U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 March 2014

CASE NO.: 2013-STA-2

IN THE MATTER OF

DARREL HALLAM,
Complainant

vs.

VAN BEEK TRUCKING, LLC, and
JEREMY VAN BEEK,
Respondents

APPEARANCES:

PAUL O. TAYLOR, Esq.,
On Behalf of the Complainant

WILLIAM CORNETT Esq.,
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act (the Act)[1], and the regulations promulgated thereunder,[2] which are employee protective provisions. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

[1] 49 U.S.C. § 31105 et seq.
[2] 29 C.F.R. Part 1978.

Procedural Background

On 26 Aug 13, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based on the entire record, which consists of the following:[3]

Witness Testimony of
Complainant
Respondent
Mathew Mayes
James Kirkland

Exhibits

Claimant's Exhibits (CX) 1-11
Respondent's Exhibits (RX) 1-9

STIPULATIONS[4]

Complainant's factual allegations if true would properly bring his complaint within the coverage of the Act. Complainant's initial complaint and objections to the initial findings were timely. The one way driving distance from Hartley Texas to Hutchison, Kansas is between 315 and 318 miles.

FACTUAL BACKGROUND

Complainant worked as a truck driver for Respondent, hauling milk from Hartley Texas to Hutchison, Kansas. The one way trip was about 315 miles and the drivers were typically dispatched to take the milk, wait for the truck to be unloaded and return in one duty day. On 7 Jul 12, Complainant told Respondent he couldn't make the round trip in time. On 8 Jul 12, Complainant said he would be filing only accurate and legal logs in the future. On 9 Jul 12, Complainant told Respondent he could not take a truck because it was overweight. Respondent told him to find a ride home.

[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] Tr. 7.

When Respondent realized his business plan was not sustainable at current driver pay rates, he reduced employer driver pay by various amounts. Complainant stayed on for a short while, but then quit, taking another truck driving job with a different employer shortly thereafter.

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

Complainant alleges that he engaged in protected activity when he told Respondent that his rig weighed more than 80,000 pounds, that he could not make the round trip within the 14 hour restriction, and that he was going to start driving and logging 100% legal. Complainant similarly also alleges he engaged in protected activity when he refused to drive because his rig weighed more than 80,000 pounds and that he could not make the round trip within the 14 hour restriction.

Complainant argues that Respondent took adverse action against him when it reduced his pay more than other similarly situated drivers, refused to dispatch him on another load on the day he refused the overweight load (and the next two days), and constructively discharged him. Complainant seeks reinstatement, backpay, compensatory and punitive damages, and nonmonetary relief.

Respondent answers that Complainant failed to establish that he engaged in any protected activity and argues that even if he did, the activity was not a contributing factor to any adverse actions.

LAW

The Act provides that

> (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) the employee … has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety … regulation, standard, or order, or …
>
> (B) the employee refuses to operate a vehicle because--
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security;[5]

It also includes "a person" in the definition of employer.[6] The implementing regulations define "person" as including one or more individuals.[7] A person who is the president and sole shareholder or owner of the respondent business may be held individually liable for violating the Act.[8]

[5] 49 U.S.C. § 31105.
[6] 49 U.S.C. § 31101.
[7] 29 C.F.R. §1978.101.
[8] *Smith v. Lake City Enterprises, Inc.*, 2006-STA-32 (ARB Sept. 24, 2010).

To prevail on his claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the respondent took an adverse employment action against him, and that his protected activity was a contributing factor in the unfavorable personnel action. If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.[9]

Although it is not necessary that a complaint expressly cite the specific motor vehicle standard, which it is alleged has been violated, the complaint must "relate" to a violation of a commercial motor vehicle safety standard. For a finding of protected activity under the complaint clause of the STAA, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation.[10] If a complainant's protected activity is a refusal to drive because it would have resulted in a violation of a regulation, standard, or order, he must prove that was the case; his belief, even if in good faith, is irrelevant.[11]

An adverse action is anything an employer does that could well dissuade a reasonable worker from engaging in protected activity.[12] The implementing regulations prohibit as adverse action and make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]"[13] A respondent constructively discharges a complainant when working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign.[14]

Employers found in violation may be ordered to take affirmative action to abate the violation; reinstate the complainant to the former position with the same pay and terms and privileges of employment; pay compensatory damages, including backpay with interest and for any special damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney fees; and pay punitive damages in an amount not to exceed $250,000.[15]

[9] *Salata v. City Concrete, LLC*, 2008-STA-12 and -41 (ARB Sept. 15, 2011).
[10] *Ulrich v. Swift Transportation Corp.*, 2010-STA-41 (ARB Mar. 27, 2012).
[11] *Minne v. Star Air, Inc.*, 2004-STA-26 (ARB Oct. 31, 2007).
[12] *Strohl v. YRC, Inc.*, 2010-STA-35 (ARB Aug. 12, 2011).
[13] 29 C.F.R. §§ 1978.102(b), (c).
[14] *Earwood v. D.T.X. Corporation*, 88-STA-21 (Sec'y Mar. 8, 1991).
[15] 49 U.S.C. § 31105(b).

Unless it is impossible or impractical, reinstatement is an automatic remedy under the Act and respondent employers must make a bona fide reinstatement offer.[16] However, reinstatement may be waived.[17] Respondents may be ordered to compensate complainants for having experienced depression and hardship, if the weight of the evidence supports such an award.[18] Complainants are entitled to backpay from the date of discharge to the date when the employer makes a bona fide, unconditional offer of reinstatement, with a reduction in liability for other earnings[19] and an adjustment for pre and post judgment interest.[20] Punitive damages are appropriate where the respondent has acted with reckless or callous disregard or intentionally violated the law.[21] Respondents may also be ordered to expunge or correct a complainant's work record[22] and post a workplace notice.[23]

Federal regulations require operators to comply with, at a minimum, the laws, ordinances, and regulations of the jurisdiction in which they operate.[24] Kansas, Oklahoma, and Texas all have 80,000 pound limits.[25]

Federal regulations also provide:

> a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:
>
> (1) More than 11 cumulative hours following 10 consecutive hours off-duty;
>
> (2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of § 395.1(o) or § 395.1(e)(2).
>
> (b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—
>
> (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
>
> (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

[16] *Dickey v. West Side Transport, Inc.*, 2006-STA-26 and 27 (ARB May 29, 2008).
[17] *Young v. Park City Transportation*, 2010-STA-65 (ARB Aug. 29, 2012).
[18] *Id.*
[19] *Hobson v. Combined Transport, Inc.*, 2005-STA-35 (ARB Jan. 31, 2008);
[20] *Dale v. Step 1 Stairworks, Inc.*, 2002-STA-30 (ARB Mar. 31, 2005).
[21] *Ferguson v. New Prime, Inc.*, 2009-STA-47 (ARB Aug. 31, 2011).
[22] *Shamel v. Mackey*, 85-STA-3 (Sec'y Aug. 1, 1985).
[23] *Scott v. Roadway Express, Inc.*, 1998-STA-8 (ARB July 28, 1999).
[24] 49 C.F.R. 392.2.
[25] Kan. Stat. 8-1909; Okla. Stat. tit.14§109; Tex. Transp. Code §621.101(b).

(c)

(1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or

(2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours. [26]

EVIDENCE

Respondent (Jeremy Van Beek) testified at hearing in pertinent part:[27]

He is thirty-two years old and has a high school diploma. He is an employee and the sole owner of Van Beek Trucking. He has owned trucks and been in the trucking business for close to seven years. He was hauling mostly for local farmers and anything to pay the bills. But in December 2011, they finally got a big contract to haul milk from Hartley, Texas, to Hutchinson, Kansas. The loads went from Select Dairy Products to Jackson Dairy. Hartley has three dairies there. On 22 Dec 11 they took over three loads a day out of the total six, and then on 1 Jan 12, they took over everything.

They didn't have the trucks and personnel to do that big of a job and rushed to find people and equipment. He already had four drivers who were working for him and approached the Ruan employees who were going to be losing their jobs. He told them he would match what they were getting and would try to make that work. Complainant had been with him since late that December and was one of the first drivers he hired when they started the milk deal. Complainant was one of four drivers he took on from the carrier that had the milk contract before he did.

When drivers are taking loads from Hartley to Hutchinson, they actually pick up a loaded trailer at his terminal yard. The milk moves in tanker trucks that do not have baffles and get a little bit of a sloshing effect when the driver accelerates or brakes.

CX-1 accurately describes the routes his trucks travel from Hartley, Texas, to Hutchinson, Kansas. The distance is approximately 318 miles one way. He doesn't agree that it probably takes longer in a truck to run that route than it would in a car. It depends on the truck and traffic. There's not much difference whether there's milk in it that's sloshing around or just straight empty.

The speed limit on the highway when a truck immediately leaves his shop is 70. Along the route from Hartley, Texas, to Hutchinson, Kansas, there are some towns. Dalhart is one of the towns and has a speed limit of 45 for about three miles. There is a town called Conlen with a speed limit of probably 55 for less than half a mile. Stratford has a speed limit of around 35 or 40, with one four-way stop. Texoma is the same as Stratford. Goodwell has a speed limit of 40. In Oklahoma, Guymon has at least three stoplights and a speed limit of 35. Hooker has a speed limit of 45, but no stoplight or stop sign. Tyrone is right on the Kansas-Oklahoma border and has a speed limit of 45, but no stoplights.

[26] 49 C.F.R. 395.3.
[27] Tr. 34-110; 195-204.

Liberal is the first major town in Kansas, has three stoplights, and has a speed limit of 45. There is a town called Kismet-Plains, but Highway 54 goes around it and there is no need to slow down. Meade has a speed limit of 45. The trucks have to drive for maybe two or three miles in Hutchison, before reaching their destination.

The trucks are governed for a certain speed. Some are 75, but the majority of them are governed at 65. Aside from the towns, the posted speeds are generally about 65 miles per hour. However, there can be traffic and road construction. He would agree that Claimant would be more familiar with the route and the speed limits and the lights and the number of stop signs in some of the towns along the route than he is.

The gross vehicle weight rating for the vehicles operated by Complainant was 80,000 pounds. Vehicle with an actual gross laden weight in of excess of 80,000 pounds cannot operate on U.S. highways. The route from Hartley to Hutchinson is mostly U.S. highways.

At the time Complainant was employed they hauled about 41 loads a week from Hartley to Hutchinson. It is now 43 loads. They normally expect drivers to do five round trips a week and Complainant normally did that.

CX-5 is a little journal of what loads are going on what day on the far right. The number is the trailer number and then on the left is the names of the drivers that will be going. The number in the middle would be the delivery time.

In July 2012, Complainant had trips on the 1st, 2nd, 5th, 6th, and the 7th. Complainant was supposed to go again on the 8th, and couldn't make it. That's when he sent the text and is on CX-5, page 7. That's why, Complainant was crossed out there. The 9th, 10th, and 11th were days off. Complainant went out the 12th, 13th, and 14th. The third week of July, Complainant had five trips and the fourth week he had four.

CX-7 is a way to match the manifest with how who hauled what load and would be reflective of loads actually hauled. They're supposed to be per week, but everybody seems to do it their own way. CX-7, page 29 shows that during the two-week period, Complainant hauled nine loads.

CX-3 is a manifest for a load with an actual weight of the product on the trailer of 50,940 pounds. When the trucks go into the Select Milk Products, Inc., facility, they are weighed when they're empty and then weighed when they're loaded. That's how they determine the weight. The empty weight of most of the tractors and trailers is right around 30 to 31,000 on average, depending on fuel. They have terminal fuel, so the drivers don't stop for fuel on the road. The majority of the time they want trucks to leave with a full load of fuel, but if they have a heavy load, they would go with half a tank of diesel, and then they could get diesel when they got there. There are some lighter trucks that are day cabs that weigh about 3,000 less. Those are units 2 through 5. Unit number 12 is not a day cab.

When they get an overweight load, most of the time they can fix it just with the diesel. The truck will hold over 225 gallons of diesel. Diesel weighs about eight pounds a gallon, so they take 100-150 gallons off, 90 percent of the time that's the easiest and quickest fix. If they totally drain the tanks it's about 1,400 pounds in diesel fuel. He believes they had to send one of the smaller trucks or day cabs to go with the load from CX-3.

CX-7, page 47 shows James Kirkland with a load on 10 Jul 12, operating truck 12 with manifest number S0283561, which is the same manifest number for the overweight load shown on CX-3.The load that was identified in that manifest that Complainant didn't pull was pulled by driver James Kirkland in a truck that would weigh about 30 to 31,000 pounds. Kirkland put in 100 and 120 of fuel on that day and it usually only takes 98, so he assumes that Kirkland went pretty light on fuel. They can also take the truck back to the dairy and pull product off and have done that before. The guys that load the trailers are instructed to do that, and apparently this one got by without them noticing it. But, by not having much diesel in it, he believes they were under the 80,000. He doesn't know how much diesel was on it, but can see where Kirkland filled up twice upon returning. Kirkland put in 100 and 120, and then on the next day, he put in another 98. The day after that it was 105 and after that, 81.

He thinks he is familiar with the hours of service rule. When drivers go on duty, they usually start with a daily vehicle inspection. That driver has to be off duty and beginning a ten-hour break, not later than 14 hours after first going on duty. DOT requires drivers to have at least ten consecutive hours, uninterrupted off duty during each 24-hour period. He does not understand that just because a driver has to remain in a state of readiness to drive, he is on duty. He does understand that when a driver is backing into a door, after he's been waiting, that that's on-duty time.

CX-8 is a payroll summary of everyone that he employs. CX-2 is texts between Complainant and him. His are on the right-hand side in the darker section and the other ones are Complainant's. He recalls reading the 7 Jul 12 message that Complainant just got to Jackson was told they wouldn't be able to start unloading until at least 8:00 p.m. They started making phone calls, trying to figure out what the hold-up was going to be, and making a plan for the next day. Delays in unloading can affect the driver's hours of service. At 9:00 p.m., Complainant sent a message that says, "They haven't started unloading me yet. I'll do the best I can on getting back. Safety is my main concern." That was followed just a few seconds later with, "I was trying to get my ten-hour break in here, but I've been woke up three times since 5:00." He understood Complainant was saying he wasn't able to get his mandatory, DOT-mandated ten-hour break in.

At 9:23 p.m., he got another text from Complainant saying, "The tank failed, so they have to redo the wash on the silo and will be at least another 30 minutes before they start unloading me." Then at 11:55 p.m. Complainant texted, "I just weighed out. I can't leave till 9:45 a.m." Complainant was telling him he couldn't go on duty again by leaving for ten more hours, because he needed that ten-hour break by law.

Then on 8 Jul 12, in the afternoon, Complainant asked if he was dispatched for 9 Jul 12. He told Complainant that Complainant had a delivery time of 2300. That meant Complainant had to leave Hartley early enough to deliver in Hutchinson at 11:00 p.m. On the evening of 8 Jul 12, he got an answer from Complainant, saying "From here on out, I will be logging 100 percent legal and driving legal time-wise and weight." That's what he thought Complainant should have been doing all along and he didn't really understand what the difference was going to be. He has never condoned Complainant running illegal time-wise or weight-wise.

He asked why Complainant would show up at the barn two hours early when he needed his ten-hour wait. Complainant answered, "Because you needed your trailer back last night, Marilyn is in Lubbock, so I had to spend the night. Hoss said the load would come off at 5:00 or 6:00 this morning, and I thought I could pick it up and go home and get a ten-hour break before I left so I could make it all the way to Hutch and back in eleven hours, but I guessed wrong." Complainant was saying he was going to pick up the load, drive home to his en route between Hartley and Hutchinson, and take his ten-hour break.

Showing up two hours early to go on service, doesn't make sense because if he leaves early from the shop and arrives early in Kansas, they're just not going to unload him. They have other trucks there unloading, and Complainant has a scheduled time. He was questioning why Complainant was there so early, because that just meant a lot of downtime waiting to be unloaded in Kansas. He was trying to make the drivers understand that they needed to leave at the correct time and try to arrive at the correct time. Hoss was one of his dispatchers. He assumes Complainant thought his load would be ready at 5:00 or 6:00 that morning, and then he would go back home to Stratford and take his ten-hour break, but there's no way that would work.

Complainant was scheduled to work on 9 Jul 12, but reported the load was overweight. He gave the run to another truck that actually left the next day. He made no attempts to bring that load into compliance with the weight restrictions in order to allow Complainant to pull the load.

On 9 Jul 12 at 10:24 a.m., Complainant texted him, "I can't take this load. It's grossing 81,040." He told Complainant to find a ride home. Complainant asked if he should take his stuff out of the truck and he asked if Complainant was quitting.

He did not suggest Complainant take off some of the diesel fuel or take weight off, but sent truck number 12 up there. Number 12 didn't have to be up there until 10 Jul 12, because that was the next load. Truck 12 was a heavier truck. Drivers don't always run the same trucks, but they couldn't put Complainant in a lighter truck, because all the day cabs were busy, since that's usually what they use to load milk with. If he remembers correctly, they also had a couple trucks in the shop that were broke down.

The text was the only communication he got from Complainant, although Complainant apparently mentioned it to another employee at the time. Complainant did exactly what he'd been instructed to do by telling him the truck was overweight. He did not tell Complainant to go ahead and pull it, but sent James Kirkland to take it. Kirkland could pull it legally, because there was less fuel in his truck and it was maybe 500 pounds lighter. Complainant was not penalized in any way for reporting that the truck was slightly overweight. The truck was 1,040 pound overweight, so with a slightly lighter truck and a little less fuel, it was very manageable. He has never been in Kirkland's truck and weighed it on a scale, so he does not know the exact weight, but he thinks Kirkland could pull over 50,000 legally.

When he told Complainant to find a ride home, he wasn't reprimanding him for saying he couldn't haul that load. His home is 30 miles from Hartley and he could have caught a ride with one of the trucks, since six trucks a day go right through there. He didn't take diesel fuel off of Complainant's truck because he doesn't really like siphoning diesel. Complainant was already full, and they really are not set up to be able to siphon it out and put it back in the overhead tank.

On 11 Jul 12, at 4:25 p.m., he gave Complainant a dispatch for trailer number 110 to deliver on 12 Jul 12 at 1700 in Hutchinson. He also told Complainant they were having to cut back on payroll and loads would now pay $200. A load means a round trip. He also let Complainant know that they would not be paying any wait time anymore. All the drivers knew there would be a pay cut. He asked if Complainant was quitting, but Complainant said "No. I keep telling you I'm not quitting.

RX-8 is a summary of the drivers' logs. It is generated by his office, based on the logbooks completed by the drivers. Page 75 is Complainant's log recap. In the extreme left-hand column are the dates. The second to the left-hand column are the hours off duty on that particular date. Page 79 shows Complainant did not work on 9 Jul 12, 10 Jul 12, or 11 Jul 12. He had zero hours of on-duty those days.

On 12 Jul 12, Complainant texted, "I will be back at the barn by 10:30 in the a.m. I'll try and be out of here by 11:00, so I can be here by 1700." Complainant was saying it was going to take about six hours to make the load. He replied, "If you can't make it, I have people wanting to go." He was telling Complainant not to run over his hours of service and that they had plenty of people.

At 7:32 p.m. on 12 Jul 12, Complainant texted "I'm not going to jeopardize your loads. Maybe you better get someone else. Like I said, I won't be at the barn till 10:30 or so." Complainant then texted, "I'm going to keep you and mainly me out of trouble in case of an accident with my logs. I know real good how to do that, and I know I'm a real good driver, but I'm not perfect. I can show I took this load home yesterday and only me and you know different. I tried to only match my in and out times. That is the only thing I can be tracked by." At the time he didn't understand Complainant to be offering to alter his logs to show that he took the load home the previous night, because he did not really read that message. He knew that Complainant wasn't going to be able to make it and was

trying to find another driver. He did message back, "So does that mean you are going to get five loads a week, and I can count on you?" Complainant then texted him, "I'm so tired of all this friction between us, and I'm sure most of it is my fault, so I'd like to apologize to you and get back to normal working relationship. It's doing either of us any good. [*sic*] I want to see you in person."

He wanted Complainant to take five loads a week and was offering him just as many loads as everyone else. He believes they can legally do five loads without driving over 70 hours in eight consecutive days. The 70-hour rule is that a driver has to have a 24-hour restart after 70 hours of service for any eight-day period. A driver cannot drive after 70 hours of on duty time, including driving, in eight consecutive days, until he has 34 consecutive hours off duty, uninterrupted, at which time he starts with a clean slate on your logs. That's why he wants his drivers to do five loads a week. It gives them plenty of time on their 34-hour restart. If they go over five loads a week, everything has to work out perfect.

He texted Complainant, "I want to stay legal and safe. Let me know as soon as possible on any loads you can't handle." He was telling Complainant not to run anything illegal and let him know if Complainant was running out of hours, so he could have someone meet him like they had in the past or otherwise cover the load.

Diesel costs were going up and they had to hire more employees and buy more tankers than he had planned on buying. There was no cash flow and no way the business was going to survive unless something was done. He quit taking a paycheck from the business, kept doing his day-to-day operations, and started loading milk. They did anything they could to save a dollar. The mechanic became a truck driver instead of a mechanic and he did most of the mechanic work. He went eight or nine months without a paycheck. They were trying to get cash flowing. He knew it would work, but it just took more money than he had anticipated to get it going. He had to do something to keep the bills paid. He was trying to get his employees as much as they possibly could still have. He told everybody that he wouldn't be around much longer if they kept up the way they were. He also told them, he understood that nobody wants to get their pay cut, but it had to be done and there was nothing else he could do about it. He did tell them if they decided not to work for him anymore, he would give recommendations. Complainant agreed to stay on.

On 25 Jul 12, Complainant texted, "Will I get a paycheck when I give you that signed paper?" He told Complainant that was what the paper said he would do. The paper was just a way of informing the drivers on the different cutbacks and what was expected of the drivers. Complainant later asked "Why did I get cut to $200 and everyone got cut to 215?" He told Complainant it was because he could trust everyone else, it's called common sense, and Complainant had a lot to prove to him. Complainant and him had been kind of feuding back and forth over whether or not Complainant was going to take five loads a week and whether he could count on Complainant. Rumors was going around the shop that Complainant was quitting, He didn't ever know what day Complainant wasn't going to show up, and he just had the fear that Complainant was going to quit.

That's what Complainant needed to prove. Complainant was a good driver and very good on paperwork. He wasn't sure why Complainant would have quit.

Not everyone got cut the same. He made cuts based on work performance, quality and cleanliness of trucks, and how much time they had in the job. Complainant was generally on time with his deliveries and had no damage claims or accidents. Complainant's truck was dirty and messy inside. They had a hard time getting anybody else to ever drive a truck that Complainant had been in. The windshields were dirty. Windshields get dirty on the road. Drivers, to a certain extent, live in the truck and eating in it sometimes. Had Complainant never crossways with him over the overweight load or the hours he still would have had the same pay cut.

Complainant's cut was $30 per day. The three guys that he usually has loading, some of them got cut up to $50 per day. There was a handful of guys that got cut $20 a day or round trip. The range was from $20 up to $50 per day that some of the drivers got cut. The drivers who were cut $50 were the loading drivers. Those are drivers who simply load the product. They don't run over the road. Complainant had the highest pay cut for the over-the-road drivers

He never told Complainant that he was going to cut back on his number of work days and had no reason to want Complainant to work less days. Complainant did mentioned from time to time that he would like to do four on and three off one week, and then four on and two off the next week. They never really got anything worked out. If Complainant and asked for a day off, he got it.

He currently has ten trucks and 12 drivers and two other employees. His policy is that his drivers don't pull loads exceeding 80,000 pounds, because they have to drive across a scale and they'll get fined. He has never had a fine at the port of entry in Kansas or for being over the time limit on the trips to Kansas.

He has driven the route to Hutchinson, Kansas, from Hartley and it took five-and-a-half hours. Most of that route is straight and level rural roads. It's all U.S. Highway 54. There is one turn in Texas and not another until Kansas. It is not difficult to make that run in five-and-a-half hours, if you drive and don't stop, you make that easily in five-and-a-half hours, even if you obey all the speed limit signs and all the stop signs. If a driver says they cannot get back within the 11 hours, they either send another truck with their load for the next day and meet them, usually in Liberal, Kansas, or that truck can just go the rest of the way, if they want the whole rest of the day off. That has happened many times. He has extra drivers and extra trucks to accommodate that situation.

Normally it's somebody coming back with an empty tank saying they're out of time. He sends a full tank in that direction and they swap. The second driver brings the empty home and the out of time driver takes his break and hauls the full load the rest of the way to Hutchison. There's no problem with the product sitting in the tanker that long. If they have to shut down because of hours of service it can run the whole schedule behind. That's why they meet them with other trucks. The driver would still get his five loads,

because they would meet him with another load halfway. If the driver runs out on the 70 hours, it is going to affect the ability to deliver five loads a week.

Complainant never reported that he was violating the rules. Complainant would let him know if he was running out of hours, and then they would have somebody meet him. He never instructed Complainant to violate the hours of service. He did not perceive Complainant to be reporting a violation when he said he was running out of hours. Complainant was saying they had to do something different. So he would send another truck. He never failed to accommodate Complainant if Complainant said he was running out of hours or the load's too heavy.

The only infraction he could find in Complainant's logs January 2012 through July of 2012 was an instance in late January when Complainant came on duty 15 minutes before his 34-hour restart was over. He has no idea why that happened; he didn't ask Complainant to come in early and Complainant never said anything about it.

The only time Complainant ever complained about having to pull a load that was over the weight limit was the one text message. He did not interpret that as a complaint of a violation.

He was at a stress max and it was unbelievable due to the finances. Any little confrontation seemed like a big deal, when it probably really wasn't. It is a five-and-a-half hour drive and there is not a whole lot of leeway and for his business model to work that had to happen. If he sends someone to exchange a trailer because Complainant can't make it all the way back without violating the safety rules, Complainant still gets paid the full price for that load and has to pay the other driver more.

He never told Complainant to go around scales. Complainant never told him that he was turning in false logs. Complainant would have been fired for that infraction. He heard Mr. Kirkland testify that he has broken hours of service regulations and he will take care of that. They will give plenty of warnings, just like they've done with everybody. They have a three-step deal. On the third warning, the driver is out. Complainant would have been warned.

They have had many problems with Matthew Mayes speeding and everything that he said he didn't do. They never once forced a load on him. He does not believe Mayes ever had an overloaded trailer. Mayes was correct on the trucks that he drove. The reason Mayes got fired was for three strikes on logbook violations. RX-9 is the notice of termination to driver Matthew Mayes.

Respondent's 29 Aug 12 memorandum states in pertinent part:[28]

> He never told Complainant he was going to cut Complainant's loads. He gave Complainant cash advances and provided Complainant's nephew with a summer job.

Complainant testified at hearing in pertinent part:[29]

> He has been a truck driver about 20 years. He has pulled flatbed, reefer, dry box, tanker, grain, car hauler, and just about any kind of truck that you can drive. Before going to work for Respondent, he worked for Ruan Transportation out of Des Moines, Iowa, hauling milk from Dalhart, Texas, to Hutchinson, Kansas. The Ruan terminal was in Dalhart.
>
> When Ruan closed their terminal in Dalhart, Respondent took over the contract and retained him as a driver. At first it was kind of like when he drove for Ruan. He pulled his loads every day and did his dispatch from Hartley, Texas to Hutchinson, Kansas.
>
> Under normal circumstances, it takes six hours to drive a commercial vehicle loaded with milk on a trailer from Hartley, Texas, to Hutchinson, Kansas. You can't make the trip loaded in five-and-a-half hours, but sometimes you can make the return trip in five-and-a-half hours when you're empty. Acceleration time is faster with an empty truck and the milk sloshes in a loaded trailer, making the truck speed up and slow down. He drove a Peterbilt sleeper cab with a speed governor set at sixty-four mile an hour. He estimates that of the total distance from Hartley to Hutchinson, Kansas, about 216 is rural driving, where there are no stop signs or stoplights and 60 is in city miles.
>
> CX-1 correctly shows on page 1 the route that he took from Hartley, Texas, to Hutchinson, Kansas. The first stretch shows 14.2 miles, going on U.S. 87 North to U.S. 385 North to U.S. 87 South to U.S. 385 South. The speed limit on 10 miles of that stretch is 70 miles an hour. The rest is posted at 35 or 40. That first stretch goes through Dalhart, Texas. It typically takes 15 or 20 minutes to get through Dalhart, Texas. There are stoplights and the highway's a four-lane street with intersecting streets. A semi-truck does not accelerate as quickly as a car.
>
> The next stretch is 246 miles on U.S. 54 East, turning right onto Liberal Street. The posted speed limit on the non-residential or commercial portions of that route is 70 mile an hour, in Texas and then it drops to 65 in Oklahoma. That stretch goes through Conlen, Texas; Stratford, Texas; Texoma, Oklahoma; Goodwell, Oklahoma; Guymon, Oklahoma; Hooker, Oklahoma; Tyrone, Oklahoma; Liberal, Kansas; Kismet, Kansas; Plains, Kansas; and Meade, Kansas. You cannot drive 65 through those areas, because there are school zones, stoplights, stop signs, city speed limits, and pedestrians crossing the road.

[28] RX-6.
[29] Tr.123-172; 205-206.

It takes 25 minutes to get through Guymon, Oklahoma. Guymon's a small town, compared to Amarillo, probably not even 10 percent the size of Amarillo. He could drive a truck through Amarillo in 25 minutes on I-40. It could take on average 25 minutes to get a truck through the city of Guymon, because there are five stoplights, plus the speed limit slows down a mile before you get into town, and it goes a mile past town. Guymon is not the largest city they go through. Liberal and Pratt are probably bigger, and if you want to count Hutchinson and Dalhart. Stratford is two or three miles. Conlen is maybe a mile. He doesn't think there are even ten people living in Conlen.

There's another stretch of 44.2 miles onto Kansas 61 North. It's a two-lane road for 34 miles. The last ten miles there are four lanes and then it turns onto city streets. The next stretch is 9.8 miles and merging onto U.S. 50 East towards Hutchinson. That's at sixty-five mile an hour. Only sixty miles of the trip is in Oklahoma. The majority of the trip is in Kansas and the max speed limit on this route in Kansas is 65 miles per hour. There are also some smaller sections of 2.1 miles and 1.1 miles on local streets. Traffic, farm equipment like combines and tractors, and construction can all slow you down.

The minimum wait time to unload would be one hour and 30 minutes. On a typical day, he would expect to be there for anywhere from one-and-a-half hours to ten hours.

On 7 Jul 12, at 4:41 p.m. he sent Respondent a message that, "I just got to Jackson, and they are telling me they won't be able to start unloading me till at least 8:00 p.m." Jackson is in Hutchison. The majority of the time the normal delivery time was 5:00 p.m. Sometimes they would get delayed, though. It could be every day one week, and the next week, it may be okay. The average delay, if there was one, was four hours.

On 7 Jul 12, they finished unloading about 11:45 p.m. He told Respondent that he was trying to get his ten-hour break in, but had been woke up three times since 5:00. The unloader came out to take the samples. The tank failed, so they had to redo the wash on the silo.

Up to July 2012, he lied on his logs, but never told Respondent he was lying on his logs. Today is the first time he specifically told Respondent his logs were not correct. He did send Respondent a message saying he would be logging 100 percent legal and driving legal because he had not been doing that before. He had decided that because of the new DOT rule that he would be held accountable, and might not get another job if he had a lot of violations and tickets. Anything that is done in a commercial vehicle now counts against the driver for three years.

He was scheduled for a dispatch on 9 Jul 12. He could tell from the manifest that he would be grossing 81,040 and his understanding of the limit on the gross vehicle weight limits on the route from Hartley to Hutchinson, Kansas was no more than 80,000 pounds. After he told Respondent he couldn't go, Respondent told him to find a ride home. No accommodation was made to provide another tractor to operate or have some of the weight pulled off the trailer. He asked Respondent if he should take his stuff out because he was figuring he was getting fired. When Respondent asked if he was quitting, he said,

"No. I keep telling you I'm not quitting." They had had some issues in the past and Respondent had asked if he was quitting before.

He would normally come in to work early because sometimes at the plant, they would unload early. He never knew until he got there and he never wanted to be late. He was never late. He had no accidents and one warning ticket.

On 13 Jul 12, he texted Respondent, "I can show I took this load home yesterday, and only me and you know different. I tried only to match my date, my in and out times. That is the only thing I can detract -- I can only detract by." He was trying to get back to where they worked like when he first started. He really wanted to stay with Respondent, who seemed to have a very good company going, and it was letting him do what he was doing before. He ended up logging what he really did, though. His logs in CX-4 are accurate.

When Respondent said, "So does that mean you're going to get five loads a week, and I can count on you?" he took it to be asking if he would do five loads a week, no matter what it entailed. There are times that if you log legally, that you can't do five runs in a week without violating the hours of service rule.

When he got CX-3, he did not actually have to operate a truck and go on duty. When he was dispatched, he'd have to go into the barn, to the refrigerator and get samples. The samples and the bills were all in a zip-lock baggied together in the refrigerator.

He had been dispatched on a load where your gross vehicle weight exceeded 80,000 pounds, before the trip with CX-3. He took the load. Respondent said to go around the scales, and if he crossed the scales with an overloaded trailer, it was his ticket, and he would be terminated. He was with other drivers when Respondent said to go around the scales. The subject came up because another driver had a load that was overloaded. It is possible to go from Hartley, Texas, to Hutchinson, Kansas and avoid the port of entry scale by going to Liberal, north to Dodge City, and then straight across Highway 50 to Hutchinson. That route has no scales.

He turned down the overweight load on 9 Jul 12 because he wasn't going to go out around to take it. Plus, they set up portable scales all along the route and that would be a violation on him. He wasn't willing at that point to break the weight laws or the hours of service regulation.

CX-7, page 6 represents a two-week pay period. He normally ran ten loads in a two-week pay period. He ran nine because he had to take off a day because his girlfriend's mom passed away. He drove two different sleeper cabs that week, 7 and 8.

CX-7, page 12 shows eleven loads that period. It was unusual for him to run 11 loads in two weeks. The fuel entries show how many gallons it took to fill the truck up when he returned or before he'd leave. The majority of the time, he could make the round trip without buying fuel.

On CX-7, page 19, he did eight runs that period. He didn't do ten because he took off three days to go to Dallas, Texas, to pick up his nephew. He had permission from Respondent to take those days off.

Page 29 of CX-7 shows nine loads. He missed the overweight load, but was available to work on 10 and 11 Jul 12. He only took three loads on the week shown on page 53 of CX-7, because that's when he quit.

He did not tell other drivers that he was going to quit. He decided to quit because he was not getting paid enough. He was realizing he wasn't going to be able to make the money and provide for the things he needed to unless he wanted to run illegal and haul five loads a week, no matter what happens. He just realized he couldn't do it. He was losing everything he had because of it. When Respondent said he was going to be cut down to $200 per round trip, he said he would try and see if he could make it with that and the $10 an hour for any wait after two hours at Jackson in Hutchinson, Kansas.

When he found out his pay was cut more than any other over-the-road driver, it made him feel really bad, because he thought he'd been doing a good job. He came to work the same time that the other drivers did, and he was never late. He didn't tear the trucks up. His trucks were not messy and at the conclusion of each trip he always took the trash out of it, because there's a trash barrel right there by the fuel pumps. He is not a smoker. If he noticed things that he thought were wrong, he would point them out to Respondent. He just really felt bad about himself and really humiliated.

CX-9 has his W-2 for 2012 from JBS Carriers. He started with them on 23 Aug 12. That's the only place he has worked since his separation from Respondent. As of last Wednesday, he had earned $31,327 in 2013 wages from JBS Carriers. That, plus the number shown on the 2012 W-2 from JBS Carriers, represents all the income since his separation from Respondent. CX-9 also has his W-2 from Respondent. It accurately represents what he earned in wages from Respondent in 2012.

He has not worked anywhere else. He did not work for a road construction crew between Texoma and Stratford beginning about a week after he quit. He didn't tell anyone that he was driving a truck for a construction crew, because he wasn't. The week after he quit he was not in the area of Texoma and Stratford, Texas. He was in Dallas until 6 Aug 12.

He wants Respondent to be ordered to offer him reinstatement; give him backpay for the load he refused to haul on 9 Jul 12 and to be paid what the other over-the-road drivers were paid; to pay him compensatory damages for emotional distress and mental pain, to pay him punitive damages; pay his attorney; and to post a copy of any favorable decision at its terminal in all places where employee notices are customarily posted. He would leave for pain and punitive damages up to the judge.

He wants an order of reinstatement, because even though it wouldn't be any better than it was when he quit, he may not work for JBS forever and might need to go back to Respondent, if he has to.

He quit Respondent on 28 Jul 12 and started JBS 23 Aug 12. He lost about $2,000 in salary for those 26 days. He gets paid less at JBS. There was no employment available where he could have been paid as much or more as Respondent was paying. In addition to the lost days after he quit, he lost pay for the loads he missed before he quit and the difference in the pay compared to other drivers with equal seniority. The difference in pay was $15 a load for two weeks, so that would be about $150.

He hasn't gone to any counselors for his emotional feelings or obtained any treatment for his emotional damage. He did not miss any work because of any emotional pain that he suffered.

He thinks he should be given punitive damages because of the way he felt humiliated when Respondent didn't pay him what everybody else who was doing the same job was getting. He felt like he was being targeted because he wouldn't run illegal like everybody else. The other drivers didn't know he was being paid less, but it was a slap to his face.

He never told Respondent that if he drove, he would be over the time limit. On 9 Jul 12, he told Respondent in a text that if he pulled the load, he would be in violation of hours. Respondent sent another driver to meet him, so he would not be in violation of exceeding the time limit for over-the-road truckers. When Respondent does that, they call it repowering a load.

He told Respondent one time in July 2012 that he was not hauling a load because he'd be over the weight limit. Respondent sent another driver with a different truck for that load. There was another time in March 2012 that he told the dispatcher he was pulling a truck or trailer over the weight limits. He took the load anyway. He didn't mention it to Respondent and doesn't know if the dispatcher did. The drivers had been told to tell the dispatcher. The March and July 2012 incidents were the only two times he ever had a load that was over the limit.

Respondent never told him to violate or exceed the time rules for over-the-road truck drivers or exceed the weight rules for over-the-road truck drivers.

Before 9 Jul 12, he had not had any loads repowered. They repowered the two loads after that date because they got held up at the plant in Hutchinson for eight-plus hours. If he had been willing to break hours of service, the loads would not have needed to be repowered. Respondent paid him full pay the first time they repowered, but said that after that, drivers would not get paid full price if they didn't make the complete trip.

When he was working for Ruan he didn't have to lie on his logs, because the run was 14 miles shorter and the 28-mile round trip difference was enough that it made it comfortable. He knew of no weight problems with Ruan.

Mathew Mayes testified at hearing in pertinent part:[30]

He has been a truck driver for seven years. He now drives over-the-road coast to coast. He has done that since leaving Respondent about nine months ago. He had been hauling milk from Hartley, Texas, to Hutchinson, Kansas. The typical driving time on that route is about six hours or six hours and 30 minutes at 65 miles top speed in Kansas. It can't be done in five-and-a-half hours without illegal speeding. That's with no traffic or mistakes or anything like that. There are towns along the route where you have to slow down to under 65 miles per hour. There are plenty of towns that you have to 25, 35, and 45 through. There's a good ten or eleven towns that you got to go through to get to Hutchinson from Hartley and every one of them, you got to slow down and hit red lights and go through town and everything else.

Respondent didn't want them to log fuel stops. Respondent wanted the drivers to log five-and-a-half hours there and five-and-a-half hours back, but not show that they were working while they were there. Respondent wanted the log to show a 15-minute pretrip and being in Hutchinson, Kansas, five hours later. The ten or eleven hours is all Respondent wanted them to log, but at the end of the day, it took 13 to 14 hours to do that load.

He did go over the hours limit almost every run, five days a week. That's just because Respondent made him do it or he wouldn't have a job and he had a family that he had to support. He logged it the actual way that he did it – six to six and a half hours each way--and ended up getting fired for log violations.

He filled out his logs. They were correct to what he did. Every week when he turned in his logs, Respondent would hand them back, saying that they were incorrect or invalid. When he asked why they were invalid, Respondent said because he can't legally do the run that way. When he replied that's the way Respondent was making the drivers do the run, Respondent said nobody's forcing them to do this run, since he only had six trucks, it had to be done that way. Respondent asked him to reduce and correct the logs, fixing them to where he could show that it was completely done in eleven hours, but that is totally unfeasible. Respondent fired him with a letter along with my last paycheck. That was a month after Complainant quit. After he got fired, he had to move to Amarillo.

If one of the milk loads showed a product weight of 50,940 pounds the load could not be legally pulled without violating the 80,000 pound weight restrictions. He has operated quite a few trucks, but he knows you can't have over about 43,000 pounds in your trailer. 43,000 pounds usually grosses out at about 79,900 pounds. He operated a total of about five trucks working for Respondent, but had one assigned truck, unit number 10. It was a 379 King Cab Peterbilt day cab. He only hauled silage in it. He also drove unit number 6 also after Complainant quit. It was a 386 Peterbilt. He doesn't recall ever operating truck

[30] Tr.112-123.

number 12. Whenever he hauled the tank he used the 386. He never pulled a load over the weight limit.

Respondent's records show in pertinent part:[31]

Mathew Mayes was terminated on 4 Aug 12 for four log violations from May to July, including three major violations for logging over the 70 hour limit.

James Kirkland testified at hearing in pertinent part:[32]

He has a CDL and twenty years' experience as a truck driver. He has worked for Respondent for five years. Respondent instructions were to do it legal and safe and go under DOT laws. He was never told to violate those time regulations. Respondent's drivers are responsible for seeing that they have correct logs. His logs are correct. He can do anything he wants in a logbook. Drivers do whatever they need to do. There is no sense in lying about it; drivers can make their logs avoid the appearance of hours of service violations. He turned in logs that at least looked legal, but has also been written up.

The legal load weight limit for an over-the-road truck is 80,000 pounds. He doesn't know if he ever hauled a load over 80,000 pounds while he has been with Respondent. He has never paid a lot of attention to the weight. He has never been asked by Respondent to haul a load that was over 80,000. He had one load that was over. Respondent took it away from him and hauled it with a day cab because of the weight. A day cab is a truck with a smaller cab and weighs a lot less. He has never been told to go around a port of entry or had an overweight ticket. Respondent says to get it legal. He has never heard Respondent tell any driver to go around scales to avoid having the trucks weighed or to violate time or weight regulations.

He has been doing the Hartley, Texas, to Hutchinson, Kansas run ever since Respondent started it. It is 315 miles each way and takes five-and-a-half hours to get there and five-and-a-half hours to get back. It's two-lane highway and at times there can be traffic, depending on the time of day. Is it not difficult to make that trip in five-and-a-half hours and that is with one stop.

Sometimes he does five and a quarter; sometimes he does five-fifteen. You just got to keep that left-hand door shut and keep going. There are some zones along that route where the speed limit is less than 65. His truck doesn't have a governor on it, but even if it had one set at 64 miles an hour, it wouldn't matter because he drove at 65, just to see how much fuel mileage he got before. He can't set the cruise at 65 and never hit the brakes, but in Texas, he can go 70. Sixty-six miles of the route is in Texas. Respondent never indicated he wanted drivers to speed and was actually on the drivers about speeding because of the fuel mileage.

[31] RX-9.
[32] Tr.172-195.

When he gets to the receiver in Hutchinson, Kansas, he goes to the scales to be weighed and then wait and see if there's another truck in the door and if he has to wait. That happens from time to time. They can tell you how long before the door will be open and he can back in. If it's going to be a while he can go off and do whatever he wants.

Once he backs in, he has to be back there and get the empty trailer out. It takes an hour and a half to unload the truck and be back on the road. He is almost always going to be there at least an hour and a half. Delays do happen once in a while. It's unpredictable. When he gets there, he goes off duty. It's their load and he's not responsible. Once he backs in that door, he doesn't have anything to do with it. He unhooks and goes and eats or goes to bed, whatever he wants to do.

He has had loads repowered when he didn't have the hours to get back in time because of the plant. If he cannot get back to Hartley, Texas, within the driving time limits, Respondent brings a load to him for the next day. All he has to do is ask and they meet him halfway, in Liberal, or somewhere. That makes is possible to stay legal with the time regulations.

He typically takes five loads a week. He couldn't do seven or eight loads, because he'd get over his 70 hours. He can't drive after having been on duty 70 hours in eight consecutive days, until he has a 34-hour restart. On-duty time would include things other than driving, like doing a pretrip, fueling, and unloading. He didn't say he always obeys the hours of service rule. He said Respondent never asked him to go over them. He doesn't know if he breaks the hours of service rule driving for Respondent. Sometimes he probably does.

Page 47 of CX-7 shows he hauled six loads on six consecutive days from 17 Jul 12 through 22 Jul 12. The driving back and forth at eleven hours per trip would put him in those six days at 66 hours of just driving time. He would also have had pretrips and fueling. He fuels the vehicle after a return and it typically takes 15 to 20 minutes to fuel around 90 gallons. The pretrip's at least 15 minutes. There is probably another six hours of on-duty, not driving time during that six-day period. He doesn't know if there was a 70 hour rule violation. The point is Respondent never asked him to do that.

When he has a load that's really close, but just a little over weight, he normally goes with it, but not because he was told to or asked to. His truck was a Kenworth and could haul about 50,000 pounds on a trailer without going over 80. CX-3 looks like a bill of lading and the manifest number matches up with that load on the top of page 47 at CX-7. With his truck, a load that's 50,940 is going to put him about a thousand pounds over. He would probably not say a thing and just take that load. Respondent doesn't know what's in that bill of lading. Respondent is an experienced driver and probably knows that a load that's 50,940 would be over gross. In 20 years as a truck driver, he has gone around a scale to avoid an inspection. That's kind of a common thing and he's not going to lie. He's a truck driver. The point is it's not because Respondent tells him to do it.

In July 2012, Respondent called him on the phone and told they had two choices: close the doors or cut pay. Respondent said he couldn't afford to keep paying the drivers the same amount they were getting. Respondent said cuts were going to go according to how long a driver has been there, how well he cares for his truck, and how he does his job. Respondent gave him the option of providing a good reference if he didn't want to stay. Respondent didn't tell everybody what he was cutting them. Respondent just told that individual. He didn't know what Respondent cut Complainant or what Respondent cut anybody else.

He took the pay cut because in Dalhart, Respondent probably pays about as good as anybody else, and is good to work for. He had nowhere else to go and rather have a few dollars less than have no job at all. If Respondent shut down, there were going to be a lot of people out of work.

He knows Complainant as an acquaintance and fellow driver. Complainant said he didn't like the pay cut. Complainant said he wished Respondent would just go ahead and fire him, so he could just draw unemployment. That was just a few days after the pay cut in July 2012. Complainant was always looking for another job.

Shortly after Complainant quit he was stopped at a construction stop sign between Texoma and Stratford. One of the road crew said Complainant was working for them. He never saw Complainant and doesn't know who the road crew guy was.

A Select Milk Producers Bill of Lading states in pertinent part:[33]

On 8 Jul 12 Respondent took a load of 50,940 pound of milk to haul to Jackson.

State unemployment records show in pertinent part:[34]

Claimant reported he quit his job with Respondent because he was being paid less than other drivers and asked to drive in excess of legal limits.

Discussion

The primary argument Respondent makes is mostly a legal one. Respondent insists that Complainant's actions did not constitute protected activity under the Act and there is no need to consider whether he was subjected to any adverse action. However, Respondent also submits in the alternative that any adverse actions would have been unrelated to those activities. Respondent did not address the issue of damages or his personal (vs corporate) liability.

[33] CX-3.
[34] RX-2.

Protected Activity

The central facts are not in any meaningful dispute. Respondent testified that on or about 7 Jul 12, Complainant was in the middle of a run and told Respondent he had been held up with a delay in unloading the milk. Respondent understood that Complainant was telling him he couldn't go on duty again by leaving for ten more hours, because he needed that ten-hour break by law. Respondent also testified that on or about 8 Jul 12, Complainant told him that from then on he would be logging and driving 100 percent legal with regard to both time and weight. Finally, Respondent testified that on or about 9 Jul 12, Complainant told him he couldn't take a load because it was grossing 81,040 pounds.

Complainant submits that Respondent's testimony describes Complainant complaining that by continuing as dispatched, he would be violating the regulations pertaining to hours and weight and refusing to do so. Complainant also suggests that his resolution to only run legal in the future clearly implies that he had run illegally in the past and was refusing to do so any longer. Complainant argues that those communications fit squarely into the definition of protected activity.

Respondent doesn't necessarily disagree that Complainant said and did those things. Respondent essentially concedes that the rig may have been overweight with Complainant's truck and that for Complainant to continue the trip without a break could have violated the regulations. Respondent instead argues that it never intended that Complainant would drive overweight or over his hours and it wanted him to communicate when that might happen, so the problem could be addressed without breaking the rules. Respondent seems to be suggesting that Complainant knew or should have known that once he raised the issue, Respondent would fix the problem. As a result, Complainant could have no reasonable belief that he was identifying a potential violation or refusing to drive because doing so would result in a violation. Without the possibility of a violation, Respondent concludes that there was no protected activity.

The third alleged protected activity was Complainant's announcement that he would henceforth drive and log legally. Implicit in that is (1) a communication that he had violated the rules in the past and was (2) refusing to do so in the future. Respondent argues that since he had no idea Complainant had been running illegally or logging falsely and didn't want him to do so, his disclosure that he had done so in the past, but would no longer do so was a moot announcement not constituting protected activity. Respondent appears to take the position that if a driver knows his employer will not force the issue, but will correct every reported violation and accommodate every refusal to drive, he cannot be said to be engaging in protected activity.

Assuming those to be the facts begs the legal question of whether Respondent's argument can be interpreted as adding a *mens rea* element that does not exist in the statute or interpreting case law, i.e. that the employer intends for the violation to be committed. Assume, for example, that an employee understands that his employer is fully committed to regulatory compliance and has never known the employer to not immediately accommodate and remedy a driver's notification of a safety or regulatory problem. If that employee reports a problem with the full (and subsequently vindicated) expectation that the employer will correct it, has he nonetheless

engaged in a protected activity? In other words, if a bus driver reports that the exhaust is leaking into the passenger compartment knowing with full certainty employer will fix the leak and the employer does so, commending the driver for identifying and reporting the problem, has he nonetheless engaged in protected activity? If the answer is yes, Complainant in this case clearly engaged in some protected activity, notwithstanding Respondent's factual allegations.[35]

However, if the answer is no, I must still address Respondent 's factual assertion, which is that Complainant should have reasonably known that Respondent wanted him to do what he did, by reporting concerns about violations and refusing to drive in violation. That requires a consideration of the context of the entire environment and context within which Complainant's actions took place.

Background

The evidence shows that Respondent took over the Hartley to Hutchison route believing that it could be sustainable from a business point of view. For that to happen, he needed his drivers to drive 315 miles, wait to be unloaded, and drive 315 miles back, making sure that they returned no later than 14 hours after they left and spent no more than 11 hours driving. He also needed for them to do that five times a week without driving more than 70 hours in eight consecutive days.

Respondent testified that he believed it was possible for his drivers to do just that, if they did not waste or mismanage their time. At the same time, Respondent conceded that there were circumstances where that might not be possible and when that happened, he would send a relief driver to "repower" the load. He was adamant that he never intended for, instructed, or encouraged any drivers to violate any regulations or laws.

On the other hand, Respondent also described that how his business starting running into trouble and the route was no longer a financial *"milk run."*[36] He said diesel costs were going up and they had to hire more employees and buy more tankers than he had planned. With no cash flow there was no way the business was going to survive without changes, so they did anything they could to save a dollar. Respondent even quit taking a paycheck for eight or nine months and started personally loading milk and doing most of the mechanic work. He told everybody that he wouldn't be around much longer if they kept up the way they were and he had to cut the drivers pay. Respondent testified he was at a max stress and under unbelievable financial pressure. He admitted that although the trip is a five-and-a-half hour drive and there is not a whole lot of leeway, for his business model to work that had to happen. If he sends someone to exchange a trailer because a driver can't make it all the way back without violating the safety rules, the original driver still gets paid the full price for that load and he still has to pay the other driver.

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[35] In that event, the fact that Respondent wanted him to report those concerns so that they could be addressed would have nothing to do with whether the reports fell within the definition of protected activity. However, it would still be very relevant to whether or not any subsequent adverse action had a nexus to the protected activity. Respondent's real argument is that since it never wanted Complainant to break the rules and was glad he raised the issue so the situation could be fixed, it had no reason or motive to treat him adversely when he did exactly what he was expected to do.

[36] A *milk run* was the term used by World War II aircrews to describe an uneventful and successful mission. Travis L. Ayres, *The Bomber Boys: Heroes Who Flew the B-17s in World War II*, NAL Caliber, 2009.

Given that situation, it seems very likely that there would be a good deal of implicit pressure on all of the drivers to do everything they could to make the plan work. The driver who refused to go the "extra mile" and do whatever it takes to complete the run would be putting the company and his colleagues in financial jeopardy.

Hours of Service and Logs

There was a substantial amount of evidence offered by the parties relating to how long it takes to drive a milk laden tanker from Hartley to Hutchison, have the truck unloaded and then drive the empty tanker back. Respondent said it was not difficult to do the one run in five and a half hours. Complainant said it was 6 hours loaded and only sometimes five and a half empty. Mathews Mayes said the typical one way time is to 6 and a half at top speed and the trip couldn't be made in 5 and a half hours without speeding. James Kirkland said five and a half hours was not difficult, even with one stop.

Kirkland also said that unloading is almost always going to take an hour and a half, but it's unpredictable and delays do happen. Mayes didn't specifically address unloading time, but did say it would take 13 to 14 hours to do the entire trip. Complainant also said the minimum unloading time was an hour and a half, but added that delays could run that time up to ten hours and while there might be no delays one week, the next might have a delay every day. He estimated the average delay time, when there was a delay, to be four hours.

It's difficult to determine reasonable averages for the total round trip driving and elapsed time for the Hartley to Hutchison milk run. Given the right conditions, it may have been possible to do it in the allotted 11 and 14 hours. However, the weight of evidence shows (and indeed Respondent conceded to some degree) that even though drivers may have been able to meet those standards at times, there was a percentage of time when they could not do so.

Respondent maintained he never intended for his drivers to go over their hours and on those occasions when it was impossible to comply, he expected them to tell him and he would repower the load. However, he admitted that doing so increased his costs. His testimony clearly established that he had virtually no margin to allow him to absorb any additional costs and he was going to go out of business if he didn't cut costs.

Mathew Mayes testified that Respondent wanted the drivers to adjust their logs to show that they were operating within their allotted driving and duty time and would return any logs that showed otherwise. James Kirkland testified that Respondent's instructions were to drive legal and never told him to run beyond his allotted hours. However, Kirkland also testified that while he didn't know if he breaks the hours regulations while driving for Respondent, at times he probably does. I found most telling Kirkland's candidly conceding that as a truck driver he broke the rules on occasion, but then repeatedly emphasizing that his real point was that Respondent never asked or told him to do that. I found that testimony to be motivated by loyalty to Respondent and the fact that Respondent was doing everything he could to keep the business going and Mayes' (along with the other drivers') jobs alive.

Moreover, the dialogue between Complainant and Respondent discloses at least an unspoken exhortation to be a team player. Respondent testified that when Complainant said he would henceforth log 100% legally, he was confused because he thought Complainant had been doing that all along and he didn't really understand what the difference was going to be. Yet his response was not to ask what Complainant meant, but rather to confirm that Complainant could be counted on to haul his five round trips each week. Similarly, Respondent told Complainant he was getting a larger pay cut because he could trust the other drivers and Complainant needed to prove himself and show common sense. Respondent's statements are more likely than not a reflection of his frustration with Complainant's hesitation to operate on (and occasionally outside) the margins and do whatever it took to keep the business going. The fact that an employer maintains a public position that it encourages reports and refusals and indeed immediately moves to correct any problems does not mean there is not a clear understanding within the business that such actions cause trouble and show a lack of loyalty and teamwork. Even if Respondent never explicitly asked his drivers to go beyond the limits and grudgingly accommodated them if they did not, the weight of the evidence is that that's what he hoped they would do, since the business would likely fail if they didn't.

Accordingly, I find that, even accepting Respondent 's legal argument that a complaint or refusal is not a protected activity if the employee should reasonably believe the employer will have no opposition to accommodating it, the evidence does not establish the factual predicate. Accordingly I find that Complainant engaged in protected activity when he notified Respondent and refused to drive in excess of the allotted time on 7 Jul 12. I similarly find that Complainant engaged in protected activity on 8 Jul 12 when he told Respondent he would not alter his log entries to insure they appeared to show compliance when that was not the case.

Weight Limitations

On the other hand, the evidence does not show an equal concern for the weight problems. Complainant testified that he only had overweight loads on two occasions, in March 2012, and then again the one he complained about and was taken off of in July 2012. Mathew Meyers testified he never pulled an overweight load. James Kirkland testified that Respondent never told him to go overweight or avoid scales. The record does not establish that weight compliance was nearly the threat to scuttle the business that hours compliance was. Accordingly, I find that the evidence does establish the factual predicate for Respondent's legal theory and Complainant should have reasonably believed Respondent would not be opposed to addressing the weight problem.

However, I believe Respondent's legal theory too narrowly defines protected activity and is actually an articulation of the nexus element of a claimant's *prima facie* case. Simply because an employee is expected to raise safety or compliance concerns does not remove those communications from the definition of protected activity. [37] However, it still leaves the question of whether any subsequent adverse action had anything to do with the protected communication Respondent said it encouraged in the first place. Accordingly, when Complainant said his rig was

[37] Communications by employees whose very job is to raise those issues (such as quality control personnel) have been regularly ruled to fall within the protection of whistleblower acts. *See, e,g., Vinnett v. Mitsubishi Power Systems*, 2006-ERA-29 (ARB July 27, 2010),

overweight, it was a protected activity. However, Complainant still must show it was a contributing factor in the adverse action.

Adverse Action and Nexus to Protected Activity

Complainant alleged the following adverse actions: reduction in pay (in excess of other drivers); loss of dispatches on the day he refused the overweight load (and the next two days); and constructive discharge. Respondent did not dispute that any of those qualified as adverse actions, but argues that they had nothing to do with his protected activity. Complainant bears the burden to show that his protected activity was a contributing factor in the decision to take adverse action. At the outset, I note that while the complaint/refusal to operate overweight was a protected activity, even Complainant conceded he was only overweight twice and weight compliance did not appear to have near as much impact on the financial bottom line. I therefore find that Complainant failed to show that the protected activity related to weight was a contributing factor to any subsequent adverse actions.

Reduction in Pay

There is no dispute that the business was in trouble and everyone took pay cuts (including, notably, Respondent's 100% cut). However the weight of the evidence shows that Complainant's per load pay was cut by $15 more than other similarly situated drivers. I found Respondent's testimony to be generally credible. However, his explanation that Complainant was cut more because his truck was dirty and messy inside and Complainant would have gotten the same pay cut, even if they had not had issues over the overweight load or the hours was inconsistent with the rest of the evidence. When asked by Complainant why his pay cut was higher, Respondent didn't mention cab cleanliness. Instead, he told Complainant it was because he could trust everyone else, it's called common sense, and Complainant had a lot to prove to him. Consequently, I find that that the reduction in pay was related to Complainant's protected activity.[38]

Loss of Dispatches

Clearly, the loss of the 9 Jul 12 load was a direct consequence of Complainant's report of and refusal to drive an overweight load. While Complainant testified that he was available to work the next two days, there is also evidence that those were off days. More importantly, Respondent gave Complainant loads on 12 Jul 12 and beyond. Thus, I find that Complainant failed to carry his burden to show that his protected activity was a contributing factor in his having no dispatches on 10 and 11 Jul 12.[39]

[38] Except those related to weight violations.
[39] Except those related to weight violations.

Constructive Discharge

I now turn to whether or not Complainant was constructively discharged and whether or not the protected activity contributed to the conditions that led to such a constructive discharge. Complainant credibly testified that he quit because he was not getting paid enough. Complainant said that when his pay was cut down to $200 per round trip, he tried to see if he could make it with that, but realized he couldn't do it. At the same time, there was evidence that he was hoping to be fired so he could get unemployment.

Given my finding that the protected activity played no role in any decrease of dispatches, but was a contributing factor in the $15 excess reduction in pay, the central question is whether a $15 per load decrease was enough to make a reasonable person in his position leave his job. In other words, the record shows that he was going to sustain a loss of income just from the business downturn, unrelated to any protected activity. Was the additional loss of $15 per load enough to compel him to leave and constitute a constructive discharge? I find that, given the very narrow margins and relative low pay to begin with, the additional $15 cut and the knowledge that he was the only driver to sustain that additional cut was sufficient to constitute a constructive discharge in which the protected activity played a contributing role.[40] In the absence of any argument from Respondent that clear and convincing evidence shows he would have been constructively discharged in the absence of the protected activity, Complainant prevails on this issue.

Damages[41]

Reinstatement

Complainant argues for an order of reinstatement. I do note that although Complainant testified that he wants an order of reinstatement and argued for that in his brief, he also testified at trial that, he may not work for JBS forever and might need to go back to Respondent, if he has to. The law is clear that Complainant is entitled to an order directing Respondent to offer to reinstate Complainant with the same status he would have had if had never left. However, Complainant must also understand that upon his declination of that offer, he will be entitled to no further compensation for future lost or reduced wages.

[40] Except those related to weight violations.

[41] Respondent did not address damages or his personal liability. I find that Respondent is liable in both his business and personal capacity.

Back Pay

Complainant seeks back pay for the $15 reduction in pay, the loss of dispatches, and the loss of all pay between his discharge and reemployment with JBS. Given my previous finding, he is entitled to $235 for the lost 9 Jul 12 load, $135 for the excess reduction on pay over 9 loads starting on 15 Jul 12, and $3,225 for lost wages until his employment with JBS. He is also entitled to interest.[42]

Compensatory Damages

Complainant seeks $5,000 for emotional distress and mental pain. While he testified that he felt bad and was humiliated that his pay was cut more, he conceded he hasn't gone to any counselors for his emotional feelings, obtained any treatment for his emotional damage, or missed any work because of any emotional pain that he suffered. Respondent's business difficulties played a large role in Complainant's difficulties as the retaliatory pay cut. I find $1,000 to be an appropriate measure in compensatory damages.

Punitive Damages

Complainant seeks $10,000 for punitive damages. The Respondent is essentially a single person[43] rather than an insulated legal entity. His business is in great financial trouble already and he personally took on as much or even more of the burden as his employees. Under those circumstances $10,000 is an excessive amount, given the deterrent purpose of punitive damages. In this case, I find $2,000 appropriately recognizes that although Respondent had no choice if he was going to save his business, he consistently operated on the edge of regulatory compliance and must have known that there would be at least occasional if not frequent violations.

Abatement and Notice

Complainant seeks an order directing Respondent to post a copy of this decision and order for 90 days in all places where such notices are normally posted. Complainant also seeks an order directing Respondent to expunge all references to Complainant's protected activity from its records; to cause all consumer reporting agencies to which it has made a report about Complainant to amend their records to delete unfavorable information; and to amend its records to show Complainant has a satisfactory work and safety record as related to the subject of this complaint. I find those requests to be appropriate and grant them.

[42] 29 C.F.R. §20.58(a).
[43] See infra.

ORDER

Accordingly, **IT IS HEREBY ORDERED** that Respondent:

1. Reinstate Complainant to his former position without loss of benefits or other privileges;

2. Purge Complainant's employment file of any reference to his protected activity and discharge, cause all consumer reporting agencies to which it has made a report about Complainant to amend their records to delete unfavorable information, and amend its records to show Complainant has satisfactory work and safety record as related to the subject of this complaint;

3. Compensate Complainant for lost back pay consistent with this decision.

5. Pay Complainant $1,000 in compensatory damages.

6. Pay Complainant $2,000 in punitive damages.

7. Post a copy of this Decision and Order wherever employee notices are posted, for a period of ninety (90) days.

8. Complainant's Counsel may file a petition for attorney fees and costs no later than 45 days after the receipt of this decision. Respondent shall file any objections within 30 days of receipt of said petition and Complainant's Counsel shall file any reply within 15 days of receipt of any objections.

ORDERED this 5th day of March 2014 at Covington, Louisiana**.**

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

PATRICK M. ROSENOW
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. § 1978.110(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. § 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(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. § 1978.110(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. § 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).