

**U.S. Department of Labor**

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**Issue Date: 15 November 2013**

**In the matter of  
TIMOTHY J. BISHOP,  
Complainant**

**v.**

**CASE NO. 2013-STA-00004**

**UNITED PARCEL SERVICE,  
Respondent**

Appearances: Paul Taylor, Esquire  
For the Complainant  
Mark Jacobs, Esquire  
For the Respondent

Before: DANIEL F. SOLOMON  
Administrative Law Judge

## **DECISION AND ORDER**

This proceeding arises from a claim brought under the employee protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105, filed by Timothy Bishop ("Complainant") against United Parcel Service ("Respondent").

Appellate jurisdiction in this matter lies with the 8th Circuit Court of Appeals.

### **PROCEDURAL HISTORY**

On July 29, 2011 Complainant filed a complaint against Respondent alleging that Respondent had discharged him in violation of the employee protection provisions of the STAA. The Secretary of Labor issued Preliminary Findings and an Order on October 12, 2012. Complainant filed objections to the Secretary's Findings and Order on October 18, 2012.

A hearing was held in St. Louis, MO on June 5, 2013. ALJ Exhibit ("AX") 1; Joint Exhibits ("JX") 1-9; Complainant's Exhibits ("CX") 2 and 6-13, and Respondent's Exhibits ("RX") 103, 108, 113, 115, and 124 were admitted into evidence. Tr. 6, 13, 154, 159, 161, 164-167, 227. At the hearing the following witnesses provided testimony: Allen Worthy, Frank Fogerty III, Rick Meierotto, Bernard Alton White, Daryl Leonard Bradshaw, Rhonda Bishop, Complainant, and Derrick Sizemore.

## STIPULATIONS

Complainant and Respondent stipulated to the following:

1. Complainant Timothy J. Bishop “Mr. Bishop” resides at 7600 Tower Road, Hillsboro, MO 62050
2. Respondent United Parcel Service (“UPS”) is a corporation with its principal place of business located at 55 Glenlake Parkway, Atlanta, GA 30328. Respondent is engaged interstate trucking operations and operates commercial motor vehicles having a gross vehicle 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. § 31005. It is also an employer within the meaning of 49 U.S.C. § 31101. Respondent is engaged in transporting products on the highways via commercial motor vehicles, that is, a vehicle with a gross vehicle weight rating of 10,001 pounds or more.
3. Respondent maintains a hub facility in Earth City, MO. Mr. Bishop was domiciled at this facility.
4. Mr. Bishop was employed by UPS from May 26, 1992 to June 24, 2011. Mr. Bishop worked as a “feeder driver” operating tractor-trailer vehicle combinations having a gross vehicle weight rating of 26,001 pounds or more on the highways transporting property in interstate commerce.
5. On June 24, 2011, UPS fired Mr. Bishop.
6. On July 29, 2011, Mr. Bishop timely filed a complaint with the Secretary of Labor alleging that UPS had discharged him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105.
7. On or about October 12, 2012, the Secretary of Labor issued preliminary findings and an order pursuant to 39 U.S.C. § 31105.
8. On October 18, 2012, Mr. Bishop filed timely objections to the Secretary’s Findings and Order.
9. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of this proceeding.
10. On various days in June of 2011, Mr. Bishop was dispatched by Respondent to operate a loaded tractor-trailer “feeder set” from its facility in Earth City, MO to a business known as the Bobber Truck Stop located at Interstate 70 Exit No. 103 near Booneville, MO. At the Bobber Truck Stop near Booneville, MO, he was scheduled to exchange trailers with another UPS feeder driver domiciled in Lenexa, KS.
11. Once Mr. Bishop exchanged trailers with the Lenexa driver at the Bobber Truck Stop, Mr. Bishop was scheduled to take the trailers he received at Booneville, MO to Mount Vernon, IL where exchanged trailers with a driver domiciled in Louisville, KY.
12. Once Mr. Bishop exchanged trailers with the Louisville, KY-based feeder driver at Mount Vernon, IL, he was scheduled to take the trailers he received at Mount Vernon, IL back to UPS’s facility in Earth City, MO.
13. UPS feeder drivers use a computer device known as an In-Vehicle-Information System, or “IVIS” to record their daily activities. From these entries into the IVIS, a driver’s daily log as required by 49 C.F.R. § 395.
14. UPS requires its feeder drivers to press a function button for “Turnaround” on the IVIS to record the time worked at a meet point. This causes this “Turnaround” time to be shown

as “On Duty, not driving” time on the driver’s record of duty status required by 49 C.F.R. § 395.8.

15. UPS requires its feeder drivers to press a function button for “Meal” on the IVIS when they are taking an unpaid meal break. This causes this “Meal” time to be shown as “Off Duty” time on the driver’s record of duty status required by 49 C.F.R. § 395.8.
16. Pursuant to Article 18 of Central Region Supplement to the National Master United Parcel Service Agreement between UPS and the Teamsters in effect for the period of December 19, 2007 thru July 31, 2013, employees are required to take an unpaid meal period between the third (3<sup>rd</sup>) and sixth (6<sup>th</sup>) hour of work.
17. Pursuant to Article 4 of the Local Union 688 Rider to the National Master United Parcel Service Agreement between UPS and the Teamsters in effect for the period of December 19, 2007 thru July 31, 2013, UPS was required to pay to the Teamsters Negotiated Pension Fund for each full time employee, the following amounts for each fulltime employee within the Local 688 bargaining unit:
  - Effective August 1, 2010: \$324.00 per week
  - Effective August 1, 2011: \$350.00 per week
  - Effective August 1, 2012: \$376.00 per week
18. In 2011, Mr. Bishop earned \$45,688.04 in gross W-2 wages working for UPS. In 2010, Mr. Bishop earned \$105,613.04 in gross W-2 wages working for UPS.
19. For feeder drivers domiciled in Earth City, MO, UPS has required its feeder drivers to begin a meal break after completing their post-trip inspection if their meet driver has not arrived at the designated meet point and they are between their 3<sup>rd</sup> and 6<sup>th</sup> hour of work. For feeder drivers domiciled in Earth City, MO, UPS requires the feeder drivers to record the break as “meal” using the IVIS.
20. On June 28, 2011, UPS sent a letter to Mr. Bishop informing him that he had been discharged effective June 24, 2011 under Article 17(a)(dishonesty) and Article 17(i) (other serious offenses) of the Collective Bargaining Agreement.
21. On October 26, 2011, Mr. Bishop and his wife, Rhonda Fay Bishop filed a petition for relief under Chapter 7 of the United States Bankruptcy Code with the United States Bankruptcy Court for the Eastern District of Missouri. Fredrich J. Cruse is the Trustee of the Bankruptcy Estate of Timothy J. Bishop and Rhonda Fay Bishop.
22. Chris Chapin, Mark Edgar, and Joe Cleaveland, feeder management personnel for UPS, if called as witnesses in this hearing, would testify that Mr. Bishop did not bring any issues or concerns to their attention regarding the Boonville, MO meet point.
23. Derrick Sizemore, a feeder scheduler for UPS, if called as a witness in hearing, would testify that Mr. Bishop complained to him in May of 2011 that Mr. Bishop’s meet man was rarely at the Boonville, MO meet point when Mr. Bishop arrived. Mr. Sizemore would also testify that Mr. Bishop did not otherwise complain about the Boonville, MO meet point.

ALJ 1.

After reviewing the record, I accept the above stipulations.

## ISSUE

Was complainant terminated in violation of employee protection provisions of the STAA?

## DISCUSSION AND ANALYSIS

The employee protection provisions of the STAA provide, in part:

- (a) Prohibitions. - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
- (A) (i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or
  - (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;
- (B) the employee refuses to operate a vehicle because –
- (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
  - (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;
- (C) the employee accurately reports hours on duty pursuant to chapter 315;
- (D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or
- (E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

49 U.S.C. § 31105.

Section (b)(1) of STAA states that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR21, 49 U.S.C. 42121(b). Under AIR21, a violation may be found only if the complainant demonstrates that protected activity was a contributing factor in the adverse action described in the complaint. 49 U.S.C. 42121(b)(2)(B)(iii). Relief is unavailable if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv); see *Vieques Air Link, Inc. v. Dep't of Labor*, 437 F.3d 102, 108–09 (1st

Cir. 2006) (per curiam)(burdens of proof under AIR21); *see also Formella v. U.S. Dep't of Labor*, 628 F.3d 381, 389 (7th Cir. 2010) (explaining that because it incorporates the burdens of proof set forth in AIR21, STAA requires only a showing that the protected activity was a contributing factor, not a but-for cause, of the adverse action.).

### Protected Activities

Accurately reporting hours on duty pursuant to Chapter 315 constitutes protected activity under the STAA. 49 U.S.C. § 31105(1)(C). Complainant alleges that he engaged in protected activity when he reported the time he spent waiting for his meet driver at the Bobber Truck Stop in Boonville, Missouri as on duty rather than reporting the time as “meal” (off duty).

Complainant testified, and Respondent does not dispute, that he recorded his time spent waiting for the meet driver as on duty. *See* Tr. at 215.

Complainant argues that his reporting of the time he spent waiting for the meet driver as on duty rather than off duty was accurate according to the applicable regulations; therefore, the reporting constitutes protected activity. Complainant advises me that regulations relating to maximum hours of service for employees for motor carriers, set forth at 49 C.F.R. § 395, required Complainant to prepare a daily record of duty log, which included lines for “on duty time,” “driving time,” and “on duty but not driving time.” The regulations in effect at the time defined “on duty time” as:

On duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. On duty time shall include:

- 1) All time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;
- ...
- 4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth;
- 5) All time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded;
- ...
- 8) Performing any other work in the capacity, employ, or service of a motor carrier;

According to Complainant, he was not relieved from work while he waited at the Bobber Truck Stop because he was required to remain in attendance at the vehicle waiting for his meet driver; he was at a facility waiting to be dispatched without having been relieved for duty; he was still responsible for the motor vehicle equipment; he was in a commercial motor vehicle, as allowed

by UPS, while waiting and was not resting in a sleeper berth; and he had to remain in attendance of a commercial vehicle. Complainant's Brief at 17-20.

Complainant also directs me to regulatory guidance concerning off-duty time issued by the U.S. Department of Transportation, which provides:

Question 2: What conditions must be met for a Commercial Motor Vehicle [CMV] driver to record meal and routine stops made during a tour of duty as off-duty time?

Guidance:

1. The driver must have been relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo or passengers it may be carrying.
2. The duration of the driver's relief from duty must be a finite period of time which is of sufficient duration to ensure that the accumulated fatigue resulting from operating a CMV will be significantly reduced.
3. If the driver has been relieved from duty, as noted in (1) above, the duration of the relief from duty must have been made known to the driver prior to the driver's departure in written instructions from the employer. There are no record retention requirements for these instructions on board a vehicle or at a motor carrier's principal place of business.
4. During the stop, and for the duration of the stop, the driver must be at liberty to pursue activities of his/her own choosing and to leave the premises where the vehicle is situated.

*See* 62 Fed. Reg. 16422. Complainant asserts that the conditions did not exist that would have allowed Complainant to record his stops at the Bobber Truck Stop as off-duty as Complainant was not relieved of all duty and was responsible for the care and custody of the vehicle, its accessories and cargo during his breaks; UPS did not issue written instructions to Complainant informing him that he had been relieved of all duty and responsibility for the care and custody of the vehicle and cargo during meal breaks; during his stops at the Bobber Truck Stop he was not at liberty to pursue activities of his own choosing and to leave the premises where his tractor-trailer set was situated. Complainant's Brief at 19-20. Therefore, Complainant argues, he accurately reported this time as on duty.

Complainant testified that he was trained "never to leave our equipment unattended and when we get to a meet point we always lock the doors, you know, and never leave your tractor-trailer unattended, always leave it – and if you go into a restaurant, always keep an eye on your equipment." Tr. at 208. He was never told he could leave and abandon his equipment. *Id.* at 211. Despite this, he was trained to hit meal (off duty time) if he arrived at a meet point and the driver was not there. *Id.* at 209. He also testified that at the time he was waiting for the meet driver the Bobber Truck Stop's restaurant and gas station were closed. *Id.* at 211-212. Although an open McDonald's drivethrough was located a half-mile away, he was trained to not to disconnect the tractor trailer from the set and leave it unattended. *Id.* at 212-213.

John Youngermann, a tractor-trailer driver for UPS, similarly testified that he has always been instructed to stay with his equipment during meal breaks. *Id.* at 180. He has never been told by anybody at UPS that he is relieved of all care, custody and control of the feeder set during his meal break. *Id.*

Respondent disputes Complainant's assertion that he was trained that he was prohibited from leaving his assigned vehicles unattended at a meet point and must always keep his assigned vehicles within sight. Mr. Worthy testified "No, that's not my understanding" when asked whether Complainant had been instructed over the years that he is not to leave his set unattended and during his meal break go off and do something with the set out of sight. Respondent also cites to Mr. Worthy, Mr. Meierotto and Mr. Bradshaw's testimony that they had never instructed a feeder driver to keep the equipment in sight and that no feeder drivers had ever complained to them about having limitations placed on them during their meal period. Additionally, Respondent objects to Complainant's testimony regarding how he was trained as hearsay, since the UPS instructors referred to by Complainant did not testify at the hearing or in a deposition. Respondent's Reply Brief at 1-2.

Although Complainant's testimony regarding his training is disputed and is alleged to be hearsay, there is ample testimony from Complainant's supervisors establishing that while Complainant was at Booneville, MO waiting for the meet driver, he was not free to pursue activities of his own choosing and was still responsible for taking care of his truck-tractor and trailers and had to remain close to his tractor-trailer set, even if he was taking a meal break.

Complainant's supervisors testified that it was their expectation, understanding or practice, in June 2011, that if a driver is waiting for his meet driver he is not relieved of responsibility for his equipment, even if he is on meal break. Mr. Worthy, the Feeder Transportation Manager for UPS based at Earth City, Missouri, testified:

Q. Okay. Now, Mr. Bishop, while he was at Booneville, Missouri waiting for another driver to bring him a set, he was not relieved of the responsibility for his equipment, was he?

A. Well, during the deposition I know that I am on the record for stating that he was not. Obviously, my statement was inconsistent with the company's policy and since this hearing, I have reached out that what I stated was inconsistent with company policy.

Q. Okay. Well, the policy at the time of Mr. Bishop's discharge is that when he's taking a meal break, at least for Earth City feeder drivers, when Mr. Bishop was taking a meal break or was at the Bobber Truck Stop, he was not free to be able to play a round of golf if he wanted to, or go to the driving range, right?

A. Well, that was his understand and that was our understanding.

Q. So the policy was, at least for, as to Earth City based drivers, was that he has to take care of the equipment and be in close attendance to it during his meal break, correct.

A. I wouldn't call it a policy, sir. That was our mindset at the time.

Tr. at 31-33. Notwithstanding this “mindset,” drivers were required to go on meal (off duty) if the meet driver had not yet arrived:

Q. So even as of today, if a UPS driver gets to a meet point and his meet driver is not there, that driver is required to go on meal, right?

A. If they have meal left, that’s correct.

Q. Okay. And at least within your district, that driver is not allowed to leave the truck unattended and say, for example, take a cab and go do something, shoot pool or anything like that?

A. At the time of this case, that’s right.

Tr. at 39.

Mr. Fogerty, Transportation Dispatch Manager at UPS in Earth City, MO, testified that it was his opinion at the time that Complainant wasn’t free to do anything he wanted while on meal break, because he had to stay at least close to the truck tractor and trailer. Tr. at 81. In June 2011, it was his understanding that “we wanted the driver to stay in the proximity of the vehicle, and I have since found that that was my opinion and not the opinion of the company, or a rule of the company.” *Id.* at 76. Mr. Meierotto, Transportation Service Supervisor at UPS, testified that it was UPS’s “practice” in June 2011 in the Missouri area that drivers were not allowed to leave their sets during meal break:

Q. Okay. And another thing is that drivers, during their break they have to keep their unit – during a meal break they have to keep their units within their sight, right?

A. That was my expectations, yes, sir.

Q. Okay. As a supervisor at UPS for a lot of years, that is your expectation of feeder drivers that when they take a meal break they need to keep it in sight, correct?

A. That was the normal thing that I had observed when I was ever with drivers, is that we always kept the vehicle in sight. So, yes, that was what I expected.

Q. And the drivers during their meet breaks were simply not going to leave the set, correct?

A. I’ve never instructed a driver that he could or could not ever leave the set. It’s just kind of an unspoken thing that we did that we just kept it in sight.

Q. In your opinion, drivers are not allowed to leave their sets during their lunch break, right?

A. Yes, that was my expectations.

Q. Okay. And that was your understanding, at least in June of 2011, that that was UPS’s policy in the Missouri area, correct?

A. I wouldn’t say policy, because I was never – I never read it on any type of document. It is just what had happened. It was what came to be normal practice.

Q. During a break – in June of 2011, you understood that UPS drivers had to keep their unit within sight during their meal breaks, correct?

A. That was my expectation.

Q. Okay. What do you mean by expectation? Were they or were they not allowed to leave their sets during meal breaks in June of 2011?



A. Well, there are instances where they do leave their sets. If they go into the restroom, they are leaving their sets from their line of sight. It was my expectation then that if we went into a restaurant and you're sitting down having a hamburger, you keep your vehicle just where you can see it, just out of normal practice.

Q. Is that a normal practice or was that required.

A. That was normal practice.

Tr. at 120-122. He was only later notified that they could not put restrictions on drivers when they go on meal. *Id.* at 126.

Mr. White, Feeder Supervisor for UPS, testified that although he wouldn't call it a requirement, it was "just a practice. It was the norm" for feeder drivers to stay in close proximity to their feeder sets during their breaks. Tr. at 132. Mr. Bradshaw, on-road manager for Complainant, testified that although he stated at a deposition that a driver was still responsible for his truck, tractor, trailer and freight when he is at a meet point and on meal, he has since been instructed that that is not a UPS policy. *Id.* at 140. He clarified that in June 2011 it was not a policy at Earth City; "it was just something that we had assumed was going to happen based upon the driver's actions whenever they were ridden (sic) with at a turnaround" and "it was what we preferred at the time, but we have since, like I said, realized that it not a UPS policy." *Id.* at 140-141." He further testified: "I have since discovered and been instructed that our policy was incorrect – or not a policy, but our practice was incorrect. We should not instruct any drivers as to what they can do and their meal time is their time." *Id.* at 144.

According to Respondent, the feeder supervisors who testified at the hearing regarding their understanding in June of 2011 that feeder drivers were not free to play golf or go to the driving range while they were on "meal" testified that their understanding and belief came from their observations of what feeder drivers like Bishop actually did when they were on meal at 1:30 in the morning, and did not come from a UPS policy. Respondent's Reply Brief at 5-6.

The supervisors quoted above avoided, sometimes with difficulty, using the word "policy" or "requirement" to describe the company's practice in Earth City. Whether the appropriate term for what the company was doing in Missouri in June 2011, is "policy," "practice," "expectation" or "understanding," the supervisors' testimony, nevertheless, establishes that Complainant was *not allowed* to pursue activities of his own choosing and was not relieved of responsibility for his equipment as he waited for the meet driver at the Bobber Truck Stop. In an unusually unequivocal response for the supervisors, Mr. Worthy testified "At the time of this case, that's right" when asked if "at least within your district, that driver is not allowed to leave the truck unattended and say, for example, take a cab and go do something, shoot pool or anything like that?" Tr. at 39. Similarly, Mr. Fogerty answered affirmatively when asked if drivers are not allowed to leave their sets during their lunch break. *Id.* at 120-122.

The testimony above demonstrates that Complainant was not free to pursue activities of his own choosing and was not relieved of responsibility for his equipment as he waited for the meet driver at the Bobber Truck Stop. Nevertheless, he was required to go on meal break. Therefore, I find that Complainant's reporting of his time waiting for the meet driver as "on duty" was accurate.

Respondent does not, in actuality, appear to dispute that Complainant's reporting was accurate according to the regulations in effect at the time. Respondent, in its brief, relies on a different argument for why Complainant's recording of his time as on duty does not constitute protected activity under the STAA. According to Respondent, Complainant did not engage in protected activity because "he did not know he was engaging in alleged protected activity prior to his discharge through the conclusion of the grievance procedure," contrary to his testimony. Respondent's Brief at 12-13, 16. Respondent points to the fact that Complainant did not say anything about DOT regulations or believing he was being asked to record his time at Boonville in a wrong or illegal manner when UPS supervisors confronted Complainant about his timecards and his "meal" versus turnaround status, on the day he was discharged when he filed a grievance, or at hearings regarding his grievance. It wasn't until he filed his complaint with OSHA that he alleged he engaged in protected activity by leaving himself in turnaround at the Boonville meet point rather than putting himself on "meal." Complainant's ignorance of the DOT regulations is further demonstrated by his admission that he "improperly record[ed] his time when he was sleeping in the tractor cab on the side of the road."

Respondent, essentially, reads into 49 U.S.C. § 31105(1)(C) a requirement that the employee knows he is accurately reporting hours on duty pursuant to chapter 315 at the time he engages in the activity. The plain language of the statute, however, does not reflect such a requirement. The statute specifies only that the employee accurately report hours on duty pursuant to chapter 315 to constitute protected activity. Therefore, I do not interpret the provision to require knowledge on the part of the employee.

In sum, I find that Complainant accurately reported his time spent waiting for the meet driver as on duty pursuant to chapter 315. As this is all that is required by § 31105(1)(C), I find that Complainant engaged in protected activity under the STAA.

#### Employer Knowledge of Protected Activities

Complainant must establish that the person making the adverse employment decision had knowledge of the protected activity. *See Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

Mr. Fogerty, who managed the drivers and the dispatch of the trailers to the drivers in June 2011,<sup>1</sup> made the decision to terminate Complainant. *See* Tr. at 62-65. Mr. Fogerty testified that, at the time he fired Complainant, he knew Complainant recorded his time waiting for the meet driver as on duty. *See* Tr. at 79.

Respondent argues that the relevant decision maker was nevertheless unaware that Complainant engaged in protected activity. According to Respondent, "two central facts guide the resolution of this matter": (1) None of the UPS managers involved in Bishop's discharge had any inkling that what they were asking Bishop to do might constitute a technical violation of a DOT regulation; and (2) None of the UPS managers involved in Bishop's discharge had any

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<sup>1</sup> Mr. Fogerty testified that he communicated safety and was involved in the management and the movement of trailers around the property to support the hub operation. Tr. at 62.

suspicion that Bishop might be engaged in protected activity until well after Bishop's discharge because Bishop did not report to anyone at UPS that he believed he was being asked to record his time improperly and not in accordance with DOT regulations. Respondent's Brief at 16.

Mr. Fogerty testified that at the time he made the decision to discharge Complainant, he had no concept that what he was doing might somehow violate DOT regulations.<sup>2</sup> Tr. at 102-103. Thus, Respondent argues, he did not have knowledge of the protected activity. Mr. Fogerty's testimony, however, shows that he knew Complainant wasn't free to do anything he wanted while on meal break, because he had to stay at least close to the truck tractor and trailer, due to the company's "practice" or "expectations," and he knew that Complainant's assigned truck-tractor was not equipped with a sleeper berth. *See id.* at 66. Mr. White's testimony shows, in addition, that Complainant informed Mr. Fogerty at his termination meeting that the Bobber Truck Stop was closed at the time he was at the meet point. *Id.* at 135. Moreover, Mr. Fogerty's job responsibilities included verifying that the feeder drivers under his supervision were complying with commercial vehicle safety regulations and performing their jobs according to UPS methods. *See id.* at 64. Mr. Fogerty's ignorance of the law is no excuse here.

Respondent's second argument is that it did not have knowledge of the protected activity because Complainant never reported to anyone at UPS that he believed he was being asked to record his time improperly and not in accordance with DOT regulations. In support of its theory that the statute requires such a statement from the Complainant, Respondent describes the legislative history of 49 U.S.C. § 31105. Specifically, Respondent highlights language in a conference report indicating that "The intent of this provision is to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers." Respondent's Brief at 19-20 (emphasis omitted). According to Respondent, "the provision under which Complainant is proceeding, must be viewed in the context of Congress's express intent to protect employees *who come forward and report* when they are being asked to record hours in a manner that is not in accordance with DOT regulations," and as a result, the provision, like § 31105(a)(1)(A)(i), "requires that an employee affirmatively report his or her concerns to the employer." Employer's Brief at 20 (emphasis in original).

I do not find Respondent's second argument persuasive either. The structure of the statute suggests that § 31105(a)(1)(C) does not require the employee to report that he believed he was being asked to record his time improperly and not in accordance with DOT regulations. Unlike §31105(a)(1)(A)(i), § 31105(a)(1)(C) does not include language like "filing a complaint." "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009). As the meaning of the statute is clear on this point, there is no need to look to its legislative history for clarification. In any event, the legislative history cited to by Respondent does not even address § 31105(a)(1)(C) in particular.

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<sup>2</sup> Mr. Worthy testified that prior to his deposition and the deposition of others in this case, he did not understand that his expectation with respect to what drivers could or could not do while waiting for a meet person might somehow be contrary to DOT regulations. Tr. at 50. He was later told by the UPS corporate office that there are no limitations placed on drivers when on a meal; they are free to do what they want. *Id.* at 51.

The person who discharged Complainant admitted that he knew Complainant recorded his time waiting for the meet driver as on duty. He also knew that Complainant was not free to pursue activities of his own choosing and was still responsible for taking care of his truck-tractor and trailers and had to remain close to his tractor-trailer set—conditions which required Complainant to record his time as on duty, pursuant to the regulations. For these reasons I find that the relevant decisionmaker knew that Complainant engaged in protected activity.

#### Adverse Employment Action

§ 31105 prohibits discharge of an employee for engaging in protected activity. Here, the evidence establishes and the parties stipulated that Complainant was discharged. Accordingly, the adverse action element is satisfied.

#### Contributing Factor

It is Complainant's burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in his termination. A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). In proving contributing factor, a complainant can show "either direct or circumstantial evidence" of contribution. *Speegle v. Stone & Webster Construction, Inc.*, ARB 11-029-A, ALJ 2005-ERA-006 (ARB Jan. 31, 2013).

Direct evidence of retaliation is "smoking gun" evidence; evidence that conclusively links the protected activity to the adverse action. *Bettner v. Crete Carrier Corp.*, ARB 07-013, ALJ 2004-STA-18, slip op. at 14 (ARB May 24, 2007). Such evidence must speak directly to the issue of discriminatory intent and may not rely on the drawing of inferences. *Id.* Direct evidence does not include "stray or random remarks in the workplace, statements by nondecisionmakers or statements by decisionmakers unrelated to the decisional process." *Id.*

The testimony of Mr. Fogerty, who terminated Complainant, and his supervisor, Mr. Worthy, provide direct evidence that Complainant's protected activity was a contributing factor in his termination.

Mr. Fogerty testified that Complainant was discharged because he did not record his time waiting for the meet driver as meal (off duty):

Q. Okay. And the reason you fired Mr. Bishop was that he failed to record his time properly on the IVIS, correct?

A. Yes.

Q. And specifically, the time that he failed to record properly was the time he was at the Bobber Truck Stop shortly before his firing – within the week of his firing, and was in the truck waiting for another driver and he recorded that time as on-duty time, and you believed he was dishonest by doing so, correct?

A. He was discharged for failing to post his meal period during the delay. I did not know where he was; I just knew that he was at the meet point and had a delay and did not record it as meal.

Tr. at 65-66.

Mr. Worthy testified that Complainant's recording of his time waiting for the meet driver as on duty rather than meal was "partially the reason" for his termination (he also attributed the termination to Complainant's failure to drive the speed limit). Tr. at 39. Mr. Worthy further testified:

Q. Okay. Well, would you agree that that was the essentially – the primary problem UPS had with Mr. Bishop was not that he did not have a meal in Booneville, but it was that his time waiting at Booneville was not recorded as his meal?

A. That to include that he knew the rules. He wasn't driving the speed limit and he had been terminated before for not recording his time properly. So he knew the rules and he violated them twice and that's the reason why he was terminated.

Q. And the rule that he knew was that he have been recording his time waiting at Booneville as off-duty with a meal, correct?

A. That's providing he had time left.

*Id.* at 42.

The testimony cited above conclusively links the protected activity to the adverse action, does not rely on the drawing of inferences, and speaks directly to the issue of discriminatory intent.

Respondent, in its brief, argues only that Complainant's protected activity was not causally linked to UPS's decision to terminate his employment because Respondent did not have knowledge of the protected activity. Respondent's Brief at 28. As discussed above, I found that Respondent did have knowledge of the protected activity. Therefore, Respondent's argument on this issue is rejected.

Complainant, via the direct evidence cited above, has established, by a preponderance of the evidence, that his protected activity was a contributing factor in his discharge.

#### Same Adverse Action Absent Protected Activities

Clear and convincing evidence that an employer would have fired the employee absent protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. *Clark v. Airborne, Inc.*, ARB 08-133, ALJ 2005-AIR-27 (ARB Sept. 30, 2010). Thus, Respondent must establish, by clear and convincing evidence, that it would have terminated Complainant even if he had not engaged in the protected activity. Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. *DeFrancesco v. Union Railroad Company*, ARB 10-114, ALJ 2009-FRS-009 (ARB February 29, 2012).

The testimony by Mr. Fogerty, who made the decision to terminate Complainant, undermines any argument that Respondent would have terminated Complainant even if he had not engaged in the protected activity. Mr. Fogerty testified:

Q. And if Mr. Bishop, in June of 2011, before he was fired, had recorded his time waiting in the truck as meal time, he would not have been discharged, would he?

A. That's correct.

Tr. at 75. Therefore, Respondent has failed to demonstrate, by clear and convincing evidence, that it would have terminated Complainant absent his protected activity.

### Damages

According to 49 U.S.C.A. § 31105(b)(3)(A), "If the Secretary [of Labor] decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to—(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (iii) pay compensatory damages, including back pay. Complainant advises me that if damages are awarded in this case, they should be paid jointly to Complainant and to the Bankruptcy Estate of Timothy J. Bishop so that the bankruptcy court may determine each complainant's interest in the proceeds of this proceeding.

### *Reinstatement*

Reinstatement is an automatic remedy under the STAA, although when reinstatement is impossible or impractical, alternative remedies such as front pay are available. *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-52 (ARB Jan. 31, 2011). Complainant, in his brief, requests reinstatement. Neither party has presented evidence that reinstatement in this case is impossible or impractical. Therefore, reinstatement is ordered with the same compensation, terms, conditions, and privileges of the Complainant's employment.

### *Backpay*

In *Ass't Sec'y & Bryant v Mendenhall Acquisition Corp.*, ARB 04-014, ALJ 2003-STA-36 (ARB June 30, 2005), the ARB summarized the legal framework for back pay awards in STAA whistleblower cases:

A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). "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." *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. ...

Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988). ... Ordinarily, back

pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. ... While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." ...

Slip op. at 5-6 (some citations omitted). Complainant has the burden of establishing the amount of back pay that a respondent owes. *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y 07/19/93). However, uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB 09/24/97).

The parties stipulated that Complainant earned \$105,613.04 in gross W-2 wages from UPS in 2010 and \$45,688.04 in gross W-2 wages from UPS in 2011. ALJ 1 ¶ 18. This calculates to an average weekly wage of \$1964.95 (\$151,301 divided by 77 weeks). He would have received a pay increase of \$0.425 per hour effective August 1, 2011 and another pay increase of \$0.425 per hour effective February 1, 2012, which would have been followed by pay increases of \$0.475 per hour effective August 1, 2012 and \$0.475 per hour effective February 1, 2013. JX 8 at 77-78. Thus, Complainant advises me, he would have earned the following wages had his employment with UPS continued uninterrupted from June 24, 2011 to the present: \$ 237,758.95 (\$1,964.95 x 121 weeks from June 24, 2011 to October 21, 2013); \$ 442.00 (Additional earnings for \$0.425 per hour increase effective 08/01/11) (0.425 x 40 hours x 26 weeks); \$ 884.00 (Additional earnings for \$0.425 per hour increase effective 02/01/12) (0.85 x 40 hours x 26 weeks); \$ 1,378.00 (Additional earnings for \$0.475 per hour increase effective 08/01/12) (\$1.325 x 40 hours x 26 weeks); \$ 2,714.40 (Additional earnings for \$0.475 per hour increase effective 02/01/13) (\$1.89 per hour x 40 hours x 37.7 weeks). Therefore, Complainant projects that he would have earned a total of \$243,177.35 from UPS from June 24, 2011 to October 21, 2013, had his employment continued uninterrupted.

Back pay awards are offset by a complainant's interim earnings in positions he or she could not have held had his or her employment with Respondent continued. *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995). Complainant advises me that since he was fired by UPS he has earned the following wages: \$1,477.50 at Lloyd A. Lynn, Inc.; \$2,192.90 at Transcorr Leasing, LLC; \$113,938.54 (actual through May 25, 2013) at B&M Transportation; and \$27,979.37 (projected, from May 26 to 10/21/2013: \$1,314.82 x 21.28 weeks). See CX 8, 13; Tr. at 234-237. I am advised that Complainant's average weekly wage from B&M Transportation in 2013 through May 25, 2013 was \$1,314.82 (\$27,230 ÷ 21.28 weeks). Consequently, Complainant projects his net back pay damages to date of his post-hearing brief are \$97,631.04 (\$243,177.35 - \$145,546.31) from UPS from June 24, 2011 to October 21, 2013. Moreover, his back pay damages will continue to accrue at a rate of \$650.13 per week because his average weekly wage with UPS was \$1,964.95 at the time of his discharge, he would have received another \$1.89 per hour in pay increases if he had remained working for UPS, making his current average weekly wage to be \$ 2,040.55 (\$1,964.95 + \$75.70), and his average weekly wage with B&M Transportation in 2013 has been \$1,314.82.

The employee has a duty to exercise reasonable diligence to attempt to mitigate damages; however, the employer bears the burden of proving that the employee failed to mitigate. *Roberts*

*v. Marshall Durbin Co.*, ARB 03-071 and 03-095, ALJ 2002-STA-35 (ARB Aug. 6, 2004). Respondent has not presented any evidence that Complainant failed to exercise reasonable diligence in seeking suitable alternative employment. See *Johnson v. Roadway Express, Inc.*, ARB 99-111, ALJ 1999-STA-5 (ARB Mar. 29, 2000).

Respondent has not objected to Complainant's calculation. I find that Complainant's calculation is reasonable and supported by the evidence. Therefore, Complainant is entitled to back pay, with interest,<sup>3</sup> in the amount of \$97,631.04 plus \$650.13 per week from October 21, 2013 to the date Complainant is offered reinstatement.

Complainant is also entitled to health and retirement benefits as well as fringe benefits. See *Dutile v. Tighe Trucking, Inc.*, 93-STA-31 (Sec'y Mar. 16, 1995). Complainant requests that UPS be ordered to pay to the Teamsters negotiated pension fund, for the account of Complainant, the following amounts:

June 24, 2011 to July 31, 2011: \$1,759.53 (5.43 weeks x \$324.00 per week);  
August 1, 2011 to July 31, 2012: \$18,200.00 (52 weeks x \$350.00 per week);  
August 1, 2012 to July 31, 2013: \$ 19,552.00 (52 weeks x \$376.00 per week).

I find that these amounts are reasonable and supported by the evidence. The parties stipulated that pursuant to Article 4 of the Local Union 688 Rider to the National Master United Parcel Service Agreement between UPS and the Teamsters in effect for the period of December 19, 2007 thru July 31, 2013, UPS was required to pay to the Teamsters Negotiated Pension Fund for each full time employee, the following amounts for each fulltime employee within the Local 688 bargaining unit: effective August 1, 2010: \$324.00 per week; effective August 1, 2011: \$350.00 per week; effective August 1, 2012: \$376.00 per week. AX 1. Complainant also requests that UPS should be ordered to pay to the Teamsters negotiated pension fund, for the account of Complainant, such additional amounts it would have been required to make but for Complainant's discharge, for the period from August 1, 2013 until reinstatement.

Additionally, Complainant requests that UPS should be required to reimburse Complainant for the following amounts related to health insurance premiums he and his wife had to pay out-of-pocket due to his discharge:

December 8, 2011 to January 12, 2012: \$ 610.56 (6 pay periods x \$101.76);  
January 19, 2012 to January 10, 2013: \$5382.52 (52 pay periods x \$103.51);  
January 17, 2013 to October 21, 2013: \$4831.03 (41 pay periods x \$117.83).  
Total Damages Due to Lost Health Insurance: \$10,824.11

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<sup>3</sup> Pre- and post-judgment interest must also be paid. *Ass • ft Sec • fy & Cotes v. Double R. Trucking, Inc.*, ARB 99-061, ALJ 1998-STA-34 (ARB Jan. 12, 2000); *Doyle v. Hydro Nuclear Services*, ARB 99-041, 99-042, and 00-012, ALJ 1989-ERA-22 (ARB May 17, 2000). The interest rate shall be the rate charged for underpayment of federal taxes, as specified in 26 U.S.C. §6621. *Ass • ft Sec • fy & Kerrick v. JLC Industries, Inc.*, 94-STA-00033 (ALJ Oct. 13, 1994).



I am also advised that Complainant's damages due to loss of health insurance caused by his discharge will continued to accrue at a rate of \$117 per week from October 21, 2013 until reinstatement. Respondent does not object to this request, and I find that the evidence supports the amounts. Ms. Bishop testified that prior to Complainant's discharge she was not purchasing health insurance through her employer but now she does, and she, her daughter Emily, Complainant, and his daughter are covered on it. Tr. at 175. A document titled "Employee Detail Earnings for Ms. Bishop show that she paid \$101.76 weekly for health insurance from December 8, 2011 to January 12, 2012, \$103.51 weekly from January 19, 2012 to January 10, 2013, and \$117.83 weekly from January 17, 2013 to the present. CX 9. Consequently, I find that Complainant is entitled to \$10,824.11 in total damages due to lost health insurance as well as \$117 per week from October 21, 2013 until the date Complainant is reinstated.

### *Compensatory Damages*

Compensatory damages under the STAA include damages for pain and suffering, mental anguish, embarrassment, and humiliation. *Hobson v. Combined Transport, Inc.*, ARB 06-016, 06-053, ALJ 2005-STA-35 (ARB Jan. 31, 2008). A key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. *Evans v. Miami Valley Hospital*, ARB 07-118, -121, ALJ 2006-AIR-22 (ARB June 30, 2009)

Complainant requests \$200,000 compensation for emotional distress caused by his termination.

Complainant testified that he feels depressed, and his depression has worsened since he lost his grievance case over his discharge. Tr. at 229. He testified that "my whole life has changed. I've gained like 45 pounds. I'm never home now. My kids are in plays and I don't get to see those." *Id.* When he worked for UPS, he was home every day, but for his current employer he is on the road five to six days a week. *Id.* at 229-230. He used to fish all the time but he does not do it anymore because "[I] [j]ust don't feel like it," and he used go on hunting trips with friends but he can't afford it anymore. *Id.* at 230. He has had difficulty paying bills, which has made him feel "Pretty bad. It's kind of embarrassing borrowing money from your family – your brother in law." *Id.* at 231. When family functions occur, he usually stays home because he is embarrassed about losing his job. *Id.* at 232. In order to pay bills he has sold some personal property, like his pickup truck, guns and boat. *Id.*

Ms. Bishop, Complainant's wife, testified that Complainant became depressed after he lost his grievance over the firing. Tr. at 170-171. After his termination,

"We didn't do anything – nobody did anything. He used to go fishing, we don't do that anymore. At family get-togethers, you know everybody is sitting in a certain room talking and he was sitting on the couch; he didn't want to talk to anybody. He didn't want to do anything. He slept all the time. I couldn't get him to do anything."

*Id.* He stopped mingling with family members and cooking the food at family get-togethers. *Id.* at 171. She came to believe he was depressed because "We don't talk. I mean, we just didn't talk; you don't say anything to each other. I mean it was just leave him alone and he will be fine.

It's just that before, you know, we always did things together, and it was nothing. It was nothing." *Id.* at 171-172. She also testified about the financial burden the loss of Complainant's job placed on their household. They couldn't afford their home anymore, had to file bankruptcy, sold some personal property, borrowed money from family members, and came close to being 30 days late on mortgage payments. *Id.* They have not been able to afford vacations. *Id.* at 173. They argue over payment of bills, and Ms. Bishop has had to pay them. *Id.* at 174.

Complainant did not provide any medical evidence to support his testimony. In *Ferguson v. New Prime, Inc.*, ARB 10-075, ALJ 2009-STA-47 (ARB Aug. 31, 2011), the ARB affirmed as supported by substantial evidence the ALJ's award of \$50,000 in compensatory damages for emotional distress based on the Complainant's unrefuted and credible testimony, even though the testimony was not supported by any medical evidence. Here, Respondent has not refuted Complainant's testimony. I find that Complainant's testimony is credible.

Complainant cites to *Fink v. R&L Carriers Shared Services, LLC*, 2012-STA-6 (ALJ Nov. 20, 2012), in which an ALJ awarded \$100,000 in compensatory damages to a driver who was fired in violation of the STAA. There, the complainant testified that he felt embarrassed, disappointed, and upset as a result of his termination. He could not afford the health insurance at his new job, which was also located an hour and 25 minutes from his home. His family lost their home and were forced to move into a mobile home. He was the major breadwinner, but was forced to borrow money from family, and he received unemployment compensation and food stamps. He has not been able to participate in hobbies that he used to do with his family because he cannot afford it. He has restless nights and trouble sleeping due to worries about supporting his family.

The facts in *Fink* are very similar to this case. Like the complainant in *Fink*, Complainant testified to feelings of embarrassment and depression, loss of hobbies, dependence on family members for financial support where he had been the major breadwinner, loss of health insurance, and onerous work requirements for his new job (here, having to be on the road five to six days per week) as a result of his termination. Complainant also testified that he has gained weight as a result of his depression, and his wife testified that he slept all the time. Although Complainant did not lose his home like the complainant in *Fink*, Complainant did testify that he had to sell some property, which was corroborated by wife's testimony, and had to declare bankruptcy. Moreover, Complainant's wife testified that they have suffered from marital tension as a result of financial issues and Complainant's depression.

The ARB upheld an ALJ's award of \$100,000.00 in *Evans*, another case with similar facts. *See* ARB 07-118, -121, ALJ 2006-AIR-022, slip op. at 20-22 (ARB June 30, 2009). There, the complainant testified that his firing took his confidence away, he and his wife were in and out of therapy together and individually, they were still in family counseling, a doctor prescribed Paxil for depression and anxiety, and his testimony was corroborated by his wife's testimony, who added that the complainant was devastated by the termination and withdrew, physically and emotionally, from their life. *Id.*

Complainant has not demonstrated why compensatory damages in this case should be greater than \$100,000.00, the amount of the award in two cases with similar facts. Consequently, I find that \$100,000.00 is an appropriate amount in compensatory damages here.

### *Punitive Damages*

Complainant seeks punitive damages in the amount of \$250,000.00. The STAA provides that "Relief in any action under subsection (b) may include punitive damages in an amount not to exceed \$250,000." 41 U.S.C. § 31105(b)(3)(C).

In *Ferguson v. New Prime, Inc.*, ARB 10-075, ALJ 2009-STA-47 (ARB Aug. 31, 2011), the ARB wrote:

The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983). The Court explained the purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979). The focus is on the character of the tortfeasor's conduct – i.e., whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. *Id.* at 54.

... [T]he ALJ did not consider whether Thomas's behavior reflected a corporate policy of STAA violations or whether punitive damages are necessary in this case to deter further violations. *See generally White v. The Osage Tribal Council*, ARB No. 96-137, ALJ No. 1995-SDW-001 (ARB Aug. 8, 1997); *Johnson v. Old Dominion Sec.*, Nos. 1986-CAA-003, -004, -005, slip op. at 29 (Sec'y May 29, 1991). Moreover, the ALJ accepted the Complainant's request for damages in the amount of \$75,000 without discussing the evidentiary basis for this finding. Thus, we vacate the ALJ's punitive damages award and remand the case for further findings on the necessity and amount of such damages under the facts of this case. In his analysis, the ALJ should include consideration of the size of the award that would adequately deter New Prime from future violations and the punitive impact of the damages on the company.

Complainant argues that UPS's discharge of Complainant was reckless and exhibited callous disregard for Complainant's rights under the STAA. According to Complainant, the decision to discharge Complainant was made by the highest management officials of the employer and reflected high animus toward activity protected under the STAA. Complainant asserts, "it is simply inconceivable that the largest motor carrier in the country was not aware of the Department of Transportation's hours-of-service regulations." Complainant advises me that Allen Worthy, who discharged Complainant, terminated the complainant, with Mr. Bradshaw's participation, in *Youngermann v. United Parcel Service*, ALJ 2010-STA-47 (ALJ May 5, 2011). There, the ALJ awarded \$100,000 in punitive damages against UPS. Complainant argues that in light of the decision in *Youngermann*, "it is obvious that UPS's Earth City, MO management has thumbed its nose at the STAA and DOT regulations." As \$100,000 in punitive damages was

not sufficient to deter the management at UPS's Earth City facility from again punishing drivers who exercise their rights under the STAA, an award of \$250,000 will deter UPS's management from future retaliation. Complainant's Brief at 32.

Respondent has not specifically objected to Complainant's request for punitive damages. Respondent did insist, throughout its briefs, that none of the UPS managers involved in Complainant's discharge "had any inkling that what they were asking Complainant to do might constitute a technical violation of a Department of Transportation Regulation." Although the supervisors' stated ignorance of the DOT regulation does not preclude a finding of protected activity or employer's knowledge of the protected activity in this case, the supervisors' awareness is relevant in determining whether Respondent had the requisite intent that would warrant punitive damages.<sup>4</sup>

Complainant's supervisors testified that they did not believe that their instructions to Complainant to record his waiting time as "meal" at the Boonville meet point if he was in between his 3<sup>rd</sup> and 6<sup>th</sup> hour of work violated or might violate the law or DOT regulations. Mr. Worthy testified:

Q. At any time prior to your deposition in this case, and the deposition of others in this case, did you have any understanding that your expectation with respect to what drivers could or could not do while waiting for a meet person might somehow be contrary to the law or DOT regulations?

A. Absolutely not.

Tr. at 50. Mr. Fogerty testified:

Q. At the time you made the decision to discharge Mr. Bishop, did you have any inkling that what you were doing violated DOT regulations and the law in any way.

A. No, I did not.

*Id.* at 89.

Mr. Fogerty testified that he terminated Complainant because he failed to post meal time while waiting for the meet driver, a period which occurred between Complainant's 3<sup>rd</sup> and 6<sup>th</sup>

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<sup>4</sup> The Supreme Court in *Kolstad v. American Dental Assn.*, construing Title VII's punitive damages provision, explained:

There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard. In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability.

527 US 526, 536-537 (1999).

hour of work, and this resulted in Complainant getting paid more than he should have. *See* Tr. at 65-66, 85, 95-97. The parties stipulated that pursuant to Article 18 of Central Region Supplement to the National Master United Parcel Service Agreement between UPS and the Teamsters in effect for the period of December 19, 2007 thru July 31, 2013, employees were required to take an unpaid meal period between the third (3<sup>rd</sup>) and sixth (6<sup>th</sup>) hour of work, and for feeder drivers domiciled in Earth City, MO, UPS has required its feeder drivers to begin a meal break after completing their post-trip inspection if their meet driver has not arrived at the designated meet point and they are between their 3<sup>rd</sup> and 6<sup>th</sup> hour of work.

I find that Complainant has not established that Respondent had the requisite intent necessary for a punitive damages award to be warranted in this case. In *Youngermann*, the supervisor acknowledged at the hearing before the ALJ that he was aware, when he ordered the employee to drive a truck without working marker lamps and tail lamps, that operating the truck in such a condition violated DOT regulations. ARB 11-056, ALJ 2010-STA-047, slip op. at 3 n. 7 (ARB February 27, 2013). Knowing this, the supervisors repeatedly ordered the employee to drive the vehicle in violation of the regulations. *Id.* at 8. Similar testimony was not elicited in this case as the supervisors here did not acknowledge that they were aware, at the time of the discharge, that requiring Complainant to record his time waiting for the meet driver as off duty violated DOT regulations. No other evidence is offered by Complainant other than that “it is simply inconceivable that the largest motor carrier in the country was not aware of the Department of Transportation’s hours-of-service regulations.” Therefore, I find Complainant has not established that punitive damages are warranted in this case.

#### *Abatement of Violation*

Complainant requests that I order UPS to post a copy of the decision and order in this case for 90 consecutive days in all places in the Central Plains District where employee notices are customarily posted; provide a copy of any decision favorable to Complainant, by mail, to all of UPS’s present employees in the Central Plains District, and those employees who worked for it in the Central Plains District during the period when he was employed there; expunge all references to Complainant’s discharge for engaging in protected activity from its personnel and labor records; and cause all consumer reporting to delete unfavorable work record information, and to show continuous employment with UPS. Complainant’s brief at 33-34.

In *Shields v. James E. Owen Trucking, Inc.*, ARB 08-021, ALJ 2007-STA-22 (ARB Nov. 30, 2009), the ARB found that the ALJ did not err when he ordered the Respondent 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 the ALJ's recommended decision and of the ARB's final decision and order for 90 days.

Respondent has not specifically objected to Complainant’s request. Respondent is hereby ordered to post a copy of the decision and order in this case for 90 consecutive days in all places in the Central Plains District where employee notices are customarily posted; provide a copy of this decision, by mail, to all of UPS’s present employees in the Central Plains District, and those employees who worked for it in the Central Plains District during the period when he was

employed there; expunge all references to Complainant's discharge for engaging in protected activity from its personnel and labor records; and cause all consumer reporting to delete unfavorable work record information, and to show continuous employment with UPS.

#### *Attorney's Fees*

Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 31105(b)(3)(B). Complainant's counsel requests leave to file a petition for attorney fees and costs. Therefore, counsel for Complainant is granted thirty (30) days from the date of the Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

### **ORDER**

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Respondent shall reinstate Mr. Bishop to his former position with the same pay, terms, conditions and privileges of employment that he would have received if he had continued working from the date of discharge through the date of the offer of reinstatement.
2. Respondent shall pay to Mr. Bishop back pay in the amount of \$97,631.04 plus \$650.13 per week from October 21, 2013, with interest, to the date Complainant is offered reinstatement.
3. Respondent shall pay Mr. Bishop \$10,824.11 in total damages due to lost health insurance plus \$117 per week from October 21, 2013 until the date Mr. Bishop is reinstated.
4. Respondent shall pay to the Teamsters negotiated pension fund, for the account of Mr. Bishop, the following amounts: June 24, 2011 to July 31, 2011: \$1,759.53; August 1, 2011 to July 31, 2012: \$18,200.00; August 1, 2012 to July 31, 2013: \$19,552.00.
5. Respondent shall pay to Mr. Bishop the sum of \$100,000.00 in compensatory damages.
6. Respondent shall post a copy of the decision and order in this case for 90 consecutive days in all places in the Central Plains District where employee notices are customarily posted; provide a copy of this decision, by mail, to all of UPS's present employees in the Central Plains District, and those employees who worked for it in the Central Plains District during the period when he was employed there; expunge all references to Complainant's discharge for engaging in protected activity from its personnel and labor records; and cause all consumer reporting to delete unfavorable work record information, and to show continuous employment with UPS.

7. Counsel for Mr. Bishop shall have 30 days from the date of this Decision and Order to file a fully supported application for fees, costs, and expenses.
8. Respondent shall have twenty days from receipt of the application to file any objections to fee requests.

DANIEL F. SOLOMON  
ADMINISTRATIVE LAW JUDGE

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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. § 1986.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1986.110(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, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1986.110(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. §§ 1986.109(e) and 1986.110(b). 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. § 1986.110(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. § 1986.109(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. § 1986.110(b).