



Issue Date: 25 June 2012

Case No.: **2011-STA-33**

In the Matter of:

LEE UHLEY,
Complainant

v.

WILLIAM F. BRAUN MILK HAULING, INC.,
ELIZABETH BRAUN, JOHN DOE, and
MARY ROE,
Respondents

Appearances:

Paul O. Taylor, Esq.
Truckers Justice Center
Burnsville, Minnesota
For the Complainant

William A. Schmitt, Esq.
Greensfelder, Hemker & Gale, P.C.
Swansea, Illinois
For Respondents William F. Braun Milk Hauling, Inc.,
and Elizabeth Braun

Before:

Alice M. Craft
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim of whistleblower protection under Section 405 of the Surface Transportation Assistance Act ("STAA"), as amended.¹ The STAA and implementing regulations² protect employees from discharge, discipline, and other forms of discrimination for engaging in protected activity, such as reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle because of its unsafe condition. In this case, the Complainant, Lee Uhley, alleges that he was terminated by Respondent Elizabeth Braun from his position as a truck driver with

¹ 49 U.S.C. § 31105 (2011).

² 29 C.F.R. Part 1978 (2011).

Respondent William F. Braun Milk Hauling, Inc., after refusing to continue driving his tractor-trailer in hazardous weather and driving conditions.

STATEMENT OF THE CASE

On September 24, 2010, Mr. Uhley filed a complaint with the Occupational Safety and Health Administration of the Department of Labor (“OSHA”). He alleged that Ms. Braun unjustly terminated his employment with William F. Braun Milk Hauling, Inc., after he refused “to resume driving until hazardous weather conditions abated.” Mr. Uhley’s refusal to drive in the hazardous weather conditions resulted in the late delivery of a shipment to Mattoon, Illinois.

On May 18, 2011, the Regional Administrator for OSHA (“Administrator”) issued findings on the complaint on behalf of the Secretary of Labor. Following a formal investigation, the Administrator concluded that there was “no reasonable cause to believe” that the Respondents had violated the STAA. More specifically, the Administrator opined that Mr. Uhley engaged in protected activity when he contacted Ms. Braun about the adverse weather conditions on June 23, 2010. The Administrator also found that Mr. Uhley did not contact Ms. Braun “once he became aware that the delivery could not be made on time,” as required by company policy. The Administrator therefore found that a “preponderance of the evidence supports Respondent’s position that Complainant’s protected activity was not a contributing factor in the alleged termination.” Accordingly, the Administrator dismissed Mr. Uhley’s complaint.

By letter dated May 31, 2011, Mr. Uhley appealed the OSHA findings and requested a formal hearing on his claim. The letter was transmitted by facsimile to the Office of Administrative Law Judges (“OALJ”) on May 31, 2011.

I conducted a hearing on this claim on October 18, 2011, in St. Louis, Missouri. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.³ Complainant’s Exhibits (“CX”) 1, 2, 4, 6, 7, 8, and 9 were admitted into evidence. Transcript (“Tr.”) 13-16, 65-66. CX 3 and 5 were excluded from evidence. Tr. 14-15. Respondent’s Exhibits (“RX”) A-D, H, K-T, W, Z, and AA were admitted into evidence. Tr. 16-22, 126, 149, 208. RX E, J, U, and BB were excluded from evidence. Tr. 17-18, 22, 232. The Respondents did not offer RX F, G, I, V, X, or Y. The witnesses were separated during the hearing and, therefore, did not hear each others’ testimony. Tr. 12-13. Mr. Uhley was granted until January 16, 2012, to submit his closing brief. Tr. 241. The Respondents were granted until February 14, 2012, to submit their closing brief, and Mr. Uhley was granted until February 28, 2012, to file a reply brief. Tr. 241. Both parties timely filed closing briefs and Mr. Uhley submitted a reply brief. The Respondents also submitted a clearer copy of RX P, as well as substitute copies of RX Z and RX AA. The record is now closed.

³ 29 C.F.R. Part 18 (2011).

In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at the hearing, and the arguments of the parties on the merits of the claim.

ISSUES

The issues in this case are whether the Respondents violated the STAA when they terminated Mr. Uhley's employment and, if so, what remedies should be awarded.

APPLICABLE STANDARDS

In relevant part, the employee protection provision of the STAA provides as follows:

- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
 - (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.⁴

The current version of the STAA provides that whistleblower complaints shall be governed by the legal burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").⁵ Under the AIR 21 standard, complainants must initially make a *prima facie* showing by a "preponderance of the evidence" that a protected activity was a "contributing factor in the unfavorable personnel action alleged in the complaint."⁶ If a complainant makes this *prima facie* showing, an employer can only overcome that showing if it demonstrates "by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of [the protected] behavior."⁷ Thus, in order

⁴ 49 U.S.C. § 31105(a)(1)(B).

⁵ 49 U.S.C. § 42121(b) (2011). *See also* 49 U.S.C. § 31105(b)(1).

⁶ 49 U.S.C. § 42121(b)(2)(B)(i). *See also*, 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) ("It is the Secretary's position that the complainant [in an STAA case] must prove by a 'preponderance of the evidence' that his or her protected activity ... contributed to the adverse action at issue."); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, slip op. at 8 (ARB Sept. 15, 2011) (STA).

⁷ 49 U.S.C. § 42121(b)(2)(B)(ii). *See also*, 75 Fed. Reg. at 53,550 ("[T]he employer can escape liability only by proving by clear and convincing evidence that it would have

to prevail on his claim under the STAA, Mr. Uhley must prove the following by a preponderance of the evidence: (1) that his refusal to drive in hazardous weather conditions constituted protected activity; (2) that the Respondents were aware of his protected activity; (3) that the Respondents took an adverse employment action against him by terminating his employment; and, (4) that his protected activity was a contributing factor in the Respondents' decision to terminate his employment.⁸ If Mr. Uhley satisfies this burden, the Respondents may avoid liability by demonstrating "by clear and convincing evidence" that they would have terminated Mr. Uhley's employment even if he had not refused to drive in hazardous weather conditions.⁹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the Evidence

As stated above, a number of documents were admitted into evidence at the hearing. The parties also presented several witnesses to testify in support of their respective cases. Mr. Uhley testified on his own behalf, and also presented Elizabeth Braun as a witness. The Respondents presented Ms. Braun and Timothy Braun as witnesses in support of their defense.

Respondent William F. Braun Milk Hauling, Inc. ("Braun Milk Hauling"), is a commercial motor carrier corporation registered in the State of Illinois. The company's headquarters are located in Hecker, Illinois. Tr. 5, 109. Braun Milk Hauling is a "family owned" company that has been in existence for approximately 70 years. Tr. 110, 112. The company's original business primarily involved hauling "milk from the farms." Tr. 112. In recent years, Braun Milk Hauling has expanded its hauling service into other areas of commerce, including the transportation of beer for the Anheuser-Busch Companies, Inc. ("Anheuser-Busch"). Tr. 110, 112. The company's headquarters are located approximately 35 miles from the Anheuser-Busch facilities in St. Louis, Missouri. Tr. 110.

Mr. Uhley was employed by Braun Milk Hauling as a commercial truck driver from September 2004 to June 25, 2010. Tr. 5. He testified that has driven professionally for 30 years and currently holds a commercial driver's license in the State of Illinois. Tr. 30. He provided the following account of his driving history:

I first hauled grain for my grandfather as a kid. I pulled milk tanks, I've pulled drive vans, I've pulled reefers. ... I've pulled dump trucks. Basically, I pulled flat bed. Basically, whatever is put in front of me is what I pull.

reached the same decision even in the absence of the protected activity.").

⁸ See *Salata*, ARB Nos. 08-101, 09-104, slip op. at 9; *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, slip op. at 4 (ARB June 29, 2011) (STA); *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 5 (ARB Jan. 31, 2011) (STA); *Villa v. D.M. Bowman, Inc.*, ARB No. 08-128, slip op. at 3 (ARB Aug. 31, 2010) (STA).

⁹ See *id.*

Tr. 31-32. He testified that he started his driving career in “mountain driving,” and has operated commercial vehicles in 48 states and Canada. Tr. 32. Mr. Uhley applied to work for Braun Milk Hauling in September 2004 because the company permitted him to have “extra time off to do the things I need to do.” Tr. 33. These activities included spending time with his family, hunting, fishing, and participating in a program with the Illinois Department of Conservation. Tr. 33-34. Mr. Uhley confirmed that he was able to take time off from driving for these activities throughout his employment. Tr. 35. During his employment with Braun Milk Hauling, Ms. Uhley worked primarily as a “beer driver” for shipments from Anheuser-Busch. Tr. 34. He testified that he “hailed Anheuser Busch primarily to Wisconsin and came back with empty half barrels or sometimes loads of miscellaneous freight which could be anything from potatoes to canned goods and brought them back ... to St. Louis.” Tr. 34. He confirmed that all of the beer shipments for Anheuser-Busch originated in St. Louis. Tr. 34. In 2009, Mr. Uhley earned \$26,895.00 in wages from his employment with Braun Milk Hauling. Tr. 60-61; CX 7.

Respondent Elizabeth Braun has been employed by Braun Milk Hauling since 2007. Tr. 111. Ms. Braun was initially hired as a team truck driver with her husband, Timothy Braun. Tr. 111. She held a commercial driver’s license from 2003 until August 2011. Tr. 111-112. Ms. Braun has served as the company’s “dispatch manager and safety administrator” since mid-to-late 2009. Tr. 111. She testified that her position generally involves keeping track of the company’s drivers and making sure “that the guys have loads.” Tr. 112. In her capacity as the safety administrator, Ms. Braun was hired “to audit logs because we had had problems before dealing with logs and that was what I was brought in to do was to keep tabs on all the safety aspects of the company to make sure that we were in compliance.” Tr. 113. She stated that she also sought to improve the company’s safety record and prevent the truck drivers from “doing things the simple way instead of the correct way.” Tr. 113-114. As a part of her job, Ms. Braun is on-call 24 hours per day and available to receive phone calls or text messages from the truck drivers at Braun Milk Hauling. Tr. 112, 136-137.

Ms. Braun testified regarding several employment incidents involving Mr. Uhley that occurred prior to June 2010. She testified that, in September 2009, Mr. Uhley had failed to inform her for over a week that he had broken his glasses and was unavailable for shipments. Tr. 127. In October 2009, he allegedly refused to take a load because he was watching his grandchildren. Tr. 128. The next incident occurred in March 2010, which Ms. Braun described as follows:

He was on a return load on Friday. I spoke to him Friday afternoon which was generally what would happen because Mr. Uhley liked to have the weekends off. I would speak to him on Fridays concerning what we would begin doing on Sunday afternoon, Monday. I spoke to him on Friday afternoon and told him kind of what my plan was. He was supposed to be going to Aurora, Colorado with a load out of Anheuser Busch and he told me that he wanted to go fishing on Saturday. I told him that was fine, he could go fishing, just as long as he left out early Sunday morning so that way, we could make the rest of our trip the way it was planned and then he decided to spring a birthday party on me at the last minute of his grandson’s that he wanted to go to.

Tr. 130. She testified that this required her “to reschedule the loads that I had taken from Mr. Uhley and place them on a different truck and reschedule what I had for him.” Tr. 131. Ms. Braun next described an incident where Mr. Uhley was reprimanded for having an unauthorized passenger in his company truck. Braun Milk Hauling has a policy that prohibits truck drivers from having unauthorized passengers in company vehicles. RX H. Mr. Uhley received and signed this policy, RX H, and it was in effect throughout his employment. Tr. 133. Ms. Braun testified that Mr. Uhley was verbally reprimanded by one of Braun Milk Hauling’s owners after taking his grandson in the company truck, but he did not receive any written warning. Tr. 93, 132. The final incident described by Ms. Braun occurred in May 2010. She testified that she received a complaint from one of the company’s brokers that Mr. Uhley “had a bad attitude, that he had called his customer and more or less chewed them out.” Tr. 134. She alleged that the broker informed her that “if this was the kind of behavior that we were going to have from him, he was no longer allowed to haul for them.” Tr. 134. Ms. Braun thus opined that she did not consider Mr. Uhley to be a good employee as of June 2010. Tr. 120.

Beginning on May 13, 2010, Braun Milk Hauling instituted a written policy regarding the late delivery of shipments. CX 2; RX A. In relevant part, the policy states as follows:

Due to a recent increase in loads being delivered late I am forced to implement a new policy. If a load is delivered late without prior approval from dispatch or a broker you will be charged \$50.00. There will be exceptions made to this policy for things such as mechanical problems, weather, etc. If it comes to a point where it looks as though you will need to deliver late then you need to let dispatch and your broker know as soon as possible so the appropriate arrangements can be made.

CX 2; RX A. Ms. Braun testified that she was the company official who created the written policy. Tr. 118. She alleged, however, that even before May 2010, Braun Milk Hauling had an established unwritten policy that “drivers were to promptly notify [the company] in the event they were going to be late making a delivery.” Tr. 119. She explained the importance of the notification policy as follows:

[T]he majority of the freight that we haul is what they like to call just in time freight. . . . [O]ur brokers work with the customers where we deliver to or where we pick up from to schedule appointment times that are going to be convenient for the shippers or the receivers to get this load in. If we don’t show up when we are supposed to show up or we have not notified them that we are not going to be there, it could possibly mess up their whole system if we come strolling in an hour after we’re supposed to be there and just expect them to unload us.

Tr. 135-136. Ms. Braun stated that the decision was made to implement a written policy because she “wanted something in writing due to the fact that [she] was not getting a whole lot of positive response out of [her] current drivers” from the unwritten policy. Tr. 119. She acknowledged that the late delivery policy has exceptions for delays caused by mechanical problems or bad weather. Tr. 119-120. In fact, Ms. Braun testified that the

company does not expect its drivers to continue driving through severe or dangerous weather. Tr. 191. She explained that such weather poses not only a risk to the company's drivers and other individuals on the roads, but also creates the potential for damage to the trucks and the cargo being transported. Tr. 116. Ms. Braun emphasized, however, that even if a delay is caused by the weather, a driver is still required to notify both the company and the broker of the delay. Tr. 120.

On June 21, 2010, Mr. Uhley was dispatched by Ms. Braun to pick up a shipment of beer from the Anheuser-Busch facility in St. Louis. Tr. 35, 138. He was instructed to transport the shipment to a facility in Rogers, Minnesota. Tr. 35, 138. The shipment was to be delivered by June 22, 2010. RX S. Ms. Braun testified that she had instructed Mr. Uhley to leave Braun Milk Hauling's yard in Hecker, Illinois, by 8:00 am on June 21, 2010. Tr. 141. Both Ms. Braun and Mr. Uhley acknowledged, however, that he did not leave the yard until 1:45 pm. Tr. 37, 141-142. This is consistent with Mr. Uhley's "trip log" for the shipment, which indicates that he left Hecker at 1:45 pm on June 21, 2010. RX K. Mr. Uhley testified that his departure was delayed because the company's mechanics were not "done working on the truck" until 1:45 pm. Tr. 37. Ms. Braun provided a contrary account of the delay and alleged that the truck was "available and in appropriate repair" by 8:00 am on June 21, 2010. Tr. 142. She testified that she considered terminating Mr. Uhley's employment after he failed to leave the company yard by 8:00 am. Tr. 166.

When Mr. Uhley arrived in St. Louis, the trailer containing the Anheuser-Busch shipment was waiting for him on the street. Tr. 106. Ms. Braun testified that she had "authorized our mechanic to go pull it out the day before and leave it on the street for Mr. Uhley to pick up." Tr. 106. After picking up the beer shipment during the afternoon of June 21, 2010, Mr. Uhley drove for three (3) hours before stopping in Wayland, Missouri, at 5:00 pm. Tr. 37; RX K. Mr. Uhley then went "off duty" for 10 hours, as required by the regulations of the Department of Transportation ("DOT"). Tr. 37; RX K. He provided the following explanation for stopping in Wayland after only three hours of driving:

[T]he load didn't deliver until the next morning and if I had continued along, I would have gotten to Rogers, Minnesota very early in the morning and there is nowhere to park a tractor trailer out there at that time.

Tr. 37. He testified that he could not park at the facility in Rogers, Minnesota, because it was gated at night. Tr. 38. Mr. Uhley acknowledged, however, that there were other available locations for him to stop for his 10-hour break between Wayland and Rogers. Tr. 71, 83-84. Nevertheless, he opined that it is difficult to find adequate parking for a tractor-trailer after 7:00 pm. Tr. 83-84.

Mr. Uhley resumed driving at 3:00 am on June 22, 2010, and arrived at the facility in Rogers at approximately 9:45 am. Tr. 38; RX K. He then unloaded the shipment at the facility from 9:45 until 10:30. Tr. 39; RX K. During this unloading period, Mr. Uhley communicated with Ms. Braun and was dispatched to pick up a new shipment in Shakopee, Minnesota, for Koch Logistics. Tr. 39, 150-151, 229. He testified that he did not know about this second shipment when he left the Braun Milk Hauling yard on June 21, 2010. Tr. 39, 229. Ms. Braun alleged, however, that she had informed

Mr. Uhley before he left the company yard that he would be making a “return load” after delivering the shipment to Rogers. Tr. 143. She testified that she had also told him that the shipment was for delivery to Mattoon, Illinois. Tr. 143. She opined that the “latest possible time” that Mr. Uhley would have known about the new shipment was when he communicated with her from Rogers. Tr. 144. Mr. Uhley arrived in Shakopee at 11:15 am on June 22, 2010, and finished loading the new shipment at noon. Tr. 40; RX K.

According to a “Carrier Rate Confirmation” from Koch Logistics, the new shipment was due for delivery in Mattoon at 6:30 am on June 23, 2010. RX P. Mr. Uhley testified that he knew at the outset that, even in perfect driving conditions, he would be unable to make a timely delivery of the shipment to Mattoon. Tr. 49. He explained that the drive from Shakopee to Mattoon is 580 miles and takes about “11 hours itself.” Tr. 49-50. He opined that it is not possible to drive 580 miles in 11 hours, even without taking the required 10-hour break. Tr. 50. Mr. Uhley thus testified that the shipment was “overbooked” from the start and did not provide him “enough time to take the [10-hour] break and do the drive.” Tr. 49. He also alleged that he notified Ms. Braun of the timeliness issue when he spoke with her on the morning of June 22, 2010, but she told him to “run it” anyway. Tr. 230. Ms. Braun testified, however, that Mr. Uhley never expressed this concern to her when she provided him with the delivery information on June 22, 2010. Tr. 150-152, 233-234. In addition, she opined that it was possible for Mr. Uhley to timely deliver the shipment to Mattoon. Tr. 140-141. She provided an extensive discussion of her own calculations regarding the time required for the shipment. Tr. 140, 186, 200-203, 205-206; RX L.

Despite his misgivings, Mr. Uhley departed Shakopee at 12:00 pm on June 22, 2010, and drove for approximately 2.50 hours before stopping in Stewartville, Minnesota, for a 10-hour break. Tr. 41; RX K. Thus, Mr. Uhley drove for a total of 9.75 hours from Wayland, Missouri, to Stewartville, Minnesota. Tr. 41; RX K. He testified that he stopped in Stewartville because this was the best spot to park a truck. Tr. 41. More specifically, he noted that he would have experienced difficulty finding a place to park if he had continued driving past Stewartville for the full 11 hours that are permitted under DOT regulations. Tr. 42. Ms. Braun testified that she did not communicate with Mr. Uhley during his drive to Stewartville and was unaware that he was going to be late making the delivery to Mattoon. Tr. 152-153. After stopping in Stewartville at 2:30 pm on June 22, 2010, Mr. Uhley was “off duty” in his sleeper bunk until 12:30 am on June 23, 2010. Tr. 44-45; RX K.

When Mr. Uhley awoke at 12:30 am on June 23, 2010, he encountered severe weather in Stewartville. Tr. 45. He described the weather conditions as follows:

[I]t was raining very hard. The winds were blowing 60 to 80 mile an hour. There was heavy lightening [sic]. You couldn't hardly see past the end of the hood of the truck. The rain was very, very hard.

Tr. 45. He testified that he also heard weather reports on the radio, which warned of “very high winds, 60 to 80 miles an hour, tornados, heavy lightening [sic], heavy flash flooding, heavy rain.” Tr. 45-46. Despite this weather, Mr. Uhley attempted to continue the drive to Mattoon, Illinois. Tr. 46. While his trip log indicates that he remained in Stewartville until 8:30 am on June 23, 2010, RX K, Mr. Uhley admitted that he falsified

this portion of the log. Tr. 62-63, 77. Instead, he testified that he continued the drive with the belief that “if [he] moved slowly and judiciously, [he’d] be able to squeeze it through” the weather. Tr. 46. He stated, however, that the weather progressively worsened after he left Stewartville. Tr. 46. Mr. Uhley drove approximately 30 miles until he reached Chester, Iowa. Tr. 47, 76. He testified that a “river was over its banks and overflowing the highway” when he arrived in Chester. Tr. 47. At this point, he decided to discontinue driving in Chester because “it was unsafe to continue operating the vehicle.” Tr. 50. More specifically, he described the conditions as follows:

I was looking out in order to make it down the road. I was having to look out of the driver’s side window at the delineators on the other side of the road. There were reflectors on a stick and that was the only way I was able to see where the truck was in relationship to the road to continue down the road.

Tr. 47. Mr. Uhley thus opined that “it was far too dangerous to continue” driving past Chester. Tr. 48, 50. He parked his truck in a convenience store parking lot to wait for the weather to improve. Tr. 49.

After stopping in Chester, Mr. Uhley attempted to notify Ms. Braun of the weather situation. Tr. 50. He testified, however, that he was unable to get cell phone service in the area. Tr. 51, 80. While the convenience store had a pay phone, the store was not open during the storm. Tr. 51. Mr. Uhley remained in Chester for approximately five (5) hours before determining that the roads were in a “travelable condition.” Tr. 51. Before leaving Chester, he again attempted to contact Ms. Braun, but was unable to obtain cell phone service. Tr. 52. Mr. Uhley resumed driving at 8:30 am on June 23, 2010, which was two hours after his shipment was due for delivery in Mattoon, Illinois. Tr. 160; RX K. After driving for approximately 10 minutes, he succeeded in contacting Ms. Braun via cell phone. Tr. 52-53. Ms. Braun confirmed that she spoke with Mr. Uhley between 8:30 and 8:45 on the morning of June 23, 2010. Tr. 153-154, 160, 175. During this conversation, Mr. Uhley explained the weather situation to Ms. Braun and informed her that he was unable to make a timely delivery to Mattoon. Tr. 53-54, 153-154. While accepting Mr. Uhley’s description of the weather as true, Tr. 115, Ms. Braun indicated that she was surprised to learn that he was only in Chester as of 8:30 am. Tr. 164, 199-200. She also emphasized that Mr. Uhley did not notify her that he was making a late delivery to Mattoon until *after* he had encountered the severe weather. Tr. 150-153, 165-166, 233-234. After speaking with Mr. Uhley, Ms. Braun contacted Braun Milk Hauling’s broker for the shipment, who did not give any indication that Mr. Uhley had contacted them about the delay. Tr. 161.

Mr. Uhley drove for approximately 8.50 hours before arriving in Mattoon at 8:00 pm on June 23, 2010. Tr. 55; RX K. According to his trip log, Mr. Uhley was off duty for two (2) hours in Wayland, Missouri, from 2:30 pm until 4:30 pm. RX K. He testified that the receiving department was closed when he arrived in Mattoon. Tr. 55. He therefore went off duty in his sleeper berth for 10 hours until 7:00 am on June 24, 2010. RX K. Mr. Uhley then delivered the shipment to the facility in Mattoon at approximately 7:00 am. Tr. 55, 154. The trip log reflects that he finished unloading the shipment by 7:45 am and then proceeded back to Braun Milk Hauling’s yard. RX K. Mr. Uhley

arrived at the yard in Hecker, Illinois, at noon on June 24, 2010. RX K. He returned the company truck and went home. Tr. 56.

On June 25, 2010, Mr. Uhley was terminated from his employment with Braun Milk Hauling. Tr. 56. He testified that he was terminated when he “went to work to pick up [his] paycheck at which point [he] was called into the office and told that [he] was fired.” Tr. 56. Ms. Braun was the company official who made the decision to terminate Mr. Uhley and informed him of the decision. Tr. 56, 90, 163. She testified that she made the decision “[s]hortly after talking to him on the morning of the 23rd.” Tr. 163. Ms. Braun testified that the main reason for terminating Mr. Uhley was his “failure to call me and make me aware that he was not going to make that delivery on time so that I could take my steps needed to ... contact the broker within a timely manner.” Tr. 163. She denied, however, that Mr. Uhley was fired for his refusal to drive in dangerous weather or that this refusal was a factor in his termination. Tr. 115. Ms. Braun provided conflicting testimony regarding other reasons for her decision to terminate Mr. Uhley’s employment with Braun Milk Hauling. She initially testified that none of the following incidents factored into her decision: (1) Mr. Uhley’s falsification of his log book; (2) Mr. Uhley’s rejection of shipments to spend time with his grandchildren; or, (3) Mr. Uhley’s failure to timely notify her that he had broken his glasses and was unavailable for shipments. Tr. 90. She subsequently stated, however, that Mr. Uhley’s rejection of shipments was “part of the reason that he was terminated.” Tr. 176. Ms. Braun also testified that Mr. Uhley’s incident involving an unauthorized passenger factored into her decision to terminate his employment. Tr. 91. She reiterated, however, that the main reason that she fired Mr. Uhley was his failure to “timely notify me of [a] delay in delivering his load.” Tr. 117.

Ms. Braun testified that she attempted to inform Mr. Uhley of the reasons for his termination, but one of the company owners “came up the stairs and told Mr. Uhley that he needed to leave because he was being loud and very rude.” Tr. 168. Mr. Uhley admitted that he was “angry, depressed, [and] confused” at the time of his termination on June 25, 2010. Tr. 56. He explained, however, that he was upset because “I had just lost my job and I’m supporting three other people along with myself and now I have no way to support my family.” Tr. 57. Mr. Uhley also acknowledged that he had lost his cool. Tr. 228. He alleged, however, that this was because Braun Milk Hauling withheld \$50.00 from his final paycheck as a fine for the late delivery to Mattoon. Tr. 228-229. In response, Ms. Braun denied that Mr. Uhley had been fined \$50.00. Tr. 232.

Following his termination, Mr. Uhley was unemployed for six to seven months. Tr. 57. He testified that he “applied to a lot of places, everywhere, lawn care services” and “even applied to McDonald’s trying to just have some income coming into the house to help take care of the kids.” Tr. 63. He stated that he received unemployment compensation, but was required to sell off personal property to support his daughter and granddaughter. Tr. 63-64. He was also forced to obtain food through hunting and fishing. Tr. 64. Mr. Uhley eventually succeeded in gaining employment as a truck driver with Mideast Transportation. Tr. 57. He testified that he quit after one week because “the equipment was very unsafe and they were requiring us to operate it even though it was out of service equipment.” Tr. 57. He earned approximately \$580.00 from Mideast Transportation. Tr. 57. Mr. Uhley was unemployed for an additional two to three weeks before obtaining a position with J.B. Hunt. Tr. 58. He worked as a truck driver “pulling

Anheuser Busch loads” for J.B. Hunt. Tr. 58. He was fired from his position after three weeks for being unsafe and having untied shoelaces. Tr. 58. He earned a total of \$1,930.39 during his employment with J.B. Hunt. Tr. 59; CX 9-3. At the time of the hearing, Mr. Uhley was driving a truck for Tri-National, Inc., and was employed through a staffing agency named RMR Driver Services. Tr. 61; CX 6; CX 9-10. A pay stub dated September 29, 2011, indicates that Mr. Uhley had earned \$9,043.50 in total gross earnings in 2011. CX 6; CX 9-10.

Mr. Uhley testified that he has also experienced depression and difficulty sleeping since his termination. Tr. 63-64. He stated that he was depressed “for the entire time that I was unemployed” and the situation “just dragged me down.” Tr. 63. He also alleged that he continues to have difficulty sleeping. Tr. 64. Mr. Uhley acknowledged, however, that he had trouble sleeping before the events of June 2010. Tr. 70. He also admitted that he has not sought medical treatment for any emotional or mental issues arising out of his termination. Tr. 70. He explained, however, that “a little depression is a normal thing” and he did not feel disabled by it. Tr. 85. In addition, he explained that he “had things [he] had to get done.” Tr. 85. Mr. Uhley reiterated, however, that he “felt bad ... felt sad [and] felt humiliated” by his termination. Tr. 85.

On September 24, 2010, Mr. Uhley filed a complaint with OSHA, where he alleged that the Respondents terminated his employment because he made a late shipment delivery after refusing to drive his truck during hazardous weather conditions. CX 7. He alleged that his refusal to drive during severe weather constitutes protected activity under the STAA. CX 7. Mr. Uhley seeks the following relief: (1) reinstatement to his prior position with Braun Milk Hauling; (2) an award of back pay for lost wages; (3) pre- and post-judgment interest on his back pay; (4) an award of compensatory damages for emotional distress and mental pain; (5) punitive damages; (6) an award of attorney’s fees and costs; and, (7) an order requiring the Respondents to abate their violation of the STAA. Tr. 68-69; CX 7.

II. Liability Under the STAA

In order to prevail on his claim under the STAA, Mr. Uhley must initially make a *prima facie* showing that his protected activity was a contributing factor in his termination by the Respondents.¹⁰ If Mr. Uhley satisfies his *prima facie* case by a “preponderance of the evidence,” the burden shifts to the Respondents to demonstrate by “clear and convincing evidence” that they would have terminated Mr. Uhley even absent the protected activity.¹¹ For the reasons discussed below, I find that Mr. Uhley has established that his refusal to drive during hazardous weather was a contributing

¹⁰ 49 U.S.C. § 42121(b)(2)(B)(i). *See also*, 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) (“It is the Secretary’s position that the complainant [in an STAA case] must prove by a ‘preponderance of the evidence’ that his or her protected activity ... contributed to the adverse action at issue.”); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, slip op. at 9 (ARB Sept. 15, 2011) (STA).

¹¹ 49 U.S.C. § 42121(b)(2)(B)(ii). *See also* 75 Fed. Reg. at 53,550; *Salata*, ARB Nos. 08-101, 09-104, slip op. at 9.

factor to his termination by the Respondents. In addition, I find that the Respondents have failed to present “clear and convincing evidence” that Mr. Uhley would have been fired even absent his protected activity. Accordingly, I find that the Respondents violated the STAA.

A. Mr. Uhley Has Established His *Prima Facie* Case by a “Preponderance of the Evidence”

To satisfy his *prima facie* burden under the STAA, Mr. Uhley must prove four elements by a “preponderance of the evidence.” First, he must show that his refusal to drive during hazardous weather constitutes protected activity.¹² Second, he must establish that the Respondents were aware of his protected activity.¹³ Third, he must show that the Respondents took an adverse employment action against him.¹⁴ Finally, he must establish that his refusal to drive during hazardous weather was a “contributing factor” in the Respondents’ adverse employment action.¹⁵

1. Protected Activity

Mr. Uhley must first establish that he engaged in protected activity within meaning of the STAA. In relevant part, the STAA prohibits an employer from retaliating against an employee who refuses to operate a commercial motor vehicle because “the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security.”¹⁶ This is known as the “actual violation” provision of the STAA. The statute similarly prohibits retaliation by an employer where an employee refuses to operate a vehicle because “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.”¹⁷ This is known as the “reasonable apprehension” provision of the STAA.

As to the “actual violation” provision of the STAA, the regulations of the Department of Transportation (“DOT”) expressly address situations where a commercial motor vehicle operator encounters hazardous weather. In relevant part, the regulations provide:

Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, *rain*, dust, or smoke, *adversely affect visibility or traction*.
... If conditions become sufficiently dangerous, the operation of the

¹² *Salata*, ARB Nos. 08-101, 09-104, slip op. at 9; *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, slip op. at 4 (ARB June 29, 2011) (STA); *Williams v. Domino’s Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (STA); *Villa v. D.M. Bowman, Inc.*, ARB No. 08-128, slip op. at 3 (ARB Aug. 31, 2010) (STA).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 49 U.S.C. § 31105(a)(1)(B)(i).

¹⁷ 49 U.S.C. § 31105(a)(1)(B)(ii).

commercial motor vehicle *shall be discontinued and shall not be resumed* until the commercial motor vehicle can be safely operated.¹⁸

Thus, the DOT regulations prohibit a driver from continuing to operate his vehicle if weather conditions become hazardous. If a driver operates his vehicle during hazardous weather, he necessarily violates the DOT regulations.

In this case, Mr. Uhley encountered severe weather while en route to Mattoon, Illinois. He described the following weather conditions:

[I]t was raining very hard. The winds were blowing 60 to 80 mile an hour. There was heavy lightening [sic]. You couldn't hardly see past the end of the hood of the truck. The rain was very, very hard.

Tr. 45. He testified that he also heard weather reports on the radio, which warned of "very high winds, 60 to 80 miles an hour, tornados, heavy lightening [sic], heavy flash flooding, heavy rain." Tr. 45-46. Despite these conditions, Mr. Uhley attempted to continue driving his truck. After reaching Chester, Iowa, however, he encountered a river that was "over its banks and overflowing the highway." Tr. 47. At this point, Mr. Uhley decided to discontinue driving in Chester because "it was unsafe to continue operating the vehicle." Tr. 50. Ms. Braun testified that she accepted Mr. Uhley's weather description as true. Tr. 115. Based on this description, I find that the weather conditions encountered by Mr. Uhley became "sufficiently dangerous" so as to require him to cease driving when he reached Chester. Accordingly, I find that continuing to drive past Chester would have resulted in Mr. Uhley's violation of "a regulation ... related to commercial motor vehicle safety, health, or security."¹⁹ For this reason, I conclude that Mr. Uhley engaged in protected activity under the "actual violation" provision of the STAA.

As stated above, the STAA also protects a driver who refuses to operate a commercial motor vehicle because he has a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition."²⁰ An employee's apprehension is only reasonable, however, 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."²¹ In addition, the employee must have "sought from the employer, and been unable to obtain, correction of the hazardous safety or security conditions."²²

In this case, Mr. Uhley provided a thorough description of the weather conditions during the early morning hours of June 23, 2010. As stated above, these conditions included "very high winds, 60 to 80 miles an hour, tornados, heavy lightening [sic],

¹⁸ 49 C.F.R. § 392.14 (2011) (emphasis added).

¹⁹ 49 U.S.C. § 31105(a)(1)(B)(i).

²⁰ 49 U.S.C. § 31105(a)(1)(B)(ii).

²¹ 29 C.F.R. § 1978.102(f).

²² *Id.*

heavy flash flooding, heavy rain.” Tr. 45-46. As he approached Chester, Mr. Uhley encountered the following road conditions:

I was looking out in order to make it down the road. I was having to look out of the driver’s side window at the delineators on the other side of the road. There were reflectors on a stick and that was the only way I was able to see where the truck was in relationship to the road to continue down the road.

Tr. 47. He thus opined that “it was far too dangerous to continue” driving past Chester. Tr. 48, 50. At the hearing, Ms. Braun testified that she accepted Mr. Uhley’s description of the weather and road conditions as true. Tr. 115. Based on this description, I find that a reasonable truck driver in Mr. Uhley’s position would have concluded that the weather was too hazardous to continue driving without causing a “real danger of accident, injury or serious impairment to health.”²³ I therefore find that Mr. Uhley’s apprehension of the hazardous weather conditions was reasonable.

I also find that Mr. Uhley sought, but was unable to obtain, a correction of the hazardous weather condition from the Respondents. Mr. Uhley testified that he attempted to contact Ms. Braun after stopping in Chester, but was unable to reach her due to a lack of cell phone service. Tr. 50-52, 80. He was not able to communicate with Ms. Braun until approximately 8:45 am on June 23, 2010, which was after he had departed Chester. Tr. 52-53, 153-154, 160, 175. In addition, none of the Respondents were in a position to correct the severe weather affecting the area between Stewartville, Minnesota, and Chester, Iowa.²⁴ I therefore find that Mr. Uhley sought, but was unable to obtain, a correction of the severe weather on June 23, 2010. Accordingly, I conclude that Mr. Uhley engaged in protected activity under the “reasonable apprehension” provision of the STAA.

For the reasons discussed above, I find that Mr. Uhley’s refusal to continue driving during severe weather constitutes protected activity under both the “actual violation” and “reasonable apprehension” provisions of the STAA. Mr. Uhley would have violated DOT regulations by continuing to drive in the hazardous weather. Even absent the regulations, he had a “reasonable apprehension” that driving in the hazardous weather posed a risk of serious injury to himself or the public. Accordingly, I conclude that Mr. Uhley’s refusal to drive during severe weather on June 23, 2010, constitutes protected activity under the STAA.

2. Employer’s Knowledge of Protected Activity

Mr. Uhley must next establish that the Respondents were aware of his protected activity. As discussed above, the testimony clearly shows that Mr. Uhley notified Ms. Braun of his protected activity at approximately 8:45 am on June 23, 2010. Tr. 52-53, 153-154, 160, 175. More specifically, he explained the weather situation to Ms. Braun

²³ *Id.*

²⁴ *Cf. Ferguson v. New Prime, Inc.*, ARB No. 10-075, slip op. at 5 n.2 (ARB Aug. 31, 2011) (recognizing that an employer is not in a position to correct the weather).

and informed her that he was unable to make a timely delivery of the shipment to Mattoon, Illinois. Tr. 53-54, 153-154. Ms. Braun did not dispute Mr. Uhley's description of the weather, Tr. 151, and acknowledged that she did not know that Mr. Uhley would be late to Mattoon until *after* he had encountered the severe weather. Tr. 150-153, 165-166, 233-234. Furthermore, Ms. Braun identified herself as the company official who made the decision to terminate Mr. Uhley's employment. Tr. 56, 90, 163. For all of these reasons, I find that the Respondents became aware of Mr. Uhley's protected activity on the morning of June 23, 2010.

3. Adverse Employment Action

The third element that Mr. Uhley must establish for his *prima facie* case is that the Respondents took an adverse employment action against him. The STAA expressly provides that a "person may not *discharge* an employee" for engaging in protected conduct.²⁵ The testimony clearly shows, and the Respondents do not dispute, that Mr. Uhley was terminated from his employment with Braun Milk Hauling on June 25, 2010. Tr. 56, 90, 163. Mr. Uhley has not alleged that he suffered any other adverse actions. Therefore, I find that Mr. Uhley suffered an "adverse employment action" when Ms. Braun terminated his employment with Braun Milk Hauling.

4. Protected Activity as a "Contributing Factor" to the Adverse Employment Action

The final element that Mr. Uhley must establish to satisfy his *prima facie* case is that his refusal to drive during hazardous weather conditions was a "contributing factor" in the Respondents' decision to terminate his employment. A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the [adverse employment] decision."²⁶ A complainant may satisfy this element by providing either direct or indirect proof of contribution.²⁷ Direct evidence is "smoking gun" evidence that "conclusively links the protected activity and the adverse action and does not rely upon inference."²⁸ If the complainant does not produce direct evidence of contribution, "he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment."²⁹ In proving that protected activity was a contributing factor in the adverse employment action, "a complainant need not necessarily prove that the [employer's] articulated reason was a pretext in order to prevail, because a complainant can alternatively prevail by showing that the [employer's] reason, while true, is only one of the reasons for its conduct, and that another reason was a prohibited one."³⁰

²⁵ 49 U.S.C. § 31105(a)(1) (emphasis added).

²⁶ *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (STA) (quoting *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, slip op. at 4 (ARB Jan. 30, 2008) (AIR)).

²⁷ *Id.*

²⁸ *Id.* (citing *Sievers*, ARB No. 05-109, slip op. at 4-5).

²⁹ *Id.*

³⁰ 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) (internal quotation marks omitted).

In the present case, Mr. Uhley presents several arguments in support of his allegation that he was terminated by the Respondents for refusing to drive his company truck during hazardous weather conditions on June 23, 2010. Most importantly, however, he contends that the “temporal proximity” between his protected activity and his termination supports an inference of discrimination. Complainant’s Brief at 13-14. It is well-established that one of the “common sources of indirect evidence is ‘temporal proximity’ between the protected activity and the adverse action.”³¹ While such proximity is not dispositive, “the closer the temporal proximity is, the stronger the inference of a causal connection.”³² A close temporal proximity may alone be sufficient to establish a causal connection in whistleblower cases.³³

In this case, I find that there are two different temporal proximities that support a finding of causation. The testimony initially establishes that Mr. Uhley was *actually* terminated two (2) days after reporting his protected conduct to Ms. Braun. More specifically, he informed Ms. Braun on the morning of June 23, 2010, that he had stopped driving because of severe weather. Tr. 52-53, 153-154, 160, 175. He was then terminated from his employment with Braun Milk Hauling on June 25, 2010. Tr. 56, 90, 163. The Administrative Review Board has repeatedly found that a temporal proximity of two days is sufficient to establish that protected activity was a “contributing factor” in an adverse employment action.³⁴ Accordingly, I find that the close temporal proximity between Mr. Uhley’s protected conduct and his termination strongly supports the conclusion that such conduct was a “contributing factor” in his termination by the Respondents.

The testimony in this case also establishes that the *decision* to terminate Mr. Uhley’s employment was made shortly after Ms. Braun learned of his protected conduct. Ms. Braun testified that she made the termination decision “[s]hortly after talking to [Mr. Uhley] on the morning of the 23rd.” Tr. 163. She alleged that the main reason for terminating Mr. Uhley’s employment was his “failure to call me and make me aware that he was not going to make [the Mattoon, Illinois] delivery on time so that I could take my steps needed to ... contact the broker within a timely manner.” Tr. 163. Ms. Braun also admitted, however, that she did not learn that the Mattoon delivery was going to be late until the morning *after* Mr. Uhley had encountered the hazardous weather in Chester, Iowa. Tr. 150-153, 165-166, 233-234. As stated above, Mr. Uhley was forced to stop in Chester because of hazardous weather during the early morning hours of June 23, 2010. Tr. 47-50. In addition, he stated that he was unable to communicate with Ms. Braun while in Chester due to a lack of cell phone service. Tr. 50-52, 80. When he finally did communicate with Ms. Braun at 8:45 am on June 23, 2010, he explained the weather situation *and* informed her that he would be late to Mattoon. Tr. 53-54, 153-

³¹ *Warren v. Custom Organics*, ARB No. 10-092, slip op. at 11 (ARB Feb. 29, 2012) (STA) (citing *Reiss v. Nucor Corp.*, ARB No. 08-137 (ARB Nov. 30, 2010) (STA)).

³² *Id.*

³³ *See Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, slip op. at 12 (ARB Mar. 28, 2012) (SOX) (citing *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, slip op. at 8 (ARB Dec. 30, 2004) (AIR), *aff’d sub nom. Vieques Air Link, Inc. v. U.S. Dep’t of Labor*, 437 F.3d 102, 109 (1st Cir. 2006)).

³⁴ *See Reiss*, ARB No. 08-137, slip op. at 5; *Negron*, ARB No. 04-021, slip op. at 8.

154. Ms. Braun admitted that, until this conversation, she was under the impression that Mr. Uhley would be making a timely delivery to Mattoon. Tr. 140-141. This testimony thus establishes that Ms. Braun first learned of the late delivery *at the same time as* when she received notice of Mr. Uhley's protected activity. As stated above, Ms. Braun made the termination decision "[s]hortly after talking to [Mr. Uhley] on the morning of the 23rd." Tr. 163. It necessarily follows that she made the decision shortly after learning of Mr. Uhley's protected activity. Accordingly, I find that the close temporal proximity between Ms. Braun's awareness of the protected activity and her termination decision strongly supports the conclusion that Mr. Uhley's protected conduct was a "contributing factor" in his termination.

In summary, I find that the close temporal proximity between Mr. Uhley's protected activity and his termination by the Respondents strongly supports a finding of causation in this case. I also find that the close proximity between Ms. Braun's awareness of the protected conduct and her decision to terminate Mr. Uhley lends further support to the conclusion that his protected conduct was a "contributing factor" in his termination. For these reasons, I conclude that Mr. Uhley has established that his refusal to drive during hazardous weather conditions was a "contributing factor" in his termination by the Respondents.

5. Conclusion Regarding the *Prima Facie* Case

For the reasons discussed above, I find that Mr. Uhley has established by a "preponderance of the evidence" that he engaged in protected conduct under the STAA when he refused to drive his truck during hazardous weather conditions on June 23, 2010. I also find that Mr. Uhley has shown that the Respondents were aware of this protected conduct and took an "adverse employment action" against him by terminating his employment with Braun Milk Hauling. Furthermore, I find that the close temporal proximity between Mr. Uhley's protected activity, Ms. Braun's termination decision and Mr. Uhley's actual termination, is sufficient to show that his refusal to drive during hazardous weather conditions was a "contributing factor" in his termination by the Respondents. Accordingly, I conclude that Mr. Uhley has established his *prima facie* case for retaliation under the STAA.

B. The Respondents Have Failed to Present "Clear and Convincing Evidence" That They Would Have Fired Mr. Uhley Regardless of His Protected Activity

Because Mr. Uhley has made a *prima facie* showing of retaliation under the STAA, the Respondents may only avoid liability if they show "by clear and convincing evidence" that they would have taken the same adverse employment action regardless of the protected conduct.³⁵ "Clear and convincing evidence" is "[e]vidence indicating that

³⁵ 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1978.104(e)(4); 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010). *See also Warren v. Custom Organics*, ARB No. 10-092, slip op. at 12 (ARB Feb. 29, 2012) (STA); *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, slip op. at 9 (ARB Sept. 15, 2011) (STA); *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011) (STA).

the thing to be proved is highly probable or reasonably certain.”³⁶ This is a higher burden of proof than the “preponderance of the evidence” standard.³⁷

In the present case, the Respondents argue that there was a “legitimate, articulated business reason” for terminating Mr. Uhley’s employment. Respondents’ Brief at 11. More specifically, they contend that Mr. Uhley violated “the Company’s policy requiring the driver to notify Braun and the broker as soon as the driver knows that delivery will be late.” Respondents’ Brief at 11. In addition, the Respondents contend that Mr. Uhley “knew well before the protected activity that he was going to be late, so ... he would have been terminated anyway.” Respondents’ Brief at 11. I initially note that Mr. Uhley’s personal beliefs regarding the timeliness of his delivery are irrelevant to the present situation. Instead, the proper focus is on what Ms. Braun, as the decision-maker in Mr. Uhley’s termination, knew when she decided to terminate his employment. Ms. Braun testified that the main reason for terminating Mr. Uhley’s employment was his “failure to call me and make me aware that he was not going to make [the Mattoon, Illinois] delivery on time so that I could take my steps needed to ... contact the broker within a timely manner.” Tr. 163. As discussed above, however, the testimony clearly shows that Ms. Braun did not learn of the late delivery until *after* Mr. Uhley had already engaged in his protected activity. See Tr. 150-153, 165-166, 233-234. In fact, Ms. Braun learned of both the late delivery and Mr. Uhley’s protected activity *at the same time* on June 23, 2010. See Tr. 53-54, 153-154. I have already found that this close temporal proximity establishes a causal connection between Mr. Uhley’s protected conduct and his termination by the Respondents. Furthermore, while the Respondents contend that Mr. Uhley knew that he would have been late anyway, Ms. Braun admitted that until she spoke with Mr. Uhley on June 23, 2010, she was under the impression that he would be making a timely delivery to Mattoon. Tr. 140-141. Accordingly, I find that the evidence is insufficient to show that it is “highly probable or reasonably certain” that, regardless of his protected activity, Mr. Uhley’s failure to give timely notice of his delivery would have resulted in his termination by the Respondents.

At the hearing, Ms. Braun discussed her other alleged reasons for terminating Mr. Uhley’s employment. She initially testified that Mr. Uhley’s rejection of shipments to go fishing and spend time with his grandchildren were “part of the reason he was terminated.” Tr. 176. During examination by Mr. Uhley’s counsel, however, she expressly stated that his rejection of shipments did not factor into her decision to terminate his employment. Tr. 90. This inconsistent testimony is not sufficient to meet the “clear and convincing” standard of proof. Ms. Braun also testified that an incident involving Mr. Uhley’s transporting of an unauthorized passenger in his truck was a factor in his termination. Tr. 91. She subsequently admitted, however, that Mr. Uhley had not received any written warning for this incident, but instead was verbally reprimanded by one of Braun Milk Hauling’s owners. Tr. 93, 132. Furthermore, Ms. Braun was adamant that the main reason for her decision to terminate Mr. Uhley was his failure to give timely notice of his late delivery to Mattoon, Illinois. Tr. 117, 163. Based on Ms. Braun’s testimony, I find that the evidence does not establish that it is

³⁶ *Williams*, ARB No. 09-092, slip op. at 6 (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 14 (ARB Jan. 31, 2006) (AIR)).

³⁷ 75 Fed. Reg. at 53,550.

“highly probable or reasonably certain” that Mr. Uhley would have been terminated for rejecting shipments or transporting an unauthorized passenger.

In summary, I find that the evidence in the record is insufficient to show that it is “highly probable or reasonably certain” that the Respondents would have terminated Mr. Uhley’s employment even absent his protected activity. More specifically, the testimony establishes that Ms. Braun learned of the late delivery and the protected activity at the same time. In addition, Ms. Braun has provided inconsistent testimony regarding other incidents that allegedly contributed to her decision to terminate Mr. Uhley. Accordingly, I find that the Respondents have failed to present “clear and convincing evidence” that they would have terminated Mr. Uhley’s employment even absent his refusal to drive his truck during hazardous weather conditions on June 23, 2010. I therefore conclude that the Respondents cannot avoid liability for retaliation under the STAA.

C. Conclusion Regarding Liability

For the reasons discussed above, I find that Mr. Uhley has established by a “preponderance of the evidence” that his refusal to operate his commercial motor vehicle during hazardous weather conditions on June 23, 2010, constitutes protected activity under the STAA and was a “contributing factor” in his termination by the Respondents. In addition, I find that the Respondents have failed to present “clear and convincing” evidence that they would have fired Mr. Uhley even absent his protected activity. Accordingly, I conclude that the Respondents violated the STAA when they terminated Mr. Uhley’s employment on June 25, 2010.

III. Individual Liability of Respondents Elizabeth Braun, John Doe, and Mary Roe

Before determining the remedies available in this case, I must determine whether Respondents Elizabeth Braun, John Doe, and Mary Roe violated the STAA in their capacities as individuals, or are personally liable to Mr. Uhley for violation of the STAA. Mr. Uhley never identified any individuals other than Elizabeth Braun as persons who should be held personally liable. In his closing brief, Mr. Uhley argues that because Ms. Braun “is the person who made the decision to discharge, she is a proper party to this proceeding and liability should be imposed upon her.” Complainant’s Brief at 19. In relevant part, the STAA defines an “employer” as a “person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce.”³⁸ The regulations define a “person” to include “one or more individuals.”³⁹ Thus, the express language of the STAA allows personal liability to be imposed on a “person” who also meets the definition of an “employer” under the statute.⁴⁰

³⁸ 49 U.S.C. § 31101(3)(A).

³⁹ 29 C.F.R. § 1978.101(k).

⁴⁰ *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033, slip op. at 8 (ARB Sept. 28, 2010) (STA).

In this case, the testimony establishes that Ms. Braun served as Braun Milk Hauling’s “dispatch manager and safety administrator” at the time of Mr. Uhley’s termination. Tr. 111. Her job duties involved keeping track of shipments and company drivers, as well as auditing each driver’s trip logs. Tr. 112-114. Ms. Braun acknowledged that she was the company official who made the decision to terminate Mr. Uhley’s employment. Tr. 56, 90, 163. There is no evidence, however, that Ms. Braun is an owner of Braun Milk Hauling. There is also no evidence that she “owns or leases a commercial motor vehicle in connection with” a business affecting commerce, or “assigns an employee to operate the vehicle in commerce.” Instead, Ms. Braun testified that she was initially hired as an employee of Braun Milk Hauling in 2007, where she served as a team truck driver with her husband. Tr. 111. She has been employed as dispatch manager and safety administrator since 2009. Tr. 111. Thus, while qualifying as a “person” under the STAA, Ms. Braun does not meet the statutory definition of an “employer.” Accordingly, I find that Ms. Braun did not violate the STAA in her capacity as an individual, and is not personally liable to Mr. Uhley for Braun Milk Hauling’s violation of the STAA. Nor does the evidence establish that any other person violated the STAA in an individual capacity, or is personally liable to Mr. Uhley.

I find that Braun Milk Hauling is the only “person” who is also an “employer” responsible for violating the STAA by firing Mr. Uhley. Respondents Elizabeth Braun, John Doe, and Mary Roe did not violate the STAA in their individual capacities, and are not personally liable to Mr. Uhley. Rather, Mr. Uhley must look to Braun Milk Hauling for his remedies.

IV. Remedies Under the STAA

Where a respondent is found to have violated the STAA, the statute and regulations provide several remedies for the affected employee. The statute and regulations generally provide that a respondent must “take affirmative action to abate the violation.”⁴¹ The available remedies include: (1) reinstatement of the employee to his former position; (2) payment of compensatory damages, including back-pay and compensation for “any special damages sustained as a result of the discrimination;” and, (3) payment of punitive damages.⁴² The statute also authorizes an award of reasonable attorney’s fees and other costs incurred by the complainant in bringing the complaint.⁴³

A. Reinstatement

Reinstatement to a complainant’s former position with the same pay, terms, and privileges of employment is an automatic remedy under the STAA.⁴⁴ Reinstatement

⁴¹ 49 U.S.C. § 31105(b)(3)(A)(i); *see also*, 29 C.F.R. § 1978.109(d)(1) (stating that an Administrative Law Judge should “order the respondent to take appropriate affirmative action to abate the violation”).

⁴² 49 U.S.C. §§ 31105(b)(3)(A), (b)(3)(C); 29 C.F.R. § 1978.109(d)(1).

⁴³ 49 U.S.C. § 31105(b)(3)(B).

⁴⁴ *See* 49 U.S.C. § 31105(b)(3)(A) (ii) (stating that a respondent is required to “reinstatement the complainant to the former position with the same pay and terms and privileges of

must be ordered “unless it is impossible or impractical.”⁴⁵ Even where a complainant has found new employment and does not request reinstatement, an Administrative Law Judge must still award it as a remedy.⁴⁶ In the present case, Mr. Uhley expressly requests that he be reinstated “to his previous position ... as a commercial truck driver” with Braun Milk Hauling. Complainant’s Brief at 20. He also requests that “he be restored to all benefits, seniority and pay to which he would have otherwise been entitled if he had not been discharged.” Complainant’s Brief at 20. Braun Milk Hauling has not presented any evidence or argument that reinstatement is “impossible or impractical.” Accordingly, I conclude that Mr. Uhley is entitled to reinstatement as a commercial truck driver with Braun Milk Hauling with the “same pay and terms and privileges of employment.”⁴⁷

B. Back Pay

A successful complainant under the STAA is also entitled to an award of back pay.⁴⁸ The purpose of a back pay award is to make the employee whole by restoring him “to the same position he would have been in if not discriminated against.”⁴⁹ Back pay is awarded from the date of the retaliatory discharge until the date on which the complainant is either reinstated or receives an unconditional, bona fide offer of reinstatement.⁵⁰ The back pay period does not end when a complainant obtains comparable work with a subsequent employer.⁵¹ While there is no fixed method for computing a back pay award, “calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with ‘unrealistic exactitude.’”⁵² Any uncertainties in determining the amount of a back pay award are to be resolved against the discriminating employer.⁵³

employment”). *See also, Assistant Sec’y of Labor & Mailloux v. R&B Transp., LLC*, ARB No. 07-084, slip op. at 10 (ARB June 26, 2009) (STA) (citing, inter alia, *Dickey v. W. Side Transp., Inc.*, ARB Nos. 06-150, 06-151, slip op. at 8 (ARB May 29, 2008) (STA)).

⁴⁵ *Mailloux*, ARB No. 07-084, slip op. at 10 (citing *Assistant Sec’y of Labor & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 7–8 (ARB June 30, 2005) (STA)).

⁴⁶ *Id.*, slip op. at 11.

⁴⁷ 49 U.S.C. § 31105(b)(3)(A)(ii).

⁴⁸ 49 U.S.C. § 31105(b)(3)(A)(iii); *see also Mailloux*, ARB No. 07-084, slip op. at 10.

⁴⁹ *Ferguson v. New Prime, Inc.*, ARB No. 10-075, slip op. at 6 (ARB Aug. 31, 2011) (STA).

⁵⁰ *Mailloux*, ARB No. 07-084, slip op. at 10; *Bryant*, ARB No. 04-014, slip op. at 6.

⁵¹ *See Hobson v. Combined Transp., Inc.*, ARB Nos. 06-016, 06-053, slip op. at 5 (ARB Jan. 31, 2008) (STA).

⁵² *Bryant*, ARB No. 04-014, slip op. at 6 (quoting *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-005, slip op. at 14 n.12 (ARB May 30, 1997) (STA)).

⁵³ *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, slip op. at 8 (ARB Aug. 31, 2004) (STA) (citing *Clay v. Castle Coal & Oil Co., Inc.*, 90-STA-37, slip op. at 2 (Sec’y June 3, 1994)).

An STAA complainant has a duty to exercise reasonable diligence to attempt to mitigate back pay damages.⁵⁴ The employer, however, bears the burden to prove that the complainant failed to mitigate.⁵⁵ The employer can satisfy this burden by establishing that “substantially equivalent positions were available to the complainant and he failed to use reasonable diligence in attempting to secure such a position.”⁵⁶

In the present case, Mr. Uhley testified that he was unemployed for six to seven months following his termination by Braun Milk Hauling. Tr. 57. He stated that he “applied to a lot of places, everywhere, lawn care services” and “even applied to McDonald’s trying to just have some income coming into the house to help take care of the kids.” Tr. 63. He eventually succeeded in gaining employment with Mideast Transportation, where he worked for approximately one week. Tr. 57. After an additional two to three weeks of unemployment, Mr. Uhley was hired by J.B. Hunt. Tr. 58. He worked for the company for three weeks before being fired. Tr. 58. At the time of the hearing, Mr. Uhley was driving a truck for Tri-National, Inc., through a staffing agency named RMR Driver Services. Tr. 61; CX 6; CX 9-10. Based on this evidence and testimony, I find that Mr. Uhley has attempted to find a new job and mitigate his back pay damages. Braun Milk Hauling has not presented any evidence or argument that Mr. Uhley failed to mitigate his damages. Accordingly, I find that Mr. Uhley has exercised a “reasonable diligence” in an attempt to mitigate his back pay damages.

Mr. Uhley requests that he be awarded back pay based on an average weekly wage of \$517.21. Complainant’s Brief at 21. He based this weekly wage on his annual earnings of \$26,895.00 for 2009. Braun Milk Hauling contend that Mr. Uhley’s average weekly wage should be \$350.59, which is based on his earnings from January 1, 2010 to June 25, 2010. Respondents’ Brief at 13. Braun Milk Hauling alleges that Mr. Uhley earned a total of \$8,764.84 from Braun Milk Hauling over a period of 25 weeks in 2010. Respondents’ Brief at 13. Braun Milk Hauling, however, does not identify how it determined that Mr. Uhley earned \$8,764.84 in 2010. In addition, the record does not contain any evidence of Mr. Uhley’s earnings from 2010. Instead, the record contains Mr. Uhley’s Form 1040 for 2009, which indicates that he earned \$26,895.00 from Braun Milk Hauling. CX 7; CX 9-4 to 9-8. There is no other evidence of Mr. Uhley’s earnings from the company. As stated above, back pay awards must be reasonable and supported by the evidence.⁵⁷ In addition, uncertainties in calculating back pay are decided against the discriminating employer.⁵⁸ Accordingly, I find that Mr. Uhley’s back pay award shall be based on annual earnings of \$26,895.00. This translates into an average weekly wage of \$517.21.

Mr. Uhley testified that he was unemployed for six to seven months after Ms. Braun terminated his employment on June 25, 2010. Tr. 57. While he has held several different jobs since his termination, there is no evidence that Braun Milk

⁵⁴ *Mailloux*, ARB No. 07-084, slip op. at 10.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Bryant*, ARB No. 04-014, slip op. at 6.

⁵⁸ *Jackson*, ARB Nos. 03-116, 03-144, slip op. at 8 (citing *Clay*, 90-STA-37, slip op. at 2).

Hauling has given Mr. Uhley a “bona fide offer of reinstatement.” As stated above, back pay is awarded from the date of retaliatory discharge until the complainant is either reinstated or is given an unconditional, bona fide offer of reinstatement.⁵⁹ Accordingly, I find that Mr. Uhley is entitled to accrued back pay for a period of two years, *i.e.*, 104 weeks, from June 25, 2010 to June 25, 2012, the date of this Decision and Order, at a rate of \$517.21 per week. This equals a total accrued back pay award of \$53,789.84 (\$517.21 x 104). Furthermore, I find that Mr. Uhley is entitled to a continuing back pay award at the rate of \$517.21 per week until he is either reinstated or given an unconditional, bona fide offer of reinstatement by Braun Milk Hauling.

Mr. Uhley further requests that he be reimbursed \$50.00 for an alleged deduction from his final paycheck. More specifically, he contends that he was fined \$50.00 by Braun Milk Hauling for his late delivery on June 23, 2010. Tr. 228-229. At the hearing, however, Ms. Braun denied that Mr. Uhley had ever been fined \$50.00. Tr. 232. There is no additional evidence in the record that either supports or refutes Mr. Uhley’s allegation. In addition, I note that Braun Milk Hauling’s written policy for late deliveries states that an employee will be fined \$50.00 if “a load is delivered late without prior approval from dispatch or a broker.” CX 2; RX A. This policy, however, expressly creates an exception for late deliveries caused by mechanical problems or weather. CX 2; RX A. In light of this policy exception, as well as the conflicting testimony in the record, I find that Mr. Uhley is not entitled to a reimbursement of \$50.00.

Under the STAA, a back pay award is offset by the complainant’s interim earnings.⁶⁰ Without this reduction, a back pay award could place the complainant in a better position than he was in while employed by the discriminating employer.⁶¹ In this case, Mr. Uhley testified that he earned \$580.00 during his one week of employment with Mideast Transportation. Tr. 57. The evidence establishes that he earned \$1,930.39 in gross wages during his three weeks of employment with J.B. Hunt. Tr. 59; CX 9-3. Finally, the evidence shows that, as of September 29, 2011, Mr. Uhley had earned \$9,043.50 in gross wages from RMR Driver Services. Tr. 61; CX 6; CX 9-10. There is no additional evidence of any interim earnings by Mr. Uhley. I therefore find that Mr. Uhley has earned a total of \$11,553.89 in gross wages since his termination by Braun Milk Hauling in June 2010. Accordingly, I have subtracted this amount from Mr. Uhley’s accrued back pay, and I find that he is left with a net accrued back pay award of \$42,235.95.

For the reasons discussed above, I find that Mr. Uhley is entitled to an accrued back pay award of \$42,235.95. This amount reflects a period of 104 weeks, from June 25, 2010 to June 25, 2012, at the rate of \$517.21 per week, less offsets for Mr. Uhley’s interim earnings. In addition, I find that Mr. Uhley is entitled to a continuing back pay award at the rate of \$517.21 per week until he is either reinstated by Braun Milk Hauling or given an unconditional, bona fide offer of reinstatement.

⁵⁹ *Mailloux*, ARB No. 07-084, slip op. at 10; *Bryant*, ARB No. 04-014, slip op. at 6.

⁶⁰ *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033, slip op. at 10 (ARB Sept. 28, 2010) (STA); *Pollock v. Cont’l Express*, ARB Nos. 07-073, 08-051, slip op. at 17 (ARB Apr. 7, 2010) (STA); *Bryant*, ARB No. 04-014, slip op. at 7.

⁶¹ *Smith*, ARB Nos. 08-091, 09-033, slip op. at 10.

C. Pre- and Post-Judgment Interest on Back Pay

The STAA expressly provides that a successful complainant is entitled to interest on an award of back pay.⁶² This includes pre-judgment interest on any accrued back pay, as well as post-judgment interest “for the period between the issuance of this [Decision and Order] and the payment of the award.”⁶³ Interest is calculated using the rate that is charged for underpayment of federal taxes, pursuant to 26 U.S.C. § 6621(a)(2).⁶⁴ The applicable interest rates are posted on the web-site of the Internal Revenue Service (“IRS”).⁶⁵ In addition, the interest accrues, compounded quarterly, until Braun Milk Hauling satisfies the back pay award.⁶⁶

1. Pre-Judgment Interest

The Administrative Review Board has outlined the procedures to be followed in calculating compounded pre-judgment interest. In *Doyle v. Hydro Nuclear Services*, the ARB initially found that an Administrative Law Judge should use the “‘applicable federal rate’ (AFR) for a quarterly period of compounding.”⁶⁷ The ARB then held that “[t]o determine the interest for the first quarter of back pay owed, the [judge] shall multiply the back pay principal owed for that quarter by the sum of the quarterly average AFR plus three percentage points.”⁶⁸ In order to determine the quarterly average interest rate, a judge must “calculate the arithmetic average of the AFR for each of the three months of the calendar quarter, rounded to the nearest whole percentage.”⁶⁹ Regarding the interest applied to the second quarter of back pay, the ARB stated as follows:

To determine the interest for the second quarter of back pay owed, the [judge] shall add the first quarter principal, the first quarter interest, and the second quarter principal. The resulting sum is multiplied by the second quarter’s interest rate as calculated according to the [formula for the first quarter]. This multiplication yields the second quarter interest.⁷⁰

The ARB concluded that this process “shall continue for computing the interest owed on the back pay through the date of the issuance of [the] decision.”⁷¹ While *Doyle* was a

⁶² 49 U.S.C. § 31105(b)(3)(A)(iii); 29 C.F.R. § 1978.109(d)(1).

⁶³ *Bryant*, ARB No. 04-014, slip op. at 10 (citing *Murray v. Air Ride, Inc.*, ARB No. 00-045, slip op. at 9 (ARB Dec. 29, 2000) (STA)).

⁶⁴ *Id.* (citing *Drew v. Alpine, Inc.*, ARB Nos. 02-044, 02-079, slip op. at 4 (ARB June 30, 2003) (STA)). See 26 U.S.C. § 6621(a)(2) and (b)(3) (The applicable interest rate is the sum of the Federal short-term rate determined by the Secretary in accordance with 26 U.S.C. § 1274(d) plus 3 percentage points, rounded to the nearest full percent.)

⁶⁵ <http://www.irs.gov/app/picklist/list/federalRates.html>.

⁶⁶ *Id.* (citing *Assistant Sec’y of Labor & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, slip op. at 3 (ARB Jan. 12, 2000) (STA)).

⁶⁷ ARB Nos. 99-041, 99-042, 00-012, slip op. at 19 (ARB May 17, 2000) (ERA).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

case arising under the Energy Reorganization Act, the ARB has subsequently found that these computation procedures apply to claims under the STAA.⁷² I have therefore applied these procedures in calculating the pre-judgment interest owed by Braun Milk Hauling in this case.

As stated above, I find that Mr. Uhley is entitled to an accrued back pay award of \$42,235.95 for a period of 104 weeks from June 25, 2010 to June 25, 2012. This period falls within the following quarters of three federal fiscal years (“FY” running from October through September): (1) Quarters 3 and 4 of FY 2010; (2) Quarters 1, 2, 3, and 4 of FY 2011; and, (3) Quarters 1, 2, and 3 of FY 2012. The applicable interest rates for June 25, 2010, to June 25, 2012, are:

Year	Fiscal Quarter	Applicable Months Within Fiscal Quarter	Monthly AFRs (Applicable Federal Rate) for Quarterly Compounding	Arithmetic Average AFR	Average AFR + 3% (rounded to nearest whole percentage point)
2010	3Q	April 2010	0.67%	0.73%	4%
		May 2010	0.79%		
		June 2010	0.74%		
	4Q	July 2010	0.61%	0.53%	4%
		August 2010	0.53%		
		September 2010	0.46%		
2011	1Q	October 2010	0.41%	0.36%	3%
		November 2010	0.35%		
		December 2010	0.32%		
	2Q	January 2011	0.43%	0.49%	3%
		February 2011	0.51%		
		March 2011	0.54%		
	3Q	April 2011	0.55%	0.52%	4%
		May 2011	0.56%		
		June 2011	0.46%		
	4Q	July 2011	0.37%	0.32%	3%
		August 2011	0.32%		
		September 2011	0.26%		
2012	1Q	October 2011	0.16%	0.18%	3%
		November 2011	0.19%		
		December 2011	0.20%		
	2Q	January 2012	0.19%	0.19%	3%
		February 2012	0.19%		
		March 2012	0.19%		
	3Q	April 2012	0.25%	0.25%	3%
		May 2012	0.28%		
		June 2012	0.23%		

⁷² See *Assistant Sec’y of Labor & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, slip op. at 10 (ARB June 30, 2005) (STA).

Applying the method for calculating back pay with compound interest set forth by the ARB, I find that Mr. Uhley is owed \$42,235.95 in back wages for the period from June 25, 2010, to June 25, 2012, and \$6,522.21 in pre-judgment interest, for a total of \$48,758.16. My calculations are shown on the following table.

PERIOD (FISCAL QUARTER)	APPLICABLE DATES WITHIN QUARTER	TOTAL WEEKS	POTENTIAL WAGES	ACTUAL WAGES/ INCOME	PERCENTAGE OF ACCRUED BACK PAY PERIOD	PRINCIPAL OWED FOR QUARTER	AVERAGE AFR (ROUNDED)	PRINCIPAL & INTEREST FROM PRIOR QUARTERS	INTEREST OWED FOR QUARTER (PRE- JUDGMENT)	LOSS ON WAGES (BACKPAY OWED)
2010										
3Q	6/25/2010 - 6/30/2010	1	\$ 517.21	\$ -	0.96%	\$ 406.11	4%	\$ -	\$ 16.24	\$ 517.21
4Q	7/1/2010 - 9/30/2010	13	\$ 6,723.73	\$ -	12.50%	\$ 5,279.49	4%	\$ 422.36	\$ 227.42	\$ 6,723.73
YEAR END TOTAL	6/25/2010 - 9/30/2010	14	\$ 7,240.94	\$ -	13.46%	\$ 5,685.61			\$ 243.67	\$ 7,240.94
2011										
1Q	10/1/2010 - 12/31/2010	13	\$ 6,723.73	\$ -	12.50%	\$ 5,279.49	3%	\$ 5,929.28	\$ 385.81	\$ 6,723.73
2Q	1/1/2011 - 3/31/2011	13	\$ 6,723.73	\$ 580.00	12.50%	\$ 5,279.49	3%	\$ 11,594.58	\$ 544.19	\$ 6,143.73
3Q	4/1/2011 - 6/30/2011	13	\$ 6,723.73	\$ 1,930.39	12.50%	\$ 5,279.49	4%	\$ 17,418.27	\$ 755.37	\$ 4,793.34
4Q	7/1/2011 - 9/30/2011	13	\$ 6,723.73	\$ 9,043.50	12.50%	\$ 5,279.49	3%	\$ 23,453.14	\$ 913.76	\$ (2,319.77)
YEAR END TOTAL	10/1/2010 - 9/30/2011	52	\$ 26,894.92	\$ 11,553.89	50.00%	\$ 21,117.98			\$ 2,599.14	\$ 15,341.03
2012										
1Q	10/1/2011 - 12/31/2011	13	\$ 6,723.73	\$ -	12.50%	\$ 5,279.49	3%	\$ 29,646.39	\$ 1,072.14	\$ 6,723.73
2Q	1/1/2012 - 3/31/2012	13	\$ 6,723.73	\$ -	12.50%	\$ 5,279.49	3%	\$ 35,998.03	\$ 1,230.53	\$ 6,723.73
3Q	4/1/2012 - 6/25/2012	12	\$ 6,206.52	\$ -	11.54%	\$ 4,873.38	3%	\$ 42,101.93	\$ 1,376.73	\$ 6,206.52
YEAR END TOTAL	10/1/2011 - 6/25/2012	38	\$ 19,653.98	\$ -	36.54%	\$ 15,432.37			\$ 3,679.40	\$ 19,653.98
GRAND TOTAL	6/25/2010 - 6/25/2012	104	\$ 53,789.84	\$ 11,553.89	100%	\$ 42,235.95			\$ 6,522.21	\$ 42,235.95

TOTAL BACK PAY (PRINCIPAL + INTEREST)	\$ 48,758.16
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2. Post-Judgment Interest

As stated above, a successful complainant under the STAA is also entitled to post-judgment interest on back pay “for the period between the issuance of [a decision] and the payment of the award.”⁷³ The post-judgment interest is calculated using the same formula as for pre-judgment interest, pursuant to 26 U.S.C. § 6621(a)(2).⁷⁴ This interest is also compounded on a quarterly basis until a respondent satisfies the back pay award. In this case, I have found that Mr. Uhley is entitled to a continuing back pay award from the date of this Decision and Order until he is either reinstated by Braun Milk Hauling or is offered an unconditional, bona fide offer of reinstatement. Accordingly, I find that he is entitled to payment of post-judgment interest at the applicable IRS rate, compounded, calculated under the same formula as the pre-judgment interest, until Braun Milk Hauling satisfies the back pay award.

D. Compensatory Damages

Mr. Uhley also seeks \$50,000.00 in compensatory damages for “emotional distress and mental pain.” Complainant’s Brief at 22. Under the STAA, a successful complainant is entitled to compensatory damages in addition to back pay.⁷⁵ Compensatory damages “are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress.”⁷⁶ To recover damages for mental suffering or emotional anguish, however, “a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm.”⁷⁷

In this case, Mr. Uhley contends that he was “depressed by his financial situation and ... felt humiliated by his discharge.” Complainant’s Brief at 22. At the hearing, he testified that he was “angry, depressed, [and] confused” after his termination. Tr. 56. He stated that he was depressed “for the entire time that I was unemployed” and the situation “just dragged me down.” Tr. 63. He explained that he was required to seek unemployment compensation and had to sell personal property in order to support his family. Tr. 63-64. He was also forced to hunt and fish in order to provide food. Tr. 64. While admitting that he did not seek any treatment for depression, Tr. 70, Mr. Uhley explained that “a little depression is a normal thing” and he did not feel disabled by it. Tr. 85. In addition, he explained that he “had things [he] had to get done.” Tr. 85. He

⁷³ *Bryant*, ARB No. 04-014, slip op. at 10 (citing *Murray v. Air Ride, Inc.*, ARB No. 00-045, slip op. at 9 (ARB Dec. 29, 2000) (STA)).

⁷⁴ *Id.* (citing *Drew v. Alpine, Inc.*, ARB Nos. 02-044, 02-079, slip op. at 4 (ARB June 30, 2003) (STA)).

⁷⁵ 49 U.S.C. § 31105(b)(3)(A)(iii); see also *Ferguson v. New Prime, Inc.*, ARB No. 10-075, slip op. at 7 (ARB Aug. 31, 2011) (STA).

⁷⁶ *Ferguson*, ARB No. 10-075, slip op. at 7 (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033 (ARB Sept. 24, 2010) (STA)).

⁷⁷ *Id.*

reiterated, however, that he “felt bad ... felt sad [and] felt humiliated” by his termination. Tr. 85.

Braun Milk Hauling argues that Mr. Uhley’s failure to seek treatment for his depression precludes an award of compensatory damages. The Administrative Review Board, however, has held that medical evidence of depression is not required to support an award of damages for emotional distress.⁷⁸ To the contrary, an award of damages can be based solely on the complainant’s own credible and uncontroverted testimony.⁷⁹ The absence of medical evidence merely impacts the *amount* of an award for emotional distress.⁸⁰ In this case, while admitting that he did not seek medical treatment, Mr. Uhley has consistently testified that he felt depressed and humiliated by his termination. Braun Milk Hauling has not presented any evidence to refute this testimony. Accordingly, I find that Mr. Uhley’s credible testimony is sufficient to support an award of damages for emotional distress and mental pain.

As additional support for his claim, Mr. Uhley argues that he experienced difficulty sleeping after his termination by Braun Milk Hauling. Tr. 64. He subsequently admitted, however, that he had trouble sleeping even before the events of June 2010. Tr. 70. Based on this testimony, I find that Mr. Uhley has not established that his termination caused his sleeping difficulties. Accordingly, I find that compensatory damages are not warranted on this ground.

In summary, I find that Mr. Uhley has provided credible testimony that he experienced depression as a result of his termination by Braun Milk Hauling on June 25, 2010. While there is no medical evidence to support Mr. Uhley’s testimony, I find that the absence of such evidence merely affects the *amount* of his award of compensatory damages award. I also find, however, that Mr. Uhley’s sleeping difficulties were not caused by his termination. Accordingly, I find that Mr. Uhley is entitled to \$25,000.00 in compensatory damages for the depression and emotional distress caused by his termination.

E. Punitive Damages

As an additional remedy for Braun Milk Hauling’s violation of the STAA, Mr. Uhley seeks punitive damages in the amount of \$25,000.00. He contends that punitive damages are warranted because Ms. Braun’s termination of his employment reflects “a policy of allowing STAA violations by a Braun manager.” Complainant’s Brief at 23. He also emphasizes that Braun Milk Hauling’s “written policy prohibits a driver from delivering a load late, without permission of a dispatcher.” Complainant’s Brief at

⁷⁸ *Id.*, slip op. at 8.

⁷⁹ *Id.*

⁸⁰ See, e.g., *Ferguson v. New Prime, Inc.*, 2009-STA-47, slip op. at 12 (ALJ Mar. 15, 2010) (awarding \$50,000 for emotional distress, as reduced from \$100,000, where there was no medical evidence of the complainant’s emotional harm), *aff’d in part & vacated in part on other grounds*, ARB No. 10-075 (ARB Aug. 31, 2011) (STA).

23. Accordingly, Mr. Uhley argues that punitive damages in this case “will deter Braun from retaliating against drivers because they have refused to violate commercial vehicle safety regulations.” Complainant’s Brief at 23.

As amended in August 2007, the STAA expressly provides that relief “may include punitive damages in an amount not to exceed \$250,000.”⁸¹ The Supreme Court of the United States has held that punitive damages may be awarded where there has been a “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law.”⁸² 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.”⁸³ The focus is on the nature of the defendant’s conduct, “whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards.”⁸⁴ As applied to claims under the STAA, the Administrative Review Board has held that an Administrative Law Judge must determine “whether [a respondent’s] behavior reflected a corporate policy of STAA violations or whether punitive damages are necessary ... to deter further violations.”⁸⁵

In this case, Mr. Uhley contends that Braun Milk Hauling has a policy of allowing STAA violations, as illustrated by their written policy regarding late deliveries. He argues that this policy “prohibits a driver from delivering a load late, without permission of a dispatcher.” Complainant’s Brief at 23. This argument, however, is contrary to the evidence in the record. In relevant part, the written company policy states as follows:

If a load is delivered late without prior approval from dispatch or a broker you will be charged \$50.00. *There will be exceptions made to this policy for things such as mechanical problems, weather, etc.* If it comes to a point where it looks as though you will need to deliver late then you need to let dispatch and your broker known as soon as possible so the appropriate arrangements can be made.

CX 2; RX A (emphasis added). Thus, while generally requiring official approval for late deliveries, the company policy makes exceptions for delays caused by weather or mechanical problems. At the hearing, Ms. Braun acknowledged that these are exceptions to the policy. Tr. 119-120. In addition, she testified that Braun Milk Hauling does *not* expect its drivers to continue driving during severe or dangerous weather. Tr. 191. She explained that such weather poses not only a safety risk for the company’s drivers and other individuals on the road, but also creates the potential for damage to the trucks and the cargo being transported. Tr. 116. Based on this testimony, as well as the express language of the written policy, I find that the evidence does not support the conclusion that Braun Milk Hauling has a policy of allowing STAA violations.

⁸¹ 49 U.S.C. § 31105(b)(3)(C); *see also* 29 C.F.R. § 1978.109(d)(1).

⁸² *Smith v. Wade*, 461 U.S. 30, 51 (1983).

⁸³ *Id.* at 54 (quoting RESTATEMENT (SECOND) OF TORTS § 908(1) (1979)).

⁸⁴ *Id.*

⁸⁵ *Ferguson*, ARB No. 10-075, slip op. at 8.

Accordingly, I find that Mr. Uhley's argument on this point does not support an award of punitive damages.

In his reply brief, Mr. Uhley presents an additional argument in support of his request for punitive damages. While acknowledging that Ms. Braun "never encouraged or asked [him] to continue driving in ... hazardous [weather] conditions," he argues that Ms. Braun's termination of his employment "when he engaged in protected activity was 'outrageous conduct' meriting an award of punitive damages." Complainant's Reply Brief at 16. To constitute "outrageous conduct," however, a respondent generally must have "acted with the purpose or intent to harm [a complainant] or with reckless disregard for [his] rights."⁸⁶ Punitive damages in employment discrimination cases are properly denied where a complainant fails to present "any evidence of malice or reckless indifference or egregious or outrageous behavior."⁸⁷ In this case, Mr. Uhley has not presented any evidence to show that Ms. Braun acted with a "reckless disregard" for his rights, or with the "purpose or intent to harm" him. He has also not presented any evidence to show that Ms. Braun's actions were otherwise "outrageous." Accordingly, I find that Mr. Uhley's argument on this point does not support an award of punitive damages.

In summary, I find that Braun Milk Hauling does not have a policy of allowing or encouraging STAA violations by its managers. In addition, I find that Mr. Uhley has failed to present any evidence that Ms. Braun's termination of his employment constitutes "outrageous conduct." For these reasons, I conclude that Mr. Uhley is not entitled to punitive damages.

F. Abatement

Mr. Uhley also requests an order requiring the Respondents to take steps to abate their violation of the STAA. More specifically, he requests that Braun Milk Hauling be ordered to "post a notice fashioned by the Court clearly indicating that Mr. Uhley was discharged in violation of the STAA, and that he has prevailed, for 90 consecutive days in all places where employee notices are customarily posted." Complainant's Brief at 23-24. In addition, Mr. Uhley requests an order requiring the company to "expunge from its personnel records, all references to [his] discharge for engaging in protected activity." Complainant's Brief at 24. Furthermore, Mr. Uhley asks that Braun Milk Hauling be required to "cause all consumer reporting agencies to which it has made a report about him to amend its report to delete any unfavorable work record information, and to show

⁸⁶ *Leveille v. N.Y. Air Nat'l Guard*, ARB No. 98-079, slip op. at 6 (ARB Oct. 25, 1999) (TSC).

⁸⁷ *Tepperwein v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 573 (2d Cir. 2011) (decided under Title VII); *see also, Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) (holding that punitive damages in employment discrimination cases require evidence of "malice" or "reckless indifference" to an employee's federally protected rights).

continuous employment with Braun.” Complainant’s Brief at 24. Braun Milk Hauling has not challenged any of these requested remedies.

It is a standard remedy in employment discrimination cases to notify a respondent’s employees of the outcome of a case against their employer.⁸⁸ In addition, the Administrative Review Board has repeatedly found that an Administrative Law Judge may order an employer “to expunge references to adverse actions taken against complainants for protected activity.”⁸⁹ Furthermore, a Judge may order the employer to contact consumer reporting agencies to request amendments of reports about a complainant.⁹⁰ I therefore find that Mr. Uhley is entitled to all of these remedies in this case.

G. Litigation Expenses

As a final remedy, Mr. Uhley requests an award of attorney fees and other expenses incurred in bringing his claim under the STAA. While he does not specify a specific amount, Mr. Uhley requests leave to file a petition for attorney fees and costs. If a complainant prevails on the merits of his STAA claim, the statute expressly authorizes the Secretary of Labor to “assess against the person against whom [an] order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint.”⁹¹ Accordingly, I find that Mr. Uhley shall have 30 days from the date of this Decision and Order to file an application for attorney fees and other expenses that were incurred in this case. Braun Milk Hauling shall have 10 days following service of the application within which to file any objections, plus 5 days for service by mail, for a total of 15 days.

V. Conclusion

For the reasons discussed above, I find that Braun Milk Hauling violated the STAA when it terminated Mr. Uhley’s employment on June 25, 2010. Mr. Uhley has successfully made a *prima facie* showing by a “preponderance of the evidence” that his refusal to drive his commercial motor vehicle during severe weather on June 23, 2010,

⁸⁸ *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, slip op. at 14 (ARB Nov. 30, 2009) (STA) (citing *Michaud v. BSP Transp., Inc.*, ARB No. 97-113 (ARB Oct. 9, 1997) (STA)).

⁸⁹ *Id.*, slip op. at 13–14. See also *Dickey v. W. Side Transp., Inc.*, ARB Nos. 06-150, 06-151, slip op. at 8–9 (ARB May 29, 2008) (STA); *Assistant Sec’y of Labor & Marziano v. Kids Bus Serv., Inc.*, ARB No. 06-068, slip op. at 4–5 (ARB Dec. 29, 2006) (STA); *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, slip op. at 13 (ARB Aug. 31, 2004) (STA).

⁹⁰ *Shields*, ARB No. 08-021, slip op. at 13.

⁹¹ 49 U.S.C. § 31105(b)(3)(B). See also 29 C.F.R. § 1978.109(d)(1); *Assistant Sec’y of Labor & Mailloux v. R&B Transp., LLC*, ARB No. 07-084, slip op. at 12 (ARB June 26, 2009) (STA).

was protected activity under the STAA and was a “contributing factor” in Braun Milk Hauling’s decision to terminate his employment. Braun Milk Hauling, however, has failed to show by “clear and convincing evidence” that it would have terminated Mr. Uhley’s employment even absent his protected activity. Accordingly, I conclude that Braun Milk Hauling violated the STAA. I also conclude, however, that Respondents Elizabeth Braun, John Doe, and Mary Roe did not violate the STAA in their individual capacities, and are not individually liable to Mr. Uhley for this violation.

As a result of this violation, I find that Mr. Uhley is entitled to reinstatement to his former position with Braun Milk Hauling with the “same pay and terms and privileges of employment” that existed prior to his termination. I find that Mr. Uhley is also entitled to an award of accrued back pay from June 25, 2010, to June 25, 2012, as well as continuing back pay until he is reinstated or given an unconditional, bona fide offer of reinstatement. I also find that he is entitled to both pre- and post-judgment interest on his back pay award, which is compounded quarterly until Braun Milk Hauling satisfies the award.

In addition, I find that Mr. Uhley is entitled to compensatory damages for emotional distress caused by his termination. Furthermore, I find that Braun Milk Hauling is required to take the above forms of abatement for the STAA violation. Finally, Mr. Uhley is entitled to reimbursement of reasonable litigation expenses, subject to his timely submission of a supported application. For the reasons discussed above, however, I find that punitive damages are not warranted in this case.

ORDER

IT IS THEREFORE ORDERED that:

1. Braun Milk Hauling shall reinstate Mr. Uhley, to his former position as a commercial truck driver, with the same seniority, status, and benefits that he would have had but for Braun Milk Hauling’s violation of the STAA.
2. Braun Milk Hauling shall pay Mr. Uhley total accrued back pay in the amount of \$42,235.95. This amount reflects a period of 104 weeks, from June 25, 2010, to June 25, 2012, at the rate of \$517.21 per week, less offsets for Mr. Uhley’s interim earnings.
3. Braun Milk Hauling shall continue to pay Mr. Uhley back pay at the rate of \$517.21 per week, from the date of this Decision and Order until he is reinstated or is given an unconditional, bona fide offer of reinstatement.
4. Braun Milk Hauling shall pay Mr. Uhley a total of \$6,522.21 in pre-judgment, compounded interest, as calculated pursuant to 26 U.S.C. § 6621(a)(2). This interest covers the period from June 25, 2010, to June 25, 2012.

5. Braun Milk Hauling shall pay Mr. Uhley post-judgment interest on his back pay award, pursuant to 26 U.S.C. § 6621(a)(2). This interest shall compound quarterly until the company satisfies the back pay award.
6. Braun Milk Hauling shall pay Mr. Uhley compensatory damages of \$25,000.00 for emotional distress caused by his termination in violation of the STAA.
7. Mr. Uhley's request for punitive damages is **DENIED**.
8. Braun Milk Hauling shall expunge negative information regarding Mr. Uhley's protected activity and its role in his termination from his personnel file, and shall contact every consumer reporting agency to whom it may have furnished a report about Mr. Uhley and request that such reports be amended.
9. Braun Milk Hauling shall conspicuously post copies of this Decision and Order for 90 days in all places on its premises where employee notices are customarily posted.
10. Mr. Uhley shall have 30 days from the date of this Decision and Order to file a fully supported application for litigation expenses, including attorney fees. Braun Milk Hauling shall have 10 days following service of the application within which to file any objections, plus 5 days for service by mail, for a total of 15 days.

A

Alice M. Craft
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within 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.⁹² Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically.⁹³

At the time you file the Petition with the Board, you must serve it on all parties, as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health.⁹⁴

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 30 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.⁹⁵ 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 30 days of the date the Petition is filed notifying the parties that it has accepted the case for review.⁹⁶

⁹² See 29 C.F.R. § 1978.110(a).

⁹³ See 29 C.F.R. § 1978.110(a).

⁹⁴ See 29 C.F.R. § 1978.110(a).

⁹⁵ See 29 C.F.R. §§ 1978.109(e), 1978.110(a).

⁹⁶ 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.⁹⁷ 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.⁹⁸

⁹⁷ 29 C.F.R. § 1978.109(e).

⁹⁸ 29 C.F.R. § 1978.110(b).