U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

MONICA CARPENTER,	**ARB CASE NO. 2025-0036**
COMPLAINANT,	**ALJ CASE NO. 2023-STA-00033** **DISTRICT CHIEF** **ALJ PAUL C. JOHNSON, JR.**
v.	
FEDEX FREIGHT,	**DATE: October 5, 2026**
RESPONDENT.	

Appearances:

For the Complainant:
Monica Carpenter; *Pro Se*; Sapulpa, Oklahoma

For the Respondent:
Bradley C. Crawford, Esq.; *FedEx Freight*; Harrison, Arkansas

Before KAPLAN and KIKO, Administrative Appeals Judges

DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA),[1] and Section 402 of the Food Safety Modernization Act (FSMA).[2] On February 22, 2025, Complainant Monica Carpenter filed a Petition for Review with the Administrative Review Board (ARB or Board), seeking review of a United States Department of Labor Administrative Law Judge's

[1] 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978 (2026).

[2] 21 U.S.C. § 399d; 29 C.F.R. Part 1987 (2026).

(ALJ) Amended Decision and Order Denying Complaint[3] (D. & O.), issued on February 13, 2025. For the reasons that follow, we affirm the D. & O.

BACKGROUND[4]

1. Factual Background

A. Complainant's Employment with Respondent

Complainant began working for Respondent FedEx Freight in 2017 as a Service Center Support employee.[5] In this role, she handled several administrative and clerical tasks, including billing.[6]

Complainant asserts, and Respondent does not dispute, that Complainant was a top biller in the company. Complainant asserts that she billed at a 99.8% accuracy rate—the highest in the company—and that in the several months leading up to the termination of her employment she completed 25% more bills than the next highest performer.[7]

Despite being a top biller, Complainant also had a history of disciplinary issues. During the approximately 21-month period before the termination of her employment, Complainant was subjected to at least four corrective actions:

- March 18, 2021 – written counseling about the need to focus on billing;
- March 18, 2022 – written counseling about performing unproductive work;
- May 17, 2022 – a "critical" corrective action for adding remarks to a shipment that were unrelated to the shipment; and

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[3] The ALJ originally issued a Decision and Order on February 12, 2025, but that decision did not include a notice of appeal rights. D. & O. at 1 n.1. The ALJ issued the amended D. & O. to include a notice of appeal rights, but did not otherwise change the substance of the original decision. *Id.*

[4] The ALJ catalogued the evidence introduced by the parties at the beginning of the D. & O., but did not cite to that evidence in making findings of fact later in the decision. We have thoroughly reviewed the record and cite to the relevant portions of the record supporting the facts recited herein.

[5] Respondent's Exhibit (RX) 7 at 1.

[6] RX 1 at 1.

[7] D. & O. at 6-7 (citing Complainant's Exhibit (CX) 1).

- May 17, 2022 – a "critical w/ 3-day" for placing remarks in a "do not print" section of a bill, naming another employee as "toxic."[8]

Complainant did not dispute that she engaged in the behavior for which she was disciplined or otherwise expressly address the disciplinary issues in her briefs to the ALJ or the ARB.

B. Complainant's Protected Activity

During her employment, Complainant frequently raised concerns internally regarding Respondent allegedly shipping foodstuffs in the same shipment as "poison" and/or failing to properly identify or label foodstuffs to ensure safe transport.[9] According to Complainant, she raised these issues as far back as November 2019.[10]

Although Complainant did not provide a clear narrative on the subject in her briefing to the ALJ or ARB, it appears that at some point after Complainant first raised these concerns, Respondent implemented a policy to flag foodstuffs, at Complainant's suggestion.[11] Respondent apparently did so to allay Complainant's

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[8] RX 7 at 4.

[9] The ALJ described Complainant's concerns as Respondent shipping foodstuffs and poison in the same shipment. D. & O. at 10. From our review of the evidence, it appears that Complainant may have also been more generally concerned about Respondent failing to properly label or tag foodstuffs so that Respondent could ensure that it was handled properly (including not being loaded with poison in the same shipment). *E.g.,* CX 2 ("After multiple examples of violations, the operation manager at the time, John Williams from the below email, did put into effect the procedure of indicating and billing food shipments and giving them priority, just like international and hazardous shipments, in order to ensure safety warnings from the system were in place and not compromised.").

[10] *Id.*

[11] *See id.*; *see also* CX 5 at 8 (discussing "the retraction of the process put into place by management indicating food when it is checked in and giving it priority just like hazmats and international in order to be flagged so that the system warnings are in place for loading mistakes and loading in route, retracted by Lisa, per Tollie (her excuse: that it was not policy. That is no excuse. It is unsafe).").

concerns, despite not believing such a practice was necessary.[12] At some point, though, Complainant says that her immediate supervisor retracted this practice.[13] This prompted Complainant to renew her concerns in 2021 and 2022. The record includes various emails from Complainant regarding these concerns in October 2021,[14] March 2022,[15] May 2022,[16] and October 2022.[17]

C. *Complainant's Alteration of a Bill of Lading and Termination of Employment*

On November 2, 2022, Respondent's Operations Manager, Scott Lovett, asked Complainant about a shipment by a regular customer, Saginaw Control and Engineering (Saginaw), that was unconfirmed and missing a Bill of Lading (BOL).[18] According to Lovett, Complainant stated that she would look for the BOL and "get it taken care of."[19]

BOLs are important documents. They provide shipment details and give title of that shipment to a specified party/addressee.[20] Respondent's policy dictated that "[e]ach shipment requires its own BOL."[21] The policy stated that employees must "[e]nsure proper completion of the BOL before loading the freight at the shipper's

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12 *See* CX 2 ("Lastly, we do not have to separate the food shipments, this is done for your benefit because it is your concern but we did not have to implement this process by any means."), 8 at 2 ("After raising my original concerns at the end of 2020, there was an investigation that led to a meeting between lower and higher management and myself in which they said that they were not required to separate food from poison. They gave me many reasons for why, when and how and assured me that safety protocols did not need the safety procedure put into place by FedEx of warning the dock of potential mistakes while loading food with poison, which will only generate the warning if the food is billed.").

13 *See* CX 2, 5 at 8.

14 CX 2.

15 CX 3 at 7.

16 CX 4 at 1-2.

17 CX 5 at 7-8.

18 RX 3, 4 at 3, 7 at 1.

19 RX 4 at 3.

20 RX 2 at 1.

21 *Id.*

location."[22] The BOL also contains a "Shipper Certification," signed by the shipper, that "complet[es] the agreement with the customer and form[s] a binding contract with the shipper."[23]

Respondent's policy also dictates that Respondent must obtain a "Corrected Bill of Lading (CBOL) . . . when any aspect of the original BOL (contract) was submitted in error or a portion was left off completely."[24] "[T]he customer who is the owner of the goods (usually the debtor) is the only party authorized to submit the new documentation."[25]

When a BOL cannot be located, Respondent's practice called for the Service Center Support employee to hold the shipment until the BOL could be located.[26] Respondent offered evidence that Complainant had followed this practice for missing BOLs on at least one occasion in the past.[27]

Instead of following this procedure for the Saginaw BOL, Complainant made a copy of an old BOL from a prior shipment by Saginaw, whited out the addressee information and replaced it with the current addressee, scratched out the weight of the prior shipment and added the new weight, and scratched out the "Pro Number" (i.e., tracking number) of the prior shipment and added the new Pro Number.[28] While Complainant replaced or edited all of these other details, she left the

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[22] *Id.*

[23] *Id.* at 4; *see also* RX 3.

[24] RX 7 at 2. RX 7 is the "Corrective Action Recap" for the termination of Complainant's employment. It includes an excerpt from the "Corrected Bills of Lading and Letters of Authority" policy, quoted above. It does not appear that the policy itself was separately included as an exhibit in the record.

[25] *Id.* at 3. The policy also says that, if the customer is a "regular shipper or receiver of goods" but "refuses to provide the proper documentation," Respondent can make "the applicable changs to the original BOL (pulled from the Imaging System), sign their name, insert the customer's name, and add the date and time to the document," and then fax a copy of the document to the customer, enter the appropriate changes in the system, and image the new document. *Id.* Complainant does not contend that she followed this alternative path, either.

[26] RX 4 at 3.

[27] *See* RX 5.

[28] RX 3, 7 at 1.

signature for Saginaw's representative in place under the "Shipper's Certificate."[29] Complainant also did not change the number of units from the prior shipment, although the shipment sizes differed.[30] Complainant did not call Saginaw about the missing BOL or let a manager know about the issue so they could contact Saginaw.[31]

Respondent quickly discovered Complainant's alteration of the BOL and conducted an investigation.[32] During the investigation, Complainant admitted that she made the changes to the BOL, though she had never done so before.[33] According to Complainant, she told Lovett what she planned to do and he "didn't say I couldn't," and she was "just trying to help."[34] Lovett, though, stated that Complainant stated that "she would look for a BOL and get it taken care of. I expected her to either find the BOL or let us know that we had not received one and needed to hold the shipment."[35]

At the conclusion of the investigation, Jeff Chapman, a human resources representative,[36] and Matthew Jordan, the Tulsa, Oklahoma Service Center Manager,[37] recommended that Respondent terminate Complainant's employment for violating (1) Respondent's Conduct of Employees Policy and (2) Respondent's Performance Improvement and Corrective Action Policy for Hourly, Mileage-Compensated, and Staff Nonexempt Employees, both of which prohibit falsification of company documents and records.[38] Rob Leach, Respondent's Employee Relations

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29 *See* RX 3.

30 *See id*. As a result, the shipment was "short" when it was delivered. RX 7 at 1.

31 *See* RX 4 at 1.

32 *See generally* RX 4, 7, Declaration of Rob Leach (Leach Decl.) at 1.

33 RX 4 at 1.

34 *Id.* at 1-2.

35 *Id.* at 3.

36 CX 24 at 2-3.

37 Declaration of Matthew Jordan (Jordan Decl.) at 1.

38 Jordan Decl. at 1-2; RX 7 at 1, 5. The Conduct of Employees Policy identifies "unacceptable performance and behavior in the work environment." It includes "Falsification of company documents," and also notes that "no changes may be made to a company-provided form except by the person who originally completed/signed the form. When making changes, the originator must initial each change." RX 9 at 1-2.

Manager for the Southwest Region, reviewed and approved the termination decision. Respondent terminated Complainant's employment in December 2022.[39]

2. Procedural History and ALJ Decision

Complainant filed a complaint against Respondent with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on December 12, 2022. OSHA found no reasonable cause to believe that Respondent violated the STAA or FSMA and dismissed Complainant's complaint. Complainant objected to OSHA's findings and the matter was assigned to an ALJ.

Shortly after the case was assigned to the ALJ, the ALJ granted Complainant's request to decide this case on the written record without a formal hearing.[40] The ALJ accepted closing briefs and exhibits and issued the D. & O. on February 13, 2025.

In the D. & O., the ALJ determined that Complainant engaged in protected activity under the STAA and FSMA when she "expressed her concerns about shipping poison and food in the same trailer several times."[41] However, the ALJ determined that Complainant did not meet her burden to show by a preponderance of the evidence that her protected activity contributed to the termination of her employment.

First, the ALJ determined that Complainant's concerns "were communicated over a period of two years without any adverse consequences."[42] "Additionally, Respondent made some attempt to address her concerns, despite Respondent's

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The Performance Improvement and Corrective Action Policy for Hourly, Mileage-Compensated, and Staff Nonexempt Employees provides a list of "the most severe and willful offenses that are not subject to the standard performance improvement and progressive correction action process . . . [for which] employees are subject to immediate removal from service and possible termination." The list includes "Dishonesty, providing false or misleading information, falsification of company documents or records (including employment application)." RX 8 at 2.

39 Leach Decl. at 1-2.

40 Order Granting Request for Decision on the Record / Scheduling Order at 1.

41 D. & O. at 12.

42 *Id.* at 13.

belief that the company was not required to make those attempts."[43] The ALJ also observed that two of the decisionmakers—Leach and Jordan—"provided sworn affidavits that they did so for the sole reason that she falsified the BOL on November 2, 2022."[44] The ALJ found their statements "credible and uncontradicted," and "consistent with both Respondent's policy against falsification of records and dishonesty and Respondent's disciplinary policy for serious infractions."[45] Furthermore, "Respondent has demonstrated that it has terminated every employee at the Tulsa Service Center found in the past five years to have committed dishonesty or falsification of records, when none of those employees had engaged in protected activity."[46] While the ALJ recognized that Complainant's last instance of protected activity occurred the day before she falsified the BOL, he rejected any inference of causation from the timing due to an intervening event—the falsification itself.[47]

For similar reasons, the ALJ also found that Respondent showed by clear and convincing evidence that it would have terminated Complainant's employment even in the absence of her protected activity. The ALJ again cited Respondent's policies against dishonesty and falsifying company records, which are identified as matters so serious that they may warrant immediate termination.[48] The ALJ also reemphasized that Complainant raised her concerns many times and that Respondent attempted to correct the problem. As the ALJ stated, "[t]here was no attempt to terminate her employment after she raised those concerns. It was not until she falsified the BOL (and admitted doing so) that FedEx began the termination process."[49] The ALJ also again pointed to comparator evidence that all others who committed dishonesty or falsification of records were terminated.[50] Finally, the ALJ again cited the uncontradicted statements of the decisionmakers

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43 *Id.*

44 *Id.*

45 *Id.* at 13-14.

46 *Id.* at 14.

47 *Id.*

48 *Id.*

49 *Id.* at 14-15.

50 *Id.* at 15.

that they recommended termination solely because of the BOL.[51] Therefore, the ALJ dismissed Complainant's complaint.

Complainant appealed the D. & O. to the Board on February 22, 2025.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue final agency decisions under the STAA and FSMA.[52] In STAA and FSMA cases, the Board reviews questions of law de novo, but is bound by the ALJ's factual findings if they are supported by substantial evidence.[53] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[54]

DISCUSSION

To prevail under the STAA and FSMA, a complainant must establish by a preponderance of the evidence that: (1) they engaged in activity protected by the statutes; (2) they suffered an adverse action; and (3) the protected activity was a contributing factor in the adverse action.[55] If the complainant meets this burden, the employer may still avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the complainant's protected activity.[56]

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[51] *Id.*

[52] *See* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); 29 C.F.R. §§ 1978.110(a); 1987.110(a).

[53] *Domebo v. Okmulgee Ready Mix Co.*, ARB No. 2024-0026, ALJ No. 2023-STA-00004, slip op. at 4 (ARB Mar. 27, 2026) (citations omitted); *Campbell v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 2020-0056, ALJ No. 2018-FRS-00129, slip op. at 2 (ARB Sept. 21, 2021) (citation omitted).

[54] *Domebo*, ARB No. 2024-0026, slip op. at 4 (citation omitted).

[55] 21 U.S.C. § 399d(b)(2)(C)(iii); 49 U.S.C. §§ 31105(b)(1), 42121(b)(2)(B)(iii); 29 C.F.R. §§ 1978.109(a), 1987.109(a); *see also Domebo*, ARB No. 2024-0026, slip op. at 5 (citations omitted); *Campbell*, ARB No. 2020-0056, slip op. at 2-3 (citation omitted).

[56] 21 U.S.C. § 399d(b)(2)(C)(iv); 49 U.S.C. §§ 31105(b)(1), 42121(b)(2)(B)(iv); 29 C.F.R. §§ 1978.109(b), 1987.109(b); *see also Domebo*, ARB No. 2024-0026, slip op. at 5 (citations omitted); *Farley v. Altasource, LLC*, ARB No. 2016-0091, ALJ No. 2015-FDA-00001, slip op. at 3 (ARB Aug. 20, 2019).

The employer's same-action defense is a counterfactual or hypothetical inquiry that asks the factfinder to decide whether the evidence, considered as a whole, shows that it is highly probable that the respondent would have made the same decision had the protected activity never occurred.[57] In this case, the question is whether Respondent still would have terminated Complainant's employment because she altered the BOL, if she had not also complained about Respondent's shipping practices.

Relevant evidence in weighing the same action defense may include the temporal proximity between the non-protected conduct and the adverse action, the independent significance of the complainant's alleged (and unprotected) misconduct, contemporaneous documentation of the misconduct and respondent's actions, the employee's work record, the respondent's established policies and practices, the consistency of the respondent's explanations, and the respondent's treatment of materially similar employees who did not engage in protected activity.[58] Considering these factors, we conclude that substantial evidence supports the ALJ's conclusion that Respondent established its defense.[59]

First, the temporal proximity between Complainant's non-protected conduct (manufacturing or altering the BOL) and the termination of her employment is quite close. Upon discovering that Complainant altered a BOL, Respondent immediately initiated an investigation pursuant to its disciplinary policy and promptly terminated Complainant's employment at the conclusion of that investigation the next month. The immediate and decisive response supports the conclusion that Respondent would have taken the same action, even in the absence of Complainant's protected activity.

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[57] *Palmer v. Canadian Nat'l Ry./Ill. Cent. R.R. Co.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 52-53 (ARB Sept. 30, 2016, reissued with full dissent Jan. 4, 2017); *Gutierrez v. R.B. Petroleum Prods., Inc.*, ARB No. 2024-0013, ALJ No. 2022-STA-00043, slip op. at 11 (ARB May 22, 2026) (citation omitted).

[58] *See Gutierrez*, ARB No. 2024-0013, slip op. at 12; *Halliday v. Transp. Express, Inc.*, ARB No. 2023-0024, ALJ No. 2020-STA-00067, slip op. at 26-27 (ARB Oct. 7, 2024); *March v. Metro-North Commuter R.R. Co.*, ARB No. 2021-0059, ALJ Nos. 2019-FRS-00032, -00035, slip op. at 20 (ARB Jan. 21, 2022); *see also Speegle v. Stone & Webster Constr., Inc.*, ARB No. 2013-0074, ALJ No. 2005-ERA-00006, slip op. at 11-12 (ARB Apr. 25, 2014).

[59] The same-action defense is dispositive. Therefore, we need not and do not reach the ALJ's holding that Complainant did not establish that her protected activity contributed to the termination of her employment or any other issue raised in this appeal.

Like the ALJ, we recognize that Complainant also expressed concerns about Respondent's shipping practices shortly before her termination.[60] But, as the ALJ noted, Complainant had been raising concerns about Respondent's shipping practices for years before Respondent launched its investigation about the BOL and terminated her employment. Only when Complainant altered the BOL did Respondent take action to terminate her employment. We agree with the ALJ that the timing of the events supports the conclusion that Respondent's investigation and decision to terminate Complainant's employment were driven by Complainant's conduct with respect to the BOL, rather than with respect to her shipping concerns.[61]

The significance of Complainant's misconduct and Respondent's established policies and practices also supports the ALJ's conclusion that Respondent would have terminated Complainant's employment, even in the absence of her protected activity. Respondent's policies made clear that BOLs are important documents. They provide shipment details, give title of the shipment to the addressee, and form a binding contract between Respondent and the shipper. As set forth above, Respondent had policies in place to ensure BOLs were created and handled appropriately and there was an established practice for what an employee should do if a BOL was missing. Complainant did not follow the practice or policy in this instance. Instead, she accessed an old BOL, altered it, and left the shipper's signature in place. In effect, she manufactured a binding contract when the original could not be located or confirmed.

On appeal, Complainant defends her decision to alter the BOL and downplays the significance of her actions. She argues that she did not act dishonestly when altering or manufacturing the BOL and that her conduct was

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60 *See* D. & O. at 14.

61 *See Brucker v. BNSF Ry. Co.*, ARB Nos. 2018-0067, -0068, slip op. at 9 (ARB Nov. 5, 2020) ("The Board has held that the probative value of temporal proximity decreases as the time gap between protected activity and adverse action lengthens, particularly when other precipitating events have occurred closer to the time of the unfavorable action.") (citation omitted); *Neely v. The Boeing Co.*, ARB No. 2020-0071, ALJ No. 2018-AIR-00019, slip op. at 17 (ARB May 19, 2022) ("Although [complainant] engaged in some protected activity within a few months of his selection for the layoff, [he] avers he began engaging in protected activity in December 2014, fifteen months before he was laid off in March 2016. This lengthy temporal gap does not support the inference that [complainant's] protected activity contributed to his layoff in the particular circumstances of this case.") (citations omitted).

"insignificant" and "harmless" because the information for a correct BOL was available from other sources.[62] Even if the information Complainant included in the BOL was technically accurate,[63] that does not mean that the document she manufactured was authentic or that her actions were consistent with policy. Complainant did not secure the original BOL, as company policy and practice required; instead, she manufactured a document and made it appear to be the original, when it was not.

Complainant also argues on appeal that updating BOLs as she did in this case was allowed and was consistent with how she was trained.[64] Complainant does not cite any evidence in support of this averment and the record undermines Complainant's claim. Although she now suggests that her actions were not out of the ordinary, Complainant admitted during Respondent's contemporaneous investigation that she had not altered a BOL like this before.[65] Indeed, Respondent offered evidence of at least one instance where Complainant followed the proper procedure and reported a missing BOL up the chain to a manager.[66] Furthermore, while Complainant claims in her Opening Brief that she was trained to "update" BOLs in this way, she inconsistently argues in her Reply Brief that her actions were the byproduct of a "lack of training."[67] Complainant cannot have it both ways—she was either trained to alter BOLs this manner, or she was not trained on the issue and acted unilaterally in contravention of policy and established practice. Claiming both undermines her credibility and diminishes her explanation for her actions.

Complainant also asserts on appeal that Lovett approved of her plan to alter an old BOL for this shipment.[68] Complainant again cites no evidence in support of this assertion and the record undermines Complainant's position. Lovett stated

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62 Opening Brief of Complainant (Comp. Br.) at 1-2.

63 The BOL Complainant created was not totally accurate—she did not change the shipping units information, which was incorrect for this shipment. RX 7 at 1.

64 Comp. Br. at 2.

65 CX 4 at 1.

66 *See* RX 5.

67 *Compare* Comp. Br. at 2 ("Updating bills was allowed, this is how I was trained and acted accordingly with Scott's approval."), *with* Complainant's Reply Brief (Reply Br.) at 1 (describing her actions as "an honest mistake/misunderstanding, due to lack of training and a complicated process of [ ] billing and updating BOL's . . . .").

68 Comp. Br. at 2.

during the contemporaneous investigation that he expected Complainant to find the original BOL or follow proper procedures if she could not.[69] And, although Complainant now claims that Lovett affirmatively told her she could proceed by altering an old BOL, during the investigation she claimed only that Lovett "didn't say I couldn't."[70] Again, Complainant's inconsistencies undermine her credibility.

Respondent also had clear, zero-tolerance policies against falsifying company records. The company's Performance Improvement and Corrective Action Policy provided that "providing false or misleading information" and "falsification of company documents or records" are among the "most severe and willful offenses" an employee can commit.[71] Indeed, Respondent regarded falsifying records as so severe that Respondent exempted it from the company's standard performance improvement and progressive corrective action processes and stated that such a violation could render the employee "subject to immediate removal from service and possible termination (pending investigation) . . . ."[72] The company's Conduct of Employees Policy also clearly prohibited "[f]alsification of company documents," and stated that "no changes may be made to a company-provided form except by the person who originally completed/signed the form."[73] Violation of this policy constituted "unacceptable performance and behavior in the work environment."[74] Complainant violated these policies by manufacturing or altering the BOL.

Respondent has also been consistent in explaining why it terminated Complainant's employment, lending further credence to its defense. Respondent has always, and only, said that it terminated Complainant's employment because she altered the BOL. The record includes two declarations from decision makers affirming that they only considered her conduct with respect to the BOL in reaching their decision, which the ALJ found credible and "uncontradicted by any other evidence, Complainant's suspicions notwithstanding."[75] Complainant has never asserted that Respondent's explanation has shifted over time or that Respondent ever offered any other rationale for its decision.

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69 RX 4 at 3.

70 *Id.* at 1.

71 RX 8 at 2.

72 *Id.*

73 RX 9 at 2.

74 *Id.* at 1.

75 D. & O. at 15.

Respondent's contemporaneous actions are also consistent with and substantiate its explanation. When Respondent discovered Complainant's conduct, it immediately launched an investigation and the available contemporaneous evidence collected during that investigation indicates that Respondent was exclusively focused on Complainant's conduct with respect to the BOL.[76] None of the contemporaneous records indicate Respondent had any ulterior motive or an interest in Complainant's previous protected activity.

Finally, comparator evidence also supports Respondent's claim that it terminated Complainant solely for manufacturing or altering the BOL. Respondent offered evidence that all three other employees found to have violated Respondent's policies against falsification and dishonesty at the same facility were, like Complainant, terminated.[77] None of these employees had engaged in protected activity, and all suffered the same consequences.

On appeal, Complainant's sole rebuttal to this comparator evidence is that "[a]ll of the other employees put forth by respondent that were terminated under this policy all lied."[78] Complainant does not elaborate on her argument or explain how the comparators' behavior differed materially from her own.

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[76] *See generally* RX 4, 7; Leach Decl.; Jordan Decl. Complainant argues that her managers, particularly her immediate supervisor Lisa Orcutt, responded adversely to her complaints about shipping practices and that if not for the "increased scrutiny" this antagonism caused, she would not have been terminated for the BOL. Comp. Br. at 3; Reply Br. at 1. Granted, Complainant offered into evidence several emails she sent complaining about alleged retaliation, intimidation, and harassment she believes she suffered, primarily at the hands of Orcutt for raising shipping concerns. Complainant clearly believed that her complaints about Respondent's shipping practices created friction with and drew ire from management, especially Orcutt. Even if it did, though, the evidence does not support Complainant's inference that the friction led to "increased scrutiny" or caused the termination of her employment. For the reasons herein, substantial evidence supports the ALJ's ultimate conclusion that Respondent would have terminated Complainant's employment anyway, for the BOL issue. Importantly, we reiterate that there is no evidence from the BOL investigation materials that suggests that Complainant's protected activity or friction with her supervisors was relevant to the decision makers or factored into the investigation. There is also no indication that Orcutt, the alleged primary retaliator, had anything to do with Respondent's decision to terminate Complainant's employment.

[77] RX 10; Leach Decl. at 2-3.

[78] Comp. Br. at 2.

The Board does not require a respondent relying on comparator evidence to identify an employee who committed precisely the same misconduct or violation as the complainant. A comparator could be relevant if he committed the "same or similar" violation as the complainant.[79] The Board has expressly declined to impose a bright-line test for what constitutes the "same or similar" violation, instead giving ALJs the "flexibility to weigh the significance of comparators case-by-case, depending on the level of similarity or lack of similarity among the comparators."[80] At its core, the governing question is whether the comparators and the complainant have enough material characteristics in common that the respondent's treatment of the comparators is probative of what the employer would have done to the complainant absent protected activity.[81] In appropriate circumstances, a violation of the same rule, even if the misconduct is different, may be sufficiently similar to warrant consideration.[82]

To be sure, we recognize that the comparators offered by Respondent did not engage in precisely the same misconduct as Complainant did here—manufacturing or altering a BOL—although they were charged with violating the same rules as Complainant.[83] Even so, Complainant's lone argument that the comparators "lied" but that she did not is undeveloped, unsupported by citations to the record, and conclusory.[84] Furthermore, while Complainant questions the relevance of the comparators Respondent proffered, she does not offer any comparators of her own

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79 *Echols v. Grand Trunk W. Ry., Co.*, ARB No. 2016-0022, ALJ No. 2014-FRS-00049, slip op. at 5 (ARB Oct. 5, 2017) (citation omitted).

80 *Id.* (internal quotations and citation omitted).

81 *See id.*

82 *See id.* at 4-5.

83 In one case, a freight inspector was found to have been failing to measure and reweigh loads, while claiming that he had fulfilled the task. RX 10 at 1. In another case, an operations employee was discovered to have been falsifying a "close down report" regarding shutting down the Tulsa facility at night. *Id.* at 4. In the third case, a maintenance employee reported that he was doing "yard checks" and "out of service equipment" checks, when in fact he was not. *Id.* at 7.

84 *See Huffman v. Swift Prepared Foods*, ARB No. 2025-0077, ALJ Nos. 2024-FDA-00013, 2025-FDA-00003, slip op. at 7 (ARB Dec. 18, 2025) ("Each of Complainant's allegations are vague and conclusory, and he failed to point to any record evidence to support or substantiate any of these serious accusations. Once again, while we are mindful of Complainant's pro se status, he must still make cognizable legal arguments and support them with citations to material from the record. Because he failed to do so, we must reject his arguments.") (citations omitted).

who also altered or manufactured a BOL but were retained by Respondent. Even if the comparator evidence is entitled to limited weight,[85] the remaining evidence substantially supports the ALJ's conclusion.

Finally, we close by noting the Board's long-standing principle that we must not sit as a super-personnel department, second-guessing the legitimate business judgment of employers. While the STAA, FSMA, and other whistleblower statutes prohibit unlawful retaliation, they do not authorize the ALJ, the ARB, or the Department of Labor to substitute their judgment for the employer's as to whether a personnel rule was wise, whether discipline was optimal or logical, or whether the employer made the same decision the tribunal would have made.[86]

Here, there is no question that Complainant altered or manufactured an important document, in clear violation of company policies and practices. Respondent acted promptly and consistently with its disciplinary policies and has consistently explained, without material contradiction from Complainant, the reason for its decision. Respondent has also taken the same decisive action against others who have violated the same rule, though perhaps not in identical circumstances, and Complainant has failed to offer evidence that others who engaged in the same or similar conduct were treated more favorably than her.

One might reasonably argue that Respondent's response to Complainant's handling of the BOL was harsh, especially for an employee who otherwise appears to have been skilled at her job and was likely acting in a way that she thought best served Respondent's interests. But, the question is not whether the employer's business judgment was correct or the employer made the same decision that we would have made; the question is instead whether the employer has proved that it

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[85] *See Echols*, ARB No. 2016-0022, slip op. at 4-5 (suggesting that the degree of similarity may go to the significance or weight or the comparison, but that the ALJ, and by extension the ARB, may consider comparators as long as they have enough in common with the complainant to permit a meaningful comparison).

[86] *Berg v. S&H Express*, ARB No. 2017-0075, ALJ No. 2015-STA-00014, slip op. at 9 (ARB June 4, 2020) ("We confirm that it is not within the authority of the Board or ALJs to sit as a super-personnel advocate who second-guesses an employer's decisions. Our responsibility is to determine whether the whistleblower protection statute in this case has been violated, not whether the employer acted the best it could have, made every right decision, or did as we would have done. The ALJ found no such violation occurred in this case, which finding is supported by substantial evidence in the record.") (internal quotations and citation omitted).

would have made the same business judgment in the absence of the protected activity. Here, substantial evidence supports the ALJ's conclusion that Respondent proved by clear and convincing evidence that it would have taken the same action, even in the absence of Complainant's complaints about shipping practices.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's D. & O.

SO ORDERED.

ELLIOT M. KAPLAN
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge