U.S. Department of Labor

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Issue Date: 19 June 2018

CASE NO.: 2017-STA-00017

In the Matter of:

BERNADINE POULTER,
Complainant,

v.

CENTRAL CAL TRANSPORTATION, LLC AND
RYAN ROTAN, AN INDIVIDUAL,
Respondents.

DECISION AND ORDER
GRANTING WHISTLEBLOWER COMPLAINT

This matter arises under the employee protection provision of the Surface Transportation Assistance Act (the "STAA"), 49 U.S.C. § 31105, and its implementing regulations found at 29 C.F.R. Part 1978. I conducted a hearing in Reno, Nevada on June 8, 2017. Attorney Peter LaVoie represented Bernadine Poulter ("Complainant"). Attorney Denise Greathouse represented Central Cal Transportation, LLC and Ryan Rotan (collectively, "Respondents").

At the hearing, the following exhibits were admitted into evidence: Joint Exhibits ("JX") 1 through 3; Complainant's Exhibits ("CX") 1 through 5; Respondent's Exhibits ("RX") 6 and 8 through 13; and Administrative Law Exhibit ("ALJX") 1. Hearing Transcript ("TR") at 7-9, 11, 89. Complainant and Respondent filed simultaneous closing briefs on August 10, 2017, which were marked as ALJX 2 and ALJX 3, respectively, thereby closing the record.

Complainant alleges that she was terminated in violation of the employee protection provisions of the STAA. As explained below, after a thorough review of the entire record, I find that Complainant has shown by a preponderance of the evidence that she engaged in protected activity and that the protected activity was a contributing factor in her termination. Respondents failed to show by clear and convincing evidence that they would have terminated Complainant absent the protected activity, and Complainant is therefore entitled to remedies and damages under the STAA.

I. ISSUES IN DISPUTE

The matter presents the following disputed issues:

1. Did Complainant engage in protected activity within the meaning of the STAA:

a. By refusing to operate a commercial vehicle on December 18, 2015, because the tandem axle set of the tractor-container combination exceeded the maximum weight permissible by law?
b. By refusing instructions by her supervisor to speed up the tractor-container set and slam on the brakes to shift the load on December 18, 2015?
c. By filing internal complaints with Respondents related to violations of applicable vehicle weight law and regulations on December 18, 2015?

2. Did Complainant suffer an adverse action when she was terminated on December 18, 2015?
3. Has Complainant shown by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged? 29 C.F.R. § 1978.109(a).
4. If Complainant establishes the elements of her claim by a preponderance of the evidence, then has Respondent established by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity? 29 C.F.R. § 1978.109(b)(1).
5. If Complainant prevails, is she entitled to reinstatement, back pay in the amount of $22,317.18 through July 7, 2016, compensatory damages of at least $50,000, punitive damages of at least $100,000, and any other relief provided by 29 C.F.R. § 1978.109(d)(1), including posting of any favorable decision at Respondent's terminal where notices to employees are customarily posted?[1]

II. STIPULATIONS

The parties agreed to the following stipulated facts at the hearing:

1. Complainant was employed by Central Cal Transportation, LLC as a truck driver from July 7, 2015, through December 18, 2015.

2. On December 18, 2015, Complainant picked up a loaded intermodal shipping container at the BNSF Railyard in Lathrop, California.

3. On December 18, 2015, Complainant drove the loaded trailer to a scale facility in Stockton, California to weigh the tractor-container set.

4. The trailer tandem axle weight of the load Complainant was assigned to haul on December 18, 2015, was 34,600 lbs.

5. On December 18, 2015, Respondents discharged Complainant for insubordination.

6. On December 21, 2015, Complainant filed a timely complaint against Respondents with the Secretary of Labor, through the Regional Administrator for OSHA Region 9, alleging that Respondents had retaliated against her in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105(a).

[1] In her closing brief, Complainant seeks only $25,000 in compensatory damages and $50,000 in punitive damages. ALJX 2 at 23.

7. On November 18, 2016, the Secretary of Labor, by Regional Supervisory Investigator Mark Marchione of the Occupational Safety and Health Administration, issued Findings pursuant to 49 U.S.C. § 31105(b)(2)(A).

8. On December 2, 2016, Complainant, by counsel, filed a timely objection to the Secretary's Findings and requested a hearing de novo before an administrative law judge of the Department of Labor.

TR at 7; ALJX 1.

III. FACTUAL FINDINGS

Background Information

1. Central Cal Transportation ("Central Cal") is an inter-modal trucking company, meaning it transports sealed containers; the shippers seal the containers and the truck drivers do not have access to the cargo. TR at 21. Ryan Rotan worked for Central Cal as a Terminal Manager out of the Reno and Fresno terminals until July 2016. *Id.* at 18-19. He performed various duties as Terminal Manager including dispatch, customer service, and accounting functions. *Id.* at 17. Although not his primary role, his dispatch duties included dispatching trucks, assigning work, and managing requests from shippers; as Terminal Manager, he was also in charge of personnel decisions such as hiring and firing. *Id.* at 18, 26. He was not the dispatcher who primarily assigned work to Complainant, but he was her direct supervisor. *Id.* at 26. Mr. Rotan does not have a commercial driver's license and has never operated a commercial tractor/trailer, but he worked with truck drivers of varying experience (from one to 20 years) every day. *Id.* at 20, 41-42.

2. Complainant began working for Respondent as an employee truck driver on July 7, 2015, making $172 per day and generally working five days per week, Monday through Friday. TR at 44, 58; Stip. ¶ 1. She has worked as a truck driver since she obtained her commercial driver's license in October 2012. TR at 62. In her career, she has driven throughout the country, but for Central Cal she drove between the Reno/Sparks, Nevada area to the Lathrop/Stockton, California area. TR at 64. This route involves driving over the Donner Pass on Highway 80, which can be "treacherous, especially in the bad weather." TR at 64-65. In the mountains, the grade going up and down the mountain is "very steep" and "curvy" and she sometimes has to hit the brakes hard. TR at 65. When asked if such heavy breaking going up and down the mountain could cause the load in the trailer to shift, Complainant replied, "Definitely" and that a driver cannot feel it happen. *Id.* at 78. If the load is not stable, it could turn over the tractor and trailer, depending on the curve. *Id.* at 78-79. If a load was overweight, she would be "very concerned" about it becoming unstable, but if it was not overweight, she would "not really" be concerned. *Id.* at 125-126. However, she also stated that if even if a truck is not overweight in its total weight, being overweight on an axle "causes problems to your tractor, the front of your trailer, your conditions of your steering, your maneuvering of your whole system down the road." *Id.* at 128.

3. Under the Department of Transportation ("DOT") regulations, the maximum statutory weight for the truck and its load is 80,000 lbs., with additional designated limits per axle. *See* 23 C.F.R. § 658.17 (maximum gross weight on any one axle is 20,000 pounds and maximum weight on tandem axle is 34,000 pounds). If a truck is overweight at a DOT checkpoint, the driver

is ticketed. TR at 80. When a container's weight exceeds regulations, there are different options to resolve the issue: 1) the driver can try to move the weight inside of the container by shifting it, 2) the driver can move the fifth wheel to redistribute the weight; or 3) the driver can drop off the container at one of Respondent's yards in order to "re-work the container," which involves getting customer approval to break the seal and taking the container to a third party to re-work the load (i.e., split it into one or two containers). TR at 26-27; *see also* RX 8 at 11 (Complainant stated drivers try to adjust an overweight load so it can be legally run, if it cannot be, they tell the dispatcher). When a driver reports an overweight load, Respondent's standard practice was to first have the driver try to shift the load if the freight inside would not be damaged by shifting it.[2] TR at 37, 39-40, 53. One way to shift the load was through a "slamming" technique; Mr. Rotan explained that "slamming a load" means to pull or speed forward and apply the brakes, so that the freight moves inside the container. TR at 31-32; *see also* RX 8 at 15. Mr. Rotan did not believe that slamming a load violates any vehicle codes or DOT regulations. TR at 54. Regarding re-working a container, customers are responsible for the cost and are aware that if a load needs to be re-worked, a delivery would take more time since re-working can take days. *Id.* at 27-28, 40. Mr. Rotan stated he was never pressured to make drivers shift the weight rather than having a load re-worked. *Id.* at 41. Some weeks, Mr. Rotan had 10 to 12 containers that needed to be re-worked, and other weeks he had none. TR at 40-41; *see, e.g.*, RX 9. In Complainant's experience, overweight loads were common across different trucking employers. RX 8 at 11. Complainant also testified that "sometimes" there was pressure to get a load to a location at a specific time, although for the incident in question, Mr. Rotan did not mention a concern about the load being late. TR at 140, 142.

December 18, 2015 Incident and Complainant's Termination

4. On December 18, 2015, Complainant picked up a loaded intermodal shipping container at the BNSF Railyard in Lathrop, California. Stip. ¶ 2; TR at 72. She drove the truck to a truck stop and scale facility in Stockton, California to weigh the tractor-container set. Stip. ¶ 3; TR at 73. Complainant described the truck stop as a "mom and pop" facility with a scale, mechanic shop, and a fuel island, but no parking. TR at 73. The scale facility is off a side street and is "kind of compact, packed in," partially fenced in, and there are sometimes cars, pedestrians, and other trucks around. *Id.* at 73-74. The container was loaded with vehicle tires, which Mr. Rotan asserted Complainant would know because the dispatch order sent to her phone has a description of the freight. TR at 50; JX 1. Complainant testified at her deposition that she did not know what was in the container because it was sealed and that they do not tell her what is in the load. RX 8 at 12-13, 21-22.[3] The container weighed a total of 76,120 lbs., with the weight on each axle as follows: steer axle was 11,880 lbs., drive axle was 29,640 lbs., and trailer axle[4] was 34,600 lbs. JX 2; TR at 74. Under DOT regulations, the maximum weight allowed on the tandem axle is 34,000 pounds. 23 C.F.R. § 658.17(d).

5. Complainant and Mr. Rotan text messaged back and forth regarding the overweight trailer axle. JX 3. Complainant first sent Mr. Rotan a text message that said "Overweight. 600 in

[2] At her deposition, Complainant testified that what they "normally" did was drop an overweight load at the yard and pick up another one. RX 8 at 12.

[3] Complainant testified she did not know what was in the load: "It could be tires; it could be Half & Half…the paperwork doesn't even say what in there." RX 8 at 21. However, she said it would not have made a difference if it was tires "[b]ecause they still could shift and it still makes it unsafe." *Id.*

[4] The "trailer axle" is the last axle, sometimes referred to as the tandem axle. TR at 31.

rear!!!!" TR at 29-30; JX 2 at 1. Per standard procedure, Mr. Rotan asked Complainant to send a copy of the scale ticket, which Complainant texted to him. TR at 30; JX 3 at 1. Complainant asked if she should take the load to Comtrac, a facility that sometimes re-works loads for Respondent, although she did not specifically reference re-working. JX 3 at 2; TR at 33. Mr. Rotan replied, "Try to slam it. You can legal 34500." JX 3 at 2; TR at 31. Complainant then replied "Nope. Nit [*sic*] gonna. Move." JX 3 at 3. Mr. Rotan's understanding of this comment was that Complainant was refusing to attempt to move the load at all. TR at 45-46, 49. Complainant stated that she told him she "would not be able to [slam it] and it was redundant to try." TR at 75; *see also* RX 8 at 15 (in her deposition, Complainant stated she meant that "slamming is not going to move 600 pounds."). Mr. Rotan then texted "No you need to know what is legal and what is not. 34500 is legal on an axle, as long as the other two axles are not overweight." JX 3 at 4; TR at 33. Complainant replied, "Well. That's. Not true. ! I've drop it at comtrac. And u can't Make. Me run a over weight Load…Only the front axle can legally. Go over the back 2 NOT." (*sic* throughout) JX 3 at 5. Mr. Rotan assumed from this text that she had already dropped the truck off at Comtrac. TR at 51. She then texted, "Am I bob tail home. Or r u sending. Me. Another. Load?" (*sic* throughout) JX 3 at 6. "Bobtail" refers to operating the tractor without a trailer attached. TR at 83.

6. Mr. Rotan then texted Complainant that she needed to call the office. JX 3 at 6. Mr. Rotan said he wanted her to call because he wanted to clarify with her that he was not trying to make her run an over-weight load. TR at 34. Complainant called when she had returned to the Lathrop yard and Mr. Rotan told her he was not trying to make her run an overweight load and also that he was trying to get her to move the weight by slamming the load to make it legal. TR at 35; RX 8 at 17. Mr. Rotan stated he asked if she would attempt to move the weight, and she responded "No." TR at 49. She did not say it was unsafe because of people around the truck or because it may cause the product to be unsecured and Mr. Rotan did not understand her to be saying she could not slam the load for a legal reason. *Id.* at 49-50, 55. At one point he told her to "do her job," by which he meant attempt to make the load legal by slamming it. *Id.* at 35-36. Complainant stated that during the phone call, Mr. Rotan told her that she did not know the rules of driving the truck and the allowable weights. TR at 82; RX 8 at 18. Mr. Rotan and Complainant were yelling at each other because it was "a heated argument."[5] TR at 126; *see also* RX 8 at 18. Complainant stated during her deposition that she told Mr. Rotan she was doing her job and that he told her she would "be legal with thirty-four five." RX 8 at 18. She replied that it was "not legal at thirty-four five." *Id.* She asked him if he was going to give her another load, and he said no and to bobtail home and bring in her phone, fuel card, and keys. TR at 83.

7. After she "refused to listen to the instructions," Mr. Rotan terminated her employment over the phone. TR at 34, 52; Stip. ¶ 5. He did not consult with anyone before firing her, and the reason he fired her was for insubordination. TR at 36; RX 10 at 1. The employee handbook provided that "[r]efusal or failure to follow job instructions or a supervisor's orders, or other insubordination" and "[r]estricting, slowing down or interfering with production or causing, advising, or directing others to do so" could result in discipline, up to and including termination. RX 6 at 29; TR at 43-44. Mr. Rotan described Complainant's attitude as "Very combative at times. Very agitated at times." TR at 48. She was never disciplined for her attitude, but Mr. Rotan dealt

[5] Complainant also raised her voice and pounded on the table at her deposition when discussing the telephone conversation. RX 8 at 18.

with attitude issues "on a daily basis from truck drivers." *Id.* He had never had an employee driver refuse to shift the load, although he has had owner/operators refuse to shift a load.[6] *Id.* at 53, 55.

Mr. Rotan's View

8. Tires would not be damaged by the slam procedure and Mr. Rotan did not believe there would be a safety concerns with moving the tires inside the container. TR at 50, 58. Mr. Rotan testified that he was trying to get Complainant to "slam it" incrementally down to 34,000 lbs. and was not trying to get her to drive the trailer with 34,500 lbs. on the trailer axle. *Id.* at 32-33, 48. He said "[i]t was worded incorrectly in the text message," and that he was trying to get her to go incrementally down in weight, "from thirty-four six to thirty-four five, down the line, to get it down to legal" because the legal limit is 34,000 lbs. *Id.* at 32-33. Mr. Rotan did not ask her to shift the axle to maneuver the load because usually the axles are already set to California law and are not able to be moved.[7] *Id.* at 53. Mr. Rotan has seen up to 1,800 lbs. moved before by slamming the load, so he believed she could move the 600 lbs. *Id.* at 46-47. Hypothetically, if she had attempted to move it and the load only shifted 20 lbs., Mr. Rotan stated he would have found her a different load or bob-tailed her home "because it would have been apparent that she tried to move it and the weight wouldn't shift far enough to become legal." *Id.* at 47. If she had told him there were people around, he would have asked for a description of her surroundings and whether there was a place she could safety move it; he said he would not have forced her to slam the load if she could not do so in a safe way. *Id.* at 50.

Complainant's View

9. Complainant understood Mr. Rotan's text "Try to slam it. You can legal 34500" to mean that "it would be legal, to move a hundred and I would be legal at [34,500 lbs.]." TR at 75-76; *see also* RX 8 at 15. She said she was not refusing to do her job, but only stating that she "can't legally make it legal" and that she wanted to get another load. TR at 82. She said by following the legal limits of the trailer weights, she was doing her job because there are safety reasons for a tractor and trailer to not be overweight, namely: "Not only because it's unsafe for your tractor and trailer to be overweight or on one side or the other, but a hazard on the road. You come up on all kinds of obstacles." *Id.* at 82-83. If the weight was legal on all axles and under the allowable gross weight, she would have driven the truck. *Id.* at 128. At the hearing, Complainant testified that it was her understanding that she was fired because Mr. Rotan wanted her to run an overweight load, not because she refused to slam it. *Id.* at 92-93, 135. She said he wanted her to run the load with 34,500 lbs. on the rear axle. *Id.* at 92-93. She wrote on her driver log, dated December 18, 2015, "Fired / For Refusing to Haul Overweight Container." CX 1 at 1. She also told the unemployment office that she was terminated for refusing to haul an illegal load. TR at 91. However, she also stated at the hearing that Mr. Rotan fired her for "refusing to do her job," which was "Slamming it, slamming to make it legal, which it wasn't going to make it legal." *Id.* at 96. Later at the hearing, Complainant agreed that her refusal was related to not wanting to haul an overweight load and to the safety issues of slamming the load. *Id.* at 138-139. She also said at her deposition that by "not doing her job," Mr. Rotan meant that she was not "slamming on the brakes and realigning that load somehow to make it legal." RX 8 at 21. Complainant admitted at her deposition that she has reported

[6] Owner/operators operate their own trucks and are not employees. TR at 21. Out of 20 to 35 drivers that Mr. Rotan supervised, roughly 60 percent were owner/operators and 40 percent were employees. *Id.* at 20.
[7] Complainant confirmed that the tandem axle was at the legal limit for California. RX 8 at 15.

overweight loads to Mr. Rotan in the past and he has not told her to drive the load; this time he wanted her to slam it and would not let her take it to the yard for re-working. *Id.* at 16. Complainant noted that he had allowed her to return an overweight load and pick up a different load "several times during the weeks prior." *Id.* at 36. She also said at her deposition that what Mr. Rotan was asking – to try to shift weight that cannot be moved – was an "illegal act" that she was within her rights to refuse to do. *Id.* at 22. She admitted at the hearing that it was "probably not" appropriate to yell at her supervisor during their "heated argument," and depending on the circumstances, it would be possible to be terminated for yelling at a manager. TR at 126-127. At her deposition, Complainant claimed she was unaware of Central Cal's "insubordination" policy. RX 8 at 11-13.

10. Complainant had slammed a load "maybe two or three" times previously, but those times the weight she was moving was under 100 lbs. because she "wouldn't want to attempt to do it if it was over 100 [lbs.]." TR at 77. She had never tried before to move more than 100 lbs. and was never requested to do so. *Id.* She stated she might move 100 or 120, but she could not move 600 "and it makes the load unstable and unsafe." RX 8 at 16. Shifting the weight could also have made the situation worse by shifting more weight to the rear. TR at 118-119. Complainant claimed it was "very likely" that if the load had been able to be shifted by slamming the brakes in the parking lot, it could have also shifted back to being overweight again when braking heavily going down the mountain. *Id.* at 79. However, she did not think that the slamming technique itself was a violation, and "[s]ome people do it all the time," although she does not.[8] TR at 110; RX 8 at 16.

11. When asked at the hearing why she did not try to slam the weight down incrementally by 100 lbs., she said "I think it was the issues that were surrounding my area." TR at 111. When asked, "What issues?" she replied, "I don't know, maybe that day there was a lot of traffic, a lot of vehicles around." *Id.* In elaborating, she stated: "There's traffic around there. I don't remember if it was heavy traffic that day or a lot of customers there or what. But I know I wasn't going to move 600 pounds. And what you're suggesting to move 100 or even Mr. Ryan telling me to move 100 at a time, that takes up a lot of time, a lot of circumstance and safety issues around it." *Id.* at 111-112. She did not "remember exactly" if the people or traffic was a reason why she did not slam the load. *Id.* at 112. She never told OSHA or the Nevada unemployment office that she refused to slam the load because of people around because she "didn't go into detail." *Id.* at 112-114. But, Complainant contended, she did state that "safety issues" were a concern when she stated she was concerned about the load shifting and becoming unstable. *Id.* at 114-115. Complainant also admitted that she did not convey any concerns about the surroundings to Mr. Rotan. *Id.* at 115; RX 8 at 15, 17. At the hearing, she stated the first time she thought about this safety issues with people around her truck was "[p]robably while [she] was at home" after she was terminated when she was "thinking about the case." *Id.* at 116. She "[did not] remember every little detail of every day" because there are too many issues to worry about, but that the circumstances surrounding the area "probably was part of the reason [she refused to slam the load]." *Id.* at 116-117. At her deposition, she said that she did not try to move the load because 1) it would not move, and 2) there were people coming and going and trucks coming in and out and "it makes it unsafe around my area" and she "didn't have the room to slam it." RX 8 at 15. However, she did not mention this concern before her deposition. *Id.* at 15, 17. According to Complainant, "the circumstance [surrounding the area] probably was part of the reason," but the biggest concern she

[8] Complainant stated at her deposition that slamming the brakes "can be" illegal because it "unstables [sic] the load" and could damage the load. RX 8 at 22.

had was that the 600 pounds was not going to move and it "wasn't going to be legal." TR at 117-118. She said repeatedly that she could not move 600 lbs., "so why even try?" TR at 119, 122; *see also* RX 8 at 17 (agreeing that it would have been a waste of time to try to slam it). When asked why she did not try to slam it and then tell Mr. Rotan that it did not work, she said she did not know why she did not do that. TR at 122. She said, "I couldn't do it, so I didn't do it. Not in a safe area, anyway." *Id.* at 121.

12. After she was terminated, Complainant was "very upset" because she felt she did not do anything wrong. TR at 83. She contended she was following the rules and that Mr. Rotan was asking her to do something she felt was unsafe. *Id.* at 83-84. She had been terminated from other jobs and been depressed, but testified that this termination was worse because she was "doing the right thing," and she was terminated just before the holidays. RX 8 at 24. She was terminated a week before Christmas and her son and pregnant daughter-in-law had just moved in with her. TR at 84. Prior to the termination, she felt "stable" because she had been working for almost six months with Central Cal. RX 8 at 24. She was "totally devastated" because of the financial pressures such as taking care of her family, herself, her animals, and her house payment, on top of it being Christmas. TR at 84. She had to miss two mortgage payments in order to make ends meet, and only recently caught up with the payments; however, she had missed payments prior to being terminated by Central Cal. RX 8 at 27, 34. Claimant said she suffered from stress after her termination, which "caused [her] back to flare up, [her] nerves went crazy," she gained weight and did not sleep well. TR at 133; *see also* RX 8 at 23. When asked at the hearing when these symptoms started, she stated: "Well, it got repeated after I got fired from Central Cal." TR at 133. Complainant stated she was "really, really stressed out" and "felt her worthiness as a driver had been shot to pieces." RX 8 at 23. She could not focus or sleep, and could not do anything "for a while there" she did not try to find a job earlier because she was "emotionally upset." *Id.* at 23-24. She saw her regular doctor at the VA and a counselor for depression related to her termination, and because her mother passed away a few months before her termination. *Id.* She said she "probably" got past her anxiety a few months after she started with her current employer, Wisdom Trucking. *Id.* at 27.

Complainant's Later Employment

13. Complainant applied for unemployment with the State of Nevada, stating that she was fired for refusing to haul an illegal load. TR at 84, 91. Her unemployment was initially denied because Central Cal contended she did not do her job; on appeal, she obtained benefits because Central Cal did not participate in the process. *Id.* at 84-85. She received $1,577.00 in unemployment benefits. CX 3 at 4.

14. Complainant was unemployed for five weeks until she obtained a job for a trucking company called CFL[9] on January 13, 2016. TR at 84, 99; RX 12 at 7. With CFL she was working "over the road" throughout California and Nevada, meaning she did not make it home every night. TR at 85. She worked for CFL until February 12, 2016; she left because she was not making enough money and it cost her more to live on the road than at home. TR at 86, 99-100, 136-137; RX 12 at 7. During her time working for CFL she made $3,186.42. TR at 100; CX 3 at 4; RX 12 at 8. On February 22, 2016, she was hired by Tesla to fill batteries, which she did for about five months until

[9] CFL, or "Consolidated Freight Logistics," is also referred to in the record as "Your People Professional, Inc." *See, e.g.*, CX 3 at 4; RX 8 at 6; RX 12 at 7-8.

she stopped on May 4, 2016, because the work was hurting her back, feet, and hands. TR at 86. She earned a total of $5,757.39 working for Tesla. TR at 101; CX 3 at 6; RX 12 at 8. On May 9, 2016, she started working for Bowen Trucking Company driving locally, but stopped working for Bowen on June 21, 2016, because she was not making enough money. TR at 87, 101. She made $2,967.86 working for Bowen. CX 3 at 6; RX 12 at 8. On July 7, 2016, she started working for her current employer, Wisdom Trucking, driving a semi-truck making $180 per day. TR at 87-88, 103-104; RX 12 at 8. She was not offered overtime at Bowen and CFL, and she stated she had weekends off.[10] TR at 104-105. When she was unemployed, Complainant was looking for work "every day." *Id.* at 108. She applied for at least three truck driver jobs that she did not get. RX 8 at 35. She utilized the help of "JobConnect," and unemployment assistance program, and she went physically to look for work every other day, but looked on the internet every day for two hours.[11] TR at 108-109; RX 8 at 34.

IV. ANALYSIS AND CONCLUSIONS OF LAW

To prevail in a STAA whistleblower complaint, the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, suffered an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C.A. § 31105(b)(1) (adopting the legal burdens of proof at 49 U.S.C.A. § 42121(b)(2)(B)(iii)); 29 C.F.R. § 1978.109; *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024, slip op. at 5 (ARB Apr. 25, 2013); *Blackie v. Smith Transp.*, Inc., ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 8 (ARB Nov. 29, 2012). If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C.A. § 42121(b)(2)(B)(iii), (iv); *Tablas*, ARB No. 11- 050, slip op. at 6; *Blackie*, ARB No. 11-054, slip op. at 8.

The STAA provides that an employer may not "discharge," "discipline," or "discriminate against an employee regarding pay, terms, or privileges of employment," because of an employee's protected activity. 49 U.S.C.A. § 31105(a)(1); 29 C.F.R. § 1978.102(a). Employment termination constitutes an adverse action under the STAA. *Id.*; *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-071, slip op. at 6, n.15 (ARB May 18, 2017). Complainant and Respondents agree that Respondents terminated Complainant's employment on December 18, 2015. Stip. ¶ 5. Accordingly, Complainant suffered an adverse action, and the remaining issues are whether Complainant can show by a preponderance of the evidence that she engaged in protected activity, and if so, whether the protected activity contributed to the adverse action. Respondents can then avoid liability by showing Complainant would have been terminated regardless of the protected activity.[12]

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[10] At her deposition, Complainant was asked if she works overtime at her current job with Wisdom Trucking. RX 8 at 6. She replied that she does not because she "like[s] her weekends." *Id.*

[11] At her deposition, Complainant stated she looked for work every other day for two hours; when this discrepancy was pointed out at the hearing, Complainant stated she did not know why she would say that, but that she "probably did." TR at 109. In her deposition, she first stated that she was looking for two hours "[e]very other day probably" but later said "[i]t varies" and that she might go out all day looking for work one day and spend the next day on the internet. RX 8 at 23.

[12] Complainant argued in her closing brief that Mr. Rotan is personally liable under the STAA. *See* ALJX 2 at 20. The issue of whether Mr. Rotan is individually liable was not listed as an issue in dispute in the prehearing order, was not addressed at the hearing, and Respondents did not argue that Mr. Rotan was not individually liable in their closing brief.

A. Credibility Determinations

In deciding this matter, the administrative law judge ("ALJ") is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. 29 C.F.R. § 18.12; *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 8 (ARB Aug. 1, 2002). In weighing the testimony of witnesses, the ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Ass't Sec'y & Mailloux v. R & B Transportation, LLC*, ARB No. 07-084, ALJ No. 2006-STA-12, slip op. at 9 (ARB June 16, 2009); *Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ No. 2003-STA-54, slip op. at 6, n.3 (ARB Sept. 30, 2005);

Overall, I find Complainant less than credible in significant portions of her testimony. Her shifting explanations regarding why her activity was protected, such as her after-the-fact statement that the slamming technique would have posed a safety concerns due to the traffic and bystanders at the scale yard, and her testimony at the hearing that an unstable load may have been unsafe on mountain roads, detracted from and negatively affected her credibility. She testified that she thought about the possible safety concerns at the scale yard at home after she was terminated. F.F. ¶ 11. She testified that she did not remember the details of that day, but that safety issues regarding her surroundings at the scale yard were "probably" part of her concern. *Id.* She did not mention such safety concerns to Mr. Rotan, in her text messages, in her statement to OSHA, or her statement to the unemployment office. *Id.* She also did not mention any concerns about the steep grades of the mountain pass during her deposition, much less at the time of the incident. Her testimony suggests she was trying to justify her complaints and refusals after the fact instead of testifying about what

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However, Complainant addressed the issue in her brief, and for the sake of thoroughness, I note that Mr. Rotan is individually liable under the STAA.

The STAA provides that "[a] *person* may not discharge an employee" for conduct protected by the Act. 49 U.S.C.A. § 31105(a)(1) (emphasis added). The implementing regulations define a person as "one or more *individuals*, partnerships, associations, corporations, business trusts, legal representatives or any group of persons." 29 C.F.R. § 1978.101(k) (emphasis added). In *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ No. 2012-STA-11 (ARB Apr. 30, 2014), the ARB noted that "[a]n integral factor for determining individual liability under the Act is whether an individual exercises control over the employee." Slip op. at 8, citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033, ALJ No. 2006-STA-032, slip op. at 9 (ARB Sept. 24, 2010). The ARB continued, "The requisite control over an employee for purposes of individual liability includes 'the ability to hire, transfer, promote, reprimand, or discharge the complainant . . . .'" *Id.* The ARB found that the owner of the respondent company was individually liable under this test, but not the operations manager and dispatcher. *Id.* at 8-9.

Individual liability is usually found as to a company's owner or sole shareholder. *See, e.g.*, *Smith*, ARB Nos. 08-091, 09-033 (finding the president and sole shareholder of the respondent was individually liable, but not her spouse); *Timex Logistics*, ARB No. 13-016 (finding the company's sole owner liable, but not the operations manager); *Ass't Sec'y of Labor v. Bolin Assocs.*, No. 1991-STA-004 (Sec'y Dec. 30, 1991) (sole shareholder and CEO of respondent corporation was individually liable). The ARB's discussion in *Timex Logistics* suggests that an individual in Mr. Rotan's position can be individually liable under the STAA even though he is not an owner of Central Cal. The ARB noted that the operations manager and dispatcher working for *Timex Logistics* was not an owner, but also noted that he did not have the authority to "hire, transfer, promote, reprimand, or discharge" the complainant. *Timex Logistics*, ARB No. 13-016, slip op.at 9. Here, it is undisputed that Mr. Rotan was Complainant's direct supervisor and had the ability to hire and discharge her, as he in fact did without consulting anyone else on December 18, 2015. F.F. ¶¶ 1, 7. Therefore, while he is not an owner of Central Cal, he is individually liable under the STAA if Complainant proves her case because he had the requisite control over Complainant's employment. *See also Bolin Assocs.*, No. 1991-STA-004, slip op. at 5-6 ("Bolin, as the person who discharged Complainant, is liable under the express language of [the STAA]").

she actually believed at the time. Given her testimony that she thought about the safety issues of the slam maneuver later, I do not find her testimony that it was "probably" a concern at the time to be credible, and her assertion that was one of the reasons she refused to slam the load undercuts her overall credibility.

She was also a times inconsistent in her testimony. For example, she stated at the hearing that she was fired for refusing to drive an overweight load, not for refusing to slam the load. F.F. ¶ 9. However, she later testified that she was fired for refusing to slam the load. *Id.* This contradiction may be explained by the intertwined nature of the two issues, but her contradictions caution against affording her testimony significant weight. However, in other respects, Complainant's testimony was consistent with the record. For example, she consistently testified that she did not believe that slamming the load would move 600 lbs, which was consistent with her text messages to Mr. Rotan on the day in question. Overall, I credit her testimony where detailed and supported by the record, such as her consistent testimony that she did not attempt the slam maneuver because of her belief that it would not move the requisite 600 lbs. I find her testimony regarding the distress she suffered as a result of her termination to be generally credible, in that it was detailed and generally consistent.

Mr. Rotan's credibility is undermined by the fact that his explanation for why he told Complainant to slam the load down to 34,500 lbs., which is integral to the resolution of the issues in this matter, is not believable. Mr. Rotan explained that he was asking her to slam the load down in 100 lb. increments until the weight reached 34,000 lbs., F.F. ¶ 8, but his text messages do not reflect this meaning. He texted Complainant "You can legal 34500" and later, more explicitly, "34500 is legal on an axle, as long as the other two axles are not overweight." F.F. ¶ 5. These text messages contradict Mr. Rotan's statement that he was trying to get Complainant to shift the weight in 100 lb. increments, and that he was not trying to get her to drive with 34,500 lbs. on the trailer axle. Mr. Rotan's contention that the text messages were "worded incorrectly" is unconvincing. Mr. Rotan also testified that he was not trying to get Complainant to drive the trailer at 34,500 lbs. on the trailer axle, and that he was only "Trying to get her to move the weight at all. If she can move it 100 pounds, she can then move it another 100 pounds until it becomes legal." TR at 47-48. It would require considerable mental gymnastics to interpret his text messages as directing Complainant to slam it incrementally down by 100 lbs. until the full 600 lbs. was shifted. Complainant also alleged that Mr. Rotan told her on the telephone that the load would be legal with 34,500 lbs. on the tandem axle. F.F. ¶ 6. While Complainant's credibility is not without its issues, her account is consistent with what Mr. Rotan wrote in his text messages and is a plausible explanation for her insistence that he was trying to get her to run an overweight load. Therefore, I do not credit Mr. Rotan's testimony that he was trying to get Complainant to incrementally slam the load down to the actual legal maximum of 34,000 lbs. on the tandem axle.

B. Protected Activity

Under the STAA, an employee can engage in protected activity in a number of ways. *See* 49 U.S.C. § 31105(a). The STAA protects employees who file complaints related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. 49 U.S.C. § 31105(a)(1)(A). The STAA also protects two types of work refusals: Section 31105(a)(B)(i) protects employees who refuse to operate a vehicle because such operation would violate a United States regulation related to commercial motor vehicle safety, health, or security, and Section 31105(a)(B)(ii) protects employees who refuse to operate a vehicle where the employee has a reasonable

apprehension of serious injury to herself or the public because of the vehicle's hazardous safety or security condition. 49 U.S.C. § 31105((a)(B)(i), (ii).

Complainant argues she engaged in protected activities by 1) filing internal complaints with Central Cal and Mr. Rotan related to violations of commercial vehicle safety regulations; and 2) by refusing to operate the tractor-trailer because such operation would result in violations of commercial vehicle safety regulations. ALJX 2 at 7. Respondents contend that Complainant did not engage in any protected activity under the STAA. ALJX 3 at 10.

1. Protected Activity under 49 U.S.C. § 31105(a)(1)(A)

The first issue is whether Complainant engaged in protected activity by filing internal complaints with Respondents related to violations of applicable vehicle weight limits and regulations on December 18, 2015.

Legal Standard

Complaints related to a violation of a commercial motor vehicle safety or security regulation, standard, or order are protected activity under the STAA. 49 U.S.C. § 31105(a)(1)(A). Internal complaints are protected, and a complaint may be oral, informal, or unofficial, but must be communicated to management. *Irwin v. Nashville Plywood Inc.*, ARB No. 16-033, ALJ No. 2014-STA-61, slip op. at 8-9 (ARB Sept. 27, 2017); *Ulrich v. Swift Transp. Corp.*, ARB No. 11-016, ALJ No. 2010-STA-041, slip op. at 4 (ARB Mar. 27, 2012); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ 2008-STA-052, slip op. at 7 (ARB Jan. 31, 2011). A complaint need not explicitly mention a commercial motor vehicle safety standard to be protected, as long as the complaint "relates to" safety concerns. *Ulrich*, slip op. at 4; *Nix v. Nebi-RC Bottling Co., Inc.*, 84-STA-1, slip op. at 4 (Sec'y July 13, 1984). The employee also "need not prove an actual violation." *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011). However, in order to be protected, the employee's belief of an actual or potential violation must be both objectively and subjectively reasonable. *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-6, slip op. at 10 (ARB Jan. 10, 2018). The employee's belief is subjectively reasonable if the employee "actually believed that the conduct he complained of constituted a violation of relevant law." *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012). The "objective" component "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.*; *Garrett v. Bigfoot Energy Servs., LLC*, ARB No. 16-057, ALJ No. 2015-STA-047, slip op. at 7 (ARB May 14, 2018).

Contentions of the Parties

Complainant argues that she "filed complaints with Mr. Rotan about her refusal to haul the overweight load…and about her refusal to slam the brakes to shift the load," and that these complaints qualify as protected activities under 49 U.S.C. § 31105(a)(l)(A)(i). ALJX 2 at 8. She notes that she told Mr. Rotan that the trailer exceeded the legally permissible weight limit and argues her refusal to haul an overweight load was a complaint related to violations of commercial vehicle

weight regulations found at 23 C.F.R. § 658.17,[13] 49 C.F.R. § 392.2,[14] and Cal Veh Code § 35551.[15] *Id.* at 8-9. Complainant argues her complaints were objectively reasonable because she scaled the load and was aware that it was overweight on the trailer tandem axles. *Id.* at 9, 11. She argues that when Mr. Rotan still "insisted that she could operate the trailer with a tandem axle weight of 34,500 lbs., her refusal to do so was protected under 49 U.S.C. § 31105(a)(l)(A)(i)." *Id.* at 11.

Complaint also argues that her refusal to slam the load, viewed as a "complaint," related to 49 C.F.R. § 396.7, which prohibits operating a vehicle "in such a condition as to likely cause an accident or a breakdown of the vehicle," and 49 C.F.R. § 392.9, which prohibits a commercial motor vehicle from being operated unless cargo is properly distributed and adequately secured. *Id.* at 8-9; 49 C.F.R. §§ 396.7(a), 392.9(a)(1).[16] She argues that the refusal to slam the load was related to "a reasonably perceived violation of commercial motor vehicle safety regulations" because the "scale yard was often full of pedestrians, passenger cars, and other trucks" and "such a risky maneuver was unlikely to shift enough weight off the tandem axles to make the load legal." *Id.* at 8-9, 11. She also argues that such a belief was reasonable "[b]ased on her years of experience as a truck driver," and noted that Mr. Rotan has never been a truck driver and "has only minimal experience in the trucking industry." *Id.* at 11-12. Complainant also argued that if 600 lbs. could have been shifted, Complainant "reasonably believed that her trip through the steep mountain grade would cause the load to shift again" and become illegal or result in the tractor-trailer rolling over "[w]ith a few hard applications of the brakes." *Id.*

Respondents argue that Complainant did not engage in protected activity under Section 31105(a)(1)(A) because she did not make a complaint based on safety issues and she failed to demonstrate that she reasonably believed that the slam maneuver would cause or result in a vehicle safety violation.[17] ALJX 3 at 11. Respondents argue that Complainant only refused to perform the slam maneuver because she believed the weight would not shift enough, not because she had any safety concerns. *Id.* at 12. Further, Respondents contend that "the record demonstrates that

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[13] 23 C.F.R. § 658.17 requires vehicles operating on interstate highways to have a maximum gross weight of 80,000 pounds; a maximum gross weight on any one axle, including any one axle of a group of axles, of 20,000 pounds; and a maximum tandem axle weight of 34,000 pounds. 23 C.F.R. § 658.17 (b)-(d).

[14] 49 C.F.R. § 392.2 provides:

> Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with.

[15] Cal Veh Code § 35551 provides that "two consecutive sets of tandem axles may carry a gross weight of 34,000 pounds each if the overall distance between the first and last axles of the consecutive sets of tandem axles is 36 feet or more. The gross weight of each set of tandem axles shall not exceed 34,000 pounds and the gross weight of the two consecutive sets of tandem axles shall not exceed 68,000 pounds." Cal Veh Code § 35551(b).

[16] Complainant cites 49 C.F.R. § 392.9(b), which provides in part that drivers must assure themselves that "paragraph (a) of this section have been complied with before he/she drives that commercial motor vehicle." However, this portion of the regulations is not applicable to Complainant because the rules in paragraph (b) "do not apply to the driver of a sealed commercial motor vehicle who has been ordered not to open it to inspect its cargo or to the driver of a commercial motor vehicle that has been loaded in a manner that makes inspection of its cargo impracticable."

[17] Respondents also repeatedly refer to Mr. Rotan's instruction to slam the load as a request "to press the brakes," which is a mischaracterization of the nature of the slam maneuver. *See, e.g.*, ALJX 3 at 12, 13. "Slamming the load," as is implied in the name of the maneuver, involves much greater forces than simply "pressing the brakes."

[Complainant] was never instructed to haul an overweight load, but only to try to make the weight legal." *Id.* Respondents assert that Complainant's allegations are undermined by the fact that in the past when a load was overweight she would be assigned a new load or sent home, and that she drove the container to Comtrac "despite Mr. Rotan's directive to make the weight legal before driving." *Id.* at 12-13. Respondents contend that therefore, Complainant did not provide a sufficient "nexus" between her complaint and a potential safety concern. *Id.* at 13, citing *HC & M Transp., Inc.,* No. 90-STA-44, slip op. at 4-5 (there must be a "sufficient nexus between [a] complaint to [employer] and a safety violation so that the substance of his statement 'relat[ed] to a violation of a commercial motor vehicle safety rule.'") and *Calhoun v. United Parcel Serv.,* ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 18 (ARB Sept. 14, 2007) ("insistence…does not constitute a complaint pursuant to the STAA unless he expresses a reasonable and specific concern about the safety of the vehicle or a violation of the FMCSRs."). Respondents argue that even if she had raised safety concerns to Central Cal, such concerns were not reasonable. *Id.* at 13-14.

Analysis

i. Complaints related to the overweight load

The analysis is somewhat complicated by the Complainant's characterization of her refusals as "complaints," but a careful parsing of the allegations demonstrates that Complainant did engage in protected activity under Section 31105(a)(l)(A). First, Complainant informed Mr. Rotan that the tractor-trailer was overweight when she texted him on December 18, 2015, that the tandem axle was overweight by 600 lbs. F.F. ¶ 5. There is no dispute that the tandem axle was over the legal weight limit according to the scale ticket and relevant commercial vehicle weight regulations, and therefore her communication to Mr. Rotan that the load was overweight on its own constitutes protected activity.

Respondents argue that Complainant was never instructed to drive an overweight load, and therefore she did not engage in protected activity under Section 31105(a)(l)(A) by complaining about hauling an overweight load. ALJX at 12-13. However, despite Respondents' argument that Complainant was instructed only to make the load legal, not to drive an overweight load, the record demonstrates that Mr. Rotan's instruction was not so clear. The preponderance of the evidence shows that Mr. Rotan wanted Complainant to slam the load to 34,500 lbs., which was 500 lbs. above the legal limit. I did not credit Mr. Rotan's testimony that he wanted Complainant to incrementally slam the load down to 34,000 lbs. When viewed as a whole, the implication of Mr. Rotan's text instructions is that 34,500 lbs. was a legal weight on the tandem axle. Therefore, the effect of his instruction was not to make the load legal, but to shift the weight on the tandem axle so that it would still be 500 lbs. overweight.

Considering his instructions, Complainant's belief that he was asking her to run an overweight load was both subjectively and objectively reasonable. She established her subjective belief through her consistent testimony, supported in the record, that Mr. Rotan wanted her to run an overweight load. This belief was also objectively reasonable, as Mr. Rotan clearly stated in his text messages that 34,500 lbs. was a legal weight. The only plausible interpretation of his text messages is that he wanted her to shift the load by performing the slamming maneuver so that the weight in the tandem axle would be 34,500 lbs., which would still be overweight. Respondents' arguments that Complainant's allegations are undermined by the fact that in the past when a load was overweight she would be assigned a new load or sent home, and that she drove the container to

Comtrac "despite Mr. Rotan's directive to make the weight legal before driving," and unpersuasive given the clear language in Mr. Rotan's texts. While Mr. Rotan may have simply been misinformed, when Complainant informed him that his information was incorrect, he continued to insist that Complainant "do her job" by engaging in this slam maneuver. However, engaging in the slam maneuver for the purposes described by Mr. Rotan – i.e., to get the weight down to 34,500 lbs., would not have made the load legal. Given the context of Mr. Rotan's instructions, he was not ordering Complainant to make the load legal, but in fact ordering her to shift the weight to a level that *would not* have made it legal. Thus, considering his instructions in context, Complainant's statement that Mr. Rotan could not make her run an overweight load are protected activity under the STAA.

ii. Complaints related to slamming the load

Both Mr. Rotan and Complainant testified that the slamming technique does not violate any vehicle codes or DOT regulations. F.F. ¶¶ 3, 10. However, if Complainant had a subjectively and objectively reasonable belief that slamming the load presented safety concerns, a complaint about slamming the load would be protected under the STAA.

After reviewing the record as a whole, I find that Complainant did not have a subjectively reasonable belief that the actual maneuver of slamming the load at the scale yard presented a safety issue. Complainant testified that she thought about the safety implications of slamming the load after the fact, while she was at home thinking about the case. F.F. ¶ 11. She said that "maybe" there was traffic and people around the scale yard, but she could not "remember exactly" if such concerns were a reason why she did not slam the load. F.F. ¶ 11. As discussed above, I do not find her testimony on this point credible. Instead, the record supports the conclusion that she only refused to slam the load because she did not think it would move enough weight. She repeatedly testified that she refused to slam the load because she did not believe the maneuver would shift 600 lbs., and that slamming the load would not make it "legal." F.F. ¶¶ 9, 10, 11. The evidence demonstrates that even if there are valid safety concerns around slamming the load at the scale yard, Complainant's subjective reasoning at the time was related to the fact that the slam maneuver would not move enough weight to bring the tandem axle weight down to the legal maximum allowed. I find that she did not actually believe when she refused the instruction that the slam maneuver presented safety concerns, and therefore any "complaints" related to slamming the load presenting a safety issue are not protected.

Because I find that Complainant did not have a subjectively reasonable belief at the time that slamming the load presented a safety issue, I will not address whether any such belief was objectively reasonable or whether her refusal to slam the load was a sufficient communication to Mr. Rotan.[18]

[18] Respondents argue that Complainant did not inform Mr. Rotan or anyone else at Central call about safety concerns and therefore that she "fails to prove by a preponderance of evidence one of the four necessary elements of a STAA [claim]," namely that Central Cal or Mr. Rotan was aware of her protected activity. ALJX 3 at 16-17. While employer knowledge of the purported protected activity has sometimes been listed as a separate element in STAA claims, the STAA and its implementing regulations do not include employer knowledge as an explicit requirement at this stage of the proceedings. *See* 49 U.S.C. § 42121(b)(2)(B) (incorporated by 49 U.S.C. § 31105(b)(1)); 29 C.F.R. § 1978.109(a). Therefore, "an employer's knowledge of protected activity is not a separate element, but instead forms part of the causation analysis." *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-6, slip op. at 8, n.34 (ARB Jan. 10, 2018), citing *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-3, slip op. at 13, 16 (ARB June 24, 2011); *see also Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-042, slip op. at 2, n.3 (Feb. 18, 2016).

2. Protected Activity under 49 U.S.C. § 31105(a)(1)(B)(i) and 49 U.S.C. § 31105(a)(1)(B)(ii)

The next issue is whether Complainant engaged in protected activity when she 1) refused to operate her truck because the tandem axle exceeded the maximum legal weight permissible, and/or 2) refused instructions from Mr. Rotan to perform the slam maneuver.

Legal Standard

The STAA's work refusal clause protects two categories of work refusal. Section 31105(a)(1)(B)(i) protects an employee when "the employee refuses to operate a vehicle because the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C.A. § 31105(a)(1)(B)(i). The ARB has held that Section 31105(a)(1)(B)(i) includes refusals to operate a vehicle where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he or she refuses to operate the vehicle. *Ass't Sec'y and Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-61, slip op. at 9 (ARB Sept. 30, 2011)[19]; *see also Klosterman v. E.J. Davies, Inc.*, ARB No. 12-035, ALJ No. 2007-STA-019, slip op. at 6 (ARB Jan. 9, 2013); *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010- STA-022, slip op. at 7 (ARB Nov. 28, 2012).

Section 31105(a)(1)(B)(ii) protects an employee who refuses to drive because of a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition, and requires a showing that the employee "sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C.A. § 31105(a)(1)(B)(ii), (a)(2). "[A]n employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury or serious impairment to health." 29 C.F.R. § 1978.102(f).

Contentions of the Parties

Complainant argues that she engaged in protected activity under 49 U.S.C. § 31105 (a)(l)(B)(i) when she refused to haul the overweight load and when she refused to slam the load.

Further, while Complainant may not have informed anyone of safety concerns regarding the slam maneuver, she did inform Mr. Rotan that the tandem axle was overweight.

[19] As Complainant noted in her brief, ALJX 2 at 3, the ARB's interpretation of subsection (B)(i) in *Bailey*, ARB No. 10-001, is controlling. The ARB's decision in *Bailey* was reversed by the Eleventh Circuit Court of Appeals in *Koch Foods Inc. v. Secretary, U.S. Dept. of Labor*, 712 F.3d 476 (11th Cir. 2013), but in its remand order, the ARB noted that while the Eleventh Circuit's decision was the law of the case, "the Eleventh Circuit's opinion is at odds with the Second Circuit's opinion in *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d. 1195 (2nd Cir. 1993)…upon which we had relied, in part, in reaching our decision in this case." *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 14-041, ALJ No. 2008-STA-61, slip op. at 3, n. 6 (ARB May 30, 2014). In at least one later decision, the ARB has applied the "reasonable belief" standard under Section 31105(a)(1)(B)(i). *See Sinkfield v. Marten Transp., Ltd.*, ARB No. 16-037, ALJ No. 2015-STA-35, slip op. at 7-8 (ARB Jan. 17, 2018). As this matter does not arise out of the Eleventh Circuit, the ARB's interpretation of Section 31105(a)(1)(B)(i) is controlling. In an order denying summary decision in this matter issued on June 1, 2017, I cited the Eleventh's Circuit's interpretation of Section 31105(a)(1)(B)(i) for the proposition that Complainant needed to show an actual violation, regardless of her reasonable belief. *See* Order Denying Summary Decision, 2017-STA-00017 at 6 (June 1, 2017). However, had I applied the ARB's interpretation, the outcome of the order would not have been different as there were a number a genuine material disputes precluding granting summary decision.

ALJX 2 at 12, 14. Complainant argues that violations of the commercial vehicle weight regulations at 23 C.F.R. § 658.17, 49 C.F.R. § 392.2, and Cal Veh Code § 35551 would have occurred but for her refusal to haul the overweight load, and that violations of 49 C.F.R. §§ 396.7 and 392.9 would have occurred but for her refusal to slam the load and shift the cargo. ALJX 2 at 13-14.

Complainant also alleges she is protected under Section 31105(a)(1)(B)(ii) because she had a reasonable apprehension that the slamming maneuver "established a real danger of injury." ALJX 2 at 14. According to Complainant, she "sought correction of the unsafe condition, as required by 49 U.S.C. § 31105(a)(2), when she placed calls to [Mr. Rotan]" and "provided [him] with options, offering to either have the load re-worked or to haul a different container." *Id.* Complainant argues that instead of taking one of these options, Mr. Rotan "repeatedly attempted to coerce her to drive with a tandem axle weight of 34,500 lbs.," and her refusal to do so is protected activity. *Id.*

Respondents argue that Complainant's refusal to slam the load is not protected under Section 31105(a)(1)(B)(i) because this portion of the statute covers only "circumstances in which operation would result in an actual violation of the law," citing *Koch Foods, Inc. v. Sec'y, United States DOL,* 712 F.3d 476,478 (11th Cir. 2013), and, as Complainant conceded, this maneuver would not result in an actual violation of a regulation related to commercial motor vehicle safety. ALJX 3 at 14. Respondents also contend that Complainant must have informed Mr. Rotan of the safety basis for her refusal to perform the maneuver, which she did not do. *Id.*, citing *Ass't Sec'y & Brown v. Besco Steel Supply,* No. 93-STA-30, slip op. at 2 (Sec'y Jan. 24, 1995) and *La Rosa v. Barcelo Plant Growers, Inc.,* No. 96-STA-10 (ALJ Apr. 8, 1996). Further, Respondents argue that Complainant did not actually believe that slamming the load would possibly cause an accident and that if she was actually concerned about driving the load, she would not have driven it to Comtrac. *Id.* at 15.

Respondents also contend Complainant did not engage in protected activity under Section 31105(a)(1)(B)(ii) because 1) she did not alert Mr. Rotan to any alleged hazard or danger, and 2) she failed to show she had a reasonable apprehension that slamming the load would create a safety hazard. ALJX 3 at 16.

Legal Standard and Analysis

i. Refusal to drive overweight load

The analysis of whether Complainant's activities were protected under Sections 31105(a)(1)(B)(i) and (ii) are similar to the analysis under Section 31105(a)(1)(A) discussed above. Complainant informed Mr. Rotan that the tandem axle was overweight, and his solution was for her to slam the load until it reached 34,500 lbs. Complainant refused to do so because she did not believe that 600 lbs. would move. Regardless of whether this belief was reasonable or not, Complainant's refusal to follow Mr. Rotan's instructions was protected given the context of what he was asking.

Complainant argues that "[a]fter Mr. Rotan directed [Complainant] to shift 100 lbs. of the tandem axle and haul the load, she again refused because such operation would still violate weight regulations," and that Mr. Rotan "repeatedly attempted to coerce her to drive with a tandem axle

weight of 34,500 lbs."[20] ALJX 2 at 8, 14. The ARB has held that "[a] driver is protected under the STAA for refusing an order when a violation of DOT driving time regulations . . . is necessarily contemplated in the order, albeit at a somewhat later time." *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ No. 2012-STA-11, slip op. at 5 (ARB Apr. 30, 2014). Similarly, here, following Mr. Rotan's instruction would have resulted in the weight still being over the maximum allowable on the tandem axle. Inherent in his instruction to slam the load to 34,500 lbs. is the implication that this weight is legal. Had she followed Mr. Rotan's instructions to slam the load down to 34,500 lbs., the commercial vehicle weight regulations at 23 C.F.R. § 658.17, 49 C.F.R. § 392.2, and Cal Veh Code § 35551 would still have been violated. Therefore, I find that Complainant refused to operate her truck because the tandem axle exceeded the maximum legal weight permissible and her refusal was protected by Section 31105(a)(1)(B)(i).[21]

Respondents do not address the argument that Complainant's refusal to drive an overweight load was protected under Sections 31105(a)(1)(B)(i) and (B)(ii), despite this issue being listed as in dispute in the prehearing order. *See* "Issues in Dispute," *above*. However, Respondent's argument under Section 31105(a)(1)(A) that Mr. Rotan never instructed her to drive an overweight load would also be unavailing under subsections (B)(i) and (B)(ii) for the same reasons it is unavailing under subsections (1)(A). Specifically, when viewing his instructions in context, he was not merely directing her to "make the load legal," he was instructing her that slamming it to 34,500 lbs. would be legal.

Regarding Section 31105(a)(1)(B)(ii), Complainant needs to demonstrate that her refusal to drive an overweight load was based on a reasonable apprehension of serious injury to herself or the public, and that she sought, and was unable to obtain, a correction of the unsafe condition. 49 U.S.C.A. § 31105(a)(1)(B)(ii), (a)(2). Whether a complainant was reasonably apprehensive that driving a vehicle could result in possible injury to herself or the public must focus on the information available to the complainant at the time of the refusal. *Kennedy v. Advanced Student Transp.*, ARB No. 09-145, ALJ No. 2009-STA-49, slip op. at 7 (ARB Apr. 28, 2011). The reasonable belief test also requires that Complainant demonstrate she actually had an apprehension of serious injury to herself or others at the time of her refusal. *See, e.g.*, *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 27-28 (ARB July 14, 2000). Complainant refused to operate the load because it was overweight on the tandem axle per state and federal regulations. There is no indication that she believed at the time that the operation of the vehicle would result in an injury to her herself or the public. She testified at the hearing that having an overweight tractor or trailer presents safety concerns, F.F. ¶ 9, but like her after-the-fact contention that slamming the load presented safety concerns, I do not find this testimony sufficient to demonstrate by a preponderance of the evidence that she had a reasonable apprehension of serious injury to herself or the public at the time of her refusal. Therefore, regardless of whether driving tractor-trailer with an overweight tandem axle could result in possible injury, Complainant did not show that this was her actual belief at the time she refused to drive.

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[20] The former argument appears under the Section 31105(a)(1)(A) portion of Complainant's brief, but given that the argument deals with her "refusal," it is applicable under the Section 31105(a)(1)(B) analysis.

[21] Even if Mr. Rotan's testimony that he was trying to get her to slam the load down incrementally were to be believed, I find that Complainant's belief that he was trying to get her to run the load at 34,500 lbs. was reasonable and would be protected under Section 31105(a)(1)(B)(i). She actually believed this was what he was asking her to do, and a reasonable interpretation of his texts would lead to the same conclusion. Therefore, under her reasonable belief of the facts at the time she refused to operate the vehicle, *see Bailey, LLC*, ARB No. 10-001, slip op. at 9, driving the vehicle would have resulted in a violation of the commercial vehicle weight regulations.

ii. Refusal to slam the load

Complainant's refusal to slam the load, in and of itself, is not protected under the STAA for the same reasons as discussed above regarding Complainant's lack of a subjectively reasonable belief in any safety issue presented by an allegedly crowded scale yard.

Initially, Complainant failed to demonstrate that the slam maneuver actually violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health. 49 U.S.C.A. § 31105(a)(1)(B)(i). Complainant argues that the slam maneuver would have resulted in a violation of 49 C.F.R. § 396.7, which prohibits operating a vehicle "in such a condition as to likely cause an accident or a breakdown of the vehicle," and 49 C.F.R. § 392.9, which prohibits a commercial motor vehicle from being operated unless cargo is properly distributed and adequately secured. ALJX 2 at 14. However, Complainant did not establish that the slam maneuver would have resulted in violations of these regulations. Both Complainant and Mr. Rotan testified that the slam maneuver itself was legal, and both testified that the slam maneuver was performed regularly. Complainant's assertion that the area around the scale yard would have contributed to an accident is not credible, and there was no credible testimony that the slam maneuver would dislodge the cargo to such an extent as to make the cargo illegally distributed. Further, Complainant's own testimony that she regularly has to slam her breaks while going over the Donner Pass tends to show that slamming the breaks is a common occurrence.

Because Complainant has not shown the slam maneuver would result in an actual violation of a regulation, standard or order of the United States related to commercial motor vehicle safety or health, to be protected under Section 31105(a)(1)(B)(i), Complainant needs to establish that under her reasonable belief of the facts at the time, performing the slam maneuver would actually violate safety laws. However, for the reasons discussed above under the Section 31105(a)(1)(A) analysis, she has failed to do demonstrate a subjectively reasonable belief that this was the case. Therefore, I need not address whether any such concern was objectively reasonable, or whether she communicated such a concern to Mr. Rotan.

Similarly, Complainant's refusal to perform the slam maneuver, in and of itself, is not protected under Section 31105(a)(1)(B)(ii), since she has not shown she had a reasonable apprehension of serious injury to herself or the public, and that she sought, and was unable to obtain, a correction of the unsafe condition.

Conclusion

In sum, Complainant engaged in protected activity under Section 31105(a)(1)(A) when she complained to Mr. Rotan that the tandem axle was overweight, and under Section31105(a)(1)(B)(i) when she refused to drive an overweight load. She did not engage in protected activity under Section 31105(a)(1)(B)(ii). Nor did she engage in protected activity under Section 31105(a)(1)(A), Section 31105(a)(1)(B)(i), or (B)(ii) related to her refusal to perform the slam maneuver.

B. Contributing Factor

Legal Standard

Under the STAA, a complainant must prove, "as a fact and by a preponderance of the evidence," that protected activity was a contributing factor in the unfavorable personnel actions taken by his or her employer. *Palmer v. Canadian Nat'l Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 16 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams*, ARB No. 09-092, slip op. at 6; *Blackie*, ARB No. 11-054, slip op. at 9. To rule for an employee at this step, the ALJ must be persuaded that it is more likely than not that the protected activity played any role in the adverse action, and the ALJ may consider any relevant, admissible evidence in making this determination. *Palmer*, ARB No. 16-035, slip op. at 17-18, 52. The ARB has emphasized that the standard is low and "broad and forgiving": The protected activity need only play some role, and even an "[in]significant" or "[in]substantial" role suffices. *Id.* at 53 (citations omitted).

A complainant may establish that the protected activity was a contributing factor by direct or circumstantial evidence. *Blackie*, ARB No. 11-054, slip op. at 9. Circumstantial evidence may include temporal proximity, pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *Id.*, citing *Bechtel v. Competitive Tech., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12 (ARB Sept. 30, 2011). Proving causation through circumstantial evidence "requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee's claim that his protected activity was a contributing factor." *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 11-12 (ARB Nov. 5, 2013). An ALJ must consider the circumstantial evidence as a whole and not in discrete pieces when asking whether the evidence establishes contribution. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op at 17-18 (ARB Aug. 29, 2014). Generally, "the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation." *Blackie*, ARB No. 11-054, slip op. at 9, citing *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept 26, 2012) ("Temporal proximity is an important part of a case based on circumstantial evidence, often the 'most persuasive factor,'" quoting *Beliveau* v. *U.S. Dep't of Labor*, 170 F.3d 83, 87 (1st Cir. 1999)). However, temporal proximity is not always dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005) ("For example, where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action.").

In addition, "the ARB has repeatedly found that protected activity and employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment action in question or the employment action cannot be explained without discussing the protected activity." *Citationshares Management*, ARB No. 12-029, slip op. at 12; *see also Palmer*, ARB No. 16-035, slip op. at 58-59. Therefore, "[w]here protected activity and unfavorable employment actions are inextricably intertwined, causation is established without the need for circumstantial evidence…." *Id.*

For example, in *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012), the ARB held that because the complainant's protected disclosures caused the respondents to conduct an investigation that led to the complainant's discharge, the protected

activity and the adverse action were "inextricably intertwined." Slip op. at 8. In *Citationshares Management*, ARB No. 12-029, the ARB found that the complainant's safety report was the "sole cause" for the respondent's decision to remove the complainant from his flight assignment and call him to a meeting regarding insufficient safety reporting. Slip op. at 12. Therefore, because the adverse action could not be explained without discussing the protected activity, the two were "intertwined," sufficient to show the protect activity contributed to unfavorable employment actions. *Id.* at 12-13. Somewhat differently, in *Nagle v. Unified Turbines, Inc.*, ARB No. 13-010, ALJ No. 2009-AIR-24, slip op. at 4 (ARB May 31, 2013), the ARB affirmed the ALJ's finding that there was a "chain of causation" where the complainant reported a co-worker's drug use, which led the co-worker to attack the complainant. This altercation "is what caused [the respondent's owners] to angrily order [the complainant] to leave the premises." *Id.* In *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020 (ARB May 31, 2013) at 6-12, the ARB found that the contributing factor may be shown through a chain of events, and that in *Hutton*, it was "not disputed that the chain of events leading to [the complainant's] termination would not have commenced without [the complainant's] filing of a report of injury." ARB No. 11-091, slip op. at 12. However, the ARB has not adopted a "pure but-for" causation standard in analyzing whether protected activity was a factor in an adverse personnel action. *DeFrancesco v. Union Railroad Co.*, ARB No. 13-057, ALJ No. 2009-FRS-9, slip op. at 7 (ARB Sept. 30, 2015).

Contentions of the Parties

Complainant argues that Mr. Rotan's testimony that her "insubordination" was the reason for her termination is direct evidence that her protected activity was a contributing factor in her termination. ALJX 2 at 16. Complainant contends that "[s]he was terminated on the same phone call in which she filed protected complaints and after she would not 'do her job,' meaning she would not haul the overweight load or slam the cargo." *Id.* Complainant also argues that circumstantial evidence supports a finding of contribution. *Id.* Complainant notes that Respondents cited her "poor attitude" a reason for her termination, but note that she was never previously reprimanded for her attitude and Mr. Rotan testified that almost every truck driver has a bad attitude at some point. *Id.* at 16-17. Complainant also notes that there was close temporal proximity between the protected activity and her termination, sufficient to raise an inference of discrimination. *Id.* at 17.

Respondents argue first that Complainant "failed to show that Mr. Rotan or anyone else at Central Cal was aware of any protected activity prior to her termination." ALJX 3 at 17-18. Second, Respondents argue that her termination was for insubordination, specifically "for refusing to follow Central Cal's instruction to try to make the load's weight legal." *Id.* at 18.

Analysis

Here, Mr. Rotan said he fired Complainant for insubordination, namely her refusal to "listen to the instructions." F.F. ¶ 7. Complainant alleged that she was fired for refusing to haul an overweight load. F.F. ¶ 9. While perhaps not strictly the case, her allegation that she was fired for refusing to haul an overweight load is instructive of the intertwined nature of her termination and her complaint about the overweight load. When Complainant informed Mr. Rotan that the load was overweight, he instructed her to slam the load so that it would reach 34,500 lbs. on the tandem axle, which, according to Mr. Rotan, was "legal." F.F. ¶ 5. As discussed above, Mr. Rotan's assertion that he was only telling Complainant to slam the load in 100 lb. increments in order to reach 34,000 lbs. on the rear axle is not credible as it is contrary to his text messages and Complainant's testimony

regarding their telephone conversation. Complainant's interpretation of his instruction, that he was telling her that 34,500 lbs. was a legal weight on the rear axle, was reasonable considering his text messages. Complainant refused his instruction because she did not believe the slam maneuver would move 600 lbs. to make the weight legal, and she informed him that his statement that 34,500 lbs. was legal was "not true." F.F. ¶ 5. Therefore, while Respondents maintain that Complainant was fired solely for refusing to slam the load, the record reflects that she was fired for her refusal to follow Mr. Rotan's instructions, which were to slam the load down to 34,500 lbs. in the rear axle. Inherent in this instruction was the direction that 34,500 lbs. on the rear axle was a legal weight, which is not accurate, as noted by Complainant in her text message to Mr. Rotan. The protected activities of complaining about the overweight load and refusing drive a load at 34,500 lbs., implied in Mr. Rotan's instructions to slam the weight down to this level, are intertwined with her termination for "refusal to follow instructions." Therefore, I find that Complainant's protected activity was a contributing factor in her termination.

Even were the termination and protected activity not intertwined, circumstantial evidence supports the conclusion that Complainant's protected activity was a factor in her termination. The strongest circumstantial evidence supporting contribution is temporal proximity. Complainant made her complaints regarding the overweight container and refused to follow Mr. Rotan's instructions in text messages immediately preceding the telephone conversation during which she was terminated. Complainant also refused to follow his instructions during the telephone call itself. In addition, Mr. Rotan's explanation at the hearing that he was actually asking her to slam the load down to 34,000 lbs., in contrast to his text messages and Complainant's testimony, represent a shifting explanation for his actions. This implies that the protected activity was a contributing factor.

Mr. Rotan's attitude toward Complainant after she refused to follow his instructions also suggests that her protected activity at least contributed to her termination. The record shows that Mr. Rotan believed that 34,500 lbs. on the rear axle was a legally allowable weight; when Complainant contradicted him, he alleged that she did not know "what is legal and what is not." F.F. ¶ 5. In fact, Complainant's knowledge was accurate and Mr. Rotan's was not, and when she informed him that the back axle could not go over the legally proscribed weight, the two engaged in a "heated argument." F.F. ¶ 6. Mr. Rotan's response to Complainant's refusal to follow instructions was to terminate her employment. Complainant had not been disciplined in the past, and although Mr. Rotan stated she had a "poor attitude," he admitted that most truckers had attitude issues "on a daily basis." F.F. ¶ 7.

Other factors weigh against finding that the protected activity was a contributing factor. There is little evidence that there was an inconsistent application of Central Cal's policies. Insubordination is listed as a justification for termination in Central Cal's employee handbook, but there was no evidence that other employees have been fired for a similar form of insubordination. Additionally, both Complainant and Mr. Rotan testified that overweight loads were routinely sent for re-working. F.F. ¶ 3. This suggests that Respondents were not hostile in general to drivers reporting overweight loads. Moreover, the evidence shows that Complainant was not harmless in the events that lead to her termination. The record reflects that Complainant was hostile and insubordinate to her supervisor, an attitude that manifested at her deposition. F.F. ¶ 6 (Complainant yelled at Mr. Rotan when the two were engaged in "a heated argument" and she pounded on the table when recalling the incident at her deposition). Complainant admitted yelling at a supervisor could be grounds for termination, although she claimed she was unfamiliar with Central Cal's specific policy on insubordination. F.F. ¶ 9.

However, after weighing the evidence as a whole, I find that circumstantial evidence establishes that Complainant's protected activity of complaining about the overweight load, and her refusal to drive an overweight load (as implied in Mr. Rotan's instructions) was a contributing factor in her termination for insubordination.

C. Affirmative Defense

To avoid liability where a complainant has established that his or her protected activity was a contributing factor in an unfavorable personnel action, the employer must show by clear and convincing evidence that it would have taken the same personnel action absent the protected activity. 49 U.S.C. § 42121(b); 49 U.S.C. § 31105(b); 29 C.F.R. § 1978.109(b)(1). It is not enough to show that the employee's conduct constituted a legitimate independent reason justifying the adverse personnel action, or that the respondent *could have* taken the personnel action in the absence of the protected activity. *See Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014); *Pattenaude v. Tri-Am Transport, LLC*, ARB No. 15-007, ALJ No. 2013-STA-37, slip op. at 15-16 (ARB Jan. 12, 2017). Instead, the employer must show that it *would have* taken the same adverse action absent the protected activity through either direct or circumstantial evidence. *Speegle*, ARB No. 13-074, slip op. at 11. The employer's affirmative defense "is a fact-intensive assessment that requires a determination, on the record as a whole, how clear and convincing [the respondent's] lawful reasons were [for the unfavorable personnel action]." *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-033, ALJ No. 2014-STA-61, slip op. at 12 (ARB Sept. 27, 2017). "Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Williams*, ARB No. 09-092, slip op. at 5, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing Black's Law Dictionary at 577). The employer can meet its burden through direct or circumstantial evidence; circumstantial evidence can include evidence of the temporal proximity between the non-protected conduct and the adverse actions, the employee's work record, statements contained in relevant office policies, evidence of other similarly situated employees who suffered the same fate, and the proportional relationship between the adverse actions and the bases for the actions. *Speegle*, ARB No. 13-074, slip op. at 11.

Respondents have not produced clear and convincing evidence that they would have terminated Complainant's employment absent her protected activity. Respondents' only evidence is that the employee handbook provides that refusals to follow a supervisor's orders can result in discipline, up to and including termination. F.F. ¶ 7. Mr. Rotan testified that he fired Complainant for insubordination, and that Complainant was "very combative at times." This evidence does not, however, rise to the level of "clear and convincing" evidence that Mr. Rotan would have terminated Complainant for insubordination absent her complaint about the overweight load.

As noted by Complainant in her brief, "the ARB has repeatedly found that when an ostensibly legitimate basis for termination is inextricably intertwined with protected activity, Respondent must bear the risk that the 'mixed motives' are inseparable." *Tablas*, ARB No. 13-091, slip op. at 7; ALJX 2 at 18. In *Tablas*, the complainant refused to operate a truck-tractor with broken air brake lines, but did not wait at the depot for repairs to be made to his vehicle. *Id.* at 5. The ALJ held that "Respondent would have terminated the Complainant's employment in any event, because the Complainant did not wait at the depot for repairs to his vehicle to be made, as he should have done." *Id.* at 7. The ARB reversed the ALJ's decision, stating, "We are not convinced however that

Tablas's failure to wait for repairs was legally separable from his protected refusal to drive. But for the faulty air lines, there would have been no need to wait for repairs." *Id.*

Here, it is similarly difficult to separate Complainant's refusal to follow Mr. Rotan's instructions to slam the load and her protected refusal to drive an overweight load because inherent in his instructions was the direction that 34,500 lbs. on the rear axle was legal. In any event, Respondents did not put forth such a showing, stating only that her insubordination was the reason for her termination. ALJX 3 at 18. As the ARB has noted, "clear and convincing evidence" is "a tough standard, and not by accident. Congress appears to have intended that companies . . . face a difficult time defending themselves." *Tablas*, ARB No. 13-091, slip op. at 6 (quoting *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)). Respondents have failed to show by clear and convincing evidence that it would have taken the same personnel action absent the protected activity. Thus, Respondents are liable under the STAA.

D. Damages

Under the STAA, a successful complainant is entitled to: reinstatement; compensatory damages, including back pay, litigation costs, and attorney fees; abatement of any violation; and punitive damages in an amount not to exceed $ 250,000.[22] 49 U.S.C. § 31105(b)(3).

Complainant requests reinstatement, back wages in the amount of $22,317.18, compensatory damages for emotional distress in the amount of $25,000.00, punitive damages in the amount of $50,000 to "send a message to Respondents that they may not retaliate against drivers who exercise their rights under the STAA," attorney's fees and costs, and the expungement of all references to Complainant's protected activities and her separation from employment from Central Cal's personnel records. ALJX 2 at 20-24.

Respondents maintain Complainant is not owed any damages. ALJX 3 at 19. They also argue that she "is owed no remedies as she blatantly failed to mitigate her damages." *Id.* at 18. Respondents argue Complainant quit three jobs in a five month period and turned down overtime because "she likes her weekends." *Id.* Further, Respondents argue that "besides the multiple companies she was hired by in a six-month period, [Complainant] only applied to two other companies during her period of unemployment," and that her testimony about how often she looked for work was inconsistent. *Id.* at 18-19. Respondents argue that Complainant's claims of stress are "unfounded" because she provided "zero medical records to support these claims." *Id.* at 19. Respondents also contest punitive damages because the evidence shows they did not have any knowledge of "any alleged safety issues and surely could not have recklessly disregarded or intended to violate any federal law." *Id.*

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[22] If a respondent violates the STAA, the ALJ "shall order" the respondent to:

> (i) take affirmative action to abate the violation;
> (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
> (iii) pay compensatory damages, including backpay with interest and 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).

1. Reinstatement

Reinstatement to a complainant's former position with the same pay, terms, and privileges of employment is an automatic remedy under the STAA. 49 U.S.C.A. § 31105(b)(3)(A)(ii); *Dickey v. West Side Transp., Inc.*, ARB Nos. 06-151, 150, ALJ Nos. 2006-STA-026, -027, slip op. at 8 (ARB May 29, 2008). Reinstatement must be ordered unless it is impossible or impractical. *Williams*, ARB No. 09-092, slip op. at 10; *Mailloux*, ARB No. 07-084, slip op. at 10. An order of reinstatement is effective immediately upon receipt of the ALJ's decision. 29 C.F.R. § 1978.109(e).

Respondents did not argue, nor is there any evidence demonstrating, that reinstatement is impossible or impractical in this case. Therefore, Respondent Central Cal shall reinstate Complainant to her former position at the same pay, terms, and privileges of employment as she had prior to her termination, including any increases in pay or benefits that would have accrued. It is reasonable to assume that Respondent Central Cal will make a written offer to Complainant as listed above within 7 days of the date this Order is served on the parties. Complainant is not required to accept the reinstatement and must accept or reject reinstatement in writing within 14 days of the date of the written offer is received.

2. Back Pay

Under the STAA, a successful complainant is entitled to an award of back pay. 49 U.S.C.A. § 31105(b)(3). Back pay awards are calculated in accordance with the make-whole remedial scheme of Title VII of the Civil Rights Act. *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36, slip op. at 5-6 (ARB June 30, 2005). Back pay is awarded from the date of the retaliatory discharge and back pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement, or, in very limited circumstances, when the employee rejects a bona fide offer. *Mailloux*, ARB No. 07-084, slip op. at 10; *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035, slip op, at 5 (ARB Jan. 31, 2008); *Bryant*, ARB No. 04-014, slip op. at 5-6. The successful STAA complainant is also entitled to pre- and post- judgment interest on a back pay award. 29 C.F.R. § 1978.109(d)(l); *Mailloux*, ARB No. 07-084, slip op. at 10; *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-034, slip op. at 9 (ARB Dec. 29, 2000).

Complainant's Duty to Mitigate

The complainant has a duty to exercise reasonable diligence to mitigate back pay damages. *Hobson*, ARB Nos. 06-016, -053, slip op. at 6. However, the employer bears the burden of proving that the complainant did not exercise diligence in seeking and obtaining other employment. *Williams*, ARB No. 09-092, slip op. at 10-11; *Mailloux*, ARB No. 07-084, slip op. at 10; *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (ARB Mar. 29, 2000). The employer can meet this burden by establishing that substantially equivalent positions were available to the complainant, and that he or she failed to use reasonable diligence in attempting to secure such a position. *Hobson*, ARB Nos. 06-016, 06-053, slip op. at 6; *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 6-7 (ARB Mar. 31, 2005).

Respondents did not present any evidence that Complainant's diligence in seeking other employment was not reasonable. The discrepancies in her testimony about how often she looked for work are minimal, and I find on this record that she was reasonably diligent in her search.

Respondents stated that Complainant was hired by "multiple companies" in a six-month period, which demonstrates she was seeking work. Even though she did not seek out overtime and left jobs because she was not getting enough hours, this does not demonstrate that she failed to mitigate her damages. In short, Respondent has not met its burden to show that complainant was not diligent in seeking and obtaining other employment.

In mitigating her damages, a complainant must not only diligently seek substantially equivalent employment, but must also "act[]reasonably to maintain such employment." *Blackie v. D. Pierce Transportation, Inc.*, ARB No. 13-065, ALJ No. 2011-STA-55, slip op. at 15 (ARB June 17, 2014); *Pollack v. Continental Express*, ARB Nos. 07-073, 08-081; ALJ No. 2006-STA-001, slip op. at 12 (ARB Apr. 7, 2010). "A failure to mitigate damages through the retention of employment will reduce the employer's back pay liability in that the back pay award will be reduced by no less an amount than that which the complainant would have made had he remained in the interim employment throughout the remainder of the back pay period." *Blackie*, ARB No. 13-065, slip op. at 15. However, while a Title VII claimant "fails to mitigate damages by voluntarily quitting comparable interim employment for personal reasons, a voluntary quit does not toll the back pay period when it is motivated by unreasonable working conditions or an earnest search for better employment." *E.E.O.C. v. Delight Wholesale Co.*, 973 F.2d 664, 670 (8th Cir. 1992), citing *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277-78 (4th Cir. 1985); *see also Cook v. Guardian Lubricants, Inc.*, 95-STA-43, slip op. at 9-10 (ARB May 30, 1997).

Here, Complainant testified that she left her employment with CFL on February 12, 2016, because she was not earning enough money and it cost her more to live on the road than at home. F.F. ¶ 14. She was unemployed for 10 days before starting work with Tesla. *Id.* She stopped working with Tesla because it was hurting her back, feet, and hands, but she was only unemployed for four days before she started work for Bowen. *Id.* She left Bowen because she was not making enough money, and was unemployed for roughly 15 days before being hired by Wisdom. I find that her decision to leave these jobs and seek out better employment was reasonable, related to an earnest search for better employment, and therefore does not constitute a failure to mitigate her damages.

Calculation of the Back Pay Award

"While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with 'unrealistic exactitude.'" *Bryant*, ARB No. 04-014, slip op. at 6 (citations omitted). Back-pay awards are ordinarily reduced by the amount of an employee's interim earnings prior to reinstatement. *Smith v. Lake City Enterprises, Inc.*, ARB No. 11-087, ALJ No. 2006-STA-32, slip op. at 4 (ARB Nov. 20, 2012).

Complainant seeks back pay through July 7, 2016, since on this date she began earning $180.00 per day, which is more than the $172 per day she contends she made at Central Cal. ALJX 2 at 22. Based on her contention that she made $172 per day with Central Cal, Complainant calculated her back pay thusly: she was unemployed from December 19, 2015, to on or about January 12, 2016, a period of 24 days, and is therefore owed $4,128.00 in wage loss damages for this period; she was employed by CFL from January 13, 2016, until February 12, 2016, earning $ 102.78 per day, $69.22 less per day than with Central Cal, making her entitled to $2,145.82 in wage loss damages for this period; she was unemployed February 13, 2016, to February 21, 2016, a period of 9

days for which she claims wage loss damages in the amount of $1,548.00; she was employed by Tesla Motors, Inc. from February 22, 2016, to May 4, 2016, earning $78.86 per day, $93.14 less per day than with Central Cal, making her entitled to $6,799.22 in wage loss damages for this period; she was unemployed from May 5, 2016, to May 8, 2016, a period of 4 days, for which she claims $688.00 in wage loss; she was employed by Bowen Transportation, Inc. from May 9, 2016, to June 21, 2016, earning $69.02 per day, $102.98 less per day than with Central Cal, making her entitled to $4,428.14 for this period; she was unemployed from June 22, 2016, to July 6, 2016, a period of 15 days, for which she claims $2,580.00; and she began employment with Wisdom Trucking, Inc. on July 7, 2016, earning $180 per day, after which she claims no further wage loss damages. ALJX 2 at 20-22. Respondents have not contested these calculations in their closing brief.

I will first address Complainant's contention that her back pay award should be based on a wage rate of $172 per day. Although Complainant did not explain in her brief or her responses to interrogatories (*see* RX 12 at 9) how she calculated her pay rate with Central Cal at $172 per day, in her deposition she stated she was paid $86 "per load going over the hill and coming back." RX 8 at 11. In addition, Mr. Rotan testified at the hearing that he believed Complainant made $172 every day, *see* TR at 44. However, while the record reflects that Complainant "generally" worked five days per week, she sometimes may have worked less or on a Saturday. *See* TR at 44-45, 136. The earnings statements in the record do not include the total number of days Complainant worked for Central Cal, and in fact suggest that her daily earnings varied. *See, e.g.*, CX 2 at 2. Therefore, I find that Complainant's back pay award should be calculated based upon her actual earnings, as evidenced in her earnings statements, divided by the total number of weeks she was employed by Central Cal in order to determine her average weekly wage.[23] During her total period of employment with Central Cal she earned $19,435.03. CX 2 at 1. She worked for Central Cal from July 7, 2015, to December 18, 2015, which is 23.6 weeks.[24] Dividing her total earnings by 23.6 weeks results in an average weekly wage of $823.52, which I will use as the basis for calculating her back pay award.

Next, I will address Complainant's calculation of her back pay award. Her calculations are flawed in that she includes weekends in her calculation of total back pay owed. She cannot claim that she primarily worked only weekdays, a claim generally supported by the record, and then calculate her back pay based on a daily amount for every single day of the week. Instead, her gross back pay award should be calculated based on her average weekly wage, and then reduced by any interim employment.

Complainant has been employed by Wisdom Trucking making $180 per day working only Monday through Friday, or $900 per week based on a five-day per week schedule, since July 7, 2016.[25] F.F. ¶ 14. Therefore, Complainant does not have any wage loss after July 7, 2016.[26] *See also*

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[23] The ARB has approved back pay calculations based on the complainant's average weekly wage. *See, e.g.*, *Bailey*, ARB No. 10-001, slip op. at 11; *Hobson*, ARB Nos. 06-016, 06-053, slip op. at 5.

[24] Between July 7, 2015, and December 18, 2015, there were 165 calendar days. 165 divided by 7 equals 23.57, which rounds to 23.6. *See Bryant*, ARB No. 04-014, slip op. at 6 (use of calendar weeks, rounded to the closest full week, is a reasonable basic computation unit).

[25] Based on Complainant's W-2 form from Wisdom, she had $23,935.80 in taxable income while working for Wisdom in 2016. CX 3 at 5. From July 7, 2016, to December 31, 2016, there are 178 days, or 25.4 weeks, which would result in an average weekly wage of $942.35. Therefore, regardless of whether her average weekly wage with Wisdom is based on her testimony or on her W-2, it is greater than her average weekly wage with Central Cal.

ALJX 2 at 22 (Complainant claims no wage loss damages after July 7, 2016). Between December 19, 2015, and July 7, 2016, there are 201 calendar days, or 28.7 weeks.[27] Complainant's gross back pay award for this period is $23,635.02.[28]

Complainant earned $3,186.42 with CFL, $5,757.39 with Tesla, and $2,967.86 with Bowen trucking, for a total of $11,911.67 in interim earnings. *See* F.F. ¶ 14. Subtracting these interim earnings from the gross back pay award, Complainant is entitled to a total back pay award of $11,723.35. She is also entitled to interest on this amount, calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and compounded daily. 29 C.F.R. § 1978.109(d)(l).

3. Compensatory Damages

Compensatory damages are designed to make the complainant whole for the harm caused by the employer's unlawful act. *Hobson*, ARB Nos. 06-016, 06-053, slip op. at 8. They "are meant to restore the employee to the same position he would have been in if not discriminated against." *Id.* Compensatory damage awards may compensate for direct pecuniary loss, as well as "such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Id.* The ARB has affirmed compensatory damage awards for emotional distress even absent medical evidence where the lay witness statements are credible and unrefuted. *Anderson*, ARB No. 13-016, slip op. at 7-8 (citing *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7-8 (ARB Aug. 31, 2011) and *Hobson*, ARB Nos. 06-016, -053, slip op. at 8). To recover damages for emotional distress, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused mental suffering or emotional anguish. *Testa v. Consol. Edison Co., Inc.*, ARB No. 08-029, ALJ No. 2007-STA-027, slip op. at 11 (ARB Mar. 19, 2010); *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022, slip op. at 20 (ARB June 30, 2009). A bare statement of emotional distress will not suffice. *Dixon v. U.S. Dep't of Interior, Bureau of Land Mgmt.*, ARB Nos. 06-147, 06-160; ALJ No. 2005-SDW-008, slip op. at 16 (ARB Aug. 28 2008).

While I found Complainant less than credible, I find that her testimony was more than a bare statement that she was distressed, in that she detailed the reasons for her distress, how it made her feel worthless as a driver to be terminated, and described how she sought treatment at the VA. Complainant testified that when she was terminated she was "very upset," "emotionally upset," "really, really stressed out," and "felt her worthiness as a driver had been shot to pieces." F.F. ¶ 12. She was terminated just before the holidays and right when family members moved in with her and said she was "totally devastated" by the financial pressures triggered by her termination. *Id.* She testified that she could not focus or sleep, and could not do anything "for a while there." *Id.* Complainant described how she had felt "stable" with Central Cal because she had been there for almost six months. She then described how her termination from Central Cal was different from previous terminations – how this time she felt that she was terminated for doing her job and

[26] While Complainant has shown she has no wage loss from July 7, 2016, forward, Respondents' back pay liability does not end until Central Cal makes a bona fide, unconditional offer of reinstatement to Complainant. *Hobson*, ARB Nos. 06-016, 06-053, slip op. at 5 (back pay liability ends with an offer of reinstatement, not when the employee obtains comparable employment); *see also Dale,* ARB No. 04-003, slip op. at 6 ("when reinstatement is ordered, the employer must make a bona fide reinstatement offer. Back pay liability ends when the employer makes the bona fide unconditional offer of reinstatement or when the complainant declines such an offer.").

[27] 201 divided by 7 days per week.

[28] $823.52 average weekly wage multiplied by 28.7 weeks.

following the law, and how this was distressing to her. She saw her regular doctor at the VA and a counselor for depression related to her termination, but also because her mother had recently passed away. *Id.* She missed two payments on her mortgage, but admitted that she had missed payments in the past. *Id.* Based on this detailed testimony that was consistent between her deposition testimony and her testimony at the hearing, I find that Complainant sufficiently established that she experienced at least some emotional distress as a result of her termination.

However, I found her less than credible overall because of her attempt to make her case about the safety of the slam maneuver after the fact. Her testimony that this was part of the reason she refused to slam the load therefore cautions against affording her testimony about her distress significant weight. There was no other evidence to corroborate her testimony, such as medical records or testimony from other witnesses regarding the level of her distress. The record also shows that Complainant was able to find a job relatively quickly, and that however distressing her termination may have been, she was able to recover. She did not demonstrate that the distress caused by her termination was severe, and some of her distress was likely related to the fact that she was already behind on her mortgage payments and the recent death of her mother. She also suggested that the physical symptoms she alleged occurred – that her back "flared up," that her "nerves went crazy," that she gained weight and did not sleep well – also happened before her termination, and that they re-emerged after her termination (*see* F.F. ¶ 12, such symptoms "got repeated" after her termination). Considering all of this evidence, given her credibility issues and the lack of supporting evidence for her distress, I find that relief for the emotional stress she experienced should be minimal.

"A key step in determining the amount is a comparison with awards made in similar cases." *Evans*, ARB Nos. 07-118, -121, slip op. at 20. In cases where there is emotional distress, but little detail that would tend to show that the distress was severe, awards have been $10,000 or less. *See, e.g.*, *Hobson v. Combined Transport, Inc.*, ALJ No. 2005-STA-035, slip op. at 12 (ALJ Nov. 10, 2005) ($5,000 for credible testimony of "increased anxiety and stress"), *aff'd.* ARB Nos. 06-016, 053 (ARB Jan. 31, 2008); *Jackson v. Butler & Co.*, ALJ No. 2003-STA-026, slip op. at 10 (ALJ June 25, 2003) ($4,000 based on unrefuted evidence that the complainant felt "moody, depressed, and short tempered with a low self-esteem and sense of embarrassment," although there was no medical evidence in support of the finding), *aff'd.* ARB Nos. 03-116, -144 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co.*, ALJ No. 2002-STA-035, slip op. at 41–42 (ALJ Mar. 6, 2003) ($10,000 in emotional distress due to "unrefuted and credible" evidence of marital strain and financial insecurity), *aff'd.*, ARB Nos. 03-071, -095 (ARB Aug. 6, 2004); *Barnum v. J.D.C. Logistics, Inc.*, ALJ No. 2008-STA-6, slip op. at 6-7 (ALJ Dec. 17, 2007) ($5,000 based on the complainant's testimony of stress from loss of insurance and benefits), *aff'd*, ARB No. 08-030 (ARB Feb. 27, 2009); *Carter v. Marten Transport, Ltd.*, ALJ No. 2005-STA-63, slip op. at 39-40 (ALJ May 5, 2006) ($10,000 for emotional distress based on complainant's testimony about depression and distress, having to live off his retirement funds and continued unemployment), *aff'd*, ARB Nos. 06-101, 06-159 (ARB June 30, 2008); *Shields v. James E. Owen Trucking, Inc.*, ALJ No. 2007-STA-22, slip op. at 33-35 (ALJ Nov. 19, 2007) (awarding $2,000 where the complainant did not provide "adequate evidence of substantial emotional distress" but the ALJ found his and his fiancée's testimony "indicate[d] some amount of emotional distress"), *aff'd*, ARB No. 08-021 (ARB Nov. 30, 2009); *Irwin v. Nashville Plywood Inc.*, ALJ No. 2014-STA-61, slip op. at 26 (ALJ Dec. 29, 2015) (awarding complainant $15,000 credible and unrefuted testimony that his affected his savings, retirement, and living circumstances and made him feel "betrayed," "worthless," and "depressed"), *aff'd*, ARB No. 16-033 (ARB Sept. 27, 2017).

Complainant argues that she should receive damages for her emotional distress in the amount of $25,000, citing to *Uhley v. Braun Milk Hauling, Inc.*, ALJ No. 2011-STA-33 (June 25, 2012), wherein the ALJ awarded $25,000 in compensatory damages for mental pain and emotional distress. ALJX 2 at 22. However, in *Uhley*, the ALJ based this award on the complainant's *credible* testimony that he experienced depression and emotional distress. *See Uhley*, ALJ No. 2011-STA-33, slip op. at 28-29. Since I do not find Complainant entirely credible, I do not find the award in *Uhley* persuasive in this case.

Based on a review of similar cases, I find that Complainant is entitled to an award of $5,000 for emotional distress caused by her termination. I am persuaded that her termination caused her some distress, but I am not convinced it rose to the level of being "totally devastating," and find that $5,000 is sufficient to compensate her for the distress she suffered due to being terminated by Central Cal.

4. Punitive Damages

Punitive damages are warranted "where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'" *Youngerman v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 5 & n.16 (ARB Feb. 27, 2013) (quoting *Ferguson*, ARB No. 10-075, slip op. at 98). "Gross or reckless indifference to the law can establish the intentional component needed for willfulness." *Beatty v. Celadon Trucking Servs.*, ARB Nos. 15-085, -086, ALJ No. 2015-STA-10, slip op. at 12 (ARB Dec. 8, 2017). In addition, egregious or reprehensible conduct is not necessarily required but may serve as evidence of an employer's intentional or reckless misbehavior. *Raye v. Pan Am Rys., Inc.,* ARB No. 14-074, ALJ No. 2013-FRS-084, slip op. at 8 (ARB Sept. 8, 2016). The amount of punitive damages award is "fundamentally a fact-based determination driven by the circumstances of the case." *Anderson v. Timex*, ARB No. 13-016, slip op. at 8. In *Anderson*, the ALJ found that the employer "set [the complainant] up for failure" and then after firing him and showed "callous disregard" for his welfare by not helping him get home. *Id.* The ARB upheld the punitive damages award of $12,500. *Id.* In *Beatty v. Celadon Trucking Servs.*, ARB Nos. 15-085, -086, the ARB upheld a "modest" punitive damages award of $10,000 based on the ALJ's reasoning that the employer "acted in complete disregard" of regulations relating to driver fatigue, but that the employer did not act maliciously or with the intent to harm. Slip op. at 12.

Here, Mr. Rotan appeared at least misinformed about the weight limitations for tandem axles given his repeated statement that 34,500 lbs. was legal, but the record falls far short of the callous disregard for Complainant's rights or the gross or reckless indifference to the law necessary to award punitive damages. There is no evidence that Respondents engaged in a pattern of disregarding the dangers of overweight loads, and the evidence is to the contrary: both Complainant and Mr. Rotan testified that they often returned loads to the yard to be re-worked. Given the circumstances of this case, I find that punitive damages are not warranted. Mr. Rotan did not act with such "callous disregard," or egregious or reprehensible conduct as to make a punitive damage award justified, and I do not find that he intentionally violated federal law.

5. Attorney's Fees

Because Complainant was successful in her prosecution of her case, she is entitled to attorney's fees and costs. 29 C.F.R. § 1978.109(d)(l). The parties are directed to submit briefing on

the amount of fees and costs awarded per the schedule below. Counsel should engage in a serious and good faith effort to amicably resolve any dispute concerning the amount of fees requested. *See Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("We emphasize, as we have before, that the determination of fees 'should not result in a second major litigation.'")

6. Expungement of Complainant's Personnel Record

Complainant is also entitled to have all references to her protected activity and her termination expunged from her personnel records as Central Cal. *See Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-22, slip op. at 13-14 (ARB Nov. 30, 2009)

7. Further Abatement of the Violation

Although not requested by Complainant, Respondent Central Cal shall post this Decision and Order for a minimum of 60 days from the date the Decision and Order is served on Respondents in a place and manner that is usual and customary for employees to gather and review employment related information. As the ARB has noted, "it is a standard remedy in discrimination cases to notify a respondent's employees of the outcome of a case against their employer. *Shields*, ARB No. 08-021, slip op. at 14.

ORDER

1. Complainant established that she engaged in protected activity and suffered an adverse action by Respondents within the meaning of the STAA.

2. Complainant established that the protected activity was a contributing factor in the adverse action.

3. Respondents did not establish by clear and convincing evidence that they would have taken the same adverse action in the absence of Complainant's protected activity.

4. Respondent Central Cal shall reinstate Complainant to her former position at the same pay, terms, and privileges of employment as she had prior to her termination, including any increases in pay or benefits that would have accrued. Respondent will make a written offer to Complainant as listed above within 7 days of the date this Order is served on the parties. Complainant must accept or reject the offer of reinstatement in writing within 14 days of the date the written offer is received.

5. Within 14 days of the date of this Order, Respondents shall pay Complainant back pay in the amount of $11,723.35, with interest in accordance with 26 U.S.C. § 6621(a)(2). *See* 29 C.F.R. § 1978.109(d)(1). Within 14 days of the date of this Order, Respondents shall also pay Complainant compensatory damages in the amount of $5,000. The total amount due to Complainant is $16,723.35. Respondents Central Cal and Ryan Rotan are jointly and severally liable for the award.

6. Complainant is not entitled to punitive damages.

7. Respondent Central Cal shall expunge all references to her protected activity and her termination from her personnel records at Central Cal. In the event that Complainant does not accept reinstatement, Central Cal shall give Complainant a favorable job reference for any future employment.

8. Respondent Central Cal shall post this Decision and Order for a minimum of 60 days from the date the Decision and Order is served on Respondents. The Decision and Order shall be posted in a place and manner that is usual and customary for employees to gather and review employment related information. Respondent Central Cal shall take all reasonable steps to ensure that no copy of the decision is altered or defaced during the 60 days the decision is posted.

9. Respondents shall pay Complainant's counsel reasonable attorney's fees and costs in this matter. Complainant's counsel is ordered to serve an initial petition for fees and costs on opposing counsel within 30 days of the date of this Order. All counsel are ordered to initiate a verbal discussion within 14 days after receipt of the fee petition in an effort to amicably resolve any dispute concerning the amount of fees requested. The discussion must include prior attorneys, if any, in addition to the current attorney. Counsel must make good faith efforts to resolve the fee dispute before filing the fee petition with me. If counsel are able to agree on the amount of fees and costs to be awarded, they are ordered to promptly memorialize their agreement in writing and to file it with me.

   If counsel cannot resolve all their disputes, Complainant's counsel is ordered to file within 30 days of the date the initial fee petition was served a Final Application for Fees and Costs. Within 21 calendar days after service of the Final Application, Respondents' counsel shall file and serve a Statement of Final Objections detailing the objections to the fees and costs sought and the basis for the objections. The Complainant's counsel may file a reply to Respondents' opposition 14 days after the opposition is served. No other reply briefs are permitted.

SO ORDERED.

RICHARD M. CLARK
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, the Associate Solicitor, Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded. Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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

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