U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 August 2019

Case No.: 2018-STA-00066

In the Matter of

CLIFFORD DRUMMOND
Complainant

v.

SNS TRANSPORT, LLC
Respondent

Appearances: Clifford Drummond
Pro Se Complainant

Shawn Hardowar
For Respondent

Before: LYSTRA A. HARRIS
Administrative Law Judge

DECISION AND ORDER

This case arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Section 31105 of the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), 49 U.S.C. § 31105, and its implementing regulations found at 29 C.F.R. Part 1978 (2013).[1]

Clifford Drummond ("Complainant") alleged that his former employer, SNS Transport, LLC ("Respondent") retaliated against him for filing a complaint with the Occupational Safety and Health Administration ("OSHA") by discharging him from his employment in violation of the employee protection provisions of the STAA. On January 24, 2018, Complainant filed a formal complaint with OSHA, U.S. Department of Labor ("Department of Labor"), alleging Respondent discharged him in violation of 49 U.S.C. § 31105.

By letter dated July 5, 2018, OSHA issued its notice that it had completed its investigation of the formal complaint and dismissed the claim, determining that Complainant had not suffered an adverse action and had not established a prima facie allegation of a STAA

[1] Under 40 U.S.C. § 31105(d), the applicable appeals court circuit under the STAA is "the court of appeals in the United States for the circuit in which the violation occurred or the person resided on the date of the violation." Here, the alleged violation occurred at Respondent's yard at 1416 Ferry Street. Tr. at 41, 88. 1416 Ferry Street is the address that was provided by Respondent, and it is in Newark, New Jersey. Tr. at 30. There was no testimony as to where Complainant resided as of the time of the alleged incident, but the address that he provided in this matter is also in New Jersey. As such, the law of the 3rd Circuit applies in this matter.

violation. On July 9, 2018, Complainant, then represented by counsel,[2] timely objected to the OSHA determination and requested a hearing before the Department of Labor Office of Administrative Law Judges ("OALJ"). This matter was subsequently assigned to the undersigned. A Notice of Hearing and Pre-Hearing Order was issued on August 13, 2018, scheduling a hearing for March 5, 2019.

A formal hearing was held on March 5, 2019 in Cherry Hill, New Jersey. Both Complainant and Respondent were self-represented.

Complainant testified on his own behalf. Shawn Hardowar and John Guzman testified on behalf of Respondent. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence, and submit post-hearing argument or briefs. Both parties made a closing statement and did not submit post-hearing briefs.

At the March 5, 2019 hearing, the following exhibits were admitted in to the record: Complainant's Exhibits ("CX") 1–6 and Respondent's Exhibits ("RX") 1–5. *See* Tr. at 21, 35.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law. All evidence that has been admitted into evidence has been considered, whether or not specifically cited herein.

I. ISSUES PRESENTED

1) Is there coverage under the STAA, i.e., is Complainant an "employee" and is respondent an "employer" within the meaning of STAA?
2) Was Claimant engaged in protected activity as defined by STAA?
3) Did Respondent know Complainant was engaged in protected activity under STAA?
4) Did Respondent take an adverse employment action against Complainant?
5) Was Complainant's protected activity a contributing factor in the unfavorable personnel action?

II. APPLICABLE STANDARDS

The Employee Protection section of the STAA provides:

§ 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

[2] On December 27, 2018, Complainant's counsel filed a Motion to Withdraw as Complainant's Counsel. The undersigned issued an Order Granting Withdrawal of Complainant's Counsel on January 21, 2019.

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

(B) the employee refuses to operate a vehicle because—(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or 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 the employee is or 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" because "Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may feel threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations."[3]

STAA whistleblower complaints are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("Air 21").[4] In order to prevail, Claimant must show that he engaged in a protected activity, he suffered an adverse action, and the protected activity was a contributing factor in the adverse action. If these elements are satisfied, the burden shifts to Respondent to show by clear

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

[4] On August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 1536, § 31105, 121 Stat. 266, 464-67 (2007), Congress amended paragraph (b)(1) of 49 U.S.C. § 31105 to make the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b), applicable in the adjudication of STAA whistleblower claims.

and convincing evidence that the adverse action would have been taken regardless of the protected activity.[5]

III. FINDINGS OF FACT

a. Exhibits

Complainant's Exhibits

CX 1—A CAT scale ticket from January 12, 2018.

CX 2—An IESI Corporation manifest bill dated January 11, 2018.

CX 3—A manifest from the transfer station for overweight dated January 12, 2018.

CX 4—A Waste Management Fairless Landfill document dated January 11, 2018.

CX 5—A payroll record.

CX 6—A document from January 11, 2018 designating that Complainant's truck was overweight.

Respondent's Exhibits

RX 1—July 5, 2018 letter from the Department of Labor addressed to Complainant concerning OSHA's determination with respect to Complainant's Complaint.

RX 2—Undated document with Shawn Hardowar's name at the bottom.

RX 3—Document wherein the first page is a document dated January 9, 2018 with Complainant's name at the bottom, the second page is B&L Towing, the third page is a continuation of the towing bill, and the last page has three lines of text on it.

RX 4—A set of invoices from Bethlehem Landfill Company.

RX 5—A payroll record from Respondent.

b. Factual Findings

Below are the undersigned's findings with respect to the pertinent events in this matter. Where testimony conflicted, the undersigned utilized a credibility analysis to determine the ultimate factual finding for that event. The credibility analysis is addressed below.

[5] 49 U.S.C. § 42121(b)(2)(B); *Mauldin v. G & K Services*, ARB No. 16-059, ALJ No. 2015-STA-00054, slip op. at 5 (ARB June 25. 2018).

i. Testimonial Evidence and Witness Credibility Determinations

The undersigned fully considered the entire testimony of every witness who appeared at the hearing. As the finder of fact in this matter, the undersigned is entitled to determine the credibility of witnesses, to weigh evidence, to draw from her own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. An administrative law judge has the authority to address witness credibility and to draw her own inferences and conclusions from the evidence. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (2968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

In weighing testimony in this matter, the undersigned considered the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor when testifying, and opportunity to observe or acquire knowledge about the matter at issue. The ALJ also considered the extent to which the testimony of each witness was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). The undersigned makes the following credibility assessments of the witnesses who presented testimony in this case:

1. Complainant (Tr. at 29–51, 87–90)

Complainant testified as to the nature of his employment with Respondent, the incidents that he believed led respondent to terminate his employment, and his attempts to obtain employment after his alleged termination. Complainant worked for Respondent as a truck driver. Tr. at 29–30. Respondent's office and yard is at 1416 Ferry Street in New Jersey. Tr. at 30, 41. He had 11 years total of truck driving experience. Tr. at 29. He had worked for Respondent since winter of 2017.[6] Tr. at 42. He averred that he worked six days per week, delivering one to two loads per day for Respondent at a rate of $110.00 per load between Brooklyn and New Jersey. Tr. at 42-43, 70. Complainant testified that his employment with Respondent ended on January 12, 2018, when he was terminated.[7]

Complainant's testimony was moderately credible. He had difficulty recollecting the dates of certain events, such as when he was hired. Complainant also had parts of his testimony contradicted by the other witnesses. He did, however, support other parts of his testimony with corroborating documentary evidence.

2. Mr. John Guzman (Tr. at 52–65)

Mr. Guzman testified about the nature of his employment with Respondent and a conversation that he had had with Complainant on the day Complainant alleged that he was terminated. Mr. Guzman, as yard manager for Respondent, was responsible for "making sure the

[6] Q: "And how long did you work for SNS?" A: "That's why—couldn't have been the 11th. It was a little longer than that. I just don't know—remember the precise date, but I know I didn't start in 2018. I started in 2017. It was in the wintertime when I started." Q: "But you say it's no more than two months?" A: "Right. It's no more than two months I worked for the man." Tr. at 42–43.

[7] Q: Since you were saying that January 12, 2018, the day after—the day you went to the CAT scale and obtained this receipt…that was the day that you were told—" A: "That was the day I was terminated." Tr. at 43.

trucks were running [well]" each day. Tr. at 52–53. Mr. Guzman was employed by Respondent from around September of 2017 until August of 2018. *Id*.

Mr. Guzman's testimony was largely credible. He provided testimony that was largely corroborated by the other witnesses, and where his testimony contradicted with that of the other witnesses, it was only in unimportant, non-material ways. Mr. Guzman's testimony about the events that occurred between him, Complainant, and Respondent were objective and nature, and he expressed no discernable bias towards either party in this matter.

3. Mr. Shawn Hardowar (Tr. at 66–84, 86–87, 90)

Mr. Hardowar testified as to his relationship with Respondent SNS Transport, LLC, the business Respondent engaged in and its practices, as well as his recollections concerning the incidents Complainant alleged occurred. In his sworn hearing testimony, Mr. Shawn Hardowar described himself as the owner of Respondent, SNS Transport LLC, for "approximately four years." Tr. at 66. According to him, Respondent is a business that hauls garbage from a transfer station to landfills, operating in New York, New Jersey and Pennsylvania. Tr. at 66–67. Mr. Hardowar averred that Respondent employs approximately 13 employees. *Id*. One of those employees was the yard manager, Mr. Guzman. Tr. at 68.

Mr. Hardowar's testimony was only partially credible. His answers to a number of questions were inconsistent or contradictory. He gave a number of answers that were illogical or improbable in light of the testimony of record as a whole. He also is a biased party in this matter as the owner of Respondent.

4. Weighing of Witness Credibility

As Mr. Guzman is no longer employed by Respondent, he has less potential bias in this matter when compared to Complainant or Mr. Hardowar. As such, Mr. Guzman's testimony will be credited over that of Complainant and Mr. Hardowar where there is conflict. All three parties did agree that Complainant informed Mr. Guzman about the overweight truck,[8] and Mr. Guzman and Complainant agree that Mr. Guzman told Complainant to leave the keys in the truck.[9] As Mr. Guzman is the party with the least bias, his further testimony on what occurred during that incident will be credited with respect to the surrounding events.

Mr. Guzman testified that his duties as a yard manager were to "wait for all the trucks to come at night, and me and the mechanic, we just making sure everything was perfect the next day. That was basically it." Tr. at 53. Mr. Guzman also averred that he had no hiring or firing

[8] Complainant: "I explained to [Mr. Guzman], showed him this CAT scale ticket that the truck is overweight and I'm not driving it to Pennsylvania, because it anything happens, DOT is going to hold me responsible because I'm supposed to go through a precheck, and me being a professional driver is supposed to know this is against the law, and, you know—what's supposed to be—you know, what's of course of—what's the next action that's supposed to happen." Tr. at 38. Mr. Guzman: Q: "So on the night of the incident…of the 12th…do you remember us having a conversation about this weight ticket?" A: "Yeah." Tr. at 61–62. Mr. Hardowar: "Oh, [Mr. Guzman] called me and said [Complainant] said the truck was overweight and he's not going to do the load." Tr. at 75.

[9] Complainant: "Then told me that [Mr. Hardowar] said, leave the truck—leave the keys in the truck…" Tr. at 38. Mr. Guzman: "Shawn says, Okay, tell him to leave the key…And I told you, leave the key there…" Tr. at 62.

authority.[10] Tr. at 62–63. Mr. Hardowar, meanwhile, did answer affirmatively when the undersigned asked if he were responsible for assigning the drivers to transport the garbage to the landfills.[11] Tr. at 69. Mr. Guzman stated that he told Complainant he would be assigned a new truck; he also maintained Mr. Hardowar was the only one between them with the authority to actually assign Complainant a new truck.

Complainant and Mr. Hardowar are both parties with an interest in this matter. They are thus potentially biased, so where their testimony conflicts with Mr. Guzman's, as was detailed above, Mr. Guzman's version of events will be credited. Mr. Guzman, however, did not testify as to the relevant events of January 13, 15 and 16, 2018, so it is necessary to determine who is more credible regarding what occurred on those dates—Complainant or Mr. Hardowar.

The testimony given by Mr. Hardowar and Mr. Guzman with respect to their duties and authorities, as discussed above, bolsters Complainant's credibility with respect to his interpretation of the instruction to leave the keys in the car as him no longer being wanted. The preponderant testimony of record supports finding Mr. Hardowar had the authority to assign Complainant a new truck. While Mr. Guzman is credited with telling Complainant he would be assigned a new truck, he lacked the authority to ultimately assign Complainant a new truck. The record does not support finding that Mr. Hardowar ever did assign Complainant a new truck. Thus, it is reasonable that Complainant interpreted an instruction of "leave the keys in the truck," absent an assignment of a new truck, to be an indication that he was no longer wanted. It is thus reasonable to credit Complainant's testimony that when he returned to work on Saturday, it was to pick up his final paycheck, and that he did not call Mr. Hardowar on Monday, as he had believed Respondent had terminated his employment.

Claimant's credibility is also bolstered by his testimony's corroboration with documentary evidence. Complainant's testimony as to the time of night that he pulled into the yard on January 12, 2018 is corroborated by the time stamped on the CAT scale ticket. *See* CX 1, Tr. at 79–80.

Additionally, Mr. Hardowar's testimony concerning the fact that he did not speak to Complainant on Saturday, January 13, 2018, when Complainant had testified that the two of them had a conversation seems unlikely given the totality of the record. Complainant testified that when he came to the yard on Saturday to pick up his check. Tr. at 40, 45. Mr. Hardowar's testimony corroborated the fact that checks were distributed on Saturdays. Tr. at 73. When asked if he was not in the yard when paychecks were distributed, Mr. Hardowar testified, "[s]ometimes I'm in the office." Tr. at 76. He testified, though, that he did not meet with Complainant on Saturday. Tr. at 73. Given, in light of the record as a whole, that it was more likely than not that Mr. Hardowar was at the yard on the day checks were distributed, the undersigned finds that it was likely that Mr. Hardowar and Complainant interacted on Saturday as Complainant described it.

Mr. Hardowar's credibility concerning his interactions with Complainant are also diminished by his testimony with respect to his attempts to contact Complainant on January 12,

[10] "Because I'm not allowed to tell you, Oh, go home, quit, because that's not my job…I never—I never fired nobody." Tr. at 62–63.

[11] Q: "All right. So who was responsible for assigning the drivers to perform—to transport the garbage to the landfills?" A: "I do." Tr. at 69.

2018. Mr. Hardowar testified that he tried to call Complainant after speaking with Mr. Guzman, but he said that Complainant had never answered his phone. Tr. at 76. Both Complainant and Mr. Guzman, however, testified that Complainant and Mr. Hardowar spoke on the phone at some point during that day. Tr. at 38, 64. As discussed above, Mr. Guzman's version of events would be credited over that of Mr. Hardowar due to his lack of potential bias as a non-party in this matter.

ii. Relevant and Material Findings of Facts

Based on the documentary exhibits and testimonial evidence presented, the undersigned makes the following relevant and material findings of fact in this case:

- Respondent SNS Transport is a Limited Liability Corporation ("LLC") involved in the interstate transportation of waste. Tr. at 66–67. Respondent operates in New York, New Jersey, and Pennsylvania, but Respondent's office and yard is located in New Jersey. Tr. at 30, 41. The drivers employed by Respondent use trucks to haul the waste from transfer stations to landfills. Tr. at 66–67. Respondent was engaged in the business of transporting garbage across state lines from New York and New Jersey to landfills in Pennsylvania using "48-footer. 46-footer, typically walking floor [trailer]" trucks that weigh around 28,500 to 32,500 pounds. *Id*.
- Respondent employed Complainant as a truck driver. Tr. at 29–30. His job responsibilities included the transportation of municipal waste. Tr. at 30. Complainant worked six days a week and delivered between one to two loads of waste per day at a rate of $110.00 per load. Tr. at 42–43, 70.
- Respondent employed Mr. Guzman as a yard manager from September 2017 to August 2018. Tr. at 53. Mr. Guzman was responsible for ensuring that the trucks were running properly and worked with Respondent's mechanic to do so. *Id*. Mr. Guzman lacked the authority to hire or fire employees. Tr. at 62–63.
- Respondent employed Mr. Guzman as a yard manager from September 2017 to August 2018. Tr. at 53. Mr. Guzman was responsible for ensuring that the trucks were running properly and worked with Respondent's mechanic to do so. *Id*. Mr. Guzman lacked the authority to hire or fire employees. Tr. at 62–63.
- On Friday, January 12, 2018, Complainant believed that his truck did not feel right. Tr. at 36–37. Complainant stopped at a certified CAT scale in New Jersey to have his truck weighed. Tr. at 36–37. The CAT scale ticket stated that Complainant's truck was overweight. Tr. at 36–37; CX 1. After Complainant scaled his truck, he returned to the yard. Tr. at 37. It was night when Complainant returned. *See* Tr. at 47, 61, 78. Mr. Guzman was present when Complainant returned to the yard. Tr. at 37–38. Complainant explained to Mr. Guzman that the truck was overweight and showed Mr. Guzman the cat scale ticket. Tr. at 38, 62. Complainant informed Mr. Guzman that he refused to drive to Pennsylvania with an overweight truck. *Id*. Mr. Guzman called Mr. Hardowar and informed him that Complainant was not going to drive the overweight truck. Tr. at 62–63, 75. Mr. Hardowar instructed Mr. Guzman to tell Complainant to leave the keys in the truck and that another truck would identified for Complainant to drive. Tr. at 62, 75. Mr. Guzman told Complainant, "[l]eave the key there; I will call you and let you know what truck you are going to drive." *Id*. Mr. Guzman never heard Complainant say, "I quit." Tr. at 64, 89. Complainant then called Mr. Hardowar and spoke with him on the phone. Tr. at 64. There is no evidence that Complainant was ever given a new truck.

- On Saturday, January 13, 2018, Complainant went to the yard to pick up his paycheck. Tr. at 39. Saturday was the usual day for paycheck distribution. Tr. at 39, 73. Mr. Hardowar was there when Complainant picked up his check. Tr. at 39. Mr. Hardowar and Complainant had a conversation about the overweight truck. *Id*. Complainant construed the conversation to mean that he was still terminated. Tr. at 40. After getting his paycheck, Complainant said to Mr. Hardowar, "I'm going to get an attorney," and he left the yard. *Id*.
- Mr. Hardowar and Complainant did not speak on Monday, January 15, 2018. Tr. at 88.
- Complainant did not come in to work for Respondent again after he had picked up his check on Saturday, January 13, 2018. Tr. at 40.[12] When Complainant did not show up for work on Tuesday, January 16, 2018, Mr. Hardowar assumed that Complainant no longer wanted to work for Respondent.[13] Tr. at 87.

IV. CONCLUSIONS OF LAW

a. Is There Coverage Under the STAA?

The parties have not disputed the issue of coverage in this matter. Nonetheless, it will be addressed herein.

The STAA applies to any "person"[14] in a position to discharge, discipline or discriminate against an "employee." 49 U.S.C.A. § 31105(a)(1). An "employee" is any "driver of a commercial motor vehicle…who in the course of his employment directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier..." 49 U.S.C.A. § 31105(j).

Although "commercial motor vehicle" is not further defined in these regulations, Title 49 defines "commercial motor vehicle" as a "vehicle used on the highways to transport…property, if the vehicle—A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater,…or D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103." 49 U.S.C.A. § 31132(1).

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[12] "I left and I proceeded, you know, to look for other jobs. It took me four months to get another job. In the midst of me just looking for another job, you know, I had to look for an attorney at the same time." Tr. at 40–41.

[13] Q: "What did you consider to have occurred with regard to Mr. Drummond's employment between your being told that his child was sick and your hearing from OSHA?" A: "I guess he didn't want to work back. From his history, work history with me, from calling out and saying all different, different things, I figured he didn't want to work back anymore." Q: "He didn't want to do what?" A: "He didn't want to work for us anymore." Q: "So when did you make that assessment?" A: "When I called him on Monday he didn't show up the next day. He didn't show up after that so. He knew where my office is, ma'am." Tr. at 87.

[14] The term "person" is defined with respect to what it does not include, with the two entities excluded from the definition of "person" being (i) the United States Postal Service and (ii) the Department of Defense. 49 U.S.C. § 114(u)(6)(A). Corporations are within the STAA definition of "person." 49 U.S.C. app § 2301(4). *Osborn v. Cavalier Homes of Alabama, Inc. and Morgan Drive Away, Inc.*, 89-STA-10 (Sec'y July 17, 1991).

Title 29 defines "commercial motor carrier" as "any person engaged in business affecting commerce between States or between a State and a place outside thereof who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate such a vehicle." 29 C.F.R. § 1978.101.

Complainant and Respondent both provided testimony as to the fact that Complainant was employed by Respondent. *See* Tr. at 30, 68–69. The evidence further establishes that Complainant drove, during the course of his employment, a highway vehicle weighing greater than 10,001 pounds. *See* CX 1–4; CX 6. It is reasonable to conclude that Claimant, as a driver of a commercial motor vehicle, directly affected the safety and security of the vehicles that he drove. Further, the evidence establishes that Respondent is a commercial motor carrier, as Mr. Hardowar testified that Respondent was engaged in the business of transporting garbage across state lines from New York and New Jersey to landfills in Pennsylvania using "48-footer. 46-footer, typically walking floor [trailer]" trucks that weigh around 28,500 to 32,500 pounds. Tr. at 66–67. Thus, the undersigned finds that coverage under the STAA has been established.

b. Did Complainant Engage in Protected Activity under the STAA?

Under 49 U.S.C. § 31105(a)(1)(B), an employee is engaged in protected activity if he or she 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[.]" A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. *Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353, 356–57 (6th Cir. 1992); *see also Lajoie v. Environmental Management Systems, Inc.*, ALJ case No. 90-STA-31 (slip op. at 3 (Sec'y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. *Nix v. Nehi-R.C. Bottling Co.*, ALJ Case No. 84-STA-1, slip. op. at 4 (Sec'y July 13, 1984).

Under the STAA, a complainant's safety concerns can be oral rather than written. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227–29 (6th Cir. 1987) (finding that the driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors); *See Clean Harbors Envtl. Serv. Inc. v. Herman*, 146 F.3d 12, 20–22 (1st Cir. 1998). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. *See Clean Harbors Envtl. Serv.*, 146 F.3d at 20–22 (1st Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

Complainant provided credible testimony and documentary evidence demonstrating that, on January 12, 2018, the truck he was then operating for Respondent had been overweight. CX 1; Tr. at 36–37. After learning that his truck was overweight, he returned with the truck to Respondent's yard in New Jersey. Tr. at 37–38. There, he presented Mr. Guzman the CAT scale ticket showing that the truck was overweight and informed Mr. Guzman that he refused to drive the truck any further. Tr. at 37–38. Complainant noted that he was worried about violating Department of Transportation Standards at the time he reported the overweight truck on January 12, 2018. Tr. at 38.

23 U.S.C. § 127 governs the vehicle weight limitations of the Dwight D. Eisenhower System of Interstate and Defense Highways. Additionally, under 23 C.F.R. § 657.5, the Federal Highway Administration's policy is that "each State enforce vehicle size and weight laws to assure that violations are discouraged and that vehicles traversing the highway system do not exceed the limits specified by law." The maximum vehicle weights for vehicles, and combinations of vehicles, operating within the State of New Jersey[15] are outlined in N.J.S.A. 39-3-84(b). The code states:

> (2) The gross weight imposed on the highway or other surface by all the wheels of all consecutive axles of a vehicle or combination of vehicles, including load or road contents, shall not exceed 34,000 pounds where the distance between consecutive axle centers is 40 inches or more, but no more than 96 inches apart.
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> (3) The combined gross weight imposed on the highway or other surface by all the wheels of consecutive axles of a vehicle or combination of vehicles, including load contents, shall not exceed 22,400 pounds for each single axle where the distance between consecutive axle centers is more than 96 inches; except that on any highway in this state which is part of, or designated as part of, the National Interstate System, as provided at 23 U.S.C. s.103(c), the single axle limitation shall not apply and in those instances the provisions of this Title as set forth at R.S.39:3-84b.(5) shall apply.
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> (4) The maximum total gross weight imposed on the highway or other surface by a vehicle or combination of vehicles, including load or contents, shall not exceed 80,000 pounds.
>
> (5) On any highway in this State which is part of, or designated as part of, the National Interstate System, as provided at 23 U.S.C s. 103(c), the total gross weight, in pounds, imposed on the highway or other surface by any group of two or more consecutive axles of a vehicle or combination of vehicles, including load or contents, shall not exceed that listed in the…Table of Maximum Gross Weights, for the respective distance, in feet, between the axle centers of the first and last axles of the group of two or more consecutive axles under consideration; except that in addition to the weights specified in that Table, two consecutive sets of tandem axles may carry a gross weight of 34,000 pounds each if the overall distance between the first and last axles of consecutive sets of tandem axles is 36 feet or more. The gross weight of each set of tandem axles shall not exceed 68,000 pounds.
>
> In all cases the combined gross weight for a vehicle or combination of vehicles, including load or contents, or the maximum gross weight for any axle or combination of axles of the vehicle or combination of vehicles, including loads or contents, shall not exceed that which is permitted pursuant to this paragraph or

[15] The STAA whistleblower provision protection extends beyond just complaints relating to federal motor vehicle safety regulations, but any relevant motor vehicle regulation, standard, or order. *See Chapman v. Heartland Express of Iowa*, ARB No. 02-030, ALJ No. 2001-STA-35 (ARB Aug. 28, 2003) (as reissued under Sept. 9, 2003 errata).

R.S.39:3-84b.(2); R.S.39:3-84b.(3); or R.S.39:3-84b.(4) of this act, whichever is the lesser allowable gross weight.

NJ Rev. Stat. § 39:3-84(b) (2013).

Complainant refused to drive the truck after the CAT scale ticket had indicated that the truck was overweight on the drive axle. Tr. at 38–40. The New Jersey code[16] and the U.S. Code[17] support Complainant's refusal due to this weight, as the CAT scale ticket states that Complainant's drive axle weighed a gross weight 36,040 pounds, while the code designates the maximum weight of the tandem axles at a gross weight of 34,000 pounds. Therefore, the further operation of the truck would have been a violation of the New Jersey Code relating to commercial vehicle safety and the U.S. Code relating to vehicle weight limitations for the Interstate system, and thus, Complainant engaged in protected activity by his refusing to drive it on January 12, 2018.

c. Was Respondent Aware of Complainant's Protected Activity?

To prevail under the STAA, Complainant must also establish that Respondent was aware of Complainant's protected activity.

Complainant's protected activity in this case was refusing to drive the overweight truck. Complainant told Mr. Guzman that the truck was overweight, showed him the CAT scale ticket that demonstrated that the truck was overweight, and informed Mr. Guzman that he was not going to drive the truck to Pennsylvania because the Department of Transportation would hold him responsible. Tr. at 38. Mr. Guzman then called Mr. Hardowar and informed him that Complainant was not going to drive the truck overweight. Tr. at 62.

Mr. Hardowar, the owner of SNS Transport,[18] was also informed that Complainant refused to drive the truck on January 12, 2018 because it was overweight. Thus, Complainant has established that Respondent was aware of his protected activity.

d. Did Respondent Take Adverse Action Against Complainant?

The employee protection provisions of the STAA provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a).

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[16] New Jersey was the state in which Claimant was driving when he discovered that his vehicle was overweight and went to the Cat Scale. *See* CX 1; Tr. at 36–37 ("I took the truck from Brooklyn to Jersey, from 1416 Ferry Street. There's a truck stop, which is a mile and a half exactly away; they have a certified CAT scale").

[17] *See* 23 U.S.C. § 127.

[18] Q: "Mr. Hardowar, can you describe what your relationship is to SNS Transport, LLC, the Respondent in this matter?" A: "I'm the owner of SNS Transport." Tr. at 66. The STAA applies to any "person" in a position to discharge, discipline or discriminate against an "employee." 49 U.S.C.A. § 31105(a)(1). As the owner of SNS Transport, Mr. Hardowar would have the authority to discharge, discipline, or discriminate against Complainant as an employee. Mr. Guzman's undisputed hearing testimony was that he was not in a position to discharge Complainant. Tr. at 62–63. This leaves only Mr. Hardowar as the person in such position for Respondent.

Under the STAA, any discharge by an employer constitutes an adverse action. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 15 (citations omitted) (Oct. 31, 2007).[19] Except where an employee has actually resigned, an employer who decides to interpret an employee's actions as a quit or resignation has, in fact, decided to discharge that employee. *Id*. at 14, *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19 (ARB Sept. 30, 2010).[20] No set words are required to constitute a discharge but words or conduct which would logically lead an employee to believe that his tenure has been terminated can be sufficient to establish a discharge. *NLRB v. Champ Corp*, 933 F.2d 688, 692 (9th Cir. 1990).

The preponderant evidence supports finding Complainant did not quit his job, but rather, interpreted the instruction to leave his keys in the truck on January 12, 2018, and Respondent's failure to assign him a new truck, as a termination of his employment. Complainant then picked up his final paycheck on January 13, 2018 and did not return to work after that. Mr. Hardowar maintained that he interpreted Complainant's actions after January 12, 2018 as a resignation, citing Complainant's failure to return to work after that date. Under the standard enumerated in *Minne* and *Klosterman*, Mr. Hardowar's interpretation of Complainant's actions after January 12, 2018 must be considered a discharge. As a discharge constitutes an adverse action under the STAA, the undersigned finds that Complainant has established this element.

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[19] In *Minne*, the ALJ found that the complainants had not been fired because the record contained no evidence that the Respondent had explicitly fired the complainants, with the ALJ apparently concluding that it was the complainants' behavior of deciding not to return to work that ended the employment relationship. The ARB held that this was error, writing that "under our precedent, except where an employee actually has resigned an employer who decides to interpret an employee's actions as a quit or a resignation has in fact decided to discharge that employee." *Minne*, ARB No. 05-005, slip op. at 14. The ARB held that because the employees did not actually resign but simply did not return to their jobs, the Respondent's "decision to remove them from the payroll rather than address the issues they had raised constituted a decision to terminate them for what Star presumed was job abandonment." *Id*. at 15. The ARB held, therefore, that adverse action had occurred.

[20] In *Klosterman*, there was undisputed evidence that the day before the date the complainant's employment ended, the Respondent's owner had drafted a letter to the union representative to the effect that it would be in the best interests of both the union and the respondent for complainant to be replaced as shop steward in order to improve relations with customers and so that the owner would not be confronted as often with complaints from the complainant about the condition of vehicles and equipment. The letter was not sent. On appeal, the ARB characterized the dispute as centering on whether the owner took any action to fulfill his goal to get rid of the complainant. The ALJ found that on the last day of the complainant's work, the complainant complained to the owner about the condition of the truck he was to drive, and the owner told the complainant to drive it or go home. The complainant walked out when the owner refused to assign him to a different truck. After the complainant left, the owner sent a letter to the union representative stating that the complainant had quit. The ARB found "[i]mplicit in the ALJ's findings is the reasonable inference that Vordermeier affirmatively took steps to perfect the end of Klosterman's employment by exploiting Klosterman's ambiguous departure on December 20, 2005." USDOL/OALJ reporter at 8. The ALJ found that that this was an actual discharge, but also was voluntary abandonment of his job by the Complainant, and therefore not adverse employment action. The ARB accepted the ALJ's factual findings, but rejected the legal conclusion that there had not been an adverse employment action. The ARB wrote, "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." (Citing *Minne*, ARB No. 05-005, slip op. at 14).

e. Was Complainant's Protected Activity a Contributing Factor?

A complainant may prove his protected activity was a contributing factor either directly,—through smoking gun evidence, that conclusively links the protected activity and the adverse action and does not rely upon inference, or may proceed—indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating [the complainant's] employment. *Williams v. Domino's Pizza*, ARB No. 09-02, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011); *Clarke v. Navajo Express, Inc*. ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011).

To prevail under this element, Complainant must prove by a preponderance of the evidence that there is a causal connection between his STAA protected activities and adverse personnel actions. Specifically, Complainant must prove that his refusal to drive the overweight truck on January 12, 2018 was a contributing factor to the discharge of his employment established above.

A "contributing factor" has been defined as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action. *Marano v. U.S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993); *Beatty v. Inman Trucking Management, Inc.*, ARB Nos. 2008-STA-20 and 21 (ARB May 13, 2014). Based on this definition, the determination of contributing factor has two components: knowledge and causation. In other words, Respondent must have been aware of the protected activity (knowledge) and then taken adverse personnel action, in part, due to that knowledge.

For the reasons discussed above, Respondent was aware of Complainant's protected activity. Thus, the discussion must turn to whether such protected activity was a contributing factor in Complainant's discharge from Respondent's employ.

Complainant's refusal to operate an overweight truck on January 12, 2018 precipitated Mr. Guzman's instructing Complainant to leave his keys in the truck and informing Complainant that he would be assigned a new truck. Mr. Hardowar, as the individual who had the authority to assign Complainant a new truck, failed to do so, which led Complainant to believe he had been terminated and engage in the series of actions that Mr. Hardowar ultimately interpreted as a resignation, which, as discussed above, constitutes an adverse action under STAA. Thus, Complainant has established that his protected activity was a contributing factor in the adverse action which Respondent took in this matter. The burden now shifts to Respondent, as will be analyzed below.

f. Would Respondent, by "Clear and Convincing Evidence," Have Taken the Same Adverse Personnel Action Had There Been No Protected Activity?

Where a complainant proves that their protected activity was a contributing factor in the adverse personnel action taken against them, the burden shifts to the respondent, in order to avoid liability, to prove that in any event, it would have taken the same adverse action by "clear and convincing evidence." *Mauldin*, ARB No. 16-059 at 5. The "clear and convincing" evidence standard is an intermediate burden of proof, "in between 'preponderance of the evidence' and 'proof beyond a reasonable doubt.'" *Id*. In order to meet this burden, Respondent must show that there is a high probability of truth to their factual contentions and that it is highly probable or reasonably certain. *Id*.

Respondent has failed to offer any evidence that he would have taken the same adverse action absent the protected activity. Thus, Respondent has failed in meeting its burden.

V. REMEDY

As outlined above, Complainant has met his burden of proof, and Respondent has failed to demonstrate by clear and convincing evidence that it would have terminated Complainant absent his protected activity. Accordingly, Complainant is entitled to damages under the STAA. 49 U.S.C. § 31105(b)(3)(A). The regulations specifically explain that an ALJ may issue an order including:

> Affirmative action to abate the violation, reinstatement of the complainant to his or her former position with the same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as the result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant may have incurred); and payment of punitive damages up to $250,000…

29 C.F.R. § 1978.109(d)(1).

Complainant, in this matter, is seeking (1) reinstatement to his previous position as a truck driver, (2) back pay from January 12, 2018, (3) compensatory damages for emotional and mental pain, (4) punitive damages as recoverable under the statute, and (5) any abatement of Respondents of alleged violation of the STAA, either expungement of any negative information that Respondent may have reported to any entity regarding Complainant or any personnel reference that it may maintain. Tr. at 23.

The burden is on the employer to show a failure of a complainant to mitigate damages. In this case Respondent presented no evidence that Complainant failed to mitigate damages, and thus failed to meet its burden.[21]

a. Reinstatement

Under the STAA, reinstatement is an automatic remedy. *Dale v. Step 1 Stairworks, Inc.*, No. 04-003, 2005 WL 76133 at *2 (ARB Mar. 31, 2005). However, circumstances may exist in which reinstatement is impossible or impractical. *Cefalu v. Roadway Express, Inc.*, No. 08-110, 2008 WL 5454142 at *2 (ARB Dec. 10, 2008) (citing A*ssistant Sec'y & Bryant v. Bearden Trucking Co.*, No. 04-014, ALJ No. 2003-STA-036, slip op. at 7–8 (ARB June 30, 2005)). For example, "reinstatement may be inappropriate where the parties have demonstrated 'the impossibility of a productive and amicable working relationship.'" *Id*. (citing *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 1993-ERA-024, slip op. at 9 (Sec'y Feb. 14, 1996)). As a complainant is presumptively entitled to reinstatement, the respondent employer bears the burden of proof to show that reinstatement is not proper. *Id*.

[21] *See Coates v. Grand Trunk W. R.R. Co*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 5 (ARB July 17, 2015) (citing *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 6-7 (ARB Marc. 31, 2005) ("the employer bears the burden of proving that the employee failed to mitigate")).

Respondent has not presented any evidence that reinstatement would be an improper remedy in this case. Therefore, the undersigned finds that Complainant is entitled to reinstatement to his previous position as a truck driver with Respondent.

b. Back Pay

Complainant is entitled to back pay. 49 U.S.C. § 31105(b)(3)(A)(iii). "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." *Jackson v. Butler & Co.*, Nos. 03-116, 03-144, 2004 WL 1955436 at * 6 (ARB Aug. 31, 2004) (citing *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992)). Back pay awards are to be calculated in accordance with the make-whole remedial scheme as embodied in the make-whole remedial scheme embodied in § 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq. See Dale*, 2005 WL 76133 at *4.

In determining back pay, the "ALJ must only reach a reasonable approximation of what a complainant would have earned but for the discrimination." *Ferguson v. New Prime, Inc.*, ARB No. 12-053, ALJ No. 2009-STA-47 (ARB Nov. 30, 2012). Complainant has not provided any specific evidence as to what amount of back pay he believes that he is owed, so the undersigned must derive the appropriate amount of back pay from the information of record.

Complainant is also entitled to interest on his award in order to properly compute back pay in current dollars. Interest will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and will be compounded daily. 29 C.F.R. § 1978.109(d)(1).[22]

The Applicable Federal Rate for short term quarterly/monthly compounding periods is calculated by the Internal Revenue Service each month. *See* INTERNAL REVENUE SERVICE *Index of Applicable Federal Rates (AFR) Rulings*, https://apps.irs.gov/app/picklist/list/federalRates.html (last visited March 26, 2018). These interest rates can vary significantly depending on the date. *See id*. (compare RR-2018-30 *Applicable Federal Rates* (December 2018) with RR-2017-24 *Applicable Federal Rates* (Dec. 2017)).

Both Complainant and Respondent testified that Complainant was paid per load. Tr. at 42, 70. Complainant testified that he was paid $110 to deliver a load from Brooklyn to Tullytown, New Jersey, and that he usually delivered between one to two loads per day. Tr. at 42. Mr. Hardowar also testified to the fact that drivers were paid $110 to deliver a load from Brooklyn to Tullytown, New Jersey, and that drivers were paid $130 to deliver a load from New Jersey to Conestoga. Tr. at 70. As Complainant only testified with respect to being paid the Tullytown rate of $110, this is the figure that shall be used in calculating his back pay. Additionally, as he testified that he would usually deliver one to two loads per day, the undersigned will use an average figure of 1.5 loads per day in calculating his back pay.

[22] These regulations are the result of a revision effective in 2012. See 77 Fed. Reg. 44,121 (July 27, 2012). Prior to that revision, the regulations did not specify how often interest on back pay was to be compounded. *See* 53 Fed.

Complainant testified that he worked a mandatory number of six days a week, so this shall be the figure used to calculate Complainant's expected back pay based on loads per week. Tr. at 43.

Based on a rate of $110.00 per load, 1.5 loads a day, and six days a week of work, Complainant would be entitled to $990.00 a week of back pay from the date of his discharge on January 16, 2018 up until the point Respondent makes a *bona fide* offer of reinstatement, plus the applicable pre-judgment and post-judgement interest on Complainant's back pay under 26 U.S.C. § 6621(a)(2).

c. Emotional Distress Damages

Under the STAA, compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Id*.

Complainant has not offered any affirmative evidence that he suffered any mental anguish or emotional distress as a result of his termination. Therefore, Complainant has failed in his burden to establish this and is not entitled to emotional distress damaged.

d. Punitive Damages

Under certain circumstances, the STAA permits an ALJ to award punitive damages to an aggrieved complainant. 49 U.S.C. § 31105(b)(30(C); 29 C.F.R. § 1978.109(d)(1). Punitive damages are warranted where there has been a callous or reckless disregard of the complainant's rights, as well as intentional violations of federal law. *Beatty v. Celadon Trucking Servs., Inc.*, Nos. 15-085, 15-086, 2017 WL 6572143 at *8 (ARB Dec. 8, 2017); *Smith v. Wade*, 461 U.S. 30, 51 (1983) (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J., concurring and dissenting)). "The inquiry into whether punitive damages are warranted focuses on the employer's state of mind and does not necessarily require that the misconduct be egregious." *Carter v. BNSF Ry. Co.*, Nos. 14-089, 15-016, 15-022, 2016 WL 4238480 at *4 (ARB June 21, 2016).

In this case, the record does not sufficiently establish that Respondent intentionally violated federal law. Although the undersigned failed to demonstrate by clear and convincing evidence that it would have terminated Complainant absent his protected activity, Employer's adverse action was a ratification of an ambiguous action on the part of Complainant as opposed to any intentional violation of federal law. As such, the undersigned finds that Complainant is not entitled to punitive damages.

e. Abatement

The Act expressly provides that successful complaints in STAA cases are entitled to abatement. 49 U.S.C. § 31105(b)(3)(A)(i). Complainant has requested abatement. The Complainant requests that Respondent expunge any negative information that Respondent may have reported to any entity regarding Complainant or any personnel reference that it may maintain.

In *Michaud v. BSP Transport, Inc.*, 95-STA-00029 (ARB Oct. 9, 1997), the Board affirmed the ALJ's order to expunge from Claimant's personnel records "all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination." The employer had objected to that order, arguing that it was vague. *Id*. The Board, however, found the order to be sufficiently clear and stated that it would not place the burden on Complainant to identify the specific documents to be expunged. *Id*. The undersigned thus finds that it is appropriate for Respondent to remove from Complainant's personnel file "all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination." *Michaud*, 95-STA-00029 at 10.

In *Hood v. R&M Pro Transport, LLC*, 2012-STA-00036 (ARB December 4, 2015), the Board affirmed an ALJ's order to correct any reports to consumer-reporting agencies concerning the complainant's work record. The Board stated that "[i]f the Respondents have not sent any negative information about Hood regarding this matter to any reporting agencies, then they have nothing to do with regard to this part of the ALJ's order. But if either of them has in any way placed information about these events that conflicts with the ALJ's findings that the Respondents unlawfully terminated Hood's employment because he engaged in protected activity, then that information must be expunged. *Id* at 8.

Respondent has not specifically objected to Complainant's requests for abatement. Respondent should therefore be required to post a copy of the decision and order in this case for 90 consecutive days in all places where employee notices are customarily posted. The undersigned also deems it appropriate for Respondent to correct and expunge any reports containing negative information on Complainant that conflict with the undersigned's findings herein.

f. Attorney's Fees

A STAA complainant who has prevailed on the merits may be reimbursed for litigation costs, including attorney's fees. 49 U.S.C. § 31105(b)(3)(B). This section provides in part that "the Secretary [of Labor] may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant bringing in the complaint." *Id*.

In accordance with Supreme Court precedent, the starting point is the "lodestar" method of multiplying a reasonable number of hours by a reasonable hourly rate. *See Jackson v. Nutler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026, slip op. at 10–11 (ARB Aug. 31, 2004); *see also Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003). The party seeking a fee award must submit "'adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs." *Gutierrez v. Regents, Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 11 (ARB Nov. 13, 2002).

While Complainant previously had an attorney in this matter, his attorney withdrew his representation prior to the hearing. At that point, Complainant became self-represented. Thus, no attorney's fees will be awarded.

VI. CONCLUSION

Complainant engaged in protected activity when he refused to drive an overweight truck; Respondent took adverse action against Complainant when Mr. Hardowar, by his own admission, interpreted Complainant's action after January 12, 2018 as a resignation; Complainant's refusal to operate an overweight truck on January 12, 2018, i.e., a protected activity, were a contributing factor in Respondent's adverse action against Complainant, and Respondent failed to show by clear and convincing evidence that it would have terminated Complainant absent his protected activity.

Thus, Complainant is entitled to reinstatement, $990.00 a week in back pay, along with applicable interest, from his termination on January 16, 2018 until Respondent makes a bona fide offer of reinstatement, and abatement.

VII. ORDER

Based on the foregoing:

1. Respondent will reinstate Complainant to his original job as a truck driver;
2. Respondent will pay Complainant $990.00 a week in back pay from his termination on January 16, 2018 until Respondent makes a bona fide offer of reinstatement;
3. Respondent will pay Complainant pre-judgment interest on the back pay award, in accordance with 26 U.S.C. § 6621(a)(2).
4. Respondent will pay Complainant post-judgment interest on his back pay award, pursuant to 26 U.S.C. § 6621(a)(2). This interest shall compound quarterly until it satisfies the back pay award in accordance with 26 U.S.C. § 6621(a)(2); Respondent will post a copy of the decision and order in this case for 90 consecutive days in all places employee notices are customarily posted and expunge Complainant's employment record of all derogatory or negative information contained therein related to Complainant's protected activity and will correct or expunge all such information reporting as such.

SO ORDERED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

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, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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

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

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

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

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