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Office of Administrative Law Judges
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Issue Date: 20 November 2012

In the Matter of

ROBERT FINK

Complainant,

Case No.: 2012-STA-6

v.

**R&L CARRIERS SHARED SERVICES,
LLC,**

Respondent.

DECISION AND ORDER

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.

PROCEDURAL BACKGROUND

Robert Fink (hereinafter "Complainant") was employed by R&L Carriers Shared Services, LLC (hereinafter "Respondent") from approximately August 24, 2010, until he was terminated on or about January 11, 2011. On January 13, 2011, the Complainant filed a complaint with the Department of Labor's Office of Occupational Safety and Health Administration (hereinafter "OSHA"), alleging that he had been discriminated against by the Respondent in retaliation for engaging in whistle blowing activities. After conducting an investigation, OSHA issued the findings of the Secretary on November 21, 2011, concluding that there was no reasonable cause to believe that the Respondent violated Section 31105 of the Surface Transportation Assistance Act.

On December 6, 2011, the Complainant filed an appeal of that determination with the Office of Administrative Law Judges (hereinafter "OALJ"). The matter was assigned to me, and I held a hearing on June 20, 2012, in Fort Wayne, Indiana. At that time, the parties appeared and were given the opportunity to present evidence and arguments. At the hearing, I admitted Joint Exhibit ("JX") 1; Claimant's Exhibits ("CX") 1 through 10; Respondent's Exhibits ("RX") 1 through 7; and Administrative Law Judge Exhibits ("ALJX") 1 through 4 into the record. The Complainant submitted his closing brief on September 19, 2012; the Respondent submitted its

closing brief on September 18, 2012. 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

Mr. Robert Fink

Robert Fink, the Complainant, has worked as a truck driver for almost thirteen years (Tr. 67). During that time, he has driven dump trailers, dump trucks, tanker trucks, tractor trailers with double trailers, man trailers, and straight trucks, with tankers on most of them, hauling hazardous material. He previously worked for Estes Express Lines, Farrellgas, R&L Carriers, Builders First Source and Maryland Metals. Mr. Fink has operated double trailer sets since 2002. Mr. Fink has driven trucks through the whole northeast corridor, as far as Los Angeles, down through Texas, and as far as Kentucky; he has driven trucks several times on the West Coast. Mr. Fink has driven trucks in mountains, winter weather, snow and ice (Tr. 69).

Mr. Fink has a Commercial Drivers License from West Virginia, and has endorsements for transporting hazardous materials, and operating tankers, doubles, and triples. His license has never been suspended, cancelled, or revoked. He has never had a DOT chargeable accident with a tractor trailer set or commercial vehicle, or a moving traffic violation in a commercial motor vehicle. Mr. Fink has received safety awards from previous employers (Tr. 74). Other than the instance involved in this claim, he did not receive any type of discipline while he worked for R&L (Tr. 67-69, 75).

Mr. Fink worked for Estes from 2002 to 2004, when he moved to Martinsburg, West Virginia. Estes had no openings in Martinsburg, so he got a job with Roberts Oxygen Company, hauling gas cylinders for oxygen, and cylinders for welding (Tr. 68). Mr. Fink worked for the Respondent from October 2007 to October 2008, and again from August 2010 to January 2011. The first time, he worked as a line haul driver, driving from Hagerstown to Lebanon, Pennsylvania, and from Lebanon to Phillipsburg, New Jersey (Tr. 72). He left in 2008 to pursue a career in the police department. Mr. Fink stated that he had been a correctional officer at one time; in addition, the police force paid much better. Mr. Fink enrolled in the Baltimore City Police Academy. However, he had a knee injury, and needed to go back to a job driving (Tr. 73).

In August 2010, Mr. Fink saw an ad for a job at R&L on Career Builder. Mr. Fink liked the company the first time he worked there; he got along great with everyone, the home time was great, and the pay was very good. He printed the application and faxed it to Hagerstown. Within two hours, he got a call back from Mr. Cree, the terminal manager, who told Mr. Fink they had an opening. He started working at R&L within two weeks (Tr. 74).

When Mr. Fink returned to R&L, he was assigned primarily to make the run from the Hagerstown terminal to the Norristown, Pennsylvania terminal, in Hatfield, Pennsylvania. He worked the dock for several hours, and then drove back to Hagerstown. Every once in a while, the company needed a load to go to Baltimore, so he took it, and then returned to Hagerstown. Mr. Fink stated that he hauled double trailer sets about 99 percent of the time.

Mr. Fink described the "crack the whip effect" that happens when the back trailer of a double set of trailers gets out of control.¹ There are eighteen wheels on a double trailer with a

¹ Mr. Fink stated that double trailers are referred to as "pups," or "wobble wagons."

single axle; twenty two wheels if it is a double axle tractor. Each set of wheels has a brake chamber and brakes. With icy roads, if you try to stop, you have no control. The back trailer just slides, like a kite; it can actually push you, and can jackknife if you slam on the brakes too hard. The back trailer pushes the tractor, gets out of control, and basically drives the tractor (Tr. 89-90).

Wind affects the trailers; the force of the wind can push trailers, and make drivers fight to hold on. Wind can present a safety hazard if the "crack the whip" effect is strong enough. According to Mr. Fink, wind affects a tractor trailer set differently than a passenger car such as an Impala or a Ford, because there is so much area for the wind to hit. If the wind speed is high, it pushes you unbelievably. While high winds would blow a 53 foot single trailer all over the place, there is not the crack the whip effect that happens with double trailers (Tr. 76-78).

Mr. Fink stated that he always took the same route from Hagerstown to Norristown. He drove four or five miles up Route 11 North, to 81 North, to 78 East, and to Route 476, an interstate toll road in Pennsylvania. He got off at the exit for Norristown or Hatfield, and then took back roads to the terminal. Along that route, there were two rest areas, at Exit 5 on 81 North, and at the 39 in Newville, Pennsylvania. According to Mr. Fink, the rest areas fill up after 8:00 p.m., even in good weather (Tr. 70, 79).

In Mr. Fink's experience, a double trailer set parked on the shoulder of the interstate highway presents a hazard, because of the length of the trailer; it is very dangerous sitting on the shoulder. In his opinion, the shoulder is not a very good "safe haven" in weather conditions (Tr. 70). Mr. Fink stated that a driver cannot just get off the highway in bad weather, and drive around looking for parking, if he does not know the area around the exit. There could be no place to turn around, weight restrictions, or low bridges. Mr. Fink stated that if you don't know the area, it is not safe to go down the roads off an exit (Tr. 70).

Mr. Fink usually returned to the Hagerstown terminal between 6:00 and 7:30 a.m. He unhooked his trailers, put them in their assigned doors, parked the tractor, did paperwork, finished his logbook, and turned in his paperwork so he would get paid. He then drove his personal vehicle home for the day. When he got home, he took a shower, ate, and went to bed (Tr. 81).

On January 11, 2011, Mr. Fink had worked the previous evening; he got up between 4:00 and 4:30 p.m. At that time, there was heavy blowing snow, but it did not concern him too much at that point. Mr. Fink watched the local and national news on television, as well as the weather channel, and checked the weather on the internet (Tr. 82). He used the internet to check on the area where he was supposed to drive that evening. The forecast for conditions between Hagerstown and Norristown was heavy blowing snow, and icy road conditions, with wind gusts up to 25 to 30 miles an hour. Mr. Fink continued to monitor the weather reports on television and the internet(Tr. 83).²

² Mr. Fink stated that he did not have the phone numbers of other drivers he could have called about the conditions (Tr. 86).

At about 5:00 p.m., Mr. Fink drove his four-wheel drive pickup truck to the grocery store. He stated that it was snowy, with the wind blowing, and slick roads. He thought that he should not have been on the road, and he returned home (Tr. 83-84). He continued to monitor weather reports for the areas along his route. Mr. Fink testified that the forecast for the entire evening, for farther north in Pennsylvania, called for conditions to worsen overnight. There were cautions to stay off the roads if at all possible unless there was an emergency situation, because the roads could be hazardous. This forecast was for his route into the northeastern part of Pennsylvania. Mr. Fink made the decision that it was not safe for him to drive that evening (Tr. 84).³

Mr. Fink stated that if he had taken his run that night, he would have left Norristown to return to Hagerstown between 2:00 or 2:30 a.m., and 4:00 a.m. He hauled hazardous materials from Hagerstown to Norristown about 99 percent of the time, for a customer named Ecolab; about 98 to 99 percent of the time he pulled double trailers from Norristown back to Hagerstown. He did not haul hazardous materials from Norristown to Hagerstown quite as often (Tr. 90-91).

Mr. Fink testified that he has driven before in snowy weather in the northeast United States. On those occasions, he was already out and moving; he did not get off, but wishes he had. There were covered roads, low visibility, icy conditions, and he was going up the mountains in the snow, with nowhere to pull off. Mr. Fink was driving double trailer combinations, which made the conditions and driving worse (Tr. 92-93). Mr. Fink acknowledged that not all snow makes it unsafe to drive; he has driven in snow, but he was already out when it started. Mr. Fink stated that icy roads are an unsafe condition; he did not encounter them when he was driving for Respondent, and if he did, he would not have driven (Tr. 122).

Mr. Fink testified that he recalled the snow forecast for Harrisburg was four or five inches of snow, with about 25 mile per hour winds. For Hatfield, the forecast was four to six inches, and it was already snowing when he turned on the weather channel, with a 100 percent chance of snow (Tr. 123-124).

About 6:00 p.m., Mr. Fink called Mr. Smith, and told him he thought it was unsafe to operate, because he had been watching the local and national weather channels, and looking on the internet, and conditions were supposed to be bad overnight. Mr. Fink told Mr. Smith that he felt it was unsafe to operate a vehicle; the weather reports were calling for heavy snow throughout certain areas and gusting, blowing wind, and low visibility at times, as well as icy roads (Tr. 85).

According to Mr. Fink, Mr. Smith told him, "You've got to be sh*tting me, we fired a guy for this last year." Mr. Fink told Mr. Smith that he could not do that. Mr. Smith said to him, "So you're not coming in?", and Mr. Fink told him no, because he felt it was unsafe to operate the vehicle (Tr. 86). Mr. Smith subsequently left Mr. Fink a message to call Mr. Stefaniak. When Mr. Fink talked with Mr. Stefaniak, he told him that he was not going out that night

³ Mr. Fink did not print off anything from his computer that night when he was watching the weather forecasts on the internet; at the time, he did not think about it, or that there might be an issue raised about it in the future (Tr. 111).

because he felt it was unsafe because of the snow. Mr. Stefaniak told him that if he was not going out, he would be resigning from his position (Tr. 87).

Mr. Fink acknowledged that after Mr. Stefaniak told him his refusal to come to work would be considered a resignation, he raised his voice, and said some things he should not have. Mr. Fink stated that he asked Mr. Stefaniak, "So you're firing me?" Mr. Stefaniak responded "No, I'm not firing you, you're resigning from your position." Mr. Fink was upset; he stated that it was embarrassing to have to tell his wife he was fired. He had two children, and he was the sole source of income; he was wondering how he would put food on the table and pay the bills without a job. That was the reason he used bad language during the conversation (Tr. 88-89).

Mr. Fink spoke with Mr. Stefaniak the next morning, and asked him if he still wanted a meeting. Mr. Stefaniak told him to bring his fuel card, because he had resigned his position the previous night. Mr. Fink said, "So you fired me?" Mr. Stefaniak said, "No, I didn't fire you, you resigned." Mr. Fink testified that he did not resign, or leave his employment with R&L voluntarily (Tr. 91).

After he was "resigned," Mr. Fink applied for work at a number of places, looking for truck driving jobs, or all other kinds of jobs. He took the first job he was offered, with Pleasant Construction, starting in August 2011 (Tr. 94). He left that job in early January 2012, because he was not getting a lot of hours. It was also about an hour and 25 minutes from his home. In addition, he could not afford the health insurance, which he had had at his job with R&L (Tr. 95-96).

Mr. Fink then took a job with Maryland Metals on January 9, 2012, where he hauled scrap metal in tractor trailers with dump trailers, and in roll off trucks. He is still employed there (Tr. 97).

While he was unemployed, Mr. Fink received unemployment compensation and food stamps (Tr. 97). He owned a home when he left R&L, and was current with the payments. However, he had to have his loan restructured, and ended up losing his house. His family, his wife and two children, ages 9 and 5, had lived in their home since August 2004, and his children asked why they had to move away from their friends. His family now lives in a mobile home (Tr. 98-100).

Mr. Fink testified that when he lost his job with R&L, he was disappointed, upset, mad, hurt, and embarrassed. He had never been fired before. He had to tell his wife that they needed support from the state, when he had worked for everything he had in his life. He had to borrow money from his parents and his wife's parents (Tr. 99). His wife works as a dental assistant, but only part time (Tr. 100).

Mr. Fink testified that he has not been able to continue with his hobbies with his family. He cannot afford to go fishing, and do the other hobbies he used to do (Tr. 100). He stated that he has restless nights, and is not able to sleep wondering how he will support his family. He wants his job back. Mr. Fink stated that those types of jobs are hard to come by; with that job, he was home every day (Tr. 101-102).

Charles Stefaniak

Mr. Stefaniak is the terminal manager, and the service center manager for all of the carriers at the Hagerstown Location (Tr. 19). He has never had a commercial drivers license; he had a permit at one time. Mr. Stefaniak worked as a truck driver for three weeks in Ohio; he did not drive in snow, wind, or conditions of low visibility, nor did he pull double trailers (Tr. 24, 28). Mr. Stefaniak acknowledged that tractor trailers behave differently than a car on the highway; they have more brakes, a lot more wheels, and a higher profile subject to swaying and the effects of wind (Tr. 28).

According to Mr. Stefaniak, Mr. Smith called him the evening of January 11, 2011, and told him that Mr. Fink had called in, and refused to go out because of weather conditions (Tr. 22). When he talked with Mr. Smith, he was on his way home for the night, and he pulled over to take the call, on the Leitersburg Pike, slightly northeast of the Hagerstown terminal. Mr. Stefaniak was not at the Norristown terminal, nor was he aware of the weather conditions in Norristown, or along Mr. Fink's route (Tr. 25).

Mr. Stefaniak stated that the Regional Director was Stephen Ford; he was not sure where Mr. Ford was located that night, but he was based in Charlotte, North Carolina (Tr. 39). Mr. Stefaniak acknowledged that it was not likely that Mr. Ford was driving in Pennsylvania that night. The safety director is located in Wilmington, Ohio; Mr. Stefaniak did not speak with the director, but with a person in the safety department (Tr. 39).

A few minutes after he talked to Mr. Smith, Mr. Stefaniak got a call from Mr. Fink. At that time, it was flurrying, with about two to three inches of snow on the ground. The roads had been plowed, and there was snow on the roads, but not much (Tr. 34). According to Mr. Stefaniak, the driving conditions were not hazardous (Tr. 35). Mr. Fink told Mr. Stefaniak that he was a f*cking prick, and had no right to make him do his run; his tone was belligerent. Mr. Stefaniak heard Mr. Fink's wife yelling in the background (Tr. 35).

Mr. Stefaniak asked Mr. Fink what seemed to be the problem, and Mr. Fink told him that he knew the law, and Mr. Stefaniak had no f*cking right to force him to go out in those conditions. Mr. Stefaniak told Mr. Fink that he was exactly right, he did not have the right to force anybody to do anything. He told Mr. Fink that the conditions were not bad enough not to do his run, and after speaking with the regional director and safety department, he concluded that they would be doing their runs in Hagerstown that night. According to Mr. Stefaniak, Mr. Fink continued to yell and swear; he told Mr. Fink that he was not yelling and swearing at him, and he would not continue to listen, and he hung up (Tr. 36).

Mr. Stefaniak stated that Mr. Fink did not report for his shift that night. Two other drivers made the run to Norristown that night; there were no incidents or accidents (Tr. 37). There were also other runs sent out, and there were no incidents. He thought that the other drivers left at 9:00 and 9:30 p.m., taking the turnpike by Leitersburg. They did not report anything hazardous (Tr. 42). According to Mr. Stefaniak, the Hagerstown terminal has never

had an incident involving a tractor trailer being involved in an accident due to weather conditions, and he has never shut down the routes because of bad weather (Tr. 37).

Mr. Stefaniak testified that he did not fire Mr. Fink because he swore at him; Mr. Fink was not the first truck driver to yell or swear at him (Tr. 41).

Mr. Stefaniak was not sure what type of vehicle Mr. Fink would have been driving on the evening of January 11, 2011; about 99% of the time he drove "pups," or double trailers with a tractor, lead trailer, and dolly (Tr. 26). Each pup is 28 feet long, with 3 feet between, for a total of 58 to 59 feet, plus about ten feet for the tractor, for a total of about 70 feet. Mr. Fink would have left between 8:30 and 9:30 that evening, and driven to the Norristown terminal in Hatfield, Pennsylvania, about 175 miles away. He would then work the dock for two to four hours, and the next morning, return from the Norristown terminal to Hagerstown (Tr. 27-28).

According to Mr. Stefaniak, if a driver encounters weather conditions, and decides to pull over, he should pull over at the first safe haven he can get to. This might be the shoulder of the road, or he could pull off on another road, at the first exit, the first gas station, the first grocery store, or the first Walmart, located in multiple locations throughout the United States (Tr. 29).

According to Mr. Stefaniak, if a driver is listening to the radio, and the CB communications with other drivers, he would know the weather conditions at the next exit.⁴ He acknowledged that a 70 foot long tractor trailer on the shoulder of the road would present a hazard to other vehicles. He also acknowledged that if a driver pulled off at the first exit, he would not know if there were low bridges unless he was familiar with the area. But he claimed that there would be signs indicating if there were low bridges ahead, and the driver should know where the low bridges were. However, Mr. Stefaniak acknowledged that he would not drive on roads he was not familiar with searching for a safe haven (Tr. 30).

In Mr. Stefaniak's experience, 99.9 percent of the time when you get off at an exit, there are either gas stations or truck stops (Tr. 31). There are also signs indicating where parking spots are. However, Mr. Stefaniak has never driven a truck at night and tried to look for truck parking in the northeast corridor (Tr. 32). He acknowledged that there were occasions when he would not go out as truck driver in bad weather, even if the highways were open. But he stated that this call is made by him and the safety department, and Mr. Fink was not allowed to have a role.

Mr. Stefaniak told Mr. Fink that the roads were open, and if he did not come in, he would be resigning his position. According to Mr. Stefaniak, it is R&L policy that if the roads are open, you attempt your run (Tr. 22). Although the home office in Ohio has input, the ultimate decision as to whether to continue operations is made at his location, between himself and the safety department. Mr. Stefaniak disagreed with Mr. Fink's concerns over the weather conditions, and his position the evening of January 11, 2011 was that Mr. Fink had to attempt his run (Tr. 23).

Mr. Stefaniak stated that R&L has a progressive discipline system; however, they did not progressively discipline Mr. Fink. He stated that up to that point, Mr. Fink had a "pretty good" work record. But there were different levels of insubordination and refusal of work assignments that required different amounts of discipline.

⁴ Mr. Stefaniak stated that drivers are allowed to have a CB radio on while they are driving; they can listen, but not talk (Tr. 30).

Mr. Fink called him the next morning, to see if Mr. Stefaniak wanted him to come in so that they could talk. Mr. Stefaniak told Mr. Fink that he could come in, but to be sure to bring his fuel card and time card, because he resigned the night before. Mr. Fink said, no, you fired me, and Mr. Stefaniak said no, you resigned (Tr. 46).

Mr. Stefaniak described the peer review process at R&L, wherein the company designates two participants, and the employee picks three participants. If one of the two company representatives thinks the employee should keep his job, or all three of the employee's choices think so after a hearing, the employee gets to keep his job (Tr. 132). It is a system that is set up to allow people a second chance, and is generally known throughout the company. He has heard of the process being used multiple times (Tr. 133). It is available if an employee feels that he has been terminated unjustly, and he satisfies the eligibility criteria (Tr. 133).

Mr. Stefaniak acknowledged that he made it clear to Mr. Fink that he considered him to have resigned his position; he did not tell him that he was terminated (Tr. 134). Mr. Stefaniak stated that the peer review process is for employees who feel that they were unjustly let go or "whatever;" he did not know if it was available to persons who were construed to have resigned (Tr. 134).

Todd Smith

Mr. Smith works as a city dispatcher with R&L, and as a backup dispatcher for the line haul (terminal to terminal) operations. He has worked for R&L for about 11 years. He does not have a commercial driver's license, and has never worked as a truck driver (Tr. 51). Mr. Smith stated that R&L is an "LTL" carrier, meaning that it hauls for customers who have less than a truckload (Tr. 48). Mr. Smith is acquainted with Mr. Fink, and stated that he had never had any problems with him (Tr. 40). As far as he knew, Mr. Fink had a good attendance and performance record, and was always courteous to him.

Mr. Smith stated that the line haul operations between the Hagerstown terminal and the Norristown terminal usually involved the transportation of double trailer sets; about 99 percent of their traffic moved in double trailer sets (Tr. 50). R&L has a customer in the Hagerstown area named Eagle Lab, which has shipments, mostly hazardous materials, almost every day from the Hagerstown terminal to the Norristown terminal (Tr. 50).

Mr. Smith testified that on January 11, 2011, Mr. Fink called him about 6:00 p.m., about the time his shift ended, and made it clear that, based on what he perceived to be hazardous weather conditions, he was not going to make his run that evening from Hagerstown to Norristown (Tr. 52). Mr. Fink told him that had been watching television and his computer, and he had seen the forecast for that night. Mr. Smith stated that at that time, there was a real light snow, nothing to be concerned about; he had no difficulty getting home (Tr. 64). He acknowledged that he did not know the weather conditions further north (Tr. 65). Mr. Smith stated that the local forecast called for light snow in the tri-state area, but he did not know the forecast for weather conditions in Norristown later that evening, or what the weather conditions

were at that time (Tr. 65). He stated that there were a "good bit" of city drivers out, and no one was complaining about problems (Tr. 65).

According to Mr. Smith, he did not have the authority to tell Mr. Fink not to take his run, even if he thought the weather was hazardous (Tr. 52). In the past, as a supervisor for line haul operations, Mr. Smith had suggested to supervisors that he did not think it was safe for drivers to go out, and they finally agreed with him (Tr. 52). He thought this incident could have been one or two years earlier. The weather was terrible that night, and he contacted the terminal manager at home, and told him he did not think it was safe for drivers to go out. The manager contacted the Wilmington terminal, and was told that the drivers needed to go out (Tr. 63). When it got closer to the time to go out, he called the Wilmington terminal, told them situation, and that he did not think the drivers could even get out of the lot. He made the decision not to run that evening. Mr. Smith thought that this was his responsibility; if he forced the drivers to go out, and something happened, he would feel responsible (Tr. 64).

According to Mr. Smith, the "old" policy was that, before anyone was dispatched out in bad conditions, they had to confer with the corporate office in Wilmington, Ohio, to make sure they were still running (Tr. 52). He did not know if that policy had really changed, but stated that if they had not heard anything before the drivers were dispatched, they went ahead and sent them out (Tr. 53).

Mr. Smith discussed another employee, Nathaniel Barron, who had been fired for refusing to take his run from the Hagerstown terminal to the Norristown terminal, because he claimed that the weather conditions were hazardous due to snow, blowing snow, and high winds (Tr. 58-59). In that instance, Mr. Smith consulted first with his immediate supervisor, and then with the corporate office in Wilmington to see if they were still running (Tr. 59). He did not think that policy had changed, and that the directive came from Wilmington as to whether they should dispatch drivers (Tr. 59).

Mr. Smith stated that it is about 175 miles from Hagerstown, northeast to Norristown. In good weather conditions it takes about four and a half hours for the one way trip (Tr. 60).

Mr. Smith stated that there was no internet access at the terminal. After Mr. Fink called, he called his boss, Mr. Stefaniak, and told him that Mr. Fink was not coming in because of bad weather conditions. He told Mr. Stefaniak that he had told Mr. Fink that they had gotten rid of a driver for the same actions, that there was not that much snow forecast, and it was not that bad. Mr. Fink told Mr. Smith that he knew the law, and he did not have to come in; he was "kind of" belligerent (Tr. 61).

ISSUES

The Respondent agrees that Mr. Fink is an employee as defined at 49 U.S.C. § 31101(2), and that it is a "person" subject to the employee protection provisions of the Surface Transportation Act.⁵ The Respondent agrees that Mr. Fink was discharged on January 12, 2011.

⁵ As the Respondent has pointed out, and the Complainant agrees, the Complainant's employer was R&L Carriers Shared Services, LLC. Accordingly, R&L Transfer, Inc. is hereby dismissed as a Respondent.

The Respondent also agrees that Mr. Fink filed timely objections to the Secretary's November 21, 2011 findings, and that the Office of Administrative Law Judges has jurisdiction over the parties and subject matter of this proceeding.

The issue to be decided is whether Mr. Fink engaged in protected activity when he refused to drive his assigned run on January 11, 2011, because of adverse weather conditions.

DISCUSSION

Statement Of The Law

49 U.S.C.A. § 31105(a)(1) ("the Act"), provides that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle regarding pay, terms or privileges of employment because the employee has engaged in certain protected activity. 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).

Whether The Complainant Engaged In Activity That Is Protected Within The Meaning Of The Act

A refusal to drive in hazardous weather conditions can constitute protected activity under the Act. *Robinson v. Duff Truck Line, Inc.*, 1986 STA 3 (Sec'y Mar. 6, 1987), *aff'd sub nom. on other grounds, Duff Truck Line, Inc. v. Brock*, 1987-3324 (6th Cir. 1988); *Eash v. Roadway Express, Inc.*, ARB Nos. 02-008 and 02-064 (June 27, 2003). The Complainant alleges that he engaged in protected activity when he refused to drive his assigned route on the evening of January 11, 2011, because of dangerous weather conditions.

According to the Respondent's interpretation of the statute, the Act contemplates that commercial motor vehicles will be driven in adverse conditions from time to time, as long as "extreme caution" is exercised, and driving is discontinued if conditions become "sufficiently dangerous." Respondent's Brief at 5-6. The Respondent argues that its safety policies are consistent with these requirements, and provide that if the safety department or local terminal manager determines that conditions do not require discontinuance of operations, the drivers are expected to report for their assigned shift.⁶ However, once the drivers are out on the road, they have the discretion to discontinue operations if they perceive that conditions are "sufficiently dangerous."

In other words, under the Respondent's policy, the safety department, which is located in another state, together with the local terminal manager, have the ability to halt operations if they perceive conditions are too dangerous, but the individual driver has no say in this determination until he is actually behind the wheel. However, the Administrative Review Board (Board) recognizes that the Act protects a reasonable refusal to drive due to hazardous weather, the Respondent's policies notwithstanding.

Thus the issue is whether the Complainant had a reasonable apprehension of serious injury to himself or the public if he drove his shift the evening of January 11, 2011. The Complainant testified that he monitored the current weather conditions and forecast on television and the internet; the conditions and forecast reported high winds, heavy snowfall, and icy road conditions along his route, with travel advisories.⁷ The Complainant, who has thirteen years of experience operating tractor trailers, concluded that it was not safe to make his run, given the current and forecasted weather conditions.

The Employer has offered the testimony of Mr. Stefaniak and Mr. Smith, neither of whom has ever worked as a line haul driver, or driven double or even single tractor trailers. Between them they have a total of three weeks of truck driving. On the evening in question, neither Mr. Stefaniak nor Mr. Smith provided Mr. Fink with any information about the weather conditions along his route.

The Complainant did not make the decision not to take his run that night casually – he was not concerned that it was snowing at 4:00 p.m. when he got up, but as he monitored the weather condition and forecasts, and particularly when he had trouble controlling his four-wheel pickup truck on his trip to the grocery, he determined that it was not safe for him to be operating a 70 foot long "wobble wagon" overnight in snowy and windy conditions.

Mr. Fink had reasonable cause to be worried about what might happen on his run that night, in hazardous conditions of snow and ice. Mr. Fink, the only witness with experience

⁶ It is not entirely clear whether the terminal manager, in this case Mr. Stefaniak, had the authority to discontinue operations because of bad weather conditions. Mr. Stefaniak testified that the decision as to whether to shut down operations was made by the terminal manager and the safety department, although it appears that in this instance he relied on the directives of the safety department in Ohio.

⁷ The Respondent's claim that Mr. Fink's decision not to drive was based on forecasted conditions, without any attempt to determine the actual conditions along his route, is incorrect.

driving tractor trailers, described in detail what happens when a double tractor trailer starts to slide, or the "crack the whip" effect.

The Employer suggests that, regardless of his apprehensions about weather conditions, Mr. Fink should have started his run, and if conditions did prove to be hazardous, found a "safe haven" to wait until conditions improved. But again, Mr. Fink, the only witness who actually has experience operating double tractor trailers, testified that in his experience, it is difficult to find parking for double tractor trailers in rest areas and truck stops after 8:00 p.m., even in good weather conditions.⁸ As Mr. Fink stated, and Mr. Stefaniak agreed, a double tractor trailer parked on the shoulder of the highway in bad weather conditions poses a danger to other motorists. And although Mr. Stefaniak claimed that there were gas stations, grocery stores, and Walmarts at every exit, Mr. Fink testified that it was not a good idea to look for a place to park on unfamiliar roads, where there might be weight restrictions, low bridges, and no ability to turn around. Mr. Stefaniak thought that there would be signs showing where there were low bridges, and that a driver should "know" where the low bridges are.⁹ But he also acknowledged that he would not drive on unfamiliar roads looking for a safe haven.

I had the opportunity to observe Mr. Fink at the hearing, and I found him to be a completely credible witness. I credit his testimony, and find that his assessment of the weather conditions that night, and the inadvisability of taking a 70 foot long double tractor trailer over the roads for 175 miles, in darkness, and with current and predicted conditions of snow and wind, to be completely reasonable.

The Employer apparently means to suggest that Mr. Fink's testimony is not credible because he has changed jobs frequently, and his average tenure at any one job before his second stint with the Respondent was less than a year. Respondent's Brief at 4. I find nothing inherently suspicious in this.¹⁰ As Mr. Fink testified, he has never had a DOT certifiable accident, nor has his license been suspended for any reason in his thirteen years of driving tractor trailers.

There is no evidence to suggest that Mr. Stefaniak or Mr. Smith took any steps to determine if the current or forecasted weather conditions along Mr. Fink's route in fact posed a hazard. Mr. Smith acknowledged that he did not know the current weather conditions in Norristown, nor did he know the forecast for conditions in that area. Mr. Stefaniak testified that at the time Mr. Fink called, it was flurrying, with about two to three inches of snow on the ground. The roads had been plowed, and there was snow on the roads, but "not much." But he did not know the weather conditions in Norristown, or along Mr. Fink's route. Nor is there any evidence that Mr. Smith or Mr. Stefaniak made any attempts whatsoever to determine what the current or forecasted conditions were in Norristown or along Mr. Fink's route. Rather, they

⁸ It is immaterial that the page from Mapquest, attached by the Respondent to its Brief but not submitted or admitted as an exhibit, shows numerous rest stops along the Complainant's route. Nor is it necessary for me to take judicial notice that there are no mountains between Hagerstown, Maryland and Norristown, Pennsylvania. Although Mr. Fink described his previous experience driving a tractor trailer in bad weather conditions over mountains, he never claimed that his route on the evening of January 11, 2011 involved driving over mountains.

⁹ Other than his speculation that there would be signs for low bridges, Mr. Stefaniak did not explain how a driver would "know" where the low bridges were on the side roads along his route.

¹⁰ Nor did the Employer, as it hired Mr. Fink the second time immediately after receiving his application.

relied on the instructions from a “person” in the safety department in Ohio that the run should be made. Indeed, the only person who *was* monitoring the weather and driving conditions on the route that Mr. Fink was scheduled to drive the evening of January 11, 2011 was Mr. Fink.

Mr. Fink consistently testified that for several hours, he monitored weather conditions and forecasts for his route on television and internet broadcasts. I find his testimony to be fully credible. The Respondent argues that

[n]ot one reference is made [by the Complainant] to the objective documentary evidence of record as to the weather conditions and forecast on the date in question. The reason is clear. None of that objective evidence supports Mr. Fink’s self-serving testimony regarding weather forecasts he claims to have seen on the date in question.

Respondent’s Reply Brief at 1. Apparently the Respondent is referring to its Exhibit 4, the National Weather Service Forecast for Central Pennsylvania.¹¹ This Exhibit reports the forecasts for central Pennsylvania beginning at 11:46 a.m. January 11, 2011, and at 3:32 p.m., and 9:58 p.m., and at 4:12 a.m. January 12, 2011. The forecasts consistently reflect a winter weather advisory overnight, with snow from 1 to 4 inches, and winds from 5 to 25 miles an hour, and gusts up to 35 miles an hour. I disagree with the Respondent’s characterization of these forecasts as “objective meteorological evidence” that contradicts Mr. Fink’s position. Respondent’s Reply Brief at 7.

Both sides have cited to the decisions in *Roadway Express, Inc. v. Administrative Review Board*, 116 Fed. Appx. 674 (2004), and *Larry E. Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, 02-064 (June 27, 2003). In that case, the complainant claimed that he engaged in numerous protected activities, including refusing to drive his route because of weather conditions. At the hearing, Mr. Eash testified that he noted freezing rain on the highway that went by his house, and he heard news reports that it was unsafe to drive on the highways where he would be dispatched. He also testified that he saw two television reporters reporting from an interstate that he would have to take on his route; they were covered in freezing rain, and stated that it was unsafe to drive on the roads. When Mr. Eash called the dispatcher and asked to be relieved from his route, he was told that other drivers were coming to work. He called about three hours later, stating that the road conditions had become worse, and he was given two hours to report for work. As he began driving to work two hours later, he nearly lost control of his car at least twice, and stopped and called the dispatcher to state that he could not get to work.

The ALJ found that a reasonable person in Mr. Eash’s situation would have recognized a *bona fide* danger of accident or injury, and that he had a reasonable apprehension of serious injury to himself or the public because of the unsafe driving conditions. However, the ALJ found that the only adverse action Mr. Eash suffered due to this protected activity was the issuance of a warning letter, and that his suspension was due to his entire work record, and not

¹¹ The Respondent misrepresents Mr. Fink’s testimony, when it argues that there is no evidence of record supporting Mr. Fink’s claim that he “actually observed” weather conditions on his scheduled route. Respondent’s Reply Brief at 3. In fact, as the Complainant pointed out in his brief, in language quoted by the Respondent, Mr. Fink relied on weather conditions seen on television and the internet *reported* as occurring along the route at the time he actually observed them. Mr. Fink never claimed that he “actually observed” weather conditions along his scheduled route.

just his refusal to drive on the evening in question. The Sixth Circuit Court of Appeals concluded that there was substantial evidence in the record as a whole to support the ALJ's conclusion, noting that Mr. Eash testified that he lost control of his personal vehicle on the way to work, and concluded that it was unsafe to operate a commercial vehicle based on his familiarity with the route and his experience, including a previous accident, in winter storms. Mr. Eash also submitted newspaper reports and weather data about the size of the storm, and the employer did not dispatch Mr. Eash on a return trip to Pittsburgh on that morning due to the weather.

I do not agree with the Respondent that this case does not support Mr. Fink's claim. I do agree with the Complainant, that the factual distinctions are minor. Thus, on January 11, 2011, Mr. Fink observed heavy blowing snow near his home. He observed and monitored broadcasts reporting that the weather conditions along his route called for heavy, blowing snow, icy roads, and high wind gusts. Mr. Fink experienced hazardous conditions when he drove his own vehicle, a four wheel drive truck. Mr. Fink's experience driving tractor trailers, including driving in adverse weather conditions, told him that he should not be driving under these conditions.

Nor does the fact that none of the drivers had accidents that might negate the reasonableness of Mr. Fink's apprehensions about the weather conditions. The Employer argues that no other driver questioned the decision to run, or discontinued his run because of weather; all reported for duty, and drove their assigned shifts without incident. However, the record at most reflects that no one reported problems to Mr. Stefaniak or Mr. Smith that evening. But there is nothing in the record to indicate, one way or another, whether any other drivers, on the route Mr. Fink was scheduled to take, driving a double tractor trailer, experienced any difficulties because of the weather.

The Respondent's claim that Mr. Stefaniak "conferred with drivers that had actually run the route before making the decision to terminate Mr. Fink" is incorrect and misleading. Brief at 14. Mr. Stefaniak testified that he told the Complainant if he did not make his run, he would be "resigning." He also testified that two other drivers made the same run that evening without incident. But he did not state that he conferred with anyone other than the "person" at the safety department in Ohio, and the regional director, based in Charlotte, North Carolina, before advising Mr. Fink that he would lose his job if he did not drive his route. The fact that two other drivers did not have any incidents is a far cry from the Respondent's claim that "all other drivers ran their scheduled routes without controversy and without incident." Respondent's Brief at 3. In short, the Respondent provided no evidence of the weather or driving conditions that were experienced by other drivers the evening of January 11, 2011, much less on the route Mr. Fink was scheduled to take.

The Respondent's claim, that to accept the Complainant's logic at face value, all interstate commerce could be shut down completely during the winter months anytime precipitation is called for, is overblown.¹² As with many things, there is a balancing test: the

¹² This case does not involve the issue of whether it was safe to drive a car, truck, or single tractor the evening of January 11, 2011. Mr. Fink specifically described the hazards of driving a double tractor trailer in snowy, icy, and windy conditions. Contrary to the Respondent's fears, allowing a driver the option of refusing to drive such a

flow of interstate commerce, and the right of the Respondent to conduct its business over the interstate highways, must be balanced against the safety of its employees, and the public that travels on those interstate highways. That is precisely why the Act permits a driver who has a *reasonable* concern that weather conditions are too hazardous to take a truck on the highways to refuse to do so, without fear of reprisal. Mr. Fink was not required to rely on the judgment of the “person” in Ohio who decreed that the runs should be made, or Mr. Stefaniak and Mr. Smith, who did not even bother to investigate the weather conditions along Mr. Fink’s route before telling him he had to make his run or be “resigned.” Nor was he required to wait until he got behind the wheel, when his options for finding a “safe haven” were limited at best, before being allowed to make the decision that the conditions were too hazardous for him to drive a 70 foot wiggle wagon.

I find that a reasonable person in Mr. Fink’s circumstances would conclude that the weather conditions along his route established a real danger of accident, injury, or serious impairment to the health of Mr. Fink and the public. Thus, Mr. Fink’s refusal to report for his run the evening of January 11, 2011 was protected under the “reasonable apprehension” prong of the Act, Section (1)(B)(ii).¹³

Knowledge of Protected Activity

Generally, it is not sufficient for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. See *Gary v. Chautauqua Airlines*, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan. 31, 2006); *Peck v. Safe Air Int’l, Inc.*, ARB Case No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

There is no dispute that the persons who made the decision to “resign” Mr. Fink, Mr. Stefaniak and his supervisors, were aware of his protected activity. Indeed, Mr. Fink’s refusal to make his run because of weather conditions was the reason that he was “resigned.”

Unfavorable Personnel Action

Nor is there any dispute that Mr. Fink suffered an adverse personnel action, as he was discharged after he refused to make his run. I find that this is so, despite Mr. Stefaniak’s testimony that nobody made the decision to fire Mr. Fink – he resigned. Clearly Mr. Fink did not quit, nor did he express any desire to “resign.” I find Mr. Stefaniak’s characterization of Mr. Fink’s firing to be a not-too-clever attempt to avoid the consequences that would accompany the firing of Mr. Fink, including the right to participate in the peer review process, and qualification for unemployment benefits.¹⁴

vehicle in conditions he reasonably believes are hazardous, without fear of reprisal, as the Act contemplates, does not automatically result in shutting down interstate commerce completely anytime precipitation is called for.

¹³ By asking to be relieved of his run that evening because of unsafe weather conditions, Mr. Fink sought correction of this unsafe condition from the Respondent, which he was not able to obtain.

¹⁴ Indeed, Mr. Fink testified that the Respondent fought his right to unemployment benefits, forcing him to undergo telephone interviews before he began receiving benefits, along with back pay.

Contributing Factor

It is the complainant's burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Clark v. Pace Airlines, Inc.*, ARB No. 04-150 (Nov. 30, 2006), slip op. at 11. Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041 (Nov. 30, 2005), slip op. at 9. Where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No 04-056 (Apr. 28, 2006).

In this case, there is no dispute that Mr. Fink's refusal to take his run contributed to the decision to "resign" him. Indeed, it was the direct cause of his forced "resignation." The dispute centers on the question of whether Mr. Fink's refusal to make his run was based on a reasonable belief that it was not safe for him to make his run the evening of January 11, 2011, because he was concerned about the weather conditions. As discussed above, on this issue, I credit the witness with thirteen years of experience driving tractor trailers, and with a record untarnished by any accidents or other performance issues.

I find it disturbing that the "policy" at R&L apparently does not allow for the drivers, who have the most direct experience with the tractor trailers, or even their immediate supervisors, to make a determination that conditions are not safe enough to make a run. It appears that this decision is made at the corporate office, located in another state, where the policy appears to be that, if the roads are open, the runs must be made. But the fact that the roads may be open does not mean that it is safe to operate a 70 foot long double tractor trailer at night, in bad weather. Curiously, R&L bows to the discretion of its drivers once they climb behind the wheel, by allowing them to get off the road if they perceive it is not safe to drive. But as Mr. Fink credibly testified, this is not necessarily a good option, because it is difficult to find a "safe haven" for such a large vehicle in those circumstances. It is not difficult to imagine a driver in such circumstances taking the third option, and continuing to drive his vehicle despite his apprehensions about the weather conditions.

Conclusion

Based on the foregoing, I find that the preponderance of the evidence establishes that Mr. Fink's refusal to drive his assigned run on the evening of January 11, 2011 was protected activity under the Act, and that the Respondent's decision to fire him because of his protected activity was unlawful discrimination under the Act.

Damages

Mr. Fink requests relief to include reinstatement, back pay, compensatory damages, punitive damages, attorney fees and costs, and abatement of the Respondent's violations of the Act.

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

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

- (i) take affirmative action to abate the violation;
- (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
- (iii) pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

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

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

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

Reinstatement

Reinstatement provides an important protection for employees who report safety violations. "[T]he employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258-250 (1987). These protections also extend to employees who refuse to drive vehicles because of safety concerns. 49 C.F.R. § 392.7. Reinstatement is an appropriate, statutory remedy under the circumstances of this case. See *Clifton v. United Parcel Service*, Case No. 1994 STA-16 at 1-2 (ARB May 14, 1997)(no front pay where reinstatement is an appropriate remedy). In the absence of a valid reason for not returning to his former position, immediate reinstatement should be ordered. *Dutile v. Tighe Trucking, Inc.*, Case No. 1993-STA-31 (Sec'y Oct. 31, 1994).

Accordingly, Mr. Fink is entitled to immediate reinstatement to his former position with the same pay and terms and privileges of employment, or if his former job no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions and benefits. Respondent's back pay liability terminates upon the tendering of a *bona fide* offer of reinstatement even if Mr. Fink rejects it. *Id.*

Back Pay

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, Case No. 1995-STA-34 (ABR Aug 8, 1997). Back pay calculations must be reasonable and supported by the evidence; they need not be rendered with "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc.*, Case No. 1995-STA-43 at 11 (ARB May 30, 1997). Back pay is typically awarded from the date of a complainant's termination until reinstatement to his former employment. Any uncertainties in calculating back pay are resolved against the discriminating party. *Kovas v. Morin Transport, Inc.*, Case No. 1992-STA-41 (Sec'y Oct. 1, 1993). Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, the allocation of the burden of proof is reversed, i.e., it is the employer's burden to prove by a preponderance of the evidence that the back pay award should be reduced because the employee did not exercise reasonable diligence in finding other suitable employment. *Polwesky v. B & L Lines, Inc.*, Case No. 1990-STA-21 (Sec'y May 29, 1991); *See also Johnson v. Roadway Express, Inc.*, Case No. 1999-STA-5 at 16 (ARB Mar. 29, 2000)(it is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages). The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. *Johnson v. Roadway Express, Inc.*, Case No. 1999- STA-5 at 4 (ARB Dec. 30, 2002); *see also Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1527 (11th Cir. 1991). Where a complainant is awarded back pay under STAA, unemployment compensation benefits are not deductible from the amount due for back pay. *Smith v. Specialized Transp. Servs.*, Case No. 1991-STA-0022 (Sec'y Nov. 20, 1991).

Based on his earnings from Respondent in 2010 and 2011, Mr. Fink projected that he would have earned \$77,217.68 working from January 12, 2011 to date, or 86 weeks times an average weekly wage of \$897.88. Mr. Fink earned \$16,767.22 from August 15, 2011 through December 31, 2011 at Pleasant Construction, and \$12,030.94 from January 9, 2012 through May 26, 2012 at Maryland Metals. Based on Mr. Fink's average weekly wage at Maryland Metals, which is \$868.05, Mr. Fink projects wages of \$12,847.14 from May 26, 2012 to September 7, 2012. Using these figures, Mr. Fink has calculated his net wage loss through September 7, 2012 at \$30,242.24.

The Respondent does not contest the computation of lost wages by Mr. Fink. I find Mr. Fink's computation to be reasonable, and that he is entitled to back pay in the amount of \$30,242.24. Additionally, Mr. Fink is entitled to lost wages of \$29.83 a week (subtracting his average weekly wage at Maryland Metals from his average weekly wage at Respondent) from

September 8, 2012 until such time as he is reinstated to his employment with the Respondent, or refuses a *bona fide* offer of reinstatement from the Respondent.

Compensatory Damages

Mr. Fink also requests compensatory damages in the amount of \$100,000.00. Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990- ERA-30 (ARB Feb. 9, 2001). The complainant has the burden to prove that he has suffered from mental pain and suffering and that the discriminatory discharge was the cause. *Crow v. Noble Roman's Inc.*, 1995-CAA-8 (Sec'y Feb. 26, 1996), citing *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992). In this case, Mr. Fink argues that he is entitled to compensation in the amount of \$100,000.00 in non-economic damages for the substantial pain and suffering he endured when the Respondent fired him.

A determination on whether a complainant is entitled to non-economic compensatory damages is a subjective determination, which must take into consideration the facts and circumstances of each individual claim. *Pillow v. Bechtel Construction, Inc.*, 1987-ERA-35 (Sec'y July 19, 1993); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004). And although psychiatric or medical testimony makes it easier to prove damages, a complainant can still receive those damages without such testimony. *Smith v. Littenberg*, 1992-ERA-52 (Sec'y Sept. 6, 1995), citing *Blackburn Metric constructors, Inc.*, 1986-ERA-4 (Sec'y Aug. 16, 1993); *Assistant Sec'y of Labor for OSHA v. Guaranteed Overnight Delivery*, ABA Case No. 96-108, ALJ Case No. 1995-STA-37 (Sept. 5, 1996); *Jones v. EG&G Def. Materials, Inc.*, ARB Case No. 97-129, ALJ Case No., 1995-CAA-3 (ARB Sept. 29, 1998).

The Board has held that a complainant's credible testimony alone is sufficient to establish emotional distress. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, PDF at 7; ALJ No. 2009-STA-047 (ARB Aug. 21, 2011); *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-040 (ARB Nov. 30, 2007).

Nor is there a requirement that Mr. Fink sought any type of medical treatment for his emotional distress. In *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10), the First Circuit affirmed a compensatory damages award of \$50,000 for mental anguish as supported by substantial evidence where the complainant credibly testified that he struggled to support his wife and two infant children while he looked for a new full-time job following his termination by the respondent; he had been forced to sell both of the family's modest cars and deplete their meager savings to make ends meet. The complainant testified that this ordeal caused him pain and suffering; the Court stated that credible testimony in this regard is more than sufficient to support a compensatory damage award. *See, e.g., Blackburn v. Reich*, 982 F.2d 125 (4th Cir. 1992) (finding that a complainant's credible testimony establishing his loss of self-esteem alone, without any concomitant financial hardship, is sufficient to support a compensatory damage award); *see also, Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -

121, ALJ No. 2006-AIR-22 (ARB June 30, 2009) (affirming the ALJ's award of \$100,000.00 in compensatory, non-economic damages where, even though the complainant's testimony was not supported by medical evidence, it was unrefuted and corroborated by his wife, both of whom were found to credible witnesses by the ALJ).

Although the testimony of health professionals may strengthen the case for entitlement to compensatory damages, it is not required. *Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir. 1981), *cert. denied*, *Burkee v. Busche*, 454 U.S. 897 (1981); *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Sec. Final Dec. and Ord., Sept. 17, 1993, slip op. at 27-28. All that is required is that the complainant "show that he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992), *citing Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978). Nor is testimony from family members always necessary for entitlement to compensatory damages. In another case involving a complainant's loss of a job in his long standing profession, the Board ordered substantial compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts. *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 1993-ERA-24, Dep. Sec. Dec. and Rem. Ord. (February 14, 1996,) slip op. at 24-25; *see also Crow v. Noble Roman's, Inc.*, Case No. 1995-CAA-08, Sec. Final Dec. and Ord., slip op. at 4 (complainant's testimony sufficient to establish entitlement to compensatory damages).

In this case, Mr. Fink testified that it was embarrassing to have to tell his wife that he had lost his job. He was the major breadwinner, and he worried about providing for his family. Mr. Fink testified that he had never been fired before, and his termination made him disappointed, upset, mad, hurt, and embarrassed. He had to tell his wife that they needed support from the state, when Mr. Fink had worked for everything he had. Mr. Fink looked for work wherever he could, and took the first job he was offered in August 2011, with a construction company. But he left that job in January 2012, because he was not getting a lot of hours; it was also about an hour and 25 minutes from his home, and he could not afford the health insurance, which he had had with the Respondent.

As a result of the lack of income, Mr. Fink and his family lost their home, where they had lived since 2004, and were forced to move into a mobile home. Mr. Fink has had to explain to his young children why they had to move and leave their friends behind. Mr. Fink testified that he has been forced to borrow money from his parents and his wife's parents to support his family; he received unemployment compensation and food stamps.

Mr. Fink is now employed, with Maryland Metals, hauling scrap metal. But he has not been able to participate in hobbies that he used to do with his family, such as fishing, because he cannot afford it. He has restless nights, and trouble sleeping wondering how he will be able to support his family. Mr. Fink wants his job back because he was able to be home every day, and those jobs are hard to come by.

Courts have awarded damages between \$100,000 and \$250,000 for emotional distress in similar claims. *Hobby v. Georgia Power Co.*, ARB No. 1998-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001) (\$250,000 award for severe emotional distress upheld); *Anderson v. Metro*

Wastewater Reclamation District, ARB No.: 98-087, ALJ No.: 1997-SDW-7 (ALJ RDO Sept. 18, 2001); *Singal v. ICF Kaiser Engineers, Inc.*, 1997-SDW-3 (ALJ June 4, 2001). As the Board noted in *Hobby*, in Title VII cases, awards up to \$300,000 for non-economic damages are allowed and each case is determined based upon its facts even without medical testimony. *Id.* See also., *Van Der Meer v. Western Kentucky Univ.*, Case No.1995-ERA-38 (ARB Final Dec. and Ord., Apr. 20, 1998, slip op. at 8-9 (\$40,000 for embarrassment because of escorted removal from university job even where the complainant suffered little out-of-pocket loss); *Creekmore*, *supra*, slip op. at 25 (\$40,000 for emotional distress from layoff); *Doyle v. Hydro Nuclear Servs.*, Case No. 1989-ERA-22, ARB Final Dec. and Ord. September 6, 1996, slip op. at 10 (\$40,000 for emotional distress from discriminatory refusal to hire); *Gaballa v. The Atlantic Group*, Case No. 1994-ERA-9, Fin. Dec. and Ord., Jan. 18, 1996, slip op. at 7 (\$35,000 for emotional distress from blacklisting where complainant already had received some compensation through settlement of a related claim); and *Marcus v. Tennessee Valley Auth.*, Case No. 1992-TSC-5, Sec. Dec. and Ord., Feb. 7, 1994, slip op. at 10 (adopting ALJ's award of \$50,000 for emotional distress because of discharge).

I find that the Respondent's termination of Mr. Fink, which I have found was unlawful, had a significant emotional impact on Mr. Fink, in the effect it had on his dignity and self esteem, his ability to support his family, and the vulnerable economic position in which he was placed. I find that the evidence, including Mr. Fink's fully credible testimony, amply supports an award of compensatory damages, which I assess at the amount of \$100,000.00, an amount that I find to be to be fully supported by the evidence in this case, as well as consistent with awards in similar cases.

Punitive Damages

The STAA allows for an award of punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 31105(b)(3)(C). The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law" *Smith v. Wade*, 461 U.S. 30, 51 (1983). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979).

Mr. Fink asks for punitive damages in the amount of \$100,000.00. The Secretary has found that awards of exemplary damages "serve in punishment for wanton or reckless conduct to deter such conduct in the future." *Johnson v. Old Dominion Security*, Case Nos. 1986-CAA-3, 4, 5, Sec. Final Dec. and Order, May 29, 1991, slip op. at 29. According to the Restatement (Second) of Torts § 908 (1979), the relevant inquiry is whether the wrongdoer demonstrated reckless or callous indifference to the legally protected rights of others, and whether the wrongdoer engaged in conscious action in deliberate disregard of those rights. As the Secretary has explained, the requisite "state of mind" is comprised both of intent and the resolve actually to take action to effect harm. *Johnson*, slip op. at 29.

This incident did not involve a judgment about which reasonable minds could differ on the question of whether the weather conditions were sufficiently hazardous to cancel Mr. Fink's

run, as claimed by the Respondent. Mr. Stefaniak, the terminal manager, deferred to the determination by the safety department in Ohio, without any attempt to determine if there was any substance to Mr. Fink's concerns.¹⁵ The Respondent's claim, that Mr. Stefaniak "conferred with drivers that had actually run the route before making the decision to terminate Mr. Fink" is a blatant misrepresentation of the record. Respondent's Brief at 14.

Mr. Stefaniak bowed to the decision made by the safety department, and when Mr. Fink did not comply, he "resigned" him. As discussed above, I have found that Mr. Fink was fired; he did not resign. However, by characterizing Mr. Fink's termination as a "resignation," Mr. Stefaniak foreclosed any possibility that Mr. Fink might participate in the peer review process and retain his job.¹⁶ Moreover, it also delayed Mr. Fink's receipt of unemployment benefits.

Under these circumstances, I find that an award of punitive damages is necessary to deter further violations of the Act.¹⁷ I find that the Respondent's conduct reflects a degree of conscious disregard for how its practices obstruct Congress' mandate in the Surface Transportation Assistance Act, and that punitive damages are appropriate to correct and deter this conduct. I assess these damages at \$50,000.00.

Interest

Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Mr. Fink's termination on January 11, 2011, until the instant order of reinstatement. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made. *Moyer v. Yellow Freight Systems, Inc.*, [Moyer I], Case No. 1989-STA-7 at 9-10 (Sec'y Sept. 27, 1990), *rev'd on other grounds sub nom. Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992). The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a) (2010) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621. *Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. Double R Trucking, Inc.*, Case No. 1998-STA-34 at 3 (ARB Jan 12, 2000). The interest is to be compounded quarterly. *Id.*

Attorney's Fees and Costs

Lastly, Mr. Fink is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 31105(b)(3)(B); *Murray v. Air Ride, Inc.*, Case No. 1999-STA-34 (ARB Dec. 29, 2000). Counsel for Mr. Fink has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Mr. Fink is granted thirty (30) days from

¹⁵ Although Mr. Stefaniak suggested that the decision on whether the run would be made was a joint decision by himself and the safety department in Ohio, there is no indication that Mr. Stefaniak actually had any input in that decision, or that he did anything other than rely on the directive from the "person" at the safety department that the runs should be made, without any further investigation on his part. The totality of the testimony by Mr. Stefaniak and Mr. Smith indicates that this determination is made by the safety department in Ohio.

¹⁶ Mr. Fink testified that he was not aware of this process.

¹⁷ Although there was testimony that suggested the Respondent had previously fired an employee (Mr. Barron) for refusing to drive in hazardous conditions, the record does not include any evidence of the circumstances surrounding this incident, and thus I do not consider it to be evidence of a pattern of discrimination on the Respondent's part.

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

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. The Respondent shall offer Mr. Fink reinstatement to his former position with the same pay, and terms and privileges of employment that he would have received if he had continued working from January 11, 2011 through the date of the offer of reinstatement.
2. The Respondent shall pay Mr. Fink back pay in the amount of \$30,242.24, as well as \$29.83 a week from September 8, 2012 until such time as Mr. Fink either accepts or rejects a *bona fide* offer of reinstatement from the Respondent.
3. The Respondent shall expunge from Mr. Fink's employment records any adverse or derogatory reference to his protected activities of January 11, 2011, and his discriminatory termination of employment.
4. The Respondent shall pay to Mr. Fink the sum of \$100,000.00 in compensatory damages.
5. The Respondent shall pay to Mr. Fink the sum of \$50,000.00 in punitive damages.
6. Counsel for Mr. Fink shall have thirty days from the date of this Decision and Order to file a fully supported application for fees, costs, and expenses.
7. The Respondent shall have twenty days from receipt of the application to file any objections.

SO ORDERED.



Digitally signed by Linda Chapman
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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).

SERVICE SHEET

Case Name: FINK_ROBERT_v_R_and_L_TRANSFER_INC_

Case Number: 2012STA00006

Document Title: **DECISION AND ORDER**

I hereby certify that a copy of the above-referenced document was sent to the following this 20th day of November, 2012:



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