U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 July 2022

CASE NO.: 2020-STA-00041

In the Matter of:

DANIEL OSBORN,
Complainant,

vs.

ELLCO LOGISTICS, INC., a/k/a
ELLCO TRANSPORTATION, INC., and
STEVEN ELLSWORTH,
Respondents.

Appearances:
Paul O. Taylor, Esq.
For the Complainant

Cary Kletter, Esq.
Nicholas A. Gioello, Esq.
For the Respondents

Before:
Susan Hoffman
Administrative Law Judge

DECISION AND ORDER GRANTING 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, the undersigned has considered all the evidence admitted into the record, the legal arguments of the parties, and the applicable law.[1] For the reasons set below, the undersigned finds 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. Respondents failed to

[1] In accordance with the Administrative Review Board's ("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. The undersigned instead focuses specifically on findings of fact pertinent to the issues in dispute, after having reviewed and considered the entire record.

show by clear and convincing evidence that they would have terminated Complainant absent the protected activity. Complainant is therefore entitled to remedies and damages under the STAA.

I. PROCEDURAL BACKGROUND

On January 3, 2020, Complainant Daniel Osborn filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") alleging that Respondents Ellco Logistics, Inc., a/k/a Ellco Transportation, Inc. ("Ellco"), and Steven Ellsworth[2], violated the STAA when they terminated his employment on December 18, 2019, in retaliation for his refusal to violate hours of service regulations and falsify electronic driving logs. In the Secretary's Findings issued on February 24, 2020, OSHA's Assistant Regional Administrator found Complainant's allegations did not make a prima facie showing of retaliation in violation of the STAA. Complainant filed objections to the Findings on March 20, 2020, and requested a hearing before the Office of Administrative Law Judges. The matter was then assigned to the undersigned and scheduled for hearing.

On May 17, 2021, Respondents filed four *Motions in Limine* seeking to exclude any undisclosed witnesses, evidence of unrelated matters, and two witnesses. At the hearing, the undersigned denied those motions. (HT at 10-18.)

The undersigned presided over a formal hearing by videoconference on May 18, 19, 20, and 21, 2021. Six witnesses, including Complainant, testified.[3] One of Respondents' proposed witnesses was excluded from testifying. (HT at 432-445, 539-544, 651.) The undersigned admitted Complainant's Exhibits ("CX") 1 through 11 (HT at 18-20, 361, 545) and Respondents' Exhibits ("RX") 1, 3, 5, 6, and 7 (HT 41-43, 47, 648-650, 651-652). Following the hearing, Complainant filed *Complainant's Closing Argument* ("Cl. Brief") on August 16, 2021. Respondents filed *Respondents' Closing Argument* ("Resp. Brief") on September 15, 2021. Complainant filed *Complainant's Reply Brief* ("Cl. Reply) on September 29, 2021. The record then closed, and the matter stood submitted for decision.

II. STIPULATIONS

At the hearing, the undersigned accepted the following stipulations of the parties:

[2] Complainant initially served Ellco Transportation, Inc., and Steven Ellsworth. Respondents argued they should have been named as Ellco Logistics, Inc. After hearing argument on the matter, the undersigned found that Respondents were properly noticed and served and had appeared, and that Respondents would be identified as Ellco Logistics, Inc., a/k/a Ellco Transportation ("Ellco"), and Steven Ellsworth. (Hearing Transcript ("HT") at 6-9.)

[3] Complainant testified (HT at 272-424, 653-655) and called to testify Steven J. Ellsworth ("Mr. Ellsworth") (HT at 72-94, 201-229, 261-269), Gabriel Issac Hernandez (HT at 96-148), David Becerra (HT at 149-191, 446-486), and Antonio Martinez (HT at 478-538). Respondents also called Mr. Ellsworth (HT 230-260, 564-583), Mayra Rodriguez (HT at 584-634), and, for impeachment purposes only, Michael Ellsworth ("Michael Ellsworth") (HT at 639-647). Mr. Ellsworth attended the entire hearing as a Respondent and Ellco's corporate representative, and Ms. Rodriguez attended the entire hearing as Ellco's corporate representative. (HT at 9-10.)

1. Complainant was an employee as defined at 49 U.S.C. § 31101(2). Complainant was not a member of a labor union, and his employment with Respondent Ellco was not subject to a collective bargaining agreement.

2. Respondent Ellco maintains a place of business at 3615 S. CA-99 W. Frontage Road, Stockton, CA 95215.

3. From December 16, 2019, to December 18, 2019, Respondent Ellco employed Complainant to operate commercial motor vehicles having a gross vehicle rating of 10,001 pounds or more on the highways to transport property in commerce.

4. On December 18, 2019, Respondents discharged Complainant.

5. On January 3, 2020, Complainant filed a complaint with OSHA alleging that Respondents had discriminated against him and discharged him in violation of 49 U.S.C. § 31105. The complaint was timely filed.

6. On February 24, 2020, OSHA issued a decision denying Complainant's complaint.

7. On March 20, 2020, Complainant filed timely objections to the OSHA decision and requested a hearing de novo before an administrative law judge of the Department of Labor.

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

(HT at 31-32, 49-52.)

III. ISSUES TO BE DECIDED

1. Did Complainant engage in protected activity on December 17, 2019, by refusing to operate a commercial vehicle after receiving a dispatch that would require him to violate hours of service regulations?

2. Did Complainant engage in protected activity on December 18, 2019, by filing a complaint with Mr. Ellco regarding future alteration of his electronic logging device ("ELD")?

3. If so, did Respondents take the adverse personnel action of employment termination?

4. If so, was Complainant's protected activity a contributing factor to the adverse employment action?

5.. If so, did Respondents show by clear and convincing evidence that they would have taken the same adverse personnel action against Complainant in the absence of any protected activity?

6. If not, what relief, if any, is Complainant entitled to receive?

IV. LEGAL FRAMEWORK AND BURDENS OF PROOF

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 California, Ninth Circuit law controls in this matter

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. 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).

Here, the parties stipulated that Complainant was an employee as defined at 49 U.S.C. § 31101(2). They also stipulated that Respondents employed Complainant to operate commercial motor vehicles having a gross vehicle rating of 10,001 pounds or more on the highways to transport property in commerce. However, Respondents maintain that the STAA is inapplicable because Ellco is not involved in interstate commerce. (Resp. Brief at 9-10.)

"[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)).

Here, there is no dispute that Ellco required its drivers to pick up bottles from Graham Packaging in Modesto, California and transport those bottles to a Shell facility in Wilmington, California. Respondent Mr. Ellsworth is the sole owner of Respondent Ellco. (HT 72-73, 230.) Mr. Ellsworth testified that Shell uses these bottles for oil (HT at 81), which the undersigned notes may be transported over state lines. Mr. Ellsworth also testified that "some bottles are brought in from out of state." (HT at 81, 227.) While Respondents argue that this line of questioning was improper and cannot be relied upon because it lacks foundation and calls for speculation, Mr. Ellsworth only testified to the extent of his knowledge, and the undersigned finds his testimony on this point to be reliable. (HT at 227.) Ellco's hauling of bottles may not have been a major portion of its total activities or income, but Ellco's activities were part of the movement of bottles across state lines, and therefore constituted the movement and sale of goods in interstate commerce. *See Ass't Sec'y & Nidy*, No. 90-STA-11, slip op. at 4-5.

Further, the Secretary has held that driving trucks on national interstate, U.S., or interconnecting state highways demonstrates that employees are engaged in commerce, even if state lines have not been crossed. *Schuler v. M&P Contracting Inc.*, No. 94-STA-14, slip op. at 2 (Sec'y Dec. 15, 1994) (citing *Arnold v. Associated Sand & Gravel Co.*, No. 92-STA-19, Sec'y. Dec. and Order of Remand Aug 31, 1992, slip op. at 5-6, and cases discussed therein); *see also Ass't Sec'y & Killcrease v. S & S Gravel, Inc.*, No. 92-STA-30, slip op. at 3 (Sec'y Feb. 2, 1993).

Ellco operates trucks on state routes and interstate highways, including Interstate 5 and Interstate 405, to transport goods. (HT at 225-227; Stipulation 3.) Complainant's Daily Log indicates that he drove on Interstate 5 while employed by Ellco (CX 4 at 9-10, 24-26, 30-32), and other Ellco drivers testified they drove on interstate highways while working for Ellco (HT at 106-107, 477-479, 492). The company has accounts other than Shell, runs to Nevada, and takes dispatches from brokers. (HT at 568-569.) Respondents have clients for which they do interstate travel. (HT at 228.) At the time Complainant worked for Ellco, the company employed approximately 12 or 18 drivers. (HT at 73, 571.) At that time, four of the drivers drove from Ellco's Fowler (Fresno) yard to the Shell facility in Wilmington, and the remaining drivers drove out of Ellco's Stockton yard. (HT at 572.) Complainant drove for Respondents only within the state of California.

The undersigned finds that Ellco engages directly in interstate commerce and in intrastate transportation that exerts a substantial effect on interstate commerce. Ellco engages in the intrastate movement of goods over major state and interstate highways, including Interstate 5. Interstate 5 "'constitute[s] a major artery running the length of the West Coast of the United States connecting Canada and Mexico.'" *Arnold v. Associated Sand & Gravel Co., Inc.*, No. 92-STA-19, slip op. at 2 (Sec'y Aug. 31, 1992) (citing *Rehling v. Sandel Glass Co.*, Case No. 91-STA-33, Sec. Remand Dec., Jan. 6, 1992, slip op. at 7). By regularly operating commercial motor vehicles on interstate highways, Respondents and their employees, even if solely intrastate haulage drivers, are engaged interstate commerce, as they affect commercial motor vehicle safety and "may facilitate or impede the course of interstate traffic and thus substantially affect interstate commerce." *See Arnold*, No. 92-STA-19, slip op. at 3 (and cases discussed within); *see also Ass't Sec'y & Killcrease*, No. 92-STA-30, slip op. at 3 (and cases discussed within); *Rehling v. Sandel Glass Co.*, No. 91-STA-33, slip op. at 3-4 (Sec'y Jan. 6, 1992) (and cases discussed within).

The undersigned therefore concludes that the STAA applies here.

B. Protected Activities

1. Complainant Refused a Dispatch on December 17, 2019

Under the Act, refusal to operate a commercial vehicle in violation of hours-of-service 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).

The Federal Hours of Service regulations, under the Federal Motor Carrier Safety regulations, apply to all employers, employees, and commercial motor vehicles that transport property or passengers in interstate commerce. *See* 49 C.F.R. § 390.3(a). The Federal Motor Carrier Safety Administration also makes clear that "[w]hen the intent of the transportation being performed is interstate in nature, even when the route is within the boundaries of a single State, the driver and CMV [commercial motor vehicle] are subject to the FMCSRs [Federal Motor Carrier Safety Regulations]." 76 Fed. Reg. 50,433, 50,434 (Aug. 15, 2011).

The Federal Hours of Service regulations prohibit a driver from driving after the 14th consecutive hour after coming on-duty without having at least 10 consecutive hours off-duty. *See* 49 C.F.R. § 395.3(a). The California Code of Regulations for Motor Vehicles prohibits a driver from driving past the 16th hour after coming on-duty without having at least 10 consecutive hours off-duty. *See* Cal. Code Regs. tit. 13, § 1212.5(a). The California Code of Regulations for Motor Vehicles also indicates that motor carriers and drivers engaged in interstate commerce must comply with the federal driver hours-of-service regulations contained in Title 49, Code of Federal Regulations, Part 395. Cal. Code Regs. tit. 13, § 1212.5(b).

Complainant worked for Ellco on December 16, 2019, and December 17, 2019, and was discharged on December 18, 2019. (Stipulations 3, 4; HT at 621-622; CX 3.) Mayra Rodriguez, Ellco's Human Resources ("HR") manager, had hiring and firing capabilities and hired Complainant. (HT at 585-588.) Complainant was hired for the route from Ellco's Fowler (Fresno) yard to the Shell facility in Wilmington and back, then the next day to the Graham Packaging plant (in Modesto) and back to the Fowler yard. (HT 82, 588-589, 596.) Complainant's first dispatch with Ellco was on December 16, 2019, when he drove from Ellco's Fowler yard to Sysco Foods in Sacramento, then to Ellco's Stockton yard, then to Graham Packaging in Modesto, then back to the Fowler yard. (HT at 233, 267, 292, 294-297, 305-310.)

On Complainant's second day of work for Ellco on December 17, 2019, he logged in around 10:00 a.m., completed his pre-trip inspection, and departed from the Fowler yard around 10:20 a.m. for the Shell facility in Wilmington. (HT at 311-313; CX 4 at 18.) Complainant exited from Interstate 710 at about 3:19 p.m., spent about an hour trying to find a legal truck route to get into the Shell facility, and entered the Shell facility at about 4:25 p.m. (CX 4 at 27-28; HT 314-

315, 382.)[4] From all this evidence, the undersigned finds that Complainant was driving around "lost" for about an hour that afternoon.

Complainant left the Shell facility around 5:38 p.m. on December 17, 2019, drove about 22 miles to a drop yard in Vernon, and arrived there around 6:36 p.m. (CX 4 at 19, 29-30.)[5] Complainant left the Vernon drop yard at about 6:51 p.m. to begin the drive back to Fowler. (CX 4 at 19, 30.) The undersigned therefore finds that Complainant was stopped at the Vernon drop yard from about 6:36 p.m. to 6:51 p.m. on December 17, 2019.

Complainant received a text from "Steve Work" at 6:35 p.m. on December 17, 2019, which the parties agree was a dispatch to work at 3:00 a.m. on December 18, 2019 (the "dispatch text"). (CX 2 at 3; Cl. Brief, p. 7; Resp. Brief, p. 5.) Both Mr. Ellsworth (HT at 250) and Complainant (HT at 334) testified that the text was a dispatch for 3:00 a.m. the next day. Respondents argue that Complainant "immediately confirmed the dispatch", citing only to the screenshot of the text message itself. (Resp. Brief, pp. 5, 12-13.) The undersigned does not find that the screenshot (CX 2 at 3) proves Respondents' argument. On the screenshot, the text following the dispatch text says, "Empty from Vernon 294735". It appears that two people other than Complainant were on this text exchange, as evidence by the notation "2 People" with two initials at the top of the screenshot. (*Compare* CX 2 at 3 *with* CX 2 at 2, where only "Isabel Work" and one initial are at the top.) The text responding to the dispatch text is on the right side of the screenshot, which tends to indicate that Complainant sent it, but it does not specifically confirm the dispatch and seems to refer only to an empty trailer number at the Vernon drop yard. Mr. Ellsworth affirmed that this particular message meant "the driver, the author of that message, has picked up an empty trailer in Vernon" and was advising the company of such. (HT at 207.) The undersigned therefore does not consider the responsive text to be Complainant's confirmation of the dispatch text, as argued by Respondents. Although no time stamp is visible for the text in question, the undersigned finds it reasonable to conclude that Complainant sent it during the time he was stopped at the Vernon drop yard.

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[4] Ms. Rodriguez testified that Complainant was lost for about 1.5 to 2 hours. (HT at 601.) At his deposition, Complainant testified that he spent about an hour circling around the Shell facility, trying to get in. (HT at 379-381.) After looking at his logs, however, Complainant testified at hearing that it he was only lost for about 20 to 25 minutes. (HT at 379, 414-415.) The longer length of time to which Ms. Rodriguez testified is not supported by any other evidence. The shorter length of time to which Complainant testified does not appear to be consistent with the undersigned's review of the Driver's Daily Log. While it is not clear from the record how long it would take to drive directly from the interstate exit to the Shell facility, the difference in recorded mileage between 3:19 p.m. and 4:25 p.m. is about 16 miles. (CX 4 at 27-28.)

[5] Complainant testified, while referring to "the grid" (a graph at CX 4 at 18), that the drive to Vernon "took an hour and 15" and that "traffic was horrendous." (HT at 332-333.) The undersigned's review of "the grid", however, shows that the line in the "D" (drive) row extends about four quarters of an hour (not five quarters) in the relevant time period, which is consistent with the information recorded elsewhere on the Driver's Daily Log. The undersigned does not consider this discrepancy to materially impact Complainant's credibility, as his interpretation of the length of the relevant line on "the grid" is fairly close, he did not thoroughly examine the entirety of the exhibit while on the stand (as the undersigned has now done), and traffic could reasonably explain why a 22-mile drive took nearly an hour at that time of day in that area. For instance, Complainant was driving on I-710 from about 5:58 p.m. to 6:18 p.m., once traveling as slow as 9 miles per hour and once as fast as 63 miles per hour (speed is recorded every two minutes). (CX 4 at 29.)

The parties agree that Complainant and Ms. Rodriguez spoke on the telephone after the dispatch text was sent, but disagree about who initiated the call and the substance of the conversation. The only direct evidence of this critical conversation is the conflicting testimony of the participants; neither party proffered physical evidence, such as phone logs, that may have established the time of the call and who initiated it.

At hearing, in response to the question, "Did you let anybody know, at Ellco, that you were refusing that dispatch?", Complainant answered, "Yes." When asked, "Who did you let know?", Complainant testified, "I called and Mayra answered the phone." (HT at 335.) He told Ms. Rodriguez that he received a 3:00 a.m. dispatch, and she said, "So?" He said he couldn't do the dispatch, and she said, "Why?" He said he was still in Los Angeles and would not have the hours to do it. She told him, "Just come when you're up on hours, or after your break." (HT at 335-336.) Complainant testified he was calling from Vernon. (HT at 336.)

On direct examination, Ms. Rodriguez testified that she knew Complainant did not make the 3:00 a.m. run on December 18th because, "I reviewed the dispatchers and I spoke to him that they made an error. And I told him to start after his 10 hours." (HT at 610.) Ms. Rodriguez testified that she never said, "so, what's the problem" after Complainant brought up issues regarding his hours of service, and she would not normally respond in such a manner if a driver complained about their hours of service. (HT at 610.) She testified that she told him, "That the dispatchers made an error, that he can't start on that because he's still driving. And he would have to get a 10-hour reset and then he could start." (HT at 611.) On cross examination, Ms. Rodriguez answered a question that began, "Did he call you and tell you he didn't have the hours . . ." with "I spoke to him. I called him and told him that he can't start that dispatch. I was reviewing the dispatchers' work." (HT at 623.) She believed she told Complainant that "around 7:00." (HT at 623.) She later said it was "around 6:00 or 7:00 p.m." when she told him to come into work after his 10 hours of break were up and that he did not call her, she called him.[6] (HT at 626.)

The undersigned considers that, on direct examination, Ms. Rodriguez never expressly stated that she placed the call to Complainant. It was only on cross examination, when confronted with two questions asking whether Complainant called her that she said she had called him. It seems almost as if Ms. Rodriguez was omitting the fact of who initiated the call as long as that question was not specifically posed.

Further, in order to assess the credibility of these two witnesses as to this telephone conversation and the weight to assign to each one's account of the call, the undersigned has considered circumstantial evidence that may tend to shed light on what actually occurred. Generally, Ms. Rodriguez had been employed by Ellco since November 2017 and held the positions of office manager, recruiter, and HR Manager with hiring and firing capabilities. (HT at 585-586.) She worked with Mr. Ellsworth to design the Fowler yard, which was created at the end of October 2019. (HT at 596-597.) Specifically, Ms. Rodriguez got to the office on December 17th "by say 10:30" and did her usual routine - asking the dispatchers how the drivers are doing (did anybody call in sick or not show up, what was their ETA, did they make it to the client's site, any issues), then checking emails, then "follow-up with log books, get the new rating hires",

[6] "Q Had he called you and told you he was going to run -- he didn't have the hours to get back and then have a 10-hour break? A No. He did not. I did." (HT at 626.)

identify driving events, or "stuff like that." (HT at 600-601.) On December 17th, she learned that Complainant was "lost in a route" when she had her dispatcher check up on him. (HT at 601.) She was monitoring drivers' times, including Complainant's, on December 17th with truck GPS. (HT at 609.)

The undersigned discounts Ms. Rodriguez's testimony about the December 17th telephone conversation with Complainant. Ms. Rodriguez did not include in any description of her general duties or of her specific activities on December 17, 2019, the task of reviewing the next day's dispatches. She performed HR-related duties, monitored truck drivers' times on GPS, gave instructions to dispatchers to check up on Complainant in the afternoon, and asked the dispatchers how the drivers were doing. But she only said she independently reviewed dispatches when she testified about speaking to Complainant to tell him the dispatchers made an error and to take his 10-hour break before reporting for duty the next day.

The undersigned also considers the timing of the conversation. Complainant arrived at the Vernon drop yard around 6:36 p.m. and left around 6:51 p.m. There is no evidence to contradict Complainant's testimony that the call took place while he was at Vernon; Ms. Rodriguez only testified it took place "around 7:00" or "around 6:00 or 7:00 p.m." The undersigned finds Complainant credible on this point, especially since the evidence establishes he was using his phone to respond to the dispatch text that was sent at 6:35 p.m. This means that Ms. Rodriguez would have had to review all of the next day's dispatches and call Complainant within that 15 minute time frame, which the undersigned considers to be coincidental at best and generally unlikely. The undersigned cannot determine what prompted her to review dispatches in that exact time frame, since there is no evidence that this task is something she routinely or regularly does. It may be that Ms. Rodriguez's daily tasks include checking the next day dispatches around the relevant timeframe, but this record does not so reflect.

In addition, this is about the same timeframe during which Ms. Rodriguez testified that she received a call from Duane Quale about Complainant and decided not to call Complainant to tell him of Mr. Quale's concerns. She testified that, on December 17, 2019, Mr. Quale called her "around -- the afternoon, around -- or the evening. . . . Around the late evening. . . . Say around -- say 6:00 or 7:00." (HT at 611.) She did not call Complainant then to tell him of her conversation with Mr. Quale because "he was driving," and she "didn't want for him to get upset" while he was driving. (HT at 611.) One might expect a forthright retelling of the events of the hour between 6:00 and 7:00 p.m. to include some account of whether Ms. Rodriguez called Complainant before Mr. Quale's call and decided not to call him again with Mr. Quale's news or whether she called him after Mr. Quale's call and decided to limit the substance of the call to just the mistaken dispatch.

Upon consideration of the evidence, the undersigned finds that Complainant's account of the telephone conversation with Ms. Rodriguez is more credible and entitled to greater weight than Ms. Rodriguez's version. It makes far more sense that Complainant, having arrived at Vernon and checked his phone once he stopped driving (as evidenced by the reply text, CX 2 at 3), saw the dispatch, knew he could not do it, and called Ellco. When he called, Ms. Rodriguez answered, and Complainant's recounting of the telephone conversation has a ring of authenticity; it sounds like how a telephone conversation would proceed. Ms. Rodriguez's account does not include the typical back-and-forth of a conversation; she simply recounts and repeats what she told him, as if

it were a talking point. Respondents' argument that Complainant could have texted back to the dispatch text is unpersuasive; the undersigned does not find Complainant's version of events less credible because he chose to call Ellco instead of responding to the dispatch by text. On the whole, the undersigned credits Complainant's account of the initiation and substance of the telephone conversation and discounts Ms. Rodriguez's version.

Whether Complainant refused to accept the dispatch and thereby refused to drive because it would violate the hours-of service regulation appears to depend on whether Complainant called Ms. Rodriguez to tell her he so refused or whether Ms. Rodriguez called him after reviewing the dispatches to tell him the dispatchers had made a mistake and to report for duty after his required 10-hour break. If Complainant's version of this conversation is accurate, then one could conclude that he refused the dispatch because it would violate the hours-of-service regulation and that only then did Respondents modify the dispatch to comply with the required break time. If Ms. Rodriguez's version of this conversation is accurate, then one could conclude that Respondents modified the original dispatch before Complainant refused it.

Based on the credibility, weight, and other evidentiary determinations set forth above, the undersigned finds that Complainant refused a dispatch that would have required him to drive before completing a 10-hour break and would have therefore required him to violate the hours-of-service regulations. The undersigned finds that Complainant's refusal was both subjectively and objectively reasonable. There is no dispute that Complainant could not have accepted the dispatch without violating the requirement for a 10-hour break. Even if the dispatch was made in error and immediately corrected when Complainant objected, the undersigned concludes that Complainant's refusal of it constitutes protected activity.

2. Complainant Complained that Falsifying Electronic Driving Logs was Illegal on December 18, 2019

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, complainants must show that they reasonably believed they were 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-STA-00019, slip op. at 28-29, 37 (ALJ Oct. 31, 2019.)

Under the Federal Hours of Service regulations, all time spent at the driving controls of a commercial motor vehicle in operation must be recorded as driving time. 49 C.F.R. § 395.2. Yard moves and "authorized personal use" are considered special driving categories. 49 C.F.R.

§ 395.28(a). 40 C.F.R. § 395.8 requires an accurate recordation of duty status and prohibits falsification of duty status. *See also* 40 C.F.R. § 395.15(h). The STAA also protects complaints related to state commercial vehicle safety regulations. *See Chapman v. Heartland Express of Iowa, Inc.*, ARB Case No. 02-030, ALJ No. 2001-STA-00035, slip op. at 3 n.9 (ARB Aug. 28, 2003). The California Code of Regulations for Motor Vehicles define driving time as "all time spent at the driving controls of a commercial motor vehicle in operation." Cal. Code Regs. tit. 13, § 1201(k). "No motor carrier shall allow or require, and no driver shall prepare or submit, a record of duty status which is not true and accurate." Cal. Code Regs. tit. 13, § 1213(f).

Complainant testified he arrived to work at 9:30 a.m. for a 10 a.m. start time on December 18, 2019, with the understanding that the company had a dispatch for him then. (HT at 339-340.) He got in and tried to start the truck, but it would not start. (HT at 340.) He then tried to call Mr. Ellsworth, and someone else answered and told him Mr. Ellsworth would call him back. (HT at 340.) Mr. Ellsworth did call him back on his cell phone. (HT at 340.) Complainant told him the truck would not start, and Mr. Ellsworth instructed Complainant how to start the truck. (HT at 341.) Complainant did what Mr. Ellsworth told him, but the truck sputtered, and Mr. Ellsworth said, "let's let it sit for a little bit, maybe we got something up in the pipe or something". (HT at 341.)

According to Complainant, Mr. Ellsworth then said, "I want to tell you some of the things you did wrong yesterday. . . . I don't pay for trucks driving around lost. . . . You drove around lost for over an hour." (HT at 341-342.) Complainant replied, "Okay, I understand." (HT at 342.) He testified that Mr. Ellsworth then said, "You know, next time, in the future, when you're in that situation to move your log book to on-duty yard move. . . . Then you could just, you know, drive around without wasting your 14 hour [drive time]."[7] (HT at 342.) Complainant replied, "That's illegal." Mr. Ellsworth said, "No, it's not. (HT at 342.) Complainant said, "Yes, it is. . . . You cannot move around [on] yard move on city streets." (HT at 342.) Mr. Ellsworth replied, "All you want to do is throw the law at me. You don't want to do what it takes to do the job." (HT at 342.) Complainant replied, "Steve, I'll do whatever it takes to do this job, whatever it takes, but I won't do it illegally." (HT at 342-343.) Mr. Ellsworth said, "All you want to do is throw the law at me. Get your stuff, get out of my truck and go home." (HT at 343.)

Complainant asked if he was being fired, because the job was "super important" to him and he "thought" he was fired. (HT at 343.) Mr. Ellsworth said, "I don't know. . . . Get out of my truck and go home." (HT at 343.)[8] Complainant said, "I thought to myself, I just got fired and what am I going to do now. I got out of my truck and went home." (HT at 343.) He felt "[h]orrible" and called his wife on the way home and told her he got fired. (HT at 343.) Twice

[7] The undersigned notes that Complainant misstated the maximum drive time. The witnesses, including Mr. Ellsworth, Mr. Becerra, Mr. Hernandez, and Mr. Martinez, agreed that the maximum drive time under the Federal hours of service rules is actually 11 hours, encompassed within a maximum 14-hour workday. (HT at 117, 164-165, 225, 506-507.) *See* 49 C.F.R. §§ 395.3(a)(2), (a)(3)(i). But this does not impact the assessment of Complainant's credibility as it does not appear to have been intentional or calculated or anything other than an inadvertent misstatement.

[8] The adverse employment action allegedly taken by Mr. Ellsworth during this conversation is discussed in more detail below. But for purposes of conciseness and flow, the undersigned addresses the credibility of the two witnesses' respective accounts of the entire conversation here.

during Complainant's testimony about this conversation and its aftermath, the transcript reads " -- (inaudible, witness emotional) --". (HT at 343-344.) He testified, "I didn't know what was going to happen. Because we [he and his wife] came off the road, because it was so hard on everybody, and I'm thinking I'm going to be right back out on the road and I would be by myself and away from my wife, away from my parents -- I didn't want to be out there." (HT at 344.)[9]

The undersigned finds Complainant's testimony regarding this conversation to be credible. It arguably would have been better for Complainant's case if Mr. Ellsworth had replied "yes" to the question whether Complainant had been fired. It strengthens the undersigned's impression of Complainant's credibility that he did not claim Mr. Ellsworth had expressly fired him during the December 18th telephone conversation. Complainant "thought" he was fired, and he told his wife, "Baby, I just got fired, I think, fired." (HT at 343.) But he acknowledged that Mr. Ellsworth's answer to his direct question whether he was fired was, "I don't know." If Complainant were not being forthright and truthful, he might have adjusted his testimony to state that Mr. Ellsworth had explicitly fired him. This restraint is an indication of candor.

Regardless of Mr. Ellsworth's reply to his question whether he was fired, Complainant believed he had been. He thought so, he told his wife so, and he understandably contemplated what he would do now and how he had wanted to get "off the road", which the job at Ellco had allowed him to do, and how having to go back on the road would keep him away from his family. The undersigned finds that Complainant's emotional reaction during his testimony was genuine and completely in line with revisiting the circumstance of unexpectedly losing a job after two days that you had thought would be a positive change for your life and your family. Again, Complainant's testimony about this conversation has a ring of authenticity, in that he described a back-and-forth exchange, he testified to what he knew and what he did not know ("someone" answered the phone and told him Mr. Ellsworth would call him back), and he explained that he remembered the conversation like it happened yesterday because it had been traumatic.[10] He also recalled certain phrases used by Mr. Ellsworth, such as, "I don't pay for trucks driving around lost" and "all you want to do is throw the law at me", which sound legitimate in context and speak to a credible memory about a traumatic conversation.

Respondents attempt to impeach Complainant on the grounds that Complainant testified at his deposition and at the hearing that the phone conversation took place on December 17, 2019, not December 18, 2019. (Resp. Brief, pp. 12, 14 n.5.) At the hearing, the undersigned questioned Complainant to clear up this discrepancy. (HT at 420-421.) The undersigned finds that Complainant's statements at deposition and the hearing that the conversation took place on December 17, 2019, were simply inadvertent mistakes (in one instance, answering questions from his attorney that referred to a conversation on December 17th) that do not impact his credibility.

Mr. Ellsworth was called to testify before Complainant and acknowledged that he spoke with Complainant on the phone on December 18, 2019, at around 10 a.m., but said they did not

[9] After a few more questions, Complainant said he was upset and thought he needed a break, and the undersigned recessed the hearing. (HT at 345.)

[10] Complainant testified that he was relying solely on his memory to recall what Mr. Ellsworth said to him, that he "remember[ed] it like yesterday", and that "it was pretty traumatic". (HT at 374-375.)

discuss Complainant's delay the previous day. (HT at 228.) Mr. Ellsworth said it was true that he told Complainant to switch to a "yard move" at certain times when he was behind the wheel.[11] (HT at 236.) He instructed Complainant to switch to a yard move, "[o]n private property, once he enters the [S]hell facility or enters the Vernon drop yard." (HT at 236.) Mr. Ellsworth did not instruct Complainant to change to a yard move when he was on a public roadway and did not ask him to falsify his log in any way at any time. (HT at 236.)

Over Complainant's objection, the undersigned allowed Respondents to call Mr. Ellsworth back to the stand after having heard Complainant's testimony. (HT at 563.) Mr. Ellsworth testified that Complainant did not testify accurately about their conversation regarding Complainant's refusal to do something unlawful with his logs. (HT at 565-566.) Mr. Ellsworth said, "I did not tell him to change his duty status to yard move on a public road." (HT at 566.) He answered, "No" to the question if he ever told Complainant to get out of his truck and go home. (HT at 567.) He said, "That did not occur." (HT at 567.) Other than disputing the accuracy of Complainant's testimony, Mr. Ellsworth gave no further account of the conversation. [12]

All he affirmatively testified to regarding this critical conversation was that he talked to Complainant on the phone on December 18, 2019, at about 10:00 a.m., and told Complainant to switch to a yard move when on private property. The lack of details about the context of this statement and the complete absence of any testimony from Mr. Ellsworth about what was talked about on this phone call (as opposed to just denying that Complainant's account was accurate) severely mar Mr. Ellsworth's credibility. Mr. Ellsworth did not explain how the conversation came about or acknowledge whether it was related to Complainant's inability to start the truck. Mr. Ellsworth's only statement about the substance of this conversation with Complainant was related to switching to yard duty, but he offered no explanation or context for how that topic arose when the apparent purpose of the call was to figure out how to start the truck. Complainant did give a context - that the discussion followed from Mr. Ellsworth's complaint about the amount of time Complainant was driving around lost and what to do in the future if he found himself in that situation.

In assessing Mr. Ellsworth's credibility regarding this conversation and the weight to be assigned to the witnesses' version of events, the undersigned also considers that Mr. Ellsworth's testimony elsewhere was less than forthright. For example, when asked if he gave Mr. Osborn the December 17th dispatch (CX 2 at 3), Mr. Ellsworth testified that "since the phones would be shared," Complainant could have recorded the phone number as his ("Steve Work") or as someone else's because no phone number was displayed. (HT at 206-207.) He acknowledged that he was the only "Steve" doing dispatch in December 2019 and that the text was typical of what he would send when dispatching a driver. (HT at 206-207.) "So, can I say that came from me, no, I cannot. But it is what I would send." (HT at 206-207.) Mr. Ellsworth's answer that he could not say he

[11] Although the timing of this conversation about switching to yard move was given only as "while [Complainant] was employed by Ellco" (HT at 236), the undersigned presumes Mr. Ellsworth was referring to the December 18, 2019, telephone conversation.

[12] The undersigned notes that Respondents' counsel chose not to pursue direct questioning (e.g., "What did Mr. Osborn say?"). (HT at 567.) The record therefore does not contain any account of Mr. Ellsworth's version of what was discussed in that phone call - only his testimony about what he did not say and his statement that he instructed Complainant to switch to yard move on private property.

sent the dispatch text appears evasive. The gist of his answer was that the screenshot of the text message did not prove he had sent it, but the question was, did he send it? The answer could have been yes, no, or I don't recall. But he instead explained what the screenshot did not show, which made it look like he was avoiding answering even a simple question about which he likely had personal knowledge.[13]

Regarding Mr. Ellsworth's denial that he told Complainant to go home on December 18, 2019, he elsewhere testified as follows:

> Q You sent Mr. Osborn home early on the 18th, December 18th, didn't you?
> A There's a lot of background noise going on there. I sent him home early -- now your question is [did I] send him home early? He did not work at all.
> Q On December 18th.
> A He did not work at all.
> Q He came to your office, didn't he, and you had a dispatch for him?
> A No, incorrect.
> Q Was he not dispatched the night of the 17th for, originally, a 3:00 o'clock a.m. --
> A Correct.

(HT at 78.) Mr. Ellsworth also testified he would have no reason to dispute it if Complainant testified that he showed up for work on December 18th. (HT at 214.) Again, Mr. Ellsworth's answer, quoted above, appear cagey. While he would not dispute that Complainant showed up for work on December 18th, he answered the question as to whether he sent him home early by saying Complainant did not work at all. Mr. Ellsworth may have denied the question about Complainant coming to his office because Mr. Ellsworth worked out of Stockton and Complainant reported for duty to the Fowler yard. But he twice answered the question if he sent Complainant home early by evasively stating that Complainant did not work at all.

The undersigned also considers that Mr. Ellsworth's testimony was not altogether consistent. For instance, he testified that he "would have to research the system" to determine if a driver has to make a manual entry of "on-duty" status in the E-log system. (HT at 217-218.) But he later testified that if he, as a driver, ever needed to capture previous on-duty (not driving) time, he would open his log and record it after the fact. (HT at 577-578.) With this later statement, he appears to say without hesitation that a driver could manually record "on-duty" time even though he previously implied that determining whether a driver had done so would require him to research the system. Also, Mr. Ellsworth testified he was not aware that there are modern truck friendly GPSs, although he was the sole owner of Ellco and a driver with over 37 years of experience. (HT

[13] Another example of Mr. Ellsworth's evasiveness is the following exchange: "Q Is Mike Ellsworth a truck driver? A He trained him on the natural gas side of the vehicle." (HT at 93.) A direct answer would have been yes, no, or I don't know. But, instead, Mr. Ellsworth answered in a way he may have thought would bolster his case on a point the undersigned does not consider to be determinative here - whether it was Mr. Ellsworth or Michael Ellsworth who trained Complainant on fueling with natural gas. Michael Ellsworth testified it was him, but Complainant testified it was Mr. Ellsworth. The undersigned finds resolving this dispute to be immaterial to the issues at hand and, even if it had been Michael Ellsworth, Complainant's impression that it had been Mr. Ellsworth does not impact his overall credibility. Complainant had not personally met either one of the Ellsworths before the alleged training, the individual from whom he received the training told him to go inside and meet "my kids," (HT at 302-304), and any misidentification was likely a result of confusion or misunderstanding rather than an intent to evade or mislead.

at 261.) For the above reasons, the undersigned generally finds Mr. Ellsworth less than credible and approaches each of his statements with careful attention.

The undersigned finds that Complainant's testimony about his telephone conversation with Mr. Ellsworth is more credible and entitled to greater weight than Mr. Ellsworth's testimony. There is no direct evidence of this conversation other than the testimony of these two witnesses.[14] As to related evidence, the undersigned considers Mr. Hernandez's testimony that neither Ellco nor Mr. Ellsworth asked him to utilize an on-duty yard move while operating on a public roadway during his employment with Ellco. (HT at 127-128.) Respondents argue that Mr. Hernandez also got lost driving the same route Complainant had driven, but that Mr. Ellsworth did not tell Mr. Hernandez to use an "on-duty yard move" while on public streets. (Resp. Brief, pp. 11-12.) The undersigned finds Mr. Hernandez's testimony on this point to be credible. The undersigned, however, does not consider the absence of such a request to one driver to negate the possibility of it having been made to another driver. Further, it is not clear that the respective circumstances of Complainant's and Mr. Hernandez's experiences of getting lost were similar; perhaps Mr. Hernandez was not coming up on the last few minutes of his allowable driving time.

Accordingly, the undersigned finds that Mr. Ellsworth and Complainant spoke on the telephone around 10:00 a.m. on December 18, 2019, while Complainant was at work and attempting to start the truck he would be driving that day. The undersigned finds that, during this conversation, Mr. Ellsworth directed Complainant to switch to "yard move" if he ever again found himself driving around lost on public roadways and using up his allowable drive time. The undersigned finds that Complainant objected to this instruction by stating it would be illegal. The undersigned finds that Complainant's complaint was both subjectively and objectively reasonable. There is no dispute that driving on public roadways while on yard move status violates federal and state regulations.

The undersigned therefore concludes that the preponderance of evidence, including Complainant's credible testimony, establishes that he engaged in protected activity on December 18, 2019, when he filed an internal verbal complaint with management or a supervisor, Mr. Ellsworth, by refusing to falsify his logs and duty status in future runs. Although no safety violations actually occurred, the undersigned finds that Complainant reasonably believed he was complaining of a perceived violation.

C. 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

[14] Respondents' counsel asked Complainant if he was "aware that [his] conversations with managers at Ellco are recorded?", to which Complainant answered, "No." (HT at 422.) If counsel's question was based in fact, that such conversations are indeed recorded, then Respondents could presumably have presented the recording of the conversation between Complainant and Mr. Ellsworth (certainly a "manager," as the owner of the company).

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).

The parties stipulated that Respondents employed Complainant from December 16, 2019, to December 18, 2019, and that Complainant was discharged on December 18, 2019.[15] (Stipulations 3, 4.) Respondents nevertheless argue that Complainant was terminated from employment on December 20, 2019. (*See* Resp. Brief at 13-14.) Complainant also testified that he admitted Ms. Rodriguez told him he was fired in his response to a request for admission. (HT at 395-396.) Still, Complainant could not remember exactly what he said in the request for admissions, and testified "Steve Ellsworth fired me on the 18th" and Ms. Rodriguez told him he was fired "[r]ecently." (HT at 395-396.) Even if Respondents did not "officially" (or, in Ms. Rodriguez's terms, "physically" (HT at 598)) fire Complainant on December 18, 2019, they certainly took adverse employment action against him on that day. He was discharged from work that day without pay and was never again called back to work.

It is undisputed that Complainant came to work on December 18, 2019, and then left. The documentary evidence confirms that no work time was recorded for Complainant that day, nor was he paid. (CX 3.) If, as Respondents claim, Complainant was not sent home by his employer, the question remains, why did he leave? Respondents argue that, because Complainant's truck needed fuel on the morning of December 18, 2019, he "could not drive his truck, he could not work, and [] there was no reason for him to remain at Ellco's truck yard and he went home. It's normal for any employee with no work to go home." (Resp. Brief at 13.) There is no evidence in the record suggesting that Complainant voluntarily went home because his truck would not start or establishing any reason other than Mr. Ellsworth's instruction for Complainant leaving work that day. Respondents' argument is sheer speculation.

Respondents also attempt to minimize or negate Mr. Ellsworth's authority, as sole owner of the company, to fire truck drivers. Mr. Ellsworth testified that Ms. Rodriguez had authority to hire and fire drivers. (HT at 252.) Ms. Rodriguez testified she had hiring and firing capabilities, and did not need approval from Mr. Ellsworth. (HT at 585-586, 616.) There is no contrary evidence, however, establishing that Mr. Ellsworth himself has no such authority or can exercise it only with approval from Ms. Rodriguez. Common sense would allow for both the owner of the company and its HR manager to have hiring and firing authority, but not for the HR manager to have sole authority and the ability to overrule any employment action taken by the company's owner. Perhaps a business could have such an arrangement, but the record does not establish that Ellco did. The undersigned accepts that Ms. Rodriguez had hiring and firing authority, but finds it improbable that the sole owner of the company did not also have that authority. There is no evidence suggesting that if Mr. Ellsworth terminated an employee, Ms. Rodriguez could override such action.

As set forth above, the undersigned gives more credence to Complainant's account of his conversation with Mr. Ellsworth than to Mr. Ellsworth's account. The undersigned finds that Mr. Ellsworth instructed Complainant to get out of the truck and go home after Complainant told him

[15] Further, Respondents, through counsel, admitted at the hearing that Complainant "suffered an adverse employment action." (HT at 555.)

that switching to "yard move" in that situation would be illegal. Although Complainant acknowledged that Mr. Ellsworth said he "didn't know" if Complainant was fired, the undersigned considers that Mr. Ellsworth discharged Complainant from work and that he was never again dispatched or called in to work again.[16] The undersigned therefore finds that Respondents took adverse employment action against Complainant when Mr. Ellsworth effectively discharged Complainant from Ellco's employment on December 18, 2019.

D. 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).

Complainant contends that his protected activities were contributing factors in his termination from Ellco's employment. Respondents contend that Complainant was discharged because he had been banned from the Shell facility. The evidence also shows that Respondents gave the reason for Complainant's discharge as his being argumentative with everybody.

The undersigned finds that Complainant's complaint about Mr. Ellsworth's instruction to switch to yard move on public roadways was a contributing factor in his discharge. As discussed above, Mr. Ellsworth admitted to discussing yard duty status in his December 18th telephone conversation with Complainant, but disputed the details of that discussion as recounted by Complainant. Mr. Ellsworth provided no account of his own as to the substance of that

[16] As set forth below, the undersigned would also find that Respondents took adverse employment action against Complainant on December 20, 2019, when Ms. Rodriguez confirmed by text that he was fired and that Complainant's protected activities were contributing factors in that decision.

conversation. According to his testimony, the conversation consisted only of his statement about moving to yard duty status while on private property.

Mr. Ellsworth also admitted to having a disagreement with Complainant. Respondents' counsel asked Mr. Ellsworth if he had "any disagreement with Mr. Osborn at anytime during his employment with Ellco?", to which Mr. Ellsworth responded, "Yes." (HT at 252.) Mr. Ellsworth testified that he had never met Complainant in person (HT at 244, 267), and there is no evidence of any direct communication between Mr. Ellsworth and Complainant while he was employed, other than the December 18th telephone conversation and the December 17th texts. The December 17th texts show no disagreement. (CX 2 at 3.) On this record, therefore, the undersigned can only conclude that Mr. Ellsworth was referring to the December 18th phone conversation when he admitted to having a disagreement with Complainant. Because Mr. Ellsworth testified to making a statement about moving to yard duty status in that conversation (and to no other subject matter), the undersigned can conclude that the disagreement was about that topic. Based only on Mr. Ellsworth's sparse testimony, therefore, he had a disagreement with Complainant about moving to yard duty status in their December 18th conversation.

As set forth above, the undersigned gives greater weight to Complainant's more detailed and forthright account of his conversation with Mr. Ellsworth than to Mr. Ellsworth's account. The undersigned has found that Mr. Ellsworth instructed Complainant to switch to yard move in circumstances that Complainant objected to as being illegal and that Mr. Ellsworth then directed Complainant to get out of the truck and go home, effectively discharging him from employment. The evidence therefore establishes an immediate temporal proximity between Complainant's protected activity of filing a complaint and his discharge from employment.

The undersigned also considers Respondents' proffered reasons for the termination. Respondents give two such reasons – first, that Complainant was discharged for being argumentative with everybody and, second, that Complainant was discharged because he had been banned from the Shell facility. Initially, the undersigned finds that these alternative reasons are circumstantial evidence of Respondents' shifting explanations for Complainant's termination.[17] In addition, the undersigned finds the evidence establishes that these two proffered reasons were pretext for Mr. Ellsworth's retaliatory discharge of Complainant.

Complainant sent a text to "Steve Work" on December 20, 2019, at 1:59 p.m. that stated, "Hi the is [sic] Daniel I have left several messages for you on your phone and with Jacob and Mayra the last couple of days but haven't heard back from you or anyone else. I would like to get my check. I need you or someone else to call me and let me know what's going on. It only take [sic] a few minutes to respond." (CX 2 at 4.) Fifteen minutes later, Ms. Rodriguez sent the text referring to Complainant being argumentative. This text, sent from Ms. Rodriguez to Complainant on December 20, 2019, at 2:14 p.m., stated, "Come pick up your check it's ready now your assignment has been ended. Due to being argumentative with everybody." (CX 2 at 5.) When asked if there was any evidence other than this text message that Complainant was fired on

[17] For instance, as discussed below, Ms. Rodriguez testified at hearing that Complainant was not fired for any reason other than being banned from Shell (HT at 599), but also told Complainant he was fired on December 20th, by text, for being "argumentative with everybody." Mr. Ellsworth testified that Complainant was fired for "being argumentative and he was banned from [the Shell] facility, that goes together" and also that he was fired for "being argumentative with the sole client he was hired to service." (HT at 76.)

December 20th, Mr. Ellsworth deflected and said he did not know, that that was a question for HR. (HT at 212-213.) Ms. Rodriguez said there is nothing else in writing giving Complainant a reason for his being fired. (HT at 620.)

Ms. Rodriguez testified that she called Complainant on the phone on December 18, 2019. (HT at 611, 613-614.) She called him when she got to work, at around 2 p.m.; she had gotten in late that day[18] because of childcare issues. (HT at 613-614.) In that conversation with Complainant, she said, "can you please tell me what happened at the Shell location." (HT at 612.) Complainant got "really irate that, you know, I'm trying to tell him that he was banned from that location. And I wanted to know what happened." (HT at 612.) Complainant was saying she was a liar, would not let her speak, was downgrading her, and every time she tried to say something, he would cut her off. (HT at 612-613.) She testified that no other drivers had ever spoken to her that way before, that he belittled and yelled at her, and compared the conversation to an "abusive relationship." (HT at 612, 619.) Complainant made threats that he was going to make sure she lost her accounts, got fired, and take her to court. (HT at 614.) The conversation ended when Ms. Rodriguez said, "I'll get back to you" and hung up. (HT at 619.) According to this narrative description of the conversation, Ms. Rodriguez apparently said nothing to Complainant about his employment status, one way or the other, during that conversation. The undersigned credits Ms. Rodriguez's testimony about Complainant's behavior during this telephone call, as her testimony appeared unrehearsed and included plausible details about how a conversation would proceed. The undersigned also finds it reasonable that Complainant would be irate at that point in time because he believed Mr. Ellsworth had fired him mere hours before.

Ms. Rodriguez testified that Mr. Quale had called her on December 17, 2019, at around 6 or 7 p.m., to tell her that Complainant was banned from the Shell facility. (HT at 598, 607, 611.) She said she did not contact Complainant then, because she knew he was driving back from the facility and did not want to upset him while driving, figuring she could just tell him the following day. (HT at 611.) However, Ms. Rodriguez testified that she did call Complainant around 6 or 7 p.m. on December 17, 2019, to tell him not to do the 3 a.m. dispatch he had received for the following day but to come in later.[19] The record is unclear as to the timing of these two calls - whether Ms. Rodriguez's call with Mr. Quale took place before or after her conversation with Complainant. If before, then one could conclude that whatever Mr. Quale told her did not prevent her from confirming that Complainant should report for work the following day. If after, Ms. Rodriguez still took no action to prevent Complainant from reporting for work the next day.

Ms. Rodriguez testified that she spoke to Complainant on December 18, 2019, but she terminated him on December 20, 2019. (HT at 598.) She confirmed later in her testimony that she specifically told him he was terminated "on the 20th". (HT at 630.) This testimony affirms that Ms. Rodriguez did not tell Complainant on December 18, 2019, that he was fired, contrary to other testimony she gave. [20] If Mr. Quale's information was sufficient to cause Complainant to

[18] Ms. Rodriguez's usual work schedule was about 10 a.m. to 7:30 p.m. in December 2019. (HT at 623.)

[19] As discussed above, the undersigned has found it more likely that Complainant placed a call to Ellco which she answered.

[20] Although the question was not specific as to time, the undersigned presumes Respondents' counsel was referring to the conversation with Complainant on December 18, 2019, when he asked, "What reason did you provide Daniel

be terminated, then she would have known that at the time she talked to Complainant the next day and would presumably have fired him. But she was apparently only able to tell him something about what Mr. Quale said and to ask Complainant to tell her what had happened at the Shell facility before the conversation degenerated to a point where Ms. Rodriguez felt she had to end the call.

If Mr. Quale had told her on December 17, 2019, that Complainant was banned from the Shell facility, and if that were enough reason to fire Complainant all on its own (as Respondents consistently maintain), then she presumably would have fired him on the basis of that information alone without asking for his side of the story. She was Ellco's HR manager with hiring and firing capabilities. (HT at 585-586.) If, however, she felt she needed to investigate Mr. Quale's claim and ask Complainant for his version of the complained-of events (which seems a reasonable approach from an HR professional), then either Mr. Quale did not tell her that Complainant was actually banned from the facility or such a statement alone would not have been cause for her to fire Complainant without further inquiry. Further, Ms. Rodriguez knew of the purported ban from the Shell facility three days before she sent Complainant the December 20th text, which gave him a different reason (his "being argumentative with everybody") for Complainant's assignment having "been ended."

When Ms. Rodriguez's texted him on December 20, 2019, Complainant had been sent home two days previously and had not again been dispatched for work. He said he had called Respondents and left voicemail messages after he was discharged, because he was worried about his check. (HT at 346-348.) Ms. Rodriguez acknowledged that Complainant had done so (HT at 615-616), although Mr. Ellsworth first could not recall and then denied Complainant doing so (HT at 211-212). Complainant testified he talked to Ms. Rodriguez on the phone during the days between December 18th and December 20th and told her he had left a couple of messages for Mr. Ellsworth. (HT at 348.) She told him Mr. Ellsworth had been working, that, "'He's having to run your loads,' or something, 'run your load.'" (HT at 348.) She said Mr. Ellsworth would call him when he had time. (HT at 348.) This testimony appears to contradict Complainant's text message to "Steve Work" on December 20th where he stated he had "not heard from you or anyone else." (CX 2 at 4.) It may be that Complainant did not consider the phone conversation with Ms. Rodriguez to be anyone getting back to him because it did not address his concern about his termination and getting his check.

Complainant said he "knew" he was fired the morning of December 18th and kept checking in with the company in the few days thereafter because he was worried about and trying to get his check; Christmas was coming up and he thought you were supposed to get your check "pretty quickly if you got fired." (HT at 348.) He also said that Ms. Rodriguez's December 20th text was the first time anyone had told him, unequivocally, that he had been fired. (HT at 349.) Complainant testified that Ms. Rodriguez told him he was fired for being barred from a Shell

for his termination?", to which Ms. Rodriguez answered, "Because of -- because of Shell." (HT at 612.) No other evidence establishes that Ms. Rodriguez terminated Complainant during their phone conversation on December 18, 2019, and, in fact, her own testimony elsewhere contradicts the premise that she fired Complainant that day "because of Shell." The undersigned therefore does not find Ms. Rodriguez's response to counsel's question to be credible on this point.

facility when he called her on the phone after he received the December 20th texts from her. (HT at 349-350.)

Ms. Rodriguez testified to a conversation she had with Complainant before she sent the December 20th text. In response to the question whether she remembered the circumstances as to why she sent that text to Complainant, she said, "Yes. Because he kept on calling me and pretty much belittling me, you know, and I -- you know, he is like complaining that I spoke to him that he could pick up his check that day, but he wouldn't -- he's like trying to demand for me to deposit it on his account. And I'm trying to tell him like, we close the office at 5:00. It's already too late. I can't deposit your account, but I'll stay here until 7:00 for you to pick up your check. He didn't want to pick it up. I was like I'll stay late for you to pick up your check. And you know, he wouldn't let me speak. He was pretty much arguing with me back and forth." (HT at 616.)

From Complainant's and Ms. Rodriguez's testimony, it appears that they had another telephone conversation after their call on December 18th and *before* Ms. Rodriguez sent the December 20th text. Complainant testified to a conversation during which Ms. Rodriguez told him Mr. Ellsworth would call him back when he had time. Complainant's recollection of the specific explanation given for Mr. Ellsworth not returning his calls sounds genuine, and the undersigned finds him credible on this point. Ms. Rodriguez testified that she sent the December 20th text because Complainant had kept calling her and belittling her. This statement is consistent with other evidence showing Complainant's attempts to reach Respondents in that time frame, and the undersigned finds Ms. Rodriguez credible on this point.

It also appears, however, that Complainant and Ms. Rodriguez may have had a telephone conversation *after* she sent the December 20th text. Complainant said it was during that conversation, after the text, when Ms. Rodriguez told him he was fired for being banned from the Shell facility.[21] Ms. Rodriguez's testimony of the discussion about direct deposit and when Complainant could pick up his check is included in her answer as to what prompted her to send the December 20th text, but it seems more likely that that discussion would have occurred after the text was sent. It also seems unlikely that, having sent the December 20th text, Ms. Rodriguez would then tell Complainant that Mr. Ellsworth would call him back when he had time. The undersigned considers that Ms. Rodriguez may have conflated two conversations in her testimony quoted above.

The testimony about Complainant's and Ms. Rodriguez's telephone conversations in this timeframe is not entirely clear. While the specific timing is not ultimately material, the undersigned finds that Complainant and Ms. Rodriguez had a conversation after their phone call on the afternoon of December 18th and before the text she sent him the afternoon of December 20th, during which she told Complainant that Mr. Ellsworth would call him back. Since she had firing authority and had purportedly received information from Mr. Quale that would be the sole basis for Complainant's termination, then she could have "officially" terminated him during that phone call, as she did not take that action during their phone call on the afternoon of December

[21] Complainant also testified that he first became aware that Mr. Quale allegedly said he was banned from the Shell facility at the hearing. (HT at 411.) The undersigned understands Complainant to have been saying he was not sure who had banned him from the Shell facility until the hearing. Regardless, the undersigned concludes that Complainant was not made aware of this alleged reason for his termination until after the December 20, 2019, text from Ms. Rodriguez. Respondents provide no contrary evidence.

18th. Ms. Rodriguez testified that she and Complainant spoke about the process for him to get his check - indicating that she knew he was terminated, had prepared his final check, and was only arguing with him about her ability to direct deposit it. But she was not clear whether this conversation happened before or after she sent him the December 20th text.

Ms. Rodriguez's testified that she fired Complainant on December 20th (HT at 598, 630) and that she made the decision to terminate Complainant on her own and did not run it by Mr. Ellsworth first. (HT at 616.) The undersigned finds it impossible to square these statements with the other evidence of record. Respondents acted as if Complainant had been terminated on December 18, 2019; he was not paid for any time he spent at work that day, he was not again dispatched or called to work and, other than Ms. Rodriguez telling him Mr. Ellsworth would call him back, Respondents did not communicate with Complainant until Ms. Rodriguez's December 20th text. In these circumstances, the undersigned cannot conclude that Complainant had still been employed by Ellco until that text.

In considering all relevant evidence at the contributory factor causation stage, the undersigned has found, as stated above, that Complainant's internal complaint regarding safety violations was a contributing factor to his termination. The undersigned does not find that Complainant's refusal of the 3 a.m. dispatch played any role in Mr. Ellsworth's discharging him from Respondents' employment. When Complainant called Ellco to refuse the dispatch, Respondents immediately made the appropriate adjustment to his schedule. Ms. Rodriguez informed Complainant during the same phone call that he should just report for duty when he had met the 10-hour break requirement, and that is what he did. Considering the timing of those two actions, Complainant refused the dispatch in a telephone call with Ms. Rodriguez near the end of her workday on December 17, 2019, and she did not report to work until about 2:00 p.m. on December 18, 2019. The conversation in which Mr. Ellsworth discharged Complainant took place around 10:00 a.m. on December 18, 2019. There is no evidence that, when Mr. Ellsworth discharged Complainant on December 18, 2019, Mr. Ellsworth was even aware of Complainant's refusal the previous day. Respondents made an error with that dispatch and immediately corrected it when Complainant brought it to their attention.

In considering Respondents position that Ms. Rodriguez terminated Complainant on December 20, 2019, for "being argumentative with everybody," the undersigned would find that both Complainants' protected activities were contributing factors to that action. The undersigned has found Complainant's account of his conversation with Ms. Rodriguez on December 17, 2019, about the dispatch text to be credible. That conversation could be considered as Complainant being argumentative, given his pushback to Ms. Rodriguez's challenges to Complainant's stating he could not do the dispatch. The conversation between Mr. Ellsworth and Complainant on December 18, 2019, could certainly be characterized as Complainant being argumentative when he confronted Mr. Ellsworth about the instruction to move to yard duty status on public roadways. Mr. Ellsworth testified that he spoke with Ms. Rodriguez between December 18th and December 20th about Complainant's purported ban from Shell. (HT at 77-78, 201, 235.) The undersigned considers it very likely, if not absolutely certain, that Mr. Ellsworth would have also told Ms. Rodriguez about his conversation with Complainant on December 18th at some point after she talked to Complainant that afternoon. Otherwise, presumably neither she nor the dispatchers would have known not to dispatch Complainant on any further runs.

As to instances of Complainant being argumentative other than while engaging in protected activities, the undersigned has found Ms. Rodriguez's testimony about her conversation with Complainant on December 18, 2019, to be credible. That conversation, during which Complainant became irate and repeatedly interrupted her, could be considered as him being argumentative. While Complainant maintains that he did not get into an argument with anyone at the Shell facility, Ms. Rodriguez testified that Mr. Quale told her Complainant was not following safety protocols and had issues with other employees at the Shell facility. (HT at 598, 607, 611.) Respondents also point to evidence from another Ellco driver, David Becerra, in support of their position that Complainant was argumentative. Mr. Becerra sent an email stating that Complainant "came across negative" in a phone call he had with him on December 17, 2019.[22] (CX 11.) He testified that he described Complainant as "negative, because he didn't want to seek my help", which Mr. Becerra also chalked up to him being "frustrated from being nervous that he was lost." (HT at 174.) The undersigned does not consider Mr. Becerra's evidence to be especially supportive of Respondents' position as to the reason for Complainant's termination or to in any way impugn Complainant's credibility.

The undersigned also considers Mr. Ellsworth's testimony that drivers who falsify logs are given written warnings and are required to fix their logs (HT at 229) and that drivers who speed are confronted about speeding (HT at 262). Apparently, Respondents do not terminate drivers for unlawful actions, but they do fire drivers who are argumentative. This may be Respondents' approach, but if a driver is fired for argumentativeness that includes refusals to take action in contravention of service and safety regulations, it is a violation of law.

The undersigned finds that Complainant's protected activities were a contributing factor in Ms. Rodriguez's "official" termination of Complainant on December 20, 2019. Other instances of Complainant's alleged argumentativeness were the second-hand accounts of his behavior at the Shell facility[23] (HT at 607), Mr. Becerra's testimony that Complainant was "negative" and refused his help (HT at 607-608), and Complainant's phone call with Ms. Rodriguez on December 18th where he cut her off and made threats (HT at 613). However, given Complainant's arguing with Ms. Rodriguez about the 3 a.m. dispatch and with Mr. Ellsworth about moving to yard duty on public roads, the undersigned concludes that Respondents' assessment of Complainant's argumentativeness included those protected activities. Even if his discharge did not formally take place until December 20, 2019 (and not by Mr. Ellsworth's direction to go home on December 18, 2019), the undersigned concludes that the acknowledged disagreement between Complainant and Mr. Ellsworth that morning, of which Ms. Rodriguez was undoubtedly aware, was a contributing factor in Respondents' termination of Complainant's employment. And she was definitely aware of Complainant's refusal of the 3 a.m. dispatch, as she had the conversation with him about it. Therefore, even accepting Respondents' position (contrary to the stipulations) that Complainant

[22] The date on this email is "Wednesday, 18 2020" and was forwarded by HR@ellco.com to "Steve Ellsworth" on Wednesday, February 19, 2020. The original email is not in evidence, and the undersigned considers the clearly altered date in the forwarded email to be concerning. Mr. Becerra could not remember the exact date he sent the email in 2020, but said it could not have been in December 2019. (HT 178-180, 451-456.) He sent it at Ms. Rodriguez's request, after Complainant's lawsuit had commenced, while he was still employed by Ellco, and he wanted to make his employer "look good". (HT at 183-185, 462.)

[23] Complainant denied that his interactions at the Shell facility could be accurately characterized as argumentative. (*See* HT at 321, 325-27, 389-90.)

was terminated on December 20, 2019, the undersigned finds that Complainant's protected activities were a contributing factor in his termination.

E. Affirmative Defense

Respondents did not inform Complainant that he was fired for being banned from the Shell facility until after he was discharged from work on December 18, 2019, and after Ms. Rodriguez sent the text informing him his assignment had been ended on December 20, 2019. The undersigned therefore considers this proffered reason for termination as an affirmative defense that, regardless of the reasons given to Complainant, Respondents would have terminated him anyway on this basis alone.

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).

Based on procedural due process grounds, the undersigned did not allow Respondents to call Mr. Duane Quale, a former employee of Shell, to testify and did not admit into evidence a declaration from Mr. Quale. Mr. Quale's evidence would have purportedly shown that he had authority to and did ban Complainant from the Shell facility. Even accepting the unproven proposition that Complainant was in fact banned from that facility, however, the undersigned does not find Respondents have met their burden to prove, by clear and convincing evidence, that Complainant would have been terminated on that basis.

During his conversation with Mr. Ellsworth on December 18, 2019, Complainant testified that Mr. Ellsworth did not inform Complainant that he was supposedly rude, mean, or argumentative with anybody at Shell, or that he was fired because he was no longer allowed on Shell's property. (HT at 344, 419-420.) Mr. Ellsworth provided no contrary testimony.

Ms. Rodriguez testified that Mr. Quale, an employee at the Shell facility in Wilmington, called her on December 17, 2019, "around -- the afternoon, around -- or the evening. . . . Around the late evening. . . . Say around -- say 6:00 or 7:00." (HT at 611.) She said Complainant was terminated, "Because he was banned from the Shell [sic]." (HT at 598.) She said she knew Complainant was banned, "Because Duane Quale called me about [Complainant] not following safety protocols and about the issue about the other employees, he brought up to my attention." (HT at 598.) She later said Mr. Quale told her Complainant got into "disagreements" with Shell employees. (HT at 607.) She believed Mr. Quale called her because she was usually contacted directly if there was an issue with one of Ellco's drivers. (HT at 599.) She also testified that she would communicate Mr. Quale or anyone at Shell "very rarely" about an issue with a driver, but that Shell had previously banned other Ellco drivers from its property as well. (HT at 599.) There is no evidence as to whether those other drivers were terminated.

Ms. Rodriguez's text to Complainant on December 20, 2019, informed him only that his assignment had ended "due to being argumentative with everybody" and did not mention any safety protocol issue or ban from Shell. (CX 2 at 5; HT at 620.)

Mr. Ellsworth said he did not talk directly to Mr. Quale about Complainant, as Mr. Quale contacted Ms. Rodriguez regarding Complainant's behavior at Shell on December 17th, and Mr. Ellsworth was verbally informed about Mr. Quale's call and Complainant's behavior at Shell by Ms. Rodriguez the afternoon of December 18th. (HT at 77-78, 201, 235, 267-268.) He testified that, at the time Complainant was fired, he did not know with whom Complainant allegedly argued with at Shell, and that prior to this case, he did not know who instructed his company that Complainant was not allowed on Shell's premises. (HT at 80.) Mr. Ellsworth testified he forgot Mr. Quale's name during his deposition in February 2021, at which he said he did not know who contacted him regarding Complainant's behavior at Shell, but testified that the name was "brought back to [his] attention" by Ms. Rodriguez. (HT at 267-268.) Mr. Ellsworth also testified that he had known Mr. Quale since 2019, and that they would have discussions regarding the scheduling of deliveries to Shell. (HT at 237-239, 240.) The undersigned does not find Mr. Ellsworth's testimony to be persuasive as to Complainant's purported ban from the Shell facility, as his information was apparently all received from Ms. Rodriguez.

There is no evidence that Mr. Ellsworth knew about Mr. Quale's complaint at 10 a.m. on December 18, 2019, during his conversation with Complainant. Ms. Rodriguez apparently had the conversation with Mr. Quale shortly before the end of her workday on December 17, 2019, and she did not arrive to work until about 2 p.m. on December 18, 2019. Neither Mr. Ellsworth nor Mr. Rodriguez gave any testimony that they had discussed Mr. Quale's information before Mr. Ellsworth sent Complainant home on the morning of December 18, 2019. The inconsistencies regarding the actions Ms. Rodriguez did and did not take with the information she allegedly received from Mr. Quale in their December 17th phone call are discussed above.

Mr. Ellsworth also testified that Ms. Rodriguez received an email from Shell, informing the company that Complainant was banned from Shell. (HT at 77-78, 201.) However, no such email was produced, Ellco no longer has the email from Shell, and the email was not placed into Complainant's personnel file. (HT at 78-80.) The undersigned finds it unlikely that such an email would not be placed into Complainant's employee file, if it were the only documentary evidence of the purported sole reason for Complainant's termination. Respondents argue that the email was lost due to email system troubles in January 2020. (Resp. Brief at 15.) However, none of the witnesses testified that the email was lost. Ms. Rodriguez gave no testimony at all about such an email, although she was its alleged recipient. On this record, the undersigned therefore cannot conclude that this email even existed.

The undersigned finds that Respondents' proffered sole reason for termination, that Complainant was banned from the Shell facility, is a pretext for their retaliatory discharge of Complainant. Mr. Ellsworth did not know of this purported ban when he told Complainant to go home on December 18, 2019. Ms. Rodriguez did know of it when she called Complainant later in the day on December 18, 2019, but did not fire him on that basis and was apparently only seeking his version of events. Her decision not to tell Complainant on December 17th, as she did not want to upset him while he was driving, about her conversation with Mr. Quale is reasonable even in the context of her asking for his perspective about Mr. Quale's complaints. It is not reasonable, however, to conclude that she intended to fire Complainant because Mr. Quale had banned him from the Shell facility when she "figured" she could just talk to him about her conversation with Mr. Quale the next day - when she was well aware, due to her conversation with him on December 17th about the dispatch text, that Complainant would be working. If she knew, on the evening of

December 17th, that Complainant was banned from the facility and that ban required his termination, then she certainly would have communicated that to him before he reported for work on December 18th.

Ms. Rodriguez had another conversation with Complainant before she sent the December 20th text, when she told him Mr. Ellsworth would call him back, but again did not tell him he had been banned from the facility or was fired. She also knew of the purported ban when she sent the December 20th text, which she stated was the only written evidence of Complainant's termination, but she gave a different reason ("being argumentative") than the purported ban for his termination at that time. In addition, Ms. Rodriguez testified that Complainant was fired because he was banned from the Shell facility, which she knew because Mr. Quale told her that Complainant had not followed safety protocols and had had disagreements with Shell employees. But she never explicitly testified that Mr. Quale told her Complainant was banned from the facility. Her narrative description of the conversation she had with Complainant on December 18, 2019, in which she was asking Complainant what had happened at Shell, bears out the conclusion that Complainant had had problematic issues while at the facility but not that he had been banned from ever coming there again. The undersigned finds Ms. Rodriguez's short conclusory answers in response to Respondents' counsel's questions[24] far less credible than her narrative descriptions of events.

Mr. Ellsworth testified that Complainant was hired directly for the Fowler to Wilmington run and that Ellco had no other routes available for Complainant to drive after he was banned from delivering products to Shell. (HT 234-235, 567-568.) But Complainant's first day of work was on a different route, and the 3:00 a.m. dispatch for his third day of work was between Modesto and Fowler. The undersigned does not credit Mr. Ellsworth's statement, for the reasons given above as to his diminished credibility.

The undersigned finds that Respondents have not met their burden to establish, by clear and convincing evidence, that they would have fired Complainant regardless of his engaging in protected activity. Even if the undersigned accepts Respondents' position that Mr. Quale told Ms. Rodriguez on December 17, 2019, that Complainant was permanently banned from the Shell facility, Respondents have not proven that it was highly probable or reasonably certain they would have fired Complainant on that basis alone. They had ample opportunity to do so between December 17, 2019, and December 20, 2019, but did not. They provide no evidence as to employment actions, if any, taken against similarly situated employees, *i.e.*, those other drivers who had also allegedly been banned from the facility. They offer no explanation for having told Complainant his assignment had ended due to his being argumentative instead of simply firing him because he had been banned from the Shell facility. If that were the true and only reason for Complainant to have been discharged, as Ms. Rodriguez variously testified, then why not just tell him so. On this record, the undersigned cannot conclude that Respondents have met their burden to establish an affirmative defense.

[24] For instance, "Q Was Daniel Osborn fired for any other reason [than the Shell ban]? A No." (HT at 599.) This testimony is also directly at odds with the reason she gave for firing Complainant in the only written evidence of his termination, her December 20th text.

F. Conclusion

Complainant has shown, by the preponderance of the evidence, that Respondents Ellco Transportation and Steven Ellsworth violated the STAA when they took adverse employment action against him on December 18, 2019, and December 20, 2019. Respondents have failed to prove an affirmative defense by clear and convincing evidence. Therefore, Complainant prevails on his claim.

VI. PERSONAL LIABILITY

Respondents maintain that Mr. Ellsworth is not personally liable to Complainant because he was not the individual who discharged Complainant and he did not have hiring and firing capabilities, which rested with Ms. Rodriguez. (Resp. Brief at 21-22.) Complainant argues that Mr. Ellsworth's instruction to Complainant to go home on December 18, 2019, was an adverse action. (Cl. Reply, p. 9.)

"[O]nly a person who exercises control over an employee *and* who is an employer under the Act can be personally liable under the STAA." *Mosley v. R&L Carriers*, ALJ No. 2020-STA-00013, slip op. at 4 (ALJ July 19, 2021) (emphasis in original); *see also Smith v. Lake City Enterprises, Inc.*, ARB Nos. 08-091, 09-033, ALJ No. 2006-STA-00032, slip op. at 8 (ARB Sept. 28, 2010). An individual exercises control over the employee when they have ability to hire, transfer, promote, reprimand, or discharge an employee. *See Smith*, ARB Nos. 08-091, 09-033, slip op. at 8 (internal citations omitted). As stated above, an "employer" under the Act 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". 49 U.S.C. §§ 31101(3)(A). A "person" includes "one or more individuals". 29 C.F.R. § 1978.101(k).

Mr. Ellsworth is an employer under the Act because he is an individual who owns Ellco, a trucking business with commercial motor vehicles that affects commerce, and assigns employees to operate his vehicles in commerce. He also exercises control over his employees as the sole owner of Ellco. For example, Complainant and Mr. Martinez testified that Mr. Ellsworth sends his employees their dispatches and employees contact Mr. Ellsworth with questions about their dispatches. (HT at 290-292, 296-297, 502, 505.) The undersigned has also found that Mr. Ellsworth discharged Complainant on December 18, 2019. Mr. Ellsworth and Ms. Rodriguez testified that Ms. Rodriguez had the authority to hire and fire drivers without approval from Mr. Ellsworth, including Complainant, but the undersigned cannot therefore conclude that Ms. Rodriguez had the *sole and only* authority to hire and fire drivers. (*See* HT at 252, 585-586, 616.) As stated above, common sense would allow for both the owner of the company to have hiring and firing authority, and the record does not establish that Ellco's business had a different arrangement.

As the owner of Ellco and as the person who discharged Complainant, Mr. Ellsworth is personally liable for violations under the STAA. *See Anderson v. Timex Logistics*, ARB No. 13-016, ALJ No. 2012-STA-00011, slip op. at 8-9 (ARB Apr. 30, 2014) (the ARB affirmed the administrative law judge's finding that the company's sole owner, who made the final decision to discharge the complainant, was individually liable, but the non-owner operations manager who

did not have the authority to hire or discharge employees was not individually liable); *see also Ass't Sec'y & Wilson v. Bolin Associates, Inc.*, No. 91-STA-4, slip op. at 4 (Sec'y Dec. 30, 1991) (finding the sole shareholder and chief executive officer of the defunct respondent corporation personally liable, as the person who discharged the complainant, under the express language of the STAA).

VII. DAMAGES

A. Reinstatement

Reinstatement is an automatic remedy under the STAA. *Cefalu v. Roadway Express, Inc.*, ARB No. 08-110, ALJ No. 2003-STA-00055, slip op. at 2 (ARB Dec. 10, 2008) (citing *Dickey v. West Side Transp., Inc.*, ARB Nos. 06-151, -150, ALJ Nos. 2006-STA-00026, -00027, slip op. at 8 (ARB May 29, 2008)); *see also* 29 C.F.R. § 1978.109(d)(1); 49 U.S.C. § 31105(b)(3)(A)(ii). However, reinstatement may be impossible or impractical in some cases. *Cefalu*, ARB No. 08-110, slip op at 2 (citing *Ass't Sec'y & Bryant v. Bearden Trucking Co.*, ARB No. 04-014, ALJ No. 2003-STA-00036, slip op. at 7-8 (ARB June 30, 2005)). "For example, reinstatement may be inappropriate where the parties have demonstrated the impossibility of a productive and amicable working relationship." *Id.* (internal citation omitted). Reinstatement should not be denied because of mere friction between the parties or mere inconvenience to the employer. *See Dale v. Step I Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-00030, slip op. at 5 (ARB March 31, 2005). Where reinstatement is inappropriate, an ALJ may award front pay or "economic reinstatement" in lieu of reinstatement. *See id.*; *see also* 68 Fed. Reg. 14,099, 14,104 (March 21, 2003) ("[E]conomic reinstatement" entitles a complainant to "receive the same pay and benefits that he received prior to his termination, but not actually return to work.").

Complainant requests to be reinstated as a truck driver for Ellco. (Cl. Brief, p. 23.) Respondents maintain that reinstatement is inappropriate in this matter because animosity between Complainant and Ellco employees make reinstatement impracticable, because Shell banned Complainant from their property, and because Complainant would have to commute 120 miles to get to his truck if dispatched from Stockton instead of Fowler, which poses safety concerns. (Resp. Brief, p. 24.) Respondents ask for "an alternative remedy", such as front pay. (Resp. Brief, p. 24 n.14.) Complainant replies that he "is a trucker and used to long drives. He could also lodge in Stockton." (Cl. Reply, p. 9.)

Reinstatement as a remedy is preferred over front pay damages, especially when a complainant wants to return to his former position. In *Dutile v. Tighe Trucking, Inc.*, the Secretary held that "when a complainant states . . . that he does not desire reinstatement, the parties or the ALJ should inquire as to why. If there is such hostility between the parties that reinstatement would not be wise because of irreparable damage to the employment relationship, the ALJ may decide not to order it. If, however, the complainant gives no strong reason for not returning to his former position, reinstatement should be ordered." No. 93-STA-31, slip op. at 3 (Sec'y Oct. 31, 1994). Here, Complainant testified that he had "reservations" about working at Ellco, but that there is "no reason why [he] shouldn't work there, as long as [he] can run legal." (HT at 357; *see also* HT at 411-412.) When explicitly asked about reinstatement, Complainant testified, "Yeah, I would love – I was so excited to have that job, I would love to have that job." (HT at 357.) He

explained on cross examination, "I would love to work there if there's something that I could do, and as long as I can run legal." (HT at 411-412.)

Cases in which a complainant was awarded front pay over reinstatement are based on Complainant's uncontested testimony of animosity between the parties or on the impossibility of returning to work. *See Palmer v. Triple R Trucking*, ARB No. 06-072, ALJ No. 2003-STA-00028, slip op. at 4 (Aug. 30, 2006) (uncontested testimony of animosity, and complainant sold his truck after being unable to make payments and therefore could not return to work for his employer); *Doyle v. Hydro Nuclear Servs., Inc.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-00022, slip op. at 7-8 (ARB Sept. 6, 1996), *rev'd on other grounds sub nom. Doyle v. United States Sec'y of Labor*, 285 F.3d 243 (3d Cir. 2002) (reinstatement impractical because company no longer engaged workers in the job classification complainant occupied).

The threshold of finding "irreparable damage to the employment relationship," when a complainant wants to return to work, is not clear. In this case, it seems that Mr. Ellsworth precipitately discharged Complainant in what could be characterized as a fit of pique over their disagreement about moving to yard duty status. Complainant had a conversation with Ms. Rodriguez later the same day, during which his behavior could be characterized as hostile, dismissive, and confrontational. There does appear to be animosity between the parties, but Respondents have not demonstrated the impossibility of a productive and amicable working relationship. It appears that Complainant wants to return to work at Ellco, and mere friction between the parties is not enough to deny reinstatement. Accordingly, the undersigned cannot conclude that the damage to the employment relationship is irreparable such that reinstatement should not be ordered.

Even if Shell had permanently banned Complainant from their facility, Mr. Ellsworth himself testified that Ellco has other accounts aside from Shell, and runs to Nevada, takes dispatches from brokers, and has hauled Red Bull loads. (HT at 568-569.) Ellco's website also mentions that the company provides "less than truck load service", which is different from Shell's "truck load" route. (HT at 569-570.)[25]

Complainant testified that, if reinstated, he "could provide transportation as a driver for something else [other than Shell]". (HT at 411-412.) In December 2019, about four out of Ellco's 18 drivers were assigned to the Shell facility, while 14 drivers drove out of Stockton. (HT at 571-572.) Mr. Ellsworth testified Complainant would not be eligible to drive out of Stockton because he would have to complete a 120-mile commute and would be too fatigued to work his scheduled shift. (HT at 572-574, 581.) He also testified that he has a policy that certain drivers must live a certain distance from the Stockton terminal, although he could not confirm whether it was a written policy or not. (HT at 581.) Instead, Mr. Ellsworth testified that he bases his decisions on his lived experiences and "cases like Walmarts", where a driver that lived too far away could not stay awake to do his job and "plowed through hundreds of tons of cars". (HT at 581.)

[25] Mr. Ellsworth testified that the website has not been updated in 15 years and is inaccurate. (HT at 570.) The undersigned does not find it likely that a company, especially one that posts job listings online, would not update its website in 15 years.

While the undersigned acknowledges Mr. Ellsworth's experience and expertise in the field, the undersigned does not find Mr. Ellsworth's testimony alone to be a sufficient basis on which to deny the remedy of reinstatement. The evidence here does not establish that Complainant was banned from the Shell facility. Even if so, however, the undersigned is not persuaded that such a ban, having been made two and a half years ago on the basis of objectionable conduct on one day, and that being the first and only day of Complainant working at the facility, would continue to be in effect. The undersigned is not persuaded that any such prohibition is absolutely permanent and irremediable. Further, in the absence of evidence of a written policy about the distance a driver is entitled to live from an Ellco terminal, the decision as to a driver's eligibility for employment is apparently in hands of Mr. Ellsworth based on his lived experiences. This testimony is somewhat inconsistent with Respondents' position that hiring and firing decisions are up to Ms. Rodriguez.

Ms. Rodriguez testified that Ellco did not need new drivers at the time of the hearing. (HT at 614.) At the time Complainant worked for Ellco, the company had about 12 to 18 drivers. Mere inconvenience to Ellco is not enough to deny reinstatement. Respondents have not proven that reinstating Complainant would be impossible for the company. Therefore, Complainant is entitled to reinstatement.

B. Back Pay

A successful complainant is entitled to an award of back pay. *See* 29 C.F.R. § 1978.105(a)(1); 29 C.F.R. § 1978.109(d)(1); 49 U.S.C. § 31105(b)(3)(A)(iii); *see also Ass't Sec'y & Moravec v. HC & M Transp., Inc.*, No. 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992) (internal citations omitted). Back pay awards under the STAA are to be calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act. *See Ass't Sec'y & Bryant*, ARB No. 04-014, slip op. at 5 (internal citations omitted). "Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement." *Id.* at 6. "While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with 'unrealistic exactitude.'" *Id.* Any "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer." *Clifton v. United Parcel Service*, No. 94-STA-0016, slip op. at 2-3 (ALJ Jan. 15, 1997) (citing *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-261 (5th Cir. 1974)).

Complainant asserts that he is entitled to $14,073.16 in back pay. (Cl. Brief at 23-24.) Respondents maintain that Complainant is entitled to no back pay, as any back pay due must be reduced by interim wages. (Resp. Brief at 22-24.)

Complainant's rate of pay at Ellco was $19 per hour. (HT at 232, 358, 596; CX 1 at 1.) Ms. Rodriguez testified that the typical schedule for a truck driver running the same route as Complainant would be 9 to 10.5 hours per day. (HT at 617.) Complainant worked 12 hours of straight time on Monday, December 16, 2019, and 12.5 hours of straight time on Tuesday, December 17, 2019 (HT at 621-622; CX 3). Weighing Complainant's actual work time on two days against Ms. Rodriguez's testimony about a truck driver's typical schedule, the undersigned considers 10.5 hours to represent a reasonable average amount of hours Complainant would have worked per day. Ellco drivers usually worked 5 days a week (HT at 157-158, 618). Therefore,

Complainant's average number of hours worked per week is 52.5. Multiplying 52.5 hours per week by $19 per hour results in an average weekly wage of $997.50.

Holidays that would have been paid must be included in Complainant's back pay calculation. *See Youngermann v. United Parcel Service*, ALJ No. 2010-STA-00047, slip op. at 14-15 (ALJ May 5, 2011) (internal citation omitted). Complainant testified that he was not scheduled to nor had he planned to work on Christmas Eve, Christmas, and New Year's Day. (*See* HT at 359.) The undersigned therefore excludes these three days from the back pay award.

On January 7, 2020, Complainant began working with Dragon Materials Transport at $20 an hour. (HT at 350-351, 353, 359-360.) He testified that his hours vary on a day-to-day basis. (HT at 350-351.) His 2020 wages were $42,832.69. (CX 8 at 3.) Complainant testified that he received a pay raise to $21 an hour a couple weeks before the hearing, around May 1, 2021. (HT at 360; *see* Cl. Brief at 24.) He also testified that he believed he would earn less in 2021 than in 2020 because there were fewer prevailing wage jobs in 2021. (HT at 354-355.) He further testified that work was so slow that he had to file for unemployment benefits in 2021. (HT at 413-414.) Any earnings by Complainant since December 18, 2019, including those from Dragon Materials Transport, must be deducted from his back pay calculation. As unemployment compensation is not deductible from the amount due for back pay, the undersigned refuses to credit Respondents with Complainant's unemployment compensation. *See Hadley v. Southeast Coop. Serv. Co.*, No. 86-STA-24, slip op. at 2 (Sec'y June 28, 1991) (internal citation omitted).

In total, then, Complainant is entitled to $997.50 per week, as his average weekly wage,[26] in back pay from the date of his termination on December 18, 2019, until the date Complainant receives a bona fide offer of reinstatement, minus any interim earnings by Complainant during this period, and minus wages from the three holidays noted above.

C. Mitigation of Damages

Once the complainant proves that he or she was terminated due to unlawful discrimination on the part of the employer, it becomes the employer's burden to prove by a preponderance of the evidence that the employee did not exercise reasonable diligence in finding other suitable employment. *Johnson v. Roadway Express, Inc.*, No. 1999-STA-5, slip op. at 13 (ALJ Oct. 12, 2000) (citing *Timmons v. Franklin Electric Cooperative*, ARB Case No. 97-141, slip op. at 11 (ARB Dec. 1, 1998)). An employee is only required to make a reasonable effort to mitigate damages, and this burden does not mandate that the complainant be successful in mitigating the damages. *Id.* (internal citations omitted). "The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available and that complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment." *Id.* (internal citations omitted).

Respondents do not argue that Complainant failed to mitigate damages, nor did Respondents provide any evidence indicating that Complainant failed to mitigate damages.

[26] The ARB has approved back pay calculation based on complainant's average weekly wage. *See, e.g., Ass't Sec'y & Bailey*, ARB No. 10-001, slip op. at 11; *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-00035, slip op. at 5 (ARB Jan. 31, 2008).

Complainant testified that, a couple weeks after his termination with Ellco, he obtained a job with Dragon Materials Transport. (HT at 350-351, 353.) He tried finding jobs on Craigslist but was not successful, and he and his wife decided he was "done chasing it." (HT at 352.) The job with Dragon Materials was seasonal and not steady. (HT at 351.) Respondents have failed to demonstrate by a preponderance of the evidence that comparable jobs to Ellco were available and that Complainant did not exercise reasonable diligence in finding other suitable employment.

D. Interest

In cases where violations of the Act have occurred, a complainant is entitled to interest on backpay. *See* 29 C.F.R. § 1978.105(a)(1); 29 C.F.R. § 1978.109(d)(1); *see also* 49 U.S.C. § 31105(b)(3)(A)(iii); *Ass't Sec'y & Cotes v. Double R Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-00034, slip op. at 3 (ARB Jan. 12, 2000). Interest is calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and will be compounded daily. 29 C.F.R. § 1978.105(a)(1).

As a violation of the STAA has occurred here, Complainant is entitled to interest on his backpay.

E. Compensatory Damages

Complainant has the burden to demonstrate by a preponderance of the evidence that he suffered emotional harm caused by Respondent's unlawful retaliation against him. *Ferguson*, ARB No. 10-075, slip op. at 7. Awards for compensatory damages "generally require that a plaintiff demonstrate both: (1) objective manifestation of distress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress." *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040, slip op. at 8 (ARB Nov. 30, 2007) (quoting *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993-SWD-00001, slip op. at 17 (ARB July 30, 1999)); *see also Ferguson*, ARB No. 10-075, slip op. at 7. Reasonable awards for emotional distress can be based upon Complainant's testimony alone, and there is no fixed limit on the amount that can be awarded. *See Hobson*, ARB Nos. 06-016, -053, slip op. at 8; *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-30, slip op. at 31 (ARB Feb. 9, 2001).

Complainant asks for $20,000 in mental pain and emotional distress damages. (Cl. Brief at 24.) Respondents maintain that because Complainant never saw a psychiatrist or therapist, never took anti-anxiety medication or anti-depressants after his termination, and testified that he is okay with his emotions, he did not suffer any negative consequences from his termination and no emotional distress damages should be awarded. (Resp. Brief at 24.) Further, Respondents maintain that the requested $20,000 in emotional distress damages is not appropriate for an employment that lasted about two days and would be draconian, unreasonable, excessive, arbitrary, and disproportionate under the Fifth, Seventh, Eighth, and Fourteenth Amendments of the United States Constitution and Article I of the California Constitution. (Resp. Brief at 24-25.)

Complainant was out of work from December 18, 2019, to January 6, 2021, or 13 days, excluding weekends. He testified that he landed on his feet pretty quickly and was not scheduled to nor planned to work on Christmas Eve, Christmas, and New Year's Day. (HT at 359, 361.) He

testified that he never saw a psychiatrist or therapist for any issues associated with his termination by Ellco, nor took any anti-anxiety medication or anti-depressants because of his termination by Ellco. (HT at 397-398.) However, Complainant also testified that he experienced financial hardship due to the loss of his job with Ellco and that Christmas 2019 was "terrible" because he did not have the money to buy his wife any presents or have a Christmas dinner. (HT at 355-356.) In addition to this, Complainant and his wife were running two households, but his wife was not able to keep her rented house after Complainant was fired. (HT at 355-356.) Complainant testified that his job with Ellco "was everything [he] had been looking for since [he] shut down [his prior] business." (HT at 283.) He also testified that, after being terminated, he was worried and upset that he would have to go back on the road and be away from his family. (HT at 344.)

The undersigned finds it credible that Complainant would suffer from mental anguish and embarrassment after being terminated from a long-sought stable job during the holidays. Medical evidence is not required to award compensatory damages for emotional distress. *See Anderson*, ARB No. 13-016, slip op. at 7-8 (internal citations omitted). Therefore, the undersigned finds that an award of **$5,000** in emotional distress is appropriate here. *See Youngermann*, ALJ No. 2010-STA-00047, slip op. at 17-19 (after a comparison to similar cases, the ALJ awarded $5,000 in emotional distress damages to a driver who had 32 years of experience and had been out of work for about 10 days).

F. Punitive Damages

The STAA allows for punitive damage awards up to $250,000. 29 C.F.R. § 1978.105(a)(1); 29 C.F.R. § 1978.109(d)(1); 49 U.S.C. § 31105(b)(3)(C). The ARB has found that punitive damages are available when there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Fink v. R&L Transfer, Inc.*, ARB No. 13-018, ALJ No. 2012-STA-00006, slip op. at 5 (ARB Mar. 19, 2014) (internal citation omitted). The ARB held that, when determining a punitive damages award, an ALJ should consider whether punitive damages are necessary to deter future violations and whether the retaliation reflected a corporate policy of STAA violations. *Ferguson*, ARB No. 10-075, slip op. at 8 (internal citations omitted). The proper amount of punitive damages is discretionary and "a fact-based determination driven by the circumstances of the case." *See Anderson*, ARB No. 13-016, slip op. at 8.

Complainant argues that a punitive damages award of at least $30,000 would deter Respondents from future retaliation. (Cl. Brief at 24-25.) Respondents maintain that punitive damages are only appropriate when the retaliation reflected a corporate policy of STAA violations or are necessary to deter future violations. (Resp. Brief at 25.) Because Complainant's witnesses' testimonies detail there was no corporate Ellco policy of STAA violations, and because Ellco's alleged conduct in violation of the STAA appears to be an outlier, any award of punitive damages, based on Complainant's employment of two days, would violate Respondents' rights under the Fifth, Seventh, Eighth, and Fourteenth Amendments of the United States Constitution and Article I of the California Constitution. (Resp. Brief at 25.)

The undersigned finds that Complainant is entitled to nominal punitive damages. The record indicates that Mr. Ellsworth demonstrated a reckless disregard for Complainant's rights when he intentionally told him to change his log to "yard duty" while driving around lost. Punitive

damages would deter any potential future violations. However, Complainant's termination does not reflect a corporate policy of STAA violations. Mr. Becerra testified that he left the company due to safety concerns driving over the Grapevine and the lack of masks at work. (HT at 153-154.) He also testified that other drivers had complained about Mr. Ellsworth micro-managing their driving times. (HT at 459.) Mr. Hernandez left the job because he felt overwhelmed after the Red Bull incident, where his trailer collapsed. (HT at 504.) But the record does not show Ellco to be a company which has repeatedly violated the STAA. Therefore, the undersigned finds nominal punitive damages, in the amount of **$1.00**, to be appropriate here.

G. Abatement of the Violation

Under the STAA, successful complaints are entitled to abatement. 29 C.F.R. § 1978.105(a)(1); 29 C.F.R. § 1978.109(d)(1); 49 U.S.C. § 31105(b)(3)(A)(i). Complainant has requested that the undersigned order Respondents to post the decision in this case for ninety consecutive days in all places it posts employee notices. (Cl. Brief at 25.) Complainant also requests the undersigned order Respondents to expunge all references to Complainant's protected activities and discharge from its files. (Cl. Brief at 25.) Respondents have not specifically objected to Complainant's requests for abatement.

The undersigned finds it appropriate for Respondents to expunge all references to Complainant's protected activities and discharge from its files, and to post the decision in this case for thirty consecutive days in all places it posts employee notices. *See Shields,* ARB No. 08-021, slip op. at 13-14 (affirming a decision ordering the respondents to expunge all negative or derogatory information from the complainant's personnel records relating to his protected activity or its role in his termination and to conspicuously post copies of the decision and order for ninety days in all places on the respondent's premises where employee notices were customarily posted); *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 1995-STA-00029, slip op. at 10-11 (ARB Oct. 9, 1997) (affirming a decision ordering the respondents to expunge from the complainant's personnel records "all derogatory or negative information contained therein relating to [the c]omplainant's protected activity and that protected activity's role in [the c]omplainant's termination" and to post written notice for thirty days in a centrally located area advising that the disciplinary action taken against the complainant had been expunged and that complainant prevailed on the complaint); *see also Drummond v. SNS Transport, LLC*, ALJ No. 2018-STA-00066, slip op. at 17-18 (ALJ Aug. 21, 2019) (and cases cited within). It is a "standard remedy in discrimination cases to notify a respondent's employees of the outcome of a case against their employer." *Shields,* ARB No. 08-021, slip op at 14 (internal citations omitted); *see also Michaud*, ARB No. 97-113, slip op. at 10. The burden remains on Respondents to specifically identify the referenced documents from its files. *See Michaud,* ARB No. 97-113, slip op. at 10.

H. Attorney Fees and Costs

An employer found to have violated the Act must pay a complainant reasonable attorney fees and litigation costs. 29 C.F.R. § 1978.109(d)(1); 49 U.S.C. §§ 31105(b)(3)(A)(iii), 31105(b)(3)(B). Complainant's counsel is entitled to fees and costs. Counsel shall meet and confer to discuss and attempt to reach a settled resolution of the attorney fees and costs. If agreement is reached, the parties shall file a stipulated agreement for approval.

If no such agreement can be reached, Complainant's counsel shall file and serve a fee petition under within 60 days of receipt of this order. Respondents must file and serve any objections to the fee petition within 30 days of service of the fee petition. Within 14 days of service of those objections, the parties must meet in person or voice-to-voice to discuss and attempt to resolve any objections. The undersigned charges both parties with the duty to arrange the meeting. If the parties agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the parties do not agree, within seven days of the meeting, Complainant's counsel shall file a report identifying the objections that have been resolved, the objections that have been narrowed, and the objections which remain unresolved. In the report, Complainant's counsel may also reply to any unresolved objections.

VIII. ORDER

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, Complainant's claim for relief under the employee protection provisions of the STAA is **GRANTED**. The undersigned specifically orders as follows:

1. Respondents Ellco Transportation and Steven Ellsworth shall reinstate Complainant, Daniel Osborn, to his former position with the same pay, terms, and privileges of employment as he had prior to his termination, including any increases in pay or benefits that would have accrued. Respondent will make a written offer to Complainant as stated herein within 14 days of the date this Decision and Order is served on the parties. Complainant must accept or reject the offer of reinstatement in writing within 14 days of the date the written offer is received.
2. Respondents shall pay Complainant back pay in the amount of $997.50 per week from December 18, 2019, until the date Respondents make a bona fide, unconditional offer of reinstatement to his former position, less any interim wages earned during this time period, and less the three days of holidays noted above. Respondents Ellco Logistics, Inc., a/k/a Ellco Transportation, and Steven Ellsworth are jointly and severally liable for the award.
3. Respondents shall pay Complainant interest on the back pay due at the rate applicable to underpayment of taxes under 26 U.S.C. § 6621, compounded daily, and commencing on December 18, 2019, the date of Complainant's discharge.
4. Respondents shall additionally pay Complainant non-economic compensatory damages in the amount of $5,000.00.
5. Respondents shall additionally pay Complainant nominal punitive damages in the amount of $1.00.
6. Respondents shall expunge all references to Complainant's protected activities and discharge from its files, and post the decision in this case for thirty (30) consecutive days in all places it posts employee notices.
7. Complainant's counsel is entitled to fees and costs, which will be separately awarded in accordance with the procedure outlined above.

SO ORDERED.

SUSAN HOFFMAN
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.

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).

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

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail

Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

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

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

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. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.