UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Pittsburgh, PA

Issue Date: 30 May 2023

CASE NO.: 2020-STA-00098

In the Matter of:

JOHN HARTMAN,
Complainant

v.

GIBSON & SON ROAD BUILDING, INC.,
and CHRIS JENKS,
Respondents

Appearances: Paul Taylor, Esq.,
Truckers' Justice Center
For the Complainant

Joseph Holland, Esq.,
Holland Law Firm, PLLC
For the Respondents

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER DENYING WHISTLEBLOWER COMPLAINT

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 ("the Act" or "STAA"), and the implementing regulations found at 29 C.F.R. Part 1978. Both parties having had a full and fair opportunity to submit evidence and closing briefs, the case is now ripe for decision. In reaching this decision, I have considered all the evidence admitted into the record, the legal arguments of the parties, and the applicable law.[1] For the reasons set below, I find that Complainant has shown by a preponderance of the evidence that he engaged in protected activity and that the protective activity was a contributing factor in his termination. However, Respondents have shown by clear and convincing evidence that they would have terminated Complainant absent the protected activity. Complainant is therefore not entitled to remedies and damages under the STAA.

[1] In accordance with the Administrative Review Board's ("the Board" or "ARB") note in *Austin v. BNSF Railway Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 2 n.3 (ARB Mar. 11, 2019) (*per curiam*), the undersigned does not include a summary of the record in this Decision and Order. Instead, I focus specifically on findings of fact pertinent to the issues in dispute, after having reviewed and considered the entire record.

PROCEDURAL HISTORY

On April 24, 2020, John Hartman ("Complainant") filed a complaint with the U.S. Department of Labor ("DOL"), Occupational Safety and Health Administration ("OSHA"), alleging Respondents violated the STAA when they terminated his employment on April 3, 2020, after he had raised numerous safety violations throughout his employment, specifically including complaints on March 10, 2020, March 25, 2020, March 30, 2020, and April 3, 2020. (Joint Exhibit ["JX"] 7). On August 17, 2020, OSHA's Assistant Regional Administrator dismissed the complaint because Complainant requested OSHA terminate its investigation and issue a determination to allow for a hearing before the Office of Administrative Law Judges ("OALJ"). Based on the information OSHA's investigation had gathered at that time, there was insufficient information for OSHA to make a determination about whether or not a violation occurred. On August 18, 2020, Complainant filed his Objections to Secretary's Preliminary Findings and Request for Hearing. (JX 8). The case was docketed with OALJ, and subsequently assigned to the undersigned on April 15, 2021.

On December 2, 2021, Respondents submitted a Motion for Summary Judgment. Complainant responded on December 16, 2021. After considering the arguments set forth, I denied the summary judgment motion on December 17, 2021.

I held a formal telephonic hearing on January 11-12, 2022.[2] The parties were afforded a full opportunity to offer exhibits, testimony, and argument. During the hearing, I admitted the following exhibits: JX 1 – 8; Complainant's Exhibits ("CX") 1 – 5; Respondent's Exhibits ("RX") 1 – 5; and Administrative Law Judge Exhibits ("ALJX") 1 – 2. In addition, six witnesses testified, including Complainant. (Tr. 12-16). Complainant and Respondents provided post-hearing briefs on May 20, 2022.

STIPULATIONS

I. The Complainant was an employee as defined by 49 U.S. Code Section 31101(2). The Complainant was not a member of a labor union in his employment with the Respondent and was not subject to a Collective Bargaining Agreement.

II. The Respondent is a motor carrier operating in interstate commerce and a person subject to the Employee Protection Provisions of the Surface Transportation Assistance Act.

III. From March 10th, 2020, to April 3rd, 2020, Respondents employed the Complainant to operate a commercial motor vehicle having a gross vehicle rating of 10,001 pounds or more on the highways, to transport property in commerce.

IV. On April 3rd, 2020, Respondent terminated Complainant's employment.

[2] References to the hearing transcript are styled ("Tr.") followed by the page number.

V. On April 24th, 2020, Complainant filed a complaint with OSHA alleging that the Respondents had discriminated against him and discharged him in violation of 49 U.S. Code Section 311305. The complaint was timely filed.

VI. On August 17th, 2020, OSHA issued a decision denying the Complainant's complaint.

VII. On August 18th, 2020, the Complainant filed timely objections to OSHA's decision and requested a hearing *de novo* before an Administrative Law Judge with the U.S. Department of Labor.

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

(Tr. 11-12).

ISSUES

I. Whether Complainant engaged in protected activity by filing complaints and/or refusing to operate his assigned equipment in March and April 2020?

II. Whether Complainant engaged in protected activity that contributed to his April 3, 2020 employment discharge?

III. If so, whether Respondent can show that it would have discharged Complainant, even in the absence of the protected activity?

IV. Whether Complainant entitled to any relief?

(Tr. 6-10).

APPLICABLE STANDARD

The employee protection provisions of the STAA prohibit an employer from discharging, disciplining, or discriminating against an employee regarding pay, terms, or privileges of employment because the employee has filed a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order, or because the employee refuses to operate a vehicle because such operation violates a regulation or standard related to commercial motor vehicle safety, health, or security. 49 U.S.C. §§ 31105(a)(1)(A)(i); 31105(a)(1)(B)(i).

"To prove a STAA violation, the complainant must show by a preponderance of evidence that his safety complaints to his employer were protected activity, that the company took an adverse employment action against him, and that his protected activity was a contributing factor in the adverse action." *Blackie v. D. Pierce Transportation, Inc.*, ARB No. 13-065, ALJ No. 2011-

STA-00055, slip op. at 5-6 (ARB June 17, 2014). A complainant can prove that his protected activity was a contributing factor in the adverse action if the complainant establishes that "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 77 Fed. Reg. 44,121, 44,127 (Jul. 27, 2012); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, slip op. at 3 (ARB Aug. 31, 2011). The contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision. . . . [E]ven an '[in]signficant' or '[in]substantial' role suffices." *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11 (ARB Jan. 6, 2017) (*citing Palmer v. Canadian Nat'l Railway*, ARB No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 52-53 (Sept. 30, 2016; reissued with full dissent Jan. 4, 2017)), *aff'd sub nom. Powers v. U.S. Dep't of Labor,* 723 Fed. Appx. 522 (9th Cir. 2018) (unpub.).

"If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the adverse personnel action, his employer can avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event." *Blackie*, ARB No. 13-065, slip op. at 6. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Coryell v. Arkansas Energy Services, LLC*, ARB No. 12-033, ALJ No. 2010-STA-00042, slip op. at 4 (ARB Apr. 25, 2013) (*quoting Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-00030, slip op. 6 (ARB Feb. 29, 2012)).

Federal appellate jurisdiction of STAA cases rests in the circuit in which the alleged violation occurred or in which the complainant resided on the date of the violation. 29 C.F.R. § 1978.112. As the alleged violation occurred in Arizona, Ninth Circuit law controls in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background

John Hartman ("Complainant") testified at the hearing that he had been a truck driver for 12 years, and he held a Class A commercial driver's license ("CDL") with a tanker endorsement. (Tr. 22). In 2009, Complainant attended truck driving school at Central Refrigerators in Salt Lake City, Utah, where he earned his CDL. (Tr. 22-23). He currently holds a CDL in Arizona and California. (Tr. 23). After completing school, Complainant worked for Central Refrigerators for almost one year hauling refrigerated food products, delivering to 42 states, and driving in different kinds of weather and terrain. (Tr. 23-24). After his time associated with Central Refrigerators, Complainant worked for Andrus Transportation for approximately six years, and then TCI Corporate Truck Leasing. (Tr. 25-26). During his time with these employers, Complainant never received any safety awards, but also had not had a commercial vehicle accident that was his fault. (Tr. 27).

Complainant saw Respondent Gibson and Son Road Building's internet advertisement for a truck driving position, so he called and spoke to Kory Gibson. (Tr. 28). Gibson advised Complainant that the job involved hauling wood chips, and that someone would be contacting him. (Tr. 28-29). Respondent Chris Jenks subsequently sent Complainant a text message on March 7, 2020, asking if Complainant was still interested in the driving position. (Tr. 30-31, 293). When

Complainant replied affirmatively, Respondent Jenks provided the name and location of where to meet on the following Tuesday (March 10, 2020). (Tr. 31-33).

Respondent Gibson and Son hired Respondent Jenks as an Operator Foreman in March 2020, and he became the company's Chief Operating Officer in June 2020. (Tr. 249-250). Respondent Jenks stated that he supervised the drivers, and had a truck boss who dispatched drivers, but he told that person what tasks needed to be completed and where the trucks were to go each day; on occasion, Respondent Jenks also dispatched drivers. (Tr. 255). Respondent Jenks has driven trucks since he was 15 years old, and has had a CDL since 2005 or 2006. (Tr. 250, 281). Respondent Jenks's compliance training was not formal; rather, he learned from experiences. (Tr. 256).

On March 10, 2020, Complainant reported for work as directed, and met Respondent Jenks at the Novo Biopower truck yard. (Tr. 35). Respondent Jenks described the job, conducted a pre-trip inspection, and took Complainant on a run to show him the routine, including where to pick up loads, how to make sure the truck was properly loaded, where to deliver the load, and what steps to take before and after dumping the load. (Tr. 35-36, 340-341). Complainant testified that one trip as a passenger was his entire training. (Tr. 42). Complainant contrasted that experience with the training provided by his past employers, which usually lasted at least three days. (Tr. 42). Complainant made two additional trips between the Duck Lake facility and Novo Biopower that day. (Tr. 45). On the second trip, Complainant drove the truck and Respondent Jenks observed. (Tr. 341). At that time, Respondent Jenks stated that he rode with all his new drivers to ensure they were competent to drive and had not lied about their experience. *Id.* Respondent Jenks was comfortable with Complainant's performance, so he got out, and Complainant finished a third run alone. (Tr. 341-342).

II. Coverage Under the STAA

The STAA protects employees, defined as:

> A driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who (A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and (B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment."

49 U.S.C. § 31105(j); *see also* 49 U.S.C. § 31101(2); 29 C.F.R. § 1978.101(d). Commercial motor vehicle is defined as "a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater." 49 U.S.C. § 31101(1)(A). An employer is defined as "a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but does not include the Government, a State, or a political subdivision of a State." 49 U.S.C. §§ 31101(3)(A) and (B).

"[C]overage under the Act depends upon whether the vehicles being used are 'in commerce' and whether the employer is a 'commercial motor carrier' which is engaged in a business 'affecting commerce.'" *Ass't Sec'y & Nidy v. Benton Enterprises*, No. 90-STA-11, slip op. at 2 (Sec'y Nov. 19, 1991). The Act has been held to apply to interstate commerce and intrastate transportation that affects interstate commerce. *Id.* (*citing Taylor v. T.K. Trucking*, Sec. Final Dec. and Order, Oct. 31, 1988). It is not necessary to cross state lines to be within the scope of Congress' power to regulate interstate commerce; Congress's power to regulate interstate commerce extends to intrastate activities that exert a substantial effect on interstate commerce. *Ass't Sec'y & Nidy*, No. 90-STA-11, slip op. at 4 (*citing Maryland v. Wirtz*, 392 U.S. 183, 189-190 (1968); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120 (1942); *United States v. Darby*, 312 U.S. 100, 119-120 (1941); *United States v. Hill*, 248 U.S. 420, 425 (1919)). "Whether transportation between two points in the same state is deemed to be a part of an interstate movement is ascertained from all the facts and circumstances surrounding the transportation." *Ass't Sec'y & Nidy*, No. 90-STA-11, slip op. at 4 (*citing Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943); *Baltimore & O.S.W.R. Co. v. Settle*, 260 U.S. 166 (1922)).

The uncontested facts demonstrate that Complainant and Respondents meet the definitions of employee and employer, respectively, under the STAA. Moreover, as set forth above, the parties stipulated to the relevant jurisdictional criteria. Therefore, I find the Act applies to the parties in this case.

III. Protected Activity

Complainant asserts that he engaged in protected activity by making complaints about defective equipment, including airbrakes, taillights, rear door, shocks, and an electrical cord, known as a pigtail, as well as expired registration tags, throughout March and April 2020. Complainant further alleges protected activity by refusing to operate his assigned equipment. In their brief, Respondents assert that Complainant did not engage in protected activity because he never refused to operate his assigned equipment.

A. Filing Complaints

Under the Act, an employee may not be discharged, disciplined, or otherwise discriminated against because the employee filed a complaint related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. 49 U.S.C. § 31105(a)(1)(A)(i). A complaint is considered to be "filed" if it is made to a supervisor. *See Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-00037, slip op. at 5-6 (ARB Dec. 31, 2022), *aff'd sub nom. Harrison v. Admin. Review Bd.*, 390 F.3d. 752 (2nd Cir. 2004). Therefore, internal complaints filed with supervisors which are related to violations of commercial vehicle safety regulations are protected. *See Carter v. Marten Transport, Ltd.*, ARB No. 06-101, -159, ALJ No. 2005-STA-00063, slip op. at 9 (ARB June 30, 2008). In order to be protected under the Act, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation. *Ulrich v. Swift Transp. Corp.*, ARB No. 11-016, ALJ No. 2010-STA-00041, slip op. at 4 (ARB March 27, 2012). Credible testimony is enough to find protected activity. *See Beatty v. Celadon Trucking Services, Inc.*, ARB Nos. 15-085, -086, ALJ No. 2015-STA-00010, slip op. at

5 (ARB Dec. 8, 2017); *McDaniel v. D.G. Construction & Hauling, LLC*, ALJ No. 2019-STA00019, slip op. at 28-29, 37 (ALJ Oct. 31, 2019).

The Administrative Review Board ("ARB" or "the Board") has explained that "reasonable belief" includes a complainant's subjective belief that the complained-of conduct constitutes a violation of relevant law, as well as that the belief is objectively reasonable. *See Brown v. Wilson Trucking Corp.*, ARB No. 96-164, ALJ No. 1994-STA054, slip op. at 2 (ARB Oct. 25, 1996)(*citing Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 82 (2d Cir. 1994)). To satisfy the subjective component of the "reasonable belief" test, the employee must have actually believed that the conduct he complained of constituted a violation of relevant law. *Harp v. Charter Commc'ns*, 558 F.3d 722, 723 (7th Cir. 2009). The second element of the "reasonable belief" standard, the objective component, "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp*, 558 F.3d at 723.

On March 13, 2020, Complainant was at the Camp Verde facility and he lost the air pressure in his braking system while coming into the town of Strawberry. (Tr. 70). Complainant realized he had very limited braking, on a downhill grade that he considered steep for a tractor trailer. (Tr. 74). Despite having limited air pressure in his braking system, the warning buzzer did not go off, nor did the truck's emergency brakes engage. (Tr. 75). Complainant slowed the truck down by engaging the clutch and revving up the engine to make the compressor build up the air pressure enough to slow the truck or bring it to a stop. (Tr. 77). Complainant acknowledged that he was scared, and had never experienced anything like that before. *Id.* When Complainant reached the bottom of the decline, he pulled over and called Respondent Jenks. (Tr. 79-80). Although not a mechanic, Complainant believed the loss of air pressure indicated something was wrong with either the tractor or the trailer. (Tr. 85). Complainant also requested that Respondent check the power steering, as well, because it was making a noise and looked like it was leaking. (Tr. 85). Complainant admitted he was stressed because in 12 years of truck driving, he had not experienced any similar issues. (Tr. 86). Complainant delivered his load to the Novo Biopower plant, then parked his truck there, as he usually did at the end of his shift; however, he left early due to the truck issues. (Tr. 87).

On March 14, 2020, Complainant sent a text message to Respondent Jenks advising him of the loss of air brakes and that the pigtail had been ripped off, and stated that he would not drive the truck unless the issues were fixed. (JX 2; Tr. 86-88). According to Complainant, the brakes were not functioning on March 14, 2020. (Tr. 93). On March 16, 2020, Complainant advised Respondent Jenks that the registration tag appeared to be expired. (JX 2; Tr. 97). On March 24, 2020, Complainant texted Respondent Jenks about missing screws. (JX 2). Complainant explained that the trailer was overloaded, which caused the side panels to bulge, and popped the screws out. (Tr. 98). Complainant testified that driving it in that condition could have put debris on the road or hitting cars behind him. (Tr. 98). On March 25, 2020, Complainant sent a photograph and text to Respondent Jenks about a broken shock and again lacking trailer brakes. (JX 2; Tr. 98). The shock had become lodged in the brake drum, which prevented Complainant from backing up. (Tr. 99). Complainant believed this situation could occur again, or the shock could fall off. (Tr. 99). Complainant refused to drive the truck back to the grinder, so Respondent

Jenks sent someone to fix it. (Tr. 100-101). Complainant also noted an air leak in the braking system on March 25, 2020. (Tr. 100).

On March 30, 2020, Complainant sent pictures to Respondent Jenks regarding an air leak in the braking system. (JX 2; Tr. 102). Complainant recounted that he again lost the air pressure in his trailer brakes coming down a hill on Highway 60 in Green Peaks, Arizona. (Tr. 102-103). Complainant stated that he believed everything with the trailer had been fixed, so he did not refuse to drive that particular trailer again. (Tr. 105). Complainant also requested someone look at the back door and a replacement left tail light, which was not working. (JX 2; Tr. 106-108). Complainant sent a text and picture to Respondent Jenks indicating the need to order more air bags for the suspension system because the mechanic had replaced the wrong one. (JX 2; Tr. 108-109).

On April 3, 2020, Complainant's photographs included illuminated warning lights indicating a defect, and gauges that demonstrated the air pressure in the braking system was again below a safe level. (JX 2; TR. 111-112). Complainant stated that he did not lose his brakes coming from Green Peaks because he slowed or stopped periodically to let the air pressure build up. (Tr. 112-113).

Complainant asserted that parts can break during operation of the truck. (Tr. 165). Respondent Jenks agreed that trucks or trailers break every day, and he texted an instruction to the drivers to let the mechanic know if they had issues, so the mechanic could fix the problems in the afternoons or evenings. (RX 2; Tr. 322-323). Respondent Jenks later asserted that this text message reflected a standing order instructing drivers to tell him what problems they had at the end of each day so he could relay the message to the mechanic. (Tr. 335). He further claimed that drivers were given the same instruction when they were hired. (Tr. 336). He expected drivers to either call him or send a text message with their mechanical issues. *Id.* Respondent Jenks asserted that there were times that Complainant had issues, but did not tell him timely. Respondent Jenks likewise contended that Complainant never showed him the photos contained in JX 1. (Tr. 329). Complainant took pictures of defects with his trailer, and stated that he told Respondent Jenks about the issues, but he never gave Respondent Jenks some of the pictures he took. (Tr. 173-174). However, Respondent Jenks acknowledged that Complainant told him about the broken pigtail and tail light. (Tr. 379-380). Respondent Jenks could not confirm whether Complainant complained about tires balding. (Tr. 381).

Based on the credible testimony, I find that Complainant had made complaints to Respondent Jenks, his supervisor, regarding legitimate safety issues. Respondent Jenks agreed that the truck's air pressure should not drop below 60 pounds, or even 90 pounds. (Tr. 375-376). Similarly, a collapsed airbag would create a safety hazard by creating an unstable load. (Tr. 377-378). Unquestionably, losing brakes on a steep downhill slope, air leaks in the braking system, suspension issues, and missing electrical components (pigtail) or screws necessary to prevent wood chips from blowing onto the road or other motorists would each represent legitimate safety concerns to an objective person. Moreover, Complainant testified about his subjective concerns, which were reasonable.

Therefore, I find Complainant has established that he engaged in protected activity by raising his safety complaints to his supervisor.

B. Refusal to Operate Equipment

Under the Act, refusal to operate a commercial vehicle in violation of regulations is a protected activity. 49 U.S.C. § 31105(a)(1)(B)(i); *see also Shields v. James E. Owen Trucking Co., Inc.*, ARB No. 08-021, ALJ No. 2007-STA-00022, slip op. at 9 (ARB Nov. 30, 2009). 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. *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-00061, slip op. at 9 (ARB Sept. 30, 2011). The reasonableness of the refusal must be subjectively and objectively determined. *Ass't Sec'y & Bailey*, ARB No. 10-001, slip op. at 9; *Sinkfield v. Marten Transp., Ltd.*, ARB No. 16-037, ALJ No. 2015-STA-00035, slip op. at 7 (ARB Jan. 17, 2018). The "subjective" component of the reasonable belief test is satisfied by showing that the complainant actually believed, in good faith, that the conduct he complained of constituted a violation of relevant law. *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-00022, slip op. at 7 (ARB Nov. 28, 2012). Objective reasonableness is "evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Gilbert*, ARB No. 11-019, slip op. at 7 (quotation omitted).

Respondent argues that Complainant never refused to operate a vehicle. (Employer's Brief at 5). Respondent further asserts that Complainant's own timecards and testimony demonstrate he never refused to operate his equipment. *Id.*

Complainant credibly explained the issues with his brakes when descending a steep grade on March 13, 2020. Matthew Priest, another driver, additionally confirmed that Complainant had a small air leak in his braking system. (Tr. 402, 412). Subsequently, when Complainant returned to work on March 14, 2020, both the truck and trailer were parked in the same place he left them the day before. (Tr. 86). According to Complainant, the brakes were not functioning on March 14, 2020. (Tr. 93). Complainant sent a text message to Respondent Jenks advising him of the loss of air brakes and that the pigtail had been ripped off, and stated that he would not drive the truck unless the issues were fixed. (JX 2; Tr. 86-88). Complainant's timecard for that day indicated that Complainant hauled 1 load, but only worked 3.5 hours, from 4:30 A.M. until 8:00 A.M.

Respondent Jenks did not interpret Complainant's text message as a refusal to drive because Complainant hinged his refusal on whether the equipment was fixed, which was done, and Complainant returned to work. (Tr. 297-298). Specifically, Respondent Jenks did not interpret Complainant's March 14, 2020 text message as a refusal to drive, but rather, that he wanted his truck fixed and he would return the following Monday. (Tr. 317). Respondent Jenks likewise did not interpret the message that Complainant was quitting. (Tr. 364). Complainant worked for 3.5 hours on March 14, 2020, and advised that he was done for the day. (Tr. 354-365).

On March 25, 2020, Complainant sent a photograph and text to Respondent Jenks about a broken shock and again lacking trailer brakes, as well as an air leak in the braking system. (JX 2; Tr. 98, 100). The shock had become lodged in the brake drum, which prevented Complainant

from backing up. (Tr. 99). Complainant believed this situation could occur again, or the shock could fall off. (Tr. 99). Complainant refused to drive the truck back to the grinder, so Respondent Jenks sent someone to fix it. (Tr. 100-101). From his timecard, Complainant hauled 3 loads, and worked 11.5 hours; while the amount of time is illegible on the photocopy, it appears that Complainant documented some amount of down time, and noted an issue with a broken shock and air leak. (JX 1).

On March 30, 2020, Complainant recounted that he again lost the air pressure in his trailer brakes coming down a hill on Highway 60 in Green Peaks, Arizona. (Tr. 102-103). Complainant stated that he believed everything with the trailer had been fixed, so he did not refuse to drive that particular trailer again. (Tr. 105).

With respect to the March 14, 2020 incident, Complainant starts by texting, "it's been fun but I'm done…" After explaining multiple concerns, he added, "if you want to fix the truck and you want to call me to come back I will but I'm not driving that truck again till it's fixed..[*sic*]" Respondent Jenks correctly understood that Complainant was willing to return and resume driving if these issues were fixed. However, despite Respondents assertions, there is no question that Complainant refused to drive his equipment in its current state on March 14, 2020. He did not drive a full day then make some complaints; nor did he complain, then proceed to drive anyway. Rather, he made a single run, discovered persistent problems that he identified the previous day, which had not been corrected, and he refused to continue driving. Understandably, Complainant stated that he was scared with the loss of his braking ability coming down a steep grade, and thus, established a subjective basis to refuse to continue driving a truck with the same defects despite assurances that they were fixed. Moreover, it is objectively reasonable that someone would refuse to drive such equipment upon discovering issues with the braking system had not been properly fixed.

On March 25, 2020, Complainant's text, with photographs included, establish that he was subjectively uncomfortable driving with the broken shock, especially after it had already become lodged in the brake drum. It is likewise objectively reasonable that driving the truck with a broken shock could pose a potential danger to the driver or other motorists, especially if it fell off, as Complainant explained in his text message. After some back-and-forth, Respondent Jenks ultimately dispatched a mechanic to resolve Complainant's issue.

Based on the foregoing, I find Complainant engaged in protected activity by refusing to drive on March 14, 2020, and March 25, 2020.

IV. Adverse Employment Action

Discharge of an employee by an employer constitutes an adverse action. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-00026, slip op. at 12-13 (ARB Oct. 31, 2007). Further, the Act prohibits not only a "discharge" for engaging in protected activity, but also other retaliatory actions. *See* 49 U.S.C. § 31105. The Procedures for the Handling of Retaliation Complaints, under the Employee Protection Provision of the STAA, declares that "[i]t is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee" filed orally

or in writing a complaint with an employer related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. 29 C.F.R. § 1978.102(b).

As set forth above, the parties stipulated that Respondents terminated Complainant's employment on April 3, 2020. As such, the uncontested facts demonstrate that Complainant suffered an adverse employment action.

V. Contributing Factor

Complainant must prove, by the preponderance of the evidence, that protected activity was a contributing factor in the adverse action taken. *Tocci v. Miky Transport*, ARB No. 15-029, ALJ No. 2013-STA-00071, slip op. at 6 (ARB May 18, 2017). This may be proven with circumstantial evidence. "Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence." *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-00003, slip op. at 13 (ARB June 24, 2011). Another type of circumstantial evidence "is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, ALJ Nos. 2008-STA-00012, -00041 (ARB Sept. 15, 2011)(internal citations omitted).

A "contributing factor" is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Powers*, ARB No. 13-034, slip op. at 11 (internal citations omitted). The trier of fact is to consider all relevant evidence in determining whether there was a causal relationship between a complainant's protected activity and the adverse employment action alleged. *See id.* at 21; *Austin*, ARB No. 2017-0024, slip op. at 8-9 n. 37 (emphasizing that the *Powers* decision allows the trier of fact to consider all relevant evidence at the contributory factor causation stage). To rule for an employee at this step, the ALJ must be persuaded that it is more likely than not that the protected activity played any role in the adverse action. The standard is low and "broad and forgiving", and the protected activity need only play some role; even an "insignificant or insubstantial" role suffices. *Palmer*, ARB No. 16-035, slip op. at 52-53 (internal marks and citations omitted).

On Saturday, April 4, 2020, after considering the aggregate of Complainant's issues following directions and constant complaints, Respondent Jenks determined the situation was not safe and was not working out for either Complainant or Respondents. (Tr. 361). Respondent Jenks advised Complainant that he was fired in response to a text message Complainant sent regarding his start time for Monday. (Tr. 361-362).

For the reasons set forth above, I found Complainant's complaints included protected activity. By Respondent Jenks's own admission, those complaints were part of the aggregated issues that led to his decision to terminate Complainant's employment. Therefore, I find that Complainant's protected activity played at least some role in the decision to fire Complainant. As such, the evidence establishes that the protected activity was a contributing factor in the adverse employment action.

VI. Affirmative Defense

Respondents must show, by clear and convincing evidence, that they would have taken the adverse action regardless of the protected activity. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Coryell*, ARB No. 12-033, slip op. at 4 (internal citation omitted).

As an initial matter, Respondents offered vehicle inspection reports to assert that the two trucks Complainant operated had passed inspection on March 7, 2020. (JX 5; RX 5). The inspections were seemingly performed by Respondents' mechanic. The mechanic/inspector noted brake hose and lighting repairs made on March 7, 2020, on Fleet unit number 30. (JX 5; RX 5). On Fleet unit number 17, the mechanic/inspector documented lighting device repairs on March 7, 2020, but windshield glazing and repairs on some suspension components on March 17, 2020. (JX 5). Moreover, the mechanic/inspector used check marks for all items, but used an "x" for the "Low Pressure Warning Device" and "Tractor Protection Valve" components of the braking system. *Id.* Based on the self-serving inspection, the repairs listed as having occurred after the inspection was supposedly completed, and the unique indicators for certain items involving the braking system that were directly at issue in this case, I accord these documents no weight towards establishing these vehicles were inspected and safe to operate.

In addition, Respondent Jenks asserted that the driver who followed Complainant's firing reported that he had no issues with the same truck or trailer that Complainant had operated. (Tr. 369-371). While this testimony is unrefuted, it could have been more credible if provided directly by the driver who succeeded Complainant in driving the truck. Therefore, I accord this self-serving statement no weight.

With respect to Complainant's time in Respondents' employ, weather and road conditions on March 11 and 12, 2020, resulted in slippery conditions, limited runs, and trucks becoming stuck in the mud. (JX 2). On March 11, 2020, Complainant sent Respondent Jenks a text message regarding another company's truck that was stuck, and he was unable to get around him because it was on a one-lane trail road. (Tr. 52-53). Other trucks, including Complainant's were also stuck in the mud. (Tr. 54; JX 3). Prior to getting his truck stuck, Complainant was on the phone with Respondent Jenks, who was on-site because he had just freed another truck. (Tr. 56; JX 3, p. 3). Complainant stated that he was going to try to proceed through a particularly bad spot, and Respondent Jenks did not object to that approach. (Tr. 56-57). After Complainant became stuck, another company's dozer operator pushed Complainant's truck out. (Tr. 58). Complainant saw three or four other trucks stuck on Duck Lake Road that day and observed vehicles getting stuck every day. (Tr. 57-58). Complainant stated that he did not disobey any instructions. (Tr. 58). However, Respondent Jenks sent a text message, which appears to be on March 11, 2020, advising Complainant to not take the haul road. (JX 2). Complainant acknowledged receipt of the message. *Id.* Moreover, according to Respondent Jenks, on March 11, 2020, Complainant picked up his first load, but Respondent Jenks saw him still loaded 1.5 to 2 hours later; despite getting lost, Complainant did not call Respondent Jenks to ask for help or directions. (Tr. 342). In his March 14, 2020 text message, Claimant seemingly acknowledged getting lost when he referenced not being able to find his way out of the mountain. (JX 2, p. 24). Complainant's timesheet revealed

that he worked for 7.5 hours, but only completed 1 load. (JX 1). At the end of the day, Complainant stated that he had an air leak. (Tr. 343).

On March 12, 2020, Complainant understood Respondent Jenks next text message that the roads were improving, and he instructed Complainant to return to the Duck Lake facility for one more trip before the stronger rains arrived. (Tr. 62; JX 2, p. 11). Complainant did not refuse the instruction, but when he arrived at Duck Lake Road, he went less than one mile, and determined that he needed to turn around because the road was slippery and unsafe. (Tr. 62-63). Complainant testified that around 10:00 A.M. that morning, he advised Respondent Jenks that he was returning to Novo Biopower and was done for the day. (Tr. 64). At some point on March 12, 2020, Respondent Jenks followed up on Complainant's report of an air leak the previous day. In addition, he observed some suspicious tire tracks, skid marks, and a boulder or big rock that had moved; when he inspected the trailers, he found damage to Complainant's trailer, including dislodged cross-members, and rips and breaks in air lines and an electrical cord. (Tr. 344). However, he acknowledged that he did not see Complainant run over a boulder. (Tr. 391).

On March 13, 2020, Complainant experienced his brake failure. Respondents contend that Complainant should have known how to adjust his brakes, although they admitted that no one had showed him how to do so. Moreover, Respondents' witnesses could not agree on the best braking method Complainant should have used to keep his brakes cool. For example, Matthew Priest said that when coming down a grade, a driver can downshift one gear, use the exhaust brake, and use the stab technique, all to keep the brakes cool. (Tr. 411). Respondent Jenks asserted that Complainant told him he was stabbing the brakes, rather than applying constant pressure, and losing air every time he did so. (Tr. 367). According to Respondent Jenks, stabbing the brakes magnified the problem caused by the air leak in Complainant's truck. (Tr. 368). Respondent Jenks's uncontroverted testimony, however, indicated that Complainant did not adequately understand how the air braking system worked. Specifically, according to Respondent Jenks, Complainant stated that the air recirculated in the braking system, while Respondent Jenks advised that the air exhausts. (Tr. 365-366, 375).

On March 14, 2020, Respondent Jenks claimed that Complainant backed his truck over rub rails on the tipper and ruined three tires and two wheels. (Tr. 344-345). On March 17, 2020, Respondent Jenks observed Complainant twice back into the conveyer that loaded the trucks, despite being directed to stop by Mr. Gibson. (Tr. 345-346, 392).

Respondent Jenks also expressed his frustration that Complainant had previously driven on a flat tire, which caused another tire to blow out. (Tr. 284-285). Had Complainant acknowledged the flat tire sooner, Respondent Jenks would have changed it. However, Respondent Jenks acknowledged that it is possible to be unaware of a flat tire and continue to drive on it. (Tr. 284-287).

On April 3, 2020, Complainant could not recall taking a load to Novo Biopower before going to NAPA, but said he might have done so. (JX 1; Tr. 151). According to Respondent Jenks, Complainant completed one load trip, then met the mechanic at NAPA to address a leaking valve. (Tr. 350). After the mechanic fixed the issue, Complainant returned to Green Peaks; by that time, the grinder moved between Complainant's first run and his recent arrival, which required drivers

to use a new turnaround. (Tr. 120, 350-351). Respondent Jenks stated that a message went out to the drivers to turn around at the Tri State bulldozer, back into the spur, and return to the grinder. (Tr. 351).

Upon arriving at Green Peaks, Complainant traveled on a paved road, then onto a dirt trail, which was wet from melting snow. (Tr. 120). Complainant stated that the usual ribbons to indicate where to turn around were not there. *Id.* He asked one of the five drivers waiting in line to be loaded, who was not one of Respondents' drivers; the driver stated to turn around where the snow started. (Tr. 120-121, 152-153). When Complainant reached that point, he did not see any other tracks and believed this guidance was not correct. (Tr. 121). When he attempted to turn around, he got stuck. (Tr. 121). Complainant called Respondent Jenks, told him what happened, and Respondent Jenks came to pull him out. (Tr. 122). Based on his tone of voice and questions he asked, Complainant believed Respondent Jenks was upset. (Tr. 122-123). According to Complainant, when Respondent Jenks arrived, he told Complainant to back up, but he did not tell Complainant where to turn around. (Tr. 125). As Complainant was backing up, he began turning around, and Respondent Jenks told him he was on the wrong side of the cattle guard to turn around. (Tr. 126). Complainant did not think Respondent Jenks provided clear directions, but believed he was following the directions given. (Tr. 126). Complainant later clarified that Respondent Jenks stopped him from turning around before the cattle guard and told him to back up through the cattle guard, and then turn around. (Tr. 156-157). Once Complainant turned around, Respondent Jenks directed him to take the truck back to the yard. (Tr. 127).

According to Respondent Jenks, when Complainant returned, he did not ask Respondent Jenks where the turnaround was located. (Tr. 354). Complainant then called Respondent Jenks to say he was stuck. (Tr. 355). Respondent Jenks took the excavator to try to find Complainant. He observed the first turnaround that had been used by other trucks based on the tracks in the ground. *Id.* Respondent Jenks also passed the turnaround just before the cattle guard with ruts from other trucks turning around in the mud. (Tr. 356). Complainant had driven past the cattle guard, which was three-quarters of a mile past the bulldozer. (Tr. 351-352). Past the cattle guard is a protected wildlife area with signs that indicate motor vehicles are not allowed. (Tr. 352). Complainant told Respondent Jenks that someone told him to go to the snow before turning around. (Tr. 356). Respondent Jenks directed Complainant to back through the cattle guard; however, Complainant twice tried to turn around before the cattle guard. (Tr. 356). Eventually Complainant backed through the cattle guard, and after turning around, Complainant was shifting gears and spinning tires. (Tr. 357).

Respondent Jenks told Complainant to go home for the day, but he had not fired him at that point. (Tr. 357). Respondent Jenks texted the grinder operator not to load Complainant's truck and directed him to advise Complainant to go home. (Tr. 357-358). Respondent Jenks received a call from Mr. Campbell that Complainant was driving fast and went through a ditch to get around Mr. Stevens's truck, which was being loaded at the time. (Tr. 358). Respondent Jenks stated that Mr. Stevens told him the same story. *Id.* Respondent Jenks said that he did not know how he would handle the situation at that time. (Tr. 359).

Matt Campbell was employed by Respondents on April 3, 2020, though he does not currently work for them. (Tr. 420). Mr. Campbell stated that there was a dozer, and drivers were

directed, by CB radio transmission, to turnaround at the dozer and return to the grinder. (Tr. 420-421). On April 3, 2020, Mr. Campbell was operating the grinder. (Tr. 421). After Respondent Jenks helped dig out Complainant, Mr. Campbell stated that Complainant drove down the haul road at an excessive rate of speed, and estimated it was over 30 miles per hour. (Tr. 421-422). According to Mr. Campbell, that speed was not a safe speed through the plant; likewise, Complainant drove his truck and trailer into a ditch to get around a truck Mr. Campbell was loading, which was also unsafe. (Tr. 422).

Mr. Campbell confirmed that he operated both a commercial vehicle and the grinder for Respondents for approximately three years. (Tr. 424-425). On cross-examination, Mr. Campbell agreed that dozers, grinders, and turnaround sites are moved around, but he claimed that the designated turnaround bulldozer location did not move because that dozer was owned by a different company that was not working at the site on April 3, 2020. (423-424).

Shannon Stevens was a driver for Respondents. (Tr. 428). On April 3, 2020, Mr. Stevens testified that he turned around at the designated dozer, and returned to the grinder where his trailer was being loaded. (Tr. 429). He observed Complainant approaching him at a high rate of speed, then driving around his truck, into a ditch, and back onto the road without stopping. (Tr. 429). Mr. Stevens recalled the conditions were wet and slippery that day. (Tr. 430). He estimated that Complainant was driving 25 or 30 miles per hour, which he believed was extremely fast given the road conditions. *Id.* Mr. Stevens asserted that he would not have driven that way, and believed Complainant's driving was unsafe. (Tr. 430-431).

On cross-examination, Mr. Stevens stated that Respondent Jenks instructed them to turn around at the dozer on April 3, 2020, and those types of instructions are usually given by text message. (Tr. 432-433). Mr. Stevens asserted that Respondent Jenks always provided those types of instructions daily. (Tr. 433).

Aside from the discrepancy of how the turnaround instructions were provided (text message versus CB radio transmission), Respondent Jenks, Mr. Campbell, and Mr. Stevens provided credible and consistent testimony about the events of April 3, 2020. Perhaps Complainant missed those instructions while he was at NAPA. Regardless, he was responsible for determining whether to ask his supervisor or a random driver where to turn around. In following the directions provided to him by a competitor's driver, he passed several turnaround areas, and proceeded to the directed point. He was in a protected zone, and realized by the lack of turnaround tracks, that he was not in the proper area. Despite the situation, Complainant proceeded at attempt a turnaround maneuver and got stuck. Based on this situation, I find Respondent Jenks's testimony regarding the follow-up instructions about backing up through the cattle guard before attempting to turn around more credible because the two men had just walked the road together and Respondent Jenks pointed out the appropriate turnaround areas as they passed them. Moreover, Mr. Campbell and Mr. Stevens had front row seats to Complainant's actions in the aftermath of Respondent Jenks sending him home for the day. Their testimony established that Complainant exited the facility by driving in an erratic and dangerous way given the narrow roads, wet conditions, and on-going loading operations.

Certainly, the proximate time between the protected activity and adverse action is a consideration in whistleblower protection cases. However, Complainant's actions leading up to, and after, getting stuck on April 3, 2020, and the way in which he exited the Green Peaks facility, risking others' safety and damage to his truck or trailer, were all bases for him to be fired on the spot. To his credit, Respondent Jenks refrained from acting impulsively, and took time to reflect on the incident. In the end, he ultimately decided to fire Complainant.

As noted above, Respondent Jenks considered all of Complainant's activities during his short tenure in deciding to terminate Complainant's employment. However, I find that Respondent established, by clear and convincing evidence, that, based on the events of April 3, 2020, in addition to the damage Complainant caused to Respondents' trucks previously, they would have terminated Complainant's employment, even absent the protected activity.

CONCLUSION

Based on the foregoing, I find that Complainant engaged in protected activity by filing safety complaints and refusing to operate his assigned equipment. Complainant suffered an adverse employment action. Moreover, Complainant's protected activity was, at least in part, a contributing factor in his adverse employment action. However, Respondents demonstrated, by clear and convincing evidence, that they would have taken the same action even in the absence of the protected activity. Thus, based upon the applicable law and my review of all of the evidence, I find Complainant did not establish whistleblower protection under the STAA and relevant regulations.

ORDER

Based on the entire record, including the aforementioned findings of fact and conclusions of law, IT IS HEREBY ORDERED that John Hartman's claim for relief under the employee protection provisions of the Surface Transportation Assistance Act is **DENIED**.

SEAN M. RAMALEY
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 the administrative law judge's decision.

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. 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, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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).

FILING AND SERVICE OF AN APPEAL

1. Use of EFS System:
The Board's Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible interface. Use of the EFS system is free of charge to all users. To file an appeal using the EFS System go to https://efile.dol.gov. All filers are required to comply with the Board's rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at https://www.ecfr.gov/current/title-29/subtitle-A/part-26.

A. Attorneys and Lay Representatives:

Use of the EFS system is mandatory for all attorneys and lay representatives for all filings and all service related to cases filed with the Board, absent an exemption granted in advance for good cause shown. 29 C.F.R Part § 26.3(a)(1), (2).

B. Self-Represented Parties:

Use of the EFS system is strongly encouraged for all self-represented parties with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all required service automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

Self-represented parties who choose not to use the EFS system must file by mail or by personal or commercial delivery all pleadings, including briefs, appendices, motions, and other supporting documentation, directed to:

Administrative Review Board
Clerk of the Appellate Boards
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220
Washington, D.C., 20210

2. EFS Registration and Duty to Designate E-mail Address for Service

To use the Board's EFS system, a party must have a validated user account. To create a validated EFS user account, a party must register and designate a valid e-mail address by going to https://efile.dol.gov, select the button to "Create Account," and proceed through the registration process. If the party already has an account, they may simply use the option to "Sign In."

Once a valid EFS account and profile has been created, the party may file a petition for review through the EFS system by selecting "eFile & eService with the Administrative Review Board" from the main dashboard, and selecting the button "File a New Appeal - ARB." In order for any other party (other than the EFS user who filed the appeal) to access the appeal, the party must submit an access request. To submit an access request, parties must log into the EFSSystem, select "eFile & eService with the Administrative Review Board," select the button "Request Access to Appeals," search for and select the appeal the party is requesting access to, answer the questions as prompted, and click the button "Submit to DOL."

Additional information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as step-by-step User Guides, answers to frequently asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the "Support" tab at https://efile.dol.gov.

3. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

4. Service of Filings

A. Service by Parties

• **Service on Registered EFS Users:** Service upon registered EFS users is accomplished automatically by the EFS system.

• **Service on Other Parties or Participants:** Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

B. Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail (unless otherwise required by law). If a party unrepresented by counsel files their appeal by regular mail, that party will be served with Board-issued documents by regular mail. Any party may opt into e-service at any time by registering for an EFS account as directed above, even if they initially filed their appeal by regular mail or delivery.

5. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and manner of service. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

6. Inquiries and Correspondence

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of the Appellate Boards by telephone at 202-693-6300 or by fax at 202-513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARB-Correspondence@dol.gov.