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Issue Date: 13 August 2015

CASE NO.: 2015-STA-10

In the Matter of:

LINDELL & APRIL BEATTY,
Complainants

v.

CELADON TRUCKING,
Respondent

Appearances:

ZEBULON D. ANDERSON, ESQ., and
KAYLA J. MARSHALL, ESQ. (On the Brief)

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER GRANTING RELIEF

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. The lesson of this case is that the hours-of-service regulations and rules merely address the minimum legal requirements for driver rest; the overarching proscription against tired or fatigued driving governs actual fatigue.

II. PROCEDURAL HISTORY[1]

Complainants, Mr. Lindell and April Beatty (hereinafter the "Beattys"), filed a complaint of discrimination with the Department of Labor, under Section 405 of the Act, against Celadon Trucking (hereinafter "Celadon"), on or about March 25, 2014, alleging they were effectively discharged by the respondent in retaliation for making protected-activity complaints related to violations of Department of Transportation hours-of-service regulations. The complaint was investigated by the Department of Labor which found no reasonable cause to believe the respondent violated the Act. On or about October 7, 2014, the Secretary issued her Findings dismissing the complaint. By letter, dated October 17, 2014, the Beattys timely objected to the Secretary's Findings and requested a hearing. I issued a Notice of Hearing, on November 18, 2014 and revised it on January 5, 2015. The matter was tried, on April 22, 2015, in Wilmington, North Carolina.

Complainant's exhibits ("CX") 1 - 11, and 15 - 16 and Respondent's exhibits ("RX") A, C - T were admitted in evidence. [2] Administrative Law Judge exhibits ("ALJ") I, Stipulations, and II, March 20, 2014 OSHA letter, were admitted without objection.[3]

III. STIPULATIONS AND THE PARTIES' CONTENTIONS

A. Stipulations

The parties agreed to, and I accepted, the following stipulations of fact:

- Celadon Trucking is an interstate motor carrier of non-household goods serving the contiguous United States, Canada and Mexico.
- The respondent is a motor carrier engaged in commercial motor vehicle operations which maintains a place of business in Indianapolis, Indiana.
- Celadon employs about 2600 drivers.
- The respondent has employees who operate commercial motor vehicles, in the regular course of business, over interstate highways and connecting routes, principally to transport non-household goods.
- The respondent is and was a "person," as defined in the STAA, 49 U.S.C. § 31101(3).
- There are different types of drivers at Celadon, including team drivers and solo drivers.
- Team drivers work in groups of two, which allows the vehicle to remain in nearly continuous travel; it is safe and legal to do so.
- Solo drivers operate alone and do not continuously operate their vehicles.
- Celadon's "expedited" division only employees team drivers.
- The Beattys were hired, on or about October 25, 2013. They were team truck drivers.

[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.

[2] CX 12 was not admitted in toto, but relevant portions were, e.g., Williams' testimony. (TR 57, 105, 191).

[3] The Beattys wished to have the Declarations of Laura Hawkinson and Dawn Armstrong admitted. (TR 389; EX S & T).

- The Beattys are 57 and 54 years of age respectively.
- The Beattys worked as drivers of a commercial motor vehicle with a gross weight in excess of 10,000 pounds used on the highways to transport general freight and non-household goods.
- Many contracts Celadon enters into with its customers are charged more using the "expedited" division when seeking expedited deliveries.
- the contracts Celadon's "expedited" division enters with its customers carry penalties for late deliveries. Some contracts contain penalty clauses wherein Celadon may be penalized up to $10,000 for every fifteen minutes a time-sensitive load is late, up to a maximum of $40,000 per incident. Other contracts impose a penalty of up to $100,000 for a late delivery.
- The Beattys worked for Celadon about eight months.
- The Celadon-furnished trucks driven by the Beattys were equipped with Qualcomm on-board computers, which allowed for communication between the drivers and Celadon dispatch and automatically recorded hours driven, which was contemporaneously communicated to Celadon.
- Both Beattys had commercial truck drivers' CDL licenses at all pertinent times.
- Hours of service rules are communicated to drivers at orientation and are included in the Driver Manual and Federal Motor Carrier Safety Administration ("FMCSA") Regulations Pocketbook, both of which are given to all drivers. The Logs Department answers drivers' log questions, and all drivers' vehicles use electronic logs, which advise drivers of how many hours they have available pursuant to federal safety regulations. The Beattys have acknowledged, in writing, that they received the Driver Manual and the Federal Motor Carrier Safety Administration ("FMCSA") Regulations Pocketbook.
- Celadon's employee handbook, then in effect, states that "Celadon Company drivers are not permitted to turn down loads if they can safely and legally make an on time pick-up and delivery." section 12-5 (pages 12-15).(See EX D).
- During orientation, Celadon informs drivers about DOT regulations, including hours of service rules.
- During orientation, Celadon informs drivers that they must follow a specified procedure should they believe they are either too fatigued or ill to drive.
- Celadon informs drivers they must communicate with their driver-managers as soon as possible when they anticipate they will not make their scheduled delivery times for any reason and that they must inform Celadon of any changes in their projected time availability ("PTA") for their next dispatch. Policy 12-4.
- During orientation, the Beattys and all other new hires were instructed upon and aware of Celadon's specified procedure on how to address situations in which they believed they were either too fatigued or ill to drive.
- 49 CFR section 395.3(b) provides that a driver cannot drive after being on duty 70 hours over eight consecutive days. 49 CFR section 395.3(c) provides that a driver may restart a fresh 8-day period by taking 34 or more consecutive hours off duty (a "34-Hour Restart").
- Celadon employed the following individuals in the positions indicated:

Deb Hart as	driver-manager
Brian Callendar as	driver-manager
Nick Barton as	driver-manager

Ray Waterman as	driver-manager
Dawn Armstrong	log manager

Mid-November 2013

- On November 10, 2013, the Beattys commenced a 34-Hour Restart, after reporting fatigue, and reported a PTA of 5:00 AM on November 14, 2013.
- On November 13, 2013, after receiving the Beattys' report, Celadon placed the Beattys on an illness hold.
- On November 14, 2013, after completing the 34-Hour Restart, the Beattys requested another assignment, but were not immediately dispatched. Later that morning, Mr. Beatty was released from the illness hold, and he received and accepted another assignment. Ms. Beatty also drove on that assignment.
- Initially, Ms. Beatty was not paid for that drive because she had not been released from the hold when Mr. Beatty had been released from the hold and had been placed on a medical hold, and Mr. Beatty was paid as a solo driver.
- After Celadon investigated the issue, it was determined that Ms. Beatty should have been released from the hold when Mr. Beatty had been released from the hold and mistakenly been placed on medical hold. Accordingly, on November 18, 2013, Mrs. Beatty was released from the medical hold, Mr. Beatty was restored to Team Driver status, and the Beattys resumed their work as Team Drivers. Mrs. Beatty subsequently was paid for the drive that took place while she had been on hold.

January 2014

- On January 25, 2014, around 3:30 pm, the Beattys were sent a load assignment (order 5925189) for pick up in Greensboro, NC, for delivery to Farmville, NC.
- The Beattys refused the load, claiming that they were fatigued.
- On January 29, 2014, Celadon's Deborah Hart, wrote up the Beattys up in a "nonconformance" report as a result of the January 25, 2014 incident.
- Operations Manager Laura Hawkinson approved the nonconformance report. [The Beattys do not disagree but have no knowledge regarding this stipulation].

March 2014

- On or about March 18, 2014, the Beattys declined a load, stating they would be taking a 34-Hour Restart after they drove another 185 miles because they were fatigued. At that time, both had been on duty for fewer than 70 hours in the preceding 8 days.
- On or after March 18, 2014, Mr. Beatty called Dawn Armstrong, and Ms. Armstrong explained to Mr. Beatty the 34-Hour Restart rule. Ms. Armstrong also explained to Mr. Beatty that his driver manager was correct in concluding that a 34-Hour Restart had not been required.

Initial OSHA complaint

- The Beattys filed their complaint with the U.S. Department of Labor, OSHA, under the provisions of the STAA, on March 25, 2014.
- The complaint was timely filed.

June 2014

- On or before June 9, 2014, the Beattys had reported that poor weather and need for trailer repair had caused them delays while driving a load.
- On June 9, 2014, they informed the Driver Manager that they could resume driving, but that they could not deliver their load until 11:00 am on June 10.
- Early on June 10, 2014, the night crew working at Celadon ran a filter and determined that the Beattys had stopped driving, were running late, and would not be able to deliver the load by 11:00 am, the ETA the Beattys had given.
- On June 10, 2014, at 9:53 a.m., the Beattys communicated that they would not deliver the load until 11:59 p.m. on June 10.
- Roughly 30 minutes later, on June 10, 2014, at 10:22 a.m., the Beattys sent another message changing their ETA again, stating that the load would not be delivered until 7:00 a.m. the following morning, on June 11, because they were tired.
- on June 10, 2014, Deborah Hart wrote up the Beattys in a "nonconformance" report as a result of this incident.
- Operations Manager, Laura Hawkinson approved the nonconformance report.

Resignations

- On or about June 18, 2014, the Beattys submitted their resignations from Celadon and returned their truck to the Kernsville, NC, terminal.
- The Beattys' employment with Celadon ended on or about June 18, 2014.

Rehiring Application

- On or about July 25, 2014, the Beattys reapplied for employment with Celadon.
- On or about July 25, 2014, Celadon's corporate counsel, Dennis Elschide, denied the Beattys' re-employment application. [The Beattys do not disagree, but they have no knowledge regarding who made the final decision].
- Celadon informed the Beattys they would not be rehired.

Secretary's Findings and Appeal

- On October 7, 2014, the Area Director, OSHA, issued "Secretary's Findings" finding the Beattys' complaint not established and dismissed their case.
- On October 17, 2014, the Beattys timely requested a hearing before an administrative law judge.

B. The Parties' Contentions:

1. *Complainants*:

The complainants simply argue that they were retaliated against by Celadon on six occasions, in the form of being placed on medical hold on November 13, 2013, write-ups, i.e., non-conformance reports of 1/29/14, 3/17/14, 6/11/14, being assigned unfavorable routes in January/February 2014 during poor winter weather, and, not being rehired on July 25, 2014, all for refusing to drive and deliver loads because they had reported being too fatigued. Admittedly, they knew and took advantage of the DOT mandated 10-hour sleep break rule every night, but after three to four weeks of driving continuously they nonetheless became fatigued and believed it would have been unsafe to drive. They repeatedly asked for a "34-hour restart" and were informed each time, i.e., by Dawn Armstrong, that under the circumstances it was not appropriate. During January and February 2014, they had reduced miles driven due to severe storms across the U.S.. Finally, after 6/11/14 write-up for not delivering a load on time, the Beattys say they resigned fearing a pending dismissal. (See Secretary's Findings and Prehearing Statement). The complainants believe punitive damages are appropriate in this case.

2. *Respondent*:

The Respondent argues against the complainants' contentions averring that it is undisputed that both parties agree that Celadon did not want any driver operating its trucks while they were not safely able to do so. Celadon employs team drivers in order to have two people in the truck one of whom is operating it and the other sleeps thus keeping the truck moving.

Celadon has numerous policies to ensure drivers communicate with their driver managers so the latter can communicate with customer service which communicates with Celadon's customers to ensure the business needs of both the customers and Celadon are met all while ensuring safety. It has a planning department and an array of computer programs to determine how and when to get freight picked up or delivered from or to a customer even when a particular driver may not be able to safely drive.[4] If drivers believe they cannot meet a schedule they were to propose an alternate time to their driver manager.[5] If the alternate time is not acceptable to Celadon, it would find another driver team or not bid on the trip.

Ms. Beatty was placed on medical hold, November 13, 1013, and her pay withheld. When the Beattys explained Ms. Beatty should not have been placed on the hold, she was taken off the hold and reimbursed fully. Thus, the employer contends this cannot be an "adverse action."

The Beattys were given non-conformance reports on two occasions because they simply failed to adhere to Celadon's communication policies which has an adverse impact on its ability

[4] See Mr. Elschide's testimony regarding the program, planners' responsibility for their 2,600 trucks, and reasons for Celadon's routing of drivers. (TR 373-5).

[5] "The Driver Manager has the responsibility of meeting the needs of the Driver as well as our commitments to our customers." (EX D).

to conduct business. The reports had nothing to do with the fact they had reported fatigue. Rather, drivers may not simply determine they are too fatigued or refuse to drive, take a "restart," or "do whatever they want to do without communicating with their supervisors about what happened. . ." (TR 35-36). Moreover, the 3/17/14 non-conformance report was removed from their file and there is no record it ever existed thus, it cannot constitute an "adverse action."

According to Celadon, the Beattys had multiple problems during their eight month tenure and decided to quit without giving notice. (TR 36-37). Five to six weeks later they reapplied for employment. (TR 37). Their applications were denied, on or about July 25, 2014, due to their "consistent violation(s) of company policies," the non-conformance reports, the fact they had quit, and the fact that their workload, as team drivers, averaged about 2,700 miles per week versus the expected 4,000-plus miles. (TR 37; Prehearing Statement, page 5).

3. *Other Non-Determinative Observations*[6]

According to the U.S. Department of Transportation ("DOT"), nearly 4,000 people die in large truck crashes each year and driver fatigue is a leading factor. Tragically, the truck drivers themselves sometimes die driving tired.[7] The DOT wrote that:

> In December of 2011, the FMCSA issued a new rule to stop fatigued driving by making changes to the "hours of service" rules for truck drivers. The rule was complicated, but it basically boiled down to two updated requirements. One is that drivers take a 30-minute rest break within the first 8 hours of their shift so they can stay alert on the road. The other updated the use of the **34-hour rest period, known as the "restart.**" In the interest of safety, the 2011 rule restricted drivers to using the restart only once every seven days and it required that the restart period include at least two periods of rest between 1:00 a.m. and 5:00 a.m. Basically, it required that drivers have the opportunity to **take a very real rest and catch up on sleep before working another very long week.** The net effect of these changes was to reduce the average maximum week a driver could work from 82 hours to 70 hours.
>
> While most truckers don't come close to operating this many hours a week, the FMCSA rules were not a solution looking for a problem. To the contrary, it was brought to our attention as we were developing this rule that **a segment of the industry was often operating at the maximum hours allowed.** It was also revealed that some truckers operating under the old rules were adding one full work shift per week. These observations were verified through studies and truck inspections conducted in the field.
>
> Additionally, new research available on the subject demonstrated that l**ong work hours, without sufficient recovery time, lead to reduced sleep and chronic fatigue.** That fatigue leads drivers to have slower reaction times and a reduced ability to assess situations quickly. One of the most dangerous elements of fatigue is how quickly it can sneak up on vehicle operators, be they car drivers or truck drivers. The research revealed that truck drivers (like most people) often can't assess their own fatigue levels accurately and are therefore unaware that their performance

[6] Should a party object to these non-determinative observations, they may do so within thirteen days of the date of the Decision & Order specifically establishing grounds for doing so.

[7] https://www.transportation.gov/fastlane/why-we-care-about-truck-driver-fatigue.

has degraded. Too often, fatigued drivers fail to notice that they are drifting between lanes. FMCSA fulfilled its responsibility to develop a rule based on the best science available, protect the driving public, and ensure the continued flow of commerce. In fact, the rule was challenged in court by those who felt it was too restrictive and others who felt it wasn't restrictive enough. The court found that FMCSA got it right. . . (emphasis added). *Id.*

Perhaps the hours-of-service rules should be revisited to better account for "team" driving, which the regulations do not appear to adequately address. In the absence of such a change, the management of team driver hours of service would best be served by appropriate motor carrier policies. A prudent policy would not require drivers to **operate at the maximum hours allowed** as the DOT put it. Obviously, team drivers may not be kept on the road together by requiring the entire team to accumulate 140 working hours before a restart. Although, each driver of a team could be required to be on-duty 70 hours in an 8-day period and the truck could conceivably be kept moving 20 hours per day, a prudent operator might not wish to focus merely on the technically correct adequate policy. Moreover, if a company did not fully entrust its drivers to report fatigue, there are not a number of technical devices which are available to monitor and address driver fatigue.

IV. ISSUES

I. Whether, under 49 U.S.C. § 31105(a)(1), the respondent discharged, disciplined or otherwise discriminated against employees, to wit the complainants, on or **about June 18, 2014**, regarding pay, terms or privileges of employment, because:

(A)They made or filed multiple complaints (with their supervisors or others) related to violations of commercial motor vehicle safety regulations, standards, or orders.

(B)Were their complaints "related to" violations of commercial motor vehicle safety regulations, standards, or orders? 49 C.F.R. §§ 395.3 operating hours-they **refused to operate** a vehicle, on **two** specified dates, because,

(i) its operation, **would have violated** a regulation, standard, or order of the united states related to commercial motor vehicle safety or health, that is pertaining to operating hours. (49 C.F.R. § 395.3).

II. If the respondent so violated 49 U.S.C. § 31105(a)(1)(A) or § 31105(a)(1)(B):

(A) what affirmative action, if any, should be taken to **abate** the alleged violation? (Including expungement of records re his discharge, an **order limiting what information** may be disclosed regarding his employment & **posting** of an order at Respondent's workplace).

(B) If **reinstatement** is the appropriate remedy (immediately upon my decision)**,** what will be the (same) pay, terms and privileges of his employment?

(C) what **compensatory damages**, including **back pay**[8], fringe benefits, lost overtime, reinstatement of seniority & tenure, & lost pension contributions, the complainants may be entitled to?

(1) Whether the complainants exercised reasonable diligence in mitigating their damages?
(2) Whether the complainants are entitled to compensation for:
(i) emotional distress and mental pain?

(D) Whether the complainants are entitled to interest on the back pay and the amount of such interest?
and,

(E) What reasonable costs and expenses are the complainants entitled to in bringing and litigating the case, including attorney's fees?

V. DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact and Law

Mrs. Beatty testified she has been truck driving since 1995 and has a Class A CDL. Celadon hired her husband and her in October 2013 as team drivers. (TR 43). They participated in a three-day orientation and were given a Handbook. (TR 178, EX I, EX K, EX R, EX K). They were told to make a report to the Safety Department if anyone tried to force them to drive while ill or fatigued. (TR 44). The Beattys make it a point to keep a clean record and had no accidents of tickets while at Celadon. (TR 45). The team driving concept means one driver sleeps while the other drives; she likes to drive during the day time and her husband prefers night times. (TR 46). She was not aware they were assigned to the "expedited" division until sometime after being hired.

Mr. Beatty, who also has a CDL, has been driving trucks since 1996 and has worked for companies such as Roadway and Yellow Freight, where he and his wife drove as a team. (TR 185-187). He testified that his first priority driving is his wife's safety in light of the fact that he had almost had a serious accident once when he was tired and while his wife was in the sleeper. (TR 196-7).

The Beattys were assigned their first dispatch on October 25, 2013 and drove continuously through mid-November without a 34-hour restart. (TR 46-47). After a while this made them tired (despite mandatory daily rest and sleep breaks). (TR 47).

[8] Back pay goes from the date of termination to the day one receives a bona fide offer of reinstatement.

Each truck was equipped with a Qualcomm device which tracked the vehicles movements, times and locations as well as acted as a message platform. (TR 49-51; CX 1).[9] Mrs. Beatty would record verbatim notes in a diary from the Qualcomm screen, primarily to ensure their customer information and their own pay was correct. (TR 52-54). CX 7 is a typed version her handwritten diary verbatim notes from 11/14/2013 or 11/18/2013. (TR 55, 59, 71, 73-4). The Qualcomm device would also inform them when they were eligible for a 34-hour restart and on each occasion they asked the dispatchers did not agree primarily because they had hours remaining. (TR 120-122; CX 1). Celadon could use filters in its dispatch system, from the Qualcomm data, to identify loads/trucks running late so they could investigate and keep their CSRs and customers informed. (TR 329).

Celadon's log manager, Dawn Armstrong, who was responsible for tracking driver hours of service, wrote that neither of the Beattys was entitled to a 34-hour restart on November 11, 2014. Ms Beatty had been on duty for 65 hours and 15 minutes and Mr. Beatty 50 hours and 10 minutes, both below the 70-hour threshold for the restart. "… [b]ecause they were team drivers, meaning that one could sleep while the other drove, **they had more than ample capacity to continue driving** without a 34-Hour restart." (EX T)(Emphasis added).

Mrs. Beatty testified about the November 2013 "medical hold" situation. On or about November 11, 2013, they were returning east from a New Mexico delivery headed to Harrisburg, PA and dispatch asked for an ETA. (TR 48). She sent the ETA and messaged that they needed a 34-hour restart upon arrival.[10] (TR 48; CX 2). They were getting tired. (EX Q; TR 369). As their trailer was being unloaded, they both fell asleep and overslept. (TR 48). Upon awakening they messaged Deb Hart about their restart request informing the latter they were tired and that oversleeping was a sign of fatigue. (TR 48, 80; CX 2). No response was given regarding the rest break and they were assigned to pick up a load in Maryland for delivery at Celadon's terminal in Indianapolis. (TR 81). On the way, when they reached Celadon's Columbus, Ohio, terminal they were both so tired they decided they were not going to drive any further. (TR 81). All through the night, in Columbus, they received dispatch messages and were encouraged to drive. (TR 81-2; CX 3). In the morning they called their DM and discussed the situation and their fatigue. Their Qualcomm message reflects how "really fatigued" and in need of rest they were. (CX 4). However, they were rested by 5:00 a.m. and ready to drive by 9:00 a.m.. They then learned they had been placed on medical or illness hold (by M. Hamlet) and could not move until cleared by the medical department. (TR 83, 369-70; EX Q). They protested they were not sick. (TR 83). Nevertheless, they contacted the medical department, informed them they were not ill and merely had needed rest. (TR

[9] The Qualcomm would inform drivers when they were eligible for a 34-hour restart. (CX1).

[10] EH H shows on 11/11/13 she was in the sleeper berth 14 hours and 28 minutes and 18 hours, 2 minutes in the sleeper on 11/12/13. On 11/13/13 she was off duty 15 hours, 9 minutes, in the sleeper 8 hours, 51 minutes with no driving time. On 11/14/15, she drove 6:22, was off duty 13:03. (TR 139). On 11/15/13, she drove 9:47 and sleeper 12:38. (TR 140). On 11/16/13, she had no driving time and 23:52 sleeper berth. On 11/17/13, she had no driving and 24:00 in the sleeper berth. (TR 140). She drove again on 11/18/13. She believed she was on medical hold 11/15-11/18/13. (TR 141). Mr. Beatty likewise had substantial hours logged as in the sleeper between 11/4/2013 and 11/18/2013. (TR 220-224; EX J).

84). Mr. Beatty was released from the hold (by Mike Griffin). (TR 85, 369-70; EX Q). They were dispatched on another trip and soon learned Mrs. Beatty had not been so released and required a doctor's note. (TR 86, 370). So, Mr. Beatty completed the driving for that trip. (TR 86). This created a pay discrepancy which was later resolved in their favor. (TR 87-89). Celadon admitted they had made a mistake. (TR 371).

Mr. Beatty agreed that by the November 10, 2013 incident they had been on the road since mid-October without a 34-hour restart and were fatigued. (TR 191). He admitted their 10-hour daily rest breaks helped but after two weeks they got tired and were not getting enough rest. (TR 269). He testified the dispatcher had listed him as sick to get him off load.[11] (TR 201-202). He did visit a physician who found he was not "sick" and after speaking with Celadon he was reinstated. (TR 202-203, 224-226; CX 7).

Mr. Beatty explained the basis for their fatigue:

> We're in the truck, we leave home in Celadon's truck, we're in that truck till we get back home, no matter if we are driving or we are not driving. If we're not driving, we are still in the truck. We're sleeping in the truck, we're getting out of the truck to eat and shower and we're getting back in the truck, whatever time. From October to November, we was in the truck. So, pretty much when we leave home, we are working when we leave home until we get back home. The only time we are not working is when we're back home and out of Celadon's truck. We park the truck, we're out of it and then we are not working. When we are in the truck we are responsible for it. We're still under FMCSR rules. . . We have to be responsible for the truck so we are still working. Even if it's not been through the responsibility of the truck. So, we are constantly working. . . We're on duty. We have to log every day. . . After like I said a few weeks of driving and stopping and going, all drivers, the deal with fatigue. . . After three weeks, first you're getting tired every now and then. You can count on tired by just a 10-hour rest break every night. . . After about two weeks, three weeks in the truck doing 10 hours every night like that, it gets a little - - you start feeling different in ways. It's hard to get sleep now. Even though I am doing 10 hours, I'm not really resting. . . (TR 193-4).
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> (With Celadon's forced dispatch method) [I]t keeps the truck like they say in continuous motion. You just keep on. You're running, running, running, running back and forth. (TR 194).

[11] Mr. Elschide testified that to stop the planners from continuously pushing loads on drivers, sometimes driver managers use the illness hold to "get the driver off the board," sometimes for fatigue or illness. (TR 369). After 3 days, an illness hold becomes a "medical" hold requiring a medical release. (TR 370).

According to Mrs. Beatty, by January 29, 2014 they had been over the road for another four weeks without a 34-hour restart.[12] (TR 89). But, she added that the November 2013 "medical hold" situation made both of them reluctant to complain of fatigue. (TR 89). They accepted a dispatch with the expectation they would be travelling toward their home (and a break). (TR 90, 146). The "home time" had been pre-scheduled. (TR 145). En route they were asked to handle another very circuitous pick up and declined stating they were tired and could not do one more load. (TR 90-1, 146). Celadon responded stating, "You guys are company drivers. You're not allowed to turn down loads." (TR 91). After Mr. Beatty's telephone call with Celadon failed to resolve the matter, they informed the company they had dropped and unhooked the trailer at the original destination and deadheaded home. (TR 92, 146). Admittedly, they had not received a routing home to Wilmington. (TR 149). Although they were close to home, they had to pull over to rest until the morning. (TR 92, 149-150). Several days later, Celadon's Ms. Deborah Hart called inquiring and relating they should not have left without communicating. Ms. Beatty explained the circumstances and that they had communicated. (TR 92). The Beattys were given a non-conformance report, issued by Mr. Barton, for the January 29, 2014 matter which they did not learn about until filing their OSHA complaint in July 2014. (TR 152). However, it was never placed in their records and there is no further record of it. (TR 214-217).

Mr. Beatty agreed with his wife's description of the January incident. (TR 228). He testified about his logs for January 18-25, 2014, including time in the sleeper berth and off-duty. (TR 232-234). He spoke with Deborah Hart about the write up, driving tired and refusing a load. (TR 206). Mr. Beatty also spoke with a recently employed Mr. Barton about a write up when the fleet manager appeared and said, if you have a load, if you're fatigued, you can't turn it down." (TR 205). Mr. Beatty noted that in Celadon's prehearing report, Mr. Elschide's statement says they had refused to pick up a load as requested by Celadon stating they were fatigued, too fatigued to drive. (TR 215). Mr. Beatty agreed EX J was his driver logs from Celadon. (TR 219).

On January 30, 2014, the Beattys unintentionally filed their first OSHA complaint against Celadon by phone as they had only intended to seek information. (TR 115, 180, 259-260). It was dismissed, on March 20, 2014, because of their lack of participation in the process precipitated by their driving schedule. (TR 99; ALJ Ex. II, TR 263). Mrs. Beatty did not know who, if anyone, at Celadon saw the complaint, but she believed they had sought dismissal. (TR 182). They refiled in March 2014. Mr. Terwilliger is the OSHA investigator. CX 10 is a June 13, 2014 letter to him. (TR 125). On April 14, 2014, they had forwarded him an email related to Celadon's forced dispatch policy. (CX 9).

Mrs. Beatty testified about the March 18, 2014 matter. (TR 93, 157). They had been out (on the road) a long time, about four weeks, without a "significant" break and had "pushed" to make their schedule despite being "too fatigued" as they remained afraid of being disciplined such as with the November 2013 "medical hold" situation. (TR 93-

[12] EX H shows the following daily sleeper berth hours, 24, 24, 13:45, 12:03, 24, 24, 24, 13:06, 17:56, 14:16, and 16:01, on 1/15-1/25/2014, and then on home time. (TR 153-155). Mrs. Beatty explained that covered the periods when they were shut down for weather. (TR 156-7).

94, 158). After informing dispatch, they were told they had (driving) hours remaining and were not eligible for a restart.[13] (TR 94; CX 8). They declined further assignments because they were too fatigued. (TR 94-5; CX 8). CX 9 is email correspondence with driver manager Nick Barton regarding Celadon's "forced-dispatch" policy found in the Handbook at 12-5. (TR 123-4). He told them he had to write them up for the incident, i.e., refusing loads, despite their protestations they had pushed on, delivered the load and declined additional loads due to tiredness and not feeling safe to drive. (TR 96, 123). They subsequently grieved the write up. (TR 96). They never saw the write up and, on March 28, 2014, Nick Barton wrote on Qualcomm that it had been deleted. (TR 98, 160-162).

Mr. Beatty agreed with his wife's testimony regarding the events surrounding the March 2014 matter. (TR 235; CX 8).

Ms. Armstrong, wrote that she informed Mr. Beatty that the Beattys were not entitled to a 34-hour restart on March18, 2014, as Mr. Beatty had been on duty only 42 hours and 20 minutes during the preceding 8-day period, far below the 70-hour maximum. (EX T). She added that she explained they should not drive when tired and to inform their driver manager, but that a rest period shorter than 34-hours may be warranted.

After their fatigue complaints, she felt they were "banished" to the I-80 corridor with lots of weather shutdowns. (TR 129). On June 9, 2014, they got caught in a wintery storm in Colorado and had to pull over and stop driving, a fact they communicated via the Qualcomm. (TR 102). Admittedly, EX H their log shows no Qualcomm communication between her and Celadon between 3:00 pm through 9:53 am on June 10, 2014. (TR 143, 169-170, 173). But, Mr. Beatty spoke with them via telephone. (TR 144, 247-8). The next morning they needed to have the trailer repaired. (TR 103, 168). Due to the repair delay they were not going to make the delivery ETA and were repeatedly queried about its changing nature. (TR 103, 173-176). Their last words back to the dispatcher were, "we're sorry we can't make this run on time, but we're tired. We're not going to run unsafe and if you guys are going to write us up again for being late because we feel tired, we don't know what to do about that." (TR 104). Celadon issued a non-conformance report. (CX 11). The corrective action plan noted if they got another write up they would need to be routed in for an ops meeting. Ms. Hart also wrote that, "if this type of transit is too much for them that we may need to find other options for them so they would be safe." While it mentions lack of communication, Mrs. Beatty testified it did not mention the many times they did communicate regarding the ETA. (TR 177).

That non-conformance report matter essentially "scared us into resigning" as they no longer felt safe driving for Celadon and wished to avoid further write-ups or a termination. (TR 107-108, 179). She testified that whenever they had asked for a "restart" at Celadon, they were told they were ineligible and had remaining hours

[13] EX H shows the following daily sleeper berth hours, 23, 16:03, 9:56, 12:47, 19:24, 16:22, 10:54, 15:16, 14:2714:06, 24, 16, 13:21, and off duty 24, 24, 24 , and sleeper 13:36, 22:15 from 3/9/14 through 3/26/2014. (TR 163-166). Between 3/27 and 3/21/14 they performed no driving due to a breakdown. (TR 166).

available to drive. (TR 122-123). She reiterated that fatigue affected them after weeks of driving without a restart, i.e., they were oversleeping at customers' locations and tired, a different type of tiredness or cumulative fatigue. (TR 123).

Mr. Beatty testified that he had been told many times, i.e., by Deb Hart and Ms. Armstrong, that they could not turn down jobs for fatigue, but admitted no one had told him to drive tired. (TR 256, 258-259, 263-5). Celadon's Handbook describes the effects of fatigue on pages 9-32-33. He believes they suffered "cumulative" fatigue. He added that whenever they had asked for a 34-hour restart, they (Celadon) said no. (TR 211). They talked to whomever they could about it in the company. (TR 211, 256).

By July 25, 2014, they were "feeling it" in the pocket book and reapplied to work at Celadon. (TR 109). Their applications were denied due to their low miles (travelled) and high breakdown record. (TR 109). In fact, Mrs. Beatty testified that they drove what Celadon gave them and it had advertised 2,500 miles per week average. (TR 132).

Mr. Beatty agreed that they had resigned from Celadon to avoid write ups and that no one had ever said they were poor drivers. (TR 199). He agreed with all his wife had said and that they had declined loads citing fatigue and gotten write ups.

The Beattys returned to work as team drivers at another trucking company, Super Service, on by July 29, 2014. (TR 110). Their pay was about $ 500-600 per week, lower than at Celadon. (TR 118). Mr. Beatty identified the company as Super Service from which they resigned as the company did not really offer team driving. (TR 248-9). They resigned on or about December 18, 2014. (TR 111). Mr. Beatty admitted he had had a traffic citation for an accident driving for them and testified after resigning he collected unemployment. (TR 252-4). They had been earning about $900 a week together at Celadon. (TR 117).

On February 20, 2015, Mrs. Beatty was rehired as a solo driver at Schaeffer Trucking at a higher pay, i.e., $750/week, than Celadon's team driving rate (for her). (TR 112, 183). Schaeffer would not hire Mr. Beatty due to his accident. (TR 255). Other than Celadon, he had not applied for work elsewhere. (TR 255-6).

Mrs. Beatty concluded although she understood the importance of communicating with Celadon, that Celadon's policies made them unsafe and did not permit them to get 34-hour restarts when they were tired. (TR 167).

Celadon's Handbook provides:

> "Driving tired is something all drivers experience at one time or another. When you are fatigued, you are not in control no matter what you might think. In fact, in extreme cases, fatigue can cause your brain to shut down (involuntarily). You may experience visual distortions, reduced decision-making and problem-solving abilities, inhibited muscle response and coordination, reduced action time, inability to concentrate or inability, exhaustion, and/or giddiness. Key factors contributing to Fatigue-related commercial motor vehicle accidents include: the

> duration of sleep during your last sleep period, the amount of sleep you got in the previous 24 hours and whether the sleep was continuous or interrupted. (*Sleep Debt)* Lack of sleep is one factor that can lead to driver fatigue. Sleep is necessary to your body as water is. Most adults need between seven and eight hours of sleep to feel well rested. Some may need more. If you cannot get enough sleep, you may be able to function for a few days, but soon sleep deprivation can develop and the longer you go without enough sleep, the more you will need to catch up. There is no way around sleep debt other than getting the sleep your body is craving. Unfortunately, you cannot build up a bank of sleep (*time*) and then expect to go without. Circadian rhythm - we are creatures of habit more than we realize. Our Circadian rhythm (*is our body's internal clock*). . . . Most people's clocks run on a 24-hour period. Your body expects you to wake up at a certain time and eat at a certain time and sleep at a certain time. If your schedule changes, (you are in a different time zone, or you change from a day shift to a night shift) your internal clock needs time to adjust to the new change, the new schedule. Sleep quality - getting the right kind of sleep is just as important as getting enough sleep. . . (TR 267-9; Handbook pp 9-32-33).

Deborah Hart has worked for Celadon since 2012, as a driver manager. She had been a truck driver and testified she was familiar with the laws, regulations, and rules governing truck driving. (TR 273). She described the duties of a driver manager and observed, in addition to supervising truckers, they are the first line of communication between the drivers and different operations departments. (TR 274). Driver manager are responsible for relaying information to the planning department and to customer service representatives. The planners are responsible for matching up customer loads with drivers and assigning loads to drivers. (TR 275). She was one of the Beattys' driver manager among 30-40 other trucks. (TR 297-8).

Ms. Hart briefly described the Qualcomm communication methodology between drivers and the company much of it via macros. (TR 276-6, 285; EX A). Celadon formed its expedited division, which only used team drivers, in January 2014. Customers, many of whom do "lean" or "just-in-time" manufacturing, pay a premium for team drivers and the expedited division has priority over others. (TR 278, 280). It is important that deliveries are made within the time frames set forth in drivers' assignments. (TR 281). If they are unable to do so, drivers much explain why. (TR 285-6).

Ms. Hart identified EX D as Celadon's Operations Compliance policies in effect when the Beattys were employed. (TR 282). The "dispatch" policy states, "Celadon company drivers are not permitted to turn down loads if they can safely and legally make on time pick-up and delivery. Celadon operates in all 50 states and Canada to serve the needs of our customers."

According to Ms. Hart, Celadon's employee handbook, then in effect, states that "Celadon Company drivers are not permitted to turn down loads if they can safely and legally make an on time pick-up and delivery." section 12-5 (EX D, page 12-5; TR 290). It goes on to state that "If at any time there is a potential problem with the on time pick-

up and delivery of a load, message or call a Driver Manager." (TR 290). The policy also states, "Celadon requires our Drivers to provide timely pick-up and delivery of all shipments. There are many hurdles along the way, but it is the responsibility of the driver to communicate any problems or circumstances that may put service in jeopardy. At the first hint of a problem, the Driver should notify the Driver Manger so that appropriate notification is given to the customer. Our professional fleet is expected to provide top quality service both in transport of freight and transfer of information. Make sure you work with your Driver Manager to set realistic delivery appointments and keep each other informed of any information related to the shipment." (EX D, page 12-10; TR 291-2). "The most crucial part of our operations is our ability to communicate problems, needs, and concerns, in our daily operations." (EX D, page 12-6; TR 292). Further, if a driver's projected time of availability ("PTA") for the next shipment changes, "it is imperative that they send a PTA update. (EX D, page 12-4; TR 294-5). Drivers must obtain an official routing assignment from Celadon for "home time" and may not take a company truck home without permission. (TR 295-6).

Ms. Hart explained the obvious importance of this required timely communication, including the need for revised ETAs and rest stops, on Celadon's business. (TR 292-4).

Ms. Hart testified she had never seen any March 2014 non-conformance report nor did she believe one was ever placed in their file. (TR 318, 350-1). Moreover, there is no way to delete write-ups in the system. (TR 351). Nor to her knowledge was the Beattys' fatigue reports a factor, in any way, in their driving assignments. Although the planners had made many of the assignments they would not have been aware of any fatigue reports. (TR 319).

Non-conformance reports are prepared by Driver Managers when loads are not delivered on time and approved by either an assistant office manager or operations manager before they are finalized. (TR 296). They have two purposes: one, to provide CSRs information to pass on to the customers and secondly, to observe patterns of particular drivers.[14] (TR 297). Ms. Hart prepared an April 2014 non-conformance report for Mr. Beatty which Laura Hawkinson, her supervisor approved. (TR 300-302; EX C; EX S).[15] The Beattys had been assigned a load, had refused it due to fatigue, and went home without a routing assignment, PTA or ETA, which resulted in Celadon having to find another driver for the delivery which ended up being late angering the customer. (TR 301-2). This violated Celadon's policies. (TR 301). The report was not done to retaliate against the Beattys for reporting fatigue, rather generated due to the CSR's concern. (TR 300, 302). She did discuss the incident with the Beattys. (TR 303). Ms. Hart testified about the routing and mileage (on Google Maps) between the various cities and towns

[14] Celadon has a "progressive disciplinary policy the objective of which is to improve performance and efficiency. (Handbook pp. 1-48-49). Non-conformance reports are not named in the process. Employees are requested (not required) to provide two-weeks' notice should they resign. (Handbook at 1-50). Grounds for discipline and possible termination include: failure to follow supervisors' directives, failure to start and complete run in scheduled running time without satisfactory explanation**, refusal to run or accept dispatch assignment**. (Handbook pp 12-15-16).

[15] EX C, prepared by Laura Hawkinson, contains no reference to fatigue or tiredness. Ms. Hawkinson is the Operations Manager for the Expedited Division and oversees driver managers. (EX S).

related to this matter which could have differed from Celadon's routing. (TR 306-309; EX L and M).

Ms. Hart prepared a June 10, 2014 non-conformance report for Mrs. Beatty which was approved by Laura Hawkinson. (TR 310-312, 315-6; EX N; EX S).[16] She discussed it with the Beattys and her expectations of team drivers. (TR 317). At the time, she was not aware of their OSHA complaint. (TR 323). Their truck had been shut down for 7.5 hours over night, the load was running late, and Celadon had been unable to contact the Beattys. (TR 311). The day before, they had given an ETA which was relayed to the CSR and customer. (TR 314). The Beattys had informed her they were tired and did not feel safe operating the truck.[17] (TR 338). When Ms. Hart reached them in the morning, they gave a new ETA twelve hours later than the earlier one which she gave to the CSR, then another ETA seven hours later, twenty minutes later. (TR 312, 314-5, 334-6). The Beattys had experienced bad weather and a needed truck repair the day before. (TR 313). The report was not done to retaliate against the Beattys for reporting fatigue, but rather because of the changing ETAs, communication, confusion to the customer and the impact on Celadon's credibility.[18] (TR 316, 332; EX S). Ms. Hart testified that she was not aware of any employees who engaged in conduct similar to the Beattys' in January and June 2104 who had not gotten non-conformance reports. (TR 322). Ms. Hart did not write the Beattys up for fatigue complaints or refusing loads, but rather "because of the communication problem." (TR 332, 340, 352).

Ms. Hart testified she had never encouraged the Beattys to drive when they claimed to be too tired to drive safely; they were not to do so. (TR 319; 259). Rather, she told them to stop and reset their ETA and PTA. (TR 320). She did not tell them to communicate with their driver managers because they were doing so. (TR 320). Ms. Hart could not specifically say whether she had discussed the 34-hour restart, but had explained what was expected of team drivers, i.e., that "they usually ran off of their recap hours . . ." (TR 320). Ms. Hart testified that usually our team drivers do not need 34-hour restarts because "[t]hey usually run off their recaps mainly because they've had enough rest to be able to keep driving because there's a lot of time too like in between loads that they have down time . . ." (TR 322, 327). If a (team) driver asked for a 34-hour restart, she would likely have "coached" them regarding whether or not they had off before and how much hours they had, but if they were too tired, they would have to reset their PTA for planning purposes. (TR 328). She added that if a driver still had hours left on their 70 and their recap, then a 34-hour restart would not be "required." (TR 342). Celadon only "suggested" recapping and had no policy requiring it. (TR 346). Nor had Ms. Hart ever discussed the Beattys' mileage driven. (TR 324). She did not feel the Beattys fatigue claims made them "unreliable," but rather was concerned about their health and the "communication problem." (TR 331).

[16] EX N, prepared by Ms Hawkinson, relates the Beattys' complaint of tiredness.
[17] It is somewhat confusing when she testified that she was not aware whether the Beattys had sent in communications declining loads due to fatigue. (TR 353).
[18] Yet, she recognized that weather conditions and needed repairs effect ETAs. (TR 335).

Mr. Dennis L. Elschide is a Celadon corporate attorney familiar with the rules and regulations governing truck driving who has worked at Celadon for eleven and one-half years. (TR 354). Celadon prohibits retaliation against employees who file government complaints or who express safety concerns. (TR 355). He explained the 34-hour restart rule for companies operating seven days per week; a driver must take a 34-hour restart after they have been on duty for 70 hours in an eight-day period. They may not take a 34-hour restart within 168 hours of their last restart. (TR 355). It is not a fatigue rule per se, but rather an hours-of-service rule. (TR 355-6). Celadon prohibits tired driving and "[I]f a driver is fatigued, certainly they should take time off. (TR 356). The Beattys did not give 2-weeks' notice when they quit. (TR 356).

Mr. Elschide testified there had been some talk that the Beattys had quit over a dispute. (TR 357). They reapplied for team driver work on July 25, 2015. (TR 357). After consulting with Laura Hawkinson and Doug Wilson, regarding hours of driving time, he decided not to rehire them mainly because of the lack of notice upon quitting and reapplying so soon. (TR 357, 384). He was aware of the on-going legal matter and the two non-conformance reports, which seemed not to be "working" as they had not taken responsibility (TR 358, 384). Moreover, they had underperformed as team drivers, i.e., averaging 2,796 miles a week, and stuck Celadon with the truck. (TR 358; EX H, EX J, EX O, and EX P). Our average team drives about 4,500 to 5,000 per week. (TR 363). The non-conformance reports are not out of the ordinary as we use them to counsel drivers. (TR 358). Their poor miles was not a main reason for not rehiring them. (TR 381). The "unreliability" of their communications was another. (TR 381). The fact the Beattys had either filed the OSHA complaint or complained of fatigue was "absolutely not" part of the decision. (TR 359). He testified no one at Celadon had gotten any correspondence from OSHA about this or the February 2014 complaints. (TR 374-5). Mr. Elschide was not aware of any team drivers who performed their job in a manner comparable to the Beattys who were rehired after they had quit. (TR 375).

B. <u>STAA Violations -- Overview</u>

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).

In August 2010 the Secretary of Labor issued new implementing regulations under the STAA that define the scope of discipline or discrimination actionable under the STAA's whistleblower protections. 29 C.F.R. § 1978.102.[19] The Administrative Review Board (ARB) has recognized that the regulations broaden prior interpretations of what constitutes an adverse action under the STAA. *Strohl v. YRC, Inc*., ARB No. 10-116, ALJ No. 2010-STA-35 (ARB Aug. 12, 2011).

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).[20]

The STAA incorporates by reference, the rules and procedures applicable to the Wendell H. Ford Aviation Investment and reform Act for the 21st Century ("AIR-21") whistleblower cases. See 49 U.S.C. section 31105(b)(1). The burden of proof standard relating to causation established pursuant to the 2007 STAA amendments requires a complainant to show by a

[19] Those regulations make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]" 29 C.F.R. §§ 1978.102(b), (c).
[20] 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).

preponderance of the evidence that his protected activity was a "contributing factor" of his adverse action. *Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037, 2012 WL 5391429, at 3* (ARB Oct. 17, 2012). Under AIR-21, an employee must show, by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and, (4) the protected activity was a "contributing factor" in the unfavorable action.[21] *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013)(applying the AIR-21 requirements in a Federal Rail Safety Act case).

The notion that the protected activity must be a "contributing factor" in the adverse employment action represents a change from earlier case law. *Mascarenas v. Interstate Hotels & Resorts, Inc.*, 2014-STA-00047 (ALJ Larsen May 12, 2015). Under the 2007 amendments to the Act, I must decide this claim under the so-called "AIR 21 standard," as set forth in 49 U.S.C. §42121, subsection (b).

The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent's reason for the unfavorable personnel action was pretext, or that the complainant's activity was the sole or even predominant cause. The complainant "need only show that his protected activity was a 'contributing factor' in the retaliatory discharge or discrimination." . . . Thus, for example, a complainant may prevail by proving that the respondent's reason, "while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity." Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence. *Mascarenas, supra at* 11-12.

If the complainant proves that his/her protected activity was a contributing factor in the unfavorable personnel action, the burden shifts to the respondent, in order to avoid liability, to prove "by clear and convincing evidence" that it would have taken the same adverse action in any event. "The 'clear and convincing evidence' standard is the intermediate burden of proof, in between 'preponderance of the evidence' and 'proof beyond a reasonable doubt.' To meet the burden, the employer must show that 'the truth of its factual contentions is highly probable.'" Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Beatty v. Inman Trucking Management, Inc*., ARB No. 13-039, ALJ Case Nos. 2008-STA-020, 2008-STA-021 (ARB May 13, 2014), citations omitted.

In the ERA case of *Spiegel v. Stone and Webster Construction*, ARB No. 13-074 (ARB April 25, 2014), the Board further defined the clear and convincing evidence' standard saying it means the employer has presented evidence of unambiguous explanations for the adverse action in question. The Board reiterated that the employer must show what it would have done, not simply what it could have done.

[21] The ARB has recently cast doubt upon employer "knowledge" as an element although it is set forth in the regulation.

This two-step analysis represents a departure from the three-part analysis applied in older cases under the Act. The former three-part analysis derived from Title VII of the Civil Rights Act of 1964, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). The current two-part "contributing-factor" standard "is far more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard." *Beatty, supra; see also Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 14-041, ALJ No. 2008-STA-61, pp. 3-4 (ARB May 30, 2014). *Mascarenas at* 12.

One of the difficulties in applying this standard appears in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB October 9, 2014), and in *Powers v. Union Pacific Railroad Company*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB April 21, 2015), particularly in the dissenting opinion. Following the AIR 21 standard has enmeshed the courts in questions of relevance, and trying to distinguish "complainant's evidence" from "respondent's evidence," at various stages of decision. In Judge Larsen's view, these cases instruct that a complainant is not to be thrown out of a hearing, especially at an early stage, simply because his or her employer can rationalize an adverse employment action with an explanation unrelated to protected activity. A complainant, at least in some cases, need not offer direct evidence of the employer's intention. And an employer's explanation of its conduct is not necessarily to be taken at face value when evaluating a complainant's prima facie showing. Ultimately, *Fordham* and *Powers* deal with the question of when it is fair to require the employer to prove, by clear and convincing evidence, that its "adverse employment actions" did not comprise retaliation for protected activity. *Mascarenas at* 12.

In *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) (*en banc*), the Administrative Review Board *en banc* panel stated that it was affirming, but clarifying the *Fordham* decision:

> [T]he ARB in *Fordham* held that legitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may not be weighed against a complainant's showing of contribution (which must be proven by a preponderance of the evidence). *Fordham*, ARB No. 12-061, slip op. at. 20-37. That holding as set forth in *Fordham* is fully adopted herein. Our decision in this case, considered en banc, reaffirms *Fordham's* holding upon revisiting the question of what specific evidence can be weighed by the trier of fact, *i.e.*, the ALJ, in determining whether a complainant has proven that protected activity was a contributing factor in the adverse personnel action at issue and, more pointedly, the extent to which the respondent can disprove a complainant's proof of causation by advancing specific evidence that could also support the respondent's statutorily-prescribed affirmative defense for the adverse action taken. Yet, while the decision in *Fordham* may seem to foreclose consideration of specific evidence that may otherwise support a respondent's affirmative defense, the *Fordham* decision should not be read so narrowly. This decision clarifies *Fordham* on that point.

The ARB's clarification is essentially that the employer's evidence must be *relevant* to the issue presented at the contributory factor stage of the analysis, and that proof of the respondent's statutory defense of proving by clear and convincing evidence that it would have taken the personnel action at issue absent the protected activity is legally distinguishable from the complainant's burden to show contributing factor causation.

C. Department of Transportation Regulations Regarding Hours of Service

49 C.F.R. § 392.3 Ill or fatigued operator.

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. However, in a case of grave emergency where the hazard to occupants of the commercial motor vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the commercial motor vehicle to the nearest place at which that hazard is removed.

[35 FR 7800, May 21, 1970, as amended at 60 FR 38746, July 28, 1995] Title 49 published on 2014-10-01.

49 C.F.R. § 395.3 (2011, 2013). Maximum driving time for property-carrying vehicles.

(a) Except as otherwise provided in § 395.1, no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle, . . . , unless the driver complies with the following requirements:

(1) *Start of work shift.* A driver may not drive without first taking 10 consecutive hours off-duty;

(2) *14-hour period.* A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive hours period without first taking 10 consecutive hours off-duty

(3) *Driving time and rest breaks. (i) Driving time.* A driver may drive a total of 11 hours during the 14-hour period specified in paragraph (a)(2) of this section.

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) Any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1:00 a.m. to 5:00 a.m.

(2) Any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1:00 a.m. to 5:00 a.m.

(d) A driver may not take an off-duty period allowed by paragraph (c) of this section to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days until 168 or more consecutive hours have passed since the beginning of the last such off-duty period. When a driver takes more than one off-duty period of 34 or more consecutive hours within a period of 168 consecutive hours, he or she must indicate in the Remarks section of the record of duty status which such off-duty period is being used to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days.
Citation: [76 FR 81188, Dec. 27, 2011, as amended at 78 FR 58485, Sept. 24, 2013; 78 FR 64181, Oct. 28, 2013]

Sec. 395.2 Definitions.

Driving time means all time spent at the driving controls of a commercial motor vehicle in operation.

On duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. On duty time shall include:

(1) All time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;

(2) All time inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All driving time as defined in the term driving time;

(4) All time, other than driving time, in or upon any commercial motor vehicle **except time spent resting in a sleeper berth;**

(5) All time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded;

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle;

(7) All time spent providing a breath sample or urine specimen, including travel time to and from the collection site, in order to comply with the random, reasonable suspicion, post-accident, or follow-up testing required by part 382 of this subchapter when directed by a motor carrier;

(8) Performing any other work in the capacity, employ, or service of a motor carrier; and

(9) Performing any compensated work for a person who is not a motor carrier.

D. Discussion of Prima Facie Case

I observed the Complainants' demeanor in the court room and as they, knowing the pains and penalties for perjured testimony, testified in the witness box under the oath I administered to them. In my judgment, the Beattys are very credible witnesses whose testimony was consistent with one-another, the facts, and which withstood intense cross-examination by Respondent's counsel.

The Beattys have established at least three instances of "protected activity," as described above: first, on November 10, 2013, when they commenced a restart after reporting

fatigue; second, on January 25, 2014, when they refused a load claiming fatigue; third, on March 18, 2014, when they claimed fatigue and declined another load.[22] *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).[23] It goes without saying that driving tired would have violated 49 C.F.R. § 392.3 (Ill or fatigued operator). Fourth, on March 25, 2014, when they filed an OSHA whistleblower complaint they engaged in protected activity. Additionally, a 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).

Secondly, they have established at least four instances of "adverse employment action:" First, non-conformance reports on or about January 29, 2014 and June 10, 2014. Secondly, the November 2013 illness (medical) holds may be considered adverse employment actions. Moreover, their "resignations" taken upon fear of further potential discipline are adverse employment actions . The decision not to rehire the Beattys constitutes an adverse employment action. Finally, the suggestion or threat concerning a March 2014 non-conformance report, if true, would constitute an adverse employment action. 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 a 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."

I do not find the evidence establishes that Celadon assigned the Beattys "undesirable" winter routes during January and February 2014. The weather nation-wide was bad during this period and, according to Celadon, other Celadon drivers experienced similar adverse conditions. (TR 320-1). I find no deliberate or conscious effort to assign them bad routes. Moreover, the evidence does not show that the planners, who assigned the routes, either knew the identities of the drivers much less knew anything of the Beattys' protected activity.

[22] This remains protected activity even if the only evidence is Mr. Barton telling the Beattys he had to write them up for the incident.

[23] 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).

The contribution of the protected activities to the adverse employment actions is established directly by Celadon's imposition of non-conformance reports nearly immediately following the Beattys' fatigue complaint and declining loads. While the January 29, 2014 non-conformance report does not refer to their fatigue/tiredness reports it arose, in part, as a consequence of the same. The June 2014 non-conformance report specifically references the Beattys' complaints of tiredness. The November 2013 illness holds and Mrs. Beatty's medical hold were a direct result of the Beattys' complaints of tiredness.

The Secretary's Findings, dated March 20, 2014, related to the Beattys' initial OSHA complaint, filed in January 2014, which was dismissed for non-responsiveness, were mailed to Celadon.[24] The second OSHA complaint was filed on March 25, 2014. Mr. Elschide testified he was aware of the "on-going legal matter." I find this establishes knowledge of the OSHA complaints.

A constructive discharge occurs when "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign . . . Furthermore, 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." *Shoup v. Kloeppfer Concrete*, ALJ No. 95-STA-33, slip op. at 3 (Sec'y Jan. 11, 1996) (quoting *Hollis v. Double DD Truck Lines, Inc.*, ALJ No. 84-STA-13, slip op. at 8-9 (Sec'y Mar. 18, 1985)). I find constructive discharge in this case. Here, I find that a reasonable person in the employees' shoes would have felt compelled to resign because, under the status quo, anytime they refused loads or dispatch assignments for fatigue they likely would have received nonconformance reports or been routed for an ops meeting which might have led to more serious disciplinary action, under Celadon's progressive disciplinary scheme and possibly discharge.[25] Such discipline would likely have tarnished their driver's records and their ability to find other trucking employment in the future.

The decision not to rehire the Beattys was informed by Mr. Elschide's consultations with Laura Hawkinson who had approved at least two of the Beattys' non-conformance reports. Ms. Hart, the originator of two of the reports, testified that she had not counselled the Beattys regarding "communication" because they had communicated with their driver managers. Nor had she ever discussed (inadequate) mileage with them. Furthermore, the Beattys' transcripts of their Qualcomm correspondence, which I find credible, clearly and unequivocally shows their constant communication with driver managers. Thus, although Mr. Elschide testified he relied, in part, on poor communications and poor mileage as bases not to rehire the Beattys, I do not find those reasons established. Moreover, as counsel set forth, in Celadon's prehearing statement, their applications were denied, on or about July 25, 2014, due to their "consistent violation(s) of company policies," poor mileage, and the non-conformance reports. Of course, the low mileage was, in part, a result of declining loads for fatigue.

[24] This matter does not adjudicate the Beattys' first complaint.

[25] In *Earwood v. D.T.X. Corp.*, Case No. 1988-STA-21 at 3 (Sec'y March 8, 1991), the Secretary held that based on the totality of the circumstances the complainant was constructively discharged where there was "pervasive coercion to violate Department of Transportation regulations." *Id*. at 4.

E. Employer's Showing

As the complainants have proven that their protected activity was a contributing factor in the adverse actions, the burden has shifted to the respondent, in order to avoid liability, to prove "by clear and convincing evidence" that it would have taken the same adverse action in any event. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain."

At the outset, I observe that Celadon repeatedly argues the Beattys have no evidence of retaliatory intent on its part. While that may very well be true, it is worth emphasizing that whistleblower complainants have no such burden under the Act.

Celadon undoubtedly and commendably provides extensive training to its employees regarding safety and hours of service rules and regulations. Moreover, it specifically advises drivers not to drive when they are too tired to drive safely.

"[T]he STAA does not protect drivers who deliberately make themselves unavailable for work by not taking advantage of their time off to rest." *Eash v. Roadway Express, Inc.*, 1998-STA-28 (ALJ May 11, 2000). *See also Eash v. Roadway Express, Inc.*, 1998-STA-28 (ARB October 29, 1999). Here, the Complainants became sleepy through no fault of their own.

As Celadon itself acknowledges:

> Driving tired is something all drivers experience at one time or another. When you are fatigued, you are not in control no matter what you might think. In fact, in extreme cases, fatigue can cause your brain to shut down (involuntarily). You may experience visual distortions, reduced decision-making and problem-solving abilities, inhibited muscle response and coordination, reduced action time, inability to concentrate or inability, exhaustion, and/or giddiness. Key factors contributing to Fatigue-related commercial motor vehicle accidents include: the duration of sleep during your last sleep period, the amount of sleep you got in the previous 24 hours and whether the sleep was continuous or interrupted. (*Sleep Debt)* Lack of sleep is one factor that can lead to driver fatigue. Sleep is necessary to your body as water is. Most adults need between seven and eight hours of sleep to feel well rested. Some may need more. If you cannot get enough sleep, you may be able to function for a few days, but soon sleep deprivation can develop and the longer you go without enough sleep, the more you will need to catch up. There is no way around sleep debt other than getting the sleep your body is craving. Unfortunately, **you cannot build up a bank of sleep (*time*) and then expect to go without.** Circadian rhythm - we are creatures of habit more than we realize. Our Circadian rhythm (*is our body's internal clock*). . . . Most people's clocks run on a 24-hour period. Your body

> expects you to wake up at a certain time and eat at a certain time and sleep at a certain time. If your schedule changes, (you are in a different time zone, or you change from a day shift to a night shift) your internal clock needs time to adjust to the new change, the new schedule. **Sleep quality - getting the right kind of sleep is just as important as getting enough sleep. . .**

(Emphasis added)(TR 267-9; Handbook pp 9-32-33).

Moreover, but hardly essential to this decision, as Judge DiNardi wrote, in *Fitzgerald v. Interactive Logistics, Inc. d/b/a National Freight, Inc. or NFI Interactive,*2001-STA-00052 (ALJ Nov. 13, 2002):

> That Complainant would have found it difficult to sleep during the day is supported by scientific research described in a decision of the Federal Motor Carrier Safety Administration ("FMCSA"). After years of research, the FMCSA has proposed an overhaul of its hours of service regulations. In a Notice of Proposed Rulemaking ("NPRM") issued on May 2, 2000, the FMCSA acknowledged that the present rules are antiquated, stating:
>
> The results of scientific research into fatigue causation, sleep, circadian rhythms, night work and other matters were unavailable decades ago when the HOS [hours of service] rules were formulated. . . . The FMCSA believes that the revised HOS rules proposed today will reduce the acute and cumulative fatigue which appears to beset many drivers. . . ." 65 C.F.R. 25541.
>
> The NPRM reviewed in great detail the scientific literature and studies concerning truck drivers and fatigue. The FMCSA acknowledged that scientific studies indicate that fatigue comes from a variety of causes:
>
> As O'Neill and his co-authors of "Understanding Fatigue and Alert Driving," a training course developed by the ATA [American Trucking Associations] in partnership with the FHWA [Federal Highway Administration], point out "Fatigue has several causes: (from) inadequate rest, sleep loss and/or disrupted sleep; from stress; from displaced biological [circadian] rhythms, excessive physical activity such as driving or loading [cargo], or from excessive mental or cognitive work." (ATA, p. 8). The term "circadian" comes from the Latin words **circa dies**, or "about a day," **i.e.**, 24 hours. Circadian rhythms become displaced as a result of schedule irregularity that affects the time when people sleep. Adverse effects of sleep deprivation can occur when the opportunity to take sleep is curtailed, when people try to obtain sleep during periods of the day when their systems are in a more-active physiological state (such as during the mid-morning and early evenings), or when environmental conditions are not conducive to obtaining sleep.
> 65 F.R. 25553. [Emphasis supplied].

At 2:00 a.m. on January 3, 2001, Complainant refused to drive because he was very sleepy. Fitzgerald testified that he was prone to sleepiness between the hours of 2:00 a.m. and 5:00 a.m. The fact that humans are normally sleepier at night is dictated by their circadian rhythms. As noted by the FMCSA:

> Another concern of the panel was the difference between daytime and nighttime driving. Their report noted several problems with nighttime driving. First, as demonstrated by Wylie, C.D., *et al*. (1996), the strongest and most consistent factor influencing fatigue and alertness is time of day. Night driving was associated with a higher level of observed drowsiness, poorer lane-tracking, and degradation of mental performance. In addition, the panel noted evidence that **daytime sleep is not as restorative as nighttime sleep, because fewer hours are spent sleeping and the quality of that sleep is poorer.** Drivers generally agree that nighttime sleep is superior to daytime sleep (Abrams et al. (1997)). The result is that overall alertness and performance are lower in the nighttime than in the day, and accident risk is correspondingly higher. The Expert Panel report cites evidence suggesting that nighttime driving is associated with as much as a fourfold or more increase in fatigue-related crashes.

Complainant was also facing the difficulty of switching from nighttime sleeping to nighttime driving. The Federal Motor Carrier Safety Administration summarized the scientific studies and evidence on this point stating:

> It has been well established that hours of the day and night are not equivalent from perspective of human alertness and safe, efficient, and productive performance to workplace tasks. [citations to studies omitted]. Humans are biologically programmed to operate on a daily cycle of just over 24 hours. The cycles of daylight and darkness act as synchronizers. . . Shiftwork can introduce another problem. A nightshift worker, required to sleep during periods of higher physiological activity and to be awake during periods of lower activity, may have difficulty adjusting to an inverted wake-sleep schedule and can accumulate a sleep debt that can seriously affect the level of performance and safety. Even when a consistent schedule is established and wake-sleep patterns are stabilized, it is generally recognized that physiological and performance levels reach the low point of their cycles in the hours after midnight and in the early to mid-afternoon. Therefore, night workers are most susceptible to the dual predicament mentioned above. Unless the night shift worker is able to obtain sufficient restorative sleep on a regular basis, the risk of substandard and potentially unsafe performance increases. *Id*. at 25554.

There is little point in parsing the Beattys' daily driving hours of service for each of the days at issue. Nor is it necessary to adjudicate the intricacies of the 34-hour restart rule. First, Celadon has offered no direct proof or observations of the Beattys' from which to conclude they had not, in fact, suffered cumulative fatigue after weeks on the road living in and out of trucks

with sleepers. Yes, the daily records reflect they had some time off, each had non-driving times, each logged sleeper berth time, and, even some "home" time. Yet, Celadon's view is myopic; the Beattys were simply worn out to the extent they could not drive safely when they declined loads. It is clear that the Beattys "pushed" it at times to either please their driver managers or to avoid further trouble.

Mr. Beatty put it best explaining the basis for their fatigue:

> We're in the truck, we leave home in Celadon's truck, we're in that truck till we get back home, no matter if we are driving or we are not driving. If we're not driving, we are still in the truck. We're sleeping in the truck, we're getting out of the truck to eat and shower and we're getting back in the truck, whatever time. From October to November, we was in the truck. So, pretty much when we leave home, we are working when we leave home until we get back home. The only time we are not working is when we're back home and out of Celadon's truck. We park the truck, we're out of it and then we are not working. When we are in the truck we are responsible for it. We're still under FMCSR rules. . . We have to be responsible for the truck so we are still working. Even if it's not been through the responsibility of the truck. So, **we are constantly working. . . We're on duty. We have to log every day. . . After like I said a few weeks of driving and stopping and going, all drivers, the deal with fatigue. . . After three weeks, first you're getting tired every now and then. You can count on tired by just a 10-hour rest break every night. . . After about two weeks, three weeks in the truck doing 10 hours every night like that, it gets a little - - you start feeling different in ways. It's hard to get sleep now. Even though I am doing 10 hours, I'm not really resting. . .** (TR 193-4)(Emphasis added).

> (With Celadon's forced dispatch method) [I]t keeps the truck like they say in continuous motion. You just keep on. You're running, running, running, running back and forth. (TR 194).

Celadon has what appears to be a highly effective and admirable business model. It seems ideal to use team drivers, sophisticated software, load optimizers, Qualcomm devices, driver managers, planners, specialized routing and fuel stops, all to keep their vehicles, drivers and customer freight moving. (TR 373). It would appear that all of the above squarely fits the requirements of their "Expedited" division. Surely, their driver managers are as familiar with DOT hours-of-service rules and regulations, as Ms. Hart is. With such a sophisticated and facially-balanced system well-coordinated communication is undoubtedly critical of all team elements, i.e., drivers, planners, driver-managers, and customer service representatives.[26]

[26] However, as important as Celadon now says "communication" is, the grounds for discipline and possible termination in Celadon's Handbook do not explicitly list it as a basis for discipline. (Handbook pp 12-15-16).

However, in Celadon's view, which I find somewhat myopic, these drivers, who had had time off, had hours to "recap," logged sleeper time, logged non-driving time, and logged hours of rest/breaks, should have been sufficiently rested to operate under its model. But, the Beattys are not automatons; they are simply human. Under the circumstances they described they became too fatigued to drive safely.

While Celadon's handbook and witnesses said the right thing, i.e., do not drive tired and no one told the Beattys to drive tired, their actions undeniably conveyed another message. That is, keep the truck and freight moving. Ms. Hart more or less admitted that in testifying that she

> explained what was expected of team drivers, i.e., that "they usually ran off of their recap hours . . ." (TR 320). Ms. Hart testified that usually our team drivers do not need 34-hour restarts because "[t]hey usually run off their recaps mainly because they've had enough rest to be able to keep driving because there's a lot of time too like in between loads that they have down time . . ." (TR 322, 327). If a (team) driver asked for a 34-hour restart, she would likely have "coached" them regarding whether or not they had off before and how much hours they had, but if they were too tired, they would have to reset their PTA for planning purposes. (TR 328). She added that if a driver still had hours left on their 70 and their recap, then a 34-hour restart would not be "required."

(TR 342).

Similarly, Ms. Armstrong, the logs manager, wrote concerning one incident that: "… [b]ecause they were team drivers, meaning that one could sleep while the other drove, **they had more than ample capacity to continue driving** without a 34-Hour restart." (EX T)(Emphasis added). Admittedly, however, the Beattys' testified that she had never told them to drive tired. (TR 259).

Celadon argues that the illness/medical holds are not "adverse" actions. However, "[A]n adverse action, however, is simply something unfavorable to an employee, not necessarily unfair, retaliatory or illegal." *Occhione v. PSA Airlines,* ARB No. 13-061 (November 26, 2014). Thus, the employer's argument regarding the lack of retaliatory intent fails. Once on illness/medical hold drivers are not permitted to drive pending an evaluation which precipitates lost loads and thus less pay. In the case of medical holds an actual physician evaluation, as in this case, is required before the driver can be released. The fact it was a mistake in Mrs. Beattys' case or that the holds spared them from driving while tired does not change the adverse nature of the hold. Here, the Beattys were not ill, but rather fatigued. Finally, it seems disingenuous for Celadon to argue placing drivers on illness/medical holds to take them off the planners' listing of available drivers is a legitimate means of dealing with otherwise healthy fatigued drivers, i.e., the end justifies the means.

In January 2014, when the Beattys complained of fatigue, the response was "You guys are company drivers. You're not allowed to turn down loads." The company's argument that the Beattys could not have been too fatigued because they were able to

drive almost all the way home and that Mrs. Beatty admitted they could have driven the 80-some miles to Farmville is unpersuasive. Going to Farmville would not have achieved their need for meaningful rest and, the fact is, they could not make it home due to fatigue. Moreover, the Beattys had attempted to communicate with Celadon albeit not to the company's satisfaction. Finally, rather than support Celadon's case, its argument that the fact the Beattys were "fussing at each other" and that Mrs. Beatty had locked her husband out of the truck on one occasion, merely is another illustration of the effects of their established fatigue.

In March 2014, CX 9 is email correspondence with driver manager Nick Barton regarding Celadon's "forced-dispatch" policy found in the Handbook at 12-5. (TR 123-4). He told them he had to write them up for the incident, i.e., refusing loads, despite their protestations they had pushed on, delivered the load and declined additional loads due to tiredness and not feeling safe to drive.

Although Celadon claims the basis for the June 2014 nonconformance report was the Beattys' "failed" communications, the record shows otherwise; there had been ample communications, including Mr. Beatty's attempt via cellular telephone. The record reflects exasperation and confusion over the multiple changed ETAs and the understandable resultant "embarrassment" to the company with its customer. Moreover, the fact that nonconformance reports may be broadly used to track driver behavior does not eliminate the fact that in this case the Beattys' fatigue complaints contributed, in part, to their issuance.

As previously noted, no one had informed the Beattys that their mileage had been inadequate. The driver managers attested and the facts show the Beattys had "communicated" with Celadon during each of the incidents in question. Despite its detail and comprehensiveness, the portions of Celadon's handbook I reviewed did not explicitly highlight driver "communication" in the manner in which the company has done in this case. The Handbook states that two-week's notice is "requested" not required should an employee resign. Moreover, the Handbook has a section dealing with "Reemployment and reinstatement" which seems at odds with Mr. Elschide apparent pique with the Beattys reapplying so soon after leaving. Such facts hardly present an unambiguous explanation for the employer's actions.

The complainants have proven that their protected activity was a contributing factor in the adverse actions, and the respondent has not met its burden of proving "by clear and convincing evidence" that it would have taken the same adverse action in any event.

VI. DAMAGES

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. I find the Beattys made

reasonable efforts to mitigate their damages, i.e., both sought and Mrs. Beatty obtained follow-on employment. Both Beattys began essentially comparable work with Super Service on July 29, 2014 at about $500-$600 per week. They resigned from Super Service on or about December 18, 2014. Mr. Beatty then collected unemployment and did not seek work because he had had a traffic accident with a citation. Mrs. Beatty was hired, as a solo driver, at Schaeffer Trucking at $750 per week, i.e., more than the couple had earned at Celadon. However, Schaeffer Trucking would not hire Mr. Beatty due to his accident. As discussed below, Celadon has not completely met its burden of showing that the Beattys had not mitigated damages relating to wages by proving both that (1) that comparable jobs were available, and (2) that the employee failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment.

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." Here, the Beattys both conducted themselves as very well-mannered, patient, conscientious and polite drivers with good sense and a strong interest in their trucking careers which would make them an asset to any trucking company.

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). 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).

Here, the Beattys are entitled to back pay as of June 18, 2014, their resignation date. Together they are entitled to $5,200, i.e., a rate of $900 per week for six weeks of unemployment, through July 29, 2014 when they were hired by Super Service. They are entitled to $300 per week through December 18, 2014 for their time at Super Service which is the difference in pay between their Celadon earnings ($900/week) and their Super Service pay for a total of $4,800, i.e., for sixteen weeks. Given the Beattys voluntarily resigned from Super Service in December 2014, their entitlement to back pay ceased then.

Complainant is entitled to interest on the back pay to compensate for loss suffered due to Celadon 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).

The Beattys are owed a total of $10,000. The following interest payment, based upon four percent, shall be made: $400 for June 2014 through June 2015 and $64 for June 18, 2015 through the date of this decision. Post-judgment interest on the total amount due at the rate of four percent, i.e., $8.00 per week is to be paid thereafter, until the date payment of back pay is made. If not agreed to be sufficiently precise, the dissatisfied party shall submit back pay interest calculations to the opposing party, attempt to resolve any disputes of said interest or reach an agreement and submit the same to the undersigned within thirty days of the date of this decision.

Celadon shall pay Mr. Beatty $450 per week (half of what he and his wife earned at Celadon per week) with three percent (4%) interest, under 26 U.S.C.A. §6621 (1999), beginning fourteen calendar days from the date of this Order, less his present and current earnings, if any, until he is provided a bona fide offer of reinstatement and either accepts or declines the same in writing.

Celadon shall pay Mrs. Beatty $450 per week (half of what she and her husband earned at Celadon per week) with three percent (4%) interest, under 26 U.S.C.A. §6621 (1999), beginning fourteen calendar days from the date of this Order, less her present and current earnings, if any, until she is provided a bona fide offer of reinstatement and either accepts or declines the same in writing. Celadon may assume she has continued working at a higher rate of pay ($750/week at Schaeffer) and thus it would not owe her anything additional under this prescription.

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. Now, they are allowed up to and including $250,000. Thus, we look at whether the Respondent's behavior was an intentional violation of federal law, a "reckless or callous disregard for the complaint's rights," or reflected a corporate policy of STAA violations or whether punitive damages are necessary in this case to deter further violations. *See generally White v. The Osage Tribal Council*, ARB No. 96-137, ALJ No. 1995-SDW-001 (ARB Aug. 8, 1997); *Johnson v. Old Dominion Sec.*, Nos. 1986-CAA-003, -004, -005, slip op. at 29 (Sec'y May 29, 1991).

The complainants have sought unspecified punitive damages. Celadon's written policies are admirable, but its employees' understanding and implementation of a fundamental aspect of safety, i.e., indirectly encouraging drivers to drive when fatigued was not. I do not find Celadon's employees acted maliciously, with intent to harm, or explicitly sought to violate the Beattys' prerogatives. They appear well-versed in the DOT hours-of-service rules and regulations. However, I find Celadon employees' view, articulated in this case, that strict adherence to the hours-of-service rules and regulations should be sufficient to preclude its team drivers from becoming fatigued to the extent that it is unsafe for them to continue driving, distressingly myopic. That is simply not the case. The Department of Transportation, in fact, recognizes this truism with its general regulatory proscription against companies allowing driver to operate while ill or fatigued or drivers operating while ill or fatigued. Although I do not find the driver managers actions were conducted with retaliatory animus per se, I find their assertiveness in keeping the teams drivers operating in the face of fatigue complaints less than fully appropriate. This demonstrated a complete disregard for the safety of these drivers and the public. Moreover, Celadon's suggestion that "illness" or "medical" holds are an allowable device to relieve fatigued drivers is inappropriate. Counsel's statement that, "[I]t simply isn't the case that if a driver determines that they are too fatigued to drive that they can simply refuse to drive. . . without communicating with their supervisor . . ." is inaccurate. The mandate of 49 C.F.R. § 392.3, Ill or fatigued operator, is explicit: "**No driver shall operate** a commercial motor vehicle, and a motor **carrier shall not require** or permit a **driver to operate** a commercial motor vehicle, **while** the driver's ability or alertness is so impaired, or so likely to become impaired, through **fatigue**, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. . ." (Emphasis added). The Beattys, as conscientious

drivers, fully comprehended this mandate; Celadon did not. It acted in complete disregard of the application of this rule in this case. Thus, I find modest punitive damages are in order to deter similar future actions.[27] Where compensatory damages are not large, a relatively high punitive damage award may serve the purpose of deterring respondents unaffected by a small compensatory award. *See, Youngermann.* I find punitive damages in the amount of $10,000.00 are appropriate. This amount should encourage enforcement of DOT driver fatigue rules.

I do not find additional compensatory damages appropriate. There is a lack of objective evidence of emotional distress or other compensatory damages.

It is appropriate I require Respondents to post this decision at the facility where Complainants 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 complainants have established that they engaged in protected activities and as a result suffered adverse actions as a result. They have established entitlement to back pay with interest and reinstatement. Moreover, punitive damages are awarded to deter similar future actions and serve as punishment for the actions at issue herein.

ORDER[28]

1. The respondent is ordered to **immediately offer** to reinstate the Beattys as team drivers evidenced by a written bona fide job offer, with the same pay and terms and privileges of employment;

2. Celadon shall pay Mr. Beatty **$450.00 per week** with four percent (4%) interest, under 26 U.S.C.A. §6621 (1999), beginning fourteen calendar days from the date of receipt of this Order, until he is provided a bona fide offer of reinstatement and either accepts or declines the same in writing;

3. Back pay in the amount of **$10,000.00** must be paid to the Beattys by certified check by Celadon, on or before thirty (30) days of the date of this Decision and Order;

[27] *Youngermann v. United Parcel Service, Inc.,* ARB Case No. 11-056, ALJ No. 2010-STA-47 (ARB Feb. 27, 2013).

[28] Reinstatement orders are effective immediately upon receipt. Other orders will be effective 14 days after the date of the decision unless a timely appeal is filed. 29 C.F.R. section 1978.109€.

4. Additionally, interest, in the amount of **$464.00** on the back pay award must be paid to the Beattys by certified check by Celadon, 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, as specified above, shall accrue from the date of this order until the award is paid;

6. Proof of payment of the above must be provided to the undersigned; and,

7. The complainants must provide both Celadon and the undersigned a written acceptance or declination of the latter's bona fide job offer, if made, within fourteen calendar days of receiving the same.

8. Respondents post this decision at the facility where Complainants worked for a period of 180 days.

9. Celadon shall pay punitive damages to the Beattys in the amount of $10,000.000.

Digitally signed by Richard Morgan
DN: CN=Richard Morgan, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Pittsburgh, S=PA, C=US
Location: Pittsburgh PA

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 fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status

of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 may be found to have waived 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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(b). 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(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).