U.S. Department of Labor

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Issue Date: 01 September 2010

CASE NO.: 2010-STA-00007	**CASE NO.: 2010-STA-00008**
In the Matter of:	***In the Matter of:***
KLEONA MYERS ***Complainant,***	**RUSSEL BAXTER** ***Complainant,***
v.	**v.**
AMS/BRECKENRIDGE/EQUITY GROUP LEASING 1, ***Respondent.***	**AMS/BRECKINRIDGE/EQUITY GROUP LEASING 1.**[1] ***Respondent.***

Appearances: **Paul O. Taylor, Esq.**
For Complainants

Steve Dennis, Esq.
For Respondent

Before: **ROBERT B. RAE**
U. S. Administrative Law Judge

RECOMMENDED DECISION AND ORDER AWARDING BENEFITS

These cases have been consolidated in the interest of judicial economy pursuant to 29 C.F.R. § 18.11. The issues herein arise under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. § 31105 (STAA), and the implementing regulations at 29 C.F.R. Part 1978. The purpose of the STAA is to provide for employee protection from discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. 29 C.F.R. § 1978.100. Here, Complainants, two employees organized as the truck-driving team of one vehicle, allege that they were wrongfully terminated by Respondent, which they contend is liable as a "joint-employer."

Complainants filed an amended STAA complaint[2] with the Occupational Safety and Health Administration (OSHA) on April 13, 2009. On December 11, 2009, the Secretary of

[1] Also formerly known as "Atlantic Professional Employers, Inc." *See* CX-5.

Labor, acting through here agent, the Regional Administrator for OSHA, found that the complaint should be denied because, while Respondent is a person within the meaning of 49 U.S.C. § 31105, it is not a commercial motor vehicle carrier engaged in transporting products on the highways via commercial motor vehicle with a gross vehicle rating of 10,001 pounds or more. 49 U.S.C. § 31101. The Regional Administrator also found that Respondent did not hire or fire complainants within the meaning of the STAA.

Complainants timely objected to the Secretary's findings and the case was referred to the Office of Administrative Law Judges (OALJ) and docketed on December 17, 2009. A formal hearing was scheduled for April 14, 2010 in Springfield, MO. On January 27, 2010, Respondent filed a Motion to Dismiss, asserting that it did not have the requisite level of control over Complainants to be liable under the STAA. After evaluating Complainant's brief in opposition and Respondent's business contract with New Rising Fenix, Inc. – the trucking company that undisputedly had the power to hire, fire, transfer, reprimand, and/or discharge Complainants – I found a genuine issue of material fact as to whether Respondent qualifies as a joint employer for purposes of STAA liability. I denied the motion on March 11, 2010.

The case proceeded to hearing as scheduled. At the hearing,[3] I admitted Complainants' Exhibits 1 through 13, 15, and 17 through 27, subject to Respondent's objections on the legibility of CX-13 and CX-20. TR. 10-16; 272-74. I also admitted Respondent's Exhibits 1 through 12, ALJ Exhibits 1 through 8, and Joint Exhibit 1, a "Stipulation of Facts and Admissibility of Evidence." TR. 5-8; 17. During the hearing, I ruled on Respondent's "Motion to Take Judicial Notice of Court Decisions of the Missouri and Florida Court of Appeals, Missouri Revised Statutes and Florida Statutes." I will take judicial notice of the statutes, but not the case law, which will be given the interpretive weight to which it is entitled based on questions of applicability and jurisdiction. TR. 45, 60.

At the conclusion of the hearing I left the record open pending receipt of closing argument briefs and submission of the deposition and further argument on the admissibility of the testimony of Complainant's "expert witness," David Englesmeier. TR. 309. The record reflects that Respondent filed a motion to exclude this testimony on April 12, 2010. I received

[2] The original complaint was filed against only New Rising Fenix, Inc. and did not include Respondent. Evidently, New Rising Fenix, Inc. is not a party to this action and no longer exists as a solvent corporate entity.

[3] Complainant's Exhibits shall be referred to as CX_; Respondent's Exhibits as RX_; Joint Exhibit as JX-1, and ALJ Exhibits as AX_, followed by the appropriate page number. References to the hearing transcript are denoted as TR._ in the same manner.

closing argument briefs from both parties on July 16, 2010. Neither brief mentions the testimony of Mr. Englesmeier. Having never received a copy of the deposition – which would have been incumbent upon Complainants – I will consider the issue waived. Respondent moved in its closing brief that I include Respondent's Prehearing Brief in the record as ALJ-9 and I have done so and considered it accordingly. The record is now closed. The decision that follows is based on the record as admitted, the relevant law, and the arguments of the parties.

Stipulations

1. New Rising Fenix, Inc., (NRF) was a commercial motor vehicle carrier within the meaning of the STAA.
2. NRF employed Complainants October 13, 2008 through November 22, 2008, as commercial truck drivers operating in interstate commerce.
3. NRF, through its CEO, Charles Daniel, discharged Complainants from their employment on November 22, 2008.

Issues[4]

1. Was Respondent, through its contractual relationship with NRF, a joint employer of Complainants within the meaning of the STAA?
2. Did Complainants engage in protected activities pursuant to Section 31105(a)(1)(B) by refusing to operate their truck on November 19, 2008?
3. Did Complainants engage in protected activities pursuant to Section 31105(a)(1)(A)(i) by filing a complaint with the Arizona Department of Transportation and the Arizona Department of Public Safety alleging that the vehicle they were directed to operate did not comply with Federal Motor Vehicle Safety Regulations, and/or by filing similar complaints with NRF?
4. Did NRF engage in discriminatory activity by discharging Complainants for engaging in a protected activity, therefore making Respondent vicariously liable?
5. If Complainants succeed, what damages are then appropriate?

Hearing Testimony

Andrew Price, Risk Manager for Respondent

Mr. Price has been the Risk Manager for Respondent since October 1, 1998. TR. 37. During that time, Respondent has revised its Staff Leasing Agreement contract a few times,

[4] These issues are presented in the order in which they will be evaluated. The later listed issues may not be reached where earlier issues are determined in the negative.

depending on the state where the contract will operate and its requirements. Paragraph 12 of the contract that governed the agreement with NRF was added after it became a statutory requirement in Florida to have such terms in staff leasing agreements. *See* CX-2. Mr. Price was not involved in drafting the contract. TR. 37.

Respondent AMS is in the business of leasing employees to other businesses for a fee. TR. 21. Such companies are known as "Staff Leasing Companies" or "Professional Employer Organizations." TR. 48. Respondent's clients hire the people they want to lease, then the hires complete paperwork for Respondent and are released back to the client company. In this "co-employer" relationship, the client company is relieved of the headache of administrative duties and also benefits from economies of scale to receive better rates on Workers' Compensation insurance. TR. 50. Many diverse types of businesses – from construction to ballet companies – utilize Respondent's services. TR. 51. In this case, New Rising Fenix, Inc., (NRF) is the client company of Respondent who hired Complainants. Per their Staff Leasing Agreement, NRF and Respondent were "co-employers" of the employees covered in the agreement. TR. 21. Respondent issued paychecks to complainants and included wages paid to Complainants on its IRS forms. TR. 22.

Mr. Price testified that he was familiar with other companies that simply process payroll; he distinguished Respondent from those companies in the following manner: "in staff leasing it is more than just to process payroll. You take on the administrative duties under the arrangement." TR. 33. Complainants' wages were paid directly from Respondent's account. TR. 38. First, NRF would fund the payroll amount to Respondent and then Respondent would issue payroll checks from that money after it was deposited into its account. TR. 38. Respondent also notified Complainants of their federal rights to COBRA and FMLA but did not actually offer them a benefit plan. TR. 39.

Because Respondent was responsible for "administrative duties of employment," if a leased employee was injured on the job, Respondent would take care of the workers' compensation and the client company would take care of the day-to-day operations of the company. TR. 48. Respondent had a Workers' Compensation policy that covered its leased employees, including Complainants. TR. 24. This policy did not include "direct employees" of NRF that were not leased by Respondent. TR. 40. Under its contract with NRF, Respondent reserved a right of direction and control over Complainants, including the authority to hire, terminate, discipline and reassign employees and the right to manage safety, risk and hazard

control. TR. 26. However, despite all of the rights that Respondent reserved in its contract, it actually exercised none of them. TR. 53-55. NRF ran its business by finding its employees, hiring, firing and promoting them, as well as determining their rate of pay and dictating job duties. TR. 48-49. Its contract with Respondent was drafted for staff leasing businesses located in the state of Florida. TR. 52.

When an employee of Respondent and a client company undergoes an "Employment Status Change," a representative of the client company fills out a form that Respondent utilizes to enable itself to be notified of such change. TR. 29. Patricia Roddery, another employee that Respondent leased to NRF, filled out the forms that corresponded to the termination of Complainants' employment. TR. 30; CX-9, CX-10. A section on the form provides for an explanation of the termination; Respondent "cares" whether the termination is voluntary or involuntary for purpose of maintaining an administrative record in the event of litigation over unemployment benefits. TR. 31. Typically Respondent would not be able to verify whether the client company was "correct" in its decision to terminate an employee unless or until there was an unemployment hearing. TR. 31. As Risk Manager, Mr. Price is aware of unemployment claims that leased employees of Respondent bring against the company; neither Complainant in this case filed an unemployment claim. TR. 47.

In the context of Respondent's Staff Leasing Agreement, "dual employment" is a term that describes the relationship that occurs when an employee becomes a direct employee, rather than a co-employee, of the client company. TR. 57. Severing the co-employment relationship to create a dual employment relationship has the effect of voiding the leased employee's coverage under the workers' compensation policy that Respondent provides. TR. 57. When Respondent terminated Complainants from its system, it severed the co-employment relationship and, for Respondent's purposes, Complainants became direct employees of NRF. TR. 72.

A leased employee of Respondent is never granted the authority to take any action on Respondent's behalf; he or she would never become an agent of Respondent. TR. 63. If a leased employee is given authority over another leased employee, the entity behind the grant of authority would be the client company, not Respondent. TR. 63. Respondent and NRF neither had nor do they have any common ownership, management, or centralized control of labor relations for their leased employees. TR. 63-64. In the case of its relationship to NRF, Respondent did not locate qualified applicants for truck driving positions, train them, ensure that they were DOT compliant, or supply them to the trucking company. TR. 64-65. *See also* CX-2,

paragraphs 4(c) and 12(f). NRF is no longer a client company of Respondent. TR. 69. Mr. Price was unsure whether NRF went out of business or simply terminated its agreement, but knew that when NRF ceased its relationship with Respondent, it did not leave owing any money. TR. 73.

In the Staff Leasing Agreement, Respondent required NRF to report all employment-related complaints, allegations, and incidents of employment misconduct to Respondent. TR. 69. Mr. Price testified that the reason Respondent put that provision in its contract was to instill a sense of obligation in the client company to handle its own issues of employment misconduct. Specifically, he stated, "why I want to be notified in my role is so it's clear to the Client Company that this is something that you need to take care of. . . I'm not going to follow back, -- in my experience for the OSHA, would I follow back up with that Client Company to see that they've resolved or paid that fine. No, because it's their duty, but I'm letting them know that it is their duty to take care of it." TR. 70-71. Mr. Price further explained that Respondent would have an interest in being notified about a racial discrimination claim or a sexual harassment claim against its client company so it could notify the client company that it needed to handle the claim. However, Respondent would not have an interest in knowing that a leased employee was a "four-time convicted axe murderer and used drugs and [the client company] was putting them behind the wheel," because recruitment decisions belong strictly to the client company. TR. 72. However, Respondent does have an interest in knowing if the leased employees are properly trained because proper training limits Respondent's exposure to Workers' Compensation liability. TR. 73.

Russel Eugene Baxter, Complainant

Mr. Baxter has been a road truck driver for two and a half to three years. He holds a commercial driver's license from the state of Missouri and has a special endorsement on the license for hazardous materials and tankers that enables him to operate tractor trailer sets weighing 26,000 pounds or more. TR. 77. Prior to working for NRF, Mr. Baxter worked for Cedar Rapids Steel Transit (CRST) operating a dry van with his co-driver, Kleona Myers. TR. 78. Before he worked for CRST, Mr. Baxter built houses. At the time that Mr. Baxter began work for NRF, he had only 10 months of experience as a truck driver – the same amount of experience as Ms. Myers, his co-driver. Tr. 140, 156. In his youth, Mr. Baxter operated farm equipment, including tractor trailers. To complete his training as a truck driver, Mr. Baxter attended the American Truck Training School in Burlington, Iowa. TR. 79. In truck training

school, Mr. Baxter learned how to safely operate a tractor trailer and the general structure of the driver's manual so that he would be able to pass the driving test. It took Mr. Baxter two tries to pass the written portion of the exam because the first time he made mistakes on the brakes portion of the exam. TR. 138. He also received training on how to perform a daily vehicle inspection. The entire class was two to three weeks long. TR. 79.

In driving school, Mr. Baxter was taught to use the "pump" method of braking, which is his preferred method to use in the mountains. TR. 175. The pump method involves keeping the truck at a desired speed by quickly pumping the brakes each time the truck goes five miles faster than the desired speed. Driving down a mountain grade Mr. Baxter does not brake the whole way down because doing so would burn up the breaks; instead, he drops the truck down two gears to keep speed down and uses the pump method of braking. TR. 176-77. Dropping down gears saves use of the brakes. TR. 177.

Prior to being hired by NRF, Mr. Baxter was interviewed by the company at its terminal in Mount Vernon, Missouri. TR. 160. His two-day orientation prior to beginning the job was also at that site. Orientation was conducted by the wife of Charles Daniel, the owner of NRF. TR. 161. Carmen Deragowski, the safety director, and Randy Ragsdale, who administered the driving test, were also present. TR. 181. At orientation for NRF, Mr. Baxter filled out paperwork, including his W-2 and I-9 forms for the IRS. TR. 83; CX-10 at 4-8. NRF also gave him a drug test, a driving test, and ensured that he was DOT compliant. TR. 161. When Mr. Baxter went to work as a commercial truck driver for NRF, he was operating a truck with a gross vehicle weight rating of over 26,000 pounds. Trailers usually weighed 32,000 to 34,000 pounds and loads he transported weighed 36,000 to 40,000 pounds. TR. 79-80. The entire weight of the truck and load Mr. Baxter operated ranged from 50,000 to 76,000 or 78,000 pounds. TR. 80. He operated those vehicles on highways across state lines, hauling the freight of NRF customers. NRF's primary contract was with Schnucks, a food chain in the Missouri area. TR. 81.

On November 13, 2008, NRF dispatched Mr. Baxter to pick up a load in Salinas, CA. TR. 86. That day, in the trucking log that Mr. Baxter prepares at the beginning of each day and updates throughout, he checked boxes on the form to indicate that parts of the truck were malfunctioning. TR. 86. A battery malfunction was causing the truck to shut down without warning, even while driving. The battery malfunctioned numerous times while Mr. Baxter drove the truck through Arizona, New Mexico, Texas and California; "[it] would be as if you're driving down the road and somebody reached in and pulled your battery out. No power,

nothing." TR. 87. Once it happened at night while Mr. Baxter was trying to pass an oversized load in Arizona.

When the battery would go out, Mr. Baxter held the truck steady until he had a clear roadway and then gently pulled the truck over to the "rub rail" on the side of the road to slowly bring the vehicle to a stop. TR. 88. The "rub rail" refers to the ribs on the side of the road that make a noise when a driver drifts over them. While Mr. Baxter was able to safely pull over his vehicle each time the malfunction occurred, he believed he presented a hazard to others on the highway because the truck was a road obstruction that had no lights or other markings to indicate its sudden slowdown. Mr. Baxter has driven in 48 states, plus Canada, and testified that there are some portions of the interstates where there is no shoulder on which to pull over. TR. 89.

Mr. Baxter also checked the box to indicate that his brakes were malfunctioning on November 13, 2008. At that point, the brakes had become saturated with oil and they were hardly engaging when the brake pedal was operated. Mr. Baxter first noticed this problem during a pre-trip inspection, the protocol of which is to walk around the truck to look for items that are cracked, broken, missing, or abnormal, open the hood, and check all the lights and the brakes. TR. 89-90. While the brake components were "enclosed," Mr. Baxter could still observe the brake shoes during his inspection. He observed oil on the brake shoes and down the driveline, as well as on the back of the cab and the header of the trailer. He identified the source of the oil as the transmission, based on where the wettest spot was located. TR. 90-91. In his experience, Mr. Baxter has observed overheated brakes but did not think that overheating was the problem because there was no smoke. TR. 178; 184.

Transmission oil lubricates parts to keep them from getting too hot and welding together. TR. 91. If the transmission loses all of the fluid, it will eventually disintegrate, which could present the hazard of parts falling out of the truck onto the road and hitting other vehicles. TR. 92. On November 13, 2008, the transmission on Mr. Baxter's truck was hard to shift and would grind gears. TR. 93. That day Mr. Baxter also checked the box for exhaust on his vehicle inspection report, indicating that exhaust was leaking into the cab of the truck.

As standard procedure, when things went wrong with the truck Mr. Baxter called dispatch on the radio or cell phone to get clearance for things like repairs or "trucker cash" – money advanced for tolls or other road expenses. TR. 168. NRF would instruct Mr. Baxter on where to take the truck for repairs and they paid for the work. NRF also paid for gas. TR. 169.

When Mr. Baxter first encountered the problem of the battery malfunctioning on November 13, 2008, he called Randy Ragsdale, the shop supervisor at NRF, to report the problem. TR. 93-94. Mr. Ragsdale essentially told him to just try to keep driving and argued with him over whether oil could actually get on the brakes because the breaks were "covered." TR. 94-95. Mr. Ragsdale believed that there was a dust cover over the hubs of the truck that prevented a clear view of the brake shoes, but there were no dust covers in place at that time. TR. 141-42. That same day, Mr. Baxter also reported the problem to dispatch to someone named Erin. TR. 94.

On November 14, 2008, Mr. Baxter drove from Brooks, Oregon to Medford, Oregon. He checked the same boxes on the log book to indicate the same malfunctions. TR. 97. He also checked the box for "clutch" because the transmission was causing the gears to grind. In the log book he indicated that after calling the shop and dispatch he was instructed to keep going. The next day Mr. Baxter drove the truck to Dunphy, Nevada and then relayed his load to another truck in Lowes, Nevada.[5] TR. 98. He again recorded the same problems in the log book and indicated that he called shop and dispatch and was told to keep going. TR. 99. He was still reporting the problems with the truck to Randy Ragsdale. Mr. Baxter did not record any activity in his log book on November 16, 2008 because he was in the sleeper birth. TR. 100.

Mr. Baxter and his co-driver, Ms. Myers, both kept a daily log book while driving the truck for NRF. TR. 146. The way that a driving team works is that when one driver goes off duty, the other driver goes on duty, so the log books should correspond to that pattern. Mr. Baxter was aware that there were allegations that Ms. Myers had falsified her logs. He never checked her books against his to see if they "matched," although he acknowledged that they should have. TR. 146. Mr. Baxter also felt that, out of the pair, Ms. Myers was stronger at clerical work such as log books and Mr. Baxter was stronger at actually driving. TR. 165.

On November 17, 2008, Mr. Baxter recorded his location as Salinas, California. He was waiting with an empty trailer to accept a load. Tr. 101. From November 17th and into November 18th, Mr. Baxter recorded that he was in the sleeper berth for 41 straight hours. This is because when California DOT trained him on how to keep log books, it taught him not to log time periods less than 15 minutes long, and the only breaks he took during that time were under 15 minutes. On November 18, 2008, a mechanic inspected the truck and signed Mr. Baxter's log

[5] While the transcript reads "Lowes, Nevada," the Exhibit to which Mr. Baxter referred at the time read "Wells, Nevada," consistent with the other testimony and evidence in the case. CX-13 at 3.

book. TR. 102. The mechanic also wrote a report detailing the condition of the truck. TR. 103; CX-15. Mr. Baxter understood the report to mean that the transmission would malfunction until it was fixed properly. TR. 104. Notes in the log book made by Mr. Baxter's co-driver indicated that the defects were not fixed on November 18; rather, dispatch ordered them to continue en route. TR. 105. On that date, Mr. Baxter and his co-driver drove the truck from Los Tios, California[6] to Kingman, Arizona, where Randy Ragsdale ordered them to stop the truck at a Petro station for service. TR. 106. The truck was serviced at the Petro station by pouring 12 quarts of transmission fluid into the transmission, the same amount of transmission fluid that had been poured into it when the truck was serviced in Salinas, California. TR. 107. The truck was still having the same electrical problems with its battery shutting down and the brakes were hardly working. TR. 107-08.

When Mr. Baxter arrived at the Petro station he told the attendant he was with NRF and the attendant indicated that NRF had called ahead and he was expecting him. TR. 109. The services technician told Mr. Baxter that he was lucky the truck made it as far as it did because it was not advisable to try to drive it any further. The brakes were completely saturated with fluid. However, they could only service the truck based on NRF's instructions, which were to top off the fluids and send them on their way. TR. 110. Mr. Baxter then drove the truck out of the bay, turned it 180 degrees and parked it in the parking lot of the shop, where he let it sit until the following day. TR. 110. He estimated that during that time the brakes had only 10 percent of their power. That night, he spoke with Kelly the night dispatcher and Ruby the dispatch manager. He refused to drive the truck any further because of how dangerous it was and reported the problems with the battery shutdown and oil-saturated brakes. Then he called the Arizona Department of Public Safety to have the vehicle put out of service in order to prevent dispatch from trying to force them to drive it further. TR. 113. Mr. Baxter specifically requested that a DOT-certified officer come to the scene. TR. 114.

A DOT-certified officer responded to Mr. Baxter's call and came to the Petro Lube to inspect the vehicle. After visually inspecting the truck from top to bottom, the DOT officer gave Mr. Baxter an out of service sticker to put on the window and a piece of paper indicating that the truck was out of service. TR. 115; EX-18. Operating a truck that is out of service can jeopardize a trucker's job. After the DOT officer left, Mr. Baxter received a call from Kelly at dispatch and

[6] While the transcript reads "Los Tios, California," the Exhibit to which Mr. Baxter referred at the time read "Lost Hills, California," consistent with the other testimony and evidence in the case. CX-13 at 6.

he told her what had happened. TR. 118. In response, Kelly cursed at him and expressed anguish that she would be in trouble for not being able to control her drivers. Then Ruby called him and told him that he should not have had the vehicle put out of service; Ruby was also angry. TR. 119.

The load on Mr. Baxter's truck was transferred and the truck itself was taken to D & G's towing, where repairs were made. TR. 120. After the truck was repaired, Mr. Baxter and Ms. Myers got back on the road to deliver the Schnuck's load and then dispatch ordered them to return to the NRF yard, where they arrived on November 22, 2008. TR. 122-23. Mr. Baxter and Ms. Myers walked into the office to submit the required paperwork and spoke with Erin and Ruby at dispatch, who indicated that he should not have had the truck put out of service. TR. 125-26. Then Mr. Baxter and Ms. Myers had a conversation with Mr. Daniel, president of NRF. TR. 127. In that conversation, Mr. Daniel fired them. TR. 130. Another NRF employee removed their personal items from the truck and then Ms. Myers' mother picked them up to take them back to her home. TR. 131.

Mr. Baxter was unemployed until February 2009, when he earned some income driving trucks and pitching tents for the circus. TR. 132; CX-26. This money was paid to Ms. Myers so that she could have access to income while Mr. Baxter was in Canada, which is where the job took him. TR. 132. After eight months of doing that job, Mr. Baxter got a job as a truck driver for Rediehs Freight Lines in February 2010. TR. 133; CX-27. During the months after NRF fired him while Mr. Baxter was unemployed, he had no income and had to rely on his fiancé's mother to pay bills and provide for their family, including their four children. TR. 134. Mr. Baxter's fiancé is his co-driver, Ms. Myers. Christmas occurred during that time and there was no money for presents, which made Mr. Baxter feel ashamed that he could not provide for his family "like he's supposed to." TR. 135. The family lived on food stamps and the charity of Ms. Myer's mother, who did not receive any money from Mr. Baxter while he was unemployed, unlike their previous arrangement. In the event that he prevails on his claim, Mr. Baxter wishes to be compensated for back pay and emotional distress.

Mr. Baxter never called Respondent during the entire tenure of his employment with NRF or afterward. TR. 170. Charles Daniel terminated Mr. Baxter from employment, though Mr. Baxter could not recall why. Mr. Baxter never reported his termination to Respondent or forwarded a complaint regarding his termination, nor did he request that Respondent reassign him. He also did not make an unemployment claim against Respondent. TR. 171. As far as Mr.

Baxter understood, Respondent never personally gave him or any other NRF employee the authority to do anything on its behalf. TR. 172-73.

Kleona Chi-Lee Gerdts Myers, Complainant

Ms. Myers possesses a commercial driver's license from the state of Missouri, which means that she went to two weeks of driving school, took a driving test and reviewed safety regulations. TR. 186. She has had it since November 17, 2007. Like Mr. Baxter, she also worked for CRST for eight or ten months prior to working for NRF. She has driven in 48 states, including the mountainous ones. TR. 187. She has never overheated her brakes. She prefers to use the "slow and steady with the Jake brake" – i.e., the engine brake – method of braking, which is how her father taught her when she was younger. When she drives in mountainous country, she lowers the truck by three gears because she likes to be safe and has better control of the brakes. TR. 188.

Ms. Myers applied for the job with NRF online, filling out the application for herself and Mr. Baxter. She was phoned by the recruiter and then went to the NRF office for an interview, where she was offered the job and informed of the rate of pay. TR. 189; 242. The following day she attended an orientation at NRF, where they covered the DOT safety regulations, administered a drug test and completed paperwork. TR. 190. The orientation was covered by Charles Daniel's wife, Marty, Patricia ("Patty") and Carmen. Patty instructed them that Respondent would be the company that dealt with payroll because they were the managing company. Ms. Myers received a handbook from Respondent at orientation. TR. 191; CX-1. She later received paychecks from Respondent, and did not recall ever receiving a paycheck directly from NRF. TR. 191; CX-3. She also received her W-2s from Respondent, not from NRF. TR. 191; CX-6.

NRF assigned the truck, the Quall-Com radio unit, and the log books in which Ms. Myers and Mr. Baxter recorded their daily travels. TR. 244. Ms. Myers recalled that Erin Osten dispatched the load that she and Mr. Baxter delivered to Wells, Nevada. TR. 193. They were not running behind schedule, but they were experiencing mechanical problems on the way back from Oregon. Specifically, "[t]he gears were hard to switch into gears" and "[t]he brakes felt spongy." Ms. Myers reported these problems to Randy Ragsdale, who told her that he would check it out when they returned to the shop and to keep going. TR. 195. At that point Ms. Myers called Erin, who instructed them to drop the load in Nevada, trade loads with another driver and head to Salinas, California. Ms. Myers informed Erin that she did not believe that the

truck would make it to Salinas. Erin got off the phone, consulted with Randy Ragsdale, and called back Ms. Myers to tell her to keep heading to Salinas, CA. TR. 197. Ms. Myers drove the truck to Salinas, but they did not make it there on schedule because of the problems with the truck.

Prior to heading to Salinas, between Wells, Nevada and Oregon, Ms. Myers and Mr. Baxter stopped at a truck stop and observed oil going up the front of the trailer and on to the refrigeration unit and on the inside of the tires. TR. 196. At that time, Ms. Myers was also experiencing problems changing gears with the grinding transmission and a lack of power in the "spongy" brakes. TR. 198. She was in contact with NRF roughly every four hours, speaking mostly with Randy Ragsdale, reporting her discomfort with driving the truck in such poor condition. TR. 199. Randy continued to tell her that everything would be fine and they would worry about it when the truck returned to the NRF yard.

Once they were in Salinas, Ms. Myers called Randy again and reported that the battery was dead and there was no transmission fluid in the truck. She and Mr. Baxter checked the fluid levels with a dipstick to confirm the leak because there was also a big puddle of fluid underneath the transmission after the truck had been parked overnight. TR. 200. When she observed the brakes, which were uncovered, she noticed that there was oil around the inside of the hub, brake pads and driver's side rear axles. TR. 201. Randy assured Ms. Myers on the phone that he would call someone to come out to the truck. Souza's 24 Hour Truck Repair arrived shortly thereafter. TR. 202. Souza's found that the transmission yoke nut was loose, the u-bolt joint was rounded off, and the truck needed further repairs. TR. 202; CX-15. Souza's could not fix the truck because the yoke nut was stripped and could not be removed; the Souza man said that Randy told him to put transmission fluid in the truck and send them on their way. TR. 203.

Ms. Myers then drove the truck from Salinas to Lost Hills, CA, a distance of less than 150 miles on flat terrain. The brakes were still slipping and had to be pushed almost completely to the floor in order to stop the truck. TR. 204. Later, in Kingman, Arizona, Ms. Myers was awoken from her time in the sleeper berth by the red and blue lights of the Arizona DOT officer's car and found out that the truck had been put out of service. TR. 206. At that point, Ms. Myers called Kelly at dispatch and Kelly asked her how the truck had been put out of service, to which Ms. Myers responded she did not know. TR. 207. Then Ruby called Ms. Myers and asked her what happened and she gave the same answer. The following morning,

Erin called to tell her which truck was coming to pick up the load and give further instructions. TR. 208. The truck was taken to D & G Towing for repairs.

After the mechanics told them it was safe to drive, Ms. Myers and Mr. Baxter drove the truck westbound on I-40 and experienced another electrical shutdown in between Kingman and New Mexico. TR. 209-10. Ms. Myers called Randy to report the problem and he told her to try to start the truck again to get it to the side of the road, and urged her to keep going despite her protests that the vehicle was unsafe. After getting the truck started again, Ms. Myers drove another 30 miles and before the truck shut down again and she called Randy back and refused to drive any more that night. TR. 210. The next day they drove the truck to Big Rig Truck Stop for about thirty minutes of repairs and then drove the truck back to the yard. TR. 211.

On November 22, 2008, Ms. Myers and Mr. Baxter were called into the office to meet with Charles Daniel. TR. 214-15. The dispatch office is about 25 by 40 feet in area, and usually only four or five people are working at a time. Mr. Daniel yelled at them and told them that they were late on the load to Wells and then he told them that they were fired and instructed them to get out of the office. TR. 215. According to Ms. Myers, there was no such thing as a "Wells load." TR. 215; 223. The person who dispatched the "Wells load" was Erin. TR. 222. Erin called while Ms. Myers was driving down from Oregon hauling a load that was intended to go back to Missouri. Erin instructed her to instead stop in Wells to transfer the load to another truck that had been stopped while in Wells and was instructed to wait for them. TR. 223. Being late on the "Wells load" was only the first reason Mr. Daniel gave for terminating Ms. Myers and Mr. Baxter. Mr. Daniel never told Ms. Myers that the reason he terminated them was because Mr. Baxter called the Arizona DPS. TR. 224.

A few days after being fired, Ms. Myers was called into Mr. Daniel's office and he asked her to write a letter saying that she falsified her logs, referring to the portions of the logs that documented the mechanical inspections that had been done on the truck. TR. 225. Ms. Myers had saved copies of the receipts to back up this information. When she told him about the receipts, he backed off of his request.

The first time that Ms. Myers decided the truck was too unsafe to drive was halfway between Wells, Nevada and Salinas, California. TR. 226. She did not have the truck put out of service at that time because she was afraid of losing her job based on rumors she had heard that if people failed to pick up a Schnucks load, they were automatically fired. Because of her belief that she would be fired according to the rumors, Ms. Myers continued to drive the truck. TR.

227. Ms. Myers drove more time than Mr. Baxter because she took longer to get places and because Mr. Baxter had determined before she did that he would not drive the truck any more. TR. 228. In fact, none of the Schnucks loads that Ms. Myers and Mr. Baxter transported actually was late. TR. 233. Ms. Myers believed that Mr. Daniel fired them because Mr. Baxter called the Arizona DPS and because they refused to drive the truck beyond Kingman, Arizona. TR. 233; 251.

Ms. Myers has not found work since she was fired from NRF. TR. 216. She has applied to other truck driving positions online, both individually and as a team with Mr. Baxter, but received no actual job offers because she does not have enough driving experience. Ms. Myers is currently pursuing a new career as a Registered Medical Assistant. TR. 235. In the meantime, she has to rely on Mr. Baxter and her mother for assistance. TR. 217. Her family is on food stamps and Christmas of 2008 was sad and depressing. In the past year she had to pay for her children's school supplies from Economic Security. If she prevails on her claim, Ms. Myers requests back pay and damages for emotional distress. TR. 218.

Ms. Myers has never called Respondent to report anything or file anything in connection with her termination. TR. 246. She has never filed for unemployment against Respondent. TR. 247. All that Respondent did for Ms. Myers was send her a paycheck every week and a W-2 form at the end of the year.

Christopher McClure, Petro Lube Systems Mechanic

Mr. McClure has been a mechanic and technician for Petro Lube Systems in Kingman, Arizona, since August 2008. TR. 256. He performs DOT inspections and repairs that are necessary to make vehicles safe and operational. On the evening of November 18, 2008, Mr. McClure was working as the shop assistant general manager overseeing the shop procedures. He recalled having a conversation with an NRF driver that evening about the state of his vehicle. The driver requested a basic full inspection. TR. 259; CX-17. The technician who conducted the inspection found a transmission leak, oil-saturated front brakes, and a leaking drive wheel seal and recommended that the truck should not be operated. He also found that the battery was in bad repair. TR. 260. His report noted that the driver was aware of the problems and was headed back to Missouri after the transmission was re-filled with 16 pints of synthetic transmission oil.

The capacity of a transmission on a truck like the one the NRF driver was driving will vary between three to five gallons of oil. TR. 261. Sixteen pints of oil is equivalent to 2 gallons

of oil. TR. 267. A leak of that amount of oil is excessive. TR. 261. Specifically, Mr. McClure testified that "that is a very debilitating amount of oil to be leaked on a rear end of a truck." If the transmission loses all of its oil and the truck continues to be driven, the metal gears grind against each other and shave metal away from each other, eventually becoming inoperative, which will cause the transmission to start slipping or in extreme circumstances, seize up. TR. 262. When transmission oil leaks onto the brakes of the truck, the brakes lose their ability to grip the drum and the truck loses its stopping power.

Mr. McClure did not conduct the primary inspection of the truck; it was performed by his technician and then he did a follow-up inspection and signed off on it. TR. 268. The invoice for services performed on the truck contains Mr. McClure's notes, which indicate that all instructions were per the shop manager of NRF and "Cliff," fleet manager. TR. 263; CX-17. Mr. McClure typically makes these notes whenever there is a controversy between what the owner of the vehicle wanted done and what the driver of the vehicle wanted done to show that the shop manager approved the repairs that were done. Mr. McClure had advised Cliff, the dispatcher, that the truck was not safe to drive. TR. 265. Cliff responded that NRF wanted the truck to be driven back to their Missouri facility for the repairs. The repairs that the truck needed could not be accomplished at the Petro facility because it required special tools and training. However, Mr. McClure believed that the truck was very dangerous and should not have been driven out of the shop, even after the transmission was filled with oil, because the brakes were still saturated and the wheel seal was leaking, which could have led to the hub assembly of the wheel falling off of the truck and spinning away at a high speed while the truck was driving. TR. 266.

Rosalind Wright, Human Resources Director of Respondent

Ms. Wright has been HR director at Respondent's company since July 2006. TR. 278. Her job duties include employee relations, unemployment, employee handbook assistance, background checks, pre-employment drug screening processing and multi-employer verification. She has nothing to do with the Staff Leasing Agreement process. TR. 279. The duty of employee relations involves keeping clients in compliance with employment laws, both state and federal. NRF did not ever "allow" her to help them in that area.

Ms. Wright's understanding was that NRF terminated Complainants. No one from NRF ever called to consult her in the matter. TR. 280. Charles Daniel was not a leased employee of Respondent when Complainants were terminated. *See also* RX-10 and RX-11. Mr. Daniel was

also not a direct employee of Respondent. TR. 281. NRF also did not "allow" Ms. Wright to help it in the area of processing unemployment claims; it handled its own unemployment claims. NRF did not "allow" Ms. Wright to help it put together its employee handbook. The Employee Benefits book that Complainants received was part of the enrollment package that Respondent gives to client companies when they first become clients. TR. 282; CX-1. NRF did not have a benefits system in place with Respondent; if it had one at all, it administered it without Respondent's help. TR. 282.

Respondent's records indicate that NRF did have its own benefit plan, but it was one that it administered and monitored itself. TR. 286. The only role Respondent had in administering the program was making the appropriate credits from the paychecks of leased employees toward NRF's benefits program. TR. 285; RX-12. NRF also did not require any assistance in processing employees pre-employment, doing criminal background checks or drug screenings. TR. 286. Nor did it "allow" Respondent to assist it with employer verification such as state assistance, mortgages, or loan verification. TR. 287.

NRF, not Respondent, selected, interviewed, hired, transferred, promoted, reprimanded, controlled, assigned work to, and scheduled the work for its own leased employees. TR. 288-89. Ms. Wright was aware that NRF was a trucking company, but she did not know what any of the individual leased employees did in connection with their employment. TR. 297; 301. She did not know what type of authority NRF gave to the leased employees. TR. 301. NRF determined the job positions, duties and authorities of its own leased employees, and had total control over terminating them. TR. 289. Respondent never instructed NRF to do anything with respect to its employees, nor did it grant NRF authority to take any actions on its behalf. TR. 290. Respondent did not terminate Complainants; it merely took them out of their payroll system after it received NRF's change of status form informing them of the terminations that NRF made. *See* CX-9. The reasons NRF gave for its termination in this case were "unsatisfactory work." *Id.* The forms were signed by Carmen Deragowski, a leased employee of NRF who had no authority or agency granted by Respondent. TR. 292.

Respondent had "nothing to do" with the termination of Complainants. TR. 293. The first time it was notified of the dispute over the reason for the termination was when it received the OSHA complaint. Respondent never had any communication with either Complainant or NRF regarding the termination. The only service that Respondent performed for NRF was payroll. TR. 295. As HR Director, Ms. Wright hardly had any contact with NRF. Any

communication she had was related to payroll history. All of Respondent's communication over payroll and transmission of payment occurred with NRF rather than the individual leased employees. TR. 296. Ms. Wright had no knowledge of the contract between Respondents and NRF.

Documentary Evidence

CX-1: *Respondent's welcome packet for new leased employees*. Respondent describes itself as an "off-site personnel office for your employer" and invites recipients to "feel free to call our office any time you have a question or concern about your paycheck, employee grievances or personnel related matter." It also includes a brief "Employee Benefits Handbook" describing COBRA insurance coverage and employee rights under the Family and Medical Leave Act (FMLA).

CX-2; RX-3: *Staff Leasing Agreement*.[7] This contract governed the relationship between Respondent and NRF, providing that Respondent will furnish "selected staffing" and "Workers' Compensation and/or Employers Liability Insurance" to NRF in exchange for a price, which varied depending on whether the leased employees were in the "trucking," "clerical," or "shop" description. Trucking employees commanded the highest price. Additionally, NRF agreed to comply with all applicable laws, provide Respondent with paperwork in a timely fashion, and provide all necessary safety training and equipment for its staff. Additionally, the contract contained "Statutory Contract Requirements" pursuant to the state law of Florida. These requirements provided that Respondent:

(a) Reserves a right of direction and control over leased employees assigned to NRF's location, but not to the extent of prescribing how the work shall be performed. NRF retains sufficient direction and control over the leased employees as is necessary to conduct NRF's business and without which NRF would be unable to conduct its business, discharge any fiduciary responsibility that it may have, or comply with any applicable licensure, regulatory, or statutory requirements of NRF;

(b) Assumes responsibility for the payment of wages to the leased employees without regard to payments by NRF to Respondent;

(c) Assumes full responsibility for the payment of payroll taxes and collection of taxes from payroll on leased employees;

[7] Where the contract refers to the "client company," "NRF" has been herein substituted. Where the contract refers to Respondent by any of its business names, "Respondent" is herein used.

(d) Retains authority to hire, terminate, discipline, and reassign the leased employees. However, NRF has the right to accept or cancel the assignment of any leased employees.

(e) Retains a right of direction and control over management of safety, risk, and hazard control at the worksite or sites affecting its leased employees, including 1) responsibility for performing safety inspections of client equipment and premises; 2) responsibility for the promulgation and administration of safety policies; and 3) responsibility for the management of workers' compensation claims, claims filings, and related procedures, although NRF acknowledges that Respondent in either providing or not providing such assistance and responsibility assumes no liability; and

(f) Gives written notice of the relationship between Respondent and NRF to each leased employee it assigns to perform services at NRF's worksite.

The language further provides that NRF took sole responsibility of any and all of its strategic operational business decisions, including the day-to-day job duties of leased employees. Respondent disclaimed any responsibility for the ability or competence of any leased employees. NRF had the responsibility to conduct history, reference, and background checks, as well as the obligation to report any incidents of employee misconduct to Respondent. The six-page contract is signed on page four by Charles Daniel on behalf of New Rising Fenix, Inc. The last two pages include acknowledgement of sections of the contract that are initialed "CAD." The sections deal with "Misclassification of Workers' Compensation Costs and Undisclosed Activities," "Collateral Accounts," (monthly payments set at $0.00) "SUTA Acknowledgment," (deemed N/A) and "Personal Guaranty," under which Charles Daniel's information is listed.

CX-3: *Pay stub and check made out to Kleona C Myers in the name of AMS*. The check is for $793.23 and is dated November 5, 2008. The pay stub indicates that the total deductions for the pay period were $225.50, which included only "Misc. Ded." There were also amounts withheld for "Federa," "FICA-O," "FICA-M" and "Missou."

CX-4: *Pay stub and check made out to Russel E Baxter in the name of AMS*. The check is for $769.23 and dated November 5, 2008. Other information is essentially identical to CX-3.

CX-5: *Letter from Rosalind Wright to OSHA Investigator*. This letter of September 23, 2009 notified the investigator that Respondent was now operating under a different name than it had been named in the OSHA complaint and provided supporting documentation. Ms. Wright described the role of Respondent vis-à-vis NRF in the same manner as she testified during the hearing and requested that the case be dismissed.

CX-6; RX-6; RX-9: *W2 Wage and Tax Statements for Kleona C Myers and Russel E Baxter*. These forms list Respondent as the Employer and each Complainant as an employee for the year 2008. Each Complainant had total earnings of $2,147.42.

CX-7; RX-5: *Note and Employee Payroll Vouchers Register Reports*. The note from "Pati" requested that the recipient use Ruby Gerdths' address on Complainants' paychecks. The two reports bear Respondent's logo and show weekly earnings and deductions for the weeks from 11-05-08 through 12-16-08 but do not have names on them.

CX-8;RX-8: *Employee Payroll Voucher Register of Kleona Myers for 2008*. This document does not contain an employer's name but shows Ms. Myers' weekly earnings and deductions for the weeks from 11-05-08 through 12-16-08.

CX-9; RX-7: *Employee Status Change forms for Kleona Myers*. This document bears Respondent's letterhead and lists NRF as the client company. It was filled out by Patricia Rodery on 11-5-08 but she did not check any boxes indicating a "payroll change" or employee separation." Another copy of the form with the same information was filled out by Carmen Deragowski on 11-26-08 and indicated that an "employee separation" was taking place in the form of an involuntary discharge for "unsatisfactory work." The termination date was 11-22-08. This exhibit also contained financial, direct deposit, and emergency contact information, a copy of Ms. Myers' enrollment form with Respondent, copies of her driver's license and social security card, and her W-4 certificate for withholding.

CX-10; RX-4: *Employee Status Change forms for Russell Baxter*. This exhibit contained information essentially identical to that contained in CX-9, except that the documentation corresponded to Mr. Baxter rather than to Ms. Myers.

CX-11: *Driver Pay Scale*. This document acknowledges the rate of pay for a driver with 10 months of experience, either solo or as a team. It is signed by Kleona Myers and was approved by Carmen Deragowski on October 14, 2008.

CX-12: *Secretary's Findings for STAA Complaints by Kleona Myers and Russel Baxter against NRF*. The Secretary, through its agent, the Regional Administrator for OSHA, found reasonable cause to believe that NRF violated 49 U.S.C. §§ 31105(a)(1)(A) and 31105(a)(1)(B)(i) and (ii). The Regional Administrator further ordered reinstatement, back pay, interest, punitive damages, compensatory damages, attorney fees, expungement of any adverse personnel records, and that NRF post a notice on its premises acknowledging its obligations under the STAA.

CX-13: *Driver's Daily Log of Russell Baxter.* This document is identical in all material respects to Mr. Baxter's testimony at the formal hearing.

CX-15: *Invoice from Souza's 24 Hour Truck Repair*. The invoice is dated November 17, 2008 and charges for 12 units of "fluid, hyd," an emergency road call to Salinas, and a diagnosis of condition, which was "Trans yoke nut loose, U-joint bolt rounded off – needs further repairs. Topped off trans fluid. Batteries dead – jump start."

CX-17: *Invoice from Petro Lube.* This document reflects precisely the testimony of Mr. McClure, who created it in the course of his business.

CX-18: *Arizona Department of Public Safety Driver-Vehicle Inspection Report.* The report, dated November 19, 2008, identifies NRF as the motor carrier and Complaints as co-drivers of the vehicle. It identifies two violations that placed the truck out of service: "oil leaks trans leaking 16 pints added; leak covering 316 brake and saturated in trans oil" and "inoperative brake." The report indicates that the rear seal, rear axle and 3 axle breaks were replaced, as well as the rear seal in the transmission. These additional notes were dated November 20, 2008.

CX-19: *Invoice from D & G Towing*. The company's letterhead indicates it is located in Kingman, AZ. The invoice charges for one wheel seal, one rear tranny [sic] seal, three sets of brake shoes and kits, one pinion nut, and one speed sensor, plus the cost of labor. The invoice lists "Randy" and a phone number as the contact for the repairs.

CX-20: *Invoice from Big Truck Service, Inc*. This document is largely illegible, but shows that the services were provided in Santa Rosa, NM at the direction of NRF.

CX-21: *OSHA Statement of Chris McClure*. This document, dated September 22, 2009, is a brief version of Mr. McClure's testimony at the formal hearing and is completely consistent therewith.

CX-22; RX-1: *Complainant's First Amended Complaint*. A copy of this complaint was forwarded to OSHA on April 9, 2009. Summarizing the facts that comprise this claim, Complainant alleges that "[a]t all times material hereto, Respondent Atlantic Professional Employers, Inc., was a joint employer of complaint's [sic] and vicariously liable for the actions of Respondent New Rising Fenix, Inc.

CX-23: *OSHA Notification Letter*. On April 16, 2009, the OSHA investigator notified Respondent that Kleona Myers had filed an STAA complaint against it and further detailed the course of future proceedings.

CX-24: *OSHA Notification Letter*. This document is identical to CX-23 except that it refers to the complaint filed by Russell Baxter.

CX-25; RX-2: *Objections to Secretary's Findings.* On December 17, 2009, Complainants filed objections to the Secretary's Findings in her December 11, 2009 decision, which were that Respondent was not liable under the STAA because it was not responsible for Complainants' termination.

CX-26: *Social Security Statement of Kleona C. Myers*. This record from the Social Security Administration shows that Ms. Myers' yearly earnings for 2009 were $9,328.00.

CX-27: *1099 Statement from All Service Trucking.* This statement is for the employee Russell E. Baxter and indicates that his year to date revenue as of April 9, 2010 as a contractor of All Service Trucking was $2,721.35.

RX-10: *NRF Employee Census – Administrative Employees*. This list included Ruby Black, Martha Daniel [wife of Charles Daniel], Carmen Deragowski, Randall Ragsdale, and Patricia Rodery.

RX-11: *NRF Employee Census – Driver Employees*. This list included Russel Baxter and Kleona Myers, and indicated that both drivers were hired on 10/13/08 and terminated on 11/22/08.

RX-12: *NRF/Employee Professional Invoices*. These invoices span the period from 11/05/08 to 11/25/08 and were issued weekly by Respondent to NRF for the payroll services performed for both administrative employees and driver employees. The invoices for the administrative employees show NRF owing gross wages each week in an amount of roughly $15,000, plus service fees in an amount roughly $1,800, less credits for "401K New Fenix, 401K Loan NRFenix, Dental New Fenix, Health New Fenix, Life New Fenix, and Disabil [sic] New Fenix" in an amount of a few hundred dollars. The invoices for the driver employees show weekly gross wages of roughly $50,000, plus service fees in an amount roughly $8,000, less credits for "Misc. deduction, Dental New Fenix, Health New Fenix, Life New Fenix, and Disabil [sic] New Fenix" in an amount of a few thousand dollars.

Analysis

Joint Employer

The evidence shows that the relationship between Respondent and NRF in terms of their operations was that Respondent provided NRF with payroll and tax withholding services for its leased employees, who were recruited, hired, managed, and – in Complainants' case – ultimately

terminated by NRF. The evidence is clear that Respondent did not actually inject itself into the day-to-day business operations of the company. The evidence also shows that while Respondent offered a package of services to NRF that included the provision and administration of various benefit plans, including disability insurance, NRF did not take advantage of these services, but provided them to its employees independently. The evidence that supports this finding is the testimony of Ms. Wright and the invoices in RX-12, which show a credit back to NRF for those services, indicating that NRF was not paying Respondent to provide them.

The evidence also shows that Respondent held itself out to the leased employees as an employer, albeit an "administrative employer," by offering direct services such as guidance on employment rights available under federal law, accessible with a single phone call. *See* CX-1. Neither Complainant ever took advantage of these services, though the evidence tends to show that Ms. Myers at the very least was aware of their availability. TR. 190-91. When Complainants were terminated by Charles Daniel, Respondent received notice of the termination from NRF, including NRF's reason explaining the discharge. CX-9, CX-10, RX-4, RX-7. Respondent took no action to investigate the services further, but simply removed Complainants from their system. TR. 290.

However, the relationship between Respondent and NRF was also governed by a contract, the Staff Leasing Agreement. CX-2; RX-3. No party has challenged this contract or made any effort to show that it should not control the legal relationship of the parties, or that it was ever modified, voided, or shown to be otherwise unenforceable. Under the Staff Leasing Agreement, Respondent reserved certain rights of direction and control that it never actually exercised in this case. These rights, where exercised, ostensibly would have enabled Respondent to control Complainants' discharge. *Id.* at ¶ 12(d) (Respondent reserved the authority to "hire, terminate, discipline, and reassign the leased employees"). Regardless of NRF's "right to accept or cancel the assignment of any leased employee," Respondent affirmatively contracted for the authority to exercise control over employment. *Id.* While this authority may be clouded by the attendant contractual rights of NRF, any ambiguity created thereby should be construed against Respondent, the party that drafted the contract. *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, *on remand* 54 F. 3d 779 (7th Cir. 1995) (holding that where ambiguity existed in a contract due to conflicting governing federal law, that ambiguity was to be resolved against the defendant drafter); *See also* Restatement (Second) of Contracts § 206, Comment *a* (1979).

Moreover, Respondent also reserved a right of discretion and control over safety and risk management, obligating itself to inspect NRF's premises, promulgate safety policies, and handle workers' compensation claims. CX-2; RX-3 at ¶ 12(e). These factors point toward a finding that Respondent had sufficient ability to control NRF to create joint employer liability under the STAA. *See Palmer v. Western Truck Manpower, Inc.*, 1985-STA-16 (Sec'y, Mar. 13, 1992) *aff'd sub nom. Western Truck Manpower, Inc. v. United States Department of Labor*, 12 F. 3d 151 (9th Cir. 1993) (applying the criterion of interrelation of operations, common management, centralized control of labor relations and common ownership, with the greatest weight given to interrelation of operations).

Respondent opposes the position that these provisions of the Staff Leasing Agreement, which are required to be in the contract pursuant to Florida law, control the joint employer issue. Brief of Respondent at 15-16. In my Order Denying Summary Judgment, I took judicial notice of Fla. Stat. § 468.525 (2009), for the purpose of observing that the contractual requirements found in ¶¶ 12(a)-(f) of the Staff Leasing Agreement are identical to the requirements of the statute, which provides that "[t]he employee leasing company's contractual arrangements with its client companies shall satisfy the following conditions . . ." and lists the provisions parroted in the Staff Leasing Agreement.[8] To the extent that Respondent argues that these provisions are meaningless because they are "required," I do not agree. They are plainly set forth within the document and, absent any evidence of contrary intent, I shall give them their ordinary meaning. *See* Restatement (Second) of Contracts § 203 (1979) ("an interpretation that gives a reasonable, lawful, and effective meaning to all the terms is preferred . . ." and "express terms" are to be accorded the greatest weight over "course of dealing," "usage of trade," and "course of performance.")

Respondent also requested that I take judicial notice of Fla. Stat. § 468.529 (2003), which I have done upon its motion. The first paragraph of the statute provides "A licensed employee leasing company is the employer of the leased employees, except that this provision is not intended to affect the determination of any issue arising under Pub. L. No. 93-406, the Employee Retirement Income Security Act." *Id.* at § 468.529(1). This proviso does not apply to issues arising under the STAA. The Florida case law that Respondent provided explains that Fla. Stat.

[8] I also found that other provisions of the contract, which were clarified in the testimony and add little to the analysis here, created a genuine issue of material fact as to whether Respondent is a joint employer. Contrary to the assertions of the parties, I did not make a legal determination as to whether the presence of the statutory provisions in the contract *per se* created a joint employer relationship. The analysis here accounts for the contract in the context of the case as a whole, including the relationship of the parties and all other relevant evidence.

§ 468.529 was enacted for the purpose of shifting liability for workers' compensation claims from the direct employer to the employee leasing company where the direct employer has contracted for that relationship. *See Maxson Construction Company, Inc. v. Welch*, 720 So. 2d 588 (Fla. 2d DCA 1998). Recognizing that issues arising under Florida law requirements for workers' compensation claims do not control the issue presented in here, it appears that the statute nonetheless was intended to shield a *direct* employer from liability – except for issues arising under ERISA – where it contracted for employee leasing services. The effect of that shield is that liability falls to the administrative employer.

In its closing brief, Respondent argues that the contractual provisions of the Staff Leasing Agreement do not make Respondent a joint employer because the provisions at issue are required by Florida law and federal courts interpreting Florida law for the imposition of liability under the Fair Labor Standards Act (FLSA) do not hold that these provisions create joint-employer liability. Brief of Respondent at 15-16 (citing *Jeannaret v. Aron's East Coast Towing, Inc*., 2002 WL 32114470 (S.D. Fla. 2002) (unpub.) *aff'd* 54 Fed. Appx. 685 (11th Cir. 2002) (unpub.); *Beck v. Boce Group, L.C.*, 391 F. Supp. 2d 1183 (S.D. Fla. 2005); *Salley v. PBS of Central Florida, Inc*., 2007 WL 4365634 (M.D. Fla. 2007) (unpub.).

Indeed, determining liability under the FLSA requires utilization of a multi-factor "economic realities test" that includes some factors relevant to the analysis under the STAA. *See Beck*, 391 F. Supp. 2d at 1187 (including but not limited to the nature and degree of control, the degree of work supervision and the right, directly or indirectly, to hire, fire, or modify employment). However, a FLSA claim is not identical to an STAA claim – it is not even a "whistleblower" claim with a similar cause of action. The controlling law in this claim comes from the STAA statute and the regulations and corresponding case law arising thereunder.

Under the STAA, the crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer – that is, exercised control over or interfered with the terms, conditions, or privileges of the complainant's employment. *See Lewis v. Synagro Techs, Inc*., ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 8 n. 14, 9-10 (ARB Feb. 27, 2004) (environmental whistleblower acts) and cases cited therein. *See also BSP Trans, Inc., v. United States Dep't of Labor*, 160 F. 3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F. 3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip*., ARB No. 03-145, ALJ No. 03-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v.*

Young's Commercial Transfer, Inc., ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003) (all actions under the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C. § 31105 (2009).

Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes. *Lewis, supra,* slip op. at 7. If a complainant is unable to establish the respondent's requisite level of control to create an employer-employee relationship, the entire claim must fail. *Williams v. Lockheed Martin Energy Sys., Inc*., ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 9 (ARB Jan. 31, 2001) (environmental protection whistleblower acts). The issue at hand is precisely what degree of control is sufficient to rise to the requisite level to create joint employer liability.

Responding to a relevance objection, Counsel for Respondent argued at the hearing that Complainants must prove that Respondent actually exercised its reserved rights of control in some way or another. TR. 36; *see also* Brief of Respondent at 16. In contrast, Complainants argue that knowing participation is not required to show joint employer liability under the STAA and that Respondent did not need to exercise its reserved rights of control – or even be aware of the adverse employment action – in order to be liable as a joint employer, as long as it had the "ability to control" the employees. Brief of Complainants at 21-22, citing *Culligan v. American Heavy Lifting Shipping Company*, ARB No. 03-046, slip op. at 13-14 (June 30, 2004); *Lewis v. Synagro Technologies, Inc*., ARB No. 02-072, slip op. at 4 (Feb. 24, 2004) (both cases arising under the Clean Air Act).

In *Palmer v. Western Truck Manpower, supra*, the ALJ found that Western was a joint employer under the STAA. Western was a leasing agent for truck drivers that leased driver services to client companies. Western prepared payroll, issued paychecks, withheld state and Federal taxes, made social security payments, maintained worker's compensation coverage, kept current medical records, and conducted all labor relations with the drivers, including negotiations of labor agreements and participation in grievance proceedings. Affirming the ALJ, the Secretary of Labor found that these actions were sufficient to hold Western liable under the STAA on a joint employer theory for the termination of an employee of the company that leased driver services from Western. *See Palmer*, 85-STA-16, slip op. at 2-5.

On appeal, the Ninth Circuit Court of appeals noted that Western was the party that actually discharged complainant by issuing a letter notifying him that he was being removed from duty for "just cause." *Western Truck*, 12 F. 3d at 152. The Court noted that the Secretary had found that Western individually violated the STAA and knowingly participated in its client company's violation of the STAA. *Id.* at 153. The Secretary has since affirmed its finding that the STAA does not require that a joint employer knowingly participate in the adverse action against an employee in order to be liable. *Cook v. Guardian Lubricants, Inc*., 95-STA-43 (Sec'y May 1, 1996). Therefore, Respondent cannot avoid liability by asserting that it did not know about the circumstances of Complainants' termination.

Nor can Respondent avoid liability by disavowing the rights of control it reserved over the circumstances of Complainants' employment. The "ability to exercise control" by hiring, transferring, promoting, reprimanding or discharging the complainant, or the "ability to influence" another employer to take such actions is sufficient to establish joint employer liability under the STAA. *See Feltner v. Century Trucking, Ltd*., ARB No. 03-118, ALJ No. 2003-STA-1, slip op. at 5-6 (ARB Oct. 27, 2004) (specifically using the language "ability to control"). When this rule is viewed in conjunction with *Cook, supra*, which does not require a joint employer to have knowledge of the adverse action, it is clear that Respondent need only have a tacit role[9] as an employer in order to be liable under the STAA for the actions of NRF, provided that it reserved the "ability" to have greater control over the employment relationship, as Respondent did here. While actually exercising those reserved rights would have been stronger proof of their existence, I find that the uncontroverted Staff Leasing Agreement is nonetheless persuasive evidence that Respondent maintained the degree of control it carved out for itself in the contract. Accordingly, I give it controlling weight and find that Respondent's legal obligations to Complainants and NRF under the Staff Leasing Agreement are sufficient to show

[9] I note that similar situation to the one at hand was presented in *Wainscott v. Pavco Trucking, Inc*., ALJ No. 2004-STA-54, slip op. at 15 (April 13, 2005). In *Wainscott*, the ALJ found:

> Complainant was paid by, and received checks from IPS. Complainant stated that he was an employee of IPS. IPS deducted taxes from Complainant's wages, paid taxes on his wages, handled his insurance plan, administered his 401(k) plan, and reimbursed him for expenses. [Respondent] maintained workers' compensation insurance on its employees. Complainant was awarded unemployment benefits by the State of Indiana and [Respondent] was responsible for those benefits. After [the direct employer] terminated Complainant's employment, it sent a form to [Respondent . . . who] then stopped paying Complainant. It was unclear from the testimony at the hearing whether [Respondent] could have assigned Complainant to another company, and there is nothing in the record to indicate if [Respondent] made any investigation into Complainant's termination.

Accordingly, the ALJ held that "[Respondent's] ability to stop payment of wages to complainant is sufficient indicia of control over his employment" to establish joint employer liability under the STAA. *Id*. at 16.

that it was a joint employer for purposes of STAA liability. Respondent is therefore vicariously liable for NRF's actions.

Prima Facie Case

The elements of a violation of the employee protection provision in the STAA are "that the employee engaged in protected activity, that the employee was subjected to adverse employment action, and that there was a causal connection between the protected activity and the adverse action." *Moon v. Transport Drivers, Inc.*, 836 F. 2d 226, 229 (6th Cir. 1987); *Scott v. Roadway Express*, ARB No. 99-013, ALJ No. 98-STA-8, slip op. at 7-8 (ARB July 28, 1999). Effective August 3, 2007, the STAA was amended to reflect the burden of proof scheme applied in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). 49 U.S.C. § 31105(b)(1). Under this scheme, a complainant need only show that his protected activity was a contributing factor in the respondent's unfavorable personnel action. *Fleeman v. Nebraska Pork Partners*, ARB Nos. 09-059, 09-096; ALJ No. 2008-STA-15, slip op. at 2, n.1 (ARB May 28, 2010) (citing *Peck v. Safe Air Int'l, Inc.* ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004). If a complainant successfully meets the contributing factor standard – which requires as a baseline that the Employer knew of the protected activity – Employer must show by clear and convincing evidence that it would have taken the unfavorable personnel act in the absence of the protected activity. *Peck*, slip op at 6-7 (citing 49 U.S.C. § 42121(a)).

Protected Activity

The STAA employee protection provision prohibits disciplining or discriminating against an employee because he has made protected safety complaints or refused to drive, providing that:

> (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms or privileges of employment because
>
> (A) 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 regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (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 or health; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe 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 unsafe condition.

49 U.S.C. § 31105(a). Under Section 31105(a)(1)(A), the "complaint clause," internal complaints to supervisors anywhere in the chain of command related to violations of commercial vehicle safety regulations qualify as protected activity. *Zurenda v. J & K Plumbing & Heating Co., Inc*., ARB No. 98-088, ALJ No. 1997-STA-16, slip op. at 4 (ARB June 12, 1998). Section 31105(a)(1)(B) is referred to as the "refusal to drive" clause, with its subsections the "actual violation" and "reasonable apprehension" categories. *Ass't Sec. and Freeze v. Consolidated Freightways*, ARB No. 99-030; ALJ No. 98-STA-26, slip op. at 5 (ARB Apr. 22, 1999). Here, Complainants allege violations of all three types of activity protected under the STAA.

Under the complaint clause, the record reflects that Complainants' version of the events is uncontroverted: on numerous occasions over the course of their drive, they complained to numerous employees at dispatch and to Randy Ragsdale, NRF shop supervisor, that the truck was unsafe and experiencing severe problems related to the battery, transmission and brakes. They also ultimately reported these issues to the Arizona DPS. The testimony of Mr. McClure and related exhibits support the fact that a notable controversy existed between the wishes of Complainants – to have their vehicle repaired – and the wishes of NRF, which were to have Complainants drive the vehicle from the Petro Station in Kingman, Arizona all the way to its Missouri facility before the repairs were accomplished. TR. 265. This evidence also shows that, in the professional opinions of Mr. McClure, the mechanics at SOUZA and the officer of the Arizona DPS, the truck was too unsafe to drive without the necessary repairs. Complainant's complaints to NRF more than satisfy the requirement that such complaints be "related to" a violation of motor a vehicle safety regulation. *See Moravec v. HC & M Transportation, Inc*., 1990-STA-44 (Sec'y July 11, 1991). Accordingly, I find that Complainants have satisfied their burden to prove a protected activity under the complaint clause.

Under the refusal to drive clause, the evidence establishes that Complainants refused to drive the truck beyond Kingman, AZ, without further repairs. TR. 233, 251. Complainants both testified that they felt that the truck was too unsafe and that operating it would violate DOT regulations and pose a danger to the public. Mr. McClure concurred on this point. Moreover, the "out of service" designation of the Arizona DPS is prima facie evidence that Complainant's

refusal to drive the truck was based on the fact that doing so would violate a commercial motor vehicle safety regulation pursuant to Section 31105(a)(1)(B)(i). *Densieski v. La Corte Farm Equipment*, ARB No. 03-415, ALJ No. 2003-STA-30 (ARB Oct. 20, 2004) (an allegation of leaking brake fluid is clearly within the ambit of DOT's safety regulations); *Davis v. H.R. Hill, Inc*., 86-STA-18 (Sec'y Mar. 19, 1987) (citation for numerous safety defects issued by state highway enforcement officer constituted actionable violation of a commercial motor vehicle safety regulation). Moreover, Complainants' counsel points out that the problems with the truck consisted of substantive violations of the Federal Motor Carrier regulations 49 C.F.R. §§ 396.5 (vehicles must be properly lubricated and free of oil and grease leaks); 396.7 (vehicles shall not be operated in a condition likely to cause an accident or breakdown); 393.9 (vehicle lamps shall be operable at all times); 392.7 (lighting devices and reflectors shall be in good working order); 396.13 (driver shall be satisfied that vehicle is in safe operating condition prior to operating it). I find that the evidence supports violations of each of these regulations. Complainants were forced to drive their truck without sufficient break power and with the constant risk of a total electrical shutdown, which the record reflects occurred on multiple occasions. Complainants have therefore established protected activity under the "actual violation" portion of the refusal to drive clause.

The evidence of the events leading up to the stop in Kingman, AZ shows that the truck was being driven in a substantially similar unsafe condition to the condition the truck was in when the Arizona DPS officer placed it "out of service" in Kingman.[10] Specifically, the invoices from SOUZA and the PETRO station note the identical problems with the truck's leaking transmission and saturated brakes that the DPS officer cited when he placed the truck out of service. *Compare* CX-15 and CX-17 *with* CX-18. The "out of service" designation of the Arizona DPS is also very strong evidence that Complainant's refusal to drive the truck was based on the fact that doing so would pose a serious danger to the safety and health of the public under Section 31105(a)(1)(B)(ii). I find this evidence persuasive on the point that any apprehension Complainants had about driving the truck in the condition it was in when it was placed out of service was a highly reasonable apprehension, therefore satisfying Sections 31105(a)(1)(B)(ii) and 31105(a)(2).

Under Section 31105(a)(2), Complainants must also show that they sought to remedy the safety problems with their Employer and been unable to obtain correction of the unsafe

[10] Mr. Baxter testified that the Arizona DPS officer was DOT-certified. TR. 114.

condition. Again, the uncontroverted evidence shows that Complainants, in their complaints to NRF, sought to have the problems remedied by requesting repairs, but NRF acquiesced only to filling the truck's leaky transmission with more oil, which continued to leak onto the brakes. An attempt to get an employer to authorize or perform more substantial repairs satisfies the requirements of Section 31105(a)(2). *See Dutile v. Tighe Trucking, Inc., 93-STA-31* (Sec'y Nov. 29, 1993); *see also Zessin v. ASAP Express, Inc., 92-STA-33* (Sec'y Jan 19, 1993) (employee sought remedy from employer where employer walked away upon the employee raising the issue of safety defects, thereby preventing correction of unsafe condition). I therefore find that the Complainants have satisfied their obligation under the "because" clause to seek a remedy for the dangerous condition from their Employer, and have established, by a preponderance of the evidence, protected activity under all three subsections of 49 U.S.C. § 31105(a).

Discriminatory Discharge/ Causation

The adverse action in this case was Complainant's termination from employment by NRF CEO Charles Daniel on November 22, 2008. *See Stipulation (3), supra*. The record contains strong circumstantial evidence that Complainants' protected activities were a contributing factor in Mr. Daniel's decision to discharge them. First, the temporal proximity between Complainants' protected activities – which occurred on or around November 18, 2008 – and Complianants' discharge on November 22, 2008 create a strong inference of causation. *See Simon v. Sancken Trucking Co*., ARB No. 06-039, 06-088, ALJ No. 2005-STA-40 (ARB Nov. 30, 2007) (temporal proximity not ineluctable proof of causation, but may support a finding along with other evidence, such as conflicting or incredible reasons for termination proffered by the employer).

The evidence persuasively shows that Complainants' safety complaints and ultimate actions to take the truck out of service were a source of tension and outright anger from NRF dispatch. Complainants began complaining to dispatch about the state of the truck on November 13, 2008. Between that time and the time that they arrived back at the NRF yard on November 22, Complainants had constant communication with dispatch. Dispatch was also obviously directing and monitoring Complainants' activities by urging them to drive on and by calling ahead to the mechanic shops to give instructions on what to fix (or not) on the truck. Ultimately, dispatch must have communicated the situation to Charles Daniel, who then fired Complainants. The relatively small size of the NRF office and the gravity of the situation that led to

Complainants' truck being placed out of service suggest that Mr. Daniel was aware of Complainants' protected activities.

Moreover, Mr. Daniel's alleged proffered reasons[11] for terminating Complainants are not credible. The original reason – that Complainants were late on the "Wells load" – did not exist because there was no "Wells load." Insofar as the load that was intended for elsewhere but relayed in Wells per instructions from dispatch could be construed as a "Wells load," Complainants testified that Dispatch was aware when it sent them from Oregon to Wells, NV, that the driver picking up the load would have to wait for Complainants to arrive because dispatch ordered him to stop when he was already in Wells en route to somewhere else. TR. 223. Respondent's argument that Complainants were "late" to Wells because the other driver had to wait therefore makes little sense. The fact that Mr. Daniel gave a pretextual reason for firing Complainants that was so closely temporally related to their protected activities shows that he felt the need to explain anger that was specifically directed at events that occurred on the same dispatch route from the NRF facility. It is reasonable to infer that those other activities were the safety complaints and refusal to drive the truck past Kingman, AZ, where Complainants had it taken out of service. My finding that Mr. Daniel's given reasons for firing Complainants are not credible is bolstered by the fact that he later changed his reason, asserting instead that Ms. Myers falsified her logs. Giving two unlikely reasons for the termination makes both reasons even less credible. *Martin v. United Parcel Ser*., ARB No. 05-040, ALJ No. 2003-STA-009, slip op. at 9 (ARB May 31, 2007) (proof that an employer's explanation is unworthy of credence can be quite persuasive").

I find that a preponderance of the credible evidence shows that Complainants' protected activities were at least a contributing factor – if not the predominant one – in Mr. Daniel's decision to discharge them. Respondent makes a variety of arguments, but cannot proffer anything that would qualify as clear and convincing evidence that, but for Complainants' protected activity, Mr. Daniel would have nonetheless terminated Complainants.

In addition to arguing that Complainants were terminated for being late on the "Wells load," Respondent argues that because Mr. Daniel never told Complainants he was firing them for refusing to drive the truck past Kingman or for any of the safety complaints that they made along the way, Complainants cannot prove causation. It is well established that under the STAA,

[11] While this evidence was received in the form of hearsay testimony, I find that it is nonetheless reliable because the testimony between both Complainants was consistent and, upon personal observation, I found the witnesses to be highly credible.

causation may be established by circumstantial evidence. *See, e.g., Clay v. Castle Coal & Oil Co., Inc.*, 90-STA-37 (Sec'y Nov. 12, 1991) (possible to establish causation by other evidence even where the complainant testified that he did not perceive a discriminatory motive).

Respondent also argues that because Complainants were not late on any load they delivered after they relayed the Wells load, they cannot show discriminatory animus on the part of NRF because NRF suffered no harm. Essentially, Respondent argues that the only motivation NRF would have had to discharge complainants would be if Complainants had caused NRF harm by delivering a late load. I find this assertion unconvincing for two reasons. First, the testimony at the formal hearing established that NRF, through the directions of Randy Ragsdale, expressed a clear preference that repairs be performed at the shop on the NRF facility rather than elsewhere, and the latter is what occurred. Second, Respondent's argument requires me to infer the parameters of NRF's possible motivations based on little or no evidence to that effect.

Overall, Respondent's arguments amount to a criticism of Complainant's evidence, which I have already credited as establishing that their discharge was discriminatory within the meaning of the STAA by a preponderance of the evidence. Respondent has therefore failed to show, by clear and convincing evidence, that this finding should not carry the day. Accordingly, I find that Complainants have sustained their burden to prove that the reason Mr. Daniel fired them was because of their activities protected under the STAA.

Appropriate Damages

The STAA provides for an award of costs, including attorney's fees, which a complainant reasonably incurs in bringing the complaint. 49 U.S.C. § 31105(b)(3)(B) (2007). It also provides for relief in the form of monetary damages, including punitive damages no greater than $250,000. *Id.* at § 31105(b)(3)(C). Complainants request back wages in an amount of $20,363.20 each (based on an average weekly wage of $370.24 multiplied over the period of 55 weeks that NRF remained in business after they were terminated) with an offset based on the wages Mr. Baxter earned during that time in an amount of $9,328.00. They also request compensatory damages for emotional distress in the amount of $50,000.00 apiece based on awards in other "similar" STAA cases, along with attorney's fees, costs and interest. Finally, Complainants request that Respondent abate the STAA violation by "post[ing] any decision favorable to them at all of its terminals for 90 consecutive days in all places where employee notices are customarily posted" and to delete all unfavorable information regarding

Complainants from its personnel files. Brief of Complainants at 25-26. Respondent has not addressed the issue of the propriety of damages.

Once Complainants prove their entitlement to back pay, it is mandatorily awarded. *Moravec. v. HC & M Transportation, Inc*., 90-STA-44 (Sec'y Jan. 6, 1992). I find that Complainants have requested an appropriate amount of back pay that is supported by the evidence in the record; moreover, it is uncontested. I therefore award Complainants back pay in the amount of $31,398.40, which reflects the combined earnings of both drivers[12] after they mitigated their losses by Mr. Baxter working for a circus in Canada for eight months, the wages from which are reflected in payments to Ms. Myers at CX-26.

Interest should be added to the award of back pay to recompense the employee for the loss suffered because the employer unlawfully deprived him of the use of his money. *Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec'y Aug. 21, 1986). In calculating interest on back pay awards under the STAA, the rate used is that charged for underpayment of federal taxes. See 26 U.S.C. § 6621(a)(2); *Drew v. Alpine, Inc*, ARB Nos. 02-044, 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003). Interest accrues, compounded quarterly, until the damages are paid. *Assistant Sec'y & Cotes v. Double R. Trucking, Inc*., ARB No. 99-061, ALJ No. 1998-STA-34, slip op. at 3 (ARB Jan. 12, 2000). Accordingly, I award interest on the payments that would have been due to Complainants in each pay period from their November 22, 2008 termination for the 55-week period thereafter that NRF was still in business.

The STAA does not define "compensatory damages," but the Board has held that they should be awarded with an eye toward restoring a complainant to the position he or she was in prior to the adverse employment action. *Hobson v. Combined Transport, Inc*., ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008). These damages should compensate a complainant not only pecuniary loss, but also for impairment of reputation, personal humiliation, and mental anguish and suffering. *Id.* Complainants requested $50,000 each in "emotional damages," based on the awards in *Michaud v. BSP Transport, Inc*., ARB No. 97-113, ALJ No. 1995-STA-29 (ARB Oct. 9, 1997) ($75,000 awarded for losing a house in foreclosure and having to receive public assistance resulting in depression and an ulcer); *Ferguson v. New Prime, Inc*., 2009-STA-47 (ALJ Mar. 15, 2010) ($50,000 awarded for emotional distress and mental pain for destitution and dependence on charity).

[12] The payments shall be disbursed individually as follows: Mr. Baxter shall receive a base amount of $20,363.20 and Ms. Myers shall receive a base amount of $11,035.20, which reflects the fact that the social security statement documenting the subtracting earnings showed that the payments were made to Ms. Myers.

To support their claims for emotional distress, Complainants testified that it has been embarrassing to move in with Ms. Myers' mother and to receive food stamps and other public assistance, and that Christmas with their four children was sad and depressing the year that they lost their jobs. At the hearing, I also observed that Complainants were emotionally disturbed by the actual experience of being pressed to drive a truck across the country for days with essentially no break power and sporadic electrical shutdowns. I am convinced that this was a harrowing experience for them that properly qualifies as compensable "mental anguish." My overall impression of Complainants was that they were both very humble, credible people whose requests were not unreasonable.

The Board has upheld awards of emotional damages based solely on the testimony of the complainant. *Hobson, supra*. Nonetheless, I find that an award of $50,000 apiece is not supported by the evidence or existing law. *See Carter v. Marten Transport, Ltd*., ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63 (ARB June 30, 2008) (affirming an award of compensatory damages in the amount of $10,000 based on Complainant's testimony about depression and distress over job loss, living off of retirement and savings, and continuing unemployment); *Hobson, supra*, (emotional distress award of $5,000 based solely on Complainant's testimony).

Of the cases raised by Complainants, I find their case more similar to *Ferguson* than *Michaud* because they cannot document their emotional distress with additional medical evidence. Here, like the situation in *Ferguson* – a case in which punitive damages[13] were also awarded – the underlying violations of the STAA support a finding of emotional distress proximately caused thereby. The complainant in *Ferguson* was awarded $50,000 in emotional damages for being forced to drive on black ice with zero visibility, for which she was fired and then harassed in the course of getting back her personal property. Slip op. at 4-7. Here, Complainants were forced to endure harrowing driving conditions but had an otherwise painless termination from employment. Weighing all of these factual considerations and the law governing sufficiency of proof, I find that Complainants are entitled to $25,000 each, for a total of $50,000 in additional compensatory damages.

Last, I deal with the issue of abatement. Orders to expunge personnel records and to post decisions adverse to the Employer on its premises are authorized as "standard remed[ies] in discrimination cases," *Michaud, supra*, slip op. at 9. Here, I find that ordering expungement of

[13] Complainants have not requested punitive damages. In this case, punitive damages would be inappropriate because they would not punish the conduct of NRF, which is the party that actually demonstrated mal intent and engaged in the egregious behavior sought to be punished, of which Respondent had no knowledge.

personnel records is proper and that Respondent shall delete any unfavorable information regarding Complainants from its personnel files. The unique situation that arises in the context of dual-employer liability leads me to conclude that ordering Respondent to post any decision favorable to Complainants "at all of its terminals . . . where employee notices are customarily posted" will not quite reach the conduct that is sought to be deterred by this action. Accordingly, I order that in addition to posting the decision on Respondent's premises for 90 days in all places where employee notices are customarily posted, I further order that Respondents provide information about STAA compliance to all commercial motor vehicle carriers with which it contracts, and that it include information about the STAA in the "Welcome Packet" (CX-1) that it provides to all leased employees of these client trucking companies.

Because this Decision is favorable to Complainants, I grant their attorney leave to file a petition for attorney's fees and costs within thirty (30) days of the date of this Decision. Respondent shall have an additional thirty (30) days thereafter in which to file a Response.

RECOMMENDED ORDER

1. Respondent shall pay Complainant Myers back pay in the amount of $11,035.20, and Complainant Baxter back pay in the amount of $20,363.20, for a total back pay award to both Complainants in the amount of $31,398.40.
2. Respondent shall pay interest on the back pay award, compounded quarterly in accordance with the methods described *supra*, pp. 34-35.
3. Respondent shall pay Complainants an additional award for emotional distress in the amount of $25,000.00 each, for a total award to both Claimants of $50,000.00.
4. Respondent shall expunge all unfavorable information regarding Complainants from its personnel files.
5. Respondent shall post a copy of this decision on its premises for ninety (90) consecutive days in all places where employee notices are customarily posted.
6. Respondent shall hereafter provide information outlining employee rights and employer compliance under the STAA to each commercial motor vehicle carrier it retains as a client company.
7. Respondent shall hereafter provide information outlining employee rights and employer compliance under the STAA to each leased employee of its client companies that it knows to be a commercial motor vehicle carrier in its "welcome packet" that details benefits Respondent offers to leased employees.

IT IS SO ORDERED.

A

ROBERT B. RAE
U. S. Administrative Law Judge

NOTICE OF REVIEW: The Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.l09(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

The relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).