

U.S. Department of Labor

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Issue Date: 23 April 2012

CASE NO. 2012-STA-00001

In the Matter of:

CLIFTON PHILLIPS,
Complainant,

v.

CON-WAY FREIGHT,
Respondent.

Appearances: Clifton Phillips
Complainant, pro se

Daniel W. Egeler, Esq.
Con-Way Freight
For Employer/Carrier

Before: Paul C. Johnson, Jr.
Associate Chief Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This proceeding arises from a claim under the employee protection provisions of the Surface Transportation Assistance Act (“STAA” or “the Act”), 49 U.S.C. § 31105 et seq., and the implementing regulations found at 29 C.F.R. Part 1978. Complainant, Clifton Phillips, alleges he was terminated for raising safety concerns, and for refusing to drive because he was fatigued. Respondent alleges Complainant was terminated for falsifying his driver’s log and pay sheet. After a complete review of the record, I find that Respondent did not violate the Act.

Background and Procedural History

Complainant was terminated on December 10, 2010, and on the same day he filed a complaint with the Occupational Safety and Health Administration (“OSHA”) under the employee protection provisions of the Act. He was reinstated effective December 17, 2010 after an internal company review, and was issued a Letter of Instruction on December 20, 2010. On September 12, 2011, OSHA concluded the investigation and found that Respondent terminated

Complainant for submitting false documents. Secretary's Findings at 2.¹ The complaint was dismissed. On October 9, 2011 Complainant submitted a letter objecting to the Secretary's Findings and requesting a hearing before an administrative law judge. A hearing was held on December 13, 2011. Closing arguments were made at the end of the hearing, and the parties were permitted to supplement their arguments with written post-hearing briefs.

Summary of Testimony

Five witnesses testified at the hearing: Complainant on his own behalf, and Brian Riordan, Jeff Boers, Stephen Fitzpatrick, Thomas Drynan, and Michael Kucinski for Respondent. Tr. 23-156.² Complainant's Exhibits ("CX") 1, 2, 4, 6, 7, 8, 10³, and 12-14 were received into evidence, as were Respondent's Exhibits ("RX") 1 through 8. The hearing concluded with the parties' closing arguments, Tr. at 155-164, and the parties were permitted to submit additional argument in writing.

Testimony of Clifton Phillips

Complainant began working for Respondent in September of 1985. Tr. 23. He works as a driver sales representative, driving freight from the facility in Aurora, Illinois to St. Louis and other destinations. Tr. at 23. For the first seven years of his employment with Respondent, Mr. Phillips had different duties, but for the last 19 years, he was a driver sales representative. Tr. 25. In late 2010, Complainant's regular run was from Aurora, Illinois to St. Louis and back. Tr. 25-26.

Before December 9, 2010, Complainant raised safety concerns three times. In 2007 or 2008, he informed the terminal manager that a hostler was leaking fuel. In August of 2010, Mr. Phillips informed the Department of Labor that a dock in the Aurora terminal was missing a bumper; after Respondent reported to the Department that the bumper had been repaired, Mr. Phillips informed the Department that Respondent's report was false. In the spring of 2010, Complainant raised a safety concern over a lack of lighting at the exit to a snow-packed parking lot near the terminal. Tr. 26-28, CX-12.⁴

On December 8, 2010, Complainant reported to work at 8:53 p.m., and was assigned his regular run between Aurora and St. Louis. His log, admitted as RX-1, shows that his on-duty status began at 9:00 p.m. Complainant testified that the normal practice is to use the closest quarter hour for time entries on the log; for example, an event that occurs at 8:07 is logged as having occurred at 8:00, while an event that occurs at 8:08 is logged as having occurred at 8:15. Complainant fueled and hooked his truck and conducted a pre-trip inspection between 9:00 and 9:37 p.m. on December 8. From midnight to 12:15 a.m. on December 9, Mr. Phillips took a rest break. Drivers for Respondent are permitted to take two 15-minute rest breaks and one 30-

¹ "Secretary's Findings" refers to the September 12, 2011 letter from the Department of Labor to Complainant issuing the Secretary's Findings.

² "Tr." refers to the transcript of formal hearing held on December 13, 2011.

³ After CX-10 was admitted, Employer renewed its objection, and the objection was partially sustained. Tr. 75-77. As a result, pages 2 and 3 of CX-10 were excluded, and only pages 1 and 4-6 are in evidence.

⁴ The transcript indicates that Complainant's testimony related to a lot named the Snow Pack Lot, but my recollection and contemporaneous notes show that he said "snow-packed lot."

minute meal break during a run, although they are not permitted to take them consecutively. Rest and meal breaks are logged as off-duty time. Drivers are not paid for the time spent in meal and rest breaks. Tr. 30-33, RX 1.

Between 2:30 a.m. and 6:00 a.m. on December 9, 2010, Mr. Phillips was logged as “on duty, not driving.” During that period of time, he was in St. Louis awaiting assignment of the load he was to take back to Aurora. He began driving at approximately 6:00 a.m. and took a rest break in Dwight, Illinois at 10:00 a.m. At approximately 6:30 a.m., Mr. Phillips called the Aurora terminal and informed Respondent that he would not have enough time to complete his return trip to Aurora. After taking his rest break, he drove from 10:15 a.m. until 11:00 a.m., when he arrived at Plainfield, Illinois. Tr. 33-36, CX 10.

Mr. Phillips knew, when he left St. Louis, that he would not have enough time to complete the run because it takes five hours and 18-19 minutes to drive from St. Louis to Aurora. Had he not taken a break, he could have completed the run, but he “take[s his] breaks.” As of 11:00, Complainant considered himself to be off duty because he had used up his 14 hours and he secured his equipment in a safe haven. He was picked up at 12:15, and he noted that time in the remark section on his pay sheet. Although his log and his pay sheet said that he was picked up at 11:00, he intended to record that he went off duty at that time. He has been completing his log and pay sheet in that manner for 18 years. Tr. 36-38, RX-1 and RX 2.

When he went off duty, Complainant called Jeff Boers to ask why Mr. Boers was not at Plainfield to pick him up. Mr. Boers told Complainant that he had been instructed to tell Complainant that he was to use his 16-hour rule exception. Mr. Phillips replied that he could not do so because he was too tired, and he needed Mr. Boers to pick him up. Mr. Boers again told Mr. Phillips to drive his truck all the way in, and Mr. Phillips repeated that he was too tired to do so. Mr. Boers told him again to use the 16-hour exception, and Mr. Phillips responded that he was going to file a complaint and that he was going to call Steve Fitzpatrick, the company’s safety manager. He did call Mr. Fitzpatrick and informed Mr. Fitzpatrick that he was too tired to drive, and Mr. Fitzpatrick told him “that’s all I need to hear.” Mr. Fitzpatrick told Complainant that he would be picked up. Tr. 38-40.

Complainant testified that Respondent was permitted to use a one-time exception to the “14-hour rule.” The “14-hour rule” provides that a driver may not work for more than 14 hours on a given day, with no more than 11 hours of those 14 hours being actual driving time. On December 8-9, the 14-hour period began at 9:00 p.m. on December 8 and ended at 11:00 a.m. on December 9. The one-time exception allows an employer to require a driver to work for 16 hours in a given day, but still allows no more than 11 hours of actual driving time. If a driver is fatigued, however, the 16-hour exception does not apply. Tr. 41-42.

Mr. Phillips was picked up at 12:15 p.m. on December 9. Upon his return to the terminal, terminal manager Tom Drynan told him not to expect to drive that night, but to expect to work on the dock instead. That evening, Mr. Drynan called Mr. Phillips at home and told him that he was being suspended. When Complainant asked him what was going on, Mr. Drynan told him that Human Resources was handling it, and that it was because Complainant had been picked up two days in a row. At 10:00 a.m. on the following morning, December 10, Complainant reported

to Mr. Drynan and Terry Frantzen, and was told that he had lied on his log book by saying that he had been picked up at 11:00. Complainant responded that he had not said he was picked up at 11:00, but that he had gone off duty at 11:00. Drivers are not allowed to “dirty up” their logs with notations. Mr. Phillips was terminated at the meeting with Mr. Drynan and Mr. Frantzen, and his insurance ended at midnight that night. Mr. Drynan walked Mr. Phillips to his locker to supervise Mr. Phillips while he was cleaning it out, walked Mr. Phillips to his car, and told him to have a nice day. Complainant was devastated by his termination. Tr. 42-46.

Complainant had seven days to file a request for review of his termination with Respondent’s Review Board, and did file such a request. The Review Board held a telephone conference on Friday, December 17, 2010, with Complainant, Mr. Frantzen (from Human Resources), Paul Lawrence (Vice President of Operations), and additional participants from Ann Arbor and Pennsylvania. Mr. Drynan gave an opening statement to the effect that there was no room in his terminal for anyone who is dishonest. Mr. Drynan said that everyone else does the job properly, but that Mr. Phillips purposely lied on his log and his pay sheet so he could make the St. Louis run the night of December 9. Mr. Phillips supplied the Review Board with information the night before the hearing. He provided the Review Board with 14 pages of documents, including contact information for the Commercial Truck Division in Springfield, all of his logs for the previous three years, and a recap of all the times he had been picked up over that time period. After the hearing ended, Complainant was called on the same day and told that he would be reinstated, effective immediately, with his next duty day set for Monday, December 20. Complainant normally did not work on the weekends. Tr. 46-50.

Before being suspended, Mr. Phillips regularly worked 70 hours over a Monday-Friday work week. He had a 34-hour “recharge” period between the end of one work week and the beginning of the next. At the time of his termination, Mr. Phillips was earning between \$1850 and \$1900 per week. Mr. Phillips was paid for the three days of work that he worked immediately before his termination, along with about 3½ weeks of accumulated vacation time. When he was reinstated, he had the choice of returning the vacation pay to recover his vacation time or retaining the money, and he elected to keep the money. Tr. 50-53.

For the return run from St. Louis to Aurora, Complainant’s time slot was changed from 5:15 to 5:07 in the middle of the year. The change means he can log in at 5:00 rather than at 5:15. The run from St. Louis to Aurora includes about 190 miles of driving in which he could run a governed truck at 62 miles per hour. If he could drive at full speed of 62 miles per hour, it would be a pretty good average, but in a governed truck, he cannot drive at full speed. Each driver has his or her own driving style and standards, and Mr. Phillips’s standards result in a run that is like clockwork – his run takes 5 hours and 18 or 19 minutes, and he is always within two or three minutes of his estimated time of arrival. He punched out in St. Louis at 5:54, and knew that he was in trouble if he had to be off the clock by 11:07. He left St. Louis later than anticipated because there was a tractor in the way, so he could not get out of the gate. He was therefore delayed at the beginning, and was in a later traffic pattern for Springfield, Lincoln, and Plainfield, Illinois. [Tr. 53-55.]

In December of 2010, Will County was one lane from Braidwood to Interstate 80. Mr. Phillips knew that he had to call the company to let them know that they could call St. Louis to

find out why he was late. As he was leaving St. Louis, he calculated his time and determined that he would not be able to make it unless he didn't take his rest break. He was tired and decided to take his rest break, and considered taking his meal break. Mr. Phillips testified that the drive from Plainfield to the terminal was about a 15-minute drive, and the company's problem was with his "always" being picked up in Plainfield. Complainant testified that Route 30 from Plainfield to Aurora was a dangerous stretch of highway, citing a number of accidents, including more than one with a fatality, in which truck drivers had been involved. Tr. 55-60.

Complainant testified that when he pulls out of a terminal, he is master of his own ship, and he decides whether he is too tired to drive. He determined that he was too tired to drive and that he could not use the 16-hour rule. Tr. 60-61. Although he was tired when he left St. Louis, he was not too tired to drive. Tr. 63.

After calling the terminal to tell them that he would not be able to drive all the way back, Mr. Phillips put his phone away and did not listen to any messages until he arrived at home on the night of December 9. When he arrived at Larry's Diner, he saw that he had messages but did not listen to them. He took a 15-minute break in Dwight, Illinois, but did not listen to his messages then. When he called the terminal, he had just crossed the Mississippi River and stopped at a ramp. He was not curious to hear back from anyone at the terminal because the same procedure had been followed the previous day. As soon as he makes arrangements, there is no need to have contact, and doing so may have endangered his ability to make it to Larry's Diner in time. Although he could have used his phone during his break in Dwight, Illinois, there was no need to do so. Tr. 63-67.

On the December 8-9 shift, Complainant drove for 9½ hours, and is allowed 11 hours of driving time in a shift. He legally could have used the 16-hour rule to complete the run to the terminal. Tr. 67-68. Respondent's Exhibit 2 is the pay sheet for the date in question, and on the right-hand side is a notation that says "11:00, picked up at Plainfield, Illinois" in Mr. Phillips's handwriting. He was actually picked up at 12:15. Tr. 68-69.

Complainant's Exhibit 2 is a recap of all the times that he ran out of hours on a shift, and the dates when he could have used the 16-hour rule. He was not terminated or disciplined after any of those events. The company has full discretion with respect to the 16-hour rule. Tr. 69-70.

Complainant's Exhibit 4 is Complainant's log from February 28, 2009, showing that he ended his shift at Respondent's terminal in LaSalle. Complainant was not picked up at that time, but drove another driver's car back to Aurora. Tr. 70-72.

Larry's Diner is not owned by Con-Way Freight, and Complainant does not know whether the company has designated it as a safe haven. He has been picked up there on numerous occasions. He has never secured his truck and walked away from Larry's Diner, leaving the equipment there. Tr. 72-73.

After he called Aurora from the St. Louis area and advised that he would need to be picked up at Larry's Diner, Complainant put his phone away and did not look at it. He did not check for messages. His "total concern" was to make it to Larry's Diner before 11:08 a.m. The

company has rules about when a phone can be used, and it was illegal to use a phone while operating the vehicle. While operating the vehicle, Complainant does not use the phone to make or answer calls. Tr. 73-80.

Testimony of Brian Riordan

Mr. Riordan had been employed by Respondent for slightly more than 2½ years as of the date of the hearing. On December 8-9, 2010, he worked in Respondent's Aurora facility as the inbound freight operation supervisor. On December 9, he received a call from Complainant at about 6:00 a.m.; Mr. Phillips told him that he was still in St. Louis and would need to be picked up at Larry's Diner. Mr. Riordan understood that Mr. Phillips was still at the dock in St. Louis, and that the drive from there to Aurora would take about five hours. Mr. Riordan told Complainant that he would get someone to Larry's Diner, although he did not know if it would be right at 11:00. Mr. Phillips did not tell Mr. Riordan that he was tired. Tr. 82-83.

When Mr. Drynan arrived at the terminal at about 8:00 on the morning of December 9, he asked Mr. Riordan to call Mr. Phillips. He instructed Mr. Riordan to ask Complainant to use the 16-hour rule and drive all the way to Aurora if he had not already used it that week. The 16-hour rule allows a one-time extension of the 14-hour daily work limit after a 34-hour reset period. If the 16-hour rule is used, the maximum drive time is 11 hours. The 16-hour rule allows a driver to continue driving until they are out of drive time hours. Mr. Riordan knew that Complainant had not used the 16-hour rule yet the week of December 8-9, because he had been picked up the day before. Mr. Riordan tried calling Mr. Phillips about five times, and left three messages asking Mr. Phillips to call him back and informing him that Mr. Drynan was asking Mr. Phillips to use the 16-hour rule to drive all the way to Aurora. Mr. Phillips never returned Mr. Riordan's calls. Tr. 83-85.

When a driver is kept on the dock too late in St. Louis and returns to Aurora late, it causes a problem in Aurora. The problem is logistical, getting freight delivered to a customer before a customer closes; it is not a violation of any law if the freight is late. The problem is not due to the driver, but to the terminals involved. Mr. Riordan obtained Mr. Phillips's phone number from a customer service representative, although Mr. Riordan believes the number is also on the employee list. He could have checked the list rather than ask someone for Mr. Phillips's number. Mr. Riordan does not know why Mr. Phillips was terminated, and was not involved in the decision to terminate him. Tr. 85-87.

Testimony of Jeff Boers

Mr. Boers was, at the time of the hearing, operations supervisor for Con-Way Freight, for which he had worked for 13 years. On December 9, 2010, he was the operations manager. When he started work on that day, he talked to Mr. Riordan, who told him that Mr. Phillips had called at 6:00 and said that he was going to run out of hours at Larry's Diner. He asked Mr. Riordan if he had left messages for Mr. Phillips to call, and Mr. Riordan said that he had. Tr. 88-89.

Mr. Boers had a conversation with Mr. Phillips after Mr. Phillips had arrived at Larry's Diner. He called Mr. Phillips at about 11:45 and told him that he would need to exercise the 16-hour rule to drive his set into the Aurora facility. At the end of the call, Mr. Phillips told Mr. Boers that he was too tired to drive to Aurora, and Mr. Boers said "okay." He did not insist that Mr. Boers use the 16-hour rule to drive from Larry's Diner to Aurora. As soon as Mr. Phillips indicated that he was too tired, Mr. Boers knew that he was going to have Mr. Phillips picked up, and made arrangements to do so. Mr. Boers went to the dispatcher office and asked them when the next driver was coming in to start work; he told the dispatchers that he would need the driver to go to Larry's Diner to pick up Complainant. Tr. 89-91.

The next driver, Eric Jurnigan, arrived about five minutes early for his shift, and Mr. Boers drove him to Larry's Diner in Mr. Boers' truck. They arrived at Larry's Diner at about 12:15, and Mr. Boers drove Mr. Phillips back to Aurora. Mr. Boers and Mr. Phillips had a brief discussion about the fact that the clock in Mr. Boers' truck was fast, and Mr. Phillips observed that Mr. Boers had picked him up at 12:15. Tr. 91-92.

Mr. Boers knows that Mr. Phillips was terminated for falsification of his logs and his pay form, but was not involved in the termination decision. Tr. 92-93.

Mr. Boers and Mr. Phillips have known each other for many years, and Mr. Boers has never had a problem with Mr. Phillips with regard to work assignments. Mr. Boers has never felt that he was between Mr. Phillips and the terminal manager in any way, or felt any friction. Mr. Boers recalls an earlier conversation with Mr. Phillips about Mr. Phillips stopping at Larry's Diner, but did not suggest that Mr. Phillips stop at the ramp at Routes 30 and 55 rather than at the diner. Mr. Boers testified that he called Mr. Phillips from Larry's Diner on December 9, and that Mr. Phillips did not call him. Mr. Boers does recall telling Mr. Phillips, while they were driving from Larry's Diner to Aurora, that he hates his job; he made that statement because of the hours he was working. It had nothing to do with being put in between Mr. Drynan and another driver. Tr. 93-96.

Testimony of Stephen Fitzpatrick

At the time of the hearing, Mr. Fitzpatrick had been employed by Con-Way freight as the regional safety manager for over four years. He is responsible for providing assistance, counseling, and direction to maintain safety and fitness for 10 terminals in the region, including the Aurora terminal. Before working for Respondent, Mr. Fitzpatrick was Director of Safety for Churchill Transportation in Detroit. He has been trained on the federal motor carrier safety regulations. Tr. 97-98.

Mr. Fitzpatrick knows Mr. Phillips. He received two telephone calls from Mr. Phillips on December 9, 2010, while Mr. Fitzpatrick was eating lunch. Mr. Phillips was in Plainfield, Illinois. In the first phone call, Mr. Phillips told Mr. Fitzpatrick that he was out of hours and needed to be picked up. Mr. Fitzpatrick replied that he would call the terminal and find out what was going on. He did so, and spoke with Mr. Boers, who told Mr. Fitzpatrick that Mr. Drynan wanted Complainant to use the 16-hour rule and drive back. Mr. Boers did not tell Mr. Fitzpatrick that Complainant had said anything about being too tired. Tr. 98-100.

Shortly after Mr. Fitzpatrick spoke with Mr. Boers, Mr. Phillips called again, and this time told Mr. Fitzpatrick that he was too tired to finish the trip. Mr. Fitzpatrick told Mr. Phillips that they were coming to get him, and called Mr. Boers to let him know that Mr. Phillips was too tired to drive and that he would have to be picked up. Mr. Boers did not indicate to Mr. Fitzpatrick that he was requiring Complainant to drive even though he said he was too tired. Tr. 100-101.

A driver in Mr. Phillips's position has to fill out a daily record of duty status document, commonly called a DOT log. RX-3 is such a log. Respondent provides information to its drivers as to how they are expected to log time, and the information is pre-printed on the inside cover and back pages of the log book. The fifth page of RX-3 (page 7 of Respondent's exhibits⁵) contains definitions taken directly from the Federal Motor Carrier Safety Regulations, including the definition of on-duty time. On-duty time is defined as "all time from the time a driver begins work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work." When a driver has run out of hours and is waiting to be picked up, the time during which he is waiting to be picked up should be logged as "on duty not driving" rather than "off duty." Tr. 101-103.

Mr. Fitzpatrick knew as of the hearing that Mr. Phillips was terminated for falsifying a company document in a DOT log book. He had no input into the decision to terminate Mr. Phillips. Tr. 103-104.

Mr. Fitzpatrick was not asked to make a determination on how to log time with respect to Mr. Phillips's situation on December 9. He is not sure whether the company would normally ask him or call the safety department in Ann Arbor to get a ruling. He does not think it is the case that the determination in Mr. Phillips's case was made by the terminal and Human Resources rather than the safety department. Mr. Fitzpatrick does not agree that Mr. Phillips called him only one time on December 9. He does believe that the definition of on-duty time is pretty well spelled out in RX-3. In response to a hypothetical question from Complainant, Mr. Fitzpatrick testified that if Mr. Phillips were met immediately at a location where he ran out of hours, and the truck he was driving was turned over to another driver, the time spent in riding from that location back to the terminal would be logged as off-duty time. Tr. 108-110. The time spent in meal breaks and rest breaks should be logged as off-duty time. Tr. 111-112.

Testimony of Thomas Drynan

At the time of the hearing, Mr. Drynan had been employed by Respondent for 19 years, and was a Service Center Manager with responsibilities to promote the safe and efficient operation of the Aurora service line. He has the authority to hire employees, but does not have the authority to terminate employees. Termination is handled through the Human Resources Department. Complainant is one of the employees who work for Mr. Drynan, and he worked for Mr. Drynan on December 8-9, 2010. At that time, Mr. Phillips was a driver sales representative,

⁵ Respondent submitted eight exhibits, totaling 16 pages of documents. The exhibits are numbered separately, but the pages are marked 1-16 without regard to the exhibit number. RX-1 is page 1 of the exhibits; RX-2 is page 2; RX-3 is pages 3-9; RX-4 is pages 10-12; RX-5 is page 13; RX-6 is page 14; RX-7 is page 15; and RX-8 is page 16.

and his assigned run was from Respondent's Aurora facility to its St. Louis facility. According to Mr. Drynan, Mr. Phillips correctly described his responsibilities, including hooking a set in Aurora, driving to St. Louis, rehandling, loading, and unloading freight, and driving back to Aurora. Tr. 112-114.

When Mr. Drynan arrived at work on December 9, 2010, he checked with Mr. Riordan, who mentioned that Complainant was going to run out of hours at Larry's Diner in Plainfield, Illinois. Larry's Diner is about nine miles away from the Aurora facility. Mr. Drynan asked Mr. Riordan whether Complainant had used his 16-hour exception, and was informed that he had not. Mr. Drynan then asked Mr. Riordan to try to reach Mr. Phillips to exercise the 16-hour exception. Mr. Drynan testified that if he had called Mr. Phillips directly and asked him to exercise the 16-hour rule, and Mr. Phillips had told him he was too tired, Mr. Drynan would have asked him where he was and that they would do their best to get someone there quickly to pick him up. Tr. 114-116.

When Mr. Phillips arrived back in Aurora, Mr. Drynan saw Mr. Phillips and told him, based on the information that he had received, to expect to work the dock in Aurora that night based on his lack of hours. Under the Federal Motor Carrier Safety Regulations, it was mandatory that he be off 10 hours before he could work another driving shift. At the time he saw Mr. Phillips, it was well after noon, and the next shift would have started at about 8:20 or 8:30 that night. He would not have been able to drive that run because he would not have 10 hours of off time. The last run is typically no later than 10:00, and Mr. Phillips would not have 10 hours of off time if he went off duty after 12:00 p.m. Mr. Drynan does not recall Mr. Phillips responding to Mr. Drynan's instruction to work the dock that night. Tr. 116-118.

After speaking with Mr. Phillips, Mr. Drynan returned to his office and found Mr. Phillips's pay sheet and log sitting in the middle of his desk. It is unusual for those documents to be there, because there are designated places to put them in the dispatch office when a driver returns from a run. Mr. Drynan observed that Mr. Phillips had noted on his pay sheet that he had been picked up at 11:00 in Plainfield, Illinois. Mr. Drynan then reviewed Mr. Phillips's log, which had the same information. He turned the information over to the Human Resources Department, which conducted an investigation. Mr. Phillips was terminated, but Mr. Drynan did not make or have the authority to make the decision to terminate him. Tr. 118-121.

Mr. Drynan is the responsible employee for the Aurora terminal with respect to Human Resources. The information provided to Human Resources came from the people involved in the incident, and Human Resources would be in contact with Mr. Drynan, Terry Frantzen, and the people involved in the incident. Tr. 121-122.

When Mr. Phillips's termination was discussed at the Review Board, the issues of whether he was on or off duty, whether his log is changed on change of duty status, and whether he said he was picked up at 11:00 or said that his duty status changed at 11:00 were all discussed. At the Review Board hearing, Mr. Drynan did not state as his opinion that there was no room for a dishonest driver at his terminal, but read the company's policy regarding falsification of a company document. Mr. Drynan did not have a chance to review the documents that Mr.

Phillips submitted to the Review Board, demonstrating that he has logged time the same way for 18 years. He never checked the accuracy of the facts in the documents. Tr. 122-124.

Mr. Drynan gave Complainant a Letter of Instruction on December 20, 2010, instructing him to note the accurate time for off duty and on duty driving appropriately on his pay sheet and log, and that the time of arrival back at the Service Center is when off-duty time begins. CX-6. Mr. Drynan testified that conducting the investigation into Mr. Phillips was not his responsibility, and that it is incorrect to say that the Review Board's reinstatement of Mr. Phillips made Mr. Drynan look bad. In Mr. Drynan's opinion, Mr. Phillips intentionally logged off duty at 11:00 so he could make the St. Louis run that night. Based on his history with the company, when a driver sales representative logs inaccurate information it is reasonable to believe that they are doing so to protect their run for the next night. Mr. Drynan does not agree that his Letter of Instruction was in error when compared to company policy and the Federal Motor Carrier Association. He does not know why the Review Board reinstated Mr. Phillips. It was Mr. Drynan who issued the Letter of Instruction. Tr. 124-125.

Mr. Drynan testified that between 6:00 and 11:00 a.m. on December 9, numerous issues arose in terminal operations so that he did not have a driver readily available to pick up Mr. Phillips. There is no retaliation, or intent to teach the drivers a lesson, involved in failing to pick up a driver immediately at the time he runs out of hours. Mr. Drynan was not upset about Mr. Phillips's having filed complaints against him in the past, or that the complaints were filed in Ann Arbor, because it is every employee's right to do so under company policy. His feelings are not hurt, and he is not bothered in the slightest, when an employee uses the company's open-door policy. Mr. Drynan testified that Complainant is a part of the company team. It is incorrect to say that Mr. Phillips could have started a run at 9:00 p.m. on December 9 on the basis that he was off duty at 11:00 a.m. Mr. Drynan does not recall whether there was a run available at 9:00 p.m. that evening. Tr. 125-131.

Mr. Drynan made no recommendations regarding disciplinary action when he turned over the log book and pay sheet to the Human Resources Department. Tr. 133.

Testimony of Michael Kucinski

At the time of the hearing, Mr. Kucinski had been employed by Respondent for twenty years and three months. His current position is Director of Human Resources, and he has also held positions as Account Executive, Service Center Manager, Director of Operations, Vice President of Sales, Vice President of Operations, and Director of Line Haul. As Director of Human Resources, his responsibilities include overseeing general human resources issues in the central area, including consistent application of policies and procedures. Although he was familiar with Mr. Phillips, he had never met him before the hearing of December 13, 2011. Tr. 135.

Mr. Kucinski became aware of the issue that Complainant had potentially falsified company documents, including DOT logs, when Terry Frantzen, the human resources generalist for the Chicago region, called him and informed him of the matter. Mr. Frantzen told Mr. Kucinski that there might be an issue with the way Mr. Phillips logged off duty at Larry's Diner.

Mr. Kucinski instructed Mr. Frantzen to conduct an investigation. It is the policy of the Human Resources to conduct an objective investigation and learn all the facts before making a determination on the issue. Investigations are routinely conducted by the Human Resources Department, and termination does not come out of every investigation. Mr. Frantzen investigated the matter, and provided Mr. Kucinski with the log and pay sheet in question, RX-1 and RX-2. Mr. Phillips's having logged off duty at 11:00 in Plainfield, Illinois is the matter that concerned Mr. Kucinski, because he understood from talking to Mr. Frantzen that Complainant was actually picked up and relieved of duty at 12:15. After reviewing the documentation, Mr. Kucinski came to the conclusion that Mr. Phillips had falsified both the federally-mandated DOT log and the company's internal pay sheet, and that termination was in order. Mr. Kucinski's understanding was that Mr. Phillips should have logged the time that he was waiting to be picked up at Larry's Diner as "on duty, not driving." The reason for that status is that Mr. Phillips had not yet been relieved of the equipment; company practice based on their understanding of the DOT regulations is that the driver should not log off duty until the driver has been relieved by a substitute driver. Tr. 136-139.

Mr. Kucinski made the decision to terminate Mr. Phillips. He relied only on general research, which could include input from department heads or subject-matter experts when there is interpretation involved. The termination decision was his alone. No manager in the field, including Mr. Drynan, has authority to terminate employment. Before making the decision to terminate Mr. Phillips, Mr. Kucinski was not aware that Mr. Phillips had claimed that he was too tired to continue driving. Tr. 139.

Respondent's Exhibit 4 is Respondent's employee conduct policy, taken from the Human Resources Policies and Procedures Manual. The second page of that policy refers to falsification of company records, including falsification of employment application or resume information, insurance claims, payroll records, time cards, trip sheets, DOT logs, and business expense reports among others. Respondent considers integrity to be an important value; it is one of the company's four core values. Tr. 139-140.

It is important to complete logs and time sheets accurately. Time sheets are the source for paying driver sales representatives, and the company relies on their accuracy for pay purposes. Additionally, there is a potential safety issue, and the logs must be completed accurately so the company can be sure that the driver sales representatives get 10 hours off, and adequate rest, before driving again. Tr. 140-141.

Respondent's Exhibit 5 is a document sent to the field from a former Vice President of Human Resources as a reminder to do the right thing from the standpoint of integrity. That document also states that it is critical that the information recorded on pay sheets, logs, delivery receipts, and other company documents be accurate and truthful. Employees were reminded to use integrity when claiming pay, and to ask a supervisor or manager if they had a question on how to claim something. RX-5 reminded employees to comply with the Federal Motor Carrier Safety Regulations and to be sure that the log is an accurate recording of what was actually done. Tr. 141.

Respondent's Exhibit 6 is a copy of an email sent from Terry Frantzen alerting the appropriate parties that Mr. Phillips had been terminated. The reason given for termination was falsification of a company document and DOT log. Tr. 142.

Respondent's Exhibit 7 is a copy of Policy 712 from the Human Resources Policies and Procedures Manual regarding the Employee Termination Review Board. The ETRB is made up of senior management leaders from the company who do not have responsibility over the region in which the employee works. An employee who is terminated has seven days to request a hearing before the ETRB, and Mr. Phillips did so. The ETRB has the option of upholding the termination or reinstating the employee. At the ETRB hearing, the Service Center Manager presents the company's side of the story to the Board, and the employee may present any information he wishes. The ETRB listens to all the information, and makes a decision by majority vote of the three voting members. The only parties involved in the deliberations are the three ETRB members. Mr. Kucinski did not participate in the deliberations, and is unable to identify the reasoning that the ETRB may have used in reaching its decision. In his experience, the ETRB considers a variety of factors, including the employee's length of service, overall safety record, and work performance. Tr. 142-145.

Respondent's Exhibit 8 is a summary of the employees in Respondent's central area who have been terminated for either pay sheet falsification or log falsification since April of 2009. Mr. Kucinski made the decision to terminate each of those employees. During Mr. Kucinski's tenure as Human Resources Director, there has never been a time that he has decided not to terminate an employee who has falsified company documents. His decision with respect to Complainant was consistent with his practice during his tenure as Human Resources director. Tr. 145-146.

The records of the Review Board are not available to see exactly what Mr. Drynan said to the Review Board. When Mr. Kucinski makes a decision, he considers the intent of the employee to determine whether there was falsification or just a mistake. Mr. Kucinski does recall a conversation with Complainant and Bruce Moss during which the issue of the 14-hour rule was discussed, but he does not recall a discussion about whether working at the terminal after the end of 14 hours violates the 14-hour rule. He also does not recall Mr. Moss leaving the conversation and returning to say that doing so does not violate the 14-hour rule if the work is done at the home terminal. He does not recall telling OSHA that Mr. Phillips could make his run in five hours and seven minutes. Tr. 147-151.

Mr. Kucinski testified that until recently, a driver could use a phone while driving, if he used an ear bud; however, the regulations recently changed so that a driver cannot use the phone at all while the truck is moving. He further testified that Mr. Phillips could have checked his phone for messages when stopped for his rest break. He is concerned when drivers are not picked up for an hour or an hour and 15 minutes after they run out of time, because if there is a pattern of doing so, it could be unsafe for the employees. The events of December 8-9 with regard to Mr. Phillips are not an actual safety concern for him. Tr. 151-156.

Findings of Fact

Upon review of the testimony and exhibits, I find that Respondent's witnesses were generally credible. To the extent that there is a conflict between their testimony and that of Complainant, I find Respondent's witnesses to be more credible than Complainant. Complainant's general demeanor demonstrated that he believes he was unfairly wronged, and his belief has caused inaccurate recollection as well as exaggeration and sinister interpretations of innocuous events. There were a few instances where his testimony did not comport with the documentary evidence: for example, although Mr. Phillips testified that he noted on his pay sheet that Mr. Boers picked him up at 12:15 p.m. on December 9, the pay sheet that Complainant turned in to Respondent does not show that notation. [RX-2.] The copy that he offered into evidence does contain that notation; however, the notation is in different, darker ink and was obviously added to the copy after the form was turned in to the company. [CX-10, p. 5.] Complainant's manufacturing of evidence for use at the undermines his overall credibility. Likewise, Complainant testified that although he notated his pay sheet and driver log that he was picked up at 11:00, he intended to show that he had logged "off duty" at that time. However, the notation did not say "off duty" but "picked up," and the driver log already showed his status as "off duty" as of 11:00 by way of a continuous horizontal line placed in the "off duty" time marker section of that document. Thus there was no apparent need to add a notation to that effect. Resolving the conflicts in the evidence, I make the following findings of fact.

1. Complainant began working for Respondent in September of 1985.
2. For the last 19 years of his employment with Respondent, up to the date of the hearing, Mr. Phillips was a driver sales representative.
3. As of December of 2010, Complainant's regular duties were to haul freight from Aurora, Illinois to St. Louis, Missouri, take on a return load in St. Louis, and drive back to Aurora. He normally made the trip five times per week, Monday through Friday.
4. In 2007 or 2008, Mr. Phillips informed Respondent of a leaking hostler.
5. On August 3, 2008, Mr. Phillips wrote to Bruce Moss, an executive with Respondent, protesting a discussion he had had on July 8, 2008 with his terminal manager in which Mr. Phillips was counseled concerning alleged problems with his integrity involving a company pay sheet and the company's integrity and ethics policies. Mr. Phillips was told that his action warranted termination, but also that he would not be terminated at that time.
6. In the spring of 2010, Complainant informed Respondent of unsafe lighting conditions at the exit to a snow-packed parking lot near the Aurora terminal.
7. In the summer of 2010, Complainant notified OSHA of a missing bumper in a loading dock at the Aurora terminal and, after Respondent told OSHA that the bumper had been repaired, Complainant told OSHA that Respondent's report was false.

8. On August 15, 2010, Complainant wrote a letter to Bruce Moss, expressing concerns with the way Respondent implemented the 16-hour exception. Mr. Phillips characterized the letter as a safety complaint against his terminal.
9. On December 8, 2010, Mr. Phillips reported to work at 8:53 p.m., logging on duty at 9:00 in accordance with normal practice of rounding to the nearest quarter-hour.
10. Mr. Phillips conducted a pre-trip inspection until 9:37 p.m., when he began driving to St. Louis. He took a rest break from midnight to 12:15 a.m. on December 9, 2010. He drove from 12:15 a.m. to 2:30 a.m., arriving in St. Louis at 2:30. From 2:30 a.m. to 6:00 a.m., he was at the St. Louis terminal, and started driving back to Aurora at 6:00 a.m.
11. Sometime between 6:00 a.m. and 6:30 a.m., Complainant called the Aurora terminal from the St. Louis area and spoke with Brian Riordan. He informed Mr. Riordan that he would not be able to complete the return trip to Aurora, because he would exceed the 14-hour time limit if he did so. He requested that he be picked up at Larry's Diner in Plainfield, Illinois at 11:00 a.m. Mr. Riordan told Mr. Phillips that someone would pick him up, but could not guarantee it would be at 11:00.
12. Larry's Diner is about nine miles from the Aurora terminal.
13. After speaking with Mr. Riordan, Mr. Phillips continued to drive toward the Aurora terminal. He took a rest break in Dwight, Illinois from 10:00 to 10:15 a.m. He arrived at Larry's Diner in Plainfield, Illinois at 11:00 a.m.
14. After Mr. Phillips spoke with Mr. Riordan, Mr. Drynan, the Aurora service center manager, arrived at the terminal and learned that Mr. Phillips had requested a pickup at 11:00 in Plainfield, Illinois because he was out of hours. Mr. Drynan asked Mr. Riordan whether Mr. Phillips had used a 16-hour exception during that work week. When he was informed that Mr. Phillips had not, he told Mr. Riordan to instruct Complainant to use the 16-hour exception and drive all the way to the Aurora terminal.
15. Mr. Riordan called Mr. Phillips's cell phone five times, attempting to inform him that he was expected to utilize the 16-hour exception and drive all the way to Aurora. Mr. Phillips did not answer his phone, and Mr. Riordan left him three messages to call back. Mr. Phillips did not check his messages or return Mr. Riordan's calls.
16. Complainant arrived at Larry's Diner in Plainfield, Illinois at 11:00 a.m., and changed his duty status to "off duty" on his driver log.
17. At about 11:45 a.m., Jeff Boers called Complainant and instructed him to use the 16-hour exception and drive all the way to the Aurora terminal. Complainant told Mr. Boers that he was too tired to drive, and Mr. Boers made arrangements to have Complainant picked up.

18. While Complainant was waiting to be picked up, he called Stephen Fitzpatrick, the regional safety manager, twice. During the first phone call, he told Mr. Fitzpatrick that he was out of hours and needed to be picked up, but did not mention that he was too tired to drive. During the second phone call, he told Mr. Fitzpatrick that he was too tired to complete the trip to Aurora. Mr. Fitzpatrick told Complainant that he would be picked up.
19. After each of the two telephone calls with Complainant, Mr. Fitzpatrick called Mr. Boers. Mr. Boers did not tell Mr. Fitzpatrick that Complainant had told Mr. Boers that he was too tired to drive, or that Mr. Boers wanted Complainant to drive to Aurora even though Complainant said he was too tired.
20. Mr. Boers drove to Larry's Diner with the next available driver, Eric Jurnigan, picked up Mr. Phillips at 12:15 p.m., and drove Mr. Phillips back to the Aurora terminal.
21. Complainant wrote "Plainfield, IL PTI, picked/up out of hours" on his driver log, with a line drawn from that notation to the 11:00 a.m. time that is pre-printed on the driver log that he turned in to Respondent.
22. Complainant wrote "11:00 picked/up at Plainfield, Illinois" on the pay sheet that he turned in to the company. In a separate location, he wrote "Plainfield, IL picked/up out of hours" and wrote "11:00" in the adjacent section of the form. He also wrote "picked/up Plainfield, IL" in a third section of the form, but did not indicate the time.
23. On the copy of the pay sheet that Mr. Phillips kept, he wrote "12:15 picked/up"; that notation does not appear on the pay sheet that Mr. Phillips turned in to the company. He also wrote "picked up at Plainfield Illinois" on the copy of the pay sheet that he kept; that notation does not appear on the copy that he turned in to the company. The pay sheet that he turned in is otherwise identical to the pay sheet that he kept.
24. When Mr. Phillips returned to the Aurora terminal on December 9, 2010, he encountered Mr. Drynan. Mr. Drynan told Mr. Phillips that he should anticipate working on the dock that night, rather than driving his St. Louis route.
25. After telling Mr. Phillips that he would be working on the dock on December 9, Mr. Drynan went to his office, where he saw Complainant's pay sheet and driver log in the middle of his desk. It was unusual to find those types of documents on his desk, because there are designated locations for turning them in at the dispatch office.
26. Upon reviewing Complainant's driver log and pay sheet, Mr. Drynan observed the entries indicating that Complainant had been picked up at 11:00 a.m. Because he had seen Complainant leaving the terminal well after noon, Mr. Drynan decided to turn the documents over to the Human Resources Department.
27. Terry Frantzen, the Human Resources generalist for the Chicago region, informed Michael Kucinski, Director of Human Resources, that Complainant had potentially

falsified company documents. Mr. Kucinski told Mr. Frantzen to conduct an investigation. Mr. Frantzen did so, and provided Mr. Kucinski with copies of the pay sheet and driver log.

28. After reviewing the documents, Mr. Kucinski concluded that Complainant had falsified them. In his opinion, the time from 11:00 to 12:15, while Mr. Phillips was awaiting pickup, should have been logged as “on duty, not driving” rather than “off duty” because Mr. Phillips had not been relieved of his equipment.
29. Respondent’s company policy is that a driver should not log “off duty” under the circumstances of this case until the driver has been relieved by a substitute driver.
30. Mr. Kucinski determined that termination was in order, and made the decision on his own. No manager in the field has the authority to terminate an employee.
31. Mr. Drynan, Mr. Riordan, Mr. Fitzpatrick, and Mr. Boers had no authority to terminate Mr. Phillips, and none of them played a role in the decision to terminate him.
32. At 10:00 a.m. on December 10, 2010, Complainant met with Mr. Drynan and Mr. Frantzen, who informed him that he was terminated from employment effective that day.
33. After Complainant was terminated, Respondent paid him for the work he had performed during the week of December 5, 2010, and paid him for 3½ weeks of vacation time that he had accumulated.
34. Respondent has an internal appeal mechanism for an employee to request a review of a decision to terminate. Complainant availed himself of that mechanism, and requested a review by the Employee Termination Review Board.
35. The ETRB held a hearing on Friday, December 17, 2010 on Respondent’s decision to terminate Complainant. The ETRB heard from Mr. Drynan on behalf of the company, and from Complainant on his own behalf. The ETRB also considered documents submitted by the parties. The board members deliberated in private, and voted to reinstate Complainant to employment.
36. Complainant was reinstated effective December 17, 2010, and his next shift was scheduled for Monday, December 20, 2010.
37. After Complainant was reinstated, he was offered the opportunity to repay the vacation pay he had received after his termination, or to keep it and start with a zero leave balance. He elected the latter.
38. Complainant was not paid for the week of work he missed from December 10 to December 17, 2010.

39. On December 20, 2010, Mr. Drynan issued Complainant a Letter of Instruction in response to the events of December 8-9, 2010. Mr. Phillips was instructed to note the accurate time for “off duty” and “on duty not driving” status on his pay sheets and logs. He was specifically instructed that if he were to run out of hours in the future and were waiting to be picked up, he should log the waiting time as “on duty not driving.” Mr. Phillips was cautioned that failure to comply with the instructions could lead to further disciplinary action, up to and including termination.
40. On January 26, 2011, Mr. Drynan issued Complainant a Letter of Communication based on an incident that occurred the previous day involving allegedly unprofessional conduct.
41. Complainant had been picked up eight times between February 27, 2009 and December 8, 2010, including December 7 and 8, 2010. He used the 16-hour exception nine times between January 6, 2010 and December 3, 2010. He had not used the 16-hour exception during the week of December 5, 2010.
42. Mr. Phillips was not disciplined for any of the eight previous times he had been picked up.
43. Mr. Phillips was not disciplined for the concerns he raised in 2007 or 2008 regarding a leaking hostler, in the spring of 2010 regarding poor lighting in a snow-packed parking lot, in the summer of 2010 regarding a missing bumper in the dock, or in August of 2010 regarding the company’s use of the 16-hour exception.
44. Respondent instructed its drivers to log “off duty” when taking a 15-minute rest break or a 30-minute meal break, and to obtain preapproval by management of any other off-duty time during a tour of duty. Drivers were instructed to record their duty status by drawing a continuous line between the appropriate time markers on the DOT log.
45. Respondent identifies falsification of company records as “unacceptable performance [or] behavior which may be subject to discipline up to and including termination.” Respondent’s policy specifically prohibits falsification of payroll records, time cards, trip sheets, and DOT logs.
46. Between July 22, 2009 and June 15, 2011, Respondent terminated eight employees in addition to Mr. Phillips for falsification of their DOT logs and/or pay sheets.
47. Between November 25, 2009 and November 5, 2011, Respondent terminated 12 additional employees who had falsified other company documents.
48. Michael Kucinski did not know that Complainant had told the company that he was too tired to complete the trip on December 9, 2011 when he made the decision to terminate Mr. Phillips.
49. Mr. Kucinski has terminated every employee who was found to have falsified company documents during his tenure as Director of Human Resources.

Conclusions of Law

The STAA prohibits discharge, discipline, or discrimination against an employee because the employee has filed a complaint related to a violation of commercial vehicle safety or security regulations. 49 U.S.C. § 31105(a). In an STAA proceeding, the general burden of proof is on the Complainant, who must establish by a preponderance of the evidence that the employer discriminated against him for engaging in protected activity. *U.S. Postal Service Board of Governors v. Aiken*, 460 U.S. 711, 713-14 (1983); *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 8 (ARB Sept. 14, 2007). The protected activity need only be a contributing factor to the employer's decision to terminate the Complainant. 29 CFR Part 1979.109(a) ("A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."). Thus, at this stage of the proceedings, Complainant must show (1) that he engaged in protected activity; (2) that Respondent took an adverse employment action against him; and (3) that his protected activity was a contributing factor in the adverse personnel action. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at p. 6; *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). If he does so, the Respondent may escape liability only by showing by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant's protected activity. *Warren, supra*, slip op. at 12 (ARB Feb. 29, 2012).

A. Complainant Engaged in Protected Activity

The STAA provides in pertinent part:

(a) Prohibitions. - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –

(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person 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 a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because -

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition....

49 U.S.C. § 31105; *see* 29 C.F.R. § 1978.102. The statute encompasses two broad categories of protected activities: (1) complaints related to violation of a commercial motor vehicle safety or security regulation, standard, or order (referred to herein as “safety complaints”), and (2) refusal to operate a vehicle (hereafter “refusal to operate”).

This matter involves only 49 U.S.C. § 31105(a)(1)(A)(i), relating to the actual filing of a safety complaint, and subsection (a)(1)(B)(i), relating to refusal to operate a vehicle. Complainant has made no allegation that he was subject to adverse employment action because Respondent perceived that he had or was about to make a safety complaint [(a)(1)(A)(ii)], and none of the acts he identifies as “protected activities” falls in that category. Complainant has made no allegation that he had a reasonable apprehension of serious injury due to a vehicle’s hazardous safety or security condition [(a)(1)(B)(ii)], and there is no evidence that he refused to operate a vehicle for that reason.

Under subsection (a)(1)(A)(i), “[p]rotected activity has two elements: (1) the complaint itself must involve a purported violation of a regulation relating to commercial motor vehicle safety, and (2) the complainant’s belief must be objectively reasonable.” *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011). Likewise under subsection (a)(1)(B)(i), a complainant is required to show only that he had a reasonable belief that operation of the vehicle would violate a regulation, order, or standard relating to commercial motor vehicle safety, health, or security. *Brown v. Wilson Trucking Co.*, ARB No. 96-164, ALJ No. 1994-STA-054, slip op. at 1 (ARB October 25, 1996). The ARB has recently held that “the reasonableness of [a refusal to drive under (a)(1)(B)(i)] must be subjectively and objectively determined.” *Ass’t Secy’ & Bailey v. Koch Foods, LLC*, ARB No. 10-101, ALJ No. 2008-STA-061, slip op. at 9 (ARB Sep. 30, 2011).

The language of the refusal-to-operate provision differs slightly from that of the safety complaint provision. The refusal-to-operate provision involves a driver who refuses to operate a vehicle “because” operating the vehicle would violate a federal regulation, standard, or order. The safety complaint provision involves a driver who files a complaint “related to” a violation of a federal regulation, standard, or order. The different language ultimately makes no difference in the standard to be applied to assess the objective reasonableness of a complainant’s belief. Indeed, because the language of the safety complaint encompasses a broader range of conduct, it would be appropriate to assess it under the *Koch Foods* standard that the reasonableness of a complainant’s belief that his complaint is related to a violation of a federal regulation, standard, or order must be subjectively and objectively determined. Put another way, “he must have actually believed that the employer was in violation of [a federal regulation, standard, or order] and that belief must be reasonable for an individual in [the employee’s] circumstances having his training and experience.” *Sylvester v. Parexel International, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039 and 2007-SOX-042, slip op. at 14 (ARB May 25, 2011); *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 28 (ARB July 14, 2000).

1. Safety Complaints

The record shows that there are a number of activities in which Complainant engaged that may qualify as protected safety complaints: (1) informing Respondent in 2007 or 2008 of a

leaking hostler; (2) writing a letter on August 3, 2008 in protest of his having been counseled about alleged problems with his integrity with regard to a pay sheet; (3) informing Respondent in the spring of 2010 about lighting problems in a snow-packed parking lot at the Aurora terminal; (4) informing OSHA of a missing dock bumper at the Aurora terminal in the summer of 2010, and informing OSHA that Respondent had not repaired the dock bumper after Respondent told OSHA that it had; and (5) writing a letter on August 15, 2010 to Bruce Moss regarding Respondent's implementation of the 16-hour rule.

a. *Leaking Hostler*

Mr. Phillips informed Respondent of a leaking hostler in 2007 or 2008. Respondent submits that a hostler is also known as a "yard horse," and is not a "commercial motor vehicle"; thus, says Respondent, any complaint relating to the leaking hostler is not a protected activity under subsection (a)(1)(A)(i). There is, however, no evidence in the record that a hostler is the same thing as a "yard horse." Because of the precise complaint that was made, however, I need not determine what a hostler is.

Respondent's argument is colorable only if the term "commercial motor vehicle" modifies all the words that follow: "safety," "health," and "security." To do so would make little sense. The phrase "commercial motor vehicle health" has no meaning – a vehicle is not organic and can have no health that can be regulated. It is more logical to interpret the language of subsection (a)(1)(A)(1) to prohibit adverse action against an employee who has "filed a complaint or begun a proceeding related to a violation" of (1) "a commercial motor vehicle safety" regulation, standard, or order; (2) a "health" regulation, standard, or order; or (3) a "security" regulation, standard, or order. This interpretation is consistent with the Administrative Review Board's requirement that the "complaint" clause under subsection (a)(1)(A) be given a broad interpretation. *See Koch Foods, supra*, ARB No. 10-001, slip op. at 8.

Therefore, if Mr. Phillips had a reasonable belief that a leaking hostler is related to health, then it falls within the scope of subsection (a)(1)(A)(1). Mr. Phillips, however, has failed to show either that he held such a belief or that his belief was objectively reasonable. His testimony establishes only that he reported the fact of a leaking hostler, but does not show that he reported it because of concerns about health or safety; he may have done so for any reason, including a simple report that a mechanic was needed. Thus, the subjective component is not met. He presented no evidence as to the type or amount of fuel that was leaked, the length of the leak, whether he or any other employee was or could have been exposed to the fuel, the danger associated with exposure, or any other information demonstrating that his belief was objectively reasonable.

In addition, Complainant has identified no regulation, standard, or order addressing a leaking hostler.

Based on the foregoing, I find that Mr. Phillips' complaint about the leaking hostler was not a protected activity under the Act.

b. *Letter of August 3, 2008*

The letter of August 3, 2008 submitted by Complainant to Bruce Moss is in the record as CX-7. A close review of the letter shows that on July 8, 2008, Mr. Phillips' terminal manager discussed with Mr. Phillips some undisclosed act that the terminal manager believed implicated two issues, characterized as (1) "violation of the integrity of a signed company pay sheet" and (2) "violation of the integrity and ethics clause of our company policy." In addition, Mr. Phillips was told that his act was grounds for dismissal, but he would not be dismissed at that time. Nothing in CX-7 involves a complaint relating to commercial motor vehicle safety, health, or security, and nothing shows that Complainant refused to operate a vehicle for any reason. Mr. Phillips' complaint was a protest against the company's disciplinary policy, which is not a protected activity. *See Brothers v. Liquid Transporters, Inc.*, 1989-STA-001 (Sec'y Feb. 27, 1990), slip op. at 8-9. Although Mr. Phillips characterized the letter as a safety issue in his hearing testimony, I find that his testimony was not credible and that he gave it that characterization only after becoming aware that it otherwise would not constitute a protected activity. I find that Mr. Phillips did not subjectively believe that at the time he wrote the letter. Thus, he did not have a subjective belief that his letter was a safety complaint, and I further find that any such belief was not objectively reasonable in light of the substance of the letter.

In addition, Complainant has identified no regulation, standard, or order that addresses these issues.

I find, therefore, that Complainant's letter of August 3, 2008 was not a protected activity under the Act.

c. *Parking Lot Lighting and Snow Conditions*

In the spring of 2010, Mr. Phillips alerted his company to inadequate lighting in a parking lot at the Aurora terminal that was packed with snow.

The Federal Motor Carrier Safety Regulations address driving in adverse weather conditions, including snow: 49 C.F.R. § 392.14 requires a driver to exercise extreme caution when, among other things, traction is adversely affected due to snow. The regulation further requires that driving be discontinued if the conditions become "sufficiently dangerous," without defining that term. Thus, Mr. Phillips' complaint related to the lighting and snow conditions at the parking lot does implicate a federal regulation relating to commercial motor vehicle safety.

As was the case with the leaking hostler, Complainant presented no evidence about the actual lighting or snow conditions or the effect that those conditions may have had on the safe operation of a vehicle. Lighting is different from a fuel leak, in that lighting conditions are a feature of everyday life such that I may assess them in light of common experience. It is self-evident that if a parking lot has inadequate lighting, and has heavy snow, those conditions may interfere with the safe operation of a vehicle. Accordingly, I find that Mr. Phillips had a subjective concern over those conditions and that his concern was objectively reasonable.

Based on the foregoing, I conclude that Mr. Phillips' complaint to Respondent about the adverse lighting and snow conditions at the parking lot qualifies as a protected activity under the Act.⁶

d. *Missing Dock Bumper*

In the summer of 2010, Mr. Phillips informed OSHA that a bumper was missing from a loading dock at the Aurora terminal. After Respondent told OSHA that the bumper had been replaced, Mr. Phillips informed OSHA that Respondent's representation was false – the bumper had not been replaced.

Respondent argues that the lack of a bumper at a loading dock does not implicate commercial motor vehicle safety. Respondent suggests that the purpose of a bumper is to protect the building from damage when a trailer is backed up to the door of the dock, and that there are no regulations, standards, or orders relating to dock bumpers; thus, Respondent says, the complaint of a missing dock bumper cannot be a protected activity.

Complainant has identified no regulation, standard, or order relating to dock bumpers, and Respondent asserts that there are none. I have been unable to find any such regulation, standard, or order, and I therefore find that the complaint about a missing dock bumper is not a protected activity.

e. *Letter of August 15, 2010*

By letter dated August 15, 2010, Complainant expressed concerns to Bruce Moss (identified as an executive with Respondent) with the way Respondent implemented the 16-hour exception. In the first paragraph of the letter, Mr. Phillips expressly characterized it as a safety complaint against his terminal.

Under the Federal Motor Carrier Safety Regulations, a driver working 70 hours over a period of eight consecutive days may work no more than 14 hours per day, of which no more than 11 hours may be actual driving time. After completing a 14-hour shift, the driver must be off duty for at least 10 hours before starting another shift. 49 C.F.R. § 395.3. The driver may work for 16 hours in a single shift provided that certain conditions are met. 49 C.F.R. § 395.1(o). There is no dispute that the conditions were met in this case to allow Mr. Phillips to work for 16 hours on December 8-9, 2010. Additionally, Mr. Phillips concedes that the decision whether to utilize the 16-hour exception is committed entirely to the company. [Tr. at 67-70.]

⁶ This claim can be distinguished from a similar claim made in *Dick v. J.B. Hunt, supra*. In *Dick*, the complainant alleged that a pickup area controlled by a customer (and not by the employer) was unsafe because inadequate lighting made it "pitch black." The complainant admitted that he was trained to deal with dark lighting conditions, and to "get out and look" before backing up to a loading dock. The ARB therefore affirmed the ALJ's finding that the complainant's refusal to drive was not a protected activity. This case, however, involves a parking lot at Respondent's Aurora terminal, which Respondent does control, and which involves a combination of inadequate lighting and heavy snow.

Because the regulations address the hours of work allowed for commercial motor vehicle drivers, and the regulation was promulgated to promote safety by prohibiting excessive driving time, the letter is “related to” the potential violation of a federal commercial motor vehicle safety regulation.

Mr. Phillips characterized his letter as involving safety issues, and I therefore find that he had a subjective belief that his complaint was related to commercial motor vehicle safety. A close review shows, however, that it actually consists of his complaint about how the company used the 16-hour exception. The tone of the letter is one of defensiveness after having a discussion with his terminal manager about the use of the 16-hour rule, and about his having been picked up on other occasions. He also expressed concerns about an unusually heavy freight load that would not be delivered properly if the drivers properly followed the hours-of-work rules. At no time, however, did Mr. Phillips indicate that the company’s approvals or denials of the 16-hour rule as to him or another driver caused a safety problem or implicated safety, health, or security concerns. He did not make any claim that Respondent’s use of the 16-hour exception was in violation of the applicable regulation. I find that Complainant lacked an objectively reasonable belief that the letter related to the violation of the regulation.

Based on the foregoing, I find that the letter of August 15, 2010 does not qualify as a protected activity.

2. Refusal to Operate

Mr. Phillips identified one occasion on which he refused to operate a vehicle: December 9, 2010, when Mr. Boers relayed Mr. Drynan’s instruction that he use the 16-hour exception to drive all the way back to the Aurora terminal. Mr. Phillips declined to do so because, he said, he was too tired.

Under 49 C.F.R. § 398.4(c), no driver may be required to operate a vehicle when “his/her ability or alertness is so impaired through fatigue, illness, or any other cause as to make it unsafe for him/her to begin or continue to drive....” Thus, Mr. Phillips’ refusal to operate his vehicle when requested to do so on December 9, 2010 implicates a regulation related to commercial motor vehicle safety.

Additionally, Mr. Phillips’ refusal to drive reflected an objectively reasonable belief that by doing so, he would violate the regulation related to driver fatigue. The evidence shows that he had worked for his full 14-hour shift, and that he had been actually driving his truck and trailer for the last five hours of that shift, save a 15-minute rest break. The last stretch of the drive to the Aurora terminal was, he understood, the most dangerous stretch of road on his route; he listed a number of non-fatal and fatal accidents that occurred along that stretch of road. Under those circumstances, I find that his refusal to drive was based on a subjective and objectively reasonable belief that operating his vehicle would have been in violation of the regulation related to fatigued driving.

Accordingly, I find that Complainant’s refusal to operate his vehicle after being asked to do so by Respondent on December 9, 2010 was a protected activity.

3. Conclusion

Mr. Phillips has met his burden to show that he engaged in protected activity when he complained to Respondent about adverse conditions in the parking lot at the Aurora terminal, and when he refused to continue to drive at the end of his shift on December 9, 2010.

B. Complainant Was Subject to Adverse Employment Action

Mr. Phillips was terminated effective December 10, 2010. Although he was reinstated one week later, he was not paid for the week during which his termination was in effect. Further, after he was reinstated, he received a Letter of Instruction cautioning him against making inaccurate entries on his driver log and pay sheet. Finally, he received a Letter of Communication in January of 2011. Respondent does not contest that Mr. Phillips' termination was an adverse employment action. I find that the Letter of Instruction and Letter of Communication were also adverse employment actions. The Letter of Instruction reflects that Respondent maintains records of previous letters issued to its employees; it lists six earlier Letters of Instruction and four earlier incident reports, and makes reference to Mr. Phillips' "overall record of performance and conduct violations." The letters issued to Mr. Phillips constitute adverse employment actions, because they are maintained in the company's records and are use to support future disciplinary action. A reasonable employee may well apprehend that the company will issue a letter, and that apprehension could have the effect of dissuading the employee from reporting safety concerns. *See Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 19-24 (ARB Sep. 30, 2008).

Accordingly, Mr. Phillips has met his burden to show that Respondent subjected him to adverse employment action.

C. Complainant's Protected Activity Did Not Contribute to the Adverse Employment Actions

1. Termination

The decision to terminate Mr. Phillips was made solely by Mr. Kucinski. He and the other company managers testified that the other managers did not have the authority to terminate employment, and I credit that testimony. At the time Mr. Kucinski made the decision to terminate Mr. Phillips, he did not know of any of the safety complaints made by Mr. Phillips, and did not know that Mr. Phillips had refused to operate his vehicle after ending his shift on December 9, 2010. His decision was made after review of the driver log and pay sheet submitted by Mr. Phillips after completing his shift of December 8-9, 2010. He concluded that Mr. Phillips had falsified the documents, and decided to terminate him on that basis alone.

The evidence known to Mr. Kucinski supports his decision. The driver log and time sheet contained false information. On both, Mr. Phillips wrote that he had been picked up at 11:00 a.m. in Plainfield, Illinois. He was not picked up until 12:15 p.m. Although Mr. Phillips tried to explain his notations as an attempt merely to change his duty status, I do not credit his

explanation. The driver log reflects that Mr. Phillips went off duty at 11:00 a.m., and his hand-written notations make no reference to his duty status on either document.

Mr. Kucinski's belief that Mr. Phillips had falsified the documents, rather than making a mistake, is supported by the circumstances under which Mr. Phillips made his hand-written notations. His normal shift would have started at 9:00 p.m. on December 9, 2010. If he completed his December 8-9 shift after 11:00 a.m. on December 9, he would not have the minimum required 10 hours of off-duty time to enable him to drive that evening. In addition, he would have exceeded 14 hours of on-duty time if he had properly shown that he went off duty at 12:15 p.m.; he went on duty at 9:00 p.m. and, after subtracting 30 minutes of off-duty time for two rest breaks, showing an off-duty time of 12:15 would have resulted in a 14-hour and 15-minute shift. For both reasons, he had an incentive to show that he was off-duty as of 11:00 a.m. In addition, the company's policy was for its drivers to record time awaiting pickup as "on duty, not driving," and Complainant violated that policy.

In addition, I note that immediately upon being informed that Mr. Phillips was too tired to continue driving, the company understood its obligation to pick him up and made arrangements to do so. They met their obligation on that date, as they had done several times in the recent past.

Under *Staub v. Proctor Hospital*, ___ U.S. ___, 131 S.Ct. 1186 (2011), the Supreme Court held that in a case under the Uniformed Services Employment and Reemployment Rights Act (USERRA), an employer may be held liable for an adverse employment action even if the decision-maker had no knowledge of the protected activities. The Court based its holding on the language of USERRA, which provides for liability if the employee's military status was a "motivating factor" in the adverse action. Reasoning that when a supervisor performs an action that is motivated by a discriminatory animus, and the action is the proximate cause of the adverse employment action against the employee, the Court held that the employer can be held liable even if the actual decision-maker had no knowledge of the supervisor's animus. *Id.*, 131 S.Ct. at 1194. Subsequent to *Staub*, the Administrative Review Board applied *Staub's* reasoning to cases brought under the Energy Reorganization Act, which provides for employer liability where the employee's protected activity is a "contributing factor" to the adverse employment action. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at pp. 16-17. The STAA uses the same "contributing factor" standard, and therefore *Staub* applies to this case.

Here, the proximate cause of Mr. Kucinski's decision to investigate and to terminate was the receipt of the falsified driver log and pay sheet. Those documents were provided to Mr. Kucinski by Mr. Frantzen, who had received them from Mr. Drynan. Mr. Drynan did have knowledge of Complainant's protected activities. I find, however, that his knowledge of Complainant's protected activities played no part in Mr. Drynan's decision to forward the documents. Mr. Drynan testified that he forwarded the documents solely because of the notations made by Mr. Phillips that he was picked up at 12:15 p.m.; Mr. Drynan knew that to be false because he had seen Mr. Phillips at the Aurora terminal at about that time. There is no evidence that Mr. Phillips' protected activities played any part in Mr. Drynan's decision to forward the documents to Mr. Kucinski. Although he did so only a short time after Mr. Phillips

told Mr. Boers and Mr. Fitzpatrick that he was too tired to continue driving, and temporal proximity can support a finding of causation, I specifically find that Mr. Phillips refusal to drive was not a contributing factor in Mr. Drynan's decision to forward the falsified documents to Mr. Frantzen and Mr. Kucinski. Accordingly, the *Straub* holding is inapplicable in this case.

Based on the evidence of record, and finding Mr. Kucinski's testimony credible, I find that Complainant's complaint regarding inadequate lighting and snow in a parking lot, and his refusal to drive after 11:00 a.m. on December 9, 2010 did not contribute in any way to the decision to terminate his employment. I further find that, even if I have incorrectly determined that Complainant's other activities were not protected activities, they played no role in either Mr. Drynan's decision to forward the falsified documents, or Mr. Kucinski's decision to terminate Mr. Phillips. Both Mr. Drynan's decision and Mr. Kucinski's decision were based solely on Mr. Phillips' falsification of his driver log and pay sheet.

2. Letter of Instruction and Letter of Communication

After Complainant was reinstated by the company's Employee Termination Review Board, Mr. Drynan issued him a letter of instruction dated December 20, 2010. The letter is based on Complainant's falsification of his driver log and pay sheet on December 9, 2010, the same action that resulted in his earlier termination. Mr. Phillips was instructed to record accurate times for being off duty and on duty, not driving, and not to record that he was off duty until he had returned to the terminal. He was specifically instructed to record time awaiting a pickup as "on duty, not driving."

On January 26, 2011, Mr. Drynan issued Mr. Phillips a Letter of Communication based on unprofessional conduct related to events that occurred on January 24 and 25, 2011. Mr. Drynan instructed Mr. Phillips to follow company conduct policies, and was instructed to raise concerns about training or work instruction assignments privately with his supervisor rather than in a group setting.

I continue to find that Mr. Phillips' protected activity played no role in the issuance of the letters of instruction and communication. Although Mr. Drynan issued both letters, and was aware of Mr. Phillips' protected activities, he issued the letters for other reasons entirely. The Letter of Communication dated December 20, 2010 was based on Complainant's falsification of his driver log and pay sheet, and on nothing else. As Complainant admits, he was picked up on numerous occasions before December 9, 2010, and was not disciplined afterwards. Likewise, he had raised numerous matters which he considered to be safety issues before December 9, 2010, and was not disciplined for doing so. The only thing different about December 9, 2010 was that Complainant submitted false information on the documents he turned in to Respondent, and did so because it was to his advantage – if the false information had been true, he would have been able to drive his route on December 9-10.

Likewise, I continue to find that the four acts that I have determined were not protected activities played no part in the decision to issue the Letter of Instruction and the Letter of Communication. The decision to issue the Letter of Instruction was based solely on

Complainants' falsification of the driver log and pay sheet. The decision to issue the Letter of Communication was based solely on Complainant's conduct on January 24 and 25, 2011.

3. Conclusion

Complainant's termination and the issuance of the Letter of Communication were based solely on his falsification of the December 8-9, 2010 driver log and pay sheet. The issuance of the Letter of Instruction was based solely on Complainant's conduct on January 24 and 25, 2011. None of the protected activities in which Complainant engaged contributed in any way to the decision to terminate his employment, or to issue either of the letters. None of the other activities which I have determined were not protected activities contributed in any way to the decision to terminate, or to issue either of the letters. Accordingly, Complainant has failed to meet his burden to show that any protected activity contributed to the adverse employment actions.

ORDER

For the foregoing reasons, the complaint of Clifton Phillips is DENIED.

SO ORDERED.

A

Paul C. Johnson, Jr.
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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 waive 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, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve

the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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(a). 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(a) and (b).