

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 September 2020

CASE NO.: 2019-STA-46

In The Matter Of

STEPHEN COTTIER,
Complainant,

v.

BAYOU CONCRETE PUMPING, LLC

and

JULIO ARANA,
Respondents.

APPEARANCES:

PETER LAVOIE, Esq.,
for Complainant

SARA CASEY, Esq.,
for Respondents

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

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.

¹ 49 U.S.C. § 31105 et seq.

² 29 C.F.R. Part 1978.

FACTUAL BACKGROUND

Complainant was employed by Respondents as a truck driver from June 2017 to 15 Sep 18. On 13 Sep 18, Complainant refused Respondents' request that he operate a truck. Respondents terminated Complainant on 16 Sep 18.

PROCEDURAL BACKGROUND

Complainant filed his initial complaint with the Occupational Safety and Health Administration (OSHA) on 9 Nov 18. He alleged he had been fired for raising issues related to safety. Complainant requested OSHA terminate its investigation before it was complete and OSHA therefore dismissed the complaint on 21 May 19. Complainant objected and requested a de novo hearing before the Office of Administrative Law Judges. On 22 Jan 20, I held a hearing 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	Calvin Brown
Julio Arana	Wayne Lucido
Byron Scandalianto	Brook Bouvier

Exhibits⁴

Complainant's Exhibits (CX) 1-5, 6 (pp. 3-90), 7-8
Respondent's Exhibits (RX) 1-11
Joint Exhibits (JX) 1-4

ISSUES IN DISPUTE AND POSITION OF THE PARTIES

Complainant argues that he continually engaged in protected activity by reporting maintenance issues in the trucks that he was required to operate. He also argues that his refusal to operate a truck on 13 Sep 18 was protected activity because operating the truck would have violated safety regulations and endangered the public. He submits that his termination was in retaliation for his protected activities.

Respondents concede that, because of the nature of his job, Complainant regularly reported maintenance problems with the equipment and thus did engage in protected activity under the Act. However, they dispute that his termination was related to anything but his refusal on 13 Sep 18 to operate the truck as directed. Respondents maintain that the refusal did not constitute protected activity, and even if it did, they were unaware of the protected activity nature

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 Some exhibits appeared to be *in globo* collections of records. Counsel were cautioned that in the case of any exhibit in excess of 20 pages only those pages specifically cited to would be considered a part of the record upon which the decision would be based.

of his refusal. Consequently, they conclude, his termination was not related in any way to any protected activity.

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

Although it is not necessary that a complaint expressly cite the specific motor vehicle standard that it 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 Act, a Complainant must show that he reasonably believed he was complaining about the existence of a safety violation.⁷

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).

⁷ *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-23, slip op. at 8 (ARB Dec. 31, 2007); *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 11 (ARB Sept. 14, 2007); *Ulrich v. Swift Transportation Corp.*, 2010-STA-41 (ARB Mar. 27, 2012).

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 refused to operate the vehicle. The reasonableness of the refusal must be subjectively and objectively determined.⁸ If the refusal is based on an apprehension of injury, it must be reasonable.⁹

EVIDENCE

Complainant testified at hearing¹⁰ and deposition¹¹ in pertinent part:

He lives in Denham Springs, Louisiana. He was born in January 1971. He has been a concrete pump operator since he was 19. As a concrete pump operator, he is also a truck driver. He has a commercial driver's license. Most of his training has been on-the-job training.

Before he started with Respondent, he worked for Star Concrete for about a year. He had some equipment at his house, there was an investigation, and he pled no contest to possession of stolen property in connection with that. Before that he worked for Cordero Concrete on and off for about three years. He left them over a wage dispute. Before that he worked at Jeffco Concrete for about a year.

When he started with Respondent, they gave him a handbook and a rundown on how everything works. They provided all the paperwork for pre-and post-trip inspections. Michelle was Respondent's HR person. She doesn't have a CDL and worked in the office.

While he worked for Respondent, he did light maintenance concrete, operated the concrete pump, and was a helper on slow days. Whether they needed a helper depended on the job. He operated a number of different trucks while he worked for Respondent. He mostly drove the 40m and the 61m. Operating those two trucks was generally the same, but the 61m was a lot more responsibility. Respondents expected him to report any issues he had with the trucks.

What he would do when he had a problem depended on how severe the problem was. If it was serious, he would stop what he was doing and call someone. If it was minor, he might just write it up on the inspection form. Some defects were minor and didn't require him to stop operations in the field. Respondents weren't a real large company with a designated safety person. It was understood that he should call if there was a problem.

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

¹⁰ Tr. 96-184 195-242.

¹¹ RX-2.

When he started, they did not have a maintenance tracking board, but he told them about a previous company he worked for that had one, and they put one up. They put it up in the admin office instead of where service was performed on the trucks. He didn't think that was the best way to do it, because it wasn't transparent. Respondents kept a number of parts in stock. That included filters and other preventive maintenance items. Respondents had mechanics to handle more serious issues.

One time he had a problem with the 40m turning to the left. He wrote it up multiple times, but it was never addressed. It never became a problem or an issue, but one time he was thinking that it might be a problem. He told Respondents he wasn't going to drive the truck until they fixed that. They pulled the truck and discovered the front leaf spring system was failing.

Page 9 of JX-3 is a weekly inspection report for the 40m completed on 23 Mar 18. He wrote up an issue with the grease lines and power steering pump box. In August 2018, he was inspected by DOT. They detected the same problem. The inspectors let him continue, but told him it had to be fixed right away. Page 8 of JX-3 is another report on the 40m truck. It had to do with the actual concrete pumping unit. Also, the steering box was leaking again and the air conditioning was not working.

There is also a weekly inspection report from 29 May 18 at JX-3, page 4. The steering box was once again leaking. There was also an air pressure issue. He talked to multiple people about the air pressure problem. JX-3, page 12 is about the 61m truck and indicates that the back was out of adjustment. The wedge pin was also broken. They were also having problems with the leveling rods. Leveling rods affect the suspension and could cause the trucks to change lanes. They consistently had problems with the airbags blowing out on the 61m truck. He would write up various issues, but often they would not be fixed. There is no real fix for a problem with the leveling system, because it depends on how you're doing the suspension. It ended up limiting the miles per hour that the truck could go. It also would mean that the truck should not go on the interstate.

He was never demoted, had his pay cut, or disciplined for reporting any maintenance issues. Sometimes, he didn't indicate a problem on inspection. That doesn't mean it didn't exist or had been fixed. It may have been because he felt like it was a waste of time to list it every day. Respondents gave him a number of pay advances during his employment. Julio approved all of the pay advances and a number of them were provided after the April 28 incident. Julio never denied him a pay advance.

In April 2018, he was driving the 61m on the interstate headed to a job in New Orleans on St. Charles Avenue. He doesn't recall if there had been a write up for any problem with the truck before that. He had no idea that the PTO light was blinking. He was on the interstate and it felt like something was hitting the undercarriage of the pump. It felt like a surge and sounded like something was knocking under the truck. He moved into the right lane and grabbed his cell phone to call Julio to tell him they had a problem. As he did that, he could see the light blinking. He took a quick video of it and sent it to Julio, who called him back. He was going between 45 and 50 miles an hour, but doesn't

remember the exact speed. He told Julio he was going about 45 mph. Julio told him to slow down and continue on to the job site.

He did not tell Julio that the truck was driving normally. At his deposition, he did testify that he didn't notice any vibration and told Julio that the truck was driving normally other than the light flickering. That's because it wasn't a massive amount of vibration, but he was worried that something had hit the bottom of the truck and noticed the light going off and on.

He continued another mile and a half and all the drive lines broke loose on the truck. It was catastrophic and nothing but one big explosion. Within seconds, he lost steering, air, and brakes. The truck was out of control and he couldn't do anything to steer it, stop it, or move it. It was a terrifying situation about a mile from the Superdome on Interstate 10 headed east. Fortunately, there wasn't much traffic. Julio sent help and came himself. They spent at least four hours on the interstate trying to get everything sorted out and picked up. He would guess they lost about 60 gallons of hydraulic fluid.

Following that incident, Respondents made repairs to the driveline, hanger bearings, hydraulic pump, air tanks, brake hand, hydraulic hoses, and power steering hoses. Those damaged parts were replaced and reinstalled. He was never disciplined or had any adverse action taking against him for anything that happened that day.

CX-2 page 1 is a picture of his helper that day, Alex Kiles. Pages 2 and 26 are pictures of the turbo boot that he took on another occasion when it exploded. Page 3 is the support holding up the rear end to the frame on the 61m. There was a crack in it that was probably 70%, if not the entire support. He does not recall when he took the picture. He told everybody about that problem. Page 4-8 are pictures of the 61m on the day it broke down on the interstate. Pages 17-21, 34, and 35 are pictures from the interstate breakdown in April.

CX-2, pages 9, 10, and 14 are pictures of the 61m at another job where the entire back end exploded and ripped off the back of the truck. CX-2, page 11 is a picture of the 40m truck with an air gate showing a problem with the air pressure. If air pressure is lost, the trucks can automatically stop no matter where they are. Page 12 is a picture of the plate that holds the bottom of the airbag on the 61m truck. It shows that the airbag is blown out. Page 13 is a picture of the 61m truck coming back from a job and having the airbag blowout. Pages 22 and 23 are pictures of the 61m where the tire blew and buckled up fender in Hammond. Page 24 shows a broken safety cable and page 25 shows a blown tire. Pages 27 through 31 are pictures of a blown out airbag.

When he had the issue with the 61m truck tire on 15 Aug 18, he reported that problem to Julio, who immediately came to his location and arranged for a tire technician, who replaced the tire with a tire from another truck. The tire technician did not express any reservation about replacing the tire. After the tire was replaced, he continued on to a job. They had another issue with the tire, and Julio and the technician again came to the location. He helped unbolt the brake hand to stop it from remaining on the tire. After they

made that repair, he continued on with no trouble. After the job, they took the truck to a repair shop, where it was repaired. He was not disciplined for reporting that issue or have any adverse action taken against him.

The Tulane job was a very big project with limited access. They started with smaller trucks, but eventually had to use the 61m truck. He constantly noted problems with the 61m truck. There were problems with the leveling system, the airbags, and the hanger bearings. He does not recall having any issues when he drove the truck to the job site.

On Saturday, as he was coming off the job, everyone screamed at him to shut the truck down. There was a knot in the driveline. All of the hanger bearings were blown out. You could grab the driveline and raise it up in the air three inches. He immediately got back in the truck and pulled it back onto the site out of traffic. He called Julio and when Julio didn't answer, he called his dispatcher, Hope Hiscox. He told her what had happened and asked permission from the site contractor to leave the pump there. He did not have Alex as his helper that day, but a 63-year-old temporary guy. Alex came over the job site and called Julio. He told Julio what had happened. They put all the gear on Alex's one-ton flatbed truck, went back to the office, and punched out to go home. Nobody was around the office when they got back.

As he understands, the truck stayed on location over the weekend and the hanger bearings were replaced on Monday. He never saw the 61m truck again, until after he was fired and needed to pick up his gear. It was not just the hanger bearings that were an issue. Every time the truck went on the interstate, the leveling rods was the most dangerous problem. The leveling system is why he didn't want to drive the truck, along with the airbags blowing, and the hanger bearings. CX-2 page 15 and 16 are the Tulane University job and show the amount of lumber that had to be put onto the truck and dragged around. Pages 32 through 33 are pictures of the set up at Tulane that he sent to his dispatcher to show that the site was never really prepared for them and prevented them from starting on time.

Respondents absolutely told him all those problems had been fixed, but it was a learned behavior, because they would change an airbag, but the airbag would blow again. They could get new parts, take the truck out tomorrow, and still have a problem. There was a vent plate that led to the airbags blowing. Respondents understood that. They would try to bend them straight. Earl told him they were going to get the suspension rebuilt, but that never happened.

When he got under the truck at Tulane, that hanger bearings were blown out. He understood that they changed the bearings, drove the truck to Laplace, and by the time they got there, there were wearing marks. Changing the parts was not a long-term solution, since the parts would just fail again.

CX-1 page 1 are text messages he had with Hope, starting on the following Tuesday. He had decided he wasn't getting back in the 61m again and had told her so over the weekend. Page 2 are pictures that he sent to Hope of his dislocated thumb. It had been

bothering him for a long time, but he was still able to drive. Page 5 are more text messages with Hope telling him she had no work for him and he should call Julio.

He only talked to Julio one time after the incident on Saturday. Julio asked him to go back down to Tulane and work with the 61m. Hope already knew he would refuse to drive the 61m. He didn't want to drive the 61m because of the breakdowns, the ongoing problems with the hanger bearings, the cracked frame, and the airbags. He was absolutely willing to drive the 40m, though. He would've been ok to drive the 61 if they would've fixed the undercarriage and the suspension. He thought he would be driving the 40m on Thursday, but that job canceled because of weather. He never worked again after that Saturday.

He got a text from Earl to come to the office. They talked about him having surgery and recovery time. Earl was not happy that there was 8 weeks of recovery. Hope asked if he wanted to run the 40m or 61m on Friday, but he told her he was not going to run the 61m. They wanted him to drive the 61m and take Julio as a helper. He told them that he wasn't going to take the 61m and also had a problem with the hoses because of his hand. It may sound good that Julio was going to be his helper, but Julio would take off for another job if he needed to, leaving the operator alone. If that would happen, he would've been out there with a bad hand trying to deal with hoses on the ground.

On Thursday, Julio called him and asked him to run the 61m at Tulane. He told Julio that he didn't have enough help, the truck is not safe, and it's eventually going to kill somebody. Julio told him the truck was fixed and safe for him to come and operate, but that's what Julio always said.

Eventually, he got a text from Earl telling him to come in for a job. He met Earl at the office on Friday and they talked about his surgery and rehabilitation. His doctor placed him on light duty with restrictions about using his hand. If he was to comply with his doctor's orders, he would have to have a helper on the job. They did not talk about anything related to the safety of the trucks.

He was upset that he had been fired. There are not that many jobs available. He couldn't pay his rent and was evicted. CX-6 was prepared by his attorneys. He was unemployed from 19 Sep 19 through 1 Nov 19. In November, he went to work for Patriot Pumping. He operates a concrete pump and works for them as an independent contractor. At first, he paid for his own fuel and parts, but now they have a fuel account. He makes less than he did before working for Respondents. He hasn't done anything to look for supplemental jobs or different jobs. It's been more than a decade since he filed tax returns. He never received any tax documents from Patriot.

Now he lives in a refurbished remodel FEMA trailer. His quality-of-life is significantly diminished. He has been absolutely depressed. The work at Patriot Pumping is inconsistent. Some weeks he might work five days and some weeks he might work one day.

*Julio Arana testified at hearing in pertinent part:*¹²

He owns Bayou Concrete with his mother-in-law. He is also the president and oversees everything. They do everything from small residential projects to concrete pours for commercial construction. They did about \$3.6 million of business in 2019. They have 11 boom trucks that pump concrete. They also have two pumps. Their largest truck reaches 61 meters vertically, so they call it the 61m. He believes it weighs 126,000 pounds. They try to keep their most experienced drivers on that truck. At the time Complainant was with them, there were only probably three drivers he would trust with that truck. They don't actually transfer concrete, but simply arrive at the location and pump concrete delivered by somebody else.

They typically stay within a 90 mile radius of their sites in Laplace and Hammond. Laplace is about 30 minutes from Hammond, Louisiana. The equipment is large and complicated and requires frequent maintenance, so they need to be able to get to the equipment easily. They prefer not to use interstate highways when they can. They have eight boom truck operators. He does not hold a commercial driver's license and is not a certified mechanic. He has a master's degree in engineering and marine architecture.

He joined Bayou Concrete in 2006 after leaving a job working as a structural marine engineer. At the time, he didn't really have any experience with the concrete pumping industry. He learned by working side-by-side with mechanics and operators. They have two mechanics and stagger their work schedules to get more coverage. All major repairs are done in Laplace. They generally buy their equipment brand-new or refurbished from the manufacturer. They purchased the 61 meter truck in 2008. It was refurbished.

The 61 meter truck is very large and they do not do all of their driver training in house. They send their drivers for training to other agencies, but also have frequent safety meetings. They have a mechanic on duty early in the day, so if a driver discovers a problem in the pre-trip inspection, the mechanic is available. He is also always available to the drivers by phone. The drivers are required to turn their inspection sheets into the dispatcher. RX-2 shows the clipboards where maintenance jobs are posted, the board to track maintenance progress, and the preventive maintenance board.

They have a preventive maintenance schedule they try to follow. One of their more common problem is with tires. They pay the tire people to come out once a week to check the tires. The trucks are so heavy that it is very difficult to recover them if they break down.

He keeps his office in Hammond. He gets to work early. Sometimes he might go straight to a job site. Because of temperatures, sometimes they have to work in the middle of the night.

The trucks have a U-joint that holds the driveshaft together. If that joint fails, the driveshaft can come apart. It does not take long to replace a U-joint, but if it fails, the

¹² Tr. 21-95, 281-317.

driveshaft can break loose. If that happens, it can cost up to \$5,000 in parts plus labor. They could fix that on the job location.

They tell their drivers to limit speed to 55 miles an hour. Because of the size, the trucks have a greatly increased braking distance. The higher speeds also cause extra wear on the driveshaft, the U-joint, the tires, and everything else. Excessive speed puts people's lives in danger. They typically use Airline Highway rather than the interstate.

Complainant worked for them for about a year. He usually spoke with the dispatcher. He did not communicate with Complainant on a regular basis. Hope was the dispatcher while Complainant was working for them. Typically, when drivers finish their jobs in the morning, they come in and service their trucks, do their post-trip inspections, and find out from Hope what their next job is. Later in the day, they get a confirmation of that assignment. Typically, they only have one job a day.

One morning around Jazz Fest in 2018, they had a job near the Superdome. Complainant called him about seven in the morning and said he noticed that the PTO light was flickering. The PTO light is the power takeoff light, which could indicate a problem. If there is a malfunction the transmission could be inadvertently put in neutral, causing the truck to lose power. Complainant said there were no other symptoms and the truck was driving fine, so he told Complainant to get off at the exit, which the GPS indicated was within 2 or 3 miles. If the U-joint had failed at that point, there should have been serious vibration and the rig would've gone out of balance.

Later that morning, Complainant called again to say something had broken underneath the truck. He does not recall the exact language Complainant used. It turned out that the U-joint broke, causing the driveshaft to become loose and strike air lines, the brake hand, air tanks, and hydraulic pump. The unit ended up being down for twelve days and they spent thousands of dollars to repair it.

CX-8 appears to be the maintenance log for the 61 meter. They keep a notebook to track maintenance on the trucks. They try to keep the books accurate, but don't necessarily include every time they replace a screw. He doesn't see anything that reflects the driveshaft work he was just discussing. JX-4 appears to have repair or part invoices for the truck. They include parts that had to be replaced when they replaced the driveshaft.

The 61m truck had issues with the hanger bearings after they replaced the driveshaft. They replace the hanger bearings 2 or 3 times. The first was in August or September. They noticed noise while they were backing the truck up. The rubber bushings that hold the hanger bearing were worn and the driveshaft was starting to flop. That was making noise. The truck has such a long driveshaft that it requires two hanger bearings. Other trucks only have one.

There was an incident in August 2018 when Complainant called to say that a tire had blown. The truck was headed to a job site in Covington when the tire blew and damaged the brake can and fender. He called the tire repair people in Hammond to come out and

repair the tire. Once the mechanic saw the truck, they discovered that the rim might have been jeopardized because it rubbed on the ground. They had to look for a replacement rim. The break-in and hose were also damaged. The hose was kinked off to stop it from leaking and a new tire and rim were placed on the truck. The brake was not functional. By putting a kink in the hose, they stopped the leak and allowed the other brakes to work. If the airbrake system has a leak, the parking brake activates and the truck has to be pulled over.

At some point in August 2018, Hope called him to say that Complainant had broken his hand. He took over the job for Complainant, who eventually had a doctor's note restricting him to light duty. They could not let him go back to any kind of work until he brought back a note with more specific limitations. The doctor said he could drive the truck and operate the remote.

In September 2018, they had a job at Tulane. It was a building with a number of floors, so was a big job. At times, the job required the 61m truck. On Saturday, 8 Sep 18, the truck got down there around 7:00 AM. After pouring part of the job, they needed to move the truck to a different location. Complainant was driving, but he was being assisted by an operator named Alex, who was there to do any heavy lifting, because Complainant was on light duty. He got a call from Alex, who said they heard noise under the truck as if something was flopping. When they went under the truck they looked and noticed that the rubber bushings were gone and the drive line was flopping hitting the driveshaft and brackets.

He told them to leave the truck where it was, because he knew what could happen if the U-joint came apart. He called the superintendent on the job site and asked if they could leave the truck in that location. He was told that they could do so, as long as it was removed by Monday. He does not recall talking to Complainant.

On Monday, 10 Sep 18, a mechanic went out and removed the driveshaft. They noticed that the rubber grommets inside the hanger bearings were gone. The grommets should not have failed in that short of a period of time. He was frustrated trying to figure out why. They replaced the drive shaft and drove the unit back to the shop that day. The truck was scheduled to go back out the next Friday.

On Thursday afternoon, the dispatcher called him to tell him that Complainant refused to go to the job at Tulane the next day. He asked her why, but she said she didn't know, just that he wasn't going to do the job. He called his business partner, Earl, and they talked about the situation. Earl said he had already talked to Complainant, who was on light duty at the time. They had had an issue with Complainant about needing a doctor's note before Complainant could do any work. Complainant was unhappy about the impact that had had on his hours. Complainant understood he would be there at Tulane to help with him any heavy lifting of dunnage or hoses.

He called Complainant right away. He told Complainant they had a job at Tulane with the 61m truck the next day. Complainant said he would not do it. He told Complainant he

would be going along to help and asked what the problem was. Complainant said he'd rather do the 40 meter truck. Nothing about safety was ever mentioned and he had no reason to believe that Complainant was concerned about a mechanical problem. The 40m truck is smaller and would not have as much dunnage or hoses to deal with. He told Complainant just to forget it. He was angry because it was unacceptable for Complainant to bailout at 4 o'clock in the afternoon before a job. At that point it was very difficult to adjust things.

RX-6 appears to be text messages he sent and received that day. He called Earl back to say how unacceptable that was. They talked about it for a while and Earl was in favor of giving Complainant a break, but finally they decided to fire Complainant. JX-1 appears to be the separation notice they filed with the state. The basis for the termination was refusing to run the truck. That was completely unacceptable, even though he didn't have any other issues with Complainant's performance. Complainant was one of their more highly paid employees.

When the truck returned the following Monday, they examined the driveshaft and while the bearings had not failed, they were showing an unusual amount of wear. If for some reason the hanger bearings would've failed far more rapidly than anyone expected, there would be enough vibration in time to get the truck to the side of the road.

He does not recall having a specific conversation with Complainant about the handling of the truck. He does remember there were issues with the leveling system. They have the leveling rods replaced on the truck. Leveling rods can get out of adjustment when they have to lift the truck off the ground with outriggers for pumping. He does recall Complainant saying that there was a problem with the leveling rods and adjusting them at various times.

CX-2, page 11 shows the dashboard of the 40m. The gauge shows primary at 90 and secondary at 130 in the air tanks. Those tanks are tied together and operate off one compressor so it would be highly unusual that the gauges would have three different pressures. They checked the actual air pressure in the system, which was correct. The gauge was malfunctioning. A new gauge was ordered and installed.

There is a shaft connecting the steering wheel to the top of the steering box. The seal on the top of that box was leaking. Dust and dirt can collect on the top seal and cause it to wear. It can then start leaking. When that happens, they change the top seal. Sometimes, an actual groove will be cut into the shaft with the sand following top of the river seal. When that happens, they ordered a new pump. They never ignored a leaking steering box week after week.

The fact that Complainant may have reported various issues with the trucks played no role in his decision to fire him. They would never allow an operator to drive an unsafe truck. They had never attempted to pressure an operator into a driving a truck that he has expressed concern about. All of the operators understand they can report maintenance or safety issues directly to him, to the mechanics, or to the dispatcher through the weekly

inspection report. He has never fired, suspended, docked pay from, stopped scheduling, or written up an employee for reporting an issue with the truck. Their trucks have issues all the time, because they are heavy pieces of equipment doing difficult jobs. It is not unusual for them to holdback a truck from a job.

Complainant never expressed concerns to him about the 61m truck after the 28 Apr 18 incident. They took the 61m truck out of service at the end of August 2018 due to an issue with power steering pump. When they did that, Complainant was furious, because he thought it was going to rob him of some hours.

JX-4, page 2 is an invoice from the repairs that were made to the 61m truck on 10 Sep 18.

Byron Scandalianto testified at hearing¹³ and made a statement¹⁴ in pertinent part that:

He has been with Respondents as an operator for about 5½ years. He has had occasion to report problems with the trucks, including the 61m truck. He tells mechanic Calvin Brown and Julio. He's probably done that a dozen times and has never been afraid to bring a problem to anyone's attention. Julio's response is normally to go see what the problem is then they address the problem. If they can't fix it they take precautions or shut the truck down. He has never been afraid for his safety while driving a truck for Respondents. It is not unusual for them to take a truck out of service because it needs a repair. He's not aware of any instance where a problem was reported and not addressed by Julio or Calvin or one of the other mechanics.

He recalls an incident in August 2018 when Julio took the 61 m truck off the road to fix a problem with the power steering. Complainant said he could've just worked with the problem and got the job done. He didn't agree with the decision to take it off the schedule.

He recalls going to Tulane on 10 Sep 18 to install a driveshaft with the mechanic. Complainant had reported an issue with the hanger bearings and felt unsafe to drive it. There was a hanger bearing issue and it was coming apart. He and the mechanic put it back together and drove it back to the yard. They had no issues driving the truck back to the yard in Laplace. He doesn't recall Complainant asking him whether or not there were any issues with the truck. The following Friday, 14 Sep 18, he operated the truck. They told him the night before he was going to take the job. He had no issues driving to the job site, pumping the concrete, or driving back.

About a week later, they noticed an issue with the hanger bearings. There was abnormal wear on the shaft closer to the hanger bearing. The mechanic noticed that they didn't look right. They made some phone calls and eventually found out that the driveshaft was about a couple inches too long and that was tearing up the hanger bearing. You couldn't tell from looking that the driveshaft was too long. They ended up measuring it to figure that out. They modified the driveshaft and haven't had a problem since.

¹³ Tr. 185-196.

¹⁴ RX-8.

He drove the 61 truck maybe a dozen times between April and September 2018 and was never concerned about safety. He does not recall Complainant ever mentioning concerns about safety with the 61m truck.

Respondents take safety as the top priority when needed. When he has come across safety issues, they have been addressed or the truck was taken out of service. He never had an issue with safety. Things happen, but Respondents do their best to take care of safety issues, especially on the road.

Calvin Brown testified at hearing¹⁵ and made a statement¹⁶ in pertinent part that:

He has worked as a mechanic for Respondents for about six years. When operators tell them they have a problem with a truck they try to find the problem and determine what they need to do to fix it. Julio has never told him not to repair something on a truck. He has never known Julio to refuse to address a problem with the truck or ignore advice by any third party mechanics. He has never known Julio to allow anyone to drive a truck if safety was at risk. Julio takes trucks out of service if they need repairs. If a repair is necessary and can't be made, the truck is taken out of service.

He also operated trucks for a while. He holds a commercial driver's license and keeps it current. There was a period when the hanger bearings kept failing on the 61m truck. The hanger bearings kept getting torn up. Eventually they figured out that it was the length of the driveshaft. There is no way of telling that until they had an independent come down who got under the truck and started using the tape measure to take distances. It turned out to be that the shaft they put in after the I-10 break down was about 1 ½ inches longer than it should have been. The bearing failure at that point could have been normal wear and tear. The truck was still working after they put the wrong size driveshaft in, but the bearings were wearing. They couldn't figure out why. Eventually a new shaft of the correct length was made. They only ended up changing the bearings two times. One was after the accident and the other one after the Tulane job.

He drives all the trucks himself, and wouldn't do that if they were unsafe. All maintenance and repairs are done the right way and on time. If a truck is unsafe, they cancel the job or find another truck that they can use. They never let anyone drive an unsafe truck. Problems do occur with the trucks, but are fixed as quickly as possible. Respondents are one of the few places he has worked that has someone come out for weekly tire inspections. Respondents really care about being safe. All the things Complainant is complaining about would've been fixed properly and on time.

There were inspection reports about the leaking steering box on the 40m truck. The boxes would develop a leak in the seal and the only way to fix that is to replace the steering box. He can replace the top seal but not the side seal that controlled the steering. The steering boxes use regular motor oil.

¹⁵ Tr. 242-259.

¹⁶ RX-7.

Wayne Lucido testified at hearing in pertinent part:¹⁷

He runs Wayne's Truck Service in Independence, Louisiana. Respondents are one of their customers. They've been working with Respondents for ten to twelve years. Respondents have always been one of their good customers and pay their bills. Respondents do have an in-house mechanic, so they don't use his shop as often as they used to. He never knew Julio to disregard his advice. Sometimes it's difficult to figure out exactly what the problem is with a truck, but Julio does whatever is right to get it fixed. They really only deal with the truck part of the rig. He holds a CDL.

Michael Masteiro made a statement in pertinent part that:¹⁸

He does not feel in anyway unsafe driving any of Respondents' equipment. He runs them all and while they have a little age on them, whenever he reports a major problem, the truck is shut down or fixed.

Brook Bouvier testified at hearing in pertinent part:¹⁹

He is a heavy-duty diesel mechanic. He is familiar with Respondents and with Julio Arana. He talks to Julio maybe four or five times year or when they need help. Julio called him in September 2018 to ask about a truck with a drive line issue that was burning up hanger bearings. He went out and looked at the 61m truck. The truck has a long driveshaft. He measured it and figured out that the driveshaft was an inch and ½ too long. As a result there was a bulge that would push out and burn the rubber bearings out. The truck would get a lot of vibration. It's very rare to come across something like that. It was first time he seen the problem. He told Julio and they replaced the shaft. The airbags are tough to break, but they do break sometimes.

Louisiana Workforce Commission records state in pertinent part:²⁰

Respondents reported that Complainant was hired on 26 Jun 17, had his last day of work on 14 Sep 18, and was terminated on 19 Sep 18 for refusing to perform work as scheduled.

Respondent's inspection reports state in pertinent part:²¹

Complainant inspected the 61m truck in mid-December 2017 and early February 2018 and reported it had no defects.

¹⁷ Tr. 259-270.

¹⁸ RX-9.

¹⁹ Tr. 270-279.

²⁰ JX-1.

²¹ JX-3 (as cited, see n.4).

Complainant's tax statements state in pertinent part:²²

Complainant earned \$49,930.45 in 2017 and \$80,925.61 in 2018.

Complainant's pay records state in pertinent part:²³

For the pay period from 9 Sep 18 to 15 Sep 18, Complainant worked 18.48 hours at \$30 per hour. Complainant also took 16 hours of vacation and 16 hours of sick leave.

Respondents loaned Complainant an advance on wages of \$1,000 on 12 Sep 17, \$1,200 on 26 Dec 17, \$2,500 on 6 Mar 18, \$600 on 21 May 18, and \$2,000 on 25 Jun 18.

Complainant earned \$47,921 while working for Patriot Pumping Co. from 1 Nov 18 to 4 Sep 19.

Cell phone records state in pertinent part:²⁴

On 8 Sep 18 at 3:06 PM, Complainant told the dispatcher that he had left the 61m truck at Tulane and would not drive it again. The dispatcher answered that she didn't blame him, and he replied that it would have been bad if he had got the truck moving.

On 12 Sep 18, the dispatcher asked Complainant if he would be okay running the 61m or 40m truck the next day. Complainant answered the 40 and the dispatcher gave him information about who would be his helper on the next day's job. The dispatcher confirmed that Complainant had arranged to send the doctor's note placing him on light duty and restricting him from lifting dunnage. Complainant asked about the time, but the dispatcher replied that the job had been canceled because of weather. The dispatcher then asked if he was running the 61m or 40m truck on 14 Sep 18. Complainant responded that he was not running the 61m again.

On 13 Sep 18, Complainant texted the dispatcher asking about his job for the next day. The dispatcher told him that he was to go to Tulane with the 61m, but that Julio would go to be his helper. Complainant answered that he was not going, and the dispatcher responded "seriously." Complainant replied that Respondents had not let him work all week because of his hand even though everyone else was on the clock. Complainant also objected that he was being asked to go not only on the 61m, but with 5 hoses. He pointed out he had told them the week before after getting "fucked" that he wasn't running the 61m and asked why he would do that now. He complained that he only got ten hours for the whole week, was now being asked to do a system pour, but wasn't allowed to work in the shop.

On 14 Sep 18 at approximately 5:00 AM, Julio Arana instructed Complainant to not come in and do the job for that day, but to come to the office around 7:00 AM.

²² RX-3.

²³ RX-4 (as cited, see n.4), 5; CX-4, 6(as cited, see n.4).

²⁴ RX-6; CX-1 (as cited, see n.4).

Complainant responded that he worked eight hours on Monday and someone had talked to his doctor already about him working, so he was not going to work that day. Arana told Complainant he still needed to come into the office by 7:30 AM and would be paid for eight hours.

On 19 Sep 18, Complainant informed the dispatcher that he had just been called and told that he was out of a job. He thanked the dispatcher and noted that she had apparently taken him off of the 61m, but Earl had put him back on it. The dispatcher asked him if he told Earl how dangerous it was with no helper and constantly breaking down. Complainant said he did but was told that wasn't the point.

SMH Orthopedic Surgery records state in pertinent part:²⁵

On 11 Sep 18, Dr. Charles Krieger issued a letter restricting Complainant to light duty because of arthritis in the left thumb that would require surgical intervention in the near future. On 12 Sep 18, the doctor issued an additional letter stating that Complainant could work with restrictions of no lifting, twisting, or turning of the left hand, but would be able to operate the machinery joy stick and could return to full duty within 3 to 6 weeks after surgery.

DISCUSSION

Complainant alleges two protected activities. The first is essentially a course of conduct consisting of multiple protected activities in the fashion of his repeated identification and reporting to Respondents various defects in the vehicles he operated during the time he was employed. The second is his refusal to operate the 61m truck on 13 Sep 18.

Respondents concede that Complainant, along with all of their other employees, engage in protected activity as a fundamental part of their job every time they report a problem with a truck. However, Respondents dispute the suggestion that any of those reports played any role in the decision to terminate Complainant.

The evidentiary record fails to support Complainant's argument that his previous reports of truck problems contributed in any way to his termination. Complainant was unable to identify any disciplinary act, retaliation, or even hostility in response to any of the protected activities that he engaged in before his refusal to operate the 61m. Julio Arana's testimony, along with the documentation and even Complainant's text messages to the dispatcher indicate that he was fired because he refused to drive the 61m truck. Moreover, because of the nature and history of the vehicle reports, temporal nexus provides little support in terms of circumstantial evidence that his reports played any role in his termination.

Complainant attempted to argue that Respondents gave short shrift to safety and were therefore more likely to have considered his previous reports in their decision to terminate him. The record does indicate that Respondents' vehicles, particularly the 61m truck, were very large and complex, requiring frequent maintenance and repair.

²⁵ RX-11.

However, all of the witnesses except for Complainant were consistent in their testimony that Respondents were safety conscious and did not put their drivers at risk. I found the testimony of Byron Scandaliato and Calvin Brown in that regard to be credible, even allowing for any bias they may have as current employees of Respondents. Their testimony was consistent with the testimony of Wayne Lucido and the statement of Michael Masteiro.

Consequently, while the record establishes that Complainant repeatedly engaged in protected activity when he reported the various defects and problems, those reports played no role in his termination, which was a consequence solely of his refusal to operate the 61m truck on 13 Sep 18. As a result, his complaint as to that protected activity is denied.²⁶

That raises the question of whether Complainant's refusal to drive the 61m truck on 13 Sep 18 constituted protected activity. He argues that it does under both the actual violation of safety regulations²⁷ and reasonable apprehension of a real danger of accident, injury, or serious impairment to health²⁸ clauses.

Complainant's brief cited sixteen specific regulations that he argues would have been violated but for his refusal to operate the truck. Of those citations, six are simply general provisions requiring compliance with standards.²⁹ Eight others are specific, but unrelated to the driveshaft issue experienced by the 61m truck.³⁰ Only two of the citations are reasonably implicated by Complainant's alleged concerns regarding the 61m truck.³¹ They provide:

(a) General. A motor vehicle shall not be operated in such a condition as to likely cause an accident or a breakdown of the vehicle.³²

and

²⁶ Complainant also alleged that he refused to operate vehicles before the 13 Sep 18 refusal. None of those refusals are clearly established by the evidence, but to the extent that they exist they similarly had no bearing on the decision to terminate him.

²⁷ 49 U.S.C.A. § 42121(b)(2)(B)(i).

²⁸ 49 U.S.C.A. § 42121(b)(2)(B)(ii).

²⁹ 49 C.F.R. § 390.11 (motor carriers are obliged to require their drivers to comply with part 325); 49 C.F.R. § 392.1 (motor carrier agents, employees, and drivers shall be instructed in the rules); 49 C.F.R. § 392.2 (motor vehicles must be operated in compliance with the most restrictive safety standard); 49 C.F.R. § 393.1 (motor carriers must be aware of the requirements of the regulations and vehicles must be operated in compliance with the regulations); 49 C.F.R. § 396.1 (motor vehicle carriers and drivers must be knowledgeable of the regulations and comply with them); 49 C.F.R. § 396.3 (motor vehicle carriers must systemically inspect their vehicles and maintain records of inspections and repairs).

³⁰ 49 C.F.R. § 392.7 (condition of parts and accessories); 49 C.F.R. § 393.9 (operation and cleanliness of lamps); 49 C.F.R. § 393.11 (location and specifications of lamps and reflectors); 49 C.F.R. § 393.24 (headlamps, fog lamps, and auxiliary lamps); 49 C.F.R. § 393.78 (windshield wiping and washing systems); 49 C.F.R. § 393.79 (windshield defrosting and defogging systems); 49 C.F.R. § 393.81 (horns); 49 C.F.R. § 393.205 (wheels).

³¹ It is unclear whether Complainant seriously intended to argue, for example, that operating the truck would have violated the provisions regarding horns, windshield defrosters, or fog lamps. It seems more possible that those citations were either a legacy from a previous brief used as a template for this case or a result of overreaching pleading. In either event, the litigation process is best served when parties and the court are not asked to review regulations that are clearly inapplicable.

³² 49 C.F.R. § 396.7.

Before driving a motor vehicle, the driver shall:

(a) Be satisfied that the motor vehicle is in safe operating condition;³³

Because of the very general nature of the regulatory provisions invoked by Complainant, the actual violation and reasonable apprehension claims largely depend on two related questions. The first is whether the 61m truck was actually safe to operate. The second is whether Complainant reasonably believed it was so unsafe to operate that doing so would create a real danger of accident, injury, or serious impairment to health. Complainant bears the burden of proof by a preponderance of the evidence on both questions.

The most probative evidence on the question of whether the truck was actually safe to operate is the fact that Respondents did in fact operate the truck without incident. Of course, the fact that no accident occurred does not necessarily mean the vehicle was safe. Complainant makes that argument in his brief by observing that the driveshaft was in fact repaired shortly after the trip and that upon arrival back in the yard following the completion of the job he refused to take, the hanger bearings were destroyed.

Complainant is accurate in the observation that Respondents did ultimately discover the cause of the accelerated wear and repair the driveshaft. The evidence is clear that the excess length of the driveshaft was a chronic problem that would cause accelerated wear and lead to unsafe operation. Complainant misstates the evidence, however, when he argues that the hanger bearings had been destroyed. The testimony of Byron Scandaliato was that about a week later, they noticed abnormal wear on the shaft closer to the hanger bearing.

The weight of the evidence establishes that it is more likely than not that the 61m truck was safe to operate for the 14 Sep 18 job that Complainant refused to accept. Thus, Complainant's claim that he engaged in protected activity when he refused to drive because doing so would have resulted in an actual violation of regulations is denied.³⁴

That leaves the question of whether Complainant's refusal qualifies as protected activity because he had a reasonable apprehension that operating the truck would have created a real danger of accident, injury, or serious impairment to health.³⁵ Complainant insists that he did and so bears the burden of proof to show that a reasonable individual in the same circumstances would have reached the same conclusion.

Complainant relies on two sets of circumstances to justify the reasonableness of his refusal include the previous problems with the truck. The first includes the specific problems with the truck when it broke down on the interstate in April and again at Tulane days before his refusal in September. The second set of circumstances are more general and include the history of mechanical problems with the 61m truck and his broad allegation that Respondents would not adequately respond to mechanical problems.

³³ 49 C.F.R. § 396.13.

³⁴ To the extent that there might have been an actual violation of the requirement that the driver be satisfied his vehicle is in safe operating condition, it would require that the driver's dissatisfaction be reasonable, which is addressed in the following discussion of reasonable belief.

³⁵ Or was reasonable in being dissatisfied that the truck was safe to operate. (Id.)

Clearly, the previous incidents would give a reasonable driver cause to be concerned about whether operating the truck would create a real danger of accident, injury, or serious impairment to health. The evidence established that the 61m truck was very large and complex and mechanical problems were not unexpected. However, the occurrence of mechanical problems does not necessarily create a reasonable concern that operation of the vehicle creates a real danger. The reasonable driver must also consider the response to those mechanical problems.

That presents the most central dispute between the parties in this case. Complainant maintains that Respondents failed to adequately maintain and repair their equipment in general and specifically the 61m truck in such a fashion that would address his reasonable concern that it would be dangerous to operate. Complainant testified that Respondents would absolutely tell him problems had been fixed, but it was a “learned behavior,” because they would still have a problem. He said Respondents told him they were going to get the suspension rebuilt, but that never happened. He conceded that Respondents changed the hanger bearings but complained that was not a long-term solution, since the parts would just fail again. In short, Complainant argues that his distrust of Respondents’ commitment to properly insure the truck was safe to operate justifies his reasonable concern that it was dangerous to operate.

On the other hand, the weight of the evidence is that Respondents did consider safety a priority and even instituted Complainant’s suggestion concerning tracking preventive maintenance, notwithstanding that he was dissatisfied with the location of the tracking board. Other than Complainant, the witnesses were consistent that Respondents properly addressed mechanical and safety issues, regularly taking unsafe equipment out of operation. More significantly, the evidence in this case is that the 61m truck was repaired and safe to operate, at least in the very short term of the job he was assigned. Complainant’s refusal to operate the truck without knowing the actual current mechanical state of the truck weighs against the reasonableness of that refusal.

It also implicates the statutory requirement that Complainant must have sought from Respondents and been unable to obtain correction of the hazardous safety condition. The weight of the evidence is that he failed to do so. He appears to argue that there was no need to do so, because his experience with Respondents that it would have been a pointless exercise. He testified that at times he skipped noting mechanical problems because Respondents would not address them anyway. Again, that testimony was directly contradicted by the weight of the probative evidence in the case. There may be circumstances related to an employer’s disinterest in repair that are so clear as to excuse an employee from the statutory requirement to seek correction of the hazardous condition. However, notwithstanding Complainant’s testimony, the overwhelming evidence suggests nothing of the sort in this case.

Complainant failed to establish both that his refusal to drive was justified because of any reasonable apprehension that doing so would create a dangerous risk and that he sought and failed to obtain any correction of the dangerous condition. Consequently, his refusal does not qualify as protected activity.

However, even if it did, Complainant would still be required to establish that the protected activity nature of his refusal contributed to his termination. There is no question that he was fired because he refused to drive the 61m truck. There is a significant dispute as to whether the individuals involved in making the decision to fire him understood his refusal was based on his concerns about safety. There is no doubt that he communicated to the dispatcher at least at one point that he was unhappy about the mechanical condition of the truck.³⁶ However, notwithstanding Complainant's suggestion that the dispatcher "must have" passed that information along there is no actual evidence that she did so.

More significantly, Arana testified that the dispatcher said she didn't know why Complainant was refusing and Complainant was unhappy about the impact that his hand injury was having had on the hours worked. He also stated that Complainant never mentioned anything about safety and he had no reason to believe that Complainant was concerned about a mechanical problem.

That testimony was consistent with the later texts Complainant sent the dispatcher in which he objected that Respondents had not let him work all week because of his hand even though everyone else was on the clock, but was now asking him to go not only on the 61m, but with 5 hoses. Complainant pointed out to the dispatcher that he had told them the week before after getting "fucked" that he wasn't running the 61m and asked why he would do that now. He also complained that he only got 10 hours for the whole week, was now being asked to do a system pour, but wasn't allowed to work in the shop.

An argument might be made that given the context of his previous discussions with the dispatcher, his remarks about not only being asked to go on the 61m implicated safety concerns. However, there is no evidence any of that contextually or otherwise was ever passed along to the individuals who decided to fire Complainant. On the other hand, the texts to the dispatcher clearly substantiate the argument that Arana concluded Complainant was refusing to drive because he was angry about his hand and his reduced hours.

The weight of the evidence is that the individuals responsible for deciding to fire Complainant were unaware that he was refusing to drive because of any concerns related to the safety of doing so. Consequently, even in the event the refusal was protected activity, Complainant has failed to carry his burden of proof and establish that the protected activity contributed to his termination.

³⁶ Respondents suggested that communications to the dispatcher would not qualify as protected activity. Although the issue is moot, I do note that I find the dispatcher to be in a sufficiently supervisory position that would make any otherwise qualified communications to her protected activity.

ORDER

The complaint is denied.

ORDERED this day of September 2020 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, 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).

PATRICKM. ROSENOW
Acting District Chief Administrative Law Judge