

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 07 January 2008**

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Case No.: 2007 STA 34

In the Matter of

JOHN F. BESS  
Complainant

v.

J.B. HUNT TRANSPORT, INC.  
Respondent

Appearances: Mr. David M. Hammer, Attorney  
Mr. Robert J. Schiavoni, Attorney  
For the Complainant

Mr. Gary F. Seitz, Attorney  
For the Respondent

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This action arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (“STAA” or “Act”) of 1982, as amended and re-codified, Title 49 United States Code Section 31105, and the corresponding agency regulations, Title 29, Code of Federal Regulations (“C.F.R.”) Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules or cause serious injury.

**Procedural Background**

On February 28, 2007, through counsel, Mr. Bess filed a complaint of alleged illegal discrimination by the Respondent, J.B. Hunt Transport, Inc. (“J.B. Hunt”) based on the December 11, 2006 termination of his employment. On May 3, 2007, after an investigation of Mr. Bess’ complaint by the Occupational Safety and Health Administration (“OSHA”), United States Department of Labor (“DOL”), the Regional Administrator dismissed the complaint. On June 7, 2007, through counsel, Mr. Bess filed his exceptions to the adverse determination and requested a hearing with the Office of Administrative Law Judges. Pursuant to a Notice of Hearing, dated June 19, 2007, I set a hearing date of July 10, 2007 for this case in Martinsburg,

WV (ALJ I).<sup>1</sup> After a one continuance (ALJ II), I conducted a hearing on August 20, 2007. Mr. Bess, his attorneys, Mr. Hammer and Mr. Schiavoni, and Respondent's counsel, Mr. Seitz, and Mr. Peter O'Neil were present at the hearing. My recommended decision and order in this case is based on the testimony presented at the hearing and the following documents admitted into evidence: CX 1 to CX 4, RX 1 to RX 5, RX 7, RX 8, RX 10 to RX 13, RX 15, and RX 16.

### **Complainant's Statement of the Case**<sup>2</sup>

During his four weeks of training with J.B. Hunt, Mr. Bess was instructed on the importance of conducting a pre-trip inspection and the significance of a popped hub vent indicator. On one occasion, his instructor pulled a trailer out of service when he observed a popped indicator. Upon completion of his training and through the time of his discharge, Mr. Bess was a successful driver. Based on his mileage and rate of pay, Mr. Bess was earning about \$40,000 a year.

On December 11, 2006, during his requisite pre-trip inspection, Mr. Bess discovered a popped wheel hub vent indicator on the trailer he was assigned to deliver. The popper is an early warning device for potential overheating problems with the wheel hub. Overheating can cause the wheel to fuse to the hub and then break off. Mr. Bess informed Mr. O'Neil about the problem. In response to Mr. Bess' discovery, the company dispatched Mr. Johnson, who is not a certified mechanic. Mr. Johnson inspected the vent indicator, rotated the wheel, reset the popper, and told Mr. Bess that the truck was fine to drive. However, Mr. Johnson advised Mr. Bess to check the wheel hub at 25 mile intervals.

After driving about 20 miles to a fuel station, Mr. Bess inspected the hub and noted the vent indicator was popped again. Mr. Bess called the dispatcher and indicated that he was returning to J.B. Hunt. The dispatcher did not object. Mr. Bess returned with the trailer, expecting to be re-assigned to a different load. Mr. Bess had never refused a load. When Mr. O'Neil was advised of the situation, he had other drivers look at the trailer hub vent, although he didn't believe that the vent indicator was popped. After the drivers indicated the trailer was safe to drive, Mr. O'Neil asked Mr. Bess to take the trailer, stating there was nothing wrong with it. Due to his safety concerns, Mr. Bess refused. In response, Mr. O'Neil fired him. Later, another driver took the trailer for delivery. The driver noted the popper was up and checked the wheel hub several times during his trip.

Since Mr. Bess' refusal to drive the trailer with a popped vent hub indicator was based on a reasonable safety concern, he engaged in a protected activity. As a result, Mr. O'Neil wrongfully terminated Mr. Bess' employment based on a protected activity.

Mr. Bess seeks numerous remedies. First, Mr. Bess should be reinstated as a J.B. Hunt driver, without any adverse consequences to his employment record, benefits and entitlements. Second, Mr. Bess is entitled to back pay since December 11, 2006 through his date of

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<sup>1</sup>The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

<sup>2</sup>Opening statement, TR, p. 24-31, 62-63, and closing brief, October 9, 2007.

reinstatement based on an annual salary of \$40,000, or about \$800 a week. The value of his monthly benefits was between an additional 6% to about \$400 a month. Third, Mr. Bess seeks prejudgment interest from December 11, 2006. Fourth, Mr. Bess' \$350 in medical expenses due to a stress-related collapse should be reimbursed. Fifth, Mr. Bess is entitled to \$50,000 for pain, suffering, mental anguish, embarrassment, humiliation, and marital discord attributable to Mr. O'Neil's outrageous conduct in terminating Mr. Bess' employment due to his refusal to drive after presenting a truthful report of a safety deficiency in compliance with J.B. Hunt's policies. Sixth, Mr. Bess seeks attorney fees and reimbursement of litigation expenses.

### **Respondent's Statement of the Case**<sup>3</sup>

The Respondent, J.B. Hunt, provides dedicated trucking services to regional Home Depot stores. In June 2006, J.B. Hunt hired Mr. Bess as one of its drivers. Despite an unusually long training period, Mr. Bess persisted in having trouble following directions. He required handwritten instructions and demonstrated a resistance to trips which required deliveries to two different stores. On occasion, due to directional problems, Mr. Bess returned loads undelivered.

On December 11, 2006, during his pre-trip inspection of a trailer he was assigned to pull as part of two-stop trip, Mr. Bess noted a hub temperature warning popper was extended. After he reported the problem to Mr. O'Neil, the Respondent obtained a mechanic, Mr. Johnson, to inspect the trailer hub. Upon inspection, Mr. Johnson observed no signs of excessive heat. The wheel rotated normally and the hub was properly packed with grease. Although Mr. Johnson reset the popper and advised Mr. Bess that the trailer was fine, Mr. Bess seemed reluctant to take it. Subsequently, after driving the trailer 20 miles to a fuel stop, Mr. Bess again observed the raised popper, called the dispatcher, and refused to take the load. After Mr. Bess returned the trailer to J.B. Hunt, two experienced drivers and the dispatcher inspected the trailer and told Mr. Bess there was nothing wrong. Since Mr. Bess still refused to take the trailer, the dispatcher called Mr. O'Neil, who then talked to Mr. Bess. Mr. O'Neil informed Mr. Bess about the company policy concerning refusal to accept a safe and legal load and tried to convince Mr. Bess to drive the trailer. However, Mr. Bess continued to refuse the driving assignment and became insubordinate. As a result, due to Mr. Bess' refusal to drive in violation of company policy and his insubordination, his employment with J.B. Hunt was terminated.

To prevail with his complaint, Mr. Bess must prove that: a) he refused to take the trailer because he believed it was unsafe, b) his safety apprehension was objectively reasonable, c) he sought correction by J.B. Hunt, and d) J.B. Hunt failed to make a correction. The termination of Mr. Bess' employment was not a violation of the STAA because Mr. Bess did not engage in a protected activity. Under the "reasonable apprehension" clause for STAA-protected refusal to drive, 49 USC §31105(a)(1)(B)(ii), the driver's apprehension must be objectively reasonable. Since Mr. Johnson, two experienced drivers and the dispatcher, after inspecting the trailer, informed Mr. Bess no problem existed, his refusal to take the trailer on the basis that it was unsafe due to the raised hub popper was not objectively reasonable. Consequently, because Mr. Bess' refusal to drive was not reasonable and protected by the STAA, his termination for

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<sup>3</sup>Opening statement, TR, p. 168 and 169, and closing brief, dated October 9, 2007.

violation of company policies by refusing to accept a safe and legal load and insubordination was proper.

Concerning his claimed damages, Mr. Bess failed to mitigate his damages because he engaged in narrow job search and did not utilize state employment services. Mr. Bess has also failed to present any evidence to support his claim for special damages.

#### **ISSUE<sup>4</sup>**

Whether Mr. Bess engaged in a STAA protected activity which caused J.B. Hunt to terminate his employment.

#### **SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE**

##### **Sworn Testimony**

*Mr. Peter O'Neil*  
(TR, p. 33 to 58, and 208 to 252)

[Complainant direct examination] Between June and through December 2006, Mr. O'Neil was working as the account manager at the J.B. Hunt trucking facility in Winchester, Virginia. Although he holds a commercial driver's license, Mr. O'Neil's expertise is in management and supervision.

As a J.B Hunt driver, in addition to insurance benefits, Mr. Bess received 42 cents a mile and \$4 per quarter hour during loading and unloading. On average, drivers earned about \$40,000 a year.

On December 11, 2006, when Mr. Bess first reported the popped hub vent indicator, Mr. O'Neil congratulated him for doing his job on pre-inspection.

When Mr. O'Neil referred to Mr. Johnson as a "certified" mechanic, he assumed that Mr. Johnson was certified because J.B. Hunt used him as a mechanic. Apparently, Mr. Johnson is not certified.

Early evening on December 11, 2006, while at home, Mr. O'Neil received a phone call from Mr. Sam Martey, the dispatcher. According to Mr. Martey, he received a phone call from Mr. Bess who indicated that he noted at a fuel stop that the hub vent indicator was popped. Mr. Bess stated he was returning to the J.B. Hunt yard and hung up. Mr. O'Neil told Mr. Martey to have other drivers look at the trailer when Mr. Bess returned to see if anything, including the hub vent popper, was wrong. Subsequently, over a speakerphone, Mr. O'Neil asked Mr. Bess why he drove the trailer back to the yard with the popped hub vent rather than call dispatch for road service. He noted that other drivers found nothing wrong with the trailer. Mr. O'Neil believed

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<sup>4</sup>As subsequently discussed in detail, since this case was fully litigated on the merits, my attention is focused on whether the Complainant has met his ultimate burden of proof by a preponderance of the evidence.

that Mr. Bess must not have really considered the trailer a safety threat since he drove it back to the yard.

After Mr. Johnson inspected the trailer, Mr. O'Neil did not review his report and he is unaware of what Mr. Johnson may have told Mr. Bess.

At the time he terminated Mr. Bess' employment, Mr. O'Neil had no evidence that Mr. Bess had tampered with the hub vent indicator.

As part of their training program, J.B. Hunt conducts monthly safety briefings. According to J.B. Hunt policy, it's the driver's decision whether it is safe to drive. Each driver is responsible for his driving safety.

[Respondent direct examination] The mission of the Winchester facility is to provide service to local Home Depot accounts. The terminal has 24 drivers and two dispatchers.

On December 11, 2006, Mr. Bess' assignment was a two-stop load to Sykesville and Warrenton. Mr. Bess reported the popped hub vent while he was still in the yard and Mr. O'Neil contacted road service. About 30 minutes later, Mr. Bess called again and Mr. O'Neil told him his report was a good thing. According to company procedure, when a mechanic finds a serious problem, Mr. O'Neil will receive a phone call about it because the equipment is being put out of service and can't be dispatched. On December 11, 2006, Mr. O'Neil heard nothing from the mechanic. As a result, Mr. O'Neil assumed Mr. Bess' trailer was okay.

Later, while at home, Mr. O'Neil received a phone call from Mr. Martey. According to Mr. Martey, Mr. Bess had called and said the popper was back out and he was bringing the trailer back to the yard. Mr. O'Neil told Mr. Martey to have other drivers look at the trailer and see if the hub vent seal had come back out. Mr. Martey also noted that one operations supervisor usually wrote down very involved directions for Mr. Bess to help him. Mr. O'Neil also recalled that Mr. Bess did not like two-stop loads.

After Mr. Bess returned to the yard and other drivers looked at the trailer, Mr. O'Neil talked to Mr. Bess over a speaker phone. He tried to determine whether there was a serious problem or Mr. Bess was "trying to get out of running a load." Mr. O'Neil did not get much more out of his conversation with Mr. Bess beyond that he was trying to get out of running the load. Since Mr. Bess drove the trailer back from the fuel stop, Mr. O'Neil concluded that Mr. Bess did not have "a serious concern for the well being of the trailer, himself, or anybody else." Mr. Bess was just trying to use the popper as a "crutch." Mr. O'Neil encouraged Mr. Bess to take the load and stop to check the wheel as many times as he wished. He told Mr. Bess the trailer was safe and did not have a serious problem according to the mechanic who inspected it. Mr. O'Neil stressed that J.B. Hunt was providing dedicated trucking service and needed to get the loads delivered on time. When Mr. Bess continued to refuse to take the load, Mr. O'Neil reminded him that the company had a forced dispatch policy for safe and legal loads. Drivers couldn't pick the loads and runs. Mr. Bess again refused to take this particular trailer. Mr. O'Neil expressed his belief that Mr. Bess was trying to pick his loads and wanted to get out of

this trip. He again told Mr. Bess about the importance of getting the trailer's freight to the store. Eventually, another driver delivered the trailer's freight safely.

Based on feedback, Mr. O'Neil believed Mr. Bess had a habit of trying to get out of loads. He also counseled Mr. Bess about time-off management.

Mr. O'Neil believes the company's benefit packages and 401k program do not become effective until a driver has been with the company for more than one year.

RX 13 is the trailer inspection record. J.B. Hunt has stricter inspection standards on its trailers than required by law. The trailer Mr. Bess was pulling on December 11, 2006 was last inspected on October 15, 2006. The inspection included examination of the wheel bearings and hub gaskets. The bearings were repacked at that time.

[Cross examination] When Mr. Fialkowski indicated that he was not going to sign off on Mr. Bess' training, Mr. O'Neil had Mr. Black continue the training to determine whether there was a personality conflict issue. Mr. Black had a more "laid back" character. Since completing his training, Mr. Bess had been a satisfactory driver. He did not have any restrictions but was not able to drive to all facilities. They usually dispatched him out and back rather than give him multiple loads because Mr. Bess would get confused and easily lost. Their goal was to eventually get him out to all the stores. Mr. Bess had previously driven to the two stores that he assigned to on December 11, 2006.

If Mr. Bess doesn't drive, he does not get paid.

On December 11, 2006, Mr. O'Neil did not talk to Mr. Johnson or read his report. Although he didn't know what Mr. Johnson said, Mr. O'Neil was aware that after Mr. Johnson's inspection, the trailer was released for its scheduled trip.

Mr. O'Neil acknowledged: a) Mr. Bess reported the hub vent indicator had popped again, b) Mr. Bess was concerned about the popped indicator, c) Mr. O'Neil congratulated earlier in the evening for reporting the first report about the popped indicator, and d) Mr. Bess received training the week earlier that it was his duty to determine whether a vehicle was safe or not.

Mr. Martey told Mr. O'Neil that Mr. Juan Valenzuela had looked at the trailer when it returned to the yard. Mr. O'Neil not aware of what Mr. Valenzuela told Mr. Martey about the trailer.

Mr. O'Neil didn't think a mechanic was necessary for the second popper incident because a mechanic had already examined the wheel and found no problem. He assumed it was the same popper. The hub vent popper is an indicator of potential failure. If the hub fails, it is a serious safety concern for the driver and other motorists.

Mr. O'Neil doesn't know how many miles the trailer traveled since its October 15, 2006 inspection.

Mr. Bess successfully completed an interactive computer training program on safety.

On Mr. Bess' termination paperwork, Mr. O'Neil indicated that he was eligible for re-hire. While Mr. O'Neil wouldn't rehire him, Mr. Bess could work for another account. Mr. O'Neil never observed Mr. Bess with a bad attitude.

[ALJ examination] Mr. O'Neil did not believe that the indicator had popped out again. Instead, he believed Mr. Bess was trying to avoid taking the load. Mr. O'Neil acknowledged he could have been mistaken.

Because a driver is a difficult "commodity" to keep, Mr. O'Neil was trying to give Mr. Bess a "fair shake." However, on December 11, 2006, because Mr. O'Neil believed Mr. Bess was trying to "do anything and everything" to get out of taking the assigned load, he concluded Mr. Bess was determined "not to do the job that I was asking him to do." Mr. Bess did not believe the popper had come out again because a mechanic had released the trailer earlier in the evening and Mr. Bess drove the trailer back to the yard. If Mr. O'Neil had believed Mr. Bess had an actual safety concern, that belief would have altered his termination decision.

Mr. Carlos J. Black  
(TR, p. 64-77)

[Direct examination] Between May and December 2006, Mr. Black was a truck driver for J.B. Hunt at the Winchester facility. When he started, Mr. Black was trained by Mr. Fialkowski for two weeks. As part of the training, he was instructed on hub vent poppers. He was told that a popper hub vent indicator meant the wheel hub was overheating and the trailer should not be pulled. In that situation, Mr. Black should call safety and have the hub inspected.

In the early evening of December 11, 2006, Mr. Black was closing out his run for the day and ready to go off duty. As he entered the dispatcher office, he observed Mr. Martey sitting at a desk with Mr. Bess off to the right. Debbie was also present. Recognizing Mr. O'Neil's voice, Mr. Black overheard a conversation between Mr. O'Neil and Mr. Bess over a speakerphone. Mr. Bess indicated that the trailer was unsafe and he didn't want to take it. Mr. O'Neil asked if he was refusing the load. Mr. Bess replied that based on his observations, the trailer was unsafe and he was not going to take it. He offered to take another load. Mr. O'Neil then told Mr. Bess to clean out his truck and leave the premises.

[Cross examination] J.B. Hunt has a road service program.

The conversation between Mr. O'Neil and Mr. Bess became heated when Mr. Bess was repeatedly asked if he was refusing the load and then told to get his stuff and go. Mr. Bess responded with obscenities. At that point, as an exchange developed between Mr. Martey and Mr. Bess, Mr. Black intervened and asked Mr. Bess to go out of the office with him. He walked Mr. Bess to his truck, watched him remove his stuff and then leave the yard. Mr. Bess told Mr. Black that he did not believe the situation had been handled correctly.

*Mr. John F. Bess*  
(TR, p. 78-158)

[Direct examination] Mr. Bess attended a technical institute for 12 weeks to obtain his commercial driver's license. He then drove a truck for about five months with a small company.

Mr. Bess started working for J.B. Hunt as a truck driver on June 5, 2006. CX 3 is his application. As a J.B. Hunt driver, Mr. Bess earned 42 cents a mile and \$16 an hour during loading and unloading. He received health insurance and participated in a 401K program with the employer adding 6% of his monthly pay.

After being hired by J.B. Hunt, Mr. Bess was trained for about two weeks by Mr. Eddie Fialkowski and Mr. Carlos Black. During that training, Mr. Bess was advised not to take a trailer with a popped out hub indicator. On one occasion, in July 2006, during a pre-trip inspection, Mr. Bess found a popped indicator and showed it to Mr. Fialkowski. In response, Mr. Fialkowski rejected the trailer. Mr. Fialkowski noted that a popped indicator meant the hub had overheated and it was dangerous to pull the trailer because the wheel might lock, possibly causing loss of control of the tractor and trailer.

In December 2006, Mr. Bess' wife was six months pregnant. Through December 2006, Mr. Bess had zero accidents as a J.B. Hunt driver.

At 3:00 p.m. on December 11, 2006, Mr. Bess arrived at the J.B. Hunt Winchester Home Depot terminal. On that day, Mr. Bess was assigned a "co-load", which is two loads on one trailer. The assigned deliveries were Sykesville and Sterling, Virginia. His scheduled departure time was 5:00 p.m. Mr. Bess estimated that he would complete the route around 1:00 a.m. the next day. He had driven that route once before.

After receiving the paperwork for his deliveries from Mr. O'Neil, Mr. Bess conducted a pre-trip inspection on his tractor as required by company policy and drove to the trailer parking spot and hooked it up to the tractor. Upon inspecting the trailer, Mr. Bess observed the pop out valve was out on the right side front wheel. The vent popper is located on the wheel hub cap and looks like a small flat red cap when it's not popped. When popped, it looks like a turkey popper, with a thin stem extending about a quarter of an inch. Mr. Bess called Mr. O'Neil, who thanked him and indicated that he'd call road service.

About 5:30 p.m., Mr. Virgil Johnson from road service arrived at the trailer. Mr. Johnson removed the hubcap, which is a plastic dust cover, knelt down, looked inside the wheel hub, and said it looked fine. The wheel assembly has two tires. According to Mr. Johnson, upon removal of the dust cap, he could see the outer wheel bearings. Mr. Johnson replaced the hub dust cover and reset the vent popper by pushing it in. Mr. Bess asked him if the trailer was safe. Mr. Johnson replied that it should be safe but he could be wrong. Mr. Johnson told Mr. Bess to check the wheel every 25 to 50 to 100 miles to see it was popped out which would indicate bearing overheating. In the "heat of the moment," Mr. Bess signed Mr. Johnson's paperwork indicating that Mr. Johnson jacked the wheel and spun it, even though he didn't.



Around 6:00 p.m., Mr. Bess left the J.B. Hunt terminal and drove about 18 miles to the Flying J fuel station to fuel his tractor. He had to wait 20 minutes. At that time, Mr. Bess observed the hub vent indicator had popped again. Mr. Bess called Mr. Martey, the terminal dispatcher, who asked him to hold for a couple of minutes. When Mr. Martey returned, he asked if Mr. Bess could take the load. Mr. Bess indicated that he didn't feel the trailer was safe. In response, Mr. Martey told Mr. Bess to bring the trailer back and they would swap loads with Juan. Mr. Bess agreed to return because the dispatcher instructed him to do so. He believed the return trip of 18 miles would not be dangerous and he drove at a reduced speed.

Upon arriving, Mr. Bess parked the tractor/trailer and went into the dispatcher office and asked Mr. Martey if Juan was still going to swap loads. Mr. Martey told Mr. Bess to go see Juan outside. Juan had just returned from a trip and indicated that Mr. Martey discussed swapping loads. When Juan asked what was wrong with the trailer, Mr. Bess told him about the popped indicator. Mr. Juan walked over to the trailer, looked at the rim and said that he didn't see anything wrong. When Mr. Bess pointed out the raised popper, Juan told him that was not a problem. Mr. Bess responded that Mr. Fialkowski trained him to believe a popped indicator was a problem. Juan indicated the trailer was fine and Mr. Bess should take it. Juan then refused to take the trailer; he did not give a reason.

Mr. Martey and another driver, Mr. Furman Patricio, come out and looked at the trailer. Mr. Patricio told Mr. Bess there was nothing wrong with the trailer. Again, Mr. Bess explained what Mr. Fialkowski trained him about the popper. Mr. Martey then asked if Mr. Bess was refusing the load. Mr. Bess stated he was refusing that trailer but was willing to take other loads. Mr. Martey got angry and asked if Mr. Bess knew what happened when he refused a load. When Mr. Bess said he didn't, Mr. Martey stated that he would likely be fired. Mr. Bess replied that they couldn't fire him for this situation because he believed something was wrong with the trailer since the popper came out again. As far as he was concerned, as the driver, Mr. Bess was the person to decide whether the trailer was safe.

CX 4 is a monthly driver safety briefing, dated December 4, 2006, which re-emphasizes the company policy that the decision on whether it is safe to drive rests with the driver to ensure his safety and the safety of motorists around him. If necessary, a driver should park and wait for improved conditions. Based on that stated company philosophy, Mr. Bess believed it was his decision whether to take the trailer. In light of Mr. Fialkowski's training, Mr. Bess believed the popped indicator meant the bearing was overheating. Additionally, Mr. Johnson advised him to periodically check the wheel rim for the popper. Consequently, based on his training, conversation with Mr. Johnson, and his observation of the popped indicator, Mr. Bess concluded the trailer was not safe to pull.

After Mr. Bess refused to take the trailer, Mr. Martey became angry and said he was going call Mr. O'Neil from the dispatcher office and let him decide. Inside the dispatcher office, Mr. Bess talked to Mr. O'Neil on a speakerphone. When Mr. O'Neil asked what was wrong, Mr. Bess told him about the recurring popped hub indicator and indicated he believed the trailer was unsafe. Mr. O'Neil noted that a certified mechanic said it was okay. Mr. Bess responded that the indicator was out again and the trailer was unsafe. He also expressed a willingness to take a different load. Mr. O'Neil asked him three times if he was refusing the load. Mr. Bess replied

that he was refusing that particular load but was not refusing any other load. Mr. O'Neil then said that he was fired. Using an obscenity, Mr. O'Neil ordered him to clear out the truck and get off his property. Mr. Bess told Mr. O'Neil that what he was doing was illegal and he would see him in court. Mr. Martey was sitting in the desk chair and started laughing. Then, Mr. Black escorted Mr. Bess out of the dispatcher office. Mr. Bess retrieved his personal belongings from the truck and left.

Mr. Bess was upset and stressed because his wife was six months pregnant and he knew how difficult it was to get a job. About a week later, Mr. Bess started looking for work on the internet with other trucking companies. However, he hasn't be able to find work. He has applied to 65 companies for all types of work. His situation has caused depression, stress and martial discord. One day, Mr. Bess broke down due to stress and had to be rushed to the hospital.

[ALJ examination] The first time the popper came out, it was about a quarter inch. The second time the indicator stem was raised the same amount, about a quarter of an inch. At the fuel stop, Mr. Bess felt the hub and it was warm. However, he didn't smell anything and didn't feel the other hub caps for comparison.

When the other two experienced drivers and Mr. Martey told him the trailer wheel was fine, Mr. Bess disagreed with them because they weren't certified mechanics.

Mr. Bess has a high school diploma and 3 months at the truck driving institute. His total truck driving experience is about 13 months. Prior to truck driving, Mr. Bess worked in factory operating forklifts and uploading trucks.

[Cross examination] RX 11 is Mr. Bess' job application for J.B. Hunt and RX 10 is the company's drivers manual. In response to the application question about prior traffic convictions, Mr. Bess answered, "none," which wasn't true. In 2004, Mr. Bess received a speeding conviction. He was truthful about leaving his former employer for a better job because they were running him over his hours.

Although Mr. Bess certified that he would abide by the company's policies, he did not read the company's handbook. Similarly, he certified reading the Home Depot dedicated driver manual, RX 12, when he didn't actually read it. Although the manual contains specific instructions in the event of a mechanical breakdown, Mr. Bess returned to the J.B Hunt terminal because he believed the "trailer would be safe for that short amount of distance." Consequently, he did not call road service.

Mr. Bess was unaware of J.B. Hunt's policy that refusal to take a lawful, safe load may be grounds for termination. He believed he would be in trouble but didn't know about the termination policy.

RX 8 is an email Mr. Bess sent to J.B. Hunt on December 12, 2006. He claimed the Winchester facility was operating illegally because he was discharged for refusing an unsafe load.

When Mr. Bess returned to the J.B Hunt terminal on December 11, 2006, he wanted Mr. Martey to assign the trailer to another driver.

When Mr. Bess conducted his pre-trip inspection of the trailer on December 11, 2006, he observed the sticker indicating the trailer had been inspected in October 2006.

Mr. Bess had one accident in the J.B. Hunt yard. Due to fatigue after a long trip, Mr. Bess forgot to unhook the airlines. As a result, when he pulled away from the trailer, the lines snapped, which is a safety concern.

Mr. Bess is unaware of whether anything else besides heat can cause the hub vent indicator to pop out. He does not know if it can be pulled out with a penknife.

When Mr. Bess returned to the yard on December 11, 2006, he did not again touch the hub cap. He does not recall the other drivers touching the hub cap. He did not have a mechanic look at the wheel. He did not see any smoke or fire.

Other than four specific companies, Mr. Bess doesn't recall the names of the other companies to which he applied for work.

[Direct examination] When he asked for the trailer to be reassigned, he would have preferred to have the trailer taken out of service, but he wasn't going to argue with his boss.

Mr. Bess printed out a list of all the jobs for which he applied. Upon review of the document, ALJ III for identification, Mr. Bess recalls the names of several other companies to which he applied for work. The list contains about 60 applications. Mr. Bess did not seek work through the state employment services because in his experience they offer work at minimum wage. He was not interested in working \$8 an hour.

[Cross examination] The decision to take a trailer out of service rests with Mr. O'Neil.

Eventually, desperate for work, Mr. Bess looked for a minimum wage job. For the last four weeks, Mr. Bess hasn't sought employment.

*Mr. Johnny G. Bess*  
(TR, p. 158-161)

[Direct examination] Mr. Johnny Bess is the Complainant's father. His son, daughter-in-law, and two grandchildren live in his house.

The Complainant was very excited when J.B. Hunt hired him. When he was fired, the Complainant was bewildered and mad. When he couldn't find re-employment, the Complainant became distraught. He was short-tempered and argued with his wife. To keep them going, Mr. J. Bess paid his son's bills by drawing money out of his 401K plan.

*Mrs. Jenyl N. R. Bess*  
(TR, p. 161-167)

[Direct examination] Mrs. Bess married Mr. Bess about four years ago. They have a five and a half month old daughter. Their daughter was born in March 2007.

Mr. Bess' employment discharge cut their income in half and caused Mr. Bess to be stressed and worried. Eventually, he collapsed and was taken to the emergency room. The doctor believed the problem was stress-related. The ambulance cost \$350 and the emergency room was \$75.

Mr. Bess has looked for work. He also supports his first child. Two children with one income is not enough. He was upset because no one called him for a job.

[Cross examination] Part of Mr. Bess' stress is his inability to find re-employment.

*Mr. Edmond M. Fialkowski*  
(TR, p. 179-207)

[Direct examination] Mr. Fialkowski has been a driver and trainer for J.B. Hunt for three and a half years. He has held a commercial driver's license for about 29 years. Prior to coming to J.B. Hunt, Mr. Fialkowski trained drivers for about 4 years.

Mr. Fialkowski trained Mr. Bess for three weeks, which is unusual because typically training lasts only three days. Mr. Bess experienced difficulty backing up, completing paperwork and reading maps. He required specific directions to various stores. Mr. Fialkowski was reassigned before he completed Mr. Bess' training. Mr. Bess was reassigned to another trainer to see if someone else could train him.

As a professional truck driver, Mr. Fialkowski is familiar with hub vent poppers. When the brakes heat up or the wheel runs out of grease, the wheel assembly will heat up causing the hub vent to pop out. In addition to heat, a hub vent popper can be pulled out by hand or it can be defective.

A pre-trip inspection involves a visual examination of the wheel hub vent poppers. When a driver finds a popped indicator, he must call his supervisor so that it can be repaired immediately. Usually, a mechanic will take care of it so the load can be delivered.

Mr. Fialkowski is aware of the circumstance of Mr. Bess' employment discharge from Mr. O'Neil and Respondent's counsel.

The distance between the J.B. Hunt terminal and the fuel station used by Mr. Bess on December 11, 2006 is about 17 miles. In his opinion, if a mechanic looks at the popped indicator and says it's fine, then it's unreasonable to refuse to drive the trailer.

The main safety concern with the popper is the failure of the wheel bearings. To determine whether you have an actual problem, you should drive 5 to 10 miles, look for smoke, and then check all the hubs. Any hub lacking grease will be extremely hot. You can also look to see if any grease is coming out of the wheel seals. And, discoloration of the hub paint may also be a sign.

[ALJ examination] The purpose of the hub vent popper is to warn that the axle is overheating. If a mechanic has looked at the popper and indicated it's ok, and then the popper comes out again, a driver should feel the hub to see if it's hot. If it's hot, then the driver knows he has a problem.

[Cross examination] As a trainer and driver, safety is a number one priority for Mr. Fialkowski. He instructs his drivers that safety is the number one priority and that they should err on the side of safety. After a mechanic looks at a problem, if it reoccurs, then it's the driver's decision whether it's safe or not.

If a hub vent pops out, it's a serious issue. Each wheel has a set of outer and inner bearings. If you remove the hub cap, you can't see the inner bearings; however, the inner set will usually be in the same condition as the outer bearings. A popped hub vent indicates there may be a problem developing.

At night, if there's no light from a street light or other vehicles, a smoking wheel bearing may be difficult to see.

If the wheel bearing continues to fail than it may physically weld itself to the axle and the wheel may eventually spin off the axle, which would pose an imminent risk to other motorists and be a serious problem with a fully loaded trailer.

Mr. Fialkowski did not experience a popped hub vent when he was training Mr. Bess. However, upon review of his driver record for July 4, 2006, CX 5 for identification, Mr. Fialkowski acknowledged that on that day, with Mr. Bess as his co-driver, Mr. Fialkowski reported "right side axle pop up vent out" and took the trailer out of service. He took the trailer out of service because the popped indicator was a safety hazard that needed to be addressed.

Mr. Fialkowski does not know what Mr. Johnson told Mr. Bess when he examined the popped indicator on December 11, 2006.

Now knowing that Mr. Johnson advised Mr. Bess to watch the indicator, Mr. Bess did the right thing in calling the dispatcher when it popped out again. However, he should have stayed in place and not moved the trailer.

[ALJ examination] When popped, the indicator extends about half an inch and is readily apparent upon visual examination if you look directly at it. If the wheel is turned so the indicator is under the hub, then a person has to get down to look at it.

If Mr. Bess had not successfully completed his driver training, he would not have continued as a J.B. Hunt driver.

*Mr. Kevin Adkins*  
(TR, p. 253-272)

[Direct examination] Mr. Adkins has been a professional truck driver since 1994 and works as an independent contractor for J.B. Hunt. On December 11, 2006, Mr. Martey called him in. By the time he arrived, Mr. Bess was in the dispatcher office. Mr. Fialkowski may have been there too.

Mr. Adkins then conducted a pre-trip inspection of the trailer. He didn't find anything wrong. Mr. Adkins observed one hub temperature indicator was popped out a quarter of an inch. However, "that doesn't really indicate anything wrong with the trailer." After his inspection, Mr. Adkins told Mr. Martey that he'd take the trailer and make the delivery. Mr. Martey agreed but told Mr. Adkins to pay particular attention to the indicator. When Mr. Adkins returned to the trailer did not see any grease or lubricant coming out of the hub seal. There was no obvious damage outside and the wheel wasn't warm to the touch. "There was just nothing obviously wrong with the hub of the trailer." During the two deliveries, Mr. Adkins did not experience any problems with the trailer. The popper did not come out again.

[Cross examination] When Mr. Martey told Mr. Adkins to inspect the truck, he did not mention any specific problem. At that time, Mr. Adkins noted one hub vent indicator was popped out about a quarter of an inch. He pushed it in and pulled it out a couple times to see if it was operating okay. The popper was functioning properly. Mr. Adkins does not know how long the trailer had been parked before his inspection. During his trip, Mr. Adkins periodically checked the hubs since the indicator is only a warning of potential danger, rather an indicator that something has failed. If the wheel bearings fail and a driver continues to pull the trailer, the wheels can be ripped off.

The only way to examine the inner bearings of the two wheel assembly is to remove the wheel.

[ALJ examination] After his inspection, Mr. Adkins returned to the dispatcher office and said he didn't see anything wrong with the trailer. Mr. Martey responded that another driver didn't find anything wrong either. Mr. Martey then assigned the load to Mr. Adkins.

When Mr. Adkins inspected the trailer the first time, he saw the raised popper. He didn't believe it was a problem because sometimes the poppers just vibrate out. Mr. Adkins believes the popper is unreliable and looks for other signs of overheating. He doubts there was any problem because he experienced no problems on his trip. While the popper is a good idea, "there's a lot of good ideas out there that never really come to fruition."

Mr. Adkins believes he told Mr. Martey that the popper was out. He didn't speak with Mr. O'Neil.

[Direct examination] Other signs of wheel bearing failure include vibration, noise, high temperature, dragging wheel, and smoke. When the popper is fully out, it extends about half an inch.

[Cross examination] The difference between a quarter inch and half an inch is “small.”

*Mr. Joseph (Virgil) E. Johnson*  
(CX 1 – August 10, 2007 deposition)

[Direct examination] In December 2006, Mr. Johnson was mechanic at Edwards Mobil which provides road service for J.B. Hunt. Although he has several years experience as a mechanic, and a certification for automotive diagnostics, Mr. Johnson is not certified for truck maintenance.

A popper is the overheat indicator on a trailer wheel hub. When a malfunction or overheating occurs in the wheel bearing assembly, the popper “will pop out,” indicating overheating or pressure buildup. The popper is metal hollow tube assembly with a plastic red pin and head that goes through one of the hub cap bolt holes and into the wheel bearing cavity. If overheating occurs, the heat expands the grease, producing hydraulic or atmospheric pressure which pops the indicator. The popper can also be pulled out with a pocket knife or key. About 80% of the trailer have poppers.

The only way to inspect the inner wheel bearings is to remove the wheel, rim, and brakes.

Typically, when responding to a popped indicator, Mr. Johnson will jack the affected axle and spin the wheel, checking for roughness and resistance. He also pulls the hub cap to make sure the lubricant is not broken down. He also looks for any metal shavings. During this process, Mr. Johnson can only observe the outer wheel bearings. If Mr. Johnson doesn’t find any resistance and there’s no problems in the hub cap area, he reassembles everything and sends the trailer “on its way” with advice to check the wheel hub the next 50 to 100 miles to make sure there are no serious problems. The inspection takes about 45 minutes.

The purpose of the hub cap indicator is to pop out before there is any serious damage to the hub and wheel. If the bearings broke down, the heat may weld the assembly to the axle, locking up the wheel and possibly causing the wheel to come off. A driver would also see smoke coming from the area.

When he responded to the trailer in the late afternoon in December 2006, Mr. Johnson followed his standard procedures. He did not find any resistance in the wheel, the hub cap did not have any debris, and lubricant was not broken down. Although he couldn’t see the inner bearings, any defect in that assembly would have left visible evidence on the hub upon removal of the hub cap. Mr. Bess was present during the inspection. He was inquisitive and asked several times if the trailer was safe. His concern seemed genuine. Mr. Johnson told Mr. Bess that he couldn’t find any problem. Mr. Johnson reset the popper and told Mr. Johnson to go ahead and take the trailer while keeping an eye on the wheel for the first few miles of his trip, 25, 50, and 100 miles. Any time Mr. Bess stopped, he should check the wheel and “make sure it

hasn't popped out again." That way, Mr. Bess could catch the problem before the wheel bearing started to fail. Mr. Johnson gave Mr. Bess the repair paperwork to sign. He told Mr. Bess, "if it does pop out again, then you will know to go ahead and pull over, call another road service, and you've definitely got a problem." When he left, it was nighttime.

Mr. Johnson didn't see any evidence of tampering but it's easy to pop out the indicator with a knife without creating any evidence. The popper is easy to reset if the wheel is cool.

Mr. Johnson has no knowledge about the number of miles on the trailer. J.B Hunt is a large company and is pretty strict about their equipment. They keep their equipment in pretty good shape. On average, the trailer wheels are serviced about every 6 months.

[Cross examination] Despite the work order documentation, Mr. Johnson does not recall pulling the wheel off the axle. That was not his standard procedure. He only pulls the wheel if he feels resistance turning it. The trailer wheel he examined for Mr. Bess was "smooth as a baby's butt." Mr. Johnson did not see any discoloration in the lubricant.

After his inspection, Mr. Johnson concluded the trailer was safe. He advised Mr. Bess to keep an eye on it. Since no one is 100% right, Mr. Johnson told Mr. Bess that he could be wrong, it might be a problem. However, it should be fine.

*Mr. Sam Martey*  
(RX 2 – August 10, 2007 deposition)

[Direct examination] Mr. Martey has been employed by J.B. Hunt for over two years. In December 2006, he was working as an operations supervisor, reporting to Mr. O'Neil. At that time, Mr. O'Neil had the authority to discharge employees.

Although they did not discuss it before hand, Mr. Martey agreed with Mr. O'Neil's decision to fired Mr. Bess.

While he was at the fuel stop, Mr. Bess called Mr. Martey and said the load was unsafe and he was bringing it back. Since on the shift change Mr. O'Neil had told Mr. Martey about the popped indicator, Mr. Martey reminded Mr. Bess that a mechanic had checked the trailer and deemed it safe for delivery. Mr. Martey also stated "Well, if it was that bad, then a certified mechanic would not say its' okay to go on the road." Mr. Bess responded that the trailer was unsafe. He indicated that the hub vent seal had popped and he was bringing it back right now. Mr. Martey didn't tell Mr. Bess to stay at the fuel stop or go into more detail because "we disconnected off the phone." Mr. Martey did not call Mr. Bess back and tell him to stay at the fuel station because he didn't want to force anything.

Mr. Martey did not talk to the mechanic who looked at Mr. Bess' trailer and he did not see the paperwork.



When Mr. Bess returned, he parked the trailer in the middle of the yard and came to the dispatcher office. As he entered the dispatcher office, Mr. Bess was already angry. He said the hub vent looked popped, a mechanic had looked at it and he wasn't going to take the trailer.

To verify Mr. Bess' complaint, Mr. Martey told Mr. Juan Valenzuela about Mr. Bess' report of a popped indicator. Mr. Valenzuela responded that it did not sound like a problem at all and indicated that it was unusual for the indicator to pop like that. However, Mr. Valenzuela volunteered to swap loads with Mr. Bess if he felt uncomfortable with the trailer on the condition that what Mr. Bess said was true. Mr. Martey and Mr. Valenzuela then went to the trailer. When Mr. Valenzuela looked at the trailer, he said the indicator wasn't popped and nothing was wrong. Stating there was no reason Mr. Bess couldn't take the trailer, Mr. Valenzuela departed with his original load. Mr. Valenzuela is not a certified mechanic.

When Mr. Martey looked at the indicator, "you could see red, but it wasn't sticking out." He didn't swap the loads for Mr. Bess because he concluded there was nothing wrong with his trailer. There was no reason to make a swap.

Mr. Martey also told Mr. Patricio about the Mr. Bess' report. After Mr. Patricio looked at the trailer, he said that he didn't see anything wrong.

Since the popper first occurred on Mr. O'Neil's shift, Mr. Martey called him and Mr. Bess and Mr. O'Neil talked to each other over a speaker phone. Mr. Bess was angry, frustrated, and cursed during the conversation. At one point, Mr. Martey feared he'd be assaulted. However, Mr. Martey remained calm. Mr. Bess cursed Mr. Martey and said that he'd see him in court. At that point, Debbie intervened and walked Mr. Bess out of the office. Mr. Black walked in right at the end.

Mr. Martey had concerns about Mr. Bess as a driver because on occasion he refused to take certain loads because he was tired. Since drivers have specific rest periods, it is unusual for Mr. Martey to hear that type of refusal.

Mr. Fialkowski is very strict and rigid when it comes to safety standards. He is one of the company's best trainers. After Mr. Bess completed three weeks of training with Mr. Fialkowski and one week with Mr. Black, the company sent him out on his own. On two occasions, he returned with loads because he couldn't find the stores. On one of those occasions, he didn't even call Mr. Martey before returning. At times, Mr. Bess needed help with directions. The company was constantly giving Mr. Bess a chance to succeed. Absent his refusal to take the load on December 11, 2006, there was no reason to discharge Mr. Bess. Mr. Bess was discharged because "he refused to do that load and the load was deemed safe." Mr. O'Neil told him that the load was safe, he was legal to drive, and there was no reason for him to refuse to deliver the load. Mr. Bess kept responding, "I'm not doing it." Mr. Martey believed the load was safe because a certified mechanic had inspected it. In addition, Mr. Martey and two other drivers saw no problem with the trailer.

Mr. Martey called Mr. Atkins in to take the load and told him about Mr. Bess' concern. After looking at the trailer more than an hour later, Mr. Atkins indicated nothing was wrong and delivered the load.

### **Documentary Evidence**

#### *December 2006 Safety Briefing* (CX 4)

During the briefing on winter season driving, the drivers are advised that the company's philosophy is that it's the driver's decision whether or not it is safe to drive. "Nobody else can make that decision for you."

#### *Affidavit of Mr. Johnson, Repair Summary, and Edward Mobil Invoice* (RX 1, RX 3, RX 4, and RX 5)

On December 11, 2006, Mr. Johnson responded to a road service call at the J.B. Hunt facility in Winchester, VA. He inspected the right front trailer wheel for trouble based on a report of a temperature popper by the driver, Mr. Bess. Mr. Johnson jacked the truck, pulled the wheel and spun the wheel. The hub grease was solid and not discolored. The interior hub was in good order and no resistance was present. Mr. Johnson reassembled the wheel assembly and told Mr. Bess the trailer was safe. Mr. Bess still did not seem to want to take the trailer. Mr. Johnson gave the invoice paperwork to Mr. Bess to sign.

#### *Disciplinary and Safety Record* (RX 8)

On July 15, 2006, Mr. Bess received a moving violation ticket.

On July 17, 2006, Mr. Bess was written up for poor trip planning.

On July 19, 2006, Mr. Bess received a verbal counseling on the need to remain focused on his driver duties after he pulled away from a trailer without unhooking the tractor airlines.

On July 20, 2006, Mr. Bess received a DOT inspection citation.

During July and August, 2006, Mr. Bess' drivers log contained multiple entry errors.

On August 6, 2006, Mr. Bess passed all safety questions concerning safe winter driving,

On a discipline form, Mr. O'Neil indicated Mr. Bess was terminated on December 11, 2006 for refusing a dispatch that was safe and legal. He was eligible for rehire in one year. In a related document, Mr. O'Neil indicates that when Mr. Bess reported an axle problem on December 11, 2006, Mr. O'Neil called a mechanic who later said the problem was fixed. Mr. Bess said he would not run the load due to the trailer having a problem earlier. The trailer was

again checked out and determined to be good to go. Mr. Bess still refused to take the load. As a result, Mr. O'Neil terminated his employment since the company has a forced dispatch policy.

*J.B. Hunt Driver's Manual*  
(RX 10)

The J.B. Hunt comprehensive driver's manual has 110 pages, which include the following extracts:

Page iii The Chief Operations Officer states that safety is the responsibility of every J.B. Hunt employee and "must be the prime consideration in our every decision."

Page 27 Immediately upon employment, an employee may contribute up to 50% of his or her pre-tax gross earnings. However, matching contributions of up to 6% by J.B. Hunt do not start until after one year of employment.

Page 35 Equipment "defects must be repaired before operating equipment."

Page 82 Pre-trip inspections or "safety checks" are important, required by law, and ensure the safety of the drivers and others.

*Employment Application*  
(RX 11)

On his J.B. Hunt employment application, Mr. Bess indicates that he no traffic citations or accidents in the past 5 years. He lists experience as a truck driver from January to April 2006. On June 14, 2006, Mr. Bess confirms a November 28, 2004 moving violation conviction for speeding 10 to 14 mph over the speed limit. On June 12, 2006, Mr. Bess accepts J.B. Hunt's conditional offer of employment.

*Winchester Dedicated Contract Services Driver's Manual and Personnel Records*  
(RX 12)

The dedicated driver's manual has 16 pages. On page 3, the manual incorporates all the provisions in the J.B. Hunt Driver's Manual (RX 10). On page 7, the manual states that employees are expected to take a "proactive" role in assuring the safety of themselves and others. Additionally, "employees should not undertake a job if they perceive it as unsafe." On page 10, drivers are made responsible for making sure trailers are in "proper mechanical condition." Drivers must report trailer mechanical problems or defects to the project manager. Page 14 states, "a safety item . . . will need to be put in the shop immediately." On the last page, Mr. Bess certifies on June 19, 2006 that he read and understood the manual.

*Trailer Maintenance Record*  
(RX 13)

On October 14-15, 2006, the wheel bearings on the trailer assigned to Mr. Bess on December 11, 2006 were repacked.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Prima Facie Case & Initial Adjudication Principles**

The employee protection provision of the STAA, 49 U.S.C. § 31105, prohibits the discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety. In order to invoke these whistle blower provisions of the STAA, a complainant has the burden of proof to establish the respondent took adverse employment action because the complainant engaged in one of the STAA's protected activities. The analysis for determining whether a complainant meets his or her burden of proof is derived from the long, and continuing, line of Federal employment law discrimination cases.

As set out in exhaustive detail by the U.S. Circuit Court of Appeals for the Eleventh Circuit, in *Wright v. Southland Corp.*, 187 F. 3d 1287 (11th Cir. 1999), a complainant may take two fundamental approaches to establish unlawful discrimination. First, relying on the traditional approach, a complainant may attempt to prove by direct evidence that more likely than not, the employer engaged in unlawful discrimination. *Id.* at 1289. If in response, the employer also provides evidence of legitimate purposes for its actions, then the case becomes a "mixed motive" case and the burden of persuasion shifts to the employer to demonstrate, as an affirmative defense, by a preponderance of the evidence, that it would have taken the same action, in the absence of the discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 to 255 (1989) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

Since directly proving an employer's intent of illegal discrimination may be difficult, the U.S. Supreme Court developed a second approach that enables a complainant to present a rebuttable presumption of illegal discrimination. *See Wright*, 187 F. 3d at 1290 and *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). The Administrative Review Board ("ARB") has applied this approach in STAA cases and in *Byrd v. Consolidated Motor Freight*, 97-STA-9 at 4-5 (ARB May 5, 1998), recently summarized the burdens of proof and production in this type of case:

A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. at 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of*

*Labor*, 64 F. 3d 261, 277 (7th Cir. 1995). A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

The ARB in a footnote to the above paragraph provided further explanation on this last phase of the adjudication process:

Although the “pretext” analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant, throughout the proceeding. Once a respondent produces evidence sufficient to rebut the “presumed” retaliation raised by the prima facie case, the inference “simply drops out of the picture,” and “the trier of fact proceeds to decide the ultimate question.” *St. Mary's Honor Center*, 509 U.S. at 510-511. See *Carroll v. United States Dep't of Labor*, 78 F. 3d 352, 356 (8th Cir. 1996).

The United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.* 120 S. Ct. 2097 (2000), provided further explanation of the pretext phase of the analysis introduced in the *St. Mary Honor Center* case. The court first reiterated that if an employer articulated a non-discriminatory reason for the challenged adverse action, the complainant retains the ultimate burden to show the stated reason is pretext for unlawful discrimination. In meeting that ultimate burden, the complainant may, but not necessarily, prevail based on the combination of a prima facie case and sufficient evidence to demonstrate the asserted justification is false. In light of the false justification, the trier of fact may conclude the employer engaged in unlawful discrimination. *Reeves*, 120 S. Ct. at 2108. In other words, there may be an inference that the employer's falsehood is an attempt to cover up the unlawful discrimination.

At this point in the adjudication, “the fact-finder may then consider the credibility of parties' evidence establishing the complaint's prima facie case and inferences properly drawn there from in deciding that the respondent's explanation is pretext.” *Regan v. National Welder Supply*, 03-STA-14 (ARB Sept. 30, 2004).

Concerning witness credibility, all factual findings, including credibility findings must be supported by substantial evidence in the record as a whole. *NLRB v. Cutting, Inc.* 791 F.2d 659, 667 (7th Cir. 1983). At the same time, the Secretary has observed that a lack of evidence to corroborate conflicting testimony on an issue, coupled with an inability to discern the truth through the demeanor of the witnesses, may lead to an inability to find a complainant's version of the facts more credible. In that case, there may be an insufficient basis for finding a prima facie case. *Cook v. Kidimula International, Inc.* 95 STA 44 (Sec'y Mar. 12, 1996).

In cases in which an employer engaged in an adverse personnel action motivated by both prohibited and legitimate reasons, the employer escapes liability only by establishing by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. *Moravec v. HC & M Transportation, Inc.* 90 STA 44 (Sec'y Jan. 6, 1992)

and *Logan v. United Parcel Service*, 96 STA 2 (ARB Dec. 19, 1996). Where evidence demonstrates that other employees, similarly situated, did not receive the same adverse personnel action, the employer may fail to carry its burden to show it would have discharged the complainant even if he had not engaged in protected activity. *Clifton, v. United Parcel Service*, 94 STA 16 (Sec’y May 9, 1995). At the same time, under this dual motive analysis, if the employer carries its burden of persuasion, then even when an employee engages in protected activity, an employer may still legitimately discipline him for insubordination and disruptive behavior. *See Logan*, 96 STA 2.

With these principles in mind, I first note that Mr. Bess provided evidence to establish a *prima facie* case of illegal discrimination. The witnesses’ testimony establish that on December 11, 2006, Mr. Bess refused to take a dispatch due his stated safety concern about a re-popped hub vent indicator. Mr. Bess communicated his concern and refusal to Mr. O’Neil. And, following Mr. Bess’ refusal to drive, Mr. O’Neil applied the ultimate adverse employment action – termination. This evidence presents the *prima facie* elements of protected activity, knowledge of the employer, adverse personnel action and an inference of causation due to temporal proximity.

In turn, J.B. Hunt produced evidence that Mr. O’Neil’s termination decision was based on Mr. Bess’ refusal to accept the dispatch of a load that was safe and legal to drive.

Due to J.B. Hunt’s production of evidence showing a non-discriminatory reason for its termination of Mr. Bess’ employment, the inference of causation between a protected activity and employment termination “simply falls away.” As a result, I will consider the entire record, render credibility and probative value determinations, make factual findings, and determine whether Mr. Bess has carried his ultimate burden of proof by a preponderance of the evidence to show: a) he engaged in an STAA protected activity; b) he suffered an adverse personnel action; and, c) the protected activity was the reason for the adverse personnel action. *See Anderson v. Jaro Trans. Services & McGowan Excavating, Inc.*, 2004 STA 2 and 3, (ARB Nov. 30, 2005).

### **Protected Activity**

As set out below, the undisputed facts clearly establish that Mr. Bess suffered an adverse personnel action on December 11, 2006 when Mr. O’Neil fired him principally based on his refusal to take an assigned trailer. Consequently, the sole issue in this case is whether Mr. Bess’ refusal to drive the assigned trailer was a protected activity.

Title 49 U.S.C. § 31105(a)(1)(B)(ii) protects an employee who refuses to operate a commercial motor vehicle which he or she reasonably believes would cause serious injury to the employee or the public due to its unsafe condition. In order to invoke protection under this provision, an employee must have a reasonable apprehension of serious injury. Such apprehension is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. Additionally, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition. *Williams v. Carretta Trucking, Inc.*, 94 STA 7 (Sec’y Feb. 15, 1995). This objective reasonableness determination must focus on the information available to the employee at the time of the work refusal.

*Caimano v. Brink's Inc.*, 95 STA 4 (Sec'y Jan. 26, 1996). Consequently, the fact that an assignment was subsequently successfully completed, standing alone, does not necessarily prove the mission was safe. *Robinson v. Duff Truck Line, Inc.*, 86 STA 3 (Sec'y Mar. 6, 1987), *aff'd on other grounds sub. nom., Duff Truck Line, Inc. v. Brock*, No. 87-3324 (6th Cir. May 4, 1988) (1988 U.S. App. LEXUS 9164). Finally, a mechanic's testimony may be relevant to show the complainant's state of mind when he refused the equipment, rather than to establish the factual condition of the equipment. *Jackson v. Protein Express*, 95 STA 38 (ARB Jan. 9, 1997).

#### *Stipulations of Fact*

At the hearing, the parties stipulated to the following facts: On December 11, 2006, Mr. Bess was an employee within the meaning of STAA and prior to his discharge, an employee-employer relationship existed between the parties (TR, page 31).

#### *Probative Weight Findings*

While all of the witnesses were generally credible and provided probative testimony, several direct conflicts in testimony and other inconsistencies require that I periodically attempt to resolve such differences. Within brackets ([-]) in the following specific findings, I will discuss in more detail my assessment of such testimonial conflicts.

#### *Specific Findings*

Based on the preponderance of the probative evidence, I render the following specific findings.

May 2006 During his initial two week training, Mr. Fialkowski instructs Mr. Carlos Black that a popped hub vent indicator on a trailer may mean the wheel hub is overheating and the trailer should not be operated. In that situation, Mr. Black is told he should call road service and have the hub inspected.

June 12, 2006 With about eight months of truck driving experience, including three months of truck driving school, Mr. Bess accepts J.B. Hunt's offer of employment to be a tractor-trailer driver at the Winchester, Virginia terminal. Through this facility, J.B. Hunt provides dedicated contract service to local Home Depot stores. As a J.B. Hunt driver, Mr. Bess' annual earnings would average around \$40,000.

[[Although Mr. Bess believes his wages were enhanced about 6% by company contributions to his 401K plan, the company's driver's manual establishes one year of service as a prerequisite for employer contributions.]]

The company's 401K matching contributions of up to 6% start after one year of employment.

June/July 2006 For about three weeks, Mr. Fialkowski trains Mr. Bess. During this period, Mr. Fialkowski advises Mr. Bess not to take a trailer with a popped hub vent indicator.

Subsequently, Mr. O'Neil assigns Mr. Carlos Black as Mr. Bess' trainer. After another week of training with Mr. Black, Mr. O'Neil successfully completes his driver training and starts to drive J.B. Hunt trucks by himself.

July 5, 2006 With Mr. Bess as his co-driver for training, Mr. Fialkowski discovers a raised hub vent indicator, points it out to Mr. Bess, and takes the trailer out of service because the popped indicator was a safety hazard that needed to be addressed.

July through December 11, 2006 At times, while driving J.B. Hunt loads, Mr. Bess has difficulty following directions and gets confused. On two occasions, he returns to the facility without delivering his loads due to an inability to find the assigned stores. Mr. O'Neil considers Mr. Bess to be a satisfactory driver.

On at least one occasion, Mr. Bess successfully completes a two-stop load assignment to the two stores that comprise his two-load assignment on December 11, 2006.

[[Although Mr. Bess initially testified that he had no accidents as a J.B. Hunt driver, he later acknowledged pulling the air hoses out of a tractor when he forgot to disconnect the hoses from a trailer prior to pulling away.]]

On one occasion, Mr. Bess forgets to disconnect air hoses before pulling away from a trailer, causing the hoses to be pulled off the tractor.

October 16, 2006 The trailer Mr. Bess is scheduled to drive on December 11, 2006 receives a maintenance inspection and its wheel bearings are re-packed.

Early December 2006 During a monthly safety briefing, Mr. Bess is reminded of the company's policy that safety is the driver's responsibility. According to the briefing, it's the driver's decision whether it's safe to drive.

At this time, Mrs. Bess is six months pregnant.

December 11, 2006 Assigned to drive a two-stop load on a trailer, Mr. Bess reports early to the Winchester facility to conduct a pre-trip inspection of his tractor and trailer. After conducting a pre-trip inspection of his tractor, Mr. Bess goes to his assigned trailer, hooks it to the tractor and inspects the trailer. During the trailer inspection, Mr. Bess discovers that the hub vent indicator on the right front trailer wheel is popped out about a quarter inch. Mr. Bess reports the popped indicator to Mr. O'Neil. In response, Mr. O'Neil compliments Mr. Bess for reporting the popped hub vent indicator. Mr. O'Neil calls road service to inspect the trailer wheel.

Responding to Mr. O'Neil's road service call, Mr. Virgil Johnson, a truck mechanic, arrives at Mr. Bess' trailer around 5:30 p.m. Mr. Johnson observes the right front wheel hub vent indicator is extended about a quarter of an inch, showing the red stem. Mr. Johnson rotates the right front wheel and finds no resistance. After removing the hubcap and examining the outer wheel bearings, he finds the bearings are properly greased. He does not observe any signs



of tampering, overheating, bearing failure or other debris. Mr. Johnson replaces the hub cap and resets the hub vent popper. He tells Mr. Bess that nothing is wrong and that the trailer is fine. Mr. Bess asks if the trailer is safe and Mr. Johnson replies that it is safe. However, also indicating that he could be wrong, Mr. Johnson advises Mr. Bess to monitor the hub vent indicator at 25 mile intervals to see if it pops again. Mr. Johnson tells Mr. Bess that if the popper comes out again, he should call road service because he definitely has a problem.

Mr. Johnson completes his paperwork, Mr. Bess signs the paperwork, and the trailer is released for dispatch.

Mr. O'Neil does not talk to Mr. Johnson or read Mr. Johnson's repair report. However, based on company procedure, because he did not hear from Mr. Johnson about any problem, Mr. O'Neil knows Mr. Bess' trailer has been released for dispatch. Mr. O'Neil ends his shift and Mr. Martey comes on as the operations supervisor. Before leaving for home, Mr. O'Neil tells Mr. Martey about Mr. Bess' pre-trip inspection problem with the trailer hub popper and Mr. Bess' dispatch. Mr. Martey does not talk to Mr. Johnson or read his report.

Mr. Bess drives about 20 miles to a fuel station. While waiting for fuel, he inspects the trailer hub vent.

[[According to Mr. Bess, upon his inspection at the fuel station, he observed that the hub vent indicator had popped again about a quarter of an inch. However, according to Mr. Martey, after Mr. Bess returned to the J.B. Hunt terminal, he and two other drivers, Mr. Valenzuela and Mr. Patricio, did not find anything wrong. Later, when Mr. Adkins took the trailer, he observed the popper raised about a quarter of an inch. Due to this controversy, I must determine a particularly critical fact in this case – whether the trailer hub vent indicator re-popped.

As a preliminary matter, I note that only Mr. Bess and Mr. Akins testified before me. Mr. Adkins was a credible witness. Concerning Mr. Bess' credibility, besides his obvious stake in the proceedings, I have also considered his failure to truthfully indicate a speeding citation on his J.B. Hunt employment application, his statement that he had not had an accident while a J.B. Hunt driver, and his admissions that despite his signed certifications, he had not completely read either the company's driver's manual or the supplemental Home Depot dedicated driver instructions. However, based on his demeanor, consistency of his testimony, general lack of equivocation, candid acknowledgments of his moving violation and incorrect driver's manual certifications, and noting that "accident" may have been interpreted as vehicle accident rather than an equipment damage incident, I found Mr. Bess to be a credible witness. Further, for the reasons noted below, upon consideration of all the eyewitness testimony, I conclude Mr. Bess did not lie when he reported that the trailer hub vent popper was extended at the fuel station.

Next, in regards to the other three individuals who looked at the trailer, Mr. Martey testified through a deposition and I was not able to observe his demeanor. However, I found little basis to question his credibility based on his testimony. On the other hand, Mr. Valenzuela and Mr. Patricio essentially testified through the hearsay recollections of Mr. Bess and Mr. Martey.<sup>5</sup> Consequently, neither Mr. Patricio nor Mr. Valenzuela were subject to cross-

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<sup>5</sup>Mr. Valenzuela and Mr. Patricio are no longer employed by J.B. Hunt.

examination. Although this deficiency does not directly relate to their credibility, the shortfall does diminish the significance of their reported observations.

Turning to the respective observations, Mr. Patricio's reported observation that nothing was wrong with the trailer lacks meaningful specificity. Absent any further clarification through cross examination, and considering that some individuals, such as Mr. Adkins, believed the raised popper was no problem, Mr. Patricio's comment is not particularly helpful because he did not directly address whether the popper was up or not.

The reported observations of Mr. Valenzuela are also of little value due to the two versions presented by Mr. Martey and Mr. Bess. Mr. Martey indicated that Mr. Valenzuela reported the indicator wasn't popped and nothing was wrong with the trailer. However, Mr. Bess recalled that after he showed the raised popper to Mr. Valenzuela, Mr. Valenzuela stated it wasn't a problem. Due to these conflicting hearsay comments, and absent any cross-examination of Mr. Valenzuela about the basis for his conclusion that nothing was wrong with the trailer, his hearsay comments do not establish whether the popper was raised.

Next. Mr. Martey's observation that he saw red in the popper but it wasn't raised is likewise less than definitive due to some ambiguity. As described by Mr. Johnson, the truck mechanic, the hub vent popper has both a red top and red stem. Mr. Martey was not specifically questioned as to whether the red he observed was the top of the indicator or the stem.

In contrast, based on his credible testimony, I believe Mr. Bess observed the hub vent indicator raised about a quarter of an inch at the fuel station.

Similarly, Mr. Adkins presented credible eye witness testimony that when he accepted the trailer for delivery later in the evening, the trailer hub vent indicator was raised a quarter of an inch.

In summary, setting aside the diminished reported observations of Mr. Valenzuela and Mr. Patricio, Mr. Martey's less than definitive observation that the popper was not raised is outweighed by Mr. Bess' and Mr. Adkins' observations that the popper was up about a quarter of an inch. Consequently, the preponderance of the probative eyewitness testimony establishes that Mr. Bess found a raised hub vent popper at the fuel station.]]

Upon inspecting the trailer, Mr. Bess finds that the hub vent indicator re-popped about a quarter of an inch. The hub was warm. He doesn't smell anything or check the other trailer hubs for warmth.

[[According to Mr. Bess, after he observed the raised popper, he called the dispatcher, Mr. Martey, who eventually told him to return to the terminal and swap loads with Mr. Valenzuela. On the other hand, Mr. Marty recalls that Mr. Bess reported the indicator being popped again. Mr. Martey reminded him that a mechanic had checked the trailer and found it to be safe. Mr. Bess responded the trailer was unsafe and he was bringing it back. Mr. Martey didn't say anything further because they got disconnected.

Whether Mr. Martey directly told Mr. Bess to return to the terminal or Mr. Bess decided to do so on his own is difficult to resolve. Both witnesses were credible and I find no viable means to differentiate their recollections. The parties to this phone call may have interpreted their conversation through their respective, though differing, personal filters.]]

Mr. Bess calls Mr. Martey and tells him that the trailer hub vent indicator has re-popped. Mr. Bess starts driving the trailer back to the J.B. Hunt Winchester terminal.

Mr. Martey calls Mr. O'Neil and advises that Mr. Bess reported that the hub vent indicator popped again at the fuel station and that he was returning the trailer to the yard. Mr. O'Neil directs Mr. Martey to have other drivers look at the trailer to see if anything is wrong.

Mr. Martey tells Mr. Juan Valenzuela about Mr. Bess' report of the popped indicator. Mr. Valenzuela volunteers to swap loads. After Mr. Bess returns to the Winchester terminal, Mr. Valenzuela goes out to the trailer. He asks Mr. Bess what is wrong. Mr. Bess points to the trailer popper. Mr. Valenzuela states the popper is not a problem, tells Mr. Bess to take the trailer, refuses to swap loads, and departs. Mr. Valenzuela informs Mr. Martey nothing is wrong with the trailer.

Mr. Martey inspects the trailer. Although he could see red, he concludes the hub vent indicator is not popped.

Mr. Martey asks Mr. Furman Patricio to look at the trailer. After Mr. Patricio inspects the trailer, he tells Mr. Bess and Mr. Martey that nothing is wrong. Mr. Martey asks Mr. Bess if he is refusing the load. Mr. Bess states that the trailer is unsafe and he is not willing to take it. Mr. Bess offers to take another load.

Mr. Martey calls Mr. O'Neil and advises that the other drivers have not found anything wrong with the trailer. Since the mechanic didn't find anything wrong earlier in the evening, and Mr. Bess drove the truck back to the yard, Mr. O'Neil doesn't believe popper has come out a second time. Instead, he thinks Mr. Bess is trying to get out of the load.

In the dispatcher office, through a speaker phone, Mr. O'Neil asks Mr. Bess what's wrong.<sup>6</sup> Mr. Bess tells Mr. O'Neil about the recurring popped hub vent indicator. He states that the trailer is unsafe to pull. Mr. O'Neil replies that the mechanic concluded the trailer was safe. Mr. O'Neil asks Mr. Bess why he drove the trailer back to the yard rather than call road service. Mr. O'Neil notes that other drivers have looked at the trailer and found nothing wrong. Mr. Bess replies that since the popper came out again it is unsafe. Mr. Bess offers to take another load. Mr. O'Neil tells Mr. Bess to take the trailer and check the wheel as often as he wants. Mr. O'Neil reminds Mr. Bess that the company has a forced dispatch policy. Mr. Bess continues to refuse to drive the trailer because it's not safe. Mr. O'Neil asks three times if Mr. Bess is refusing the load. Mr. Bess responds each time that he is refusing to take his assigned trailer but

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<sup>6</sup>Other than insignificant differences, Mr. O'Neil and the individuals present in the dispatcher office, Mr. Bess, Mr. Martey, and Mr. Black, presented remarkably consistent recollections of the conversation between Mr. Bess and Mr. O'Neil.

is not refusing to take a load. Mr. O'Neil fires Mr. Bess and tells him to clean out his truck and leave the facility. The conversation becomes heated. Mr. Bess uses obscenities. When Mr. Martey and Mr. Bess start to exchange comments, Debbie and then Mr. Black, who arrives at the end of the conversation, walk Mr. Bess out of the dispatcher office. Mr. Bess removes his personal property from the tractor and leaves the Winchester terminal.

When Mr. Adkins arrives later in the evening to take Mr. Bess' load, he inspects the trailer and observes that the hub vent indicator is extended about a quarter of an inch. He pushes it back in and pulls it out a couple of times. Since he does not detect any sign of damage or overheating, Mr. Adkins concludes the indicator is not a problem. He tells Mr. Martey that nothing is wrong with the trailer, agrees to take the trailer, and makes the required deliveries without any problems.

### *Discussion*

Again, in review, since Mr. Bess is asserting his refusal to drive the trailer on December 11, 2006 is protected under 49 U.S.C. § 31105(a)(1)(B)(ii), he must establish that: A) his refusal was based on a concern that operating the trailer would cause serious injury to himself or the public due to its unsafe condition; B) he subjectively believed that safety concern; C) his belief was objectively reasonable; and, D) he sought and was unable to obtain correction of his safety concern.

#### A. Serious Injury

The stated basis of Mr. Bess' refusal to accept the dispatch of his assigned trailer on December 11, 2006 was a re-popped hub vent indicator. Through the testimony of Mr. Johnson, and as acknowledged by Mr. O'Neil, Mr. Bess has proven that a raised trailer hub vent indicator is a serious safety concern because an overheated axle can cause a trailer wheel to weld to the axle, leading to possible separation of the wheel and corresponding loss of control of the trailer – clearly an event that could cause serious injury to Mr. Bess and the public traveling the highways.

The indicator is only a warning device and does not necessarily indicate that catastrophic failure of the wheel-axle-hub is imminent. Nevertheless, the purpose of hub vent indicator is to warn of the precursor stages of overheating, which if ignored can lead the unsafe and seriously dangerous separation of the trailer wheel. Accordingly, I find Mr. Bess' refusal to drive on December 11, 2006 related to a potential unsafe condition of the assigned trailer that could cause serious injury.

#### B. Subjective Belief

Based on his training from Mr. Fialkowski, and J.B. Hunt's policy, Mr. Bess was well aware of the requisite pre-trip inspection of trailers and the safety purpose of the hub vent indicator. He knew that the hub vent indicator was an early warning indicator of an overheating hub and that if the overheating problem was not resolved the trailer wheel could separate from the hub, posing a significant danger to himself and other motorists due to possible control

difficulties. He was present when Mr. Fialkowski placed a trailer out of service due to a raised trailer hub vent indicator. Additionally, during the company's December 2006 safety briefing a week earlier, Mr. Bess had been informed that as J.B. Hunt driver he was responsible for determining whether his equipment was safe to drive or presented a danger to himself or other motorists. With that background, the circumstances of December 11, 2006 provided a sufficient foundation for his development of a personally held belief that the re-popped trailer hub vent indicator was an unsafe condition that warranted his refusal to accept the trailer for delivery.

Nevertheless, at this point, since Mr. Johnson testified that the popper can be raised manually and the Respondent asserts Mr. Bess was just trying to avoid his driving assignment on December 11, 2006, I need to address the possibility that Mr. Bess did not have a subjective safety concern because he had tampered with the indicator so that it appeared to have re-popped. For three reasons, I conclude Mr. Bess did not tamper with the indicator at the fuel station.

First, Mr. Bess' driving record with J.B. Hunt from the completion of his training in early July 2006 to December 11, 2006 was satisfactory. During that period, while he apparently earned a reputation for being directionally-challenged and required additional help in finding his delivery locations, Mr. Bess only returned two times with an undelivered loads due to his inability to find the assigned Home Depot stores' locations. Notably, on those two failed occasions, Mr. Bess attempted to deliver the loads; he did not refuse the dispatches.

Second, the possibility that Mr. Bess did not really have a safety concern and instead was just trying to get out of running an assignment on December 11, 2006 is significantly diminished by his clearly expressed willingness to take any other load that night. In other words, Mr. Bess' refusal was directed solely at pulling his assigned trailer with the re-popped hub vent indicator, rather than a refusal to drive at all that night.

And, third, the possibility that Mr. Bess was motivated to fabricate a safety concern because he did not want to run his assigned two-load trailer on December 11, 2006 due to navigational concerns is diminished by the fact that Mr. Bess' was already familiar with the route because he had previously successfully completed the same dispatch.

Another challenge to Mr. Bess' subjective belief that his assigned trailer was unsafe for dispatch, and a not unreasonable factor considered by Mr. O'Neil, was Mr. Bess' act of driving the trailer back to the J.B. Hunt terminal after he discovered the re-popped hub indicator. However, since Mr. Bess had already dealt with road service, his 20 mile return trip at reduced speed rather than a call for road service a second time, while not the best choice, was not completely inconsistent with a subjective belief that the trailer was unsafe for the longer distances associated with the delivery of loads to two separate Home Depot stores that night. Further, Mr. Bess' return to the yard would possibly facilitate maintenance on the trailer and make him more readily available for assignment to another trailer and delivery.

I have considered that Mr. Bess may have had other less obvious motives for not taking the assigned trailer on December 11, 2006 unrelated to safety. However, besides the more likely reasons discussed and dismissed above, his other possible motives would not preclude Mr. Bess

from developing a subjective belief that something was wrong with the assigned trailer's hub when the indicator popped a second time at the fuel stop.

As a final consideration, having concluded Mr. Bess was a credible witness, I believe his testimony that he was concerned about the safety of the trailer for his assigned two-load delivery when the hub vent indicator re-popped after 20 miles.

### C. Objectively Reasonable Belief

In determining whether Mr. Bess' safety concern about the re-popped hub vent indicator was objectively reasonable, I focus on the following information that was available to Mr. Bess at the time he repeatedly told Mr. O'Neil on December 11, 2006 that he was refusing to accept the trailer for dispatch.

During Mr. Bess' initial J.B. Hunt driver training, and as similarly experienced by Mr. Black, Mr. Fialkowski stressed the importance of inspecting for popped trailer hub vent indicators. Practicing what he stressed, and while training Mr. Bess, Mr. Fialkowski placed a J.B. Hunt trailer out of service due to a popped hub vent indicator.

In an early December 2006 safety briefing, Mr. Bess was informed that J.B. Hunt drivers were vested with the decision on whether conditions were safe to drive.

After Mr. Bess first reported the popped hub vent indicator, he watched Mr. Johnson freely rotate the wheel, remove the hub cap, inspect the hub, and reset the hub vent indicator. Mr. Johnson then advised Mr. Bess that the trailer was fine. However, he also recommended that Mr. Bess regularly check the indicator because if it popped again he had a problem.

Following Mr. Johnson's inspection, after leaving the J.B. Hunt terminal and driving about 20 miles, Mr. Bess re-inspected the hub vent indicator and found that it had re-popped. The hub was also warm.

Upon his return to the J.B. Hunt terminal, Mr. Valenzuela, Mr. Patricio, and Mr. Martey looked at the trailer wheel and told Mr. Bess that nothing was wrong.<sup>7</sup> During their conversation, Mr. O'Neil reminded Mr. Bess that Mr. Johnson, Mr. Valenzuela, Mr. Patricio, and Mr. Martey found nothing wrong with the trailer.

Applying the objective person standard to these circumstances, I am presented with four considerations. First, as Mr. Martey and Mr. O'Neil understandably emphasized to Mr. Bess that night, Mr. Johnson had just inspected the trailer wheel and found nothing wrong; he would not have released the trailer for dispatch if there had been a legitimate problem. Specifically, with Mr. Bess present, Mr. Johnson freely rotated the wheel, removed the hub cap and found the wheel bearings properly greased, and noted no signs of overheating. At that moment, Mr. Bess'

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<sup>7</sup>While the testimony of Mr. Martey, Mr. Valenzuela, and Mr. Patricio is insufficient for determining whether the hub vent indicator was raised, their comments remain relevant as to Mr. Bess' state of mind and his knowledge that two other truck drivers and the dispatcher believed nothing was wrong with the trailer after examining the wheel.

acceptance of the trailer and driving it to the fuel station was certainly objectively reasonable. However, the objective reasonableness of relying on Mr. Johnson's post-inspection conclusion that nothing was wrong with the trailer and his release of the trailer for dispatch changed when Mr. Bess found the hub vent indicator re-popped 20 miles later.

Which leads to the second, and definitive consideration, after Mr. Johnson completed his inspection, he added a significant caveat. Although his inspection revealed nothing wrong, Mr. Johnson told Mr. Bess something that Mr. Valenzuela, Mr. Patricio, Mr. Martey, and Mr. O'Neil were not told – if the popper came out a second time, the trailer had problem. I find Mr. Johnson's additional comment provided an objectively reasonable basis for Mr. Bess' refusal to accept the trailer with a re-popped hub vent indicator for dispatch. Mr. Bess was the only person who spoke with Mr. Johnson on December 11, 2006, and Mr. Johnson advised him that despite his normal inspection overheating may be a problem if the popper came out again and he should stop and call road service.

Third, as Mr. O'Neil also stressed, two other J.B. Hunt drivers, and a dispatcher, examined the trailer and found nothing was wrong. However, of the four individuals advising Mr. Bess about the condition of his assigned trailer on December 11, 2006, only Mr. Johnson was a truck mechanic. Mr. Valenzuela, Mr. Patricio, and Mr. Martey were not. Additionally, as discussed above, only Mr. Bess knew everything that Mr. Johnson told him. Consequently, in determining what weight to give the observations of Mr. Martey, Mr. Valenzuela, Mr. Patricio that nothing was wrong with the trailer, Mr. Bess reasonably gave greater weight to Mr. Johnson's admonition concerning a re-popped hub vent indicator. In light of his conversation with Mr. Johnson and considering the J.B. Hunt's policy about individual driver responsibility for the safety of his equipment, Mr. Bess' failure to accept the consensus of two other J.B. Hunt drivers and the dispatcher that the trailer was safe was objectively reasonable.

Fourth, as highlighted by the Respondent, later in the evening, after resetting the trailer hub vent indicator, Mr. Adkins successfully completed the two deliveries with Mr. Bess' assigned trailer without the hub vent indicator re-popping. In other words, Mr. Adkins' successful run provides some evidence that nothing was wrong with the trailer. However, the objective reasonableness of Mr. Bess' refusal based on Mr. Johnson's post-inspection warning is not impeached just because Mr. Adkins' subsequent deliveries may have proven Mr. Johnson wrong about a re-popped indicator being indicative of a problem with the trailer.

In summary, based on Mr. Fialkowski's training about the safety significance of a trailer hub vent indicator, Mr. Fialkowski's rejection of a trailer for a popped indicator, the company's safety briefing on driver responsibility for the determination on whether a vehicle is safe to drive, Mr. Johnson's advice to check the popper every 25 miles, and his critical statement that a re-popped hub vent indicator meant there was a problem with the trailer, I find Mr. Bess had an objectively reasonable safety concern when he refused the dispatch of the assigned trailer with the re-popped hub vent indicator on December 11, 2006.

#### D. Corrective Action

When Mr. Bess returned the trailer with the re-popped hub vent indicator to the J.B. Hunt Winchester terminal and refused to continue the dispatch of the trailer, he presented the Respondent with an opportunity to correct the defect. In response, the sole action Mr. O'Neil directed was to have other drivers and the dispatcher look at the trailer's wheel to determine if anything was wrong. Since Mr. O'Neil was aware that a mechanic had inspected and released the trailer earlier in the evening, his choice of action is understandable. Nevertheless, Mr. Bess brought an unsafe condition to the Respondent's attention. When presented with the re-popped hub vent indicator, and given the company's stated policy that safety is a "prime consideration" in every decision, the appropriate response remained the same as when Mr. Bess reported the first raised popper during his pre-trip inspection – having a mechanic respond. Although the trailer had been deemed safe for dispatch earlier in the evening, the re-popped hub vent indicator placed its road-worthiness back into question based on Mr. Johnson's warning to Mr. Bess. Additionally, Mr. O'Neil's suggestion to Mr. Bess that he accept the trailer and periodically look for signs of overheating was not a sufficient corrective action considering Mr. Bess had essentially already tried that option and found the indicator re-popped after driving 20 miles.

Accordingly, since Mr. O'Neil did not call for a mechanic to inspect the re-popped hub vent indicator or even discuss the situation with the mechanic who had responded to Mr. Bess' first report of a raised hub vent indicator, I find that Respondent's response to the reported unsafe condition of a re-popped hub vent indicator was insufficient. As a result, since Mr. Bess was unable to obtain sufficient corrective action of an inspection of the re-popped hub vent indicator by a mechanic, his continued refusal to accept the trailer for dispatch remained objectively reasonable.

#### Conclusion

Based on the specific findings, and for the reasons set out above, I conclude that Mr. Bess engaged in an STAA protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii) when he refused to take an assigned trailer on December 11, 2006 for dispatch based on a subjective and objectively reasonable belief that the trailer had an unsafe condition that could lead to serious injury due to a re-popped trailer hub vent indicator. Prior to his continued refusal to drive, Mr. Bess provided the Respondent an opportunity to take corrective action. However, the Respondent took insufficient action such that Mr. Bess was unable to obtain correction of his safety concern.

#### **Final Determination**

On December 11, 2006, by refusing to accept an assigned trailer for dispatch with a re-popped hub vent indicator, an unsafe condition that could lead to serious injury, and in the absence of sufficient corrective action, Mr. Bess engaged in a protected activity under the STAA. Based on that protected activity, Mr. O'Neil terminated Mr. Bess' employment, in violation of the employee protection provision of the STAA.



### **Mixed Motive Consideration**

During the proceedings, the Respondent asserted another basis for Mr. Bess' employment discharge on December 11, 2006 – insubordination. Upon consideration of this stated reason for Mr. Bess' employment termination, two acknowledgments by Mr. O'Neil render the record insufficient to conclude Mr. O'Neil would have fired Mr. Bess on December 11, 2006 based on the way he behaved in the dispatcher office absent his protected activity. First, Mr. O'Neil stated that prior to December 11, 2006, he had not experienced any attitude issues with Mr. Bess. Second, and more important, Mr. O'Neil frankly admitted that if he believed Mr. Bess had an actual safety concern for his refusal to drive, he would have altered his termination decision. That acknowledgement indicates that Mr. Bess' refusal to accept the trailer for dispatch, which I have concluded was an STAA protected activity, was the sole determinative reason for Mr. Bess' employment discharge.

### **DAMAGES**

Through the preponderance of the more probative evidence, Mr. Bess has proven that J.B. Hunt engaged in illegal employment discrimination under the STAA. Accordingly, Mr. Bess is entitled to specific relief to remedy the harm caused by the discrimination. According to 49 U.S.C. § 31105(b)(3)(A), as implemented by 29 C.F.R. § 1978.109, the appropriate remedies include immediate reinstatement of the complainant with the same pay and privileges of employment; compensatory damages, which include back pay; prejudgment interest; and costs and expenses, including reasonably incurred attorney fees. *See Drew v Alpine, Inc.*, 01 STA 47 (ARB Jan. 25, 2002) and 29 C.F.R. § 1978.109(a). Compensatory damages may also include recovery for mental and emotional distress suffered as a consequence of the discrimination *Doyle v. Hydro Nuclear Servs.*, 89 ERA 22, slip op. at 18-19 (ARB May 17, 2000), *rev'd on other grounds, Doyle v. U.S. Secretary of Labor*, No. 00-1589 and 00-2035 (3d Cir. May 27 2002).<sup>8</sup>

### **Reinstatement**

As mandated by 29 C.F.R. § 1978.109(b), a complainant's reinstatement is effective immediately upon receipt of an administrative law judge's decision by the respondent. Although the regulation states that an administrative law judge "may" order reinstatement, the ARB has held that reinstatement is normally mandatory except in circumstances such as where the parties have demonstrated the impossibility of a productive and amicable working relationship, or where the company no longer has positions for which the complainant is qualified. *See Dale v. Step 1 Stairworks, Inc.*, 02-STA-30 (ARB Mar. 31, 2005).

Accordingly, since Mr. O'Neil's termination of Mr. Bess' employment on December 11, 2006 violated the STAA employee protection provisions, J.B. Hunt must now reinstate Mr. Bess in his former job as truck driver. In regards to pay, terms, and privileges of employment, J.B. Hunt shall compensate Mr. Bess at the rate of pay and provide the appropriate other privileges

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<sup>8</sup>The text of the appellate court's decision may be found on the Office of Administrative Law Judges website, [www.oalj.dol.gov](http://www.oalj.dol.gov) in the whistleblower library associated with the administrative law judge and ARB decisions for 1989 ERA 22.

and conditions of employment as if he had remained a driver with the company since December 11, 2006. Mr. Bess' reinstatement as a J.B. Hunt truck driver is effective upon J.B. Hunt's receipt of this Recommended Decision and Order.

### **Compensatory Damages**

#### ***Back Pay***

To make a person "whole for injuries suffered for past discrimination," the Act mandates an award of back pay as compensatory damages to run from the date of discrimination until either the complainant receives a bona fide offer of reinstatement, is reinstated or obtains comparable employment. *Nelson v. Walker Freight Lines, Inc.* 87 STA 24 (Sec'y Jan. 15, 1988), slip op. at 5, *Polwesky v. B & L Lines, Inc.*, 90 STA 21 (Sec'y May 29, 1991), *Moravec v. HC & M Transportation, Inc.*, 90 STA 44 (Sec'y Jan. 6, 1992), and *Polgar v. Florida Stage Lines*, 94 STA 46 (ARB Mar. 31, 1996). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc.*, 95 STA 43 (ARB May 30, 1997), slip op. at 11-12, n.12. Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co., Inc.*, 90 STA 37 (Sec'y June 3, 1994) and *Kovas v. Morin Transport, Inc.*, 1992 STA 41 (Sec'y Oct. 1, 1993). At the same time, the lost wages claimed as back pay must have been caused by the employer's misconduct. *Hampton v. Sharp Air Freight Service, Inc.*, 1991 STA 49 (Sec'y July 24, 1992).

The employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. *Hadley v. Southeast Corp. Serv. Co.*, 86 STA 24 (Sec'y June 28, 1991). Concerning interim earnings, the deduction is warranted only if the complainant could not have obtained the interim earnings if his employment with the respondent had continued. *Nolan v. AC Express*, 92 STA 37 (Sec'y Jan. 17, 1995).

The burden of showing that a complainant failed to make reasonable efforts to mitigate his damages is also on the employer. *Polwesky*, 90 STA 21, citing *Carrero v. N.Y. Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) and *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614 (6th Cir. 1983). While the complainant need only make reasonable efforts to mitigate his damages and is not held to the highest standards of diligence, and doubt is resolved in the complainant's favor, *Moyer v. Yellow Freight System, Inc.* 1989 STA 7 (Sec'y Aug. 21, 1995), the employer may carry the evidentiary burden by showing that jobs for the complainant were available during the back pay period. *Polwesky*, 90 STA 21. The reasonableness of the effort to find substantially equivalent employment should be evaluated in terms of the complainant's background and experience in relation to the relevant job market. *Intermodal Cartage Co., Ltd. v. Reich*, No. 96-3131 (6th Cir. Apr. 24, 1997)(unpublished decision available at 1997 U.S. App. LEXIS 9044) (case below 94 STA 22).

In the present case, at the time of his employment termination on December 11, 2006, and as Mr. O'Neil estimated, Mr. Bess' earnings as a J.B. Hunt driver would average \$40,000 a year. Consequently, I find Mr. Bess' suffered a loss of pay in the annual amount of \$40,000, or about \$770 in weekly wages.

The record contains no evidence of interim earnings.

Regarding mitigation, Mr. Bess provided some evidence of his futile attempts to obtain re-employment through contacting multiple employers since his termination, with one four week exception. The Respondent asserts his effort was insufficient and no back pay award is warranted because Mr. Bess did not mitigate his damages. Mr. O'Neil also testified to his difficulty in finding drivers. However, in addition to considering Mr. Bess' credible testimony about his re-employment efforts, I note the Respondent failed to provide any substantial evidence that suitable jobs were readily available. Mr. O'Neil's generalized representation is insufficient to meet the Respondent's burden of showing that a viable employment market for Mr. Bess' driving skills existed in the local community and job opportunities were available, such that he could have obtained a comparable job elsewhere following his termination.

At the same time, Mr. Bess testified that during four weeks prior to the August 20, 2007 hearing he did not look for re-employment. Since Mr. Bess failed to make any effort to mitigate his damages during that period, he is not entitled to back pay for that four week period, a reduction of \$3,080 (4 x \$770) from his back pay award.

Concerning the value of additional employment benefits, Mr. Bess presented varied estimations which lack sufficient specificity to be included as part of his back pay award. In particular, Mr. Bess claimed an additional amount of 6% in terms of the Respondent's contribution to his 401K plan. However, Mr. Bess was not entitled to employer matching contributions until after working one year as a J.B. Hunt driver, or June 12, 2007. Additionally, the Employer's contribution would be predicated on Mr. Bess' contribution. Mr. Bess did not establish the percentage of his contributions to his 401K plan. As a result, I am unable to ascertain the amount J.B. Hunt would have been required to match after June 12, 2007.

In summary, Mr. Bess' compensatory award of back pay as of January 9, 2008 is determined as follows:

- December 11, 2006 through December 11, 2007	+ \$40,000
- December 12, 2007 through January 9, 2008 (4 weeks x \$770)	+ 3,080
- Lack of mitigation offset July/August 2007 (4 weeks x \$770)	- <u>3,080</u>
	\$40,000

Finally, the back pay award based on an average weekly wage of \$770 continues from January 9, 2008 until Mr. Bess' reinstatement or the date of a bona fide offer of reinstatement.

#### *Mental and Emotional Distress*

As part of compensatory damages, a successful whistleblower complainant may recover for mental and emotional distress suffered as a consequence of the discrimination. *Doyle*, 89 ERA 22 (ARB May 17, 2000). To establish entitlement, the complainant must show that he suffered mental and emotional distress and that the respondent's adverse action caused the distress. *Id.* Consulting a physician, psychologist or similar professional on a regular basis is

not a prerequisite to entitlement. *Smith v. Littenberg*, 92 ERA 52 (Sec'y Sep. 6, 1995), *appeal dismissed*, No. 95070725 (9th Cir. Mar. 27, 1996). At the same time, the complainant must prove the existence and magnitude of subjective injuries with competent evidence. *Lederhaus v. Paschen Midwest Inspection Service, LTD.* 91 ERA 13 (Sec'y Oct. 26, 1992), *citing Carey v. Piphus*, 435 U.S. 247, 264 n. 20 (1978). In determining the amount of compensation for mental and emotional distress, an administrative law judge may review other types of wrongful employment termination cases for assistance. *Ass't Sec'y & Bigham v. Guaranteed Overnight Delivery*, 95 STA 37 (ARB Sept. 5, 1996).

Due to the depression, stress, and marital discord caused by his wrongful employment discharge, Mr. Bess seeks compensatory damages in the amount of \$50,000. The Employer objects to the award of any special damages due to the lack of any evidence.

Contrary to the Employer's lack of evidence assertion, Mr. Bess, his wife, and his father presented credible testimony of his struggle with depression, temper, and marital discord after he lost his job as a J.B. Hunt driver. Besides the obvious stress associated with the sudden loss of employment and reduction of his household income by half, Mr. Bess experienced additional mental and emotion distress because he found himself out of work when his wife was six months pregnant. Additionally, Mr. Bess was hospitalized due to stress on one occasion, which cost \$425.

As directed by *Bigham*, I have reviewed several wrongful employment termination cases. One particular case, *McCouston v. Tennessee Valley Association*, 89 ERA 6 (Sec'y Nov. 13, 1991) contains a fairly detailed discussion on mental and emotional distress compensatory awards ranging from \$10,000 to \$50,000. In that case, after reviewing several cases, the Secretary awarded \$10,000 for mental and emotional distress where the record established the complainant had been embarrassed and humiliated before fellow employees; experienced sleeplessness; suffered severe headaches, depression, stomach problems and aggravation of pre-existing hypertension; and, consequently experienced difficulty in trying to obtain other employment. In another case, *Lederhaus v. Paschen Midwest Inspection Service, LTD.* 91 ERA 13 (Sec'y Oct. 26, 1992), the complainant also received \$10,000 for mental and emotional distress. In that case, for over five months after his discharge, the complainant struggled with depression, contemplated suicide, withdrew from family and friends, and developed significant interpersonal relationship problems. Finally, in *Dutkiewicz v. Clean Harbors Environmental Services, Inc.*, 95 STA 34 (ARB Aug. 8, 1997), the Board upheld an award of \$30,000 for a complainant who as a result of his unlawful termination suffered severe emotional distress associated with a forced relocation, concerns for his family's survival, marital difficulties, and an on-going ulcer.

With these cases in mind, I first observe that although his termination conversation with Mr. O'Neil became heated, the apparent prevalent emotions at the time were Mr. Bess' anger and frustration, rather than humiliation, at being discharged due to his stated safety concern. Next, although Mr. Bess testified about some generalized symptoms and one hospital visit, he provided little information about the depth, duration, and frequency of his mental and emotional distress and the associated physical manifestations. Consequently, I have little specific evidence on how his mental strife and depression may have adversely affect his quality of life and ability to work.

Further, some of the stress associated with his unemployment was alleviated by the generosity of his father who provided housing for Mr. Bess' family and paid some of the bills. Consequently, in comparison to the other cases involving prolonged depression and social dysfunction, Mr. Bess' mental and emotional distress does not rise to the level of seriousness or intensity that warrants a significant compensatory award of \$50,000. Instead, I conclude that an award of \$5,000 for Mr. Bess' mental and emotional distress, plus \$425 for his one hospital trip, is appropriate.

#### *Prejudgment Interest.*

As part of a compensatory damage award, a complainant is entitled to prejudgment interest to compensate for the loss of use of his wages. *Hufstetler v. Roadway Express, Inc.* 85 STA 8 (Sec'y Aug. 21 1986), *overruled on other grounds, Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). In calculating the interest on STAA back pay awards, the rate used is that charged for underpayment of federal taxes. *See Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp. d/b/a Bearden Trucking*, 03 STA 36 (ARB June 30, 2005) and 26 U.S.C. § 6621(a)(2). The interest is compounded quarterly, until the damage award is paid. *Bryant*, slip op. at 10, and *Doyle.*, 89 ERA 22, (ARB May 17, 2000).<sup>9</sup>

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

#### *Attorney Fees*

Due to the successful prosecution of his STAA discrimination claim, Mr. Bess is entitled to recover the associated litigation expenses, including reasonable attorney fees under 29 C.F.R. § 1978.109(a). Accordingly, counsel for Mr. Bess may submit an attorney fee petition within 30 days of receipt of this Recommended Decision and Order. The Respondent will have up to 21 days from receipt of the attorney fee petition to file a response.

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<sup>9</sup>The machinations associated with this calculation are not insignificant and I leave the particulars to parties' counsel. For the first calendar quarter following the termination date, the "applicable federal rate" (AFR) for that calendar quarter must be determined by averaging the Federal short-term rate for each of the three months in that quarter. Next, that average interest rate is arithmetically rounded and 3% is added. Then, that combined interest is then applied to the quarter's principal. To determine the interest owned on the second calendar quarter, after determining the combined interest rate for the second quarter, the first quarter principal, the first quarter interest and second quarter's principal are added and the second quarter compound interest is applied to that sum. Finally, the iterations continue for each quarter until the damage payment is made.

## ORDER

1. Effective IMMEIDATELY upon receipt of this Recommended Decision and Order, the Respondent, J.B. HUNT TRANSPORT, INC., **SHALL REINSTATE** the Complainant, MR. JOHN F. BESS, as a driver at the same pay, and with the same terms, privileges, and conditions of employment that would be applicable if he had remained a driver with the company since December 11, 2006.

2. The Respondent, J.B.HUNT TRANSPORT, INC., **SHALL PAY** the Complainant, MR. JOHN F. BESS, compensatory damages in the amount of \$40,000 for back pay, and continuing from January 9, 2008, at the weekly rate of \$770, until the date of reinstatement or bona fide offer of reinstatement.

3. The Respondent, J.B. HUNT TRANSPORT, INC., **SHALL PAY** the Complainant, MR. JOHN F. BESS, compensatory damages in the amount of \$5,425 for mental and emotional distress and associated medical expense.

4. The Respondent, J.B.HUNT TRANSPORT, INC., **SHALL PAY** the Complainant, MR. JOHN F. BESS, prejudgment interest, compounded quarterly in accordance with 26 U.S.C. § 6621(a)(2).

5. The Complainant, MR. MR. JOHN F. BESS, may file a petition for reasonable attorney fees within 30 days or receipt of this Recommended Decision and Order. The Respondent, J.B. HUNT TRANSPORT, INC., may provide a response to the Complainant's attorney fee petition up to 21 days after receipt of the petition.

**SO ORDERED:**

**A**  
RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: January 7, 2008  
Washington, D.C.

**NOTICE OF REVIEW:** The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109 (c) (2). All further inquiries and correspondence in this matter should be directed to the Board.

**The order directing reinstatement of the complainant is effective immediately upon receipt of the decision by the respondent.** All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).