

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 February 2016

Case No.: 2014 STA 00069
In the Matter of

BRANDON T. HOPPER,
Complainant,

v.

MARTEN TRANSPORT, LTD.,
Respondent.

Appearances: Mr. Paul O. Taylor, Attorney
For the Complainant

Mr. Stephen A. DiTullio, Attorney
For the Respondent

Mr. Scott M. Paler, Attorney
For the Respondent

Before: Christine L. Kirby
Administrative Law Judge

DECISION AND ORDER

This action arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (“STAA” or “Act”) of 1982, as amended and re-codified, Title 49 United States Code Section 31105, and the corresponding agency regulations, Title 29, Code of Federal Regulations (“C.F.R.”) Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules or cause serious injury.

Procedural Background

On September 17, 2013, Complainant, Brandon T. Hopper, filed a complaint of alleged illegal discrimination by Respondent, Marten Transport, Ltd. based on the July 25, 2013, termination of his employment. On June 19, 2014, after an investigation of Complainant’s complaint by the Occupational Safety and Health Administration (“OSHA”), United States Department of Labor (“DOL”), the Regional Administrator dismissed the complaint. On July 18, 2014, Complainant filed a timely objection to the adverse determination and requested a hearing with the Office of Administrative Law Judges. On April 14, 2015, pursuant to a Notice

of Hearing dated September 23, 2014 (ALJ 1),¹ I conducted a hearing in Kansas City, Missouri. My decision and order in this case is based on the testimony presented at the hearing and the following documents admitted into evidence: CX 1-11; RX 2-16, 18, 19, 21;² RX 22, and ALJ 1-2. (TR. 5, 10, 12, 252). Both parties filed post-hearing briefs in this matter and Respondent submitted an additional letter on August 13, 2015, in response to Complainant's brief. Complainant did not submit a response to Respondent's letter.

Complainant's Statement of the Case

Complainant asserts that Respondent unlawfully discharged him from employment in retaliation for his protected activities. He asserts that he was retaliated against for his complaints to supervisors and refusal to operate his assigned tractor-trailer sets on May 13, 2013, and July 15, 2013, because he believed they exceeded the weight allowed by law and would cause him to be in violation of laws and regulations governing vehicle weight restrictions. He also asserts that he was retaliated against for his complaints to supervisors and refusal to operate his assigned tractor-trailer sets on June 19, 2013, July 1, 2013, and July 9, 2013, because his assigned dispatches, if completed as directed or scheduled would have resulted in violation of the hours of service regulation.

Complainant asserts that he did not resign his position with Respondent, but that Mr. Reda, Respondent's Operations Manager, confronted and baited him by telling him that he should "part ways" with Respondent because they "weren't seeing eye to eye". Complainant asserts that the reason for this conversation with Reda was because Reda was upset over Complainant's protected activities of refusing to haul loads because they either exceeded the weight allowed by law or would cause him to violate the hours of service regulation. Due to his refusal of loads, which Complainant asserts was protected activity, Respondent chose to interpret Complainant's actions as a resignation. Complainant asserts that Respondent, in fact, unlawfully discharged him by characterizing his actions as a resignation. Complainant further asserts that Reda's actions in telling him that it was time to "part ways" constituted harassment or other retaliation within the meaning of the Act.

Complainant asserts that Respondents took a second adverse action against him when it placed negative information in his Separation Form prepared by his supervisor, Mr. Stratman, with Mr. Reda's assistance. Specifically, in the comment section of the form, Stratman wrote that there were "Constant issues with driver failing to come out of the house and refusing freight." Complainant asserts that Respondent placed this comment on his separation form because it was unhappy with him for his refusal to drive in violation of weight and hour restrictions, i.e., his protected activity.

¹The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

² At the hearing, Respondent withdrew RX 17 and 20. (TR 7-8).

Respondent's Statement of the Case

Respondent asserts that it did not take any adverse actions against Complainant. It asserts that Complainant voluntarily resigned his position because he was unhappy with being assigned a load outside his normal route. Respondent asserts that this behavior was in keeping with Complainant's history of frequently resigning from positions. Respondent further asserts that Mr. Reda understood Complainant to say that he wanted to resign. Respondent asserts that Reda did not have the authority to discharge Complainant and only a human resources official could discharge an employee, which would only have been done after progressive discipline and not for the refusal of a single load. In support of its position, Respondent asserts that Complainant was never given a termination letter, his supervisor was in the process of scheduling Complainant for additional routes, he was permitted to continue driving approximately 200 miles after the conversation with Reda, Complainant did not file an internal complaint, the separation documents reflect that Complainant resigned, and Respondent offered to purchase a bus ticket for Complainant to return home, which it would not have done in the case of a termination. Respondent further asserts that Complainant, himself, described his separation as a resignation when seeking subsequent employment. Finally, Respondent asserts that it would not have terminated Complainant because he was a safe, productive driver and it was experiencing a driver shortage.

In its brief, Respondent does not deny that Complainant engaged in protected activities,³ but rather concedes that Complainant engaged in protected activity by stating that there was no "significant disagreement" over Complainant's protected activities and that in all cases the loads in question were either reassigned to other drivers, adjusted so as not to constitute violations, or did not, in fact, constitute violations of any laws or regulations.⁴ (R. Br. at 25, et seq.) Respondent admits that Complainant refused to haul loads due to claims of them being overweight or that taking them would result in hours of service issues, but states that Complainant was never disciplined for refusing such a load and that the conversation leading to Complainant's resignation from employment did not result from any protected activity. Rather, Respondent argues that Complainant resigned because he did not want to accept a driving assignment to New Jersey, which was outside of his normal region.

Respondent further argues that the alleged decision-maker, Mr. Reda, did not know of all of Complainant's protected activity, but only was aware of two alleged instances of protected activity, May 13, 2013, and July 15, 2013, when Complainant refused loads that were allegedly over the legal weight that could be hauled. Of these two incidents, Respondent argues that the July load in fact, fell within legal limits and therefore if Complainant had taken it, it would not have resulted in an actual violation of law. Respondent argues that Complainant's mere belief that the load was outside legal weight limits cannot support a claim of retaliation. With regard to

³ In its opening statement, Respondent conceded that there were some issues that came up between Complainant and Respondent about refusing loads due to weight and hours of service issues. Respondent characterized these issues as the normal issues that often come up between drivers and managers. (TR 20). In its brief, Respondent does assert that the refusal of a load on July 15, 2013 was not protected activity. (R. Br. at 27-28).

⁴ In its brief, Respondent disputes that Complainant's July 15, 2013, refusal of a load was protected activity because, according to Respondent, Complainant merely *believed* that driving the load in question would have resulted in a violation of law, but argues that it would not have resulted in an *actual* violation of law. (R. Br. at 27-28).

the May 2013 overweight load, Respondent argues that because this event occurred "multiple months" before his separation, Complainant was not disciplined at the time, and he was given a different load the same day, that Complainant cannot establish that it was a contributing factor to any alleged adverse employment actions taken against him in July 2013. (R. Br at 27-28).

Stipulations

The parties stipulated in relevant part to the following:

1. Complainant was an employee of Respondent, was not a member of a labor union, and his employment was not subject to the terms of a collective bargaining agreement.
2. Respondent is an employer within the meaning of the Act.
3. From about May 5, 2011, to January 6, 2013, and from March 2013 to July 24, 2013, Respondent employed Complainant to operate commercial vehicles with a gross vehicle weight rating of 10,001 pounds or more on the highways in interstate commerce.
4. Complainant's last day of work for Respondent was July 25, 2013.
5. On September 17, 2013, Complainant filed a timely complaint with the Occupational Safety and Health Administration (OSHA), alleging, among other things, that Respondent had discharged him and retaliated against him in violation of the employee protection provisions of the Act.
6. On June 19, 2014, the Assistant Secretary of Labor issued a preliminary decision and order dismissing Complainant's complaint.
7. On July 18, 2014, Complainant filed a timely objection to the Assistant Secretary's Findings and Order and requested a *de novo* hearing before an Administrative Law Judge.
8. The United States Department of Labor, Office of Administrative Law Judges has jurisdiction over the parties and subject matter of this proceeding. (ALJ 2).

Issues

1. Whether Complainant engaged in protected activity;
2. Whether Respondent knew of the protected activity;
3. Whether Respondent took any adverse employment actions against Complainant;
4. Whether Complainant's protected activities were a contributing factor to any adverse employment actions taken against him.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Sworn Testimony⁵

Mr. Chad Christy
(TR. 22, 267)

[Examination as adverse witness] He has been employed by Respondent for five years and is a fleet manager. A fleet manager is responsible for setting up loads, dispatching trucks, taking care of things that need to be done on the truck, working with the drivers to make sure their home time is met on time and in accordance with regulations, and managing the truck. A fleet manager is also known as a dispatcher. In 2011 he began working at Respondent's Kansas City area terminal. His supervisor was Seth Reda. In August 2013, he transferred to Mondovi, Wisconsin. One of his duties is to make sure trucks run profitably. In May 2013, he was Complainant's immediate supervisor. In late May 2013, Mark Stratman became Complainant's immediate supervisor. He helped to train Stratman.

He did not provide any information for Complainant's separation form (CX 8). From the separation form, he understands that Complainant had constant issues refusing freight and coming out of the house. Drivers have to earn home time. For every 5 days they are away from home, they are entitled to one day of home time. The Kansas City regional format was two days off every other weekend. He cannot recall any specific dates when Complainant failed to come out of the house.

Complainant's driver log (CX 8) reflects that on June 7, 2013, Complainant went off duty at home. He was off duty for the next two days and came back on duty at 6:33 AM on June 10, 2013. Based on the log, he cannot tell if Complainant returned on time. The log shows also that Complainant went off duty on June 21, 2010, at home. He was off duty the next two days and came out of the house at 8:51 AM on June 24, 2013. He cannot state whether the log shows that Complainant had trouble coming out of the house.

He cannot recall any specific dates during the period he supervised Complainant that Complainant had a problem coming out of the house. However, he knows that on more than one occasion, Complainant came out of the house late. They never took any disciplinary action against Complainant, but they dealt with this issue. He does not recall the circumstances of the actual loads or specific dates when they had such issues with Complainant. CX 8, page 2 shows Complainant's miles for April 2013. His miles for April through June 2013 were about average for drivers. It is possible to come out of the house a few hours late and miss a pickup and then be dispatched on another pickup. The more time a driver spends at home, the less money he makes.

RX 11 shows Qual-Comm interaction between the driver and fleet manager. Qual-Comm has several elements including a GPS system to track trucks and a communication system. The driver has a screen and keyboard to type messages to send them to dispatch, the service

⁵ The summary of testimony is not intended to be a verbatim recitation of testimony, but is merely a summary of the key points of the witness' testimony

department, safety, payroll, and other places in the company. Respondent personnel can send messages back to the driver. The system also has macros that the driver can hit with one button to indicate form messages and fill in the details.

The Qual-Comm indicates that on May 10, 2013, he dispatched Complainant on a load from the Edwardsville, Kansas terminal for delivery in St. Joseph, Missouri. He cannot tell whether Complainant had an issue coming out of the house on that day.

RX 11, page 3 (May 13, 2013) indicates that Complainant informed him that the trailer was overweight by 1,440 pounds. This indicates that Complainant was saying the load was over the legal weight on the drive axle. Complainant returned the load back to the terminal and refused to pull the load because it was overweight. Complainant was sent back to the yard for another truck to deliver. He does not recall the specifics of the conversation with Complainant, but he recalls the incident. He recalls discussing with Complainant that the load was overweight and that it was brought back to the terminal for another truck to work with. He recalls that Complainant was asked to slide the load and asked why he could not make the axles legal on the trailer. He believes that Complainant said he could not slide it and make it legal. Another driver delivered the load to St. Joseph Missouri. They may have used a smaller truck to make the load legal. He agrees that the load was too heavy for the Complainant's truck based on the Qual-Comm message, but he does not recall seeing a weight slip or a reweigh slip, which would have showed trying to slide the tandem axles. Complainant said he tried to slide the tandems and could not get the load legal which is why another tractor would have [taken it].

CX 6 is a Certified Automated Truck (CAT) scale ticket dated May 13, 2013, that indicates there was a weight measurement taken for Respondent. It shows the drive axle weight at 35,440 pounds. It would have been illegal to haul this load with that kind of drive axle weight. He does not recall whether Complainant gave him the ticket on May 13, 2013.

The Qual-Comm records at RX 11, page 6 indicate that Complainant sent him a message on June 19, 2013, asking him if he wanted Complainant to lay-over. He responded to Complainant asking him if he could break there and Complainant responded that he could not deliver because he would be on a 10 hour break. This indicates to him that Complainant would have been on his 10 hour break under the DOT regulations. A driver could not drive over 11 hours in a single duty cycle without having 10 hours uninterrupted time off duty. A driver also had to commence a 10-hour break of uninterrupted time off duty not later than the 14th hour after he first came on duty. Looking at RX 11, page 6, he believes Complainant was stating that he could not make a delivery on the load he had been dispatched on without violating the hours of service regulation. This was a normal conversation between himself and a driver trying to work out a problem if there was one. At the end, Complainant stated he could not do it because he would be on a break.

In May 2013, when Complainant brought the load going to St. Joseph back to the terminal, Mr. Reda knew that Complainant had brought the load back because he was at the yard.

[Direct Examination by Respondent] (Tr. 267) As a fleet manager, he was provided training on hours of service requirements and weight requirements for trucks operated by

Marten. He never instructed Complainant to drive an overweight vehicle in violation of Federal or State law. He never instructed Complainant to bypass state weigh-in scales for trucks. He did not instruct Complainant to take a load from Kansas City to St. Joseph by avoiding a state scale. He would not tell a driver to bypass state weigh-in scales for trucks. He did not instruct Complainant to violate the hours of service rules. He would never force anybody to do anything illegal.

He does not recall suggesting to Reda that Complainant was a poor employee. He did not view Complainant as being an unsatisfactory driver. He does not recall talking to Reda about Complainant's employment status during July of 2013. He never recommended to Reda or anyone at Marten that Complainant be discharged. His understanding was that only Human Resources could terminate a driver.

[Cross Examination] He does not recall suggesting to Reda that Complainant had constant issues coming out of the house, but he is sure that Reda, as the Operations Manager would have been aware of such issues if there were such a situation. He communicated with Reda every business day. He was located only a few feet from Reda's office. He does not believe that there was ever a specific instance where he communicated to Reda that Complainant had constant issues refusing freight. He cannot recall a specific load that he would have told Reda about. If Complainant had refused a load, he probably would have handled the situation on his own. It is important that Marten meet its delivery schedules and commitments to customers.

Mr. Mark Stratman
(TR. 54, 273)

He was employed by Marten upon his graduation from Iowa State and was a Fleet Manager and Complainant's immediate supervisor in June and July of 2013. He dispatched trucks. Complainant's Exhibit 8 is a Separation Form that Stratman prepared. He wrote in the comments section "Constant issues with driver failing to come out of the house and refusing freight." He also wrote that the type of termination was "Resignation" and that the reason for termination was "Refused Load." Failing to come out of the house means that a driver spent more than the allotted days given for home time.

In order to fail to come out of the house, you have to be at home. Looking at CX 8, page 2 (separation form), during the period that he supervised Complainant in June and July of 2013, Complainant was home one time. In June and July of 2013, Complainant had zero days at home. Even though the form says Complainant had no days at home in June and July, the form might not necessarily be accurate. However, he prepared this document. Compared to other drivers, Complainant did not spend an inordinate amount of time at home. Looking at CX 8, page 1, where the form says that Complainant had constant issues refusing freight, he cannot recall any particular load that Complainant refused to haul.

Looking at RX 11, page 7 (Qual-Comm communication, July 1, 2013), a general message was sent out to the entire fleet telling employees to remember to send any request for time off two weeks in advance. Then, there is a text sent from Stratman to Complainant stating, "Working on the next load. Planner had you on 2100 live load. You wouldn't have the hours to

make that." Further down, Complainant sent a message to Stratman stating, "What are you looking at for later today? I will have hours to work with." He understood that Complainant was telling him that he only had 5 hours of available on duty time to work with without violating the hours of service regulation. Further down, there is a dispatch of 24 pallets going from Corn Products International in Argo, Illinois, to New Holstein, Wisconsin. The load was scheduled for pickup at 2100. It was scheduled to deliver at 8:00 AM. He does not know how far it is from Argo to New Holstein.

Looking at RX 11, page 8, [July 1, 2013] he sent Complainant a message stating, "Planner needs us on this load. You can break at shipper. You just have to park and then break. You will be fine." This message was in reference to telling Complainant pick up the load in Argo, Illinois and break at the shipper. The initial load was sent at 10:25, so if Complainant took a break at the shipper until 20:25, then he would be there ready to go after his break was up. He does not know where Complainant was at 10:25. In order to pick up a load at 2100, it would be 11 o'clock in the morning. If Complainant were in Tomah, Wisconsin at 10:00 AM, it would be difficult getting to Argo, Illinois and taking his break at the time suggested. They are able to track drivers with a GPS.

He believes Complainant refused the load going from Argo, Illinois to New Holstein, Wisconsin because he needed to take a 10 hour break. Stratman then attempted to dispatch Complainant at 4:00 PM in Northbrook, Illinois at Highlands Bakery on a load going to Oakwood Village, Ohio. He does not know the distance from Northbrook to Oakwood Village. At the time he attempted to dispatch Claimant on this load, he had already received the message from Complainant informing him that he only had 5 hours to work with. The load was to be loaded at 4:00 PM Central time and delivered at 9:30 AM in Oakwood Village. Driver's log-in in the time zone in which their home terminal is located. Complainant told him he had 5 hours to work with. Stratman dispatched him on a load that loaded at 4:00 p.m. in Northbrook Illinois, and delivered in Oakwood Village the next morning at 8:30 Central time. On page 9 of RX 11 (July 1, 2013), Complainant acknowledged the dispatch and told Stratman that he did not have the hours to complete this run.

On RX 11, page 14, [July 9, 2014] he sent a text to Complainant stating, "We don't have anyone that can take that at the moment. Any way you can get to Norfolk at some point today?" He received a message back from Complainant stating, "Mark, I hate to ask, but I am sick and very fatigued from getting up at 1:30 last 'cpl' (couple) nights. Is there anything we can do with this load? I am at Pilot Knob, Salina, Kansas." Then Stratman sent Complainant a message stating, "Can you push through and run out your clock today? It is only four more hours." He was asking Complainant if he was too fatigued to run four hours. He was asking Complainant to run out the hours he had left on his clock for the day.

He understands that drivers have to plan their stops so that a truck stop or rest area with available parking is available when they run out of hours. In Complainant's message (July 9, 2013) when he said he was short of hours to drive all the way, Complainant was saying that he did not have time available without breaking the Hours of Service regulation. Complainant responded that he was short of hours to drive all the way. Then Stratman sent him a message stating, "Take your break now until midnight or 0100. Run straight through and you can make

the other two deliveries." Then Complainant sent a message stating, "I just woke up, seen you called." Stratman responded saying, "Why can't you make North Platte. It is a drop and hook facility. They should have parking for you." Complainant responded, "Because 14 hours. I leave tonight and appointment is an hour past my 14 tomorrow." Stratman understood that this meant that at the end of the 14th hour, after first going on duty, a driver had to commence a 10 hour break. He understood that Complainant was telling him this on July 9, 2013. He then sent Complainant a message back stating, "You good on that plan? There is no one to repower this." Complainant responded stating, "I can make Norfolk but not North Platte."

RX 11, page 16 [July 10, 2013] has a message from Stratman to Complainant stating, "I am not sure if that was a question or a statement, but I just reconfirmed with Customer Service, he is confident they will take you early. If you can't park there, find parking close. It is North Platte, Nebraska. There has got to be something." Stratman was telling Complainant to keep driving to North Platte and park there and that they would unload his truck early. Complainant responded, "I will be able to check in at 1400. Perfect. I appreciate it."

RX 11, page 17 [July 15, 2013] shows that Stratman dispatched Complainant to pick up a load at Lamb Weston Corporation in Fort Worth, Texas on July 15, 2013. He thinks the load was going to Houston. Complainant telephoned Stratman and told him the load was overweight when he went to pick it up, meaning it exceeded the legal weight limit. Stratman asked Complainant to drive the load to a commercial scale to have it weighed. Complainant responded that he was not going to drive there because the load was overweight, and he already knew it was overweight. This was said in a conversation with Complainant. Stratman attempted to persuade Complainant to drive the load to the scale and Complainant refused. Stratman involved his supervisor, Seth Reda.

The system showed the estimated weight for the load, so he told Complainant to take it to a scale house to weigh it and if it was overweight to bring it back. If it was not overweight he was to go. If the weight was over 44,500 pounds it could be overweight depending on the tractor. He does not know how much the load weighed or how much the bill of lading reflected the weight to be. If Complainant received a [police] ticket for pulling an overweight load, the ticket would be on him. CSA stands for Comprehensive Safety Analysis. Drivers have a permanent record that follows them around for a number of years for any infraction of commercial vehicle regulations. He does not recall if Complainant told him on July 15 what the weight was on the bill of lading. At his deposition in January, Stratman stated that he was sure that Complainant told him the weight on the bill of lading. He put another driver on that load.

He was Complainant's supervisor at the time of his separation from Marten. Complainant never told him that he had resigned from his employment.

[Direct examination by Respondent] (TR. 273) He does not recall Complainant having any speeding citations, accidents, or disciplinary warnings. Complainant was never disciplined at Marten.

He communicated with Complainant during his appointment in part by Qual-Comm messages. RX 11, page 18 contains a statement that he sent to Complainant on July 23, 2013 in

which he communicated to Complainant that he was working on his plan for the upcoming weekend of July 27 and 28. When he sent this message to Complainant, he understood that Complainant was going to continue to drive for Marten Transport. He had no expectation at that time that Complainant's employment would be ending any date. In the day following the July 23 message, he did not receive any indication from anyone at Marten that Complainant was going to be discharged, or that he should be routed for discharge.

RX 11, page 20 contains a message he sent to Complainant on July 24, 2013, at 7:47 AM. In the message he was communicating to Complainant that his next load would be to Edison, New Jersey. Complainant called him immediately after this message was sent. Complainant said that he was not happy with the load to New Jersey. Stratman told Complainant that the load was in his best interests. He has heard drivers complain about receiving New Jersey routes before. When you are going on the East Coast, there is a lot more congestion, the roads are smaller, and it takes more time to do fewer miles. Since drivers are paid by the mile, it is less favorable. He understood that Complainant was unhappy because he did not want to go to New Jersey. Stratman transferred the telephone call to his manager, Reda. It was not out of the ordinary to transfer a call to Reda. At no time before this phone conversation had he ever recommended Complainant's discharge. He did not want Complainant to be discharged. He is unaware of anyone at Marten who wanted Complainant to be fired. If he lost a driver, it would reflect poorly on him.

The reason he transferred the call to Reda was because he believed the conversation was no longer being productive. He was trying to convey to Complainant that this load would be in his best interests, but he wasn't being successful in that. After Reda and Complainant hung up the telephone, Stratman spoke to Reda who told him that Complainant had resigned.

He completed a Separation Form for Complainant (CX 8). On the form, he identified Complainant's separation as a "resignation" because to his knowledge Complainant had resigned. He received this information from Reda. In the comment section he meant to convey the issues they had. Complainant frequently refused freight and was hard to get out of the house after scheduled home time. When you are filling out the form, you are required to enter comments. You cannot submit the form without entering comments, so you fill it out about the driver's performance, if he is resigning. This information is used in rehire scenarios so they have an idea of what the issues were. In the comments, he was not suggesting that Complainant was being discharged. On page two of the separation form, it appears that Complainant had five or six days at home between March and July of 2013. These are not the only days that Complainant actually spent at home. The computer system does not always accurately reflect the days that a driver had at home. With the computer system, you have to actually mark a driver at home and this turns off their fuel cards. For unscheduled home times, it is frequently not done. It is an extra maintenance thing that gets missed.

When any driver is going home, you get them home on Friday or Saturday and send them their next load for Monday to return to work. Frequently it would be a 9:00 load and 8:30 would roll around and he could not get a hold of Complainant. However, he did not record this anywhere. This situation happened more than once. He cannot estimate how many times it occurred.

RX 11, page 25 contains an entry on July 24, 2013, at 9:39 AM asking Complainant if he would like Marten to get him a bus ticket or if he would be arranging his own travel. With this statement, Stratman was asking Complainant whether, since he was resigning and turning his truck in, he would need travel back to his house and if Marten needed to set that up for him. If this were a discharge situation, he would not be having any discussion with Complainant about a bus ticket. After he found out that Complainant was resigning, he scheduled him for one further load. The load was for Coke, a large customer. He would not have scheduled Complainant for this load if he had been discharged. Reda assisted him with filling out the separation form at CX 8.

[Cross-examination] (TR. 289) During his time at Marten, drivers whom he supervised have been fired. He has no say in the firing decisions. When he dispatched Complainant on the Edison, New Jersey load, he told him it was in his best interests. Some drivers do not like running in New Jersey because of traffic congestion. In his experience, there is also traffic congestion in Chicago, Columbus, Kansas City, St. Louis, and Minneapolis-St. Paul. In his experience, traffic in the Chicago area is heavy and similar to that in New Jersey.

Reda did not tell him what words were used in the telephone conversation with Complainant. He did not dispatch Complainant on something other than the New Jersey load, because many times, there isn't anything else.

On the Separation Form (CX 8), he was indicating that Complainant had more than one refusal of freight. He cannot recall what other loads Complainant refused, but there were several. He refused a load out of Lamb Weston in Fort Worth, Texas that he said was overweight. He turned down two loads in the Chicago area; one going to New Holstein, Wisconsin and another going to Oakwood, Ohio.

Looking at Complainant's logs for June (RX 13), he went home on the evening of June 1 at about 4:14 PM. He was back on duty the following morning a little after 9:00. It does not appear he had trouble coming out of the house that day. The next time he went home was June 7. He was home for two days and came out on June 10. He cannot tell if Complainant had trouble coming out of the house on June 10. On June 21 he went off duty again for a little over two full days. He cannot tell if Complainant had trouble coming out of the house on June 24. It appears that in June, Complainant only went home three times.

RX 14, page 1 shows the month of July. It appears that Complainant went off duty shortly before midnight on July 5 and came back on July 8. He cannot tell if Complainant had trouble coming out of the house. On July 19, Complainant went off duty for a little over two full days. He cannot tell if Complainant had trouble coming out of the house. He was back on duty at 5:41 on July 22, 2013. That was the last time he went home for July. Based on the logs, he cannot point to any specific time that Complainant had trouble coming out of the house. He cannot remember when Complainant had trouble coming out of the house. It is a normal problem for drivers to have trouble coming out of the house. The comments section on the separation form is for the reason the driver left.

[Redirect examination] In his experience, New Jersey was complained about more often by drivers than many other places. In the comments section of the separation form, when he talked about turning down freight and failing to come out of the house, he was referring to generally refusing freight. A driver is allowed to refuse loads if there is an hours of service or overweight issue.

Seth Reda
(TR. 75, 306)

[Examination by Complainant] He has been employed by Marten transport for a little over five years. He has been the Operations Manager for Kansas City and the Central Plains area for the past three and a half years. In this role, he oversees the dispatch and coordination of all freight for the central region of the United States. He knows Brandon Hopper as one of the drivers assigned to the Kansas City Regional Fleet. Reda was Chad Christie's immediate supervisor when Mr. Christie was a fleet manager at the Kansas City terminal and was Mark Stratman's immediate supervisor from the time he came to work for Marten Transport until about a month prior to the hearing, when Mr. Stratman transferred. He worked the same hours as these two employees when he was assigned to the Kansas City Terminal.

Part of his job involves helping dispatchers resolve issues they have with their drivers. He also reviews Qual-Comm communications between drivers and Fleet Managers. He always has access to those records and reviews them on occasion to resolve an issue or check on a service failure. CX-8 is a Separation Form. Mr. Stratman put the information into the form and made the determination to put the reason for termination as "refused load." Stratman also noted in the comments section that there were constant issues with the driver failing to come out of the house and refusing freight. Reda remembers that Complainant's failing to come out of the house arose as an issue at times. He might have helped Mr. Stratman fill out the Separation Form because Stratman was fairly new at the time.

He reviewed page 2 of CX-8, the section entitled "Driver's Activity by Month," which indicated that Complainant had zero days at home in June 2013 and zero days at home in July 2013. He stated that based on the document, it did not appear that Complainant had constant issues failing to come out of the house during those months. Complainant also did not appear to have constant issues failing to come out of the house for May of that year. However, failure to come out of the house could mean a number of things, and it's possible that Complainant failed to come out of the house and it wasn't entered into the system that he was actually set at home. Drivers who constantly fail to come out of the house may be able to make up the miles throughout the week. However, if a driver spends too much time at home, he will make less money for himself and Marten Transport. A driver's miles traveled are computer-generated based on the dispatches he accepts and hauls. Complainant drove above average miles each month in April-June 2013. Complainant did not finish the month of July with the company. At times, Complainant did not have a very strong work ethic, though overall he was a good driver.

The Qual-Comm Record (RX-11) indicates on page 2 (May 13, 2013) that a dispatch or load was sent from Joliet, IL to Saint Joseph, Missouri, and that Complainant was dispatched to take the load from Kansas City, Kansas to St. Joseph, Missouri. Complainant's load was

overweight, which means that he could not legally haul the load. Reda was not aware that Complainant refused to take a load to St. Joseph, Missouri on May 13, 2013. He only became aware of this at the deposition. When drivers refuse dispatches, he might become involved if the Fleet Manager cannot resolve the issue and they have the hours to work with.

On page 7 of RX-11 (July 1, 2013), Complainant states “I will have five hours to work with.” An employee has 11 available drive hours during the day, and 14 hours that they are available to work. Therefore, the statement could mean either that he has five hours left on his 11 or five hours left on his 14.

Page 8 of the Qual-Comm Record (July 1, 2013) states, “Planner needs us on this load. You can break at shipper; you just have to park and then break.” Some shipping and receiving locations have driver parking available that would allow Complainant to take a break and run the load once he gets his hours back. If a driver runs out of hours at the dock while the load is being loaded, he should just stay at the dock. [At his deposition on January 13, 2013], Reda stated that in this situation, a driver should go to a “safe haven,” meaning the nearest place that he could park safely, but that ideally he would not need to go anywhere.

Complainant refused to haul the load from Lamb Weston in Fort Worth, TX on July 15, 2013. Reda first had a conversation with Mark Stratman in which Stratman told him Complainant was refusing the load because he believed the load to be over the weight permitted by law. He is not sure whether Complainant stated that the weight showed on the bill of lading from the shipper. A driver always receives and is required to sign a bill of lading from the customer. The bill of lading contains a description of the load, including the weight of the load. On July 15, 2013, Reda sent Complainant a message telling him to “go to the scales” because they did not have an actual weight of the load until they got a scale reading. If a driver pulls a load that is overweight, the [police] ticket is on him even if he is on his way to a scale to weigh it. The ticket will remain on his CSA score, a measurement of a driver’s safety record, for three years. Mr. Reda does not know whether Marten hires drivers with high safety scores.

Marten Transport is not under contract to haul anything over 44,500 pounds due to weight restrictions. Marten used to have contracts with customers with lighter trucks in order to haul heavier loads. However, the load Complainant was hauling was not a lightweight load. Mr. Reda never told Complainant that he was being a nuisance.

RX-11, page 18 [July 23, 2013] includes a text from Complainant stating “Text received. Have you got any pre-plan yet, boss?” A pre-plan refers to the next load that a driver will be carrying. This message does not look like a message from someone who is resigning from his job.

Complainant requested home time [on July 23, 2013] (RX 11, page 18) starting August 2. This statement also does not indicate that he will be resigning from his job at that time. RX-18 indicates the approximate pay rates that Complainant would have been making in 2013. Since then, the pay rates have increased, but he is not sure how much. The average length of the hauls Complainant handled as a Kansas City Regional Fleet Driver was in the low 400’s.

He is familiar with the Go Travel Center at the Shell Station by Marten's terminal. The CAT scale usually varies about 500 pounds on the heavy side, but is close to reliable. The load going from Marten's terminal to Saint Joseph, MO was not, to his knowledge, reworked, i.e., no weight was taken off or reconfigured.

On July 24, 2013, he had a conversation with Complainant in which Complainant seemed unhappy with Marten and his current situation, and Reda suggested that it might be best for both parties to separate or part ways. He cannot remember the exact wording he used. Complainant ultimately resigned from his position.

[Direct examination by Respondent] (TR. 305) As the Operations Manager, he was familiar with Marten's policies regarding hours of service and scale. RX 10 contains the Hours of Service policy for Marten. It applies to drivers dispatched out of the Kansas City terminal. Marten's policy is consistent with the Department of Transportation regulations. Drivers are to advise Fleet managers of any Hours of Service issues that might be coming up. Marten allows drivers to refuse the load if they do not have sufficient hours of service to run the load. This happens regularly. Marten asks drivers prior to accepting a load whether they have sufficient hours to run it. Drivers are sent a Qual-Comm message asking if they have the hours to do the load. Drivers respond with a yes or no. Drivers are not asked to deliver a load in violation of the hours of service regulations. It is illegal and would reflect negatively upon Marten and the drivers, affecting the CSA score. If a driver runs in violation of hours of service, it impacts Marten's CSA score. Marten could lose its business and customers if they do not think Marten is a safe carrier. Marten is audited by DOT in regards to a safety rating.

RX 10, page 4 contains Marten's scale policy. He is not aware of any situation where Marten has required drivers to run overweight loads. It could affect the driver and company's safety rating or CSA score in a negative manner. RX 13 is a driving log for complainant for June 2013. The June 2013 logs do not reflect any hours of service violations. RX 14 covers July 2013. It does not reflect any hours of service violations involving Complainant for July 2013.

As an operations manager, he is not allowed to discharge a driver. Only HR is allowed to discharge drivers. In July 2013, Melissa Rubin of HR would have been responsible for discharging drivers at the Kansas City terminal. If he discharged a driver, he could possibly lose his job. HR would fire someone based on recommendations from various departments such as the Safety Department, Operations Department or upper management. HR makes the final decision as to whether the company has cause to terminate. He has never personally discharged a driver but during his tenure, approximately 500-plus drivers have been discharged in the last three and a half years by HR.

In March 2013, when Complainant was rehired by Marten, he okayed it. He observed Complainant during his first and second terms of employment and communicated with him occasionally. He did not see any change in Complainant's performance or communication style. A Fleet manager would generally have more contact on a daily basis with drivers than he would. In July 2013, Stratman was Complainant's Fleet manager. During Complainant's second term of employment, Reda had contact with Complainant one to two times a month.

On July 15, 2013, he sent a Qual-Comm message to Complainant telling him to go scale the load as we don't know the actual weight of the load until we have a scale reading and we don't haul anything over 44,500, by contract. He asked Complainant to scale the load because they did not know the actual weight. Complainant ultimately refused the load. He did not scale the load as asked. Another driver scaled it legally and finished the delivery on it.

Complainant did not have any disciplinary warnings either during his first or second term of employment. He did not have arguments with Complainant during his employment other than the discussions he would have with other drivers. He did not dislike Complainant. He recommended his rehire in March 2013.

He did not discharge Complainant in July 2013. Complainant's employment with Marten ended in July 2013 in a phone conversation between Reda and Complainant. Complainant was not under any progressive discipline. He was not aware of any issues involving Complainant for which he was thinking about recommending discharge. On July 24, 2013, Stratman transferred the phone to him in reference to a refused load going into New Jersey. He does not think that Complainant refused loads out of the ordinary. Complainant was never disciplined for refusing loads. There are acceptable bases for a driver to refuse loads such as hours of service issues. If a driver has the hours of service and the load is legal, they could face possible discipline if they refuse it. That would typically be through the three-step discipline program.

In the phone conversation with Complainant on July 24, 2013, Reda raised the issue of resignation. He raised the issue because Complainant seemed unhappy and he was not seeing eye to eye with the company. Reda did not tell Complainant that he was required to resign. He has used similar language about parting ways with other drivers. Some drivers have decided to stay and some have decided to go. It is up to the driver. At the time of the July 24, 2013, conversation with Complainant, he was not considering recommending Complainant for discharge. He never used the words discharge, terminate or fire or anything to that effect. He never had a discussion about Complainant with the HR Department in July 2013. He never discussed Complainant's resignation with anyone at the Indianapolis terminal. He never discussed Complainant with Joshua Netherton, the shop foreman. If Complainant had not resigned during the phone call, he would have continued working for the company in July 2013. During the phone call, they did not discuss any overweight or hours of service issues.

If a driver is discharged, they would not be allowed to continue to drive the Marten vehicle. The equipment would be taken to a terminal to lockdown immediately or if it were outside the terminal area, it would be taken to a yard to lockdown immediately. Drivers are not allowed to drive the equipment after separation. At the time of the July 24, 2013, call, Complainant was located in Columbus Ohio. If he had been discharged, they would have had him go to a towing company or sit there and lock the truck down. If a termination were to happen, even before termination was mentioned, the driver would go to such a place so he would not be operating the vehicle. The driver is never informed of discharge prior to the truck being locked down. He would be fired if he allowed a driver to continue driving after termination. There would also be insurance issues involved.

When a driver separates from Marten, a separation report is prepared by the Fleet Manager. At times he suggests information for the Fleet Manager to include in the document. He recalls making suggestions to Stratman as to what to include in Complainant's separation form. He probably helped Stratman with the "comments" section as well as the last day worked. He would have told Stratman that the type of termination was a "resignation." The form says that the reason for termination is "refused load" because that led to the conversation. In a rehire situation, Marten would review the comments section, the reason for termination, and the type of termination. He did not recommend that Stratman use the 901 code under the work record. He thinks HR would have put that in there. In a resignation, Marten would provide a bus ticket home for the driver. In a termination, the driver has the choice to get a bus ticket or find his way home, or it would be payroll deduction. He told Stratman that if Complainant wanted a bus ticket, the company would get him one. Complainant would not have been charged for a bus ticket.

Complainant's performance was satisfactory as to the number of miles he was driving. He was within the norm for drivers at Marten. Without Complainant driving for Marten, he would have had to find other drivers to cover Complainant's miles. Turnover would hurt the Fleet. They would have to reseat the truck and hire a new driver, which is costly. There is a driver shortage at Marten. The company's foremost mission right now is to get drivers. It was the same in 2013. He purposely works with drivers and Fleet Managers to retain as many drivers as possible. They want to grow as a company. He is not aware of a driver being discharged when he had no progressive discipline, a clean safety record, and was running miles within the average.

[Cross-examination] If he wants to retain a driver he does not suggest to them that, "it is time we part ways." He suggested to Complainant that they part ways based on how unhappy Complainant was. They had a conversation in which they both agreed that it was time for them to go their separate ways. He does not remember the exact verbiage. He raised the issue of resignation with Complainant. He did this because he believed that Marten and Complainant were not seeing eye to eye. At the time, they were not seeing eye to eye regarding the refused load, but there were other issues that he presented. A driver could be happy one day and then miserable the next. He and Complainant were not seeing eye to eye when Complainant refused to scale the load at Fort Worth Texas. He does not know if Complainant was asked to scan the bill of lading and e-mail that to Marten.

He is allowed to recommend termination for operations issues, for progressive discipline. He does not think that if a driver is told that it is time to part ways, that he might construe that as a firing. Complainant was a safe driver. "CSA" stands for "comprehensive safety analysis". He is not saying that Marten never gets violations by its drivers. He is not certain how often compliance reviews are conducted. Marten has a satisfactory safety record from the Federal motor carrier safety administration.

He assisted Stratman with filling out the Separation Form. He suggested that Stratman put all of the comments necessary so that the rehire process could look at them. He cannot name any other loads that Complainant refused, but he knows there were some instances. He

remembers after one load, Complainant refused to come out of the house. He cannot remember if that was the first or second time that Complainant worked for Marten.

[Redirect examination] He understands that Marten wants to limit as much as possible violations for hours of service, overweight issues or other safety issues.

Mr. Brandon Hopper
(TR. 106)

Direct Examination

Complainant has lived in Otterville, Missouri for six years. He has one child and lives with his child, fiancée, and her child. His family relies on him for financial support. He has completed the tenth grade and attended a month-long accredited commercial driver's license (CDL) school in 2005 to become a truck driver. He holds a commercial driver's license from Missouri, which he first obtained in April 2005 and has continued to hold since that time. Prior to working at Marten, he operated tractor-trailers of various types. He has driven in all of the contiguous 48 states with the exception of Nevada, Montana, and Vermont. He estimates that he has driven 8-900,000 miles in a commercial vehicle and has worked for Butler, Hogan, Trans-Am, TMC, and Steelman in addition to Marten. He applied to work with Marten in 2011 based on the company's reputation, specifically, the quality of its equipment. He began work as a Kansas City Regional Driver mainly in the Midwest.

Complainant left Marten Transport in January of 2013 for an opportunity to dispatch lumber trucks for a local company. When this opportunity did not work out, he reluctantly returned to Marten, and they were happy to have him back. He returned to Marten because they are a good company. His supervisor when he returned was Chad Christy. He feels he had a good working relationship with Mr. Christy. He was part of the Kansas City Regional Fleet when he returned to Marten.

The home-time policy was that you earned one day of home time for every five days on the road, and you had a minimum of two weeks on the road before you could have home time. In regards to CX-8 (separation form), which notes "Constant issues with driver failing to come out of the house and refusing freight," he has never failed to come out of the house. When he worked for Marten Transport the second time, he was typically at home every 2-3 weeks and would stay at home just for the weekend.

While working at Marten, he would refuse freight for hours of service, meaning when he could not run the load legally because he had met his hours. On May 13, 2013, he was assigned to transport a load from the Kansas City terminal to Saint Joseph, Missouri. (RX-11, p. 2). When he arrived at the terminal, he hooked onto the load and proceeded with the pre-trip inspection of the trailer and his vehicle. This included looking at the bill of lading and comparing it to the seal on the rear of the trailer, and checking the air suspension gauges, which give the driver a general idea of the weight of the trailer. He observed that the tractor gauge was over 50 pounds, which led him to believe that the nose of the trailer was heavier than the tail-end. He adjusted the weight by sliding the axles forward, and the suspension gauges indicated

that that the weight had not shifted enough, but that it was still questionable. He then drove approximately three-quarters of a mile from the terminal to the On the Go Truck Stop to weigh the trailer on the CAT Scale.

The CAT Scale provides both a gross weight and also weighs the trailer in three separate sections: steer axles on the front of the tractor, tandem axles on the rear of the tractor, and trailer tandems. He received a copy of the CAT Scale ticket when he purchased it (CX-6). The ticket indicates that the steer axle weighed 11,680, and the steer axle rate maximum is 12,000 pounds. The drive axle weighed 35,440 pounds, and Complainant believed the legal weight limit to be 35,000 pounds. Because he believed the drive axle to be over the legal weight limit, he sent a message from the truck stop to Chad Christy stating that the trailer was overweight by 1,440 pounds. He also had a telephone conversation with Mr. Christy in which he informed him of the issue and that he was on his way back to the terminal with the load. He asked whether there was anything that could be done to adjust the load, and Mr. Christy said no. Mr. Christy asked if there was any other way they could get the load to St. Joseph, and Complainant suggested that a lighter truck could take it. He told Mr. Christy that he was going to return to the terminal with the load.

The most direct route from Kansas City to St. Joseph is Interstate 29, and there is a government scale located about halfway between the two cities. At a government scale, the scalemaster writes down the D.O.T. numbers for the company, weighs each axle, and looks for any issues that might deem the trailer out of service. There is no way of bypassing the scale. There are several other ways to get from Kansas City to St. Joseph. On May 13, 2013, Complainant drove back to the yard and went to the dispatch office, where he gave a copy of the bill of lading to his Fleet Manager, Chad Christy. Mr. Christy asked if Complainant would be willing to take an alternate route because his main concern was crossing the state scale with the overweight axles. Complainant said, "absolutely not" because an overweight ticket could give him points against his CSA score. They spoke with Seth Reda, who also asked Complainant if there was any other route that he could take. He believes that Mr. Christy and Mr. Reda said that they would dispatch the load to another driver, and asked him to unhook from the trailer.

The Qual-Comm Records state on RX 11, page 6 [June 19, 2013], "Text received. I can't deliver that. I will be out of town on a break but -." Complainant sent this message and believes that it was referring to his hours of service. The 14-Hour Rule says that you end your time 14 hours after you start, and the 11-Hour Rule says that you are allowed 11 hours of driving within that 14 hours. He believes that prior to June of 2013, a new law was passed requiring a 30-minute break before a driver's eight hours of being on duty. Other than that, you would need a 10-hour break to proceed with your next 14 hours.

RX-11, page 7 includes a [July 1, 2013] message that says "Text sent. Working on next load. Planner had you on 2100 live load. You wouldn't have the hours to make that." Mr. Stratman sent this message to Complainant. A live load takes a minimum of two hours to complete. Complainant responded "What are you looking at for later today? I will have five hours to work with." In this response, he was asking for a pre-plan and letting them know how many hours he had available.

Complainant reviewed his log for July 1, 2013. (RX-14). He began his day at 7:34 a.m. in New Richmond, Wisconsin. He received the dispatch shown in RX-11 when he was in Tomah, Wisconsin. He noted that on page one, there is an entry stating "On duty. Unload?" This means that he was at a receiver unloading in St. Charles, Illinois at 1558. The load was scheduled to be picked up at 2100 Central Time and was scheduled to be delivered in Holstein, Wisconsin at 8:00 a.m. He could not have hauled this load without violating the hours of service regulation because it likely would have violated a 10-hour break. On this date, he would have been able to load the load at Argo, Illinois, at 9:00 p.m. However, because he needed to start his 10-hour break by 9:34 p.m., he would not have been able to legally pull away from the dock at Argo. He also could not have made it to Holstein without violating the hours of service rule. He therefore refused to transport the Argo, Illinois load to Holstein, Wisconsin. Complainant always performs daily vehicle inspections, which take 10-20 minutes, after his 10-hour break.

Complainant reviewed page 8 of RX-11 [July 1, 2013], which includes a message stating "Planner needs us on this load. You can break at shipper. You will just have to park and then break. You will be fine." Whether Complainant could have actually parked at the shipper and been fine depends on the circumstances. He has never had a shipper/receiver let him keep his trailer in the dock overnight, or for ten consecutive hours. "Planner needs us on this load" means that it was urgent to comply with the customer's needs. Further down on the page, the log showed a dispatch at 16:00 Central Time from Highland Baking in Northbrook, Illinois. It would have taken at least two hours to load a live load at Highland Baking.

At page 9 of RX-11 [July 1, 2013], the log indicated that there was a load going to Oakwood Village, Ohio that would have been delivered at 9:30 Eastern Time the following day. Complainant would have finished his unloading in Northbrook, Illinois at 8:00 at the earliest. When Complainant loads up and needs a place to stay in the Chicago area for his 10-hour break, he either goes to a Marten terminal or plans not to stay in the area at all because there is limited parking. Complainant stated that, based on his driving experience, it would take two hours just to get out of the Chicago metro area, let alone two states over. There was no overnight parking available at Northbrook. Complainant did not have the hours available to bring the load from Northbrook to Oakwood Village. The log states that Complainant indicated that he could break at 21:00 but could not load at this time because he would be outside of his 14 hours. On the following page of the log, Complainant indicated that he did not have the hours to complete this run for an on-time delivery.

Page 12 of the log (RX 11) [July 1, 2013] states, "9388 has a current PTA of 07/01 14:00," indicating that Complainant's truck had a current pick-up time of 14:00. Page 14 [July 9, 2013] contains text messages between Complainant and Mark Stratman, in which Complainant states that he is sick and fatigued and asks whether there is anything that they can do with his load. At this time, Complainant was in Salinas, Kansas and had five hours available to continue driving under the 14-hour rule. According to the log, Mr. Stratman asked whether he could push through and run out his clock, and Complainant said that he couldn't and that he was short of hours to drive all the way. Complainant reviewed the logs and testified that it would have taken four hours, give or take, to drive to the destination of the load, which was Norfolk, Nebraska. According to the log, Complainant told Mr. Stratman that he could make Norfolk but not North Platte.

Page 17 of the log [July 15, 2013] shows a text from Seth Reda asking Complainant to scale the load, as they didn't know the actual weight of the load until they had an actual scale reading. The trailer was already loaded, and the pick-up was at noon Central Time from Lamb Weston Corporation. Complainant has picked up from Lamb Weston before, but he did not haul this particular load because the bill of lading weight exceeded what he believed to be a combination weight that he could legally haul. Complainant had been hauling truck-tractor No. 9388 for several months and was familiar with what it weighed with and without loads. He was also familiar with what trailers weighed empty. He could legally haul approximately 44,000 pounds and some change in his tractor-trailer set. The bill of lading for the Lamb Weston load was 45,000 and some change, which indicates that the gross weight would have been roughly 800-1,200 pounds overweight, meaning over 80,000 pounds. There was nothing else to indicate that the tractor-trailer set was overweight. He does not recall what the suspension gauges on the truck read.

When Complainant refused to haul the Lamb Weston load out of Fort Worth (July 15, 2013), he first relayed the message to his Fleet Manager, Mr. Stratman, both by telephone and Qual-Comm. He informed Mr. Stratman that he believed the load was overweight and asked if the customer could rework the load. When Mr. Stratman told him that nothing could be done until he obtained a certified scale ticket, Complainant responded that he could not do that because, to the best of his knowledge, a driver was not allowed to drive if he had knowledge that he was running overweight. To his knowledge, the nearest scale was 20 or 25 miles away. He stated that he would not pull the load unless they could get the customer to rework the load, meaning reweigh all of the freight to confirm the weight on the bill of lading or remove shipment from the load.

Complainant was then referred to Mr. Stratman's supervisor, Seth Reda. The conversation between Complainant and Mr. Reda was a repeat of the one he had had with Mr. Stratman. Mr. Reda tried to convince him that the load was legal, but he knew it wasn't. Then Mr. Reda said that he would have another truck come and weigh it, but that Complainant would have to wait for the truck. He then made remarks about Complainant being a nuisance over the last several months. The text message reading "Please go scale the load" (RX-11, page 17) [July 15, 2013] was sent to Complainant by Mr. Reda before he had the telephone conversation with him.

When Complainant sent the message asking "You got any preplan yet boss," (RX-11, page 18) [July 23, 2013] he was asking for his next assignment. The records indicate that Complainant personally requested to be home August 2-5. He followed the normal process by requesting this time off by text message. Complainant was dispatched from Abbott Nutrition in Columbus, Ohio to Edison, New Jersey. He did not take that load because he believed that he was being influenced to go through their Pennsylvania Terminal. This was based on a conversation with Mr. Stratman in which he called and asked the dispatcher if there were any loads available that morning, and the dispatcher responded that they were looking for one to get him through the Pennsylvania Terminal. Complainant asked whether that was the reason for sending him East, because it was a rare occasion and legitimate question. Mr. Stratman said he didn't know. Complainant then asked what the reason was for him going out there. It was the

tone of Mr. Stratman's voice that made Complainant suspicious. It seemed unusual to be routed through the Pennsylvania Terminal.

When Complainant refused the load going from Columbus, Ohio to Edison, New Jersey, he spoke with Seth Reda on the phone. He told Mr. Reda that from what Mr. Stratman was saying, "it sounded like you guys aren't happy with me" and that he didn't want to be out East if they were planning on doing something in retaliation. Mr. Reda informed him that this was not the case. Mr. Reda asked him if he was happy with Marten, and he responded, "yes." Mr. Reda then asked if he would like to resign, and he responded, "no." Mr. Reda stated that if he got a load through Indianapolis, he could get a bus ticket home. Complainant responded that he didn't need a bus ticket, and "if that is the way you want it," he'll "get the load from Indianapolis, but he is not resigning, and he will get his own ride home." Mr. Reda said that was fine.

The next load Complainant hauled for Marten Transport was a Coca Cola load out of Columbus, Ohio. He was instructed to take it to the Indianapolis terminal. There, he dropped the loaded trailer, took his personal belongings from the truck, and turned the keys in to the shop personnel.

After Complainant's separation from Marten Transport, he was out of work for approximately three or four days. He next went to work for PNS Enterprise, where he worked for approximately two months. His average paycheck from PNS was \$400 net. After PNS, he went to work for Starline Brass for ten months at an hourly rate of about \$10.35. He earned year-to-date wages around \$11,765.75 in 2013 from Starline. He left Starline in May 2014 and went to work for Hogan Transportation. There he made year-to-date gross wages of a little over \$3,700. Beginning in October of 2014, he began work with Steelman Transportation, where he was a contract driver making 90 cents a mile gross. Some weeks he made \$300, while other weeks he made \$1,000. He estimates that he earned about \$1,000 net after expenses. He has not been fired from any of the jobs he has had since leaving Marten, nor did he ever leave a job voluntarily without having another job lined up.

Complainant is not currently working and has been unemployed for two months. He does not have a reason at the moment to work. On July 24, 2013, he felt disappointed to not be working for Marten anymore, and then humiliated for quite some time. There are days that he still feels this way. He does not recall ever being fired before. At Marten, he made more money than with any of his previous employers. The loss of his employment with Marten affected him financially, and he was unable to participate in as many hobbies. He was able to hunt and fish the year after Marten fired him, but not as much as he wanted to or as much as he had done in the past.

Complainant did not resign his employment with Marten. He wants his job back if possible, and would like for Marten to be ordered to give him his job back. He also wants back-pay and damages for mental pain and emotional distress as well as punitive damages to punish Marten. He would like to be awarded his attorney's fees. Complainant clarified that he is currently unemployed by choice.

[Cross Examination] He never experienced a shipper allowing a truck to stay parked on the dock. It is possible that a shipper could allow a truck to stay parked at the dock if they were asked. He likes to drive everywhere. New Jersey is a more congested area for driving. Some drivers don't like to drive in certain cities, possibly for congestion reasons.

On July 24, 2013, Complainant called Mr. Stratman about the load to New Jersey because it was going out of the Kansas City region, which was unusual. He was not particularly upset about being dispatched out of the Midwest area. He called Mr. Stratman because it has been his experience in trucking that you can get a more personal feel of what is going on with the company through a phone conversation. He would have called Mr. Stratman regardless of whether he was comfortable driving a load to New Jersey.

In regards to Complainant's Qual-Comm communications set forth in RX-11, Complainant testified that no one from Marten ever stated that he was required to take the loads he had discussed in his earlier testimony. At no point did he actually weigh the Lamb Weston load. He agreed that Mr. Reda's message asking him to scale the load is not in any way confrontational and was a polite message.

During the phone conversation with Mr. Reda on July 24, he told Reda that he was not resigning, but would get his own ride home. It is not true that during the phone conversation Mr. Reda never stated to him that he was being discharged or terminated.

He believes that, as of July 22, 2013, Mr. Stratman was still pre-planning two routes for him. This would have been reflected in the Qual-Comm communications. It is not unusual to pre-plan any of the drivers. He agreed that in pre-planning his trips, there is a clear intention for him to continue running trade for Marten.

Complainant agreed that in the last ten years of his employment, he has resigned employment from trucking companies approximately 15 times. Approximately 11 of those times were before he began working for Marten Transport. Since he began working for Marten, he has resigned employment several times. He resigned employment from trucking companies for a variety of reasons, including one occasion when he resigned from a position because he did not like the pay and was unhappy with the work. Some of the positions he has held in the last ten years have been for time periods less than what he worked for Marten.

During his first term of employment lasting about a year and a half, Complainant had a good working relationship with Marten. His complaint only focuses on his second term of employment. He does not have any reason to believe that Marten retaliated against him during his first term of employment. He resigned from Marten Transport in January of 2014 because he wanted to take a non-driving position. After performing a non-driving position for two months, he decided to go back into driving. Marten was the first company he contacted to return to driving a truck because he had had such a positive experience with them.

Complainant's second term of employment lasted approximately five months, from March to July of 2013. During this time, he never received a serious warning or a final warning from Marten. He does not recall receiving any disciplinary notices during this time. Mr. Reda

was not his immediate supervisor during his second term of employment; instead, it was one of the two Fleet Managers. Prior to July 24, 2013, he had spoken with Mr. Reda about a dozen times. He had several arguments with Mr. Reda in that dozen times. This included the argument over the load going from Kansas City to St. Joseph and the argument over the overweight load where he was being a “nuisance” in Fort Worth, Texas. These were fairly brief discussions. Mr. Reda never wrote him up a disciplinary notice, and he never received a negative Qual-Comm, email, or text regarding his performance from Mr. Reda. Mr. Reda never threatened to discharge him prior to July 24, 2013.

Complainant’s phone call with Mr. Reda on July 24, 2013, lasted fifteen minutes. [Respondents’ attorney noted that, in Complainant’s deposition, Complainant testified that the phone call lasted less than five minutes.] He was located in Ohio at the time of the call. There were no witnesses on his end of the telephone call, and he has no documents confirming that his employment was terminated. It is possible that he initially spoke with Mr. Stratman on July 24, and then the call was transferred to Mr. Reda. He assumes that Mr. Stratman was the only person who dispatched him on the load. After being transferred, he spoke with Mr. Reda about the route from Ohio to New Jersey.

During the call, he refused to run the route because the tone of Stratman’s voice had led him to believe that Marten was displeased with him and because of the fact that they wanted him to go through the Pennsylvania Terminal. This made him think that he would be terminated there, and he did not want to proceed with the load further east knowing that he would need to get a ride home. During this conversation, Mr. Reda mentioned several issues that had occurred over the past several months with Complainant but did not use the words “overweight load” nor specifically mention anything about hours of service. Complainant does not know whether it was possible that Mr. Reda was referencing some of the loads he refused to take rather than any specific weight or hours of service issues. Mr. Stratman did not tell him they were going to route him to Pennsylvania in order to fire him, but he got that impression based on Stratman’s tone of voice.

Complainant had run routes east of Ohio prior to July 2013 and understood that Marten had the option to assign him to routes outside his normal region. After Complainant refused to take the load to New Jersey, Mr. Reda asked him if he would like to resign. He does not know what Mr. Reda would have been thinking if Mr. Reda understood him to say that he was, in fact, resigning. He did tell Mr. Reda that he would be getting his own ride home. After his discussion with Mr. Reda on July 24, he ran a load from Ohio to Indianapolis. During that day, he never contacted any human resources representative or management official to complain about his phone call with Mr. Reda or to complain of retaliation. He does not recall whether any human resources representative or management official contacted him to discuss his separation of employment. All he recalls from that day was the humiliation of the phone call he had to make to get a ride home from Indianapolis.

Complainant believes that Mr. Reda terminated him and then asked him to drive his vehicle from Columbus, Ohio to Indianapolis, approximately 188 miles from his location in Ohio. He agreed that an upset, terminated driver could potentially drive the truck poorly to make the company look bad, could damage the truck, or could damage property to a third party or

injure a person. The truck was carrying a load from Coca-Cola, one of Marten's largest customers.

During the conversation on July 24, 2013, Mr. Reda offered Complainant a bus ticket home. He does not know whether Marten purchased a bus ticket for him. He is not aware that Marten charges drivers for bus tickets if they are discharged from the company. He does not recall whether he received a discharge or termination letter from Marten after July 24, 2013. After he drove his last trip with Marten, he received a monthly safety letter in the mail, a regular letter that goes out to drivers. He did not receive anything else from Marten.

Complainant received a Driver's Employee Handbook during his first term of employment with Marten. He signed an acknowledgement form in regard to receipt of that handbook. He did not receive this handbook during his second term of employment. Mr. DiTullio noted that RX-4 indicates that Complainant signed a form indicating that he did receive the handbook at the start of his second term. Complainant agrees that the employee handbook directs a driver to present any retaliation concerns to either an HR official, his supervisor, or another Marten management official. Complainant did not report his concerns of retaliation to any Marten official.

Complainant recalls that during his employment with Marten, Marten occasionally sent Qual-Comm messages to drivers to watch safety videos. He remembers that some of those videos concerned hours of service issues and cargo weight issues. He agreed that Marten sends macro information about every proposed load that asks if the driver has sufficient hours to run the load under the hours of service requirements, and if a driver answers yes he is basically confirming that he has sufficient hours to run the load under D.O.T. regulations. Complainant also agreed that there were times when he would have open communication with his Fleet Manager about hours of service issues. He would have this same sort of communication about hours of service issues, as well as overweight issues, at other companies he worked for. These issues come up frequently in a driver's life and are important to communicate to the Fleet Manager.

On page 6 of RX-11, Complainant confirmed that in the last communication between himself and Mr. Christy (June 19, 2013), he informed Mr. Christy that he could not deliver a load because he would be on a 10-hour break. Mr. Christy did not respond and did not require him to take the load. On page 7 of RX-11, Complainant agreed that in stating "Working on next load. Planner had you on a 2100 live load, you wouldn't have the hours to make that," Mr. Christy is confirming that Complainant does not have the hours to run the load.

Complainant testified that Marten Transport harassed him to try to get him to drive the load from Kansas City to St. Joseph. He did not drive that load and was not disciplined in any way or threatened with termination for refusing to take it. He returned that load to the Kansas City terminal and was assigned another load that same day.

With overweight issues, Marten could transfer the load to a light truck to run. He agreed that Marten has many drivers throughout the country. He understands that a negative CSA rating follows a trucking company around in addition to following the driver around. He was never

written up and did not receive any disciplinary warnings for any of the hours of service issues that came up in July of 2013.

In regard to the load for Lamb Weston in July of 2013, Complainant testified that Mr. Reda asked him to weigh the load, but he refused. He does not know if Marten located another driver to have the truck weighed and complete the route. [Respondent's counsel noted that, in Complainant's deposition, Complainant indicated that he was aware that Mr. Reda ultimately located another driver to have the truck weighed and complete the route.]

Complainant found another job with PNS Enterprise within a week of his separation from Marten. During his application process with the company, he informed them that he had resigned from his employment with Marten rather than being terminated. A DAC report is a report that includes the basic job history of a commercial driver and where previous employers can report satisfactory and unsatisfactory employment. It also lists tickets or accidents that occurred during the driver's employment. Complainant is familiar with his DAC report and has reviewed it recently. The report states that he resigned from his employment with Marten. He was not aware that drivers can challenge information to HireRight regarding their DAC reports, and he never made an inquiry of HireRight about the information in his DAC report. He didn't feel there was any need to say anything until it was determined what the court had to say about it.

In regard to his claim of emotional distress, Complainant stated that he took pride in being with Marten Transport for the term that he did, and he feels humiliated when he has to explain to people that he was fired. He does not tell people that Marten's position is that he resigned from the company or that his DAC report indicates that he resigned. Since his employment with Marten ended, he has not consulted with any doctor or mental health professional about his emotional distress because he lost his benefits and wages. He agrees that he was out of work for just three days and that he has worked for some good companies since leaving Marten, including some large carriers.

Redirect Examination, TR. 204

Complainant testified that the term abandonment, as it is used in the trucking industry, refers to a driver retaliating against a company by abandoning his truck. After Mr. Reda fired Complainant and he drove the load from Columbus, Indianapolis was, to his knowledge, the closest Marten terminal. He could not just abandon the truck in Columbus because it would have wrecked his career. It seems logical that Marten would want to get its truck back to its terminal after firing a driver.

In regards to the statement on page 8 of RX-11, "Planner needs us on this load. You can break at shipper. You just have to park and break. You will be fine," Complainant testified that it would sometimes be out of the ordinary to receive a message like this after declining a load due to hours of service issues, as Complainant did. It would be out of the ordinary for a driver to be dispatched on a load, inform them that he had no hours available, and then be dispatched again.

Complainant told Mitch Twinner at PNS Enterprise that he resigned his employment with Marten because if he had said he was terminated, Mr. Twinner would have wanted to know why. It was easier to say that he had resigned in order to move on with his career.

Melissa Rubin
(TR. 208)

Direct Examination

Melissa Rubin is currently employed with Marten Transport. She began working for Marten in January of 2008 at the Indianapolis, Indiana facility. She is a Corporate Trainer, a position she has held since May 2004, and which involves working with different levels of management to create training for employees and work with ongoing training for existing employees to ensure that they are kept up to date with any changes. Prior to this position, she held the position of HR Senior Generalist. In this role, she worked with employees to ensure that Marten was following all of its policies and procedures in terms of hiring and termination. She was familiar with the company's employee discharge policies and practices in July of 2013.

In the time she has been an employee of Marten, the only department that can discharge employees is Human Resources. She was involved in discharges in her role as Senior HR Generalist. She recalls more than once turning down a request from an Operations Manager to discharge a driver. In her experience, drivers were not allowed to operate a Marten truck after being discharged from the company. Certain procedures must be followed in discharging an employee, including making sure that the truck has been secured and that the driver is no longer able to drive it. These procedures would not be followed in the event of a resignation, and she is not aware of an exception ever being made. A Marten truck is worth \$80-\$100,000, and a refrigerated trailer is worth \$40-60,000. There is no situation in which a load would have been assigned to be hauled by a discharged driver.

Ms. Rubin was personally responsible for HR services supporting the Kansas City terminal in July of 2013 and remained in that position throughout 2013. She was involved in the employment discharge process of Marten's drivers who were dispatched out of Kansas City during that time period. She was also responsible for a number of other terminals. She worked regularly with Marten's Terminal Managers, which are the same as Operations Managers. Operations Managers do not have the authority to directly discharge a driver and are trained that only Human Resources can discharge an employee. Most of the company's Operations Managers are former Fleet Managers. She believes Seth Reda was a Fleet Manager before becoming an Operations Manager. He would have gone through the training described above. Marten's Operations Managers are subject to discipline for discharging a driver on an independent basis. She has never been involved in a situation in which an Operations Manager ignored that practice and independently discharged a driver.

Ms. Rubin has been at Marten Transport since January of 2008 and has a sense of the culture at the company. She has been involved in the training of employees and confirmed that when drivers are first hired, they are informed that Human Resources is the only department that is allowed to discharge an employee. She was Mr. Reda's HR person and worked regularly with

him in his capacity as Operations Manager for Kansas. She was never involved in a situation in which Mr. Reda willfully ignored Marten policy or practice. If he had independently discharged a driver, he would have been disciplined by the company.

Ms. Rubin knows of Complainant from his papers but has never had a conversation and has never received any email or other communications from him. She was the employee handling all the driver discharges for the Kansas City Terminal in July of 2013. She did not discharge Complainant, and there is nothing that would make her believe that Mr. Reda discharged Complainant. It is Marten's policy to send a termination letter to any driver who resigns. Marten did not send a discharge or termination letter to Complainant. Ms. Rubin has reviewed parts of Complainant's personnel file. She identified RX-8, a Separation Form for Complainant. She is familiar with how these separation forms are completed. She identified the initials of Cody Bommert, Complainant's Fleet Manager at the time of his separation from Marten.

The separation form was in reference to Complainant's first term of employment with the company. This type of form is used for both resignations and discharges and is used at all of the company's terminals. Ms. Rubin noted that the form included DAC code 901 for satisfactory and indicated that that type of separation was a resignation. If the separation is a resignation, the Fleet Manager completes the separation form; if it is a termination, the HR person that discharged the employee completes the form. For Kansas City in January of 2013, the HR person would have been Ms. Rubin. However, Complainant's form was completed by his Fleet Manager. She has seen separation forms with negative information in the Comments field and forms with negative information in the Reason for Termination Field. If a driver was on progressive discipline, it would be noted on the separation form. There is nothing listed in the Previous Disciplinary Action Field. This indicates to her that Complainant was not on progressive discipline at the time of his separation from Marten. There is nothing on the form to indicate that Complainant was an unsatisfactory employee.

Based on her review of RX-8, her understanding is that Complainant resigned from his position in January of 2013. She identified CX-8 as Complainant's separation form from July 2013 indicating that he resigned his position. The Fleet Manager identified on the form is Mark Stratman, and it is her understanding that Mr. Stratman completed the form. This indicates that Complainant resigned, because Ms. Rubin would have completed the form if he had been terminated. The work record states that Complainant is satisfactory, the same level indicated on RX-8. CX-8 lists the type of termination as resignation. It does not indicate that Complainant was under any previous disciplinary action. A discharge would never receive a 901 code (satisfactory) under Work Record.

Ms. Rubin has reviewed separation forms for other Marten drivers who resigned, but had negative comments on their forms. If the refused load referenced in the Comments section had been serious enough to warrant discipline of Complainant, this could have been listed in the Comments section or under Previous Disciplinary Action, and either in the Previous Termination Comments or the MAT Employee Comments. Marten uses a progressive discipline system with its drivers.

Ms. Rubin is very familiar with the Driver Employee Handbook (RX-2) through her role as HR Senior Generalist. This handbook is one chapter of the entire Driver Manual, and non-drivers receive a separate Employee Handbook. The Driver Employee Handbook sets forth Marten's progressive discipline policy. The policy requires that the company begin with a written warning with a six-month probationary period, followed by a serious warning with a nine-month probationary period, if issues continue, and finally, a serious warning with a year's probation. (RX-2 at 35) There are situations where this policy would not be used, such as when an employee fails a drug screen or commits misconduct, which would result in an automatic termination. The company would not consider refusing load to be misconduct warranting an automatic termination. If refusing loads were serious enough to warrant discipline, Marten would start with a written warning. Complainant was never put on any type of progressive discipline by the company.

There are reasons that a driver can refuse a load that are considered appropriate by Marten. For example, a driver could refuse a load for an hours of service issue or if the load would take him in the wrong direction. Refusing loads for these reasons would not result in discipline. There is no reference in CX-8 to Complainant being on any type of warning. If Complainant was on a final warning, his separation report would have reflected that. Marten would not have discharged a driver with a good employment record like Complainant.

The Anti-Retaliation Policy at RX-2, page 31, covers situations in which a driver believes he is being retaliated against for having overweight load issues or hours of service issues. Drivers are directed to report violations to Human Resources. There is no record in Complainant's file that reflects any type of retaliation report for Complainant. Marten provides information to HireRight for DAC reports for every driver who leaves Marten's employment, whether they resigned or were terminated. Marten tries to provide accurate information to HireRight. If a driver believes something on their DAC report is not true and correct, he can go to DAC and refute it. Marten would face some type of civil liability if it was not accurate in DAC reports.

Ms. Rubin identified Complainant's report that Marten put together for DAC/HireRight. RX-21. This report covers March 2013 until July 2013. It states that the reason for Complainant leaving was "resigned, quit, or driver terminated lease." Complainant did not have a truck leased with Marten. EX-21 states that Complainant's work record was satisfactory. When a Marten driver resigns his employment, the company makes arrangements for transporting the driver home. The company asks the driver if he would like a ride home and pays for a Greyhound bus ticket. In a termination, the company charges the driver for the bus ticket. Marten ordered a bus ticket for Complainant in July of 2013, and there was no amount deducted from his paycheck for the ticket. Ms. Rubin infers from this that Complainant resigned.

An Empty Truck Form is a form that is usually filled out by the shop foreman. When a driver leaves Marten, he needs to return some items that were issued to him when he was hired, and then the empty truck form is completed. If a truck were returned to the Indianapolis terminal, the form would be completed by the foreman at that terminal, who in July of 2013, was Josh Netherton. Ms. Rubin identified Complainant's empty truck form (RX-19) dated July 25, 2013. The form lists "Resignation" as the empty truck type. Josh Netherton's initials are found

on the form. A Marten driver could never be discharged and charged with abandonment at the same time because there is a \$700 charge for abandonment on a DAC. As an HR Senior Generalist, she does not have a role in resignations. In the event of a discharge, she sends an email out to several people, including the shop of the location of the truck so that they would know to expect the driver to come in and turn in his things. If he did not turn those items in, they would contact him to seek the items back. None of this was done with Complainant.

Marten employs around 2,000 employees nationwide. This number was about the same in July of 2014. It is her understanding that there was a shortage of drivers for Marten in July of 2013. It would be surprising if an Operation's Manager recommended discharge of a driver who had a clean driving record, good miles, and a good safety record, because the company was always trying to hold on to good drivers. The company would not want to lose Complainant as a driver and risk replacing him with someone who was less of a driver.

Cross Examination

Ms. Rubin testified that Marten Transport has discharged people in the past four years. She does not recall firing anyone for refusing loads or refusing to leave home. She stated that Complainant's resignation is supported not just by the paperwork, but by the fact that the company let Complainant drive after his conversation with Mr. Reda.

She does not know how long it takes to send a DAC report in on a driver after he leaves. It would seem a bit unusual that it would take four months to send a report in; however, she does not deal with DAC after she fills out a separation form. Complainant's DAC report was originally received on November 6, 2013.

Ms. Rubin does not know when Complainant filed his complaint with OSHA alleging retaliation by Marten Transport. Complainant's DAC report states that he is eligible for rehire. She does not know of any Operation's Manager who has not followed Marten's policies in regards to having only HR fire drivers. She dealt very closely with her four Operations Managers and, for the most part, is in a position to know whether a manager followed policy. She is not aware of any situation in which Marten has retaliated against a driver for making safety complaints or for refusing to drive in violation of a safety regulation.

Marten's discipline policy is a progressive policy. However, Marten's disciplinary policy states that Marten is under no obligation to follow its three-step progressive discipline guidelines. RX 2, page 35. Marten can and has deviated from its progressive discipline policy from time to time. Compared to some other problems, having issues coming out of the house is minor. The comment on Complainant's separation form (CX-8) stating that he has constant issues failing to come out of the house and refusing freight is a negative comment. The separation form states, "Reason for termination: Refused load." It is her understanding that Complainant resigned for refusing to take a load. She does not have expertise in the law surrounding reporting inaccurate information on a DAC report.

If an employee of Marten is unhappy, a supervisor or manager may suggest that it is time that the employee look elsewhere. Ms. Rubin has herself talked to drivers who seemed unhappy

with the company. A Marten manager or supervisor may not tell an employee “I think it is time to part ways” in that wording. However, they can say that the driver is unhappy and ask if they want to stay at Marten.

Redirect Examination

Ms. Rubin testified that Complainant’s DAC/HireRight report states “Review required before rehiring.” CX-21. This is a designation that Marten uses both for drivers who resigned and drivers who were discharged. It is used for any driver who leaves Marten. This is also set forth in CX-11. Marten deviates from its three-step progressive discipline policy in extreme circumstances. This would include a preventable accident, failing a drug screen, or theft. A refusal for a load would not be a basis for misconduct that would deviate from the progressive warnings. Drivers refuse loads all the time.

Recross Examination

Ms. Rubin testified that refusals of multiple loads would be a basis for discipline, but not for discharge from Marten.

Documentary Evidence⁶

CX 1, OSHA Complaint

CX 2, Driver’s Logs, June- July, 2013

CX 3, Qual-Comm messages, March-July 2013

CX 4, Marten Transport Policy Excerpts

CX 5, Road Skill Evaluation, 5/3/11

CX 6, CAT Scale Ticket, 5/13/13

On May 13, 2013 a truck was weighed at the On the Go Travel Center, I-435 and Woodend Road exit 8B, Edwardsville Kansas. The steer axle weighed 11,680 pounds. The drive axle weighed 35,440 pounds and the trailer axle weighed 29,340 pounds. The gross weight was 76,460 pounds.

CX 7,DAC Report 7/30/13

CX 8, Separation Form

This form shows that the last day Complainant worked for Marten was July 24, 2013, and the effective date of his separation was July 26, 2013. The type of termination was described as

⁶ Although I have read each exhibit *in toto*, in the interest of efficiency, I will not summarize each exhibit, but will only highlight key points and refer to exhibits as necessary in the discussion.

a “Resignation” and the reason for termination was described as “Refused Load.” The comments section states, “Constant issues with driver failing to come out of the house, and refusing freight, when he was told that we are a forced dispatch company he still decided to refuse freight and we accepted his resignation over the phone.”

CX 9, Objections to Secretary’s Findings 7/18/14

CX 10, Tax return, 2013 and wage information

CX 11, Employment Record

RX 2, Marten Transport Driver Employee Handbook

RX 3, Employee Acknowledgment Form

RX 4, Acknowledgment and Confidentiality Pledge

RX 5, Operations Mission Statement

RX 6, Driver Application signed by Complainant on May 3, 2011

RX 7, DAC Report

RX 8, Separation Form, 1/21/13

RX 9, Separation Form, 7/26/13

RX 10, Hours of Service Regulations Policy

RX 11, Qual-Comm Communications

RX 12, OSHA Complaint

RX 13, Driver Log

RX 14, Driver Log

RX 15, Complainant's Responses to Discovery Request

RX 16, CAT Scale Ticket, 5/13/13

RX 18, Job Offer, 5/2/11

RX 19, Empty Truck Form, 7/25/13

RX 21 DAC Services, Employment Record, 10/24/14

This report indicates that Complainant ended service with Marten Transport in July 2013 and that he resigned, quit or driver terminated lease. His work record is described as “satisfactory.”

RX 22, Separation form, Anthony L., 9/4/13

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

The parties have stipulated that the United States Department of Labor, Office of Administrative Law Judges has jurisdiction over the parties and subject matter of this proceeding. (ALJ 2).

Applicable Law

The Surface Transportation Assistance Act of 1982 provides in pertinent part:

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

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

(B) the employee refuses to operate a vehicle because – (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition:

49 U.S.C. § 31105.⁷

⁷ The whistleblower provision of the Surface Transportation Assistance Act was enacted in 1982 and codified at 49 U.S.C. app. § 2305. In 1994, the STAA was recodified at 49 U.S.C. § 31105. The STAA was amended the Implementing Recommendations of the 9/11 Commission Act 2007, P.L. No. 110-053 (Aug. 3, 2007). This law significantly amended the STAA employee protection provision, broadening the definition of protected activity, harmonizing the legal burdens of proof with the AIR21 model, and providing for punitive damages up to \$250,000, among other changes.

Complaints filed under the STAA are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).⁸

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.⁹ Once the complainant has established that the protected activity was a contributing factor in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.¹⁰

Complainant alleges that but for his refusals to drive loads on May 13, 2013, June 19, 2013, July 1, 2013, July 9, 2013, and July 15, 2013, actual violations of federal and/or state laws would have occurred. (C. Br. at 29-35). He specifically alleges that the following safety laws and regulations would have been violated:¹¹

May 13, 2013: Revised Missouri Statue § 304.180 (RSMo. § 304.180) which limits the weight on tandem axles to a maximum of 34,000 pounds on Interstate Highways and 36,000 pounds on all other highways;¹² Kansas Statute 8-1908¹³ and 23 C.F.R. § 658.17¹⁴ which limits the maximum weight for tandem axles to 34,000 pounds.¹⁵

July 15, 2013: Texas Transportation Code § 621.101(b)¹⁶ and 23 C.F.R. § 658.17(b)¹⁷ which limits the gross weight on any tractor-trailer set to 80,000 pounds.

⁸ 49 U.S.C.A. § 31105(b)(1); *see* 49 U.S.C.A. § 42121 (Thomson/West 2007).

⁹ 49 U.S.C.A. § 42121(b)(2)(B)(iii).

¹⁰ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

¹¹ I take judicial notice of the statutes cited.

¹² “[N]o vehicle shall be moved or operated on any state highway of this state having a greater weight than thirty-four thousand pounds on any tandem axle.” RSMo. § 304.180(1). “Notwithstanding the weight limitations contained in this section, any vehicle or combination of vehicles operating on highways other than the interstate highway system may exceed single axle, tandem axle and gross weight limitations in an amount not to exceed two thousand pounds. However, total gross weight shall not exceed eighty thousand pounds.” RSMo. § 304.180(6).

¹³ “The gross weight on tandem axles shall not exceed 34,000 pounds.” Kansas Statute 8-1908(e.)

¹⁴ “The maximum gross weight on tandem axles is 34,000 pounds.” 23 C.F.R. § 658.17(d).

¹⁵ 23 C.F.R. § 658.17 sets weight limitations for commercial vehicles operated on the National System of Interstate and Defense Highways. 23 C.F.R. §§ 651.1, 658.5, and 658.9.

¹⁶ “The overall gross weight on a group of two or more consecutive axles may not be heavier than 80,000 pounds, including all enforcement tolerances, regardless of tire ratings, axles spacing (bridge), and number of axles.” TEX TN. Code § 621.101(a)(2).

¹⁷ “The maximum gross vehicle weight shall be 80,000 pounds except where lower gross weight is dictated by the bridge formula.” 23 C.F.R. § 658.17((b)).

June 19, 2013, July 1, 2013, and July 9, 2013: Hours of Services Regulation, 49 C.F.R. § 395.3. This regulation provides in pertinent part:

Sec. 395.3 Maximum driving time for property-carrying vehicles.

(a) Except as otherwise provided in § 395.1, no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, unless the driver complies with the following requirements:

(1) Start of work shift. A driver may not drive without first taking 10 consecutive hours off duty;

(2) 14-hour period. A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive-hour period without first taking 10 consecutive hours off duty.

(3) Driving time and rest breaks. (i) Driving time. A driver may drive a total of 11 hours during the 14-hour period specified in paragraph (a)(2) of this section. (ii) Rest breaks. Except for drivers who qualify for either of the short-haul exceptions in § 395.1(e)(1) or (2), driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 min.

Credibility Assessments

Based on his demeanor, direct answers, consistency, and absence of confusion or equivocation, I found Complainant to be a credible witness.

I found the testimony of Stratman to be inconsistent and vague regarding key details. Based on this, I found his testimony to be less credible than that of Complainant. For example, Stratman both testified, and wrote on Complainant's separation form (CX 8), that Complainant had "constant" issues with refusing loads and failing to come out of the house. However, in testimony at the hearing, Stratman was unable to recall even one specific instance where Complainant failed to come out of the house. In fact, in reviewing the driver's logs, Stratman could not point to one instance where it even appeared that Complainant had trouble coming out of the house. Although Stratman attempted to explain this by stating that the driver's logs would not necessarily reflect a problem, he was still unable to describe one instance where Complainant had trouble failing to come out of the house, which is surprising if it were a constant problem.

Similarly, the only loads that Stratman could recall Complainant refusing (with the exception of the July 23, 2013, load) were only for reasons that could potentially be considered protected activity such as complaints of being overweight or having hours of service issues.

Additionally, although Stratman placed negative performance information in Complainant's separation form, which he admitted could be used to negatively affect Complainant in a rehiring decision, he inconsistently testified that Complainant was a good driver who never had any speeding citations, accidents, or disciplinary problems. In fact, he

testified that Complainant was never disciplined at Marten for any reason and that he never would have recommended him for discharge due to his good performance.

Similarly, I also found the testimony of Reda to be inconsistent and vague regarding key details and thus less credible than that of Complainant in important aspects. Reda could remember little of the significant conversation that he had with Complainant on July 24, 2013, in which he claimed that Complainant had resigned. Although he could recall “suggesting” to Complainant that maybe it were time for Complainant and Marten to part ways, he could not recall any of the words that were said. (Tr. 104). He thus could not recall any of the statements that Complainant claims to have made in that conversation. He further testified that if he wanted to retain a driver, he would not suggest to them that it were time to part ways. (Tr. 341). He testified that Complainant had no disciplinary issues and he was not in any way considering recommending his discharge. (Tr. 326-28). Yet, Reda clearly testified that he, in fact, raised the topic with Complainant of parting ways with Marten, which tends to indicate that perhaps Reda did not want to retain Complainant. He testified, contrary to the testimony of Complainant, that they *both* agreed that it was time for them to go their separate ways. (Tr. 341). He admitted, however, to being the one to raise the issue of parting ways with Complainant and claimed he did so because he believed they were not seeing “eye to eye,” although he did not describe anything that they were not seeing eye to eye about, other than the one July 23, 2013, load to New Jersey which admittedly was outside of Complainant’s normal route. (Tr. 327, 342). He vaguely testified that there were “other issues that he presented,” but did not explain what these other issues included. (Tr. 342).

As with Stratman, Reda testified that Complainant was a good, safe driver who was never disciplined for any reason. Yet, Reda also testified inconsistently that Complainant did not have a strong work ethic and that he had issues with failing to come out of the house. However, Reda could not specify any instances where this occurred and stated that it was possible that Complainant failed to come out of the house and it just was not entered into the system or reflected in any documentation. (Tr. 81-86). Reda then went on to testify that Complainant drove about the average number of miles of other drivers during his employment. (Tr. 86). This would seem to indicate that he did not have constant issues with failing to come out of the house.

With regard to refusing loads, Reda testified that based on the “Comments” section of the Separation Form (CX 8), which he assisted Stratman in preparing, it looked like Complainant was constantly refusing freight. However, besides the July 23, 2013, New Jersey load, he could not provide details of any other load that Complainant refused and could not even recall if it might have happened during Complainant’s first or second term of employment. (Tr. 80, 349-350). He further testified that Complainant did not refuse loads more than other drivers or with a frequency out of the ordinary. (Tr. 325).

With regard to the Separation Form (CX 8), Stratman testified that Reda helped him complete the form. Yet when first questioned, Reda testified that he could not recall helping Stratman although he “might” have helped Stratman fill out the separation form because Stratman was fairly new at the time. (Tr. 81). Reda later testified that he, in fact, believed he made “suggestions” to Stratman as to what to include in the separation form. (Tr. 333-34).

Christy's testimony was also problematic in that he testified that on more than one occasion, Complainant came out of the house late. (Tr. 33). Yet, like Stratman and Reda, he could not describe one such incident. (Tr. 30, 33). He testified that Complainant, in fact, drove about the average number of miles per month as other drivers. (Tr. 34-35). He also stated that no disciplinary action was ever taken against Complainant. Similarly, he could not recall the circumstances of any loads that Complainant refused to haul.

I also find that there was inconsistency in the testimony of Christy, Complainant and Reda regarding Reda's knowledge of whether Complainant refused to haul the May 13, 2013, load. Christy testified that on May 13, 2013, Reda knew the load Complainant was supposed to haul was back at the yard and had been refused. Complainant testified that Christy, in fact, made him discuss the load with Reda. (Tr. 126). He testified that both Christy and Reda asked him if he could take an alternative route with the load. (Tr. 126). However, Reda testified that he did not become aware of the May 13, 2013, load being refused until he was deposed in preparation for litigation. (Tr. 88-89). Yet, in its brief, Respondent concedes that Reda knew about Complainant's alleged May 13, 2013, protected activity.¹⁸ (R. Br. at 27-28). This inconsistency causes me to question Reda's recollection of the events of May 13, 2013. I find based on a preponderance of the evidence presented that Reda was aware that Complainant refused the load because it was overweight, as will be discussed further, below.

Protected Activity

Complainant alleges that there were five incidents in which he refused to drive assigned loads and engaged in protected activity under the STAA. These alleged incidents occurred on May 13, 2013, June 19, 2013, July 1, 2013, July 9, 2013, and July 15, 2013.

I make the following findings of fact with regard to these incidents:

May 13, 2013

On May 13, 2013, Complainant was assigned by Respondent to drive a load from the Kansas City, MO terminal to St. Joseph, Missouri. (RX 11, p. 2; Tr. 40, 116). He hooked onto the load and conducted a pre-trip inspection of the trailer and his vehicle. As part of the inspection, Complainant observed the bill of lading and suspension gauges. He observed that the tractor gauge was over 50 pounds, which led him to believe that the nose of the trailer was heavier than the tail end. He attempted to adjust the weight by sliding the axles forward, but the suspension gauges indicated that the weight had not shifted enough to put it in compliance with the law. Complainant then drove approximately 3/4 of a mile from the terminal to weigh the trailer at a CAT scale. The scale indicated that the steering axle weighed 11,680 pounds and the drive axle weighed 35,440 pounds. (CX 6; Tr. 116-121).

I find that the weight was over the legal limit of 34,000 pounds and that if Complainant had hauled it with his vehicle, he would have been in violation of Revised Missouri Statute § 304.180 (RSMo. § 304.180), Kansas Statute 8-1908(c), and 23 C.F.R. § 658.17.

¹⁸ Respondent argues, inter alia, that this incident was too distant in time to have had anything to do with the July 24, 2013, conversation between Reda and Complainant.

On May 13, 2013, after receiving the weight from the CAT scale, Complainant informed the fleet manager, Christy, by both Qual Comm message and telephone that the trailer was overweight by 1,440 pounds, he could not legally haul the load, and was going to return it to the terminal. Christy asked whether anything could be done to adjust the load and Complainant suggested that perhaps a lighter trailer could haul the load. Complainant refused to haul the load with his vehicle and returned it to the terminal. Christy was aware that Complainant had returned the load to the terminal. (Tr. 122-126). The Operations Manager, Reda was also aware that Complainant had refused the load as being overweight. (Tr. 53). He discussed the load with Complainant on May 13, 2013, and inquired as to whether Complainant could deliver it by another route. Complainant refused to haul the load and it was ultimately assigned to another driver. (Tr. 41-50; 126-127).

I find that Complainant engaged in protected activity on May 13, 2013, and that the Fleet Manager and Operations Manager, Christy and Reda respectively, were both aware of his protected activity.

June 19, 2013

On June 19, 2013, Complainant was dispatched by his Fleet Manager, Christy to haul a load. (RX 11, p. 6). Complainant testified credibly that he informed Christy that he would not deliver the load because to do so would violate the hours of service regulations, specifically that he could not drive over 11 hours in a single duty cycle without having 10 hours of interrupted time off duty. (*Id.*). This testimony is corroborated by the documentation at RX 11 and RX 13 for June 19, 2013. Christy was aware that Complainant was refusing the load and that if Complainant had delivered the load, he would have violated the hours of service regulation. (Tr. 51-52). Christy agreed that Complainant would be in violation of the hours of service regulations and accordingly assigned the load to another driver to haul instead of Complainant. (*Id.*).

I find that if Complainant had delivered the assigned load on June 19, 2013, he would have violated the Hours of Services Regulation, 49 C.F.R. § 395.3, *et seq.* I further find that Complainant engaged in protected activity on June 19, 2013, by refusing the load and that his supervisor, Christy, was aware of his protected activity.

July 1, 2013

On July 1, 2013, Complainant's Fleet Manager, Stratman, dispatched him to haul a load of 24 pallets from Corn Products International in Argo, Illinois to New Holstein, Wisconsin. (RX 11, p. 7; Tr. 59, 134-135). Complainant refused to drive the load because he needed to take a 10 hour break and if he hauled the load, he would be in violation of the hours of service regulation. (Rx 11, p. 9; TR. 61, 135-137). Stratman was aware of this refusal. (*Id.*). Stratman then attempted to dispatch Complainant on a load from Northbrook, Illinois to Oakwood Village, Ohio. (RX 11, pp. 8-9; TR. 61-64, 138). Stratman was aware that Complainant only had 5 available driving hours to work with and that the load was scheduled to be picked up at 4:00 PM Central Time and delivered the next morning at 8:30 AM Central Time which would have taken

more than 5 hours. If Complainant had hauled this load, he would have been in violation of the hours of service regulations. Stratman was aware of this situation. (Tr. 63-64). Complainant informed Stratman that he did not have the hours to complete the run and refused the load. (RX 11, p. 11). He informed Stratman that he could pick up the load, but could not deliver it on time as he would be out of hours at 2100 hours. (*Id.*).

I find that if Complainant had completed either of these assignments as requested, he would have been in violation of the Hours of Services Regulation, 49 C.F.R. § 395.3, *et seq.* I further find that Complainant engaged in protected activity on July 1, 2013, by refusing to drive the loads assigned and that his supervisor, Stratman, was aware of his protected activity.

July 9, 2013

On July 9, 2013, while he was at Pilot Knob, Salina, Kansas, Complainant's Fleet Manager, Stratman, tasked him to drive a load to Norfolk, Nebraska. (RX 11, p. 14; Tr. 63-66, 144). Complainant responded to Stratman via Qual Comm message that he was feeling sick and fatigued and asked if Stratman could do something else with the load. (*Id.*). Stratman then told Complainant to push through and run out his clock. (*Id.*) Complainant then responded that he could not do so because he was short of hours to drive in all the way and refused the load. (*Id.*) Stratman then instructed Complainant to take a break. (*Id.*).

Stratman next wanted Complainant to drive to North Platte, Nebraska. (RX 11, p. 14.) Complainant told Stratman via Qual Comm that he could not make it to North Platte. (*Id.*). Stratman asked Complainant why he could not make it to North Platte and Complainant responded that he would be in violation of the 14-hour rule. (RX 11, p. 15). Complainant then said he could drive to Norfolk, but refused to drive to North Platte. (*Id.*). However, Stratman persisted and told Complainant that there was no one else to whom he could assign (repower) the North Platte load. It appears from the Qual Comm exchange that Stratman then made arrangements with the customer for Complainant to be able to deliver the load earlier than originally planned. Complaint agreed and drove the load to North Platte. (Rx 11, pp. 15-16).

I find that if Complainant had completed the initial assignment to Norfolk, Nebraska as requested, he would have been in violation of the Hours of Services Regulation, 49 C.F.R. § 395.3, *et seq.* I find that Complainant engaged in protected activity on July 9, 2013, by refusing to drive the load to Norfolk and that his supervisor, Stratman, was aware of his protected activity.

I also find that if Complainant had driven to North Platte as originally requested by Stratman, he would have been in violation of the Hours of Services Regulation, 49 C.F.R. § 395.3, *et seq.* I further find that Complainant engaged in protected activity on July 9, 2013, by initially refusing to drive the load to North Platte, and that his supervisor, Stratman, was aware of his protected activity. However, after Complainant initially refused the load, Stratman then coordinated for the load to be delivered earlier. At that point, Complainant could and did haul the load without violating the Hours of Service regulation.

July 15, 2013

On July 15, 2013, Stratman dispatched Complainant to pick up a load at Lamb Weston Corporation in Fort Worth, Texas. (TR. 69, 147; RX 11, p. 17). Complainant telephoned Stratman and told him that the load was overweight when he went to pick it up. (TR. 70). Upon inspecting the trailer and the bill of lading, Complainant observed based upon the bill of lading which reflected the weight as over 45,000 pounds and the suspension gauges, that the laden weight of the tractor-trailer set exceeded 80,000 pounds. (TR 148-149). Complainant based on his experience of operating the truck-tractor for several months knew what it weighed without a load in it and knew that he could legally haul a load that was slightly over 44,000 pounds, but could not haul a load over 45,000 pounds without violating the legally permitted 80,000 pound limit. (TR. 148). Complainant told Stratman that he could not haul the load. (TR 149-150). Complainant informed Stratman of the weight on the bill of lading. (TR. 73). In response, Stratman told Complainant to drive the load to a scale and get a certified scale ticket. (TR 70, 150). Complainant refused to drive the load to a scale because, based on the bill of lading and his prior experience with the tractor-trailer, he knew the load was overweight and he could not legally drive it to a scale. The closest scale was approximately 20 to 25 miles away. (TR 150). Complainant suggested that Stratman have the customer rework the load. (TR. 150-151).

Stratman then involved his supervisor, Reda, who then had a telephone conversation with Complainant. (TR 71, 94, 151). Reda was aware that the driver would have a bill of lading containing a description of the load and its weight. (TR. 95). Reda was also aware that the company could not haul anything over 44,500 pounds due to legal weight restrictions and that because of this, Marten's contracts provide that it will not haul loads weighing in excess of 44,500 pounds. (TR. 98, 321). Although the load possibly could have been hauled with a light weight truck, Complainant's truck was not part of the light weight fleet. (TR 98-99). Reda instructed Complainant to drive the load to a scale and have it weighed. Complainant refused to haul the load to a scale because it was overweight and he did not want to risk getting a ticket. (Tr. 150). A ticket would affect Complainant's CSA score. (TR. 96). A citation also would appear on Complainant's DOT safety record. (TR. 72, 96-97). Complainant refused to haul the load and it was ultimately assigned to another driver. It is unclear from the record whether the weight of his truck was the same as that of Complainant's truck or whether it was lighter. (Tr. 343-345).

I find that if Complainant had driven the load either to the scale or to its intended delivery site, he would have been in violation of Texas Transportation Code § 621.101(b) and 23 C.F.R. § 658.17(b). I further find that Complainant's refusal to drive constituted protected activity and that both Stratman and Reda were aware of Complainant's protected activity on July 15, 2013.

Adverse Personnel Action

As previously discussed, the Act prohibits an employer from discharging, disciplining, or discriminating against an employee regarding pay, terms or privileges of employment because he or she engaged in a protected activity. 49 U.S.C. § 31105(a)(1). Having engaged in STAA protected activities, Complainant must next prove that he suffered an adverse personnel action.

Resignation versus Involuntary Discharge

The parties agree that Complainant's last day of employment with Marten was July 24, 2013, but they are in dispute as to how his employment ended. Complainant contends that his employment was involuntarily terminated and that this constituted an adverse action. Specifically, he contends that Respondent chose to interpret his actions as a resignation and that, by doing so, it involuntarily discharged him. Respondent contends that it took no adverse action against Complainant and that he resigned because he was unhappy with being assigned a load outside of his normal route.¹⁹

After reviewing all of the evidence of record, I make the following findings of fact with regard to the events of July 23-24, 2013:

On the afternoon of July 23, 2013, Complainant sent a message to Stratman requesting home time starting August 2, 2013, and inquiring about his next assignment dispatch. (TR. 101, 152; RX 11, page 18). On July 24, 2013, Stratman dispatched Complainant to transport a load from Abbott Nutrition in Columbus, Ohio, to Edison, New Jersey. (TR 153, 276-277; RX 11, p. 20). Complainant refused this dispatch because Stratman told him he would be dispatched to go through Marten's Pennsylvania terminal and based on the tone of Stratman's voice and a prior conversation with Stratman in which he told Complainant that they were looking for a load to get him through the Pennsylvania terminal, Complainant believed he was getting this assignment because the company was unhappy with him and retaliating against him for his prior protected activity. (TR 153-155, 166, 176-178).

Complainant asked Stratman why he was being sent East which was a rare occasion, and Stratman said he did not know. (TR. 154). I find that Complainant's refusal of this load was not protected activity and that it was within Complainant's job duties to transport a load to New Jersey, even if it was not his normal route.

Stratman tried to convince Complainant that the load was in his best interest. (TR. 278). When he could not convince Complainant of this, Stratman transferred the telephone call to Reda. (TR. 279, 281)

Reda asked Complainant why going through the Pennsylvania terminal and a load to New Jersey was bad, and Complainant said words to the effect of, "It sounds like you guys are not happy with me and I don't want to be out East if you guys are planning on doing something in retaliation." (TR. 155). Reda denied this. (*Id.*). Reda then inquired as to whether Complainant was happy with Marten and suggested to him that maybe it was time for Complainant and Marten to part ways. (TR 155, 341).

There is a dispute as to what Complainant said in response to Reda's suggestion of parting ways. Complainant states that Reda asked him if he wanted to resign and he said "No." Complainant states that Reda told him that if he got a load through Indianapolis, the company

¹⁹ See *Smith v. Jordan Carriers*, ARB No. 05-042. ALJ No. 2004-STA-7 (ARB Aug. 25, 2006) (finding that substantial evidence supported the ALJ's finding that the Respondent did not fire the Complainant; rather, the Complainant chose to sever his employment for reasons unrelated to his safety complaint.

would get him a bus ticket home and he responded to Reda that he did not need a bus ticket, but if that was the way Reda wanted it, he would take the load to Indianapolis, but he was not resigning and would get his own ride home. (TR 155-156).

Reda cannot remember any of the specifics of what was said during the conversation, although he recalls being the one to raise the issue of parting ways with Complainant. Reda states that both he and Complainant agreed that it was time for them to go their separate ways because they were not seeing eye to eye. (TR. 341-342). Reda said that they were not seeing eye to eye about the refused July 24, 2013, load, but that there were "other issues" as well. However he did not provide any details as to what the other issues were. (TR. 342).

I find, based on the relevant testimony of the parties, that on July 24, 2013, Reda suggested to Complainant that it was time for him to part ways with Marten. I find that based on this suggestion by his second level supervisor (i.e., his Fleet Manager's supervisor), Complainant believed that the company was unhappy with his performance and wanted to end his employment. I find that Complainant did not explicitly state that he was resigning from Marten, but that he did say that he would get his own ride home. I find that Complainant's statement and action in finding his own ride home was an ambiguous departure and that Reda and Stratman took steps to end Complainant's employment by treating his statements and actions as a resignation. I find that thereafter the company treated Complainant as if he had resigned his employment. I find that Complainant believed he had been fired. I find that after the conversation between Complainant and Reda, Complainant drove one final load to Indianapolis, removed his belongings from the truck, and found his own way home.

Following the conversation with Complainant, Reda informed Stratman that Complainant had resigned. Stratman was actively involved in the separation action and was the person who filled out and submitted Complainant's separation form. (CX 8). Reda helped Stratman to fill out the separation form. (CX 8). In the separation form, with Reda's help, Stratman characterized Complainant's termination as a "resignation".

With Reda's guidance, Stratman also placed negative information on the separation form, specifically that there were "Constant issues with driver failing to come out of the house, and refusing freight." The intent of this negative information was to hinder Complainant from being rehired. I find that, with the exception of July 24, 2013, the only times that Complainant refused freight were for legitimate issues of the freight being overweight or for hours of service issues as discussed above, and that these refusals constituted protected activity. The record does not reflect any other instances of Complainant refusing freight. Although Christy, Stratman, and Reda testified that Complainant had "constant" problems with failing to come out of the house, none of the witnesses could describe even one such instance and the documentary evidence does not support their assertion that Complainant had constant issues with failing to come out of the house. Rather the testimony of the supervisors supports that Complainant drove the average number of miles as other drivers and did not spend an inordinate amount of time at home. I find that it was Reda and Stratman's actions rather than Complainant's which ultimately ended the employment relationship.

A series of recent ARB decisions establishes that when an Employer chooses to treat an equivocal statement or action by an employee as a resignation, the employer has effectively discharged the employee. *Hood v. R&M Pro Transport*, ARB No. 15-010, ALJ No. 2012-STA-036 (ARB Dec. 4, 2015); *Kirk v. Rooney Trucking Inc.*, ARB No. 14- 035, ALJ No. 2013-STA-042 (ARB Nov. 18, 2015); *Nevarez v. Werner Enterprises*, ARB No. 14-010, ALJ No. 2013-STA-012 (ARB October 30, 2015). "The ARB has held that where an employee has not actually resigned, 'an employer who decides to interpret an employee's actions as a voluntary quit or resignation has in fact decided to discharge that employee.'" *Nevarez* at 11 *citing to Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19 (ARB Sept. 30, 2010; *see also Minne v. Star Air Inc.* ARB No. 05-005, ALJ No. 2004-STA-26 (ARB Oct. 31, 2007) . Since under the STAA "any discharge by an employer constitutes adverse action," I find as a matter of law that Respondents subjected Complainant to adverse employment action. *See Nevarez* at 11.

Unfavorable Information

Complainant also asserts that Respondent took adverse action against him by placing unfavorable information on his separation form. The form stated that Complainant had "Refused load" and that he had "Constant issues with driver failing to come out of the house and refusing freight." Complainant asserts that these notations on the separation form constituted harassment or other retaliation within the meaning of 29 CFR § 1978.102. In support of his argument, Complainant cites to the Board's decision in *Williams v. American Airlines Inc.*, ARB number 09-018, ALJ number 2007-AIR-4 (ARB Dec. 29, 2010).

Respondent does not specifically address Complainant's argument, but Respondent argues in its brief that inclusion of some negative information about an individual who resigns, on a separation form, is not unusual and that the purpose of including such information is to provide a complete picture for the Recruiting Department should a resigning employee seek re-employment in the future.

With regard to the separation form, I make the following findings of fact after reviewing the testimony and documentary evidence. I find that Stratman and Reda jointly included negative information on Complainant's separation form, i.e., that he had constant issues with failing to come out of the house and refusing freight.²⁰ I find that the evidence does not support that Complainant had constant issues with failing to come out of the house and refusing freight. The record does not reflect any documented instances where Complainant failed to come out of the house. Although there was testimony to this effect by Christy, Stratman, and Reda, none of these witnesses could describe even one incident where Complainant failed to come out of the house. Nor could they point to any documentary evidence such as a driver's log or Qual Comm communication which indicated that Complainant ever had issues with coming out of the house or to any disciplinary action that was ever taken against Complainant for such a transgression. Similarly, other than the July 24, 2013, refusal of a load, the witnesses could not specify any incidents where Complainant refused to haul a load other than for legitimate concerns of the load being overweight or causing Complainant to violate hours of service regulations, which would

²⁰ I do not find that the statement "Refused load" was necessarily negative information, and in fact it was a true statement as Complainant had refused a load on July 24, 2013, and his refusal on that date was not protected activity.

have constituted protected activity. Nor does the documentary evidence show any incidents where Complainant refused to haul a load other than for reasons that would be considered protected activity.

I find that Stratman and Reda included this negative information on Complainant's separation form with the intent of negatively affecting his ability to obtain future employment and both admitted that such information would be examined by the Recruiting Department in a re-hire situation.

Upon review of the *Williams* decision, I find that this placement of negative information in Complainant's personnel record was an adverse action and an attempt to blacklist him from future employment. I further find that placement of such negative information in an employee's personnel file would serve to deter an employee from engaging in protected activity.

Causation

Having established STAA protected activities and adverse personnel actions, Complainant must also prove by a preponderance of the evidence a causal connection between these two elements. Specifically, Complainant must prove that his refusals to take loads on May 13, 2013, June 19, 2013, July 1, 2013, July 9, 2013, and July 15, 2013, which were protected activities, were contributing factors, or a contributing factor individually, in the termination of his employment relationship with Marten Transport.

The Courts have defined "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action, *Marano v. U. S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993); *Beatty v. Inman Trucking Management, Inc.*, ARB Nos. 2008-STA-20 and 21 (ARB May 13, 2014). Based on this definition, the determination of contributing factor has two components: knowledge and causation. In other words, the respondent must have been aware of the protected activity (knowledge) and then taken the adverse personnel action, in part, due to that knowledge (causation).

Knowledge

Since both Stratman and Reda actively participated in the termination of Complainant's employment, as the first step in establishing that one or more of his protected activities were contributing factors, Complainant must demonstrate that they were aware of one or more of his protected activities.

As discussed above, I find that Reda had knowledge of the following protected activities: May 13, 2013, and July 15, 2013. In its brief, Respondent concedes that Reda had knowledge of Complainant's refusal of loads on those dates.

As discussed above, I find that Stratman had knowledge of the following protected activities: July 1, 2013, July 9, 2013, and July 15, 2013.

Contributing Factor

Finally, I must determine whether Complainant can prove that one or more of his protected activities was a contributing factor in the determination by Stratman and Reda to end his employment relationship with Marten Transport.

Complainant argues that direct evidence shows that his protected activity contributed to his discharge. Complainant claims that in his discussion with Reda on July 24, 2013, in which Reda suggested to Complainant that he and Marten part ways because they were not seeing eye to eye, that Reda mentioned Complainant's refusal of loads over the past several months. When I examine the testimony, I note that Complainant could not recall Reda's exact words and was not sure exactly what loads Reda was referring to. (TR 177-178). However, other than the July 24, 2013, load, the only loads Complainant had refused were for protected reasons. Therefore, I find that Reda must have been referring to one or more of these protected activities.

Complainant also argues that circumstantial evidence supports a finding that Complainant's protected activities contributed to his separation from employment with Marten. Complainant asserts that it is undisputed that his complaints alleging that his assigned tractor-trailer sets were over the legal weight limits and refusals to pull those sets were communicated to Reda. As stated above, I do find that Reda was aware of Complainant's protected activities on May 13, 2013 and July 15, 2013.

Complainant also asserts that it is highly probable that Reda was also aware of his refusal to accept dispatches that would have violated the hours of service regulation on July 1, 2013, because Reda was Stratman's immediate supervisor and Stratman was a newly hired employee and fresh out of college when he came to work for Marten. While this is possible, I do not find that a preponderance of the evidence establishes that Reda had knowledge of the July 1, 2013, protected activity, nor the June 19 and July 9, protected activities, which Complainant did not specifically address. Complainant also argues that when he refused to drive on May 13, 2013, Reda tried to persuade him to drive nevertheless. (TR 126-127). I find that Reda did in fact try to persuade Complainant to drive on May 13, 2013, even after Complainant informed him that his tractor-trailer set was over the legal weight limit. Accordingly, I find that Reda did not reassign the load to another driver out of his own volition and may have harbored some degree of frustration or animus with Complainant.

Complainant argues that additional evidence of Marten's animus toward Complainant's protected work refusals is found in the separation form prepared by Stratman with help from Reda. As discussed above, I do find that Reda and Stratman included negative comments regarding Complainant's constantly refusing freight and I find that the only freight that Complainant refused other than the July 24, 2013, load, was for protected reasons under the STAA. I find that this is the most compelling evidence that Respondent harbored animus toward Complainant for protected activity. The fact that the form cites to "constant issues" with refusing freight indicates to me that Respondent was referring to Complainant refusing not only the July 24, 2013, load, but also loads on previous occasions. The only loads that were refused on previous occasions were for reasons that would constitute protected activity. I thus find that Complainant's protected activity contributed to his discharge from employment, as well as to the

inclusion of negative information on his separation form which would become a part of his personnel record and serve to blacklist him or at a minimum hinder him from future employment with the company.

Respondent argues that Complainant's protected activity had nothing to do with his separation from Marten Transport. Respondent argues that although it was aware of Complainant's protected activities, it was not upset about them and they were the normal types of conversations and exchanges that it would have with drivers on a routine basis. Respondent argues that Complainant was never disciplined for refusing loads and that in all cases the loads were simply assigned to other people and Complainant was given different assignments. Respondent asserts that Complainant was unhappy with being assigned to haul a load to New Jersey which was outside his normal region and that was why he resigned. Respondent asserts that this was in keeping with Complainant's history of resigning from jobs 15 times in 10 years before joining Marten transport. Respondent also asserts that Complainant himself described his separation as a resignation when seeking subsequent employment.

I do not find Respondent's arguments convincing. If Respondent was not upset or frustrated about Complainant's refusal to haul loads on several occasions, I do not believe that it would have specifically referred to "constant issues" with Complainant refusing loads in his separation form. As stated above, I find that the only loads that Complainant refused other than the one final load, were all for protected reasons. Second, the record established that drivers, including Complainant, were occasionally assigned loads outside of their normal region. This does not appear to be sufficient reason for Complainant to have resigned his employment. Third, although Complainant may have resigned from employment with other employers, I do not have the facts or circumstances of those situations before me and will not assume, based on nothing other than Respondent's inference, that Complainant did not resign for good reasons. Although, I do find that Complainant told a subsequent employer that he had resigned from Marten, I found his testimony credible when he stated that he did so in order to avoid having to discuss the circumstances of what happened at Marten.

I also find that the temporal proximity between Complainant's protected activities and the adverse actions raises an inference of causation and is circumstantial evidence that his protected activities were contributing factors to the adverse actions taken against him. Complainant's protected activities took place on May 13, 2013, July 1, 2013, July 9, 2013, and July 15, 2013. His last day of employment with Respondent was July 24, 2013. Although, in its brief, Respondent argues that the May 13, 2013,²¹ protected activity could not have contributed to any adverse action, in part, because it occurred multiple months before his separation,²² I do not find this argument convincing. Certainly, the protected activities in July 2013 were sufficiently close in time to Complainant's separation to raise an inference of causation. However, I also find, contrary to Respondent's assertion, that the May 13, 2013, protected activity was not so distant in time as to negate the inference that Complainant's protected activity led to his discharge. *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995); *Goldstein v. Ebasco*, 86-

²¹ This is the only protected activity that Respondent concedes may be relevant, although I have found protected activities on four dates to be relevant.

²² R. Br at 28.

ERA-36, Sec. Dec., Apr. 7, 1992, slip op. at 11-12, rev'd on other grounds sub nom., *Ebasco Constructors, Inc. v. Martin*, No. 92-4567 (5th Cir. Feb. 19, 1993) (causation established where eight to ten months elapsed between protected activity and adverse action).

After examination of the entire record as well as the arguments of the parties, I find that a preponderance of the evidence supports my finding that Complainant's protected activities were contributing factors in the determination by Stratman and Reda to end his employment relationship with Marten Transport.

Affirmative Defense

As previously discussed, an employer that has engaged in an adverse personnel action motivated by both prohibited and legitimate reasons may escape liability by establishing by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. *Beatty v. Inman Trucking Management, Inc.*; *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-24 (ARB Apr. 25, 2013).

In this case, Respondent does not argue that it would have taken the same action against Complainant even in the absence of protected conduct. Rather, respondent asserts that it had no intention of terminating Complainant's employment because he was a good employee and Marten Transport needed good drivers. Therefore, Respondent did not assert an affirmative defense and cannot escape liability on this basis.

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 \$ 250,000.²³

Complainant seeks reinstatement, back wages in the amount of \$54,371.14 plus interest, compensatory damages in the amount of \$20,000, punitive damages in the amount of \$250,000.00, attorney fees and costs, and abatement.

Respondent asserts that Complainant is not entitled to back pay because he received more money after leaving Marten than he would have made if he had stayed with Marten Transport. Respondent asserts that, at most, Complainant is entitled to \$1,700.00 in back pay. Respondent asserts that Complainant is not entitled to compensatory damages because he has not shown concrete evidence of emotional injury. Respondent also asserts that no punitive damages are appropriate in this matter.

Reinstatement

Reinstatement is an automatic remedy under the STAA.²⁴ An Administrative Law Judge

²³ 49 U.S.C. § 31105(b)(3)(A).

must order reinstatement unless it is impossible or impractical.²⁵ While the STAA expressly provides that a prevailing complainant is entitled to reinstatement, the statute does not prohibit voluntary waiver of that right. Complainant has stated that he would like to be reinstated to his previous position at Marten Transport. Respondent has not shown that reinstatement would be impossible or impractical and, in fact, its witnesses stated that Marten is in need of drivers. Therefore, I conclude that reinstatement with the same pay, terms and privileges of employment is appropriate.

Back Pay

To make a person “whole for injuries suffered for past discrimination,” the Act mandates an award of back pay as compensatory damages to run from the date of discrimination until either the complainant receives a bona fide offer of reinstatement, is reinstated or obtains comparable employment. *Robert Palmer v. Triple R. Trucking*, ARB No. 03-109, 2003-STA-28 (ARB Aug. 31, 2005); *Cynthia Ferguson v. New Prime Inc.*, 2009-STA-47 (Sec’y March 15, 2010); *Nelson v. Walker Freight Lines, Inc.* 87 STA 24 (Sec’y Jan. 15, 1988), slip op. at 5, *Polwesky v. B & L Lines, Inc.*, 90 STA 21 (Sec’y May 29, 1991), *Moravec v. HC & M Transportation, Inc.*, 90 STA 44 (Sec’y Jan. 6, 1992), and *Polgar v. Florida Stage Lines*, 94 STA 46 (ARB Mar. 31, 1996). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require “unrealistic exactitude.” *Cook v. Guardian Lubricants, Inc.*, 95 STA 43 (ARB May 30, 1997), slip op. at 11-12, n.12. Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co., Inc.*, 90 STA 37 (Sec’y June 3, 1994) and *Kovas v. Morin Transport, Inc.*, 92 STA 41 (Sec’y Oct. 1, 1993). At the same time, the lost wages claimed as back pay must have been caused by the employer’s misconduct. *Hampton v. Sharp Air Freight Service, Inc.*, 91 STA 49 (Sec’y July 24, 1992).

The employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. *Hadley v. Southeast Corp. Serv. Co.*, 86 STA 24 (Sec’y June 28, 1991). Concerning interim earnings, the deduction is warranted only if the complainant could not have obtained the interim earnings if his employment with the respondent had continued. *Nolan v. AC Express*, 92 STA 37 (Sec’y Jan. 17, 1995).

The burden of showing that a complainant failed to make reasonable efforts to mitigate his damages is on the employer. *Polwesky*, 90 STA 21, 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). While the complainant need only make reasonable efforts to mitigate his damages and is not held to the highest standards of diligence, and doubt is resolved in the complainant’s favor,

²⁴ 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).

²⁵ 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.”).

Moyer v. Yellow Freight System, Inc. 89 STA 7 (Sec'y Aug. 21, 1995), the employer may carry the evidentiary burden by showing that jobs for the complainant were available during the back pay period. *Polwesky*, 90 STA 21. The reasonableness of the effort to find substantially equivalent employment should be evaluated in terms of the complainant's background and experience in relation to the relevant job market. *Intermodal Cartage Co., Ltd. v. Reich*, No. 96-3131 (6th Cir. Apr. 24, 1997)(unpublished decision available at 1997 U.S. App. LEXIS 9044) (case below 94 STA 22).

Complainant testified that his average pay per mile at Marten was 42 cents. (TR. 102; RX 18). This is supported by RX 18 which lists the base pay rate per miles driven. He drove 42,125 miles from March 12, 2013, to July 24, 2013. (CX 8, p. 2). He thus asserts in his brief that he earned approximately \$17,692.50 (42,125 miles x 42 cents) while working for Marten from March 12, 2013, to July 24, 2013, for an average of \$1,203.57 per week ($\$17,692.50 \div 14.7$ weeks).²⁶ It is unclear to me how Complainant determined that March 12 to July 24 equaled 14.7 weeks. I calculate that this period would have equaled roughly 15 weeks (105 days divided by 7 = 15 weeks). I find his average weekly wage was therefore approximately \$1,179.50.

Complainant projects that he would have earned \$97,489.17 at Marten from July 25, 2013, to February 14, 2015, which is when he voluntarily stopped working ($\$1,203.57 \times 81$ weeks). (C. Br at 51). I find that this figure of projected earnings should be \$95,539.50 ($\$1,179.50 \times 81$).

Complainant testified that after being discharged by Respondent, he was out of work for three to four days. He then went to work for PNS Enterprise, where he worked for approximately two months. His average paycheck was \$400 per week. (TR. 157). This would bring his total earnings at PNS to approximately \$3,200.²⁷

After PNS, Complainant went to work for Starline Brass for ten months. (TR. 157). He earned \$11,765.75 in 2013 from Starline for the period Jan. 1, 2014 to May 24, 2014. This equates to \$571.15 weekly from Starline ($\$11,765.75 \div 20.6$ weeks). Complainant estimates that he earned about \$24,559.45 in wages from Starline for the ten months he was employed ($\$571.15 \times 43$ weeks).

After Starline, Complainant went to work for Hogan Transport where he earned \$3,758.58. (CX 10, p. 2; TR. 158).

Complainant testified that he next went to work for Steelman Transportation as an owner-operator, where he earned from \$300 to \$1,000 per week for 14 weeks. He estimated that he earned \$1,000 per week net, after taxes for a total of \$14,000. (TR. 159). However, he was unclear as to how much he earned each week and there is a significant difference between \$300

²⁶ I note that CX 8, p 2 indicates that Complainant drove the following miles per month from March to July 2013, respectively: 6,308; 9,948; 9,121; 9,654; 7,094. In his brief Complainant asserts that in his answers to interrogatories, which he did not sign, it estimated his average weekly wage at \$385 (RX 15, p.7). He states that this was an error as it would have meant the he drove an average of only 917 miles per week.

²⁷ In his brief, Complainant incorrectly estimates that he earned a total of \$800 at PNS. This figure would only equate to his earnings for 2 weeks rather than 2 months.

and \$1,000. Therefore, his assertion that he earned \$1,000 instead of \$300 per week works to the favor of Respondent in determining offset for wages received.

Complainant testified that he was not currently working and did not have a reason at the moment to work. He testified that he voluntarily stopped working about 2 months prior to the April 14, 2015, hearing, i.e. around February 14, 2015. (TR. 160).

Complainant asserts that he is due \$54,371.14 in back wages (projected earnings of \$97,489.17²⁸ at Marten minus \$800²⁹ from PNS, \$24,559.45 from Starline, \$3,758.58 from Hogan and \$14,000 from Steelman). I find that the correct amount due Complainant in back wages based on his corrected earnings at PNS and corrected projected earnings at Marten is **\$50,021.47** (95,539.50 minus 3,200 minus 24,559.45, minus 3,758.58 minus 14,000).

I find that the evidence demonstrates the Complainant made reasonable efforts to mitigate his damages by searching for jobs and securing alternative employment, albeit at lower wages. He found alternative employment almost immediately. He did not quit a job, until he had another one lined up, until he voluntarily stopped working in February 2015. Respondent proffered no evidence establishing that substantially equivalent jobs were available to Complainant. Therefore, the Respondent has not carried its burden of establishing that the Complainant failed to make reasonable efforts to mitigate damages.

In its letter of August 13, 2015, Respondent asserts that Complainant should be limited to backpay in the amount of \$1,700.00 and expresses surprise that Complainant is seeking more money in back wages. However, I find that all of the necessary information to calculate the backpay award is present in the record and Respondent was on notice of all necessary figures to make the calculation. Furthermore, it is apparent that there was a miscalculation in the response to Respondent's Interrogatory question 7, as Complainant earned more than an average of \$385 per week based on documentation provided by Respondent. (RX 18). This information would have been within Respondent's control. With this information, Respondent could have determined Complainant's projected earnings.

Interest

As part of a compensatory damage award, a complainant is entitled to prejudgment interest to compensate for the loss of use of his wages. *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). Similarly, a complainant may receive post-judgment interest on back and front pay. *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp. d/b/a Bearden Trucking*, 03 STA 36, slip op. p. 10, (ARB June 30, 2005).

In calculating the interest on STAA back pay awards, the rate used is that charged for underpayment of federal taxes. *See Bryant* and 26 U.S.C. § 6621(a)(2). The interest is compounded quarterly, until the damage award is paid. *Bryant*, slip op. at 10, and *Doyle v.*

²⁸ This figure should be \$95,539.50 instead of \$97,489.17.

²⁹ This figure should be \$3,200 instead of \$800.

Hydro Nuclear Servs., 89 ERA 22, slip op. at 18-19 (ARB May 17, 2000), *rev'd on other grounds, Doyle v. U.S. Secretary of Labor*, No. 00-1589 and 00-2035 (3d Cir. May 27 2002).

In light of the above principles, Complainant is entitled to prejudgment and postjudgment interest on his back pay award. The interest will be calculated in accordance with 26 U.S.C. § 6621(a)(2) and compounded quarterly.

Compensatory Damages

As part of compensatory damages, a successful whistleblower complainant may recover for mental and emotional distress suffered as a consequence of the discrimination. *Michaud v. BSP Transport, Inc.*, 95-STA-29 (ARB Oct. 9, 1997); *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, 95-STA-34 (ARB Aug. 8, 1997). To establish entitlement, the complainant must show that he suffered mental and emotional distress and that the respondent's adverse action caused the distress. *Id.* Consulting a physician, psychologist or similar professional on a regular basis is not a prerequisite to entitlement. *Smith v. Littenberg*, 92 ERA 52 (Sec'y Sep. 6, 1995), *appeal dismissed*, No. 95070725 (9th Cir. Mar. 27, 1996); *Busche v. Burkee*, 649 F.2d 509, 519 n.2 (7th Cir. 1981). At the same time, the complainant must prove the existence and magnitude of subjective injuries with competent evidence. *Lederhaus v. Paschen Midwest Inspection Service, LTD.* 91 ERA 13 (Sec'y Oct. 26, 1992), *citing Carey v. Piphus*, 435 U.S. 247, 264 n. 20 (1978). In determining the amount of compensation for mental and emotional distress, an administrative law judge may review other types of wrongful employment termination cases for assistance. *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery*, 95 STA 37 (ARB Sept. 5, 1996).

As directed by *Bigham*, I have reviewed several wrongful employment termination cases. One particular case, *McCouston v. Tennessee Valley Association*, 89 ERA 6 (Sec'y Nov. 13, 1991) contains a fairly detailed discussion on mental and emotional distress compensatory awards ranging from \$10,000 to \$50,000. In that case, after reviewing several cases, the Secretary awarded \$10,000 for mental and emotional distress where the record established the complainant had been embarrassed and humiliated before fellow employees; experienced sleeplessness; suffered severe headaches, depression, stomach problems and aggravation of pre-existing hypertension; and, consequently experienced difficulty in trying to obtain other employment. In another case, *Lederhaus v. Paschen Midwest Inspection Service, LTD.* 91 ERA 13 (Sec'y Oct. 26, 1992), the complainant also received \$10,000 for mental and emotional distress. In that case, for over five months after his discharge, the complainant struggled with depression, contemplated suicide, withdrew from family and friends, and developed significant interpersonal relationship problems. Finally, in *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, 95 STA 34 (ARB Aug. 8, 1997), the Board upheld an award of \$30,000 for a complainant who as a result of his unlawful termination suffered severe emotional distress associated with a forced relocation, concerns for his family's survival, marital difficulties, and an on-going ulcer.

The Complainant is seeking \$20,000.00 in compensatory damages for emotional distress and mental pain. Complainant testified that after his discharge he felt disappointed to not be working for Marten anymore, and humiliated for quite some time. However, he did not describe

his symptoms of mental distress, either in the short or long term such as trouble sleeping, concentrating, etc. Complainant testified that he was unable to seek treatment for emotional distress because he lost his benefits and wages.

While Complainant's credible testimony establishes that he suffered some understandable emotional distress due to his loss of employment with Marten, he did not fully describe his symptoms or provide any specifics about the depth, duration, and frequency of his mental and emotional distress and associated physical manifestations. Additionally, Complainant appears to have been able to cope with his distress in part by quickly finding re-employment within three to four days of his discharge. In comparison to the previously noted cases involving prolonged depression and social and physical dysfunction, Complainant's mental and emotional distress does not rise to the level of seriousness or intensity that warrants a high compensatory award for mental and emotional distress. Emotional distress is not presumed; it must be proven. *Moder v. Village of Jackson, Wis*, ARB Nos. 01-095, 02-039, ALJ No. 00-WPC-005, slip op. at 10 (ARB Jun. 30, 2003) (awards require plaintiff demonstrate both objective manifestation of distress and a causal connection between the violation and distress). A complainant's credible testimony alone, however, is sufficient to establish emotional distress. *Ferguson v. New Prime Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, PDF at 7-8 (ARB Aug. 21, 2011); *see also Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007). While I found Complainant's testimony regarding his emotional distress to be credible, it is not extensive, and I find that the evidence is not sufficient to support anything more than nominal damages.

Accordingly, I deny Complainant's request for an additional compensatory award of \$20,000 based on mental and emotional distress. However, I find that an award of **\$2,000.00** is appropriate to compensate Complainant for emotional distress.

Punitive Damages

An award of punitive damages is warranted "where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'" *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ No. 2012-STA-011 (ARB Apr. 30, 2014); *Youngerman v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 5 & n.16 (ARB Feb. 27, 2013) (quoting *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-47 (ARB August 31, 2011)). In assessing punitive damages, relevant factors include the degree of the defendant's reprehensibility or culpability, the relationship between the amount of damages and the harm to the victim, and the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001); *Fink v. R&L Transfer, Inc.*, ARB No. 13-018, ALJ No. 2012-STA-006 (ARB March 19, 2014). Although a respondent's wealth alone cannot provide a basis for an otherwise unwarranted punitive damage award, it may be considered in determining the size of a suitable award. *Youngerman v. UPS*, ARB No. 11-056, ALJ No. 2010-STA-047 (February 27, 2013) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003)).

The Complainant is seeking \$250,000 in punitive damages. The STAA provides that a successful complainant may be awarded punitive damages in an amount not to exceed \$250,000.

In his brief, Complainant argues that a large punitive damage award is necessary to deter Marten's management from future retaliation against drivers who exercise their rights under the STAA. He cites to the Board decision in *Ferguson* as standing for the proposition that an ALJ should include consideration of the size of the award that would adequately deter [an employer] from future violations and the punitive impact of the damages on the company. In that case, the ALJ awarded \$75,000 in punitive damages.

Complainant also argues that this is not the first time that Marten has violated the STAA and cites to *Carter v. Marten Transport, Ltd.*, 2005-STA-63 (ALJ May 18, 2006) (affirmed by the Administrative Review Board, ARB Nos. 06-101, 06-159 (June 30, 2008), in which a "modest" amount of damages was awarded. Complainant asserts that this award has not deterred Marten from retaliating against drivers in violation of the STAA.

Respondent argues that the *Carter* case should not be considered by me because the case was never identified as a potential or actual exhibit. However, I find that this case is a matter of public record and therefore I see no reason why Complainant could not refer to it in its brief. I have not required either of the parties to submit copies of cited cases in their briefs as exhibits and Respondent cites to no authority requiring this.

Respondent also argues that punitive damages are not warranted because Marten Transport did not engage in outrageous conduct. It asserts that at all times Marten had well established, legally compliant policies to prevent hours of service and overweight truck violations. It asserts that the evidence is undisputed that both Stratman and Reda received extensive training on these policies and regulations and that Marten went out of its way to ensure drivers were aware of them as well. Drivers were routinely reminded to watch safety videos and were asked before each load if they had sufficient hours to run the load and were required to refuse loads if they anticipated exceeding the allowed number of hours. Respondent also argues that Marten maintained strong policies and procedures designed to prevent retaliation against drivers. Finally, respondent argues that Reda and Stratman's actions and alleged retaliatory animus was their own and was not a reflection of company culture.

The size of a punitive award is fundamentally a fact-based determination driven by the circumstances of the case. *Anderson*, supra at 8. After reviewing all of the evidence of record, I find that Reda and Stratman demonstrated a reckless or callous disregard for Complainant's rights, and that their intentional violations of the STAA warrant punitive damages. I feel that such damages are especially appropriate given Reda and Stratman's attempt to negatively impact Complainant's future employability, in addition to retaliating against him for protected activities. Punitive damages are necessary to deter such conduct in the future, particularly given the company's previous violation of the STAA for which no punitive damages were awarded. However, I do find some mitigation in the fact that Marten Transport had legally compliant policies in place, whereas other cases in which punitive damages were awarded have involved violations of law that essentially constituted company policy. *See Griebel v. Union Pacific Railroad Company*, 2011-FRS-00011 (January 31, 2013) (finding that the respondent company exhibited a mentality that discouraged its employees from filing incident reports in violation of the FRSA). Therefore, while I do find that some punitive damages are appropriate, I decline to award the requested amount of \$250,000.00, which I find excessive. I find that an award of

\$50,000.00 in punitive damages is appropriate in this case due to the callous disregard for Complainant's rights and violations of the STAA.

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 Marten Transport. Moreover, the Complainant seeks to have Respondent expunge from his personnel records all references to his refusals of freight and issues "coming out of the house" from its personnel records. I find that such relief is appropriate under the STAA.

Attorney Fees

Due to the successful prosecution of his STAA discrimination claim, Complainant is entitled to recover the associated litigation expenses, including reasonable attorney fees.

ORDER

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

- 1. Reinstatement:** Respondent shall immediately reinstate 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 Marten Transport since July 24, 2013.
- 2. Back Pay:** Respondent shall pay Complainant **\$50,021.47** in back pay, with interest in accordance with 26 U.S.C. § 6621(a)(2).
- 3. Compensatory Damages:** Respondent shall pay Complainant **\$2,000** in compensatory damages.
- 4. Punitive Damages:** Respondent shall pay Complainant **\$50,000** in punitive damages.
- 5. Abatement:** The Respondents shall expunge from the Complainant's personnel file all information pertaining to the Complainant's termination and all references to his refusals of freight and issues "coming out of the house" and post this Decision and Order in its facilities for ninety (90) consecutive days.
- 6. Attorney Fees and Costs:** The Complainant's attorney is hereby allowed thirty (30) days to file an application for fees. Respondent 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.

CHRISTINE L. KIRBY
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).