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Issue Date: 04 February 2016

In the Matter of
CEDRIC SINKFIELD
Complainant

v. Case No **2015 STA 00035**

MARTEN TRANSPORTATION, LTD..
Respondent

Paul Taylor, Esquire
For Complainant
Steven DiTullio, Esquire and Scott Paler, Esquire
For Respondents

DECISION AND ORDER

AWARD OF DAMAGES

This case was heard from October 20 to October 21, 2015 in Ft. Smith, Arkansas under the Surface Transportation Assistance Act ("STAA"), 49 USC § 31105 (formerly 49 USC app. § 2305). The parties submitted 23 joint exhibits, marked as "JX" 1 to JX 23. I admitted these on October 20 along with two Complainant's exhibits, "CX" 1 – CX 2. On October 21, I entered CX 3 and Respondent's exhibits, "RX"-2 through RX-5, into evidence.

LAW AND REGULATIONS

To prevail under the STAA, Complainant must prove by a preponderance of the evidence that he (1) engaged in protected activity, (2) that the employer was aware of the activity, (3) that there was an adverse employment action taken against the complainant, and (4) that there was a causal connection between the protected activity and the adverse employment action. ***Clarke v. Navajo Express, Inc***., ARB No. 09-114, ALJ No. 2009-STA-18, slip op. at 4 (ARB June 29, 2011).

If the Complainant meets his prima facie burden, the Respondent may avoid liability if it can demonstrate by clear and convincing evidence that it would have taken the same adverse action in any event. 49 U.S.C. § 42121(b)(2)(B)(iv); ***Clarke***, ARB No. 09-114, *slip op*. at 4.

An employee engages in protected activity when he refuses to drive because the operation of a vehicle would violate "a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security." 49 U.S.C. § 31105(a)(1)(B)(i); 29 C.F.R. § 1978.102(c)(1)(i). A refusal to drive constitutes a protected activity when "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's

hazardous safety or security condition." 49 U.S.C. § 31105(a)(1)(B)(ii); 29 C.F.R. § 1978.102(c)(1)(ii). Complaints made internally, to a company hotline or a supervisor, constitute protected activity under the STAA. ***Williams v. Domino's Pizza***, ARB No. 09-092, ALJ No. 2008-STA-052, slip op at 7 (ARB Jan. 31, 2011).

FINDINGS OF FACT

The following witnesses testified: The Complainant, Connie Ahlers, Daniel Blair, Joseph Dosher, Jason Marten, Annette Konsela, and Emma Aikman. Ahlers, Blair, Marten, Konsela and Aikman were called by both of the parties.

The parties proffered the following stipulations:

1. Cedric Sinkfield is an employee as defined in 49 U.S.C. Section 31101(2), and resides at 1413-B Flat Rock Road, Van Buren, Arkansas 72956. Complainant is not a member of a labor union, and his employment with Respondent, Limited, was not subject to the terms of a collective-bargaining agreement.
2. MARTEN TRANSPORTATION, LTD.., is an employer as defined at 49 U.S.C. Section 31101(3) and subject to 49 U.S.C. Section 31105. Respondent , Limited, hereinafter also Marten, maintains a place of business at 129 Marten Street, Mondovi, Wisconsin 54755.
3. From March 24, 2014, to June 5, 2014, Respondent, LTD., employed Complainant to operate commercial motor vehicles, transporting property on the highways in interstate commerce.
4. Joint Exhibit 5 is a copy of the scale ticket Complainant received at Miller/Coors in Colorado for a load he was assigned by Respondent on May 29, 2014.
5. The scale at the Miller/Coors facility was inspected at regular intervals by the State of Colorado and found to pass such inspections. The accuracy percentage required to pass inspections is unknown.
6. On June 17, 2014, Complainant filed a timely complaint with the Regional Administrator United States Department of Labor, Occupational Safety and Health Administration Region VI, alleging inter alia that Marten discharged him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. Section 31105.
7. On February 17, 2015, the assistant secretary of labor by the regional supervisory investigator for Region V of the Occupational Safety and Health Administration issued a preliminary decision and order pursuant to 49 U.S.C. Section 31105(b)(2)(A), dismissing Complainant's complaint.
8. On February 17, 2014, Complainant by counsel filed a timely objection to the assistant secretary's findings and order and request for a hearing de novo before an Administrative Law Judge of the Department of Labor.
9. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and the subject matter of this proceeding.

A determination over jurisdiction vests with me, and cannot be acquiesced by stipulation, but I accept that I have jurisdiction. After a consideration of the record, I accept stipulations 1 to 8. I marked the written stipulations as exhibit ALJ-1, and admitted it into evidence.

PROTECTED ACTIVITY AND KNOWLEDGE

The Complainant maintains that he was terminated June 4, 2014 after he had complained about an overweight load on May 29, 2014, originating at the facility of Miller/Coors in Golden, Colorado. His tractor was equipped with an APU, an auxiliary power unit. He undisputedly refused this load. Complainant operated Respondent's truck no 9824 (TR 42, 137). There is an issue whether the load was overweight and whether he was compliant with Respondent's requests to correct the situation if it were overweight. The truck and trailers that Complainant operated had an approximate gross vehicle weight rating of 80,000 pounds (TR 53, 137-138). The truck-tractor was equipped with an auxiliary power unit weighing 415 pounds (TR 138, 350; RX-2). He operated that truck-tractor and trailers in interstate commerce (TR 179). Complainant maintains that these exceeded the legal limits for weights were related to violations of 23 C.F.R. § 658.17. That regulation limits the gross vehicle weight of a tractor-trailer set operated on the Interstate Highways to no more than 80,000 pounds. 23 C.F.R. § 658.17(b). It also generally limits the gross weight on any set of tandem axles operated on Interstate Highways to no more than 34,000 pounds. 23 C.F.R. § 658.17(d). 23 C.F.R. § 658.17(n) provides that states may allow up to an additional 400 pounds above the maximum weights prescribed for any vehicle that utilizes an auxiliary power or idle reduction technology unit.

There also is no dispute that the law of the Eighth Circuit Court of Appeals governs this case. Respondent had problems with Miller/Coors loading trailers over the legal weight limits for "a lot of years." (TR 71, testimony of Ahlers). This fact is undisputed. This facility is the situs of the alleged protected activity.

Because this case has been fully tried, theoretically there is an inference that a prima facie case has been made. ***Kester v. Carolina Power & Light Co***, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 5-8 (ARB Sept. 30, 2003) ("[W]e continue to discourage the unnecessary discussion of whether or not a whistleblower has established a prima facie case when a case has been fully tried."). ***Kester*** has been cited as authority in many recent cases, i.e. ***Barrett v. e-Smart Technologies, Inc.,*** ARB Nos. 11-088, 12-013, ALJ No. 2010-SOX-31 (ARB Apr. 25, 2013).[1]

Complainant was an "at will" probationary employee. However, Respondent has a progressive discipline policy. Under that policy a driver may receive a "1st Level Warning" for violation of policy which will stay in the driver's file for six months. Continued performance issues may result in a "2nd Level Warning" which will be placed in a driver's file for nine months. A "3rd Level Warning" can result from "continued performance issues" and will be placed in a driver's file for 12 months. A 3rd level warning may also result in a face-to-face meeting (JX-20, p. 5). A driver performance issue during the 90-day introductory period need not follow progressive discipline (JX-20, p. 5). Progressive discipline is made on a case-by-case

[1] See also ***Hoffman v. Nextera Energy***, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 12 (ARB Dec. 17, 2013) (prima facie showing irrelevant once case goes to hearing before ALJ); ***Barry v. Specialty Materials***, ARB No. 06-005, ALJ No. 2005-WPC-003, slip op. at 7 n.32 (ARB USDOL/OALJ Nov. 30, 2007) (same); ***Journeay v. Barry Smith Transp.***, ARB No. 01-046, ALJ No. 2001-STA-003, slip op. at 3 n.5 (ARB June 25, 2001) (same); ***Jordan v IESI PA Blue Ridge Landfill***, ARB No. 10-076, ALJ No. 2009-STA-062, slip op. at 2 (ARB Jan. 17, 2012) (same); ***Spelson v. United Express Sys.***, ARB No. 09-063, ALJ No. 2008-STA-039, slip. op at 3 n.3 (ARB Feb. 23, 2011) (identifying investigatory stage before OSHA as the "prima facie level of proving a case").

basis and Respondent reserves the right to impose less or more severe discipline (TR 133, 421-422; JX-20, p. 5).

Connie Ahlers was Complainant's Fleet Manager. TR 268. As a Fleet Manager, Ahlers generally communicated with drivers whom she supervised by Qualcomm, which is an in-vehicle GPS system that allows communication between the truck and Respondent , and also does GPS routing for the drivers, and keeps track of the location of the truck. TR 39, 44. She prepared numerous entries regarding Complainant in the Human Resources Information System ("HRIS") report as indicated by her initials CMA. TR 269-270; JX-7. Her March 27, 2014 entry addressed Complainant's first load. TR 272; JX 7. This entry reflects that three days into his employment with Respondent, Complainant had already violated the Company's policy for securing equipment. She reached this conclusion based upon satellite tracking. TR 271-272.

Complainant parked a loaded trailer at a truck stop and then drove the truck to his house rather than ensure that the truck trailer was secured properly. TR 271; JX-7. Prior to dropping the truck trailer at an unsecure location, Complainant had received a Qualcomm communication asking him if he had a secure place to park the truck and trailer, and he had responded "Yes." TR 203; JX-2, p. 7. Complainant acknowledged that he was forbidden from leaving equipment unattended in an unsecure location. TR 203-205. Respondent's Employee Conduct and Discipline policy lists "failure to secure equipment" as an infraction that may result in disciplinary action, including suspension or discharge. JX-20, p. 4. Ahlers reminded him about this policy violation against dropping a trailer at an unauthorized location. TR 271-272.

Approximately one month later, on April 10, 2014, Ahlers recorded an unusually high truck idle time of 10.94 percent. TR 273; JX 7. She asserted that Complainant had violated a policy requiring all trucks to idle below 4 percent in order to save fuel and to save wear and tear on the truck engine. TR 274-275. She asserted that most trucks run at 1 to 2 percent idle time. TR 275. She testified that she warned Complainant that he would incur progressive discipline if his idle time did not improve. She wanted to ensure that Complainant understood that idle time is very important. TR 275; JX-7.

On May 6, 2014, Respondent issued a written warning to Complainant due to another failure by him to secure his assigned equipment and a failure to deliver his assigned load. TR 276-277; JX-7. While Ahlers did not prepare the HRIS entry on May 6, 2014, she was personally involved regarding this incident. TR 277. Before this incident, Complainant had asked to be transferred to the South Central Regional Dispatch fleet, which was granted in early May 2014. However, he was re-assigned to Ahlers' fleet after one day because he had failed to deliver the first load assigned to him by the South Central Regional Dispatch fleet. TR 278.

In a May 7th email exchange, Ahlers informed the Director of Human Resources and a Safety Department employee that Complainant had left his assigned truck and trailer at an unsecured location because he needed to have a tooth pulled. TR 279-280; JX-22. Complainant never told anyone that he needed to leave the truck due to some sort of emergency. TR 280. He left the truck and trailer at a customer's facility, where it was subsequently towed, at Respondent's cost, after the customer contacted the Company. TR 280-281.

Ahlers testified that her impression was that she no longer felt she could rely on him. She was disappointed that after the Company had placed Complainant on the South Central Regional Dispatch fleet at his request, he had failed his first assigned load for that fleet. She testified that he was basically "kicked off" the Regional fleet. TR 281-282. She also stated that she had never seen a driver re-assigned from a fleet after only one day. TR 283.

Complainant acknowledged that he had left both the truck and trailer at Arkansas Refrigerated on May 6, 2014, which was not an approved site. TR 209, 252. He admitted that his truck was towed from Arkansas Refrigerated. TR 210.

After Ahlers was told that Complainant would be reassigned to her fleet after spending one day on the South Central Regional Dispatch fleet, she recommended that he be given a written warning for failing to secure Company equipment and failing to deliver the load as required. TR 282-283. Complainant did not dispute the written warning. TR 282.

On May 14, 2014, Complainant was given a "serious warning" by Ms. Ahlers. TR 284-285, 288; JX-7. Complainant was charged with not following instructions and not cooperating with Respondent officials in regard to overnighting bills for a load to be taken into Mexico. TR 285, 288; JX 7. Complainant reportedly told Ahlers that he did not want to overnight the bills, did not think it was his job to overnight the paperwork, and wanted to put the bills in regular mail instead. TR 286-287. Complainant agreed to haul the load to Mexico but he ostensibly believed he was not responsible for overnighting the bills as requested. TR 315. Ahlers provided funds through a Comcheck for Complainant to overnight the bills. TR 315. After he could not cash it, Complainant never reported to Ahlers that the overnight service would not accept a Comcheck. TR 315. Ahlers' direct supervisor, Daniel Blair, spoke to Complainant about the overnight bills issue in order to emphasize the importance of overnighting the paperwork. Blair is a "Team Leader." He supervises approximately 12 fleet managers and a planner (TR 73-74, 342-343). Because there was perishable fresh meat on the load to Mexico, a claim loss of an estimated $60,000 to $70,000 could have resulted if Respondent lacked the paperwork needed to get the load into Mexico. TR 345-346. Blair testified that he believed that Complainant had no sense of urgency about overnighting the bills. TR 346. Ahlers was concerned that Complainant had had another performance issue and received a serious warning only seven weeks after hire. She testified that she believed that Complainant was in danger of losing his job at that time. TR 288-289.

On May 27, 2014 another entry noted Complainant was not ready to haul a new load on the date on which he had previously agreed. TR 289-291; JX-7. His version is that he asked to have some additional time at his home with his family over the weekend. Respondent granted this request (TR 158-159). Ahlers noted Complainant 's request to extend his home time on HRIS comments (TR 290-91; JX-7, p. 2). She did this in case "there were future issues of this nature" (TR 291). She maintained that she was not considering recommending Complainant's discharge, nor did she consider issuing a final written warning (TR 291).

On May 29, 2014 the issue regarding the Miller/Coors load occurred. TR 50-51; JX-2, p. 244. Complainant was assigned to transport a load of 24 pallets of beer to be picked up at the Coors/Miller facility at Golden, Colorado and deliver it to Coeur d'Alene, Idaho (JX-2, p. 243;

TR45, 47, 50, 140, 293). Qualcomm records indicate that the trailer would already be loaded when Complainant arrived to pick it up and that the shipment would be a "live unload" meaning the driver was required to stay with the trailer while it was being unloaded (TR46; JX-2, p. 243). In order to transport the load to Couer d' Alene, Idaho, he would have had to drive in Colorado and Idaho, and either Wyoming or Utah (TR 56, 223).

Complainant was required to check in with a vendor responsible for spotting trailers at Miller/Coors when he arrived to pick up the load of beer. The Qualcomm message dispatching Complainant to pick up the load indicated that the load would be "HVY" [heavy] and stated that he should go in with a low level of fuel in the tanks in order to avoid going over the legal weight limits. The Qualcomm message instructed him to weigh the loaded tractor-trailer set at the scale on-site (TR 48-50; JX-2, p. 243).

Respondent argues that it strictly forbids overweight load violations, and Complainant acknowledged this at the outset of his employment. It "strictly" requires drivers to comply with all Department of Transportation ("DOT") safety rules, including those dealing with "Cargo-Related" issues such as overloading. JX-20, p. 1. Respondent has established a "Scale Policy:" "Employees are responsible for scaling loads to maintain legal weights. Failure to confirm appropriate weight resulting in safety violations and tickets may result in disciplinary actions up to and including termination of employment." JX-20, p. 2. Complainant signed his acknowledgment of these policies at the outset of his employment, as all driver employees are required. JX-21. Complainant admitted that he was provided a set of employment policies and procedures, and a copy of the company's Driver Employee Manual at the outset of his employment. TR 182, 183.

Complainant acknowledged that he had sufficient hours to complete that load under the hours of service regulations. TR 52; JX-2, p. 244. Respondent specifically asked him through Qualcomm to scale the Miller/Coors load. TR 201; JX-2, 223. The gross weight of the Miller/Coors load was 80,040 pounds. TR 292-293; JX-7.

Respondent alleges that neither Ahlers nor Blair recommended termination of Complainant for refusing to haul the Miller/Coors load. TR 298, 354.[2] However, the record shows that Ahlers made an entry in the HRIS report regarding the refused load allegedly not because it was overweight, "but rather because of Complainant 's poor communication with her about the load." See Brief citing to TR 298-299; JX-6; JX-16. I am advised that furthermore, neither the HRIS report nor the termination form reference the axle weight, but rather only the gross weight. Respondent maintains that Complainant could have hauled the Miller/Coors load under the APU exemption. All Respondent trucks are equipped with an Auxiliary Power Unit ("APU"). TR 295, 349, 374. It argues that Complainant understood that the truck he operated for Respondent was equipped with an APU. TR 138. Both of the briefs note that the APU weighed approximately 400 to 415 pounds. See also 338, 349, 350, 374; RX-2. The APU was on Complainant's truck when he weighed it. TR 222. When Complainant refused the Miller/Coors load, Ahlers reminded him during a phone call that there was a 400 pound APU allowance that made the Miller/Coors load a legal haul. TR 55-56, 293-295. Respondent emphasizes that

[2] Respondent asserts that Mr. Blair did not instruct anyone to give Complainant an unfavorable load after he declined the Miller/Coors load. TR 354.

Ahlers tried to explain to Complainant that there was a 400 pound APU allowance, but he was not saying anything back indicating that he understood what she was saying. TR 59.

Respondent argues that because there was no feedback from Complainant on this issue, Ahlers transferred the phone call to her Team Leader, Blair. TR 59. Blair reiterated to Complainant about the 400 pound APU allowance, advising Complainant he could have taken on the load. TR 80, 348. Complainant's assigned truck had documentation on board explaining the APU exemption. Respondent asserts that it only buys one brand of APU, a Thermo King. A document from Thermo King was in the permit book regarding the APU, its weight, and the APU exemption. TR 81, 349, 375; RX-2. The APU exemption document in the book stated that the APU weighed approximately 415 pounds. TR 81, 350; RX-2. Blair asserted that drivers would know the contents of their permit book because there are instances when it would need to be provided to DOT officers or to inspection lanes at Respondent terminals. TR 351.

Complainant recalls that Ahlers and Blair told him about the APU weight exemption, and that he could haul the load due to the APU exemption. TR 228-229. Respondent maintains that at the time of their conversation, Blair did not know that Complainant was refusing to haul the Miller/Coors load, but rather Blair knew there was an issue with the load and he was trying to explain the APU allowance. TR 82-83. Blair testified that Complainant did not understand the APU exemption explanation he was providing to him. TR 84.

At hearing, Blair asserted that he did not urge Complainant to take the load, but was just trying to explain the APU exemption. TR 84. Eventually, Blair told Complainant that he would take him off the load and move him on to something else. TR 83.

Complainant directs me to testimony about the total weight of the truck. One gallon of diesel fuel weighs about 7.4 pounds (TR 48). He later told Mr. Marten that the truck had between ¼ and ½ tank of fuel on (JX-2, p. 244; TR90-91). The fuel tanks held about 350 gallons of fuel. Arguably, the assigned truck-tractor had fuel mileage between 5.3 to 6.2 miles per gallon (TR 141).

Ahlers sent a Qualcomm message to Complainant stating "Cedric, we are taking you off the load since you are refusing to do it. I asked the planner to put you back on the list waiting for a load." TR 229; JX-2, p. 247. According to Ahlers, Complainant did not mention anything to Mr. Blair about the axles being overweight. His only issue was with the gross weight. TR 348. Respondent argues that Complainant never spoke to Ahlers about an issue regarding the axles being overweight – his sole focus was on the gross weight of his vehicle. TR 221, 295-296. He did not provide a scale ticket for this loads. TR 339.

Complainant was supposed to drive through Colorado, Idaho, Utah and Wyoming – each of which recognizes an APU weight exemption. TR 351. Blair asserted to Complainant that the APU allowance for gross weight would have been allowed in those states. TR 352. Respondent alleges that had he take Blair's advice Complainant could have made the Miller/Coors load "legal." It asserts that based on the two scale tickets on the Miller/Coors load showing the gross weight and the axel weights, Complainant could have slid the tandems to the correct pin setting so that the axel weights would have been correct. TR 379-380; CX-3; RX-5. The weight of the

driver and/or his belongings in the sleeper berth typically would be included in the steer axle weight. TR 380.

Respondent alleges that it took Complainant off the Miller/Coors load and immediately placed him on the waiting list for another load. TR 292; JX-7. The Miller/Coors load was covered by another driver. TR 353. Respondent provided layover pay to Complainant while he waited for a new load. TR 353. Complainant acknowledges that he was given a new load later on during the same day he refused to haul the Miller/Coors load. TR 229-230, 297-298, 353.

Complainant argues that when Ahlers left work on May 29, 2014, she did not know whether Complainant accepted the dispatch from Golden, Colorado to Coeur d'Alene, Idaho (TR 51-52). Joseph Dosher was a night fleet manager in May 2014 and generally worked from 4:00 p.m. to midnight, Sunday through Thursday (TR39, 88-89). On the night of May 29, 2014, Mr. Dosher knew that Complainant had been dispatched to transport a load from Golden, Colorado to Couer d' Alene, Idaho (TR 90). At 17:28 on May 29, 2014, Complainant sent a Qualcomm message accepting the dispatch and acknowledging that he had hours available to haul the load to Couer d' Alene, Idaho without violating the hours of service rule (TR90; JX-2, p. 244). At 18:19 p.m. May 29, 2014, Complainant sent a Qualcomm message indicating that he had arrived at Miller/Coors and that the load consisted of 24 pallets of beer (JX-2, p. 244; TR91-92). Complainant picked up the loaded trailer of beer and drove to a scale operated by Jacobson Companies at Miller/Coors (TR218). The scale was inspected at regular intervals by the State of Colorado and found to pass such inspections. The accuracy percentage required to pass inspections is unknown (TR7, ALJ-1). The first time Complainant weighed the loaded tractor-trailer set, the weight measured 32,040 pounds on the tractor tandem axles, 35,920 pounds on the trailer tandem axles and 80,040 pounds gross weight (CX-3).

The sliding tandem axles on trailers can be moved to adjust weights on trailer tandem axle sets and tractor tandem axle sets (TR 94). Adjustment of axles does not change the gross weight of the tractor-trailer set (TR 145). Whether the sliding of tandem axles can bring the axle weight into compliance with weight laws depends upon how the trailer is loaded (TR 381-382). These facts are undisputed.

After Complainant first weighed the loaded tractor-trailer set, he slid the trailer tandem axles (TR 219-220). After sliding the trailer axles he weighed the set again. The weight recorded was 12,080 pounds on the steering axle, 34,840 pounds on the tractor tandem axle set, 33,120 pounds on the trailer tandem axle set, and the gross weight was 80,040 pounds (JX-5; TR 144-145).

At 1995 p.m. on May 29, 2014, Complainant sent a message to Marten stating "CAN NOT TAKE THIS LOAD DUE TO BEING OVERWEIGHT AND SHIPPER CANT REWORK LOAD. STEER-12,080 DRIVE 34,840 TRL [trailer]-33,120" (JX-2, p. 245; TR 61, 93, 143, 225).

Dosher responded to Complainant asking, "can u slide tandems to adjust drive and trailer weight?" He immediately followed with a message asking Complainant, "Did you weigh on a CAT scale? (TR61, 93-94; JX-2, p. 245). Complainant responded, "ALREADY DONE THAT.

WONT MAKE A DIFFERENT. DID YOU SEE THE GROSS WEIGHT THIS LOAD? THEY ARE ASKING ME TO GO DROP IT BACK WHERE I GOT IT FROM. NO. HERE AT SHIPPER DROPPING LOAD BACK AT SHIPPER." (TR95; JX-2, p. 245).

During testimony Dosher agreed that a steering axle weight may not exceed 12,000 pounds and that a set of two axles may not exceed 34,000 pounds (TR93). He agreed that a complete set may not legally exceed 80,000 pounds (TR93). He admitted that Complainant could not legally haul the load due to the weight (TR95).

Complainant argues that had he taken his assigned load to Couer d' Alene, Idaho, he would have used up some fuel and reduced weight but he would have needed to purchase more fuel in route in order to avoid running out of fuel (TR146). Complainant informed Respondent that he was taking the overweight trailer back to the loading area to see if he could have the load reworked (JX-2, p. 245; TR146-147). Complainant testified that he called to see if arrangements could be made to have the load reworked. He could not get anyone on the telephone (TR147). He then spoke with an individual in the scale house who suggested that he drive to the shipping department at Miller/Coors to see if the load could be reworked (TR147).

At 21:56 on May 29, 2014, Complainant sent a message stating that he did not accept responsibility for the load to Couer d' Alene, ID (TR96, 148-149; JX-2, p. 246). Dosher testified that he understood that Complainant was refusing to haul the load due to the weight (TR97).

Complainant waited for further instructions that evening. Receiving none, he drove to a truck-stop to take a 10-hour break (TR149).

When Ahlers arrived at work on May 30, 2014, she assumed that Complainant had accepted the load to Couer d' Alene, Idaho (TR 52). At 13:11 on May 30, 2014, Complainant sent a Qualcomm message to Marten stating, "WHAT IS THE PLAN ON GETTING ANOTHER LOAD? HAVE NOT HEARD ANYTHING YET" (JX-2, pp. 274-275; TR53-54, 149, 226). Ahlers responded stating, "you are on trip 732267 going to ID." (JX-2, p. 274; TR54, 150, 293).

Ahlers reviewed the messages exchanged by Complainant and Dosher and also discovered that Complainant had telephoned his concern over the weight of the tractor-trailer set (TR54-55, 293, 323-324). She then called Complainant after observing that the set was "only" 40 pounds over the legal gross weight limit (TR 293-294). Complainant asserts that he told Ahlers that the loaded tractor-trailer set was over the gross weight permitted by law (TR55-56, 227-228). He also told her that the load was over the legal weight on the tandem axles (TR152). She told Complainant that he could haul up to 400 pounds over the legal limits because his assigned truck-tractor was equipped with an auxiliary power unit (TR55-56, 295). Complainant asked Ahlers to fax him something stating that there was an exemption from the weight limitations because his truck-tractor was equipped with an APU (TR152, 294).

Complainant asked Ahlers if he could call the Department of Transportation to look at his load and then she could tell a DOT officer why he could legally haul the load (TR153).

Complainant continued to refuse the load (TR152-153). It appeared to Complainant that Ahlers was frustrated (TR156).

Reportedly, Ahlers knew that some states did not allow a weight allowance over the otherwise maximum legal weights even though the truck-tractors were equipped with an auxiliary power unit (TR 55). She understood that the steering axle weight limit on a truck-tractor was 12,000 plus the APU allowance (TR 62). She also understood that the weight measured on any set of two axles may not exceed 34,000 pounds (TR 62). At 13:36 on May 30, 2014, Complainant sent a Qualcomm message to Marten stating, "THAT LOAD IS OVER GROSS." (JX-2, p. 275; TR54).

Whether the load actually was overweight is disputed, but the test under STAA, is whether Complainant reasonably believed he was engaged in protected activity. A***ss't Sec'y & Bailey v. Koch Foods, LLC***, ARB No. 10-001, ALJ No. 2008-STA-061, *slip op*. at 9 (ARB Sept. 30, 2011)(emphasis added). The refusal is subjectively reasonable so long as the employee "actually believed that the conduct he complained of constituted a violation of relevant law." Id. The objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the employee. Id.

On June 2, 2014, Respondent dispatched Complainant to pick up a load for Coca-Cola in Waco, Texas and deliver it in Harrisonville, MO (JX-2, p. 262). After picking up the load he drove for four hours and then took a break of 15½ hours (JX-16, p. 2; TR 157). Complainant stopped at Respondent's terminal in Desoto, Texas because he was required to do so by company policy in order to have his assigned vehicles inspected (TR 158). Complainant overslept and caused Respondent to miss its service commitment for the load (TR 158). At 8:46 a.m. on June 4, 2014, Complainant sent a Qualcomm message indicating that he had overslept after taking some medication for a shoulder injury and that he had been further delayed because his assigned truck-tractor had been in Respondent's shop and he was restrained by the hours of service regulation (TR 324-325; JX-2, p. 268).

The Coca-Cola load was delivered more than 6½ hours late, causing a service failure (TR 214, 232). Complainant maintains that this was the only service failure about which Respondent had ever spoken to him prior to his discharge (TR 168).[3]

Ahlers placed a notation in the HRIS comments recording Complainant's service failure on the Coca-Cola load (JX-7, p. 2; TR 299-300). Coca-Cola is a large customer (TR 301, 366-

[3] As stated above, he sent a message stating "CAN NOT TAKE THIS LOAD DUE TO BEING OVERWEIGHT AND SHIPPER CANT REWORK LOAD. STEER-12,080 DRIVE 34,840 TRL -33,120" (JX-2, p. 245). He also sent a message to Dosher on May 29, 2014, stating, "DID YOU SEE THE GROSS WEIGHT THIS LOAD?" (Tr. 95; JX-2, p. 245). On May 30, 2014, Complainant filed complaints with Ms. Ahlers, by telephone, stating that the loaded tractor-trailer set was over the gross weight permitted by law (TR 55-56, 227-228). He also told her that the load was over the legal weight on the tandem axles (TR 152). He also asked Ahlers if he could call the Department of Transportation to look at his load and then Marten could tell a DOT officer why he could legally haul the load (Tr. 153). At 13:36 on May 30, 2014, Mr. Sinkfield sent a Qualcomm message to Marten stating, "THAT LOAD IS OVER GROSS." (JX-2, p. 275; Tr. 54). He also filed complaints with Mr. Blair stating that his load was "overweight" on the gross vehicle weight and tandem axle weight (Tr. 154, 156).

367). Coca-Cola is still a Marten customer (TR 383-384, testimony of Jason Marten). Complainant is not the only driver who has had a service failure hauling a load for Coca-Cola (TR 383, testimony of Jason Marten). Marten does not fire every driver who has a service failure hauling a load for Coca-Cola (TR 383, 479, testimony of Jason Marten and Emma Aikman).

Respondent does not always fire drivers who have two service failures during their probationary period (TR 70, 105). In fact, there is no set number of service failures by a driver or set number of "notable issues" that will result in discharge (TR 132, 358, testimony of Emma Aikman and Jason Marten).

At 6:56 a.m. on June 4, 2014, Marten's operations manager in Desoto, Texas, Allison Gorton, sent an email to Jason Marten indicating that Complainant "Completely bombed on Coke supply load…please make sure he is written up and it's documented." Ahlers received a copy of the email (TR 302-303; JX-22, p. 6-7). Jason Marten asked Ahlers to find out why there was a service failure on the Coca-Cola load that Complainant was hauling (JX-22, p. 6-7; TR 303). Jason Marten was a Team Leader for Marten. In late May and early June 2014, he was supervising some of Blair's fleet managers including Ms. Ahlers (TR 101, 303, 364-365).

In early June, 2014, Jason Marten recommended to the Human Resources Department that Complainant be fired (TR 101-102; JX-22, p. 6). In making his recommendation that Respondent fire Complainant, Jason Marten reviewed the HRIS comments for Complainant (JX-7; TR 101-105).

Ahlers recommended to Jeremy Guth (Blair's supervisor) and the Human Resources Department that Complainant be fired (TR 64-65, 303; JX-22). Company policy dictates that only Human Resources Department officials may discharge a truck driver (TR 108, 119, 369-370, 395, 430).

Annette Konsela is a Human Resources Senior Generalist (TR 107, 394). Her job duties include working with operations personnel on progressive discipline and separations from employment (TR 108, 394-395). Ahlers asked Konsela to look at the circumstances involving a service failure by Complainant on the Coca-Cola load and recommended to Konsela that Complainant be fired (JX-22, p. 6). Konsela reviewed Complainant's work record (TR 110). Konsela decided to place Complainant on a "terminal routing" in order to be fired at the recommendation of Ahlers and Jason Marten, who also recommended that Complainant be fired (TR 399; JX-22, p. 2).

Konsela recommended to Emma Aikman, Human Resources Generalist, that Complainant be fired (TR 109, 417, 439). At the time Konsela admittedly knew that Complainant had refused a load on May 30, 2014 because he believed it was overweight (TR 400).

Konsela was the only person who recommended to Aikman that Complainant be fired (TR 120). Aikman knew that others, including possibly Ahlers, had recommended to Konsela that Complainant be fired (TR 120). Konsela understood that Marten was firing Complainant

due to his overall performance record (TR 416). By company policy, a decision to discharge a driver is made based on the driver's total work record (TR 110). Konsela understood that Complainant was discharged based on his entire work record during his probationary period (TR 101).

Aikman made the decision to fire Complainant based on his performance (TR 398-399, 436-437). On June 4, 2014, Respondent placed Complainant on a "terminal routing" to be discharged (TR 65, 307; JX-22, p. 2). At that point Ms. Ahlers understood that Respondent was acting on her recommendation that Complainant be fired (TR 65).

Complainant was dispatched to Respondent's terminal at Edwardsville, Kansas (TR 123). Complainant drove to Edwardsville, where the terminal manager, Seth Reda, directed him into the office for a conference call (TR 166-167). Aikman then fired Complainant by telephone on June 5, 2014 (TR 63, 123, 167).

At the time she fired Complainant she admittedly knew that he had refused the load from Miller/Coors because it was overweight. Respondent had problems with Miller/Coors loading trailers over the legal weight limits for "a lot of years." (TR 71, testimony of Ahlers). She knew that Ahlers had told Complainant that it was okay for him to haul the load, that Ahlers could not reason with him and that he had been removed from the dispatch (TR 121, 484). Aikman testified that she did not believe Complainant had a legitimate reason to refuse to haul the load (TR 125-126, 462, 481). Respondent policy considers a refusal of a load without a legitimate reason to constitute unsatisfactory job performance (TR 477, testimony of Emma Aikman).

I had an opportunity to observe the Complainant during two days of hearing, and I find that he is credible as to his understanding of the law as well as to his mental state at the time he refused the Miller/Coors load.

Respondent developed a thorough record in an attempt to disprove Claimant's subjective understanding, but I find that the controversy as to how the weight distribution and state weight standards weigh in Complainant's favor. I note again that Complainant's first line supervisor noted on May 30, 2014, Complainant had a "CONFLICTWITH FLEET MANAGER" relating to his refusal to haul the load from Miller/Coors stating, that "HE CAN NOT BE REASONED WITH." (JX-7, p. 2; TR 58-59, 292, 298-299, 321-322). I find that this is evidence that Complainant was vociferous in his position. I also find that Respondent was placed on inquiry notice of the possible weight violation, and had reason to know that the weight issue should have placed Complainant in protected status.

Respondent had other load difficulties at the same facility. [4] I note that the Respondent later argues that it did not hold the incident against him in its termination process. When Ms. Aikman fired Complainant she discussed all of his performance-based issues including his refusal to haul the load from Miller/Coors that he believed was overweight (TR 124-125, 167, 455, 466). A "Term Sheet" sets forth the issues of Complainant's work history at Respondent.

[4] Respondent has a forced dispatch policy which prohibits drivers from refusing dispatches unless the dispatch would violate the hours of service regulation or if the vehicles had a defect that may result in an accident or breakdown (TR 84). A driver's refusal to haul a load can create a service failure (TR 74).

Respondent's HRIS comment sheet for Complainant was also included as part of the term sheet (TR 76-78, 113; JX-16). The term sheet indicated in the comments section that Complainant had "SEVEN NOTABLE ISSUES SINCE 3/24 HIRE DATE." The seven notable issues included the a "REFUSED LOAD" on May 30, 2014 due to the tractor trailer set being overweight. (JX-16, pp. 1, 3; TR 79-80). The comments in the term sheet recap the reasons for the discharge (TR 114-115, 122, 421). The reason for termination listed on the term sheet was "PERFORMANCE ISSUES" and was placed into the term form by Emma Aikman (TR 113; JX16, p. 1).

Respondent sent Complainant a letter dated June 4, 2014, terminating his employment that states that he was fired "due to unsatisfactory performance during your introductory period." (Tr. 173, 215; JX-10)

I find that by denying the fact that Complainant was in protected activity and later acknowledging that he had been in protected activity, Respondent asserts inconsistent positions.

Moreover, Respondent alleges that had he take Blair's advice Complainant could have made the Miller/Coors load "legal." Complainant submitted the following:

> The laws of Idaho, Utah and Wyoming prohibit operation of a 5-axle tractor-trailer set on the Interstate Highways where the gross vehicle weight of the set exceeds 80,000 pounds and where any set of two axles exceeds 34,000 pounds, unless an overweight permit has been issued to the motor carrier.

Brief.[5]

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[5] Idaho Statute 49-100 states in pertinent part as follows:

WEIGHT, SPEED AND TIRE REGULATIONS

49-1001. ALLOWABLE GROSS LOADS. The gross load imposed on the highway by any vehicle or combination of vehicles shall not exceed the limits in this section. The maximum single axle gross weight shall be twenty thousand (20,000) pounds, the maximum single wheel gross weight shall be ten thousand (10,000) pounds and the maximum gross vehicle or combination weight shall be one hundred five thousand five hundred (105,500) pounds, provided that maximum gross vehicle or combination weight on United States federal interstate and defense highways of this state shall not exceed eighty thousand (80,000) pounds, except as permitted under the provisions of section 49-1004, Idaho Code.

Idaho Code Section 49-1001(b) provides that any set of two axles may not exceed a weight of 34,000 pounds. While Idaho Code Section 49-1000 sets forth certain exemptions from the otherwise applicable weight limitations, upon application for a special permit, it contains no exemption for auxiliary power units.

The Utah Administrative Code, Rule R909-2-3 contains the following definitions:

(3) "Bridge formula" is a bridge protection formula used by federal and state governments to regulate the amount of weight that can be put on each of a vehicle's axles, or the number of axles, and the distance between the axles or group of axles must be to legally carry a given weight.

***

(17) "Highway" any public road, street, alley, lane, court, place, viaduct, tunnel, culvert, bridge, or structure laid out or erected for public use, or dedicated or abandoned to the public, or made public in an action for the partition of real property, including the entire area within the right-of-way.

***

(20) "Interstate system" means any highway designated as an interstate or freeway. For the purpose of this rule: I-15, I-215, I-80, I-70, US 89 between I-84 and I-15 and SR 201 between I-15 and I-80 will be considered interstate.

Complainant argues that STAA protects complaints related to state commercial vehicle regulations. ***Chapman v. Heartland Express of Iowa, Inc***., ARB No. 02-030, ALJ No. 2001-STA-35 n. 9 (ARB Aug. 28, 2003). Complainant's complaints alleging that the gross weight and axle weights of his assigned tractor-trailer set exceeded the legal limits were related to violations of Idaho Statute 49-100, Utah Administrative Code Rule R909-2-5, Wyoming Statutes § 31-18-801 and 23 C.F.R. § 658.17 because those laws prohibit operation of a tractor-trailer set where the gross vehicle weight of the set exceeds 80,000 pounds. Those laws and 23 C.F.R. § 658.17 prohibit operation of a tractor-trailer set where the weight on tandem axles exceeds 34,000 pounds. Wyoming Statutes § 31-18-801 allows tandem axle weights up to 36,000 pounds, but not on the Interstate and National Highways. Complainant's complaints were also related to

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> ***
> (49) "Truck tractor" means a motor vehicle designed and used primarily for drawing other vehicles and not constructed to carry a load other than a part of the weight of the vehicle and load that is drawn.
> ***
> (56) "Vehicle" every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices used exclusively upon rails or tracks.

The Utah Administrative Code, Rule R909-2-5, sets forth limits on commercial vehicle weights and states as follows:

> R909-2-5 Legal Weight Limitations.
> (1) The maximum gross and axle weight limitations are noted in Table 2 and may not be operated in excess of:
>
> TABLE 2
>
> | Maximum Gross and Axle Weight Limitations | |
> |---|---|
> | Single Wheel | 10,500 pounds |
> | Single Axle | 20,000 pounds |
> | Tandem Axle | 34,000 pounds |
> | Tridem Axle | Must comply with bridge formula |
> | Gross Vehicle Weight | 80,000 pounds |
>
> (2) An overweight permit must be obtained to authorize any exception to the maximum weight limitations listed in Table 2.

While the Utah Administrative Code sets forth certain exemptions from the otherwise applicable weight limitations provided an overweight permit is obtained, it contains no exemption for auxiliary power units.

> Wyoming Statutes § 31-18-801 states in pertinent part as follows:
> (v) Weights:
> ***
> (D) No single axle shall carry a load in excess of twenty thousand (20,000) pounds;
> (E) No tandem axle shall carry a load in excess of thirty-six thousand (36,000) pounds and no one (1) axle of any group of two (2) consecutive axles shall exceed the weight permitted on a single axle;
> ***
> (G) Subject to the limitation imposed by the axle load, no vehicle or combination of vehicles shall be operated on the interstate or national defense highways exceeding the maximum weight allowed under federal law and unless in compliance with Table I corresponding to a distance in feet between the extremes of any axle groups measured longitudinally to the nearest foot except that vehicles with two (2) consecutive sets of tandem axles may carry a gross load of thirty-six thousand (36,000) pounds each if the distance between the first and last axles of the consecutive sets of tandem axles is thirty-six (36) feet or more;

Wyoming Statutes contain no exemption for auxiliary power units.

violations of 49 C.F.R. § 392.2 which requires that "commercial motor vehicles must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated."

Although Complainant did not expressly state the above to Respondent on May 29 and May 30, 2014. I find that by necessary implication Respondent had reason to know that Complainant could reasonably assume that he was protected by state law.

Although, Blair asserted that he did not urge Complainant to take the Coca-Cola load, and was just trying to explain the APU exemption, I find that the circumstances dictate that he and Ahlers exerted pressure on Complainant to take the load despite his protestations.

Complainant also argues that circumstantial evidence supports a finding that the protected work refusal and protected complaints contributed to his firing. I note that there was a mere week between the May 29 and the June 4 incident.

I find that the impetus to do so was supplied by Ms. Ahlers, Complainant's line supervisor before June 5, the date of firing:

> Q [By Mr. Taylor] Okay. … tell the Court what it means to have be placed on a terminal routing.
> A [Connie Ahlers]. Terminal routing is used whenever we're going to fire a driver or place them on a final warning. We always do the final warnings in person, if they're to be and that's also called a terminal routing.
> Q Well, once Complainant was … placed on a terminal routing, you had a pretty good idea that he was going to be fired. Correct?
> A Correct.
> Q So you understood that HR was acting upon your recommendation. Correct?
> A Correct.

TR 65. [6] I accept that this shows that Respondent accepted her version of the facts.

Complainant argues that through Ms. Ahler's recommendation, Ms. Konsela knew that Complainant had refused a load on May 30, 2014 because it was overweight (TR 400). I am advised that the knowledge of Complainant's protected activity, coupled with close temporal proximity of the protected activity and the adverse employment action raises an inference of retaliation. Citing to ***Cefalu v. Roadway Express, Inc***., ARB Nos. 04-103 & 04-161, ALJ No.

[6] On June 4, 2014 Respondent placed Complainant on a "terminal routing" to be fired at Annette Konsela 's instruction and Ms. Aikman fired him on June 5, 2014 (TR 63, 65, 123, 167, 307; JX-22, p. 2). Konsela is a Human Resources Senior Generalist (TR 107, 394). Her job duties include working with operations personnel on progressive discipline and separations from employment (TR 108, 394-395). Ahlers asked Ms. Konsela to look at the circumstances involving a service failure by Complainant on the Coca-Cola load and recommended to Ms. Konsela that Complainant be fired (JX-22, p. 6). Ms. Konsela reviewed Complainant's work record (TR 110). Ms. Konsela placed Complainant on a terminal routing to be fired based upon the recommendation of Mr. Ahlers and Mr. Marten. Ahlers and Mr. Marten also recommended termination (TR 399; JX-22, p. 2). Ms. Konsela recommended to Ms. Aikman that Complainant be fired (TR 109, 417, 439).

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

I accept the Complainant's argument.

Therefore, I find that Complainant engaged in protected activity at that time, and Respondent was aware of it.

ADVERSE PERSONNEL ACTION

There is no dispute that Complainant was fired by Respondent.

CONTRIBUTION

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." ***Williams v. Domino's Pizza***, *supra*, at 5. Complainant can succeed by "providing either direct or indirect proof of contribution." Id. "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." Id. If Complainant "does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment." Id."

Direct evidence shows that the protected activity contributed to his discharge. The "Term Sheet" prepared by Aikman noted in the comments section "SEVEN NOTABLE ISSUES SINCE 3/24 HIRE DATE." The seven notable issues included the refusal to take the overweight load May 30, 2014 (JX-16, pp. 1, 3; Tr. 79-80, 122). Konsela testified that the comments in the term sheet recap the reasons for the discharge (Tr. 114-115, 122). The comments on the term sheet noting the seven notable issues provides direct evidence that the protected refusal of the overweight load on May 29-30, 2014 contributed to his firing. Additionally, the term sheet mentions his 'CONFLICT WITH FLEET MANAGER" concerning the overweight load on May 30, 2014 (JX-16, p. 3). This notation is direct evidence that the protected complaints about the overweight load contributed to his discharge.

The term sheet sets forth "PERFORMANCE ISSUES" as the reason for Complainant's termination (JX-16, p. 1). This information was placed into the term form by Aikman (TR 113; JX16, p. 1). Aikman testified that all of the "SEVEN NOTABLE ISSUES" referred to in the term sheet were performance issues (TR 483). The termination letter was sent to Complainant and indicated that he was fired "due to unsatisfactory performance during your introductory period." (TR 173, 215; JX-10)

Complainant also posits that Respondent also had an ulterior motive to fire him. Respondent takes the position that a refusal of a load without a legitimate reason constitutes an unsatisfactory job performance event (TR 477). In establishing a basis for discharge, Aikman did not assume that Complainant might have had a legitimate reason to refuse to haul the load (TR 125-126, 462, 481). A driver's refusal to haul a load can create a service failure (TR 74). Respondent has a forced dispatch policy which prohibits drivers from refusing dispatches unless

the dispatch would violate the hours of service regulation or if the vehicles had a defect that may result in an accident or breakdown (TR 84, testimony of Blair). When Aikman fired Complainant, she enumerated all of his performance-based issues with him including his refusal to haul the load from Miller/Coors that he believed was overweight (TR 124-125, 167, 455, 466). She testified that she fired him based on his entire work record (TR 121). Therefore, in her algorithm for discharge, protected activity was part of the equation.

As to Aikman's testimony that she fired Complainant based on his entire work record, I am directed to the comments made in the term form. I am reminded that the Second Circuit Court of Appeals has held that pretext can be demonstrated by "evidence of inconsistencies or anomalies that could support an inference that the employer did not act for its stated reason." ***Keller v. Orix Credit Alliance, Inc***., 105 F.3d 1508 (3rd Cir. 1997) (quoting ***Sempier v. Johnson & Higgins,*** 45 F.3d 724, 731 (3rd Cir. 1995)) (emphasis in original). On its face, Respondent claims that it fired Complainant principally because of the service failure on the Coca-Cola load on June 4, 2014. Respondent has a progressive discipline policy which calls for 3 separate warning letters (JX-20, p. 5). Complainant received only 2 written warnings before he was fired (JX-16, pp. 2-3). While a Respondent's handbook states that progressive discipline need not be followed during the driver's 90-day introductory period need not follow progressive discipline, Respondent does not fire every driver who has a service failure hauling a load for Coca-Cola (TR 383, 479). The term sheet only shows one service failure (JX-16). Respondent does not always fire drivers who have two service failures during their probationary period (TR 70, 105). Complainant argues that these anomalies constitute strong evidence of pretext.

I find that the record does not substantiate that the service failure on the Coca-Cola load on June 4, 2014 was the basis for discharge. To the contrary, the testimony and the documentation shows that discharged was based on a performance record that included the Miller/Coors incident. I do not accept that the fact that the progressive discipline policy was not followed to the letter is evidence of pretext. I do find, however, that comments made in the term form are contrary to the allegation that Complainant was fired because of the June 4, Coca-Cola incident. This supports an inference that the Respondent did not act for its stated reason. It is more reasonable to a reasonable degree of probability that one reason for discharge was the Miller/Coors incident.

I find that the Complainant has proven protected activity directly and through circumstantial evidence. Therefore, I find that Complainant engaged in protected activity at that time, and Respondent was aware of it.

I accept that this information resonated through the entire chain of HR command. When she fired him, Aikman knew that Complainant had refused the load from Miller/Coors because he believed that it was overweight (TR 121, 484).

I find that the testimony of Complainant's line supervisor regarding "terminal routing" is the "smoking gun" that convinces me that Complainant has established contribution of the termination by a preponderance of the evidence.

SHIFTING BURDEN OF PROOF

To avoid liability Respondent must show "by clear and convincing evidence" that it would have taken the unfavorable personnel action in the absence of protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); ***Fleeman v. Nebraska Pork Partners***, ARB Nos. 09-059 & 09-096, ALJ No. 2008-STA-15, at 2, n. 1 (ARB May 28, 2010). "Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain." ***Clarke***, ARB No. 09-114, slip op. at 4 (internal quotation marks deleted)(citations omitted). See also ***DeFrancesco v. Union Railroad Company***, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012). The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard.

The Administrative Review Board has been using the following test: the plain language of the statute requires a case-by-case balancing of three factors:

(1) How 'clear' and 'convincing' the independent significance is of the non-protected activity;

(2) The evidence that proves or disproves whether the employer 'would have' taken the same adverse actions; and

(3) The facts that would change in the 'absence of' the protected activity.

Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, ALJ No. 2005-ERA-006, *slip op*. at 12 (ARB Apr. 25, 2014) (internal citations omitted). Although Speegle was a nuclear whistleblower, the standard would be the same. ***Timmons v. CRST Dedicated Services, Inc.,*** ARB No. 14-051, ALJ No. 2014-STA-9 (ARB Sept. 29, 2014)

Here Respondent argues that it has produced clear and convincing evidence that it would have fired Complainant absent protected activity. This factor, if proven, overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability.[7]

Complainant has been employed in a wide variety of truck driving jobs including operating tractor-trailer sets, dump trucks and ready-mix trucks (TR 136-137). Complainant worked during a 90-day introductory period (TR 181). He was a long-haul driver except for one day when he was a regional driver (TR 182).

At the start of his employment, Complainant received a Driver Employee Manual (TR 183; JX-21). Respondent has a policy which requires drivers to scale loads to ensure that legal weights are maintained (JX-20, p. 2; TR 185).

Under its policies Respondent may discipline drivers for a variety of reasons including failing to secure equipment, failing to pick up and deliver loads on time and unsatisfactory job performance (JX-20, pp. 4-5).

[7] Although I am flattered that Respondent cites to some of my decision where I found clear and convincing evidence, Respondent did not cite to my decisions where I did not.

The timeline is:

Date	Event	Respondent's Reaction
March 27, 2014	Complainant leaves load unsecure on his very first load, which expressly violates the Employee Conduct and Discipline Policy (TR 7-8)	Complainant's Supervisor, Connie Ahlers, is concerned that he has an incident so soon, and because he directly violated her instructions on his first load. (TR 15-16) Ms. Ahler's verbally counsels Complainant. (TR 13-14)
April 10, 2014	Complainant violates company policy to maintain "idle time" below 4 percent. (TR 17-18)	Ms. Ahler counsels Complainant about "idle time" and threatens progressive discipline if he does not improve. (TR 20)
May 6, 2014	Complainant fails to secure his assigned equipment and fails to deliver his assigned load. (PFOF 21) He never communicated with anyone that he was leaving his assigned truck and it is towed at company expense. (TR 24-27)	Respondent issues a written warning to Complainant. (TR 21) Complainant is removed from the "Regional Fleet," an opportunity he had requested, after a single day. (TR 23, 28) Complainant's supervisor, Ms. Ahlers, allegedly had never seen a situation in which a driver had been removed from another fleet after one day. (TR 29)
May 14, 2014	Complainant initially fails to overnight important paperwork to Respondent that is needed for a meat load to cross into Mexico. (TR 37) His failure to do so exposed the Company to a potential loss of the load, which was worth $60,000-$70,000. (TR 42)	Respondent issues a Serious Warning to Complainant. (TR 36)
May 27, 2014	Complainant fails to be ready to handle a new load on the date at which he agreed to be ready. (TR 46)	No discipline is issued. (TR 46)
May 29, 2014	Episode involving Coors/Miller, the subject of the alleged protected activity.	

Date	Event	Respondent's Reaction
June 4, 2014	Complainant takes two unauthorized breaks during a load haul for one of Respondent's largest customers—one for 3.5 hours and one for 15.5 hours. (TR 106-07) Complainant admits that he simply "overslept." (TR 109) The Coca-Cola load was delivered 8 hours late. (TR 116)	Complainant is terminated. (TR 146)

Please note that I modified this time line from the structure submitted by Respondents.

Respondent argues that Complainant "had one of the worst starts to his employment at Respondent imaginable. The record plainly shows that Respondent had more than enough reasons to terminate Complainant's employment based on events that bore no connection whatsoever to any protected activity." See Brief. I am reminded that Complainant had serious performance issues in his first 73 days of employment. Respondent argues that evidence "conclusively" shows that Complainant accumulated "a pitiful performance record" during the first 73 days of his probationary period, including:

- Multiple documented performance and disciplinary issues while in his Introductory Period.
- A Written Warning and Serious Warning in only his first few months of employment.
- Exposing the Company to a potential $60,000-$70,000 loss on a single load. "Completely bomb[ing]" a load for one of Respondent Transport's largest customers immediately before his termination and after his refused load.

JX 9 contains several warning letters issued to Complainant. JX 10 is a discharge letter.

Respondent argues that the June 4, 2014 service failure, the event immediately preceding the termination was egregious.

Complainant argues that as to the June 4, 2014 service failure, the fact that Respondent does not fire every driver who has a service failure hauling a load for Coca-Cola, and does not always fire drivers who have two service failures during their probationary period tends to disprove any claim that Respondent would have fired Complainant in the absence of the protected activities. See Brief.

I find that the facts show that the Respondent's conduct did not need to follow progressive discipline in this case because he was a probationary employee. Reviewing Respondent's policy, I find further that a single episode, such as the Coca-Cola incident, *could* be the basis for termination.

In this case, I agree that Complainant had at least three episodes that could have been the basis for discharge. Had the Respondent fired Complainant after the May 27, it could have done

so. However, the protected activity arose two days later, as a result of the Miller/Coors incident. On June 4, when the Coca-Cola incident occurred, the Complainant was in protected status. The principal issue is whether Respondent would have fired Complainant as a result of the Coca-Cola incident or for any non-protected activity *anyway*. To meet the burden, the employer must show that 'the truth of its factual contentions is highly probable.'" See, ***Araujo v. New Jersey Transit Rail Operations, Inc***., 708 F.3d 152, 159 (3d Cir. 2013). "In addition to the high burden of proof, the express language of the statute requires that the 'clear and convincing' evidence prove what the employer 'would have done' not simply what it 'could have' done." ***Speegle***, ARB No. 13-074, slip op. at 11.

The testimony for the June 4, 2014 incident included the following colloquy:

> Q [By Respondent counsel] And you agree this [was a June 4, 2014] load for Coca-Cola?
>
> A I believe so.
>
> Q Had you run loads for Coca-Cola before this one?
>
> A No, sir.
>
> Q And Ahlers [The immediate supervisor] was also asking you for an ETA [estimated time of arrival], meaning what time you expected it to be delivered to Coke. Correct?
>
> A Yes, sir.
>
> Q And if you keep reading the Qualcomm communication, you indicated at 8:57 that you took something last night for your injured shoulder and overslept. Did I read that correctly?
>
> A Yes, sir.
>
> ….
>
> Q You understood that oversleeping would cause the load to be delivered late. Correct?
>
> A Yes, sir.
>
> Q And you had not received advanced approval from Marten at the time that you took the pain reliever that caused drowsiness. Correct?
>
> A That's correct.
>
> ….
>
> Q And you don't dispute that as a result of your conduct, the load that you were to deliver was more than six-and-a-half hours late. Correct?
>
> A No, sir. I don't dispute that.
>
> ….
>
> Q Okay. And you understand that that load on June 4, 2014, constituted a service failure. Correct?
>
> A Yes, sir.
>
> Q And you were you agree that you were terminated from your employment at Marten on the following day. Correct?
>
> A Yes, sir.

TR 212-214.

Complainant does not argue that the June 4, 2014 load was overweight.

Respondent has proven that Complainant was a demonstrably poor employee in his first 73 days of employment. But it alleges that the failed Coca-Cola load was "the last straw" and is underscored by the Company's reaction to it. According to Respondent, immediately after the failed load, Respondent personnel began discussing termination. TR 119-20. Respondent proffered an email chain. Respondent argues that the first email in the chain references Complainant's failed Coca-Cola load, and the later email in the sequence calls for his termination. Id. "Nowhere in this email chain is there any reference to any refused load or protected activity by Complainant. Id. The sole focus is on Complainant's serious performance issues."

Respondent also argues that multiple Respondent personnel other than the discharge decision-maker recommended Complainant's termination, and paid no attention to the refused load.

I am also advised that clear and convincing evidence exists is because it has the benefit of seeing how important Respondent personnel other than the discharge decision-maker – Ms. Aikman – would have addressed Complainant's situation. I am advised that Jason Marten and Aikman stated in documentation just before Complainant's separation that they believed Complainant should be terminated after the failed Coca-Cola load, and neither cited any refused load or protected activity in their recorded rationale. TR 119-20.

Respondent also argues that the refused load situation was relatively minor – Complainant was not disciplined let alone fired after the refusal, and he received non-obligatory waiting pay. It alleges that the only reason that the Miller/Coors load was even noted in Complainant's personnel file was because of Complainant's poor communication and because it seemed to reflect a lack of understanding by Complainant about the APU exemption. TR 64 and 75. "Given these facts, Complainant's refused load should not be viewed as anything but a relatively minor event in an employment history marked by serious deficiencies and major warnings." See Brief.

Respondent argues as follows:

> For this Court to find that there is not clear and convincing evidence, the Court would effectively need to believe that Complainant may not have been fired if only he had taken the Miller/Coors load. To reach this conclusion would be to ignore: (1) the huge number of performance problems incurred by Complainant during just the first 73 days of his Introductory Period, (2) Complainant's ascension up the disciplinary chain well before the Miller/Coors load, (3) the seriousness of the "[c]ompletely bombed" Coca-Cola load immediately before his termination, but after his refused load, (4) the emails showing that Respondent officials were recommending termination for reasons that had nothing to do with protected activity, (5) the favorable actions that Respondent took toward Complainant in the wake of his alleged protected activity, and (6) the testimony of multiple Respondent witnesses that Complainant would have been terminated whether he had refused a single load or not.

I find that this argument misstates my findings above. When Complainant has the burden of proof, Complainant need not show that the protected activity completely or even significantly caused the adverse action. Evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. See ***Benjamin v. Citationshares Mgmt., L.L.C***., ARB No. 14-039, ALJ No. 2010-AIR-001 (ARB July 28, 2014).

Here the burden for Respondent is greater than the preponderance standard. I note that none of the documents prepared contemporaneously with the firing track or are even consistent with the argument made in the briefs and enumerated above. Although Respondent alleges it began discussing termination immediately after the Coca-Cola load failure, they had been discussing it long before then.

Complainant reminds me, to the contrary, that the term sheet lists only two notable issues: the refusal of the overweight load and related "CONFLICT WITH FLEET MANAGER" occurring on May 30, 2014, and the service failure on June 4, 2014 (JX-16). Thus, there is no independent significance of the non-protected notable issues occurring before May 29-30, 2014. Complainant argues that as to the June 4, 2014 service failure, the fact that Respondent does not fire every driver who has a service failure hauling a load for Coca-Cola, and does not always fire drivers who have two service failures during their probationary period tends to disprove any claim that Respondent would have fired Mr. Sinkfield in the absence of the protected activities.

I agree. Moreover, Aikman noted in the comments section "SEVEN NOTABLE ISSUES SINCE 3/24 HIRE DATE." The seven notable issues included the refusal to take the overweight load May 30, 2014 (JX-16, pp. 1, 3; Tr. 79-80, 122). Konsela testified that the comments in the term sheet recap the reasons for the discharge (Tr. 114-115, 122). The comments on the term sheet noting the seven notable issues provides direct evidence that the protected refusal of the overweight load on May 29-30, 2014 contributed to his firing. Additionally, the term sheet mentions his 'CONFLICT WITH FLEET MANAGER" concerning the overweight load on May 30, 2014 (JX-16, p. 3). This notation is direct evidence that the protected complaints about the overweight load contributed to his discharge.

The term sheet sets forth "PERFORMANCE ISSUES" as the reason for Complainant's termination (JX-16, p. 1). This information was placed into the term form by Aikman (TR 113; JX16, p. 1). Aikman testified that all of the "SEVEN NOTABLE ISSUES" referred to in the term sheet were performance issues (TR 483). The termination letter was sent to Complainant and indicated that he was fired "due to unsatisfactory performance during your introductory period." (TR 173, 215; JX-10).

I also note that the termination took place within a week of the protected activity, which I find, substantiates that protected activity, the Miller/Coors incident, was temporally proximate to termination.

I find that the reasons for termination were not that the June 2-4, 2014 event was "the last straw" or that the Coke account was crucial or because sleeping through the commitment to take the load was egregious. He was fired after an evaluation of his performance, which admittedly included the protected activity. This invokes prong 1 of the ***Speegle*** standard: How 'clear' and 'convincing' the independent significance is of the non-protected activity? I find it is unconvincing given the rationale expressed as "performance issues" that incorporate the protected activity. [8]

I find that not only has Respondent failed to establish that termination was by a clear and convincing standard as expressed by prong 2 of the ***Speegle*** standard, evidence that proves or disproves whether the employer 'would have' taken the same adverse actions; a preponderance of the evidence favors a finding the Complainant was fired in part due to the protected activity.

[8] "[L]egitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may not be weighed against a complainant's showing of contribution (which must be proven by a preponderance of the evidence)." ***Fordham v. Fannie Mae***, ARB No. 12-061, ALJ No. 2010-SOX-051, *slip op*. at 20-37 (ARB Oct. 9, 2014); Accord, ***Powers v. Union Pac. R.R. Co.***, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Mar. 19, 2015).

Finally, I find that Respondent has not established the facts that would change in the absence of the protected activity as required by the third prong in ***Speegle***, *supra*.

For the above reasons, I find that Respondent has failed to meet its burden of proof. 49 U.S.C.A. § 42121(b)(2)(B)(iv).

REMEDIES

Under the STAA, a successful complainant is entitled to reinstatement, compensatory damages, back pay, interest and attorney fees and costs. 49 U.S.C. § 31105(b)(2)(A). In appropriate cases, a complainant may also recover punitive damages. Complainant requests all relief available to him.

A. Reinstatement. Under the STAA, a successful complainant is entitled to automatic reinstatement to his former position with the same pay and terms and privileges of employment. 49 U. S. C. § 31105(b)(3)(A)(ii). Reinstatement is a mandatory remedy. ***Ferguson v. New Prime, Inc***., ARB No 10-075, 2009-STA-47, at 6 (ARB Aug. 31, 2011). Unless it is impossible or impractical, reinstatement is an automatic remedy under the Act and respondent employers must make a bona fide reinstatement offer. Respondent did not address this issue in its brief.

B Back Wages. An award of back pay in an appropriate amount is mandated once it is determined that an employer violated the Act. ***Moravec v. HC & M Transportation, Inc.,*** 1990-STA-44 (Sec'y Jan. 6, 1992), citing ***Hufstetler v. Roadway Express, Inc***., 1985-STA-8 (Sec'y Aug. 21, 1986), slip op at 50, aff'd sub nom., ***Roadway Express, Inc. v. Brock***, 830 F.2d 179 (11th Cir. 1987. Back pay awards are to be calculated in accordance with the make-whole remedial scheme embodied in § 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. (1988). See, ***Loeffler v. Frank***, 489 U.S. 549 (1988).

Complainant earned $4,661.99 in W-2 wages, and $2,282.56 in per diem pay while he worked for Marten (Tr. 174; JX-14). He worked for Respondent for 11.9 weeks. Thus, his average weekly wage was $583.60 ($6,944.44÷ 11.9 weeks). Mr. Sinkfield was out of work for two weeks after Respondent fired him. Thus, he is entitled to $1,167.15 in back pay. Mr. Sinkfield does not have to prove his wage loss with "unrealistic exactitude." ***Cook v. Guardian Lubricants, Inc***., ARB No. 97-055, ALJ No. 1995-STA-43, at 11, n. 12 (ARB May 30, 1997). Any uncertainty about wage loss calculations is to be resolved in favor of Mr. Sinkfield as the non-discriminating party. See, ***Johnson v. Roadway Express, Inc.***, ARB Case No. 01-013, ALJ No. 1999-STA-5, at 13 (ARB Dec. 30, 2002).

C. Compensatory Damages. The STAA permits awards of compensatory damages for emotional distress and mental pain. ***Michaud v. BSP Transport, Inc***., ARB No. 97-113, ALJ No. 1995-STA-29, at 7-8 (ARB Oct. 9, 1997). The amount awarded is often based upon awards in similar cases. ***Ferguson v. New Prime, Inc***., ARB No. 10-075, ALJ No. 2009-STA-47, at 8 (ARB Aug. 31, 2011).

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. Compensatory damages are designed to compensate not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. ***Martin v. Dep't of the Army***, ARB No. 96-131, ALJ No. 93-SDW-1, slip op. at 17 (ARB July 30, 1999), *citing* ***Memphis Community Sch. Dist. v. Stachura***, 477 U.S. 299, 305-307 (1986); ***Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (Dep. Sec'y Feb. 14, 1996)*** (compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts); ***Crow v. Noble Roman's, Inc.***, No. 95-CAA-08, slip op. at 4 (Sec'y Feb. 26, 1996) (complainant's testimony sufficient to establish entitlement to compensatory damages); ***Jones v. EG&G Defense Materials, Inc***., ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (injury to complainant's credit rating, the loss of his job, loss of medical coverage, and the embarrassment of having his car and Truck repossessed deemed sufficient bases for awarding the compensatory damages).

When Aikman fired Complainant, she indicated that Respondent would buy a bus ticket for his travel home, but that the cost would be deducted from his paycheck (TR 168). Instead of having to pay for a bus ticket home, he called his wife and asked her to drive to Kansas City to pick him up at the terminal (TR 168-169). He testified that he felt humiliated and "let down" due to his firing (TR 169). He was concerned that he would be unable to support his family financially (TR 170). No medical bills or other out of pocket evidence was submitted.

Complainant directs me to ***Carter v. Marten Transport, Ltd***., 2005-STA-63 (ALJ May 18, 2006) I awarded $10,000 in compensatory damages for emotional distress to a driver who was fired in violation of Id. at 39. I am advised that the driver in ***Carter***, like Mr. Sinkfield, suffered some mental pain and testified that it was felt "[v]ery depressing for me because you fill out job applications; no one wants to hire me…. The Complainant also testified that it made him feel [v]ery depressed, worthless, and [r]eal down to lose his job and to have to tell his wife that he had lost his job" and still felt depressed. Id. at 39.

There are no medical bills proffered. There are no treatment records. Usually I hear testimony about symptoms and I am provided medical records. In order to adjudicate credibility I usually rely on substantiation of symptoms, by documented signs and laboratory findings as to complaints.

Complainant suggests an award for compensatory damages in the amount of $20,000, which is twice the amount awarded in ***Carter***. Although Mr. Sinkfield was unemployed for only two weeks after his separation from Marten, he earned quite a bit less at his interim employers than he had made at Marten. Mr. Carter was fired on June 14, 2005. Id. at 18. Mr. Sinkfield was fired 9 years later, and more than 9 years after decision in ***Carter*** was issued. Given the passage of time since ***Carter*** was decided, Complainant requests a compensatory damages award of $20,000 is appropriate here.

However, in ***Carter***, although there were no medical records to substantiate damages, the Complainant had an apparent syncopal episode while he was on the stand before me.

The Complainant is credible. I accept that he did suffer some distress. Reviewing comparable awards, I find that where there is established distress, one thousand dollars in a fair award.

D. Punitive Damages. The STAA allows punitive damage awards. 49 U.S.C. § 31105 (b)(3)(C). I am reminded that in ***Ferguson v. New Prime, Inc***., ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011) the Board provided guidance to be considered in awarding punitive damage awards under the STAA. In that case the complainant received $75,000 in punitive damages. The Board vacated this award and remanded the case for consideration of whether the behavior of the dispatcher who caused the discharge reflected a corporate policy of STAA violations, and whether punitive damages were necessary to deter future violations. Id. at 8. An "ALJ should also include consideration of the size of the award that would adequately deter [the employer] from future violations and the punitive impact of the damages on the company." Id. at 8-9.

Complainant maintains adverse actions toward Complainant were reckless and exhibited callous disregard for his rights under the STAA. I am advised that Respondent is a large company and a large punitive damages award is necessary to deter it from retaliating against employees because they have engaged in protected activities in the future. I am reminded that this is not the first time that Respondent has violated the STAA. In ***Carter***, supra, the decision to discharge Mr. Carter was made by an official of Respondent's Human Resources Department. Id. at 18. Complainant argues that it is obvious that Employer learned nothing about retaliation against drivers who exercise their rights under the STAA. It is still retaliating against drivers in violation of the STAA.

Complainant also cites to ***Youngermann v United Parcel Service***, ALJ No. 2010-STA-47 (ALJ May 5, 2011), Judge Kennington awarded $100,000 in punitive damages even though the driver was only out of work for a few days. Id. at 27. In ***Carter***, the complainant was awarded a modest amount of damages, which it alleges, has not deterred Respondent. ***Carter***, *supra*, at 41. Complainant argues that punitive damages are necessary to deter management from future retaliation against drivers who exercise their rights under the STAA.

I agree. Reckless or callous disregard of complainant's rights may establish a right to punitive damages. ***Cain v. BNSF Rwy Co.,*** ARB Case No. 13-006, 2014 WL 4966163, at *7 (Dep't of Labor Sept. 18, 2014). ***Jackson v. Union Pacific Railroad Co***., ARB No. 13-042, ALJ No. 2012-FRS-17 (ARB Mar. 20, 2015). Respondent had problems with Miller/Coors loading trailers over the legal weight limits for "a lot of years." (TR 71, testimony of Ahlers). This fact is undisputed. I find that Respondent knew that Complainant was in a protected activity when it removed him. I find that all of the employer witnesses took the position that the Complainant did not engage in protected activity in the face of concrete evidence that there had

been problems involving the weights of loads from the Miller/Coors facility, where the protected activity arose.

I assume the Respondent's costs of litigation exceed the compensatory damages and back pay award in this case. I note that Respondent brought a virtual parade of witnesses from several locations and two counsel from Madison, Wisconsin to Ft. Smith. Meanwhile, few complainants can pay for the expenses of litigation. I note the prior claim. I accept that Complainant is correct that punitive damages are an inducement necessary to promote safety at Respondent company.

Although a party has the right to a vigorous defense and can try the case in any manner it deems is fit, I find that a party must consider the exposure and the risk.

After a review of awards in similar cases,[9] I award Complainant fifty thousand dollars ($50,000.00) for punitive damages.

E. Interest. I agree that Mr. Sinkfield is entitled to interest on his back pay.

F. Attorney Fees and Costs. Under the STAA, a successful complainant is entitled to an award of attorney fees and costs. 29 C.F.R. § 1978.109(d)(1). Complainant requests leave to file a petition for attorney fees and costs.

G. Abatement of the Violation. The "standard remedy in discrimination cases [is to] notif[y] a respondent's employees of the outcome of a case against their employer." ***Michaud v. BSP Transp., Inc***., ARB No. 97-113, ALJ No. 1995-STA-29 at 9 (ARB Oct. 9, 1997), rev'd on other grounds sub nom. ***BSP Transp., Inc. v. United States Dep't of Labor,*** 160 F.3d 38 (1st

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[9] I address only recent cases. I have been the judge in cases like ***Cain***, *supra*, where the ARB reduced my award to $125,000 in punitive damages. I awarded $20,00.00 in punitive damages in ***Dady v. Harley Marine Services, Inc***., ARB Nos. 13-076, -077, ALJ No. 2012-SPA-2 (ARB July 31, 2015), which was affirmed. Unlike Respondent, Harley had no history of non-compliance. The case has been appealed to the 11th Circuit Court of Appeals. In ***Harvey v. Union Pacific Railroad Co***., ARB No. 15-036, ALJ No. 2011-FRS-39 (ARB May 29, 2015), a $100,000 punitive award was rendered by Judge Jennifer Gee. An appeal to the ARB was withdrawn, making the Decision and Order final. Judge Coleen Geraghty awarded $40,000 in punitive damages in a Decision and Order on Remand May 16, 2013. This was affirmed by the ARB. ***Santiago v. Metro-North Commuter Railroad Co., Inc***., ARB No. 13-062, ALJ No. 2009-FRS-11 (ARB June 12, 2015). After Judge Paul C. Johnson awarded $100,000 in punitive damages, the parties settled while the case was at the ARB. ***Peterson v. BNSF Railway Co***., ARB Nos. 14-026, 15-019, ALJ No. 2010-FRS-29 (ARB Mar. 19, 2015).

In ***Leiva v. Union Pacific Railroad Co., Inc***., ARB Nos. 14-016, -017, ALJ No. 2013-FRS-19 (ARB May 29, 2015), the ARB affirmed the ALJ's finding that the Respondent violated the FRSA employee protection provision, and remanded for consideration of the Complainant's claim for punitive damages, which the judge had not addressed in his decision and order. Respondent did not object to Leiva's request for punitive damages in its brief. The ARB noted:

> Under 49 U.S.C.A. § 20109(e)(3), "[r]elief in any action under subsection (d) may include punitive damages in an amount not to exceed $250,000." FRSA does not require "illegal motive" to sustain a punitive damage award. An award of punitive damages may be merited where there has been "'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'" The size of a punitive award "is fundamentally a fact-based determination."

After remand, Leiva was settled and approved by Judge Kennington July 14, 2015.

Cir. 1998). Mr. Sinkfield asks me to order Respondent to post a copy of the decision and order in this case for 90 consecutive days in all places where employee notices are customarily posted. Such non-monetary relief is appropriate in cases under the STAA. ***Cefalu v. Roadway Express, Inc.***, ARB Nos. 04-103 & 161, ALJ No. 2003-STA-55, at 8 (ARB Jan. 31. 2006), aff'd. sub nom., ***Roadway Express v. United States Department of Labor***, 495 F.3d 477 (7th Cir. 2007).

Complainant requests that I order Respondent to expunge all references to Complainant's protected activity and unfavorable information, including references to a discharge or termination, from its personnel records and from any report it has made about him to any consumer-reporting agency such as HireRight (f.k.a. DAC Services). Such relief is appropriate in cases under the STAA. ***Griffith v. Atlantic Inland Carriers***, 2002-STA-34 (ALJ Oct. 21, 2003) adopted ARB Case No. 04-010 (ARB Feb. 20, 2004).

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Respondent shall reinstate Complainant to his former position with the same pay, terms, conditions and privileges of employment that he would have received if he had continued working from June 5, 2014 through the date of the offer of reinstatement.

2. Respondent shall pay Complainant the amount of $1,167.15 in back pay with interest.

3. Respondent shall pay to Complainant the sum of one thousand dollars ($1000.00) in compensatory damages and fifty thousand dollars ($50,000.00) in punitive damages for a total of fifty one thousand dollars ($51,000.00).

4. The rate of interest is that required by 29 C.F.R. § 20.58(a) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621. Interest is to be compounded daily. 29 C.F.R. § 1978.105(a)(1).

5. Counsel for Complainant shall have 30 days from the date of this Decision to file a fee petition. The parties are directed to discuss this issue before the Petition is filed. Respondent shall have ten (10) days to object.

6. Respondent shall post a copy of the decision and order in this case for 90 consecutive days in all places where employee notices are customarily posted.

7. Respondent shall expunge all references to Complainant's protected activity and unfavorable information, including references to a discharge or termination, from its

personnel records and from any report it has made about him to any consumer-reporting agency

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

DANIEL F. SOLOMON
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. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1982.110(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, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (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. § 1982.109(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. § 1982.110(b).