

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 24 August 2018

CASE NOS.: 2016-STA-00051; 2017-STA-00002; 2017-STA-00018

In the Matter of:

SANDRA E. COUTU,
Complainant,

v.

STUDENT TRANSPORTATION OF AMERICA, INC.,
Respondent.

Before: Jonathan C. Calianos, Administrative Law Judge

Appearances:

For the Complainant:

Sandra E. Coutu, Pro Se, Hudson, New Hampshire

For the Respondent:

Richard J. De Fortuna, Esq., Paisner Litvin, LLP, Bala Cynwyd, Pennsylvania

DECISION AND ORDER DENYING BENEFITS

I. **STATEMENT OF THE CASE**

This matter arises under the whistleblower provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. § 31105(a), and its implementing regulations found at 29 C.F.R. Part 1978. Sandra Coutu (the Complainant) is a school bus driver who filed three separate complaints against her former employer, Student Transportation of America, Inc. (the Respondent). Coutu alleges that she engaged in protected activity by raising safety complaints regarding student behavior and the placement of a table and tent on her bus.¹

¹ On the last day of a four day trial, Coutu also alleged for the first time that on August 19, 2015, she engaged in protected activity by making a safety complaint to the Federal Motor Carrier Safety Agency for the State of New Hampshire. (TR at 950-82). Where Coutu had ample opportunity to make that pleading sooner but waited until the eleventh hour to do so, it would be unduly prejudicial to the Respondent for me to accept that argument and I refuse

Because of her protected activity, Coutu claims that the Respondent: removed her from Windham and Pelham bus routes, set her up to fail an unwarranted fitness-for-duty evaluation, and demoted her to casual driver.

The Respondent disagrees that Coutu engaged in protected activity, but argues that even if she had, its actions towards her were unrelated to the substance of her complaints. According to the Respondent, it removed Coutu from Windham and Pelham bus routes because of complaints regarding her condescending and demeaning behavior towards others and concerns that she focused inadequate attention on the road. The Respondent says that it asked Coutu to undergo a fitness-for-duty examination out of concern for the health and safety of Coutu and the students she transported in her bus every day after several different people observed her struggling to breathe on various occasions. The Respondent vehemently denies the notion that it acted in any fashion to influence the outcome of her evaluation. Finally, the Respondent indicates that it temporarily classified Coutu as a casual driver because she was unsuccessful in the annual bidding process as described in the Collective Bargaining Agreement (CBA) between the Respondent and Coutu's union.

All three claims were eventually transferred to the Office of Administrative Law Judges and assigned to me for *de novo* hearing. I held trial over the course of four days at the U.S. Bankruptcy Court in Manchester, New Hampshire.² On November 7 and 8, 2016, I took argument and evidence on two of Coutu's claims that had previously been consolidated involving the Windham School District. *See* (TR at 1-581). Coutu's third claim involved the Pelham School District, and on November 23, 2016, I consolidated that claim with her other two claims involving Windham without objection. On December 19, 2016, and January 30, 2017, I took additional argument and evidence on all three claims. *See* (TR at 582-1093).

Including herself, Coutu introduced testimony from sixteen witnesses during her case-in-chief. The following four witness testified solely about events relating to Windham: Ryan O'Connor, Teacher and Cross Country Coach at Windham High School; Jack Byrne, Teacher, Football Coach, and Wrestling Coach at Windham High School; Adam Steel, Director of Business Finance and Operations for Windham School District; and William ("Bill") Raycraft,

to consider it. Even if I were to consider that information, however, it would have no bearing on the outcome of this case for reasons discussed further in this opinion.

² "TR" refers to the hearing transcript.

Athletic Director, Director of Human Performance and Wellness, Director of Clubs and Activities, and Head Football Coach at Windham High School. *See* (TR at 31-176, 338-422).

Nurse Practitioner Lauren MacDonald testified solely about Coutu's fitness-for-duty examination. *See* (TR at 273-92).

The following two witnesses testified exclusively about events relating to Pelham: Stacy Maghakian, Former Assistant Principal at Pelham Elementary School; and Amanda Lecaroz, Superintendent of the Pelham School District. *See* (TR at 591-627, 831-55).

The remaining nine witnesses were all employed by the Respondent and provided evidence on various issues in this matter: John Vincent, Bus Driver; Patrick Bourgelais, Maintenance Shop Manager; Georgina ("Jean") Heilman, Bus Driver and Union Shop Steward; Debra ("Deb") Mullins, Bus Driver; Mary-Alyce Riddinger, Bus Driver and Assistant Union Shop Steward; Jonathan Roe, Area Safety Manager; Wayne Sabato, Bus Driver; Christine Wyatt, Operations Manager for Windham and Pelham School Districts; and the Complainant herself. *See* (TR at 179-234, 240-69, 302-17, 425-78, 492-505, 530-47, 631-52, 658-828, 881-1040).

During trial I admitted the following evidence: official documents ("ALJX") 1 through 26; joint exhibits ("JX") A through E; Complainant's exhibits ("CX") A through J, L, S through X, AA, BB, and CX-S1 through 3;³ and Respondent's exhibits ("RX") 2A through F. (TR at 7, 11, 13-16, 18, 22, 179, 348, 588, 590, 596, 665, 863, 888, 903, 920, 941, 967, 989, 1020, 1039). In lieu of written briefs, each Party presented oral arguments during a telephonic hearing on the record that was held on April 26, 2017.⁴ The record is now closed, and this matter is ripe for disposition.

II. STIPULATIONS

The Parties did not submit any formal stipulations in this matter.

III. ISSUES PRESENTED AND SUMMARY OF FINDINGS

The dispositive issue is: Did Coutu's alleged protected activities contribute to the Respondent's alleged retaliatory actions towards her? In considering the evidence as a whole, I find that Coutu did not prove by a preponderance of the evidence that her alleged protected activities contributed to the Respondent's alleged retaliatory actions towards her. Even assuming they had, however, the Respondent proved by clear and convincing evidence that it would have

³ "CX-F" is sometimes referred to as "CX-4."

⁴ Neither Party objected to waiving written briefs.

taken the same alleged retaliatory actions towards her regardless. As a result, Coutu's claims for relief are denied.

IV. FACTUAL SUMMARY

A. Background

Coutu is a licensed commercial driver qualified to drive passengers and school buses. (TR at 881). From 2012 to at least 2016, she worked for the Respondent—a transportation company that provides bus services to different school Districts including Windham and Pelham, New Hampshire. *See* (CX-A at 35, 70-71); (CX-F); (JX-A); (JX-B). The Respondent's transportation agreements all state that bus drivers are expected to be courteous to and cooperative with others, and that a District can request a driver's removal as it sees fit. *See* (JX-B at 11-12); (TR at 159, 657-58, 695).

Coutu had a regular route in Pelham and occasionally drove Windham sports charters. (TR at 765). In November of 2015, Windham asked that Coutu be removed from all routes, so the Respondent removed her. *See* (CX-A at 5, 31). Then, in September of 2016, Pelham asked that Coutu be removed from all routes, so the Respondent removed her from that District, as well. *See* (RX-2F at 1). Set forth below is a chronological timeline of the events that gave rise to these claims.

1. March and June of 2015 – Pelham Parents Complain About Coutu's Behavior Towards Their Son.

On March 26, 2015, Pelham parents Mark and Sue Jozokos emailed Principal Stacy Maghakian alleging that Coutu bullied their son who rode bus P14, which was her regular route at the time. (RX-2A at 1-2); *see also* (TR at 600, 716, 766-67, 808-09, 825). The email read:

I would like to put in a formal complaint about the bus driver on bus P14- Sandra. She is bullying my son Matthew.

She has treated my son very poorly since she took over this route. But today she went to[o] far by accusing my son of being a racist among other things. She was making up many lies about him and yelling at him about these lies in front of the whole bus. My son was doing nothing. He was actually being picked on by another student (Kyle) before Sandra butted in. She was so mean that my daughter stuck up for my son. And the students on the bus that witnessed this could not believe the things Sandra was making up.

Other students wanted to speak up but were afraid of Sandra. Sandra even threatened to write up my daughter because she said Matt didn't do anything she was accusing him of.

Matt doesn't want to ride the bus because he is afraid of her outbursts and accusations. I have heard other parents complaining of this bus driver as well. It is not fair that students should have to put up with her. I do not want my son to have to sit with Kyle ever again. And Sandra should not be driving students.

I think the video tape of this afternoon[']s bus ride needs to be reviewed so that you can see that my son was not doing anything wrong and that Sandra's behavior was unacceptable.

(RX-2A at 1-2).

Maghakian forwarded the email to Christine Wyatt,⁵ the Respondent's Operations Manager for Pelham and Windham School Districts, who retrieved video footage of Coutu's bus and sent it to Maghakian. (RX-2A at 1); *see also* (TR at 655, 716, 766-67, 773, 808, 825). At trial, Maghakian could not recall whether the video portrayed Coutu accusing the student of being racist, and it is unclear what, if any, immediate repercussions Coutu suffered from that complaint. (TR at 628-29).

On June 16, 2015, the Jozokos family emailed Wyatt directly with additional complaints about Coutu's behavior. (RX-2B at 1); *see also* (TR at 716, 766-67, 808-09, 825). This time, the grievance read:

I would like to place a formal complaint about our horrible bus driver Sandra who drives bus P14. The way she picks on my son on a regular basis is now in the bullying category. Because of her behavior I have been driving my son and daughter to school in the morning the whole school year (in September they took the bus a handful of times in the morning). I have also driven my two kids home from school all of April, most of May until I started working three days a week. We told our son to not even speak to her, to avoid problems with her. He minds his own business. My daughter and all the kids on the bus are his witness.

Today, June 16, 2015, she called his name as he was walking to take a seat at the back of the bus. Because the high school kids were not going to be on the bus, it was okay for the middle school kids to sit back there. She yelled at him and told him to sit up front. The rest of the kids on the bus including my daughter were confused as to why she was singling him out and yelling at him. She then yelled at the rest of the bus and told my son that she wanted to speak to him before he got off the bus. You can look at the tapes from today and see he did nothing wrong and also hear her yelling at him and the bus.

I know I am not the only parent who has issues with this bus driver. I am getting more upset and frustrated that my children and all the other kids on the bus have to deal with her. And that I have to take time to complain about her. She is always mean and nasty to the kids on the bus. I want her to stop talking to my

⁵ "Escott" is Wyatt's maiden name. (TR at 655).

son. I want her to stop making up stories about my son. I want her to stop bullying my son. I take this very serious. If this continues in the fall I will pursue this, because no child should be worried about their bus driver bullying them every day.

Please take this as a formal complaint and look into this.

(RX-2B at 1).

It is unclear what, if any, immediate repercussions Coutu suffered from this incident.

2. *September of 2015 – Windham Asks That Coutu Be Removed From Cross Country Charters After She Drove the Team to a Meet at Oyster River High School.*

On September 19, 2015, Coutu drove the Windham Cross Country Team and its coach, Ryan O'Connor, to and from a meet at Oyster River High School. (CX-A at 18); (TR at 32, 34). O'Connor brought a five foot (approximate) table and tent on the bus placing the tent in the front seat and the table in the aisle. (TR at 34, 36-40). Coutu complained that it was unsafe for the table and tent to be transported that way, but allowed it that one time, and she corrected student behavior multiple times throughout the trip. (CX-A at 25); (TR at 38, 41, 43, 46-54, 63-65, 68-71, 928-29, 939-40, 948-49, 1086).

Shortly after the meet, O'Connor told Bill Raycraft—Windham High School's Athletic Director, Director of Human Performance and Wellness, Director of Clubs and Activities, and Head Football Coach—that he did not want Coutu driving the team again. (TR at 42, 49, 339). O'Connor felt that Coutu's excessive yelling, which by his estimate occurred about twenty times an hour, and the reasons for most of her yelling, such as a foot in the aisle, created a poor environment on the bus. *See* (TR at 42, 44-45, 47-52, 62-65, 69-71, 928-29). He said "[l]ooking at the character of the kids and knowing who they are . . . some of the best and brightest and most well-behaved students in the school, the frequency and the tone of what I deemed as minor indiscretions was akin to how you would treat a toddler." (TR at 70-71); *see also* (TR at 42-43, 47-54, 63-64, 70-71, 928-29). O'Connor testified that he believes in following safety protocol, but in his opinion, Coutu's yelling was unreasonable and condescending. (TR at 52, 61-64, 70-71). During Coutu's examination of him at trial, O'Connor also said: "And, quite frankly, the amount of time you spent looking in the rearview mirror at those students -- those good students -- concerned me." (TR at 64-65).

Raycraft emailed Wyatt to relay O'Connor's request "that whomever the driver was for Cross Country on Saturday not do their trips any further." (CX-A at 21); *see also* (TR at 42, 44-

45, 339, 342-43, 410-11, 695). He told Wyatt: “I asked for specifics but it sounds like she was condescending and treated them like little kids and brought the team down when preparing for their meet.” (CX-A at 21); *see also* (TR at 345-46, 355-56, 358-59, 409-10, 700-03, 765). In closing, he stated: “I know it can be difficult getting drivers but if we can move her to another team that might be best for all.” (CX-A at 20).

Wyatt responded: “The driver for cross country on Saturday was Sandra Coutu. Is this the only complaint from a coach that you have received on her? I can remove her from cross country per the district. She is actually a Pelham route driver that does trips for Windham sometimes as well.” (CX-A at 21-22). Raycraft replied: “Thank you Chris, yes this is the only complaint we have received on her and while the coach was rather vague on the specifics it didn’t sound like anything major but rather not a good fit for Coach O’Connor and the XC trips.” *Id.* The following day, on September 25, 2015, Wyatt informed Coutu that she had been removed from Windham Cross Country charters. (CX-A at 20, 25); (TR at 700-03, 709-12, 765, 769-72).

In an email dated October 6, 2015, Coutu denied having treated anyone in a condescending manner explaining it was her understanding that, as the driver, she had to ensure that passengers remained seated and that the emergency exit aisle remained unobstructed at all times. (CX-A at 25); (TR at 700-01, 917-19, 937); *see also* (TR at 925, 928, 930-31, 937). She acknowledged having griped about the table and tent placement on the bus, and said: “[t]he coaches clearly want to continue carrying this equipment to the meets so I believe this was a preemptive strike against me driving them for I would not allow this again.” (CX-A at 25); *see also* (TR at 709-12, 769-72, 939-48, 1087-88).

Approximately twenty-five minutes after receiving Coutu’s email, Wyatt forwarded it to Raycraft and Adam Steel, the Director of Business Finance and Operations for Windham School District, stating:

Please see the email below from one of my drivers, Sandra Coutu. She is the driver you requested to be removed from all Windham cross country trips due to a personality conflict. She feels the coach is retaliating against her for making him follow required safety regulations. I did watch the video from this trip and I did see the table being transported in the bus aisle and the large tent in the front seat which does concern me. My recommendation for future cross country events is to request a bus with an undercarriage when the coach needs to bring the tent and table to an event. I understand that this issue may have caused some conflict

between the coach and the driver. Let me know if you still want this driver banned from all WHS cross country trips.

(CX-A at 24); *see also* (TR at 143, 171-73, 357-58). At trial, Wyatt emphasized that she would not have removed Coutu from Cross Country had it been based on her efforts to enforce safety. (TR at 702-03, 714-15); *see also* (TR at 171-73, 357-58, 811).

Less than ten minutes later, Raycraft replied:

Thanks for the followup Chris. I will speak to Coach O'Conner [sic] again but do not recall anything pertaining to her following safety protocol but her manner in which she spoke to the students being demeaning.

He coaches all three seasons for us since 2009 and is the first time I had such a request from him so deemed it worth the request.

To be safe, let's request the bus with under carriage for the few remaining XC events.

(CX-A at 24).

The Respondent did not impose its own discipline against Coutu for the District's request. (TR at 767).

3. October/Early November of 2015 – Pelham Asks That Coutu Be Switched From Route P14 to Route P9 After Receiving Another Parent Complaint About Her Behavior.

On October 29, 2015, the Jozokos family sent Maghakian their third complaint about Coutu. (RX-2C at 3-4); *see also* (TR at 716, 766-67, 808-09, 825). In pertinent part, the complaint stated:

She is constantly picking on my son and we are fed up with it. She doesn't let him talk on the bus with[]out her yelling at him. If she does not like children why is she driving a bus? We are tired of her bullying our son and I let the school know at the end of last year that I wasn't going to let my son put up with her picking on him again. I know we are not the only parents complaining about this woman. She needs to be stopped. I am not going to drop this, we will keep fighting this. I will rally with other parents if this isn't addressed and fixed. Maybe she should be driving another bus, though I would feel bad for those kids.

I would like someone to talk to her about her behavior, constantly singling my son out, only punishing him, and that her punishment did not fit the crime. When she makes him sit behind her she is constantly harassing him. The best place for my son is away from her, the furthest back a PMS student can sit. I would also like to get the paper[]work to fill out a formal complaint and a bullying complaint against her.

(RX-2C at 3-4).

Maghakian forwarded the Jozokos family's complaint to Wyatt requesting video footage of Coutu's bus. (RX-2C at 3). Wyatt acquiesced and also reviewed the footage herself. (RX-2C at 2).

About a week later, on November 6, 2015, Wyatt emailed Maghakian asking:

Did you have a chance to review the video from P14? I know the parent had said she was going to file bullying charges so I was wondering what your thoughts were regarding this. We did receive another call from a parent today claiming that she has been picking on her son as well so you may receive a call from her. We are reviewing the video from this Monday as well to see what had transpired.

(RX-2C at 1).

Maghakian responded: "I do understand why the parent is upset. Though the student can argue the little details, the driver seemed to harp on him a lot more than seemingly deemed necessary." *Id.*; *see also* (TR at 601-03, 610-16, 625-26). At trial, she said that Coutu's yelling was needlessly relentless, somewhat sarcastic, and disrespectful towards the student; in her opinion, Coutu mishandled the situation. (TR at 601-03, 610-16, 625-26). Superintendent Amanda Lecaroz subsequently emailed Wyatt requesting that she "change bus routes for the drivers on P9 and P14 (swapping them) to address the parent issue/concerns that have been raised." (RX-2D at 1); *see also* (TR at 792-93).

4. *Late November of 2015 – Windham Asks That Coutu Be Removed From Windham Bus Routes Altogether After She Drove the Football Team to a Game at the University of New Hampshire (UNH).*

On November 22, 2015, Coutu drove the Windham Football Team to a state championship game at UNH. (CX-A at 27-29). Assistant Football Coach Jack Byrne rode Coutu's bus on the way to the game. (TR at 72-73). It was about the fourth time he had driven with her, and consistent with past experiences, he credibly described the trip to UNH as "uncomfortable." (TR at 72-78, 97, 102). Coutu's relentless yelling, which he estimated occurred about once a minute, "felt really out of control" making it very difficult to concentrate on anything else. (TR at 77); *see also* (TR at 74-78, 95, 101, 133, 931). It seemed like Coutu's eyes were too focused on the rearview mirror, and at one point, she made an abrupt turn before almost missing an exit. (TR at 73, 76-78, 119-20, 175, 314-15, 325-30, 373-75, 382, 728-29, 774, 1010-11). He remembers thinking how disturbing it was that "we were worried about a foot in the aisle, and we almost could have tipped the bus over." (TR at 120).

Not only that, but Byrne felt that Coutu seemed to lack common sense where most, if not all, of her yelling had to do with trivial things, such as a foot in the aisle that could have easily been moved in the event of an emergency. *See* (TR at 74-82, 93-95, 101-02, 104, 930). Byrne emphasized that he believes in safety and would have supported Coutu if she raised genuine safety concerns, but based on her body language and tone of voice, “it didn’t seem like it was coming from a safety standpoint. It seemed like it was coming from an obsession standpoint.” (TR at 74); *see also* (TR at 75-78, 81, 93-95, 100-02, 104, 133). Byrne corrected occasional misbehavior that he saw, but most of the time he did not understand what Coutu was yelling about to the point it felt like she was harassing the students and just trying to catch people in trouble; he never got the impression that the students were intentionally bating her either. (TR at 74-75, 77, 79, 94-95, 100-01, 133-34, 929-30).

Coutu admits that she corrected student behavior, but denies she did so excessively or unjustifiably explaining:

It depends on how they are acting. If I have to say it often, I have to say it often. It’s a response to their choices. And a knee out in the aisle is a little different than sitting perched on the seat with most of the body in the aisle. If they are sitting sideways, perched on the edge of the seat with their legs, arms and even their torso bent into it, I will address that more often than I will a knee or a foot. So if they are not choosing to be very noncompliant [sic], I will ask them to comply.

(TR at 931); *see also* (TR at 925, 930, 937).

Before the game, Coutu dropped the team off in a no parking zone. (TR at 304). She then parked in a big lot “quite a walk from the field” along with fellow drivers Debra Mullins and John Vincent; Vincent was a new employee and following Coutu’s lead. (TR at 306); *see also* (TR at 302, 304-05, 307-08, 318-20, 324-25, 492).

After the game, the team could not find the buses. (TR at 157, 310, 319, 361-62, 389, 779). Coutu assumed that the team would walk to where the buses were parked, so refused to move when Vincent asked what they should do to find the team. (TR at 307-11, 319-20, 322-25). Vincent did not think it made sense for the team to walk to the buses considering how much equipment they had and how far the buses were parked, but he trusted Coutu’s guidance as the more experienced driver. (TR at 307-11, 319-20, 322-25). After about forty-five minutes to an hour, Raycraft called Wyatt asking where the buses were located. (TR at 157, 310, 319, 361-62, 389, 779).

Raycraft rode Coutu's bus home from the game and credibly described the ride as an "unsatisfactory experience." *See* (CX-A at 32); (TR at 321, 344, 363, 366-67, 369, 372-74, 376-85). As soon as he got on the bus, Coutu complained that equipment packed in seats was stacked too high. (CX-A at 32); (TR at 366, 928-29). Raycraft restacked the equipment without reservation because he respected that it was Coutu's bus and Coutu's rules. (TR at 366, 369); *see also* (CX-A at 32).

But then, Coutu immediately started yelling about students standing up in their seats. (TR at 366, 369, 929-31); *see also* (CX-A at 32). Initially, Raycraft just turned around to correct student behavior, but Coutu's yelling was so frequent that he eventually sat facing backwards to spearhead any issues. (TR at 370); *see also* (CX-A at 32); (TR at 369, 371-73). There were a few times that Raycraft saw students sitting up in their seats, but he never actually saw any students standing up. (CX-A at 32); (TR at 369-70, 372-73). And there were several times when Coutu yelled "[t]hey are up again," but Raycraft saw nothing at all. (TR at 370); *see also* (CX-A at 32); (TR at 369, 372-73). As time went on, Raycraft distrusted Coutu's judgment explaining that it "[a]lmost seemed like she was looking just to catch somebody. The eyes more constantly in mirror." (TR at 372); *see also* (CX-A at 32); (TR at 372-73, 384).

Raycraft also became increasingly concerned that Coutu focused inadequate attention on the road. (CX-A at 32); (TR at 344, 366-68, 372-74, 381, 384, 728-29). At one point, Coutu stopped abruptly because it seemed like she did not notice traffic slowing down ahead of her. (CX-A at 32); (TR at 376-80). And at another point, Coutu ran over a tire retread at full speed because it seemed like she did not see it in the middle of the road even though vehicles ahead of the bus had avoided it. (CX-A at 32); (TR at 175, 376-79, 728-29, 1002-03).

After the trip, Wyatt asked Raycraft and Coutu about their experiences as she knew there had been some issues with the post-game pick-up. *See* (CX-A at 33); (TR at 362-63, 365-66, 779). Raycraft said that he preferred the "female driver" be removed from driving future Football charters. (CX-A at 32); *see also* (TR at 344-45, 383). While he expressed his displeasure with the team's delayed pick-up, he testified "the picking up late wasn't as big a deal for me." (TR at 344). Based on his own experience and what he learned from Byrne, however, he felt that Coutu's "demeanor towards the players" was unacceptable as was her unsafe driving. (CX-A at 32); *see also* (TR at 103-04, 109, 157-58, 345, 382, 384, 414-17, 728-29).

Wyatt watched footage of Coutu's bus that substantiated Raycraft's version of events. *See* (CX-A at 31). She emailed Raycraft explaining:

I did watch the video because the driver had said she had issues. If I felt there were issues with the team that needed to be addressed, I would let you know. Safety is always our number one priority. However, I felt the teams were very well behaved both there and back. I did witness all the things you mentioned in your response. I will speak to her about everything I witnessed as well as focusing too much attention on her student mirror and not enough attention to the road. This seems to be an ongoing issue with the coaches. I apologize for the inconvenience and I will handle things with the driver.

Id.; *see also* (TR at 774). Raycraft replied: "Thanks Chris, I have no doubt you are on it and certainly if you hear of any issues with our teams please let me know." (CX-A at 31).

Subsequently, on November 23, 2015, Steel interjected requesting that Coutu be removed from Windham bus routes altogether. *Id.*; *see also* (TR at 383, 414, 697). In explaining the basis for his decision, he credibly testified:

In speaking with Bill Raycraft and Chris Wyatt -- more from Bill Raycraft -- and also from hearing from Mr. O'Connor through the email, my understanding was that she was condescending towards students; that she was focused more on student innocuous safety concerns than she was on the road; and that she was looking more in the rearview mirror than looking out the windshield of the vehicle; and that was a -- was a concern for me.

(TR at 166); *see also* (CX-A at 31); (TR at 157-63, 166-69, 175). Steel said that the substance of Coutu's directives had no bearing on his decision; "[i]t was the manner in which she was requesting it and the way that she was conveying her -- her request." (TR at 167); *see also* (CX-A at 31); (TR at 160, 414-19, 811).

By letter dated November 24, 2015, Wyatt informed Coutu that she had been removed from Windham. (CX-A at 6); (JX-E at 1). The beginning of the letter read: "STA's primary obligation is to provide safe and reliable transportation to the students, employees, customers and the communities in which we serve." (CX-A at 6). Wyatt went on to state: "I received a complaint about your conduct, behavior towards the coaches and team as well as your disregard for safety." *Id.* She cited Coutu's late pick-up, the alarming extent her attention was focused on the rearview mirror as opposed to the road, and the poor manner in which she spoke to students and coaches. *Id.* In closing, Wyatt said: "Please be warned that further violations of this nature will result in further corrective action up to and including termination." *Id.*

5. *December of 2015 – The Respondent Asks Coutu to Undergo a Fitness-For-Duty Examination.*

On November 23, 2015, Mullins contacted Wyatt raising concerns that she had about Coutu's health after spending the day with her during the UNH football charter. (CX-A at 4); (TR at 495-98, 501-03, 507-08). Coutu had noticeably belabored breathing, her lips appeared blue, and she could barely walk to the restroom. (TR at 495-98, 501-03, 507-08). Mullins felt that Coutu would not take her concerns seriously, so she did not bother saying anything at the time. (TR at 497-98); *see also* (JX-E at 15, 17-19); (TR at 997-98).

Three weeks later, on December 15, 2015, Patrick Bourgelais, the Respondent's Shop Manager, reported similar concerns to Wyatt. (CX-A at 4, 7); (TR at 631-37, 645-46). That day, Bourgelais saw Coutu leaning over a chain linked fence situated about twenty-five feet from the area he works with pronounced breathing that drew the attention of people in the immediate area. (CX-A at 4, 7); (TR at 631-37, 645-46); *see also* (TR at 183, 195, 260). Bourgelais had witnessed Coutu "stopping at the fence catching her breath multiple times[,] but this instance she really appeared to be struggling to breath," so he felt it best to bring it to Wyatt's attention. (CX-A at 7); *see also* (CX-A at 4); (TR at 635-36, 645).

Wyatt had also witnessed Coutu struggling to breathe before, so after speaking with Bourgelais, the Respondent paid her to undergo a fitness-for-duty examination. (JX-E at 15, 17-19); (TR at 743-44, 752, 782-84, 1019); *see also* (CX-A at 64, 70); (TR at 183-84, 195, 197, 241, 483). Wyatt testified that she requested the evaluation because she was concerned for the health and safety of Coutu and the students she transports in her bus every day. *See* (TR at 183, 195, 483, 496-97, 744, 752, 782-84). Mary-Alice Riddinger, Driver and Assistant Shop Steward, attended the meeting with Coutu and testified that she thought the Respondent's request was reasonable where she had also observed Coutu with breathing difficulties before. (TR at 194-95, 197-98).

Although Coutu felt that the Respondent's request was unwarranted, she reluctantly agreed to be examined. *See* (JX-D at 1); (JX-E at 15, 17-19, 28-30); (TR at 273, 997-98, 1019). Nurse Practitioner Lauren MacDonald evaluated Coutu and ultimately determined that she was unfit for work based on the results of her pulmonary function test. (CX-A at 8-11); (JX-D at 1-5); (JX-E at 26, 28-30); (TR at 273, 280-81, 286-87); *see also* (JX-E at 18); (TR at 787). Coutu's Department of Transportation card was temporarily suspended and she was placed on

medical leave. *See* (CX-A at 14); (JX-E at 26, 28-30); (TR at 197, 280-81, 437-39, 517-18, 787, 797-98).

6. *February of 2016 – Coutu Returns to Work as a Stand-By Driver.*

Coutu was medically cleared to return to work in February of 2016, and because her Pelham route, P9, was no longer available,⁶ the Respondent classified her as a stand-by (spare) driver until the end of the school year at which point she was expected to bid for another route like everyone else. (JX-E at 28-30); (TR at 517-18, 789, 793-95, 797-98); *see also* (JX-A at 13); (RX-2D at 1). Under the parties' CBA, a stand-by driver had no fixed route or assignment and was expected to cover any route for any District at any time. (JX-A at 8); *see also* (JX-A at 23); (TR at 248, 758, 794). The Respondent usually only maintained four stand-by drivers at once, but created a fifth stand-by position just for Coutu. (TR at 248-49, 758, 791-92, 794-95).

7. *April of 2016 – Pelham Receives Parent Complaint About Coutu's Conduct as a Stand-By Driver.*

On April 26, 2016, Lecaroz emailed Wyatt about Coutu's actions as a stand-by driver for route P9. (RX-2E at 3); *see also* (TR at 716, 808-09, 825, 850). The email read:

I had reported to me by a parent that last Monday that a spare driver was on the bus (P9) and asked the kids to help them find the necessary stops. When they didn't notify her soon enough she missed a turn on Mammoth road so she pulled into WayStateLine (not sure about the name of the business exactly) and tried to turn around. She couldn't make the turn so she backed up into Mammoth Road to turn around with a bus full of kids.

I guess this is the same spare driver that had a problem on P15 about 2 weeks ago?

I then have been informed that this spare driver is no longer allowed to drive in Windham.

Does any of this sound accurate?

(RX-2E at 3).

Wyatt responded:

Yes it is the same driver. She did report issues with the students on P15 the day she drove it so I had reviewed the video and sent it to the school but I couldn't confirm her claims. I was not aware of her backing in an unsafe manner when she drove P9. We require drivers to radio us when they need to back up so we can make sure it's done safely. I can ask the dispatcher if she recalls an issue with her on P9. Do you want me to review the video?

⁶ Under the Parties' CBA, Coutu exceeded the number of days she could be absent to keep her regular route, so P9 was reposted and someone else successfully bid for it. *See* (JX-A at 13, 25); (JX-E at 30); (TR at 793-94).

(RX-2E at 2).

Lecaroz said yes, and after doing so, Wyatt followed up stating:

I did review the video from 4/18/16 regarding the spare driver on P9. She did miss a turn on Mammoth so she pulled into Ray's State Line to turn around. However, she did not back up onto Mammoth Rd. She only slightly backed up while in Ray's because she couldn't make the swing. She was also the spare driver on P15 on 4/8/16 and she had reported issues with the HS/MS students claiming they had threatened her and were out of control but I could not confirm these claims and neither could Dan Alexander at PHS but he did send it to the resource officer. The students were a little upset because she missed stops which is a typical reaction from the students. There was only one student that reacted abruptly and tried to get off the bus and Dan did deal with that student.

Also, to answer your question regarding Windham, yes she was removed from the Windham School District.

(RX-2E at 1).

Lecaroz responded:

In all fairness, the person reporting this to me was an ex-driver so I don't know if there is some kind of ulterior motive here or not. Please let me know of any other issues with this driver if you become aware of them as I think then I should have her removed from Pelham too.

Id. It is unclear what, if any, immediate repercussions Coutu suffered from this exchange.

8. *May of 2016 – Pelham Asks That Coutu Not Drive Softball Charters at the Coach's Request.*

In May of 2016, Pelham's Athletic Director, Todd Kress, told Lecaroz that the softball coach did not want Coutu driving the team again because she "was like a prison guard. He did know that she was extremely strict with rules, but it was over the top." (TR at 841); *see also* (TR at 840, 850). Eventually, someone from Pelham contacted Wyatt who then called Coutu to relay the coach's complaints. *See* (TR at 923-27). Coutu explained that one student punched another student in horseplay, so she told the coaches that she would need to write the incident up. *Id.*

9. *August of 2016 – Coutu Temporarily Becomes a Casual Driver.*

At the end of the 2015-16 school year, Coutu was unsuccessful in the annual bidding process, and on August 10, 2016, she officially became a casual driver, which meant she had no guaranteed hours.⁷ (JX-E at 27); (TR at 795, 802). Under the parties' CBA: "Casual school bus

⁷ The Addendum to Article 9 Section 19 of the Parties' CBA states: "The number of stand-by drivers may vary based on need and will be determined by the manager and reviewed for adjustment regularly. When the number of spare drivers needed is reduced, those drivers may become Casual drivers." (JX-A at 23).

driver is an employee assigned to run on an intermittent basis and is not required to report to the terminal each day. . . . The company agrees to offer all available work to the Home to School and Charter Drivers, prior to the use of Casuals.” (JX-A at 9).

Coutu was displeased with her new classification and filed a grievance. (JX-E at 27). Coutu then emailed Wyatt asking: “Please clarify what job category you’ve assigned me and when I should report to the office. Thank you.” (JX-E at 29); *see also* (JX-A at 9). On August 26, 2016, Wyatt responded, in pertinent part:

This matter was addressed in February when you returned following your leave of more than sixty (60) days, and again on August 16, 2016, when STA responded to the Local’s grievance. . . .

. . . As we explained at the time and upon your return, the suspension of your license prevented you from performing your duties for STA and broke your seniority pursuant to Article 9, Section 3 (g) of the Collective Bargaining Agreement.

Nevertheless, and even though your condition rendered you unable to perform any of the functions of your position for an indeterminate amount of time and thereby disqualifying you as a Driver under the collective bargaining agreement, you were placed on FMLA leave until such time as you could qualify as fit for duty pursuant to Department of Transportation regulations, as determined by a doctor. Your leave exceeded sixty (60) days and, pursuant to Article 14, Section 4 of the Collective Bargaining Agreement, your route assignment was put up for bid. When you returned, you were allowed to act as a partial Stand By driver for the remainder of the school year – again, as an accommodation to you despite the fact that you were only capable of performing this function for the Pelham School District routes, as the Windham School District demanded your removal in November of last year – and again, as was discussed upon your return from leave. You were also told at that time that you could bid for Pelham School District routes in the coming (now current) school year only, due to the Windham School District’s decision to remove you from its routes.

This school year, you remain able to bid for any available Pelham routes, but your ability to operate as a Stand By remains limited as you cannot drive any Windham routes and are, therefore, not able to perform all of the essential functions of your position. Further, STA’s needs assessment for the current year indicates that only four Stand By drivers are necessary and, in any event, the Collective Bargaining Agreement, Addendum Article 9 . . . requires that all Stand By drivers are capable of covering routes for both Windham and Pelham School Districts – a condition you do not currently satisfy despite STA’s earlier accommodation. You are, however, eligible to become a Casual driver pursuant to the Addendum, as you have known since last February.

(JX-E at 28-29); *see also* (JX-A at 1-25); (TR at 795, 798).

10. Coutu Accepts Route P6 and Pelham Subsequently Asks That She Be Removed From Pelham Routes Altogether After Receiving Another Parent Complaint.

On September 14, 2016, Coutu accepted a position driving Pelham route P6. (JX-E at 33); (TR at 796, 802-03). The Respondent had initially offered her a Bishop Guertin route, but Coutu was concerned about the reliability of her transportation to and from the District because she drove a 1994 vehicle. (JX-E at 32); (TR at 763-64, 796-97).

On September 19, 2016, the middle school's principal emailed Lecaroz about a parent complaint she had received about Coutu on September 16, 2016. (RX-2F at 2-3); *see also* (TR at 802-06, 842-43, 850). The principal wrote:

I am writing you for assistance please. I am asking for this driver to be taken off this route and any other route. Her words to the children are unprofessional and emotionally upsetting.

On 9/16/2016:

My 7 year old daughter came off the bus crying stating that the bus driver "hates her" and that the bus driver stated that she will no longer be picking her up in front of our house (the bus has picked up at our home on 24 Boulder Lane for years transporting both my older children and my 7 year old since Pelham Kindergarten).

This bus driver stated to my daughter "[i]f your parents have an issue they will need to contact the bus company." Now aside from the fact that our address is clearly listed on the Pelham bus route: list posted on the PSD website, and the fact that the bus has been picking her up at the same location the entire year; under what circumstances is it appropriate to communicate something like that, in that manner, to a 7 year old? If there has been a bus route change, especially one that is NOT reflected on the website it needs to be communicated with the parents directly. That being said, this is the first year that Ashleigh has taken the [b]us without an older brother ([i]Jakob is now in 6th Grade) and is understandably nervous and this type of unprofessional behavior does not help the situation.

The bus stops in front of our driveway while navigating around the cul-de-sac and it is an additional 19 seconds (I timed it) to pick our daughter up. Ironically enough, 10 minutes after the incident on Friday afternoon an updated bus route email was sent out from the PSD with our address still listed on it.

I would also like to point out some additional and potentially concerning incidents that my Middle School aged children have informed me with regards to this new bus driver also on Friday afternoon. My son was told that he could not drink water on the bus. This may very well be a policy that we are not aware of, and if it is they will obey without argument. However, when my boys exited the bus, this bus driver thought it was appropriate to make a statement of "Make sure you give your brother some water, he must be parched" in what was described as an extremely condescending manner. This incident and her condescending

comments upset both my sons in addition to the incident an hour later with my daughter.

I respect challenges and the responsibilities of this job and understand the unique personalities of every parent and student but I feel compelled to address these very important issues and ask for her to be removed from P6 immediately please and thank you.

(RX-2F at 2-3); *see also* (TR at 716, 803-06, 842-843).

That same day, Lecaroz emailed the parent:

Thank you for your email and I want you to know that . . . [the] bus company did view the video from the trip in question; some of what was relayed to you is observable on the video and some other parts a little more questionable. (if you would like specifics, feel free to give me a call . . .)

That being said, we are going to keep the bus stop at your driveway and it will not be moved also your children will be having a different bus driver on their route in the near future.

(RX-2F at 2); *see also* (TR at 806-08).

Two minutes later, Lecaroz emailed Wyatt: “As a result of issues last year with students and again this year, please remove the driver from P6 from driving buses in the Pelham School District.” (RX-2F at 1); *see also* (TR at 716, 803-09, 811, 825, 831). Lecaroz had never made such a request in the past, but she had also never received so many complaints about a bus driver before. (TR at 848, 851). Until trial, Lecaroz had never seen Coutu and said that she only learns the identity of drivers when there is an issue, which is rare. (TR at 848, 850-51).

Lecaroz emphasized: “Obviously we want our buses to be safe, and we want our students to follow the rules. So I wouldn’t remove somebody for adhering to the rules and enforcing them on the bus. We need that, because we need our students to be safe.” (TR at 853); *see also* (TR at 811, 843-44, 850-51, 854-58). But it was not a matter of what Coutu said—it was how she said it. (TR at 854). All of the complaints she ever received about Coutu involved her uninspiring interactions with students. (TR at 851).

In response, Coutu defended her actions. Regarding the route change, Coutu testified that she had discussed the alteration with the child’s parent prior, so only informed the child, who was around seven years old, because she thought that the dispatcher wanted her to. (TR at 905, 908-16). As far as the water incident, Coutu admits that she told the middle school student something along the lines of: “Don’t forget to give your brother a drink. He’s thirsty.” (TR at

917). But according to her, the remark was meant as a reminder and not meant to be snide. (TR at 917-19).

B. Evidence Regarding Reasonably Accepted Commercial Motor Vehicle Safety Standards and Practices

1. Jonathan Roe – The Respondent’s Area Safety Manager

As of trial, Jonathan Roe had been the Respondent’s Area Safety Manager for about a year with about seven years of experience working as a certified⁸ trainer in driving and safety. (TR at 427-28). Roe’s duties include managing employee files and overseeing new driver training and safety/monthly in-service meetings. (TR at 427). According to Roe, section 10 of New Hampshire’s CDL Manual is used for training because that is what all licensure testing is based on. (TR at 430). The “Handbook for New Hampshire School Bus Driver” used to be utilized in training, but the state stopped using and relying on it in July of 2015; now it is merely a reference material that can be used for tips, but is not a mandatory guide. (TR at 430-33); *see also* (CX-E).

Given Roe’s background and experience, both Parties asked him some specific questions about motor vehicle safety. For example, Coutu asked Roe: “What do you state in training for the movement of your eyes around the mirrors, a time frame?” (TR at 440). Roe responded: “The state says that you are to look in the mirror every 5 to 8 seconds and you rotate mirrors as you are looking at them.” *Id.*

In exploring what it means for there to be an obstructed aisle and whether a student’s foot constitutes an unsafe obstruction, Roe explained:

A true obstruction is an object. Because in the case of an emergency, everyone is told to leave everything on the bus. Your foot goes with you. So that, to me, would not be an object; does that make sense? In the case of an emergency everyone’s getting off the bus, so that foot would not be there. Whereas, if it’s a golf bag, they are instructed to leave that on the bus in the case of an emergency. So if that’s in the aisle, that would be an obstruction.

(TR at 444); *see also* (TR at 443).

Finally, the following colloquy took place between Coutu and Roe exploring the safety of certain driving maneuvers:

Q. So if you stop at the traffic light at the same intersection, but you are the third or fourth vehicle back, stopped, and you take a right onto the ramp, could that be considered a safe maneuver?

⁸ Roe received his certification through the State of New Hampshire. (TR at 428).

You are not crossing the white line because that's up near the divider.

...

THE WITNESS: There's three or four vehicles in front of me? I guess I would have to say, yes, that, to me, that would still be unsafe because if I, all of a sudden, I go, Oh, I need to be over there, then I'm not paying attention. As a professional driver, I should have been paying attention and known that I should have been over there.

...

Q. . . . Every time a bus driver misses a turn and/or misses the approach to a turn and then makes it or misses a turn, is that an unsafe maneuver?

A. They missed a turn and then they decide to make the turn?

Q. Yes.

A. I would classify that as some kind of evasive maneuver and I would say, yes, there is a safety issue there.

Q. Okay. So we're at the stoplight and I'm back three or four vehicles, and I make a turn. There's no traffic coming this way. And I'm stopped, and take a right. You originally said that was a safe maneuver. You are now changing your testimony to say it's not?

A. Yes, because as I'm talking, our definition of safety as a company, which you are probably well aware of is freedom from risk. If I put myself in that situation, there's a risk there. So there is a safety issue there.

(TR at 469-70); *see also* (TR at 471-72).

As far as how to deal with continued problematic student behavior, Roe indicated that there are write-up forms that can and should be used to communicate serious issues to the school. (TR at 476-77). In his opinion, repeatedly correcting student behavior is not appropriate. (TR at 477).

2. *Georgina Heilman and Mary-Alice Riddinger – Experienced Bus Drivers*

Georgina Heilman, a driver with twenty-three years of experience, and Riddinger, a driver with sixteen years of experience, both work for the Respondent and testified at Coutu's request. (TR at 179, 236, 240, 248). When asked about aisle obstructions, both women opined that there is no safety issue presented by feet in the aisle because feet can move. (TR at 236, 253). Riddinger further testified that, in her experience, a driver's eyes would have to be quite fixated on the rearview mirror to even notice feet in the aisle. (TR at 236). On a similar note, Heilman testified that it would be difficult to focus on safe driving while making repeated comments to correct student behavior. (TR at 253-54). As far as transporting a table placed on

top of seats, Riddinger surmised that it is unsafe and not something she would allow. (TR at 237).

C. Wayne Sabato – A Driver Removed From Bishop Guertin (BG)/Presentation of Mary Academy (PMA) Routes Altogether.

Wayne Sabato is a driver for the Respondent who Coutu asked to testify about his experience being removed from BG/PMA routes. (TR at 530-31, 533-34). In March of 2016, Sabato reprimanded a driver for passing his bus while its stop sign was out and lights flashing; he was driving a BG/PMA route at the time. (TR at 532-34, 552). The woman Sabato reprimanded worked for PMA and accused him of acting crazy and unprofessional. (TR at 533, 554). Sabato concedes that her complaint was about the manner in which he addressed her as opposed to what he actually said, and he was ultimately removed from BG/PMA routes as a result. (TR at 533, 543, 546, 554-55). He suffered no additional repercussions from that incident and still works for the Respondent. (TR at 533, 542).

V. DISCUSSION

Coutu did not prove that the Employer violated her rights under the STAA. Coutu's claim is governed by the two-step burden shifting framework set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121(b). See 49 U.S.C. § 31105(b)(1); *Garrett v. Bigfoot Energy Servs., LLC*, ARB No. 16-057, ALJ No. 2015-STA-00047, slip op. at 4 (ARB May 14, 2018); *Beatty v. Celadon Trucking Servs., Inc.*, ARB Nos. 15-085 & 15-086, 2015-STA-00010, slip op. at 4 (ARB Dec. 8, 2017). At step one, Coutu must prove by a preponderance of the evidence that: (1) she engaged in protected activity, as defined by the STAA; (2) she suffered an adverse action; and (3) her protected activity contributed, in whole or in part, to the adverse action taken against her. 49 U.S.C. § 42121(b)(2)(B)(iii); *Garrett*, ARB No. 16-057, at 4-5; *Beatty*, ARB Nos. 15-085 & 15-086, at 4; *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-00071, slip op. at 5-6 (ARB May 18, 2017).

If Coutu proves that the Respondent retaliated against her due in whole or in part to protected activity, STA can only escape liability by presenting clear and convincing evidence that it would have acted the same regardless. 49 U.S.C. § 42121(b)(2)(B)(iii) & (iv); *Garrett*, ARB No. 16-057, at 4-5; *Beatty*, ARB Nos. 15-085 & 15-086, at 4; *Tocci*, ARB No. 15-029, slip op. at 5-6.

Based on the whole record, I need not rule on whether Coutu's conduct was protected and whether the Respondent's actions toward her constitute "retaliation" under the STAA because I find Coutu failed to prove that STA's actions were motivated, even in small part, by her alleged protected activities. Even assuming Coutu satisfied her burden of proving contribution, however, I find that the Respondent proved by clear and convincing evidence that it would have taken the same alleged adverse actions towards Coutu notwithstanding her alleged protected activities.

A. Protected Activity Under the STAA.

The STAA prohibits employers from retaliating against an employee in any manner merely because it perceives that "[t]he employee has filed orally or in writing or is about to file orally or in writing a complaint with an employer, government agency, or others . . . related to a violation of a commercial motor vehicle safety or security regulation, standard or order." 29 C.F.R. § 1978.102(e)(1). *See also* 49 U.S.C. § 31105(a)(1)(A)(ii). Coutu claims that she engaged in several acts of protected activity between September and November of 2015 when she complained about the placement of a table and tent on her bus and when she repeatedly corrected student behavior in the interests of safety.

Since I ultimately find that Coutu's alleged protected activities did not contribute to the Respondent's actions against her, I need not determine whether her actions were protected under the STAA because that issue is not dispositive under the facts presented here. *See Prior v. Hughes Transport, Inc.*, ARB No. 04-044, ALJ No. 2004-STA-00001, slip op. at 2-3 (ARB Apr. 29, 2005) (affirming decision where ALJ refused to determine whether activity was protected because issue was non-dispositive). For all purposes, I will assume that Coutu engaged in protected activity.

B. Retaliation Under the STAA.

Under 29 C.F.R. § 1978.102(e), "[i]t is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, harass, suspend, demote, or in any other manner retaliate against any employee because the employer perceives that . . . [the employee has engaged in protected activity]." *See also* 49 U.S.C. § 31105(a)(1)(A)(ii). Coutu claims that the Respondent retaliated against her by: removing her as a driver from Pelham and Windham routes; demanding she undergo a fitness-for-duty examination that was fixed to make her fail; and demoting her to casual driver. Because I find that Coutu's alleged protected activities did not

contribute to the Respondent's actions towards her, I need not rule on whether all of its actions constitute "retaliation" under the STAA, and instead, for the sake of argument, I will presume they do. *See Prior*, ARB No. 04-044, at 2-3.

C. Coutu Did Not Prove by a Preponderance of the Evidence that Her Alleged Protected Activities Contributed to The Respondent's Alleged Retaliatory Actions Towards Her.

"A contributing factor is 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" *Palmer v. Canadian Nat'l Ry./Ill. Cent. R.R. Co.*, ARB No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 53 (ARB Sept. 30, 2016) (reissued (with full dissent) Jan. 4, 2017) (internal quotation marks and citations omitted) (emphasis in original). In determining whether Coutu has proved the contribution element of her claims, I may consider any and all relevant, admissible evidence, including the Respondent's non-retaliatory reasons for its actions towards her. *Id.* at 16, 18, 53, 56. The Administrative Review Board has repeatedly emphasized how extremely low, broad, and forgiving the standard for proving contribution is, stating: "'Any' factor really means any factor. It need not be 'significant, motivating, substantial or predominant'—it just needs to be a factor. The protected activity need only play some role, and even an '[in]significant' or '[in]substantial' role suffices." *Id.* at 53 (internal citations omitted) (brackets and emphasis in original).

Notwithstanding this admittedly low bar, Coutu fails to persuade me that it is more likely than not, that her alleged protected activities contributed to the Respondent's adverse actions towards her. *See id.* at 52. Rather, the evidence overwhelmingly supports a contrary conclusion—specifically, that Coutu's alleged protected activities had absolutely no bearing whatsoever on any of the Respondent's alleged adverse actions towards her.

1. The Respondent Removed Coutu From Windham and Pelham Bus Routes Per Each District's Separate Request in the Wake of Several Independent Complaints From Various Individuals Regarding Her Behavioral Issues.

Coutu argues that the Respondent removed her from the Windham and Pelham bus routes due to her complaints about the unsafe placement of a table and tent on her bus during a Windham Cross Country charter and her repeated attempts to correct unsafe student behavior. *See* (CX-A at 25); (TR at 38, 41, 43, 46-54, 63-65, 68-71, 709-12, 769-72, 928-29, 931, 939-49, 1086-88). As far as student behavior, Coutu admits that she asked noncompliant students to

obey the rules as much as necessary because, as the bus driver, she felt it was her responsibility, stating:

It depends how they are acting. If I have to say it often, I have to say it often. It's a response to their choices. And a knee out in the aisle is a little different than sitting perched on the seat with most of the body in the aisle. If they are sitting sideways, perched on the edge of the seat with their legs, arms and even often their torso bent into it, I will address that more often than I will a knee or a foot. So if they are not choosing to be very compliant, I will ask them to comply.

(TR at 931); *see also* (925, 930, 937). Coutu explained that she did not address students specifically if coaches were present, and she denies ever treating anyone in a condescending or demeaning manner. *See* (CX-A at 25); (TR at 700-01, 917-19, 925, 928, 930-31, 937).

According to the Respondent, each District separately requested Coutu's removal in the wake of repeat reports about her demeaning behavior and concerns that she focused inadequate attention to the road. *See* (CX-A at 5, 31); (RX-2F at 1). Between March 2015 and September 2016, the Respondent received at least ten different complaints about Coutu stemming from eleven different incidences involving: Windham Cross Country and Football Team charters, Pelham routes P14, P15, and P9, a Pelham Softball charter, and Pelham route P6. *See* (CX-A at 6, 21, 32); (JX-E at 1); (RX-2A at 1-2); (RX-2B at 1); (RX-2C at 3-4); (RX-2E at 3); (RX-2F at 1-3); (TR at 42, 44-45, 339, 342-45, 383, 410-11, 600, 655, 695, 716, 766-67, 773, 802-09, 811, 825, 831, 840-43, 850, 923-27). Strikingly, not one complaint mentioned the substance of Coutu's alleged comments and concerns regarding motor vehicle safety.⁹ Looking at the totality of the circumstances, I find the Respondent's interpretation of events to be more consistent with the evidence.

a. Windham

Respondent received two complaints regarding Coutu's behavior stemming from events that transpired during Windham sports charters. *See* (CX-A at 21, 32); (TR at 42, 44-45, 339, 342-45, 383, 410-11, 695). In September of 2015, Coutu drove the Cross Country Team to a meet, and immediately thereafter, Coach O'Connor told Raycraft that he would prefer Coutu not drive the team again. (CX-A at 18); (TR at 32, 34, 42, 49, 339). O'Connor felt that Coutu

⁹ *See* (CX-A at 6, 20-22, 24-25, 31-32); (JX-E at 1); (RX-2A at 1-2); (RX-2B at 1); (RX-2C at 3-4); (RX-2D at 1); (RX-2E at 1-3); (RX-2F at 1-3); (TR at 42, 44-45, 47-52, 62-65, 69-79, 81-82, 93-95, 97, 101-04, 109, 119-20, 133, 157-63, 166-69, 171-73, 175, 314-15, 321, 325-30, 339, 342-45, 357-58, 363, 366-67, 369-70, 372-85, 410-11, 414-19, 600-03, 610-16, 625-26, 655, 695, 697, 702-03, 714-16, 728-29, 766-67, 773-74, 792-93, 802-09, 811, 825, 831, 840-44, 850-51, 854-58, 917-19, 923-31, 1002-03, 1010-11).

created a poor environment by treating students, who O'Connor described as some of the best and brightest in the school, as toddlers, and in his opinion, the demeaning tone and relentless manner of her yelling were unjustifiable. (TR at 42, 44-45, 47-54, 62-65, 69-71, 928-29).

When Raycraft relayed O'Connor's feelings to Wyatt, he said: "Chris, my XC coaches did not get her name but they just requested that whomever the driver was for Cross Country on Saturday not do their trips any further." (CX-A at 21); *see also* (TR at 42, 44-45, 339, 342-43, 410-11, 695). Consistent with O'Connor's testimony, Raycraft explained that it was his understanding "she was condescending and treated . . . [the students] like little kids and brought the team down when preparing for their meet." (CX-A at 21); *see also* (TR at 345-46, 355-56, 358-59, 409-10, 700-03, 765).

It was not until after Coutu learned that she had been removed from further Cross Country charters that she told Wyatt about her alleged protected activity. *See* (CX-A at 25); (TR at 700-01, 917-19, 937). Coutu told Wyatt: "The coaches clearly want to continue carrying this equipment to the meets so I believe this was a preemptive strike against me driving them for I would not allow this again." (CX-A at 25); *see also* (TR at 709-12, 769-72, 939-48, 1087-88). Upon learning this information, Wyatt immediately came to Coutu's defense by telling Raycraft that, after having watched footage of Coutu's bus herself, she felt Coutu had valid safety concerns about how the table and tent were stored and said that an undercarriage bus should be used for future trips. *See* (CX-A at 24); *see also* (TR at 143, 171-73, 357-58, 702-03, 714-15, 811).

Raycraft responded that he was not aware of any alleged safety complaints and felt that O'Connor's request stemmed from a personality conflict, which he deemed notable because O'Connor had coached the Cross Country Team three seasons a year since 2009 and had never raised a similar issue. (CX-A at 24). In any event, Raycraft agreed with Wyatt's recommendation, stating: "To be safe, let's request the bus with under carriage for the few remaining XC events." *Id.*

Shortly thereafter, in November of 2015, the Respondent received additional complaints about Coutu after she drove a Windham Football charter to UNH. *See* (CX-A at 31-32). During that trip, Raycraft had called Wyatt because he could not find where the buses were parked after the football game. (TR at 157, 310, 319, 361-62, 389, 779). Realizing that the pick-up did not

go smoothly, after the trip, Wyatt called Raycraft to follow-up on the remainder of the bus trip experience. (CX-A at 33); (TR at 362-63, 365-66, 779).

Without realizing that Coutu was the same driver who had been removed from Cross Country, Raycraft said that he preferred the “female driver” not be assigned to drive Football charters again. (CX-A at 32); *see also* (TR at 344-45, 383). In addition to the late pick-up, Raycraft said that Coutu’s yelling throughout the entire trip home was so frequent that he eventually positioned himself towards the back of the bus, and even then, he could not understand what was causing Coutu to act so unreasonably. *See* (CX-A at 32); (TR at 103-04, 109, 157-58, 345, 382, 384, 414-17, 728-29, 774). He said that her tone was demeaning and it “[a]lmost seemed like she was looking just to catch somebody.” (TR at 372). At one point, Coutu ran over the remnants of a blown truck tire, or what was described as “a tired retread” lying in the road because, in Raycraft’s opinion, her eyes were too fixated on the back of the bus; he believes that she could have avoided the retread had she been paying more attention on driving and less attention on what was happening in the back of the bus. *See* (CX-A at 32); (TR at 175, 344, 366-68, 372-74, 376-81, 384, 728-29, 1002-03).

Byrne had a similarly “uncomfortable experience” with Coutu on the ride to the UNH football game. (TR at 72-75, 97, 102, 104, 106). By his estimate, Coutu yelled about once a minute over what he considered extremely trivial things. (TR at 72-82, 93-95, 97, 101-02, 133, 930-31). Judging from her body language and tone of voice, it “seemed like it was coming from an obsession standpoint” as opposed to anything truly safety-related. (TR at 74); *see also* (TR at 75-78, 81, 93-95, 100-02, 133). Like Raycraft, there were numerous times that Byrne tried to remedy whatever was bothering Coutu, but every time he did there was nothing to remedy as far as he could tell, and he concluded that she was fixated on just trying to catch people in trouble. (TR at 74-75, 77, 79, 94-95, 100-01, 133-34, 929-30). At one point, Coutu made an unnecessarily abrupt turn so as not to miss an exit because, in Byrne’s opinion, her eyes were too focused on the rearview mirror. (TR at 73, 76-78, 119-20, 175, 314-15, 325-30, 373-75, 382, 728-29, 774, 1010-11). At trial, it was clear that Byrne was vigilant with the students, trying to minimize interactions with Coutu during the bus ride, but despite his efforts, Coutu continued to correct students who merely had a foot in the aisle, and the corrections were “relentless” and disturbing, creating more of a safety concern than the actual perceived obstruction of having a person’s foot in the aisle. *See* (TR at 74-82, 93-95, 101-02, 104, 930).

When Raycraft told Wyatt that he wished the “female driver” not be assigned to future Football charters, Wyatt reviewed footage from the bus herself before taking any action. *See* (CX-A at 31). Wyatt emphasized that safety was the Respondent’s “number one priority,” so had she seen issues that needed to be addressed she would let Raycraft know, but after viewing the bus footage herself, she agreed that the students were well behaved both to and from UNH. *Id.*; *see also* (TR at 774). She told Raycraft that she would talk to “the driver” about everything including Coutu’s eyes being too fixated on the rearview mirror instead of the road, which seemed “to be an ongoing issue with the coaches.” (CX-A at 31).

Steel had been kept up to speed on all correspondence between Wyatt and Raycraft, and when he eventually connected the dots that Coutu had been the same driver who had already been removed from Cross Country, he immediately demanded that she be removed from Windham bus routes altogether. (CX-A at 31); *see also* (TR at 383, 414, 697). At trial, I found Steel extremely credible when he said that Coutu’s alleged safety complaints had absolutely no bearing on his decision; “[i]t was the manner in which she was requesting it and the way that she was conveying her -- her request.” (TR at 167); *see also* (CX-A at 31); (TR at 160, 414-19, 811). Not only that, but the alarming extent to which she focused on the rearview mirror as opposed to the road really concerned him. *See* (CX-A at 31); (TR at 157-63, 166-69, 175).

When Wyatt notified Coutu of her removal, she stated: “STA’s primary obligation is to provide safe and reliable transportation to the students, employees, customers and the communities in which we serve.” (CX-A at 6). In support of Coutu’s removal, Wyatt cited the late pick-up at UNH, the alarming extent her attention was diverted to the rearview mirror as opposed to the road, and the poor manner in which she spoke to students. *Id.*

Based on the evidence as a whole, I find that Coutu’s alleged protected activities played no role in the Respondent’s decision to remove her from Windham bus routes. Rather, Coutu was removed from Windham bus routes because of the negative and condescending manner in which she conveyed her alleged safety complaints and because of concerns that she focused too much attention on the back of the bus as opposed to the road. Her obsession with a student’s foot in the aisle and her constant corrections compromised the safe operation of the bus. While ideally it would be great to have nothing in the aisle, these students were football players, some very large, and it is amazing that they were able to fit the majority of their bodies within the confines of the seat. *See* (CX-S). Having a foot in the aisle is not the kind of obstruction that

Coutu should have concerned herself with as any such obstruction is temporary in nature and inevitable given the conditions of the bus and the size of the students. *See Id.*

b. Pelham

As for Pelham, complaints about Coutu started as early as the spring of 2015. *See* (RX-21 at 1-2); *see also* (TR a t600, 716, 766-67, 808-09, 825). In March and June of that year, a family filed complaints about Coutu's conduct as a driver on route P14. *See* (RX-2A at 1-2); (RX-2B at 1). The family characterized Coutu's treatment of their son as "bullying," and said that her false accusations and outbursts scared him. *See* (RX-2A at 1-2); (RX-2B at 1). Again, in October of 2015, the same family expressed similar displeasure with Coutu's "harassing" behavior towards their son, and requested "paperwork to fill out a formal complaint and a bullying complaint against her." (RX-2C at 3-4); *see also* (TR at 716, 766-67, 808-09, 825).

In response to the October incident, both Principal Maghakian and Wyatt reviewed footage of Coutu's bus. *See* (RX-2C at 1-2). Maghakian acknowledged that she understood why the parent was upset because "the driver seemed to harp on . . . [the student] a lot more than seemingly deemed necessary." (RX-2C at 1); *see also* (TR at 601-03, 610-16, 625-26). To avoid further problems, Superintendent Lecaroz merely requested that Coutu's regular route be switched from P14 to P9. (RX-2D at 1); *see also* (TR at 792-93).

Then, in April of 2016, the Respondent received complaints involving Coutu as a driver on routes P15 and P9. *See* (RX-2E at 3); *see also* (TR at 716, 808-09, 825, 850). As it relates to P15, Coutu complained that, on April 8, 2016, students threatened her and acted out of control. (RX-2E at 1). Wyatt and Dan Alexander from Pelham High School reviewed footage of Coutu's bus, but neither could verify Coutu's claims. (RX-2E at 1-3). According to Wyatt: "The students were a little upset because she missed stops which is a typical reaction from the students. There was only one student that reacted abruptly and tried to get off the bus and Dan did deal with that student." (RX-2E at 1).

Two weeks later, a parent complained to Lecaroz that Coutu missed a turn on route P9 and backed up into the main road with a bus full of kids. (RX-2E at 3); *see also* (TR at 716, 808-09, 825, 850). After watching bus footage, Wyatt acknowledged that Coutu did miss a turn, but defended Coutu, stating: "She did miss a turn on Mammoth so she pulled into Ray's State Line to turn around. However, she did not back up onto Mammoth Rd. She only slightly backed up while in Ray's because she couldn't make the swing." (RX-2E at 1). In response, Lecaroz

admitted: “In all fairness, the person reporting this to me was an ex-driver so I don’t know if there is some kind of ulterior motive here or not.” *Id.* As a result, Lecaroz gave Coutu the benefit of the doubt. *See id.*

The following month, in May of 2016, Coutu drove a Softball charter and the team’s coach subsequently asked that Coutu not drive the team again. (TR at 840-41, 850) Coutu told Wyatt that the students had been engaged in horseplay, so she told the coaches that she was writing them up. (TR at 923-27). According to the coach, Coutu “was like a prison guard. He did know that she was extremely strict with the rules, but it was over the top.” (TR at 841).

Finally, on September 19, 2016, Lecaroz received a parent complaint concerning Coutu’s behavior on route P6—a route that Coutu had accepted just five days prior. *See* (JX-E at 33); RX-2F at 2-3); (TR at 763-64, 796-97, 802-06, 842-43, 850). The parent asked that Coutu be removed from P6 after her seven year old daughter left the bus crying because she thought that Coutu hated her. (RX-2F at 2-3); *see also* (TR at 716, 803-06, 842-43). Coutu admittedly told the young child that she was no longer picking her up in front of her house anymore. *See* (TR at 905, 908-16). Coutu said that she had discussed the route change with the child’s parent prior, and only conveyed that information to the child because she thought that the dispatcher had told her to do so. *See* (TR at 905, 908-16). The parent who authored the email was seemingly unaware of the proposed route change and was extremely displeased with how Coutu had handled the situation. *See* (RX-2F at 2-3).

The parent also mentioned that on a separate trip that same day, Coutu would not allow her middle aged school son to drink water on the bus. (RX-2F at 2-3). She said that her children would obey the rule without argument, but as her two sons exited the bus, she did not appreciate Coutu making a condescending comment along the lines of: “Make sure you give your brother some water, he must be parched.” (RX-2F at 2-3) (internal quotation marks omitted). Coutu admits that she made a comment to the brothers as they exited the bus, but from her perspective, the comment was merely a reminder and not meant to be condescending. (TR at 917-19).

Despite having given Coutu the benefit of the doubt on several occasions, the September complaint was the straw that broke the camel’s back. *See* (RX-2D at 1); (RX-2E at 1); (RX-2F at 1); *see also* (TR at 716, 792-93, 803-09, 811, 825, 831). At that point, Lecaroz had received 6 different complaints about Coutu that required her involvement (TR at 850-51). Complaints about bus drivers were rare, and she had never received six complaints involving the same bus

driver while working as Superintendent. *Id.* She noted a commonality in all of the complaints and explained as follows: “That would be the interaction between the bus driver and the students. ... [O]ur mission is inspire success one mind at a time in students, and the interactions that were either observed on video – or that were reported to me from parents—were not inspiring to students at all.” (TR at 851). Lecaroz was not concerned with what Coutu was saying, but how the message was consistently delivered—in a demeaning and condescending manner. (TR at 853-54). Consequently, Lecaroz requested that Coutu be removed from Pelham bus routes altogether. *See* (RX-2F at 2); *see also* (TR at 806-08). The decision was hers alone, based on her own observations and conversations with staff and parents. (TR at 831, 851- 54).

Lecaroz is a credible witness. She did not know who Coutu was until the day they met in court. (TR at 830). She acknowledged the importance of student safety and adherence to rules and emphatically stated she would never remove a driver for adhering to the rules and enforcing them, however, it was the way in which Coutu interacted with the students that was problematic. *See* (TR at 811, 843-44, 850-51, 853-58). In other words, the substance of Coutu’s alleged safety directives had no bearing on her decision; it was only the negative manner in which she consistently addressed everyone that caused the District to request her removal. *See* (TR at 811, 843-44, 850-51, 853-58).

Based on the totality of the evidence, I find that Coutu’s alleged protected activity had zero effect on her removal from Pelham School District. Rather, the District, justifiably requested her removal in the wake of repeated complaints about her condescending behavior towards others over the course of a year and a half.

2. The Respondent Asked Coutu to Undergo a Fitness-for-Duty Examination After Several Concerned People Observed Her Struggling to Breathe on More Than One Occasion.

Coutu claims that the Respondent set her up to fail a fitness-for-duty examination it forced her to take in retaliation for her protected activity. Conversely, the Respondent argues that it asked Coutu to undergo a fitness-for-duty examination out of concern for her health and safety and the safety of the students she transported in her bus every day. Based on the record as a whole, I find there is no evidence to support the notion that Respondent’s request for the exam had anything to do with Coutu’s alleged protected activities.

In late November of 2015, driver Mullins told Wyatt that she had some concerns about Coutu’s health after having spent the day with her at UNH during the Windham Football charter.

(CX-A at 4); (TR at 495-98, 501-03, 507-08). Coutu's breathing seemed extremely belabored, her lips appeared blue, and she was unable to walk to the bathroom without assistance. (TR at 495-498, 501-03, 507-08). Mullins said that she did not mention her concerns to Coutu because she felt as though Coutu would not do anything about it, which I find reasonable where Coutu denies having had any remarkable breathing issues. *See* (JX-E at 15, 17-19); (TR at 497-98, 997-98).

Not long after, on December 15, 2015, Bourgelais expressed similar concerns about Coutu to Wyatt. (CX-A at 4, 7); (TR at 631-37, 645-46). That day, Bourgelais, among others, saw Coutu hanging over a chain linked fence struggling to catch her breath. (CX-A at 4, 7); (TR at 631-37, 645-46); *see also* (TR at 183-84, 195, 197, 241, 483). He had observed her with breathing difficulties before, but that particular incident was unusually concerning. (CX-A at 4, 7); (TR at 635-36, 645).

As Wyatt had also observed Coutu with breathing difficulties on a number of occasions, she felt that Coutu should be evaluated just to ensure her health was not going to put her own safety or the safety of the children she transported at risk. (JX-E at 15, 17-19); (TR at 183, 195, 483, 496-97, 743-44, 752, 782-84, 1019); *see also* (CX-A at 64, 70); (TR at 183-84, 195, 197, 241, 483). The Respondent paid for the examination and paid Coutu to attend it. (TR at 1019).

Nurse practitioner MacDonald performed Coutu's evaluation. (TR at 273-74). Coutu's visit was seemingly unremarkable to MacDonald where she could not recall much about the visit outside of what she dictated in her treatment notes. *See* (TR at 286). MacDonald said that the results of the physical examination and pulmonary function test rendered Coutu unfit for work and she credibly denied having conspired with the Respondent in reaching that conclusion. (CX-A at 8-11); (JX-D at 1-5); (JX-E at 26, 28-30); (TR at 273, 280-81, 286-87); *see also* (JX-E at 18); (TR at 787). She explained that when she conducted examinations of this nature, she looks at things from a medical stand point only, and "has no motivation to make any choice outside of that." (TR at 286). MacDonald testified under subpoena and had no idea why she was being called to testify. She did her best to recall the facts surrounding Coutu's examination and did so credibly.

Based on the totality of the evidence before me, I find that the Respondent's request that Coutu undergo a fitness-for-duty examination was completely unrelated to her alleged protected activity. Having personally observed Coutu over the course of four days of trial, I also witnessed

her breathing and mobility limitations firsthand. (CX-A at 9, 11). I find that the Respondent acted reasonably when it asked Coutu to be evaluated in the interests of safety and genuine concern for her well-being.

3. The Respondent Temporarily Classified Coutu as a Casual Driver Because She Was Unsuccessful in the Annual Bidding Process.

Coutu alleges that the Respondent demoted her to casual driver due to her alleged protected activities. The Respondent argues that Coutu was temporarily classified as a casual driver because she was unsuccessful in the annual bidding process under the Parties' CBA. I find the Respondent's interpretation of events to be more consistent with the evidence as a whole.

In February of 2016, Coutu was classified as a stand-by driver. (JX-E AT 28-30); (TR at 517-18, 789, 793-95, 797-98); *see also* (JX-A at 13); (RX-2D at 1). The Respondent already had four stand-by drivers and ordinarily only maintained four stand-by drivers at a time, but created a fifth stand-by position to accommodate Coutu when she returned to work from medical leave. *See* (TR at 248-49, 758, 791-92, 794-95). With that being said, the Respondent only agreed to place Coutu as a stand-by driver until the end of the school year and then she would have to participate in the annual bidding process like all other drivers per the terms of the parties' CBA. *See* (JX-A at 13); (JX-E at 28-30); (RX-2D at 1); (TR at 517-18, 758, 789, 793-95, 797-98).

At the end of the school year, Coutu was unsuccessful in the annual bidding process, in part, because she was not qualified to be a stand-by driver. *See* (JX-A at 8, 23); (JX-E at 27); (TR at 248, 758, 794-95, 802). Stand-by drivers were expected to cover any route at any time, and Coutu could not cover any Windham routes per the District's request. *See* (CX-A at 5, 31); (JX-A at 8, 23); (TR at 248, 758, 794). Further, from a financial standpoint the Respondent only needed four stand-by drivers—not five. (JX-E at 28-29). Because Coutu did not secure a regular route or a stand-by position at that time, per the CBA, she became a casual driver for a very short period of time before being offered the BG/PMA route, and subsequently, the Pelham route, which she ultimately accepted. *See* (JX-A at 23); (JX-E at 27, 33); (TR at 795-96, 802-03).

I find that based on the totality of the evidence before me, Coutu's alleged protected activities played no role in the Respondent's decision to classify her as a casual driver. Coutu was classified as a casual driver solely because she was unsuccessful in the annual bidding process per the parties' CBA.

D. Even Assuming Coutu’s Alleged Protected Activities Played a Role in the Alleged Retaliatory Actions Taken Against her, the Respondent Proved by Clear and Convincing Evidence That it Would Have Acted the Same Regardless.

For possible appellate purposes and completeness of the record, I will assume that Coutu has met her prima facie case and address whether the Respondent would have taken the same actions regardless of the alleged protected activity. “The ‘clear and convincing evidence’ standard is the intermediate burden of proof, in between ‘a preponderance of the evidence’ and ‘proof beyond a reasonable doubt.’” *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3rd Cir. 2013) (internal citation omitted). This means that the Respondent must prove it “is highly probable or reasonably certain” that it would have taken the alleged adverse actions against Coutu irrespective of her protected activities. *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, slip op. at 6, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (internal quotations omitted).

The Respondent denies it took any of the alleged adverse actions against Coutu on account of her alleged protected activities. Instead, the Respondent argues that she was removed from Windham and Pelham School Districts after multiple complaints concerning her condescending and demeaning behavior towards the students and concerns that she did not focus enough attention on the road while driving. Further, Coutu was asked to undergo a fitness-for-duty evaluation after several people observed her with breathing difficulties—later substantiated by the results of her pulmonary function test—such that the Respondent was concerned for her health and safety and the safety of the students being transported. Finally, Coutu was temporarily classified as a casual driver because she was unsuccessful in the annual bidding process.

For all of the reasons already discussed in Part C above, I find it is highly probable that the Respondent would have taken the same alleged retaliatory actions towards Coutu regardless of any protected activity. Per the Districts’ service contracts with the Respondent, Coutu was expected to be courteous to and cooperative with others—there is ample evidence to support that she was not. (JX-B at 11-12). The Respondent is a business whose success depended on satisfactory customer service. After repeated behavioral complaints about Coutu involving various people at various points in time, each District independently determined that Coutu’s overall customer service was unsatisfactory and reasonably requested her removal pursuant to

the terms of its service contract with the Respondent. *See* (CX-A at 5, 31); (JX-B at 11-12); (RX-2F at 1); (TR at 159, 657-58, 695)

Beyond the customer service aspect, Roe, Heilman, and Riddinger substantiated a lot of the safety concerns raised by Coutu's conduct. Based on Roe's testimony regarding lane changes, I find that it was unsafe for Coutu to abruptly cross lanes with a bus full of people on the way to UNH as she did. *See* (TR at 469-72). And as supported by Riddinger's testimony, I find that Coutu's eyes were constantly (and unsafely) fixated on the rearview mirror to notice feet in the aisle to the extent that she did. *See* (TR at 236). Not only that, but I find that all three witnesses highlighted the unreasonableness of Coutu's complaints by testifying that feet do not constitute an unsafe aisle obstruction as feet can move in the event of an emergency. *See* (TR at 236, 253). Further, I agree with Heilman's testimony that it would be very difficult to focus on safe driving while making repeated comments to correct student behavior, which is presumably why Roe testified that repeatedly correcting student behavior is not appropriate and that the use of write-up forms was preferred. (TR at 253-54, 477). Coutu did not follow that procedure and persisted in her repeated oral corrections of a condition (feet in the aisle), that does not even constitute an unsafe obstruction. All of the alleged adverse actions constitute a series of unrelated events without a shred of evidence to show that the Respondent had some hand in orchestrating the events or that the school districts conspired with each or other (or the Respondent) to retaliate against Coutu. To be sure, the only common thread was Coutu's irrational and compulsive behavior in repeatedly correcting student actions that did not constitute true safety concerns, and the condescending and demeaning manner in which Coutu consistently interacted with students. The alleged adverse actions all result from Coutu's own shortcomings and nothing more. The totality of the evidence before me supports that the Respondent would have acted the same towards Coutu irrespective of any alleged protected activities.

While almost complete, I will address one other witness called by Coutu. Wayne Sabato was a driver for the Respondent and was allegedly removed from a route at the request of a school district. Sabato was not sure who directed his removal from the route, but attributes it to an act of revenge by employees of the school district who misrepresented certain facts to secure his removal. (TR at 531-33, 536, 540, 543-44, 546, 555-58). At the time of trial, he still worked for the Respondent and he received no discipline from the Respondent on account of the incident. (TR at 530, 542). On balance, Sabato's testimony adds little to the landscape.

VI. ORDER

Based on the record as a whole, I find that Coutu does not have valid STAA claims where she did not meet her burden of proving that her alleged protected activities contributed to the Respondent's alleged adverse actions towards her. Even assuming she had, however, I find that the Respondent proved by clear and convincing evidence that it would have taken the same alleged retaliatory actions towards Coutu irrespective of her alleged protected activities. Accordingly, it is ORDERED that Coutu's claims for relief are DENIED.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

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. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

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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, 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).