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Office of Administrative Law Judges
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Issue Date: 26 October 2012

CASE NO.: 2010-STA-00020

In the Matter of:

ALPHONSE MADDIN,
Complainant,

v.

TRANS AM TRUCKING, INC.,
Respondent.

Appearances: Austin W. Garrett, Esq.
Miller Cohen, PLC
For Complainant

Timothy J. Davis, Esq.
Seigfreid, Bingham, Levy, Selzer & Gee, PC
For Respondent

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

INTERIM DECISION AND ORDER

Introduction

This matter arises under the employee-protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "the Act") and its implementing regulations found at 29 C.F.R. Part 1978. Complainant Alphonse Maddin, a driver employed by Respondent Trans Am Trucking, filed a complaint with the Occupational Safety and Health Administration alleging that he was terminated from employment after having informed Respondent that his truck was not safe to drive. Respondent disputes the claim, and alleges that Mr. Maddin was terminated for abandoning a trailer. For the reasons set forth below, I find that Complainant has met his burden to prove that he engaged in protected activity, that Respondent had knowledge of Complainant's protected activity, that Complainant's protected activity was a "contributing factor" in the decision to terminate him, and that Respondent has failed to show by clear and convincing evidence that it would have terminated Mr. Maddin absent the protected activities. Accordingly, I will order that Complainant be reinstated immediately to employment with Respondent, and that Respondent pay certain compensatory damages to Complainant. There

is insufficient evidence for an award of back pay; however, such an award is mandatory under the Act, and I will therefore reopen the record to receive such evidence.

Procedural History

Mr. Maddin filed his complaint with OSHA on June 1, 2009. On December 18, 2009 the OSHA Supervisory Investigator dismissed the complaint, and Mr. Maddin timely objected to the dismissal and requested a hearing. The matter was docketed in this Office on January 21, 2010. After a tortuous pre-hearing process involving a number of procedural and discovery disputes, I held a hearing on November 1, 2011 in Detroit, Michigan. The parties were represented by counsel. At the hearing, I received Complainant's Exhibits ("CX") 1 and 2, and Respondent's Exhibits ("RX") 101-105, 116, and 117 into evidence. After the hearing, I gave Complainant the opportunity to submit documentary evidence on economic damages. Instead of documentary evidence, Complainant submitted a declaration, which I struck on Respondent's motion as not in compliance with my order that documentary evidence only would be considered. The parties submitted written closing arguments.

Summary of Evidence

Gregory Nelson

Gregory Nelson testified that he is unemployed at present, but was employed by Respondent as a driver from May of 2008 through February of 2009. When he was hired, he went to Kansas for training, which included orientation, over-the-road training, and classroom training. He was instructed that drivers were never to idle the trucks. [Transcript of formal hearing ("Tr.") pp. 24-25.]

Mr. Nelson made several runs during cold weather. In his experience, there was no heat from the engine inside the truck while the truck was at a standstill during cold weather. Mr. Nelson had occasion to call Road Assist on two occasions when the bunk heater in the truck was not working during cold weather, and he was offered a room on both occasions. The first time was in Denver in November of 2008, but Mr. Nelson declined the room because he could deal with the cold temperature at that time. He was directed by Respondent to take his truck to a dealership, and he did so, but did not learn anything about the condition of his bunk heater. The second time was in January of 2009 near Columbus, Ohio; it was extremely cold, and Respondent immediately paid for a room. Nobody ever told Mr. Nelson to keep the truck warm by idling the engine. [Tr. 25-28; 29-30.]

On January 15, 2009, Mr. Nelson called Complainant because Complainant was out late at night and Mr. Nelson wanted to ask if he was still driving. Mr. Nelson and Complainant are cousins and frequently kept up with each other. When Complainant answered the phone, Mr. Nelson asked what he was doing. Mr. Nelson's phone call woke Complainant up, and based on Complainant's slurred speech and shivering, he believed he was cold. The conversation continued for about 30 seconds, and Complainant did not sound like himself during any of the conversation. [Tr. 28-29.]

Mr. Nelson said that Road Assist is a department of Respondent that a driver calls when breakdowns occur; drivers are trained and encouraged to do so when any problem comes up. It was Road Assist that told him to drive his trucks to hotels in both November 2008 and January 2009. [Tr. 32-33.]

Mr. Nelson testified that to start a truck, the driver presses the brake and turns the key. Trucks shut off automatically when they are idled longer than a short period of time, five minutes or less, to reduce fuel consumption and emissions. After trucks shut off, they can be re-started the same way in which they are originally started. [Tr. 35-37.]

Alphonse Maddin, Complainant

Mr. Maddin is currently unemployed, and was previously employed as a company driver by Respondent. He started orientation, which is part of the initial training, on his 40th birthday, September 24, 2008. [Tr. 39.]

On January 13 or 14, 2009, Mr. Maddin was assigned a run that involved picking up a load in Shiloh, Nebraska, and delivering it to three locations: two in Wisconsin and one in Michigan. He was given his assigned runs by his onboard computer, also referred to as a Qualcomm. With respect to the January 13 run, he read the message, returned an acknowledgment on the Qualcomm, and then wrote down his assignment on a piece of paper. The assignment includes a trip plan, which in turn includes fuel stops. Mr. Maddin's handwritten notes are contained in CX-1. [Tr. 39-43.]

The shipper was 12 hours late with the load that Mr. Maddin was assigned to pick up on January 13. When he finally picked up the load and started the truck, the truck sputtered, so Mr. Maddin contacted Road Assist. He was told to buy some anti-gel, but the type he needed required compatibility with ultra low-sulfur fuel, and it was not available in Shiloh. He contacted Road Assist again and told them that the truck seemed okay, and was told to go to Council Bluffs, Iowa to buy the anti-gel. At Council Bluffs, his company issued comm data card was rejected when he tried to buy the anti-gel. He again contacted Road Assist and told them that the truck seemed okay, and he started his run without adding anti-gel. [Tr. 44-45.]

Going to Council Bluffs was not part of the original trip. At Council Bluffs, the sun was shining but it was very cold, and Mr. Maddin anticipated that it would be even colder at night. His route was re-optimized after he went to Council Bluffs, and the new route is reflected on the last five or six lines on the bottom of CX-1. He received the new route from dispatch by the onboard computer. [Tr. 45-46.]

As Mr. Maddin was driving on I-88 in Rochelle, Illinois, he looked for a RR/Pilot truck stop in order to buy fuel, as instructed on his Qualcomm. Respondent did not allow him to fill up at Council Bluffs, but only authorized a purchase of 50 gallons and then re-optimized his route and fuel plan. He did not see the fuel stop, so he became conscious of his fuel state and checked his fuel gauge. The fuel gauge was below "E" and Complainant had not seen the RR/Pilot station on I-88, so he decided to pull over at the next exit ramp. When he did so, the

Qualcomm buzzed and Mr. Maddin was told that the driver with whom he was supposed to swap his load was not out of the shop, so Mr. Maddin was told to continue to the first delivery stop. The planned load swap was a result of the shipper's having been 12 hours late in delivering the load to Mr. Maddin. Mr. Maddin pulled over at approximately 11:00 p.m. on January 14. [Tr. 46-50.]

While he was pulled over, Mr. Maddin informed Respondent that there was no RR/Pilot, and he was told to look for a Road Ranger station. He found a Road Ranger on his GPS, but when he tried to go there, the brakes on the trailer he was pulling had locked up. This was less than 10 minutes after he pulled over. Mr. Maddin reported the frozen brakes to Road Assist, then also called Road Assist on his cell phone. CX-2 is a detail list of the calls made on his cell phone. His call to Road Assist is item 262 on CX-2. In addition to the brake problem, Complainant told Road Assist that the APU was not working. The bunk heater is not on while the truck is moving, so the first time that he knew it was not working was when he tried it while he was stopped on the side of the road. Road Assist said that they would get a repair outfit out. [Tr. 50-55.]

Complainant waited over three hours for the repairman to show up. He was bundled up and eventually went to sleep, and was awakened by the phone call from Gregory Nelson, who is his cousin and friend. Mr. Nelson asked if he was okay, and Mr. Maddin replied that he was. Mr. Nelson asked a couple more times during the conversation, and then Mr. Maddin sat up straight to make sure he was all right. When he sat up he knew something was seriously wrong; he felt a crackling sensation in his flesh, his torso was numb, and he could not feel his feet at all. [Tr. 56-58.]

Before falling asleep, he tried to heat the truck by idling, and was not successful because the heat was not adequate. In his experience, there is no heat produced unless the truck is driving down the road, but he was also aware that the fuel gauge was below "E." He decided to bundle in on the assumption that it wouldn't take more than an hour for the repairman to arrive. [Tr. 58-59.]

When he realized his physical condition, his first impulse was to panic, but he stayed calm and told his cousin he would call him back. He called Road Assist again, shown as Item 269 on CX-2, and told them that the heat was not working, informed them of his physical condition, and asked when help was going to arrive. Road Assist told him to hang in there, that they were getting help, and that once the repair outfit arrived they would find Mr. Maddin a hotel room. [Tr. 59-61.]

Complainant tried to "hang in there." He made no additional calls to Road Assist because he had thoughts about losing his feet or dying and not seeing his family again. He decided that he needed to seek safety. He put on his boots, exited the vehicle, put a lock on the trailer, lowered the landing gear, and pulled the truck about three feet away from the trailer. He called Larry Kluck, another employee of Respondent, and told him that he was seeking help because he was stranded, temperature was low, he couldn't feel his feet, his skin was burning, and he had breathing problems, so he was heading to Road Ranger. Mr. Kluck informed him that he could not leave the trailer because the company would get a fine, and told Mr. Maddin to

drag the trailer with him or stay put. Complainant re-emphasized his condition. Mr. Kluck told him to turn on the heat, and Mr. Maddin told Mr. Kluck that it was not working. Mr. Kluck again told him to turn on the heat, and Mr. Maddin again told Mr. Kluck that it was not working. They repeated the same exchange an additional time, and Mr. Maddin decided to continue on to seek safety, and drove the truck off, leaving the trailer on the side of the road. [Tr. 61-63.]

Mr. Maddin followed his GPS to the nearest Road Ranger, but it was closed, and it was an automobile service station, not a truck stop. A second Road Ranger nearby was open, but was also not a truck stop. He left that station, and saw what appeared to be a truck stop in the distance, but could not figure out how to get there. [Tr. 63-64.]

While he was away from the trailer, Mr. Maddin spoke with Josh from Maggio Truck, the repair company. Josh called Mr. Maddin, showing as Item 272 on CX-2. Mr. Maddin told Josh that he was low on fuel, and Josh told him to go to Oasis. Mr. Maddin found a police officer who gave him directions to Oasis, but he returned to the trailer without going to Oasis first. When he arrived at the trailer, Josh told him to go get fuel. Josh had repaired the brakes but had not repaired the bunk heater. [Tr. 65-68.]

Mr. Maddin called Road Assist and spoke with an employee named Maggie to ask her whether Oasis would accept his comm data card. The call is shown as Item 275 on CX-2. While Mr. Maddin was speaking with Maggie, he heard Mr. Kluck yelling in the background telling Maggie to ask Mr. Maddin why he had left the trailer. Maggie repeated the question to Mr. Maddin, who repeated the situation to Maggie. Maggie then gave the phone to Mr. Kluck, who yelled at Mr. Maddin and told him that he was going to write him up for a "late load." Mr. Maddin explained that the shipper was 12 hours late in delivering the load, and Mr. Kluck responded by saying that in that case he would write up Mr. Maddin for missing his fuel stop. After the conversation, Mr. Maddin realized that he had not had his question answered about whether Oasis would accept his comm data card, so he called back. He then followed Josh to Oasis which did not accept the comm data card and told him to go to Petro. Mr. Maddin requested authorization to go to Petro and, after lots of confusion, ultimately received authorization to go to Petro. As he was following the signs to the Petro station, they took him off I-88 and onto I-39 and, when he reached the exit, saw signs for RR/Pilot and decided to go there. He believed that the RR/Pilot station off I-39 was the same station that his fuel plan showed was on I-88, so after he fueled, he sent a message via the Qualcomm that the station was on I-39 and not I-88. He received no response to his message. [Tr. 68-75.]

Mr. Maddin thereafter called Mr. Kluck again, who told him that he had not received his message about the location of the RR/Pilot station. Complainant asked Mr. Kluck if he had written him up for missing his fuel stop, and Mr. Kluck said that he had not. Instead, he had written him up for leaving his trailer instead, which he said would likely lead to Mr. Maddin's termination. [Tr. 75-76.]

Mr. Maddin did not understand that leaving the trailer under these circumstances would lead to termination. He believed that driver safety was paramount, because during his initial training the company president had said both in person and by videotape that "No load is worth your life." [Tr. 76-77.]

After the last conversation with Mr. Kluck, all communications were through the Qualcomm onboard computer, and there was no indication whom he was talking to. There were no further communications about the frozen brakes, but he did report problems with the bunk heater through the Qualcomm using prescripted forms. He received no response. He sent at least three messages, and the only reply was to deliver his loads. [Tr. 77-79.]

After he delivered his last load, he eventually returned to Trans Am and was terminated. The termination occurred during a meeting in the conference room. Before the meeting, he had been denied access to his personal money on his comm data card and his truck had been turned off. He took a moment to be sarcastic and asked, "If I tell a good enough story, can I keep my job?" He tried to explain why he left the trailer, but Mary Hoyt went on a rant about keeping Mr. Maddin's money because he was a thief. She had fired 29 drivers the previous weekend. During the meeting, Ms. Hoyt left and then returned with a printout from Road Assist acknowledging that there was no heat in the truck. [Tr. 79-82.]

Mr. Maddin left the trailer sometime between the calls shown as Items 270 and 271 on CX-2. The load he was carrying was from Cargill Meats. As shown on CX-1, the notation "temp 29" meant that the temperature in the trailer was to be set at 29 degrees, and the notation "wgt" indicated that the meat weight was approximately 41,000 pounds. [Tr. 93-94; 101-102.]

Mr. Maddin received the Respondent's Driver's Information Handbook, and acknowledged receipt (R-101). R-102 through R-105, R-116, and R-117 are excerpts from the handbook. The security guidelines shown on R-104 say, "Always leave the tractor and trailer hooked up. If it is necessary to drop a trailer, obtain permission from your Driver Manager." The Handbook also provides that "Abandoning or leaving a truck or trailer" may result in disciplinary action, up to and including immediate discharge. [Tr. 104-110.]

During the run involved in this matter, Mr. Maddin bought 50 gallons of fuel at 3:07 p.m. on January 14 in Council Bluffs, Iowa, and 143.8 gallons at 6:10 a.m. on January 15 in Rochelle, Illinois. [R-117.]

Thomas J. Schubel

Mr. Schubel is employed part-time by Respondent, but was previously employed full-time as a Driver Manager. He was so employed on January 23, 2009. A Driver Manager performs duties as a dispatcher, but has additional responsibilities to assist drivers with problems that arise while they are on the road. Complainant was one of 60 drivers that Mr. Schubel oversaw at the time, and Mr. Schubel is familiar with Mr. Maddin. Mr. Schubel attended the meeting on January 23, 2009 during which Mr. Maddin was terminated. He was terminated for violation of company policy by abandoning his load while under dispatch, and Mr. Maddin was informed of that reason during the meeting. Other attendees besides Mr. Schubel and Mr. Maddin were Mary Hoyt and Chris Goepfert. During the meeting, there were no raised voices, and all were very professional. [Tr. 126-130.]

In Mr. Schubel's experience, drivers occasionally leave a load but it does not happen "real often." In most cases, drivers who abandon loads do so because they decide for whatever reason that they want to quit, and they simply unhook their loads and drive off. He is unaware of any time that another driver temporarily abandoned a load, as Mr. Maddin did, and then returned to it. [Tr. 131, 133-134.]

Edward R. Sublett, Jr.

Mr. Sublett is employed as a Road Assist coordinator for Respondent. He was at work during the night shift of January 14-15, 2009, and spoke with Mr. Maddin. Mr. Maddin made no complaints about the APU and no complaints about his fuel state, only reporting the problem with the brakes on the trailer. Mr. Maddin told Mr. Sublett that he had been idling the truck to stay warm. [Tr. 144-146.]

Mr. Sublett spoke with Mr. Maddin twice. During the first conversation, Mr. Maddin reported the breakdown, and during the second conversation, Mr. Maddin asked how much longer he would have to wait for brake service. There was about an hour between the calls. When he received the report of the brake order, Mr. Sublett started a work order, which consists of a description of the problem and the identification of the vendor hired to repair it. Mr. Maddin did not report any heater problem during either conversation. Mr. Sublett was the only Road Assist person working from 8 p.m. on January 14 until 5 a.m. on January 15, and he was unaware of any other conversations Mr. Maddin may have had with any Road Assist personnel. The work orders that he prepares are not sent to the Driver Manager, but only put into the system to pay the vendor. Mr. Sublett would email the Driver Manager to make sure that he would know of the breakdown. [Tr. 146-148.]

Mr. Sublett has received reports of APUs not functioning, perhaps 2-3 times per month. When he does, he tries to help the driver get it working or, if it was "real bad out," would offer a hotel room. He has never sent out a repair team for a faulty APU. [Tr. 148-150.]

Frank A. Nicholson

Mr. Nicholson is Respondent's Vice President for maintenance. In that job, he oversees the maintenance department, inspects equipment, and sets procedures for maintenance. He has been in the trucking industry since 1981. His first 12-13 years were as a technician, and the rest have been in management. [Tr. 152-153.]

The burn rate for Respondent's trucks at idle is 1-1¼ gallons per hour. Respondent uses Kenworth T-660 trucks, each of which has two 100-gallon fuel tanks, for a total capacity of 200 gallons. The trucks automatically shut off after five minutes of idle, and can be re-started simply by turning the key. Respondent has over 1100 trucks on the road on any given day, and 100% of them have APUs. The APU is for use only while the truck is at rest, and does not run while the truck is moving. It provides heat, cooling, and household power for the driver, and is installed because the Environmental Protection Agency prohibits trucks from idling for more than five minutes. [Tr. 155-157.]

The automatic shutoff can be worked around by tapping on the accelerator; once tapped, the engine continues to run. [Tr. 158; 161.]

Anti-gel is an additive to prevent fuel from gelling. Respondent does not use it because their trucks use ultra-low-sulfur diesel fuel, and adding anti-gel would change the properties of the fuel so that its use would be illegal. Older fuel was low-sulfur, and anti-gel could be used. Mr. Maddin's truck has a Caterpillar engine, and is a newer model that uses ultra-low-sulfur fuel. [Tr. 164-166.]

Findings of Fact

The following facts were deemed admitted by Complainant's failure to respond to Respondent's Requests for Admissions:

1. Complainant was employed by Respondent on January 14, 2009 as a truck driver.
2. On January 14, 2009, Complainant was driving a truck for Respondent.
3. On January 14, 2009, Complainant was pulling trailer # 185907 for Respondent.
4. On January 14, 2009, the brakes on trailer #185907 became frozen up due to frigid temperatures while Complainant was stopped.
5. Complainant was parked along the shoulder of an interstate highway ramp when the brakes froze on trailer #185907.
6. On January 14, 2009, Complainant sought help from TransAm to repair the frozen brakes on trailer #185907.
7. On January 14, 2009, Complainant was advised that TransAm had contacted a truck repair center to send a service truck to his location to fix the problem.
8. On January 14, 2009, Complainant was specifically ordered ***not*** to unhook trailer #185907 and drive the truck.
9. On January 14, 2009, Complainant refused to refrain from operating the vehicle (i.e., he unhooked trailer #185907 and drove the truck after he was told not to do so).
10. On January 14, 2009, Complainant unhooked trailer #185907 and drove the truck after he was told not to do so.
11. On January 14, 2009, while Complainant was away from trailer #185907, the service truck from the truck repair center called by TransAm arrived at the location of trailer #185907 to fix the problem with the frozen brakes.
12. On January 14, 2009, the frozen brake problem on trailer #185907 was corrected.
13. On January 14, 2009, Complainant knew that even though the truck engine would automatically turn off after a few minutes of idling, it was possible to continue to repeatedly restart the truck to keep the heat on.
14. Prior to January 14, 2009, Complainant was aware that it is a violation of TransAm company policy to leave a loaded trailer unattended on the side of a highway.
15. Complainant was terminated for unhooking trailer #185907 and driving off to get fuel on January 14, 2009.

I make the following additional findings of fact based on the testimony and exhibits presented at the hearing:

Communications

Mr. Maddin communicated by cell phone and by way of his onboard computer system. The onboard computer system is also referred to as a "Qualcomm" because the communication devices were originally made by that company. "Onboard computer" and "Qualcomm" refer to the same communication device.

APU/Bunk Heater

The questions and answers used the terms "APU" and "bunk heater" interchangeably. Based on Mr. Nicholson's testimony, I find that the APU is an auxiliary power unit that supplies heating and cooling the truck as required, and also provides power for electrical appliances that the driver wishes to operate. It operates only when the truck engine is off, and is installed because idling of the truck engine for more than five minutes is legally prohibited. During cold weather, the driver obviously wants heat from the APU. If the APU is not working, then it puts out no heat into the truck. References to the APU are, in the context of this case, references to the heater for the cab.

Complainant's Service with Respondent

Complainant was hired as a driver by Respondent and began his orientation and training on September 24, 2008. He was employed by Respondent at all times relevant to this matter. During his initial training, he was told by Respondent's president both in person and by videotape that "No load is worth [a driver's] life."[1]

Complainant was assigned to pick up a load of frozen meat between 6:00 p.m. and 11:00 p.m. on January 13, 2009, in Schuyler, Nebraska, and deliver it to three locations, two in Wisconsin and one in Michigan. The assignment was delivered through the onboard computer, also known as a Qualcomm, in Complainant's truck. The assignment included route instructions and a fuel plan. The shipper in Schuyler was 12 hours late in providing the load to Complainant. When Complainant started his truck on January 14 after receiving the load, the engine sputtered, and he called Road Assist to ask for guidance. He was instructed to obtain some anti-gel additive, but was unable to find any in Schuyler. He called Road Assist again, and was instructed to drive to Council Bluffs, Iowa to buy anti-gel. When Complainant arrived at Council Bluffs, he was unable to purchase the anti-gel, and persuaded Road Assist that he could drive his truck to his delivery point. However, because Council Bluffs was not included in his original route or fuel plan, Complainant was provided with a re-optimized route and fuel plan, which included a stop for fuel near Rochelle, Illinois. Complainant was permitted to buy 50 gallons of fuel in Council Bluffs before proceeding on his re-optimized route.

[1] Complainant's testimony regarding the company president's statement is credible; under the STAA, driver safety is a top priority, and any principled trucking company would make it one. Further, Complainant's testimony was not contradicted by any of Respondent's witnesses or evidence.

Because the original load was provided 12 hours late, Respondent advised Complainant that he would swap out with another driver at an undefined point along the route.

While driving on I-88 near Rochelle, Illinois, Complainant attempted to find the RR/Pilot station at which he had been instructed to purchase fuel. He was unable to find it, and he became concerned about his fuel state when he saw that the gas gauge was below "E." He decided to pull over on the side of the ramp. When he did so at approximately 11:00 p.m., he received a message that the driver with whom he expected to swap the trailer was not available because he was still in the shop. Complainant was told to continue driving to the first delivery point. He responded that there was no RR/Pilot station on I-88 and that he was below "E" on fuel. He was instructed to look for a Road Ranger station, and he found one on his GPS. When he did, he tried to drive there, but the brakes on the trailer had frozen due to the frigid temperatures. He attempted to drive to the Road Ranger station about 10 minutes after he pulled over on the exit ramp. Mr. Maddin reported the frozen brakes to Respondent via the Qualcomm.

Complainant called Road Assist on his cell phone at 11:16 p.m. and 11:17, and reported the frozen brakes. Road Assist told Complainant that they would send out a repair company to fix the brakes. Although Complainant testified that he also informed Road Assist that the APU was not working, I find that he did not do so. Mr. Sublett testified that he was the only Road Assist employee on duty that night, and that Complainant did not report a faulty APU to him. I find his testimony more credible than Complainant's on this specific issue. His uncontradicted testimony of Mr. Sublett – who was the sole Road Assist employee on duty that night – is that when he receives reports that APUs are not working, he tries to help the driver to start it, and if the weather is "real bad," he offers the driver a hotel room. Complainant did not testify that Road Assist tried to help him start his APU or that Road Assist offered him a hotel room at this point in the evening. Thus, the preponderance of the evidence is that Complainant did not report that the APU was faulty during the calls at 11:16 and 11:17 p.m.

Complainant's 11:17 call to Road Assist lasted for 17 minutes, and therefore ended at 11:34 p.m. Complainant made four personal calls beginning at 11:40 p.m., with the last ending at 12:15 a.m. on January 15. Sometime after 12:15 a.m., he fell asleep in his truck. He was awakened by a phone call from his cousin, Gregory Nelson, at 1:18 a.m. Mr. Nelson observed that Complainant's speech was slurred and it sounded like he was shivering, so he asked Complainant if he was feeling all right. Complainant said that he was, but Mr. Nelson continued to believe that Complainant didn't sound right, and asked him two more times if he was all right. After the third time, Complainant sat up straight to see if he really was all right, and realized that his skin was crackling from the cold, that his torso was numb, and that he couldn't feel his feet. Although his first impulse was to panic, he stayed calm and told Mr. Nelson that he would call him back. That call ended at 1:24 a.m., and at 1:25 a.m. Mr. Maddin again called Road Assist.

During the 1:25 a.m. phone call, Mr. Maddin informed Road Assist that the heat was not working. Although Mr. Sublett testified that Mr. Maddin did not do so, I find that he did do so during this telephone call. Mr. Maddin's testimony was credible, and he testified that during this call Road Assist – which must mean Mr. Sublett, who was the only Road Assist employee on duty at that time – offered to find him a hotel room after the repair company arrived. This offer is consistent with Mr. Sublett's admitted practice when informed that an APU is not working.

During this phone call, Mr. Maddin informed Mr. Sublett of his physical condition and asked when the repairman would be arriving. Mr. Sublett told him to "hang in there." The phone call ended at 1:29 a.m.

Complainant tried to "hang in there" for some period of time; however, he had become fearful of losing his feet or even dying and never seeing his family again. He put on his boots, exited his truck, and unhooked the trailer after deploying the trailer's landing gear. He pulled the truck about three feet away and, at 1:59 a.m., called Larry Kluck. Mr. Kluck was an employee of Respondent, but the evidence does not establish what Mr. Kluck's position was. Complainant told Mr. Kluck that he was going to seek help because he was stranded in low temperatures, and couldn't feel his feet, his skin was burning, and he was having trouble breathing. He told Mr. Kluck that he was heading to Road Ranger. Mr. Kluck told Complainant not to leave the trailer because the company would get a fine, and ordered him to either drag the trailer with its frozen brakes or to stay where he was. Complainant reiterated his physical condition. Mr. Kluck told him to turn on the heat, and Complainant told him it was not working. Twice more, Mr. Kluck told Complainant to turn on the heat, and Complainant told him it was not working. This phone call ended at 2:05 a.m.

After speaking with Mr. Kluck, Complainant drove the truck off, leaving the trailer unattended. He drove to the closest Road Ranger, which he had located with his GPS, but it was closed. As he continued to seek a truck stop to buy fuel, he received a phone call at 2:19 a.m. – no more than 14 minutes after driving off – from Josh with Maggio Trucking, who had arrived to fix the trailer's brakes. Although he had received directions to a truck stop from a police officer, Complainant returned to the trailer and met Josh. Josh repaired the brakes, but did not repair the heater. Some time between 2:19 a.m. and 3:20 a.m. – when Complainant called Mr. Kluck again – the repairs were complete. Josh advised Complainant to go to Oasis, where Complainant could buy fuel; however, Complainant was concerned that Oasis would not accept his comm data card. Thus, at 3:20 a.m., Complainant made a call to Respondent to see whether Oasis would accept the card. During that phone call, Mr. Kluck yelled that he intended to write up Complainant for a late load, until Complainant told him that the shipper was 12 hours late delivering the load in the first place. Mr. Kluck then told Complainant he was going to write him up for missing his fuel stop, and the conversation ended. Complainant followed Josh to Oasis, only to learn that they would not accept his comm data card for payment. He eventually received authorization to purchase fuel at Petro, and he started driving to Petro, following highway signs. As he did so, the signs took him off of I-88 onto I-39, and when he exited from I-39 he saw signs for RR/Pilot. He concluded that the RR/Pilot on I-39 was the truck stop that Respondent had intended him to use and had told him was on I-88. He reported the incorrect location to Respondent by onboard computer.

Complainant then called Mr. Kluck, who said that he had not received Complainant's report of the incorrect location of the truck stop. He asked Mr. Kluck if he was being written up for missing his fuel stop, and Mr. Kluck informed him that he was writing him up for abandoning the trailer instead. He told Complainant that it would probably lead to termination.

On January 23, 2009, Complainant was called to the company offices in Olathe, Kansas, and met with Mary Hoyt, Jeff Goepfert, and Mr. Schubel. Complainant was informed that he

was being terminated for violating the company policy against abandoning a load while under dispatch. Complainant testified that he was being terminated for lying. The two reasons given for termination are different, but are not inconsistent. It is likely that at some point during the meeting, a company representative expressed disbelief about Complainant's version of the events of January 14-15. It is also likely that Complainant remembers that accusation above all other communications made during the meeting, and has elevated its importance in his own mind. I find, therefore, that Complainant was both accused of lying about the events, and informed that he was being terminated for abandoning his load. Additionally, there are differing accounts of the tenor of the meeting, but I find that the demeanor of the participants is not material to my decision and need not resolve those differences.

Conclusions of Law

To prevail on a whistleblower claim under the Act, a complainant must prove by a preponderance of the evidence that (1) the employee engaged in activity or conduct the statute protects; (2) the respondent took unfavorable action against the employee; and (3) the protected activity was a contributing factor in the adverse personnel action. *Canter v. Maverick Transportation, LLC*, ARB No. 11-012, ALJ No. 2009-STA-054, slip op. at 5 (ARB June 27, 2012); see 29 C.F.R. §§ 1978.104(e)(2) and 1978.109(a). If the complainant meets his burden of proof, the employer may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event. 29 C.F.R. § 1978.104(e)(4); see also *Canter*, slip op. at 5.

1. Protected Activity

The Act provides in pertinent part:

> (a) Prohibitions. - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because -
>
> (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;
>
> (B) the employee refuses to operate a vehicle because -
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition….

49 U.S.C. § 31105. The regulations implementing this statutory prohibition on discrimination provide in pertinent part:

> (a) No person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in any of the activities specified in paragraphs (b) or (c) of this section. In addition, no person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because a person acting pursuant to the employee's request engaged in any of the activities specified in paragraph (b).
>
> (b) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee or a person acting pursuant to the employee's request has:
>
> (1) Filed orally or in writing a complaint with an employer, government agency, or others or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order; or
>
> (2) Testified or will testify at any proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.
>
> (c) It is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee:
>
> (1) Refuses to operate a vehicle because:
>
> (i) The operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
>
> (ii) He or she has a reasonable apprehension of serious injury to himself or herself or the public because of the vehicle's hazardous safety or security condition….

29 C.F.R. § 1978.102. Broadly, the Act and its implementing regulations prohibit discriminatory action by an employer because an employee has engaged in activities falling into two categories: complaints, and refusal to operate a vehicle.

The parties seem to believe that the "complaint" category is not applicable in this matter, and devote their arguments to whether Mr. Maddin engaged in a "refusal to operate" protected activity. Nonetheless, the evidence of record shows that Mr. Maddin engaged in protected activity when he reported the frozen brakes on his trailer. That report satisfies the requirement that he "filed [a complaint] orally…with [the] employer." Further, his report of frozen brakes is a complaint related to a violation of a commercial motor vehicle safety regulation, specifically 49 C.F.R. § 392.7, which prohibits a driver from operating a vehicle unless the driver is satisfied that the brakes, including trailer brakes, are in good working order. *See Barnett v. Lattimore Materials, Inc.*, ARB No. 07-053, ALJ No. 2006-STA-038, slip op. at 4 (ARB Sept. 22, 2008). Accordingly, I find that Mr. Maddin's report of frozen brakes qualifies as protected activity under 49 U.S.C. § 31105(a)(1)(A)(i) and 29 C.F.R. § 1978.102(a) and (b)(1).

The parties disagree over whether Mr. Maddin's behavior on the night of January 14-15, 2009 constitutes protected activity in the "refusal to operate" category. Employer contends that

Mr. Maddin did not refuse to operate his vehicle at all; its position is that he in fact operated his vehicle in direct violation of an order not to leave the trailer at the side of the road. Because Mr. Maddin actually operated his vehicle, argues Employer, he did not engage in protected activity in the nature of a refusal to drive out of safety concerns. Complainant, on the other hand, argues that his conduct in disconnecting the trailer and driving off to obtain fuel is protected under 49 U.S.C. § 31105(a)(1)(B)(ii), as he had a reasonable apprehension of serious injury due to the extreme cold. Neither party's position is persuasive.

Complainant's argument fails because it ignores the issue of whether Mr. Maddin refused to operate his vehicle. A reasonable apprehension of serious injury is a valid basis for refusing to operate a vehicle, but refusal to operate is a sine qua non for finding that he engaged in protected activity. Complainant appears to be arguing that anything a driver does out of a reasonable apprehension of serious injury is protected activity; however, the statute and regulation are not that broad, and require a refusal to operate a vehicle to qualify as a protected activity.

On the other hand, Employer's argument – that because Mr. Maddin operated his vehicle, he did not refuse to operate it and therefore did not engage in protected activity – overlooks some salient facts. Mr. Maddin's uncontradicted testimony, which I credit, was that he was directed by Mr. Kluck either to drag the trailer, with frozen brakes, or to stay put at the side of the road. By disconnecting the trailer, Mr. Maddin refused to operate the truck *under the conditions set by Mr. Kluck.* He refused to operate his vehicle while dragging a trailer with frozen brakes, and did so because of safety concerns. Employer's characterization of Complainant's conduct – that he operated his vehicle in violation of company rules and a direct order, and therefore did not refuse to operate his vehicle for any reason – is erroneous and incomplete. Although Mr. Maddin did operate the truck, he refused to operate the entire truck/trailer combination. Additionally, in light of 49 C.F.R. § 392.7, operation of a vehicle with inoperable brakes would violate a safety regulation. Finally, it is self-evident that driving a tractor-trailer with frozen trailer brakes creates a serious threat of accident or injury to the driver.

Under the statute and regulations, however, apprehension of serious injury is reasonable

> only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

29 C.F.R. § 1978.102(f), implementing 49 U.S.C. § 31105(a)(2). I conclude in this case that a reasonable individual in Mr. Maddin's circumstances would conclude that operating his truck, while dragging a trailer with frozen brakes, establishes a real danger of accident or injury. Mr. Maddin was operating a heavily-laden tractor/trailer combination in subzero temperatures after midnight, and it was essential that under those conditions the vehicle be in optimal driving condition. It was not.

I further find that Mr. Maddin sought correction of the frozen brakes from Respondent. He testified that he did, and Respondent's evidence also establishes that he did. The dispute is whether he was "unable to obtain" correction of the hazardous condition. According to Respondent, a brake repair person from Maggio in fact went to the truck and fixed the brakes, and, therefore Mr. Maddin was not "unable to obtain" repairs to the brakes. But it's not that easy. Mr. Maddin was forced to wait for the repair company in his truck, in extremely cold temperatures. More than two hours after reporting the frozen brakes, and after feeling the physical effects of the extreme cold, Mr. Maddin asked Respondent when the repair company would be there; but the best Respondent could do was to tell him to "hang in there." A half hour after giving that advice, the repair company still had not arrived, and Mr. Maddin again called Respondent. He reported his physical condition – crackling skin, numbness, and difficulty breathing – and told Respondent he was going to seek help. At that time, he was ordered not to leave the load, and to either drag the trailer with its frozen brakes, or to stay with the load. There was still no indication when the brake repair would be made. Given the extreme temperatures and Mr. Maddin's physical condition, and the uncertainty when the brakes would be repaired, I find that at the time Mr. Maddin drove the truck off and left the trailer at the side of the road, he had sought, and was unable to obtain, correction of the hazardous safety condition.

Accordingly, I find that Mr. Maddin's conduct qualifies as a "refusal to operate" protected activity under 49 C.F.R. §§ 31105(a)(1)(B)(i) and (a)(1)(B)(ii).

2. Respondent's Knowledge

There is no dispute that Respondent knew that Mr. Maddin had engaged in both varieties of protected activity as discussed above, and I find that it did.

3. Unfavorable Action

Mr. Maddin was terminated from employment with Respondent on January 23, 2009 as a direct consequence of his actions on January 14-15. His termination is clearly an unfavorable employment action; Respondent does not dispute it, and I so find.

4. Contributing Factor

Engaging in a protected activity is a "contributing factor" to the adverse action if it "alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 11 (ARB Feb. 29, 2012). A complainant can show contribution by either direct or indirect proof. *Id.* If Mr. Maddin "does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment." *Id*. One method of indirect proof is evidence of "temporal proximity" between the protected activity and the adverse action. *Id.*, citing *Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010).

In this case, the protected activities occurred in the late evening hours of January 14, 2009 and the early morning hours of January 15, 2009. Mr. Maddin reported the frozen brakes at

11:16 or 11:17 p.m., and drove the disconnected truck away from the trailer shortly after 2:05 p.m. During a telephone call at about 3:20 a.m., Mr. Kluck threatened to write Mr. Maddin up for delivering a late load and, after Mr. Maddin reminded Mr. Kluck that he received the load 12 hours late to begin with, Mr. Kluck told Mr. Maddin that he was going to write him up for missing his fuel stop. Sometime between 3:20 a.m. and the end of his run, Mr. Maddin was told by Mr. Kluck that he was going to write him up for abandoning his load, and that he would likely be terminated for it. On January 23, 2009, the threat became reality: Complainant was terminated.

Thus, there was both direct and indirect evidence that Complainant's conduct on January 14-15, 2009 contributed to Respondent's decision to terminate him. The close temporal proximity between the protected activities and the termination gives rise to an inference that the former contributed to the latter. More important, the uncontradicted testimony of Respondent's employees, and of Mr. Maddin, as well as the deemed admission of Request for Admission No. 15, established that Respondent terminated him for driving off and leaving a loaded trailer at the side of the road. That action – unhooking the trailer and leaving it in place – is inextricably intertwined with Complainant's refusal to operate the truck while the trailer, with its frozen brakes, was attached to it. But for the fact that the trailer's brakes were frozen, Mr. Maddin would not have done what he did. Respondent can characterize its action any way it wants, but it is clear that the decision to terminate Complainant was based on his refusal to operate the truck while dragging a trailer with frozen brakes.[2] Further, Mr. Maddin was specifically given the choice of dragging the trailer by an employee of Respondent. He manifested his refusal to do so by unhooking the trailer and driving the truck off in search of fuel.

Based on the foregoing, I find that Complainant has met his burden to show that he engaged in protected activity, that Respondent had knowledge of his protected activity, that he was subject to adverse action, and that his protected activity was a contributing factor in Respondent's decision to terminate him.

5. Employer's Burden

As discussed above, Respondent can avoid liability if it can show by clear and convincing evidence that it would have taken the same action in the absence of protected activity. *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at p. 6-7 (Feb. 29, 2012); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)(citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams*, ARB No. 09-092, slip op. at 5, (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing Black's Law Dictionary at 577). In the context of this case, Respondent must prove that it is "highly probable or reasonably certain" that it would have fired Mr. Maddin for leaving the trailer temporarily unattended.

[2] While Complainant's failure to respond to a request for admission resulted in a deemed admission that he was fired for unhooking his trailer and driving off in violation of company policy, in my view, that does not preclude a finding that his protected activity (his refusal to operate the truck with a trailer with frozen brakes) was a "contributing factor" to the termination decision.

Respondent's central argument is that Mr. Maddin was terminated based on a single violation of company policy. Respondent's employee handbook includes a prohibition on "abandoning or leaving a truck or trailer." [RX 105; Tr. 131.] Abandoning a load is not a frequent occurrence, but it does happen. [Tr. 131.] Doing so "may result in disciplinary action, up to and including immediate discharge." [RX 105.] At least one driver, and possibly more, have walked away from their trucks and gone home, and those drivers were terminated. [Tr. 133-135.] However, there has been no other situation with circumstances like the present case, where a driver has temporarily left a load and then returned to it; Mr. Maddin's case is unique. [Tr. 143.] Respondent submitted a receipt evidencing that Mr. Maddin had received Respondent's employee handbook. [RX-101; RX-105.]

After a review of all the evidence, I find Respondent has not demonstrated, by clear and convincing evidence, that it would have taken the unfavorable personnel action against Mr. Maddin in the absence of his protected activity. Respondent does not identify other instances in Mr. Maddin's employment history aside from his refusal to operate his truck on January 14-15, 2009, to support its assertion that his employment was terminated for nonretaliatory reasons. Respondent acknowledges that Mr. Maddin's case is unique; however, Respondent has presented no evidence that other employees have been lawfully terminated for temporarily violating a company policy in response to safety concerns.

Relief

A successful complainant under the STAA is entitled to affirmative action to abate the violation, reinstatement to his former position with the same pay, terms and privileges of employment, attorney fees and costs reasonably incurred, and may also be awarded compensatory damages. Specifically, the STAA provides that:

> (A) If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor shall order the person to
>
> > (i) take affirmative action to abate the violation;
> >
> > (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
> >
> > (iii) pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
>
> (B) If the Secretary of Labor issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary of Labor may assess against the person against whom the order is issued the costs (including attorney

fees) reasonably incurred by the complainant in bringing the complaint. The Secretary of Labor shall determine the costs that reasonably were incurred.

(C) Relief in any action under subsection (b) may include punitive damages in an amount not to exceed $250,000.

49 U.S.C. § 31105(b)(3)(A)-(C). Considering the foregoing findings and conclusions, reinstatement, back pay, restoration of benefits, interest and attorney fees and costs are mandatory.

1. Reinstatement

Reinstatement provides an important protection for employees who report safety violations. "[T]he employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258-250 (1987). These protections also extend to employees who refuse to drive vehicles because of safety concerns. 49 C.F.R. § 392.7. Reinstatement is an appropriate, statutory remedy under the circumstances of this case. *See Clifton v. United Parcel Service*, Case No. 1994 STA-16 at 1-2 (ARB May 14, 1997)(no front pay where reinstatement is an appropriate remedy).

In the absence of a valid reason for not returning to his former position, immediate reinstatement should be ordered. *Dutile v. Tighe Trucking, Inc.*, Case No. 1993-STA-31 (Sec'y Oct. 31, 1994). Accordingly, Complainant is entitled to immediate reinstatement to his former position with the same pay and terms and privileges of employment, or if his former job no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions and benefits. Respondent's back pay liability terminates upon the tendering of a bona fide offer of reinstatement even if Complainant rejects it. *Id*.

2. Compensatory Damages

a. Back Pay & Interest

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, Case No. 1995-STA-34 (ARB Aug 8, 1997). Back pay calculations must be reasonable and supported by the evidence; they need not be rendered with "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc.*, Case No. 1995-STA-43 at 11 (ARB May 30, 1997). Back pay is typically awarded from the date of a complainant's termination until reinstatement to his former employment. Any uncertainties in calculating back pay are resolved against the discriminating party. *Kovas v. Morin Transport, Inc.*, Case No. 1992-STA-41 (Sec'y Oct. 1, 1993).

Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, the allocation of the burden of proof is reserved, i.e.,

it is the employer's burden to prove by a preponderance of the evidence that the back pay award should be reduced because the employee did not exercise reasonable diligence in finding other suitable employment. *Polwesky v. B & L Lines, Inc*., Case No. 1990-STA-21 (Sec'y May 29, 1991); *See also Johnson v. Roadway Express, Inc*., Case No. 1999-STA-5 ay 16 (ARB Mar. 29, 2000)(it is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages). The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. *Johnson v. Roadway Express, Inc*., Case No. 1999-STA-5 at 4 (ARB Dec. 30, 2002); *See also Weaver v. Casa Gallardo, Inc*., 922 F.2d 1515, 1527 (11th Cir. 1991). Where a complainant is awarded back pay under STAA, unemployment compensation benefits are not deductible from the amount due for back pay. *Smith v. Specialized Transp. Servs*., Case No. 1991-STA-0022 (Sec'y Nov. 20, 1991).

Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Complainant's termination until the instant order of reinstatement. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made. *Moyer v. Yellow Freight Systems, Inc*., [*Moyer I*], Case No. 1989-STA-7 at 9-10 (Sec'y Sept. 27, 1990), rev'd on other grounds sub nom. *Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992). The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a) (2010) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621. *Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. Double R Trucking, Inc*., Case No. 1998-STA-34 at 3 (ARB Jan 12, 2000). The interest is to be compounded quarterly. *Id*.

Although Complainant was previously given the opportunity to present evidence of economic damages, he failed to do so in a manner consistent with my earlier orders. Nonetheless, he is not barred from doing so now. The Administrative Review Board has held that ""An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005). I must, under the Act and Board precedent, make Mr. Maddin whole by making an award of back pay. Therefore, the parties will be ordered to provide evidence of back pay within thirty (60) days from the date of this Interim Decision and Order within which to file and serve a supported statement concerning back pay. Such evidentiary support may include affidavits, declarations, documents such as pay stubs, W-2 forms and tax returns, deposition transcripts, and any other relevant documentation.

b. Other Compensatory Damages

Mr. Maddin may receive compensatory damages in addition to back pay. 49 U.S.C.A. § 31105 (b)(3)(A)(iii). Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Ferguson v. New Prime, Inc.*, ARB No. 10-10-075, ALJ No. 2009-STA-047, slip op. at 7 (ARB Aug. 31, 2011), citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 24, 2010). To recover

compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Id.*

In this case, Mr. Maddin presented evidence in the form of testimony from Mr. Nelson, his cousin, who has known Mr. Maddin for 41 years. Mr. Nelson testified that Mr. Maddin's personality underwent a significant change after his employment was terminated. While he was previously an upbeat, proud, and outspoken and outgoing man, he became reserved and withdrawn after his termination. From Mr. Nelson's perspective, Mr. Maddin became reserved, saddened, and depressed. After termination, Mr. Maddin has been unable to spend much time with his daughter and his relationship with his mother has become very strained. Mr. Nelson's testimony is credible; he has known Mr. Maddin for over 40 years, and is in a position to testify regarding his observations of Mr. Maddin's personality change after termination. I find that Mr. Nelson's testimony has established that Mr. Maddin suffered emotional distress as a result of his termination, and that Mr. Maddin is entitled to an award of compensatory damages. There is no formula for calculating the appropriate amount. Based on the minimal (but adequate) evidence of emotional distress, and the lack of evidence that Respondent has done anything since terminating Mr. Maddin to increase his anguish, I find that an appropriate award is $5,000.00.

3. Punitive Damages

The STAA allows for an award of punitive damages in an amount not to exceed $250,000. 49 U.S.C. § 31105(b)(3)(C). The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . . ." Smith v. Wade, 461 U.S. 30, 51 (1983). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979).

I find that although the Respondent's conduct in this matter violated its own frequently-expressed tenet that "a load is not worth a life," that conduct was not outrageous, and did not show reckless or callous disregard for Mr. Maddin's rights under the Act. I therefore will not make an award of punitive damages.

4. Attorney's Fees and Costs

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 31105(b)(3)(B); *Murray v. Air Ride, Inc.*, Case No. 1999-STA-34 (ARB Dec. 29, 2000). Counsel for Complainant will be given the opportunity to submit a fee application after receipt of wage evidence and issuance of a final Decision and Order.

ORDER

Based upon the foregoing, IT IS ORDERED:

1. Respondent shall immediately reinstate Complainant to his former position with the same pay, terms and privileges of employment that he would have received had he continued working from January 23, 2009, through the date of the reinstatement.

2. Respondent shall expunge from the employment records of Complainant any adverse or derogatory reference to his protected activities of January 14-15, 2009, and his termination on January 23, 2009.

3. Respondent shall pay Complainant $5,000.00 in compensatory damages for emotional distress; and

4. The parties are granted thirty (60) days from the date of this Interim Decision and Order within which to file and serve a supported statement regarding back pay, after which a final Decision and Order will be issued.

SO ORDERED.

Digitally signed by PAUL JOHNSON
DN: CN=PAUL JOHNSON,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge