U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 January 2013Case No.: 2012-STA-33

In the matter of:

MONTE WARD,
Complainant

v.

McLEOD EXPRESS LLC,
Employer

DECISION AND ORDER
DENYING CLAIM

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("the Act"), and implementing regulations set forth at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the discharge or discipline of, or discrimination against an employee in retaliation for the employee engaging in certain protected activity.

The STAA and implementing regulations protect employees from discharge, discipline, and other forms of discrimination for engaging in protected activity, such as reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle because of its unsafe condition. In this case, the Complainant, Monte Ward, was employed by McLeod Express (hereinafter "Employer"), from May 24, 2011 until June 17, 2011. On August 23, 2011, Mr. Ward filed a complaint with the Department of Labor's Office of Occupational Safety and Health Administration (hereinafter "OSHA"), alleging a violation of the STAA, requesting back-pay, reinstatement (or front-pay in lieu of reinstatement), and other compensatory damages as well as punitive damages. After conducting an investigation, OSHA issued the findings of the Secretary, concluding that the evidence did not establish that the Employer created a work environment that was sufficiently severe or pervasive as to alter the conditions of the Complainant's employment, or that the Complainant established a constructive discharge claim.[1]

On June 5, 2012, Mr. Ward filed an appeal of that determination with the Office of Administrative Law Judges (hereinafter "OALJ").[2] The matter was assigned to me, and I held a hearing on October 16, 2012, in Terre Haute, Indiana. At that time, the parties appeared and

[1] The Secretary's findings are not dated; they were received at the Office of Administrative Law Judges on May 10, 2012.
[2] Mr. Ward is proceeding *pro se*, as his previous counsel withdrew their representation on June 6, 2012.

were given the opportunity to present evidence and arguments. At the hearing, I admitted Claimant's Exhibits (CX) 1-6, Employer's Exhibits (EX) A-H, and Administrative Law Judge Exhibits (ALJX) 1-5. On January 7, 2013, I issued an Order admitting Claimant's Exhibit 7.

The Claimant submitted his argument by email on January 13, 2013; the Employer submitted a written brief on January 14, 2013. The Employer submitted a reply brief by email on January 21, 2013; Mr. Ward submitted his reply by email on January 21, 2013. I have based my decision on all of the evidence, the laws and regulations that apply to the issues under adjudication, and the representations of the parties.

HEARING TESTIMONY

Monte Ward

Mr. Ward began working as a driver for the Employer on June 1, 2011, driving semitractor trailers (Tr. 34). Mr. Ward testified that he has worked as a truck driver since the early 1990s when he had to, as a fall-back type of job; he has a total of more than five years' experience driving trucks. According to Mr. Ward, this is not the kind of job that anyone would want, because you never go home, you're always at risk, and you are the fall guy (Tr. 35-36). Mr. Ward went to two training schools, and he has a CDL (Tr. 35-36). He worked for about 12 different companies before starting work for the Employer (Tr. 36). The longest he worked for any of these employers was probably about six months (Tr. 36). Mr. Ward has never had any chargeable accidents or citations, and has never been involved in an accident (Tr. 37).

Mr. Ward described the events on June 16, 2011, when he was assigned to drive a loaded trailer from Lafayette, Indiana, to central Illinois (Tr. 38). He drove his tractor and a trailer to Lafayette, unhooked his trailer, and picked up the "old junky" trailer (Tr. 41). About twenty minutes after he picked up the fully-loaded trailer, Mr. Ward noticed that the trailer's brakes were "weak."[3] (Tr. 38-39). When he pulled over to inspect the brakes, Mr. Ward noted "nothing visibly wrong with the vehicle," so he continued on and made his delivery in Sycamore, Illinois (Tr. 41-42). That morning, about 8:00 a.m. when the office opened, he called the dispatcher, Josh Bell, on his cellphone and told him that the brakes on the trailer were weak, and he thought there was something wrong with them, but he did not know what it was, because he could not see anything wrong (Tr. 43). Mr. Bell told him to go to another location to pick up another load, which Mr. Ward claimed was even heavier than the one he had just dropped off (Tr. 43). Mr. Ward also received a Qualcomm message, which indicated the weight of the load, which as he recalled was over 44,000 pounds (Tr. 46).

Mr. Ward refused to pick up this load, and told Mr. Bell that his vehicle did not want to stop with the weight he had on it, and he would not put even more weight on it (Tr. 44). At the hearing, Mr. Ward discussed his view that, while the Employer's position was that if a load was legal it was safe, his view was that safe and legal were two very different things. Safe was when the vehicle operated well enough to stop with the load that was on it (Tr. 45).

[3] Mr. Ward stated that the trailer he picked up was the only "old junky" one in the yard, and he suspected that it had been sitting there for about a year without being moved, and that was the reason for the problems (Tr. 40).

Mr. Ward claimed that when he told Mr. Bell that he refused to haul the load, Mr. Bell "had a fit," and became abusive – saying that "people that didn't play ball didn't get good runs and didn't make very good money," and started calling him names (Tr. 46). Mr. Ward stated that he listened to Mr. Bell "have his fit," and then told him that he was not going to put more weight on his trailer, and they needed to have the brakes checked (Tr. 48). According to Mr. Ward, Mr. Bell told him that he was going to report him to the safety department, but finally he relented and assigned him to pick up a load in Chicago. Mr. Ward claimed that Mr. Bell lied about the weight of this load to get him to take it (Tr. 48). Mr. Ward also claimed that he asked Mr. Bell about getting the brakes checked, but was told no, just go get the load (Tr. 48). Mr. Ward stated that he told Mr. Bell he did not know what was wrong with the brakes, all he knew is that they did not work, and did not want to stop (Tr. 50).

Mr. Ward drove his empty trailer almost two hours to pick up the next load in Chicago. He stated that there were problems with the brakes on the way, and when he got to Chicago, he told Mr. Bell about it, and told him that there was oil on the brakes (Tr. 50-51). Mr. Bell asked him to look at the brakes, but he did not see any oil. Mr. Ward continued to tell Mr. Bell that the brakes needed to be fixed, but Mr. Bell told him that if he did not see any oil in the brakes, there was nothing wrong with them, and he was a prima donna (Tr. 52).

Mr. Ward agreed to take the load from Chicago to Toledo, but when he got the bills for the load, he noticed that it weighed a lot more than what was on the Qualcomm message.[4] As he started driving away, the brakes immediately started howling, squeaking, and squealing, a sure sign of oil on the brakes (Tr. 53-54). He had agreed to take the load to Toledo, so he did; he drove slow (Tr. 54). When he got to Toledo, he backed the trailer into the Coca-Cola Company dock, where it was unloaded (Tr. 55).

Mr. Ward stated that he inspected the tractor trailer, walking all around it and looking at the brakes. He saw oil all over the tire on one side, and starting to come out of the brake drums on the other side (Tr. 55). He then told Mr. Dixon (the supervisor at the Coca-Cola dock) that he was "red tagging" the trailer, and not moving it (Tr. 55). According to Mr. Ward, the DOT regulations say that if a vehicle is unsafe, you can put a "red tag" on it, usually at the hoses that connect the brakes from the tractor to the trailer, where it will be easily seen (Tr. 56). Mr. Ward put on a red tag that said bad brakes; he stated that this meant "not even the President can move it," and it has to be towed under federal laws (Tr. 56).

According to Mr. Ward, Mr. Dixon was not happy about this. Mr. Ward walked out of his office and went back to the truck, where he "was arguing with these people on the phone, and there was a lot of swearing and name calling and threatening and loddy-do-dah" (Tr. 57).

Mr. Ward called Mr. Bell, and told him he had red tagged the trailer, but claimed that Mr. Bell did not appear to care about it (Tr. 57). Mr. Ward told Mr. Bell that he would deliver the trailer back to Terre Haute without freight ("deadheading"), but Mr. Bell told him that he had to go with more freight on the trailer, because the company did not support driving the trailers

[4] Mr. Ward acknowledged that the bills of lading reflect that the first load he hauled was 43,000 something pounds, while this load was 42,849 pounds.

around without freight (Tr. 57-58). Mr. Ward told Mr. Bell that he would take the trailer without freight and deliver it back to them (Tr. 58).[5]

At some point, Mr. Ward stopped speaking with Mr. Bell, who then spoke by phone with Mr. Dixon, who told Mr. Ward that Mr. Bell wanted him to take the trailer to a repair facility (Tr. 58).[6] According to Mr. Ward, however, the Employer had no intention of taking the vehicle to a repair facility. Mr. Ward speculated that the Employer would have told him that it was Friday, and they were trying to get a repair facility that could take the vehicle before Monday, but in the meantime, he should go pick up a load of freight, and when he had picked it up, he would be told where to take the vehicle to have the brakes fixed. But after he picked up the load of freight, he would be told that no one could be found in Toledo to look at the trailer until Tuesday, and he would have to wait in Toledo (Tr. 59).[7]

When Mr. Dixon told him that Mr. Bell wanted him to take the vehicle to a repair facility, Mr. Ward responded that there was a red tag on it, and it was illegal to move it; Mr. Dixon was not happy (Tr. 60). Mr. Ward stated that he felt bad for Mr. Dixon, because they only had three bays; his truck and trailer were in one of them. Mr. Dixon wanted him to move the truck out of his dock. But Mr. Ward walked out, stopped answering his cell phone, took his things out of the truck, and called a cab (Tr. 60). He stated that he was not going to drive the vehicle, because it was unsafe (Tr. 61).[8] Mr. Ward estimated that it was about twenty minutes between the time he red tagged the truck until he got in the taxi (Tr. 61).

Mr. Ward went to a UPS store to buy boxes to ship his things home, and then to a Greyhound Bus Station (Tr. 62). Mr. Ward stated that the taxi ride cost more than a hundred dollars (Tr. 62). Because on all of the previous three Fridays he worked for the Employer, he ended up in Braysville, Indiana, 22 miles from Terre Haute, he had his van parked there, anticipating that he would again end up in Braysville, where he could retrieve his things from the tractor and drive his van home (Tr. 62-63). Mr. Ward rode a Greyhound bus back to Terre Haute, where a friend drove one of his other cars to Decatur, where he had a car. Mr. Ward stated that he wanted to get it out of there "before they took a hammer to it" (Tr. 63). Mr. Ward did not speak with anyone from the Employer after he left the warehouse (Tr. 64).

According to Mr. Ward, the situation at the Coca-Cola warehouse was tense. He stated that there was "some big grease-ball guy" that told Mr. Ward he was going to move the truck, and acted like he wanted to start a fight. Mr. Ward told him that he was not moving the truck, and that "I don't work for those people anymore." He told the person to move it himself, and that the keys were in it (Tr. 64). Mr. Ward acknowledged that he did not tell Mr. Bell that he had quit, but he "was obviously not in their employ anymore," because he was waiting for the cab so that he could leave (Tr. 65).

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[5] Mr. Ward stated that he also talked on the phone with Mr. Bell's supervisor, and at one point called the 800 number and asked to speak with the owner of the company, but he was referred back to Mr. Bell (Tr. 63-64).
[6] Mr. Ward claimed that Mr. Bell was "so abusive that there really wasn't a point." (Tr. 58).
[7] Mr. Ward offered no basis or support for this speculation.
[8] According to Mr. Ward, the Employer was trying to talk Mr. Dixon into calling the police and having him arrested (Tr. 61).

Mr. Ward testified:

> Judge Chapman: Had Josh told you [that] you were fired?
>
> Mr. Ward: No.
>
> Judge Chapman: Or a supervisor?
>
> Mr. Ward: They did not fire me.
>
> Judge Chapman: Okay.
>
> Mr. Ward: Now, if I was a liar, like most of the rest of the people involved in this, I'd probably say they did, but they didn't. I'm telling you the truth. They did not fire me.

(Tr. 65). Mr. Ward testified that he did not tell either Mr. Bell or his supervisor that he quit. He was unclear as to what he said to Mr. Dixon, stating that if he told Mr. Dixon that he quit "it was simply a matter of convenience" (Tr. 66). Mr. Ward stated that he "left their employ because [he] was placed in an untenable situation . . . to drive a vehicle that was not only unsafe, but red tagged. I'm not sure but I think that driving – moving a vehicle that is red tagged, I believe that's a felony" (Tr. 66). Mr. Ward claimed that if he had driven the vehicle away from the dock and been involved in an accident, DOT would have inspected his vehicle, and if someone was injured or killed, he would have gone to prison for criminal negligence, for at least five years (Tr. 66).

When asked why he was willing to drive the empty freight car back to the Employer's facility, Mr. Ward stated that the empty trailer weighed nothing, and if the air lines to the trailer were cut, the tractor would have plenty of brakes to stop the empty trailer. That would not have been unsafe (Tr. 67). Mr. Ward stated: "My entire objection this whole time was not to the law, but to the safety of the thing" (Tr. 67).[9]

Mr. Ward stated that he had two choices. If he wanted to remain in the Employer's employ, he had to drive a vehicle that he knew was unsafe and had a red tag on it, which is "the biggest no-no there is." He claimed that the Employer told him that if he unhooked the tractor, they would call the police and report that he stole it, and he did not need that hassle. The second thing they would do was to cut the engine off with the satellite dish (Tr. 68). His choice was to drive a vehicle "that was illegal to move ten ways from Sunday," or take his stuff out and get on the bus (Tr. 68-69).

Mr. Ward acknowledged that he was familiar with the Qualcomm messaging system, and that he used it to send messages to Mr. Bell, and possibly Mr. Denton, Mr. Bell's supervisor (Tr. 70-71). Mr. Ward stated that he received a load on June 16, 2011, and acknowledged that he probably typed the message at Employer's Exhibit A, p. 6 (Tr. 72-73). He stated that although there were "a million Joshes in the world," he presumed that the person on the other end was Mr.

[9] The trailer was empty when Mr. Ward "red tagged" it.

Bell (Tr. 74). Mr. Ward messaged Mr. Bell about his safety concerns regarding the weight of his load.

The message reads as follows: "This is way too much weight. Will not [h]aul." Mr. Ward sent a message a few minutes later, stating: "This trck will not stop safely at 43000 I will [n]ot haul 45 if I kill somebody its my ass, no[t] yours."

In response to Mr. Bell's message of "What????????" Mr. Ward sent this message:

> I will not haul 45 stone. Its not safe. Dead serious. Now, or later. When your greed gets someone killed, I will not be there. Have them cut a pallet or give it to someone else. If I'm fired just say so and I will return your rig.

(RX A, p. 9). Mr. Bell asked Mr. Ward if there was something wrong with the brakes, stating that all of their trucks could haul 44,500 to 45,000 pounds (RX A, p. 10). At the hearing, Mr. Ward stated that he responded that he did not know what was wrong with the brakes (Tr. 75). His response on Qualcomm reads as follows:

> It can, yes just not with me in it 44 stone is my absolute limit. I value life more then money. If we have a disagreement, that is it's basis. Maybe you need a kid, fresh from school. That's not me. I've seen too much and come that close to being involved in it . . . this truck is squirrely in front from having the 5th wheel too far back right now. No more. Please don't try to tell me, Josh. You know your job and I know mine. Mine will get me and other people killed. Yours won't.

(RX A, p. 11-13). Mr. Ward acknowledged that it was part of his duty as a driver to adjust the fifth wheel, to distribute the weight of the tractor properly and legally among the axles on the tractor (Tr. 77-78). He agreed that at the time he made his comments to Mr. Bell about the fifth wheel on his tractor, he had not yet picked up his load. But he claimed that he could not adjust the fifth wheel before he picked up the load, because that would make the front axles over the legal limit on weight (Tr. 78).

Mr. Ward stated that 44,000 pounds was his personal maximum load that he would accept (Tr. 78). He agreed that the maximum legal weight for a truck without an overweight permit was 80,000 pounds (Tr. 79). He claimed that the truck he was driving had bad brakes, and could not safely haul the load. Mr. Ward agreed that the load was not illegal, but he claimed that there was a difference between a legal load and a safe load, which is the condition of the vehicle on which the load is placed (Tr. 79). He acknowledged that the Burrows Load was not illegal (Tr. 80).

Mr. Ward claimed that he accepted the alternative load from the Coca Cola facility "on false pretenses," that it was lighter than it actually turned out to be (Tr. 80-81). He sent a Qualcomm message to the Employer at 3:11 a.m. the following day, from a location outside Toledo, stating

> I will not load this trailer again. The brakes on it are too bad. I should refuse to move it because it will not pass the PTI. I will deadhead it through the house, then bring it to you on Monday so you can fix it when empty. The brakes lock and rear wheels hop.

(Tr. 81-82; RX B, p. 1).[10] Mr. Ward explained that this message meant that he would unload at the Coca Cola facility, and haul the empty trailer back through his house, and bring it back to Decatur the following Monday morning (Tr. 83). In his message, Mr. Ward also stated:

> When loaded, the brakes howl like banshees, classic symptoms of bad seals and oil on the brake shoes. I will deadhead it back or I will refuse to move it. After the crap you folks tried to pull on me yesterday, I will certainly not donate my time waiting to get it fixed . . .What goes around comes around. I won't be here much longer anyway, even without your flagrant disregard for human life. The deal with the tolls is more than I can handle. I will just call the numbers on the backs of the trucks that fly by me. . . . I won't bother you much longer.

(Tr. 83-84; RX B, p. 2-4). Mr. Ward explained that the reference to numbers on the backs of trucks was to him calling the numbers to get another job (Tr. 84). Mr. Ward did not contact the Employer about continuing to work for them (Tr. 85).

Mr. Ward again stated that when a trailer is empty, the brakes on the tractor will stop it fine; it is only when weight is added to the trailer that there is a problem. That was why he told the Employer he would bring the trailer back to them empty, because that would have been safe. But he refused to take the trailer to a repair facility in the Toledo area (Tr. 87-88, 90).

Mr. Ward discussed his communications with the Employer the previous day about the weight of his load, and the problems with the fifth wheel (Tr. 91-92). He stated that the fifth wheel problems had something to do with his refusal to drive the load on June 16, but the brakes were bad, and he told Mr. Bell that the truck did not want to stop with the weight of the load he had on it, let alone more weight (Tr. 92). When asked whether he specifically referred to brakes, maintenance, or adjustment to fifth wheels in his message to Mr. Bell, Mr. Ward stated that when he said that the truck would not stop safely at 43,000 pounds, it meant that it wouldn't stop safely until it was fixed. "The brakes stop the truck, in case you're not aware of that" (Tr. 93).

On rebuttal, Mr. Ward claimed that he probably did all of the things the witnesses said he did, but none of the things they did to provoke him were mentioned (Tr. 176). He described these as:

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[10] Mr. Ward claimed that this was not his first written transmission to the Employer regarding the maintenance condition of his vehicle, claiming that he stopped at a "pickle park" outside Toledo, where he had a discussion on Qualcomm as well as on cellphones (Tr. 81-83). This particular message was sent at 3:11 a.m. from a location outside Toledo; it is the first Qualcomm communication transmitted after Mr. Ward picked up his load at 6:30 the previous evening.

> Just whatever you would normally do to make someone angry, call them names, insinuate things about them, make insulting references to their sexual preference and, you know, whatever.

(Tr. 177). Mr. Ward claimed that "all of them," Mr. Bell and Mr. Denton, did this, telling him that he was a real prima donna because he would not do that, and it was just part of the job (Tr. 177). According to Mr. Ward, they did anything and everything they could do in order to make him angry (Tr. 178). He stated that they "seemed to have it down to a science. They seemed to have been there before. They didn't want to fire me, you know" (Tr. 178). They did these things purposely to anger him (Tr. 179). They made him very angry, and he participated and gave as well as he got (T. 179).

Mr. Ward claimed that Mr. Denton's testimony about the shotgun was added; he did not tell Mr. Denton he was going to be at the Employer's facility with a shotgun. What he told Mr. Denton was that if he had guts enough, he would take him outside and whip his ass (Tr. 180).

Mr. Ward claimed that no matter what they said, "these people" knew the brakes were bad, and what was left out was their flagrant disregard for human life" (Tr. 181). He claimed that they never said they wanted him to take the trailer to a repair shop, and that a few of the Qualcomm communications were fabricated (Tr. 181). Specifically, he claimed that any Qualcomm communications that say that any time before he arrived at his destination in Toledo, he was offered a chance to take the truck to a repair shop, are "pure and simple fabrication" (Tr. 182).[11]

Mr. Ward identified Employer's Exhibit B-5, a Qualcomm message from Mr. Bell to him, as a "complete fabrication" (Tr. 182).[12] Mr. Ward stated that he was not offered an opportunity to take the truck to a repair facility until it was sitting at the dock in Toledo with a red tag on it. The first time this was mentioned was by the dock manager (Mr. Dixon), who told him that Mr. Ward's boss wanted him to take the truck to a repair facility (Tr. 182).

Mr. Ward claimed that there was a slight difference in the fonts on the messages. He claimed that the messages at A-6 and A-7 were "rather suspect," and differ completely (Tr. 186). He claimed that the Employer fabricated Qualcomm messages from him to Mr. Bell (Tr. 186). He was not claiming that he did not send the messages, because he did not remember. Mr. Ward claimed that he has a very poor memory, because he ate some mercury when he was little (Tr. 186).

Mr. Ward felt that the messages at B-7 and B-8 could well be fabricated, because B-8, which is a reply to B-7, does not quote the line from the original message (Tr. 187). He recalled sending a message to Mr. Bell stating "That's rich," but did not think he put in the next line about not donating his time waiting in the shop (Tr. 187). He thought he put in the line stating that he would deadhead the truck home or leave it where it sat (Tr. 187).

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[11] Mr. Bell did not respond to the 3:11 a.m. message until he got into work, almost fifteen minutes before Mr. Ward reported that he had arrived at the dock.

[12] When I pointed out that at page B-7, Mr. Ward responded to Mr. Bell's message by saying that he was not going to take the truck to a shop, he was going to deadhead it home, he claimed that he just said that "preemptively."

As part of his closing argument, Mr. Ward stated that he offered to deadhead the tractor and trailer home. When he was asked if this was the same tractor and trailer that was too unsafe to take to the repair shop, he claimed that this would have involved him waiting at the repair shop for no pay. Although the Employer said they would pay him, he claimed that he had been there too many times, and the money never showed up on the check.[13] And after what they pulled on him the day before, lying to him about the load, why should he do anything for them? He stated that the truck had a red tag on it; it was illegal to drive it. He tried to compromise by offering to deadhead it home. He claimed that all he was trying to do was to save his job (Tr. 196).

Joshua Bell

Mr. Bell has worked for McLeod Express for eight and a half years; he worked as a dispatcher first, and is now a customer service planner (Tr. 95). As a dispatcher, Mr. Bell dealt with drivers on a daily basis, by phone and on Qualcomm, and helped them get from point A to point B (Tr. 96). Mr. Bell confirmed that he communicated with Mr. Ward via the Qualcomm messaging system, and that the messages in EX-A were the universe of Qualcomm messages transmitted on June 16, 2011. Mr. Bell stated that he retrieved these messages by using Mr. Ward's truck number, and printing out everything between Mr. Ward and the Employer for that date (Tr. 98).

Mr. Bell identified a message sent on June 16, 2011 at 7:00 a.m. from Carolyn, the planner, to Mr. Ward, with his pre-plan, which specified the weight and pieces for the load the Employer wanted him to pick up (Tr. 99).[14] At 7:21 a.m. Mr. Ward responded, stating that it was way too much weight (Tr. 100). Specifically, he stated "This truck will not stop safely at 43,000. I will not haul 45. If I kill somebody, it's my ass, not yours" (Tr. 101, RX A, p. 7).

Mr. Bell thought this meant that Mr. Ward thought that it was more weight than he could legally haul (Tr. 100). According to Mr. Bell, the pre-plan indicated that the load would weigh 45,025 pounds; the legal weight is 80,000 pounds (Tr. 100). The load weight information comes from the customer whose load is being picked up (Tr. 101). In this case, the customer was Burrows Paper (Tr. 101).

Mr. Bell was Mr. Ward's dispatcher; he interpreted Mr. Ward's response as his opinion that he could not haul 43,000 pounds (Tr. 101-102). According to Mr. Bell, a load of 43,000 pounds would not put Mr. Ward over 80,000 pounds; "apparently," there must have been an issue, to explain why Mr. Ward would refuse a legal load (Tr. 102).[15] Mr. Bell was confused, because 43,000 pounds was legal to haul (Tr. 102).

In response to Mr. Bell's reply of "What?" Mr. Ward stated "You want to haul 45 stone, it's not safe, dead serious, now or later" (Tr. 102). Mr. Ward talked about greed catching up

[13] Mr. Ward had been working for the Employer for less than two months. He did not describe any occasions when the Employer failed to pay him for his time waiting for repairs.
[14] As the load planner, Carolyn sends out the pre-plans and lines people up to take them (Tr. 99).
[15] Mr. Bell stated that he assumed it was a maintenance issue (Tr. 123).

with you, and having the customer cut a pallet, and said "If I'm fired, just say so and I will return your rig" (Tr. 102-103). Mr. Bell stated that he had not discussed anything about firing Mr. Ward (Tr. 103).

Mr. Bell assumed that Mr. Ward's refusal to haul 45,000 pounds was a personal preference, because they can haul up to 45,275 pounds legally; but in Mr. Ward's opinion, it was not safe (Tr. 103). Mr. Bell explained that the term "cut a pallet" in Mr. Ward's response meant that he wanted them to call the customer or shipper and ask them to cut a pallet of freight off so the load would weigh less (Tr. 104).

Mr. Bell responded by asking Mr. Ward if there was something wrong with the brakes, saying that all of their trucks could haul 44,500 to 45,000 pounds. Mr. Ward responded that it could, just not with him in it; 44,000 pounds was his absolute limit. To Mr. Bell, this meant that Mr. Ward would not haul the legal limit, and had a preference for "what he likes to do" (Tr. 104; 137-139). Mr. Bell thought that Mr. Ward's reference to the truck being squirrely in front because the fifth wheel was too far back probably meant that the fifth wheel was acting funny. But he stated that the only way to deal with the fifth wheel was for the driver to reach under and grab it, and move it; it will not move without somebody tampering with it (Tr. 105). The driver is primarily responsible for adjusting the fifth wheel; this can be done on the road, after unhooking the trailer (Tr. 105). According to Mr. Bell, moving the fifth wheel can affect the handling characteristics of the vehicle (Tr. 105).

Mr. Bell told Mr. Ward that "As long as you scale it and it's under 80,000 pounds, you will be fine. It is legal then" (Tr. 106). By this, he meant that Mr. Ward should go to a scale and weigh the tractor and trailer; if he was over the limit, he would have to go back and get some of the load taken off (Tr. 106). Mr. Ward told Mr. Bell: "I will not take it, Josh. If I'm fired, just say so. I'll live to find another job and so will some little kid riding in the wrong car" (Tr. 108). Again, Mr. Bell stated that he had not brought up any kind of action, such as firing (Tr. 108).

Mr. Bell's supervisor, Jason Denton, then sent Mr. Ward a message asking him to call in (Tr. 108).[16] According to Mr. Bell, Mr. Ward called Mr. Denton; the Qualcomm communications reflect that Mr. Denton removed the pre-plan that Mr. Ward objected to. Carolyn sent him a new assignment, which was to be delivered to Coca Cola in Toledo, Ohio (Tr. 109-110). Mr. Bell stated that at no time during these communications did Mr. Ward complain about the brakes on his trailer (Tr. 111).

Mr. Bell identified the pre-plan message to Mr. Ward, which showed that the load would weigh 22,356 pounds. Mr. Bell stated that this estimate comes from the shipper; the customer can change the amount of weight actually put on the vehicle (Tr. 111). Mr. Ward sent a message on June 16, 2011 at 6:30 p.m., stating that he had picked up the load, which actually weighed 43,249 pounds (Tr. 111-112).

Mr. Bell reviewed the Qualcomm communications between himself and Mr. Ward for June 17, 2011, which he also printed from the Employer's system (Tr. 112). Mr. Ward sent a

[16] Mr. Bell stated that his communications on this date with Mr. Ward were all by Qualcomm; if he talked to Mr. Ward on the phone, it was to transfer him to Mr. Denton (Tr. 108).

message at 3:11 a.m., which went to his general Qualcomm mailbox; when Mr. Bell got to work that morning, he saw the message (Tr. 113).

Mr. Bell explained that "PTI" means pre-trip inspection; deadheading is taking a unit without a load; and "through the house" meant that Mr. Ward would take the unit through his house before he returned to Decatur (Tr. 114). Mr. Bell stated that the Employer pays its drivers when they are waiting for maintenance. He also stated that it was company policy for drivers to use non-toll roads unless it was necessary or they had permission (Tr. 115). Mr. Bell thought that when Mr. Ward said he would not bother them much longer, it sounded like he was going to be quitting (Tr. 116).

When Mr. Bell got in on June 17 and saw Mr. Ward's messages, he asked him why he didn't tell them about the brakes the day before. He instructed Mr. Ward to call their shop once his trailer was empty, so they could get him into a shop in the Toledo area to have the brakes looked at.[17] He stated that this was a must, and there was to be no deadheading (Tr. 116). According to Mr. Bell, it is company policy that there is no deadheading; it has to do with revenue (Tr. 117). But if there were a serious maintenance issue on an empty trailer and it was a risk, the company would allow it to be deadheaded (Tr. 117). Mr. Bell stated that a trailer that is empty can be stopped with the tractor's brakes (Tr. 117).

Mr. Bell identified a message from Mr. Ward at 7:53 a.m. on June 17, in response to Mr. Bell's message, stating "Why didn't I tell you? That's rich. I will not donate my time in a shop waiting. I deadhead it home or I leave it where it sits" (Tr. 118-119). According to Mr. Bell, this meant that Mr. Ward was going to leave the unit where it was, and not get it fixed, or he was going to take it all the way home. Mr. Bell responded, and told Mr. Ward to call Mr. Denton. He stated that when it comes to issues like this, he turns it over to his supervisor (Tr. 119).[18]

Mr. Bell sent Mr. Ward a message at 8:06 a.m., stating "We are not trying to make you do anything illegal. We are trying to help. You need to get this trailer into a shop and get it fixed" (Tr. 120). At 8:10 a.m., Mr. Bell sent Mr. Ward a message, stating "What if we line you up with a trailer shop to drop it off for repairs and then you can bobtail here?" (Tr. 120). Mr. Bell explained that this would mean Mr. Ward left the trailer in a shop in the Toledo area, and returned with just the tractor, which he could bring in on Monday and pick up a load (Tr. 120-121). Mr. Ward did not respond (Tr. 121).[19]

Jason Denton

Mr. Denton is the operations manager for dispatch at Employer; he has had this position for nearly seven years. He was a dispatcher for a few years previously, and before that he drove

[17] This is one of the Qualcomm messages that Mr. Ward claims was fabricated.

[18] Mr. Bell stated that the telephone conversation between Mr. Denton and Mr. Bell might have been on speakerphone, but he did not recall any specifics of the conversation, which he did not participate in (Tr. 121).

[19] Mr. Ward accused Mr. Bell of lying when he told Mr. Ward that they did not speak by cell phone on June 16, 2011, claiming that he had the phone records at home to prove it (Tr. 127, 129). He also claimed that his cell phone records showed "dozens" of cell phone calls between him and the Employer on June 16 (Tr. 129-130). However, on the phone records Mr. Ward submitted, he denoted only four calls to McLeod on June 16, 2011; there is nothing to link any of these calls to Mr. Bell, or to any other specific person (CX 6).

a truck. He has worked for Employer for almost eleven years (Tr. 147). As the operations manager, Mr. Denton oversees the dispatchers, makes sure the planners and dispatchers get the plans to the drivers, and that the drivers know what they are doing (Tr. 147-148). At that time, there were about five dispatchers under his supervision; two work nights, and three work days (Tr. 148). Mr. Denton explained that the planner gathers all of the information regarding what the customer wants picked up and delivered, assigns it to a truck, and the truck is assigned to a dispatcher, who makes sure that the driver understands what he has to pick up and when (Tr. 148). The planner very seldom communicates directly with the driver; the dispatcher has the majority of communication with the driver (Tr. 148-149). Mr. Denton described himself as sort of a middleman – if a driver and dispatcher are not getting along, he gets in the middle; if a planner needs a load and the dispatcher does not think the driver can make it, he helps smooth things over (Tr. 149).

Mr. Denton reviewed RX A, stating that it looked like a load assignment being sent to Unit Tractor 976; it appeared to him that this exhibit included all of the Qualcomm communications for June 16, 2011 regarding that unit (Tr. 150).[20] Mr. Denton stated that this was a pre-plan load for Burrows Paper Corporation (Tr. 151). Mr. Ward, who was driving that unit, sent a message saying no to the pre-plan; this message went to Carolyn, the planner, and Mr. Bell (Tr. 151).

Mr. Denton identified a message sent at 9:33 a.m. June 16, 2011 to Mr. Ward, asking Mr. Ward to call him (Tr. 153). Mr. Ward called, and Mr. Denton asked him how he knew the load was too heavy; Mr. Ward had not scaled out the load yet (Tr. 153). According to Mr. Denton, every driver at the Employer is told that every load needs to be scaled, because it is the driver's responsibility to make sure the load is within the legal weight limit (Tr. 153). He told Mr. Ward that until he actually scaled the load, they could not do anything about it; they did not know if it was too heavy (Tr. 154).[21] Again, Mr. Denton stated that all loads, no matter how heavy or light, always need to be scaled out to be safe (Tr. 154). According to Mr. Denton, it happens very often that when a load is scaled, it turns out to be over the legal limit, and the driver is sent back to the customer to have some of the load removed (Tr. 154).

Mr. Denton did not recall Mr. Ward's exact response when he asked him how he knew the load was overweight when he had not scaled it; Mr. Ward just said that he was not going to do it. According to Mr. Denton, Mr. Ward's tone indicated that he was upset and angry (Tr. 155). They argued, and Mr. Denton could tell they were not going anywhere, so he told the planner to take the load off of Mr. Ward (Tr. 155). Mr. Ward refused to get the load and scale it; Mr. Denton thought it was better not to argue about it (Tr. 156). He recalled that the new load was for Coca Cola; Mr. Ward accepted that load (Tr. 156-157).

Mr. Denton reviewed the Qualcomm communications for June 17, 2011, and stated that they appeared to cover all of the Qualcomm communications between Mr. Ward and the Employer for that date (Tr. 157). Mr. Denton stated that Mr. Bell called him before he sent the message to Mr. Ward to call Mr. Denton, stating that Mr. Ward was upset with the trailer and

[20] Mr. Denton agreed that if messages were missing or had been added, he would not be able to tell (Tr. 172).
[21] Mr. Denton stated that the weight of the proposed load was on the Qualcomm assignment, and the drivers are told that it is an estimate. That was why they always had the drivers get scaled out (Tr. 168).

had issues with it, and would not do a load (Tr. 158). Mr. Ward called him, and they argued about trailer brakes. Mr. Denton found a place not too far from Mr. Ward where he could drop it off or have it looked at, but Mr. Ward did not want to do that either (Tr. 158). Mr. Ward told him that he was not going to sit around and wait, and Mr. Denton told him he could drop it off, and Mr. Denton would send him somewhere else, so he would not have to wait (Tr. 158). According to Mr. Denton, he told Mr. Ward that if he got to the shop and they could not look at the trailer in a timely manner, he could drop the trailer off at the shop, and bobtail to the nearest trailer to pick up another load (Tr. 159).

Mr. Denton told Mr. Ward that he would coordinate maintenance in the Toledo area, but Mr. Ward was not having it (Tr. 159). He wanted to deadhead the tractor and trailer home; but he would not move the tractor and trailer to the maintenance facility, because he said it was unsafe (Tr. 160). Mr. Denton tried to reason with him, and explain that that did not make sense. He told Mr. Ward that they really needed him to just take the trailer to a shop, and they would get him another trailer and load back to Decatur where they could talk it over. Mr. Denton stated that it got "a little hot and heavy," and Mr. Ward told him that the only way he was coming back was with a shotgun (Tr. 159-160). Mr. Denton described his tone as threatening (Tr. 161). Mr. Denton stated that they had a very irate driver who needed to chill out; he told Mr. Ward that he could call him back when he chilled out (Tr. 159). Mr. Denton hung up on Mr. Ward when he threatened to come back with a shotgun.

About ten or fifteen minutes later, someone from the Coca Cola facility (later identified as Mr. Dixon) called and said there was an irate driver there who needed to be taken care of (Tr. 161). Mr. Dixon told Mr. Denton that the driver came up to the window, and was very agitated, frustrated, and conflictive. Mr. Denton knew who he was talking about, and he told Mr. Dixon that if he had any problem, if Mr. Ward was making anybody feel unsafe, he had Mr. Denton's permission to call the police (Tr. 161-162). He apologized for Mr. Ward's actions.

Mr. Dixon called back and told him that Mr. Ward had left the property, and they needed someone to come in and move the truck, which was in the dock. Mr. Denton gave him permission to move the tractor and trailer out of the way until they could send someone to get it (Tr. 162). Mr. Dixon told Mr. Denton that they would prefer that Mr. Ward never come back to make a delivery (Tr. 164).

Mr. Denton stated that Mr. Ward then called back and wanted to know where the shop was, so he could take the truck and trailer. He told Mr. Ward that the customer did not want him back on the premises, and if he went back, they were going to call the police (Tr. 162-163). Mr. Ward said fine, I'm done, and that was the last Mr. Denton heard from him (Tr. 163, 165). Mr. Denton did not know what Mr. Ward meant by "I'm done," but the only thing he could think of was that Mr. Ward quit (Tr. 163). Mr. Denton did not tell Mr. Ward that he was fired (Tr. 163, 174).

According to Mr. Denton, the drivers at McLeod inspect the trailer, and if they see anything that does not look right, they are connected to the maintenance shop, which can tell the drivers how to adjust the brakes on the road, or get them to a nearby shop to have the brakes looked at (Tr. 165-166). Mr. Denton stated that if a trailer has a wheel seal that is leaking on the brakes, it is not immovable; it can be taken to the nearest place for repair (Tr. 166). It cannot go

very far, but can make it to a facility within 30 to 40 miles (Tr. 166). This is so even if the trailer is loaded, depending on the severity of the leak; it would be a little easier on the trailer if it were empty (Tr. 166).

Mr. Denton drove for a little over two and a half years. In his experience, an empty trailer can stop, based on just the tractor's braking power. A leaking wheel seal would not necessarily pose a problem for a short distance haul of an empty trailer to a maintenance facility (Tr. 167). Even if the trailer had to be towed, it would not be on a flat bed, the wheels would still be rolling down the road; they can go that far for safety reasons (Tr. 167).

Mr. Denton stated that when he hears the term "too heavy," it means that the truck is over 80,000 pounds, and it is illegal (Tr. 170). He does not consider the condition of the vehicle in this calculation (Tr. 171). He stated that at some point, a vehicle's condition determines how much weight it can actually carry, but if it were to that point, Mr. Ward would not have been able to make it to where he did (Tr. 172-173). According to Mr. Denton, not every trucking company has the same trucks. This is why there is a DOT regulation on weight, which is a base (Tr. 173). Mr. Denton stated that a legal load is a safe load; there is no difference (Tr. 174).

Daryl Dixon's Telephonic Deposition

Mr. Dixon testified by deposition on October 2, 2012. His deposition was entered into the record in full at the hearing.[22] Mr. Dixon has been a warehouse supervisor for Coca Cola for about two years, in Toledo, Ohio. His duties as a warehouse supervisor include managing people, truck traffic, rotation of stock, and budgets. His facility is about 70,000 square feet, with four docks; they load approximately 20 trucks a night (Tr. 6). Mr. Dixon described the facility as a cold warehouse; they load trucks and distribute the product to their customers (Tr. 7). In June 2011, there were about a hundred employees. Mr. Dixon is in charge of about four employees, on morning shift (Tr. 7).

Mr. Dixon stated that he had not met Mr. Ward before. But he recalled an incident involving a McLeod Express driver in June 2011 at his facility (Tr. 7). He stated that on that day, a load came in, and they unloaded the McLeod truck. After it was unloaded, Mr. Dixon was checking in another driver, and heard somebody talking loudly. He looked outside, and saw a McLeod driver, who was evidently talking to his dispatcher about his truck being unsafe (Tr. 7-8). Mr. Dixon stated that the driver was speaking to someone, he thought a dispatcher, on what looked like a cell phone. He could hear the driver telling the person on the other end that he "just quit" (Tr. 9). He did not recall the driver's demeanor during the telephone conversation.

Mr. Dixon asked the driver to pull the truck out of the dock, because he was done and unloaded; the driver said he would not pull the truck out of the dock, and it was not roadworthy to hit the roads under DOT regulations (Tr. 8). Mr. Dixon asked him how, if it was not roadworthy, he drove the truck there, and the driver did not respond. Mr. Dixon told him that he needed the truck moved out of the dock, but the driver refused (Tr. 8). According to Mr. Dixon,

[22] The Employer originally offered excerpts from Mr. Dixon's testimony. At Mr. Ward's request that the entire transcript be considered, I directed Employer's counsel to submit the entire transcript, and to provide a copy of the exhibit to Mr. Ward.

at the time this conversation occurred, he was handing the driver his paperwork through a metal gate. The driver told him that he had quit, and was not moving the truck (Tr. 10).

The driver asked Mr. Dixon if he had a telephone book, and Mr. Dixon sent him up to the front office, which was locked and secured; he was not going to let him in the building. The driver was calling a cab. While the driver went up to the front office, they grabbed the keys out of the tractor; the driver had already gotten his clothes and duffle bag (Tr. 8). The driver waited at the curb for the taxi to pick him up (Tr. 9). Mr. Dixon stated that he would say that the driver quit, because he walked away from the truck (Tr. 12).

The driver gave Mr. Dixon the dispatcher's number, and either he called the dispatcher, or the dispatcher called him. The dispatcher asked him what had happened, and if everything was okay; Mr. Dixon told the dispatcher that the driver was not threatening anybody, and evidently he was having a bad day (Tr. 10). Mr. Dixon told the dispatcher that if there was any kind of violence, he would have called the police and had the driver arrested, but he did not see any of that; the driver was just a little agitated. The dispatcher told Mr. Dixon that it was fine for them to have the keys, and Mr. Dixon told him that he would park the truck on a side street as soon as the driver was gone (Tr. 11). The dispatcher told Mr. Dixon that the driver had quit (Tr. 8). At that time, the driver was outside the building; Mr. Dixon stated that he was not getting any kind of disturbance (Tr. 8).

After the driver left, Mr. Dixon had one of his drivers pull the truck out and park it on the street (Tr. 9). Mr. Dixon was later contacted by someone from McLeod, who told him that somebody would be by to pick up the tractor and trailer; within a few days, someone came to get it (Tr. 11).

ISSUES

The issues for decision in this case are:

1. Did Mr. Ward engage in protected activity as contemplated under the STAA;
2. If so, did the Employer have knowledge of this protected activity;
3. Did the Employer take adverse employment action against Mr. Ward;
4. If so, was the protected activity a contributing factor to that adverse action; and if so,
5. Can the Employer show by clear and convincing evidence that the adverse employment action would have been taken regardless of the protected activity?

THE SURFACE TRANSPORTATION ASSISTANCE ACT

In passing the Transportation Act, Congress "recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations." *See Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994) (citations omitted).

As a result, Congress enacted section 405 of the Surface Transportation Assistance Act, 49 U.S.C. § 31105, to protect "employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance." *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 255 (1987). Section 31105(a)(1)(B) provides:

> A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because 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.

The protected activity includes making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order." § 31105(a)(1)(A). Internal complaints to management are protected under the Act. *Reed v. National Minerals Corp*., Case No. 1991-STA-34, (Sec'y., July 24, 1992), slip op. at 4. A "commercial motor vehicle" includes "any self-propelled . . . vehicle used on the highways in commerce principally to transport passengers or cargo" with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. App. § 2301(1).

The Act further provides protection for employees who have a reasonable apprehension of serious injury to themselves or the public due to an unsafe condition. § 31105(a)(1)(B)(ii). Whether an employee's apprehension of serious injury is reasonable is subject to an inquiry of whether a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. *Id.*

To prevail under the Act, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young's Commercial Transfer, Inc.,* ARB No. 02-122, ALJ No. 2001-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sec'y v. Minnesota Corn Processors, Inc.,* ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003).

Protected Activity

Mr. Ward must first demonstrate that he engaged in a type of activity protected by the STAA. Mr. Ward alleges that he refused to accept the load assigned to him on June 16, 2011, because it was too heavy. Additionally, Mr. Ward alleges that on June 16 and 17, 2011, he complained about the brakes on his tractor trailer, and refused to move his tractor and empty trailer from the Coca Cola dock in Toledo, Ohio, to a repair facility, on the grounds that it was illegal because he had "red tagged" the trailer for bad brakes.

June 16, 2011

On June 16, 2011, Mr. Ward had completed his delivery from Lafayette, Indiana, to Sycamore, Indiana. He was then assigned a new delivery by the trip planner, for a delivery to the Employer's customer Burrows Paper. As Mr. Bell and Mr. Denton testified, the estimated weight for an assigned load is provided by the customer, but this can change; the actual load can be lighter or heavier. All of the Employer's drivers are instructed to take the load to a scale to be weighed; if it is over the legal limit of 80,000 pounds total, they are to return to the customer to have some of the load removed.

Mr. Ward refused to take this load, because it was over 43,000 pounds.[23] The evidence clearly establishes that Mr. Ward's refusal had nothing to do with a violation of any safety or health regulation. There was no dispute that the load assigned to Mr. Ward on that date was within the legal weight limits.[24]

Under the STAA it is unlawful for an employer to "discharge an employee . . . [who] refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C. § 31105(a)(1)(B)(ii). Further, "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition." *Id.* § 31105(a)(2). Thus, to establish a claim under this section, Mr. Ward must show that (1) he refused to operate his truck because he was apprehensive of an unsafe condition on the truck; (2) his apprehension was objectively reasonable; (3) he sought to have the Employer correct the condition; and (4) the Employer failed to do so. *See Brink's, Inc. v. Herman*, 148 F.3 d 175, 180 (2nd Cir. 1998).

Mr. Ward claims that he refused to accept his assigned load on June 16, 2011, because he was apprehensive of an unsafe condition on his truck. Mr. Ward claims that he was concerned about the weight of the assigned load, as well as the condition of the brakes. But the evidence does not establish that Mr. Ward had a reasonable apprehension that the weight of the assigned load presented a safety hazard. Although Mr. Ward repeatedly stated that "legal is not the same as safe," he offered no evidence to support a finding that the weight of the load assigned to him on that date presented a safety hazard. Mr. Ward attempted to establish the general proposition that the condition of a truck affects the amount of weight it can safely carry. But he offered no evidence to suggest that the condition of the tractor and trailer he was driving made it unsafe to haul more than 43,000 pounds. Indeed, the evidence clearly establishes that Mr. Ward's refusal to accept a load more than 43,000 pounds (or his "absolute limit," 44,000 pounds) was based on his across the board preference, and had nothing to do with the condition of the particular rig he was driving. His communications clearly reflect that he would not haul a load more than 43,000 at any time.

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[23] The message from Carolyn indicated that the weight was 45,025 pounds (RX A, p. 3).

[24] As Mr. Denton pointed out to Mr. Ward during their phone conversation, Mr. Ward could not know the weight of the load until he actually picked it up and scaled it out.

Mr. Ward now claims that when he told Mr. Bell that "this truck will not stop safely at 43,000" pounds, he meant that there was a problem with the brakes. But Mr. Bell understood Mr. Ward's message differently; he took Mr. Ward's refusal to mean that the load was more weight than he could legally haul. Although, according to Mr. Ward, he meant to convey that there were problems with the brakes, he did not say that in his Qualcomm message. Indeed, when Mr. Bell asked him if there was something wrong with the brakes, stating that all of their trucks could haul 44,500 to 45,000 pounds, Mr. Ward responded that they could, but just not with him in it. He did not mention any problems with the brakes, but complained about the fifth wheel being too far back. In the five messages Mr. Ward transmitted, reflecting his refusal to accept the assigned load, he never stated that there were any problems with the brakes on his rig.

Nor did Mr. Ward raise any issue about the brakes when he spoke with Mr. Denton on June 16, 2011. Their conversation revolved around the weight of the load, and Mr. Ward's refusal to pick up the assigned load and take it to a scale to be weighed.

I find that Mr. Ward did not have a reasonable apprehension that the weight of his assigned load on June 16, 2011 presented a safety hazard. Nor did he raise any complaints to the Employer on June 16, 2011 about the safety of his brakes.

Nevertheless, even assuming that Mr. Ward raised reasonable concerns about the weight of his assigned load, or the condition of his brakes, when he sought corrective measures by refusing the load, the Employer took corrective action. Mr. Denton testified that, even though he did not agree with Mr. Ward's assessment about the safety of the assigned load, and that Mr. Ward stubbornly refused to pick up the load and find out what it actually weighed, he cancelled the assignment and gave Mr. Ward another load. Mr. Ward accepted this load, and made no more complaints until he got close to Toledo early in the early morning of June 17, 2011.

Thus, even assuming that Mr. Ward's refusal to accept his assigned load on June 16, 2011 was based on a reasonable apprehension of safety concerns, Mr. Ward cannot satisfy the fourth element: that the Employer failed to correct the condition. The STAA requires that, for Mr. Ward's refusal to drive his truck to constitute protected activity, he must have been denied a corrective measure by the Employer. *Cf. Duff Truck Line, Inc. v. Brock*, No. 87-3324 (6th Cir. 1988), *aff'g Robinson v. Duff Truck Line, Inc.*, 86-STA-3 (Sec'y Mar. 6, 1987) (confirming that the language of the third sentence ties protection to an attempt to obtain *correction* of the unsafe condition reference in the "because" clause and the second sentence) (emphasis added).

Mr. Denton took Mr. Ward off the load he refused, and assigned him another, lighter load. *See* Tr. 109:12-24. Although Mr. Ward claimed that he was assigned this load under false pretenses, and that the Employer (specifically, Mr. Bell), lied about the weight of the load to get him to take it, he provided no evidence in support of this claim. As both Mr. Bell and Mr. Denton testified, the weight of a pre-plan load is provided by the customer. The actual weight can change by the time the driver actually picks up the load, becoming either heavier or lighter. Nor did Mr. Ward complain about the weight of the load – the Qualcomm messages reflect that he picked up the load at 6:30 p.m., and that it weighed 42,849 pounds. There was no further

communication from Mr. Ward until 3:11 a.m. the next morning, when Mr. Ward was outside Toledo.

I find that Mr. Ward's refusal to accept his assigned load on June 16, 2011, did not constitute protected activity under the STAA.

June 17, 2011

Almost nine hours after he picked up his load on the evening of June 16, 2011, Mr. Ward sent a Qualcomm message at 3:11 a.m. on June 17, 2011, from a location outside Toledo, stating that he refused to load his trailer again, because "the brakes on it are too bad." He stated that the "brakes howl like banshees," and he noted "classic symptoms of bad seals and oil on the brake shoes." He clearly stated his intention to deadhead the tractor trailer back home, and bring it in the following Monday, or he would refuse to move it. He stated that he would not "donate" his time while the trailer was being repaired, and stated that he would not be around much longer, and that he planned to call numbers on the backs of trucks.

When Mr. Bell got to work that morning, and saw the message, he was surprised because Mr. Ward said nothing about the brakes the day before; Mr. Bell had specifically asked Mr. Ward if there was something wrong with the brakes. Mr. Bell instructed Mr. Ward by Qualcomm that, once the trailer was empty, he should call their shop so arrangements could be made to get the trailer to a facility in the Toledo area to be looked at. He specifically advised Mr. Ward that there was to be no deadheading.

Shortly after Mr. Bell sent this message, Mr. Ward messaged that he had arrived at the shipper. His message reads: "Why didn't I tell you that's rich I will noy [sic] donate my time in a shop, waiting I deadhead it home or I leave it where it sits."[25] In his three subsequent messages to Mr. Ward, Mr. Bell advised Mr. Ward to call Mr. Denton, told him that he needed to get the trailer into a shop and get it fixed, and in the last message, sent at 8:10 a.m., offered to line him up with a trailer shop to drop the trailer off for repairs, and then bobtail back. Mr. Ward did not reply to these messages.

I find that the evidence is sufficient to establish that Mr. Ward raised a reasonable concern about the safety of the brakes on his trailer on June 17, 2011. The Employer accepted Mr. Ward's assessment, and immediately took steps to get the trailer into a repair shop in the area to have the brakes checked. Although the repair invoice submitted by Mr. Ward does not show that the brake seals were "replaced," as claimed by Mr. Ward, but reflects only that they underwent routine maintenance, nevertheless there was some work done on the brakes. I find that Mr. Ward's apprehension about the safety of the brakes on his trailer was objectively reasonable.

I find that the evidence is sufficient to establish that Mr. Ward sought out a corrective measure from the Employer, as evidenced by his communications with the Employer regarding

[25] Although this message from Mr. Ward clearly appears to be a response to Mr. Bell's instructions to take the trailer to a repair shop, Mr. Ward claimed that Mr. Bell's message was fabricated, and that he sent this message to Mr. Bell "preemptively."

his concerns about the brakes and the safety of hauling a load given the brakes' condition. However, Mr. Ward attempted to pre-empt any corrective measure the Employer might offer with the ultimatum of letting him deadhead the trailer back home, or leaving it in the customer's dock.

> I will deadhead it back or I will refuse to move it. After the crap you folks tried to pull on me yesterday, I will certainly not donate my time waiting to get it fixed . . .What goes around comes around. I won't be here much longer anyway, even without your flagrant disregard for human life. The deal with the tolls is more than I can handle. I will just call the numbers on the backs of the trucks that fly by me. . . . I won't bother you much longer.

Mr. Ward has not established that the Employer failed to correct the condition. Mr. Denton immediately took steps to arrange for the truck and trailer to be checked out at a repair facility in the Toledo area.[26] Mr. Bell and Mr. Denton gave Mr. Ward options: he could drive the truck and tractor to the repair facility, and wait for them to check the brakes, and be paid for his time waiting. Or he could drive the trailer to the repair facility, unhook it, and drive his truck (bobtail) to another location, where he could pick up another load. But they made it clear that deadheading was not an option.

Mr. Ward was not required or instructed to haul another load in the trailer he claimed had bad brakes. He was instructed to move the empty trailer from the customer's dock, and take it to a repair facility, which Mr. Ward acknowledged would be safe to do.

Mr. Ward relies on his claim that, once he "red tagged" the trailer, it was illegal to move it, and that he was justified in abandoning the tractor and trailer at the Coca Cola dock. The regulation on which Mr. Ward relies prohibits him from operating a vehicle in such a condition that would "cause an accident or breakdown of the vehicle." *See* 49 C.F.R. § 396.7(a). This regulation provides that Mr. Ward had two options after tagging his vehicle as "out of service": either await repairs where he was, or travel the vehicle "only to the nearest place where repairs can be safely effected," provided that doing so was not a comparatively greater public hazard than remaining stationary. *See Id.* § 396.7(b); *see also* § 396.9(c)(2) (". . . nor shall any person operate any motor vehicle or intermodal equipment declared and marked 'out-of-service' until all repairs required by the 'out-of-service notice' have been satisfactorily completed.").

After Mr. Ward notified the Employer of the problems with his brakes in his 3:11 a.m. Qualcomm message, Mr. Ward proceeded neither to a repair facility nor remained stationary – he continued his delivery to the Coca Cola facility.[27] It appears that Mr. Ward "red tagged" his trailer only after being advised by Mr. Bell, almost fifteen minutes before Mr. Ward messaged that he had arrived at the dock, that he could not deadhead the tractor and empty trailer back

[26] Mr. Ward claimed that Mr. Bell never gave him the option of taking the trailer to a repair facility, and that the Qualcomm message reflecting that is a fabrication. But he never disputed that Mr. Denton gave him that opportunity.

[27] Indeed, Mr. Dixon wondered how Mr. Ward was able to get to the Toledo facility if his vehicle was not roadworthy.

home. Mr. Ward did not await repairs, nor did he move the trailer to a local repair shop, as instructed by the Employer.

Mr. Ward's claim that his red-tagging of the trailer justified his abandonment of the Employer's tractor and trailer at the Coca Cola dock is nonsensical, and contrary to the testimony of Mr. Bell, Mr. Denton, and Mr. Ward himself that the brakes on the tractor would be sufficient to safely stop the empty trailer. Although he stated repeatedly that, once he "red tagged" the trailer for brakes, not even the President could move it, Mr. Ward himself wanted to deadhead the truck and empty trailer back to his home in Terre Haute, and return it to the Employer's facility in Decatur the following Monday. Mr. Ward made it clear to the Employer that either he be allowed to deadhead the tractor and trailer back to his home, or he would leave it in the Coca Cola dock. Clearly Mr. Ward did not perceive that driving the empty trailer back to Terre Haute would present any safety risks, and he agreed with Mr. Bell and Mr. Denton that the brakes on the truck were sufficient to stop the empty trailer, "any day, all day." Mr. Ward did not comply with the regulations on which he relies – he did not wait with his tractor and trailer for repairs, or drive the empty trailer the short distance for repairs. He presented the Employer with an ultimatum, and when he was refused, he took his things and left.

As the Employer argues, Mr. Ward did not "refuse" to move the tractor trailer from the dock. He refused to move it except on his terms – he wanted to drive it all the way back to Terre Haute. His refusal to drive it to a repair facility, as instructed by the Employer, was not based on any concerns about the safety of driving the empty trailer – it was based on his refusal, communicated before he even reached the dock in Toledo, to "donate" his time while the trailer was repaired.[28]

Nor did Mr. Ward accept the offer to drop the trailer at the repair facility, and pick up another load. Mr. Denton, whose testimony I found to be credible and consistent with the documentary evidence, specifically the Qualcomm communications, stated that he tried to persuade Mr. Ward to take the trailer to a shop, and they would get him another trailer and load to haul back to Decatur. I note that, after the heated exchange between Mr. Ward and Mr. Denton, in which Mr. Denton hung up on Mr. Ward after his threat of physical violence, Mr. Ward called back and asked if he could take the trailer to the repair shop, and pick up another load. Of course, by this time it was too late.

In previous STAA cases, the Secretary has made clear that the point of the communication requirement is to provide a timely correction of a hazard, and is met only when the employee is unable to obtain correction of the unsafe condition. *See LeBlanc v. Fogleman Truck Lines, Inc.*, 89-STA-8 (Sec'y Dec. 20, 1989). While this is qualified by unusual circumstances, such as futility, an employee's refusal to accept the employer's corrective measure is not the same as being unable to obtain a corrective measure – being unable to obtain a corrective measure completes the requirements of engaging in protected activity, whereas an

[28] Mr. Denton testified that Mr. Ward would have been paid for his time, and Mr. Ward offered no support for his speculation that he would not. And even if there were any support for Mr. Ward's speculation that the Employer intended to trick him into taking another load on the trailer, it would be irrelevant – Mr. Ward refused to take the trailer to a repair shop as instructed, not because of any safety concerns, but because he did not want to wait around while it was repaired.

employee refusing a protective measure does not. *Cf. Bates v. Kasbar, Inc.*, 85-STA-11 (ALJ Mar. 7, 1986), adopted (Sec'y May 29, 1986) (holding that where the evidence credited by the ALJ indicated that the complainant was offered another truck after attempts to repair the truck he was originally assigned were unsuccessful, the essential element of an STAA whistleblower complaint of refusal to correct an unsafe condition was not present, and complainant failed to demonstrate that employer violated the Act).

In this case, the Employer promptly offered corrective action based on Mr. Ward's report of problems with the brakes. Mr. Ward refused to accept the Employer's proposed corrective measures, and attempted to coerce the Employer into allowing him to deadhead the unit back home by refusing to move it from the Coca Cola dock. Mr. Ward was offered corrective action, but he preferred another option, which was against the Employer's company policy.

I find that Mr. Ward did not engage in protected activity on June 17, 2011, when he reported problems with the brakes on his trailer, and refused to move the tractor and trailer from the Coca Cola dock.

Adverse Action

Finally, even assuming that Mr. Ward established that he engaged in protected activity, he has not established that he suffered any adverse action, due to his protected activity or otherwise. At the hearing, the following exchange took place:

> Judge Chapman: So I understand that whether you were fired is an issue in this case; is that correct?
>
> Mr. Ward: Not in my mind.
>
> Judge Chapman: All right.
>
> Mr. Ward: I was not fired.

(Tr. 11). Mr. Bell and Mr. Denton consistently and credibly testified that at no point during their communications with Mr. Ward on June 16 or 17, 2011 did they tell him he was fired, or even suggest that he was in danger of being fired. Indeed, when Mr. Denton spoke with Mr. Ward on June 17, 2011, and told him he could bobtail his tractor to pick up another load, he told Mr. Ward that he could come in and talk the following Monday. According to Mr. Denton, Mr. Ward's response was that the only way he was coming to the Employer's facility in Decatur was with a shotgun. Nor did Mr. Denton tell Mr. Ward he was fired when he called back to ask if he could take the offer to bobtail his tractor to get another load.

The only evidence of any employment action, adverse or otherwise, comes from Mr. Ward, who repeatedly made comments reflecting his intention to quit. Even before he got to the Coca Cola dock in Toledo, Mr. Ward stated that he would not bother the Employer much longer, and that he intended to start calling around for other jobs. During all of the exchanges, written and verbal, Mr. Ward was the only person to bring up the subject of his continued employment

with the Employer. Mr. Bell and Mr. Denton consistently and credibly testified that they never considered firing him. Indeed, the only person who proposed that Mr. Ward be fired was Mr. Ward. Even when Mr. Ward threatened Mr. Denton with physical harm, Mr. Denton did not fire him; he hung up on him.[29]

Mr. Ward attempts to suggest that the Employer goaded him into becoming angry and quitting, or, in other words, that he was constructively discharged. The evidence certainly reflects that there were heated exchanges between Mr. Ward and Mr. Denton. Mr. Denton acknowledged as much, and Mr. Ward stated that he "gave as good as he got." But there is absolutely nothing to even suggest that Mr. Bell or Mr. Denton, or anyone else at the Employer's, manipulated Mr. Ward into becoming angry and quitting.

No one forced or otherwise coerced Mr. Ward to remove his things from his tractor and abandon the tractor and trailer at the Coca Cola dock. And clearly, when he called Mr. Denton back and was told that it was too late to go back and get his tractor and trailer, deliver the trailer to the repair shop, and bobtail to pick up another load, Mr. Ward had decided that he was "done."

Mr. Ward argues that he was placed in an "untenable position," where he either had to drive a truck that was not only unsafe, but "red tagged," or quit. But this is simply inconsistent with the evidence, including Mr. Ward's acknowledgement that it was safe to drive the empty trailer, and his willingness to drive that trailer from Toledo to Terre Haute. The Employer wanted Mr. Ward to drive the empty trailer a short distance to a repair facility, which every witness, including Mr. Ward, agreed would be safe, as the tractor's brakes were sufficient to stop the empty trailer. Mr. Ward preferred to deadhead the tractor and trailer back to Terre Haute, and when the Employer told him he could not do that, he quit. If anything, it was Mr. Ward who placed the Employer in an "untenable position," by threatening to leave the empty trailer in the Employer's customer's dock if he did not get what he wanted.

In a case even more extreme than Mr. Ward's, *Shoup v. Kloepfer Concrete Co.*, 95-STA-33 (Sec'y Jan. 11, 1996), the complainant refused to drive an overweight mixer, and the Yard Supervisor wanted to discharge the complainant because of this protected activity. The Yard Supervisor, lacking authority to fire the complainant, sought authority from the manager, who in turn sought out the vice president. Ultimately, the complainant was offered an alternative train mixer. The complainant walked out, stating he had been fired, as he previously made known that he considered such mixers to be unsafe. Nevertheless, the Secretary found that the complainant quit voluntarily, that the offer of a train mixer was a reasonable solution, and that there had not been a constructive discharge.

Here, I find that the Employer promptly offered a reasonable solution to Mr. Ward's complaint about the brakes on his trailer. The evidence does not establish that Mr. Ward's only choice was to drive a vehicle that was unsafe and red tagged. Mr. Ward had several choices: he could drive the empty trailer to the repair shop and wait for it to be checked out, or he could drive the empty trailer to the repair shop and unhook it, and take his tractor to pick up another load to take back to Decatur. As even Mr. Ward conceded, it was not unsafe to drive the empty

[29] Mr. Denton stated that Mr. Ward threatened to come to the Employer's facility with a shotgun, which Mr. Ward denied. However, he did state that he threatened to beat Mr. Denton up.

trailer, because the tractor's brakes would be sufficient to stop it. Mr. Ward was not presented with the option of doing something illegal or quitting. It was his choice to refuse to take the trailer to a repair shop, and his choice to quit. I find that Mr. Ward has not established that he suffered any adverse action. Mr. Ward was not placed in an "untenable situation:" he was denied his request to deadhead the empty trailer back to his home, and he took his things and left.

Reporting Mr. Ward's Work Record

Although Mr. Ward did not elaborate on this claim at the hearing or in his post-hearing submissions, Mr. Ward's pleadings indicate that he believes the information the Employer provided to HireRight in his Termination Record was retaliation for his protected activity.

As discussed above, I have found that Mr. Ward has not established that he engaged in protected activity under the STAA. But even if he had, there is no evidence to support his claim that the Employer has "blacklisted" him, in retaliation for his protected activity or otherwise. The Employer submitted the Termination Record from HireRight, reflecting its submission of a termination record for Mr. Ward (RX C). The report indicates that Mr. Ward was employed from May 2011 to June 2011, and that his reason for leaving was "Resigned/Quit (or Driver Terminated Lease)." Under "Work Record," the report states: "Unauth. Location – w/o Notice (Quit Under Load/Abandonment)."

I find that this description of the circumstances of Mr. Ward's termination does not reflect any retaliatory animus. *Compare Dale Becker v. West Side Transport*, ALJ 00-STA-4 (Feb. 27, 2003) (finding no retaliatory conduct by the employer's termination report because the complainant failed to show any animus generated by simply stating that he had "excessive complaints" about the employer) *with Leideigh v. Freightway Corp.*, 88-STA-13 (Sec'y June 10, 1991) (finding retaliatory animus because the employer went so far as to explicitly mention the complainant's STAA complaint in its filed documents).

The Employer's description of Mr. Ward's "Work Record" does not refer to any protected activity on Mr. Ward's part, or to any of his claims of safety concerns. It merely reflects that Mr. Ward quit, after abandoning his load. This is precisely what happened, and the Employer's reporting of these facts, without any comment on Mr. Ward's alleged safety complaints, cannot be considered as "blacklisting," or retaliation for any protected activity.

CONCLUSION

Based on the foregoing, I find that Mr. Ward has not established that he engaged in protected activity on June 16, 2011 when he refused to accept his assigned load, or on June 17, 2011, when he made complaints about the brakes on his trailer, and refused to move the Employer's trailer to a repair shop. Nor has Mr. Ward established that he suffered any adverse action, whether as a result of any protected activity or otherwise. I find that Mr. Ward quit his job with the Employer; the evidence does not establish that he was the victim of a constructive discharge. Accordingly, Mr. Ward's claim for relief under the STAA is DENIED.

SO ORDERED.

Digitally signed by Linda Chapman
DN: CN=Linda Chapman,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

LINDA S. CHAPMAN
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: ARBCorrespondence@ 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).