U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 June 2017

Case Number: 2016-STA-00039

In the Matter of:

IBRAHIM TANNER,
Complainant,

v.

U & ME LOGISTICS, INC.,
Respondent.

Appearances: Robert A. Hicks, Esq.
Macey & Swanson
Indianapolis, Indiana
For the Complainant

Fred L. Cline, Esq.
Oliver & Cline LLP
Danville, Indiana
For the Respondent

Before: Stephen R. Henley
Chief Administrative Law Judge

DECISION AND ORDER AWARDING BACK PAY

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA" or the "Act"), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, and corresponding regulations found at 29 C.F.R. Part 1978.

Procedural Background

Ibrahim Tanner ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") on October 29, 2015, alleging that his former employer, U & ME Logistics, Inc. ("Respondent" or "U & ME Logistics"), terminated his employment on May 13, 2015 in retaliation for refusing to drive over his hours of service limit and falsify his driver logs. After investigating, OSHA's Regional Supervisory Investigator dismissed the complaint

on March 1, 2016, finding no violation of the STAA. By letter dated April 5, 2016, Complainant timely filed objections to the findings and requested a hearing before the Office of Administrative Law Judges ("OALJ"). Upon my assignment, I issued a *Notice of Hearing* on April 12, 2016, notifying the parties that a hearing on the above-captioned case was scheduled for October 25, 2016 in Indianapolis, Indiana.[1]

A de novo hearing in this matter was held in Indianapolis, Indiana on October 25, 2016. Complainant and his counsel were in attendance. Although aware of the hearing, Respondent did not appear but was represented by counsel, who orally moved for a continuance.[2] Complainant's Exhibits 1-3 were received into evidence.[3] (Tr. 23, 40.) Complainant was the only witness to testify. (Tr. 8-41.)

On November 14, 2016, I granted the parties' joint motion to appoint a post-hearing mediator. However, as the parties were unable to reach a settlement, I issued an order concluding mediation on January 5, 2017. The parties were then granted leave to file post-hearing briefs. (Tr. 41.) On January 31, 2017, Complainant filed a *Post-Hearing Submission* ("Compl. Brief"). On February 6, 2017, Respondent filed a *Hearing Brief of U & ME Logistics* ("Resp. Brief").

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 Complainant Ibrahim Tanner is entitled to back pay.

Summary of the Evidence

Ibrahim Tanner's Hearing Testimony (Tr. 8-41)

I attended truck driving school at the Center for Transportation Safety and began working as a truck driver about four months prior to starting employment at U & ME Logistics. Before working for U & ME Logistics, I was employed by Laser Spot working forty hours per week at $16 an hour. (Tr. 32.)

I started working at U & ME Logistics in Plainfield, Indiana on April 11, 2015. (Tr. 8, 9, 24.) My job was to drive commercial trucks, generally from Plainfield to Vernon Hills, Illinois. I drove a semi-truck with a sleeper berth and a 53-foot trailer that carried metals and computers. The truck and trailer weighed about 40,000 pounds without cargo, and about 60,000 pounds with cargo. (Tr. 9.) I did not own the truck; I drove U & ME Logistics' trucks. (Tr. 24.) I normally drove four to six days a week; although "it was supposed to be five days a week[,] [s]ometimes it would roll over to six days." (Tr. 24.) I made the run from Plainfield to Vernon Hills four or

[1] The specific location and time of the hearing were set by an order issued on October 4, 2016.

[2] I denied Respondent's counsel's request as untimely, but indicated that I would entertain a motion to keep the record open post hearing to allow Respondent the opportunity to introduce documentary evidence. No such motion was made. (Tr. 5.)

[3] I will use the following abbreviations in this decision: "Tr." for the official hearing transcript; and "CX" for a Complainant's Exhibit.

five days per week. (Tr. 9.) It took "a little over five hours" to make that run. (Tr. 9.) I completed daily log sheets while working at U & ME Logistics. CX-1 is a copy of log sheets that I completed. (Tr. 10.)

I made $0.35 per mile at U & ME Logistics. (Tr. 11.) "Our initial agreement was . . . a flat rate of $1,000 a week to run loads up to Illinois." (Tr. 24.) However, "when I received my first check," I saw "that they weren't satisfying their end," because "it wasn't the correct amount." U & ME Logistics told me that I would be paid $200 for each load. "And then once I got back from Texas, [I was paid] $0.38 a mile for the miles that I drove, not including the miles I drove into the area code. It was supposed to be . . . $20 for a drop." I was also supposed "to get extra incentives for doing different tasks on the way up there and on the way back." I started doing runs under that compensation arrangement around April 18, 2015. (Tr. 25.) That compensation arrangement continued up until my termination. (Tr. 26.) After having my memory refreshed by an email exchange I had with my attorney, I recall that (i) I was paid twice a month; (ii) I earned $1,800 for a two-week period; (iii) I earned $1,100 for another two-week period; and (iii) I earned $800 for a one-week period. (Tr. 39.)

I recall driving on May 12, 2015. (Tr. 11.) I was off duty until around 9:00. (Tr. 11-12.) After that, there is a quarter of an hour entry where I was on duty, in which I was "inspecting the truck, making sure everything is properly working, make sure there's no malfunction on the truck or the trailer . . . checking lights and pretty much everything you can see or put your hands on." After that entry, there is a driving entry of 2.75 hours for when I left Plainfield. The log sheet stops at 12:00 a.m. and goes into the next day, May 13, 2015. At that time, I marked down "from Plainfield, Indiana to Crown Point" because that's where I was at midnight. (Tr. 12.) I drove until about 2:15 a.m., when I arrived at Vernon Hills. (Tr. 12-13.) Between 2:15 and 3:15 a.m., I was on duty while the warehouse unloaded the trailer. Afterwards, I slept in the sleeper berth in Vernon Hills. I woke up at 11:15 a.m. and was in contact with U & ME Logistics "for a load heading back to Plainfield or to the Indianapolis area." (Tr. 13.) The next entry is for a quarter hour for pre-trip duties consisting of "another visual test and hands-on test just to make sure everything's properly working." (Tr. 13-14.) Another on-duty entry follows for the drive from Vernon Hills to Elm Point. On the way, I went through DeMotte. I left DeMotte at 3:15 p.m., headed for U & ME Logistics in Plainfield. (Tr. 14-15.)

I arrived at Plainfield at 5:30 and was on duty until 6:00. Before arriving in Plainfield, I had been in contact with Bobby from U & ME Logistics, at 4:30 or 4:45. Bobby "initially called me to check on a load, and then he advised me to not drop the load in Plainfield, that I should drop it in Crawfordsville at the delivery location." He was referring to the load that I already had on my truck. (Tr. 15.) I had no problem going to Crawfordsville, as it is about 15 minutes from Plainfield. (Tr. 15-16.) However, I did not end up going to Crawfordsville "because before the conversation ended, he said once you get done with the Crawfordsville load, there's another load going back to Vernon Hills, Illinois." After Bobby told me about the load going back to Vernon Hills, "I told him that I didn't have enough hours of service time; that I had enough hours of service to potentially make the run to Crawfordsville and then end my day, but it was no way that I could make another trip to Vernon Hills." At that point, Bobby "said that's fine, don't run the Crawfordsville load. That's not an important load right now. Just do the Vernon Hills load." (Tr. 16.)

Bobby and I "began arguing because I was explaining to him" that I had 30 to 45 minutes, and that "there's no way possible I can make the run back up to Vernon Hills." (Tr. 16-17.) Bobby "pretty much told me it was my responsibility to run the load. At one point, he had told me that I should take a nap, that the person who came and gave us the DOT summary at the safety meeting, he had contacted him and he said it was okay if I took a four hour split shift, went to sleep, woke up about 9:00, 9:30 and took the load up to Vernon Hills, Illinois; that's completely legal. And [we were] arguing back and forth." I told him "that's not legal" and "I've never heard anything like that in school or in the safety meeting." Bobby told me to go take a four-hour nap, from 5:30 to 9:30. But, at that time it was past 6:00, "so I said, 'Hey, this is past 6:00,' and he said, 'Don't worry. Put in your log book that it's 5:30. So just falsify your log and make it look like you slept from 5:30 to 9:30, and then take the load up to Vernon Hills.'" (Tr. 17.) I understood that falsifying my log would be a DOT violation and "a criminal act." (Tr. 17-18.) I told Bobby that he was jeopardizing my license and "he told me that if I get pulled over on the way up to Illinois to call him and he'll speak to the officer and let him know that I was following his orders." My last communications with Bobby that day were between 7:00 and 8:00. (Tr. 18.) Bobby "told me that if I didn't take the load up to Vernon Hills that I would be fired."

I did not falsify my log as Bobby instructed. The records in CX-1 are accurate records. I did not take the load to Vernon Hills. I would have been violating federal law and safety regulations because "you only have 11 hours driving time with a 30-minute break." (Tr. 19.) I have the following understanding of the hours of service rules:

> After a ten-hour break, you can legally drive 11 hours. And within those 11 hours, you have 14 hours to drive 11 hours, so you can take a three-hour break in between. You can't drive [any] more than eight hours straight without taking a 30-minute break. So you can drive eight hours, take a 30-minute break, and then drive three more hours and you will be done for the day. There is something called a 'split-break' and that's where you stop for eight hours, and sometimes it resets the clock. Sometimes it doesn't. I'm really not sure how to do the eight-hour break, but I had [taken] one [the morning of May 12, 2015] just to make it back to Plainfield. It's something that I put in my phone and it tells me if I have a full reset or a partial reset or whatnot.

(Tr. 35.) It generally takes about five hours to drive from Plainfield to Vernon Hills. (Tr. 37.) There is also on-duty time in addition to the drive time. "I have to hook the trailer up and make sure the lights work and things of that nature." That is reflected in the quarter hour entries following each drive. (Tr. 38.)

When I didn't take the load to Vernon Hills, I understood that I had been fired. (Tr. 20.) Bobby and I "continued to argue for about an hour" after I arrived back in Plainfield. "After a while of talking and back and forth to Bobby, his brother, [the president of U & ME Logistics] came up to the truck and. . . told me I was fired and to get off the lot." Before firing me, Bobby's brother asked me if I was going to get the load. He started screaming at me when I said no. Then, he said "You're fired. Get off the lot." "I hollered back at him. Then he goes into the

building and gets a bat for some reason, but he doesn't approach me, he just stands there with the bat. And I put myself in my car and I leave." He did not say why I was fired. (Tr. 34.)

I did not receive an official termination notice from U & ME Logistics. (Tr. 26-27.) U & ME Logistics was not required, under a contract, to give me continued hours. (Tr. 27.) U & ME Logistics docked my pay $200 for not complying with Bobby's instructions to take the load to Vernon Hills on May 13. (Tr. 20.) "When I picked up my paycheck, it said minus $200, and then it had a note on the side and he told me 'this is for you not taking the load up to Illinois,' said 'I had it docked because I had to pay somebody else to take it.'" (Tr. 28.)

I spoke to Bobby "a couple days later and he said that he would rehire me if I signed a waiver stating that I would drive the way he wants me to drive, and that I would be liable for all loads, and whatever he tells me to do, I have to do it. And that was supposed to be some new form that he was making all the drivers sign." (Tr. 19-20.) I saw the document that they wanted me to sign when I went to pick up my check. (Tr. 27.) It said that "if you drive for U & ME Logistics, you have to drive the way Bobby wants you to drive, you got to complete your load if he tells you to do it. Pretty much everything he tells you to do, you got to do it." (Tr. 27-28.)

After being terminated, it took me three weeks to get another job. (Tr. 21, 28.) Since that initial three-week period of unemployment, I have been continuously employed. (Tr. 28.) I worked at McGill's Trucking for one month. (Tr. 21.) I made $400 to $500 a week, which was $400 a week after child support and taxes. (Tr. 21, 29.) I was paid by the mile. I left McGill's because of a "truck maintenance issue," specifically that the truck had broken down. (Tr. 29.) After McGill's Trucking, I worked at Laser Spot, a trucking facility. There was no gap between the two jobs. (Tr. 21.) I worked at Laser Spot for three months and made $400 to $500 a week and was paid by the hour. (Tr. 22, 29.) I typically worked 40 hours per week at Laser Spot, at an hourly rate of $16. (Tr. 29.) After that, I went back to McGill's Trucking for two months, but was paid less than I had been previously and made a little less than $500 a week. (Tr. 22.) I was paid by the mile again, at $0.37 per mile. I stopped working at McGill's the second time because of the same issues where the truck would break down and I was "stranded places for days at a time." (Tr. 30.) I stopped working at McGill's in October 2015 and began working at Paschal Truck Line for $300 a week. (Tr. 22.) I worked at Paschal Truck Line from November 2015 until March 2016, and was compensated by the mile. (Tr. 22, 30.) I was paid $0.35 a mile. (Tr. 30.) I did not receive any additional bonuses or incentives. I left Paschal Truck Line because "it was an over-the-road company; it was just too much down time, being away from my family too long, and not making the money that . . . I was told I would make." Afterwards, I worked for Hogan Transportation from April to August 2016 for about $1,000 a week. (Tr. 23, 31.) I was paid "$0.44 a mile plus, I think, $20 for each stop, and $50 for a layover. I think it was additional pay also. I can't recall." I left Hogan Transportation because of "a traffic ticket that I had received." (Tr. 31.) I then worked for Spec Logistics making about $1,000 and am currently employed there. (Tr. 23, 31.) I make $17 an hour and normally work about 55 hours per week. (Tr. 31-32.) I am not seeking reinstatement at U & ME Logistics. (Tr. 39-40.)

Complainant's Exhibits

CX-1 is Complainant's driving log, dated May 10-13, 2015. The logs indicate the following:

May 10, 2015 – From Plainfield, IN to Crown Point, IN

- Off duty 21.25 hours, until 9:15 p.m.
- On-duty (not driving) 0.25 hours, from 9:15 p.m. – 9:30 p.m.
- Driving 2.5 hours, from 9:30 p.m. – midnight

May 11, 2015 – from Crown Point, IN to Plainfield, IN

- Driving 6.75 hours total, from midnight – 2 a.m.; 1:15 p.m. – 2:45 p.m.; 4:15 p.m. – 7:30 p.m.
- On-duty (not driving) 2.75 hours, from 2:00 a.m. – 3:00 a.m.; 1:00 p.m. – 1:15 p.m.; 2:45 p.m. – 3:30 p.m.; 4:00 p.m. – 4:15 p.m.; 7:30 p.m. – 8:00 p.m.
- Sleeper berth 10 hours total, from 3:00 a.m. – 1:00 p.m.
- Off duty 4.5 hours, from 3:30 p.m. – 4:00 p.m.; 8:00 p.m. – midnight

May 12, 2015 – from Plainfield, IN to Crown Point, IN

- Off duty 21 hours, until 9:00 p.m.
- On-duty (not driving) 0.25 hours, from 9:00 p.m. – 9:15 p.m.
- Driving 2.75 hours, from 9:15 p.m. – midnight

May 13, 2015 – from Crown Point to Plainfield, IN

- Driving 6.75 hours, from midnight – 2:15 a.m.; 11:30 a.m. – 12:15 p.m.; 1:00 p.m. – 2:30 p.m.; 3:15 p.m. – 5:30 p.m.
- On-duty (not driving) 3.25 hours, from 2:15 a.m. – 3:15 a.m.; 11:15 a.m. – 11:30 a.m.; 12:15 p.m. – 1:00 p.m.; 2:30 p.m. – 3:15 p.m.; 5:30 p.m. – 6:00 p.m.
- Sleeper berth 8 hours, from 3:15 a.m. – 11:15 a.m.
- Off duty 6 hours, from 6:00 p.m. – midnight

CX-2 is a timeline of Complainant's off-duty and on-duty hours on May 12-13, 2015, derived from the information in CX-1. (Tr. 20-21.)

CX-3 is an email exchange between Complainant and his attorney's law firm dated August 13, 2015. Complainant's counsel used the document to refresh Complainant's recollection during the hearing regarding the amount of money he earned while working for Respondent. (Tr. 39.)

Uncontested Facts

The parties have not entered into a formal stipulation of fact. However, Respondent does not contest the following facts put forth by Complainant:

- U & ME Logistics, Inc. was, at all material times, an employer subject to the employee protection provisions of the STAA.

- Complainant was an employee of U & ME Logistics covered by the STAA's employee protection provisions. In the regular course of business, Complainant operated a commercial motor vehicle with a gross vehicle weight rating of at least 10,001 pounds on the highways in commerce.

- Complainant was employed by Respondent from April 11, 2015 until his termination on May 13, 2015, which was an adverse employment action.

- It generally took Complainant about five hours to travel from Plainfield to Vernon Hills.

- On October 29, 2015, Complainant timely filed a complaint with OSHA.

- By letter dated April 5, 2016, Complainant filed timely objections to the Secretary's Findings with the OALJ.

I find that there is ample support in the record for the above facts, and incorporate them into my findings of fact.

Issues for Determination

1. Did the Complainant engage in protected activity on May 13, 2015, by refusing to drive to pick up a load at Vernon Hills or by refusing to falsify his driver's logbook?

2. Is Respondent's withholding of $200 from Complainant's last paycheck an adverse employment action?

3. Were Complainant's protected activities contributing factors in Respondent's decision to take adverse employment actions?

4. Can Respondent show by clear and convincing evidence that they would have taken adverse actions against Complainant in the absence of protected activities?

5. What relief, if any, is Complainant entitled to under the STAA?

Discussion

Applicable Standard

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," *id.* § 31105(a)(1)(B)(i); (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," *id.* §

31105(a)(1)(B)(ii); or (iv) "accurately reports hours on duty pursuant to chapter 315," *id.* § 31105(a)(1)(C), 29 C.F.R. § 1978.102(c)(2).

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." *Id.* § 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."[4] *Id.* § 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. *Id.* § 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." *Id.* § 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." *Id.* § 395.1(g)(1)(ii)(C).

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.[5]

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 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."[6] 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).

[4] There are limited exceptions to this requirement that are not relevant to this matter.

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

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

Thus, in order to prevail in this case, Mr. Tanner must prove: (i) that he engaged in protected activity; (ii) that his employer, U & ME Logistics, took an adverse employment action against him; and (iii) that the protected activity was a contributing factor in his employer's decision to take the adverse employment action. If Mr. Tanner satisfies this initial burden by a preponderance of the evidence, Respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action against him even if he had not engaged in protected activity.

Findings of Fact and Conclusions of Law

Complainant engaged in protected activities on May 13, 2015

As discussed in greater detail below, Complainant engaged in two types of protected activity on May 13, 2015. First, he engaged in protected activity when he refused to drive to Vernon Hills because it would have violated the hours of service rules. Second, he engaged in protected activity when he insisted on accurately reporting his hours of service in his logbook.

Complainant engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B) when he refused to pick up a load in Vernon Hills on May 13, 2015. The record reflects that Complainant would have been in violation of the FMCS regulations on hours of service if he had driven to Vernon Hills on May 13, 2015, as instructed by Bobby. Specifically, I find Complainant's testimony regarding the May 12-13, 2015 timeline to be reliable, and credit it completely. I also note that Complainant's driving logs and testimony regarding his driving logs are uncontested. This evidence shows that Complainant began driving at 9:00 p.m. on May 12, 2015. He drove from Plainfield, Indiana, to Crown Point, Indiana, logging 0.25 hours on duty (not driving) and 2.5 hours driving. He then drove from Crown Point, Indiana, to Plainfield, Indiana, logging 2.75 hours on duty (not driving), 6.75 hours driving, 10 hours in his sleeper berth, and 4.5 hours off duty. Complainant then drove from Plainfield, Indiana, to Crown Point, Indiana, logging 0.25 hours on duty (not driving), 2.75 hours driving, and 21 hours off duty. Finally, Complainant set out from Crown Point and made stops in Vernon Hills, Elm Point, and DeMotte, Illinois.

I also fully credit Complainant's testimony regarding his conversation with Bobby, a U & ME Logistics supervisor, after Bobby asked him to drive to Vernon Hills. In that conversation, Complainant told Bobby that driving to Vernon Hills would put him over his hours, resulting in a violation of the hours of service rules. Specifically, Complainant and Bobby began a conversation around 4:30 or 4:45 p.m., while heading back to the U & ME Logistics lot in Plainfield. Complainant arrived in Plainfield around 5:30 or 6:00 p.m. on May 13, 2015. Upon his arrival at Plainfield, Complainant had logged an additional 3.25 hours on duty (not driving), 6.75 hours driving, 8 hours in his sleeper berth, and 6 hours off duty.[7] At that point, Complainant was ordered to take a load from Plainfield to Vernon Hills upon his arrival in Plainfield. When he alerted Bobby that he could not take the load to Vernon Hills without violating the hours of service requirements, Bobby instructed Complainant to sleep until 9:00 or 9:30 p.m. and then take the load to Vernon Hills. Complainant expressed his view that he would

[7] As noted above, Complainant's driving logs and testimony regarding his driving logs are uncontested.

be in violation of the hours of service requirements and ultimately refused to take the load to Vernon Hills, either immediately or after napping until 9:00 or 9:30 p.m.

Complainant's relevant 14-hour window ran from 9:00 p.m. on May 12 through 7:00 p.m. on May 13, 2015. A 14-hour window commences after a driver takes ten consecutive hours off duty. In this case, Complainant took 25 hours off duty: from May 11, 2015 at 8:00 p.m. to May 12, 2015 at 9:00 p.m. The relevant 14-hour window for Complainant began at 9:00 p.m. on May 12 and would have run through 11:00 a.m. on May 13. During that time period, Complainant's 14-hour window was not reset because he did not take ten consecutive hours or the equivalent off duty. However, Complainant spent eight hours in his sleeper berth, from 3:15 a.m. to 11:15 p.m. Those eight hours are excluded from the calculation of the 14-hour period in accordance with § 395.1(g)(1)(i)(D), thereby extending the 14-hour window to 7:00 p.m. on May 13. Accordingly, Complainant could not drive after 7:00 p.m. without resetting his 14-hour window, as summarized by the chart below.

	9:00 p.m. (May 12) *Beginning of 14-hour window*				***7:00 p.m. (May 13)*** *End of 14-hour window*
8:00 p.m. (May 11) – 9:00 p.m. (May 12)		**9:15 p.m. (May 12) – 3:15 a.m. (May 13)**	**3:15 a.m. – 11:15 a.m. (May 13)**	**11:15 a.m. – 6:00 p.m. (May 13)**	**6:00 p.m. -11:15 p.m. (May 13)**
Off Duty		Driving or On Duty	Sleeper Berth	Driving or On Duty	Driving or On Duty
25 hours		6.25 hours	8 hours	6.75 hours	5.25 hours

I find that the drive to Vernon Hills takes about five hours. Accordingly, had Complainant began a trip to Vernon Hills at 6:00 p.m. on May 13, he would not have been able to reach Vernon Hills before 7:00 p.m. on May 13, the end of his 14-hour window. Complainant would have required 15 minutes of on-duty time at 6:00 p.m. to perform his safety inspection, followed by five hours of driving time to reach Vernon Hills. Therefore, had he complied with Bobby's initial instruction, Complainant would have reached Vernon Hills at approximately 11:15 p.m., more than four hours past the 7:00 p.m. close of his 14-hour window.[8]

I also find that Complainant would have been in violation of the hours of service rules found at 49 C.F.R. Part 395 if he had driven to Vernon Hills after sleeping until 9:30 p.m., and that Complainant refused to drive to Vernon Hills after being directed to do so in a manner intended to impermissibly skirt the hours of service rules. Respondent correctly asserts that Complainant could have started a new 14-hour period if he had taken two hours off duty or in his

[8] Complainant was also required to take off-duty or sleeper-berth periods of at least 30 minutes every eight hours. *See* 49 § 395.3(a)(3)(ii). On May 13, 2015, Complainant spent an eight-hour period in his sleeper berth that ended at 11:15 p.m. Accordingly, a new eight-hour period began at 11:15 p.m. Complainant would have been required to take 30 minutes of off-duty or sleeper berth time at 7:15 p.m. at the latest in order to remain in compliance with the provision on rest breaks at § 395.3(a)(3)(ii).

sleeper berth. (Resp. Brief at 2.) Had that happened, Complainant would have accumulated the equivalent of at least ten consecutive hours off duty under § 395.1(g)(1)(i)(A)(4). Complainant's new 14-hour period would have commenced at the end of the first period in his sleeper berth, 11:15 a.m. on May 13. That 14-hour period would have expired at 1:15 a.m. on May 14. *See* 49 C.F.R. § 395.1(g)(1)(ii)(C). Respondent asserts in its brief that Complainant would not have violated hours of service regulations if he had "completed the run as requested by U & M[E]" by taking a rest period of two hours from 6:00 p.m. to 8:00 p.m. on May 13. (Resp. Brief at 2.) However, I credit Complainant's testimony that he was not told to rest from 6:00 to 8:00 p.m., but rather was initially told to transport the load to Vernon Hills immediately and subsequently told to transport the load after sleeping until 9:00 or 9:30 p.m. I find that Complainant would not have had sufficient time to complete the approximately five-hour drive to Vernon Hills before the expiration of his 14-hour window at 1:15 a.m. had he complied with Bobby's revised instruction to sleep until 9:00 p.m. Complainant would have reached Vernon Hills at approximately 2:15 a.m., after adding in pre-trip inspection time. The chart below summarizes this scenario.

	11:15 a.m. (May 13) *Beginning of new 14-hour window*			***1:15 a.m. (May 14)*** *End of new 14-hour window*
3:15 a.m. – 11:15 a.m. (May 13)		**11:15 a.m. – 6:00 p.m. (May 13)**	**6:00 p.m. – 9:00 p.m. (May 13)**	**9:00 p.m. (May 13) – 2:15 a.m. (May 14)**
Sleeper Berth		Driving or On Duty	Sleeper Berth	Driving or On Duty
8 hours		6.75 hours	3 hours	5.25 hours

I further find that Bobby ordered Complainant to change his logbook in a way that would falsely reflect his hours. Complainant's accurate representation of his hours constitutes protected activity under Section 31105(a)(1)(C) of the Act and 29 C.F.R. § 1978.102(c)(2).

Complainant suffered adverse employment actions

Discharge of an employee and discrimination regarding pay are specified as adverse actions under the Act. *See* 49 U.S.C. § 31105(a); 29 C.F.R. § 1978.102. Accordingly, I find that Respondent took two adverse actions against Complainant. First, Respondent terminated Complainant's employment on May 13, 2015. Second, Respondent wrongfully withheld $200.00 from Complainant's last paycheck.

Complainant has shown, by a preponderance of the evidence, that his protected activities were contributing factors to the adverse actions taken against him

Plaintiff has established by a preponderance of the evidence that his protected activities were contributing factors to his termination and the $200.00 deduction from his paycheck. I credit Complainant's testimony that he was told he would be fired if he did not take the load to Vernon Hills. (*See* Tr. 19, 33-34.) I further find, by a preponderance of the evidence, that the owner and president of U & ME Logistics fired Complainant immediately after Complainant

again refused his request to take the load to Vernon Hills, and communicated that the termination and $200.00 deduction were for not driving the load to Vernon Hills. An employer cannot deduct money from a driver's paycheck, which the driver has otherwise earned, for refusing to drive a load when doing so would be in violation of hours of service regulations.

I find Complainant's testimony credible that he was both verbally told that his pay was docked for not transporting the load to Vernon Hills and that it was noted on his paycheck that $200 was subtracted for not taking the load.[9] (*See* Tr. 20, 28.)

Respondent argues that Complainant has not established that his refusal to falsify his driving logs "was the cause of his termination." (Resp. Brief at 2.) However, Complainant need only show that his refusal to falsify his driving logs was a contributing factor, i.e., that it had an effect on Respondent's decision to terminate Complainant. I find that Complainant has established that both of the protected activities described above were contributing factors in the adverse actions taken by Respondent.

Respondent has failed to establish, by clear and convincing evidence, that it would have taken the same adverse actions against Complainant in the absence of protected activity

Respondent has failed to show, by clear and convincing evidence, that it would have terminated Complainant and withheld compensation in the absence of his protected activities. Respondent did not offer any testimony or documentary evidence at the hearing to support this position. Instead, Respondent simply submits that Complainant did not engage in protected activity when he refused to complete the run to Vernon Hills. (Resp. Brief at 2.) Respondent only disputes whether Complainant engaged in protected activity, not whether the specific activities alleged to be protected contributed to its decision to terminate Complainant and withhold compensation. In other words, Respondent does not challenge whether its decision to terminate Complainant and withhold compensation was effected by Complainant's activities on May 13, 2015, only whether those activities were protected under the Act. Thus, Respondent appears to implicitly agree that the sole motivation for firing Complainant was his refusal to follow the instructions given by Bobby and the owner of U & ME Logistics. I conclude Respondent cannot avoid liability to Claimant under the Act.

Remedy

The STAA provides, in general, that "[a]n employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole." § 49 U.S.C. § 31105. Relief shall include: (A) reinstatement with the same seniority status that the employee would have had but for the discrimination; (B) any back pay, with interest; and (C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. 49 U.S.C. § 31105(b)(3)(A)(iii). Furthermore, "[r]elief in any action under subsection (d) may

[9] I find that both of Complainant's protected activities were contributing factors in Respondent's decisions to terminate Complainant and to withhold compensation.

include punitive damages in the amount not to exceed $250,000." *Id.* § 31105(b)(3)(A)(iii)(C); *see also* 29 C.F.R. § 1978.109(d)(1).

Reinstatement. Complainant specifically declined reinstatement on the record at the October 25, 2016 hearing. (Tr. 39-40.) Although the ARB generally finds that "a complainant cannot waive reinstatement until the employer makes a bona fide, unconditional offer of reinstatement,"[10] it has approved such waivers in circumstances similar to the facts presented here, where a complainant testifies during a hearing that he is not interested in returning to employment with the respondent. *See, e.g.*, *Young v. Park City Transp.*, ARB No. 11-048, ALJ No. 2010-STA-065 (ARB Aug. 29, 2012). Given that he earns more in his current job than he did while working for Respondent, I find that Complainant's unequivocal hearing testimony that he does not wish to be reinstated constitutes a knowing and voluntary waiver.

Loss of Wages. Complainant requests compensation for the three weeks that he was unemployed, as well as for an amount representing the difference between his wages while employed by Respondent and his wages while working for subsequent employers. (Compl. Brief at 21.)

Liability for back pay begins from the date of termination through the date of reinstatement or the date that the complainant declines a bona fide, unconditional offer of reinstatement.[11] However, a respondent will receive a credit for any interim wages earned by a complainant. Additionally, a complainant has a duty to mitigate damages by exercising reasonable diligence in seeking and maintaining a substantially equivalent position, but the burden is on the employer to establish a failure to do so. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-005, slip op. at 10 (ARB Dec. 30, 2002). A substantially equivalent position is one in which the "promotional opportunities, compensation, job duties, working conditions, and status" are the same. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 7 (ARB Mar. 31, 2005). A complainant may accept a position at a lower rate of pay after he "has taken reasonable steps to obtain substantially equivalent employment but has been unsuccessful." *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 1995-STA-043, slip op. at 9 (ARB May 30, 1997). Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621, and will be compounded daily.[12]

[10] *Blackie v. Pierce Transp. Inc*., ARB No. 13-065, ALJ No. 2011-STA-055, slip op. at 3 (ARB July 24, 2013).

[11] *See, e.g.*, *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-035 (ARB Jan. 31, 2008) ("Back pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement or . . . when the employee rejects a bona fide offer, not when the employee obtains comparable employment.").

[12] These regulations are the result of a revision effective in 2012. *See* 77 Fed. Reg. 44,121 (July 27, 2012). Prior to that revision, the regulations did not specify how often interest on back pay was to be compounded. *See* 53 Fed. Reg. 47,676 (Nov. 25, 1988) (providing for back pay and not addressing interest); 75 Fed. Reg. 53,544 (Aug. 31, 2010) (providing for back pay with interest but not specifying compounding). The ARB applied quarterly compounding before the 2012 revision. *See Dalton v. Copart*, ARB Nos. 04-027, 04-138, ALJ No. 1999-STA-046, slip op. at 7 (ARB June 30, 2005) (stating that "such interest is to be compounded quarterly").

I find Complainant is entitled to wages based on a weekly rate of $780.00, with accrual beginning on May 14, 2015, the date after his termination, and ending on October 25, 2016, when he declined reinstatement on the record at the formal hearing.

Weekly Rate

Complainant's average weekly wage while employed by Respondent was $780.00. Complainant testified that he believed his initial agreement with Respondent was for $1,000.00 a week. However, Complainant stated that he was never paid that amount. I find that Complainant's testimony regarding the three paychecks he received while working for Respondent is reliable evidence of his wages and it is sufficient to establish his weekly rate of pay.[13] His testimony indicated that he was paid the following wages:

Paycheck	Number of Weeks Paid For	Amount
1	2	$1,800.00
2	2	$1,100.00
3	1	$800.00

Based on the above earnings that Claimant actually received, plus compensation for the $200 in wages that Respondent deducted from Complainant's paycheck in retaliation for his protected activities, I conclude that Complainant earned a total of $3,900.00 in five weeks at U & ME Logistics, equating to an average weekly wage of $780.00.

Time Period of Accrual

Back wages began accruing on May 14, 2015, the day following Complainant's termination. Accrual continued until Complainant waived reinstatement on October 25, 2016.

Subsequent Employment

I find that Respondent is entitled to a credit for interim wages Complainant earned through October 25, 2016.[14] Complainant was unemployed for a period of three weeks following his termination by Respondent. After that three-week period, Complainant began working at McGill's Trucking, making approximately $500 per week. Complainant then worked at Laser Spot, also for $500 per week. There has been no testimony or other evidence presented to establish why Complainant left Laser Spot. After working at Laser Spot, Complainant worked at McGill's Trucking again, this time for an amount "a little less" than $500 per week.

[13] *See Johnson*, ARB No. 01-013, slip op. at 12 ("Back pay calculations . . . need not be rendered with unrealistic exactitude"); *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-034 (ARB Dec. 29, 2000) (affirming the ALJ's estimation of back pay because it was consistent with the evidence).

[14] Interim wages earned by Complainant will be subtracted from the amount owed by Respondent for each discrete period. Back wages will not accrue to the extent that Complainant's interim wages in a given period were greater than his $780 average weekly wage with Respondent. Respondent may not transfer any excess credit to offset periods of lower interim wages.

Complainant testified that he left his job at McGill's because the truck would break down. (*See* Tr. 30.) Complainant next took a job at Paschal Truck Line in November 2015, making $300 per week. Complainant then began working for Hogan Transportation at $1,000 per week in April 2016, and finally worked for Spec Logistics beginning in August 2016, making $1,000 per week.

Although Complainant did not offer pay stubs or other income documentation, I find his testimony sufficient to establish his periods of employment, income, and back pay as follows:

Time Period	**Employer**	**Weekly Wage**	**Weekly Amount Owed by Respondent**	**Total Amount Owed Including Interest[15]**
May 14, 2015 – June 3, 2015	Unemployed	$0	$780	$2,604[16]
June 4, 2015 – July 4, 2015	McGill's Trucking	$500	$280	$6,076[17]
July 5, 2015 – September 30, 2015	Laser Spot	$500	$280	
October 1, 2015 – October 31, 2015[18]	McGill's Trucking	$500[19]	$280	
November 1, 2015 – January 31, 2016 February 1, 2016 – March 31, 2016	Paschal Truck Line	$300	$480	$6,340[20] $4,114
April 1, 2016 – August 2016	Hogan Transportation	$1,000	$0	$0
August 2016 – October 25, 2016	Spec Logistics	$1,000	$0	$0
				$19,134

[15] An interest rate of 3% was used, which represents the relevant underpayment rate during all periods that interest was applied. *See* Rev. Rul. 2016-06, 2016-1 C.B. 519 (Mar. 14, 2016), App. A, *Table of Interest Rates From January 1, 1999 – Present, Noncorporate Overpayments and Underpayments*. Interest was calculated through April 1, 2016, the date that Complainant's interim wages exceeded what he would have made if still employed by Respondent. I find that awarding interest for the entire pre-judgment period would not be equitable given the facts of this case. Within one year, Complainant procured employment making substantially more money than he would have if employed by Respondent. That income does not offset back wages owed to Complainant during earlier periods of interim employment. Given Complainant's very rough estimation of wages earned, I find that the evidence does not allow an exact accounting. Tracking back pay according to each pay period would not add additional accuracy to the estimation of back pay. Further, because of the relatively small sums and low interest rate at issue, the variance between alternative methods of calculating interest on back wages is small. I also found it appropriate to round these calculations to the nearest dollar.

[16] Interest was calculated based on daily compounding beginning June 4, 2015. This number also includes the $200 withheld from Complainant's last paycheck.

[17] Interest was calculated based on daily compounding beginning November 1, 2015.

[18] Although Complainant testified that he worked at McGill's for two months during this period of employment, he also testified that he stopped working at McGill's in October 2015, and I find his recollection of which month that he stopped working at McGill's to be more reliable than an approximation of the length of his employment there.

[19] Although Complainant testified that he made "a little less" than $500 per week, I find that the evidence presented allows only an approximation of $500 per week.

[20] Interest was calculated based on daily compounding beginning February 1, 2016.

Respondent notes that Complainant's "subsequent work history was sporadic, indicating numerous jobs with numerous payment arrangements." (Resp. Brief at 2-3.) I agree that Complainant had numerous pay arrangements and has not presented clear evidence regarding either his pay arrangements during his employment with Respondent or during his subsequent employment.[21] However, I credit Complainant's testimony regarding his weekly earnings and find that it a reliable metric for Complainant's compensation. I further find that Respondent has not established that Complainant failed to mitigate damages.[22]

In sum, Complainant lost $36,191.00 in earnings from U & ME Logistics during the period of May 14, 2015 through October 25, 2016, but made $17,229.00 during the same period while working for other employers. In this case, the amount of back pay and interest owed Complainant will be offset by the amount of income earned in the alternative jobs, which equals a net total of $19,134.00, including the $200 withheld from his final paycheck.

Special Damages. Complainant submits that he is entitled to unspecified "special damages," apparently for the emotional toll taken upon him and his family as a result of the termination and "almost a year to find employment that paid him what he was supposed to earn at U & M[E]." (Compl. Brief at 21). I construe this request for special damages as seeking compensatory damages for emotional distress and mental suffering, for which a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (ARB Aug. 31, 2011) (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08- 091, ALJ No. 2006-STA-032 (Sept. 24, 2010)) (affirming ALJ's award of $50,000 in compensatory damages for emotional distress). While reasonable emotional distress damages may be based "solely upon the employee's testimony," *Ferguson*, ARB No. 10-075, slip op. at 7-8, Complainant presented absolutely no testimony or documentary evidence supporting compensatory damages for distress caused by the adverse employment actions taken by Respondent. Moreover, I find that any "emotional toll" suffered by Complainant and his family as a consequence of the resultant OSHA investigation and OALJ hearing is not compensable as an employer is entitled to have its case heard through a statutory adjudicatory process without subjecting it to compensatory damages for emotional distress. In other words, the actual investigation and hearing conducted in this case, though understandably stressful, are not "adverse personnel actions" for which Complainant may seek damages.

[21] *See* Tr. 25 (Complainant states that Respondent paid him "$0.38 a mile for the miles that I drove, not including the miles I drove into the area code. It was supposed to be, I think like $20 for a drop. You [were] supposed to get extra incentives for doing different tasks on the way up there and on the way back.")

[22] As stated above, it is Respondent's burden to prove that Complainant failed to mitigate damages. Respondent does not allege that Complainant did not meet his duty to seek or maintain substantially equivalent employment, nor has it produced any evidence to that effect. Complainant's testimony, standing alone, is insufficient to establish that he failed to mitigate damages. Complainant did not testify regarding his rationale for accepting employment that was not substantially equivalent. His testimony that he left McGill's Trucking for Paschal Truck Line, where he received lower wages, does not provide enough information to conclude that Complainant failed to maintain employment.

On the evidence before me, I conclude that Complainant has not established by a preponderance of the evidence that he is entitled to emotional distress damages. Moreover, as Complainant will receive back wages and interest for the year it took him to find a job that paid him what he earned at U & ME Logistics, I conclude any additional special damages for this time frame is unwarranted.

Punitive Damages. Punitive damages may be awarded "where there has been reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Youngermann v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 5 (ARB Feb. 27, 2013) (internal citations omitted). While U & ME Logistics failed to clearly and convincingly demonstrate that Mr. Tanner's refusal to operate his vehicle and falsify his log book were immaterial to its termination decision, I find there is nothing in the record that suggests an insensitive or callous disregard for Mr. Tanner's rights or a corporate policy that reflects such illegal conduct. Respondent's actions seem to have been taken in ignorance of the law, rather than out of disregard for it. Consequently, I find that punitive damages are not warranted.

Conclusion

Complainant has demonstrated by a preponderance of the evidence that he engaged in protected activity, that Respondent had knowledge of that protected activity, that he experienced an adverse action, and that his protected activity contributed to the adverse action. Respondent has failed to demonstrate by clear and convincing evidence that it would have taken the adverse action despite Complainant's engagement in the protected activity. Respondent is therefore liable pursuant to STAA, and Complainant is entitled to the remedy described above.

ORDER

IT IS ORDERED that, no later than 30 days from the date of this Order, U & ME Logistics shall pay to Complainant back pay and prejudgment interest for the period beginning May 14, 2015 through October 25, 2016 in the amount of $19,134.00. If complete payment is not made within 30 days of the date of this Order, post-judgment interest on the remaining sum shall accrue at the rate provided at 26 U.S.C. § 6621, beginning 30 days after the date of this Order to the period ending the date complete payment is made.[23] No punitive or other compensatory damages shall be paid.

IT IS FURTHER ORDERED that U & ME Logistics shall pay to Complainant all costs and expenses, including reasonable attorney fees incurred by him, in connection with this matter before the OALJ. Counsel for Complainant shall have 45 days from the date of this Order to submit an appropriate petition for such costs and expenses. A service sheet showing that proper service has been made upon Respondent and Complainant must accompany the petition. If Respondent disagrees with any aspect of the petition, it shall first confer with Complainant's counsel and make reasonable efforts to resolve such differences. If counsel for Complainant wishes to change its petition following such conference, it must file an amended petition within

[23] I note the current underpayment rate, applicable through June 30, 2017, is 4% compounded daily. *See* Rev. Rul. 2017-06, I.R.B. 2017-12 (Mar. 20, 2017); 26 U.S.C. 6622(a).

10 days from the date of the conference. If instead there remain unresolved differences following the conference, Respondent must file objections, accompanied by a statement explaining why it has not been able to agree with opposing counsel, within 30 days of the conference.

SO ORDERED:

Digitally signed by STEPHEN R. HENLEY
DN: CN=STEPHEN R. HENLEY, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

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 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).