U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 13 June 2017

Case No.: 2016-STA-00019

In the Matter of

ROBERT GORDON
Prosecuting Party

v.

BRINDI TRAILER SALES AND SERVICE, INC., ET. AL.
Respondent

DECISION AND ORDER

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 31105 of the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), 49 U.S.C. § 31105, and its implementing regulations found at 29 C.F.R. Part 1978 (2013).

Robert Gordon ("Complainant") alleged that his former employer, Brindi Trailer Sales And Service, Inc. and Roberto Urbina (separately each referred to as "Respondent" and jointly as "Respondents") terminated his employment in February 2012, after he complained to them and to law enforcement about violations of commercial vehicle safety regulations and refused to continue operation of commercial vehicles as unlawful retaliation under the STAA.

On May 7, 2012, Complainant filed a formal complaint with Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor ("DOL"), alleging Respondents discharged him in violation of the 49 U.S.C. § 31105.

By letter dated January 20, 2016, OSHA issued its notice that it had completed its investigation of the formal complaint and determined there was reasonable cause to believe Respondents violated the Act in its action against Complainant. In that letter, OSHA outlined the Secretary's specific findings and directed Respondents' payment of lost wages, punitive damages, attorney's fees, as well as Respondent's expungement of Complainant's employment records and posting of a notice of the Secretary's findings.

By letter dated February 19, 2016, Respondents timely objected to the OSHA determination and requested a hearing before the DOL Office of Administrative Law Judges ("OALJ"). The matter was assigned to me on February 29, 2016. Pursuant to a Notice Of Hearing And Pre-Hearing Order issued on April 4, 2016, a hearing was held on July 28, 2016 at the OALJ District Office in Cherry Hill, New Jersey.[1] Respondent and Complainant were both represented by counsel.

Complainant testified on his own behalf. Respondent, Roberto Urbina, his wife, Fahirje Urbina, and Mike Desena testified on behalf of Respondents. At the hearing, the parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing argument or briefs: Complainant submitted his "Proposed Findings of Fact and Legal Argument" ("Complainant's Proposed Findings") which was received on October 19, 2016; Respondent's "Written Closing Argument" ("Respondent's Closing Argument") was received on October 20, 2016.

At the July 28, 2016 hearing, the following exhibits were admitted into evidence: Joint Exhibit ("JX") 1[2]; Complainant's Exhibits ("CX") 1-3; 5-6, as well as Respondents' Exhibits ("RX") 1-16.[3] *See* Hearing Transcript ("HT") 9-11; 13; 86.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law. All evidence admitted into evidence has been considered, even if not specifically cited herein.

<u>Stipulation</u>

The parties have stipulated to and the record supports finding Complainant operated a commercial vehicle as the subject of this case which had a gross vehicle weight rating of 10,001 pounds or more and was used to transport property in interstate commerce. HT at 6.

<u>Issues</u>

The issues presented in this matter are as follows:

1. Is there coverage under the STAA, i.e., is Complainant an "employee" and is Respondent an "employer" within the meaning of the STAA?
2. Did Complainant engage in protected activity under the STAA?
3. Were Respondents aware of such protected activity?
4. Did Respondents take adverse action against Complainant?
5. Was Complainant's protected activity a contributing factor in such adverse action?

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[1] By letter dated April 8, 2016, the Assistant Secretary of Labor for OSHA, through counsel, withdrew from this matter as "Prosecuting Party" pursuant to 29 C.F.R. § 1978.108(a)(2).

[2] Respondents were directed to submit this exhibit post-hearing; the post-hearing submission is marked as "Exhibit A" and "JX" but will be referred to herein as Joint Exhibit ("JX") 1 as it was so identified during the hearing.

[3] CX 4, described by Claimant's counsel as "some medical records" inapplicable to the time period at issue, was withdrawn. HT at 7.

6. Would Respondents have taken the adverse action notwithstanding the protected activity?
7. Is Complainant entitled to damages and attorney fees?

Applicable Standards

The Employee Protection section of the STAA provides:

§ 31105. Employee protections

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

> (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;
>
> (B) the employee refuses to operate a vehicle because— (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;
>
> (C) the employee accurately reports hours on duty pursuant to chapter 315;
>
> (D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or
>
> (E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or

security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

49 U.S.C. § 31105(a).

This provision was enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles" because "Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations."[4]

STAA whistleblower complaints are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[5] In order to prevail on his case, Complainant must show that he engaged in a protected activity, he suffered an adverse action, and the protected activity was a contributing factor in the adverse action. If these elements are satisfied, the burden shifts to Respondent to show by clear and convincing evidence that the adverse action would have been taken regardless of the protected activity.[6]

Evidence Summary

Exhibits

Complainant's Exhibits

CX 1 – Complaint filed with OSHA pursuant to 49 U.S.C. § 31105 on May 7, 2012

CX 2 – Driver's Vehicle Inspection Reports ("DVIRs") as required by D.O.T. Federal Motor Carrier Safety Regulations dated 2/3/12, 2/8/12, 2/16/12, 2/17/12, 2/12/12, 2/18/12 and signed by Complainant

CX 3 – Motor Carrier Management System Information Safety Company Safety Profile from the Federal Motor Carrier Safety Administration outlining commercial vehicle inspections of Respondents covering the period from 1/1/11 to 11/1/15

CX 5 –TD Bank simple checking account statements for Complainant covering the periods from 7/26/11 to 8/11/11; 8/12/11 to 9/11/11; 9/12/11 to 10/11/11; 10/12/11 to 11/11/11; 11/12/11 to 12/11/11

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[4] *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

[5] On August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 1536, § 31105, 121 Stat. 266, 464-67 (2007), Congress amended paragraph (b)(1) of 49 U.S.C. § 31105 to make the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b), applicable in the adjudication of STAA whistleblower claims.

[6] 49 U.S.C. § 42121(b)(2)(B); *Beatty v. Inman Trucking Management, Inc.*, Case No. 13-039 (ARB May 13, 2014).

CX 6 – OSHA determination letter to Respondents dated January 20, 2016 outlining Secretary's Findings of a violation and Secretary's order of remedies

Respondents' Exhibits

RX 1 – DVIR and Driver's Daily Log dated 10/1/11; DVIR and Driver's Daily Log dated 10/5/11

RX 2 – Shipping Order dated "11/31/2011"

RX 3 – Receipts dated 12/29/2011 from Pilot Travel Centers LLC for truck diesel totaling $250.00 and $207.96 charged to Visa and complaint name noted "Brindi Trailer Sales." Receipts dated 1/4/2012 from Flying J for food, cigarettes totaling $38.74 and truck diesel totaling $187.19

RX 4 – Bill of Lading dated 12/22/2011signed by Complainant

RX 5 – Wise Foods Inc. Bill of Lading with delivery dated of 12/27/11 and signed on that date

RX 6 – Receipt from Piedmont Truck Tires invoice dated 2/15/2012, totaling $1,363.25

RX 7 – Receipts from Tullo Brothers (Tire Services) dated 11/12/11, totaling $1,028.00

RX 8 – Work Order Invoice dated 2/21/12 for towing and windshield removal/replacement

RX 9 – Invoice to Respondent Brindi Trailer Sales from Wilkes Barre Truck Center dated 2/20/12 for a V-Ribbed Belt and Belt

RX 10 – Annual Vehicle Inspection Report dated 8/10/11 for fleet unit numbers "353" and "5001" including certification that both vehicles passed "all inspection items for the annual vehicle inspection report in accordance with 49 CFR 396."

RX 11 – Invoice and receipt dated 9/14/2011 totaling $797.00 for vehicle repair work (i.e., springs, u-bolt assembly, shackle, spring pins)

RX 12 – Unsigned letter dated 7/7/2015 on Respondent Brindi Trailer Sales & Service, Inc. letterhead

RX 13 – Letter from OSHA to Respondents dated May 17, 2012, notifying Respondents that the instant complaint had been filed and requesting a position statement

RX 14 – Copy of Complainant's complaint dated May 7, 2012 filed with OSHA

RX 15 – Complainant's Application for Employment (Pre-Employment Questionnaire) dated 9/9/11

RX 16 – Driver/Vehicle Examination Report – inspection dated 2/20/2012 – multiple violations noted for truck (equipment ID "5001") and trailer

Joint Exhibit

JX 1 – Copies (front and back) of canceled checks for various amount issued by Respondents to Complainant dated 10/1/11, 10/8/11, 10/14/11, 10/28/11, 11/11/11, 11/19/11, 12/9/11, 12/23/11, 1/6/12, 1/17/12, 1/27/12, 2/8/12, 2/10/12 and 2/17/12.

Hearing Testimony

Direct Examination

Complainant has a G.E.D. and a tractor trailer driving certification from Utica Truck Driving School obtained approximately in 1984. HT at 149-50. From 1984 until his employment with Respondents he has worked for various truck driving companies, hauling various commodities and operating various trailers. HT at 150-52.

In March 2013, he was told by a physician that his "physical problems" were "due to too much driving." HT at 152.

He called Respondent Roberto Urbina Brindi[7] to ask for a job which he then offered; he had met Mr. Brindi through Mr. Brindi's friend Steve of "Signature" for whom Complainant had previously worked as a truck driver. HT at 153-54.

Mr. Brindi served as Complainant's supervisor. HT at 154. Complainant answered negatively when asked if he shared in the profit of Respondents' when he worked there. *Id.* His pay rate was "[s]upposed to be 35 cents per mile." *Id.* In an average week working for Respondents, Complainant stated that he operated "[r]oughly 2,500 to 2,800" miles "[u]p and down 95, the eastern corridor of the United States." HT at 154-55. Complainant drove Respondents' truck with unit number 5001 and Respondents' trailer with unit number 53. HT at 155.

While working for Respondents, Claimant maintained that he prepared a daily vehicle inspection report (also referred to herein as a "DVIR") as well as a driver's daily log which he handed in when he went to Respondents' yard in Brooklyn, NY. HT at 155. He averred that he noted everything wrong with the truck in a DVIR when he did his "daily walk around pre-trip and post-trip." HT at 156.

Complainant did not submit the DVIRs to Respondents found at CX 2. HT at 157; 160. In one of those DVIRs dated 2/3/12, Complainant noted that the stairs were loose on the

[7] Throughout his hearing testimony, Complainant repeatedly refers to Respondent Roberto Urbina as "Mr. Brindi." When asked if he were referring to "Mr. Urbina," Complainant pointed to Respondent at counsel's table at the hearing and responded "[w]ell, I know him as Mr. Brindi." HT at 184. Respondent will be referred to by both names in this Decision.

passenger side of the truck (identified as unit 5001), "brakes, service". HT at 157-58; see also CX 2 at 1. He averred that the brakes on the tractor "kept going to the floor…giving way." HT at 159. He also noted the coupling device hooking the tractor and trailer together, the suspension, transmission and steering were defective; he noted an engine oil leak and a chipped and cracked windshield, as well as defective city horn, right rear turn signal and tires. HT at 159-63. He described the various ways in which each of these defects could affect the safety of operating the vehicle. *Id.*

On an illegibly dated DVIR, Complainant noted that his resignation was given on 2/11/12 and accepted; that DVIR included the notations that "[h]e refuses to service and repair the tractor", "breakdown", "tires blowout" and "repairs Raleigh". HT at 169; *see also* CX 2 at 3.

Complainant stated that he intended to resign on February 11 if "he refused to keep the truck unserviced" because "[i]t was a safety hazard to him and the motoring public." HT at 170. He acknowledged he did not see Respondent Mr. Brindi too often in February 2012 when asked how often he complained to Mr. Brindi about the defective items referenced in the DVIRs at CX 2. HT at 170. He told Mr. Brindi twice in January and in February 2012 about the defects with the truck and on those occasions, Mr. Brindi told him just to drive the truck. HT at 171.

Initially, Complainant stated Mr. Brindi did correct some of the defects noted in the DVIRs found at CX 2. HT at 177. Then he asserted an exhaust leak repair was made prior to the DVIRS of record and that none of the defects noted in those DVIRs were fixed before his employment with Respondents ended. HT at 178.

Complainant maintained Mr. Brindi allowed him to take Respondents' vehicle home "probably" four times. *Id.* At the time of his employment with Respondents, Complainant lived in Edwardsville, PA. HT at 149.

His last load for Respondents was "picked up down the Carolinas somewhere" and "was going to Massachusetts." HT at 180. Complainant met with Mr. Brindi in Brooklyn, NY before delivering that last load. He could not recall the day on which he last met with Mr. Brindi. *Id.* Their meeting lasted two or three hours and no one else was present. HT at 182. At this last meeting with Mr. Brindi, Complainant stated that he expressed concern about the condition of the windshield, brakes; he also mentioned "air leaks." *Id.* After the meeting, Complainant took the truck to his home in PA – "[a]pproximately 180 miles" from Brooklyn, NY. HT at 183.

Complainant chose to have the truck and trailer inspected in PA; in the event the truck was put out of service, he would then be near to his home. HT at 184-85. Because the brakes "gave out" on him and the windshield condition, as well as the "illegal inspection sticker" which he, rather than a certified mechanic, affixed to the windshield at Mr. Brindi's direction, Complainant believed the truck would be put out of service once inspected. HT at 185. Complainant contacted PA Department of Transportation ("DOT") in Harrisburg, PA, explained the defective vehicle conditions and requested an inspection. HT at 186.

At around 11:00 a.m., February 20, 2012, Complainant operated tractor 5001 and trailer 53 from his home to an PA State Police inspection site in Luzerne, PA – about 10 miles. HT at 187-88. He maintained that PA DOT chose the inspection site. HT at 187.

He confirmed the inspection site location was as noted on the Driver/Vehicle Examination Report at RX 16 at 1. HT at 189. The inspection took "[r]oughly an hour and a half to two hours" while he remained "inside the cab" of the truck as he was told. HT at 190.

Complainant stated that, while in the truck during the inspection, he telephoned Mr. Brindi and told him he "was being inspected." HT at 191-92. The following is testimony was offered about Respondent Urbina's response during that telephone conversation with Complainant:

> Q. What did he say to you in response, if anything?
> A. He blew up at me.
> Q. What did he say to you in response, if anything?
> A. He started cursing at me, and eventually he asked me how I got – how come I didn't go around the inspection.
> Q. And what did you say to him in reply, if anything?
> A. That I wanted the truck inspected and I couldn't get around the inspection because it was place in a – in a manner were the tractor trailers cannot get away without being caught.
> Q. What did you mean by saying you wanted the truck inspected
> A. because of all the safety issues that I was having with the truck that were being failed to be looked at by the – by Mr. Urbina
> Q. Did you tell that to Mr. Urbina?
> A. Yes, sir.
> Q. What did he say to you in reply?
> A. Pack my stuff and get out of the truck.
> Q. He said to pack – okay. What stuff did you have in the truck?
> A. I had my clothes and CB radio. A TV.

HT at 192-93.

Complainant signed and received a copy of the Driver/Vehicle Examination Report from the PA State Police on February 20, 2012. HT at 194; *see also* RX 16. He called his mother for a ride home from the inspection. HT at 194.

When asked to describe how he felt after he returned home from the inspection on February 20, 2012, Complainant replied"[p]retty – pretty sore, angry, embarrassed, not good" and that he felt that way "[f]or quite a while" and that he "still [feels]…bad about getting fired." *Id.*

Complainant maintained he looked for work for "[w]ell over a year" after February 20, 2012 and started "the same week [he] was dismissed." HT at 195. For his work search, he "was on the Internet trying to find work" and he used "the phone book, local newspapers, trucker job boards," and he also asked his brother "put out feelers for [him]." *Id.* He maintained that

"[r]oughly a dozen" of his Internet applications "got spread out to…well over a hundred companies." HT at 196.

Complainant has not worked since Respondents: he stated he received a trucking job offer from Meade Trucking which was rescinded after he was "bad-mouthed by Mr. Urbina." HT at 196-97.

From February 20, 2012 until March 2013, Complainant lived off of his savings and then he "had to go onto…welfare." HT at 197. He stated he "was embarrassed" when asked how felt about receiving welfare. *Id.* Complainant was also evicted from his house unable to pay his bills and rent; he moved in with his mother in June or July of 2013. *Id.*

Complainant's pay from Respondent is reflected in his bank account statements found at CX 5. HT at 198-99. Respondent Mr. Brindi would make deposits directly into that account. HT at 199. Complainant answered negatively when asked if ever received a "W-2" or a "1099" from Respondent. HT at 200.

During his employment with Respondents, Complainant once took Respondents' tractor to see his wife who was incarcerated in Muncy, PA. HT at 201. He answered affirmatively when asked if he had permission to take the tractor. *Id.* Complainant answered negatively when asked if Mr. Urbina voiced any objection to his visiting his wife. *Id.*

<u>Cross-examination</u>

Complainant acknowledged he had been convicted of a crime in 2012, i.e., receiving stolen property. HT at 208-210. He also acknowledged he had worked for less than 1.5 years total during the period from 2004 until 2011 when he started working for Respondents. HT at 213.

Complainant agreed that the original DVIR is to be turned in to the truck owner and the DVIR is to be completed pre-trip and post-trip. HT at 223-24. He maintained that he would submit them when he "came into Brooklyn" but he had forgotten to submit DVIRs to Respondent at times. HT at 224-26. Complainant also stated that "[n]inety-eight percent of the time every single box…that needed to be checked is checked" on the DVIRs he submitted. HT at 230. Although he stated he would never check off "condition of the above vehicle satisfactory," Complainant identified a DVIR with his handwriting with just that checked off. HT at 230-31; *see also* RX 1 at 1; 5.

Complainant stated he would submit the original DVIRs when he was in Brooklyn but acknowledged that the DVIRs at CX 2 indicate that they were "original". HT at 232. He further acknowledged that the DVIRs at CX 2 were not submitted to Mr. Urbina on his "last trip" to Respondents' Brooklyn yard. HT at 234.

Complainant could not recall if he submitted any paperwork to Respondent the last time he was called into Brooklyn, but stated the reason for his being brought into Brooklyn was "[p]robably to get some paperwork off [him]." HT at 236. He acknowledged receiving "about

$100 for tolls" from Mr. Urbina on his last trip to Brooklyn, but could not recall the specific date or day of the week on which that occurred. HT at 236-38.

Complainant spent "[l]ike two" days at home before inspection of the tractor trailer. HT at 243. He answered negatively when asked if he called Respondent Urbina during that period. HT at 243-44. Then Complainant stated Respondent Urbina and he "spoke numerous times on the phone" but he "can't say whether it was that weekend or not." HT at 245. When asked if, between the time he left Respondents' place of business in Brooklyn and the time he called DOT, Complainant "ever call[ed] Bobby to complain to him about the condition of the truck, he answered negatively. HT at 245.

Complainant acknowledged that he called and arranged for an inspection on February 20, 2012, despite previously avoiding multiple inspection sites "[u]p and down the East Coast" at Mr. Urbina's instruction. HT at 245-46. Complainant answered affirmatively when asked if he suspected that, upon the inspection he requested, the vehicle would be impounded. HT at 247-48.

Complainant answered affirmatively when asked if he felt it was safe to drive the truck home to Pennsylvania. HT at 249. He also maintained that his concerns about his personal safety and the safety of others regarding his operation of the truck began "[a]bout two or three months prior to the inspection." *Id.*

Complainant averred, that to get to the inspection on February 20, 2012, he drove the tractor trailer "on city streets, 25, 15 mile an hour speed zones" and "[o]ff the highway" to the on-ramp of Highway 309. HT at 251-52. He agreed that between February 3 and February 18, 2012, two trailer tires were repaired. HT at 255.

Complainant could not recall the specific times during his employment with Respondents when he visited his wife who was then incarcerated but he acknowledged visiting once using Respondents truck and once using his personal vehicle. HT at 259. His wife was incarcerated "[r]oughly 180, 200 miles" away from Brooklyn. *Id.* When he used Respondent's truck to visit his incarcerated wife in Muncy, PA, Complainant was either "en route probably to pick up or a delivery was close by or [he] was – spending time at the house." HT at 260-61. Complainant maintained Respondent had no problem with his visiting his wife. HT at 261.

Complainant answered affirmatively when asked if he had given Respondents notice and if he intended to quit two weeks after the inspection incident if Respondents did not "repair the truck satisfactorily." *Id.*

Complainant also answered affirmatively when asked if he began looking for other employment as soon as he stopped working for Respondents. HT at 263. But when presented with his prior deposition testimony, Complainant then stated that he "would say he waited for a little bit" for beginning his employment search. HT at 264. On cross-examination at hearing, Complainant stated he submitted "[a]t least 50 resumes" to potential employers after his employment with Respondents ended, but when presented with his prior deposition testimony

that he had submitted six resumes, he stated he did not recall making that statement in his deposition testimony. HT at 264.

Complainant could also not be specific about either (1) the number of companies he contacted trying to find jobs or (2) the number of companies which called him back and told him he was being "blackballed" by Respondents. HT at 267.

When asked why he stopped looking for work around March 2013, Complainant stated that a doctor found he has "six discs, along with carpal tunnel in both hands, both wrists, right elbow, three discs in [his] neck, three discs in [his] hips," and that he "was advised that [he] would have a hard time even working anymore." HT at 269. He confirmed that was near the time he applied for Social Security disability. *Id.*

Complainant acknowledged the deposition testimony he gave regarding his treatment by psychiatrist and psychologist for "[d]epression, post-traumatic stress disorder, paranoid schizophrenia" prior to his working for Respondents, but he stated that those conditions "were overcome." HT at 273-74.

Respondent was to compensate Complainant at a rate of $0.35 per mile. HT at 275. Complainant identified two checks from Respondent payable to him and deposited into his bank account as payroll checks dated 2/10/12 and 2/17/12 – both for the amount of $690.00. HT at 279; *see also* JX 1 at 9 and 11.

<u>Roberto Urbina</u>

<u>Examination by Complainant</u>

Mr. Urbina is the sole owner of Brindi Trailer Sales[8] – a transportation service provider – since 1996 or 1997. HT at 34. He has one tractor truck – a 2001 Volvo with unit number 5001 which pulls a trailer. HT at 34-35. Complainant pulled a trailer with the name "Brindi Trailer" on its side for Respondent. HT at 36.

He dispatched Complainant; paid for fuel by giving Complainant a credit card. HT at 37. He has not had other drivers except himself and Complainant. HT at 40.

He confirmed Complainant's pay rate was $.35 per mile for "[a]ll miles driven." HT at 42; *see also* RX 15 at 2. In describing the typical miles driven per week, Mr. Urbina offered the following:

> Q. Okay. And would you – how many miles a week would you estimate when you were operating for Brindi Trailer Sales did you drive in a week?
> A. I had making one load a week myself. And he [Complainant] was making the same wage, one load.
> Q. One load.

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[8] Also known as "Brindi Trailer And Service, Inc." – the named Respondent in this matter as reflected in the case caption above.

A. One load. One going – from here to – from New York to Pennsylvania or Massachusetts or Virginia. And then the load back home. That was the – that was the –
Q. Out and back?
A. Yes. So I – you talking about at least maybe 800, 900 miles.
Q. In a week?
A. Yeah, in a week. Yes.

HT at 42.

Complainant began working for him in October or September of 2011. HT at 59. Mr. Urbina knew Complainant's previous employer. *Id.* When asked the number of Brindi Trailer Sales employees, Respondent Urbina answered: "[t]wo people; me and him," referring to Complainant. HT at 82.

According to Mr. Urbina, Complainant was not allowed to take the truck home; Complainant was to park the truck in Respondent's "yard" between hauls. HT at 64. Respondent Urbina averred that he learned Complainant had taken the truck home to PA"[w]hen the Trooper called [him]." *Id.* Mr. Urbina maintained he also called Complainant, after learning Complainant did not show up for a delivery in Massachusetts on February 20, 2012 but Complainant did not answer his phone. HT at 64-65.

Mr. Urbina described the circumstances of his last interaction with Complainant before the February 20, 2012 inspection. He maintained that he met with Complainant on February 18, 2012; the truck was at his place in Brooklyn. HT at 65. He gave Complainant "the money and the paperwork to make the delivery for Massachusetts. Monday morning, 7:00 in the morning [Complainant] supposed to drive in his load." *Id.* Complainant was to deliver a load he had previously picked up in South Carolina. *Id.*

Respondent believed Complainant had the truck inspected on February 20, 2012 because Complainant was upset with him. HT at 67. Complainant had used Respondents' truck to visit his wife in prison and "he did something not supposed to do for [Respondent]." *Id.*

When contacted by a PA State Police trooper, Mr. Urbina was told the truck was out of service because of a broken windshield, brakes, and a hanging muffler. HT at 68. Mr. Urbina answered affirmatively when asked if "an out of service violation means it's got to be towed or fixed at the site of inspection[.]" HT at 69.

Respondent disputes "almost every one" of the violations noted on the PA State Police inspection report. HT at 74; *see also* RX 16. He identified the signature on the inspection report of the repair shop which did repairs on the truck after the inspection. HT at 77; *see also* RX 16. He also identified repair shop bills from a Volvo dealer to replace the truck windshield and other repairs. HT at 79; *see also* RX 8 and 9. He did not know really know what Volvo did after the inspection, noting that "Volvo take [*sic*] care of everything." HT at 81.

Respondent Urbina answered negatively when asked if he fired Complainant and when asked if Complainant still worked for him. HT at 82.

Examination by Respondent

When Mr. Urbina met Complainant in July or August 2011, Complainant was driving a truck for Signature Transportation – a trucking company owned by Mr. Urbina's friend named Steve. HT at 88. When asked his knowledge of the circumstances of Complainant's separation from Signature Transportation, Respondent averred that Steve threw Complainant out of his truck and that "Steve fire [sic] him because he took the money from the fuel and he went to…see his wife in prison." HT at 89. This incident occurred approximately "three, four" days before Complainant began working for Respondents. HT at 91.

Mr. Urbina stated he would give Complainant cash to pay for tolls and a credit card as well as cash for fuel. HT at 93. He also referred to using "T-check" which is an advance from company with the load for delivery for Complainant's fuel payment. *Id.* However, he denied such T-check use when questioned by Complainant's counsel. HT at 38.

Mr. Urbina stated he did not have any problems with Complainant in the first month of Complainant's employment with him. HT at 95. He maintained that Complainant was required to complete a DVIR and to fill out a driver's log book "[e]very time he goes on a trip[.]" HT at 96.

A DVIR dated10/5/11 and signed by Complainant indicates via a checked box that the condition of the vehicle is satisfactory. HT at 99; *see also* RX 1 at 5. Respondent Urbina averred that Complainant always checked that box on the DVIRs submitted to him; he answered negatively when asked if he ever received any DVIR reports from Complainant indicating any problems with the truck. HT at 99.

In December 2011, Mr. Urbina learned from Complainant himself that he took the truck to visit his wife in prison before picking up a load. HT at 100-101. Mr. Urbina stated that he told Complainant not to do that again. HT at 105. According to Mr. Urbina, "[a]fter that, in January [Complainant] did the same to [him]" and he then told Complainant, on either January 20 or 22nd, he could not "continue doing this because [he] was going to start looking for another driver." *Id.*

When asked how often Complainant would come to Respondents' yard in Brooklyn during the months of December, January and February, Mr. Urbina responded "[m]aybe once a week, twice a week." HT at 107. Sometimes, Complainant would bring Respondent Urbina "paperwork" or "POD", but answered negatively when asked if Complainant ever complained to him about the condition of the truck. HT at 109.

He maintained the last time he saw Complainant was on Saturday, February 18th at the Brooklyn yard, after Complainant had picked up a load in South Carolina the previous Wednesday and was due to deliver it in Massachusetts on the upcoming Monday. HT at 111-12; 114. According to Mr. Urbina, Mike Desena and two others were present with him and

Complainant at the yard on that date. HT at 114. Mr. Urbina stated that he gave Complainant $700 for fuel and tolls on that date. *Id*.

Mr. Urbina received a call from a "trooper" on February 20, 2012 advising him his truck had been impounded and needed to be taken to a repair shop "because the windshield, everything was busted." HT at 118. He answered negatively when asked if he had seen any problems with the truck's windshield on February 18, 2012. *Id*. According to Mr. Urbina, the trooper also advised him that the driver had "removed his clothes, all his stuff from the truck." HT at 119.

Mr. Urbina testified that, although he called Complainant "several times" after the trooper contact on February 20, 2012, he did not speak with Complainant until some three days later and has not spoken to him since. HT at 118; 120.

Mr. Urbina maintained the truck was repaired after he received the call from the trooper on February 20, 2012. HT at 123. Prior to the inspection on February 20, 2012, Respondent Urbina had new tires placed on truck. HT at 131; *see also* RX 6 at 12.

<u>Cross-examination</u>

Mr. Urbina answered affirmatively when asked if the tire replacement occurred in Raleigh, NC, but denied that Complainant complained to him about the condition of the tires. HT at 132-33. When asked how he would know the tires needed replacement in Raleigh, Mr. Urbina responded "[b]ecause they were running a special." HT at 132. He confirmed there were two "steering tires" replaced on the vehicle at that time. HT at 134. Mr. Urbina stated he did "not remember" if a defective trailer tire were cited as a reason for placing his vehicle out of service. *Id*.

Mr. Urbina maintained that PA DOT has the bill of repairs performed after his truck was placed out of service in February 2012 – he denied retaining a copy of it. HT at 135-36. He also acknowledged not having a copy of the bill of lading for the load Complainant was to deliver in Massachusetts on February 20, 2012. HT at 142.

Mr. Urbina answered affirmatively when asked if Complainant submitted only three DVIRs during his employment with Respondent. HT at 144.

Mr. Urbina gave Complainant "a warning" after Complainant visited his wife in December 2011. HT at 145. He maintained that when Complainant again visited his wife in January 2012, he told Complainant to look for another job; Mr. Urbina acknowledged that he let Complainant continue to drive for him after January 2012. *Id.*

<u>Mike Desena (appeared telephonically)</u>

<u>Direct examination</u>

Mr. Desena worked for Signature Distributors with Complainant. HT at 303. He was a dispatcher at Signature Distributors from 2010 until the end of 2011. HT at 306. As a dispatcher, he "would give work to the drivers" and he also "did payroll." *Id.*

Mr. Desena averred he was told by Steve, the owner of Signature Distributors, that, when working for Signature Distributors, Complainant took the truck to a facility in Pennsylvania to visit his wife "270 miles out of the way" and the "[d]elivery was supposed to go up to Massachusetts[.]" HT at 311.

Mr. Desena did dispatch work for Respondents. HT at 312. He described that on Saturday "they get paid" and "just hang out" on Respondents' lot in Brooklyn. *Id.* He answered affirmatively when asked if he was present at that lot on February 18, 2012, with Complainant: he said he and another person were there along with Complainant and Mr. Urbina. HT at 311. According to Mr. Desena, "the truck looked fine." HT at 313. When asked if he saw anything wrong with its windshield, Mr. Desena responded: "No. Not at all." *Id.* He also answered similarly when asked if he heard Complainant complain to anyone about the truck's condition on that date. *Id.*

<u>Cross-examination</u>

Mr. Desena acknowledged he did not inspect Respondents' truck or get into the cab on February 18, 2012. HT at 316. In describing the truck's location when he observed it on that date, Mr. Desena stated "the truck was parked right there in front of us[,]" and that he "didn't see no cracks" in the windshield. HT at 317.

<u>Fahirje Urbina</u>

<u>Direct examination</u>

Fahirje Urbina is the wife of Mr. Urbina. HT at 281. In 2011 and 2012, she was involved in the business of Respondents – "doing mileage and light paperwork." HT at 282. She would also do payroll and sometimes, Mr. Urbina would do it. *Id.* She confirmed Complainant was paid $.35 per mile he traveled, but she believed, but was not sure, that Complainant was paid by checks. HT at 282-83.

She answered negatively when asked if she saw anything wrong with the truck when she stopped at the lot "on the evening when [Complainant] came to the yard[.]" HT at 283.

<u>Cross-examination</u>

She acknowledged that when she observed Respondents' vehicles at the yard in Brooklyn on February 18, 2012, "it was dark" and she did not get under the truck or look at its tires. HT at 289.

Credibility assessment

In deciding the issues presented, consideration and evaluation has been given to the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. Account has been taken of all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. *See Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." *Indiana Metal Products v. NL*RB, 442 F.2d 46, 51 (7th Cir. 1971). As the 7th Circuit further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe ... Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

The behavior, bearing, manner, and appearance of witnesses have been observed, as well as the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for resolving issues, credibility findings made herein are based on a review of the entire testimonial record and exhibits with consideration of the logic of probability and plausibility, as well as the witnesses' demeanor at hearing.

For reasons discussed below, the testimony of both Complainant and Mr. Urbina lack credibility on certain key points.

Complainant provided varied descriptions of his employment search efforts such as the number of applications and the number of bad references received from Respondent. He admitted to "stretching" the number of such bad references he received. HT at 265. He provided testimony at hearing which differed from his prior testimony about those efforts without any explanation except that he did not remember providing conflicting account of those efforts.

Complainant also provided inconsistent testimony about his concern about the safety of Respondents' vehicles – expressing extreme concern about the brake condition on direct examination, but then maintaining on cross-examination that he felt the vehicles were safe to drive to PA from Brooklyn on February 18, 2012 and from his home to the PA State police inspection station on February 20, 2012.

As for his noting defective conditions of Respondents' vehicles, he acknowledged that he did not submit to Mr. Urbina the only DVIRs of record which show such conditions.

He maintained that he was allowed to take Respondents' vehicles home to PA and was allowed to do so on February 18, 2012 – the last day he saw Mr. Urbina at the lot in Brooklyn – prior to the PA State Police inspection. However, on a DVIR dated 2/18/12 he noted that Respondent refused to dispatch him to home "for time off." CX 1 at 4. Complainant's testimony contradicts his own written record which purports to be a contemporaneous account of events.

Mr. Urbina stated that Complainant drove for him "once in a while" but the payroll checks, as well as bills of lading and other documentary evidence shows that Complainant completed multiple trips for Respondents.

He stated that he maintained his vehicles in perfect condition and yet the PA State Police inspection resulted in those vehicles being placed out of service on February 20, 2012.

He also stated Complainant never complained to him about the conditions of the vehicles and yet he had tires replaced in North Carolina on February 15, 2012 when Complainant was operating those vehicles. His assertion that he did so because of some promotion or sale rather than a complaint or concern raised by Complainant fails to satisfy the plausibility test.

He also offered contradictory statements about the manner in which he provided Complainant fuel payment – initially stating he only provided a credit card, and then later stating he provided cash. When questioned by Complainant's counsel, Mr. Urbina adamantly denied using T-checks for Complainant's fuel payment, although he acknowledged doing so when questioned by his own counsel.

Is there coverage under the STAA?

The parties have not disputed the issue of coverage in this matter. Nonetheless, a brief analysis of the issue is included here.

The STAA applies to any "person" in a position to discharge, discipline or discriminate against an "employee." 49 U.S.C.A. § 31105(a)(1). According to Department of Labor regulations implementing the STAA's employee protection provision, an "employee" is any "driver of a commercial motor vehicle . . . or [employee] of a commercial motor carrier . . . who in the course of his employment directly affects commercial motor vehicle safety." 29 C.F.R. § 1978.101(d)(1).

Although "commercial motor vehicle" is not further defined in these regulations, Title 49 defines "commercial motor vehicle" as a "vehicle used on the highways in interstate commerce to transport . . . property, if the vehicle – A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater; . . . or D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and

transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103." 49 U.S.C.A. § 31132(1).

The parties stipulated that Complainant drove "a commercial motor vehicle as the subject of this case which had a gross vehicle weight rating of 10,001 pounds or more and was used to transport property in interstate commerce." HT at 6.

The preponderant evidence, including the testimony of Complainant and Respondent Urbina and Respondents' witnesses Mrs. Urbina and Mr. Desena, supports finding Complainant was an 'employee' of Respondents Brindi Trailer Sales and Mr. Urbina under the STAA.[9] Complainant completed an employment application submitted to Respondent. RX 15. Mr. Urbina directed Complainant's job activities – determining load pick up and delivery. HT at 37. Complainant operated a truck and a trailer marked with Respondent's name. HT at 36. Complainant paid for fuel costs with a credit card or cash provided by Respondent. HT at 36-37; 92-93; 318.

As Respondent, Mr. Urbina, exercised control over the terms and conditions of Complainant's employment and was therefore Complainant's 'employer' under the STAA. *See e.g.*, *Lewis v. Synagro Techs., Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 8 n.14, 9-10 (ARB Feb. 27, 2004) (environmental whistleblower acts) and cases cited therein.

Did Complainant engage in protected activity under the STAA?

Complainant's internal complaints

Complainant contends that he made numerous internal complaints to Mr. Urbina about defective conditions of the motor vehicles he operated for Respondent during his employment—both verbally and in his completion and submission of DVIRs.

The preponderant evidence supports finding that Complainant complained at least once to Respondent about defective trailer tire condition which resulted in the replacement of two tires in North Carolina on February 15, 2012. RX 6 at 12; HT at 131; 134. Mr. Urbina acknowledged that he authorized and paid for replacement of those tires, but he disputes Complainant had previously complained to him about the tire condition. RX 6 at 12; HT at 131-34. As discussed above, it defies reason to credit Mr. Urbina's testimony that the tires were replaced then because "they were running a special" in North Carolina rather than in response to expressed concerns of Complainant who was operating Respondents' vehicles at the time.

Complainant's complaint to Mr. Urbina on or around February 15, 2012 about tire conditions related to a possible violation of commercial vehicle safety regulation (for *e.g.*, 49 C.F.R. § 392.7) and therefore constitutes protected activity under the STAA.

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[9] In his post-hearing submission, Complainant contemplated that Respondent may argue Complainant was an independent contractor and not an employee. *See* Complainant's Proposed Findings Of Fact And Legal Argument at 12. Respondent has not, however, challenged if Complainant is an 'employee' under the STAA either at hearing or in its post-hearing argument.

Complainant's submission of a DVIR denoting defective items on Respondents' vehicles could also constitute protected activity under the STAA, i.e., a complaint of a reasonably-perceived possible commercial vehicle safety regulation violation. *See, e.g*., *Urlich v. Swift Transp. Corp.*, ARB Case No. 11-016, ALJ Case No. 2010-STA-41, slip op. at 4 (ARB Mar. 27, 2012); *see also Gaines v. K-Five Constr. Corp.*, 742 F.3d 256, 267-68 (7th Cir. 2014); *Guay v. Burford's Tree Surgeon's, Inc.*, ARB Case No. 06-131, ALJ Case No. 2005-STA-045, slip op. at 6-8 (ARB June 30, 2008). However, the preponderant evidence fails to support finding Complainant submitted such a DVIR to Mr. Urbina during the relevant period. The only DVIRs of record on which multiple "defective" items are checked are the ones which Complainant stated he never submitted to Respondents. *See* CX 2; HT at 232-34. The DVIRs which Respondent proffered do not have any defective items checked and indeed the box next to the statement "condition of the above vehicle is satisfactory" is checked above Complainant's signature which he identified as at hearing. *See* RX 1; HT at 231.

Refusal to drive

Under its "refusal to drive" provision, the STAA prohibits retaliation against an employee because that employee "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security." 49 U.S.C. § 31105(a)(1)(B)(i). This is known as the "actual violation" provision of the STAA. The STAA similarly prohibits retaliation by an employer where an employee refuses to operate a vehicle because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." 49 U.S.C. § 31105(a)(1)(B)(ii). This is known as the "reasonable apprehension" provision of the STAA.

It is undisputed that rather than drive to Massachusetts to deliver a load for Respondents on February 20, 2012, Complainant instead took Respondents' commercial motor vehicles to the PA State Police inspection site. In other words, Complainant engaged in a refusal to drive. Complainant's refusal to drive on February 20, 2012 constitutes protected activity under the STAA because it was due to Complainant's subjectively and objectively reasonable belief that operating Respondents' vehicles would violate commercial safety law or regulation.

On cross-examination, Complainant confirmed that he "suspected" Respondents' vehicles would be impounded at the PA State Police inspection he arranged to occur on February 20, 2012, rather than drive to Massachusetts. HT at 247. He offered the following as to why:

> Q. Did you suspect the truck would be placed out of service?
> A. Yes, sir.
> Q. Why?
> A. Due to severity of the improper, you know, parts – or not parts, but the – it just didn't – it just wasn't right.
> Q. What parts were it that [led] you to believe that it would result in an out of service –

> A. Well, with the – with the brakes given, the way they gave – the way that they gave out on me, and then I knew the windshield, there's only allowed three chips and three cracks. And then I knew that the inspection sticker was bad.

HT at 185.

It is undisputed the PA State Police determined that Complainant's assigned vehicle be placed out of service, citing multiple code violations including defective brakes, damaged windshield "(intersecting cracks over width of windshield)", as well as a lack of PA State Inspection and periodic trailer inspection. RX 16. Complainant refused on February 20, 2012 to operate a commercial vehicle which actually did violate such vehicle safety standards. Therefore, Complainant's refusal to drive on February 20, 2012 constituted protected activity under the "actual violation" provision of the STAA.

Respondents question Complainant's motivation in refusing to drive and instead arranging for PA State Police inspection of its commercial vehicles on February 20, 2012. Mr. Urbina averred Complainant's anger or vengefulness toward him for reprimanding Complainant about using Respondent's vehicle to visit his incarcerated wife motivated Complainant. HT at 67. Even if such anger or vengefulness motivated Complainant, it is irrelevant. *See, e.g*., *Nichols v. Gordon Trucking, Inc.*, 97-STA-2 (ARB July 17, 1997) (an employee's motivation in making safety complaints has no bearing on if those complaints constitute protected activity).

Was Respondent aware of Complainant's protected activity?

Respondents were aware of Complainant's protected activity in February 15, 2012 and later on February 20, 2012. On February 15, 2012, Mr. Urbina paid for a tractor tire replacement because, as found above, he was made aware of defective tire conditions by Complainant. Respondent became aware of Complainant's refusal to drive on February 20, 2012 on that date according to Mr. Urbina's own testimony at hearing.

Did Respondents take adverse action against Complainant?

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

The parties do not dispute that Complainant's employment with Respondents did not continue after February 20, 2012. They do dispute how that employment came to end.

Complainant testified that he called Mr. Urbina during the PA State Police inspection on February 20, 2012 to advise him of the inspection. HT at 190-92. According to Complainant, Mr. Urbina questioned why he did not avoid an inspection site and directed him to pack up and remove his belongings from the truck. HT at 192.

Mr. Urbina averred that he was informed by a PA State trooper (and not Complainant) that his truck and trailer had been inspected and placed out of service. HT at 117-18; 122. Respondents argue that Complainant "abandoned" its vehicles and, in effect, voluntarily resigned from his employment. *See* Respondent's Closing Argument at 18-19. Mr. Urbina maintained that he spoke with Complainant by phone three days after the PA State Police inspection and asked him for the toll money he had given him, as well as for a GPS and CB radio which were in the truck. HT at 118-19. Complainant testified that he did not speak with Mr. Urbina after the inspection on February 20, 2012.

It is undisputed that Complainant removed belongings from the truck on February 20, 2012. It has not been established, however, if he were told do so by Mr. Urbina, or if he did so, on his own. Complainant's offers the argument that it was "not probable" he would have removed belongings from the truck absent Mr. Urbina's direction. *See* Complainant's Proposed Findings at 25. This argument is not entirely persuasive—particularly when it is only Complainant's testimony to support it and Complainant has been a less than credible witness in this matter.

Regardless, Complainant's actions of packing up and removing his belongings, as well as arranging for his own ride home after the February 20, 2012 inspection was an ambiguous departure: it is equivocal as to whether Complainant was quitting his employment with Respondents or responding to the vehicle's placement out of service by the PA State police.

Mr. Urbina treated Complainant's actions on February 20, 2012 as a resignation. Mr. Urbina testified that he contacted a Volvo dealer and arranged to have the out-of-service vehicle towed from the inspection site for repair. HT at 120. Mr. Urbina further testified that "the driver is supposed to stay with the truck, where is with the load," when asked what a driver's responsibility is when a truck is impounded. HT at 122. Although Mr. Urbina averred that he did not "fire" Complainant, Complainant did not drive for Respondents after the February 20, 2012 inspection. However, no evidence has been presented to support finding Complainant provided any definitive indication to Mr. Urbina that he intended to quit or resign on February 20, 2012.[10]

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

[10] The record does include an illegibly-dated DVIR which states in the remarks section that "resignation given 2/11/12 [and] accepted!" CX 2 at 3. However, it is undisputed that Complainant did not submit any of the DVIRs found at CX 2 to Mr. Urbina. Moreover, Mr. Urbina dispatched Complainant to deliver a load to Massachusetts *after* February 11, 2012.

Respondents interpreted Complainant's actions on February 20, 2012 as abandonment, i.e., a quit or resignation and therefore must be deemed to have discharged Complainant. Because the STAA provides "any discharge by an employer constitutes adverse action," it must be concluded as a matter of law that Respondents subjected Complainant to an adverse employment action. *See Nevarez* at 11.

Was Complainant's protected activity a contributing factor?

A complainant may prove his protected activity was a contributing factor through either direct, "smoking gun evidence, that conclusively links the protected activity and the adverse action and does not rely upon inference" or may proceed "indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating [complainant's] employment." *Williams v. Domino's Pizza*, ARB No. 09-02, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011); *Clarke v. Navajo Express, Inc*. ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011).

Having established STAA protected activities and adverse personnel actions, Complainant must also prove by a preponderance of the evidence a causal connection between these two elements. Specifically, Complainant must prove that his internal complaint about tire conditions on or about February 15, 2012 and his refusal to drive on February 20, 2012—both protected activities—were contributing factors, or a contributing factor individually, in the termination of his employment relationship with Respondents.

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

The record establishes Mr. Urbina had knowledge of Complainant's protected activity. For reasons discussed above, Mr. Urbina's assertion that he did not learn of defective tire conditions from Complainant prior to arranging for tractor tire replacement in North Carolina on February 15, 2012 lacks credence. Furthermore, Mr. Urbina acknowledges learning on February 20, 2012 that Complainant did not drive to Massachusetts to deliver a load but instead took Respondents' vehicles to a PA State police inspection site on that date. Complainant's discharge followed those protected activities so closely, it must be concluded that Mr. Urbina's knowledge of those activities played a part in Complainant's discharge. *See, e.g*., *Simon v. Sancken Trucking Co.*, ARB No. 06-039, -088, ALJ No. 2005-STA-40 (ARB Nov. 30, 2007) (citing *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 1996-ERA-034, 036, slip op. at 6 (ARB Mar. 30, 2001))(the circumstances of a given case may support a fact-finder's conclusion that the temporal proximity between protected activity and adverse action establishes that the adverse action was motivated by the protected activity) .

Employer failed to show it would have taken the adverse action regardless of Complainant's protected activity

Because Complainant has demonstrated that his protected activities were a contributing factor in his discharge by Respondents, it must now be determined if Respondents have shown, by clear and convincing evidence, that they would have taken the same adverse action in the absence of Complainant's protected activity. *See Palmer v. Canadian National Railway/Illinois Railroad Co*., ARB No. 16-035, 2014-FRS-154, slip op. at 56(ARB Sep. 30, 2016) ; *Pattenaude v. TriAm Transport*, LLC, ARB No. 15-007, ALJ No. 2013-STA-37, slip op. at 9 (ARB Jan. 12, 2017) ; 29 C.F.R. § 1978.104(e)(4).

In *Palmer*, the ARB stated the following:

> The standard of proof that the ALJ must use, "clear and convincing" is usually thought of as the intermediate standard between "a preponderance" and "beyond reasonable doubt," and requires that the ALJ believe that it is "highly probable" that the employer would have taken the same adverse action in the absence of the protected activity.

Palmer, slip op. at 56-57.

In *Pattenaude*, the ARB held it is was insufficient to show that the employee's conduct violated company policy or otherwise constituted a legitimate independent reason justifying the adverse action, or that the employer could have taken the adverse action in the absence of the protected activity: in determining if a respondent has met its burden of proof, consideration should be given to the independent significance of the non-protected activity relied on by the respondent to justify the adverse personnel action, the facts that would change in the absence of the complainant's protected activity, and evidence relevant to if the employer would have taken the same adverse action without the protected activity. *Pattenaude*, slip op. at 11.

Here, Respondents maintain that Complainant's employment relationship ended with them because Complainant failed to comply with Mr. Urbina's direction not to use Respondents' vehicles to visit his wife, failed to deliver a load to Massachusetts on February 20, 2012 and "abandoned" Respondents' vehicles following inspection. *See* Respondent's Closing Argument at 18-19.

Respondents have failed to show that it is 'highly probable' Complainant's personal use of its vehicles would have resulted in Complainant's discharge. Mr. Urbina testified that he was aware Complainant had done so in his previous truck driver position and that he dispatched Complainant to deliver a load after learning that Complainant had used Respondents' own vehicle to visit his incarcerated wife in Pennsylvania. HT at 89-91; 105; 111.

Mr. Urbina's own testimony provides no support for concluding Complainant would have been discharged for personal use of Respondents' vehicles absent his engaging in protected activity under the STAA—specifically the protected activity of his refusing to drive on February 20, 2012. Respondents knowingly hired and dispatched Complainant after Complainant engaged

in the very conduct it now contends warranted Complainant's discharge from employment. It is therefore highly improbable, that absent Complainant's arranging for a PA State Police inspection in lieu of driving to deliver a load on February 20, 2012, Complainant would have been discharged on February 20, 2012.[11]

Citing Complainant's refusal to deliver a load, i.e., to drive and leaving and abandonment of vehicles at the inspection site does not aid Respondent in avoiding liability in this matter. The ARB decision in *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 13-091, ALJ No. 2010-STA-00024 (ARB Feb. 28, 2014) is instructive as its facts bear similarity to those presented in this case. In *Tablas*, the ARB reversed the ALJ's finding that the employer met its burden to show it would have discharged the complainant in the absence of his protected activity. Dismissing the complaint, the ALJ in *Tablas* found that the complainant's decision not to wait for repairs to be completed "the most important factor" in the complainant's firing and the ARB reversed, stating the following:

> The ALJ maintained…that the failure to wait for repairs was the principal reason for the termination and, since that failure was not protected, it constituted clear and convincing evidence that Tablas would have been fired in the absence of his protected work refusal. We are not convinced however that Tablas's failure to wait for repairs was legally separable from his protected refusal to drive. But for the faulty air lines, there would have been no need to wait for repairs. The ARB has repeatedly found that when an ostensibly legitimate basis for termination is inextricably intertwined with protected activity, Respondent must bear the risk that the "mixed motives" are inseparable.

Tablas at 7, *citing Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-00007 at 4 (ARB Jun. 20, 2012) and *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, at 6-7 (ARB Feb. 29, 2012).

As discussed above, Complainant's refusal to drive to deliver a load to Massachusetts constitutes protected activity because Complainant had refused to operate a commercial vehicle found to actually violate safety regulations upon inspection. Complainant's failure to wait with the vehicles which Respondents characterize as abandonment and therefore a reason for employment termination is "inextricably intertwined" with that protected activity. As in *Tablas*, but for the numerous violations found on inspection, including one for defective brakes, there would have been no need for Complainant to wait with Respondents' vehicles for repair. Respondents' retaliatory motive intertwines inextricably with any legitimate concern about 'abandonment' of its vehicle and delivery load.

There is an issue of sabotage by Complainant to ensure a failed inspection which Respondents have alluded to in their closing argument. Respondents suggest the condition of

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[11] As Complainant correctly notes in his post-hearing submission, it is Respondents' burden to demonstrate, through clear and convincing evidence, that they "would have" terminated Complainant for such non-protected conduct, not that they "could have" terminated Complainant for such conduct. *See* Complainant's Proposed Findings at 31, n. 12, *citing Douglas v. Skywest Airlines, Inc*., ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14, at 17 n. 108 (ARB Sept. 30, 2009).

their vehicle changed between Complainant's stop at Respondents' yard in Brooklyn on February 18, 2012 and the PA State police inspection on February 20, 2012. *See* Respondent's Closing Argument at 18.

On direct examination, Respondent and Respondents' witnesses, Mrs. Urbina and Mr. DeSena averred that they did not observe anything wrong with the truck (including windshield cracks) when the truck was in the Brooklyn yard. HT at 139; 283; 313. The Driver/Vehicle Examination Report from the PA State police summarizing the inspection of February 20, 2012 indicates that there were "intersecting cracks over width of windshield [sic]." RX 16.

On cross-examination, Mr. Urbina and Mr. DeSena conceded that they had looked at the truck windshield from outside of the truck. HT at 139; 316-17. Mrs. Urbina acknowledged it was dark when she observed the truck. HT at 289. None of Respondents' witnesses stated that they entered the truck cab to inspect its windshield when the truck was at Respondents' Brooklyn yard on or about February 18, 2012 and Mr. Urbina answered affirmatively when asked if the truck hood is taller than he. HT at 139.

Crediting the testimony of Respondents' witnesses that they did not observe windshield cracks on or about February 18, 2012 does not establish that the condition of the vehicle changed between then and when it was inspected on February 20, 2012. The witnesses' degree and ability of windshield inspection was limited. Their observations could therefore differ from those which occurred two days later at the PA State police inspection station.

Even if the condition of Respondents' truck windshield changed between February 18 and February 20, 2012, "damaged or discolored windshield" was not the only violation noted on the PA State Police Driver/Vehicle Examination Report. RX 16. Respondents offered no evidence to show how the conditions cited in that Report such as defective brakes, or, for that matter, the "flat tire" or exposed fabric, lack of PA state inspection, expired fuel tax sticker, unsigned registration card differed between February 18, 2012 and February 20, 2012.

Respondents did present an Annual Vehicle Inspection Report ("AVIR") dated August 10, 2011 for its tractor truck and trailer which included certification that both passed "all inspection items for the annual vehicle inspection report in accordance with 49 CFR 396." RX 10. It also presented an invoice and receipt dated September 14, 2011 for truck repair work performed on shackle, spring pin, and u-bolt assembly, as well as an invoice and receipt dated November 12, 2011 for two truck tires. RX 11; RX 7. In addition, Respondent cites the "satisfactory" condition noted in DVIRs for in October 2011. RX 1.

The invoices and receipts dated September and November 2011 support finding the condition of Respondents' vehicle may have changed subsequent to the August 10, 2011 AVIR. The August 2011AVIR and the October 2011 DVIRs reflect the condition of Respondents' vehicles as of those dates; those documents are immaterial as to whether sabotage occurred to those vehicles between February 18, 2012, when Respondents' witnesses observed the vehicles in Brooklyn, NY, and the February 20, 2012 PA State Police inspection.

The preponderant evidence of record fails to support any finding of sabotage to Respondents' vehicle between February 18 and February 20, 2012 as suggested in Respondents' closing argument.

Individual liability

The STAA and its implementing regulations expressly permit individual liability for violating the STAA. 49 U.S.C. § 31105(a)(1); 29 C.F.R. § 1978.101(k). The ARB addressed individual liability in the case of *Anderson v. Timex Logistics*.[12] If an individual exercises control over the employee, including ability to hire, transfer, promote, reprimand, or discharge an employee, then individual liability would attach. In *Anderson*, the Board held that an administrative law judge properly found the owner of the company liable, but not the operations manager or the dispatcher, who did not have such authority.

Here, as Complainant correctly notes in his Proposed Findings submitted post-hearing, Mr. Urbina exercised such control over Complainant and also constituted an 'employer' under the Act.[13] *See* Complainant's Proposed Findings at 33-34. Mr. Urbina dispatched his commercial vehicles with loads to Complainant and he arranged for payment of tolls and fuel for Complainant. Therefore, Mr. Urbina must be held individually liable for the STAA violation found herein.

Entitlement to relief

As the successful litigant, Complainant is entitled to an order requiring Respondents to take affirmative action to abate the violation, to reinstate him to his former position with the same pay, terms and privileges of employment, and to pay him compensatory damages, including back wages.[14] 49 U.S.C. § 31105(b)(3)(A)(ii); 29 C.F.R. § 1978.109.

Under the STAA, a successful complainant is entitled to: reinstatement; compensatory damages, including back pay, litigation costs, and attorney fees; abatement of any violation; and punitive damages in an amount not to exceed $ 250,000. *See* 49 U.S.C. § 31105(b)(3)(A).

Complainant seeks reinstatement, back wages in the total amount of $46,532.50 plus interest, compensatory damages in the amount of $100,000, punitive damages in the amount of

[12] ARB No. 13-016, ALJ No. 2012-STA-11, slip op. at 8-9 (ARB Apr. 30, 2014).

[13] The STAA provides that "a person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because the employee … has filed a complaint[.]" 49 U.S.C. § 31105(a)(1)(A)(i). The STAA defines an employer as a "person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce[.]" 49 U.S.C. § 31101(3)(A). Thus, the STAA's express language covers a person that is an employer. *See Wilson V. Bolin Assocs, Inc.,* Case No. 1991-STA-4 (Sec'y Dec. 30, 1991).

[14] That subsection provides that the employer shall "reinstate the complainant to the former position with the same pay and terms and privileges of employment" as he or she held before the retaliatory action. The implementing regulation provides that the ALJ's "decision and order concerning whether the reinstatement of a discharged employee is appropriate shall be effective immediately upon receipt of the decision" by the employer. 29 C.F.R. § 1978.109(b).

$10,000, attorney fees and costs, and abatement of the violation. *See* Complainant's Proposed Findings at 34-39.

Respondent asserts that Complainant is not entitled to "loss wages, punitive damages or attorney's fees" because his actions were not protected under the STAA. *See* Respondents' Closing Argument at 20-21.

Reinstatement

Under the STAA, reinstatement is an automatic remedy designed to re-establish the employment relationship. *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 03-STA-26, slip op. at 7 (ARB Aug. 21, 2004). *See Palmer v. Western Truck Manpower,* ALJ No. 85-STA-6, slip op. at 19 (Sec'y Jan. 16, 1987) (an order of reinstatement is not discretionary).

Reinstatement not only vindicates the rights of the complainant who engaged in protected activity, but also provides concrete evidence to other employees, through the return of the discharged employee to the jobsite, that the legal protections of the whistleblower statutes are real and effective. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 1990-ERA-30, slip op. at 8 (ARB Feb. 9, 2001) (citing *Allen v. Autauga County Bd. of Educ*., 685 F.2d 1302, 1306 (11th Cir. 1982)), *aff'd sub nom. Georgia Power Co. v. United States Dep't of Labor*, 52 Fed. Appx. 490, 2002 WL 31556530 (table) (11th Cir. Sept. 30, 2002). Moreover, as the Supreme Court recognized in *Brock v. Roadway Express, Inc.,* the STAA's whistleblower protection provision "would lack practical effectiveness if the employee could not be reinstated pending complete review." 481 U.S. 252, 258-59 (1987).

Complainant testified that he is currently unable to work as a truck driver. HT at 152. Specifically, he maintained that in March 2013, a physician told him he had "several" physical problems related to driving. *Id*. Complainant acknowledged on cross-examination that this coincided with his application for Social Security disability benefits. HT at 269. Nonetheless, Complainant argues in the relief entitlement section of his post-hearing submission that Respondents "should be ordered to offer [him] reinstatement to his former position provided he could pass a Department of Transportation physical." *See* Complainant's Proposed Findings at 35.

Other than Complainant's own self-serving hearing testimony, there has been no evidence proffered to support finding Complainant's reinstatement would be impossible or impractical in this case. Therefore, Complainant's reinstatement with the same pay, terms and privileges of employment would be appropriate relief.

Back pay

An employee whose employment is wrongfully terminated is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc*., ALJ No. 90-STA-44, slip op. at 18 (Sec'y Jan. 6, 1992) (citation omitted). Back pay awards to successful whistleblower complainants are calculated in

accordance with the make-whole remedial scheme embodied in section 706 (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq. (West 1988). *See, e.g., Polgar v. Florida Stage Lines*, ARB No. 97-056, ALJ No. 94-STA-46, slip op.at 3 (ARB Mar. 31, 1997).

To make a person "whole for injuries suffered for past discrimination," the STAA mandates an award of back pay as compensatory damages to run from the date of discrimination until either the complainant receives a bona fide offer of reinstatement, is reinstated or obtains comparable employment. *Robert Palmer v. Triple R. Trucking*, ARB No. 03-109, 2003-STA-28 (ARB Aug. 31, 2005); *Cynthia Ferguson v. New Prime Inc*., 2009-STA-47 (Sec'y March 15, 2010).

Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc*., ARB No. 97-055, ALJ No. 1995-STA-043, slip op. at 11-12, n.12 (ARB May 30, 1997). Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co*., No. 1990-STA-037 (Sec'y June 3, 1994); *Kovas v. Morin Transp., Inc*., No. 1992-STA-041 (Sec'y Oct. 1, 1993).

Complainant's testimony as well as the testimony of Respondents' witnesses support finding Complainant's pay rate with Respondents was $.35 per mile. HT at 42; 92; 94; 154; 283. Complainant stated that he drove an average of 2,500 to 2,800 miles per week during his employment with Respondents. HT at 154. By contrast, Mr. Urbina testified that Complainant drove only one trip per week – "800, 900 miles" per week. HT at 42.

No credit is given to the mileage reflected on the DVIRs Complainant admittedly did not submit to Respondents which comprise CX 2.[15] Under rigorous cross-examination, Complainant could not state where he was when he recorded the mileage reflected on the DVIRs at CX 2. HT at 241-42. Complainant's hearing testimony that Mr. Urbina allowed him to take the truck home conflicts with the notation he made on a DVIR that Respondent would not dispatch him to his home. HT at 242-243. On the issue of documenting mileage reflected at CX 2, Complainant was evasive; his demeanor at hearing less than forthright. Due to Complainant's credibility issues, the DVIRs at CX 2 cannot therefore be deemed contemporaneous records of relevant events.

Credit will be given to Respondents' documentary evidence on the issue of mileage driven during Complainant's employment. Respondents proffered a Driver's Daily Log dated October 1, 2011 showing that Complainant drove 464 miles from Wilkes-Barre, PA to Max Meadows, VA. HT at 44-45; RX 1 at 2. The Driver's Daily Log dated October 5, 2011 shows that Complainant drove 443 miles from Lynn, MA to Easton, MD. HT at 48; RX 1 at 4. Respondents also proffered a bill of lading showing Complainant picked up a load in Freehold, NJ on December 22, 2011 and delivered it in Taylor, PA (zip code 18517) on December 26, 2011. RX 4. Another bill of lading shows that Complainant picked up a load in Berwick, PA on December 27, 2011 and delivered it in Raymond, NH on December 28, 2011. RX 5. Judicial notice is taken of the distance between Freehold, NJ and the location in Taylor, PA with a zip

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[15] Complainant's assertion that he "drove 5407 [miles] in a 15-day period, or an average of 2,574 [miles] per week (5407/2.1 weeks)" is based on mileage noted on the DVIRs at CX 2. Complainant's Proposed Findings at 35.

code of 18517 as 163 miles and the distance between Berwick, PA and Raymond, NJ as 393 miles.[16]

The documentary evidence of record comports more with Mr. Urbina's testimony that Complainant drove between 800 and 900 miles per week for an average of 850 miles per week. Therefore, had Complainant remained employed with Respondents until March 2013 and not been discharged on February 20, 2012, he would have driven 45,050 miles (i.e., 850 miles x 53 weeks). Complainant would then be entitled to $15,767.50 in back pay (i.e., 45,050 miles x $.35 per mile) if it were found that he made reasonable efforts to mitigate his damages.

A wrongfully terminated employee is entitled to back pay for the period after the termination of employment. 49 U.S.C. § 31105(b)(3). The employee has a duty to exercise reasonable diligence to attempt to mitigate damages. *Griffith v. Atl. Inland Carrier*, ARB No. 04-010, ALJ No. 02-STA-034, slip op. at 70 (ARB Feb. 20, 2004). Complainant need only make reasonable efforts to mitigate his damages: he is not held to the highest standards of diligence and doubt must be resolved in his favor. *See Moyer v. Yellow Freight System, Inc*. 89 STA 7 (Sec'y Aug. 21, 1995). Nonetheless, the employer bears the burden of proving that the employee failed to mitigate. *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1101 (3d Cir. 1995). The employer can satisfy its burden by establishing that "substantially equivalent positions were available [to the complainant] and he failed to use reasonable diligence in attempting to secure such a position." *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 90-ERA-30, slip op. at 50 (ARB Feb. 9, 2001). A "substantially equivalent position" provides the same promotional opportunities, compensation, job duties, working conditions, and status. *Id.*

On cross-examination at hearing, Complainant testified that he began looking for work "[p]robably a couple weeks, maybe a month or so" after his employment with Respondents. HT at 263. He maintained that he waited for weeks or a month because he "had to rest" from "all the overnight trips" he did for Respondents. HT at 263-64. When further asked on cross-examination about the number of resumes he submitted, Complainant responded "[a]t least 50." HT at 264. However, when confronted with his response of "'probably about six'" when asked the same question during his deposition testimony Respondents took prior to hearing, Complainant stated he "probably thought it was the truth" at that time." HT at 265. Complainant's demeanor and responses when questioned about the issue of his job search efforts reflected a lack of forthrightness.

Even in applying the less than highest standards for such, Complainant's own testimony supports finding Complainant failed to exercise reasonable diligence in attempting to secure work after his employment with Respondents ended and March 2013 when he began receiving Social Security disability benefits. Complainant concedes he did not begin to look for work for at all for at least one month after his discharge from Respondents' employ. Therefore, at best, Complainant did not seek to mitigate his damages until March 2012. Nonetheless, Respondents have not presented any evidence to show that employment substantially equivalent to tractor truck-trailer driver was available to Complainant during the back pay period at issue, i.e., from

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[16] These are the distances in mileage between these locations as noted on https://www.mapquest.com (last visited 5/31/2017).

March 20, 2012 to March 1, 2013.[17] Therefore, a finding is compelled that Respondents have not met their evidentiary burden of showing Complainant failed to mitigate the damages he incurred from March 20, 2012 to March 1, 2013. Complainant would then be entitled to back pay in the amount of $14,577.50.[18]

Interest

As part of a compensatory damage award, a complainant is entitled to prejudgment interest to compensate for the loss of use of his wages. *Hufstetler v. Roadway Express, Inc.* 85 STA 8 (Sec'y Aug. 21 1986), *overruled on other grounds, Roadway Express, Inc. v. Brock,* 830 F.2d 179 (11th Cir. 1987). Similarly, a complainant may receive post-judgment interest on back and front pay. *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp. d/b/a Bearden Trucking,* 03 STA 36, slip op. at 10 (ARB June 30, 2005).

In calculating the interest on STAA back pay awards, the rate used is that charged for underpayment of federal taxes. *See Bryant* and 26 U.S.C. § 6621(a)(2)and (b)(3) (The applicable interest rate is the sum of the Federal short-term rate determined by the Secretary in accordance with 26 U.S.C. § 1274(d) plus 3 percentage points, rounded to the nearest full percent). The applicable interest rates are posted on the website of the Internal Revenue Service ("IRS").[19] In addition, the interest accrues, compounded quarterly, until Respondent satisfies the back pay award. *Id.* (citing *Assistant Sec'y of Labor & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, slip op. at 3 (ARB Jan. 12, 2000) (STA).

The ARB has outlined the procedures to be followed in calculating compounded prejudgment interest. In *Doyle v. Hydro Nuclear Services*, the ARB initially found that an Administrative Law Judge should use the "'applicable federal rate' (AFR) for a quarterly period of compounding." ARB Nos. 99-041, 99-042, 00-012, slip op. at 19 (ARB May 17, 2000). The ARB further held that "[t]o determine the interest for the first quarter of back pay owed, the [judge] shall multiply the back pay principal owed for that quarter by the sum of the quarterly average AFR plus three percentage points." *Id.* In order to determine the quarterly average interest rate, a judge must "calculate the arithmetic average of the AFR for each of the three months of the calendar quarter, rounded to the nearest whole percentage." *Id.*

While *Doyle* arose under the Energy Reorganization Act, the ARB has subsequently found that these computation procedures apply to claims under the STAA. *See Assistant Sec'y of Labor & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 10 (ARB June 30, 2005). Such procedures should therefore be applied in calculating the pre-judgment interest owed by Respondents in this case.

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[17] Complainant would be entitled to back pay from March 2012 to March 2013. *See, e.g., Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 02-STA-35 (ARB Aug. 6, 2004), PDF at 18-19 (back pay award excluded period where Complainant acknowledged he failed to look for work and therefore failed to mitigate his damages).

[18] This is based on 850 miles x 49 weeks (53 weeks minus the 4 weeks of Complainant's failure to mitigate) for a total of 41,650 miles which would have been driven from March 2012 to March 2013. 41,650 miles x $.35 per mile totals $14,577.50.

[19] Index of Applicable Federal Rates (AFR) Rulings, IRS, *available at* http://www.irs.gov/app/picklist/list/federalRates.html (last visited May 31, 2017).

As stated above, Complainant is entitled to an accrued back pay award of $14,577.50 for a period of 49 weeks from March 20, 2012 to March 1, 2013. This period falls within the following quarters of federal fiscal year ("FY") 2012 and 2013 which run from October through September: (1) Quarters 2, 3, and 4 of FY 2012; (2) Quarters1and 2 of FY 2013. Judicial notice is taken of monthly Federal short-term interest rates published for the period from March 1, 2012 through March 1, 2013 as set forth in the IRS's monthly Revenue Rulings.[20]

The applicable interest rates for March 20, 2012 to March 1, 2013 then are as follows:

Year	Fiscal Quarter (Q)	Applicable months	Monthly AFR	Average AFR	Average AFR + 3% (rounded up to nearest whole percentage point)
2012	2Q	January 2012	0.19%	0.19%	3%
		February 2012	0.19%		
		March 2012	0.19%		
	3Q	April 2012	0.25%	0.25%	3%
		May 2012	0.28%		
		June 2012	0.23%		
	4Q	July 2012	0.24%	0.23%	3%
		August 2012	0.25%		
		Sept. 2012	0.21%		
2013	1Q	Oct. 2012	0.23%	0.23%	3%
		Nov. 2012	0.22%		
		Dec. 2012	0.24%		
	2Q	Jan. 2013	0.21%	0.22%	3%
		Feb. 2013	0.21%		
		Mar. 2013	0.24%		

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

The table below outlines the computation of pre-judgment interest applicable for the back pay owed Complainant:

Fiscal quarter	**Dates**	**Total Weeks**	**Weekly Pay Rate**	**Potential Wages**	**AFR**	**Back pay Owed**	**Interest earned on loss**	**Back pay + Interest**	**Running Total**
2Q	3/20/12-3/31/12	2	$297.50	$595.00	3%	$595.00	$0.50	$595.50	$595.50
3Q	4/1/12-6/30/12	13	$297.50	$3,867.50	3%	$3,867.50	$33.47	$3,900.97	$4,496.47
4Q	7/1/12-9/30/12	13	$297.50	$3,867.50	3%	$3,867.50	$62.73	$3,930.23	$8,426.70

[20] See footnote 16 above.

1Q	10/1/12-12/31/12	13	$297.50	$3,867.50	3%	$3,867.50	$92.21	$3,959.71	$12,386.40
2Q	1/1/13-3/1/13	8	$297.50	$2,380.00	3%	$2,380.00	$110.75	$2,490.75	$14,877.15
Total		49		$14,577.50			$299.65		$14,877.15

Compensatory damages

As part of compensatory damages, a successful whistleblower complainant may recover for mental and emotional distress suffered as a consequence of the discrimination. *Michaud v. BSP Transport, Inc.,* 95-STA-29 (ARB Oct. 9, 1997); *Dutkiewicz v. Clean Harbors Environmental Services, Inc.,* 95-STA-34 (ARB Aug. 8, 1997).

To establish entitlement, Complainant must demonstrate that he suffered mental and emotional distress and Respondent's adverse action caused the distress. *Id.* Consulting a physician, psychologist or similar professional on a regular basis is not a prerequisite to entitlement. *Smith v. Littenberg,* 92-ERA-52 (Sec'y Sep. 6, 1995), *appeal dismissed,* No. 95070725 (9th Cir. Mar. 27, 1996); *Busche v. Burkee*, 649 F.2d 509, 519 n.2 (7th Cir. 1981). At the same time, Complainant must prove the existence and magnitude of subjective injuries with competent evidence. *Lederhaus v. Paschen Midwest Inspection Service, LTD.* 91-ERA-13 (Sec'y Oct. 26, 1992), *citing Carey v. Piphus,* 435 U.S. 247, 264 n. 20 (1978).

In determining the amount of compensation for mental and emotional distress, an administrative law judge may review other types of wrongful employment termination cases for assistance. *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery, 95-STA-37* (ARB Sept. 5, 1996).

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

Complainant is seeking $100,000.00 in compensatory damages for emotional distress and mental pain. Complainant testified that after his discharge he felt "pretty sore, angry, embarrassed, not good" because of Respondents' terminating his employment. HT at 194. After the adverse action at issue, Complainant exhausted his personal savings and then received public assistance about which he felt embarrassed. HT at 197. Complainant also described being evicted from his home for failing to pay rent. *Id*. However, Complainant did not describe symptoms of mental distress, such as trouble sleeping or concentrating. Furthermore, as discussed above, Complainant exercised less than reasonable diligence in mitigating his back pay loss and he did not associate that lack of diligence with any emotional distress or mental anguish.

While Complainant's testimony (to the extent credited), establishes he experienced some emotional distress due to his loss of employment with Respondents, he did not fully describe his symptoms or provide any specifics about the depth, duration, and frequency of his mental and emotional distress with any associated physical manifestations. In comparison to the previously noted cases involving prolonged depression, as well as social and physical dysfunction, Complainant's mental and emotional distress does not come close to the level of seriousness or intensity warranting a high compensatory award. Emotional distress is not presumed: it must be proven. *Moder v. Village of Jackson, Wis*, ARB Nos. 01-095, 02-039, ALJ No. 00-WPC-005, slip op. at 10 (ARB Jun. 30, 2003) (awards require plaintiff demonstrate both objective manifestation of distress and a causal connection between the violation and distress). A complainant's credible testimony alone, however, is sufficient to establish emotional distress. *See, e.g*., *Ferguson v. New Prime Inc.,* ARB No. 10-075, ALJ No. 2009-STA-00047, slip op. at 7-8 (ARB Aug. 21, 2011). Here, Complainant's testimony regarding his emotional distress is not extensive and insufficient to support anything more than nominal damages.

Complainant's request for an additional compensatory award of $100,000 based on mental and emotional distress is excessive. An award of $2,000 would adequately compensate Complainant for his emotional distress resulting from Respondents' adverse action.

Punitive damages

An award of punitive damages is warranted "where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'" *Anderson v. Timex Logistics,* ARB No. 13-016, ALJ No. 2012-STA-011 (ARB Apr. 30, 2014); *Youngerman v. United Parcel Serv., Inc*., ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 5 & n.16 (ARB Feb. 27, 2013) (quoting *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-47 (ARB August 31, 2011)). In assessing punitive damages, relevant factors include the degree of the defendant's reprehensibility or culpability, the relationship between the amount of damages and the harm to the victim, and the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 523 U.S. 424, 434-35 (2001); *Fink v. R&L Transfer, Inc.,* ARB No. 13-018, ALJ No. 2012-STA-006 (ARB March 19, 2014).

Although a respondent's wealth alone cannot provide a basis for an otherwise unwarranted punitive damage award, it may be considered in determining the size of a suitable award. *Youngerman v. UPS,* ARB No. 11-056, ALJ No. 2010-STA-047 (February 27, 2013) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell, 538* U.S. 408, 428 (2003).

The STAA provides that a successful complainant may be awarded punitive damages in an amount not to exceed $250,000. 49 U.S.C. § 31105(b)(3)(C). Complainant is seeking $10,000 in punitive damages. Complainant argues that an award of punitive damages in the amount of $10,000 "will send a message to Respondents that they may not retaliate against drivers who exercise their rights under the STAA" and cites the case of *Butler v. Neier, Inc*., ALJ No. 2014-STA-68 (ALJ July 29, 2016) in which that amount was awarded in punitive damages against a small motor carrier. *See* Complainant's Proposed Findings at 38.

The size of a punitive award is fundamentally a fact-based determination driven by the circumstances of the case. *Anderson*, supra at 8. All of the evidence of record fails to support finding Respondents demonstrated a reckless or callous disregard for Complainant's rights under the STAA and that their violation of the STAA warrant punitive damages. The record does not show Respondent to be a large company which has repeatedly violated the STAA and such are the circumstances under which punitive damages have been awarded.

Abatement

Complainant seeks an order requiring Respondents "to expunge all references to [his] protected activities and his separation from employment from its personnel records." *See* Complainant's Proposed Findings at 39. Such relief is appropriate under the STAA.

Attorney's fees and costs

Due to the successful prosecution of his claim under the STAA, Complainant is entitled to recover the associated litigation expenses, including reasonable attorney fees and costs. 49 U.S.C. § 31105(b)(3)(B). This section provides in part that "the Secretary [of Labor] may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint." *Id. See also* 29 C.F.R. § 1978.109(d)(1).

In accordance with Supreme Court precedent, the starting point is the "lodestar" method of multiplying a reasonable number of hours by a reasonable hourly rate. *See Jackson v. Butler & Co.,* ARB Nos. 03-116, -144; ALJ No. 2003-STA-026, slip op. at 10-11 (ARB Aug. 31, 2004); *see also Scott v. Roadway Express,* ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003). The party seeking a fee award must submit "'adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area,' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs." *Gutierrez v. Regents, Univ. of Cal.,* ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 11 (ARB Nov. 13, 2002).

Conclusion

For the reasons discussed above, Respondents (Brindi Trailer Sales and Service, Inc. and Roberto Urbina, jointly and individually) violated the employee protection provisions of the STAA when they discharged Complainant on February 20, 2012. The preponderant evidence

has established that (1) Complainant engaged in protected activity of which Respondents were aware and (2) Respondents took adverse action against Complainant, i.e., interpreted his actions on February 20, 2012 as a quit or resignation. The preponderant evidence also has established Complainant's protected activity, i.e., his refusing to operate a vehicle which would actually violate safety rules and instead arranging for its inspection, was a contributing factor in the adverse action taken against him. Respondents failed to establish through clear and convincing evidence that it would have taken that action regardless of such protected activity.

As a result of this violation, Complainant is entitled to an award of accrued back pay from March 20, 2012 to March 1, 2013. He is also entitled to both pre- and post-judgment interest on his back pay award, which is to be compounded quarterly until Respondents satisfy such award.

In addition, Complainant is entitled to $2,000 in compensatory damages for emotional distress caused by his Respondents' adverse action against him.

Respondents must take the above forms of abatement for their violation of the STAA. For the reasons discussed above, however, no award for punitive damages will be made in this case.

Finally, Complainant is entitled to reimbursement of reasonable attorney fees and costs associated with the litigation of this matter before this office, subject to his timely submission of a supported application.

ORDER

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

1. Respondents will pay to Complainant compensatory damages the sum of $14,577.50 in back pay, covering the period from March 20, 2012 to March 1, 2013.

2. Respondents will pay Complainant prejudgment interest on the back pay award in the amount of $299.65, in accordance with 26 U.S.C. § 6621(a)(2).

3. Respondents will pay Complainant post-judgment interest on his back pay award, pursuant to 26 U.S.C. § 6621(a)(2). This interest will compound quarterly until the back pay award is satisfied in accordance with 26 U.S.C. § 6621(a)(2).

4. Respondents will pay to Complainant the sum of $2,000 in compensatory damages for emotional distress.

5. Complainant's claim for punitive damages be denied.

6. Respondents will expunge all references to Complainant's engaging in protected activity, i.e., his refusing to operate a commercial motor vehicle in violation of actual safety regulations, from its personnel and labor records and will provide a neutral reference (confirming period of employment and pay rate) in response to any inquiries about Complainant from potential employers.

7. Counsel for Complainant will have 30 days from the date of this Decision and Order to file a fully supported application for fees, costs, and expenses. Respondent will have 20 days from receipt of such application to file any objections.

SO ORDERED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).