UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Pittsburgh, PA

Issue Date: 01 May 2024

CASE NO.: 2022-STA-00038

In the Matter of:

DALE DETIE,
Complainant

v.

TRANSWOOD, INC.,
and MARK MILLER,
Respondents

Appearances: Peter Lavoie, Esq.,
Truckers' Justice Center
For the Complainant

Christopher Hoyme, Esq.,
Nicholas McGrath, Esq.,
Holland Law Firm, PLLC
For the Respondents

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER DENYING WHISTLEBLOWER COMPLAINT

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 ("the Act" or "STAA"), and the implementing regulations found at 29 C.F.R. Part 1978. The Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or refuse to operate a vehicle when such operation would be in violation of those rules.

This matter involves a complaint of retaliation by Dale DeTie ("Complainant") against TransWood, Inc. ("Respondent TransWood" or "TransWood") and Mark Miller ("Respondent Miller" or "Mr. Miller") (collectively "Respondents").[1] All parties having had a full and fair opportunity to submit evidence and post-hearing briefs, the case is now ripe for decision. In reaching this decision, I have considered all the evidence admitted into the record, the legal

[1] Walter Hornbeck was also named as an individual respondent in Mr. DeTie's complaint, but Mr. Hornbeck passed away during the pendency of this claim and is no longer a party. (Hearing Transcript ["Tr."] at 19-20).

arguments of the parties, and the applicable law.[2] For the reasons set forth below, I find that Complainant engaged in protected activity by filing complaints in April 2021 relating to commercial vehicle safety. However, Complainant did not engage in protected activity by refusing to operate a commercial vehicle on April 24, 2021. I also find that Complainant's protected activity did not contribute to any adverse employment action. Therefore, Complainant is not entitled to remedies and damages under the STAA.

PROCEDURAL HISTORY

On June 14, 2021, Complainant filed a complaint with the U.S. Department of Labor ("DOL"), Occupational Safety and Health Administration ("OSHA"), alleging that Respondents violated the STAA when they terminated his employment on April 25, 2021, after Complainant told Respondents that he refused to haul any load exceeding the weight permitted by law and after Complainant refused to operate his assigned truck tractor. (Complainant's Exhibit ["CX"] 8).

On March 10, 2022, OSHA's Assistant Regional Supervisory Investigator dismissed the complaint. (CX 12). Based on the information available at the time, OSHA was unable to find reasonable cause to believe that a violation of the statute occurred. *Id.* On April 4, 2022, Complainant filed objections to OSHA's decision and requested a *de novo* hearing before an Administrative Law Judge. *Id.* The case was docketed with the DOL's Office of Administrative Law Judges ("OALJ") on April 5, 2022, and was assigned to the undersigned on June 3, 2022.

On May 15, 2023, I held a videoconference hearing. The parties were afforded a full opportunity to offer exhibits, testimony, and arguments. During the hearing, I admitted the following exhibits into the evidentiary record: Joint Exhibits ("JX") 1 through 4; CX 1 through 8, and CX 12; Respondents' Exhibits ("RX") 1 through 10; and Administrative Law Judge Exhibits ("ALJX") 1 and 2. (Tr. at 9-18). Two witnesses, Complainant and Respondent Miller, testified at the hearing. (Tr. at 25-195). Complainant and Respondents provided their respective post-hearing briefs on September 13, 2023. Complainant submitted a reply brief on October 11, 2023; Respondents submitted a reply brief on October 16, 2023.

STIPULATIONS

Prior to the hearing, the parties offered twelve stipulated facts. During the hearing, the parties confirmed that they agreed to the following stipulated facts, which were then adopted into the record:

I. Complainant was an employee as defined at 49 U.S.C. § 31101(2). Complainant was not a member of a labor union, and Complainant's employment with the Respondent, TransWood, Inc., was not subject to a collective bargaining agreement.

[2] In accordance with the Administrative Review Board's ("the Board" or "ARB") note in *Austin v. BNSF Railway Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 2 n.3 (ARB Mar. 11, 2019) (*per curiam*), the undersigned does not include a summary of the record in this Decision and Order. Instead, I focus specifically on findings of fact pertinent to the issues in dispute, after having reviewed and considered the entire record.

II. Complainant began working for TransWood as a driver in January 2021.

III. Complainant reported out of TransWood's St. Louis, Missouri Terminal.

IV. Complainant worked the night shift, roughly 5:00 P.M. to 5:00 A.M.

V. Complainant reported to TransWood's driver dispatcher on duty, who in turn reported to TransWood's Terminal Manager, Mark Miller.

VI. As a driver, Complainant was responsible for delivering gasoline and diesel fuel to Circle K convenience stores and gas stations.

VII. At the beginning of the shift, Complainant would pick up a dispatch sheet from TransWood terminal and take his truck to a load depot to fill his trailer with gasoline or diesel fuel for customer deliveries.

VIII. On April 25, 2021, Respondent TransWood, Inc., terminated Complainant's employment.

IX. On June 14, 2021, Complainant filed a complaint with OSHA alleging that Respondents had discriminated against him and discharged him in violation of 49 U.S.C. § 31105. The complaint was timely filed.

X. On March 10, 2022, OSHA issued a decision denying Complainant's complaint.

XI. On April 4, 2022, Complainant timely filed objections to OSHA's decision and requested a *de novo* hearing before an Administrative Law Judge of the United States Department of Labor.

XII. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties.

(Tr. at 7-9).

ISSUES

I. Whether Complainant engaged in protected activity under 49 U.S.C. § 31105(a)(1)(A) in April 2021, by filing complaints related to reasonably perceived violations of commercial vehicle safety regulations, including commercial vehicle weight regulations?

II. Whether Complainant engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B) in April 2021, by refusing to operate commercial vehicles because such operation would result in actual violations of commercial vehicle safety regulations, including various commercial vehicle weight regulations?

III. If Complainant engaged in protected activity, whether Respondents knew of Complainant's protected activity?

IV. If Complainant engaged in protected activity, whether such protected activity contributed to Complainant's April 25, 2021 discharge, or any other adverse employment action?

V. If Complainant's protected activity contributed to the adverse actions taken by Respondents, does clear and convincing evidence show that Respondents would have taken the same actions in the absence of any protected activity?

VI. To what relief, if any, is Complainant entitled to under the STAA?

(Tr. at 6-7).

APPLICABLE STANDARD

The employee protection provisions of the STAA prohibit an employer from discharging, disciplining, or discriminating against an employee regarding pay, terms, or privileges of employment because the employee has filed a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order, or because the employee refuses to operate a vehicle because such operation violates a regulation or standard related to commercial motor vehicle safety, health, or security. 49 U.S.C. §§ 31105(a)(1)(A)(i); 31105(a)(1)(B)(i).

"To prove a STAA violation, the complainant must show by a preponderance of evidence that his safety complaints to his employer were protected activity, that the company took an adverse employment action against him, and that his protected activity was a contributing factor in the adverse action." *Blackie v. D. Pierce Transportation, Inc.*, ARB No. 13-065, ALJ No. 2011-STA-00055, slip op. at 5-6 (ARB June 17, 2014). A complainant can prove that his protected activity was a contributing factor in the adverse action if the complainant establishes that "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 77 Fed. Reg. 44,121, 44,127 (Jul. 27, 2012); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, slip op. at 3 (ARB Aug. 31, 2011). The contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision. . . . [E]ven an '[in]signficant' or '[in]substantial' role suffices." *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11 (ARB Jan. 6, 2017) (*citing Palmer v. Canadian Nat'l Railway*, ARB No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 52-53 (Sept. 30, 2016; reissued with full dissent Jan. 4, 2017)), *aff'd sub nom. Powers v. U.S. Dep't of Labor*, 723 Fed. Appx. 522 (9th Cir. 2018) (unpub.).

"If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the adverse personnel action, his employer can avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event." *Blackie*, ARB No. 13-065, slip op. at 6. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Coryell v. Arkansas*

Energy Services, LLC, ARB No. 12-033, ALJ No. 2010-STA-00042, slip op. at 4 (ARB Apr. 25, 2013) (*quoting Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-00030, slip op. 6 (ARB Feb. 29, 2012)).

Federal appellate jurisdiction of STAA cases rests in the circuit in which the alleged violation occurred or in which the complainant resided on the date of the violation. 29 C.F.R. § 1978.112. As the alleged violation occurred in Missouri, Eighth Circuit law controls this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background Information

A. Complainant's Employment Background

Complainant has been a commercial truck driver since 2018. (Tr. at 25). Complainant has a Missouri commercial driver's license ("CDL") with "X" endorsements and air brakes. (Tr. at 25). Complainant obtained his CDL through a school in Cedar Rapids, Iowa. (Tr. at 26). Complainant's first trucking job was over the road ("OTR"), hauling dry cargo in a "standard 53-foot box trailer." (Tr. at 26-27).

In 2020, Complainant applied for a truck driving position with Respondent TransWood. (Tr. at 27). Complainant applied online and then spoke with Walter Hornbeck, the lead driver trainer. (Tr. at 27, 140). Mr. Hornbeck told Complainant that Complainant needed additional qualifications, including a Transportation Worker Credential ("TWIC") card and endorsements on his license. (Tr. at 28). After obtaining those qualifications, Complainant began working at TransWood in January 2021. (Tr. at 8, 29, 38, 178).

Complainant trained with other employees for approximately one month. (Tr. at 29-31). During that time, Complainant learned safety procedures, how to drop the fuel into ground wells, and how to measure the amount of fuel in the wells. (Tr. at 30). Complainant was certified to load fuel from two facilities (also referred to as "racks"). (Tr. at 30).

Once Complainant finished training, Complainant began working the night shift (approximately 5:00 P.M. to 5:00 A.M.). (Tr. at 8, 33-34). Complainant was assigned to deliver fuel to Circle K convenience stores and gas stations. (Tr. at 8, 29). Complainant received a dispatch sheet at the beginning of each shift. The sheet listed the delivery locations, and the type and quantity of fuel to be delivered. (Tr. at 31-32). Complainant did not have the ability to choose different loads than those listed on the dispatch sheet. (Tr. at 63, 66). However, drivers are trained to call dispatch if the amount on the dispatch sheet exceeded the maximum volume. (Tr. at 175). There were two fuel dispatchers on night shift and two fuel dispatchers on day shift. (Tr. at 140).

Complainant personally loaded the fuel into his truck from the racks. (Tr. at 104). A loading matrix was available as a reference for drivers to know the weight limits. (Tr. at 174-75). Complainant acknowledged that he was prohibited from loading his truck at one of the racks for a period of two weeks after Complainant mistakenly overfilled his truck. (Tr. at 104).

Complainant would typically haul four to five loads of fuel in one shift. (Tr. at 32). Complainant's pay was calculated by the miles between the racks and the stores. Thus, Complainant's pay varied based on the loads he hauled. (Tr. at 34-35).

B. Complainant's First Pay Dispute

In February and early March, Complainant had a dispute with Respondent TransWood about his pay. Complainant's paycheck was short $685.00. (Tr. at 35). Complainant spoke to Respondent Miller, who resolved the issue. (Tr. at 35, 102). Mr. Miller told Complainant to notify him of any future pay issues. (Tr. at 35, 191).

C. Complainant's Attendance

Complainant had attendance problems during his three months with TransWood. The record includes several text messages from Complainant to Mr. Hornbeck, which reflect that Complainant was late or absent from work in January and February 2021. (CX 1). Complainant received his first attendance write-up letter in the mail; it was dated March 25, 2021. (RX 4; Tr. at 82). The letter stated that Complainant had "constant late starts," which caused delivery delays, and that Complainant had been late 10 times in March alone. (RX 4). The letter was signed by Respondent Miller. (RX 4). Mr. Miller also met with Complainant in person to address Complainant's attendance issues. (Tr. at 70, 108, 183). Complainant recalled speaking to Mr. Miller in late March. Complainant testified that Respondent Miller told him "it wasn't a big deal." (Tr. at 70). Complainant further testified that the attendance problems were a misunderstanding. Complainant recalled that he was offered an optional sixth day of work, but Complainant testified that he never accepted the offer. Complainant stated that he told dispatch only that he "might want to come in on a sixth day," but he ultimately decided not to work. (Tr. at 71). Complainant also denied being late 10 times or having any other attendance issues. (Tr. at 107-08). However, Complainant signed the attendance write up letter and did not dispute its contents at that time. (Tr. at 70). On cross examination, Complainant was further questioned about being late 10 times in March. Complainant denied being late, but later equivocated, stating "Again, it's been a while. So I guess I don't remember." (Tr. at 108-09).

On April 4, 2021, Complainant received another attendance write-up. The letter stated that Complainant called off three times in the past three weeks, the first of which was a "no show . . . no notification provided." (RX 5). Complainant signed the letter on April 8, 2021. (RX 5; Tr. at 110). On cross-examination, Complainant again denied having attendance issues. Specifically, Complainant denied having any no call/no shows. Complainant repeated his explanation about the optional sixth day. He also stated that "[i]f there was an issue, that was in March, it could have been, the weather was bad. I'm not sure." (Tr. at 111). Following the April 4 attendance write-up, Complainant refused to work two shifts due to another pay discrepancy. (Tr. at 120-21, 191; RX 6).

During Respondent Miller's direct testimony, Respondent Miller stated that dispatch alerts him if a driver has attendance problems; Respondent Miller then verifies the problem using the driver's logs. (Tr. at 151). He asserted that Complainant had "poor" attendance and explained that "[Complainant] continually had problems showing up for work, showing up on time, working

his whole shift. Between absences and tardies and call-offs, it was very poor attendance record." (Tr. at 180). Respondent Miller further explained that TransWood defined "excessive absenteeism" as "three occurrences in a six-month period for absences or tardies." (Tr. at 180). An employee could be terminated for excessive absences. (JX 1; Tr. at 181). Respondent Miller also discussed the optional sixth workday, stating, "It's always optional unless they confirmed they're going to work it and we put them on the schedule, then it's treated exactly as any other attendance issue." (Tr. at 163). Respondent Miller testified to Complainant's write-ups; he characterized being late 10 times in March as "extreme." (Tr. at 184). Respondent Miller confirmed that he met with Complainant to discuss his attendance; however, he asserted that he never told Complainant that the problems were not a big deal. (Tr. at 184, 188). He stated that Complainant continued to have attendance problems after the two write-ups.

Considering the conflicting testimony regarding Complainant's attendance, I find Mr. Miller's testimony more credible.[3] Complainant's testimony was not fully corroborated. More specifically, it was inconsistent with other evidence of record, including two attendance write-ups, Complainant's attendance record, and Complainant's text messages to and from Mr. Hornbeck indicating that Complainant was late on more than one occasion. (RX 4, 5; CX 1). Accordingly, I find Complainant somewhat less credible and assign his testimony less weight on this issue. Respondent Miller's testimony was internally consistent and supported by the evidence in the record. Accordingly, I find that he is a credible witness and assign his testimony more weight. As such, I find that Mr. Miller's testimony accurately reflects Complainant's attendance issues.

D. Complainant's Concerns Regarding Overweight Loads

On April 1, 2021, another driver, Kevin Gibbs, sent a group text message about overweight loads to Complainant and other TransWood employees. Mr. Gibbs' message stated the following:

> I am sending you this text because I want this to be documented. Walters term full loads are illegal loads if you are outside the 270 loop in Missouri and ANYWHERE in Illinois. I will always choose to operate this vehicle as safely as possible within the legal limits set forth by the DOT....

(CX 2)(emphasis in original). After receiving this message, Complainant began to question his truck's weight. During his time at TransWood, Complainant had never taken his truck to a scale or weigh station. Complainant explained that the scales and weigh stations were generally closed during his shift. (Tr. at 38). Complainant testified that after receiving the message, he raised the issue with Mr. Hornbeck. Complainant stated that he went to Mr. Hornbeck because, "I always went to Walter with anything I had. He told me to come to him before bringing it to anybody else." (Tr. at 40). Complainant further stated that he "thought [Mr. Hornbeck] was assistant

[3] In deciding this matter, I will weigh the evidence, draw inferences from it, and assess the credibility of witnesses. 29 C.F.R. § 18.12; *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 8 (ARB Aug. 1, 2002). In weighing the testimony of witnesses, I may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Ass't Sec'y & Mailloux v. R & B Transportation, LLC*, ARB No. 07-084, ALJ No. 2006-STA-12, slip op. at 9 (ARB June 16, 2009); *Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ No. 2003-STA-54, slip op. at 6, n.3 (ARB Sept. 30, 2005).

supervisor or another manager . . . because [Mr. Hornbeck] said come to him with anything. He told all the drivers come to him first. If you have any questions on a procedure or tickets or whatever the problem might have been." (Tr. at 41). Complainant testified that Mr. Hornbeck directed Complainant to weigh an empty truck on April 2, 2021. (Tr. at 43). Complainant weighed his truck at the beginning of his shift and sent a copy of the scale ticket to Mr. Hornbeck. (Tr. at 43, 60; CX 1, 3).

During Respondent Miller's cross examination, he asserted that Mr. Hornbeck was not a manager or supervisor. He stated that Mr. Hornbeck did not have authority to hire, suspend, discipline, or terminate employees, nor could he affect drivers' compensation, set schedules, or resolve complaints on behalf of Respondent TransWood. (Tr. at 167). I find Mr. Miller's testimony inconsistent with other evidence of record, particularly testimony from both Complainant and Respondent that Mr. Hornbeck was involved in the hiring process. The parties agreed that Mr. Hornbeck was the lead driver trainer and participated in hiring. Text exchanges between Mr. Hornbeck and Complainant reflect that Mr. Hornbeck answered questions regarding Complainant's application and qualifications. (CX 1). Complainant also testified, and Respondents do not dispute, that Mr. Hornbeck held himself out as a resource to the drivers. Mr. Hornbeck made himself available to answer questions about procedures or other issues, and Complainant testified that Mr. Hornbeck instructed him to come to him first with any issues. Based on the foregoing, I find that Mr. Hornbeck was a supervisor under the STAA.

In response to Mr. Gibbs' text message, on or about April 22, 2021, Respondent Miller issued a memo regarding overweight loads. (Tr. at 59; JX 2; CX 8, p. 5). Respondent Miller denied knowledge of any specific issues raised by Complainant, but stated, "It was my impression based on the fact that Mr. Gibbs elected to send a mass text out raising concerns, that I put this memo out to try to clarify." (Tr. at 158). To address those concerns, Respondent Miller sent the following memo to the Circle K drivers:

> Clarification, as apparently the request to haul heavier loads was conveyed incorrectly or misinterpreted by some.
>
> I have asked if we are hauling loads to an in town store and you feel comfortable doing so, to haul 8000 ULSD and 9000 Gasoline loads. Simply a request as we are paid by payload.
>
> This is by no means a <u>Mandate or Demand</u>. If you are not comfortable hauling over 7500 ULSD and 8500 gasoline then by all means continue to haul this size load.
>
> No driver has or ever will be reprimanded for hauling 7500/8500 gallon loads. It was not my intent to make anyone feel obligated to do so. therefore as it was explained to me the concern and interpretation that it was mandated, I want to clarify it was not, it was requested IF you felt ok with it.
>
> Guys, My door is always open and my phone is always on, Please get with me if you have concerns over what you think we are asking or saying. I promise I will work to resolve before it becomes a sticking point.

(JX 2)(emphasis in original). Respondent Miller testified that he sent the memo to clarify issues raised by Mr. Gibbs' text message. (Tr. at 158). Respondent Miller explained that the "270 loop" referenced by Mr. Gibbs was a "geographical marker" for a commercial zone. (Tr. at 153). Mr. Miller stated that weight limits differ depending on whether the vehicle is in a commercial zone. (Tr. at 153). When asked whether the memo included any information about commercial zones and different weight limits, Mr. Miller stated that "it was more about putting the drivers at ease and making them understand I wasn't mandating anything." (Tr. at 158). Mr. Miller further testified that "it was easier for me to allow a driver just to drop to the 7,500/8,500 than to try to explain and train every driver what was legal based on the mileage of the commercial zone." (Tr. at 156-57).

Complainant testified that he understood the memo to mean that drivers should keep hauling overweight loads. Complainant acknowledged that the memo was not a mandate. However, he stated that "I have seen other drivers, you know, have issue with not doing what their dispatch says, and then they get reprimanded and talked to. But that's just the memo saying that you will not be." (Tr. at 61). Complainant testified that he was "really worried" about overweight loads and worried about the "the repercussions and the safety of driving these overweight loads." (Tr. at 65-66). He testified that he spoke to Mr. Hornbeck and Mr. Miller about his concerns. (Tr. at 65). Complainant recalled one specific conversation between himself, Mr. Miller, and Mr. Hornbeck in the break area. (Tr. at 70). Complainant stated that Mr. Hornbeck and Mr. Miller "both said the same thing, just that a ticket goes to the company, and a couple of times after that, and it's just the same thing, same response every time." (Tr. at 69). Complainant testified that he brought up the issue often, but he could not recall any other specific conversations. (Tr. at 66). Complainant stated that Mr. Hornbeck's and Mr. Miller's responses were always the same. (Tr. at 69-70). Respondent Miller could not recall any conversation with Complainant regarding weight limit concerns. (Tr. at 157, 168).

Complainant also testified that he did outside research about the weight of fuel. (Tr. at 54-58). Complainant stated "I looked online, and I also talked to the supervisors at the racks about how much a gallon would weigh because it just wasn't enough to look online. I also asked the authorities or the person that was in charge at the racks." (Tr. at 56). Based on his own research, Complainant concluded that he was hauling overweight loads. (Tr. at 55).[4]

E. Termination

On April 24, 2021, Complainant walked off the job approximately two hours into his shift. (Tr. at 94). Complainant testified that he had fueled up his truck, brought it back, and then left early because of the load weight. (Tr. at 74). Complainant did not notify dispatch before leaving. (Tr. at 126; JX 4). Approximately 40-45 minutes later, Complainant texted Mr. Hornbeck.[5] Complainant's April 24, 2021 text exchange with Mr. Hornbeck was as follows:

[4] During the hearing, the parties disagreed about the correct weight per gallon; different online searches produced different results. (Tr. at 93, 132-33). However, Respondents do not dispute that Complainant used his own research to reach his conclusions.

[5] Complainant initially testified that he texted Mr. Hornbeck before leaving. However, Mr. Miller testified that Complainant texted Mr. Hornbeck approximately 45 minutes after going off duty. Mr. Miller's testimony is consistent

Complainant: Hey, Walter I took off early because of the load weight still unsure about it just worried about points didn't have anything on the dispatch sheet that wasnt.

Walter Hornbeck: What points are you referring to

Complainant: On my license Ive already got to ou [*sic*] know Ive got a lot of people telling me

Walter Hornbeck: If your [*sic*] talking about overweight there is no point assigned to a driver's license is a ticket that goes…

Walter Hornbeck: It's show you on them Circle K store sheets which doors are on the other side of the scale Then you load it the old way anything on this size scale You loaded how the dispatcher say I don't know who you are talking to but you should learn to talk to people that know what they are talking about we don't want anybody going through scale overweight but if your [*sic*] not going to scale it's a different story

Walter Hornbeck: Dale you don't even bother to talk to the dispatchers raining do this Justice [*sic*] taking off and gone home due to this gotta stop

Walter Hornbeck: Man we got stores that need fuel this is who pays us so that we can employ drivers to haul fuel is the source and if we run out of fuel L [*sic*] then why did they need us

(CX 1).

The following day, April 25, 2021, Respondent Miller told Complainant that he was fired for walking off the job. (JX 3). Respondent Miller "was the primary decision maker" in Complainant's termination. (Tr. at 168). Respondent Miller believes that dispatch notified him that Complainant walked of the job. The April 25, 2021 text exchange between Respondent Miller and Complainant was as follows:

Mr. Miller: You don't need to come in tonight, you are not on dispatch, can call me if need to discuss, but walking off last night without even speaking to dispatch was job abandonment.

Complainant: I told Walter but there's another issue my check before last is short again also I've been overcharged on my physical.

with Complainant's termination notice. (JX 4). On cross examination, Complainant agreed that, based on the text, it appeared Complainant had left before he sent the text message. (Tr. at 130). Based on the foregoing, I find that Complainant had already left work by the time he texted Mr. Hornbeck.

Mr. Miller: Walter is not dispatch. Elle was in office, you did not even ask of concerns Let me know what week and what short I will get fixed

Complainant: I understand, but I was under the impression that if I had an issue to contact Walter first. I'm unsure of policies. However, the inconsistency of my checks is a huge deal obviously I come to work to be paid.

Mr. Miller: And as we discussed if there is an error give me the info and I will get corrected, but walking off the job is not the answer.

Complainant: Like I said I didn't think I walked off, I told Walter before I left. Who then do I report to dispatch only because, I let Ruby know I wasn't coming in one day, and Davidda had no Idea.If you want me to call or text you, no problem.

Mr. Miller: Doesn't matter now Get me info so I can fix your pay, and bring keys and com data card in.

Complainant: So I'm fired because of the lack of transparency and being short on my check and complaining about it I go to work and I don't get paid you see the Dilemma

Complainant: Are you firing me

Mr. Miller: You are fired for walking off the job.

Complainant: I never did and there was only one instance of me no call no show

Complainant: I text Walter again

Complainant: I have everything on paper and in text

Mr. Miller: We can discuss tomorrow if you want to provide

(JX 3). Respondent Miller followed-up with Complainant the next day, telling him when he would be in the office, but Complainant did not respond. (JX3; Tr. at 161).

Complainant understood that he was fired when he saw Respondent Miller's first text. (Tr. at 79). He testified that he raised the issue of his paycheck because he wanted to make sure his last check was correct. (Tr. at 79, 128). Complainant never mentioned overweight loads in his last exchange with Respondent Miller. Complainant stated that the only thing that would indicate that he thought the truck was overweight was his April 24, 2021 text message to Walter Hornbeck. Complainant further testified that he did not mention the overweight loads because he "already talked to [Miller] in person and this is just a reoccurring thing. So I didn't think it was necessary if he was just going to fire me to go any further after I had already spoken to Walter and him about the subject." (Tr. at 128-29).

Respondent Miller testified that he made the decision to fire Complainant based on "[a] culmination of his attendance issues resulting in him walking off the job." (Tr. at 145). He explained that Circle K loads made up a large part of the business, and that the loads were time sensitive, and that ongoing delivery problems could result in a loss of business. (Tr. at 141-42). However, Respondent Miller acknowledged that he did not address Complainant's previous attendance issues in the final write-up. (Tr. at 145). Complainant's final write-up states "abandoned job, Drove back to yard from Phillips, parked truck and left without contacting dispatch. Either by phone or by simply walking into office to discuss with dispatcher on duty." (JX 4). The supervisor's comments reiterated much of the same information, stating:

> On Saturday, You came in, got your dispatches, Drove to PPCAH, then decided you did not wish to load, without contacting dispatch, you drove back to the yard, parked the unit, and left. You went off duty on yard at 1855. You decided to Text Walter advising you left early, at 19:41 ~ 45 minutes later, and never contacted dispatch. Terminated for Job Abandonment.

(JX 4). The write-up was signed by Respondent Miller on April 26, 2021. Respondent Miller testified, "I would assume dispatch had advised me" about Complainant's April 24, 2021 message to Mr. Hornbeck. (Tr. at 144). Respondent Miller testified that if Complainant had not walked off the job on April 24, 2021, he would not have been fired. (Tr. at 164).

F. Post-Termination Mitigation

Complainant testified that he was disappointed by his termination. (Tr. at 83). He stated that he experienced stress and anxiety. (Tr. at 89). Complainant estimated that the anxiety started three years before the date of the hearing, and he attributed it to "a combination of my son being born, doing this job at TransWood, and just the stress of you know, always worried about something could happen to [my son]." (Tr. at 90). Complainant did not seek treatment from any mental health professional. (Tr. at 89, 114).

Complainant found a new job a few weeks after his termination. (Tr. at 85). Complainant worked part time at Triple A Landscaping and worked as a painter. Complainant testified that his work at Triple A Landscaping was "on and off because it's seasonal." (Tr. at 86). In October 2022, Complainant began working as a driver for SNL Distribution. (Tr. at 87, 98). Complainant delivered local and earned more in this position than he did at TransWood. (Tr. at 87, 97-98). On December 27, 2022, Complainant resigned from SNL Distribution because of a dispute about the safety of the truck. (Tr. at 88, 99).

Following his termination, Complainant was also in contact with JB Hunt Transportation about job opportunities. (Tr. at 99-101). Complainant declined a regional job because he wanted to work locally. Complainant testified that he remains in touch with the company, but he has not received any local job offers. (Tr. at 100-101).

Complainant currently works for the McNeil Group, Triple A Landscaping, and does subcontracting. (Tr. at 87).

II. Coverage under the STAA

The STAA prohibit an employer from discharging, disciplining, or discriminating against an employee regarding pay, terms, or privileges of employment because the employee has filed a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order, or because the employee refuses to operate a vehicle because such operation violates a regulation or standard related to commercial motor vehicle safety, health, or security. 49 U.S.C. §§ 31105(a)(1)(A)(i); 31105(a)(1)(B)(i).

The STAA defines "employee" as follows:

> a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who (1) directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and (2) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

49 U.S.C. §§ 31101(2); *see also* 49 U.S.C. 31105(j). "The term ["employee"] includes an individual formerly performing the work described above or an applicant for such work." 29 C.F.R. § 1978.101(h). Commercial motor vehicle is defined as "a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater." 49 U.S.C. § 31101(1)(A).

The Act defines "employer" as a "person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but does not include the Government, a State, or a political subdivision of a State." 49 U.S.C. § 31101(3)(A)-(B). Further, the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals."

"[C]overage under the Act depends upon whether the vehicles being used are 'in commerce' and whether the employer is a 'commercial motor carrier' which is engaged in a business 'affecting commerce.'" *Ass't Sec'y & Nidy v. Benton Enterprises*, No. 90-STA-11, slip op. at 2 (Sec'y Nov. 19, 1991). The Act has been held to apply to interstate commerce and intrastate transportation that affects interstate commerce. *Id.* (*citing Taylor v. T.K. Trucking*, Sec. Final Dec. and Order, Oct. 31, 1988). It is not necessary to cross state lines to be within the scope of Congress' power to regulate interstate commerce; Congress's power to regulate interstate commerce extends to intrastate activities that exert a substantial effect on interstate commerce. *Ass't Sec'y & Nidy*, No. 90-STA-11, slip op. at 4 (*citing Maryland v. Wirtz*, 392 U.S. 183, 189-190 (1968); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120 (1942); *United States v. Darby*, 312 U.S. 100, 119-120 (1941); *United States v. Hill*, 248 U.S. 420, 425 (1919)). "Whether transportation between two points in the same state is deemed to be a part of an interstate movement is ascertained from all the facts and circumstances surrounding the transportation." *Ass't Sec'y & Nidy*, No. 90-STA-11, slip op. at 4

(*citing Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943); *Baltimore & O.S.W.R. Co. v. Settle*, 260 U.S. 166 (1922)).

The uncontested facts demonstrate that Complainant and Respondents meet the definitions of employee and employer, respectively, under the STAA. Moreover, as set forth above, the parties stipulated to the relevant jurisdictional criteria. Therefore, I find the Act applies to the parties in this case.

III. Adverse Employment Action

Discharge of an employee by an employer constitutes an adverse action. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-00026, slip op. at 12-13 (ARB Oct. 31, 2007). Further, the Act prohibits not only a "discharge" for engaging in protected activity, but also other retaliatory actions. *See* 49 U.S.C. § 31105. The Procedures for the Handling of Retaliation Complaints, under the Employee Protection Provision of the STAA, declares that "[i]t is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, harass, suspend, demote, or in any other manner retaliate against any employee because the employee" filed orally or in writing a complaint with an employer related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. 29 C.F.R. § 1978.102(b).

As set forth above, the parties stipulated that Respondents terminated Complainant's employment on April 25, 2021. As such, the uncontested facts demonstrate that Complainant suffered an adverse employment action.

If Complainant can prove by a preponderance of the evidence that he engaged in protected activity and that his protected activity was a contributing factor to his termination, the burden will shift to Respondents to show by clear and convincing evidence that they would have taken the same adverse action absent Complainant's protected activity.

IV. Protected Activity

A. Filing Complaints

Section 31105(a)(1)(A) of the Act protects employees who file complaints related to commercial vehicle safety violations. An employee's complaints are protected when made internally. *Zurenda v. J & K Plumbing & Heating Co., Inc.*, 1997-STA-00016 (ARB June 12, 1998); *see also Yellow Freight System, Inc. v. Martin*, 954 F. 2d 353, 356-57 (6th Cir. 1992). Internal complaints may be oral, informal, or unofficial. *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 14 (ARB Sept. 14, 2007); *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 6 (ARB Dec. 31, 2002). "However, such complaints cannot be implied. They must be communicated to a manager or supervisor." *Jackson v. CPC Logistics*, ARB No. 07-006, ALJ No. 2006-STA-004, at 3 (ARB Oct. 31, 2008) (citing *Harrison*, slip op. at 6). It does not matter where the supervisor falls in the chain of command. *See Zurenda v. J & R Plumbing & Heating Co., Inc.*, ARB No. 98-088, ALJ No. 97-STA-16, slip op. at 5 (ARB June 12, 1998).

In order to be protected under the Act, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation. *Ulrich v. Swift Transp. Corp.*, ARB No. 11-016, ALJ No. 2010-STA-00041, slip op. at 4 (ARB March 27, 2012); *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-006, slip op. at 10 (ARB Jan. 10, 2018). "This standard requires both a subjective belief and an objective belief." *Newell*, ARB No. 16-007, slip op. at 10. The subjective component is "satisfied by showing the complainant actually believed that the conduct he complained of constituted a violation of relevant law. The objective component "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Garrett v. Bigfoot Energy Servs.*, LLC, ARB No. 16-057, ALJ No. 2015-STA-047, slip op. at 7 (ARB May 14, 2018)(quoting *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022 (ARB Nov. 28, 2012)). Credible testimony is enough to find protected activity. *See Beatty v. Celadon Trucking Services, Inc.*, ARB Nos. 15-085, -086, ALJ No. 2015-STA-00010, slip op. at 5 (ARB Dec. 8, 2017); *McDaniel v. D.G. Construction & Hauling, LLC*, ALJ No. 2019-STA00019, slip op. at 28-29, 37 (ALJ Oct. 31, 2019).

Complainant alleges that he filed complaints about overweight loads with two supervisors, Mr. Miller and Mr. Hornbeck, throughout April 2021. After receiving Mr. Gibbs message, Complainant asked Mr. Hornbeck about the load weights. Mr. Hornbeck instructed Complainant to weigh an empty truck at the beginning of Complainant's shift. A scale receipt shows that Complainant weighed his truck on April 2, 2021; Complainant sent a copy of the receipt to Mr. Hornbeck. Complainant also recalled a conversation with Mr. Hornbeck and Mr. Miller in the break area shortly after receiving Mr. Gibbs' text message. Complainant testified that both Mr. Hornbeck and Mr. Miller told Complainant that any points assigned from a ticket for having an overweight truck would go to the company, not Complainant's license. Complainant alleges that he continued to raise the weight issue with Mr. Horneck and Mr. Miller throughout April 2021. However, Complainant could not recall any other specific conversations with Mr. Hornbeck or Respondent Miller. Finally, Complainant texted Mr. Hornbeck about overweight loads after walking off the job on April 24, 2021.

Mr. Miller testified that he could not recall ever speaking to Complainant directly about overweight loads. Mr. Miller further testified that he was aware of a general concern among drivers due to Mr. Gibbs mass text message. There is no dispute that Complainant failed to mention overweight loads in his April 25, 2021 text exchange with Respondent Miller. Based on the foregoing, I find that there is insufficient evidence that Complainant filed complaints directly with Mr. Miller. However, Complainant has shown that he filed complaints with Mr. Hornbeck.

Respondents do not dispute that Complainant raised the issue with Mr. Hornbeck. However, Respondents argue that Mr. Hornbeck is not a supervisor under the Act. As set forth above, I find that Mr. Hornbeck was a supervisor. Mr. Hornbeck spoke to Complainant about his application, instructed Complainant regarding job qualifications, and received Complainant's employment documents. (CX 1). Mr. Hornbeck also made himself available to drivers to answer questions. Complainant testified that Mr. Hornbeck told the drivers to come to him first with any issues, and the evidence reflects that Complainant reached out to Mr. Hornbeck on multiple occasions regarding attendance and other issues. Thus, I find that Complainant filed complaints relating to commercial vehicle safety regulations with a supervisor.

Such complaints are protected if there is a reasonably perceived violation of a commercial vehicle safety law or regulation. As discussed above, this standard requires both subjective and objective belief. After speaking with Mr. Hornbeck and conducting his own research, Complainant concluded that his loads were overweight. Respondents do not dispute that Complainant had a subjective belief that his loads were overweight. Based on the foregoing, I likewise find that Complainant had a subjective belief that the loads were overweight.

I find that Complainant also had an objective belief that the loads were overweight. Complainant received a text message from another driver expressing concerns about overweight loads. Complainant then asked Mr. Hornbeck about overweight loads, and Mr. Hornbeck did not deny that loads were overweight; he only stated that points would not go to Complainant's license. Similarly, Mr. Hornbeck stated that they did not want drivers going through scales with overweight loads, but that when the scales were closed, it was a "different story." Moreover, Mr. Miller testified that the loads were within the weight limits for commercial zones; however, Mr. Miller's April 2021 memo did not explain commercial zones to the drivers. The memo only indicated that drivers would not be reprimanded for refusing to haul heavier loads. Thus, I find that there is sufficient evidence to establish that a reasonable person in Complainant's circumstances would believe that Respondents assigned overweight loads.

Based on the foregoing, Complainant engaged in protected activity under 49 U.S.C. § 31105(a)(1)(A) by filing complaints related to commercial vehicle safety regulations with Mr. Hornbeck.

B. Refusal to Operate Equipment

In addition to filing a complaint, a complainant may also prevail by showing that he suffered an adverse employment action because he refused to operate a commercial vehicle in a manner that would violate 49 U.S.C. § 31105(a)(1)(B). The STAA protects employee who refuse to operate a motor vehicle for one of the two reasons provided by statute:

> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
>
> (ii) the employee has a reasonable apprehension of a serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a)(1)(B). Under the STAA, "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 unsafe condition establishes a real danger of accident, injury, or serious impairment to health." *Id.* at § 31105(a)(2). Moreover, "[t]o qualify for the protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition." *Id.*

The Parties do not dispute that Complainant was terminated, which is an adverse employment action. Additionally, there is no dispute that Complainant was terminated, at least in

part, because he walked off the job on April 24, 2021. However, there is a dispute as to whether walking off the job constituted protected activity.

Complainant provided conflicting reasons for abandoning his job on April 24, 2021. Complainant alleged that he refused to operate his truck on April 24, 2021, because the load was overweight. As evidence, he submitted a text exchange between himself and Mr. Hornbeck. The texts reflect that, approximately 40-45 minutes after Complainant left work on April 24, 2021, Complainant texted Mr. Hornbeck, "Hey, Walter, I took off early because of the load weight. Still unsure about it. Just worried about points. Didn't have anything on the dispatch sheet that wasn't." (CX 1).

However, there is no evidence that Complainant questioned the assigned weight prior to walking off the job. Mr. Miller credibly testified that drivers are trained to call dispatch if the amount on the dispatch sheet exceed the maximum volume. (Tr. at 175). The parties agreed that Complainant reported to the driver dispatcher. (Stipulated Fact V.) However, according to the text exchange between Complainant and Mr. Hornbeck, as well as Complainant's own testimony, Complainant never contacted dispatch on April 24, 2021.

The following day, Respondent Miller texted Complainant that "walking off last night without even speaking to dispatch was job abandonment." (JX 3). Complainant did not dispute that he failed to tell dispatch before he was leaving, nor did he state that his reason for leaving was related to the assigned load's weight. Complainant only raised the issue of a pay discrepancy during his text exchange with Respondent Miller. Moreover, Complainant specifically stated "So I'm fired because of the lack of transparency and being short on my check and complaining about it." (JX 3).

In addition to failing to notify dispatch before leaving, Complainant did not refuse to fill the truck to the level indicated on the dispatch sheet; rather, Complainant testified that he fueled the truck to the assigned level and returned to the terminal before leaving. Weighing all the evidence, I find that Complainant did not meet his burden in establishing that he refused to operate his vehicle on April 24, 2021, due to weight concerns.

Additionally, even if Complainant had refused to operate the vehicle because he reasonably believed that his truck was overweight, Complainant does not qualify for protection because he failed to seek correction of the hazardous safety or security condition, as required by the Act. 49 U.S.C. § 1105(a)(2). Complainant alleged that his dispatch sheet contained overweight load assignments. Yet, as stated above, Complainant did not contact dispatch or otherwise request a lighter load. Moreover, Complainant controlled the amount of fuel loaded into his vehicle, and he testified that he filled the tanker to the assigned level. Complainant then returned the full truck and left the job. At no time did Complainant seek any corrective activity, such as raise his concerns with dispatch, seek a lighter load, or fill the tanker with a load that would have been within the allowable weight limits. Thus, Complainant fails to qualify for protection under the Act.

V. Knowledge of Protected Activity

Having shown that he engaged in protected activity by making safety complaints, Complainant must demonstrate that Respondents knew of the protected activity. As set forth above, Complainant made complaints about overweight loads with Mr. Hornbeck in April 2021. Complainant testified that he spoke to Mr. Hornbeck about the issue in person, and weighed his truck on April 2, 2021, at Mr. Hornbeck's direction. Complainant also texted Mr. Hornbeck, on April 24, 2021, that his assigned loads were overweight. Complainant testified that he also raised the issue with Respondent Miller, but Respondent Miller denied any knowledge of Complainant's concerns.

Here, the evidence indicates that Respondents were aware of Complainant's protected activity. As set forth above, Complainant made complaints to supervisory personnel. Even if Respondent Miller was not initially aware of Complainant's concerns, he was aware of a general concern among the drivers regarding overweight loads when he issued his April 2021 memo. Moreover, the exact timing of Complainant's April 24, 2021 text message to Mr. Hornbeck was referenced in his final write-up. The write-up was signed by Respondent Miller. Based on the foregoing, I find that Respondents had knowledge of Complainant's protected activity.

VI. Contributing Factor

Complainant must also prove, by the preponderance of the evidence, that protected activity was a contributing factor in the adverse action taken. *Tocci v. Miky Transport*, ARB No. 15-029, ALJ No. 2013-STA-00071, slip op. at 6 (ARB May 18, 2017). This may be proven with circumstantial evidence. "Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence." *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-00003, slip op. at 13 (ARB June 24, 2011). Another type of circumstantial evidence "is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, ALJ Nos. 2008-STA-00012, -00041 (ARB Sept. 15, 2011)(internal citations omitted).

A "contributing factor" is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Powers*, ARB No. 13-034, slip op. at 11 (internal citations omitted). The trier of fact is to consider all relevant evidence in determining whether there was a causal relationship between a complainant's protected activity and the adverse employment action alleged. *See id.* at 21; *Austin*, ARB No. 2017-0024, slip op. at 8-9 n. 37 (emphasizing that the *Powers* decision allows the trier of fact to consider all relevant evidence at the contributory factor causation stage). To rule for an employee at this step, the ALJ must be persuaded that it is more likely than not that the protected activity played any role in the adverse action. The standard is low and "broad and forgiving", and the protected activity need only play some role; even an "insignificant or insubstantial" role suffices. *Palmer*, ARB No. 16-035, slip op. at 52-53 (internal marks and citations omitted).

Here, Complainant alleges that filing complaints and refusing to operate equipment on April 24, 2021, contributed to his termination. As at forth above, I find that the refusal to operate equipment was not protected activity. Therefore, even if Complainant can demonstrate that the refusal to operate equipment contributed to his termination, it has no bearing on whether he qualifies for protection under the Act. On the other hand, I have determined that Complainant engaged in protected activity by filing complaints with Mr. Hornbeck throughout April 2021. Thus, if Complainant can establish that he was terminated, in part, for making complaints relating to overweight loads, then he qualifies for protection under the Act.

Complainant argues that the timeline creates a "strong inference of retaliation." (Compl. Br. at 14). Notably, Complainant was terminated less than one month after his first complaint to Mr. Hornbeck. Complainant testified that he first became concerned about the prospect of hauling overweight loads after receiving the April 1, 2021 text message from Kevin Gibbs. Complainant brought his concerns to Mr. Hornbeck, and on April 2, 2021, Mr. Hornbeck instructed Complainant to weigh his empty truck and send a copy of the scale ticket. Complainant testified that he later met with Mr. Hornbeck and Mr. Miller in the break area and discussed the issue of overweight loads. Respondent Miller denied any recollection of meeting with Complainant, nor did Respondent Miller testify to any knowledge of Complainant's conversations with Mr. Hornbeck. However, Respondent Miller was aware of a general concern among the drivers about overweight loads. On or about April 22, 2021, Respondent Miller issued the memo to all the Circle K drivers, including Complainant. Complainant interpreted the memo to mean that he was required to carry overweight loads. Two days later, on April 24, 2021, Complainant left work early without notifying dispatch. Complainant later texted Mr. Hornbeck that his assigned loads were overweight. On April 25, 2021, Respondent Miller notified Complainant that he was terminated.

Despite the temporal proximity, I find that there is insufficient evidence that filing complaints contributed to Complainant's termination. During the April 25, 2021 text exchange with Mr. Miller, Complainant only raised concerns over a pay discrepancy; he did not mention anything about prior complaints about overweight loads. Complainant then specifically stated that he was being fired "because of the lack of transparency and being short on my check and complaining about it." (JX 3). Complainant later testified that he did not mention the overweight loads when Respondent Miller told him that he was fired because he "already talked to [Mr. Miller] in person and this is just a reoccurring thing. So I didn't think it was necessary if he was just going to fire me to go any further after I had already spoken to Walter and him about the subject." (Tr. at 128-29).

During the text exchange, Respondent Miller replied only that Complainant was fired "for walking off the job." *Id.* At the hearing, Mr. Miller testified that he made the decision to fire Complainant based on "[a] culmination of his attendance issues resulting in him walking off the job." (Tr. at 145). Although the final write-up did not reference prior attendance problems, there is no dispute that Complainant had received two attendance write-ups during his three months with Respondent TransWood, one of which pre-dated any complaints regarding overweight loads. During the hearing, Mr. Miller characterized Complainant's attendance as "poor" and "extreme," and he explained that under TransWood's attendance policy, excessive absences could lead to termination. (Tr. at 180). There is also no dispute that Complainant left work on April 24, 2021 without notifying dispatch, which violated company policy. Mr. Miller testified that if

Complainant had not walked off the job on April 24, 2021, he would not have been fired. (Tr. at 164).

Considering the entire record, I find that protected activity of making safety complaints did not contribute to Complainant's termination or any other adverse employment action. Although Complainant was terminated within a few weeks of filing his complaints, Complainant has not met his burden in establishing that such complaints contributed to his termination. Rather, the record supports Mr. Miller's testimony that Complainant was terminated for abandoning his job without notice.

VII. Affirmative Defense

If Complainant had established all the requisite elements, Respondents would be required to show, by clear and convincing evidence, that they would have taken the adverse action regardless of the protected activity. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Coryell*, ARB No. 12-033, slip op. at 4 (internal citation omitted).

Assuming, arguendo, that Complainant had met his burden in establishing that the complaints were a factor in his termination, Respondents can show by clear and convincing evidence, that they would have taken the adverse action regardless of the protected activity.

Respondents assert that Complainant was fired for attendance problems, which began before any alleged protected activity. Complainant's text messages to Mr. Hornbeck reflect that he was late or absent from work in January and February 2021. Complainant also received two attendance write-ups during his three months with TransWood. The first write-up reflected that Complainant had constant late starts and had been late ten times in March. The second write-up reflected that Complainant called off three times in three weeks, the first of which was a "no show…no notification provided." (RX 5). Following the second write-up, Complainant also refused to work two shifts due to a pay discrepancy. (Tr. at 120-21, 191; RX 6). Finally, on April 24, 2021, Complainant left work approximately two hours into his shift without first notifying dispatch or any other TransWood supervisor. Respondent Miller credibly testified that Complainant's past attendance problems contributed to the decision to terminate his employment, but, as Respondent Miller testified, Complainant walking off the job on April 24, 2021 was the deciding factor.

Complainant contests Respondents' characterization of his attendance. However, as discussed above, I am not persuaded by Complainant's testimony regarding the extent of his attendance problems. Not only was it inconsistent with the information from the write-ups, but Complainant personally signed the write-ups and admitted in a text message to Respondent Miller that he had at least one no call/no show. Additionally, Complainant does not dispute that he left work on April 24, 2021, without notifying dispatch. Although Complainant initially testified that he notified Mr. Hornbeck before leaving, upon reviewing the timing of the messages, Complainant agreed that he had already left work by the time he texted Mr. Hornbeck. Therefore, I find Complainant's testimony regarding the extent of his attendance problems less credible on this issue. On the contrary, Mr. Miller's credible testimony is supported by the evidence of record.

Based on the foregoing, I find that Respondents can show by clear and convincing evidence that they would have terminated Complainant for attendance issues, specifically walking off the job on April 24, 2021, without notifying dispatch, regardless of Complainant's protected activity.

VIII. Relief

Because Complainant cannot establish that his protected activity contributed to his discharge, or any other adverse employment action, Complainant is not entitled to relief under the Act. Alternatively, assuming that Complainant could establish all the elements required under the Act, I find that Respondent has demonstrated, by clear and convincing evidence, that it would have taken the same adverse action even in the absence of Complainant's protected activity.

CONCLUSION

Based on the foregoing, I find that Complainant did not engage in protected activity when he refused to operate his commercial vehicle on April 24, 2021. However, I find that Complainant engaged in protected activity when he complained to the lead driver trainer, Walter Hornbeck, regarding commercial vehicle weight regulations. Respondents terminated Complainant's employment on April 25, 2021. Thus, Complainant established that he engaged in protected activity, Respondents knew of Complainant's protected activity, and Complainant suffered an adverse employment action. Nevertheless, I find that Complainant's protected activity did not contribute to his April 25, 2021 discharge or any other adverse employment action. In the alternative, even if Complainant had established all of the requisite elements, Respondent has demonstrated, by clear and convincing evidence, that it would have terminated Complainant's employment in the absence of the protected activity. Therefore, Complainant is not entitled to relief under the STAA.

ORDER

Based on the entire record, including the aforementioned findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that Dale DeTie's claim for relief under the employee protection provisions of the Surface Transportation Assistance Act is **DENIED**.

SEAN M. RAMALEY
Administrative Law Judge

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

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

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

FILING AND SERVICE OF AN APPEAL

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

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

    B. **Self-Represented Parties: Use of the EFS system is strongly encouraged for all self-represented parties** with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all required service

automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

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

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

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

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

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

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

3. Effective Time of Filings

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

4. Service of Filings

A. Service by Parties

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

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

B. Service by the Board

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

5. Proof of Service

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

6. Inquiries and Correspondence

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