



In the Matter of:

MICHAEL BUTLER,

ARB CASE NO. 16-084

COMPLAINANT,

ALJ CASE NO. 2014-STA-068

v.

DATE: JUN 22 2018

**NEIER, INC., OLIVER HASTE, JOHN HAYS,
MIKE PARKER, JOHN DOE, and MARY ROE,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq.; *Truckers Justice Center*, Burnsville, Minnesota

For the Respondent:

A. Jack Finklea, Esq.; *Scopelitis, Garvin, Light, Hanson & Feary, P.C.*, Indianapolis, Indiana

Before: Joanne Royce, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended, 49 U.S.C.A. § 31105(a) (Thomson Reuters 2016), and its implementing regulations at 29 C.F.R. Part 1978 (2017). Michael Butler filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA). Butler alleged that Respondents (Neier) retaliated against him, by refusing to assign him dispatches and then firing him, in violation of the STAA's whistleblower protection provisions because (1) he refused a dispatch with an assigned schedule that he believed he could not meet without violating the hours of service regulation at 49 C.F.R. § 395.3, given a scheduled safety meeting the following morning; (2) he raised a safety concern about his vehicle's brakes, and (3) he logged that safety

meeting as “on duty,” following a Neier manager’s statement that he should log it any way he wanted. OSHA determined that there was no reasonable cause to believe that Neier violated the STAA, and thus dismissed the complaint. Butler objected to OSHA’s findings and requested a hearing. A Department of Labor Administrative Law Judge (ALJ) held a formal evidentiary hearing in May 2015. On July 29, 2016, the ALJ concluded that Neier violated the STAA and awarded damages and other remedies. Decision and Order Granting Relief (D. & O.) Neier appealed the ALJ’s decision to the Administrative Review Board (ARB or Board). Complainant has responded, and Neier has filed a reply.¹ We affirm the ALJ’s decision, award of damages, and remedies.

BACKGROUND

The ALJ noted that the parties were “in substantial agreement as to the facts” up to September 6, 2013, when their version of events begin to differ. D. & O. at 9. The ALJ resolved many disputed facts. We briefly set forth the facts pertinent to disposition, noting disputed facts.

Butler worked as a driver for Neier from July 15, 2013, to September 11, 2013, when Neier discharged him. On Friday, September 6, 2013, Butler drove his truck back to the Neier’s facility in Indianapolis, Indiana. Butler testified that Mike Parker, the dispatcher, called him during this return trip and told him to attend a safety meeting the following morning of September 7. Butler testified that Parker also told him that his next dispatch would be to “load at Valero,” a refinery in Memphis, Tennessee, at 6:00 am on Sunday, September 8th “followed by appointments Tuesday morning and Thursday morning.” Butler testified that he responded that he could not log this dispatch legally because he would be breaking the hours of service rules. According to Butler, Parker told him that there was no other work being offered to him and he had to accept this dispatch; that if he did not accept the dispatch, there would be no work available for him until Wednesday, September 11. Butler testified that the dispatcher had to rely on his representation that he did not have enough hours because Butler had yet to submit his log for that week, but the dispatcher would have known the loads Butler had already had that week. Hearing Transcript at 158-160; D. & O. at 10. Butler also testified that he told Parker that he had noticed a problem with the brakes that needed to be looked at before he would drive the truck again. Butler stated that Parker told him to bring the truck to the repair shop at the Indianapolis terminal. Nevertheless, Butler testified, he did not leave the truck at the shop. Hearing Transcript at 91.

Parker testified that he did not recall Butler refusing any load; he only remembered that Butler was hard to reach. Parker did recall that there was an 8 am Saturday, September 7 to Sunday, September 8 run to the Valero refinery that Butler could not run that particular day “that Monday” for whatever reason, and so he had to assign another driver. Hearing Transcript at 356, 379; D. & O. at 11. Parker also testified that he did not recall telling Butler that there would be no

¹ Neier claims in its Reply Brief that Complainant’s counsel untimely filed Complainant’s Brief and thus the Board should not consider it on appeal. Respondent’s Reply Brief at 1. Complainant’s counsel responds, and argues that Complainant’s Brief was timely filed as the ARB considers the date of service of process/ mailing as the date of filing and that date was timely (November 2, 2016). We agree, and consider the pleading in this appeal.

work for him until Wednesday, if he refused the Valero run. Hearing Transcript at 363; D. & O. at 11.

Parker testified that he did not recall calling Butler to tell him about the Saturday September 7, safety meeting. Parker explained that if Butler said that attending the safety meeting would not allow him to make a Memphis run, he would have preferred that Butler not attend the safety meeting. Parker added that attending a safety meeting can interrupt a driver's ability to take a 34-hour restart, because the time needed for the restart would not start until after the meeting. Parker agreed that attendance at a safety meeting starts the clock for the 14-hour rule. Hearing Transcript at 364-365, 379, 382; D. & O. at 11. Neier denied that Butler legitimately refused the dispatch.

The ALJ found Neier phone records show that on the evening of September 6, dispatchers Parker and Dave McCullough each called Butler twice on his cell phone after he went on duty. Respondent's Exhibit K. Butler testified that he tried to call them both back after receiving voicemail messages. Butler testified that McCullough had left a message to the effect that if he did not accept the run Parker had given him, there would be no work for him the following week. Butler was unable to reach either dispatcher, and Parker called again that evening but did not reach Butler. Hearing Transcript at 90-91; Respondents' Exhibit K; Complainant's Exhibit 9 at 11; D. & O. at 12.

Butler attended the September 7 safety meeting. He testified that during the meeting, he asked whether the drivers should log the meeting as on or off duty. Butler stated that Kasey Thomas, Neier's Safety and Compliance Officer, responded that the meeting could be logged any way the drivers wanted. Butler indicated that he replied that he was pretty sure it should not be logged off duty. Hearing Transcript at 96-99, 200-201, 282-283; D. & O. at 12. Thomas testified at the hearing, however, that she had never told a driver or a group of drivers that it did not matter whether they log a mandatory safety meeting as on or off duty. Hearing Transcript at 388. Resolving this conflict in the evidence, the ALJ credited the testimony of another driver who attended the same safety meeting that morning, Russell Mattingly, whose testimony, the ALJ determined, was consistent with Butler's description of Thomas's statement at the safety meeting. D. & O. at 12. Butler recorded the September 7 safety meeting in his log as "on duty (not driving)" from 8:00 am until 12:00 noon. Complainant's Exhibit 2 at 46; Respondents' Exhibit G at 7. The ALJ noted that there are no more logs in the record after the September 7 log. D. & O. at 12.

Butler further testified that on that same day, September 7, 2013, he submitted the "Driver's Vehicle Inspection Report" (DVIR) (Complainant's Exhibit 10) that he dated and signed and in which he noted a problem with the truck's service brakes, indicating, "I think foot valve might be bad." Complainant's Exhibit 10; Hearing Transcript at 85-90, 158, 160, 161, 181-182, 187, 217; D. & O. at 10. Parker testified that he did not recall Butler complaining about his truck's brakes and refusing to drive it until the brakes were fixed. Hearing Transcript at 365, 366; D. & O. at 11-12. Oliver Haste², Neier's Director of Human Resources, testified that he did not find the DVIR that Butler testified he submitted to Neier on September 7. Hearing Transcript at 411.

² Oliver Haste's last name appears in both the ALJ's decision and the Hearing Transcript alternatively as "Hast." Neier identifies its employee as Oliver Haste, as do we. Respondent's Initial Brief at 3.

On the morning of Monday, September 9, Parker called Butler on his cell phone but received no answer. Respondents' Exhibit K. Haste called Butler on his land line later that morning but also got no answer. *Id.* Haste testified that he believed that he called Butler because dispatch was having trouble reaching him and he thought he remembered a dispatcher say that Butler had cleaned out his truck; so he wanted to check in with Butler. Haste left a message that dispatch believed Butler had quit his job at Neier, as he had cleaned out his truck. Hearing Transcript at 35, 399, 400, 408; D. & O. at 13.

Butler testified that he was not at home September 9 and most of September 10. Transcript at 110. When he returned home September 10 and listened to Haste's voice mail message he was disturbed since it suggested he had quit his job or was being fired and Haste wanted to see him. Hearing Transcript at 110, 202, 207. The next day, Butler called OSHA because he thought he was being punished by not being given a load due to having refused a dispatch. Hearing Transcript at 107-109; Complainant's Exhibit 9 at 15.

Butler further testified that on Tuesday, September 10, he returned Haste's telephone call. Butler testified that he told Haste that he did not understand why Haste thought he had quit. Butler explained that he always took his personal gear out of his truck. Butler testified that Haste told him that dispatch complained that Butler kept refusing dispatches and that Neier would not tolerate that. Butler stated that he replied to Haste that any time he passed on a load it was because he could not legally log it. Butler testified that Haste told him to come to see him Wednesday, September 11 at 8:00 am but that Butler told him that he could not get there before 11 am as his wife would have to drive him after taking the children to school. Butler further testified that Haste told him that he did not know if there were any available assignments but that he would have a dispatcher call him back. Hearing transcript at 107-112; Complainant's Exhibit 9 at 15; D. & O. at 13-14.

The ALJ noted that Haste's account of the conversation differed from Butler's in that Haste denied, (1) that Butler told him that he could not meet at 8:00 am the next morning but would be there around 11:00 am, and (2) that Butler told him that the dispatcher was trying to have Butler run loads that he could not legally log. Hearing Transcript at 401-402, 409; D. & O. at 14.

McCullough called Butler after Haste did on the evening of September 10. McCullough did not testify at the hearing. Butler testified that McCullough called him to give him an 11 am dispatch the following morning of September 11. Respondents' Exhibit K; Hearing Transcript at 114, 208, 279-280; D. & O. at 14.

Haste testified that when before 10:00 am on September 11, he discovered that Butler had not yet arrived, he decided to terminate his employment as a probationary employee. Haste testified he then called John Hays, Neier's vice president, to let him know of his decision, and wrote a letter terminating Butler's employment. Hearing Transcript at 402, 426; D & O. at 14. That letter is not of record.

Butler testified that his wife drove him to the Neier facility, arriving at 10:30 am on September 11, so that he could begin the run. He found his truck in the shop and noticed that another driver's belongings were in it. Butler stated that he then went to see Haste who told him

he was being fired and that “Neier is done with you” because Butler was unhappy, did not want to work there, and kept refusing loads claiming that he could not legally log them. Butler also testified that Haste told him that he was supposed to have been there by 8 am, but Butler replied that McCullough had told him to be there between 10:30-11:00 am. Butler stated that when he told Haste that it was illegal to fire him for refusing to take a load that he could not legally log, Haste called Hays in. Butler testified that Hays told Butler to leave immediately or be thrown out. Butler then walked to his car, in which his wife was waiting. Hays followed him until Butler turned around when his wife called his name; Hays turned around too and returned to the office. Hearing Transcript at 114-115, 275, 321-322, 345; D. & O. at 14, 15. The ALJ found that Haste’s, Hays’s, and Butler’s accounts of what happened in Haste’s office were similar. D. & O. at 15. Haste alone made the decision to fire Butler.

Butler filed a complaint with OSHA. Butler alleged that Neier retaliated against him for engaging in activity that the STAA protects, including (1) his refusal to accept a dispatch with an assigned schedule that he believed he could not meet without violating the hours of service regulation at 49 C.F.R. § 395.2, 395.3 given a scheduled safety meeting the following morning; (2) raising a safety concern about his vehicle’s brakes, and (3) logging that meeting as “on duty,” following a Neier manager’s statement that he should log it any way he wanted. Butler alleged that Neier retaliated against him in violation of the STAA’s employee protection provisions when it removed him from any dispatch assignment from September 6-11, 2013, and when it discharged him on September 11. Complainant’s Exhibit 1. OSHA dismissed the complaint, and Butler requested a hearing. Complainant’s Exhibit 8. The ALJ found, after holding a hearing, that Butler had demonstrated that he had engaged in protected activity when he refused the dispatch as one he could not legally log, which protected activity was a contributing factor in Haste’s decision to discharge him. The ALJ also found that Neier had not met its burden to show, by clear and convincing evidence, that it would have fired Butler absent his protected activity. The ALJ ordered reinstatement, and awarded back pay plus interest, \$50,000 in compensatory damages for emotional distress, and \$10,000 in punitive damages. The ALJ also ordered that Neier expunge from Butler’s employment records his discharge and any negative information regarding his STAA-protected activities, and post copies of the D. & O. The ALJ also afforded Complainant’s counsel time in which to submit a petition for attorney’s fees. Neier appealed the ALJ’s decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA. 29 C.F.R. § 1978.109(a); Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). The ARB reviews questions of law presented on appeal de novo, and is bound by the ALJ’s factual determinations if the findings of fact are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.110; *Hood v. R&M Pro Transp.*, ARB No. 15-010, ALJ No. 2012-STA-036, slip op. at 4 (ARB Dec. 4, 2015); *Myers v. AMS/Breckenridge/Equity Grp. Leasing I*, ARB No. 10-144, ALJ Nos. 2010-STA-007, -008 (ARB Aug. 3, 2012). The ARB will uphold an ALJ’s factual finding “even if we would justifiably have made a different choice had the matter been before us de novo.” *Henrich v. Ecolab, Inc.*,

ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

DISCUSSION

STAA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, at 49 U.S.C.A. § 42121(b) (Thomson Reuters 2016). See 49 U.S.C.A. § 31105(b)(1); *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-071 (ARB May 18, 2017). To prevail, a successful STAA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. 49 U.S.C.A. § 42121(b)(2)(B)(iii); cf. *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012). If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C.A. § 42121(b)(2)(B)(iii), (iv).

We affirm the ALJ's conclusions, which are supported by substantial evidence on the record as a whole, that Butler engaged in protected activity, that this protected activity contributed to Neier refusing to dispatch Butler temporarily and then discharging him, and that Neier failed to prove by clear and convincing evidence that it would have discharged Butler in the absence of his protected activity.

1. Protected activity

Butler engaged in protected activity by refusing to take a dispatch because he could not take it without violating the hours of service rules at 49 C.F.R. § 395.2, 395.3, while accurately reporting the safety meeting as "on duty." 49 U.S.C.A. § 31105(a)(1)(B)(i), (C). The STAA protects certain employee complaints, refusals to operate a vehicle, and accurate reports of hours of duty:

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because—

- (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
 - (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;
- (C) the employee accurately reports hours on duty pursuant to chapter 315.

49 U.S.C.A. § 31105(a). Under the STAA, an employee engages in protected activity when he refuses to drive because such operation would violate a rule, regulation, or standard related to commercial motor safety or because he accurately reports hours on duty. The ARB has held that for a refusal to be protected under the STAA, § 31105(a)(1)(B)(i), the complainant must demonstrate a subjectively and objectively reasonable belief of a violation. *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012) (noting that refusals do not need to be based on actual violations to be protected under STAA); *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011) (noting that an employee "need not prove an actual violation of a motor vehicle safety regulation, standard, or order, but must at least be acting on a reasonable belief regarding the existence of an actual or potential violation."). See also *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (noting that STAA protection is not dependent upon whether complainant proves a safety violation).

The ALJ concluded, after an exhaustive analysis of the parties' positions and the relevant evidence, that Butler engaged in STAA-protected activity for refusing to take a dispatch. The ALJ reviewed the evidence regarding Butler's hours of service vis-a-vis his refusal to take the run to Valero. The ALJ found:

Counting from the start of the meeting at 8:00 a.m. on Saturday, based on Butler's experience, he could not complete the dispatch with his legal hours of service. This is true whether the assigned time to arrive at Valero was 6:00 a.m., as Butler contends, or 8:00 a.m. as Neier contends, as 24.75 hours from 8:00 a.m. on Saturday would be 8:45 p.m. on Sunday. Because this calculation is based on Mr. Butler's prior dispatch from Indianapolis to Valero, it does not account for any time needed for Mr. Butler to resolve whether there was a problem with the brakes on the truck he drove the day before, or to change trucks, so his reported concern about the brakes is not a factor in this calculation. Nor does it account for the fact that Mr. Butler's driving time between Indianapolis and Valero in August 30 was only 7 hours, when both Mr. Butler and Mr. Parker testified that the normal driving time was about 7 hours 45 minutes. Tr. at 101 (Butler), 378 (Parker). DOT regulations do not allow dispatching that requires speeding to meet a schedule.

D. & O. at 18. The ALJ then concluded, “Thus, even were I to accept Neier’s theory that there was no problem with the brakes, and Mr. Butler did not properly request service on the truck, Mr. Butler was correct that he could not attend the safety meeting and complete the dispatch to Valero within his legal hours of service.” *Id.* at 18. The ALJ specifically determined that Butler was “correct” in his “belief” that he could not legally log the run and the safety meeting without violating the Department of Transportation hours of service rule. *Id.* at 1, 10, 12-14, 17, 18. The ALJ further noted that none of Neier’s witnesses denied that Butler had refused the dispatch and that while Neier’s witnesses suggested that Butler could have been excused from the safety meeting to take the dispatch, “there is no evidence that anybody told Mr. Butler that the meeting was anything other than mandatory. I find that Butler established that he engaged in protected activity when he refused the dispatch to Valero.” *Id.* at 18.

Neier appeals the ALJ’s finding that Butler engaged in protected activity. Neier argues that the ALJ committed reversible error by not holding Butler to a burden to establish that his refusal to drive was based on the fact that operation of his truck would actually violate safety laws as it must, citing *Koch Foods, Inc. v. Sec’y Dep’t of Labor*, 712 F.3d 476 (11th Cir. 2013), in which the Eleventh Circuit Court of Appeals vacated the ARB’s decision in *Assistant Sec’y of Labor for Occupational Safety and Health v. Bailey*, ARB No. 10-001, ALJ No. 2008-STA-061 (ARB Sept. 30, 2011)(protections afforded refusals to drive under Section 31105(a)(1)(B)(i) also includes refusal where operation of vehicle would actually violate safety laws under employee’s reasonable belief of facts at time of refusal to operate vehicle, and reasonableness of refusal must be subjectively and objectively determined); *see also Gilbert v. Bauer’s Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022 (ARB Nov. 28, 2012). The Eleventh Circuit’s decision conflicts with ARB precedent and we are not bound by it in cases outside the Eleventh Circuit and do not acquiesce in it. This case arises within the appellate jurisdiction of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit has not followed the ruling in *Koch Foods, Inc.* that to be protected, a refusal to drive under Section 31105(a)(1)(B)(i) must be based on the fact that operation of the vehicle would actually violate safety laws.³ The ALJ found that Butler engaged in protected activity because he correctly believed that he could not take the dispatch without violating the hours of service rules. Under the objective, reasonable person standard, Butler’s correct belief was borne out by the preponderance of the evidence as comprehensively analyzed and weighed by the ALJ. D. & O. at 5-18.⁴

Neier next advances its own interpretations of the evidence relevant to Butler’s refusal of the dispatch based on his belief that he could not take the run without violating the hours of service rule, asserting that the ALJ ignored this evidence. Respondents also argue that Butler’s testimony that Parker told him that he had to go to the meeting “cannot be credited” as “[i]t would not have made sense” for Parker to demand Butler’s attendance. Respondent’s Initial Brief at 16-19.

³ Although the Seventh Circuit has favorably cited *Koch Foods, Inc.*, the citation refers only to protected *complaints*, not refusals to drive. *See Gaines v. K-Five Constr., Corp.*, 742 F.3d 256, 269 (7th Cir. 2014) (citing *Koch Foods, Inc.*, 712 F.3d at 482-83 (recognizing that a complaint is protected under Section 31105(a)(1)(A)(i) if it was based on a reasonable belief or perception that a company was engaged in a violation of a motor vehicle safety violation)).

⁴ Thus, even under *Koch Foods, Inc.*, Butler would have prevailed in establishing protected activity based on his refusal of the dispatch.

Neier's arguments amount to a request that the Board reweigh the evidence, which we will not do. Moreover, it is for the ALJ, as trier-of-fact, to determine the weight and credibility of the evidence, including the testimony given by the witnesses who appeared before her at the hearing. Because we find that substantial evidence on the record as a whole supports the ALJ's evidentiary findings and conclusion that Butler engaged in protected activity, we affirm that conclusion.

2. Contributing factor causation

Neier next challenges the ALJ's findings on causation. Upon review, we find that substantial evidence supports the ALJ's conclusion that Butler established that his protected refusal to drive contributed to Haste's decision to terminate his employment. The ALJ initially determined that on its face, it is "unlikely" that tardiness to a meeting on the morning of Wednesday, September 11, 2013, was the sole reason that Haste decided to discharge Butler, as Haste testified. The ALJ explained that tardiness is not a serious enough offence under Neier's policies and Haste testified that he made the decision to discharge Butler in the context of having been told that Butler had cleaned out his truck of his personal belongings and may have quit. The ALJ properly noted that the issue before him was whether, even accepting as true Haste's stated reason for the discharge, Butler's protected activity of refusing a dispatch was also a contributing factor in his decision. D. & O. at 18. The ALJ noted, "There is no direct evidence that Mr. Butler's refusal of the dispatch to Valero was a contributing factor to his discharge. But there is considerable circumstantial evidence that it was." *Id.* The ALJ explained that Haste alone made the decision to fire Butler, where normally he would consult others, and it was not normal for a Neier employee to be fired for one instance of tardiness, where its progressive discipline system would apply only a one-point penalty. Respondents' Exhibit F; D. & O. at 7, 14, 15, 19-21.

The ALJ also found it unlikely that Parker did not tell Haste that Butler had refused a dispatch given Haste's testimony that dispatchers would inform him when a driver refused a dispatch. D. & O. at 19. The ALJ also found persuasive the fact that no witness contradicted the fact that Neier did not assign Butler a dispatch for a week after he refused a dispatch, a fact supported by an earlier instance where Neier punished Butler for refusing a dispatch. *Id.* at 19, 20. Critically, the ALJ found that under these circumstances, Butler had no reason to expect a call from Neier following his September 6 refusal and phone records merely document that Neier could not reach Butler on the evening of Friday, September 6 and the morning of Monday, September 9. *Id.* at 19. The ALJ also credited Butler's testimony that he contacted OSHA on Tuesday, September 10, before he returned Haste's call, because he thought he was going to be fired for refusing a dispatch that he believed he could not run without violating the hours of service rules. The ALJ also noted that Haste's query as to whether Butler wanted to continue to work at Neier "makes more sense in the context of Mr. Butler having refused a dispatch than it does if Mr. Haste only thought that Mr. Butler had taken his personal items from the truck." *Id.*

The ALJ further found Butler to be a credible witness as to the material facts, dismissing Neier's contrary arguments, and determined that while the evidence was "inconclusive" as to whether the truck had a brakes problem Friday, September 6, as Butler claimed, that issue was "not material to the central issue of refusing a dispatch." *Id.* at 20.

The ALJ next determined that close temporal proximity existed between Butler's second refusal of a dispatch and his discharge less than a week later. The ALJ found that certain factors "in the sequence of events in this case are compelling to support Butler's allegation Neier fired him because he refused the dispatch, including his uncontradicted testimony that he was not given any work for a week in August because he declined a dispatch, confirmed by his log; his call to OSHA on September 10, the day before he was fired, because of his fears of retaliation for a second time, confirmed by his telephone records; and his threat to file suit over an illegal discharge during the meeting with Mr. Haste on September 11, confirmed by Mr. Haste's and Mr. Hays's testimony." *Id.* at 21. The ALJ added that Butler's filing of a complaint with the Department of Transportation is also protected under the STAA at 49 U.S.C.A. § 31105(a)(1)(A), (D), and (E). *Id.*

Neier challenges the ALJ's causation finding and argues as follows:

The ALJ's decision found that Mr. Butler's dispatch refusal contributed to his discharge. In rendering the finding, the ALJ's Decision relied heavily on a belief that a single absence is a minor offence and that it is therefore unlikely Mr. Haste's reliance on Mr. Butler's failure to appear for work at 8:00 a.m. as instructed was the true reason for the discharge. ALJ's decision at 19. Mr. Butler, however, was a probationary employee who had already been discharged once by Neier, who had removed all personal items from his truck, and who was not returning the calls of dispatchers or Mr. Haste. Indeed Neier dispatchers had attempted to contact Mr. Butler at least five times for dispatch on a single evening. Tr. 163-64; RX M. Accordingly, the ALJ erred by looking at Mr. Butler's tardiness in a vacuum.

Respondent's Initial Brief at 19. Neier also challenges the ALJ's weighing of Mrs. Butler's testimony regarding her schedule on the morning of September 11 with regard to Butler's tardiness and his discharge that morning. Neier's assertions lack merit. As set forth above, the ALJ thoroughly considered the "circumstances" and import of phone records showing only that Parker could not reach Butler on the evening of Friday, September 6 and the morning of Monday, September 9. The ALJ specifically rejected as "not borne out by the phone records," Parker's testimony that he had trouble reaching Butler "a lot of times." D. & O. at 19. The ALJ further thoroughly addressed Haste's stated basis for firing Butler, his tardiness on the morning of September 11, in the context of Butler's status as a probationary employee, who had been previously discharged, who had removed personal items from his truck, and who was driven to work that day by his wife. Contrary to Neier's arguments, the ALJ's weighing of this evidence is not contrary to precedent and does not contain reversible error. The fact that Neier urges a different result is unavailing. Based on the foregoing, we affirm as supported by substantial evidence, the ALJ's findings on causation.

3. Affirmative defense

The ALJ's findings on Neier's affirmative defense are also supported by substantial evidence. If a complainant meets his burden of proof to prove that protected activity was a contributing factor in the adverse action, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C.A. § 42121(b)(2)(B)(iii),(iv); *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-071 (ARB May 18, 2017). "Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."⁵ In *Speegle*, the ARB wrote:

To sum up the factors that must be considered in applying the "clear and convincing" defense, we find that the statute requires us to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how "clear" and "convincing" the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse actions; and (3) the facts that would change in the "absence of" the protected activity.

Speegle v. Stone & Webster Co., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 12 (ARB Apr. 25, 2014) (footnotes omitted).

The ALJ concluded that "Neier violated the STAA when it fired Mr. Butler from his employment, and has failed to establish by clear and convincing evidence that he would have been fired even absent his protected activity." D. & O. at 21. In addition to her numerous findings of fact that convincingly demonstrate that Neier fired Butler because of his refusal to drive (D. & O. at 19-21), the ALJ also factually supported her dismissal of Neier's stated reason for Butler's firing as pretext—because it was a minor infraction that typically garnered only minimal discipline. D. & O. at 19. Finally, the ALJ addressed the final *Speegle* factor, reasoning as follows:

If Mr. Butler had accepted the dispatch for Valero for September 7-8, 2013, none of the ensuing events would have happened. Mr. Parker would not have reported to Mr. Haste that he thought Mr. Butler may have quit, and Mr. Haste would not have called Mr. Butler in for an 8:00 a.m. meeting. By his own testimony, Mr. Haste did not decide to fire Mr. Butler until he failed to appear on time for the meeting. I find that Mr. Butler's refusal of the dispatch is inextricably bound up in the ensuing events. Mr. Butler was not accused of any misconduct which could have resulted in his discharge for reasons unrelated to his protected activity. Nor did Neier give any reason other than his failure to show up at the meeting on time to evaluate Mr. Butler as an unsuitable employee under the 90-day probation policy. Thus, Neier has not and cannot

⁵ *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015).

establish by clear and convincing evidence that Mr. Butler would have been fired even absent his protected activity.

Id. (emphasis added.)

Neier takes issue with the ALJ's indication that Butler was not accused of any misconduct that could have resulted in his discharge for reasons unrelated to his protected activity. Neier argues, "Mr. Butler's decision to remove his CB radio and other personal belongings from the truck was unrelated to his protected activity, as was the impression of voluntary resignation created by his doing so. Likewise, Neier's inability to reach Mr. Butler on several occasions that weekend was unrelated to his protected activity." Respondent's Initial Brief at 23. Neier adds, "In short, regardless of whatever Mr. Butler had or had not done to that point, all he had to do was appear at work by 8:00 a.m. and he would still be working for Neier. Mr. Butler failed to do so and was properly discharged. As such, Mr. Haste established by clear and convincing evidence that he would have made the same decision regardless of protected activity."

Substantial evidence in the record supports the ALJ's findings that Neier "has not and cannot" prove its affirmative defense by clear and convincing evidence. Neier's arguments here present no challenge to the evidence relied upon by the ALJ in finding that Butler's protected refusal of the dispatch "is inextricably bound up in the ensuing events." These arguments plainly ignore facts essential to the ALJ's conclusion, including that Butler had been away from work at the time of his September 11 discharge because Neier had not assigned Butler a dispatch for the period of time directly following his September 6 protected refusal of the dispatch. Accordingly, we affirm the ALJ's conclusion that Neier failed to meet its burden to prove by clear and convincing evidence that it would have discharged Butler absent his protected activity. Consequently, Neier cannot escape liability in this case for its violation of the STAA.

Neier next argues that Butler was not a credible witness and thus the ALJ should not have credited his testimony, as she did in resolving his claim. Neier asserts that this "makes no sense given Mr. Butler's penchant for lying." Neier lists several instances in which, it asserts, the ALJ "passed over Mr. Butler's serious credibility issues," including omitting from his Neier employment application his previous employment with Midnight Flyer. Respondent's Initial Brief at 23-25. Neier's arguments are refuted by the record. The ALJ properly considered the credibility of the witnesses in a substantive manner, including finding that Butler's omission of Midnight Flyer from his employment application "does not significantly undermine his credibility." The ALJ did, however, consider Butler's failure to identify his whistleblower claim against Midnight Flyer to be a clear violation of his "duty of candor." She nevertheless declined to otherwise mistrust him, because she found Butler's testimony regarding material facts to be corroborated by other witnesses and exhibits. D. & O. at 20. To the extent Neier urges the Board to substitute the ALJ's credibility determinations with our own, we do not.

4. Back pay

Neier disputes the ALJ's award of back wages and asserts that the ALJ erred in finding that Butler "consistently sought other employment" after Neier discharged him. Neier also argues that Butler did not use reasonable diligence in finding substantially equivalent work "after the five-

month hiatus because he only did the bare minimum to obtain unemployment compensation.” Respondent’s Initial Brief at 26-27. Contrary to Neier’s arguments, the record shows that the ALJ properly determined that Neier did not prove that Butler failed to exercise reasonable diligence in mitigating damages by attempting to find another job. While Neier asserts that “motor carriers are desperate for drivers and Mr. Butler could have easily found substantially equivalent work if he wanted it,” *id.* at 28, Neier offered no supporting evidence, and the ALJ so found. The ALJ specifically found that Neier sought work as a truck driver immediately after Neier discharged him and continued to seek work. D. & O. at 24-25.

Neier further asserts error in the ALJ’s award of \$904.91 per week, less money earned at Boyd Grain, because, Neier argues, Butler was unable to work since November 11, 2014, due to a worker’s compensation injury and he would therefore have been unable to drive for Neier as well and no back pay should have been awarded thereafter. Respondent’s Initial Brief at 27. But as the ALJ ruled, Butler’s injury in the past is not a bar to his reinstatement in the future and, under ruling precedent, liability for back pay continues until the employer makes a bona fide, unconditional offer of reinstatement. D. & O. at 23, 24. Substantial evidence in the record supports the ALJ’s findings that, “Butler’s calculation of his weekly earnings at \$904.91 per week is a reasonable measurement of his lost pay. Mr. Butler’s earnings of \$21,403.81 from Boyd Grain, at \$589.64 per week from March 7 to November 11, 2014, shall be deducted from the back pay award.” *Id.* at 24. The ALJ’s order of back pay at a rate of \$904.91 per week stands until Neier makes a bona fide offer of reinstatement. *Id.* at 25. Therefore, we affirm the ALJ’s award of back pay. Neier does not further contest the ALJ’s order of damages and remedies and thus, we affirm them. *See* Respondent’s Petition for Review to The Administrative Review Board; Respondent’s Initial Brief.

5. Refusal to admit evidence

Neier alleges that the ALJ committed reversible error in refusing to admit Respondent’s Exhibit P, a statement to OSHA containing a description of what Mrs. Butler witnessed at the Neier facility on September 11, 2013, the day Neier fired Butler. The ALJ sustained Complainant’s objection to the use of the document for impeachment purposes because it was not a “true contradiction” of Mrs. Butler’s testimony, finding that it was “an abbreviated version of what she’s testified to.” Hearing Transcript at 339-345. Neier asserts that the exclusion of this evidence prejudiced Neier, given that ALJ credited the version of events Butler and his wife testified to. Upon review of the record, we find no reversible error here. The ALJ duly considered counsels’ arguments and ruled on the admissibility of this document and we find no reason to disturb that ruling. Further, Neier’s assertion of prejudice is unavailing in this case where both Butler and his wife appeared at the hearing and were subject to cross-examination.


CONCLUSION

Accordingly, we **AFFIRM** the ALJ’s Decision and Order. Butler’s attorney shall have thirty (30) days from receipt of the Final Decision and Order in which to file a fully supported

attorney's fee petition for costs and services before the ARB, with simultaneous service on opposing counsel. Thereafter, Neier shall have thirty (30) days from its receipt of the fee petition to file a response.

SO ORDERED.


JOANNE ROYCE
Administrative Appeals Judge


LEONARD J. HOWIE III
Administrative Appeals Judge