UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 07 June 2023

CASE NO.: 2021-STA-00054

In the Matter of:

COREY D. ROUSE,
Complainant,

v.

COBB INDUSTRIAL, INC. /
STULL TRUCKING, INC.
Respondents.

Before:

Timothy J. McGrath, Administrative Law Judge

Appearances:

Peter LaVoie, Esq.,
Truckers Justice Center, Edina, Minnesota,
For Complainant

Collin Hatcher, Esq.,
King, Yaklin, & Wilkins, Marietta, Georgia,
For Respondents

DECISION AND ORDER

This proceeding arises from a complaint of discrimination filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act ("STAA" or "Act"), as amended, 49 U.S.C. § 31105, and the procedural regulations found at 29 C.F.R. Part 1978.

On March 11, 2020, Corey Rouse ("Complainant") filed his amended complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") alleging

that Cobb Industrial, Inc., and Stull Trucking, Inc. ("Respondents")[1] violated the employee protection provisions of the Act when he was terminated from employment on January 24, 2020, in retaliation for reporting workplace safety concerns and refusing to drive in violation of the Act.

After investigating, OSHA dismissed the complaint on May 20, 2021, finding no violation of the Act. Complainant timely filed objections to the OSHA findings and requested a hearing before the Office of Administrative Law Judges ("OALJ"). The matter was then assigned to me, and I presided over a virtual hearing via the Microsoft Teams Meeting platform on October 4, 2022. The trial transcript is referred to herein as "TR."

At the hearing, I admitted Joint Exhibits ("JX") 1 through 5; Complainant's Exhibits ("CX") 1 through 3; and Respondent's Exhibits ("RX") 1 through 6. TR 6, 8-12. Testimony was heard from Complainant as well as from Scott Miller ("Miller") and Crystal McPherson ("McPherson") of Cobb Industrial ("Cobb") and Stull Trucking ("Stull"). I also took official notice of all filings made with the OALJ in this matter. TR 13. Complainant and Respondent filed post-hearing briefs ("Compl. Br." and "Resp't. Br.", respectively) on December 5, 2022.

I base my decision on all the evidence admitted, relevant controlling statutory and regulatory authorities, and case law and arguments of the parties. As explained below, I find Complainant has met his burden of proving his claim by a preponderance of the evidence and is therefore entitled to remedies.

I. Stipulations

The parties stipulated to a number of things. Those stipulations are generally supported by the record, and I make the following findings of fact based upon them:

(1) Complainant was an employee as defined by the Act. He was not a member of the labor union, and his employment was not subject to a collective bargaining agreement;

(2) From December 6, 2019, to January 24, 2020, Respondents employed Complainant to operate motor vehicles having a gross vehicle rating of 10,0001 pounds or more on the U.S. highways to transport property and commerce;[2]

(3) On January 24, 2020, Respondents terminated Complainant's employment;

(4) On February 28, 2020, Complainant filed a complaint with OSHA alleging the Respondents had discriminated against him and discharged him in violation of 49 U.S.C. § 31105. The complaint was timely filed;

(5) On March 11, 2020, Complainant filed an amended complaint with OSHA;

[1] Complainant also listed Scott Miller as a party, but the Notice of Docketing from June 1, 2021, did not identify Miller as a respondent. However, I will address Miller's liability as part of this decision and order.

[2] Parties stipulated to November 1, 2019, as the start date of employment, but this is not supported by other documents in the record. I address this discrepancy later in this decision. I also address Cobb Industrial's argument that only Stull Trucking was Complainant's employer.

(6) On May 20, 2021, OSHA rendered a decision and found "Respondent terminated Complainant for insubordination . . . and not in retaliation for any activity protected by the STAA";

(7) On June 14, 2021, Complainant filed timely objections to the OSHA decision and requested a hearing de novo before an administrative law judge of the Department of Labor; and

(8) The Department of Labor OALJ has jurisdiction over the parties and the subject matter of this proceeding.

JX-5 at 1-2.

II. Findings of Fact

A. Complainant's Testimony

1. Background

Complainant has been a truck driver for 34 years and first obtained his commercial driver's license in July 1988. TR 17. In November 2019, Complainant interviewed with Robert Stull to work for Stull Trucking at its truck terminal in Marietta, Georgia. TR 19-20.[3] At the time Mr. Stull hired Complainant, he informed him Stull Trucking had merged with Cobb Industrial, and Cobb would eventually "buy them out." TR 20. According to Complainant, the truck terminal sign listed Cobb Industrial, not Stull Trucking, as the owner. TR 21. Complainant's paychecks were issued by Cobb Industrial. TR 21. His W-2 statements for 2019 and 2020 also list Cobb Industrial as his employer. TR 63; CX-3.

Complainant worked as an over-the-road flatbed driver hauling steel beams and coils. TR 21-22, 30. There were five to ten drivers working out of the Marietta terminal at the time, but Complainant drove the same truck every day. *See* TR 21, 24.[4] Respondents leased the truck from another company and paid for all operating expenses, including fuel. TR 24. The truck was relatively new and had a sleeper cab. TR 24-25. Initially, Mr. Stull gave Complainant his assignments and functioned as his dispatcher. TR 28-29. Because Complainant did not have a personal vehicle, Mr. Stull gave him permission to drive the truck to and from his home. TR 31. Later, Scott Miller took over as the terminal manager. TR 28-29.

Complainant would most often make steel deliveries to Ohio and Pennsylvania. TR 25. Stull or Miller would contact him via cell phone to let him know about a job, and then he would go into the truck terminal office to pick up the paperwork for his assignment. TR 34, 49, 96; *see* JX-4 at 1-3. Complainant was paid by the mile while driving and by the hour while on-duty but not driving. TR 26. To avoid traveling back from a delivery with an empty flatbed, which would

[3] Complainant's employment application only lists Stull Trucking. *See* TR 65-66; RX-1 at 33-37.

[4] Complainant testified there were eight to ten total drivers, whereas Miller testified there was four over-the-road and one local driver. TR 21, 136.

have been a wasted or "dead head" trip, Complainant would pick up "back hauls" to convey to the Marietta area. TR 25. Complainant's back hauls "could have been anything from wood to steel to . . . general freight, anything that can be placed on a flat bed." TR 25-26.

At one point while Stull was still his supervisor, Complainant informed Stull in advance that he would need time off for personal bankruptcy proceedings. TR 35-36. He made his scheduled delivery in Texas, but then Stull wanted him to pick up a back haul in Alabama. TR 36. Complainant stated he did not have the time, as it would make him late to court, and Stull informed him he would not be paid for "dead head" miles. TR 36. Complainant still did not pick up the load because he "had no choice. I had to be in court." TR 36.

2. Securing Cargo

Before placing cargo onto Complainant's flatbed, the loaders first put down "dunnage," which was lumber such as "four by fours or two by fours." TR 22. This allowed the loaders to space the steel out so a customer could easily access and unload the cargo without a crane. TR 22-23. In addition to the dunnage, the cargo was secured with "straps, chains, binders, [and] sometimes tarps." TR 23. According to Complainant, Respondents were supposed to provide the necessary equipment to secure the cargo, including "a certain amount of chains, a certain amount of binders, [and] protectors which are edge protectors which protect your straps in case you're dealing with sharp edge equipment or sharp edge material." TR 23. These chains and straps were stored in a "headache rack" in the back of the sleeper cab or inside the truck. TR 26-27, 91.

As the driver, Complainant was responsible for determining how to secure a load. TR 27. If the cargo fell off, leading to an accidental injury or death, the driver would be held responsible. TR 62. Depending on the "weight and size" of the cargo, Complainant would use different types and amounts of equipment to secure the load. TR 27, 90-91. Complainant testified there were several times when he initially did not have enough chains or straps in his truck to secure the load he had. TR 27-28. If Complainant did not have enough load securing equipment, he would "get in touch with Robbie [Stull] or Scott [Miller]." TR 28. If Stull or Miller were unavailable, Complainant would interact with a different person in the truck terminal office. TR 29. If Claimant was at the terminal, Stull or Miller would often instruct him to take securing equipment from another truck, even if those chains and binders had already been used to secure a load. TR 37-38.

On one trip, after delivering steel to a construction site in Ohio, Complainant had to meet with a truck driver "down the street from the construction site to get some chains and binders and dunnage from him so I could go pick up my back haul." TR 28. On a different occasion, Complainant was instructed to pick up a steel coil in either "Virginia or Pennsylvania," but when he arrived there were actually three coils. TR 30.[5] Since he only had equipment to secure two coils, Complainant attempted to reach Miller, but he was unable to. TR 30. He coordinated instead with a different dispatcher to purchase the necessary chains and binders at a local "truck stop or dealership." TR 30. Complainant had to drive a "town or two over" to pick up the equipment. TR 30-31.

[5] During cross examination, Complainant stated this was likely the load he mentioned in his interrogatory responses from Turtle Creek, Pennsylvania, but he was not sure. TR 69-71; *see* RX-5 at 4-5.

During cross examination, Complainant acknowledged he only mentioned one specific instance in his interrogatory responses, but he reiterated "there were several complaints of not having the proper securement equipment and a lot of times, we were person to person or I would be on the phone with them requesting it or what have you." TR 69-72; *see* RX-5 at 4-5.

3. Electronic Log-In Device and Hours of Service

While working for Respondents, Complainant would record his status with the electronic log-in device ("ELD") mounted in the truck. TR 33. Sometimes the ELD would automatically make entries, but he could manually correct the entries as needed. TR 33. A log printout of ELD entries would note the amount of time spent on-duty not-driving, on-duty driving, off-duty, or in the sleeper berth. TR 41. Respondents could access Complainant's ELD at any point. TR 62-63.

Complainant's understanding of the regulations on driving time was "after driving for 11 hours, if you're not on duty not driving, it's mandatory that you take a 10-hour break." TR 44. On-duty not-driving time could be "incorporated within the next three hours" for a total of 14 hours of service, but "after eight hours, you have to take a 30-minute break." TR 44. Furthermore, drivers had to take a 34-hour reset after working 70 hours in an eight-day period. TR 46. During cross examination, Complainant stated driving the truck to and from work would constitute "personal conveyance," which would not count towards his hours of service. TR 73-75. On redirect, however, Complainant agreed moving the truck "for the benefit of the company under instruction by a dispatcher" would not constitute personal conveyance. TR 88-89.

4. Termination

On January 23, 2020, Complainant went on duty sometime around 12:30 or 12:45PM. TR 43; *see* JX-1 at 16. He began driving around 3:00PM and drove for approximately eight of the next nine hours. TR 43; *see* JX-1 at 16. He continued driving into the early morning of January 24, completing his drive at around 2:30AM and going off duty a little bit before 4:00AM. TR 44; *see* JX-1 at 21. Complainant then drove his truck home, which he estimated was "about 45, 50 minutes" from the truck terminal. TR 45.

On the morning of January 24, Miller contacted Complainant and asked him to pick up another load. TR 46, 50.[6] Complainant told Miller he would not be able to and wanted to take his 34-hour reset. TR 46-47. He had only just gone to sleep, and he let Miller know: "[N]o, I was not going to bring the truck out because I didn't have the hours to do so, first of all, and second of all, I was too tired. I couldn't move. I was beat." TR 48.

The exchange in the record before me begins with a text message from Miller at around 8:00AM asking what time Complainant could come into the terminal and assigning him a load bound for California. JX-4 at 3; *see* TR 50, 77-79. The conversation proceeded as follows:

> Complainant: Gonna leave Sunday for Ca. What's the trailer #.

[6] Initially, Complainant testified Miller texted him at 5:00AM, then later stated Miller called him. TR 46, 50.

> Miller: No. Leaving today
> Miller: Load in olive branch by three
>
> Complainant: I'm a bit fatigued I'm gonna be safe and reset and come out for us on Sunday OK put California
>
> Miller: Just come on in and turn in truck and equipment.
> Miller: I need it here by ten am

JX-4 at 3, 6; *see* TR 51-54, 79-80.

According to Complainant, he called Miller "immediately after that" to tell him he would return the truck after his wife got back from work, since he had no other transportation. TR 54.[7] Complainant understood Miller's request to turn in his truck and equipment as a termination. TR 53-54. His next text message to Miller demonstrates this: "I just got done at the very end of my h o s. But ok you're terminating me because I'm fatigued. I won't be there by ten but I'll bring it as soon ASAP." JX-4 at 6. While Complainant acknowledged Miller's text did not mention termination, he understood the phrase "turn in" to mean "give it back like it's no longer yours." TR 79-82. Since he was using the truck to get to and from work, he would no longer be able to come into the truck terminal. TR 82.

Complainant believed he would not be able to pick up the load without violating the regulations: "I didn't have the hours of service and I didn't have the ability to do it. I was just out of it. There was no way I was going to get behind the wheel of that big truck with my eyes half closed and not coordinated well." TR 54-55. Complainant texted Miller his request was "[u]nlawful and unsafe. I could've gotten there by 5:00 or so legally HOS Rules and safety 1rst (sic). See you in a few." JX-4 at 6-7. He believed by then his required break would have been over, allowing him to return the truck without violating the rules on hours of service. *See* TR 55-56. Miller replied: "I have your hours of service printed out and I'm happy to talk to you about how meant (sic) hours your (sic) ran this week and how many hours you have available/left to drive." JX-4 at 6-7.

Complainant and Miller continued to text back and forth throughout the day about returning the truck. TR 56; *see* JX-4 at 7-8. Miller also informed Complainant of his termination during a phone call sometime that day. TR 82-83. As of 4:53PM, Complainant was at the yard cleaning out the truck and preparing to turn in his paperwork. *See* JX-4 at 8. Complainant testified he received his termination letter the following Monday when he went to pick up his final check. TR 57; *see* JX-3 at 13-14.

After his termination, Complainant "felt like the rug [had] been snatched out from under me. As I said, I was going through bankruptcy and getting my footing back. I was catching up, all my bills and for that to happen, it just blew me away. I mean, I was all distraught." TR 58-59. He filed for unemployment and began searching for trucking jobs online and through word-of-mouth. TR 59-60. He received one unemployment check before starting a trucking job with Artur

[7] He sent a text message with the same information at 2:00PM. JX-4 at 7. According to Complainant, there was a mixture of phone calls and text messages that day. TR 54.

Express on February 26, 2020. TR 59-60. At the time of hearing, Complainant worked for Ryder Logistics and was able to bike to work. TR 61.

B. Scott Miller's Testimony

1. Background

Scott Miller, a former commercial truck driver,[8] was hired to be the operations manager for Stull Trucking sometime after Complainant started working there. TR 99-100. Miller took over for Robert Stull at the truck terminal in Marietta, Georgia, the only truck terminal Stull owned. TR 99-100. Cobb Industrial, which is a steel manufacturer, bought Stull Trucking to streamline the delivery of its steel products. TR 102. According to Miller, both Cobb Industrial and Stull Trucking were registered motor carriers with the Department of Transportation at one point in time. TR 103. Miller left Stull Trucking in October or November of 2021 to move back to Florida. TR 135.

As the operations manager, Miller was responsible for "driver compliance, making sure loads got shipped out, maintenance on trucks, trailers, drivers' pay, back hauls." TR 101. Miller reported to the owners of Cobb Industrial, Gabe and Mike Haluperb. TR 105. Someone from Cobb would load up the flatbed trailers, set them in the yard, and provide paperwork to Miller. TR 105. Miller would then assign the drivers to the loads based on their "hours, location, things like that," assign back hauls, and provide the drivers with the necessary paperwork for their trips. TR 105-06. Miller had access to each truck's ELD and the GPS coordinates for each truck while in the office. TR 106. Most of the time, Miller would text the drivers their next assignments. TR 106.

While Stull Trucking owned the flatbed trailers at the Marietta terminal, Stull leased the truck cabs from Penske, who covered the costs of oil changes and other maintenance. TR 103-04. If a truck went in for service, Penske would provide a temporary replacement. TR 104-05. Miller was also able to rent additional trucks for a day if needed, but he rarely did this as the "cost was too high." TR 104-05. He estimated renting an over-the-road truck with a sleeper cab would cost "pretty close to $600.00 a day and about 35 cents a mile." TR 124.

The headache rack at the back of each truck was approximately "five, six feet tall" and "a foot and a half, two feet thick." TR 107-08. This would hold "[c]hains, binders, straps, protectors, coils, wraps, tarps, [and] lumber." TR 108. According to Miller, "I've seen over 12 chains and guys could stack up straps, 30, 40 straps if they want to. They can literally be stacked up in there." TR 108. If a driver at the terminal required additional equipment, the driver would ask Miller for it, as he kept additional equipment in a locker. TR 108. If Miller did not have the equipment the driver asked for, he would instruct the driver to take it off another truck whose driver was on a 34-hour reset. TR 108-09. Miller also functioned as the safety manager. TR 134-35. Miller testified, "I never let my drivers go with torn equipment. If it was damaged, I wanted it turned in right away and gave them new ones." TR 109. He also stated, "Never in a million years is a driver going to violate hours of service. I will never allow that to happen." TR 172.

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[8] Miller obtained his commercial driver's license in 1992 and worked as an over-the-road trucker until 2017. TR 138.

When the drivers came into the Marietta terminal, Miller would provide them "reload information" about "what they needed with their back hauls along with the paperwork for their back haul, what we called the rate confirmation." TR 119. This included information about what kind of securing equipment a driver might need. TR 119. However, if a driver requested additional equipment while loading a back haul, Miller would find a local store or truck stop selling it. TR 111. The driver would either pay for it and turn in the receipt for reimbursement, or Miller would put the driver in contact with "Rich" in procurement, who would pay for it with a company credit card. TR 112, 119.

Miller would try to be in the office by 6:00AM each day. TR 110. He would regularly work ten to twelve hours at the office, but he was also on call "24 hours a day basically," as the drivers would also contact him if a problem occurred after hours. TR 109-110. One of the first things he did in the morning was to check each driver's location. TR 113-14. If a driver was behind schedule, Miller would contact the supervisor of the construction site to expect a late delivery. TR 114.

Late steel deliveries were not "a big deal" as the delivery was to one of Cobb's "four sister companies." TR 114. However, if a driver was late picking up a load for a broker, such as on a back haul, this was a problem because "they have what they call carrier ratings. When you're late for loads, you don't have equipment, you fail on loads, you drop loads, it knocks you down on a rating scale, then you become what they call unqualified." TR 114. Brokers would often have "just in time" freight deliveries, where instead of "ordering 5,000 pieces of metal," which would rust or sit in a yard, a company would order "maybe 30 pieces of metal at a time." TR 115-16.

As the operations manager, Miller was responsible for all hiring and firing decisions at the Marietta truck terminal. TR 106. He "pretty much had final authority," but he "would generally" consult the owners of Cobb Industrial or Crystal McPherson, the head of Human Resources for Stull and Cobb. *See* TR 107, 187. McPherson would fill out the necessary paperwork for the State of Georgia and issue the final paycheck after a termination. TR 133-34. Miller did not fire a driver very often, and as a former truck driver himself, he did not take "things like that lightly." TR 135. He would never fire a driver in the middle of a load. TR 183-84. He was also responsible for implementing changes in policy from the owners of Cobb, such as instructing the drivers, including Complainant, to no longer use the truck cabs for personal conveyance to and from the terminal. TR 126-27, 168-70.[9]

2. Complainant's Final Trip – January 21 to 24, 2020

Much of Miller's testimony involved his interpretation of the ELD print-out from Complainant's final trip prior to his termination. According to Miller, on January 21, 2020, Complainant began driving from Marietta, Georgia, to Calhoun, Georgia, at around 5:30PM. TR 139-40; *see* RX-6 at 5. Prior to leaving, Miller instructed Complainant to take "dunnage and coil racks" with him for his back haul. TR 119, 141, 145. Miller found out later Complainant told the loader he "didn't have room for coil racks on his truck. He refused to take them." TR 119, 141.

[9] Respondents provided the declaration of Uriel Santiago, a billing specialist at Stull Trucking, who attested both to the company's policy and to Miller instructing Rouse not to take the company truck home. *See* RX-4 at 1-2. Miller stated Santiago was "an employee of Cobb Industrial" who did his accounting. TR 168.

Complainant never spoke to Miller directly, but Miller agreed this was an "act of insubordination." TR 142. A coil rack is "three inches tall and maybe four feet wide," and, according to Miller, no other drivers ever complained about not being able to fit necessary securement equipment into the "huge" headache rack each truck had. TR 142-43; *see* RX-2 at 1-7.

Complainant drove north from Calhoun from approximately 6:45PM to 10:45PM. TR 146-47; *see* RX-6 at 6-7; JX-1 at 1. He rested for about eight hours until around 7:00AM on the morning of January 22, 2020. TR 147; *see* RX-6 at 7-9; JX-1 at 1, 8. Miller testified Complainant "liked to use sleeper berth split sleeper time," but he preferred the drivers "did their full 11 and 10-hour breaks" or it was too difficult to plan schedules. TR 147. Prior to this trip, Miller had asked Complainant to just use "straight logging" rather than "split logs." TR 120, 148. Miller agreed Complainant's use of split sleeper time from January 21 to January 22 was another act of insubordination. TR 148, 170. However, he admitted it was perfectly legal. TR 173.

On January 22, 2020, Complainant drove for about half an hour before taking a short break. TR 149; RX-6 at 9.[10] Complainant began driving again around 7:40AM, arriving in Lordstown, Ohio, to unload just past 1:00PM. TR 151; *see* RX-6 at 10. At around 4:30PM, Complainant drove to Follansbee, West Virginia, and began loading cargo at around 6:00PM. TR 152; *see* RX-6 at 12. He contacted Miller to inform him he did not have the "lumber or coil racks" necessary for the load. TR 152. Miller told Complainant to stay in Follansbee while he attempted to find him the necessary equipment. TR 153-55. However, Complainant drove to Barnesville, Ohio, some 40 miles away, where he stayed from around 9:00PM until the next morning. *See* RX-6 at 15-17; TR 154. While driving four miles to a rest stop was not something Miller was worried about,[11] driving "50 miles [to Barnesville], that's a different story." TR 176-77.

Shortly after 7:00AM on January 23, 2020, Miller instructed Complainant to go to a truck stop to see if they sold coil racks. JX-4 at 5; *see* TR 119, 153, 155-56. Around an hour later, Complainant replied, "They do." JX-4 at 5. Miller informed Complainant that "Rich" from procurement would make the payment for the racks. *Id.*; *see* TR 118-19, 156. Complainant stated he would call Miller, as he "[j]ust got up," and he needed lumber as well. JX-4 at 5.

At 10:11AM, Miller texted Complainant to go to Steubenville, presumably to purchase the necessary equipment. JX-4 at 5; *see* TR 118. Miller estimated the distance between Follansbee and Steubenville was around 10 miles, but it would take an "hour and 14 minutes" to get to Steubenville from Barnesville. TR 158-59. At 10:17AM, Complainant marked "PC" as well as "back to work site," which Miller stated was an "improperly designated" entry as Complainant

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[10] Miller testified between 7:27 and 7:39AM, Complainant traveled 33 miles "advancing his load" and improperly marked this as "personal conveyance" time instead of driving time. TR 149-50; *see* RX-6 at 9. It seems unlikely Complainant drove 33 miles in 12 minutes. The odometer entry of 29,353 in Kentucky at 6:53AM and 29,386 in Richmond at 7:32AM makes it more plausible Complainant drove these 33 miles during his first half-hour of the day prior to taking a break at 7:27AM. *See* RX-6 at 9.

[11] In earlier testimony, Miller questioned whether Complainant should have even noted "personal conveyance" time when moving his truck four miles to a truck stop without a load. TR 152; *see* RX-6 at 11.

was "under dispatch." TR 160-61; *see* RX-6 at 17.[12] At around 10:30AM, Complainant purchased a coil rack and lumber from the Steubenville Truck Center. *See* RX-3 at 1-2; TR 159-60. He returned to Follansbee just after noon and began loading at approximately 12:45pm. RX-6 at 17; *see* TR 161-62. He then began driving with his cargo at around 3:00PM. *See* TR 162; RX-6 at 19. Miller testified Complainant should have left Follansbee earlier, as "we got the receipts of 10:00." TR 164.

Sometime in the afternoon of January 23, Miller "found a really good load [for Complainant] going out to California that had to be loaded at a certain time but could have delivered at any time." TR 120, 162. Miller knew Complainant wanted to make extra money after filing for bankruptcy. TR 120, 162.

Complainant finished his trip back to Marietta on January 24, 2020, at around 3:45AM. RX-6 at 22. However, Miller took issue with how Complainant certified his ELD logs for the previous day. Miller testified: "He certified his logs at 2:39 [in Calhoun] and then at 3:42, boom, he shows up in Marietta." TR 164-65; *see* RX-6 at 22. Miller testified Complainant improperly designated this time, as he was "under a load" but stated he went "off duty" at Calhoun prior to returning to the truck terminal in Marietta. TR 165-66; *see* RX-6 at 22. Miller stated "falsifying the logs" is grounds for immediate termination. TR 167. He further testified, since he checked the logs every morning, he would have known Complainant had "miscertified his driver logs" for the night before when he contacted Complainant at 8:00AM on January 24. TR 167-68. Miller agreed this went into "some of the rationale" of why he terminated Complainant. TR 168.

Miller could not recall whether he spoke with Complainant on the phone on the morning of January 24, 2020. TR 120-21. The load for California had to be picked up in Olive Branch, Mississippi, which Miller estimated was "a couple hours" away from the truck terminal. TR 121-22. Miller admitted Complainant "did need a reset" of 34 hours, but he testified Complainant "could have done his reset on the road" after picking up the cargo. TR 120. He acknowledged 10:00AM, when he asked for Complainant to return the truck, was not a full ten hours after 4:00AM, when Complainant finished his prior trip. TR 178. However, Miller blamed Complainant being "out of time" on the fact he split up his sleeping time. TR 120, 178.

When Complainant stated he would not be able to pick up in Olive Branch, he asked Complainant to bring in his truck so a different driver could get the load. TR 120. The local day truck could not travel this distance, so Miller needed Complainant's over-the-road truck: "I wasn't going to rent a truck just to go up there and pick up a load for him to go to California with." TR 120, 122-23. After that, Complainant would have been able to take the load to California at his own pace, as it was an open, or flexible, delivery. TR 122-23. Miller testified he did not intend his instruction to "turn in the truck and equipment" to be a termination—he just needed Complainant's truck. TR 124, 170.

Miller's testimony about when he decided to fire Complainant was inconsistent, as he stated both the "switch flipped" when Complainant did not agree to bring in the truck and that he did not fire Complainant until later in the afternoon at the truck terminal. TR 124-27. Eventually,

[12] It is not clear when Complainant left Barnesville, as the ELD marked his location as near Barnesville at 10:17AM, yet he purchased the equipment in Steubenville more than an hour away at 10:30AM. *See* RX-6 at 17; RX-3.

Miller clarified he decided to fire Complainant when he failed to bring in the truck by 10:00AM, as this meant Miller was no longer able to send a driver in time to Olive Branch. TR 129-30, 171. The company "lost that load" as a result, and this hurt the company's "credit rating with this broker." TR 125. However, Miller testified he did not actually convey to Complainant he was terminated until later in the day. TR 171-72.

Miller filled out Complainant's termination paperwork on January 24, 2020. TR 130-31; *see* JX-2. Complainant refused to sign any paperwork connected with his termination. TR 132-34; *see* JX-2 at 2-3. Miller's listed reason for firing Complainant was specifically insubordination: "Abandoned load for the second time. No proper equipment to complete the job for the second time (company had to purchase new equipment in order to help complete the job. Repeatedly failed to follow instructions." JX-2 at 1. Miller testified the first abandoned load was the back haul Complainant refused to take due to his bankruptcy proceeding, and the second abandoned load was the Olive Branch pick up. TR 131. The equipment Miller "had to keep buying" for Complainant was securement equipment. TR 132.

Complainant's failure to follow instructions included his continued use of his truck for personal conveyance and his use of split sleeping time while driving. TR 132, 179-80. Miller reiterated his belief if Complainant had not split up his time during his last trip, he would have been able to bring in the truck: "He would have had his 10-hour break and I would not have violated it when I contacted him." TR 180. When asked whether Miller terminated Complainant for refusing to bring the truck back to yard in violation of OSHA regulations, Miller firmly denied this. TR 172. However, on redirect, Miller admitted while he did not fire Complainant for taking the truck home on the morning of January 24, Complainant's refusal to bring it back "made the difference" in his decision to terminate Complainant. TR 182.

C. Crystal McPherson's Testimony

Crystal McPherson is the Human Resources ("HR") and payroll administrator for both Cobb Industrial and Stull Trucking. TR 187. Cobb Industrial has always written her paychecks. TR 197. McPherson does not make any hiring or firing decisions, but processes employee paperwork as instructed by the operations manager. TR 196. McPherson testified Stull Trucking hired Complainant on December 6, 2019. TR 188. In mid-December, after receiving his first paycheck, Complainant contacted McPherson to ask if she could forward him additional cash. TR 189-90; *see* JX-3 at 1-3. McPherson understood Complainant had filed for bankruptcy at the beginning of January. TR 188.

McPherson prepared Complainant's termination letter dated January 24 based on the documentation Miller filled out and sent her. TR 194-96; *see* JX-2 at 1-2. There was an acquisition of Stull Trucking by Cobb Industrial around the time of Complainant's termination, and, as Stull Trucking did not have its own letterhead, she and Miller used Cobb Industrial letterhead on Complainant's separation paperwork. TR 194; *see* JX-2 at 1-3.

On January 27, 2020, Complainant texted McPherson stating Miller fired him for "an abandoned load with Robbie and another load which I don't know of and if he's referring to the one I dropped on the yard, he told me that a local guy will deliver it today." TR 191; JX-3 at 16.

McPherson informed Complainant the first load was "the load you failed to deliver because of your Bankruptcy. The problem is that you failed to inform anyone prior to the incident." TR 192; JX-3 at 17. McPherson did not have all the information about this load, but she testified Complainant "compromised" the company's ability to work "with other entities" by "not fulfilling his duties" and abandoning it. TR 192-93. The second load Complainant abandoned was "last week when you were supposed to drop a load and take another to California, where you told [Miller] you would do it Sunday instead of when you were scheduled to." TR 193; JX-3 at 17. McPherson mailed Complainant his last paycheck in early February. JX-3 at 18.

III. Conclusions of Law

A. Surface Transportation Assistance Act Framework

The STAA provides that an employer may not discharge or otherwise retaliate against an employee with respect to the employer's compensation, conditions, or privileges of employment because the employee engaged in protected activity. *See* 49 U.S.C. § 31105(a)(1); 29 C.F.R. § 1978.102(a). Complaints filed under the STAA are governed by the two-step burden shifting framework set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century Act ("AIR21"). *See* 49 U.S.C. § 31105(b)(1); *id.* § 42121(b).

First, a complainant must establish a *prima facie* case by showing by a preponderance of the evidence: (1) he engaged in protected activity, as defined by the STAA; (2) he suffered an adverse employment action; and (3) his protected activity was a contributing factor in the unfavorable personnel action. *Buie v. Spee-Dee Delivery Serv., Inc.*, ARB No. 2019-0015, PDF at 3-4 (ARB Oct. 31, 2019); *see* 49 U.S.C. § 42121(b)(2)(B)(iii). If the complainant does not prove one of these requisite elements, "the entire claim fails." *See Riess v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 11-032, PDF at 5 (ARB Dec. 19, 2012). If a complainant proves a respondent retaliated against him, due in whole or in part to protected activity, then the respondent to avoid liability must demonstrate by clear and convincing evidence it would have taken the same action even absent the protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(iv).

B. Protected Activity

As is relevant here, a complainant may engage in protected activity under either the STAA's so-called "Complaint Clause" or "Refusal to Drive Clause." 49 U.S.C. § 31105(a)(1)(A), (B)(i). Complainant's alleged protected activities in this case are: (1) his complaints about the failure of Respondent to provide securing equipment for his vehicle; and (2) his refusal to drive while fatigued and in violation of his allowable hours of service. Compl. Br. at 10-11. I will address both in turn.

1. Safety Complaints

The "Complaint Clause" of the STAA protects an employee from retaliation who "has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order" or is perceived to be in the process of doing so. 49 U.S.C.

§ 31105(a)(1)(A)(i)-(ii). Internal complaints to company management, whether written or oral, suffice to satisfy the complaint requirement of Section 31105(a)(1)(A)(i). *See Holovatyuk v. EM Cargo, LLC*, ARB No. 2021-0046, PDF at 9 (ARB Jan. 12, 2022); *see also Clean Harbors Env't Servs., Inc. v. Herman*, 146 F.3d 12, 22-23 (1st Cir. 1998); *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Yellow Freight System, Inc. v. Martin*, 983 F.2d 1195, 1198 (2d Cir. 1993); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 228-29 (6th Cir. 1987).

To qualify as protected, a complaint must be based on a reasonable belief the company was engaging in "an act reasonably perceived to be a violation" of a motor vehicle safety regulation. *See Koch Foods, Inc. v. Sec'y of Lab.*, 712 F.3d 476, 482 (11th Cir. 2013); *see also Dick v. Tango Transp.*, ARB No. 14-054, PDF at 7-8 (ARB Aug. 30, 2016) (explaining a belief must be both subjectively and objectively reasonable). A belief is subjectively reasonable if the complainant "held the belief in good faith" and is objectively reasonable if "a reasonable person in the same factual circumstances with the same training and experience" would also believe a respondent was violating a regulation. *Dick*, ARB No. 14-054, PDF at 7.

As a preliminary matter, I find Complainant's testimony to be credible. While Complainant admittedly could not recall all the details of what occurred on January 24, 2020, he was consistent in his descriptions of his work and his understanding of the regulations governing it. Miller, likewise, was generally a credible and knowledgeable witness, although he likewise could not clearly recall all the events of January 24, and he agreed with Complainant about the regular operations and procedures of the Marietta truck terminal.

Complainant alleges Respondents fired him partially due to his complaints about the lack of securement equipment. Compl. Br. at 10-11. Complainant testified there were several times when he initially did not have enough chains or straps to secure a load on the trailer of his vehicle. TR 27-28. The record indicates this may have happened on at least two occasions—on December 29, 2019, when picking up a load in Turtle Creek, PA, and on January 23, 2020, when picking up steel coils. *See* RX-5 at 4-5; JX-4 at 5. Both Complainant and Miller credibly testified it was Respondents' obligation to provide the necessary equipment to secure cargo. TR 23, 108. However, there is no evidence in the record to suggest Respondents ever refused to do so.

On the contrary, Complainant testified whether he was at the truck terminal in Marietta or on the road, he would contact his supervisor, who would either provide him with the equipment he was requesting, instruct him to borrow it from a different vehicle not in use, or enable him to purchase it from a nearby location, either through the use of a company credit card or with the promise of reimbursement. TR 28, 30-31. Similarly, Miller stated he would always provide the necessary securement equipment for the drivers under his supervision, and he would immediately replace any torn or damaged equipment. TR 108-09, 111. Most telling, Complainant never claimed his requests for extra chains, straps, etc., were denied, nor did Complainant allege he was ever ultimately unable to properly secure a load or could not safely drive due to a lack of equipment.

Complainant testified Respondent was supposed to provide "a certain amount of chains, a certain amount of binders, [and] protectors" in the headache rack of each truck. TR 23, 26-27.

Complainant has provided no citations to any federal regulations on this point.[13] Additionally, both Complainant and Miller testified it was ultimately the driver's responsibility to decide what kind of equipment and how much of it was needed, which implies Complainant himself understood he might decide he wanted to use more chains and straps than were initially provided. TR 27, 108-09.

Complainant's testimony on this point belies a good faith belief Respondent was legally bound to always have the exact type and amount of securement equipment a driver wanted stored in advance in each driver's truck. Nor would a reasonable person in Complainant's circumstances, with the same training and experience, have such a belief. To determine Respondents were in violation of federal law simply because on two occasions Complainant requested additional equipment, which Respondents then promptly provided, would be an unsound conclusion.

Furthermore, at least in the matter of the January 23, 2020, back haul of steel coils, the testimony at hearing and the termination paperwork suggests Complainant's lack of equipment was due to his own failure to bring the necessary coil racks and lumber with him. *See* TR 119; JX-2 at 1-2, 4. Whether this was a result of some miscommunication about the number of coils he was picking up, as per Complainant's testimony, or a result of Complainant's refusal to bring the equipment, as per Miller's testimony, it is clear Respondent purchased coil racks and lumber for Complainant upon his request. *See* TR 30, 141-42; JX-4 at 5; RX-3 at 1-2.

Based on Complainant's experience as a truck driver and his general understanding of the regulations governing his profession, I find he had neither a subjectively nor objectively reasonable belief the initial lack of equipment constituted a violation of any federal law, as Respondent ultimately always provided what he deemed to be necessary.

Complainant further argues his text messages to Miller on the morning of January 24, 2020, refusing to drive also constitute complaints under 49 U.S.C. § 31105(a)(1)(i)-(ii). *See* Compl. Br. at 11-12. I do not find Complainant has provided any evidence Miller terminated him for sending him these messages or "complaints," and I will not address this further. Instead, I will turn to whether Miller terminated Complainant for the content of these communications—namely, Complainant's refusal to drive.

2. Refusal to Drive

Under the STAA's "Refusal to Drive Clause," subpart one, a complainant may have engaged in protected activity if he refused to operate a commercial vehicle because the operation would violate a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security. 49 U.S.C. § 31105(a)(B)(i).[14] Eleventh Circuit caselaw, which

[13] The equipment requirements for commercial motor vehicles can be found in 49 C.F.R. § 393. Sections 393.100 to 393.136 address the minimum performance criteria and types of securement devices needed for different cargo, but these sections do not appear to mandate how much gear a vehicle must store prior to securing a load.

[14] Section 31105(a)(B)(i) requires a driver to establish the violation of a federal regulation, whereas Section 31105(a)(B)(ii) requires a driver to establish a reasonable apprehension of danger to himself or the public due to the unsafe or hazardous condition *of his vehicle*. While Complainant testified he was fatigued, this does not relate to the condition of his vehicle but to whether Miller asked him to drive while impaired in violation of 49 C.F.R. § 392.3. As such, only the first subpart of the "Refusal to Drive Clause" is applicable in this matter.

is controlling in this matter, requires a complainant to establish an *actual* violation of applicable rules or regulations would have occurred for his conduct to be protected. *See Koch*, 712 F.3d at 478.[15]

According to Complainant, federal regulations allow a driver to work for a total of fourteen hours, of which eleven hours may be driving. TR 44. A driver must take a thirty-minute break after eight hours of driving, and after eleven hours of driving, a driver must take a ten-hour break. TR 44. Drivers who have worked seventy hours in an eight-day period must also take a reset of thirty-four hours prior to being scheduled again. TR 46. I find Complainant's testimony on this point accurately reflects the regulations on hours of service found at 49 C.F.R. §395.3, with one clarification—a driver may not drive without first taking ten *consecutive* hours *off duty*. 49 C.F.R. §395.3(a)(1) (emphasis added).[16] While there are some exceptions to these regulations, such as in adverse driving conditions or for short-haul drivers operating within 150 miles, a cursory review shows these exceptions do not apply to Complainant. *See* 49 C.F.R. § 395.1(b)-(f), (h)-(x).

As noted above, Complainant alleges Respondents terminated him because he refused to drive on January 24, 2020. Compl. Br. at 10-11, 13-14. In text messages with Miller on the date in question, Complainant stated he would not pick up a load in Olive Branch [Mississippi] by 3:00pm, as he was fatigued and had completed his hours of service. JX-4 at 6. Based on the evidence before me, I find if Complainant had complied with Miller's instruction and picked up the load by 3:00PM, he would have been in violation of federal law.

Miller testified at length about the ELD system and Complainant's driving times during his final trip from January 21 to January 24, 2020. *See* TR 151-170. Miller, in reviewing Complainant's ELD printout, agreed Complainant began driving with his cargo at around 3:00PM on the afternoon of January 23. TR 162; RX-6 at 19. He also acknowledged Complainant certified his logs in Calhoun at 2:39AM on January 24 and was in Marietta at 3:42AM. TR 164-65; RX-6 at 21-22. Between 3:00PM on January 23 and 3:45AM on January 24, 2020, Complainant's ELD print out demonstrates he completed 10 hours and 31 minutes of driving. *See* RX-6 at 16, 22. Under the regulations, Complainant could only drive for 29 minutes before he would need to take a ten-hour break. *See* 49 C.F.R. §395.3.

Complainant requests I take judicial notice of the distance between Marietta, Georgia, and Olive Branch, Mississippi, but I need not even go this far. Compl. Br. at 8 n.1. According to Miller's testimony, the drive to Olive Branch takes "a couple hours." *See* TR 122. Miller told Complainant he needed the truck by 10:00AM, indicating Miller believed the trip to Marietta would take at least five hours to complete. *See* TR 165-66; JX-4 at 6. Since Complainant went off duty in Marietta at 3:42AM, if Complainant had agreed to begin driving to Olive Branch at

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[15] In cases not bound by the Eleventh Circuit, the Board has held a complainant's refusal to drive may be protected activity so long as he had a subjectively and objectively reasonable belief about the existing of an actual or potential violation, applying a similar analysis as for claims under the "Complaint Clause." *See, e.g.*, *Mauldin v. G & K Servs.*, ARB No. 16-059, PDF at 5 n.12 (ARB June 25, 2018); *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, PDF at 7 (ARB Nov. 28, 2012).

[16] This regulation was last updated September 29, 2020, but I note the previous version effective from September 12, 2019, to September 28, 2020, contains substantially identical provisions.

10:00AM, he would have been in violation of the regulations on hours of service. *See* RX-6 at 22; *see also* 49 C.F.R. § 395.3.

Furthermore, Complainant in his correspondence with Miller on the morning of January 24, 2020, stated he was too tired to drive. *See* JX-4 at 6-7. He messaged Miller it would be "[u]nlawful and unsafe." JX-4 at 6-7. Complainant testified: "There was no way I was going to get behind the wheel of that big truck with my eyes half closed and not coordinated well." TR 54-55. Federal regulation provides:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3. While I note a driver's level of fatigue can be a subjective determination, according to the ELD printout, when Miller texted Complainant on the morning of January 24 at around 8:00AM, Complainant had just completed an overnight trip involving eleven hours of driving and had, at most, approximately four hours of sleep. JX-1 at 23. I credit Complainant's testimony that his level of fatigue had impaired him and made it unsafe for him to drive, and I find if he had done so this would have been in violation of Section 392.3.

Despite unclear testimony from Complainant on whether he believed returning his truck to the terminal on January 24, 2020, would have constituted "personal conveyance" or "on-duty" time, Section 392.3 makes no such distinction. *See* TR 73-75, 88-89. It simply prohibits the operation of a commercial motor vehicle while a driver is impaired by fatigue. 49 C.F.R. § 392.3. Consequently, Complainant would have violated this regulation even in following Miller's instruction to return the truck by 10:00AM, as this would have required him to drive forty-five to fifty minutes back to Marietta while still fatigued. *See* TR 45.

Accordingly, after considering the testimony and all the evidence in the record before me, I find Complainant has established his refusal to drive on the morning of January 24, 2020, was protected activity under the STAA, as in driving he would have violated both the regulation against driving while fatigued under 49 C.F.R. § 392.3 and the regulation against driving for more than eleven hours without taking a ten-hour break under 49 C.F.R. § 395.3.

C. Adverse Action and Contributing Factor

The record before me demonstrates Respondents discharged Complainant from employment on January 24, 2020, a clearly adverse personnel action. *See* JX-2. Despite lengthy testimony on the subject, I do not find it necessary to pinpoint precisely when Miller terminated Complainant and whether this occurred via text message, phone call, or in person. As noted above, I find Complainant's refusal to drive, whether this was to return the truck to Marietta or to pick up the load in Olive Branch, constituted protected activity under the STAA. However, to establish his *prima facie* case, Complainant must still demonstrate by a preponderance of the evidence his

refusal to drive was a contributing factor in Respondent's decision to terminate him. *Buie*, ARB No. 2019-0015, PDF at 3-4; *see* 49 U.S.C. § 42121(b)(2)(B)(iii).

The Board has repeatedly held a contributing factor may be "any factor which, alone or in combination with other factors, tends to affect in any way the outcome" of the adverse personnel action. *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 13-039, PDF at 8 (ARB May 13, 2014); *see, e.g.*, *Evans v. Miami Valley Hosp.*, ARB No. 07-118, PDF at 17 (ARB June 30, 2009); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, PDF at 4 (ARB Jan. 30, 2008). A complainant may prevail by proving either through direct or circumstantial evidence his protected activity was one of the reasons a respondent took the adverse action. *Beatty*, ARB No. 13-039, PDF at 8-9. In the matter before me, Complainant need only prove his refusal to drive was a factor, not the only factor, in Miller's decision to terminate him on January 24, 2020. I find the evidence in the record supports such a conclusion.

Complainant understood Miller's instruction to "come on in and turn in truck and equipment" was a termination, as he was reliant on the truck to get to and from work. *See* JX-4 at 3, 6; TR 53-54, 82-83. Complainant texted Miller in response, "I just got done at the very end of my h o s. But okay you're terminating me because I'm fatigued." JX-4 at 6. Miller in his testimony agreed when Complainant refused to bring the truck in by 10:00AM, this was the point when he decided to fire Complainant. TR 129-30, 171. The termination paperwork indicates one of the reasons Respondents terminated Complainant was for abandoning a load "for the second time." JX-2 at 1. The uncontroverted testimony of both Miller and McPherson was this second load was the pickup in Olive Branch. *See* TR 131, 193.

Given Complainant's failure to retrieve the cargo in Olive Branch was due to his refusal to drive in violation of regulations on driving while fatigued and the hours of service, Complainant has established his *prima facie* case he engaged in protected activity, and this was a contributing factor in his termination.

D. Respondents' Rebuttal

Since Complainant has established his *prima facie* case, the burden now shifts to Respondent to prove by clear and convincing evidence it would have taken the adverse personnel action even absent the protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(iv). Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Beatty*, ARB No. 13-039, PDF at 9 (citations omitted). A respondent must demonstrate not what it could have done, but what it *would* have done. *See Buie*, ARB No. 2019-0015, PDF at 7. After reviewing the entirety of the record before me, the evidence does not clearly and convincingly establish Respondent would have terminated Respondent if he had not refused to drive on the morning of January 24, 2020.

According to the termination paperwork, Miller fired Complainant for insubordination, and more specifically for (1) failing to bring equipment to complete a job for the second time; (2) repeatedly failing to follow instructions; and (3) abandoning a load for the second time. *See* JX-2 at 1-2; TR 130-31, 194-96. Miller agreed Complainant's failure to bring lumber and coil racks on his trip on January 21 was an "act of insubordination." TR 142. However, nothing in the record

before me indicates Miller reprimanded Complainant, and, in particular, I note nothing in Miller's text message exchange with Complainant about purchasing this equipment indicates he had any intention of disciplining Complainant for this. *See* JX-4 at 5.

On a similar vein, Miller stated he asked Complainant not to use split sleeper time or to use his truck for personal conveyance, and Complainant's failure to follow these instructions partially informed his decision to terminate him. TR 132, 179-80. Respondent has even provided an affidavit as to Miller's repeated instructions not to use the truck for personal conveyance. *See* RX-4. However, there is once again no evidence in the record before me demonstrating these instructions were accompanied by any kind of official reprimand or discipline.

Respondents make much of Miller's testimony on how Complainant filled out his ELD, *see* Resp't. Br. at 7-10, but Miller *never mentioned* "improper designation" or "falsifying the logs" in Complainant's termination paperwork. *See* JX-2 at 1-4. I find to be a glaring omission given his testimony this would have been immediate grounds for termination. TR 166-67. This implies either Miller did not fully read Complainant's ELD logs prior to discharging him, the ELD entries were not as incorrect as Miller's testimony indicates, or small errors in the logs were not truly a terminable offense in Miller's eyes.

From the record before me, none of these actions on the part of Complainant appear to have risen to the level of terminable offenses in Miller's mind prior to January 24. While Miller testifies these actions *could have* been grounds for termination, he never testified he *would have* fired Complainant for them absent Complainant's refusal to drive. *See* Resp't. Br. at 7-12. Miller's testimony demonstrates the opposite, in fact, as even as late as the afternoon of January 23—*after* Complainant had purchased additional equipment, used split sleeper time on the road, and driven 40 miles to Barnesville—Miller tried to help Complainant financially by finding him a "really good load" going to California. TR 120.

As such, even if I credit Miller's testimony Complainant repeatedly failed to follow instructions on company policy, it is clear Complainant's refusal to return the truck or to pick up the load in Olive Branch was the proverbial straw that broke the camel's back. Miller admitted it was not Complainant's decision to drive his truck home on the morning of January 24, but his refusal to bring it back to the terminal that "made the difference" in his decision to terminate Complainant. TR 182. He also repeatedly testified Complainant's use of split sleep time was problematic *because* it resulted in Complainant being unable to retrieve the cargo in Olive Branch. *See* TR 120, 178-80.

Accordingly, I find Respondent has failed to prove by clear and convincing evidence it would have terminated Complainant even if he had not refused to drive on the morning of January 24, 2020. Therefore, Complainant is entitled to remedies under the STAA.

IV. Remedies

Once a complainant has established a respondent violated the employee-protection provisions of the STAA, the complainant may be entitled to an abatement of the violation; reinstatement to his former position with the same pay, terms, and privileges of employment; and

compensatory damages, including backpay with interest, as well as special damages such as litigation costs and reasonable attorney's fees. *See* 49 U.S.C. § 31105(b)(3)(A)(i)-(iii); 29 C.F.R. § 1978.109(d)(1). Such remedies may be reduced if a respondent proves by a preponderance of the evidence the complainant did not exercise reasonable diligence in finding other suitable employment, thus failing to mitigate his damages. *See Anderson v. Timex Logistics*, ARB No. 13-016, PDF at 7 (ARB Apr. 30, 2014).

In the matter before me, Complainant testified he immediately filed for unemployment and began diligently searching for positions with other companies after his termination by Respondent. *See* TR 58-60. He found a trucking job with Artur Express on February 26, 2020, approximately one month later. TR 59-60. Respondent has presented no evidence contesting Complainant's mitigation efforts. Accordingly, I find Respondent has failed to meet its burden, and Complainant is entitled to the full remedies available to him under the Act. Complainant is requesting "all relief available to him," including reinstatement and backpay. Compl. Br. at 22.

A. Liability of Respondents

Complainant has argued that Scott Miller should be held individually liable for his actions under the STAA. The Board has acknowledged the "express language of the STAA permits individual liability" where an individual "exercises control over the employee." *See Anderson*, ARB No. 13-016, PDF at 8. This includes the ability to "hire, transfer, promote, reprimand, or discharge" a complainant. *Id.* Importantly, however, this is because the STAA defines an *employer* 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) (emphasis added). Thus, the Board has understood the individual liability allowed for under the Act applies to employers who might also be individuals. *See Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033, PDF at 8 (ARB Sept. 28, 2010) (holding an owner-operator individually liable for the complainant's wrongful termination).

Miller testified he was responsible for all hiring and firing decisions at the Marietta truck terminal. TR 106. However, he further testified he would consult with the owners of Cobb Industrial or with McPherson about this decision. TR 107. McPherson had to sign off on all the final paperwork. *See* TR 133-34. Furthermore, Miller did not own any part of Cobb Industrial or Stull Trucking. His actions in terminating Complainant were in the context of his position as operations manager, not as a co-owner. Accordingly, I do not find Miller can be held individually liable for damages under the Act.

Separately, Respondents have argued Complainant was employed solely by Stull Trucking, and not Cobb Industrial. Resp't. Br. at 2-4, 14-15. Respondent alleges there is no evidence in the record to indicate Cobb Industrial was a joint employer. Resp't. Br. at 15.

In *Myers v. AMS/Breckenridge/Equity Group Leasing 1*, the Board explained the definition of "person" under the STAA could implicate liability for more than one corporation under either the "integrated enterprise test" or the "joint employer" test. ARB No. 10-44, PDF at 8-10 (ARB Aug 3, 2012). Under the integrated enterprise test, a company could be held liable "without knowing participation" by the actions of another based on: "(1) interrelated of operations, (2)

common management, (3) centralized control of labor relations, and (4) common ownership." *Id.* at 9-10. All four factors need not exist to establish two corporations are "so interrelated to justify treating them as one entity" or person under the STAA. *Id.* at 9 n.19.

The lack of clarity about the legal relationship between Stull Trucking and Cobb Industrial is precisely the flaw in Respondents' argument. As I have no contracts, articles of incorporation, or other information in the record before me, it is not clear whether Stull Trucking functions as a subsidiary of Cobb Industrial, whether there is some sort of contractual agreement between Respondents, or whether they are one legal entity doing business under two different names.

The evidence I do have in the record is as follows: Complainant applied for employment with and was hired by Stull Trucking. TR 20, 65-66; RX-1 at 32-37. Complainant was told Stull Trucking and Cobb Industrial had merged, and McPherson also testified Cobb Industrial bought out Stull Trucking around this time. TR 20, 194. Miller testified he replaced Robert Stull as the operations manager at Stull Trucking, but Cobb Industrial owns Stull Trucking. TR 99-100, 102. Both Stull and Cobb were registered motor carriers. TR 102. However, Miller reported to the owners of Cobb Industrial, checked with them about hiring and firing decisions, and implemented changes in policy at their direction. TR 105, 107, 126-27.

Complainant's paychecks and W-2 statements indicate Cobb Industrial was his employer, and his termination paperwork, created by McPherson on Cobb Industrial letterhead, also indicated Cobb Industrial was his employer. *See* TR 63; CX-3; JX-2. This includes paperwork McPherson submitted to the State of Georgia. *See* JX-2 at 4. While McPherson served as the human resources and payroll administrator for both Cobb Industrial and Stull Trucking, she testified Cobb Industrial issued her paychecks. TR 187,197.

The testimony of all three witnesses and the documentary evidence clearly indicates Cobb Industrial's owners had supervisory control over the operations of Stull Trucking and Cobb Industrial paid Complainant, McPherson, and Miller. Given the evidence in the record before me, I find Cobb Industrial and Stull Trucking are an integrated enterprise for the purposes of liability under the act.

Alternately, the Board has explained a joint employer relationship may exist where one or more corporations, acting as separate entities, may be held jointly liable where they are "jointly controlling the terms and conditions of employment." *Myers*, ARB No. 10-44, PDF at 11. In *Myers*, the Board affirmed the payroll company who contracted with the complainant's employer was not liable for his wrongful termination. *Id.* at 11-12. This was based not only on the liability language in the contract between the two companies but also on the lack of control the payroll company had over the trucking company's operations and termination decisions. *Id.* at 3-4, 11-12. Similarly, in *Smith v. CRST International, Inc.*, the Board agreed the language of the contract between steel manufacturer CRST and trucking company LCE indicated LCE bore the liability for LCE's wrongful discharge of the complainant. ARB 11-086, PDF at 8-9 (ARB June 6, 2013).[17]

[17] This case involves the same complainant and companies as *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033 (ARB Sept. 28, 2010), cited earlier in this decision.

Unlike in *Myers* and *Smith*, I have no documents in the record before me indicating Stull is merely a contracting party with Cobb. On the contrary, as I have already noted, Miller, the operations manager of Stull, reported directly to the owners of Cobb, consulted with them and McPherson about hiring and firing decisions, and implemented new policies with the truckers at their direction. Even if Cobb Industrial and Stull Trucking function as two separate corporate entities, Miller's testimony, in addition to the documentary evidence indicating Cobb identified itself as Complainant's employer on his W-2 and termination paperwork, is sufficient to indicate Cobb was a joint employer with control over the terms and conditions of Complainant's employment.

Accordingly, I find both Cobb Industrial and Stull Trucking should be held liable for violations of the Act.

B. Reinstatement

Reinstatement for successful complainants is automatic under the STAA, even where a complainant has found new employment. *See Ass't Sec'y & Mailloux v. R&B Transp., LLC*, ARB No. 07-084, PDF at 10 (ARB June 26, 2009). Reinstatement "must be ordered unless it is impossible or impractical." *Id.* Respondent has provided no evidence to indicate reinstatement is not possible or the relationship between Respondent and Complainant is so intolerable as to make it impractical. Accordingly, Respondent must make a bona fide offer of reinstatement to Complainant with the same pay, terms, and privileges of employment. *See* 49 U.S.C. § 31105(b)(3)(A)(ii).

C. Compensatory Damages

In addition to reinstatement, a successful complainant under the STAA is automatically entitled to compensatory damages, including back pay with interest. 49 U.S.C. § 31105(b)(3)(A)(iii); *see Mailloux*, ARB No. 07-084, PDF at 10; *Kennedy v. Advanced Student Transp.*, ARB No. 09-145, PDF at 10 (Apr. 28, 2011). Back pay is calculated from the date of termination until a complainant is either reinstated, the employer "makes a bona fide, unconditional offer of reinstatement or, in very limited circumstances, when the employer rejects a bona fide offer, not when the employee finds comparable employment." *Hobson v. Combined Transp., Inc.*, ARB Nos. 06-016, 06-053, PDF at 5-6 (ARB Jan. 31, 2008); *see Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, PDF at 6 (ARB June 30, 2005). Such a calculation must "only reach a reasonable approximation of what a complainant would have earned but for the discrimination." *Ferguson v. New Prime, Inc.*, ARB No. 12-053, PDF at 4 (ARB Nov. 30, 2012). Uncertainties are resolved against the respondent as the discriminating party. *See Johnson v. Roadway Express, Inc.*, ARB No. 01-013, PDF at 14 (ARB Dec. 30, 2002).

Complainant is seeking back pay in the amount of $3,006.72 but simultaneously asserts his wage loss damages were $3,042.50. Compl. Br. at 23. According to Complainant, he was employed from November 1, 2019, until January 24, 2020, and earned a total of $7986.55 over 84 days, equating to an average daily wage of $95.08. *Id.* He was then unemployed for 32 days. *Id.* Complainant did not testify directly about either his dates of employment with Cobb or his wage, other than to state he received an hourly wage when not driving and otherwise was paid by the

mile. *See* TR 26. I have nothing in the record before me detailing Complainant's exact hours or miles driven while working for Respondent. Complainant's W-2 statements supports he earned a total of $7986.55 while employed by Cobb Industrial, having earned $2433.40 in 2019 and $5553.15 in 2020. *See* CX-3.

However, the start date of Complainant's employment is unclear—he alleges he began work on November 1, 2019, but his employment application and drug screening are dated November 19, 2019, and November 25, 2019, respectively. *See* Compl. Br. at 23; RX-1 at 12-16, 21-24. Given the dates of Complainant's employment paperwork, it is logical his first shift occurred in December following his onboarding. McPherson testified Complainant began working on December 6, 2019. TR 188. The earliest text message exchange between McPherson and Complainant on December 16, 2019, indicates he had received his first paycheck the previous Friday. *See* JX-2 at 1-2. Accordingly, I credit McPherson's testimony Complainant began working on December 6, 2019.

Where Complainant was employed from December 6, 2019, to January 24, 2020, I find he worked for Respondents for fifty days or approximately seven weeks. If his total wages were $7986.55, his average weekly wage would thus be $1,140.94.[18] Complainant would ordinarily be entitled to this weekly amount beginning from January 24 to whenever a bona fide offer of reinstatement is made, minus interim earnings. *See Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, PDF at 14 (May 13, 2020).[19]

However, Complainant testified when he began working again on February 26, 2020, he made more than he did for Employer, and he is thus only seeking back pay for a month's worth of wages covering this period of unemployment. TR at 60-61. Accordingly, I find Complainant is entitled to a backpay award of four-and-a-half weeks' worth of wages, or $5,134.23, plus interest. *See Simpson*, ARB No. 2019-0010, PDF at15 (holding respondent's back pay obligation ended when complainant acquired a higher paying job, as liability for back pay is limited to "make-whole relief"). Interest will be calculated as per 26 U.S.C. § 6621 and compounded daily. 29 C.F.R. § 1978.109(d)(1).

The Board has held compensatory damages also include damages awarded for emotional pain and suffering. *See Anderson*, ARB No. 13-016, PDF at 7-8. Complainant seeks $25,000 in compensatory damages for "emotional distress and mental pain." Compl. Br. at 23. Complainant testified his termination by Respondent left him "distraught" and like the "rug [had] been snatched out from under" him. TR 58-59. Complainant had recently been dealing with personal bankruptcy, and his financial struggles are illustrated by his text message exchange with McPherson asking for cash in mid-December 2019. *See* JX-3 at 1-3. Following his discharge, he

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[18] I find utilizing an average daily wage is not a reasonable estimate of Complainant's income where he was paid by the miles and hours and had an irregular schedule. *See Beatty*, ARB No. 13-039, PDF at 9 ("[C]alculations of the amount due must be reasonable and supported by evidence; they need not be rendered with 'unrealistic exactitude.'" (citations omitted)); *see also Cook v. Guardian Lubricants, Inc.*, ARB No. 97-005, PDF at 11 n.12 (ARB May 30, 1997) (noting calculating back pay by calendar weeks is reasonable for an irregular work schedule).

[19] While Complainant received one unemployment check during his month without work, *see* TR 59-60, under Eleventh Circuit caselaw unemployment benefits should not be deducted from a backpay award in cases of employment discrimination. *See Brown v. A.J. Gerrard Mfg. Co.*, 715 F.2d 1549, 1550-51 (11th Cir. 1983).

struggled to support his family and pay his bills. TR 58-59. However, he managed to promptly sign up for unemployment and started a new position truck driving only one month later on February 26, 2020. TR 59-60.

While unemployment can be a point of stress, Complainant's brief testimony that he was "distraught" and was having financial difficulties does not demonstrate he suffered extreme emotional distress or experienced any other special circumstances warranting additional compensation. As such, I decline to award compensatory damages beyond his award of back pay with interest.

D. Punitive Damages

Punitive damages may also be awarded to a successful complainant under the STAA where there has been a "callous or reckless disregard of the complainant's rights, as well as intentional violations of federal law." *Anderson*, ARB No. 13-016, PDF at 8 (citations omitted); *see* 49 U.S.C. § 31105(b)(3)(C); 29 C.F.R. § 1978.109(d)(1). Complainant requests $25,000 in punitive damages to "deter the Respondents from future violations of the STAA." Compl. Br. at 23-24. He further argues Respondents were "motivated by greed" when they requested Complainant drive in violation of hours of service. Compl. Br. at 23-24.

From the record before me, it is not clear Respondent's conduct rises to the level of intentionality warranting an award of punitive damages. There is no indication Respondents engaged in a pattern of requesting drivers to violate hours of service. To the contrary, Miller testified he specifically requested drivers not to split their sleeper berth time so he could create schedules allowing for the requisite ten-hour breaks. TR 147-48. Without anything more, I also do not find Miller or Respondents demonstrated a callous or reckless disregard for Complainant's rights. Accordingly, I find Complainant is not entitled to punitive damages.

E. Attorney's Fees and Costs

A successful complainant under the STAA may further be awarded litigation costs and reasonable attorney's fees. *See* 49 U.S.C. § 31105(b)(3)(A)(iii), (b)(3)(B). This includes all costs that were "reasonably incurred by the complainant in bringing the complaint." *Id.* § 31105(b)(3)(B). Counsel for Complainant may file and serve an application for fees, costs, and expenses, in accordance with the final order below.

ORDER

Based on the foregoing, the following **ORDER** shall enter:

(1) Pursuant to 49 U.S.C. § 31105(b)(3)(A)(ii), Respondent shall provide to Complainant, Corey Rouse, a bona fide offer of reinstatement to his former position, with the same pay, terms, and privileges of employment he would have received had he continued working from January 24, 2020, to the date of the reinstatement offer;

(2) Pursuant to 49 U.S.C. 49 U.S.C. § 31105(b)(3)(A)(iii), Claimant is entitled to back pay at the average weekly wage of $1,140.94 from the date of January 24, 2020, for a total of $5,134.23, with interest calculated pursuant to 26 U.S.C. § 6621;

(3) If Complainant seeks an award of attorney's fees and costs pursuant to 49 U.S.C. § 31105(b)(3)(A)(iii) and (b)(3)(B), an application shall be filed within **30 days** of the date of this Order. Should Respondent object to any fees or costs requested in the application, the parties shall discuss and attempt to informally resolve the objections. **THE PARTIES ARE STRONGLY ENCOURAGED TO REACH AN AGREEMENT**. Any agreement reached between the parties as a result of these discussions shall be filed in the form of a stipulation. If the parties are unable to resolve all issues relating to the requested fees and costs, **objections shall be filed within 30 days** of service of the fee application. **The objection must be accompanied by a certification the parties made a good faith effort to resolve the controversy prior to the filing of the objection.**

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

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).

FILING AND SERVICE OF AN APPEAL

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

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

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

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

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

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

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

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

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

3. Effective Time of Filings

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

4. Service of Filings

A. Service by Parties

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

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

B. Service by the Board

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

5. Proof of Service

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

6. Inquiries and Correspondence

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