



In the Matter of:

ALPHONSE MADDIN,

ARB CASE NO. 13-031

COMPLAINANT,

ALJ CASE NO. 2010-STA-020

v.

DATE: November 24, 2014

TRANSAM TRUCKING, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant, Alphonse Maddin:

Robert D. Fetter, Esq.; Miller Cohen, P.L.C.; Detroit, Michigan

For the Respondent, TransAm Trucking, Inc.:

Brad K. Thoenen, Esq.; Seigfreid Bingham, P.C.; Kansas City, Missouri

BEFORE: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended,¹ and its implementing regulations.² Respondent TransAm Trucking, Inc. (TransAm) appeals from two Decisions and Orders (D. & O.) issued on October 26, 2012, and January 7, 2013, in which the presiding Administrative Law Judge (ALJ) held that TransAm terminated Complainant Alphonse Maddin's employment in violation of the STAA's whistleblower protection provisions. For the following reasons, the ARB affirms the ALJ's decisions.

¹ 42 U.S.C.A. § 31105 (Thomson/West Supp. 2014).

² 29 C.F.R. Part 1978 (2013).

BACKGROUND AND PROCEEDINGS BELOW

Complainant Maddin worked as a truck driver for TransAm beginning on September 24, 2008.³ On January 13, 2009, Maddin was scheduled to pick up a load of frozen meat in Nebraska and deliver it to three locations in Wisconsin and Michigan.⁴ Because the shipper was 12 hours late in delivering the load, Maddin did not begin the trip until the following day on January 14.⁵ On his trip, Maddin experienced several problems including that his engine sputtered, his APU or bunk heater quit working,⁶ and he was unable to find the station where he had been directed to purchase fuel.⁷ While attempting to locate a fuel station, Maddin became worried that his gas gauge was below “E.” At about 11:00 p.m., he decided to pull over onto the side of the ramp.⁸

While he was pulled over, Maddin received a message that the driver who was supposed to switch out with him was unable to do so, and that he should continue to the first delivery point. Ten minutes after he had pulled over, he tried to start his truck to drive to a gas station, but the brakes on the trailer that he was hauling had frozen due to the frigid temperatures. Maddin reported the frozen brakes to TransAm.⁹

Maddin called Road Assist (a TransAm department that drivers call when breakdowns occur) on his cell phone at 11:16 p.m. and 11:17 p.m. and reported the frozen brakes. Road Assist told him that they would send out a repairman to fix the brakes. After this call, Maddin made several other calls and then, sometime after 12:15 a.m., Maddin fell asleep. He was awakened when his cousin, Gregory Nelson, called Maddin at 1:18 a.m. Nelson observed that Maddin’s speech was slurred and that Maddin

³ Interim D. & O. at 9.

⁴ *Id.*

⁵ *Id.*

⁶ The APU or bunk heater is an auxiliary power unit that provides heat and air conditioning to the truck when the truck engine is off. Interim D. & O. at 9. When the truck is on, a different heating unit, provides heat automatically. *Id.* at 8. After a few minutes of idling, the truck engine automatically shuts off. *Id.* It was possible to continue to repeatedly restart the truck to keep the heat on. *Id.* However, idling of the truck engine for more than five minutes is legally prohibited. *Id.* at 9.

⁷ *Id.* at 9-10.

⁸ *Id.* at 10.

⁹ All the facts in this paragraph come from the Interim D. & O. at 10.

sounded like he was shivering. Nelson asked if Maddin was feeling alright. Although Maddin replied that he was, Nelson did not think he sounded well and continued to press him about it. After the third time Nelson asked him if he was feeling alright, Maddin sat up straight to determine exactly how he felt and realized that his skin was crackling from cold, that his torso was numb, and that he could not feel his feet. Maddin's first impulse was to panic, but he stayed calm and told Nelson that he would call him back.¹⁰

One minute after he got off of the phone with Nelson, Maddin called Road Assist and informed them that the heat was not working in his truck.¹¹ Maddin informed Road Assist of his physical condition and asked when the repairman would be arriving and Road Assist told him to "hang in there."¹²

Maddin tried to follow this suggestion but became fearful of losing his feet, dying, and never seeing his family again. Maddin next put on his boots, left the truck cab, unhooked the trailer from the truck, and pulled the truck about three feet away from the trailer. Then, at 1:50 a.m., he called Larry Kluck, his supervisor at TransAm and told Kluck that he was going to seek help at a gas station because he was stranded in low temperatures, could not feel his feet, had burning skin, and had trouble breathing. Kluck told Maddin not to leave the trailer because the company would get a fine, and ordered Maddin "to either drag the trailer with its frozen brakes or to stay where he was." Maddin reiterated his physical condition to Kluck, who told Maddin to turn on the heat. Maddin explained that the heat was not working. Twice more, Kluck told Maddin to turn on the heat, and Maddin told Kluck that the heat was not working.¹³

After the conversation with Kluck ended at 2:05 a.m., Maddin drove the truck in search of the closest gas station and left the trailer unattended. When he got to the gas station, it was closed, so he continued to drive to look for an open gas station. While he was driving, he received a phone call at 2:19 a.m. from Josh with Maggio Trucking, who had arrived to fix the trailer's brakes. Maddin returned to the trailer to meet Josh. Josh repaired the brakes but did not fix the heater. By the time Maddin called Kluck again at 3:20 a.m., the repairs to the truck's brakes were complete. During this call, Kluck told Maddin that he intended to write Maddin up for a late load, to which Maddin responded that the shipper had been 12 hours late delivering the load to him. Kluck then told Maddin that he would write him up for missing his fuel stop, and the conversation ended.¹⁴

¹⁰ All the facts in this paragraph come from Interim D. & O. at 10.

¹¹ *Id.*

¹² *Id.* at 11.

¹³ All the facts in this paragraph come from Interim D. & O. at 11.

¹⁴ *Id.*

Maddin then followed Josh to a gas station only to learn that they would not accept the form of payment he had for fuel. Maddin was authorized to purchase fuel at Petro and began driving there. While on the way to Petro, he saw signs for the gas station that TransAm had intended for him to use, but noted that it was off of I-39. TransAm had told him that it was off of I-88. Maddin reported the incorrect location to TransAm by onboard computer. Maddin then called Kluck and asked him if he was going to be written up for missing the fuel stop. Kluck responded that he was going to write him up for abandoning the trailer instead. Kluck told Maddin that the write up would probably lead to termination.¹⁵

On January 23, 2009, TransAm requested Maddin to come to the company offices for a meeting.¹⁶ TransAm told Maddin that it was terminating his employment because he abandoned his load, which was against company policy.¹⁷ TransAm also accused Maddin of lying about the events of the night of January 14-15, 2009.¹⁸

Maddin filed a complaint with the Occupational Safety and Health Administration (OSHA) on June 1, 2009, alleging that TransAm terminated his employment in violation of the STAA's whistleblower protection provisions. Following an investigation, OSHA issued a determination letter dismissing Maddin's complaint, and Maddin filed objections and requested a hearing before a Department of Labor ALJ.

After an evidentiary hearing on the merits, the ALJ issued an Interim D. & O. holding that Maddin proved by a preponderance of the evidence that his refusal to drive constituted whistleblower protected activity under the STAA, and that TransAm's termination of Maddin's employment was unlawful discrimination under the Act. The ALJ ordered TransAm to reinstate Maddin, expunge any adverse references to Maddin's protected activities from Maddin's employment records, and pay Maddin \$5,000.00 in compensatory damages. The ALJ gave the parties 60 days to file supported statements regarding the back pay award. After taking additional evidence on the issue of back pay, the ALJ issued a separate D. & O. ordering TransAm to pay Maddin back wages until the date Maddin was reinstated, pay interest on the back wages, and take steps to remove all negative reports made about Maddin or his termination to any entity. TransAm timely appealed the Final D. & O. to the ARB.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 11-12.

¹⁸ *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the STAA, and implementing regulations.¹⁹ The ARB reviews the ALJ's factual findings under the substantial evidence standard.²⁰ The ALJ's conclusions of law are reviewed de novo.²¹

DISCUSSION

1. The Merits

The STAA provides that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activity.²² To prevail on a STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that he was subjected to adverse employment action, and that his protected activity was a contributing factor in that adverse action.²³ If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.²⁴

¹⁹ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); see also 29 C.F.R. § 1978.

²⁰ 29 C.F.R. § 1978.110(b).

²¹ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

²² 42 U.S.C.A. § 31105(a)(1).

²³ *White v. Action Expediting, Inc.*, ARB No. 13-015, ALJ No. 2011-STA-011, slip op. at 4-5 (ARB June 6, 2014).

²⁴ *Id.* at 5.

A. Protected Activity

In support of its petition challenging the ALJ's decisions, TransAm argues that Maddin did not engage in protected activity when he complained about the frozen brakes on his trailer.²⁵ TransAm asserts that while "it may constitute a violation of the commercial motor vehicle safety or security regulations to operate a vehicle with defective, malfunctioning or inoperable equipment, the mere existence of these defects or problems does not—and cannot—constitute a violation in and of itself. TransAm argues that, while it may be a violation to *operate* a truck with defective brakes, it is not a violation for a truck simply to have frozen brakes. TransAm stresses that it was impossible for Maddin to move the trailer, so he could not operate the truck with the frozen brakes.²⁶ Further, TransAm stresses that Maddin complained about frozen brakes, not a violation, rather than about operating a vehicle with frozen brakes, which would be a violation.²⁷

The ALJ found that the evidence of record showed that Maddin engaged in protected activity when he reported frozen brakes on his trailer and that his report was a complaint related to a violation of a commercial motor vehicle safety regulation (49 C.F.R. § 392.7) that prohibits a driver from operating a vehicle unless the driver is satisfied that the brakes, including trailer brakes, are in good working order.²⁸ The ALJ thus found that Maddin's report of frozen trailer brakes qualified as protected activity under 29 C.F.R. § 1978.102(a) and (b)(1).

The ALJ's finding that Maddin engaged in protected activity when he complained about frozen trailer brakes is supported by substantial evidence. A complaint is protected if it "relate[s] to a violation of a commercial motor vehicle safety or security regulation, standard, or order."²⁹ It is well-established that "[a]s long as the complaint raises safety concerns, the layman who usually will be filing it cannot be expected to cite standards or rules like a trained lawyer. The statute requires only that the complaint 'relate' to a violation of a commercial motor vehicle safety standard."³⁰ Uncorrected vehicle defects,

²⁵ Br. at 15-17.

²⁶ *Id.*

²⁷ *Id.*

²⁸ All of the statements in this paragraph reference Interim D. & O. at 13.

²⁹ 29 C.F.R. § 1978.102(b)(1).

³⁰ *Nix v. Nehi-RC Bottling Co., Inc.*, No. 1984-STA-001, slip op. at 4 (Sec'y July 13, 1984).

such as faulty brakes, violate safety regulations and reporting a defective vehicle falls squarely within the definition of protected activity under STAA.³¹

TransAm also argues that the ALJ erred in concluding that Maddin engaged in protected activity under the “refusal to drive” prong of the statute. TransAm argues that it was impossible for Maddin to haul the trailer with the truck, so he could not refuse to drive it and that Maddin did not have any safety concerns with respect to any attempt to drive the truck with the trailer attached.³² TransAm argues that, to be protected under STAA’s “refusal to drive” clause, Maddin must have refused to operate the vehicle. According to TransAm, rather than refusing to operate his truck, Maddin operated his truck in a manner that violated company policy and a direct order from his supervisor.³³

The ALJ held that “refusal to operate is a sine qua non for finding [that Maddin] engaged in protected activity.”³⁴ Nevertheless, the ALJ found that by unhooking the trailer, “Maddin refused to operate the truck *under the conditions set by Mr. Kluck*” and that he did so because of safety concerns. The ALJ credited Maddin’s uncontradicted testimony that Kluck directed Maddin either to drive the truck dragging the trailer with frozen brakes or to remain with the trailer on the side of the road. The ALJ noted the regulations at 49 C.F.R. § 392.7 would be violated if Maddin operated the vehicle with inoperable brakes and that driving a vehicle with frozen trailer brakes would create a serious threat of accident or injury to the driver. The ALJ concluded that a reasonable person in Maddin’s circumstances would conclude that operating his truck while dragging a trailer with frozen brakes, would establish a real danger of accident or injury.

Although we affirm the ALJ’s finding of protected activity and generally agree with his analysis, we do not agree with the ALJ’s particular holding that “refusal to operate is a sine qua non for finding [that Maddin] engaged in protected activity.” The “refusal to operate” clause should not be read so narrowly. Under the facts of this case, driving or operating the truck in violation of Kluck’s order to remain with the trailer falls within the ambit of the “refusal to operate” clause of STAA and presented precisely the risk of serious injury that STAA is designed to avoid. Our precedent supports this interpretation. For example, in *Beveridge v. Waste Stream Env’tl.*, ARB No. 97-137, ALJ No. 1997-STA-015, slip op. at 3 (ARB Dec. 23, 1997), the Board held that an employee who refuses to drive an overweight truck does not lose protection under the STAA “refusal to drive” provision by correcting the perceived illegality (by off-loading) and

³¹ See *Maverick Transp., LLC v. U.S. Dept. of Labor, Admin. Review Bd.*, 739 F.3d 1149, 1156 (8th Cir. 2014).

³² Br. at 10-14.

³³ *Id.* at 14.

³⁴ All of the statements in this paragraph reference Interim D. & O. at 14.

proceeding to drive.³⁵ Similarly, an employee’s refusal to operate a truck over a certain speed under conditions rendering it unsafe or illegal might be protected under the “refusal to operate” clause.³⁶ Certain refusals or insubordinate acts arising out of the complainant’s employment as a truck driver may be covered under the “refusal to operate” clause even where the activity does not strictly constitute a refusal to operate the vehicle.

The ALJ’s finding—that by unhooking the trailer “Maddin refused to operate the truck *under the conditions set by Mr. Kluck*”—is consistent with this reasoning. The ALJ found that Kluck directed Maddin to either drag the trailer or remain with it, and Maddin refused both options.³⁷ As the ALJ found, dragging a trailer with frozen brakes would be very dangerous. On the other hand, Maddin reasonably believed that remaining with the trailer would seriously endanger his health and consequently he refused to do so. The ALJ found that TransAm’s president told Maddin that “No load is worth [a driver’s] life.”³⁸ The ALJ also found that Maddin waited in subzero temperatures for nearly three hours in a truck with no heat. As a consequence, Maddin experienced crackling skin, numbness, and difficulty breathing.³⁹ Substantial evidence supports the ALJ’s finding that Maddin engaged in protected activity when he refused to remain with the trailer: “Given the extreme temperatures and Mr. Maddin’s physical condition, and the uncertainty when the brakes would be repaired, I find that at the time Mr. Maddin drove the truck off and left the trailer at the side of the road, he had sought, and was unable to obtain, correction of the hazardous safety condition.”⁴⁰ The ALJ’s conclusion that Maddin’s refusal to remain with the trailer constituted STAA-protected activity under 49

³⁵ See also *McGavock v. Elber, Inc.*, No. 1986-STA-005, slip op. at 3 (Sec’y July 9, 1986) wherein the Secretary held that an employee’s refusal to speed in the future, under circumstances in which the carrier’s policies required drivers to violate DOT speeding regulations, is protected activity under the STAA’s “refusal to operate” provision which prohibits the discharge of an employee “for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards or orders applicable to commercial motor vehicle safety or health.”

³⁶ *Krahn v. United Parcel Serv., Inc.*, ARB No. 04-097, ALJ No. 2003-STA-024, slip op. at 6 (ARB May 9, 2006) (ARB assumes arguendo that by refusing to follow employer’s instructions regarding brake usage and maintaining speed, employee effectively refused to operate a vehicle under section 31105(a)(1)(B)).

³⁷ Interim D. & O. at 14.

³⁸ *Id.* at 9.

³⁹ *Id.* at 15.

⁴⁰ *Id.*

U.S.C.A. § 31105(a)(1)(B)(ii) is supported by substantial evidence and in accord with applicable law. As explained above, a “refusal to operate” may encompass actually operating a vehicle in a manner intended to minimize danger of harm or violation of law.⁴¹

*B. Contributing Factor*⁴²

TransAm also asserts that the ALJ erred in holding that Maddin’s protected activity was a contributing factor in TransAm’s decision to terminate his employment.⁴³ TransAm reiterates that it fired him for unhooking the trailer and driving off with the truck in violation of company policy to stay with the trailer.⁴⁴ TransAm posits that it is laughable that it would fire a driver for reporting frozen brakes and notes its interest in promptly fixing problems with driver’s trucks.⁴⁵ TransAm argues that it is likewise nonsensical that it would fire a driver for refusing to drag a trailer with the wheels locked—in essence for failing to defy the laws of physics in dragging a 41,000 lb. trailer down the highway and ruining TransAm’s property.

Regardless of how TransAm characterizes its motivation, it is clear that Maddin was fired for abandoning a trailer with defective brakes. The ALJ found both direct and indirect evidence that Maddin’s protected conduct on January 14-15, 2009, contributed to TransAm’s decision to terminate his employment eight days later on January 23, 2009. The ALJ appropriately ruled that the close temporal proximity of Maddin’s protected activity with his termination gave rise to an inference of causation.⁴⁶ The ALJ also noted the shifting explanations of disciplinary measures with which Kluck threatened Maddin: “Kluck threatened to write Mr. Maddin up for delivering a late load and, after Mr. Maddin reminded Mr. Kluck that he received the load 12 hours late to begin with, Mr.

⁴¹ See also *Green v. Creech Bros. Trucking*, No. 1992-STA-004, slip op. at 8 (Sec’y Dec. 9, 1992) (“Green therefore is protected in refusing to leave his vehicle on the highway and in moving it to the nearest safe location.”); *Krahn*, ARB No. 04-097, slip op. at 6 (ARB assumes arguendo that by refusing to follow employer’s instructions regarding brake usage and maintaining speed, employee effectively refused to operate a vehicle under section 31105(a)(1)(B)).

⁴² TransAm did not object to the ALJ’s finding of adverse action. This finding is affirmed as undisputed.

⁴³ Br. at 17.

⁴⁴ *Id.* at 18.

⁴⁵ *Id.*

⁴⁶ Interim D. & O. at 16.

Kluck told Mr. Maddin that he was going to write him up for missing his fuel stop.”⁴⁷ After Maddin notified Kluck that Maddin had been given the wrong location for his fuel stop, Kluck informed Maddin that he would write him up for abandoning his trailer and he would probably be fired.⁴⁸ Shifting justifications for adverse action, like close temporal proximity, constitute classic circumstantial evidence of causation.⁴⁹

The ALJ also listed the direct evidence that supported his finding of causation: namely, the uncontradicted testimony of TransAm’s own employees, Maddin’s testimony, and the deemed admission of Request for Admission No. 15 (“Complainant was terminated for unhooking trailer #185907 and driving off to get fuel on January 14, 2009.” Interim D. & O. at 8.). The ALJ explained that this evidence directly verified that Maddin was fired for driving off and leaving a loaded trailer at the side of the road. As the ALJ reasoned, Maddin’s protected activity—namely, his refusal to remain in his truck with the trailer until the trailer’s brakes were fixed—was “inextricably intertwined” with TransAm’s decision to terminate Maddin’s employment for abandoning the trailer.⁵⁰ The ARB has repeatedly ruled that under certain circumstances, a “chain of events” or events that are “inextricably intertwined” may substantiate a finding of causation.⁵¹

In this case, the basis for Maddin’s dismissal (abandoning the load) cannot be explained without discussing Maddin’s protected activity of “refusal to operate the truck

⁴⁷ D. & O. at 16.

⁴⁸ Interim D. & O. at 11.

⁴⁹ Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward the complainant after he or she engages in protected activity. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 7 (ARB Feb. 29, 2012).

⁵⁰ All of the statements in this paragraph reference Interim D. & O. at 16.

⁵¹ In *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 8 (ARB June 20, 2012), we held that a complainant’s disclosures were “inextricably intertwined” with the investigations that resulted in his discharge because the content of those disclosures gave the company the reasons for the adverse action taken against the complainant. In *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 3 (ARB Feb. 29, 2012), the employee’s suspension was intertwined with his protected activity because the employer investigated the reason for the reported injury and blamed the employee for the injury. In *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 4 (ARB Oct. 26, 2012), the employee was fired for an allegedly late reporting of an injury as well as for causing the injury.

under the conditions set by” his employer. It is evident that Maddin’s refusal to either drag the trailer or remain with the trailer are inextricably intertwined with the adverse action taken against him (termination for abandoning the trailer). We therefore affirm the ALJ’s conclusion that Maddin met his burden to show that his protected activity was a contributing factor in TransAm’s decision to terminate his employment. The ALJ’s causation finding is supported by substantial evidence in the record and in accordance with the law.

C. Affirmative Defense

TransAm further argues that even if Maddin proved his case, that the ALJ erred in holding that TransAm failed to show by clear and convincing evidence that it would have terminated Maddin’s employment absent the alleged protected activity.⁵² TransAm asserts that the *only* evidence admitted at the hearing demonstrates that TransAm fired Maddin because he abandoned the trailer in direct violation of company policy and his supervisor’s order.⁵³

This argument is simply a rehashing of TransAm’s position that protected activity did not contribute to the termination decision and cannot succeed. We agree with the ALJ that, except for Maddin’s protected activity, TransAm identified no other behavior to support its assertion that he was fired for nonretaliatory reasons. We affirm the ALJ’s finding that TransAm did not demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action against Maddin in the absence of his protected activity.

2. Evidence of Economic Damages

TransAm claims that the ALJ improperly admitted evidence of economic damages after the hearing. However, the ALJ explicitly reopened the record to receive evidence of back pay. Both parties submitted evidence and each had an opportunity to comment on the submissions. We find no error in the admission of this evidence. Maddin’s evidence includes records of regularly conducted activity (29 C.F.R. § 18.803(6)) and public tax records (29 C.F.R. § 18.803(8)), which sufficiently support the ALJ’s back pay award.

3. Per Diem Pay

TransAm asserts that the ALJ erred in awarding Maddin per diem travel allowances of \$168.58 per week because Maddin should not receive travel allowances for the time when he was not incurring travel expenses on TransAm’s behalf and because

⁵² Br. at 19.

⁵³ *Id.*

TransAm's payment of this amount without withholding appropriate amounts for taxes violates federal law. The ALJ noted that the nature of the travel allowances was unclear and analyzed whether they were intended to offset expenses or as a part of a driver's compensation. The ALJ looked at the pay stubs that TransAm submitted for Maddin, noting reimbursement for expenses as a separate line item, and concluded that the travel expenses were part of Maddin's compensation "as they were clearly paid whenever Complainant was driving for TransAm."⁵⁴ Thus, substantial evidence supports the ALJ's finding that the per diem travel allowances constituted compensation and were properly included in Maddin's lost earnings, and we affirm.

4. Interim Earnings

TransAm concedes that Maddin properly mitigated his damages but argues that the ALJ erred by not deducting Maddin's 2010-2012 interim earnings of \$42,791.05 from the back pay award. However, Maddin proffered evidence that he had no taxable income from his earnings during those years because he was a contractor (as opposed to an employee) and thus had to buy his own truck and pay for his own business expenses. Maddin's tax records show a taxable income of only \$4,913 for 2010 and a loss of \$2,780 for the year 2011. Although Maddin did not include tax records for the year 2012, he submitted a document demonstrating that he had an overall loss that year of \$5,301.26.⁵⁵ The ALJ thus found that Maddin's 2010-2012 gross earnings were more than offset by his expenses and declined to deduct his earnings from his back pay award.⁵⁶ We affirm this holding and agree with the ALJ's award of all back wages to which Maddin is entitled beginning on February 13, 2009, and continuing until the date of his reinstatement.

CONCLUSION

For the reasons above, the Board affirms the ALJ's finding that Maddin engaged in STAA-protected activity, and that TransAm's decision to terminate Maddin's employment because of his protected activity violated the STAA's whistleblower protection provisions. Accordingly, the Board **AFFIRMS** the ALJ's Decision and Order in all respects, including the ALJ's order of reinstatement.

⁵⁴ All of the statements in this paragraph reference D. & O. at 4.

⁵⁵ Although this document is not a public document like the tax records submitted for the years 2010 and 2011, the ALJ apparently concluded that it contained sufficient guarantees of trustworthiness to admit it. 20 C.F.R. § 18.803(24).

⁵⁶ See *Smith v. Lake City Enters., Inc. & Morgan*, ARB No. 11-087, ALJ No. 2006-STA-032, slip op. at 5 (ARB Nov. 20, 2012).

Any petition for costs (including attorney's fees) reasonably incurred by Complainant in bringing this appeal must be filed with the Board within 30 days from the date of this Final Decision and Order. See 49 U.S.C.A § 31105(b)(3)(B). Any opposition is due within 30 days after the petition is filed.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge