



Issue Date: 07 September 2018

Case Numbers: 2016-STA-00059
2016-STA-00060

In the Matter of:

**JEFF O’HAGAN and
ROCKY HULSEY,**

Complainants,

v.

**CANADIAN RIVER TRUCKING,
Respondent,**

Appearances: Clayton T. Hasbrook, Esq.
Hasbrook & Hasbrook
Oklahoma City, Oklahoma
For the Complainants

Ross A. Plourde, Esq.
Elizabeth Bowersox, Esq.
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Oklahoma City, Oklahoma
For the Respondent

DECISION AND ORDER DISMISSING THE COMPLAINTS

These matters arise under the employee-protection provisions of 49 U.S.C. § 31105 of the Surface Transportation Assistance Act of 1982 (“STAA” or “Act”), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978.

Procedural Background

Jeff O’Hagan and Rocky Hulsey (collectively, “Complainants”) filed separate complaints with the Occupational Safety and Health Administration (“OSHA”) on February 22, 2016 alleging that Canadian River Trucking (“Respondent” or “CRT”) terminated their employment on February 22, 2016 in retaliation for complaining about faulty trailers and for refusing to violate regulations governing hours of service. After conducting a joint investigation, OSHA’s

Regional Supervisory Investigator dismissed the complaints on June 6, 2016, finding no violation of the STAA. By letters dated June 27, 2016 and June 28, 2016, Complainants individually filed objections to the findings and requested a hearing before the Office of Administrative Law Judges (“OALJ”). By order issued July 20, 2016, a consolidated hearing in the above-captioned matters was scheduled for January 25, 2017 in Oklahoma City, Oklahoma. The hearing was continued to April 11, 2017 by order issued on November 14, 2016. On March 20, 2017, the date and venue were changed due to a courtroom conflict.

A de novo hearing was eventually held in Tulsa, Oklahoma on April 10, 2017. Complainants, Respondent, and counsel for both were in attendance. Respondent’s Exhibits 10-14, 16-20, 22-38, 41, 43, 45, and 46 were admitted into evidence.¹ (Tr. 11-12.) Complainant’s Exhibits 1, 2, 5-16, 18-21 were admitted into evidence.² (Tr. 10-11.) Joint Exhibits 1-9 were admitted into evidence. (Tr. 12.) Five witnesses testified, including Complainants. (Tr. 20-252.)

During the hearing, I established the following post-hearing briefing schedule: the parties were given until July 10, 2017 to file closing briefs; and until July 24, 2017 to submit reply briefs. (Tr. 259-60.) On July 11, 2017, Respondent filed its *Post Hearing Brief* (“Resp. Brief”). On July 14, 2017, Complainants filed their *Post-Hearing Brief* (“Compl. Brief”). On July 25, 2017, Respondent filed its *Response Brief to Complainants’ Post-Hearing Brief* (“Resp. Reply”). On July 31, 2017, Complainants filed their *Reply to Respondent’s Post-Hearing Brief* (“Compl. Reply”).

I have based my decision on all of the evidence, relevant controlling statutory and regulatory authority, and the arguments of the parties. As explained in greater detail below, I find that neither Complainant engaged in activity protected under the Act and dismiss both complaints.

Summary of the Evidence

Hearing Testimony

Norman Hall (Tr. 20-79, 233-52)

Background

I am the Human Resources Manager for Alliance Steel and its sister company, Canadian River Trucking. My duties consist of “[a]ll facets of Human Resources, everything from cradle to grave, hiring to firing and all points in between.” (Tr. 21.) I have been doing HR for 15 years.

¹ I use the following abbreviations in this decision: “Tr.” for the official hearing transcript; “CX” for a Complainant’s Exhibit; “RX” for a Respondent’s Exhibit; “ALJX” for an Administrative Law Judge’s Exhibit; and “JX” for a Joint Exhibit. RX-15, RX-21, RX-39, RX-40, RX-42, and RX-44 were withdrawn. (Tr. 11-12, 122.)

² Complainants withdrew CX-3, CX-4, and CX-17. (Tr. 7-10.) I overruled Respondent’s objection to CX-6 and CX-20. (Tr. 8-10.)

I have attended HR conferences and I have access to attorneys or HR experts if I have questions. (Tr. 77.) I do not have any HR certifications. (Tr. 78.)

In February 2016, about ten drivers worked at CRT. (Tr. 23.) The only people on the CRT payroll are the drivers. HR consists of myself and one assistant. My assistant “[p]rimarily . . . handles a lot of benefits and a lot of onboarding.” My assistant does not make firing decisions.” (Tr. 24.)

“[G]enerally, [CRT is] hired by a general contractor . . . that needs a building.” We act as a subcontractor to the general contractor. We consider both the end user and the general contractor to be customers. “[T]he general contractor is the person that we want to keep happy.” There are many documents that pass between a general contractor and us, by email, fax, or mail. (Tr. 57.) The deliveries are scheduled based upon the customer’s expectations of when it will be available. Questions regarding parking on site and other job site instructions to be aware of could be included in delivery paperwork. However, “those conditions could change as other deliveries are made to the job site.” It would have been nice to know that the customer involved in this matter preferred staggered deliveries, “but that’s information the drivers could seek out themselves as well.” (Tr. 59.)

“We rent our trucks or they’re leased from Penske and so that’s where our drivers generally store their trucks.” (Tr. 43.) The drivers do not receive their dispatch instructions by email or text message. They “get a courtesy text message from the dispatcher letting them know where it is they’re going to be going and what time they need to be there, but it’s not the full document that they would have or that they would require in order to make their delivery.” (Tr. 44.) I would guess that the drivers get that courtesy text message around 5:00 or 6:00 p.m. (Tr. 45.)

Jeff and Rocky’s supervisor was the dispatcher, Steve Johnson, who reports to Dennis Lucero, the plant manager for our production facility. Dennis Lucero reports to Don Heidelberg, who reports to the president of the company. (Tr. 53.) Steve Johnson sends out the dispatch text message. (Tr. 54.) Salespeople, sales coordinators, and schedulers are in contact with customers before the driver delivers. (Tr. 56.)

There is no codified policy or procedure regarding customer complaints. However, customers are encouraged to contact us if they have issues. (Tr. 47.) In this case, one of our salesman received a call regarding the late deliveries of Mr. O’Hagan and Mr. Hulsey. (Tr. 47-48.)

I think that Jeff and Rocky each made roughly \$800 or \$850 per week. It would vary according to tenure and participation in runs over the weekend. (Tr. 23.)

Expectations of Drivers

“We believe it’s the driver’s responsibility to coordinate their deliveries with each other when there’s multiple deliveries going to the same location with more than one driver.” (Tr. 40-41.) I don’t know when the drivers get the customers’ phone numbers. “I would assume it

would be on the dispatch paperwork.” (Tr. 41-42.) Drivers’ dispatch paperwork is “placed in their box for them to pick up” when they get their materials as they leave the yard. It’s the driver’s determination when they leave; “[t]hey know where they have to be and what time they have to be there.” It’s up to the drivers “to make the determination to plan their route to determine when they’re going to be wherever it is that they have to go and how they’re going to get there. As professional drivers, we trust them to do that. They know the hours of service rules. They know where it is they need to be and they know what our expectations are.” A text message will give them a heads-up and let them know where they will be going. (Tr. 42.)

“Our drivers are expected to deliver the load safely, legally, and courteously to the customers. That’s an expectation of all drivers and we handle professional drivers. We’re not in the business of taking someone who’s never driven before and training them to be a driver. We are looking for an experienced driver who can come in and knows the basic fundamentals” (Tr. 45-46.) We expect the drivers to know the hours of service rules. We have no procedures relating to splitting the sleeper berth time, “[j]ust what’s in the regulations.” (Tr. 46.) Our drivers probably utilize a split sleeper berth, within the confines of the regulations. (Tr. 47.) Our drivers are in charge of making sure the company follows the DOT regulations. The weekly logbooks are reviewed and filed by our dispatcher. (Tr. 48.) “The driver . . . is responsible for his hours of service, keeping up a log book. . . . We’ve hired a professional driver and it’s our expectation that he’s going to follow those motor carrier regulations to the letter.” (Tr. 48-49.)

It is not uncommon for drivers to start their ten-hour reset at a job site. “Drivers would be encouraged” to start their ten-hour reset where it can be done safely and where they are out of the customer’s way.” (Tr. 55.)

It is “our expectation that the drivers are going to deliver on time and if they’re not going to deliver on time, we need to sound the alarm and let people know, more than just the customer know. We need to let people on our end know so that we can massage that relationship if we need to and in this instance, that did not happen.” That is not written down anywhere. (Tr. 50.)

“We have an open door policy” and drivers have an obligation to let us know “if they feel there’s an issue.” (Tr. 52.) Employees are “encouraged to talk with [their] supervisor” before contacting Human Resources or your supervisor’s supervisor. Notes are made about complaints, but there is not a specific form that must be filled out. I generally file those notes in my own file, not in the employee’s personnel file. (Tr. 53.)

On February 17, all the drivers were required to begin using Fleetmatics. (Tr. 61.) Don Heidelberg held a meeting and explained how the system worked, what we expected, and “reminded our drivers that we want it to be legal.” We “made it clear to the drivers that they were also to run paper logs as a backup to this system and then once we realized there were as many problems as there were, that their paper logs were to be” their official logbook if they were stopped or audited. (Tr. 62.)

Mr. O’Hagan and Mr. Hulsey “were told to use paper logs. They pushed for” the KeepTrucking app. (Tr. 251.) Mr. O’Hagan and Mr. Hulsey were never instructed not to drive together. (Tr. 242-43.) I agree that it’s preferable for drivers to get back legally as soon as

possible to Oklahoma City. (Tr. 243.) Mr. O'Hagan and Mr. Hulsey's plan to take their rest period while being unloaded would be "difficult for them to do" because "they've got some obligations once their load is unloaded." They have paperwork that needs to be signed and "[t]here may be questions that the on-site individual," the receiver or the checker, may have. (Tr. 243.) "If they're in their sleeper berth, then that's difficult for them to be responsive to those questions whatever they may be. It's best that our drivers are there on site, on time and available to the customer for whatever issues or problems may arise there at the job site." (Tr. 243.)

We offer meal reimbursement based on the distance of the run and whether it is day or night. We made a change to the policy, but I do not approve those receipts or work with it on a daily basis. "There was an issue with some of our drivers, Mr. O'Hagan and Mr. Hulsey specifically, where we felt there were some abuses of the meal policy and where they were asking us to pay for anything and everything and we didn't feel that was prudent for us as a company." (Tr. 50-51.) Initially, "we paid for pretty much anything and there [were] some abuses there." So we limited the reimbursements. Mr. O'Hagan and Mr. Hulsey both had problems with that." (Tr. 51.) There are no policies for how long a break for food should take other than the requirement in the regulations stating that a driver must have a 30-minute break under certain circumstances. "[I]t's just be prudent with your time and company resources, use your best judgment." I would estimate that most of our drivers take a half hour or 45 minutes for a lunch break. (Tr. 54.)

Once the product has been manufactured, contact with the customer "becomes the driver's responsibility." I do not know how the "information flows from the customer back into our organization" regarding job site conditions. (Tr. 56.)

The Decision to Terminate Complainants

I first became aware of the problem with Mr. O'Hagan and Mr. Hulsey when Don Heidelberg called me at home around 4:00 p.m. on Thursday to tell me that two drivers had arrived at a job site late. (Tr. 234, 249.) "I had a feeling when he said it was two drivers that it was Mr. O'Hagan and Mr. Hulsey because they commonly drove together." Mr. Heidelberg confirmed that it was Mr. O'Hagan and Mr. Hulsey. He gave me a few details. He told me he had pulled up the Fleetmatics software and that he was watching it. He told me that Rocky was sitting at a casino, and that he thought Rocky was waiting on Jeff. He asked me if, based on what he was looking at, if I thought we had enough to terminate Mr. O'Hagan and Mr. Hulsey. (Tr. 234.) I told him, "Well, maybe. Let's talk more about that tomorrow." (Tr. 235.) "Any time we're talking about terminating an employee, it's a big decision. It's not something we just do on a whim. I said, 'Well, let's make sure we gather up data, look at what we can see based on the visualization we get from the Fleetmatics software and let's take a look at it Friday morning and then we can make a determination . . .'" (Tr. 235.)

I decided to fire Jeff and Rocky the morning of Friday, February 19, 2016. (Tr. 23.) "Don Heidelberg and I had reviewed the Fleetmatics software timelines showing Mr. O'Hagan and Mr. Hulsey's trip, all points, where they'd left, what time they arrived, where they'd stopped, those particular details." (Tr. 22-23.) I did not interview any of the dispatchers or drivers. I am familiar with the hours of service regulations. (Tr. 23.)

Don and I looked at the GPS printouts on Friday morning. “We looked at them and could see what time they left, what time they arrived at various points and just looking at it, it was pretty clear that they went about this the wrong way.” If Mr. O’Hagan and Mr. Hulsey “know they’ve got to be there at 8:00 in the morning and the load isn’t ready until early evening, it would make sense to leave early in the morning like 2:00 or 3:00 a.m. and make the necessary run.” (Tr. 235.) “It was clear to us that there were ways that that load could have been” delivered on time. (Tr. 242.) Mr. Heidelberg and I talked about that and Mr. Heidelberg said, “Let’s just – based on grossly poor planning on their part.” (Tr. 235.) Then, we talked about their return trip, and “we could see several instances where they weren’t very judicious with their time on the way back, which kind of compounded the problem. So, not only are they late and they’ve upset a customer and the customer called our salesperson, but they also kind of wasted time on the way back and made it such they wouldn’t be available for dispatch on another day.” (Tr. 235-36.) We did some back-of-the-envelope calculations and it looked like that trip would have been possible to do in one day, instead of the three days it took Mr. O’Hagan and Mr. Hulsey. “[B]ased on their poor planning and neglect of their responsibilities as a driver for us, we deemed it appropriate to terminate their employment.” (Tr. 236.) By the time Mr. O’Hagan and Mr. Hulsey had returned to Oklahoma City, the window has passed to assign them a delivery the next day. Those assignments are typically “done midday around lunchtime.” That’s when “we need to start making plans for our loads for the next day, need to know what drivers are going to be going and if we need to use outside carriers at a great expense to us. We need to go in and get that in the works. So, if we’ve got a driver that we know for a fact isn’t going to be back until late in the evening, we may run into a problem with their mandatory breaks, but also by that point, we may have already contracted that load out with some other entity” (Tr. 240, 248.)

In my opinion, Jeff and Rocky should have left at 2:00 or 3:00 a.m., driven to the customer, and made the delivery, even if it required them to take their mandatory rest break on the back end. “Better that they do that and deliver to the customer on time than to leave knowing that they were going to be late.” (Tr. 62.) I think that Mr. O’Hagan and Mr. Hulsey “knew good and well that there was no way that they would be able to make that delivery on time and there were things that they could have done that could have prevented that.” (Tr. 62-63.) They could have parked on site and made the delivery on time. They had “fourteen hours to utilize. If they would have left at 7:30, 14 hours makes 9:30 the following morning. If they had been there on the location, whether they stopped for a rest break or not, they could have been there on site on time at least two different ways and they went about it in a third way which in my opinion is the worst of all possible outcomes because now they’re late for the customer and then on their way back, all kinds of snafus happen on their way back even though they were asked to head back. We knew that they were unloaded. We knew they had the hours to come back and they were told to come back and refused to do so.” (Tr. 63.)

I have reviewed all the phone recordings that were provided. (Tr. 27.) A recording between Mr. Hulsey and Mr. O’Hagan was played by Mr. Hulsey during the termination. “I don’t remember the full details of it, but [Mr. O’Hagan] was very upset using a lot of expletives” He was upset because “[h]e wasn’t being unloaded quickly enough.” (Tr. 38.) “I think he’s more concerned with the fact that we know where he is and whether or not he’s moving”

than with hours of service. (Tr. 38-39.) CRT installed software that digitized the driver logs and provided GPS tracking of the drivers, with the intent of keeping the drivers honest. “We want[ed] to be able to know how much time they have, whether or not they’re going to make their deliveries in a timely fashion, make sure that their logs are legitimate in a timely fashion, make sure that their logs are legitimate so we can play by those rules.” That system becomes mandatory for trucking companies December of 2017. “We wanted to be ahead of the curve so we installed the software in advance.” (Tr. 39.)

It is possible that Mr. O’Hagan and Mr. Hulsey planned their trip in a way that they could get a meal out of it. I believe “that they would work within [our rules] to maximize their potential gain, whether it be monetary, whether it be a free meal. It would not surprise me at all.” (Tr. 247.) “It’s my understanding that [Mr. O’Hagan and Mr. Hulsey] were reimbursed” for meals on that trip. I know that Mr. Hulsey’s casino buffet receipt was given to me. “I know I passed it along. I believe he had a secondary check that he came back to pick up from me and I believe that that’s what that check was.” (Tr. 236.) Mr. O’Hagan and Mr. Hulsey had complained about a change in the expense reimbursement policy. (Tr. 236.) We had drivers sign an acknowledgement of the policy change in September 2015. RX-31 is Mr. O’Hagan’s form. On it, he explains why he disagrees with the policy. RX-32 is Mr. Hulsey’s form. He also “made notes on the bottom of it why he disagreed with the change of the policy.” (Tr. 237.) Mr. O’Hagan and Mr. Hulsey also both approached myself, Dennis, and Steve to complain about the policy. “We felt that the two of them were kind of fishing for the answer that they wanted to hear between the three of us.” (Tr. 237.)

Before terminating Mr. Hulsey and Mr. O’Hagan, I was not told that either had refused to drive because of the hours of service. (Tr. 237-38.) I talked to Mr. Lucero and Steve before Mr. O’Hagan and Mr. Hulsey were terminated, “but it was more to inform them” of the decision that Don and I made to terminate their employment so that they could make arrangements for scheduling deliveries. Mr. O’Hagan and Mr. Hulsey were expected to comply with the hours of service rules. (Tr. 238.)

CX-22 appears to be Mr. O’Hagan’s timeline on February 17-19, 2016. I don’t know if Mr. O’Hagan planned to park on site. (Tr. 65.) RX-35’s timeline would be pushed back an hour and twenty-three minutes “[b]ased on the time it actually took him to be unloaded on that date.” However, “we’re concerned more with what time a load arrives than what time they arrive back at the yard.” Based on that adjustment, the 14-hour reset would need to have been taken at 4:00 p.m. somewhere between Fayetteville and Oklahoma City. (Tr. 70.) Accordingly, Mr. O’Hagan would not have been available for an 8:00 a.m. delivery, but it could have been possible for him to be available later in the day. That “wouldn’t have been an issue provided it was done legally.” (Tr. 71.)

Neither Mr. O’Hagan nor Mr. Hulsey were fired for refusing to violate the hours of service rules; they were “terminated for what we believe [was] willful neglect of duty, mismanagement of resources that belong to the company, including [their] time, our vehicle, company money, company trailers.” (Tr. 241-42.) The deliveries on Friday, February 19 did not have anything to do with their termination. (Tr. 246-47.) “[W]e based our decision on . . . whether or not they were able to arrive at the customer on time. We believed that they could

have, but not the way that they did it and in light of that, we feel that they misused our resources, misused our truck, violated our trust and then compounded that problem on the way back by taking nine hours in one case to get home, such that they were unavailable for a load the next day.” (Tr. 247.) “We were disappointed that they weren’t available for us to use them on Friday.” (Tr. 249.) I don’t know “for certain” whether Mr. O’Hagan and Mr. Hulsey actually missed loads they would have taken on Friday. (Tr. 249.) I did not know at the time that Dennis texted Rocky telling him to “come home” while he was waiting at the casino, or that Dennis later called Mr. O’Hagan and told him that “he was just fucking with” Mr. Hulsey and instructed Mr. O’Hagan to tell Mr. Hulsey to continue waiting. (Tr. 250-51.) It’s possible that Mr. Hulsey could have been dispatched for a load the next day, having left the delivery site at 12:39 p.m. (Tr. 251.)

Dispatch would know what deliveries needed to go out on February 19. I don’t know for certain whether we missed any deliveries on the 19th. (Tr. 72.) I don’t know if we had deliveries scheduled for the 20th. (Tr. 72-73.) That information would have been irrelevant in the decision to terminate Mr. O’Hagan and Mr. Hulsey. (Tr. 73.)

I would agree that somebody looks at the logbooks to determine how efficient a driver is. The logbooks are a resource that we can use to “establish trends and determine this particular driver needs to make better use of the company’s time on his way back or on his way down or whatever it may be.” We never counseled Jeff or Rocky regarding their efficiency, however “Steve had said to me before that he felt that they didn’t make the best use of company’s time.” He said that “[a] few times while they worked with us.” (Tr. 49.) We never documented it. (Tr. 50.)

I do not recall any complaints from any of the drivers about dispatchers telling them to fudge log books. Mr. O’Hagan and Mr. Hulsey complained about Steve Johnson because he wouldn’t dispatch them together frequently enough. (Tr. 60.)

I got along with Jeff and Rocky before they were terminated. They did not have any prior disciplinary action, write-ups, or late deliveries at CRT that I am aware of. I think Rocky had been with us maybe four or five years. (Tr. 25.)

Post-Termination References

After terminating Mr. O’Hagan, I received a reference check from the government regarding his employment with CRT. (Tr. 73, CX-20.) My response references Mr. O’Hagan’s deception to the company. “I believe that [Mr. O’Hagan] wasn’t operating in the best interest of the company in regards to the use of his time and our equipment. Rather than complying by or exercising his role within the company’s best interest, I believe he worked to circumvent the rules that were in place to his own advantage. I think he was well aware of what the federal regulations were, what our policies and practices were and I believe that he used those to his own gain either to work as little as possible for the same amount of pay or to maximize his pay by making himself unavailable to make deliveries subsequent days or position himself so that he could get runs that are on the weekend which potentially could boost his pay.” (Tr. 74-75.) I decided he was deceiving the company “[a]t the moment we decided we were going to terminate

his employment.” (Tr. 75.) This deception occurred “[c]ertainly on the days in question, but I do believe that Mr. O’Hagan and Mr. Hulseley as well didn’t always act in the best interest of the company. With the software that we had in place, we could see exactly where they were, when they were there, and confirm those suspicions.” (Tr. 75.)

“Mr. O’Hagan called me on more than one occasion upset.” (Tr. 77.) For example, once we “[h]ad a long conversation with him in the break room one time where he was complaining about our change to our meal reimbursement policy and it’s a small thing and he was extremely upset about it. I did the best I could to calm him down and I told him that I was going to have a conversation with Dennis Lucero and Steve Johnson about that to make sure that we’re understanding and enforcing that policy right and he was upset with me because he had come to me and was expecting me to provide final say on this policy and in many instances, about this particular policy more than once, I know, Mr. O’Hagan would contact me, he would contact Dennis and he would contact Steve trying to play us against each other to get one of us to say the answer that he wanted to hear and so in order to protect myself and insulate the company, I told him I wanted to confer with him to make sure we were all on the same page and he did not like that answer.” (Tr. 77.)

It is good practice to make records of employee complaints or complaints we have with employees. I did not make any documents, which I am aware of, regarding Mr. O’Hagan’s volatile personality. Other than the date he was terminated, I did not document anything regarding Mr. O’Hagan’s deception to the company. I did not make any documentation regarding Mr. O’Hagan’s distrust of coworkers. (Tr. 78.) I think that Mr. O’Hagan has stability issues. I did not document these mental or emotional stability issues, other than at termination. (Tr. 79.)

To my knowledge, nobody contacted Cardinal or AWG about Mr. O’Hagan. (Tr. 238-39.) CRT received “faxed reference checks” from Cardinal or AWG that I handled. “Our policy on those is to respond with position and dates of service, but no more information than that.” There are also questions regarding failed drug tests and accidents on duty, “and we are required by DOT regulations to provide that information.” (Tr. 239.) “[T]here was no character aspect or anything like that that was questioned. It was just dates of service, what position they held and then the requisite DOT information that’s required.” (Tr. 239.)

We also received a request for information relating to a security clearance. We responded differently to that because I have “an obligation to reply to that.” (Tr. 239.) “[S]ince it’s an issue of national security, I felt that it was my duty to respond accurately and truthfully to those questions.” (Tr. 239-40.)

Alliance was audited by the Department of Transportation in the spring of 2016, after Mr. O’Hagan and Mr. Hulseley were terminated. They reviewed DOT files, driver files, and driver logs. (Tr. 240-41.) There were no comments that I am aware of regarding deliveries during sleeper berth rest periods. (Tr. 243.) They “found that one driver wasn’t taking an appropriate break after eight hours of driving and we sat down with that driver.” (Tr. 240-41.) Steve let that driver know that “[w]e follow the rules here.” (Tr. 241.) “It’s my belief that Mr. O’Hagan and Mr. Hulseley contacted the DOT” and prompted the investigation. (Tr. 241.)

Don Heidelberg (Tr. 80-115)

I am currently the Operations Manager of a heavy structural fabricator located in Jackson, Tennessee. (Tr. 81.) In February 2016 I was employed by CRT as the Vice President of Manufacturing for Alliance buildings. (Tr. 81, 101.) CRT was our freight company at that time; “[t]hey hauled all of our freight.” (Tr. 81.) I left Alliance on good terms. I had responsibility for oversight for Alliance. (Tr. 82.) My duties there ranged from “shipping, receiving, manufacturing operations.” (Tr. 101.) I am familiar with the DOT hours of service but have not had any formal training with it. (Tr. 101-102.) I have “had drivers work for me for 25 years.” (Tr. 102.)

“I’m assuming” Mr. O’Hagan and Mr. Hulsey were generally good employees. “I don’t really know. I wasn’t in the day-to-day with” them. (Tr. 102.) I interacted with them at drivers’ meetings and in connection with the introduction of the new software. (Tr. 107.) I am not aware of prior disciplinary write-ups of Mr. O’Hagan or Mr. Hulsey. (Tr. 106.) I was involved in the decision of CRT to terminate Mr. O’Hagan and Mr. Hulsey. Norman Hall and I made that decision on behalf of CRT. CRT’s drivers are salaried. They are unsupervised.

The “whole fiasco of delivering to one of our large customers and then on the return trip, it just looked pretty bad.” (Tr. 82.) “There’s a high level of trust when it comes to our drivers because they’re not supervised. They’re in hundreds of thousands of dollars’ worth of equipment. They’re dealing with million dollar customers so we’re very particular.” (Tr. 82-83.)

I made the decision to get the Fleetmatics system “a matter of weeks” before the decision to terminate Mr. O’Hagan and Mr. Hulsey. (Tr. 83.) We met with the drivers before we installed the system. We held two seminars and explained “that we would have full visibility” of where the drivers were “at all times.” We would also know if drivers broke a speed law. “It gives you a huge amount of information.” I wanted everyone to know that we could see what they were doing and to “make sure we’re above board.” (Tr. 84.) We instructed the drivers to “run paper logs in conjunction [with the Fleetmatics system] until we got the bugs worked out.” We told the drivers to rely on the paper logs until the “system was doing everything that we needed it to do.” (Tr. 84.)

We had discussions regarding hours of service early on and “it was understood that anybody that broke our hours of service would be terminated.” (Tr. 85.) That’s what we told the drivers. We also had that discussion with Mr. O’Hagan and Mr. Hulsey. They indicated that “sometimes you just can’t” always follow the rules and make your deliveries. I told them that “we always have to, always.” (Tr. 85.) We got the same reaction from about three of our drivers at one of our first meetings regarding the new system. (Tr. 107.) RX-8 and RX-9 contain job descriptions for over the road drivers. (Tr. 91-92.) They are signed by Mr. O’Hagan and MR. Hulsey, respectively. Part of the job is adhering to FMCSA regulations, safe driving techniques, and maintaining proper log books. (Tr. 92.) I assume that Dennis and Steve audited the logbooks. (Tr. 108-109.)

I do not know if it's common for CRT drivers to start their sleeper berth time at the delivery location; we "leave that up to the drivers." (Tr. 107-108.) "I think Dennis took care of a lot of" pre-delivery conversations with the customer, as far as the availability of parking at a job site. (Tr. 110.) "A lot of the drivers know if it's a customer that we deliver to a lot, they know people on site that you can call and ask." (Tr. 110.) I did not know anything about this particular location. I was not aware of anybody that did know anything about this location. "I had all the information I needed with the GPS and with the instructions, repeated instructions to come home and repeated stopping." (Tr. 110.) I did not interview Mr. Lucero, the dispatcher. (Tr. 110.)

I was notified any time there was a late delivery, "especially with a big customer." In this case, dispatch and then the sales rep for that customer notified me of the late delivery. (Tr. 86.) "[T]he salesperson and Dennis called me and said, 'Hey, we got a late delivery. Our guys ran out of hours last night making the delivery and they had to berth.'" (Tr. 112.) The salesperson was Mike Meehan and I think the customer was Nabholz. (Tr. 112.) In order to figure out where we went wrong, "we dug in on it." (Tr. 86.) I think the customer called the sales rep, and that's how the sales rep learned the order was late.

It is important to be prompt in making deliveries to Alliance's customers because "there's thousands of dollars of equipment sitting there and men and they have absolutely nothing to do till you show up. So, when you don't show up, it's not good." (Tr. 86.) Typically the big cranes are rented, which is expensive, and when the equipment is "sitting idle, then it doesn't make for a good day." (Tr. 87.) "We've had instances where we couldn't make a delivery" and the customer back charges us. The timeliness of the delivery also has an impact on sales. "The biggest part of sales at Alliance was that we could deliver it when nobody else could so hence the planning of the delivery." (Tr. 87.)

I investigated why the delivery was late. I "[i]mmediately pulled the software and went through the route and what time we loaded, what time we left and it just didn't make sense." (Tr. 87.) Norman and I talked and "we watched as it progressed from that point because it got worse. The trip home was about as bad as the trip down." (Tr. 87.) Norman and I talked about how if they had been inexperienced drivers, "we might have done something, but these guys had been hauling loads for a long time and making in excess of \$50,000 a year. It was just bad planning. They know when they show up at the site that only one truck is going to get unloaded first. So, they know they probably need to stagger, but sometimes they'd rather run as a team and we tell them 'You know you need to stagger,' because they're only going to unload one truck at a time." (Tr. 87-88.)

The issue wasn't that Mr. O'Hagan and Mr. Hulsey ran out of hours. "The issue was how we ran out of the hours and then once we got our hours back to where we could roll again, we didn't use our time very wisely coming back and it drug out. It played out what we felt could possibly be a one-day run turned into a several day run" (Tr. 88.) We were looking at the GPS even before Mr. O'Hagan and Mr. Hulsey came back. (Tr. 89.) Using the GPS, we were able to determine when Mr. Hulsey finished unloading on the 18th. I don't recall the exact time. "I think it was mid-morning." (Tr. 96.) RX-37 summarizes the timeline using the GPS data. It indicates that Mr. Hulsey left the drop-off site at 12:39. (Tr. 96.) We determined that Mr.

Hulsey took so long to get back because he stopped at Pilot for about an hour. We were watching his GPS at that point and “I told Steve to contact him and get him rolling again.” We told him “we needed [him] to come home and he proceeded from there . . .” He stopped at a casino for several hours, “I don’t know why. I think he was waiting on Mr. O’Hagan.” (Tr. 97.) RX-37 indicates that he arrived at the casino at 3:00, left at 5:37, and finished his run at 9:20 at Penske. His late finish impacted his availability to make deliveries the following day. (Tr. 97.) That is the point “where I kind of stopped watching. It was already a mess.” (Tr. 98.) When drivers do not return to make deliveries, we pay another trucking company to haul the loads. “[F]reight for the last couple of years was enormous and nobody could figure out why. So, as we dug in when these drivers aren’t coming back, we’re paying a freight company in effect to do their job and it’s a lot of money. So, I think we blew our freight budget by a million dollars so I had people hammering me over freight so I was looking at freight pretty hard.” (Tr. 98.) RX-37 reflects the information from Fleetmatics for Mr. O’Hagan. (Tr. 98-99.)

CRT has a meal reimbursement policy. They will pay for meals after a certain number of miles if you’re overnight. Mr. O’Hagan and Mr. Hulsey would not have received reimbursement for their meals had they left at 2:00 in the morning instead of 7:30 the night before because they would have gotten back that day. (Tr. 93.)

The driver is responsible for trip planning. (Tr. 89.) We don’t tell them how to plan the trip. However, if a driver is late, “then we want to discuss it.” (Tr. 90.) There is no way that I know of that Mr. O’Hagan and Mr. Hulsey could have started their trip at 7:00 the night before and made the delivery at 8:00 the next morning. “[T]hat’s what really didn’t make sense.” (Tr. 90.) “One of them could have left around . . . 2:00 and the other one, knowing that they got to unload the first one, could have left a little later and easily made those deliveries.” (Tr. 90-91.) If there was a third truck going, they should have talked to each other and staggered it even further by having drivers leave at 2:00, 3:00, and 4:00. The drivers know that and “[t]hey know they can only unload one truck at a time. They know if they all get there, somebody is going to be sitting in the truck.” It’s common knowledge. (Tr. 91.)

I met with both Mr. O’Hagan and Mr. Hulsey separately, as part of the termination process. (Tr. 94.) Mr. Hall and I were both at the termination meeting on February 19. (Tr. 112.) It was either Mr. Hall or me who actually terminated the employees. (Tr. 113.) We met with Mr. O’Hagan first. It was a brief meeting. Mr. O’Hagan “just got up and walked out.” (Tr. 94.) Mr. Hall did the talking. “We had a copy of the report that we printed out for the trailer of the truck and what all had happened there transpired over those couple of days.” (Tr. 94.) Mr. O’Hagan did not say anything at that time; “I think he just left.” (Tr. 95.) He did not say anything about hours of service. He did not protest or make a scene. Although “[h]e looked really angry, . . . he just got up and left.” (Tr. 95.) We asked Mr. O’Hagan why he chose to leave the night before. I do not recall what he told us. “I don’t think we got a response from Mr. O’Hagan. He just left.” (Tr. 93-94.)

The meeting with Mr. Hulsey went a little differently. “We spoke a little bit more and he tried to plea[d] his case.” (Tr. 95.) He said at one point, “Of all the things I’m going to get fired for, I didn’t think this would be it.” (Tr. 95.) We told him that we didn’t feel like we could trust him to do what he needed to do and follow the rules. Hours of service “never came up.” (Tr.

95.) He did not describe any issues that he had with the grounds of termination, other than that was not what he thought he would be fired for. (Tr. 96.)

When we terminated Mr. O'Hagan and Mr. Hulsey, I was not aware of their actual hours of service on February 17 and 18, 2016. "I just knew that . . . the reason [they] didn't make the deliver[ies] is because [they] ran out of hours." (Tr. 114.) I think Dennis told me that. We did not make any attempts to verify that Mr. O'Hagan and Mr. Hulsey were out of hours after they told us that was the case. We did not look at their paper logs. (Tr. 114.)

Before I terminated Mr. O'Hagan and Mr. Hulsey, I was never told by anyone that they refused to drive at any time on the 18th because it would violate the hours of service rules. Hours of service did not come up in any conversation I had while looking into this. [T]he only time it ever came up was the fact that they had to stop and reset before they could deliver [to] the customer." (Tr. 99.) It was my understanding that when they made their deliveries, they had reached the reset because "[t]he driver was ready to go again. He had his time in his berth." (Tr. 99-100.) Mr. O'Hagan and Mr. Hulsey knew how I felt about hours of service. "[E]verybody knew how I felt about that. It was no secret. We don't violate hours of service ever for any reason." (Tr. 100.) I told them what to do if somebody instructed them to violate hours of service regulations: "my door was always open. They didn't hesitate to call me." (Tr. 100.)

Mr. Hulsey was not fired for refusing to violate the hours of service limits. (Tr. 100.) "He was fired for this fiasco of a truck run that we had and not taking care of our customers and almost blatant disregard for the company's time. It was pretty ugly." (Tr. 100-101.)

Mr. O'Hagan was not fired in retaliation for refusing to violate the hours of service limits. He was fired for "[t]he exact same reason" as Mr. Hulsey. Mr. O'Hagan "just didn't seem to care. You can't teach care." (Tr. 101.) "I don't think it was just the delivery" that caused CRT to terminate Mr. O'Hagan and Mr. Hulsey. "It was the whole planning and delivery and then the return." (Tr. 102.)

"I'm not sure" what CRT's actual damages on the late delivery was. (Tr. 103.) I am not sure of any missed deliveries they needed to take from the next day. (Tr. 103.) "Like I said, there won't be a missed delivery. There will be a payment to a freight company to cover when our drivers can't get back." (Tr. 103-104.) "[W]e hire[] out and run drivers every day, 15, 20 loads a day." I do not know how many loads we had to hire out because of the late deliveries. (Tr. 104.) I don't know if they were scheduled to work the next day. However, "we knew they were going to miss a delivery because they weren't coming back." (Tr. 105.) If Mr. O'Hagan and Mr. Hulsey were not there, we definitely had to put two more drivers out. (Tr. 106.) We wouldn't consider how many loads we had to hire out before termination because "the termination came from the trust that we saw when on the delivery and the return." (Tr. 104.) "[T]o have drivers, professional drivers, not new drivers, guys that have been driving for years hauling our buildings to perform in this manner, we just didn't feel like we could trust them to do the right thing." (Tr. 104.)

Jeff O'Hagan (Tr. 123-190)

Background

I have had a commercial driver's license since 1996. (Tr. 123.) I was a flatbed truck driver at CRT. I was paid a salary while at CRT. I got paid the same whether I made one trip a week or trips every day. (Tr. 176-77.) I liked working at CRT. I always tried to do what was best for the company. "I feel I went above and beyond. I had customers that were friends." (Tr. 123.)

Steve Johnson was my direct supervisor at CRT. Dennis Lucero was my second level supervisor. (Tr. 160.) Don Heidelberg was the Vice President of the company and Dennis Lucero's boss. (Tr. 178.) I acknowledged in my deposition that I was not always honest with Steve Johnson and Dennis Lucero. (Tr. 160-61.) I try to be truthful with people, including employers and coworkers. (Tr. 188.)

I am familiar with the hours of service rules, with the exception of split logging. That was not new to me in this case. "It's just an unaccepted practice that not many truck drivers use." (Tr. 163.) I was never instructed to start using split logging or split sleeper berths. (Tr. 188-89.) One of the job requirements as a truck driver for CRT was to be familiar with and adhere to the hours of service regulations. I believe it even says that in the job description. I generally know how to schedule trips to be in compliance with the federal hours of service regulations. (Tr. 163.) Part of my job as a driver was occasionally having to present customers with paperwork. I couldn't do that if I was asleep. (Tr. 164.)

At CRT, I was told where I was going and what time the delivery was supposed to be there; no one told me what time to leave. "They would send you texts about when the load was going to be ready and you wanted to assume that's about when they want you to leave." (Tr. 164.) The load could be picked up any time after it was ready. (Tr. 164-65.) CRT provided us with printouts of routes on Google Maps. That may have been a suggestion. However, it was up to the driver to pick the best route. We were expected to make whatever plan was necessary to get the job done efficiently, on time, and legally. I knew it was important to make deliveries on time. (Tr. 165.)

CRT never corrected me on how I was using my hours of service. (Tr. 155.) I trained some of the drivers. (Tr. 155-56.) I did not have any write-ups at CRT. "I complained to Don Heidelberg in 2015 when we went to Broken Bow and it was one of those late night out of the plant deals and we ran all night long and then came back the next day after we sat there all day waiting to unload. The same kind of conversation with him that I had with Dennis: 'We got to get these loads out of that plant and on the yard and we have to have a day's leave time in order to run these jobs legally and safely.'" (Tr. 156.)

The Events of February 17-18, 2016

When I was dispatched on February 17, 2016 for the delivery on February 18 to Nabholz Construction, I knew that it was due at 8:00 in the morning. On February 17, I knew at 6:00 p.m. that the load wouldn't be ready until 7:30 p.m. or so. It is about four and a half hours from Oklahoma City to Fayetteville. I knew that I needed to be in my sleeper berth parked for the night by 10:00 p.m. at the latest to get a ten-hour rest break by 8:00 a.m. There is no way I could

have gotten loaded up and made it all the way to Fayetteville in two and a half hours. (Tr. 161.) The only way the plan would have worked was if I could have parked on site and stayed in the sleeper berth. Although we were not usually told whether there was parking on site, there was normally parking on location. (Tr. 162.)

“Dispatch instructions would be sent to us in a text between usually 10:00 and 2:00 and it would give us the trip, city and sometimes who we’re rolling with, sometimes how many trucks.” (Tr. 129.) For the trip on February 17, I don’t recall exactly what the text message said; maybe ‘Fayetteville, Arkansas with Rocky and J.R.’ (Tr. 129-30.) After getting the text message, I would “begin to prepare for whatever kind of trip that was going to be, look at the route, figure out how long it’s going to take you and try to ascertain when the loads are going to be ready.” (Tr. 130.) While working for Alliance, I can remember one or two times that I was told what kind of parking would be available on site. (Tr. 130.)

The delivery was late to Fayetteville, Arkansas “[b]ecause we were out of hours. We couldn’t leave from where we were without causing a safety issue.” (Tr. 124.) We left the evening of February 17, 2016 because “[t]hat’s the way we normally do it because Alliance expected us to be back the next day to work. It was in order to get our time off and be able to go the next day without issues.” (Tr. 124.)

RX-38 “appears to be a representation of what actually happened.” (Tr. 124.) Our “[a]ctual plan was to go on duty when the loads were ready and go to the location and go in the sleeper berth and take our 10-hour reset on location.” (Tr. 124.) That was a common practice; other CRT drivers do that. The plan changed when “I talked to the customer on the telephone and found out that there was no parking at the location.” (Tr. 124.) That was when I learned the plan was not going to work. “The option at that point was to go off duty back home, come back at a later time which the result if you do the math would be the same. We would have still been a couple, three hours anyway late to the job site or continue on with the trip and call the customer and try to make him aware of what was going on and as the evening progressed and the next morning, we did call him several times.” (Tr. 126.) After learning that there was no on-site parking, “we finished tying down and left. I believe they might have still been unloading us, but I don’t know. There might have been some more pieces that had to go on the truck.” (Tr. 131.)

“[W]e went across town, got on I-44 and stopped at the turnout just at the beginning of Tulsa/Bristol area maybe.” That is a common route for trips to that area of Arkansas. (Tr. 131.) We stopped for the night in Tontitown, Arkansas, “at an old job site that we [had] done before so we knew there was parking on the street.” (Tr. 131.) When we got to Tontitown, we “did our post-trip and then went to the sleeping berth.” (Tr. 132.) I did not call Dennis Lucero, Steve Johnson, Don Heidelberg, or Mike Meehan to let them know we were going to be late for the delivery. (Tr. 182.)

I spoke with Dennis Lucero around 8:00 a.m. on February 18, 2016. (Tr. 137.) I told Dennis that I couldn’t drive until 11:30 a.m. I think I recall him saying okay. No one from CRT instructed me to drive in violation of the hours of service. In my mind, I was out of hours. (Tr. 173.) I refused to drive on February 18, 2016. (Tr. 189.) Between 8:00 and 9:00 a.m., I “just waited for my clock to end before I could go leave for the job site.” (Tr. 138.) I think I was available again at 11:30; it may have been 11:15. (Tr. 138.) I did not go over when Rocky did

“[b]ecause my machine on my dash said I had to wait till whatever time it was . . . and I knew my hours hadn’t run.” My clock needed to be reset or it would “cause problems later on in the day and issues later.” (Tr. 138.) I was also keeping another log on the KeepTrucking app, which I could print as a paper log to turn in. (Tr. 138.)

When I got to the construction site, there wasn’t room for any trucks. I parked on the street. “There was a flagman there that was flagging traffic. It was a two-lane road and I parked behind Rocky.” (Tr. 139.) It took them several hours to unload my truck. (Tr. 139.) I talked to Dennis while the customer was unloading my truck. (Tr. 149.) During that conversation, I did not think CRT was irritated with me for the delivery. I was surprised to be fired. (Tr. 150.)

I do not recall Dennis ever telling me not to eat at the buffet. (Tr. 149.) I had eaten there before and it was common for other CRT drivers to eat there. (Tr. 149-50.) It takes about an hour to eat there, maybe longer. (Tr. 150.) I do not recall if I was reimbursed for the buffet at the casino; I don’t think I was. (Tr. 189.)

One option would have been to pick up the load early in the morning and go straight to the delivery site. However, “it would leave us off. It would leave us taking a break on the way back.” (Tr. 166.) If we had to take a break on the way back, “we wouldn’t be available to work the next day.” (Tr. 166.) I did tell the customer that I could have left at 3:00 a.m. to make the delivery on time, but that we would have been out of hours on the return trip. (Tr. 166.) I’ve seen other drivers take loads at 3:00 a.m. and have taken 3:00 a.m. loads myself. (Tr. 167.) Alternatively, I agree that if I came on duty at 7:30 p.m. I could have stayed on duty until about 9:30 a.m., and I could have made the delivery at 8:00 a.m. if there was parking. (Tr. 170.) Instead, I decided to go down the night before the delivery and took my 10-hour rest break before making the delivery late. I arrived at Nabholz Construction at 12:14 p.m. on February 18. (Tr. 171.) The customer was not able to start unloading my truck right away when I arrived at the location. (Tr. 172.)

I knew the customer was not happy at some point while I was unloading. (Tr. 176.) It is common for me and other employees at CRT to use bad language; “[w]e’re truck drivers.” (Tr. 189.)

In hindsight, with all the information I have now, I would have planned the trip differently, “knowing that the Fleetmatics stuff is in there and how we’re tied to that and how things can go wrong, I probably would.” (Tr. 190.) Knowing that I couldn’t park there, “I would have left early in the morning and just not been back to work the next day.” (Tr. 190.)

Termination and Post-Termination

Norman Hall and Don Heidelberg were at the termination meeting. Dennis Lucero was not in the meeting. (Tr. 179.) At the termination, “I was handed the letter by Mr. Hall that I was being terminated. I read the letter. I told them they were way off base and I left and I told them to have a good day” and gave them my keys. (Tr. 158-59.) “I think I was asked if I was going to sign [the letter].” I said no. (Tr. 159.) The information in the letter was incorrect. “They stated that we had all day to get over there which was untrue. The loads weren’t ready till 7:30 at night.

... It indicated that we fooled around at the casino and that's untrue. We ate dinner." (Tr. 158.) Neither the supervisor nor HR asked what happened on that date. (Tr. 159.)

It made me depressed to be fired. "I felt like I was doing the job and in fact, doing the job better than most and I was fired." (Tr. 154.) "I raised my son by myself and that's a pretty scary thing when you don't have any income." (Tr. 154-55.) I did not sleep regularly immediately after I was terminated. My decreased sleep lasted for several weeks. I was "[w]orrying why I had been terminated, what I was going to do, how I was going to provide for my son." (Tr. 155.) I have never seen a doctor for any depression following my termination. I have not provided tax records in this case. (Tr. 182.)

After being terminated, "I tried to draw my retirement out and start my own trucking business and I was never able to buy a truck." I worked hauling groceries for Associated Wholesale Grocers before getting a job at Tinker. (Tr. 150.) CX-10 is a disbursement of my entire retirement. I put that money "into a commercial account and I purchased . . . the DOT number and the licensing to get it started to buy a truck and then just paid myself a salary every week until it was depleted." (Tr. 151.) I did not get any revenue from that company, which lasted about three months. I started at Cardinal, a contractor that hauls Associated Wholesale Grocers, on May 15, 2016. The first week I made \$911, net pay of \$709. Pay before taxes at CRT was \$850. (Tr. 151.) I stopped working at Cardinal on July 16 because the pay was not what I had expected. (Tr. 152-53.) Then I went to work at Alutech or Tinker Air Force Base, starting a couple of weeks after leaving the Cardinal job. I believe I started on August 8. (Tr. 153.) It is now 40 hours a week at \$21.88 an hour. (Tr. 154.) I left Cardinal Logistics because I quit. Some weeks I made more money working at Alutech than Cardinal and some weeks I did not. (Tr. 183.)

CX-20 is the response from Mr. Hall to request sent pursuant to a background check for Alutech so that I could sweep the air field in secured areas. (Tr. 156.) I don't know if the security clearance is still pending. "There hasn't been a definite ruling on it." (Tr. 157.) Before I was terminated, nobody at CRT mentioned "deception," "volatile personality," or how I worked with my coworkers to me. (Tr. 157.) I never saw a doctor for mental or emotional stability issues. I got along with Norman Hall; "I only spoke to him two or three times." (Tr. 157.) I got along with Steve Johnson. (Tr. 157.)

I was charged with "providing beer to [a] minor" in 1995. (Tr. 189.)

Rocky Hulsey Tr. (190-220)

Background

I live in Oklahoma City, Oklahoma. I liked working at CRT. It was a good job. I am not aware of any complaints about my job performance. (Tr. 191.)

As a truck driver, I am required to be familiar with the hours of service rules, and I am familiar with them. It was part of my job description as a truck driver for CRT to follow the hours of service regulations. I knew how to schedule my trips to be in compliance with those

regulations. CRT would tell me where I was going and what time the delivery was to be there. (Tr. 198.) We were expected to select a route and make a plan that would get the job done efficiently, on time, and legally. I was told several times that I was expected to make deliveries on time. “I like[d] having the freedom to do things as I choose and the way I see fit.” (Tr. 199.)

Don Heidelberg had a meeting with all the drivers before the Fleetmatics tracking software was installed in the trucks. He told us to keep it legal in that meeting. “[T]hat was . . . his answer[] to our questions about the way we had run in the past. Really get it done, no excuse[s].” (Tr. 209.) I used an app to keep my log on February 17 and 18, 2016. (Tr. 206.)

I frequently made runs with Mr. O’Hagan. (Tr. 199-200.) There was no requirement that we would take the same route. “It was up to the individual.” (Tr. 200.) It’s not required that I wait on another driver. (Tr. 200.) Generally, I could plan the trip myself. However, “[a] lot of times . . . if I was going to be running with Mr. O’Hagan, [Mr. Johnson] just kind of left me out of the process. He would inform Mr. O’Hagan and then Mr. O’Hagan would contact me and tell me where I was going. That happened plenty of times, but if it was just myself, . . . I got the dispatch from Mr. Johnson.” (Tr. 201.) Even if I was not dispatched personally, and instead got the message from Mr. O’Hagan regarding the delivery place and time, I could make the plan from there. (Tr. 201.)

Split logging is “not really a common practice. It’s like anything, if you don’t use it, you kind of forget it.” (Tr. 198.) You need at least eight hours in the sleeper berth consecutively. And “[i]f you’re going to split log,” you need a “[m]inimum of eight hours and then a remainder of two.” (Tr. 192.) If I ran out of hours before I could make it home from delivery, I could call the dispatcher or Dennis and say I was out of hours and pulling over. I have done that in the past. (Tr. 201.) Fayetteville is about four hours away. (Tr. 202.)

It was common for me to drive to the job site and start my sleeper berth time and unload as described by Mr. O’Hagan, “[i]f it was a long trip and you’re trying to get your reset so you can come back the next day after unload, it was common practice if you’re at location.” (Tr. 191.)

The Events of February 17-18, 2016

On February 17, 2016, I decided to come on duty around 7:30 p.m. When I came on duty around 7:30 p.m., I knew I wouldn’t be getting to Fayetteville until about 11:30 p.m. at the earliest. I stopped for the night around 1:10 a.m. on February 18 in Tontitown. (Tr. 202, 217.) I had been on duty less than six hours at that point. There is typically no requirement that you get a ten-hour sleeper berth break after less than six hours on duty. (Tr. 202.) I remained stopped until 10:10 a.m. on February 18, 2016. (Tr. 203.) I did not leave for Fayetteville from Tontitown at 7:30 a.m. because “I was on my ten-hour break.” (Tr. 193.)

I did not make the delivery at 8:00 a.m. because “I kind of follow the lead of Mr. O’Hagan. We got to Tontitown about 1:10. The right thing to do was what he did, contact the customer previous to showing up, let him know that we couldn’t move our trucks.” (Tr. 217.) Even the customer agreed that “[i]t was a good idea to park in Tontitown,” because, otherwise,

we would have been parked in the street during the ten-hour break. It's about 20 minutes from Tontitown to Fayetteville. I didn't leave at 7:40 a.m. to make the 8:00 a.m. delivery because "[t]hat would have put me out of hours sitting there on the street pretty close." (Tr. 218.) "[M]e not going over there is essentially refusing to drive. I didn't get up and drive over there." (Tr. 220.) "At about 9:00 or so, Mr. O'Hagan opened up my truck, woke me up and told me Dennis said to get over there." I had at least eight hours in my sleeper berth at that time. (Tr. 219.)

At 10:10 a.m., I went over to the job site to make the delivery. I never refused to drive on February 18, 2016. "I had stopped originally at 1:10 to take a ten-hour break. Knowing that I could go over there after eight hours of rest, I went over there, but that technically left me stranded in the middle of the street during unloading without any hours. That was the purpose of getting the ten-hour break in and then going to unload." (Tr. 203.) When I left at 10:10 a.m., I had only been on duty for less than six hours; I was not in violation of the hours of service at that time. (Tr. 203.)

I was late for the delivery. The delivery was supposed to be made at 8:00 a.m.; I made the delivery around 10:30 a.m. I had been told by the company to be on time for deliveries. Part of my job is to maintain good customer relations, part of which is being on time for deliveries. (Tr. 204, 205.) I did not tell the customer, Dennis, Don Heidelberg, or Steve Johnson that I was going to be late. (Tr. 204.) I did not talk to Dennis before I left the delivery on February 18. (Tr. 209-210.)

I text messaged Dennis after unloading and Dennis told me to come home. (Tr. 210.) I left the delivery location at 12:39 p.m. I got back to Penske to drop off my truck and went off duty around 9:20 p.m. I told Dennis Lucero earlier in the day that I was at the Pilot rest stop and that I was getting cleaned up and getting something to eat and then I'd come home. After that I parked at the casino in my sleeper because "I wasn't feeling well and I was waiting on Jeff to get there and we were going to eat together." (Tr. 191-92.) It is "common practice to wait on another [driver]. It was safer to drive back by two and it was accepted by the company." (Tr. 192.) I was paid a salary at CRT, so I was paid the same whether I drove straight back or spent three hours at the casino. (Tr. 205.) I did not get my meal at the casino reimbursed; it did not meet the threshold of being a long trip. (Tr. 206.)

It took nearly nine hours to get back, including the wait for Mr. O'Hagan. (Tr. 205.) On February 18, I did not get any dispatch instructions for the next day's delivery. (Tr. 197.) "[T]he only text messages I received that day were from Dennis Lucero and it wasn't a dispatch." (Tr. 197.) I did not make complaints about the equipment on February 17 or 18. (Tr. 200.)

While at CRT, there were times that I came on duty at 3:00 a.m.; I have seen other drivers come on duty at 2:00 or 3:00 a.m., including Mr. O'Hagan. (Tr. 206.) I could have left at 2:00 or 3:00 in the morning on February 18 and I probably would have been on time for the delivery. I don't think I could have made the whole delivery in one day and been back again within the 14-hour window. (Tr. 207.) During my deposition I agreed that the delivery could have been completed and I could have returned in one day "if everything goes great." (Tr. 207-209.) If I got up there at 8:00 a.m., on time for the delivery, and it took longer to unload than

expected, I could take the ten-hour break on the way back. I have done that in the past. (Tr. 209.)

I do not like being away from home. "I'm married and my wife and I, we raised four of our grandchildren. They're a blast to be around. I mean, I prefer to be at the house." (Tr. 194.) On February 17 and 18, I was not trying to make my trip as long as possible. (Tr. 194.)

Termination and Post-Termination

When I was terminated, it was by Norman Hall and Don Heidelberg. Dennis Lucero was not in that meeting. I was told I was terminating for neglecting my duty. (Tr. 210.)

It was "very stressful" getting terminated. "[E]verything in your life just falls apart. The fun times I had with my grandchildren were extremely upset because now there's no money to do all the fun, cool things. Can't take care of all the creature comforts my wife kind of demands" (Tr. 196.) "I felt like I was a good employee. I was on time all the time, did my job, really only complained when I felt like was needed." (Tr. 196.) "I feel like I was retaliated upon for bringing up a few times of being forced to violate hours of service and bringing up some times about some equipment and the way Steve Johnson dispatched . . . it just wasn't right and it could have been so much easier and better. I feel that's the reason I was terminated, not because I took a break at a casino waiting on a co-driver to show up." (Tr. 197.)

I had a little bit of anxiety after my termination from CRT and "spoke to my family physician" about it. "I never went to go see a psychiatrist or anything like that. I was pretty distraught after I had been terminated." I did not provide any record of any doctor visits for emotional distress or damages. I did not provide documents showing financial problems following my termination. (Tr. 214.)

I made \$800 a week at CRT. (Tr. 194.) In 2015 I did not have any jobs besides CRT. (Tr. 195.) After being terminated from CRT, I worked as "an owner/operator for Western Express" in Nashville, Tennessee. (Tr. 194.) It took about a month to find that job. (Tr. 211.) I was at Western Express for "about a month and a half." (Tr. 195.) I started March 20, 2016. (Tr. 195.) I had orientation time before that, which I don't believe I was paid for. March 20 was the day they gave me the certification. I did not turn over documents regarding my employment with Western Express; there are "really no documents to turn over." (Tr. 211.) I stayed at Western Express until May 5, 2016. (Tr. 211.) After Western Express, I got a job with Universal Truck Load Services, Inc., located in Warren, Michigan. I was employed as a truck load driver. (Tr. 195.) I think I started there May 5. I made \$900 a week. (Tr. 196.) I make \$100 a week more than I did at CRT. However, there is no expense reimbursement, the benefits are not as good, and I hardly have any time at home. (Tr. 212.) I've never had any overtime there; they pay the salary and it includes all the time I work. I have not given copies of paystubs from Universal Truck Load to CRT. I have turned over my tax records for 2016. I did not turn over supporting documentation for those tax records, but I signed releases for those documents. (Tr. 213.) I am no longer employed with Universal Truck Load; I was injured on September 20. "[T]hey were still paying my insurance up until February." (Tr. 214-15.) On March 20, 2017, I was recently released to return to work from my injury. (Tr. 215.)

I had a computer with notes that CRT wanted that were relevant to this case. It was at my home, under my possession. I no longer have that computer; it got thrown away. (Tr. 216.)

I do not know of any reference requests employers or potential employers have made from CRT. "I'm sure they made requests, but I'm just not familiar with what they might have said." (Tr. 217.)

Dennis Lucero (Tr. 220-233)

Background

I live in Yukon, Oklahoma. I work at Alliance Steel as the Shop Supervisor. CRT is the sister company of Alliance Steel. I have a dispatcher, Steve Johnson, who "runs and oversees if there [are] problems." (Tr. 221.) I was the second-level supervisor to Mr. O'Hagan and Mr. Hulsey. (Tr. 221-22.) Don Heidelberg was the Vice President of the company and my boss at the time. I could not tell Mr. Heidelberg or Mr. Hall what to do. (Tr. 222.)

Drivers "set up their own time. They know when they[ve] got to be there. We set everything up for 8:00 delivery. It's up to the driver to make the decision on when to get the load and to be there on time to the best of their ability." We expect them to make their runs legally. (Tr. 223.)

I was not in the meeting regarding Fleetmatics, "but I was told by Don Heidelberg that all drivers were told to go off paper logs until we had to go into effect on" the Fleetmatics logs. (Tr. 226-27.) There has never been a time during my employment that I told a driver to fudge his log books. It is not part of my job to make sure there is parking on site for drivers. I don't know whose job it is to find out if there's parking available. "We get directions [from the customer]. That's what we go off of." (Tr. 227.) Most of the delivery sites do not have parking spots. (Tr. 227-28.)

I can't explain split logging or sleeper berth splitting. (Tr. 230.) I don't have hours of service knowledge; I don't keep up with the drivers. I used to drive a truck but never had a CDL. Steve Johnson looks at the weekly logbooks. (Tr. 231.) The drivers pick up the loads at "[a]ll different times." (Tr. 231-32.) Some drivers park overnight at the job site, some don't. It "depends on the job site." (Tr. 232.) It was common for drivers to come on duty at 2:00 or 3:00 a.m. to make their deliveries. (Tr. 233.) I am not aware of any complaints from any of the drivers about the dispatcher telling them to fudge the log books. (Tr. 232.)

The Events of February 17-18, 2016

I had a conversation with Mr. O'Hagan on the morning of February 18, 2016. (Tr. 222.) "If I can remember correctly, either I got a phone call from our salesman or Steve did and he came to me and said, 'Our drivers didn't make delivery.' So, I called to verify why. I was told they both were out of hours, couldn't make it to the delivery. There was no place to park on the job site." I don't remember what time it was when I called. (Tr. 223.)

Before I called Mr. O'Hagan, Mr. O'Hagan may have called me to say they were going to be late, "but I can't remember." I did not tell Mr. O'Hagan to violate the hours of service at any point. I talked to Mr. Hulsey after he made the delivery, but I do not think I spoke to him beforehand. I did not order Mr. Hulsey to violate the hours of service on February 18. I also did not tell Mr. O'Hagan to tell Rocky to violate the hours of service. When I called the morning of February 18, I did not know independently whether they were out of hours. (Tr. 224.) The drivers are "always in charge of their hours. I don't keep up with them." When Mr. O'Hagan told me that he couldn't go anywhere until 11:30, my response was to say "Okay." I did not tell Mr. O'Hagan that he needed to go over before 11:30. (Tr. 225.) If Mr. O'Hagan suggested that Rocky would go over to the job site at 10:00, I would not have thought that Rocky was out of hours and couldn't go. It was not my intention to require Mr. Hulsey to violate the hours of service to make the delivery that morning. Mr. Hulsey did not tell me he was refusing to drive that morning. (Tr. 226.)

I don't set up the deliveries so I don't know if they missed any deliveries because of their late arrival Thursday night before the 18th. (Tr. 229-30.) Steve Johnson sets up deliveries. Mr. O'Hagan and Mr. Hulsey "did a great job for me." Mr. Johnson "had an issue with Rocky at one time." I don't remember what it was regarding. (Tr. 230.)

Termination and Post-Termination

I have never given a negative reference regarding Mr. O'Hagan or Mr. Hulsey since they were terminated. (Tr. 228.) "I take it" that Mr. O'Hagan and Mr. Hulsey were terminated "for not following the rules." (Tr. 229.) I was not involved in any way in the decision to terminate Mr. Hulsey and Mr. O'Hagan. "I was asked if I could deal without them and whatever we had to do, we'd make it work." (Tr. 222.) I think that Mr. Hulsey was conscientious in his job. (Tr. 229.)

I was not surprised by Mr. O'Hagan's and Mr. Hulsey's terminations. "I felt there towards the end after Don Heidelberg came in, they didn't like some of the changes he made. We all got to follow what's put in place. New company, new people. They want it [run] their way." (Tr. 232.) I was not aware of any complaints about Mr. O'Hagan and Mr. Hulsey other than regarding the delivery on February 18. (Tr. 232.)

Exhibits

JX-1³ is Complainant Jeff O'Hagan's request for a hearing before the OALJ. In it, Mr. O'Hagan states:

This entire incident stems from a retaliation because I had been writing up faulty trailers to include most with no brakes, lack of shipping documents to legally back haul items, and most of all a report by myself and Hulsey to the then President of Alliance Steel, Mr. Larry Thomas, and Norman Hall of Human Resources that the

³ JX-1 is also contained in CX-9.

Dispatcher and Shipping Manager were conducting illegal activities at the expense of the company.

JX-2⁴ is Complainant Rocky Hulseley's request for hearing before the OALJ. In it, Mr. Hulseley states:

The morning of delivery Dennis tried to call me but I was asleep. He contacted Jeff for an update. Jeff informed Dennis Lucero that he wouldn't deliver his load until his break was over at 11:00 am. Jeff woke up at about 9:00 am and told me that Dennis told him that I needed to deliver my load anyway and that it didn't matter because my e-log equipment was not working. I really needed my job and had been told in the past that if I wanted to keep my job I would deliver my loads regardless of what the logs show.

I was terminated for complaining about being forced to constantly having to violate the HOS regulations and for complaining to HR about illegal activities of the dispatcher (Steve Johnson) and Dennis Lucero. I was even denied being able to record my complaints when I went to HR. Norman Hall advised me to turn off my recording device I was not permitted to record such meetings. I do have the beginning of it where I was told to turn it off.

JX-3 is Jeff O'Hagan's letter of termination, dated February 19, 2016. It cites insubordination, disobedience, refusal to perform work as directed, and willful neglect of duty. The letter states:

On Wednesday, February 17, 2016, you were dispatched for a run to Fayetteville, AR, a run of approximately four hours. You left the yard at around 8:30 pm in the evening, arriving at your overnight stop after 1am Thursday, February 18, 2016.

Due to your poor planning on your departure, your required time off made you late for your appointment, upsetting our customer.

On the way back from the job site, you met up with a fellow driver spending a full hour at a Casino. You eventually arrive on Alliance property at 8:42 pm a full five hours after finishing your unload at the customer. Due to your late arrival on our property, you were effectively unavailable for a run on Friday, February 19, 2016.

As you were told in our meeting regarding our new Fleetmatics software, we have the ability to track your whereabouts at all times. It is clear to us that you did not make the best use of your time, the company's time and resources, and wasted a lot of time in making this delivery. More troubling, you were late for your appointment, despite having the entire previous day to make your way to Fayetteville to ensure timely delivery.

⁴ JX-2 is also contained in CX-9.

JX-4 and CX-2 is Rocky Hulsey's letter of termination, dated February 19, 2016. It cites insubordination, disobedience, refusal to perform work as directed, and willful neglect of duty. The letter states:

On Wednesday, February 17, 2016, you were dispatched for a run to Fayetteville, AR, a run of approximately four hours. You left the yard around 8:30 pm in the evening, arriving at your overnight stop after 1am Thursday, February 18, 2016.

Due to your poor planning on your departure, your required time off made you late for your appointment, upsetting our customer.

On the way back from the job site, you met up with a fellow driver and spent over an hour at a Pilot Truck Stop, then roughly an hour later, another stop of two and a half hours at a Casino. You eventually arrive on Alliance property at 8:42pm a full eight hours after finishing your unload at the customer. Due to your late arrival on our property, you were effectively unavailable for a run on Friday, February 19, 2016.

As you were told in our meeting regarding our new Fleetmatics software, we have the ability to track your whereabouts at all times. It is clear to us that you did not make the best use of your time, the company's time and resources, and wasted a lot of time in making this delivery. More troubling, you were late for your appointment, despite having the entire previous day to make your way to Fayetteville to ensure timely delivery.

JX-5 and JX-6 are the Fleetmatics tracking reports for Jeff O'Hagan and Rocky Hulsey.

JX-7 and CX-11 is a copy of the Secretary's Findings, dated June 6, 2016.

JX-8 and JX-9 are the CRT Job Descriptions for an OTR Driver signed by Jeff O'Hagan on August 14, 2011 and by Rocky Hulsey on July 23, 2013.

CX-1 is printouts from Google Maps of the driving route, customer location, and casino that Complainants stopped at.

CX-5 is a letter from the U.S. Department of Transportation to Jeff O'Hagan stating that "[a]n investigation into this matter has been conducted which revealed some substance to your complaint. Appropriate administrative action will be taken that should bring about future compliance."

CX-6 are vehicle inspection reports from KeepTruckin, signed by Jeff O'Hagan, dated December 9, 2015; December 22, 2015; December 29, 2015; December 31, 2015; January 3, 2016; January 4, 2016; January 6, 2016; January 10, 2016; January 11, 2016; January 18, 2016; January 19, 2016; January 25, 2016; January 27, 2016; February 1, 2016; February 8, 2016; February 14, 2016; and February 15, 2016.

CX-7 is the Fleetmatics tracking report, dated February 17, 2016 through February 18, 2016 for Rocky Hulsey.

CX-8 are Rocky Hulsey's Daily Driving Logs from KeepTruckin ranging in date from December 20, 2015 through February 18, 2016.

CX-10 contains a check to Jeff O'Hagan for \$12,572.46; and pay stubs from Alutiiq Commercial Enterprises LLC and Cardinal Logistics Management Corp.

CX-12 are phone logs for 405-326-8469 and 405-824-1993.

CX-13 is a screenshot of sleeper berth time.

CX-14, CX-15, and CX-16 are text messages.

CX-18 is a transcript of a recorded conversation between Jeff O'Hagan and Dennis.

CX-20 is a form signed by Steve Johnson regarding Jeff O'Hagan's employment.

CX-21 is a tax form for Rocky Hulsey.

RX-10 and RX-18 are the KeepTruckin logs of Jeff O'Hagan and Rocky Hulsey.

RX-11 are Jeff O'Hagan's responses to interrogatories and requests for production of documents.

RX-12 is the transcript of Jeff O'Hagan's deposition.

RX-13 is Jeff O'Hagan's resume.

RX-14 are pay stubs from Jeff O'Hagan's current employer.

RX-16 is a letter, dated August 16, 2016, from the IRS to Jeff O'Hagan.

RX-17 are text messages between Steve Johnson and Jeff O'Hagan.

RX-19 are Rocky Hulsey's responses to interrogatories and requests for production of documents.

RX-20 is the transcript of Rocky Hulsey's deposition.

RX-22 and RX-23 are copies of text messages between Rocky Hulsey and Steve Johnson; and between Rocky Hulsey and Dennis Lucero.

RX-24 is a copy of Rocky Hulsey's employment background check.

RX-25 and RX-26 are job applications to Alliance Steel from Jeff O'Hagan and Rocky Hulsey.

RX-27 and RX-28 are signed acknowledgement of safety rules by Jeff O'Hagan and Rocky Hulsey.

RX-29 and RX-30 are at-will employment acknowledgements for Jeff O'Hagan and Rocky Hulsey.

RX-31 and RX-32 are the driver expense reimbursement policies signed by Jeff O'Hagan and Rocky Hulsey.

RX-33 are the hours of service regulations.

RX-34 is the FMCSA Interstate Truck Driver's Guide to Hours of Service.

RX-35 and RX-36 are maps of the route from Oklahoma City to Fayetteville and from Oklahoma City to Tontitown.

RX-37 is a timeline of events.

RX-41, RX-43, and RX-45 are transcripts of recorded telephone calls of Jeff O'Hagan and Rocky Hulsey.

RX-46 is a text between Jeff O'Hagan and Rocky Hulsey.

ALJX-1 is my Notice of Hearing (issued July 20, 2016).

ALJX-2 is an order approving withdrawal of counsel (issued October 4, 2016).

ALJX-3 is an order continuing the hearing (issued November 14, 2016).

ALJX-4 is an order denying the Motion to Compel Discovery Responses, in Part (issued December 16, 2016).

ALJX-5 is an order granting Motion to Compel Discovery Responses and Denying Motion for Summary Decision (issued February 15, 2017).

ALJX-6 is an order changing the hearing date and location.

ALJX-7 is Complainants' prehearing statement.

ALJX-8 is Respondent's prehearing statement.

Stipulations⁵

⁵ These stipulations are contained in Respondent's prehearing submission, marked ALJX-8, as prehearing submission facts 1-13, and were mutually agreed to during the hearing. *See* Tr. 117. They are hereby incorporated into my findings of fact.

1. Rocky Hulsey was employed by Canadian River Trucking, LLC from August 2013 to February 19, 2016.
2. Jeff O'Hagan was employed by Canadian River Trucking, LLC from August 2011 to February 19, 2016.
3. The Fleetmatics GPS tracking record is an accurate record of the Complainant's movements on February 17 and 18, 2016.
4. Complainants were dispatched at approximately 11:00 a.m. on February 17, 2016 to make a delivery from Oklahoma City, OK to Fayetteville, AR.
5. Deliveries are to generally be made at 8:00 a.m. the following day.
6. The materials were loaded by Alliance and ready to be picked up between 7:30 and 8:30 p.m. on February 17, 2016.
7. Jeff O'Hagan arrived at Tontitown, Arkansas at approximately 1:10 a.m., [on February 18, 2016] and left for Fayetteville at 11:47 a.m. He arrived at the customer's location at 12:14 p.m. [on February 18, 2016].
8. Unloading the truck driven by Jeff O'Hagan took 3 hours and 23 minutes.
9. Rocky Hulsey arrived in Tontitown, Arkansas at approximately 1:10 a.m., [on February 18, 2016] and left for Fayetteville at 10:10 a.m. He arrived at the customer's location at 10:33 a.m. [on February 18, 2016].
10. Unloading the truck driven by Rocky Hulsey took 2 hours and 6 minutes.
11. Rocky Hulsey made no complaints of faulty or defective equipment of any kind on February 17 or 18, 2016.
12. Jeff O'Hagan made no complaints of faulty or defective equipment of any kind of February 17 or 18, 2016.
13. The OSHA investigation into CRT's alleged retaliation dismissed Complainants' complaints and found there was not enough evidence to sustain a violation.

Issues to be Decided

1. Did Complainants⁶ engage in protected activity on February 17 or 18, 2016 when they delayed a dispatch in order to avoid exceeding hours of service limitations?

⁶ While I refer to Complainants in the aggregate, it is only for ease of reference. I have evaluated Complainants' complaints on their individual merits.

2. If so, were Complainants' protected activities contributing factors in Respondent's decision to terminate their employment?
3. If so, can Respondent show by clear and convincing evidence that it would have terminated Complainants in the absence of the protected activity?
4. If not, what relief, if any, are Complainants entitled to under the STAA?

Discussion

Legal Framework

The employee protection provisions of the STAA provide, in general, that a covered employer may not take adverse employment action against an employee because the employee (i) has filed a complaint or testifies about "a violation of a commercial motor vehicle safety or security regulation, standard, or order," 49 U.S.C. § 31105(a)(1)(A); (ii) "refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," § 31105(a)(1)(B)(i)⁷; (iii) "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); or (iv) "accurately reports hours on duty pursuant to chapter 315," § 31105(C), 29 C.F.R. § 1978.102(c)(2).

The STAA employee protection provisions were enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles." Congress recognized that employees in the transportation industry are often best able to detect safety violations and, yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting the violations.⁸

The current version of the STAA provides that whistleblower complaints shall be governed by the legal burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b)(2)(B)(i). 49 U.S.C. § 31105(b)(1). Under the AIR 21 standard, complainants must

⁷ The ARB has held that an actual violation need not have occurred; an objectively and subjectively reasonable belief of facts that would constitute a violation is sufficient. *See Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-061, PDF at 9-10 (ARB Sept. 30, 2011) (stating that "the protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined."). Although the Eleventh Circuit disagreed, *Koch Foods, Inc. v. Secretary, U.S. Dept. of Labor*, 712 F.3d 476 (11th Cir. 2013), the law of the case varies according to the U.S. Circuit Court that will have jurisdiction. The Tenth Circuit has yet to weigh in. Therefore, the standard articulated by the ARB in *Bailey* is controlling.

⁸ *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).

initially prove by a preponderance of the evidence that a protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. A “contributing factor” is “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.”⁹ If a complainant makes this showing, an employer can avoid liability by demonstrating with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior. 49 U.S.C. § 42121(b)(2)(B)(ii).

Thus, in order to prevail in this case, Complainants must prove: (i) that they engaged in protected activity; (ii) that their employer, CRT, took an adverse employment action against them; and (iii) that the protected activity was a contributing factor in CRT’s decision to take the adverse employment action. If Complainants satisfy this initial burden by a preponderance of the evidence, CRT may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action even if Complainants had not engaged in protected activity.

Hours of Service Regulations

Federal Motor Carrier Safety (“FMCS”) regulations set limitations on hours of service for drivers. See 49 C.F.R. Part 395. The FMCS provides, in relevant part, that a driver begins a period of 14 consecutive hours after a period of 10 consecutive hours of off-duty time. A driver “may not drive after the end of the 14-consecutive-hour period without first taking 10 consecutive hours off duty.” § 395.3(a)(1)-(2). During that 14-hour period, “[a] driver may drive a total of 11 hours.” However, “driving is not permitted if more than 8 hours have passed since the end of the driver’s last off-duty or sleeper-berth period of at least 30 minutes.”¹⁰ § 395.3(a)(3). Finally, if a driver spends at least eight but less than ten consecutive hours in his sleeper berth, that period of time is excluded from the calculation of the 14-hour period described above. § 395.1(g)(1)(i)(D); 395.1(g)(1)(ii)(C). The 14-hour period may be reset if a driver accumulates “[t]he equivalent of at least 10 consecutive hours off duty,” by spending “[a]t least 8 but less than 10 consecutive hours in a sleeper berth” plus “[a] separate period of at least 2 but less than 10 consecutive hours either in the sleeper berth or off duty, or any combination thereof.” § 395.1(g)(1)(ii)(A). If a driver opts for the “equivalent of at least 10 consecutive hours off duty” provision, the 14-hour period is “recalculated from the end of the first of the two periods.” § 395.1(g)(1)(ii)(C).

Essential Findings of Fact and Conclusions of Law

- Rocky Hulsey was employed by Canadian River Trucking, LLC from August 2013 to February 19, 2016.
- Jeff O’Hagan was employed by Canadian River Trucking, LLC from August 2011 to February 19, 2016.

⁹ *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, PDF at 11 (Jan. 6, 2017) (internal citations omitted).

¹⁰ There are limited exceptions to this requirement that are not relevant in this matter.

- Complainants were dispatched at approximately 11:00 a.m. on February 17, 2016 to make deliveries from Oklahoma City, Oklahoma to a customer in Fayetteville, Arkansas, a distance of about 215 miles, roughly a four and a half hour drive.
- The delivery to Fayetteville was to be made at 8:00 a.m. on February 18, 2016.
- The materials were loaded on Complainants' trucks and ready to be picked up between 7:30 and 8:30 p.m. on February 17, 2016.
- If they had left for Fayetteville at 2:00 a.m. on February 18, 2016, neither driver would have exceeded HOS limitations. Instead, both drivers dispatched at 7:30 p.m. on February 17, 2016, resulting in a required rest break before delivery.
- Jeff O'Hagan came on duty around 7:30 p.m. and left Oklahoma City around 8:30 p.m. on February 17, 2016, stopping in Tontitown, Arkansas at approximately 1:10 a.m. on February 18, 2016. He rested and left for Fayetteville at 11:47 a.m., arriving at the customer's location at 12:14 p.m. on February 18, 2016.
- Jeff O'Hagan's delivery on February 18, 2016 was late.
- Rocky Hulseley came on duty around 7:30 and left Oklahoma City around 8:30 p.m. on February 17, 2016, stopping in Tontitown, Arkansas at approximately 1:10 a.m. on February 18, 2016. He rested and left for Fayetteville at 10:10 a.m., arriving at the customer's location at 10:33 a.m. on February 18, 2016.
- Rocky Hulseley's delivery on February 18, 2016 was late.
- Fayetteville, AR is about 10 miles from Tontitown, AR.
- Respondent terminated both Complainants on February 19, 2016 for poor planning during the February 17-18, 2016 delivery run that resulted in late delivery to the customer.
- Complainants did not engage in protected activity on February 17 or 18, 2016.
 - Neither Complainant refused to drive as defined by the STAA.
 - A refusal to drive requires either an implicit or explicit request to operate or not operate a vehicle in a certain way, and Respondent did not make either an implicit or explicit request that Complainants operate their vehicles in contravention of the hours of service requirements.
 - Mr. Hulseley did not refuse to drive the morning of February 18, 2016.

- Respondent's dispatcher did not request that Mr. O'Hagan drive on the morning of February 18, 2016 when he learned that Mr. O'Hagan believed that driving would put him over his hours of service.
- Respondent had a standing directive to its drivers, which both Complainants acknowledged, to make deliveries on time *and* in compliance with the hours of service regulations.
- Respondent's standing directive did not function as either an implicit or explicit instruction to Complainants to drive in contravention of the hours of service regulations.
- Respondent's drivers, including Complainants, were responsible for planning their own driving and rest schedules within the requirements of the hours of service regulations.
- Complainants may have been able to make their deliveries on time and within HOS in spite of their decision to go on duty at 7:30 p.m. on February 17, 2016 if onsite parking had been available, Complainants knew that it was possible that onsite parking would not be provided. Additionally, Respondent's drivers, including Complainants, were not typically told upon dispatch whether onsite parking would be available.
- A different driving schedule would have made it possible for both Complainants to have made their deliveries on time and in compliance with the hours of service regulations.
- Complainants came on duty in Oklahoma City knowing it would result in a late delivery in Fayetteville in the event that there was no parking on site because their 14-hour window would run out, necessitating a rest break.
- No poor weather conditions or other circumstances beyond Complainant's control resulted in the decision to dispatch from Oklahoma City on February 17, 2016.
- Complainants were terminated only for poor planning resulting in a late delivery to a customer who complained, not because of a required HOS reset.

Discussion

Complainants Did Not Engage in Protected Activity on February 17 or 18, 2016

Complainants did not engage in protected activity on February 17 or 18, 2016. Neither Complainant refused to drive as defined by the statute and regulations. A refusal to drive requires a request by the employer to operate (or not operate) the vehicle in a certain way. This request could be either explicit or implicit. In this case, the parties agree that Respondent, after being told that Mr. O'Hagan believed that he would be in violation of the hours of service

requirements if he drove at that time, did not explicitly request that Mr. O'Hagan drive on the morning of February 18, 2016; the parties further agree that Mr. Hulsey did not refuse to drive after the phone call between Mr. O'Hagan and the dispatcher.¹¹ Complainants therefore contend that, at most, Respondent's expectation that deliveries would be made on time operated as an implicit instruction to Complainants to drive.

Complainants both agree that Respondent emphasized *both* that deliveries should be made on time and that the drivers comply with all regulations, including hours of service. It is uncontested that Respondents emphasized the hours of service regulations and required adherence to those regulations. There is no evidence to suggest that it was Respondent's policy or that Respondent lead either Complainant to believe that they should prioritize timely deliveries over complying with the hours of service regulations. To the contrary, the uncontested testimony is that Respondent required compliance with both. Complainants cited compliance with hours of service regulations when their dispatcher inquired whether they were at the delivery site. I find that the dispatcher did not pressure or suggest to the Complainants that they drive in contravention of the hours of service during that conversation.¹² I find that: (i) Respondent required drivers to comply with the hours of service regulations; and (ii) Complainants were aware that Respondents required compliance. It is also uncontested that drivers were responsible for planning their own driving and rest schedules within the requirements of the hours of service regulations,¹³ and that it was possible for Complainants to have scheduled their trip to make the deliveries on time. *See* Tr. 190 (Mr. O'Hagan agrees that, in hindsight, he should have planned the trip differently, by leaving early the morning of February 18 even if it ultimately meant getting back for his next delivery later); Tr. 207-209 (Mr. Hulsey acknowledged testifying in his deposition that he could have made his delivery on time and returned in one day "if everything looks great," and that if unloading took longer than expected after making the on-time delivery, he could take a ten-hour break on the way back, as he has done in the past.).

Accordingly, I reject the characterization of Respondent's dual directive to make deliveries on time and to follow hours of service requirements as an instruction to drivers to violate the hours of service regulations in order to deliver on time. There may be cases in which an employer's requirement that drivers make deliveries on time operates as an implicit directive to violate the hours of service regulations. However, those are not the facts at hand.

Conclusion

¹¹ Complainants have not clearly identified the timing of their refusals to drive.

¹² I base this conclusion upon the conversations between dispatcher Dennis Lucero and Mr. O'Hagan, as transcribed at CX-18, as well as the testimony of Dennis Lucero, Tr. 220-33, and the testimony of Mr. O'Hagan, Tr. 149-50, which all reflect that Dennis Lucero did not pressure Complainants to drive in violation of hours of service rules, and that Mr. O'Hagan did not perceive that he was being pressured.

¹³ Tr. 164-65, 198-99.

In sum, I find that neither Complainant engaged in protected activity on February 17 or 18, 2016. As Complainants have failed to establish a required element of their respective claims, Respondent is not liable under the FRSA.¹⁴

ORDER

IT IS ORDERED that the relief sought by Complainants is DENIED and the complaints filed on February 22, 2016 are hereby DISMISSED.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

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

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file

¹⁴ In the alternative, I find that, even if Complainants had engaged in protected activity, Complainants have not established that their protected activity was a contributing factor in the decision to terminate their employment. I find that Respondent terminated Complainants' employment for reasons entirely unrelated to any refusal to violate the hours of service regulations. As discussed above, Complainants agree that Respondent expected its drivers to make deliveries on time *and* to comply with the hours of service regulations. Complainants further agree that Respondent expected drivers to take responsibility for planning their delivery schedules and routes after being given their delivery instructions; that Complainants could have planned a delivery schedule that would have resulted in an on-time delivery and no violation of the hours of service regulations, Tr. 166, 207; that on-site parking was not always available, Tr. 129-30, 162; and that drivers were sometimes required to be on duty during unloading, Tr. 164, 243. Although Complainants contend that their plan to park at the job site overnight would have resulted in an on-time delivery and no violations had there been parking, I credit Respondent's assertions that such a course of action would have been poor planning regardless of the availability of parking. *See* Tr. 243 (Norman Hall explains that drivers often need to interact with the customer while being unloaded and comments that it would be difficult to do so during sleeper berth time). Respondent terminated Complainants' employment because of the poor planning by Complainants leading to the late delivery; the decision to terminate had nothing to do with Complainants' refusing to violate hours of service rules.

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, on the 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).