



Issue Date: 07 January 2014

CASE NO.: 2012-STA-48

IN THE MATTER OF

MARVIS HOWERTON,

Pro-se Complainant

vs.

NORTHERN PLAINS TRUCKING,

Respondent

DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act (the Act)¹, and the regulations promulgated thereunder,² which are employee protective provisions. The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

Procedural Background

This case has a convoluted background marked by Complainant’s morphing and unfocused allegations. Complainant initially complained to the Office of Health and Safety Administration (OSHA) on 27 Apr 12 that Respondent suspended him for one day, after he had complained about safety issues. He later added that Respondent had reduced work hours and placed him on a one day suspension in retaliation for filing an OSHA complaint in or around December of 2011. OSHA dismissed the complaint, determining that Respondent had not reduced Complainant’s hours and that the one day suspension was not for complaining about the production water, but for violating company policy relating to the use of cell phones while refueling.

Complainant filed his objections and requested a de novo hearing. He also added an allegation that on 23 Apr 12 he had complained about improper labeling on new gas and diesel fuel tanks and explained that the reduction in hours was a result of Respondent limiting the number of locations to which he was dispatched.

¹ 49 U.S.C. § 31105 et seq.

² 29 C.F.R. Part 1978.

During an initial conference call on 13 Sep 12 with the pro se Complainant and Respondent's counsel, I explained the litigation steps to Complainant and that we all needed to understand exactly what he was alleging so Respondent could respond and I could adjudicate the case. I told him to send me a specific explanation of each of his protected communications and the adverse action that Respondent took against him because of it. Over the course of a number of conference calls, it became clear that Complainant was having difficulty understanding and communicating the specific elements of his whistleblower case. Throughout the process, it was difficult to determine exactly what Complainant was alleging, as he would provide unclear and ever-changing explanations for what he wanted to identify as his protected activities and Respondent's corresponding adverse actions.

However, after even more conferences and extensive discussions, Complainant agreed during a 25 Feb 13 conference call that his allegations could be summarized into two whistleblower violations:

The first protected activity involved complaints he made to supervisors and safety personnel about the lack of proper documentation for contaminated water that drivers were transporting from fracking sites. Those complaints culminated in a December 2011 complaint about the subject to OSHA. Complainant alleges that as a result of those complaints, his driving hours were reduced by Respondent.

His second protected activity occurred in April 2012 and involved his complaints to supervisors and safety personnel that the fuel tanks from which he was fueling his truck were not properly labeled. Complainant alleges that as a result of that second complaint, he was taken off work until he passed a pretextual physical and eventually was forced to resign.

Complainant agreed that there were no other protected activities or adverse actions that he intended to assert in this litigation and indicated he understood that the case would be limited to these allegations. Respondent then filed a motion for summary decision to dismiss both counts. I granted the motion in part, leaving the following allegations for litigation.

Complainant complained to supervisors, safety personnel, and OSHA about the lack of proper documentation for contaminated water that drivers were transporting from fracking sites. As a result, Complainant was (1) reassigned to Grover field and suffered a reduction in his driving hours and (2) suspended for one day in April 2012.

On 26 Aug 13, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based on the entire record, which consists of the following:³

Witness Testimony of

Complainant
Robert Smith, Jr.
Randall Ekx
Joni Stoner

Exhibits

Claimant's Exhibits (CX) 1-3⁴
Respondent's Exhibits (RX) 1-13

STIPULATIONS

The parties stipulated that the complaint comes within the coverage of the Act.⁵

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

Complainant alleges that after he questioned Respondent's procedures for proper documentation of the cargo he was driving, he was reassigned to a route that allowed for less working hours and was suspended for a day. Respondent denies that Complainant engaged in any protected activity and submits that even if he did, he was not subjected to any adverse action. It further argues that if there was protected activity and adverse action, the protected activity was not a contributing factor. Finally, it submits as a last alternative, that even if there was a contributing nexus it would have taken any adverse action in the absence of the protected activity.

³ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁴ At the end of the hearing, Complainant said he wanted to offer as CX-4 his copies of each of the daily driver logs upon which the data compilations offered by Respondent as RX-11-13 were based. Complainant stated he believed the individual logs might contradict those compilations. Respondent objected and I told Complainant to check the individual logs, add them up, and if he determined that RX-11-13 were not accurate, he could submit CX-4 post hearing to rebut RX-11-13. During a post hearing conference call on 29 Aug 13, Complainant conceded that the figures on his daily logs were consistent with the summaries at RX-11-13. I therefore did not consider them.

⁵ Tr. 7.

LAW

The Act provides that

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

(A) the employee ... has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or

...

(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 or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.⁶

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. 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 it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event.⁷

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. For a finding of protected activity under the complaint clause of the STAA, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation.⁸ 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.⁹ If a complainant’s protected activity is a refusal to drive because he was apprehensive that it would have resulted in serious injury, he must prove that apprehension was reasonable.¹⁰

⁶ 49 U.S.C. § 31105.

⁷ *Salata v. City Concrete, LLC*, 2008-STA-12 and -41 (ARB Sept. 15, 2011).

⁸ *Ulrich v. Swift Transportation Corp.*, 2010-STA-41 (ARB Mar. 27, 2012).

⁹ *Minne v. Star Air, Inc.*, 2004-STA-26 (ARB Oct. 31, 2007).

¹⁰ *Barnett v. Lattimore Materials, Inc.*, 2006-STA-38 (ARB Sept. 22, 2008).

An adverse action is anything an employer does that could well dissuade a reasonable worker from engaging in protected activity.¹¹ The implementing regulations prohibit as adverse action and make it a violation for an employer to “intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]”¹²

EVIDENCE

*Complainant testified at hearing in pertinent part:*¹³

He lives in Johnstown, Colorado and first went to work for Respondent in September 2010. He drove a tanker truck hauling production water and hazmat material. He was trained in the Grover field. He was dispatched in every part. Half the time he was in Grover and the other half he was going to other sites in Wyoming and Colorado. He was hauling production water and some fresh water in for the new well sites. He was hauling disposal water into Percy.

All of the production tanks were lettered, "Production Water," and had the same chemical placards that the oil tank had. There was a possibility of it being potentially flammable. It was and was not properly documented.

By the law, Respondent would have to test each and every load. Basically, as a CDL driver, he is responsible. They were given sight tubes for the back of their trucks, to help control the amount of oil. The nature of the stuff he was hauling out of those other places varied from place to place. It was extremely difficult to use an eye contact to try to perform a multi-gas flammable type situation.

He was doing the same job from September 2010 going into December 2011.

They were using the trucks for non-hazmat distribution of fluids. It was a combination of 80/20, hazmat. He's not an expert. He has a little bit of environmental law background. He does know that, normally, if you've got much in the way of hazmat in a tanker truck, it's probably going to be all classified as hazmat. They were hauling a material that should have some sort of documentation. He wasn't sure. That's why he questioned how they could determine, from load to load, whether it was a legal responsibility.

In December of 2011 he finally decided to ask. As a DOT driver, he is required to know what he is hauling. He wasn't sure, so he asked. It was both that the trucks were not documented and the drivers weren't properly trained. They had an idea of what was in the trucks, they just didn't know exactly, what the quantities were. That is the grey area within the oil and gas business.

¹¹ *Strohl v. YRC, Inc.*, 2010-STA-35 (ARB Aug. 12, 2011).

¹² 29 C.F.R. §§ 1978.102(b), (c).

¹³ Tr. 14-75; 133-137; 192-194.

On 16 Dec 11, he arrived at the dispatch office at 5 AM. They dispatched him to C-6, a disposal site that was not part of Grover. They were responsible for taking disposable water and turning it into recyclable water. He was to go pick up. So, he was going empty to the disposal. That was typical and he had been to C-6 before, but only once before did he load recyclable two percent KCl. He was told what he was going to be hauling and he knew that KCl is not a chemical under DOT regulations. But they mix a biocide with the KCl to kill the bacteria in the wells.

He went back out to the truck with the information from the dispatch. He started thinking that he had brought this up many times before, but would really like to get some clarification on what it is they're doing and if it is okay for him to take this chemical. In his mind, they were asking him to go pick up two percent KCl with a biocide chemical. He believed that under DOT regulations, he couldn't haul it without the documentation or somebody giving him a piece of paper listing the biocide on a bill of lading that described that one bag of biocide was in the recyclable water.

Respondent had its own KCl and biocide in a bucket next to the tank that had the KCl. He had been instructed many times that they were to get it there and then go to a hydrant and fill up with water, using the specified amounts. Then they were to take it to a work-over rig.

This time he mentioned to the dispatcher, that he didn't know if he could legally take this from C-6 without the proper documentation. The dispatcher said that they could get somebody else to do it, if he didn't want to. He told the dispatcher that what he really needed to do is talk to somebody and get clarification. He had done it over and over and over again, to the point where he was really unsure and didn't feel comfortable about doing it anymore. He wanted something in writing that it's okay to take a bag of biocide chemical and put it into the truck.

They have a book in the truck with different licenses and permits. There are some situations where they have been given permission to do certain things in the oil fields. He was wondering if they couldn't specify something from the oil company that's responsible for what they were really picking up, so he could go in and out of these locations with some sort of documentation.

The dispatcher said, there was no problem and they would get another driver. He went back out to the truck and got his stuff out of it. He tried to call Bob Smith but Smith was on vacation that whole week. So he just left a message and went home.

He had no personal meeting with anybody from Respondent from the time he left dispatch on the 16th to the time that he actually came back and logged in to do more work for Respondent.

The next Monday morning he ended up calling Joni Stoner at HR and told her he just needed to know any chemicals that were involved and some clarification on the documentation. That was more general than just C-6. She said she hadn't heard of

anything like this before. Stoner also gave him the number for John Greer, who is Respondent's attorney.

Ms. Gravito provided him with the name and telephone number of Sergeant Josh Downing, of the Hazardous Materials Divisions of the Colorado State Patrol. He gave her the name of the person that he talked to, but she thought that that person was giving him the wrong information. So, she gave him another person's name. That person told him he was right and was going to get several stories on what's okay.

Finally, Bob Smith was able to get back in touch with him and wanted to know what was going on. He spent the rest of the week calling different people like the Department of Transportation and people that would demonstrate a legal right for him to explain what it was if he got pulled over and they tested the chemicals, because then he would be in trouble. He told them it's a grey area.

He stayed off for six days. Bob Smith was doing whatever he could do and called back several times. He told Smith he was getting in touch with Respondent's attorney. Smith was okay with him going back to work and wanted to make it easier. He went back to work, because he needed a job and liked doing what he was doing. He did still think it was a grey area and he was driving loads that should have been individually tested.

They did have an understanding of what they were doing, because the production water tank, at a well site, has got the same symbol on it as the oil tank. They have to do that, because if there is any of that there, they have to explain it. So, he thought, legally, as a DOT driver, he would have to have the same documentation of that chemical symbol.

The production site has some labels that indicate what he was potentially putting into his truck. Anytime a truck driver goes to a shipper and picks up a load, it's got some documentation. He has done that for, you know, 40 years. The oil fields are the only place that it does not take place.

Respondent really did what they could to explain it. But they were explaining right up to their legal responsibility, which is different from his. Basically, he was out there taking a chance. He had to be experienced enough to know, without having a multi-gas meter. They had a Weld County Police Officer at one of the safety meetings say they were taking somebody to jail, once a week, from the oil fields.

On 20 Dec 12, after about six days, he went back to work, but no one ever made him totally feel better about it. He got as much clarification, as he could. A hazmat DOT police officer told him it really is a grey area within the law. Respondent is allowed to send drivers to an oil field without documentation and there are some old laws that they can do that legally.

Once he started back, Respondent was doing what they could, to make him feel comfortable about doing the job. He was okay with the Grover loads because he thought they were not illegal or that grey. Noble Energy was doing what they could,

environmentally, to make the production water safer. Once he started back, he pretty much only went to Grover.

There was verbal understanding with Respondent he would only be dispatched to transport production water from the Grover field. Nobody communicated that to him; it was just done. He just showed up for work and they dispatched him to Grover. That was acceptable to him to a point, but in Grover there are still times when there might be too much oil in the production water and he wouldn't know. He's not the shipper.

After he returned to work, he did ask the dispatcher if there was more work for him to do. He was willing at that point to be dispatched to other well sites and to transport KCl water or flow-back water, because he was a trainer. He felt like he could determine the difference, when he got to the job site, if there was something that he needed to say to somebody, or communicate a risk, that's where he started running into problems. He was not okay with being confined to Grover field.

There were times he was sent home when other drivers were being sent out to other jobs and he could have gone. Getting reassigned to Grover hurt his ability to work overtime. There were times when they were done with Grover, they had a lot of other places that they could go to and they could get more revenue off one of these trips to Wyoming than to Grover. It is not true that during the period of time that he was employed by Respondent, they assigned certain drivers, to drive primarily to Grover field.

He thinks he lost around \$7,000.00. But there were a lot of things that happened during that year. He had three surgeries, but missed less than five days.

On 23 Apr 12, he was getting ready to fuel. The fuel tanks were up against a fence and then they had the fuel island. He was on the satellite side of the fuel island, a good 35, 40 feet away from the fuel tank. But the way that they pumped fuel is to turn the fuel pump on. He never fueled both sides at the same time. So, he went and started the pump and then came over to the satellite side and put the nozzle into the truck. He had his cell phone in the truck, and heard it ring. He hadn't started the pump yet, so he got his cell phone and answered it. The nozzle was in the tank, but the pump had not been started. He was leaning over the fuel tank, but the pump wasn't running, and that's the way he understood it.

Bob Smith drove up and he went over to his car and Smith asked what he was doing. He explained to Smith he was not pumping any fuel, but Smith really didn't want him to be on the cell phone. Smith didn't say he was going to suspend him for a day at that time and basically never got out of his car. Smith did tell him to come to the Lucerne yard, to get a written disciplinary warning.

He did follow Smith back to the yard. Mr. Ekx joined them. Smith gave him a written warning.¹⁴ He didn't argue with Smith, but told him that the fuel pump wasn't running. No one from HR was involved and he felt like there could be some things that he needed

¹⁴ RX-3.

to talk to them about. He didn't think the written warning had the right information on it, so he didn't sign it or take it, even though Smith asked him to.

And the next two days, 24 and 25 Apr 12, were his regularly scheduled days off. On 24 Apr 12, he called in and reported a safety hazard to OSHA about the fuel tanks not being properly marked.¹⁵ The Department of Labor did send back an answer to the request and Respondent had a certain amount of time to answer. He didn't really say that Respondent's employees were allowed to use their cell phones while fueling. It was a very common thing that all of the supervisors were doing while they were waiting to fuel. A lot of times they were in a long line.

He did not know that it was improper to have his cell phone in the fueling area. He told OSHA there wasn't the right description of what they were asking them to do. He does not agree he was fueling his truck on 23 Apr 12. If he had been fueling while using his cell phone it would have been a violation of safety policy. Every police officer in Denver County fuels the truck with radios hooked to their bodies. They fuel vehicles during thunderstorms.

He was not given "Safe Operating Standards CES Rockies, Inc.,"¹⁶ as part of his employment. He received one like it, but not like that one. The standards say, "Pagers, cell phones and other non-static electric drivers shall be left in the vehicle, while fueling is in progress," but it was never clarified that he was refueling the truck.

Since the 24th and 25th were his regular days off, the 26th was his one-day suspension. On April 26th, he filed another complaint with OSHA.¹⁷ He told them Respondent was retaliating against him based on everything that's happened since 16 Dec 11.

They had the normal slow period after Christmas, but other than just reassigning him to Grover, Respondent didn't do anything else to his hours or say anything to him that gave him the sense that they were unhappy with him. As a matter of fact, they gave him a raise, just a couple months after the fuel thing. He didn't think that they would give him a raise a couple months after breaking some rule.

In terms of what he wants from the hearing, he was basically trying to get some closure in a situation that was understood by everybody. He just didn't accept it the same way that the other drivers did. He wanted some documentation, a piece of paper, saying that he can legally drive his truck. As a DOT driver, he felt like he was being taken advantage of. If he wins his case, he wants, he is guessing, maybe \$7,000.00 in lost wages. He also wants compensation for pain and suffering and reimbursement for the stress and anguish that this has caused. He never had to go to the doctor for any of this and is not taking any medications, because he's upset about it. There were times where he was sent home, early in the afternoon, when they were dispatching other drivers to different places. That

¹⁵ RX-6.

¹⁶ RX-5.

¹⁷ RX-8.

was because he was limited him to Grover. There were some situations where they did let him go out, to certain places, if there was a dispatch they thought he'd be okay with.

It's the shipper's responsibility to designate and provide an MSDS sheet, showing whether or not there is hazardous material. Whoever is shipping that material, arranging it to be shipped, is responsible for designating whether or not it's a hazardous material. Respondent is not the shipper, with regard to production water, waste water, flow-back water, or KCl water. When he asked the shipper for the paperwork, they said that they don't do that. He was more comfortable with hearing that from the Grover field people.

The last day he worked for Respondent was 17 Oct 12. His 2012 W-2¹⁸ statement is for approximately, nine and a half months. His 2011 W-2¹⁹ is for 12 months. That would explain the difference in the amount of money you received in 2011 and 2012. There is a \$15,000.00 difference and he basically cut it in half as a guess. He did get a merit pay raise in September 2012, after he had filed multiple claims with OSHA. It was based on the date that he was hired and he was with a group of people in that same period of time, so it was for longevity. Respondent had to give it to him unless they were going to fire him.

He has logs that show 50 percent of the time he was in Grover from September and October of 2011 through the first five months of 2012.

Robert Smith, Jr. testified at hearing in pertinent part:²⁰

He was employed by Respondent from 2002 until July of 2013. Before that he worked for Lead Energy Services, which was another company involved in the oil and gas well field service business. Several employees from Lead Energy split off and formed Respondent. He has been employed in the oil and gas well field service business since 1992.

For Respondent, he was initially a dispatcher, and then became Operations Manager. He was Operations Manager for about five years. As Operations Manager, he oversaw the daily operations of the whole department to make sure the dispatchers were getting the work out and the drivers were being taken care of. He hired, disciplined, approved the day-to-day bills, and even contacted customers to make sure the work was still coming in. He kept the customers and drivers satisfied. Respondent is an oil field service company. They haul produced, flow-back, and KCl water, which is considered dirty water in the oil field, as opposed to fresh water.

Fracking is when they pump water and sand down under high pressures and it fractures the formation below, creating pores for the oil and gas to come up. Once a company drills and fracks a well, the well produces oil, gas, and water. The separated water is considered produced water, because it came back out of the well bore. It went into what would be called "pits" or big upright tanks.

¹⁸ CX-2.

¹⁹ CX-1.

²⁰ Tr.75-143.

Once the well is fracked and producing, but before they put it online, they have to pull that frack pipe out and put regular pipe back in. They have to use KCl water, to hold the fluid down, so it doesn't just blow out everywhere. It holds the fluid down, so they can frack pipe and run the regular tubing back down the hole. If they used fresh water it would swell the formation and cause all kinds of problems, so they use two percent KCl water with biocide, to kill any microbes.

Once they start to capture more gas and oil than water, they put it online, through a separator that separates it into the oil tank. The gas goes down the sales line and the water would just go into a pit or a tank. That is flow back water.

Respondent would haul the produced, flow back, and KCl water from various locations to certain injection disposals. Trucks would load the water, go to the disposal, get emptied, and then call up for another load. Ninety percent of the work was produced and flow-back water. The other 10 percent was the KCl water.

The production company determines whether or not the water is a hazardous material. They provide Respondent with a Material Safety Data Sheet (MSDS). The Material Safety Data Sheet, tells the transporter, whether it can be transported as a non-hazardous material. The common carrier relies upon that to determine how it can be transported and whether or not it has to be transported as a hazardous material. Respondent puts an MSDS book in every truck. The production company informs Respondent and the dispatcher what type of water is to be hauled and the MSDS book has all the different types of fluids. They have an MSDS for produced, flow-back, KCl, biocide, even diesel. When a driver shows up for dispatch, they know what is being hauled. Pre-dispatch, they're told what they're going to do. Respondent's trucks are 150 barrel and have two baffles inside each truck. They have a vacuum pump and suck the water from the production tank into the truck.

They have to assume what they are hauling is indeed what the company tells them it is. The standard for the industry is to rely on the representation of the customer. Otherwise they would have to lab test every single load. No one expects the truck drivers to be doing independent chemical testing. There are certain fail safes they have. We have the sight tube, which is a clear tube through which the driver can actually see what's going into the truck. An experienced truck driver, like Complainant would know the difference between water and oil. There is also a paste compound the driver can put on a stick or a gauge line. If it turns pink, it's water; if it stays gold, it's oil. If a driver sees that something is not right, they can run that test. Then they stop and call dispatch, which sends out oil representatives. That happens multiple times a day.

During the period of time that he worked for Respondent, they had two hundred employees, of whom about 125 were water truck drivers. They would come into the dispatch office and get their dispatch. Respondent worked for two major oil companies, Noble Energy and Anadarko, with three pit lists. Noble would produce a pit list of just produced water and would also, send a Grover list. There was also the Anadarko list.

A driver would come in, meet with his designated dispatcher, and get his job. Then the driver would go out to his truck, get it pre-tripped and fired up. That usually took about a half hour. Then they'd just go on out and get their load. If they were dispatched out to go pull three production pits, they'd go out and pull the three pits, go to the nearest or designated disposal, and then they call up on the radio and ask for another load. The dispatcher, over the radio, would give them another three or four pits, or a load of flow-back, or a load of KCl. In many instances, no one would be at the pit or pick up point, but they did it often enough that they knew where to go. They didn't pick up any new paperwork from that supplier, because they already had standard paperwork for each kind of load, and could tell what they were picking up.

About 12 drivers were assigned to the Grover field. The Grover field is in Grover, Colorado, 60 miles north of Greeley and an hour's drive up there. It had its own little concentration of wells that Noble had acquired. Instead of having little underground pits, they had big upright 300 barrel water tanks. Because of that it was less physically demanding on the drivers. If a driver goes and pulls pits, he is throwing his hose on and off the truck at least 50 times a day, along with getting in and out of the truck and stuff. It would be at least a three-hour cycle for one run to Grover, so they would only haul, maybe, three or four loads a day, as opposed to the other guys having to haul, maybe, five or six loads a day. It was just a less physically demanding job and there was less risk for injury for certain individuals.

There was no difference in pay, between drivers assigned to the Grover field, as opposed to drivers who were assigned Anadarko or to Noble wells not located in the Grover field. They were all paid hourly, right off their logs. If they hauled 10 loads or if they hauled two loads, they got paid for the 12 or 14 hours that they worked that day. He doesn't think there was a big difference, money-wise, between the Grover drivers and the others, because they tried to bring all the trucks in about the same time. The goal was always to try to get everybody parked within an hour or two of each other.

New employees hired by Respondent are given orientation training. It includes watching the Noble orientation, CANA orientation, gas monitor awareness, an OSHA 10-hour class, and 10-hour Safe Land class. They are provided with the CES Rockies, Inc., Safe Operating Standards. RX-5 is that SOS safety booklet. It tells employees not to use cell phones or to leave cell phones in their trucks while refueling. That instruction is repeated during monthly safety meetings.

He personally hired Complainant for Respondent. They did the drive test and everything together. Complainant was hired to haul water. He was Complainant's direct supervisor. He recalls telling Complainant Respondent was going to put him in the Grover field, so he'd have more windshield time, instead of having to be doing the pit pulling in the regular DJ Basin. Complainant was assigned to the Grover field, relatively early on in his employment. Once drivers get done with all the other safe land training they go with other drivers for a minimum of five days, so they can learn all aspects of the job. But other than that, Complainant was pretty much just assigned to the Grover area. Prior to

December of 2011, Complainant was assigned to transport production water, from the Grover field about 90 percent of his time. He considered Complainant to be a good performer.

On 16 Dec 11, Complainant was dispatched out to go bottom out a flat tank. That's where they're done using the KCl and they roll it through the hole and it comes back up. Sometimes, there's a little sheen of oil on there. As he recalls, the dispatchers told him Complainant had gotten out there and didn't want to bottom that flat tank out, because it had oil on it and his truck wasn't placarded to haul crude oil.

At that time, oil was about \$121.00 a barrel and certain companies were saying that even if there was two or three inches of oil on that flat tank, they wanted it skimmed off and put into the oil tank, not to go to disposal. It was just barely a little bit of sheen and he refused to haul the load. Complainant came back to the yard and said he needed to do some research and he needed to get in his own mind that it was okay to haul that used KCl water. Complainant said he just didn't feel comfortable and was going to go home for a few days and see what he could dig up, because he didn't think that he felt safe hauling that water, because it should be considered hazmat material.

He called Joni Stoner, the HR Director, who contacted Laura Gravito, the Compliance Manager. They came down that afternoon and had Complainant come back in. They all talked that afternoon and told Complainant that if he was comfortable hauling at the Grover area, they would just keep him up in the Grover area and he wouldn't have to go haul KCl. Complainant said that would be fine with him. Complainant didn't come right back to work, but took two or three days off, to research.

Complainant's concern was not reasonable, because there's always a little skim of oil on all those open top flat tanks. That's because once they get the tubing back in the hole and bring that water back out into the flat tank, there's always a little. Sometimes, 20 or 30 barrels of oil will come back out. If there had been even two or three inches, that company man would have made them skim that off and put it back in the production tank. That little sheen of oil is pretty much found in every pit. There's always a sheen of oil. Any driver with Complainant's experience and background should have understood that. Out of the 115 drivers, he was the only one that was really concerned about it. So, they thought they'd do him a favor and just eliminate the problem for him. He could just go haul the Grover water and wouldn't have to worry about it.

Shortly after that incident, he received a letter from OSHA, indicating that someone had complained about a safety issue. He suspected it was Complainant. RX-1 is a letter he received from Herb Gibson, the Area Director of OSHA. Mr. Gibson called before he faxed the letter and said Respondent had a disgruntled employee that was calling and saying that there were un-placarded trucks out there hauling hazardous material.

When he received the letter, he called Matt Daniel, who was the HS&E Safety Director. They did what they were supposed to do with the OSHA thing and posted it up on the wall for the five days. Then they came up with RX-2, as the rebuttal to his complaint.

They never heard any more from Mr. Gibson or had any further investigation. He didn't discuss the complaint with Complainant. When Complainant returned to work and was only being dispatched to the Grover field it was just business as usual.

At the time that Complainant was being dispatched to the Grover field, there were 10 or 11 employees. RX-11 lists the employees who were assigned to the Grover well field, at the same time Complainant was. Those drivers were assigned the same approximate number of hours per pay period.

The pay period ran from Monday morning through Sunday night and employees were paid every two weeks. Respondent did not try to give certain drivers assigned to the Grover field more hours than other drivers. The dispatchers decided which driver would be assigned to a particular well in the Grover field. They would take a look at the list that Noble had provided the night before and would dispatch as the wells became available.

After Complainant returned to work in December, there was no discussion about dispatching him to fewer wells or attempt to dispatch him to fewer wells than other drivers assigned to the Grover field. In fact, there was times where he would hear them bringing the Grover drivers in, and he would suggest moving a couple of the other guys onto flow-back, so Complainant could have one more load. Complainant never complained to him that his hours were being reduced. He never heard about Complainant complaining to any of the dispatchers, about his hours being reduced.

On 23 Apr 12, they had a new fuel island in the Grover yard where all the trucks would refuel and he was just kind of making his rounds. It had gone online in December and they had had some times where guys had been seen or heard talking on their cell phones. They also had a couple of guys actually drive off, leaving the fuel handle in their truck and pulling it off, making a big mess on the brand new concrete pad. He would just routinely drive in there in the late afternoon, just to see what was going on.

As he pulled in, he saw Complainant had the fuel nozzle in his truck with the fuel cap off. Complainant was talking with the phone in his left hand. Complainant was leaning over his fuel tank, talking away on the telephone. As soon as Complainant saw him pull up, Complainant backed up, got off the phone, and walked over to talk. He asked Complainant what he was doing and Complainant said, "What do you mean, what am I doing? I'm getting fuel." He pointed out that Complainant was not supposed to be talking on the cell phone, while fueling up, and Complainant said the pump wasn't on. He explained to Complainant that he had an empty fuel tank, which is more dangerous than a full fuel tank, because of the fumes. Complainant responded that he thought that only applied to unleaded, and he was fueling with diesel. He explained the rule applied to diesel too, and told Complainant to come up to the office for a written warning.

They went up to the office and brought in Mr. Randy Ekx as a witness. Randy was the Assistant Operations Manager, had been in the Safety Department for 20 plus years, and had given the safety meetings on cell phone use at the fuel pumps. Randy reminded Complainant about the safety meeting they had a couple months before, where they

watched a person catching on fire while getting fuel. But Complainant just wanted to argue and argue and argue.

So after about a half hour of it, he had enough of it and told Complainant he was off for a day so that maybe he would get the point. He suspended Complainant for the day, not so much for fueling and talking on the cell phone, but for arguing with him about it for so long.

RX-3 is the warning report that he prepared and tried to give to Complainant. Complainant said he wasn't going to sign it because he didn't want it and didn't agree with it. Complainant then left the building. The next day he prepared RX-4, because he had a feeling that Complainant might complain about being unfairly suspended and he might need a document written while all the facts were fresh.

The next day, 24 Apr 12, he received a call from OSHA that Respondent didn't have the fuel tanks marked correctly. RX-6 is the letter he got from OSHA the next day. They didn't say who had made the report to them, but he had a hunch. Then when he read the first paragraph, he knew it had to be Complainant, because that's exactly what he was suspended for.

RX-7 is Respondent's answer to OSHA. It explains that Respondent's company policy as stated in the handbook is that drivers are not allowed to use cell phones while fueling. OSHA never requested any further information or conducted any further inquiry into the safety issues that were raised in the 24 Apr 12 letter. They did add some additional placarding to what was already on the pumps.

On 30 Apr 12, he received RX-8, a letter from OSHA indicating that Complainant had filed a whistle-blower complaint. When he read it, he just really couldn't believe it, because Complainant was complaining about something that he had just been written up for. Complainant called OSHA to complain that he had been suspended for breaking a work rule.

Complainant alleged that he voiced safety issues to management on 19 Apr 12 and then Complainant was given a days' suspension for using his cell phone while fueling. He didn't recall Complainant ever voicing any safety concerns and when they looked at the vacation logs, they discovered Complainant wasn't even at work on 19 Apr 12.

30 Apr 12 was the first time that he learned Complainant was claiming that the one-day suspension of 23 Apr 12 was due to the concerns about KCl water he had raised in December 2011. Prior to 30 Apr 12, Complainant never expressed any safety related concerns. He suspended Complainant because Complainant was combative and was caught fueling his truck while talking on his cell phone. It had nothing to do with the safety concerns Complainant had voiced in December 2011. When Complainant came back, in December, he was quiet and just went back to business as usual.

Complainant wasn't reassigned to the Grover field in December 2011. Complainant was always assigned to the Grover field. The accommodation Respondent made, after Complainant voiced the safety concerns, was to only assign him to the Grover field. After that decision was made and explained to Complainant, he didn't make any complaints about only being assigned to transport production water from the Grover field.

Assigning Complainant to only transport water from production tanks in the Grover field did not result in a reduction in his work hours. RX-11 is a summary of all the Grover haulers and by each pay period. At the bottom is an average of each hour of their average hours. RX-11 is consistent with his recollection of how many hours they were working per pay period. At no time, prior to the date Complainant filed this action, did he ever complain about reduced work hours.

CX-3, attach A is a Grover dispatch sheet for December 16th.

When the drivers haul KCl with biocide the load still covered by the sheet pre-positioned in the truck. Respondent buys the KCl from a sister company and sells it to the operators. It's not a high enough concentration to require compliance with placarding as if they were hauling biocide on pallets and ballets. It's one little bag of biocide. Complainant never complained about that issue. If a driver is stopped, he has the proper MSDS sheet.

Randall Ekx testified at hearing in pertinent part:²¹

He is Respondent's Health Safety and Environmental manager. He has also been Assistant Ops Manager, Operations Manager and a Safety Supervisor. He was a Safety Director for A&W Water Service, for about eight years and then went to CES Rockies, as a field Safety Manager or Supervisor. CES Rockies owns Respondent and A&W water.

From April, 2012 until recently, he assisted in handling the day-to-day affairs of the company, as far as operations go. He would also do some hiring and some of the disciplinary actions and investigations. He would assist the safety team doing investigations into issues. He helped with a lot of the billing tickets and worked with the dispatchers, trying to build a more efficient, cohesive team. He tried to help them through some difficulties, if they had trouble with drivers or conflict resolution. As the Safety Supervisor, he oversaw the safety, doing safety meetings and audits of drivers in the field.

Respondent had new drivers go through an initial safety training program. Respondent gave them a manual that they could take home with them to read through. There was an orientation and some computer work. Respondent also would send them through an OSHA 10-hour class, and a safe land side 8 to 10-hour class. He did a lot of the training. New drivers would go with experienced drivers for a week or two. Respondent also had monthly safety meetings.

²¹ Tr.145-164.

There were frequent discussions about the dangers of static electricity and related devices in the presence of hydrocarbons. It was a reoccurring theme. They also covered using cell phones in the presence of hydrocarbons. It was a company rule, communicated to all employees, that cell phones should be left in vehicles when fueling. The fumes from fueling are volatile. A cell phone is not an intrinsically safe device, and people's reaction is to answer it when it rings. They have to leave it in the truck so they're not distracted by the ring and answer it out of habit. He believes that was communicated to Complainant. He did static electricity training, and showed some videos. One showed a young lady in a real fuzzy argyle sweater fueling up her car. She touched the fuel nozzle and it created a fire at her car.

One day in April 2012, he was in his office when Bob Smith came in and asked him to sit while he gave Complainant a write-up for leaning over his open fuel tank with his cell phone in his ear. Complainant joined them shortly thereafter and they talked about the situation. Complainant repeatedly said that diesel fuel is not as volatile as unleaded or gasoline. He explained that while diesel is not as volatile as gasoline, diesel fumes are volatile. Complainant kept arguing about it, wouldn't agree with anything they said, and didn't want to accept the write-up.

At first, Smith said he was just going to do a write-up on Complainant, but ended up suspending Complainant after an extended conversation in which Complainant was argumentative and refused to sign the write-up. At no time did Complainant claim that the reason he was being written up and suspended was because of safety concerns he had raised in the past. Complainant didn't raise any safety concerns during the meeting.

When Complainant served his one-day suspension and returned to work, he was doing fine. Complainant never made any complaints about safety related issues to him after the suspension. One time before that, Complainant mentioned he was going to talk to Bob Smith about a skim of oil on the tanks. He explained to Complainant that they have MSDS sheets for that.

The dispatchers decided how drivers were dispatched and to what well locations they would be sent. There a certain group of 10 or 12 drivers assigned to the Grover well field. Complainant was one of them. Complainant was happy there and did a good job. Complainant didn't require a lot of supervision over him to get the loads hauled. As far as he knows, Complainant was always, or at least most of the time, up there. Complainant was assigned to the Grover well field, prior to December 2011. Complainant never complained to him about being assigned to the Grover well field or indicated that he wanted to be dispatched to well sites located outside of the Grover well field.

Complainant's work hours would have increases or decreases after December 2011 only if the workload was lower or higher. It could have gone either way, just depending on the workload. They did have a little bit of a slowdown in July and August of 2012. A couple months were kind of slow all over the basin, but just in Grover. He thinks all the Grover drivers had about the same hours, within reason. Complainant never came to complain

that he thought his hours were being decreased or being reduced. Respondent never made a decision to dispatch Complainant to fewer wells than other drivers.

Respondent does have the trucks washed out quite often. If they had one to be repaired and weld on, they would test the flammability of the empty trailer. If it was too high to weld on they would have to get it steamed out. Some trucks may have transferred oil on a location and according to the DOT, OSHA, or EPA, that material is not deemed hazardous until it actually physically leaves the location. So, you could have a residual bit of fumes in your truck, but it would not need a placard. He does not recall Complainant ever mentioning that as a problem.

Joni Stoner testified at hearing in pertinent part:²²

She is the Director of HR for CES Rockies Fluid Management Division, in the Rockies Region. CES Rockies is Respondent's parent company. She has taken care of the HR services for Respondent since February 2007. She oversees the HR function that several other HR generalists handle more of the day-to-day, like entering new hires or terminations into the HR payroll system. She is involved in audits, oversees the recruiting function, and handles disciplinary investigations and employee issues.

She knows Complainant. He was a driver for Respondent from September 2010 and to his termination date of 31 Oct 12. She recalls that on 16 Dec 11, Bob Smith was talking to her about Complainant being concerned about a certain load of fluid and refusing to haul it. She got Laura Gravito, who is in charge of the DOT compliance and they drove from the Longmont office to the Lucerne office. They got with Bob Smith and asked Complainant to join them and explain his concerns. It was probably late morning or early afternoon, by the time they got up there to speak with Complainant.

Complainant was concerned that he might not have proper papers for hauling certain loads and he felt certain loads should be placarded. Mrs. Gravito brought some paperwork in and reviewed it with Complainant. She then gave Complainant the name of a person in charge of hauling hazardous materials and suggested Complainant might even want to call him. That person could explain what was acceptable in the oil and gas industry and what needs to be placarded and what doesn't need to be.

They asked Complainant why he hadn't mentioned it before and Complainant said he felt comfortable hauling the produced water, but not some of the other types of water. They talked about it and suggested that they could have him haul the production water that he was comfortable with in the Grover field. That was the field he was based out of and what he normally was doing on a day-to-day basis. Complainant said he felt like he would be comfortable and agreed to do that. He did say that he still felt he wanted to do a little bit more investigation on his own. Complainant returned to work four or five days later, into the next week. He began hauling the production water, as he was used to. Things seemed to go along well from that point.

²² Tr.165-191.

After Complainant returned to work, he never approached or contacted her again about safety related issues. He seemed comfortable with his assignment to the Grover field and never complained that he was losing hours or asked to be moved. He did call a couple times about a surgery that he was going to have to have.

In April 2012, she got a call from Bob Smith, who explained that he witnessed Complainant at the fuel island, had written him up for the incident and some insubordinate behavior that went on in the meeting to discuss it, and was going to suspend Complainant for one day. Mr. Smith forwarded RX-3 and RX-4 to her. Complainant never contacted her or any other member of the HR department, to complain or voice a concern that the reason he was suspended and written up was because of safety concerns he had raised in the past.

Later that month, Respondent got RX-8 from OSHA, indicating that Complainant had filed a retaliation or whistle-blower's complaint. She was not aware of Complainant raising any safety issues, on 19 Apr 12, so she went back to try to determine what Complainant was doing on that day. She determined that he was not working on that date, but had sent in a request to be off on a day of vacation. At no time between December of 2011 and when he received a copy of the whistle-blower complaint in April 2012 did Complainant ever come to anybody in the Human Resources Department and make any safety related complaints.

As part of formulating a response to Complainant's whistle-blower complaint, she pulled the information out of the payroll HR system. They collected some documentation to compare his hours against other people's hours that were working predominantly in the Grover field. The hours in the system are based upon what the drivers write down on their driver's logs.

She created a report.²³ It lists the people that worked in and were assigned to the Grover field for six months prior to and six months after Complainant's December complaint. RX-12 is the same document, but with different dates. It starts with the pay period after Complainant started work in September of 2010 and then goes until June, of 2012. RX-13 starts from Complainant's hire date going through to 17 Aug 12. It's just a longer period of time.

Her review showed Complainant's work hours stayed the same after December 2011. Complainant did receive a pay increase in September 2012. Employees come up for periodic review based on time. She gets with the supervisors and determines if and how much of an increase that person would get. The increases must be approved by company management. Mr. Smith would also be involved in approving. Some employees get a reduced amount and there are times that people will get no increase. The standard depends on the time and the job that the person has.

²³ RX-11.

On 10 Sep 12, Complainant received a pay increase from \$15.50 to \$16.00. That was about an average increase and it was after Complainant raised concerns about what he was transporting and four or five months after Complainant filed his whistle-blower complaint.

Complainant never complained to her or anybody else in the HR Department that the suspension he received, in April 2012, was because of safety concerns he had previously raised or that his work hours were being reduced because of safety concerns he had made.

Letters between OSHA and Respondent state in pertinent part:²⁴

In December 2011, OSHA notified Respondent that it had received a complaint that Respondent's employees were exposed to hazardous chemicals, not adequately trained, and not provided material safety data sheets. (MSDS). Respondent replied that (1) MSDS were available at facilities, offices, and vehicles and (2) hazardous material training was provided at new hire orientation and refresher training. Respondent attached documents corroborating its response.

On 24 Apr 12, OSHA notified Respondent that it had received a complaint that (1) Respondent's employees were pumping fuel while using cell phones and without adequate grounding and (2) new fuel islands were not labeled. Respondent replied that (1) its policy prohibited the use of cell phones during fueling and employees who do so are subject to discipline; (2) the fuel stations were in fact properly grounded; and (3) the stations were labeled diesel and unleaded, but additional signage prohibiting smoking and cell phone usage was added.

Respondent's records show in pertinent part:²⁵

Complainant requested and took a vacation day on 19 Apr 12.

Complainant's IRS W-2 Forms state in pertinent part:²⁶

Respondent paid him \$54,986.79 in 2011 and \$39,707.55 in 2012.

Discussion

Complainant alleges as his protected activity that he complained to supervisors, safety personnel, and OSHA about the lack of proper documentation for contaminated water that drivers were transporting from fracking sites. He further alleges that those complaints contributed to Respondent taking adverse action against him by (1) reassigning him to the Grover field and reducing his driving hours and (2) suspending him for one day.

²⁴ RX-1-2; 6-8.

²⁵ RX-9.

²⁶ CX-1-2.

At the outset, I note that there were a number of contradictions between Complainant's testimony and that of Robert Smith, Randall Ekx, and Joni Stoner, particularly as they related to the reasonableness of Complainant's complaint, the circumstances of his assignment to the Grover field and the impact that assignment had on his driving hours, and the circumstances surrounding his suspension. In that regard, I found that all the witnesses appeared to be candid and telling the truth as they understood it to be. However, even allowing for the fact that Complainant was pro-se and trying to present his case in a stressful and unfamiliar environment, his actual testimony was confused, at times internally inconsistent, and revealed a fundamental uncertainty not just about legal issues but specific facts. His recollection of the circumstances surrounding his initial complaint, refusal to drive, and cell phone incident at the fuel pump was inconsistent with that of Respondent's witnesses.

Consequently, while Complainant's testimony did not impress me as intentionally deceitful, it did impress me as unreliable and I found the other witnesses to be much more credible.

Protected Activity

Complainant initially bears the burden of showing that he (1) complained to Respondent or OSHA about a violation of a safety regulation, standard, or order; or (2) refused to drive his truck because (a) doing so would violate a safety regulation, standard, or order; or (b) of a reasonable apprehension of serious injury.

Complainant essentially testified that after having driven the same loads since September 2010, he wasn't sure about the legality of the MSDS procedure Respondent was using. He understood it was a grey area of the law and had mentioned his concerns before, but on 16 Dec 11, he finally decided to really get some clarification. He told the dispatcher that he wasn't comfortable and before he drove the load, he needed to talk to someone and get something in writing. Even after taking some days off to research it, he couldn't get an answer, but was OK with going back to work when Respondent limited him to Grover loads, which he believed were not that grey. At the same time, he also testified that Respondent was allowed by some old laws to send drivers to the fields without documentation, but he was unwilling to do that, like the other drivers did.

Robert Smith testified that the drivers knew from the production company what type of load they were hauling and that they had the proper standard documentation for each type of load. He pointed out that common carriers are entitled to rely on the representations of shippers as to the composition of the cargo. Otherwise, drivers would have to test and examine every load they carry. As to the oil sheen on Complainant's load on 16 Dec 11, he noted that there was always a little skim of oil and the production company had a huge economic disincentive to allow any more than that to be hauled. He also explained that any driver with Complainant's experience should have known that, noting that all of the other 115 drivers did. He said Complainant's concerns were unreasonable, but since he was a good performer otherwise, Respondent accommodated him by limiting him to Grover field loads. He noted that Complainant never complained again about having documentation. Joni Stoner corroborated that testimony.

There is no evidence that Complainant refused to drive because of any apprehension of serious injury. He had driven those loads for over a year, and never raised any concerns about potential serious injuries. His focus clearly was on regulatory compliance.

That leaves the question of whether Complainant's concerns about compliance were reasonable and he has the burden to show that they were. His testimony was equivocal and revealed a basic level of confusion. Robert Smith's testimony was far more cogent and credible. Smith explained why Complainant's concerns were unreasonable and pointed out that he was the only one of more than 100 drivers to have a problem understanding why the process was legal.²⁷ Thus, while Complainant may have subjectively not understood and been uncomfortable with the MSDS process, I find that a reasonable driver with his experience and background would have understood that it was in compliance. Based on this record, I find Complainant failed to carry his burden to show any protected activity.

Adverse Action

Respondent argues Complainant was primarily assigned to the Grover from the very beginning and there was no adverse action following his complaint. However, the record shows that they did "accommodate" him to some extent by adjusting his loads. The question is whether that was an adverse action that would dissuade a reasonable worker from engaging in protected activity. In this case, Complainant said he was not comfortable with certain loads and Respondent offered to give him loads that would not cause him concern. He agreed, took the loads, and never complained. Moreover, the credible evidence shows that, to the extent that the mutually arrived at solution changed his dispatched loads, it had no impact on his earnings. Accordingly, the record does not establish any adverse action in terms of the Grover field assignment. On the other hand, the one day suspension clearly qualifies as an adverse action.

²⁷ Of course, the fact that Complainant was the only one of a large number to complain does not mean by necessity that he was unreasonable. It may be that others were afraid or didn't care enough to say anything. But given the circumstances of this case, it is corroborative of Smith's testimony.

Nexus

The Grover field accommodation was done in response to Complainant's concerns about the loads. On the other hand, Complainant was unable to establish that his refusal to drive or complaints contributed in any way to his suspension, which was entirely and exclusively related to his use of the cell phone while fueling and arguing about it after the fact. Even if Complainant had been able to show it was a contributing factor, the evidence is clear and convincing that Respondent would have suspended him even in the absence of the refusal and complaint.

Accordingly, the complaint is dismissed.

So ORDERED.

PATRICK M. ROSENOW
Administrative Law Judge

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

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

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

See 29 C.F.R. § 1978.110(a).

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

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

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

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