It specifically disputes whether the safety issues Complainant raised were sufficiently serious to have constituted violations of the Act and whether Complainant raised them to the right people; it argues that Complainant used safety complaints as a means to avoid using equipment they didn't like. Tr. 8, 253-254, 303; *Respondent's Responsive Brief* at 3.

Respondent would have preferred Complainant to continue to operate the equipment unless there was an "imminent" safety concern. Tr. 261-264. It would have preferred Complainant to note what it considered to be "small defects" on a piece of paper and then place them in a supervisor's box. *Id*. at 254, 278. Respondent argues that noting small defects in this way would permit management and Penske to fix several defects at once. *Id*. at 254, 278 ("I'm saying [a broken hood latch] needed to be repaired. It probably could have waited until the next PM. PM is preventative maintenance schedule."), 298-300 (non-serious issues could be written down and placed in a manager's box, so the manager would know that it needed to be fixed at a later time).

Complainant argues that they were required by law to conduct proper pre-trip inspections and to properly report safety issues found during the pre-trips. *Complainant's Brief* at 1. Complainant argues that when they were able to choose which truck they drove, they drove trucks they knew to be safe and properly maintained, which reduced their need to put trucks out of service. Tr. 172-173. After Respondent began assigning trucks, however, they were required to report more issues because they were the only driver reporting safety issues; other drivers did not report them. *Id*.; CX 9 at 50. Respondent did not dispute that other drivers failed to report safety issues and, as a result, the issues might have built up between Complainant's inspections. Tr. 173; CX 9 at 50.

An employee engages in STAA protected activity when "the employee … has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order." 49 USC § 31105(a)(1)(A)(i); 29 CFR § 1978.102(b)(1). An employee also engages in STAA protected activity when

> the employee refuses to operate a vehicle because (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

49 USC § 31105(a)(1)(B)(i); 29 CFR § 1978.102(c)(1)(i). A driver alleging protected activity for refusing to drive due to a "reasonable apprehension of serious injury to the employee or the public" must show that "a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health" and also that they sought correction of the hazardous safety or security condition from the employer, but the employer refused to correct the hazard. 49 USC § 31105(a)(2); 29 CFR § 1978.102(f).

Under 49 C.F.R. § 396.11(a), every motor carrier "shall require its drivers to prepare a written report at the completion of each day's work covering vehicle parts and accessories." The report "shall cover **at least** … [s]ervice brakes including trailer brake connections; [p]arking brake; [s]teering mechanism; [l]ighting devices and reflectors; [t]ires; [h]orn; [w]indshield wipers; [r]ear vision mirrors; [c]oupling devices; [w]heels and rims; [and] [e]mergency equipment." 49 C.F.R. § 396.11(a)(1)(i)-(xi) (emphasis added). Drivers are required to "list any defect or deficiency discovered by or reported to the driver which would affect the safety of operation of the vehicle or result in its mechanical breakdown." 49 C.F.R. § 396.11(a)(2)(i). "Drivers are not required to prepare a report if no defect or deficiency is discovered by or reported to the driver." *Id*. "Prior to requiring or permitting a driver to operate a vehicle, every motor carrier or its agent shall repair any defect or deficiency listed on the driver vehicle inspection report which would be likely to affect the safety of operation of the vehicle." *Id*. at (3)(i).

Even though motor carriers are required to repair defects or deficiencies listed on the post-trip which would be likely to affect the safety of operation of the vehicle, the STAA also requires a pre-trip. Before driving a vehicle, a driver "shall … [b]e satisfied that the motor vehicle is in safe operating condition; [r]eview the last driver vehicle inspection report if required by § 396.11(a)(2)(i); and [s]ign the report to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed." 49 C.F.R. § 396.13(a)-(c).

Complainant reasonably believed that they were required to inspect their vehicle prior to operation, review the last driver inspection report, and attest that required repairs had been performed or note those needing repair. Complainant thus engaged in protected activity when they took these steps regarding conditions they reasonably believed to be safety violations. *Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201, 212 (4th Cir. 2009) (noting that "complaints to company management are protected activity if the complaint is "based on a reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation."); *Hoffman v. NOCO Energy Corp.*, ARB Case Nos. 15-070, 16-009, 2017 WL 3000772, * 3 (June 30, 2017);

see also TransAm Trucking, Inc. v. Admin. Rev. Bd., 833 F.3d 1206, 1212 (10th Cir. 2016) (noting that the purpose of the STAA is to "encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles.") (quoting *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987)).

Complainant's belief as to whether the conditions they reported would be likely to affect the safety of operation of the vehicles they inspected was reasonable, and this is well-demonstrated by the conditions Complainant reported and the Penske Vehicle Work Summaries. CX 1; CX 19.

On February 27, 2021, Complainant reported that the Number 30 truck had a "loud power steering noise in the steering shaft coming into the cab" and put the truck out of service. Tr. 260-261; CX 1 at 1 (right side photo). While Respondent debated whether the condition was sufficiently imminent to be a "legitimate safety concern," such that the truck should have been placed out of service, the Penske Vehicle Work Summary for Truck Number 30 shows that the power steering pump had failed and needed to be replaced. Tr. 260-261; CX 19 at 81.

On April 3, 2021, Complainant reported that the "driver side bottom air tank [was] bent and loose," on the Number 19 truck and put the truck out of service. Tr. 263; CX 1 at 2 (upper left side photo). Complainant testified that the air tank was a safety risk because it could fall off and hit the car behind them. Tr. 144; CX 17 at 72. Respondent disputed whether a single loose strap rose to the level of an out of service complaint because "[t]here are two straps on that tank, and if it is just long enough to get it to Penske, it's perfectly safe." Tr. 263. The Penske repair records, however, show that the air tank strap was cracked and needed repair. *Id*.; CX 19 at 90.

Respondent also disputed whether shorts in a trailer's electrical cable that caused its lights to flicker and a broken hood latch were conditions sufficient to warrant Complainant placing equipment out of service. Tr. 272 (short in wire was "subjective" but "could be" legitimate safety concern), 277-278 (broken hood latch was safety concern, but "probably could have waited until the next PM."). Complainant explained that a broken hood latch was a "huge safety risk if the hood pops up when I'm driving and I can't see." *Id*. at 144. The Penske service records showed that the light cord end on the tractor side was worn and needed to be replaced and that the passenger hood latch was broken and needed to be replaced. CX 19 at 82 (hood latch), 94 (electrical short).

Complainant did report doors needing lubricant and headlights that were aimed too low, but these conditions were reported in concert with other conditions such as a misaligned steering wheel and an electronic display that would not shut off at night thus causing it to be "too bright at night in the drivers face." CX 1 at 1 (truck number 17, reported on February 26, 2021); CX 19 at 83. Complainant also reported an unglued coat hanger along with stone chips on a passenger side window, but it does not appear that they reported these conditions in such a manner as to put the truck out of service. Tr. 270; CX 1 at 2 (truck number 18, reported April 16, 2021); CX 19.

I find that Complainant reasonably believed that the conditions they reported were safety violations and that their refusal to drive the equipment they placed out of service was also reasonable, in light of the conditions they noted and the repairs made. I also credit Complainant's testimony, as corroborated by Stoman's testimony, that Complainant was the only driver regularly noting safety issues, and as such, they were saddled with the reporting of them. Tr. 170-173. Complainant thus engaged in protected activity when they reported these conditions to management and when they refused to operate equipment because of their safety concerns.

c. Adverse Action

Terminating an employee is an adverse action. Respondent admits to firing Complainant on April 21, 2021, and it confirmed the firing by letter on April 22, 2021. Tr. 8; RX 6. It also admits to asking Complainant to sign a "Last Chance Agreement" on April 12, 2021, and telling them they could leave with dignity and with a severance agreement on that same date, if they would provide a quit date. Tr. 242, 237-238, 306; *Respondent's Responsive Brief* at 2-3; CX 3.

The Last Chance Agreement required Complainant to admit that they were consistently tardy, consistently took more time to complete routes than other drivers, were consistently "belligerent and obstinate whenever his supervisor(s) attempt to 'coach' him to improve productivity." CX 3. It provided that Complainant would, going forward, show up when their shift started, respond to criticism with respect, and "speed up in order to safely complete his route(s) closer to the time it takes BND's other drivers to complete the same route." *Id*. It also provided that Complainant's "continued employment will be evaluated quarterly starting at the end of April 2021." *Id*.

Despite the language of the Last Change Agreement, Respondent had already decided to fire Complainant and they asked Complainant to set a voluntary departure date at the April 12, 2021 meeting. Tr. 237-238, 242.

Discharge is a type of adverse action and Complainant's discharge affected their compensation, as well as the terms, conditions, and privileges of their employment. 29 CFR § 1978.102(a). I thus find that Respondent's discharge was an adverse action.

d. Causation

To demonstrate that their protected activities were a contributing factor in Respondent's adverse action, a complainant need not show a retaliatory motive or that the protected activity was the only motivating factor. Instead, a complainant need only show that their protected conduct, alone or in combination with other factors, tended to affect in any way the outcome of the discipline or other adverse action. *Tocci v. Miky Transport*, ARB No. 15-029 slip op. at 4, 2017 WL 2838085 (May 18, 2017).

To establish that the protected conduct was a contributing factor, Complainant may provide either direct or circumstantial evidence. *Beatty v Inman Trucking Management, Inc.*, ARB No. 13-039 slip op at 8-9, 2014 WL 2917587 (May 13, 2014). Direct evidence is evidence that

conclusively links the protected activity and the adverse action without relying upon any inference. *Id*. 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 they engaged in protected conduct. *Id*.

The timing of events is interesting in this matter, as two events coincided and both played a role in creating the hostility between Complainant and Respondent. First, Complainant returned from medical leave for an on-the-job-injury caused by faulty equipment and began making safety complaints. Tr. 92 (faulty landing gear broke Complainant's finger), 231 (Complainant returned form medical leave in February of 2021), 237 (same); *Complainant's Responsive Brief* at 1; CX 1 at 1. Second, Respondent changed several of its business practices. Tr. 285-286 ("Both events kind of happened simultaneously, yes, because upon your return from your medical leave, both things happened at once. You started putting -- doing your super inspections and you started playing a little more fast and loose with the roster and the schedule.").

The business practice changes began in the fall of 2020, after Respondent hired a consultant to help them maximize efficiencies. Tr. 228-231; *Respondent's Responsive Brief* at 2. Complainant was on medical leave during the winter of 2020, and when they returned Respondent had instituted a rule requiring drivers to show up when they were scheduled, even if their equipment wasn't ready. *Id*. Respondent had also instituted "driver scorecards" that ranked drivers by several metrics, including total miles driven, speed violations, idle time, ELD non-compliance and "compliance rank." *Id*.; CX 11. "Compliance rank" ranked drivers by whether they showed up when their shift was scheduled to begin, even if their equipment was not ready. Tr. 250-251.

Complainant argues that Respondent fired them because of their safety complaints. Tr. 9. Respondent argues that Complainant's firing was due to their tardiness, their relative slowness relative to other drivers, and their refusal to respect the chain of command. *Id*. at 8, 231-232, 304; RX 6; RX 10 at 2; *Respondent's Responsive Brief* at 2-3. Respondent basically argues that it transitioned from a much more lax, informal way of doing things to a more structured, formalized operation and Complainant refused to abide the new structure. *Respondent's Responsive Brief* at 2-3; RX 10 at 2.

Respondent does not deny that it was irritated by Complainant's safety complaints. Tr. 267. It believed that Complainant "put far more [trucks and trailers] out of service than was actually technically out of service," and it took issue with whether several of the conditions Complainant reported in their ELD were safety violations. *Id*. at 267-268. Respondent explained that when safety concerns are listed in the ELD, Respondent is "obligated to take care of them." *Id*. at 267-268. If Complainant had not listed their complaints in the ELD, Respondent could have repaired them at the next scheduled preventative maintenance. *Id*. at 267-268, 278.

Tardiness

Complainant avers that Respondent began making them show up when their shift began only after they began making safety complaints and, as such, Respondent's enforcement is just a pretext for firing them because they were making safety complaints. Respondent avers that its firing was, in part, due to Complainant's consistent tardiness and had nothing to do with Complainant's protected activity. *Respondent's Brief* at 7, *Respondent's Responsive Brief* at 3.

Complainant alleges that Respondent's normal practice was to require drivers to show up when their equipment was ready for use, not when their shift was supposed to start. Tr. 109-110, 129. Respondent argues that it hired a consultant in September of 2020 to help it maximize its efficiencies and one of the consultant's recommendations was to have the workers arrive when their shift began, instead of when their equipment was ready. *Id*. at 165-166, 231-232. After consideration of all of the testimony on this issue, I note that the tests and testimony Complainant put forth to evidence a flexible start time are dated prior to the workplace changes. *Id*. at 69, 93, 94; 109-110, 113, 222 (Complainant had an open schedule on Sundays in October of 2020); CX 6; CX 8 at 45. I thus credit the testimony of Respondent's witnesses on this issue, and I find that requiring Complainant to show up when their shift was scheduled to start was not adverse action, and it does not evidence retaliatory motive.

Respondent's enforcement of the new start time procedure does evidences retaliatory motive, however. Respondent argues that it terminated Complainant, in part, because they had "consistently been tardy" and Respondent had given them "several warnings regarding tardiness." CX 3; RX 6. The evidence of record, however, shows that Complainant was no more tardy than other drivers.[12] CX 11 at 63-64. It also shows that Complainant did not, in fact, receive "several warnings" regarding their tardiness; they received only one verbal warning. Tr. 236-237; RX 5 (showing that Complainant was late three times, but they notified their supervisor that they would be late two of the times and thus no warning was given). Respondent argues that it counseled Complainant "for basically a week," prior to issuing them this one warning, but it also avers that the factors listed on the driver scorecards were never used "for any sort of punishment or reward. It's simply a scorecard." Tr. 227, 235, 285. The evidence of record simply does not support Respondent's assertion as to Complainant's continued tardiness. Nor does it support a finding that Respondent enforced the schedule against anyone else, including drivers who were less compliant than Complainant. I thus find that tardiness was not a good faith basis for Complainant's termination.

Slowness

Complainant argues that the driver score cards show that Respondent made a choice to elevate speed above safety and this shows that Respondent didn't value safety, thus supporting their assertion that they were fired due to their safety complaints. Tr. 121-122, 184-185; *Complainant's Responsive Brief* at 1-2. Respondent argues that Complainant was fired, in part,

[12] Adherence to the start time was not measured by "schedule adherence." Schedule adherence measured a driver's ability to complete a route within a specified time. Tr. 229-230. Showing up on time was measured by a driver's "compliance score." Tr. 250-251.

due to their relative slowness in completing routes, and not due to their protected activity. Tr. 60, 160; CX 3 at 12 (asking Complainant to affirm that they had "consistently taken more time to complete routes than other drivers").

The evidence of record shows that Respondent was irritated at the time Complainant took to complete the DePere route, but it does not support Complainant's assertion that Respondent's choice to rank drivers by speed shows that Respondent did not value safety. Tr. 218-219, 229-230. It also does not support Respondent's assertion that Complainant was significantly slower than other drivers to complete routes, however. *Id*. at 228-229, 231, CX 11.

The evidence of record shows that Complainant was far from being the slowest driver. CX 11 at 64. They were, in fact, the sixth fastest out of fourteen drivers and, again, Respondent avers that it did not use the factors listed in the driver ranking cards for punishment or reward, vis a vis other drivers.[13] Tr. 227; CX 11 at 64. Respondent argues that Complainant was, however, the only driver who resisted its efforts to improve the overall scores. Tr. 181-182. Complainant's resistance is discussed in connection with their insubordination, below.

The evidence does not show that Respondent's workplace changes showed a disregard for safety, and it does not show that Complainant took more time to complete routes than other drivers or that other, slower drivers were similarly disciplined. I thus find that relative slowness was not a good faith basis for Complainant's termination.

Protected Activity

Respondent does not dispute that Complainant was fired, in part, for making safety complaints, which Respondent often referred to as conducting "super inspections." Tr. 239 ("I started to draw the line at these super inspections that he was doing" and this led to the April 12, 2021 meeting). Respondent's notes from the April 12, 2021 meeting note that most of the issues between Respondent and Complainant "revolve around Clif [Vollendorf] putting trucks out of service for very minor offenses, i.e., a rusty shock, lumpy seat, dirty windshield, or mis-aligned headlights." RX 3 at 1.

The shock Complainant reported was not just rusty, however, it was broken. Tr. 264-265; CX 19 at 93. The seat was not just lumpy; the seat cushion needed replacement due to age and use. CX 19 at 84. Complainant did not just report mis-aligned headlights; they reported this condition in concert with other, more serious safety concerns. *See* CX 1 at 1 (headlight concern reported along with failed steering pump); CX 19 at 81 (showing replacement of failed power steering pump). And Respondent understood that while Complainant complained about dirty windshields, Complainant did not note this condition in an eLog or made a safety complaint regarding dirty windshields. Tr. 279.

[13] The Google Maps printouts Complainant introduced also help show Complainant's speed relative to other drivers. Tr. 205-206; CX 24

Respondent attempted to backtrack on several of these allegations at hearing, arguing that they were told that the shock was just rusty; they didn't know that it was anything beyond that. Tr. 264-265. They also tried to argue that "So even as Penske said the seat cushion was fine, and every other driver would run it, and I would have run it myself because I'm a CDL driver as well, I told them to replace the seat because I don't want to hear about it again," despite the repair records showing that Penske did in fact find the seat needed replacement. *Id*. at 239; CX 19 at 84.

Respondent also argued that Complainant "always had the right to take another truck" if they felt their assigned truck was unsafe, but Respondent noted that doing so was likely to cost it money as doing so might cause a truck to go over mileage, or it might require Respondent to lease a truck for the day. Tr. 253-254, 263.

The evidence of record shows that Complainant's protected activity played a causative role in Respondent's decision to terminate.

e. Employer's Rebuttal

Even though Complainant has shown that their protected activity played a causative role in Respondent's decision to terminate, Respondent may rebut by showing that it would have taken the adverse action notwithstanding Claimant's protected activity. An employer satisfies its burden to show that it would have taken the adverse action in absence of a complainant's protected activity when it shows by clear and convincing evidence that it is "highly probable" that it would have taken the action in the absence of protected activity. 20 C.F.R. § 1978.104(e)(4); 49 USC § 31105(b) (referring to the burdens of proof at 49 USC § 42121(b)(2)(B)(ii) and (iv)); *Taylor v. Combined Transport, Inc.*, ARB Case No. 2021-0034, 2022 WL 1091414, * 4 (Mar. 9, 2022) (citing *Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 6, 2020 WL 3146472 (May 13, 2020)).

Employer argues that it "would have terminated Complainant in the absence of his protected activity" because Complainant was insubordinate and had a "history of being litigious." *Employer's Brief* at 1, 15. Respondent argues that Complainant's insubordination took many forms, including Complainant's failure to arrive at work on time, relative slowness, refusal to abide the direction of their immediate supervisor, and their refusal to attend a meeting with Andrew Pritchard on April 20, 2021. *Respondent's Brief* at 1. I find that Complainant's tardiness and relative slowness were not good faith bases for firing for the reasons discussed above, and I find that Complainant's tardiness and relative slowness do not evidence insubordination for the same reasons.

I find the same as regards Complainant's failure to attend the April 20, 2021 meeting. Respondent admits that it knew it would fire Complainant before April 12, 2021, and it told Complainant as much. Tr. 126, 237-238; s*ee also* RX 6 at 14 ("Make no mistake – The decision to terminate the employment relationship was made weeks ago due to poor performance and attitude."). Given that both Complainant and Respondent understood that Complainant had

been all but fired prior to April 20, 2021, I do not find that Complainant's behavior on that date was cause for termination.

Complainant was indeed insubordinate, but the informality of Respondent's workplace weighs against a finding that their insubordination, alone, made it highly probable that Respondent would have fired Complainant if Complainant had not made safety complaints.

Complainant routinely challenged the directions of their direct supervisor by going to Pritchard, for example, but such informality appeared to be the norm rather than an exception. Tr. 109-112; CX 8. The texts in evidence do not show that management directed Complainant to respect the chain-of-command when Complainant broke it; the texts do not show that Respondent respected their own chain-of-command or the responsibilities thereof. CX 8; CX 9. This could be because of the past friendship between the parties, it could be because Respondent did not maintain a very formal workplace, or it could be both. Tr. 110 (Complainant discussed their issues with their immediate supervisor with Pritchard "[b]ecause me and Andy [Pritchard] at the time were friends"), 209 (O'Donnell considered Complainant "a close friend"), 226-227 (explaining that Respondent needed to being in a consultant to help them become a "a professional trucking company"), 238 (Pritchard considered Complainant a "friend at one time").

The most shocking example of this informality and lack of formal discipline for insubordination are the texts of Warehouse Lead Tim O'Donnell. Tr. 212; CX 5. O'Donnell sent an hours'-long diatribe full of extremely offensive personal attacks to Complainant while intoxicated, and while they were not Complainant's manager, they did have supervisory responsibilities over other employees and their opinion as to the speed with which Complainant completed routes was considered by other managers and Respondent's President. Tr. 208-209, 210-211, 121. There is no evidence to suggest that O'Donnel was disciplined for this behavior, just as there is no evidence to suggest that Complainant was disciplined for their insubordination before they began making safety complaints.

I thus find that Respondent failed to show that it would have taken the same action notwithstanding Complainant's complainant activity and that Complainant's protected activity also played a role in Respondent's decision to terminate.

g. Remedies

Back Pay

Complainant seeks reinstatement with the same pay, terms, conditions, and privileges of employment. Tr. 9. 49 USC § 31105(b)(3)(A)(i)(iii); 29 CFR § 1978.109(d)(1). Complainant also states, however, that they didn't lose any pay because they "ended up getting another job the very afternoon I was fired." Tr. 9-10; *see also* Complaint at 3 ("I started a new job as a truck

driver the following day at $21.00, now $22.00 as opposed to the $21.50 [with Respondent]").[14] If Complainant wishes to argue that they are due back pay for the time that they suffered a fifty-cent diminution in their hourly rate of pay, they must submit a brief on remedies **no later than fifteen days from the date of this order**. Complainant's brief on remedies may not exceed four pages, not including exhibits. It must include records evidencing the pay Complainant received at their new job, how long they earned the rates of pay, and the hours they worked. If Complainant files a brief on remedies, Respondent will be afforded fifteen days in which to respond. Respondent's response brief will also be limited to four pages, not including exhibits.

Attorneys' Fees

Complainant did not hire counsel, and they have thus not sought reimbursement for attorneys' fees or costs. 49 USC § 31105(b)(3)(A)(i)(iii) and (b)(3)(B); 29 CFR § 1978.109(d)(1);

Abatement

Respondent is **ORDERED** to abate the violation by posting this decision as well as the regulations applicable to pre-trips (49 C.F.R. § 396.13) and post-trips (49 C.F.R. § 396.11) at its place of business in a conspicuous location frequented by drivers, such as a breakroom, locker room, or clock-in area. 29 C.F.R. § 1978.105(a)(1).

Reinstatement

Respondent is **ORDERED** to offer reinstatement to Complainant with the same pay, terms, conditions, and privileges of employment as they would have had had they not been terminated. 29 C.F.R. § 1978.105(a)(1). In making this ruling, I considered whether the hostility between the parties is such that reinstatement would not be wise because of irreparable damage to the employment relationship. *Simpson v. Equity Transportation Co., Inc.*, ARB Case No. 2019-0010, 2020 WL 3146472, * 8-9 (May 13, 2020). While the parties do have animus, I do not find that it the employment relationship irreparably damaged. Complainant may, nonetheless, decline such reinstatement if they so choose.

Punitive Damages

Finally, I order Respondent to pay $5,000 in punitive damages to Complainant. Punitive damages are warranted when the evidence shows "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Simpson*, ARB Case No. 2019-0010, 2020 WL 3146472, * 11 (citing *Smith v. Wade*, 461 U.S. 30, 51 (1983)). The proof in this matter showed that Complainant was the only driver making safety complaints and putting unsafe equipment out of service. By discouraging safety complaints, Respondent showed a reckless disregard for the Complainant's safety, the safety of its other drivers, and the safety of other commercial and non-commercial drivers who could have been injured by the safety issues that went unreported by the other drivers.

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[14] Complainant also states that they were "going to get a raise on the next pay period." *Complaint* at 3. I take this to mean that Complaint believed that they would be given a raise if Respondent had not terminated them. There is no evidence in the record as to how Respondent accorded raises or why Complainant believed that they would be given a raise.

It is **SO ORDERED**.

WILLOW EDEN FORT
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 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.