U.S. Department of Labor

Secretary of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

DATE: May 1, 1996
CASE NO. 95-STA-43

IN THE MATTER OF

GALE COOK,

COMPLAINANT,

v.

GUARDIAN LUBRICANTS, INCORPORATED,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

This case arises under Section 405 (the employee protection provision) of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (West 1994). Before me for review is the Recommended Decision and Order (R. D. and O.) issued on January 12, 1996, by the Administrative Law Judge (ALJ). The ALJ concluded that Complainant Gale Cook (Cook) had failed to establish that Respondent, Guardian Lubricants, Incorporated (Guardian), had violated the STAA by terminating Cook for engaging in protected activity and he therefore recommended that the complaint be dismissed. Following a thorough review of the record, including the findings of the ALJ, I disagree with the recommendation that the complaint be dismissed.

The facts in this case establish that Guardian was a joint employer with Conex Freight Systems (Conex) and Seattle Freight, transport companies to which Cook was assigned while employed by Guardian. The record also establishes that Guardian knowingly participated[1/] in a continuing violation of the STAA, with Conex and Seattle Freight, which culminated in Guardian's termination of Cook. The evidence of record thus establishes that Guardian's

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[1/] Under the STAA, the Secretary has held that a joint employer may be held vicariously liable, even in the absence of knowing participation, for the discriminatory acts of another. *Palmer v. Western Truck Manpower, Inc.,* Case No. 85-STA-16, Sec. Dec. on Remand, Mar. 13, 1992, slip op. at 3-6. In view of the finding that Guardian knowingly participated in the discriminatory acts of joint employers Conex and Seattle Freight, I need not rely on a theory of strict liability in this case. *See Western Truck Manpower, Inc. v. United States Dep't of Labor,* 12 F.3d 151, 153-54 (9th Cir. 1993).

termination of Cook was motivated, at least in part, by retaliatory animus against Cook for engaging in protected activity. Further, I conclude that Guardian has not demonstrated that it would have terminated Cook in the absence of his protected activity. Guardian is therefore liable not only for damages resulting from Cook's termination but also for the loss of income that Cook suffered during the October-November, 1994 period that he was assigned to work with Seattle Freight. I therefore remand the case to the ALJ for a hearing regarding the damages due Cook.

I. Pertinent findings of fact

If the ALJ's findings of fact are supported by substantial evidence on the record considered as a whole, they are conclusive. 29 C.F.R. § 1978.109(c)(3)(1995). In the instant case, the ALJ did not address evidence that is pertinent to the question of retaliatory intent as well as the joint employer, continuing violation and knowing participation issues.[2/] Consequently, I find it necessary to render findings of fact as required for the resolution of those dispositive issues and to reject those factual findings that are not supported by the record, considered in its entirety.[3/] *See Moyer v. Yellow Freight System, Inc.,* Case No. 89-STA-07, Sec. Dec., Oct. 21, 1993, slip op. at 12-13; *see generally Bechtel Const. Co. v. Secretary of Labor,* 50 F.3d 926 (11th Cir. 1995)(affirming Secretary's reversal of ALJ's findings in case arising under the employee protection provision of the Energy Reorganization Act, 42 U.S.C. § 5851 (1988)); *Simon v. Simmons Foods, Inc.,* 49 F.3d 386 (8th Cir. 1995)(affirming Secretary's reversal of ALJ's findings in case arising under the employee protection provisions of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1367(a) (1988), and the Solid Waste Disposal Act, 42 U.S.C. § 6971(a) (1988)). In rendering the necessary factual findings, I have engaged in a thorough review of the evidence of record.

As basis for the resolution of any pertinent conflicts presented in the testimony, *see NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983); *Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981); *Dobrowlosky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979), I note that the testimony of Carol Guddat (Guddat), Guardian's secretary/treasurer,[4/] is riddled with inconsistencies, particularly with regard to his business relationships with Conex and Seattle

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[2/] Inasmuch as Cook's May 6, 1995 complaint alleged a continuing violation resulting from protected activity engaged in at Conex, and evidence pertinent to activity protected under both the work refusal clause and the complaint clause was adduced at hearing, it is unnecessary to remand this case for further development of the evidence. *Cf. Caimano v. Brink's, Inc.,* Case No. 95-STA-4, Sec. Dec., Jan. 26, 1996, slip op. at 9 n.5 (distinguishing *Yellow Freight System, Inc. v. Martin [Moyer],* 954 F.2d 353 (6th Cir. 1992) in which the court remanded the case for adjudication under the complaint clause).

[3/] I note that the illumination of these issues was impeded by the *pro se* status of the parties, which added considerably to the burden of the ALJ in conducting the hearing in this case.

[4/] Although Guddat testified that his wife, Joyce Guddat, was the president of the family business, T. 93, Mrs. Guddat did not appear at hearing and the record clearly demonstrates that Guddat was the Guardian manager. *See, e.g.,* T. 3-4 (J. Guddat).

Freight. In addition, Guddat was extremely evasive about the nature of Cook's protected activity regarding overweight shipments at Conex. Guddat's reply to the ALJ in the following exchange provides an example:

> Q. To your knowledge, did Mr. Cook ever refuse to accept a load from Conex or any other contract carrier or common carrier because he felt a particular load was illegal?
>
> A. No. I didn't know about this until about a week after it happened.
>
> Q. When you say "this," what are you talking about?
>
> A. Well when he said he was let go. In other words, we didn't know that he --
>
> Q. You mean when he was let go by Conex?
>
> A. Yes, right.

T. 106.[5/] Similarly confused was Guddat's testimony regarding what he had been told about Cook's raising of complaints to the Conex manager, Tony Stafford (Stafford), on October 14, 1994. The ALJ asked:

> Q. Do you know what it was that Mr. Cook allegedly did to --
>
> A. No, I don't.
>
> Q. -- get him kicked out?
>
> A. And it's the same thing with Conex.....Now I talked to Tony this morning again about it, and he said that Gale was not let go. He just told him he couldn't use his services any more, and that there was no -- there wasn't even a discussion about which load he was going to haul that might have been overloaded. He just said he was going to haul -- he wanted him to haul some containers for them and Gale said "I'm not going to haul them anymore." So there wasn't even a discussion about this container is overloaded, "I'm just not going to haul it anymore."

T. 137-38. Later in the hearing, Guddat testified as follows:

> Q. When you first heard that Conex was refusing to allow Mr. Cook to pick up any more loads, what was it that Tony told you then, if --
>
> A. He --

[5/] The following abbreviations are used herein for references to the record: Hearing Transcript, T.; Complainant's Exhibit, CX; Respondent's Exhibit, RX. Both Jeff Guddat and Carol Guddat testified at hearing. References to the testimony of Jeff Guddat are designated "J. Guddat".

> Q. -- you recall. I know you testified at one point about this, but if you could kind of reiterate it and maybe expand upon what he said?
>
> A. Yes. What he said was that he had called him in to haul some containers out of their terminal and Mr. Cook said that he wasn't going to haul any more of those overloaded containers. Or maybe it wasn't overloaded, maybe -- I think he said just containers, period. And Tony had said that what did he mean -- you know, he didn't know what the containers weighed. He just said he wasn't going to haul them anymore from their location there at their office. . . . .

T. 142-43. In addition, Guddat's son, acting on Guddat's behalf in his absence from the hearing initially scheduled in this case, T. 12, submitted a letter signed by Guddat and addressed to the ALJ which stated that Cook had called Guardian and "stated that he was quitting," RX 1. Guddat's son reiterated that point at that hearing. T. 13. In contrast, Guddat acknowledged at the second hearing, where both he and Cook were in attendance, that Cook did not indicate that he quit. T. 121.

Furthermore, Guddat's testimony suggests that his memory of the events here at issue is faulty. Guddat testified in a rather detailed manner and without equivocation that Cook delivered the truck keys and telephone to Guddat in person following his termination by Guddat. T. 122-23. Following Cook's testimony that he mailed the truck keys and telephone to Guddat, T. 159, Guddat recalled that the keys and telephone had indeed been mailed by Cook, T. 180-83.

In contrast, Cook's testimony was consistent on all pertinent points throughout two hearings and, although he stated that he could not recall some details of his last conversations with Guddat prior to his termination, the content of his testimony was otherwise quite direct and straightforward. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Dorf v. Bowen*, 794 F.2d 896, 901-02 (3d Cir. 1986); *Kent v. Schweiker*, 710 F.2d 110, 116 (3d Cir. 1983); *Cutting, Inc.,* 701 F.2d at 666; *Ertel v. Giroux Brothers Transp., Inc.,* Case No. 88-STA-24, Sec. Dec., Feb. 16, 1989, slip op. at 12 and n.7 (differentiating between demeanor based credibility determinations and those based on the substance of the testimony). The foregoing factors have been taken into consideration in rendering any necessary findings of fact. As background for the analysis to follow, I provide the following factual framework.

Cook worked under a contract agreement with Guardian from March 13, 1994 until mid-November, 1994.[6/] T. 14, 51 (Cook); RX 2. Pursuant to the agreement with Guardian, Cook was leased a truck, which was to be maintained by Guardian and operated by Cook to transport freight or equipment as directed by freight companies with which Guardian also had lease agreements, which were located primarily around the port of Seattle. T. 15-20 (Cook); *see* R. D. and O. at 2-3. From the beginning of his employment with Guardian until October 15, 1994,

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[6/] In view of the conclusion, discussed *infra*, that the events immediately preceding Guddat's termination of Cook did not play a determinative role in Guddat's decision, it is unnecessary to determine the exact day, Monday, November 14, or Tuesday, November 15, 1994, that Cook was terminated. *See* T. 51-2, 79-80, 190; R. D. and O. at 6.

Cook regularly worked with Conex, a freight company that dispatched shipments from various pick-up sites serving the Seattle port area. T. 18-19, 28-33 (Cook), 143-45 (Guddat); R. D. and O. at 3. Cook also worked some weekends with other companies having contracts with Guardian. T. 19, 174-76 (Cook).

While working with Conex, Cook became concerned about the high incidence of shipments that were over applicable weight limits that he was being assigned, particularly at the Conex terminal in Tukwila. T. 34-39, 55-56 (Cook); *see* R. D. and O. at 3. On various occasions, Cook relayed his concerns to Guddat, who responded by advising Cook that the decision of whether to haul a load or reject it was Cook's. T. 25 (Cook), 101, 141 (Guddat); *see* R. D. and O. at 3. Prior to October 14, 1994, Cook did not address his concerns to Conex personnel, but opted to avoid shipments dispatched from the Tukwila terminal, and sought assignments from Conex that were dispatched from the Burlington Northern railroad yard. T. 31-33; *see* R. D. and O. at 3.

On October 13, 1994, Cook was summoned to carry refrigerated containers for Conex from their Tukwila terminal. T. 34-40 (Cook); R. D. and O. at 3. When those containers were weighed upon delivery at the Seattle port, Cook's concern that they were overweight was confirmed. T. 34-39 (Cook); R. D. and O. at 3. The next day, Stafford summoned Cook to the Tukwila terminal to transport a similar refrigerated container. T. 34-37 (Cook); R. D. and O. at 3. When Cook advised Stafford regarding the overweight shipments that he had transported the previous day and expressed his objection to hauling overweight shipments, Stafford told Cook that he was fired. T. 37-40, 55-56 (Cook); R. D. and O. at 3-4. Cook then left the Conex premises. T. 39 (Cook).

About a week later, not having heard any further word from Stafford, Cook telephoned Guddat and told him that he had been fired for refusing to transport overweight shipments at Conex. T. 39-40, 150-51 (Cook); *see* T. 107 (Guddat); R. D. and O. at 4. Cook then sought assignments with Seattle Freight. T. 20, 40, 152 (Cook), 112 (Guddat); R. D. and O. at 4. Cook's request to haul shipments originating at the Burlington Northern rail yard near the Seattle port was denied by the Seattle Freight manager, however, and Cook was assigned empty equipment to haul and was no longer utilized for weekend work. T. 40-42, 46-47 (Cook); *see* T. 153-54 (Cook); R. D. and O. at 4.

On the evening of Thursday, November 10, Cook telephoned Seattle Freight to advise that he would not be in the next day, because of illness. T. 43-44, 73-74 (Cook); *see* R. D. and O. at 5. At some point around that date, Cook telephoned Guddat to discuss with him paychecks for his work with Seattle Freight that Cook believed to be overdue and told Guddat that he could not be expected to work without being paid.[7/] T. 73-74, 152-62 (Cook). Cook did not, however, indicate that he wished to terminate his employment with Guardian. T. 156 (Cook); *see* T. 121 (Guddat); R. D. and O. at 5-6. Cook received a paycheck from Guddat over the weekend of November 11, T. 159-60 (Cook); *see* T. 116-18 (Guddat), and on the morning of Monday,

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[7/] The reasons for this delay in payment by Seattle Freight were explained by Guddat in his hearing testimony. T. 186-88.

November 14 or Tuesday, November 15, Cook arrived at Harbor Island to pick up the truck and begin his work for the day, T. 158-69, 190-91; *see* T. 131-32 (Guddat). Finding the truck missing, Cook telephoned Guddat who had picked up the truck and demanded that Cook return the keys to him. T. 20, 158, 168-70, 190-91 (Cook). Within a few days, Guddat received the truck keys and cellular telephone by mail. T. 159 (Cook), 180-83 (Guddat).

II. Pertinent legal standards and analysis

To establish a violation under the employee protection provision of the STAA, Cook must establish that adverse action was taken against him because he engaged in activity protected under either the complaint clause, 49 U.S.C. § 31105(a)(1)(A), or the work refusal clause, 49 U.S.C. § 31105(a)(1)(B). *See, e.g., Yellow Freight System, Inc. v. Reich,* 27 F.3d 1133 (6th Cir. 1994), *aff'g Smith v. Yellow Freight System, Inc.,* Case No. 91-STA-45, Sec. Dec., Mar. 10, 1993.

The ALJ concluded that Guddat had terminated Cook based solely on Guddat's concern that Cook was refusing to haul shipments for Seattle Freight until he received payments that Cook believed were overdue from Guddat. R. D. and O. at 10-12. In so doing, the ALJ credited the general basis advanced by Guddat, *i.e.,* that it was too costly for Guardian to maintain the truck driven by Cook if the truck were not kept "busy" so as to maximize Guardian's revenues from Cook's hauling work. R. D. and O. at 11-12. The record indicates, however, that Cook's failure to keep the truck adequately "busy" was directly attributable to the repercussions of Cook's raising concerns about the high incidence of overweight loads at Conex, which gave rise to his blacklisting by Stafford and the assignment of less profitable shipments to Cook at Seattle Freight. Furthermore, as noted *supra*, the ALJ failed to consider the issue of Guddat's knowing participation in the retaliatory actions of Seattle Freight and Conex, as joint employers.

A. Employee and joint employers

The ALJ properly concluded that Cook, although working under an independent contractor agreement entered into with Guardian, RX 2, was an employee as defined under the STAA. R. D. and O. at 7; *see* 49 U.S.C.A. § 31101(2)(West 1994)*;* 29 C.F.R. § 1978.101(d)(1995).[8/] The ALJ failed to recognize, however, the significance of the control

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[8/] The STAA defines "employee" as follows:

a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who--

(A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and

(B) is not an employee of the United States Government, a State or a political subdivision of a State acting in the course of employment.

(continued...)

shared with Guardian by Conex and, alternatively, Seattle Freight, as freight companies to which Cook was assigned. In cases involving similar employment arrangements, *i.e.,* the leasing of drivers and trucks to a separate business entity that shared employment responsibilities with the respondent employer, the two entities have been deemed to be joint employers, for the purpose of determining liability under the STAA. *Settle v. BWD Trucking Co., Inc., and Red Arrow Corp.,* Case No. 92-STA-16, Sec. Dec., May 18, 1994, slip op. at 4 n.2; *White v. "Q" Trucking Co.,* Case No. 93-STA-28, Sec. Ord., Mar. 7, 1994, slip op. at 3 n.1; *Palmer v. Western Truck Manpower, Inc.*, Case No. 85-STA-16, Sec. Dec. on Remand, Mar. 13, 1992, slip op. at 2-3; *see* 42 U.S.C.A. § 31101(3) (West 1994)(definition of "employer").[9/]

In this case, Cook's contract was with Guardian, who provided and maintained the truck tractor and paid Cook from revenues received from the assigned freight company, RX 2; T. 15, 75 (Cook), 99, 111, 118-19 (Guddat), but Conex and Seattle Freight each exercised the requisite degree of control over Cook, through the day-to-day assignment of work, *see, e.g.,* T. 21, 27-43 (Cook), 106-07, 126 (Guddat), and the authority to reject Cook's services, T. 38-39 (Cook), 138 (Guddat). *See Carrier Corp. v. NLRB,* 768 F.2d 778, 781 (6th Cir. 1985); *Palmer,* slip op. at 4-5 (citing *Tanforan Park Food Purveyors Council v. NLRB*, 656 F.2d 1358, 1360 (9th Cir. 1981), and *Sun-Maid Growers of Calif. v. NLRB,* 618 F.2d 56, 59 (9th Cir. 1980)).[10/] The record also establishes an interrelationship between the operations of Guardian and each of these two transport companies, a significant factor in determining that a joint employer relationship exists for purposes of adjudication of a STAA complaint, *Palmer*, slip op. at 4-5. Guardian was engaged in the business of leasing trucks to drivers and leasing drivers and trucks to freight companies for use in hauling freight, whereas both Conex and Seattle Freight were engaged in the business of transporting freight. *See, e.g.,* T. 15-17 (Cook), 71 (J. Guddat), 95-97,

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[8/] (...continued)
42 U.S.C.A. § 31101(2) (West 1994).

[9/] As in *Palmer*, only one of the joint employers has been named as respondent in this complaint. *Cf. White,* slip op. at 1-2 (addressing complainant's motion to join additional joint employers).

[10/] As this case involves an independent contractor arrangement, a narrower range of employment responsibilities are involved than those discussed in *Palmer.* An agreement entitled "Acknowledgement of Independent Contractor" between Guardian and Cook provided that Guardian would not deduct any taxes from payments to Cook and Cook would not be entitled to any fringe benefits. RX 2.

112-14, 138 (Guddat); RX 2.[11/] I therefore conclude that Guardian and Seattle Freight, and Guardian and Conex, respectively, were joint employers of Cook for purposes of this adjudication.

B. Protected activity under the complaint clause

The record indicates that all three employers were aware of Cook's raising of complaints about overweight shipments. As the ALJ found, Cook had raised safety concerns about overweight shipments to Guddat beginning in the summer of 1994 and continuing until his reassignment to Seattle Freight in late October 1994.[12/] T. 24-6, 33, 193 (Cook), T. 101-02 (Guddat); *see* R. D. and O. at 3, 8-9. In addition, the record demonstrates that Cook had raised complaints about overweight loads directly to Stafford at Conex, on October 14, 1994.

Although the ALJ properly concluded that the work refusal that Cook engaged in on October 14 would not be protected under the STAA,[13/] Cook's uncontradicted testimony indicates that, immediately prior to declining to transport a load of freight that he believed to be overweight on October 14, 1994, he complained to Stafford about similar refrigerated container

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[11/] Although he repeatedly acknowledged that he entered into lease agreements with these companies, *see, e.g.,* T. 94-96, 113-14, 125-26, 180-82, 192, Guddat attempted throughout the hearing to minimize the extent of Guardian's business arrangements with Conex and Seattle Freight, *see, e.g.,* T. 101, 137, and he did not offer copies of the lease agreements with these companies into evidence.

[12/] Cook had also raised concerns to Guddat regarding the mechanical condition of the truck he had leased from Guardian as well as the hours of service being requested by Conex. T. 24-26, 49-50 (Cook), 101-02, 105 (Guddat); *see* R. D. and O. at 8-9. Although these safety concerns may have contributed to the retaliatory animus demonstrated on this record, the following analysis focuses on the evidence of record concerning retaliation for Cook's complaints regarding the high incidence of overweight shipments assigned by Conex, which clearly contributed to such animus.

[13/] The evidence does not establish, as is required for work refusal protection under the STAA, that such refusal was based on *knowledge* that the operation of the truck would violate a Federal safety standard (49 U.S.C. § 31105(a)(1)(B)(i)) or an allegation that Cook was reasonably apprehensive that he or the public would be seriously injured due to an unsafe condition if he had accepted the load assigned by Stafford (49 U.S.C. § 31105(a)(1)(B)(ii)). R. D. and O. at 9 n.8; *see* T. 34-39 (Cook); *cf. Cook v. Kidimula International, Inc.,* Case No. 95-STA-44, Sec. Dec., Mar. 12, 1996 (dismissing complaint because work refusal not covered under actual violation clause, no allegation regarding reasonable apprehension clause made, and no covered complaints made to employer); *see generally Hadley v. Southeast Coop. Service Co.,* Case No. 86-STA-24, Sec. Dec., June 28, 1991, slip op. at 2-4 and cases cited therein (comparing differing requirements for work refusal protection under the actual violation or "when" clause, 49 U.S.C. § 31105(a)(1)(B)(i), and the reasonable apprehension or "because" clause, 49 U.S.C. § 31105(a)(1)(B)(ii)).

shipments, which Cook had transported the previous day and which had been weighed as overweight at the destination. T. 34-39, 55-56 (Cook); R. D. and O. at 3; *see* T. 143-45 (Guddat, testifying that Stafford told Guddat that he expected Cook to haul all loads assigned by Conex or none at all); *but see* T. 32-33 (Cook, testifying regarding previous occasions when he had complained to Guddat rather than Conex personnel about overweight loads). Such complaints clearly constitute a protected activity under Section 405 of the STAA.[14/] *See Yellow Freight System, Inc. v. Martin,* 954 F.2d 353, 356-57 (6th Cir. 1992); *see generally Brock v. Roadway Express, Inc.,* 481 U.S. 252 (1987)(addressing purpose of employee protection provision of the STAA); *see also* R. D. and O. at 8-9 (properly concluding that complaints regarding overweight shipments made to Guddat constitute protected activity).

Furthermore, although Cook apparently did not raise safety concerns to or otherwise engage in protected activity while assigned to Seattle Freight, T. 43 (Cook), 102 (Guddat), the record establishes that the Seattle Freight manager was aware of Cook's raising of concerns about overweight shipments at Conex, T. 40-41 (Cook).

C. Continuing violation

The ALJ properly noted that the STAA provides a 180 day period in which a complainant may challenge a particular adverse action.[15/] R. D. and O. at 7 n.5; *see* 49 U.S.C.A. § 31105(b)(1) (West 1994); 29 C.F.R. § 1978.103 (1995); *see also* R. D. and O. at 3. Regulations promulgated under Section 405 of the STAA, however, provide that discrimination "in the nature of a continuing violation" will justify tolling the statutory period. 29 C.F.R. § 1978.103(d)(3) (1995); *see Ellis v. Ray A. Schoppert Trucking*, Case No. 92-STA-28, Sec. Dec., Sept. 23, 1992, slip op. at 2-5. Although Cook has failed to establish that his October 14, 1994 work refusal was protected and thus that the ensuing termination action by Stafford at Conex was in violation of the STAA, *see* n.13 *supra,* the record does establish that, after October 14, when

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[14/] Cook testified that his complaints about the high incidence of overweight shipments assigned by Conex were based on firsthand experience. Cook testified, without contradiction, that he had seen "interchange" paperwork, which was prepared attendant to the transfer of container shipments from the dock to the ships in port, that indicated that certain shipments were several thousand pounds over the 80,000 pound limit set by the Department of Transportation for the truck driven by Cook. T. 32 (Cook, estimating that 75% of Conex shipments that he carried from the Conex Tukwila terminal to the port were overweight, based on the interchange paperwork for each shipment); *see* T. 36 (Cook), 66 (J. Guddat testifying regarding the weight limit for Guardian trucks); Cook's letter of Sept. 7, 1995 to Department of Labor Regional Administrator Richard S. Terrill (referring to interchange paperwork).

[15/] The ALJ properly noted that the October 14, 1994 action taken by Conex to terminate its business relationship with Cook falls outside the 180 day statutory period for the filing of complaints under the STAA and was not timely complained of by Cook. R. D. and O. at 7 n.5; *see* 49 U.S.C.A. § 31105(b) (West 1994); *see also* R. D. and O. at 3. Moreover, as noted *supra*, the record does not establish that Cook's work refusal on October 14 qualified for protection under the STAA.

Cook left his assignment with Conex, he was given discriminatory assignments in retaliation for his raising complaints about overweight shipments at Conex.

Furthermore, as discussed *infra*, these less profitable assignments directly contributed to Guardian's termination of Cook. A continuing violation of the STAA thus occurred, beginning with action taken by Stafford after his termination of Cook on October 14, 1994, and culminating in the termination of Cook by Guddat approximately one month later. Inasmuch as this series of related discriminatory actions culminated in Guddat's termination of Cook, which was timely complained of, the series of events is properly within the ambit of this complaint.[16/] *See Elliott v. Sperry Rand Corp.,* 79 F.R.D. 580, 585 (D.Minn. 1978), *cited in Carter v. Electrical Dist. No. 2 of Pinal Cty.,* Case No. 92-TSC-11, Sec. Dec., July 26, 1995, slip op. at 14; *cf. Varnadore v. Oak Ridge National Laboratory,* Case Nos. 92-CAA-2, 92-CAA-5, 93-CAA-1, Sec. Dec., Feb. 5, 1996, slip op. at 73 (holding that ALJ erred in failing to determine whether any of a series of allegedly retaliatory acts occurred within the time period provided under environmental whistleblower statutes there at issue).

D. Retaliatory intent -- Conex and Seattle Freight

The record indicates that Stafford was clearly hostile to Cook's raising of concerns about overweight shipments. Cook testified that when he expressed his concern to Stafford about overweight refrigerated containers on October 14, Stafford replied, "I don't care," and directed Cook to transport the shipment that Cook suspected to be overweight "anyway." T. 36-39*; see* T. 55. Stafford's response to Cook's concern suggests a disregard for applicable Federal highway weight limits; such disregard is consistent with statements from Guddat's testimony concerning the Conex operation.

For example, Guddat testified that Conex did dispatch overweight shipments and that Stafford routinely advised drivers that Conex would reimburse them for any fines levied by the Department of Transportation for carrying overweight loads. T. 103-04; *see* T. 145. Guddat also testified that Conex has "to have people that are willing to do everything that they have to do," T. 143, and that Stafford did not want Cook working with Conex if "he didn't want to haul any" of the shipments assigned, T. 144.

When possible, Cook had worked at the Northern railway yard near the Seattle port while assigned to Conex, because it appeared that fewer overloaded shipments were assigned there than

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[16/] The ALJ found that Cook filed his complaint on May 6, 1995, based on a letter that Cook wrote to the Occupational Safety and Health Administration following receipt of a reply to a April 27, 1995 letter sent by Cook to the Department of Transportation. R. D. and O. at 6-7; *see* ALJ Exhibit 1; T. 57-60. In view of the conclusion that Cook's termination by Guardian was the culmination of a continuing violation and that the 180 day filing period is thus tolled pursuant to 29 C.F.R. § 1978.102(d)(3), I need not address the question of whether Cook's letter of April 27, 1995 constituted a filing of his complaint in the wrong forum, *see Ellis,* slip op. at 4; *but see Lewis v. McKenzie Tank Lines, Inc.*, Case No. 92-STA-20, Sec. Dec., Nov. 24, 1992 (construing 29 C.F.R. § 1978.102(d)(3)).

at other Conex pick-up sites. T. 27-33 (Cook). Following his move to work with Seattle Freight in late October, 1994, Cook asked to be assigned to the Burlington Northern railway yard, but the Seattle Freight manager denied his request, stating, "No, you can't work the rail because of Tony [Stafford]." T. 41-42. Cook testified that Stafford had worked for the railroad company for several years and was "a big wheel" in the freight industry serving the Seattle port. T. 41-43, 60-61. Cook was then assigned by Seattle Freight to transport empty chassis and containers, which was much less profitable than transporting full loads of freight. T. 41-42, 174 (Cook); *see* T. 141-45 (Guddat). This evidence clearly supports a finding that Cook was the target of blacklisting by Stafford and that such blacklisting resulted in discriminatory assignments by Seattle Freight. *See Earwood v. Dart Container Corp.,* Case No. 93-STA-0016, Sec. Dec., Dec. 7, 1994, slip op. at 2-3, and cases cited therein. Guddat's testimony suggested that the difficulty between Stafford and Cook arose from a personality conflict, T. 138-39, but he did not provide any factual support for that conclusion and nothing in this record contradicts the evidence establishing that Stafford was hostile to Cook as the result of his protected activity.

The type of shipments, *i.e.,* empty equipment, that Cook was assigned by Seattle Freight makes clear the connection between Cook's assignments with that company and retaliatory animus emanating from Cook's October 14 exchange with Stafford about overweight shipments. *See generally Esmark, Inc. v. NLRB,* 887 F.2d 739, 747-48 (7th Cir. 1989) (discussing concept of "inherently destructive" conduct, which carries with it unavoidable consequences that the employer must have foreseen and must have intended, as enunciated in *National Labor Relations Board v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)). The assigning of empty container shipments to Cook obviated the need for any discussions about overweight shipments. *See* T. 40-41 (Cook, testifying that he did not recall any problems with overweight shipments arising at Seattle Freight, but also testifying that he was hauling empty equipment).

These assignments by Seattle Freight had an adverse effect on Cook because such assignments were much less profitable than shipments of freight. T. 174-76 (Cook, testifying that his income dropped by approximately one-half while working only with Seattle Freight).[17/] Cook also testified that his working conditions with Guardian seemed to deteriorate after the October 14 exchange with Stafford, T. 170-71, that he had kept the truck "busy" until he was terminated from Conex, T. 163, 174-75, and that he thought that Guddat wanted him "to quit after leaving Conex, because of the problems that we were having there with the illegal loads," T. 167-68; *see* T. 50-51, 156-57 (Cook), and especially because "Conex was a big customer," T. 51. Furthermore, Cook testified that he ultimately filed a complaint, months after he left Guardian, because he felt that he was continuing to be discriminated against because of his complaints about overweight shipments, and he decided "either I file a complaint or [I] stop driving on the waterfront." T. 56-57; *see* T. 60-61 (Cook), 88-89 (J. Guddat). As discussed in the following analysis, the record supports Cook's allegation that the October 14 exchange with Stafford, in which Cook raised his concerns regarding overweight shipments, contributed to Guddat's termination of Cook approximately one month later.

[17/] Some portion of this decrease in income was attributable to the weekend hauling work that Cook had engaged in at the Seattle port prior to being terminated by Conex. T. 174-76.

E. Retaliatory intent -- Guardian

The ALJ concluded that Cook failed to establish that Guddat's termination of Cook was motivated, even in part, by Cook's protected activity. R. D. and O. at 8-10; *see Yellow Freight System, Inc.,* 27 F.3d at 1138. The ALJ properly noted that Cook had raised safety concerns about overweight shipments to Guddat, R. D. and O. at 3, 8-9; *see* T. 24-5, 33, 193 (Cook), T. 101-02 (Guddat), and that Guddat was aware that Cook's complaints about overweight shipments from Conex contributed to Stafford's termination of Conex' business relationship with Cook on October 14, 1994, R. D. and O. at 4; *see* T. 106-07, 145 (Guddat). The ALJ erroneously concluded, however, that the evidence did not indicate that "Guddat was particularly hostile" to Cook's complaints about overweight shipments, R. D. and O. at 11. That conclusion does not reflect proper consideration of Guddat's testimony that demonstrates a disregard for applicable weight limits and an emphasis on profits at the expense of safety.

To summarize, Guddat's testimony indicates that he had no interest in correcting the high incidence of overweight Conex shipments complained of by Cook and felt no obligation to assist Cook in pursuing that issue with Conex. Furthermore, Guddat's testimony, as a whole, demonstrates that he was hostile to Cook's raising of concerns about overweight shipments and terminated Cook, at least in part, because his protected activity on October 14, 1994 had ultimately resulted in a significant decrease in Guardian's revenues. Finally, the inconsistent and evasive substance of Guddat's testimony evinces an intent to obfuscate the facts pertinent to this complaint, and thus further supports a finding of retaliatory intent. *See generally St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742, 2749, 125 L.Ed. 2d 407, 418-19 (1993)(addressing role of defendant's mendacity in drawing inference of retaliatory intent).

Cook testified that he had expected Guddat to respond to his complaints about the high incidence of overweight loads assigned by Conex by contacting Conex in the interest of resolving the issue. T. 192-93; *see* T. 31. Cook testified regarding the provision in his contract with Guardian requiring that he operate the truck in a safe manner and in compliance with applicable laws, T. 26, 55, 63; *see* RX 2, repeatedly urged that Guddat was remiss for failing to address his concern to Conex, T. 24-27, 88-89, 140-41, 170-71, 192-93, and questioned Guddat at hearing regarding why Guddat did not address Cook's concerns to Conex, T. 134-136. Cook testified that Guddat's response when Cook discussed concerns about overweight loads with Guddat was "Turn them down, haul 'em, or quit." T. 25. Guddat characterized his response to Cook as a reminder that, pursuant to the terms of his contract agreement, the decision regarding whether to refuse to haul a load based on a concern that it was overweight was Cook's. T. 101, 141. The record, taken as a whole, compels the conclusion that Guddat's response was tantamount to a warning to Cook that he could not expect any support from Guddat if he complained about the high incidence of overweight shipments at Conex and that Cook would be acting at the risk of any adverse consequences that might result.

Further support for this conclusion is provided by Guddat's testimony concerning the hauling of overweight shipments by trucks leased to freight companies by Guardian. Although Guddat asserted that Guardian did "not condone doing anything illegal," T. 101, he nonetheless defended his failure to address Conex management regarding the overweight issue as follows,

"Because as far as we were concerned, we were providing the truck to Conex to do whatever they wanted done and it was between the drivers and Conex to work things out." T. 136. Furthermore, at hearing, Guddat was critical of Cook's attempt to avoid the overweight issue by avoiding what Cook believed to be the source of most of the overweight shipments, the Conex Tukwila terminal; Guddat testified that Conex has "to have people that are willing to do everything that they have to do." T. 143; *see* T. 27-29; *but see* T. 33 (Cook, testifying that Guddat did not interfere with his working "most of the time" at the Seattle port rather than at the Tukwila terminal). Similarly, Guddat testified approvingly regarding Stafford's announced policy of reimbursing drivers who were fined by the Department of Transportation for carrying overweight loads. T. 103-04.[18/] Guddat also emphasized that "[A]ll of the different freight companies have a problem like that . . . ." T. 103-04. The clear import of this testimony is that Guddat viewed the hauling of overweight shipments to be a routine occurrence in the ordinary course of business, not a proper subject for complaint by drivers like Cook.

At hearing, Guddat attempted to justify his failure to address Cook's complaints to Conex by down-playing the extent of Guardian's business relationships with Conex and Seattle Freight. Guddat sought to distance Guardian from Conex and other freight companies to which Cook had been assigned, stating, "[W]e have no contact with these people that he's working for," T. 101, and "I'm not the party that's contracting with them," T. 137. These statements are inconsistent with several other statements made by Guddat, and Cook, at hearing concerning contracts entered into between Guardian and the freight companies to which Cook was assigned. *See* n.11 *supra.*

Guddat was also evasive concerning the issue of whether Conex played a role in some containers being overloaded. In response to the ALJ's question regarding whether Conex loaded certain containers that were assigned to Cook for transport, Guddat testified, "Probably. Could be. I don't know whether these containers were containers that they loaded or not. That really is not my business to go in and tell them how to run their business. . . ." T. 142. These statements

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[18/] Guddat was nonetheless anxious to defend Conex in regard to overweight shipments, as indicated by the following exchange with the ALJ:

Q. Well have any other drivers complained to you about Conex giving them overloaded containers?

A. No.

Q. Do you know if Conex has a particular reputation in this area as --

A. No, I don't think so.

Q. -- overloading? You don't think so or you don't know?

A. I don't -- no, I -- well I've never heard of it. I mean, like I say, all of the different freight companies have a problem like that . . . .

clearly demonstrate Guddat's complete lack of interest in pursuing with Conex the question of correcting the high incidence of overweight shipments being assigned by Conex.

Similarly non-responsive was Guddat's testimony indicating his view that a truck driver could not legitimately question whether a shipment was overweight without first weighing it.[19/] Specifically, Guddat testified that if Cook had taken an overweight shipment to be weighed and then returned it to a freight company, refusing to transport it because overweight, Guardian would "have a legal right" to intervene on Cook's behalf and would have done so. T. 142; *see* T. 141, 145. Guddat also stated that Cook would have been "perfectly" within his rights to refuse to haul an assigned shipment if "he knew" it was overweight. T. 102-03. Guddat pointed out, however, that the drivers "really don't know what [the shipment] weighs unless" it is taken to be weighed.[20/] *Id.*

Guddat appears to be relying on the distinction between a protected work refusal and an unprotected work refusal, *see* nn. 13, 15 *supra*, which is not at issue here. Guddat's statements do not address the issue of complaints concerning the high incidence of overweight containers assigned by Conex, which is the protected activity that is at issue in this case. Further, Guddat's testimony on this point disregards the fact that Cook could, and did, properly raise concerns about overweight shipments based on his experience with Conex shipments that were in fact confirmed to have been overweight. T. 34-39 (Cook); *see* n.14 *supra*. Finally, Guddat's explanation wholly sidesteps the issue of why he did not consider Guardian to be obligated, if not under the STAA then pursuant to contract, to act on Cook's complaints in the interest of ensuring the legal operation of the truck leased to Conex.[21/]

In sum, Guddat has failed to refute the evidence that establishes that he was hostile to Cook's complaints by providing an independent basis for his failure to discuss the overweight shipments issue with Conex management. Cook testified that he thought that Guddat was more concerned about "keeping the revenues coming in" than compliance with weight limits.

[19/] Guddat's statement that it was Cook's decision regarding "whether to legalize the load or haul it or not haul it or whatever," T. 101, suggests that a driver could *question* whether an assigned shipment was overweight and seek corrective action rather than simply refusing to haul the shipment, which action would put a driver at risk of acting outside the protection of the STAA, *see* n.13 *supra.* The conflict in Guddat's statements on this point represents yet another inconsistency in his testimony.

[20/] Guddat submitted a magazine article concerning the need for a weigh station at the site where trucks picked up container shipments, so that the weight of the shipment could be ascertained prior to acceptance by the driver. T. 102-03; RX 3.

[21/] Any valid contract or lease entered into between Guardian and Conex or Seattle Freight would contain a provision, either expressly included by the parties or implied by operation of law, requiring that the truck be operated in a lawful manner. *See generally* 17 Am.Jur.2d *Contracts* § 155 (1995).

T. 52-53, 55-56. This record clearly supports that conclusion. *See generally Caimano v. Brink's, Inc.,* Case No. 95-STA-4, Sec. Dec., Jan. 26, 1996, slip op. at 26-27 (addressing employer's emphasis on profits at the expense of safety).

As indicated *supra* at n.1, the Secretary has held that the STAA provides strict liability for the discriminatory conduct of joint employers. *Palmer*, slip op. at 3-6. The United States Court of Appeals for the Ninth Circuit affirmed the Secretary's decision in *Palmer* without reaching the issue of strict liability. *Western Truck Manpower, Inc. v. United States Dep't of Labor,* 12 F.3d 151, 153-54 (9th Cir. 1993). As the record in this case supports a finding of vicarious liability based on Guddat's knowing participation in the discriminatory conduct of Conex and Seattle Freight against Cook after October 14, 1994, I need not rely on a theory of strict liability in this case.

Knowing participation is not established when an employer has merely acquiesced in the discriminatory conduct of a joint employer, as "an entirely innocent and unconscious instrument" of the perpetrating employers, *Carrier Corp. v. NLRB,* 768 F.2d 778, 783 (6th Cir. 1985) (quoting *NLRB v. Gluek Brewing Co.,* 144 F.2d 847, 855 (8th Cir. 1944)). In this case, however, Guardian is vicariously liable based on Guddat's knowledge of the discriminatory conduct and his knowledge of the illegal motivation for the conduct. *See Capitol EMI Music, Inc.*, 311 N.L.R.B. 997 (1993) and cases cited therein; *cf. Carrier Corp.,* 768 F.2d at 783.

Guddat testified that, on a weekly basis, he collected a copy of the paperwork indicating the hauling work done by Cook for each day. T. 125; *see* T. 107. Such paperwork would have indicated the dollar amount due to be paid per mile by the freight company for each shipment. *See* RX 2. Furthermore, testimony by Guddat and his son, Jeff Guddat, indicates that they were aware of "the situation that [Cook] was having down at the port." T. 88 (J. Guddat), T. 123-24 (Guddat). Assuming, *arguendo,* that Guddat did not have direct knowledge that Stafford had interfered with Cook's working relationship at Seattle Freight, the record nonetheless indicates that Guddat knew that Cook was being assigned the less lucrative shipments of empty equipment while he was working with Seattle Freight.

In addition, Guddat was put on notice that Seattle Freight was retaliating against Cook for his protected activity by the very nature of the conduct, *i.e.,* the assignment of loads of empty equipment to a driver who had raised questions concerning overweight shipments. *See Esmark, Inc.,* 887 F.2d at 747-48 (discussing concept of "inherently destructive" conduct). The record thus supports the inference that Guddat knew that Seattle Freight was acting on an illegal motive. Also, as discussed previously, Guddat knew of Stafford's hostility toward Cook, and Guddat shared Stafford's cavalier attitude toward weight restrictions. Finally, as discussed *supra*, Guddat culpably failed to address Cook's complaints about the high incidence of overweight shipments to Conex. The record thus supports the conclusion that Guddat knowingly participated in the discriminatory conduct of Conex and Seattle Freight, as joint employers. *Cf. Capitol EMI Music, Inc., supra* (holding joint employer not vicariously liable because it had no knowledge of improper motive of discriminating employer); *Palmer,* slip op. at 10 (holding that employer's failure to enforce contractual obligation of joint employer supported a finding that employer knowingly participated in discriminatory conduct).

The preponderance of the evidence thus establishes that Guddat was hostile to Cook's protected activity and that he knowingly participated in the retaliatory conduct of Conex and Seattle Freight. The record also establishes that the diminished revenues earned by Cook as a result of such retaliatory conduct contributed to Guddat's termination of Cook approximately one month after Cook's termination by Conex.

Cook questioned Guddat at hearing concerning his "haul 'em or quit" approach to the overweight shipments issue, specifically asking if Guddat merely expected to replace Cook with another driver who would not question such practices. T. 141. Particularly in view of the evidence indicating that, at the time of hearing, Guardian had three trucks in operation and all three were working for Conex, T. 121, 182 (Guddat); *see* T. 112 (Guddat), I conclude that such approach was indeed Guddat's intention.[22/] Guddat's testimony clearly indicates that he considered Cook to be a business liability following Cook's exchange with Stafford on October 14, 1994 and his inability to keep the Guardian truck "busy" thereafter. In responding to the ALJ's question regarding why Guddat had not rehired Cook later to drive one of his idle trucks, Guddat stated:

> [I]f we couldn't work it at Conex, we had a definite problem there, so that we wouldn't be able to put -- you know, if the drivers couldn't work -- if he -- if he couldn't work for Conex, then he was definitely limited just to where he could work. And as far as we were concerned, if -- if he wasn't willing to keep the truck busy, it was actually a detriment to us, because every day that the truck sits, it costs us money.

T. 123-24. Guddat's statement that he terminated Cook because he had not kept the truck busy is tantamount to an admission that Cook was terminated, at least in part, for engaging in protected activity. *See Blake v. Hatfield Electric Co.,* Case No. 87-ERA-4, Dep. Sec. Dec., Jan. 22, 1992.

I therefore conclude that Cook has established that he was terminated, at least in part, in retaliation for his protected activity. *See Yellow Freight System, Inc.*, 27 F.3d at 1138. Consequently, Guardian may avoid liability only by establishing that it would have taken the adverse action in the absence of the protected activity. *See Yellow Freight System, Inc.,* 27 F.3d at 1140; *Williams v. Carretta Trucking, Inc.,* Case No. 94-STA-07, Sec. Dec., Feb. 15, 1995, slip op. at 10-11; *Asst. Sec. and Kovas v. Morin Transport, Inc.*, Case No. 92-STA-41, Sec. Dec., Oct. 1, 1993, slip op. at 6 (direct evidence case). On the following basis, I conclude that Guddat has not established that he would have terminated Cook in the absence of his protected activity.

Initially, I note my disagreement with the ALJ's conclusion that Guddat's failure to terminate Cook when he was made aware of the October 14, 1994 incident at Conex indicates a lack of retaliatory animus towards Cook, R. D. and O. at 11. Guddat testified concerning the

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[22/] Like its counterpart in *Carrier Corp.,* Guardian suffered losses concomitant to those of the employees who were discriminated against. Unlike the innocent employer in *Carrier Corp.*, however, Guardian has had an opportunity to recoup those losses, through the trucks and drivers it has since leased to Conex.

exceptional difficulty of attracting drivers to work under contract with Guardian, T. 114, 120-21, and, although Guddat raised some vague complaints about Cook's performance, *see, e.g.,* T. 107-11, 136-38, he also testified about other drivers who were apparently much less dependable than Cook had been, working only a week and then quitting without advising Guddat, T. 114. In addition, at the time that Guddat became aware of Cook's termination by Conex, approximately a week after the October 14 incident, it is likely that Guddat was not

yet aware that Cook would be blacklisted by Stafford and limited to less profitable assignments by Seattle Freight.

I similarly reject the conclusion that Cook's reluctance to drive other trucks that he was offered by Guardian when his leased truck was being serviced provides any justification for Guddat's termination of him. *See* R. D. and O. at 12. As noted by Cook, T. 163-67, his contractual agreement with Guardian required that he drive a specific truck. RX 2. In addition, and on a more practical level, Cook explained his concern about his driving trucks that were leased to other Guardian drivers and vice versa, testifying to one incident in which the truck leased to him had been driven by another Guardian driver and incurred tire damage as a result. T. 165-67. Cook's testimony also indicates that Guddat had exaggerated the number of occasions on which such offers of alternate trucks were made, as most repairs were made by Guardian to its trucks over weekends, and not during Cook's regular work week. T. 165-67.

In conclusion, I note the following factors. The record establishes that Guddat was hostile to Cook's protected activity. The record also demonstrates Guddat's view that Cook's complaints about overweight shipments had unnecessarily cost Guardian revenues derived from Cook's work with Conex. Furthermore, the record demonstrates that Guddat knowingly participated in the discriminatory conduct of Conex and Seattle Freight toward Cook, which occurred after Cook's termination at Conex. Finally, Guddat effectively admitted that Cook's protected activity at Conex contributed to Guddat's conclusion that Cook had become a business liability, which conclusion precipitated Guddat's termination of Cook. I therefore conclude that Guddat was anxious to terminate Cook based on his protected activity, and that Cook's absence on November 11, 1994, and the misunderstanding about Cook's "overdue" paychecks provided an opportunity for Guddat to advise Cook that he was cancelling their contract. In view of the foregoing, I conclude that Guddat has failed to establish that he would have terminated Cook in the absence of his protected activity. *See Yellow Freight System, Inc.,* 27 F.3d at 1140.

ORDER

I find Respondent Guardian Lubricants, Inc., to be individually liable for its discrimination against Complainant in violation of Section 405 of the STAA based on its termination of Complainant in November 1994, and also liable based on its knowing participation in the discriminatory conduct engaged in by Respondent's joint employers Conex and Seattle Freight between October 14, 1994 and November 15, 1994. Accordingly, Respondent is ORDERED to offer Complainant reinstatement to his position as a truck driver, or to a comparable position; to refrain from engaging in or knowingly participating in discriminatory conduct toward Complainant; to pay all back pay and other appropriate compensation, with interest, as provided for under the STAA; and to pay Complainant's costs and expenses incurred in bringing this complaint, including a reasonable attorney's fee. This case is

hereby REMANDED to the ALJ for such further proceedings as may be necessary to establish Complainant's complete remedy, consistent with this decision.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.