**U.S. Department of Labor**

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

**Issue Date: 29 December 2015**

Case No.: 2014-STA-00061

In the Matter of:

PAUL IRWIN,
Complainant,

v.

NASHVILLE PLYWOOD, INC.,
JAMES AGEE, and
RONALD MEREDITH,
Respondents.

Appearances:
Paul O. Taylor, Esq.
Truckers Justice Center
Burnsville, Minnesota
For the Complainant

Randle S. Davis, Esq.
Lassiter, Tidwell and Davis, PLLC
Nashville, Tennessee
For the Respondents

Before: Joseph E. Kane
Administrative Law Judge

# DECISION AND ORDER GRANTING RELIEF

This matter arises from a claim under the employee protection provisions of § 405 of the Surface Transportation Assistance Act ("STAA" or "Act"), 49 U.S.C. § 31105, as amended and re-codified, and the implementing regulations at 29 C.F.R. part 1978. The STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee regarding pay, terms, or privileges of employment because the employee has undertaken protected activity, including: (1) participating in proceedings relating to the violation of a commercial motor vehicle safety regulation; or (2) refusing to operate a motor vehicle when doing so would violate the regulations.

## PROCEDURAL HISTORY

On February 24, 2014, Paul Irwin (the "Complainant") filed a complaint under the STAA alleging that Nashville Plywood, Inc., James Agee, John Doe, and Mary Roe[1] (the "Respondents") retaliated against him and discharged him on December 10, 2013 for: (1) reporting alleged violations of commercial vehicle safety regulations; and (2) refusing to drive in violation of those regulations. (JX 1).[2] Thereafter, the Occupational Safety and Health Administration ("OSHA") of the Department of Labor ("DOL" or "Department") initiated an investigation. In a letter dated June 2, 2014, OSHA's Regional Supervisory Investigator dismissed the Complainant's complaint, after concluding the following: (1) operating the vehicle that the Complainant refused to operate would not have constituted an actual violation of a regulation or standard; (2) insufficient evidence existed to demonstrate that the Complainant had a reasonable apprehension of serious injury because of the vehicle's hazardous safety or security condition; and (3) even if the Complainant demonstrated a reasonable apprehension of serious injury, he failed to ask the Respondents to correct the hazardous safety or security condition. (JX 1 at 3).

In a letter dated June 30, 2014, the Complainant filed objections to OSHA's findings and requested a hearing before the Office of Administrative Law Judges. (ALJ 2). This case was assigned to Administrative Law Judge Joseph E. Kane on August 29, 2014. Pursuant to a Notice of Hearing and Prehearing Order issued on September 3, 2014, I held a hearing on this claim on November 5, 2014, in Hopkinsville, Kentucky. I afforded both parties a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges.[3] At the hearing, I admitted into the record ALJ 1-9,[4] JX 1-4,[5] and CX 1-9.[6] (TR at 6-12). The Respondents did not submit any exhibits. I hereby overrule the Respondents' objections to CX 1-9. James Agee, Stephen Angel, and Paul Irwin testified at

---

[1] The Complainant initially brought his complaint against John Doe and Mary Roe, as "unknown persons who caused Nashville Plywood, Inc. to fire Complainant and retaliate against him in violation of 49 U.S.C. § 31105."

[2] In this Decision and Order, "ALJ" refers to the Administrative Law Judge's exhibits, "JX" refers to the Joint Exhibits, "CX" refers to the Complainant's exhibits, "TR" refers to the transcript of the hearing held on November 5, 2014, and "TR 2" refers to the transcript of the telephonic hearing held on April 24, 2015.

[3] 29 C.F.R. Part 18, Supbart A.

[4] The record contains the following Administrative Law Judge Exhibits: (1) the Complainant's complaint and OSHA's investigative report; (2) the Complainant's Objections to Secretary's Findings and request for a hearing; (3) the preliminary Order assigning the case to the undersigned, dated August 1, 2014; (4) the Notice of Hearing, dated September 3, 2014; (5) the Notice of Hearing Location, dated October 21, 2014; (6) the Complainant's Motion for Order Compelling Respondent to Produce Witnesses, dated October 27, 2014; (7) the Respondent's Response to the Complainant's Motion, dated October 28, 2014; (8) the Complainant's submissions; and (9) the Respondent's submissions. (TR at 6-7).

[5] The record contains the following Joint Exhibits: (1) a wait ticket from a Certified Automatic Truck Scale, dated December 9, 2013; (2) a State of Tennessee International Registration Plan Apportioned Cab Card for the 2006 Kenworth truck; (3) the Complainant's Objections to Secretary's Findings and request for a hearing; and (4) the Complainant's W-2 from 2012. (TR at 7-8).

[6] The record contains the following Complainant's Exhibits: (1) the Complainant's complaint; (2) two photographs of a tire; (3) excerpts from the Tiger Industry Association training manual; (4) the Complainant's earnings statements form an interim employer; (5) the Complainant's 2013 IRS 1040; (6) Michael Millard's curriculum vitae; (7) Michael Millard's expert witness report; (8) payroll reports from Nashville Plywood; and (9) Wade Means' expert witness report. (TR at 8-9, 159).

the hearing on November 5, 2014. Moreover, Ronald Meredith testified at the telephonic hearing on April 24, 2015. Both parties filed closing briefs, and the record is now closed.

In reaching a decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the hearing testimony, and parties' arguments. Where applicable, I have determined the credibility of the witnesses. While I have considered all of the evidence of record, I have only summarized the evidence that is relevant to resolving the issues in this case.

## ISSUES

The parties contest the following:

1. Whether the Complainant engaged in activity protected under 49 U.S.C. § 31105(a)(1)(A)(i);

2. Whether the Complainant engaged in activity protected under 49 U.S.C. § 31105(a)(1)(B)(i);

3. Whether the Complainant has shown that his allegedly protected activity contributed to the Respondents' decision to terminate him;

4. Whether the Respondents have shown by clear and convincing evidence that they would have taken the same adverse action against the Complainant absent his alleged protected activity;

5. Whether the Complainant took reasonable steps to mitigate his damages;

6. Whether James Agee and Ronald Meredith are individually liable under the STAA for their roles in taking adverse action against the Complainant; and

7. Whether the Complainant is entitled to relief under the STAA.

## STIPULATIONS

At the hearing, the parties stipulated to the following:

1. The Complainant, Paul Irwin, was an employee of Nashville Plywood as defined by 49 U.S.C. § 31101(2);

2. Nashville Plywood is the Employer as defined by 49 U.S.C. § 31101(3), and a person subject to 49 U.S.C. § 31105;

3. Respondent James Agee is the President of Nashville Plywood, and a person within the meaning of 49 U.S.C. § 31105;

4. From approximately July 2010 until December 9, 2013, Nashville Plywood employed the Complainant, whose duties included operating, on the highways in interstate commerce, commercial motor vehicles having a gross vehicle weight rating of 10,000 pounds or more;

5. On February 19, 2014, the Complainant timely filed his complaint with the Regional Administrator for OSHA Region Four;

6. The Complainant worked at Nashville Plywood's facility located at 154 Pardue Lane, Hopkinsville, Kentucky; and

7. The Complainant timely filed objections to OSHA's preliminary determination and timely requested a hearing.

(TR at 14-15).

## TESTIMONIAL EVIDENCE

*James Agee's Testimony*

James Agee testified at the hearing on November 5, 2014. (TR at 22-57). He has been the President of Nashville Plywood for seventeen years. (TR at 22-23). Mr. Agee testified that he has never had a commercial driver's license. (TR at 30). As to the Complainant's job responsibilities, Mr. Agee explained the Complainant would "pull orders," load and unload his truck, help others load and strap their trucks, deliver loads, and drive a forklift. (TR at 26, 31). Mr. Agee stated the Complainant also "swept" in the warehouse and "kept things cleaned up," noting Nashville Plywood is "a small company and everybody pitches in." (TR at 32). He testified the Complainant was not only hired as a driver and would not drive every day. (*Id.*). In his estimation, it would take approximately thirty or forty-five minutes to strap down a load of plywood on a 44,000 pound truck. (TR at 54). Mr. Agee testified that Nashville Plywood would move inventory between Kentucky and Nashville twice per week. (TR at 43). The Complainant would drive between the two locations to transfer material between warehouses. (TR at 32).

Mr. Agee testified the Complainant operated two commercial vehicles for Nashville Plywood, the Kenworth and the International, both of which had tag axles. (TR at 27). Mr. Agee explained that a tag axle is "a third axle." (TR at 28). Trucks usually have two axles when purchased, but adding a tag axle qualifies the truck "to carry a larger load and also provides for a better ride." (TR at 28-29). He further explained that a driver can "disperse the weight on the bed of the truck" using a tag axle. (TR at 29, 36). Mr. Agee agreed the image in CX 7 at 3 was a tag axle. (*Id.*). He explained that trucks are registered with the International Registration Plan ("IRP"), based on the number of axles they have. (TR at 36-37). Nashville Plywood registers trucks with the IRP on an annual basis. (TR at 37-38). He stated the three-axle trucks at Nashville Plywood carry up to 44,000 pounds of weight, and the State of Tennessee determines how many pounds a three-axle truck can carry. (TR at 37-38, JX 2). He testified the State of Tennessee did not ask for tire specifications when he registered the trucks. (TR at 52). Moreover, he testified that no other "structural modifications," such as "springs, additional bracing, new

axles," were made to the trucks after the tag axles were added. (TR at 30). According to Mr. Agee, Nashville Plywood has never incurred any violations involving its trucks or loads. (TR at 38).

Mr. Agee testified that in August 2012, Rusty Angel conveyed to him that the Complainant complained about the weight of his truck. (TR at 23-25). He also testified that on December 9, 2013, he was speaking with Ron Meredith on the phone, who said the Complainant "would not be in Nashville with the load." (TR at 41). Mr. Agee asked what happened, and Mr. Meredith responded, "Well, he's left," and explained the Complainant "came back with the load, said it was overweight, dropped the keys on my desk and said he was going home." (*Id.*). Mr. Agee responded, "What do you mean he went home?" and Ron replied, "He said he was going home." Mr. Agee then asked, "Does that mean he's coming back?" and Ron responded, "I don't know. He didn't say." Following that exchange, Mr. Agee requested an on-site temporary driver to haul the load. (*Id.*). He agreed that what he knows about the sequence of events on December 9, 2013 is based on what Mr. Meredith told him. (TR at 55).

Mr. Agee discussed a scale ticket dated December 9, 2013, which showed the Complainant's truck weighed 36,280 pounds. (TR at 42, JX 1, JX 2). At the time of the December 2013 incident, Mr. Ronald Meredith was the Complainant's immediate supervisor. (TR at 25). Mr. Agee stated he did not give the Complainant permission to leave the premises before the end of the workday on December 9, 2013. (TR at 42). To his knowledge, nobody else did either. (*Id.*). In Mr. Agee's opinion, the Complainant "walked off the job. He quit." (TR at 43). He is unaware of another instance wherein the Complainant left before 4:30 p.m. without permission. (*Id.*). When asked, "What is the result of an employee of Nashville Plywood, Inc. leaving the job before the conclusion of the workday without the permission of the supervisor or the company?" Mr. Agee responded, "The loss of a job." (TR at 50).

Mr. Agee discussed the Complainant's testimony at a Kentucky Unemployment Insurance Commission proceeding. (TR at 46-50). When asked, "Did [the Complainant] testify that he knew about the 44,000 limit?" Mr. Agee replied, "Yes." (TR at 50). Furthermore, when asked, "And so then he further said it didn't matter?" Mr. Agee stated, "Yes." (*Id.*).

*Stephen Angel's Testimony*

Stephen Angel testified at the hearing on November 5, 2014. (TR at 57-69). He has been the Vice President of Nashville Plywood since approximately 2000. (TR at 58). He testified the Complainant worked as a truck driver and in the warehouse, from 7:00 a.m. until 4:30 p.m. on Monday through Friday. (TR at 59, 63).

Mr. Angel said the Complainant approached him in 2012 and reported the truck he was operating was overloaded. (TR at 60). Mr. Angel provided the following testimony regarding the incident:

> Q: Okay and what did he tell you that you took to be a summons to have you come out to the yard?
> A: Paul said the truck was overloaded.

Q: And did you go out and talk to Mr. Irwin?
A: I did.
Q: Tell me what he said to you and what you said to him.
A: He said, "The truck is overloaded."
Q: Did he say what he meant by being overloaded?
A: He said, "The truck is overloaded."
Q: That's it?
A: That's all I can remember.
Q: Okay. What did you say, if anything, in reply?
A: I said, "The truck can't be overloaded. I've checked the tickets. I'll go check them again."
Q: Okay. Anything else you remember about that conversation with you and Mr. Irwin?
A: No, sir.
Q: You told him there was no way the truck was overloaded because you had checked the tickets? Is that true?
A: I don't remember telling him. I think I told the supervisor that.
Q: Okay.
A: I did make that statement and then went back to check the tickets.
Q: And then did you speak with Mr. Irwin again after you checked the tickets?
A: We checked the tickets. I spoke with Mr. Irwin. We went in and talked with Mr. Agee. I explained to Paul the way the weights were figured on the truck, double checked them with Mr. Agee and I was finalized that the truck was not overweight.
Q: What did Mr. Agee say, if anything?
A: He agreed with me.

(TR at 60-62). As to this interaction with the Complainant in 2012, Mr. Angel denied telling the Complainant, "Drive the truck and the company will take care of you if something happens." (TR at 68). He testified that an employee would lose his or her job for leaving work early without permission. (*Id.*).

Mr. Agee explained that each vehicle at Nashville Plywood is registered to carry a certain weight, as noted on the Cab card. (TR at 64-65). The difference between the Cab card weight and the weight of the unloaded truck is the weight a vehicle may safely carry. (TR at 65). He explained that he looks at the tickets to make sure the vehicles are under the weight limits. (*Id.*). He stated, "Generally, when I load a truck in a transfer, I try to leave myself about 2,000 pounds so it's not overloaded." (TR at 66).

*Paul Irwin's Testimony*

The Complainant, Paul Irwin, testified at the hearing on November 5, 2014. (TR at 69). He has an Associate's degree and is pursuing a Bachelor's degree. (TR at 70). He testified his sister and her two children live with him. (*Id.*). The Complainant has held a commercial driver's license continuously since 2004, and it has never been suspended or revoked. (TR at 70, 74). He has never had a chargeable accident in a commercial vehicle. (TR at 75-76). He has had one

moving violation for speeding. (TR at 76). The Complainant estimated he has driven half of a million miles in commercial vehicles. (*Id*.).

The Complainant discussed the places he worked prior to working for Nashville Plywood. (TR at 70-76). He first started driving for Nashville Plywood while working for Manpower Temporary Service. (TR at 75). He testified Mr. Agee asked him to work for Nashville Plywood in July 2010. (TR at 76-77). He explained he would drive an "established route" from Monday through Thursday. (TR at 77). Friday was "a free day," but he would take loads if the company sold products. (*Id*.). He testified he loaded trucks on occasion. (TR at 78-79). When asked whether he would sweep the floor, he explained he would occasionally do so on his own initiative if "there was nothing else to do." (TR at 79). The Complainant eventually started transporting materials between Nashville Plywood's warehouses in Nashville and Hopkinsville. (TR at 77, 81-82). He drove two trucks at Nashville Plywood, the International and the Kenworth. (TR at 79, 83). He primarily transported plywood, and occasionally lumber, screws, laminate, and other materials used in the cabinet industry. (TR at 80).

The Complainant testified he first became concerned about the amount of product loaded on his assigned vehicle for a warehouse transfer in August 2012. (TR at 82). He explained that the manufacturer of the International and the Kenworth placed stamps, called Cab cards, on the inside of each truck door, which list the "gross vehicle weight [rat]ing" ("GVWR"). (*Id*.). According to the Complainant, the GVWR is the manufacturer's "recommendation for what a truck can haul." (*Id*.). Furthermore, he stated the Cab card contains the weight of the truck when it is empty. (*Id*.). He observed that both vehicles he drove had a GVWR of 33,000 pounds. (*Id*.). By subtracting the weight of each empty truck, 13,500 pounds, from 33,000 pounds, the GVWR, he determined each truck could carry approximately 20,000 pounds of product, as determined by the manufacturer. (*Id*.). He elaborated that if he "had a transfer and the weight on the tickets exceeded 20,000 pounds," he would be alerted "because that would mean that … the weight of the material plus the weight of the truck empty would have to be over the 33,000 [pounds]." (TR at 83).

The Complainant testified that on August 30, 2012, the weight on the ticket for the International truck was over 20,000 pounds, so he brought it to Mr. Angel's attention. (TR at 83-84). He observed that "the material on the truck was loaded high above the headboard." (TR at 84). He explained a headboard "is at the front of the bed directly behind the cab of the truck," which exists to stop heavy material from sliding forward and injuring or killing the driver. (TR at 80). The Complainant said he told Mr. Angel he thought the truck had too much weight on it. Moreover, he told Mr. Angel he was "going to get the paper out of the truck and show it to" Mr. Angel, because Mr. Angel "said he didn't believe that the 33,000 was the correct weight." (TR at 85-86). The Complainant testified that he showed Mr. Angel "the sticker that showed the 33,000 for the gross weight of the vehicle." (TR at 86). Thereafter, Mr. Angel brought it to Mr. Agee, and the three individuals had a conversation. (*Id*.). The Complainant reported that Mr. Agee had registration information and told the Complainant "that the truck was registered for 44,000" pounds. (TR at 87). The Complainant responded by saying the registration weight and the GVWR from the manufacturer were two different numbers. (*Id*.). He elaborated as follows regarding their conversation:

> We had a discussion about, I remember he said he sees trucks on the road that have extra axles and there was a comment made about 'People that haul houses or large objects that have additional axles, they're to handle that weight' and I explained to him that the weight rating from the manufacturer is not only for --- that it's also based on the brakes, the transmission, the frame, suspension, all these components are important. That's where the weight rating comes from the manufacturer because Mr. Agee said that a tag actually had been added to the truck which made it eligible to be registered for 44,000, but I disagreed with the --- like I said, just because it was registered for 44,000, that doesn't mean that the vehicle could safely transport 44,000.

(*Id*.). According to the Complainant, Mr. Agee responded by telling him "to drive the truck, that it was safe and legal." (TR at 88). Moreover, the Complainant testified that Mr. Angel told him that "they wouldn't let anything happen to" him and "they would take care of" him "if anything happened." (*Id*.).

The Complainant testified that after August 30, 2012, he spoke to Mr. Angel regarding his concern over the height of a load, which was "well above the headboard." (TR at 88-89). He testified he told Mr. Angel he thought the load was unsafe to drive, which led to an argument. (TR at 89). The Complainant nonetheless agreed to drive the truck. (TR at 90).

The Complainant testified that he also had discussions with Mr. Meredith, his supervisor, regarding what he perceived as overloaded trucks. (*Id*.). Specifically, the Complainant described an incident that occurred a few months before he stopped working for Nashville Plywood, in which he was to transfer melamine between Hopkinsville and Nashville. He stated:

> I don't recall the exact weight, but it was well over 20,000 pounds. I told Mr. Meredith I didn't want to drive it. They need to take at least one bundle off. He told me that they weren't going to take anything off. In Nashville, really that was their call and whether he actually tried, I couldn't tell you, but I'm assuming that he just assumed they wouldn't take it off and I told him I would not drive the truck in that state because there was too much weight on it.

(TR at 91). According to the Complainant, another driver drove the truck that day. (TR at 92).

On December 9, 2013, the Complainant was scheduled to transfer a load from Hopkinsville to Nashville on the Kenworth truck. (TR at 92, 96). He explained it takes anywhere from twenty to forty-five minutes to load a truck before it needs to be strapped. (TR at 94). When he arrived at work, material was being loaded onto his truck. (TR at 95). He said "the first thing" he noticed was that there was "a lot of material that was going to go on the truck." (*Id*.). After clocking in, he got the transfer ticket from Mr. Meredith. (TR at 96). Once he looked at the weight, he noticed it "was well over 20,000 pounds." (*Id*.). He said that "raised a red flag" because he "knew that if it was over 20,000 pounds, [] it would put it over that gross vehicle weight rating of 33,000." The Complainant testified the sticker on the Kenworth's doorframe "said the front axle weight rating was 12,000 pounds and the gross vehicle weight rating for the

vehicle is 33,000 pounds. It also told tire size of 11R22.5 and I believe it had a tire pressure." (TR at 97).

The Complainant provided the following description of the truck once it was loaded and tarped:

> The truck was loaded, heavy on the front. The front end of the truck was sloped downwards towards the pavement and the tires you could tell by looking at the tires that there was a lot of weight on the vehicle just because - well, you could tell when you look at a tire, an empty car as opposed to a full one, you can tell that it's got pressure pushed on it besides kind of coming out. So, it looked to me like there was a lot of weight. You could tell there was a lot of weight on the tires.

(TR at 99). When asked why he drove the truck, the Complainant responded that he had had previous discussions with management about weight and he "tried to complain several times to no avail." (TR at 101). Thus, he said he "needed documentation that showed without a doubt that there was too much weight on the front of the truck." (*Id.*).

The Complainant drove the Kenworth to a truck stop in Oak Grove, Kentucky, which is approximately eight miles from Nashville Plywood's facility. (TR at 101). He stopped there because it was the closest certified CAT scale. (TR at 102). The Complainant stated that during the drive, the truck's "steering was almost non-responsive" because it was "impacted from the weight." (TR at 101). The Complainant agreed JX 1 is a copy of the CAT scale ticket he received on December 9, 2013. (TR at 102). According to the ticket, the front axle, or steer axle, weighed 12,980 pounds, and the drive axle, or regular mounted axle, and the tag axle, which is directly behind the drive axle, weighed 23,300 pounds. (TR at 102-103). The Complainant agreed the regular axle and the tag axle were less than forty-two inches apart. (TR at 103, 115).

After weighing the truck, getting fuel, and thinking about how to proceed, the Complainant drove back to Nashville Plywood's facility, parked the truck, and spoke to his supervisor, Mr. Meredith. (TR at 104). He testified he told Mr. Meredith the following:

> I told Mr. Meredith that the truck was overloaded again and I told him that I had been put in this position time and time again and I explained to him that it was unsafe and there was too much weight on the front. I told him that I had a scale ticket that showed the total weight and the weight on the steer axle and I told him that if something was to happen as far as an accident or some kind of injury that the people who made this decision in Nashville, their lives wouldn't be affected. My life as the driver would be affected because I was responsible for the load and for the truck. If I was to get pulled over or --
> …
> And I told him that I couldn't drive the truck because it was unsafe. I wasn't going to do it anymore and that I was going to go home and I would be back in the morning and we could discuss it further.

(TR at 104-105). The Complainant testified that Mr. Meredith looked at the scale ticket, but did not offer to have product removed from the truck. (TR at 105). He stated he told Mr. Meredith that the scale ticket "showed that there was entirely too much weight on the front axle," it was "unsafe," and he did not "feel comfortable driving it." (TR at 109). He said he "was worried that the front axle was going to snap where the tires would blow because it was an extreme amount of weight on the front of the truck." (TR at 116). He testified he told Jeff Stewart that he "had gotten a scale ticket and that it was loaded heavy. There was too much weight on the truck and that the front end, the front axle was extremely heavy and I suggested that he not drive the truck in the state that it was in." (TR at 108-109). The Complainant said Mr. Meredith went into his office, got on the phone, subsequently came out of his office, and told another driver, Mr. Stewart, to drive the truck. (TR at 108). When asked whether he had "ever been provided any certification from Nashville Plywood evidencing that his truck had been adapted so that it could safely exceed the manufactured cross vehicle weight rating," the Complainant responded, "No." (TR at 116).

Thereafter, the Complainant went home. (TR at 109). When asked why, he responded:

> They had previously convinced me to drive the truck even though deep down I felt like it was unsafe on other occasions and I thought that by taking a stand and refusing to drive the truck that we would have maybe a third party come in and mediate as far as the registered weight versus the gross vehicle weight rating by the manufacturer. I was also --- I'm sure I was upset. It had happened time and time again and I just decided that it'd be better if I went home. I had left. It was a pretty laid back place to work. If you had an obligation, a doctor's appointment or you needed to go somewhere, there was never an issue with leaving. So, I assumed that since I wasn't driving that I could leave.

(TR at 109-110). The Complainant responded, "No" when asked whether Mr. Meredith told him not go to home, offered to have him drive another truck, or offered him other work to do. (TR at 105-106, 138). He testified that he would occasionally sweep when there was nothing else to do, but he was never instructed to do so. (TR at 134). He estimated that he drove eighty or eighty-five percent of the time while working at Nashville Plywood. (TR at 135). He stated that he always received his work assignments at the start of each workday, and, other than driving the truck, he had no other assignment on December 9, 2013. (TR at 110). Moreover, on cross-examination, he explained that he had left early on prior occasions, stating, "If I let my supervisor know that I was going home, there generally was never a problem." (TR at 133).

After he went home, the Complainant did not get a call from Mr. Meredith asking him to return to work. (TR at 111). However, he did receive a call from Jeff Stewart, the temporary driver. The Complainant said Mr. Stewart reported the following:

> [H]e drove 55 miles an hour on the interstate because the weight on the truck worried him and he said as soon as he got there, Mr. Agee showed him I guess a cab card that showed that the truck could haul --- that was registered for 44,000 pounds and he told me that after I left, Mr. Agee, I guess, Ronnie or Mr. Meredith had Mr. Agee on the telephone and he handed it to Jeff, the temporary driver, and

> it was Mr. Agee and he said, he told him he needed to bring the truck down to Nashville and if he couldn't do it, they would find somebody that could.

(TR at 111-112).

The Complainant reported for work at 7:00 a.m. the following day, December 10, 2013. (TR at 119). He described the conversation he had with Mr. Meredith as follows:

> I asked him if he spoke to Mr. Agee. He replied that he had. I asked him what Mr. Agee said and he said if I showed up this morning, to tell me to go home. I asked him if that meant I was fired and he said yes.

(TR at 120). The Complainant alleges he gave Mr. Meredith a copy of the scale ticket, which Mr. Meredith copied. (*Id.*). Following that, he collected his belongings and left work. (*Id.*). He called Mr. Meredith once he returned home because he "wanted to know the exact reason" he was "being terminated." (TR at 120-121). According to the Complainant, Mr. Meredith told him he was fired because he "refused to drive the truck to Nashville" and stated the Complainant "was not supposed to take the trucks to a scale." (TR at 121).

The Complainant testified that CX 2 contains images of the steering tires on the Kenworth. (TR at 122). He stated CX 2 at 2 is a picture of "the writing on the tire that lists the acceptable weight for the tire per the manufacturer." (*Id.*). He stated the photos were taken on either December 12 or 13, 2013, when he met Mr. Stewart at a fuel stop. (TR at 123). The Complainant agreed the photo shows the "max load single" is "2,800 kilograms, 6175 pounds." (TR at 123, CX 2 at 2). When asked whether he understood that to mean the maximum load for each steer tire, he responded, "Correct." (TR at 123). The Complainant testified that based on his observation, and having performed at least forty vehicle inspections on the Kenworth, the tires photographed were the same tires that were on the Kenworth on December 9, 2013. (TR at 125-126).

The Complainant testified that after he left Nashville Plywood, he sought employment through Monster and Career Builder, and he registered with the Kentucky Unemployment Office. (TR at 126). He started working for Hand Family, LLC, which does business as Budweiser of Hopkinsville, on July 28, 2014. (TR at 127). He did not have an income from December 9, 2013 until July 28, 2014,[7] and during that time, he lived off savings, his income tax refund, and his 401K withdrawal. (TR at 127-128). The Complainant testified that he earned $23,194 at Nashville Plywood in 2013. (TR at 130, CX 5).

On cross-examination, the Complainant agreed that he was aware that the vehicles were registered for 44,000 pounds. (TR at 144). However, he explained that the 33,000 weight related to "the frame of the truck, the brakes of the truck, the suspension, the steering. All the components of the truck are based on that 33,000. Adding a tag axle will only distribute the weight instead of having two axles, now you have three." (TR at 145). He did not know who installed the tag axle, but opined there should have been a "new certification." (*Id.*). When asked

[7] Although the Complainant said "January," I infer from his remaining testimony and the evidence of record that he meant to say "July," as he subsequently testified he started working for Hand Family, LLC on July 28, 2014.

whether he had any knowledge of what was done to the truck, such as modifications made by the person who installed the tag axle, the Complainant responded, "No, sir." (*Id.*). He explained that "33,000 is not a registered weight," rather, it is the "manufacturer specified weight," highlighting the two are "different things… The registered weight is what you register your truck for when you get your tag and your license plate. That's not the same as the gross vehicle weight rating from the manufacturer of the vehicle." (TR at 146). He responded to the following testimony regarding his knowledge of the registered weight of the truck:

> Q: The representatives of the company were telling you that the vehicle was not overweight based upon their registrations that have been done, correct?
> A: They told me that it was registered for 44,000, correct.
> Q: And Mr. Angel testified that he told you it was not overweight. He pulled the ticket and said, "It's not overweight"?
> A: Well, we were at impasse because in my opinion, it was.
> Q: So, you put your opinion about the status of the vehicle above those who are actually handling the registration, correct?
> A: Correct.
> Q: And when you came in on the 9th and you took the truck to get it weighed, you came back at the 36,000 which you said, "That's above the 33,000 therefore, it's unsafe and I'm not going to drive it", correct?
> A: And the front axle weight, correct.
> Q: And the front axle weight. So, those two items, you said you weren't going to drive and then you left the premises without permission, correct?
> A: I left the premises, yes.

(TR at 149-150).

The Complainant testified his payroll at Nashville Plywood was based on timecards. (TR at 152). He was paid overtime after working forty hours per week. (TR at 153). He discussed his timesheets in CX 8, and agreed there were days he went home early because work was slow. (TR at 154-155, CX 8). For example, he agreed that during the week of March 22, 2013, he only worked for 33.45 hours, so he probably went home early or missed a day. (TR ta 154, CX 8). He testified that in his last few weeks of employment at Nashville Plywood, if he was not driving, he "didn't really do anything" and would be "[s]itting in the break room." (TR at 156).

*Ronald Meredith's Testimony*

Ronald Meredith testified at the telephonic hearing on April 24, 2015. (TR 2). He has worked as a warehouse manager at National Plywood in Hopkinsville, Kentucky since 2002. (TR 2 at 4-5). Mr. Meredith was the Complainant's immediate supervisor. (TR 2 at 6). He testified the Complainant was a truck driver, and when he was not driving the truck he would "work in the warehouse, pull orders, load trucks, unload trucks, sweep… whatever was required." (*Id.*).

Mr. Meredith testified the Complainant never told him that the loads on his truck were too heavy. (TR 2 at 6-7, 12). Regarding the events in December 2013, he agreed that the Complainant returned his truck to the Hopkinsville warehouse and reported the load was

overweight. (TR 2 at 7, 13). He agreed the Complainant left work and said, "I'll see you and I'll talk to you in the morning." (TR 2 at 8). Mr. Meredith stated he did not give the Complainant permission to leave. (TR 2 at 14). When asked whether he asked the Complainant to stay or gave him other work, Mr. Meredith said he "[d]idn't have time to." (TR 2 at 19-20).

When questioned regarding Complainant's complaint that day, Mr. Meredith said he could not recall whether the Complainant said it would be unsafe to drive the Kenworth. (TR 2 at 7). He agreed that nothing was removed from the truck and another driver drove the load to Nashville. (TR 2 at 8). Mr. Meredith denied that the Complainant showed him the scale ticket for the overweight load. (*Id.*). He also denied that the Complainant called him within an hour or two after he left his employment at Nashville Plywood. (TR 2 at 9-10). Although Mr. Meredith testified that from what he "understood," the truck "looked safe and legal," he acknowledged he has never held a commercial driver's license. (TR 2 at 17-18).

Mr. Meredith agreed that he did not tell the Complainant that he had other work for the Complainant to do on December 9, 2013. (TR 2 at 8). He said he never let the Complainant leave work early unless the Complainant asked permission. (TR 2 at 9). When asked whether other jobs existed that the Complainant could have done if he were not driving a truck, Mr. Meredith responded, "Yes, if he would have stayed." (TR 2 at 16).

Mr. Meredith agreed the Complainant reported for work the day after he refused to drive the load to Nashville. (TR s at 9). He responded to the following questions regarding his encounter with the Complainant that day:

> Q: The day after Mr. Irwin refused to pull this load that he said was overweight to Nashville, the day after that he reported for work, did he not?
> A: Yes.
> Q: Okay. And you told Mr. Irwin, you said that Mr. Agee had told you to send him home, correct?
> A: Correct.
> Q: And Mr. Irwin said to you, does that mean I'm fired, correct?
> A: Yes.
> Q: And you said, yes, correct?
> A: Yes.

(TR 2 at 9).

## LAW AND ANALYSIS

The STAA prohibits discharge, discipline, or discrimination against an employee who refuses to operate a commercial motor vehicle with a gross weight rating in excess of 10,000 pounds in violation of Federal Rules or Regulations because of apprehension of serious injury due to unsafe conditions or health matters.[8] On August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 1536, § 31105, 121 Stat. 266, 464-67 (2007), Congress amended paragraph (b)(1) of 49 U.S.C. § 31105 to make applicable in the adjudication of STAA

[8] 49 U.S.C. § 31105; 29 C.F.R. § 1978.100(a).

whistleblower claims the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b) ("AIR 21").

In order to prevail on his claim under the STAA, the Complainant must demonstrate by a preponderance of the evidence that he engaged in protected activity under the STAA, that the Respondents took an adverse employment action against him, and that the protected activity was a "contributing factor" to the adverse personnel action.[9] A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[10] If the Complainant establishes that the protected activity was a contributing factor in the Respondents' decision to take adverse action, the Respondents may avoid liability if they demonstrate "by clear and convincing evidence" that they "would have taken the same adverse action in the absence of any protected activity or the perception thereof."[11] "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'"[12]

The Administrative Review Board ("Board") has recently considered whether a respondent's evidence of legitimate, non-retaliatory reasons for its action may be weighed against a complainant's causation evidence in determining whether a complainant has met his or her burden of proving by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue.[13] A split panel of the Board ruled, *inter alia*, that an Administrative Law Judge may not weigh a respondent's evidence of a legitimate, non-retaliatory reason for an adverse action when determining whether the complainant has met his or her burden of proving contributing factor causation by a preponderance of the evidence.

More recently, however, in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) (en banc), the Board affirmed, but clarified, the *Fordham* decision, stating:

> While, as *Fordham* explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant's proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation *as long as the evidence is relevant to that element of proof*. 29 C.F.R. § 18.401.[14]

The Board in *Powers* said the *Fordham* majority "properly acknowledged that 'an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected

---

[9] 49 U.S.C. 42121(b)(2)(B)(iii); 29 C.F.R. § 1978.109(a); *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011).
[10] *Williams*, ARB No. 09-092, slip op. at 6.
[11] 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(b).
[12] *Williams*, ARB No. 09-092, slip op. at 6, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 14 (ARB Jan. 31, 2006).
[13] *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014).
[14] *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, slip op. at 23 (ARB Mar. 20, 2015) (en banc).

or whether the employer's action constituted an adverse action, as well the credibility of the complainant's causation evidence.'"[15]

Reading the Board's decisions in *Powers* and *Fordham* together, therefore, it appears that the Board finds there is no inherent limitation on evidence that a factfinder can evaluate when determining whether a complainant's protected activity was a contributing factor in the alleged adverse action, provided only that the evidence is relevant to that element of proof.

**1) Protected Activity**

The Complainant alleges that he engaged in protected activities when he (1) told the Respondents that his loads were overweight; and (2) refused to drive a load to Nashville on December 9, 2013. At the evidentiary hearing stage before an Administrative Law Judge, the Complainant "is required to *prove* the four *prima facie* elements by a preponderance of the evidence … and not merely *allege* circumstances sufficient to establish the four elements."[16]

a. Filing an Internal Complaint

The Complainant first alleges that he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(A)(i)[17] when he complained to the Respondents that his loads were overweight, in violation of both Kentucky and Federal regulations. An employee engages in STAA-protected activity when he files a complaint or begins a proceeding "related to a violation of a motor vehicle safety regulation, standard, or order."[18] To qualify for protection, a complaint must be based on a "reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation."[19] Internal complaints to management are protected activity under the whistleblower provision of the STAA.[20] A complaint need not expressly cite the specific motor vehicle standard allegedly violated, but it must "relate" to a violation of a commercial motor vehicle safety standard.[21] An internal complaint must be communicated to management, but it may be oral, informal, or unofficial.[22]

The Complainant testified that on various occasions, he reported to the Respondents that the trucks he was driving were overweight. The Complainant testified that he first became concerned about the amount of product loaded on his truck in August 2012. (TR at 82). He stated

---

[15] *Powers,* ARB No. 13-034, slip op. at 23 (quoting *Fordham*, ARB No. 12-061, slip op. at 24).

[16] *Fordham*, ARB No. 12-061, slip op. at 19-20 (emphasis in original); *see also Bechtel v. Administrative Review Bd., U.S. Dep't of Labor,* 710 F.3d 443 (2d Cir. 2013); *Brune*, ARB No. 04-037, slip op. at 12-14; *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 8-9 (ARB Jan. 30, 2004).

[17] 49 U.S.C. §§ 31105(a)(1)(A)(i) 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, 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."

[18] 49 U.S.C. § 31105(a)(1)(A)(i).

[19] *Calhoun v. United States DOL*, 576 F.3d 201, 212 (4th Cir. 2009), citing *Dutkiewicz*, No. 97-090, 1997 DOL Ad. Rev. Bd. LEXIS 98, at 6 (Aug. 8, 1997), *aff'd sub nom. Clean Harbors*, 146 F.3d 12.

[20] *Williams*, ARB No. 09-092, slip op. at 6.

[21] *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-41 at 4 (ARB Mar. 27, 2012).

[22] *Id*.

that on August 30, 2012, the weight on the ticket for the International truck was over 20,000 pounds, so he brought it to the attention of Mr. Angel. (TR at 83-84). He understood that if the weight ticket exceeded 20,000 pounds, the weight of the material and the truck would exceed 33,000 pounds, which was the manufacturer's GVWR for both of the trucks he drove. (TR at 83). Mr. Angel, the Vice President of Nashville Plywood, agreed that on one occasion in 2012, the Complainant approached him and told him that the truck he was operating was overloaded. (TR at 60). Mr. Agee also testified that in August 2012, Rusty Angel conveyed to him that the Complainant complained about the weight of his truck. (TR at 23-25). Thus, I find that Mr. Agee and Mr. Angel were aware of the Complainant's concerns in 2012.

The Complainant described a second incident, which occurred a few months before he stopped working for Nashville Plywood in December 2013. He explained that he was supposed to transfer melamine between Hopkinsville and Nashville. (TR at 90-91). He could not recall the exact weight of the material on the truck, but he stated "it was well over 20,000 pounds." (TR at 91). He testified that he told Mr. Meredith he did not want to drive the truck and estimated that "at least one bundle" needed to be taken off the truck. (*Id.*). According to the Complainant, Mr. Meredith did not remove any additional weight from the truck, and another driver drove the load that day. (TR at 92).

The final incident, and the primary one at issue in this case, occurred in December 2013, when the Complainant allegedly observed that the front end of the truck he was scheduled to drive from Hopkinsville to Nashville was sloped downward, with a lot of weight on the tires. (TR at 99). After leaving Hopkinsville, the Complainant reported that the Kenworth truck's "steering was almost non-responsive" because it was "impacted from the weight." (TR at 101). The Complainant drove to a truck stop in Oak Grove, Kentucky, weighed his truck on a CAT scale, and learned that the front axle, or steer axle, weighed 12,980 pounds, and the drive axle, or regular mounted axle, and the tag axle, weighed 23,300 pounds. (TR at 101-103, JX 1). He decided to return the truck to Nashville Plywood's Hopkinsville facility, and reported to Mr. Meredith that the truck was "overloaded again," it was "unsafe," and "there was too much weight on the front." (TR at 104-105). Mr. Meredith testified the Complainant never complained to him that the loads on his truck were too heavy. (TR 2 at 6-7, 12). However, he subsequently agreed that in December 2013, the Complainant returned his truck to the Hopkinsville warehouse and complained that the load was overweight. (TR 2 at 7, 13). When asked whether the Complainant said the truck was unsafe to drive, Mr. Meredith said, "I don't recall that. It's possible, but I don't recall it." (TR 2 at 7).

As to the discrepancies between the Complainant's testimony and that of Mr. Meredith, I note that an Administrative Law Judge is entitled to weigh the evidence, draw inferences from it, and assess whether witnesses are credible.[23] After observing the Complainant's demeanor and statements while testifying, and comparing them to the demeanor and testimony of Respondents' witnesses, I find the Complainant's testimony to be credible. He provided detailed and consistent accounts of his alleged protected activity. Moreover, I find the Complainant's testimony more credible than that of Mr. Meredith, as Mr. Meredith initially testified that the Complainant never reported that his loads were too heavy, but then proceeded to describe the incident in December 2013 wherein the Complainant did exactly that.

[23] *See Germann v. Calmat Co.*, ARB No. 99-114, slip op. at 8 (ARB Aug. 1, 2002); 29 C.F.R. § 18.29.

The Complainant alleges the Respondents violated various provisions in 49 C.F.R. §§ 392, 393, and 396. The regulation at 49 C.F.R. §§ 392.1 provides, "Every motor carrier, its officers, agents, representatives, and employees responsible for the management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers, shall be instructed in and comply with the rules in this part." Moreover, 49 C.F.R. § 392.2 provides, "Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated."

The Complainant alleges that his complaints related to reasonably perceived violations of Kentucky Revised Statute ("KRS") §§ 189.221 and 189.222, and 603 KAR 5:066. KRS § 189.222(c) prohibits the Transportation Cabinet from increasing weights beyond "twenty thousand (20,000) pounds per single axle, with axles less than forty-two (42) inches apart to be considered as a single axle." Furthermore, 603 KAR 5:066 § 1 provides, "Unless the motor vehicle being operated has been issued an overdimensional permit by the Transportation Cabinet, the maximum allowable gross weight (mass) for" class "A" highways is a "maximum allowable gross weight (mass) of 44,000 pounds (20,090.05 kilograms)." On Class A, AA, and AAA highways, "[g]ross axle weight (mass) for a single axle shall not exceed 20,000 pounds (9071.84 kilograms)."[24] Finally, pursuant to 606 KAR 5:066 §§ 3-5, axles less than forty-two inches apart are considered a single axle.[25] Consistent with Kentucky law, the Department of Transportation regulations provide "The maximum gross weight upon any one axle, including any one axle of a group of axles, or a vehicle is 20,000 pounds."[26]

On December 9, 2013, the Complainant weighed the Kenworth using a CAT scale. The ticket revealed the drive axle and the tag axle, which is directly behind the drive axle, weighed 23,300 pounds. (TR at 102-103, JX 1). The Complainant testified that on the Kenworth, the regular axle and the tag axle were less than forty-two inches apart. (TR at 103, 115). The Respondents have not presented any evidence to dispute the Complainant's testimony. Complaints are protected if they relate to a reasonably perceived violation of a commercial vehicle safety regulation.[27] I find reasonable the Complainant's belief that the weight of the two axles, 23,300 pounds, which was greater than 20,000 pounds, was a violation of law. Therefore, the Complainant's perception that the truck was overloaded was entirely reasonable in light of 49 C.F.R. § 392.2, which requires the Complainant and the Respondents to operate motor vehicles in accordance with Kentucky State law.

The Complainant also alleges violations of 49 C.F.R. §§ 392.7,[28] 393.100,[29] 393.114,[30] and 396.13.[31] He expressed concern over the tires, material loaded above the headboard, and the

---

[24] KAR 5:066 §§ 3, 4, 5.
[25] *Id.*
[26] 23 CFR § 658.17(c).
[27] *Ulrich*, ARB No. 11-016.
[28] 49 C.F.R. § 392.7 provides, "No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed: … Tires."

overall operating condition of the vehicles he drove. For example, on August 30, 2012, the Complainant observed that "the material on the truck was loaded high above the headboard." (TR at 84). At the hearing, he explained that a headboard "is at the front of the bed directly behind the cab of the truck," which exists to stop heavy material from sliding forward and injuring or killing the driver. (TR at 80). The Complainant testified that after August 30, 2012, he again spoke to Mr. Angel regarding his concern over the height of the load, which was "well above the headboard." (TR at 88-89). Moreover, he testified that on December 9, 2013, he "was worried that the front axle was going to snap where the tires would blow because it was an extreme amount of weight on the front of the truck." (TR at 116). He stated the front end of the truck was "sloped downwards towards the pavement and the tires you could tell by looking at the tires that there was a lot of weight on the vehicle..." (TR at 99). The Complainant's testimony suggests that on more than one occasion, he was not satisfied that the trucks he was to drive were in safe operating condition, as required by 49 C.F.R. § 396.13.[32]

The Respondents allege that because the Complainant knew the vehicles he drove were registered to carry 44,000 pounds, he merely put his own opinions as to how much weight they could carry above those of persons at Nashville Plywood who are responsible for registering the vehicles. The Complainant agreed that he was aware that the vehicles were registered for 44,000 pounds. (TR at 144). However, he rationally explained why he nonetheless thought the trucks were overweight. He thought that the 33,000 weight related to "the frame of the truck, the brakes of the truck, the suspension, the steering. All the components of the truck are based on that 33,000. Adding a tag axle will only distribute the weight instead of having two axles, now you have three." (TR at 145). He explained that "33,000 is not a registered weight," rather, it's the "manufacturer specified weight," highlighting the two are "different things… The registered weight is what you register your truck for when you get your tag and you license plate. That's not the same as the gross vehicle weight rating from the manufacturer of the vehicle." (TR at 146). Mr. Agee testified that no other "structural modifications," such as "springs, additional bracing, new axles," were made to the trucks after the tag axles were added. (TR at 30). When asked whether he had "ever been provided any certification at Nashville Plywood indicating that the equipment had been adapted so that it could safely exceed the manufactured cross vehicle weight rating," the Complainant responded, "No." (TR at 116). Even if the Complainant had seen the State of Tennessee Cab Card, it does not indicate how much weight each axle can carry, or how far apart the axles must be in order to constitute separate axles. (JX 2). The Complainant repeatedly testified he was concerned about the amount of weight loaded on the "front axle." (TR

---

[29] 49 C.F.R. § 393.100 (c) provides, "Prevention against shifting of load. Cargo must be contained, immobilized or secured in accordance with this subpart to prevent shifting upon or within the vehicle to such an extent that the vehicle's stability or maneuverability is adversely affected."

[30] 49 C.F.R. § 393.114(a) provides, "Applicability. The rules in this section are applicable to commercial motor vehicles transporting articles of cargo that are in contact with the front end structure of the vehicle. The front end structure on these cargo-carrying vehicles must meet the performance requirements of this section." 49 C.F.R. § 393.114(b) provides, "Height and width. (1) The front end structure must extend either to a height of 4 feet above the floor of the vehicle or to a height at which it blocks forward movement of any item or article of cargo being carried on the vehicle, whichever is lower. (2) The front end structure must have a width which is at least equal to the width of the vehicle or which blocks forward movement of any article of cargo being transported on the vehicle, whichever is narrower."

[31] 49 C.F.R. § 396.13 provides, "Before driving a motor vehicle, the driver shall: (a) Be satisfied that the motor vehicle is in safe operating condition."

[32] See *Id*.

at 149-150). He testified the sticker on the Kenworth's doorframe "said the front axle weight rating was 12,000 pounds," and the CAT scale ticket he obtained on December 9, 2013 showed the steer axle weighed 12,980 pounds. (TR at 97, JX 1). Moreover, the CAT scale ticket showed the drive axle weighed 23,300 pounds. I am persuaded that a reasonable person in the circumstances then confronting the Complainant would conclude that the manufacturer's specifications and the registration were two separate measurements of what the Kenworth truck could carry, and that the truck was unsafe because the steer axle and drive axle weighed 12,980 and 23,300 pounds, respectively.

Based on the evidence and testimony of record, I find that in August 2012 and December 2013, the Complainant engaged in protected activity when he reported his concerns that the loads on his trucks were overweight and the vehicles were unsafe to drive. His complaints were orally made to Mr. Angel and Mr. Meredith, both of whom are management-level employees or higher. Therefore, I find he has met his burden to establish that he engaged in activity protected pursuant to 49 U.S.C. § 31105(a)(1)(A)(i).

b. <u>Refusing to Drive</u>

Second, the Complainant alleges that he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i)[33] when he refused to drive the Kenworth truck from Hopkinsville to Nashville on December 9, 2013.

The undisputed evidence of record reveals the Complainant weighed his truck on a CAT scale on December 9, 2013, which showed the drive axle weighed 23,300 pounds. (JX 1). Kentucky law prohibits a single axle from carrying beyond 20,000 pounds, and two tandem axles spaced less than forty-two inches apart are considered one axle.[34] Moreover, Department of Transportation regulations provide, "The maximum gross weight upon any one axle, including any one axle of a group of axles, or a vehicle is 20,000 pounds."[35] Although the Respondents allege that because the State of Tennessee registered the Kenworth to carry 44,000 pounds, the "Complainant has failed to prove that an actual violation of law occurred or would have occurred on December 9, 2013," the Respondents do not explain how one axle carrying over 20,000 pounds is not a violation of 23 CFR 658.17(c), 49 C.F.R. § 392.2, and KRS § 189.222(c). (Respondent's Post-Hearing Legal Brief at 3). Moreover, the Respondents do not challenge the Complainant's testimony that the tag axle and the drive axle on the Kenworth truck were less than forty-two inches apart. Therefore, pursuant to Kentucky law, the two axles constitute a single axle, and together they should not weigh more than 20,000 pounds. I conclude that had the Complainant driven the Kenworth truck from Hopkinsville to Nashville, he would have violated

---

[33] 49 U.S.C. § 31105(a)(1)(B)(i) provides "A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because-- the employee refuses to operate a vehicle because-- the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security."

[34] Kentucky State law prohibits the Transportation Cabinet form increasing weights beyond "twenty thousand (20,000) pounds per single axle, with axles less than forty-two (42) inches apart to be considered as a single axle." Pursuant to 606 KAR 5:066 §§ 3, 4, 5, axles less than forty-two inches apart are considered a single axle. Moreover, on Class A, AA, and AAA highways, "[g]ross axle weight (mass) for a single axle shall not exceed 20,000 pounds (9071.84 kilograms)."[34]

[35] 23 CFR § 658.17(c).

49 C.F.R. § 392.2, which requires that motor vehicles be operated in compliance with the laws and regulations of the jurisdiction in which they are being operated.

The Complainant testified that once he returned to Nashville Plywood's facility, he told his supervisor, Mr. Meredith, the "truck was overloaded," "unsafe," and it had "too much weight on the front." The Complainant showed Mr. Meredith the CAT scale ticket and told Mr. Meredith that he could not drive the truck because it was unsafe. (TR at 104-105). The Complainant testified that Mr. Meredith looked at the scale ticket, but did not offer to have product removed from the truck. (TR at 105). In fact, Mr. Meredith showed no sincere concern for public safety after learning of the Complainant's protected activity. Rather, he insisted the truck could carry 44,000 pounds, and directed a temporary driver, Mr. Stewart, to drive the load. (TR at 112). Internal complaints to management are protected activity under the whistleblower provision of the STAA.[36] I find that Mr. Meredith, as the Complainant's supervisor, was a manager as contemplated by the Act. Moreover, the Act expressly delineates that an employee may refuse to operate a vehicle if doing so would violate a regulation related to commercial motor vehicle safety, health, or security.[37] I am satisfied that safety is one of the goals of the regulations that define and establish weight limitations on trucks and axles.[38]

In sum, because the drive axle on the Kenworth truck weighed 23,300 pounds, and the tag axle and the drive axle were less than forty-two inches apart, driving the Kenworth truck would have violated 40 C.F.R. §§ 392.1 and 392.2. Therefore, I find the Complainant engaged in protected activity when he refused to drive the Kenworth truck on December 9, 2013.

**2) Adverse Action**

Under the STAA, "any employment action by an employer which is unfavorable to the employee, the employee's compensation, terms, conditions, or privileges of employment constitutes an adverse action."[39] Accordingly, an employer's decision to terminate employment constitutes an adverse action.[40] The Board has held that "except where an employee actually has resigned, an employer who decides to interpret an employee's actions as a . . . resignation has in fact decided to discharge that employee."[41]

The Complainant alleges that the Respondents took adverse action against him when they fired him from Nashville Plywood. (Complainant's Proposed Findings of Fact and Legal Argument at 22). The Respondents allege they would have terminated any employee of

---

[36] *Williams*, ARB No. 09-092, slip op. at 6

[37] 49 U.S.C. § 31105(a)(1)(B)(i).

[38] *See Bates v. West Bank Containers*, ARB No. 99-055, ALJ No. 98-STA-30, slip op. at 12 n.5 (April 28, 2000) ("Although OSHA has never asserted in this case that the 80,000 pound load 'limit' was a safety law, we are satisfied that safety is indeed one of the goals of [the] weight limit regulations."); *see also Galvin v. Munson Transp., Inc*., 91-STA-41 (Sec'y Aug. 31, 1992) (noting that the employee's refusal to haul an overweight load was based on the potential violation of federal regulations and a safety concern for himself and the public).

[39] *Long v. Roadway Express, Inc.,* ALJ No. 1988-STA-00013 (ALJ March 9, 1990).

[40] *Minne v. Star Air, Inc.,* ARB No. 05-5005, ALJ No. 2004-STA-026, slip op. at 13, 15 (citations omitted) (Oct. 31, 2007).

[41] *Minne*, ARB No. 05-5005, slip op. at 14; *see also Klosterman v. E.J. Davies, Inc.,* ARB No. 08-035, ALJ No. 2007-STA-019 (Sept. 30, 2010); *Hood v. R&M Pro Transport, LLC*., ARB No. 15-010, ALJ No. 2012-STA-00036 (Dec. 4, 2015).

Nashville Plywood for leaving work early without prior approval from a supervisor. (Respondent's Post-Hearing Legal Brief at 7).

Although the Complainant does not contest that he left work early on December 9, 2013, he testified he did so because he always received his work assignments at the start of each workday, and other than driving the truck, he had no other assignment on December 9, 2013. (TR at 110). He said Mr. Meredith did not stop him from going home, offer to have him drive another truck, or offer him other work to do. (TR at 105-106). The Complainant testified that he would occasionally sweep when there was nothing else to do, but he was never instructed to do so on December 9, 2013. (TR at 134). Mr. Meredith agreed that he did not tell the Complainant to do any other work that day. (TR 2 at 8). The Complainant explained that he had left early on prior occasions, stating, "If I let my supervisor know that I was going home, there generally was never a problem." (TR at 133). In contrast, Mr. Meredith testified he never let the Complainant leave work early unless the Complainant asked permission. (TR 2 at 9).

After leaving work on December 9, 2013, the Complainant testified he reported for work at 7:00 a.m. on December 10, 2013. (TR at 119). He described the conversation he had with Mr. Meredith as follows:

> I asked him if he spoke to Mr. Agee. He replied that he had. I asked him what Mr. Agee said and he said if I showed up this morning, to tell me to go home. I asked him if that meant I was fired and he said yes.

(TR at 120). Following their conversation, the Complainant collected his belongings and left work. (*Id*.). He stated he called Mr. Meredith once he returned home because he "wanted to know the exact reason why" he was "being terminated." (TR at 120-121). According to the Complainant, Mr. Meredith told him he was fired because he "refused to drive the truck to Nashville" and stated the Complainant "was not supposed to take the trucks to a scale." (TR at 121). Mr. Meredith agreed the Complainant reported for work on December 10, 2013. (TR 2 at 9). He also agreed that he told the Complainant that Mr. Agee directed him to send the Complainant home. (*Id*.). Finally, he responded, "Yes" when asked, "And Mr. Irwin said to you, does that mean I'm fired, correct?" (TR 2 at 9).

Having reviewed the evidence of record, the undisputed testimony demonstrates that the Complainant was terminated from his position at Nashville Plywood on December 10, 2013. Mr. Meredith, the Complainant's supervisor, testified he said "Yes" when the Complainant asked whether he had been fired. Moreover, even assuming, *arguendo*, that the Complainant "walked off the job" and "quit," as Mr. Agee alleged, I find that when the Respondents treated the Complainant's actions on December 9, 2013 as a voluntary resignation, and then accepted that resignation the next day, they effectively discharged the Complainant. (TR at 43). An employer who chooses to interpret an employee's equivocal action as resignation has effectively discharged that employee.[42] Thus, by interpreting the Complainant's early departure on December 9, 2013 as a resignation, and by subsequently telling the Complainant to go home and

---

[42] *Klosterman,* ARB No. 08-035 (explaining that "exploiting [a complainant's] ambiguous departure," constitutes "affirmative[ . . .] steps to perfect the end of [the complainant's] employment") (citing *Minne,* ARB No. 05-005, slip op. at 14 (ARB October 31, 2007))); *see also Hood,* ARB No. 15-010, slip op. at 5.

informing him that he had been fired, the Respondents effectively discharged the Complainant. Accordingly, I find that the Respondents engaged in adverse action against the Complainant.

**3) Contributing Factor**

Given substantial evidence establishing that the Respondents took adverse action against the Complainant, the Complainant needs only to show that his protected activity contributed to the Respondents' decision to terminate him. A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[43] A complainant can succeed by "providing either direct or indirect proof of contribution."[44]

Close temporal proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action.[45] "Temporal proximity is just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action."[46] While such proximity is not dispositive, "the closer the temporal proximity is, the stronger the inference of a causal connection."[47] A close temporal proximity may alone be sufficient to establish a causal connection in whistleblower cases.[48]

Mr. Angel testified that the Complainant worked from 7:00 a.m. until 4:30 p.m., from Monday through Friday. (TR at 63). The Complainant testified that when he arrived at work on December 9, 2013, his truck was in the process of being loaded. (TR at 95). He explained it takes anywhere from twenty to forty-five minutes to load a truck before it needs to be strapped. (TR at 94). After departing from Nashville Plywood's Hopkinsville facility, the Complainant drove approximately eight miles to a truck stop in Oak Grove, Kentucky. (TR at 101). He estimated that on December 9, 2013, he was at the truck stop for one hour before returning to Nashville Plywood's Hopkinsville facility. (TR at 103-104). Upon returning to the facility, the Complainant told Mr. Meredith that he could not drive the truck because it was overloaded and unsafe. (TR at 104-105). While the record does not establish exactly when the Complainant refused to drive the load, I find it occurred at some point in the morning on December 9, 2013. The Complainant reported for work at 7:00 a.m. the following day, December 10, 2013. (TR at 119, TR 2 at 9). Shortly after his arrival, Mr. Meredith terminated him. (TR at 120, TR 2 at 9). Therefore, the Respondents discharged the Complainant less than twenty-four hours after he engaged in protected activity. The Board has repeatedly found that adverse action within two

---

[43] *Salata v. City Concrete, LLC,* ARB Nos. 08-101, 09-104, slip op. at 9 (ARB Sept. 15, 2011) (citing *Williams*, ARB 09-092, slip op. at 5).
[44] *Id.*
[45] *Kovas v. Morin Transport, Inc.,* 92-STA-41 (Sec'y Oct. 1, 1993) (*citing Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987)).
[46] *Spelson v. United Express Systems*, ARB No. 09-063, slip op. at 3, n. 3 (ARB Feb. 23, 2011) (quoting *Clemmons v. Ameristar Airways, Inc*., ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010)).
[47] *Warren v. Custom Organics*, ARB No. 10-092, slip op. at 11 (ARB Feb. 29, 2012) (citing *Reiss v. Nucor Corp.*, ARB No. 08-137 (ARB Nov. 30, 2010)).
[48] *See Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, slip op. at 12 (ARB Mar. 28, 2012) (citing *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, slip op. at 8 (ARB Dec. 30, 2004), *aff'd sub nom. Vieques Air Link, Inc. v. U.S. Dep't of Labor*, 437 F.3d 102, 109 (1st Cir. 2006)); *Hood*, ARB No. 15-010, slip op. at 5-6.

days of protected activity is sufficient to establish that the protected activity was a "contributing factor" in the adverse action.[49] Here, the Respondents took adverse action against the Complainant in half of that amount of time. Accordingly, I find that the close temporal proximity between the Complainant's protected activity and his termination strongly supports the conclusion that his protected activity was a "contributing factor" in his termination.

**4) Respondents' Rebuttal**

Because the Complainant has shown that refusing to drive the Kenworth truck to Nashville on December 9, 2013 contributed to the Respondents' decision to terminate him, the Respondents may only avoid liability by demonstrating "by clear and convincing evidence" that they "would have taken the same adverse action in the absence of any protected activity or the perception thereof."[50] "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'"[51]

The Respondents allege that Nashville Plywood would terminate any employee for leaving work before the end of the workday without permission from a supervisor or manager. (Respondent's Post-Hearing Legal Brief, TR at 50, TR at 68). I find that the Respondents' argument is insufficient to carry their burden. Although the Respondents allege they terminated the Complainant for leaving work early, Mr. Meredith agreed that he did not assign the Complainant other work to do on December 9, 2013. (TR 2 at 8). Moreover, although he said he did not give the Complainant permission to leave work on December 9, 2013, the Complainant testified that Mr. Meredith did not stop him from going home, offer to have him drive another truck, or offer him other work to do. (TR 2 at 14, TR at 105-106). When asked whether other jobs existed that the Complainant could have done if he were not driving a truck, Mr. Meredith responded, "Yes, if he would have stayed." (TR 2 at 16). The Complainant testified that in his last few weeks of employment at Nashville Plywood, if he was not driving, he "didn't really do anything." (TR at 156). Although there is some evidence that the Complainant could have swept the floor or completed odd jobs around the warehouse, there is no evidence that the Respondents asked him to do any of those jobs, or warned him that he would lose his job if he left work early. In fact, when questioned whether he asked the Complainant to stay at work or assigned the Complainant other work to do, Mr. Meredith said he "[d]idn't have time to." (TR 2 at 19-20). However, Mr. Meredith agreed that the Complainant said, "I'll see you and I'll talk to you in the morning," when he left on December 9, 2013. (TR 2 at 8). There is no evidence that the Respondents warned the Complainant, or even informed him, that they would terminate him if he left early on December 9, 2013.

The Respondents' case is further weakened by the fact that the Complainant's pay was based on timecards. (TR at 152). Thus, he was only paid for the time that he worked. He testified that he always received his work assignments at the start of each workday, and other than driving the truck to Nashville on December 9, 2013, he had no other assignments that day. (TR at 110). The Respondents have not advanced any evidence, such as an employee handbook, or documentation demonstrating how other employees in situations similar to the Complainant's

---

[49] *See e.g. Reiss*, ARB No. 08-137, slip op. at 5; *Negron*, ARB No. 04-021, slip op. at 8.
[50] 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(b).
[51] *Williams*, ARB No. 09-092, slip op. at 6, quoting *Brune*, ARB No. 04-037, slip op. at 14.

have been treated, to show that Nashville Plywood has a policy of automatically terminating every employee who leaves work early, even when that employee is paid by the hour and has no other work assignments.

I conclude that the Respondents have failed to show that it is "highly probable or reasonably certain" that they would have terminated the Complainant absent his decision not to drive the Kenworth truck to Nashville on December 9, 2013. Accordingly, the Respondents may not avoid liability under the Act.

## DAMAGES

Under the Act, a successful complainant is entitled to: reinstatement; compensatory damages, including back pay, litigation costs, and attorney fees; abatement of any violation; and punitive damages in an amount not to exceed \$ 250,000.[52] The Complainant seeks reinstatement, back wages, compensatory damages, punitive damages, attorney fees and costs, and abatement. (Complainant's Proposed Findings of Fact and Legal Argument at 32-35).

### 1) Reinstatement

Reinstatement is an automatic remedy under the STAA.[53] An Administrative Law Judge must order reinstatement unless it is impossible or impractical.[54] While the STAA expressly provides that a prevailing complainant is entitled to reinstatement, the statute does not prohibit voluntary waiver of that right. The Complainant testified that he would like to be reinstated to his previous position at Nashville Plywood. (TR at 131). The Respondents have not shown that reinstatement would be impossible or impractical. Therefore, I conclude that reinstatement is appropriate.

### 2) Back Pay

The Respondents bear the burden of showing that the Complainant failed to make reasonable efforts to mitigate damages.[55] The mitigation of damages doctrine requires a wrongfully discharged employee to not only diligently seek equivalent employment during the interim period, but also act reasonably to maintain such employment.[56] The Complainant testified that after he left Nashville Plywood, he looked for jobs on Monster and Career Builder, and registered with the Kentucky Unemployment Office. (TR at 126). He did not have an income from December 9, 2013 until July 28, 2014. (TR at 127-128). On July 28, 2014, he started working as a delivery driver for Hand Family, LLC, which does business as Budweiser of

---

[52] 49 U.S.C. § 31105(b)(3)(A).

[53] 49 U.S.C. §31105(b)(3)(A)(ii); *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-1 (ARB Apr. 7, 2010); *Dale v. Step 1 Stairworks, Inc.*, ARB Nos. 05-142, 06-057, ALJ No. 2002-STA-30 (March 31, 2005).

[54] *See Dale*, ARB Nos. 05-142, 06-057; *see also Dickey v. West Side Transp., Inc.,* ARB Nos. 06-150, 06-151, ALJ Nos. 2006-STA-26, 27 (ARB May 29, 2008) ("On remand, the ALJ should therefore order West Side to reinstate [the complainant] unless the parties demonstrate that circumstances exist under which reinstatement would not be appropriate.").

[55] *Polwesky v. B & L Lines, Inc.,* 90-STA-21 (Sec'y May 29, 1991) (*citing Carrero v. N.Y. Hous. Auth.,* 890 F.2d 569 (2d Cir. 1989) and *Rasimas v. Michigan Dep't of Mental Health,* 714 F.2d 614 (6th Cir. 1983)).

[56] *Cook v. Guardian Lubricants, Inc.*, 95-STA-43, slip op. at 6 (ARB May 30, 1997).

Hopkinsville. (TR at 127). The Complainant earned $6,010.60 working there between July 28, 2014 and October 5, 2014. (TR at 127, CX 4). The evidence demonstrates the Complainant made reasonable efforts to mitigate his damages by searching for jobs and securing alternative employment. Therefore, the Respondents have not carried their burden of establishing that the Complainant failed to make reasonable efforts to mitigate damages.

Back pay ordinarily runs from the date of discriminatory discharge until the date the complainant receives a bona fide offer of reinstatement or gains comparable employment.[57] The Board has approved back pay calculations based on the complainant's average weekly wage.[58] According to his 2013 Income Tax Return, the Complainant earned $23,194 at Nashville Plywood in 2013. (TR at 130, CX 5). As Nashville Plywood terminated the Complainant on December 10, 2013, approximately three weeks prior to the end of the year, I will divide his earnings by forty-nine weeks. Thus, his average weekly wage was $473.35.[59] I find the Complainant was unemployed for thirty-three weeks, starting on December 10, 2013, the day the Respondents terminated him from Nashville Plywood, until July 27, 2014, the day before he started working for Hand Family, LLC. Therefore, I find the Complainant is entitled to $15,620.55 in back pay.[60] As the Complainant's average weekly wage at Hand Family, LLC is higher than it was at Nashville Plywood, I find his back pay award should not be modified. (TR at 127, CX 4).

**3) Interest**

Pursuant to 49 U.S.C. § 31105(b)(3)(A)(iii), the Complainant is entitled to interest on his back pay award.[61] In calculating the interest on STAA back pay awards, the rate used is that charged for underpayment of federal taxes.[62] Interest is compounded quarterly, until the Respondents pay the back pay award.[63] In light of the foregoing, I find the Complainant is entitled to prejudgment interest on his back pay award, in accordance with 26 U.S.C. § 6621(a)(2), compounded quarterly.

**4) Punitive Damages**

The Complainant is seeking $50,000 in punitive damages. (Complainant's Proposed Findings of Fact and Legal Argument at 34). The STAA provides that a successful complainant may be awarded punitive damages in an amount not to exceed $250,000.[64] The Supreme Court

---

[57] *Nelson v. Walker Freight Lines, Inc.,* 87-STA-24 (Sec'y Jan. 15, 1988), slip op. at 6 n.3; *Earwood v. D.T.X. Corp.,* 88-STA-21, slip op. at 10 (Sec'y Mar. 8, 1991).
[58] *See e.g., Ass't Sec'y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34 (ARB Jan. 12, 2000); *Polger v. Florida Stage Lines,* 94-STA-46 (Sec'y Apr. 18, 1995).
[59] $23,194/49 = $473.35.
[60] 33 x $473.35 = $15,620.55.
[61] *See Johnson v. Roadway Express, Inc.,* ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), slip op. at 17-18 (citations omitted)*; Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec'y Aug. 21, 1986), *overruled on other grounds, Roadway Express, Inc., v. Brock,* 830 F.2d 179 (11th Cir. 1987).
[62] *See* 26 U.S.C. §6621(a)(2); *see also Johnson,* ARB No. 99-111, slip op. at 17-18; *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp. d/b/a/ Bearden Trucking,* 03-STA-36 (ARB June 30, 2005).
[63] *See Murray v. Air Ride, Inc*., ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000); *See also Bryant,* 03-STA-36, slip op. at 10; *Johnson,* ARB No. 99-111, slip op. at 17-18; *Cotes*, ARB No. 99-061, slip op. at 3.
[64] 49 U.S.C. §31105(b)(3)(C).

has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law."[65] 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."[66] However, punitive damages in employment discrimination cases are inappropriate where a complainant fails to present "any evidence of malice or reckless indifference or egregious or outrageous behavior."[67] In this case, the Complainant has not presented any evidence to show that the Respondents acted with a reckless disregard for his rights, or with the purpose or intent to harm him. Accordingly, I find that the Complainant has failed to establish that he is entitled to punitive damages.

**5) Emotional Damages**

The Complainant is seeking $100,000 in compensatory damages for emotional distress and mental pain. (Complainant's Proposed Findings of Fact and Legal Argument at 33). The Complainant testified that while he was unemployed, he lived off his savings and income tax refund, and he liquidated his 401K retirement account. (TR at 127-128). He testified he felt "betrayed," "worthless," and "depressed." (TR at 128). Moreover, he could not provide his two nieces, who live with him, a meaningful Christmas because he did not have disposable income. (*Id.*). Although the Complainant has not provided medical evidence of his emotional distress, the Board has "affirmed compensatory damage awards for emotional distress, even absent medical evidence, where the lay witness statements are credible and unrefuted."[68] I have found the Complainant to be a credible witness. His unrefuted testimony demonstrates how being terminated from Nashville Plywood affected his savings, retirement, and living circumstances. Therefore, I find he is entitled to $15,000 in compensatory damages for the emotional distress resulting from his wrongful termination.

---

[65] *Smith v. Wade*, 461 U.S. 30, 51 (1983).

[66] *Id.* (citing Restatement (Second) of Torts §908(1) (1979)).

[67] *Tepperwein v. Entergy Nuclear Operations, Inc.,* 663 F.3d 556, 573 (2d Cir. 2011) (decided under Title VII); *see also Kolstad v. Am Dental Ass'n*, 527 U.S. 526, 534 (1999)(holding that punitive damages in employment discrimination cases require evidence of "malice" or "reckless indifference" to an employee's federally protected rights).

[68] *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ No. 2012-STA-11 (ARB Apr. 30, 2014); *see also Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63 (ARB June 30, 2008) (ALJ awarded compensatory damages of $10,000 for emotional distress based on the Complainant's testimony about depression and distress he experienced as the result of his discharge, about having to live off his retirement savings as a result of his discharge, and about his continued unemployment. The Board acknowledged that the Complainant had turned down a comparable job, but nonetheless affirmed the ALJ's award. The Board also affirmed the ALJ's reliance on his observation of the Complainant's distress during the hearing); *Hobson v. Combined Transport, Inc*., ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008) (Board affirmed the ALJ's award of $5,000 in compensatory damages for stress and anxiety which was based solely on the Complainant's testimony and was not supported by medical evidence. The Board noted that the ALJ had found the testimony credible, that it was unrefuted, and that the Board has affirmed reasonable emotional distress awards that had been based solely on the employee's testimony); *Ferguson v. New Prime, Inc*., ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011) (Board affirmed as supported by substantial evidence the ALJ's award of $50,000 in compensatory damages for emotional distress based on the Complainant's unrefuted and credible testimony, even though the testimony was not supported by any medical evidence).

**6) Abatement**

The Complainant seeks an order requiring the Respondents to post this Decision and Order for ninety consecutive days in a place where employee notices are customarily posted at Nashville Plywood. Moreover, the Complainant seeks to have Nashville Plywood expunge from his personnel records all references to his discharge. I find that such relief is appropriate under the STAA.[69] Therefore, Respondents shall: (1) expunge from the Complainant's personnel file all information pertaining to the Complainant's termination; (2) correct any reports to consumer-reporting agencies concerning the Complainant's work record; and (3) post this Decision and Order for ninety (90) consecutive days in a location or locations within Nashville Plywood's facilities where employees may accessibly read it.

## ORDER

Based on the foregoing, Paul Irwin's request for relief under the employee protection provisions of the STAA is **GRANTED**. I hereby **ORDER** the following:

1. **Reinstatement**: The Respondents shall immediately reinstate the Complainant as a driver with the same pay, terms, privileges, and conditions of employment that would have applied to him had he remained working for Nashville Plywood since December 10, 2013;

2. **Back Pay**: The Respondents shall pay the Complainant $15,620.55 in back pay, with interest in accordance with 26 U.S.C. § 6621(a)(2). The Respondents shall jointly share liability for the award of back pay;

3. **Compensatory Damages**: The Respondents shall pay the Complainant $15,000 in compensatory damages for the emotional distress resulting from his wrongful termination. The Respondents shall jointly share liability for the award of compensatory damages;

4. **Abatement**: The Respondents shall expunge from the Complainant's personnel file all information pertaining to the Complainant's termination and post this Decision and Order in its facilities for ninety (90) consecutive days; and

---

[69] *Cefalu v. Roadway Express, Inc*., 2003-STA-55 (ARB Jan. 31, 2006), *aff'd sub nom*., *Roadway Express v. United States Department of Labor,* 495 F.3d 477 (7th Cir. 2007).

5. **Attorney Fees and Costs**: Pursuant to 49 U.S.C. § 31105(b)(3)(A)(iii), the Complainant's attorney may be entitled to reasonable attorney fees. The Complainant's attorney is hereby allowed thirty (30) days to file an application for fees. The Respondents shall have fifteen (15) days following service of the application within which to file any objections, plus five (5) days for service by mail, for a total of twenty (20) days.

JOSEPH E. KANE
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

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).