



In the Matter of:

JUAN NEVAREZ,

ARB CASE NO. 14-010

COMPLAINANT,

ALJ CASE NO. 2013-STA-012

v.

DATE: October 30, 2015

WERNER ENTERPRISES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Juan Nevarez, *pro se*, North Las Vegas, Nevada

For the Respondent:

**Katherine F. Parks, Esq.; *Thorndal, Armstrong, Delk, Balkenbush & Eisinger, P.C.*;
Reno, Nevada**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*.
Chief Judge Igasaki, concurring.**

DECISION AND ORDER OF REMAND

This case arises under the Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, 49 U.S.C.A. § 31105 (Thomson Reuters 2007 & Supp. 2015), and its implementing regulations, 29 C.F.R. Part 1978 (2015). Complainant Juan Nevarez filed a complaint alleging that Respondent Werner Enterprises retaliated against him in violation of the STAA's whistleblower protection provisions. Nevarez appeals to the Administrative Review Board (ARB) from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on November 15, 2013, dismissing Nevarez's complaint after a

hearing on the merits. For the following reasons, the ARB affirms the ALJ's D. & O. in part, reverses in part, and remands the case for further proceedings consistent with this Decision and Order of Remand.

BACKGROUND¹

Werner Enterprises (also referred to as "Werner" or "Respondent") hired Nevarez as a truck driver in March of 2011, and he began driving for Werner in May, upon completion of required training.

As discussed more fully below, on June 21, 2011, a manager for Werner Enterprises informed Nevarez that his actions immediately following events occurring on June 18 and 19, 2011, had led to management's conclusion that Nevarez had voluntarily quit his job. To place into context those events, it is necessary to recount certain incidents involving Nevarez's employment leading up to June 18 and 19. From June 3, 2011, to June 14, 2011, two events occurred about which the facts are disputed.² Nevarez claimed that on June 3, 2011, he refused to drive his truck for safety reasons because it did not have panel lighting or an air brake warning, while Werner Enterprises claimed that Nevarez abandoned his truck and could not be reached for several days. Respondent decided that Nevarez voluntarily quit in this instance, and then it rehired him on June 13, 2011. In a second instance, on June 14, 2011, Respondent took Nevarez out of work for disputed reasons. Nevarez claimed that he did not feel safe to drive with his co-driver because his co-driver could not pass a safety test, while Respondent asserted that Nevarez was unable to get along with his co-driver.

On June 16, 2011, Nevarez returned to work. He took a bus from Fontana, California, to Indianapolis, Indiana, to meet up with Manuel Menchaca, his newly-assigned co-driver. Nevarez stayed in a hotel that Werner Enterprises paid for (with a credit card over the phone) and met with Menchaca the following day, June 17th.³

After Nevarez and Menchaca started their trip on June 18, 2011, at 11:27 a.m., Respondent advised Menchaca, via a Qualcomm message: "You are under a 'customer watch

¹ The findings of fact set forth in the ALJ's D. & O. do not provide a complete picture of the relevant background in this case. Therefore, in addition to the findings of fact in the D. & O., the Background statement relies on evidence of record that the D. & O. did not take into consideration to fill in missing relevant information about the events in this case. Unless specific citation to the record is made, the Background information is based on the findings contained in the D. & O.

² These two events are referred to later in this decision as the "prior June incidents." See discussion, *infra* at p. 15.

³ Respondent's Exhibit (RX) 13 at 22, 23, and 29.

load.’ On time delivery critical. Any delays or questions, contact DSP ASAP.”⁴ That same day, at 5:32 p.m., dispatch requested information on whether Menchaca and Nevarez would be on time, and Menchaca, responded with a “Y.”⁵

At some point on June 18th, Menchaca, who was driving at the time, picked up a hazardous material load.⁶ When Menchaca reached his maximum allowable hours of driving later that day, and attempted to turn driving responsibility over to Nevarez, Nevarez informed Menchaca that he did not have a Hazmat certification that would permit him to operate a vehicle carrying hazardous materials. At around 10:26 p.m. Menchaca notified Werner Enterprises dispatch that Nevarez did not have Hazmat certification.⁷ He indicated that he would have to shut down for the night, and requested that dispatch please advise.⁸

A Werner Enterprises incident report indicates that Nevarez called Werner’s dispatch “hot-line” at 10:45 p.m. and stated that Menchaca had threatened him.⁹ There is a significant evidentiary dispute (that the ALJ did not satisfactorily reconcile) about who at Werner Enterprises talked to Nevarez the night of June 18, 2011. Nevarez testified that he spoke to Thomas Henley, Werner’s off-hours supervisor, and that Henley told Nevarez to go to a motel and call in the morning, and to pay for the motel with an EFS check¹⁰ that Henley authorized for

⁴ *Id.* at 47.

⁵ *Id.* at 50.

⁶ The evidentiary record is unclear as to when and under what circumstances the hazardous materials load was picked up.

⁷ Given that Nevarez noted on his employment application that he did not have a Hazmat certification, Respondent was surely aware of this at the time Nevarez was assigned as co-driver on the truck with Menchaca. D. & O. at 8 (the ALJ also found that that “Respondent knew that Complainant did not have the proper Hazmat certification”). On this issue, we vacate one ALJ finding that is not supported by substantial evidence in the record. Regarding the Hazmat load, the ALJ found “that it was not uncommon to have non-Hazmat drivers on a Hazmat load . . .” *Id.* at 4. While Montgomery testified that it had no issue with the truck stopping when Menchaca ran out of hours on June 18, he never testified that it was “not uncommon” for non-Hazmat drivers to be assigned to drive on a Hazmat load truck. Hearing Transcript (Tr.) at 83-85. There is no evidence to support the ALJ finding that it was not uncommon to have non-Hazmat drivers on a Hazmat load, and we vacate it.

⁸ RX 13 at 54.

⁹ RX 7.

¹⁰ An “EFS” check is company-approved advance on a driver’s paycheck that the driver can receive while on the road upon authorization by a company dispatcher. D. & O. at 4. It is unclear from the evidentiary record who personally approved Nevarez’s EFS check.

\$100.¹¹ Respondent asserted at the hearing before the ALJ (in its opening statement and through the testimony of Harold Montgomery, a Werner dispatch “hotline” specialist) that Nevarez talked to Montgomery; that Montgomery told Nevarez to go to a hotel and call him back; but that because Nevarez never called him back he was unable to pay for the motel room with a company credit card that night. However, Montgomery’s testimony is contradicted by his attestation to OSHA under penalty of perjury, dated September 24, 2012, in which he stated that he did not talk to Nevarez on June 18 or 19; that Nevarez instead talked to Henley during this time.¹² Joseph Nanasy, Werner’s Manager of Safety (Hotline)/Safety Specialist, also submitted a declaration indicating that Nevarez had talked to Henley.¹³ Henley, on the other hand, testified that he had no recollection of having talked to Nevarez.¹⁴

In any event, whomever Nevarez spoke with at dispatch advised him to call 911 and request police assistance, which Nevarez did while remaining in a gas station. Upon the arrival of the police, Nevarez returned to the truck to retrieve his personal items, whereupon he retired for the night at a local motel that he paid for with cash from the \$100 EFS check that Werner had authorized.¹⁵

At 12:28 a.m. the morning of June 19th, Montgomery wrote to Menchaca, “Manuel, this is Harold in safety – call me at [***-***-****], concerns your co-driver.”¹⁶ At 1:00 a.m., dispatch wrote to Menchaca stating: “show u 2 hrs early as of now, why do you say [load] will

¹¹ Tr. at 31-32.

¹² See Respondent’s Motion for Summary Decision (Mar. 15, 2013), Exhibit (Ex.) J (Montgomery’s September 24, 2012 written statement memorializing his interview with OSHA).

¹³ *Id.*, Ex. H.

¹⁴ Tr. at 98.

¹⁵ The ALJ appears to have credited Werner’s version of events that it expected Nevarez to stay in the hotel both Saturday and Sunday night (“Rather than wait to be contacted by Employer the next day [Monday], Complainant decided that he did not have any money to pay for another \$69-night in the motel, even though Respondent had authorized an EFS check and he had a Visa charge card . . .”). D. & O. at 9. This finding ignores that the EFS check that Werner Enterprises authorized for Nevarez was for \$100 of which \$69 had already spent for Saturday night. Thus, the EFS check would not cover another night (Sunday night) in the hotel. Neither is there any evidence in the record that Werner Enterprises knew that Nevarez had a personal Visa card he could use to pay for another night in a hotel. The question arises, in Werner Enterprises’ version of events, how did it expect Nevarez to pay for the second night in the hotel, when it did not authorize an EFS check large enough to cover two nights and it would not answer or return Nevarez’s calls on Sunday to effectuate a way to pay for it? Given the facts, Werner Enterprises’ version of events appears somewhat incredible and if credited by the ALJ, must be explained on remand.

¹⁶ RX 13 at 56.

be over 2 days late?"; to which Menchaca responded: "My co-driver doesn't have hazmat. And he got off the truck an hour ago. So I'm solo as of now."¹⁷

The morning of June 19, 2011, Nevarez made several phone calls to Werner Enterprises. Not able to reach anyone, he left phone messages.¹⁸ After checking out of the motel shortly before noon, Nevarez continued making calls to Werner Enterprises from the motel lobby and leaving messages. The only person at Werner Enterprises that Nevarez reached was a Werner safety hotline dispatcher named Linda, who unsuccessfully attempted to connect him to the safety department, informing Nevarez that she "[could] not get them to answer their phone"¹⁹ In Nevarez's calls with Linda, he informed her that he was heading to the bus station because he felt he must return home to Las Vegas since he did not "have money for hotels and meals," and had no assurance of reimbursement from Werner Enterprises.²⁰

At 2:00 p.m. on June 19, Werner Enterprises noted on the incident report (RX 7) that Nevarez would be leaving on a bus home.²¹ Nevarez left on the bus seven hours later, at 9:05

¹⁷ *Id.* at 57. This dispatch exchange appears to indicate that the load could not be delivered on time unless Nevarez drove the Hazmat load. On remand, the ALJ should address this issue because if the load could not have been delivered on time without Nevarez driving, the inference may arise that Werner expected Nevarez to drive the Hazmat load illegally and did not expect him to refuse to do so.

¹⁸ Nevarez has asserted on appeal that the video recordings of calls he made to Werner Enterprises at Complainant's Exhibit (CX) 11 show that he tried to contact Werner Enterprises many times but the ALJ incorrectly stated that the one at 12:42 a.m. was the first one. In the first video at CX 11, Nevarez left a message on J.D.'s voicemail in which he stated at one point: "I called the safety department, they told me to call you, I left four messages." In the second recording, Nevarez spoke to Linda and stated, "Hi Linda, it's Juan, I talked to you earlier . . . your directions to call my dispatcher, he is not returning my calls . . . I have left four messages."

¹⁹ CX 11.

²⁰ *Id.*

²¹ It is perplexing that someone at Werner Enterprises would note on the incident report that Werner Enterprises knew at 2:00 p.m. on Sunday, June 19, that Nevarez planned to take a bus home but that no one at Werner Enterprises would call Nevarez on that day to tell him not to take the bus and to wait for another truck, if in fact, that is what Werner Enterprises wanted Nevarez to do. It is especially perplexing given that the incident report indicates that Nevarez was to call dispatch on Monday, and that he would be staying in a motel until then, although there is no evidence of record indicating that anyone with Werner informed Nevarez about this. The incident report indicates that Respondent had seven hours after dispatch recorded actual notice of Nevarez's intent to return home to contact Nevarez before his bus left. It is inexplicable that someone at dispatch would fail to do so when company dispatch records indicate that Werner's dispatch office was actively working that day. RX 13.

p.m., after having charged \$214 on his personal Visa card for the bus ticket. The next day, June 20, Werner's team development manager, "J.D.," called Nevarez while he was still on the bus, approximately halfway home to Las Vegas, to inform him that Respondent had another trucking assignment for him and that he should return to Missouri to meet the new truck. Nevarez claims that J.D. was not willing to authorize payment for his return to Missouri. The call was inexplicably disconnected, and Nevarez continued his journey home. Neither J.D. nor Nevarez called the other back that day. Nevarez arrived in Las Vegas the next day, June 21, 2011. A few days later, Nevarez spoke by phone with J.D., who informed him that Werner Enterprises believed that he had voluntarily quit. An entry made on June 21st in the incident report indicates that Nevarez had voluntarily quit.²²

On June 30, 2011, Werner Enterprises took money out of Nevarez's paycheck in the amount of \$315.35 as reimbursement for an "advance, air tickets, tractor cleaning, and line haul," leaving Nevarez with a paycheck, after these deductions, of \$36.95.²³ Nevarez testified that he asked for reimbursement of the deductions, but that Werner refused.

Nevarez filed a complaint with the Occupational Safety and Health Administration (OSHA) on August 4, 2011, alleging that Werner Enterprises refused to pay his lodging and terminated his employment because he engaged in STAA-protected activity. On October 23, 2012, OSHA dismissed Nevarez's complaint. Nevarez timely objected and requested a hearing before a Department of Labor Administrative Law Judge. A hearing before the assigned ALJ was held on June 18, 2013, and on November 15, 2013, the ALJ issued the Decision and Order dismissing Nevarez's complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to issue final agency decisions in STAA cases.²⁴ The ARB reviews questions of law presented on appeal de novo, while reviewing the ALJ's factual determinations under the substantial evidence standard.²⁵

²² RX 7.

²³ CX 3, 4, 5.

²⁴ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

²⁵ 29 C.F.R. § 1978.110(b); *Bucalo v. United Parcel Serv.*, ARB No. 08-087, ALJ No. 2006-TSC-002, slip op. at 5 (ARB July 30, 2010) (a case arising under the STAA as well as the Toxic Substances Control Act (TSCA)).

An ALJ's opinion must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . ." 5 U.S.C.A. § 557(c)(3)(A) (Thomson Reuters 1996 & Supp. 2015). Where a material issue of fact is left unresolved, remand is usually necessary.²⁶ The ARB may set aside a decision if "we 'cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes.'"²⁷

The ARB accords special weight to an ALJ's credibility findings that "rest explicitly on the evaluation of the demeanor of witnesses."²⁸ The ARB generally defers to an ALJ's demeanor-based credibility determinations, where supported by substantial evidence of record, unless they are "inherently incredible or patently unreasonable."²⁹ Lesser weight is accorded to credibility finding based on other aspects of a witness's testimony, such as internal discrepancies or witness self-interest.³⁰ "[C]redibility findings based on internal inconsistency, inherent improbability, important discrepancies, impeachment or witness self-interest are entitled to the weight which 'in reason and in the light of judicial experience they deserve.'"³¹ In any event, "all findings of fact, including those based on credibility, must be supported by substantial evidence."³²

²⁶ *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 8 (ARB June 24, 2011).

²⁷ *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 7 (ARB Sept. 24, 2009) (quoting *Universal Camera Corp., v. NLRB*, 340 U.S. 474, 477-478 (1951)).

²⁸ *Litt v. Republic Serv. of S. Nev.*, ARB No. 08-130, ALJ No. 2006-STA-014, slip op. at 8 (ARB Aug. 31, 2010) (quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983) and *Waincott v. Pavco Trucking Inc.*, ARB No. 05-089, ALJ No. 2004-STA-054, slip op. at 4 (ARB Oct. 31, 2007)). This is so because the ALJ "sees the witnesses and hears them testify while . . . the reviewing court look[s] only at cold records." *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991) (quotations omitted).

²⁹ *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 5 (ARB Dec. 30, 2004) (parenthetical quoting *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989)).

³⁰ *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029; slip op. at 16 (ARB Oct. 31, 2003) (parenthetical explaining *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663, 667 (7th Cir. 1983)).

³¹ *Bartlik v. Tenn. Valley Auth.*, No. 1988-ERA-015, slip op. at 3, n.2 (Sec'y Apr. 7, 1993) (quoting *Universal Camera Corp.*, 340 U.S. at 496).

³² *NLRB v. Cutting, Inc.*, 701 F.2d at 663 (citing *Universal Camera Corp.*, 340 U.S. at 496).

The ARB “construe[s] complaints and papers filed by *pro se* complainants ‘liberally in deference to their lack of training in the law’ and with a degree of adjudicative latitude.”³³

DISCUSSION

The STAA provides that an employer may not “discharge,” “discipline,” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activity.³⁴ The STAA protects an employee who “refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security.”³⁵ To prevail in his claim, a complainant must show by a preponderance of evidence that his action was 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.³⁶ If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the adverse personnel action, the employer avoids liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.³⁷

I. Nevarez’s claim of adverse personnel action is not a claim of “constructive discharge” but of wrongful employment termination by Werner Enterprises

The thrust of Nevarez’s complaint before the ALJ was that Werner Enterprises retaliated against him in violation of the STAA’s whistleblower protection provisions by refusing to cover

³³ *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 5 (ARB Apr. 30, 2010) (quotation omitted). Similarly, an ALJ “must accord a party appearing *pro se* fair and equal treatment, but a *pro se* litigant ‘cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.’” *Pik v. Credit Suisse, AG*, ARB No. 11-034, ALJ No. 2011-SOX-006, slip op. at 3 (ARB May 31, 2012) (quotation omitted). Thus, while “an ALJ has some duty to assist *pro se* litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the *pro se* litigant.” *Id.* Ultimately, “*pro se* litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel.” *Id.*

³⁴ 49 U.S.C.A. § 31105(a)(1); *see also* 29 C.F.R. § 1978.102(c).

³⁵ *Id.*

³⁶ 49 U.S.C.A. § 42121(b)(2)(B)(iii). The STAA provides, at 49 U.S.C.A. § 31105(b), that all complaints initiated under STAA’s whistleblower protection provision are governed by the legal burdens of proof set forth under 49 U.S.C.A. § 42121(b); *see also* 29 C.F.R. § 1978.109(a).

³⁷ 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1978.109(b)).

his cost of lodging and necessary living expenses while awaiting a new truck assignment and by ultimately terminating his employment because Nevarez refused, the evening of June 18, 2011, to drive a vehicle hauling hazardous material.

The ALJ found that Nevarez's refusal to drive because he was not qualified to operate a vehicle carrying hazardous materials constituted STAA-protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i).³⁸ The ALJ nevertheless dismissed Nevarez's complaint because he also found that Nevarez failed to prove that he was subject to adverse personnel action. On appeal, Nevarez challenges the ALJ's determination that he was not subjected to adverse action, a legal conclusion that the Board reviews de novo.³⁹

The ALJ understood Nevarez to claim that he was constructively discharged because of his refusal to drive. Citing the accepted standard for constructive discharge,⁴⁰ the ALJ found that "the evidence simply does not establish any animus on the part of Respondent [and] no evidence of intolerable working conditions forced on Complainant."⁴¹ The ALJ recognized that an employer's refusal to reimburse or otherwise cover an employee's expenses constitutes adverse personnel action when the employer has a policy providing for such coverage.⁴² However, the ALJ found that notwithstanding Werner's policy of covering expenses such as those Nevarez incurred, Nevarez failed to prove that Werner refused to pay for, or reimburse, his lodging and basic living expenses while he awaited a new assignment.⁴³ Moreover, the ALJ concluded, "the

³⁸ Substantial evidence supports the ALJ's factual findings in support of his conclusion that Nevarez proved by a preponderance of the evidence that he engaged in protected activity under the STAA.

³⁹ *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019, slip op. at 9 (ARB Sept. 30, 2010); *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 12, n.14 (ARB Oct. 31, 2007).

⁴⁰ "[When] working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. . . . [I]t is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in intolerable conditions." *Shoup v. Kloepfer Concrete, Co.*, No. 1995-STA-033, slip op. at 3 (Sec'y Jan. 11, 1996).

⁴¹ D. & O. at 10.

⁴² *Id.* at 9 (citing *Spearman v. Roadway Express, Inc.*, No. 1992-STA-001, slip op. at 7 (Sec'y June 30, 1993)).

⁴³ *Id.* The ALJ found that Nevarez "never submitted his hotel receipt to Respondent for reimbursement, and did not call Mr. Montgomery back so that he could pay for the room with a credit card the night of the Menchaca incident [June 18, 2011]. Rather than wait to be contacted by Employer the next day, Complainant decided that he did not have any money to pay for another \$69-night in the motel, even though Respondent had authorized an EFS check and he had a Visa charge card, which he used to pay for a \$214 bus ticket to Las Vegas." *Id.* The ALJ reasoned that because

evidence supports a finding that Respondent acted appropriately when it instructed Complainant [on June 18th] to leave his work truck and the difficult environment with Mr. Menchaca, go to a motel, and await further instructions. The overwhelming evidence established that Complainant became frustrated and decided to take matters into his own hands [the next day, June 19th] and leave under his own volition.”⁴⁴ In the ALJ’s opinion, “the new assignment offered to Complainant [on Monday, June 20th, when Nevarez was on the bus, half-way home] was a reasonable solution to the problem.” Thus, the ALJ concluded, “the overwhelming evidence established that Complainant voluntarily quit his employment and was not constructively discharged by Respondent.”⁴⁵

The fatal error in the ALJ’s “constructive discharge” analysis is that the substantial evidence of record does not support the ALJ’s finding that Nevarez voluntarily quit his employment.⁴⁶ Indeed, the record is barren of any evidence whatsoever supporting the ALJ’s finding. The uncontroverted evidence of record indicates that on Sunday, June 19th, Nevarez, believing he had no other alternative, boarded a bus for the sole purpose of returning home.⁴⁷ The uncontroverted evidence of record further indicates that Respondent *believed* that Nevarez quit, interpreting his decision to return home as a voluntary resignation.⁴⁸ Nevarez testified that

Nevarez “hastily boarded a [G]reyhound bus less than 24 hours after the incident with Mr. Menchaca . . . [r]ather than wait to be contacted by Employer,” Respondent “was never given the chance to pay for the motel then and, because Complainant never submitted his receipt later, Respondent could not reimburse him after the fact.” *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Nor does the substantial evidence of record support the ALJ’s finding that Respondent’s failure to cover Nevarez’s living expenses while awaiting a new driving assignment did not constitute adverse personnel action. *See* discussion *infra*.

⁴⁷ Tr. at 33, 34, 119-120; Nevarez’s Response to Order Regarding Motion for Summary Decision, p. 4; CX 11, 11a (recording of phone conversation with Werner safety hotline dispatcher on Sunday, June 19, 2011, in which he informs her “that he was headed to the bus station because felt he must return home since he had no money for food and shelter.” D. & O. at 5). In fact, before the ALJ, Respondent did not dispute Nevarez’s account of his behavior. Counsel for Werner Enterprises, in her closing argument before the ALJ at hearing, summarized the evidence pertaining to Nevarez’s actions stating: “The evidence shows that Mr. Nevarez got on a bus and came home.” Tr. at 122.

⁴⁸ Joseph Nanasy, Werner’s Safety Manager, the apparent author of the incident report recounting what had transpired, stated in support of Werner’s Motion for Summary Decision before the ALJ, Exhibit H, “I believe that Mr. Juan J. Nevarez quit his position.” Also in support of Werner’s Motion for Summary Decision, at Exhibit J, Harold Montgomery, a safety specialist for Werner, similarly stated that “I believe that Mr. Nevarez quit as a driver” based on his “reading in the report that Joe Nanasy wrote that Mr. Nevarez was a voluntary quit on or around June 21, 2011.”

he was informed that he had “voluntarily quit” a couple days after his return home, which both surprised and mystified him.⁴⁹ Respondent does not, on appeal, dispute Nevarez’s account, stating that, “[o]n June 21, 2011, Nevarez again spoke with the team development manager and was told that the Respondent believed he had voluntarily quit.”⁵⁰

Under ARB precedent, a constructive discharge has been found only in those cases where a complainant has *actually resigned*.⁵¹ On the other hand, the ARB has held that where an employee has not actually resigned, “an employer who decides to interpret an employee’s actions as a [voluntary] quit or resignation has in fact decided to discharge that employee.”⁵² Consistent with this case authority, Respondent’s decision to treat Nevarez’s action as a voluntary resignation constitutes a decision *by Respondent* to discharge Nevarez from employment. Given that under STAA, “any discharge by an employer constitutes adverse action,”⁵³ the Board holds as a matter of law that Werner Enterprises subjected Nevarez to adverse employment action.

II. Werner Enterprises also engaged in adverse personnel action against Nevarez by effectively withholding payment for his lodging

The ALJ also erred when he concluded that Nevarez did not prove a second adverse personnel action, *i.e.*, that Werner Enterprises failed to pay for Nevarez’s lodging. The uncontroverted evidence of record indicates that: (1) Nevarez checked into a motel the night of June 18, 2011, which he paid for with cash secured from a \$100 EFS check that Respondent had authorized; (2) it is unknown who personally authorized the EFS check, but it is Respondent’s practice for such authorizations to be made by the company’s dispatch office; (3) EFS checks

(Entered into the incident report, presumably by Nanasy, was the notation “VQ” indicating that Nevarez had voluntarily quit.)

⁴⁹ Tr. at 34, 120.

⁵⁰ Respondent’s Brief in Opposition to Complainant’s Petition for Review, at 4.

⁵¹ See, *Minne*, ARB No. 05-005, slip op. at 13, n.16, and cases therein cited. See, *e.g.*, *Lajoie v. Env’tl. Mgmt. Sys., Inc.*, No. 1990-STA-031, slip op. at 5-6 (Sec’y Oct. 27, 1992) (rejecting ALJ’s finding of constructive discharge where the complainant had not voluntarily resigned but merely refused to work unless the respondent addressed his safety concerns).

⁵² *Klosterman*, ARB No. 08-035, slip op. at 6 (quoting *Minne*, ARB No. 05-005, slip op. at 14). Interestingly (or “Oddly”), the ALJ initially, in denying Respondent’s motion for summary decision, recognized the applicability of *Klosterman*, stating that “if Complainant did not explicitly indicate he wished to quit, but merely told Respondent he was returning home, and Respondent then assumed he quit and classified Complainant’s status as such, it would be Respondent’s action that amounted to a discharge.” ALJ Order Denying Motion for Summary Decision, at 7 (Apr. 10, 2013).

⁵³ *Klosterman*, ARB No. 08-035, slip op. at 6; *Minne*, ARB No. 05-005, slip op. at 15.

constitute an advance against an employee's salary or wages; (4) it is the policy and typical practice of Werner Enterprises to pay for motels over the phone with a company credit card in situations such as that in which Nevarez found himself on June 18-19, 2011; (5) Nevarez did not attempt to reach Montgomery after he went to the motel; (6) Nevarez attempted on Sunday, June 19, to speak by phone with an appropriate official with Werner Enterprises' safety "hot line" or dispatch office, including leaving messages asking that his calls be returned; (7) officials with Werner were aware on June 19th of Nevarez's phone calls, yet no one either accepted or returned his calls; (8) Werner officials were aware on June 19 of Nevarez's decision to return home; and (9) shortly after his return home on June 21st, Nevarez was informed by a company official that Respondent understood Nevarez to have "voluntarily quit.

The ALJ found that Nevarez called and spoke with Montgomery late evening on June 18, and that Montgomery advised Nevarez to call the police, obtain his belongings from the truck, then go to a motel and call him back, but that Nevarez never called him back.⁵⁴ From this, and because Nevarez never submitted his motel receipt for reimbursement, the ALJ concluded that Respondent did not refuse to pay or reimburse Nevarez for his lodging expense because he did not follow Montgomery's instructions or otherwise afford Respondent the opportunity to pay or reimburse the cost of the lodging, either at the time or later.⁵⁵

The ALJ's finding is not, however, supported by substantial evidence of record. To begin with, the ALJ's finding is based on Montgomery's hearing testimony,⁵⁶ which lacks credibility given its inconsistency with Montgomery's statement under oath to OSHA that he never spoke with Nevarez, and that Nevarez had instead spoken with Thomas Henley at dispatch the evening of June 18th. Montgomery's attestation to OSHA is not only consistent with Nevarez's testimony that he spoke with Henley,⁵⁷ it is consistent with the attestation of Nanasy, Werner's Manager of Safety, to OSHA, in which Nanasy stated that it was Henley with whom Nevarez spoke the evening of June 18th,⁵⁸ which Henley in turn did not dispute.⁵⁹ Moreover, the mere fact that Nevarez was authorized by dispatch to advance to himself cash for his lodging

⁵⁴ D. & O. at 4.

⁵⁵ *Id.* at 9.

⁵⁶ Tr. at 80-82.

⁵⁷ Nevarez consistently testified that he talked to Henley, that Henley told him that they would not pay for lodging, and that Henley authorized the EFS check that allowed Nevarez to obtain a cash advance against his salary to pay for the motel room the night of June 18, 2011. Tr. at 31, 66, 116, 124.

⁵⁸ RX 8 (Nanasy's September 17, 2012 written statement memorializing his interview with OSHA).

⁵⁹ Henley merely testified that he did "not recall" speaking to Nevarez. Tr. at 98.

from his wages through use of an EFS check belies any intent on the part of Respondent to pay for Nevarez's lodging.

From the foregoing, the conclusion is inescapable that Respondent effectively withheld from Nevarez payment of, or reimbursement for, his lodging the night of June 18th. The fact that Nevarez did not submit a claim for reimbursement after his employment was terminated is immaterial. Whether intentional or not, Respondent's withholding of payment, where company policy provided for such payment,⁶⁰ subjected Nevarez to adverse personnel action.

III. Resolution of Nevarez's complaint upon remand

Upon remand of this case in light of the Board's ruling, the ALJ must address whether Nevarez can prove by a preponderance of the evidence that the STAA-protected activity in which he engaged was a contributing factor in the adverse personnel action Respondent took against him and, if so, whether Werner Enterprises can nevertheless avoid liability by proving, by clear and convincing evidence, that it would have taken the same adverse action in the absence of any protected activity. In considering these issues on remand, the ALJ's attention is directed to the Board's analysis of "contributing factor" causation in *Fordham v. Fannie Mae*,⁶¹ as recently reaffirmed and clarified *en banc* in *Powers v. Union Pac. R.R.*,⁶² and the Board's even more recent analysis in *DeFrancesco v. Union R.R. Co.*⁶³ of the "clear and convincing" burden of proof requirement imposed upon a respondent to avoid liability. In doing so, the ALJ may necessarily have to revisit evidence Nevarez presented in support of his claim. Similarly, the ALJ may have to revisit evidence Werner Enterprises submitted either in opposition to Nevarez's claim or in support of its affirmative defense that it would have taken the same personnel action against Nevarez had he not engaged in STAA-protected activity. Because of this, the Board considers it prudent to address a number of the ALJ's evidentiary rulings in the Decision and Order presently on appeal, lest error found in those rulings be repeated upon remand.

A. The ALJ's Credibility Findings

In determining what took place the evening of June 18 and the following day, the ALJ gave little weight to Nevarez's account, crediting the testimony of Respondent's witnesses, Montgomery and Henley, over that of Nevarez's.⁶⁴ While the question of whether Nevarez was

⁶⁰ D. & O. at 4.

⁶¹ *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014).

⁶² *Powers v. Union Pac. R.R.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015).

⁶³ *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009 (ARB Sept. 30, 2015).

⁶⁴ See D. & O. at 6-7.

constructively discharged is rendered moot by the Board's ruling on appeal, the question of Nevarez's credibility will remain alive upon remand. Because of this, and because we consider the ALJ's credibility findings not entitled to the weight, which "in reason and in the light of judicial experience they deserve,"⁶⁵ the ALJ's evaluation and assessment of the testimony of the parties' respective witnesses in the Decision and Order currently under review is rejected. Upon remand, the following must necessarily be taken into account.

The ALJ found that Nevarez "offered little evidence, beyond his own personal perceptions, that Respondent intended to induce [him] to quit or act in violation of the law." While believing Nevarez to be "truthful in his perceptions," the ALJ found his testimony to be "colored by emotions, trucking driving [sic] inexperience, and past interactions with Respondent."⁶⁶ To the extent that the ALJ is here referring to two prior incidents occurring in June about which Nevarez testified, the record contains insufficient information about either that could serve as a reliable basis for drawing a negative inference with respect to the credibility of Nevarez's testimony. One incident, occurring on June 3rd, involved Nevarez's internal complaint about safety concerns with the truck he was driving at the time. The second incident involved Nevarez's removal from a team assignment, which Nevarez asserted was due to his complaints about being coerced by Respondent into falsifying a safety test for a co-driver. As discussed *infra*, the ALJ disregarded the potential relevance of these incidents to Nevarez's complaint of retaliation, and curtailed Nevarez's testimony about them. Development of the evidentiary record about these preceding incidents may, or may not, result in the crediting of one party's testimony over that of the other. What is more important about the further evidentiary development of these two incidents, however, is that even though Nevarez's complaint focuses on the events of June 18 through the 21st, the preceding incidents may prove relevant to Nevarez's proof that his protected activity of June 18-19 was a contributing factor in his discharge. Perhaps more importantly, the evidence pertaining to these prior incidents may shed light on Respondent's practice in dealing with similar occurrences to that in which Nevarez engaged on June 18 and 19, and thus of relevance to Respondent's proof that it would have taken the same adverse action against Nevarez even if he had not engaged in the protected activity.

In support of his credibility determination, the ALJ cited, as example, Nevarez's account of what transpired on June 18 and 19 regarding his communications with Respondent and his resulting conclusion to return home. The ALJ viewed Nevarez's account as "exaggerated" and "demonstrat[ing] the unreliable nature of his recollection and testimony Complainant's perceptions are not borne out by the other evidence in the record."⁶⁷ The ALJ gave greater weight to the testimony of Montgomery and Henley, who he stated "testified credibly, in a forth

⁶⁵ *Universal Camera Corp.*, 340 U.S. at 496.

⁶⁶ D. & O. at 6.

⁶⁷ *Id.*

right, believable manner, and did not appear to embellish their testimony.”⁶⁸ However, a careful review of the record reveals that in crediting Respondent’s witnesses’ account of what transpired over that of Nevarez’s, the ALJ ignored evidence of record dictating a different conclusion regarding the weight of the parties’ conflicting testimony.

The ALJ credited Montgomery’s hearing testimony that he talked to Nevarez on June 18, told him to call 911, to go to a motel to await the police, and to call him back to get payment for the motel room but that Nevarez never called him back.⁶⁹ However, as previously noted, undermining this testimony, but ignored by the ALJ, is Montgomery’s attestation before OSHA that he never talked to Nevarez on either June 18 or June 19; that Nevarez had talked to Thomas Henley. Aside from discrediting Nevarez’s testimony that he spoke the evening of June 18th with Henley, and not Montgomery,⁷⁰ the ALJ also ignored the attestation of Nanasy, Werner’s Manager of Safety, who stated to OSHA under penalty of perjury that it was Henley with whom Nevarez spoke after the confrontation with Menchaca and before the police intervention.⁷¹ Nor did Henley dispute this, testifying only that he did “not recall” speaking to Nevarez on June 18 or 19.⁷² While his lack of memory about what transpired does not necessarily render Henley’s testimony incredible, it certainly is not testimony that weighs against Nevarez’s version of events, particularly when one considers Henley’s repeated protestation that he lacked knowledge of another key event in which he surely was involved or about which he should have known.⁷³

⁶⁸ *Id.* at 7.

⁶⁹ D. & O. at 4, 7, 9; Tr. at 80-82.

⁷⁰ Nevarez consistently testified that he talked to Henley, that Henley told him that they would not pay for lodging, and that Henley authorized the EFS check that allowed Nevarez to obtain a cash advance against his salary to pay for the motel room the night of June 18, 2011. Tr. at 31, 66, 116, 124.

⁷¹ RX 8 (Nanasy’s September 17, 2012 written statement memorializing his interview with OSHA).

⁷² Tr. at 98. Moreover, when the ALJ asked Henley whether he had any record of Nevarez calling dispatch on June 18 or 19, Henley responded that he did not have any specific record, although when the ALJ asked if he checked for a record, Henley confessed, “No, I did not.” Tr. at 107.

⁷³ When Nevarez asked Henley at hearing before the ALJ about a truck recovery fee Werner Enterprises charged to Nevarez, Henley’s response is hardly the type of testimony that one would describe as credible or forthright. His memory lapse proved complete, stating: “I couldn’t tell you that”; “I wouldn’t have any way to know that”; “I wouldn’t know that. I didn’t review any of that information”; “I don’t know which truck you’re talking about. This was from a previous truck that was abandoned”; “I don’t know”; and “I wouldn’t know that.” Tr. at 102-103.

These inconsistencies obviously undermine the credibility of Montgomery's hearing testimony, upon which the ALJ relied not only in finding that Nevarez did not call Montgomery back as instructed, but that Respondent did not refuse to cover Nevarez's lodging because Nevarez did not afford Respondent the opportunity to do so. The failure of the ALJ to reconcile the conflicting testimony of Respondent's own witnesses, instead covering it with a blanket of credibility that in turn was weighed against Nevarez's account of what transpired, raises serious evidentiary questions in need of reconciliation upon remand, particularly in light of the fact that some of this same testimony will be relevant to Nevarez's proof of causation and Respondent's rebuttal affirmative defense.⁷⁴

B. Potential Relevance of Prior June Incidents

Nevarez brought to the ALJ's attention two previous job-related occurrences that immediately preceded the June 18-19 incident that he contends were relevant to his claim, which he argues he was unable to fully testify about because the ALJ considered the incidents irrelevant. The first incident occurred on June 3, 2001, when Nevarez reported safety concerns to Respondent about the truck he was driving. Nevarez alleged that Werner Enterprises was not willing to fix the truck, and because he did not feel safe driving the truck he refused to continue driving. In response, Werner treated Nevarez's refusal to drive as a "voluntary quit," and the ALJ found that Werner had to recover the truck from Las Vegas at its own expense.⁷⁵ The second incident occurred upon Nevarez's return to work, when Nevarez was removed on June 14th from the driving team to which he had been assigned. The ALJ found that Respondent took Nevarez off of the team assignment because he was unable to get along with his co-driver.⁷⁶ Nevarez, on the other hand, contends that underlying this incident is a complaint he raised about being coerced into falsifying a safety test for his co-driver.

Nevarez argues that he has been denied an adequate opportunity to present evidence relevant to his claim, especially regarding prior protected activities for which he claims he was retaliated against.⁷⁷ He objects that he was charged with truck abandonment for refusing to drive unsafe trucks that posed a threat to him and the public, in essence arguing that he was discriminated against in prior circumstances for engaging in protected activity.⁷⁸ He asserts that

⁷⁴ Regarding the ALJ's finding that Nevarez's "credibility [wa]s colored by his brashness, his overwhelming sense of rightness, his lack of listening skills, and his demanding demeanor," D. & O. at 7, it is merely noted that having emotions or an "overwhelming sense of rightness" are not necessarily personality traits indicative of untrustworthiness or a lack of credibility.

⁷⁵ D. & O. at 3. The evidentiary record shows that actually, the Respondent took the expense of recovering the truck out of Nevarez's June 30, 2011 paycheck. See CX 5.

⁷⁶ *Id.*

⁷⁷ Nevarez's "Points and Authorities," at 1 (Dec. 27, 2013).

⁷⁸ *Id.*

the ALJ's finding that he voluntarily quit and abandoned his truck on June 3, 2011, is false; that he simply refused to drive a truck that was in an unsafe condition.⁷⁹ Nevarez argues that his discharge as a result of the June 18-19 incident was colored by these previous incidents involving, among other things, Respondent's refusal to provide him with a safe truck, requiring him to incur out of pocket expenses for which he was not reimbursed, teaming him with a co-driver who was unable to pass a required driving test, and threatening him for refusing to violate the law.⁸⁰ Nevarez argues that had he been allowed to fully develop his evidence about these prior incidents, it would have demonstrated that he was justified in the action he took on June 19th.⁸¹

Based on a review of the hearing transcript, it appears that while the ALJ afforded Nevarez an opportunity to testify about the prior occurrences, the ALJ gave them little, if any, consideration. The ALJ seemingly cut Nevarez off before he had concluded his testimony concerning each event, although this is not at all clear. What is clear, however, is that given the ALJ's view of Nevarez's claim (i.e., a claim of constructive discharge), the ALJ considered testimony or evidence going beyond the events of June 18 and 19 irrelevant. In response to Nevarez's testimony about the June 3rd incident, the ALJ informed Nevarez that "the only issue that I'm here to resolve . . . was the issue as laid out by Ms. Parks [Werner Enterprises' counsel] in her prehearing statement: Was Mr. Nevarez constructively discharged for refusing to drive a hazardous materials load without proper training? That's the same issue you submitted to OSHA. This is involving the incident with Mr. Menchaca around June . . . 19th through 21st, 2011. That's your understating, correct? That's the only issue I'm going to resolve today, Mr. Nevarez? Mr. Nevarez: Yes, your Honor."⁸² Similarly, when Nevarez testified about the June 14th incident, the ALJ responded by refocusing Nevarez's testimony to his immediate claim: "Okay, Mr. Nevarez, as we talked about before, the only issue before me is the incident involving Mr. Menchaca that we talked about at first in June, the end of June, June 18th to the 21st, 2011. So I appreciate the background, but is there anything else about the incident or the time involving Mr. Menchaca that you want me to know? . . . Is there anything else related to what happened in Kingdom, Missouri and the time that you spoke to J.D. after you got back to Las Vegas that you want me to now about the case?"⁸³

Contrary to the ALJ's opinion, the prior incidents may prove relevant to Nevarez's complaint of whistleblower retaliation, particularly when his complaint is properly understood as

⁷⁹ *Id.* at 2.

⁸⁰ *Id.* at 5.

⁸¹ *Id.* at 6.

⁸² Tr. at 5-6.

⁸³ Tr. at 45-46.

one involving employment discharge initiated by the employer, rather than one of constructive discharge where the complainant has voluntarily resigned. To be clear, we are not interpreting Nevarez's complaint of retaliatory discharge to encompass protected activity beyond his refusal to drive on June 18th. Nor are we prejudging the relevancy of what previously occurred to the question of whether Werner Enterprises discharged Nevarez because of his June 18 refusal to drive. We merely point out that the prior incidents, because of their *potential* relevance to Nevarez's proof of causation and, in turn, Respondent's rebuttal proof that it would have discharged Nevarez in any event, are deserving of closer scrutiny on remand than that which the ALJ previously accorded either incident.

C. Potential unresolved issue for consideration on remand

Finally, Nevarez appears to argue on appeal that he was denied certain discovery requests. Before the ALJ, Nevarez requested that Werner Enterprises provide him with: (1) the bill of lading for the truck on June 18, 2011; (2) the names and numbers of the drivers assigned to the truck; (3) a copy of his final pay stub; (4) a copy of the truck assignment in Fontana, California; (5) a report of all attempts by Antonio to pass a safety test; (6) a copy of video of surrounding area for the duration of Antonio's final test; and (7) a full report of all the time Nevarez was required to drive and remain on duty from the time he was assigned to the truck in Fontana and all the time that J.D. had Nevarez riding around on the bus to Indiana after Werner Enterprises took the truck away from him and gave it to Antonio. It is unclear from the record whether Werner provided any of these documents other than Nevarez's final pay stub. This documentation may prove of relevance to the issue of causation. Consequently, on remand, if Werner has not produced the requested documents, the ALJ should consider whether this evidence should be provided to Nevarez.⁸⁴

CONCLUSION

The ALJ's Decision and Order dismissing Nevarez's complaint for failure to prove that he was subjected to adverse personnel action is **REVERSED**. The case is **REMANDED** for further proceedings consistent with this Decision and Order of Remand.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

⁸⁴ Nevarez has argued on appeal that "relevant evidence was not allowed," that "many attempts were made to evade evidence," that "evidence that is relevant to the case has been avoided" by Werner, and specifically that the bill of lading he requested in this case would be evidence that would help him prove his case. Nevarez's concerns should be reconsidered by the ALJ on remand.

Chief Judge Igasaki, concurring in result:

I agree that the ALJ's Decision and Order should be reversed and the case remanded for further proceedings consistent with this Decision and Order of Remand with one exception. I do not agree with the guidance offered in the majority opinion as to how to analyze "contributing factor" causation as described in the last sentence on page 12 and continuing onto page 13 of the majority opinion. My reasoning is as explained in *Nelson v. Energy Northwest*, ARB No. 13-075, ALJ No. 2012-ERA-002, slip op. at 10-12 (ARB Sept. 30, 2015).

PAUL M. IGASAKI
Chief Administrative Appeals Judge