**U.S. Department of Labor**

Office of Administrative Law Judges
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**Issue Date: 06 September 2017**

Case No.: 2016-STA-73

*In the Matter of:*

ROBERT SHARPE,
Complainant,

v.

SUPREME AUTO TRANSPORT,
Respondent.

Appearances:

Jack Schulz, Esq.
Detroit, Michigan
For Complainant

Carolyn B. Witherspoon, Esq.
Little Rock, Arkansas
For Respondent

Before: Steven D. Bell
Administrative Law Judge

## DECISION AND ORDER DENYING CLAIM AND DISMISSING COMPLAINT

This proceeding arises under the whistleblower protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. §31105. Robert Sharpe ("Complainant" or "Mr. Sharpe") was a truck driver employed by Supreme Auto Transport ("Respondent" or "Supreme"). Complainant alleges that Respondent unlawfully repossessed his vehicle and effectively terminated his employment. Complainant seeks back pay, economic damages, emotional distress damages, punitive damages, attorney fees and litigation costs.

### Procedural History

Complainant was employed by Respondent as a truck driver. Complainant's last day of work with Respondent was March 10, 2015. On March 3, 2015, Complainant filed a Complaint with the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor. In his OSHA Complaint, Complainant alleged that he had been terminated from employment by Respondent in violation of the whistleblower protection provisions of STAA.

Following an investigation, OSHA dismissed the Complaint on August 4, 2016. Complainant requested a hearing before the Office of Administrative Law Judges of the Department of Labor on September 5, 2016. The case was assigned to me on October 6, 2016. Following a conference call with counsel, I issued an Order on November 2, 2016 setting the formal hearing for April 26, 2017, and due to administrative reasons, rescheduled the hearing for May 16 and 17, 2017.

Respondent filed a Motion for Summary Decision on February 13, 2017. On March 22, 2017, I issued an Order denying the Motion for Summary Decision.

I conducted the formal hearing in the McNamara Federal Building in Detroit, Michigan on May 16, 2017. Complainant testified at the hearing. Other witnesses also presented testimony. I admitted into the record Joint Exhibits[1] 1 through 4, also marked as A through D, Complainant's Exhibits[2] 1 through 20 and 24, and Respondent's Exhibits[3] E, F, G, H, I, L, M, O, P, S, T, U, V, W, X, Y, Z, AA, BB, FF, GG, II-002, and JJ.[4]

Post-Hearing briefs have been submitted by both parties.

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

**Stipulated Facts**

At the hearing, the parties stipulated to the following facts, and I so find:

1. During all relevant times, Complainant operated a "commercial motor vehicle" as defined in 49 U.S.C. §31101(1).

2. Respondent is an "employer" as defined in 49 U.S.C. §31101(3) and 29 C.F.R. §1978.101(i).

3. Respondent is also a "person" as defined in 29 C.F.R. §1978.101(k).

4. At all relevant times, Respondent was subject to the employee protection provisions of the Surface Transportation Act, 49 U.S.C. §31105.

5. Complainant has not worked for Respondent at any time after March 10, 2015.

[1] "JX".
[2] "CX".
[3] "RX".
[4] I admitted Complainant's Exhibit 24 (Calculation of owner revenue, expenses, and margin for Complainant from 3/16/2014 through 3/15/2015) over the Respondent's objection. Tr. 187.

6. Complainant filed a complaint against Respondent with Occupational Safety and Health Administration of the United States Department of Labor ("OSHA") on March 3, 2015.

7. Complainant's OSHA complaint was timely filed.

8. OSHA dismissed Complainant's complaint on August 4, 2016.

9. Complainant submitted a request for hearing to the Office of Administrative Law Judges of the Department of Labor on September 5, 2016.

10. Complainant's request for hearing was timely.

11. Metro City Transport Group LLC ("Metro") and Supreme Equipment entered into a Master Lease Agreement on or about March 14, 2014.

12. The Master Lease Agreement provided for the lease of a truck and trailer.

13. The lease term was for 48 months for a monthly lease payment of $3,900.

14. Complainant was required to make a security deposit in the amount of $5,000.

15. Sharpe/Metro was required to pay licenses, permits, taxes, fees, and insurance. The authorized carrier lease permitted Supreme Auto to deduct from any payment due to Sharpe/Metro the expenses specified in the authorized carrier lease."

(Tr. 11-13).

In reaching my decision, I have reviewed and considered the entire record, including the exhibits admitted into evidence, the testimony at the hearing and the arguments of the parties.

**Issues Presented**

The issues to be decided in this case are: (1) whether Complainant engaged in protected activity within the meaning of the STAA when he complained to OSHA and the Department of Transportation; (2) whether Complainant engaged in protected activity within the meaning of the STAA when he complained about driving overweight internally; (3) whether the complaint was related to a violation of a commercial motor vehicle safety or security regulation; (4) whether Complainant's actions constituted the protected activity of a refusal to drive; (5) whether that refusal was based on a reasonable apprehension of serious injury to himself or the public; (6) whether Complainant suffered an adverse employment action when his vehicle was repossessed; (7) whether the decision-makers knew about the protected activity; (8) whether Complainant's protected activity was a contributing factor in the adverse action; and (9) whether Respondent would have taken the same unfavorable personnel action in the absence of the protected activity.[5]

[5] In its post hearing brief, (*Resp. Post-Hg. Bf.*), Respondent attempted to challenge Complainant's right to bring suit based on the fact that the lease agreements are in the name of Complainant's company, Metro, and based on the

## Statement of Facts

Respondent is a trucking company which operates out of several locations throughout the country including Toledo, Ohio and previously Markham, Illinois.[6] Complainant, doing business as Metro City Transport Group, contracted with Respondent to lease a truck from and be an independent contractor for Respondent, through the combination of an authorized carrier lease and master lease agreement, on March 14, 2014.[7] This lease agreement provided for the termination of the lease and repossession of the vehicle automatically upon the default of Complainant, as well as the termination of the lease upon written notification by either party with ten days' notice.[8] On March 9, 2015, Complainant emailed Respondent's employees, Hilda Hinton and Debbie Lange, with the subject "Termination Lease," and an attached letter in which he stated that he was "planning to terminate the carrier lease" and asked what his obligations would be to Supreme as well as how the "negative balance owed [might be] settled[.]"[9] Sometime within 24 hours of receiving this notification, Supreme had the vehicle repossessed.[10]

Robert Sharpe's Testimony

Complainant testified that he began driving for Respondent following a phone interview and his flying to Virginia to East Coast Truck and Trailer where he signed the lease agreement and picked up his truck.[11] He testified that no representative of Supreme was present at the signing of the lease agreement, although he did receive an orientation sheet at that time which he signed, stating that he had undergone orientation.[12] It was his understanding that he was an independent contractor with the ability to drive loads for other companies besides Respondent.[13] He signed a list of dispatch requirements for independent contractor drivers which included reading and complying with any special instructions on a trip sheet, notifying dispatch of any discrepancies or being held liable for inconsistencies, a complete inspection signed by an authorized rep on every load, and the weighing of loads before crossing state lines.[14] He testified that he did not recall whether he had read the indemnification clause of the authorized carrier lease before initialing the page because he had been rushed through the contract at the end of the day.[15] However, he did recall reading the master lease agreement before signing,[16] which stated

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argument that because Supreme Equipment was the entity that repossessed the truck per the lease agreement, making it a necessary party. *Resp. Post-Hg. Bf.* at 14-5. However, Respondent has not presented any argument as to why Complainant was not an independent contractor as a driver, and Respondent failed to timely raise the issue of failure to join a necessary party as required by the rules. Therefore, I find that Respondent has not adequately raised these issues and have not considered them in my decision.

[6] Tr. 20, 48.
[7] JX A at 17; JX B at 9.
[8] JX A at 6, JX B at 2, 5.
[9] JX C at 1-2.
[10] Tr. 102, 237.
[11] Tr. 32-6.
[12] *Id*. at 37, 122; RX S.
[13] *Id*. at 43-4.
[14] Tr. 123; RX T.
[15] TR 123-5; JX A at 7.
[16] Tr. 125-6.

that if rent was more than 10 days past due, it would be deemed a default and entitle the lessor to repossess the truck.[17]

Complainant testified that while he worked as an independent contractor for Respondent, the drivers were assigned several load sheets per day, which resulted in load assignments that were consistently overweight, but which failed to state the weights of the units.[18] He also testified that there was no scale on the premises of the Markham lot, where he worked until Supreme withdrew from the location, and that the closest commercial scale was an hour away, making it difficult to avoid driving overweight by determining the weight of the load.[19] He stated that he mailed scale tickets showing that his load was overweight to Respondent's headquarters and took pictures of the truck whenever it was overweight.[20] Complainant testified that he complained about the assigned overweight loads on numerous occasions to the dispatcher Brenda Freeman assistant terminal manager Angela Burnside:

> I might load up two units on the truck, so then I walk in the office and I say, "Hey," I said, "Brenda, look baby, it's like this all the time." "Oh, Robert, you're going to have heavy days. This, it's a truck lot. Big trucks." So I'm like, "I can't keep doing this."[21]
>
> Q. And I guess in regards -- because you had stated that you had made verbal complaints to Markham?
>
> A. Yes.
>
> Q. Did you ever receive any response to any of those verbal complaints?
>
> JUDGE BELL: Verbal complaints about what?
>
> MR. SCHULZ: About driving overweight.
>
> THE WITNESS: Driving overweight. I never received any response. I talked to the girls in Markham –
> …. Brenda Freeman and Angela Burnside.[22]

While he was working out of the Markham location, he also sent a letter, as an email attachment, to CEO Doug Fellows in which he complained about the trip sheets not being recalculated when multiple load sheets were consolidated into a single load.[23] This letter

[17] JX B at 2, 5.
[18] Tr. 49, 51
[19] Tr. at 52, 54, 61, 74-5. Respondent has pointed to the fact that there was a weigh station in Monee Illinois, approximately fifteen miles from the Markham location, and that Complainant had used this weigh station, to refute this testimony. *Resp. Post-Hg. Bf.* at 11 *citing* CX 6 at 3, 5, 7, 10, 14, 17.
[20] Tr. 56.
[21] Tr. 64.
[22] Tr. 70-71.
[23] Tr. 68-9; CX 8.

mentioned the effect on Complainant's net earnings when a load required him to deliver 80% of the load at the furthest location and then return for the rest of it, using more fuel, and taking more time.[24]

After he started working out of Toledo and Belvedere, he also complained to Matt Howe, a dispatcher,[25] about driving overweight:

> Q. Did you complain verbally to anyone at Toledo or Belvidere that you were being dispatched overweight?
> A. Yes.
>
> Q. Who?
>
> A. Matt Howe.[26]

Complainant testified that Matt Howe had been retaliating against him for taking smaller loads and leaving vehicles resulting in excess weight behind. He stated that Mr. Howe had told him he was not cut out for driving and that he had repeatedly called and texted Complainant regarding the pick-up of loads, had sworn at him, and had hung up on him.[27] The letter which he sent to Respondent regarding Mr. Howe's behavior described several incidents of harassment and referred to Mr. Howe asking him about whether he had loaded his truck, but it did not mention loads being overweight.[28] Complainant testified that he was treated differently following this letter: he started getting lower paying loads.

Complainant never looked up the weight of the vehicles he hauled.[29] Complainant agreed that he never saw a written policy requiring him to take each load in one trip and that he would not remove vehicles from his overweight load when he discovered he was overweight an hour outside of Markham.[30]

Complainant testified that on January 5, 2015 he made a complaint to the Department of Transportation ("DOT") regarding Supreme dispatching him with overweight loads and that on January 21, 2015 he submitted a second complaint after continuing to receive overweight loads.[31] He testified that he believed someone at Supreme had contacted United Road Service ("U.R.S."), the company he had been back-loading with, to interfere with his back loading, based upon the fact that a U.R.S. employee had told him that they had plenty of freight before his first trip, but later said they had nothing for him.[32] On February 21, 2015, after he was told that there were no loads available for him, Complainant emailed Debbie Lange, the corporate dispatcher at

[24] CX 8.
[25] Tr. 78.
[26] Tr. 82.
[27] Tr. 84-5; JX D/4.
[28] JX D/4.
[29] Tr. 135.
[30] Tr. 137-8.
[31] Tr. 87-8. Complainant has submitted emails addressed from Steve Kleszczynski at the DOT to Complainant, which state that an investigation was conducted, violations discovered, and enforcement issued. CX 10-11.
[32] Tr. 89-93.

Supreme, asking who had interfered with the back-loading arrangement.[33] There is no response from Debbie Lange in the record. The next day, he sent Debbie Lange an email in which he stated that he had been leaving three units behind each week because they were overweight, that driving overweight was too great a risk and that he was "not driving no more than the legal weight allowed."[34] Complainant testified that he sent the email to Ms. Lange because as head dispatcher, he hoped she would speak to Matt Howe about his load assignments.[35]

On February 18, 2015, Complainant called OSHA, and on March 2, he was asked to sign a written complaint.[36] Mr. Sharpe then submitted this formal OSHA complaint on March 3, 2015. In this complaint, he stated that Respondent forced him to drive overweight, that he was underpaid on more than one occasion, and that he was being harassed for refusing to take overweight loads.[37] On March 9, Complainant emailed a letter to Respondent with the subject line "Termination Lease (Supreme)."[38] In this letter, Complainant stated that he was "planning to terminate the carrier lease with Supreme ASAP[,]" that "the current prices set running legal weight do not cover operating expenses," and asked what his obligations to Respondent would be as well as how the "negative balance owed" could be settled.[39] Complainant testified that he had intended to continue driving for Supreme until his lease was actually terminated and had texted Matt Howe to see if there were any loads for him that day, but was told that it was a slow day. His truck was repossessed that evening without warning.[40] The day after it was repossessed, Complainant sent a letter to Doug Fellows stating that the job had been well paid if one drove overweight and over-height, that he had been falsely accused of damaging the loads 50% of the time, and that he was discriminated against when he requested support or reported mistakes.[41] Complainant testified that he never attempted to arrange work with Respondent after his truck was repossessed because he did not have another truck to drive.[42]

Although Complainant testified that he never discussed the his debt of thousands of dollars with anyone at Supreme,[43] he also stated that he had sent an email in January of 2015 about adjusting his negative settlement and that he had been receiving settlement documents reflecting this negative balance in the mail at his Detroit address.[44] The settlements and summaries in evidence show that Complainant did in fact owe money to Supreme at the time his vehicle was repossessed.[45]

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[33] CX 12, Tr. 94.
[34] CX 13/ RX L.
[35] Tr. 96.
[36] Tr. 97; CX 15.
[37] CX 16 at 1-3.
[38] JX C.
[39] *Id*. at 2.
[40] Tr. 100-101.
[41] Tr. 107; CX 20.
[42] Tr. 137.
[43] Tr. 156.
[44] Tr. 160-2. Settlements are the "reconciliation of the pay period" every two weeks, according to Doug Fellows. Tr. 237-8. They are calculated by taking into account the driver's truck payment, security deposit, the amount of money the driver has placed in escrow, and past negative settlements, according to Jack Nugent. *Id*. at 332, RX E.
[45] RX E at 9-10, RX G at 13, CX 24.

Angela Burnside's Testimony

Angela Burnside testified that in her position as an assistant terminal manager with Brenda Freeman at Respondent's Markham location, she observed the pressuring of drivers to take overweight loads out when they complained about their weight.[46] She noted that the dispatcher, Brenda Freeman, put the loads together on the load sheets.[47] She testified that to her knowledge, none of the dispatchers notified the drivers of the weights of the vehicles they would be hauling, and that the drivers would frequently wait for the scales to close before leaving or deviate around the scales.[48] She testified that Complainant had complained to her about driving overweight, but that when she passed such complaints on to Brenda Freeman, she was told to try to convince him to take the overweight load.[49]

Doug Fellows's Testimony

Doug Fellows, Chief Executive Officer ("CEO") of Supreme, testified that he reviews "the basics of the lease" with each independent contractor before sending it to the person to sign.[50] Supreme Equipment would buy the truck from a distributer, East Coast, in this instance, and would then lease it to the independent contractor.[51] Complainant first received a copy of the lease when he arrived at East Coast to pick up the vehicle, before which point he was only familiar with the terms reviewed by Mr. Fellows. According to Mr. Fellows, his orientation should have occurred earlier through the safety department via telephone, but there is no documentation whether this call actually took place aside from the orientation sheet Complainant signed at East Coast.[52] He also testified that the loads are compiled by the terminal based upon a combination of how long a unit has been on the lot, where each one is being delivered, and the weight capacity of the average truck.[53] He testified that the drivers are responsible for loading the units onto the trucks and that they are responsible for ensuring that the load, which is designed for the average truck, does not put their specific truck overweight. He also testified that most drivers look up the weights on their phones.[54] Drivers are also responsible for any damages to the units that they fail to note before leaving the lot.[55]

Mr. Fellows acknowledged that the Federal Highway Administration finds a truck to be over the weight limit if it weighs over 80,000 pounds. He also acknowledged that Supreme received a conditional rating from a DOT audit in 2014, but stated that this rating was due to the DOT's mistake and was subsequently changed to the later satisfactory rating.[56] He testified that

[46] Tr. 174, 181-3.
[47] Tr. 175.
[48] Tr. 178, 180-1.
[49] Tr. 182-3.
[50] Tr. 188, 193.
[51] Tr. 250-51.
[52] *Id*. at 252-3, 256.
[53] Tr. 194-6.
[54] Tr. 197-8.
[55] *Id*. at 198. "Unit" refers to the vehicles being shipped.
[56] Tr. 202-4; RX X at 1-3.

the DOT did not contact Supreme with any complaints in 2014 or 2015.[57] Doug Fellows did not recall if he had seen the January 13, 2015 complaint that Mr. Sharpe submitted regarding Matt Howe and was unaware whether it had been submitted to his office. His position was that Complainant had in his February 22, 2015 email to Ms. Lange, refused to drive overweight, but that he was not allowed to do so in the first place. Mr. Fellows did not know whether anyone was pressuring Complainant to drive overweight. Based on this, Mr. Fellows believes there was no reason for it to be brought to his attention.[58]

Mr. Fellows testified that Debbie Lange was the administrative manager of the terminal managers who oversaw the dispatch of loads of inventory.[59] Problems related to having more inventory than could be dispatched legally in a day would be addressed during a daily conference call between the terminal managers, the Denver-based dispatchers, and sometimes Jack Nugent. Mr. Fellows personally speaks to the dispatchers and terminal managers with varying frequency, around once per week.[60] Ms. Lange never reported to Mr. Fellows any complaints from Mr. Sharpe, despite his email complaining about driving overweight from February 22, 2015.[61] He stated that he had not seen this email until after the litigation process had begun and he was unaware of whether it had been brought to the attention of the safety department in accordance with procedure. However, he also stated that he interpreted the email as a complaint about "not making enough money."[62] He did recall receiving the December 3, 2014 letter from Complainant regarding the calculation of trip sheets and acknowledged that Complainant was having problems generating income.[63]

Mr. Fellows stated that he had no knowledge of whether drivers contracting with Respondent had been engaging in the practice of overloading their trucks and waiting for the weigh stations to close to avoid enforcement of the weight limitations.[64] He stated that he was unaware of any allegations of driving overweight until the beginning of the hearing and that as a result he had not investigated the allegations. He also stated that in the industry, no truck yards have scales and that it is the driver's responsibility to know the weights of the different vehicles being moved.[65] Mr. Fellows testified that Complainant's text messages to him had never mentioned driving overweight, and that he did not know if Complainant had ever tried to reach him by phone. He stated that the reports to Debbie Lange and to Matt Howe were not appropriate reports to a supervisor, and that he is not aware of Ms. Lange reporting this complaint to the safety department or anyone else.[66]

Mr. Fellows stated that after receiving the March 9, 2015 lease termination letter from Complainant, Respondent attempted to recover the truck without first communicating with him

[57] Tr. 205-6.
[58] *Id*. at 267-71.
[59] Tr. 258.
[60] *Id*. at258-9, 263
[61] Tr. 220, RX L/CX 13.
[62] Tr. 221-2.
[63] Tr. 283.
[64] Tr. 224, 227.
[65] *Id*. at 225.
[66] *Id*. at 234-5.

because it was an asset worth $250,000 and they did not want anything to happen to it.[67] He testified that they were afraid he would remove the chains and straps from the truck if they informed him before repossessing it, so they did not give Complainant advanced notice. He noted that Metro, Mr. Sharpe's company, was 2.5 months behind in its payments, owing $10,880.49, which meant that he was in default under the lease.[68] Upon receiving the letter, he checked Complainant's settlements and saw what he owed.[69] Respondent would regularly give Complainant a cash advance that was greater than Complainant's subsequent paycheck, resulting in $17,598 in cash advances.[70] He had interpreted Complainant's previous communications about being released from his contractual obligations as attempts to voice concerns in contrast to the contract termination that came in the March 9, 2015 communication. He stated that Respondent would have repossessed the truck at any point at which Complainant expressed a wish to terminate the lease and that the March 9 letter was the first time this was expressed clearly. He interpreted the comment about finding solutions as being about paying off his debt, having already decided to terminate the lease.[71]

Mr. Fellows first became aware of Mr. Sharpe's OSHA complaint on March 12, 2015 upon receipt of a notification and a copy of the complaint from OSHA, after he and Jack Nugent had made the decision to repossess the truck. On August 4, 2016, Respondent received the notification from OSHA of the negative findings of its investigation.[72]

Jack Nugent Testimony

Jack Nugent, the chief operating officer ("COO") of Respondent, oversees day to day operations and staff and works closely with Mr. Fellows. Mr. Nugent testified that he was aware that Mr. Sharpe had made a complaint against Matt Howe and that he had spoken with and verbally reprimanded Mr. Howe for his use of profanity and treatment of Complainant.[73] He testified that he reported the incident to Debbie Lange to "make sure that people were involved and understood what had happened and that it wasn't repeated" and that he offered Complainant a special lane to take a different route out of Toledo, but that no complaints regarding driving overweight were involved in the situation.[74] A special concession had been made to allow Complainant to avoid stopping in the Belvedere terminal.[75] He testified that Supreme's independent contractors are required to follow internal as well as DOT safety regulations. Supreme has a safety department monitored by the DOT, and the drivers are monitored passively by the monitoring of any tickets for DOT violations or changes in the Commercial Safety and Accountability ("CSA") scores.[76] Respondent offers monetary rewards and recognition in the company newsletter for DOT inspections with no violations.[77]

[67] Tr. 237.
[68] *Id*. at 237-8; JX B at 2.
[69] Tr. 294
[70] *Id*. at 242.
[71] *Id*. at 275-9.
[72] Tr. 245, 293, RX P, RX O.
[73] Tr. 302-5, JX D/4.
[74] *Id*. at 305-6.
[75] *Id*. at 385-6.
[76] *Id*. at 308-10.
[77] *Id*. at 315-6.

Mr. Nugent testified that the dispatchers' primary responsibility as to the drivers is freight management and continuously providing loads but that they are not authorized to hire or fire drivers and may not override a driver's decision regarding the freight they take.[78] During the daily conference calls involving those dispatchers, in which he participates approximately 60 percent of the time, he has never seen issues related to Complainant raised, although he does recall discussing various driver statuses.[79]

He testified that drivers are not released to drive until after they have taken the orientation with the safety department, training them in safety and operations, and after they have reviewed the dispatch requirements. He stated that Complainant underwent this training over the phone, although the only documentation is the orientation sheet which he signed at East Coast.[80] Mr. Nugent stated that he had never heard about drivers waiting for the scales to close before, that it had never been raised in any of the conference calls, and that this would not be a viable business strategy. He testified that he first became aware of Mr. Sharpe's OSHA complaint on March 12, 2015 when Respondent received the notice from OSHA. Complainant had not discussed with him the filing of this complaint or any such complaint prior to this time nor had he heard of it from anyone else.[81]

According to Mr. Nugent, Complainant owed $11,178.14 to Supreme at the time of his departure. When the Markham terminal closed, Complainant sent a letter to Respondent addressing his contract and lease, but no overweight issues. Similarly, Complainant's March 9, 2015 letter did not contain any complaints about driving overweight to his knowledge.[82] Mr. Nugent stated that he and Mr. Fellows decided to repossess the equipment after receiving this letter because they felt they were obligated to protect the capital equipment as Mr. Nugent was a personal guarantor of the loan and Complainant was terminating his lease. He stated that Respondent was exercising its rights per the lease in retrieving the truck, and neither he nor Mr. Fellows knew of any of Mr. Sharpe's complaints when they made the decision. They based this decision on the letter which they considered his resignation, and they were the only people who participated in the decision.[83] They reviewed his truck file, including the settlements and other financial information, and then contracted with a DOT approved driver to retrieve the truck.[84] Mr. Fellows and Mr. Nugent are the only ones who have the authority to discipline drivers by firing, taking them off of routes, or repossessing a truck. Debbie Lange reports directly to them. She did not provide Mr. Nugent the February 22, 2015 email from Complainant which complained about overweight loads.[85] He testified that he speaks with Ms. Lange almost daily and that it would be her responsibility to bring a problem with drivers behind on loads to his attention as a part of the day to day operations and an issue affecting the whole fleet.[86] He

[78] Tr. 322-4.
[79] *Id*. at 324-5.
[80] *Id*. at 326-7, 348, RX S (This signature page acknowledges reading and understanding the orientation packet, but makes no reference to any training session or oral orientation).
[81] Tr. 329-31, RX P.
[82] Tr. 341-2, RX M, RX C.
[83] Tr. 342-4.
[84] *Id*. at 388-9.
[85] *Id*. at 358-9.
[86] *Id*. at 363-4.

testified that he visited the Markham lot approximately twice per year and used the time there to meet with staff and drivers, hear any concerns, ensure that the drivers have his contact information, and to meet with customers. He communicated with Matt Howe and other dispatchers a "[c]ouple times a week."[87]

According to Mr. Nugent, Supreme repossesses vehicles "[a]s infrequently as possible."[88] He believed Complainant had negative profit margins because he was spending more money than he was earning. He had the avoidable expenses of carrying a passenger, taking cash advances, and damages to the cargo that did not meet his insurance deductible.[89] Because all other charges for such damages are deducted prior to the payment of the rent on the truck, it would be impossible for a driver to be current on the rent while owing a greater amount for damages.[90] He stated that the company had never considered listing the weights of the units on the load sheets even though it would be beneficial to the drivers to know them. The drivers were expected to look up the weights, which were easily obtainable, if they were not aware of them. He testified that he had never previously seen the scale tickets which Complainant mailed to Supreme.[91]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Applicable Standards

The STAA prohibits an employer from discharging or discriminating against an employee because the employee has engaged in certain protected activity. The employee protection provisions of the STAA[92] are these:

> Prohibitions: (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because: (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order; (B) the employee refuses to operate a vehicle because (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (C) the employee accurately reports hours on duty pursuant to chapter 315;

[87] *Id*. at 367-8.
[88] Tr. 369.
[89] *Id*. at 374-6.
[90] *Id*. at 378-9.
[91] *Id*. at 381-4.
[92] 49 U.S.C. §31105.

Congress amended the STAA on August 3, 2007 to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C.A. §42121(b).[93] The post-2007 standards of proof apply in this case. I also note the recent decision of the Administrative Review Board in *Palmer v. Canadian National Railway*, No. 16-035, 2016 WL 5868560 (September 30, 2016). The ARB's decision in *Palmer* will affect all cases (such as this one) where the whistleblower burdens of proof have been drawn from AIR-21.

In order prevail on his claim under the STAA, Complainant must demonstrate by a preponderance of the evidence that: (1) that he engaged in protected activity; (2) that Respondent took an adverse employment action against him; (3) that Respondent was aware of the protected activity; and (4) that his protected activity was a contributing factor in the adverse action.[94] Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision."[95] "If the employee does not prove one of these elements, the entire complaint fails."[96]

If Complainant successfully proves that he engaged in protected activity, and also proves that his protected activity was a contributing factor in the decision to repossess the truck, then Respondent may nonetheless avoid liability if it demonstrates by clear and convincing evidence that the adverse employment action was the result of events or decisions independent of protected activity.[97] "Clear and convincing" evidence is evidence showing that it is "highly probable" that the employer would have taken the same adverse action in the absence of the protected activity.[98]

> The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.
>
> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity,

[93] Pub. L. 110-53, 9/11 Commission Act of 2007, 212 Stat. 266 §1536; *Smith v CRTS International, Inc*., No. 11-086, 2013 WL 2902809, *2 fn 1 (ARB Jun. 6, 2013); 49 U.S.C. §31105(b).
[94] *Williams v. Dominos Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011).
[95] 77 FR 44127 (July 27, 2012); *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013).
[96] *Coryell v. Arkansas Energy Services, LLC*., No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013).
[97] 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).
[98] *Palmer*, ARB No. 16-035, slip op. at 57.

> would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.[99]

**Complainant's External Complaints Constituted Protected Activity**

Complainant first alleged that he engaged in protected activity under 49 U.S.C. §31105(1)(A)(i) when he filed formal complaints with the DOT and OSHA alleging that he was being forced to drive overweight. An employee engages in STAA-protected activity when he files a complaint or begins a proceeding "related to a violation of a motor vehicle safety regulation, standard, or order."[100] A complaint need not expressly cite the specific motor vehicle standard allegedly violated, but it must "relate" to a violation of a commercial motor vehicle safety standard.[101]

Although Complainant never cited to a particular regulation or statute which provided the weight limitation on trucks, both parties have acknowledged that there is a legal weight limit of 80,000 pounds for commercial trucks.[102] This constitutes a commercial motor vehicle safety standard. The parties have stipulated that Complainant filed a complaint with OSHA.[103] This complaint alleged that Mr. Sharpe was being "forced to drive overweight."[104] Thus, Complainant filed a complaint related to a violation of a motor vehicle safety standard. This OSHA complaint therefore constitutes protected activity under the STAA.

Complainant has also alleged that he engaged in protected activity when he submitted a complaint to the DOT. Complainant testified that he submitted two complaints regarding overweight loads and submitted emails from Steve Kleszczynski, a DOT employee, which state that an investigation was conducted following the submission of his complaint.[105] As stated above, the legal weight limitations constitute a commercial motor vehicle safety standard. There is no evidence in the record which refutes the existence of this complaint. Therefore, I find that the DOT complaints constitute protected activity under the STAA.

Based on the preponderance of the testimonial and documentary evidence, I find that the external complaints constitute protected activity under §31105(1)(A)(i) of the STAA.

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[99] *Id*. at 32.
[100] 49 U.S.C. § 31105(a)(1)(A)(i.)
[101] *Ulrich v. Swift Transportation Corp.*, ARB No. 11-016, ALJ No. 2010-STA-41 at 4 (ARB Mar. 27, 2012.).
[102] Tr. 66, 202;
[103] Tr. 12.
[104] CX 16 at 1.
[105] Tr. 87-8, CX 10-11.

**Complainant's Internal Complaints Constituted Protected Activity**

Complainant has also alleged that he engaged in protected activity when he complained internally to Angela Burnside, Brenda Freeman, Matt Howe, and Debbie Lange. The whistleblower protection provisions of the STAA were enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles."[106] The statute covers internal complaints to supervisors as well as external complaints to government officials.[107] A complaining employee's complaints should not be too generalized or informal.[108]

"Internal complaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial."[109] All complaints, whether internal or external, must "relate to" safety violations. Courts have construed "relate to" broadly to encompass violations of both federal and state laws.[110] In order to qualify for protection, the complaint must be based on a "reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation."[111]

Complainant testified that he regularly complained orally to Ms. Burnside, Ms. Freeman, and Mr. Howe about the fact that he was receiving overweight loads and that the system was designed such that he could not make enough money by carrying loads within the legal weight limit.[112] He also emailed Debbie Lange with a complaint about driving overweight.[113] The letter he sent to Doug Fellows on December 3, 2014 did not mention any pressure to drive overweight, focusing instead on how the trip sheets were not recalculated when more than one trip was necessary to complete them.[114] Angela Burnside testified that Complainant had complained to her about driving overweight on numerous occasions and that she had passed these complaints on to Brenda Freeman, the terminal manager.[115] I find this testimony to be credible as it is consistent with the testimony of Complainant.

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[106] *Brock v. Roadway Express, Inc*., 481 U.S. 252, 258 (1987).
[107] *See Nix v. Nehi-RC Bottling Co., Inc.*, 84 STA-1 (Sec'y Jul. 13, 1984); *Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec'y Mar. 19, 1987); *Harrison v. Roadway Express, Inc*., 1999 STA 37 (ARB Dec. 31, 2002).
[108] *Calhoun v. U.S. DOL*, 576 F.3d 201, 213-14 (4th Cir. 2009).
[109] *Jackson v. CPC Logistics*, ARB No.07-006, ALJ No. No 2006-STA-4 (ARB Oct. 31, 2008); *see Clean Harbor Env't Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (finding that a driver "filed a complaint" when he sent letters to his superiors explaining various safety precautions he had been taking in an attempt to explain his slow pick-up times).
[110] *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992).
[111] *Calhoun*, 576 F.3d at 213; *See Smith v. Lake City Enters., Inc.,* ARB Nos. 09-033, 08-091; ALJ No. 2006-STA-032 (ARB Sept. 24, 2010); *Guay v. Burford's Tree Surgeon's Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045 (ARB June 30, 2008).
[112] Tr. 64, 70-1, 82
[113] CX 13/RX L.
[114] CX 8.
[115] Tr. 182-3.

In order to be considered to be protected by the STAA, a complaint must be communicated to "any supervisory personnel."[116] Complainant's testimony, supported by the letter to Ms. Lange, shows that Complainant did communicate his concerns to someone in a supervisory position. "Under STAA a safety complaint to any supervisor, no matter where that supervisor falls in the chain of command, can be protected activity."[117] Debbie Lange was in a supervisory position over the terminal managers.[118] Although Matt Howe, Debbie Lange, and Angela Burnside did not have supervisory positions, this does not change the fact that Ms. Lange was a supervisor. Therefore, Complainant's internal complaints to Ms. Lange constitute protected activity under 49 U.S.C. §31105(1)(A)(i).

**Complainant's Refusal to Drive Overweight Constitutes Protected Activity**

Complainant next alleged that he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) when he sent a letter to refusing to drive overweight and when he removed overweight units from his truck while he was working out of Toledo. Refusing to drive based on a concern that the truck was overweight and would thus violate federal regulations and endanger the public is protected activity under § 2305(b).[119]

Complainant refused to drive overweight when he removed the overweight units from his truck, while he was driving out of Toledo. This is documented by his email to Debbie Lange, in which he also refused to drive overweight in the future.[120] This refusal to drive overweight in violation of the regulations was thus protected activity.

**The Repossession of Complainant's Truck Constituted an Adverse Employment Action**

In determining whether an adverse employment action took place, I must apply the standard established in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).[121] Under this standard, an adverse employment action occurs when the action is "materially adverse" to the employee. An action is materially adverse if it is "such that it 'could well dissuade a reasonable worker from making or supporting a charge of discrimination.'"[122] Here, the alleged adverse action is Respondent's repossession of the truck leased by Complainant. The repossession of the truck is considered a termination. The board has found that when an employer choses to treat an ambiguous employee action as a resignation without first clarifying the employee's intent to resign, the employer action is considered a constructive discharge which

[116] *Harrison v. Roadway Express, Inc.*, ARB No. 00 048, ALJ No. 1999 STA 37 at 6 (ARB Dec. 31, 2002) (*internal citation omitted*).
[117] *Zurenda v. J & K Plumbing & Heating Co., Inc.*, ARB No. 98-088, ALJ No. 97-STA-16, slip op. at 5 (ARB June 12, 1998).
[118] Tr. 258.
[119] *Galvin v. Munson Transportation, Inc.*, 91-STA-41 (Sec'y Aug. 31, 1992).
[120] CX 13/ RX L.
[121] This standard was applied to the STAA in *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008).
[122] *Melton* ARB No. 06-052, ALJ No. 2005-STA-2 at 19-20 (*citing Burlington Northern*).

is an adverse action.[123] This is especially true when the complainant has expressed a willingness to continue working.[124]

In this case, Complainant sent a letter to Respondent which communicated a desire to terminate the carrier lease with Respondent as soon as possible, but also stated a desire to continue "transport[ing] loads for Supreme" and asked about obligations owed to Respondent and settling negative balances.[125] Complainant also contacted Matt Howe later that day to see if there were any loads available for him to drive.[126] Thus, although Complainant had expressed a desire to terminate his lease soon, there was a definite ambiguity surrounding whether he intended to resign from his independent contractor position. Both Doug Fellows and Jack Nugent have stated that neither of them had attempted to inquire further or clarify whether Complainant intended to resign prior to their decision to have Complainant's truck repossessed.[127] Thus, the repossession of the truck based on Respondent's decision to treat Complainant's March 9, 2015 letter as a resignation without further clarification, constitutes a constructive discharge. A constructive discharge is an adverse employment action. It is an action that could reasonably dissuade a worker from engaging in protected activity. Therefore, the repossession of the truck is an adverse employment action.

**Complainant has not Shown that the Decision-Makers were Aware of the Protected Activity at the Time of the Adverse Employment Action or that Complainant's Protected Activity was a Contributing Factor to the Adverse Employment Action**

Complainant must demonstrate by a preponderance of the evidence that those making the decision to repossess the truck were aware of his protected activities, such that they contributed to the adverse employment action. A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[128] Temporal proximity may be considered as evidence of awareness and contribution. However, it must be weighed against other evidence related to awareness and animus to show whether it was a contributing factor to the decision to take the adverse employment action.[129]

Complainant has relied entirely on the fact that the repossession occurred within weeks of the filing of the OSHA complaint and the lack of response to Complainant's internal complaints to show Respondent was aware of the protected activity and it contributed to the decision to repossess the truck.[130] However, this argument fails to take the other evidence into account.

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[123] *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19 at 6 (ARB Sept. 30, 2010) (*citing Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 14-5 (citations omitted) (Oct. 31, 2007)).
[124] *Hood v. R&M Pro Transp., LLC*, ARB No. 15-010, ALJ No. 2012-STA-036, Slip Op. at 6 (ARB Dec. 4, 2015).
[125] JX C at 2.
[126] Tr. 101, CX 18.
[127] Tr. 237-8; Tr. 342-3 (describing the events that occurred after the receipt of the March 9 letter leading up to the repossession which did not include communicating with Complainant).
[128] *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011).
[129] *Blackie v. Smith Transport, Inc.*, ARB No. 11-054, ALJ No. 2009-STA-43 (ARB Nov. 29, 2012), *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-34, slip op. at 6 (ARB Mar. 30, 2001).
[130] *Compl. Post-Hg. Bf.* at 19-20.

The notice that the OSHA complaint had been filed was dated March 12, 2015: *three days after* the truck had been repossessed.[131] Mr. Fellows and Mr. Nugent made the decision to repossess the truck. Both have testified that they were not notified of the OSHA complaint until they received the OSHA notice, and they were unaware of the complaint at the time they made the decision to repossess the truck.[132] Complainant has presented no evidence to refute this testimony as supported by the notification from OSHA. Likewise, both Mr. Fellows and Mr. Nugent have testified that they were unaware of the DOT complaints at the time of the repossession,[133] and Complainant has presented no evidence, testimonial or otherwise, to refute this testimony.

Finally, while Complainant did complain internally at Supreme, he never testified to raising the issue of driving overweight with either Mr. Fellows or Mr. Nugent, the only two decision-makers, nor did any of the documented communications between Complainant and either of the decision-makers prior to the repossession of the truck address the issue of driving overweight.[134] Complainant did email a complaint to Debbie Lange fifteen days prior to the repossession; however, Doug Fellows and Jack Nugent both testified that they had not been informed of the complaint at the time of the decision.[135] I find their testimony regarding the email from Mr. Sharpe to Ms. Lange to be credible

A much more direct link has been made between the letter from Complainant in which he states that he would like to terminate his lease without mentioning any of his complaints regarding driving overweight,[136] and the decision to repossess Complainant's truck. The decision was made the same day that Respondent received the letter, Respondent has shown that Complainant was behind on the lease payments, giving it the right to repossess under the lease agreement, and both Doug Fellows and Jack Nugent have testified that it was the termination of the lease and fear for the property, on whose loan Mr. Nugent was a personal guarantor, that motivated the decision to repossess the truck.[137] Mr. Fellows has also testified that drivers were required to remove any overweight units from their loads in order to comply with the weight limits.[138] Complainant has submitted no evidence that they were motivated in any way by his complaints about driving overweight. The only evidence of animus from anyone at Supreme submitted by Complainant was in the form of his complaint against Matt Howe who was uninvolved in the decision to repossess the truck.[139] In addition, Doug Fellows testified that after he learned of Mr. Howe's hostile interactions with Complainant, he verbally reprimanded Mr. Howe,[140] which testimony I find credible.

Therefore, I find that the preponderance of the evidence does not show that Mr. Sharpe's complaints about driving overweight were a contributing factor in the decision to repossess Mr.

[131] RX P at 1.
[132] Tr. 245, 293, 329-31.
[133] Tr. 205-6, 329-31.
[134] JX D/4, RX M, RX Y, CX 8, CX 9.
[135] CX 13, Tr. 220, 358-9.
[136] JX C.
[137] Tr. 237-8, 342-4, 388-9, JX A at 6, JX B at 2, 5, RX E at 9-10, RX G at 13, CX 24.
[138] Tr. 269.
[139] JX D/4.
[140] Tr. 302-5.

Sharpe's truck, resulting in his constructive discharge. Thus, Complainant has failed to prove his claim by a preponderance of the evidence.

**Respondent has Established that it would have Taken the Same Action in Repossessing the Truck Even if Complainant had Never Engaged in Protected Activity**

Alternatively, I find that Respondent has shown by clear and convincing evidence that it would have taken the same adverse action even if Complainant had never complained about driving overweight.[141]

Respondent established that the lease agreements gave Respondent the right to repossess the truck upon the default of Complainant or upon the termination of the lease by either party.[142] The lease agreement gave several definitions of default, including the failure to pay an installment of rent.[143] Because Complainant was behind on rent payments, Respondent had the right to repossess the truck due to default. Complainant had also signaled that he intended to terminate the lease in the near future which would also have triggered the repossession.[144] Jack Nugent testified that as a personal guarantor of the loan taken on the truck, he felt obligated to protect the company's investment in the equipment.[145] Complainant owed Supreme $10,880.49 at the time Mr. Fellows and Mr. Nugent made the decision to repossess the truck, and the truck was worth $250,000.[146] Respondent had already paid at least $200,000 on the truck.[147] Mr. Fellows testified that they would have repossessed the truck at any time when Complainant expressed a wish to terminate the lease.[148] Considering the amount of money at stake, and the fact that Mr. Sharpe was already behind on his payments while still driving for the company, I find the testimony or Mr. Fellows and Mr. Nugent that this alone was enough to motivate the repossession of the truck, to be credible.

I find that Respondent has established by clear and convincing evidence that it would have repossessed the truck regardless of his protected activity, for legitimate non-retaliatory reasons based on the money owed on the truck and the imminent termination of the lease.

CONCLUSION

Having failed to establish that his protected activity was a contributing factor in the adverse employment action, Complainant has not established his *prima facie* case. Moreover, even assuming arguendo that Complainant had established a *prima facie* case, Complainant's claim would still fail because Respondent has presented clear and convincing evidence that it would have made the decision to repossess the truck even if Complainant had never complained about driving overweight. The Complainant has failed to establish that the Respondent violated the STAA. Therefore, his request for relief is denied.

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[141] *See* 49 U.S.C.A. § 42121(b)(2)(B)(iv), 29 C.F.R. § 1979.109(a)), *and Palmer*, ARB No. 16-035, slip op. at 57.
[142] JX B at 5.
[143] JX B at 2, 4-5.
[144] *Id*., JX C at 2.
[145] Tr. 343.
[146] Tr. 237-8.
[147] Tr. 249.
[148] Tr. 275.

## ORDER

Complainant's claim is hereby **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

Steven D. Bell
Administrative Law Judge

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

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

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

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law

Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, 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).