

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
STEVEN P. DUSO,
Complainant

v.

DOCKET NO. 06-BEM-00579

ROADWAY EXPRESS, INC.
n/k/a YRC, Inc.,
Respondent

Appearances: Renee J. Bushey, Esq. for Complainant
Michael N. Chesney, Esq. and Kelly S. Lawrence, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On March 2, 2006, Complainant, Steven Duso, filed a claim of discrimination against the Respondent Roadway Express, now known as YRC, Inc., alleging discrimination in employment on account of his disability. Complainant, who was a truck driver for Respondent, alleged that he suffered from a knee impairment that resulted in his being unable to drive certain trucks in Respondent's fleet and that Respondent refused to honor his request for a reasonable accommodation. The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. The matter was certified for hearing and a hearing was held before the undersigned Hearing Officer on April 6, 7, and 8, 2009 and June 23, 2009. The parties filed post-hearing briefs in January of 2010. Having reviewed the entire record in this

matter and the post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Steven Duso is employed by Roadway Express, Inc, n/ka YRC Inc. working out of Roadway's Concord Street terminal in North Reading, Massachusetts. Complainant began working for Roadway in 1997 as a pick up and delivery driver. ("P&D driver") (Tr. I, pp. 35-36) Complainant has driven tractor trailers for most of his adult life and has been employed as a truck driver for various employers for many years. (Tr. I, pp. 44-45) He is a member of Teamsters Local Union No. 25 ("Local 25" or the "Union"), which represents the drivers at Roadway in North Reading. Roadway and the Union are parties to the National Master Freight and Northern New England Supplemental Agreement which is a collectively bargained agreement. (Tr. I, pp. 41,42; Joint Exs. 21 & 22)

2. Respondent, Roadway, is a motor carrier providing freight transportation services. Roadway transports freight by truck throughout North America, using a network of terminal facilities, including the one in North Reading, Massachusetts. Respondent serves various customers from manufacturing and commercial facilities to residences and its freight can include perishables and hazardous materials. (Tr. II, pp. 302, 303; Tr. II p. 10) Inherent in Respondent's operation is delivering freight safely and efficiently. (Tr. IV, pp. 10-14)¹

3. According to Respondent, the efficient dispatching of freight is a complicated and fluid process that involves many variables. It begins early in the day with the Operations Supervisor talking to the inbound supervisor and walking the dock to determine what

¹ Tr. IV refers to the transcript of June 23, 2009.

freight is in the terminal and what needs to be delivered that day. He considers variables such as specific customer requests and if there are any critical time sensitive deliveries. The Operations Manager then puts together a plan to dispatch the city drivers to various locations. This plan changes a number of times on any given day, as freight levels and customer specifications evolve.

4. There are three different positions at Respondent that are primarily involved in the movement of freight: (1) the city driver (or pick up and delivery “P& D” driver); (2) the dockworker; and (3) the linehaul driver (or “over-the-road” driver). (Tr. II, pp. 302-303)

P&D drivers deliver inbound freight from a terminal to its final destination within the local area, and pick up freight from customers in the local area and deliver it to the terminal for outbound shipping from the terminal. Dockworkers unload incoming or outgoing freight and load it on to another tractor or truck either for delivery in the local area or for shipping long haul to another destination. Combined freight is transported over-the-road to a terminal in another area by linehaul drivers. (Tr. I, pp. 35,36; Tr.II, pp. 302,303). Linehaul drivers drive freight long distances from point to point across the country. They are paid by the mile, not by the hour, and generally spend several days out of their home area staying at hotels. (Tr. I, pp.38-40)

5. P&D drivers, linehaul drivers and dock workers at Respondent bid for their preferred position and shift by seniority pursuant to Respondent’s collective bargaining agreement with the Union. At least one time per year, drivers and dockworkers participate in the bidding process, utilizing their seniority to bid into one of three positions (city driver, linehaul driver or dockworker) and a desired start time. Seniority also governs the selection of assigned runs for city drivers, some of which have

designated start times. Some start times are designated as unassigned runs. An assigned run means that a driver will perform work in a specific geographic area, when work is available. (Tr. Vol. II, pp. 322-323; Ex. R-2; Tr. Vol. IV, p.19) When work in that area is not available, the assigned driver will become unassigned for that day. (Tr. Vol. II, 322-323; Tr. Vol. IV, pp. 53-54) Unassigned drivers utilize what is called “window seniority” to select their routes on a given day. Window seniority allows all drivers at the dispatch window at a particular start time to select routes based on their relative seniority. (Tr. Vol. IV, pp. 323-324)

6. Union seniority does not apply to the assignment of a specific tractor or load. (Jt. Ex. 21, p.155; Jt. Ex. 22, pp. 178-79) Rather, pursuant to the Union contract, management reserves the right to make assignments so that Respondent is able to comply with customer requests and load specifications, which often dictate the type of equipment needed on a particular run. According to Respondent, if a driver utilizes window seniority to select a run that will require a straight truck on that day, the driver must take the straight truck that has already been loaded. (Tr. Vol. II, p. 325) Similarly, if a driver’s route (whether assigned or obtained through window seniority) requires a truck with a lift gate, the driver will be limited in the types of trucks he can use for that assignment. (Tr. Vol. IV, pp. 22-23)

7. Respondent utilizes three general categories of tractors (trucks): linehaul tractors, city tractors; and straight trucks. City tractors are domiciled in the North Reading terminal where they start and end each day. The city fleet in North Reading consisted primarily of retired linehaul tractors of various makes, models and years. Straight trucks are the smallest trucks of all and have a trailer permanently affixed to them. (Tr. Vol. II,

pp. 196, 316-317) Linehaul tractors primarily transport goods over-the-road to destinations outside of the Boston area through Respondent's network of terminals. These tractors are not domiciled at any particular terminal, and they constantly move throughout Respondent's network. However, when they come to the North Reading terminal they are available to be dispatched on city routes during the day and are generally are dispatched from the terminal to go back over-the-road to terminals in Buffalo or Harrisburg at 8:00 p.m. (Tr. Vol. II, p. 317, 318, 319) According to Respondent, the terminal manager cannot predict with any degree of certainty the amount or type of linehaul tractors that will be available at a given time or on a given day. (Tr. Vol. II, p. 319; Vol. IV, p. 40-41) However, there was testimony that the terminal manager could check the computer to determine what trucks were due in and this was never a problem in the past. (Tr. Vol. II p 353-354) I do not credit Respondent's assertion that the terminal manager cannot predict what trucks are, or will be available, on a given day.

8. Complainant was a P&D driver and his shifts were during the daytime hours. Prior to 2009, Complainant worked exclusively as a P& D driver and he never bid on a linehaul position. (Tr. Vol. I, pp.37-38) In April of 2004, Complainant had a total knee replacement surgery on his left knee to remedy an arthritic condition that was causing him a great deal of pain. Complainant was working for Respondent at the time and was out of work for a total of fourteen weeks following his knee surgery. Following the surgery, Complainant had only 90 degrees range of motion in his left knee which limited his activities. In a June, 2004 visit with his surgeon, Complainant discussed his slow progression in regaining range of motion in his knee and how it negatively affected him

at work, particularly his ability to drive a tractor trailer truck. (Tr. Vol. I, pp. 46-51; Ex. C-1) Complainant testified that because he can't bend his knee, this makes it difficult to operate the clutch on certain standard trucks with insufficient leg room. He testified that if the seat goes back far enough he can drive a city truck but that some of the city cabs are too small. According to Complainant, he informed his two previous general managers of this problem. (Tr. Vol. I p. 52) Complainant also testified that the restricted range of motion in his knee makes certain activities which require full bending of one's knee more difficult. He stated that because he cannot fully bend his knee, he has to walk sideways when descending average steps. He cannot walk straight down because his knee doesn't bend enough and he will trip and fall. If he climbs a ladder or any stairs he must lead with his right foot in order to get his left foot up and over, and when he attends venues, like the Fleet Center or Fenway Park he cannot sit in the general seating and has to sit in the handicap location. He cannot drive a standard shift car, unless the seat can be pushed back far enough for him to bend his knee to operate the clutch. (Tr. Vol. I , pp. 88-89) He stated that his impairment affects his ability to do his job of truck driving only to the extent that he needs a tractor with sufficient leg room. (Tr. Vol. I, p. 100)

9. Following his knee replacement, Complainant returned to work in August of 2004. He acknowledged that he did not present any documentation to Respondent upon his return to work regarding any impairment or limitations of his ability to drive the trucks in Respondent's fleet. (Tr. Vol. II, pp. 203-204) He did, however, tell his surgeon that the diminished range of motion in his knee affected his ability to operate the clutch on certain trucks and that he needed an accommodation to return to work. His discussion of this

problem with his surgeon in June and July of 2004 is documented in Complainant's medical records. (Ex. C-1)

10. When Complainant returned to work in August of 2004 he generally drove linehaul trucks. His shift began at 10:00 a.m. and ended around 6:30 p.m. On one occasion shortly after his return to work, there was no linehaul truck available for him to drive. The only two trucks available were the smallest city trucks, which he could not operate because of the diminished range of motion in his knee. Complainant discussed this issue with the Dispatcher Matthew Denley, who directed him to the terminal manager, Larry Aiello. (Tr. Vol. I, pp. 54-57) Complainant explained to Aiello the range of motion issue in his knee and the fact that he needed more seating room in the truck, and asked Aiello to come out to the yard so he could demonstrate. Aiello accompanied Complainant to the yard whereupon Complainant demonstrated the problem he had with some city trucks that had much smaller cabs. In that short time, a linehaul truck had come in to the yard and Complainant demonstrated the difference between operating the linehaul and city truck. Aiello responded "ok," and thereafter, under Aiello's management, Complainant drove only linehaul trucks. (Tr. Vol. I, pp. 57-58)

11. Larry Aiello served as the Terminal Manager of the North Reading Terminal from the beginning of 2003 to November of 2004. Mr. Aiello testified that he had no recollection of Complainant ever requesting an accommodation. (Tr. Vol. III, p. 508) He testified that there was nothing in writing to evidence the granting of such a request and that formal requests for accommodation are not processed at the terminal level, and that the terminal manager must involve individuals at the regional and national levels in order

to analyze and respond to such a request. (Tr. Vol. III p. 492-494). Based on the certainty of Complainant's testimony and his clear memory of the event, I credit his testimony that he made an informal request for an accommodation to drive trucks with a larger cab and that Aiello granted his request.

12. Complainant also testified that he asked Aiello if he could be assigned to a bigger truck or tractor when a new one came into the fleet. According to Complainant, Aiello replied, "I don't see why not, and you can talk to one of the supervisors at the time." (Tr. Vol. I. p. 58) At his request, Complainant was assigned truck no. 21305 and drove it for about one and a half to two weeks at which time he was told he was no longer assigned to that truck, but given no reason. Complainant resumed driving other linehaul trucks without issue until 2005. (Tr. Vol. I p. 59) Complainant testified that during that time, there were only one or two occasions when a linehaul truck was not available for him to drive and he had to wait a half hour at most for a truck to arrive at the yard from Harrisburg or Buffalo. During the short period of time he was waiting, he performed dock work. Complainant stated that all drivers are required to perform dock work as part of their regular duties. (Tr. Vol. I, pp. 59-60). Complainant also testified that there were some occasions where other drivers would volunteer to take certain trucks so that he would have a linehaul truck available for his run. (Tr. Vol. I, pp. 69-69) I credit Complainant's testimony.

13. As a general rule, Respondent attempts to assign drivers to the same truck as much as possible. (Tr. Vol. II, p. 325) This general rule is based on the notion that drivers tend to take better care of the tractor, become more familiar with the tractor and are better able to identify maintenance issues. (Tr. Vol. II, pp. 325-326; Tr. Vol. IV, pp.

55-56) Respondent asserted that this does not mean that a driver will *always* drive the same truck, and it asserted that P&D drivers do not drive the same tractor everyday. However, when asked whether certain drivers, nevertheless, tend to drive the same trucks on a regular basis, Lawrence Aiello, the Terminal Operations Manager at North Reading for a number of years including 2003 to 2004, stated “usually, on a regular basis, maybe, yes. I mean, we would like to have some consistency... you don’t want everybody choosing a tractor in the morning and wasting a lot of time in the morning, so, yes.” (Tr. Vol. III, pp. 497-498) This is consistent with Complainant’s position that Union seniority does not govern the particular equipment used by driver and that management has the discretion to make assignments of equipment. Complainant also testified that Respondent’s P& D drivers usually drive the same truck everyday and that it was a customary and regular business practice for P&D drivers to drive linehaul trucks on a daily basis. (Tr. Vol. I, p. 25-26, 127). I credit Complainant’s and Aiello’s testimony on this issue.

14. On March 15, 2005, Complainant saw his surgeon once again to discuss the lack of range of motion in his knee which had not improved much from its original 90 degrees. Complainant indicated his goal was to be able to drive more equipment on the job and discussed the benefits with his surgeon of arthroscopic surgery to remove scar tissue and gain flexion in his knee. Complainant also relayed to his surgeon that he had stiffness going up and down stairs and driving trucks. Complainant underwent arthroscopic surgery in September of 2005. His physician’s notes stated that “the patient drives a standard truck as a profession and had difficulty using many of the vehicles in his job due to his decreased range of motion.” (Ex. C-1; Tr. Vol. I, pp. 60-66)

Complainant testified that he decided to undergo the surgery in order to continue in his profession because the range of motion problem impacted his ability to be a truck driver for any company because the equipment used in the trucking industry is standard. (Tr. Vol. I, pp.69-71)

15. Following his surgery, Complainant was on medical leave for about six or seven weeks. When he returned to work on October 31, 2005, he provided Respondent with a note from his surgeon indicating that he could return to work, but that he “does require a properly fitting truck for his size.” (Jt. Ex.-1) The Terminal Manager at that time was John Kristek. Sometime after he returned to work, Dispatcher Matt Denley sent Complainant to speak to Kristek about his knee condition on an occasion when there was not a linehaul truck available in the yard for him to drive. (Tr. Vol. I, p.76) Complainant testified that he explained his issue to Kristek and invited him to the yard so he could demonstrate the problem and that Kristek accompanied him to the yard for a demonstration of his limitation. By then a linehaul truck which Complainant could drive had arrived in the yard. Complainant testified that he continued to drive linehaul trucks without issue for the remainder of 2005. (Tr. Vol. I, pp. 77-78) In his deposition testimony, Kristek vaguely recalled a conversation with Complainant regarding his preference for larger tractors, but recalled that the issue had to do with Complainant’s size and not his knee. He could not recall any sort of accommodation being requested by or provided to Complainant. (Ex. R-41, pp.9-11) Given Complainant’s certainty about what transpired that day and his testimony that he explained the problem with his knee to Kristek and demonstrated why he needed a larger tractor, I credit the Complainant’s version of what occurred on that day.

16. Matthew Denley, the former dispatcher at the terminal, who is currently the operations manager testified, that when working as a dispatcher he recalled Complainant coming to him and advising him that no tractors were available that he could drive because of his knee. He also recalled that the terminal manager Kristek saw that a linehaul truck was due in to the terminal shortly and instructed Denley to assign Complainant dock work in the meantime. (Tr. Vol. II p 353-354) Denley also testified that two other drivers besides Complainant began working on the 11:00 a.m. shift. According to Denley, because Complainant was the junior man with less seniority he did not have the pick of assignments, but at least one of the other drivers would defer to Complainant when it came to window seniority and allow him to take a truck he could drive. (Tr. Vol. II, pp. 355-356) Complainant testified that this only occurred on rare occasions when a delivery required a smaller, straight truck. Denley also corroborated Aiello's testimony that the majority of P&D drivers drove the same truck most of the time and that there were 5 or 6 additional P&D drivers who drove linehaul tractors every day. (Tr. Vol. III, pp. 429, 430).

17. Respondent's witnesses testified that safety is a paramount concern for their operation and that the company provides extensive safety-related training to its employees. The safety of equipment is monitored by pre- and post-trip inspections of all vehicles and participation in Federal and State annual inspection systems. (Tr. II, pp. 253-253; Tr. IV, pp. 11-14) Complainant testified that he appreciated these safety concerns and that he has never driven a truck that he could not safely drive. He testified that he has attended Respondent's safety training classes and understands that he should never do anything that is unsafe or that would jeopardize the public, the company or the

company's equipment. (Tr. Vol. I, pp. 66-67) While Respondent asserted that the consequences of failing to take appropriate safety measures could be catastrophic and far reaching, the evidence does not suggest that Complainant had ever been, or would be, a safety risk. All drivers are required to take periodic DOT physicals, and in August of 2006, Complainant was recertified to drive by the Department of Transportation (DOT) with no medical restrictions. (Tr. Vol. I, p. 104; Jt. Ex. 9) I also find that Complainant's vast experience driving all types of rigs informed his judgment about his ability to drive safely and that his safety record is a significant factor to consider. Aiello testified that Complainant preferred not to drive an older Freightliner truck, despite its larger cab, because it had a smaller windshield and Complainant was so tall he couldn't see out of the mirrors of the windshield. (Tr. Vol. III, pp. 504-505).

18. In January of 2006, Complainant sprained his ankle while performing work. He filed a worker's compensation claim, and was out of work for approximately one month. (Jt. Ex. 15, 16) At the beginning of 2006, Michael Day became Respondent's terminal manager. Complainant performed his duties as a P& D driver for approximately one week under Day's management, until one day when a linehaul tractor was not available for Complainant to drive. (Tr. Vol. I, p. 87) Complainant reported this to Matt Denley who referred him to Day. Complainant went to speak to Day and explained his problem with lack of range of motion in his knee and asked Day to accompany him to the yard so he could demonstrate the problem with trucks that don't have sufficient room. Day flatly refused to go to the yard with Complainant. Complainant then explained that he had been performing his duties as a P&D driver for approximately a year and a half since his surgery. (Tr. Vol. I, pp. 87-88) Day told Complainant that he needed a doctor's note on

file, and Complainant stated that there already was one on file. (Jt. Ex. 1) Day responded that this letter was not sufficient, and Complainant stated that he would try to get another letter as soon as possible. After this conversation, a linehaul truck became available for Complainant to drive, and he continued to drive that day and for the rest of the week. (Tr. Vol. I, pp. 89)

19. Michael Day recalled Matt Denley coming to him on early February 2006 and informing him that there were no trucks available for Complainant to drive because of his disability and that Complainant was requesting a reasonable accommodation for his knee. He also admitted that Complainant asked him to go to the yard to witness the limited range of motion in his knee and that he refused to do so because once Complainant stated he was disabled and needed an accommodation, Day thought it was best to check the records first. (Tr. Vol. IV, pp.66, 150) Day testified that subsequent to their conversation, he pulled Complainant's personnel file to determine if there was documentation to support Complainant's claims of disability and the need for an accommodation. (Tr. Vol. IV, p. 68) The only document he found in the file was a return to work note from Complainant's physician, doctor King, dated October, 2005, which indicated that Complainant needed a properly fitting truck for his size. (Tr. Vol. IV, p.68; Jt. Ex. 1) Day stated there was no documentation indicating that Complainant was disabled or that an accommodation had been previously requested or provided. (Tr. Vol. IV, pp. 69-7) Day then consulted with the human resources and legal departments of the company and thereafter requested that Complainant's doctor fill out forms, answer questions, and provide medical documentation to support his claim that he was disabled and that an accommodation would be needed. (Tr. Vol. IV, pp. 70-71; 154)

20. In response to Day's request, on February 14, 2006, Complainant presented him with a letter from Dr. King. (Jt. Ex-2) This letter stated that following a total knee replacement in April of 2004 and arthroscopic surgery in September of 2005, Complainant was left with limited range of motion in his knee, and would not regain full range of motion. The doctor's note stated that, "to that degree, his knee is a disability," and that his limited range of motion coupled with his height requires him to drive a truck with ample seating room to allow him to safely operate the truck, as he had been doing for 1 ½ years since his surgery. Upon receipt of the letter, Day told Complainant he could not drive and Day sent him home out of concern that Complainant presented a safety issue. When Complainant protested that he had been driving safely for 18 months, and asked why, all of a sudden, he'd become a safety risk, Day stated that Complainant had to be able to drive every piece of equipment in Respondent's fleet or he could not drive at all. (Tr. Vol. I, p. 91) Day testified that the doctor's note raised the issue of Complainant's ability to drive all trucks safely and did not provide sufficient information about the type of accommodation needed and so he decided to put Complainant out of service. (Tr. Vol. IV, p. 71-72) He did not review Complainant's safety record at the time. (Tr. Vol. IV. p. 72)

21. Complainant testified that because Respondent would not accommodate his disability and fearing he would lose his livelihood and his pension, he filed the instant complaint with the Commission. (Tr. Vol. I, p.92) After receipt of Complainant's charge of discrimination, Respondent sent him a letter seeking further information about his disability. (Jt. Ex. 4) Complainant testified that he was very frustrated by this additional request, because he believed that Respondent's questions were addressed by his doctor's

original letter. He highlighted those portions of the doctor's letter that he deemed responsive to the inquiry and sent it back to Respondent, believing in good faith that his doctor's letter adequately documented the range of motion problem in his knee and that his impairment, coupled with his height, required him to drive a larger tractor. (Jt. Ex. 5) Complainant testified that it was very frustrating to him to have Respondent repeatedly seeking answers to questions his doctor had already addressed. (Tr. Vol. I, pp.93-98)

22. Complainant remained out of work involuntarily until mid-March of 2006. On March 12, 2006, Complainant bid on a dock-only position after Day called him and advised him he could bid on a position at Respondent as a dock worker. Complainant returned to work as a dock worker on or about March 12, 2006. The dock worker and P&D driver positions carry the same rate of pay and benefits. (Tr. Vol. II, pp. 237-238; Vol. IV, p. 95)

23. Shortly after he returned to work as a dock worker, Complainant's noon dock-only start time was abolished and he therefore had to bid on a 4:00 p.m. dock-only start time. (Jt. Ex. 7) Following his 4:00 p.m. start time, Complainant finished work at 12:30 a.m. and returned home at approximately 2:00 a.m. (Tr. Vol. I, pp. 100, 107, 155) As a dock worker, Complainant loaded and unloaded trucks using a forklift, and had to work out of doors. He described the conditions on the dock as not optimal, "below zero in winter and overheated and dusty in the summer." (Tr. Vol. I, pp. 108-109) According to Complainant, most dock workers do not have commercial driver's licenses. (Tr. Vol. I, p. 110)

24. Complainant testified that he has been by-passed in favor of junior employees on the seniority list because he was restricted from driving, despite having a valid CDL

license with no medical restrictions. (Tr. Vol. II, p. 292) As a result of the difficult economy and being restricted to only dock work, he has been laid off periodically, while drivers with less seniority have continued to work. According to Complainant, employees who can perform both dock work and driving provide Respondent more flexibility and as a result they are often called in to work prior to dock workers who might have greater seniority. (Tr. Vol. I, pp. 111-112) Complainant continued in the position of dock worker for several years during the pendency of this action.

25. Day agreed that he was informed that Complainant could drive at least ten and probably fourteen of the twenty- four trucks in Respondent's city fleet. He also stated that there were about forty to fifty tractors available for P& D drivers at the North Reading terminal and that everyday five or six P&D drivers drive linehaul trucks out of the terminal as part of the company's regular business operations. He also testified that dock work is available for city drivers every day, generally in the morning, but that city drivers do not, as a general rule, work on the docks everyday. (Tr. Vol. IV, pp. 124-127).

26. In March of 2008, in an attempt to resolve this matter, Complainant asked his physician to send an additional letter to Respondent. The doctor's March 18, 2008 report stated that Complainant has a "significant disability" and that his function is limited in many situations. It indicates he has difficulty performing certain activities and getting into certain positions and that he was "unable to drive trucks where there is insufficient leg room for his stiff knee." (Jt. Ex. 11) The report further states that despite the fact that Complainant was forced by his employer to cease driving trucks, he can still operate many of the trucks without difficulty. The doctor's summary indicates that

Complainant's limited range of motion prevents him from operating only certain vehicles. (Ex. C-1)

27. Following receipt of the doctor's March 2008 letter, Respondent requested that Complainant provide minimum leg room dimensions under which he could perform his job. (Jt. Ex. 12) In response to this request, Complainant measured a specific truck that had adequate room to accommodate the restricted range of motion in his knee and relayed those dimensions to his doctor, explaining the situation. As a result of that conversation, his doctor provided a document dated May 20, 2008 specifying the dimensions of the trucks Complainant could drive, accompanied by the diagram Complainant had made. (Jt. Ex.13)

28. Complainant testified that he compared the measurements he had provided the doctor with the dimensions of the trucks in Respondent's fleet, (Ex. R-6) and concluded that he could safely drive the majority of the trucks in Respondent's overall fleet. (Ex. C-2) He also testified that he can drive all the trucks in Respondent's linehaul fleet. (Tr. Vol. I, p. 122-123)

29. Complainant testified credibly that his work situation has been very frustrating, upsetting and difficult for him and his family. He testified that he no longer engages in many social or recreational activities with his wife and family because of his work hours, and he has lost interest in the things he used to do. (Tr. Vol. I, pp. 186, 187, 189) He acknowledged that he did not sign up for overtime work on weekends after he was placed in a dock-only position and his work hours changed, because he wanted to spend time with his family. (Tr. Vol. II, pp. 292-233)

30. In August of 2008, Respondent offered Complainant an alternative to working a dock-only shift that would have resulted in his returning to a P&D driver position. On August 12, 2008, Day sent correspondence to the union agent, John Murphy, which stated that if Complainant would agree to a dedicated start time of 9:00 a.m. or earlier as a P&D driver, he would be permitted to have this time regardless of his seniority and he would be granted seniority at the dispatch window to pick an assignment that satisfied his alleged restrictions. Respondent asserted that this arrangement would greatly increase Complainant's chance of getting a tractor that fit the dimensions he needed and would give the company greater flexibility relative to available work and tractor assignments for Complainant. (Ex. R-4) The Union responded that Respondent's proposed accommodation would violate the Union contract, and the Union refused to agree to it. Day testified that the parties to the Union contract could modify the provisions contained therein following negotiations and agreement, but the Union did not offer to negotiate about Respondent's proposal and it did not propose any alternative. (Tr. Vol. IV, p. 104)

31. After Complainant's doctor provided further clarification regarding certain floor to ceiling dimensions, in April of 2009, days before the hearing in this matter, Complainant bid into a linehaul position at Respondent's urging and returned to driving a linehaul tractor as an over-the-road driver. (Tr. Vol. IV, p. 90, 113; Exs. R-30, R-38) According to Respondent, prior to April of 2009, Complainant never indicated a willingness to entertain a linehaul bid, but Complainant was told by the Union steward that he could only bid on dock positions. (Tr. Vol. II, p. 392) Respondent asserts that the April 2009 doctor's letter was the first indication it had that Complainant was cleared to drive linehaul tractors. I find this position to be disingenuous, given that Complainant

was always capable of driving the majority of linehaul tractors in Respondent's fleet and could have easily demonstrated this had he been given the opportunity to do so.

32. In his current linehaul position Complainant leaves the local terminal on Sunday nights and returns on Tuesday. On Tuesday nights he leaves again and returns on Thursday. He goes out again on Thursday night and returns on Saturday morning. Complainant spends most of his nights in hotels in Harrisburg or Buffalo. (Tr. Vol. IV, pp. 183-184) He testified that he rarely sees his family and has no weekend time to spend with them. He also stated that he bid for his prior P& D position driving days after Respondent closed the New Hampshire terminal in Portsmouth close to where he lives. Since then he has had over an hour- long commute to the North Reading Massachusetts terminal. This long commute makes driving over-the-road more stressful and difficult. (Tr. Vol. IV, pp. 184-186) While Respondent asserted that Complainant has the opportunity to earn more as a linehaul driver than in his P&D driver position, Complainant stated this fact does not make it an accommodation, because the position is much more difficult and stressful and keeps him away from home most of the time. (Tr. IV, p. 108, 185)

33. On March 9, 2009, Respondent and Yellow Transportation, Inc. merged to form YRC, Inc. (Tr. Vol. II, pp. 300-301) In addition to other changes, the two operations were consolidated into one terminal in North Reading and the seniority lists from both terminals were merged or "dovetailed" into one master list. (Tr. Vol. IV, pp. 8, 31-32, 61-62, Ex. R-14) The North Reading terminal now handles pick-up and deliveries in the downtown Boston area, the majority of which need to be delivered on a straight truck.

Since the merger in 2009, the number of straight trucks in Respondent's North Reading fleet has more than doubled (Tr. Vol. IV, p. 34).

34. Complainant alleges that he lost wages while in the dock- only position because he was laid off for periods of time while employees with less seniority were called into work as drivers and dock workers. (Tr. Vol. II , pp. 237-239) Pursuant to the Union contracts in effect for the years at issue, the salary for P& D drivers and dockworkers was: \$21.58 per hour effective April 1, 2006; \$22.08 effective April17, 2007; \$22.68 effective April 1, 2008; and \$23.08 effective April 1, 2009. (Jt. Ex. 22; Joint Stipulation of Damages 1/7/10) As of April 14, 2006, Complainant was number 48 on the seniority list and his closest comparator, Lou Ragucci, was number 49 on the list. (Ex. C-5) As of July 7, 2008, Complainant was number 39 on the seniority list and Ragucci was number 40. (Ex. R-13) At all relevant times, Ragucci was less senior than Complainant.

35. Complainant earned \$40,536.56 in 2006. Complainant was paid for 1,649.08 regular hours and 54.19 overtime hours, and for 112 vacation/sick/personal hours. The total amount of wages for overtime was \$1,754.13. Ragucci earned \$73,051.43 in 2006. Ragucci was paid for 2,670.32 regular hours, 822.86 overtime hours, and 120 hours of vacation/sick/personal time. (Jt. Ex. 24)

36. Complainant earned \$45,363.76 in 2007. He was paid for 1,798.84 regular hours and 20.1 overtime hours, and 240 hours of leave time. (Jt. Ex. 23) He earned \$656.56 in overtime hours. Ragucci earned \$71,124.62 in 2007. He was paid for 2,537.8 regular hours, 735.83 overtime hours and 270 hours of leave time. (Jt. Ex. 24)

37. Complainant earned \$36,957.84 in 2008. He was paid for 1,340.51 regular hours, 35.1 overtime hours and 249 hours leave time. He earned \$1,171.78 in overtime pay. (Jt.

Ex. 23) Ragucci earned \$61,713.51 in 2008. He was paid for 2,140.22 regular hours, 638.69 overtime hours, and 252 hours leave time. (Jt. Ex. 24)

38. Since job opportunities and layoffs are based on seniority, Complainant should have made at least as much for regular hours worked as Ragucci from 2006 up to March of 2009. Complainant asserts he did not work as many hours as Ragucci because he was denied opportunities to drive from February 2006 until March of 2009. I find that Complainant is entitled to the difference in wages for regular hours between what he earned performing dock work and what Ragucci- the next most senior driver- earned. In 2006, Ragucci's regular wages were \$46,532.27. Based on his seniority, Complainant would have earned at least this amount in regular wages. Complainant earned \$38,782.43 for regular hours in 2006. Therefore, he is entitled to \$7,749.84 in lost wages for 2006. In 2007, Ragucci's regular wages were \$46,874.63. Complainant's regular wages were \$44,707.20. Complainant is entitled to \$2,167.43 in lost wages for the year 2007. In 2008 Ragucci's regular wages were \$40,116.23. Complainant earned \$35,786.06 in regular wages. Therefore, Complainant is entitled to \$4,330.17 for lost regular wages in 2008.² Complainant returned to the position of linehaul driver in April of 2009, and thus, is not seeking damages for lost wages beyond that point. Based on his 2008 losses, Complainant is owed \$2,035.96 for January, February and March of 2009. I find that Complainant's total lost wages for regular work hours from February 2006 until April 2009 are \$16,283.40.

² Day testified that Complainant was offered the opportunity to bid on a linehaul position in January of 2008 at his deposition if he would provide a doctor's note clearing him to do so, but that he declined because he did not want to work over-the-road and be away from his family for long periods. (Tr. Vol. IV, pp. 105-106). Complainant did respond with an additional doctor's note in March of 2008 that led to additional negotiations culminating in his April 2009 bid to a linehaul position.

39. Complainant admitted that after he was removed from his P & D driver position and involuntarily transferred to a dockworker position, he chose not to sign up for weekend overtime, which is when overtime work is primarily offered. (Tr. Vol. II, pp. 278-280, 381) Overtime is assigned by seniority to those employees who have signed up for it. (Tr. Vol. II, p. 381) Employees who work Sunday overtime are guaranteed eight hours of pay at “time and a half” the regular rate of pay, regardless of how many hours are actually worked. (Tr. II, p. 280, 385-386) Matt Denley testified that he had reviewed the Sunday overtime sign-up sheets for January 2006 through February 2, 2009 (Ex. R-15) and determined that Complainant had sufficient seniority to have secured eight hours of Sunday overtime work on 117 separate occasions during that time period. By failing to sign up for such overtime, Complainant had forfeited \$30,961.32 in overtime pay for that time period. (Tr. Vol. II, pp. 385-390) However, Complainant testified that he did not sign up for overtime because the start time for his shift as dock worker was changed from 11:00 a.m. to 4:00 p.m. and consequently his day ended at 2:00 a.m. He testified that this disrupted his sleeping patterns and his entire life and that he was no longer able to spend any time with his wife or family during the week. I find that Complainant would have continued to seek overtime hours and would have worked overtime consistent with his practice in the past, had he not been involuntarily removed from his P&D driver position. Consequently, I find that he was justified in not seeking weekend overtime as a dock worker given the unfavorable conditions and hours associated with this job. I find that he is entitled to damages for lost overtime pay based on an average of his overtime hours in the years 2004 and 2005, which was 221.28 hours per year. Complainant worked only 54.19 overtime hours in 2006. (Ex. C-7) Overtime is

computed at time and a half. Based on his prior average of overtime as a driver, Complainant would have earned \$1,168.91 in overtime from January 2006 to March 31, 2006 $[(\$21.13 \times 1.5) \times (221.28 \times 3/12)]$ and \$3,581.42 from April of 2006 to December 31, 2006. $[(\$21.58. \times 1.50 \times (221.28 \times 9/12)]$ Deducting the overtime that he earned for 54.19 hours, I conclude that he is entitled to \$2,996.20 in lost overtime for 2006. Based upon his prior average, Complainant's overtime earnings from January 1, 2007 to March 31, 2007, would have been \$1,193.81 $[\$21.58 \times 1.50 \times (221.28 \times 3/12)]$. His overtime earnings from April 1, 2007 to December 31, 2007 would have been \$3,664.40 $[(\$22.08 \times 1.5) \times (221.28 \times 9/12)]$. I conclude that he is entitled to \$4,201.64 in lost overtime for 2007. Based upon his prior average, Complainant's overtime earnings in 2008 would have been \$1,221.47 $[(22.08 \times 1.5) \times (221.28 \times 3/12)]$ from January 1 to March 31, and \$3,763.97 $[(\$22.68 \times 1.5) \times (221.28 \times 9/12)]$ from April 1 to December 31. I conclude that Complainant is entitled to lost overtime of \$3,813.65 for lost overtime earnings in 2008. I find that Complainant's total lost overtime wages are \$11, 011.49.

40. According to the Rules and Regulations for the New England Teamsters & Trucking Industry Pension Fund, a participant will receive one year of contributory credit when 1,800 hours of work is completed. Complainant received full contributory credit for 2006 & 2007. However, in 2008, he received credit for only 1,661 hours of work, which left him 139 hours short of full credit. (Ex. C-10) According to Article 65-Pension Fund of the Agreements, the hourly employer pension contribution to the pension fund is at a rate of \$5.91 per hour. Complainant asserts that because he was denied work as a result of being limited to dock work duties and because less senior drivers worked well over

1800 hours in 2008, he is owed \$821.49 (139 hours x \$5.91) for lost pension benefits in 2008. I concur with this assertion.

41. In or about July of 2006, July of 2008, March of 2009 and July of 2009, Complainant paid \$527.62, \$981.26, \$1,194.49, and \$616.03 respectively to continue full coverage of his health and welfare benefits. He was required to pay these amounts because he was laid off from dock work while less senior drivers were not laid off, and as a result, he did not work sufficient hours to maintain his health coverage. Complainant is owed a total of \$3,319.40 for out-of-pocket health and welfare benefits he would not otherwise have incurred.

42. Complainant testified regarding the emotional toll resulting from being removed from his long-standing position and how frustrating the struggle has been to pursue his former position, which he is capable of doing, with a minor accommodation. (Tr. Vol. I, pp. 97) He testified that due to his altered dock start time of 4:00 p.m., he does not get home until 2:00 a.m. These late hours, and coupled with his long commute, have resulted in his sleeping half the weekend, being tired all the time, no longer having regular eating habits, and experiencing a complete loss of interest in the social and recreational activities he used to enjoy with his family. He testified that he does not get to spend time with his grandchildren. (Tr. Vol. I, pp. 186-188.) Complainant's wife testified about the emotional toll on Complainant, their relationship and their family life, stating that it is "very hard." She stated that she and Complainant no longer spend evenings and weekends together, no longer get to eat dinner together and they only speak to each other for about 10 minutes a day on the phone. (Tr. Vol. I, pp. 155-157) She testified her husband's sleeping habits are not good, that he has gained weight and that these patterns

have grown worse over the past two years. (Tr. Vol. I, p. 158) She confirmed the decline in their social and recreational activities stating that prior to 2006, they were avid golfers and members of a golf club, fished, hiked and went boating. They rarely partake in these activities any longer because Complainant has lost interest in them. (Tr. Vol. I, pp. 158-159)

III. CONCLUSIONS OF LAW

General Laws c. 151B s. 4(16) prohibits discrimination against persons with disabilities who are capable of performing the essential functions of the job with an accommodation and requires employers to provide reasonable accommodation to such disabled employees unless they can demonstrate that the accommodation sought would impose an undue hardship to the employer's business. A handicap is defined by G.L. c. 151B s. 1(17), as "(a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment." See *Dahill v. Police dept't of Boston*, 434 Mass. 233 (2001); *Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against discrimination*, 441 Mass. 632 (2004). Consistent with the Legislature's directive that the provisions of G.L. c. 151B shall "be construed liberally" to effectuate the remedial purposes of the statute, the Commission has traditionally interpreted the definition of handicap broadly to effect protections for those employees who have suffered impairments that affect their ability to do their jobs but who are still capable of carrying out the essential functions of the job. G.L. c. 151B, s. 9. *Dahill, supra.* at 240. This liberal interpretation of G.L. c.151B is also consistent with Congress's intent in its recent

amendments to the ADA, and EEOC's interpretive guidelines and its proposed pending regulations. 29 CFR 1630 (Fed. Reg. 9/23/09, Vol. 74 No.183) Pursuant to the 2008 amendments, "the definition of disability ...shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA, and the determination of whether an individual has a disability should not demand extensive analysis. (Appendix to 29 CFR part 1630--Interpretative Guidance on Title I of the Americans with Disabilities Act—Introduction, Fed. Reg. 9/23/09, Vol. 74 No. 183) To that end, "the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a 'person with a disability.'" 2008 Senate Managers' Statement at 11. One of the primary purposes of the amendments to the ADA is that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Section 2(b)(5) " Findings and Purposes." 29 CFR §1630.2(j), Fed. Reg. 9/23/09, Vol. 74 No.183)

The Commission's interpretation of the handicap provisions of G.L. c. 151B has been consistent with this approach as have Massachusetts courts. See *Dahill, supra*. (defining disability more broadly and declining to adopt the holding in *Sutton v. United Airlines, Inc.* 527 U.S. 471 (1999) that if impairment is corrected or mitigated by measures such as medication or eye glasses, the employee may not be deemed disabled) The Supreme Judicial Court has emphasized that "[G.L.] c. 151B anticipates that

determining whether a person is a ‘handicapped person’ will be an individualized inquiry...Per se rules are to be avoided. *Ocean Spray Cranberries, Inc. v. Mass. Comm’n Against Discrimination, supra.* at 637. Whether an impairment substantially limits a major life function turns on factors including the nature and severity of the impairment, the duration of the impairment, and its permanent and long-term impact. See *School Committee of Norton v. Mass. Comm’n Against Discrimination*, 63 Mass. App. Cot 839, 844 (2005).

Complainant’s total knee replacement in 2004 left him with limited range of motion in his left knee. He underwent arthroscopic surgery in September of 2005 to ameliorate the problem, but was still left with diminished range of motion in his knee. This is a chronic and long-term impairment which affects all types of activities requiring the ability to bend one’s knees. It impacts Complainant’s ability to kneel and climb stairs or ladders, requires him to use the handicap seating at sports and entertainment venues, and affects his ability to drive certain vehicles.

For most of his adult life, Complainant’s job has been driving tractor trailers, and he has done this job for Respondent since 1997. Complainant’s impairment affects his ability to drive smaller trucks with standard transmission and a clutch. He cannot drive a standard shift car unless the seat can be pushed back sufficiently to allow him to bend his knee. Complainant testified that his impairment affects his ability to do his job to the extent that he requires a tractor with sufficient leg room. He has demonstrated his ability to continue driving linehaul trucks. Complainant’s doctor confirmed that that he will never regain normal range of motion in his knee and that the diminished range of motion in his knee is a disability. His doctor also stated that he is “quite limited in many

situations.” (Jt. Ex. 2) In 2008, Dr. King reiterated that Complainant has a disability stating, “Because of his knee stiffness, I believe he has a significant disability.” He explained further that Complainant is limited in how high he can raise his knee when walking; he is limited in his ability to climb stairs; he is unable to sit in areas with confined seating; he is limited in his ability to kneel; and he is limited in his ability to drive certain trucks. Dr. King’s March 18, 2008 report stated that Complainant has difficulty performing certain activities and getting into certain positions. (Ex. C-1) Respondent produced no medical evidence to dispute Dr. King’s assertions that Complainant is disabled.

While Respondent has argued extensively that Complainant’s limited range of motion in his knee is not a significant impairment and has cited to numerous federal cases holding that persons with similar disabilities are not disabled from “working,” these cases are not consistent with our interpretation of disability under c. 151B, as supported by Congress’s recent admonition that the federal courts have been overly restrictive in their approach to what constitutes a disability under the ADA.³ I therefore do not accept Respondent’s assertion that Complainant is not disabled within the meaning of c. 151B. Complainant’s limited range of motion in his knee was a disability to the extent it impaired his ability to engage in a number of activities that involve walking, climbing, sitting, and kneeling. An “impairment does not need to be so substantial that the [complainant] is completely incapable of performing the major life activity in question. The ADA ‘addresses substantial limitations on major life activities, not utter inabilities.’”

³ In proposing revised regulations interpreting the recent amendments to the ADA, consistent with the intent of Congress, the Chairman of the EEOC stated in June of 2009, “These regulations will serve to shift the focus of the courts from further narrowing the definition of disability and putting it back to where Congress intended when the ADA was enacted in 1990.” (EEOC Press release 6/17/09)

Bragdon v. Abbott, 524 U.S. 624, 641 (1998) I conclude that Complainant's impairment renders him disabled within the meaning of c. 151B and that the law was intended to be interpreted liberally, specifically to address just such scenarios and to protect employees, who, like Complainant, are capable of performing their job with a reasonable accommodation, and to ensure their continued livelihood. The law's broad prohibition against the discrimination of qualified handicapped individuals is "recognition that persons who are physically or mentally impaired are nevertheless capable of becoming" or remaining, "successful members of the workforce," and c. 151B, s. 4 has been construed "to give the fullest effect to that recognition." *Dahill, supra.* at 240-241.

Having determined that Complainant is disabled within the meaning of the statute, I turn to the subsequent inquiry of whether he is a qualified handicapped individual, i.e., capable of performing the essential functions of the job, with a reasonable accommodation, and whether he sought such an accommodation.

Complainant has asserted that he is capable of performing the essential functions of his job with a reasonable accommodation and that he requested an accommodation. That Complainant was able to perform the essential functions of his job and to continue in his job as a P&D driver is supported by his doctor's assessment, the fact that he could continue to drive the majority of trucks in Respondent's city fleet and all of the trucks in Respondent's linehaul fleet, the fact that he remained certified by the DOT to safely drive large trucks, and the fact that he retained his commercial drivers license at all times. The evidence establishes that Complainant was able to drive a tractor that accommodated his disability for eighteen months and that there were only one or two occasions when he had

to wait a short time for a truck that he could drive. On these occasions he performed dock work.

Complainant testified credibly that he sought and received an accommodation to drive a truck with a larger tractor from the two terminal managers who preceded Day. These requests for an accommodation were supported by his doctor's note addressing his need to drive a larger tractor on account of his limited range of motion. Complainant's requests to the prior terminal managers were informal and verbal. They were accompanied by requests that the terminal manager come to the yard for a demonstration of Complainant's problem. Complainant testified that both previous managers acceded to his request to drive a truck with a larger tractor and on the rare occasion when a truck was not available, they assigned Complainant to dock work.

Respondent asserts that it was not on notice of Complainant's disability and that he did not make a formal written request for an accommodation. However, a request for accommodation need not be formal or in writing. See *Anderson v. United Parcel Service*, 32 MDLR 45 (2010). The duty to provide a reasonable accommodation requires an employer to participate in an interactive process with a disabled employee who requests an accommodation. See MCAD Handicap Guidelines at 15-16, 20 MDLR Appendix (1998); *Mammone v. President & Fellows of Harvard College*, 446 Mass. 657, 670 n.25 (2006); *Shedlock v. Department of Correction*, 442 Mass. 844, 856 n. 8 (2004); *Ocean Spray Cranberries, Inc. v. MCAD*, 441 Mass. 632, 644 (2004). The interactive process requires the employer to engage in a direct, open, and meaningful communication with the employee. It is designed to identify the precise limitations associated with the employee's disability and the potential adjustments to the work environment that could

overcome the employee's limitations. See *MBTA v. MCAD*, 450 Mass 327, 342 (2008); *Mazeikus v. Northwest Airlines*, 22 MDLR 63, 68-69 (2000); *Daly v Codman & Shurtleff, Inc.*, 32 MDLR18 (2010).

Rather than engage in an "open" and "meaningful" communication with Complainant, Respondent insisted that Complainant's request for accommodation could only be evaluated after his doctor answered a number of formulaic questions. Complainant insisted that Respondent already had the information it sought and that he could easily demonstrate his impairment and its limitations. This disagreement over whether the information Respondent had was sufficient to constitute a request for an accommodation deteriorated into a contest of form over substance. I conclude that the communications from Complainant and his doctor relating to the type of truck he needed to drive did, in fact, constitute request for an accommodation.

Respondent next argues that it would constitute an undue burden on its business operations to grant Complainant's request for an accommodation, and offers several reasons why it could not accommodate Complainant's request. The first is that it is a requirement of the job that Complainant be able to drive all trucks in its city fleet. The second is that it could not predict with any degree of certainty that an appropriate truck would always be available to Complainant, and that the lack of availability would potentially disrupt its operations and cause undue expense insofar as it would have to pay Complainant for time he was not working. The third is that Complainant posed a safety risk, because it is an essential function of a P&D driver's position to be able to safely operate all the trucks in Respondent's city fleet. (Tr. Vol. II, p. 361; Tr. Vol. III pp. 496-497) Contrary to Respondent's reasoning, it is not an essential function of the P& D

driver position to be able to operate all of the trucks in Respondent's city fleet. Complainant demonstrated that he was able to perform his job for eighteen months while restricted from driving straight trucks or smaller trucks. Furthermore, Respondent's claims that it could not guarantee Complainant a suitable truck or the availability of dock work on any given day are purely speculative and contrary to the evidence that there were only two times in eighteen months when a rig was not available for Complainant to drive. Moreover, on both occasions there was dock work available for Complainant to perform for a short period until a rig became available. There was no evidence Respondent's operations were disrupted in these two instances. In fact, Respondent was not able to point to one occasion in the eighteen months prior to February of 2006 when its operations were disrupted or when it had to pay Complainant for not working. Moreover, I categorically reject Respondent's assertion that it could not have assigned Complainant a truck that suited his needs, because the Union contract and seniority provisions did not govern the assignment of equipment and management retained the right to assign trucks. In addition, there was ample testimony that many P&D drivers are routinely assigned to the same truck and that management prefers this practice and encourages drivers to drive the same rig because there they were more likely to treat it as their own and take better care of it, and because the practice often promotes greater efficiency of operations.

Finally, I do not accept Respondent's assertion that Complainant posed a safety risk. Day's order that Complainant cease driving because he posed such a risk was unjustified. When Complainant informally advised Day of his existing arrangement for an accommodation, Day refused to accompany him to the yard and refused to discuss the issue further, telling Complainant that he needed a doctor's note on file. Complainant

insisted that Respondent already had a letter from his doctor. Day's refusal was a rejection of precisely the sort of less formalized, interactive dialogue that front line supervisors should have with disabled employees in order to determine an appropriate accommodation. Complainant insisted Respondent already had a letter from his doctor, but Day insisted that he secure more detailed documentation of his disability and the accommodation he needed.

Complainant's doctor complied with the request to provide more detailed documentation of Complainant's disability and need for an accommodation. He stated that Complainant needed "ample seating room to allow him to safely operate the truck, as he has been doing for 1½ years since his surgery," In response to this reasonable documentation, Day determined that Complainant posed a *safety* risk, told him he could no longer drive and sent him home without any discussion regarding what Complainant could or could not do. Without having engaged in any interactive dialogue with Complainant, Day then undertook to comply with an unnecessarily rigid and formalized process. "Respondent's rigid and unyielding approach to the interactive process violates the premise that it should be a flexible dialogue designed to achieve a mutually beneficial goal." *Anderson, supra.* 32 MDLR at 51 *citing, Johansson v. MCAD*, Appeals Court, No. 2005-P-1367, p. 7 (2007), Rescript Judgment per Rule 1:28 (recognizing duty to cooperatively explore issue of reasonable accommodation with disabled employee in order to determine if accommodation is feasible)

Respondent asserts that once information about a disability is provided at the terminal level, the terminal manager is to involve individuals at the regional and national levels in order to analyze and respond to the request. (Tr. Vol. III, pp. 492-494) This is

precisely the juncture at which “Respondent’s approach to the reasonable accommodation process was long on formality and short on substance.” *Id.* at 251. Rather than have a discussion at the terminal level, with the principals involved, particularly with the employee, who has a unique and personal understanding of his limitations and knows better than anyone else what he can and cannot do, Respondent resorted to a bureaucratic process involving its legal and human resource departments. Once a request for accommodation has been made, “the appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.” 29 C.F.R. §1603.9, App. (1995) In this case, Respondent’s inflexible approach sought details from Complainant’s physician that were based on generic questions and forms, rather than seek practical information from Complainant, who was in the best position to know what his limitations were, and how they could be best accommodated. Instead, Complainant was ordered to cease driving absent any evidence that his continuing to drive posed a safety risk to himself or others.

In order to establish a defense that an employee poses a safety risk, the employer must prove that there is a “reasonable probability of substantial harm” to the employee or others. *See* MCAD Handicap Guidelines Section IX (B) (3) at 34-35, 20 MDLR Appendix (1998); *Ryan v. Town of Lunenburg*, 11 MDLR 1215, 12-41-42 (1989) *citing* *Mantolete v. Bulger*, 767 F.2d 1416 (9th cir. 1985). While Respondent made the subjective determination that Dr. King’s February 2006 letter called into question Complainant’s ability to safely perform his job, this assessment was not consistent with Complainant’s proven ability to perform the essential functions of job over a period of eighteen months. There is no objective evidence to suggest that he posed a safety risk.

Given Complainant's prior safety record and the fact that his driving certifications and credentials remained valid, the evidence points to the opposite conclusion. The fact that Complainant was allowed to begin driving linehaul trucks again in April of 2009, absent any change in his circumstances, also supports this conclusion.

Respondent makes much of the fact that it was not until May 20, 2008 that it received from Dr. King medical information specifying the exact dimensions of a cab that Complainant could safely drive. Respondent asserts this was the first time it learned what equipment Complainant could safely operate. I find this assertion to be entirely specious given that the information regarding these dimensions was generated by the Complainant and merely relayed to his doctor for re-transmission to Respondents. Complainant's attempts to relay this information to Respondent were thwarted from the start by Respondent's insistence that the information come from a medical provider who was not an occupational expert in trucking and knew nothing about driving requirements or the size or dimensions of tractor trailers. Complainant sought to communicate this information to Respondent initially and could have clarified his needs at any time during the three years it took for him to resume driving, had anyone wished to listen. He provided a number of doctor's letters to Respondent, none of which it deemed satisfactory. I do not accept Respondent's assertions that Complainant has failed to comply with the interactive process and is responsible for its refusal to allow him to be a truck driver for a three year period.

Finally, I reject Respondent's position that its offers to Complainant to perform dock work from March of 2006 until April of 2009 and to resume driving linehaul trucks in an over-the-road position in April of 2009, constitute reasonable accommodations that

relieve it of any liability and damages. Complainant testified that the dock worker position involved drastically different job functions and hours. The position of dock worker was a much less favorable position, involving much more physical labor and much less desirable working conditions. Complainant testified that his dedicated start time of 11:00 a.m. was abolished for dock work and he was involuntarily placed on a 4:00 p.m. start time, which meant he returned home at 2:00 a.m. In addition Complainant lost opportunities to work because he was subject to more lay-offs. Given the undesirable nature of the dock work position, the offer to perform such work was essentially an involuntary transfer, which Complainant felt compelled to accept in order to continue working. Generally, a reasonable accommodation for a current employee is a modification or adjustment to the work environment that enables a qualified handicapped individual to perform the essential functions of *that* position. *See* MCAD Handicap Guidelines Section VII (B) at 25-26, 20 MDLR Appendix (1998) Given the considerable disadvantages associated with the dockworker position, and the fact that the accommodation Complainant sought, to continue driving in the P& D position with a larger truck, was reasonable and feasible, I conclude that assignment to a dock worker position was not a reasonable accommodation.

Whether Respondent's offer to Complainant to resume driving linehaul tractors in an over-the-road position constitutes a reasonable accommodation is somewhat more difficult. Complainant testified that in an over-the-road position he is away from home almost all the time, and is never home at night during the week. He travels 2000 miles one week and 3000 miles the next. He leaves the local terminal on Sunday night and returns on Tuesday, leaves again on Tuesday nights and returns on Thursday, leaves

again on Thursday nights and returns on Saturday. He testified that he never has a full day and night at home and spends most nights in hotels in Harrisburg, PA or Buffalo, NY, and that this over-the-road traveling takes an enormous toll on him at his age. He is always tired, rarely sees his family and has no weekend time to spend with them. Since Respondent closed its New Hampshire terminal, which was much closer to where he lives, he has over an hour long commute to the North Reading Massachusetts terminal, which makes driving over-the-road more stressful and difficult. Given that this position is materially disadvantageous to Complainant and fundamentally alters the terms and conditions of his job, I do not deem it to be an accommodation, but rather an offer made under the guise of an accommodation at the eleventh hour as this case approached hearing. I reach this conclusion in light of the fact that the accommodation Complainant sought, to continue driving in his P&D position, an assignment earned by seniority rights, was feasible and reasonable, with the assignment of proper equipment.⁴ Given that management retains the right to assign specific equipment to employees, Respondent would have violated no contract rights of other employees in making this accommodation, nor was there evidence that its operations would have been disrupted.

While Respondent has asserted that it would be continue to be an undue burden to its operations to assign Complainant to a linehaul truck for his P&D position because it has merged fleets with YRC and the number of straight trucks in its city fleet has more than doubled, I am still not persuaded that this accommodation cannot be made without adverse consequences to its business operations or finances. An increase in the number

⁴ The Union's intransigence and refusal to negotiate Respondent's offer to grant Complainant a dedicated 9a.m. P&D start time regardless of seniority, with greater likelihood of a larger truck, placed Complainant in a no-win situation.

of linehaul trucks presumably resulted from merger also. Therefore I conclude that Respondent has violated and continues to violate its obligation to provide reasonable accommodation to Complainant in his P&D driver position and he should be granted the guaranteed accommodation of driving an appropriately sized truck in his P&D position commencing immediately.

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole, and to ensure compliance with the anti-discrimination statute. G.L.c. 151B s. 5; *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004). The Commission may award monetary damages for, among other things, lost compensation and benefits, lost future earnings, and emotional distress suffered as a direct and probable consequence of the unlawful discrimination. In addition the Commission may issue cease and desist orders, award other affirmative, non-monetary relief and assess civil penalties against a Respondent.

Back Pay

In this case, Complainant seeks an award of lost wages from February of 2006 until April of 2009, the period of time from when he was ordered by Respondent to cease driving all trucks, until he began driving linehaul trucks in an over-the-road position. He also seeks lost overtime pay for the period from February 2006 until December of 2008. Although Complainant's hourly rate of pay as a dock worker remained the same as that of P&D driver, Complainant lost opportunities to work regular hours while performing dock work because he was laid off for periods of time, while less senior employees were

called in to work. If Respondent had not ordered Complainant to cease driving and had not transferred him involuntarily to a dock worker position, he would have had the potential for greater earnings, as noted in the findings of fact. Based on the regular-time salary of the next most senior driver, Ragucci, and on the hourly rate of pay for the time period at issue as governed by the Union contract, I conclude that Complainant lost \$16,283.40 in regular wages from February 2006 until April of 2009, as a result of involuntary lay-offs. He is entitled to recoup that amount of damages for back pay.

An award for lost overtime is also warranted, given that Complainant has persuaded me that he would have continued to work at least the amount of overtime he worked in prior years had he been allowed to remain in his P&D driver position with an accommodation. But for the more difficult working conditions on the dock and the incredibly draconian work hours, Complainant would have continued to seek out and work overtime. As a result of the change in his start time on the dock to 4:00 p.m. and his return home at 2:00 a.m., Complainant was frequently exhausted on weekends and his only opportunity to see his wife and family was on weekends, when most overtime was offered. Given these circumstances, I find Complainant is entitled to recoup wages for lost overtime in the amount of \$11,011.49.

Lost Benefits

I have also concluded that Complainant lost contributory credit to his pension fund because he did not work sufficient hours in 2008 and therefore is entitled to \$821.49 to compensate him for the lost benefit. He is also entitled to \$3,319.40 in out of pocket expenses for health and welfare benefits for the period he was laid off from dock work while other less senior drivers were not laid off. I conclude that as a direct result of his

inability to drive, he did not work sufficient hours for certain periods to maintain his health coverage and should be compensated for his out-of-pocket expenses.

Emotional Distress Damages

Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in determining the extent of Complainant's suffering are the nature, character and severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004). I conclude that Complainant suffered significant emotional distress during the period of over three years that he was not allowed to drive trucks for Respondent and was relegated to dock work, a much less desirable position. I conclude that he has continued to suffer emotional distress as an over-the-road driver because of the much more draconian schedule. Complainant's demeanor was quiet and composed as he described his emotional state during his lengthy, unsuccessful, bid to return to a P&D driver position. He conveyed a strength of character and stoicism that has clearly sustained him through a very difficult period. My observations of Complainant convinced me that he has shouldered an enormous amount of emotional pain, but has done so quietly and stoically. He described not having regular eating habits, irregular sleep, losing interest in all social and recreational activities that he and his wife once enjoyed and sleeping half the weekend because of his draconian work schedule. He discussed the disruption to his life of not being at home during regular hours and not seeing his wife from February of 2006 on because he had to work evenings and nights until the wee hours of the morning. Since April of 2009 he has rarely been at home for any extended period of time and spends most nights in hotels. He stated this has taken a toll on him emotionally and negatively

impacted his relationship with his wife and grandchildren. He also discussed the enormous frustration he has experienced in his four-year long struggle to secure the accommodation to which he is entitled. Complainant's wife also testified about his emotional health over the last four years. She confirmed that the change in Complainant's job and work schedules has made their life very hard, that they never spend nights and weekends together, no longer eat dinner together and speak to each other only ten minutes a day on the phone. She confirmed that her husband's eating and sleeping habits are totally disrupted, have worsened, and that he has gained weight. She also confirmed that they no longer engage in the social and recreational activities they once enjoyed. I find that the disruption to Complainant's life has affected his emotional well being and caused him to lose interest in the normal every day activities that sustained his family and relationships. I conclude that the Complainant has suffered significant emotional distress as a direct result of Respondent's refusal to grant him a reasonable accommodation and that he is entitled to an award for emotional distress in the amount of \$100,000.

V. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L. c. 151B, s. 5, Respondent is hereby ordered to:

- (1) Cease and desist immediately from refusing to provide Complainant with the accommodation of an appropriately sized truck that will allow him to bid on

a P&D driver position and grant him this guaranteed accommodation commencing forthwith.

- (2) Pay to Complainant the sum of \$16,283.40 in back pay damages for regular time and \$11, 011.49 in back pay damages for overtime, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (3) Pay to Complainant the sum of \$821.49 for lost pension contributions and \$3,319.40 for out-of-pocket health care expenses.
- (4) Pay to Complainant the sum of \$100,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.
- (5) Conduct a training session regarding handicap discrimination and the provision of reasonable accommodation, within 120 days, for all of its managers and supervisors at the North Reading terminal and those managers or officers who participate in the handicap accommodation process, regardless of whether they are based in Massachusetts. Respondent shall utilize a trainer approved by the Commission or a graduate of the Commission's "Train the Trainer" course. Respondent shall submit a draft training agenda to the Commission at least one month prior to the training date and note the location of the training. The Commission retains the right for a designated representative to attend and observe the training session.

The Respondent shall notify the Commission of the names and job-titles of those who attend any training session. The training shall be repeated at least one time within one year of the first session for any and all managers or supervisors who did not attend the initial training or who were hired thereafter.

This decision represents the final Order of the Hearing Officer. Any party aggrieved by this decision may file an appeal to the Full Commission by filing a Notice of Appeal with the Clerk of the Commission within ten (10) days of receipt of this decision and a Petition for Review within thirty (30) days of receipt of this decision.

So Ordered this 2nd day of August, 2010.

Eugenia M. Guastaferr
Hearing Officer