Whistleblower Newsletter Surface Transportation Assistance Act (STAA)

July 30, 2007

	U.S. Department of Labor **Office of Administrative Law Judges** **800 K Street, NW, Suite 400-N** **Washington, DC 20001-8002** **(202) 693-7500** **www.oalj.dol.gov**	**John M. Vittone** **Chief Judge**

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In ***Farrar v. Roadway Express***, ARB No. 06-003, ALJ No. 2005-STA-46 (ARB Apr. 25, 2007), the ARB affirmed the ALJ's finding that the Complainant had not filed a timely complaint of retaliation under the STAA in regard to his discharge. However, the ALJ erred in failing to address the Complainant's allegation that he had attempted to raise a complaint with OSHA alleging that he was retaliated against during a grievance proceeding because the Respondent had presented false and misleading information. OSHA had dismissed the complaint for lack of timeliness and closed the investigation. When the Complainant subsequently mailed a packet of materials to OSHA, it returned the packet to the Complainant unopened. The Complainant alleged that a letter in that packet clarified that his complaint included the Respondent's actions at the grievance proceedings. Before the ALJ, the Respondent filed a motion to dismiss based on lack of timeliness of the complaint following the discharge. The Complainant's response only addressed timeliness in regard to the discharge and did not address timeliness in regard to the grievance proceeding. Although the ALJ was aware of the allegation concerning the grievance proceeding, he recommended dismissal based on motion to dismiss. On appeal to the ARB, the ARB construed the Complainant's position liberally and with a degree of judicial latitude because of his pro se status, and remanded for the ALJ to make findings regarding the grievance hearing allegations.

[STAA Whistleblower Digest II B 2 c iv]
TIMELINESS OF COMPLAINT; TELEPHONE CALL TO OSHA TO GIVE A "HEAD'S UP" ABOUT ANTICIPATED RETALIATION

In ***Farrar v. Roadway Express***, ARB No. 06-003, ALJ No. 2005-STA-46 (ARB Apr. 25, 2007), the Complainant argued that he timely filed a STAA complaint when he called OSHA from a truck stop to give it a "heads-up" that he suspected that he may be retaliated against in an upcoming grievance hearing. The ARB rejected this contention, holding that that, "while … 29 C.F.R. § 1978.102 provides that '[n]o particular form of complaint is required,' at the very least a complainant must evince his current intention to file a complaint." USDOL/OALJ Reporter at 8. The ARB distinguished *Harrison v. Roadway Express, Inc.*, 1999-STA-37 (ALJ Dec. 16, 1999), *aff'd* ARB No. 00-048 (ARB Dec. 31, 2002), because in that case the complainant had personally visited an OSHA office and provided specific and detailed information on the nature of the complaint sufficient to permit OSHA to build the entire complaint from the record of the interview, whereas in the instant case the Complainant had not alleged that he had provided such details, nor that his phone call was memorialized in notes or a logbook as had happened in *Harrison*.

[STAA Digest II K]
DISCOVERY; ALJ'S DISCRETION TO IMPOSE REASONABLE SANCTIONS

In ***Roadway Express v. U.S. Dept. of Labor, Administrative Review Board***, No. 06-1873 (7th Cir. July 25, 2007), the Complainant alleged that he had been fired in retaliation for his support of a co-worker in a grievance hearing in which the co-worker had been accused of falsifying his driving log. The Complainant filed a statement in the proceeding asserting that the Respondent had asked him to falsify his driving log. The Respondent fired the Complainant the same day on the stated ground that he had falsified his employment application regarding his driving record. When the complaint reached the ALJ level, the Complainant sought in discovery the identity of all persons who had provided information about his driving record. The Respondent refused, claiming that revealing its source would put the informant at risk of retaliation and hurt its business operations. The ALJ rejected this argument and granted a motion to compel, noting that the Respondent had not invoked any recognized privilege. The Complainant requested entry of default judgment, but the ALJ chose the lesser sanction of precluding the Respondent from presenting any evidence that arose from the confidential source. The Respondent had no other evidence to support its claim that the discharge was not retaliatory, and therefore the sanction as a practical matter was fatal to its defense. The ARB affirmed the ALJ. On appeal to the Seventh Circuit the Respondent argued that the discovery sanction deprived it of fundamental due process and was disproportionate to the discovery violation. The Seventh Circuit found that the ALJ had the authority to impose reasonable rules to structure the proceeding before him, and that under the facts no due process violation had occurred. In regard to the proportionality of the sanction, the court recognized that it had an enormous impact on the Respondent's case, but that the Respondent's noncompliance made it impossible for the Complainant to present his case, and for the ALJ to resolve the claim on the merits. Thus, the ALJ's leveling of the playing field as best he could through a sanction was not an abuse of discretion.

The court, however, then considered whether the sanction should have extended to prevent presentation of evidence relevant to the issue of reinstatement. The court noted that the STAA frames reinstatement as an absolute requirement, but recognized that there were practical limits to reinstatement as a remedy. The court wrote: "If, for example, Cefalu were now blind, we would not require Roadway to reinstate him as a truck driver. If Roadway no longer existed, we would not force it to reincorporate for the purposes of reinstating Cefalu. In short, if the premise behind the statutory remedy, that the status quo ante can be restored, fails, then the Board is entitled to adopt a remedy that is the functional equivalent of the one prescribed by the statute. " Slip op. at 12. The court found that although the ALJ's sanction was appropriate for the merits stage of the hearing, the Respondent should have been permitted to present evidence on whether it was impossible to reinstate the Complainant because of his driving record.

IV. Burden of proof and production

[STAA Digest IV A 1]
LEGAL ANALYSIS; ONCE RESPONDENT PRESENTS REBUTTAL EVIDENCE, PRIMA FACIE CASE ANALYSIS IN NO LONGER RELEVANT

In ***Luckie v. United Parcel Service, Inc.***, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007), the erred when he described the legal burden of proof in a STAA whistleblower cases in terms of establishing a prima facie case, and then briefly analyzed each element of the claim, but was not clear whether he was using the ultimate burden of proof requirements to prevail or whether he was applying the burden of persuasion requirements to establish a prima facie case. The ARB observed that the Secretary of Labor explained in *Carroll v. Bechtel Power Corp.*, No. 1991-ERA-46, slip op. at 11 (Sec'y Feb. 15, 1995), that "[o]nce the respondent has presented his rebuttal evidence, the answer to the question whether the plaintiff presented a prima facie case is no longer particularly useful."

[STAA Digest IV A 2 d]
EMPLOYER'S KNOWLEDGE OF PROTECTED ACTIVITY; RELEVANT AWARENESS IS OF THOSE RESPONSIBLE FOR THE ADVERSE ACTION

In ***Luckie v. United Parcel Service, Inc.***, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007), the Complainant was the security manager for one of the Respondent's districts, who complained to district manager about the lack of adequate investigation of a fire in a sorting facility. Two days after making this complaint, the Complainant was offered a promotion which required him to relocate. The promotion offer was allegedly adverse because it was ill-timed for the Complainant. The ARB noted that the Complainant must prove by a preponderance of the evidence that those responsible for the adverse action were aware of the alleged protected activity. The ARB found that the ALJ's finding of fact that the Complainant's supervisors were aware of the Complainant's alleged protected activity was supported by substantial evidence, but that the ALJ did not make findings of fact or conclude that the Respondent's corporate security executives at headquarters were aware of the alleged protected activity. It was these executives who made the decision to offer the Complainant a promotion.

[STAA Digest IV A 2 d]
PROTECTED ACTIVITY; KNOWLEDGE OF RESPONDENT; COMPLAINANT'S REQUEST FOR TIME OFF

In ***Ridgley v. C.J. Dannemiller Co.***, ARB No. 05-063, ALJ No. 2004-STA-53 (ARB May 24, 2007), the Complainant complained that his trip sheet showed more stops than usual and might take over 14 hours to complete. The Respondent accommodated the Complainant by assigning a different driver and allowing the Complainant to go home. Under the company's arrangement with drivers, they were guaranteed full-time paychecks even when there were not eight hours of work to be performed on a particular day. There was no indication in the record, therefore, that

reassigning the trip was adverse to the Complainant. That evening, the Complainant's supervisor called the Complainant to determine whether he planned to come to work the next day. Because the Complainant did not answer, he left a phone message which noted that the route had taken the other driver 8 hours and 20 minutes to complete "[s]o it wasn't quite as bad as it appeared I guess this morning." The ARB agreed with the ALJ that this message, a recording of which was entered into evidence, was delivered in a calm and patient manner.

When the Complainant returned the supervisor's call, he asked whether any stops had been removed from the route. The supervisor answered that they had not, and the Complainant replied that this was hard to believe. The supervisor asked if the Complainant was calling him a liar. The Complainant indicated that he was, and it was at that point that the supervisor fired the Complainant.

On appeal, the ARB found that substantial evidence supported the ALJ's finding that, although the Complainant engaged in protected activity, he failed to prove by a preponderance of the evidence that the reason for termination was a pretext to discrimination. The ALJ found that when the supervisor called, he had no intention to fire or discipline the Complainant, and that in fact if was not in the Respondent's interest to do so during a busy holiday season. The Complainant argued on appeal that well established case law holds that when an employee engaged in impulsive behavior, such impulsive conduct does not remove the right to engage in protected activity or provide the employer with a legitimate, nondiscriminatory reason for adverse action. The ARB, however, observed that the impulsive behavior standard applies to impulsive conduct *incidental to the protected activity*. Moreover, the ARB agreed with the ALJ's finding of fact that the supervisor had not provoked the Complainant or otherwise unlawfully interfered with his protected activity. Rather, the ARB affirmed the ALJ's finding that the Complainant was fired for insubordination.

[STAA Digest IV C 2 b]
PRETEXT NOT ESTABLISHED; INSUBORDINATION DURING REVIEW OF DRIVING COMPLAINTS

In ***Chapman v. J.B. Hunt Transportation Co.***, ARB No. 05-097, ALJ No. 2004-STA-44 (ARB June 29, 2007), the Complainant failed to establish that the Respondent's articulated reason for firing him – insubordination and lack of professionalism during a review of his driving – was pretext for discrimination. Under the Respondent's procedure the team leader, fleet manager, and safety manager confer with a driver to discuss driving incidents upon receiving four complaints about the driver from members of the public. During this meeting the Complainant became hostile and was unreceptive to any criticism regarding his driving. The Board wrote: "Chapman strongly disagreed with Hunt's instruction and criticism regarding his driving methods. Nevertheless, the issue before us is not the merit of Hunt's suggestions. Hunt fired Chapman because of his insubordinate behavior during the multiple complaint review, and Chapman's insubordinate behavior does not constitute STAA-protected activity. Chapman has therefore failed to prove an

essential element of his claim, i.e., that Hunt terminated his employment because he engaged in protected activity." USDOL/OALJ Reporter at 6 (footnote omitted).

[STAA Digest IV C 2 b]
PRETEXT; ABRUPT OFFER OF PROMOTION AND TRANSFER AT AN INCONVIENT TIME FOR THE COMPLAINANT FOUND NOT TO BE PRETEXT UNDER THE FACTS OF THE CASE

In ***Luckie v. United Parcel Service, Inc.***, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007), the Complainant was the security manager for one of the Respondent's districts, who complained to district manager about the lack of adequate investigation of a fire in a sorting facility. Two days after making this complaint, the Complainant was offered a promotion which required him to relocate. He was given 24 hours to make a decision. If he declined the promotion, his options were to accept a demotion and wait for future promotion opportunities, or to leave the company with three weeks of severance pay. The promotion offer, which had been in the works for some time, was ill-timed for the Complainant for personal reasons. The Respondent knew about the Complainant's timing issues. The Complainant chose none of the options and announced that he would continue to do his present job, whereupon the Respondent fired him. The ALJ found that the proximity of the promotion offer and the protected activity raised an inference of a causal link, and that the Respondent's proffered legitimate, non-discriminatory reason for making the offer when it did was pretext.

The ARB disagreed. Before the fire occurred, a need arose to replace an outgoing manager and the decision was made to select the Complainant. Instructions had already been given to inform the Complainant of the decision and move immediately on filling the vacancy. The district manager to whom the Complainant had complained about the fire investigation's inadequacy had not communicated with the corporate headquarters officials who played a role in selecting the Complainant for the promotion and transfer. The ARB found no support in the record for the ALJ's conclusion that employees are normally interviewed prior to being offered a promotion. The ARB agreed with the ALJ that the district manager was irritated with the Complainant, but found that the Complainant had offered no evidence to establish that "she [was] so irritated that she was motivated to take action to adversely affect Luckie's employment." The ARB found it not credible that the Respondent would force an employee to "self-terminate" based on a good faith complaint about the fire investigation where he had a good record, the Employer had invested 25 years in him, and there was no evidence of prior discord between the Complainant and other employees.

[STAA Whistleblower Digest IV C 2 b]
PRETEXT NOT ESTABLISHED

In ***Carney v. Price Transport***, ARB No. 04-157, ALJ No. 2003-STA-48 (ARB May 31, 2007), the ARB found that substantial evidence supported the ALJ's finding that the Complainant was fired for a legitimate, non-discriminatory reason – tampering

with the Respondent's truck by clamping a turbo hose to increase power at the expense of possibly voiding the mechanical warranty on the truck or causing severe damage. The ALJ found the testimony of the Respondent's witnesses to be credible as to the likely damage and the fact that other employees had been repeatedly warned not to tamper with the turbo hose. The ALJ found not credible the Complainant's explanation that his apparent admission to clamping the hose was merely an attempt to get his job back. The ARB also noted that the Complainant made no showing that the Respondent did not believe that the Complainant had clamped the hose. Unconverted testimony also showed that the Respondent had fired another employee, who had not engaged in protected activity, for the same offense. Finally, the ALJ found no evidence of retaliatory animus and no evidence that the Complainant had ever been disciplined for complaints about hours of service.

[STAA Whistleblower Digest IV C 2 b]
PRETEXT NOT ESTABLISHED

In ***Martin v. United Parcel Service***, ARB No. 05-040, ALJ No. 2003-STA-9 (ARB May 31, 2007), the ARB found that substantial evidence supported the ALJ's finding that the Complainant was fired for a legitimate, non-discriminatory reason – repeated violation of the collective bargaining agreement by failing to record stops and taking more than one hour of meal period. The Complainant did not explain why he failed to adhere to the meal policy or properly log all of his stops, and did not dispute that he knew he was to log all stops on the Respondent's computer system. The ARB found substantial evidence to support the ALJ's finding that the log failures had not stemmed from safety concerns.

[STAA Whistleblower Digest IV C 2 b]
PRETEXT; "LEEWAY FOR IMPULSIVE BEHAVIOR" STANDARD; INSUBORDINATE BEHAVIOR MUST BE INCIDENTIAL TO THE PROTECTED ACTIVITY

In ***Ridgley v. C.J. Dannemiller Co.***, ARB No. 05-063, ALJ No. 2004-STA-53 (ARB May 24, 2007), the Complainant complained that his trip sheet showed more stops than usual and might take over 14 hours to complete. The Respondent accommodated the Complainant by assigning a different driver and allowing the Complainant to go home. Under the company's arrangement with drivers, they were guaranteed full-time paychecks even when there were not eight hours of work to be performed on a particular day. There was no indication in the record, therefore, that reassigning the trip was adverse to the Complainant. That evening, the Complainant's supervisor called the Complainant to determine whether he planned to come to work the next day. Because the Complainant did not answer, he left a phone message which noted that the route had taken the other driver 8 hours and 20 minutes to complete "[s]o it wasn't quite as bad as it appeared I guess this morning." The ARB agreed with the ALJ that this message, a recording of which was entered into evidence, was delivered in a calm and patient manner.

When the Complainant returned the supervisor's call, he asked whether any stops had been removed from the route. The supervisor answered that they had not, and the Complainant replied that this was hard to believe. The supervisor asked if the Complainant was calling him a liar. The Complainant indicated that he was, and it was at that point that the supervisor fired the Complainant.

On appeal, the ARB found that substantial evidence supported the ALJ's finding that, although the Complainant engaged in protected activity, he failed to prove by a preponderance of the evidence that the reason for termination was a pretext to discrimination. The ALJ found that when the supervisor called, he had no intention to fire or discipline the Complainant, and that in fact if was not in the Respondent's interest to do so during a busy holiday season. The Complainant argued on appeal that well established case law holds that when an employee engaged in impulsive behavior, such impulsive conduct does not remove the right to engage in protected activity or provide the employer with a legitimate, nondiscriminatory reason for adverse action. The ARB, however, observed that the impulsive behavior standard applies to impulsive conduct *incidental to the protected activity*. Moreover, the ARB agreed with the ALJ's finding of fact that the supervisor had not provoked the Complainant or otherwise unlawfully interfered with his protected activity. Rather, the ARB affirmed the ALJ's finding that the Complainant was fired for insubordination.

[STAA Whistleblower Digest IV C 3]
PRETEXT; COMPLAINANT MUST SHOW THAT THE ARTICULATED, LEGTIMINATE NON-DISCRIMINATORY REASON FOR THE ADVERSE ACTION IS PHONY RATHER THAN JUST NOT WELL-GROUNDED

In ***Bettner v. Crete Carrier Corp.***, ARB No. 06-013, ALJ No. 2004-STA-18 (ARB May 24, 2007), the Complainant had been recruited for the Respondent's dedicated fleet, which required pick-up and delivery of freight at specific times. He was assigned a dispatch, but failed to complete on-time deliveries due to DOT hours of service limitations. The Respondent determined that the failure was based on the Complainant's inability to properly plan and execute his dispatches, and thus decided to transfer the Complainant to the Respondent's national fleet, which did not demand time sensitive pick-up and delivery. In addition, the Complainant was informed that his next dedicated fleet dispatch had been assigned to a different driver. The Complainant then cleaned out his truck and left a message indicating that he had not quit, but had concluded that he had been fired. Negotiations for the Complainant's return to work were unfruitful, and the Complainant filed a STAA whistleblower complaint. The Complainant argued that there were significant differences in the working conditions between the dedicated and national fleets. The ALJ granted summary decision on several grounds. On appeal to the ARB, the focus was on the Complainant's failure to address whether the Respondent's articulated legitimate non-discriminatory reason for transferring the Complainant was pretextual. The ARB noted that the ALJ had granted summary decision because the Complainant had adduced no evidence to suggest that the reason for transfer was pretextual, and found that the Complainant arguments on appeal – trying to convince the ARB that

the lack of timely deliveries and pick-ups were not his fault – failed to address the question of whether the transfer was grounded in protected activity rather than the Respondent's belief that that the untimely pick-ups and deliveries resulted from poor planning by the Complainant. Thus, the ARB affirmed the ALJ's grant of summary decision.

[STAA Whistleblower Digest IV C 3]
PRETEXT; COMPLAINANT MUST SHOW THAT THE ARTICULATED, LEGTIMINATE NON-DISCRIMINATORY REASON FOR THE ADVERSE ACTION IS PHONY RATHER THAN JUST NOT WELL-GROUNDED

In ***Bettner v. Crete Carrier Corp.***, ARB No. 06-013, ALJ No. 2004-STA-18 (ARB May 24, 2007), the Complainant had been recruited for the Respondent's dedicated fleet, which required pick-up and delivery of freight at specific times. He was assigned a dispatch, but failed to complete on-time deliveries due to DOT hours of service limitations. The Respondent determined that the failure was based on the Complainant's inability to properly plan and execute his dispatches, and thus decided to transfer the Complainant to the Respondent's national fleet, which did not demand time sensitive pick-up and delivery. In addition, the Complainant was informed that his next dedicated fleet dispatch had been assigned to a different driver. The Complainant then cleaned out his truck and left a message indicating that he had not quit, but had concluded that he had been fired. Negotiations for the Complainant's return to work were unfruitful, and the Complainant filed a STAA whistleblower complaint. The Complainant argued that there were significant differences in the working conditions between the dedicated and national fleets. The ALJ granted summary decision on several grounds. On appeal to the ARB, the focus was on the Complainant's failure to address whether the Respondent's articulated legitimate non-discriminatory reason for transferring the Complainant was pretextual. The ARB noted that the ALJ had granted summary decision because the Complainant had adduced no evidence to suggest that the reason for transfer was pretextual, and found that the Complainant arguments on appeal – trying to convince the ARB that the lack of timely deliveries and pick-ups were not his fault – failed to address the question of whether the transfer was grounded in protected activity rather than the Respondent's belief that that the untimely pick-ups and deliveries resulted from poor planning by the Complainant. Thus, the ARB affirmed the ALJ's grant of summary decision.

V. Protected activity

[STAA Digest V A]
PROTECTED ACTIVITY; COMPLAINANT'S GOOD FAITH BELIEF THAT THE RESPONDENT WAS FAILING TO CONDUCT AN ADEQUATE INVESTIGATION OF A FIRE IN A SORTING FACILITY WAS NOT PROTECTED ACTIVITY UNDER THE STAA WHEN IT WAS NOT SHOWN TO BE LINKED TO HIGHWAY SAFETY

In ***Luckie v. United Parcel Service, Inc.***, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007), the Complainant was the security manager for the Respondent's Alabama district. His primary responsibilities were to direct his staff in resolving customers' claims for lost, stolen, or damaged packages; investigate incidents of employee theft and violations of UPS harassment and integrity policies; and oversee security at the company's facilities, including alarm systems and guard services. Following a package fire on a conveyor belt inside a sorting facility, the Complainant sent one of his investigators who reported back that the fire looked suspicious. The Complainant contacted the manager whose Department was responsible for UPS's compliance with federal hazardous materials statutes and regulations. When the Complainant concluded that the fire was not being properly investigated and that there was potential danger with possibly hazardous packages being unloaded, he contacted his district manager. Noting that an employee need demonstrate only a reasonably perceived violation of the underlying statute, the ALJ found that the Complainant's concerns about the fire were "in good faith," particularly in the wake of 9/11. The ARB agreed that the complaint to the district manager was "in good faith," but stated that the issue was whether the Complainant had a "reasonable belief" that the Respondent's actions were in violation of the STAA or a STAA regulation. Reversing the ALJ's finding that the Complainant had engaged in protected activity, the ARB wrote that "the purpose of the STAA is to promote highway safety, encourage the safe operation and maintenance of commercial motor vehicles, and protect the health and safety of operators. *See* 128 Cong. Rec. S32,510 (1982). We fail to see how a package fire caused by a possible malfunction of a conveyor belt in a sorting center such as the Montgomery hub could endanger public safety on the highways."

[STAA Digest V B 1 c ii]
PROTECTED ACTIVITY; SUPPORT OF CO-WORKER IN DRIVING LOG DISPUTE

In ***Roadway Express v. U.S. Dept. of Labor, Administrative Review Board***, No. 06-1873 (7th Cir. July 25, 2007), the Complainant alleged that he had been fired in retaliation for his support of a co-worker in a grievance hearing in which the co-worker had been accused of falsifying his driving log. The Complainant filed a statement in the proceeding asserting that the Respondent had asked him to falsify his driving log. On appeal, the Respondent argued that this was not protected activity because it was not a "proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order." 49 U.S.C. § 2305(a). The Respondent thus argued that the alleged falsification of driving logs was unrelated to

vehicle safety. DOL in contrast argued that "driving logs serve important safety purposes of ascertaining whether a driver has reached his maximum hours." Slip op. at 6 (quoting DOL's position). The court agreed with the DOL position, noting that two other circuits had characterized driving logs as a measure of safety compliance, and driving-log rules as safety regulations. The court held that if a manager of the Respondent had, as the Complainant testified, ordered the co-worker to falsify driving logs, such an order would have been a violation of federal safety regulations and therefore the Complainant's actions protected under the STAA.

VI. Adverse action

[STAA Digest VI B 4]
ADVERSE ACTION; PROMOTION OFFER KNOWINGLY MADE AT AN INCONVENIENT TIME FOUND NOT TO BE ADVERSE ACTION UNDER THE FACTS OF THE CASE

In ***Luckie v. United Parcel Service, Inc.***, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007), the Complainant was the security manager for one of the Respondent's districts, who complained to district manager about the lack of adequate investigation of a fire in a sorting facility. Two days after making this complaint, the Complainant was offered a promotion which required him to relocate. He was given 24 hours to make a decision. If he declined the promotion, his options were to accept a demotion and wait for future promotion opportunities, or to leave the company with three weeks of severance pay. The promotion offer, which had been in the works for some time, was ill-timed for the Complainant for personal reasons. The Respondent knew about the Complainant's timing issues. The ALJ, concerned about the coincidence of the promotion suddenly being offered shortly after the alleged protected activity, found that the timing of the offer was an adverse employment action. The ARB disagreed. The ARB found that the meeting with the Complainant at which the promotion was offered had been previously scheduled, albeit on different matters, and that the executive who made the promotion offer had decided to do so at this meeting before the fire at the sorting facility had taken place. In addition, the ARB found that it was the Respondent's normal procedure to set short time frames for making decisions about promotions, and that the Respondent was not required to by the STAA to time its promotions (and accompanying relocations) according to the Complainant's home life. The ARB found that the Complainant knew that a promotion and relocation were in the works and that his failure to accept the transfer was blocking a promotion for another employee. The ARB found that the Respondent knew that the timing would be disruptive to the Complainant, but concluded that the demotion or resign options were attempts to accommodate the Complainant.

VII. Employer/employee

[STAA Digest VII A 2 e]
COVERED EMPLOYEE; SECURITY MANAGER WHO WAS NOT RESPONSIBLE FOR COMMERCIAL MOTOR VEHICLE SAFETY

In ***Luckie v. United Parcel Service, Inc.***, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007), the Complainant was the security manager for the Respondent's Alabama district. The STAA defines a covered employee as "a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier." 49 U.S.C.A. § 31101(a)(2)(A). The ALJ found that the Complainant was a covered employee under the STAA whistleblower provision as "either a freight handler or a person who directly affected commercial vehicle safety in the course of his employment or both." The ARB, however, found that that the Complainant's infrequent touching of packages in connection with a claims investigation did not qualify him as a freight handler under the STAA. In addition, the ARB found, as a matter of law, that the Complainant was not an individual who directly affected commercial motor vehicle safety because his job duties did not directly impact the safety of UPS's commercial motor vehicles. Although the Complainant referenced concerns about UPS's response to post 9/11 fears of truck bombs, the ARB found that the Complainant had no responsibility for the operational safety of UPS's commercial motor vehicles; nor was he responsible for reporting, auditing, or reviewing any safety defects in those vehicles. Those functions were the responsibility of another UPS department. The ARB, therefore, concluded that the Complainant was not a covered employee under the STAA.

IX. Damages and remedies

[STAA Digest IX A 7]
REINSTATEMENT; DISCOVERY SANCTION BARRING EVIDENCE ON DRIVING RECORD FOUND APPROPRIATE IN REGARD TO THE MERITS, BUT NOT ON THE ISSUE OF WHETHER THE COMPLAINANT COULD BE REINSTATED

In ***Roadway Express v. U.S. Dept. of Labor, Administrative Review Board***, No. 06-1873 (7th Cir. July 25, 2007), the Complainant alleged that he had been fired in retaliation for his support of a co-worker in a grievance hearing in which the co-worker had been accused of falsifying his driving log. The Complainant filed a statement in the proceeding asserting that the Respondent had asked him to falsify his driving log. The Respondent fired the Complainant the same day on the stated ground that he had falsified his employment application regarding his driving record. When the complaint reached the ALJ level, the Complainant sought in discovery the

identity of all persons who had provided information about his driving record. The Respondent refused, claiming that revealing its source would put the informant at risk of retaliation and hurt its business operations. The ALJ rejected this argument and granted a motion to compel, noting that the Respondent had not invoked any recognized privilege. The Complainant requested entry of default judgment, but the ALJ chose the lesser sanction of precluding the Respondent from presenting any evidence that arose from the confidential source. The Respondent had no other evidence to support its claim that the discharge was not retaliatory, and therefore the sanction as a practical matter was fatal to its defense. The ARB affirmed the ALJ. On appeal to the Seventh Circuit the Respondent argued that the discovery sanction deprived it of fundamental due process and was disproportionate to the discovery violation. The Seventh Circuit found that the ALJ had the authority to impose reasonable rules to structure the proceeding before him, and that under the facts no due process violation had occurred. In regard to the proportionality of the sanction, the court recognized that it had an enormous impact on the Respondent's case, but that the Respondent's noncompliance made it impossible for the Complainant to present his case, and for the ALJ to resolve the claim on the merits. Thus, the ALJ's leveling of the playing field as best he could through a sanction was not an abuse of discretion.

The court, however, then considered whether the sanction should have extended to prevent presentation of evidence relevant to the issue of reinstatement. The court noted that the STAA frames reinstatement as an absolute requirement, but recognized that there were practical limits to reinstatement as a remedy. The court wrote: "If, for example, Cefalu were now blind, we would not require Roadway to reinstate him as a truck driver. If Roadway no longer existed, we would not force it to reincorporate for the purposes of reinstating Cefalu. In short, if the premise behind the statutory remedy, that the status quo ante can be restored, fails, then the Board is entitled to adopt a remedy that is the functional equivalent of the one prescribed by the statute. " Slip op. at 12. The court found that although the ALJ's sanction was appropriate for the merits stage of the hearing, the Respondent should have been permitted to present evidence on whether it was impossible to reinstate the Complainant because of his driving record.

[STAA Digest IX B 1]
TAX IMPLICATIONS OF WHISTLEBLOWER AWARD

In *Murphy v. Internal Revenue Service*, No. 05-5139 (D.C.Cir. Aug. 22, 2006), the Plaintiff had been awarded damages in a Department of Labor whistleblower proceeding, which included payments for "emotional distress or mental anguish" and "injury to professional reputation." *See Leveille v. New York Air National Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Oct. 25, 1999). The Plaintiff initially paid taxes on the award, but later filed an amendment seeking a refund. The IRS denied the request for refund, and the Plaintiff filed suit in federal court arguing that the amount should have been excluded from gross income under 26 U.S.C. § 104(a), which provides an exclusion for damages received on account of personal physical injuries or physical sickness, or in the alternative that the I.R.C. provision was

unconstitutional to the extent that failed to exclude damages awarded for emotional distress and injury to professional reputation. The District Court rejected both arguments. The Court of Appeals for the District of Columbia also rejected the first argument, but accepted the constitutional argument, finding that damages for matters such as emotional distress and injury to reputation are not income within the meaning of the 16th Amendment to the Constitution. The Department of Justice thereafter petitioned for an en banc hearing. The appeals panel, however, issued an Order on December 22, 2006 vacating the August 22, 2006 decision, and scheduling oral argument. ***Murphy v. Internal Revenue Service***, No. 05-5139 (D.C. Cir. Dec. 22, 2006).

In its decision on rehearing, the Court of Appeals held that the compensatory damages award, "even if it is not income within the meaning of the Sixteenth Amendment, is within the reach of the congressional power to tax under Article I, Section 8 of the Constitution." ***Murphy v. Internal Revenue Service***, No. 03-CV-02414 (D.C.Cir. July 3, 2007), slip op. at 5-6. Moreover, upon close review of the ALJ and ARB decisions, the court found that the Plaintiff compensatory damages award was not "awarded by reason of, or because of, ... [physical] personal injuries," and therefore § 104(a)(2) of the IRC did not permit her to exclude the award from gross income. *Id.* at 11. The court held that "gross income in § 61(a) must ... include an award for nonphysical damages such as Murphy received, regardless of whether the award is an accession to wealth." *Id.* at 19.

X. Settlements

[STAA Digest X A]
SETTLEMENT UNDER BOTH STAA AND ENVIRONMENTAL STATUTES WHERE NO PARTY APPEALS; ARB REVIEW OF SETTLEMENT IS LIMITED TO THE STAA CLAIM

In ***Andrews v. Max Trans, LLC***, ARB No. 07-065, ALJ No. 2006-STA-45 (ARB May 30, 2007), the parties settled a whistleblower case involving both the Surface Transportation Assistance Act, and the TSCA, SDWA, SWDA, WPCA, and CERCLA. The ARB reviewed and approved the settlement in regard to the STAA because it issues the final order in such cases. The ARB, however, did not review the settlement under the environmental laws because no party had filed an appeal.

[STAA Digest X A 1]
SETTLEMENT; CLAUSE FORBIDDING RE-EMPLOYMENT IS NOT INHERENTLY VOID AS AGAINST PUBLIC POLICY

In ***Taylor v. Greyhound Lines***, ARB No. 06-137, ALJ No. 2006-STA-19 (ARB Apr. 30, 2007), the Complainant argued for repudiation of a settlement agreement based, *inter alia*, on the contention that a clause forbidding re-employment was too restrictive. The Complainant argued that given the Respondent's market share, the

clause essentially precluded him from seeking employment with any motor carrier and would be a violation of his Civil Rights. The ARB rejected the contention, noting that the Complainant had freely agreed to the waiver, and not provided any evidence, legal authority or analysis in support of his position. The ARB also stated that it was "not aware of any case precedent holding such reemployment waivers void as against the public interest," whereas a recent Tenth Circuit decision upheld such a provision in a Title VII case. *Jencks v. Modern Woodmen of America*, 479 F.3d 1261, 1266-67 (10th Cir. 2007).

[STAA Whistleblower Digest X B]
SETTLEMENT; REPUDIATION; ALLEGATION THAT THE SETTLEMENT WAS MISLEADING AS TO THE WITHHOLDING OF TAXES; MERE REGRET DOES NOT RENDER A SETTLEMENT VOIDABLE

In ***Taylor v. Greyhound Lines***, ARB No. 06-137, ALJ No. 2006-STA-19 (ARB Apr. 30, 2007), the ALJ had recommended approval of a settlement agreement, but on automatic review by the ARB the Complainant sought to repudiate the agreement. The ARB stated that an STAA settlement agreement is a contract which is binding and conclusive, but which may be challenged upon a showing of fraud, duress, illegality, or mutual mistake. In ***Taylor***, the Complainant argued that the Respondent tricked him into signing the settlement agreement, but proffered no supporting evidence. The Complainant also alleged that he agreed to the settlement in a hasty manner. The ARB, however, held that "[m]ere regret will not make a settlement voidable." USDOL/OALJ Reporter at 3. The Complainant contended that the settlement erroneously listed him as an employee; that when he was remitted the settlement check, taxes had been withheld; and that he was due the full dollar amount stipulated in the agreement. The ARB rejected this contention, observing that the settlement covered incidents that occurred while the Complainant was an employee, that the settlement consistently listed him as an employee, and that the settlement explicitly stated that tax withholdings would be made. Thus, the ARB found that the settlement was not misleading or deceptive.

[STAA Whistleblower Digest X B]
SETTLEMENT; REPUDIATION; ALLEGATION OF FAILURE TO PROVIDE LETTER OF REFERENCE REQUIRED BY SETTLEMENT IS A QUESTION OF BREACH OF CONTRACT, WHICH IS WITHIN THE JURISDICTION OF THE FEDERAL DISTRICT COURTS, NOT THE ARB

In ***Taylor v. Greyhound Lines***, ARB No. 06-137, ALJ No. 2006-STA-19 (ARB Apr. 30, 2007), the Complainant argued for repudiation of a settlement agreement based, *inter alia*, on the alleged failure of the Respondent to produce a letter of reference as required in the settlement. The ARB found that this contention related to whether the settlement had been breached, which is a question under the jurisdiction of the federal district courts.