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OSHA NO.: 9-3290-18-512
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9-3290-18-510

In the Matter of:

MICHAEL RAZIANO, JIM DAVIS, Jr., MARK SOTO, and BRIAN TRAISTER,
Complainants,

vs.

ALBERTSONS, LLC,
Respondent.

APPEARANCES:

PAUL O. TAYLOR, Esq.
Truckers Justice Center
Edina, MN
For the Complainants

RAYMOND PEREZ, II, Esq.
Jackson Lewis
Atlanta, GA
For the Respondent

Before: Christopher Larsen
Administrative Law Judge

ORDER VACATING DECISION AND ORDER AND AMENDED DECISION AND ORDER AWARDING RELIEF

The Decision and Order Awarding Relief issued July 29, 2022, in this case did not include the proper Notice of Appeal Rights. Accordingly, I now vacate that Decision and Order, and in its place issue an Amended Decision and Order Awarding Relief, as follows:

These are claims under the employee-protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. §31105 ("STAA" or "the Act").I conducted a videoconference hearing in this case on March 10, March 11, and April 28, 2022. Attorney Paul O. Taylor appeared for the Complainants, and Attorney Raymond Perez, II, appeared for the Respondent.

At the hearing, I received in evidence Claimant's Exhibits ("CX") 1 through 28; Employer's Exhibits ("EX") 1 through 8; and Joint Exhibits ("JX") 1 through 5. I heard testimony from witnesses Michael Raziano, Jim Davis, Mark Samuel Soto, Brian Traister, Lana Sykes, Arturo Vega, and Brent Bohn. Additionally, both parties have filed post-hearing briefs. I have carefully considered all of the documentary evidence, all of the testimony, and the arguments of the parties in reaching this decision.

Stipulations of the Parties

The parties stipulate, and I find:

1. Each Complainant is, or was, an employee as defined at 49 U.S.C. § 31101(2). Each Complainant is, or was, a member of a labor union and his employment with Albertsons, LLC, is, or was, subject to a collective bargaining agreement.

2. Respondent Albertsons, LLC, maintains a base of operations at Albertsons Irvine Distribution Center, 9300 Toledo Way, Irvine, CA 92618 and Albertsons Brea Distribution Center, 200 N. Puente St., Brea, CA 92821. Respondent Albertsons, LLC, is a motor carrier operating in interstate commerce and a "person" subject to the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA").

3. Respondent Albertsons employs or employed each 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. In May of 2018, each Complainant filed a complaint with OSHA alleging that Respondent had discriminated against him and assessed him demerit points and/or warning in violation of 49 U.S.C. Sec. 31105. The Complaint was timely filed.

5. On June 1, 2020, OSHA issued a decision denying each Complainant's Complaint.

6. On June 23, 2020, each Complainant filed timely objections to the OSHA's decision and requested a hearing *de novo* before an Administrative Law Judge of the Department of Labor.

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

Facts Not in Dispute

At relevant times, Respondent enforced an Attendance Policy under which a driver's repeated absence from work, "regardless of the reasons,"[1] resulted in corrective action up to an including discharge[2] (CX 1, p. 1.5; CX 2, p. 2.4). A driver who accumulated seven absences, or "occurrences," in any 52-week period would receive a verbal warning; a driver who accumulated nine absences, or "occurrences," in any 52-week period would receive a written warning; a driver who accumulated eleven absences, or "occurrences," in any 52-week period would receive a two-day suspension; and a driver who accumulated thirteen absences, or "occurrences," in any 52-week period would be discharged (*see* CX 1, pp. 1.7-1.8; CX 2, pp. 2.4-2.5). (The parties often informally refer to a "point" or "demerit point" being placed on a driver's record for each "occurrence.") Under this Policy, Respondent charged absences against the four Complainants on occasions when they reported they were too sick or fatigued to drive safely. Thereafter, in the summer of 2018, without amending the written description of the Attendance Policy in drivers' handbooks, and without announcing the change to the drivers, Respondent stopped assessing "occurrences" (or "attendance points") to drivers who missed work because they were too ill or too fatigued to drive a commercial motor vehicle safely. Respondent also expunged from all drivers' records, including the four Complainants, any attendance points the drivers had accumulated for missing work because of illness or fatigue which prevented them from driving safely. These facts are undisputed, and I so find.

Complainants contend the Attendance Policy, as originally administered, violated the Act, and they contend Respondent knew even before the summer of 2018 that it did. They further contend they suffered damages, including emotional distress, because they had no reason to know Respondent had changed the manner in which it enforced the policy beginning in August, 2018.

[1] Absences "approved in advance," absences "permitted by the Collective Bargaining Agreement," and "time off provided for by law" were exceptions to the rule (CX 1, p. 1.7; CX 2, p. 2.4).

[2] Under some circumstances not relevant to the claims of any of the four Complainants, Respondent might consider consecutive days of absence caused by illness as a single "occurrence."

SUMMARY OF THE EVIDENCE

1. Mr. Raziano's Testimony

Michael Raziano lives in Lakewood, California (TR I, 23:19-20).[3] He is employed as a truck driver at the Albertsons Distribution Center in Irvine, California (TR I, 23:21 - 24:25; 24:7-10). He has been a truck driver since 1984. He worked at Vons Grocery beginning July 21, 2004, and has worked at Albertsons since it merged with Vons, Safeway, and Pavilions in 2017 (TR I, 24:1-10; 25:10-25). Typically, he works a ten-to-twelve-hour day, delivering groceries from the Irvine Distribution Center to grocery stores in southern California (TR I, 26:1-3; 32:4-19). He earns about $31.20 per hour (TR I, 37:9-20). His goal is to work until retirement in September, 2025 (TR I, 38:21-24).

Mr. Raziano is a member of Teamster Local 952 (TR I, 37:15-20). When he worked at Vons, he belonged to Teamster Local 848 (TR I, 37:21 - 38:1). He has been a union steward at the Irvine Distribution Center for six or seven years, and was a union steward at Vons for about two years before the merger with Albertsons (TR I, 42:25 - 43:22). At present, in addition to Mr. Raziano, there are four other union shop stewards at the Irvine Distribution Center (TR I, 128:15-18).

Mr. Raziano testified that various aspects of his job require him to be alert. Before he begins driving for the day, he performs pre-trip inspections of his tractor and his trailer, checking radiator fluid, hoses, belts, springs, tires, lug nuts, lights, brakes, brake pads, windshield washer fluid, and looking for oil and grease that may be leaking (TR I, 26:8 - 27:4; 28:22 - 29:18). In past pre-trip inspections, he has discovered worn tires that needed to be replaced, for example (TR I, 31:1-21), or other deficiencies that would make his tractor unsafe to drive (TR I, 29:19-25). He needs to be alert while driving on city streets, interstate freeways, and in residential areas, and while delivering products to stores (TR I, 32:20 - 34:11; 35:6 - 36:4; 36:20 - 37:8).

When Mr. Raziano began working for Albertsons, he attended an orientation for drivers, where he received a copy of the Albertsons Irvine Distribution Center Drivers' Manual, portions of which appear in CX 1 (TR I, 39:20 - 40:21).

> Q: Okay. Going to the next page of the exhibit, CX-1, page five, it's page 12 of the actual manual itself, but page 1.5 of the exhibit.
>
> A: Okay.

[3] In this Decision, I cite to the three volumes of the transcript of the hearing as TR I, TR II, and TR III respectively.

Q: It's a – the last sentence on the page, it says: "Repeated absences of tardiness, regardless of the reason, will result in corrective action up to and including discharge."

Did anybody at Albertsons ever tell you that there's an exception to the "regardless of reason"? For example, if you're calling out because you're too ill to safely drive, we you ever told orally, or in writing, that there's any sort of exception that would excuse an absence where you're too ill to safely drive?

A: No to my recollection.

(TR I, 49:13 - 50:3).

At the orientation, Cara Holmvik and Lana Sykes reviewed the policies in the manual with the drivers (TR I, 40:22 - 41:9). Mr. Raziano specifically asked about the Attendance Policy described in the manual:

A: Okay. And this is to the best of my knowledge, because this is almost five years ago. I – after Ms. Holmvik and Ms. Sykes were discussing the Attendance Policy, I raised my hand and asked them if they were familiar with the STAA. And they said no. I shouldn't say – Ms. Holmvik and Ms. Sykes said no. I explained to Ms. Holmvik and Ms. Sykes about the protections that drivers have for the STAA when they're – when they're too sick or – or fatigued to safely operate a commercial motor vehicle. And they said, they were not familiar with it and hadn't heard about it. And that's – that's – I explained to them that the policy in the STAA that giving points was – was not allowed under the STAA.

Q: Giving points for what? Did you explain?

A: For calling in sick or calling in too fatigued to safely operate a commercial motor vehicle.

Q: What else did you discuss with Ms. Holmvik and Ms. Sykes with respect to the STAA or the Attendance Policy during your orientation?

A: Well, during the – they – we went over that. And – and I don't remember all of the words that were said, but there was some back-and-forth about the – about the attendance policy and the STAA. And nobody addressed it – well, I shouldn't say nobody. That's not correct. During the orientation meeting, it

> was not addressed anymore after – after our discussion between the three of us.

(TR I, 41:17 - 42:17).

On January 2, 2018, Mr. Raziano was sick and felt he could not drive safely. Following the established procedure (TR I, 46:8 - 49:12), he called the Irvine Transportation Call-In Line (CX 1, p. 1.4) and left a message saying he was too sick to work the next day because he could not safely operate a commercial motor vehicle (TR I, 46:8 49:12; 51:24 - 52:7).[4] No one at Albertsons ever asked for any more information about his condition (TR I, 52:8-17). On March 8, 2018, Mr. Raziano again missed work because he was too ill to drive safely (TR I, 55:16-25). Again, he called the Call-In Line and reported he could not drive safely because of his illness (TR I, 56:1-8).

But Mr. Raziano feared Albertsons would assess points against him for missing work, so he asked David Jamaica, a Human Resources employee, for a copy of his most recent attendance report (TR I, 52:18 - 53:8). That report (CX 5) showed he had been assessed points for missing work on January 3, 2018, and March 8, 2018 (TR I, 57:11-25):

> Q: Okay. How did that make you feel when you received knowledge that you had points because you had refused to drive a commercial motor vehicle due to illness?
>
> A: As a professional driver, you know, I was – I was angry. I was upset. The points are nothing that I particularly take slightly because each point leads further down the road. And I was – at some point – if – if you were to have a severe sickness or other issues that happened that are pointable *[sic]* offenses, you can get in trouble fairly quickly.
>
> Q: What was your understanding in March of 2018 as to how many points it took to get you fired?
>
> A: According to the Attendance Policy, I believe the points total to get fired, actually terminated, is 13, if I'm not mistaken.
>
> Q: Okay. If faced in the future with the choice of driving in a fatigued or ill condition that makes driving unsafe and/or the choice of losing your job, which would you do?
>
> A: I would have to go to work.

[4] Mr. Raziano's wife signed a declaration under penalty of perjury verifying he was too sick to work on January 3, 2018 (CX 14; *see also* TR I, 68:11-17).

Q: Why?

A: I have financial responsibilities not only to myself, but to my wife, to my daughter. You know, mortgage, car notes, utilities, food, everything it takes to – to live. I would lose my pension if I'm – you know, that, that's not accurate. I would not lose my pension. I would lose my medical coverage if I was fired. And then I would have to go purchase medical. These are things that – this is a bridge that I don't want to cross. If I had to choose between driving, you know, very, very sick, to the point where it was unsafe, or being terminated and losing my job, I would have to drive because I have a family to take care of and support.

Q: Well, would you lose part of your pension if you were forced to retire early because you were fired due to refusing to drive while too ill to –

A: Yes. I –

Q: -- drive?

A: I'm sorry. I didn't let you finish your question. I apologize.

Q: Well, you said you wouldn't lose your pension.

A: Right. That was a – I would actually only accrue pension to the point where I was terminated. If I were to be hired at another company that had a pension, I would have to start all over again. And at almost 60 years old, I'll be 60 this year, that could be a significant decrease in the value of my pension.

(TR I, 58:1 - 59:22.) Mr. Raziano was angry for "being disciplined with attendance points for something that's completely out of my control" (TR I, 60:18 - 61:4). The assessment of points made him fearful "because each assessed point going forward leads you further down the road to the – to the disciplinary practices" (TR I, 60:18 - 61:8).

Albertsons removed the attendance points from Mr. Raziano's attendance record (TR I, 128:19 - 129:5). Nevertheless,

Q: Do you continue to worry about the issuance of points?

A: I actually do because I haven't received or – anything in writing, even as a steward of the Local, I haven't received any-

> thing in writing to indicate anything different than what is printed on the Albertsons' Operating Guidelines.
>
> Q: You're talking with respect to the handbooks portion you –
>
> A: Yes.
>
> Q: -- absenteeism –
>
> A: Yeah, absentee and Attendance Policy that was issued to us at orientation, I have not received anything in writing to indicate that, that policy has been changed.

(TR I, 69:12-25.) Mr. Raziano further testified no one from management had told him verbally of any such change in the Attendance Policy (TR I, 64:13 - 65:3).

When he was a shop steward at Vons, Mr. Raziano filed a grievance on behalf of another driver, Renee Morales, who had been suspended from work after accumulating attendance points, including points assessed because she missed work due to illness (CX 9; TR I, 61:21 - 64:7).[5] It was while researching that grievance that Mr. Raziano learned about the Surface Transportation Assistance Act (TR I, 130:24 - 131:14). Another Albertsons driver, Carl Young, complained to Mr. Raziano that Albertsons had assessed attendance points against him in 2020 and 2021 (CX 13):

> Q: Okay. All right. Did you talk with Carl Young about Complainant's 13?
>
> A: Yes. I did.
>
> Q: Did he indicate to you anything with respect to his level of illness on the dates he received the points that are listed on Complainant's 13?
>
> A: I asked him specifically if these were legitimate sick calls and he indicated to me that they were.

(TR I, 67:21 - 68:3.) Mr. Raziano later learned Albertsons removed those points from Mr. Young's attendance record (TR I, 124:23 - 125:8).

Mr. Raziano does not recall filing any grievances through Local 952 for drivers against whom Albertsons assessed attendance points for missing work because of illness (TR I, 89:5-11).

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[5] Mr. Raziano does not know whether Renee Morales has ever worked for Albertsons (TR I, 77:1-14). But Vons, like Albertsons, also assessed attendance points against drivers who missed work because of illness (TR I, 77:22 - 78:24).

2. Mr. Davis's Testimony

Jim Davis has been a truck driver since 1988, when he first earned his commercial vehicle license (TR I, 138:15 - 139:7). He completed the tenth grade, and later earned a GED while in the Army (TR I, 139:8-15). He has been employed as a truck driver at Albertsons since August 7, 1991 (TR I, 140:24 - 141:1). He worked at Albertsons' Brea facility until about two years before the hearing, when he was transferred to the Irvine Distribution Center (TR I, 141:2-9).

He testified CX 2 was excerpted from the Brea Distribution Center Drivers' Handbook (TR I, 141:10-24).

Like Mr. Raziano, Mr. Davis performs daily vehicle inspections and delivers goods to stores over interstate highways, state highways, residential streets, and in and around parking lots (TR I, 143:23 - 145:22; 149:8 - 151:5).

Mr. Davis testified he gets migraine headaches from a back injury and also suffers from "severe allergies" (TR I, 143:9-14). When working in Brea, if Mr. Davis was too sick to drive safely, he would call a number and speak to a live person, rather than leave a message on a recording. He would give his name, birthdate, and phone number. The person he spoke to would ask why he was calling, and he would tell the person he was sick "because they asked nothing else" (TR I, 142:23 143:8). Between November 11, 2016, and May 13, 2017, Albertsons assessed Mr. Davis 9.5 attendance points, as documented on CX 8, six of those points because he was too sick to drive safely (TR I, 142:4-17; 146:4-15; 148:23-25; 149:1-7; *see also* CX 17; TR I, 152:11-17).

> Q: Okay. How many more points would get you fired?
>
> A: Three point one.
>
> Q: Okay. When you got a – a point – when you got these points that are listed, were you worried?
>
> A: Yes.
>
> Q: Why?
>
> A: Well, I don't want to lose my job. And I've had issues before where I've been suspended from the company and lost two days of work. And if anything else would have happened once I got to these points, or just the points in general, like if I'd gotten in a car accident on my way to work, that would be considered a point. And it could cause me to lose my job.

Q: If you had two – if you had two more points due to refusing to drive due to the illness, where would you stand then? Would you lose your job?

A: Well, on this, it's nine point five. So, two more points, I would be suspended.

Q: Okay. Were you angry when you received the points for refusing to drive due to illness?

A: I don't know about angry. I'd say frustrated and it caused anxiety because I did not know what was going to happen next.

(TR I, 146:24 - 147:21.) He further testified,

Q: Okay. Are you scared about losing your job at Albertsons?

A: Yes.

Q: Why?

A: Well, if I lose my job, I can't pay my bills, and my house payment, and other stuff. And right now, you don't want to be without a job. You never want to be without a job, but.

(TR I, 151:15-22.)

Mr. Davis has since learned Albertsons removed the attendance points for illness from his attendance record (TR I, 160:16-24).

3. Mr. Soto's Testimony

Mark Samuel Soto began working as a truck driver at Vons on September 29, 2009, and was employed by Albertsons after the merger in October, 2017. He retired on June 1, 2021 (TR I, 170:16-24; 173:22 - 174:10). While employed by Vons, he worked in Santa Fe Springs; and after the acquisition by Albertsons, he worked in Irvine (TR I, 174:25 - 175:5). His description of his job duties, and the aspects of his job which demand his alertness, is substantially similar to the testimony of Messrs. Raziano and Davis (TR I, 175:6 - 183:13).

Mr. Soto suffers daily knee pain (TR I, 183:24 - 184:14). There were times during his employment when he drove with knee pain although he felt he should not have been driving (TR I, 185:13-16). He testified, " . . . a lot of times my knees will lock up on me, or it would keep me from actually walking" (TR I, 184:18 - 185:5). Further,

> Q: Okay. What's it like to attempt to operate a commercial motor vehicle with severe nerve *[sic]* pain – knee pain?
>
> A: It's just very difficult. It's hard to focus and it was – it's just – it's unsafe.
>
> Q: Okay. Why is it hard to focus?
>
> A: Because you have it – you – the – I mean, the pain is just constantly there on your knees. Plus, you have a clutch that you have to push in, which is 80 pounds of pressure. And you're forcing your – your – your knee against that. Plus the moving around, and the inspection, and getting in and under the trailer, and it's just – it's always with you and it keeps you from focusing.

(TR I, 185:17 - 186:4.)

As documented on CX 6, Albertsons assessed Mr. Soto seven attendance points for missing work on October 28, 2017; November 19, 2017; November 22, 2017; December 9, 2017; December 13, 2017; December 23, 2017; and December 31, 2017. On all of those dates, he missed work because the pain in his knees left him unable to operate a commercial vehicle safely (TR I, 183:18 - 184:14).[6] He testified,

> Q: And how – as of December 31, 2017, how many more points would have been needed to – for Albertsons to suspend you?
>
> A: Two more, I think. At nine points, I believe it was a suspension, if I'm not mistaken.
>
> Q: And how many more points to fire you?
>
> A: It would be 13, so it would be seven, eight – six points.
>
> Q: How did you feel about these points that were issued to you, when you discovered that they had been issued to you?
>
> A: It bothered me.
>
> Q: How so?
>
> A: Well, it's – I mean, it was my whole future. I mean, the – the last couple of years that I had been there, I mean, I have been driving for over 47 years. And it's just, I mean, every-

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[6] His wife corroborated his inability to drive safely on those days in a Declaration admitted as CX 15 (*see* TR I, 192:1-6).

thing is just right at the end for me. I mean, it's – you know, I mean, I – this is my life and I didn't want to get fired. And it's – I was just trying to hang in there to get my pension and to receive my medical.

Q: So, when you received these points, were you worried about receiving your pension?

A: Yes. I was.

. . .

Q: Are you drawing a pension now?

A: Yes. I am.

Q: And how much is your monthly pension from Albertsons?

A: It's only $745 because of the – the missed days, I lost the vestment.

Q: Okay.

A: So, I lost out of my pension.

Q: Those vested days, though, were because you couldn't work due to illness. Correct?

A: Yes. Correct.

Q: Okay. And what would it have been like for you had you not gotten a pension?

A: It would be devastating.

Q: Okay. And if you hadn't lost --- if you had lost your job shortly after December 31, 2017, because you had too many points, how would that have affected your ability to support your household?

A: It would have affected it a lot. I mean, I'm – I'm the sole worker in the household. I mean, I'm with my wife, but we've been – we're on 50 years we've been married. And she – she hasn't had a job in her life. It's – I've always supported her. So, it's only the one income that comes in, and we're relying on that for whatever time we have left. So, it affected me a lot.

Q: When you received the points that are listed on 6.1, did you worry about your future?

A: I worried about all of the points, especially being that – at this close to retirement and towards the end of my career.

Q: How long did that impact – how did that impact you emotionally and mentally?

A: Day and night, because my – I worried about it because I knew my condition. I mean, it's like I – I know I – I had the recurring knee pain. I mean, it's just over the years I – it just got bad. I mean, it's not like – I know I said earlier like I've always had knee pain, but I meant, it's like towards the end, it's just wear and tear from all the years of – I mean, I've had, you know, 47 years of driving and it just caught up. It catches up with you. Wear and tear. And it – it was just thinking that, I might not make it. I might not be able to stay here. And especially with the point system, it scared the heck out of me because not only that, you have ben working too to get the pension to put in for the union pension to get the medical. And I was just waiting for that. They knew what I worked. My supervisors knew it. I mean, I had days where I'd walk in and they'd go, "Hey, how you doing? How your knees doing? How you doing?" You know, and I go, "Okay. Just hanging in there." And they knew as soon as my – as soon it came through with my paperwork, I was gone. And as soon as it came through, I was gone. So, it did. It devastated me.

Q: Which management officials at Albertsons knew of your –

A: Oh, they all did.

Q: – knee pain?

A: They all did.

. . .

Q: What are the names you remember of the people who were aware through your telling them about your knee problems?

A: Well, I mean, Imed (ph), I don't know his last name. He was the supervisor there. Shelley, she was there. Nicole, everybody there. Leonard. They all knew, and not only that, they knew visually because I – I was always wearing two braces.

> Q: Did – did – when you were issued these points, did it affect your ability to obtain restful sleep?
>
> A: Yes. It did. Because my – I mean, it bothered me enough during the day but at night, I couldn't get to sleep because my mind was just running, thinking that, okay, now I got through the day, now I got to get through tomorrow. And it – and then I kept calling the – the union, asking them about the pay person. Every time I issue – to put in for the medical, they send it back, this is wrong, that's wrong. And it – just everything was affecting me. And I was just waiting. And I mentioned it to the supervisors, and to people in the office, and they go, "Well, I thought you were retiring." And I go, "Yeah. As soon as my paperwork comes through and they keep sending it back to me. But as soon as it comes, I'm gone." So, of course, it did affect me.

(TR I, 187:9 – 191:25.)

Mr. Soto testified he needs his union pension. His present sources of income include "a pension that I get with the one I mentioned from the Teamsters and then Social Security. And then I'm with the Disabled American Veterans. I get $135 a month from them. And that's it" (TR I, 192:13-19). If he had to choose between driving unsafely or being fired, he would have chosen to drive because of his future, and his wife's (TR I, 192:7-12).

Mr. Soto is aware Albertsons later removed the attendance points from his attendance record (TR I, 194:18 - 195:5; 196:6-10).

4. Mr. Traister's Testimony

Brian Traister worked as a Class A driver for about 39 years, including about 20 years with Vons and then Albertsons (TR I, 204:12 - 205:7). He was a member of Teamsters Local 848 during the seventeen years he worked for Vons, and a member of Local 952 while employed by Albertsons (TR I, 205:8-17). While employed by Albertsons, he reported to work in Brea (TR I, 205:21-23). He last worked for Albertsons on November 22, 2020 (TR I, 206:24-25), having been fired for alleged discrepancies in his time records. Mr. Traister has grieved his termination, and the matter is currently on appeal before the National Labor Relations Board (TR I, 228:16 - 229:17). He has also filed a civil action against Respondent over his termination (TR I, 236:12-15). He contends his termination was retaliatory (TR I, 228:23 - 229:4).

Mr. Traister described his job duties, and the reasons they require alertness in order to be performed safely, substantially as the other driver witnesses did (TR I, 212:12 - 216:2).

Mr. Traister was a union shop steward from 2006 at Vons until his last day of work for Albertsons, first with Local 848 and then with Local 952 (TR I, 207:13-22). At no time while he worked for Albertsons did he ever receive a memo indicating the company would not issue attendance points against drivers who refused to drive because of illness or fatigue. At no time while he worked for Albertsons did he hear any oral representation for anyone that Albertsons would no longer assess attendance points against drivers who refused to drive because of illness or fatigue (TR I, 207:1-12).

As documented on CX 7, Albertsons assessed attendance points against Mr. Traister for missing work on August 10, 2017; September 28, 2017; January 30, 2018; February 22, 2018; and March 2, 2018. On all of those days, Mr. Traister missed work because he was too sick to operate a commercial motor vehicle safely (TR I, 207:23 - 212:8). He testified,

> I'm not one to miss work. And I'm – and I – I'm a good worker and I'm a good employee. So, for me to miss work, I'd have to be really sick. And I've gone to work sick. Okay? You know, where I shouldn't have. I made that mistake and I went. And I've ended up – I ended up sitting on the side of the freeway, you know, going to the restroom in a coffee can, and throwing up and doing that, and I've you know, I mean – and – and that's – that's how bad it's gotten.

(TR I, 216:11-19.) Mr. Traister learned the attendance points had been assessed against him on April 11, 2018 (TR I, 207:23 - 208:12), and the knowledge caused him to "stress out" (TR I, 229:18-24). He testified,

> Well, yeah. It – it – it affects my home life when I'm at home. It affects – the affects my – my kids at the time, my wife. It affects everything. And – and you know, I'm sure you – you wouldn't understand because you're an attorney. You're not a driver. But to be a driver out there, and then – and – and be in our shoes. You know, and it's a whole different world because your license is your life.

(TR I, 230:20 - 231:2.)

The attendance points were upsetting to him for another reason. He testified he had repeatedly complained, first while employed at Vons and later at Albertsons, that assessing attendance points against drivers who missed work because they could not drive safely because of illness or fatigue was illegal. "I brought it to their attention in 2006, that – that the way they were doing their point system was illegal. And we met several times over the years. And I met with Albertsons' people in 2015, Deborah Conrad and Diana Gonzalez and all them. And – and we met with

them again, and explained to them that their point system was illegal in how they were doing it" (TR I, 217:9-16).

He recalled a meeting in 2015 he attended, together with Ralph Black, the business agent for Local 848; Juan Medina, another business agent from Local 848; Karen Smith, the manager for Vons Transportation;[7] Brenda Montoya, transportation supervisor for Vons; "Diane Gonzalez, who was just under Deborah Conrad at the time. And Deborah Conrad was there" (TR I, 218:8-22).

> Q: Who, specifically, told the company on May 28th, 2015 that their point system was illegal?
>
> A: I did.
>
> Q: Okay.
>
> A: Like I did several times.
>
> Q: What – okay. When else, besides May 28th, 2015, did you tell company representatives that their absenteeism – or their point system was illegal?
>
> A: Several times from 2006 to 2015, and then after that, several times after the fact. I've even filed grievances after 2015, and then before 2015.
>
> Q: After you moved from Vons to Albertsons, did you ever raise with Albertsons' management any allegation of illegality of their point system as applied to drivers who refuse to drive due to illness or fatigue?
>
> A: Yes.
>
> Q: Okay. What did you do?
>
> A: I went and spoke with them and told them that their system was illegal, and that they're in violation of the STAA rules.
>
> Q: Okay. I don't know anybody named "them." "I spoke with them." With whom did you speak?
>
> A: I spoke with Scott Dukes.
>
> Q: Who is Scott Dukes?

[7] Ms. Smith would later assume a management position at Albertsons (TR I, 219:13-17). At the time of the meeting, Deborah Conrad worked for Albertsons (TR I, 222:8-14).

A: Transportation manager. Trucking manager.

Q: At what facility?

A: Brea.

(TR I, 225:4 - 226:5.) Mr. Traister further testified,

> Q: If you had it to do over again, and you were faced with enough points that the next point would get you fired, but you were nonetheless, too ill to safely drive, would you drive the truck?
>
> A: I would drive the truck.
>
> Q: Why?
>
> A: I didn't – I couldn't afford to lose my job. I had bills to pay like everybody else.

(TR I, 228:6-13.)

5. Ms. Sykes' Testimony

Laura Sykes is the Human Resources Manager at Albertsons Irvine Distribution Center, where she has worked for twenty-seven years (TR II, 261:22 - 262:6). She is responsible for the operation of the Human Resources department, which includes recruiting, talent acquisition, employee development, and attendance, and "we uphold all the policies" and "partner with payroll" (TR II, 262:7-22). The Human Resources Department decides whether to assess an attendance point against a driver (TR II, 291:23 - 292:3). Ms. Sykes' immediate supervisor is the General Manager, Joe Patterson (TR II, 262:23-25).

She acknowledged the Irvine Distribution Center Driver Manual contains this language:

> Albertsons depends on its employees to work as scheduled or as called in, and to arrive on time so that the D.C. can meet production and delivery schedules. For this reason, you are required to review the work schedule each week, and to report to work at the assigned time. Repeated absences or tardiness, regardless of the reason, will result in corrective action up to and including discharge.

To her knowledge, this provision in the manual has never been modified. But she testified it does not mean a driver can be disciplined for any absence (TR II, 266:4-23; *see also* CX 1, p. 1.5.) This is because the Manual also includes an exception to

the attendance policy at CX 1, p. 1.7: “The exclusions to this policy will be time off approved in advance, time off permitted by the Collective Bargaining Agreement, or time off provided for by law” (TR II, 267:18 - 268:20; *see also* CX 1, p. 1.7). She testified,

> Q: How is the driver supposed to know that that’s what that means?
>
> A: Well, it says anything covered by the law. So –
>
> Q: Okay.
>
> A: -- yeah, I guess, it would be subject to their interpretation, but, I mean, we do go over the – the policies.
>
> Q: Okay. You – “we” go over the policies. Who is “we” who goes over the policies?
>
> A: “We” in orientations – I’m sorry, to answer your question, “we” would be somebody in Human Resources.

(TR II, 268:21 - 269:6). But she did not know whether Mr. Raziano had been so advised at his orientation, although she was present at the time (TR II, 269:7-17; 269:24 - 270:4).[8] She also did not know whether Messrs. Traister, Soto, or Davis had been told they would not receive attendance points for missing work because they were too ill or too fatigued to drive safely (TR II, 269:24 - 270:2). She later clarified by testifying

> Q: Okay; So, you go through orientation in 2017, and is that – that’s – you’re – you’re maintaining that, at least the drivers who went through orientation were, in fact, as of 2017, being informed of – that they would not receive points for booking off work due illness?
>
> A: I – I did not say that. I said, at that time, we didn’t go into the – the granularity of that exclusion component. So, that we wouldn’t have said that, in that orientation.

(TR II, 272:9-17.) And although the Human Resources Department educates drivers about discrimination based on race, religion, national origin, age, and disability, it does not provide training about drivers’ rights under the Surface Transportation Assistance Act:

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[8] Specifically, she answered “I know that Raziano went through an orientation on or around October of 2017, I believe it was. But – but whether or not the specifics, as you just stated, were specifically said, I don’t know that we dove into the granularity of that component” (TR II, 269:12-17).

Q: Is it your position that the STAA is not a discrimination law?

A: I don't particularly get into the granularity of – of STAA. I know for a fact we don't.

(TR II, 274:2-5; 273:5-22.) Ms. Sykes further testified the Attendance Policy is described similarly in the Brea Distribution Center Drivers' Handbook, with the same exception; and she does not know if drivers in Brea are told that time off due to illness or fatigue that impairs the driver's ability to drive safely is included in the exception (TR II, 284:3 - 285:8).

Ms. Sykes acknowledged Albertsons had assessed attendance points against Mr. Raziano, Mr. Davis, Mr. Soto, and Mr. Traister for missing work because they were too ill to drive safely, as they had earlier testified, and as set forth on CX 4, CX 5, CX 6, CX 7, and CX 8 (TR II, 271:6-14; 280:10 - 282:10; 283:8 - 284:2; 286:17 - 287:11). But

Q: Okay. And in terms of, you know, issuing points for a driver who reported that they were ill or sick or fatigued, during your time, was there ever any changes made to how that policy was interpreted and how it was implemented?

A: Yes.

Q: Okay. And yeah, if you could, kind of, explain, you know, how you became aware of that, how that occurred, and what the change was.

A: Sure. So, on or around August of 2018, we had received word from our associate relation partners,[9] which do not sit in this facility, that effective immediately and going forward, if a driver calls off citing sick or fatigue, that we were no longer to point.

Q: Okay. And as part of that process, did they ask you to do anything about prior points or discipline that was issued previously to drivers that had reported that they were too sick or ill to drive?

A: They did.

[9] Ms. Sykes later testified that Associate Relations is part of Albertsons management, located in the Fullerton Division Office, "and they sit with our Labor Relations team" (TR II, 314:5-19).

> Q: And yeah, so, just, kind of, be able to explain what – what that – what they asked you to do, and what you did.
>
> A: Yeah. So we were – we were asked –we were asked to scrub all of the files for the 230 drivers that we had, give or take. And that we were to – anything that had been identified as sick or had called in as fatigued, we were to remove the points and/or remove any discipline that may have been generated as a result of that.
>
> Q: Okay. And I was going to say, how long did that process take?
>
> A: Oh, it took several months. It – it – it probably took us up through December of 2018.

(TR II, 292:25 - 294:6). The same corrections were made to the records of the drivers at the Brea facility (TR II, 296:2-7).

Ms. Sykes attended some of the orientation meetings for drivers in 2017, but she does not remember any driver asking questions about the Attendance Policy (TR II, 304:24 - 308:4). She has no knowledge or recollection of the May, 2015, meeting, about which Mr. Traister had testified earlier (TR II, 308:25 - 309:5). She was not aware in 2017 of any "complaints, concerns, or grievances filed by drivers" about the Attendance Policy (TR II, 310:1-6).

She testified there was no announcement at the Irvine Distribution Center to inform drivers that the Attendance Policy would be interpreted differently than it had been in the past (TR II, 316:12-16).

6. Mr. Vega's Testimony

Arturo Vega has worked for Albertsons for fifteen years and is currently the transportation superintendent (TR II, 326:20-24). His responsibilities, with respect to Albertsons Attendance Policy, are to document calls from drivers, update the work schedule as necessary, record the information on a computer drive, create a document called an IAR for the driver to sign when he or she returns to work, and then forward the IAR to the Human Resources Department (TR II, 329:12-24; 330:9-17). Mr. Vega's department does not make determinations or issue attendance points to drivers (TR II, 329:25 - 330:6).

Four to five years ago, Mr. Vega recalls drivers asking questions about being given attendance points for missing work because they were too sick to drive safely. He understands the Human Resources Department reviewed the question and made changes so that points are no longer assessed under those circumstances (TR II, 331:25 - 333:2).

Mr. Vega testified CX 1 is taken from the most recent edition of the Irvine Distribution Center Drivers' Manual, which is still in effect today (TR II, 333:3-19). The description of the Attendance Policy in the Manual has not changed, but the interpretation of the policy has changed (TR II, 334:1-12). Mr. Vega was not involved in that change in any way (TR II, 343:13-16). He does not remember any drivers, at the time of the merger between Albertsons, Safeway, and Vons, raising any questions or concerns about the Attendance Policy (TR II, 334:21 - 335:12; 337:24 - 338:3). At the time of the merger, he was unaware of CX 9 or of any issues between drivers and management at Safeway or Vons over those companies' attendance policies (TR II, 344:12-25).

Mr. Vega receives employee grievances and forwards them to his manager and the Labor Relations department (TR II, 342:10-15), but he does not remember any grievances about the assessment of points to drivers who reported they were too sick or fatigued to drive safely (TR II, 342:25 - 343:4).

Mr. Vega has not taken steps to educate drivers about the change in Albertsons' interpretation of its Attendance Policy (TR II, 347:11-20).

7. Mr. Bohn's Testimony

Brent Robert Bohn began working for Albertsons Companies, Inc., in 1999, when he became the Director of Labor Relations for the Southern California Division (TR III, 6;2-11). By 2017 and 2018, he was also the Vice President of Labor Relations and Human Resources in the Southern California Division as well (TR III, 6:12-16). In both of these positions, he has direct responsibility for the Brea and Irvine, California, Distribution Centers (TR III, 6:17-25). Additionally, no later than 2018, he was responsible for labor negotiations in the Portland Division, which includes the entire state of Oregon (TR III, 15:13-22). Mr. Bohn is admitted to practice law in California, having been licensed since 1991 (TR III, 34:9-15), and was formerly employed by the firm Paul, Hastings, Janofsky and Walker (TR III, 40:11 - 41:6).

Between 2000 and 2005, Mr. Bohn negotiated with Teamsters Local 952 – the union representing drivers at the Brea and Irvine Distribution Centers – an attendance policy applicable to members of the union (TR III, 11:22 - 12:2). Mr. Bohn describes this policy as a "no-fault" policy (TR III, 10:6-7). Unlike collective bargaining agreements, this attendance policy had no expiration date (TR III, 7:25 - 8:21). That attendance policy is set forth in EX 1 (TR III, 8:22 - 9:9).

Negotiations on the attendance policy lasted from four to six months (TR III, 9:22 - 10:1). During those negotiations,

> Q: . . . did it ever come to your attention of any issues related to Department of Transportation regulations relating to drivers

reporting if they were too ill or fatigued to drive and how that would have any impact on this attendance policy?

MR. TAYLOR: It's a compound question. If he could break it down.

JUDGE LARSEN: That's true. Do you understand the question, Mr. Bohn?

THE WITNESS: I do.

JUDGE LARSEN: You may answer, if you understand.

THE WITNESS: Yes. Simply put, the issue never came up during our negotiations.

BY MR. PEREZ:

Q: And during your negotiations with the union, did the whistleblower standard under the Surface Transportation Assistance Act, did that come up during the negotiations with the union?

A: No.

Q: And at the time you were negotiating this contract, was any information provided to you that the issuance of points to drivers who would report that they were too ill or fatigued to drive would be considered or could be considered a violation of either Department of Transportation regulations or the STAA?

A: No.

(TR III, 13:9 – 14:10.) Mr. Bohn likewise was unaware, during those negotiations, of CX 11, sometimes referred to as the "Dan Henry Settlement Agreement" (TR III, 14:19 - 15:6). In fact, Mr. Bohn admittedly had no knowledge of the whistleblower provisions of the Surface Transportation Assistance Act before 2018 (TR III, 34:22-24).[10]

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[10] In rebuttal to this assertion, Mr. Raziano testified he had seen an arbitration award issued in 2002 in favor of two drivers at the Brea Distribution Center who contended they had been issued attendance points for refusing to drive after reporting they were too fatigued to drive safely. That arbitration award, according to Mr. Raziano, cited the Surface Transportation Assistance Act, and identified Mr. Bohn "as consulting" (TR III, 44:4-24). After the hearing, I allowed Complainants to file a copy of the union's brief in that arbitration as CX 29, and a copy of the arbitration award as CX 30. The union's brief cites STAA and cases decided under the STAA (CX 29, pp. 8-9, 13-14). In the arbitration award, the arbitrator also cites two cases decided under the STAA in finding for the grievants

But early in 2018, Mr. Bohn learned that a driver in Portland had filed an OSHA complaint about the issuance of attendance points to drivers who reported they were too ill or fatigued to drive (TR III, 15:8 - 16:2). Mr. Bohn was surprised by the complaint; "[i]t was something that I wasn't aware of as being a legal issue" (TR III, 16:3-8). Mr. Bohn sought counsel from an outside law firm, and learned "a driver who lets a company know that he or she is too ill or fatigued to drive should not be disciplined as a result of making that statement" (TR III, 17:7-18). At about the same time, Mr. Bohn learned of the Dan Henry Settlement Agreement, CX 11 (TR III, 17:19-22).

> Q: And so after you received that information about the research that was done, what steps did you take after that point?
>
> A: After we got the opinion from the outside counsel regarding the complaint in Oregon?
>
> Q: Yes.
>
> A: We then let – I, myself, my director of labor relations, we let our facility know – the facilities in southern California, Irvine and Brea, know that drivers should not be disciplined as a result of them letting the company know that they were too ill or too sick or too fatigued to drive.
>
> Q: And do you recall when that would have been communicated?
>
> A: Sometime in the summer of 2018.

(TR III, 17:23 - 18:11.) Later, Mr. Bohn testified

> Q: Yeah. So, Mr. Bohn, again, after you received the information from outside counsel after you had received that OSHA complaint, what step did you take in terms of reevaluating the attendance policy?
>
> A: We did not change the attendance policy. I conveyed to the facilities that – and did so through our Labor Relations Manager, Diana Gonzalez, that drivers were not to be given points if they told the facility that they were too sick, too ill, or fatigued to drive.

(CX 30, pp. 9-10, 19). I find no mention of Mr. Bohn in CX 30. The union's brief, CX 29, avers that after the two drivers refused to drive, "David Moore and Brent Bohn, members of the Employer's Labor Relations Department, were consulted regarding the grievants' refusal to drive after completing their eight hour spotting shift."

Q: And do you recall roughly the time – like the timeframe that that would have occurred those communications *[sic]*?

A: Sometime in the late summer of 2018.

Q: And actually that kind of brings up a good point because you mentioned that there was no written – so there was no written changes to the actual policy that was before you like, for example, under RX 1?

A: That's correct.

Q: And why did you feel it was not necessary to make any written changes to the policy?

A: I can pull it –

MR. TAYLOR: Relevance objection.

JUDGE LARSEN: Overruled. You may answer.

THE WITNESS: I can pull it up. I don't have it in front of me right now. There's a section in the attendance policy that talks about the inapplicability of the policy should it conflict or the like with the law.

(TR III, 21:19 - 22:19; *see also* TR III, 41:7-12 (no written changes made to the Irvine or Brea attendance policies since 2018).)

Q: -- under the exclusion section then on page 2, RX 1, page 2.

A: Oh. Yeah. That's exactly – so the exclusion says policy will be time off approved. Obviously, when we bargained with the union, they were very insistent that if someone took time off that was approved that couldn't count as a point, but we also included in there that time off that's provided for by the law would not be considered to be a point that would lead to discipline either.

Q: And again, just to kind of come back to it. So how did you assess that provision in combination with the information that was provided by outside counsel in terms of the assessments of points under this policy?

A: Because of that provision of the agreement, I didn't feel as though we needed to change the actual policy itself, but we

needed to make it clear that how the policy was implemented on a local level didn't run afoul with any provisions of the law.

Q: And I was going to say is there any concerns about having to document or specify every single law that might be out there that may be impacted by this attendance policy?

A: I didn't think so.

(TR III, 23:18 - 24:14.) For example, Mr. Bohn acknowledges Albertsons should not assess an attendance point against a driver who lawfully exercises his or her rights under the Family Medical Leave Act (TR III, 25:8-17).

Mr. Bohn does not know what efforts, if any, Albertsons made to inform the affected employees of its decision to stop assessing attendance points in derogation of the Surface Transportation Assistance Act after 2018 (TR III, 42:16-21).[11]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent implicitly acknowledges it violated the STAA by counting as an "occurrence" under its attendance policy the absence from work of a driver who reasonably and in good faith believed he or she was too ill or too fatigued to drive safely. According to Mr. Bohn, Respondent's lawyers told it so in the summer of 2018, after an Albertson's driver outside of California raised the issue, and Mr. Bohn directed the Irvine and Brea Distribution Centers to stop the practice (TR III, 17:7 - 18:11). Ms. Sykes received such instructions and expunged occurrences from the records of sick or fatigued drivers at the Irvine Distribution Center thereafter in late 2018 (TR II, 292:25 - 294:6). Respondent offers no defense for its previous practice other than its own ignorance of the law.[12] Neither is there any evidence of record to show any of the Complainants were not, in fact, too sick or fatigued to drive safely, as they testified they were. It follows that the Complainants engaged in pro-

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[11] Mr. Raziano testified he has not seen, at any time since 2018, any notice that Albertsons had changed the implementation or application of the attendance policy with respect to ill or fatigued drivers. He testified he has never been notified of any such change (TR III, 47:11-23).

[12] I know of no authority, and Respondent cites none, to suggest a motor carrier need not comply with STAA so long as it is ignorant of STAA. What is more, Mr. Bohn, a member of the State Bar of California who negotiated the attendance policy with the union, should been aware of STAA before mid-2018. According to undisputed testimony in the record before me, Mr. Raziano had raised the question with Ms. Holmvik and Ms. Sykes in 2017 (TR I, 41:17 - 42:17). Mr. Traister made similar complaints to Deborah Conrad and Dina Gonzalez in 2015 (TR I, 217:9-16) and later to Transportation Manager Scott Dukes (TR I, 225:4 - 226:5). A 2002 arbitration award against Respondent cites two cases decided under the STAA in finding against Respondent (CX 30, pp. 9-10, 19). Respondent's management in general, and Mr. Bohn in particular, ought not to have been ignorant of STAA and the applicable regulations, and their implications for the attendance policy, even in the absence of these episodes. But their ignorance is all the more shocking given the fact that their employees appear to have understood the issue clearly, and to have raised it on several occasions.

tected activity when they missed work because they were too ill or too fatigued to drive safely. 49 C.F.R. section 392.3; *Ass't Sec'y and Bailey v. Koch Foods, LLC,* ARB No. 10-001, ALJ No. 2008-STA-61, at 9-10 (ARB Sep. 30, 2011). It likewise follows they suffered an adverse employment consequence when Respondent counted those absences as a step towards warning, suspension, and termination. 29 C.F.R. section 1978.102, subsections (a) and (b).

Accordingly, I reject Respondent's argument that Complainants have not made a *prima facie* case for relief (Respondent's Brief, pp. 12-17).

I likewise reject Respondent's argument that these claims are moot because Respondent corrected the Complainant's records to conform to the STAA (Respondent's Brief, pp. 18-20). In this case, there is no evidence to show Respondent ever communicated to its drivers that it had decided, in 2018, to interpret the attendance policy in such a way as to make it consistent with STAA. Mr. Bohn knew of no such communication (TR III, 42:16-21). Ms. Sykes knew of no such communication (TR III, 42:16-21). Mr. Vega has had no part in any such communication (TR II, 347:11-20). Mr. Raziano has never received any such communication (TR III, 47:11-23). Neither has Mr. Traister (TR I, 207:1-12). For all I can tell from the record, when Respondent realized it had been violating STAA, it did not acknowledge its mistake to anyone outside management. Instead, it simply construed the written language of its attendance policy in a new way, so that absences protected by STAA would henceforth be considered "time off required by law" as an "exception" to the policy (CX 1, p. 1.7; CX 2, p. 2.4). Once Respondent privately decided its attendance policy actually *required* that which it had been previously understood to *forbid*, it kept this epiphany a secret from its employees. At driver orientations, according to Ms. Sykes, she never said so (or, as she more euphemistically put it, she "didn't go into the – the granularity of that exclusion component" when presenting it to new drivers (TR II, 272:9-17; 274:2-5)).

Respondent's decision not to notify its employees of the change in the attendance policy after 2018 seriously undermines its contention that it acted at all times in this case in good faith. On the contrary, Respondent's silence retained the *in terrorem* effect of the old unlawful interpretation of the policy. The record shows the four Complainants, for example, were in fact confused by Respondent's silence and reasonably continued to fear adverse employment consequences which STAA prohibits, even if Respondent had privately decided not to impose them.[13] Complainants had been advocating for this change in the attendance policy for some time. Respondent appears to have agreed they were right, but carried on as if they were wrong. Respondent offers no justification for its silence on this point, and I see no legitimate business purpose in it. It misled Respondent's employees and further

[13] The record before me likewise suggests Respondent did not tell the union about its new interpretation of the attendance policy, even though that policy was part of a collective bargaining agreement with the union (TR III, 11:22 - 12:2).

undermined their trust. Even now, Respondent appears to see nothing wrong with having hidden its new interpretation of the attendance policy from the employees who are affected by it.

Under STAA, a successful complainant is entitled to compensatory damages. 49 U.S.C. section 31105, subsection (b)(3)(A)(iii). Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091; ALJ No. 2006-STA-032 (ARB Sep. 24, 2010). To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Id.* More importantly, an award for emotional distress may be based solely upon the employee's testimony. *See, e.g., Jackson v. Butler & Co.,* ARB Nos. 03-116, -114; ALJ No. 2003-STA-026, slip. Op. at 9 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095; ALJ No. 2002-STA-035, slip op. at 17 (ARB Aug. 6, 2004). In this case, the Complainants' testimony about their emotional distress was credible, and undisputed. I find the evidence supports an award of compensatory damages of $5,000.00 to Mr. Raziano and Mr. Soto. Given the fact that they had accumulated six and five "occurrences" and in violation of STAA respectively, I award $10,000.00 in compensatory damages to Mr. Davis and Mr. Traister.

Under STAA, I may also award punitive damages of not more than $250,000.00. 49 U.S.C. section 31105, subsection (a)(3)(C). Punitive damages are appropriate where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . .." *Smith v. Wade*, 461 U.S. 30, 51 (1983). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS section 908(1) (1979). The focus is on the character of the tortfeasor's conduct – i.e. whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. *Id.* At 54. In my judgment, a motor carrier's ignorance of STAA is outrageous, and does not excuse a carrier's failure to comply – even in the absence of any complaint by any employee, and even in the absence of any arbitration referring to it. By its own admission, Respondent gave no thought to STAA when it negotiated the attendance policy with the drivers' union, or when it enforced that policy in derogation of STAA, even after the drivers themselves raised the issue. A motor carrier must know and follow the STAA. It is an essential requirement of a motor carrier's business. And if it must change a policy to conform to the STAA, it should not keep affected employees in the dark about it.

Here – as demonstrated most irrefutably by Respondent's immediate abandonment of the practice on the advice of counsel in 2018 – there is no question that it was, from the early 2000s until 2018, the corporate policy of Albertsons, LLC, to impose progressive discipline on drivers who missed work because they could not

operate a motor vehicle safety by reason of illness or fatigue. This practice was inimical to the purpose of STAA. Respondent contends I should overlook this fact because "[t]here is no evidence that Respondent acted with a willful, wanton or reckless disregard for the law," and no evidence that its attendance policy was "designed or implemented to retaliate against Complainants or drivers for exercising their rights under the STAA or for complying with DOT safety regulations" (Respondent's Brief, p. 21). These arguments are unpersuasive, not only because Respondent was obligated to know about STAA and had reason to know about STAA, but because the attendance policy in fact retaliated against Complainants and drivers for exercising their rights under STAA, regardless of Respondent's intentions. If Respondent did not intend to violate STAA, it would have only its own inexcusable ignorance to thank. To be sure, the unlawful attendance policy did not cause as much harm as it had the potential to cause, a happy circumstance which owes more to Respondent's dumb luck than to the purity of its intentions. Because the attendance policy might have caused considerably more harm than it actually did, I decline Complainants' invitation to award the statutory maximum, and instead award punitive damages of $150,000.00 to deter Respondent's inexcusable ignorance of STAA on the record before me, and its decision not to tell affected employees of its intention to change its ways and follow the law.

Under 49 U.S.C. section 31105, subsection (b)(3)(A)(i), I may also require Respondent to take affirmative action to abate the violation. Finally, under 49 U.S.C. section 31105, subsection (b)(3)(A)(iii), I may award attorney fees and costs to the Complainants.

ORDER

1. Respondent must pay compensatory damages in the amount of $5,000.00 to Mr. Raziano and Mr. Soto.

2. Respondent must pay compensatory damages in the amount of $10,000.00 to Mr. Davis and Mr. Traister.

3. Respondent must pay punitive damages of $150,000.00.

4. Respondent must notify in writing to all drivers and other employees subject to its attendance policy at the Brea Distribution Center and the Irvine Distribution Center that

(a) the STAA prohibits Respondent from penalizing drivers who are absent from work because they are too ill or too fatigued to drive safely;

(b) Respondent has, in the past, violated STAA by imposing progressive discipline on drivers who were absent from work because they were too ill or too fatigued to drive safely, and will no longer do so; and

(c) the Department of Labor has ordered Respondent not to impose progressive discipline on drivers who are absent from work because they are too ill or too fatigued to drive safely.

Respondent must deliver notice to each person entitled to receive it either by first-class mail, personal delivery, or both.

5. Complainants' counsel is entitled to recover attorney fees and costs under 49 U.S.C. section 31105, subsection (b)(3)(A)(iii). Counsel must file a fee petition within 30 days of the date the District Director serves this order. Respondents must file their objections within 14 days of service of the fee petition (or, if they have no objections, must file a statement of non-opposition within 14 days of service of the fee petition.) If Respondents file objections, 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. Both parties are charged with the duty to arrange the meeting. Within seven days of the meeting, Complainants' counsel must file a report identifying the objections that have been resolved, the objections that have been narrowed, and the objections which remain unresolved. The report may also reply to any unresolved objections.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within **fourteen (14) days** of the date of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupa-

tional 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).

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.