



**In the Matter of:**

**THERON CARTER,**

**ARB CASE NOS. 06-101  
06-159**

**COMPLAINANT,**

**ALJ CASE NO. 2005-STA-063**

**v.**

**DATE: June 30, 2008**

**MARTEN TRANSPORT, LTD.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Paul O. Taylor, Esq., *Truckers Justice Center*, Eagan, Minnesota**

***For the Respondent:***

**Robert C. Greene, Esq., *Foster, Swift, Collins & Smith*, Grand Rapids, Michigan; Stephen A. DiTullio, Esq., *Mindy Rowland Buenger DeWitt Ross & Stevens, S.C.*, Madison, Wisconsin; Robert C. Greene, Esq. *Foster, Swift, Collins & Smith*, Grand Rapids, Michigan**

**FINAL DECISION AND ORDER**

Theron Carter (Carter) filed a complaint with the United States Department of Labor alleging that when his former employer, Marten Transport, Ltd. (Marten), discharged him, it violated the employee protection section of the Surface Transportation Assistance Act (STAA) of 1982.<sup>1</sup> A Department of Labor Administrative Law Judge

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<sup>1</sup> 49 U.S.C.A. § 31105 (West 2007). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2007). The STAA has been amended since Carter filed his complaint on June 16, 2005. See Implementing Recommendations of the 9/11 Commission Act of

(ALJ) heard the case and concluded that Marten violated the STAA. The ALJ recommended that Marten reinstate Carter and awarded Carter back pay with interest, compensatory damages, and other equitable relief. We affirm.

## **BACKGROUND**

Marten is an interstate trucking company with its principal place of business in Mondovi, Wisconsin. Marten hired Carter as a driver on June 2, 2005, and assigned him truck-tractor number 5730. Carter primarily transported shipments for General Mills which were loaded into attached trailers.

When Marten assigned Carter truck 5730, it was located at Brayer's Auto Service in Scranton, Pennsylvania. Truck 5730 had been in an accident on May 31, 2005, when its previous driver struck a low bridge while pulling a trailer. Carter picked up the truck at Brayer's on June 3, 2005.

While at Brayer's, Carter inspected the truck and found a defective windshield washer pump, wiper blades that needed replacement, a broken passenger side door, a missing driver's side door knob, low fluid levels, missing vent louvers, a damaged and unsecured fire extinguisher, a soiled sleeper berth mattress, and a bent passenger side exhaust stack. Carter also did not find the previous driver's post-trip inspection report or a daily inspection form.

Carter informed Marten's Road Service department (Road Service) and Brandon Smith (Smith), Marten's General Foods Fleet Manager, of these problems. Marten authorized Brayer's to take the necessary steps to make truck 5730 roadworthy. Brayer's replaced the fire extinguisher and addressed the low fluids issue. Mr. Brayer informed Carter that he needed more time to get a new windshield washer pump and mattress. Carter chose not to wait for those replacements because he determined that those problems would not result in truck 5730 being placed out-of-service. Carter then drove to Bethlehem, Pennsylvania where he picked up an empty trailer.

The next day Carter picked up a shipment in Avenel, New Jersey for delivery to Detroit, Michigan on June 6. En route, Carter observed that the engine heated up in mountainous areas, once activating an engine warning light. Carter stopped in Barkeyville, Pennsylvania where he added engine oil, observed what he thought was a leaking wheel seal, and informed Road Service of these problems. Carter also reported that the engine was losing oil. Carter told Road Service that he could continue his trip to Detroit because he did not feel that these defects presented an imminent safety hazard.

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2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is unnecessary for us to determine whether the amendments apply to Carter's complaint because they are not implicated by the issues presented and thus, even if the amendments were applicable to this complaint, they would not affect our decision.

On June 6, still en route to Detroit, Carter told Kari Serum, Marten's Fleet Manager, that the company had deceived him about the condition of the truck when he picked it up on June 3 and that the truck was experiencing problems and needed to be serviced. Carter also spoke with Smith and Alan Austin, Marten's Assistant Road Service Manager. Carter told Austin that the sleeper berth mattress had a urine odor, that the truck had a wheel seal leak, an oil leak, the windshield washer pump was defective, the bunk strap was missing, engine coolant was low, vent louvers were damaged and missing, the exhaust stack was bent, and the Qualcomm communication unit was not secured. Carter also told Austin that the daily inspection book was missing from inside the truck and that he needed one. Carter complained to Austin that the truck was not roadworthy and did not comply with United States Department of Transportation (DOT) regulations. Austin asked Carter if he felt comfortable driving the truck to the Dermody Peterbilt repair shop in Grand Rapids, Michigan. Carter responded that he would drive the truck there but no further.

Austin arranged for repairs with John McNeilly, Dermody's service advisor, and prepared a work order detailing Carter's complaints. Austin told McNeilly that the truck had been in an accident, had a leaking wheel seal, a broken windshield washer pump, and needed the exhaust system inspected and a new sleeper berth mattress.

After he delivered the load to Detroit on June 6, Carter drove to Dermody in Grand Rapids where he left the truck. McNeilly prepared an initial write-up as he inspected the truck with Carter. Carter reported the following defective items to McNeilly: wheel seal leak, passenger door, fifth-wheel air switch, exhaust stack, engine oil leak, washer pump, headlamp, wiper blades, driver's side doorknob, sleeper berth mattress, bunk light, and dash vents. McNeilly personally observed the bent exhaust stack, damaged driver's side door knob, a coating of dirt and oil on the engine, a hole in the high beam light, the soiled mattress, the inoperative bunk light, damaged vents, and a missing CB antenna. Marten authorized all of the repairs except for the inoperable sleeper berth light and missing bulb covers, and instructed Dermody to check for an engine oil leak. Austin also told Carter that replacing the bunk strap would have to wait until the truck was at one of Marten's terminals. Two days later, Carter spoke with Serum and informed her that Dermody was still working on the truck. Carter again told Serum about his concerns with the condition of the truck.

Dermody mechanics worked on the truck until June 10, 2005, when Carter picked it up. The mechanics determined that the wheel seal leak that Carter had reported was actually a leaking axle gasket seal, and they replaced that gasket. Dermody also replaced the bent exhaust stack, passenger door latch, broken high beam light, the sleeper berth mattress, the missing CB antenna, the driver's side door knob, and the missing vent louvers. They did not find an engine oil leak or any defect in the fifth wheel air switch. Carter inspected the truck when he picked it up and reviewed the repair bill with McNeilly. McNeilly informed Carter that Dermody's mechanics had tested for but not found an engine oil leak.

Marten dispatched Carter to pick up a load in Kalamazoo, Michigan, for delivery

in Tomah, Wisconsin on June 12. After that, Carter was to pick up a shipment in Mondovi, Wisconsin for delivery in Bolingbrook, Illinois on June 13.

Carter picked up a load on June 11 in Kalamazoo and delivered it to Tomah the next evening. During this trip, Carter noticed that the fifth wheel switch was not working properly, and the truck was running hot. Also while en route to Tomah, Carter stopped for a break in Portage, Wisconsin and observed that the truck was down two quarts of oil. Carter reported to Marten employees that his truck was experiencing problems and needed servicing. The Marten dispatcher instructed Carter to bring the truck for repair to its facility in Mondovi, which he did, arriving the evening of June 12. Marten cancelled Carter's June 12 dispatch from Mondovi to Bolingbrook.

Carter spoke with two Marten mechanics about the truck's condition. Carter also completed a "Driver Vehicle Condition Report," listing problems that included fifth wheel, "Hi Idle," florescent light in bunk, left steering wheel tire cut, "Air valve on King pin Release, does not release," "oil all over" engine compartment, and "truck needs washing." Carter testified that he also told the mechanics that the bunk had no strap, the radiator was plugged, the engine leaked oil, and the automatic coupling device did not work.

The next morning, June 13, Mitchell Goss, a mechanic, asked Carter to drive Truck 5730 into Marten's repair shop. Carter told Goss that the truck had been overheating, the radiator was plugged, the left steering wheel was cut, there was an engine oil leak, and the bunk strap was missing. Carter gave Goss the damaged fire extinguisher that was in the truck when he picked it up June 3 and asked him to make sure that the new fire extinguisher he had been given at Brayer's complied with DOT regulations.

Goss prepared a Maintenance Record Repair Work Order and began work on Truck 5730. Goss observed the cut tire, and another employee inspected it for DOT compliance and determined its condition was not problematic. Goss also found that the radiator was badly plugged due to excess oil leaking from the "blow-by" tube on the engine. The oil was collecting on the radiator fins. Goss testified that blow-by is a form of waste oil and causes a loss of oil. Goss also testified that a radiator plugged with oil and dirt can cause an engine to overheat and shut down while on the road. According to Goss, truck 5730's engine was prone to excessive blow-by. In addition, Goss determined that the truck's automatic fifth wheel coupling device did not work properly due to a leaking air cylinder. Goss replaced the bunk light bulb. Goss also adjusted the bent exhaust stack which was loose.

After his meeting with Goss, Carter spoke with Diane Ashwell, a safety supervisor. Carter told her that the problems with truck 5730 that existed when he picked it up should have been corrected before Marten assigned him the truck, and that he had discovered that the truck was not safe to drive after he picked it up. Carter testified that he told Ashwell that the truck was in the repair shop, that an engine oil leak still needed to be fixed, that the bunk strap was still missing, and that the idle adjustment and the

automatic fifth wheel coupling device needed to be repaired.

Ashwell took Carter to the office of her boss, Daniel Peterson, Safety Director. Carter told Peterson that he was concerned that the truck's condition at the time he picked it up did not comply with DOT regulations and that it had been in an accident. He told Peterson about the problems when he picked up the truck and said that a Marten representative should have accompanied him to pick up the truck. Carter also told Peterson that the truck was in the shop, that the exhaust stack was bent, that the bunk strap was missing, that the truck had needed oil and was using lots of oil, and that the passenger door did not work. Carter asked Peterson for a copy of the previous driver's post-trip inspection book. Peterson told Carter that he would make sure that the repair shop addressed all of the defects.

Carter then met with Serum. He told her that the truck was in the shop and told her about the present condition and past problems with its condition. Carter asked Serum for a second set of load locks to secure his load, but Serum explained Marten's policy of issuing one set only. Serum told Carter to talk to James Pendergast, Marten's Equipment Manager, if he wanted to pursue his request. She also told Carter to speak with Pendergast and her boss, Douglas Petit, about his truck condition complaints and load lock policy issues. When Carter met with Pendergast, Pendergast told him that if the truck was in the shop too long he would see about getting Carter assigned a different truck. When Carter asked Pendergast about obtaining reimbursements for repair bills, Pendergast took him to see Michael Ashwell, the Road Service manager. When Carter told Michael Ashwell that he was unhappy with Marten, he told Carter to go to Human Resources.

Later that afternoon, the repair shop informed Carter that the truck was ready. Goss told him that the radiator had in fact been plugged and that he had cleaned it. Carter thanked Goss. When he inspected the truck, Carter saw that the bunk strap was still missing and that oil and dirt were still caked on the right rear axle drive indicating a possible oil leak. And he still had not been given the previous driver's post-trip inspection report and an inspection form. Carter complained to Diane Ashwell that these problems could result in an out-of-service order. Ashwell brought Carter to Kristi Decker (Decker), a Human Resources staff member.

Carter told Decker about his safety concerns and informed her that the truck was in the shop. He also discussed the condition of the truck when he had picked it up on June 3. Decker told Carter that she would investigate the matter and get back to him. Decker thereafter talked to Pendergast and called the repair shop which told her that truck 5730 was ready for dispatch. Decker arranged to meet Carter the next day, June 14, at 10 a.m.

At their meeting, Decker told Carter that the repair shop had informed her that the truck was ready for dispatch. Carter told Decker that he did not agree as the truck still lacked a bunk strap, still had oil splattered on its front, and he had not been given the previous driver's post-trip inspection report and an inspection form.

At a follow-up meeting with Decker that afternoon, Carter discussed resigning because of the stress of the last two days. He advised Decker that he was going to call the DOT and the Federal Motor Carrier Safety Administration (FMCSA) to file complaints against Marten. Decker told Carter that she would accept his resignation, that she needed his badge and fuel card, and that she would mail his personal belongings cash-on-delivery. Carter told Decker that she was threatening him, and that if he did resign, he wanted someone to inspect the truck with him and an exit interview. Carter also asked Decker for the telephone number of the Wisconsin Department of Transportation, which she did not have. Decker then left and went to Peterson's office.

Peterson was in a meeting with Stacia DeWitt, the Recruiting Director, when Decker entered his office looking for Susan Deetz, the Human Resources Director. Decker told Peterson and DeWitt that she was having trouble with Carter who had told her that he was going to resign.<sup>2</sup> Decker asked for Wisconsin DOT's phone number and explained that Carter had asked her for it so that he could call that agency. Decker also asked whether Marten would pay to ship Carter's personal items home as he was upset at the prospect of having to pay for them himself.<sup>3</sup> Peterson and DeWitt agreed that Marten would bear that cost, and DeWitt left to assist Decker.

DeWitt and Decker then met with Carter. DeWitt informed Carter that Marten would pay for shipping his personal items and that Decker would proceed with the exit interview. Carter told DeWitt about the oil all over the engine, that the fire extinguisher was damaged and unsecured when he picked up the truck but had been replaced, that the radiator had been badly plugged, and that there was no sleeper berth strap. Carter told DeWitt and Decker that his resignation was not voluntary. DeWitt told him that he would be discharged if he did not resign. DeWitt insisted that they proceed to an exit interview which Carter found "unacceptable." Carter told DeWitt and Decker that he would be calling DOT, FMCSA, and Wisconsin DOT. After they left the room, Carter went to a break room where he used the phone to call FMCSA and state and local police.

DeWitt returned to Peterson's office and told him that Carter wanted someone to accompany him to inspect the truck so that he could point out what he felt violated DOT regulations. DeWitt also told Peterson that Carter wanted to call FMCSA and DOT to lodge complaints against Marten. T. at 117, 168. Peterson told DeWitt that they had to "get the situation handled." *Id.*

Decker, DeWitt, and Peterson then met with Deetz and discussed Carter. Deetz and Peterson decided that Carter needed to leave the Marten property. Deetz had already arranged for a police escort and for Carter's bus ticket home. Peterson and Police Officer Scott Smith went to the break room where Carter was. Deetz then entered the break room. Deetz told Carter to leave the property and gave him the bus ticket home. When

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<sup>2</sup> Hearing Transcript (T.) at 167-168.

<sup>3</sup> T. at 169.

Carter replied that he was not ready to leave, Deetz insisted that he was leaving and had Officer Smith escort Carter from the property. Carter was escorted first to his truck from which he retrieved some of his personal belongings. Then Carter was escorted to a taxi. Deetz testified that she discharged Carter, and Marten stipulated that Carter separated from its employment on June 14.

Carter filed his STAA complaint on June 16, 2005. The Labor Department's Occupational Safety and Health Administration (OSHA) investigated and denied the complaint. Carter objected and requested a hearing before an ALJ. The ALJ held a hearing in Grand Rapids, Michigan from January 10-13, 2006, and issued a Recommended Decision and Order on May 18, 2006 (R. D. & O.). The ALJ concluded that Marten violated the STAA when it discharged Carter on June 14, 2005. The ALJ recommended that Carter be reinstated, and be awarded back pay, interest, compensatory damages, and equitable relief. The ALJ later recommended that Carter be awarded attorney's fees and costs.<sup>4</sup> This matter is before us pursuant to the STAA's automatic review provisions.<sup>5</sup>

#### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.<sup>6</sup> Under the STAA, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings.<sup>7</sup> Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>8</sup>

Substantial evidence does not, however, require a degree of proof "that would foreclose the possibility of an alternate conclusion."<sup>9</sup> Also, whether substantial evidence

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<sup>4</sup> Supplemental Recommended Decision and Order Awarding Attorney's Fees and Costs dated May 25, 2006.

<sup>5</sup> 49 U.S.C.A. § 31105 (b)(2)(C); 29 C.F.R. § 1978.109 (c)(1) (2007).

<sup>6</sup> Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

<sup>7</sup> 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

<sup>8</sup> *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

<sup>9</sup> *BSP Trans., Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998).

supports an ALJ's decision "is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion."<sup>10</sup>

In reviewing the ALJ's conclusions of law, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."<sup>11</sup> Therefore, we review the ALJ's conclusions of law de novo.<sup>12</sup>

## DISCUSSION

### Legal Standard

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities. These protected activities include filing a complaint or beginning a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order," or when an employee testifies or will testify in such a proceeding.<sup>13</sup>

To prevail on his STAA claim, Carter must prove by a preponderance of the evidence that he engaged in protected activity, that Marten was aware of the protected activity, that Marten discharged, disciplined, or discriminated against him, and that the adverse action was taken because of protected activity. If Carter does not prove one of these requisite elements, his entire claim fails.<sup>14</sup>

### Carter Engaged in STAA-Protected Activity

The ALJ found that Carter engaged in protected activity when he told his supervisor and other Marten managers about problems with the truck that related to either

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<sup>10</sup> *Dalton v. U.S. Dep't of Labor*, 58 Fed. App. 442, 445, 2003 WL 356780 (10th Cir. Feb. 19, 1993), citing *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989).

<sup>11</sup> 5 U.S.C.A. § 557(b) (West 2004).

<sup>12</sup> *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029, slip op. at 2 (ARB Oct. 31, 2003).

<sup>13</sup> 49 U.S.C.A. § 31105 (a)(1)(A)(i).

<sup>14</sup> *See West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).



an actual or potential violation of a specific motor vehicle safety regulation.<sup>15</sup> The record clearly shows that Carter made numerous complaints to Serum, his supervisor, and to other Marten managers, that related to commercial motor vehicle safety standards in general and DOT regulations specifically. This action falls within the clause, just noted, that protects an employee who files a complaint or begins a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. Marten does not dispute that Carter made these complaints to his supervisor and other Marten managers. But once an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity.<sup>16</sup>

Marten argues that it addressed and resolved several of Carter's complaints, yet he continued to make these complaints to management. The record supports this argument. For example, Carter continued to complain until June 14 that the truck had a soiled mattress at the time of pickup. But Marten had replaced the mattress on June 10. Similarly, Carter continued to complain until June 14 that the fire extinguisher he found in the truck on June 3rd was damaged. But Marten replaced it before Carter took possession of the truck. Thus, Carter could not have reasonably believed that his continued complaints about these resolved safety issues related to an actual or potential motor vehicle safety violation. Therefore, like the ALJ, we conclude that any complaints that Carter made about previously resolved motor vehicle safety issues do not constitute protected activity under the STAA.

We find, however, that Carter engaged in protected activity between June 3 and June 14 whenever he complained to any Marten manager about a violation of any motor vehicle safety regulation, standard, or order that Marten had not resolved. Goss, Marten's mechanic, inspected the truck on June 13 and found that the radiator was badly plugged, as Carter had previously reported. Goss determined that the radiator was plugged with dirt and oil caused by waste oil, or "blow-by," leaking from the tube on the engine and collecting on the radiator fins.<sup>17</sup> Goss testified that this defect accounted for what Carter had previously reported as an engine oil leak and the over-consumption of engine oil.<sup>18</sup> Goss also determined that the automatic fifth wheel coupling device was

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<sup>15</sup> R. D. & O. at 23-29.

<sup>16</sup> See *Williams v. U.S. Dep't of Labor*, 157 Fed.Appx. 564, 2005 WL 3087895 (4th Cir. 2005) (teacher's whistleblowing activities initially protected but lost their protected status after resolution of her safety complaints); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996-STA-020 (ARB Nov. 12, 1996) (finding that when employer fully responded to his safety concerns, employee's continued complaints about them not protected).

<sup>17</sup> T. at 727-731, 772. See 49 C.F.R. §§ 396.1, 396.3, 396.7 (prohibiting unsafe operation of motor vehicle).

<sup>18</sup> T. at 735. See 49 C.F.R. § 396.5 (carrier must ensure motor vehicle had proper lubrication and is free of oil and grease leaks).

defective and not working correctly, as Carter had previously reported. Goss determined that this defect was due to a leaking air cylinder.<sup>19</sup> Goss further observed that the bunk strap was missing, as Carter had previously reported. Carter testified that on June 14, the bunk strap was still missing, and his testimony is undisputed.<sup>20</sup> Also, Carter testified that he still had not received the previous post-trip report or an inspection form. Therefore, the record contains substantial evidence that before his discharge, Carter reported unresolved problems with his truck that were related to motor vehicle safety regulations. Thus, we conclude, as did the ALJ, that that these unresolved complaints constituted protected activity under the STAA.

Furthermore, on June 14, but before he was terminated, Carter told Decker and Dewitt that he would call FMCSA and the Wisconsin DOT to file complaints against Marten. Later that same day and prior to Carter's discharge, DeWitt conveyed this information to Peterson. Though Deetz denied it, Peterson testified that Deetz told him that Carter had called the FMCSA, the United States DOT, and the Wisconsin State Patrol.<sup>21</sup> Carter testified that he did call FMCSA and the state and local police from Marten's employee break room. Therefore, substantial evidence supports the ALJ's finding that Carter threatened to call FMCSA and did in fact call FMCSA. Substantial evidence also supports a finding that Deetz was aware that Carter had either called or threatened to call, among others, FMCSA.

When Carter called FMCSA, he engaged in STAA-protected activity because he was filing a complaint or beginning a proceeding related to a violation of a motor vehicle safety regulation, standard, or order. Threatening to file a complaint based on a reasonable belief regarding the existence of a violation is also protected.<sup>22</sup>

### **Marten Terminated Carter Because of Protected Activity**

As we noted, Carter must prove by a preponderance of the evidence that Marten

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<sup>19</sup> T. at 737-738. See 49 C.F.R. § 392.7 (prohibition against motor vehicle being driven unless driver satisfied that parts and accessories, including coupling devices, are in good working order), and 49 C.F.R. § 396.7 (prohibiting unsafe operation of motor vehicle).

<sup>20</sup> See 49 C.F.R. § 393.1 and 49 C.F.R. § 393.76(h) (mandating sleeper berth equipped with means of preventing ejection of occupant during deceleration of vehicle).

<sup>21</sup> T. at 44-45, 118, 119, 192.

<sup>22</sup> See *Leach v. Basin Western, Inc. & Pac. Intermountain Express*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 2 (ARB July 31, 2003); *William v. Carretta Trucking, Inc.*, 1994-STA-007 (Sec'y Feb. 15, 1995) (employee's threat to enforce motor carrier safety regulations is protected under analogous employee protection provisions and should be protected under STAA's provisions).

discharged him “because” he engaged in protected activity. We have interpreted “because” to mean that a STAA complainant must show that the protected activity was a “motivating factor” in the employer’s decision to take adverse action.<sup>23</sup> The ALJ found that Deetz’s testimony contained direct evidence that she terminated Carter in part because of his protected complaints about truck 5730. The ALJ noted that while Marten had argued that there is no direct evidence of unlawful discrimination, Marten could not “escape the clear implication of Deetz’s testimony.”<sup>24</sup>

Deetz was the sole decision maker in discharging Carter. Deetz testified that Carter first came to her attention on June 14 when she received a phone call from Wisconsin State Patrol Officer Rita Garrison. Garrison told Deetz that Carter had called her earlier that day and had told Garrison that his truck had many mechanical problems.<sup>25</sup> Deetz replied that Marten had repaired the truck and that she was preparing to ask Carter to leave the property. Garrison advised Deetz to arrange for a police officer to escort Carter from the property, and Deetz did so.

Deetz then talked individually with Decker, DeWitt, and Peterson. Decker and DeWitt each told Deetz that Carter had complained about problems he experienced with the truck and had spoken to many people at Marten about the truck’s condition and how it had been assigned to him when it was not DOT-compliant. Decker told Deetz that Carter was unhappy with the equipment. Decker also told Deetz that Carter had talked about resigning but wanted an exit interview and his statement taken, and that he also wanted someone from Marten to accompany him to the repair shop so that he could point out what he thought did not comply with DOT regulations.

Peterson told Deetz that Carter had related many problems he experienced with truck 5730, that it was in the shop, and that Carter felt that Marten should have inspected the truck before assigning it to him since it had been in an accident. Deetz told Peterson that she knew that Carter had already called FMCSA and DOT.<sup>26</sup>

Peterson also told Deetz that Carter told him that the Safety Department had not done its job to ensure the condition of his truck and should have inspected the truck prior to assigning it to him.<sup>27</sup> Peterson and Deetz discussed that Carter had repeatedly complained about an oil leak and the lack of a post-trip inspection book. Peterson and Deetz further discussed Carter’s complaint that Road Service was not doing its job and

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<sup>23</sup> *Muzyk v. Carlsward Transp.*, ARB No. 06-149, ALJ No. 2005-STA-060, slip op. at 4 (ARB Sept. 28, 2007).

<sup>24</sup> R. D. & O. at 31-32.

<sup>25</sup> Joint Exhibit 9 at 8-9.

<sup>26</sup> T. at 118, 192.

<sup>27</sup> T. at 120, 169-170, 195-196.

had delayed necessary repairs.<sup>28</sup> Deetz and Peterson decided that Carter was not “going to be a good fit” for Marten and discussed having him removed from the property with police escort. Peterson testified, however, that he did not recommend Carter’s termination.<sup>29</sup>

After Police Officer Scott Smith arrived at Marten, he and Peterson went to the break room where Carter was on the phone. Deetz arrived and Carter got off the phone when Deetz caught his attention. Deetz told Carter that he needed to leave the property and handed him a bus ticket home. When Carter said that he was not ready to leave, Officer Smith took over and told Carter that he would be leaving the property. Then Smith and Peterson escorted Carter to his truck from where Carter retrieved some of his personal belongings. Smith then escorted Carter to a taxi.<sup>30</sup>

When asked why she discharged Carter, Deetz testified that she discharged him because of “excessive complaints,” “violation of company policy,” “failure to meet company expectations,” and because he said that he was “unhappy” with Marten. When asked what she meant by “excessive complaints,” Deetz explained that she was referring to Carter’s complaints about the “functionality” of Marten’s equipment, the safety of the truck, and the fact that Carter “felt [the truck] was still unsafe to drive” despite the repairs that had been made. She further explained that her decision to discharge Carter was “due to a majority of the complaints that he was making pertaining to the equipment and not being able to perform his job.”<sup>31</sup> She stated that Carter’s excessive complaints were “primarily about the equipment,” and that she had relied in large part on the fact that Carter was unhappy with the equipment.<sup>32</sup>

The ALJ found that Marten discharged Carter on June 14, 2005.<sup>33</sup> The ALJ found that Deetz admitted that at least one of the motives for her decision to discharge Carter was his protected equipment-related complaints.<sup>34</sup> Substantial evidence supports this finding. Marten argues to us that Deetz was referring to equipment complaints which Marten had fully addressed and resolved.<sup>35</sup> We reject this argument because Deetz did

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<sup>28</sup> T. at 120-122.

<sup>29</sup> T. at 195.

<sup>30</sup> T. at 171, 1094-1095, 64-66.

<sup>31</sup> T. at 34-35, 54-55, 43-44, 74-75, 1077-78.

<sup>32</sup> T. at 1088, 60.

<sup>33</sup> R. D. & O. at 18.

<sup>34</sup> R. D. & O. at 32.

not distinguish between protected and non-protected complaints when she testified that she terminated Carter because of “excessive complaints” related to the safety of his truck. Therefore, the record demonstrates that Deetz was referring not only to Carter’s non-protected resolved complaints, but also to his unresolved STAA-protected complaints. Substantial evidence in the record considered as a whole supports the ALJ’s finding that Deetz’s discharge decision was motivated in part by Carter’s protected activity. Therefore, we conclude that Marten unlawfully retaliated against Carter and violated the STAA when Deetz discharged him.

### **Marten Did Not Prove Dual Motive**

In determining whether a complainant has proven unlawful discrimination, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the protected conduct, and thus the employee has failed to prove retaliation. If, however, the trier of fact concludes that the employer was motivated by both a prohibited and a non-retaliatory reason (dual or mixed-motives), the employer can avoid an order of relief by proving, by a preponderance of evidence in STAA cases, that it would have reached the same decision even in the absence of protected activity.<sup>36</sup> Thus, to avoid liability, Marten must prove by a preponderance of the evidence that it would have discharged Carter in the absence of the protected activity, namely Carter’s unresolved motor vehicle safety complaints.

Marten argued to the ALJ that it would have discharged Carter for four other reasons. First, because he acted unprofessionally over the course of his employment; second, because he was unhappy with Marten’s employees, policies, and equipment; third, because he was not meeting company expectations; and, finally, because the state police had called Deetz and recommended that she arrange for a police escort to see Carter off the premises.<sup>37</sup> But the ALJ found that although Marten articulated these “potential” reasons for taking adverse action against Carter, the company had “failed to offer persuasive evidence that any of those justifications would have led [it] to actually take the same adverse action” against Carter.<sup>38</sup> Like the ALJ, we find nothing in the record that proves that Marten would actually have fired Carter for any of these four reasons. Marten’s burden is to demonstrate by a preponderance of the evidence that it “would have,” not “might have,” terminated Carter for one of those reasons.<sup>39</sup>

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<sup>35</sup> Respondent’s Brief at 1, 3-18.

<sup>36</sup> *Muzyk*, slip op. at 5 (citations omitted).

<sup>37</sup> R. D. & O. at 33-36.

<sup>38</sup> *Id.* at 36.

<sup>39</sup> See *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 13 (ARB Sept. 30, 2003).

## Remedies

### *Reinstatement*

As a successful complainant under the STAA, Carter is entitled to an order requiring Marten to reinstate him to his former position with the same pay, terms, and privileges of employment.<sup>40</sup> The ALJ properly found that neither Marten nor Carter made any showing that reinstatement would be impossible, impracticable, or cause irreparable animosity.<sup>41</sup> Therefore, we order Marten to make an unconditional, bona fide offer of reinstatement to Carter.

### *Back Pay*

A successful complainant under the STAA also is entitled to an award of back pay.<sup>42</sup> Back pay is awarded from the date of the retaliatory discharge. Back pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement, or, in very limited circumstances, when the employee rejects a bona fide offer.<sup>43</sup> The successful STAA complainant is also entitled to pre- and post- judgment on a back pay award.<sup>44</sup>

A STAA complainant like Carter has a duty to exercise reasonable diligence to attempt to mitigate back pay damages.<sup>45</sup> But the employer bears the burden to prove that the complainant failed to mitigate. The employer can satisfy its burden by establishing that substantially equivalent positions were available to the complainant and he failed to use reasonable diligence in attempting to secure such a position.<sup>46</sup>

The ALJ found that Carter's testimony established that he received a job offer as an over-the-road truck driver from Iowa-based Brooks Trucking, but he turned it down.

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<sup>40</sup> 49 U.S.C.A. § 31105(b)(3)(A)(ii).

<sup>41</sup> R. D. & O. at 36.

<sup>42</sup> 49 U.S.C.A. § 31105(b)(3)(A)(iii).

<sup>43</sup> *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035, slip op, at 5 (ARB Jan. 31, 2008).

<sup>44</sup> *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-034, slip op. at 9 (ARB Dec. 29, 2000).

<sup>45</sup> *Hobson*, slip op. at 6.

<sup>46</sup> *Hobson*, slip op. at 6, citing *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4-5 (ARB Mar. 31, 2005).

The ALJ found that this job was comparable to Carter's former job with Marten in that it was located in the same vicinity and offered substantially similar benefits, although it paid three cents less per mile. Therefore, the ALJ reduced the amount of pay Carter would have been receiving from Marten but for the termination by the amount he would have received from Brooks. Substantial evidence in the record as a whole supports the ALJ's recommended back pay award, and we therefore affirm that award.

### *Compensatory Damages*

Carter is also entitled to compensatory damages.<sup>47</sup> Marten argues that the ALJ erroneously awarded \$717.00 for personal items that Marten did not return. Marten claims that it returned all the items. Substantial evidence supports the ALJ's finding that Marten did not return several of Carter's belongings which he could not manage to carry home with him when he was discharged.<sup>48</sup> Additionally, we find, as did the ALJ, that Carter is entitled to reimbursement of the expenses he incurred to travel to his home after he was discharged. We order Marten to reimburse Carter \$132.15 for these expenses.

### *Emotional Distress*

Marten argues that the record does not support the ALJ's award of \$10,000 in compensation for emotional distress. The ALJ found that Carter testified that he felt "very depressed," "worthless," and "real down" when he lost his job and that he still felt down because he had been discharged. The ALJ found that this testimony constituted evidence that Carter suffered emotional and mental distress as a result of his discharge. The ALJ also relied on Carter's testimony that he was forced to live off his retirement savings as a result of the discharge and remained unemployed since the discharge. Marten correctly points out, however, that Carter turned down the job with Brooks Trucking. The ARB has affirmed reasonable emotional distress awards based solely on the employee's testimony.<sup>49</sup>

Moreover, at one point during the hearing, the ALJ noticed that Carter was struggling while testifying. He asked Carter whether he was having a "hard time." Carter replied that he was, and the ALJ ordered a recess. Later, after the hearing resumed, Carter testified that he was having trouble listening to questions and answering them because he was under stress and that his medication was less effective when he was under stress. The ALJ found that this episode evidenced the emotional distress "that these circumstances" placed on Carter.<sup>50</sup> Marten objects to this finding because there is

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<sup>47</sup> 49 U.S.C.A. § 31105(b)(3)(A)(iii).

<sup>48</sup> See Complainant's Exhibit 24; Respondent's Exhibit 15; T. at 344-349.

<sup>49</sup> See *Hobson*, slip op. at 8, 9 n.36, and cases cited therein.

<sup>50</sup> R. D. & O. at 39.

no evidence that this episode was related to the discharge. The ALJ found otherwise and, given these facts, substantial evidence supports that finding. Therefore, since the ALJ did not abuse his discretion in recommending a \$10,000 award for emotional damages suffered as a consequence of Carter's retaliatory discharge, we affirm that award.

We also affirm the ALJ's order that Marten take such action as is necessary to cause USIS Commercial Services to amend Carter's "DAC" report and his order that Marten post the ALJ's decision in all of its terminals for ninety consecutive days.

### *Attorney's Fee*

Since Carter has prevailed, he is entitled to "the costs (including attorney's fees) reasonably incurred."<sup>51</sup> In deciding the merits of attorney's fee petitions, we employ the loadstar method whereby we determine the number of hours reasonably spent on the litigation multiplied by a reasonable hourly rate.<sup>52</sup>

The Complainant's counsel, Paul Taylor, submitted a petition to the ALJ for attorney's fees and costs. Taylor requested \$128,994.79 in fees and \$2,903.29 in costs for a total of \$131,898.08. Marten objected to the petition. Marten sought a reduction in Taylor's hourly rate from the \$275 Taylor requested to \$250 and argued that compensation for certain work entries should be disallowed. Marten also argued that Taylor could not recover certain costs.

In his May 25, 2006 Supplemental Recommended Decision and Order Awarding Attorney's Fees and Costs, the ALJ granted an hourly rate of \$275 as he found it to be reasonable and supported by affidavits and the circumstances of the case. The ALJ disallowed compensation for certain work entries amounting to 9.25 hours because he found that the entries were either inadequately documented or duplicative. The ALJ further disallowed reimbursement for \$87.92 in costs. Multiplying the number of hours allowed by the applicable hourly rate, the ALJ awarded \$129,766.41 in fees and costs. Before the ARB, Marten relies on the brief it filed with the ALJ, which the ALJ fully addressed. We find that the ALJ fully analyzed Marten's objections. We affirm the award because substantial evidence supports the ALJ's finding that Taylor's hourly rate and the number of hours he spent on the case were reasonable.

Taylor also requests that the Board grant him a fee enlargement to compensate him because he has not yet received the attorney's fee that the ALJ awarded on May 25, 2006. Taylor relies on *Dalton v. Copart, Inc.* in support of his request.<sup>53</sup> But *Dalton* involved a nearly five-year delay due to protracted litigation, a situation that has not

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<sup>51</sup> 49 U.S.C.A. § 31105(b)(3)(B).

<sup>52</sup> See, e.g., *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144, ALJ No. 2003-STA-026, slip op. at 9 (ARB Aug 31, 2004).

<sup>53</sup> ARB Nos. 04-027, 04-138, ALJ No. 1999-STA-046 (ARB June 30, 2005).



occurred here. Therefore, we deny the request for a fee enlargement.

### **CONCLUSION**

Substantial evidence supports the ALJ's findings that Carter engaged in STAA-protected activity and that Marten terminated him because of that activity. The record also supports a finding that Marten would not have terminated Carter for other reasons. Furthermore, substantial evidence supports the remedies that the ALJ recommended. Therefore, since Marten has violated the STAA, Carter is entitled to the remedies we have discussed.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief, Administrative Appeals Judge**