**UNITED STATES DEPARTMENT OF LABOR**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**
**COVINGTON, LA DISTRICT OFFICE**

**Issue Date: 13 May 2024**

*In the Matter of*:

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| **ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY & HEALTH,**<br>*Prosecuting Party*,<br>and<br><br>ERNEST BELL,<br>*Complainant*,<br>v.<br><br>**CRANE MASTERS, INC.**<br>*Employer and Carrier*, | **CASE NO.: 2022-STA-00010**<br><br>OSHA NO: 6-3280-20-102<br><br><br><br><br><br>**JOHN M. HERKE**<br>Administrative Law Judge |

## DECISION AND ORDER AWARDING DAMAGES

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA" or "Act"), 49 U.S.C. § 31105, as amended by the implementing recommendations of the 9/11 Commission Act of 2007, and corresponding regulations found at 29 C.F.R. Part 1978.

### Procedural History

On July 14, 2020, Mr. Ernest Bell ("Mr. Bell" or "Complainant") filed a complaint with the U.S. Department of Labor (DOL), Occupational Safety and Health Administration ("OSHA"), alleging that his employer, Crane Masters, Inc. ("Crane Masters" or "Respondent"), violated the STAA by terminating his employment in retaliation for his refusal to violate federal Department of Transportation (DOT) hours-of-service regulations for commercial motor vehicle drivers.[1] After conducting an investigation, the OSHA Secretary issued his Findings on November 17, 2021. The Secretary found reasonable cause to believe that Respondent violated the STAA.[2] The Secretary awarded Mr. Bell reinstatement, back pay plus interest, compensatory emotional damages, and punitive damages, among other remedies.[3] After the Secretary issued his Findings,

[1] Hearing Exhibit 33; Hearing Exhibit 2.
[2] Hearing Exhibit 22.
[3] *Id.* at 5-6.

the parties had 30 days to file any objections and to request a hearing before an Administrative Law Judge.[4]

On November 24, 2021, Crane Masters timely requested a hearing before the Department of Labor's Office of Administrative Law Judges (OALJ).[5] On December 14, 2021, the DOL assigned this matter to Administrative Law Judge John M. Herke.

On March 16, 2022, the parties attempted settlement using the Covington District Office's settlement judge program; however, they were unsuccessful.[6] After two requests to reschedule the formal hearing, an in-person formal hearing occurred on October 14, 2022 in Houston, Texas.[7]

During the formal hearing, five witnesses testified: (1) Mr. Bell, (2) Jeffrey Cedar, (3) Mike Mabee, (4) Colton Bowen, and (5) Micah Shilling.

The findings below are based on a thorough review of the record, including all evidence and testimony adduced at the hearing. Although this decision and order does not discuss every exhibit in the record, all the testimony and exhibits were carefully considered in reaching a decision.

## Issues

The issues to be decided in this case are:

1. Whether Mr. Bell established by a preponderance of the evidence that he engaged in protected activity under the STAA;

2. Whether Mr. Bell established by a preponderance of the evidence that he suffered an unfavorable employment action from Crane Masters.

3. Whether Mr. Bell established by a preponderance of the evidence that his protected activity was a contributing factor in Crane Masters' unfavorable employment action;

4. If Mr. Bell met his burden, whether Crane Masters established by clear and convincing evidence that it would have taken the same unfavorable employment action against Mr. bell in the absence of his protected activity; and

5. If Mr. Bell met his burden and Crane Masters did not meet its burden, what relief, if any, is Mr. Bell entitled to under the STAA?

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[4] *Id.* at 6.

[5] Exhibit 23.

[6] Settlement Judge Conclusion (March 17, 2022).

[7] On May 10, 2022, the first hearing order was issued setting the case for hearing on July 19, 2022. On July 14, 2022, the hearing was rescheduled to September 13, 2022. Then, on August 4, 2022, the hearing was rescheduled to October 13, 2022.

## Findings of Fact

1. Mr. Ernest Bell is a licensed commercial truck driver.[8]
2. Mr. Bell worked for Crane Masters from September 24, 2019 to June 5, 2020.[9]
3. As a driver for Crane Masters, Mr. Bell operated a commercial motor vehicle on public roadways from Crane Masters' Houston, Texas location.[10]
4. Mr. Bell's duties for Crane Masters included transporting crane counterweights of approximately 30,000 to 50,000 pounds, as well as various crane booms.[11]
5. While working for Crane Masters, Mr. Bell would usually drive short-hauls (150 miles or less), but sometimes he would drive long-hauls (more than 150 miles).[12]
6. On June 4, 2020, Mr. Bell worked a total of 19 hours when he drove from the Crane Masters yard to Round Rock, Texas before returning to the Crane Masters yard that evening.[13]
7. Mr. Bell was on duty for the entirety of the time he was in Round Rock on June 4, 2020.[14]
8. Mr. Bell received a 9-hour rest between his June 4, 2020 shift and his June 5, 2020 shift.[15]
9. Mr. Bell worked on June 5, 2020 from 8 a.m. to 4:30 p.m.[16] That day, he drove from the Crane Masters yard to Livingston, Texas before returning to the yard that afternoon.[17]
10. On June 5, 2020, Mr. Bowen texted an assignment to Mr. Bell for a job in Round Rock, Texas the next day, June 6, 2020, at 7 a.m.[18] Mr. Bowen's text told Mr. Bell he would have to arrive at Round Rock by 7 a.m.[19] To be "on the job" at Round Rock at 7 a.m., Mr. Bell would have to leave the Crane Masters yard on June 6, 2020 between 3 a.m. and 3:15 a.m. to arrive in Round Rock on time.[20]
11. Mr. Bowen instructed Mr. Bell to drive back to Livingston on the afternoon of June 5, 2020.[21]
12. Mr. Bell refused to return to Livingston, and instead told Mr. Bowen that he would not be able to stay within the hours-of-service regulations if he drove to Livingston and back and then had to arrive at work for 3:30 a.m. the next day, June 6.[22]

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[8] Hearing Transcript, p. 30.
[9] Hearing Exhibit 31, p. 1; *see also* Hearing Transcript, p. 45; 202.
[10] Hearing Transcript, p. 7.
[11] Hearing Transcript, p. 8.
[12] Hearing Exhibit 47, pp. 21-22.
[13] Hearing Transcript, pp. 34-38; Hearing Exhibit 6; Hearing Exhibit 40, p. 1.
[14] Hearing Transcript, pp. 75-80.
[15] Hearing Transcript, pp. 38-39.
[16] Hearing Transcript, pp. 38, 43, 86; *see also* Exhibit 6.
[17] Hearing Transcript, p. 107.
[18] Hearing Transcript, p. 48; Hearing Exhibit 19.
[19] Hearing Transcript, pp. 50-51; *see also* Exhibit 19.
[20] Hearing Transcript, pp. 50-51.
[21] Hearing Transcript, pp. 45; 209.
[22] Hearing Transcript, pp. 45; 209.

13. Mr. Bowen told Mr. Bell to “hit the gate” if he would not return to Livingston on the afternoon of June 5.[23]
14. The Bowen-Bell yard disagreement lasted for a couple of minutes.[24]
15. Mr. Bell’s driver’s log for the June 1 to June 6, 2020 time period was not accurate.[25]
16. During the week of June 1, 2020 to June 6, 2020, Mr. Bell worked 40 regular hours and 6 overtime hours.[26]
17. Mr. Bell had complained about working outside of the hours-of-service limit a few times during his employment with Crane Masters.[27]
18. The work environment at Crane Masters encouraged drivers to work outside of the hours-of-service limits.[28]
19. Mr. Bowen terminated Mr. Bell’s employment on June 5, 2020.[29]
20. Mr. Bell filed his Online Whistleblower Complaint on July 14, 2020, which was the same day he started working for another employer (Pinnacle Propane).[30]

## Applicable Law and Regulations

**1. Surface Transportation Assistance Act of 1982 (“STAA”), 49 U.S.C. § 31105, and the regulations promulgated at 29 C.F.R. Part 1978.**

The STAA prohibits a covered entity from discharging or otherwise retaliating against a covered employee for engaging in any activity that is protected under the Act.[31] A “protected activity” includes refusing to operate a vehicle because such operation “violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security.”[32] Covered employees who believe they have been retaliated against by their employer in violation of the STAA may file a “whistleblower” complaint with the Occupational Safety and Health Administration (OSHA).[33]

STAA whistleblower complaints are governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”).[34] Under the AIR 21 standard, a complainant must initially prove by a

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[23] Hearing Transcript, pp 45; 209.
[24] Hearing Transcript, pp. 45; 220; 249.
[25] Hearing Transcript, pp. 65-66; 146; 192. Mr. Bell only recorded 5.87 hours in his driver’s log to avoid recording his hours-of-service violations.
[26] Hearing Transcript, p. 58; Hearing Exhibit 6; Hearing Exhibit 40, p. 1.
[27] Hearing Transcript, p. 88; 133.
[28] Hearing Transcript, p. 124.
[29] Hearing Transcript, pp. 45; 202.
[30] Hearing Transcript, pp. 60-61. Hearing Exhibit 43.
[31] *See* 49 U.S.C. § 31105 (a).
[32] 49 U.S.C. § 31105 (a)(1)(B)(i).
[33] 29 C.F.R. § 1978.103.
[34] *See* 49 U.S.C. § 42121(b)(i)(2011); 49 U.S.C. § 31105(b)(1) “All complaints initiated under this section shall be governed by the legal burdens set forth in section 42121(b)”; *Tocci v. Miky Transp.,* ARB No. 15-029, ALJ No. 2013-STA-071 (ARB May 18, 2017); Beatty v. Inman Trucking Mgmt., ARB No. 13-039, ALJ No. 2008-STA-020 (ARB May 12, 2014).

preponderance of the evidence that he engaged in a protected activity, and that the protected activity was a contributing factor in an adverse action taken against him. A "contributing factor" is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[35] If that burden is met, the burden shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action regardless of the employee's protected activity.[36] If employer meets that burden, relief may not be awarded.

Thus, Mr. Bell may prevail in this case if he establishes, by a preponderance of the evidence: (i) that he engaged in a protected activity under the Act; (2) that Crane Masters committed an adverse action against him; and (iii) that the protected activity was a contributing factor in Crane Masters' decision to commit the unfavorable employment action. If Mr. Bell proves these factors, Crane Masters may still avoid liability if it establishes by clear and convincing evidence that it would have taken the same unfavorable action against Mr. Bell in the absence of his protected activity.

### 2. Hours-of-service Regulations

The Federal Motor Carrier Safety Administration (FMCSA) created the regulations governing the hours-of-service for all commercial motor carriers and drivers.[37] A driver of a property-carrying CMV must take a 10-consecutive-hour break after being on duty for a maximum of 14 hours.[38]

## Conclusions of Law

### 1. Complainant Engaged in a Protected Activity

The contested protected activity in this matter is: refusing to operate a vehicle in violation of a regulation or standard related to CMV safety, health, or security. Under the employee protections of 49 U.S.C. § 31105(a)(1)(B):

> A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, [when] . . . the employee refuses to operate a vehicle because-
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security. . . .

[35] *Powers v. Union Pac. R.R. Co.,* ARB No. 13-034, ALJ No. 2010-FRS-030, at 11 (Jan. 6, 2017) (internal citations omitted).
[36] 42 U.S.C. § 42121(b)(2)(B)(iv).
[37] *See* 49 C.F.R. § 395.1.
[38] 49 C.F.R. § 395.3(a).

An employee's reasonable belief that such operation would be a violation is not enough to establish a protected activity under this section of the Act.[39] Instead, the employee may refuse to operate the vehicle only if such operation would actually violate a U.S. Department of Transportation regulation, standard, or order.[40] Therefore, the issue is whether Mr. Bell would have actually violated the hours-of-service regulations if he had agreed to drive back to Livingston on Friday evening, June 5. Despite some inconsistencies in the record, the preponderance of the evidence established that Mr. Bell would, in fact, have violated the hours-of-service regulations if he had agreed to drive back to Livingston on Friday evening, June 5.

*Inconsistencies in the Documentary Evidence*

Comparison of Complainant's driver log to the witness testimony, Complainant's timecard, his truck's GPS data, and Complainant's pay stub demonstrates an inconsistency in determining how many hours Complainant worked on Thursday, June 4. Complainant's daily driver log (Exhibit 7) does not match either his timecard or the GPS data for June 4; instead, it shows that between 5/30 and 6/5, Complainant worked only 5.87 hours. In the recap column to the right of the log, it shows Complainant worked 5.87 hours on 6/2, and no other hours the rest of the week. Based on the testimony of the witnesses, Mr. Bell's timecard, his pay stub, and the truck's GPS data, however, it is clear Mr. Bell's driver log was not accurately filled out.

First, Mr. Bell credibly testified that he worked 19 hours on June 4. Mr. Bell was able to describe his specific whereabouts for the entire day, including what he did while at the Round Rock job site that day. Mr. Bell arrived at the Crane Masters yard on Thursday, June 4 to do a pre-trip inspection, then he began driving at 3:51 a.m. and arrived at Round Rock at 7:15 a.m.[41] He left Round Rock at 7:45 p.m. to return to Crane Masters, and arrived at Crane Masters at 10:38 p.m. This testimony aligns with the June 4, 2020 GPS data shown in Exhibit 28. This GPS data established that Mr. Bell started his vehicle at 3:51 a.m. and likely started driving at about 4:20 a.m. when the vehicle's speed changed from 0 to 41 mph. The data show a gap between 7:14 a.m. and 1:19 p.m., and several other gaps and speed changes during the course of the day. By way of explanation, Mr. Bell testified that between 7:15 a.m. and 7:45 p.m., he helped set up the crane, staged,[42] and then broke down the crane.[43] Generally, while at a job site, Mr. Bell would wait until he was called to come back and pick up the crane. Sometimes, Mr. Bell would have to drive from the front of the site to the back of the site, drop the trailer, take off

[39] *Koch Foods, Inc. v. U.S. Dept. of Labor*, 712 F.3d 476, 486 (11th Cir. 2013) (explaining the statutory subsection's lack of a "reasonable belief" standard).

[40] *Id.* at 480-86 (holding that an STAA whistleblower is protected under 49 U.S.C. § 31105(a)(1)(B)(i) only when operation of the motor vehicle would result in an actual violation of the law).

[41] The record as a whole establishes Mr. Bell was in Round Rock the entire day of June 4, 2020, and that Mr. Bell misspoke when he said he worked in both Round Rock and Livingston on Hearing Transcript, page 98. There is no genuine dispute he was in Round Rock the entire day of June 4, because the rest of the hearing testimony indicates that he was in Round Rock the entire day of June 4, and that he was in Livingston on June 5. *See* Hearing Transcript, pp. 107-108.

[42] Mr. Bell testified that "staging" refers to the period of time a driver is not actively driving, and he is waiting on the job site. (Hearing Transcript, p. 102).

[43] Hearing Transcript, p. 78.

counterweights, pick up another trailer with counterweights, and bring those parts to build the crane. Therefore, the truck is not stationary on the job site the entire time.[44] After leaving the Round Rock job site, Mr. Bell's vehicle speed picked up and he was consistently driving around the 7:40 p.m. mark. This momentum lasted until 10:38 p.m., as indicated by the end of the GPS data log.[45]

Neither party established that Mr. Bell slept at any point while at the Round Rock jobsite on June 4. To the contrary, Mr. Bell testified that he assisted loading and unloading the vehicle during the day, engaged in some staging, and that–other than his lunch break–he was working all day. Mr. Bell, Mr. Cedar, and Mr. Bowen all testified that a truck driver at Crane Masters will perform a pre-trip inspection and may load materials before starting to drive.[46] Similarly, the driver will conduct a post-trip inspection after returning to the yard.[47]

Second, Mr. Bell's handwritten timecard indicates he worked from 3:30 a.m. to 11 p.m. that day, for a total of 19.5 hours.[48] Further, his pay stub for June 1 through June 7 reflected he was paid for the same hours tallied on his timecard.[49] Third, the GPS data from Mr. Bell's truck for June 4 establishes that the truck was in use from 3:51 a.m. until 10:38 p.m. that day.[50] The preponderance of the evidence thus supports a determination that Complainant did, in fact, work for 19 hours straight on June 4.[51] Per the applicable regulation, then, Mr. Bell was supposed to have been off duty for 10 consecutive hours before driving again.[52]

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[44] Hearing Transcript, p. 110.

[45] *See* Exhibit 28.

[46] Mr. Bell testified that a normal day of driving at Crane Masters entailed arriving at the yard, then performing the pre-trip of the truck, prior to loading the truck (Hearing Transcript, p. 32). Mr. Cedar testified that a driver does not immediately start driving at the beginning of a shift; rather, he will do a pre-trip and load counterweights before driving (Hearing Transcript, p. 136). Mr. Bowen testified that a driver would conduct a pre-trip log when first starting the truck or before starting the truck (Hearing Transcript, p. 213). The purpose of performing the pre-trip is to check the equipment and ensure the truck is in proper condition to drive to the job site.

[47] Mr. Bell testified he would conduct a post-trip inspection upon returning to the yard from a job site. The post-trip inspection involved checking the truck for flat tires, air leaks, working lights, and ensuring the truck was in overall good condition. (Hearing Transcript, p. 37).

[48] Mr. Bell incorrectly wrote the date range on his timecard as 6/31-7/5 instead of 5/30-6/5. At the hearing, he testified that he was flustered and "frustrated" at having just been terminated, and he mistakenly entered those dates. Hearing Transcript, pp. 54-55. This testimony is reasonable and more likely than not true because it is undisputed that Mr. Bell no longer worked at Crane Masters on the dates shown on the timecard (Exhibit 6).

[49] *See* Exhibit 5, p. 1.

[50] *See* Exhibit 28, pp. 1-8.

[51] Mr. Jackson attempted in his cross examination of Mr. Bell to show that Bell voluntarily worked 19 hours straight, when he could have decided to stop work and remain under the maximum hours-of-service regulations. However, Mr. Bell credibly testified that everyone at Crane Masters violated the regulations to get their job done. They were tasked with working back-to-back shifts that required them to be at the yard early in the morning, and sometimes hours before their time for arrival at the job so they had time to do a pre-trip inspection and then drive to the job site. Whether Mr. Bell voluntarily violated FMCSA regulations is not material to determination of the issue. The whistleblower protection provision is clear–once an employee refuses to work out of fear for his safety or others because of fatigue, for example, or because he doesn't want to violate the regulations, and that employee is retaliated against in response to such protected activity, he has a remedy under the Act.

[52] 49 C.F.R. § 395.3(a).

*"Actual Violation"*

Under the "actual violation" standard, the Administrative Review Board (ARB) has held that an employee engages in protected activity if he refuses a dispatch that *would have* caused an hours-of-service violation.[53] Having established that Mr. Bell worked 19 hours on June 4 and was supposed to have been off duty for 10 consecutive hours before driving again, it must now be determined whether an "actual violation" *would have* occurred had Mr. Bell agreed to complete the Livingston job requested by Mr. Bowen on the afternoon of June 5.

As explained below, the evidence establishes that an actual violation would have occurred in at least[54] three ways: First, if Mr. Bell had stayed on duty to drive back to Livingston that day, he would have extended an already occurring hours-of-service violation. Second, he would necessarily have again violated the 10-consecutive-hour break rule in light of Mr. Bowen's earlier dispatch text instructing Bell to drive to a jobsite in Round Rock early the following morning. Third, Mr. Bell testified he was already tired from working 19 hours the previous day, so it is more likely than not that he would have been fatigued and unable to safely drive to Round Rock on Saturday if he also made the return trip to Livingston on Friday.

On Friday, June 5, Mr. Bell reported for work at 8 a.m., as indicated on his timecard.[55] Mr. Bell testified that on that Friday morning he helped Mike Langley with a trailer before he started driving to Livingston.[56] Mr. Bell's rest period between the hours of 11 p.m. Thursday night and his arrival at Crane Masters at 8 a.m. Friday morning equals only a 9-hour break when he was off duty. Therefore, when Mr. Bell began work again at 8 a.m. on June 5, he was <u>already in violation</u> of the hours-of-service regulations. He arrived back at the Crane Masters yard at 4:09 p.m., unloaded his truck, and at about 4:30 p.m., he talked with Mr. Bowen about a return trip to Livingston. At that point he had been on duty a total of 27 hours with only a 9-hour break. Returning to Livingston would have extended the hours-of-service violation that began at 8:00 a.m. on Friday.

Next, if Mr. Bell accepted Bowen's instruction to return to Livingston that Friday afternoon, he could not have taken Mr. Bowen's dispatch instruction for the following Saturday morning without again violating the 10-consecutive-hour break rule. Mr. Bell arrived back at the Crane Masters yard Friday afternoon at 4:09 p.m., unloaded the truck, and performed a post-trip inspection.[57] Then, at around 4:30 p.m. Mr. Bowen told him to return to Livingston that night.

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[53] *See Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-22, p. 19 (ARB Nov. 30, 2009).

[54] Although not made as a specific finding herein, it is instructive that Mr. Bell may well have again exceeded the maximum of 14 hours on duty had he returned to Livingston on Friday. He testified that under the best of conditions, a return trip to Livingston and back to the Crane Masters yard on Friday afternoon would have taken until about 9:30 p.m. *See* Hearing Transcript, p. 91. Assuming the usual 20 to 30 minutes for unloading and post-trip inspection, Mr. Bell would not have left the Crane Masters yard until about 10 p.m. after having come on duty at 8 a.m.

[55] *See* Exhibit 6.

[56] Hearing Transcript, pp. 39-40.

[57] Hearing Transcript, p. 43.

Mr. Bell knew at that point that he would be in violation of the hours-of-service regulations (again) if he agreed to make the drive.[58] This is because during the day on Friday, June 5, Mr. Bowen texted Mr. Bell an assignment for Saturday, June 6.[59] Mr. Bowen's text advised Mr. Bell he was expected to drive to Round Rock and arrive "on the job" at 7 a.m.[60] At that point, Mr. Bell had already worked 19 hours on June 4, and had received an insufficient rest of 9 hours between June 4 and June 5. He was working from 8 a.m. to 4:30 p.m. on June 5, and his unrebutted testimony established that the round-trip drive from Crane Masters to Livingston that Friday afternoon would take until about 9:30 p.m.[61] Mr. Bell also knew from Mr. Bowen's text that he had to return to the Crane Masters yard at 3:30 a.m. Saturday morning so that he could be "on the job" at Round Rock by 7 a.m.[62]

Therefore, Mr. Bell would not have had time for a 10-hour rest between his return from Livingston at 9:30 p.m. and his expected arrival at the yard on Saturday at 3:30 a.m. Even if Mr. Bell went immediately to sleep (for example in the truck's sleeper berth) at 9:30 p.m., and he had to be back on duty at 3:30 a.m. the next day, he still would have only received a 6-hour off-duty break.

Moreover, considering Mr. Bell's 19-hour workday on June 4, an approximate 14-hour workday on June 5 (assuming a return to Livingston that day), and the requirement for him to be back at work at 3:30 a.m. on June 6 after only a 6-hour off duty break, Mr. Bell would likely have been gravely fatigued and unable to safely make the trip to Round Rock on Saturday.[63] Indeed, Mr. Bell testified to having advised Mr. Bowen of that very concern.[64] When questioned further on that issue, Mr. Bell explained his concern by stating ""I'm not the only person on the road, there's other people's friends, families, and family members that's on the road. If I was to hurt them, I'm going to be the one in trouble, not Crane Masters."[65]

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[58] *See* Hearing Transcript, p. 45-50.

[59] Exhibit 19.

[60] Exhibit 19.

[61] *See* Hearing Transcript, p. 91.

[62] Mr. Bell credibly testified that the trip from Crane Masters to Round Rock took approximately 3.5 hours and, when combined with a pre-trip inspection, that travel time required him to arrive at the Crane Masters yard at 3:30 a.m. *See* Hearing Transcript, p. 47.

[63] *See* 49 C.F.R. § 392.3 ("No driver shall 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").

[64] Hearing Transcript, p. 45. On the issue of Mr. Bell's "real" reason for refusing the return trip to Livingston, Crane Masters presented a portion of an audio interview between Mr. Cedar and Mr. Bell (Exhibit 43, *see* Hearing Transcript, pp. 165 to 167). In the interview, Mr. Bell told Mr. Cedar he had "other plans" on the evening of June 5, which is one reason why he did not wish to return to Livingston that night. This evidence is unavailing for two reasons. First, a review of the full audio interview reveals that the first reason Mr. Bell gave for refusing the return trip to Livingston was that doing so would violate the hours-of-service regulations. *See* Exhibit 43, from approximately 1 minute to 3 minutes. Second, even if Mr. Bell had "other plans" for the evening of June 5, 2020, that fact would not negate the hours-of-service violation that would have occurred if Mr. Bell accepted the assignment to return to Livingston that day.

[65] Hearing Transcript, p. 91.

Mr. Bell established by a preponderance of the evidence that he would have actually violated hours-of-service regulations had he agreed to return to Livingston on the afternoon of Friday, June 5. The preponderance of the evidence established that Mr. Bell engaged in a protected activity when he voiced his refusal to drive to Livingston on the afternoon of Friday, June 5 because, had he done so, he would have committed actual federal hours-of-service violations.[66]

**2. Crane Masters Committed an Unfavorable Employment Action when it Terminated Complainant**

Mr. Bell contends Crane Masters terminated his employment on June 5, 2020 after he refused to return to Livingston as directed by Mr. Bowen. Crane Masters contends Mr. Bell voluntarily quit. As discussed more fully below, the preponderance of the evidence establishes more likely than not that Crane Masters terminated Mr. Bell, either actually or constructively, on June 5, 2020.

The conversation that led to Mr. Bell's separation from Crane Masters occurred at about 4:30 p.m. on June 5, 2020. Only two people were involved in that conversation: Mr. Bell and Mr. Bowen. Only one other person purported to have overheard the conversation: Crane Masters' mechanic, Mr. Shilling. All three people testified at the hearing. Importantly, parts of Mr. Bowen's testimony supported Mr. Bell's version of events, and Mr. Shilling's testimony was not credible.

Mr. Shilling testified that he overheard part of the Bell-Bowen conversation because he was working in the Crane Masters shop and around the yard at the time.[67] However, Mr. Shilling's testimony varies greatly regarding the length of the Bell-Bowen conversation.[68] Mr. Shilling tried to estimate the length of the conversation in relation to the time it took him to perform a task in the yard. However, his account varied too widely to reliably fit into the timeline of events. Based on this portion of his testimony, the Bell-Bowen conversation lasted anywhere from less than 5 minutes to as much as one hour.[69] As for the content of the conversation, Mr. Shilling stated that he did not hear the beginning of the conversation, but that he heard Mr. Bell say to Mr. Bowen "F- you bitch, I quit."[70] This testimony contrasts with Mr. Bowen's account that Mr. Bell stated, "I f-ing quit."[71]

As for the two actual participants in the disputed conversation, there is no dispute that Mr. Bowen asked Mr. Bell to return to Livingston on June 5 and that Mr. Bell refused. However, the two men's testimony diverges on the issue of firing versus quitting. Mr. Bell testified that Mr.

[66] Hearing Transcript, p. 45.
[67] *See* Hearing Transcript,
[68] *See* Hearing Transcript pp. 236 to 243.
[69] *See* Hearing Transcript, pp. 238 to 243.
[70] *See* Hearing Transcript, pp. 243 to 244.
[71] *See* Hearing Transcript, p. 209.

Bowen told him to "hit the gate" after he refused to return to Livingston.[72] Mr. Bowen testified that Mr. Bell first stated, "I f-ing quit," and that Mr. Bowen then told Mr. Bell, "Well, there's the gate."

The preponderance of the evidence, when viewed as a whole, supports a finding that Mr. Bell's testimony is more reliable on this issue. First, Mr. Bowen knew Mr. Bell worked 19 hours the previous day (June 4). He also knew Mr. Bell had already worked 8.5 hours that day (June 5) and that a return trip to Livingston, Texas would put Mr. Bell at approximately the maximum of 14 hours for that day. Additionally, as the person who assigned Mr. Bell to drive to Round Rock the following day, Bowen knew Bell could not return to Livingston as directed and still be within the hours-of-service regulations by taking the next day's assignment. Knowing all this, Mr. Bowen still insisted that Mr. Bell return to Livingston, which shows disregard for the hours-of-service regulations. Second, the undersigned credits Mr. Cedar's testimony that his investigation revealed all of Crane Masters' drivers were sometimes expected to exceed the hours-of-service regulations. Third, Mr. Cedar's testimony on this point aligns with that of Mr. Bell's, and there was no testimony rebutting this point. As such, the expectation that Crane Masters' drivers were to take driving assignments regardless of the hours-of-service regulations, when coupled with Mr. Bowen's knowledge of the looming violation(s) triggered by his insistence that Mr. Bell make a return trip to Livingston on June 5 leads to the conclusion that when Mr. Bell refused the return trip, Mr. Bowen more likely than not told him to "pack your [stuff] and hit the gate."[73]

Additionally, even assuming Mr. Bowen's testimony were the more reliable of the two (and that Mr. Bell did, in fact, quit), then Mr. Bell's resignation was effectively a constructive discharge. The testimony in evidence shows Mr. Bowen gave Mr. Bell no viable choice: either Mr. Bell could continue to violate the hours-of-service rules by returning to Livingston, or he could "hit the gate," i.e., he could be fired. Further, for a finding of constructive discharge, it is sufficient that Mr. Bowen wanted Mr. Bell to commit an hours-of-service violation.[74] The evidence is clear that Mr. Bell told Mr. Bowen a June 5 return trip to Livingston would result in an hours-of-service violation and that Mr. Bowen told Bell "You have to go back [to Livingston]."[75] Thus, even if Mr. Bell did quit, his leave-taking qualified as a constructive discharge based on Mr. Bowen's directive that Mr. Bell "[had] to go back" to Livingston and thus commit an hours-of-service violation.

"*Chilling Environment*"

The OSHA investigator and Mr. Bell testified to there being a chilling environment at Crane Masters. First, Mr. Bell testified that his driver log was inaccurate because he had to exclude his time on June 4 and 5 to avoid listing hours that would indicate a DOT violation. Mr. Bell knew

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[72] Hearing transcript, p. 45 (Mr. Bell testified that Mr. Bowen said something like: "Well, I got some bad news for you, you're going to have to go back to Livingston," and that Mr. Bell refused.); Hearing transcript, p. 209 (Mr. Bowen states they had a load come in and he asked Mr. Bell to return to pick it up, but that Mr. Bell refused.).

[73] *See* Hearing Transcript, p. 45.

[74] *Junior v. Texaco, Inc.*, 688 F.2d 377, 379 (5th Cir. 1982) (stating that "it is not necessary to show that the employer subjectively intended to force a resignation," rather, it is only necessary to show an intent for the employee to work in the intolerable conditions).

[75] *See* Hearing Transcript, pp. 45 (testimony of Ernest Bell) and 209 (testimony of Colton Bowen).

he would go over his hours limit. Mr. Bell stated that his log was his responsibility; however, during his time with Crane Masters, "no one ever, pretty much, took logs the way that they were supposed to, because there was a lot of illegal activity going on." Mr. Bell further stated that he started being concerned about violating the hours-of-service once working illegally became consistent. Then, when he spoke up, he was terminated.[76]

Mr. Cedar stated that after he gathered evidence and conducted employee interviews, he determined that there was "a culture in Crane Masters that had a chilling effect." He said that the employees he interviewed conveyed to him there was an expectation to drive the hours asked: "…Not all the time, but that was the focus, that if you don't drive, you're going home, because they could starve you out."[77]

The fact that Mr. Bell's testimony was supported by Mr. Cedar's testimony lends credibility to Mr. Bell's testimony. Mr. Bell shared his personal experience relating to purposefully writing inaccurate hours to avoid recording an hours-of-service violation, and he shared his understanding that other employees would engage in the same behavior. Then, Mr. Cedar, as the OSHA investigator, testified that his investigation determined other witnesses would drive over the hours-of-service limits to avoid termination. Therefore, Mr. Bell's and Mr. Cedar's testimony was credible in determining Crane Masters' culture of overlooking or side-stepping DOT regulations involving hours-of-service.

The culture of expecting drivers to work extended and illegal hours demonstrates that Mr. Bell would likely undergo some form of push back from management for refusing to drive on the afternoon of June 5, even though he would have violated the hours-of-service regulations. Based on the evidence as a whole, and the credible testimony from Mr. Bell and Mr. Cedar, the preponderance of the credible evidence established that Mr. Bell was terminated.

**3. Complainant's Protected Activity Contributed to his Termination**

Lastly, Complainant must prove by a preponderance of the evidence that his refusal to drive was a contributing factor in the adverse action taken against him. 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."[78] This step is "broad and forgiving," meaning that a complainant's protected activity need not be a significant, motivating, substantial, or predominant factor in an adverse action.[79]

"Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation."[80] The closer the temporal proximity

[76] Hearing Transcript, p. 68. "I did what I had to do to try to take care of my family. So, if that had to be to work illegal sometimes, I had to do what I had to do. But then it became consistent, over and over, and that's when I had a problem. Once I got to saying something, then this is what happens, you get fired."
[77] Hearing Transcript, p. 124.
[78] *Beatty v. Inman Trucking Mgmt., Inc.,* 2014 WL 2917587, at *5 (A.R.B. May 13, 2014).
[79] *Feldman v. L. Enf't Assoc. Corp.*, 752 F.2d 339, 348 (4th Cir. 2014).
[80] *Greatwide Dedicated Transp. II, LLC v. United States DOL*, 72 F.4th 544, 556-57 (4th Cir. 2023) (quoting *Tice v. Bristol-Meyers Squibb Co*., 2006 DOLSOX LEXIS 44, 2006 WL 3246825, at *20 (A.L.J. Apr. 26, 2006)).

between the protected activity and the adverse employment action, the stronger the inference of a causal connection becomes.[81]

On Friday, June 5, when Mr. Bell returned to the Crane Masters yard, he spoke with Mr. Bowen. The facts establish this conversation took place right around 4:30 p.m. The testimony indicated this conversation took no more than a few minutes. Then, Mr. Bell was told to "hit the gate;" or, in other words, he was fired. He did not return to work at Crane Masters, and he found new employment. Further, no evidence indicated that he was asked to show up to work again after the conversation in the yard with Mr. Bowen. Therefore, as soon as Mr. Bell refused to violate FMCSA regulations by driving with too little rest between assignments, he was terminated.

The temporal proximity between Mr. Bell's protected activity and his termination was nearly simultaneous, and it was more than sufficient to establish an inference of causation. Complainant has shown by a preponderance of the evidence that his refusal to violate FMCSA regulations contributed to his termination.

### 4. Respondent Has Not Shown that Complainant Would Have Been Terminated Absent His Protected Activity

This step is inapplicable because Crane Masters' stance is that it never committed an adverse action toward Complainant. Instead, Respondent alleges that Complainant voluntarily quit. Therefore, Respondent put forth no evidence to support an alternative reason for Mr. Bell's termination.

## REMEDIES

OSHA ordered Respondent to provide Mr. Bell monetary damages and other types of remedies.[82] Upon review by OALJ, Complainant proved by a preponderance of the evidence that Respondent violated the STAA when it terminated him for refusing to drive in violation of the FMCSA regulations. Therefore, Mr. Bell's remedies under the STAA must be determined.

### Compensatory Damages

"Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. A key step in determining the amount is a comparison with awards made in similar cases. To recover compensatory damages for mental suffering or

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[81] G*reatwide Dedicated Transp. II, LLC v. United States DOL*, 72 F.4th 544, 557 (4th Cir. 2023) *(citing Warren v. Custom Organics*, 2012 WL 759335, at *8 (A.R.B. Feb. 29, 2012)).

[82] The Secretary ordered reinstatement; expungement of Complainant's employment records of any reference to the exercise of his STAA rights; and the removal of any negative information entered on the DAC Reports for Complainant. Also, the Secretary ordered that Respondent shall not retaliate or discriminate against Complainant in any manner instituting or causing to be instituted any proceeding under the STAA; and, that Respondent shall post immediately in a conspicuous place in or around Crane Masters' facility the attached Notice to Employees.

emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm."[83]

**1. Reinstatement**

***i. Secretary's Award.*** In the Secretary's Preliminary Order, Respondent was ordered to reinstate Complainant to his former position at $20 per hour.

***ii. Applicable Law.*** Though reinstatement is an automatic remedy under the STAA, reinstatement may be impossible or impractical under certain circumstances.[84] For example, "[r]einstatement may be inappropriate where the parties have demonstrated the impossibility of a productive and amicable working relationship."[85]

***iii. Analysis.*** Mr. Bell testified he found a new job about five weeks after his termination at Crane Masters, when he started working at Pinnacle Propane on July 14, 2020. At the time of the formal hearing, Mr. Bell was employed at Jacob Transportation. Considering Mr. Bell has been able to find alternate employment, reinstatement with Crane Masters is not necessary. Additionally, regardless of whether Mr. Bell is employed at the time of this decision, it would be impractical for Mr. Bell to be reinstated at Crane Masters. The acrimonious dispute that occurred on Mr. Bell's last day makes a productive and amicable working relationship with Crane Masters unlikely. Therefore, because the circumstances render reinstatement impractical, reinstatement is not awarded.

**2. Back Pay**

***i. Secretary's Award.*** The Secretary awarded Complainant back pay (including interest) in the amount of $7,663.09 as of November 17, 2021. Additionally, the Secretary ordered that Respondent shall pay Complainant back pay at the rate of $800 per week (minus interim earnings) until Respondent makes Complainant a bona fide offer of reinstatement.

Mr. Cedar testified that OSHA calculates back pay at the whistleblower's wage rate, which was $20 per hour in this case.[86] Further, in determining the back pay award, Mr. Cedar did not consider whether Respondent paid any unemployment compensation, nor did he consider any taxes on the $20 rate. Instead: "It's the straight back pay."[87]

***ii. Applicable Law.*** A complainant who is successful in establishing the occurrence of an STAA violation is entitled to an award of back pay.[88] The complainant is also entitled to pre-

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[83] *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022, slip op. at 20 (ARB June 30, 2009) (citations omitted).
[84] *Dale v. Step 1 Stairworks, Inc.*, No. 04-003, 2005 WL 76133 at 2 (ARB Mar. 31, 2005); *Assistant Sec'y & Bryant v. Bearden Trucking Co.*, No. 04-014, ALJ No. 2003-STA-00036, slip op. at 7-8 (ARB June 30, 2005).
[85] *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 1993-ERA-00024, slip op. at 9 (Sec'y Feb. 14, 1996).
[86] Hearing Transcript, p. 159.
[87] Hearing Transcript, p. 161.
[88] 49 U.S.C.A. § 31105(b)(3)(A)(ii).

and post-judgment interest on a back pay award.[89] Back pay awards are to be calculated in accordance with the make-whole remedial scheme embodied in § 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*[90] Interest is awarded at the federal rate which is set at 28 U.S.C. § 1961(a).

***iii. Analysis.*** While working at Crane Masters, Mr. Bell earned $20 per hour for working regular hours, and he earned $30 per hour for working overtime hours.[91] Mr. Bell testified that his employment at Crane Masters ended on June 5, 2020 and he started work with a new employer on July 14, 2020. Importantly, there was no evidence presented that Mr. Bell took a lower-paying position after Crane Masters or that he suffered any reduction in benefits due to the change of jobs. Therefore, the undersigned calculated Mr. Bell's back pay damages as follows:

There being no evidence of lower wages or benefits, Mr. Bell's back pay award is limited to the period between when he was terminated and the time he gained new employment, plus interest on the award until the award is paid. Mr. Bell was unemployed from June 6, 2020 to July 14, 2020.

Mr. Bell's last Crane Masters paycheck shows his 2020 year-to-date earnings were $17,900 for regular pay, and $4,590 for overtime pay.[92] Dividing the amounts earned by the hourly rates establishes that in 2020 Mr. Bell worked 895 regular hours and 153 overtime hours by the time he was terminated on June 5, 2020.[93]

Regular pay award – Mr. Bell was unemployed for 5 weeks and one day from Saturday, June 6, 2020 to Monday, July 13, 2020. Had he worked 40 hours per week at $20 per hour for those 5 weeks and one day, he would have received $4,160 for regular pay. Mr. Bell is owed **$4,160** for regular hourly back pay during the period from June 6, 2020 to July 14, 2020.

Overtime pay – The record contains Mr. Bell's paystubs from December 23, 2019 to June 6, 2020. An average of Mr. Bell's past overtime hours must be calculated to determine an appropriate overtime pay award. First, there were 157 days from January 1, 2020 to June 5, 2020.[94] Dividing those 157 days by 7 days per week yields 22.43 weeks of work for Mr. Bell in 2020.

Dividing Mr. Bell's $4,590 of 2020 overtime pay by 22.43 weeks yields an average weekly overtime pay of $204.64. Next, multiplying that average of $204.64 per week in overtime pay by 5 weeks of unemployment yields a lost overtime pay figure of $1,023.20. Additionally, it is undisputed that had he continued to work at Crane Masters, Mr. Bell would have driven to Round Rock, Texas on June 6, 2020 during a week in which he had already worked 40 regular hours and 6 overtime hours. Thus, Mr. Bell is entitled to 8 additional hours of lost overtime pay

[89] *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-034, slip op. at 9 (ARB Dec. 29, 2000).

[90] *Dale v. Step 1 Stairworks, Inc.*, No. 04-003, 2005 WL 76133 at *4 (ARB Mar. 31, 2005).

[91] Hearing Transcript, p. 67; Hearing Exhibit 40.

[92] Hearing Exhibit 1, p. 1.

[93] $17,900 regular pay / $20 per hour = 895 regular hours. $4,590 overtime pay / $30 per hour = 153 overtime hours.

[94] 2020 was a leap year; therefore, February had 29 days.

at $30 per hour for the June 6, 2020 trip he did not take. Therefore, Mr. Bell is owed **$1,263.20**[95] in overtime pay for the weeks between his Crane Masters termination and being hired at Pinnacle Propane.

Adding Mr. Bell's lost **$4,000** in regular pay to his lost **$1,263.20** in overtime pay yields a total back pay award of **$5,263.20.** This figure differs from the Secretary's Finding of $7,250.00 in back pay plus interest as of November 17, 2021. Upon a review of the evidence in the record, however, the Secretary's calculation of back pay was inaccurate and did not match the evidence presented at the hearing.[96] Thus, the $5,263.20 calculated in this decision is awarded, plus interest on the award at the statutory federal interest rate starting from June 6, 2020 and continuing until Mr. Bell is paid.

**3. Pain and suffering**

***i. Secretary's Award.*** The Secretary awarded Mr. Bell $7,000 for pain and suffering, including emotional, financial, and mental distress. Mr. Mabee testified that OSHA determined $7,000 was "an approximate amount for pain and suffering in this instance."[97] He testified that $7,000 was what it calls "kind of garden variety pain and suffering."[98]

***ii. Applicable Law.*** The ARB has held that an ALJ may award compensatory damages based on a complainant's testimony of the stress he endured after suffering the adverse action.[99] Further, the ARB has affirmed reasonable emotional distress awards that were based solely on a complainant's testimony.[100] In *Barnum v. J.D.C. Logistics, Inc.*, for example, the ARB affirmed the ALJ's award of $5,000 for compensatory damages for a complainant's stress and the effects of losing fringe benefits.[101] In *Huang v. Greatwide Dedicated Transport II*, the ARB affirmed the ALJ's award of $5,000 in compensatory damages for the Complainant's emotional distress.[102]

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[95] Eight hours at $30 per hour equals $240. That amount added to the averaged lost overtime amount of $1,023.20 equals $1,263.20.

[96] *See* Hearing Exhibit 14. By way of example, OSHA's back pay calculation indicated five workdays per week at 10 hours per workday (and all 10 hours at the "regular pay" rate of $20 per hour). However, some days showed "lost" daily regular pay of $1,000 while other days showed "lost" daily regular pay of $800 based on the same number of hours per day. Also, "lost" overtime pay was inexplicably calculated from July 18, 2020 through August 15, 2020. Yet, it was undisputed that Mr. Bell was employed elsewhere as of July 14, 2020, and no evidence was presented to show his new employment was at a lesser rate. As such, Hearing Exhibit 14 was deemed unreliable.

[97] Hearing Transcript, p. 186; Merriam-Webster defines "garden-variety" as an adjective to describe something that is ordinary or commonplace.

[98] *Id.*

[99] *Barnum v. J.D.C. Logistics, Inc.*, ARB No. 08-030, ALJ No. 2008-STA-00006 (ARB Feb. 27, 2009) (citing *Hobson v. Combined Transp., Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035, slip op. at 5 (ARB Jan. 31, 2008)); *see also Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-00063 (ARB June 30, 2008).

[100] *Barnum v. J.D.C. Logistics, Inc.*, ARB No. 08-030, at 7 (citing *Hobson*, slip op. at 8).

[101] *Id.* at 7-8; *See Barnum* (2008-STA-00006) at 6-7 (The ALJ considered the fact that Complainant was entitled to medical benefits, he suffered great stress, he could not afford his medicine, and he lost his car and car insurance.).

[102] *Huang v. Greatwide Dedicated Transport II, LLC*, ARB No. 2019-0053, ALJ No. 2016-STA-00017 (ARB May 27, 2021) at 13. *See Huang* (2016-STA-00017) at 41 (The ALJ considered Complainant was "very unhappy" for at

***iii. Analysis.*** Mr. Bell testified that he was distraught from being terminated during the middle of a pandemic because he did not know if he would be able to find a new job.[103] He said the then-current pandemic was the only reason he remained at Crane Masters because there were so few other jobs, and businesses were closing.[104] Mr. Bell testified that he knew he was committing hours-of-service violations by working at Crane Masters, but he continued to work because he had no other way to feed his family.[105] Additionally, Mr. Bell stated:

> I did what I had to do to try to take care of my family. So, if that had to be to work illegal[ly] sometimes, I had to do what I had to do. But then it became consistent, over and over, and that's when I had a problem. Once I got to saying something, then this is what happens, you get fired.[106]

After Mr. Bell was terminated on June 5, 2020, he was hired by Pinnacle Propane starting on July 14, 2020, and he worked there for about one year. Thus, he did not endure unemployment for very long. After working at Pinnacle Propane, he worked at Ship Popo. Then, he worked at Jacob Transportation, which is where he worked at the time of his testimony at the hearing.[107] These facts demonstrate that Mr. Bell was not without a job for very long, and that he was able to hold employment at several businesses after his Crane Masters termination. Still, Mr. Bell was upset about losing his job, and the COVID-19 pandemic added to Mr. Bell's concern about finding a new job.

The Secretary's award of $7,000 aligns with the ALJ's award of $5,000 in *Barnum v. J.D.C. Logistics, Inc.* and the ALJ's award of $5,000 in *Huang v. Greatwide Dedicated Transport II.* Further, *Barnum* was decided in 2009, and $5,000 in 2009 is roughly equivalent to $7,000 today.[108] Therefore, considering Mr. Bell's pain and suffering as a whole, an award of $7,000 is reasonable.

**Punitive Damages**

***i. Secretary's Award.*** The Secretary awarded Mr. Bell $10,000 for punitive damages. Mr. Mabee testified that OSHA determined $10,000 was a very low amount when compared to the $250,000 that the STAA allows for a punitive damage award.[109] Mr. Mabee said OSHA does not

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least 6 months after he was terminated, and that he overall was less outgoing and had less energy. Mr. Huang had requested an award of $25,000, but the ALJ decided the facts and case law supported an award of $5,000).

[103] Hearing Transcript, p. 67-68.

[104] Hearing Transcript, p. 68.

[105] Hearing Transcript, p. 90.

[106] Hearing Transcript, p. 68.

[107] Hearing Transcript, pp. 29-30.

[108] According to 13dollars.com, "$5,000 in 2009 is equivalent in purchasing power to about $7,279.21 today." (website last visited May 9, 2024). *See also* Amortization.org (finding $5,000 in 2009 to be equivalent to $7,295.56 in 2024 (website last visited May 9, 2024).

[109] Hearing Transcript, p. 187.

use a specific formula when calculating punitive damages, but that they look at similar types of cases. He also said it was rare to order punitive damages as low as $10,000.[110]

Mr. Mabee testified that "we all agreed that we thought $10,000 was an appropriate amount that would send that message and prevent that conduct from happening in the future."[111] OSHA determined punitive damages in this case were appropriate because "the Complainant was being asked to violate Federal Motor Carrier Regulations, and it seemed that the Respondent had a very cavalier attitude about… enforcing Hours-of-service Regulations themselves and, therefore, we felt that it was appropriate to punish the Respondent for the wrongdoing, and to prevent that from happening in the future."[112]

***ii. Applicable Law.*** An award of punitive damages may be warranted where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law."[113] Further, "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[114] The ARB has stated the following pertaining to punitive damages:

> Neither the STAA, nor the associated DOL regulations, nor precedent provide explicit guidance for how to determine a suitable amount for a punitive damage award beyond the general prescription that the appropriate standard is the amount necessary to punish the respondent for its outrageous conduct and to deter the respondent and others from similar conduct in the future.[115]

However, it is also true that "a penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another."[116] In Texas, where this case arose, courts consider (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of

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[110] Hearing Transcript, p. 203.

[111] Hearing Transcript, p. 187.

[112] Hearing Transcript, p. 203.

[113] *Youngerman v. United Parcel Serv. Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 4-5 (ARB Feb. 27, 2013).

[114] *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 568 (1996).

[115] *Youngerman*, at 8 (citing *Ferguson*, ARB No. 10-075, slip op. at 8, citing *Smith*, 461 U.S. at 51; *Johnson v. Old Dominion Sec.*, Nos. 1986-CAA-003, -004, -005; slip op. at 29 (Sec'y May 29, 1991)). There is little precedent to guide ALJs in an award of punitive damages. In *Fink v. R&L Transfer, Inc.*, ARB No. 13-018, ALJ No. 2012-STA-00006, at 5-6 (ARB Mar. 19, 2014) the ARB affirmed an award of $50,000 in punitive damages. In that case, however, the ALJ considered the fact that the terminal manager mischaracterized Complainant's termination as a "resignation," which delayed Complainant from receiving unemployment benefits. Further, the ALJ considered that the terminal manager did not follow up on Complainant's concerns about driving in the snowy and icy weather. Instead, the manager only consulted persons in other states about whether the route should be driven. The ALJ found "that the Respondent's conduct reflects a degree of conscious disregard for how its practices obstruct Congress' mandate in the Surface Transportation Assistance Act, and that punitive damages are appropriate to correct and deter this conduct." For the reasons set forth herein, this case does not establish such a "degree of conscious disregard for Congress'[s] mandate" in the STAA.

[116] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008) (citing O.W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897)).

the wrongdoer, (4) the situation and sensibilities of the parties concerned, (5) the extent to which such conduct offends a public sense of justice and propriety, and (6) the net worth of the defendant.[117]

***iii. Analysis.*** The issue here is whether the environment at Crane Masters was so outrageous that it warrants an award of punitive damages. As noted in the Adverse Action section above, Mr. Bell worked 19 hours on June 4, prior to reporting to work the next day–a fact of which Dispatch would have been aware. Mr. Bell also testified that not only was he required to work outside the legal hours-of-service, but that all Crane Masters drivers were required to work over the regulatorily allowed hours. Such testimony indicates that Crane Masters' culture tacitly allowed for hours-of-service violations to occur.

Additionally, Mr. Cedar testified that during his investigation, he spoke with some Crane Masters employees who conveyed to him that there was an expectation to drive the hours asked by Crane Masters, or that they would be "starved out."[118] But, these witnesses were not called to testify at the formal hearing. Moreover, when Crane Masters asked at the hearing who these "other employees" were, the opposing party raised a "government informant" privilege.[119] With due respect to Mr. Cedar's investigation, it would be patently unfair to Crane Masters to consider the uncorroborated hearsay statements of unidentified witnesses in determining whether punitive damages should be awarded. As such, only Mr. Bell's testimony and Mr. Bell's treatment on June 4 and 5, 2020 support the contention that Crane Masters had a "culture" of intentional violation of federal regulations. Although this evidence was enough to establish that Mr. Bell suffered an adverse action by Crane Masters, it is insufficient to demonstrate that Crane Masters' actions were "outrageous" such that they warranted imposition of punitive damages. The most that was proven in this regard is that Crane Masters knew Mr. Bell exceeded the hours-of-service regulations on June 4, and that Crane Masters expected Mr. Bell to do so again on June 5 and 6.

Furthermore, when deciding an appropriate punitive damages award, an ALJ should consider the net worth of the defendant, and whether the award would impose a deterrent effect on the business without also crippling that business.[120] Here, Crane Masters' net worth and other finances are unknown, because there was no evidence presented on these matters.

Additionally, Mr. Mabee's testimony about how the amount of punitive damages was determined evidenced a lack of consistency in imposition of such damages. In fact, Mr. Mabee specifically testified that OSHA does not use any particular formula when calculating punitive damages, but that they look at similar types of cases. Yet, no evidence was presented of what amounts were awarded in any previous cases. Therefore, there is insufficient evidence on which to determine whether $10,000 is a reasonable amount of punitive damages to impose on Crane Masters. The lack of a systematic approach to determining what amount of punitive damages to award belies the Supreme Court's admonition that "a penalty should be reasonably predictable in

[117] *In Re Amberjack Interests, Inc*., 326 B.R. 379, 393 (S.D. Tex. Houston Div. 2005).
[118] Hearing Transcript, p. 124.
[119] Hearing Transcript, pp. 161 to 164.
[120] *See In Re Amberjack Interests, Inc*., 326 B.R. 379, 393 (S.D. Tex. Houston Div. 2005).

its severity."[121] In summary, the facts as presented do not merit a finding of either outrageous conduct on Crane Masters' part, or a reasonably supported method of determining an amount of punitive damages. Therefore, punitive damages are not awarded.

**Additional Awards**

***i. Secretary's Award.*** In addition to reinstatement, back pay, pain and suffering, and punitive damages, the Secretary awarded the following:

- Respondent shall expunge Complainant's employment records of any reference to the exercise of his rights under STAA, 49 U.S.C. § 31105.
- Respondent shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to STAA, 49 U.S.C. § 31105.
- Respondent shall remove any and all negative information that it entered on the Drive-A-Check (DAC) Reports for Complainant.
- Respondent shall post immediately in a conspicuous place in or about Respondent's facility, including in all places where notices for employees are customarily posted, including Respondent's internal website for employees or e-mails, if Respondent customarily uses one or more of these electronic methods for communicating with employees, and maintain for a period of at least 60 consecutive days from the date of posting, the attached Notice to Employees, to be signed by a responsible official of Respondent and the date of actual posting to be shown thereon.

***ii. Applicable Law.*** A person who retaliates against an employee in violation of 49 U.S.C. §31105(a) shall be ordered to take affirmative action to abate the violation.[122] The STAA Final Rule clarifies this portion of the statute, stating the following:

> The requirement to take appropriate affirmative action to abate the violation is separated from the other remedies, as it is in the STAA remedy provision, 49 U.S.C. 31105(b)(3)(A). Affirmative action to abate the violation, required by section 31105(b)(3)(A)(i), includes a variety of measures in addition to others in (3)(A), such as posting notices about STAA orders and rights, as well as expungement of adverse comments in a personnel record.[123]

***iii. Analysis.*** The Secretary's awards are appropriate forms of abatement for Crane Masters' retaliation against Mr. Bell. Thus, these awards are affirmed.

[121] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008) (citing O.W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897)).

[122] 49 U.S.C. §31105 (b)(3)(A)(i).

[123] 29 C.F.R. Part 1978 (citing *Scott v. Roadway Express, Inc.*, No. 01-065, 2003 WL 21269144, at *1-2 (ARB May 29, 2003) (posting notices of STAA orders and rights); *Pollock v. Continental Express*, Nos. 07-073, 08-051, 2010 WL 1776974, at *9 (ARB Apr. 7, 2010) (expungement of adverse references).

## ORDER

Based on the foregoing it is ORDERED that:

(i) Respondent shall pay Mr. Bell **$5,263.20** in back pay;

(ii) Respondent shall pay Mr. Bell **$7,000** in pain and suffering damages;

(iii) Respondent shall pay interest on the total monetary award of $12,263.20 at the statutorily approved federal interest rate starting from June 6, 2020 and continuing until the time Mr. Bell is paid;

(iv) No punitive damages are awarded;

(v) Respondent shall expunge Mr. Bell's employment records of any reference to the exercise of his rights under STAA, 49 U.S.C. § 31105.

(vi) Respondent shall remove any and all negative information that it entered on the Drive-A-Check (DAC) Reports for Complainant.

(vii) Respondent shall post immediately in a conspicuous place in or about Respondent's facility, including in all places where notices for employees are customarily posted, including Respondent's internal website for employees or e-mails, if Respondent customarily uses one or more of these electronic methods for communicating with employees, and maintain for a period of at least 60 consecutive days from the date of posting, the attached Notice to Employees, to be signed by a responsible official of Respondent and the date of actual posting to be shown thereon; and

(viii) Respondent shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to STAA, 49 U.S.C. § 31105.

**SO ORDERED** this day at Covington, Louisiana.

**JOHN M. HERKE**
Administrative Law Judge