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Issue Date: 11 February 2011

CASE NO.: 2010-STA-56

In the Matter of:

Joseph R. Hildebrand,
Complainant,

v.

H.H. Williams Trucking,
Respondent.

DECISION & ORDER

PROCEDURAL STATUS

This proceeding arises under the employee protective provisions of the Surface Transportation Assistance Act (STAA),[1] and the regulations promulgated thereunder.[2] The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles. On 19 Oct 10, a formal hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs. Both parties were represented by counsel.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony

Complainant
Howard Williams
Melinda Kapp
Cheryl Williams
James Moore

[1] P.L. 103-272 at 49 U.S.C. § 31105.
[2] C.F.R. Part 1978.
[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

Exhibits[4]

Complainant's Exhibits (CX) 1-34
Respondent's Exhibits (RX) 1-40

Stipulations[5]

1. Complainant was an employee of Respondent within the meaning of the Act and resides in Hudson, Colorado.
2. Respondent was an employer conducting interstate trucking from its place of business in Greeley, Colorado and is subject to the Act.
3. From 1 Dec 08 to 8 Dec 08, Respondent employed Complainant to operate commercial motor vehicles with a gross vehicle weight of at least 10,001 pounds.
4. On the afternoon of 2 Dec 08, Respondent dispatched Complainant to transport a shipment of meat from Greeley, Colorado to Wilder, Idaho.
5. The reported gross weight of the vehicle and load when weighed was 80,360 pounds.
6. Respondent discharged Complainant on 8 Dec 08.
7. Complainant made a timely complaint and demand for hearing.

My findings and conclusions are based upon the stipulations of the parties, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

FACTUAL BACKGROUND

On 1 Dec 08, Complainant was hired to drive trucks for Respondent. His first dispatch was on 2 Dec 08, hauling a load of meat from Greeley, Colorado to Wilder, Idaho. When he took the load from the shipper to be weighed the ticket showed a weight of 80,360 pounds. He did not call his dispatcher, but returned to the shipper to have some meat taken off and bring the weight below 80,000 pounds. The load had to be unsealed, an entire bin of 2000 pounds had to be removed and the load had to be retested and resealed. Following that delay, Complainant drove only about two hours before stopping. While off duty, he turned off his phone. He eventually delivered the load to Wilder and on his way back to Colorado picked up a load of Christmas trees. After delivering them, he returned to Respondent's yard and was fired shortly thereafter.

[4] Respondent offered a post hearing affidavit, but Complainant objected and it was not considered.
[5] Tr.10-14.

ISSUES AND POSITIONS OF THE PARTIES

Complainant alleges that he engaged in three protected activities: (1) He refused to drive a rig that was overweight under the applicable laws; (2) He refused to drive in excess of the allowed hours; and (3) He refused to falsify his log books. He argues he was fired in retaliation for those refusals and seeks reinstatement, back pay, compensatory damages, abatement, and attorney fees.

Respondent answers that because of a possible variance in the actual weight vs. the reported weight, it did not actually ask Complainant to drive an overweight rig. Respondent also maintains that it never asked him to exceed the allowed driving hours or falsify any log entries. It concedes it fired him, but because he failed to adequately communicate with the dispatcher and keep Respondent informed about what was going on.

LAW

The language of the Act provides:

> A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because…the employee refuses to operate a vehicle because… the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security…[6]

The refusal to drive is protected only if the record establishes that the employee's driving would have violated a motor vehicle regulation, standard, or order.[7] There is no exception for *de minimis* or technical violations of the regulations.[8]

Federal regulations set a limit of 85,000 pounds for vehicles on interstate highways.[9] Colorado law sets a limit of 85,000 pounds for vehicles on secondary roads[10] and 80,000 on interstate highways.[11] Wyoming follows the federal limit.[12]

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[6] 49 U.S.C. § 31105 (2011).
[7] *Pollock v. Continental Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-1 (ARB Apr. 7, 2010)(citing *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 4 (ARB July 31, 2003).
[8] *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004)(finding protected activity in the refusal to drive a truck with unserviceable windshield wipers nine miles on a cloudless sunny day to have the wipers repaired).
[9] C.F.R. §958.17(b)(2011).
[10] C.R.S. §42-5-508 (1)(b))(2011).
[11] C.R.S. §42-5-508 (1)(c)(III)(B)(2011).
[12] WY ST § 31-18-802(a)(v)(G)(2011).

The regulations also provide:

> (a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:
>
> > (1) More than 11 cumulative hours following 10 consecutive hours off-duty;
> > (2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of § 395.1(o) or § 395.1(e)(2).[13]

The elements of a claim under the Act are (1) protected activity, (2) adverse employment action, and (3) a causal connection between the protected activity and the adverse action.[14] The complainant bears the ultimate burden of proving that the respondent discriminated against him.[15] If he does not prove one of the requisite elements, the entire claim fails.[16] If the respondent presents evidence of a nondiscriminatory reason for the adverse action, the complainant must then prove by a preponderance of the evidence that the reason offered was not its true reason but was a pretext for discrimination.[17] If the complainant can show by a preponderance of the evidence that the respondent did act against him at least in part because of the protected activity, the only means by which the respondent can escape liability is by proving by a preponderance of the evidence that it would have taken the adverse action even in the absence of protected activity.[18]

Although reinstatement is an automatic remedy under the Act, alternative remedies such as front pay are available when reinstatement is impossible or impractical.[19] A wrongfully discharged complainant is also entitled to compensatory damages, including back pay, but is also required to mitigate his damages through the exercise of reasonable diligence in seeking alternative employment.[20] The respondent has the burden to establish any failure by a wrongfully discharged complainant to

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[13] 45 C.F.R. 395.3.

[14] *Pollock v. Continental Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-1 (ARB Apr. 7, 2010)(citing *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004).

[15] *Id.* (citing *West v. Kasbar, Inc /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005)).

[16] *Id.* (citing *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004)).

[17] *Id.*(citing *Formella v. Schnidt Cartage, Inc.*, ARB No. 08-050, ALJ No. 2006-STA-035, slip op. at 5(ARB Mar. 19, 2009)).

[18] *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *Clean Harbors Envtl. Servs. v.Herman*, 146 F.3d 12, 21-22 (1st Cir. 1998); *Mourfield v. Frederick Plaas*, ARB No. 00-055, ALJ No. 1999-CAA-013, slip op. at 5 (ARB Dec. 6, 2002)).

[19] *Id.*(citing *Dale v. Step 1 Stairworks, Inc.,* ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4-5 (ARB Mar. 31, 2005).)

[20] Where back pay is appropriate, damages will include interest compounded quarterly based on the rate charged on the underpayment of Federal income taxes (26 U.S.C. §6621(a)(2)). *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000).

properly mitigate damages.[21] Other remedies include orders to expunge references to adverse actions taken against complainants for protected activity[22] and to notify a respondent's employees of the outcome of a case against their employer.[23]

EVIDENCE

Complainant's testimony at trial,[24] phone call records,[25] and driver's logs state in pertinent part that:

> He is presently employed by MDE International in Aurora, Colorado testing large vehicles. He began working for MDE International just a year ago. His primary occupation over the years has been as a line producer and production manager in the film industry. He supplements that with driving.
>
> He has worked full time as a commercial driver and first became a commercial truck driver years ago, after having obtained a license and owning his own big rigs. He owned and operated that company from 1979 through 1991 out of Park City, Utah. He was the sole owner/operator of a firm with 18 or 19 drivers. They had their own equipment that they were hauling and were engaged in search and rescue, as well as doing some on-location movie work and wild land fire suppression during the summer. The business was not transporting loads for third party customers. They hauled their own equipment, all-terrain vehicles, Snow-Cats and things that were used in their ski business. He had 21 full-time employees and about as many part-timers. He sold that business and then did some part time basic over-the-road driving in the late 1980s and early 1990s.
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> After high school he attended nearly four years of college at Brigham Young University, but before actually graduating went to work with Amoco Oil Company in the Marketing Department. He traveled the country working in the marketing areas, involved in the production of the various roadmaps, doing the roadmap production and a number of promotions with General Motors and Chevy.

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[21] *Pollock v. Continental Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-1 (ARB Apr. 7, 2010)(citing *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 95-STA-043, slip op. at 5 (ARB May 30, 1997)).
[22] *Id.*(citing *Dickey v. West Side Transp., Inc.*, ARB Nos. 06-150, 06-151; ALJ Nos. 2006-STA-026, -027, slip op. 8-9 (ARB May 29, 2008); *Ass't Sec'y & Marziano v. Kids Bus Serv., Inc.*, ARB No. 06-068, ALJ No. 2005-STA-064, slip op. at 4-5 (ARB Dec. 29, 2006); *Jackson v. Butler & Co.*, ARB Nos. 03-116,-144, ALJ No. 2003-STA-026, slip op. at 13 (ARB Aug. 31, 2004)).
[23] *Id.*(citing *Michaud v. BSP Transp., Inc.,* ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 5-6 n.3 (ARB Oct. 9, 1997)).
[24] Tr. 149-249.
[25] CX-33-34; RX-1.

A lot of times in between commercial projects, he would connect with friends that had trucking businesses in Salt Lake City and do some weekend runs, sometimes two and three weeks at a time. He came to Denver in 2006. He has worked for Fowler Trucking, which was contracted with Navajo Express; Pacific Shipping; and Respondent. The principal hauling business of Pacific was hauling containers full of meat. About 90 percent of everything he hauled was meat.

He quit the job with Navajo Express. He had a non-DOT accident with them. Of the last three trucking companies that he worked for, he quit one and was terminated from the others. He has logged just under a million miles in a commercial vehicle and has no moving traffic violations or DOT chargeable accidents. He has never received an overweight fine. He has a current commercial driver's license from Colorado and is authorized to operate Class A type tractor trailers, up to 80,000 pounds.

After he left Pacific Shipping he interviewed with Jim Moore, who was Respondent's Operations Manager and Safety Director. Mr. Moore offered him a job. There were some discussions about complying with Federal Motor Carrier Safety Regulations, because at that time he had been let go by Pacific Shipping because of similar situations. He provided Respondent with a letter explaining that he had been let go by Pacific Shipping and he would refuse to operate in any kind of an illegal fashion. He needed Respondent to know that up front, because he was not interested in going to somebody that might expect him to operate illegally, which is something that is rather normal in the trucking industry.

Respondent didn't really have an orientation. It was a morning of "Here's a bunch of stuff," check out a few videos, and take the operating manual home and read it. Jim Moore provided him a copy of CX-3. Melinda Kapp was not present. The orientation lasted about two hours. All but thirty minutes was watching the videos. No one told him he should fuel after loading at Swift.

He originally had a 2 Dec 09 going from Grand Island, Nebraska to Nogales, Arizona at 7:15 or 7:30 in the morning.[26] He got a phone call saying that load had been canceled and then was assigned another load going from Greeley to Wilder. It was then he first met Howard Williams. Mr. Williams was very insistent that before he left the yard with that truck, he had to fuel with Respondent's fuel. In 2008 there was four and five dollar fuel, and Respondent wanted to burn as much of its cheap fuel as possible. Mr. Williams forewarned him to buy as little fuel as possible while on the road. He saw the wall on the map in the office. He did not know they showed approved routing. From the things that had been said, he

[26] CX-5.

understood he was expected to stay as close to the interstates and stay on the most direct route from the shipper to the receiver as possible.

The afternoon he got his assignment, he went to the office and was standing at Melinda Kapp's desk with a little sheet of questions to ask, not the least of which was what to do about overweight loads. She indicated that it was the driver's responsibility to make sure that that load was scaled and if it was overweight, to take it back and have some weight taken off. That was the procedure at Navajo and at Pacific. He was never given any separate set of instructions or told that if he was overweight he was required to call dispatch if he had an overweight load. He was told dispatchers would usually be available from six in the morning to eleven at night.

CX-7 is the bill of lading for the shipment he took to Wilder. CX-8 is the driver's instructions regarding appointments and late deliveries from JBS Swift. 22:12 was when he was first notified that the load would be ready and that he could go over and pick it up. The load was finally complete and ready at 03:45 on 3 Dec 08. He was never told not to turn off his phones or given a route to take to Wilder.

He went on duty on 2 Dec 08 while he was waiting for the load. During that time he communicated with Respondent about the status of the load. Once they gave him confirmation that he did have the five o'clock load, he arrived at the shop and was on-duty at four o'clock, prepping the truck to be ready and doing a pre-trip inspection on the tractor. Since he went on-duty at 4:00 p.m. he had to go off-duty 14 hours later, at 6:00 a.m. the next morning.

At five o'clock, he drove to Swift and was told that the load would not be ready for several hours and he needed to go back up to the shop and wait there. He went back and sat in the yard waiting. He called Melinda Kapp, who told him to sit tight for awhile and give them some time. She said she would call Swift and call him back. She did call back at 7:54 p.m., to say she hadn't talked with them yet and that he needed to just sit tight and give her a call back in a few minutes. She did not get back in touch with him that night. He was resting in his sleeper berth from 6:00 p.m., to 10:00 p.m.

At 10:00 p.m. he drove down to Swift, hooked up to the trailer, did an inspection, proceeded to the gate, and got the bill of lading. He then went immediately to the scale and the ticket[27] showed that he was over by 360 pounds. He supposes a scale could be inaccurate, but has never questioned one. He thought the dispatchers were not on call after 11:00. He got the weight ticket right around 11:30.

[27] CX-12 p.1.

Remembering the conversation with Melinda, he took care of it. He didn't just go down the highway with 80,360 pounds because it was illegal and he wasn't about to put his license at jeopardy. Diesel fuel weighs 7.1 or pounds per gallon. One of the things that help change a rig's weight is the amount of fuel onboard. He understands bleeding fuel off has been done, but has never done it. Before he told Swift to remove some product, he was unaware that it was in 2,000 pound tubs. He knew they would have to retest and seal the meat. He knew they might tell him to bring it back, if it had e-coli.

He drove back to Swift and told them he was overweight and needed to have the weight adjusted. They asked how much he was over and he gave them the scale ticket. They told him to drop the trailer and they would take care of it. He did that and went back to Respondent's shop to wait. At 01:30 he got a call asking if he was sure he wanted that weight taken off and he said at least 1000 pounds needed to come off. They told him that the load was in 2,000 pound tubs and that they really couldn't split a tub, so they would have to take one tub off. He had been authorized by Melinda Kapp to have the meat removed early when she told him not to take an overweight load. He realized he was hauling meat that had been tested by the Department of Agriculture and needed to have an e-coli certificate. He saw no problem with having a 2,000 pound tub removed from that trailer to correct 360 pounds overweight. They called back at 03:15 to say the load was ready. He went back to Swift, did another inspection on the trailer and waited for the paperwork. From there he went back to the scale for a re-weigh [28] and hit the road.

He drove Highway 84 to Highway 14 to Highway 287 to I-80. The weight restriction on those roads is 80,000 pounds. He took the interstate from Greeley to Wilder. The first time he become aware that the interstate was not the particular route traveled by Respondent was at the hearing.

He stopped at Warren Road truck stop on Interstate 80, just west of Cheyenne at six in the morning, because he had run out of his 14-hour work day. He called Respondent at 6:30 a.m. to tell them that the load had been overweight and delayed him, he was shutting down for his 10-hour break, and he would be calling them back as soon as he got some rest. It's the driver's responsibility to find a safe and secure place to park the truck and the load. Once it is parked safe and secure and with a post-trip inspection, the next ten hours is to rest, eat, or whatever, but basically it's the driver's time. The accepted norm is turning cell phones off, because uninterrupted sleep is necessary. He used his personal phone even though he was issued a telephone by Respondent, because he has always had unlimited calls on his personal phone and prefers to just keep one phone handy. He gave the

[28] CX-12 p.2.

personal cell phone number to Respondent. When he went out-of-service on 3 Dec 08, he turned both phones off.

At 12:17 p.m. he spoke with both Paul and Melinda. Paul wanted to know where he was and why he was there. He told Paul he had run out of legal hours and had been up since 5:00 o'clock on Tuesday morning. He had been on the clock at four o'clock that afternoon, up and down all night, and was dead tired. He mentioned he had been overweight and had extra weight removed. Most of that conversation was with Melinda, who said if she had realized he was only 360 pounds overweight, she would have encouraged him to go. He also told her he had run out of hours and was tired. She said "Well, that's not going to work." He did not turn his phone off again, after talking with Melinda on Wednesday afternoon. He called Melinda approximately 12 hours after loading for the trim approval number.

He took his required break from 6 AM to 4 PM. At a little after four, he called Respondent and was told he needed to get up there as early as possible and try to get an early delivery. He did an inspection and went on down the road for about five hours to Snowville, Utah at 12:30 am. He had roughly two hours available to drive in his 11 hour driving duty cycle. He didn't just keep going another two hours, because that road is pretty desolate and there are very few places to safely pull over and park a truck. All of the really solid, safe truck stop parking gets taken up. Plus, he had ample time to get to Wilder on time anyway. So, he stopped at a truck stop in Snowville until 10:30 the next morning.

He didn't start driving right away when his 10-hour break was up at 10:30, because he was only three and a half to four hours out of Wilder. His delivery time was 10 o'clock that night and he didn't want to burn on-duty time sitting there giving him less time after he unloaded. By leaving later, he would have more time on duty after the drop off to get headed to the next receiver or shipper. He called Respondent at 8:55 a.m. and was told they were trying to get him beyond Wilder for the next load. They were asking about how many hours of service he would have after he dropped at Wilder. He told them about his plan to make sure that he extended his off-duty time before delivering at 10:00 p.m. They agreed with that plan. Melinda said it was a 10:00 o'clock appointment for delivery and they very seldom would vary off of that.

At 1:07 that afternoon, he was called by Mr. Williams, who wanted to know, "What the hell [he was] doing sitting there in Snowville, Utah?" He explained that he was conserving time so he would have time left after unloading in Wilder and had talked with Paul and Frank about it. Mr. Williams was yelling that he didn't care about any of that kind of stuff and wanted the load in Wilder as soon as possible, whether or not the people could take it early.

He can't remember exactly how he said it, but he said something about the documentation of hours of service and the logs and trying keep everything legal. Mr. Williams said the logs need to be adjusted to get the job done and be able to pull away from Wilder with a full 11 hours to drive. Mr. Williams also said it was ridiculous to have taken weight off and shutdown just an hour and a half or two hours out of Greeley. He told Mr. Williams he ran out of hours and Mr. Williams repeated the thing about adjusting logs and knowing how to get a load down the road. There was nothing said about off-loading fuel. The first time he heard that suggestion was in this hearing.

After receiving that call from Mr. Williams he went ahead and drove to Wilder. He arrived in Caldwell, which is just 17 miles out of Wilder, and stopped at the Flying J there. He called the receiver, but they would not take the load early, so he held there from 5:45, until 9:30.

At 4:35, he got a call from John Joseph, another of Respondent's drivers. Joseph asked him why he didn't know how to avoid scale houses and adjust logs, so that he could drive 20 hours in a day. Joseph told him he should have made the trip from Greeley up to Wilder in a day and then been logging a 10-hour break there. He got another call from Joseph at 8:07 p.m. to say they should meet and exchange loads. He would take Christmas trees back to Denver and Joseph would go north to McCall, Idaho to pick up a load there and then go on up the road to McCall, Idaho that very day, after having been on the road for 16 or 17 straight hours.

He eventually delivered the meat and took the load of Christmas trees back to Denver, arriving at about 2:00 o'clock in the afternoon; two hours shy of the scheduled 4:00 delivery. After that he returned the empty trailer to Respondent's yard at 7:30 on Saturday, 6 Dec 08. He was told to call in Monday morning. He has driven in that part of the country for 30 years. No one gave him a route to take back to Denver.

He called and Mr. Williams told him things weren't working out and he should come and clean out the truck. That was it, he was fired. CX-19 is the only paycheck he ever received and CX-20 is the W-2 from Respondent.

He went online and went to any number of trucking companies, all the big names and little names, looking for work. He Googled "Trucking," looking for a driving job. He had been all over Craig's List looking for basic management jobs and production work. He turned the country inside out looking for work for months on end. He contacted carriers and filled out online applications. He tried 40 or 50 motor carriers. He can only assume the reason he can't get hired is because Respondent has gotten to other companies. The only work he found was with

MDE Staffing. He started with them in October of 2009, so he was out of work for approximately 11 months. CX-21 is his W-2 from MDE Staffing and CX-22 is his most recent pay stub from 2010 from MDE Staffing. They represent all of the earned income he has had since Respondent fired him.

When he was fired, he was devastated and sick. It was December, coming up on Christmas. It made for a very, very tough December. He would have rather have been working. Since then, it's been a roller coaster. He was trying to look for work and you can't look for work without spending money, but things were getting pretty doggone tight. He didn't get a chance to spend time with his family and friends. Both his companion Anita and his mother passed away recently. He had had plans to at least get an opportunity to take a spring trip to see her. While he was driving, he had regular opportunities to stop over in St. George, Utah and see his folks. He'd see them three or four times, maybe five times a year. It was the same with his kids in Salt Lake.

He works 70-80 hours a week for MDE Staffing. His average weekly take home pay is $700 or $800. The fact that he had been unemployed created a financial stress. He wants to be reinstated, back pay, damages for emotional distress and mental pain, punitive damages, and attorney fees.

He has never run heavy, manipulated log books, or exceeded time on service. He believes there are quite a few drivers who could say the same thing.

Melinda Kapp testified in pertinent part that:[29]

She has been employed by Respondent for approximately three years, but has never been employed as a truck driver. She is an outbound dispatcher since January of this year. Prior to that, she worked in customer service, tracking the loads of Swift, who is Respondent's big customer. She does not recall how many employees worked in Respondent's office in December of 2008. It was fewer than ten. Mr. Williams normally comes into the office every day and has a desk in the office three or four feet from hers. They talk throughout the day. Mr. Williams is pretty much a hands-on owner and likes to monitor what's happening with the loads. If something out of the ordinary was happening she would tell him. In December of 2008 she worked 6:00 am to 4:00 p.m. (970) 353-7222 is the general office number. (970)539-2486 is her company cell. Respondent's dispatchers were on-call from 4:00 a.m., to 11:00 p.m. to assist with any problems. A phone call at 7:57 p.m. on 2 Dec 08 to (970) 539-2486 would have been to her cell. A call at 7:54 p.m., on 2 Dec 08 2nd from (970) 539-2486 would have been from her cell.

[29] Tr.84-124.

In December 2008, Respondent had a policy that check calls were to be made between 8:00 a.m. and 9:00 a.m., every day except Sundays and there will be a $25.00 fine for late calls and failure to call each day. She has not has problems, in the past, with drivers failing to communicate with her or issues where truckers have been on a run and she was unable to contact them. One time a driver was sick and couldn't answer his phone. She checks-in with her drivers for a variety of reasons, even if they're not checking in with her.

Respondent also had a policy that drivers should fuel their truck and trailer at the shop before leaving on each trip. That was so that drivers didn't fill their trucks up until after they were loaded. Respondent also told its drivers it does not pay overweight tickets and all loads must be weighed before departing. There is a difference in loads traveling on an interstate versus traveling on a secondary road. Secondary roads allow a higher limit of 82,000 pounds. Sometimes loads are taken back to the receiver and weights taken off. Respondent's shop is about a mile from the Swift plant and three or four miles from the CAT scale in Evans.

She is normally involved in the orientation of all drivers, but does not specifically recall Complainant. As part of the hiring orientation for the drivers, she tells them: how important the loads are and how important it is to be on time; that they are handling a product people are going to eat; how important it is not to break the seals; if they are overweight to contact dispatch before they take it back to the plant; to not go into the receiver or even the shipper with more than a half a tank of fuel; and to scale after they load and then to fuel, so they can avoid fueling to overweight. She told every driver that it's not uncommon for a driver to refuel to less than capacity multiple times in a trip so that they stay under the weight limits.

She is familiar with the run from Greeley to Idaho that Complainant was dispatched on. They have been doing it for years and the drivers like it, because it's easy. The routing is on a map in the office. Complainant was told to use the route on the map.

Since the load was trim, there was 12 hours for the e-coli test to be done, and the results have to be sent to the driver. That goes through dispatch. Complainant's dispatch sheet[30] shows that he was to call approximately 12 hours after loading to determine whether or not the load passed an e-coli test. It also shows the delivery appointment time was 10:00 pm. About fifty percent of the time they will accept an early load, so all the drivers are instructed to go in early.

[30] CX-6.

She became aware that Complainant had taken the load that was going to Idaho from Greeley on 2 Dec 08, weighed at a scale, and taken it back to the shipper to have weight removed. She doesn't recall how she found out. It wasn't the first time a driver had ever gone back to the Swift plant to have weight removed. It was not Respondent's policy to go ahead and take a load as long as it's not 800 pounds overweight or to give Complainant permission to go only 390 pounds overweight and then pay any fines for him. She had a conversation with Complainant on 3 Dec 08 about the load that he had brought back to the customer, but really doesn't remember what was said. It's been 22 months. Complainant did not tell her the load was overweight until he had already taken it back. She would have asked him how much fuel he had on. They have the ability at the shop to go ahead and take fuel off. That's a dispatch call, not a driver call. Respondent always has a mechanic on-duty at night. She doesn't recall the last time fuel was taken off a vehicle to bring it into compliance with the weight restrictions.

The trucks had GPS tracking and she noticed that Complainant hadn't made it very far. She tried to call him, because she was concerned that there was a problem and he hadn't called her. When she is not in, the calls are forwarded. Her cell phone is also on the dispatch sheet. She is contacted at home after hours all the time by drivers with questions about weight shifts, being overweight, e-coli readings, breakdowns, illness, and anything else that would compromise the integrity of the load or arriving on time.

When she came in to work on 3 Dec 08, she would have known that Complainant had been dispatched for a 5:00 p.m. dispatch the previous day. She knows that once a driver goes on-duty, he must begin a 10-hour break not later than the completion of the 14th hour after going on-duty. She doesn't recall if on the morning of 3 Dec 08 Complainant had run out of hours.

The dispatch sheet[31] says any shortages, damages, refusals or overages must be called into Swift Claims and/or her before leaving the receiver. There is no statement that drivers on overweight Swift loads must also call her before leaving.

Respondent has had drivers violated in the past. That is handled through the Safety Department and there is a disciplinary course of action. That is Mr. Williams' call.

She never told Complainant to run a heavy load, fudge his hours, or run past his allotted hours.

[31] CX-6.

Howard Williams testified in pertinent part that:[32]

He is the owner and president of Respondent. He oversees the operations, hires people, drives trucks, greases trucks, and does everything. He has been in the trucking industry about 33 years and has about a million and half miles driving. He fired Complainant.

Respondent owns the vehicles and has total liability. Respondent's drivers average 2,500 to 2,800 miles per week. They are paid 19 cents per mile as wages and 11 cents as per diem. It was one of Respondent's company policies that drivers should fuel their truck and trailer at the shop before leaving on and at the end of each trip. Respondent hires drivers to drive the trucks safely. They are not given authority to make decisions concerning the loads, because there's so many other things involved in the load. Load decisions are the dispatcher's and his responsibility. Drivers are told in orientation to contact dispatch anytime they have a problem. Dispatch makes the decision. Claimant received the same orientation as all drivers and was told about contacting dispatch. He did part of Complainant's orientation. Complainant was told that in orientation he could call dispatch 24 hours a day.

Complainant was hauling trim, which is the meat that they make hamburger out of. This particular load was going to Wilder, Idaho to a McDonald's plant. He has pulled out of that packing plant for 27 years. Respondent has a very good longstanding relationship with that particular customer.

They watch these loads very closely, because when they leave the plant they are tested for e-coli. When it's loaded they take an e-coli test of each bin. A bin is about 2,000 pounds. The e-coli test takes approximately eight hours. That is one reason why Respondent gives a telephone to the driver. He's supposed to leave it on so that if Respondent gets get a call from Swift or the U.S. Department of Agriculture that there's a problem with e-coli, they can get the load stopped and handle it. Respondent has to be able to be in contact with the driver, especially the first 10 to 12 hours, because that's when the e-coli test comes out.

There are legal road restrictions on weight in the United States. Highway 14, Highway 287, I-70 between Denver and Loma, and all secondary roads in Colorado allow weights over 80,000 pounds. Each state has different weight rules and length rules on its state roads. In Colorado, the interstate limit is 80,000. Unless they're in a town or something, secondary roads, such as Highway 84 or Highway 287 have a limit of 82,500 pounds. Interstate 70 between Denver and Loma, has the 82,500 limit because there is no secondary road.

[32] Tr.26-83;266-289.

The CAT scale where Complainant had the load weighed is at Evans, Colorado. The weight restriction on Highway 85, the road from Greeley to Evans, is 82,000 pounds, 36,000 pounds per axle. After Evans, Complainant would go back up 85 to 14, then to 287. The weight restriction is 82,000 pounds, 36,000 pounds per axle.

Respondent does give drivers permission to go at 360 pounds overweight, because there's so much variation at scales. They unofficially give Respondent about a one percent variation. A big truck on a scale with a 30 mile-an-hour wind will change weight 200 or 300 pounds. So, if the truck is within a small percentage, Respondent will go with the load, because there's so much variation in the scales. The fines don't start until over 800 pounds. That's within the discretion of the Weight Master, who can write up a load for a pound over. He does not know why Respondent would have a written policy saying it would pay fines for a driver.

Drivers are not allowed to pick just any route to get from Point A to Point B, because Respondent knows certain routes are the most efficient, the safest, and have the best weather. The approved route from Greeley to Wilder is Highways 85 to 14 to 287 to I-80. He has run this route a hundred times. He has run this route above 80,000 pounds because it is on secondary roads, which give him up to 82,000 pounds. Complainant should have taken his load from Greeley on Highway 14 to Highway 287 to I-80. That would not take longer than running the interstates. He did not personally dispatch Complainant on the run or give him the routing. Respondent has a map on the wall that shows the drivers the routes.

Cheryl Williams is his wife and does Respondent's payroll. She prepared Respondent's position statement for OSHA[33] and talked to him about it. Respondent absolutely does not tell drivers to run even if they are over 80,000 pounds, because Respondent will take care of the fines.

RPP does not fire drivers who have one log book violation. It did fire drivers who fail to make check calls. The policy to fine drives $25 for failing to make check calls between 8:00 a.m. and 9:00 a.m. was not in effect in December, 2008. Respondent had put GPS units in the trucks about a year earlier and didn't need check calls. Respondent also gave the drivers a telephone that's supposed to be on them all the time. Respondent's dispatchers are on-call from 4:00 a.m., to 11:00 p.m., daily, to assist with any of the problems that drivers may encounter on the road.

[33] CX-31.

On 3 Dec 08, Melinda, a dispatcher, told him she had been informed by Swift that Complainant had brought the load back to take some weight off because it was over 80,000 pounds. Complainant did not call dispatch. (970) 353-7222 is the main office number.

Hours of Service Regulations require a driver is to take a minimum break of 10 hours after 14 hours from first going on-duty. Off-duty is when he is released from any responsibility of the truck or trailer. When a driver is on his 10-hour break, as far as he's concerned, the driver is in the sleeper.

The log book has grids for driving, on-duty not driving, sleeper berth time, and off-duty time. Sleeper berth time can be part of off-duty time. Off-duty drivers are free to pursue whatever activities they want, such as playing golf or eating. They do need to be available to take a call from dispatch.

Respondent has a system of progressive discipline for log violations. Some violations will render a driver declared "out-of-service" by a Commercial Vehicle Enforcement Officer. When he fired Complainant, he had not reviewed Complainant's logs.

Complainant went up Interstate 85 to Interstate 80. By taking that route, it's possible that Respondent could have been restricted to the 80,000 pound limit and fined.

Dispatch never told Complainant to run heavy. Dispatch was not informed until later in the next day by Swift that he had brought the load back. At no time did he inform dispatch that he was overloaded. When dispatch could not contact Complainant it contacted the customer and found out the load had been returned.

A gallon of fuel weighs 7.34 pounds. This truck carries 300 gallons, which is about 2,100 pounds. The truck weighed 80,360 pounds. Had Complainant contacted dispatch they could have had him pump the fuel off and get the weight down.

Respondent tries to prevent having out-of-service drivers by setting up loads such that the drivers have plenty of time to make it to their destinations. If anything happens and they call dispatch, Respondent changes the scheduling. Some drivers still do it and Respondent takes actions against them when they do it. Respondent has fired some drivers for that. Respondent has policies approved by the U.S. Department of Transportation, of what to do to correct these problems. Drivers flagged as out-of-service go on a form that any customer can look at. It can affect business and insurance.

By the time Complainant got to I-80, he'd have burned off enough fuel to be legal. I-80 is about 98 miles from the scale. Complainant was about 360 pounds over 80,000 according to the scale. By the time Complainant got to I-80 he would have burned about 20 gallons, or 140 to 150 pounds of fuel. That is so close to 80,000 that one scale might say 80,150 and another might say 79,950. Whether or not the truck is overweight would depend on the scale and whether or not there was a fine would depend on the Weight Master. Weight Masters won't give a fine unless the weight is thousands of pounds over, not a hundred pounds. It is possible that the truck would have been over the 80,000 pound limit when it entered I-80.

Complainant would have had to burn off approximately 49 gallons to eliminate 360 pounds. Respondent's trucks get about four and a half to five miles per gallon. To burn off all 360 pounds, Complainant would have had to gone a little over 250 miles. He is not claiming Complainant would have been under 80,000 pounds by the time he reached I-80. The truck scale manned by Commercial Vehicle Enforcement will give some leeway, even though the weight is slightly over. He believes Respondent was complying with the spirit of the regulation and industry practice.

He made the decision to fire Complainant because of lack of communication. He was very upset, because Complainant had his phone turned off during an off-duty period. Even while Complainant was off-duty, there may have been instances that Respondent needed to contact Complainant. It is okay for a driver to call in before 8:00 a.m. Calls from Complainant on 3 Dec 08 at 6:30 a.m., at 12:17 p.m., on and at 4:18 p.m. would be acceptable forms of communication.

He would have picked up the load and went with it. It would be Laramie, Wyoming, before he ever hit the interstate and he'd be so close to legal there that it's immaterial. It would have been 100, 150 pounds that he wouldn't have had any problem with. He wouldn't have filled the truck up before he picked up the load. He would have picked up the load, weighed it and put what fuel on he could. Fueling up the truck prior to picking up the load is a big rookie mistake and he was told personally not to do that. Otherwise, if he had a belief that he was over the weight limit, he would have contacted dispatch and let them fix getting the load underweight.

Complainant's logs are illegal logs for not only the addition and the subtraction, but form and function. The first entry on 2 Dec 08 at 4:00 o'clock, in the afternoon says, "PTEC." Complainant's supposed to put where he was at, Greeley, Colorado. In an audit, that would automatically be one point. The next one says, "Checked in with JBS." That's two points. The on-duty status and all that is correct, but it's still an illegal log. He knows the law.

He talked to Complainant on 4 Dec 08, sometime around noon. Complainant was sitting in Caldwell, Idaho, 12 miles away from the customer. He told Complainant, "Get over to the customer. Go to the customer now. They might need that meat." Complainant had been sitting in Caldwell for several hours. Drivers need to get to the customer. If the customer doesn't want the load then, don't worry about it, it's there. Complainant had the legal time to drive the 12 miles. He didn't ask Complainant to do anything illegal. That was the only time that he talked to Complainant. At that time he knew Complainant wasn't somebody that he wanted working for him anymore. Complainant had an attitude and hadn't communicated. It wasn't going to work out. The only other conversation he had with Complainant after that was to tell him to clean out his truck because he was fired.

In his 30 years in the industry, he has run heavy and longer than maybe he should have. Anybody that says they have not is a liar. Three weeks ago, he went to the Port of Loma at Downeyville, 800 pounds over the weight minimum. It wasn't a significant enough violation for them to cite him, even though technically, it is a violation of the regulation. There's nothing in the regulation that says there's a one percent variance for plus or minus on the scale weight. There's the realistic application of the law and the technical letter of the law and the industry does not operate on the technical letter as much as the reasonable application.

He expected Complainant to act reasonably and realize no one would cite a truck for two or three hundred pounds, but Complainant insisted on being technical about it rather than following the industry practice.

DOT can find violations in anybody's log, especially form violation. They can be not out-of-service items, if there are enough of them. Complainant says he's not perfect. He's just saying everybody makes mistakes, even though there is nothing false on Complainant's log. He does not want drivers falsifying logs. They don't need to. This route was 740 miles. Complainant had a day and a half or two days to do it; all the time in the world.

They don't want to start out with a load over weight, even by a few hundred pounds. But if they do, they're not going to stop the world to get back under the max, because they don't think it's that big of a deal. Setting aside the question of fueling after weighing the load, once Complainant was in a position where he was at 80,360, Respondent's policies was to drive it, even if that meant by the time Complainant got to Interstate 80, the load was still going to be a little bit over 80,000.

Respondent never asked Complainant to drive heavy, manipulate his log books or drive past his allotted hours.

Cheryl Williams testified in pertinent part that:[34]

She is married to Howard Williams and has been part owner of Respondent for more than ten years. She is the payroll person, does fuel tax reports, shuffles paper a lot, and handles human resources issues. The average number of miles a driver drives in a week for Respondent is 2500. In December of 2008, Respondent had seven people working in the office, including dispatchers. Her husband spends part of the time in the dispatch office, part of the time in the shop, and part of the time in a truck. Dispatchers are always available on their cell phones. Communication between dispatch and the truck driver is paramount.

She wrote Respondent's response to OSHA[35] based on information provided by Paul Weichel, lead dispatch, Melinda Kapp, second dispatcher, Frank Norman, part-time dispatcher, Howard Williams, CEO and James Moore, Safety Director. She does not recall who told her Respondent's policy is to go ahead and take the load, as long as it is not 800 pounds overweight. She does not recall who told her Respondent would have given Complainant permission to go on only 390 pounds overweight and it would have paid all fines.

Respondent encourages drivers to fuel at the shop because the fuel is cheaper. No driver has been fired from Respondent for fueling the truck up before going to a customer to load. Drivers have been fired for not communicating. They don't always get a warning first. She doesn't know the last time Respondent had a driver pump off fuel to get 80,000 pounds. She only works four hours a day.

She never told Complainant to run a heavy load, manipulate his logs, or run past his allotted hours.

James Moore testified in pertinent part that:[36]

He was employed with Respondent from 1997 to 2008 as a dispatcher and Safety Director. He spoke to Complainant when Complainant applied for a driving job. Complainant had an orientation in which he was told what to do if he had an accident and to stay in communication with Respondent with an 8:30 a.m. check-in. He was told to contact dispatch if he was overweight issue. Depending on the size of the overweight, Respondent could pump out fuel on the top and get it to the legal weight. If it has to go back, dispatch is responsible letting the plant know. The driver just drops it off. Complainant appeared to have a good grasp of the Department of Transportation rules and regulations and how to do his logs.

[34] Tr.126-148.
[35] CX-31.
[36] Tr.250-266.

It was not Respondent's policy to go ahead, take the load, and to pay the fine as long the load is not over 800 pounds overweight. There is no written policy that says if drivers have an overweight load they need to call dispatch. Complainant made a mistake in not contacting dispatch. If a load is overweight, the fine is the driver's responsibility. Respondent has assigned routes that normally keep drivers on the interstates. Greeley to Wilder is a pretty standard run and the vast majority of Respondent's drivers have been around long enough to know what route they're supposed to take without being told.

Respondent's Company Policy Letters state in pertinent part that:[37]

Drivers are to make check call to Respondent between eight and nine in the morning, every day except Sunday. There is a $25 fine for noncompliance. Drivers will leave before noon if their trailers are load. There are designated routes for each destination and a $100 fine for failing to follow them. Respondent does not pay overweight fines and all loads must be weighed before departure. Drivers are to fuel at the shop before departure. Cell phones with limited minutes are provided. Additional minutes are expensive and the responsibility of the driver. Progressive log violations will result in warning letters, remedial training, and suspension.

Load documents and driver instructions state in pertinent part that:[38]

On 2 Dec 08, Complainant was assigned a load from the Swift plant in Greeley, CO to Nogales, AZ to be picked up at 8 a.m. on 3 Dec 08.

Complainant was assigned a load from the Swift plant in Greeley, CO to SSI Food Service in Wilder, ID. The load was to be picked up on 2 Dec 08 at 5 p.m. and delivered at 10 p.m. on 4 Dec 08. The broker was to be advised of any delay of twos in loading or transit. Complainant was to call Melinda approximately twelve hours after loading an approval number. The load was bins of meat weighing 41,140 pounds. The load was finally completed at 3:45 a.m. on 3 Dec 08.

Complainant was assigned to take a load of Christmas trees originating in McCall, ID to Aurora, CO with a delivery at 8 a.m. on 5 Dec 08.

[37] CX-3-4; RX-5, 8, 20.
[38] CX-6-8, 15-16; RX-36-37, 39-40.

Weight scale records indicate in pertinent part that:[39]

> On 2 Dec 08, Complainant's rig weighed 80,360 pounds. On 2 Dec 08, his rig weighed 78,140 pounds.

Mileage logs show in pertinent part that:[40]

> It is 61 miles from Greeley, CO to Cheyenne, WY.

Gas Station receipts show in pertinent part that:[41]

> On 4 Dec at 7:51 p.m. Complainant purchased food in Caldwell, ID. On 5 Dec 08, Complainant purchased 223 gallons of fuel in Trementon, UT.

Pay and tax records indicate in pertinent part that:[42]

> On 10 Dec 08, Respondent issued Complainant a check for $550.37 in earnings, less $25.65 in taxes and $65 in claims. Complainant's wages from Respondent were 335.35.
>
> In 2009, Complainant earned $5280.00 from MDE Staffing. Through 26 Sep 10, Complainant had 2010 earnings of $27,059.55.

State unemployment insurance records state in pertinent part that:[43]

> Respondent reported Complainant was terminated for failing to communicate, not following instructions, and having a log violation.

A 9 Mar 09 letter from Respondent to Complainant states in pertinent part that:[44]

> An audit of logs found he had missing or illegible daily duty status totals on 2 Dec 08.

[39] CX-12.
[40] CX-17; RX-15.
[41] CX-9; RX-35.
[42] CX-19-22; RX-18.
[43] CX-27; RX-23-24.
[44] CX-30;RX-29.

Respondent's response to the OSHA investigator states in pertinent part that:[45]

> Complainant made mistakes by (1) not telling dispatch there was a weight problem, (2) not checking his calls between 8 and 9 a.m., (3) not closely monitoring the weather, and (4) wasting time instead of proceeding directly to Wilder. Complainant should have fueled after picking up his load and weighing. That way he could have reduced the fuel load to stay under weight. Complainant was intent on doing things his way, would not follow instructions, interrupted constantly, and was not cooperative or communicative. He also had a log violation. Respondent did not ask Complainant to do anything illegal.
>
> It is Respondent's policy that drivers should take overweight loads as long as they do not exceed 800 pounds overweight. Had Complainant called the dispatcher, he would have been told to go with the 390 pounds of excess weight and Respondent would pay any fines.

ANALYSIS

Liability

Protected Activity

The parties do not have a fundamental factual dispute related to the allegation that Complainant refused to drive his rig in violation of the rules related to maximum weight. The record is clear that when Complainant took the rig to the scales for the first time, the reported weight was 80,360 pounds. There was testimony that the scale may have been within calibrated tolerances and still report a weight that was slightly more or less than the actual weight. Nevertheless, the preponderance of the evidence is that the rig weighed 80,360 pounds.

Similarly, there was some conflict as to the correct weight limitations on non-interstate highways and the routing Complainant was supposed to take to I-80. Nonetheless, given a starting overage of 360 pounds, the burn rate of the truck, and the mileage to Cheyenne, the preponderance of the evidence in the record establishes that had Complainant continued with the initial load, he would have more likely than not been operating on I-80 in excess of 80,000, in violation of the regulation. In fact, Howard Williams conceded in his candid and credible testimony that Complainant would not have been under 80,000 by the time he reached I-80. However, Mr. Williams added that he did not see that as a violation, because the truck scale manned by Commercial Vehicle Enforcement will give some leeway, even though the weight is slightly over. He believed that Complainant could have continued with the original load and still been in

[45] CX-31;RX-26.

compliance with the spirit of the regulation and industry practice. While Mr. Williams' testimony may have stated a rational position and accurate assessment of industry practice, it does not reflect applicable law. Complainant's actions were no more outside of the spirit of the regulation than a refusal to drive nine miles on a sunny day to replace unserviceable windshield wipers.[46] Accordingly, Complainant's refusal was protected activity under the Act.[47]

Moreover, there is no dispute that Respondent was aware that Complainant had refused to take the original load when it terminated him. That leaves only the question of what part, if any, Complainant's refusal played in Respondent's decision to fire Complainant.

Nexus to Adverse Action

Respondent maintains that the real reason that it terminated Complainant was that he failed to communicate with dispatch and follow instructions. Finding Respondent's most likely reason or reasons involves determining subjective motives. That makes the credibility of the witnesses, particularly that of Howard Williams, who actually fired Complainant, highly relevant.

I found the testimony of all of the witnesses at hearing, including both Complainant and Howard Williams to be generally credible. The one salient exception involved the statement in Respondent's submission to the OSHA investigator that it is Respondent's policy that drivers should take loads as long as they do not exceed 800 pounds overweight. If Complainant had called the dispatcher, he would have been told to go with the 390 pounds of excess weight and that Respondent would pay any fines. Cheryl Williams said she based her letter on information she got from the dispatchers, Howard Williams, and James Moore; but could not recall who told her told her those things. Melinda Kapp, James Moore and Howard Williams all testified Respondent had no such policy. I find her report to OSHA to be more credible than their testimony on that point, particularly since it was consistent with Mr. Williams' philosophy of taking a reasonable approach to very small excess weights.

Indeed, the most probative evidence on this issue is Howard Williams' testimony. He consistently maintained that a couple of hundred pounds did not qualify as being overweight and that Respondent's policy was to drive with it. He believed Complainant should have just taken the load, even if that meant by the time Complainant got to Interstate 80, the load was still going to be a little bit over 80,000. He also said that he would have picked up the load and gone with it. It would have been Laramie, Wyoming, before he ever hit the interstate and he'd be so close to legal there that it's immaterial. He

[46] See n. 8.

[47] The finding on this allegation makes it unnecessary to address the allegations that Complainant also engaged in protected activity by refusing to falsify his driving logs or drive in excess of the allowed hours.

testified that he expected Complainant to act reasonably and realize no one would cite a truck for two or three hundred pounds, but Complainant insisted on being technical about it rather than following the industry practice.

The record shows that it more likely than not that Complainant's refusal to take the original load at the very minimum was a contributing factor in the decision to fire him. That puts the burden on Respondent to show it would have fired him anyway, even if he had not refused the first load.[48]

Mr. Williams testified that he was very upset that Complainant had his phone turned off during an off-duty period and made the decision to fire Complainant because of lack of communication. Mrs. Williams' report to OSHA cited Complainant's failure to contact dispatch about the weight problem and check with them between 8 and 9 a.m., she noted Complainant was intent on doing things his way, would not follow instructions, interrupted constantly, and was not cooperative or communicative.

It is difficult to distill the alleged failure to communicate with dispatch about the overage and insistence on doing things "his" way as a basis for the termination from the refusal to carry the first load. Based on the most credible evidence it certainly seems more likely than not that Complainant would have been told to take the load anyway. In any event, Respondent's argument that it fired Complainant not because he refused to take the first load, but because of the way he did it and the way he failed to communicate subsequently is not substantiated by the evidence. Respondent was unable to prove that had Complainant simply taken the first load, it more likely than not still would have fired him for failing to communicate and monitor the weather, wasting time on the way to Wilder, and doing things his way.

While it would be true to say that Respondent fired Complainant for doing things "his way" instead of Respondent's way, the record shows that the most important main thing Complainant did "his way" was refuse to engage in even a technical violation of the maximum weight regulations. The record does not show that the other things he did "his way" would most likely have led to his firing anyway. Therefore, Respondent is liable for the wrongful termination of Complainant in retribution of his refusal to drive a load in violation of regulations setting the maximum vehicle load.

[48] The parties assumed that a respondent's burden in such a situation is to show by clear and convincing evidence. However, the Board clearly stated in *Pollock* (n. 18, supra) that the standard is by a preponderance of the evidence. As I found Respondent unable to meet the less stringent burden, the issue is moot.

Damages

On brief, Complainant argued for reinstatement, back pay, compensatory damages for emotional distress and mental pain, punitive damages, interest, attorney fees, deletion of related adverse information from his record, workplace posting and mailing to employees of these findings. Respondent elected not to respond to any of Complainant arguments for damages and addressed liability only.

Reinstatement

In the absence of compelling circumstances to the contrary reinstatement is a presumptive remedy. Complainant seeks it and Respondent entered no opposition. Based on the record, it is an appropriate remedy and the request for reinstatement is granted.

Back Pay

Complainant argues for back pay of $57,380.45 through 3 Jan 11 and $148.50 per week thereafter. Respondent was silent on the subject.

Complainant was wrongfully terminated on 8 Dec 08. The record shows that since that time Respondent's drivers have averaged 2,800 miles per week at 30¢ for a weekly income of $840. The record also shows he was unable to find mitigating employment until October of 2009 and was totally unemployed for eleven months. At that time, he began to earn a mitigating weekly salary of $712.[49] Thus, Complainant is owed back damages of $840 per week from 8 Dec 08 to 25 Oct 09, or $38,520.[50] Complainant is also owed back pay damages of $128 per week[51] from 26 Oct 09 to the date of reinstatement. Complainant is also owed interest on those amounts.[52]

[49] $712 represents 2010 earnings through 26 Sep 10 of $27,059.55, divided by 38 weeks. I used that as a more accurate assessment of Complainant's mitigating income, rather than Complainant's assumption that he returned to work on 1 Oct 09 and aggregation of 2009 and 2010 earnings. The record and Complainant's testimony were unclear as to when in October he returned to work. His earnings for 2009 appear to be at a lower rate than those for 2010, but 2009 would have included holidays that 2010 did not. If the average wage for 2010 is applied to the total wages for 2009, the result shows only about seven weeks of work, which would correspond to a late October 2009 date of employment with MDE and some unpaid vacation time. Thus, I will apply a 25 Oct 09 as the date of initial mitigating employment.

[50] ($840x 321 (days)) ÷ 7 days/week.

[51] $840 (Respondent pay) – $712 (MDE pay)

[52] See fn.20, supra.

Compensatory Damages

Complainant's testimony was the only evidence on the issue of emotional distress and mental pain. There were no corroborating or contradictory witnesses or mental health/medical records. Complainant testified that he was devastated and sickened by the firing. It made the holidays very difficult and he has been on a roller coaster since then. Things were tight financially and the loss of his job meant he couldn't take regular opportunities to see his folks or his kids in Salt Lake.

Complainant argued for $50,000 in compensatory damages and Respondent entered no response. Complainant suggested his situation was similar to those of complainants who lost a home through foreclosure and been forced on public assistance[53] or was destitute and forced to depend on charity for sustenance.[54] Even in the absence I do not find the record supports an award of compensatory damages corresponding to either of those cases. In cases where there was a finding of distress and even treatment with a mental health provider much more modest amounts were awarded.[55] This case is much closer to *Calhoun*. Complainant testified that he made it clear to Respondent up front that he was not interested in going to somebody that might expect him to operate illegally, which is common in trucking. Complainant appears to be an experienced driver who, for better or worse, is less sensitive to the harsh realities of the industry. Consequently I find that an award of $6,000 for compensatory damages is appropriate.

Punitive Damages

Complainant maintains that Respondent was reckless and exhibited callous disregard for his rights. He argues that nothing less than an award of $50,000 in punitive damages will deter Respondent from engaging in future wrongful acts. Respondent filed no rebuttal on the subject.

Respondent expected Complainant to drive a rig that would be less than one half of one percent overweight, albeit for only a relatively brief period of time. That technical violation does not suggest a fundamental disregard for public safety. On the other hand,

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[53] *Michaud v.BSP Transport, Inc.*, 1995-STA-29 (ARB 9 Oct 97).

[54] *Ferguson v. New Prime, Inc.* 2009-STA-47 (ALJ 15 Mar 10).

[55] *Calhoun v. United Parcel Service*, 2002-STA-31 (ALJ 2 Jun 04)(The complainant sought treatment with a psychologist, the respondent did not challenge whether the complainant suffered such distress, the ALJ concluded that a modest award of $2,000 for emotional damages was appropriate under the facts of the case); ***Jackson v. Butler & Co.***, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004)(ARB affirmed award of $4,000 for emotional distress based on the testimony of the complainant and his wife, even though that testimony was not supported by evidence of professional counseling or other medical evidence, where the testimony was unrefuted by the Respondent).

Complainant was correct in asserting that the action would have been illegal, even if enforcement agencies would have likely dismissed it as *de minimis* and Respondent fired Complainant for doing no more than abiding by the letter of the law.

Moreover, Respondent's attempt to portray itself as committed to compliance and safety, but focusing on the spirit rather than the letter of the law is largely undercut by the evidence. Complainant testified without rebuttal that another of Respondent's drivers called to ask why Complainant didn't know how to avoid scale houses and adjust logs, so that he could drive 20 hours in a day. He also told Complainant he should have made the trip from Greeley up to Wilder in a day and then logged a 10-hour break there. Complainant also testified that when he told the dispatcher he had run out of hours and was tired, she said that was not going to work. Finally, Complainant testified that Howard Williams told him the logs needed to be adjusted to get the job done and be able to pull away from Wilder with a full 11 hours to drive.

Both the dispatcher and Mr. Williams denied ever asking Complainant to falsify his logs or drive over allowed hours. In so doing, they may have testified sincerely, but also have substituted their judgment for what is reasonable and safe for the letter of the regulations, much as Howard Williams did in terms of the weight. In any event, I found Complainant's testimony to be sufficiently credible to establish at least some type of conversations took place that discussed being more aggressive in driving and logging hours.[56]

While the $50,000 suggested by Complainant is excessive, some amount is appropriate to vindicate the principles behind the Act and discourage Respondent from substituting its subjective judgment for regulatory standards. I find that an amount of $10,000 is sufficient for that purpose.

Abatement

Complainant requests an order that Respondent post a notice of this decision and mail a similar notice, informing all drivers Respondent is prohibited by law from disciplining drivers for refusing to drive in violation of commercial vehicle safety regulations. Respondent entered no opposition. The request is consistent with the Act and granted.

[56] Those issues formed the basis of additional allegations of protected activity that became moot with my finding on the overweight allegation. While I found that Complainant's testimony was generally credible and those conversations mostly likely took place in general terms and Complainant was encouraged to be a "team player," the weight of the evidence is that Respondent would have fired him even in the absence of those conversations, because of his refusal to drive overweight and taking meat off the load before departing. Conversely, the weight of the evidence is also that Respondent would not have fired him had he not initially refused the overweight load. Nevertheless, even though they were not a reason he was fired, they still are relevant evidence of Respondent's general attitude toward compliance.

ORDER

Accordingly, it is hereby **ORDERED** that Respondent:

1. Reinstate Complainant to his former position without loss of benefits or other privileges;

2. Purge Complainant's employment file of any reference to his protected activity and discharge;

3. Compensate Complainant for lost back pay by payment of $840 per week from 8 Dec 08 to 25 Oct 09 and $128 per week from 26 Oct 09 to the date of reinstatement.

4. Pay Complainant interest on lost back pay in accord with 29 CFR § 20.58(a).

5. Pay Complainant $6,000 in compensatory damages.

6. Pay Complainant $10,000 in punitive damages.

7. Post a copy of this Decision and Order wherever employee notices are posted, for a period of ninety (90) days.

8. Mail to each driver a notice that Respondent is prohibited by law from disciplining drivers for refusing to drive in violation of commercial vehicle safety regulations and either a copy of this decision or the URL for its posted location on the DOL website.

ORDERED this 11th day of February, 2011 at Covington, Louisiana.

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PATRICK M. ROSENOW
Administrative Law Judge

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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

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

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).