U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 September 2022

CASE NO.: 2021-STA-00073
OSHA Case No.: 5-8120-21-028

In the Matter of:

GREG THACKER,
Complainant

v.

M & C TRUCKING, LLC,
Respondent

Appearances:

Paul Taylor, Esq.,
For the Complainant

Cheryl Callahan, self-represented,
For the Respondent

Before: **DREW A. SWANK**
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105, *et seq*., (the "Act" or the "STAA"), as amended by the implementing recommendations of the 9/11 Commission Act of 2007 and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging, disciplining, or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment. 49 U.S.C. § 31105(a)(1).

I. PROCEDURAL HISTORY[1]

On February 17, 2021, Complainant, Greg Thacker (hereinafter "Thacker" or "Complainant"), filed a complaint with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), alleging that Respondents had retaliated against him in violation of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA). Stipulation 4. The applicable regulations provide that the Assistant Secretary will issue, within 60 days of the filing of the complaint, written findings as to whether there is reasonable cause to believe that the Respondent has retaliated against the Complainant in violation of STAA. 29 C.F.R. 1978.105. As more than 60 days had lapsed without the issuance of written findings by OSHA, Complainant requested that OSHA terminate its investigation and issue a determination. As noted in its August 23, 2021 determination letter, OSHA stated "[b]ased on the information gathered thus far in its investigation, OSHA is unable to conclude that there is reasonable cause to believe that a violation of the statute occurred" and thus it dismissed the complaint. Parties were notified that they had 30 days from receipt of OSHA's findings to file objections and request a hearing. On September 22, 2021, Complainant filed Objections to the OSHA findings and requested a hearing before an Administrative Law Judge. *See* Stipulation 5.

II. HEARING AND EVIDENCE

Pursuant to the Notice of Hearing, the undersigned held a telephonic hearing in this case on May 31, 2022, at which all parties had a full and fair opportunity to present evidence and argument as provided by law and applicable regulations.

A. STIPULATIONS

The parties entered into the following stipulations, a copy of which was admitted at the hearing, and which is labeled Proposed Stipulated Facts. TR 6.

1. Complainant worked as an employee for M & C Trucking, LLC as a truck driver from October 2020 to December 30, 2020.

2. In the course of his employment with Respondent M & C Trucking, LLC, Complainant operated commercial motor vehicles with a gross weight rating of 80,000[2] pounds and hauled across state lines as a truck driver.

3. Complainant's final day of employment with Respondent M & C Trucking, LLC, was December 30, 2020.

[1] References in the text are as follows: "ALJX" refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judge; "CX" refers to complainant's exhibits; "RX" to respondent's exhibits; "JX" to exhibits jointly offered by the parties; and "TR" to the hearing transcript.

[2] A typographical error in the original stipulations was corrected at the hearing and is correctly noted as 80,000 pounds. TR 6.

4. On February 17, 2021, Complainant filed a timely complaint against Respondents with OSHA alleging that Respondents had retaliated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105(a).

5. On September 22, 2021, Complainant, by counsel, filed a timely objection to the OSHA's Findings and order and requested a hearing before an administrative law judge of the Department of Labor.

B. ADMITTED EVIDENCE

Evidence admitted at the hearing consists of CX-1-3 (TR 38, 74, 77); RX-1, 3, 4, 6 and 9 (TR 123); and JX-1-5 (TR 5). The following Exhibits are also hereby admitted into evidence ALJX-1 (October 14, 2021 Notice of Hearing and Pre-Hearing Order) and ALJX-2 (April 5, 2022 Notice of Rescheduled Hearing and Pre-Hearing Order).

C. SUMMARY OF TESTIMONY

1) Testimony of Complainant, Greg Thacker

Complainant Greg Thacker testified that he has been a truck driver for four years and that he holds a commercial driver's license which he obtained in 2018. TR 9. He received training as a truck driver at Southern State Community College in Washington Court House, Ohio for four weeks and he received a certificate for commercial truck driving. TR 9-10. His first trucking job was at Dutch Maid in Willard, Ohio where he did over the road truck driving as a "team driver" which means he drove with another driver. TR 10. He worked for this company between approximately September of 2018 until May of 2019. *Id.* After this he worked for a large carrier called Dart Transit where he worked for about eight months. He quit due to a disagreement with a dispatcher regarding whether he needed to "reset" before completing his run. TR 11. Complainant explained that the DOT (Department of Transportation) hours of service rule allows a driver to drive 70 hours in a week and when that amount of driving is reached, a reset is required. TR 11-12. He explained that a reset occurs when a driver takes 34 consecutive hours off duty, after which he is able to drive another 70 hours. TR 13. He testified that he refused to break the reset rule. TR 12. After his employment with Dart he worked for a large carrier called CFI in Joplin, Missouri where he performed cross country work operating tractor-trailer sets. After this employment he worked for Morral Company, a fertilizer company in Marion, Ohio. TR 14-15. Complainant testified that he has not had any DOT reportable accidents and has never failed a DOT drug or alcohol test. TR 16. His next employment was with a company called Circle T where he delivered parts and operated a tractor-trailer combination. Id. After this employment Complainant began working for the Respondent, M & C Trucking, LLC. TR 16.

Complainant testified that he operated tractor trailer sets with a flatbed trailer for M & C Trucking. TR 16-17. He would haul rebar from Nucor and Harris Bar, as well as a few loads from Meyer Wire in Upper Sandusky, Ohio. His truck would be loaded and then after he delivered to his destination, he would return and be loaded again. His dispatcher was Cheryl Callahan. TR 17. His deliveries required him to cross state lines into Indiana, Michigan, Pennsylvania, and West

Virginia. *Id.* His rate of pay at M & C was 30 percent of the load. TR 18. Complainant testified that CX-1 consists of photos he took for the purpose of showing the Respondents the problems he was having with his truck. *Id.*

Complainant testified that on December 28, 2020, while driving Tractor Trailer #204, he lost all air pressure and therefore could not move the truck. TR 19 27. He stated that the fifth wheel switch, which is part of the coupling device that couples the tractor and trailer together, completely blew off. He noted the shut off valve on the air pump/compressor did not "cut off" around 145 pounds and continuously pumped air until it built up so much pressure that it blew out the fifth wheel switch. TR 20. He stated when the line disconnected it caused all of the truck's airline pressure to drop. *Id.* He noted that the compressor provides air that operates essential components of the truck including brakes, inflation of suspension bags on the tractor and trailer, the air horn, and the truck's transmission. He testified that the condition caused by the air pump constantly running was "really unsafe because it had blown three brake chambers prior to blowing this line off. And you know, going down the road or anything if anything blows, you just lose everything..." TR 21. Complainant testified that he took the photo at CX-1, p.2 on December 28, 2020 to show his Employer the fifth wheel switch had blown. Complainant testified that he used needle nose pliers to clamp the air hose in order to stop the leak. Complainant stated that he took the photo at CX-1, p.3 on December 28, 2020 to show his Employer that he had attempted to clamp the hose to stop the air leak. TR 23. He explained that when air pressure drops to about 50 to 60,000 psi of pressure an alarm sounds to warn the driver to pull off the road as all emergency brakes on the truck will engage and the brakes will lock up. TR 25-26. He stated that this could cause the truck to jackknife. TR 26.

Complainant testified that Truck #204 is the only truck he had driven for M & C Trucking. He stated he had previously complained to Mike and Cheryl Callahan that there was an oil leak near the motor which he believed needed to be fixed. TR 27. Thacker testified that he asked his Employer to fix the oil leak, beginning shortly after he began his employment up to shortly before his separation from employment, but the oil leak had never been fixed. TR 27, 37. He took several photos found at CX-1, on or about December 27, 2020, to document the oil leak. It was his understanding that an oil leak coming from the engine compartment could get on engine parts or brake parts causing them to get hot and present a danger of fire. TR 27-28. He also photographed a cracked valve cover which he believed may have been the source of the oil leak and which he believed affected the safe operation of a commercial vehicle. TR 29-30. He stated that he complained to Mike and Cheryl Callahan about the cracked valve cover, but the cracked valve cover was not fixed. TR 31. He noted the photos in CX-1 were taken approximately one day before he was let go. TR 31-32. He testified that he was told by Mike and Cheryl Callahan that if there is anything wrong with the truck it would be fixed. TR 32. Thacker testified that when he had worked for other trucking companies, he had never seen oil leaks to the extent he saw on Truck # 204. TR 33-34. Complainant testified that he reached the point on December 28, 2020, when he refused to drive the truck due to the oil leaks and other items. TR 37-38. He stated that he checked the oil levels every other day, but the truck was losing about five gallons of oil in a short period of time. He would top off the oil when it was low. TR 39.

Thacker testified that when he experienced the air leak problem with his truck on December 28, 2020, he texted Cheryl Callahan that he needed someone to come out and check on the truck because the brakes were not working. TR 40 -41. *See* CX-2. He stated he was told that,

> [I]f they have to send a mechanic down there, then he'll just back the brake lines off on the trailer to where I wouldn't have no brakes so I could drive it up to Sandusky, because they was wanting me to back the brakes off and I refused to drive a truck with no brakes or a trailer with no brakes.

TR 41.

Complainant stated he was communicating with Mike, who was on a "run," by phone, and Cheryl, as well, who was the dispatcher. Thacker testified that he explained to Michael Callahan that the airline had blown out. He was told to check the brakes to see if they were working. TR 41. He stated he tried to check the brakes but was almost hit by a passing truck while he was pulled over on the side of the road. Complainant testified that he is not qualified to adjust brakes, did not have training to adjust brakes, and had never adjusted brakes in the past for any of his previous employers. TR 42. Therefore, he told his Employer that he needed someone to come out and check out the problem because he could not drive the truck. TR 41-42. Thacker understood the term "backing the brakes off" to mean that the trailer would have no brakes. He did not believe it would be safe to pull a trailer while only having operating tractor brakes. TR 42. Thacker stated that he was scheduled to go to Nucor on both, December 28, 2020 and December 29, 2020 to pick-up and deliver loads of rebar. TR 42-43.

Complainant also testified that he had problems operating his truck on or about December 15, 2020, due to two fuel filters which needed to be replaced. The work was performed by a mechanic chosen by the Complainant but ultimately approved by the Employer, rather than the one that Employer had suggested. Employer complained that the bill was higher than expected. TR 51-52.

Complainant admitted that he failed to see and report, on pre or post-trip inspections, a blown tire that needed to be replaced on or about December 17, 2020. However, he believed he generally performed good pre-trip and post-trip inspections of Truck # 204. TR 49, 50, 51.

Thacker testified regarding an email exchange with Michael Callahan and Cheryl Callahan on the morning of December 29, 2020, a copy of which has been offered into evidence as CX-2. He explained that he communicated to Michael and Cheryl that he "was up all-night sick after I got done with work the day before." TR 62. He stated that he had been up since midnight, vomiting blood, and was also tired from not sleeping. TR 62-63. He stated that he explained that in addition to his being sick and fatigued:

> I'm tired of this truck, you know, with oil leaking, constantly breaking down, always having issues, and everything. That to go ahead to get it running to where if I get inspected by ODOT, you know, triple pass, … It would give me time to see

> if I could feel any better by the time I got the truck ready for me to go ahead and run the load that the truck was loaded with.

TR 63.

He stated that he still had a load on the truck at this time but was too sick to safely drive the truck on the morning of December 29, 2020. *Id*. He further testified:

> I was tired and I knew that he wouldn't have the truck fixed right away, trying to buy some time to see if I feel any better later so I could get and run the load. You know I just wasn't feeling the best. I mean, I had been up all night.

TR 64.

Thacker confirmed that he received a text from Michael Callahan at 8:38 a.m. on December 29, 2020 which stated, "If I do your load, you're no longer needed." TR 64. Complainant understood this to mean that if he did not run the load, his Employer was firing him. TR 65. Complainant also received a text at that time implying that he was often late when performing his job. Complainant denied that he was late when doing his loads, other than when the truck had mechanical issues. *Id.* Thacker confirmed that he sent a text to his Employer which stated, "It will all fall back on me. I can't rest good anymore. Trying to keep my record clean." TR 65. He explained that what he meant by this text was that if he were pulled over for an inspection, and was cited for "oil leaks or any other issues" it would fall on him as the driver "because that truck should not be on the road leaking oil like it [ ] did at the time." *Id.* He also confirmed that he received a message from Michael Callahan at 10:18 a.m. on December 29, 2020 which stated, "You're done. No longer needed here. Quit under dispatch will be put on your data." TR 66. Respondent understood this to mean he was fired. He denied that he quit under dispatch. *Id.*

Thacker also confirmed that he had an email exchange with Cheryl Callahan the same morning, December 29, 2020, wherein she stated, "You missed your pickup appointment. This is my last text. We are assuming you must have quit under dispatch because you won't answer. You can at least let me know so I can see what I can do to cover this load." TR 67. He explained that he responded to her that he had been up all night having bloody diarrhea and stated, "I haven't quit under dispatch. I am sick." *Id.* Another text he sent to her stated, "My guts been feeling like they were shredded up and run up. But as this pain, when it kicks in, has me about in tears like my hernia." TR 69. Complainant also testified that when he received his paycheck, $250.00 had been deducted from his wages, "for quitting under dispatch." TR 72.

Complainant testified that he currently works for Tri-State Transport. TR 74. He stated that he was unemployed for approximately one month after his employment with the Respondent was terminated on December 30, 2020. He filed applications with a few companies after his termination. TR 76. He started working for Tri-State Transport on about February 1, 2021. TR 75-76. He stated he has not worked for any other companies since he was terminated by the Respondent, other than Tri-State Transport. TR 75. He testified that his rate of pay with Tri-State is about the same as his rate of pay with the Respondent. TR 77. *See* CX-3. He also testified that

the two jobs are similar in regard to the amount of time he is able to spend with his family. TR 78. He testified that the month he was unemployed, January of 2021, was stressful because he had bills to pay and also due to the fact that Respondent included a statement in his employment record that he had "quit under dispatch," which he claimed could negatively affect a truck driver's ability to find a job. *Id.* He was also concerned because Respondent had sent letters to his current Employer regarding a non-compete clause that was in the contract he signed with Respondent, which he thought might prevent him from getting a job with Tri-State Transport. TR 78-79.

Complainant testified that he is requesting lost wages resulting from his being fired, an offer of reinstatement regarding his job with M & C Trucking, LLC, compensatory damages for the mental pain he incurred during the month he was unemployed, January of 2021, as well as attorney fees. TR 80-81.

On cross examination Complainant stated that he wrote his complaints about oil leaks and other issues on the back of his weekly trip reports throughout his employment. TR 85. He stated that on the evening of December 28, 2021, he was on his 10-hour reset and may not have received texts at that time. TR 91. Complainant admitted that during his employment with M & C Trucking he was asked to have Truck #204 washed. He also admitted that he had never had Truck #204 washed while employed with the Respondents. TR 93-94. He testified that some of the mechanical problems he reported were fixed and some were not. TR 95.

Complainant confirmed on redirect that he is not a mechanic and never had any training as a truck mechanic. TR 97. He also stated that washing a truck would not eliminate an oil leak. TR 97. He testified that the oil leak he reported was never fixed while he worked for the Respondent. TR 98.

2) Testimony of Johnny Flick of Flick's Truck Repair in Gallon, Ohio

Johnny Flick testified that he made a service call on December 28, 2020 on tractor trailer #204 near Delaware, Ohio. TR 104. He stated that the trailer was empty at that time and only the driver was present. TR 105. He testified that he had been asked to go out and check on the truck due to a problem with its losing air. He stated that when he arrived the air pressure was full. *Id.* At that time, he and the driver released the trailer brakes and he crawled underneath the trailer and verified that the brakes were fully released. Next, they engaged and then released, the parking brakes. He verified that there was proper operation of the brakes at the time of his arrival. He told the driver that he would follow him back on the road to the point where he turns off to go home, and if there were no problems up until that point, "then all is well." He stated that he then notified Cheryl Callahan that everything was okay. *Id.*

Mr. Flick admitted on cross examination that he did not shut the truck down and turn it on again to make sure that air pressure was maintained. TR 107. He observed the truck for air leaks with the truck running, but not with the truck turned off. TR 108.

3) Testimony of Michael Callahan

Michael Callahan of M & C Trucking, LLC, Respondent, testified that when the Complainant was hired in late October 2020, he told Complainant that Truck #204 burned at least a gallon of oil per week. TR 113. He stated that he was never informed by the Complainant that he was losing large amounts of oil. *Id.* He testified that the only report he was aware of from Complainant, regarding problems with oil leaks or tires, were those made on or about December 17, 2020. He stated that the items noted by Complainant at that time, were repaired. TR 114. Referring to CX-1, p. 16, Mr. Callahan stated that the photo shows old oil that had collected dirt towards the top of the photo, while the middle of photo, which shows the motor, looks like fresh oil. TR 124. He stated that at the bottom of the photo under the oil fill tube, it appears to show old oil that is very dark and has collected dirt. He also testified that the oil cap on the side of the motor had been missing but was replaced after the Complainant started driving the truck. *Id.*

On cross examination regarding whether Truck #204 had any oil leaks, Mr. Callahan testified that he was notified on December 17, 2020, on Complainant's mileage sheet, that there was an oil leak. TR 125. He confirmed that he did ask his drivers to wash trucks when needed, or when there is a major problem, but not weekly. TR 126. He testified that if a truck is operated when it has been run out of oil, the engine can seize up on the truck and shut down. TR 128. He testified that Truck #204 held 10 gallons of oil. *Id.* He stated that if oil from oil leaks gets on brake parts, it can increase the stopping distance of a truck tractor and in addition, can present a danger of fire. *Id.*

Michael Callahan acknowledged that he and Complainant exchanged text messages on December 29, 2020. TR 130. He confirmed that he received a text message from the Complainant stating: "Get the truck to where it's safe to have on the road, and I'll take the load. The oil leaks alone will fail me on an inspection. It will fall back on me. I can't risk it anymore. I'm trying to keep my record clean." *Id.* He understood this text to mean that Complainant was refusing to take the load and operate the truck that was assigned to him. He also confirmed that he understood that Complainant knew less about mechanical problems with trucks than he did, and also that Complainant "probably actually thought the truck had oil leaks even if it didn't." *Id.* He also testified that he understood that the statement made by the Complainant was the equivalent of him asking Respondent to correct what he perceived to be an unsafe condition. TR 131.

Mr. Callahan testified that he was not aware of the Complainant's training in the area of brake adjustment and making brake repairs. *Id.* He testified that he would expect the Complainant to be able to back a brake off to get the truck off the road safely if he had a breakdown. *Id.* He stated that he did not expect the Complainant to adjust brakes, but he did expect that he would be able to back the brake off, if it locked up on the road, to get the truck off the road safely. TR 132. He testified that the Complainant's rate of pay for M & C Trucking was about 30 percent of the load. It could go up one to three percent depending on how much the driver drove and how much the truck "grossed." He also testified that the oil leak that Complainant reported on December 17, 2020 was fixed. TR 134 - 135. At that time, he found that one hose clamp was loose on the power steering and one turbo drain tube was cracked. TR 135. He testified that to his knowledge the truck did not develop an oil leak again after December 17, 2020. *Id.*

III. ISSUES

The unresolved issues presented by the parties are:

1. Whether Complainant engaged in protected activity within the meaning of the STAA?
2. Whether Complainant meets his burden of proving by a preponderance of the evidence that his alleged protected activity was a contributing factor in the termination of his employment?
3. If Complainant meets his burden of proving that protected activity contributed to his termination, does Respondent establish, by clear and convincing evidence, that it would have taken the same adverse action absent the alleged protected activity?
4. Whether Complainant is entitled to remedies and attorney fees?

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The STAA provides that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. These protected activities include:

> (A)(i) making a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order;
>
> (B)(i) refusing to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
>
> (B)(ii) refusing to operate a vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

49 U.S.C. § 31105 (a)(1)(A)(i) - (B)(i)-(ii).

The STAA further provides that under paragraph (B)(ii) "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain correction of the hazardous safety or security condition." 49 U.S.C § 31105 (a)(2).

Based on the stipulation of the parties, Complainant is a covered employee and M & C Trucking, LLC is a covered Employer within the meaning of the STAA as Complainant operated a commercial motor vehicle with a gross weight rating of 80,000 pounds and he hauled across state lines as a truck driver. *See* Stipulation 2. *See also* 49 U.S.C. § 31101.

To prevail on an STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay or terms or privileges of employment; and that the employee's protected activity was a contributing factor in the adverse employment action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052 (ARB Jan. 31, 2011); *Riess v. NuCor Corp*., ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010). Once the employee has established that the protected activity was a "contributing factor" in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

Thus, the STAA employs the AIR 21 two-step analytical framework: (1) whether the complainant has met his burden of establishing that protected activity was a "contributing factor" in the alleged adverse personnel action, and if so, (2) whether the respondent can establish by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity. *See Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 21 (ARB May 13, 2014).

A. PROTECTED ACTIVITY

In this case the Complainant alleges that he engaged in protected activity under Section A(i) of the STAA in making internal complaints of safety issues to his Employer, as well as protected activity under Sections B(i) and (ii) in refusing to operate a vehicle.

1) Complaints regarding safety violations under 49 U.S.C. § (a)(1)(A)(i)

Complainant's alleged protected activity under Subpart A(i) of the STAA, the complaint clause, will be addressed first. Internal complaints filed with supervisors which are related to reasonably perceived violations of commercial vehicle safety regulations are protected under 49 U.S.C. § (a)(1)(A)(i). *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101 & 159, ALJ No. 2005-STA-63, at 9 (ARB June 30, 2008). Complainant alleges that his complaints related to reasonably perceived violations of commercial vehicle safety regulations which include 49 C.F.R. §§ 392.3, 392.7,[3] 393.40, 393.207, 396.3(a), 396.5, and 396.7.

[3] 49 C.F.R. § 392.7 states (a) No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed: Service brakes, including trailer brake connections. Parking (hand) brake. Steering mechanism. Lighting devices and reflectors. Tires. Horn. Windshield wiper or wipers. Rear-vision mirror or mirrors. Coupling devices. Wheels and rims. Emergency equipment.
(b) Drivers preparing to transport intermodal equipment must make an inspection of the following components, and must be satisfied they are in good working order before the equipment is operated over the road. Drivers who operate the equipment over the road shall be deemed to have confirmed the following components were in good working order when the driver accepted the equipment:
- Service brake components that are readily visible to a driver performing as thorough a visual inspection as possible without physically going under the vehicle, and trailer brake connections - Lighting devices, lamps, markers, and conspicuity marking material - Wheels, rims, lugs, tires - Air line connections, hoses, and couplers - King pin upper

The facts in this case support that the Complainant engaged in multiple instances of protected activity. Complainant's testimony and the supporting text message evidence establishes that he reported multiple mechanical safety issues with Truck Tractor #204 while he was employed for the Respondent between the last week of October 2020 and December 30, 2020. He testified that some of the items he reported were fixed while others were not. He reported an oil leak, fuel filter problem requiring replacement, broken wiper pump, worn tires needing replacement, as well as an air leak and related brake issues.

The evidence supports that the Respondent remedied most of the reported issues in a timely fashion. This would include the replacement of the fuel filters, replacement of a broken wiper pump, replacement of worn or blown tires, as well as other minor issues as the Respondent trucking company became aware of them. However, Complainant alleges that the Respondent did not adequately address an oil leak that he reported, as well as an air leak which occurred on December 28, 2020, which impacted the safe operation of Truck #204 including the braking system.

Regarding the oil leak, Complainant testified that he asked his Employer to fix an oil leak, beginning shortly after he began his employment up to shortly before the termination of his employment, but he believed the oil leak had never been fixed. TR 27, 37. Respondent (Michael Callahan) acknowledged that an oil leak was reported on or about December 17, 2020 when Complainant wrote a list of repairs on the back of his weekly mileage sheet. TR 125. He also testified that the oil cap on the side of the motor had been missing but was replaced after the Complainant started driving the truck. *Id.* Callahan also acknowledged that if oil gets on brake parts, it can increase the stopping distance of a truck tractor and in addition, can present a danger of fire. Respondent Michael Callahan testified that the oil leak that Complainant reported on December 17, 2020 was fixed. TR 134 - 135. Callahan stated that he found one hose clamp was loose on the power steering and one turbo drain tube was cracked. TR 135. He testified that to his knowledge the truck did not develop an oil leak again after December 17, 2020. *Id.*

The evidence in the record does not establish whether in fact the oil leak was adequately repaired by the Respondent on or about December 17, 2020. However, the photos taken by the Complainant as well as Complainant's testimony support that there appeared to be a continuing oil leak as there was some oil which appeared to be fresh in the photos taken on or about December 27, 2020. Referring to CX-1, p. 16, Michael Callahan acknowledged that the photo shows old oil that had collected dirt towards the top of the photo, while the middle of the photo, which shows the motor, appears to be fresh oil. TR 124. Thus, the evidence establishes that fresh oil was present, at least to some extent, at the time the photos were taken which Complainant testified was about December 27, 2020. TR 27-28.

coupling device - Rails or support frames - Tie down bolsters - Locking pins, clevises, clamps, or hooks - Sliders or sliding frame lock.

Complainant further testified that he had to clamp an air leak which developed on Truck #204 on December 28, 2020 because the air leak affected the safe operation of multiple essential components of the truck including the brakes. TR 23.

The federal regulation pertaining to the operation of a commercial vehicle at 49 C.F.R. § 392.7 provides generally that a commercial motor vehicle should not be driven unless the driver is satisfied that essential elements of the operating system, including the brakes, are in good working order. Other federal regulations regarding the operation of a commercial vehicle relevant to this case include the following:

> 49 C.F.R. § 393.40(a)
>
> (a) Each commercial motor vehicle must have brakes adequate to stop and hold the vehicle or combination of motor vehicles. Each commercial motor vehicle must meet the applicable service, parking, and emergency brake system requirements provided in this section.
>
> 49 C.F.R. § 396.3(a)
>
> (a) General. Every motor carrier and intermodal equipment provider must systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles and intermodal equipment subject to its control.
>
> (1) Parts and accessories shall be in safe and proper operating condition at all times. These include those specified in part 393 of this subchapter and any additional parts and accessories which may affect safety of operation, including but not limited to, frame and frame assemblies, suspension systems, axles and attaching parts, wheels and rims, and steering systems.
>
> 49 C.F.R. § 392.7 Equipment, inspection and use.
>
> (a) No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:
>
> Service brakes, including trailer brake connections.
> Parking (hand) brake.
> …
> Horn.
> ….
> Coupling devices.
>
> 49 C.F.R. § 393.207 Suspension systems.…
>
> (f) Air suspensions. The air pressure regulator valve shall not allow air into the suspension system until at least 55 psi is in the braking system. The vehicle shall be level (not tilting to the left or right). Air leakage shall not be greater than 3

psi in a 5-minute time period when the vehicle's air pressure gauge shows normal operating pressure.

49 C.F.R. § 396.5 Lubrication.

Every motor carrier shall ensure that each motor vehicle subject to its control is

(a) Properly lubricated; and

(b) Free of oil and grease leaks.

49 C.F.R. § 396.7 Unsafe operations forbidden.

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

49 C.F.R. § 392.3 Ill or fatigued operator.

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. However, in a case of grave emergency where the hazard to occupants of the commercial motor vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the commercial motor vehicle to the nearest place at which that hazard is removed

In order for complaints regarding safety violations to constitute protected activity under Subpart A(i) (the complaint clause of the STAA), such complaints must be based upon a subjectively and objectively reasonable perception of a violation of a commercial vehicle safety regulation. *See Ulrich v. Swift Transportation Corp*., ARB No. 11-016, 2010-STA-41 (ARB Mar. 27, 2012). Therefore, the various complaints made by the Complainant regarding safety violations must be analyzed to determine whether they can be determined to be both subjectively and objectively reasonable, in order to be deemed protected activity under this Part of the STAA. (Emphasis added).

In reaching the determination of subjective and objective reasonableness, under the STAA, the Administrative Review Board (ARB) has considered this standard as applied under the environmental whistleblower statutes which require a "reasonable belief" of a violation, rather than an actual violation. Under these statutes, "the 'subjective' component of the reasonable belief test is satisfied in the same manner as it was when it was identified as the 'good faith' test by showing that the employee actually believed that the conduct he complained of constituted a violation of relevant law ... An objective reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant…" *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 10-001, slip op at 9, ALJ No. 2008-STA-61 (ARB Sept. 30, 2011) (Reasonable belief of violation requires both subjective reasonableness, and objective reasonableness, which is evaluated based on the

knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant).[4]

In applying this standard of reasonableness to the Complainant's complaints of an ongoing oil leak in Truck #204, as well as a problem with the air compressor which occurred on December 28, 2020 affecting the braking system, the undersigned notes that there is no dispute that the Complainant had very limited knowledge or training in truck mechanics. He testified he attended basic training for operating a truck in order to obtain his commercial license in 2018, but had no training as a mechanic, nor any training in brake systems or the adjustment of brakes. TR 9-10, Complainant confirmed during his testimony that he is not a mechanic and never had any training as a truck mechanic. TR 97. He also testified that he is not qualified to adjust brakes, did not have training to adjust brakes, and had never adjusted brakes in the past for any of his previous employers. TR 42. Respondent Michael Callahan also confirmed during his testimony that he understood that Complainant knew less about mechanical problems with trucks than he did, and also that Complainant "probably actually thought the truck had oil leaks even if it didn't." TR 130.

Based on the evidence in the record the undersigned finds that Complainant's stated complaints regarding an ongoing oil leak and his complaint about the air compressor system impacting the braking system on December 28, 2020 and December 29, 2020 are objectively and subjectively reasonable. That is to say, the evidence supports that Complainant actually believed the perceived oil leak and air compressor problems affected the safe operation of Truck #204. Further, a reasonable person with limited training in truck mechanics such as Complainant, would also believe that the noted problems affected the safe operation of Truck #204. Thus, the Complainant's stated complaints of an ongoing oil leak in Truck #204 and his expressed concern over the air compressor system affecting the braking system, both of which impacted the safe operation of Truck # 204, constitute protected activity under the STAA.

2) Complainant's refusal to drive under 49 U.S.C. §§ (a)(1)(B)(i) and (ii)

An individual's refusal to drive constitutes protected activity under subpart (B)(i) of the STAA, if the operation of the vehicle violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health. The refusal to operate the vehicle is protected activity under subpart (B)(ii) of the statute, if the employee refuses to operate the vehicle because the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. *See* 49 U.S.C. § 31105 (a)(1)(B)(i)-(ii).

[4] In *Bailey* the Board stated, "[t]he Board has consistently held that under the complaint clause [of the STAA], the complainant must at least be acting on a reasonable belief regarding the existence of a violation, *citing Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091; ALJ No. 2006-STA-032 (ARB Sept. 24, 2010); *Guay v. Burford's Tree Surgeon's Inc.*, ARB No. 06-131, ALJ No. 2005-STA-045 (ARB June 30, 2008). The Board further recognized that a reasonable belief of a violation requires both subjective reasonableness, and objective reasonableness, which is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as Complainant. *See Bailey*, slip op. at 8-9.

The STAA further provides that under paragraph (B)(ii) "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances, then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain correction of the hazardous safety or security condition." 49 U.S.C § 31105 (a) (2).

There is some disagreement in the case law as to whether subpart B(i) requires an actual violation of a motor vehicle safety regulation to constitute protected activity under the STAA, or whether an employee's refusal to operate a motor vehicle where the employee reasonably believes at the time that operation of the vehicle would violate a pertinent safety law is sufficient to constitute protected activity. The undersigned applies the standard as articulated by the Administrative Review Board in *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 10-001, slip op. at 9, ALJ No. 2008-STA-61 (ARB Sept. 30, 2011).[5] In *Bailey* the Board stated,

> [W]e conclude that the protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined.

Id.

Thus, protected activity under both refusal to drive subparts would require that the Complainant's refusal to operate the vehicle was both subjectively and objectively reasonable. Subpart (B)(i) addresses whether the employee reasonably believes a violation of a motor vehicle regulation would occur and subpart (B)(ii) addresses whether the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

After analyzing the evidence presented in this case, the undersigned finds that the Complainant has proven that his refusal to drive on December 28, 2020 and December 29, 2020 was protected activity under both Subpart (B)(i) (actual violation) and (B)(ii) (reasonable apprehension of serious injury) of the STAA statute.

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[5] In *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-61 (ARB Sept. 30, 2011) the ARB affirmed the ALJ's decision and applied the standard noted above that is, "the protection afforded under Section 31105(a)(1)(B)(i) also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined." *Bailey* slip op. at 9. However, on appeal to the Eleventh Circuit Court of Appeals, the Eleventh Circuit disagreed with the Board on this issue and concluded that Section 31105(a)(1)(B)(i) covers "only those situations where the record shows that operation of a motor vehicle would result in the violation of a regulation, standard, or order related to commercial motor vehicle safety, health, or security." *Koch Foods, Inc. v. Secretary, U.S. Dept. of Labor*, 712 F.3d 476(11th Cir. 2013). As this case arises in the Sixth Circuit, where this issue has not been addressed, the undersigned applies the standard articulated by the ARB. See also *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 14-041, ALJ No. 2008-STA-61 (ARB May 30, 2014).

Complainant's refusal to drive on December 28, 2020 in this case, was based on the fact that Thacker experienced a mechanical problem with the air compressor system in the form of an airline leak that affected multiple components of the truck's operating system including the braking system which clearly affected the safe operation of Truck #204. Thacker testified that he refused to "back the brakes off" of the trailer which would result in operating the tractor trailer with tractor brakes, but without trailer brakes. Thacker also reasonably believed he was not qualified, or adequately trained, to make any adjustments to the braking system. The undersigned finds the Complainant's refusal to drive the truck until it was checked over by a mechanic, on the scene, is protected activity as it is based on the Complainant's refusal to drive due to actual violations of safety regulations including 49 C.F.R. §§ 392.7, 393.40, 396.3(a), 393.207 and 396.7, as well as the Complainant's reasonable apprehension that to drive the Truck would result in serious injury to the employee or the public because of the vehicle's unsafe condition. As the proper operation of the braking system is fundamental to the safe operation of the tractor trailer, the undersigned finds that the Complainant's refusal to drive the truck on December 28, 2020 is both subjectively and objectively reasonable. Complainant's testimony supports that he believed the tractor trailer could not be operated safely because the brakes were not working properly and a reasonable person with similar training as the Complainant would also believe the tractor trailer could not be operated safely without the brakes working properly. Testimony also supports that the Complainant may have temporarily remedied the problem with the air leak when he applied a pliers to clamp the airline leak. Therefore, the brakes may have been working properly when the mechanic, Joe Flick, arrived on the scene. However, the Complainant, with limited mechanical experience (or a reasonable person with similarly limited mechanical experience), would not be expected to know whether the "stop gap" remedy which the Complainant applied (using a pliers to pinch the airline) would be sufficient to remedy the air leak and allow for the safe operation of the tractor trailer. Therefore, the Complainant's refusal to drive on December 28, 2020, until the mechanic arrived on scene and verified the brakes on Truck #204 were working properly, is protected activity under the STAA.

Complainant's refusal to drive on December 29, 2020 is also protected under the STAA. Complainant provided two reasons for his refusal to drive on December 29, 2020. He stated that due to a medical problem that caused him to experience bloody diarrhea, vomiting and fatigue, during the early morning hours of December 29, 2020, he believed he was too ill and fatigued to safely operate Truck 204, even though he understood that he was under dispatch to pick up and deliver a load of rebar. TR 62-64.

The second reason given by the Complainant for his refusal to drive on December 29, 2020 was that due to the ongoing oil leak and other issues with Truck #204, Complainant did not believe that Truck #204 was safe to drive. Complainant testified that he reached the point on December 28, 2020, when he refused to drive the truck due to the oil leaks and other items. TR 37-38. He testified that he explained to Michael and Chery Callahan that in addition to his being sick and fatigued:

> I'm tired of this truck, you know, with oil leaking, constantly breaking down, always having issues, and everything. That to go ahead to get it running to where if I get inspected by ODOT, you know, triple pass, … It would give me time to see

> if I could feel any better by the time I got the truck ready for me to go ahead and run the load that the truck was loaded with.

TR 63.

He further testified:

> I was tired and I knew that he wouldn't have the truck fixed right away, trying to buy some time to see if I feel any better later so I could get and run the load. You know I just wasn't feeling the best. I mean, I had been up all night.

TR 64.

Michael Callahan acknowledged that he and Complainant exchanged text messages on December 29, 2020. TR 130. He confirmed that he received a text message from the Complainant stating:

> Get the truck to where it's safe to have on the road, and I'll take the load. The oil leaks alone will fail me on an inspection. It will fall back on me. I can't risk it anymore. I'm trying to keep my record clean.

Id.

Callahan testified that he understood this text to mean that Complainant was refusing to take the load and operate the truck that was assigned to him. He also confirmed that he understood that Complainant knew less about mechanical problems with trucks than he did, and also that Complainant "probably actually thought the truck had oil leaks even if it didn't." *Id.* He also testified that he understood that the statement made by the Complainant was the equivalent of Complainant asking Respondent to correct what he perceived to be an unsafe condition. TR 131.

After considering the testimony of both the Complainant and the Respondent Michael Callahan, which is supported by the text message evidence, the undersigned finds that the Complainant's refusal to drive on December 29, 2020 constitutes protected activity under both provisions of the refusal to drive provision of the STAA, that is Subpart (B)(i) (actual violation provision), and Subpart B (ii) (reasonable apprehension of serious injury provision). *See* 49 U.S.C. §§ (a)(1)(B)(i) and (a)(1)(B)(ii).

Complainant's refusal to drive due to illness and fatigue, alone, even without considering Complainant's stated complaints about ongoing oil leaks and mechanical issues, is sufficient to support that his refusal to drive on December 29, 2020 is protected activity under the STAA. Complainant's testimony which is supported by the text message evidence supports that he believed he was too ill and fatigued from his illness to drive on December 29, 2020. Driving while ill or fatigue is a violation of 49 C.F.R. §392.3 which provides that:

> 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.

Thus, Complainant's refusal to drive meets the Subpart A standard of actual violation of a regulation. U.S.C. §§ (a)(1)(B)(i). It also meets the reasonable apprehension standard of Subpart B as his testimony supports that he was too ill and fatigued to safely drive on December 29, 2020, and that doing so would result in serious injury to the employee or the public. The undersigned finds that Complainant's uncontroverted testimony regarding his illness and fatigue on December 29, 2020 is both subjectively and objectively reasonable. Although a determination of illness and fatigue necessarily has a subjective component, Complainant's testimony is found to be credible, and his consistent and uncontroverted testimony as to the degree of illness and pain he experienced, as well as fatigue due to his inability to sleep because of his illness, supports that a reasonable person in the same circumstances would also conclude that he or she would be unable to drive due to fatigue and illness. Therefore, Complainant's refusal to drive on December 29, 2020 constitutes protected activity under the provisions of the STAA.

Further support for the conclusion that the Complainant's refusal to drive on December 29, 2020 is protected activity can be found in the Complainant's testimony that his concerns over ongoing oil leaks and other mechanical issues caused him to believe that Truck #204 was not safe to drive. As previously noted, Michael Callahan confirmed that he received a text message from the Complainant on the morning of December 29, 2020 stating: "Get the truck to where it's safe to have on the road, and I'll take the load. The oil leaks alone will fail me on an inspection. It will fall back on me. I can't risk it anymore. I'm trying to keep my record clean." TR 130. Callahan testified that he understood this text to mean that Complainant was refusing to take the load and operate the truck that was assigned to him. He also confirmed that he understood that Complainant knew less about mechanical problems with trucks than he did, and also that Complainant "probably actually thought the truck had oil leaks even if it didn't." *Id.* He also testified that he understood that the statement made by the Complainant was the equivalent of him asking Respondent to correct what he perceived to be an unsafe condition. TR 131. This testimony lends additional support to the conclusion that Complainant's refusal to drive due to his concerns of mechanical problems with Truck #204 was subjectively as well as objectively reasonable, for an individual with limited training or knowledge of truck mechanics.

Therefore, in summary, and for the reasons noted above, the Complainant's stated complaints of an ongoing oil leak in Truck #204 and his expressed concern over the air compressor system affecting the braking system, both of which impacted the safe operation of Truck #204, constitute protected activity under the STAA. Further Complainant's refusal to drive on December 28, 2020 and December 29, 2020 also constitute protected activity as defined by the STAA.

B) CONTRIBUTION OF PROTECTED ACTIVITY TO THE ADVERSE ACTION

In order for a Complainant to prove his prima facie case under the whistleblower provisions of the STAA, an employee must prove by a preponderance of the evidence that he engaged in protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay or terms or privileges of employment; and that the employee's protected activity was a contributing factor in the adverse employment action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052 (ARB Jan. 31, 2011); *Riess v. NuCor Corp*., ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010).

Under the AIR 21 burden of proof framework which is applicable to this case, the Board has noted:

> [T]he complainant is initially required to show by a preponderance of the evidence that protected activity was a 'contributing factor' in the alleged adverse personnel action. Should the complainant meet the 'contributing factor' burden of proof, the burden shifts to the employer who is required, in order to overcome the complainant's showing, to prove by 'clear and convincing evidence' that it would have taken the same adverse action in the absence of the protected conduct."

(*Beatty v. Inman Trucking Management Inc.* ARB No.13-039, slip op. at 8, ALJ Nos. 2008-STA-20, 21 (ARB May 13, 2014)).

As noted by the Board in *Beatty*,

> [T]he ARB has consistently determined that a contributing factor is 'any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision.' Thus, for example, a complainant may prevail by proving that the respondent's reason, 'while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity.' Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence.

Beatty, slip op. at 8-9.

In this case the only adverse action alleged by the Complainant is his discharge from employment on December 29, 2020. As discussed above, Complainant's protected activity includes both the complaints he made regarding mechanical issues or necessary repairs to Truck #204, including what he perceived to be an ongoing oil leak, as well as his refusal to drive on December 28, 2020 and December 29, 2020. There is no support in the record that the Complainant was terminated, or in any other way reprimanded, for the reports of mechanical issues or maintenance requests for the truck prior to his refusal to drive on December 29, 2020.

The Complainant's refusal to drive on December 29, 2020 was predicated upon his representation that he was too ill and fatigued to safely operate his truck on December 29, 2020. In addition, the uncontroverted testimony also supports that he informed his Employer, Michael Callahan, that he would not work until what he claimed were necessary repairs were made to Truck #204. Complainant testified that on the morning of December 29, 2020, he communicated to Michael and Cheryl Callahan that he "was up all night sick after I got done with work the day before." TR 62. He stated that he had been up since midnight, vomiting blood, and was also tired from not sleeping. TR 62-63. Thacker also confirmed that he had an email exchange with Cheryl Callahan on the morning of December 29, 2020, wherein she stated, "You missed your pickup appointment. This is my last text. We are assuming you must have quit under dispatch because you won't answer. You can at least let me know so I can see what I can do to cover this load." TR 67. He explained that he responded to her that he had been up all night having bloody diarrhea and stated, "I haven't quit under dispatch. I am sick." *Id.* Another text he sent to her stated, "My guts been feeling like they were shredded up and run up. But as this pain, when it kicks in, has me about in tears like my hernia." TR 69.

Michael Callahan also acknowledged that he and Complainant exchanged text messages on December 29, 2020. TR 130. He confirmed that he received a text message from the Complainant stating: "Get the truck to where it's safe to have on the road, and I'll take the load. The oil leaks alone will fail me on an inspection. It will fall back on me. I can't risk it anymore. I'm trying to keep my record clean." *Id*. He understood this text to mean that Complainant was refusing to take the load and operate the truck that was assigned to him.

Complainant testified that he still had a load on the truck at this time but was too sick to safely drive the truck on the morning of December 29, 2020. *Id*. He further testified:

> I was tired and I knew that he wouldn't have the truck fixed right away, trying to buy some time to see if I feel any better later so I could get and run the load. You know I just wasn't feeling the best. I mean, I had been up all night.

TR 64.

Thacker confirmed that he received a text from Michael Callahan at 8:38 a.m. on December 29, 2020 which stated, "If I do your load, you're no longer needed." TR 64. Complainant testified he understood this to mean that if he did not run the load, his Employer was firing him. TR 65. He also confirmed that he received a message from Michael Callahan at 10:18 a.m. on December 29, 2020 which stated, "You're done. No longer needed here. Quit under dispatch will be put on your data." TR 66. Respondent understood this to mean he was fired. He denied that he quit under dispatch. *Id.*

The undersigned finds that the evidence in this case establishes that the Complainant was terminated by his Employer due to his refusal to drive on December 29, 2020. The undersigned also finds that the Complainant's refusal to drive on December 29, 2020 was predicated on his belief that he was too ill and fatigued to safely operate his truck, as well as his belief that the ongoing oil leak and other mechanical issues caused the truck to be in violation of commercial

motor vehicle safety regulations. Accordingly, Complainant's refusal to drive on December 29,2020, which constitutes protected activity under the STAA, contributed to the Respondent's termination of his employment on the same day. Respondent's statement, "If I do your load, you're no longer needed." clearly establishes that Complainant was terminated because he refused to drive on December 29, 2020. Additional support for the causal nexus is the temporal proximity between the Complainant's refusal to drive on December 29, 2020 and his termination at 10:18 a.m. on December 29, 2020, when Michael Callahan texted him "You're done. No longer needed here. Quit under dispatch will be put on your data." TR 66. Thus, Complainant has proven his prima facie case under the whistleblower provisions of the STAA, by a preponderance of the evidence, that he engaged in protected activity and that his protected activity was a contributing factor in the Respondent's termination of his employment.

Accordingly, since Complainant has established his prima facie case under the whistleblower provision of the STAA, the burden shifts to the Employer to prove by clear and convincing evidence that it would have taken the adverse personnel action of termination of Complainant's employment, absent the protected activity.

Once a Complainant proves his prima facie case the burden shifts to the Employer to prove by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the complainant's protected acts. *See Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F. 3d 152, 157 (3d Cir. 2013) (referring to the AIR 21 legal burden of proof standard as the two-part burden-shifting test). The clear and convincing evidence standard is the intermediate burden of proof, in between preponderance of the evidence and proof beyond a reasonable doubt. To meet the burden, the employer must show that the truth of its factual contentions is highly probable. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Beatty v. Inman Trucking Management, Inc*., ARB No. 13-039, ALJ Case Nos. 2008- STA-020, 2008-STA-021 (ARB May 13, 2014). In meeting its burden under the clear and convincing standard, evidence must establish what the employer "would have done," not simply what it "could have done," absent the protected activity. *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 13-074, ALJ no. 2005-ERA-6 (ARB April 25, 2014).

The undersigned finds that the Respondent has failed to meet its burden of proving that it would have fired the Complainant, but for, his refusal to work on December 29, 2020, which I have determined to be protected activity under the STAA. There is no evidence in the record that the Complainant had been reprimanded or disciplined by the Respondent in the course of his employment. Minor disagreements between the Complainant and the Respondent over the choice of repair shops for the replacement of fuel filters, or Complainant's failure to wash his truck, do not rise to the level where they would be a justification for the termination of the Complainant's employment with the Respondent, especially in light of the fact that Respondent provided no evidence that it had disciplined the Complainant, for any reason, nor ever threatened him with termination of his employment for any actions he had taken during the course of his employment, other than his refusal to drive on December 29, 2020.

Accordingly, the undersigned finds that Complainant has met his burden of proving by a preponderance of the evidence that his refusal to drive on December 29, 2020 constituted protected activity under the STAA and this protected activity contributed to his discharge from employment by the Respondent. Respondent has failed to prove by clear and convincing evidence that it would have discharged the Complainant from his employment in the absence of the Complainant's refusal to drive on December 29, 2020, which is determined to constitute protective activity. Therefore, Complainant has proven his case under the STAA and is entitled to remedies.

V. REMEDIES

Complainant is entitled to remedies under the STAA. 49 U.S.C. § 31105(b)(3)(A). The applicable regulation states that an ALJ who has determined that a Respondent has violated the law will issue an order that will require, where appropriate, remedies including:

> … affirmative action to abate the violation, reinstatement of the complainant to his or her former position with the same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as the result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant may have incurred); and payment of punitive damages up to $250,000. Interest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

29 C.F.R. § 1978.109(d)(1).

Once a Complainant establishes that an employer discharged him in violation of the provisions of the STAA it is the employer's burden to prove by a preponderance of the evidence that the employee did not exercise reasonable diligence in finding other suitable employment. The employer must prove that comparable jobs were available to the employee and that the employee complainant failed to make reasonable efforts to find substantially equivalent employment. *Ass't Sec'y and Landsdale v. Intermodal Cartage Co., Ltd.*, Case No. 1994-STA-22, at 6-7(Sec'y July 26, 1995), *aff'd sub nom Intermodal Cartage Co. Ltd.v. Reich*, 113 F.3d 1235 (6th Cir. 1997). *See also Coates v. Grand Trunk W. R.R. Co*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 5 (ARB July 17, 2015) (citing *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 6-7 (ARB Marc. 31, 2005) ("the employer bears the burden of proving that the employee failed to mitigate")).

In this case Respondent presented no evidence that Complainant failed to mitigate damages, and thus failed to meet its burden. To the contrary. Complainant's testimony establishes that he filed applications with other trucking companies after his termination and, in fact, found a comparable job approximately one month after his termination at equal or better wages. TR 75-78.

Complainant, in this matter, testified that he is seeking lost wages resulting from his being fired, an offer of reinstatement regarding his job with M & C Trucking, LLC, compensatory damages for the mental pain he incurred during the month he was unemployed, January of 2021, as well as attorney fees. TR 80-81. Complainant's brief notes that Complainant requests all relief available to him. *See* Complainant's brief at 29.

A. REINSTATEMENT

Under the STAA, a successful Complainant is automatically entitled to reinstatement to his former position with the same pay and terms and privileges of employment. 49 U.S.C. §31105(b)(2)(A). *Ferguson v. New Prime, Inc.,* ARB No 10-075, 2009-STA-47, slip op. at 6 (ARB Aug. 31, 2011). *See also Dale v. Step 1 Stairworks, Inc.,* ARB No. 04-003, 2002-STA-30, slip op. at 3-4 (ARB Mar. 31, 2005). However, circumstances may exist in which reinstatement is impossible or impractical. *Cefalu v. Roadway Express, Inc.*, ARB No. 08-110, 2003-STA-055, slip op. at 2 (ARB Dec. 10, 2008) (citing A*ssistant Sec'y & Bryant v. Bearden Trucking Co.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 7–8 (ARB June 30, 2005)). For example, "reinstatement may be inappropriate where the parties have demonstrated 'the impossibility of a productive and amicable working relationship.'" *Id*. (citing *Creekmore v. ABB Power Sys. Energy Servs., Inc*., 1993-ERA-024, slip op. at 9 (Sec'y Feb. 14, 1996)). As a Complainant is presumptively entitled to reinstatement, the respondent employer bears the burden of proof to show that reinstatement is not proper. *Id*. Respondent has not presented any evidence that reinstatement would be an improper remedy in this case. Therefore, the undersigned finds that Complainant is entitled to reinstatement to his previous position as a truck driver with Respondent, at the same pay and terms of employment that he would have but for his discharge.

B. COMPENSATORY DAMAGES

Complainant is entitled to compensatory damages (backpay with interest and compensation for any special damages sustained as the result of the retaliation). 29 C.F.R. § 1978.109(d)(1); 49 U.S.C. § 31105(b)(3)(A)(iii). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, 2003-STA-26, slip op. at 7 (ARB Aug. 31, 2004) (citing *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992)). The purpose of a back pay award is to make the employee whole by restoring him "to the same position he would have been in if not discriminated against." *Ferguson v. New Prime, Inc.,* ARB No. 10-075, 2009-STA-47, at 6 (ARB Final Decision and Order of Remand, Aug. 31, 2011). In determining back pay, the "ALJ 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, ALJ No. 2009-STA-47 (ARB Final Decision and Order, Nov. 30, 2012).

In this case Complainant was employed for the Respondent between October 21, 2020 to December 30, 2020 which is a period of 10 weeks. See JX-1, Stipulation 1. His earnings during this period equal $7,876.92 (per W-2 at JX-5) + $250.00 (incorrectly deducted for quitting under dispatch, *see* TR 72) for a total of $8,126.92. Thus, he earned approximately $812.69 per week for the 10 weeks he was employed for M & C Trucking, LLC. Complainant testified that he was

unemployed for about one month after his discharge on December 30, 2020, until he began working for Tri-State Transport on or about February 1, 2021, which the undersigned finds equates to four weeks of unemployment. TR 75-76. Accordingly, Complainant is awarded back pay in the amount of $3,250.76 ($812.69 x 4 weeks).

Complainant testified that his rate of pay with Tri-State is about the same as his rate of pay with the Respondents. TR 77. *See* CX-3. He also testified that the two jobs are similar in regard to the amount of time he is able to spend with his family. TR 78. He testified that the month he was unemployed, January of 2021, was stressful because he had bills to pay and also due to the fact that Respondent included a statement in his employment record that he had "quit under dispatch," which he claimed could negatively affect a truck driver's ability to find a job. *Id*. He was also concerned because Respondents had sent letters to his current Employer regarding a non-compete clause that was in the employment contract he signed with Respondents, which he thought might prevent him from getting a job with Tri-State Transport. TR 78-79.

Jurisdiction of the undersigned in this matter is limited to the claim filed under the STAA. Therefore, the undersigned will not address any matters related to the legality of a "non-compete clause" that was contained in an employment contract that the Complainant signed with the Respondent.

The undersigned finds that the Complainant has failed to establish that he experienced emotional distress or any other special damages during his month of unemployment (January, 2021) such as to warrant an award of additional compensatory damages beyond an award of back pay plus interest.

C. INTEREST

Complainant is entitled to interest on his award of back pay. Interest is to be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and will be compounded daily. 29 C.F.R. § 1978.109(d)(1).

D. PUNITIVIE DAMAGES

Under certain circumstances, the STAA permits an Administrative Law Judge to award punitive damages to an aggrieved Complainant. 49 U.S.C. § 31105(b)(30(C); 29 C.F.R. § 1978.109(d)(1). Punitive damages are warranted where there has been a callous or reckless disregard of the complainant's rights, as well as intentional violations of federal law. *Beatty v. Celadon Trucking Servs., Inc.*, ARB Nos. 15-085, 15-086, 2015-STA-10, slip op. at 12 (ARB Dec. 8, 2017); *Smith v. Wade*, 461 U.S. 30, 51 (1983) (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J., concurring and dissenting)). "The inquiry into whether punitive damages are warranted focuses on the employer's state of mind and does not necessarily require that the misconduct be egregious." *Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, 15-022, 2016, 2013-FRS-82, slip op. at 6 (ARB June 21, 2016).

In this case, the record does not sufficiently establish that Respondent intentionally violated federal law or that there was a callous or reckless disregard of the Complainant's rights, or that the employer engaged in a pattern of behavior in violation of federal law. Accordingly, the undersigned finds that Complainant is not entitled to punitive damages.

E. ABATEMENT

The Act expressly provides those successful Complainants in STAA cases are entitled to abatement. 49 U.S.C. § 31105(b)(3)(A)(i). The standard remedy in discrimination cases [is to] notify[y] a respondent's employees of the outcome of a case against their employer." *Michaud v. BSP Transp., Inc.,* ARB No. 97-113, ALJ No. 1995-STA-29 at 9 (ARB Oct. 9, 1997*), rev'd on other grounds sub nom. BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38 (1st Cir. 1998). The Complainant requests that Respondent post a copy of the decision and order in this case for 90 consecutive days in all places where employee notices are customarily posted. Such relief has been found to be appropriate in STAA cases. *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103 & 161, ALJ No. 2003-STA-55, at 8 (ARB Jan. 31, 2006), *aff'd. sub nom., Roadway Express v. United States Department of Labor*, 495 F.3d 477 (7th Cir. 2007).

Complainant has requested abatement. The undersigned finds that it is an appropriate remedy in this case and therefore orders the Respondent to post a copy of this Decision and Order for 90 days in all places where employee notices are customarily posted. The undersigned further orders that all references to the Complainant's discharge be expunged from its files. *Id*. *See also Griffith v. Atlantic Inland Carriers*, 2002-STA-34 (ALJ Oct. 21, 2003) *adopted* ARB Case No. 04-010 (ARB Feb. 20, 2004).

F. ATTORNEY FEES

An STAA Complainant who has prevailed on the merits may be reimbursed for litigation costs, including attorney's fees. 49 U.S.C. § 31105(b)(3)(B). This section provides in part that "the Secretary [of Labor] may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint." *Id*.

In accordance with Supreme Court precedent, the starting point is the "lodestar" method of multiplying a reasonable number of hours by a reasonable hourly rate. *See Jackson v. Nutler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026, slip op. at 10–11 (ARB Aug. 31, 2004); *see also Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003). The party seeking a fee award must submit "'adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs." *Gutierrez v. Regents, Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 11 (ARB Nov. 13, 2002).

Therefore, Counsel for Complainant is granted thirty (30) days from the date of the Decision and Order within which to file and serve a fully supported application for fees, costs and

expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

VI. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, and after consideration of the entire record, the following is hereby **ORDERED**:

(1) Respondent shall offer Complainant, Greg Thacker, reinstatement to his former position with the same pay, terms and privileges of employment that he would have received had he continued working from December 30, 2020, through the date of the offer of reinstatement.

(2) Respondent shall pay Complainant, Greg Thacker, back pay at the weekly wage of $812.69 for his four weeks of unemployment during the month of January 2021 for a total of $3,250.76 with interest calculated thereon pursuant to 26 U.S.C. §6621.

(3) Respondent shall expunge from the employment records of Complainant, Greg Thacker, all references to the Complainant's improper discharge on December 29, 2020.

(4) Respondent shall post a copy of this Decision and Order in all places where employee notices are customarily posted for 90 consecutive days.

(5) Counsel for Complainant shall have thirty (30) days from the date of this Decision and Order within which to file a fully supported and verified application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

SO ORDERED.

DREW A. SWANK
Administrative Law Judge

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

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).

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

IMPORTANT NOTICE ABOUT FILING APPEALS:

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

Filing Your Appeal Online

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

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will

then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.
Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

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

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

Filing Your Appeal by Mail

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

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

Access to EFS for Other Parties

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

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

After An Appeal Is Filed

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

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-

issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.