

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 26 May 2015

CASE NOS: 2008-STA-00020
2008-STA-00021

In the Matter of:

LINDELL BEATTY and
APRIL BEATTY,
Complainants,

v.

INMAN TRUCKING MANAGEMENT, INC.,
Respondent.

Appearances: E. Holt Moore III, Esq.
Law Office of E. Holt Moore III
For Complainants

Andrew J. Hanley, Esq.
Crossley, McIntosh, Collier, Hanley & Edes, PLLC
For Respondent

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge

DECISION AND ORDER ON REMAND

These cases arise under the employee-protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 and its implement regulations at 29 C.F.R. Part 1978 (“STAA” or “the Act”).

Procedural History

This matter has been the subject of three previous ALJ decisions and orders, and three previous decisions and orders of the Administrative Review Board (ARB). The cases were initially assigned to Administrative Law Judge Daniel Sarno, who on December 9, 2008 issued a Recommended Decision and Order dismissing the Complainants’ complaints as untimely. Complainants appealed that order, and on June 30, 2010 the ARB affirmed in part and reversed in part, finding that most of the allegations in the complaint were time-barred while also finding that to the extent that the complaint alleged post-employment blacklisting, the complaint was

timely. The ARB directed Judge Sarno to make findings of fact and conclusions of law on the merits.

On December 2, 2010, Judge Sarno issued a Decision and Order on Remand, finding that Respondent did not blacklist the Complainants. Complainants again appealed, and on June 28, 2012, the ARB reversed and remanded that Decision and Order. In doing so, the ARB found that the facts established that Respondent had in fact blacklisted Complainants by filing an adverse DAC report concerning their employment with Respondent. The ARB directed Judge Sarno to address whether Complainants had engaged in protected activity that had contributed to the decision to file an adverse DAC report and if so, whether Respondent had shown by clear and convincing evidence that it would have filed the adverse DAC reports even if Complainants had not engaged in protected activity.

On February 7, 2013, Judge Sarno issued another Decision and Order on Remand, finding that Complainants had failed to show a causal relationship between their protected activity of reporting an exhaust leak, and Respondent's decision to file adverse DAC reports. Complainants again appealed.

On May 13, 2014, the Administrative Review Board issued a Decision and Order remanding the above-captioned cases to the administrative law judge for further consideration. After affirming as unchallenged on appeal that Complainants had engaged in the protected activity of reporting exhaust leaks, the ARB found that the undisputed evidence established that the protected activity was a contributing factor in Respondent's filing of adverse DAC reports. As of that remand order, Judge Sarno had retired from the Department of Labor, so the case was re-assigned to me. On July 21, 2014, I issued an order allowing additional briefing on the two issues remaining in these cases: (1) whether Respondent has shown by clear and convincing evidence that it would have issued an adverse DAC report even if Complainants had not engaged in protected activity; and (2) if not, the appropriate remedies to be awarded to Complainants. The parties submitted timely briefs. For the reasons set forth below, I find and conclude that Respondent has not met its burden to show by clear and convincing evidence that it would have issued adverse DAC reports regarding the Complainants even if they had not engaged in protected activity; and (2) Complainants are entitled to an award of damages consisting of lost pay and interest thereon.

Summary of Evidence

Testimony of Complainant April Beatty¹

Mrs. Beatty has been in the trucking business as a tractor-trailer driver since 1995. She was employed by Respondent from August of 2004 through December of 2005. In August of 2007, she and Mr. Beatty applied for driver positions with U.S. Express; while attending an orientation session, they were pulled out and told that they would not be hired. The company would not disclose the reason for deciding not to hire them, so Mrs. Beatty called her recruiting office, and one of the recruiters told her that an adverse DAC report directly affected the

¹ Summaries of testimonies are not findings of fact, but merely summarize the witnesses' testimony at the hearing. The phrase "the witness testified" should be read into each statement set forth.

dismissal from orientation. At that time, she did not know what the contents of the DAC report were, but did learn that the comments on the report were placed before the Beattys started to attend orientation at U.S. Express.

Eventually, Mrs. Beatty learned the contents of the DAC report when Complainants were seeking employment with Cargill Meats, and the safety manager at Cargill informed her that the DAC report led him to believe that the Beattys were having trouble with customers and violated company policy. She was provided with the DAC report itself at that time.

Complainants' Exhibit A is a series of pictures of Respondent's trucks, showing their typical condition; Mrs. Beatty had to clean almost every truck that they took out of the yard. The pictures in the exhibit are pictures of a truck with trash in it, including empty soda cans, fast food wrappers and bags, and empty food containers, that the Beattys were asked to drive to California.

During the period from 2000 to 2005, the Beattys did not have any difficulty obtaining employment in the trucking industry. After U.S. Express didn't hire them, they continued to seek employment and were turned down by three other companies between August and October. They obtained employment in November, after the DAC report had been cleared.

After their termination from employment with Respondents, the Beattys received 26 weeks of unemployment benefits. They then obtained employment with FedEx in June of 2006. They left that company voluntarily after three months, and did not try to find work until they applied to U.S. Express. After learning in November that their DAC report had been cleared, the Beattys applied with Covenant Transport, were hired with no problem, and worked for Covenant for six months.

Exhibit D consists of DAC reports relating to the Beattys. One DAC report covered a period of service with Respondent in February 2003, and contains no negative comments. It pertained to a previous period of employment with Respondent, when the Beattys drove only one trip. Page 99 of Exhibit D reflects the negative DAC report from the second period that the Beattys worked for Inman. It reflects "excessive complaints, company policy violation, personal contact requested" and "other." The next page is a DAC report with some, but not all, of the negative information removed, which still kept them from getting work. The following page is a clear DAC report.

Exhibit I is a calculation of lost income for the period from August 10 to August 17. August 10 was the date Mrs. Beatty spoke with the Department of Labor investigator for the first time after being dismissed from orientation at U.S. Express. That dismissal occurred on about August 7.

Mrs. Beatty did not have any formal disciplinary action while employed by Respondent. Her understanding of the reason that the Beattys were fired was that Mr. Beatty had a disagreement with someone in the office, and was told to get off the property.

Exhibit G is a letter from the finance company for the Beattys' car, indicating that it had been repossessed and would be sold. Exhibit H is a copy of the statement sent to Dale Boyd of

the Department of Labor after he asked for one, telling him what happened while the Beattys were working for Inman. Everything in the letter is true.

While the Beattys were on a trip to California in around October of 2005, Mr. Beatty was driving while Mrs. Beatty was in the bunk asleep. She kept waking up due to fumes coming into the bunk. At one point, Mr. Beatty pulled over and Mrs. Beatty woke up. They were in Knoxville, and Mr. Beatty was on the phone to Mr. Mufurro reporting an exhaust leak that was keeping them from sleeping. They kept on going, and eventually the muffler “blew out” when they reached Albuquerque. Mrs. Beatty is unsure of the date, but it could have been around October or December. Before arriving in Albuquerque, the Beattys called several times to have the problem fixed, and were told they were “tired of us complaining, to go ahead to California and get it fixed in California.” Mr. Beatty told them at one point that they couldn’t make it all the way to California with the fumes coming into the bunk, because the non-driver couldn’t sleep. By the time they got to Oklahoma City, there was a noise coming from the muffler, so they pulled over. Mr. Beatty got under the truck and took pictures, called Respondent again about the muffler, and was brushed off. They got back on I-40 and made it as far as Albuquerque, and could go no further without repairing the muffler. Mrs. Beatty is unsure of the number of the truck they were driving.

While drawing unemployment, Mrs. Beatty looked for both administrative and truck-driving work but there wasn’t any available. She applied for driving work with Ace Truck Driving and MCO Trucking, both in Wilmington, North Carolina. The Beattys worked for FedEx for about three months starting in June 2006; they were paid by the mile, and made more many there than they had at Inman. Mr. Beatty was asked to leave FedEx because the owner of the truck, a FedEx contractor, had a problem with their having a major oil leak repaired. The truck was blowing oil out the side, so they had to get it repaired. When they did, the owner said he had no more use for them. During the six months that they worked for Covenant Transport, the Beattys made “very much more” than they had made at Inman. They left Covenant Transport voluntarily, and on good terms.

When they were pulled out of orientation with U.S. Express, the company filed a DAC report because they had not completed orientation. A representative of U.S. Express told them that the company had to file a DAC report, but it was not considered a negative report. Mrs. Beatty does not have a problem with the U.S. Express DAC report.

Exhibit A are pictures of a dirty truck, but Mrs. Beatty does not believe they were terminated because they refused to drive a dirty truck.

Mrs. Beatty does not know whether the negative DAC reports were in place when she and her husband went to work for FedEx, but based on her experience, she believes that FedEx would not have hired them if they were. She believes that the reference to violating company policy is to Mr. Beatty having called FleetNet for repairs, and then leaving before FleetNet arrived to do the repairs, with the company being billed. She believes that the reference to excessive complaints meant that they made too many complaints to the company, and did not mean that there were excessive complaints from customers, because the Beattys were never the subject of any customer complaints. But they were not told they were fired for either of those

reasons. Mrs. Beatty believes they were fired because Mr. Beatty had words with someone at Inman.

Testimony of Complainant Lindell Beatty

Mr. Beatty is married to Complainant April Beatty, and has been a truck driver since 1989. He was employed by Respondent during the exact same time that Mrs. Beatty was. He heard Mrs. Beatty's testimony, and does not disagree with any of it. With respect to the DAC report, the Beattys did not have a reason to check it, because to their knowledge their licenses were clean.

The Beattys were terminated on December 14, 2005. Mr. Beatty went into the office where Al Gover, Darryl, and Trent were. Mr. Beatty had a conversation with Mr. Gover, who was in charge of the safety of the trucks for Inman. The Beattys had just returned from a run and went into the office to do some paperwork. Mr. Beatty took a tape recorder with him because of some previous incidents. Mr. Gover said something derogatory about being a truck driver. Mr. Beatty responded, "Oh, well, so that's how it is here?" Mr. Gover said, "Yes." Mr. Beatty told Mr. Gover, "Well that's why I got this tape recorder," and he was fired right there. Mr. Gover told him to get off the property. He went outside and got Mrs. Beatty and they left.

As a CDL driver, it was Mr. Beatty's responsibility to make sure that the trucks were in good condition for driving. He is not supposed to drive over certain hours, or drive with leaking mufflers or oil leaks. He informed Inman of a number of problems with the cleanliness of the trucks and with a leaking muffler. He was concerned for Mrs. Beatty's safety, as breathing exhaust fumes can be fatal. He would let Inman know about any incident; Inman considered it complaining, but he considered it taking care of his wife and himself. During the whole period of employment with Respondent, he reported everything from the cleanliness of the trucks to the condition of the trucks. At first, the Beattys were told to call FleetNet if they needed repairs, but were eventually told not to call FleetNet anymore, but to call the office instead. That is why he called Trent Murfurro at Inman rather than FleetNet when the muffler leak occurred.

When the muffler leak occurred, Mr. Beatty mentioned to Mr. Murfurro that there was a T/A across the road from where the truck was, and Mr. Murfurro told him to take the truck there. The T/A repair person found a hairline split in the muffler right at the bunk, and said they could fix it, but would have to wait a day for the part. Mr. Murfurro told Mr. Beatty not to wait, but to continue driving. By the time they got to Albuquerque, the little split had become a big gash, and it sounded like eight tractors coming down the road. Mr. Beatty is unsure of the date of the muffler-leak issue. Mr. Beatty told Inman's owner that if the truck had been repaired in Knoxville it would not have been as expensive as it was in Albuquerque. The Beattys stayed in a hotel in Albuquerque while the repair facility got the part and made the repair.

Mr. Beatty took the pictures of the truck at CX A in August or September of 2005. Before that time, he had made incident reports of similar problems, and every time he went into the office they said, "You always have a problem, and you're always complaining, and you always do this." He felt he needed proof of the issue, so he took the pictures. The Beattys had been called on a Friday evening to come in and drive a truck to California, and when they

arrived, the truck was in the condition shown in the pictures. He asked Mr. Murfurro if they could take an hour to clean the truck before they left, and he told them they could not, that they had to leave right away. Mr. Beatty said that the truck was filthy, and Mr. Murfurro said that he didn't care, and that if the Beattys didn't want to take the trip, they didn't have to. Mr. Beatty replied that they wouldn't take the trip. He went home, then came back to take the pictures so he could show Darryl on Monday. He had the pictures blown up, and showed them to Darryl on Monday. Darryl's response was that he wouldn't want his wife to drive a truck in that condition either. They were not fired for that incident; everything was fine and they kept driving.

Mr. Beatty took the pictures included in CX B. on the night of the muffler incident. He thinks, but is not sure, that it was Truck 167. All the pictures except No. 7, which was taken in Albuquerque, were taken in Oklahoma. Mr. Beatty lay on the ground and took pictures of the leak; pictures No. 5 and No. 6 show the big gash in the muffler under the bunk of the truck.

After being fired by Inman, Mr. Beatty drew 26 weeks of unemployment, and then found some work driving locally. Mrs. Beatty didn't have the experience to do local work, driving dump trucks and working construction sites. Although local trucking companies are supposed to follow the same DOT rules as other companies, most of them don't; if you have a license, they hire you. When he started at Inman, the company did not require a road test by him or Mrs. Beatty, which most companies do require. That showed him that the company was not concerned with safety.

After his unemployment benefits ran out, there was a period of time that Mr. Beatty had difficulty finding employment. Because Mrs. Beatty couldn't do the local work, Complainants decided to look for over-the-road work with U.S. Express or a similar company.

CX C includes Mr. Beatty's DAC reports. They reflect the same series of events that Mrs. Beatty described in her testimony.

In around March of 2005, while they were employed with Inman Trucking, the Beattys were told to drive a truck that was over its weight limit. They went to Idaho to pick up some potatoes, and the maximum gross vehicle weight was 80,000 pounds. They picked up the potatoes and had the load weighted; it was at 80,000 pounds. The Beattys were told to go back and pick up more potatoes, and they were reluctant to do that. Darryl told them to get out of his truck if they wouldn't do it. The company also told them that since they would be driving on the weekend, they wouldn't have to have the load weighed as the scales would be closed. The Beattys went back and took on the extra load and, as they were driving back, had to scale the load at a scale and were issued a \$400 ticket for being overweight. Inman refused to pay the ticket, and the Beattys were upset as they were only getting paid \$1500 per load and were made to take the extra load.

Mr. Beatty believes that Inman had a problem with his report of the leaking muffler. His belief is based on Inman's refusal to repair the muffler when they called it in, and their statement that the Beattys were always complaining while other drivers were not.

At one point, Mr. Gover made a comment to the Beattys to the effect that the company would have to detail and clean the trucks for them. This was in the context of the Beattys continually making reports of dirty trucks, and Mrs. Beatty needing to spend time mopping, spraying, disinfecting, and cleaning the trucks before every trip. Mr. Beatty was venting his frustration to the company, but they were taking it as a joke. They told Darryl Smith², who was the supervisor, about the issue, and he offered to pay Mrs. Beatty for cleaning out the trucks. Others in the office wanted Darryl to fire the Beattys when they refused to take the trip because of a dirty truck, but he didn't.

Every time they took a truck to California, the Beattys had to clean it out, because it would have been driven by a team who stayed in there two or three weeks, ate their food in the truck, and left the paper and food in it. There was moldy food and dirt everywhere, and Mrs. Beatty was not going to drive a truck like that. They asked the company to have the drivers clean out whatever they brought into the truck at the end of a trip. It happened all the time, so Mr. Beatty was labeled as a complainer.

The Beattys were given a card for FleetNet and were told to call FleetNet whenever there was a problem with the truck. He called once when a headlight was out, which is a DOT safety rule violation. The company called it complaining, and told the drivers not to call FleetNet anymore.

The only time that Mr. Beatty took a tape recorder into the Inman Trucking office was on December 14. He took it in that time because of previous incidents, and he had it in mind that he had to get proof. He did not think he was going to get fired on December 14.

The only time Mr. Beatty refused to take a truck was the time he described, which was not on December 14, but was in August or September of 2005. He did not refuse to drive a truck in December of 2005 because it was dirty. Mr. Beatty does not have a specific memory of the derogatory remark that Mr. Gover made on December 14. Prior to that time, he had reported the muffler leak, and had complained about exceeding the load capacity. The muffler leak is a serious DOT safety issue. But he did not believe on December 14, 2005 that those complaints had any part in his getting fired. He thought he was fired because he had a tape recorder.

Exhibit B shows that an exhaust leak in Tractor 172 was called in to FleetNet on October 29, 2005 from Knoxville, Tennessee. After Trent told Mr. Beatty to call FleetNet, they waited on the highway, and FleetNet never came. The FleetNet invoice states that the driver canceled the call, but Mr. Beatty does not have the authority to cancel a call.

Exhibit F shows a Com check charge for \$75.00 for a hotel. The date is December 4, but it was the same incident as the exhaust leak. The dates are wrong. The exhibit states that there was a layover for two days, Sunday and Monday December 4 and 5, 2005; "exhaust pipe causing fumes to come into a cab and bunk"; "pipe rusted with cracks and a large hole." The dates are confusing. The truck was repaired at a Peterbilt Truck Center in Albuquerque on December 6. It could be that Mr. Beatty was confusing two incidents and considering them as one, because there

² This individual is referred to as Darryl Spivey in CX H and EX D. Accordingly, he will be referred to as Mr. Spivey in this Decision and Order, except when summarizing testimony in which he is referred to as "Darryl."

was an October 29 incident and a December incident. The October incident involved Truck No. 172, and the truck repaired in December was Truck No. 167. The October incident was not a complaint, but was a report of a mechanical issue needing repair. Mr. Beatty does not dispute that he called in to FleetNet regarding Truck 172 in October, as that is what it says on the invoice. He has also called them for problems with Truck 167.

Mr. Beatty started working for FedEx in June of 2006. He never had any discussions with FedEx about his DAC report. He was fired after about three months for complaining about safety issues, but never made a complaint about his firing to the Department of Transportation, OSHA, or anybody else. He earned more working for FedEx than he had working for Inman Trucking. He worked for Covenant Transport for about six months starting in November of 2007, and resigned in June 2008 to come back and take care of the instant proceedings. He could have continued working for Covenant Transport, and to his knowledge there is work available for him there, but he is not planning to back to work for that company. He earned more at Covenant Transport than he had earned at Inman Trucking.

Testimony of Anthony Hall

Mr. Hall is an owner/operator and runs a small trucking company. He has one truck, which is leased to Cargill out of Milwaukee, Wisconsin. He has been in the trucking business since 1993.

Mr. Hall knows the Beattys. He advertised for a truck driver to run from Milwaukee to the Carolinas every week, and they responded to his advertisement in early August of 2007. They filled out an application, which went to the company safety director in Milwaukee, who submitted it to Cargill. Cargill denied the application for reasons they would not disclose to Mr. Hall. Mr. Hall was not aware of any reason they could not be hired. The Beattys' application was run through DAC three separate times because they said it had been cleared up, but that was not the case. Mr. Hall eventually found a driver, who did not have any information on his DAC report.

Exhibit I was prepared by Mrs. Beatty, and appears to be a reasonable calculation of what the Beattys would have earned if they had been hired. The total is \$10,692.00, based on three round trips per week from August 1 to mid-September 2007. Mr. Hall thinks they could only do two round trips per week, unless they could drive together to continue making the truck go; in which case, they could keep going, provided the loads were there. They could make as many trips as they could do, providing they had the hours to do it. In his opinion, they could only do two round trips, because they had to make many stops.

Mr. Hall had the contract with Cargill for four months, and had one driver making the runs. That driver made two round trips to Michigan per week. He would make a round trip and then take two days off before the next run. During the four-month period, the driver took two one-week periods off for personal reasons.

The safety director called Mr. Hall up and said that he could not hire the Beattys because of information on their DAC report. He was not allowed to say what the information was, and

did not identify which DAC report was involved or whether it was the Inman Trucking DAC report. Cargill ran the DAC report three times in September and still would not accept it. If they had a clean DAC report, they would have been hired.

Testimony of Alan Gover³

Mr. Gover is Respondent's safety director, and has been for about 13 years. He has personal knowledge of the repairs made to Truck Numbers 167 and 172. Mr. Beatty called FleetNet on October 29, 2005 at 4:58 a.m. for an exhaust leak on Truck 172, as reflected in Exhibit D. FleetNet dispatched a repairman immediately, and Mr. Beatty was told he would arrive in about an hour. About 15 minutes before his estimated arrival, the Beattys called and told him that they were driving on, and canceled the call. The repair records for Truck 172 reflect no repairs to the exhaust in October or December of 2005. Respondent was charged \$165 for the service call.

Truck 167 had an exhaust repair in Albuquerque, New Mexico on December 6, 2005. The Beattys were put up in a hotel for two nights, and paid layover pay and were paid for their meals.

The policy of Inman Trucking requires drivers to make three trips each month to be considered full time. As reflected in Exhibit B, the Beattys averaged two trips per month between June and December of 2005. That number of trips is a violation of company policy. The Beattys were brought down to part-time pay, and were reprimanded "constantly" for failing to live up to the responsibilities of the job. Most of Respondent's drivers are assigned a specific truck, but the Beattys could not be assigned a specific truck because the company never knew when they were going to work. The trucks had to be kept moving; the company can't afford to park them for two weeks waiting for a driver to show up.

The Beattys obtained work either by calling in and saying they were ready to drive, or by Darryl calling them and begging them to take a trip. About half the time they came in, they would refuse to take a truck because it was too dirty. Once, they said a truck didn't have enough room and they wanted another truck; but the one they were given, and accepted, had the same amount of room as the truck they refused to drive. There was constantly something that prevented them from taking a trip. It's company policy for a driver to clean out the truck at the end of a trip, but when they come in at the end of a trip and quit, he doesn't care about cleaning out the truck. The company can't afford to have a truck detailed each time a driver quits, or every time a truck becomes available.

As to whether the Beattys complained about cleanliness or safety issues, "nine times out of ten" it was that the truck was too dirty. The one time he heard about an exhaust leak was on December 13, when they came in and said something about, "Well, what about the exhaust leaks that we've kept talking about?" In Mr. Beatty's mind there was only one, as he testified, but there were actually two. The exhaust leak that Mr. Beatty reported in December was repaired

³ Although the name is spelled "Grover" throughout the transcript and earlier decisions, the witness's signature on the DAC report change requests, and the typed signature block on Complainants' Exhibit C, clearly read "Gover." Thus, I will spell his name "Gover" in this Decision and Order.

shortly after he reported it. Mr. Gover understands Mr. Beatty's testimony about being asked to keep driving after reporting the exhaust leak, because it was 4:00 in the morning and there is nobody open to fix it at that hour. His understanding, however, was that the dispatcher left it up to the Beattys to determine whether they could keep going or stop where they were. The Beattys chose to go as far as they could, and then stopped in Albuquerque because they couldn't go any further. They called in to say that the leak had gotten worse, and it was fixed right away.

The Beattys were fired because of excessive complaints. Mr. Beatty was not fired because he brought a tape recorder into the office. The decision had been made long before to fire them if they refused a trip for any reason. He would not have fired them for making a safety complaint. The company was so tired of the excuses and reasons for not taking a trip that the decision to fire them was made ahead of time.

Mr. Beatty was not given a road test when he was hired because it would have been insulting. There has not been a requirement to do so since 2002. When a driver with a CDL and Mr. Beatty's experience came to them, Mr. Gover would not require a road test.

Mr. Gover filled out the Beattys' DAC reports within a day of their termination date. They were originally received by DAC on December 14, 2005; they were not filled out at some later date in order to blackball the Beattys. Regarding the Beattys' work record, the DAC report stated, "Excessive complaints, company policy violation, personal contact requested and other." The reference to "excessive complaints" was to the Beattys' excessive complaints about dirty trucks, and the size of the trucks. The reference to "company policy violation" was to the Beattys' running two trips a month instead of three, and also calling FleetNet personally instead of contacting the office first. "Personal contact requested" indicated that future employers should contact him, so that he could explain what he meant on the DAC report. He wanted to clarify to other employers that the excessive complaints were from the drivers and not from customers. "Other" is basically a catchall phrase. The reasons for the Beattys' termination, which he stated in the original DAC report, were accurate. Mr. Gover would not have changed the DAC report if OSHA had not offered to settle the case by changing the report.

Mr. Gover changed the DAC report several times in order to settle with the Beattys. He first removed "personal contact requested," and then, three days later on August 27, 2007, removed "excessive complaints," and changed "eligible for rehire: no" to "review required before rehiring." On September 13, 2007 he submitted the specific DAC codes to make the final changes. By September 17, 2007, the final changes were made.

The truck number provided to FleetNet in October 2005 regarding the exhaust leak would have come from the driver, or from a dispatcher who called it in. It is not possible that there was an error in the truck number, because there is too much other documentation for the time frame. It is not unusual for FleetNet to generate an invoice a month and a half after the date of service, because under the terms of Inman's contract, FleetNet has either 30 or 45 days to send a bill. Hypothetically, the Beattys might have waited two hours rather than one hour on October 29, and may have not wanted to sit there with the engine idling and exhaust coming into the cab. Mr. Gover does not know exactly what times were involved.

Every time the Beattys complained about a dirty truck, the company offered to pay to have it cleaned if they would just go ahead and take it. At one point, they offered the Beattys \$40 to clean the truck in order to get them out on the road. The repair issues were more expensive than the cleanliness issues. There were two separate reports of exhaust issues involving two different trucks, one report in October and one in December. Mr. Gover does not know how big the hole in the muffler was in December. If it was that big, it should have been caught in a pre-trip inspection, although it was possible that there was only a hairline crack at the beginning of the trip.

It is very possible that an employer who reads “excessive complaints,” “company policy violations,” and “personal contact requested” might decide not to go to the trouble to make the personal contact because there is an obvious problem. When Mr. Gover is in that situation he weighs a lot of factors in deciding whether to hire someone – not just the DAC reports, but other things as well.

Complainants’ Exhibit F is an email dated September 13, 2007 sent by Mr. Gover to Mr. Boyd stating, “Mr. Boyd, first let me offer both you and the Beattys a sincere apology for my [obstinacy] and stubbornness. I am sitting here in abject and red-faced shame.” Mr. Gover sent that email because up until that point, he had been under the impression that there was just one report of an exhaust leak, which was a “phantom” leak, but then learned that there were two. The “phantom” leak referred to the report that cost the company \$165 although there was in fact no exhaust leak. That got his dander up, and he dropped the ball by not continuing his investigation. When he did further investigate, he found that there was a trip in early December in Truck 167 where there was an exhaust leak, and Mr. Beatty handled it exactly as he should have. It had nothing to do with why he was fired. Before he learned about the December exhaust leak, Mr. Gover was irate over what he thought was the only exhaust-leak issue, and that was why he was being stubborn about changing the DAC reports. When he made the first change, removing only “personal contact requested,” he thought that was all the Beattys wanted. Mrs. Beatty called him back and said that they needed “ineligible for rehire” changed to “review required before rehire.” He sent another change request, repeating the first one and adding Mrs. Beatty’s new requests. Mr. Gover doesn’t remember whether it was Mrs. Beatty or Mr. Boyd who told him that the Beattys were having trouble finding work, but it was Mr. Boyd who suggested changing the DAC reports to keep the issue from being escalated. He refused to make any additional changes, because it would have resulted in an untruthful report.

The income projections by Mr. Hall were based on the Beattys working six straight weeks for him. The Beattys never worked six straight weeks for Inman Trucking. They ran two trips a month, each of which was seven to eight days, or about 16 days per month.

Complainants’ Exhibits (CX)

CX A consists of 12 color photographs. Pictures 1-3 are exterior shots of Inman Trucking Truck No. 167, showing dirt on the outside of the truck. Pictures 4-11 are interior shots of a truck, showing a large amount of trash, food waste, and a food container. Picture 12 shows a row of Inman trucks viewed through the windshield of an unidentified vehicle.

CX B consists of nine color photographs of the exhaust system underneath a truck. Pictures 3-6 show a large hole in the muffler. Picture 7 shows a severed pipe. Picture 9 shows discoloration at a joint in a hose.

CX C consists of the DAC reports of Lindell Beatty that are at issue in this matter. The first page is a DAC report reflecting Mr. Beatty's employment with Respondent in February of 2003. The remaining DAC reports are consistent with their descriptions in the witness testimony summarized above.

CX D consists of the DAC reports of April Beatty that are at issue in this matter. The first page is a DAC report reflecting Mr. Beatty's employment with Respondent in February of 2003. The remaining DAC reports are consistent with their descriptions in the witness testimony summarized above.

CX E is a copy of Respondent's response to Complainants' OSHA complaint, signed by Mr. Gover. Mr. Gover suggests that Respondent did not blacklist Complainants because the language indicating that the Beattys were not eligible for rehire referred only to Respondent's standards, and not to any other company. In addition, Mr. Gover indicates that "excessive complaints" refers to the Beattys coming to the office for dispatch only to refuse to be dispatched because a truck was too dirty, or a light bulb was burned out on the inside of the cab. As a result, Respondent was forced to reschedule loads or to try to find another team at the last minute. This happened so frequently that the Beattys were deemed unreliable. "Company violations" referred to the Beattys failing to call into dispatch daily when they were at home between trips; the Beattys failed to do so on many occasions, placing an undue burden on dispatchers trying to cover loads. The response also says that Mr. Beatty had an preventable accident on his record, which alone would have been cause to discharge him. Finally, Mr. Gover states that the Beattys had a poor attitude and work ethic, and caused arguments whenever the dispatchers tried to dispatch them. As a result of all these factors, the decision was made to discharge the Beattys.

CX F is a copy of an email dated September 13, 2007 from Mr. Gover to Mr. Boyd of the Department of Labor apologizing for his obstinacy and stubbornness in refusing to change the Beattys' DAC reports. He had learned of new information and, in the interest of fairness, decided to change the DAC reports. He faxed the changes to DAC at about 2:00 p.m. on September 13.

CX G is a notice from Eastern Carolina Auto Finance Co., LLC to the Beattys, dated October 3, 2007, informing the Beattys that Eastern Carolina intended to sell a 2003 Buick Century at auction.

CX H is a statement from Mrs. Beatty to Dale Boyd, the OSHA investigator, setting out the history of the Beatty's employment with Inman Trucking and their post-Inman attempts to find employment. She described, consistent with the hearing testimony, the following events:

- The occasion on which the Beattys were called on a Friday evening to drive a truck to California, but ended up refusing the trip because of the uncleanness of the truck, after which they took pictures and showed them to Mr. Spivey. Mrs. Beatty additionally stated that they expected to be fired for refusing the trip, but when they

- showed the pictures to Mr. Spivey, he understood why they did not want to take the trip, and Mr. Murfurro and Mr. Gover were angry that the Beattys were not reprimanded for refusing the load.
- The trip to California during which the Beattys reported an exhaust leak beginning in Knoxville and continuing until it was repaired in Albuquerque. Mrs. Beatty additionally stated that Mr. Murfurro refused to “deal with” the Beattys when they called in, and it took a call to Mr. Spivey to have the repair authorized. She further wrote, inconsistently with Mr. Beatty’s hearing testimony, that they completed the run and turned in the paperwork on a Friday, and then were called into the office on Monday; when they arrived, Mr. Murfurro and Mr. Gover told the Beattys that they were tired of their complaints, Mr. Beatty started to explain the reasons but was told that he was making unwarranted complaints and making trouble, and that other drivers did what they were asked with no problems. Mr. Beatty told them he was going to record the conversation and took out his tape recorder, and Mr. Spivey told them to get out of the office and off the property.
 - The denial of employment in August of 2007, when Mrs. Beatty was told during the orientation process that she would not be hired. Mrs. Beatty described, consistent with her hearing testimony, how she learned that Inman Trucking had filed an adverse DAC report.
 - Mrs. Beatty described incidents with mechanics at Inman trucking in which the mechanics made comments about the Beattys’ complaining. The incidents involved a problem with the Jake brake, and the removal of spot mirrors from the hood of a truck. Mrs. Beatty felt that their relationship with the Inman administrative staff was strained; whenever they had a question about pay issues, the office staff thought they were complaining.
 - Mrs. Beatty described, consistent with hearing testimony, the attempt to drive for Cargill. In addition, she said that the entry on Mr. Beatty’s DAC report regarding his having backed into or over a car was untrue, and that Respondent told that lie to hurt Mr. Beatty’s chances of working as a driver. She also stated that Mr. Gover had repeatedly told lies to potential employers and had cost the Beattys jobs.
 - Mrs. Beatty stated that Mr. Murfurro once told them that they were great drivers and did a good job when they weren’t complaining. She stated that the Beattys frequently drove vehicles that had problems, but just had to be exceptionally careful. Other drivers told them they had the same problems, but had to keep quiet or Mr. Gover would punish them and not give them work.

CX I is a calculation of income lost by the Beattys’ being refused employment with Cargill, showing total lost income of \$10,692.00 for the period August 10, 2007 to September 17, 2007.

CX J is a copy of the Secretary’s Findings dated November 22, 2007, dismissing the Beattys’ complaint under the Act.

CX K is a copy of 49 C.F.R. § 393.83, the Department of Transportation regulation specifying the safe operating requirements of exhaust systems.

Respondent's Exhibits (EX)

EX A is another copy of the Secretary's Findings dated November 22, 2007.

EX B consists of a number of employment-related documents. The first page is a Driver Settlement Register detailing payments made to Mrs. Beatty during the period from June 15 through December 14, 2005. That page is followed by a number of pages showing how the payments were calculated for specific trips during the period between September 30 and November 25, 2005. The last four pages consist of the DAC reports concerning Mr. Beatty, including both the original adverse report and the changes made by Mr. Gover.

EX C consists of the change requests to both Beattys' DAC reports prepared by Mr. Gover.

EX D is a \$165.00 invoice from FleetNet America for a reported exhaust leak on October 29, 2005. The invoice is dated December 13, 2005. The invoice reflects that a service call was made on Tractor 172 because of the smell of exhaust in the cab. The call was made at 4:58 a.m., and the driver was given an ETA of one hour. The invoice reflects that the call was canceled by the driver, who decided to take the truck on. The service was completed at 5:45 a.m.

EX E is the repair/service history of Respondent's Truck No. 172 for the period October 15, 2002 through March 28, 2006.

EX F consists of a number of documents relating to the stop in Albuquerque for repair to the exhaust system in Truck 167 on December 4-5, 2005. The documents show the cost of repairs to the truck as well as the hotel and meal costs for the Beattys during their layover. In addition, a number of fuel receipts and other trip expenses were included in the exhibit.

Findings of Fact and Conclusions of Law

To prevail on a claim under the STAA, complainants must prove by a preponderance of the evidence that (1) they engaged in protected activity, (2) the respondent was aware of the protected activity, (3) the respondent took an adverse employment action against them, and (4) the complainants' protected activity was a contributing factor in the adverse action. *Beatty v. Inman Trucking*, ARB Case No. 11-021, ALJ Case Nos. 2011-STA-020 & -021, slip op. at 5 (ARB June 28, 2012; 49 U.S.C. § 42121(b)(2)(B)(iii); see *Villa v. D.M. Bowman, Inc.*, ARB No. 08-128, ALJ No. 2008-STA-046, slip op. at 3 (ARB Aug. 31, 2010). If the complainants meet that burden, the employer may escape liability only by proving with clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Beatty, supra*, slip op. at 5; 49 U.S.C. § 31105(b)(2)(B)(iv).

After the lengthy litigation to date, it is legally established that Complainants herein have met their burden to show all elements of their case: they engaged in protected activity, which contributed to Respondent's decision to file adverse DAC reports. At this stage, the only matters to be decided are whether Respondent has met its legal burden to escape liability and if not, what remedies should be awarded. As to whether Respondent has shown by clear and convincing

evidence that it would have made the adverse DAC reports even in the absence of protected activity, the ARB previously noted, “the evidentiary burden on Respondent is high. As the Eleventh Circuit has remarked, ‘[f]or employers, this is a tough standard, and not by accident. Congress appears to have intended that companies . . . face a difficult time defending themselves.’” *Beatty v. Inman Trucking*, ARB Case No. 13-039, ALJ Case Nos. 2011-STA-020 and -021, slip op. at 13 (ARB May 13, 2014), quoting *Stone & Webster Eng’g Corp.*, 115 F.3d 1568, 1572 (11th Cir. 1997). Additionally:

The ALJ must determine whether the evidence of record supports finding that it is highly probable or reasonably certain that Inman Trucking would have made the negative DAC report entries even if the Beattys had not engaged in their protected activity. If the evidence of record supports such a conclusion, the Beattys will not be entitled to relief. If, on the other hand, the evidence of record does not clearly and convincingly establish that Respondent would have made the same entries in the Beattys’ DAC report had they not engaged in whistleblower protected activity, the ALJ must then address on remand the issue of damages.

Beatty, supra, slip op. at 13 (ARB May 13, 2014).

Findings of Fact

Based on the record before, and after due deliberation on all relevant evidence, I make the following findings of fact.

Complainants were hired by Respondent to work as long-haul truck drivers in August of 2004, and were terminated by Respondent on December 13, 2005. During the course of their employment with Respondent, Complainants consistently informed Respondent that the trucks they were asked to drive were dirty on the inside or outside, and on at least one occasion, refused to take a cross-country trip in a truck that they considered too dirty. On one occasion, the Complainants also asked for a different truck from the one they were assigned because the cab was too small; the truck they accepted and drove had the same size cab as the one they turned down.

During their employment, Complainants gained a reputation as “complainers” among the management, mechanics, and administrative staff for Inman Trucking. They turned down trips for reasons that no other drivers had any problems with. Most of their complaints had to do with cleanliness of the trucks, but some were reports of safety issues and/or violations of Department of Transportation regulations. For example, the Beattys reported missing side mirrors and exhaust leaks on two different occasions, October 29 and December 4, 2005. As a result of their turning down trips because of the trucks’ uncleanliness or other reasons, the Beattys were considered unreliable and were not assigned a specific truck to drive, as other drivers were.

Inman Trucking company policy required drivers to complete three cross-country round trips per month. For at least the last six months of their employment, the Beattys completed no more than two round trips per month. They were reduced to part-time pay, and counseled about

their failure to complete the required number of trips. When this counseling occurred is not clear from the record.

On October 29, 2005, the Mr. Beatty called FleetNet for services on an exhaust leak in Truck 172 near Knoxville, Tennessee. They were told that the repairman would arrive in about an hour. After 47 minutes, Mr. Beatty canceled the call and continued his trip. Respondent was billed \$165.00 for the canceled call.⁴

On December 4, 2005, while the Beattys were driving from North Carolina to California in Truck 167, the truck developed an exhaust leak. Mr. Beatty called it in to a dispatcher at Inman trucking. Whether the Beattys were directed to keep driving, or chose to keep driving, is unclear and immaterial; they did keep driving after the initial report. It is unclear where the truck was located when they first called the issue in, as it appears from the testimony that the Beattys conflated the October 29 event with the December 4 event. At any rate, after continuing to drive, the muffler noise increased to the point that it “sounded like eight tractors coming down the road,” and Mr. Beatty pulled the truck over near Oklahoma City. He crawled beneath the truck and took pictures of the muffler; those pictures show a very large hole in the muffler itself, a severed pipe, and a damaged hose. Mr. Beatty again talked with someone at Inman, and after that conversation, continued to drive. When the Beattys arrived in Albuquerque, they decided that they could not drive the truck any further without repairs to the exhaust system. They called Trent Murfurro, Respondent’s dispatcher, who refused to discuss the repairs with them, and directed that they talk to Mr. Spivey about them. When Complainants talked to Mr. Spivey, he authorized the repair. The repairs were not completed until December 6, 2005, so the Beattys had a two-day layover in Albuquerque. Respondent paid for their hotel rooms and meals in Albuquerque. The Beattys thereafter completed the run to California, dropped their load, picked up loads in California, and drove back to North Carolina.

Complainants arrived back in North Carolina on Monday, December 12, 2005.⁵ Mr. Beatty went into Respondent’s office to complete his post-trip paperwork. In light of his bad experiences with employees of Respondent, he took a tape recorder with him. When he was in the office, Mr. Gover made a comment to him about drivers. Mr. Beatty took exception to the comment, and told Mr. Gover he was going to record their conversation. Mr. Gover then told Mr. Beatty that he was fired, and told him to leave the property.⁶

On December 14, 2005, Mr. Gover submitted DAC reports concerning the Beattys. He noted excessive complaints, company policy violation, “personal contact requested,” and “other” in the “work history” section of the DAC reports; he also responded “No” to whether they were eligible for rehire. Mr. Gover intended for “excessive complaints” to mean that the Beattys made an excessive number of complaints about the condition and/or size of the trucks they were asked

⁴ In making this finding, I rely on the FleetNet invoice showing that the service request came from Mr. Beatty and showing that the “driver” canceled the call. I do not credit Mr. Beatty’s testimony that he did not call FleetNet, as he was uncertain that the October 29 event even occurred, and there is no evidence to show that anyone from Inman Trucking other than Mr. Beatty made the call.

⁵ See manifest included in EX F. I take official notice that December 12, 2005 was a Monday.

⁶ On this issue, I credit Mr. Beatty’s testimony at the hearing. It was not contradicted by Mr. Gover. I do not credit the statement written by Mrs. Beatty to the OSHA investigator as she testified, and I find, that she was not present during the conversation between Mr. Beatty and Mr. Gover.

to drive, not to mean that they were the subject of customer complaints. The complaints the Beattys made included both cleanliness complaints and safety complaints.⁷ It is less clear what he intended by his reference to violations of company policy. At the hearing, he testified that he intended to refer to the Beattys' failure to complete three trips per month as they were expected to do; but in his response to OSHA, he stated that the violation was the Beattys' failure to call in to dispatch daily when they were not on a trip. I find that the reference to violating company policy refers to both the failure to complete enough trips, and the failure to call in to dispatch on days they were not driving.

After their termination from employment with Respondent, the Beattys received unemployment benefits for 26 weeks. In June 2006, the Beattys started working for FedEx. They worked as drivers for FedEx for three months before their employment was terminated. After being terminated from FedEx, they did not seek further employment until they applied to work for U.S. Express.

In early August of 2007, the Beattys applied to work for U.S. Express. While attending orientation, they were pulled out and told they would not be hired. They made several attempts to find out why, and learned only that there was adverse information in their DC reports. They did not learn then what the information was, or which employer provided it.

Also in early August of 2007, the Beattys responded to an ad for drivers to drive round trip between Milwaukee and North Carolina for Cargill Meats. They submitted their application, which Mr. Hall sent to the safety manager, who forwarded it to Cargill. Cargill did not approve the application, and told Mr. Hall that it was because there was adverse information in the Beattys' DAC reports. When the Beattys were so informed, they finally learned that the adverse information on the DAC reports was the information provided by Mr. Gover in December of 2005. Had the Beattys not had negative DAC reports, they would have been hired by Cargill. In that job, they would have been paid 33% of the total load, which averaged 1800 pounds, or \$594 per load. They would have been able to run two loads per week, so their weekly pay would have amounted to \$1188.⁸

On August 9, 2007, shortly after they were denied employment at Cargill, the Beattys submitted their retaliation complaint against Respondent to OSHA. The OSHA investigator attempted to assist the parties in reaching a resolution, which included changing the information on the DAC reports.

Pursuant to the OSHA investigator's request, and in an effort to settle the complaint, Mr. Gover changed the DAC reports on August 24, 2007, to remove "personal contact requested."

⁷ I make this finding on the basis of Mr. Gover's testimony that "nine times out of ten" the complaints were about the cleanliness the trucks. The other complaints of record involved one complaint about the size of the cab, two reports of exhaust issues, and one report of missing spot mirrors on the hood of one truck. Thus, about one in ten of the complaints that did not involve cleanliness included the reports of exhaust system problems and missing spot mirrors.

⁸ In this regard, although Complainant's counsel insinuated in questioning Mr. Hall that Complainants could have made three runs per week rather than two, Mr. Hall opined that due to the nature of the operation, which required stopping at several places along the route, they could not realistically do more than two. I credit Mr. Hall's opinion, as he is the person most familiar with the operations involved in fulfilling the Cargill contract.

He changed them again on August 27, 2007, to remove “excessive complaints” and to change “Eligible for Rehire: No” to “review required before rehiring.” On September 13, 2007, Gover submitted the specific DAC codes to make the final changes. By September 17, 2007, the DAC reports were “clean”, that is, they no longer included negative information. Mr. Gover had no intention of changing DAC report if OSHA had not attempted to settle the case. Each change was made at the Beattys’ request in order to resolve their complaint.

In November of 2007, the Beattys obtained employment as drivers for Covenant Transport, where they worked until June of 2008. They voluntarily resigned, and could return to Covenant if they chose to do so, but they do not expect to do so.

Discussion

1. Respondent Has Not Met Its Burden to Show It Would Have Submitted Adverse DAC Reports Even in the Absence of Protected Activity

The only decision-maker shown in the evidence with respect to the DAC reports is Mr. Gover. Although he testified that he would not have fired the Beattys for making safety complaints, and has never done that, he did not make the same statement with respect to the DAC reports. As to the DAC reports, Mr. Gover testified that he submitted them with no knowledge of the December 4-6 incident involving a defective exhaust system. He said that he believed on December 14 that the Beattys’ only report of an exhaust leak was on October 29 with respect to Truck 172, and there was no exhaust leak on that truck at any time. He therefore believed that the report was false, and referred to it as the “phantom” exhaust leak. He further testified that it was only upon discovering that the exhaust problem in December, on Truck 167, actually did occur, that he realized he was in the wrong and agreed to change the DAC reports. I do not credit his testimony. As he acknowledged, upon the Beattys’ return from the December trip they came into the office and referred to “the exhaust leaks we keep talking about.” This occurred before the DAC reports were submitted, and clearly referred to the fact that the Beattys had reported more than one exhaust leak. His explanation that he thought only the October “phantom” leak was involved is therefore not credible. It is also not believable that he, as safety manager, was unaware that Truck 167 had required a two-day layover little more than a week before the Beattys’ termination in order to repair the exhaust system.

The crucial point of the analysis, however, is whether Mr. Gover would have submitted the adverse DAC reports had the Beattys never reported any safety concerns. As discussed, the safety concerns included two reports of exhaust leaks and one report of missing spot mirrors. These reports were included among the “excessive complaints” that Mr. Gover noted on the initial DAC reports. Indeed, the complaints were frequent and continuing; but the Beattys were not fired and subjected to adverse DAC reports until they (1) reported the exhaust leak on December 4, 2005, and (2) referred to their report of “exhaust leaks we keep talking about” at the very meeting during which they were fired.

Furthermore, Mr. Gover testified that he had previously decided to fire the Beattys if they refused another trip for any reason. When he fired them, they had not refused another trip. They had just returned from a trip, during which they reported an exhaust leak that required a two-day layover for repairs, and referred to that exhaust problem when they saw Mr. Gover upon their

return. It is clear to me that no decision to terminate the Beattys had been made until those events, and their termination was in direct response to them. The DAC reports were made because the Beattys were terminated, and I find and conclude that they were made for the same reason.

Finally, assuming that the Beattys had never reported exhaust leaks or missing spot mirrors, Respondent has not offered any evidence that it would have terminated them, and then submitted the adverse DAC reports, based on their excessive complaints of uncleanness or of the size of the cab. Certainly Respondent could have done so, and could have taken the adverse actions if the Beattys refused to drive a truck for any reason, but Respondent has not shown that it *would have* done so. The only direct evidence of the intent to take adverse action was Mr. Gover's testimony that he intended to fire the Beattys (and presumably file the DAC reports) if they refused another trip. They did not refuse another trip, and he fired them anyway, and submitted the adverse DAC reports. Respondent has not shown that it took adverse action any other drivers for complaining about truck size or cleanliness, and has not shown that it had a company policy of doing so.

The burden is on Respondent to show by clear and convincing evidence that it would have submitted the adverse DAC reports even if the Beattys had not engaged in the protected activities of reporting safety concerns. In this case, Respondent has not done so. To the contrary, the evidence shows that the reported exhaust leak of December 4 led directly to the Beattys' termination and the consequent adverse DAC reports.

2. The Beattys Are Entitled to an Award of Lost Pay

After their termination from Inman Trucking, the Beattys collected unemployment benefits, and upon exhausting those benefits, found employment right away with FedEx. After being terminated from FedEx, they did not seek further employment until they applied to U.S. Express, and were pulled from orientation due to the adverse DAC reports. There is no evidence of the wages they would have earned had they started driving for U.S. Express. On approximately August 7, 2007, they were denied employment with Mr. Hall on his contract with Cargill, and learned that it was because of the information contained in the DAC reports submitted by Respondent. Mr. Hall testified, and I find, that had the DAC reports not been adverse, the Complainants would have been hired by Cargill. They are entitled to the pay they would have received working for Mr. Hall on the Cargill contract. Although the contract lasted for four months, thus ending in December, I find that Complainants are not entitled to four months' worth of pay, as they actually found employment in November of 2007 with Covenant Transport. There is no evidence as to their earnings with Covenant, so I am unable to conclude that they earned less working for Covenant than they would have earned working for Mr. Hall during the overlapping period.

As to the time period during which Complainants lost pay, they have only claimed about six weeks' lost wages. The end date of their request is September 17, 2007, when their DAC reports were finally "clean." I find that it would be inappropriate to end the lost pay on that date. The remedial provisions of the STAA are make-whole provisions. Indeed, the purpose of a pay award is to place the wronged employee in the position he or she would have been in had the

employer not retaliated against them. See *Ass't Secretary & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005) (internal citations omitted). Complainants were not hired for a contract that would have, if they had been hired, provided them four months' employment. Thus, but for the fact that they found employment with Covenant Transport, they would be entitled to compensation for the entire four-month period of pay they did not receive from Mr. Hall. As they did find employment with Covenant as of November, they are not entitled to pay from that point on. However, as Complainants bear the burden to show their damages, and they did not specify the date in November that they started with Covenant Transport, I must conclude that they started with Covenant on November 1, cutting off Respondent's liability as of October 31. They are therefore entitled to the pay they did not receive from Mr. Hall for the period from August 7, 2007 to October 31, 2007, a period of 12 weeks. I credit Mr. Hall's testimony that they would have been able to make two runs per week rather than three, for a total of 24 runs in that 12-week period. I also credit his testimony that CX I accurately reflects the pay they would have received – 33% of \$1800 per run, or \$594 per run. Twenty-four runs at \$594 per run amounts to a total of \$14,256.00. In addition, Complainant is entitled to interest on the unpaid earnings. Under 29 C.F.R. § 1978.105(a)(1), “[i]nterest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621” – generally the short-term Federal rate plus three percent – “and will be compounded daily.” Respondent will be ordered to calculate and pay such interest.

3. The Beattys Are Not Entitled to Other Compensatory or Punitive Damages

In their supplemental brief on remand, Complainants also ask for compensatory damages “for their emotional distress as a result of being...wrongfully terminated, blacklisted by the DAC reports and then repeatedly denied employment as a result of Respondent's acts.” The evidence, however, does not support an award of non-economic compensatory damages. There is nothing in the record to show that the Complainants suffered from any sort of stress or emotional distress based on the adverse DAC reports or on any other grounds. It appears that although they were only intermittently employed between their termination from employment with Respondent to the date of the hearing,⁹ they felt no particular need to find employment, looking for work only when they decided they needed to. They provided no testimony about their emotional conditions before or after their employment with Inman Trucking. There is no evidentiary basis for an award of compensatory non-economic damages.

Likewise, Complainants request an award of punitive damages, asserting that they “have been victims of the very type of behavior the statute is designed to punish, and hopefully prevent in the future...” The STAA allows for an award of punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 31105(b)(3)(C). The United States Supreme Court has held that punitive damages may be awarded where there has been “reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law” *Smith v. Wade*, 461 U.S. 30, 51 (1983). The purpose of punitive damages is “to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.” Restatement (Second) of Torts § 908(1) (1979).

⁹ Complainants suggest in their supplemental brief on remand that they continue to have periods of unemployment attributable to the adverse DAC reports. They have not supplied any evidence in support of that suggestion, and I am limited to the evidence of record.

I find that although the Respondent's conduct in this matter violated the STAA, the violation was not outrageous. Respondent had ample reason to terminate the Beattys and submit adverse DAC reports based on that termination even without their having reported exhaust leaks.¹⁰ Respondent's actions did not show reckless or callous disregard for the Beattys' rights under the Act. I therefore will not make an award of punitive damages.

4. Complainants Are Entitled to an Award of Attorney Fees and Costs

Complainants are entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of this complaint. 49 U.S.C. § 31105(b)(3)(B); *Murray v. Air Ride, Inc.*, Case No. 1999-STA-34 (ARB Dec. 29, 2000). Counsel for Complainant will be given the opportunity to submit a fee application.

ORDER

Based upon the foregoing, IT IS ORDERED:

1. Respondent shall pay to Complainants the amount of \$14,256.00, representing lost pay for the period from August 7, 2007 through October 31, 2007;
2. Respondent shall additionally pay interest on that lost pay, calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 (the short-term Federal rate plus three percent) and compounded daily since October 31, 2007; and
3. Counsel for Complainant may, not later than 30 days after the date of this Final Decision and Order, file a fully-supported application for attorney's fees and costs, after which Respondent is allowed 21 days to file objections thereto.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic

¹⁰ That they had ample reason to do so, of course, does not establish by clear and convincing evidence that they would have done so.

File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has

been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).