U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 November 2018

CASE NO.: 2017-STA-00076

In the Matter of:

JAMES SIMPSON,
Complainant,

v.

EQUITY TRANSPORTATION COMPANY, INC.,
Respondent.

Appearances: Jack Schultz, Esq.
Schultz Gotham PLC, LLP
Detroit, Michigan
For the Complainant

Michael D. Ward, Esq.
Ward Law PC, LLP
Grand Rapids, Michigan
For the Respondent

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AWARDING CLAIM

This proceeding arises from a claim of whistleblower protection under Section 405 of the Surface Transportation Assistance Act ("STAA"), as amended.[1] The STAA and implementing regulations[2] protect employees from discharge, discipline and other forms of discrimination for engaging in protected activity, such as reporting violations of commercial motor vehicle and safety rules or refusing to operate a vehicle because of its unsafe condition. In this case, the Complainant requested a hearing before the Office of Administrative Law Judges because he objects to a finding by the Occupational Safety and Health Administration ("OSHA") that

[1] 49 U.S.C. § 31105 (2015).
[2] 29 C.F.R. Part 1978 (2015).

Respondent did not commit a violation of the STAA. The Complainant seeks back pay, compensation for special damages, punitive damages and attorney fees and costs.

STATEMENT OF THE CASE

On March 1, 2017, James Simpson ("Complainant" or "Simpson") filed a complaint against Equity Transportation Company, Inc. ("Respondent" or "Equity") with OSHA, alleging retaliation against him for an incident of protected activity occurring in October 2016.[3] On July 21, 2017, OSHA issued its determination, finding that no violation of STAA occurred. The Complainant objected to the determination and requested a hearing before the Office of Administrative Law Judges on August 6, 2017. The hearing in this matter was held on February 27, 2018 in Grand Rapids, Michigan. The Respondent filed its post-hearing brief on May 29, 2018 and the Complainant filed his post-hearing brief on May 31, 2018.[4] In reaching my decision, I have reviewed and considered the entire record, including the exhibits admitted into evidence, the testimony at the hearing and the parties' post-hearing briefs.

ISSUES

The issues in this case are whether the Complainant engaged in protected activity within the meaning of the STAA; whether the Respondent violated the STAA by discharging the Complainant; and, if so, whether the Respondent has established by clear and convincing evidence that it would have terminated Complainant even absent protected activity. If the Complainant prevails, I must consider the appropriate remedies. The Complaint alleges violations under 49 U.S.C. § 31105(a)(1)(B)(i), and § 31105(a)(1)(B)(ii).

APPLICABLE STANDARDS

The Employee Protection section of the STAA provides in part:

§ 31105. Employee protections

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

(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

[3] *See* Complaint and Complainant's Brief.
[4] The parties' briefs will hereinafter be cited as Complainant's Brief and Respondent's Brief.

(B) the employee refuses to operate a vehicle because-

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

49 U.S.C. § 31105(a). This provision was enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations."[5]

STAA whistleblower complaints are governed by the legal burdens set forth in whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("Air 21").[6] In order to prevail on his case, the Complainant must show, by a preponderance of the evidence, that he engaged in a protected activity, that the Respondent took an adverse employment action against him, and that the protected activity was a contributing factor to the adverse action. If the Complainant does not prove one of these elements, his claim fails.[7] If the Complainant proves that the Respondent discriminated against him because of his

[5] *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).
[6] 49 U.S.C. § 42121(b) (2015). *See* 49 U.S.C. § 31105(b)(1).
[7] *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sep. 30, 2016) (reissued with full dissent Jan. 4, 2017); *Dick v. Tango Transport*, ARB No. 14-054, ALJ

protected activity, then the Respondent may avoid liability by showing by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of the protected activity.[8]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CONTENTIONS OF THE PARTIES

Complainant's Contentions:

The Complainant contends that he engaged in protected activity in October of 2016 when he refused to drive a truck that he felt was unsafe due to a failed anti-lock brake system. (Complainant's Brief at 12-13). The Complainant contends that he was then subject to unfavorable personnel actions by Respondent by being asked to pay $1,000 and then being terminated when he refused to pay. *Id.* at 13-14. The Complainant asserts that his protected activity contributed to the adverse personnel actions, and that the Respondent has not met its burden to show by clear and convincing evidence that it would have taken the same unfavorable personnel actions absent the protected activity. *Id.* at 14-18.

Respondent's Contentions:

The Respondent contends that the Complainant has not met his burden to prove that he engaged in protected activity or that any such protected activity was a contributing factor in the adverse personnel actions the Respondent took. The Respondent argues that the Complainant cannot prevail on his claims of protected activity because he cannot establish that a regulation, standard or order of the United States would have been violated by the operation of the truck and because he sought and was able to obtain correction of the hazardous safety condition. (Respondent's Brief at 10-12). The Respondent also contends it had a legitimate, non-retaliatory basis for any disciplinary action taken against the Complainant. *Id.* at 12-15.

B. SUMMARY OF THE EVIDENCE

STIPULATIONS

Prior to the hearing, the Complainant and the Respondent entered into stipulations as set forth in the parties Pre-Hearing Statements filed on February 7, 2018 (Respondent) and February 8, 2018 (Complainant). Additional stipulations were agreed upon at the hearing. (Tr. at 10-12). The parties stipulated to the following:

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

No. 2013-STA-060 (ARB Aug. 30, 2016); *Pattenaude v. Tri-Am Transport,* ARB No. 15-007, ALJ No.2013-STA-037 (ARB Jan. 12, 2017); *DeFrancesco v. Union Railroad Co*., ARB No. 13-057, ALJ No. 2009-FRS-009 (ARB Sep. 30, 2015).

[8] 49 U.S.C. § 42121(b)(2)(B); *see also Palmer, supra,* ARB No. 16-035; *supra, Pattenaude,* ARB No. 15-007; *Dick v. Tango Transport, supra,* ARB No. 14-054.

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

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

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

5. Mr. Simpson first began driving a commercial vehicle with the Respondent, Equity Transportation Inc., on April 12, 2016.

6. In October 2016, the Freightliner, a semi-truck driven by Mr. Simpson, had repairs performed at a TA Truck Service in Gadsden, Alabama.

7. The Complainant has not worked or contracted with the Respondent at any time after November 11, 2016.

8. The Complainant filed a complaint against the Respondent with the Occupational Safety and Health Administration of the United Stated Department of Labor on March 1, 2017.

9. The Complainant's Occupational Safety and Health Administration complaint was timely.

10. The Occupational Safety and Health Administration dismissed the Complainant's complaint on July 21, 2017.

11. The Complainant timely submitted a request for a hearing dated August 6, 2017 to the Office of Administrative Law Judges of the Department of Labor.

12. The Complainant's request for a hearing was timely.

13. The Complainant resides at 2101 Briarwood Avenue, Southwest Number 210, Fort Payne, Alabama.

14. At all times material hereto, the Complainant was an employee within the meaning of 49 U.S.C. § 31101 and 29 C.F.R. § 1978.101(h).

15. The Respondent is a corporation with its principal place of business located at 3685 Dykstra Drive Northwest, Grand Rapids, Michigan.

16. At all times material hereto, the Respondent owned and the Complainant operated commercial motor vehicles as defined in 49 U.S.C. § 31101(a) and 29 C.F.R. § 1978.101(e).

17. The Complainant was not a member of a labor union and was not subject to a collective bargaining agreement.

18. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and the subject matter of this proceeding.

EXHIBITS

At the hearing, the following exhibits were offered and received into evidence. Administrative Law Judge Exhibits ("ALJX") 1 through 3;[9] Joint Exhibits ("JX") A through I;[10] Complainant's Exhibits ("CX") J, K, L-2 through L-4 and L-6 through L-11[11] and Respondent's Exhibits ("RX") A through X.[12]

SUMMARY OF HEARING TESTIMONY

James Simpson:[13]

Examination by Mr. Shultz

Mr. Simpson testified that he has a high school diploma and was working to obtain a BA in Criminal Justice. He stated that in late 2014 he trained for one month to learn to drive semi-trucks and was certified as a solo driver in December of 2014. He stated that he worked as an over-the-road trucker who hauled long distances and slept on the road, typically driving 400 to 650 miles per day. He testified that he applied for a job with Equity Transportation in March or April of 2016. He stated that he did not own his own truck and began working as a company driver making 40 cents a mile. (Tr. at 39-42). The Complainant testified that he was based out of Equity's terminal in Walker, Michigan. (Tr. at 42-43). He stated that his routes were assigned to him by a dispatcher, usually Brandon Whalen, who would e-mail him the route details. He stated that he would speak with a dispatcher if he needed to talk about loads, home time, truck issues or maintenance. (Tr. at 43-45).

The Complainant identified CX J as his pay stubs from Equity. (Tr. at 46). He stated that his first pay stub documented that he hauled one load 399 miles. He stated that his total pay was the miles he drove times 40 cents per mile. He stated that he received an advance from Equity for living expenses while he was on the road, which was documented as a post-tax deduction. He stated that his per diem for living expenses on the road that was not taxed. He explained that his taxable gross pay was his total pay minus his per diem. He stated that after taxes Equity took out a portion of his income to pay back the advance and added the per diem allowance to arrive at what he was actually paid. He stated that he was paid every week. (Tr. at 46-53).

[9] Tr. at 13.
[10] Tr. at 30.
[11] Tr. at 24-25, 97, 99, 107, 111, 112, 114, 120, 123 and 129.
[12] Tr. at 27-28, 257.
[13] Mr. Simpson's testimony is found at Tr. at 39-182.

He testified that for a short time in August 2016 he worked for Equity as an independent contractor but went back to being a company driver because he was not making enough money. He stated that in November of 2016 he was an Equity employee and not paid as an independent contractor. (Tr. at 53-58). He identified CX K as a spreadsheet he created summarizing his total pay from each of the stubs from when he worked as a company driver and then calculated his average pay by dividing the total by the 25 weeks that he worked. (Tr. at 58-60).

The Complainant testified that Rick Brady was the head of maintenance at Equity and ran the truck repair bay in Walker, Michigan. He stated that Equity had two repair shops, one in Walker, Michigan and one in Atlanta, Georgia. (Tr. at 61-62). He testified that Eric Dean was the head of operations at Equity and managed all the dispatchers and drivers. He stated that he did not interact with Mr. Dean very often because he usually spoke to his dispatcher. He stated that before October 2016 the work environment at Equity was "generally good" and that he got along with everyone and things usually went smoothly. He stated that prior to October 2016, he had never been formally disciplined or given a write-up for anything. He noted that he once became angry with his dispatcher, Mr. Whalen, because he received misinformation regarding a load he was supposed to pick up and was stranded all weekend, without a load, in Eau Claire, Wisconsin. He stated that he apologized to Mr. Whalen via e-mail and was not written up or disciplined for the incident. (Tr. at 62-63).

He stated that on October 21, 2016 he was driving from Atlanta, Georgia to Fort Payne, Alabama when the ABS indicator light in his truck came on. He stated that there were plans to do minor repairs on the truck in Fort Payne but when he took the truck to the shop in Fort Payne the mechanics told him they were not equipped to work on the braking system. He stated that the same day he took the truck to a Freightliner authorized service center at a Petro Truck Stop Service Station in Gadsden, Alabama.[14] (Tr. at 66-69). He testified that the mechanics at the Petro Station worked on the truck overnight and when he arrived on October 22, 2016 the ABS indicator light was off. He stated that he drove the truck five feet and the ABS indicator light came back on. He noted that ABS stood for the anti-lock braking system. He stated that he called Equity to tell them the truck was not repaired adequately. He spoke with Mr. Whalen and a man involved in the repair shop named Mike. He stated that when he called he was told to drive the truck to Michigan. (Tr. at 69-74). He stated that he felt "pressure" to drive the truck and did not feel right about doing that so he began recording his phone conversations with Equity. He stated that Mr. Whalen authorized the Petro mechanics to look at the truck a second time, but on October 24, 2016 the mechanics told him that the master electronic control module for the ABS system was not working and that they were unable to do the work needed to repair it. (Tr. at 74-75).

The Complainant identified JX A page 1 as the invoice from the Petro Station for the work performed from October 21st to the 22nd. He stated that the initial repairs cost $582.00. He identified JX A page 5 as the Petro Invoice for the work done on October 24, 2016. The notes from the invoice state that the mechanic replaced the ABS module but that the ABS indicator light continued to come on during test drives. (Tr. at 75-80). He stated that he talked to Mike and informed him that the Petro mechanics were unable to complete the repairs and that Mike

[14] The Complainant testified that Petro Truck Stop is the same company as TA Truck Stops. The service station is referred to as "Petro" or "TA" interchangeably throughout the testimony. (Tr. at 68).

told him he should have driven the truck to Michigan. (Tr. at 81). He stated that three people at Equity told him to drive the truck, but that he refused to do so. (Tr. at 82). He identified JX A page 9 as part of the invoice from Petro and stated that the technician's comment that "Equity told driver to roll to terminal" and "Mike would not authorize" meant that someone at Equity told the mechanic that the truck should be driven and that Mike would not authorize repairs to be done at the Petro Station. (Tr. at 85-86). He stated by October 24th he had written confirmation from the Petro mechanics that there was a complete failure of the ABS electronics. (Tr. at 85).

He discussed the recordings that he made using an application called Boldbeast Recorder and identified CX L-2 as a transcript of recording that he made on October 24, 2016.[15] (Tr. at 87). He stated that he thought he was speaking to either Rick Brady or Mike during the call. He stated that at that time he did not want to drive the truck with the ABS light illuminated because he had been told by the Petro technicians that there was a "total failure" of the ABS system and that the lack of an ABS system could be a safety issue that could cause the tires to lock up. He added that he could be issued a ticket for driving with an illuminated light or could be found to be at fault if he was involved in an accident, which could lead to loss of his license or jail time. (Tr. at 89-91).

The Complainant identified CX L-3 as a phone call between himself and Mike where he was told to drive the truck to Atlanta. (Tr. at 97). He stated that Equity also wanted him to pick up a load from Tennessee before heading to Atlanta. He stated that at that time he did not feel the truck was safe to drive because of the issues with the ABS system and he did not feel it would be safe to haul a load. (Tr. at 97-99). He identified CX L-4 as a phone conversation between himself and two other Equity employees, Mr. Whalen who then transferred him to Mr. Brady or to someone else in the shop. (Tr. at 100-101). He stated that he was still being asked to drive the truck but did not want to do so because he could get in trouble for driving with an illuminated ABS indicator light. (Tr. at 102).

He stated that CX L-6 was a recording of a phone conversation between himself and Mr. Brady from October 25, 2016. (Tr. at 107). He stated that at the time he was feeling depressed because he had been repeatedly told to drive on "bad brakes" and that there were documents (referring to the invoices at JX 1) that the ABS system had completely failed. He stated that Rick Brady told him he could either drive to Atlanta or to Birmingham. He testified that when he asked if there was any other option he hoped that Mr. Brady would say that truck could be towed. (Tr. at 108-109).

The Complainant stated that CX L-7 is a recording of a conversation between him and Mr. Whalen that also took place on October 25, 2016. (Tr. at 112-113). He stated that CX L-8 is a recording of another conversation between himself and Mr. Whalen. (Tr. at 113-114). He stated that the ECU is the engine control unit and that the technicians at Petro told him the ECU was tied to the ABS control module and that failure in one system could lead to problems with the other. (Tr. at 114).

[15] The recordings were played for the court at the hearing and the transcripts were offered into evidence as CX L-2 through 4 and L-6 through 11.

The Complainant testified that the truck was eventually towed to the Freightliner in Birmingham, Alabama at Equity's expense and that the tow cost around $580. He stated that .after the truck was repaired he picked up a load in the area and returned to Kentwood, Michigan. (Tr. at 114-116). He stated that JX A pages 7 and 8 are an invoice for the repairs performed at Freightliner in Birmingham. (Tr. at 116-117). He stated that CX L-9 is another conversation with Mr. Whalen about paying for the towing expenses. (Tr. at 118-119).

The Complainant testified that after his truck was repaired he was called into a meeting with Eric Dean on November 11, 2016. He stated that he recorded his meeting with Mr. Dean and identified the transcript of the recording as CX L-10. He stated that he met with Mr. Dean at the Equity office in Walker, Michigan and that only he and Mr. Dean were in the room. (Tr. at 119-122). He interpreted Mr. Dean's statement that he should have unplugged the ABS light to mean that he should have committed a crime by concealing or obstructing that the ABS indicator light was illuminated. Asked how he felt about Mr. Dean's repeating the phrase "Equity is not a good fit for you, and you're not a good fit for Equity," he stated that he was depressed and exhausted and that he felt the purpose of the meeting was to fire him or to pressure him "out the door." (Tr. at 123-124).

He was asked about an issue with him driving the truck to Pennsylvania instead of returning it to the shop in Walker and stated that he had been informed in Birmingham that the truck had a small oil leak near the turbo that would eventually need to be fixed, but that he did not think the repair was urgent. He stated that after picking up a load in Atlanta and dropping it off in Kentwood, Michigan, he was informed by dispatch that there was a "hot load," meaning a load that urgently needed to be delivered, and that because he was a company driver on forced dispatch he was unable to refuse the load. (Tr. at 124-125). He stated that the day before his meeting with Mr. Dean, he was involved in a backing accident at a truck stop where he backed his trailer into a car carrier damaging one of the cars. (Tr. at 125-126).

Asked if he ever tampered with any Equity equipment, he stated that he did not. (Tr. at 126). He stated that he did not go into the meeting with Mr. Dean planning to quit but did not think that he should have had to pay $1,000 to Equity. *Id.* He felt that the $1,000 was retaliatory. *Id.* He identified CX L-11 as the second conversation between himself and Mr. Dean. (Tr. at 127-128). He stated that he refused to pay $1,000 to Equity and that it had been established in the first meeting that if he didn't pay that he would be fired. He stated that after the second meeting he was sent home. He stated that he did not intend to quit during that second meeting and that he believed he was terminated because he cost Equity extra money by refusing to drive on bad brakes. He stated that he was never told he would still have a job if he did not pay the $1,000. Asked how the termination made him feel, he stated that at the time he was emotionally drained, depressed and exhausted from lack of sleep. (Tr. at 129-130). He stated that he was unable to drive for a month and a half because he was an "emotional wreck" and it would have been unsafe. He testified that he got a new job around January 19, 2017 at Delta Freight Systems and that Delta paid him about the same as Equity. (Tr. at 130-132).

Examination by Mr. Ward

The Complainant stated that he applied to work at Delta Freight Systems around January 10, 2017 and that he did not work between November 12, 2016 and then because he was depressed. He testified that prior to working at Equity, he worked as a flatbed truck driver for WTI and before that he worked for TransAm Trucking. He stated that he left both of those jobs voluntarily and was not involved in any accidents while working for those companies. He testified that he had two accidents while employed at Equity, one in May of 2016 and one in November of 2016. (Tr. at 134-138).

The Complainant testified that he considered, but did not attempt, rerouting wires in the truck dashboard in order to charge his phone with the cigarette lighter. He guaranteed that the repairs to the dashboard wiring were not related to anything that he did. He stated that the cigarette lighter was not working because of a device called a low voltage disconnect. He denied tampering with any wires related to the cigarette lighter or the low voltage disconnect. He stated that the wiring in the dashboard was repaired by Freightliner in Birmingham. He stated that he did not know the cost of the repairs but that replacing the low voltage disconnect would cost around $400. He stated that he would not be surprised if the cost of the total repair to fix the low voltage disconnect was around $1,300. (Tr. at 138-140).

He stated that when he was leaving Freightliner in Birmingham he was informed there was a slight oil leak in the turbo. He testified that he communicated the issue to Equity and was told that it could be repaired in Michigan since it was not an urgent problem. He stated that he was not given a date to bring the truck to the Equity shop for repairs. (Tr. at 140-142). He stated that when he was told about the oil leak he was told it was "very, very minor" and that he and Equity both agreed the truck was safe to drive at that point. (Tr. at 168-169).

He discussed his November 11, 2016 meeting with Mr. Dean and stated that he was told he had to pay Equity $1,000 and that repayment could be worked out between him and Mr. Dean. He testified that Mr. Dean knew he did not have $1,000 but also that he did not think he owed Equity the money. He stated that he never told Mr. Dean that he should not have to repay the money but added that he felt that his attempts to "clarify" the situation were brushed off and that Mr. Dean was verbally "pressing the point" and continued to speak so that he could not go back and clarify a particular issue. He stated that the whole meeting felt rushed and that he felt like he had to agree or he would be "out the door." He stated that he was depressed at the time of the meeting and that prevented him from speaking up and saying what was on his mind. He testified that he has never been treated for depression and never told anyone at Equity that he was feeling depressed. (Tr. at 142-147).

The Complainant was shown RX V and stated that he had never seen the document before. Asked about the statement "sent Brandon a text message swearing for no reason," he stated that he did swear at Mr. Whalen but had a good reason for doing so. (Tr. at 147-149). He testified that he texted with Mr. Whalen all the time and identified RX I is a copy of the text messages sent between himself and Mr. Whalen. (Tr. at 152-155). Asked about the other items listed on RX V, he stated that he considered tampering with Equity equipment, but did not do so. He stated that he was not aware that there was a target date that he needed to have the truck back to the Equity shop. He addressed the backing incident and stated that he was told that was one of the reasons he was being given a three-day suspension. (Tr. at 150-152). He stated that he did

not ask any questions regarding his three-day suspension because it was "equitable" discipline with regards to the backing incident. (Tr. at 169-170). He stated that he did not feel like he could pay the $1,000 with a payment plan because Mr. Dean did not bring that up during their second meeting when he stated he could not afford to pay. (Tr. at 170).

He testified that "Mike" worked in the Equity shop and may have been the "afterhours shop guy." Regarding the decision to tow the truck, he stated that Mr. Whalen informed him, as noted in CX L-8, that he and Eric were "trying to figure this out," but that he did not know if Mr. Dean was actually involved in making the decision to tow the truck to Birmingham. (Tr. at 171-173). He acknowledged that there was no recording of the conversation where Equity agreed to tow the truck to Birmingham. He stated that no technician ever told him the ABS issue was only with the indicator light and not the brakes themselves. (Tr. at 173-177). He stated that he drove between 50 and 60 miles between when he noted the ABS light was illuminated and arriving at the Petro station in Gadsden. He stated that once the light went on there was no difference in how the truck felt to drive and that the brakes appeared to work. He stated that he asked the technicians at the Petro station if the truck was safe to drive and they said that they could not advise him as to whether or not he should drive the truck. (Tr. at 177-180).

Eric Dean:[16]

Examination by Mr. Shultz

Mr. Dean testified that he had four years of college but "left early" before going to work in the transportation industry. He stated that he was not a certified mechanic and not certified to repair semi-trucks or trailers. He stated that he had never driven a semi-truck. He testified that he was the transportation manager at Equity and oversaw the dispatch operations, load planning and customer service. He stated the he had a supervisory position and was able to discipline and/or fire employees. He stated that he had worked at Equity for almost two years. He stated that Brandon Whalen was a driver manager and his subordinate. He stated that one of Mr. Whalen's duties was to assign routes to drivers. He stated that Rick Brady was the day shift shop foreman. He stated that the Mike Turner was the director of maintenance in October of 2016. He stated that he did not know if the "Mike" referenced on the recordings was Mike Turner. (Tr. at 183-187).

Mr. Dean testified that he could not identify the participants in the records of CX L-2, L-3, L-4, L-6, L-7, L-8 or L-9 but identified CX L-10 and L-11 as recordings of the meetings he had with the Complainant on November 11, 2016. He stated that he was aware the Complainant had his vehicle repaired in Alabama and that he was involved in the decision to have the truck towed. He stated that he had been told that the Complainant did not want to drive but that the truck needed to get to a shop to be repaired. He stated that he was told the truck had a problem with its ABS but he was not aware of how severe it was. He stated that it was not his job to look at or approve repairs. (Tr. at 187-189).

Mr. Dean testified that in one of the recordings Mr. Simpson was asked to drive the truck to Equity's Atlanta shop for repairs and he agreed that the Complainant refused to do so. He agreed that the recordings showed that Mr. Simpson asked if there were other options besides

[16] Mr. Dean's testimony is found at Tr. at 183-253.

driving the truck to either Atlanta or Birmingham. He agreed that Mr. Simpson told Equity that it was a violation of the law to drive without a working ABS and that it would not be good for a driver to drive a truck with a brake or ABS light issue. (Tr. at 190-191). He agreed that it would be reasonable for a driver to believe that a truck was unsafe if there was a braking issue and the ABS light was on. (Tr. at 191). He stated that Equity wanted to repair the truck in Atlanta at an Equity facility because they like their own technicians to do the repairs. He stated that Mr. Whalen informed him about what was going on with the truck and that a decision was made to tow the truck to Freightliner in Birmingham. He stated that it cost Equity $575 to tow the truck and that Equity had to pay to put Mr. Simpson up in a hotel room and for five days of layover. (Tr. at 191-193).

When asked if he felt that Mr. Simpson should have driven the truck to Atlanta, he stated that the Equity technicians had informed him that there was no braking issue. Asked about his comment that Mr. Simpson should have unplugged the ABS, he stated that he had been informed by the technicians that the truck was drivable. He added that it was his understanding that there was no problem with the ABS system. When asked why he thought the light would need to be unplugged if there was no problem he stated that he did not know how the ABS system actually worked but that he was going by what the Equity technicians told him. He testified that he did not know why the Equity technicians thought the light should have been unplugged. He stated that he would never instruct anybody to do anything illegal. Asked if he thought Mr. Simpson should have unplugged the light, he replied that "everybody needs to drive safe." (Tr. at 191-197).

Asked what could happen if Mr. Simpson was pulled over with a lit ABS indicator, he stated that the truck could be shut down by the DOT. He agreed that tampering with an ABS indicator light was illegal. (Tr. at 197-198). Asked about his statement that the decision to discipline Mr. Simpson was because Equity had to spend $4,000 to repair the truck instead of $2,000 and if he was referring to the fact that the truck had to be towed to Birmingham instead of being repaired in Atlanta, he said "no" and added that the repairs ended up costing $4,000 because the lighter did not work so they had to pay for 4 to 5 more hours of repair. (Tr. at 198-199). He stated that he never inspected or made any repairs to the truck. He stated that he did not speak with any of the mechanics at Birmingham Freightliner. He stated that Mr. Simpson was the first person to mention the lighter issue and told him that the lighter would not charge his cell phone so he was going to look at the wires to try to trace the problem, which Mr. Dean interpreted to mean the Complainant was pulling wires out. (Tr. at 199-200). He stated that Equity's maintenance director at Equity's shop told him that more time was needed to repair the lighter. He also stated that Mr. Whalen told him that he (Mr. Whalen) had been told by the Freightliner technicians that wires had been pulled out from underneath the dashboard. He stated that he did not know if Mr. Whalen was lying. (Tr. at 200-203).

Asked if he gave Mr. Simpson an ultimatum of paying $1,000, he stated that he would not call it an ultimatum but would have considered it coaching or a disciplinary action. Asked if Mr. Simpson would still have a job if he choose not to pay the $1,000, he testified that they "could have talked about it" but that all he wanted to do was talk to Mr. Simpson about the backing accident and the other things he wrote down. He stated that paying $1,000 dollars was related to the tampering incident. (Tr. at 203-204). He identified RX T as a repair order written

up by Equity for repairing the ABS harness on October 27, 2016. (Tr. at 204-205). Asked if he told Mr. Simpson to pay $1,000 as compensation for any "harness issues," he replied that he asked Mr. Simpson to pay because wires had been pulled out from underneath the dash and there was downtime for putting the wires back in. He stated that he discussed a harness at the November 11, 2016 meeting because Mr. Simpson had mentioned the truck had harness issues in a conversation that was not recorded. He testified that on November 11, 2016 he had not seen RX T because it was a document that came from the shop. He stated that he had not seen any repair documents prior to the November 11, 2016 meeting. (Tr. at 205-207).

Mr. Dean was asked who told him Mr. Simpson should have to pay $1,000, and stated that he made the decision with his boss, Mike Scherens, who is Equity's General Manager. He testified that the backing incident occurred on private property and that the Complainant's CSA scores were not affected. (Tr. at 207-209). He stated that a CSA score was a transportation score that came from the U.S. Government for transportation companies. He stated that Mr. Simpson was not the first person to have a backing incident and stated that other Equity employees had been terminated for backing accidents. He testified that Mr. Simpson took a load to Pennsylvania rather than taking the truck to Equity's shop but agreed that Equity was at fault for dispatching him. (Tr. at 209-210).

Asked what he meant by his statement that "James Simpson was not a good fit for Equity and Equity was not a good fit for him," he stated that "due to the amount of accidents and occurrences we've had in the short amount of time that I was there . . . I was thinking that my feeling in the short time I was there, there was a lot of accidents and incidents occurring to that point." (Tr. at 210-211). Asked if he could imagine that such a statement would make a person feel like they were not welcome at Equity anymore, he stated "not necessarily. No." (Tr. at 211). He stated that in his opinion, telling someone they were not a good fit for Equity and that Equity was not a good fit for them would not make someone feel like they did not belong. (Tr. at 211-212). Asked if he wanted Mr. Simpson "gone" at the November 11, 2016 meeting he stated replied "no." Asked if Mike Scherens wanted Mr. Simpson "gone," he stated "no". (Tr. at 211).

Asked about his statement that Mr. Simpson "should have got back in the truck, got the load and went to Atlanta and had somebody look at the truck, because I deem those mechanics are not very good," he stated that he was speaking about the mechanics at Birmingham Freightliner. Asked why he felt they were not very good, he stated it was because it took four or five days to get everything fixed. (Tr. at 212-215). Asked when Mr. Simpson should have gone to Atlanta, he stated that the Complainant should have gone after the fix was complete. (Tr. at 217). He stated at the November 11, 2016 meeting that the Complainant's backing incident was the "camel that broke the straws back (sic)," and agreed that a lot of incidents led to the decision to discipline Mr. Simpson. However, he denied that Mr. Simpson's refusal to drive to Atlanta was a reason for the discipline. (Tr. at 218-219). Asked why he would bring up the Complainant's refusal to drive to Atlanta three times at the meeting if it had nothing to do with his discipline, he stated that he only felt like they needed to discuss the incidents listed on RX V. He agreed that RX V was not signed by Mr. Simpson. Asked why Mr. Simpson did not sign the paper, he stated that Equity policy is to have the employee sign once they are written up and "everything is laid out of what's going to happen" then the document is put in their file. He stated that he never showed Mr. Simpson RX V during their conversation. (Tr. at 220-221).

Asked what he meant by his comment to Mr. Simpson at page 3 of Exhibit L-10 that Mr. Simpson "did not want to drive your truck when the ABS light wouldn't work when all you had to do was unplug it and go 50 miles down the road, because you deemed it unsafe," he stated that went back to the "same thing of bringing the truck in, bringing the truck into the shop." (Tr. at 221). Asked what a "hot load" was, he stated it was an industry term for a load that the customer wanted as soon as possible. He testified that after the Complainant stated he would not pay the $1,000, Equity purchased him a bus ticket home. Asked how he came up with $1,000 as the amount that needed to be repaid, he stated that it was based on the time lost figuring out and fixing the lighter when it did not work. (Tr. at 223). He testified that a driver should not drive if he believes that doing so would break the law or if he believes that it is unsafe for himself and other people on the road. (Tr. at 224).

Examination by Mr. Ward

Mr. Dean identified RX S as a work order that was created when work was done and placed in the Equity system and then attached to an invoice once that document was received. He stated RX S was a work order for a tow bill in the amount of $575. He identified RX U as a work repair order for $1336.65. He testified that the order stated the description of the work done was "repair wiring, replace cigarette lighter module." He identified RX R as a repair order for $1,149 for repairing the ABS on the road. He identified RX T as a repair order for $1,331.45 to replace the ABS harness. He testified that the repair orders were documents maintained in the ordinary course of business at Equity. (Tr. at 225-229). He testified that the repair orders were created in the shop usually by the maintenance director or Rick Brady and were created when a repair was called into the shop. He indicated that the repair orders were generated in Equity's transportation system and that to his knowledge they were not created for use in this litigation. (Tr. at 249-250). Regarding RX U, he stated that he did not know where the comment "driver tore wiring out of dash" came from other than that it was entered by an Equity employee. He stated that the repair was at a facility other than Equity. He said that Equity did not do the repair but it would enter a repair order. Asked how the Equity employee became aware of the repair description he stated "either from an invoice or a phone call." (Tr. at 252-253).

He discussed the recording of his November 11, 2016 meeting with the Complainant and his statement that it cost Equity $1,000 for the Freightliner shop in Birmingham to "fix whatever they were going to fix" and to "put the wires back in, find out that it was a whatever you said, find out a harness or something, find out that the fuses were missing, find out that something was" and stated that he was discussing Mr. Simpson's actions of pulling the wires out. Asked about his reference to the "harness" he stated that there was no significance in that word and that he was discussing whatever the wires had been pulled out of. He stated that he was not discussing the ABS harness. (Tr. at 229-233).

He identified RX V as a written notice for Mr. Simpson and noted that he filled the document out. He stated that the November 10, 2016 incident was the backing accident that Mr. Simson was involved in. He was asked about his note that Mr. Simson "drove over 700 miles home without authorization" and stated that the Complainant "got mad and drove his truck empty . . . all the way home" from Wisconsin. He stated that the comment that the Complainant

"said [he] was going to tamper with Equity equipment" was a reference to the dashboard wires. He stated that the backing accident on November 10, 2016 was Mr. Simpson's third accident with the company. He discussed the comment that the Complainant was "told to report to the shop on Saturday, November 5, and did not do so" and stated that Mr. Simpson was told when he dropped a load off in Kentwood that he needed to bring the truck into the shop so the Equity technicians could look at the oil leak and check the work done at the other repair shops. He said that instead of returning to the shop, Mr. Simpson was dispatched to take a load from Kentwood to Pennsylvania. He stated that he wrote the note that Mr. Simpson was "terminated / James decided to quit." He testified that he took Mr. Simpson's actions to be a voluntary resignation. (Tr. at 233-237).

Asked to identify the "Mike" addressed in the recording, he stated that he could not be sure which Mike was referenced in the recordings. He stated that Mike McCue was on outside contractor who worked to find an Equity approved shop to handle repairs when a truck broke down on the road. He stated that he did not think that Mike McCue would have any authority to direct an Equity employee to drive any distance with an ABS light illuminated. (Tr. at 237-238).

Mr. Dean identified RX W as a copy of Mr. Simpson's personnel file cover sheet that was created by the safety department as part of the ordinary course of business. He stated that he did not know when the document was written. He stated that the document was kept on the outside of the file and was supposed to be a summary of what was inside the file. Mr. Dean stated that he did not know what was in Mr. Simpson's safety file itself and could not state if there were additional documents within the file that were not reflected on the cover sheet. (Tr. at 239-242). He identified RX I as a document created by Equity of Mr. Simpson's text messages to Equity and responses from Mr. Whalen. He stated that Equity did not maintain everyone's text messages but noted there were incidents where texts had been taken to the HR or safety departments. He stated that he did not personally compile the test messages but noted that they came from Mr. Whalen's cell phone. (Tr. at 244-247).

C. DISCUSSION

Facts not disputed or established by the evidence

I find the following facts to be established by the parties' stipulations, which I adopt, or by the testimony and exhibits received in evidence:

The Complainant worked as an over-the-road truck driver for the Respondent from April 12, 2016 until November 11, 2016. He is a resident of the state of Alabama. The Respondent has its principal place of business in the state of Michigan. The Complainant, James Simpson, was an "employee'' within the meaning of 49 U.S.C. § 31101(2) and 29 C.F.R. § 1978.101(h) at all times relevant hereto. The Respondent was an "employer" within the meaning of 49 U.S.C. § 31101(3) and 29 C.F.R. § 1978.101(i) at all times material hereto. The Respondent was also a 'person" as defined at 29 C.F.R. § 1978.101(k). The Respondent owned, and the Complainant operated, "commercial motor vehicles" as defined in 49 U.S.C. § 31101(1)(A) and 29 C.F.R § 1978.101(e). The Complainant was not a member of a labor union and was not subject to the terms of a collective bargaining agreement. On March 1, 2017, the Complainant timely filed a

complaint with the Secretary of Labor alleging that the Respondent discharged him and retaliated against him in violation of the STAA. On July 21, 2017, OSHA issued its Findings and dismissed the complaint. On August 6, 2017, the Complainant timely filed objections to the Secretary's Findings and Order and requested a hearing before an Administrative Law Judge. I have jurisdiction over the parties and subject matter of this proceeding.

During the period relevant to this case, the Complainant worked hauling loads for the Respondent across the eastern United States. On October 21, 2016, the Complainant was driving from Atlanta, Georgia to Fort Payne, Alabama when the ABS indicator light in his truck came on. The Complainant drove the truck to a TA/Petro Truck Stop Service Station in Gadsden, Alabama. Mechanics worked on the truck overnight and when the Complainant returned to the truck on October 22, 2016 the ABS indicator light was off. After driving the truck five feet, the ABS indicator light came back on. By October 24, 2016 the repairs to the anti-lock braking system were unable to be competed at the Petro station.

The truck was towed to a Freightliner facility in Birmingham, Alabama for additional repairs on October 25, 2016. The repairs to the ABS harness were completed on October 28, 2016. The technicians at Birmingham informed the Complainant that there was a small oil leak in the turbo. After repairs were complete, the Complainant picked up a load in Athens, Alabama and dropped it off at Kentwood, Michigan. He was then dispatched to take a load to Pennsylvania. On November 10, 2016, while in Pennsylvania, the Complainant backed his trailer into a car carrier damaging and scraping one of the cars. On November 11, 2016, the Complainant had a meeting with Mr. Eric Dean, the transportation manager at Equity, during which he was informed that he needed to pay $1000 and was suspended for three days. After informing Mr. Dean that he was unable to pay $1000, the Complainant's employment with Equity came to an end.

Did the Complainant engage in protected activity?

The Complainant contends that he engaged in activity protected under 49 U.S.C. § 31105(a)(1)(B)(i) and 31105(a)(1)(B)(ii) when he refused to drive a truck with an illuminated ABS indicator light.[17] The Respondent argues that the Complainant cannot prevail on his claims

[17] In his Post-Hearing brief, the Complainant also argues that he engaged in protected activity under section 31105(a)(1)(A), however that theory was not raised in any earlier pleading, including the initial complaint (*see* JX B), Complainant's objection to the secretary's findings and request for a hearing or his pre-hearing statement. I find that to address this new theory of liability would violate the Employer's due process rights. *See Ass't Sec'y & Helgren v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-44 (ARB July 31, 2003) (respondents in STAA cases have the right to know the theory on which the agency will proceed); *Kelley v. Heartland Express, Inc. of Iowa*, ARB No. 00-049, ALJ No. 1999-STA-29 (ARB Oct. 28, 2002) (affirming the ALJ's finding due process would be compromised if Complainant's new theories of liability, first raised in his post-hearing brief, were considered); *Douglas v. Owens*, 50 F.3d 1226, 1235-37 (3d Cir. 1995)(introduction of evidence without objection on one theory of liability did not show trial by consent or fair notice of new theory of recovery); *Carlisle Equipment Co. v. U.S. Secretary of Labor*, 24 F.3d 790, 794-95 (6th Cir. 1994)(due process violation where introduction of evidence did not fairly serve notice that new safety violation was entering case); *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357-59 (6th Cir. 1992)(STAA defendant was deprived of due process when Secretary's decision was based on theory that was not included in notice to carrier or tried by implied consent of parties). Thus, I conclude that only the question of whether the Complainant engaged in protected activity 49 U.S.C. § 31105(a)(1)(B)(i) and 31105(a)(1)(B)(ii) is at issue in this case.

of protected activity because he cannot establish that a regulation, standard or order of the United States would have been violated by the operation of the truck and because he sought and was able to obtain correction of the hazardous safety condition. The Complainant's alleged protected activity took place from October 22 to October 25, 2016.

The Complainant took the truck to a Petro Service Station in Gadsden, Alabama October 21, 2016 for repairs to the ABS indicator light. The technician comments on the invoice from the TA Truck Station dated October 21, 2016 state in pertinent part:

> checked ABS problem on trailer and hooked trailer testing cart to it found open circuit has no ABS light replaced pigtail and light on trailer and cle ared (*sic*) codes that were inactive after fixing lights and there are no active faults on trailer ABS[.] Checked tractor ABS problem hooked up JPRO to see what code was and LR ABS sensor was falling out pu lled (*sic*) LR wheel and brake drum to check sensor and found sensor too far away from exciter and met AL on sensor removed sensor and cleared and put back in with correct clearance reinstalled sensor an d (*sic*) tire drove around parking lot ligght (*sic*) went and (*sic*) there are no active ABS codes.

(JX A-1, A-2).

The Complainant testified that when he returned to the truck, the ABS light was initially off but re-illuminated after the truck was driven five feet. He stated that he called Equity to tell them the truck was not repaired adequately and was told to drive the truck to Michigan. He stated that he felt "pressure" to drive the truck and did not feel right about doing that. (Tr. at 69-74). He testified that Mr. Whalen eventually authorized additional repairs to be made to the truck at the Petro Station. (Tr. at 74-75, *see also* JX A-9). The technician comments invoice from the TA Truck Station dated October 24, 2016 state in pertinent part:

> Check and advised ABS light on tractor performed A BS (*sic*) check list found that module is bad and needs to be replaced . . . replaced module hasd (*sic*) dri ver (*sic*) drive around parking lot ABS light then went off as driver was pulling back in ABS light came b ack (*sic*) on ran code was same code for open circuit on RR sensor code then went to inactive cleared code had driver drive around parking lot code then came back as active called tech support told then wha t (*sic*) I had done tech support advised me that problem would most likely be in the computer[.]

(JX A-5, A-6).

The Complainant testified that on October 24, 2016, the Petro mechanics informed him that the master electronic control module for the ABS system was not working and needed repair but that the mechanics at the Petro station were unable to perform the needed work. (Tr. at 74-

75). He stated that he asked the technicians at the Petro station if the truck was safe to drive and that they could not advise him as to whether or not he should drive the truck. (Tr. at 177-180). He stated that he then spoke to three people at Equity, who all told him to drive the truck, but that he refused to do so. (Tr. at 80-82). The Complainant submitted recordings of his phone conversations.

On October 24, 2016 the Complainant recorded a conversation he had with Mike,[18] who worked in Equity's repair shop. (CX L-3). Mike told the Complainant that additional repairs to the truck would be done at Equity's shop in Atlanta. *Id.* The Complainant stated "Okay. So I'm going to have to take it to Atlanta, I guess," to which Mike responded "yes." *Id.* When the Complainant stated he would call dispatch and cancel his scheduled load, he was told that he could still take the load. *Id.* At the hearing, the Complainant testified that he had been instructed to drive the truck to Atlanta but that he did not think the truck was safe to drive because there was a "serious failure" of the ABS system and he did not feel like it would be safe to haul a load. (Tr. at 97-98).

The Complainant spoke to Rick Brady[19] on October 25, 2016. (CX L-6). During the call Mr. Brady stated "I instructed you to go to Atlanta last night and you guys refused . . . You can either take the truck to Freightliner or bring it to Atlanta." *Id.* When the Complainant asked if there was any other options Mr. Brady replied "no." *Id.* The Complainant asked if there was any choice other than driving the truck, but the call ended without a response. *Id.* At the hearing, the Complainant tested that he was feeling depressed because he had been repeatedly told to drive on "bad brakes." He testified that when he asked if there was any other option he hoped that Mr. Brady would say the truck could be towed. (Tr. at 108-109).

The Complainant also spoke to Brandon Whalen[20] on October 25, 2016, where he was again informed to take the truck to Atlanta. (CX L-8). When the Complainant asked what his other options were, he was told the other options were Freightliner in Birmingham or Kentwood, [Michigan]. *Id.* The Complainant stated that driving the truck was "unsafe and illegal" and was then told to take it 50 miles to Birmingham. *Id.* He again stated that driving the truck was unsafe and illegal because the mechanics at Petro were unable to fix the issues with the ABS and the engine control unit and then asked what he was supposed to do. *Id.* Mr. Whalen responded that he was "not sure" and stated "I agree with you" and that "me and Eric are trying to figure this out." *Id.*

The Complainant testified that the truck was eventually towed to the Freightliner repair shop in Birmingham. (Tr. at 82-83). Mr. Dean testified that he was involved in the decision to have the truck towed and stated that he had been told that the Complainant did not want to drive but that the truck needed to get to a shop to be repaired. He stated that he was told the truck had a problem with its ABS but that he was not aware of how severe it was. (Tr. at 187-189, 191-192). He testified that if the Complainant was pulled over with a lit ABS indicator that the truck

[18] Mr. Dean testified that there were two "Mikes," Mike Turner, who was a director of maintenance, and Mike McCue, who worked nights in the Equity repair shop. He said he could not tell by the voice which Mike was in the recordings. Tr. at 186-87.
[19] Mr. Dean identified Mr. Brady as a shop foreman. Tr. at 185.
[20] Mr. Dean identified Mr. Whalen as a driver manager, a truck supervisor. Tr. at 184.

could be shut down by the DOT. (Tr. at 198). Once the truck was towed to Freightliner Birmingham, the technician notes from the shop from October 26, 2016 state in pertinent part:

> Pulled unit into shop. Confirmed ABS light on. Connected meritor and pulled ABS codes, found active code . . . left rear wheel speed sensor open circuit. Disconnected sensor and checked resistance. . . . sensor is good, checked wiring between sensor harness and ABS ECU and have open circuit . . . traced through wiring harness and tracked open circuit to harness A06-37976. Will need harness replaced or overlay ran.

(JX A-8).

The technician notes from Birmingham Freightliner from October 26, 2016 state in pertinent part:

> Cut all cable ties from defective harness. Un-plugged all connectors from front ABS sensors and modulators. Removed harness from underneath cab. Routed new harness into place. Plugged sensors and modulators back up. Secured into place w/ new cable ties. Complete need to check and clear and inactive faults from unit.

(JX A-7, A-8).

The Complainant testified that after the repairs to the truck were completed he picked up a load in the area and returned to Kentwood, Michigan. (Tr. at 114-116).

Protected activity under 49 U.S.C. § 31105(a)(1)(B)(i)

The Complainant alleges that he engaged in protected activity under section 31105(a)(1)(B)(i) when he refused to drive a truck with incomplete repairs to the anti-lock braking system. To be protected under subparagraph (i), the complainant must show that operating the vehicle would have caused an actual violation of a motor carrier safety regulation; it is not sufficient that the driver had a reasonable belief about a violation.[21] 49 C.F.R. § 393.40(a) of the implementing regulations states that "each commercial vehicle must have brakes adequate to stop and hold the vehicle or combination of motor vehicles." Additionally, 49 C.F.R. § 393.48(a) states that "all brakes with which a motor vehicle is equipped must at all times be capable of operating."[22]

The Respondent argues that the Complainant did not engage in protected activity because he was never asked to drive the truck once it was determined it needed repairs and because the Complainant's subjective complaints regarding the ABS system were insufficient to show that

[21] *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026 (Oct. 31, 2007).

[22] 49 C.F.R. Parts 300-399 are regulations of the Federal Motor Carrier Safety Administration, Department of Transportation. 49 C.F.R. Part 393 addresses "Parts and Accessories Necessary for Safe Operation."

operating the truck would violate a law. The Complainant testified that he was asked several times to drive his truck on October 24 and October 25, 2016 with incomplete repairs to the anti-lock braking system. (Tr. at 82, 97-98, 102, 108). The Complainant also submitted recordings of his phone conversations with various Equity employees during this time. Initially, on October 24, 2016, the Complainant was told by Mike at Equity to take the truck to the Equity shop in Atlanta for additional repairs. (CX L-3). In that same conversation he was informed that he could still pick up a load. *Id.* The next morning the Complainant spoke with Rick Brady who stated "I instructed you to go to Atlanta last night and you guys refused . . . You can either take the truck to Freightliner in Birmingham or bring it to Atlanta." (CX L-6). Mr. Brady told the Complainant that he had no other options. *Id.* The Complainant then spoke with his dispatcher, Brandon Whalen, who told him to "take [the truck] to the Atlanta shop" and "I'm being told to send you to Atlanta." (CX L-8). When the Complainant stated that would be unsafe and illegal, Mr. Whalen said that it would be fine if the Complainant went to Birmingham. *Id.* The Complainant again stated that would be unsafe and illegal. Mr. Whalen agreed with the Complainant and stated that he and Eric [Dean] were attempting to figure something out. *Id.*

I find that these recordings support the Complainant's testimony.[23] The Complainant was told on October 24th that he was still expected to pick up a load. As picking up a load in a trailer that is being towed is not inherently reasonable, I find based on this conversation that Equity wanted the Complainant to drive the truck to pick up the load and then drive the truck to Atlanta for repairs upon completion of his work. Further, I find that the statements that the Complainant "go to Atlanta" and "take the truck" to either Birmingham or Atlanta to be tantamount to instructions that the Complainant drive the truck to another location so that additional repairs could be made. Further, Mr. Dean testified that he became involved in the decision to have the truck towed because the truck needed to get to a shop for repairs but that the Complainant did not want to drive it. (Tr. at 189). Thus, I find that Mr. Dean's testimony also supports the Complainant's assertions that he was told to drive the truck but refused to do so and that the truck was only towed after his repeated refusals.

The Respondent also argues that there was no issue with the brakes, only a faulty illuminator light, which should not have prevented the Complainant from operating the vehicle. The only evidence to support the Respondent's assertion is testimony from Mr. Dean, who stated that he had been informed by technicians at Equity that there were no braking issues and that the truck was drivable. (Tr. at 194). However, Mr. Dean testified that he is not a certified mechanic, had not been informed of the severity of the ABS issue or what the ABS was and that he never spoke to the mechanics in Alabama. (Tr. at 189, 191, 199-200). Thus, I find that his opinion regarding the condition of the truck is of little probative weight.

[23] The Respondent objected to these transcripts suggesting that they were not what they purported to be, *i.e.* discussions between the Complainant and Equity employees and were unable to be authenticated. (Tr. at 92, 94-96, 99, 105, 110, 112, 114). I overruled these objections at the hearings. (Tr. at 95-96, 99, 107, 111, 112-113, 114). The Complainant testified that these recordings were accurate representations of his conversations. (Tr. at 98, 103, 109-110, 112, 113-114). I further noted that the Respondent had an opportunity to present evidence to rebut the substance of the transcripts but failed to do so. (Tr. at 96). Additionally, I find CX L-3, L-6, and L-8 to be especially probative as the Equity employees the Complainant was conversing with are clearly identifiable within the four corners of the transcript.

The Complainant testified that the ABS indicator light in the truck re-illuminated after the initial repairs were made. (Tr. at 70, 72). He stated that was eventually informed by the mechanics at the Gadsden Petro Station that there was a problem with the anti-lock brake system in the engine control unit that they were unable to repair. (Tr. at 75). I find that the Complainant's belief about the condition of the truck's anti-lock brakes and ECU was not subjective as the Respondent contends, but is supported by the invoices from the TA Truck Service, which document several on-going issues with the truck. (JX A-1, A-2, A-5, A-6). Also important is the fact that additional repairs were made to the ABS system, including the complete replacement of a harness due a problem with the left rear wheel speed sensor, once the truck was inspected at the Freightliner shop in Birmingham. (JX A-7, A-8). Because additional defects in the ABS system were identified in Birmingham I find that the record shows that not all the brakes on the truck would have been capable of fully operating prior to the repairs in Birmingham. Furthermore, even assuming, as the Respondent appears to suggest, that the dangers of driving with a malfunctioning anti-lock brake illuminator may have been *de minimus*, doing so still would have violated a regulation relating to commercial motor vehicle safety, specifically 49 C.F.R. § 393.48(a) of the implementing regulations. There is no exception for *de minimus* or technical violations of the regulations.[24] I find that the Complainant's refusal to drive the truck constituted protected activity under 49 U.S.C. § 31105(a)(1)(B)(i).

Protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii)

The Complainant also asserts that he engaged in protected activity under section 31105(a)(1)(B)(ii) when he refused to drive a truck with an illuminated ABS light. To be protected under subparagraph (ii), a complainant must have a reasonable apprehension of serious injury. An apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health.[25] In addition, the complainant must have sought from the employer, and have been unable to obtain, correction of the unsafe condition.[26]

Here the Complainant testified that he had serious safety concerns about driving the truck without complete repairs to the anti-lock brakes because the brakes could "lock up" while he was driving. (Tr. at 90-91, 98). He expressed these concerns to the Respondent over the course of several phone conversations with Equity employees. (CX L-3, L-6, L-8). The Complainant testified that the mechanics at the Petro Station could not advise him as to whether the truck was safe to drive. (Tr. at 180). Driving a truck with malfunctioning anti-lock brakes would have been dangerous as the defect may have prevented the brakes from working properly and resulted in difficulty slowing or controlling the vehicle in an emergency situation. I find that a reasonable person in the Complainant's circumstances would have had a reasonable apprehension of serious injury due to the defective anti-lock brakes. Further, the Complainant made several attempts to

[24] *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004).
[25] *See Pollack v. Continental Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 3 (ARB Apr. 7, 2010; *Stauffer v. Walmart*, ARB No. 00-062, ALJ No. 1999-STA-021 (ARB July 31, 2001); 29 C.F.R. § 1978.102(f).
[26] *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-031 (ARB Sept. 14, 2007), *aff'd*, 576 F.3d 201 (4th Cir. 2009).

seek a correction of this safety issue when he asked Mr. Brady and Mr. Whalen if there were other options aside from driving the truck to either Atlanta or Birmingham but was unable to obtain a correction as the Respondent continued tell him there were no other options. (CX L-6, L-8).

Accordingly, for the reasons discussed, I find that the Complainant's conduct on October 24 and October 25, 2016 qualifies as a "refusal to operate" protected activity under 49 C.F.R. §§ 31105(a)(1)(B)(i) and (a)(1)(B)(ii).

Did the Complainant suffer from an adverse employment action?

Under the STAA, an adverse action is anything an employer does that could well dissuade a reasonable worker from engaging in protected activity.[27] The implementing regulations prohibit an adverse action and make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]"[28] Accordingly, any discharge by an employer constitutes an adverse action.[29] Under Board precedent, "except where an employee actually has resigned, an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee."[30]

Neither party disputes that the Complainant was told at the November 11, 2016 meeting that he needed to pay $1,000 and was being suspended for three days. However, the Complainant did not pay the fine or serve his suspension because his employment with Equity ended on November 11, 2016. The parties disagree on whether or not the end of the Complainant's employment was an adverse employment action against the Complainant. The Respondent argues that the Complainant voluntarily resigned. (Respondent's Brief at 6-7). However, citing to *Klosterman v. E.J. Davis*, ARB No. 035, ALJ No. 2007-STA-019 (ARB Sept. 30, 2010) and *Hood v. R&M Pro Transport, LLC,* ARB No. 15-010, ALJ. No. 2012-STA-036 (ARB Dec. 4, 2015), the Complainant alleges that he suffered an adverse employment action when he was fined and suspended and then terminated after refusing to pay the fine. (Complainant's Brief at 13-14).

In *Hood,* the complainant refused to drive an overweight load and left a voicemail for his dispatcher stating that he was "done" and would clean out his truck, which his employer interpreted as a statement of resignation. The Board upheld the ALJ's determination that the complainant's statement that he was "done" was not an unequivocal declaration of resignation and that by interpreting it as a resignation, the employer effectively discharged the

[27] *Strohl v. YRC, Inc.*, ARB No. 10-116, 2010-STA-35 (ARB Aug. 12, 2011).
[28] 29 C.F.R. §§ 1978.102(b) & (c).
[29] *Minne, supra,* slip op. at 15.
[30] *Minne, supra,* slip op. at 14 (citations omitted); *Nevarez v. Werner Enterprises*, ARB No. 14-010, ALJ No. 2013-STA-012 (ARB Oct. 30, 2015).

complainant.[31] In *Klosterman,* the complainant raised a complaint about a flat tire and walked out after he was told by his supervisor to "drive or go home." The supervisor then wrote a letter stating that the complainant had quit his employment. The Board concluded that the complainant had been subject to an adverse employment action, *i.e.* a discharge, when his supervisor told him to drive or go home and then immediately considered that he had voluntarily quit.[32] The Board determined that it was the supervisor's behavior, rather than the employee's, which ultimately ended the employment relationship.[33]

In this case, the Complainant met with Mr. Dean on November 11, 2016 and was informed that he was being placed on a three day suspension and asked to pay a fine of $1,000. Mr. Dean told the Complainant twice that he thought James Simpson was not a good fit for Equity and that Equity was not a good fit for James Simpson. (CX L-10 at 2, 5). Mr. Dean told the Complainant that he needed to "make a decision" and that it was not "working out" because the Complainant and the company were not making any money and the Complainant was causing "a few headaches." (*Id.* at 6). The Complainant was told to think about the situation and if he decided that Equity was not a good fit then Mr. Dean would get him a ride home. (*Id.* at 9). Later that day, the Complainant told Mr. Dean that he could not afford to pay $1,000 and stated that "if that means you're sending me home, I guess . . . it means you're sending me home," to which Mr. Dean responded "Okay. All right." (CX L-11). After this meeting, Mr. Dean wrote on the written notice "Terminated / James decided to quit." (RX V, Tr. at 236).

The Complainant testified that he felt that the purpose of the November 11, 2016 meeting was to fire him or to pressure him "out the door." (Tr. at 124). He testified that he felt that if he did not pay the $1,000 that he would be fired and that he was sent home after refusing to pay. (Tr. at 129). He stated that he did not intend to quit. *Id.* Mr. Dean testified that asking the Complainant to pay $1,000 was not an ultimatum and that he and Mr. Simpson "could have talked about" whether he would still have had a job even if he did not pay. (Tr. at 203). He testified that he took Mr. Simpson's actions to be a voluntary resignation. (Tr. at 236-237).

As explained above, under Board precedent, "an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee."[34] Here, the evidence in the record does not show that the Complainant voluntarily quit his employment. Like the complainants in *Hood* and *Klosterman,* who were given the option to drive a truck they felt was unsafe or to go home, the Complainant was given the option to pay $1,000 or to go home. I find that the Complainant's statement that he could not pay the $1,000, even if that meant he would be sent home, was not an unequivocal resignation, especially because he was also informed he was being given a three day suspension. The Complainant also testified at the hearing that he did not intend to quit. The parties' conversation regarding this was as follows:[35]

Mr. Simpson: I can't afford to pay 1000 bucks.

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[31] *Hood, supra,* slip op. at 5-6.
[32] *Klosterman, supra,* slip op. at 10-11.
[33] *Id.,* slip op. at 10.
[34] *Minne, supra,* slip op. at 14.
[35] *See* CX L-11.

Respondent: Okay.

Mr. Simpson: So if that means you're sending me home, I guess --

Respondent: Okay.

Mr. Simpson: -- it means you're sending me home.

Respondent: Okay. All right.

After the Complainant told Mr. Dean that he could not pay the $1,000, Mr. Dean chose to interpret this action as a resignation, rather than by addressing the issue or having further discussions about re-payment options. Although Mr. Dean testified at the hearing that he and the Complainant "could have talked about" whether or not the Complainant would have continued to have a job if he did not pay the fine, there is no evidence to show that possibility was ever conveyed to the Complainant in the November 11, 2015 meeting. Instead, as in *Klosterman,* it was the supervisor's behavior rather than the employee's that ultimately ended the employment relationship.[36] Respondent chose to believe that the Complainant quit, interpreting his statement as a voluntary resignation.

Based on the precedent set forth in *Minne* and *Klosterman,* I find that the Respondent's decision to treat the Complainant's action as a voluntary resignation constitutes a decision *by the Respondent* to discharge the Complainant from employment. Given that under the STAA, "any discharge by an employer constitutes adverse action,"[37] I find that the Respondent subjected the Complainant to adverse employment action.

Did the Respondent have knowledge of the Complainant's protected activity?

The Complainant must demonstrate that the Respondent was aware of his protected activity in order to establish it contributed to his termination. The evidence demonstrates that Mr. Whalen, the Complainant's dispatcher, and Rick Brady, Equity's maintenance director, were aware of his refusal to drive on October 25, 2016 because of the transcripts of the telephone calls. (CX L-6, CX L-8). Likewise, Mr. Dean testified that he was involved in the decision to have the truck towed after he had been informed by Mr. Whalen that the Complainant did not want to drive but that the truck needed to get to a shop to be repaired. (Tr. at 188-189). Thus, I find that the Complainant has established that the Respondent was aware of his protected activity.

[36] It is unclear from the record who the Complainant's direct supervisor was. However, Mr. Dean testified that he was the transportation manager at Equity, which was a supervisory position, and that he was able to discipline and or fire employees. (Tr. at 183-184). Thus, I find that Mr. Dean was acting as the Complainant's supervisor on November 11, 2016.

[37] *Klosterman, supra,* slip op. at 6; *Minne, supra,* slip op. at 15.

Was the Complainant's protected activity a contributing factor to the Respondent's adverse action?

In *Palmer v. Canadian National Railway/Illinois Railroad Co.*, the Board held that in determining whether a complainant's protected activity contributed to the Respondent's adverse action, the factfinder may consider all relevant, admissible evidence, including the employer's evidence of non-retaliatory reasons for the adverse action.[38] The Board further stated:

> We have said it many a time before, but we cannot say it enough: "A contributing factor is '*any* factor, which alone or in combination with other factors, tends to affect in *any* way the outcome of the decision" We want to reemphasize how low the standard is for the employee to meet, how "broad and forgiving" it is. "Any factor really means *any* factor. It need not be "significant, motivating, substantial or predominant" – it just needs to be *a* factor. The protected activity need only play some role, and even an "[in]significant or [in]substantial" role suffices.[39]

The contributing factor element may be established by direct evidence or indirectly by circumstantial evidence.[40] 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.[41]

The Respondent argues that there is no causal link between the Complainant's refusal to drive and the discipline he was assessed and that the Complainant was disciplined for the five reasons outlined on an undated Written Notice form completed by Mr. Dean. (RX V). Mr. Dean testified that the decision to discipline the Complainant was not related to his refusal to drive. (Tr. at 218-219). However, I find that the circumstantial evidence supports that Complainant's protected activity contributed to his discipline and eventual discharge on November 11, 2016.

Close temporal proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action.[42] However, while such proximity is not dispositive, "the closer the temporal proximity is, the stronger the inference of a causal connection."[43] A close temporal proximity alone may be sufficient to

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[38] *Palmer, supra,* slip op. at 15, 29.
[39] *Id.* slip op. at 53.
[40] *Id.* slip op. at 55; *Coates v. Grand Trunk Western Railroad*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015); *Rudolph v. National Railroad Passenger Corp.*, ARB Case No. 11-037, ALJ No. 2009-FRS-015, slip op. at 16 (ARB Mar. 29, 2013) (*Rudolph I)*; *Bobreski v. J. Givoo Consultants*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13-14 (ARB June 24, 2011).
[41] *Blackie v. Smith Transp., Inc.*, ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 8 (ARB Nov. 29, 2012); *Speegle v. Stone & Webster Constr., Inc.,* ARB No. 11-029, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Jan. 31, 2013).
[42] *Kovas v. Morin Transport, Inc.,* 92-STA-041 (Sec'y Oct. 1, 1993) (*citing Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987)).
[43] *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 11 (ARB Feb. 29, 2012) (citing *Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010).

establish a causal connection in whistleblower cases.[44] However, temporal proximity is not always dispositive, for instance, 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.[45]

The Complainant originally refused to drive the truck with the ABS light illuminated on October 24 and 25, 2016. (Tr. 50-51). The Complainant was discharged from his employment on November 11, 2016, 17 days after the protected activity. The Board has found that adverse action within three weeks of protected activity is sufficient to establish that the protected activity was a contributing factor in the adverse action.[46] The record does indicate that the Complainant was involved in a backing accident on November 10, 2016, after his protected activity but before his meeting with Mr. Dean,[47] and Mr. Dean also listed other reasons for the intended discipline in the Written Notice form (RX V). I find that the close temporal proximity between the Complainant's protected conduct and his termination creates a strong inference, but is not dispositive in determining, that the Complainant's protected activity was a contributing factor in his termination.

Further, the November 11, 2016 meeting suggests that the Complainant's refusal to drive the truck was a contributing factor to the decision to discipline him. Mr. Dean testified that the decision to discipline the Complainant was not related to his refusal to drive but was based on five other "accidents and incidents" that had occurred up to that point. (Tr. at 201-211, 218-219). However, his assertion that the Complainant's refusal to drive did not factor into the decision to discipline him is contradicted by the transcript of the meeting. In addition to testifying about the meeting at the hearing, the Complainant made a recording of the meeting and the transcript of that recording was admitted to the record. (CX L-10).[48]

Mr. Dean repeatedly told the Complainant that he was not a good fit for Equity and that Equity was not a good fit for him. (CX L-10 at 2, 5, 6). Asked about his comment at the hearing, he stated that "due to the amount of accidents and occurrences we've had in the short amount of time that I was there . . . I was thinking that my feeling in the short time I was there, there was a

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[44] *See Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 12 (ARB Mar. 28, 2012) (citing *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004), *aff'd sub nom. Vieques Air Link, Inc. v. U.S. Dep't of Labor*, 437 F.3d 102, 109 (1st Cir. 2006)).

[45] *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

[46] *See Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 1999-STA-035 (ARB June 28, 2002); *see also Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (temporal proximity of 30 days established nexus); *Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec'y Feb. 16, 1989) (complainant's discharge five weeks after testifying at a co-workers grievance hearing was sufficient to support an inference of causation); *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995) (a six week lapse is not so distant as to negate the inference of a causal link between the protected activity and the adverse employment action).

[47] I note that the Complainant had one or two prior accidents while employed at Equity, and the record does not show any evidence of discipline imposed because of those accidents.

[48] The Respondent objected to the admission of this recording. (Tr. at 122-123). The Complainant testified that he made the recording and the recording was an accurate representation of what was said at the meeting. (Tr. at 122). Further, Mr. Dean testified at the hearing and did not testify that the recording was an inaccurate or incomplete account of his meetings with the Complainant on November 11, 2016.

lot of accidents and incidents occurring to that point." (Tr. at 210-211). The Complainant argues that this statement indicates retaliatory animus. Proof of animus towards protected activity may be sufficient to demonstrate discriminatory motive.[49] "[R]idicule, openly hostile actions or threatening statements," may serve as circumstantial evidence of retaliation.[50] I find that a reasonable person would interpret Mr. Dean's statement that the Complainant was not "fitting in" to be indicative of his displeasure with the Complainant's actions. He told the Complainant that his employment was not "working out" because he was causing "a few headaches" and costing himself and the company money. (CX L-10 at 6). Further, Mr. Dean's comments seem to indicate a change in the Respondent's attitude toward the Complainant that occurred after he engaged in the protected activity. The Complainant testified that the work environment at Equity was "generally good," that he got along with everyone and things usually went smoothly. However, once the Complainant engaged in protected activity the Respondent's attitude toward the Complainant changed and he was, as Mr. Dean put it, no longer a "good fit" for the company.

In addition to referencing the situations listed on the Written Notice form, Mr. Dean made repeated references to the Complainant's actions on October 24th and 25th. Mr. Dean stated that "you seemed to not want to drive your truck when the ABS light wouldn't work, when all you had to do was unplug it and go 50 miles down the road because you deemed it to be unsafe, because it was going to help you out, so we towed the truck." (CX L-10 at 3). He further stated "[a]gain, what I would say to you is that you should have got in the truck, got a load, and went to Atlanta and had somebody look at your truck, because I deem that the – them mechanics [at Freightliner] are not very good." (*Id.* at 7). I find that these statements relate to the Complainant's refusal to drive his truck to pick up a load or drive to Atlanta for additional repairs and strongly suggest that the Complainant's refusal to do so was a contributing factor in the Respondent's adverse action.

The Board has found that protected activity and employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment action or the employment action cannot be explained without discussing the protected activity.[51] When Mr. Dean was asked at the hearing why he would bring up the Complainant's refusal to drive to Atlanta at the meeting if it had nothing to do with his discipline, he stated that it went back to the Complainant taking a load from Kentwood and then not bringing the truck to the shop. (Tr. at 219-221). I find that Mr. Dean's statement indicates that the Complainant's protected activity was directly related to a basis for his discipline. The reason that Mr. Dean wanted the Complainant to bring the truck into the shop in Michigan was because the repairs were not done by Equity employees in Atlanta. Mr. Dean stated that the Complainant needed to take the truck to the shop so that Equity employees could look the whole truck over and see if it was fixed because they had spent so much money to repair the truck on the road. (Tr. at 235-236). The reason that the work was done on the road and not in Atlanta was because the Complainant refused to drive the truck there from Gadsden even though he was asked several times to do so on October 24th and 25th. But for the Complainant's refusal to drive there would be no need for him to have to bring his truck to the Equity shop after delivering a load in Kentwood. The Board

[49] *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 27 (ARB Jan. 30, 2008).
[50] *Timmons v. Mattingly Testing Services*, 1995-ERA-040 (ARB June 21, 1996).
[51] *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 12 (ARB Nov. 5, 2013); *see also Palmer*, *supra*, slip op. at 58-59.

has held 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."[52] Under the circumstances here, I find that the Complainant's refusal to drive his truck to Atlanta is "inextricably intertwined" with what could conceivably be a legitimate basis for discipline, not reporting to the Equity shop when asked to.

In considering the evidence, Mr. Dean's tone throughout the November 11th meeting was one of frustration and displeasure. He continually made comments that the Complainant was not "fitting in" with Equity because his actions cost the company money and caused headaches. The Complainant's refusal to drive required Mr. Dean to authorize having the truck towed to Birmingham for repairs rather than having the Complainant drive to Equity's shop in Atlanta, as the company would have preferred. At the hearing, Mr. Dean expressed displeasure for how long the repairs at Birmingham took to complete. (Tr. at 215). Thus, the Complainant's refusal to drive cost the company money because it had to pay to have the truck towed and the truck was out of commission for four to five days while repairs were being made. The Complainant also refused to take a load during this time. Mr. Dean's comments during the meeting express a change in attitude toward the Complainant after he engaged in the protected activity. Overall, despite his hearing testimony to the contrary, I find that the Complainant's refusal to drive his truck with incomplete repairs to the ABS system was an issue for Mr. Dean because he continually brought the actions up during the November 11, 2016 disciplinary meeting where the Complainant was eventually discharged from his employment.

Additionally, the Complainant's refusal to drive was directly related to one of the reasons he was written up for discipline, because if the repairs had been done at an Equity shop there would be no need for him to take to truck to the shop on November 5, 2016. Finally, the fact that Mr. Dean raised additional issues in the meeting does not negate the fact that he was also concerned about the Complainant's refusal to drive. As noted above, the protected activity does not need to be a motivating, substantial or significant factor in the decision to take an adverse action, it merely needs to play some role. I find that the Mr. Dean's concerns were related to the Complainant's actions that cost the company money, which included the Complainant's refusal to drive the truck to an Equity shop for additional repairs or pick up a load along the way.

Due to the temporal proximity between the Complainant's refusal to drive and his meeting with Mr. Dean, because Mr. Dean expressed his displeasure and frustration at his meeting regarding the Complainant's refusal to drive his truck to Atlanta or pick up a load, because Mr. Dean's comments indicate a change in attitude toward the Complainant and because the Complainant's refusal to drive was inextricably intertwined with the need to bring the truck to the Equity shop, I find that the Complainant's protected activity of refusing to drive his truck contributed to the decision to discipline him and was a contributing factor in the Respondent's adverse actions against him.

Has the Respondent proven by clear and convincing evidence that it would have taken the same adverse actions in the absence of the Complainant's protected activity?

[52] *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 13-091, 2010-STA-024, slip op. at 7 (ARB Feb. 28, 2014).

Because the Complainant has proven that the protected activity was a contributing factor in the Respondent's decision to discipline him, I must now determine whether the Respondent has proven, by clear and convincing evidence, that it would have taken the same adverse action in the absence of Complainant's protected activity.[53] In *Palmer*, the Board stated that:

> The standard of proof that the ALJ must use, "clear and convincing" is usually thought of as the intermediate standard between "a preponderance" and "beyond reasonable doubt," and requires that the ALJ believe that it is "highly probable' that the employer would have taken the same adverse action in the absence of the protected activity.[54]

In *Pattenaude*, the Board noted that it is not enough to show that the employee's conduct violated company policy or otherwise constituted a legitimate independent reason justifying the adverse action, or that the employer could have taken the adverse action in the absence of the protected activity. It stated that in determining whether a respondent has met its burden of proof, consideration should be given to the independent significance of the non-protected activity relied on by the respondent to justify the adverse personnel action, the facts that would change in the absence of the complainant's protected activity, and evidence relevant to whether the employer would have taken the same adverse action without the protected activity.[55] The Board went on to state that the respondent must show "through factors extrinsic to [complainant's] protected activity" that the discipline complainant was given was "applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations."[56] I have considered the non-protected activity relied on by Respondent to justify disciplining the Complainant as well as the other evidence in the record and I find that it is insufficient to support the finding that the Respondent would have taken the same adverse action in the absence of the protected activity.

The Respondent contends that it has legitimate reasons for disciplining the Complainant, including that he 1) drove 700 miles home without authorization; 2) swore at Mr. Whalen via text message for no reason; 3) tampered with Equity equipment; 4) was involved in a backing accident and 5) did not report to the Equity shop when he was told to do so. (RX V, Respondent's Brief at 12-15). As a result of the November 11, 2016 meeting with Mr. Dean, the Complainant was asked to pay the company $1,000 and was suspended for three days. The Respondent asserts that because the Complainant did not contest the five reasons he was written up and because he testified that his suspension was "equitable," the discipline the Complainant was given was legitimate. (Respondent's Brief at 12-15). The Complainant contends that the Respondent had no legitimate reason to discipline him because he did not tamper with any company property and because he did not report to the shop because he was forced to drive to Pennsylvania with a high priority load. (Complainant's Brief at 16-18).

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[53] *See Palmer, supra,* slip op. at 56; *Pattenaude, supra,* slip op. at 9; 29 C.F.R. § 1978.104(e)(4).
[54] *Palmer, supra,* slip op. at 56-57.
[55] *Pattenaude, supra,* slip op. at 11 (*citing Carr v. Soc. Security Admin*., 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1370-1375 (Fed. Cir. 2012); *Speegle, supra,* slip op. at 12).
[56] *Pattenaude, supra* slip op. at 11, (*citing DeFrancesco, supra*).

Once again I note that the Respondent's burden under this prong of the analysis is significant and it must do more than present a legitimate reason for discipline; it must establish that it would have taken that action even if the employee had not engaged in protected activity.[57] I have considered the reasons relied on by Respondent to justify disciplining the Complainant as well as the other evidence in the record and I find that the reasons advanced by Respondent are insufficient to support a finding that the Respondent would have taken the same adverse action in the absence of the protected activity.

As a result of the November 11, 2016 meeting with Mr. Dean, the Complainant was asked to pay the company $1,000 and was suspended for three days. Of the reasons stated by Respondent as justification for its adverse action, the evidence suggests that the Respondent considered the two most serious offenses to be the allegations that the Complainant tampered with the wiring in his truck and the November 10, 2016 backing accident. Mr. Dean testified that the Complainant was asked to pay $1,000 as reimbursement for money spent on parts and service to repair the truck's lighter. (Tr. at 232). Intentional destruction of company property would be grounds for discipline. However, there is conflicting evidence about whether or not the Complainant engaged in the destructive behavior that the Respondent is claiming. The Complainant testified that the technicians in Birmingham did replace the truck's low voltage disconnect but he denied tampering with that part and guaranteed that the repairs to the dashboard wiring were not related to anything that he did. (Tr. at 138-139). He testified that he considered, but did not attempt, to reroute wires in the dashboard so he could charge his phone and denied that he ever tampered with the wires on the truck. (Tr. at 126, 138). In contrast, Mr. Dean testified that the Complainant told him the lighter did not work and that he pulled the wires out in an attempt to fix the problem himself. (Tr. at 200). Mr. Dean testified that Mr. Simpson told him he was "looking at the wires" to identify if there was a problem with the lighter, which he interpreted to mean the Complainant had pulled the wires out. *Id*. Mr. Dean stated that he had been informed by the Equity maintenance director and by Brandon Whalen that the mechanics in Birmingham had told them that wires had been pulled out from beneath the dashboard. (Tr. at 200-202).

Mr. Dean identified an Equity Repair Order related to a charge to "repair wiring, replace cigar lighter and module" that includes the comment "driver tore wiring out of dash." (RX U). Mr. Dean testified that the repair order was created in the Equity shop when a repair was called into the shop. He indicated that repair orders were generated in Equity's transportation system and that to his knowledge RX U was not created for use in this litigation. (Tr. at 249-250). He stated that he did not know where the comment "driver tore wiring out of dash" came from other than that it was entered by an Equity employee. I note that the actual repair was performed by an outside company, Birmingham Freightliner (*see* RX U). Asked how an Equity employee became aware of the repair description he stated "either from an invoice or a phone call." (Tr. at 252-253). Mr. Dean also identified RX W as a handwritten note from the cover of the Complainant's personnel safety file that includes the note "repair cost $5591 tore dash apart to fix cigarette lighter." (RX W). Mr. Dean testified that the file was created and updated by the safety department and that the cover sheet was supposed to be a summary of what was in the file. He stated that he did not know when the sheet was created. (Tr. at 239-242).

[57] *Ajauro v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 162 (3rd Cir. 2013).

I find that the evidence in the record that would support Mr. Dean's testimony that the Complainant pulled out the wires in the dashboard is not probative. The Respondent submitted four Repair Order Details relating to the maintenance performed on the truck. (RX R, RX S, RX T, and RX U). Mr. Dean stated that he did not know where the comment "driver tore wiring out of dash" came from other than that it was entered by an Equity employee. Asked how an Equity employee became aware of the repair description he stated "either from an invoice or a phone call." (Tr. at 252-253). However, unlike the other repair orders in the record, there is no other evidence, such as invoices, to corroborate the charges and description of the work put on the order by the Equity employees. RX R is a repair order indicating that TA of America needed to "repair the abs on road" and corresponds to an invoice in the record from TA Truck Service that also outlines the repairs made to the ABS system. (JX A at 5). RX S is a bill for towing the truck from Gadsden to Birmingham and corresponds to the information discussed in a telephone call between the Complainant and Mr. Whalen. (CX L-9). RX T is a repair order for replacing the ABS harness and corresponds to an invoice in the record from Birmingham Freightliner that documents the repairs to the ABS harness. (JX A at 7-8). There is no similar invoice relating to the work performed on the low voltage disconnect or any of the truck's wires in the record. Thus, because there is no evidence in the record about who created the repair order and no way to corroborate the comment contained in the report, I give the comments in this repair order little probative weight.

The other evidence relied on by the Respondent is a handwritten note on the cover of the Complainant's personnel file which states he "tore dash apart to fix cigarette lighter." (RX W). Mr. Dean testified that the file was created and updated by the safety department and that the cover sheet was supposed to be a summary of what was in the file. (Tr. at 239-242). It is unclear from the record who made the notation on the cover of the file, when the notation on the file was written and how the author came about their information. Further, the contents of the Complainant's personnel file were not submitted. Thus, I find that this sheet is insufficient to establish that the Complainant tore apart the dashboard.

Additionally, I found the Complainant to be a more credible witness than Mr. Dean. The Complainant was able to speak knowledgably about the truck and its issues and he had first-hand knowledge regarding the repairs that were being made as he was at the repair shops and interacted with the mechanics. On the other hand, Mr. Dean testified that he never looked at the truck or reviewed the repairs and often seemed confused about what the issues with the truck were and what needed to be fixed. For instance, at the November 11, 2016 meeting he stated that the $1,000 was reimbursement for the mechanics fixing "whatever they were supposed to fix . . . for them to put the wires back in, find out that it was a – whatever you said, found out a harness or something, find that fuses were missing, find that something was –[.]"(CX L-10 at 4). His testimony at the hearing was equally confusing and suggests that Mr. Dean did not possess a clear understanding of what repairs were being done to the truck and why they were being done. The record shows that Mr. Dean had no first-hand knowledge about the truck repairs, but that he relied on statements from the maintenance director and Mr. Whalen when he determined that the Complainant tampered with the truck. However, as noted above, there is no probative evidence in the record to support why the maintenance director or Mr. Whalen believed that it was the Complainant who tore the wires out.

Overall, I find that the lack of probative evidence regarding the tampering incident calls into question the Respondent's reasoning for requiring the Complainant to pay them $1,000. The Complainant testified that he did not tamper with the truck's wiring and the Respondent relies on an unsupported maintenance order and personnel file sheet but is unable to identify the basis for the comments on either document. Moreover, Equity did not present the testimony or affidavit of any worker who was involved in making these notations that the Complainant tore out the wiring.

In addition to being unable to support its reasoning for requiring the Complainant to pay $1,000, the Respondent has not presented any evidence to show that the discipline it sought to assess was consistent with its company policies or with discipline given to other employees who engaged in similar conduct. The Respondent has not presented any evidence of company policies or rules regarding employee conduct at work. There is very little evidence in the record about any established disciplinary procedures in place to deal with employees who violate company policies or rules. The Respondent submitted a typed "Written Notice" form, which suggests that it may have some formal process in place for dealing with rule and policy violations. (RX V). However, the Respondent has not presented any evidence on how it treats other employees who engaged in conduct similar to that noted in RX V but who have not engaged in protected activity. There is no evidence that the Respondent routinely fines or terminates employees who make a statement regarding tampering with company property, or who actually have tampered with company property. The Respondent has not presented any significant evidence about its disciplinary policies or discipline imposed for alleged conduct violations similar to or comparable to that the Complainant was alleged to have engaged in. Thus, the Respondent has not established that it has clearly defined and established company policies regarding employee conduct and that it disciplined the Complainant pursuant to those policies.

Further, the evidence in the record also demonstrates a change in the Respondent's attitude toward the Complainant after he engaged in the protected activity. The Complainant testified that the work environment at Equity was "generally good," that he got along with everyone and things usually went smoothly. He stated that prior to the discipline in this case, he had never been formally disciplined or received a write-up for anything. (Tr. at 61-62). The cover of the Complainant's personnel file does not document any instances of misconduct that pre-date his protected activity. (RX W). However, once the Complainant engaged in his protected activity, Mr. Dean wrote the Complainant up for conduct that took place before the protected activity occurred. For instance, when asked about the incident where the Complainant allegedly drove 700 miles without authorization, Mr. Dean stated that the Complainant "got mad and drove his truck empty . . . all the way home" from Wisconsin. (Tr. at 234). The Complainant did not discuss this allegation but testified that he once became angry with Mr. Whalen because he received misinformation regarding a load he was supposed to pick up in Eau Claire, Wisconsin and ended up "stranded" all weekend. (Tr. at 62-63). In discussing this occurrence, the Complainant acknowledged that he swore at Mr. Whalen. (Tr. at 149). Mr. Dean and the Complainant identified RX I as copies of text messages between the Complainant and Mr. Whalen. (Tr. at 152-155, 245). Included in the exhibit are messages sent at 16:07 on October 1, 2016 from the Complainant that state "Brandon you disgusting piece of shit. You didn't give me enough information to do my job. Again. This load in Eau Clair had to pick up

last night at midnight. They are completely shut down all weekend. I'm stuck here until Monday. AGAIN. FUUUUUUCK!!!!!!!!! . . ." (RX I at 2). Thus, it appears that the issue of driving home 700 miles without authorization and swearing at Mr. Whalen via text message relates to an incident that took place on or around October 1, 2016. The Complainant testified that he apologized to Mr. Whalen for swearing and was not written up or disciplined for the incident. (Tr. at 62-63). Although such language is clearly not acceptable and may have legitimately warranted some discipline, I find it concerning that these activities occurred before the Complainant engaged in protected activity, but that the decision to discipline him was not made until after the protected activity took place. It was not until after the Complainant engaged in protected activity that he was written up and verbally reprimanded for these actions and there was no reason given for this delay.

Similarly, while the Complainant acknowledges that he was he was in a backing accident at a truck stop the day before his meeting with Mr. Dean, the record suggests that the accident of November 10, 2016 was not the Complainant's first while he was employed with the company. The Complainant testified that he was in two accidents while employed at Equity (Tr. at 134-138), while Mr. Dean testified that this was the Complainant's third accident. (Tr. at 233). However, there is no evidence in the record that the Complainant was ever suspended, or disciplined in any other way, for these earlier accidents. The prior accidents were also not recorded on the Complainant's personnel cover sheet. (RX W). However, once the Complainant had engaged in protected activity, the Complainant was given a three day suspension after being involved in an accident and the incident was recorded on his permanent file. Again, there is no evidence in the record to show why this accident was treated in a different manner than the Complainant's previous accidents, and no evidence to show a policy regarding discipline for accidents or what prior discipline, in any, has been imposed for such incidents. Even though Mr. Dean testified that the Complainant was not the first person to have a backing incident and that "some" Equity employees had been terminated for accidents (Tr. at 209-210), I find this testimony too vague to be able to determine if the discipline imposed on the Complainant was equivalent to what would be routinely assessed against other employees who were also involved in backing accidents.

Overall, there is no evidence in the record that the Complainant's behavior or actions were a serious problem prior to his protected activity. He was not written up for swearing at Mr. Whalen when the incident occurred. There is also no evidence in the record that he was written-up for driving unauthorized when that incident occurred. Further, there is no evidence that the Complainant was disciplined in relation to other accidents he had been involved in prior to his protected activity. Finally, the cover sheet for the Complainant's file makes no reference to any prior safety violations or other misconduct that pre-date his protected activity. The inference to be drawn is that the Respondent did not feel these issues warranted discipline at the time of their occurrence. However, once the Complainant engaged in protected activity the Respondent's attitude toward the Complainant changed and he was, as Mr. Dean put it, no longer a "good fit" for the company.

Finally, as noted above, Complainant was also written up for failing to bring his truck to the Equity shop in Michigan on November 5, 2016. (RX V). Mr. Dean stated that the Complainant was told to bring his truck to the Equity shop in Michigan so that it could be looked

over but instead was dispatched to Pennsylvania with another load. (Tr. at 235-236). The Complainant testified that he knew the truck needed additional repairs to fix on oil leak, but that he did not think the need was urgent and testified that he was never informed that he needed to take the truck to the shop on November 5, 2016. (Tr. at 140-142, 150). He stated that he was dispatched to Pennsylvania with a "hot load" that needed to be delivered. (Tr. at 124-125). Again, the reason the Claimant was required to bring the truck into the shop was because the repairs were not made by Equity mechanics and the reason the repairs were not done at Equity was because the Complainant refused to drive the truck to an Equity shop. Thus, but for the Complainant's refusal to drive he would not have had to bring the truck into the shop. Thus, this reason for assessing discipline is "inextricably intertwined" with the Complainant's protected activity.

In sum, I find that the evidence in the record does not show by clear and convincing evidence that the Respondent would have disciplined the Complainant absent his protected activity. The Respondent has attempted to paint the Complainant as a poor performer who consistently violated company policies, thereby leading to the decision to discipline him. However, the Respondent failed to establish that the tampering it alleges the Complainant did actually happened, failed to show that the discipline it assessed was applied pursuant to a well-established company policy or that it routinely disciplined employees who engaged in the same or similar conduct, and exhibited a change in attitude toward the Complainant after he engaged in protected activity. For all these reasons, I conclude that the Respondent cannot avoid liability for retaliation under the STAA.

Remedies

The STAA states that if the Complainant is successful in proving a violation under the act remedies include an order of reinstatement of the Complainant to his former position with the same pay and terms and privileges of employment; payment of 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.[58]

Here, the Complainant requests ten weeks of back-pay, calculated at the amount of $880 per week; compensatory damages based on his testimony regarding emotional distress; attorney fees and costs; and punitive damages in the amount of $250,000.

Reinstatement

The Complainant has not asked for reinstatement and at the time of the hearing testified that he had found subsequent employment. However, reinstatement is a mandatory remedy under the Act and the Board has held that it is an error for an Administrative Law Judge not to order reinstatement even in such cases where there is evidence the complainant has found alternative

[58] 49 U.S.C. §31105(b)(3).

employment.[59] The Respondent is therefore to offer to reinstate the Complainant to his prior position with the same pay and terms and privileges of employment.

Back pay

Regarding remedies under the STAA, the Board has stated:

> A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. §31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc*., 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002), citing *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 418-421 (1975). Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988). *Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 760 (6th Cir. 2004). *See, e.g., Polgar v. Florida Stage Lines*, ARB No. 97-056, ALJ No. 94-STA-46, slip op. at 3 (ARB Mar. 31, 1997).
>
> Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. P*olewsky v. B&L Lines, Inc.,* 90-STA-21, slip op. at 5 (Sec'y May 29, 1991). 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." *Cook v. Guardian Lubricants, Inc*., ARB No. 97-005, ALJ No. 95-STA-43, slip op. at 14 n.12 (ARB May 30, 1997), citing *Pettway v. Am. Cast Iron Pipe Co., Inc*., 494 F.2d 211, 260-61 (5th Cir. 1974).

Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp., ARB No. 04-014, ALJ No. 2003-STA-36, (ARB June 30, 2005).

As noted, there is no fixed method for calculating back pay. The record contains the Complainant's paystubs from Equity. (CX J). He testified that he began working at Equity in April 2016 as a company driver and worked until November 11, 2016. (Tr. at 39). He stated that for a short time in August 2016 he worked for Equity as an independent contractor. (Tr. at 53).

[59] *Ass't Sec'y & Mailloux v. R & B Transportation, LLC*, ARB No. 07-084, ALJ No. 2006-STA-12 (ARB June 16, 2009).

He stated that in November of 2016 he was an Equity employee and not paid as an independent contractor. (Tr. at 53-58). Based on his paystubs, the Complainant calculated that his average pay for a week of employment was $879.19. (CX K). I find this method of calculation to be reasonable based on the information in the record.

The Respondent does not take issue with the Complainant's wage calculation, but argues that he did not make sufficient effort to mitigate his damages by immediately looking for work in November of 2016. The Complainant testified that from November 12, 2016 to January 10, 2017 he was not actively seeking alternative employment. (Tr. at 136). Typically, an employee has a duty to mitigate damages by seeking suitable employment and the employer has the burden of showing that the award of back pay should be reduced because the employee did not exercise diligence in seeking and obtaining other employment.[60] The employer can satisfy its burden by showing the availability of substantially equivalent positions and that the Complainant failed to use reasonable diligence in seeking those positions.[61] However, the Board has held that where an employee admits to not job searching, the need to show the availability of comparable work is obviated. In *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 095, ALJ No. 2002-STA-35, slip op. at 18 (ARB Aug. 6, 2004), the Board held that the Respondent met its burden of showing Complainant failed to mitigate damages where the Complainant admitted that he had not looked for work for about 8 months after his discharge because he was busy working on his OSHA complaint. However, once the Complainant began his job search, the Respondent was obliged to present evidence of the availability of substantially equivalent work.

The Complainant testified that from November 12, 2016 to January 10, 2017 he was not actively seeking alternative employment. (Tr. at 135). Based on the Board's reasoning in *Roberts*, I find that the Complainant is not entitled to lost wages from November 11, 2016 to January 10, 2017 because he admitted that he was not actively looking for a job during that time. After January 10, 2017, the Complainant was actively searching for a job. At that point it became the Respondent's burden to demonstrate not only that the Complainant did not conduct a job search, but also that substantially comparable work was available. The Respondent offered no evidence that the Complainant was not actively looking for work after January 10, 2017, or that comparable work was available, and therefore did not meet its burden of proof to mitigate any additional damages.

The Board has stated that "[b]ack 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, not when the employee obtains comparable employment."[62] In this case, there was never any offer of reinstatement. Thus, the Respondent is liable for the payment of back pay until it makes a bona-fide offer or reinstatement or the Complainant rejects such an offer.

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[60] *Rudolph v. Nat'l Railroad Passenger Corp.*, ARB Nos. 14-053 and 14-056, ALJ No. 2009-FRS-015, slip op. at 13 (ARB April 5, 2016) (*Rudolph II*) (citing to Citing *Abdur-Rahman v. DeKalb Cty*, ARB Nos. 12-064, -067, ALJ No. 2006-WPC-002 (ARB Oct. 9, 2014); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No.1999-STA-005, slip op. at 14 (ARB Mar. 29, 2000)).

[61] *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA-30, slip op. at 7 (ARB Mar. 31, 2005); *Johnson supra*; *Abdur-Rahman, supra*.

[62] *Hobson v. Combined Transport, Inc*., ARB Nos. 06-016, -053, ALJ No. 2005-STA-35, slip op. at 5 (ARB Jan. 31, 2008).

Other earnings can reduce liability for back pay.[63] However, under the STAA, the employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings.[64] The Complainant testified that he began working as a truck driver at Delta Freight Systems on January 19, 2017 and that his pay was at least as much as he made at Equity. (Tr. at 131-132). He testified that he worked at Delta Freight Systems until February 26, 2018. (Tr. at 131). He stated that he was starting a new job on February 28, 2018 but did not testify about his job duties or his compensation (Tr. at 134), nor does the record contain confirmation that he actually started such employment. Here, because the Complainant testified that he made at least as much at Delta Freight Systems as he had at Equity, I find that the Respondent's liability for back pay is completely offset from January 19, 2017 to February 26, 2018 while the Complainant was employed at Delta Freight Systems. However, as there is no evidence in the record regarding the Complainant's earning or compensation after February 28, 2018, I find that the Respondent has failed to meet its burden to establish that its back pay liability should be reduced by any interim benefits.

In sum, I find that the Respondent owes the Complainant back pay at the rate of $879.00 per week for the period from January 10, 2017 until January 19, 2017 and from February 28, 2018 until it makes a bona-fide offer or reinstatement or the Complainant rejects such an offer.

Compensatory damages

The Complainant seeks compensatory damages up to the amount of $75,000 for emotional distress. (Complainant's Brief at 19-20). The Respondent argues that the Complainant is not entitled to any recovery for emotional distress because he offered no medical records that he was ever treated for depression. (Respondent's Brief at 16). Damages for emotional distress are recoverable under the STAA.[65] Damages for emotional distress may be based solely on s complainant's testimony where it is found to be credible.[66] For example, in *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004), the ARB affirmed the ALJ's award of $4,000 for emotional distress based on the testimony of the Complainant and his wife, even though that testimony was not supported by evidence of professional counseling or other medical evidence, where the testimony was unrefuted by the respondent. An award of compensatory damages must be supported by substantial evidence.[67] The Complainant testified that he was depressed over being asked to drive a truck without working brakes. (Tr. at 108-109). He stated that the events of October 24 and 25th left him emotionally drained, depressed, exhausted and unable to sleep. He stated that after his termination he was unable to drive because he could not "get his head on straight" and was an emotional wreck. (Tr. at 130-131). He testified that he has never been treated for depression and never told anyone at Equity that he was feeling depressed. (Tr. at 142-147). As the Complainant stated he was never treated for depression, the only support for the

[63] *Id*. at 10.
[64] ***Hadley v. Southeast Coop. Serv. Co.,*** 86-STA-24 (Sec'y June 28, 1991).
[65] *Rudolph II, supra*, slip op. 14-15; *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7-8 (ARB Aug. 31, 2011).
[66] *Ferguson, supra,* slip op. at 7-8; *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ No. 2012-STA-011, slip op. at 7-8 (ARB April 30, 2014).
[67] *Rudolph II, supra*, slip op. at 14.

Complainant's claim for emotional distress damages is his testimony. I find that the Complainant's testimony regarding how the Respondent's actions and his subsequent termination affected him to be credible. Courts consider damage awards for emotional distress in other whistleblower cases in arriving at an appropriate amount.[68] I have therefore considered the amounts of other awards for emotional distress in whistleblower cases in determining the appropriate amount to award.

I found the Complainant's testimony credible on this issue. His testimony was not extensive, and there was no evidence of physical manifestations of stress other than sleeplessness. I find that the evidence of emotional harm, or mental anguish or upset, is sufficient to support some damages. While his termination clearly caused him mental distress, the Complainant did not present evidence sufficient to justify more than an award of $5,000. Consequently, I find that the Complainant is entitled to $5,000 in damages for mental distress.

Punitive damages

The Complainant seeks an award of punitive damages in the maximum amount allowable, $250,000, arguing that the Respondent showed a reckless disregard for safety and the law when it repeatedly ordered the Complainant to operate a truck with malfunctioning anti-lock brakes. (Complainant's Brief at 20). The ARB has held that 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."[69] In *Youngerman,* the Board noted that the Supreme Court has stated that while actual malice need not be shown, "its intent standard, at a minimum, required recklessness in its subjective form."[70]

I find the Complainant's argument in favor of an award of punitive damages convincing, but not in the amount requested. As discussed above, the record establishes that once it was determined that the repairs to the anti-lock brake system could not be completed at the Gadsden Petro station, the Complainant's dispatcher informed the Complainant several times that he should drive the truck to either Michigan or Atlanta so that the repairs could be completed at an Equity shop. At one point the Complainant was even instructed that he should pick up a load to haul on his was to Atlanta. Although Mr. Dean testified that he would not want company drivers to break the law and that everyone should drive safe, he clearly expressed frustration and displeasure at the November 11, 2016 meeting over the Complainant's refusal to drive the truck. I find that the record establishes that Equity was more concerned with keeping trucks on the road than with making sure those trucks are able to operate safely. I find that the Respondent has shown a reckless disregard for the Complainant's safety and the safety of other motorists and I find an award of punitive damages in the amount of $15,000 appropriate.

Attorney Fees and Costs

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[68] *See, e.g., Ass't Sec'y & Bingham v. Guaranteed Overnight Delivery*, ARB No. 96-108, ALJ No. 95-STA-37 (Sept. 5, 1996).

[69] *Youngerman v. United Parcel Service, Inc.*, ARB No. 11-047, 2010-STA-047 (ARB Feb. 27, 2013) *citing to Ferguson, supra*, slip op. at 8; *Smith v. Wade*, 461 U.S. 30, 51 (1983).

[70] Citing *Kolstad v. American Dental Assoc.*, 527 U.S. 526, 527, citing *Smith*, 461 U.S. 45-48.

The Act provides for recovery by a successful claimant of her litigation costs, including reasonable attorney fees, and therefore the Complainant is entitled to such fees and costs in this matter.[71] The Complainant's counsel has stated that he has billed approximately 154.3 hours at a rate of $201 per hour for a total of $31,014.30 in fees. (Complainant's Brief at 20). Counsel has also indicated that the Complainant has incurred $1,329 in costs. However, Counsel has not filed a fee petition detailing the work performed and the time spent on such work and specifying the costs incurred. Therefore, Complainant is granted thirty (30) days from the date of this Decision and Order within which to file and serve a fully supported application for fees and costs. Thereafter, Respondent shall have twenty-one (21) days from receipt of the application within which to file any opposition thereto.

Conclusion

The Complainant has shown by a preponderance of the evidence that he engaged in protected activity, that he suffered an adverse action, and that his protected activity contributed to the adverse actions. The Respondent failed to show by clear and convincing evidence that it would have taken the same adverse actions absent the protected activity. The Complainant is thus entitled to the remedies under the Act described above.

ORDER

IT IS THEREFORE ORDERED THAT:

1. The Respondent, Equity Transportation Company, Inc., shall offer to reinstate Complainant, James Simpson, to the position of truck driver with the same pay and terms and privileges of employment.

2. The Respondent shall pay the Complainant back pay at the rate of $879.00 per week for the period from January 10, 2017 until January 19, 2017 and from February 28, 2018 until it makes a bona-fide offer of reinstatement or the Complainant rejects such an offer, plus interest from the date such wages were unpaid until the date of payment, calculated at the interest rate for underpayment of taxes under 26 U.S.C. § 6621(a)(2), compounded daily.

3. The Respondent shat pay the Complainant the sum of $5,000.00 in compensatory damages for emotional distress.

4. The Respondent shall pay the Complainant the sum of $15,000.00 in punitive damages.

5. The Respondent shall pay the Complainant's litigation costs and reasonable attorney fees. Counsel for the Complainant shall file a fully supported and verified application for fees, costs and expenses within thirty (30) days of the date of this Decision and Order. A service sheet showing that proper service has been made on the Respondent and the Complainant must accompany the

[71] 49 U.S.C.A. § 31105(a)(3)(B).

fee application. The Respondent has twenty-one (21) days from the date of receipt of the fee application to file any objections.

SO ORDERED.

LARRY A. TEMIN
Administrative Law Judge

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

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.
Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

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

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

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

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

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

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