



Issue Date: 20 January 2012

CASE NO.: 2011-STA-22

IN THE MATTER OF:

JEFFREY COLE

Complainant

v.

R. CONSTRUCTION COMPANY¹

Respondent

APPEARANCES:

MICHAEL V. GALO, JR., ESQ.
For The Complainant

GEORGE GORDON, ESQ.
RICHARD BROWNE, ESQ.
For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment.

¹ Respondent's name appears as amended at the hearing. (Tr. 5).

On or about January 4, 2011, Jeffrey Cole (herein Complainant) filed a complaint against R. Construction Company (herein Respondent) with the Occupational Safety and Health Company (OSHA), U.S. Department of Labor (DOL), complaining of various unsafe acts under the STAA, including his termination on December 22, 2010. An investigation was conducted by OSHA and on January 19, 2011, the Regional Supervisory Investigator for OSHA issued the Secretary of Labor's Findings concluding that Complainant's complaint lacked merit. (ALJX-1). Complainant subsequently filed a request for formal hearing with the Chief Administrative Law Judge, Office of Administrative Law Judges.

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a hearing in Dallas, Texas, on May 24, 2011. (ALJX-2). On March 14, 2011, in compliance with the Pre-Hearing Order, Complainant filed a formal complaint alleging the nature of each and every violation claimed as well as the relief sought in this proceeding. (ALJX-4). On March 31, 2011, Respondent duly filed its Answer to the Complaint. (ALJX-5). The parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.²

Post-hearing briefs were received from the Complainant and the Respondent by the due date of July 29, 2011. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

I. ISSUES

The unresolved issues presented by the parties are:

1. Whether Complainant engaged in protected activity within the meaning of the STAA?
2. Whether Complainant was constructively discharged in retaliation for his protected activities in violation of the STAA?
3. Whether Complainant is entitled to remedies?

² References to the transcript and exhibits are as follows: Transcript: Tr.____; Complainant's Exhibits: CX-____; Respondent's Exhibits: RX-____; and Administrative Law Judge Exhibits: ALJX-____.

II. STATEMENT OF THE CASE

The Testimonial Evidence

Complainant

Complainant testified that he was employed by Respondent for three and a half years. (Tr. 273). He began working there on April 10, 2007, and separated from his employment on December 22, 2010. (Tr. 273-274). His hourly pay at the time of separation was \$14.50. He worked as a truck driver. He was assigned a particular truck to drive during his last year of employment. (Tr. 274).

Following the December 17, 2010 incident, Complainant worked on December 18, 2010, and was off of work for two days on December 19 and 20, 2010. (Tr. 274-275). On December 21, 2010, he presented for work, but his assigned truck was not available. (Tr. 275).

Complainant was never reprimanded, counseled or disciplined by anyone at Respondent regarding his work performance. He admitted to being late for work on a few occasions, but he believed that other drivers were also late. (Tr. 275). He testified that no one talked to him about taking too long to complete a job or his alleged falsification of time sheets. (Tr. 275-276). He stated that he was meticulous with his time sheets and never falsified them. (Tr. 276).

Complainant admitted that Respondent lent him money. He paid all amounts lent back with interest. (Tr. 276). Joanna Price, Respondent's office manager, told him the interest rate for the loans was 10 percent. (Tr. 276-277). He knew of other drivers who also borrowed money from Respondent. (Tr. 277).

Complainant had a commercial driver's license. He had a haz-mat endorsement at some point before he began working for Respondent, but he did not have a haz-mat endorsement while working for Respondent. (Tr. 277).

As a driver for Respondent, he primarily hauled salt water in a Class A tractor with a 6,000-gallon tanker trailer. Following the December 17, 2010 incident, Respondent moved him to the salt water hauling division, even though that was almost exclusively what he had been doing before the incident. (Tr. 278-279). He also hauled some fresh water drilling mud, but the vast majority of his work was salt or fresh water hauling. He

picked up the water from numerous locations. He would "pick it up from vendors in the field that sold fresh water." He would generally bring it to a drilling rig, where "they used it in their operations." (Tr. 279).

Complainant testified he was not told Respondent would be slowing down and hours would be cut before the December 17, 2010 incident. (Tr. 279-280). He recalled a meeting in early 2010 where discussions were held regarding reducing the work day from 12 hours to 11.5 hours. He believed he was working 10 to 15 hours of overtime per week on average in the months preceding December 2010. He never asked for his overtime to be reduced. (Tr. 280). When he was hired by Respondent, he believed his schedule would be 12 hours per day with four days on and two days off. It was his understanding that the job entailed a substantial amount of overtime. He enjoyed that schedule because "it was consistent for a truck driver on a local route." He stated, "To have a consistent schedule like that with two days a week off and still be able to make 50, 60 hours a week is great." Overtime was paid at time and one-half. (Tr. 281). He believed more than 30 percent of his compensation per week consisted of overtime pay. (Tr. 282).

Complainant was aware of poor performance by other drivers at Respondent, including coming in late and involvement in vehicular accidents. (Tr. 282). He recalled that Cornell White had "rolled a truck over" and was not fired. He testified that the vast majority of the vehicular accidents he was aware of there were the drivers' fault. He recalled one driver being discharged after he "rolled a truck over." (Tr. 283).

On December 17, 2010, Prater attempted to call him. He missed the call, but he heard from another driver that he needed to report to Halliburton. He did not know that the haul was diesel-based drilling mud. (Tr. 284). He reported to Halliburton in Marquez, Texas. Two trucks were ahead of him in line. Cornell White and another driver named "Larry" were in front of him, and Steve Bibby was behind him. None of Respondent's trucks had placards. (Tr. 285). They did not carry placards with them, and there were no placard braces on the trucks or trailers. (Tr. 285-286). Larry's truck was loaded, and he picked up his billing and left. White's truck was loaded. He attempted to leave, but Complainant stopped him. Complainant asked to see White's bill of lading, which indicated that the load was haz-mat. At that time, Complainant's truck was being loaded. (Tr. 286).

Complainant's review of the bill of lading revealed that the material was hazardous and not exempt. He called Prater, his immediate supervisor, and told him he was not going to be able to haul the load because it was haz-mat. He recalled that Prater stated, "Well I wish I would've known that." (Tr. 287). He testified that he did not know what Prater meant by that statement. Prater agreed to pick him up from the site. (Tr. 288).

Complainant moved his truck to the side and went into the scale house to speak to the scale master. The scale master told him he needed to sign the bill of lading. Complainant told him he was not going to make the haul because he was not endorsed for it. (Tr. 288). He testified that he did not yell, scream or "cuss" at the scale master. (Tr. 288-289). He did not believe that he was rude to the scale master in any way. He told the scale master that another driver was coming to take the load. (Tr. 289). He also spoke with Bibby, and told him the load was haz-mat. (Tr. 289-290).

When Prater arrived at Halliburton he signed Bibby's bill of lading, which was haz-mat. (Tr. 290). Complainant testified that it was "highly unusual" and "meaningless" for a supervisor to sign a bill of lading because the driver was supposed to sign the bill of lading. (Tr. 290-291). After Prater signed the bill of lading, Bibby left with the load. Complainant did not witness Bibby's interaction with the scale master. Then, Complainant left the yard in Prater's truck. Prater did not indicate that he was going to write Complainant up, and the two did not exchange cross words. (Tr. 291).

Complainant spoke to Casey when he returned to Respondent's site. He saw Casey in the breezeway as he was walking toward his truck and "didn't want to dodge him." He knew Casey was the salesman on the Rockefeller Hughes job. Casey used profanities, stating he was upset because Complainant "cost him a lot of money." Complainant told him that he was concerned about the safety aspects of hauling a haz-mat load without an endorsement and placards. He was concerned about the possibility of an accident and injuring someone. He was concerned that he would end up in jail. (Tr. 293). He explained he did not want to be in that situation because he could not retire for 15 years. (Tr. 293-294). He testified that Casey stated, "You should've hauled it. We would've paid for your ticket." He could not specifically recall anything else that Casey stated.

James TiJerima, a senior dispatcher, approached during the conversation with Casey. He told Complainant that he needed to leave because they were speaking too loudly. Then Casey stated, "I'm not mad at him personally. I'm mad at what he did." (Tr. 294). Then TiJerima escorted Complainant out of the building. Complainant reiterated his reasoning to TiJerima, who told him he should have hauled the load. He testified that TiJerima told him it had "been done in the industry for years and that's just what we do." (Tr. 295). Then, Complainant went home. (Tr. 296).

Complainant worked on Saturday, December 18, 2010. He only spoke to other drivers during his shift. He was off work on December 19 and December 20, 2010. (Tr. 296). He believed that he possibly spoke to Hall on December 19, 2010, but he could not recall the exact date of their conversation. He returned to work on December 21, 2010. A truck was not available for him to use. He did not know why the truck that was assigned to him was not available. (Tr. 297).

Complainant spoke to Casey on the morning of December 21, 2010; he knew Casey was in sales but also heard him refer to himself as vice-president. Complainant testified Casey told him he spoke to Rodell, who stated he wanted to fire both Complainant and Bibby. (Tr. 298). Casey told him his hours were being cut permanently to 40 hours per week. (Tr. 299). He testified that no one told him that his hours were going to be cut before the conversation with Casey. (Tr. 300-301). He recalled some discussion of cutting hours in 2009 due to the cost of gas, but those discussions never came to fruition. Complainant stated to Casey, "Why am I being punished for something I didn't do." He testified that he was referring to his refusal to haul haz-mat. (Tr. 300). Casey told him he cost Respondent \$100,000.00 to \$110,000.00, but he believed that statement was made during their conversation on December 17, 2010. (Tr. 301).

Complainant testified that he never called Casey to request a layoff. (Tr. 301). He inferred from his conversation with Casey that his hours were being cut because he refused to haul haz-mat. He did not recall Casey mentioning anything about work being slow. (Tr. 302).

Complainant testified that he had become friends with Rodell. He was given the opportunity to hunt on Rodell's property, and he went hunting on Casey's property. He believed Rodell treated him fairly prior to the December 17, 2010 incident. (Tr. 302).

Complainant spoke to Rodell on the telephone following his conversation with Casey. (Tr. 302). He testified Rodell initially told him that he did not know anything about his being fired or his hours being cut. Then, he stated Rodell admitted to cutting his hours so he could "get [his] head on straight." (Tr. 303). Complainant testified he told Rodell, "You're punishing me for something I didn't do." He claimed Rodell responded, "Well, that's just the way it is." Complainant stated he then ended the conversation. At that point, he was extremely concerned about his job status. (Tr. 303). He testified he was concerned about his job because he knew "once you got in those kind of cross hairs with those kind of people, that you weren't going to be long for there." (Tr. 304). He stated he witnessed them "force" other drivers out. (Tr. 304-305). He was also concerned because he did not think he could afford the pay cut that would come from working only 40 hours per week. (Tr. 305).

Complainant called Curtis Hall after his discussion with Rodell. (Tr. 304-305). He asked Hall if he heard about his hours being cut; Hall stated he had not. Complainant testified he did not believe Hall because it was "hard to really believe anything he says exactly." He was friends with Hall. He told Hall about the December 17, 2010 incident and that he felt "like [he had] a target on [his] back." He testified that Hall agreed with his statement. He told Hall the situation made him uncomfortable. (Tr. 306). He claimed Hall told him, "When you do your pre-trip, you better make sure you do it 100 percent and don't miss anything, because if you get stopped by DOT on the side of the road, Joey's going to hang you out to dry. He's not going to pay anything for it." Complainant testified he saw Respondent treat other employees that way. (Tr. 307). He stated a former employee, who was rehired, was given reduced hours, which Hall told him was done to force him to leave the company. (Tr. 307-308).

Complainant admitted he proposed a layoff to Hall because he did not feel he "had any other options." He believed he could not continue to work for the company because cutting his hours was a "signal" he was "finished there." (Tr. 308). He denied ever telling anyone that he could make more money on

unemployment than working 40 hours per week. (Tr. 308-309). He stated he "couldn't exist" and would not have taken the job if only 40 hours per week was offered. He also believed he was not welcome at the company based on the statements of Rodell and Casey. (Tr. 309).

Complainant's employment was terminated on December 22, 2010. He was eligible for rehire, but he stated he would not reapply because "the environment there is hostile and extreme." He did not believe Respondent would hire him. (Tr. 310).

Complainant did not believe it was fair for Respondent to blame him for the loss of the contract. (Tr. 310). Complainant did not recall telling anyone other than Hall that he wanted to be laid off. (Tr. 310-311).

Complainant did not speak to Rodell following the December 21, 2010 phone conversation. He did not believe Rodell listened to his concerns. Rodell gave him no reason to believe his job was not in jeopardy. His discussion with Casey caused him to believe his job was in jeopardy. (Tr. 311).

Complainant testified that three people were present during his exit interview; he recalled Morgan and Prater being there but could not recall the third person. He believed Bibby was still working for Respondent at that time. (Tr. 312).

Hall presented to Complainant's home uninvited. (Tr. 312-313). He testified his home was on a country road in a remote area. He was not expecting Hall, and Hall had never been to his house. (Tr. 313). He believed that he had filed his claim with OSHA at that time. (Tr. 313-314). Hall told him he did not want to be "in the middle" of the litigation. He testified Hall told him that he knew why he was proceeding with litigation against Respondent, but Hall indicated that he did not want to be involved. (Tr. 314).

Complainant has not worked since his separation from Respondent. He testified that he made an effort to find a job. (Tr. 314). He claimed to have applied for three or four jobs per week. He enrolled in college beginning in May 2011 to study networking, system administration. (Tr. 315).

Complainant's commute to Respondent's site was between 32 and 34 miles. (Tr. 315). Some truck driving positions were available following his termination, but none were "comparable" to his previous position. The schedules required six to seven work days per week "over-the-road," and the jobs paid less. (Tr. 316).

Complainant was involved in workers' compensation litigation in 2006. (Tr. 317).

On cross-examination, Complainant stated his workers' compensation claim took place in Okeechobee County, Florida. (Tr. 317). He did not know how Hall was aware of the prior litigation. He admitted that Hall was a good friend to him, but denied that Hall ever loaned him money. He also denied ever buying property from Hall, with the exception of some farm equipment. (Tr. 318).

Complainant claimed that the only time he asked for a layoff was in his conversation with Hall. He told Hall the reason he wanted to leave was because he was "in the cross hairs." He thought he did not have "any other option" because he was "being forced out of the company." (Tr. 319). He believed Respondent was forcing him out by cutting his hours and over one-third of his pay. (Tr. 319-320). His hours had not been cut at the time of his lay off, but he was "under the assumption" that his hours were going to be cut to 40 hours a week. He decided to have a conversation with Hall, and a layoff was part of the conversation. (Tr. 320). He decided to leave voluntarily. (Tr. 320-321). He testified that "till that point" Respondent had never acted adversely toward him. (Tr. 321).

Complainant began looking into his legal rights shortly after the December 17, 2010 incident. (Tr. 321). He contacted the Department of Transportation, OSHA, the Department of Labor and the Texas Workforce Commission. (Tr. 321-322). He testified that he called the Texas Workforce Commission because he was "frightened and afraid for [his] job." He knew when he spoke to the Texas Workforce Commission he was "headed out the door." He was not fired by Respondent. (Tr. 322). Some of the agency contacts were made prior to December 22, 2010. (Tr. 323).

Complainant testified that Hall did not promise him he would speak to management about a layoff. He contacted Hall because he knew Hall "would have influence on the management there." He wanted to "see what they were going to tell" Hall. (Tr. 324). He could not recall having any other conversations with Hall. (Tr. 324-325). He did not speak to Hall because "the events happened shortly after" their conversation. (Tr. 325).

The layoff paperwork was completed by Morgan. His signature indicated that he read and understood the document. (Tr. 325; RX-7, pp. 7-8). The documentation indicated that Complainant was laid off and eligible for rehire. (Tr. 326; RX-7, p. 7). Complainant could read and understand English. (Tr. 326). The reason for termination listed on the document was "lack of available work which may be due to a change in [Respondent's] business operations or some other circumstance unrelated to the employee's conduct or performance." (Tr. 326; RX-1, p. 8). Complainant admitted that the document indicated he was laid off and the content of the document was not hostile. (Tr. 327). He did not contest the accuracy of the documentation because "it wouldn't have been in [his] interest to do that." He believed it was not sensible to contest the layoff. He did not believe that continuing to work for Respondent to determine if his hours would increase was "an option afforded" to him because he was laid off. (Tr. 328). He did not agree that he could have continued working to determine whether his hours would actually be cut. (Tr. 329).

Complainant could not recall how many days he was late to work or missed work in December 2010. (Tr. 329). He was uncertain how many times he was late to work over the course of his employment. His paychecks were directly deposited into his bank account by Respondent. (Tr. 330).

Casey was at the yard when Complainant returned from Halliburton on December 17, 2010. (Tr. 331). Complainant did not know why Casey claimed he cost the company \$110,000.00. (Tr. 331-332). He believed Respondent lost the Rockefeller Hughes account because it could not fulfill the oral contract. (Tr. 332). He did not know Respondent claimed it lost the account because of his rude or unprofessional conduct. (Tr. 333).

Complainant completed the eighth grade. He had no professional training in the oil field industry. He knew the material being hauled from Halliburton was diesel-based oil

because it was denoted in the bill of lading. (Tr. 334). An employee at Halliburton also told him the load was diesel-based. (Tr. 335). He did not have documentation showing that the load was diesel-based mud. (Tr. 336). The bill of lading was the only documentation of such. (Tr. 337).

Complainant had several job offers he declined based on the schedule. He did not believe a 40-hour work week was "normal" in the truck driving profession. (Tr. 337).

Complainant denied that he asked for a layoff on December 18, 2010. He did not agree that he left Respondent before any adverse action was taken against him. (Tr. 338). He denied that Respondent paid for purchases he made for his vehicle. (Tr. 339-340). The purchases referenced were deducted from his check. (Tr. 340; CX-1, p. 30). Respondent allowed him to make the purchases on its account. It also sold him the vehicle and financed it for him. (Tr. 340).

Complainant owed \$40,000.00 in back child support. He was under an income reduction order. (Tr. 341). He did not believe anything was deducted from his unemployment compensation. (Tr. 342).

He hauled water-based drilling mud previously, but did not haul oil-based drilling mud. He had not been to Halliburton before the December 17, 2010 incident. He did not believe anyone at Halliburton or Rockefeller Hughes "had it in" for him. (Tr. 342). He was not a manager for Respondent, but he believed he had a legal right to view his employee file. (Tr. 343-344). He asked for the file, but he was not given the file. His request was not in writing. (Tr. 344).

Complainant asked Casey why he was being punished on December 17, 2010, because he felt like "the subject of his wrath." (Tr. 344). He testified that the encounter was "short lived." Casey accused him of making a mistake and creating a scene. Complainant was "frustrated and angry" with the situation. (Tr. 345-346).

Rodell loaned Complainant money through Respondent. Respondent sold four or five company vehicles. (Tr. 346).

Complainant testified he did not think about Respondent being able to object to his unemployment compensation benefits if he left the company voluntarily. (Tr. 348). He called the Texas Workforce Commission before his employment was terminated to determine if he could get a hearing "in case [he] ran into a snag over there." (Tr. 349).

Complainant was attending school at Texas State Technical College. He did not reapply with Respondent. (Tr. 349). He received \$415.00 per week from the Texas Workforce Commission. (Tr. 340-350). He continued to receive unemployment compensation benefits at the time of the formal hearing. He did not tell anyone at the Texas Workforce Commission that he was eligible for rehire by Respondent. He was not actively looking for a job at the time of the formal hearing because he was in school. (Tr. 350). He stated that he would continue school even if he stopped receiving unemployment compensation benefits. He told the Texas Workforce Commission he was laid off for lack of work. (Tr. 351). The Texas Workforce Commission documentation indicated Complainant was not employed due to a permanent layoff. (Tr. 351; RX-1, p. 3). Complainant testified that he did not write "permanent layoff" on the documentation or tell that to anyone at the Texas Workforce Commission. (Tr. 352).

Complainant testified that he never told the U.S. Department of Labor investigator he wanted a layoff because he believed he would receive more compensation through unemployment benefits. (Tr. 353). However, the investigator found that was Complainant's motivation. (Tr. 354).

Complainant's farthest trip to XTO was two and a half hours. (Tr. 355). He testified that other drivers often relayed his work orders, as occurred on December 17, 2010. (Tr. 356). He would take an order from another driver if it was "a passed message from the supervisor." (Tr. 356-357). He was told by the other driver that Prater wanted him to report to Halliburton. He did not know what time he would have gotten off work had he made the haul from Halliburton. (Tr. 357).

Complainant could not state why he went to work on December 18, 2010, even though he felt the environment was hostile. (Tr. 358).

On re-direct examination, Complainant stated he advised the Texas Workforce Commission that he was in school. He actively looked for work at all times prior to entering school. (Tr. 359).

Complainant did not work for Respondent after being told his hours would be cut on December 21, 2010. (Tr. 361).

James Prater

Prater testified that he was a truck supervisor for Respondent. He possessed a commercial driver's license. (Tr. 36). He supervised the drivers in the field, but was not responsible for training the drivers. At the time of the formal hearing, Respondent employed 40 to 50 truck drivers, but he could not recall how many truck drivers Respondent employed in 2010. (Tr. 37).

Prater was hired while Complainant was working for Respondent, and he became Complainant's direct supervisor. (Tr. 37-38). Complainant was primarily performing salt water hauling. He was one of Prater's senior drivers. (Tr. 38). Prater stated that a typical work-day consisted of a 12-hour shift from 6:30 a.m. to 5:00 or 6:00 p.m., with most employees working a four-day-on and two-day-off schedule. All drivers worked the same schedule. (Tr. 39).

Respondent lost a contract with Forest Oil before Complainant left the company, but Complainant had nothing to do with the contract being lost. (Tr. 40). Prater heard from Dudley Casey, one of the other supervisors, Complainant's hours were going to be cut to 40 hours per week. (Tr. 41). Casey told him the hours would be cut "for a while," until work "picked back up." Casey did not tell him of anyone else's hours being cut. Casey did not indicate to him the reason for cutting Claimant's hours. Prater did not hear anything about Respondent cutting Steve Bibby's hours, but he believed that Bibby quit his job. (Tr. 42).

Prater did not know if Complainant had a haz-mat endorsement. He was familiar with some motor carrier regulations, and he was aware that a driver carrying haz-mat loads was required to have a haz-mat endorsement. A truck carrying a haz-mat load was also required to have placards. Respondent had hauled haz-mat loads. (Tr. 43). Some of Respondent's drivers were haz-mat endorsed. He did not recall if he made sure the drivers who drove haz-mat loads were

endorsed. He did not know if Respondent had a haz-mat permit. He would insure that trucks caring hazardous materials were properly placarded. (Tr. 44).

On December, 17, 2010, Complainant was sent to Halliburton along with several trucks. (Tr. 44-45). Prater did not recall if Halliburton was a new client. He did not know the loads were oil-based mud. (Tr. 45). He did not know if oil-based drilling mud was hazardous material. He underwent training regarding hazardous materials while working for other companies, but not while he was working for Respondent. Respondent did provide training on hazardous materials to its drivers. (Tr. 46).

Prater dispatched two trucks to Halliburton on December 17, 2010. Complainant and Bibby were the drivers. Someone called him to pick up Complainant from Halliburton. (Tr. 47). He spoke to Complainant, who told him he did not have a haz-mat endorsement. He told the dispatcher at Halliburton that he was taking Complainant back to the yard and he would send another driver. (Tr. 48). The dispatcher only spoke with Prater. He did not voice any complaints, but he stated that Complainant refused to sign the bill of lading. The dispatcher stated the truck would not move with his products in it until the bill of lading was signed. Prater did not sign the bill of lading. (Tr. 49). He stated that legally Complainant did the right thing. (Tr. 50).

Prater signed the bill of lading for Bibby because he refused to drive unless Prater signed it. (Tr. 50). He did not classify Bibby's actions as insubordination. He did not ask Bibby if he had a haz-mat endorsement. The bill of lading designated the load as a haz-mat load. (Tr. 51). He could not recall checking Bibby's truck for a placard. (Tr. 52). He did not see the bill of lading issued to Complainant. (Tr. 53).

The individuals at Halliburton did not complain to Prater about Complainant or Bibby, other than informing him they would not sign the bills of lading. (Tr. 53-54). They did not indicate to him that Complainant was rude, raised his voice or used profanity. (Tr. 54). Prater does not have a haz-mat endorsement, but he was unsure whether he would have hauled the load under the circumstances. (Tr. 54-55). He cannot fault a driver for refusing to drive a haz-mat load without an endorsement. He had no problem with Complainant's actions that day. (Tr. 55).

Prater did not discuss the occurrence with anyone, including Complainant, Casey or Joey Rodell. December 17, 2010 was the first time he knew of the Respondent hauling for Halliburton. (Tr. 55). He did not believe Respondent continued to haul for Halliburton following the occurrence. He did not know how many loads were hauled from Halliburton that day. He did not know who dispatched the other drivers to Halliburton. (Tr. 56).

Prater stated it was unusual for him to initial a driver's bill of lading. He recalled initialing a bill of lading on only two occasions, including December 17, 2010. (Tr. 56). Prater did not speak with anyone from Respondent following the incident to discuss the issue of hauling haz-mat. (Tr. 57).

Prater did not ask Casey why Complainant's hours were being cut. (Tr. 57). The majority of Respondent's drivers continued to work 12 hours per day, on a four-day-on and two-day-off schedule, following the December 2010 incident. (Tr. 57-58). Some driver's schedules were shortened but the majority continued to work their regular shifts. He had not personally shortened anyone's schedule. (Tr. 58).

Respondent replaced the work from the Forrest Oil contract with a new contract in 2010 with Anadarko. (Tr. 59).

Prater also heard that Bibby's hours were going to be cut, but they never were because he quit. (Tr. 59-60). He could not recall whether Complainant or Bibby left the company first. Following the December 17, 2010 incident, he did not speak with Curtis Hall or James TiJerima regarding Complainant. (Tr. 60).

Prater opined that Complainant's work was reduced to 40 hours per week because "everything was pretty slow." He stated Complainant was not the only driver who lost hours. (Tr. 61).

Typically, when there is not enough work a driver will volunteer to go home early. If no one volunteers, a driver is randomly selected to go home without work. The decision is not based on seniority or performance. He could not recall sending anyone home in December 2010. (Tr. 66).

On cross-examination, Prater stated that ordinarily the employee who arrives on the site first will not have to go home when there is not enough work. He noted that Complainant was often late. Respondent would require Complainant to return home without work when he arrived late and there was not enough work

for all of the drivers. He testified that Complainant was not required to return home without work "a whole lot." (Tr. 67).

Complainant told him "he could not make it on only 40 hours" a week. (Tr. 67). He could not recall Complainant stating to other employees that he wanted to be laid off. (Tr. 67-68).

Respondent required its drivers to regularly attend safety meetings. (Tr. 68).

Prater testified that drivers would not work 24 hours per day. Respondent had two shifts. The drivers would work double shifts. (Tr. 68). He supervised one shift. (Tr. 68-69).

Before December 17, 2010, Respondent lost a bid on the Forrest Oil project. Prater called Forrest Oil a "substantial client and business." (Tr. 69).

Prater never required drivers to move a load if they refused to drive. He would pick up an unwilling driver and send another driver to complete the job. (Tr. 69). He did not try to force Complainant to drive. (Tr. 69-70). Prater did not know what conversations Complainant had with the Halliburton dispatcher. (Tr. 70).

Prater and Complainant arrived at the yard before Casey. (Tr. 70). He did not know why Complainant did not go home after returning to the yard. Paydays are on Friday; December 17, 2010 was a pay day. Prater noted that Complainant had a tendency to want to leave early every day. (Tr. 71-72). He did not want to work "long hours." Respondent allowed drivers to go home early when a dispatch finished early. (Tr. 72). An average driver made 6 to 7 loads a day; Complainant averaged 4 to 5 loads a day. (Tr. 73).

Prater stated he prepared an "incident report" that stated Complainant was rude with a Halliburton employee. (Tr. 73-74; RX-1, p. 9; CX-6). The incident report was not completed on December 17, 2010. (Tr. 73). The report noted that Complainant returned to the water hauling department following the incident. (Tr. 74; RX-1, p. 9; CX-6). In the water hauling department, he had little contact with the customer. (Tr. 74).

Complainant continued to work for Respondent for part of the next week following the December 17, 2010 incident. (Tr. 74). Prater could not recall whether Complainant presented for work on time during that period. If Complainant got to work late, there may not have been a truck to drive; Prater opined that this could be why Complainant only worked for four hours on a particular day. (Tr. 75). On Saturday, December 18, 2010 Complainant worked, but on December 21, 2010, there was no truck for him to drive. (Tr. 75-76; RX-4, pp. 28-29).

Prater heard Complainant state that he could make as much money or more on unemployment as he did at work. (Tr. 76). He admitted to becoming aggravated when employees refused to make a haul or wanted to leave early, but he stated that he never gave those employees "a hard time." (Tr. 76-77).

Prater stated he did not treat Complainant any differently than other drivers. He never told Complainant he was limited to 40 hours and did not know of anyone else doing so. (Tr. 77). He learned that Complainant had asked to be laid off. He believed Complainant was eligible for re-hire. Since Complainant left his employment with Respondent, other drivers have "come and gone." Some of those employees were fired and others voluntarily left. (Tr. 78).

On re-direct examination, Prater stated he never wrote up Complainant for being late to work or for any other reason, even though he could have done so on several occasions. (Tr. 78-79). Complainant worked in excess of 40 hours most weeks. He could not recall ever sending Complainant home early. (Tr. 79).

Prater stated that he would have followed Casey's instruction to limit Complainant's hours, if such an instruction were made. (Tr. 80).

A new account with Encana replaced the Forest Oil account. The new account began before Complainant left the company. (Tr. 80).

Reporting time is 6:30 a.m. On December 21, 2010, there was no truck for Complainant, even though he arrived at 6:30 a.m. (Tr. 81).

Someone in Respondent's office asked Prater to write an incident report. (Tr. 82). Casey told him to "put something in the file." (Tr. 83). He stated "rude" was not a good word to use to describe Complainant's refusal to sign an invoice. A

Halliburton employee reported Complainant was "rude" because he would not take the load. (Tr. 84-85). He acknowledged it is illegal to reprimand a driver for refusing to drive. (Tr. 85). He could not provide his reasoning for dating the incident report December 17, 2010, even though he did not complete the incident report on that date. He did not give a copy of the incident report to Complainant, but it was placed in his personnel file. (Tr. 87). He surmised that he completed the incident report the week following the December 17, 2010 incident. (Tr. 88).

Neither Casey nor Joey Rodell told him they were thinking about letting Complainant go from employment. (Tr. 88-89).

Respondent assigns trucks to its "senior drivers," including Complainant. The senior drivers drive the same truck "as long as it's running." Prater could not recall whether or not Complainant's truck was running on December 18, 2010. (Tr. 89). He noted that his testimony regarding trucks being assigned on a first-come, first-serve basis did not apply to senior drivers who were assigned trucks. (Tr. 90).

On re-cross examination, Prater stated the incident report was prepared to document what occurred on December 17, 2010. He noted a driver can drive up to 70 hours per week. (Tr. 91). Complainant did not work a 70-hour week from December 18, 2009 through December 31, 2010. (Tr. 91-92; RX-2). Most of his weekly driving hours were in the forty to fifty-hour range. (Tr. 92). After examining the records, Prater opined that Complainant was "not consistent in making a lot of overtime." (Tr. 93). He did not know how much Complainant drew in unemployment. (Tr. 93-94).

On further re-direct examination, Prater noted there were weeks that Complainant worked in excess of 50 hours a week. Vacation hours would be reflected in the records. (Tr. 94).

Respondent hired approximately ten drivers from Stallion following December 2010. Prater did not believe Respondent laid off any other workers following December 2010. Respondent hired a few drivers in addition to those from Stallion. (Tr. 95). He stated that Respondent was in "hiring mode" since December 2010. (Tr. 96).

Prater did not believe the incident report was prepared after Complainant filed an OSHA report, but was not certain. (Tr. 96).

Prater supervised the day shift, and two supervisors worked at night. He believed that he was supervising seven or eight drivers in December 2010. He dispatched two trucks on December 17, 2010, and the dispatcher dispatched the others. (Tr. 97).

Dudley Casey

Casey testified that he worked for Respondent as a salesman. He did not classify himself as a member of management, with the exception of the sales department. He reported to Joey Rodell, whom he believed was the president of Respondent. He had no ownership interest in Respondent. (Tr. 100). He began working for the company in 1995. Casey held a commercial driver's license without a haz-mat endorsement. (Tr. 101).

Respondent performs haz-mat transportations. He did not know the process Respondent used to insure that the haz-mat loads were transported by haz-mat endorsed operators because that was not his department. He knew Complainant. He presented some safety meetings. (Tr. 101). He did not ever recall haz-mat being a subject in safety meetings he presented. Respondent conducted safety meetings twice per month. He would typically attend both meetings but conduct only one. (Tr. 102). He could not recall haz-mat ever being a topic at any of the safety meetings. (Tr. 103).

Halliburton was not a customer of Respondent. Rockefeller Hughes, an oil and gas firm, was the company that contracted with Respondent to haul product from Halliburton. (Tr. 103). There was not a written contract between Respondent and Rockefeller Hughes. Under the oral contract, Respondent was to haul 1,100 barrels of mud. He did not know the mud was diesel mud or if diesel mud is haz-mat. Neither he nor anyone at the company asked whether the loads were haz-mat. (Tr. 105). The agreement was to haul the mud from Halliburton to the rig site, approximately 30 miles. Complainant was not the only driver assigned to the contract. He could not recall how many trailer loads were anticipated. (Tr. 106). The job was paid at a rate of \$65.00 per hour. (Tr. 107).

Casey hoped to earn more work with Rockefeller Hughes in the future, but there were no promises of such. Respondent performed some light construction work for Rockefeller Hughes at rig sites following the December 17, 2010 incident, but it did not perform any truck work for Rockefeller Hughes following the

incident. (Tr. 107). For approximately 30 to 40 days prior to December 17, 2010, Respondent's employees worked "hauling fluids" for Rockefeller Hughes. Respondent was paid for all work performed. (Tr. 108).

Casey was called by "Wayne," his contact at Rockefeller Hughes, and told not to haul anymore loads because there was a problem at Halliburton after a driver refused to haul a load. Wayne told him that Halliburton did not want to continue working with Respondent. (Tr. 109). Casey spoke with Scott Kirby from Rockefeller Hughes within a few days of the December 17, 2010 incident. He did not speak with anyone from Halliburton. (Tr. 110). Wayne did not explain the reason for the problem, ask if the drivers were haz-mat endorsed or ask if the company had a hazardous materials permit. (Tr. 110-111). Casey did not know if Respondent had a permit that allowed it to transport hazardous materials. The day after the incident, Scott Kirby told him that one of the "drivers really showed his ass last night." (Tr. 111).

Casey stated that he was not qualified to determine whether Complainant should have hauled the load without a haz-mat endorsement. He opined that he would not do something he did not "feel comfortable doing" while acting as a representative of Respondent. He did not recall telling Complainant that he should have taken the load. (Tr. 112).

Casey remembered being upset with Complainant. In the afternoon on December 17, 2010, Complainant approached him about the incident. Complainant followed him around wanting to know "what's happening here?" He told Complainant three times to leave him alone and speak to his supervisor. (Tr. 113-114). He testified that he was "very angry." He told Complainant "he had cost him a lot of money." (Tr. 114).

Casey did not believe that it was his responsibility as a salesman to insure that the drivers were properly endorsed. (Tr. 113). He admitted that he may have told Complainant that he should have transported the load because Respondent would have paid the ticket if he was fined. (Tr. 115). Complainant told him that he felt like he was "walking around with a target on his back." (Tr. 116).

He stated that firing Complainant was not his decision and he "didn't care." (Tr. 116). He blamed Complainant "to some extent" for losing the account because he "caused a scene." He believed that Complainant caused a scene based on his discussion

with Wayne from Rockefeller Hughes, who stated it had "caused a problem." He made no inquiry into whether the bills of lading were designated as haz-mat. He did not know what Complainant did to cause a scene. (Tr. 117).

Casey did not recall a conversation with Joey Rodell, but he was sure he had one. (Tr. 118). He was not sure if he told Complainant Rodell wanted to cut his hours to 40 per week. He believed that he learned of Rodell's plan to cut Complainant's hours from someone else. (Tr. 119). He recalled other employees hours being cut in December 2010, but he could not specifically recall whose hours were cut. (Tr. 119-120). He believed that Rodell decided to cut hours because business was down. He believed all the drivers were affected by the cuts. (Tr. 120).

Casey testified that the Forrest Oil account was lost before Christmas 2010. RX-6 is correspondence dated December 29, 2010, between J. Rodell and Forrest Oil, following Complainant's separation from employment. (Tr. 123-124). He noted that both a Joseph Rodell and a Joey Rodell worked for Respondent. (Tr. 123). The e-mail discussed a rate increase. He believed the Forrest Oil contract ended in mid-December 2010. An e-mail dated December 29, 2010, from Carl Abshire of Forrest Oil to Joseph Rodell stated, "Please continue hauling until you hear from me." (Tr. 126; RX-6). Casey interpreted the e-mails to mean that Respondent had lost some work and was re-bidding. (Tr. 127; RX-6).

Casey noted that Respondent's work had picked up since December 2010. (Tr. 129). Encana was a contract that began in July 2010, but work on that contract decreased. In February 2011, Anadarko became a new account with seven loads a day. Casey did not recall any other new accounts. (Tr. 130).

Casey stated he did not monitor the amount of work performed by Respondent's drivers. He would observe tickets entering the company, but he did not keep track of Respondent's revenues. He did not know whether the volume of Respondent's work increased or decreased between July 2010 and December 2010. (Tr. 131).

Casey was not present when Complainant separated from employment. (Tr. 131-132). He claimed Complainant called him on the phone and stated he had a target on his back and he would

rather be laid off. (Tr. 132). Casey believed Complainant told him he could "draw enough on unemployment to suffice." (Tr. 133).

Casey testified that he was not paid based on commission. (Tr. 133). However, he wanted to do a good job for the company. He did not believe that he told Joey Rodell that the Rockefeller Hughes contract was lost. (Tr. 134).

On cross-examination, Casey stated EMR Services participated with him in presenting the safety meetings. They discussed haz-mat issues with Respondent's employees. (Tr. 136).

Casey believed Complainant was not fired but requested a lay off and Respondent granted his wish. (Tr. 136-137).

Prior to December 2010, Respondent lost contracts with Approach Services, J Management, and Barrett. (Tr. 137). Respondent did not guarantee employees any certain number of hours. (Tr. 137-138). The drivers are employees at will. (Tr. 138).

RX-5 is an e-mail to Casey from Henley and Associates dated January 13, 2011, confirming the loss of a contract. (Tr. 138-139). Respondent did not oppose Complainant's unemployment compensation claim. (Tr. 142).

On re-direct examination, Casey stated that he did not recall Respondent gaining business in the two months preceding December 2010. (Tr. 143).

Casey did not know if Respondent lost the trucking contract with Rockefeller Hughes because it did not employ enough haz-mat endorsed drivers. (Tr. 144). Respondent did not continue to work with Henley and Associates. (Tr. 145).

Joey Rodell

Joey Rodell is the president of Respondent. He is also a shareholder in the closely held corporation, which is a family-run business. The supervisors report to him. (Tr. 146). Rodell's wife Kay Rodell is a vice-president of Respondent, but she does not oversee any areas of the business. (Tr. 146-147). Casey is over sales and service. (Tr. 147).

Respondent primarily performs oil field site preparation work. It hires and employs drivers with commercial driver's licenses, but does not require that the drivers have haz-mat endorsements. Rodell had a commercial driver's license at one time, but he did not maintain one at the time of the formal hearing.

Rodell testified that he was somewhat familiar with the motor carrier regulations. (Tr. 147). Respondent consulted EMR Safety Services for safety. (Tr. 148).

At the time of the formal hearing, Respondent employed 60 drivers. In December 2010, Respondent had 40 to 45 drivers. Respondent had 35 trucks at the time of the formal hearing and 28 trucks in December 2010. Respondent increased its employees and trucks due to gaining new accounts and moving into another location. (Tr. 148). Respondent operated out of two locations in Buffalo, Texas, and Center, Texas. (Tr. 148-149). New drivers were only hired in Buffalo, Texas, where Complainant worked. (Tr. 149).

In February 2011, Anadarko became a new account. Since December 2010, Respondent lost contracts with Barrett Oil, Rockefeller Hughes and Forrest Oil. (Tr. 150). Respondent had not laid off any employees since December 2010, but "a few of them just quit for no work." Respondent cut the hours of Complainant and two or three other drivers after losing "a couple accounts." Rodell could not recall when Respondent lost the Forrest Oil account, but he believed it was in November 2010. (Tr. 151).

Steve Bibby was one of the drivers whose hours were cut. He testified that the time sheets, load tickets and paychecks would determine whose hours were cut. A written memo discussing cut-backs was not issued. (Tr. 152). He made the decision to cut Complainant, Steve Bibby and several other drivers' hours based on job performance. Rodell testified that Complainant was not performing to the top of his ability hauling salt water. (Tr. 153).

Complainant worked for Respondent for three and a half years. (Tr. 153-154). Rodell did not check Complainant's disciplinary records to determine if he had been previously reprimanded. He noted that Complainant was moved from a job with Devon Energy due to lack of customer satisfaction. He moved to XTO Fuel, where he "wasn't producing." Rodell told Complainant "he needed to pick his feet up and let's get a few

more loads." (Tr. 154). He determined that Complainant's work was sub-par after reviewing load tickets one year prior to the December 2010 incident. (Tr. 155).

In November 2010 Rodell informed three of Complainant's supervisors that his hours would be cut to 40 hours per week. One of the supervisors communicated this information to Complainant, but he did not know which of the supervisors told Complainant about the cuts. (Tr. 155-156). The decision was not documented in writing. He testified that Complainant's time sheets would show the cuts, but the drivers kept their own time based on an honor system. He would not necessarily have noticed if Complainant's time sheets were not reduced to 40 hours per week. (Tr. 156). He claimed he does not write up or fire employees on a first offense because they are a "close-knit company." (Tr. 157). Rodell did not have a supervisor write Complainant up because Complainant owed him money and was afraid he would leave. (Tr. 157-158). He testified that Complainant did not have a truck assigned to him and was not a senior driver. (Tr. 158).

Rodell learned about the December 17, 2010 incident on December 18, 2010, from Casey. He was told Complainant refused to haul a load because he did not have a haz-mat endorsement, and another driver had to be sent to the site. (Tr. 159). His refusal delayed the drilling project, upsetting individuals at Halliburton and Rockefeller Hughes. (Tr. 159-160). He spoke to Prater and another supervisor, who stated he had to go to Halliburton to relieve Complainant because he did not have a haz-mat endorsement. (Tr. 160-161).

Rodell blamed Complainant for Respondent losing money and a customer. He did not agree with the way Complainant "pulled the incident off" because he was "rude to the customer." He did not know exactly what happened, but he believed the incident "escalated." According to an individual from Halliburton, Complainant "thr[ew] a fit." (Tr. 161). Rodell claimed Respondent lost "\$100,000.00 worth of hauling that one day." He blamed Complainant for "stirr[ing] it up" and not being professional. He testified that Complainant had the right to refuse the load, but he should have done so in a professional way. Someone from Halliburton told him that Complainant did not act professionally, but he could not recall the individual's name. (Tr. 163).

Rodell testified that the December 17, 2010 incident did not influence his decision to cut Complainant's hours. He could not recall whether Complainant was told about the cut in hours before or after the incident. He did not personally tell Complainant that his hours were being cut. (Tr. 163). He did not recall a phone call with Complainant following the December 17, 2010 incident. He denied telling Complainant, over the phone, that he was cutting his hours due to the December 17, 2010 incident. (Tr. 164).

Rodell claimed that Steve Bibby's hours were cut due to a reduction in work and because he was not producing "to his potential." He did not hear Bibby refused to haul from Halliburton on December 17, 2010, without his supervisor signing the bill of lading. Bibby was fired by his supervisor at Rodell's direction due to lack of work. He did not consider firing Complainant because he asked for a layoff. (Tr. 165).

Rodell did not investigate what other drivers hauled loads from Halliburton on December 17, 2010. He considered the possibility that other drivers without haz-mat endorsements hauled from Halliburton that day. Respondent remedied the situation by electing not to haul haz-mat after the incident. (Tr. 166).

Rodell knew of an issue between Bibby and Halliburton before terminating Bibby's employment. He believed Bibby and Complainant "caus[ed] a ruckus at Halliburton." (Tr. 169-170). He discovered there actions after being contacted by Halliburton. (Tr. 170).

Respondent does not have a haz-mat permit. (Tr. 170). Rodell believed that Respondent did not need a haz-mat permit because only placards on the trucks and an endorsement on the drivers' licenses were required. (Tr. 171).

Rodell did not recall anyone from Respondent stating that they wished they could fire Complainant. He stated that he would need to consult the records to determine if any of the drivers' hours were not cut. (Tr. 171). He also stated he would have to consult his insurance records to determine if haz-mat is covered.

Complainant was paid on a weekly basis. His payroll records indicate he worked the following hours per week in November and December 2010: 58 hours, 52.5 hours, 42.5 hours, 54 hours, 58 hours, 46 hours, 45 hours, 58.5 hours and 37 hours.

(Tr. 173-174; CX-8). Rodell claimed Complainant may not have been honest regarding the hours worked. He indicated that the load tickets showed Complainant did not work the hours paid. (Tr. 174). He testified that he brought this discrepancy to a supervisor's attention. (Tr. 174-175). He clarified that the load tickets would show Complainant's production but not hours working on tasks other than "running loads." (Tr. 176). He claimed Complainant was not hauling enough loads per day. (Tr. 176-177).

Respondent's Weekly Time Sheets indicated that a number of employees worked over 40 hours the weeks of December 2, 2010, December 9, 2010 and December 16, 2010. (Tr. 180-181; RX-3, pp. 13-17). Rodell agreed that the bulk of Respondent's employees were paid for over 40 hours per week from December 2010 through March 9, 2011. Some employees earned over 50 or 60 hours per week. (Tr. 185; CX-10). He testified that Respondent's employees could not work more than 70 hours per week and 12 hours a day for DOT reasons. (Tr. 185). Drivers work a four-day-on, two-day-off rotating schedule. He recognized that Respondent was busier at the time of the formal hearing than it was in December 2010. (Tr. 186).

On cross-examination, Rodell stated Complainant left employment on December 22 or December 23, 2010. Respondent was losing business at that time. Employees worked a total of 2,664 hours the week of December 16, 2010, 2,412 hours the week of December 23, 2010, 2,374.5 hours the week of December 30, 2010, 2,646 hours the week of January 6, 2011, 2,673 hours the week of January 13, 2011, 2,583.5 hours the week of January 20, 2011, 2,190 hours the week of January 27, 2011, 2,205 hours the week of February 3, 2011. (Tr. 187-191; CX-10). The total hours worked the week of February 10, 2011, increased to 2,960.5. (Tr. 191; CX-10). Rodell testified that Respondent began working for Anadarko the week of February 10, 2011. Total hours worked by Respondent's employees continued to increase, exceeding 3,000 total hours in mid-February and March 2011. (Tr. 191-192; CX-10). Rodell testified that if Claimant had continued to work for Respondent he would have benefited from the increased work. He stated he never told Complainant his 40 hour week would be permanent. (Tr. 192).

Rodell testified that Complainant decided to be voluntarily laid off. (Tr. 192). Mark Morgan, one of Complainant's supervisors, told him that Complainant wished to be laid off. (Tr. 192-193).

Respondent never regained the business from Halliburton or Rockefeller Hughes. He did not have first-hand knowledge what occurred at Halliburton. (Tr. 193).

Rodell was not aware of Respondent ever having an employee intentionally violate any law. (Tr. 193). He testified that someone picked up Complainant when it was discovered that the load was haz-mat. He did not believe that anyone retaliated against Complainant. (Tr. 194).

Complaint only worked one week that exceeded 60 hours; he worked 18 weeks totaling less than 40 hours per week. (Tr. 195; RX-2). Rodell opined Respondent's drivers averaged 65 to 70 hours per week. He testified that Complainant would have benefited from the new business with more hours had he remained with the company. (Tr. 196). Respondent did not require that drivers work overtime. He believed Complainant did not want to work "a whole lot of hours." He was not aware of Complainant applying for rehire, but he is eligible if a job was available. (Tr. 197).

Texas DOT performed periodic audits of Respondent. (Tr. 197-198). Texas DOT never informed him that Respondent needed a haz-mat permit. It was his understanding that Respondent did not make a lot of haz-mat hauls. (Tr. 198). Placards are placed on the trailers at the point of loading. Halliburton would have put a placard on the trailer if it knew the load was hazardous, or Respondent would have placed a placard on the trailer if it knew the driver was going to a location where placards were not available. (Tr. 199).

Respondent had never been fined for any violation of any over-the-road hauling regulation. (Tr. 199). Casey did not make decisions regarding disbursement of trucks or drivers among jobs. (Tr. 199-200). Casey participated in safety meetings, but was not the presenter or leader of those meetings. EMR Safety Consultants, an independent agency, led the meetings. (Tr. 200).

Respondent maintained water hauling permits issued by the state. A fleet number must remain on those vehicles. (Tr. 200).

Respondent loaned money to Complainant, sold vehicles to him and financed vehicles for him. Respondent also loaned Complainant money to save his property. (Tr. 201).

On re-direct examination, Rodell stated he loaned Complainant money because the company was "family oriented." It was his final decision to cut Complainant's hours and such action was not recommended by someone else. He decided to cut Complainant and Bibby's hours "until business picked up." He believed that he told Mark Morgan to do so. (Tr. 202).

Complainant averaged 13 to 14 hours of overtime per week in the year preceding his separation from the company. (Tr. 203). Overtime was paid at time and one-half. (Tr. 203-204). Complainant's rate of pay was \$14.50 per hour, which Rodell classified as "on the high side." He did not believe a 33 to 35 percent cut in pay due to loss of overtime was substantial. (Tr. 204).

Mark Morgan

Mark Morgan testified that he had been employed by Respondent for 10 years. He is one of Respondent's four supervisors/truck pushers. (Tr. 209). He stated that the duties of those positions overlapped sometimes. Supervisors "trade off" every four weeks. He worked some weekends. A supervisor would be on duty each day of the week. (Tr. 210).

Morgan testified that he knew Complainant for four years. Complainant worked as a truck driver. (Tr. 210). Most truck drivers hired by Respondent were qualified to haul any load, with the exception of hazardous loads. (Tr. 210-211). Complainant was qualified to haul materials, parts and salt water. Respondent usually assigned a driver with a haz-mat endorsement to haul a hazardous load. If Respondent knew the load was hazardous when the truck leaves the yard, placards are placed on it. Placing placards on a truck hauling a hazardous load was the driver's responsibility. The shipper could also issue placards. (Tr. 211).

Morgan did not dispatch Complainant on December 17, 2010; he believed Prater had done so. He did not know who received the call from Complainant explaining that the Halliburton load was haz-mat. (Tr. 212).

Morgan testified that "some could say" he was the senior truck pusher. However, Curtis Hall was his "senior in years on the job." Hall worked for the company for "a long time" and had other job functions apart from truck pusher. (Tr. 212).

Morgan was in the office when Complainant returned to the yard in the early afternoon on December 17, 2010. He could not recall who brought Complainant back or if it was a pay day. He witnessed a heated argument between Complainant and Casey. (Tr. 213).

All drivers were dispatched from a dispatch room. (Tr. 213). A window divided the dispatch room from the rest area/driver's room. (Tr. 213-214). Complainant's discussion with Casey took place in the driver's room. He could not recall why Complainant stayed in the room even though he had finished his work for the day. (Tr. 214).

Morgan and Complainant were not friends. During a phone conversation, Complainant told Morgan that he wanted to be voluntarily laid off. (Tr. 214). Morgan believed the conversation occurred within a day or two of the December 17, 2010 incident. He also heard Complainant make that statement in the presence of others. Complainant stated that he could make more money on unemployment than he could by working 40 hours per week. (Tr. 215).

Truck drivers were not guaranteed a certain number of hours per week. They worked scheduled days but could choose to work all their hours or get off work early. The normal work time for drivers was a four-day schedule, 12 hours a day. (Tr. 215). Drivers working the day shift would typically arrive at 6:30 a.m. (Tr. 215-216).

Morgan testified that Complainant was not a prompt employee. Complainant did not make as many hauls as the other drivers. Complainant explained to Morgan that he did not want to get hurt, speed or get "in a bind." (Tr. 216). Six to eight drivers would typically haul for XTO, a customer of Respondent, at a time. (Tr. 216-217). The routes covered the same area every day. The average driver would make six to eight hauls per day; Complainant made four to five hauls per day. Morgan did not know if anyone spoke to Complainant about his job performance prior to December 17, 2010. (Tr. 217).

Morgan informed Complainant that his hours were being cut to 40 hours per week due to a loss of customers. (Tr. 217-218). Respondent lost two or three accounts at that time. It was his understanding that Respondent lost the Rockefeller Hughes contract because of the scene Complainant caused on December 17, 2010. (Tr. 218).

Two drivers, Complainant and Steve Bibby, were initially dispatched to Halliburton on December 17, 2010. (Tr. 218-219). After the drivers refused to haul the loads, another driver with a haz-mat endorsement was dispatched. Morgan testified that Respondent had never forced an employee to break any law. (Tr. 219). In his experience, Respondent always dispatched a new driver when someone called in refusing to make a haul. (Tr. 219-220).

Morgan testified that Casey did not tell him to fire Complainant or cut his hours after their heated conversation. Rodell told him to cut Complainant's hours. Casey was not involved in the delivery process or the dispatch of trucks. (Tr. 220). The decision to cut Complainant's hours was not a permanent one. (Tr. 220-221). It was based on a lack of business, and Complainant would likely have resumed working overtime after Respondent got the Anadarko account. Respondent hired additional drivers after getting the Anadarko account. (Tr. 221).

Morgan completed Complainant's lay off paperwork. (Tr. 221-222; RX-1, p. 7). At Complainant's request, he marked the reason for termination as a lay off. He noted that Complainant was eligible for rehire. (Tr. 222; RX-1, p. 7). Complainant completed the bottom portion of the form, signing and dating it December 22, 2010. (Tr. 222; RX-1, p. 7). Complainant was aware that he was eligible for rehire, but he never reapplied. Morgan testified that he would have been considered had he reapplied. He stated that turnover was persistent for the truck driving positions. (Tr. 223). He was not aware of the jobs Complainant applied for through the Texas Work Force Commission. (Tr. 223-224).

Morgan took pictures of the haz-mat placards. He testified that the pictures accurately portrayed what a placard looks like. (Tr. 224; RX-8). Respondent kept placards on site. Placards are placed on trucks by someone at Respondent when they know the vehicle will be performing a hazardous haul. (Tr. 224). If Respondent did not know a load was hazardous, it would be the shipper's responsibility to place a placard on the truck. (Tr. 224-225).

On cross-examination, Morgan testified that Rodell told him to cut Complainant and Steve Bibby's hours after the December 17, 2010 incident due to a loss of business. (Tr. 225-226). At the time, Morgan was aware that those two drivers were involved in the incident at Halliburton. (Tr. 226). He learned about

the incident after "hearing their versions of the story." He understood that they were presented haz-mat bills of lading. He did not know if Bibby had a haz-mat endorsement. He did not check into the endorsements because he did not dispatch the trucks. He stated the dispatcher should have inquired as to whether the drivers had haz-mat endorsements. He did not know why Complainant and Bibby were dispatched to haz-mat loads. He did not know if Respondent had a haz-mat permit. (Tr. 227).

Morgan knew driver Cornell White. He left Respondent two months prior to the formal hearing. Morgan did not know if White had a haz-mat endorsement. (Tr. 228). Respondent claimed it employed five drivers with haz-mat endorsements. He did not identify any of the drivers pictured as White or Bibby. (Tr. 229-230).

Morgan could not recall ever writing Complainant up, but he had the power to do so. He testified it was fair to assume he was never written up if a record was not in his personnel file. He was coached to write-up problematic employees. (Tr. 230). He made it a regular practice to write-up employees with performance problems. He believed that his first warning to Complainant was a verbal warning. Some verbal warnings were documented. (Tr. 231). He wrote up other employees for coming to work late, leaving without telling a supervisor and damaging a vehicle, but he was not sure if he ever wrote up an employee for failing to run enough loads. He testified that he would have written up someone for not working hard enough had he witnessed it. (Tr. 232).

Bibby was laid off for lack of work. Morgan did not know if Bibby had any write-ups in his file. He did not make the decision to lay off Bibby. (Tr. 232). Rodell made that decision. He would have looked at performance records to determine who to lay off.

Morgan testified that in December 2010 there were probably drivers with more write-ups than Complainant. He was not the worst performer. (Tr. 233).

Morgan could not hear the conversation between Complainant and Casey. (Tr. 233). Casey told him he was mad at Complainant. (Tr. 233-234). Casey stated that he thought Complainant had lost a big account, but he did not indicate that he wanted to fire Complainant. Rodell only told Morgan to cut Complainant and Bibby's hours. (Tr. 234).

On re-direct examination, Morgan testified that other drivers' hours were cut during the same period. (Tr. 234-235). Complainant requested to be laid off. (Tr. 235).

Curtis Write had a haz-mat endorsed license. A driver without a haz-mat endorsement could be inadvertently dispatched if the dispatcher was not aware that the haul was for haz-mat. (Tr. 235). The shipper was normally responsible for letting Respondent know what kind of haul it was. The drivers are responsible for calling Respondent when they are not endorsed to make a certain haul. Confrontations with the shipper were discouraged. Morgan believed Complainant did things that caused Respondent to lose a customer. He did not know the other drivers that were dispatched with Complainant and Bibby. (Tr. 236).

Respondent's normal policy was to issue a verbal warning on a first offense. Complainant was laid off in part because of lack of customer work. He was going to get 40 hours per week. Respondent did not guarantee any number of hours to its drivers. (Tr. 237).

On re-cross examination, Morgan testified that he believed a 34 percent decrease in a driver's pay was substantial. (Tr. 237-238). Many drivers told him they liked working for Respondent because of the amount of overtime they received. (Tr. 238).

Morgan was not present at Halliburton on December 17, 2010. He did not know what Complainant stated or did during the incident. He did not speak with anyone about the incident. (Tr. 238). Everything he knew about the incident he heard from Casey, Prater and James Tijerima. Each of them told him their version of the incident. (Tr. 239).

When Rodell told him to cut Complainant's hours he did not relate it to the Halliburton incident. (Tr. 239). Rodell told him to write eligible for rehire on Complainant's termination slip. (Tr. 239-240).

Curtis Hall

Curtis Hall testified that he was a senior truck supervisor for Respondent, where he began working 24 years prior. He was a supervisor of the trucks, other supervisors, truck drivers, roustabouts and foremen. He was familiar with Complainant, whom he knew for approximately three years. (Tr. 242).

Hall received a call from Complainant on December 17, 2010 between 4:00 and 5:30 p.m. (Tr. 242-243). Complainant told him he was being urged to take a load that he was not supposed to haul. Hall asked Complainant to call the supervisor who sent him out to bring relief. He did not hear who went to pick Complainant up from Halliburton. Respondent does not require its drivers to haul haz-mat loads or haul loads the driver does not want to take. (Tr. 243). Hall was aware of other drivers calling to ask for relief on prior occasions. During the phone conversations Complainant told him, "I got to move the truck. I'm out at Halliburton and they're telling me to come on." He was not at the shop when Complainant returned that evening. (Tr. 244).

On December 18, 2010, Hall had a follow-up conversation with Complainant between 1:00 and 3:00 p.m. (Tr. 245). Complainant called him asking for a voluntary layoff. Complainant asked him to tell Casey, Rodell "and everybody else," and he complied with the request. (Tr. 245, 254-255). Complainant told him he "could not make it" working only 40 hours per week. He did not mention his conversation with Casey or why his hours were being cut. They did not talk about a "target being on his back." (Tr. 255). He denied that Complainant told him he was afraid they were going to set him up to fire him. He also denied telling Complainant to be very careful to do his pre-trips excellently. (Tr. 256). Hall testified that he "did not care" why Complainant's hours were being cut or about the Halliburton incident. (Tr. 257). The following day he was told that Complainant had been laid off. (Tr. 245).

Hall spoke with Complainant on one other occasion at his home. He noticed the truck that Respondent sold to Complainant and financed for him outside his home. (Tr. 237). This conversation took place approximately two weeks after the December 17, 2010 incident. (Tr. 247). Complainant told him he planned to sue Respondent. Hall told him "keep me out of it." Complainant told him that Respondent granted his wish to be laid off. (Tr. 248).

He believed Respondent always treated Complainant with the utmost respect. Complainant asked him for money before pursuing a loan through Respondent. (Tr. 246). The loan was for \$2,000.00. Complainant bought a tractor from Hall and his

father-in-law; Rodell financed the purchase. He believed Respondent treated Complainant "real good." No one made derogatory comments about Complainant to him. (Tr. 247).

Complainant told Hall he was in a "bind" with regard to child support he owed; 50 percent was being deducted from his check. (Tr. 248). Complainant told him he owed approximately \$30,000.00 in back child support. (Tr. 249).

Hall knew that Complainant was eligible for rehire by Respondent. He did not believe that Complainant ever applied to be rehired, but he knew that jobs were available because "business picked up." Respondent lost business in December 2010, and the number of hours that drivers could work was down. (Tr. 249).

On cross-examination, Hall testified that he was "very loyal" to Respondent. Rodell signed his paychecks. His position was above Morgan's position as head truck supervisor. (Tr. 250).

Hall testified that he "got along real good" with Complainant. He believed Complainant was a "fair" employee but a "little bit lazy." Complainant was dependable but he "couldn't get the loads" Hall wished he would. However, Complainant was not his worst employee. He wrote up one or two employees for not showing up to work. Complainant would come to work "but a lot of times he was late." Hall never wrote Complainant up. (Tr. 251). He believed Complainant may have falsified his time sheets, but he did not have evidence of such behavior. (Tr. 251-252).

Hall did not believe that Respondent had a permit to transport hazardous materials. No one told him that Complainant allegedly did wrong at Halliburton on December 17, 2010. (Tr. 252). He did not know that Casey was upset with Complainant. (Tr. 252-253).

Hall believed he and Complainant were personal friends. He testified that he was not mad at Complainant. (Tr. 254).

Hall spoke to Rodell, Casey and Morgan over the phone about Complainant's request for a layoff. (Tr. 257). He called Rodell first, who stated he "would talk about it." Rodell asked him to speak with Casey about it and get his opinion. Hall testified that Casey was a salesman and not in management but "everybody's got a little something to do with personnel."

Casey was consulted because he had been working for Respondent for a "long time." (Tr. 258). Finally, Hall called Morgan to see what he was planning to do because Morgan was his assistant. The following day, Morgan told him Complainant was going to be laid off. (Tr. 259). Hall testified that he was only doing what Complainant asked him to do. (Tr. 260). He did not inquire into why Complainant wanted to be laid off. (Tr. 260-261).

Hall testified that Morgan laid Bibby off. He was not involved in that decision. Bibby did not ask him for a layoff. (Tr. 261). He did not perform hiring for Respondent. He was not told in advance about Bibby being laid off. He did not ask why Bibby was laid off. (Tr. 262).

On re-direct examination, Hall testified that Complainant stated the lawsuit "wasn't his first ball game." He moved to Texas from Florida, where his child support was being paid. Complainant told him he was suing Respondent because he was "treated wrong." (Tr. 263). Complainant stated that they wanted him to haul the haz-mat and he was scared he'd lose his license. (Tr. 263-264).

Sam Lindsey, Jr.

Sam Lindsey is the chief financial officer of Respondent. His duties include finance and administration. (Tr. 362). He supervises the staff and the following areas: human resources, invoicing, payables, payroll and insurance. He testified that "almost anything that's not operations falls under [his] purview." He graduated from the University of Houston in 1971 with an accounting degree, and he became a C.P.A. in 1973. He practiced public accounting until 1992. Since 1992, he served as the chief financial officer for several reporting companies. He became Respondent's interim CFO in 2000 and a full-time CFO in June 2010. The companies he served as CFO were all publically traded, which required coordination with auditors and filing reports with the Securities and Exchange Commission. (Tr. 363).

Lindsey never spoke to Complainant prior to his separation from Respondent. He reviewed Complainant's files and records after his layoff. He used Complainant's payroll verification of employment report to calculate his net pay. (Tr. 364-365; RX-2; RX-11). He calculated that Complainant worked 2,683 total hours in 2010, with an average of 51.6 hours per week. (Tr. 368-369). Based on this average, he concluded that Complainant averaged

11.6 overtime hours per week. He calculated Complainant's average weekly net pay for 2010 as \$522.87. (Tr. 369).

Complainant filed his complaint with the Secretary of Labor on January 4, 2011, alleging Respondent retaliated against him on December 22, 2010. (Tr. 369). Complainant did not make any complaints to Lindsey regarding the alleged hostility toward him. (Tr. 370).

Respondent did not contest the Texas Workforce Commission filing made by Complainant. Joanna Price, the HR director, would have received the file. Each notification of a potential chargeback was reviewed to determine if a protest could be filed. Lindsey was Price's supervisor. (Tr. 370). Rodell told Price not to contest Complainant's filing. (Tr. 371). Respondent did not contest Complainant's Texas Workforce Commission filing. (Tr. 371-372).

Lindsey prepared the response to the complaint Complainant filed with the Department of Labor. (Tr. 373). He reviewed the complaint, conducted interviews with Prater, Morgan, TiJerima, Casey, Rodell, Price and Hall, and examined the report from the Texas Workforce Commission. (Tr. 373-374).

Lindsey had no personal knowledge of what transpired between Complainant and Halliburton on December 17, 2010. He believed Respondent was no longer a candidate to haul from Halliburton because of the incident. (Tr. 374). He clarified that Halliburton was a supplier, so several customers could need Respondent to haul from there. A water hauling account with Rockefeller Hughes was also withdrawn. He testified that the impact on Respondent was "hard to measure" because it was not significant revenue to the entire income statement, but could have generated more revenue in the future. Respondent lost work prior to December 2010. (Tr. 375). Gross profit margins were dropping in October and November 2010 due primarily to increased labor costs and increased fuel costs. (Tr. 375-376). As a result, Casey went to Respondent's major water hauling customers to negotiate a price increase. (Tr. 376).

Respondent lost an account with Forrest Oil, one of Respondent's four major water hauling customers, as a result of the re-bidding of Forrest Oil. (Tr. 376-377). At that time, discussions regarding reducing the number of trucks and drivers took place among the management at Respondent. Reduction of hours was also a concern. The number of trucks was not reduced, but the employees' hours were shortened. (Tr. 377). The formal

notification terminating the Forrest Oil account was received by Respondent on December 29, 2010, but Lindsey testified the company knew the work was lost two to three weeks before the formal notification. (Tr. 378, 380). Casey received the formal notification. (Tr. 380). Lindsey believed Casey informed him that Respondent was losing the account in early December. (Tr. 381).

Lindsey completed a summary of the weekly payroll hours for Respondent from December 2, 2010 through March 9, 2011, based on RX-3 and CX-10. (Tr. 379, 382; RX-10). He opined that there was a steady weekly decrease in total hours worked during the period, with one exception. For the period ending December 15, 2010, the drivers worked 95.5 hours more than the previous week. During the other weeks there were decreases in hours worked. (Tr. 383; RX-10). He testified that there was a 19 percent decrease between week one and week 10 of the period. He noted hours began to increase in February 2011, when Respondent entered a new hauling contract with Anadarko. (Tr. 384; RX-10). He opined that Respondent was under-utilizing its fleet of trucks before being awarded the Anadarko contract, but after, the hauling hours increased substantially allowing Respondent to hire a substantial number of new drivers. (Tr. 384). In the week ending February 11, 2011, the driver's experienced a 34 percent increase in hours worked. Lindsey opined Complainant would have benefited from the increase had he continued to work for Respondent. (Tr. 385).

Lindsey opined that nothing in Complainant's personnel file made him ineligible for rehire. (Tr. 385). Nothing in Complainant's personnel file indicated that Respondent had created a hostile work environment for him or that Complainant was complaining of such. (Tr. 385-386). His first notification of Complainant's arguments was the complaint from OSHA. (Tr. 386). He saw the complaint, spoke with the investigator and prepared the answer. Respondent was not found in violation of any federal statute, and the company was not fined. (Tr. 388).

On cross-examination, Lindsey testified it was his understanding Respondent stopped hauling for Forrest Oil two or three days after the December 29, 2010 formal notification. (Tr. 388-389). Respondent was hauling for Forrest Oil through the date of Complainant's separation and up to December 29, 2010. (Tr. 389).

Lindsey chose to begin his payroll analysis with the week ending December 8, 2010, because it was the most convenient date to reflect "a period prior to [Complainant's] separation and through the first quarter." (Tr. 389-390; RX-10). The records reflected that Respondent's drivers, including Complainant, regularly worked overtime. (Tr. 390). He did not believe a review of prior records would be beneficial because the average weekly hours throughout 2010 were similar to the total weekly hours worked in the beginning of December 2010. (Tr. 390-391). He believed the "document represent[ed] the testimony that was given, and show[ed] the effect of the loss of Forrest Oil." (Tr. 392).

Lindsey believed that a review of prior records would "dilute" the assessment "with more variables than Forrest Oil." (Tr. 393). He admitted that Respondent worked on the Forrest Oil account for several years, but he believed the "base period would be diluted with other sales or other customers" if the review were extended back to prior periods. The graph he prepared represented all hours worked, not merely hours worked on the Forrest Oil account. (Tr. 394). Some drivers were working in excess of 40 hours a week during the period examined by Lindsey. (Tr. 395; RX-10). He believed that his analysis "most accurately reports the effect of losing the Forrest Oil account." (Tr. 398; RX-10). He noted there were likely other increases and decreases in hours worked during the period. (Tr. 398-399). He did not believe analyzing the payroll hours for October 28, 2010, measured the effect of losing the Forrest Oil account, but he recognized the period would represent a 3.9 percent decrease. He did not know whether the drivers worked more hours in 2009 or 2010. (Tr. 399).

Lindsey testified there was not a written contract between Respondent and Rockefeller Hughes. Water hauling for Rockefeller Hughes was a new account. He did not believe there was a promise of future work from Rockefeller Hughes. He received an e-mail from someone at Rockefeller Hughes regarding the contract. (Tr. 400). He did not believe Respondent received a notice indicating it should not allow non-haz-mat endorsed drivers to haul haz-mat loads. (Tr. 400-401). He did not believe it was an issue. No one from Halliburton, Rockefeller Hughes or Henley and Associates expressed a concern about Respondent hauling hazardous material without a hazardous material permit. (Tr. 401).

Lindsey did not believe the material hauled was haz-mat. He did not have any training on the federal Motor Carrier Safety Regulations or haz-mat regulations. He opined that haz-mat loads comprised less than one percent of Respondent's business. (Tr. 401). He did not believe the load Complainant refused to haul from Halliburton was haz-mat because he never received a notification from Rockefeller Hughes, Henley and Associates or Halliburton which indicated that the haul was haz-mat. He had not reviewed the bill of lading from the load Complainant refused to haul. (Tr. 402). He denied ever receiving bills of lading from loads Respondent's drivers hauled. (Tr. 402-403). He attempted to obtain a copy of the bill of lading from Prater and Morgan during the OSHA investigation, but he did not obtain it. He did not contact Halliburton regarding the bill of lading. (Tr. 403).

Lindsey testified that on occasions Respondent's drivers had been involved in vehicular accidents that caused damage to property. (Tr. 403-404). He did not believe those drivers were always fired. He was not aware of a regulation requiring that Respondent keep copies of its bills of lading. He had not met Complainant prior to the formal hearing. (Tr. 404).

On re-direct examination, Lindsey stated that RX-10 was based on CX-10. (Tr. 404). He believed RX-10 correctly and accurately reflected CX-10. (Tr. 404-405). He opined that RX-10 accurately reflected the loss of the Forrest Oil account. (Tr. 405).

Rockefeller Hughes was a Canadian company. Henley and Associates was a group of petroleum engineers based in Houston, Texas, who managed the job Respondent was performing and ordered materials. Henley and Associates ordered the drilling fluids from Halliburton and set up the schedule. (Tr. 405). They had a drilling rig in place waiting for the materials from Halliburton. (Tr. 405-406).

Before Complainant's separation from the company, Respondent knew it was going to lose the Forrest Oil account. (Tr. 406).

On re-cross examination, Lindsey stated CX-10 was produced from Respondent's accounting records. Casey was notified in late November or early December that Forrest Oil was not going to accept a price increase. Forrest Oil decided to rebid the account. (Tr. 407). The December 29, 2010 e-mail was formal notice of Forrest Oil's decision to rebid the job. (Tr. 407;

RX-6). Respondent rebid the job for the same price that Forrest Oil had rejected in the renegotiation. Respondent did not expect to get the job following the rebid. (Tr. 408).

Lindsey testified that he could calculate how many hours of work were attributable to the Forrest Oil account, but he had not done so. (Tr. 409). He recognized that use of those records would be a more accurate way of depicting how many lost hours were attributable to the Forrest Oil account. (Tr. 409-410). Barry Oil was one of two or three smaller accounts Respondent lost. He testified that his graph was an attempt to depict the impact of losing the Forrest Oil account. (Tr. 410).

Lindsey stated he had no reason to doubt Prater's assertion that the material loaded on December 17, 2010, was haz-mat. He believed that Halliburton may have designated the material as haz-mat "out of an abundance of caution." Respondent's drivers would haul the same material from a pit to a mud plant, and in those instances the material was not designated as haz-mat. (Tr. 411). However, Halliburton, the owner of the material, designated it as haz-mat. (Tr. 412).

The Contentions of the Parties

Complainant argues he engaged in protected activity by refusing to drive the haz-mat load on December 17, 2011. He alleges seven instances, which he claims establish that he suffered an adverse employment action in the form of a constructive discharge. He asserts the following instances as evidence of hostile treatment he received from Respondent: (1) he was verbally berated by Casey on December 17, 2010, for refusing to haul the haz-mat load; (2) Casey and TiJerima told him he should have hauled the haz-mat load without the proper endorsement; (3) his hours were cut to 40 hours per week resulting in a 33 to 35 percent decrease in his weekly wages; (4) Casey told him Rodell wanted to fire him for refusing to haul the haz-mat load; (5) Rodell cut his hours so that he could "get his head on straight;" (6) Hall told him he had a target on his back; and (7) he was accused of costing Respondent a \$100,000.00 account. He asserts there was not a legitimate, non-discriminatory basis for Respondent's action. Finally, he requests back pay, punitive damages, attorney fees, costs and interest.

Respondent argues, in brief, that Complainant should not prevail on the constructive discharge element because he has not shown that the working conditions were so intolerable that a reasonable employee would have no choice but to resign. It asserts that Complainant should have waited to see if his work hours were in fact reduced or scheduled a meeting with management to resolve the matter. Finally, it argues that adverse action was not taken against Complainant.

III. DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe ... Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Complainant's burden of persuasion rests principally upon his testimony. His **prima facie** case is corroborated by the testimony of other witnesses. I found Complainant generally an impressive witness in terms of confidence, forthrightness and overall bearing on the witness stand. I found his testimony to be straight-forward, detailed and presented in a sincere and consistent manner.

Some of the other witnesses were not as impressive in my view. Casey's demeanor belied his testimony in crucial areas such as his selective recollection of his discussion with Complainant on December 17, 2010, and subsequent conversations with Rodell. When he was initially questioned, Casey stated he did not recall telling Complainant that he should have hauled the load, but he subsequently testified that he may have done so.

Rodell did not impress me as sincere in his testimony. He testified that he informed three of Complainant's supervisors of his decision to cut Complainant's hours in November 2010, but the record does not reflect that such cuts were actually made until after the December 17, 2010 incident at Halliburton. Further, none of the supervisors testified to or corroborated such a conversation. In a subsequent statement, he could not recall whether Complainant was told about the cut in hours before or after the Halliburton incident. Morgan's testimony contradicted Rodell's on several issues. Morgan testified that Rodell asked him to cut Complainant and Bibby's hours following the December 17, 2010 incident. He also testified that Rodell did not ask him to cut any other drivers' hours. Based on the foregoing, I find that statements made by Rodell were incredulous, which tempered my view of much of his remaining testimony.

B. The Statutory Protection

The employee protection provisions of the STAA provide, in pertinent part:

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

(A)

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

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

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

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

49 U.S.C. § 31105(a) (2007). Thus, under the employee protection provisions of the STAA, it is unlawful for an employer to impose

an adverse action on an employee because the employee has complained or raised concerns about possible violations of DOT regulations. 49 U.S.C. § 31105(a)(1)(A). See e.g., Reemsnyder v. Mayflower Transit, Inc., Case No. 1993-STA-4, @ 6-7 (Sec'y Dec. and Ord. On Recon. May 19, 1994). Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to drive because operating a vehicle violates DOT regulations **or** because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C. § 31105(a)(1)(B).

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of enforcement through formal proceedings." (Emphasis added). Davis v. H.R. Hill, Inc., Case No. 1986-STA-18 @ 2 (Sec'y Mar. 19, 1987).

C. Burden of Proof

In 2007, Congress amended the STAA's burden of proof standard as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). Under the amendment, STAA whistleblower complaints are governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b) (AIR 21). Under the AIR 21 standard, complainants must show by a "preponderance of evidence" that a protected activity is a "contributing factor" to the adverse action described in the complaint. 49 U.S.C. § 42121(b)(2)(B)(i); see also 75 Fed. Reg. 53545, 53550. The employer can overcome that showing only if it demonstrates "**by clear and convincing evidence** that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545, 53550; 49 U.S.C. § 42121(b)(2)(B)(i).

Under the 2007 amendments to the STAA, to prevail on his STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity; that the respondent took an adverse employment action against him; and that his protected activity was a contributing factor in the unfavorable personnel action. Clarke v. Navajo Express, Inc., ARB No. 09-114, Case No. 2009-STA-18, @ 4 (ARB June 29, 2011) (citing Williams v. Domino's Pizza, Case No. 2008-STA-52, @ 5 (ARB Jan. 31, 2011)).

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Id. The complainant can succeed by "providing either direct or indirect proof of contribution." Id. "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." Id. If direct evidence is not produced, the complainant must "proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating" the complainant's employment. Id. "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." Id. (citing Riess v. Nucor Corporation-Vulcraft-Texas, Inc., ARB No. 08-137, Case No. 2008-STA-11 @ 3 (ARB Nov. 30, 2010)). If the complainant proves pretext, an ALJ may infer that the protected activity contributed to the termination, but he is not compelled to do so. Williams, supra @ 5.

If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. Williams, supra @ 5 (citing 49 U.S.C. § 4212(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain."

D. The Protected Activity: Refusal to Drive

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C. § 31105(a)(1)(B)(i), requires that Complainant show he refused "to operate a vehicle because—the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety,

health, or security." The second refusal to drive provision, 49 U.S.C. § 31105(a)(1)(B)(ii), focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury "to the employee or the public because of the vehicle's hazardous safety or security condition."

The STAA defines reasonable apprehension as:

[A]n employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. **To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.**

49 U.S.C. § 31105(a)(2) (emphasis added).

In order to prevail on the merits of his claim, Complainant must prove that he engaged in activity protected by either or both of the foregoing provisions, and that he was terminated, at least in part, because of that protected activity. Byrd v. Consolidated Motor Freight, Case No. 1997-STA-9 @ 4 n.2 (ARB May 5, 1998); Sommerson v. Yellow Freight Systems, Inc., Case No. 1998-STA-9 @ 8 (ARB Feb. 18, 1999).

Complainant asserts that he refused to drive the truck from Halliburton on December 17, 2010, because under the circumstances then existing, if he had done so, he would have violated Texas Transportation Code § 522.042 and 49 C.F.R. § 397.3.

Texas Transportation Code § 522.042 provides in pertinent part:

ENDORSEMENTS; OFFENSES.

(a) The department may issue a commercial driver's license with endorsements:

(1) authorizing the driving of a vehicle transporting hazardous materials,

subject to the requirements of Title 49
C.F.R. Part 1572; . . .

(b) The holder of a commercial driver's license may not drive a vehicle that requires an endorsement unless the proper endorsement appears on the license.

(c) A person commits an offense if the person violates Subsection (b). An offense under this section is a Class C misdemeanor.

The Federal Motor Carrier Safety Regulations require that "[e]very motor vehicle containing hazardous materials must be driven and parked in compliance with the laws, ordinances, and regulations of the jurisdiction in which it is to be operated. . . ." 49 C.F.R. § 397.3.

In the instant case, Complainant testified that he refused to drive a truck after being presented with a haz-mat bill of lading from Halliburton on December 17, 2010. Complainant's testimony finds corroborative factual support in the record regarding the events at Halliburton on December 17, 2010. Prater testified the bill of lading designated the load as a haz-mat load. Morgan believed that Complainant was presented a haz-mat bill of lading from Halliburton. Casey made no inquiry into whether the bills of lading were designated as haz-mat. Lindsey was the only witness that testified he did not believe the diesel-based drilling mud was haz-mat. However, he did not have any training on the federal Motor Carrier Safety Regulations or haz-mat regulations. He based his assertion on the fact that he never received a notification from Rockefeller Hughes, Henley and Associates or Halliburton which indicated that the haul was haz-mat.

Respondent failed to produce a copy of the bill of lading. However, I find based on the preponderance of the evidence presented, that the load Complainant was asked to haul from Halliburton on December 17, 2010, contained hazardous material. The Federal Motor Carrier Safety Regulations require that drivers of vehicles containing hazardous materials comply with the laws of the jurisdiction in which it is operated. Texas law penalizes individuals who drive a vehicle without the proper endorsements. Complainant lacked the endorsement necessary for driving a truck containing hazardous material.

Based on the foregoing evidence, Complainant has established that a genuine violation of a federal safety regulation would have occurred had he driven the load assigned on December 17, 2010. Accordingly, I find that Complainant engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) by refusing to operate a vehicle because the operation would have violated a regulation of the United States related to commercial motor vehicle safety or health.

E. Respondent's Adverse Action

The STAA states that an employer may not "discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment." 49 U.S.C. § 31105(a)(1). Thus, termination or discharge from employment is not required; rather demonstration of an adverse action by the employer is sufficient.

In Long v. Roadway Express, Inc., Case No. 1988-STA-31 (Sec'y Sep. 15, 1989), the Secretary held any employment action by an employer which is unfavorable to the employee, the employee's compensation, terms, conditions or privileges of employment constitutes an adverse action. Thus, regardless of the employer's motivation, proof that such a step or action was taken is sufficient to meet the employee's burden of establishing that the employer took adverse action against the employee. Id. In a case tried fully on the merits, the relevant inquiry is whether the complainant "established, by a preponderance of the evidence" that the employer "subjected him to adverse action in retaliation for protected activity." Walters v. Exel North American Road Transport, Case No. 2002-STA-3 @ 2 (ARB Dec. 10, 2004).

In August 2010 the Secretary of Labor issued new implementing regulations under the STAA that define the scope of discipline or discrimination actionable under the STAA's whistleblower protections. 29 C.F.R. § 1978.102. Those regulations make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]" 29 C.F.R. §§ 1978.102(b), (c). The Administrative Review Board (ARB) has recognized that the regulations broaden prior interpretations of what constitutes an adverse action under the STAA. Strohl v. YRC, Inc., Case No. 2010-STA-35 (ARB Aug. 12, 2010).

It is undisputed Complainant was voluntarily laid off on December 22, 2010, after he was informed that his hours would be cut to 40 hours per week. Thus, the pivotal issue is whether Respondent's actions constituted an adverse employment action against Complainant.

A constructive discharge occurs where "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Held v. Gulf Oil Co., 684 F.2d 427, 434 (6th Cir. 1982); NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981); Cartwright Hardware Co. v. NLRB, 600 F.2d 268 (10th Cir. 1979). "Furthermore, it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions." Hollis v. Double DD Truck Lines, Inc., Case No. 1984-STA-13 @ 8-9 (Sec'y March 18, 1985).

In the context of a Title VII claim, the Supreme Court has found that a complainant "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response" to establish a constructive discharge claim. Pennsylvania State Police v. Suders, 542 U.S. 129, 134 (2004). The Court noted that a constructive discharge included "employer-sanctioned adverse action officially changing [the complainant's] employment status or situation" including a humiliating demotion, extreme pay cut or transfer to a position with unbearable working conditions. Id.

The presence of aggravating factors are required for a finding of constructive discharge and adverse consequences such as demotion, failure to promote and failure to provide equal pay for equal work were generally insufficient to substantiate a finding of constructive discharge. Earwood v. D.T.X. Corp., Case No. 1988-STA-21 @ 3 (Sec'y March 8, 1991). In Earwood, the Secretary held that based on the totality of the circumstances the complainant was constructively discharged where there was "pervasive coercion to violate Department of Transportation regulations." Id. @ 4.

The National Labor Relations Board has held that assigning a truck driver fewer loads, according him less seniority and assigning him older, less road-worthy trucks amounts to a constructive discharge. Interstate Equipment Co. and Teamsters Local 135, 172 NLRB 145(1968), 1968-2 CCH NLRB 20,084. In Scerbo v. Consolidated Edison Co. of New York, Inc., Case No. 1989-CAA-2 (Sec'y Nov. 13, 1992), the Secretary found adverse

action where a complainant was transferred from a relatively mobile, outdoor job to a constrained, isolated warehouse position, and as a result also lost overtime opportunities.

In Mandreger v. The Detroit Edison Co., Case No. 1988-ERA-17 (Sec'y Mar. 30, 1994), the Secretary found adverse action where the complainant was referred to the Employee Assistance Program, and as a result of the referral, a psychologist found that the complainant suffered from a mental disorder, the complainant was not permitted to return to work at the nuclear power plant where he had been employed, and after his sick leave and vacation days ran out, he was eventually placed in a position in which there was less opportunity to earn overtime pay and less opportunity for advancement.

In brief, Complainant alleges seven instances, which he claims establish that he suffered an adverse employment action in the form of a constructive discharge. Respondent argues, in brief, that Complainant should not prevail on the constructive discharge element because he has not shown that the working conditions were so intolerable that a reasonable employee would have no choice but to resign. Respondent asserts that Complainant should have waited to see if his work hours were in fact reduced or scheduled a meeting with management to resolve the matter.

I find, based on a preponderance of the evidence presented, that Complainant suffered an adverse action in the form of a constructive discharge following his refusal to drive on December 17, 2010.

Rodell, acting for Respondent, officially changed Complainant's employment situation by making him ineligible for overtime work, which comprised over 30 percent of his weekly wages. Lindsey calculated Complainant's average overtime as 11.6 hours per week. Complainant did not believe he could afford the pay cut that would come from working only 40 hours per week. He stated that he would not have taken the job if he were only offered 40 hours per week when he was hired.

Rodell stated that he informed Complainant's supervisors that his hours were being cut in November 2010. However, the preponderance of the evidence establishes that Complainant was not informed that his hours were being cut until after the December 17, 2010 refusal to drive. Moreover, Respondent's payroll records belie Rodell's testimony. Complainant's payroll records indicate that he worked 54 hours the week ending

November 17, 2010, 58 hours the week ending November 24, 2010, 46 hours the week ending December 1, 2010, 45 hours the week ending December 8, 2010, and 58.5 hours the week ending December 15, 2010. Rodell implied that Complainant may have falsified his time sheets. I decline to give credence to Rodell's assertion based on Respondent's payroll records and the testimony of Complainant and Morgan. Complainant testified he was not told his hours would be cut until December 21, 2010. Morgan testified that Rodell told him to cut Complainant and Steve Bibby's hours after the December 17, 2010 incident due to a loss of business. Further, none of the supervisors who testified at the formal hearing indicated that Rodell asked them to cut Complainant's hours prior to December 17, 2010. Therefore, I find that Complainant's hours were cut following the December 17, 2010 refusal to drive as a punishment therefor.

Complainant was also verbally berated by Casey following the December 17, 2010 incident. Casey admitted he was "very angry" with Complainant, but he could not recall the content of their conversation on December 17, 2010. Complainant was blamed for Respondent's loss of a \$100,000.00 account. Casey admitted to blaming Complainant "to some extent" for losing the Rockefeller Hughes account. Rodell testified that he blamed Complainant for Respondent losing money and a customer.

Further, several of Complainant's superiors encouraged him to drive the haz-mat load in violation of truck driving regulations. Casey admitted he told Complainant that he should have transported the load because Respondent would have paid the ticket if he was fined. Complainant also testified that TiJerima told him he should have hauled the load because it had "been done in the industry for years."

Complainant believed Respondent was forcing him out by cutting his hours and over one-third of his pay. He admitted to proposing a layoff because he did not feel he had any other options. He believed he could not continue to work for the company because cutting his hours was a "signal" he was "finished there."

I reject Respondent's assertion that Complainant should have waited to see if his work hours were in fact reduced. Complainant was verbally berated by his superiors, blamed for costing Respondent over \$100,000 and encouraged to violate transportation regulations. After those incidents, Complainant was told that his overtime hours would be cut, which would reduce his wages by over 30 percent. Further, Prater testified

that on December 21, 2010, there was no truck for Complainant to drive, even though he arrived on time and was a senior driver who typically drove the same assigned truck each day. I find it unreasonable to require that Complainant remain in such a hostile environment to determine whether his hours would in fact be cut.

In view of the totality of the circumstances, I find that the working conditions following the December 17, 2010 incident were arguably so difficult or unpleasant that a reasonable person in Complainant's position would have felt compelled to resign. Therefore, Complainant has proven by a preponderance of the evidence that he was constructively discharged by Respondent.

Adverse action closely following protected activity "is itself evidence of an illicit motive." Donovan v. Stafford Const. Co., 732 F.2d 954, 960 (D.C. Cir. 1984). The timing and abruptness of a discharge are persuasive evidence of an employer's motivation. NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983), citing NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 465 (2d Cir. 1973). See NLRB v. RainWare, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984).

Based on the foregoing, I find that Complainant proved by a preponderance of the evidence that he engaged in protected activity, and that Respondent took an adverse employment action against him. The remaining issue to be decided is whether his protected activity was a contributing factor in the unfavorable personnel action. Complainant has not presented direct evidence of a contributing factor. As discussed above, an ALJ may infer that protected activity contributed to the termination where the complainant discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation. Thus, the pivotal issue is whether Respondent's constructive discharge of Complainant was motivated **even in part** by his protected activity. I find Respondent's action was so motivated for the reasons below.

F. The Alleged Legitimate, Nondiscriminatory Reason for Termination

The Act does not prohibit an employer from discharging a whistleblower where the discharge is not motivated by retaliatory animus. See, e.g., Newkirk v. Cypress Trucking Lines, Inc., Case No. 1988-STA-17 @ 9 (Sec'y Feb. 13,

1989) (although a complainant engaged in protected activity, he was terminated by the respondent's managers who collectively determined to discharge the complainant for his failure to secure bills of lading); cf. Lockert v. United States Department of Labor, 867 F.2d 513, 519 (9th Cir. 1989) (an employee who engages in protected activity may be discharged by an employer if the employer has reasonable grounds to believe the employee engaged in misconduct and the decision was not motivated by protected conduct); Jackson v. Ketchikan Pulp Co., Case No. 1993-WPC-7 (Sec'y Mar. 4, 1996) (when a respondent's beliefs that the complainants engaged in sabotage, which was not a protected activity, played a major role in its decision to terminate them, it needed to prove only that the managers who decided to fire the complainants had a reasonable and good faith belief the complainants engaged in the unprotected activity).

To prevail under the Act, the employee must establish that the employer discharged him because of his protected whistleblowing activity. Newkirk, supra @ 8-9. It is Respondent's subjective perception of the circumstances which is the critical focus of the inquiry. Allen v. Revco D.S., Inc., Case No. 1991-STA-9 @ 5-6 (Sec'y Sept. 24, 1991) (a complaint was dismissed when the respondent presented evidence of a legitimate business reason to discharge complainant -- falsification of logs of records - and the evidence permitted an inference that the employer believed that the schedule could be run legally and believed that complainant illegally and unnecessarily falsified his logs).

Respondent contends that Rodell made the decision to cease Complainant's overtime hours due to lack of work and based on his poor job performance. However, the preponderance of the evidence establishes that other drivers did not experience a decrease in overtime work in December 2010.

Casey testified that he recalled other employees hours being cut, but he could not specifically recall whose hours were cut. Rodell testified that Respondent cut the hours of Complainant and two or three other drivers after losing a few accounts. However, Rodell could only specifically recall cutting Complainant and Bibby's hours. Rodell agreed that the majority of Respondent's employees were paid for over 40 hours per week from December 2010 through March 9, 2011. Prater testified that the majority of Respondent's drivers continued to

work 12 hours per day, on a four-day-on and two-day-off schedule, following the December 2010 incident. Morgan testified that other drivers' hours were cut during the same period. However, Rodell only told Morgan to cut Complainant and Bibby's hours.

Respondent's payroll records indicate that a major drop in total hours worked did not occur until late January 2011, after Complainant was laid off. Respondent's employees worked a total of 2,664 hours the week of December 16, 2010, 2,412 hours the week of December 23, 2010, 2,374.5 hours the week of December 30, 2010, and 2,646 the week of January 6, 2011. The total hours worked the week of January 27, 2011, decreased to 2,190 hours, and 2,205 hours the week of February 3, 2011. Further, the formal notification terminating the Forrest Oil account was received by Respondent on December 29, 2010, but Lindsey testified the company knew the work was lost in early December 2010. Respondent was hauling for Forrest Oil through the date of Complainant's separation and up to December 29, 2010.

Rodell testified that he also made the decision to cut Complainant's hours based on job performance. Hall testified that he believed Complainant was a "fair" employee but a "little bit lazy." Complainant was dependable but he "couldn't get the loads" Hall wished he would. However, Complainant was not his worst employee. Complainant stated he was never reprimanded, counseled or disciplined by anyone at Respondent regarding his work performance. He admitted to being late for work on a few occasions, but he believed that other drivers were also late. Further, Complainant's employment records show that he was never written-up for poor job performance. I find that Respondent failed to demonstrate by clear and convincing evidence that it would have taken the same adverse action in any event based on Complainant's alleged poor job performance.

Based on the foregoing, I find that Complainant presented sufficient circumstantial evidence to discredit Respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation. Therefore, I also find that the protected activity contributed to Complainant's constructive discharge. Further, I find and conclude Respondent has failed to establish by clear and convincing evidence that it would have taken the adverse action against Complainant regardless of December 17, 2010 incident. Respondent's assertions appear to be conjecture not supported by the evidence presented. Temporal proximity between Complainant's protected activity and his constructive discharge by Respondent is also

persuasive in establishing a causal connection for Respondent's adverse actions and justifying a retaliatory motive. See Skinner v. Yellow Freight System, Inc., Case No. 1990-STA-17 @ 7 (Sec'y May 6, 1992).

G. Relief

A successful complainant under the STAA is entitled to affirmative action to abate the violation, reinstatement to his former position with the same pay, terms and privileges of employment, attorney fees and costs reasonably incurred, and may also be awarded compensatory damages.

Specifically, the STAA provides that:

(A) If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor shall order the person to

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and

(iii) pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(B) If the Secretary of Labor issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary of Labor may assess against the person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint. The Secretary of Labor shall determine the costs that reasonably were incurred.

(C) Relief in any action under subsection (b) may include punitive damages in an amount not to exceed \$250,000.

49 U.S.C. § 31105(b)(3)(A)-(C). Considering the foregoing findings and conclusions, reinstatement, back pay, restoration of benefits, interest and attorney fees and costs are hereby ordered.

1. Reinstatement

Reinstatement provides an important protection for employees who report safety violations. "[T]he employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review." Brock v. Roadway Express, Inc., 481 U.S. 252, 258-250 (1987). These protections also extend to employees who refuse to drive vehicles because of safety concerns. 49 C.F.R. § 392.7. Reinstatement is an appropriate, statutory remedy under the circumstances of this case. See Clifton v. United Parcel Service, Case No. 1994 STA-16 @ 1-2 (ARB May 14, 1997) (no front pay where reinstatement is an appropriate remedy).

In the absence of a valid reason for not returning to his former position, immediate reinstatement should be ordered. Dutile v. Tighe Trucking, Inc., Case No. 1993-STA-31 (Sec'y Oct. 31, 1994). Accordingly, Complainant is entitled to immediate reinstatement to his former position with the same pay and terms and privileges of employment, or if his former job no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions and benefits. Respondent's back pay liability terminates upon the tendering of a **bona fide** offer of reinstatement even if Complainant rejects it. Id.

2. Back Pay

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Dutkiewicz v. Clean Harbors Environmental Services, Inc., Case No. 1995-STA-34 (ABR Aug 8, 1997). Back pay calculations must be reasonable and supported by the evidence; they need not be rendered with "unrealistic exactitude." Cook v. Guardian Lubricants, Inc., Case No. 1995-STA-43 @ 11 (ARB May 30, 1997). Back pay is typically awarded from the date of a complainant's termination

until reinstatement to his former employment. Any uncertainties in calculating back pay are resolved against the discriminating party. Kovas v. Morin Transport, Inc., Case No. 1992-STA-41 (Sec'y Oct. 1, 1993).

Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, the allocation of the burden of proof is reserved, i.e., it is the employer's burden to prove by a preponderance of the evidence that the back pay award should be reduced because the employee did not exercise reasonable diligence in finding other suitable employment. Polwesky v. B & L Lines, Inc., Case No. 1990-STA-21 (Sec'y May 29, 1991); See also Johnson v. Roadway Express, Inc., Case No. 1999-STA-5 @ 16 (ARB Mar. 29, 2000) (it is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages).

The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. Johnson v. Roadway Express, Inc., Case No. 1999-STA-5 @ 4 (ARB Dec. 30, 2002); See also Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527 (11th Cir. 1991).

Where a complainant is awarded back pay under STAA, unemployment compensation benefits are not deductible from the amount due for back pay. Smith v. Specialized Transp. Servs., Case No. 1991-STA-0022 (Sec'y Nov. 20, 1991).

A back pay award is terminated on the date that the complainant voluntarily becomes a full-time student, and thus no longer available for work. Ass'y Sec'y & Cotes v. Double R Trucking, Inc., Case No. 1998-STA-34 (ARB July 16, 1999).

Complainant has not worked since his separation from Respondent. He testified that he made an effort to find a job, claiming to have applied for three or four jobs per week. Respondent has not shown any substantially equivalent positions were available to Complainant. Complainant's layoff paperwork indicates he was eligible for rehire by Respondent. However, as discussed above, Complainant was subjected to a hostile environment where he believed he was being forced out of his employment. Therefore, I find it would have been futile for him

to apply for rehire. Thus, Complainant is entitled to back pay from the date of his constructive discharge on December 22, 2011, until he enrolled in Texas State Technical College on May 9, 2011.

Complainant earned \$14.50 per hour at 40 hours per week straight time (40 hours x \$14.50 = \$580.00 per week) plus 11.6 additional hours per week on average as overtime computed at time and one-half or \$21.75 per hour (11.6 hours x \$21.75 = \$252.30) for a total weekly wage of \$832.30. Complainant's back pay entitlement is \$16,229.85 (19.5 weeks x \$832.30 per week = \$16,229.85) commencing on December 22, 2010 through May 9, 2011.

3. Punitive Damages

The STAA allows for an award of punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 31105(b)(3)(C).

The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law" Smith v. Wade, 461 U.S. 30, 51 (1983). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979).

Complainant argues he is entitled to punitive damages because Respondent engaged in flagrant disregard for the law by encouraging him to haul a haz-mat load without the proper endorsements. Complainant also points to Casey and Rodell's behavior.

I reject Complainant's punitive damages claim because he has not established that Respondent's actions rose to the level of reckless or callous disregard for his rights or that punitive damages are necessary to deter Respondent from similar conduct in the future. Consequently, I find that Complainant is not entitled to punitive damages.

H. Interest

Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Complainant's termination on December 22, 2011, until the instant order of reinstatement. Post-judgment interest is to be paid thereafter, until the date

of payment of back pay is made. Moyer v. Yellow Freight Systems, Inc., [Moyer I], Case No. 1989-STA-7 @ 9-10 (Sec'y Sept. 27, 1990), rev'd on other grounds sub nom. Yellow Freight Systems, Inc. v. Martin, 954 F.2d 353 (6th Cir. 1992). The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a) (2010) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621. Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. Double R Trucking, Inc., Case No. 1998-STA-34 @ 3 (ARB Jan 12, 2000). The interest is to be compounded quarterly. Id.

I. Attorney's Fees and Costs

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 31105(b)(3)(B); Murray v. Air Ride, Inc., Case No. 1999-STA-34 (ARB Dec. 29, 2000). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted thirty (30) days from the date of the Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

IV. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Respondent shall offer Complainant reinstatement to his former position with the same pay, terms and privileges of employment that he would have received had he continued working from December 22, 2010, through the date of the offer of reinstatement.

2. Respondent pay Complainant back pay at the weekly wage of \$832.30 for the period of December 22, 2010 through May 9, 2011, or \$16,229.85, less authorized payroll deductions, with interest thereon calculated pursuant to 26 U.S.C. § 6621.

3. Respondent shall expunge from the employment records of Complainant any adverse or derogatory reference to his protected activities of December 17, 2010, and his discriminatory lay off on December 22, 2010.

4. Counsel for Complainant shall have thirty (30) days from the date of the Decision and Order within which to file a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

ORDERED this 20th day of January, 2012, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty

double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).