

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 November 2007

In the Matter of:

DUNCAN F. SHIELDS

Complainant

v.

Case No.: 2007-STA-00022

JAMES E. OWEN TRUCKING, INC.

Respondent

APPEARANCES:

Paul O. Taylor, Esq.
For the Complainant

Donald M. Rowe, Esq.
For the Respondent

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

AWARD OF DAMAGES

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the "Act" or "STAA"), 49 U.S.C § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. This matter is before me on the Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA") after investigation of the complaint.

The safety standard underlying Complainant's charge is a Department of Transportation (DOT) regulation that limits a driver's "maximum driving time" in order to avoid driver fatigue. 49 C.F.R. § 395.3¹

¹ Subject to the exceptions and exemptions in §395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(a)(1) More than 11 cumulative hours following 10 consecutive hours off duty; or

SUMMARY OF THE EVIDENCE²
STIPULATION OF FACTS³

1. Duncan F. Shields ("Shields" or "Complainant") resides at 715 East Main Street, Bedford, VA 24523 (Tr.135).
2. Prior to his employment with James E. Owen Trucking Company, Inc. ("Owen Trucking" or "Respondent"), Shields had worked for approximately twenty different trucking companies in the twenty years he had been driving trucks. (Tr. at 136-137).
3. Owen Trucking ("Owen Trucking" or "Respondent") is engaged in interstate trucking operations and operates commercial vehicles on the highways in commerce with a gross vehicle weight rating of 10,001 pounds or more.
4. Shields began working for Owen Trucking as a truck driver on or around October 11, 2006. (TR at 122, 137). Shields hauled his first load for Respondent on October 16, 2006 (Tr. 156).
5. As an employee of Respondent, Shields operated commercial motor vehicles with a gross vehicle weight rating of 10,001 pounds or more on the highways in interstate commerce. (Tr.53-55; CX-1, CX-16).
6. On December 18, 2006, while employed as a truck driver for Owen Trucking, Shields was scheduled to deliver a load that originated in Texas with the first delivery stop in Arlington, VA for December 18, 2006, and a final stop in Temple Hills, MD (Tr. 137-38). The final destination was McCrea Equipment in Temple Hills, MD scheduled for delivery at 11:00a.m. (RX 8, Respondent's Tracking or Invoice Number 31684), but Shields did not actually begin unloading the shipment until around 1:30 or 1:45 p.m. on December 19, 2006. (TR at 143-144).
7. On December 19, 2006, Shields went on duty at 4:30 a.m., and he performed a pre-trip inspection on his truck and trailer, which inspections generally take him fifteen to thirty minutes to perform (TR at 139-140).
8. After the trailer was unloaded in Temple Hills, MD, on December 19, 2006, between 2:00 p.m. and 2:40 p.m.⁴ Shields had a telephone conversation with the dispatcher for

(a)(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty except when a property-carrying driver complies with §395.1(0) and §395.1(e)(2).

² At the hearing on June 12, 2007, I admitted all exhibits into evidence and noted the objections by Complainant's Counsel as to the admissibility of RX3, RX5, RX6, and RX7.

³ The parties submitted a joint stipulation as to the facts in this case.

⁴ The parties agree that the conversation took place on the afternoon of December 19, 2006, but the actual time is disputed. Mr. Preston testified that he dispatched Shields at 2:00 p.m. (Tr. at 252) Shields testified that the dispatch was at 2:40 p.m (TR at 144-145)

- Owen Trucking, Norvel (Butch) Preston (hereinafter "Preston"). (TR at 143-144; 252-253). During that conversation, Preston told Shields that Owen Trucking had a load for him to pick up in Baltimore to take to Georgia. Preston did not tell Shields where in Georgia he was supposed to deliver the load; rather, he instructed Shields to call the broker/customer, C.H. Robinson (TR at 145).
9. Shields called C.H. Robinson and was told that the load was going to Gainesville, Georgia, and it had a delivery window of 8:00 a.m. to 4:30 p.m. on December 20, 2006. (TR at 148-149).
 10. Shields told the individual at C.H. Robinson that he could not get the load to Gainesville by the next day, because he had to take his ten-hour break, to which the C.H. Robinson employee advised Shields to call his dispatcher at Owen Trucking. (TR at 149).
 11. Shields telephoned Preston and told him that he could not pick up the load in Baltimore, MD and deliver it in Gainesville because he did not have available driving hours. Preston never discussed a delivery appointment time with Shields. (TR at 252-253). Preston then transferred Shields to Dennis Gardner (hereinafter "Gardner") who is the Operations Manager for Owen Trucking.
 12. Shields then spoke with Gardner. Both Shields and Gardner thought that it would take Shields one and one-half to two hours to drive to the shipper in Baltimore from Temple Hills, Maryland. (TR at 32, 44, 152-153).
 13. P.C. Miler⁵, which is used extensively by the trucking industry, showed the distance from Baltimore to Gainesville, Georgia to be 646.7 leg miles and 11.20 leg hours.
 14. According to the P. C. Miler program used by Owen Trucking, the distance from Temple Hills, Maryland to Baltimore, MD is 51.8 miles (Tr. 37-39; CX-3, pg. 1).
 15. The shipment to be transported from Baltimore, MD to Gainesville, GA consisted of aluminum sows.
 16. Loading of the shipment aluminum sows would have taken 10 to 20 minutes (Tr. 51-52).

⁵ PC Miler is a software program designed for the trucking industry and used by James E. Owen trucking. The program calculates distances between two points, the estimated driving time required for the trip based on factors that can be modified by the user.

17. A shipment weighing 45,000 pounds is heavy compared to other shipment weights and would cause a tractor-trailer combination to be close to the maximum allowable gross vehicle weight of 80,000 pounds (Tr. 52-53) A shipment of aluminum would
18. be dense and thus use only a relatively small portion of the trailer's cubic capacity (Tr. 54).
19. Due to the weight of the load, the aluminum sows would need to be distributed so as to avoid having excess weight on the trailer axles (Tr. 54-55).
20. The driver transporting the shipment of aluminum sows would have to ensure that the load is blocked and braced before it left the shipper dangers would be posed if the shipment was not adequately blocked and braced (Tr. 56-58).
21. After the driver had completed blocking and bracing of the shipment he would have to obtain the bill of lading and/or manifest for the shipment and make sure the piece count for the shipment is correct. (Tr. 58, 210-211).
22. If Shields had accepted the dispatch from Baltimore, MD to Gainesville, GA he would have been on duty waiting at the shipper for instructions, backing the trailer into a loading dock door, waiting while the shipment was loaded, reporting back to the shipping desk to receive paperwork such as the bill of lading and a load manifest (Tr.48-58).
23. If Complainant had managed to go off duty by 6:30 p.m. on December 19, 2006, he would have been able to go back on duty, no earlier than 4:30 a.m. on December 20, 2006, in order to avoid a violation of hours of service regulations.
24. A trailer loaded with a shipment of aluminum weighing 45,000 pounds or more should be weighed at a commercial scale in order to avoid exceeding maximum gross vehicle weight rating (Tr. 59). The nearest place where Shields could have weighed the load on December 20, 2006, would have been at a truck stop at Jessup, MD (Tr. 62).
25. John Griffith, a driver/auto parts specialist who testified as an expert on behalf of Shields, opined that it would have taken Shields one-half hour to load the 45,000 pounds of aluminum sows at the shipper, another hour to block and brace the load, and another ten to fifteen minutes to complete the paperwork at the shipper (TR at 206-210).
26. When Shields was asked during the June 12, 2007, proceeding whether Shields thought he could “have driven from Temple Hills, Maryland to Baltimore and done all those things, loaded the load and blocked and braced it got—found safe haven by 6:30,” Shields responded, ““Maybe, maybe not.” (TR at 153).

27. Shields told Gardner that he could not take the load to Gainesville, Georgia, because he was going to run out of hours, and he had to take a ten-hour break. (TR at 150).
28. C. H. Robinson scheduled the load to deliver in Gainesville on December 20, 2006 (TR at 77), and the C.H. Robinson confirmation noted a delivery window of 8:00 a.m. to 4:30 p.m. on December 20, 2006, but Owen Trucking had not set a delivery appointment time at the time Shields and Gardner spoke about the Gainesville, Georgia delivery. (TR at 77, 278).
29. Shields and John Griffith opined that it would have taken Shields twelve to thirteen hours of actual driving time to get to Gainesville, Georgia, from Baltimore, (TR at 155, 229), which would have meant that Shields could not deliver the load in Gainesville, Georgia on December 20, 2006, because of the ten-hour break he would have been required to take under the hours of service regulations. (TR at 120-121).
30. If a delivery appointment had been set in Gainesville, Georgia for December 21, 2006, Shields could have delivered the shipment without a violation of the hours of service regulation.
31. On the afternoon of December 19, 2006, Shields refused the dispatch of the shipment from Baltimore, MD during a telephone conversation with Dennis Gardner. During this same conversation Gardner discharged Shields.
32. On December 19, 2006, when Shields refused to pick up the load in Baltimore, Maryland, and deliver it to Gainesville, Georgia, Gardner told Shields to bring the truck home and clean it out. (TR at 33).
33. Gardner thus fired Shields on December 19, 2006. (TR at 33-34).
34. Shields took the truck to his home, and did not return the truck to Owen Trucking until December 22, 2006. (TR at 186).
35. Shields earned \$5,102.68 from Owen Trucking from October 16, 2006, when he took his first load to December 19, 2006, when Gardner discharged him (CX-5, pg. 2).
36. Shields average weekly wage while he worked for Owen Trucking was \$ 558.28
37. After his discharge from employment with Owen Trucking, Complainant earned the following wages from other employers:

Interim Employer	Interim Wages	Record References
Mountain Milk Hauling	168.54	CX-6, Tr. 156
Western Express, Inc.	631.81	CX-7, Tr.157-58

C. A. Padgett Enterprises	3,055.69	CX-8, Tr. 158
Patterson Brothers Paving	3,228.50	CX-15, 160-61
Nationwide Transportation Partners	250.00	Tr. 161-62
TOTAL:	\$ 7,334.54	

38. On January 9, 2007, Shields, by his attorney, filed a complaint with the United States Department of Labor, Occupational Safety and Health Administration, alleging that Owen Trucking had discharged him and discriminated against him in violation of the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA"). The Complaint was timely filed.
39. On February 13, 2007, the United States Department of Labor, Occupational Safety and Health Administration, issued a preliminary determination pursuant to 49 U.S.C. 31105(b)(2)(A).
40. On February 23, 2007, Shields, by his attorney, filed an objection to the Secretary's preliminary determination and requested a hearing *de novo* before the United States Department of Labor, Office of Administrative Law Judges. Shield's objection and request for a hearing *de novo* was timely filed.
41. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and the subject matter of this proceeding.

*The Testimony of Dennis Gardner (Operations Manager at Owens Trucking)*⁶

On Direct Examination of adverse witness:

Mr. Gardner testified that he is the Operations Manager at Owen Trucking for approximately seven years. Mr. Gardner also testified that he was the one to fire the Complainant on the 19th of December. (TR2 at 32-33)⁷ The Complainant was told to bring the truck home, bring his fuel card home, and all of his paperwork. He did not bring the truck back in until the 22nd. The Complainant was fired during the conversation regarding his order to pick up a load in Baltimore that was going to Gainesville. Mr. Gardner stated that four people work in the office, including him.⁸ He also testified that the Complainant originally called in and spoke with Mr. Preston, who was attempting to dispatch the Complainant for the previously mentioned load. The call

⁶ Mr. Gardner was an adverse witness first questioned by Paul Taylor, Counsel for the Complainant.

⁷ TR2 refers to the Transcript of the hearing held on June 12, 2007, in Roanoke, VA.

⁸ The four workers include Mr. Gardner, Mr. Sale, Mr. Preston, and Darlene Gardner.

was then transferred to Mr. Gardner. The Complainant refused to take the load for the full trip because he had to take a break before he got to Gainesville. He would run out of hours.⁹ The Complainant testified that he argued with Mr. Gardner regarding the ability to complete the dispatch order without taking a mandatory 10 hour break. The Complainant's phone conversation with the dispatcher and Mr. Gardner took place sometime between 2:00 pm and 2:40 pm. Complainant was in Temple Hills, MD, in the DC area.

Mr. Gardner testified that the company uses P.C. Miler to calculate the mileage between points of interest. The P.C. Miler report stated that it was 51.8 miles from Temple Hills, MD to Baltimore, MD, the site of the pickup. The Complainant would not be facing a significant amount of traffic at that time of the day. Mr. Gardner agreed that, based on the 14 hour rule, if the Complainant went on duty at 4:30 AM on December 19, then he would have to go off duty by 6:30 PM. Mr. Gardner stated that he did not know the exact whereabouts of the Complainant at the time of dispatch, but knew he was somewhere in the DC area in Maryland. Mr. Gardner had told OSHA that the distance was seventeen (17) miles because he was guessing at the mileage and he was not in front of his computer to look it up on PC Miler. Mr. Gardner testified that the distance would not change his conclusion that the Complainant would be able to make it to Baltimore in approximately 2 hours.

In his deposition, Mr. Gardner admitted that Baltimore would have worse traffic than DC by the time Complainant got there. The shipper, C.H. Robinson, told Mr. Gardner they wanted a truck at 4:00 p.m. and that if he wanted to buy a little extra time he could because they did not close until 5:00 p.m.

Mr. Gardner testified as to the procedures necessary prior to loading the truck for shipment, such as backing it into the dock, walking around the truck to make sure everything is intact, and opening the door of the trailer for loading. The Complainant's load in Baltimore was palletized aluminum, with an estimated weight of 45,000 pounds. If a load is palletized it will go in quicker than an unpalletized load. The load would have taken 10 to 20 minutes. Regarding the legal restrictions of the axle weight, Mr. Gardner testified that the regulations permit 12,000 pounds on the steering, 34,000 on the drives, and 34,000 on the trailer. After the load is set, the driver is responsible for blocking and bracing the load; a standard provision written on all Robinson loads. The Federal Motor Carrier Safety Regulations state that it is the driver's responsibility to ensure that cargo is adequately secured. After the blocking and bracing, the driver must get his bill of lading. After he leaves the shipper he must find a place to stay. The driver must take a 10 hour break from the time he goes off duty. If he went off duty at 6:30 p.m. he would be able to get back on duty at 4:30 a.m. Mr. Gardner testified that after the Complainant goes on duty he would have to do his daily vehicle inspection first, which at best, would take 15 minutes. He would start driving at 4:45 a.m. Then he must go to a truck scale to get scaled. It would take him approximately 30 to 35 minutes to find a truck scale. From where the pickup location was, the best case scenario is that the driver would be at the truck scales at 5:15 a.m., and you can rarely get in and out of the scales in 30 to 35 minutes, so we're looking at 5:45 a.m. heading to Gainesville. By the time he gets to Washington, DC the driver will be facing traffic at around a quarter of 7:00. He will get to Richmond probably two and a half to

⁹ When a driver is "out of hours", it means that the driver has to take a break, you cannot drive any further without violating the Hours of Service Regulation. The driver must take a ten (10) hour break.

three hours after he leaves DC. If the Complainant cannot make it in 11 hours driving time he will have to take another 10 hour break. As the Complainant is driving and completing his route he will be taking restroom breaks and meal breaks. If the driver is called into a scale along the way that will slow him down, and there are usually lines at the scale which slow him down further.

Mr. Gardner testified that he never had a conversation with Mr. Sale regarding the Complainant's hours. Mr. Gardner also stated that Owens Trucking never provided a performance review to the Complainant because performance reviews were not done at that time. Mr. Gardner stated that the appointment for the delivery of the load had never been made. In a prior deposition, Mr. Gardner had stated that the load was scheduled to be delivered the next day, although no appointment was made. There was no delivery time appointment on it. Mr. Gardner was questioned repeatedly concerning the scheduled delivery of the load on Wednesday, December 20th. Mr. Gardner insisted that in his deposition he had stated that the load was scheduled for a Wednesday delivery date but that no appointment had been set on it.

Mr. Gardner testified that he consulted with Mr. Preston on several occasions prior to firing the Complainant. Mr. Gardner was shown an exhibit containing a PC Miler report from Baltimore to Gainesville stating "leg miles 646.7" and leg hours "11.20."¹⁰ Counsel for Claimant reviewed several payroll records with Mr. Gardner.

When questioned about the discrepancy in pay between drivers employed by the Respondent and how drivers in comparable positions could earn more money, Mr. Gardner made a distinction between "steering wheel" drivers and "truck drivers," stating that the former did not make much money because they were not willing to take freight wherever it needed to go. Mr. Gardner expects his drivers to put 70 hours a week in the log book. A driver can put in 70 hours a week in his log book, which is total time, not driving time.

Cross-Examination:

Mr. Gardner stated that the Complainant was fired not only for the refusal to pick up the load on the 19th, but also for all of the late deliveries. The Complainant was late 16 or 17 out of 21 loads. The Complainant was warned several times about taking the truck home. The final straw was taking the truck home, the lateness in the deliveries, and the refusal of the deliveries.

Re-Direct Examination:

Mr. Gardner was questioned about Stanley Oldham, who also took the truck home. Mr. Oldham was reprimanded for this action several times, according to Mr. Gardner. Mr. Gardner stated that Mr. Oldham no longer worked for James E. Owen Trucking. The Complainant's refusal to pick up the load in Baltimore was the straw that broke the camel's back. Mr. Gardner stated that the Complainant had enough hours to get the load picked up. Mr. Gardner testified that the broker had told him that the load should be delivered the next day. Mr. Gardner disputes having received any firm delivery time from the broker. The Complainant was late 16 or 17 times out of 21 loads and had been warned several times. On the 19th of December the Complainant was

¹⁰ See pages 81-82 of June 12, 2007, hearing transcript.

working for James Owen trucking and was fired immediately after refusing to pick up the load in Baltimore.

Re-Cross Examination:

Mr. Gardner was questioned about the delivery on the 20th of December. He stated that the 20th was a 24 hour day and that the Complainant could have made the delivery to Gainesville without violating provisions of the STAA.

The Testimony of John Sale (Safety Director at Owens Trucking)

On Direct Examination of adverse witness:¹¹

Mr. Sale found out that the Complainant was going to be fired when Mr. Gardner discharged him. It was obvious to Mr. Sale that there was an argument going on between Mr. Gardner and the Complainant. Mr. Sale disputed opposing Counsel's insinuation regarding the dispatch order to pickup the load and also deliver it. Mr. Sale was not sure if delivery was included in the dispatch order of the 19th. The witness was shown a load confirmation sheet showing delivery times between 8:00 and 16:30. Mr. Sale said that this window was not set in concrete. The witness agreed with Counsel's hypothetical that if the Complainant left Baltimore at 5:45 a.m., he would not get to the destination in the 24 hour period Mr. Sale had previously questioned Mr. Gardner about.

It was Mr. Sale's impression that the Complainant's refusal of the load from Baltimore was, the "straw that broke the camel's back" with respect to Mr. Shields getting fired.

Redirect Examination

Mr. Sale did state that he could only hear one side of the conversation that Mr. Gardner was having with a third party. However, he did state that there were a lot of assumptions that could be drawn from Mr. Gardner's end of the conversation.

The Testimony of Lynley Owensby (Fiance of Complainant)

On Direct Examination:

Ms. Owensby testified that she is unemployed, has been disabled for 12 years due to cancer, and was previously a carpet installer. She stated that she had cancer which started in December 1996, and that it is incurable. She became engaged to the Complainant on March 8, 2005. The date of marriage was set for March 8, 2006. It was changed due to financial considerations resulting from job loss. Ms. Owensby has two children not related to the Complainant. Ms. Owensby lives with the Complainant and recalls the day he was fired from James Owen Trucking.

She testified that the Complainant had called her that morning and told her he had just been fired for not taking a load because he was out of hours. The Complainant was very upset about the situation. He was an upbeat guy, according to his fiancé. Things between the Complainant and his fiancé became distant due to the stress. There was a change in him on the 19th. He was very

¹¹ Mr. Sale was an adverse witness first questioned by Paul Taylor, Counsel for the Complainant.

frustrated. Things are stressful and, financially, the Complainant and his fiancé cannot enjoy some of the activities they used to do.

The witness also testified as to Stanley Oldham, who lives approximately 4 miles from her. She has been by his house. She and the Complainant had stopped to talk with Mr. Oldham on occasion. There were occasions when a James Owen truck was parked in front of his house, the most recent time being the night prior to this hearing. Prior to this incident, she testified that she had seen it in the shopping center, in front of the Dollar store, and numerous times on Orange street, and he brought it to her house on one occasion. She has seen the truck parked in front of his house at least 3 times in the past six months.

Testimony of Duncan Shields (Complaint)

On Direct Examination:

Mr. Shields testified that he has been a truck driver for approximately 20 years, employed by about 20 different trucking companies. He operated his own trucking company for about 5 years. He has never had any accidents in a commercial vehicle and has not received any moving violations. He also has not had any traffic offenses in his personal vehicle.

The Complainant went to work for James Owen Trucking on October 11, 2006.¹² He also testified that he had a load going to Arlington, VA on the 18th, with two drops, one in Arlington, and the other in Temple Hills, MD. He was not able to deliver the load on the 18th because he did not have directions into Arlington. He relies on dispatchers and receivers for directions. Mr. Preston was the dispatcher at the time. The Complainant testified that Mr. Preston did not give him driving directions and that Mr. Sale ultimately got directions for him about 4:00 p.m. However, it was too late in the day to make the delivery in Arlington. The Complainant went on duty at 4:30 a.m. on December 19th. He did his pre-trip inspection, which takes approximately 15 to 30 minutes. He made delivery in Arlington at 6:00 a.m, but there was no one to receive the load. From 6:00 a.m. until 11:15 a.m., the Complainant waited for somebody to show up to unload the trailer. Somebody showed up at 10:00 a.m. Complainant next attempted to go to Temple Hills, MD, but went the wrong way based on the receiver's instructions. The Complainant finally arrived at the Temple Hills location and began unloading at 1:45 p.m. He was unloaded at 2:30 p.m. The Complainant testified that he next called Mr. Preston, who called him back at 2:40 p.m. and gave him information on the next load and also told the Complainant to call C.H. Robinson. The Complainant spoke with Chad at C.H. Robinson. Chad gave the Complainant a window of 8:00 a.m. to 4:00 p.m. on the following day as the delivery window. The Complainant responded by saying he could not deliver it by the next day. Chad instructed the Complainant to call his dispatcher. The Complainant testified that he called Mr. Preston and Mr. Preston transferred the call to Mr. Gardner, who told the Complainant to be in Gainesville by 8:00 a.m. The Complainant refused and Mr. Gardner told him to clean my stuff out and bring the truck back. After talking with his fiancé, the Complainant called Mr. Sale. Asked if Mr. Gardner had fired the Complainant for not breaking the law, Mr. Sale responded by saying: "what Dennis [Gardner] said." The Complainant stated that there was no way to deliver the load the next day without breaking the hours of service regulation. The Complainant, at the time,

¹² See page 137 of June 12, 2007, hearing transcript.

estimated that it was about 50 miles to Baltimore and would take him roughly 1 ½ to 2 hours to get there. Asked whether he could have completed all of the work necessary for picking up the load and then find safe haven for the night, Mr. Shields responded “maybe, maybe not.” He estimated that the distance between Baltimore and Gainesville was approximately 650 to 700 miles, and that very little of the highway route consisted of 70 mph speed limits.

Mr. Shields testified that his total income from James Owen Trucking from October 11, 2006 through December 19, 2006, was \$510.68. He also stated that he worked for various companies subsequent to his firing from Owen trucking.¹³ The Complainant also testified that he sought employment with several trucking companies. He was turned down by several, one of which referred him to Owen Trucking for an explanation as to why he was denied employment. He called approximately 10 carriers.

Complainant testified that the unemployment has affected him in more ways than just financially, impacting his Christmas holiday, and disrupting his proposed plans for marriage with his fiancé.

Complainant testified that he did see a James Owen truck parked outside Stanley Oldham’s house. He knew it was an Owen truck because of the model and because there was a sign on it that said so.

The Complainant stated that he is seeking his job back, and he wants backpay, and wants to receive reimbursement of his attorney’s fees and case expenses.

On Cross-Examination

Complainant testified as to the number of jobs he has held over his 20 year career as a truck driver. He stated that most of the bouncing around occurred during his twenties, and that more recently he has stayed at companies much longer. He testified that he has had only one or two late deliveries.

The Complainant was unable to determine whether he was still on duty after his firing because he was driving a commercial vehicle and had to abide by the DOT rules. The Complainant testified that he worked, at most, 40 to 50 hours a week.

When questioned about his general efforts to seek employment after being terminated by the Respondent, the Complainant testified that the previous Sunday he had looked for jobs in the Roanoke paper and found only two. In response to questioning about finding a job in a market with a shortage of drivers, the Complainant said that he was blacklisted by James Owen Trucking.

The Complainant testified that, at one point, he was in business for himself and had a trucking company. He had filed for divorce and before his wife could get it he got rid of it. He also testified that he went to his house with the truck before coming back to the yard, because he did not have a car at the yard. He needed to unload his TV, movies, clothing, pictures, and other personal items. He brought the truck back on December 22.

¹³ See pages 155-162 of transcript of hearing held on June 12, 2007.

Re-Direct Examination:

According to the Complainant, after he was fired by James Owen Trucking, he was not under any dispatch orders, was not given a timeframe for bringing back the truck, and was not under any obligation to haul loads or do any activity for James Owen trucking.

He also testified that he had no way of getting home after Mr. Gardner fired him. He had to have someone meet up with him and he had to unload all of his personal belongings that are in the truck. The truck is essentially a home when at work. It has a sleeper unit, with bedding, pictures, books, and a television is inside the truck. It is a lot easier to unload the personal property at home instead of unloading it into a car and then driving it home.

Questioning by the presiding Judge:

The Complainant testified that the 19th of December was a clear day without any snow. The weather was fair.

Testimony of John Griffith (Complainant's Expert Witness Truck Driver/Auto Parts Specialist)

Direct Examination

Mr. Griffith became a professional truck driver in 1997. He started out hauling automobiles and as he became a Class A driver, he has operated drive vans only. That is the type of van James Owen Trucking utilizes. A dry van is an enclosed container for hauling cargo. Witness testified that he has operated in 48 states. He has driven at least a dozen trips on I-85. He has worked for several carriers. The witness has also consulted for Complainant's Counsel in other cases. The witness keeps abreast of truck technology and DOT regulations by reading the trucking magazines and Federal Motor Carrier Regulations, as well as the FMCSA (Federal Motor Carrier Safety Administration.) The witness has also been a complainant in an STA case, with Mr. Paul Taylor, Esq., as his attorney.¹⁴

Mr. Griffith testified that the Complainant would first encounter a problem with finding a place to stay. At 6:00 p.m. on December 19th, it would be very difficult to find a truck stop and he may have to go all the way to Virginia before finding one. This would put him in an hours of service violation. In Mr. Griffith's opinion, it would have taken approximately 2 hours to get from Temple Hills, MD to Baltimore in the heavy traffic and finding a place to park for the night is very difficult at that time of the day. You cannot just park anywhere.

In addition, the Complainant had to go through several procedures to get the load picked up. If Mr. Shields arrived at the shippers at 4:40 pm, then he would be out of there in no less than an hour. At that point, he has some trip planning to do. He has to get his logs taken care of. Paperwork probably will take 10 to 15 minutes. Overnight truck parking is also a problem,

¹⁴ Respondents object to the qualifications of the expert witness, arguing that his occupation as a truck driver does not qualify him as an expert witness. Complainant responds that the expert is going to testify as to his simulation of the route between Baltimore and Gainesville, intended to aid the trier of fact in understand that the route could not have been completed in less than 11 hours. The testimony was allowed as it went to the issue of credibility as well as the distance and possible time of completion.

depending on who you talk to. In Mr. Griffith's opinion, the northeast corridor is especially problematic for truck parking. Listening to all of the testimony at this hearing, if Mr. Shields had received dispatch orders at 2:40 p.m. to pick up a load in Baltimore from Temple Hills, MD, he would not have been able to find a safe haven by 6:30 pm in order to avoid an hours of service violation under the 11 hour rule.¹⁵

Mr. Griffith ran a test route between Gainesville and Baltimore starting in Gainesville. In the simulation, he maintained his speed as close as possible to the posted speed limit. He testified that he ran the route that Complainant would have run and did not deviate from it. He started from the destination on the manifest to the Rocker terminal in Baltimore. By actual count the distance was 675 miles. The odometer was checked against mile markers for accuracy. The trip began at 10:15 am on Sunday. The traffic was light through North and South Carolina. About 100 miles of the route is posted at 70 miles per hour speed limit. Approximately 50% is posted at 65 mph. It took 11.3 hours of elapsed time to drive the route, averaging 58 to 59 mph. The Complainant's load was also heavy and the likelihood would have been that he would be pulled in for a platform scale to determine the gross weight and the axle weights. In Mr. Griffith's opinion, if Mr. Shields started at 6:00 am, the actual driving time for a truck with a freight of 45,000 pounds would be in the vicinity of 12 or 13 hours, which is straight through driving.

Cross-Examination:

Mr. Griffith was questioned about the size of the pallets, the configuration of the load and the actual weight. Mr. Griffith's understanding of the load came from the C.H. Robinson manifest. Mr. Griffith was asked if he had seen an actual load confirmation from C.H. Robinson. He responded that he had not other than the one from the Complainant.

Mr. Griffith was briefly questioned about the accuracy of the simulation run since he ran the test in the opposite direction of the actual route that Mr. Shields would have taken from Baltimore to Gainesville. Mr. Griffith indicated that the traffic in both directions on that particular Sunday was similar and the northbound direction of the route did not render the simulation inaccurate.

Mr. Griffith also testified that he had never been to the truck stop in Jessup, Maryland, but has been to several truck stops near the Baltimore area. Mr. Griffith also testified that truckers at these stops park for various periods of time. Some stay for a 10 hour break, while others are there for several days waiting for a load. Some leave after dinner and a spot opens up for another driver.

Mr. Griffith also testified that he has worked for four companies and has a clean record.

Re-Direct Examination:

There was some commercial traffic activity on the day of the simulation. When Mr. Griffith entered the Washington, DC area rush hour was ending. The traffic going in the opposite direction was not different. The fact that the simulation was done in reverse route did not change the mileage calculation.

¹⁵ The eleven (11) hour prohibits more than 11 hours of driving in a 14 hour period. The fourteen (14) hour rule states that once you have been on duty for 14 hours you must take a 10 hour break, and the seventy (70) hour rule states that a driver can only be on duty seventy hours in an eight day period.

Testimony of Norvel Preston (Dispatcher at James Owen Trucking)

Direct Examination:

Mr. Preston testified that he dispatched the Complainant at around 2:00 pm; the Complainant responded that he did not want to do it and would be pushed for hours. Mr. Preston stated that he never discussed delivery appointment times, which are set by James Owen Trucking. Mr. Preston overheard a conversation between the Complainant and Mr. Gardner. Nothing was said about delivery appointment. In Mr. Preston's opinion, the Complainant had enough time to pick up the load. The Complainant had 2 ½ hours to pick it up. There is no way of knowing because he did not attempt it. There was discussion about buying extra time from the shipper, maybe getting in as late as 5:00 pm.

Mr. Preston stated that problems with the Complainant in the past included late deliveries on a fairly regular basis, and an inability to reach the Complainant. Like a lot of the drivers, he would call in when he was on time, but you will not hear from them when they are late.¹⁶

Mr. Preston testified that Mr. Stanley Oldham last worked for James Owen Trucking on May 27, 2007. He was dispatched on a load on the 26th and Mr. Preston spent the entire next day looking for him. The truck that was purportedly seen at his house is sitting in James Owen Trucking parking lot behind two disabled trucks. The satellite tracking system does not show any trucks in Bedford.

Cross-Examination:

Counsel for Complainant attempted to impeach Mr. Preston's credibility by referring to Mr. Preston's prior conviction for aiding and abetting false entries on log books. Mr. Preston had plead guilty to two counts of falsification of logs. Mr. Preston also plead guilty to giving false information to the office of Motor Carriers of the Federal Highway Administration and was incarcerated.

Mr. Preston testified that his prior employment included part owner and dispatcher of K & C Trucking, of which he had 30% ownership. Mr. Preston testified that the Office of Motor Carriers had questioned him about a driver who had tested positive for controlled substances and that Mr. Preston was aware that the driver tested positive and that K&C Trucking was assessed a civil penalty of \$7,500.00. A follow-up compliance review revealed that K&C had failed to maintain its drivers log books and allowed an employee to operate a commercial motor vehicle to transport flammable hazardous materials without a valid license as required under federal regulations.

¹⁶ As an example, Mr. Preston recounted two separate shipments from Lee Carpet in Glasgow to Raleigh, North Carolina. The first one was late, according to Mr. Preston, and so was the second one. It was two to three weeks before James Owen got another shipment out of that plant.

Questioning by judge:

On questioning by the judge regarding the Lee Carpets delivery and account, the witness testified that there was no documentation that a delivery had been late, and that no letters existed indicating that the company would no longer use James Owen Trucking.

When Mr. Preston spoke to Mr. Shields and he was dispatched up there was never any question as to the delivery because it had not been set. The only question was getting the load picked up. He had adequate time to get the load picked up. The delivery time would get set the next day after we saw what time he got out of DC. The bottom line is that Mr. Shields was let go because of the late deliveries and wouldn't cooperate and wouldn't call in and it was just a constant problem.¹⁷

Cross-Examination:

Mr. Preston testified that the computer logs they maintained show the time when the driver was dispatched, what time he arrived, but it does not show how many hours the driver had under the hours of service regulation.

Mr. Preston reiterated his earlier testimony that he had not said anything to Mr. Shields regarding the delivery date and time. Counsel for the Complainant referred Mr. Preston to his earlier deposition on this matter. Questioning in that deposition follows:

- [Question]:* When was the load scheduled to be picked up in the Baltimore area?
[Answer]: It was scheduled to be picked up that afternoon.
[Question]: Are you talking about December 19, 2006?
[Answer]: Whatever date it was he was up there, I'm not sure what the date was.
[Question]: When was it scheduled to be delivered in Gainesville, Georgia?
[Answer]: The next day.
[Question]: What time?
[Answer]: There had to be an appointment made.
[Question]: Did you dispatch Mr. Shields on that load?
[Answer]: Yes, sir.
[Question]: Okay, who was to make the appointment on the load?
[Answer]: I was. I was or the broker, let me rephrase that.
[Question]: Did you tell Mr. Shields that the load had to be delivered the next morning?
[Answer]: I told Mr. Shields it had to be delivered the next day.

¹⁷ The Respondent's exhibit showing delivery times had not been on the exhibit list. Counsel for the Complainant objected to its introduction after the Complainant has rested. The records were admitted into the record as exhibit 8, RX8.

DISCUSSION

The Respondent is engaged in transporting cargo and maintains a place of business in Forest, VA. The Respondent is a “person” within the meaning of 49 U.S.C. § 31101 and 49 U.S.C. § 31105 and a “commercial motor carrier” within the meaning of 49 U.S.C. § 31101, and it is therefore covered by the Act. The Respondent employed the Complainant as a driver of a commercial vehicle in its commercial motor carrier business, and he drove the Respondent’s trucks over highways on interstate routes. In the course of this employment, the Complainant had a direct effect upon motor vehicle safety. He is therefore covered by the Act.

APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

(a) Prohibitions:

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

(A) 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 vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

(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 or health; or

(ii) The employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition. 49 U.S.C. § 31105(a).

Prima Facie Case

Claims under the STAA are adjudicated pursuant to the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, the complainant must initially establish a prima facie case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987); *see also Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To establish a prima facie case of retaliatory discharge under the Act, the complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the employer. *Moon, supra*.

Protected Activity

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992); *see also Lajoie v. Environmental Management Systems, Inc.*, 1990-STA- 00031 (Sec'y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. *Nix v. Nehi-R.C. Bottling Co.*, 1984-STA-00001, slip op. at 8-9 (Sec'y July 4, 1984). An employee's threats to notify officials of agencies such as the Department of Transportation or the Federal Motor Carrier Safety Administration may also be protected under the STAA. *William v. Carretta Trucking, Inc.*, 1994-STA-00007 (Sec'y Feb. 15, 1995).

Such complaints may be oral rather than written. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. *See Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

Under the STAA, an employee can also engage in protected activity by refusing to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health" or because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C §§ 31105(a)(1)(B)(i)-(ii). These two types of refusal to drive are commonly known as the "actual violation" and "reasonable apprehension" subsections. *Eash v. Roadway Express, Inc.*, ARB No. 04-036, slip op. at 6 (Sept. 30, 2005) (*citing Leach v. Basin Western, Inc.*, ARB No. 02-089, slip op. at 3 (July 31, 2003)). Determining when the STAA protects a refusal to drive requires an analysis of the specific circumstances of the refusal to drive under each of these subsections. *Id.*, *citing Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-5, slip op. at 7-8 (ARB Mar. 29, 2000).

The Complainant alleges that, in response to a dispatch order, he refused to operate a vehicle because the operation of the vehicle would violate a regulation of the United States related to commercial motor vehicle safety. 49 U.S.C. § 31105(a)(1)(B)(i).

Adverse Employment Action

The employee protection provisions of the Surface Transportation Assistance Act provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). There is no dispute that the Complainant was terminated by the Respondent on December 19, 2006. (TR at 33-34) Thus, it has been established that he suffered adverse employment action within the meaning of the Act in this case.

Causal Connection

A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the employer was aware of the protected activity and that adverse action followed closely thereafter. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Thus, close proximity in time can be considered evidence of causation. *White v. The Osage Tribal Council*, ARB No. 99- 120, slip op. at 4 (Aug. 8, 1997). While temporal proximity may be used to establish the causal inference, it is not necessarily dispositive. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6 (Apr. 28, 2006). When other, contradictory evidence is present, inferring a causal relationship solely from temporal proximity may be illogical. *Id.* Such contradictory evidence could include evidence of intervening events or of legitimate, nondiscriminatory reasons for the adverse action. *Id.*

Rebutting the Complainant's Prima Facie Case

If the Complainant can carry his burden of establishing a prima facie case, the burden shifts to the Respondent to rebut that prima facie case. The Respondent can do so by articulating, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. The employer “need not persuade the court that it was actually motivated by the proffered reasons,” but the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). “The explanation provided must be legally sufficient to justify a judgment for the [employer].” *Id.* If the Respondent is successful, the prima facie case is rebutted, and the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the respondent was a mere pretext for discrimination. *Id.* at 255-256.

The Respondent is a trucking company that is engaged in the transportation of goods on interstate highway routes throughout the United States. The Respondent is a “person” within the meaning of 49 U.S.C. § 31101 and 49 U.S.C. § 31105 and a “commercial motor carrier” within the meaning of 49 U.S.C. § 31101, and it is therefore covered by the Act. The Respondent employed the Complainant as a driver of a commercial vehicle in its commercial motor carrier business, and he transported loads of goods over highways on interstate routes. In the course of this employment, the Complainant had a direct effect upon motor vehicle safety. He is therefore covered by the Act.

Complainant's Protected Activity

The parties stipulated to the fact that the Complainant began working for the Respondent as an employee on or about October 11, 2006; that on December 19, 2006, the Complainant went on duty at 4:30 a.m.; that on December 19, 2006, between 2:00 and 2:40 p.m., Complainant received an order from dispatcher Norvel Preston, of Owens Trucking, to pickup a load in Baltimore scheduled for delivery in Gainesville, Georgia; that Mr. Preston instructed the Complainant to call the broker/customer, C.H. Robinson, for delivery times and; that the Broker stated the delivery time to be a window between 8:00 a.m. to 4:00 p.m. on Friday, December 20, 2006.

The parties further stipulated to the fact that the Complainant told Mr. Preston that he could not pick up the load in Baltimore and deliver it in Gainesville because he did not have enough driving hours; that Complainant's concern was verbally expressed to Owens Trucking Operations Manager, Dennis Gardner and, that the Complainant refused the dispatch of the shipment from Baltimore in a telephone conversation with Mr. Gardner on December 19, 2006.

The first inquiry is whether Complainant's activity is protected under the STAA provisions. Complainant alleges that his refusal to drive is a protected activity. An employee must actually refuse to operate a vehicle to be protected under the refusal to drive provision of the STAA. 49 U.S.C. § 31105(a)(1)(B). *Williams v. CMS Transportation Services, Inc.*, 94-STA-5 (Sec'y Oct. 25, 1995). The parties stipulated to the fact that the Complainant expressed to Mr. Gardner his refusal to drive the vehicle and pick up the load in Baltimore. An STAA complaint under 49 U.S.C. § 31105(a)(1)(B)(i) also requires that a complainant show an actual violation of a commercial motor vehicle safety regulation; it is not sufficient that the driver has a reasonable good faith belief about a violation.¹⁸ See *Cook v. Kidimula International, Inc.*, 95-STA-44 (Sec'y Mar. 12, 1996). The complainant must prove by a preponderance of the evidence that an actual violation of a regulation, standard, or order of the United States would have, in fact, occurred had the complainant operated the vehicle.

The Complainant was dispatched at sometime between 2:00 p.m. and 2:40 p.m. on December 19, 2006. He was to drive from his then current location in Temple Hills, Md, to the warehouse in Baltimore to pickup a load of aluminum sows. The distance between these two points was stipulated to be 51.8 miles. On direct examination by Complainant's Counsel, Mr. Gardner testified that upon arrival at the shipper, the driver goes to the shipping desk to announce his arrival and obtain a dock to back the truck into. (TR 47-49) He then waits for the load to be loaded (TR 57-58. Once the trailer is loaded the driver will need to block and brace the load so that it is properly distributed. (TR 55-56) He then goes back to the shipping desk to receive the bill of lading and ensure that it is correct. (TR 58) Finally, because the Complainant is approaching his maximum driving time, he must find a truck stop to go off duty. Depending on the shipper, he may be able to stay at the shipper's location. (TR 60)

There was conflicting testimony between Mr. Gardner and that of Mr. Griffith and the Complainant, on the length of time required to complete the pickup of the load in Baltimore. The parties could not stipulate as to the time the order was dispatched, the amount of traffic congestion between Temple Hills, MD and Baltimore between 2:00 p.m. and 6:30 p.m., or the amount of time required for completion of incidental tasks associated with the pickup of the load. Each party's calculation as to how long it would take the Complainant to pick up the load is premised on uncertain variables. During his testimony the Complainant was asked whether he could complete the pickup and avoid an hours of service violation. He responded "maybe, maybe

¹⁸ Based on the mistaken presumption that Complainant's allegation of protected activity was premised on the occurrence of a safety violation, Respondent's Counsel was advised in the telephone hearing on September 20, 2007, that an actual violation was not required, but merely a good faith belief by the Complainant that a safety violation would occur. Complainant's cause of action is based on 49 U.S.C. § 31105(a)(1)(B)(i), which requires Complainant to show that an actual violation occurred or would occur but for the refusal to drive the commercial vehicle. The discrepancy has been noted and Respondent's Counsel so advised.

not.” Picking up the load and finding safe haven without incurring an hours of service violation was a possibility. Even the Complainant was unsure whether an actual violation would occur had the order simply been to pickup the load without any further requirements. Therefore, the facts of the case indicate that any conclusion as to whether an actual violation would occur by attempting to pick up the load in Baltimore is mere conjecture.

However, Complainant was not only asked to pickup the load in Baltimore, but also to deliver the load in Gainesville, GA the following day. The Complainant’s refusal to pickup the load on December 19, 2006 constitutes a protected activity because delivery of the load to Gainesville, GA the following day, on December 20, 2006, would result in an actual hours of service violation. The Respondent argues that an appointment time for delivery was never set. Mr. Gardner testified that the whole discussion during dispatch of the order was whether the Complainant had enough hours to pick up the load in Baltimore, MD. (TR 71) Respondent asserts that the appointment had never been made on the load to be delivered. (TR 74) However, Mr. Gardner’s prior testimony conflicts with his testimony at the hearing. In the deposition, Mr. Gardner was asked about the delivery of the load: (TR 75-76)

[Question]: When was the load scheduled to be picked up that afternoon?
[Mr. Gardner]: It was scheduled to be picked up that afternoon.
[Question]: Are you talking about December 19, 2006?
[Mr. Gardner]: Whatever afternoon it was he was up there. I’m not sure what the date was.
[Question]: When was it scheduled to be delivered in Gainesville, Georgia?
[Mr. Gardner]: The next day.

When shown a copy of the deposition, Mr. Gardner testified that an appointment had not been set. The schedule was the next day, but there was no delivery time appointment on it. When the Complainant received the dispatch order and called the shipping company, he was told to deliver the load between 8:00 a.m. and 4:00 p.m. on December 20, 2006. The load confirmation sheet confirms this delivery window. The Complainant notified the representative of the shipping company that he did not have enough hours. The shipping representative instructed him to contact his dispatcher. The evidence indicates that both the shipping company and the Respondent operated on the belief that the load would be delivered on December 20, 2006. The Respondent; however, argues that a set delivery time had not been set. The Respondent’s assertion is that a 4:00 p.m. fixed deadline did not exist. Despite Respondent’s assertions and evidence to the contrary, the Complainant was precluded from delivering the load on December 20, 2006, regardless of the actual delivery time. A mandatory 10 hour break would prevent delivery of the load prior to December 21, 2006.

Both parties stipulated that the Complainant went on duty at 4:30 a.m. on December 19, 2006.¹⁹ Based on the 14 hour rule, the Complainant would have had to go off duty no later than 6:30 p.m.²⁰ If the Complainant was able to complete the pickup of the load in Baltimore and

¹⁹ See Stipulation of facts, stipulation 7.

²⁰ 49 C.F.R. §395.3(a)(2)

find a rest area prior to 6:30 p.m., he could go off duty earlier. The parties stipulated to a distance of 51.8 miles between Temple Hills, MD and the pickup location in Baltimore; and a 10 to 20 minute wait for loading of the trailer.²¹ Mr. Gardner testified that the Complainant could get from anywhere north of Washington, DC to Baltimore in 2 hours. (TR 43) Once at the shipper's location, the driver would need to report to the shipping desk to receive a vacant dock in which to park and have the trailer loaded. The loading would require 10 to 20 minutes. (TR 52) Once the trailer is loaded, the driver needs to block and brace the load because the driver is responsible for ensuring that the load is adequately secured. (TR 55-56)

The Federal Motor Carrier Safety Administration (FMCSA) requires drivers to ensure that a motor vehicle's cargo is properly distributed and secured. (TR 57) Once the load is blocked and braced, the driver returns to the shipping desk to obtain his bill of lading. (TR 58) Finally, a rest area must be found to park the truck and go off duty. The parties offer differing estimates for the time required to complete the tasks. The difference in the estimates between the Complainant and Respondent does not yield different outcomes. Under both scenarios the Complainant would run into an hours of service violation. Whether the pickup was completed at 5:00 p.m. or 6:30 p.m., the Complainant was required to take a 10-hour break. He would not be able to come back on duty for another 10 hours; 3:00 a.m. on December 20, 2006, at the earliest. The parties stipulated that the distance between Baltimore, MD and Gainesville, GA is 646.7 miles.

The Complainant's expert witness, Mr. John Griffith, tested the route that the Complainant would have taken; however, the test was conducted in reverse from the storage facility in Gainesville, GA, to the warehouse at the shipper's location in Baltimore, MD. Mr. Griffith testified that 50%, or 323 miles, of the entire route consisted of highway with a posted speed limit of 65 mph, and 100 miles of highway at 70 mph. (TR 220-222)

The duration of the trip, calculated with assumptions most favorable to the Respondent, would yield an estimated driving time of 10 hours and 25 minutes. This is premised on the assumption that the driver could attain the maximum posted speed limit at every stage of the trip. The 100 miles of 70 mph route would take 1 hour and 26 minutes. The 323 miles of highway with a 65 mph speed limit would take approximately 5 hours. The remaining 224 miles would take roughly 4 hours, for a total of 10 hours and 27 minutes. This assumes that the speed of the truck was consistently at 70 miles per hour for 100 miles of the trip, 65 miles per hour at 323 miles of the trip, and no less than 55 miles per hour for 224 miles of the trip. The route simulation was run on a Sunday with minimal traffic relative to the traffic normally present on a Wednesday – the day of the scheduled delivery. PC Miler, the software used by James E. Owen Trucking for calculating distances and driving times, calculated the duration of the trip at 11.20 hours. Both parties stipulated to this calculation. Under the best circumstances, the Complainant would be unable to complete the trip with less than 11 hours of driving time. A driver may not drive a commercial motor vehicle more than 11 cumulative hours following 10 consecutive hours off duty. 49 C.F.R. § 393.5 (a)(1). A ten-hour break on December 20, 2006 would effectively preclude the Complainant from delivering the load in Gainesville, GA without an hours of service violation. Thus, Complainant's refusal to pickup the load in Baltimore, MD on December 19, 2006, and deliver the cargo to Gainesville, GA on December 20, 2006 was

²¹ See Stipulation of facts, stipulations 14 and 16.

protected activity because it would have resulted in a violation of the provisions of the STAA, in this particular case, section 393.5(a)(1).

Adverse Employment Action

The Complainant's employment was terminated by the Respondent on December 19, 2006. Any employment action by an employer which is unfavorable to the employee constitutes an adverse action. See *Long v. Roadway Express, Inc.*, 88-STA-31 (Sec'y Mar 9, 1990). Moreover, the fact that an employer may have had a legitimate non-discriminatory reason for the action does not alter the fact that an adverse action took place. Regardless of the employer's motivations, the fact that such an action occurred is sufficient to establish that an adverse employment action was undertaken by the employer. *Id.* The Complainant has met his burden of proving that an adverse employment action was taken.

Causal Link Between Adverse Employment Action and Protected Activity

The Complainant's employment was terminated immediately following his conversation with Mr. Dennis Gardner, in which he told Mr. Gardner that he refused to pick up the load in Baltimore, MD and deliver the load to Gainesville, GA because he did not have enough hours. A causal link between the adverse employment action and the protected activity may be inferred by the proximity between the two occurrences. Close proximity between the protected activity and the adverse employment action may raise the inference that the protected activity was the likely reason for the adverse action. See *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993). The proximity in time between the protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of a *prima facie* case. See *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989) (temporal proximity sufficient as a matter of law to establish the final element in a *prima facie* case of retaliatory discharge); See also *Stiles v. J.B. Hunt Transportation, Inc.*, 92-STA-34 (Sec'y Sept. 24, 1993) (where the Complainant was discharged a week after he raised safety concerns, the Secretary found that the Complainant raised the inference of causation.) Temporal proximity such as this raises a presumption that there is a causal nexus between the protected activity and the adverse action. Mr. Gardner testified that he fired the Complainant immediately after he refused to pick up the load in Baltimore:

[Question]: You fired Mr. Shields on the 19th of December, 2006, correct?
[Mr. Gardner]: I don't have it in front of me, but that sounds correct.
[Question]: And you fired him immediately after – or during a phone conversation when he refused to pick up a load in Baltimore that was going to Gainesville, Georgia, correct?
[Mr. Gardner]: Yes, sir.
[Question]: I mean it wasn't a matter of time. It was during that conversation, correct?
[Mr. Gardner]: Yes, sir, right after he refused to pick up the load.

The Respondent asserts that the termination of employment was triggered by an accumulation of events culminating in the Complainant's refusal to pickup the load in Baltimore. The firing of the Complainant comes so close on the heels of the refusal that it raises an

inference of causation In the present case, the termination occurred so close on the heels of the Complainant's protected activity that it raised an inference as to the Respondent's motive for such adverse action. *See Bergeron v. Aulenback Transportation, Inc.*, 91-STA-38 (Sec'y June 4, 1992) (inference is raised when the discharge immediately follows protected activity.) In the present case, the termination occurred so close on the heels of the Complainant's protected activity that it raised an inference as to the Respondent's motive for such adverse action. *See Bergeron v. Aulenback Transportation, Inc.*, 91-STA-38 (Sec'y June 4, 1992) (inference is raised when the discharge immediately follows protected activity.)

In an STAA whistleblower proceeding, a *prima facie* case requires the Complainant to show that the Respondent was aware of the protected activity when the adverse action was taken. *See Melton v. Morgan Drive Away, Inc.*, 90-STA-41 (Sec'y April 26, 1991) Those responsible for the adverse employment action must be aware of the protected activity. *See Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007) Neither party disputes the knowledge of the Respondent as to the Complainant's refusal to pick up the load in Baltimore because of a concern that the driver lacked sufficient hours to complete the entire trip. Mr. Gardner, Operations manager for Owens Trucking, testified that he fired the Complainant after being told by the Complainant that he did not have enough hours to complete the scheduled delivery of the load. Therefore, Mr. Gardner, who fired the Complainant, was fully aware of the Complainant's worry regarding an hours of service violation when he fired the Complainant.

On December 19, 2006, the Complainant received a dispatch order to pickup a load from Baltimore, MD and deliver the load to Gainesville, GA, the following day, on December 20, 2006. The Complainant informed the Respondent that he did not have sufficient hours to complete delivery of the load as scheduled. Immediately after expressing his refusal to pickup the load he was fired by Mr. Gardner. Because of the close proximity between the firing and the refusal to pickup the load, there is an inference that Respondent's adverse employment action was motivated by the Complainant's allegations. Despite the Respondent's assertions that the firing was premised upon an accumulation of late deliveries and other performance related issues, any legitimate, non-retaliatory reasons the Respondent had for terminating the Complainant's employment with the company will not be a consideration at this stage of the analysis. In considering whether the Complainant has established a *prima facie* case under STAA, it is improper to consider the Respondent's reasons for the adverse action, regardless of their legitimacy. *See Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992); *Barr v. ACW Truck Lines, Inc.*, 91-STA-42 (Sec'y Apr. 22, 1992); *Hernandez v. Guardian Purchasing Co.*, 91-STA-31 (Sec'y June 4, 1992). The Complainant; therefore, has established a *prima facie* case which must be rebutted by the Respondent.

Rebutting the Complainant's Prima Facie Case

Since the Complainant has established a *prima facie* case of retaliatory discharge, the burden shifts to the Respondent to rebut that *prima facie* case. The employer "need not persuade the court that it was actually motivated by the proffered reasons," but the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)

The Respondent's burden is one of articulation, not proof. The Employer is not under the burden to prove a legitimate non-discriminatory, non-pretexual reason for its actions. *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993); *Shute v. Silver Eagle Co.*, 96-STA-19 (ARB June 11, 1997).

The Employer asserts that the Complainant's termination was not premised solely on the refusal to comply with the dispatch order of December 19, 2006, and pickup the load in Baltimore. To the contrary, what is alleged is that the Complainant had a history of poor performance in delivering loads on schedule in a timely manner. In fact, Respondent alleges that the Complainant was late in delivering sixteen of seventeen loads. The refusal to comply with the dispatch order on December 19, 2006 was merely an accumulation of unacceptable job performance which culminated in the Complainant's termination of employment from Owens Trucking. In support of its argument, the Respondent submits evidence of a letter from one of the company's clients voicing dissatisfaction with the delivery of a scheduled load the Complainant was responsible for. Evidence of untimeliness for other loads the Complainant was responsible for comes from printouts of a computer system that Respondent used for tracking the delivery dates and times of scheduled loads.²² The computer printouts, which appear as manual entries, show delivery times for scheduled loads and reveal scheduled times that are earlier than completed delivery loads by the Complainant. The Respondent states that no performance reviews were conducted during the tenure of Complainant's employment with the Respondent. Performance reviews were not conducted for any drivers, including the Complainant. The Respondent states that performance reviews have since been instituted as part of the company's employment practices. Thus, Respondent produces no evidence that it was dissatisfied with the Respondent's job performance beyond the introduction of computer generated printouts of its scheduled load data entry system and the letter of dissatisfaction from one of its clients.

Respondent also alleges that the Complainant, upon being fired, was ordered to clean out the truck and bring it in. Respondent cites the Complainant's failure to return the truck on the 19th as one of the reasons for his termination. However, the failure to promptly return the truck is an incident subsequent to the Complainant's termination of employment and cannot be a reason for his firing. There is no logical basis to infer a causal nexus between an employee's conduct and an adverse employment action when the conduct occurs subsequent to the employee's termination of employment. The Respondent's reason for firing the Complainant was his refusal to drive the load.

It has already been demonstrated that the Complainant has established a *prima facie* case of retaliatory discharge. The burden of production then shifts to the Respondent to produce an explanation to rebut the *prima facie* case--i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." *See Burdine*, 450 U. S., at 254. "[T]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. *Id.*, at 254-

²² The Complainant's counsel objected to the introduction of evidence showing the delivery dates and times of scheduled loads. The evidence was not furnished to the Complainant prior to the hearing and was introduced at the hearing and objected to the Complainant's Counsel.

255. It is important to note, however, that although the presumption shifts the burden of production to the defendant, the ultimate burden of persuading the trier of fact that the respondent unlawfully retaliated against the complainant remains at all times with the plaintiff," *Id.*, at 253.

If the respondent satisfies this burden of production, the presumption raised by the *prima facie* case is rebutted and drops from the case. *Burdine*, 450 U. S., at 255. The complainant then has "the full and fair opportunity to demonstrate," through presentation of his own case and through cross examination of the respondent's witnesses, "that the proffered reason was not the true reason for the adverse employment decision." *Id.* at 256.

Whether the Respondent was actually motivated by the reason given for the termination is not at issue in this stage of the analysis. See *Burdine*, *supra*; *Auman v. Inter Coastal Trucking*, 91-STA-32 (Sec'y July 24, 1992) (In considering whether the complainant established the elements of a prima facie case, it is error to consider the respondent's reasons for firing the complainant); see also *Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992), *appeal docketed*, No. 92-70102 (9th Cir. Feb. 18, 1992) (it is improper to consider Respondent's reasons for terminating Complainant because to do so would combine the analysis of the complainant's initial burden with the complainant's ultimate burden to establish that Respondent's proffered reason for the adverse action is a pretext for retaliation.)

The Respondent, at this stage of the analysis, has demonstrated a legitimate, non-discriminatory reason for the termination of the Complainant. The burden of production now shifts to the Complainant to demonstrate that the Respondent's proffered reason(s) were merely a pretext for discrimination. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-148 (2000).

Pretext

Because the employer has successfully rebutted the inference of retaliation that arises from the Complainant's *prima facie* case by showing a legitimate motive for the adverse action, the burden now shifts to the employee to rebut the employer's showing by proving that the employer's articulated reason was not the true reason for the adverse action. An employee can prevail by proving that the reason given by employer is "unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In order to prove pretext for discrimination, Mr. Shields must prove both that the reason was false and that discrimination was the real reason. During the course of the hearing, I was able to observe the witnesses and ask some questions. I find that Mr. Shields is the most credible witness as to the incident that led to his termination as a driver for Employer.

Mr. Gardner testified that he fired the Complainant on the 19th of December. (TR 2 at 32-33). On that date, the Complainant refused a load. The parties stipulate that the Claimant was fired on that date by Mr. Gardner for that reason. See stipulations 29 to 32. Both Shields and Gardner thought that it would take Shields one and one-half to two hours to drive to the shipper in Baltimore from Temple Hills, Maryland. (TR at 32, 44, 152-153). See Stipulation 12. Once at the shipper's location, the driver would need to report to the shipping desk to receive a vacant

dock in which to park and have the trailer loaded. The loading would require 10 to 20 minutes. (TR 52) Once a trailer is loaded, the driver needs to block and brace the load because the driver is responsible for ensuring that the load is adequately secured. (TR 55-56).

At a minimum, there was a dispute whether the Complainant was “out of time” on that date. Relying on the “14 hour rule” Mr. Gardner testified that if the Complainant went on duty at 4:30 AM on December 19, then he would have to go off duty by 6:30 PM. Mr. Gardner stated that he did not know the exact whereabouts of the Complainant at the time of dispatch, but knew he was somewhere in the DC area in Maryland. On cross examination, Mr. Gardner had told OSHA that the distance was seventeen (17) miles because he was guessing at the mileage and he was not in front of his computer to look it up on PC Miler. The parties stipulated that according to the P. C. Miler program used by Owen Trucking, the distance from Temple Hills, Maryland to Baltimore, MD is 51.8 miles. See stipulation 14. Mr. Gardner testified that the distance would not change his conclusion that the Complainant would be able to make it to Baltimore in approximately 2 hours. I find that this is actually a major discrepancy and find that it undermines his testimony.

In fact, earlier, in his deposition, Mr. Gardner admitted that Baltimore would have worse traffic than DC by the time Complainant got there. The shipper, C.H. Robinson, told Mr. Gardner they wanted a truck at 4:00 p.m. and that if he wanted to buy a little extra time he could because they did not close until 5:00 p.m. I find that Mr. Shields’ explanation is more reasonable under these circumstances. I infer that the parties knew that there was heavy traffic en route. I find that he could not have reported to the shipping desk to receive a vacant dock in which to park and have the trailer loaded, and performed the loading tasks, block and brace the load, by 5:00 p.m. safely.

I also note that Mr. Gardner made a distinction between “steering wheel” drivers and “truck drivers,” including Mr. Shields in a category of employees who did not make much money because they were not willing to take freight wherever it needed to go. He made reference to this distinction several times during his testimony. At one point, he was extremely agitated while giving this testimony, Tr 95-99. Although Mr. Gardner denied it, I infer from this that Mr. Shields was expected to follow instructions above and beyond the call of duty if he were to be considered as a “truck driver.” By including Mr. Shields in that category, I infer that company policy made safety less important than persistence.

Moreover, I accept that Mr. Shields would have had to drive the entire route from Baltimore to Gainesville, Georgia, the next day. The parties accept that Mr. Shields telephoned Mr. Preston and told him that he could not pick up the load in Baltimore, and delivery it in Gainesville because he did not have available driving hours. Mr. Preston never discussed a delivery appointment time with Mr. Shields. (TR at 252-253). Mr. Preston then transferred Mr. Shields to Mr. Gardner. Stipulation 11. Based on the credible testimony of Mr. Griffith, the maps and a review of the record, Complainant could not have driven the route and maintained his hours.

The Respondent alleges that it really fired the Complainant because of poor job performance due to the late delivery of scheduled loads. I find that the Respondent is generally

not credible because of the inconsistent statements and because of the impeachment of the testimony of Mr. Gardner and Mr. Preston. The Respondent alleges that the Complainant was late on 16 or 17 out of 21 scheduled loads. I also note that the Respondent also relies on the testimony of Mr. Preston on this point. I find his testimony is also not credible. Mr. Preston alleged problems with late deliveries on a fairly regular basis, and an inability to reach the Complainant to discuss them. I note that there were no written warnings to substantiate this allegation. The evidence submitted by the Respondent in support of its allegation shows loads being delivered past their scheduled delivery time by a few hours. The Respondent fails to explain why, despite the alleged late deliveries, it continued to schedule loads for the Complainant. Mr. Gardner also testified that he had spoken with the Complainant about the impact on clients when loads are delivered late. However, there is no written evidence of that allegation. Moreover, there is no evidence indicating that James E. Owen Trucking suffered economic loss as a result of the late deliveries. The evidence contains only one letter from a client expressing dissatisfaction with the delivery of a particular load and threatening loss of business.²³ Assuming, *arguendo*, that the Complainant was late on 16 out of 21 deliveries and that there was a negative impact on client satisfaction beyond what is demonstrated by the single letter in evidence, the Respondent is simply unable to offer a logical explanation reconciling inherently contradictory motives of striving to satisfy its client base while, at the same time, continuing to assign loads to the Complainant who makes repeated late deliveries that allegedly adversely affect clients.

More troubling is Respondent's reliance on Mr. Preston's credibility on this point. He has a conviction for aiding and abetting making false entries on log books. Mr. Preston plead guilty to two counts of falsification of logs and to giving false information to the office of Motor Carriers of the Federal Highway Administration and was incarcerated. I find his testimony not credible.

Although Respondent alleges that the Complainant was warned several times about taking the truck home, this is also not substantiated. I have already determined that the Respondent is generally not credible. Moreover, on this issue, even if the Complainant had wrongfully kept the truck, this would not have occurred until his job had been terminated, so this is not a valid basis for termination, and is a classic example of a "phony reason," a pretextual excuse. See *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995), citing *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994).

After a review of the entire record, I find Claimant met his burden to prove that the Respondent's proffered reasons for terminating the Complainant were merely a pretext for discrimination based on Complainant's refusal to violate provisions of the STAA.

Alternative Finding (Dual Motive) – Pretext

The Respondent also alleges that the refusal to pickup the load was not the sole cause for termination of the Complainant. The refusal was merely the "last straw" in an accumulation of

²³ See Respondent's Exhibit 7 showing a copy of a letter from L. Watkins & Associates, Inc., expressing dissatisfaction with the late of the load scheduled for December 18, 2006. The load was actually delivered on December 19, 2006, to the client's facilities located in Maryland.

incidents indicating poor job performance. Mr. Gardner testified that the Complainant was orally admonished for his unacceptable performance in carrying out his job duties, but because performance reviews were not part of the company's practice of reviewing employees' performance, the evidence does not contain any written assessment of the Complainant's job performance. The only evidence indicating that the Complainant was warned about his late deliveries comes from the testimony of Mr. Gardner. The Complainant disputes Respondent's allegation of numerous late deliveries. (TR at 172-175) It was Mr. Gardner's testimony that emphasized the firing of the Complainant based on late deliveries. Mr. Gardner testified that the Complainant was fired for everything, not just his refusal to pick up the load.

[Question]: When you spoke to Mr. Shields on the day in question about his hours of service and that you then had told him just to bring the truck in was he fired for that particular incident or were there other things precipitating to that incident?

[Mr. Gardner]: He was fired for everything – all the late loads that he was delivering and not picking this load up. He delivered late, without going back to the records, like sixteen (16), seventeen (17) times out of twenty one (21) loads.²⁴

The Respondent asserts termination of the Complainant's employment resulted from a combination of factors: the Complainant's late deliveries, failure to abide by company policy regarding the use of company owned trucks for personal use and, ultimately, refusal to accept a dispatch order which, according to the Respondent, could be delivered without incurring an hours of service violation. The Complainant has established that the load was scheduled to be delivered on December 20, 2006, and that delivery of the load on December 20, 2006 was not possible considering the mandatory 10 hour break that the Complainant was required to take. The Respondent disputes the Complainant's assertion that the adverse employment was premised solely on the refusal to pick up the load, as instructed by the dispatch order. Mr. Gardner, in his testimony, acknowledged that he fired the Complainant immediately upon the Complainant's refusal to pick up the load. However, Respondent argues that to construe this action as resulting exclusively from the Complainant's act of refusal to pick up a load is to dismiss the significance of the Complainant's job performance, especially the repeated late deliveries of loads assigned to the Complainant. Without determining the sufficiency of the Respondent's evidence as to the untimeliness of deliveries, it is clear that Mr. Gardner's act of firing the Complainant on December 19, 2006, was premised, at least in part, on the Complainant's refusal to pick up the load in Baltimore and deliver the load to Gainesville, GA on December 20, 2006.

Thus, based on the Respondent's own testimony, there existed a dual, if not multiple, motive(s) for firing the Complainant: his refusal to accept the dispatch order, not abiding by company policy regarding the use of trucks, and a high percentage of loads being delivered in an untimely manner. This necessitates a mixed motive analysis.

Where an employer is motivated by both a legitimate and illegal reason, in order to avoid liability, the employer "has the burden of proof or persuasion to show by a preponderance of the

²⁴ See page 103 of transcript. Hearing held in Roanoke, VA on June 12, 2007.

evidence that it would have reached the same decision even in the absence of the protected conduct." See *Dartey v. Zack Co.*, 80-ERA-2 (Sec'y Apr. 25, 1983). A mere showing that the employee was "in part" discharged for a legitimate reason does not meet the employer's burden of proof. *Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec'y Mar. 19, 1987). The issue; therefore, is whether, absent the Complainant's refusal to accept the dispatch order, the Complainant's employment would have been terminated.

The Respondent alleges that one of the reasons for dismissing the Complainant was based on the Complainant's failure to abide by company policy regarding the use and parking of company trucks. Insurance regulations precluded drivers from taking trucks home. Allegedly, Complainant engaged in this practice on several occasions and was repeatedly warned. When asked whether a former colleague of the Complainant engaged in similar conduct, Mr. Gardner testified that the employee was reprimanded and finally let go, not indicating to what extent the employee's conduct of taking the truck home played in the firing. There is no evidence indicating that the Complainant frequently, or on several occasions, took the truck home. Although it was a serious offense, as Mr. Gardner testified, and the Complainant was warned several times, no adverse action was taken against the Complainant for this offense. (TR at 107-108)

[*Question:*] Mr. Shields taking the truck home was a small part of the reason You fired him, right?

[*Mr. Gardner:*] It was a part of it, I'm going to say a small part, I mean, it's a serious offense because, you know, the insurance has got it in their bylaws that we cannot take trucks home.

[*Question:*] Okay. I'm going to have to try to find – I'm sorry, I was looking at the wrong transcript no wonder I couldn't find it. It was a very minor part of your reason, right?

[*Mr. Gardner:*] It was a part of it, between it and late deliveries.

Despite the seriousness of the Complainant's alleged violations of company policy, no adverse action was taken. To accept Mr. Gardner's testimony on this issue as credible, I can only conclude that the Complainant merely received warnings not to engage in this alleged behavior. The lack of subsequent disciplinary action presumably indicates that the activity subsided or stopped and was not of sufficient concern to the Respondent to warrant any specific disciplinary measures. The Respondent does emphasize; however, the untimeliness of the Complainant's scheduled deliveries as a significant reason for the termination of his employment. By accepting the Respondent's argument that multiple motives contributed to the Complainant's firing, the evidence establishes that the firing of the Complainant was based on a legitimate reason (the substantial number of late deliveries), as well as an illegal reason (refusal to accept a dispatch order that would result in an hours of service violation.) Therefore, It is incumbent on the Respondent to demonstrate that it would have terminated the Complainant even in the absence of the Complainant's refusal to pick up the load in Baltimore. Nothing in the evidence or in the testimony of the parties demonstrates that the Respondent would have terminated the Complainant's employment absent the occurrence of the protected activity.

Mr. Gardner testified that the Complainant was late in delivering sixteen (16) out of twenty one (21) loads. Computer generated reports were introduced into evidence in support of the Respondent's allegations of the untimeliness of the Complainant's deliveries. Despite the Respondent's evidence of the Complainant's apparent failure to deliver loads on time, the Respondent continued to schedule loads and assign them to the Complainant for delivery. Based on the evidentiary record, only one of the company's clients, L. Watkins & Associates, expressed dissatisfaction with the scheduled delivery of a load assigned to the Complainant. If Respondent's assertions are correct, approximately 76% of the loads assigned to the Complainant were untimely delivered. It is reasonable to conclude that late deliveries of initial loads did not prompt Respondent to take adverse employment actions against the Complainant, presumably in the hope that delivery times would improve. I am unable to accept as credible, Respondent's argument, that in the face of such a high percentage of late deliveries that continued to be a problem, with little evidence of customer dissatisfaction²⁵, and continued assignment of scheduled loads, that the Complainant's termination, which was effected immediately upon notice to Mr. Gardner of Complainant's refusal to accept the scheduled dispatch order, would have occurred regardless of the protected activity. In *Palmer v. Western Truck Manpower*, 85-STA-6 (Sec'y Jan. 16, 1987), where the record indicated, *inter alia*, that Complainant's earlier conduct may have justified a discharge, but no action had been taken on the basis of such conduct until after Complainant had engaged in protected activity, Respondent failed to establish that it would have rejected Complainant for reemployment even if Complainant had not engaged in protected activity.

Similarly, the record in this case indicates that if the Respondent's allegations of Complainant's repeated late deliveries of scheduled loads are accepted as accurate, Complainant's job performance may have justified a discharge, but no action had been taken by James E. Owen Trucking on the basis of this conduct until after Complainant refused to drive the load on December 19, 2006 because of an hours of service violation. Therefore, Respondent has failed to establish that it would have dismissed the Complainant even if the Complainant had not engaged in the protected activity. *Id.*

CONCLUSION

The Complainant has been able to establish a prima facie case of retaliatory discharge. The burden of proof then shifted to the employer to advance legitimate, non-discriminatory reasons for discharging the Complainant. The Respondent put forth various legitimate reasons for the discharge and, once again, the burden shifts back to the Complainant to prove, by a preponderance of the evidence, that the proffered reasons given by the Respondent were merely a pretext. I find that the Respondent's reasons for discharging the Complainant were merely a pretext for unlawful termination of employment based on the Complainant's protected activity.

Under the STAA, a prevailing complainant is entitled to relief including abatement, reinstatement and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A)(i)(iii). Complainant contends that such relief is appropriate in the instant case.

²⁵ Respondent's only evidence of the impact that the alleged late deliveries had on the company's clients is a letter from L. Watkins & Associates, Inc., expressing dissatisfaction with the late delivery of a load scheduled for December 18, 2006, and actually delivered on December 19, 2006. The Respondent has not furnished any additional evidence of client dissatisfaction of the numerous alleged late deliveries by the Complainant.

Accordingly, Complainant seeks reinstatement to his previous position as a truck driver for James Owen Trucking, award of back wages, compensatory damages for mental pain and emotional distress, attorney's fees and litigation expenses, as well as an Order directing Respondent to abate its violation of the STAA.

Back Pay Calculation

The parties stipulated that the Complainant's average weekly wage while he worked for the Respondent was \$558.28, that the Complainant earned a total of \$5102.68 while an employee of the Respondent from October 16, 2006 through the date of his termination on December 19, 2006. The parties further stipulated to the fact that following the Complainant's termination of employment, he earned total wages of \$7334.54 from employment at five different companies: Mountain Milk Hauling, Western Express, C.A. Padgett Enterprises, Patterson Brothers Paving, and Nationwide Transportation.

The Board has previously held that mitigation of damages doctrine requires that a wrongfully discharged employee not only diligently seek substantially equivalent employment during the interim period but also that the employee acts reasonably to maintain such employment. *See Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 95-STA-43, slip op. at 6 (ARB May 30, 1997). "[A] failure to mitigate damages through the retention of employment will reduce the employer's back pay liability in that the back pay award will be reduced by no less an amount that that which the complainant would have made had he remained in the interim employment throughout the remainder of the back pay period." *Id.* (emphasis supplied). A complainant has a duty to exercise reasonable diligence to mitigate damages, but it is the employer's burden to prove failure to mitigate. *See Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005) The Respondent has not produced evidence demonstrating a lack of diligence by the Complainant in finding interim employment following his termination by the Respondent.

The Board, citing *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1169 (6th Cir. 1996) and *Patterson v. P.H.P. Healthcare*, 90 F.3d 927, 937 (5th Cir. 1996), has stated that "only if the employee's misconduct is gross or egregious, or if it constitutes a willful violation of company rules, will termination resulting from such conduct serve to toll the discriminating employer's back pay liability." *Cook*, ARB No. 97-055, slip op. at 6. There is no evidence indicating that Complainant's change of jobs in his interim employment resulted from gross or egregious misconduct.

The purpose of back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Albemarle paper Co. v. Moody*, 422 U.S. 405 418-421 (1975) (under Title VII). Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e seq. (West 1988). Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. Back pay calculations must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-05, slip op. at 11 (citing *Beltway v. American*

Cast Iron Pipe Co., Inc., 494 F.2d 211; 260-61 (5th Cir 1974). Counsel for Complainant submitted evidence of gross wages of several of Respondent's employees. In *Danny Johnson v. Roadway Express, Inc.*, ARB No. 01-013, the Board affirmed the ALJ's decision to use the average gross wages of representative employees in calculating the amount of back pay awarded to the complainant. The ALJ's decision was premised on the fact that evidence in the record did not indicate the source of disparities between the complainant's wages and those of representative employees. There is no such ambiguity in this case. The parties stipulated to Complainant's weekly wages of \$558.28. The source of the disparity between the Complainant and other employees is clear – the number of hours worked and, to a much lesser extent, the type of freight transported.

I accept the parties' stipulation and award the Complainant weekly back pay in the amount of \$558.28 discounted by the amount of wages earned by the Complainant from interim employment - \$7334.

Interest

Complainant requests interest to be paid on his back pay award. Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Complainant's termination on December 19, 2006, until the instant order of reinstatement. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made. *Moyer v. Yellow Freight System, Inc.*, [Moyer I], Case No. 89-STA-7 at 9-10 (Sec'y Sept. 27, 1990), rev'd on other grounds. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992).

The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a)(2001)²⁶ which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621 (2001). The interest is to be compounded quarterly. *Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. Double R Trucking, Inc.*, Case No. 98-STA-34 at 3 (ARB Jan. 12, 2000).

Compensatory Damages for emotional distress

The Complainant has requested compensatory damages that he suffered as a result of the Respondent's wrongful acts. Complainant seeks compensation for mental pain and emotional distress.

The common meaning of "compensatory" includes back wages, as well as damages for pain and suffering. See *Michaud*, *supra*. The Secretary and the Administrative Review Board

²⁶ § 20.58 Rate of interest.

- (a) The rate of interest assessed shall be the rate of the current value of funds to the United States Treasury as published in the FEDERAL REGISTER (as of the date the notice is sent), unless another rate is specified by statute, regulations or preexisting Contract condition. The Office of the Chief Financial Officer will notify agencies promptly of the current Treasury rate. The responsible agency may assess a higher rate of interest if it reasonably determines that a higher rate is necessary to protect the interests of the United States, and such rate is agreed to by the Chief Financial Officer (or his designee). The rate of interest prescribed in section 6621 of the Internal Revenue Code shall be sought for backwages recovered in litigation by the Department.

"have long held that compensatory damage awards for emotional distress or mental anguish should be similar to awards made in other cases involving comparable degrees of injury. See *Leveille v. New York Air National Guard*, 1994-TSC-3 & 4 (ARB Oct. 25, 1999). A vast array of award amounts have been upheld. See, e.g., *McCustion v. Tennessee Valley Authority*, 1989-ERA-6 (Sec'y Nov. 13, 1991). For example, in *DeFord v. Tennessee Valley Authority*, the claimant received \$10,000 in damages for chest pains, difficulty with swallowing, indigestion, sleeplessness, and general anxiety and depression *DeFord v. Tennessee Valley Authority*, 1981-ERA-1 (Sec'y Apr. 30, 1984). However, in *Muldrew v. Anheuser-Busch, Inc.*, the Court of Appeals held an award of \$50,000 was reasonable for emotional distress and mental suffering for the complainant's loss of his house and his car, and marital difficulties that resulted. See *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992 (8th Cir. 1984). Likewise, in *Wulf v. City of Wichita*, the court granted an award of not greater than \$50,000 to a plaintiff who was angry, scared, frustrated, depressed, under emotional strain, and experienced financial difficulties as a result of losing his job. *Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989).

In *Calhoun v. United Parcel Services*, 2002-STA-31 (ALJ June 2, 2004), the ALJ awarded compensatory damages for emotional distress. Based on the ALJ's observations of the Complainant at two hearings, the Complainant's treatment by a psychological for emotional distress, and the Employer's lack of challenging the Complainant's emotional distress claims, the ALJ awarded a modest amount of damages for emotional distress. Similarly, in *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000), the ALJ awarded emotional distress damages where the Complainant had put forth evidence demonstrating that he had gained weight from depression and stress, testified that he had trouble sleeping, and that his self-esteem had been damaged.

The Complainant has not provided adequate evidence of substantial emotional distress to justify a significant amount in awarding compensatory damages for mental distress. In comparable cases, a complainant will often offer evidence of adverse effects that psychological trauma has had on his or her life, such as damage to a relationship, an inability to function at work, or other disruption of the normal routines of life.²⁷ The Complainant's fiancé testified as to the toll the firing took on the Complainant (TR 128-129):

²⁷ For examples, see:

- *Hall v. U.S. Army, Dugway Proving Ground*, 1997-SDW-5 (ALJ Aug. 8, 2002) (awarding \$400,000 in compensatory damages for mental anguish, adverse health consequence, and damage to professional reputation caused by "repeated and continuous discrimination and retaliation" that caused great mental suffering, compromised mental health, and destroyed professional reputation).
- *Moder v. Village of Jackson, Wisconsin*, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003) (awarding no emotional trauma damages because the plaintiff failed to demonstrate both (1) objective manifestations of distress, e.g., sleeplessness, anxiety, embarrassment, depression, feelings of isolation, and (2) a causal connection between the violation and the distress).
- *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, slip op. at 25 (Dep'y Sec'y Dec., Feb. 14, 1996) (awarding \$40,000 for emotional pain and suffering caused by a discriminatory layoff after the Complainant showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company).
- *Michaud v. BSP Transport, Inc.*, ARB Case No. 97-113, ALJ Case No. 95-STA-29, slip op. at 9 (ARB Dec. Oct. 9, 1997) (awarding \$75,000 in compensatory damages where evidence of major depression

[Question:] Have you seen any changes in Mr. Shields' demeanor or – in his demeanor since his discharge by James E. Owen Trucking?

[Ms. Owensby:] Yeah, I have.

[Question:] How so?

[Ms. Owensby:] Butch is always a pretty up going, up beat person, takes things in stride and everything, very active always going, always doing. Between all of this it just like – like I kind of watched him just like crumble. He came where he didn't do much anymore. He wasn't going out in the yard every day like he was. He was just kind of sitting there. Just sitting up in the room a lot and mulling over things. Of course, things between us, not argue-wise, but things between us became distant from all of the stress. Numerous times I was very concerned that he was going to have a heart attack on me, due to the stress of everything.

[Question:] That was how he changed from before December 20th or December 19th till after December 20th?

[Ms. Owensby:] Because between the divorce and the firing they all knew that he was under the gun for a certain amount of money before he had to go to court, which they knew. With all that --

[Question:] You're getting off subject, I just asked you if there was a change in him on December 19th?

[Ms. Owensby:] Oh yeah. I mean he was just so frustrated. He just at that point didn't know what to do anymore between the two. He was just – like he could win no matter what, you know. He just kind of got really down, depressed.

The Complainant also testified as to his emotional distress, but did not offer any additional evidence beyond what was already stated by his fiancée, Ms. Owensby. (TR at 165-166).

[Question:] As you were discharged from James E. Owen Trucking has it affected you besides financially?

[Mr. Shields:] Yes.

[Question:] How so?

[Mr. Shields:] Well, it took my Christmas away from me.

[Question:] How so?

caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist; evidence also showed foreclosure on Michaud's home and loss of savings).

- **Blackburn v. Metric Constructors, Inc.**, Case No.1986-ERA-4, slip op. at 5 (Sec'y Dec. after Remand, Aug. 16, 1993) (awarding \$5,000 for mental pain and suffering caused by discriminatory discharge where complainant became moody and depressed and became short tempered with his wife and children).
- **Lederhaus v. Paschen**, Case No. 91-ERA-13, slip op. at 10 (Sec'y Dec., Oct. 26, 1992) (awarding \$10,000 for mental distress caused by discriminatory discharge where the Complainant showed he was unemployed for five and one half months, foreclosure proceedings were initiated on his house, bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted).

[*Mr. Shields:*] I had to take my Christmas money to keep the house going during the period I was looking for a job.
[*Question:*] Have you changed any of your habits or hobbies?
[*Mr. Shields:*] Well, she claims I have, but, I mean, myself I didn't notice.
[*Question:*] She, you're referring to Lynn?
[*Mr. Shields:*] Yes.
[*Question:*] Ms. Owensby
[*Mr. Shields:*] Yes, Ms. Owensby.

The testimony of the Complainant, as well as his fiancée, indicate some amount of emotional distress resulting from the wrongful act of the Respondent. There is no medical evidence or expert testimony as to the level of emotional distress, and none is required for an award of compensatory damages. See *Jackson v. Butler & Company*, ARB Case No. 03-116 (Aug. 31, 2004). I do believe that Complainant has suffered emotional pain and distress as a result of his wrongful termination and is entitled to compensatory damages for this suffering. However, absent additional evidence, I conclude that an award in the amount of \$2000 is reasonable.

Reinstatement

The STAA expressly provides that a prevailing complainant is entitled to reinstatement. 49 U.S.C. § 31105(b)(3)(A)(ii). Complainant has indicated that he desires to be reinstated to his former position with James E. Owen Trucking as he prefers to work with a local company, get a regular income, the quality of their equipment is good, and it puts the Complainant in and out of his house on a regular basis. (TR at 167) Respondent offers no objection to this request. Because Respondent offers no reason as to why reinstatement is inappropriate in this case, I find that Complainant is entitled to reinstatement into his former position as a driver with James E. Owen Trucking.

Abatement

As previously noted, the Act expressly provides that successful complainants in STAA cases are entitled to abatement. 49 U.S.C. § 31105(b)(3)(A)(i). Complainant has requested abatement. The Complainant requests the Employer to post a copy of this decision for a period of ninety days in all places where employee notices are posted. Complainant also requests an order directing the Employer to delete all information pertaining to the Complainant's wrongful discharge from its personnel records and to show continuous employment by the Complainant. In *Michaud v. BSP Transport, Inc.*, 95-STA-00029 (ARB Oct. 9, 1997), the Board affirmed the ALJ's order to expunge from Complainant's personnel records "all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination." The employer had objected to the order, arguing that it was vague. *Id.* The Board, however, found the order to be sufficiently clear, and stated that it would not place the burden on Complainant to identify the specific documents to be expunged. *Id.* Since I have found in the instant case that Complainant was wrongfully terminated as a result of his protected activity and have ordered reinstatement, I further find it appropriate for James E. Owen Trucking to remove from Complainant's personnel file "all derogatory or negative information contained therein relating to Complainant's protected activity

and that protected activity's role in Complainant's termination." *Michaud v. BSP Transport, Inc., supra.*

Attorney Fees and Costs

Complainant has requested attorney's fees and costs. Under the STAA, a prevailing complainant is entitled to litigation expenses including attorney fees and costs. *See, e.g., Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004); *Eash v. Roadway Express, Inc.*, ARB Nos. 02 008, 02 064, ALJ No. 2000 STA 47 (ARB Mar. 9, 2004). Fifteen (15) days will thus be allowed to Complainant's counsel for the submission of a petition for attorney fees and costs. Respondent's counsel will be allowed fifteen (15) days thereafter to file any objections thereto.

RECOMMENDED ORDER

For the foregoing reasons, I hereby **RECOMMEND** that Complainant, Duncan F. Shields, be awarded the following remedy:

1. Respondent, James E. Owen Trucking, shall reinstate Complainant, Duncan F. Shields, with the same seniority, status, and benefits he would have had but for Respondent's unlawful discrimination;
2. Respondent shall remit to Complainant:
 - A. Back pay in the total amount of \$ 19,462.90 for the period of December 19, 2006 (date of discharge) through November 16, 2007 (date of decision); representing back pay in the amount of \$26, 797.44 discounted by the wages earned from interim employment in the amount of \$7334.54
 - B. Interest on the entire back pay award, calculated in accordance with 26 U.S.C. §6621.
3. The Respondent pay to the Complainant \$2,000 in compensation for the stress and anxiety that the Complainant suffered as a result of his wrongful discharge;
4. Respondent shall immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination;
5. Respondent shall contact each and every consumer reporting agency to whom it *may have* furnished a report about Complainant, and request that any such reports with reference to Complainant's termination be amended in the manner described above;

6. Complainant shall have fifteen (15) days from the date of this Order within which to file a petition for attorney fees and costs, and Respondent shall have fifteen (15) days thereafter to file a response to such petition;
7. The Employer shall post copies of this Recommended Decision and Order and of the final decision and order in this case, for ninety days, in all places on the premises of James E. Owen Trucking where employee notices are customarily posted. The Employer shall ensure that such copies are prominently displayed and not removed or covered;

SO ORDERED

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, at 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquires and correspondence in this matter should be directed to the Board.