



Issue Date: 05 May 2011

CASE NO.: 2010-STA-00047

IN THE MATTER OF

**JOHN YOUNGERMANN,
Complainant**

vs.

**UNITED PARCEL SERVICE,
Respondent**

Appearances:

Paul Taylor, Esq.,
On behalf of Complainant

Vance Miller, Esq.,
On behalf of Respondent

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (“STAA” or “Act”) of 1982, as amended and re-codified, 49 U.S.C. § 31105 and the implementing regulations at 29 C.F.R. § 18.1 *et seq.* (2001). Under Section 31105(a) of the Act, a person is prohibited from discharging, disciplining, or discriminating against an employee regarding pay, terms, or privileges of employment because the employee has made a complaint “related to a violation of commercial motor vehicle safety regulations or refuses to operate a vehicle because to do so would violate a regulation, a standard, or order of the United States related to commercial motor vehicle safety, or health, or the employee has a reasonable apprehension of serious injury to the employee or public because of the vehicle’s unsafe condition.” 49 U.S.C. § 31105(a). Under Section 31105(a)(2), reasonable apprehension is defined as that which a reasonable employee, in the circumstances then confronting said individual, would conclude to be unsafe so as to establish a real danger of accident, injury, or

serious impairment to health, provided that employee sought, but was unable to obtain, correction of the unsafe condition. 49 U.S.C. § 31105(a)(2).

The Act protects employee complaints about vehicle-safety issues ranging from the voicing of concerns to one's employer to the filing of formal complaints related to commercial motor vehicle safety. 49 U.S.C. § 31105 (a)(1); *See Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 3-8 (ARB Feb. 28, 2003). For an employee to be protected under the complaint clause, it is necessary that complainant be acting on a reasonable belief regarding the existence of a violation. *Clean Harbors Env'tl. Servs., v Herman*, 146 F.3d 12 (1st Cir. 1998). The Act also protects two (2) categories of work refusals commonly referred to as "actual violation" and "reasonable apprehension" refusals. 49 U.S.C. § 32205 (a)(1), (B)(i)-(ii); *Artis Anderson v. Jaro Transportation Services et al.*, ARB No. 05-011, ALJ Nos. 2004 STA-2, 2004-STA-3; *Ass't Sec'y v. Consol. Freightways (Freeze)*, ARB No. 99-030, ALJ No. 98-STA-26, slip op. at 5 (ARB Apr. 22, 1999). For an employee to be protected under the actual violation category, the record must show that the employee's driving of a commercial vehicle would violate a pertinent motor vehicle standard. 49 U.S.C. 31105 (a)(1); *Freeze*, slip op. at 7. Under the reasonable apprehension category, an employee's refusal to drive is protected only if based on an objectively reasonable belief that operation of a motor vehicle would pose a serious injury to the employee and the public, and the employee has sought, but been unable to obtain, correction of the unsafe condition. 49 U.S.C. § 31105 (a)(2); *Young*, slip op. at eight (8); *Freeze*, slip op. at 7.

II. STIPULATIONS

At the commencement of the hearing, the parties stipulated (ALJX-1), and I find:

1. Respondent operates, inter alia, commercial motor vehicles having a gross weight rating of 10,001 pounds or more transporting property on the highways in interstate commerce. Respondent is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105. Respondent is also a commercial motor carrier within the meaning of 49 U.S.C. § 31101.
2. Complainant has been employed by Respondent from August 25, 1977, to the present at Respondent's Earth City, Missouri, facility ("ECH"). From about September 2000 to the present, Complainant has worked as a feeder driver operating tractor-trailer vehicle combinations having a gross vehicle weight rating of 10,001 pounds or more on the highways transporting property in interstate commerce.
3. On April 15, 2009, Respondent discharged Complainant.
4. On or about June 1, 2009, Complainant timely filed a complaint with the Secretary of Labor alleging that Respondent had discharged him and discriminated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105.

5. On or about April 22, 2010, the Secretary of Labor issued preliminary findings and an order pursuant to 49 U.S.C. § 31105.
6. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of this proceeding.
7. On April 15, 2009, Complainant was dispatched by Respondent to pick up a loaded trailer at a customer's facility and return it to the Earth City Hub ("ECH").
8. Complainant arrived at the customer's facility at approximately 7:23 p.m. April 15, 2009. After Complainant coupled his assigned truck-tractor to the trailer, FSTZ883932, at the customer's facility, he commenced a pre-trip inspection of the trailer. During the inspection, Complainant discovered that the trailer did not have working taillights or side marker lights. Additionally, Complainant discovered that one low beam headlamp on his assigned truck-tractor did not work. All other lights, including but not limited to the tractor's brake lights and the trailer's brake lights, turn signals, and flashers were working.
9. Complainant informed Respondent that his assigned trailer had no working taillights or side marker lights in addition to the fact that a low beam headlight was inoperable on the tractor. Complainant informed Respondent that he would not pull the trailer back to Respondent's facility at Earth City, MO, a distance of approximately 15 miles.
10. Respondent instructed Complainant to turn his high beams on and turn on his flashers and return to Respondent's facility. Complainant refused.
11. A supervisor, Daryn Kurik, arrived at the customer's facility accompanied by another of Respondent's drivers, Jerry Field, Mr. Kurik instructed Jerry Field to pull the trailer back to Respondent's Earth City facility. Mr. Field did so with Mr. Kurik following him in Mr. Kurik's vehicle.
12. Complainant rode with Mr. Kurik in Mr. Kurik's vehicle back to Respondent's Earth City facility. Upon Complainant's return back to Respondent's facility, Complainant's employment was terminated under Article 17(i) (other serious offenses) of Respondent's agreement with the International Brotherhood of Teamsters. At the time of his discharge, Al Worthy told Complainant that he was being discharged because he refused a supervisor's instruction.

13. After Complainant was terminated for his failure to follow a supervisor's instruction, Complainant's time card and the on board recording device (TACT Card) were pulled to compare them, and it was discovered they did not agree. Complainant was then terminated for Article 17(a) (Dishonesty) of the Union Agreement as well.
14. The letter discharging Complainant for refusing to drive (other serious offenses) was dated April 16, 2009. The records from the United States Postal Service (USPS) certified mail revealed that this letter bearing certified mail receipt number 700811830 00014186 9208, was received by the post office on April 17, 2009, and returned unclaimed May 5, 2009.
15. The letter discharging Complainant for alleged dishonesty was also dated April 16, 2009. The records from the United States Postal Service (USPS) reveal that this letter was received by the post office on April 21, 2009, and returned unclaimed May 8, 2009.
16. On or about April 15, 2009, Complainant filed a grievance pursuant to the collective bargaining agreement between Respondent and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America protesting his discharge.
17. During the initial processing of Complainant's grievance, Respondent reduced Complainant's discharge to a 10-day suspension and on April 30, 2009, Complainant reported to work. Complainant's grievance continued to be processed through the collective bargaining agreement's grievance procedure.
18. At a Deadlock Committee hearing on December 3, 2009, it was determined that Complainant's discipline should be reduced to a one day suspension without pay and Respondent should pay Complainant for time lost after the one day suspension. Respondent complied with the Joint Area Committee decision.

III. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Claimant was engaged in protected activity when he refused to drive the tractor-trailer.
2. Whether this court should defer to the parties private arbitration.

3. The appropriate remedies Complainant is entitled to, if any.

IV. STATEMENT OF THE CASE

Complainant holds a Missouri commercial driver's license with endorsements authorizing him to transport double and triple trailer vehicle combinations and has received safety awards from Respondent. (Tr. 23-24, 118-119). Complainant was first employed by Respondent on August 25, 1977, at its Earth City, Missouri, facility ("ECH"). Since September of 2000 to the present, Complainant has worked as a "feeder driver" operating tractor-trailer vehicle combinations having a gross vehicle weight rating of 10,001 pounds or more on the highways transporting property in interstate commerce. (Tr. 24-25).

Complainant operates tractor-trailer vehicle combinations picking up shipments from customers, exchanging with other drivers, and driving to other cities such as Chicago or Kansas City. (Tr. 24-25). On a typical work day, he is given dispatches at the start of the work day and provided a "dispatch slip" with his assigned trailer numbers on it. (Tr. 30). He performs an inspection of his assigned truck-tractor to ensure it is safe to operate. (Tr. 27-28). As part of his duties, Complainant is required to operate his assigned equipment in accordance with Department of Transportation ("DOT") regulations and to keep accurate time records via an onboard computer system. (Tr. 67, 231-32).

During his shift on April 15, 2009, Complainant engaged in a conversation with another employee who informed Complainant of some problems that he was having at work. This conversation lasted between a few seconds and a few minutes. (Tr. 27-28, 232-38). Although Complainant is a union steward, he was not this employee's union steward. (Tr. 120). A supervisor observed Complainant's conversation with the other employee and asked Complainant what the conversation was about. (Tr. 97-98, 197). Complainant was then reminded he was not to conduct union business on company time without a supervisor's approval. Complainant was upset with his supervisor when he left the office, but he received no warnings or discipline of any type for speaking with the other employee. (Tr. 120).

On April 15, 2009, Complainant was dispatched by Respondent to pick up an empty trailer at Respondent's yard and take it to a customer's facility where he was also to pick up a loaded trailer and return it to the ECH. (ALJX-1; Tr. 27). Complainant states he left the docks at 7:00 p.m., but he failed to properly enter the time when he left. (Tr. 106-07). Complainant arrived at the customer's facility at approximately 7:23 p.m. on April 15, 2009, and by this time it was "close to dark" outside. After Complainant coupled the tractor to trailer FSTZ883932 at the customer's facility, he commenced a pre-trip inspection of the trailer. During the inspection, Complainant discovered that the trailer did not have working taillights or side marker lights. Additionally, Complainant discovered that one low beam headlamp on his assigned tractor was not functioning. All other lights, including but not limited to the tractor's brake lights as well as the trailer's brake lights, turn signals, and flashers were working. (ALJX-1). The only lamps that illuminated on the back of the trailer were three clustered marker lamps. (Tr. 34). Complainant

attempted to correct the defect with the trailer lamps by wiggling the electrical cord that runs from the tractor to the trailer and by separating prongs on the connecting plug attached to the trailer. (Tr. 35). This has worked for him in the past when he has encountered similar electrical problems with trailers. (Tr. 35-36). Complainant informed Respondent that his assigned trailer had no working taillights or side marker lights also a low beam headlight was burned out on the tractor and also informed Respondent that he would not pull the trailer back to Respondent's facility at Earth City, MO, a distance of approximately 15 miles. (ALJX-1).

Complainant first spoke with Nick Puzzella, a UPS dispatcher, and informed Mr. Puzzella that his assigned trailer had inoperable marker lamps and tail lamps and had an inoperable license plate light. (Tr. 37, 189). Mr. Puzzella then put a mechanic, Dan Johnson, on the telephone. (Tr. 37, 108-109, 189). Mr. Johnson suggested that Complainant wiggle the connector and Complainant responded that he had already tried this without success. Nevertheless, Complainant shook the cord a second time which, once again, did not correct the problem. (Tr. 37).

Mr. Johnson suggested that Complainant spread the prongs on the electrical plug. He told Mr. Johnson that he had already tried that, but he did it again without success. (Tr. 38). Mr. Johnson suggested that Complainant try using a spare electrical cord, and he did so. However, the lights on the trailer did not illuminate. (Tr. 38, 109). Mr. Johnson asked Complainant if the brake lights and emergency flashers worked, and he responded that they did. (Tr. 109). Mr. Puzzella and Mr. Johnson each told Complainant that if he felt comfortable, he could bring the trailer back to Earth City. (Tr. 38-39, 109). Complainant stated that he was not comfortable driving the trailer back to the hub in its present condition. Mr. Johnson asked if he needed to get a supervisor on the line to instruct him to drive the trailer back to the Earth City Hub. (Tr. 39, 100). Complainant told him to do whatever he needed to do. The telephone connection was then cut off. (Tr. 39).

Complainant called back and spoke with Mr. Puzzella again. (Tr. 39, 190, 198). Mr. Pat Bryan then came on the telephone and asked Complainant about the situation; Complainant responded that his assigned trailer had no rear side marker lights, taillights, or license plate light. (Tr. 39-40, 198). Mr. Bryan then instructed Complainant that he had to bring the trailer back to the Earth City Hub, and Complainant responded that he did not think it was safe or legal to bring the trailer back to the hub. (Tr. 40).

At this point, Mr. Mike Redman - who is one of Respondent's Shop Supervisors - joined the telephone conversation between Complainant and Mr. Bryan. (Tr. 198-99, 203, 250). Complainant told Mr. Redman that his assigned trailer did not have operable rear side marker lamps, tail lamps, or license place lamp. During this conversation, Complainant observed that one of the truck-tractor headlights was out and informed Mr. Redman at that time. (Tr. 40-42, 111, 204, 250-51). Mr. Redman asked Complainant if the brake lights and emergency flashers worked on the trailer, and Complainant stated that they did. (Tr. 111-112, 199, 251). As a result, Mr. Redman instructed Complainant to drive the tractor and trailer back to the hub with the high beams and flashers on. Complainant refused this instruction stating that he did not think it was safe or legal to bring the trailer back to Respondent's facility in this condition. (Tr. 41, 199, 251).

Thereafter, Mr. Bryan also told Complainant to turn on high headlight beams and emergency flashers and to bring the trailer back to the hub. Complainant again refused the instruction stating that he did not believe it would be safe or legal to drive the truck-tractor and trailer. (ALJX-1; Tr. 40, 204-205, 251; RX-6, pg. 10).

Mr. Bryan then contacted Mr. Al Worthy – Respondent’s Division Manager – to resolve the dispute with Complainant. (Tr. 161, 199; CX-2, pg. 1). Mr. Bryan told Mr. Worthy that the trailer was in jeopardy of “missing the twilight sort.” (Tr. 214). While speaking to Complainant on the telephone, Mr. Worthy asked Complainant what was wrong with his assigned trailer, and Complainant informed Mr. Worthy that the trailer did not have operable rear side marker lamps, tail lamps, or license plate lamp. (Tr. 215). He also told Mr. Worthy that he had recently discovered that one headlamp on the tractor was not operating properly. (Tr. 41, 155, 161-62, 251; CX-2, pg. 1).

Mr. Worthy then asked Mike Redman if Complainant could pull the trailer, and Mr. Redman responded that he could. (Tr. 215). Mr. Worthy then instructed Complainant to drive back to the hub using the tractor’s high beams and emergency flashers. (Tr. 42, 216, ALJX-1). Complainant refused Mr. Worthy’s instruction informing him that he did not feel safe pulling the trailer and that it was not legal to do so. (Tr. 42-43, 216, 251; ALJX-1; CX-2, pg. 1).

Complainant testified that he did not believe it was safe to pull the trailer because it was dark and because there was a risk that someone could rear end the trailer. In addition, while the emergency flashers are operating he would not be able to signal lane changes. (Tr. 54-55). He also believed that it would be hazardous to drive the truck-tractor with the headlight’s high beams activated. (Tr. 56).

Consequently, Mr. Worthy told Complainant to wait where he was and that he, Mr. Worthy, would pick him up. (Tr. 43). Mr. Worthy then instructed Daryn Krulik, one of Respondent’s Supervisors, to select a driver to pick up the trailer. (Tr. 216). Approximately one-half hour later Mr. Krulik arrived with Jerry Fields, another Feeder Driver. (Tr. 43, 136, 140). Complainant told Mr. Fields that he had a headlight out on the tractor and that the tail lamps and the rear side marker lamps on the trailer did not work. (Tr. 43, 140). After verifying that these lamps did not work, Mr. Fields asked Complainant if he had tried changing the electrical cord that connects from the tractor to the trailer. (Tr. 44-45, 141-42, 150). Complainant stated that he had and showed Mr. Krulik that the side marker lamps and tail lamps on the trailer were not working. (Tr. 45, 180; CX-3).

Mr. Krulik had instructions from Respondent to have Mr. Fields bring the trailer back and to have Complainant ride back with him to the Earth City. (Tr. 181). Mr. Krulik told Mr. Fields to drive the truck and trailer back to the Earth City Hub. (CX-1; Tr. 146). However, Mr. Fields told Mr. Krulik that he would not drive the trailer back to the ECH unless Mr. Krulik agreed to drive directly behind him because he would not be able to communicate with other vehicles to notify them of any lane changes due to the lack of turn signals. (Tr. 143, 147). Mr. Krulik agreed to follow Mr. Fields back to Respondent’s facility, and Complainant rode back with Mr. Krulik. (Tr. 44-46, 113). As Mr. Krulik and Complainant followed Mr. Fields on the way back to ECH, Mr. Fields had difficulty while attempting to exit to the Earth City Expressway because he was

not able to properly signal his intentions to other vehicles. (Tr. 144-45, 152-53). Complainant observed that when Mr. Fields hit a bump in the road the tail lamps on the trailer illuminated. (Tr. 46, 182; CX-1). Because it was slightly past 9:00 p.m. when Mr. Krulik and Mr. Youngermann returned to the ECH, the load on the trailer missed the “Twilight Sort” which disappointed Mr. Worthy because it resulted in reduced service to customers. (Tr. 162-163, 183; CX-2, pg. 1).

When Complainant arrived at the ECH, Mr. Worthy instructed him to stand by the parked trailer. A manager, Daryl Bradshaw, then took photographs of the trailer. (Tr. 48). Although the lamps on the trailer were all working at that point, Mr. Krulik told Mr. Worthy that when he had arrived at the customer’s facility, as Complainant had stated, the tail lamps and the side marker lamps were not functioning. (Tr. 53, 183, 228; RX-10).

Thereafter, Complainant - accompanied by his union steward, Bill Stallhuth - went to Mr. Worthy’s office along with Respondent’s managers including Mr. Bradshaw, Mr. Bryan, and Mr. Redman. (Tr. 53, 218, 254). During the meeting in Mr. Worthy’s office, Mr. Redman read aloud from a book setting forth the differences between Appendix G to 49 C.F.R. Part 396 and the Out-of- Service Criteria. (Tr. 57, 225, 265). Mr. Redman stated that defective tail lights and side marker lights were not out of service items under the Out of Service Criteria. (Tr. 225, 254).

The Out of Service Criteria are published by the Commercial Vehicle Safety Alliance (“CVSA”) and used by law enforcement officers during roadside inspections. (Tr. 269-70). Enforcement Officers may place a vehicle out of service “only when by reason of its mechanical condition or loading [the vehicle] is to be determined so imminently hazardous as to likely cause an accident or breakdown, or when conditions would contribute to the loss of control of the vehicle by the driver.” The Enforcement Officer is given a certain amount of discretion in determining whether to place the vehicle out of service at the inspection site or whether it would be less hazardous to allow a vehicle to proceed to a repair facility. During a roadside inspection, Enforcement Officers may allow equipment to be driven up to twenty-five (25) miles for repair. (Tr. 224).

Mr. Redman believed that if Complainant was stopped by the DOT while driving the trailer that he had been assigned to pick up, he would have been cited for having a non-critical violation of DOT regulations (Tr. 275). Mr. Redman has had Respondent’s vehicles towed because the equipment defects were out of service defects, and he was aware that operating without working marker lamps and working tail lamps is a violation of DOT regulations. (Tr. 226, 264). While testifying, Mr. Worthy affirmed that he believed it was a violation but that it would not lead to being put out of service. (Tr. 226).

Respondent sent a letter, signed by Mr. Worthy, to Complainant dated April 16, 2009, indicating that he had been fired under Article 17(i) (other serious offenses) of Respondent’s agreement with the International Brotherhood of Teamsters for disobeying a supervisor’s instructions to pull the trailer back to the Earth City facility. (Tr. 54, 55, 159; ALJX-1; CX-4). The United States Postal Service certified mail records reveal that this letter was received by the post office on April 17, 2009, and returned unclaimed May 5, 2009. (ALJX-1; CX-4).

On April 16, 2009, Complainant's union steward filed a grievance for him over his discharge under the contractual grievance process. (Tr. 60; CX-6, pg. 1). On April 20, 2009, the parties attended a local level grievance hearing. (Tr. 60). The hearing was a meeting between the employer and the union to discuss Mr. Youngermann's discharge and grievance. (Tr. 62). Respondent offered to reinstate Complainant, and Complainant countered that he would accept reinstatement but that he wanted to retain the right to pursue the grievance for time lost and back pay. (Tr. 60-61). Eventually, the JAC Deadlock Committee issued an opinion stating Complainant's suspension should be reduced to a one day suspension and Respondent should pay Complainant for lost wages. (Tr. 75-76).

After Complainant was discharged for his failure to follow a supervisor's instruction, Complainant's time card and the on board recording device for April 15, 2009, were pulled for comparison at which point Respondent discovered a discrepancy. Thereafter, Complainant was sent a "Corrected Copy" letter indicating that he was fired for (1) Dishonesty under Article 17(a) of the Collective Bargaining Agreement and (2) for "other serious offenses." (CX-5; ALJX-1; Tr. 237). The "Corrected Copy" letter discharging Complainant was also dated April 16, 2009, the same date as the earlier letter of termination. However, the letter was not mailed until April 21, 2009. While an additional reason was added, the second letter of termination still stated that Complainant was being terminated under Article 17(i) of the collective bargaining agreement for "other serious offenses". (ALJX-1; CX-5, pg. 2).

V. DISCUSSION

On August 3, 2007, Congress amended the STAA to include the legal burdens of proof under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) 49 U.S.C.A. § 42121 (Thomson/West 2007). Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007) codified at 49 U.S.C.A. § 31105(b)(1) (Thomson/West Supp. 2010) ("All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)."). Under § 42121(b) of AIR 21, a complainant must prove at the hearing stage that protected activity was a "contributing factor" in an adverse action prohibited under the statute. Furthermore, under AIR 21, now applicable to STAA, notwithstanding a finding that protected activity contributed to the adverse action, a tribunal may not award relief if the employer "demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C.A. § 42121(b)(2)(B)(1), (4).

Under the STAA as amended, to prevail on his claim, Complainant would have to prove by a preponderance of the evidence that: (1) he engaged in STAA-protected activity; (2) Respondent was aware of his protected activity; (3) Respondent subjected him to an adverse action; and (4) Complainant's protected activity was a contributing factor in the discharge. Furthermore, relief cannot be granted if Respondent proves by clear and convincing evidence that it would have taken the adverse action even if he had not engaged in protected activity. *Cf. Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, -074, ALJ No. 2006-AIR-014, slip op. at 8 (ARB Sept. 30, 2009).

The parties have stipulated that Complainant's refusal to follow instructions to drive the tractor and trailer was the initial reason he was discharged. (See Stipulation 12). In essence, the parties have stipulated that Respondent was aware of Complainant's actions and these actions were a contributing factor in Complainant's discharge. Thus, if Complainant's actions constitute protected activity, then a finding in his favor is appropriate.

A. Claimant's Case

In this case, Complainant alleges he engaged in protected activity when he refused to drive as instructed due to the condition of the truck and trailer. The STAA protects a driver who refuses to drive in two situations: the actual violation situation and the reasonable apprehension situation. First, a driver is protected under the actual violation category if the driver refuses because driving would actually violate a regulation related to commercial motor vehicle safety, health, or security. 49 U.S.C.A. § 31105(a)(1)(B)(i). Second, a driver is protected under the reasonable apprehension category if he refuses because he has a reasonable apprehension of serious injury to himself or the public because of the vehicles condition and the employer does not correct the safety hazard. 49 U.S.C.A. § 31105(a)(1)(B)(ii).

Complainant alleges he refused to operate the truck because the trailer's tail lamps and side marker lamps were inoperable and the truck's low beam bulb in one head light was not working. Further, if he had not refused and did actually drive, then he would have been driving in violation of Sections 392.7, 393.1, 393.9, 393.11, 393.24, 396.3, 396.7, and 396.13 of the Code of Federal Regulations.

Respondent admits the truck and trailer were having lighting issues and also admits Complainant followed proper procedures by attempting to remedy the problems and by informing dispatch of the situation. Further, respondent admits that it would not have allowed "this trailer to leave the ECH with the lighting issues it had."¹ Respondent claims these facts are not pertinent and the real issue is whether the truck could have been driven back to the ECH for repairs under the Out of Service Criteria ("OSC"). According to Respondent, the OSC are used to determine whether equipment that is on the road and having trouble can legally be brought to the repair facility.

Respondent argues that the brake lights, the turn signals, and the emergency flashers on the trailer were operational; therefore, it was legal under the *North American Standard Vehicle Out-of-Service Criteria* to bring the equipment back to the ECH repair facility. Further, since it was legal under the OSC the operation of the vehicle would not violate a DOT regulation. Respondent argues that the Out of Service Criteria only require one stop light and functioning turn signals on the rear most vehicle of a combination to be operative at all times. The OSC also only requires one head lamp and one tail lamp to be operative during the hours of darkness.

Nothing in regulations or in the interpretations sanctioned by the DOT appears to support this argument. In fact, Appendix G of the regulations requires that "all lighting devices required

¹ Respondent's Brief p. 12

by section 393 to be operative at all times." Section 393.9 states, "All lamps required by this subpart shall be capable of being operated at all times. This paragraph shall not be construed to require that any auxiliary or additional lamp be capable of operating at all times." 49 C.F.R. § 393.9(a). Furthermore, among other things Section 393.11 requires headlamps; tail lamps; stop lamps; license plate lamp (rear); and turn signal (rear). 49 C.F.R. § 393.11; *See also* 49 C.F.R. § 393.11 Table 1.

The OSC are a reference guide developed and maintained by the Commercial Vehicle Safety Alliance - an association of state, local, provincial, and federal officials - to assist enforcement personnel in deciding whether to allow a driver, found in violation of the law, to continue in commerce. Thus, they apply only to authorized safety inspections of vehicles on the road. Further, the Supplementary Information guidance states that the out-of-service criteria "are usually less stringent" than the regulations in that they allow a violation of a regulation to continue if it presents no immediate or undue threat to public safety. 63 Fed. Reg. 38792 (1998). *See Appendix A, North American Standard Vehicle Out-of-Service Criteria, Policy Statement (Handbook Edition, 2002).*

In this case, the trailer was parked at a customer's facility and no enforcement personnel were involved. Therefore, the out-of-service criteria do not apply. Because it is undisputed that the trailer's tail lights and side markers as well as one head lamp on the tractor were not in working order, the undersigned finds operating the truck would have violated, *inter alia*, Section 393.9. Thus, I find that Complainant's refusal to drive the tractor trailer combination was protected activity under Section 31105(a)(1)(B)(i). 49 U.S.C.A. § 31105(a)(1)(B)(i). Moreover, based on the testimony regarding the telephone conversation between Complainant and various representatives of Respondent, I find that Respondent had knowledge of the protected activity.

Moreover, Complainant clearly informed Respondent that he did not find the tractor-trailer to be in suitable condition to operate on the highway. Clearly, Complainant was not satisfied that the tractor-trailer's lighting was in good working order.² Because Complainant's belief was reasonable, operating the vehicle would have been a violation of Section 392.7. 49 C.F.R. § 392.7.

According to testimony, Complainant was discharged for failure to follow instructions after he was instructed to drive the trailer back to the ECH and he refused. Further, Mr. Worthy's testimony clearly shows that he was aware that Complainant's refusal to drive was based on the condition of the truck and trailer. In addition, Mr. Worthy testified that he informed Complainant that he was being discharged for failure to follow the instruction to drive the trailer

² § 392.7 **Equipment, inspection and use.** "(a) No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed: Service brakes, including trailer brake connections; Parking (hand) brake; Steering mechanism; **Lighting devices and reflectors;** Tires; Horn; Windshield wiper or wipers; Rear-vision mirror or mirrors; Coupling devices. (b) Drivers preparing to transport intermodal equipment must make an inspection of the following components, and must be satisfied they are in good working order before the equipment is operated over the road. Drivers who operate the equipment over the road shall be deemed to have confirmed the following components were in good working order when the driver accepted the equipment: Service brake components that are readily visible to a driver performing as thorough a visual inspection as possible without physically going under the vehicle, and trailer brake connections; Lighting devices, lamps, markers, and conspicuity marking material . . ."

back to the ECH. (Tr. 157). As such, I find Respondent discharged Complainant because of his protected activity. In other words, Complainant's protected activity was a contributing factor in his discharge.

In summary, the undersigned finds Complainant has established by a preponderance of the evidence that (1) he engaged in protected activity; (2) Respondent was aware of Complainant's protected activity; (3) Complainant was subject to adverse action; and (4) Complainant's protected activity was a contributing factor in Respondent's adverse action. Therefore, the undersigned will find in favor of Complainant unless Respondent has shown by clear and convincing evidence that it would have taken the same action even if Complainant had not engaged in the protected activity. *See Douglas v. Skywest Airlines, Inc.*, ARB Nos 08-070, -074, ALJ No. 2006-AIR-00014 (ARB Sept. 30, 2009).

Respondent argues that Complainant was discharged for failing to perform job functions as well as falsifying time cards. However, the parties stipulated that this decision was not made until after Complainant was discharged, and logic does not allow for a fired employee to be terminated. Moreover, the record clearly establishes that Respondent does not discharge employees for inaccuracies on their time cards. (Tr. 66-67, 127, 138-39, 145-48, 154, 171, 184, 207-08, 241-42). In addition, Mr. Worthy testified that he "never" disciplines drivers for forgetting to "code" items on the in-truck recorder. (Tr. 171). Therefore, this reason is a mere pretext for firing Complainant.

In this case, Respondent's main argument was that Complainant's refusal to drive was not protected activity because driving the truck would not have constituted a violation of the Out of Service Criteria; thus, according to Respondent, Complainant's refusal was not protected activity. As noted above, I find Complainant was engaged in protected activity and, therefore, Respondent's discharge was in violation of the STAA.

B. Private Arbitration

Respondent also requests the undersigned defer to the parties' contractual grievance and arbitration procedure. Under Section 1978.112(c), deferral to the outcome of other proceedings initiated by complainant may be made where it is clear that (1) those proceedings dealt adequately with all factual issues; (2) the proceedings were fair, regular, and free of procedural infirmities; and (3) the outcome of the proceedings was not repugnant to the purpose and policy of the STAA. 29 C.F.R § 1978.112(c).

However, as Respondent points out the dispute resolution procedures of the collective bargaining agreement have been designed to resolve disputes quickly and informally. As noted above, the undersigned finds Complainant engaged in protected activity and Respondent discharged him in violation of the STAA. In addition, the "grievance board" found it appropriate that Complainant be suspended for one day. Therefore, to defer to the grievance board's decision would be to affirm an adverse action taken against Complainant for engaging in protected activity. Clearly, such an action by the undersigned would be repugnant to the purpose and policy of the STAA. Thus, I find it is inappropriate to defer to the grievance board's decision.

C. Relief Requested

Complainant asserts he is entitled to certain relief under the STAA if successful. Complainant requests the following: (1) Back Pay for lost wages in the amount of \$2,617.06; (2) Expenses in the amount of \$210.00; (3) Damages for emotional distress and mental pain in the amount of \$10,000.00; (4) Punitive damages in the amount of \$250,000.00; (5) Interest on the damages awarded; (6) Attorney's fees and costs; and (7) Abatement of the Violation, including an order requiring Respondent to post notice of this decision for 120 consecutive days and to publish the notice in Respondent's employee magazine and also including an order requiring Respondent to expunge all information related to Complainant's discharge from its personnel records.

On the other hand, Respondent asserts Complainant is not entitled to any award because it did not act in violation of the STAA. Alternatively, Respondent argues that (1) Reinstatement is not proper because Complainant has already been reinstated; (2) Considering what Respondent already paid, Complainant is not owed any additional back pay; (3) Emotional damages are not appropriate; (4) Punitive damages are not appropriate because Respondent acted in good-faith and complied with the law as it understands it; (5) Posting any Notice is inappropriate; and (6) Respondent has already expunged Complainant's record in accordance with the collective bargaining agreement.

1. Back Pay and Reinstatement

When a complainant is suspended or discharged in violation of the STAA said individual is generally entitled both to reinstatement and back pay. Back pay is due a Complainant for the time period of his until Respondent makes a bona fide, unconditional offer of reinstatement or, in very limited circumstances, when an employee rejects a bona-fide offer.

A successful STAA complainant is also entitled to pre- and post-judgment interest on a back pay award. However, a complainant has the duty to exercise reasonable diligence to attempt to mitigate back pay damages. Respondent on the other hand has the burden to prove a failure to mitigate. *Assistant Secretary of Labor for Occupational Safety and Health et al v. R & B Transportation, LLC et al*, ARB Case No. 07-084, ALJ Case No. 2006-STA-012 (June 26, 2009); *Johnson v. Roadway Express, Inc.* ARB No. 99-011, ALJ No. 1999-STA-56 (ARB Mar. 29, 2000).

An unconditional offer of reinstatement precludes a subsequent order of reinstatement. *Giandonato v. Sybron Corp.*, 804 F.2d 120 (10th Cir. 1986). Since Respondent has already offered and Complainant has already accepted an offer of reinstatement in this case, any order of reinstatement would be precluded. Based on the record, it appears Complainant has been fully restored to his former position, and as a result no order of reinstatement is required.

An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA. *Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992), *citing Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec'y Aug. 21, 1986), slip op. at 50, *aff'd sub nom., Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). Back pay awards to victorious whistleblowers in DOL adjudications are to be calculated in accordance with the make whole remedial scheme embodied in § 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988). *See Loeffler v. Frank*, 489 U.S. 549 (1988). Uncertainties in calculating back pay are resolved against the discriminating party. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993).

Where an employer is found to have violated STAA, 49 U.S.C. app. § 2305, and the complainant is found to be entitled to an offer of reinstatement to his or her former position and to back pay, the employer's liability for back pay continues until such time as the employer reinstates the complainant or makes him a bona fide offer of reinstatement. *Polewsky v. B & L Lines Inc.*, 90-STA-21 (Sec'y May 29, 1991). In *Hobson v. Combined Transport, Inc.*, the ARB stated that "[b]ack pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement or, in very limited circumstances, when the employee rejects a bona fide offer, not when the employee obtains comparable employment." *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008).

Because I find Respondent in violation of the STAA, Complainant is entitled to back pay from the date of his discharge, April 15, 2009, until he was reinstated to his former position, April 30, 2009. During this period, Complainant was unemployed and without pay for a period of ten (10) days.

Regarding calculation of the amount owed for back pay, the ARB approved the following method for calculation of back pay:

- (1) Determine the number of straight and overtime hours worked by the complainant during the relevant time period.
- (2) Divide the total hours by the number of weeks in the period to determine an average number of hours worked per week.
- (3) Multiply the weekly average of straight and overtime hours by the complainant's straight time pay rate and his overtime pay rate, producing an average weekly wage.
- (4) Determine the number of weeks in which the complainant lost wages.
- (5) Multiply the average weekly wage by the number of weeks of lost work. Add straight time pay for holidays that would have been paid.
- (6) Deduct interim earnings

Ass't Sec'y & Cotes v. Double R. Trucking, Inc., ARB No. 99-061, ALJ No. 1998-STA-34 (ARB Jan. 12, 2000).

In this case, the only available wage records show Respondent paid to Complainant \$82,281.83 in wages during the entirety of 2009. (CX-8). Therefore, the undersigned must use 2009 as the relevant time period. However, the wages include back pay already paid to Complainant as well as time that Complainant was not allowed to work. Based on the information available, the undersigned has determined that in 2009 Complainant earned \$80,199.59 while working 49.6 weeks.³ Further, Complainant worked an average of 10.61 hours of overtime per week in 2009, assuming 40 hours per week at straight time.⁴ Thus, Claimant's average weekly wage was \$1,617.06 resulting in a total amount of back pay owed of \$3,880.94.⁵ However, this should be reduced by \$2,082.24, the amount of back pay Respondent has already paid Complainant. This results in \$1,798.70 in back pay still owed to Complainant from 2009. In addition, Complainant seeks back pay for a day of work lost on October 26, 2010, due to the hearing in this case. The undersigned finds this is required in order to make Complainant whole and will therefore add an additional one-fifth (0.2) of a week for an amount of back pay due totaling \$2,122.12.

³ This was calculated by subtracting the back pay previously paid (December of 2009) from the total wages shown on Complainant's W-2 [(82,281.83 - 2,082.24) = \$80,199.59]. Also, the time Complainant lost in 2009 due to Respondent's actions (10 day suspension plus 2 days to attend hearings) was subtracted from 52 weeks. (52 weeks - 2.4 weeks) = 49.6 weeks.

⁴ The following formula was used: WAGES = (Straight Time hours x's Straight Time rate) + (Over Time hours x's Over Time rate). If "Y" represents Complainant's Over Time hours then Y = (WAGES - (Straight Time hours x's Straight Time rate)) / (Over Time rate). Thus, Y = (\$80,199.59 - ((49.6 x's 40) x's 28.92)) / (43.38) or (\$80,199.59 - \$57,377.28) / (\$43.38) or 22,822.31 / 43.38 or 526.10 Over time hours in 49.6 weeks. 10.61 over time hours per week

⁵ Average Weekly Wage = (Straight time hours x's Straight time rate) + (Over Time hours x's Over Time rate). AWW = (40 x's 28.92) + (10.61 x's 43.38) or (1,156.80) + (460.26) = \$1,617.06 per week. Back Pay = (AWW x's time lost) or (1617.06 x's 2.4 weeks) = \$3,880.94.

The ARB has also instructed that an ALJ should determine the pre-judgment and post-judgment interest on the back pay award. *See Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 99-STA-34, slip op. at 9 (ARB Dec. 29, 2000). In calculating the interest on back pay awards under the STAA, the rate used is that charged for underpayment of federal taxes. *See* 26 U.S.C.A. § 6621(a)(2) (West 2002); *Drew v. Alpine, Inc.*, ARB Nos. 02-044, 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003). Moreover, the interest accrues, compounded quarterly, until the Respondent pays the damages award. *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); *see Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 18-21 (ARB May 17, 2000) (outlining the procedures to be followed in computing the interest due on back pay awards). Pursuant to the instruction of the ARB, the undersigned has calculated that as of April 1, 2011, Respondent owed Complainant \$2,968.53 in back pay including interest.⁶

⁶ The following tables are a summary of the undersigned's method of calculating the interest and total amount owed.

Quarter	Monthly AFR			Average	Rounded	Plus 3
3rd 2009	0.83	0.76	0.75	0.78	1	4
4th 2009	0.82	0.83	0.84	0.83	1	4
1st 2010	0.75	0.71	0.69	0.72	1	4
2nd 2010	0.57	0.72	0.64	0.64	1	4
3rd 2010	0.67	0.79	0.74	0.73	1	4
4th 2010	0.61	0.53	0.46	0.53	1	4
1st 2011	0.41	0.35	0.32	0.36	0	3
2nd 2011	0.43	0.51	0.54	0.33	0	3

Quarter	Back Pay	Rate	New Princ. Owed	Adjustments	
3rd 2009	\$3,880.94	4%	\$4,036.18	0	1
4th 2009	\$4,036.18	4%	\$4,197.62	0	1
1st 2010	\$4,197.62	4%	\$2,200.00	(-) \$2,082.24	Paid in 12/09
2nd 2010	\$2,200.00	4%	\$2,288.00	0	1
3rd 2010	\$2,288.00	4%	\$2,379.52	0	1
4th 2010	\$2,379.52	4%	\$2,474.70	(+) \$323.42	Missed Work Day 10/10
1st 2011	\$2,474.70	3%	\$2,882.06	0	0
2nd 2011	\$2,882.06	3%	\$2,968.53	0	0
3rd 2011	\$2,968.53				

2. Expenses

Complainant also seeks to recover expenses in the amount of \$100.00 for hotel cost and \$110.00 for mileage.⁷ Regarding compensatory damages the ARB has stated:

The STAA does not define "compensatory damages." Black's Law Dictionary defines the term to mean "[d]amages sufficient in amount to indemnify the injured person for the loss suffered." Compensatory damages is synonymous with "actual damages," which is the amount awarded to "compensate for a proven injury or loss; damages that repay actual losses." The purpose of a compensatory damage award is to make the complainant whole for the harm caused by the employer's unlawful act. Put another way, compensatory damages are meant to restore the employee to the same position he would have been in if not discriminated against. Compensatory damages are designed to compensate discriminates not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering.

Hobson v. Combined Transport, Inc., ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008). In order to put Complainant in the position he would have been absent Respondent's actions, the undersigned finds it necessary to compensate him for the travel expenses associated with defending his refusal to drive in a union hearing. Therefore, I find it appropriate to award Complainant \$210.00 in expenses as requested.

3. Emotional Distress

An employer who violates the employee protection provision of the STAA and in so doing causes the employee to experience mental and emotional distress may be held liable for compensatory damages. *Moyer v. Yellow Freight System, Inc.*, 89-STA-7 (Sec'y Aug. 21, 1995) slip op. at 23-24 n. 16. An employer whose discriminatory conduct aggravates an employee's pre-existing condition is liable for the effects of its illegal action on the employee. *Id.* slip op. at 26-27.

Complainant asserts he is entitled to emotional damages because he was depressed due to his loss of employment and prospective financial situation. More specifically, Complainant had recently moved his elderly parents into his own home and purchased a new house and, thus, was concerned about his ability to pay two house notes and to support his parents while unemployed. However, Respondent argues that Complainant's actions do not demonstrate that he was emotionally distraught and generally attacks Complainant's credibility on this issue. Moreover, Complainant was not forced to sell any assets, was not unable to care for his parents, was not unable to purchase the new house, and did not seek or receive medical treatment.

The Board has affirmed a \$10,000 compensatory award for emotional distress based on the Complainant's testimony about depression and distress he experienced as the result of his

⁷ These costs are associated with Complainant's travel to Columbia, MO, for a grievance hearing against Respondent. The mileage requested is 200 miles at \$0.55 and totals \$110.00.

discharge, about having to live off his retirement savings as a result of his discharge, and about his continued unemployment. *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63 (ARB June 30, 2008). The ARB acknowledged that the Complainant had turned down a comparable job, but nonetheless affirmed the ALJ's award. *Id.* The ARB also affirmed the ALJ's reliance on his observation of the Complainant's distress during the hearing. *Id.*

In *Hobson v. Combined Transport, Inc.*, the ARB affirmed the ALJ's award of \$5,000 in compensatory damages for stress and anxiety which was based solely on the Complainant's testimony and was not supported by medical evidence. *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008). The ARB noted that the ALJ had found the testimony credible, that it was unrefuted, and that the ARB has affirmed reasonable emotional distress awards that had been based solely on the employee's testimony. *Id.*

However, in *Simon v. Sancken Trucking Co.*, the ALJ found that the Complainant suffered emotional distress as a result of his termination and inability to find permanent employment, and awarded \$5,000.00 in compensatory damages. *Simon v. Sancken Trucking Co.*, ARB No. 06-039, -088, ALJ No. 2005-STA-40 (ARB Nov. 30, 2007). The ARB found no documentary evidence in the record supporting any loss of reputation or mental anguish, and therefore reversed the compensatory damages award, holding that emotional distress may not be presumed but must be proven. *Id.*

In *Jackson v. Butler & Co.*, the ARB affirmed the ALJ's award of \$4,000 for emotional distress based on the testimony of the Complainant and his wife, even though that testimony was not supported by evidence of professional counseling or other medical evidence, where the testimony was unrefuted by the Respondent. *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004).

In *Calhoun v. United Parcel Service*, the ALJ found that the Respondent violated the STAA when it disciplined the Complainant for making pre-trip inspections that were more extensive than the Respondent's standard procedure (but which the ALJ found were reasonable). *Calhoun v. United Parcel Service*, 2002-STA-31 (ALJ June 2, 2004). The ALJ found, based on his observations of the Complainant at two hearings, that the Complainant had suffered emotional distress as a result of the Respondent's retaliatory actions. *Id.* The Complainant had sought treatment with a psychologist, and the Respondent had not challenged whether Complainant suffered such distress. *Id.* Reviewing other emotional damages awards to make a comparative award, the ALJ concluded that a modest award of \$2,000 for emotional damages was appropriate under the facts of the case. *Id.* The ALJ found that the Respondent's retaliation was not as egregious as taken by some employers in other cases and the evidence of emotional damage was not as extensive as in other cases. *Id.*

In this case, Complainant has requested \$10,000 in emotional damages. Considering Complainant was only out of work for ten (10) days, the undersigned finds this amount excessive. I do however credit Complainant's testimony regarding his emotional state. The

undersigned finds it both reasonable and likely that an employee of thirty-two (32) years would suffer depression and distress after being wrongfully terminated. In addition, I find Complainant has shown that he did in fact suffer such distress. Therefore, I find, after comparing other cases, that an award of \$5,000.00 is appropriate.

4. Punitive Damages

Complainant also requests punitive damages in the amount of \$250,000. Under the STAA, relief may include punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 31105(b)(3)(C). 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" *Smith v. Wade*, 461 U.S. 30, 51 (1983). The record in this case shows Respondent repeatedly ordered Complainant to drive a vehicle in violation of the regulations. Respondent has asserted that it did not and does not believe it is a violation of the regulations to drive a vehicle in that condition because the tractor-trailer did not violate the Out of Service Criteria.

Even considering this, I find punitive damages appropriate in this case. First, Respondent acted with callous disregard for Complainant's rights when it continuously instructed him to drive a vehicle in violation of the regulations. In addition, Respondent attempted to convince Complainant through misinformation that it was in fact not a violation to drive the truck in its condition. At the very least, Respondent showed a complete disregard for the safety of Complainant and the public by continuously instructing Complainant to drive the truck after he repeatedly stated he did not feel it was legal or safe. Based on the foregoing, the undersigned finds an award of punitive damages in the amount of \$100,000.00 to be appropriate.

5. Attorney Fees

Complainant also requests an award of attorney's fees and costs; however, no award of attorney's fees for services to the Complainant is made herein since no application for fees has been made by the Complainant's counsel. As Counsel for Complainant has prevailed, Counsel may request a reasonable attorney's fee. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Complainant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto.

6. Abatement of Violation

The STAA expressly mandates that a complainant who established a meritorious case is entitled to immediate reinstatement to his or her "former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment" 49 U.S.C. app. § 2305(c)(2)(B). Therefore, the Respondent shall 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 and shall conspicuously post copies of the ALJ's recommended decision and of the ARB's final decision and order for 90 days. *See Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-22 (ARB Nov. 30, 2009).

VI. CONCLUSION

Based upon the foregoing, I find as follows:

1. Respondent discharged Complainant effective April 15, 2009, due to Complainant's protected activity including, *inter alia*, his refusal to drive an unsafe vehicle in violation of § 393.9. However, Respondent reinstated Complainant to his former position effective April 17, 2009. Respondent shall immediately reinstate Complainant effective April 15, 2009.
2. Respondent shall pay Complainant \$2,122.12 in back pay with interest as required by 29 C.F.R. § 20.58. This amount is in addition to the \$2,082.24 previously paid.
3. Respondent shall pay reimburse Complainant \$210.00 for expenses.
4. Respondent shall pay Complainant \$5,000.00 for emotional damages caused by the unlawful discharge and/or suspension.
5. Respondent shall be assessed \$100,000.00 in punitive damage as a result of its conduct.
6. Respondent shall expunge Complainant's employment record, eliminating all disciplinary action from his personnel file relating to his protected activity.
7. The Respondent shall post Notice of this decision as detailed above as well as the Notice to Employees included with the decision rendered by OSHA.
4. Complainant's counsel has thirty (30) days from the date of service of this decision to submit an application for attorney's fees.

A

**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**

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

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

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

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

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

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition

is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).

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