



Issue Date: 24 October 2014

CASE No.: 2012-STA-00036

In the Matter of:

Chris Hood,

Complainant,

v.

R & M Pro Transport, LLC, and Baylor Intermodal, Inc.

Respondents.

Appearances:

Ted Walton, Esq.
For Complainant

Jerry L. McCullum, Esq.
For Respondent Baylor

John L. Grannan, Esq.
For Respondent R&M

Before: Joseph E. Kane
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (“STAA”).¹ The STAA protects employees from employer retaliation against protected activity, such as refusing to operate a vehicle that violates a standard of commercial motor vehicle safety.² Chris Hood (“Complainant”) alleges his employment was terminated for refusing to haul an overweight load. (Complainant’s Post-Hr’g Br. 14-16). Respondent Baylor alleges that the Complainant was discharged due to his failure to communicate with his superiors regarding the overweight load. (*Id.* at 16; Transcript of Record (“Tr.”) at 261; Baylor’s Post-Hr’g Br. V(B)(3)(v)).

Procedural History

¹ 49 U.S.C.A. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 11053; 29 C.F.R. Part 1978.

² 49 U.S.C.A. § 31105(a).

On August 8, 2011, the Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that his former employers, R & M Pro Transport, LLC (“R&M”) and Baylor Intermodal Inc. (“Baylor”) violated the STAA. (Complainant’s Exhibit (“CX”) 17, 23). OSHA investigated the complaint and determined that there was “no reasonable cause to believe that Respondent[s] violated STAA” because the “Complainant voluntarily terminated himself by not calling in as he was instructed, returning, and leaving the vehicle at Respondent Baylor’s location.” (CX 23). The Complainant, by correspondence dated July 18, 2012, objected to the Secretary’s findings and requested a formal hearing before the Office of Administrative Law Judges. (CX 24).

A formal hearing took place on May 22, 2013, in Louisville, Kentucky. At the hearing, Administrative Law Judge Exhibits 1-10, CX 1-32, Respondent Baylor’s Exhibits 2-11, and Respondent R&M’s Exhibits A, E, and F were admitted into evidence. (Tr. 12-13). The Complainant testified at the hearing. Respondent R&M called Robert Farley, the owner of the trucks for R&M, as a witness. Respondent Baylor called Jamie Fiepke, President of the Kentucky Motor Transport Association; Tanner J. Kitchen, its Safety Director; and Mark Fessel, its owner. On August 15, 2013, the Complainant filed a Motion to File a Supplemental Exhibit showing the formation of Freedom Transportation Services, LLC., which I granted on June 25, 2014. Subsequently, Baylor and the Complainant filed closing briefs.

Factual Findings

I. Background:

According to federal regulations, truck drivers traveling on interstate highways are allowed to carry up to 80,000 pounds.³ In addition to the gross weight, there are also limitations on the amount of weight an individual axle may carry.⁴ Every motor carrier must issue a receipt or bill of lading for property tendered for transportation in interstate commerce indicating the freight’s weight and other information.⁵

The Complainant has been a truck driver since 1980. (Tr. 57). He testified that he has “way over a million miles under [his] belt.” (Tr. 128). From June of 2010 until he was terminated in May of 2011, he was a contract driver for R&M, a company that hauled freight exclusively for Baylor Intermodal. (Tr. 17, 44, 140). R&M supplies Baylor with trucks and drivers to haul intermodal loads. (Tr. 16-17). R&M drivers are assigned loads by Baylor, who notifies them using a Qualcomm “on[-]board computer satellite tracking” and messaging system. (Tr. 197). Drivers accept an assigned load by sending a Qualcomm message in return to Baylor’s dispatch officer with the load number and their acceptance. (*Id.*).

According to its Safety Director, Tanner J. Kitchen, Baylor drivers must weigh all loads reportedly weighing 40,000 pounds or more at the nearest certified public scale to ensure compliance with federal and state weight limits. (Tr. 183-184). Mark Fessel, the sole owner of Baylor, confirmed that policy and testified that drivers were encouraged to weigh loads of reportedly less than 40,000 pounds if the driver believed the reported weight was inaccurate.

³ 23 C.F.R. §658.17(a).

⁴ *Id.* §658.17(e).

⁵ 49 C.F.R. §373.101(a)-(e).

(Tr. 222). Mr. Kitchen testified that the bills of lading received from the shippers only estimated a load's weight, and were not always accurate. (Tr. 185). Further, Mr. Fessel testified that because drivers frequently pick up "blind box[es]," they cannot be sure their loads comply with weight restrictions until they weigh the loads on a certified public scale. (Tr. 222-223).

Jamie Fiepke, Respondent Baylor's expert witness, testified that it was a common industry practice to require drivers to "scale out" their loads before delivering them. (Tr. 29). He added that "scaling out" a load requires that the truck travel on an interstate highway for a short distance. (Tr. 30). Mr. Fiepke testified that it was common practice in the trucking industry to drive overweight loads to the closest available facility to have them "reworked," although, there were "not necessarily" many places with the dock facilities needed to rework overweight loads. (Tr. 35-36).⁶ However, despite its purported regularity, Mr. Fiepke testified that the practice of hauling overweight loads to nearby facilities constituted "illegal activity." (Tr. 39).

II. Refusal of Overweight Load:

On May 12, 2011, after delivering a load to the G-4 railyard in Joliet, Illinois, the Complainant was dispatched by Qualcomm to the "Cowboy Yard" in Channahon, Illinois. (Tr. 48-49, CX 14). Upon his arrival at the Cowboy Yard around 4:00 p.m., he learned that the load he had been assigned was "over gross [and] overweight by axle." (Tr. 49, CX 14).⁷ The scale ticket listed the container's gross weight as 80,080 pounds, its drive axle weight as 38,100 pounds, and its trailer axle weight as 31,360 pounds. (Baylor Ex. 2). After logging the load number and container number, the Complainant called Robert Farley, the owner of the trucks at R&M, and explained that he "absolutely was not" hauling the overweight load. (Tr. 50-51).

The Complainant asked Mr. Farley to dispatch him a different assignment. (Tr. 52). After Mr. Farley called Mr. Kitchen, he reportedly told Complainant that Mark Fessel was "firm on [the Complainant] taking [the overweight] load" and indicated that the Complainant would not be assigned another load. (Tr. 52). When the Complainant asked Mr. Farley what he should do, Mr. Farley responded:

"seeing as Baylor Intermodal had taken every reasonable step to get this situation straightened out, that I would do what Dispatch asked me to do. I told him that I would move the load the short distance, get the load reworked, and bring it down to the Baylor Intermodal yard in Clarksville, IN and call it a day." (CX 9, R&M Ex. E). Mr. Farley also told the Complainant that "[d]ispatch was unable to meet this request [for a different assignment] due to there being no other drivers reasonably able to get the load picked up and reworked before the receiver's business hours were over." (CX 9, R&M Ex. E).

The Complainant spent the next 1-2 hours on the telephone with Mr. Farley and Mr. Kitchen. (CX 9, R&M Ex. E). The Complainant testified that Mr. Kitchen reiterated the importance of getting the overweight load reworked. (Tr. 53). Similarly, Mr. Kitchen conceded:

⁶ The expert reports of Kevin Lhotak (Baylor Ex. 7) and Glynn C. Powers, Sr. (Baylor Ex. 11) reiterated the pervasiveness of the practice.

⁷ Mr. Kitchen (Tr. 179), Mr. Fessel (Tr. 224-225), and Mr. Farley (Tr. 145) all acknowledged that the assigned load was initially overweight.

I would've probably suggested that he does move it. It's in the best interest of everybody because somebody has to move it. Somebody has to get it reworked. And he is the guy that's onto that time spot because if he didn't do it, the next guy's going to have to do it. And the next guy might've been two hours behind him. I don't know when the shipping dock closed or reopened. It, it's really all—it's more about the time, you know, who's got the time to do what.

(Tr. 189). While on the phone with Mr. Kitchen, the Complainant testified that he heard Mr. Fessel say, "He's going to take that load, he's going to take that load. That's all there is to it, that's all there is to it." (Tr. 53). Additionally, Mr. Kitchen testified that "once it became a big topic . . . [Mr. Kitchen] was in the office with dispatch, [Mr. Fessel,] and everybody else" and that Mr. Fessel was "cussing about the situation" and was doing so "assertively." (Tr. 211). During these initial conversations, the dock facility available to rework the overweight load closed. (Tr. 54). According to the directions the Complainant received by Qualcomm, the receiver's lot closed at 5:00 p.m. (CX 14). The Complainant was reportedly advised to "stay there all night[to] take it and have it delivered" the following day. (Tr. 55). Mr. Farley documented that "Mr. Hood at this point had wasted enough time that the receiver had closed and he was probably going to need to wait until the next morning to get the load reworked." (CX 9, R&M Ex. E).

III. Termination of Employment

At 5:02 p.m., shortly after the receiver's lot closed, the Complainant received a Qualcomm message that read "CHRIS Y[O]U NEED TO CALL [MARK] AT OFFICE NOW." (CX 14). Five minutes later, at 5:07 p.m., Complainant received a second Qualcomm message, which read "CHRIS DO NOT MOVE THIS LOAD [UNTIL] YOU CALL MARK." (*Id.*). According to his testimony, at approximately 5:00 p.m., the Complainant called the Illinois State Police, who informed him that he could not legally drive the overweight load to get it reworked. (Tr. 55). Additionally, the Complainant reportedly contacted the Indiana Department of Transportation, who also informed him that "[t]he truck is not to be on the road illegally over gross, overweight." (Tr. 96).

The Complainant asked Mr. Farley about the consequences of "bobtailing"⁸ back to the Baylor yard in Clarksville; according to the Complainant, Mr. Farley replied "It's up to you. But they'll fire you." (Tr. 52, 60). According to Mr. Farley, he told the Complainant that he "really wasn't sure, but ignoring direct instruction from Dispatch for Mr. Hood to call them or Mark Fessel to address [his] situation probably wouldn't be good." (CX 9, R&M Ex. E). In response to Baylor's Qualcomm messages, the Complainant reportedly told Mr. Farley "I don't have to call [Mr. Fessel]. I have nothing to say to that man." (Tr. 154). Mr. Fessel documented that the Complainant "replied to [Mr. Kitchen] as well as [Mr. Farley] by saying 'I don't have to call them (Dispatch or Mark Fessel), I got nothing to say to them! They won't give me a different load and I'm leaving . . . I'm done!'" (CX 9).

After he refused to call the office or haul the overweight load, the Complainant received a Qualcomm message at 7:31 p.m. indicating that he had been "REMOVED FROM THE LOAD

⁸ To "bobtail" is to drive a tractor with no trailer attached. (Baylor Ex. 9, R&M Ex. E).

AND [WAS] NO LONGER UNDER DISPATCH AT BAYLOR,”⁹ which he understood to mean that Baylor had terminated his employment. (Tr. 62). That Qualcomm communication was sent by Mr. Kitchen, who reportedly did not intend to terminate Complainant. Instead he explained that the phrase “no longer under dispatch at Baylor” referred only to “your dispatch that you accepted,” meaning the driver’s present hauling assignment. (Tr. 198). The Complainant then decided to bobtail back to the Baylor yard in Clarksville, Indiana. (Tr. 61).

At approximately 7:46 p.m., Complainant left Mr. Farley the following voicemail message:

“Yeah, Robert, this is Chris. Listen, they ain’t budging and you know, they’re leaving me stuck here. You know, I had to do what I done. I called Department of Transportation. They’re watching for that trailer to come out of that yard. And I called my attorney. And they don’t even have to fire me, you know. I’m done because, you know, they put me under—they got me so upset. I’m going to sue them. That’s all there is to it. But look here, I don’t want to involve you in it. But I don’t want my money held up for coming back. I’m coming back and I don’t want to have to do that to you. So you know, I mean you’re going to have to get your money from Baylor because they are asking me to do something illegal and I’m not doing it. So you can’t legally hold my money for coming back because they’re leaving me out here stuck. And that’s the advice I got from my attorney and also from the Department of Transportation. So, you know, I mean, I hated doing this. But you know, T.J. was supposed to call me back and he didn’t. So I don’t know what else to do. You know, I’m done. I’ll clean my truck out. But, you know, I expect my money. And I appreciate everything you’ve done. So I’d appreciate it if you’d give me a call, thanks.”

(CX 1; Tr. 62-63).

Mr. Fessel testified that the Complainant’s discharge was based on his driver profile, which contained an entry from May 4th that read “Driver MIA,” an entry from May 8th that indicated that he was again a “no call, no show” for two days; “And then on May the 12th[,] I had this driver who’s out of control, puts me on high alert that there’s a major problem. And I need to address the safety of the public.” (Tr. 219). He clarified “[t]hat’s the reason I put the brakes on. It had absolutely nothing to do with him refusing the load.” (*Id.*). Mr. Fessel testified that “It[was] Chris’s unwillingness to communicate to try to resolve a problem that I felt was paramount in safety of transportation and the public.” (Tr. 220). He characterized the Complainant’s refusal to call him as “a serious safety violation to allow him to continue to move. Any time a driver refuses to contact and communicate with dispatch, safety, or myself, there’s a problem. And I’m going to shut it down.” (Tr. 261).

Mr. Kitchen testified to Baylor’s concern regarding the effect of the Complainant’s mood upon his ability to drive safely. Having previously testified that the Complainant was “very upset,” “angry,” and “not a happy person,”¹⁰ he testified as follows:

⁹ CX 14.

¹⁰ Tr. 187.

“I was, yeah, I was concerned about Chris, concerned about, you know, things that might happen. If a driver—everybody in here drives a car. And you know how aggressive you can be when you’re angry about something driving your car, let alone, you know, a tractor, a road tractor that you know, just a bobtail tractor itself weighs anywhere from 18,000 to 20,000 pounds. And those mistakes [cannot] just disrupt our driver’s life, but also anybody that might come into contact with him. And it might not be his fault. It could be something that somebody else might’ve had a bad day, but Chris wouldn’t be able to make a good decision on what he should’ve done as far as maneuvering his truck.”

(Tr. 187-188). Mr. Kitchen later testified that the Complainant “was not aggressive towards me. But he was aggressive towards the job and the situation at that time.” (Tr. 188). Mr. Kitchen later acknowledged that the Complainant was only “very tense, intense about . . . his feelings . . . [about] not wanting to move that load or call in and speak to Mark.” (Tr. 204-205). Mr. Farley testified that the Complainant was “very upset that evening” which led him to conclude that the Complainant was “done driving a truck, not just under me or under Baylor, but you know, for both of us.” (Tr. 142). However, Mr. Farley also testified that “Drivers get upset all the time in the industry. Let’s be honest here. It’s what some people call the big boy leagues. It’s—it’s a tough job. Okay? But it’s a job and it’s part of what you have to do. But these guys tend to get a little wound up sometimes.” (Tr. 219). The Complainant testified that he “was a little bit upset” but “wasn’t angry.” (Tr. 130).

Law and Analysis

Under the STAA, “an employee is a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle).”¹¹ An employer is a person who “engage[s] 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. . . .”¹² I find that because the Complainant was an independent contractor for R&M and drove its commercial motor vehicles, he was an employee under the STAA. Furthermore, I find that both Baylor and R&M are employers under the STAA because, R&M provides trucks and drivers, with which Baylor “make[s] intermodal loads.”¹³ Therefore, both are “engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business.”¹⁴ Similarly, I find that both had authority to “assign[] an employee to operate the vehicle in commerce.”¹⁵

To prevail on his claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that the respondent took an adverse employment action against him, and that his protected activity was a contributing factor in the unfavorable personnel action.¹⁶ If the complainant proves by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, a respondent may avoid liability if

¹¹ 29 C.F.R. § 1978.101(h).

¹² 29 C.F.R. § 1978.101(i).

¹³ Tr. 16-17.

¹⁴ 29 C.F.R. §1978.101(i).

¹⁵ *Id.*

¹⁶ *Salata v. City Concrete, LLC*, 2008-STA-12 and -41 (ARB Sept. 15, 2011).

it demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.¹⁷

Although it is not necessary that a complaint expressly cite the specific motor vehicle standard, which it is alleged has been violated, the complaint must “relate” to a violation of a commercial motor vehicle safety standard. If a complainant’s protected activity is a refusal to drive because it would have resulted in a violation of a regulation, standard, or order, he must prove that was the case; his belief, even if in good faith, is irrelevant.¹⁸

I. Protected Activity

The employee protection provisions under the STAA provide that an employer may not “discharge...discipline, or discriminate” against an employee regarding “pay, terms, or privileges of employment” because an employee refused to operate a commercial motor vehicle that violates a “regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security.”¹⁹

It is undisputed that the Complainant was assigned an overweight load. Except in situations not applicable here, the maximum gross vehicle weight permitted by regulation is 80,000 pounds.²⁰ The May 12, 2011, scale ticket establishes a gross weight of 80,080 pounds. (Baylor’s Ex. 2). Furthermore, the maximum weight permitted on the drive axle is 34,000 pounds. (Tr. 57, 134). The May 12, 2011, scale ticket establishes a drive axle weight of 38,100 pounds. (Baylor’s Ex. 2). Although Respondents offered voluminous evidence establishing that the trailer was only slightly over gross, and that common industry practice permits hauling overweight trailers a short distance, the Respondents have not presented any persuasive evidence that the load in question was not overweight. In fact, Baylor’s expert, Jamie Fiepke, testified that hauling overweight loads to nearby facilities constituted “illegal activity.” (Tr. 39).

The Complainant expressed his refusal to haul the overweight load to Mr. Farley and Mr. Kitchen, both of whom have supervisory duties at Baylor. (Tr. 50-51, 53). The governing regulations expressly delineate that an employee may refuse to operate a vehicle if doing so would violate a regulation related to safety, health, or security. I am satisfied that safety is one of the goals of the weight limitations.²¹ Baylor’s expert, Jamie Fiepke, characterized the weight limit violation as “not a safety issue” with “a professional driver and a well-maintained piece of equipment,”²² however, this testimony misapplies the governing standard. While the danger of hauling a minimally over gross load may practically have been *de minimis*, doing so would have

¹⁷ *Id.*

¹⁸ *Minne v. Star Air, Inc.*, 2004-STA-26 (ARB Oct. 31, 2007).

¹⁹ 49 U.S.C.A. § 31105(a)(1)(B)(i). I find that 49 U.S.C.A. § 31105(a)(1)(B)(i) applies to Baylor and R&M because they operate commercial vehicles with a gross weight of 10,000 pounds or more. (Complainant’s Post-Hr’g Br. 12).

²⁰ 23 C.F.R. §658.17; Tr. 28; Tr. 55; Tr. 184-185; Tr. 236.

²¹ *See Bates v. West Bank Containers*, ARB No. 99-055, ALJ No. 98-STA-30, slip op. at 12 n.5 (April 28, 2000) (“Although OSHA has never asserted in this case that the 80,000 pound load ‘limit’ was a safety law, we are satisfied that safety is indeed one of the goals of [the] weight limit regulations.”); *see also Galvin v. Munson Transp., Inc.*, 91-STA-41 (Sec’y Aug. 31, 1992) (noting that the employee’s refusal to haul an overweight load was based on the potential violation of federal regulations and a safety concern for himself and the public).

²² Tr. 42.

“violate[d] a regulation, standard, or order . . . related to commercial motor vehicle safety, health or security.”²³ There is no exception for *de minimis* or technical violations of the regulations.²⁴

In sum, because the load was overweight, because the weight restrictions constitute safety regulations, and because the Complainant refused to haul the overweight load, I find that the Complainant’s refusal constituted protected activity.

II. Adverse Action

Under the STAA, “any employment action by an employer which is unfavorable to the employee, the employee’s compensation, terms, conditions, or privileges of employment constitutes an adverse action.”²⁵ Accordingly, any termination of employment by an employer constitutes an adverse action.²⁶ Under Board precedent, “except where an employee actually has resigned, an employer who decides to interpret an employee’s actions as a . . . resignation has in fact decided to discharge that employee.”²⁷

In his brief, the “Complainant contended that Baylor took adverse action against him when Baylor sent him a Qualcomm message that he had been “REMOVED FROM THE LOAD AND [WAS] NO LONGER UNDER DISPATCH AT BAYLOR.” (Complainant’s Post-Hr’g Br. At 15). The Complainant also asserted that the Qualcomm message was an “unequivocal” notice of termination considering he was told that he would be fired for refusing the overweight load. (*Id.* at 15). Conversely, Mr. Kitchen testified that “no longer under dispatch” denoted only that the Complainant was no longer responsible for his assignment—the overweight load in dispute. (Tr. 197-198). Additionally, Mr. Kitchen testified that if the Complainant had been terminated, Mr. Kitchen or Mr. Fessel would have expressly communicated that fact to him. (Tr. 202). Furthermore, Mr. Kitchen testified that the Complainant would not have been terminated via Qualcomm communication. (*Id.*).

Regardless of whether the Qualcomm message itself constituted an adverse action, I find that Baylor’s interpretation of the Complainant’s voicemail did. An employer who chooses to interpret an employee’s equivocal action as resignation has effectively discharged that employee.²⁸ Baylor argues that it did not take adverse action against Complainant because Complainant quit on May 12, 2011, when Complainant left a voicemail to Mr. Farley stating, “They are asking me to do something illegal and I’m not doing it. . . I’m done. I’ll clean out my truck.” (Resp’t Baylor’s Post-Hr’g Br. 9, CX 2). Mr. Farley testified that he interpreted this statement as a resignation because Complainant was reportedly demonstrably unhappy with his

²³ 29 C.F.R. §1978.102(c)(1)(i).

²⁴ *Roberts v. Marshall Durbin Co.* ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004).

²⁵ *Long v. Roadway Express, Inc.*, ALJ No. 1988-STA-00013 (ALJ March 9, 1990).

²⁶ *Minne v. Star Air, Inc.*, ARB No. 05-5005, ALJ No. 2004-STA-026, slip op. at 13, 15 (citations omitted) (Oct. 31, 2007).

²⁷ *Minne*, ARB No. 05-5005, slip op. at 14 (citations omitted); *see also Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019 (Sept. 30, 2010).

²⁸ *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019 (ARB September 30, 2010) (explaining that “exploiting [a complainant’s] ambiguous departure,” constitutes “affirmative[. . .] steps to perfect the end of [the complainant’s] employment”) (citing *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 14 (ARB October 31, 2007))).

employment at Baylor. (Tr. 142). However, when asked whether the Complainant had given Mr. Farley notice of his intention to resign, Mr. Farley testified:

“I really wouldn’t say that. He didn’t give me an intention to terminate. He just seemed generally unhappy, you know. I mean, I can’t really elaborate on a lot of real fine specifics. But there were just incidents where he seemed unhappy with the way things were going and the way that things were done at Baylor, containers and just the whole thing.”

(Tr. 143). Additionally, shortly after leaving the voicemail, the Complainant told Mr. Farley that he would not clean out his truck when he returned to Clarksville. (Tr. 54). At the hearing, the Complainant explained that when he said “I’m done,” he meant only that he was “done with the illegal stuff.” (Tr. 54). Furthermore, when the Complainant “bobtailed” back to Clarksville, got in his personal vehicle, and drove home, he did not clean out his truck. (Tr. 99). The following day, after the Complainant reportedly told Mr. Farley that he wanted to come back to work, Mr. Kitchen and Mr. Fessel “discussed it and decided it would be in everyone’s best interest that we were—we’d separate company.” (Tr. 206).

I find the Complainant to be a credible witness and his testimony is consistent. Based on the Complainant’s testimony that “I’m done” indicated only that he was “done with the illegal stuff,”²⁹ I find ambiguity in the Complainant’s voicemail. It is equivocal whether the Complainant’s statement denoted his resignation or simply his intention to refuse all future illegal assignments. By interpreting the Complainant’s voicemail as his resignation, which Baylor then accepted, Baylor effectively discharged the Complainant and accordingly engaged in adverse action against him.³⁰

III. Contributing Factor

Under the 2007 amendments to the STAA, to prevail on his STAA claim, a complainant “must prove by a preponderance of the evidence that [he engaged in] protected activity; that his employer ... took an adverse employment action against him; and that his protected activity was a contributing factor in the unfavorable personnel action.”³¹ A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the

²⁹ See Tr. 54.

³⁰ Even assuming, *arguendo*, that the Respondents’ interpretation of the Complainant’s voicemail did not constitute a discharge, adverse action was taken against the Complainant the following day. On May 12, 2011, Mr. Kitchen called the Complainant and proposed that the parties meet to discuss the situation. (Tr. 64). However, when the Complainant called Mr. Kitchen the following day, Mr. Kitchen told the Complainant that Baylor cancelled the meeting because the Complainant had been fired. (*Id.*) Mr. Kitchen explained that he and Mr. Fessel agreed that “it would be in everyone’s best interest” to “separate company.” (Tr. 205-206). Because Baylor decided to end the Complainant’s employment, and because such a discharge constitutes adverse action, I find that even without considering Baylor’s previous discharge, Baylor took adverse action against the Complainant.

³¹ *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104, ALJ Nos. 2008-STA-12 and -41 (ARB Sept. 15, 2011) (citing *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011)); see also *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

decision.”³² A complainant can succeed by “providing either direct or indirect proof of contribution.”³³

Close temporal proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action.³⁴ “Temporal proximity is just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.”³⁵ However, while such proximity is not dispositive, “the closer the temporal proximity is, the stronger the inference of a causal connection.”³⁶ A close temporal proximity may alone be sufficient to establish a causal connection in whistleblower cases.³⁷

The Complainant originally refused the overweight load between 4:00 p.m. and 5:00 p.m. on May 12, 2011. (Tr. 50-51). Baylor’s decision to terminate the Complainant’s employment, and the Complainant’s actual discharge, both occurred within 24 hours of his refusal.³⁸ The Administrative Review Board has repeatedly found that adverse action within two days of protected activity is sufficient to establish that the protected activity was a “contributing factor” in the adverse action.³⁹ Accordingly, I find that the close temporal proximity between the Complainant’s protected conduct and his termination strongly supports the conclusion that such conduct was a “contributing factor” in his termination.

Because the Complainant has proven by a preponderance of evidence that his protected activity was a contributing factor in the unfavorable personnel action, the Respondents may only avoid liability by “demonstrat[ing] by clear and convincing evidence” that they would have taken the same adverse action in any event.⁴⁰ “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’”⁴¹ Here, the evidence fails to establish with reasonable certainty that the Respondents would have discharged the complainant absent his protected activity. Mr. Kitchen testified that the Complainant was instructed to call Mr. Fessel because Mr. Fessel “wanted to see what his, you know, what his reasoning was, what was going on with Chris to make sure that, you know, Chris was okay to move the load or a load because Chris was very angry. Chris was upset.” (Tr. 180). He added that “Chris wouldn’t be able to make a good decision on what he should’ve done as far as maneuvering his truck.” (Tr. 188). However, Mr. Kitchen later testified that he and Mr. Fessel “need[ed] to make sure he’s okay,” but clarified that “[w]hen I say okay, I don’t mean that, you

³² *Salata*, ARB 08-101, 09-104 at 9 (citing *Williams*, ARB 09-092, slip op. at 5).

³³ *Id.*

³⁴ *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec’y Oct. 1, 1993) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)).

³⁵ *Id.* (quoting *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010)).

³⁶ *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)).

³⁷ 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)).

³⁸ Tr. 206; see also *supra* Section II. Adverse Action.

³⁹ See *Reiss*, ARB No. 08-137, slip op. at 5; *Negron*, ARB No. 04-021, slip op. at 8.

⁴⁰ *Williams*, ARB 09-092, slip op. at 5 (citing 49 U.S.C.A. §42121(b)(2)(B)(iv); 29 C.F.R. §1979.109(a)).

⁴¹ *Williams*, ARB 09-092, slip op. at 5, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing BLACK’S LAW DICTIONARY at 577).

know—that he’s okay to drive a truck.” (Tr. 190). He then asserted that “when you start doing things where it’s uncontrollable, we can’t allow that.” (*Id.*).

Mr. Fessel claimed that the Complainant’s discharge was based on his driver profile, which contained an entry from May 4th that read “Driver MIA”; an entry from May 8th that indicated that he was again a “no call, no show” for two days; “And then on May the 12th I had this driver who’s out of control, puts me on high alert that there’s a major problem. And I need to address the safety of the public. That’s the reason I put the brakes on. It had absolutely nothing to do with him refusing the load.” (Tr. 219). He also testified that he felt that the Complainant’s “unwillingness to communicate to try to resolve a problem . . . was paramount in safety of transportation and the public.” (Tr. 220). Mr. Fessel testified that allowing the Complainant to continue to drive “was a serious safety violation . . . Any time a driver refuses to contact and communicate with dispatch, safety, or myself, there’s a problem. And I’m going to shut it down.” (Tr. 261). However, the Complainant asserted that he was in “near constant communication with the owner of the truck, Baylor’s dispatch, and Baylor’s safety department,” which is corroborated by Mr. Kitchen’s and Mr. Farley’s testimony. (Complainant’s Post-Hr’g Br. 16; Tr. 51-56, 145-153, 187, CX 9, R&M Ex. E). Mr. Kitchen estimated that he spent between 1.5 and 2 hours on the phone with the Complainant the day of the dispute. (Tr. 210). Additionally, Mr. Fessel contradicted his own prior testimony by asserting, because he never spoke to the Complainant on the phone, he was primarily concerned with why the Complainant refused this overweight load. Mr. Fessel testified:

Q. The information that you had about his state of mind was that he was refusing a load that was overweight. Correct?

A. The initial -- when I got involved was when dispatch said Chris is refusing to pick this load up and take it to get it reworked. And then throughout that process, it escalated to where T.J. came in and talked to me. We had a conversation about Chris. And I made the decision that until I talked to him to find out what his state of mind is, he's not moving, not under my direction.

Q. But you had no way to know what his state of mind was?

A. Only from the information that was relayed to me.

Q. And that came from T.J.?

A. T.J. and Robert Farley and dispatch that *there were concerns that why this was creating a problem when it hasn't in the past*. So I mean, we had a state of mind issue that put up a red flag for me.

(Tr. 247) (emphasis added).

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 the Complainant’s employment absent his protected activity. Specifically, the inconsistent testimony fails to establish that Mr. Fessel had a sincere concern for public safety after he learned of the Complainant’s protected

activity. In addition, Mr. Fessel and Mr. Kitchen provided inconsistent testimony regarding the behavior that allegedly contributed to their decision to terminate the Complainant. Accordingly, I find that the Respondents have failed to present “clear and convincing evidence” that they would have terminated the Complainant’s employment even absent his refusal to drive an overweight truck on May 12, 2011. I therefore conclude that the Respondents cannot avoid liability for retaliation under the STAA.

IV. Damages

A successful STAA complainant is entitled to reinstatement, compensatory damages, punitive damages, and attorney’s fees.⁴² Accordingly, the Complainant seeks reinstatement, compensatory damages (including back pay), punitive damages, and attorney’s fees. (CX 17).

a. Reinstatement

Reinstatement is an automatic remedy under the STAA.⁴³ Reinstatement must be ordered unless it is impossible or impractical.⁴⁴ While the STAA expressly provides that a prevailing complainant is entitled to reinstatement, the statute does not prohibit voluntary waiver of that right. The parties have not shown that reinstatement would be impossible or impractical. In fact, the Complainant testified that he would “go back to work for Baylor just as long as [he’s] left to do [his] job legally.” (Tr. 83). Accordingly, I find that an order of reinstatement is appropriate.

b. Compensatory Damages

(I) Back Pay

The Complainant is also entitled to back pay. The Board has approved calculations of back pay based on the complainant’s average weekly wage.⁴⁵ 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.⁴⁶ As evidence of his earnings, the Complainant documented his average earnings totals, including mileage, mileage performance, and detention. (CX 29). Relying on Complainant’s earnings record, I find that Complainant earned an average of \$941.35 per week from February 6 through May 7, 2011.⁴⁷ Applying that wage to the 177 week period between the Complainant’s discharge and the issuance of this decision, I find that the Complainant is entitled to \$166,618.95 in back pay.⁴⁸ However, the Complainant also provided evidence of his subsequent earnings, which mitigate the back pay

⁴² 49 U.S.C. §31105(b)(3)(A)(i)-(iii), (C).

⁴³ 49 U.S.C. §31105(b)(3)(A)(ii); *Pollock v. Cont’l Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-1 (ARB Apr. 7, 2010); *Dale v. Step 1 Stairworks, Inc.*, ARB Nos. 05-142, 06-057, ALJ No. 2002-STA-30 (March 31, 2005).

⁴⁴ *Dale*, ARB Nos. 05-142, 06-057, ALJ No. 2002-STA-30; *see also Dickey v. West Side Transp., Inc.*, ARB Nos. 06-150, 06-151, ALJ Nos. 2006-STA-26, 27 (ARB May 29, 2008) (“On remand, the ALJ should therefore order West Side to reinstate [the complainant] unless the parties demonstrate that circumstances exist under which reinstatement would not be appropriate.”).

⁴⁵ *See e.g., Ass’t Sec’y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34 (ARB Jan. 12, 2000); *Polger v. Florida Stage Lines*, 94-STA-46 (Sec’y Apr. 18, 1995).

⁴⁶ *Assistant Sec’y of Labor & Mailloux v. R&B Transp., LLC*, ARB No. 07-084, slip op. at 10 (ARB June 26, 2009); *Bryant*, ARB No. 04-014, slip op. at 6.

⁴⁷ The Complainant earned \$12,237.50 over those thirteen weeks. $12,237.50 \div 13 = 941.35$.

⁴⁸ $941.35 \times 177 = 166,618.95$

award. The Complainant proffered evidence of \$37,288.51 in wages earned since his wrongful discharge. Accordingly, I find that the Complainant is entitled to a back pay award of \$129,330.44.

Although he is entitled to back pay, Complainant is required to mitigate his damages through the exercise of reasonable diligence in seeking alternative employment.⁴⁹ The mitigation of damages doctrine requires that a wrongfully discharged employee not only diligently seek substantially equivalent employment during the interim period but also that the employee acts reasonably to maintain such employment.⁵⁰ However, “only if the employee’s misconduct is gross or egregious, or if it constitutes a willful violation of company rules, will termination resulting from such conduct serve to toll the discriminating employer’s back pay liability.”⁵¹ The Complainant testified that he worked for Mad Dash Courier, Inc., and Roeder Cartage Co., Inc., in 2011 and 2012. That employment was corroborated by his W-2 forms showing that he earned \$12,670.51 from Mad Dash Courier, Inc., in 2011 (CX 28), \$7,979.05 from Mad Dash Courier, Inc., in 2012 (CX 26), and \$14,024.70 from Roeder Cartage Co., Inc., in 2012. (CX 25). He testified that he quit working for Mad Dash due to the unsafe conditions of the company’s vehicles. (Tr. 75). Additionally, he testified that he left Roeder Cartage to return to Mad Dash because he was “gone all the time.” (*Id.*). After Mad Dash changed management, he returned to work at Mad Dash. The Complainant eventually left the company a second time because, even under new management, “the equipment and everything started going down. They started running it wrong again.” (Tr. 77). Currently, the Complainant performs maintenance tasks for his landlord in exchange for a \$300 discount on his rent. (Tr. 131).

The burden is on the employer to establish any failure by a wrongfully discharged complainant to properly mitigate damages through the pursuit of alternate employment.⁵² Mark Fessel testified that “[t]here are somewhere in the neighborhood of about 8,000 available driving jobs today in the United States. And to say you can’t find a driving job, I find it hard to believe. I mean[,] I’m telling you that every company is looking for qualified quality drivers.” (Tr. 236). The Complainant testified that there were “plenty of jobs,” but “a lot of them don’t pay real good. And you’re gone 30 and 40 days at a time. I’m too old to be gone that long.” (Tr. 131). I do not find the Complainant’s reported behavior to be “gross,” “egregious,” or to constitute a “willful violation of company rules.” Accordingly, I find that he exercised reasonable diligence in securing and maintaining employment. Therefore, I find that the Complainant is entitled to receive \$129,330.44 in back pay.

(II) *Emotional Damages*

Additionally, the Complainant requested damages “of at least \$200,000” to compensate for the emotional distress caused by his unlawful discharge. (Complainant’s Post Hr’g Br. at 22). The Complainant testified that he suffered from anxiety, depression, and trouble sleeping. (Tr. 108, 130). He testified that his ailments were caused by “stress[,] . . .] depression[,] . . . and] a

⁴⁹ *Pollock v. Cont’l Express*, ARB Nos. 07-073, 08-051, ALJ No. 2006-STA-1, slip op. at 12 (ARB Apr. 7, 2010) (citing *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 95-STA-043, slip op. at 5 (ARB May 30, 1997)).

⁵⁰ *Id.* (citing *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-005, slip op. at 10 (ARB Dec. 30, 2002) and *Cook*, ARB No. 97-055, slip op. at 5).

⁵¹ *Id.* (citing *Johnson*, ARB No. 01-013, slip op. at 10-11; *Cook*, ARB No. 97-055, slip op. at 6.)

⁵² *Id.*

number of things.” (Tr. 130). He added that since he was wrongfully discharged, he has “struggled and struggled and struggled, and [his] conditions have [arisen].” (*Id.*).

In comparable cases, a complainant will offer evidence of adverse effects that psychological trauma has had on his or her life, such as damage to a relationship, an inability to function at work, or other disruption of the normal routines of life. Here, however, the Complainant referenced the anxiety, stress, and the sleeplessness caused by the Respondents’ actions, as well as medications he took to relieve his symptoms. I do find that the Complainant is credible, however, and that, as a result of the Respondents’ conduct, he did suffer increased anxiety and stress. Additionally his unemployment or under employment lasted quite some time. I accept that this effect is compensable, and the Complainant is entitled, therefore, to compensatory damages for the anxiety, depression, and sleeplessness caused by his termination. Accordingly, I find that the Complainant is entitled to \$20,000 for the stress, anxiety, and sleeplessness resulting from his wrongful discharge.

c. Interest

As part of a compensatory damage award, a complainant is entitled to prejudgment interest to compensate for the loss of use of his wages.⁵³ In calculating the interest on STAA back pay awards, the rate used is that charged for underpayment of federal taxes.⁵⁴ The interest is compounded quarterly, until the damage award is paid.⁵⁵

In light of the above principles, the Complainant is entitled to prejudgment interest on his back pay award. The interest will be calculated in accordance with 26 U.S.C. §6621(a)(2) and compounded quarterly.⁵⁶

d. Punitive Damages

A successful STAA complainant may receive punitive damages in an amount not to exceed \$250,000.⁵⁷ Accordingly, the Complainant requested \$250,000 in punitive damages. The Supreme Court has held that punitive damages may be awarded where there has been “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law . . .”⁵⁸ The purpose of punitive damages is “to punish [the defendant] for his outrageous conduct

⁵³ *Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec’y Aug. 21, 1986), *overruled on other grounds*, *Roadway Express, Inc., v. Brock*, 830 F.2d 179 (11th Cir. 1987).

⁵⁴ *See Ass’t Sec’y & Bryant v. Mendenhall Acquisition Corp. d/b/a/ Bearden Trucking*, 03-STA-36 (ARB June 30, 2005); *see also* 26 U.S.C. §6621(a)(2).

⁵⁵ *Bryant*, slip op. at 10, and *Doyle*, 89-ERA-22 (ARB May 17, 2000).

⁵⁶ The machinations associated with this calculation are not insignificant and I leave the particulars to parties’ counsel. For the first calendar quarter following the termination date, the “applicable federal rate” (“AFR”) for that calendar quarter must be determined by averaging the Federal short-term rate for each of the three months in that quarter. Next, that average interest rate is arithmetically rounded and 3% is added. Then, that combined interest is then applied to the quarter’s principal. To determine the interest owed on the second calendar quarter, after determining the combined interest rate for the second quarter, the first quarter principal, the first quarter interest and second quarter’s principal are added and the second quarter compound interest is applied to that sum. Finally, the iterations continue for each quarter until the damage payment is made.

⁵⁷ 49 U.S.C. §31105(b)(3)(C).

⁵⁸ *Smith v. Wade*, 461 U.S. 30, 51 (1983).

and to deter him and others like him from similar conduct in the future.”⁵⁹ However, 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.”⁶⁰

In this case, the Complainant has not presented any evidence to show that the Respondents 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 the Respondents’ actions were otherwise “outrageous.” Moreover, I find that a punitive damage award against the Respondents would not serve to punish or deter future similar conduct. Accordingly, I find that the Complainant’s argument on this point does not support an award of punitive damages.

e. Attorney Fees

Complainant requests an award of attorney’s fees and costs and has submitted an updated affidavit in support of his application. Respondents have not yet responded to such.

f. Abatement of Violation

Complainant seeks expungement of any adverse information in his personnel files maintained by Respondents and correction of any reports to consumer-reporting agencies concerning his work record. He also requests that Baylor be required to post a copy of the decision in this case at all of its work locations. The STAA expressly mandates that a complainant who establishes a meritorious case is entitled to immediate reinstatement to his or her “former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant’s employment”⁶¹ Therefore, Respondents shall expunge all negative or derogative information from the Complainant’s personnel records relating to his protected activity or their role in the Complainant’s termination, shall correct any reports to consumer-reporting agencies concerning the Complainant’s work record and shall conspicuously post copies of the ALJ’s Decision and Order for 90 days.⁶² Such relief is appropriate for meritorious cases under the STAA.⁶³

⁵⁹ *Id.* (citing Restatement (Second) of Torts §908(1) (1979)).

⁶⁰ *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).

⁶¹ 49 U.S.C. § 31105(b)(3)(A).

⁶² *See Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-22 (ARB Nov. 30, 2009).

⁶³ *Cefalu v. Roadway Express, Inc.*, 2003-STA-55 (ARB Jan. 31, 2006), *aff’d sub nom., Roadway Express v. United States Department of Labor*, 495 F.3d 477 (7th Cir. 2007).

ORDER

Chris Hood's claim for relief under the employee protection provisions of the STAA is **GRANTED**. I therefore order the following:

1. *Reinstatement*. Respondents shall immediately reinstate the Complainant as a driver at the same pay, and with the same terms, privileges, and conditions of employment that would be applicable if he had remained a driver with the company since May 12, 2011.
2. *Back Pay*. Respondents shall pay the Complainant \$129,330.44 in back pay. Additionally, the Respondents shall pay prejudgment interest, compounded quarterly in accordance with 26 U.S.C. § 6621(a)(2).
3. *Compensatory Damages*. Respondents shall pay the Complainant \$20,000 in compensatory damages for the stress, anxiety, and sleeplessness caused by his discharge.
4. *Attorney's Fees*. Complainant's attorney has filed an application for attorney fees and costs, as supported by an affidavit of counsel. Respondents must file objections to Claimant's application for attorney fees and costs, and have **twenty days** following receipt of this Decision and Order to respond.
5. *Abatement of Violation*. Respondents shall expunge all unfavorable information regarding Complainant from its personnel files and shall correct any reports to consumer-reporting agencies concerning the Complainant's work record. Further, Respondents shall conspicuously post a copy of this decision on its premises for ninety (90) consecutive days in all places where employee notices are customarily posted.

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the

findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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

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