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Office of Administrative Law Judges
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Issue Date: 22 June 2011

CASE NO.: 2011-STA-16

In the Matter of

JOE N. OGLESBY,
Complainant

v.

FORESIGHT TRANSPORTATION GROUP,
Respondent

APPEARANCES:

JOE N. OGLESBY, pro se

GARY W. NOVAK, ESQ.,
For the Respondent

DECISION AND ORDER

I. JURISDICTION

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 [hereinafter "the Act" or "STAA"], 49 U.S.C. § 31105 (formerly 49 U.S.C. app. § 2305), and the applicable regulations at 29 C.F.R. Part 1978. The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules.

II. PROCEDURAL HISTORY[1]

Complainant, Mr. Joe N. Oglesby (hereinafter "Oglesby"), filed a complaint of discrimination with the Department of Labor, under Section 405 of the Act, against Foresight Transportation Group (hereinafter "Foresight"), on or about May 24, 2010, alleging he was

[1] References in the text are as follows: "ALJX ___" refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judge; "CX ___" refers to complainant's exhibits; "RX ___" to respondent's exhibits; and "TR ___" to the transcript of proceedings page and testifying witness' name.

discharged by the respondents in retaliation for making protected-activity complaints and refusing to drive in violation of Department of transportation hours-of-service regulations. The complaint was investigated by the Department of Labor and found to no reasonable cause to believe the respondent violated the Act. On or about November 4, 2010, the Secretary issued her Findings dismissing the complaint. By letter, dated November 17, 2010, Mr. Oglesby timely objected to the Secretary's Findings and requested a hearing. I issued a Notice of Hearing, on December 9, 2010. The matter was tried, on March 29, 2011, in Wheaton, Illinois.

Complainant's exhibits ("CX") 1-6 and Respondent's exhibits ("RX") 1-14 were admitted in evidence with no objections. (TR 245). CX 2 consists of six complainant's small Ohio and Pennsylvania Turnpike receipts from March 14-16, 2010, at: 11:25 PM on 3/14 (Portage to Eastpoint); 4:17 on 3/15 (Exit 239); 4:25 on 3/15 (Gateway); 2:09 PM on 3/15 (Warrendale); 7:47 AM on 3/16 (Newburgh, NY), including on TravelCenter Scale receipt, on 3/15 at 4:36 PM (Harrisville, PA). (TR 43 & 45). CX 1 is complainant's four legible Illinois highway toll receipts, dated 3/14/10, at 6:49 PM, 7:06 PM, 8:34 PM, and 8:50 PM. (TR 45). CX 3 consists of fourteen pages of Driver's Daily Logs, eight of which are signed by Oglesby, for the period of 3/14 through 3/20/10, showing a trip to Belle Vernon, PA, Manchester, NH, Ridgewood, NY, Brooklyn, NY, Mifflin, PA, Glendale, WV, and, Elizabeth, NJ. CX 4 consists of tissue carbon copies of four pages of unsigned Driver's Daily Logs for 3/14-15/2010. CX 5 consists of two identical compact disk recordings. CX 6 consists of three photocopies of a Certified Automated Truck Scale document from Boling Brook, IL, on 3/14/2010 and 3/15/2010 from Barkleyville, PA.

Employer exhibits 1, 2, 4, 5, 7, 8, 9, and 12, consist of photocopies of signed Driver's Daily Logs for the period of 2/25/2010 through 3/ 11/2010. The printing on these documents is the same as on the complainant's exhibits and I find it is Mr. Oglesby's printing. EX 3 consists of two credit card receipts from the Greater Chicago I55 Truck Stop, on 3/5/2010, signed by Oglesby. EX 6 is a photocopy of a Certified Automated Truck Scale document from Boling Brook, IL, on 3/7/2010 and a photocopy of two Illinois Toll Highway receipts for 3/7/2010, at 3:41 and 3:57 AM. EX 7 also has a photocopy of a credit card fuel receipt from a TravelCenters of America, dated 3/8/2010, in Duncan, SC. EX 8 also has a photocopy of a largely illegible credit card fuel receipt, signed by Oglesby, from a TravelCenters of America. EX 10 consists of a photocopy of: a TravelCenters of America credit card fuel receipt, signed by Oglesby, with no date, from Columbia, NJ; a New Jersey Turnpike receipt, dated 3/10/2010; and, a turnpike receipt from 3/10/2010. EX 11 is a photocopy of a Certified Automated Truck Scale document from Columbia, NJ, dated 3/10/2010. EX 12 also has a photocopy of a signed credit card fuel receipt from a TravelCenters of America, Gary, (Ill.), dated 3/11/2010. EX 13 consists of a photocopy of three 3/11/2010 toll road receipts, one of which (Indiana) is largely illegible, and two from Ohio and Delaware. EX 14 is a printed Transaction report for Foresight's credit card charges for fuel for the period of 3/5/2010 through 3/20/2010, reflecting purchases in IL, SC, VA, NJ, CT, NY, and IN, four of which were purportedly made by Oglesby.

The complaint presents the issue of whether Mr. Oglesby was discharged in violation of the STAA. A post-hearing brief was filed on behalf of the respondent, on May 31, 2011. Mr. Oglesby did not submit a brief.

III. STIPULATIONS AND THE PARTIES' CONTENTIONS

A. Stipulations

The parties agreed to, and I accepted, the following stipulations of fact (TR 13-17):

1. The respondent is a motor carrier engaged in commercial motor vehicle operations which maintains a place of business in Carol Stream, Illinois.
2. The respondent's employees operate commercial motor vehicles, in the regular course of business, over interstate highways and connecting routes, principally to transport products.
3. Mr. Oleksadr ("Alex") Sardak is the Corporation's President.
4. The respondent is and was a "person," as defined in the STAA, 49 U.S.C. § 31101(3).
5. The complainant was hired o/a March 5, 2010, as an Over-the-road truck driver**.**
6. The complainant worked as a driver of a commercial motor vehicle with a gross weight in excess of 10,000 pounds used on the highways to transport cargo.
7. Prior to working for the respondent, the complainant had worked as a safety instructor at the Progressive Truck Driving School and subsequent to working for the respondent with Mobility Network.
8. The complainant had not, on or before filing his complaint, commenced or cause to be commenced, a proceeding under the STAA, had not and was not about to testify in a proceeding under the STAA, and had not or was not about to participate in any proceeding under the STAA.
9. The complaint was timely filed, i.e., within 180 days of the alleged adverse action.

Moreover, the parties agreed to the authenticity of the tape recording, daily logs, toll receipts, gas receipts, and scale receipts. (TR 18-19).

B. The Parties' Contentions:

1. *Complainant*:

The complainant argues that after his first week of driving the company President, Mr. Sardak, told him his mileage was inadequate and instructed him to disregard the law and how to falsify his log books and maintain a false set of toll booth receipts so that it would appear he was not violating the hours-of-service regulations; all his drivers were required to do so. While he reluctantly accepted these lessons, he informed Mr. Sardak he did not wish to engage in unlawful practices.

After delivering a load, in Pittsburgh, Pennsylvania, on March 15, 2010, he called dispatch (Mr. Sardak) to inform him and was given a new assignment. He initially declined it because he had exceeded hours-of-service. Mr. Sardak informed him, if he declined, he would be fired and not compensated for the trip. On March 22, 2010, upon returning to base, he informed the dispatcher, Jerry Rack, that he would not falsify his logs, whereupon he was summoned to a meeting with Messrs. Rack and Sardak. He secretly recorded the meeting. At the meeting, he reiterated his opposition and refusal to file false log books. He claims Jerry told him the company's drivers had been doing so because it is the only way for the company to remain

profitable. Finally, he claims that the company refused to pay his final compensation because he informed them he would file an OSHA complaint.

Mr. Oglesby seeks an award of punitive damages, emotional distress damages for unlawful withholding of pay and unlawful termination, back pay with interest, and attorney's fees.[2]

2. *Respondent*:

The Respondent argues against the complainant's contentions averring that at some time after recording the tape introduced in evidence, the complainant simply "disappeared" from the lot and was not heard from again until contacted by an attorney on his behalf; he simply was neither discriminated against or discharged for any activity while in the respondent's employ.

IV. ISSUES

A. Whether, under 49 U.S.C. § 31105(a)(1)(a), the respondent discharged, disciplined or discriminated against an employee, to wit the complainant, regarding pay, terms or privileges of employment, because,

> He had filed complaints related to a violation of a commercial motor vehicle safety regulation, standard, or order, or

B. Whether, under 49 U.S.C. § 31105(a)(1)(b)(i), the respondent discharged, disciplined or discriminated against an employee, to wit the complainant, regarding pay, terms or privileges of employment, because,

> He refused to operate a vehicle, on or about March 15, 2010 and March 20, 2010, because its operation would have violated a regulation, standard, or order of the United States related to hours-of-service and recording duty status.

C. If the respondent so violated 49 U.S.C. § 31105, what are the appropriate sanctions or damages?

V. DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact and Law

Mr. Sardak is Foresight's owner. (TR 82). He works as a dispatcher, safety officer, fleet manager, and cleanup lady. (TR 214). He testified his company has eighteen truck drivers and eighteen trucks. (TR 116). He hired Oglesby, on March 4, 2010, an ex-Marine with extremely good discipline who knows the log book rules and drive smart. (TR 113, 119). He testified that it was important for his drivers and employees to follow DOT regulations. (TR 24). His wife and

[2] He had an attorney earlier in the process, Mr. Marty Williamson. (TR 65).

part-time employee, Monica, reviewed drivers' log books post trips. The company dispatched Oglesby on two week-long trips, for the weeks of March 14, 2010 and March 15, 2010. Mr. Sardak testified that a third dispatch was "on the list" for March 22, 2010. (TR 26-18). He admitted his drivers, including Oglesby, are not paid for the first two weeks of driving to cover the company's costs and investment per their contract. (TR 29). Mr. Sardak denied not paying Oglesby because he had filed an OSHA complaint. (TR 33). Drivers are paid based on mileage. (TR 35). Mr. Sardak denied ever telling Oglesby he would be fired if he did not drive illegally. (TR 113). He added his company had not had any complaints similar to Oglesby's, no reportable accidents, no injuries, and that it is "almost impossible to cheat on a log book." (TR 117-8).

Mr. Sardak testified he saw Oglesby about 9:00 AM, Monday, March 22, 2010, as he worked around the office. (TR 35-36). While him, Rudy (Andy) and Jerry greeted Oglesby, he did not recall having any conversation with him. (TR 36). Later, he testified that Jerry and Andy (the dispatcher) were in the office. (TR 82, 99). Mr. Sardak confirmed the voices on the tape were Jerry's and Oglesby's. (TR 84). When Oglesby left, he assumed it was to drive his truck on a route for a key customer, his number one customer. (TR 36, 115-6). Mr. Sardak testified that he won't fire a driver for making a mistake on the road because if he did he would have to fire all his guys. (TR 111). He did not see Oglesby again until at the hearing. (TR 115).

Mr. Sardak testified that Jerry Rack had been with the company since its inception and for the most part did sales. (TR 85). He books/registers the routes, arranges the rates, ensures payment, plus checks up the yard and dispatcher, but does not do compliance. (TR 85, 89). While a very loyal employee, and has good judgment, he sometimes says stupid things, like anyone, and patience is not his number one thing. (TR 85-86). The conversation on the tape is an example. (TR 87). Monica was our former compliance officer "making sure the drivers were right and bringing the books." (TR 85). Mr. Sardak testified that it was inappropriate for (Jerry) or any employee to say the things reflected in the tape recording. (TR 89). But, in the end, the driver has the final say how to drive. (TR 89). "That's the number one rule in this company." (TR 89). If our drivers are tired they are told to rest and if they run late, we will readjust delivery times. (TR 89-90). The number two rule is communication, drivers must call the office. (TR 90). Mr. Sardak testified that when he heard Jerry's comments, he wanted to stop him, but felt it was not appropriate, so told him to "slow down" "you can't force a driver to do that" and had a conversation about it later. (TR 91, 94, 110, 112). But, Jerry is responsible for his own behavior. (TR 217).

Later, on the tape recording, Mr. Sardak testified that he was speaking about new customers, concentrating on southern states, i.e., Tennessee, Kentucky, Arkansas, so as to maximize "head haul," and sending Oglesby on such a route. (TR 93, 94, 97-98). He testified he was also commenting on how to run the truck profitably. (TR 95). At some point, we hear Jerry dispatching out the local driver to go to Racine, Wisconsin, number 53. (TR 103). Mr. Sardak testified that he told Oglesby "you have to drive like you drive. . . Driver has to drive smart and it doesn't mean illegal." (TR 104). At another point Mr. Sardak is one the phone with Jackie. (TR 106). He testified he was trying to calculate whether Oglesby had enough hours Monday to deliver his load and pick up another load. (TR 107). Mr. Sardak said he believed Oglesby had exceeded his hours upon returning from his last trip. (TR 108-109). He says Jerry made a

statement that "if you're cheating for them why don't you cheat for me?" (TR 109). It was a pretty stupid thing to say. (TR 109).

Mr. Oglesby testified, referring to the highway toll receipts and weighing receipts to establish the times involved for his trips. (CX 1-2; TR 45-50). At or about 8:15 AM, March 15, 2010, after his Belle Vernon, PA, delivery he informed Mr. Sardak he was "out of hours" (i.e., he could not take another trip at the time). Oglesby testified latter told him if he did not accept the new assignment and get the load to New York by the next day he would be fired and not paid for his completed trip. (TR 50-54, 74, 249). Mr. Oglesby testified that, at that point, he was "basically fired." (TR 255). Sardak confirmed a call had occurred, but the substance was not what Oglesby related. (TR 114). Oglesby needed to wait ten hours for another trip. (TR 51, 74). But, he took the trip to New York any way. (TR 51, 74). Yet, Oglesby testified that Foresight informed OSHA that Oglesby did not make the run. (TR 51-52). The toll receipt, date stamped March 15, 2010, at 2:09 PM, at Warrendale, PA, reflects he was on his way to New Castle, PA, to pick up the next assigned load. (TR 52-54). The 3/16/2010 Newburgh, NY, toll receipt, at 7:47 AM, shows he got the load there. (TR 54). He testified that "[A]t this point, I had been driving three days with little to no rest." (TR 54).

Oglesby testified that the Driver's Dailey Logs, in CX 3, were his "fabricated" log books for the Sunday, 3/14/2010 through Saturday, 3/20/2010 trip. (TR 57, 263). CX 4 is the unsigned Driver's Dailey Logs prepared by Monica Sardak to serve as a lesson on how to do them falsely. (TR 57, 138). After completion of his first week, at Mr. Sardak's direction, Monica instructed Oglesby to always show he was starting off the work week that he had had seven days off. (TR 261, 263-5). The samples she gave him in CX 4 would always reflect an in-compliance driver. (TR 261-2). Mr. Sardak testified that CX 3 was Oglesby's original log book forms, he had given Foresight copies. (TR 200). Oglesby admitted he had not followed the DOT rules. (TR 251). Oglesby testified that Mr. Sardak instructed him to keep his trip receipts in a sealed, stamped, envelope with the mail because the DOT was not allowed to open them. (TR 268). He could keep receipts without time stamps in the truck. (TR 268).

On Saturday, March 20, 2010, upon returning from the week-long trip, Oglesby testified he bought a tape recorder and went to work at 8:00 AM. (TR 59-60). He was to take a load to Chicago. He inspected his truck, found a flat tire, and started the truck. He intended to get "straight to the point" and tell them he was not going to do this, hoping they would then fire him. (TR 60). He called Jerry Rack, whom he believed to be Foresight's owner, but came to learn differently. (TR 61, 79). He told Mr. Rack he would not cheat on his log book whereupon the latter told him to come to the office and hung up. (TR 61-62).

The conversation is as follows:

MALE VOICE ANSWERING PHONE: Dispatch.

MR. OGLESBY: Yeah, can I speak to Jerry?

MALE VOICE ANSWERING PHONE: Just one moment.

MR. JERRY RACK: Foresight.

MR. OGLESBY: Is this Jerry?

MR. JERRY RACK: Yes.

MR. OGLESBY: Hey, Jerry, it's Joe. Hey, I'm in the truck. I was doing my -- a few quick things -- I was in the truck doing my pre-trip and one of the tires on my trailer, it looks like somebody slashed it, it's low.

MR. JERRY RACK: (0032) *Somebody slashed your tires.*

MR. OGLESBY: And the other thing is, Jerry, I talked it over with my wife, and before I go out on this next trip you should know that I'm not gonna cheat on my log book. I'm taking too much of a risk, so you guys are going to have to set the delivery so I can make it.

MR. JERRY RACK: Come to the office, come to the office, come to the office.

[WHEREUPON, there was a brief pause in the recording.]

MR. OGLESBY: (01:12) *All right, I'm going into the office, and I'm about to talk to Jerry -- he's the owner -- and see what he says.*

[WHEREUPON, the taped conversation continued.] (TR 62-63).

MR. JERRY RACK: (2:18) *Pull up a chair. Go away dog, go away. In this business, I don't care where you go, what you gonna do. It's all a one -- fucking dog, get out of here!* (2:49) *It's one big lie. Everybody knows it. Do you think those guys go straight with those log books?* (2:57) *I've been doing this for twenty years. Nobody, not one person ever, did their log books right, nobody.* (3:05) *If I gotta run this truck, and have it straight with the log books, then we're all out of job, every single one of us.* (3:13). *Then this business will go down. You think the customer gives a shit about log books? Not a tiny bit. They want their shit picked up in New Jersey in the afternoon and delivered in Chicago the following day.* (3:26) *Ask him [Alex] how many times, and you know what? One time we had a guy, fucking asshole, paid $450.00 for a load, and you know what*

he did? He went in the following day and we were late, because we loaded the trailer late. The guy didn't have time to drive there. The guy fucked the log books up. He was late, they charged a $500 penalty.(3:48) *It only paid $450 on it so we had to pay $50 out of our own pocket to cover the cost.*(3:53). MR. SARDAK: *Jerry. We are gonna see if it – if we're gonna make money on this one. We're gonna send him south and stuff like that, as I said, we'll see how it's gonna go,* (04:05) *because, we never drove 500 miles overnight, so we're going to see how it's gonna go.* (4:11).

MR. OGLESBY: Well, let me call her and tell her.(4:13).

MR. RACK: Why are you telling your wife? Involving your wife is the worst thing you can ever do, man. You want a paycheck - you're only here for one reason, to make money, right? She wants to make money. (4:26).

OTHER VOICE (Sardak): Jerry. . . (4:31). *537, 560, Pleasant. . .Wisconsin. . .*

MR. OGLESBY: Right. That's true.

MR. RACK: So, let's make money, that's it.

MR. ALEX SARDAK: (4:27) *Jerry, Jerry.*

MR. RACK: (4:46) *Okay, well any way, don't sweat the log book stuff, nobody's gonna really shoot you … nobody, right?* (4:53).

MR. ALEX SARDAK: (4:55). *Jerry, he wants to drive like he wants to drive. That's fine.*

MR. RACK: What are you all stressed out about? . (5:03)

*MR. OGLESBY: Cause, what if they, what if I get a ticket?(*5:05*). I mean I haven't had a problem yet with it.. ., what if, . . and I think I know how to do it.* (5:11) *and nobody's gotten caught before?* (5:16).

MR. SARDAK: No, Jerry, if he wants to drive like this, I mean, Joe, you're driving like you are driving and that's fine (5:21). . . *I mean, I'm just telling you that, you know, you did how many miles, 800 miles overnight when you came home?* (5:27).

MR. RACK: What did you get- you got a load on Thursday, right?

MR. OGLESBY: (Affirmative response).

*(*5:32) Phone rings.

MR. RACK: And you came in on Saturday?

MR. SARDAK: Thursday.

MR. RACK: Yeah, Thursday.

MR. OGLESBY: No, I got loaded Friday. (5:38)

MR. SARDAK: You got loaded Friday? (5:39).. . .

MR. RACK: (5:39). *What time?*

MR. OGLESBY: Like around twelve (5:44). *I mean, I know I forget.*

MR. RACK: Noon?

MR. OGLESBY: Yeah.

MR. RACK: (5:47). *And you made it here before 2:00 PM the following day?*

MR. OGLESBY: (5:49). *Mmhmm.*

MR. RACK: And you're telling me. . .that was legal by the logs? (5:51).

MR. OGLESBY: Well, no. . .(5:53) . . .

MR. RACK: So, . . . the stuff's gotta add up, either you do it or you don't. (5:58). *You do it for yourself or you don't do it for the company?* (6:01).

MR. SARDAK: He's not asking. . . No, it's good Jerry, I mean you cannot force the drivers to. . (6:04).

MR. RACK: No, no I cannot (6:06). *I cannot.*

MR. SARDAK: Jerry, I don't want to hear that. (6:10). . .

MR. RACK: No, I understand, no you cannot, nobody is perfect. . .(6:11)…It happens, you know what I am saying? . . .

MR. RACK: Nobody's going to force you, nobody's going to threaten you or nothing like that it's . . . (6:12). *It's not gonna happen. What I'm saying is, man, you can make a decent buck, alright? So why cut yourself short?* (6:20).

MR. OGLESBY: (6:23) *What about the tire on the trailer?*

MR. RACK: That, you gotta talk -- Have Luke take a look at it…

Further discussion regarding tire. . .(6:47-6:57) (Walking noises).

MR. OGLESBY: Hey Luke. One of the tires on my trailer is completely flat. It looks like somebody slashed it. (7:04).

LUKE: Okay, just pull it inside and we'll fix it…..

MR. OGLESBY: Pull it inside, right here? (7:21). (Walking noises).

LUKE: (7:11) *Yeah.*

END

Just as he shut the truck down, after pulling the truck into the bay as directed by Luke, Mr. Oglesby testified that Luke, the mechanic, approached him and said Jerry wanted to see him and to take his log books and receipts with him. Luke escorted him to the office. When he went to the office he thinks he saw Jerry Rack, Alex Sardak, possibly Monica walking around and Andy Barrone. (TR 64, 79). He gave Mr. Sardak the carbon copies of his logs. (TR 64). Sardak asked where are his receipts. When he informed him he did not have them with him, Sardak told him they would deduct it from his pay. (TR 64). Then, he testified that Jerry Rack said to get his things out of the truck "we're letting you go… it's not working out" (TR 64). Oglesby said he would have to file an OSHA complaint whereupon Sardak said "go ahead." (TR 65). Oglesby testified that Mr. Sardak did not begin to admonish Mr. Rack until he (Oglesby) was seen adjusting the recorder in his pocket which he believes Sardak noticed. (TR 252). Oglesby testified on cross-examination that the tape itself does not reflect coercion or retaliation. (TR 258).

A week or two, after March 20, 2010, Mr. Oglesby found work at Galto Trucking, Roselle, IL, at $400 to $500 per week ($1900-$2000 a month) or at 30 percent of whatever they made per load. (TR 68-9). He worked for Galto from April 2010 through November 2010. He was then hired by RJW Transport, Woodridge, IL, and began driving when the owner offered to sell him one of his trucks. So, around November 2010, his father loaned him money to buy his

the truck, which he did, in January 2011. (TR 72). He has been "running local" since then. (TR 72). He earns about $1,500 to $1,800 a week after fuel costs and less repair costs. (TR 73).

He had earned about $1600 a month at Foresight, based on 38 cents per mile, although since he was never paid he was not sure. (TR 69-70). The parties agreed he had driven 2,949 his first week but could not agree on 2,501 for his second. (TR 71). Mr. Oglesby thought it was about 3,300 the second week. (TR 70).

Mr. Sardak testified that during Oglesby's first week working, Friday, March 5, 2005, on a trip to Williamson, SC, and back, Mr. Oglesby had an apparent log book discrepancy where he showed he was off, but a TCA receipt shows he was filling fuel. (TR 120-7). Then, he shows he was filling the tanks in Williamston, SC, when a receipt shows refueling in Spartanburg, SC. (TR 130, 228). Mr. Sardak speculated this was to "catch up with hours." (TR 130). Rather than leaving sufficiently early on Friday, to deliver the load by Monday, at 8:00 AM, and have sufficient rest to be able to return to Illinois, on March 8, Mr. Sardak believed he departed too late, on Sunday, March 7, 2010, at 1:30 AM, and drove 10 hours Sunday. (TR 133-5, 163, 170). Oglesby had a route to Belle Vernon, PA, assigned for pick up on Sunday, March 14, 2010, at 7:00 AM, for delivery in Belle Vernon, PA, at 7:00 AM, March 15, 2010. (TR 178-181). Then he was to go to New Castle, PA, about thirty miles away, pick up a load and deliver it to Manchester, NH. (TR 181). But, Oglesby called him on his cell phone to say he could not make it to Manchester, by 7:00 AM, tomorrow. (TR 181). Mr. Sardak testified that he told him "just get on the road, do your best, call me in the morning. . . tell them where you are at, we're going to readjust the appointment." (TR 181). The load was delivered between 1:00 and 3:00 PM, March 16, 2010. His next load was to be picked up in Greenville, NH, but Oglesby called saying he was not going to be able to go anywhere. (TR 184). But, he did drive 211 miles, on March 16, 2010. (TR 185). Then Mr. Sardak described Oglesby's subsequent assignments and potential discrepancies. (TR 188-193). He concluded that based on Oglesby's driving record, "we would have to just sit him down and okay, you leave this time, you come this time, tell us what time you leaving, what time you coming. I mean, we have to be really precise with Joe about things like that." (TR 195, 207).

Mr. Sardak testified that Oglesby's log reflects an error reporting he was sleeping, at 3:03 PM, on March 10, 2010, rather than "on-duty" when he was refueling and scaling shown by the scaling receipt. (TR 140-142). Looking at Oglesby's log for March 10-11, 2010, it shows him in the sleeper berth from 1:00 PM through midnight then off-duty until 145 AM, when receipts show him refueling between 2:00-3:00 PM and scaling at 3:09 PM. (TR 144-155; EX 9, 11, 12, 14). On Thursday, March 11, 2010, Mr. Sardak believed Oglesby reported himself sleeping between 2:45 PM through midnight, but he arrived back in Chicago between 6:00 and 7:00 AM, Friday, March 12, 2010. (TR 155-161). That appeared inaccurate, i.e., "cheating," to Mr. Sardak. (TR 161, 196, 226). Mr. Sardak did not believe Monica was able to keep up with her work because of working so few hours. (TR 205-8).

Mr. Jerry Rack testified that he did mostly sales, looks for customers, tries to get the best rates, and drove trucks, but that he was not familiar with the federal rules for motor carriers since he had not driven professionally for fifteen years. (TR 232, 234). When he sees the need to fill in for other duties, i.e., dispatcher, he fills in. (TR 243). He never looked at the new rules.

(TR 232). On Monday, March 22, 2010, he spoke with Oglesby about 9:00 or 10:00 AM, asking him to make the earlier 7:30 AM Heinekens delivery. (TR 235-6). He had not, so Mr. Rack tried to reschedule it and told Oglesby to go to his truck and get it going. (TR 238). Then he got a call from Oglesby who mentioned a tire thing, he cannot drive because he is out of hours and would not cheat on his logs. (TR 238-9). Mr. Rack was concerned with losing the Heineken deal. (TR 239). He testified he was "really upset" because the week had just started and things were falling apart. (TR 239-240). He testified his comments were not appropriate – "I was just blowing off some steam." (TR 240). Mr. Sardak reprimanded him about that later and he claims to have learned something about the regulations. (TR 240-1). But, he did not believe that a dispatcher needed to know the new hours-of-service regulations. (TR 241). Mr. Rack admitted it was his voice on the recording played. (TR 243).

B. STAA Violations -- Overview

A complainant may recover under the Act under three circumstances:

First, by demonstrating that he was subject to an adverse employment action because he has filed a complaint alleging violations of safety regulations. 49 U.S.C. § 31105 (a)(1)(A). This provision of the Act provides specifically and in pertinent part:

> (a) Prohibitions. -- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
>
> > (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . .

The U.S. Department of Labor ("DOL") interprets this provision to include internal complaints from an employee to an employer. DOL's interpretation that the statute includes internal complaints has been found "eminently reasonable." *Clean Harbors Environmental Services v. Herman,* 146 F.3d 12 (1st Cir. 1998)(case below 95-STA-34). The Circuit Court of Appeals has stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id*.

Second, by demonstrating that he was subject to an adverse employment action for refusing to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. § 31105(a)(1)(B)(i).

In such a case, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service,* 1994-STA-55 (Sec'y Aug. 4, 1995). However, protection is not dependent

upon actually proving a violation. *Yellow Freight System v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).

Third, by showing that he was subject to an adverse employment action for refusing to operate a motor vehicle "because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." 49 U.S.C.§ 31105(a)(1)(B)(ii). To qualify for protection under this provision, a complainant must also "have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C § 31105(a)(2).[3]

The burdens of proof under the Act have been adopted from the model articulated by the Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993). *See Anderson v. Jonick & Co.*,1993-STA-6 (Sec'y, September 29, 1993).

In *Byrd v. Consolidated Motor Freight*, 97-STA-9 at 4-5 (ARB May 5, 1998), the Administrative Review Board (ARB), summarized the burdens of proof and production in STAA whistleblower cases:

> A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. at 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of Labor*, 64 F.3d 261, 277 (7th Cir. 1995).[4] A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

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

[3] Under 49 U.S.C.A. § 31105(a)(1)(B)(ii) a complainant must prove by a preponderance of the evidence that his or her alleged reasonable apprehension of serious injury due to the vehicle's unsafe condition, was objectively reasonable. *Brame v. Consolidated Freightways*, 1990-STA-20 (Sec'y, June 17, 1992) slip op. at 3 and *Brunner v. Dunn's Tree Service,* 1994-STA-55 (Sec'y, Aug. 4, 1995).

[4] If other factors are present supporting discipline, then timing alone may not be sufficient to establish the necessary causal link. *Moon*, 836 F.2d at 229-230.

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

Once the complainant satisfies these four elements, a rebuttable presumption of discrimination arises, and the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. The burden shifting to the employer at that point is only to articulate a legitimate, nondiscriminatory, reason for the adverse action. The employer's burden at this point is one of production, not of proof.

With only one exception, the burden always remains with the claimant to establish the elements of his case: (1) protected activity; (2) a causal nexus between the protected activity and the adverse action; and (3) in response to employer's evidence of an allegedly legitimate reason for its action, evidence of pretext.[5]

The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the proffered reason is not legitimate, and that the discharge was motivated at least in part by retaliation for protected activity, then the employer must establish by a preponderance of the evidence that it would have discharged the complainant independently of his protected activity. *Faust v. Chemical Leaman Tank Lines,* , 93-STA-15 (Sec'y, April 2, 1996); *Moravec v. HC & M Transportation,* 90-STA-44 (Sec'y, January 6, 1992), slip op. at 12, n. 7.

Oglesby alleged violations of both the complaint provision at 49 U.S.C. § 31105(a)(1)(A), and the refusal to drive provisions at § 31105(a)(1)(B). I will examine the complaint provision first.

C. The Complaint Provisions

Oglesby verbally complained verbally to company superiors about being asked or pressured to exceed DOT hours of service, on or about March 15, and March 20, 2010, which relates to violations of federal trucking regulations. Under the STAA, an employee's complaint need only be "related" to a safety violation to be protected. Internal complaints to supervisory employees that are related to a violation of a commercial motor vehicle safety regulation are

[5] In *Moon v. Transport Drivers*, 836 F.2d 226 (6th Cir. 1987), the court noted the addition of a fourth factor, i.e., that the employer knew of the plaintiff's protected activity.

protected under the STAA. *Moravec v. HC & M Transportation, Inc.*, 1990-STA-44 (Sec'y July 11, 1991). I find Oglesby's testimony credible considering his demeanor and consistency, particularly in light of the fact that he admitted, under oath, that he had in fact falsely recorded his times and the fact, recognizing the potential consequences, he challenged a job which would have continued to either require or, at least encourage, him to violate the law.

Thus, I find that Oglesby's complaints to Messrs. Sardak and Rack regarding violating hours-of-service regulations and log book entries constituted "protected activity" under the STAA. *See Dutkiewicz v. Clean Harbors Environmental Services,*1995-STA-34 (Sec'y Aug. 8, 1997) (internal complaint to superiors is a protected activity under the STAA); *accord*, *Stiles v. J.B. Hunt Transportation*, 1992-STA-34 (Sec'y Sept. 24, 1993) and cases there cited; and, *Pillow v. Bechtel Construction,*1987-ERA-35 (Sec'y July 19 1993) (under analogous employee protection provision of the Energy Reorganization Act, contacting a union representative about a safety violation is protected), *aff'd sub nom. Bechtel Construction Co. v. Secretary of Labor*, 98 F.3d 1351 (11th Cir. 1996).[6] Additionally, the complainant is not required to prove a reasonable apprehension of injury, an actual violation or that the complaint has merit. *Pittman v. Goggin Truck Line, Inc.*, 1996-STA-25 (ARB Sept. 23, 1997); *Lajoie v. Environmental Management Systems, Inc.*, 1990-STA-31 (Sec'y Oct. 27, 1992); *Barr v. ACW Truck Lines, Inc.*, 1991-STA-42 (Sec'y Apr. 22, 1992); *Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992).

D. Refusal to Drive

A refusal to drive is protected under two STAA provisions. The first provision, 49 U.S.C.A. § 31105(a)(1)(B)(i), requires that a complainant "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive -- a mere good faith belief in a violation does not suffice." *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993).

The second refusal to drive provision focuses on whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he drove. 49 U.S.C.A. § 31105(a)(1)(B)(ii); *Cortes v. Lucky Stores, Inc.*, 1996-STA-30 (ARB Feb. 27, 1998).

An employee must actually refuse to operate a vehicle to be protected under the refusal to drive provision of the STAA. *Williams v. CMS Transportation Services, Inc.*, 1994-STA-5 (Sec'y Oct. 25, 1995). A refusal to drive must be accompanied by a safety basis for employee's refusal to drive. *See, e.g., Smith v. Specialized Transportation Services*, 1991-STA-22 (Sec'y Apr. 20, 1992)(Complainant's statement that she was "too stressed out" to drive during a conversation with her supervisor did not establish that she conveyed to the supervisor that her refusal to drive was because she was unable to do so safely or without danger of injury); *Mace v.*

[6] Under the STAA, a safety related complaint to any supervisor, no matter where that supervisor, no matter where that supervisor falls in the chain of command, can be protected activity. *See, e.g., Hufstetler v. Roadway Express*, 1985-STA-8 (Sec'y, Aug. 21, 1986), *aff'd Roadway Express v. Brock*, 830 F.2d 179 (11th Cir. 1987).

Ona Delivery Systems, Inc., 1991-STA-10 (Sec'y Jan. 27, 1992) (The complainant could not prevail on his STAA complaint where the record established that his complaint to respondent centered on extra job assignments rather than on perceived safety violations. Because complainant failed to communicate safety defects as a basis for his refusal to work, Respondent was not aware of any vehicle defect and was not motivated by such in discharging complainant).

Mr. Oglesby admitted that he had driven in violation of the DOT hours-of-service regulation, on March 15, 2010, after informing Mr. Sardak he was out of time and buckling under the pressure from the latter's threat of job loss and non-payment. Thus, that incident cannot constitute a refusal to drive. However, on March 20, 2010, Oglesby made it clear he would not cheat on hours-of-service or on his log books and refused to drive in violation of the regulations. Mr. Rack's recorded statements makes it clear that Oglesby's position was not acceptable to Foresight. The fact he pulled the truck into the service bay does not change that.

I find, given that Mr. Rack was Mr. Sardak's "right-hand man", that the latter knew or reasonably should have known that Mr. Rack was coercing drivers to falsify log books and disregard DOT hours-of-service regulations, which he admittedly did not know. Given that Mr. Rack also acted as a dispatcher, it was imperative he understand hours-of-service rules. Mr. Rack was not completely ignorant about the general limitations of hours of service rules and explained that Foresight could not operate in compliance with the rules and make money. He admitted his comments were inappropriate. His candor under oath, having been caught on tape, is commendable. He did not refute Oglesby's testimony that he had fired him, on March 20, 2010. I find his candid testimony fatally undermines Mr. Sardak's testimony to the contrary.

It is not just that I find Mr. Oglesby, a former United States Marine, whom even Mr. Sardak admitted was disciplined, credible, based upon my observations of his testimony and demeanor, his candid admissions of wrongdoing, and corroboration by the recording, I find Mr. Sardak's testimony lacks credibility, based upon my observations of his testimony and demeanor, Mr. Rack's credible testimony, and his participation in the recorded conversation. Moreover, I do not find Mr. Sardak's taped comments are sufficiently definitive to obviate this conclusion. I also observe that Foresight had not paid Mr. Oglesby for his trips, just as he testified, by the time of the hearing.

Based on the foregoing evidence, Complainant has established that a genuine violation of a federal safety regulation would have occurred.

Thus, I find Mr. Oglesby established protected activity under the refusal to drive provision.

E. Adverse Action, Termination or Discharge

A complainant need not establish a termination or discharge, but rather only an adverse employment action. In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB addressed the request on appeal to abandon the "tangible employment consequence" test, and to adopt instead the deterrence standard, i.e., "materially adverse" standard, of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). A two-member majority found that it does. *Burlington Northern* held that for the employer action to be deemed "materially adverse," it must be such that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." Foresight not only threatened to but also declined to pay Oglesby for his two weeks of driving. Moreover, it essentially made violating hours of service and falsifying log books a condition of working for Foresight. Thus, I find adverse employment action established.

In *Long v. Roadway Express, Inc.,* 88-STA-31 (Sec'y Mar. 9. 1990), the Secretary held any employment action by an employer which is unfavorable to the employee, the employee's compensation , terms, conditions, or privileges of employment constitutes an adverse action. Thus, regardless of the employer's motivation, proof that such a step or action was taken is sufficient to meet the employee's burden to establish that the employer took adverse action against the employee. So, in *Galvin v. Munson Transportation, Inc.,* 91-STA-41 (Sec'y Aug. 31, 1992), where the complainant was instructed to remove his belongings from the assigned truck, he could not complete the assigned job, he did not return to work for the respondent thereafter, and he was denied rehire several months later, this evidence was sufficient to make a prima facie case of adverse action despite the respondent's characterization of the incident as a voluntary quit.

However, on occasion, the Board and courts have found "constructive terminations." When no clear statements have been made by management establishing an employee's status, the test of whether an employee has been discharged depends on the reasonable inferences that the *employee* could draw from the statements or conduct of the employer. *Pennypower Shopping News, Inc. v. N.L.R.B.,* 726 F.2d 626, 629 (10th Cir. 1984) (emphasis in original)." *N.L.R.B. v. Champ Corp.,* 933 F.2d 688, 692 (9th Cir. 1990), *cert. denied, Champ Corp. v. N.L.R.B.,* 502 U.S. 957 (1991). So, in *Jackson v. Protein Express*, 95-STA-38 (ARB Jan. 9, 1997), the Board concluded that when Respondent failed to respond to Complainant's request for another truck to drive and to his message asking for clarification of his status, and removed his belongings from the truck against his wishes, Respondent had indicated it had discharged Complainant.

Whether a constructive discharge has occurred depends on whether working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign. *Watson v. Nationwide Ins. Co.,* 823 F.2d 360 361- 362 (9th Cir. 1987). In *Earwood,* the prospect of continued employment under a system that precipitated hours and logging violations and encouraged employees to drive when ill was unattractive. The Secretary found that Respondents pervasive coercion to violate DOT regulations was intolerable and in view of the totality of the circumstances, a reasonable person in Complainant's position would have felt compelled to quit. It is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions. *Hollis v.*

Double DD Truck Lines, Inc., 84-STA-13 (Sec'y Mar. 18, 1985), *citing Junior v. Texaco, Inc.*, 688 F.2d 377 (5th Cir. 1982); *Bourque v. Powell Electric Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980).

In this case, I find, based on Oglesby's testimony and the recording of Mr. Rack, that it is established that in order to continue in Foresight's employ, Oglesby would have, at a minimum, been continually coerced or pressured into falsifying his log books and violating DOT hours of service rules, at worst, it was a condition of working for Foresight. The working conditions were so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign. Thus, although not necessary for the resolution of this matter given the finding of an adverse action, I also find a constructive discharge.

Finally, I find Mr. Oglesby's testimony regarding the termination by Mr. Rack, which occurred after the recording ended, credible.

REMEDIES

Under the Act, a successful complainant is entitled to: reinstatement; back pay; other compensatory damages; attorney fees and costs; and, abatement of any violation. 49 U.S.C. § 31105(b)(2)(A). Punitive damages may also be appropriate.

Reinstatement is an automatic remedy under the STAA. The statute does not prohibit voluntary waiver of that right. A complainant's decision not to seek reinstatement must be recognized and respected. *See, e.g., Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992), slip op. at 22 n.14, appeal docketed, No. 92-70102 (9th Cir. Feb. 18, 1992); *Nidy v. Benton Enterprises,* 90-STA-11 (Sec'y Nov. 19, 1991), slip op. at 17 n.15. Reinstatement must be ordered unless the evidence shows that reinstatement would be impossible, impracticable, or cause irreparable animosity, it need not be directed. *Williams v. Domino's* Pizza, ARB No. 09-092, ALJ No. 2008-STA-52 (ARB Jan. 31, 2011). Reinstatement obligates the respondent employer to "make a bona fide reinstatement offer." Back pay liability does not end merely upon the complainant's obtaining comparable employment, but when the employer makes a bona fide unconditional offer of reinstatement or, in very limited circumstances when the employee rejects a bona fide offer. *Dickey v. West Side Transport, Inc.,* ARB Nos. 06-150, 06-151, ALJ Nos. 2006-STA-26 and 27 (ARB May 29, 2008). Ordinarily, back pay runs from the date of discriminatory discharge until the date that the complainant receives a bona fide offer of reinstatement or gains comparable employment. *Nelson v. Walker Freight Lines, Inc.,* 87-STA-24 (Sec'y Jan. 15, 1988), slip op. at 6 n.3; *Earwood v. D.T.X. Corp.,* 88-STA-21 (Sec'y Mar. 8, 1991), slip op. at 10. Where, however, the complainant declines reinstatement, and has a post-discharge job which is substantially lower-paying and considerably dissimilar, that job does not constitute comparable employment. *See Rasimas v. Mich. Dept. of Mental Health,* 714 F.2d 614, 624 (6th Cir. 1983). *Gagnier v. Steinmann Transportation, Inc.,* 91-STA- 46 (Sec'y July 29, 1992) (In *Gagnier*, the Secretary ordered back pay to continue until the Respondent complied with the Secretary's order).

An award of back pay is mandated once it is determined that an employer violated the Act. *Moravec v. HC & M Transportation, Inc.,* 1990-STA-44 (Sec'y Jan. 6, 1992) *citing Hufstetler v. Roadway Express, Inc.,* 1985-STA-8 (Sec'y Aug. 21, 1986), slip op. at 50, *aff'd*

sub. Nom., Roadway Express, Inc.,v. Brock, 830 F.2d 179 (11th Cir. 1987). His average pay at Foresight was $1035 per week. Here, Oglesby was unemployed from March 20, 2010 until April 1, 2010, when he worked for Galto Trucking. He earned about $400-$500 per week there. He worked at Galto until November 30, 2010 and then RJW for about a month. Absent evidence, I assume his earnings at RJW were equivalent to those at Foresight. Any uncertainty with respect to wage loss calculations are to be resolved in favor of the non-discriminating party. *See, Johnson v. Roadway Express, Inc.*, 1999-STA-5 at 13 (ARB Dec. 30, 2002). However, given the large weekly pay disparity between his earnings at Foresight and Galto, I find he is owed back pay of $535.00 per week from April 1, 2010 through November 30, 2010 or $18,725.00 for thirty-five (35) weeks. For March 20, 2010 until April 1, 2010, he is owed $2,070.00. Mr. Oglesby has earned more with his own truck than he did at Foresight and thus, although back pay continues the reduction for his current earnings results in nothing due since January 2011.

Complainant is entitled to interest on the back pay to compensate for loss suffered due to NFI having deprived him of the use of his money. *Hufstetler v. Roadway Express, Inc*., 1985-STA-8 (Sec'y Aug. 21, 1986), *aff'd sub nom., Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987) Prejudgment interest shall be calculated in accordance with 26 U.S.C. § 6621 (1988), which specifies the rate for used in computing interest charged on underpayment of Federal taxes. *See Park v. McLean Transportation Services, Inc***.**, 1991-STA-47 (Sec'y June 15, 1992), *slip op***.** at 5; *Clay v. Castle Oil Co., Inc.*, 1990-STA-37 (Sec'y June 3, 1994).

"Interest is due on back pay awards from the date of discharge to the date of reassignment. Prejudgment interest is to be paid for the period following [a complainant's] termination ... until the ALJ's order of reinstatement. Post-judgment interest is to be paid thereafter, until the date payment of back pay is made. ... The rate of interest to be applied is that required by 29 C.F.R. §20.58(a)(1999) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C.A. §6621 (1999). ... [which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points. *Doyle v. Hydro Nuclear Services,* ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000).] The interest is to be compounded quarterly." *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), slip op. at 17-18 (citations omitted).

The rate of interest to be applied on a back pay award under the whistleblower provision of the STAA is that required by 29 C.F.R. § 20.58(a)(1999) that is, the IRS rate of underpayment of taxes set out in 26 U.S.C.A. §6621 (1999). The interest is compounded quarterly. *Ass't Sec'y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34 (ARB Jan. 12, 2000).[7]

[7]

Quarter	Monthly	AFR		Average	Rounded	Plus 3%
1st 2010	0.75	0.71	0.69	0.72	1	4
2nd 2010	0.57	0.72	0.64	0.64	1	4
3rd 2010	0.67	0.79	0.74	0.73	1	4
4th 2010	0.61	0.53	0.46	0.53	1	4

Compensatory damages for Oglesby's two weeks of earnings at Foresight, which have not been paid, in the amount of $2,070.00, based on $0.38 per mile for two trips of 2,501 miles and 2,949 miles, are awarded. The evidence does not provide a sufficient basis upon which to award other compensatory damages, such as for emotional distress.

Effective August 3, 2007, the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-053 amended the STAA to allow punitive damage awards. Given the fact that Foresight has been caught "red-handed" in a blatant effort to pressure and to have its driver falsify records and violate hours-of-service regulations, as well as instructing a driver how to sneakily avoid being caught, punitive damages are in order which may serve as a deterrent to such behavior. I have also considered the small size of the company and Mr. Sardak's testimony that the company has had no other violations. I find punitive damages in the amount of $20,000.000 are appropriate.

It is appropriate to require Respondents to post this decision at the facility where Complainant worked. *Scott v. Roadway Express, Inc.,* 1998-STA-8 (ARB July 28, 1999). In *Smith v. Esicorp, Inc.,* 1993-ERA-16 (ARB Aug. 27, 1998), the respondent therein was ordered to post the decision of the ARB and an earlier Secretary of Labor remand decision, in a lunchroom and another prominent place accessible to its employees for a period of 180 days.

VII. CONCLUSIONS

The complainant has established that Foresight violated the Act. Damages are in order.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Complainant's relief requested is hereby APPROVED.

1. The respondent is ordered to immediately reinstate Mr. Oglesby, evidenced by a written bona fide job offer, with the same pay and terms and privileges of employment and a copy sent to the undersigned;

2. Foresight shall pay $ 1,035.00 per week with three percent (3%) interest, under 26 U.S.C.A. §6621 (1999), from the date of this Order, less Oglesby's present and current earnings of $ 1,500.00 per week (or $0.00), until Mr. Oglesby is provided a bona fide offer of reinstatement and either accepts or declines the same in writing;

1st 2011	0.41	0.35	0.32	0.36	0	3
2nd 2011	0.43	0.51	0.54	0.33	0	3

3. Back pay in the amount of **$ 20,795.00** must be paid to Mr. Oglesby by certified check by Foresight, on or before thirty (30) days of the date of this Decision and Order;

4. Additionally, interest, in the amount of **$ 3,288.49** on the back pay award must be paid to Mr. Oglesby by certified check by Foresight, on or before thirty (30) days of the date of this Decision and Order;

5. Additional interest on the back pay award, at the same rate shall accrue from the date of this order until the award and full punitive damages are paid;

6. Compensatory damages for Oglesby's two weeks of earnings at Foresight, which have not been paid, in the amount of **$ 2,070.00**, must be paid by the respondent by certified check, on or before thirty (30) days of the date of this Decision and Order;

7. Additionally, punitive damages in the amount of **$ 20,000.00** must be paid to Mr. Oglesby by certified check by Foresight, on or before thirty (30) days of the date of this Decision and Order;

8. If the complainant can prove he spent money for legal advice and a proper fee petition is served upon Foresight with a copy to the undersigned, within thirty days of the date of this Order, such fees may be payable in a supplemental order;

9. Proof of payment of the above must be provided to the undersigned;

10. The complainant must provide both Foresight and the undersigned a written acceptance or declination of the latter's bona fide job offer, if made, within seven days of the same; and,

11. The respondent must **post this decision** at the facility where complainant worked, in a lunchroom, dispatch office, drivers' lounge and another prominent place accessible to its employees for a period of 180 days.

A

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to

the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the

Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).