

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 February 2009

Case No.: 2008 STA 15
In the Matter of

BILL FLEEMAN
Complainant

v.

**NEBRASKA PORK PARTNERS &
NEBRASKA PORK MARKETING, LLC**
Respondent

Appearances: Mr. Daniel T. Hoarty, Attorney
For the Complainant

Mr. Larry J. Karel, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (“STAA” or “Act”) of 1982, as amended and re-codified, Title 49 United States Code Section 31105, and the corresponding agency regulations, Title 29, Code of Federal Regulations (“C.F.R.”) Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules or cause serious injury.

Procedural Background

On May 30, 2007, through counsel, Mr. Fleeman filed a complaint of alleged illegal discrimination by the Respondent, Nebraska Pork Partners & Nebraska Pork Marketing, LLC (“NPP”) based on the January 4, 2007 termination of his employment. On November 2, 2007, after an investigation of Mr. Fleeman’s complaint by the Occupational Safety and Health Administration (“OSHA”), United States Department of Labor (“DOL”), the Regional Administrator dismissed the complaint. On December 5, 2007, through counsel, Mr. Fleeman filed his exceptions to the adverse determination and requested a hearing with the Office of Administrative Law Judges. After two continuances, and pursuant to a Notice of Hearing dated

April 9, 2008 (ALJ III),¹ I conducted a hearing on July 22, 2008 in Omaha, Nebraska. My recommended decision and order in this case is based on the testimony presented at the hearing and the following documents admitted into evidence: CX 1 to CX 3, CX 5 to CX 12, and RX 1.

Complainant's Statement of the Case²

On January 4, 2007, Mr. Fleeman's employment with NPP was wrongfully terminated because he engaged in protected activities under the STAA.

Over the course of his employment, Mr. Fleeman periodically complained drivers were not receiving sufficient periods of rest, which required them to violate U.S. Department of Transportation ("DOT") hours of service regulations. On multiple occasions, in the course of driving NPP loads, Mr. Fleeman exceeded the DOT hours of service.

In late November 2006, Mr. Fleeman complained to Mr. Horton at a drivers' meeting that the load scheduling was illegal because it did not provide the required 10 hour break. He also noted that one route could not be completed within the hours of service as scheduled.

On December 1, 2006, Mr. Horton, on NPP's behalf, renewed the company's employment relationship with Mr. Fleeman under a motor carrier agreement.

On December 21 and 22, 2006, due to icy, hazardous road conditions, Mr. Fleeman declined to accept loads and they were cancelled.

On January 2, 2007, as he was completing one route, Mr. Fleeman, for the first time in working for NPP informed Mr. Horton that he would not be able to drive his next scheduled load that evening because he was out of hours.

On January 4, 2007, Mr. Horton terminated Mr. Fleeman's employment with NPP.

For several reasons, the testimony of Mr. Meays and Mr. Horton regarding the purported reasons for terminating Mr. Fleeman's employment is inconsistent, contradictory, not believable and pretext. First, Mr. Fleeman's belligerence cited by both supervisors occurred nearly a year earlier in January 2006. Similarly, their concern about Mr. Fleeman's refusal to accept loads to certain occasions related to conditions that existed a year earlier which had been subsequently resolved. Third, Mr. Fleeman's violation of hours of service at the end of December 2006 was a common practice with NPP drivers and no one had been disciplined. Fourth, during the hearing, Mr. Meays presented three versions of who drafted the termination letter and when.

Nothing significant occurred between the December 1, 2006 renewal of Mr. Fleeman's contract with NPP and the January 4, 2007 termination notice that legitimately warranted NPP ending its employment relationship with Mr. Fleeman. Instead, Mr. Fleeman's employment was

¹The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

²Opening statement, TR, p. 6-13., and closing brief, October 31, 2008.

terminated due his complaints about illegal scheduling, refusal to drive in hazardous weather, and refusal to accept a load because he was out of hours.

Mr. Fleeman seeks reinstatement, over \$118,000 in back pay, \$20,000 in compensatory damages due to stress associated with the termination, and attorney fees and reimbursement of litigation expenses.

Respondent's Statement of the Case³

Mr. Fleeman's STAA discrimination complaint should be dismissed because he never reported any illegal procedures or policies to NPP. The termination of his employment was based on legitimate, necessary business reasons, including his belligerent attitude, creation of unrest among other drivers, violation of DOT hours of service, and failure to report his violation of hours of service.

In January 2006, in response to not receiving a specific assignment, Mr. Fleeman accused Mr. Horton of cheating him and not being man enough to correct the mistake.

During 2006, Mr. Fleeman refused to accept numerous loads for various reasons, such as the type of road and location, which lead other drivers to object to favoritism. Mr. Meays and Mr. Horton never received any complaint from Mr. Fleeman about alleged violations of DOT hours of service.

Mr. Fleeman's belligerent attitude interfered with his effectiveness and adversely affected the morale of other company drivers.

In November 2006, Mr. Fleeman invited other drivers to a meeting he had with NPP and the meeting discussion became heated.

On December 1, 2006, NPP signed a new agreement with Mr. Fleeman with the hope that his hostility would cease. However, his attitude didn't change.

On December 21 and 22, 2006, when Mr. Fleeman refused loads due to weather, Mr. Horton cancelled the trips. Due to the bad weather, and the company's concern for safety, the loads of many other drivers were also cancelled.

On December 30, 2006, in taking a load, Mr. Fleeman violated DOT hours of service regulations. Mr. Fleeman failed to advise NPP that he was having an hour of service problem and he did not inform the company of the violation.

On January 2, 2007, Mr. Horton became aware of Mr. Fleeman's December 30, 2006 hours service violation, decided to terminate Mr. Fleeman, and prepared the notice. On the same day, when Mr. Fleeman called in to refuse his load, Mr. Horton had already worked on

³Opening statement, TR, p. 13-17 , and closing brief, dated October 29, 2008.

reassigning the load. Mr. Fleeman was not expected to take the load and no hard feelings were created by his refusal to take the load.

On January 4, 2006, the termination notice was sent to Mr. Fleeman.

ISSUE⁴

Whether Mr. Fleeman engaged in an STAA protected activity which caused NPP to terminate his employment.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Sworn Testimony

Mr. John Bohac
(TR, p. 28-51)

[Direct examination] Mr. Bohac worked for NPP for approximately 2 years, leaving on December 31, 2006. While an employee, he transported hogs and other livestock. Transporting livestock involved picking up a trailer from NPP in Columbus, Nebraska, going to a specified unit to load the livestock, driving to the delivery unit and unloading the livestock, and then returning the trailer back to Columbus.

During Mr. Bohac's employment, Mr. Horton was in charge of scheduling loads. Mr. Bohac expressed to Mr. Horton several times that the loads were scheduled such that they could not be run legally. According to Mr. Bohac, DOT regulations mandate that once a driver is on duty, he may drive a total of 11 hours and be on duty for a total of 14 hours; then, the driver must take 10 hours of rest before going back on duty. Mr. Bohac complained to Mr. Horton about the scheduling of loads on more than one occasion. Specifically, on many occasions, there wasn't enough time for sufficient rest, or "enough time to sleep," between the completion of a run and the scheduled run the next day. Mr. Bohac recalled one instance that he communicated load problems to Mr. Horton when the two of them were by the fuel pumps. Mr. Horton's response to Mr. Bohac's concerns was sometimes "we just have to adjust on the fly." Mr. Bohac also made complaints to Mr. Horton at drivers' meetings.

Right after Mr. Meays was hired, Mr. Bohac talked to him about illegally scheduled loads and safety concerns. He encouraged Mr. Meays to work with Mr. Horton to schedule loads legally. Mr. Bohac also talked to Mr. Meays about the problem at drivers' meetings. Mr. Meays acknowledged his understanding that the loads were being scheduled illegally and responded to the complaints by stating "I have to work with him [Mr. Horton]."

Mr. Bohac remembers hearing other drivers make complaints about the scheduling, including Mr. Fleeman. Mr. Fleeman made complaints about both safety and exceeding the DOT hours of service. He specifically complained that the scheduled loads could not be run

⁴As subsequently discussed in detail, since this case was fully litigated on the merits, my attention is focused on whether the Complainant has met his ultimate burden of proof by a preponderance of the evidence.

legally. Although Mr. Fleeman complained about certain issues to Mr. Horton and Mr. Meays, Mr. Bohac never heard Mr. Fleeman criticize the new contract to management.

Mr. Bohac attended a drivers' meeting in November 2006 regarding the new contract NPP wanted each driver to sign. At the drivers' meeting, Mr. Fleeman brought up the concern that drivers were not being provided enough time to sleep between loads. To Mr. Bohac's knowledge, Mr. Fleeman did not attempt to discourage any of the other drivers from signing the new contract at the meeting or elsewhere.

On December 31, 2006, Mr. Bohac ended his employment with NPP because he was uncomfortable with the way the loads were scheduled and not getting enough sleep to comfortably run the loads expected of him. He never refused a load but did make complaints regarding safety issues.

[Cross examination] Mr. Bohac called NPP on December 31, 2006 and notified Mr. Horton he did not renew his insurance because he was not going to run anymore. During his course of employment with NPP, Mr. Bohac drove his own truck and pulled a trailer provided by NPP.

Mr. Bohac made complaints about some of the runs scheduled by NPP. One run he found problematic was the Awahee run which was about 850 miles in distance, which was more distant than the other runs.

Mr. Bohac acknowledged that his contract with NPP required him to comply with DOT hours of service regulations. However, Mr. Bohac stated, "I ran what I had to do to keep my job" and he never refused a load.

Mr. Bohac also made complaints about the loads at Cedar Nursery and Cedar Farrowing because of the driveways going into the units.

Mr. Bohac attended the meetings NPP had regarding safety and DOT regulations. He remembers NPP providing forms to report concerns but he never used them. None of his complaints were ever in writing.

Mr. Bohac and Mr. Fleeman were friends and talked quite a bit when they worked together.

There were times when Mr. Bohac got delayed at one end or another of a run. NPP would sometimes work to adjust the schedule in these situations where there were unforeseen kinds of delays.

[ALJ examination] The issues, problems, and complaints Mr. Bohac noted were spread out over the length of his employment.

Mr. Bohac complained about the Awahee run because it violated DOT hour requirements. That run required a driver to take an empty trailer to Awahee, load feeder pigs,

transport them to another plant in Iowa, and unload the pigs. The route could be completed within 11 hours of driving and 14 hours of duty. However, on many occasions, final unloading would not be complete until 2:30 to 4:00 in the afternoon and the driver was then usually expected to reload fat hogs that night at another location and take that load to the processing plant in Crete, Nebraska. Mr. Bohac believed the driver should have been provided the requisite 10 hours sleep break between the time he dropped off the feeder pigs in Iowa and picked up that fat hogs for Nebraska. Due to the tight schedule, a driver usually only had about 8 hours for sleep. Despite only taking an 8 hour break, the driver's log would reflect that a 10 hour break had occurred.

At a November 2006 meeting for all owners of the trucks, Mr. Fleeman complained there wasn't time between loads on the Awahee run. The meeting was intended to be a forum for NPP and the contract carriers to go through the new contract. Mr. Horton pointed to his schedule and indicated that he had to get all the loads scheduled.

Mr. Bohac signed the new contract but within 4 to 5 weeks, he realized that he was tired of "running that hard." He was putting in too many hours and doing too many runs at night, so he decided not to haul for NPP anymore.

[Cross examination] The November 2006 meeting where Mr. Fleeman addressed scheduling concerns was the only meeting Mr. Bohac attended regarding the new contract. Mr. Bohac believed this was a meeting for all truck owners and had never heard that there was supposed to be individual meetings for each driver.

Mr. William Fleeman
(TR, p. 51-102)

[Direct examination] Mr. Fleeman started working for NPP in 2004 when NPP took over the business of Mr. Fleeman's prior employer. His employment with NPP required him to use his own truck to haul hogs in NPP's trailers at a schedule dictated by NPP. He drove in Nebraska, South Dakota, Iowa, and Minnesota.

Since NPP took over, Mr. Horton has been responsible for scheduling and dispatching the loads. Mr. Meays was the Fleet Coordinator. Mr. Fleeman only had contact with Mr. Meays once regarding the scheduling of loads.

The DOT regulations permit a driver to be on duty 14 hours, of which 11 hours can be spent driving. After 14 hours, the regulations require a 10 hour break.

Mr. Fleeman's typical load started with going to NPP's Columbus, Nebraska facility to pick up a trailer, then proceeding to a specified location to pick up hogs, next Mr. Fleeman took the hogs to the destination point, and then he would take the trailer back to Columbus, Nebraska. Mr. Fleeman had issues with how loads were scheduled. Specifically, Mr. Fleeman believed NPP was not allowing proper break times and he took issue with NPP not allowing drivers to sleep after the load was picked up until they returned the trailer to Columbus. At times, drivers would run out of on-duty time before getting back to Columbus due to scheduling or delays.

NPP told its drivers that they were not allowed to stop and sleep until their trailer was returned to Columbus. Mr. Fleeman made complaints to Mr. Horton about scheduling at a couple of drivers' meetings, including the meeting held in November 2006. Mr. Fleeman also made a complaint about scheduling to Mr. Horton on January 2, 2007 over the telephone. In the complaints, Mr. Fleeman told Mr. Horton there was not enough time to run the loads and drivers could not continue to run loads without the proper break or when the schedule ran loads into other loads. In particular, he complained about the Awahee run. One of Mr. Horton's responses was "My hands are tied. This farmland has to have those pigs at a certain time." Another time, Mr. Horton opened his scheduling book and said "This is what I've got to deal with. I've got this many loads. These pigs gotta go out so the new pigs can come in."

After returning from a load with Mr. Bohac, Mr. Fleeman made his sole complaint to Mr. Meays about Mr. Horton's scheduling. Mr. Meays responded with "I know. I'm working with him on it."

Mr. Fleeman was scheduled to take one load on December 21, 2006 and two loads on December 22, 2006. On December 21, 2006, there were ice storm warnings and ice storms on the road. Accordingly, Mr. Fleeman called Mr. Horton to say he was uncomfortable taking the load. On December 22, 2006, Mr. Fleeman took his first load but after completing the haul, he noticed that the ice was thawing out and he could not pass on the road. The conditions were deteriorating from the time he did his first load. Mr. Fleeman began to have safety concerns about completing his second load. He spoke with some other drivers regarding the road conditions. One of NPP's pickup trucks had wrecked that morning and Mr. Fleeman had seen a feed truck fall into a ditch the day before at the unit Mr. Fleeman was scheduled to load, which had gone unmentioned by Mr. Horton. When Mr. Fleeman called to notify Mr. Horton that he would not be doing his second load, Mr. Fleeman asked Mr. Horton why the feed truck incident had not been mentioned. Mr. Horton would not answer Mr. Fleeman's question.

Mr. Fleeman was scheduled to load at 10:00 p.m. on January 1, 2007. However, Mr. Horton called to push the load time back to 7:30 a.m. on January 2, 2007 because the hog facility did not have power. To load at 7:30 a.m., Mr. Fleeman left around 3:00 a.m. due to ice concerns. Mr. Fleeman loaded and made the haul to Crete, Nebraska by about 1:00 p.m. After unloading, he returned to Columbus at around 3:45 p.m.

Mr. Fleeman was also scheduled to pick up a load of pigs at 11:00 p.m. on January 2, 2007 in Pocahontas, Iowa. However, on the way back from Nebraska in the afternoon of January 2, 2007, Mr. Fleeman called Mr. Horton to tell him there was no way that he could go to Pocahontas because he had already been on duty for 13 hours. To get to Pocahontas, Iowa by 11:00 p.m., Mr. Fleeman would have to pick up the trailer around 6:00 p.m. This would only leave him with approximately 2 hours of break time. In response, Mr. Horton said he would see what he could do and hung up. This was the first time Mr. Fleeman had refused a load due to hours. However, he had made prior complaints about scheduling and had refused a couple of loads a few weeks prior based on weather concerns.

The next correspondence Mr. Fleeman received from NPP was a certified letter a couple days later, on January 5, 2007, terminating his contract. No reasons were provided. Upon receipt of the letter, Mr. Fleeman attempted to contact Mr. Horton but Mr. Horton did not answer. So, Mr. Fleeman called Mr. Meays to inquire about the reasons behind his termination. Mr. Meays said Mr. Fleeman was terminated because NPP needed people who were not going to pick and choose the units they would do. Mr. Meays asserted Mr. Horton had a whole list of units Mr. Fleeman had refused. Mr. Fleeman told Mr. Meays this was not true. Mr. Fleeman said he had previously refused Cedar Nursery, Cedar Farrowing and Awahee but had not refused the loads since the driveways at those locations were fixed.

Mr. Fleeman refused Cedar Nursery and Cedar Farrowing in January 2006 and Awahee in May 2006. He filled out a form complaining about the driveways at Cedar Farrowing and Cedar Nursery but did not complete a form for Awahee.

A short time after talking to Mr. Meays, Mr. Fleeman received a call from Mr. Meays and Mr. Horton on speakerphone. Mr. Fleeman again asked why he had been terminated. Mr. Horton replied it was because Mr. Fleeman was always the first to call with weather concerns and because Mr. Fleeman had refused to do the Cedar Farrowing, Cedar Nursery, and Awahee runs. When Mr. Fleeman replied that was ridiculous, Mr. Horton added that Mr. Fleeman did not like the new contract.

Mr. Fleeman called Mr. Horton approximately two weeks later to again inquire about his termination because he did not want to leave NPP. Mr. Horton said he already told Mr. Fleeman that NPP fired him because of his weather concerns and because he refused the Cedar Farrowing, Cedar Nursery, and Awahee runs. Mr. Fleeman responded by saying that the reasons did not make sense because a couple of months prior to his termination, Mr. Horton had called to tell him what a great job he was doing. Mr. Horton replied that the contracts says it can be terminated for any reason.

Mr. Fleeman was never told that his termination was due to anything stemming from the loads on December 25, 2006, December 26, 2006 or December 30, 2006 or because he violated DOT hours. Mr. Fleeman admitted that he violated DOT hours many times because it was expected since NPP did not allow a driver to sleep after a run until he returned the trailer.

NPP never criticized Mr. Fleeman's driving during the time he was an employee. Mr. Fleeman never discussed the December 2006 contract with anybody from NPP prior to the November 2006 drivers' meeting. However, Mr. Fleeman did discuss the contract with some of the drivers. A lot of the drivers were not happy about the pay and scheduling in the new contract and Mr. Fleeman agreed. Prior to the November 2006 meeting, Mr. Fleeman called one of the other drivers just to let him know that he would be attending the meeting.

Mr. Fleeman met with Mr. Horton on December 1, 2006 to sign the new contract. Mr. Horton brought up no concerns about Mr. Fleeman as a driver for the company.

In January 2006, Mr. Fleeman filed five report forms and received a response from Mr. Horton, CX 6, providing explanations for why NPP made the decisions that were the basis of Mr.

Fleeman's concerns. The response also indicated Mr. Fleeman was a quality driver and thanked him for his inputs.

Mr. Fleeman made about \$99,000 a year at NPP once operating expenses were taken out. NPP had a payment system where drivers were paid \$1.05 per mile plus a surcharge per mile depending on the price of fuel. The old payment system also included weekly minimums. Mr. Fleeman's 1099 for 2006 showed approximately \$154,000. He was labeled an independent contractor on the 1099. His expenses included fuel, insurance, and truck maintenance. Mr. Fleeman earned approximately \$15,000 from NPP in 2007 for his work from January 1, 2007 through early February 2007. After receiving the termination letter, which provided 30 days notice, Mr. Fleeman worked for an additional 30 days for NPP.

In February 2007, Mr. Fleeman began to drive for Camaco. He earned around \$29,000 with Camaco in 2007. He is still working there and has probably earned \$21,000 or \$22,000 in 2008. He is no longer an independent contractor. As an employee of Camaco, Mr. Fleeman drives Camaco's trucks and is paid monthly. Mr. Fleeman had to "get rid" of the truck he had used when working for NPP. Mr. Fleeman indicated that he can purchase a truck if he is reinstated with NPP.

Mr. Meays had never criticized Mr. Fleeman's driving prior to Mr. Fleeman's termination. Mr. Fleeman never had a meeting with Mr. Meays or Mr. Horton regarding any issues prior to Mr. Fleeman's termination.

[ALJ examination] In order to pick up the scheduled load in Iowa at 11:00 p.m. on January 2, 2007, Mr. Fleeman would have had to pick up a trailer in Columbus, Nebraska around 6:00 p.m.

The contract Mr. Fleeman signed in December 2006 had a significant pay cut from the contract he had been working under previously. The pay cut was due to NPP's decision to cut back the fuel surcharge by only paying a surcharge for miles actually driven rather than the contractual daily minimum mileage. Mr. Fleeman signed the contract so that he would not lose his job.

Mr. Fleeman has never had a problem with his log book at inspections. NPP does not review the drivers' log books.

[Direct examination] Mr. Fleeman and his wife discussed how the termination would be problematic for their family. Mr. Fleeman is the only person working in his family. He has encountered a lot of stress from losing his job. He has lost his truck, has not been able to pay bills on time, and has had to borrow quite a bit of money from his in-laws, which makes him feel bad. Mr. Fleeman has not seen a doctor in the past year.

[Cross examination] The IRS has asserted that Mr. Fleeman owes the agency money and has put a lien of about \$150,000 on Mr. Fleeman's house and self. Mr. Fleeman is contesting that he owes any money and has not used any of the money he borrowed from his family towards the lien.

The 2006 contract between NPP and Mr. Fleeman labeled Mr. Fleeman as an independent contractor but Mr. Fleeman has brought a work-force development case against NPP claiming he was an employee. Mr. Fleeman has appealed this case to the Nebraska Court of Appeals.

Mr. Fleeman does not believe that Mr. Horton's load schedules allowed sufficient time for drivers to get to and from the units within DOT hours of service regulations. Mr. Fleeman would receive his weekly driving schedule the Friday before the week started. Sometimes, the schedule would show the route could not be completed within the DOT hours because a 10 hour break was not provided.

The November 2006 drivers' meeting took place at NPP's office. NPP invited Mr. Fleeman to the meeting to discuss the new contract. Mr. Fleeman did not believe that the meeting became heated. He also did not realize he was the only driver invited to the meeting by NPP. Mr. Meays informed Mr. Fleeman of the meeting and told Mr. Fleeman that they both should notify as many other drivers as possible.

Mr. Fleeman had difficulty with the Awahee run and in early 2006 said he would not make that run. Mr. Fleeman also had said that he would not do Cedar Farrowing or Cedar Nursery runs until the driveways were fixed. Mr. Horton did not schedule him for those runs after his complaints but Mr. Fleeman did not think it caused any problems with the other drivers.

Mr. Fleeman considered himself a driver with seniority but there is no specific policy regarding treatment of drivers based on seniority.

In January 2006, Mr. Fleeman had an issue with Mr. Horton because a load was not given to him that he should have gotten. So, Mr. Fleeman wrote a letter to Mr. Horton stating things like Mr. Horton "robbed him of \$558," Mr. Horton "screwed" him, and Mr. Horton wasn't man enough to recognize the mistake in not giving Mr. Fleeman the load.

In response to Mr. Fleeman's letter, Mr. Horton sent a letter informing Mr. Fleeman that NPP did not give him the load because of bio-security issues and Mr. Fleeman's wrestling schedule. Mr. Fleeman believed that this exchange did not create more problems with NPP and Mr. Horton and did not notice any difference in his contractual relationship with Mr. Horton or Mr. Meays.

NPP had a regulation requiring drivers to call Mr. Horton if there was a problem with a carrier, so Mr. Fleeman called Mr. Horton when he had a carrier issue.

NPP had meetings from time to time regarding safety and DOT regulations. Mr. Fleeman does not recall ever being told what the DOT regulations were but he did recognize that his contract with NPP holds him responsible for the DOT regulations and both himself and NPP responsible for following all state and federal laws. Mr. Fleeman did not file driving logs with NPP because he was an independent contractor. Mr. Fleeman maintained his log.

Mr. Fleeman had issues with doing runs due to weather other than those previously mentioned that took place on December 21 and 22, 2006. Mr. Fleeman called Mr. Horton when he had weather concerns because it was the only way to change a driver's schedule. Mr. Horton would change a driver's schedule for inclement weather, but not willingly. Mr. Horton cancelled Mr. Fleeman's loads on December 21 and 22, 2006 upon his complaints.

Mr. Fleeman was at an NPP meeting where NPP provided the drivers with forms to submit to NPP if the drivers had a problem. Mr. Fleeman used the form for his January 2006 letter to Mr. Horton regarding the Saturday load Mr. Fleeman had not received. He also used the form to complain about not wanting the Cedar Farrowing, Cedar Nursery, and Awahee runs. However, Mr. Fleeman had not used the form, or made any other written reports, for any of his concerns about safety or DOT regulation violations.

The contract between NPP and Mr. Fleeman stated that if there were conflicts because of DOT regulations, the contract would be revised to comply with those issues and hours driven. Mr. Fleeman never attempted to organize other drivers to resist NPP policies. He did, however, have conversations with Mr. Meays and Mr. Horton in front of the other drivers concerning illegal scheduling. Mr. Fleeman is not aware of any other conversations he had with other drivers regarding NPP policies in front of Mr. Meays and Mr. Horton.

Mr. Fleeman did not like the pay cut in the new contract and let Mr. Horton know of his dislike, but never told Mr. Horton that he was seeking other employment opportunities.

When unforeseen issues arose during Mr. Fleeman's runs that added time to the run, Mr. Fleeman would just keep driving to return the trailer. Mr. Fleeman did not call unless the problem concerned mechanical difficulties because that was the only time he believed Mr. Horton wanted him to call.

NPP drivers were responsible for DOT hour compliance and, accordingly, also responsible for making the decision not to drive if a delay they encountered would cause them to violate DOT policy.

[Redirect examination] At one drivers' meeting, an NPP driver questioned Mr. Horton's policy of dispatching trucks at 75 miles per hour. Mr. Horton responded that he dispatched trucks at 65 miles per hour. This prompted Mr. Fleeman to ask "How can you do that when the speed limit is 60 miles per hour in Nebraska and 55 miles per hour in Iowa?" Mr. Horton did not respond; he just smirked.

Mr. Fleeman's January 2006 letter to Mr. Horton was not brought up when Mr. Fleeman signed the new contract-carrier contract in December 2006. Neither Mr. Horton nor Mr. Meays ever suspended Mr. Fleeman or gave him a warning regarding his employment due to the January 2006 letter.

Mr. John Meays
(TR, p. 104-133)

[Direct examination] Mr. Meays is the Fleet Coordinator at NPP. He joined the company in September 2005. As Fleet Coordinator, Mr. Meays is responsible for safety management and compliance. He is also in charge of maintenance and both licensed and unlicensed vehicles, generators, and farm implement. Mr. Meays works closely with Mr. Horton coordinating issues that might come up regarding loading times, weather issues, and other problems drivers may come across. Mr. Meays also works with NPP's drivers and contract-carriers.

NPP holds meeting a couple of times each year with its contract-carriers to go over how NPP is doing, safety issues, compliance issues, and the yearly contract. The yearly contract signing is the only meeting "actually kind of scheduled" each year. Mr. Meays was responsible for the preparation of the December 2006 contract carrier contract. Initially, Mr. Meays intended to meet with Mr. Fleeman to negotiate the 2006 contract at NPP's Columbus office and only invited him to a meeting. However, word got out and the meeting evolved to include all of the drivers. Typically, Mr. Meays likes to go over a new contract with one or two driver contractors before actually presenting the contract to the rest of the drivers. Mr. Fleeman was selected to be one of the drivers to see the contract early but he started telling the other drivers about the meeting, so Mr. Meays felt "kind of forced to invite everybody to that meeting."

About eight to ten drivers were actually present at the meeting to discuss the 2006 contract. The meeting became kind of heated over the pay schedule because NPP took away the fuel surcharge on miles not actually driven. Mr. Meays does not recall any questions at the meeting that addressed safety, DOT regulation issues, or scheduling that prohibited compliance with any other regulation.

The 2006 contract provided that the contract-carrier was responsible for staying in compliance with all federal and state rules and regulations. Mr. Meays has very little input concerning the regulation of the independent contractors because independent contractors run their own business. NPP does not examine driver logs but expects that each driver will maintain his driver log because the contract requires him to do so.

Mr. Meays remembers that conflicts arose between Mr. Fleeman and NPP but has a hard time remembering the specifics. Mr. Meays remembers Mr. Fleeman stated there were issues with scheduling but upon review, Mr. Meays did not believe the complaints were justified. Mr. Fleeman also had issues driving loads to Cedar and Awahee but Mr. Meays was uncertain of the specifics surrounding Mr. Fleeman's refusals because that was more of a dispatcher issue.

Mr. Meays never received any written or verbal communication from Mr. Fleeman regarding safety issues or DOT regulation compliance concerns. Mr. Fleeman never expressed to Mr. Meays an interest in pursuing other employment opportunities.

Mr. Meays stated that Mr. Horton "and I both drafted" the January 4, 2007 termination letter "together." In accordance with the contract, the letter provided Mr. Fleeman with a 30 day

notice. The basis for Mr. Fleeman's termination was Mr. Fleeman's lack of communication with NPP, his belligerent attitude, and his getting other drivers wound up. Mr. Fleeman also brought down the morale of other NPP employees. NPP's decision to terminate Mr. Fleeman was not motivated in any way by a desire to retaliate for any DOT or safety concerns that he brought up.

Upon review of company records, Mr. Meays found no written complaints from Mr. Fleeman about safety and DOT issues. Mr. Meays does not recall Mr. Fleeman ever calling attention to DOT or safety issues.

Mr. Meays did not have a conversation with Mr. Bohac when Mr. Bohac left the company.

Any owner-operator complaint relative to DOT or safety regulations should have been addressed to Mr. Meays.

NPP takes weather into account when dealing with whether drivers should be hauling on a given day. Mr. Meays looks to the television, internet, and lastly calls drivers already out at units to determine if the weather should impact the scheduled loads. To decide whether to delay or change a load, NPP usually has a pick-up truck drive down the road to get a first-hand look at road conditions.

NPP is very concerned about safety requirements and regulations. Mr. Meays and Mr. Horton act on violations brought to the attention of the company.

[Cross examination] The DOT regulations allow a driver to work a 14 hour day, 11 hours of which may be drive time, and then require at least a 10 hour break.

Mr. Meays does not recall sending a letter to Mr. Fleeman in October 2006 for the November 2006 meeting. About a month after the November 2006 meeting, Mr. Fleeman signed the new contract, which extended Mr. Fleeman's employment with NPP.

Mr. Meays helped Mr. Horton draft Mr. Fleeman's termination letter. Mr. Meays thinks he and Mr. Horton began drafting the termination letter on January 2, 2007 but does not remember the time of day. Mr. Fleeman's issues of communication and belligerence, which NPP relied on as reasons for termination, were present before the 2006 contract was signed in December.

Mr. Meays looked at the January 20, 2006 letter Mr. Fleeman wrote to Mr. Horton on the day that Mr. Horton received the letter. Mr. Meays did not respond to the letter.

[ALJ examination] Mr. Horton is Mr. Meays' supervisor and performs Mr. Meays' annual appraisal. Mr. Horton and Mr. Meays are both responsible for finding independent contractors. Mr. Meays signs the contracts with the independent contractors, although in 2006, Mr. Horton was responsible for signing the contracts. While Mr. Horton had signed Mr. Fleeman's 2006 contract, Mr. Meays signed Mr. Fleeman's termination letter along with Mr.

Horton because Mr. Meays and Mr. Horton are “in this together.” Both Mr. Meays and Mr. Horton deal with the drivers.

As Fleet Coordinator, Mr. Meays takes care of safety and compliance and maintains the vehicles as well as the generators and farm tractors. Mr. Meays has been with NPP since September 2005.

Mr. Meays was unaware at the time of the occurrence that Mr. Fleeman had weather issues on December 21 and 22, 2006. Mr. Horton did not call to tell Mr. Meays about Mr. Fleeman’s weather concerns. Mr. Meays became aware of the issues a day or two after the ice storms were over. Mr. Meays was also unaware Mr. Fleeman refused to take a trip in early January until a couple days after the refusal. Mr. Fleeman refused a trip on January 2, 2007 because hours of operation issues.

When Mr. Meays sat down to draft the termination with Mr. Horton on January 2, 2007, Mr. Meays was unaware that Mr. Fleeman had refused his January 2, 2007 load. Mr. Horton told Mr. Meays about the January 2, 2007 refusal sometime after the two had begun drafting Mr. Fleeman’s termination letter. Although Mr. Meays and Mr. Horton did not sit down until January 2, 2007 to draft a termination letter, Mr. Horton and Mr. Meays had talked about a termination letter sometime before Christmas. Mr. Fleeman was terminated because he did not communicate with NPP. For example, when Mr. Fleeman was down in Crete, Nebraska and out of hours on January 2, he opted not to call anyone and made the decision to drive home even though he should have stayed in Crete for ten hours to rest. Mr. Meays wasn’t sure but he believed this event occurred on January 2, 2007, after he and Mr. Horton had started drafting the termination letter.

Mr. Meays did not remember whether he or Mr. Horton initiated the termination letter. Mr. Meays has only terminated two contracts during his employment with NPP but does not remember the specifics about Mr. Fleeman’s termination. Mr. Meays then stated, Mr. Horton “actually drafted the letter.” And when he brought the letter to his office, Mr. Meays agreed with the termination letter because Mr. Fleeman had a tendency to turn the drivers against the company through actions such as calling other drivers in inclement weather and saying he was not going to drive, which caused other drivers to follow suit. Mr. Meays believed Mr. Fleeman also did not maintain trailers properly.

NPP had been having the above mentioned problems with Mr. Fleeman since a few months after Mr. Meays started with NPP. NPP signed a contract with Mr. Fleeman in December 2006 continuing Mr. Fleeman’s employment despite the problems because the company needed drivers. NPP still needed drivers in January 2007 but when Mr. Horton came in with Mr. Fleeman’s termination letter, Mr. Meays said “yes, let’s do this.” Mr. Meays is unable to remember why they did not write the termination letter in mid-December 2006.

Even though Mr. Meays and Mr. Horton included a clause in the termination letter requesting that Mr. Fleeman come talk to them about the termination, Mr. Meays never received a phone call from Mr. Fleeman during his remaining 30 days with NPP.

[Redirect examination] Mr. Meays started talking about the 2006 contract and putting it on paper in early November 2006. Mr. Meays reviewed the contract with the drivers and owner-operators after he put the contract on paper in November. During the time Mr. Meays was drafting the contract, Mr. Horton had more contact with Mr. Fleeman than did Mr. Meays.

The Crete incident described earlier could have happened on December 30, 2006. Mr. Meays was very confused with some of the dates and other information he testified to.

[Recross examination] Mr. Meays and Mr. Horton did not list the reasons for Mr. Fleeman's termination in the January 2007 letter. Mr. Meays did not include anything in Mr. Fleeman's termination letter that indicated trailers were not being maintained or Mr. Fleeman had a belligerent attitude or failed to meet the expected communication standards. The ending line of the termination letter said "If you wish to discuss this further, or terminate this agreement at an earlier date, please contact us." Mr. Fleeman did not contact Mr. Meays on January 5, 2007 or any other date. Mr. Meays was surprised Mr. Fleeman never inquired about why he was terminated.

Mr. Meays responded on behalf of NPP to the Secretary of Labor regarding Mr. Fleeman's complaints. Mr. Meays believes he spoke with someone from the Department of Labor over the phone. He remembers telling them that Mr. Fleeman was terminated because of his belligerence towards the company.

Mr. Meays has only been involved with one other termination at NPP. When terminating the other employee, NPP sent a termination letter that included the specific reasons NPP fired the driver which included absenteeism and dishonesty.

[ALJ examination] Mr. Horton did not tell Mr. Meays not to sign a contract on behalf of NPP with Mr. Fleeman on December 1, 2006.

Mr. Nate Horton
(TR, p. 133-171)

[Direct examination] Mr. Horton is the Logistics Supervisor and dispatcher for NPP. His duties include making certain NPP's pigs are moved in a responsible and timely manner to the appropriate units, that the movements are done in a bio-secure fashion and in a manner maintaining animal welfare, and ensuring NPP remains in compliance with other regulations such as the DOT regulations. Mr. Horton is responsible for scheduling the drivers' loads on a weekly basis. NPP usually keeps 20 to 25 independent contractor drivers. During 2006, NPP had somewhere between 10 and 12 independent contractor drivers.

When creating load schedules, Mr. Horton considers bio-security protocol and compliance, timing, and location of the loads so the loads can be done in the most productive manner. Mr. Horton usually starts working on a schedule a week before it would be in effect. Certain destinations and certain beginning points have different bio-security issues. NPP attempts to maintain the good health status of those units where disease is least prevalent.

Mr. Horton uses Microsoft Streets and Trips to help determine how long each load should take to keep contractor-carriers in compliance with DOT regulations and operating times. Microsoft Streets and Trips includes a time calculator and the speed limits for interstates, state roads, and country roads. Using the calculator, Mr. Horton inputs the times and plans out the schedules accordingly with weather and other circumstances that may arise. Mr. Horton uses a speed of 50 miles per hour average for the 11 hour driving period, which accounts for an interstate speed limit up to 70 miles per hour and lower county road speed limits.

Mr. Horton has never purposefully scheduled a driver for loads the driver would not be able to complete within DOT compliance. However, sometimes drivers are unable to complete their scheduled loads within DOT regulation. When this happens, Mr. Horton relies on the drivers to inform him they are out of hours. Mr. Horton estimates that he receives such a notification from a driver about once a week. Drivers usually call Mr. Horton's attention to loads that the completion of which would cause them to go over their hours. Mr. Horton never had such notification from Mr. Fleeman or Mr. Bohac.

If Mr. Horton is notified that a driver's schedule does not comply with DOT regulations, Mr. Horton will find another driver to haul the load or switch the driver to a load going to the same place at a different time so the driver would be in compliance.

Performing his scheduling duty requires Mr. Horton to pay particular attention when the load areas experience inclement weather. To do this, Mr. Horton pays attention to road closures and communicates with units already receiving loads and the drivers already out on the roads to ensure the drivers feel safe as they haul loads.

On December 21 and 22, 2006, there were very severe ice storms and a large number of loads were cancelled. As a result, Mr. Horton had to reschedule the rest of the week to get all of the loads covered. Mr. Fleeman's December 21 load was cancelled. On December 22, there were still some icy conditions but many trucks were out on the road and several loads got hauled. Mr. Fleeman completed one load on December 22 but his second load was cancelled.

NPP is concerned with driver safety; so, the company holds meetings to remind the drivers of the importance of driver safety and to ask that if any safety issues arise, the drivers report the issues to NPP via phone and written report.

The Crete incident involving Mr. Fleeman that Mr. Meays testified about occurred when inclement weather caused Mr. Fleeman to run over his DOT hours of service. While running that load, Mr. Fleeman failed to contact NPP about his hours of service problem. Mr. Horton only became aware of the violation on January 2, 2007 when he received the billing invoice for that load. Mr. Fleeman had written on the bottom of the billing invoice that he had gone over his hours of service.

NPP requests that the drivers call when they run into the type of situation that Mr. Fleeman did in Crete, but Mr. Fleeman failed to do so. If Mr. Fleeman had contacted Mr. Horton, Mr. Horton would have advised Mr. Fleeman to comply with the DOT regulations.

There would have been plenty of time the following day to get the trailer cleaned and ready for the next load.

Mr. Horton receives complaints from drivers when they are asked to lay-over in certain locations because the drivers would rather be home. In fact, Mr. Horton had previously received such complaints from Mr. Fleeman and Mr. Bohac.

Mr. Horton became acquainted with Mr. Fleeman when NPP took over the previous company Mr. Fleeman hauled for and Mr. Horton became NPP's logistics supervisor. Mr. Fleeman wrote a letter to Mr. Horton on January 20, 2006 regarding a Saturday load Mr. Horton had scheduled. Saturday loads usually come to Mr. Horton's attention close to the load date and, therefore, provide him little notice for scheduling. There are not enough loads for 23 drivers, so drivers are first considered based on whether the previous and following weekly schedules allow the driver to take the Saturday load. If more than the required number of drivers are able to take a Saturday load based on the schedule, NPP uses a first come, first serve basis to determine which drivers get to haul Saturday loads.

For the Saturday discussed in Mr. Fleeman's letter, there were 11 loads that needed to be covered. NPP called fourteen drivers; thirteen responded that they would take a load. This meant that two willing drivers would not be able to go. Mr. Fleeman did not get the load because Mr. Horton knew that Mr. Fleeman had a young son in wrestling and during the previous year, Mr. Fleeman asked for many Saturdays off to go to tournaments. Mr. Horton was unsure whether Mr. Fleeman's son had a tournament on the weekend in question so Mr. Fleeman got less consideration. Additionally, the load Mr. Fleeman was scheduled for the following Monday had bio-security issues and Mr. Horton wanted to keep Mr. Fleeman away from the Farmland Packing Plant where disease is prevalent. If Mr. Fleeman went to the Farming Packing Plant on Saturday, NPP would put its herd at risk that following Monday.

Mr. Fleeman's January 20, 2006 letter asserted Mr. Horton "screwed him out of \$558." Mr. Fleeman also wrote that because Mr. Horton had two days to change the decision not to send Mr. Fleeman, Mr. Horton was not man enough to make the change. Mr. Horton took offense to Mr. Fleeman's letter. Mr. Horton cites the January 20, 2006 letter as the point at which Mr. Fleeman's relationship with NPP began to deteriorate. This is the point when Mr. Horton began to experience a lack of communication and the seeds of discontent amongst the other drivers started.

Mr. Horton sent a response letter to Mr. Fleeman explaining the reasons he did not get the load.

Their relationship further deteriorated when Mr. Fleeman advised Mr. Horton that he would not drive to the Awahee Farrowing site in South Dakota and the Cedar Farrowing and Cedar Nursery sites. His refusal to do these sites also affected the morale of the other drivers. Other drivers would call Mr. Horton and ask why Mr. Horton was showing favoritism towards Mr. Fleeman.

Mr. Fleeman refused the Awahee load because the 2005 contract used a five-day, 2,250 mile minimum to determine drivers' compensation. Since Awahee took two days, Mr. Fleeman thought he should be compensated for a six-day minimum which was not provided for in the contract. His refusal had nothing to do with DOT compliance or safety regulations. The Awahee run allowed for DOT compliance. The load took place Monday morning because of the site's high bio-security. Because the load took place on Monday mornings, it allowed plenty of downtime from bio-security and DOT standpoints by making sure the driver could run the extra hours on Sunday to get up to the unit to load. If a driver got up to Awahee Sunday, he had plenty of time on Monday to load and haul the hogs within the allotted hours.

The "biggest" issues with Mr. Fleeman were the "seeds of discontent scattered amongst the other drivers." During the time frame that Mr. Fleeman started refusing loads, the other drivers' discontent became apparent. Mr. Horton believes Mr. Fleeman was the cause of the discontent because some of the other drivers would say things like "this is what Bill [Fleeman] said."

Mr. Horton also highlighted Mr. Fleeman's lack of communication with NPP as a problem. The phone records show that Mr. Fleeman's calls to Mr. Horton were short and often Mr. Horton did not have a chance to get his point across in the limited time Mr. Fleeman was on the line. Occasionally Mr. Fleeman's calls were angry.

Mr. Fleeman was terrible about calling regarding delays he encountered. He also did not call if he violated the allowed hours of service; NPP would find out after the hours had been violated so there was no recourse NPP could take to remedy the situation. To support his assertions, Mr. Horton provided the example of Mr. Fleeman running over his hours on December 30, 2006 down in Crete, Nebraska. In this instance, despite being over his DOT hours of service, Mr. Fleeman did not call NPP; he just drove back to Columbus. Had Mr. Fleeman called, Mr. Horton would have advised him to take 10 hours of down time to stay in compliance.

Mr. Horton recalls January 2, 2007 because the week before a major ice storm occurred and a lot of storms were in Nebraska. Due to the storms, the TSP finisher site was under generator power which caused Mr. Fleeman's January 1, 2007 load, along with other drivers' scheduled loads, to be pushed back. Mr. Fleeman's load was moved from 10:00 p.m. on January 1, 2007 to daylight the next morning on January 2, 2007. From the time Mr. Fleeman's load had to be pushed back, Mr. Horton was working to resolve the issues with the drivers' schedules further on in the week because Mr. Horton recognized there would be hours of service violations if the schedules were maintained as written.

One change Mr. Horton made was to take Mr. Fleeman off the load out of Pocahontas, Iowa he was scheduled to run the night of January 2, 2007 and instead give him a TSP finisher load. All of the rescheduling decisions took place during a relatively long period of his January 2, 2007 work day, as he had a lot of drivers to reschedule.

Mr. Horton does not recall receiving a telephone call from Mr. Fleeman on January 2, 2007. "If the phone call was made, it was during a very busy time" and Mr. Horton had already resolved the issue. The load Mr. Fleeman claims to have refused was not the load he was going

to be required to do and the billing reflects that he did not take that load but instead hauled a TSP load on January 2 going into January 3. Mr. Horton has never required a driver to carry a load that would cause them to violate DOT hours.

NPP signed the contractor-carrier contract with Mr. Fleeman in 2006 hoping the new contract would resolve some of Mr. Fleeman's concerns about the Awahee runs and the way NPP provided compensation for the day to day minimum. However, after the contract was signed, Mr. Fleeman's belligerent attitude continued to be a problem. Mr. Horton continued to receive word that Mr. Fleeman was stirring discontent among the other drivers. Mr. Horton began discussing Mr. Fleeman's termination with Mr. Meays in mid-December.

After the new pay rates were set out in the 2006 contract, Mr. Fleeman agreed to take Awahee runs.

At the time of Mr. Fleeman's termination, Mr. Horton felt good about the existing crew of drivers. Driver morale improved once Mr. Fleeman was gone.

Mr. Fleeman never filed a written report about, or verbally drew Mr. Horton's attention to, DOT regulation issues or safety issues. Mr. Horton was first made aware of Mr. Fleeman's DOT compliance and safety concerns when Mr. Horton was notified by DOL.

Mr. Horton worked with Mr. Bohac. The contract between Mr. Bohac and NPP required a 30-day written notice if either party intended to terminate the contract. However, Mr. Bohac just called at the end of 2006 and informed NPP that he did not intend to renew his insurance, which did not go into 2007, and would not continue to drive for NPP once his insurance ran out. During his employment, Mr. Bohac did not report DOT or safety regulation issues; his biggest concern was compensation.

Mr. Horton had a conversation with Mr. Fleeman on January 5 or 6, 2007. Mr. Fleeman had left Mr. Horton a voice message requesting Mr. Horton call him back, so Mr. Horton did. According to Mr. Horton, in response to Mr. Fleeman's question about why he had been fired, "we told him it had to do with his belligerent attitude, that he had a tendency to stir up the other drivers and cause problems with the morale, and related to that was the refusal and reluctance to haul certain loads that all of the drivers from time to time ended up hauling." Mr. Fleeman denied those reasons. However, in fact, those were the reasons Mr. Horton fired Mr. Fleeman. No retaliation was involved.

Mr. Fleeman was very good at the job itself, which included handling the hogs and driving safely. There were some concerns with occasional lateness, which also caused him to be out of hours of service. For example, if Mr. Fleeman was scheduled to load at midnight and drop off at 4:00 a.m. at Farmland, he would not be the only driver scheduled for a load at Farmland at that time. The same load crew is responsible for handling those loads. So, if Mr. Fleeman was late for his midnight load, then the next guy in line (the one scheduled for a 1:00 a.m. load) would take Mr. Fleeman's load. However, there is still a delay of 15 to 45 minutes that causes all the drivers scheduled behind Mr. Fleeman to then be behind on their scheduled delivery time

at Farmland. This domino effect of lateness happened on occasion with Mr. Fleeman. However, this was not a factor in the termination.

The written reports Mr. Fleeman filed over the course of his employment were about hauling the loads to Cedar Nursery, Cedar Farrowing, and Awahee and his seniority status and the load that he did not get. Those were the only two written reports received from Mr. Fleeman.

NPP provided company forms to contractors, who are encouraged to make reports in writing especially when the concern was a safety issue. NPP has a preventative maintenance program. The company provided copies of FM CSR regulations to owners and drivers in the fall of 2005.

Mr. Horton does not remember what he advised Mr. Fleeman during their January 2, 2007 telephone call. Phone records show there was a call and Mr. Horton does not deny that Mr. Fleeman called him on January 2, 2007. However, Mr. Horton indicated, "I don't remember the nature of our conversation." The phone records show the call took place sometime between 3:00 p.m. and 4:00 p.m. and by that time the load Mr. Fleeman was supposed to make was in the process of being changed.

The only issues regarding DOT regulations Mr. Horton has had input from Mr. Fleeman on were the issues that arose on December 21 and 22, 2006 and January 2, 2007.

[Cross examination] The original schedule for January 2, 2007 had Mr. Fleeman loading at 11:00 p.m. at Baker One which takes about 4 to 4.5 hours to get to from Columbus. This means Mr. Fleeman would have been leaving around 6:30 p.m. to get to the scheduled load on time. By 3:00 p.m., Mr. Horton had not called Mr. Fleeman about the schedule change. Mr. Horton never called to tell Mr. Fleeman that the schedule was changed and he would not be making the Baker One run. Again, Mr. Horton doesn't recall the nature of their call since January 2, 2007 was a very busy day. Mr. Horton's assistant assisted Mr. Horton with the calling and advising drivers of a load changes on January 2, 2007.

One of the reasons for Mr. Fleeman's termination was his reluctance to drive the Awahee load. Mr. Fleeman first informed NPP he would not do this load in a January 2006 written report. Mr. Fleeman was back doing the Awahee run by late 2006 but Mr. Horton had "heard through the grapevine" that Mr. Fleeman was still complaining about the run.

Mr. Horton did not suspend or punish Mr. Fleeman in any way for the letter Mr. Fleeman wrote on January 20, 2006. Mr. Horton believed that the January 20, 2006 letter was the beginning of the decline in the relationship between NPP and Fleeman Transportation that led to Mr. Fleeman's termination in January 2007.

Mr. Horton and Mr. Meays had a conference call with Mr. Fleeman on January 5, 2007 regarding Mr. Fleeman's termination. Mr. Horton explained to Mr. Fleeman that his termination was based on his reluctance to drive Awahee, his belligerent attitude, and bringing down the morale of the other drivers. Mr. Horton did not say Mr. Fleeman's termination was because Mr. Fleeman was the first to bring up weather concerns. Prior to January 5, 2007, Mr. Horton never

had a meeting or discussion with Mr. Fleeman regarding his belligerent attitude or the decline in the morale of other drivers.

The termination letter was sent on January 4, 2007.

[ALJ examination] Mr. Horton had previously received complaints that he used the wrong speed limit when making load schedules. Mr. Horton would respond to the complaining driver by explaining how he arrived at the times using Microsoft Street and Trip. When a driver said these times were wrong, Mr. Horton made adjustments when appropriate.

Loads do not go just like the weekly schedule is set out. When the schedule gets disrupted, Mr. Horton readjusts those drivers and sites accordingly. Readjusting the drivers and sites often means loading later in the day or the following day or assigning a driver to a different load.

Mr. Horton believed Mr. Fleeman sowed “seeds of discontent” because Mr. Fleeman often threw around the word “seniority.” NPP had no stipulations about the seniority of a driver but by using the word “seniority”, Mr. Fleeman intimidated new drivers. Mr. Fleeman also tried to influence other drivers to act against Mr. Horton and the way schedules were being done.

The seeds of discontent, Mr. Fleeman’s communication problems and belligerent attitude, and Mr. Fleeman showing up late for some of his loads were all present in 2006. However, Mr. Horton did not tell Mr. Meays not to renew Mr. Fleeman’s contract in December 2006 because Mr. Horton thought Mr. Fleeman would like the new compensation changes for the Awahee run. Mr. Horton was hopeful that the extra compensation would change Mr. Fleeman’s general attitude which would also help communication and make Mr. Fleeman stop sowing seeds of discontent.

By December 2006, Mr. Fleeman was driving the Cedar routes he had previously refused, which meant Mr. Fleeman was no longer refusing any loads.

Mr. Horton and Mr. Meays started discussing terminating Mr. Fleeman in mid-December. Within the first few weeks of Mr. Fleeman signing the new contract on December 1, 2006, Mr. Fleeman began complaining to other drivers about the Awahee run, which caused other drivers’ morale to decline. Mr. Fleeman was trying to persuade the other drivers that the new contract caused a reduction in the drivers’ pay, when the contract actually was a raise in pay across the board. Mr. Horton explained to the other drivers how the contract increased pay which resolved that problem.

Mr. Fleeman had started a new employment relationship on December 1, 2006. The “final straw that broke the camel’s back [leading to Mr. Fleeman’s termination] was the December 30th incident in which there was no communication between Mr. Fleeman and Mr. Horton regarding his violating the hours of service.”

One reason Mr. Horton decided to terminate Mr. Fleeman in January is because there were other drivers that were available that would help with driver morale. However, Mr. Horton

acknowledged the other drivers were also available on December 1, 2006. Mr. Horton approached Mr. Meays and said there were problems with Mr. Fleeman and he needed to be terminated. Mr. Horton went to Mr. Meays to ensure that the termination letter was in compliance with the terms of the contract.

Mr. Horton did not terminate Mr. Fleeman in mid-December even though discussions on the topic had begun because there was a lot going on at that time. Also, Mr. Horton said if the termination was pinned to one specific incident, it was the December 30, 2006 incident which did not become apparent until January 2, 2007 when Mr. Horton received the billing. Mr. Horton began drafting Mr. Fleeman's termination letter the morning of January 2, 2007 after receiving the billing statement.

Mr. Fleeman had failed to communicate being over his hours of service before but was not fired because NPP likes to allow drivers a chance to reconcile themselves. NPP did not provide Mr. Fleeman an opportunity to reconcile his miscommunication problem concerning the December 30, 2006 run.

[Redirect examination] Another reason for terminating Mr. Fleeman was his lack of respect for Mr. Horton's authority which he made known to other drivers. Mr. Horton did not believe he could be effective with his job if Mr. Fleeman stayed an employee of NPP.

[ALJ examination] Mr. Horton knew what Mr. Fleeman thought of his authority in January 2006.

Documentary Evidence

January 4, 2007 Termination Letter (CX 1)

On January 4, 2007, Mr. Horton and Mr. Meays signed a letter terminating the motor carrier agreement between NPP and Fleeman Transportation. They specifically cite a contract provision that permits either party to terminate the contract, "with or without cause" upon 30 days written notice. The effective date of the termination is February 4, 2007. Mr. Meays and Mr. Horton also offer to discuss the termination by phone or in the NPP office.

2006 Motor Carrier Agreement (CX 2)

Mr. Fleeman on behalf of Fleeman Transportation entered into a contractual relationship with NPP by Mr. Horton on December 1, 2006. The contract provided that Fleeman Transportation would haul live hogs and related items in trailers provided by NPP at a schedule determined by NPP.

The contract was effective for one year but either party had a right to terminate the agreement at "any time, with or without cause, upon thirty (30) days' written notice to the other party."

Fleeman Transportation was responsible for providing lawful and responsible transportation service to NPP. Fleeman Transportation was an independent contractor. Fleeman Transportation was required to maintain specific insurance and provide NPP thirty days notice if it planned to cancel such insurance.

Both parties agreed to comply with all applicable federal, state, municipal, and provincial laws, rules, and regulations, including federal and state safety regulations. If the contract violated any such laws, rules, or regulations, the contract would be modified to comply with such laws, rules and regulations.

Fleeman Transportation was responsible for all fuel and other transportation-related expenses.

Fleeman Transportation was responsible for making all reasonable attempts to pick up and/or deliver NPP's loads in inclement weather based on the road conditions. NPP agreed to give special considerations for events caused by inclement weather.

The contract provided cumulative and progressive weekly minimums. The miles for a single trip by a driver that exceed 11 hours of on duty driving or 14 hours of on duty driving plus on duty not driving will count toward two separate days of the weekly minimums.

Mr. Fleeman's Telephone Records

(CX 3)

Mr. Fleeman made and received many calls on December 22, 2006. Marked by the Claimant are the following: incoming calls from (402) 276-3629 at 6:45 a.m. and 9:57 a.m., incoming calls from (402) 910-5867 at 7:16 a.m., 7:17 a.m., and 10:04 a.m.; outgoing calls to (402) 910-5867 at 7:34 a.m. and 10:02 a.m.; and outgoing calls to (402) 276-3629 at 8:11 a.m., 9:36 a.m., and 9:45 a.m..

Mr. Fleeman also made an outgoing two minute phone call to (402) 910-5867 on January 2, 2007 at 3:28 p.m.

Trucker Report Form Dated January 20, 2006

(CX 5)

Mr. Fleeman submitted a Trucker Report Form to NPP on January 20, 2006. His concern was that in the previous summer, Mr. Horton had told Mr. Fleeman that Saturday loads went off a seniority basis. Mr. Fleeman was called, offered the load and he agreed to take the load. Despite Mr. Fleeman being called before the other drivers, he did not get the load.

Mr. Fleeman believed he was a driver that gave Mr. Horton the least amount of headaches and just did his job and went home. Mr. Fleeman was irritated because he felt Mr. Horton "screwed" him. Mr. Fleeman approached Mr. Horton about not getting the load 7 days before the load was scheduled and Mr. Horton still wasn't man enough to change the mistake.

Mr. Fleeman was especially upset since this load fell on the last Saturday he could work until April due to wrestling tournaments. Mr. Fleeman accused Mr. Horton of threatening drivers' seniority if the drivers did not sign the contract.

Letter to Mr. Fleeman Dated January 31, 2006
(CX 6)

Mr. Horton wrote a letter to Mr. Fleeman on January 31, 2006 stating that seniority is very rarely the primary factor in making day-to-day company decisions. Usually seniority is a secondary factor in a "tie-break" situation.

The factors that affected who got the Saturday, January 21, 2006 loads were level of willingness to haul, notification of future schedule, and bio-security. When considering a driver's level of willingness to haul, NPP looked for drivers willing to haul either location. Mr. Horton also stated that if Mr. Fleeman had notified NPP prior to January 20 that January 21 was his last opportunity to do a Saturday load until April, the outcome of the drivers selected may have been different. Last, Mr. Horton pointed out that due to an already scheduled load for the following week, Mr. Fleeman would require more downtime, which also weighed into the decision making process.

Mr. Horton closed by complimenting Mr. Fleeman's driving, followed by an assurance that Mr. Fleeman's other trucker reports were being investigated.

Driver's Daily Log
(CX 7)

Mr. Fleeman's driver's log from January 2, 2007 indicates that he was on duty for 13 hours, 7.5 of which were driving hours. He ran from Columbus, Nebraska, to Elgin, Nebraska, to Crete, Nebraska, and back to Columbus. Between 2:45 p.m. and 3:45 p.m., Mr. Fleeman was driving from Crete, Nebraska to Columbus, Nebraska.

Mr. Fleeman's Earnings
(CX 8, CX 9, CX 10, and CX 11)

NPP reported on a Form 1099- Misc. non-employee income for Mr. Fleeman in 2005 of \$152,039.40. The reported income for 2006 was \$155,442.49. In 2007, NPP paid \$15,175.48.

Mr. Fleeman's 2007 W-2 showed earnings of \$29,194.81 with Camaco, LLC. During the July 6 to July 11, 2008 pay period, Mr. Fleeman's gross pay with Camaco was \$871.06, the year-to-date gross pay total was \$21,150.04.

2005 Motor Carrier Agreement
(CX 12)

Fleeman Transportation entered into a contractual agreement with NPP on June 23, 2005. (The contract was in large part the same as the 2006 contract between the two parties discussed above.)

Mr. Fleeman's Driver Schedule and Invoice for the Week of December 24, 2006
(RX 1)

Mr. Fleeman ran loads on December 27, 2006, December 28, 2006, December 29, 2006, and December 30, 2006. On December 26, 2006, Mr. Fleeman left for his Wednesday destination. In getting there, he exceeded the 11 hour driving rule. The rest of his week went according to the schedule provided until December 30, 2006. On December 30, 2006 Mr. Fleeman went over his 14 hour on-duty time rule and had to report it as a 6-day minimum. He requested a copy of the invoice for his records.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preliminary Jurisdictional Findings

Engaged in the transportation of freight and pork products in interstate commerce on public highways with commercial tractor-trailer vehicles, NPP is a commercial motor carrier within the meaning of the STAA and subject to its provisions, including the prohibition regarding employee discriminations. 49 U.S.C. § 10102(13) and 29 C.F.R. § 1978.101(e). *See also Killcrease v. S & S Sand and Gravel, Inc.* 92 STA 30 (Sec'y Feb. 2, 1993). Similarly, as an independent contractor driving NPP's trailers and products under a motor carrier agreement contract who directly affected commercial motor vehicle safety, Mr. Fleeman fell within the Act's definition of "employee." *See* 29 C.F.R. § 1978.101(d)(1), CX 2, and CX 12.

***Prima Facie* Case & Initial Adjudication Principles**

The employee protection provision of the STAA, 49 U.S.C. § 31105, prohibits the discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety. In order to invoke these whistle blower provisions of the STAA, a complainant has the burden of proof to establish the respondent took adverse employment action because the complainant engaged in one of the STAA's protected activities. The analysis for determining whether a complainant meets his or her burden of proof is derived from the long, and continuing, line of Federal employment law discrimination cases.

As set out in exhaustive detail by the U.S. Circuit Court of Appeals for the Eleventh Circuit, in *Wright v. Southland Corp.*, 187 F. 3d 1287 (11th Cir. 1999), a complainant may take two fundamental approaches to establish unlawful discrimination. First, relying on the traditional approach, a complainant may attempt to prove by direct evidence that more likely than not, the employer engaged in unlawful discrimination. *Id.* at 1289. If in response, the employer also provides evidence of legitimate purposes for its actions, then the case becomes a

“mixed motive” case and the burden of persuasion shifts to the employer to demonstrate, as an affirmative defense, by a preponderance of the evidence, that it would have taken the same action, in the absence of the discrimination. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 to 255 (1989) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

Since directly proving an employer’s intent of illegal discrimination may be difficult, the U.S. Supreme Court developed a second approach that enables a complainant to present a rebuttable presumption of illegal discrimination. See *Wright*, 187 F. 3d at 1290 and *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). The Administrative Review Board (“ARB”) has applied this approach in STAA cases and in *Byrd v. Consolidated Motor Freight*, 97-STA-9 at 4-5 (ARB May 5, 1998), recently summarized the burdens of proof and production in this type of case:

A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. at 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a “causal link” or “nexus,” e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec’y of Labor*, 64 F. 3d 261, 277 (7th Cir. 1995). A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

The ARB in a footnote to the above paragraph provided further explanation on this last phase of the adjudication process:

Although the “pretext” analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the “presumed” retaliation raised by the *prima facie* case, the inference “simply drops out of the picture,” and “the trier of fact proceeds to decide the ultimate question.” *St. Mary’s Honor Center*, 509 U.S. at 510-511. See *Carroll v. United States Dep’t of Labor*, 78 F. 3d 352, 356 (8th Cir. 1996).

The United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.* 120 S. Ct. 2097 (2000), provided further explanation of the pretext phase of the analysis introduced in the *St. Mary Honor Center* case. The court first reiterated that if an employer articulated a non-discriminatory reason for the challenged adverse action, the complainant retains the ultimate burden to show the stated reason is pretext for unlawful discrimination. In meeting that ultimate burden, the complainant may, but not necessarily, prevail based on the combination of a *prima*

facie case and sufficient evidence to demonstrate the asserted justification is false. In light of the false justification, the trier of fact may conclude the employer engaged in unlawful discrimination. *Reeves*, 120 S. Ct. at 2108. In other words, there may be an inference that the employer's falsehood is an attempt to cover up the unlawful discrimination.

At this point in the adjudication, "the fact-finder may then consider the credibility of parties' evidence establishing the complaint's *prima facie* case and inferences properly drawn there from in deciding that the respondent's explanation is pretext." *Regan v. National Welder Supply*, 03-STA-14 (ARB Sept. 30, 2004).

Concerning witness credibility, all factual findings, including credibility findings must be supported by substantial evidence in the record as a whole. *NLRB v. Cutting, Inc.* 791 F.2d 659, 667 (7th Cir. 1983). At the same time, the Secretary has observed that a lack of evidence to corroborate conflicting testimony on an issue, coupled with an inability to discern the truth through the demeanor of the witnesses, may lead to an inability to find a complainant's version of the facts more credible. In that case, there may be an insufficient basis for finding a *prima facie* case. *Cook v. Kidimula International, Inc.* 95 STA 44 (Sec'y Mar. 12, 1996).

In cases in which an employer engaged in an adverse personnel action motivated by both prohibited and legitimate reasons, the employer escapes liability only by establishing by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. *Moravec v. HC & M Transportation, Inc.* 90 STA 44 (Sec'y Jan. 6, 1992) and *Logan v. United Parcel Service*, 96 STA 2 (ARB Dec. 19, 1996). Where evidence demonstrates that other employees, similarly situated, did not receive the same adverse personnel action, the employer may fail to carry its burden to show it would have discharged the complainant even if he had not engaged in protected activity. *Clifton, v. United Parcel Service*, 94 STA 16 (Sec'y May 9, 1995). At the same time, under this dual motive analysis, if the employer carries its burden of persuasion, then even when an employee engages in protected activity, an employer may still legitimately discipline him for insubordination and disruptive behavior. *See Logan*, 96 STA 2.

With these principles in mind, I first note that Mr. Fleeman provided sufficient evidence to establish a *prima facie* case of illegal discrimination, including an interference of causation due to temporal proximity. Specifically, as discussed later in greater detail, Mr. Fleeman engaged in several STAA protected activities from January 2006 through January 2, 2007. Two days after the most recent protected activity, Mr. Horton and Mr. Meays severed NPP's employment relationship with Mr. Fleeman.

In turn, NPP produced evidence that Mr. Fleeman's termination decision was based on Mr. Fleeman's belligerent attitude, ruining the morale among the other drivers, and lack of communication. Due to NPP's production of evidence showing a non-discriminatory reasons for its termination of Mr. Fleeman's employment, the inference of causation between Mr. Fleeman's protected activity and employment termination "simply falls away."

Consequently, I will consider the entire record, render credibility and probative value determinations, make factual findings, and determine whether Mr. Fleeman has carried his

ultimate burden of proof by a preponderance of the evidence to show: a) he engaged in an STAA protected activity; b) he suffered an adverse personnel action; and, c) the protected activity was the reason for the adverse personnel action. *See Anderson v. Jaro Trans. Services & McGowan Excavating, Inc.*, 2004 STA 2 and 3, (ARB Nov. 30, 2005).

Credibility Assessments

Based on their hearing demeanor, direct answers, candor, consistency within their respective testimonies, and the absence of confusion or equivocation, I found Mr. Fleeman and Mr. Bohac to be credible witnesses. Further, although Mr. Bohac is a friend of Mr. Fleeman and voluntarily terminated his employment with NPP at the end of December 2006, I found no evidence that either relationship had an effect on his testimony.

As warranted, I will subsequently address the varying credibility, and probative value, of the testimonies of Mr. Meays and Mr. Horton in detail. However, in general terms, Mr. Meays appeared to have selective difficulty recalling certain details, presented significantly different testimony about who wrote the termination letter between direct examination and cross examination,⁵ and near the end of his testimony indicated that he was “very confused.” While Mr. Horton generally provided direct responses to questions and demonstrated a clear and detailed recollection of most aspects of Mr. Fleeman’s employment with NPP, he was seemingly unable to recall a pivotal event in this litigation, the telephone exchange between himself and Mr. Fleeman on January 2, 2007. Specifically, as discussed in greater detail later, considering Mr. Fleeman’s January 2, 2007 phone call involved an hour of service problem, and since Mr. Fleeman’s earlier failure to report the same type of problem was severe enough to provoke Mr. Horton to draft the termination letter on the same day of the phone call, Mr. Horton’s inability at the hearing to recall the “nature” of their telephone conversation on January 2, 2007 diminishes my confidence in his veracity.

Protected Activity

As previously mentioned, the STAA prohibits the discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety. Two types of these activities fall in the categories of safety complains and refusal to drive in violation of regulatory standards.

Safety Complaints

Under 49 U.S.C. § 31105(a)(1)(A), an employee is protected 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. DOL interprets this provision to include internal complaints from an employee to an employer. DOL’s interpretation that the statute includes internal complaints “is eminently reasonable.” *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12 (1st Cir. June 10, 1998) (case below 95 STA 34). The U.S. Circuit Court of Appeals also stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is

⁵During direct, Mr. Meays testified that he and Mr. Horton drafted the termination letter together. However, on cross-examination, Mr. Meays testified that Mr. Horton drafted the letter and brought it to him.

being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id.* For example, a complainant's expressed preference to make shorter runs due to his inability to continue making longer trips like he could as a younger driver, in the absence of any stated safety-related concern, is not an STAA protected activity. *Barr v. ACW Truck Lines, Inc.*, 91 STA 42 (Sec'y Apr. 22, 1992). On the other hand, a complainant's motivation for making a safety complaint has no bearing on whether the complaint is a protected activity. *Nichols v. Gordon Trucking, Inc.* 97 STA 2 (ARB July 17, 1997).

Additionally, under 49 U.S.C. § 31105 (a)(1)(A), the complaint or concern need only "relate" to a violation of any commercial motor vehicle safety standard. Neither the Act nor the legislative history draw in the limitation in 49 U.S.C. § 31105 (a)(1)(B)(i) concerning a violation of a federal safety standard. *See Nix v. Nehi-RC Bottling Company, Inc.*, 84 STA 1 (Sec'y July 13, 1984), slip op. at 8-9. At the same time, and in particular, complaints relating to alleged violations of DOT regulations constitute protected activities. *Hernandez v. Guardian Purchasing Co.*, 91 STA 31 (Sec'y June 4, 1002). Specifically, the operation of overweight trucks involves commercial motor vehicle safety. *See Galvin v. Munson Transportation, Inc.* 91 STA 41 (Sec'y Aug. 31, 1992). And, in light of 49 C.F.R. § 392.6,⁶ exceeding applicable local speed limits involves a violation of a federal motor carrier safety regulation. *Nolan v. A.C. Express*, 92 STA 37 (Sec'y Jan. 17, 1995). Further, to invoke protection under this provision, the employee need only demonstrate that he reasonably believed he was complaining about a safety hazard. *Schuler v. M & P Contracting, Inc.*, 94 STA 14 (Sec'y Dec. 14, 1994).

Finally, the Secretary, through the ARB, has determined that if an employee makes an objection regarding an unsafe condition and then actually drives the vehicle, the complaint should be more properly analyzed under the "complaint" provision of 49 U.S.C. § 31105 (a)(1)(A). *Zurenda v. J & K Plumbing & Heating Co., Inc.*, 97-STA-16 (ARB, June 12, 1998).

Mr. Fleeman testified that over the course of his employment from January through November 2006, he presented several internal complaints that NPP's scheduling of certain routes and the Awahee load required NPP drivers, including Mr. Fleeman, to violate the DOT hours of operations regulations by not taking the required 10 hours off duty between loads. Since Mr. Fleeman's complaints involved violations of a federal hours of service regulation designed to ensure a driver has sufficient rest to drive safety, 49 C.F.R. § 395.3,⁷ Mr. Fleeman's complaints clearly related to a violation of a commercial motor vehicle safety standard.

Turning to the reasonableness of his belief, I have considered Mr. Horton's testimony that he: a) did not purposefully scheduled NPP drivers for routes that required them to violate DOT hours of service regulations or force drivers to violate the hours of service limitations, and

⁶No motor carrier shall schedule a run or permit the operation of any commercial motor vehicle in a manner that would necessitate the vehicle "being operated at speeds greater than those prescribed by the jurisdiction in or through which the commercial motor vehicle is being operated."

⁷A driver of a commercial vehicle carrying property may not drive more than 11 cumulative hours following 10 consecutive hours off duty or remain on duty more than 14 hours after coming on duty.

b) adjusted the routes when he received scheduling complaints relating to hours of service. Additionally, Mr. Meays indicated that he didn't believe Mr. Fleeman's scheduling complaints were justified.

Mr. Horton's representations on this issue have diminished probative value considering two acknowledgements and the credible testimony of Mr. Fleeman and Mr. Bohac. First, Mr. Horton stated he was aware that about once a week a driver was not able to complete scheduled routes within the DOT regulations.⁸ He also acknowledged that his scheduling software program for NPP routes utilized an average of 50 miles per hour for the 11 hour driving period based in part on an interstate speed limit of 70 miles per hour. However, Mr. Fleeman's uncontested credible testimony establishes that the maximum truck speed in the two of the four states he drove NPP loads, Iowa and Nebraska, were 55 and 60 miles per hour respectively.⁹ Mr. Fleeman also credibly testified that he violated the DOT hours of service regulations multiple times due to NPP scheduling and the company's insistence that he return its trailers to the Columbus, Nebraska facility before starting his break period. Mr. Bohac's credible testimony corroborates Mr. Fleeman's scheduling complaints. On multiple occasions, Mr. Bohac exceeded the DOT hours of service limitations to comply with NPP's schedule. The 850 mile Awahee run was a particular problem because any delay would not permit a driver to take the required 10 hours off duty before picking up the next load.

Mr. Meays' testimony about the validity of Mr. Fleeman's concerns also has diminished probative value because he did not address the miles per hour conflict inherent in NPP scheduling software program and acknowledged that he was unaware of all the details of Mr. Fleeman's concerns about Awahee since load refusal was something a dispatcher (Mr. Horton) handled.

Due to the diminished probative value of testimony of Mr. Horton and Mr. Meays on this issue and through his testimony and Mr. Bohac's corroboration, Mr. Fleeman has established that he presented internal complaints based on a reasonable safety belief regarding NPP's route scheduling causing drivers to violate the federal hours of service regulation. Accordingly, based on the preponderance of the probative evidence, I find Mr. Fleeman's complaints from January through November 2006 about NPP scheduling causing drivers to violate the DOT hours of service regulation were protected activities under 49 U.S.C. § 31105(a)(1)(A).

Refusal to Drive – Regulatory Violation

Title 49 U.S.C. § 31105(a)(1)(B)(i) protects an employee who refuses to operate a commercial motor vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." The complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 94 STA 55 (Sec'y Aug. 4, 1995). In that regard, a driver's refusal due to hazardous and dangerous conditions is a protected activity

⁸In this situation, Mr. Horton relied on the driver to tell him he was out of hours.

⁹See also fn. 6.

since forcing the employee to drive would have violated a federal regulation (49 C.F.R. § 392.14). *Robinson v. Duff Truck Lines, Inc.*, 86 STA 3 (Sec’y Mar. 6, 1987), *aff’d Duff Truck Line, Inc. v. Brock*, 48 F.2d 189 (6th Cir. 1988)(per curiam)(unpublished decision available at 1988 U.S. App. 9164). Further, although 49 U.S.C. § 31105(a)(1)(B)(i) refers to federal rules, regulations, and standards, the ARB has concluded a refusal to drive in violation of local law is also covered by this section. *Beveridge v. Waste Stream Environmental, Inc.*, 97 STA 15 (ARB Dec. 23, 97).¹⁰ For example, refusal to drive an overweight truck is a protected activity. *Galvin v. Munson Transportation, Inc.* 91 STA 41 (Sec’y Aug. 31, 1992). Finally, refusal to drive when the contemplated run would cause a driver to violate the federal hours of service regulation (49 C.F.R. § 395.3) is a protected activity. *Paquin v. J.B. Hunt Transport, Inc.*, 93 STA 44 (Sec’y July 19, 1994).

During three specific time periods, Mr. Fleeman refused to drive assigned loads and may have engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i).

January through May 2006

Mr. Fleeman refused to accept loads to Cedar Nursery, Cedar Farrowing, and Awahee from January through May 2006 because the driveways needed repair and he submitted reports about the problems at the Cedar facilities. While Mr. Horton asserts Mr. Fleeman’s refusal where due to his disagreement on compensation for the routes under the 2005 contract, I consider Mr. Fleeman’s credible testimony sufficient to establish a subjective belief that operating his motor vehicle on these driveways would prove hazardous. However, the evidentiary record remains insufficient to establish that the driveways were sufficiently hazardous that driving a load on those routes would have violated 49 C.F.R. § 392.14¹¹ which prohibits the operation of a commercial motor vehicle in dangerous conditions. Notably, although Mr. Bohac had same concerns, Mr. Fleeman acknowledged that other drivers did not seem to have problems with those driveways. Additionally, NPP continued to successfully run loads to these facilities with other drivers. As a result, Mr. Fleeman’s refusals to accept assignments to Cedar Nursery, Cedar Farrowing, and Awahee due to driveway conditions were not protected activities under 49 U.S.C. § 31105(a)(1)(B)(i).

December 21 and 22, 2006

On December 21, 2006, Mr. Fleeman refused to drive an assigned load due to ice storms. On December 22, 2006, he also refused a second load due to deteriorating weather conditions. Mr. Fleeman’s credible testimony and his observations of two NPP truck accidents during these two days due to weather conditions establishes his reasonable safety concern about the serious consequences associated with driving a hog trailer in icy conditions. Mr. Horton cancelled Mr. Fleeman’s trips based on his notification; he also indicated that a large number of loads were

¹⁰The ARB reasoned that New York motor vehicle laws were incorporated by the U.S. Department of Transportation’s regulation, 49 C.F.R. § 392.2, which requires every commercial vehicle to operate in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. *Id.*, slip op. 4.

¹¹If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated.

cancelled during this period due to very severe ice storms. Since 49 C.F.R. § 392.14 states that if hazardous conditions caused by snow, ice, and sleet become sufficiently dangerous, “the operation of the commercial motor vehicle shall not be resumed,” the testimony of Mr. Fleeman and Mr. Horton also demonstrates that driving the assigned loads in the ice storms on December 21 and 22, 2006 would have violated a federal regulation. Consequently, Mr. Fleeman’s refusals to drive on December 21 and 22, 2006 due to adverse weather conditions were protected activities under 49 U.S.C. § 31105(a)(1)(B)(i).

January 2, 2007

Consistent with Mr. Fleeman’s credible testimony, his driver’s log for January 2, 2007, CX 7, indicates that he came on duty at 3:00 a.m. and came off duty at 4:00 p.m., a total of 13 hours on duty, including 7.5 hours of driving. The testimony of Mr. Fleeman and Mr. Horton also establishes that later that evening he was scheduled to pick up a load at 11:00 p.m. in Pocahontas, Iowa, which would have required him to come on duty at about 6:00 p.m. at the NPP trailer facility and then travel to load pick up destination. However, on January 2, 2007, around 3:30 p.m., Mr. Fleeman refused the 11:00 p.m. assignment because he would have to come back on duty with only 2 hours of rest, rather than the required 10 hours. Had Mr. Fleeman taken that assigned load for the night of January 2, 2007, he would have violated the federal hours of service regulation, 49 C.F.R. § 395.3. Accordingly, Mr. Fleeman has proven that on January 2, 2007, he engaged in a protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) when he refused to take the load scheduled for 11:00 p.m.

Summary

For the reasons set out above, I find that Mr. Fleeman engaged in the following categories of STAA protected activities: a) under 49 U.S.C. § 31105(a)(1)(A) when he complained from January through November 2006 that NPP schedules caused drivers to violate the federal hours of service regulation; b) under 49 U.S.C. § 31105(a)(1)(B)(i) when he refused to drive loads on December 21 and 22, 2006 due to hazardous weather conditions which would have violated federal motor safety regulations; and, c) under 49 U.S.C. § 31105(a)(1)(B)(i) when he refused to take a scheduled load on January 2, 2007 that would have cause a violation of the federal hours of service regulation.

Adverse Personnel Action

As previously discussed, the Act prohibits an employer from discharging, disciplining, or discriminating against an employee regarding pay, terms or privileges of employment because he or she engaged in a protected activity. 49 U.S.C. § 31105(a)(1). Having engaged in STAA protected activities, Mr. Fleeman must next prove that he suffered an adverse personnel action.

On January 4, 2007, Mr. Horton and Mr. Meays signed and sent a letter to Mr. Fleeman severing NPP’s motor carrier agreement and employment contract with Mr. Fleeman effective February 4, 2007. Since employment termination represents the most severe adverse personnel action, Mr. Fleeman has proven this requisite element.

Causation

Having established STAA protected activities and an adverse personnel action, Mr. Fleeman must also prove by a preponderance of the evidence a causal connection between these two elements. Specifically, Mr. Fleeman must prove that his complaints from January through November 2006 about NPP's schedule forcing drivers to violate the DOT hours of service, his refusal to accept loads on December 21 and 22, 2006 due to hazardous weather conditions, and his refusal to take a load on January 2, 2007 that would have violated the federal hours of service regulation, were contributing factors, or a contributing factor individually, in the termination of his employment relationship with NPP on January 4, 2007.

The Courts have defined "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action, *Marano v. U. S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). Based on this definition, the determination of contributing factor has two components: knowledge and causation. In other words, the respondent must have been aware of the protected activity (knowledge) and then taken the adverse personnel action in part due to that knowledge (causation).

Knowledge

Since both Mr. Horton and Mr. Meays participated in the termination of Mr. Fleeman's employment, as the first step in establishing that one or more of his protected activities were contributing factors, Mr. Fleeman must demonstrate that they were aware of one or more of his protected activities.

Safety Complaints

Mr. Meays and Mr. Horton denied ever receiving any safety complaints from Mr. Fleeman about NPP scheduling causing violations of the hours of service regulation. Mr. Fleeman testified that he presented multiple complaints to Mr. Horton about the scheduling problem and raised the issue once with Mr. Meays. In addition to making his own complaints about NPP scheduling not providing sufficient rest, Mr. Bohac heard Mr. Fleeman make similar scheduling complaints to Mr. Horton and at the November 2006 meeting.

In resolving the conflict in testimony between Mr. Meays and Mr. Fleeman, I again note that I found Mr. Fleeman to be a credible witness. On the other hand, I have diminished confidence in Mr. Meays' general denial. While Mr. Meays remembered Mr. Fleeman had scheduling complaints which Mr. Meays believed were unjustified, he also testified that he was unsure of many details about those complaints. As a result, Mr. Fleeman's testimony establishes that he presented a complaint to Mr. Meays once regarding NPP scheduling causing hours of service violations.

Both Mr. Fleeman and Mr. Bohac credibly testified that Mr. Fleeman presented scheduling complaints regarding hour of service regulation to Mr. Horton. Mr. Horton was unequivocal in his denial that he ever received any safety complaints about his scheduling. To

the extent Mr. Horton's denial is credible, it is nevertheless outweighed by the credible consensus of Mr. Fleeman and Mr. Bohac. Accordingly, through the preponderance of the credible testimony, I find that Mr. Fleeman communicated his complaints about NPP's scheduling and associated violations of the federal hours of service regulation to Mr. Horton.

Refusal to Drive – December 21 and 22, 2006

Mr. Horton received both calls from Mr. Fleeman concerning his refusal to accept two assigned loads on December 21 and 22, 2007. A few days later, Mr. Meays became aware of Mr. Fleeman's refusal to drive the two assignments due to bad weather. Consequently, both Mr. Horton and Mr. Meays had knowledge of these protected activities.

Refusal to Drive – January 2, 2007

According to Mr. Fleeman, he called Mr. Horton while driving back to Columbus, Nebraska in the afternoon of January 2, 2007 and refused his next scheduled pick-up because it would cause him to violate the hours of service regulation. While agreeing that he received a phone call from Mr. Fleeman on January 2, 2007 based on the cell phone record, CX 7, Mr. Horton testified that he didn't recall the "nature" of their conversation. Mr. Meays testified that within a couple days of January 2, 2007, Mr. Horton told him that Mr. Fleeman had refused a load on January 2, 2007.

Again, Mr. Fleeman's testimony that he called Mr. Horton on January 2, 2007 and refused the scheduled load is credible. Since Mr. Meays did not seem confused about this incident, his testimony is also credible. In determining whether Mr. Horton was truthfully unaware of the substance of Mr. Fleeman's January 2, 2007 phone call, I have considered the short duration of the Mr. Fleeman's phone call and Mr. Horton's representations that January 2, 2007 was a very busy day and he was already in the process of changing Mr. Fleeman's schedule. However, in addition to Mr. Fleeman's credible recollection, Mr. Meays' credible testimony that Mr. Horton told him within a couple days of January 2, 2007 that Mr. Fleeman refused a load on January 2 clearly demonstrates that within two days of the phone call Mr. Horton still remembered the substance or "nature" of their discussion. Consequently, I find that by January 4, 2007, Mr. Meays and Mr. Horton knew about Mr. Fleeman's protected activity of refusing to drive a second load on January 2, 2007.

Causation

Finally turning to the principal issue in this case, I must determine whether Mr. Fleeman can prove that one or more of his protected activities were a contributing factor in the determination by Mr. Horton and Mr. Meays to terminate his employment contract with NPP.

Preliminarily, I find insufficient evidence that Mr. Fleeman's first protected activity regarding his safety complaints was contributing factor in his employment termination. Although Mr. Fleeman expressed his concerns through the November 2006 drivers' meeting, both parties renewed their employment contract at the beginning of December 2006. After the contract renewal, although Mr. Fleeman remained displeased with the fuel surcharge provision,

the record contains no evidence that he continued to present complaints about NPP scheduling as a safety concern. Consequently, sufficient circumstantial evidence to establish causation based on the temporal proximity of this protected activity and adverse personnel action is lacking.

On the other hand, based on the following essentially uncontested facts, exceptionally strong circumstantial evidence of causation exists in regards to the Mr. Fleeman's protected activities in refusing to drive in violation of federal regulations. First, for over a year, Mr. Fleeman was a satisfactory driver for NPP and never received any counseling or criticism from either Mr. Meays or Mr. Horton about his job performance, attitude, or effect on other drivers. On December 1, 2006, NPP renewed its employment relationship with Mr. Fleeman for another year. Sometime between mid-December 2006 and Christmas of that year, Mr. Horton and Mr. Meays began discussing the termination of Mr. Fleeman's employment. During this same period, Mr. Fleeman engaged in protected activity by refusing two loads on December 21 and 22, 2006 due to hazardous driving conditions. On January 2, 2007, the same day Mr. Fleeman engaged in the protected activity of refusing a load which would have violated the federal hours of service regulation, Mr. Horton drafted a letter terminating Mr. Fleeman's motor carrier agreement with NPP and brought it to Mr. Meays who agreed they should act on it. Two days later, Mr. Horton and Mr. Meays signed and sent the termination letter to Mr. Fleeman.

Standing against this circumstantial evidence is the testimony of Mr. Meays and Mr. Horton concerning the reasons for, and the timing of, their decision to terminate NPP's employment relationship with Mr. Fleeman. Mr. Horton and Mr. Meays have presented some legitimate reasons for their decision. Mr. Fleeman acknowledged that he encouraged other drivers to attend the November 2006 meeting with Mr. Horton and Mr. Meays believed the discussion became heated. He also discussed the new contract with other drivers and he agreed with their concerns over the reduced pay structure. Even though Mr. Fleeman signed the new contract in December 2006, he continued to believe its provisions actually represented a significant reduction in pay due to the change in calculating the fuel surcharge, which might have provided a basis for the concern of Mr. Meays and Mr. Horton about his attitude. And, in terms of Mr. Fleeman's impact on other drivers, Mr. Bohac, who had also just recently renewed his contract with NPP and was Mr. Fleeman's friend, quit on December 31, 2006 without providing the requisite 30 day notice over working conditions.

However, even though some facts in the case may provide legitimate support for a business decision to end NPP's contract with Mr. Fleeman, considering my concerns about the credibility of Mr. Meays and Mr. Horton, further scrutiny beyond their general denials of discriminatory motivation is warranted to determine whether Mr. Fleeman's protected activities nevertheless may have also contributed to the adverse personnel action.

Mr. Meays

Concerning the reasons for the discharge, at the hearing, Mr. Meays indicated that Mr. Fleeman was terminated for being belligerent, failing to communicate, getting other drivers worked up, bringing down morale, and turning drivers against NPP. Upon additional questioning, as an example of Mr. Fleeman turning other drivers against NPP, Mr. Meays noted that Mr. Fleeman called other drivers in inclement weather to tell them he was not going to drive

which caused them to also refuse to drive. Mr. Meays also indicated that an example of Mr. Fleeman's miscommunication problem was his failure to call in his hours of service problem on December 30, 2006.

Mr. Fleeman also credibly testified that Mr. Meays provided a different reason during their phone call a few days after the termination. Although Mr. Meays denies any post-termination contact with Mr. Fleeman, I again find his denial of diminished probative value in light of stated confusion about events and Mr. Horton's testimony that he and Mr. Meays had a telephone conference call with Mr. Fleeman shortly after January 4, 2007. According to Mr. Fleeman, Mr. Meays indicated he was terminated because NPP could not let drivers pick and chose routes and Mr. Horton had a list of runs Mr. Fleeman refused to run.

Several aspects of these stated reasons are problematic. First, Mr. Meays' example of turning other drivers against NPP at a minimum relates to Mr. Fleeman's protected activities of refusing loads due to bad weather on December 21 and 22, 2006 and also coincides with the initiation of the discussion between Mr. Meays and Mr. Horton before Christmas 2006 to terminate Mr. Fleeman's employment. Next, Mr. Meays' choice of using Mr. Fleeman's failure to call in about being out of hours on December 30, 2006 as an example of miscommunication to support termination is notable because Mr. Meays also stated that he became aware of that problem only after he and Mr. Horton began the letter drafting process on January 2, 2007; that is, after he concluded to "do it." Further, since Mr. Meays was also apparently aware before the termination letter went out on January 4, 2007 that Mr. Fleeman had also called in on January 2, 2007 with an hours of service issue, he did not explain why he believed Mr. Fleeman still had a communication problem that warranted termination. Finally, Mr. Meays' initial stated reason to Mr. Fleeman right after the termination action, his refusal to take certain routes, seems pretext because, by December 2006 after NPP renewed its contract with him Mr. Fleeman was accepting the two Cedar assignments and the Awahee route.

In regards to timing of the termination decision, Mr. Meays explained that while he and Mr. Horton discussed terminating Mr. Fleeman before Christmas 2006, Mr. Meays did not make his decision until January 2, 2007 when Mr. Horton brought him the draft termination letter that did not contain any stated reason for the termination action¹² and Mr. Meays declared "let's do it." According to Mr. Meays, he reached this definitive conclusion because Mr. Fleeman turned other drivers against NPP. However, Mr. Meays did not identify any event involving Mr. Fleeman's interference with NPP drivers that occurred between mid-December 2006 and January 2, 2007 that warranted his employment termination epiphany. Under this sequence of events, I do not consider Mr. Meays' explanation for the timing of his definitive decision to actually fire Mr. Fleeman on January 2, 2007 believable.

In summary, Mr. Meays' pretext initially stated termination reason, his use of an example relating to Mr. Fleeman's protected activity on December 21 and 22, 2006, the timing of his

¹²While the motor carrier agreement permits either party to terminate the relationship without cause with 30 days notice, Mr. Meays did not explain why Mr. Fleeman was treated differently than the only other driver to be terminated in 2007 who received notice of the specific reasons for his employment cessation, absenteeism and dishonesty, in his termination letter.

knowledge about Mr. Meays' miscommunication problem, his apparent failure to consider Mr. Fleeman's compliance with NPP communication policy on January 2, 2007, and the unconvincing explanation for the timing of his termination decision, diminishes the probative value of Mr. Meays' testimony on whether Mr. Fleeman's protected activities were contributing factors in his decision to cancel NPP's motor carrier agreement with him.

Mr. Horton

In their post-termination conference call following Mr. Fleeman's receipt of the January 4, 2007 termination letter which provided no reason for the action, Mr. Horton advised Mr. Fleeman that he was terminated due to his belligerent attitude, his tendency to stir up other drivers, and his refusal or reluctance to accept loads which adversely affected other drivers' morale. At the hearing, Mr. Horton explained that beginning in January 2006 after his angry letter, Mr. Fleeman began sowing seeds of discontent among the other drivers through his refusal to take the Cedar Farrowing, Cedar Nursery, and Awahee routes. Mr. Fleeman also used seniority to intimidate other drivers and made known his lack of respect for Mr. Horton. Mr. Horton also indicated that the termination was based in part in Mr. Fleeman's miscommunication problems. Besides short and terse calls, Mr. Fleeman also failed to call in on December 30, 2006 to advise Mr. Horton that he had an hours of service problem.

Again, while some of these stated reasons may be legitimate considerations, several discrepancies are readily apparent. Initially, although not protected activities, Mr. Fleeman's reluctance and refusal to take the Cedar and Awahee runs, which Mr. Horton indicated acted as "seeds of discontent" among other NPP drivers, occurred in the first part of 2006 well before the new employment contract was signed in December 2006. After December 1, 2006, although Mr. Fleeman may still have disagreed about the fuel surcharge payment schedule, Mr. Horton was well aware that he was no longer refusing the Cedar and Awahee assignments. Next, although NPP had a policy of permitting drivers to correct their problems, Mr. Horton readily acknowledged that he did not address the attitude and morale issues with Mr. Fleeman during 2006. Instead, in the hope of changing Mr. Fleeman's attitude, Mr. Horton renewed Mr. Fleeman's contract with NPP on December 1, 2006. However, despite Mr. Horton's stated hopes, the renewal of Mr. Fleeman's employment contract and the absence of any rehabilitative counseling in 2006 seriously undermines the stated gravity of Mr. Fleeman's attitude and morale problems as a basis for discharge. The December 1, 2006 renewed contract clearly was not indicative of a significant, deteriorating employment relationship that would warrant termination action in about a month. Additionally, as discussed in greater detail concerning the timing of Mr. Horton's termination decision, the viability of Mr. Horton's use of Mr. Fleeman's omission in reporting an hours of service issue on December 30, 2006 as a legitimate basis for discharge is greatly undermined by Mr. Fleeman's act of commission three days later on January 2, 2007 when he reported an hours of service problem. Finally, the purported significance of Mr. Fleeman's reporting omission on December 30, 2006 is further reduced considering that Mr. Horton did not present this failure to Mr. Fleeman as a reason for his termination during their post-termination telephone conference in January 2007.

Mr. Fleeman also testified that in their post-termination discussion, Mr. Horton indicated that another reason for his termination was the fact that he was the first to call in during bad

weather. Mr. Horton denied making that statement. In resolving this conflict in testimony, in addition to finding Mr. Fleeman's testimony credible, I note the Mr. Meays' testimony provides some corroboration for Mr. Fleeman's recollection. Specifically, in his testimony as an example of Mr. Fleeman inciting other drivers, Mr. Meays highlighted Mr. Fleeman calling other drivers in bad weather which caused them to call in too. Consequently, I find that Mr. Horton referenced Mr. Fleeman being the first to call in about bad weather as a reason for discharge. Since Mr. Horton did not provide specific details about this reason to Mr. Fleeman or specifically indicate that Mr. Fleeman's act of refusal, rather than just its the timing, was the actual reason, his statement to Mr. Fleeman falls short of direct evidence of an impermissible retaliatory motive. At the same time, at a minimum, Mr. Horton's post-termination reference to Mr. Fleeman's calls about bad weather, coupled with Mr. Meays' example of Mr. Fleeman inciting other drivers during bad weather, certainly raises a strong implication that Mr. Fleeman's protected activities on December 21 and 22, 2006 were on Mr. Horton's mind as he was contemplating terminating Mr. Fleeman's employment at that time.

Regarding the timing of the termination decision, Mr. Horton indicated that while he began discussing Mr. Fleeman's termination with Mr. Meays in mid-December 2006, he did not take action at that time because he was "very busy." Mr. Horton further testified that the final straw which helps explain why he finally drafted the termination letter on January 2, 2007, which was also a "very busy" day, was his discovery on that day of Mr. Fleeman's annotations on a billing invoice that he had driven in violation of the hours of service regulation on December 30, 2006. Contrary to Mr. Horton's expectations as a dispatcher, Mr. Fleeman had violated the hours of service regulation rather than call Mr. Horton to let him know that he had a problem. Standing alone, in light of Mr. Horton's long standing issue with Mr. Fleeman's terse and sparse communications with NPP, that basis for discharge may appear legitimate.

However, Mr. Horton's discovery of Mr. Fleeman's invoice notation showing an hours of service violation does not stand alone. On January 2, 2007, Mr. Fleeman also called in and refused a load for that evening because driving the load as scheduled would violate the hours of service regulation. Not only is this phone call in the afternoon of January 2, 2007 profoundly relevant as a protected activity, Mr. Fleeman's call represents compliance with the policy of NPP and Mr. Horton to report hours of service problems rather than violate the federal regulation.

Regardless of whether Mr. Horton started drafting the termination letter on January 2, 2007 before Mr. Fleeman's phone call in the afternoon about his hours of service problem, Mr. Horton certainly had important evidence before he mailed the termination letter on January 4, 2007 that Mr. Fleeman would comply with NPP's requirement to call in hours of service issues. Under these circumstances, if Mr. Horton's discovery on January 2, 2007 of Mr. Fleeman's failure to call in an out of hours situation on December 30, 2006 was the actual trigger event for his termination decision, Mr. Horton has failed to explain why Mr. Fleeman's call the same day in compliance with NPP policy was insufficient to cause him to remove his finger from the trigger. According to Mr. Horton, Mr. Fleeman had a history of communication issues. Nevertheless, in light of Mr. Horton's statement that that NPP permits drivers to reconcile their problems, his explanation for the timing of his decision to fire Mr. Fleeman for failure to call in an hours of service problem and subsequently act on that decision at the same time Mr. Fleeman called in an hours of service problem loses probative force. Mr. Fleeman's compliant January 2,

2007 phone call deflates the reasonableness of Mr. Horton's reliance on Mr. Fleeman's failure to report an hours of service problem three days earlier as a cause of action and effectively impeaches his assertion that Mr. Fleeman's failure on December 30, 2006 was the trigger event that explains why he decided to terminate Mr. Fleeman's employment on January 2, 2007. Consequently, I find Mr. Horton's stated reliance of Mr. Fleeman's communication dereliction on December 30, 2006 as the final termination event to be pretext.

In summary, the noted discrepancies associated with some of Mr. Horton's stated reasons for Mr. Fleeman's discharge and his pretext explanation for the timing of his termination decision, diminishes the probative value of his testimony on whether Mr. Fleeman's protected activities were contributing factors.

Conclusion

In conclusion, upon consideration of all the evidence, and having rendered credibility determinations, I first find that some of Mr. Meays' stated reasons for termination and his explanation of the timing of Mr. Fleeman's discharge are inconsistent and pretext. Similarly, a few of Mr. Horton's stated reasons for the separation action are problematic and his reliance of a communication deficiency on December 30, 2006 for the timing of his termination decision is pretext. The preponderance of the remaining evidence, in particular the temporal proximity of protected activities on December 21, 2006, December 22, 2006, and January 2, 2007 with the initiation of termination discussion between Mr. Meays and Mr. Horton and their final decision to terminate, is probative and establishes that Mr. Fleeman's STAA protected activities on December 21, 2006, December 22, 2006, and January 2, 2007, which were known to Mr. Meays and Mr. Horton, were contributing factors in NPP's termination of his employment under the motor carrier agreement.

Affirmative Defense

As previously discussed, an employer engaged in an adverse personnel action motivated by both prohibited and legitimate reasons may escape liability by establishing by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct.

Considering my previous adverse determinations regarding the credibility of Mr. Meays and Mr. Horton and the diminished probative value of their explanations and stated reasons for the termination action, I find NPP is unable to establish that Mr. Fleeman would have been terminated on January 4, 2007 for his belligerent attitude, his adverse effect on drivers' morale, his refusal to accept routes in 2006 before December of that year, and his continued displeasure with the new employment contract that he signed on December 1, 2006, absent his protected activities on December 21, 2006, December 22, 2006, and January 2, 2007.

DAMAGES

Through the preponderance of the more probative evidence, Mr. Fleeman has proven that NPP engaged in an act of illegal discrimination under the STAA when his employment under the December 1, 2006 motor carrier agreement was terminated effective February 4, 2007.

Having suffered an act of illegal employment discrimination for an STAA protected activity, Mr. Fleeman is entitled to specific relief to remedy the harm caused by the discrimination. According to 49 U.S.C. § 31105(b)(3)(A), as implemented by 29 C.F.R. § 1978.109, the appropriate remedies include compensatory damages, which includes back pay and compensation for mental and emotional distress; reinstatement with the same pay and privileges of employment; prejudgment and postjudgment interest; and costs and expenses, including reasonably incurred attorney fees. *See Drew v Alpine, Inc.*, 01 STA 47 (ARB Jan. 25, 2002) and 29 C.F.R. § 1978.109(a).

Compensatory Damages

Back Pay

To make a person “whole for injuries suffered for past discrimination,” the Act mandates an award of back pay as compensatory damages to run from the date of discrimination until either the complainant receives a bona fide offer of reinstatement, is reinstated or obtains comparable employment. *Nelson v. Walker Freight Lines, Inc.* 87 STA 24 (Sec’y Jan. 15, 1988), slip op. at 5, *Polwesky v. B & L Lines, Inc.*, 90 STA 21 (Sec’y May 29, 1991), *Moravec v. HC & M Transportation, Inc.*, 90 STA 44 (Sec’y Jan. 6, 1992), and *Polgar v. Florida Stage Lines*, 94 STA 46 (ARB Mar. 31, 1996). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require “unrealistic exactitude.” *Cook v. Guardian Lubricants, Inc.*, 95 STA 43 (ARB May 30, 1997), slip op. at 11-12, n.12. Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co., Inc.*, 90 STA 37 (Sec’y June 3, 1994) and *Kovas v. Morin Transport, Inc.*, 92 STA 41 (Sec’y Oct. 1, 1993). At the same time, the lost wages claimed as back pay must have been caused by the employer’s misconduct. *Hampton v. Sharp Air Freight Service, Inc.*, 91 STA 49 (Sec’y July 24, 1992).

The employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. *Hadley v. Southeast Corp. Serv. Co.*, 86 STA 24 (Sec’y June 28, 1991). Concerning interim earnings, the deduction is warranted only if the complainant could not have obtained the interim earnings if his employment with the respondent had continued. *Nolan v. AC Express*, 92 STA 37 (Sec’y Jan. 17, 1995).

The burden of showing that a complainant failed to make reasonable efforts to mitigate his damages is on the employer. *Polwesky*, 90 STA 21, citing *Carrero v. N.Y. Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) and *Rasimas v. Michigan Dep’t of Mental Health*, 714 F.2d 614 (6th Cir. 1983). While the complainant need only make reasonable efforts to mitigate his damages and is not held to the highest standards of diligence, and doubt is resolved in the complainant’s favor, *Moyer v. Yellow Freight System, Inc.* 89 STA 7 (Sec’y Aug. 21, 1995), the employer may carry

the evidentiary burden by showing that jobs for the complainant were available during the back pay period. *Polwesky*, 90 STA 21. The reasonableness of the effort to find substantially equivalent employment should be evaluated in terms of the complainant's background and experience in relation to the relevant job market. *Intermodal Cartage Co., Ltd. v. Reich*, No. 96-3131 (6th Cir. Apr. 24, 1997)(unpublished decision available at 1997 U.S. App. LEXIS 9044) (case below 94 STA 22).

Initially addressing the issue of mitigation, Mr. Fleeman testified that he secured employment with another trucking company in February 2007. NPP makes no assertion that the effort was insufficient. Since the amount collected from Mr. Fleeman's position following his termination from NPP is less than what he would have made had he continued working for NPP, Mr. Fleeman is entitled to a compensatory award of back pay.

According to Mr. Fleeman's uncontested testimony, although he received gross receipts of \$152,039.00 in 2005 and \$155,442.49 in 2006 (CX 8) under the motor carrier agreement with NPP as an independent owner-operator truck driver, his actual income after operating expenses during this period was \$99,000 a year, which represents an average weekly wage at the time of his termination of \$1,903.85 (\$99,000/52). Consequently, Mr. Fleeman seeks compensatory damages based on that loss of earned income.¹³

Following his five weeks of employment in 2007 with NPP and discharge on February 4, 2007, Mr. Fleeman started working for Camaco, as a truck driver. Based on Mr. Fleeman's 2007 W-2 from Camaco, CX 10, he earned \$29,194.81 during the remaining 47 weeks of the year. Accordingly, his Camaco average weekly wage was \$621.17 (\$29,194.81/47). Taking into account his Camaco earnings, Mr. Fleeman's weekly loss of income associated with his employment termination with NPP from February 4, 2007 through December 31, 2007 was \$1,282.68 (\$1,903.85 - \$621.17).

Based on a Camaco earnings statement, CX 11, Mr. Fleeman's year-to-date income through July 6, 2008, or 27.71 weeks, was \$21,150.04. As result, Mr. Fleeman's average weekly wage with Camaco for 2008 was \$763.26 (\$21,150.04/27.71). Since neither side has presented evidence that Mr. Fleeman's employment status or income has changed with Camaco, I find both that his average weekly wage for 2008 was \$763.26 and that his average weekly wage continues to be \$763.26. Based on these earnings, Mr. Fleeman weekly loss of income for 2008 was \$1,140.59 (\$1,903.85 - 763.26), and that weekly loss continues to be \$1,140.59.

¹³Since Mr. Fleeman did not specifically state that his income figure was "after taxes" and back pay award are subject to income tax, I rely on Mr. Fleeman's representation of his compensatory damages as earned income. See *Bryant v. Mendenhall Acquisition Corp.* ARB NO. 04-104, ALJ No. 2003 STA 36 (ARB June 30,2005). ,

In summary, Mr. Fleeman's compensatory award of back pay through the week of this decision is:

1. February 4, 2007 to December 31, 2007 (47 weeks x \$1,282.68)	\$ 60,285.96
2. January 1, 2008 to December 31, 2008 (52 weeks x \$1,140.59)	59,310.68
3. January 1, 2009 to February 9, 2009 (6.5 weeks x \$1,140.59)	<u>7,413.84</u>
	\$127,010.48

Mental and Emotional Distress

As part of compensatory damages, a successful whistleblower complainant may recover for mental and emotional distress suffered as a consequence of the discrimination. *Doyle*, 89 ERA 22 (ARB May 17, 2000). To establish entitlement, the complainant must show that he suffered mental and emotional distress and that the respondent's adverse action caused the distress. *Id.* Consulting a physician, psychologist or similar professional on a regular basis is not a prerequisite to entitlement. *Smith v. Littenberg*, 92 ERA 52 (Sec'y Sep. 6, 1995), *appeal dismissed*, No. 95070725 (9th Cir. Mar. 27, 1996). At the same time, the complainant must prove the existence and magnitude of subjective injuries with competent evidence. *Lederhaus v. Paschen Midwest Inspection Service, LTD.* 91 ERA 13 (Sec'y Oct. 26, 1992), *citing Carey v. Piphus*, 435 U.S. 247, 264 n. 20 (1978). In determining the amount of compensation for mental and emotional distress, an administrative law judge may review other types of wrongful employment termination cases for assistance. *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery*, 95 STA 37 (ARB Sept. 5, 1996).

As directed by *Bigham*, I have reviewed several wrongful employment termination cases. One particular case, *McCuiston v. Tennessee Valley Association*, 89 ERA 6 (Sec'y Nov. 13, 1991) contains a fairly detailed discussion on mental and emotional distress compensatory awards ranging from \$10,000 to \$50,000. In that case, after reviewing several cases, the Secretary awarded \$10,000 for mental and emotional distress where the record established the complainant had been embarrassed and humiliated before fellow employees; experienced sleeplessness; suffered severe headaches, depression, stomach problems and aggravation of pre-existing hypertension; and, consequently experienced difficulty in trying to obtain other employment. In another case, *Lederhaus v. Paschen Midwest Inspection Service, LTD.* 91 ERA 13 (Sec'y Oct. 26, 1992), the complainant also received \$10,000 for mental and emotional distress. In that case, for over five months after his discharge, the complainant struggled with depression, contemplated suicide, withdrew from family and friends, and developed significant interpersonal relationship problems. Finally, in *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, 95 STA 34 (ARB Aug. 8, 1997), the Board upheld an award of \$30,000 for a complainant who as a result of his unlawful termination suffered severe emotional distress associated with a forced relocation, concerns for his family's survival, marital difficulties, and an on-going ulcer.

Mr. Fleeman specifically seeks compensation for the stress that he developed after his termination. Although he leaves the amount of the appropriate compensation to my discretion, Mr. Fleeman requests \$20,000. At the hearing, Mr. Fleeman indicated that he was "at a loss" upon receipt of his termination letter because he is the only one who works in his family. He

also described stress associated with losing his truck, being unable to pay bills on time, and “feeling bad” about having to borrow money from family members.

While Mr. Fleeman’s credible testimony establishes that he suffered some understandable mental and emotional distress due to his loss of employment with NPP, he did not describe even generalized symptoms or provide any specifics about the depth, duration, and frequency of his mental and emotional distress and any associated physical manifestations. Additionally, Mr. Fleeman appears to have been able to cope with his distress in part by rapidly finding re-employment. In comparison to the previously noted cases involving prolonged depression and social and physical dysfunction, Mr. Fleeman’s mental and emotional distress does not rise to the level of seriousness or intensity that warrants a compensatory award for mental and emotional distress. Accordingly, I deny his request for an additional compensatory award of \$20,000 based on mental and emotional distress.

Reinstatement

A complainant who prevails in a STAA employee discrimination case is presumptively entitled to reinstatement, *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1171 (6th Cir. 1996). As mandated by 29 C.F.R. § 1978.109(b), a complainant’s reinstatement is effective immediately upon receipt of an administrative law judge’s decision by the respondent. According to the ARB, reinstatement is normally mandatory except in circumstances such as where the parties have demonstrated the impossibility of a productive and amicable working relationship, or where the company no longer has positions for which the complainant is qualified. *See Dale v. Step 1 Stairworks, Inc.*, 02 STA 30 (ARB Mar. 31, 2005).

In situations where reinstatement is not possible, then front pay is appropriate as an equitable substitute and functional equivalent to provide the complainant the same benefit as possible that he would have received with reinstatement. *Williams v. Pharmacia*, 137 F.3d 944, 952 (7th Cir. 1998). Although the STAA does not specify front pay as a remedy, the ARB has determined it is available to a successful litigant. *Michaud v. BSP Transp., Inc.*, ARB No. 97 STA 113, ALJ No. 95 STA 29, slip op. at 5-6 (ARB Oct. 9, 1997). Additionally, the entitlement to, and amount of, front pay are equitable issues to be decided by a judge. *Price v. Marshall Erdman & Assocs., Inc.*, 966 F.2d 320, 324 (7th Cir. 1992).

Since Mr. Fleeman has proven that an STAA protected activity contributed to his termination, he is entitled to reinstatement with NPP as an owner-operator under the motor carrier agreement. Although seeking reinstatement as a remedy, Mr. Fleeman indicated that he no longer had a truck which renders him presently unqualified to return to NPP in his former employment as an owner-operator. At the same time, Mr. Fleeman stated that he could obtain a truck if reinstated with NPP. Consequently, I find both: a) reinstatement remains a viable remedy, and b) Mr. Fleeman is entitled to front pay until he obtains another truck at the weekly rate of \$1,140.59, which represents Mr. Fleeman’s continuing weekly loss of income. Upon notification that Mr. Fleeman has obtained a truck and meets the qualifications to resume his employment as an owner-operator under the motor carrier agreement with NPP, his entitlement to front pay will cease and NPP shall immediately reinstate Mr. Fleeman as a contract owner-

operator with the same rate of pay, privileges and other conditions of employment as if he had remained a driver with the company since February 4, 2007.

Interest.

As part of a compensatory damage award, a complainant is entitled to prejudgment interest to compensate for the loss of use of his wages. *Hufstetler v. Roadway Express, Inc.* 85 STA 8 (Sec’y Aug. 21 1986), *overruled on other grounds, Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). Similarly, a complainant may receive post-judgment interest on back and front pay. *Ass’t Sec’y & Bryant v. Mendenhall Acquisition Corp. d/b/a Bearden Trucking*, 03 STA 36, slip op. p. 10, (ARB June 30, 2005).

In calculating the interest on STAA back pay awards, the rate used is that charged for underpayment of federal taxes. *See Bryant* and 26 U.S.C. § 6621(a)(2). The interest is compounded quarterly, until the damage award is paid. *Bryant*, slip op. at 10, and *Doyle v. Hydro Nuclear Servs.*, 89 ERA 22, slip op. at 18-19 (ARB May 17, 2000),¹⁴ *rev’d on other grounds, Doyle v. U.S. Secretary of Labor*, No. 00-1589 and 00-2035 (3d Cir. May 27 2002).¹⁵

In light of the above principals, Mr. Fleeman is entitled to prejudgment and postjudgment interest on his back and front pay awards. The interest will be calculated in accordance with 26 U.S.C. § 6621(a)(2) and compounded quarterly.

Attorney Fees

Due to the successful prosecution of his STAA discrimination claim, Mr. Fleeman is entitled to recover the associated litigation expenses, including reasonable attorney fees. I will give Mr. Fleeman’s counsel an opportunity to submit an attorney fee petition within 30 days of receipt of this Recommended Decision and Order. The Respondent will have up to 21 days from receipt of the attorney fee petition to file a response.

¹⁴The machinations associated with this calculation are not insignificant and I leave the particulars to parties’ counsel. For the first calendar quarter following February 2007, the “applicable federal rate” (AFR”) for that calendar quarter must be determined by averaging the Federal short-term rate for each of the three months in that quarter. Next, that average interest rate is arithmetically rounded and 3% is added. Then, that combined interest is then applied to the quarter’s principal. To determine the interest owned on the second calendar quarter, after determining the combined interest rate for the second quarter, the first quarter principal, the first quarter interest and second quarter’s principal are added and the second quarter compound interest is applied to that sum. Finally, the iterations continue for each quarter until the damage payment is made.

¹⁵The text of the appellate court’s decision may be found on the Office of Administrative Law Judges website, www.oalj.dol.gov in the whistleblower library associated with the administrative law judge and ARB decisions for 1989 ERA 22.

ORDER

1. The Respondent, NEBRASKA PORK PARTNERS & NEBRASKA PORK MARKETING, LLC, **SHALL PAY** the Complainant, MR. BILL FLEEMAN, compensatory damages in the amount of \$127,010.48 for back pay through February 9, 2009.

2. The claim of the Complainant, MR. BILL FLEEMAN, for compensatory damages of \$20,000 for mental and emotional distress is **DENIED**.

3. Pending restoration of his qualifications as an owner-operator, the Respondent, NEBRASKA PORK PARTNERS & NEBRASKA PORK MARKETING, LLC, **SHALL PAY** the Complainant, MR. BILL FLEEMAN, front pay at the weekly rate of \$1,140.59 from February 17, 2009 until his reinstatement.

4. Upon notification that Mr. Fleeman is qualified as an owner-operator, NEBRASKA PORK PARTNERS & NEBRASKA PORK MARKETING, LLC, **SHALL IMMEDIATELY REINSTATE** the Complainant, MR. BILL FLEEMAN, as an owner-operator truck driver at the same pay, and with the same terms, privileges, and conditions of employment that would be applicable if he had remained a driver with the company since February 4, 2007.

5. The Respondent, NEBRASKA PORK PARTNERS & NEBRASKA PORK MARKETING, LLC, **SHALL PAY** the Complainant, MR. BILL FLEEMAN, prejudgment and postjudgment interest, on the back pay and front pay awards, compounded quarterly in accordance with 26 U.S.C. § 6621(a)(2).

SO ORDERED:

A

RICHARD T. STANSELL-GA.M.M
Administrative Law Judge

Date Signed: February 9, 2009
Washington, D.C.

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, Suite S-5220, 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 of, 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 inquiries and correspondence in this matter should be directed to the Board.

The order directing reinstatement of the complainant is effective immediately. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).