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Office of Administrative Law Judges
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Issue Date: 20 August 2018

CASE NO.: 2017-STA-38

IN THE MATTER OF

KEVIN STOCKWELL,
Complainant

vs.

J&B COMMODITIES, LLC,
JORDY COLLIER
Respondents

APPEARANCES:

PAUL TAYLOR, Esq.,
for Complainant

SHAWN D. TWING, Esq.,
for Respondents

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act (the Act)[1], and the regulations promulgated thereunder,[2] which are employee protective provisions. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

Procedural Background

Complainant filed his initial complaint with the Occupational Health and Safety Administration (OSHA) on 9 Dec 16. OSHA dismissed the complaint on 3 Feb 17. Complainant objected and requested a de novo hearing before the Office of Administrative Law Judges. On

[1] 49 U.S.C. § 31105 et seq.
[2] 29 C.F.R. Part 1978.

23 Oct 17, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based on the entire record, which consists of the following:[3]

Witness Testimony of

Complainant
Billye Stockwell
Jordy Collier
Mark Collier
Cory Collier
Vicki Akin

Exhibits

Complainant's Exhibits (CX) 1-11
Respondent's Exhibits (RX) 1-12

STIPULATIONS[4]

Respondent and Complainant are subject to the Act, the complaint was timely, and from 6 Jun 16 to 8 Sep 16, Complainant was employed by Respondent J&B Commodities to operate commercial motor vehicles with a gross vehicle weight rating of 80,000 pounds or more and transporting property on the highway and in commerce.

FACTUAL BACKGROUND

On 8 Sep 16, while working for Respondent, Complainant was assigned and completed three trips. Complainant was then assigned another delivery. After some discussion, he accepted the assignment and even started the trip, but ultimately changed his mind, elected to refuse the assignment, and returned to Respondent's facility. After further discussion, Complainant left the workplace and has not returned since.

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

Complainant argues that during his discussions with Jordy Collier, he engaged in protected activity by: (1) complaining about being asked to operate a vehicle (a) in a state where he would be impaired by fatigue and (b) in violation of regulations related to hours of service limitations; and (2) refusing to accept a dispatch that would cause him to (a) operate a vehicle while fatigued, endangering himself and others, and (b) operate a vehicle in violation of regulations. Complainant further submits that the final discussion he had with Jordy Collier

[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] Tr 7-8.

ended with Collier firing him, such firing constituting the adverse action resulting from his protected activity.

While Respondent's brief also suggests that Complainant did not engage in protected activity, it notes that the case centers upon the critical question of whether Complainant was fired or voluntarily quit working for Respondent.

LAW

The Act provides that

> (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) the employee … has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety … regulation, standard, or order, or …
> (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;
> (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 …
> (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.[5]

To prevail on his claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the respondent took an adverse employment action against him, and that his protected activity was a contributing factor in the unfavorable personnel action. If he proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.[6]

[5] 49 U.S.C. § 31105.
[6] 75 Fed. Reg. 53545, 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii); *Salata v. City Concrete, LLC*, 2008-STA-12 and -41 (ARB Sept. 15, 2011).

Although it is not necessary that a complaint expressly cite the specific motor vehicle standard that it is alleges has been violated, the complaint must "relate" to a violation of a commercial motor vehicle safety standard. For a finding of protected activity under the complaint clause of the STAA, a Complainant must show that he reasonably believed he was complaining about the existence of a safety violation.[7]

Where a complainant's protected activity is a refusal to drive because it would have resulted in a violation of a regulation, standard, or order, he must prove the operation of a vehicle would actually violate safety laws under his reasonable belief of the facts at the time he refuses to operate the vehicle. The reasonableness of the refusal must be subjectively and objectively determined.[8]

A complainant must prove that operation of the vehicle would in fact violate the specific requirements of the fatigue rule at the time he refused to drive.[9] If the refusal is based on an apprehension of injury, it must be reasonable.[10]

An adverse action is anything an employer does that could dissuade a reasonable worker from engaging in protected activity.[11] 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[.]"[12]

Where an employer and a driver disagree over whether a trip is safe or legal, the employer tells the driver to "drive or go home," and the driver elects to resign rather than drive; the employer's acceptance of the driver's resignation is functionally the same as having fired the driver.[13] Individuals can be liable under the Act where they have "the ability to hire, transfer, promote, reprimand, or discharge the complainant [.]"[14]

"Contributing factor" causation may be proven indirectly by circumstantial evidence such as "temporal proximity, indications of 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."[15]

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[7] *Bethea v. Wallace Trucking Co.,* ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 8 (ARB Dec. 31, 2007); *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 11 (ARB Sept. 14, 2007); *Ulrich v. Swift Transportation Corp.*, 2010-STA-41 (ARB Mar. 27, 2012).

[8] *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No 10-001, Sept. 30, 2011; *Sinkfield v.Marten Trans. Ltd.*, ARB No. 16-037 (ARB Jan. 17, 2018).

[9] *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ARB Sept. 30, 2008.

[10] *Roadway Exp., Inc. v. Dole, 929 F.2d 1060*, (C.A.5 1991).

[11] *Strohl v. YRC, Inc.*, 2010-STA-35 (ARB Aug. 12, 2011).

[12] 29 C.F.R. §§ 1978.102(b), (c).

[13] *Klosterman v. E.J. Davies, Inc.*, ARB No. 12-035, ALJ No. 2007-STA-19 (ARB Dec. 18, 2012).

[14] *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ No. 2012-STA-11 (ARB Apr. 30, 2014).

[15] *DeFrancesco v. Union R.R. Co.*, 2009-FRS-009, (ARB Feb. 29, 2012); *See, e.g., Id.; Bobreski v. J. Givoo Consultants, Inc*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011).

Employers found in violation may be ordered to take affirmative action to abate the violation; reinstate the complainant to the former position with the same pay and terms and privileges of employment; pay compensatory damages, including back-pay with interest and for any special damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney fees; and pay punitive damages in an amount not to exceed $250,000.[16]

Unless it is impossible or impractical, reinstatement is an automatic remedy under the Act and respondent employers must make a bona fide reinstatement offer.[17] However, reinstatement may be waived.[18] Respondents may be ordered to compensate complainants for having experienced depression and hardship, if the weight of the evidence supports such an award.[19] Complainants are entitled to back pay from the date of discharge to the date when the employer makes a bona fide, unconditional offer of reinstatement, with a reduction in liability for other earnings[20] and an adjustment for pre and post judgment interest.[21] Punitive damages are appropriate where the respondent has acted with reckless or callous disregard or intentionally violated the law.[22] Respondents may also be ordered to expunge or correct a complainant's work record[23] and post a workplace notice.[24]

Federal regulations define hours of service limits for drivers:

> a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:
>
> (1) More than 11 cumulative hours following 10 consecutive hours off-duty;
>
> (2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of § 395.1(o) or § 395.1(e)(2).
>
> (b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—
>
> (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

[16] 49 U.S.C. § 31105(b).
[17] *Dickey v. West Side Transport, Inc.*, 2006-STA-26 and 27 (ARB May 29, 2008).
[18] *Young v. Park City Transportation*, 2010-STA-65 (ARB Aug. 29, 2012).
[19] *Id.*
[20] *Hobson v. Combined Transport, Inc.*, 2005-STA-35 (ARB Jan. 31, 2008).
[21] *Dale v. Step 1 Stairworks, Inc.*, 2002-STA-30 (ARB Mar. 31, 2005).
[22] *Smith v. Wade*, 461 U.S. 30, 51 (1983); *Ferguson v. New Prime, Inc.*, 2009-STA-47 (ARB Aug. 31, 2011).
[23] *Shamel v. Mackey*, 85-STA-3 (Sec'y Aug. 1, 1985).
[24] *Scott v. Roadway Express, Inc.*, 98-STA-8 (ARB July 28, 1999).

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)

(1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or
(2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours. [25]

They also address driver fatigue:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.[26]

EVIDENCE

Complainant testified at hearing in pertinent part:[27]

After he finished high school he went to truck driving school. It was in Boston about 40 years ago. He has been a commercial driver since 1977 and has driven 3 ½ million tractor-trailer miles. He has had no accidents and no citations while driving a commercial motor vehicle. He has had every possible endorsement on his commercial driver's license. He has driven commercially in Canada and every state except Hawaii. He has never had a citation. He passed his DOT physical with no restrictions. He does not recall ever having been fired as a commercial driver. He had a pair of strokes about six years ago. It, along with his age, has impacted his memory. He gets emotional at times.

He was working as a driver for Top of Texas when it was bought out. He started working at Agri-Plex. They didn't really have a lot of rules and he worked too many hours. They never did logbooks. He wanted to leave them, so one day he called Jordy Collier, who hired him on the spot. That's how he started working for Respondent. He was never given an employee handbook.

He enjoyed the actual driving part of his job. He did not enjoy all the waiting they had to do at the time and were not getting paid for. Other than one or two times, every load he picked up for Respondent was at White Energy. He has waited at White Energy from one hour to twelve hours. He waited twelve hours one time for a load. The typical waiting time that White Energy was probably an hour to an hour and a half.

[25] 49 C.F.R. § 395.3.
[26] 49 C.F.R. § 392.3.
[27] Tr. 152-254.

He would take the loads from White Energy to various feedlots, all of which were probably within 150 miles. At first Vicki Akin at White Energy was sending him on a long-haul to New Mexico for his first run every day. It was over 100 miles. The length of that trip meant he couldn't take as many loads in a day. They did not get paid for sitting around. He thinks they were paid by how many loads they took. He never told Vicki or Jordy that he only wanted to do short runs. There were probably around 50 feedlots they would deliver to from White Energy.

He only knew Vicki through her dispatching him. He probably actually met her a dozen times in the time he worked for Respondent. Those were impromptu meetings where he would tell her about a load or a customer. Vicki was the contact point for White Energy. He does not recall telling Vicki he wanted to drive less. If anything, he would want to have his last trip of the day to be to Kirkland.

There are times that one day off is not enough to address the effects of accumulated fatigue. For example, if he had to work ten or twelve straight days without a day off it would take its toll. Working nineteen days with just two off would affect his ability to do the job.

He would almost always take his truck home at night. He knew a couple other drivers who took their trucks home, too. In the morning he would do a pre-trip inspection to check the systems. Eighty to ninety percent of the time he would have already gotten his dispatches on his tablet computer. Based on his dispatches, he would plan his day. After his pre-trip inspection, he would drive to White Energy and be weighed empty. It was very rare that he did not have to wait. If he had to deliver to Quality Beef, he couldn't get there before 8:00 AM. They would weigh him and then unload him. Sometimes there would be lines of trucks to be weighed. Unless he was going to New Mexico, he would typically get up at 5:30 or 6 AM. If he had to go to New Mexico, he would get up at 1:00 AM so he could have the load delivered before 6:00 AM.

The entire time he worked for Respondent no one ever told him he wasn't working hard enough, complained about him taking enough loads, or warned him about raising his voice or cursing at Jordy. The only discipline he received was the write up shown at CX-2. They had changed the procedures for entering the parking lot and when Jordy came out to tell him what to do, there wasn't really enough room and he rolled close to a ditch. He did not almost turn the truck over.

CX-4 shows that on 3 Sep 16, he turned his truck on at 8:59 AM and turned it off at 5:23 PM. On 5 Sep 16, he started at 7:07 AM and ended at 5:41 PM.

CX-5 generally describes where he was during the day on 8 Sep 16. He started at his truck at his house at 7:07 AM, but would have done about a 15 minute pre-trip inspection before that. According to his tablet, he had three loads to take that day. From his house he drove to White Energy. It's about 43 miles and takes about 45 minutes. It is possible that it took him about 15 minutes to load at White Energy. From White Energy he went about 40 miles to Quality Beef. That drive probably took about 45 minutes. He could have

spent about 16 minutes getting unloaded at Quality Beef. He headed back to White Energy, arriving there at about 9:37 AM.

He picked up another load and took the 48 minute drive to Paco Feed Yard, getting there about 10:41 AM. Taking 20 or 21 minutes to unload at Paco would not be an unreasonable estimate. He went back to White Energy, arriving at about 11:43 AM, which would be a reasonable length of time for that drive. If they were fast he could have finished loading at White Energy in 17 minutes, or around noon. He headed back to Quality Beef, making a 46 minute run and arriving at 12:46 PM. CX-5 shows a 12:50 PM departure from Quality Beef, but that's not a doable unload time.

He probably took his half-hour break after leaving Quality Beef and starting to head back to White Energy. He had done that before. Based on his tablet, he understood that he had completed his last load for the day and would be done and back home in Vega in about 40 minutes.

Sometime after his delivery to Quality Beef, Vicki called him from White Energy. It wasn't unusual for Vicki to call and add another load. A short run would not be a problem. She told him he probably still had time for a Hansford County Spearman delivery. He had made the drive from White Energy to Hansford before and the last time he had done it, it took nine and a half hours to load, go there, unload, and come back. It's over 160 miles and there is a lot of truck traffic on the two lane roads. Just the drive between White Energy and Spearman would take at least three hours on a good day. It would then take him three hours to drive from Spearman to his home in Vega, Texas. Unloading at Hansford Co. feed would take up to 30 minutes. The roads from Spearman to Vega are pitch black with all sorts of wildlife.

He told her he didn't think he would be able to do it. He told her he was tired and it would be very late, probably around 9, 10, or 11; and he didn't think he could do it safely. He also told her he would not have enough hours of service to do it. She told him she knew he could do it and if he wouldn't do it she would have to call Jordy. He told her he would call Jordy.

He called Jordy on his cell phone, using his Bluetooth. He told Jordy it was too far to go, he didn't have enough hours of service, he was tired and would be fatigued, and he didn't feel he could do it in a safe manner. He told Jordy it would be close to midnight by the time he got back. Jordy did not seem to be surprised by the phone call and did not give him any specific instructions. He would have been safe to pick up a load at White Energy and then go home pre-loaded.

Instead of going home, he drove back to the shop to talk to Jordy about refusing the load. It wasn't too late to do that. He explained he was tired and fatigued and would only be worse coming back at night. Jordy was very angry and started yelling at him. Jordy told him he was tired of all the complaints. Then the conversation calmed down and they started talking again. He mentioned the possibility of picking the load up at White Energy, taking it home, and then delivering it to Spearman the next day, but Jordy said it

had to be that night. He reluctantly agreed to do the full trip, even though he knew it was wrong. He was trying to be a good employee, but went anyway knowing that he was too tired, would be violating the rules, and putting his life and other lives at risk.

On his way to White Energy, he got caught having to wait for a train. He started thinking more about it and decided he just couldn't do the run. It would be three hours each way and with load and unload time eight or nine hours. He would be too exhausted to get home. He called Jordy and explained that he couldn't do the run with the train slowing him down. Jordy told him there were other ways to get to White Energy, but he was past that point, so he just headed back to the shop. He didn't go to White Energy to pick up the load with the idea of going home afterward, because Jordy said it had to be delivered that night. It seemed like a lot better idea to go back to the shop and talk to Jordy and reach some sort of agreement. He is not sure whether it was before or after he got back to the shop, but he did call his wife and tell her that he and Jordy were arguing about the load and he didn't know what was going to happen.

He got back to the shop around 4:00 PM and walked into the office. He does not recall encountering Jordy's brother or talking to him. He saw Jordy's brother, Corey, standing in the hallway, but is certain he did not talk to him.[28] He walked into Jordy's office and they started talking about the load again. He mentioned the fatigue again and Jordy asked him if he wanted to be on part-time work. He told Jordy he wanted full time, but not if it means being in danger. Jordy yelled at him and it started going back and forth and getting ugly. He did not cuss, holler, or berate Jordy. Jordy then told him if he didn't want to do it, he guessed they didn't need him anymore. He took that to mean he was fired and walked out of the office.

He pulled his truck into its parking spot and called his wife to tell her he wasn't going to have enough hours and was too tired to do this. He does not recall if he turned his keys in or left them in the ignition. She came over to pick him up and helped him clean out all of his personal belongings. On the way home with his wife, it was very difficult to tell her he was no longer going to be able to take care of her. He felt that someone had pulled the rug out from under him. He needed the money and did not quit the job.

The next day, on 9 Sep 16, Jordy called him and started going wild on the phone yelling at him. He could not even understand the first part of what Jordy said. Then Jordy calmed down and asked him why he had not pre-loaded, gone home, and delivered in the morning. He told Jordy that Jordy had said last night it had to be done that night. He does not recall what Jordy said in response. He doesn't know why Jordy would call him the next day to ask why he didn't take the load, if Jordy had fired him the day before.

About thirty minutes later, Jordy's father, Mark, called and asked him what was going on. He told Mark that Jordy had fired him after he refused the load because he was tired. Mark told him he didn't know what "the boys" were doing and would have a talk with them. Mark told him he was a good driver, he could get him a job, and he would get back

[28] Inconsistency in the original testimony.

to him. Mark never called him and he never called Mark. That was the last he heard anything from Respondent.

His first job after being fired was with Parker Oil, who he started with on 1 Mar 17. He worked for about three weeks at $18 an hour. He worked between 18 and 20 hours a day. He quit working for Parker Oil because they were not following the proper hazmat regulations. They were picking up waste oil in California and hauling it to Arizona where they would somehow remanufacture it into diesel fuel to ship back into California. The way they were doing it was breaking federal law. He told them that they were asking him to break the law. He did not file any complaint against Parker Oil. He doesn't have any pay stubs from them, because his wife takes care of all that. He doesn't handle their money.

Being without a job was humiliating and he was only sleeping two to three hours a night. He was irritable with his wife and turned into a very bad husband. He was humiliated to know that his wife had to borrow money from her friend. He actually contemplated suicide, but was talked out of it by his pastor.

He tried every day to find a new job but it was difficult. He probably applied either online or orally for fifty jobs. Of those, he probably made it to about six actual driving tests, all of which he passed. On one of those occasions, the employer asked his age. He also applied for heavy equipment operator jobs and warehouse work. He even went to Arizona and California to try to find a job. He tried getting jobs with Western Express, Hurricane Express, CTI, Kingsman, Gillen Transportation, and CRST. He doesn't recall putting his age on any of the applications and has heard that it's against federal law to refuse to hire a person because of their age.

His DOT physical license is current and was current during the time he was unemployed after he was fired by Respondent. He kept looking for a job and eventually ended up with Havens Transportation out of Farmington, New Mexico. They were looking for drivers in Amarillo. He started with Havens on 24 Mar 17. He makes more money from Havens than he did with Respondent. He loves his new job. If Respondent would pay him what he is getting now, he might consider going back.

Billye Stockwell testified at hearing in pertinent part:[29]

She has been married to Complainant for a little over three years. They have been together for ten years. She currently works at Subway and has worked there about a year. While Complainant worked for Respondent, he was always back home every night and never had to go on an overnight trip. Complainant loved working for Respondent. He quit both of the two jobs he had before he went to work for Respondent. He was making about $700 a week while he worked for Respondent.

On 8 Sep 16, she was sitting in the Walmart parking lot, about four or five miles away from Respondent's facility in Hereford, Texas. She had probably talked to Complainant

[29] Tr. 25-56.

four or five times earlier that day, but doesn't recall any specifics of the conversations. It was sometime after 4:00 PM and she received a phone call from Complainant telling her he had been fired and she needed to come pick him up. When she got there, he was standing in the parking lot. She picked him up and they went to his truck and he removed his personal possessions from the truck. On the drive home, he told her that he was tired, was over hours, and could not safely drive. Everything she knows about why he left Respondent is based on what he told her. When they got home, Complainant was very tense, agitated, and pacing around.

Complainant was out of work for about six months. She had not been working, but had been taking care of the household duties. She went to work at Subway, making about seven dollars an hour. Their finances were desperate and she had to borrow about $20,000 from her best friend so they did not lose their house. They were also behind on her car payments. Their house is in Vega, Texas and had a mortgage, but they used the loan to pay it off. They are still paying the loan back. Vega is about 35 miles from Amarillo and has a population of about 800. Vega does have some social services, but they did not know how to take advantage of those. She knew there were food stamps, but her pride would not allow them to use them.

Complainant became very depressed and started saying he was worthless as a human being and that she should get rid of him. She contemplated divorce at one point, because he threatened to commit suicide. Complainant went to Arizona to look for a job. She called a friend of Complainant's, who was also in Arizona and asked the friend to check on Complainant. That only made Complainant angry.

They have nine grandchildren between the two of them. Once Complainant lost his job, they were no longer able to take them to dinner, feed them at home, or go out for fun. For Christmas dinner in December 2016, they shared one potato. Their cabinets were bare.

Complainant had a couple of strokes about six years ago and as a result has a condition that causes him to cry very easily. While he was unemployed, he was in a horrible mood and snapped at her. He cursed, which he never did before. He would yell at their three little dogs and kick the blind one. Before he lost his job with Respondent, in all the years she knew him, she never once saw him lose his temper with her or anyone else, even though he had reason to. While he was unemployed, he had difficulty sleeping. He still has occasional difficulty sleeping. He didn't have any of those troubles while he was working for Respondent.

They spent hours on the computer looking for jobs for Complainant and filling out online applications. He filled out the applications himself. He was looking for jobs that would allow him to be at home at night. She is not aware of him turning down or even being offered any jobs. The printer was broken so they were unable to print any records of the jobs they looked at. They didn't know how to download the files showing he had applied.

The first job he got after he was fired by Respondent was in Arizona, but she doesn't know exactly what it was. He stayed depressed until he got his job at Havens

Transportation, where he currently works. He got that job in April 2017 and is making more than he made working for Respondent.

Jordy Collier testified at hearing in pertinent part:[30]

He owns one third of Respondent, as do his brother Corey and his father Mark. He served as Respondent's dispatcher and fleet coordinator. He has a commercial driver's license and has had one since he was nineteen. He has driven for three or four different companies. Up to a year ago, he was still doing quite a bit of driving for Respondent. Top of Texas trucking was owned by his uncle, Matt. Top of Texas was eventually sold out.

RX-8 is Respondent's handbook for employees. It emphasizes safety and regulatory compliance. It is possible during day-to-day operations in a trucking company for a driver to go over hours unintentionally. He never saw any evidence with Respondent of a concerted attempt or pattern to push drivers to go over hours. He is unaware of ever having been accused of doing so. They were audited by the State of Texas for compliance and were told their performance was above and beyond the call of duty. He has never heard of anyone at Respondent asking a potential employee whether or not they had filed a complaint against another employer. Doing that would be a flagrant violation of the law.

Corn is hauled to White Energy, which processes it to produce ethanol. That results in a corn mash byproduct that is hauled from White Energy to feed livestock. The feedlots are open at all sorts of different hours for delivery. Respondent has been in business for almost four years. White Energy is currently Respondent's only account and it would be a significant blow to lose that account. Respondent has a number of competitors. The primary competitor is Panhandle Express. Respondent actually took over Panhandle Express' contract with White Energy.

The actual loading at White Energy does not take long, but sometimes there may be a line of trucks waiting. When the trucks arrive, they are weighed empty and then weigh full. There have been times when he has waited at White Energy for several hours. He has also had drivers call him and complain about the wait at White Energy. It's hard for the drivers to get the truck to go more than 70 or 75 miles an hour unless they can find a good hill to go down. Respondent does not rely on the agricultural exemption in the hours rules. In 2016, Respondent had no more than 25 drivers. Respondent's driver earn on average about $1,000 per week. It is based on number of loads.

His father, Mark, is safety director for Respondent. They have employees that go over daily trip sheets to review hours of service. They have a weekly meeting on Friday mornings to review the hours of service. Respondent did not require drivers to complete grid logs, because the drivers were not exceeding the statutory 150 mile radius from the terminal. That exemption for grid logs only applies if a driver goes off duty within twelve hours. They use the four line log books for drivers who go out of state or beyond 150 mile radius. The books are in the drivers' possession. However, Respondent did not

[30] Tr. 57-151.

require drivers who exceeded twelve hours to prepare a grid log. He doesn't know why not. The hours of service rules provide that a driver cannot drive after being on-duty 70 hours in eight consecutive days. There is also a rule that provides the drivers cannot drive after fourteen hours from going on duty.

He has known Complainant since high school. They drove together for Top of Texas. His uncle, Ronnie, was the dispatcher at that time. He also was a dispatcher for Top of Texas. Complainant is twice as old as he is and has much more driving experience. He thinks Complainant is a hard worker and does not think he is lazy. Respondent hired Complainant because they felt like they owed it to them. He is also an experienced driver and experienced drivers are definitely in demand. He had some hesitations about hiring Complainant because Complainant would have regular outbursts of cussing and screaming and yelling. Complainant lost his temper a number of times and acted irrationally and impulsively, but they hoped he had turned a new leaf.

They made some special accommodations for Complainant that they did not make for other drivers. They allowed Complainant to park his truck at home. They will occasionally allow other drivers to park at home. They also asked Vicki at White Energy to accommodate his preferred loads. A number of drivers have runs that they preferred to take. They gave Complainant off on the weekends in consideration for his experience and the friendship and bond they had with each other. He was not aware of any medical restrictions for Complainant and they never had any discussions about sleeplessness or depression. Complainant ended up working for Respondent from 6 Jun 16 to 8 Sep16.

Even though Complainant was belligerent, they kept him on because they needed drivers and thought he would get over those issues. Complainant would come in the office and start crying and talking about the past. He trusted Complainant, even though he had had a stroke and could be emotional at times. The big change after the stroke was that he would cry more. They never disciplined Complainant because he wasn't running hard enough, because he was belligerent, or because he was cursing, irrational, or impulsive.

A couple of weeks before Complainant left Respondent, there was an incident that resulted in Complainant receiving discipline. Respondent had a specific entry and exit for its parking lot. He had warned Complainant not to come in the exit. One afternoon, Complainant came in the exit at a pretty good rate of speed. He tried to call out and stop Complainant and tell him not to do that again. He did not want to cause Complainant to blow up. Complainant whipped through the parking lot and his loaded trailer fell off into the ditch. He thought the trailer was going to flip over and there was some damage to the tire and a big scene.

He was angry with Complainant but asked the driving supervisor to handle the situation because he did not want to approach Complainant. CX-7 is a copy of the write up that was issued and indicates that the incident took place on 17 Aug 16. That was the only write up Complainant ever got.

CX-3 shows the start and end times of Complainant's truck. Respondent uses that document to check hours of service compliance. The start time is when the ignition key is turned on. The stop time is when the ignition key is turned off. That would not include any inspection time the driver spends before turning the ignition on. Drivers are required to perform a pre-trip and post-trip inspection. A pre-trip inspection should take between 15 and 30 minutes. A post-trip inspection should take 10 or 15 minutes, tops. It would be fair to add 15 minutes to both ends of the CX-3 time to show hours of service. For example, CX-3, page 1, shows that on 2 Aug 16, Complainant turned his truck on at 6:58 AM and turned it off at 6:04 PM.

CX-3 also shows that, without adding in 30 minutes for pre- and post-trip inspections, Complainant had 11 hours and 38 minutes on 1 Sep 16 and 15 hours and 38 minutes on 2 Sep 16. CX-4, page 18, shows that without adding in 30 minutes for pre-and post-trip inspections, Complainant had 8 hours and 25 minutes on 3 Sep 16, was off on 4 Sep 16, had 10 hours and 34 minutes on 5 Sep 16, had 9 hours and 50 minutes on 6 Sep 16, had 11 hours and 18 minutes on 7 Sep 16, and had 8 hours and 53 minutes on 8 Sep 16, ending at 4:00 PM. If those numbers accumulate to 72 hours on 8 consecutive days, Complainant would not have had hours to take any more loads on the afternoon of 8 Sep 16. However, based on Complainant's schedule, there was enough time for a 14 hour reset on 5 Sep 16, so there would not be a violation of the 72 hour rule.

Complainant would normally get his schedule for loads for a day on the day before, when he signed on to his tablet. CX-5 is generated by their GPS tracking system. The GPS system can indicate where the truck was turned on and off and also when it started or stopped moving. CX-5 shows that on 8 Sep 16, Complainant turned on his truck at 7:07 AM. Assuming 15 minutes for a pre-trip inspection starting at about 6:55 AM, Complainant would have to have completed all work by 8:55 PM to avoid a violation of the 14 hour rule.

It appears that Complainant turned his truck on at 7:07 AM on 8 Sep 16. It shows that on 8 Sep 16, Complainant was at White Energy from 7:47 AM to 7:55 AM and then another 4 or 5 minutes. That probably reflects a very short movement, perhaps to get onto the scales. Complainant would have been traveling from White Energy to Quality Beef between 8:01 AM and 8:45 AM on 8 Sep 16. It's about 35 miles between those locations. Page 2 is the origin ticket for White Energy showing gross weight of 83,860 pounds and empty weight of 33,260 pounds. Page 1 of CX-6 is the destination scale ticket Quality Beef showing Complainant weighed in loaded at 8:32 AM. The time shown on the wait tickets in CX-6 are times on the scale itself, not the time the truck arrived to wait to be weighed.

It appears that Complainant then at about 8:37 AM returned to White Energy and pick up another load to take to Paco Feed Yard in Friona. The GPS records show that Complainant stopped for a period along I-40, perhaps for lunch or to call his wife. He returned to the shop and then went back to White Energy to pick up a load. At some point

Complainant called him to say he was being delayed by a train. That would be in the 3 o'clock time frame somewhere between 3:29 PM and 3:57 PM.

CX-8 appears to be a destination ticket from Hansford County. It was a distance of about 130 to 135 miles. The drive would have taken at least 2 ½ hours and at most 3 hours. The last load Complainant was assigned to take on 8 Sep 16 was an afternoon load from White Energy to Hansford County Feeders, in Spearman, Texas. However, Complainant also would have had to go to White Energy and pick up the load to take to Spearman. Complainant had already been at White Energy earlier that day. It appears that the load was taken by another carrier.

He does not recall Vicki from White Energy calling him to tell him Complainant called them and told them he wasn't going to take the load. When Vicki called to tell him Complainant had refused to pick up the load, she was not upset in the slightest.[31] She did indicate Complainant had been kind of belligerent and said he was going to call Respondent. It would not be unusual for Vicki to call one of his drivers and ask them to pick up an extra trip. That's what happened with the Spearman trip. It would not be unusual for that driver to tell her that they didn't have sufficient time to do the trip. CX-5 shows Complainant stopping for about 30 minutes on the I-10 Frontage Rd. That would match up approximately with the time Complainant would have been talking to Vicki.

Complainant called him in his office sometime before 2:00 PM and told him he was not going to take the load. He doesn't recall what exactly went on that day, but he recalls Complainant being particularly mad. He doesn't recall if Complainant was mad about going to Hansford, because Complainant had particular preferences about destinations. Complainant did not refuse to take the load from White Energy to Spearman. Complainant told him he was not going to take the load to Spearman, but never said anything about hours of service or driver fatigue.[32] During the phone call, Complainant said he was going to quit. Complainant said he was done and just couldn't do it. He tried to calm Complainant down and told Complainant to just get it loaded. He tried to be diplomatic. At that point, he thought Complainant was going to get the load and call him when he was done.

He was surprised to see Complainant drive back up with the truck. Complainant said he wasn't going to Hansford, he was tired of stupid loader operators at the plant, and was done messing with them. CX-5 shows a period from 2:15 PM to 3:18 PM, which is about when he would have been meeting with Complainant. He tried to talk Complainant out of quitting and calm him down. Complainant didn't like taking the longer loads. They never talked about hours of service. He told Complainant that he would have to put in a full legal day's worth of work, but it seemed they were having a hard time doing that. By the end of the conversation they kind of had made up and Complainant told him he didn't mean to get upset and would go load the truck. He thought it was just another incident they would get by. Complainant was not the only driver to complain about the length of

[31] Inconsistencies in the original testimony.
[32] Inconsistencies in the original testimony.

trips. Longer loads did not pay more, so you could make more money by taking more short trips. He believes Vicki tried to even out the long and short roads.

He never fired Complainant. He thinks Complainant walked back in the office and was asked by Corey if he was done already. Complainant just responded that he quit and left. He recalls calling Complainant back and telling him to go home and blow some steam off. The first time he found out Complainant was alleging that he had been fired was when he started getting phone calls from previous employers and coworkers.

A full day of work will allow a driver to carry four to five loads. It does not require any sort of extraordinary effort. On that day, Complainant had taken three. Complainant was not running as hard as he could have and could squeeze another run or two out of his day. Complainant's earnings were about half compared to the other drivers. He suggested Complainant at least go over to the plant and pre-load the truck for next day delivery. At that point, if he had gone and picked up a load and then headed home, he should have been done by 4:30 PM. He never told Complainant that he would be fired if he didn't take the load. Vicki had told him she would be fine with a pre-load. He did not have any conversations with anyone at White Energy about Respondent suffering any adverse effects of not getting the load to Hansford that day.

They do not want tired drivers to keep driving. If a driver calls to say they are too tired to keep going, they would be told to park the truck and someone would come pick them up. If Complainant had 72 total hours as of 4:00 PM on 8 Sep 16, he would have broken the rules even by picking up the load and taking it home.

Vicki Akin testified at hearing in pertinent part:[33]

She currently works as an independent insurance agent but worked for White Energy as a logistics coordinator. She worked for them for 13 months until they moved her position to Kansas and she was laid off. Her last day with White Energy was 7 Oct 16. Logistics coordinator is essentially a dispatcher. When she was at White Energy she worked for the head of marketing.

She dispatched all of the contractor drivers for White Energy. She has had a commercial driver's license for 34 years and spent 22 years running coast-to-coast. She ran local for seven years. She has also operated her own equipment and driven for companies. She worked as a dispatcher for about seven years altogether. She is familiar with the federal rules regarding hours of service.

Complainant was one of Respondent's drivers and she scheduled him on a daily basis. She would do his dispatches first, because he had been to her office and told her that even though the hours of service allow up to 14 hours, he preferred a 10 to 11 hour day. She normally had the drivers' dispatches to them by 3 o'clock in the afternoon the day before.

[33] Tr. 251-275.

On 8 Sep 16, she had Complainant going first to Quality Beef, then to Friona, and then to Quality Beef. He had three loads for the day. He couldn't have legally done two Quality Beef trips and two Hansford trips. Hansford is 165 miles one way. The route is not interstate, but it is good highways with a 75 mile per hour speed limit in Texas. It is a three-hour one-way trip. Unloading at Hansford can be done in 15 to 20 minutes. If someone was at White Energy at 3:02 PM, it would be at least 6:00 PM before they could get to Hansford. If it took them 15 minutes to unload, they would not get back to Hereford until 9:15 PM. What she could do for Complainant would be to send him home instead of back to Hereford, since that was 30 minute shorter period, but it still would be close on hours of service.

Depending on what had happened during the day, it would be possible to do two Quality Beef's and a Hansford. She can't recall a lot about the loads that day, but she could have decided that after two Quality Beef's and a Paco trip, Complainant would still be legal to make a Hansford run. If Complainant started work at 7:07 AM he would have to be done by 9:07 PM to avoid a violation of the 14 hour rule.

She does not recall whether or not she called him that day to dispatch him on an additional trip. She assigns trips by the tablet and not by the phone. She does not recall having any conversation with Complainant and having him tell her he was too tired to take a load. She does not recall saying that she would call Jordy, since he wouldn't take the load.

She would not push anyone beyond hours of service. She would never force a driver to take a load after having them say they were too tired to take it. If someone called to tell her they were going to refuse a load because they were too tired to complete it, it would be unusual enough that she would remember that. If that happened, she would tell him to go to White Energy to pre-load, go home for the night, and then go to Hansford first thing the next morning. Hansford was big enough that they would not be hurting for feed in the short term. She would never threaten to call Jordy, unless a driver was abusive and she would remember that.

She would occasionally call Jordy to ask about truck availability or finding an extra driver. If a driver had to turn down the load because he ran out of hours, she would call Jordy to see if there was another way to cover the load. She could also asked the other contractors.

Cory Collier testified at hearing in pertinent part:[34]

He got his commercial driver's license when he was a teen working for American Dusting. He started working for Respondent in February 2014 and became an equity participant in Respondent in January 2016. He owns one third of the company. He is the office manager and CFO. He will occasionally help out with dispatching. RX-11 is the printout showing Complainant's last trip on 8 Sep 16. Complainant left their shop, drove

[34] Tr. 297-309.

a few miles to some railroad tracks near White Energy, and then turned around and came back to the shop. RX-9 is a document generated by the same software.

He did see Complainant in the office on 8 Sep 16 a couple of times when Complainant passed by his office. He may have said hello or something like that. He does not recall, but that would have been typical. Complainant was back with his brother for a while. He was able to overhear the conversation between his brother and Complainant. He didn't really hear any cursing or shouting, but the conversation was strained. Complainant seemed fine when he walked out. After Complainant left, he went back to ask his brother what was going on.

As a result, he was surprised to see Complainant come back so soon. Complainant was clearly agitated. He did not see Complainant talking to Jordy. He does not recall hearing any conversation between them. He asked Complainant why he was back so soon and Complainant said he quit. Complainant turned in his paperwork and walked out the front door. It would take about 30 seconds to get from where the truck was parked to the office. RX-5 indicates the truck is at the shop at 4:00 PM. It indicates the truck left the shop about 3:18 PM

He noticed a car parked out front with the lady sitting in it. He did not recognize her. Complainant got into the car with her. The car was there before Complainant returned to the shop.

Mark Collier testified at hearing in pertinent part:[35]

He is Jordy and Cory Collier's father. He owned an insurance agency for fifteen years and has a compliance company he calls Workplace Compliance. It focuses on trucking companies. He is also partners with his sons as owners of Respondent. They each own one third. Workplace Compliance serves as a consultant to help trucking companies review records and paperwork flows to ensure regulatory compliance. Safety is a big portion of that. They also help in investigating claims, making sure drivers are properly hired, do drug screens, and do insurance. They have a chiropractor who performs DOT physicals. They try to be a one-stop shopping for trucking companies. They place truck drivers and at any time have 5 to 10 positions they are looking to fill.

He wasn't personally involved in any of the events leading up to Complainant's termination. He will talk to his sons on a day-to-day basis in the morning and the evening to see how things are going. The day that Complainant quit they tried to tell him what happened, but he can't remember all the details.

He has known Complainant for 15 to 20 years. Complainant worked for his brother and was a good driver. The day after Complainant left, he called Complainant and asked him to come in so they could look into getting him another job. He didn't call Complainant back again. If Complainant needed the job he could have called back. He sent Complainant's attorney information about job openings and postings. In their area at any

[35] Tr. 274-297.

given time there will be 10 to 15 job openings for truckers. An experienced driver with a commercial driver's license and multiple endorsements, along with a clean driving record and clean medical record could get placed immediately. Complainant is a good driver. Even drivers over 60 can get hired. Many companies prefer an older driver because of their experience and work ethic.

Complainant's Driving Logs state in pertinent part:[36]

Date (Sep '16)	Started truck	Turned off truck	Time
1	0704	1843	11:38
2	0710	2248	15:38
3	0900	1724	8:24
4	-	-	-
5	0707	1742	10:35
6	0715	1704	9:49
7	0457	1616	11:19
8	0707	1601	8:54

On 8 Sep 16, Complainant departed his home in Vega at 7:07 AM. He drove to White Energy, then to Quality Beef, back to White Energy, then to Friona, back to White Energy, then to Quality Beef. Complainant departed Quality Beef at 12:50 PM and proceeded to a location along I-40, where he stopped at 1:04 PM and delayed until 1:31 PM. He then returned to Respondent's facility, arriving at 2:15 PM. He departed Respondent's facility at 3:18 PM, stopped at a location on S. Progressive Rd. at 3:29 PM for approximately eighteen minutes, proceeded to a location on 1st Street, stopped for approximately four minutes, and returned to Respondent's facility, arriving at 4:00 PM.

Weight records state in pertinent part:[37]

On 8 Sep 16, Complainant weighed in at Quality Beef at 8:32 AM and weighed out at 8:47 AM. He weighed in at White Energy at 9:37 AM and weighed out at 9:45 AM. He weighed in at Paco Feed Yard at 10:44 AM. He weighed in at White Energy at 11:43 AM. He weighed in again at Quality Beef at 12:34 PM and weighed out at 12:48 PM.

A load delivered to Hansford Co. feeders on 9 Sep 16 weighed in at 9:00 AM and weighed out at 9:26 AM.

[36] CX-7-11.
[37] CX-6, 8; RX-10, 12.

Complainant's pay records show in pertinent part:[38]

> In the time he worked for Respondent, Complainant earned $8,294.74. From 27 Aug 16 through 2 Sep 16, Complainant earned $720.01. From 23 Sep 17 to 6 Oct 17, Complainant earned $2,329.31.

Complainant's driver records show in pertinent part:[39]

> He had a clean driving history and was fully medically qualified to drive.

Discussion

The parties in this case dispute whether Complainant engaged in any protected activity and Respondent took any adverse action against him. The legal arguments they make rely heavily upon often diametrically opposed conclusions drawn from ambiguous evidence. Consequently, any meaningful discussion must start with a finding of essential facts.

Fortunately, Respondent's automated truck tracking system removes much of the doubt as to where Complainant was and what he was doing with his truck on the dates before 8 Sep 16[40] and the times on 8 Sep 16 leading up to the assignment of the additional load. Much of the other evidence, particularly as to the state of mind of the various parties is highly subjective. Nonetheless, I must determine the most likely factual scenario and enter findings of essential facts based on the evidence as a whole and taking into consideration incomplete memories, consistencies and inconsistencies, and potential biases.

Finding of Facts

Respondent expected its drivers to operate to the limits of the law and fully utilize all the time provided for in the regulations. Complainant preferred not to work 14 hour days, even if they were legal, and had communicated that preference to Akin and Collier. Although Complainant had a personality prone to emotional outbursts, he was a good driver and had a long term personal relationship with the Colliers. Consequently, they tried to accommodate him, to include allowing him to take his truck home at the end of the day.

On 8 Sep 16, Complainant started his truck for the first time at 7:07 AM. Given a 15 minute pre-inspection, his duty day began at 6:52 AM. He had completed three deliveries, with the last loading at about 12:48 PM. He thought he was done for the day and was on his way home when, sometime between 1:04 PM and 1:30 PM, Akin called him about taking an additional load to Hansford.

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[38] CX-9-10; RX-2.

[39] RX-1.

[40] There was some discussion of a possible violation of the 72 hour rule, however, the driving records show a break from 5:24 PM on 3 Sep 16 to 7:07 AM on 5 Sep 16. That appears to be, as Jordy Collier testified, a sufficient break to reset the 72 hour clock. Nonetheless, the records from the days prior to 8 Sep 16 remain relevant as circumstantial evidence of chronic fatigue.

The additional trip would take at least 6 hours and 15 minutes upon his departure from White Energy. Given the regulation's 14 hour maximum duty day, Complainant had to be done for the day with his truck either at home or at Respondent's facility by 8:52 PM. Since he needed to arrive at his final stop by at 8:52 PM, Complainant would have had to leave White Energy by 2:37 PM. Assuming 15 minutes to load at White Energy means Complainant would have had to get there at least by 2:22 PM. Although it would be close, Akin believed Complainant could legally do the trip.

At the time he was initially tasked with the additional load by Vicki Akin, Complainant had a reasonable possibility of completing the trip within the regulatory duty day. Although there would be little margin for errors or delays, had Complainant simply accepted the load when asked and everything else had gone smoothly, Complainant could have completed the trip within the maximum time. However, Complainant was unhappy about the change. He told Akin he was tired; didn't think he would get back until 9, 10, or 11; didn't think he could do it safely; and would not have enough hours of service to do it. He also told her he did not want to take the trip and would call Collier.

Akin called Collier to let him know Complainant was upset and going to call. Both Akin and Collier believed it would have been possible for Complainant to take the Hansford load and complete the trip within the maximum legal hours. They both understood it was close and Complainant might eventually have to do a shorter pre-load instead, but wanted Complainant to try to do the complete trip, particularly at the point when Akin first asked Complainant to take the load.

Complainant then called Collier from the road. Complainant, who preferred not to work to the limit of the regulation, was unhappy that he was being pushed to do so, particularly since it was going to be a close call on hours of service and he did not get the assignment until late in the day when he was already tired and thought he was done and going home.

Collier was unhappy that Complainant refused the trip, even though it would have been legal when it was assigned. Collier thought Complainant's refusal was a consequence of his preference for shorter days and inclination for emotional outbursts. They had an emotional conversation during which Complainant told Collier he was done for the day, could not take the trip, and was going to quit. Collier believed that Complainant was just blustering and thought Complainant would take the trip. However, Complainant drove back to discuss the matter with Collier in person, arriving around 2:15 PM.

Under the impression that Complainant had only been venting, Collier was surprised to see that Complainant had not taken the load. The time consumed by the trip back to talk to Collier only added to Complainant's fatigue level and made it even less likely the trip could be completed legally. That led to a more heated discussion during which Complainant griped about being tired of having to wait on stupid loaders at the plant and the late hours. He said he was tired and talked about quitting his job. Collier still thought Complainant's rejection of the load was a function of his preference to avoid 14 hour workdays and do only short trips. They discussed pre-loading and going home as an alternative and Complainant was not too fatigued to do that, but Collier was frustrated that Complainant had not simply taken the complete trip to begin with and

believed the complete trip could still be legal. He told Complainant that if Complainant wasn't willing to work 14 hour workdays and take longer trips, Respondent could not use him. Ultimately, Complainant swallowed his frustration, calmed down, and told Collier he would take the load.

However, by that time, Complainant had spent about an hour at Respondent's facility, making it virtually impossible to complete the trip legally. Moreover, shortly after leaving, Complainant got stuck at a train crossing. As he waited, he became more frustrated and angry and reconsidered his decision to take the load. He called Collier, who suggested trying to get around the train crossing. Complainant abandoned the trip and went back to talk to Collier in person again. On the way back, he called his wife and told her that he and Collier were arguing about the load and he didn't know what was going to happen.

When Complainant returned, he was agitated and had another heated discussion with Collier, who again told him it was a not a part-time job and if he was not willing to work full days and take longer trips, Respondent could not use him. Complainant was angry and said that he quit, but Collier believed it was just part of another heated exchange and told him to go home, blow off some steam, and cool off. Complainant, still angry, left his keys and his truck, collected his belongings, and drove home with his wife. Collier thought it was another emotional outburst and did not take the "I quit" seriously.

The next day, Jordy Collier called him to find out why he had not just pre-loaded and gone home. The telephone conversation was once again very emotional and heated.

Protected Activity

Complainant alleges four protected activities related to the request that he take the additional load to Hansford during the afternoon of 8 Sep 16. He alleges that he complained that the extra load would cause him to violate regulations concerning the maximum hours of service and cause him to drive in a fatigued state. He similarly alleges that he eventually refused to take the load because doing so would be in violation of the regulations and, create, because of his fatigue, a reasonable apprehension that he would seriously injure himself or others.

Respondent counters that Complainant could have accepted the additional trip without violating any regulations and was in fact simply not interested in working a long day. Moreover, it submits that Complainant never communicated to Respondent that he was too fatigued to safely complete the trip. Respondent further argues that Complainant never actually refused to operate his vehicle, but rather quit and in any event could have completed the trip without a reasonable apprehension of serious injury.

Hours of Service

In order to establish protected activity related to regulatory violations, Complainant must show that (1) he communicated to Respondent his reasonable concern that the additional trip would cause him to violate the regulations as to hours of service and/or (2) the trip he refused to

take actually would have violated the regulations as to hours of service. The two essential factors to consider in determining whether Complainant could have taken an extra load are (1) how long the extra load would take and (2) when was he asked to take it.

Part of how long the additional load would have taken to complete depends on where Complainant was when he started and where he could end. At a minimum, he would have had to go from White Energy to Hansford and either back to Respondent's facility or to his home. Once he arrived at White Energy and loaded, he needed a minimum of 6 hours and 15 minutes. Since the conversation took place sometime between about 1 and 1:30 PM, it would not be unfair to estimate the actual time of request to be around 1:15 PM.

Consequently, while the time would have been tight and everything would have had to go right, at the time of the initial request it would have been possible to take the trip without violating the hours of service rules. However, because it was so tight, it was not unreasonable for Complainant to voice his concerns about the probability that he would run out of time. Moreover, once Complainant told Akin he was refusing to take the Hansford run, called Collier, and headed back to Respondent's facility; it was no longer possible to make a legal Hansford run, even under favorable conditions.

Consequently, I find that Complainant was able to establish that he had reasonable concerns that the trip would result in a violation of the regulations. On the other hand, he was not able to establish that the trip he initially refused would have actually resulted in his violation of the 14 hour rule.[41]

That leaves only the question of whether or not Complainant communicated that concern to Respondent. Based on the context of their conversations, I find it is more likely than not that either directly or implicitly, Complainant did communicate with Akin and Collier in such a way that they should have reasonably understood that hours of service were a concern.[42] Consequently, I find that Complainant was able to establish protected activity by raising the possibility of an hours of service violation.

Fatigue & Apprehension of Danger

In order to establish protected activity related to fatigue and danger, Complainant must show that (1) he communicated to Respondent his reasonable concern that the additional trip would cause him to be unsafe due to fatigue and consequently violate the regulations and/or (2) he refused to take the trip because (a) of his reasonable apprehension of serious injury as a result of fatigue and/or (b) taking it would have caused him to violate the regulation prohibiting operation of a vehicle in an unsafe manner due to fatigue.

[41] Complainant was able to carry that burden as to his subsequent refusals, but his initial refusal caused the delay that changed the additional trip from possibly legal to clearly illegal.

[42] Although Aikin did not work for Respondent, she clearly had implicitly been granted authority to act as its agent in assigning trips. Moreover, she communicated Complainant's refusal to Jordy Collier.

There is little question that the additional trip would have involved a lengthy duty day, even if it was less than the maximum allowed by the regulation. The weight of the evidence is also clear that Complainant preferred not to work long days. That preference may have been a function of both the fact that long trips effectively paid less and he was more fatigued at the end of a 13 to 14 hour day then he was at the end of a 9 to 10 hour day.

In any event, the evidence shows that when Akin called him about the additional trip after 1:00 PM, Complainant had already been on duty since before 7:00 AM. Even though Complainant conceded that at the time Akin and Collier asked him to take the Hansford trip, he could have safely completed a pre-load, it is not unreasonable to conclude that the prospect of taking another trip of a minimum of 6 ½ hours led Complainant to have significant concerns about his ability to complete the day without being fatigued, particularly given his schedule over the preceding week.[43]

Exactly what Complainant said to Akin and Collier is less clear. Both Akin and Collier deny that Complainant said anything about fatigue or hours of service, although Complainant insists that he mentioned both. In any event, he clearly communicated to them that he did not want to take the additional trip and Collier testified that Complainant said he could not take the trip. Even if Complainant's primary motivation was anger at having to accept a long trip to Hansford in spite of his clearly stated preferences, it seems unlikely that he would not have mentioned the length of the day or fatigue.[44]

Consequently, I find that Complainant more likely than not engaged in protected activity by communicating to Respondent his reasonable concerns that the additional trip could cause him to violate the regulations against driving while fatigued.

The allegation of protected activity by refusal to drive because of fatigue is slightly more problematic in that it involves anticipatory fatigue. When Akin first assigned him the Hansford trip, Complainant could have finished it sometime before 9:00 PM, assuming everything went smoothly. Complainant's concern that he might not return until 10:00 or 11:00 PM was unrealistic at that time, unless there were unexpected significant delays and that possibility exists with every trip. Nonetheless, if he was already so fatigued that taking the Hansford trip, even if he finished it as quickly as possible, would still result in him being unsafely fatigued, his refusal to drive on that basis would constitute protected activity. Given his testimony and the fact that he would have been well past 12 hours, it is not unreasonable to conclude that refusing the Hansford trip, even at the time it was initially offered, constitutes protected activity, and I so find.[45]

Finally, the allegation of protected activity by refusing to drive because of reasonable apprehension of serious injury requires Complainant to establish that he allowed Respondent to address the dangerous situation, but Respondent declined to do so. The evidence in this regard is

[43] The fact that a 14 hour day is legal does not necessarily mean that a driver can safely be on duty for that long. If a driver consistently complains to an employer that he was too fatigued to complete an otherwise legal duty day, the employer would be entitled to terminate the driver, not because he is a whistleblower, but because he lacks the required endurance for the job.

[44] Moreover, his primary motivation is not particularly relevant, except to the extent it may impeach the sincerity of his report of subjective fatigue.

[45] See n.44.

highly ambiguous, in that both sides acknowledge the discussion of Complainant taking a pre-load as an alternative.

However Complainant maintains that he raised the possibility, only to be told by Collier that it was unacceptable. Collier, on the other hand, testified that he suggested it and even called the next day to find out why Complainant had not taken the pre-load option. Akin does not recall anything specific, but did testify that had Complainant raised a problem with fatigue or hours of service, she would have told him to pre-load, because Hansford was large enough that they could handle the delayed delivery. It appears that pre-loading was a common practice.

In this instance, however, that ambiguity makes it difficult for Complainant to establish that he more likely than not was the one to suggest a pre-load as an accommodation, only to be rebuffed by Collier. Given the equally likely alternative that Collier suggested it, but it was rebuffed out of anger, I do not find that Complainant was able to meet his burden of proof as to opportunity to correct and consequently unable to carry his burden of proof as to protected activity by refusal to drive because of a fear of injury.

However the distinctions between the types of protected activity have little real significance, given the most likely factual context. Whether Complainant's protected activity was specifically his communication or his refusal is largely a legal distinction without a particularly relevant difference in the outcome of this case. The two actions were part of the same general facts. Having establish protected activity, Complainant must also establish adverse action.

Adverse Action

The parties have fundamentally inconsistent views of how Complainant came to no longer be in Respondent's employ. Complainant says Respondent fired him. Respondent says Complainant quit. Both sides suggest the other's witnesses are incredible and even lied under oath.

All of the witnesses' testimony included some inconsistencies, both internal and when compared to the testimony of other witnesses. Complainant said he did not tell Vicki Akin he wanted to drive less, he called her on 8 Sep 16 to tell her he could not safely take the Hansford load, and she told him she would call Jordy Collier. However, Akin testified that Complainant told her he preferred to work less than 14 hours, Complainant never mentioned being too tired to take the Hansford load, and she never threatened to call Collier. On the other hand, Collier testified that he did not recall Akin calling him to say Complainant called her to say he was refusing the Hansford load. However, Collier also testified that when she called him to say Complainant had refused the load, she indicated he had been belligerent and told her he was going to call Collier.

Complainant testified that when he called his wife, he told her that he and Collier were arguing about the load and he didn't know what was going to happen. He further testified that when he returned the truck to Respondent's facility, he called his wife and told her he wasn't going to have enough hours and was too tired to do this. He did not testify that he specifically told her he had been fired, although that was her testimony.

Complainant also testified that he specifically told Collier that the Hansford trip was too far to do safely and within the hours of service, that he suggested the possibility of pre-loading, and that Collier insisted the trip had to be completed that night. Collier denied that Complainant raised anything about fatigue and testified that he suggested the possibility of pre-loading, because Akin told him a pre-load would be fine. Collier was consistent in his testimony that although Complainant threatened to quit, he thought he had talked him out of it. Complainant says he never quit, but was told Respondent didn't need him if he didn't want to take the load.

Cory Collier testified that although he did not hear any cursing or shouting between Complainant and his brother, he could tell they were having a strained conversation. He also noted that Complainant appeared to be fine when he walked out after that conversation, but was clearly agitated when he returned. He further testified that Complainant told him that he quit, turned in his paperwork, and walked out the front door. Mark Collier also testified that Complainant quit, but that was based on what his sons told him.

Some of the explanation for the widely different inferences and confusion in the wake of the discussions between Jordy Collier and Complainant can likely be explained by the nature of the conversation and the emotional states of the individuals involved. Jordy Collier testified that Complainant had regular emotional outbursts that included cursing, screaming, yelling, losing his temper, and acting irrationally and impulsively. Collier explained that they hired Complainant because he was a hard worker, they had a history together, and they hoped he had turned a new leaf. Complainant conceded in his testimony that his memory is not as good as it once was and he gets emotional at times. Complainant's spouse testified that he suffers from a condition that causes him to cry very easily.[46]

Jordy Collier also testified that when Complainant called him about the Hansford load, Complainant was particularly mad, said he just couldn't do the load, and was going to quit. He testified that he tried to talk Complainant out of quitting when Complainant returned and by the end of their conversation, Complainant told him he didn't mean to get upset and would go load the truck. Collier concluded it was just another incident that would blow over. That is consistent with Cory Collier's testimony that Complainant did not appear agitated after his conversation with Jordy in Jordy's office. It is also largely consistent with Complainant's testimony, which was that although Jordy was angry and started yelling at him, the conversation calm down and he decided to take the full trip.

Based on my observation of their testimony, I believe the ambiguity and inconsistency between the witnesses, particularly Jordy Collier and Complainant, is not a product of their intent to deceive, but more likely a reflection of their biases and the fact that they were engaged in an emotional and confrontational discussion, likely saying things they did not necessarily mean and

[46] She also testified that before he lost his job with Respondent, she never once saw Complainant lose his temper with her or anyone else, even if he had good reason to. Given her relationship with Complainant and what appears to be a likely, albeit understandable, exaggeration in his favor, I did not find her testimony as to his total absence of any temper whatsoever prior to his leaving Respondent very credible.

making it unlikely either would be able to accurately recall specifics. Consequently, it is difficult to ascertain the specific language that Collier and Complainant used in their discussions, what each of them meant to say, and what the other thought they meant.

It is clear that Respondent and Complainant got into a disagreement over whether or not he should take the Hansford load. That discussion was manifested over five occasions, during which it appears Complainant became more and more frustrated. The first occasion was when he received Akin's phone call asking him to take the Hansford load, which would mean he was not going home for the day. The second occasion was Complainant's call from the road to Collier when he was upset, mentioned quitting, and decided to confront Collier in person. The third occasion was the first conversation in Collier's office, during which they were both angry and Complainant again said something about quitting. The fourth occasion was the call Complainant made while being delayed waiting for the train, when he was even more frustrated by Collier's suggestion that he take an alternate route that he knew would not help. The fifth occasion was when Complainant returned to Respondent's facility in an agitated state and they engaged in another adversarial dialogue. When Respondent said something he took to be an ultimatum, he told them he quit and walked out.

Complainant has the burden of proving that it is more likely than not that Respondent took an adverse action against him. The alleged adverse action in this case is that he was terminated. However, there is no evidence that Jordy Collier or anyone on behalf of Respondent ever directly told Complainant he was fired.

However, in some instances supervisors may tell drivers their job depends on taking a load and the driver simply quits instead of taking the load. In such a case, the employer might try to escape accountability by claiming that it never actually fired the driver. In order to address that disingenuous argument, the law provides that if the employer accepts that decision and allows him to resign, it is the functional equivalent of the driver having refused the load and being fired by the employer.

It is at least as likely as not that Complainant could have accepted and completed the Hansford trip within the regulation maximum hours if he had taken it when it was assigned. Collier was unhappy that Complainant did not do that. When Complainant raised fatigue, Collier interpreted it as a manifestation of Complainant's preference for shorter days, which led to their arguments over whether or not Complainant wanted to work as a full-time driver. Indeed, both Collier and Complainant testified that they were arguing about whether or not Complainant would do full 14 hour days or wanted to work part-time. In any event, although still frustrated that Complainant did not take the complete trip, Collier ultimately mentioned the pre-load option.

Nonetheless, Complainant also testified that in the course of their argument, Collier said if he didn't want to do it, Respondent didn't need him. Complainant suggests that he inferred from Collier's remarks that if he couldn't take the Hansford load, Respondent had no room for him, so he quit. Respondent counters that Complainant was unhappy about being asked to do a 14 hour day. That raises a significant issue, since Complainant must show that he reasonably understood Collier was telling him that Respondent had no place for him unless he took the Hansford load or was otherwise willing to drive over hours or in a fatigued state. If Collier was simply saying that,

as long as it was legal and safe, Respondent expected Complainant to work the same full time schedule as other drivers, Complainant's resignation, even if accepted by Respondent, would not constitute a termination and adverse action.

In either event, Complainant's response was to tell both Collier brothers that he quit. Complainant did not, as was his custom, take his truck home. Instead, he emptied it out, left his keys at the office, and drove home with his wife. While that may just have been a show for the Colliers, it appears more likely that at the end of the day, Complainant believed he had quit and was no longer driving for Respondent. However, the evidence further shows that, given Complainant's history, Jordy Collier did not take Complainant seriously about quitting. Collier told him to go home and blow off some steam, with the expectation that it was just another outburst.

Consistent with his belief that Complainant was still working for him, Jordy Collier called him the next day about getting the load to Hansford. Had Collier intended to terminate Complainant, accept his resignation, or for any reason thought that Complainant was no longer working for Respondent, he would have had no reason to call his former employee the next morning. Consequently, the evidence shows that as of the morning of 9 Sep 16, although Complainant thought he had quit, Jordy Collier thought Complainant was still working for Respondent and had not accepted any resignation. Moreover, to the extent that Jordy Collier's call the next morning to ask why Complainant had not taken the pre-load option (which everyone agreed could have been done without violating any rules) should have resolved any misapprehension that Respondent did not need Complainant unless he was willing to take the full Hansford trip. The fact that Collier called about the pre-load also corroborates his testimony that he offered that option to Complainant the day before.

Thus, the 9 Sep 16 phone call is highly significant because before the call, Respondent believed that Complainant remained in its employ and therefore had not accepted his resignation. Consequently, the evidence fails to establish any adverse action as of that time. However, after the call, both parties understood that Complainant was no longer working for Respondent.

There is only limited evidence of what was said during that phone call. Collier did not specifically discuss it in his testimony. According to Complainant, Collier called and started yelling so much he could not understand what Collier was saying. After Collier calmed down, he asked Complainant why he had not simply taken the pre-load. Complainant was able to recall and testify that when Collier asked him why he had not done the pre-load, he answered that he didn't think that was an option, because Collier wanted it done that night. However, Complainant could neither recall what Collier said in response nor explain why they even had the discussion, if he had been fired the day before.

Ultimately, the question of whether Respondent took any adverse action against Complainant rests on what happened during the phone call. There is no evidence that Collier told Complainant he was fired during that call. Consequently, Complainant therefore has the burden of proof to show that it is more likely than not that (1) during their conversations on 8 Sep 16 and the phone call the next morning, he reasonably understood Collier to be telling him that if he was not willing to take the Hansford trip or otherwise drive in an unsafely fatigued state or over hours,

Respondent had no place for him; (2) he resigned in response; and (3) Respondent accepted his resignation.

Given Complainant's inability to recall the entirety of his conversation with Collier over the phone on 9 Sep 16, it is difficult to determine exactly what happened, how Collier came to understand that Complainant did actually intend to quit, and under what circumstances he accepted that resignation.

Complainant submits that he needed the paycheck and would never quit on his own. Indeed, Complainant's difficult financial circumstances are circumstantial evidence that he would have been less likely to quit his job. On the other hand, the fact that he never responded to Mark Collier's offer to quickly find him another job is similar circumstantial evidence that his emotions overcame his rational thought processes in terms of considering his financial circumstance.

Collier never told Complainant he was fired. The evidence establishes that it is at least as likely as not that Respondent offered to accommodate Complainant's fatigue by allowing him to take the pre-load option and had not accepted his resignation as of the telephone call on 9 Sep 16. In other words, in spite of his behavior the day before, Complainant still had his job when he answered the phone. However, Complainant was unable to recall significant portions of that phone call relating to the pre-load option or how Collier came to understand Complainant was not simply blowing off steam and no longer intended to work for Respondent.

The evidence of record certainly allows for the possibility that that Respondent told Complainant that it had no room for him unless he drove unsafely fatigued or in violation of the rules, Complainant responded by resigning, and Respondent accepted that resignation. However, Complainant was unable to establish that the possibility is more likely than not what actually occurred. Accordingly, the record fails to establish adverse action.

ORDER

The complaint is dismissed.

ORDERED this 20th day of August, 2018 at Covington, Louisiana.

PATRICK M. ROSENOW
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).