



**Issue Date: 26 August 2011**

Case No: 2010-STA-70

In the Matter of:  
Edward Schrieber,  
Complainant

v.

Beacon Transport, Inc.,<sup>1</sup>  
Respondent

Appearances:  
John Cornett, Esq.  
For Complainant

Stan Pritchett, *pro se*  
For Respondent

Before: Joseph E. Kane  
Administrative Law Judge

### DECISION AND ORDER AWARDING BENEFITS

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA").<sup>2</sup> The STAA protects employees from employer discrimination or retaliation when the employee engages in a protected activity, including refusing to operate a vehicle when the operation could cause serious injury.<sup>3</sup> Edward Schrieber alleges that his former employer, Beacon Transport, fired him for refusing to haul a load, which he believed could cause serious injury. Beacon responds that Schrieber was fired for violating company policy.

In this decision, CX, RX, and ALJX refer to the exhibits of the Complainant,

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<sup>1</sup> Also identified in the case file as Beacon Transport, LLC.

<sup>2</sup> 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 11053; 29 C.F.R. Part 1978.

<sup>3</sup> 49 U.S.C. § 31105(a).

Respondent, and Administrative Law Judge, respectively. Tr. refers to the hearing on March 22, 2011.

### **Procedural History**

Edward Schrieber filed an STAA complaint with the Occupational Safety and Health Administration (“OSHA”) on October 6, 2009. (ALJX 1). OSHA investigated the complaint and determined that Schrieber did not engage in protected activity. *Id.* Schrieber objected to the findings and requested a hearing. (ALJX 2).

A formal hearing took place on March 22, 2011, in Cincinnati Ohio. At the hearing, Administrative Law Judge Exhibits 1-8 and Respondent’s Exhibits 1-6 were admitted without objection. Schrieber testified and called John Cooper and his wife, Paulette Schrieber, as witnesses. Beacon called Larry Kewley, its Safety Director, as a witness. I allowed Schrieber to submit his W-2 post hearing. It was received on March 29, 2011. Receiving no objections to this evidence, it is now admitted as CX 1. Subsequently, the parties filed closing briefs.

### **Factual Findings**

#### **I. Background**

According to federal regulations, truck drivers traveling on interstate highways are allowed to carry up to 80,000 pounds.<sup>4</sup> In addition to the gross weight, there are also limitations for the amount of weight an individual axle may carry.<sup>5</sup> Every motor carrier shall issue a receipt or bill of lading for property tendered for transportation in interstate commerce indicating the freight’s weight and other information.<sup>6</sup>

Edward Schrieber has been a truck driver since 1990. (Tr. 18). He worked for Beacon Transport as an over-the-road truck driver from 2008 until he was fired on October 2, 2009. (Tr. 18-19; RX 5). His wife, Paulette Schrieber, usually rode with him. (Tr. 20). John Cooper also testified at the hearing; he has been a truck driver for 21 years and worked for Beacon in August and September 2009.

Larry Kewley is the Safety Director at Beacon. (Tr. 105). According to Kewley, drivers are instructed to look at the bill of lading to determine the freight’s weight. (Tr. 83-84). If the facility does not have a certified calibrated scale on it, drivers are instructed to take the freight to a certified CAT scale. *Id.* The reason is because of federal weight limitations on individual axles. *Id.* So, even if the gross weight is

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<sup>4</sup> 23 C.F.R. § 658.17(a).

<sup>5</sup> *Id.* § 658.17(e).

<sup>6</sup> 49 C.F.R. § 373.101(a)-(e).

under 80,000, the driver may still be “overweight” if one individual axle has more than the allowed load. (Tr. 85).

## **II. Cooper’s Load**

Beacon has provided a list of loads hauled for Crystal Logistics from the port at Camden, New Jersey, from February to October 2009. (RX 3). The list includes thirty-seven loads, including a load hauled by John Cooper on September 9, 2009.

Cooper picked up a load from the Camden port on September 9, 2009. (Tr. 62). He was given a bill of lading that did not include the freight’s weight and was asked to take eighteen pallets of plywood. (Tr. 63). Cooper believed that eighteen pallets of plywood would exceed the weight limits. (Tr. 64). He first called the broker who arranged this load and asked for the weight. *Id.* According to Cooper, “after going back and forth about it, they got a hold of this guy Rich. He sent over another bill of lading that called for 16 pallets instead of 18.” (Tr. 65). This second bill of lading had weight information, and Cooper was satisfied that the weight was within the limits at this point. (Tr. 65-66, 74).

This was the first time Cooper received a bill of lading that did not have a weight on it. (Tr. 67). When asked whether the shipper accommodated him because of his concerns, Cooper responded:

Oh, I think only because I was raising a fit about it. And I told them I’m not moving anywhere until I know. Because once you get a load and you leave the property, it’s yours. You can’t bring it back.

(Tr. 75). Cooper left Beacon transport because he “didn’t care for the company.” (Tr. 68). The load at Camden “had a lot to do with it.” (Tr. 69).

## **III. Schrieber’s Load**

Almost two weeks after Cooper’s incident at the Camden port, on the morning of September 22, 2009, Schrieber went to pick up load, as previously instructed by the broker, Crystal Logistics. (Tr. 20). He was given a bill of lading, which did not have a product or weight listed. He was told to go down the street to pick up the load. *Id.*

Schrieber went down the street and was escorted into the Camden port where he was told that the freight was 18 pallets of plywood. (Tr. 21-22). Records show that the truck was “2.4 Mi SW of Camden, NJ.” (RX 2). According to Schrieber,

after 20-some years of driving a truck, I know plywood basically goes on a flatbed trailer and it gets strapped down for safety. And it's also heavy, because it is lumber. I had a dry box trailer, which is a closed-in box trailer, and it was 53 foot. And there are weight limits on that.

(Tr. 22-23). Schrieber testified that he asked about the weight "five or six times." (Tr. 48). He told the shipper that he could haul up to eighty thousand pounds and that he did not know how much the eighteen skids weighed. (Tr. 23). Schrieber also asked if there was a scale available to weigh the plywood. *Id.* The shipper maintained that Schrieber should know the weight of the freight. (Tr. 23-24). In describing the conversation that occurred next, Schrieber explained,

[the port employee] called me a "damned hillbilly." And at that time I just—I told the man—I said—and I'll be honest about it. I said, you know, "Where did you get your teeth at, you know, K-Mart?" You know, I didn't cuss at the man.

(Tr. 24). According to Schrieber, the shipper and the escort were laughing and "joking around." (Tr. 27). He was adamant that he did not "cuss." (Tr. 27, 30, 37, 50, 53, 58).

According to Schrieber, a bill of lading typically includes the weight of the freight. (Tr. 25). In his experience as a truck driver, he never received a bill of lading that did not provide the weight. (Tr. 32). Schrieber testified that both the shipper and Kewley told him to go to the truck stop and weigh the freight. (Tr. 26). But the nearest truck stop was fifteen miles, and Schrieber would not have been able to return any freight in the event that the load was overweight. (Tr. 26). Schrieber did not want to take the load because he did not know the weight. (Tr. 25). He explained that he could receive a fine and "the brakes could fail on the truck and I could kill somebody, and then that would be on me also." *Id.* Ultimately, Schrieber refused to haul the load because he did not know how much it weighed. (Tr. 27).

Kewley agreed that it is common practice for bill of lading to indicate the weight of the load. (Tr. 103). Based on his 15 years of experience, he also stated facilities that load freight usually do not have a certified calibrated scale on their property. (Tr. 101). When a driver is not given the weight, Kewley advised that the driver contact the broker to get information about the weight. (Tr. 107).

What happened next is disputed. According to Schrieber, he left the shipper's office and went to a staging area at the shipping yard where he called Rich Henry at Crystal Logistics. (Tr. 28, 47, 48). He testified,

I told him I wasn't going to haul the load, that's the first thing I said to him, and he hung up the phone on me.

(Tr. 28). He tried calling back but did not reach the broker. (Tr. 60). According to an email from Rich Henry, Schrieber "refused to calm down and accept my information." (RX 1). The email is dated January 2010, four months after the incident. The email was sent from [broker'sname]@sbcglobal.net.

Schrieber next called Kewley and told him that he did not know the weight and that he would rather quit than haul an overweight load. (Tr. 29). Paulette Schrieber's testimony is consistent with her husband's testimony. She was with him in Camden, New Jersey, on September 22, 2009. (Tr. 77). She stayed in the truck while he went in to get the paperwork. According to her testimony, Schrieber was upset when he came back and attempted to call the broker. (Tr. 78). She confirmed that when Schrieber called the broker and Kewley, he was still on the shipper's property and the truck was still at the port. (Tr. 79). She heard her husband tell Kewley that he could not get the weight for the load. *Id.*

Kewley testified that "Schrieber called and stated that he was not being provided with a weight, that he was going to quit." (Tr. 88). He described Schrieber as "irate." *Id.* He also testified that Schrieber "was telling me that he was not going to pull this load because of the weight issue." (Tr. 89-90). Although this testimony is consistent with Schrieber's testimony, Kewley also testified that he did not fully understand what happened until later in the afternoon when customer service representative informed him that Schrieber was banned and not allowed back on the property. (Tr. 89, 91). He explained,

[a]ll I knew at that point was that something had occurred that there had been some kind of argument or some kind of name calling. Something derogatory had taken place as to where Mr. Schrieber was not welcome to come back to their facility.

(Tr. 91-92). According to Kewley, "the bill of lading we've had with this previous customer [show] they had a certain idea of how much these pallets weighed, how many they could put on a truck." (Tr. 104).

Also contrary to Schrieber's testimony, Kewley testified that Schrieber was not "on the facility" when he was talking to him. (Tr. 91). But he later acknowledged that he knew Schrieber was in a staging area, outside the gate of the port. (Tr. 99). He also disagreed with Schrieber's characterization of the behavior. Based on a discussion with a customer service representative that had contact with the broker, Kewley testified that Schrieber's behavior was "harassing, aggressive, and derogatory." (Tr.

92, 96). Kewley also testified that Schrieber was permanently banned from the port and that the broker did not want to work with Schrieber. (Tr. 92).

After the call to Kewley, Schrieber communicated with dispatch via the truck's Qualcomm communication system. (Tr. 29). He received a message: "Now you're sounding like the people you're mad at. Expecting us to just snap our fingers and give you something we don't know about. Find a safe place to park and chill out, ok?? C/S working on something else to get you rolling." (RX 2). Schrieber responded: "Sorry, but not going to have somebody call me names and expect me to come and load their freight." *Id.* Records show that the truck was still "2.4 Mi SW of Camden, NJ." *Id.* Schrieber agreed that Qualcomm messages are the "primary mode of communication with [his] supervisor." (Tr. 55). He explained that he called Kewley first because of the nature of the problem. *Id.* According to Schrieber, the Safety Director has information about the weight limitations and overweight fines, not the dispatcher. *Id.*

#### **IV. Following the Incident**

Schrieber went to Pennsylvania to pick up a load, which he hauled to North Carolina and delivered. (Tr. 33). The bill of lading for this load included the weight. *Id.* Schrieber next picked up a load in North Carolina and hauled it to Missouri. (Tr. 34). Following the New Jersey incident, Schrieber was on the road for Beacon for ten or eleven days, driving as far as California. (Tr. 35).

Schrieber returned to Beacon's headquarters in Tennessee, and Kewley fired him on October 2, 2009. (Tr. 36; RX 5). Kewley testified that Schrieber was fired because he went against company policy, which requires drivers to treat customers in a respectful, courteous manner. (Tr. 93-94; RX 6). According to Schrieber, Kewley did not allow him to explain what happened in New Jersey (Tr. 37-29).

At Beacon, Schrieber received thirty-four cents a mile, which totaled \$700 or \$800 per week. (Tr. 41). Schrieber submitted a W-2 from 2009 showing that he earned \$31,513.40. (CX 1). After his termination, Schrieber was out of work for about "a year and five or six months." (Tr. 42). He believed this was because of his "DAC Report." (Tr. 45). According to Schrieber, this report that contains information about "drivers and their performance at their jobs, safety, alcohol and drug abuse, just pretty much all work history." (Tr. 45). Schrieber testified that Bacon reported that he violated company policy, which interfered with his ability to find work. (Tr. 46).

Following his employment with Beacon, the first position Schrieber obtained was at Rocky Trucking. (Tr. 42). He quit that job "because they would not take care of their equipment". (Tr. 43). Two weeks after that job, he found his current

employment. *Id.* As of the March 2011 hearing, Schrieber had been employed “about three weeks.” He makes more in his current job than he made working at Beacon. *Id.*

## Law and Analysis

Schrieber must prove by a preponderance of the evidence that he engaged in protected activity, that Beacon knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action that Beacon took.<sup>7</sup> Schrieber obviously suffered adverse action when Beacon fired him on October 9, 2009.<sup>8</sup> Thus, I will consider whether Schrieber has established the remaining elements. Beacon may avoid liability if it proves by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.<sup>9</sup>

### I. Protected Activity

The employee protection provisions of the STAA provide that an employer may not discharge an employee who made safety complaints or refused to drive in certain circumstances.<sup>10</sup> Schrieber argues that his refusal to drive is protected activity. (Complainant’s Brief). The refusal to drive provision prohibits an employer from terminating an employee when the employee refuses to operate a vehicle in two circumstances:

- (1) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health or
- (2) because the employee has reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.<sup>11</sup>

These are generally referred to as the “actual violation clause” and the “reasonable apprehension” clause.

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<sup>7</sup> 49 U.S.C. § 31105(b)(1); 49 U.S.C. § 42121(b)(2)(B)(i); *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 7-8 (ARB Sept. 30, 2003).

<sup>8</sup> See 49 U.S.C. § 31105(a)(1) (“A person may not discharge an employee [for engaging in protected activity].”).

<sup>9</sup> 49 U.S.C. § 31105(b)(1); 49 U.S.C. § 42121(b)(2)(B)(iv); *Kester*, ARB No. 02-007, slip op. at 7-8.

<sup>10</sup> 49 U.S.C. § 31105(a)(1).

<sup>11</sup> *Id.* § 31105(a)(1)(B)(i), (ii).

Protection under the actual violation clause requires that a complainant prove a violation of safety laws would have occurred but for the refusal to drive; a reasonable and good faith belief that the operation would violate the law is not enough.<sup>12</sup> Schrieber's refusal to drive does not qualify for protection under the first clause because he has not shown that the load was overweight or would otherwise violate any safety law.

Protection under the reasonable apprehension clause first requires proof that the employee's fear be objectively reasonable: an employee's fear is reasonable if "a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger or accident, injury, or serious impairment to health."<sup>13</sup> Additionally, the employee must establish that he unsuccessfully sought correction of the unsafe condition from the employer.<sup>14</sup>

*A. Schrieber's actions were reasonable.*

Schrieber argues that, based on his experience as a truck driver, he believed that the weight was heavier than allowed by applicable law and he had reasonable apprehension of serious injury to himself and to the public as a result of not knowing the weight. (Complainant's Brief at 4-5). Beacon does not dispute this argument. *See generally* Respondent's Brief.

The determination of whether the apprehension was reasonable must focus on the information available to the complainant at the time of the refusal to drive.<sup>15</sup> At that time, Schrieber did not know how much the eighteen pallets of plywood weighed. He additionally explained that plywood is usually hauled on a flatbed trailer, not in the closed-in boxed trailer, which is the type of trailer he had. He testified that he did not want to take the load because he believed it was too heavy and could receive a fine or cause injury to the public as a result of the overweight load. Specifically, he testified that "the brakes could fail on the truck and I could kill somebody." (Tr. 25). Schrieber's testimony is corroborated by Cooper's testimony. When Cooper, another experienced truck driver, was asked to haul eighteen pallets of plywood, he refused and did not take the load until he received a second bill of lading with the weight information.

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<sup>12</sup> *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-26 (ARB Oct. 31, 2007).

<sup>13</sup> 49 U.S.C. § 31105(a)(2).

<sup>14</sup> *Id.*

<sup>15</sup> *Caimano v. Brinks, Inc.*, 95-STA-049; (Sec'y Jan. 26, 1996); *Kennedy v. Advanced Student Transp.*, ARB No. 09-145, ALJ No. 2009-STA-049, slip op. at 7 (ARB April 28, 2011).



The evidence shows that the broker probably intentionally left the cargo weight off the bill of lading. Cooper's testimony shows that this happened at least once before and in close temporal proximity to Schrieber's load. Schrieber and Cooper testified that they never received a bill of lading without a weight before the incidents involving Crystal Logistics and the Camden port. In light of Schrieber's testimony, I find that Schrieber genuinely believed that he could cause injury if he hauled the overweight load. Based on the federal limits on weight, Schrieber's experience as a truck driver, and Cooper's testimony, I further find that this belief was objectively reasonable under the circumstances.

Although Beacon does not dispute the reasonableness of Schrieber's fear, Beacon argues that Schrieber's communication did not implicate safety because he communicated that he did not know the weight—not that the load was overweight. (Respondent's Brief at 3). The distinction is insignificant. The Federal Highway Administration's policy is to provide a safe and efficient national network of highways that can **safely** and efficiently accommodate the large vehicles authorized by the STAA.<sup>16</sup> Federal regulations allow truck drivers traveling on interstate highways to carry up to 80,000 pounds.<sup>17</sup> In addition to the gross weight, there are also limitations for the amount of weight an individual axle may carry.<sup>18</sup> I am satisfied that safety is one of the goals of the weight limits.<sup>19</sup> Additionally, Kewley, Schrieber, and Cooper explained that a truck driver must know the weight of the load, trailer, and truck in order to comply with federal regulations. In an attempt to correct the condition, Schrieber contacted the broker and Kewley, Beacon's Safety Director. He explained that he called Kewley first because of the nature of the problem. According to Schrieber, the Safety Director has information about the weight limitations and overweight fines, not the dispatcher. Accordingly, I find that Schrieber's concern that he did not know the weight implicates the safety concerns expressed and remedial efforts mandated by federal regulations, regardless of whether the load ultimately satisfied the weight limits.

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<sup>16</sup> 23 C.F.R. § 658.3 (emphasis added).

<sup>17</sup> *Id.* § 658.17(a).

<sup>18</sup> *Id.* § 658.17(e).

<sup>19</sup> See *Bates v. West Bank Containers*, ARB No. 99-055, ALJ No. 98-STA-30, slip op. at 12 n.5 (April 28, 2000) ("Although OSHA has never asserted in this case that the 80,000 pound load "limit" was a safety law, we are satisfied that safety is indeed one of the goals of [the] weight limit regulations."); see also *Galvin v. Munson Transp., Inc.*, 91-STA-41 (Sec'y Aug. 31, 1992) (noting that the employee's refusal to haul an overweight load was based on the potential violation of federal regulations and a safety concern for himself and the public).

*B. Schrieber unsuccessfully sought correction of the unsafe condition.*

While I have found Schrieber's actions were objectively reasonable, I must additionally consider whether Schrieber unsuccessfully sought correction of the unsafe condition from Beacon. According to Schrieber, he left the shipper's office and went to a staging area at the shipping yard where he called Rich Henry at Crystal Logistics. (Tr. 28, 47, 48). He testified, "I told him I wasn't going to haul the load, that's the first thing I said to him, and he hung up the phone on me." (Tr. 28). He tried calling back but did not reach the broker. (Tr. 60). I find this testimony to be consistent, credible, and entitled to probative weight.

Beacon points to John Cooper's experience at the Camden port, where Cooper was able to get the weight information from the broker. (Respondent's Brief at 2). But Beacon mischaracterizes what happened. Cooper only got a new bill of lading "after going back and forth about it." (Tr. 65). And when asked whether the shipper accommodated him because of his concerns, Cooper responded: "I think only because I was raising a fit about it." (Tr. 75). Schrieber also tried to get a new bill of lading from the broker. He was unsuccessful.

Beacon has also provided an email from the broker, Rich Henry. (RX 1). According to the email, Schrieber "refused to calm down and accept my information." (RX 1). This evidence is entitled to little probative weight. The email was sent four months after the incident. Also, based on the domain name in the email address (sbcglobal.net), it does not appear to have been sent from a company email address. Finally, Rich Henry did not testify at the hearing, and Beacon did not otherwise offer any foundation regarding the credibility of this evidence.

Weighing Schrieber's testimony against the evidence offered by Beacon, I am persuaded that Schrieber unsuccessfully sought correction of the unsafe condition from the situation from the broker.<sup>20</sup>

In addition to contacting the broker, Schrieber called Beacon's Safety Director, Larry Kewley. Schrieber testified that he told Kewley that he did not know the weight and that he would rather quit than haul an overweight load. (Tr. 29). Kewley acknowledged this phone call. Although Kewley testified that he did not fully understand what was happening until later in the afternoon, he acknowledged that "Schrieber called and stated that he was not being provided with a weight, that he was going to quit." (Tr. 88). In light of the testimony of Schrieber and Kewley, I am

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<sup>20</sup> Cf. *Zessin v. ASAP Express Inc.*, 92-STA-33 (Sec'y Jan. 19, 1993) (citing *Green v. Creech Bros. Trucking*, 92-STA-4 (Sec'y Dec. 9, 1992) (finding the complainant satisfied this element where the respondent did not respond to the complaint but walked away, effectively preventing the complainant from seeking correction of the unsafe condition)).

also persuaded that Schrieber unsuccessfully sought correction of the unsafe condition from Kewley.

To the extent that Beacon argues that Schrieber left the shipper's property before giving it a chance to correct the problem, I find this argument is without merit. Records show that the truck was "2.4 Mi SW of Camden, NJ" when Schrieber arrived at the shipper. (RX 2). He testified that he first called Kewley then communicated with dispatch via the Qualcomm communication system. When the first Qualcomm message was sent following the incident, records show that the truck was still "2.4 Mi SW of Camden, NJ." (RX 2). This is consistent with Schrieber's testimony that he called Kewley while the truck was still at the port.

A preponderance of the evidence shows that Schrieber refused to haul a load because he had an objectively reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. A preponderance of the evidence further shows that Schrieber unsuccessfully sought correction of the unsafe condition from his employer. Accordingly, I find that Schrieber has established that he engaged in protected activity and that Beacon knew about this activity when it fired him.

## **II. Causal Connection**

An employee must show by a preponderance of the evidence that his protected activity was a contributing factor in the employer's unfavorable personnel action.<sup>21</sup> According to Beacon's "Employee Termination Notice," "failing to follow instructions in which to load freight in which Beacon has obliged is an insubordinate act." (RX 5). Schrieber and Kewley signed this notice. Although the notice shows other nonretaliatory reasons for the termination (e.g., no longer allowed on the broker's property, harassing behavior at the Camden port), it clearly states that Schrieber's refusal to drive was a contributing factor in the termination. I have found that the refusal to drive and the termination that followed constituted protected activity and adverse action under the STAA. Accordingly, I find that Schrieber has established the requisite causation element.

## **III. Beacon's Affirmative Defense**

Beacon may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.<sup>22</sup> "Clear and convincing evidence denotes a conclusive

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<sup>21</sup> 49 U.S.C. § 31105(b)(1); 49 U.S.C. § 42121(b)(2)(B)(iii).

<sup>22</sup> 49 U.S.C. § 31105(b)(1); 49 U.S.C. § 42121(b)(2)(B)(iv); *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 7-8 (ARB Sept. 30, 2003).

demonstration; it indicates ‘that the thing to be proved is highly probative or reasonably certain.’”<sup>23</sup> Highly probative evidence instantly tilts the evidentiary scales in the affirmative when weighed against the opposing evidence.<sup>24</sup>

Beacon argues that it terminated Schrieber because his conduct at the Camden port was inconsistent with Beacon’s company policy. (Respondent’s Brief at 3). Schrieber essentially argues that the protected activity was a motivating factor and that Beacon cannot prove that it would have fired Schrieber in the absence of the protected activity. (Complainant’s Brief at 11).

The right to engage in statutorily protected activity permits some leeway for impulsive behavior.<sup>25</sup> But this leeway must be balanced against the employer’s right to maintain order and respect in its business by correcting insubordinate acts.<sup>26</sup> Beacon “bears the risk that ‘the influence of legal and illegal motives cannot be separated.’”<sup>27</sup>

For example, in *Kenneway v. Matlack, Incorporated*, the respondent terminated the complainant after he refused to accept a driving assignment, which would have caused him to violate federal safety regulations governing maximum driving and on-duty time.<sup>28</sup> The respondent argued that it fired the complainant for vulgar and abusive language directed at the respondent’s dispatcher during a telephone conversation. Explaining that “[c]ourts have recognized that the use of intemperate language is associated with some forms of statutorily protected activities . . . due to the adversarial nature of these activities,” the Secretary found that any language on the complainant’s part was not offered in defiance to management authority, did not represent a refusal to follow reasonable instructions, and did not present a threat to shop discipline. Consequently, the Secretary held that the respondent failed to meet its burden to produce evidence of a legitimate, nonretaliatory reason.

Here, Schrieber refused to accept a driving assignment based on a reasonable fear of serious injury. In describing what followed the refusal, Schrieber explained,

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<sup>23</sup> *Kennedy v. Advanced Student Transp.*, ARB No. 09-145, ALJ No. 2009-STA-049, slip op. at 8 (ARB April 28, 2011) (quoting Black’s Law Dictionary 577 (7th ed. 1999)).

<sup>24</sup> *Id.* (quoting *Duprey v. Florida Power & Light*, ARB No. 00-070, ALJ No. 2000-ERA-005, slip op. at 6 (ARB Feb. 27, 2003)).

<sup>25</sup> *Kenneway v. Matlack, Inc.*, 1988-STA-20 (Sec’y June 15, 1989).

<sup>26</sup> *Id.*

<sup>27</sup> *Kennedy v. Advanced Student Transp.*, ARB No. 09-145, ALJ No. 2009-STA-049, slip op. at 8 (ARB April 28, 2011) (quoting *Abdur-Rahman v. DeKalb Cnty.*, ARB Nos. 08-003, 10-074, ALJ Nos. 2006-WPC-002, 003, slip op. at 11 (ARB May 18, 2010)).

<sup>28</sup> *Id.*

[the port employee] called me a “damned hillbilly.” And at that time I just—I told the man—I said—and I’ll be honest about it. I said, you know, “Where did you get your teeth at, you know, K-Mart?”

(Tr. 24). He also acknowledged the Qualcomm message—“not going to have somebody call me names and expect me to be calm.” Regardless, Schrieber was adamant that he did not “cuss.” (Tr. 27, 30, 37, 50, 53, 58). After the incident, Schrieber called Kewley, who described Schrieber’s behavior as “irate.” This testimony was credible, based on the parties’ first-hand knowledge, and is entitled to probative weight. I am convinced that the situation at the Camden port was confrontational and involved intemperate language.

Also relevant to this issue is the email from Rich Henry. According to the email, Schrieber “cussed at a guard.” (RX 1). And Kewley testified that Schrieber’s behavior was “harassing, aggressive, and derogatory” based on a discussion with a customer service representative that had contact with the broker. (Tr. 92, 96). For the reasons discussed above, I give little probative weight to the email. I also decline to rely on Kewley’s description of Schrieber’s behavior as being “harassing, aggressive, and derogatory.” He based this description on a discussion with a customer service representative that had contact with the broker. The broker did not testify at the hearing nor did any customer service representative. While I have credited Kewley’s description of Schrieber’s behavior (“irate”), I decline to rely on his description of Schrieber’s behavior that is based on hearsay.

Weighing the evidence on this issue, I rely on the testimony of Schrieber and Kewley. While I am not convinced that Schrieber used foul language, the circumstances surrounding his refusal to drive were no doubt confrontational. Indeed, intemperate language is associated with some forms of statutorily protected activities because of the adversarial nature of these activities. Schrieber’s outburst was plainly incidental to his protected activity. He attempted to contact the broker and his employer regarding the issue. His behavior only took place because he was engaging in protected activity. In considering the specific facts of this case, I find that Schrieber’s language did not defy management authority. He directed it at the shipper, not Beacon, and it arose out of a confrontational situation. Schrieber did not refuse to follow reasonable instructions. In fact, the evidence shows that following the New Jersey incident, Schrieber was on the road for Beacon for ten or eleven days, driving as far as California. (Tr. 35). Because this incident did not take place in front of other Beacon employees, I also find no threat to shop discipline. Accordingly, I

find that Beacon failed to show by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of that behavior.<sup>29</sup>

#### IV. Damages

A successful STAA complainant is entitled to abatement, reinstatement, compensatory damages, and punitive damages.<sup>30</sup> Schrieber seeks compensatory damages (including back pay), attorney's fees, and punitive damages. (Complainant's Brief 13-14).

##### A. Abatement

The Board has upheld decisions requiring the employer to expunge all negative or derogatory information from the complainant's personnel records relating to his protected activity or its role in the complainant's termination; to contact every consumer reporting agency to which it may have furnished a report about the complainant; to request that the reports be amended; and to conspicuously post copies of decision.<sup>31</sup>

##### B. Reinstatement

Although not requested by Schrieber, reinstatement is an automatic remedy under the STAA.<sup>32</sup> Reinstatement must be ordered unless it is impossible or impractical.<sup>33</sup> While the STAA expressly provides that a prevailing complainant is entitled to reinstatement, the statute does not prohibit voluntary waiver of that right. There is limited evidence on this issue, but the parties have not shown that

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<sup>29</sup> Cf. *Formella v. Schmidt Cartage, Inc.*, ARB No. 08-050, ALJ No. 2006-STA-35 (ARB March 19, 2009) (finding that the employee exceeded the leeway to which a whistleblower is entitled when the employee was angry and threatening — "He was in my face.").

<sup>30</sup> 49 U.S.C. § 31105(b)(3)(A)(i)-(iii), (C).

<sup>31</sup> See e.g., *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-22 (ARB Nov. 30, 2009); *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-8 (ARB July 28, 1999); *Michaud v. BSP Transp., Inc.*, 95-STA-29 (ARB Oct. 9, 1997); *Self v. Carolina Freight Carriers Corp.*, 91-STA-25 (Sec'y Aug. 6, 1992).

<sup>32</sup> 49 U.S.C. § 31105(b)(3)(A)(ii); *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-1 (ARB Apr. 7, 2010); *Dale v. Step 1 Stairworks, Inc.*, ARB Nos. 05-142, 06-057, ALJ No. 2002-STA-30 (March 31, 2005).

<sup>33</sup> *Dale*, ARB Nos. 05-142, 06-057, ALJ No. 2002-STA-30; see also *Dickey v. West Side Transp., Inc.*, ARB Nos. 06-150, 06-151, ALJ Nos. 2006-STA-26, -27 (ARB May 29, 2008) ("On remand, the ALJ should therefore order West Side to reinstate [the complainant] unless the parties demonstrate that circumstances exist under which reinstatement would not be appropriate.").

reinstatement would be impossible or impractical. In fact, at the hearing, Schrieber testified that he would have liked to remain employed with Beacon. (Tr. 112). Accordingly, I find that an order of reinstatement is appropriate.

### C. Back Pay

Schrieber is also entitled to back pay.<sup>34</sup> The Board has approved calculations of back pay based on the complainant's average weekly wage.<sup>35</sup> Schrieber testified that he received \$700 or \$800 per week at Beacon. As evidence of his earnings, Schrieber submitted a W-2 from 2009 showing that he earned \$31,513.40. (CX 1). Since Beacon fired Schrieber on October 2, 2009, Schrieber explained that \$31,513.40 represents earnings for nine months or January through September. (Complainant's Brief at 14).

Relying on Schrieber's testimony as corroborated by the 2009 W-2, I find that Schrieber earned an average of \$3,500 per month from January through September 2009. This equals approximately \$808 per week.<sup>36</sup> Although Schrieber testified that he earned between \$700 and \$800 per week, he did not indicate whether these amounts represented pre- or post-tax earnings. Uncertainties in calculating back pay are resolved against the discriminating party.<sup>37</sup> Accordingly, I will resolve the uncertainty in favor of Schrieber and will use an estimated weekly wage of \$808 to determine the amount of back pay.

Although he is entitled to back pay, Schrieber is required to mitigate his damages through the exercise of reasonable diligence in seeking alternative employment.<sup>38</sup> The mitigation of damages doctrine requires that a wrongfully discharged employee not only diligently seek substantially equivalent employment during the interim period but also that the employee acts reasonably to maintain such employment.<sup>39</sup> After his termination, Schrieber was out of work for about "a year and five or six months." (Tr. 42). He believed this was because of his "DAC Report." (Tr. 45). According to Schrieber, this report that contains information about "drivers and their performance at their jobs, safety, alcohol and drug abuse, just

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<sup>34</sup> 49 U.S.C. § 31105(b)(3)(A)(iii).

<sup>35</sup> See e.g., *Ass't Sec'y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34 (ARB Jan. 12, 2000); *Polger v. Florida Stage Lines*, 94-STA-46 (Sec'y Apr. 18, 1995).

<sup>36</sup> \$3,500/4.33 weeks/month = \$808/month

<sup>37</sup> *Kovas v. Morin Transp., Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993).

<sup>38</sup> *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-1, slip op. at 12 (ARB Apr. 7, 2010); (citing *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 95-STA-043, slip op. at 5 (ARB May 30, 1997)).

<sup>39</sup> *Id.* (citing *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-005, slip op. at 10 (ARB Dec. 30, 2002) and *Cook*, ARB No. 97-055, slip op. at 5).

pretty much all work history.” (Tr. 45). Schrieber testified that Bacon reported that he violated company policy and this interfered with his ability to find work. (Tr. 46).

Eventually, Schrieber found employment. He first worked for Rocky Trucking but quit that job “because they would not take care of their equipment. (Tr. 42-43). Two weeks after that job, he found his current employment. *Id.*

The burden is on an employer to establish any failure by a wrongfully discharged complainant to properly mitigate damages through the pursuit of alternative employment.<sup>40</sup> In *Dale v. Step 1 Stairworks, Inc.*, , the Board found that the administrative law judge had a duty to inform the pro se respondent that it had the burden of proof to show that the complainant had breached his duty to mitigate damages.<sup>41</sup> Here, as in *Dale*, Beacon appeared throughout this proceeding without the assistance of counsel. I now give Beacon notice that it bears the burden of proof to show that Schrieber breached his duty to mitigate damages.

The employer can satisfy its burden by establishing that “substantially equivalent positions were available [to the complainant] and he failed to use reasonable diligence in attempting to secure such a position.” A “substantially equivalent position” provides the same promotional opportunities, compensation, job duties, working conditions, and status.<sup>42</sup>

I will permit Schrieber and Beacon to more fully to address the mitigation issue before issuing a final award of back pay.

Finally, back pay liability ends when the employer makes a bona fide unconditional offer of reinstatement or when the complainant declines such an offer.<sup>43</sup> Tolling the employer’s liability is proper when a complainant obtains a higher-paying job.<sup>44</sup> As of the hearing on March 22, 2011, Schrieber had been employed “about three weeks.” He makes more in his current job than he made working at Beacon. *Id.* Based on Schrieber’s testimony, I will toll Beacon’s liability for back pay for three weeks prior to the hearing. The parties should clarify whether

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<sup>40</sup> *Id.*

<sup>41</sup> ARB No. 04-003, 2002-STA-30, slip. op. 7-8 (ARB Mar. 31, 2005)

<sup>42</sup> *Id.* (internal citations omitted).

<sup>43</sup> *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051, slip op. at 14, ALJ No. 2006-STA-1 (ARB Apr. 7, 2010) (citing *Dale*, ARB No. 04-003, slip op. at 6; *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 5-6 n.3 (ARB Oct. 9, 1997)).

<sup>44</sup> *Ass t Sec’y & Mulanax & Andersen v. Red Label Express*, 95-STA-14, -15 (Sec’y Nov. 1, 1995).



Schrieber remains employed at the higher-paying job, keeping in mind that Beacon bears the burden of proof on this issue.

#### *D. Interest*

Interest is due on back pay awards from the date of discharge to the date of reassignment.<sup>45</sup> Prejudgment interest accrues for the period following a complainant's termination until reinstatement.<sup>46</sup> Postjudgment interest accrues until the back pay is paid.<sup>47</sup> The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a)(1999), which is the IRS rate for the underpayment of taxes set out in 26 U.S.C.A. § 6621 (1999); the interest is to be compounded quarterly.<sup>48</sup>

#### *E. Other Compensatory Damages*

The purpose of compensatory damages is to make the complainant whole for the harm caused by the employer's unlawful act.<sup>49</sup> Citing this purpose, the Board affirmed an administrative law judge's award of compensatory damages for a bus ticket for the complainant's return home after he was terminated by the respondent.<sup>50</sup> Schrieber testified that when Beacon terminated him, he paid his own return home, which was "over two hundred miles." (Tr. 44; Complainant's Brief at 15). I find that Schrieber is entitled to reimbursement for this expense at an amount to be determined.

#### *G. Punitive Damages*

A successful STAA complainant may receive punitive damages in an amount not to exceed \$250,000.<sup>51</sup> The Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . . ."<sup>52</sup> The purpose of

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<sup>45</sup> *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), slip op. at 17-18 (citations omitted).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-1, slip op. at 15 (ARB Apr. 7, 2010) (citing *Smith v. Esicorp*, ARB No. 97-065, 97-112, ALJ No. 1993-ERA-016, slip. op. at 5 n.4 (ARB Aug. 27, 1998)).

<sup>50</sup> *Id.*

<sup>51</sup> 49 U.S.C. § 31105(b)(3)(C).

<sup>52</sup> *Smith v. Wade*, 461 U.S. 30, 51 (1983).

punitive damages is “to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.”<sup>53</sup>

Although Schrieber unsuccessfully attempted to obtain correction of the unsafe condition from Beacon, I do not find a reckless or callous disregard for Schrieber’s rights or an intentional violation of federal law on the part of Beacon. When a driver is not given the weight of a load, Beacon’s Safety Director advised that the driver contact the broker to get information about the weight. (Tr. 107). Consistent with this advice, Schrieber called the broker. (Tr. 28, 47, 48). He was unsuccessful. The evidence shows that the broker probably intentionally left the cargo weight off the bill of lading. Cooper’s testimony shows that this happened at least once before and in close temporal proximity to Schrieber’s load. Schrieber and Cooper testified that they never received a bill of lading without a weight before the incidents involving Crystal Logistics and the Camden port. A punitive damage award against Beacon Transport would not serve to punish or deter the appropriate entity.

### ORDER

Edward Schrieber’s claim for relief under the employee protection provisions of the STAA is **GRANTED**. I order the following:

1. *Abatement*. Beacon shall immediately expunge from Schrieber’s personnel records all derogatory or negative information contained therein relating to Schrieber’s protected activity or its role in Schrieber’s termination. Beacon shall further contact every consumer reporting agency to which it furnished a report about Schrieber to request that the reports also be so amended. Finally, Beacon shall post a written notice in a centrally located area frequented by Beacon’s employees for a period of thirty days advising that its disciplinary action taken against Schrieber has been expunged from his personnel record and that Schrieber’s complaint has been decided in his favor.
2. *Reinstatement*. Beacon shall offer to reinstate Schrieber to his former position with the same pay and terms and privileges of employment.
3. *Back Pay*. Beacon shall remit back pay with interest compounded quarterly at an amount to be determined in a supplemental order for a period beginning October 2, 2009, and ending on the date that Beacon makes a bona fide offer of reinstatement. Because I did not notify Beacon that it had the burden of proof to show that the complainant had breached his duty to

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<sup>53</sup> *Id.* (citing Restatement (Second) of Torts § 908(1) (1979)).

mitigate damages, Beacon is allowed **thirty days** to offer evidence on this issue. Schrieber may respond up to **twenty days** following receipt of Beacon's submission. Following the parties response, I will determine the amount of back pay owed by Beacon and issue an appropriate order.

4. *Other Compensatory Damages.* Beacon shall reimburse Schrieber for any expenses incurred in traveling from Nashville to his home on the date of his termination. Schrieber is allowed **thirty days** to submit evidence on this issue. Beacon may respond within **twenty days** following receipt of Schrieber's submission. I will determine the amount owed in a supplemental order.
5. *Attorney's Fees.* Beacon shall pay Schrieber's attorney reasonable fees and costs, to be determined in a supplemental decision and order. A period of **sixty days** is allowed for Schrieber's counsel to submit an application for attorney's fees and costs. Beacon must file any objections within **twenty days** following receipt of the application.

**A**

JOSEPH E. KANE  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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

Associate Solicitor, Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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

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