

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 29 July 2016**

Case No.: **2014STA00068**

*In the Matter of:*

MICHAEL BUTLER,  
Complainant,

v.

NEIER, INC., OLIVER HASTE, JOHN HAYS,  
MIKE PARKER, JOHN DOE, and MARY ROE,  
Respondents.

Appearances:

Paul O. Taylor, Esq.  
Peter LaVoie  
Truckers Justice Center  
Burnsville, Minnesota  
For the Claimant

A. Jack Finklea, Esq.  
Scopelitis Garvin Light Hanson & Feary  
Indianapolis, Indiana  
For the Employer

Before: Alice M. Craft  
Administrative Law Judge

**DECISION AND ORDER GRANTING RELIEF**

This proceeding arises from a claim of whistleblower protection under Section 405 of the Surface Transportation Assistance Act (“STAA”), as amended.<sup>1</sup> The STAA and implementing regulations<sup>2</sup> protect employees from discharge, discipline, and other forms of discrimination for engaging in protected activity, such as reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle because of its unsafe condition. In this case, the Complainant, Michael Butler, alleges that he was terminated from his position as a truck driver for the Respondent, Neier, Inc., because he declined a dispatch which he thought could not be completed within the legal number of hours of service under Department of Transportation

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<sup>1</sup> 49 U.S.C. § 31105 (2014).

<sup>2</sup> 29 C.F.R. Part 1978 (2015).

regulations, raised concerns about the condition of the brakes on his tractor and other safety matters, and logged time spent at a mandatory safety meeting as “on duty (not driving)” time.

## I. STATEMENT OF THE CASE

Mr. Butler filed a complaint with the Occupational Safety and Health Administration of the Department of Labor (“OSHA”) on November 21, 2013. The complaint was reduced to writing in a “Complainant Statement” dated November 30, 2013, and amended in a filing by his attorney on February 12, 2014. Mr. Butler alleged he had been terminated on September 11, 2013, in violation of the STAA.

On June 13, 2014, the Regional Administrator for OSHA issued his findings on the complaint. The Administrator found no reasonable cause to believe that Neier violated the STAA when it discharged Mr. Butler.

Mr. Butler objected to the Regional Administrator’s findings, requested a hearing, and waived time constraints found in the regulations in a filing which his counsel transmitted to the Office of Administrative Law Judges (“OALJ”) by facsimile on July 11, 2014 .

I conducted a hearing on this claim on May 27 and 28, 2015, in Indianapolis, Indiana. Both parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18A.<sup>3</sup> At the hearing, Complainant’s Exhibits (“CX”) 1–10, and Respondent’s Exhibits (“RX”) A–G, I–O and R were admitted into evidence without objection. RX H was not offered. RX P and RX Q were excluded from evidence. The witnesses were separated, and, therefore, did not hear each other’s testimony. The record was held open after the hearing to allow the parties to consider whether to submit an additional exhibit, and to submit closing briefs. Neither party submitted any additional evidence. Both parties submitted closing briefs, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at hearing and the arguments of the parties.

## II. ISSUES

The issues in this case are whether Neier violated the STAA when it terminated Mr. Butler’s employment and, if so, whether Neier has established by clear and convincing

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<sup>3</sup> On May 19, 2015, the Department of Labor promulgated extensive revisions to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 C.F.R. Part 18A. 80 Fed. Reg. 28767 *et seq.* (May 19, 2015). The revised rules became effective on June 18, 2015. 80 Fed. Reg. at 28768. This case was heard under the rules in effect before June 18, 2015. *See* 29 C.F.R. Part 18A (2014).

evidence that he would have been fired even absent protected activity. A finding in favor of Mr. Butler also raises the issue of what remedies should be awarded.

### III. APPLICABLE STANDARDS

The Employee Protection section of the STAA provides:

#### § 31105. Employee protections

(a) PROHIBITIONS.—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because—

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

49 U.S.C. § 31105(a). This provision was enacted “to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations.”<sup>4</sup>

STAA whistleblower complaints 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”).<sup>5</sup> In order to prevail on his case Mr. Butler must show that he engaged in a protected activity, he suffered an adverse action, and the protected activity was a contributing factor in the adverse action. If these elements are satisfied, the burden shifts to ACC to show by clear and convincing evidence that the adverse action would have been taken regardless of the protected activity.<sup>6</sup> Thus Neier can prevail if it demonstrates either that Mr. Butler cannot establish one of the three listed elements, or that Neier would have taken the action it did regardless of his protected activity.

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### A. Summary Of The Evidence

The parties stipulated that Mr. Butler is an employee and Neier is an employer as defined in the STAA. They also stipulated that Mr. Butler was formerly employed by Neier to operate commercial motor vehicles having a gross vehicle weight rating of 80,000 lbs., transporting property on the highways in interstate commerce. They also stipulated that Mr. Butler's complaint and objections to OSHA's findings were timely filed. Transcript (“Tr.”) at 13–14.

Mr. Butler lives in Dubois, Indiana, which is in the southwest part of the state, about 109 miles from Neier's Indianapolis location in the center of the state. He is 45 years old and has a 12<sup>th</sup> grade education. He is married, and his wife and her two children live with him. Tr. 54–55, CX 6 at 1–2. He has a commercial driver's license with endorsements for tankers and transporting hazardous materials. He has never had a Department of Transportation chargeable accident in a commercial vehicle. Tr. at 55. He began driving a dump truck for his father's

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<sup>4</sup> *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

<sup>5</sup> 49 U.S.C. § 42121(b) (2014). *See* 49 U.S.C. § 31105(b)(1).

<sup>6</sup> 49 U.S.C. § 42121(b)(2)(B); *Beatty v. Inman Trucking Management, Inc.*, Case No. 13-039 (ARB May 13, 2014) (STA), PDF at 7–10.

business, Butler Trucking, in his teens. Tr. at 56. After that, beginning in 1995, he drove commercial vehicles for several other companies. He began driving hazardous materials in 1998. Tr. at 61. He had worked for Neier before, but was fired in 2001. Tr. at 62.

In 2013, Neier advertised an opening for a driver on Craig's list. Mr. Butler called Neier in response to the ad, and spoke to Oliver Haste, the Director of Human Resources. Tr. at 63. Mr. Butler inquired whether there was a southern route available because he wanted to be home on weekends. Mr. Haste told him there was a route driving a tanker of hazardous materials at the Valero refinery in Memphis, Tennessee. Tr. at 64, 212. Mr. Butler was interested and applied for the job; he said Mr. Haste told him he was likely to be hired because Neier was short of drivers, and they needed to fill the position. Tr. at 65. Mr. Haste reviewed Mr. Butler's employment application. He noticed that Mr. Butler had previously worked for Neier and been fired. Mr. Haste spoke to the owner to find out the circumstances and whether there was an objection to rehiring him. After speaking to the owner, Mr. Haste, who had the authority to do so, decided to hire Mr. Butler. Tr. at 393–394.

Mr. Butler began working for Neier in July 2013. After undergoing a week of training, he began driving various routes because the run to Valero was not yet available. Tr. at 167, 394–395, CX 2, RX C. At that time Neier was operating Monday through Friday with three overlapping shifts. Office hours were 8:00 am until 5:00 pm Monday through Friday, but the office might remain open later if dispatchers were there. The repair shop was open 24 hours a day, five days a week, and some mechanics worked four to five hours on Saturday. Tr. at 396–397.

The U.S. Department of Transportation (DOT) regulates motor carrier safety. Drivers are required by DOT regulations not to drive unless they are satisfied that their equipment is in good working order. To that end, drivers perform pre- and post-trip inspections of their vehicles. *See* RX E, Neier's Pre-Trip Inspection Guidelines. If they discover a defect, they must complete a driver vehicle inspection report (DVIR) identifying the vehicle and listing any defect or deficiency which would affect the safety of the operation of the vehicle or result in mechanical breakdown.<sup>7</sup> Motor carriers must schedule runs so that the schedule can be met without exceeding speed limits.<sup>8</sup> DOT regulations also limit the hours of service for drivers.<sup>9</sup> In order to ensure compliance, drivers are required to record their duty status for each 24 hour period.<sup>10</sup> The logs show the date, the carrier, mileage, truck and trailer numbers, the time spent in "off duty", "sleeper berth", "driving", or "on duty (not driving)" status in 15-minute increments, the location for each change in status, and location at the beginning and the end of the 24 hour period, and are signed by the driver. *See* CX 2 and RX G.

The DOT hours of service regulations are incorporated into a section of the Neier Company Handbook found at RX F. The Handbook provides:

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<sup>7</sup> *See* 49 C.F.R. §§ 392.7 and 396.11.

<sup>8</sup> 49 C.F.R. § 392.6.

<sup>9</sup> 49 C.F.R Part 395.

<sup>10</sup> 49 C.F.R. § 395.8.

Hours of Service Limitations:

11 HOUR RULE

No driver may drive more than eleven (11) hours following ten (10) consecutive hours off duty. After having driven for eleven (11) hours a driver may not drive again until he/she takes a ten (10) consecutive hour break. The ten (10) hours off may be either off-duty time or sleeper berth time or a combination of both.

The eleven-hour rule affects driving time only. It does not include line 4 [of the log] (on duty not driving).

... [omitted exception for unexpected adverse driving conditions]

14 HOUR RULE

A driver is allowed a period of fourteen (14) consecutive hour duty period even if you take some off-duty time, such as a lunch break or a nap, during those 14 hours. No driver may drive after having been on duty (lines 3 and four) [of the log] for fourteen (14) hours following ten (10) consecutive hours off duty.

70 HOUR RULE

No driver may drive for any period after having been on duty (lines 3 and four [of the log]) seventy (70) hours in any period of eight (8) consecutive days. It is the driver's responsibility to inform dispatch of his available hours under the 70 hour rule. If you take a load that you do not have the hours to legally run, and you do not tell dispatch, then you are solely to blame for the violation. You cannot blame dispatch and therefore are subject to the appropriate disciplinary procedure.

OFF DUTY LOGGING

By blanket authorization, Neier, Inc. permits each driver to log only the following time off duty on line 1 [of the log] during each work period:

- For each consecutive 14 hour on duty, up to one and one half hours for meals, coffee, or similar routine stops.

Before leaving the vehicle, the driver must make sure it is legally parked and properly secured against rollaway or theft.

...

Each month driver's log books will be reviewed and audited for violations. This policy establishes a uniform point system to monitor each driver's violation frequency and determines the corrective action required to minimize future violations. The following standards apply to all existing drivers for the determination of eligibility to remain in service.

Violation Category	Description	CSA Point Value
Falsification	Falsification	7
General Form & Manner	Any error entered onto the log book; examples include (but are not limited to) missing signature, missing daily miles, shipping documents, etc.	2
Hours of Service	Any hours of service violation regarding the 11 hour, 14 hour, 10 hour, or 70 hour rules	7
Missing Record of Duty	Missing log page	5

Included on each driver’s monthly logbook review letter will be a point accumulation for violations identified on his/her logs. Points for each violation are assigned according to the schedule above. In this way, each driver will be fully aware of these verity of his/her violations for the month period the allowable point limit is 10 points per review before any corrections. The list below reflects possible disciplinary action for incurring more than the allowable point limit per month, resulting from noncompliance. Disciplinary action will be administered in accordance with the following schedule for any consecutive rolling twelve-month time period:

Months Exceeding Point Limit	Action
1 <sup>st</sup>	Verbal warning
2 <sup>nd</sup>	Conference with written warning
3 <sup>rd</sup>	1 week suspension
4 <sup>th</sup>	Termination

RX F at 14–15. “CSA Point Value” stands for Compliance Safety and Accountability points; points are assigned by the DOT. Tr. at 29. In addition to these hours of service rules, there is also a 34-hour restart rule allowing the 70 hour rule to “restart” after an off-duty period of 34 or more consecutive hours.<sup>11</sup>

The Neier Company Handbook also contains other rules and policies pertinent to this case. The Handbook specifies that employees are hired with a probationary period of 90 days. The purpose of the probationary period is to give Neier and the employee “the opportunity to evaluate each other, allowing either party to make any adjustments or terminate the relationship without notice.” RX F at 6. Mr. Butler was terminated during his probationary period.

Neier has a program to maintain a new driver’s income during the probationary period if no loads are available:

<sup>11</sup> 49 C.F.R. §395.3(c) and (d); *see also* 79 Fed. Reg. 76241–242 (Dec. 22, 2014).

## MINIMUM DRIVER'S EARNING PROGRAM

Neier, Inc. will ensure the income of new employees throughout the 90 day probationary period. A new driver becomes eligible for this program upon completion of initial training procedure, and will remain eligible throughout completion of the first 90 days of employment from date of hire. The purpose of this program is to supplement driver's pay when no loads are available. If there are no loads available for the driver, the driver may be paid up to eight (8) hours for work completed at the home terminal. Job tasks will vary, and can be designated by the Director of Operations, Director of Transportation, Director of Maintenance or selected designee. An eligible driver may not refuse a load in exchange for hourly work at the home terminal.

Mr. Butler was never offered any hourly work. Tr. at 158. He understood the policy to mean that he could not do hourly work if he passed on a load. Tr. at 267–268. Mr. Haste also described the program as being available when there was no load for a driver. Tr. at 35–36, 39.

The Handbook also includes the company attendance policy which provides:

### ATTENDANCE:

Employee absence and/or tardiness will be tracked on an accumulating point system for each 12 month calendar year.

Point values:

Excused absence...0 points  
Tardiness...1 point  
Absence...2 points

Disciplinary schedule:  
5 points...written reprimand  
8 points...5 day suspension  
10 points...Termination

RX F at 7. Neier contends that Mr. Butler was fired because he was late for a meeting with Mr. Haste on the day he was fired, as is explained further below.

Mr. Butler's logs show that after he completed his training, he was on duty driving various routes for five or six days a week (beginning on Monday each week) during the weeks of July 22, July 29, August 5, and August 12. CX 2 at 8–33. He was off duty for eight days from August 17–24. CX 2 at 33. Mr. Butler testified that he was not given any work that week because he declined a run. Tr. at 109. No witness contradicted his testimony on that point. He returned to work driving various routes from Sunday, August 25 to Thursday, August 29. CX 2 at 34–38.

On Friday, August 30, Mr. Butler made his first and only run from Indianapolis to Valero in Memphis. Tr. at 70–74, 290–291, CX 2 at 39. The log shows that he went on duty in Greencastle, Indiana, at 1:30 a.m., and went off duty in Cape Girardeau, Missouri, at 3:30 p.m.,



14 hours later. All of the times recorded on the logs and appointment times reflected Eastern times, even though he spent part of the time in the Central time zone, because Mr. Butler was based at Neier in Indianapolis, which is in the Eastern time zone. Tr. at 70–71, 225–226. Mr. Butler left Indianapolis at 2:30 a.m., and arrived at Valero at 10:30 a.m., with a one-hour stop in Hoyt, Missouri. After arriving at Valero, Mr. Butler was “on duty (not driving)” from 10:30 a.m. to 1:00 p.m. while his tanker was loaded. Tr. at 76–77. Then he drove to Cape Girardeau before going off duty. Mr. Butler’s driving time between Indianapolis and Valero was seven hours. Mr. Butler and other witnesses said the typical driving time between Indianapolis and Valero was 7.5 to 8 hours, but Mr. Butler made the trip with only 7 hours of driving time. Tr. at 75, 173, 378. Mr. Butler conceded that he probably exceeded the speed limit by a few miles per hour, but he also said the trip would have taken longer had he been driving at night. Tr. at 271. On Saturday, August 31, Mr. Butler drove from Cape Girardeau to Dubois, and then went off duty. CX 2 at 40, RX G at 1. He was off duty on September 1 and 2. Tr. at 79–80, CX 2 at 41, RX G at 2.

Mr. Butler was on duty again for the following week, from September 3 to September 7. On Tuesday, September 3, he drove from Dubois to Valero. Driving time from Dubois to Valero was 6.25 hours. When he arrived at Valero on September 3 at 10:15 a.m., he immediately went off duty for the rest of the day. Tr. at 80–81, CX 2 at 42, RX G at 3. On Wednesday, September 4, he drove from Valero to Hannibal, Missouri, and then went on to Bowling Green, Missouri. CX 2 at 43, RX G at 4. He was off duty while waiting for a service truck to fix problems with the equipment. Tr. at 82. On Thursday, September 5, he drove from Bowling Green to Valero. He arrived at Valero at 9:00 a.m., immediately went off duty (during loading) until 12:45 p.m., and then returned to Valero to begin a drive to Matthews, Missouri, where he went off duty for the rest of the day. Tr. at 82–83, CX 2 at 44, RX G at 5. On Friday, September 6, he drove from Matthews to Hannibal, and then from Hannibal to Indianapolis. His log shows he was driving from Hannibal to Indianapolis from 12:00 p.m. until 5:00 p.m., when he went off duty. Tr. at 84, CX 2 at 45, RX G at 6. He removed his personal items (CB radio, clothes and a cooler) from the truck when he arrived in Indianapolis because he did not expect to be driving again until Wednesday as a result of phone conversations with the dispatcher described below. Tr. at 105, 201–202.

Up to this point the parties were in substantial agreement as to the facts. But beginning with September 6, their versions of what happened next diverge.

Mr. Butler said he drove to Indianapolis instead of Dubois on September 6 because he did not know what his dispatch would be for the next week, and a couple of times when he applied the brake, it felt to him like the pedal was going down further than it normally should. Mr. Butler was under the impression that the foot valve might have been going bad. He did not believe there was any immediate danger, but he thought it should be looked at. Tr. at 86–87, 176, 178, 179–180, 182, 213. He alleged that he red-tagged the truck and turned in a repair order to the shop when he arrived in Indianapolis. He initially said he turned in a DVIR, CX 10, with his other paperwork on Saturday morning. Tr. at 92, 183, 186–187. On cross examination, he said he did not recall precisely what he did with the DVIR. Tr. at 177. Mr. Butler appeared to be making a distinction between a DVIR and a repair order during his testimony, *see, e.g.*, Tr. at 183, but the distinction was never fully explained. At other points in his testimony, he referred to two DVIRs, *see* Tr. at 186–187. The only DVIR introduced into evidence was dated September 7, and said he

thought the foot valve might be bad. Mr. Butler made the only entries on the DVIR; it has not been signed off by a mechanic.

Neier denies that Mr. Butler properly reported having a problem with the brakes. Neier points out that it does not use red tags. Tr. at 177, 411. Mr. Butler said he got the red tag at a truck stop, and used it as a visual signal to any other driver that there was a problem with the truck. Tr. at 178. Neier also points out that if Mr. Butler filled out a DVIR as part of his post-trip inspection, it should have been turned in to the shop immediately, and the DVIR introduced as an exhibit at the hearing was incompletely filled out. Tr. at 257–259; *compare* CX 10 with RX I. Mr. Haste testified that he had reviewed Neier's records, and found no record of the DVIR in the maintenance records for the tractor. Tr. at 410. But he also said that if the mechanic found nothing wrong, there would be no repair order. Tr. at 418. Mr. Butler said he wrote the truck up on September 7 because it had not been moved when he came to the safety meeting. Tr. at 187. In any event, Mr. Butler also testified that he only took his truck home if he was running the southern route and was en route. If his home was out of route, or if he would be leaving Indianapolis to run elsewhere, it did not make sense to drive it to Dubois. On September 6, when he left Hannibal, he was not sure what he would be doing the following week. Tr. at 182.

Mr. Butler also alleged that during the drive back to Indianapolis, he refused a dispatch because he could not legally log the hours that would be required and arrive at his destination on time. Tr. at 89–90. The dispatcher had to rely on Mr. Butler's representation that he did not have enough hours, because Mr. Butler had not yet turned in his log for that week, but the dispatcher would have known the loads Mr. Butler had already had that week. Tr. at 158–160. Neier also denies that Mr. Butler legitimately refused the dispatch.

The parties introduced their telephone records into evidence at the hearing. Neier's records are found in CX 3, RX K, and RX L. Mr. Butler's records are found in CX 9. Mr. Butler has two phone numbers, one a cell number provided by Sprint (CX 9 at 1–12), and the other a land line number provided by Frontier (CX 9 at 13–15). Mr. Butler testified that he does not get cell phone reception at his home. Tr. at 106. Neier phone records show calls to both numbers.

Mr. Butler testified, and the phone records confirm, that he spoke to Mike Parker, a dispatcher, twice during his return trip to Indianapolis on the afternoon of September 6. According to Mr. Butler, the first time he called Mr. Parker to find out what dispatch would be available for him the next week. Mr. Parker responded that he did not have everything worked out yet, but he would probably be going to Memphis. Tr. at 85. Mr. Butler testified that Mr. Parker called him back to tell him to attend a mandatory safety meeting on Saturday morning, and load at Valero in Memphis at 6:00 a.m. on Sunday. He was to return to Memphis on Tuesday and Thursday, and unload on the days in between. Mr. Butler said he could not log that dispatch legally, because he would be breaking the hours of service rules. According to Mr. Butler, Mr. Parker told him that there was no other work being offered to him, and he had to accept the dispatch. If he did not accept the dispatch, there would be no work available for him until Wednesday. Tr. at 88–90, 217. Mr. Butler also said Mr. Parker did not argue with him about whether he could legally accept the dispatch. Tr. at 161. Mr. Butler said he also told Mr. Parker that before he could take the truck out again, his brakes needed to be looked at. Mr. Parker told him to bring the truck to the shop. Tr. at 90, 181–182.

Mr. Parker testified that he did not recall Mr. Butler refusing any loads; he only remembered that Mr. Butler was difficult to reach “a lot of times” when he tried to call him. Tr. at 353–354. The phone records from Neier found in RX K begin on August 26, and end on September 11. They show 15 calls from Mr. Parker to Mr. Butler’s cell phone (highlighted in green on RX K). Of the 15 calls, Mr. Butler missed 3 on the evening of September 6, and 1 on the morning of September 9, which can be determined because the calls lasted only 1 minute according to Neier’s records, and they do not appear on Mr. Butler’s cell phone records at all. Compare RX K and CX 9. On cross examination Mr. Parker said he was not saying that Mr. Butler did not refuse the dispatch; he was only saying he did not recall it. Tr. at 378. But he did recall that there was a run to Valero that Mr. Butler could not run, so he had to assign someone else. Tr. at 379. He also testified that starting times for the Valero runs were generally at 7:00 a.m. Central time (8:00 a.m. Eastern). But he said that “on that particular day,” the appointment time was at 8:00 a.m.; they had not been doing 7:00 a.m. runs for a while. Neier had put another driver on the run because “for whatever reason Mr. Butler couldn’t run it that day, that Monday.” Tr. at 356. Thus there is a discrepancy in Mr. Parker’s testimony regarding the time and the date of the dispatch he was referring to which I cannot reconcile on the record before me. It is possible that Mr. Parker was recalling the previous incident in August when Mr. Butler declined a dispatch that led to his being off work for a week. Mr. Parker did not recall how he found out that Mr. Butler could not do the run on September 7–8. *Id.* Mr. Butler testified that he thought there were runs for both Sunday and Monday, but Mr. Parker did not want to allow Mr. Butler to swap Sunday for Monday. Tr. at 214.

Mr. Parker said he would not have any problem if Mr. Butler said he could not legally run a dispatch. Their usual procedure when that happened was to dispatch another driver, or call the customer to reschedule the load. In an extreme case they could push the load back for a day because they were shorthanded. Tr. at 359, 384. He said the schedule had to be adjusted a couple of times a week. Tr. at 360. But Mr. Butler said that Mr. Parker was unwilling to change the scheduled arrival time for the run in question. Tr. at 221. In September 2013, the company was using paper logs, and had to rely on the driver’s word about their available hours. Tr. at 360–361. If a driver runs out of 11 hours of driving time, or 14 hours of driving plus on “duty (not driving)”, he has to take a 10-hour break. Tr. at 361. Mr. Parker said he did not pressure a driver who was out of hours to make him take the run anyway, or penalize a driver for refusing a load. He would try to find something to fit the hours they had available, or they could work hourly. He did not recall telling Mr. Butler that there would be no work for him until Wednesday if he refused the Valero run. Tr. at 363. Mr. Parker said he calls drivers to dispatch them for the next day, to see where they are, or to see how they are doing on their hours. He did not recall calling Mr. Butler to tell him about the safety meeting, either. Not every driver attended. Some drivers were out on the road or could not attend for other reasons. When that happened, they would catch them up later. Tr. at 364. He said if Mr. Butler said attending the safety meeting would not allow him to make a Memphis run, he would have preferred that Mr. Butler not attend the safety meeting. Tr. at 364–365. He said attending the safety meeting can interrupt a driver’s ability to take a 34 hour restart, because the time needed for a restart could not start until after the meeting. He agreed that attendance at a safety meeting starts the clock for the 14 hour rule. Tr. at 379, 382.

Mr. Parker also said he did not recall Mr. Butler complaining about the brakes on his truck. Tr. at 365. The normal procedure for a problem with brakes would be to pull over and call someone to look at them. Neier has also sent tractors out on tow trucks to replace a tractor with

an issue. Mr. Parker did not recall that Mr. Butler ever refused to drive until his brakes were fixed. Tr. at 366.

Neier phone records show that on the evening of Friday, September 6, Mr. Parker and Dave McCullough, another dispatcher, each tried to call Mr. Butler on his cell phone twice between 6:53 p.m. and 7:22 p.m., after he went off duty. RX K. Mr. Butler said he tried to call both of them back after receiving voicemail messages from them. He said the voicemail from Mr. Parker asked him to call back. He said the voicemail from Mr. McCullough said if he did not accept the run Mr. Parker had given him, there would be no work for him the following week. Mr. Butler was not able to reach either Mr. Parker or Mr. McCullough when he called them back at 8:14 and 8:15 p.m. Tr. at 90–91, CX 9 at 11. Then Mr. Parker tried to call Mr. Butler on his cell again at 8:29 p.m., RX K, but Mr. Butler did not receive that call either. Mr. Parker was not asked why he tried to call Mr. Butler that evening. Mr. McCullough did not testify at the hearing.

On Saturday, September 7, Mr. Butler attended the mandatory safety meeting, which was scheduled to start at 8:00 a.m. He was running late, so he called Neier to let them know he would be late. Mr. Butler and his wife (who drove him) said when he arrived at Neier on Saturday morning, the truck was where he left it the night before. Tr. at 187, 348. The safety meeting was attended by John Hays, Vice President of Neier; Mr. Haste; all three dispatchers (Mr. Parker, Mr. McCullough, and Jimmy Thompson); Kasey Thomas, Safety and Compliance Coordinator; and several drivers, other employees, and family members. During the meeting, Mr. Butler asked whether the drivers should log the meeting as on duty or off duty. According to Mr. Butler, Ms. Thomas said the meeting could be logged any way he wanted. Mr. Butler responded that he was pretty sure it should not be logged off duty. Tr. at 96–99, 200–201, 282–283. Mr. Butler said his conversation with Ms. Thomas included his belief that he could not take a dispatch because the safety meeting was supposed to be logged as on duty. Tr. at 104. Another driver who attended the meeting, Russell Mattingly, confirmed that Ms. Thomas left it to the drivers to choose whether to log the meeting as on or off duty. Tr. at 147–150. Neier challenged Mr. Mattingly’s credibility because he was later fired for turning off his GPS and falsifying his logs. RX R. But Mr. Mattingly was not present in the court room during Mr. Butler’s testimony, and yet his description of the discussion with Ms. Thomas about how to log the safety meeting was consistent with Mr. Butler’s description. I credit his testimony on this. Ms. Thomas denied that she ever suggested that a driver should log a safety meeting should log it as “off duty”, or that it did not matter how they logged it. Tr. at 388. Mr. Butler recorded the meeting on his log as “on duty (not driving)” from 8:00 a.m. until 12:00 noon. CX 2 at 46, RX G at 7. There are no more logs in the record after the September 7 log. After the safety meeting was over, Mr. Butler went home. Tr. at 104. He said he had been told to call back in on Wednesday to check in. When he left the meeting, he had no plans to work again until the following Wednesday; he had no inkling that there could be any work for him any sooner. Tr. at 105–107.

Mr. Haste and Ms. Thomas both confirmed that attendance at safety meetings is mandatory, although there could be excused absences. Tr. at 25–26, 392. Neier issued a flyer for the September 7 meeting which was posted, and may have been put in the drivers’ mail boxes. The flyer said it was a mandatory meeting. Mr. Haste suggested that if a driver had said the meeting would adversely affect his hours of service, the driver could have been excused. Tr. at 26–27. Ms. Thomas said if drivers are required to attend and are being paid, that is on duty time. Tr. at 392.

Mr. Haste attended the meeting, but he could not recall whether Mr. Butler raised the issue of whether the time should be recorded as on duty. Tr. at 27–28. He said falsification of a log book is a serious issue which is governed by the company handbook. Both the driver and the company can be assessed points for violations. Drivers' log books are reviewed once a month for compliance with the regulations. Points are assigned for each violation according to the schedule found on page 15 of RX F. The allowable point limit in any month is 10 points per review before any discipline is assessed. Disciplinary action for incurring more than 10 points in a month is administered in accordance with a schedule applying to any consecutive rolling 12-month time period, progressing through verbal warning, conference with a written warning, one-week suspension, and termination. Tr. at 30. After Neier fired Mr. Butler, the DOT audited Neier's log book process. About 25% of the drivers' logs were audited. Tr. at 31–32. Mr. Haste had an exit interview with the DOT in January 2014, but he did not recall the specific findings. He thought they found that Mr. Butler had correctly logged the meeting, and another did not. Tr. at 32–33. A letter from the DOT to Mr. Butler after the audit was completed confirming Mr. Haste's recollection is described below.

On Monday, September 9, Mr. Parker called Mr. Butler on his cell phone at 9:26 a.m., but got no answer. RX K. Mr. Haste called Mr. Butler on his land line half an hour later, at 9:56 a.m., but he got no answer, either. RX K. As far as Mr. Haste could recall, he called Mr. Butler because dispatch was having trouble getting hold of him. Mr. Haste thought he remembered hearing a dispatcher say Mr. Butler had cleaned out his truck; Mr. Haste wanted to follow up with Mr. Butler. Tr. at 35, 399. Haste left a message that dispatch believed he had quit, observing that he had cleaned out his truck. Tr. at 400. Mr. Haste testified that typically drivers leave personal belongings in their trucks, so removing personal items led him to believe Mr. Butler had quit. Tr. at 408.

Mr. Butler testified that he was not at home September 9 and most of September 10 because he had gone to help a friend do some remodeling. Tr. at 110. When he returned home on September 10, he discovered a voicemail from Mr. Haste, saying something to the effect that Mr. Haste thought Mr. Butler was unhappy and was unsure if Mr. Butler wanted to work at Neier anymore; Mr. Haste wanted Mr. Butler to come in to talk to him. *Id.* Mr. Butler did not recall the exact contents of Mr. Haste's message, but was disturbed since it suggested he had quit or was being fired. Tr. at 202, 207.

On September 10, at 1:04 p.m., Mr. Butler called OSHA because he thought he was being punished by being given no work for refusing the load, as had occurred in August. The call lasted 3 minutes. Tr. at 107–109, CX 9 at 15.

Also on September 10, at 5:36 p.m., Mr. Butler returned Mr. Haste's call from September 9. The call lasted for 23 minutes. Tr. at 107–108, CX 9 at 15. Mr. Butler said that during the phone call, he told Mr. Haste he did not understand why Mr. Haste would think he had quit. He told Mr. Haste that he always took his personal belongings out of the truck. Mr. Haste told him dispatch had complained that he kept refusing trips, saying he could not log them, and Neier would not tolerate that. Mr. Butler told Mr. Haste that any time he passed on a load, it was because he could not log it legally. Mr. Haste told him to come in on Wednesday at 8:00 a.m. Mr. Butler told Mr. Haste that he only had one car, and that his wife would have to bring him after she took the children to school, so he could not arrive until near 11:00 a.m.

Mr. Haste said he did not know if there were any assignments available, and he would have one of the dispatchers call him back. Tr. at 110–112.

Mr. Haste's testimony regarding the phone call was similar in some respects, but different in others. According to Haste, when Mr. Butler called him back the next day, Mr. Butler said he wanted to work. Mr. Haste told Mr. Butler if he wanted to work, he should come to the office at 8:00 a.m. Mr. Haste agreed that Mr. Butler told him he did not have cell phone coverage at his home, but he denied that Mr. Butler told him he could not be there at 8:00 a.m. Tr. at 401. When they ended the conversation, Mr. Haste said it was his understanding that Mr. Butler would be at the terminal at 8:00 a.m. At that point, he did not intend to fire Mr. Butler. Tr. at 401–402. Mr. Haste denied that Mr. Butler mentioned to him that the dispatcher was trying to send him on a load he could not legally run. Tr. at 409.

After Mr. Butler spoke to Mr. Haste, at 6:24 p.m., Mr. McCullough called Mr. Butler to give him a dispatch for Wednesday, September 11, at 11:00 a.m. Tr. at 114, 208, 279–280, RX K. The call lasted 3 minutes. RX K. The phone records confirm that Mr. McCullough called Mr. Butler. But because Mr. McCullough did not testify, Mr. Butler's testimony is the only evidence regarding the contents of that call.

Mr. Haste testified that on Wednesday morning before 10:00 a.m., he went looking to see if Mr. Butler had arrived. When he learned that Mr. Butler had not arrived, he decided to terminate his employment as a probationary employee. He called Mr. Hays to let him know, and wrote out a termination letter. Tr. at 402. The letter is not in evidence. Mr. Hays said Mr. Haste did not ask him whether Mr. Butler should continue in his employment. Tr. at 426.

Mr. Butler testified that he arrived at Neier at 10:30 a.m. on September 11 to begin the run. When he got there, he could not find his truck to put his belongings in it. The truck was in the shop, and already had someone else's belongings in it, so he went to speak to Mr. Haste. Tr. at 114–115, 275, 321–322, 345. There is nothing in the record to explain why the truck was in the shop that day; the only work order for the truck, found in RX J, was for an annual inspection on August 20, 2013. Mr. Butler's wife drove him to Mr. Haste's office and waited in the car. Tr. at 115, 322.

According to Mr. Butler, when he arrived in Mr. Haste's office, Mr. Haste was alone. Mr. Butler asked what was going on. Mr. Haste responded that Mr. Butler was being fired because he was unhappy, did not want to work there, and kept refusing loads claiming he could not log them. He said that Neier was "done with you." At some point Mr. Haste told Mr. Butler he was supposed to have been there at 8:00 a.m.; Mr. Butler replied that McCullough had told him to be there at 10:30 or 11:00. When Mr. Butler told Mr. Haste it was illegal to fire him for refusing to take a load that he could not legally log, Mr. Haste called Hays into the office. Mr. Butler said he was upset, but he did not stand up or raise his voice. When Hays came into the office, he was "agitated" from the beginning, and told Mr. Butler to leave immediately or be thrown out. As Mr. Butler went out to his car, unbeknownst to him, Hays was following him. When his wife called his name and he turned around, Hays turned around too, and returned to the office. Mr. Butler and his wife went across the street and called the police for assistance because Mr. Butler had Neier property which he thought should be returned. The police suggested he mail the property to Neier, which he did. Tr. 117–123, 322–323. Mr. Butler thought Hays was acting aggressive and out of control. Tr. at 123.

Mr. Haste and Mr. Hays gave similar accounts of what happened in Mr. Haste's office as Mr. Butler gave. Mr. Haste testified that when Mr. Butler came to his office near 11:00 a.m., Mr. Haste told Mr. Butler that because he arrived so late, Mr. Haste did not believe he really wanted to be at Neier, and he was done. Tr. at 403. Mr. Haste said Mr. Butler responded that everyone knew that he had to take his children to school; Mr. Haste said his response was to ask how Mr. Butler could have a job if he could not be somewhere until 11:00 a.m. Tr. at 405. Neier contends that the children were being home schooled at that time based on Mrs. Butler's testimony that the children only went to public school between August 2014 and January 2015. Tr. at 334. I infer that Mrs. Butler misspoke as to the dates, and meant that they went to public school from August 2013 to January 2014. Otherwise, it would have made no sense for Mr. Butler to have raised the need to take the children to school during the meeting as Mr. Haste said he did. According to Mr. Haste, Mr. Butler immediately became agitated, and threatened to sue. Mr. Haste said he was shocked, and called Mr. Hays to join them. Tr. at 404. When Mr. Hays arrived, Mr. Butler tried to argue about the status of his employment, but Mr. Hays told him it was not a debate. Tr. 427. Mr. Hays told Mr. Butler they were trying to be professional, and Mr. Butler could leave, or they would have him removed. Tr. at 404-405, 427. Mr. Butler said they did not have to throw him out, and walked out. Tr. at 405, 428. Mr. Hays followed behind Mr. Butler when he left the office, and then turned around and came back in. Tr. at 406. Mr. Haste and Mr. Hays denied that there was anything threatening about Mr. Hays' manner; Mr. Hays just followed to make sure Mr. Butler left the premises. Tr. at 407, 412, 428-429. Mr. Haste reiterated that his decision to fire Mr. Butler was based on his failure to arrive on time that morning. He denied that refusal of the dispatch, the complaint about the brakes, or anything that occurred during the safety meeting played any role in his decision. Tr. at 416-417.

Mr. Haste made the decisions to hire and fire Mr. Butler. Tr. at 25, 393-394. Mr. Haste had been the Director of Human Resources since May 2013, only two months before he hired Mr. Butler, and four months before he fired him. He had no prior experience in the trucking business or familiarity with DOT motor carrier safety regulations when he was hired. Nor did he receive any training on the regulations. Tr. at 21-22.

Mr. Haste reports to Mr. Hays (the Vice President), as does Ms. Thomas (the Safety and Compliance Coordinator). Tr. at 22-23. Dispatch is in the office next door to Mr. Haste, but there is no door between the office and dispatch. To access dispatch, he had to go around to the dock. Tr. at 23-24. Mr. Haste testified that during a typical work day, he occasionally talked to the dispatchers. Dispatchers talked to him about discipline issues, missing paperwork, training needs, etc. If a driver refused work the dispatchers might tell him verbally, or file an incident report or write-up. Tr. at 24. Mr. Parker also testified that he would talk to Mr. Haste if he was having difficulty with an employee. Tr. at 370. Discipline is governed by the employee handbook. Typically a decision whether and how to discipline would be made in conference with the Director of Transportation, Jimmy Callen, or, if it concerned a compliance issue, the Safety and Compliance Coordinator. Sometimes Mr. Hays would also be involved. Tr. at 24-25. But in Mr. Butler's case, Mr. Haste was the sole decision-maker. Tr. at 25. Mr. Hays testified that he did not participate in the decision to fire Mr. Butler, and that it does not normally result in a discharge if a driver is late for work. It takes several instances of tardiness before a driver would be assessed any discipline at all. Tr. at 49.

On cross examination, Mr. Haste agreed that Neier needed drivers in September 2013. The company had more trucks than drivers. If a driver refused a run, they did not necessarily have another driver to assign the run. Thus a driver refusing a run could put Neier in a bind. Tr. at 417–418. Mr. Hays confirmed Mr. Haste’s testimony on this point. Tr. at 48. Mr. Haste also agreed that Mr. Butler spoke with one of the dispatchers after he spoke to Mr. Haste on Tuesday, September 10; Mr. Haste did not know what the dispatcher told Mr. Butler, or if the dispatcher gave Mr. Butler a different time to report to work. Mr. Haste was not Mr. Butler’s immediate supervisor, and Mr. Butler did not normally report to him to start work. Tr. at 421. But he would have expected Mr. Butler to contact him if he was not going to arrive at 8:00 a.m., which Mr. Butler did not do. Tr. at 423.

In addition to his OSHA complaint, Mr. Butler also made a complaint to the Federal Motor Carrier Safety Administration of the DOT. Tr. at 195–199. There is little information about that complaint other than Mr. Haste’s testimony cited above, and a letter to Mr. Butler from the Department which stated:

This is in further reference to the complaint you filed against of [sic] Neier, Inc.

An investigation into this matter has been conducted which revealed some substance to your complaint. You alleged that drivers were logging required safety meeting as “off duty”. A review of your logs showed that you logged a safety meeting as “on duty”. You were not in violation. A sampled driver’s log showed he logged a safety meeting as “off duty”. Carrier officials were questioned and they indicated that mandatory safety meetings should be logged as “on duty”. A pattern of this type of violation was not established.

You also alleged that that [sic] the carrier would not allow you to take a mandatory “34 hour reset”. Mandatory “34 hour reset’s” [sic] are not required. We could not discover hours of service violations when we reviewed your logs. We did discover other falsifications, not related to your allegation. An enforcement action is currently being prepared for those violations.

RX O.

According to his W-2, found in CX 4, Mr. Butler earned \$7510.78 from Neier for two months of work (July 9–September 7, *see* his logs, CX 2). He testified that he was unemployed from September 2013 until March 2014. Before he was fired, he paid his bills on time. After he was fired, he was upset, worried and confused. He still felt that way at the time of the hearing. He did not understand why he was punished for trying to follow the rules. He had problems sleeping, and worried about paying his bills and losing his house. He received unemployment compensation, but got behind on paying his bills such as electricity, car and house payments, house, car, and health insurance, and credit card bills. His family had to seek assistance in the form of food stamps and Medicaid. He was too stressed to maintain his normal relationship with his wife. Christmas 2013 was not good for him and his family. Tr. 124–126. He sought medical help for depression after he was fired, and had received a prescription for an antidepressant. Tr. at 307–310.



Mrs. Butler confirmed Mr. Butler's testimony about the damage to their finances and Mr. Butler's depression and inability to carry on his normal activities after he was fired. He withdrew from activities with the family and lacked focus, and they argued a lot. She thought his termination had adverse effects on his physical as well as his mental health. He is diabetic, and had trouble controlling his blood sugars, which caused multiple physical problems. Before he was fired, he was happy, but afterwards, he would "flip at the flip of a switch." Their credit rating dropped because they could not pay their bills on time, they lost their camper and the barn, and they depleted the children's college fund. They could not carry out their plans to buy a house or have another child. Tr. at 320, 324–332.

Mr. Butler was on unemployment compensation from September 2013 until March 2014. After he was fired, he applied for two or three jobs a week. He could not remember names of the companies where he applied, but he was required to apply for work as a condition of obtaining unemployment compensation. Tr. at 126, 233–235. His wife obtained a list of places he had applied from the state unemployment office. Tr. 135–137, 324–326, 336, CX 7.

Mr. Butler took a job with Boyd Grain in March 2014. He injured his rotator cuff and was on workers' compensation beginning in November 2014. Tr. at 127–128. His last paycheck from Boyd Grain for November 5–11, 2014, is found in CX 5. His year-to-date gross income from Boyd Grain was \$21,403.81.

Mr. Butler is seeking reinstatement to his job with Neier, on the same route, pay, and other privileges of employment. He also seeks back pay, compensatory damages for mental pain and emotional distress, punitive damages sufficient to deter Neier from firing someone else for the same reason, and an award of attorney's fees. Tr. at 137.

## B. Discussion

Mr. Butler alleged that he engaged in several protected activities. The crux of his claim, however, is that he refused a dispatch which he believed would violate the hours of service if he logged the safety meeting as "on duty (not driving)". The STAA prohibits discharge of an employee who refuses to violate DOT safety regulations, or who accurately reports hours on duty.<sup>12</sup>

During his testimony at the hearing, counsel for both parties walked Mr. Butler through several scenarios of how he could or could not have made a run to arrive at Valero by 6:00 a.m. or 8:00 a.m. on Sunday September 8. Tr. at 100–104, 214–216, 220–222, 224, 275–279, 291–294. But there are many variables which could affect such a calculation. Based on the testimony at the hearing and the company Handbook, time factors to be taken into account in that calculation include driving time; time for fueling; time for hooking up a trailer; pre- and post-trip inspections; a required 30 minute break after eight hours on duty (4:00 p.m. since he went on duty at 8:00 a.m.); up to 1.5 hours off duty for meals, coffee, or similar routine stops allowed by Neier during 14 hours on duty; whether Butler had to remain with the truck during loading at Valero or otherwise be available to drive the truck off Valero property; and 10 hours off duty. Other factors could have lengthened the time needed even further. *See* Tr. at 278 (Butler), 356–

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<sup>12</sup> 49 U.S.C. § 31105(a)(B)(i) and (C).

357, 380–382 (Parker), 436–437 (Hays). Because there are so many variables, the parties’ attempt to establish that one scenario is more likely than another is speculative. Mr. Butler was on the road when he received the dispatch. He did not have paperwork in front of him and would not have been able to perform precise calculations. Tr. at 304. The best measure Mr. Butler had to determine whether he could make the run within his allowable hours of service was his single run from Indianapolis to Valero on Friday, August 30. On that day, his run originated in Greencastle, Indiana, and he then had to drive to Indianapolis. He performed an inspection at Indianapolis at 2:15 a.m., left Indianapolis at 2:30 a.m., drove to Valero, and was on duty at Valero until 1:00 p.m., for a total of 10.75 hours from the time he began his pre-trip inspection at Indianapolis to the time he left Valero. But by attending the safety meeting, he would already have 4 hours on duty. Adding a 10-hour break brings the total time required to attend the meeting, take the required break, and complete the dispatch, to 24.75 hours. Counting from the start of the meeting at 8:00 a.m. on Saturday, based on Butler’s experience, he could not complete the dispatch within his legal hours of service. This is true whether the assigned time to arrive at Valero was 6:00 a.m., as Butler contends, or 8:00 a.m., as Neier contends, as 24.75 hours from 8:00 a.m. on Saturday would be 8:45 a.m. on Sunday. Because this calculation is based on Mr. Butler’s prior dispatch from Indianapolis to Valero, it does not account for any time needed for Mr. Butler to resolve whether there was a problem with the brakes on the truck he drove the day before, or to change trucks, so his reported concern about the brakes is not a factor in this calculation. Nor does it account for the fact that Mr. Butler’s driving time between Indianapolis and Valero on August 30 was only 7 hours, when both Mr. Butler and Mr. Parker testified that that the normal driving time was about 7 hours 45 minutes. Tr. at 101 (Butler), 378 (Parker). DOT regulations do not allow dispatching that requires speeding to meet a schedule. Thus, even were I to accept Neier’s theory that there was no problem with the brakes, and Mr. Butler did not properly request service on the truck, Mr. Butler was correct that he could not attend the safety meeting and complete the dispatch to Valero within his legal hours of service.

None of Neier’s witnesses denied that Mr. Butler refused the dispatch. Mr. Parker testified that he did not remember Mr. Butler refusing that particular dispatch, but he was not saying that Mr. Butler did not refuse it. Moreover, he did recall that Mr. Butler refused at least one dispatch. Neier also suggested that Mr. Butler could have been excused from the safety meeting in order to take the dispatch. But there is no evidence that anyone told Mr. Butler that the meeting was anything other than mandatory. I find that Mr. Butler has established that he engaged in protected activity when he refused the dispatch to Valero.

Neier took adverse action against Mr. Butler when Mr. Haste terminated his employment.

Mr. Butler has also established that his protected activities were a contributing factor to his termination. In the case of *Beatty v. Inman Trucking Management, Inc.*, cited above in the section describing the standards applicable to this case, the Administrative Review Board explained at length the meaning of the “contributing factor” element in cases, like this one, governed by the legal burdens set forth in AIR 21:

...[T]he “contributing factor” standard was “intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a ‘significant’, ‘motivating’, ‘substantial’, or ‘predominant’ factor in a personnel action in order to overturn that action.” The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the

respondent's reason for the unfavorable personnel action was pretext, or that the complainant's activity was the sole or even predominant cause. The complainant "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge of discrimination." A "contributing factor" ... is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the [adverse employment] decision." Thus, for example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity." Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence.<sup>13</sup>

Mr. Haste testified that he alone made the decision to fire Mr. Butler, and that his sole reason was because Mr. Butler was late for their meeting set for 8:00 a.m. on Wednesday, September 10. On its face, this is unlikely since tardiness is not a serious offense under Neier's policies as set forth in the Handbook. Moreover, Mr. Haste testified that he made this decision in the context of having been told that Mr. Butler had cleaned out his truck and may have quit. The question I must decide is whether, even if I accept Mr. Haste's reason as a true one, whether Mr. Butler's protected activity of refusing the dispatch was also a contributing factor to Mr. Haste's decision.

There is no direct evidence that Mr. Butler's refusal of the dispatch to Valero was a contributing factor to his discharge. But there is considerable circumstantial evidence that it was. Mr. Haste normally consulted others when deciding to discharge an employee, but he did not do so in this case. It was not normal for an employee to be fired for being late on one occasion; the penalty for tardiness was only 1 point under the progressive discipline system. Mr. Haste testified that dispatchers inform him when a driver refuses a dispatch. He did not recall the details of what the dispatchers told him about Mr. Butler before he called Mr. Butler on September 9, other than they had been unable to reach Mr. Butler by phone. But I find it unlikely that Mr. Parker did not tell Mr. Haste that Mr. Butler had refused a dispatch. Mr. Butler's testimony that he was not given any dispatches for a week after he refused a dispatch in August was not contradicted by any of Neier's witnesses. That he was punished for having refused a dispatch once before lends support to Mr. Butler's testimony that he was told there would be no dispatches for him until Wednesday if he did not take the trip on Saturday–Sunday, September 7–8. Under these circumstances, he had no reason to expect a call from Neier for another dispatch. Mr. Parker's testimony that he had trouble reaching Mr. Butler "a lot of times" is not borne out by the phone records, which document only that Mr. Parker could not reach Mr. Butler on the evening of Friday, September 6, and the morning of Monday, September 9. In addition, I credit Mr. Butler's testimony that he called OSHA on Tuesday September 10, before he returned Mr. Haste's call, because he thought he was being punished a second time for refusing a dispatch. Mr. Haste's query whether Mr. Butler wanted to keep working for Neier makes more sense in the context of Mr. Butler having refused a dispatch than it does if Mr. Haste thought only that Mr. Butler had taken his personal items from the truck. Moreover, temporal proximity between an employee's protected activity and an employer's adverse personnel action may be circumstantial evidence that the protected activity was a contributing factor. In this case, Mr. Butler was terminated less than a week after he refused a dispatch for the second time. Nor do I accept Neier's suggestion that Mr. Butler could have performed hourly work at the terminal;

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<sup>13</sup> *Beatty, supra*, PDF at 8–9 (citations omitted).

the Minimum Driver's Earning Program on its face is intended to maintain new drivers' income when no dispatches are available, and there is no evidence that Mr. Butler was offered hourly work either time he declined a dispatch.

Neier has pointed to several inconsistencies in Mr. Butler's testimony to attack his credibility. Neier's Post-Hearing Brief at 22–24, 25, 27. But I do not find the examples cited by Neier to be material to the central issue in the case, or to seriously undermine his credibility as to whether he declined the dispatch, or raised the issue of how to log the time spent at the safety meeting. Neither Mr. Haste nor Ms. Thomas recalled the discussion whether the time should be logged as on duty, but they did not establish that such a discussion did not take place. Mr. Mattingly corroborated Mr. Butler's testimony that the subject was discussed, and the substance of Ms. Thomas' response. In addition, the DOT investigation corroborated that at least one driver who attended the meeting logged it as off duty time.

The evidence regarding whether there was a problem with the brakes on Mr. Butler's truck on Friday, September 6 is inconclusive. But Mr. Butler and his wife testified that the truck was in the shop on Wednesday, September 11 when they arrived at Neier. No one contradicted that testimony. The reason the truck was in the shop is unexplained in the record; according to Neier's witnesses, there is no record of service to that truck on either Saturday, September 7 or Wednesday, September 11. Reporting a safety hazard, or refusing to drive equipment because it is unsafe, would also constitute protected activity. But in this case, any concern Mr. Butler had regarding the brakes is not material to the central issue of refusing a dispatch.

Neier also raises Mr. Butler's failure to list Midnight Flyer as a former employer on his application for employment with Neier, or to identify his STAA complaint against Midnight Flyer in his answers to Neier's interrogatories as evidence that his testimony was not truthful.

Mr. Butler said his failure to list Midnight Flyer on his employment application was because he misunderstood the form or got interrupted. Tr. at 239–240. The instructions on the application first state that driver applicants should list "all employers during the preceding 3 years." The next paragraph states that driver applicants "to drive a commercial motor vehicle in intrastate or interstate commerce shall also provide an additional 7 years' information..." RX N at 2. Mr. Butler did not identify *any* employers before he began his self-employment in January 2009; thus Midnight Flyer was not the only omitted employer. But Mr. Haste hired Mr. Butler without inquiring into his employment history other than to check on why Mr. Butler had been fired in 2001, the first time he worked for Neier. That Mr. Butler had been fired by Neier in 2001 was a red flag that the application was incomplete because Mr. Butler listed no employers between 2001 and 2009. But after consulting with Neier's owner on the reason for the prior discharge, Mr. Haste hired Mr. Butler anyway. Omitting other employers by mistake is plausible given the way the instructions appear on the form. I conclude that the omission of Midnight Flyer from his employment application does not significantly undermine his credibility.

Mr. Butler's failure to identify his whistleblower claim against Midnight Flyer is more serious, however, as he clearly violated his duty of candor when he answered the interrogatories under oath. I have carefully considered the significance of this omission, and whether it so undermines his credibility that I should mistrust his testimony on other matters. Because his testimony on the facts material to this claim is corroborated by other witnesses and exhibits,

however, I conclude that this omission should not be fatal to his claim. Moreover, I do not accept Neier's argument that because the judge in his claim against Midnight Flyer did not believe Mr. Butler's testimony, that I am compelled to reach the same conclusion in this case.

Certain factors in the sequence of events in this case are compelling to support Mr. Butler's allegation that he was fired because he refused the dispatch, including his uncontradicted testimony that he was not given any work for a week in August because he declined a dispatch, confirmed by his log; his call to OSHA on September 10, the day before he was fired, because of his fears of retaliation for a second time, confirmed by his telephone records; and his threat to file suit over an illegal discharge during the meeting with Mr. Haste on September 11, confirmed by Mr. Haste's and Mr. Hays' testimony. Nor should his filing a complaint with the DOT be considered "retaliation" as Neier suggests. Neier's Post-Hearing Brief at 18. Mr. Butler's right to file a complaint with the DOT is also protected by the STAA,<sup>14</sup> and the DOT investigation found a log violation relating to the safety meeting, as well as other log falsifications not specifically related to Mr. Butler's complaint.

If Mr. Butler had accepted the dispatch for Valero for September 7–8, 2013, none of the ensuing events would have happened. Mr. Parker would not have reported to Mr. Haste that he thought Mr. Butler may have quit, and Mr. Haste would not have called Mr. Butler in for an 8:00 a.m. meeting. By his own testimony, Mr. Haste did not decide to fire Mr. Butler until he failed to appear on time for the meeting. I find that Mr. Butler's refusal of the dispatch is inextricably bound up in the ensuing events. Mr. Butler was not accused of any misconduct which could have resulted in his discharge for reasons unrelated to his protected activity. Nor did Neier give any reason other than his failure to show up at the meeting on time to evaluate Mr. Butler as an unsuitable employee under the 90-day probation policy. Thus Neier has not and cannot establish by clear and convincing evidence that Mr. Butler would have been fired even absent his protected activity.

I conclude that Neier violated the STAA when it fired Mr. Butler from his employment, and has failed to establish by clear and convincing evidence that he would have been fired even absent his protected activity.

### C. Individual Liability of Respondents Haste and Hays

Before determining the remedies available in this case, I must determine whether the individually named respondents can be held liable. Mr. Butler named several individuals as Respondents in the claim. In his Proposed Findings of Fact and Legal Argument, however, Mr. Butler argues only that Mr. Haste and Mr. Hays are personally liable to him, Mr. Haste because he made the decision to fire Mr. Butler, and Mr. Hays because he participated in the discharge. *See* pp. 43–44. Neier argues that Mr. Hays was improperly named as a respondent because he is "neither the owner nor a person involved in the decision to discharge Mr. Butler." Neier's Post-Hearing Brief at 31. Neier did not address Mr. Haste's liability as an individual.

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<sup>14</sup> *See* 49 U.S.C. § 31105(a)(1)(A), (D), and (E).

The statute and the regulations expressly permit individual liability for violating the STAA.<sup>15</sup> The Administrative Review Board addressed individual liability in the case of *Anderson v. Timex Logistics*.<sup>16</sup> The standard for determining whether an individual is liable is whether the individual exercises control over the employee, including ability to hire, transfer, promote, reprimand, or discharge an employee. In *Anderson*, the Board held that an administrative law judge properly found the owner of the company liable, but not the operations manager or the dispatcher, who did not have such authority. In this case, Neier's witnesses who gave testimony relevant to this issue all agreed that Mr. Haste made the decision to hire and to fire Mr. Butler, and that he had the authority to do so. Thus it is possible that Mr. Haste could be held individually liable. But in every case cited by Mr. Butler in which the Board held an individual liable for a violation, that person was also an owner or officer of the entity which employed the complainant. See *Wilson v. Bolin Associates, Inc.* (individual held liable was the sole shareholder and CEO of a defunct corporate respondent)<sup>17</sup>; *Gagnier v. Steinmann Transportation, Inc.*, (individuals held liable were the President and the Vice President of the respondent corporation)<sup>18</sup>; *Smith v. Lake City Enterprises, Inc.* (individual held liable was the President and sole shareholder; her husband was not liable as he was not a shareholder or employee and played no role in hiring or firing the complainant).<sup>19</sup> As the Administrative Review Board (ARB) stated in the *Smith* case:

The STAA provides that "a person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because the employee ... has filed a complaint ...." 49 U.S.C.A. § 31105(a)(1)(A)(i). The STAA defines an employer as a "person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce" 49 U.S.C.A. § 31101(3)(A). Thus, the STAA's express language covers a person that is an employer. See *Wilson V. Bolin Assocs, Inc.* ... There is no question that Morgan was Smith's employer and that she was engaged in the commercial motor vehicle business as the president of LCE...<sup>20</sup>

I construe the line of cases cited by Mr. Butler to stand for the proposition that individual liability accrues only when the individual both exercises control over the employee, and is an employer under the definition in the Act. In this case, Mr. Haste had authority to and was acting on behalf of Neier, Inc., but Mr. Haste was not Mr. Butler's employer in his individual capacity.

Mr. Hays cannot be held liable under either prong of the standard. Although he is Mr. Haste's superior in the organization at Neier, there is no evidence that he exercised control over personnel decisions regarding Mr. Butler. Mr. Haste testified to the effect that he notified Mr. Hays when he reached the decision to fire Mr. Butler, but not that he sought Mr. Hays' permission to do so. Moreover, Mr. Haste began the meeting with Mr. Butler with only the two of them in his office. He only called Mr. Hays in as back-up when Mr. Butler threatened to sue the company. And like Mr. Haste, Mr. Hays does not meet the definition of an employer. Thus I find that Mr. Hays cannot be held individually liable in this case.

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<sup>15</sup> 49 U.S.C. § 31105(a)(1); 29 C.F.R. § 1978.101(k).

<sup>16</sup> Case No. 13-016 (ARB Apr. 30, 2014), PDF at 8–9.

<sup>17</sup> Case No. 1991-STA-4 (Sec'y Dec. 30, 1991).

<sup>18</sup> Case No. 1991-STA-46 (Sec'y July 29, 1992).

<sup>19</sup> Case Nos. 2008-091 and 2009-033 (ARB Sept. 24, 2010) (STA).

<sup>20</sup> *Id.* PDF at 8.

As noted above, Mr. Butler did not argue that any other named individual (the dispatcher, Mr. Parker, nor the unidentified John Doe and Mary Roe) should be held liable. In any event, like Mr. Hays, Mr. Parker does not meet either prong of the standard for individual liability.

#### D. Remedies

Where a respondent is found to have violated the STAA, the statute and regulations provide several remedies for the affected employee. A respondent must generally “take affirmative action to abate the violation.”<sup>21</sup> Specific 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.<sup>22</sup> The statute also authorizes an award of reasonable attorney’s fees and other costs incurred by the complainant in bringing the complaint.<sup>23</sup>

##### 1. Reinstatement

Reinstatement to a complainant’s former position with the same pay, terms, and privileges of employment is an automatic remedy under the STAA.<sup>24</sup> Reinstatement must be ordered “unless it is impossible or impractical.”<sup>25</sup> Even where a complainant has found new employment and does not request reinstatement, an Administrative Law Judge must still award it as a remedy.<sup>26</sup> In the present case, Butler seeks reinstatement. At the time of the hearing in May 2015, he was not working, but instead was on workers’ compensation for a shoulder injury sustained at Boyd Grain. I find that is not a bar to his reinstatement at the present time.

Accordingly, I conclude that Mr. Butler is entitled to reinstatement as a driver with Neier, with the “same pay and terms and privileges of employment” as he would have had absent a violation of the Act.<sup>27</sup>

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<sup>21</sup> 49 U.S.C. § 31105(b)(3)(A)(i); *see also*, 29 C.F.R. § 1978.109(d)(1) (stating that an Administrative Law Judge should “order the respondent to take appropriate affirmative action to abate the violation”).

<sup>22</sup> 49 U.S.C. §§ 31105(b)(3)(A), (b)(3)(C); 29 C.F.R. § 1978.109(d)(1).

<sup>23</sup> 49 U.S.C. § 31105(b)(3)(B).

<sup>24</sup> *See* 49 U.S.C. § 31105(b)(3)(A) (ii) (stating that a respondent is required to “reinstate the complainant to the former position with the same pay and terms and privileges of employment”). *See also*, *Assistant Sec’y of Labor & Mailloux v. R&B Transp., LLC*, Case No. 07-084, PDF at 10 (ARB June 26, 2009) (STA) (citing, *inter alia*, *Dickey v. W. Side Transp., Inc.*, Case Nos. 06-150, 06-151, PDF at 8 (ARB May 29, 2008) (STA)).

<sup>25</sup> *Mailloux*, PDF at 10 (citing *Ass’t Sec’y of Labor & Bryant v. Mendenhall Acquisition Corp.*, Case No. 04-014, PDF at 7–8 (ARB June 30, 2005) (STA)).

<sup>26</sup> *Id.*, PDF at 11.

<sup>27</sup> 49 U.S.C. § 31105(b)(3)(A)(ii).

## 2. Back Pay

A successful complainant under the STAA is also entitled to an award of back pay.<sup>28</sup> The purpose of a back pay award is to make the employee whole by restoring him “to the same position he would have been in if not discriminated against.”<sup>29</sup> 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.<sup>30</sup> The back pay period does not end when a complainant obtains comparable work with a subsequent employer.<sup>31</sup> 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.’”<sup>32</sup> Any uncertainties in determining the amount of a back pay award are to be resolved against the discriminating employer.<sup>33</sup>

An STAA complainant has a duty to exercise reasonable diligence to attempt to mitigate back pay damages.<sup>34</sup> Mr. Butler and his wife both testified that Mr. Butler consistently sought other employment after he was fired by Neier. Mr. Butler was required to seek work as a condition of receiving unemployment compensation. The employer bears the burden to prove that the complainant failed to mitigate.<sup>35</sup> 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.”<sup>36</sup> Neier did not offer any evidence to show that substantially equivalent jobs were available to Mr. Butler. I find that Neier has not met its burden to establish that Mr. Butler failed to use reasonable diligence in attempting to find another job.

In this case, Mr. Butler seeks back pay in the amount of \$904.91 per week based on his earnings from Neier of \$7,510.78 from July 16, 2013, when he took his first load, to September 11, 2013, when he was fired, for a total of 8.3 weeks. The record is unclear whether Mr. Butler was paid during the week of training before he took his first load (July 9–16, recorded on his log as off duty). But he was not offered hourly work during the week of August 17, when he was off work after the first time he refused a dispatch, and thus he would not have been paid for that week. Because the week of training, when he might have been paid, and the week of August 17, when he would not have been paid, would offset each other, I find that Mr. Butler’s calculation of his weekly earnings at \$904.91 per week is a reasonable measurement of his lost pay. Mr. Butler’s earnings of \$21,403.81 from Boyd Grain, at \$589.64 per week from March 7 to November 11, 2014, shall be deducted from the back pay award. I am unable to determine

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<sup>28</sup> 49 U.S.C. § 31105(b)(3)(A)(iii); *see also* *Mailloux, supra*, PDF at 10.

<sup>29</sup> *Ferguson v. New Prime, Inc.*, Case No. 10-075, PDF at 6 (ARB Aug. 31, 2011) (STA).

<sup>30</sup> *Mailloux, supra*, PDF at 10; *Bryant, supra*, PDF at 6.

<sup>31</sup> *See Hobson v. Combined Transp., Inc.*, Case Nos. 06-016, 06-053, PDF at 5 (ARB Jan. 31, 2008) (STA).

<sup>32</sup> *Bryant, supra*, PDF at 6 (quoting *Cook v. Guardian Lubricants, Inc.*, Case No. 97-005, PDF at 14 n.12 (ARB May 30, 1997) (STA)).

<sup>33</sup> *Jackson v. Butler & Co.*, Case Nos. 03-116, 03-144, PDF at 8 (ARB Aug. 31, 2004) (STA) (citing *Clay v. Castle Coal & Oil Co., Inc.*, Case No. 90-STA-37, PDF at 2 (Sec’y June 3, 1994)).

<sup>34</sup> *Mailloux, supra*, PDF at 10.

<sup>35</sup> *Id.*; *Anderson, supra*, PDF at 7.

<sup>36</sup> *Id.*



whether and when Mr. Butler returned to employment at Boyd Grain, or any other employer since the hearing. If Mr. Butler returned to work after May 28, 2015, he must notify Neier within 30 days of this order of any such earnings, which may be deducted from this back pay award by re-calculating the amount owed using the same formula as appears on the table calculating pre-judgment interest due on the back pay award which appears below. Because Neier drivers operated seven days per week, I have divided the weekly rate by seven to obtain a daily rate in order to calculate the total amount of back pay and interest due Mr. Butler.

### 3. Interest

The STAA expressly provides that a successful complainant is entitled to interest on an award of back pay.<sup>37</sup> This includes pre-judgment interest on any accrued back pay, as well as post-judgment interest “for the period between the issuance of this [Decision and Order] and the payment of the award.”<sup>38</sup> Interest is calculated using the rate that is charged for underpayment of federal taxes, pursuant to 26 U.S.C. § 6621(a)(2).<sup>39</sup> The applicable interest rates are posted on the web-site of the Internal Revenue Service (“IRS”).<sup>40</sup> In addition, the interest accrues, compounded quarterly, until Neier satisfies the back pay award.<sup>41</sup>

#### a) Pre-Judgment Interest

The Administrative Review Board has outlined the procedures to be followed in calculating compounded pre-judgment interest. In *Doyle v. Hydro Nuclear Services*, the ARB initially found that an Administrative Law Judge should use the “‘applicable federal rate’ (AFR) for a quarterly period of compounding.”<sup>42</sup> The ARB then held that “[t]o determine the interest for the first quarter of back pay owed, the [judge] shall multiply the back pay principal owed for that quarter by the sum of the quarterly average AFR plus three percentage points.”<sup>43</sup> In order to determine the quarterly average interest rate, a judge must “calculate the arithmetic average of the AFR for each of the three months of the calendar quarter, rounded to the nearest whole percentage.”<sup>44</sup> Regarding the interest applied to the second quarter of back pay, the ARB stated as follows:

To determine the interest for the second quarter of back pay owed, the [judge] shall add the first quarter principal, the first quarter interest, and the second quarter principal. The resulting sum is multiplied by the second quarter’s interest rate as calculated according to the [formula for the first quarter]. This multiplication yields the second quarter interest.<sup>45</sup>

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<sup>37</sup> 49 U.S.C. § 31105(b)(3)(A)(iii); 29 C.F.R. § 1978.109(d)(1).

<sup>38</sup> *Bryant, supra*, PDF at 10 (citing *Murray v. Air Ride, Inc.*, Case No. 00-045, PDF at 9 (ARB Dec. 29, 2000) (STA)).

<sup>39</sup> *Id.* (citing *Drew v. Alpine, Inc.*, Case Nos. 02-044, 02-079, PDF at 4 (ARB June 30, 2003) (STA)). See 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.)

<sup>40</sup> <http://www.irs.gov/app/picklist/list/federalRates.html>.

<sup>41</sup> *Id.* (citing *Assistant Sec’y of Labor & Cotes v. Double R. Trucking, Inc.*, Case No. 99-061, PDF at 3 (ARB Jan. 12, 2000) (STA)).

<sup>42</sup> Case Nos. 99-041, 99-042, 00-012, PDF at 19 (ARB May 17, 2000) (ERA).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

The ARB concluded that this process “shall continue for computing the interest owed on the back pay through the date of the issuance of [the] decision.”<sup>46</sup> While *Doyle* was a case arising under the Energy Reorganization Act, the ARB later found that these computation procedures apply to claims under the STAA.<sup>47</sup> I have therefore applied these procedures in calculating the back pay, less earnings at Boyd Grain, plus pre-judgment interest, which Neier must pay to Mr. Butler, as appears in the following table:

Fiscal quarter	Dates within quarter	Total Days	Daily Pay Rate	Potential Wages	Days worked for Boyd Grain	Actual wages (from Boyd Grain)	Back pay principal owed for quarter	Average rounded applicable federal rate (AFR)	Pre-judgment interest owed per quarter
4Q	9/11/2013 - 9/30/2013	19	\$129.27	\$2,456.18		-	\$2,456.18	3%	\$73.69
1Q	10/1/2013 - 12/31/2013	92	\$129.27	\$11,893.10		-	\$11,893.10	3%	\$432.69
2Q	1/1/2014 - 3/31/2014	90	\$129.27	\$11,634.56	25	\$2,140.50	\$9,494.06	3%	\$654.60
3Q	4/1/2014 - 6/30/2014	91	\$129.27	\$11,763.83	91	\$7,791.42	\$3,972.41	3%	\$423.63
4Q	7/1/2014 - 9/30/2014	92	\$129.27	\$11,893.10	92	\$7,877.04	\$4,016.06	3%	\$252.36
1Q	10/1/2014 - 12/31/2014	92	\$129.27	\$11,893.10	42	\$3,596.04	\$8,297.06	3%	\$376.96
2Q	1/1/2015 - 3/31/2015	90	\$129.27	\$11,634.56		-	\$11,634.56	3%	\$609.26
3Q	4/1/2015 - 6/30/2015	91	\$129.27	\$11,763.83		-	\$11,763.83	3%	\$720.23
4Q	7/1/2015 - 9/30/2015	92	\$129.27	\$11,893.10		-	\$11,893.10	4%	\$975.09
1Q	10/1/2015 - 12/31/2015	91	\$129.27	\$11,763.83		-	\$11,763.83	4%	\$985.28
2Q	1/1/2016 - 3/31/2016	91	\$129.27	\$11,763.83		-	\$11,763.83	4%	\$980.52
3Q	4/1/2016 - 6/30/2016	91	\$129.27	\$11,763.83		-	\$11,763.83	4%	\$980.33
4Q	7/1/2016 - 7/29/2016	29	\$129.27	\$3,748.91		-	\$3,748.91	4%	\$659.72
<b>Total</b>		1051	\$1,680.55	\$135,865.77	250	\$21,405.00	\$114,460.77		\$8,124.35
Total (Principal + pre-judgment interest)								\$122,585.12	

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

<sup>47</sup> See *Assistant Sec’y of Labor & Bryant v. Mendenhall Acquisition Corp.*, Case No. 04-014, PDF at 10 (ARB June 30, 2005) (STA).

## b) Post-Judgment Interest

As stated above, a successful complainant under the STAA is also entitled to post-judgment interest on back pay “for the period between the issuance of [a decision] and the payment of the award.”<sup>48</sup> The post-judgment interest is calculated using the same formula as for pre-judgment interest, pursuant to 26 U.S.C. § 6621(a)(2).<sup>49</sup> This interest is also compounded on a quarterly basis until a respondent satisfies the back pay award. In this case, I have found that Mr. Butler is entitled to a continuing back pay award from the date of this Decision and Order until he is either reinstated by Neier, or is offered an unconditional, bona fide offer of reinstatement. Accordingly, I find that he is entitled to payment of post-judgment interest at the applicable IRS rate, compounded, calculated under the same formula as the pre-judgment interest, until Neier satisfies the back pay award.

## 4. Compensatory Damages

Mr. Butler also seeks \$50,000.00 in compensatory damages for emotional stress and mental pain. Under the STAA, a successful complainant is entitled to compensatory damages in addition to back pay.<sup>50</sup> Compensatory damages “are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress.”<sup>51</sup> To recover damages for mental suffering or emotional anguish, however, “a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm.”<sup>52</sup> The Administrative Review Board recently upheld a similar award based on “credible and unrefuted” lay witness testimony.<sup>53</sup>

Mr. Butler based the amount of the award he seeks in part on a comparison with my award of compensatory damages in the case of *Uhley v. Braun Milk Hauling, Inc.*<sup>54</sup> I awarded \$25,000 in that case. Mr. Butler contends that the award in this case should be increased because of more extensive adverse effects on Mr. Butler, and the passage of time. I agree that in this case, Mr. Butler suffered more severe adverse effects from his discharge than did the complainant in the *Uhley* case. Mr. Butler and his wife both testified that he was upset, worried, and confused. He had problems sleeping after his discharge, got behind on paying his bills, and had to seek public assistance. His mental state interfered with his relationship with his wife and children. He sought medical treatment for depression, and was prescribed an antidepressant.

I find that Mr. Butler is entitled to \$50,000.00 in compensatory damages for the depression, mental pain, and emotional distress caused by his termination.

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<sup>48</sup> *Bryant, supra*, PDF at 10 (citing *Murray v. Air Ride, Inc.*, Case No. 00-045, PDF at 9 (ARB Dec. 29, 2000) (STA)).

<sup>49</sup> *Id.* (citing *Drew v. Alpine, Inc.*, Case Nos. 02-044, 02-079, PDF at 4 (ARB June 30, 2003) (STA)).

<sup>50</sup> 49 U.S.C. § 31105(b)(3)(A)(iii); *see also Ferguson v. New Prime, Inc.*, Case No. 10-075, PDF at 7 (ARB Aug. 31, 2011) (STA).

<sup>51</sup> *Ferguson, supra*, PDF at 7 (citing *Smith v. Lake City Enters., Inc.*, Case Nos. 08-091, 09-033 (ARB Sept. 24, 2010) (STA)).

<sup>52</sup> *Id.*

<sup>53</sup> *Anderson, supra*, PDF at 7–8.

<sup>54</sup> Case No. 2011-STA-33 (ALJ June 25, 2012).

## 5. Punitive Damages

As an additional remedy for Neier’s violation of the STAA, Mr. Butler seeks punitive damages in the amount of \$30,000.00. He contends that punitive damages are warranted because Neier’s actions were reckless and exhibited callous disregard for Mr. Butler’s rights under the STAA. He also contends that the discharge was executed by high management officials. Accordingly, Mr. Butler argues that punitive damages in this case are necessary to prevent Neier from retaliating against drivers who exercise their rights under the STAA.

The STAA expressly provides that relief “may include punitive damages in an amount not to exceed \$250,000.”<sup>55</sup> The Supreme Court of the United States has held that punitive damages may be awarded where there has been a “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law.”<sup>56</sup> The purpose of punitive damages is to “punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.”<sup>57</sup> The focus is on the nature of the defendant’s conduct, “whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards.”<sup>58</sup> As applied to claims under the STAA, the Administrative Review Board has held that an Administrative Law Judge must determine “whether [a respondent’s] behavior reflected a corporate policy of STAA violations or whether punitive damages are necessary ... to deter further violations.”<sup>59</sup>

I find that Neier acted in reckless disregard of the hours of service limitations when it twice punished Mr. Butler for refusing a dispatch which he justifiably believed could not be completed within his legal hours of service. Neier kept him off work a week the first time he refused a dispatch, and fired him the second time he did so. In seeking to determine the appropriate amount to assess, I have reviewed recent decisions awarding punitive damages ranging from \$2,000 to \$50,000 in STAA cases. The record does not show that Neier is a large company or a repeat offender, or required a driver to drive in inherently hazardous conditions, as was found in cases with the higher range of punitive awards.<sup>60</sup> Nor is the respondent a very small company in financial difficulties, or one which administered only minor discipline (a one-day suspension) in violation of the Act, as was the case in the smallest awards.<sup>61</sup> I find that the facts of this case are more similar to those in cases with awards in the range from \$10,000 to \$12,500,<sup>62</sup> but not as egregious as those in which a judge awarded \$20,000 (in which the

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<sup>55</sup> 49 U.S.C. § 31105(b)(3)(C); *see also* 29 C.F.R. § 1978.109(d)(1).

<sup>56</sup> *Smith v. Wade*, 461 U.S. 30, 51 (1983).

<sup>57</sup> *Id.* at 54 (quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1979)).

<sup>58</sup> *Id.*

<sup>59</sup> *Ferguson, supra*, PDF at 8.

<sup>60</sup> *See Hopper v. Marten Transport Ltd.*, Case No. 2014-STA-69 (ALJ Feb. 22, 2016) (\$50,000); *Sinkfield v. Marten Transportation, Ltd.*, Case No. 2015-STA-35 (ALJ Feb. 4, 2016) (\$50,000).

<sup>61</sup> *See Hallam v. Van Beek Trucking, LLC*, Case No. 2013-STA-2 (ALJ Mar. 5, 2014) (\$2,000); *Ass’t Sec’y of Labor for Occupational Health and Safety v. Smithstonian Materials, Inc.*, Case No. 2013-STA-50 (ALJ July 31, 2015) (\$2,000); *Fink v. R&L Carriers Shared Services, LLC*, Case No. 2012-STA-6 (ALJ \$50,000), *aff’d. sub nom. Fink v. R&L Transfer, Inc.*, Case No. 13-018 (ARB Mar. 19, 2014).

<sup>62</sup> *See Beatty v. Celadon Trucking*, Case No. 2015-STA-10 (ALJ Aug. 13, 2015) (\$10,000); *Anderson, supra* (\$12,500);

respondent was “caught ‘red-handed’ in a blatant effort ... to falsify records and violate hours-of-service regulations, as well as instructing ... how to sneakily avoid being caught”<sup>63</sup> or another award of \$19,000 on remand after the Administrative Review Board vacated an award of \$75,000.<sup>64</sup>

I find that Neier should pay Mr. Butler punitive damages in the amount of \$10,000.00.

## 6. Abatement

Mr. Butler also requests an order requiring the Respondents to take steps to abate their violation of the STAA. More specifically, he requests that Neier be ordered to post a copy of this decision for 90 consecutive days in all places where employee notices are customarily posted, and expunge all references to Mr. Butler’s refusals of dispatches and complaints about violations of commercial vehicle safety regulations from its personnel records.

It is a standard remedy in employment discrimination cases to notify a respondent’s employees of the outcome of a case against their employer.<sup>65</sup> In addition, the Administrative Review Board has repeatedly found that an Administrative Law Judge may order an employer “to expunge references to adverse actions taken against complainants for protected activity.”<sup>66</sup> I therefore find that Mr. Butler is entitled to both remedies in this case.

## 7. Expenses of Litigation

As a final remedy, Mr. Butler requests an award of attorney fees and other expenses incurred in bringing his claim under the STAA. While he does not specify a specific amount, he requests leave to file a petition for attorney fees and costs. If a complainant prevails on the merits of his STAA claim, the statute expressly authorizes the Secretary of Labor to “assess against the person against whom [an] order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint.”<sup>67</sup> Accordingly, I find that counsel for Mr. Butler shall have 30 days from the date of this Decision and Order to file an application for attorney fees and other expenses that were incurred in this case. Neier shall have 14 days following service of the application within which to file any objections, plus 3 days for service by mail, for a total of 17 days.

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<sup>63</sup> *Oglesby v. Foresight Transportation Group*, Case No. 2011-STA-16 (ALJ June 22, 2011).

<sup>64</sup> *Ferguson v. New Prime, Inc.*, Case No. 2009-STA-47 (ALJ Feb. 9, 2012) (\$19,000), on remand from *Ferguson v. New Prime, Inc.*, Case No. 10-075 (ARB Aug. 31, 2011).

<sup>65</sup> *Shields v. James E. Owen Trucking, Inc.*, Case No. 08-021, PDF at 14 (ARB Nov. 30, 2009) (STA) (citing *Michaud v. BSP Transp., Inc.*, Case No. 97-113 (ARB Oct. 9, 1997) (STA)).

<sup>66</sup> *Id.*, PDF at 13–14. See also *Dickey v. W. Side Transp., Inc.*, Case Nos. 06-150, 06-151, PDF at 8–9 (ARB May 29, 2008) (STA); *Assistant Sec’y of Labor & Marziano v. Kids Bus Serv., Inc.*, Case No. 06-068, PDF at 4–5 (ARB Dec. 29, 2006) (STA); *Jackson v. Butler & Co.*, Case Nos. 03-116, 03-144, PDF at 13 (ARB Aug. 31, 2004) (STA).

<sup>67</sup> 49 U.S.C. § 31105(b)(3)(B). See also 29 C.F.R. § 1978.109(d)(1); *Assistant Sec’y of Labor & Mailloux v. R&B Transp., LLC*, Case No. 07-084, PDF at 12 (ARB June 26, 2009) (STA).

E. Conclusion

Mr. Butler has shown by a preponderance of the evidence that his protected activity under the STAA was a contributing factor in Mr. Haste's decision to terminate his employment. Thus I find that Neier violated the STAA by firing Mr. Butler. Moreover, Neier has failed to show by clear and convincing evidence that it would have fired Mr. Butler even absent his protected activity. Accordingly, I conclude that Butler is entitled to the full range of remedies available under the STAA.

V. ORDER

**IT IS THEREFORE ORDERED** that:

1. Neier shall reinstate Mr. Butler to his former position as a driver, with the same seniority, status, and benefits that he would have had but for the violation of the STAA.
2. Neier shall pay Mr. Butler total accrued back pay plus pre-judgment interest, compounded quarterly, calculated pursuant to 26 U.S.C. § 6621(a)(2), from September 11, 2013, to July 29, 2016, in the amount of \$122,585.12. Mr. Butler must notify Neier within 30 days of the date of this order of any earnings he had from employment after May 28, 2015, which may be deducted from this back pay award by re-calculating the amount owed using the same formula as appears on the table above.
3. Neier shall continue to pay back pay from the date of this Decision and Order until Mr. Butler is reinstated or is given an unconditional, bona fide offer of reinstatement, at the rate of \$904.91 per week, plus post-judgment interest compounded quarterly, calculated pursuant to 26 U.S.C. § 6621(a)(2), until the company satisfies the back pay award.
4. Neier shall pay Mr. Butler compensatory damages in the amount of \$50,000.00 for emotional distress caused by his discharge in violation of the STAA.
5. Neier shall pay Mr. Butler punitive damages in the amount of \$10,000.00 on account of its reckless disregard of Mr. Butler's rights and intentional violation of the STAA.
6. Neier shall expunge Mr. Butler's termination, and any negative information regarding Mr. Butler's protected activities and their role in his termination, from his personnel file.
7. Neier shall conspicuously post copies of this Decision and Order for 90 days in all places on its premises where employee notices are customarily posted.

8. Counsel for Mr. Butler shall have 30 days from the date of this Decision and Order to file a fully supported application for litigation expenses, including attorney fees. Neier shall have 14 days following service of the application within which to file any objections, plus 3 days for service by mail, for a total of 17 days.

Alice M. Craft  
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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).