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Issue Date: 12 February 2014

Case No.: **2013-STA-00042**

In the Matter of:

DONNY G. KIRK,
Complainant,

v.

ROONEY TRUCKING, INC.,
Respondent.

Appearances:

Donny G. Kirk, *pro se*, Odessa, MO
For Complainant.

Stuart D. Wieland, Esq., Law Offices of Norton & Norton, Kansas City, MO
For Respondent.

Before: Pamela J. Lakes
Administrative Law Judge

DECISION AND ORDER GRANTING CLAIM

This case involves a claim under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "Act"), with implementing regulations at 29 C.F.R Part 1978.[1] The STAA prohibits an employer from retaliating against an employee because the employee engaged in protected whistleblowing activity. Specifically, inter alia, the Act protects employees who refuse to operate a commercial motor vehicle when operation would violate a Federal safety regulation or when the employee has a reasonable apprehension of serious injury to himself or the public due to the vehicle's unsafe condition. Complainant, Donny G. Kirk ("Complainant"), alleges that Rooney Trucking, Inc. ("Respondent") terminated him based on his refusal to drive a truck because he was experiencing flu-like symptoms.

[1] The STAA was amended on August 3, 2007 by Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007); the implementing regulations were amended on August 31, 2010, 75 Fed. Reg. 53544 (Aug. 31, 2010) and on July, 27, 2012, 77 Fed. Reg. 44121 (July 27, 2012). References in this decision are to the current version of the statute and regulations.

STATEMENT OF THE CASE

On December 18, 2012, Complainant filed a timely complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") in Kansas City, Missouri. (CX 4).[2] He alleged that Respondent terminated his employment in retaliation for his calling in sick and for his refusal to operate a truck while suffering from flu-like symptoms. OSHA investigated the complaint, and on April 22, 2013, it concluded that there was no reasonable cause to believe that Respondent violated the STAA. Specifically, the Area Director determined that Respondent terminated Complainant for a legitimate, non-retaliatory reason, not in retaliation for engaging in protected activity. On May 6, 2010, Complainant filed a timely objection and request for a hearing.

A hearing was held before the undersigned administrative law judge on October 29, 2013 in Kansas City, Missouri. At the hearing, Complainant's Exhibits 1 through 7 (CX 1 through CX 7) and Respondent's Exhibits 1 through 8 and 10 through 14[3] (RX 1 through RX 8; RX 10 through RX14) were admitted.[4] ALJ 1, telephone records from T-Mobile was also admitted.[5] There were four witnesses, as discussed below. The record closed at the end of the hearing.

The parties were allowed sixty (60) days (or until December 30, 2013) to submit post-hearing briefs, which period was subject to extension by stipulation. (Tr. 172-173). On December 26, 2013, Respondent moved to extend the deadline for post-hearing briefs by two (2) weeks (or until January 13, 2014). The motion was granted over Complainant's objection. Complainant's post-hearing brief was mailed on January 13, 2014 and date-stamped as received on January 17, 2014, and Employer's post-hearing brief was mailed on January 17, 2014 and date-stamped as received on January 23, 2014.[6] Inasmuch as any delay was insignificant and there has been no prejudice, both briefs are accepted as timely and the case is now ready for decision. SO ORDERED.

[2] Complainant's, Respondent's, and Administrative Law Judge's exhibits will be referred to as "CX," "RX," and "ALJ," respectively, followed by the exhibit number. "Tr." followed by a page number refers to the transcript of the hearing in this case.

[3] Respondents' Exhibit 9 was excluded from the record. (Tr. 13-15). See footnote 5 below.

[4] Respondent objected to Complainant's Exhibits 1 through 6, as being irrelevant to the issue before the court. (Tr. 10, 41-42). These exhibits are letter of recommendations submitted on behalf of Complainant. The exhibits were admitted and the objection to relevance will be considered as to the weight given the exhibits.

[5] Exhibits ALJ 2, a 2012 calendar; and RX 9, Docket Entries Results from the Missouri Courts remain in the case file, but are not admitted as evidence in the official record. (Tr. 172).

[6] At the hearing, I indicated that the date of mailing would be considered the date of filing. (Tr. 173). The rules of procedure add five days when filing is by mail and provide that when the filing period ends on a weekend or holiday, the due date will be on the next business day. Applying the latter rule, the brief would have to be filed by January 21, 2014.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTUAL BACKGROUND

Witness Credibility

The following witnesses testified at the hearing: Complainant, Donny Kirk; Respondent's Vice President, Patrick Rooney; Respondent's Office Manager, Mindy Rooney; and Respondent's President, Tammy Alspaugh. I found all of the witnesses to be credible. Where there were discrepancies in the testimony or the witnesses' testimony differed from the other evidence of record, I found this to be due to difficulty recalling the events in question, which took place nearly one year prior to the hearing, compounded by witnesses reviewing the statements of other witnesses and other records and attempting to reconcile any discrepancies.

Complainant's Employment with the Respondent

Complainant's Testimony

Complainant testified that he was employed by Rooney Trucking for approximately four months, which ended on December 13, 2012. (Tr. 17). Complainant filed an application with Respondent on August 21, 2012, and he was hired the following day. *Id.* at 58, *see also* RX 1. Complainant transported mail from the post office to the bulk mail center in Kansas City, Missouri. (Tr. 18). His work schedule began at 4:40 in the morning; he then ran a mail route and returned back to the dock at 8:00 in the morning. *Id.* After Complainant completed his morning route he had a daily break from 8:00 in the morning until 12:30 in the afternoon, at which time he ran another route until approximately 6:30 in the evening. *Id.* This was Complainant's work schedule five days a week; Complainant also worked on Saturdays but had an extra two-hour break. *Id.* at 19. Complainant worked 55 hours per week with Respondent. *Id.* at 36, 42. Complainant's hourly wage while working for Respondent was $24.84. *Id.* at 36.

On more than one occasion, Complainant attempted to have his hours with Respondent reduced. *Id.* at 38. He testified that when he was hired with Respondent, he was told he would have a 5-day work week schedule, but was required to work 6 days per week. *Id.* at 38-39. Complainant testified that when Respondent was unable to obtain another driver to relieve him of some of his hours, he suggested that he could find a driver. *Id.* at 39. He indicated that he had been trying to find another driver to pick up his morning schedule. *Id.* at 43.[7] Complainant explained that, as a favor to him, his friend Steven Hoot agreed to drive a little during the Christmas season, but once he saw the equipment he decided not to drive. *Id.* at 39. Another friend tried to substitute for Complainant for some of his work hours, but apparently gave up after several failed attempts to call Respondent. *Id.* at 40.

[7] Complainant testified that having another driver take his morning route would decrease his hours by approximately 15 hours per week, to 30 to 40 hours a week. *Id* at 43, 78. However, it would actually amount to 3 hours and 20 minutes daily for six days, or 20 hours, and would reduce his hours from 55 to to 35 (based upon five afternoon routes of 6 hours and one, on Saturday, of 5 hours).

Complainant testified that he "just needed to reduce" his hours and the need for fewer hours was not related to bankruptcy, any lawsuit, or any judgment against him. *Id.* at 77. He explained that he wanted fewer hours because it was wintertime and he was tired of sitting in the cold for four hours. *Id.* He explained that the four hour break was spent just sitting in the middle of the day; he explained since he lived 45 minutes from Respondent he could not return home during that time. *Id.* at 96. Respondent suggested that Complainant wanted to lower his income because he filed for bankruptcy and had a judgment entered against him. *Id.* at 93. Complainant explained that he filed for bankruptcy and his payments had been established with the court long before he started working for Respondent. *Id.* at 95.

Complainant's Other Employment

Complainant's Testimony

Subsequent to his employment with Respondent, Complainant began working for Mail Transport Services and Centerline. (Tr. 16). Complainant began working for Mail Transport Services, the week following his termination with Respondent, on December 21, 2012. [8] *Id.* at 30, 79-80, *see also* CX 2. He was able to obtain employment quickly because of their need for drivers during the Holiday season. *Id.* at 31. Complainant received an hourly pay of $24.84 from his new employer, Mail Transport, and $15.50 to $16.50 with Centerline. *Id.* at 31, 37. Complainant has been employed with Centerline since April 2013. (CX 1). At the time of the hearing, Complainant indicated that he worked part-time with his new employers; he elaborated by stating, "I'm lucky if I get 30 or 40 hours" per week, working both jobs. (Tr. 36). Complainant explained that he worked 19 hours a week with Mail Transport, at an hourly rate of $24.84, and 20 to 25 hours per week with Centerline, at an hourly rate between $15.50 and $16.50. *Id.* at 37.

Prior to his employment with Respondent, Complainant drove trucks with Matheson Postal Service between July 2010 and July 2012. *Id.* at 31. He worked for Yellow Freight from May 2007 until May 2012. *Id.* at 34. Complainant worked as a truck driver and welder with Acme Products from December 1997 until May 2007. *Id.* Prior to driving trucks Complainant was a project manager/ secretary with the Hyatt Regency in Kansas City. *Id.* Complainant was on active duty with the United States Navy from February 1975 until April 1977; he was on reserve for the Navy from February 1975 until April 1981. *Id.* at 35. Complainant has completed one year of college at Lee's Summit Community College. *Id.*

Complainant's Termination

Complainant's Testimony

On the afternoon of Thursday, December 13, 2012, around 5:30 in the evening Complainant became "very ill with a rampant flu." (Tr. 17). At that time, Complainant was on his way home, finishing his evening route, between Belton and Kansas City. (Tr. 18). He began

[8] In a June 24, 2013 letter from Mail Transport Services' Safety Director, Eli Gray, indicated Complainant started with them on December 19, 2012. (CX 2). Complainant explained that December 19, 2012 was the date of hire, but that his first run was on December 21, 2012. (Tr. 80).

"explosively vomiting," and was "running a fever." (Tr. 17-18). Complainant was scheduled to report to work the next morning at 4:40 am. *Id.* at 20. Complainant called Respondent when he became "physically ill" on the way home on the evening of Thursday, December 13, 2012. *Id. See also,* ALJ 1.

Complainant testified that he first called the vice president of Rooney Trucking, Inc., Mr. Patrick Rooney. (Tr. 21). Complainant explained that as he understood it, he was to report his illness to either Mr. Patrick Rooney or Ms. Tammy Alspaugh. *Id.* at 23. Complainant testified that he informed Mr. Rooney that he was vomiting that evening and concerned about his ability to go into work the following morning.[9] *Id.* at 23-24. Mr. Rooney informed Ms. Alspaugh. *Id.* Complainant stated that Ms. Alspaugh immediately called him and informed him that if he was not in his truck at 4:00 a.m. he would not have a job. *Id.* at 24. Complainant informed Ms. Alspaugh that he would be unable to be in his truck at 4:00 a.m., and he disconnected from the call because he was vomiting. *Id.* Ms. Alspaugh called Complainant back and told him either he show up to drive his truck in the morning or he would be fired. *Id.* at 25. Complainant responded "go ahead and fire me." *Id.* Complainant recalled that this call took place around 7:00 pm on Thursday, December 13, 2012. *Id.*

At the hearing, Complainant testified that he called Ms. Alspaugh's cell phone the next day, Friday, December 14, 2012 around 12:56 pm and informed her, through a phone message, that he was still ill.[10] *Id.* at 25 to 27. Although he did not have a clear recollection, Complainant recalled that he spoke with Ms. Alspaugh the following day, Saturday, December 15, 2012, and asked if he could work on Sunday or come in on Monday. *Id*. at 28. According to Complainant, Ms. Alspaugh informed him that she already covered his shift and instructed him to call "early next week." *Id.* Complainant testified that he called Respondent numerous times on Monday, December 17, 2012 and left messages, but did not receive an answer. *Id.* at 29.

Complainant testified that he called Respondent again on Tuesday, December 18, 2012 and was informed, by Mindy Rooney that he was being "laid off"; however, the conversation may have taken place on December 17. *Id.* at 29. Complainant testified that during this conversation he heard Ms. Alspaugh in the background stating he had been "laid off." *Id.* Complainant elaborated during his testimony that both Ms. Alspaugh and Mindy Rooney stated (in their statements during the OSHA investigation, appearing in the record as RX 13 and 14), that he called into the office on December 18, 2012. *Id.* at 82. As discussed below, there is no reflection of these calls on the phone records for December 18 (appearing at ALJ 1 and excerpted at RX 8); however, there were multiple telephone calls on December 17, 2012. When interviewed during the OSHA investigation, as reflected by his written statement, Complainant

[9] The transcript misstates Complainant's testimony. Although it reflects that he said "I told him I probably would be able to go in in the morning" his actual testimony was that he "probably *wouldn't* be able to go in in the morning." (Tr. 24).

[10] In his statement to the OSHA investigator, closer to the time of the events in question, he stated: "I didn't call in Friday morning because I had called in Thursday night. I didn't hear from anyone at the company all day. That evening, I called Tammy's number. Her husband answered. I told him I was still sick. He told me I need to talk to Tammy and gave me a number to call. I called the number but no one answered." (RX 11). The phone records reflect a single call on Friday that was one minute long. (RX 8; see also Tr. 48-50). According to Ms. Alspaugh's statement to the OSHA investigator, Complainant did not call her on Friday but called her cell phone on Saturday, December 15, late in the morning. (RX 12).

initially stated that he called and spoke with Ms. Rooney on Monday, December 17, 2012, and he heard Ms. Alspaugh in the background asking her to tell him that he was laid off at that time. (RX 11). He apparently adjusted his statement after reviewing the written statements of Ms. Alspaugh and Ms. Rooney. *Id.* at 29; 82.

Complainant testified that he later contacted Respondent on December 21, 2012 inquiring about his pay check, and again on December 24, 2012. *Id.* at 30. He also noted that on his Application for Employment, under the section labeled "Termination of Employment" his supervisor, Ms. Alspaugh indicated that Complainant was "laid off" on December 14, 2012. *Id.* at 81; *see also* RX 1.

Complainant testified that he did not visit the doctor when he was ill, between December 13, 2012 and December 15, 2012. (Tr. 54). Complainant explained that he used home remedies such as broth and orange juice to keep from dehydrating during his illness. *Id.* at 81. He stated that he began to look for new work on December 17, 2012. *Id.* at 56. Complainant explained that he called into work after the start of his shift because he believed Ms. Alspaugh instructed him to call at those times. *Id.* at 57. He testified that Ms. Alspaugh informed him to call "early next week," which he implied meant "anytime." *Id.*

During his testimony, Complainant explained that the "serious loss of income," he has experienced since his termination with Respondent, has caused a modification in his lifestyle. *Id.* at 37. He and his wife worry about being able to pay their bills and provide for their family needs. *Id.* He testified that postal jobs pay the best, but that he has had to "run through the entire night" for "$10 less an hour," working side jobs. *Id.* at 38.

Patrick Rooney's Testimony

Mr. Rooney is the vice president of Rooney Trucking, Inc. *Id.* at 100. Rooney Trucking, Inc. is owned by Mr. Rooney's and Ms. Alspaugh's parents. *Id.* Mr. Rooney started working for Respondent in 1987. *Id.* Mr. Rooney testified that he received a call from Complainant on the night of Thursday, December 13, 2012, informing him that Complaint was "throwing up real bad," and probably wouldn't make it in the next morning. *Id.* at 102-103. Mr. Rooney informed Complainant that he was already covering a route for another driver, and he would need to contact Ms. Alspaugh. *Id.* Mr. Rooney testified that he waited for Complainant to show up to work on Friday, December 14, 2012, and that when Complainant did not show he covered Complainant's route, and had a mechanic cover the other route he was previously covering. *Id.* at 104. Mr. Rooney testified that the next and last time he spoke with Complainant was around Thursday, December 21, 2012, when he called to inquire about his pay check. *Id.* at 105.

Mr. Rooney also testified that Complainant informed him that he wanted to reduce his hours, but he never informed him why he wanted his hours reduced. *Id.* at 106. Complainant referred Wes Baker to Respondent for the purpose of having him cover Complainant's morning route. *Id.* at 107. Mr. Rooney testified that at the time of the hearing, Mr. Baker was working Complainant's full shift, six days a week. *Id.*

Mindy Rooney's Testimony

Ms. Rooney is the office manager of Rooney Trucking, Inc. *Id.* at 109. As office manager, she prepares Respondent's payroll, interviews drivers, and does "day-to-day stuff." *Id.* at 110. Ms. Rooney testified that she does not recall receiving any phone calls from Complainant between December 13, 2012 and December 18, 2012. *Id.* at 111. She stated that she does not recall there being any voice messages left on the office phone during that period as well. *Id.* Ms. Rooney testified that she was present in the office, and answered the phone, on December 18, 2012, when Complainant called the office and spoke with Ms. Alspaugh. *Id.* at 112. She indicated that Complainant called around 10:00 or 11:00 in the morning. *Id.* Ms. Rooney testified that during this conversation, she heard Ms. Alspaugh tell Complainant that his route had been covered and that he was laid off. *Id.* at 113. When asked, Ms. Rooney indicated that she merely believed that his shift was covered and there was no work available at that time, not that he was fired. *Id.* at 114.

Ms. Rooney testified that she believes Complainant called into work and spoke with Ms. Alspaugh on December 18, 2012, because it was a Tuesday and she does paychecks on Tuesdays. *Id.* at 133. Ms. Rooney elaborated that Complainant was not fired and his employment was not terminated. *Id.* at 138. When Complainant asked Ms. Rooney if the call between him and Ms. Alspaugh could have been on Monday, December 17, 2012, she testified that she recalls working on paychecks at the time of the call, and she does not work on paychecks on Mondays. *Id.* She elaborated that December 18, 2012, was the first day she learned that Complainant was laid off. *Id.* at 139. Ms. Rooney testified that she made the entry on Complainant's Application for Employment indicating he was laid off on December 14, 2012; she believes she wrote the wrong date on the form. *Id.* at 127, 138.

According to Ms. Rooney, Complainant spoke with her more than once about reducing his hours. *Id.* at 116. She testified that Complainant told her he was in the middle of a lawsuit and would need to talk to his lawyer to find out how much he needed to reduce his hours. *Id.* at 116, 118. She explained that he indicated around October or November that he was making too much money and needed to reduce his income. *Id.* at 118-119. Ms. Rooney explained that she drafted two schedules with two other drivers to have Complainant work one route one week, and a different route another week; with this schedule Complainant would have every other Saturday off. *Id.* at 117. Under this proposed schedule, Complainant would work 28 hours one week and 32 hours the other week. *Id.* Ms. Rooney testified that upon her suggestion of this schedule Complainant declined it, without giving a reason. *Id.* The proposed schedule's morning shift ended between 6:30 and 7:00 a.m. and the driver would have a break until 4:30 or 5:00 p.m. until the second shift began. *Id.* at 126.

Ms. Rooney testified that she has worked for Respondent for almost 20 years and she has never known Respondent or Ms. Alspaugh to terminate someone for being sick. *Id.* at 119. She believes that Complainant was laid off because he did not call into work for three days, and when he did call, it was hours after his shift had started. *Id.* at 120. Ms. Rooney stated that Complainant would be eligible for rehire, upon review. *Id.* at 136. Ms. Rooney testified that she

has hired ten drivers since Complainant was laid off, and that Respondent employs 63 drivers in total. *Id.* at 121.

Tammy Alspaugh's Testimony

Ms. Alspaugh has been the president of Rooney Trucking, Inc. for the past five years, and has worked for Respondent for 25 years. *Id.* at 142. Ms. Alspaugh testified that Complainant did not tell her directly that he wanted to change his hours, but Ms. Rooney informed her about it sometime in November 2012. *Id.* at 145, 154. She elaborated that Ms. Rooney told her "I never had anybody wanting to decrease their hours, they made too much money." *Id.* at 145. Ms. Alspaugh testified that the location where Complainant takes his morning break is at a heated shop, and he would not have to be in the cold during that period. *Id.* at 156.

Ms. Alspaugh testified that on December 13, 2012, Mr. Rooney called her and informed her that Complainant called and stated he was sick. *Id.* at 146. She hung up with Mr. Rooney and immediately called Complainant. *Id.* She testified that during this call with Complainant, she asked him to wait until the morning to determine if he could come in or not, because it was Christmastime and she was short staffed. *Id.* at 147. She stated that Complainant became irate and refused her request to call back in the morning. *Id.* at 147-148. She further testified that he stated "if you want to fire me, you can fire me, I'll just quit," and he hung up the phone. *Id.*

According to Ms. Alspaugh, the next time she spoke with Complainant was Saturday, December 15, 2012, around 10:30 or 11:00 a.m. *Id.* at 149. Ms. Alspaugh explained that Complainant called after his Saturday route had begun, and she informed him that she "had it covered," and for him to check with her later. *Id.* Ms. Alspaugh testified that she did not hear from Complainant on Monday, December 17, 2012, but not until Tuesday, December 18, 2012 around 9:30 a.m. *Id.* at 150. She elaborated that during the December 18, 2012 call, Complainant asked "[d]o I still have a job?" *Id.* She responded "[n]o, we're going to have to lay you off right now. If something comes available, we'll be happy to give you a call." *Id.* Ms. Alspaugh explained that Complainant called after his shift had begun and she already had it covered. *Id.*

Ms. Alspaugh explained that she recalls that Complainant called the office of Tuesday, December 18, 2012, because Ms. Rooney was doing payroll, which is always done on Tuesday. *Id.* at 162.

Ms. Alspaugh testified that she has never fired a driver for being sick, or for not showing up to work. *Id.* at 151. She elaborated that Respondent has a policy that if an employee is off work for three days, then the employee is not paid, and the employee is dismissed from duties upon missing work again. *Id.* Ms. Alspaugh indicated that she did not consider Complainant terminated as of December 18, 2012. *Id.* at 152. She elaborated that an employee who has been laid off is placed on a list, and, if new schedules or routes become available, drivers on the list are offered the positions first. *Id.*

Complainant's T-Mobile Phone Records [11]

The first telephone call on T-Mobile's phone records that was marked by Complainant as being placed to one of Employer's telephone numbers, was placed at 6:59 p.m.[12] on December 13, 2012, to Patrick Rooney's telephone number; this call lasted two minutes. (Tr. 20, 45; RX 8 *see also* ALJ1). The phone records indicate that Ms. Alspaugh called Complainant promptly at 7:06 p.m. that same evening and the call lasted one minute. *Id.* On Friday, December 14, 2012, the phone records show that Complainant called Ms. Alspaugh at 2:56 p.m. (RX 8). Complainant testified that Ms. Alspaugh's husband answered and he informed him that he was still sick. (Tr. 48; *see also* RX 8 and RX 11). Complainant testified that Mr. Alspaugh provided him with another number in which to reach Ms. Alspaugh. (Tr. 48-49). The phone records do not show that Complainant made a call to another number to reach Ms. Alspaugh. (RX 8; *see also* Tr. 50). The T-Mobile phone records for Saturday, December 15, 2012 and Sunday, December 16, 2012 do not reflect that Complainant made any calls to Ms. Alspaugh or Rooney Trucking, Inc., as he thought. (Tr. 50-51; RX 8.) The records indicate that Complainant called Ms. Alspaugh's number on Monday, December 17, 2012, four times after the beginning of his scheduled shift, at 8:05 a.m., 8:08 a.m., 9:17 a.m., and 10:44 a.m. (RX 8; *see also* Tr. 51-52). The phone records for Tuesday, December 18, 2012 do not reflect that Complainant made any calls to Ms. Alspaugh or Respondent, as he testified. (ALJ 1, CX 7; *see also* Tr. 52-54, RX 7). The next set of calls that Complainant made to Respondent and Ms. Alspaugh occurred on Monday, December 24, 2012 beginning at 10:40 a.m. (RX 8; *see also* Tr. 54). Complainant made seven calls to Respondent on December 24, 2012 from 10:40 a.m. until 11:08 a.m., to inquire about his last paycheck. (RX 8; Tr. 55).

DISCUSSION AND ANALYSIS

Legal Standard

The employee protection/whistleblower provisions of the STAA prohibit covered employers from discharging or otherwise retaliating against employees because of their participation in protected activity. 49 U.S.C. § 31105; 29 C.F.R. § 1978.102. Specifically, the STAA prohibits retaliation against employees who have filed a complaint or participated in a proceeding related to the violation of commercial motor vehicle safety or security regulations, and, as amended, the Act also protects employees whom an employer believes to have engaged in such activity. 49 U.S.C. § 31105(a)(1)(A); 29 C.F.R. § 1978.102(b), (d), (e). Similarly, the Act protects employees who refuse to operate a vehicle either because operation of the vehicle would violate motor vehicle safety regulations or because they have a reasonable apprehension of serious injury to themselves or others due to the vehicle's hazardous condition. 49 U.S.C. § 31105(a)(1)(B); 29 C.F.R. § 1978.102(c)(1). [13]

[11] The complete set of records appears as ALJ 1 while excerpts appear as CX 7 and RX 8. Complainant marked the relevant calls (for Employer's four telephone numbers) on RX 8. (Tr. 20-21).

[12] The T-Mobile records lists the call as occurring at 4:59 p.m.; however, both parties agree that the phone records are two hours ahead of the actual time the calls were placed. (Tr. 45, 47). The times reflected here have been adjusted and are indicated as such on the annotated phone records, RX 8.

[13] As amended on August 3, 2007, the STAA was amended to include three other categories of protected activity: (1) accurately reporting hours on duty; (2) cooperating with a safety or security investigation by certain federal

As amended by the 9/11 Commission Act of 2007, whistleblower complaints under the STAA are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). 49 U.S.C. § 31105(b)(1); *see also* 75 Fed. Reg. 53544, 53547 (Aug. 31, 2010); 77 Fed. Reg. 44121 (July 27, 2012) (preambles to STAA regulations). Under the AIR 21 standard, "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." 77 Fed. Reg. 44122 (July 27, 2012). The "contributing factor" standard (which is to be contrasted with the "motivating factor" standard) is not a demanding one and does not require proof of retaliatory animus or motive. *Hutton v. Union Pacific Railroad Company*, ARB Case No. 11-091, ALJ No. 2010-FRS-020 (ARB May 31, 2013), slip op. at 7.

Thus, to prevail in an STAA case, a complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity[14]; 2) the employer was aware of the protected activity; 3) the employer took adverse action against him; and 4) the protected activity was a contributing factor in the unfavorable personnel action *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052 at 5 (ARB Jan. 31, 2011), *appeal filed* No. 11-903 (2d Cir. March 8, 2011). *See also* 29 C.F.R. § 1978.104(e)(2) (relating to investigatory phase of proceedings.) If the complainant satisfies this burden, the respondent may avoid liability by demonstrating through clear and convincing evidence that the complainant would have been terminated even absent his protected activity. 29 C.F.R. § 1978.109(b); *Jordan v. IESI*, ARB No. 10-076, 2009-STA-00062 (ARB Jan. 17, 2012).

Liability Under the STAA

Protected Activity

Complainant bears the burden of showing that his refusal to drive constituted protected activity. 49 U.S.C. § 31105(a)(1)(B). The refusal to drive clause provides two categories of circumstances in which an employee's refusal to drive will be protected under the STAA. First, the STAA prohibits an employer from retaliating against an employee who refuses to operate a commercial motor vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). This is known as the "actual violation" provision. *See Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-5, slip op. at 3 (ARB July 31, 2003). The statute similarly prohibits retaliation by an employer where an employee refuses to operate a vehicle because "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." 49 U.S.C. § 31105(a)(1)(B)(ii). This is known as the "reasonable apprehension" provision of the STAA. *See Leach*, slip op. at 3. Whether a refusal to drive qualifies for STAA protection requires evaluation of the circumstances surrounding the refusal under the particular requirements of each of the

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entities; and (3) furnishing information to federal entities relating to an accident or incident resulting in injury, death, or property damage. Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007).

[14] The Act also protects employees whom an employer believes to have engaged in protected activity. 29 C.F.R. § 1978.109(a).

provisions. *See Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, 02-064, ALJ No. 2000-STA-47 slip op. at 6 (ARB Mar. 13, 2006).

Actual Violation

As to the "actual violation" provision of the STAA, the regulations of the Department of Transportation ("DOT") expressly address situations where a commercial motor vehicle operator is ill or fatigued. In relevant part, the regulation provides:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3 (2011). This regulation, known colloquially as the "fatigue rule," covers a driver who anticipates that his or her ability or alertness is so likely to become impaired that it would be unsafe to begin or continue driving. *Eash* at 6.

To invoke protection under the refusal to drive provision under 49 U.S.C. § 31105(a)(1)(B)(i), the threshold inquiry is whether the employee's operation of the vehicle, as scheduled, would have constituted a violation of an applicable regulation. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 10 (ARB Oct. 31, 2007). Thus, in cases of fatigue or illness, a complainant must prove that he refused to drive because his ability or alertness was in fact impaired, or was likely to become impaired, by his illness, as to make it unsafe for him to have taken the run at the time he refused to take it. *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 2000-STA-048, slip op. at 4 (ARB July 31, 2003). However, "the protection Section 31105(a)(1)(B)(i) affords also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle," and "the reasonableness of the refusal must be subjectively and objectively determined." *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19 (ARB Dec. 18, 2012).

Complainant asserts that he engaged in protected activity when he refused to drive while experiencing flu-like symptoms, between Thursday, December 13, 2012 and Saturday, December 15, 2012.[15] (Tr. 21-26; RX 11). According to Claimant, around 5:30 p.m., toward the end of his truck route (which ended at 6:30 p.m.), he began "explosively vomiting," and "running a fever." (Tr. 17-18). At the time he became ill, his evening shift was nearly finished and Complainant was not scheduled to report back to work until 4:40 am on the following morning. *Id*. at 20. Complainant called Respondent the evening of Thursday, December 13, 2012, at 7:13 p.m., to inform them he was ill, and that he thought he would be unable to drive in the morning. (Tr. 21-24). Respondent's president, Ms. Alspaugh, requested that Complainant call her in the morning, before the start of his shift, to confirm that he was still ill and unable to

[15] In his written statement to the OSHA investigator, Complainant indicated that around 7:00 pm on Thursday, December 13, 2012, he "became violently ill with flu-like symptoms." (RX 11). He elaborated by stating, "I was throwing up a lot" and he had been forced to stop on the side of the road twice, to vomit. *Id.*

drive, because she thought he might have food poisoning and might feel better when his shift began nine and one half hours later. *Id.* at 147. Complainant did not call the next morning, at the time he was scheduled to drive. *Id.* 148; RX 11. Although she was not sure, Ms. Alspaugh did not expect him to be there and she double-checked with her brother Patrick Rooney to ensure that the route was covered. (Tr. 147-49). Mr. Rooney testified that he waited for a call from Complainant the next morning because Complainant had said he probably wouldn't be able to come in; however, he covered the route when Complainant did not contact him and had a mechanic handle the route he was planning to cover. (Tr. 103-04). Complainant placed one call on Friday, December 14, 2012 around 2:56 p.m. as reflected by the telephone records (RX 8). While his recollection was sketchy, he either left a phone message for Ms. Alspaugh or spoke with Mr. Rooney, to inform them that he was still ill. *Id.* at 25, 27, 48-50; RX 11. Complainant testified that he was ill until the afternoon of Saturday, December 15, 2012. (Tr. 26). Given the fact that he was running a fever and vomiting, and those symptoms continued until Saturday afternoon, the preponderance of the evidence demonstrates that he was sufficiently ill on Friday morning as to impair his ability or alertness and to make it unsafe for him to operate his vehicle. He therefore engaged in protected activity when he refused to drive the vehicle on Friday, December 14, 2012. Although it is less clear with respect to his failure to report to work on Saturday, December 15, 2012, based upon Complainant's credible testimony, I also find that he was sufficiently impaired on the morning of December 15 so that his operation of the vehicle would have violated the fatigue rule on that date as well.

In view of the above, I find that Complainant has established that he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i). when he refused to drive on December 14 and 15, and that an actual violation of the fatigue rule would have occurred had he done so.

Reasonable Apprehension

As stated above, the STAA also protects a driver who refuses to operate a commercial motor vehicle because he has a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition. 49 U.S.C. § 31105(a)(1)(B)(ii). To satisfy this clause, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the same circumstances would conclude that the safety or security condition establishes a real danger of accident, injury, or serious impairment to health. 49 U.S.C. §31105(a)(2). To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. *Id.* This clause covers more than just mechanical defects of a vehicle, but is also intended to ensure "that employees are not forced to commit . . . unsafe acts." *Garcia v. AAA Cooper Transp.*, ARB No. 98-162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998). Thus, a complainant may establish a violation when the unsafe condition at issue is caused by the physical condition of a driver that could affect safe operation of the equipment. *Palazzolo v. PST Vans, Inc.*, 1992-STA-23 (Sec'y Mar. 10, 1993) (holding that the "complainant did not show by a preponderance of the evidence that he sought a correction of the unsafe condition, which in this case would entail informing [the respondent] that he was not able to drive the truck safely due to pain and medication.") The employee's belief must be both subjectively and objectively reasonable. *Brown v. Wilson Trucking Co.*, ARB No. 96-164, ALJ No. 1994-STA-054, slip op. at 1 (ARB October 25, 1996).

I find that Complainant's refusal to drive is also protected by the "reasonable apprehension" provision of the STAA. Complainant testified that he had explosive vomiting between Thursday, December 13, 2012 and Saturday, December 15, 2012, and he was also running a fever. (Tr. 21-24; RX 11). Based on Complainant's description of his illness, a reasonable person under the circumstances then confronting Complainant, would conclude that there was a bona fide danger of an accident, injury, or serious impairment of health resulting from the unsafe condition, or that the Complainant's ability or alertness was so impaired as to make vehicle operation unsafe. Informing an employer that one cannot drive a truck due to a severe illness or safety condition is sufficient to satisfy the requirement that he sought correction of the condition under *Palazzolo,* and he did so here. He did not merely state that he was sick, but he described his condition adequately to inform Respondent that it would be unsafe for him to drive. Respondent did not express any doubt to the accuracy of Complainant's statements and to the severity of his condition. Although, again, the situation with respect to Saturday is less clear, I find that Complainant's refusal to drive on Friday and Saturday constituted protected activity.

In light of the above, Complainant has established that he engaged in protected activity when he refused to drive due to his flu-like illness and he informed Mr. Rooney and Ms. Alspaugh that he would unable to report to work to drive his commercial vehicle due to the illness. Therefore, I find Complainant's apprehension was objectively reasonable, and his refusal to drive on Friday December 14, 2012 and Saturday December 15, 2012 was protected under the (B)(ii) provision of the Act.

Employer's Knowledge

Complainant must show that the person responsible for his termination was aware of the protected activity. *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-005 (ARB Oct. 31, 2007). At the hearing, Ms. Tammy Alspaugh, president for Rooney Trucking, Inc., testified that it was her decision to lay off Complainant. (Tr. 150). Ms. Alspaugh testified that she was aware that Complainant had called out sick, on December 13, 2012, before she decided to lay him off. *Id.* 146. Complainant, Mr. Rooney, and Ms. Alspaugh testified that Complainant informed Respondent that he was violently ill and, while they were hopeful that he would recover in time to cover the Friday shift, they were aware that he probably would not be able to do so. *Id.* at 24, 102-103, 146. Furthermore, the telephone records confirm the times in which these phone conversations occurred. (RX 8). As noted above, Complainant's efforts to follow up with Mr. Rooney and Ms. Alspaugh prior to his failure to report to work on Saturday are less clear, but they were nevertheless aware of his illness.

Although I found all of the witnesses to be credible, Complainant, Ms. Alspaugh, and Ms. Rooney all had trouble recalling the details of Complainant's termination. Ms. Alspaugh and Ms. Rooney both testified that they recalled Ms. Alspaugh laying off Complainant on Tuesday, December 18, 2012; however, the phone records indicate that no calls were made between Complainant and Respondent on such date, suggesting that the witnesses were mistaken. (Tr. 138, 162; RX 8). Complainant initially testified that he was laid off on December 18, 2012, but later in the hearing indicated that he agreed with the phone records that he spoke with Respondent and was laid off on December 17, 2012 (as he had stated in his statement to

OSHA). (Tr. 29; 82; *see also* RX 8 and RX 11). In view of the discrepancy, I will rely on the telephone records.

Regardless of the date of this conversation, it is clear that the president and management for Respondent were aware of Complainant's illness and of his refusal to drive the truck when it decided to terminate him.

Adverse Action

An employer may not "discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment," because of the employee's involvement in a protected activity. 49 U.S.C. § 31105(a)(1). The regulations under 29 C.F.R. § 1978.102, further make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee." 29 C.F.R. §§ 1978.102(b),(c); *see also Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008)(quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)). An employer's action is considered adverse if it is deemed "materially adverse," such that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination," and from engaging in protected activity. *Id.*

Respondent indicated in its brief that Complaint was believed to have "quit his job by failing to come to work and seeking other employment as of the day prior to his lay off." (Respondent's Closing Argument p. 9). However, this reason was never expressed in the testimony provided at hearing nor is it reflected in any documentary evidence, and it is not supported by the record before me. Complainant disputes that he voluntarily quit. (Complainant's Letter Brief.) Furthermore, the testimonial evidence and Complainant's Application for Employment confirm that Complainant was "laid off," not that he quit. (Tr. 29-30, 120, 136, 150; RX 1).

Respondent contends that Complainant was never terminated, but merely "laid off"; however, its decision to "lay off" Complainant clearly constitutes adverse action. As a result of Complainant being laid off, he was not allowed to return to his normal shift when he recovered from his illness; this action is effectively the same as a discharge or termination. (Tr. 162). Ms. Alspaugh testified that once an employee is laid off, the employee is placed on a list and offered available positions first. *Id.* at 152. She indicated that she would be "happy" to give Complainant a call, if something came available. *Id.* at 150. However, Respondent has since hired ten new drivers, and it has not asserted that it actually offered Complainant any of those positions. *Id.* at 121. Being "laid off" with the possibility of never returning to work is discipline that would dissuade a reasonable worker from engaging in protected activity, and is actionable under the STAA.

Casual Nexus

A determination that an STAA violation has occurred may only be made by an administrative law judge when the complainant has demonstrated by the preponderance of the evidence that the protected activity (or perception of protected activity) was a contributing factor

in the alleged adverse action. 29 C.F.R. § 1978.109(a). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams*, slip op. at 5 (quoting *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008). A complainant can succeed by "providing either direct or indirect proof of contribution." *Id.* "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." *Id.* If the complainant "does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation" was a contributory reason for terminating his employment. *Id.* "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Id.* (citing *Riess v. Nucor Corp.*, ARB 08-137, ALJ No. 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010)). "Another type of circumstantial evidence is temporal proximity between the protected activity and the adverse action." *Riess, supra;* 77 Fed. Reg. 44130 (July 27, 2012), *citing Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011). However, an inference of causation may be negated by intervening events. *Johnson v. Rocket City Drywall*, ARB No. 05 131; ALJ No. 2005-STA-24 (ARB Jan. 31, 2007).

As discussed above, the contributory factor test is not a demanding one and does not require establishment of a retaliatory motive or animus. As the ARB recently noted in *Hutton, supra*:

> Neither motive nor animus is a requisite element of causation as long as protected activity contributed in any way – even as a necessary link in a chain of events leading to adverse activity.

Here, Complainant's protected activity occurred between December 13, 2012, and December 15, 2012, when he was violently ill and failed to report to work due to his illness and his apprehension of serious injury to himself or the public if he were to operate a truck notwithstanding his illness. Although I found all of the witnesses to be credible, Ms. Alspaugh and Ms. Rooney both had trouble recalling the details of Complainant's termination. The office manager and president of Respondent testified that the adverse action, Complaint being laid off, occurred five days after he first refused to drive his truck, on December 18, 2012. (Tr. 138, 162). Complainant testified that he was laid off, on December 17, 2012; four days after he became ill. (Tr. 24). The T-Mobile phone records support Complainant's claim that he was laid off on December 17, 2012. (RX 8). However, Ms. Rooney indicated on Complainant's Application for Employment, that he was laid off on December 14, 2012, the day after Complainant refused to drive his truck. (RX 1). The period between the protected activity and the adverse action was one to five days. I find the Complainant's termination, one to five days after his protected activity, to be in close proximity thereby raising the inference that his protected activity was likely the reason for Respondent's adverse action. Moreover, it is clear that he was laid off as the result of the chain of events put into motion due to his refusal to drive.

Ms. Alspaugh testified that Respondent has a policy to lay an employee off once he or she has been absent, without pay, for more than three days.[16] (Tr. 151). However, the evidence

[16] Employer did not offer documentary evidence of this policy.

shows that Complainant was either laid off on December 14, 2012, one day after first calling in sick, or December 17, 2012, which is the third day Complainant was absent from work without pay (as Complainant was not scheduled to work on Sundays). Under the policy Ms. Alspaugh testified to, Complainant should have been allowed to return to work on December 18, 2012.[17]

Complainant testified that he told Ms. Alspaugh that she could go ahead and fire him, suggesting possible insubordination. (Tr. 25). In that regard, even if an employee engages in protected activity, an employer may discipline the employee for insubordination. *See Clement v. Milwaukee Transport Services, Inc.*, ARB No. 02-025, ALJ No. 2001 STA 6 (ARB Aug. 29, 2003); *Frausto v. Beall Concrete Enterprises, Ltd*., ARB No. 05-122, ALJ No. 2005-STA-9 (ARB Aug. 24, 2007). While Respondent mentioned Complainant's comments in its brief, it does not allege that Complainant was laid off because of his behavior, but because of his recurring absences.[18] In its brief, Respondent indicated that Complainant was laid off for his failure to report to work, December 15, 2012 through December 18, 2012. (Respondent's Closing Argument p. 10). Moreover, even if Respondent acted in part based upon Complainant's alleged insubordination, that in itself would be insufficient to negate a causal link under the contributing factor standard.

In sum, there is no evidence breaking the chain of events leading from Complainant's protected activity to his termination or lay off. As noted above, it is not necessary for Complainant to establish any bad motive on the part of Respondent; it is enough for him to establish that his protected activity (whether alone or in conjunction with other factors) led to the adverse personnel action. It clearly did so here.

Considering all of the evidence, I find that Complainant was laid off at least in part because he refused to drive a commercial vehicle while experiencing flu-like symptoms. Therefore, Complainant has proven by a preponderance of the evidence that his protected activity contributed to the adverse action.

Same Adverse Action Absent Protected Activity

Under the pertinent regulations, if a complainant has satisfied the burden of establishing that the protected activity was a contributing factor in the alleged adverse action, "relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action absent any protected activity." 29 C.F.R. § 1978.109(b). Even where a complainant has proven discrimination by a preponderance of the evidence, liability does not attached if the employer can demonstrate clearly and convincingly that it would have taken the same adverse action in any event. *Williams, supra,* slip op. at 6. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Id*. (citing *Brune v. Horizon Air. Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-

[17] While Respondent contends that Complainant was laid off on December 18, 2012, the preponderance of the evidence (including the phone records) proves that Complainant called into work and was laid off on December 17, 2012.

[18] Respondent concluded its brief with the statement that Complainant "invited his employer to 'go ahead and fire me,' and that he 'didn't care' whether he continued to be employed by Respondent." (Respondent's Closing Argument p. 10).

008, slip. op. at 14 (ARB Jan. 31, 2006) (citing Black's Law Dictionary at 577)). Clear and convincing evidence is a heightened burden of proof – more than a mere preponderance of the evidence but less than evidence meeting the "beyond a reasonable doubt" standard. *Remusat v. Bartlett Nuclear, Inc.*, ALJ No. 1994-ERA-36 (Sec'y Feb. 26, 1996) citing *Yule v. Burns International Security Service*, ALJ No. 1993-ERA-12 (Sec'y, May 24, 1995).

As noted above, the alternative explanation provided by Respondent as to its basis for laying off Complainant is not persuasive. In that regard, Respondent has relied upon an alleged policy to lay an employee off once he or she has been absent, without pay, for more than three days. (Tr. 151). Here, the evidence establishes that the Complainant was laid off on or before December 17, 2012, the third day he was absent from work without pay. Thus, the evidence of record does not support Respondent's alternative basis for termination. It is also inconsistent with the basis for termination stated by Ms. Rooney on the Driver's Application for Employment form reflecting that Complainant was "Laid off 12/14/12." (RX 1). Moreover, even if Respondent were to show that Complainant would have been appropriately terminated based upon this alleged policy, it is clear that the policy would not have come into play absent Complainant's protected activity. Under these circumstances, I find that Respondent has failed to establish by clear and convincing evidence, or even by a preponderance of the evidence, that it would have laid off Complainant in the absence of his protected activity.

REMEDIES UNDER THE STAA

Where a respondent is found to have violated the STAA, the statute and regulations provide several remedies for the affected employee. The statute and regulations generally provide that a respondent must "take affirmative action to abate the violation." 49 U.S.C. § 31105(b)(3)(A)(i); *see also,* 29 C.F.R. § 1978.109(d)(1). The available remedies include: (1) reinstatement of the employee to his former position; (2) payment of compensatory damages, including back-pay and compensation for "any special damages sustained as a result of the discrimination;" and, (3) payment of punitive damages. 49 U.S.C. §§ 31105(b)(3)(A), (b)(3)(C); 29 C.F.R. § 1978.109(d)(1). The statute also authorizes an award of reasonable attorney's fees and other costs incurred by the complainant in bringing the complaint. 49 U.S.C. § 31105(b)(3)(B).

Reinstatement

Reinstatement to a complainant's former position with the same pay, terms, and privileges of employment is an automatic remedy under the STAA. *See* 49 U.S.C. § 31105(b)(3)(A)(ii); *see also, Assistant Sec'y of Labor & Mailloux v. R&B Transp., LLC*, ARB No. 07-084, ALJ No. 2006-STA-12, slip op. at 10 (ARB June 26, 2009)(citing, inter alia, *Dickey v. W. Side Transp., Inc.*, ARB Nos. 06-150, 06-151, ALJ Nos. 2006-STA-26 and 27, slip op. at 8 (ARB May 29, 2008). Even where a complainant has found new employment and does not specifically request reinstatement, an Administrative Law Judge must still award it as a remedy unless it is impossible or impractical. *Mailloux, supra,* slip op. at 10-11 (citing *Assistant Sec'y of Labor & Bryant v. Mendenhall Acquisition Corp. ["Bryant"]*, ARB No. 04-014, ALJ No. 2003-STA-36**,** slip op. at 7–8 (ARB June 30, 2005)).

Complainant has not expressly requested that he be reinstated to his previous position as a commercial truck driver with Respondent. However, Complainant testified that while he has found new employment, he is employed with two separate part-time positions with fewer hours and less pay as his previous position. (Tr. 31, 36-37). Ms. Alspaugh and Ms. Rooney both testified that Complainant was never terminated and is eligible for re-hire. *Id.* at 136, 152. Additionally, Respondent has not presented any evidence or argument that reinstatement is "impossible or impractical," nor has Complainant done so. Accordingly, I conclude that Complainant is entitled to reinstatement as a commercial truck driver with Respondent with the "same pay and terms and privileges of employment." 49 U.S.C. § 31105(b)(3)(A)(ii). As he is being reinstated, there is no basis for an award of front pay.

Back Pay

A successful complainant under the STAA is also entitled to an award of back pay. 49 U.S.C. § 31105(b)(3)(A)(iii); *see also Mailloux* at 10. An award of back pay is to make the employee whole by restoring him "to the same position he would have been in if not discriminated against." *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 6 (ARB Aug. 31, 2011). As a general rule, a back pay award should be based on the earnings the employee would have received but for the termination. *See generally Blackburn v. Metric Constructors, Inc.*, 1986-ERA-4 (Sec'y Oct. 30, 1991)). Back pay is awarded from the date of the retaliatory discharge until the date on which the complainant is either reinstated or receives an unconditional, bona fide offer of reinstatement. *See Mailloux*, at 10; *see also Bryant* at 6. The back pay period does not end when a complainant obtains comparable work with a subsequent employer. *See Hobson v. Combined Transp., Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-035, slip op. at 5 (ARB Jan. 31, 2008). 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.'" *Bryant* at 6 (quoting *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-005, ALJ No. 1995-STA-43, slip op. at 14 n.12 (ARB May 30, 1997)). Complainant generally has the burden of establishing the appropriate amount of back pay. *Pillow v. Bechtel Construction, Inc.*, 1987-ERA-35 (Sec'y July 19, 1993). However, uncertainties in determining the amount of a back pay award are to be resolved against the discriminating employer. *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-26, slip op. at 8 (ARB Aug. 31, 2004)(citing *Clay v. Castle Coal & Oil Co., Inc.*, 1990-STA-37, slip op. at 2 (Sec'y June 3, 1994)).

A complainant has a duty to exercise reasonable diligence to attempt to mitigate back pay damages. *Mailloux*, at 10. The employer, however, bears the burden to prove that the complainant failed to mitigate. *Id.* The employer can satisfy this burden by establishing that "substantially equivalent positions were available to the complainant and he failed to use reasonable diligence in attempting to secure such a position." *Id.* Any back pay award should be offset by the complainant's interim earnings. *See Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033, ALJ No. 2006-STA-032**,** slip op. at 10 (ARB Sept. 28, 2010); *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-001, slip op. at 17 (ARB Apr. 7, 2010); *Bryant* at 7. Without this reduction, a back pay award could place the complainant in a better position than he was in while employed by the discriminating employer. *Smith* at 10.

The evidence shows that Complainant exercised "reasonable diligence" in attempting to completely mitigate his back pay damages. Here, Complainant testified that he began looking for work on December 17, 2012, the day he received notice he was being laid off, and it is clear he made reasonable efforts to mitigate his damages. (Tr. 30, 43). Complainant began working for Mail Transport Services, the week following his termination with Respondent, on December 21, 2012. (Tr.16, 30, 79-80), *see also* CX 2. Complainant also started working for Centerline Drivers, in April 2013. (CX 1). Complainant receives an hourly pay of $24.84 from Mail Transport, and $15.50 to $16.50 with Centerline. (Tr. 31, 37). Complainant testified that he works part-time with his new employers, about 30 to 40 hours per week, working both jobs; however, his testimony reflects 39 to 44 hours weekly.[19] *Id.* at 36. In that regard, Complainant explained that he worked 19 hours a week with Mail Transport, at an hourly rate of $24.84, and 20 to 25 hours per week with Centerline (if he was "lucky"), at an hourly rate between $15.50 and $16.50. *Id.* at 37. Complainant worked 55 hours per week with Respondent. *Id.* at 36, 42, RX 5. Complainant's hourly wage while working for Respondent was $24.84. *Id.* at 36. Respondent has not presented any evidence or argument that Complainant failed to mitigate his damages.

While Respondent indicated that Complainant is eligible for rehire if a position were to become available, there is no evidence that Respondent has given Complainant a "bona fide offer of reinstatement." As stated above, back pay is awarded from the date of retaliatory discharge until the complainant is either reinstated or is given an unconditional bona fide offer of reinstatement. *Mailloux* at 10; *Bryant*. at 6.

Although Complainant has not expressly requested he be awarded "back pay," he has effectively done so. In that regard, Complainant stated in his closing brief that he experienced "serious financial hardship due to a loss of income of about $20,000 for the year." (Complainant's Closing Argument). Based on his actual workweek of 55 hours, Complainant's previous average weekly wage with Respondent was $1,366.20.[20] Complainant is eligible for back pay damages based upon his loss of earnings, calculated by offsetting his actual earnings from the earnings he would have received had he continued his employment with Respondent.

Although Complainant did not provide earnings records, he testified as to the wages he earned at subsequent employment.[21] Complainant began working 19 hours per week with Mail Transport on December 21, 2013, making $24.84 per hour (or $471.96 per week based upon a 19-hour week). This was Complainant's only source of income until he began working for Centerline in April 2013. Therefore, Complainant's loss of wages, per week, during the period from December 21, 2012 to April 1, 2013 was $894.24 ($1,366.20 less $471.96). Once Complainant began working with Centerline he earned an additional average weekly wage of

[19] Based upon his testimony that he worked 19 hours for Mail Transport Services and 20 to 25 hours for Centerline Drivers, Complainant was actually working between 39 and 44 hours per week.

[20] Complainant's average weekly wage while working for Respondent of $1,366.20 was calculated by multiplying 55 hours by his hourly wage of $24.84.

[21] Complainant has been vague in terms of submitting pay records to support his estimates, and his testimony was contradictory, in that he initially testified that he worked "part time" between 30 and 40 hours weekly, but then testified that he worked 19 hours at one job and between 20 and 25 hours at the other job, which would equate to between 39 and 44 hours, or an average of 41.5 hours.

$360.00.[22] His combined weekly wage increased to $831.96[23] (based on a 41.5 hour work week) which is an average of $534.24 less, per week, than what he would have been making if he had not been laid off (based on a 55 hour work week).

I find that use of this figure would result in unjustifiably large damages, as it is premised upon Complainant working six days for a total of 55 hours per week, whereas it is undisputed that Complainant was seeking to reduce his hours by eliminating his morning shift (which ran from 4:40 a.m. to 8:00 a.m.), which would have reduced his hours to less than 40 hours weekly. Furthermore, he indicated that when he started working for Respondent, he expected to be working a five-day workweek. After eliminating the 3 hours and 20 minutes per day involved in the morning shift, Complainant's hours would be reduced to 35 hours weekly (over a six-day workweek). Based upon 35 hours at $24.84 hourly, his earnings with Respondent would be $869.40 weekly; based upon 40 hours, the earnings would be $993.60. Complainant was able to obtain work several days after he was laid off; however, he was only able to work 19 hours (at the same rate he received with Respondent) one week after leaving Employer until he obtained employment with Centerline three months later (where he works as much as 20 and 25 hours per week, at a lower rate), totaling between 39 and 44 hours. Thus, a more realistic measure of his damages would be the difference between the wages he was earning previously and the wages he subsequently earned, based upon either a 35-hour workweek or a 40-hour workweek. Inasmuch as Complainant was a full time employee, and it is unclear how long he would have worked for 55 hours weekly or what reduction in hours may have ensued subsequently, I find that a 40-hour workweek would be a better base line for measuring his actual loss of income.

In view of the above, I find that a fair measure of Complainant's actual earnings would be based upon a comparison of the wages he would have earned with Respondent based upon a 40-hour week and his subsequent earnings based upon a 40-hour week (consisting of 19 hours with Mail Transport at $24.84 hourly and 21 hours with Centerline at $16 hourly.) Based upon his hourly wage of $24.84, his daily earnings for an eight-hour day would be $198.72. That would result in a loss of four days pay from December 17 to December 20 (amounting to $794.88, based upon 8 hours for 4 days). As he made the same hourly wages at Mail Transport, the first 19 hours weekly were payable at the same rate, for the period from December 21, 2012 through April 1, 2013; however, as he worked 21 hours less than a 40-hour workweek, his lost pay would amount to $521.64 weekly (21 hours at the rate of $24.84 hourly) for 14 weeks, for a total of $7,302.96 in lost wages for that period. Beginning April 1, 2013, his wages were increased by $16 per hour for the remaining 21 hours ($336.00), and his lost pay would be the difference between $24.84 hourly and $16 hourly ($8.84 hourly) for 21 hours weekly ($185.64) continuing until the time of rehire.[24] Through February 14, 2014, the end of the week that this decision is being issued, that would amount to 46 weeks, at a rate of $185.64 weekly, for a total of $8,539.44.

[22] The average pay received with Centerline, working 20 to 25 work hours (for an average of 22.5) and earning $15.50 to $16.50 per hour (for an average of $16) is $360.00 per week.

[23] The combined average weekly wage of $831.96 was calculated by adding Complainant's earnings with Mail Transport for 19 hours with his average earnings with Centerline for 22.5 hours, for a 41.5 hour work week.

[24] Adjusting Complainant's earnings with Respondent based on a 40-hour workweek ($993.60) by deducting his average earnings in his two jobs for 40 hours ($471.96 at Mail Transport plus $336.00 at Centerline) also results in a weekly loss of $185.64.

Accordingly, I find that Complainant is entitled to accrued back pay for the period from December 17, 2012 up until the date of this decision (or February 14, 2014, based on the end of the week). That would amount to $16,637.28 (consisting of $794.88 from December 17 to 20, 2012; $7,302.96 from December 21, 2012 through April 1, 2013; and $8,539.44 from April 1, 2013 through February 14, 2014). I further find that Complainant is entitled to a continuing back pay award at the rate of $185.64 per week until he is either reinstated, is given an unconditional, bona fide offer of reinstatement by Respondent, or obtains other employment comparable to his employment with Respondent.

For the reasons discussed above, I find that Complainant is entitled to an accrued back pay award of $16,637.28. This amount reflects Complainant's loss of earnings based upon a 40-hour week, less offsets for Complainant's interim earnings. In addition, I find that Complainant is entitled to a continuing back pay award at the rate of $185.64 per week until he is either reinstated by Respondent, given an unconditional, bona fide offer of reinstatement, or obtains comparable employment.

Pre- and Post-Judgment Interest on Back Pay

The STAA expressly provides that a successful complainant is entitled to interest on an award of back pay. 49 U.S.C. § 31105(b)(3)(A)(iii); 29 C.F.R. § 1978.109(d)(1). Payment of interest on a back pay amount is mandatory in a discrimination case in order to make the complainant whole. *Assistant Sec'y of Labor & Cotes v. Double R. Trucking, Inc. ["Cotes"]*, ARB No. 99-061, ALJ No. 1998-STA-34, slip op. at 34 (ARB July 16, 1999). This includes pre-judgment interest on any accrued back pay, as well as post-judgment interest for the period between the issuance of the decision and the payment of the award. *Bryant*, at 10. Interest is calculated using the rate that is charged for underpayment of federal taxes, pursuant to 26 U.S.C. § 6621(a)(2). *Id.; see also,* 26 U.S.C. § 6621(a)(2) and (b)(3) (The applicable interest rate is the sum of the Federal short-term rate determined by the Secretary in accordance with 26 U.S.C. § 1274(d) plus 3 percentage points, rounded to the nearest full percent). The applicable interest rates are posted on the web-site of the Internal Revenue Service ("IRS").[25] Interest is calculated on a quarterly basis. *Bryant*, at 10.

In this case, as set forth above, I have found that Complainant is entitled to a back pay award for the period from December 17, 2012, until the date of this decision, with the award continuing from the date of this Decision and Order until he is either reinstated by Respondent, is offered an unconditional, bona fide offer of reinstatement, or obtains equally lucrative alternative employment. Accordingly, I find that he is entitled to payment of both pre judgment and post judgment interest at the applicable IRS rate, compounded, calculated at set forth above.

Other Damages

Complainant has not itemized any other special damages nor has he sought an award of punitive damages, and I find no basis for an award of punitive damages on the facts before me. Inasmuch as Complainant is unrepresented and there are no allowable costs, no attorney fees or costs are awarded.

[25] http://www.irs.gov/app/picklist/list/federalRates.html.

CONCLUSION

Based on the foregoing findings of fact, conclusions of law, and all evidence of record, I find that Complainant has proved by a preponderance of the evidence that his protected activity contributed to the adverse action taken against him. Furthermore, Respondent has not presented clear and convincing evidence that it would have terminated Complainant even absent his protected activity. Accordingly, I find that Respondent violated the Surface Transportation Assistance Act when it disciplined Complainant for refusing to drive, while experiencing flu-like symptoms, and I further find that Complainant is entitled to reinstatement; $16,637.28 in back pay until the time of this decision, plus interest; and back pay from the date of this decision at the rate of $185.64 per week continuing until reinstatement, a bona fide offer of reinstatement, or comparable alternative employment. Accordingly,

ORDER

IT IS HEREBY ORDERED that the claim of Complainant, Donny G. Kirk, against Respondent Rooney Trucking, Inc. under the STAA be, and hereby is, **GRANTED**;

IT IS FURTHER ORDERED that Respondent shall reinstate Complainant to his former position as a commercial truck driver, with the same seniority, status, and benefits that he would have had but for Respondent's violation of the STAA;

IT IS FURTHER ORDERED that Respondent shall pay Complainant accrued back pay in the amount of $16,637.28, together with pre-judgment interest, as calculated pursuant to 26 U.S.C.§ 6621(a)(2); and

IT IS FURTHER ORDERED that Respondent shall continue to pay Complainant at the rate of $185.64 per week, from the date of this Decision and Order until he is reinstated, is given an unconditional, bona fide offer of reinstatement, or obtains comparable alternative employment, together with post-judgment interest, pursuant to 26 U.S.C. § 6621(a)(2).

Digitally signed by Pamela Lakes
DN: CN=Pamela Lakes, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any

exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., 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.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.