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Issue Date: 08 June 2007

CASE NO.: 2006-STA-00012

**ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY AND HEALTH**

Prosecuting Party

and

PETER MAILLOUX

Complainant

v.

R&B TRANSPORTATION

and

PAUL BEAUDRY,

Respondents

APPEARANCES:

For the Prosecuting Party: Kevin E. Sullivan, Esq. Office of the Solicitor,
U.S. Department of Labor, Boston, MA

For the Complainant: Peter Mailloux, *pro se*

For the Respondents: James F. Laboe, Esq., Orr & Reno, Concord, NH

BEFORE: COLLEEN A. GERAGHTY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. Statement of the Case

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the "Act" or "STAA"), 49 U.S.C § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety

and health matters. This matter is before me on Respondents' request for a hearing and objection to the findings of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA") after investigation of the complaint.

II. Background

The Complainant, Peter Mailloux, was hired by the Respondents, R&B Transportation and Paul Beaudry, as a driver of a commercial motor carrier in August 2004. The Complainant was discharged on December 21, 2004. After his discharge, the Complainant alleged in a complaint to OSHA that his discharge was in retaliation for his complaints regarding the company's requiring him to violate the hours of duty regulations enforced by the United States Department of Transportation ("DOT") under the Federal Motor Carrier Safety Act.

OSHA investigated the complaint and in findings issued on January 9, 2006, OSHA determined that the Respondent violated the STAA by discharging the Complainant after he informed the company that he could not make a delivery on the date the Respondents directed, as doing so would require him to drive in violation of the DOT's hours of service regulations at 49 C.F.R. § 395.3(b)(2). OSHA ordered the Respondents to pay the Complainant back wages from December 26, 2004 through February 27, 2005 when the Complainant found other employment.

The Respondents appealed the finding in a letter to the Docket Clerk of the Office of Administrative Law Judges on January 9, 2006. Respondents contend that the Complainant was terminated for poor performance, violating the hours of service regulations, and refusal to communicate with the company's dispatcher on a timely basis. GX 9 and GX 13.

The case was eventually assigned to me and I issued a Notice of Hearing and Pre-Hearing Order on March 24, 2006, setting a hearing for May 22, 2006. In response to a request from the Prosecuting Party, to which the Respondents assented, the hearing was continued and subsequently rescheduled for July 20, 2006. The hearing was held on July 20-21, 2006, in Concord, New Hampshire. The Complainant was assisted by the Prosecuting Party and the Respondents were represented by counsel. Testimony was heard from the Complainant, Peter Mailloux; Bruce Holmes, Division Administrator for the United States Department of Transportation's Federal Motor Carrier Safety Administration; Scott Hill, former driver for Respondents; Chris Kidder, OSHA Investigator; Deborah Beaudry, Office Manager for Respondents; Paul Beaudry; Trish Patrick, Safety Manager who also works in the accounting department for the Respondents; Charles Hancock, part owner of BAT Express which shares office space with Respondents; and Heather Bagley, former employee of R&B¹. The Hearing Transcript is referred to herein as ("TR"). Thirty-three exhibits were admitted from the Prosecuting Party as Government Exhibits ("GX") 1-33² and twenty-seven exhibits were received from the Respondent as ("RX") 1-27. TR 12, 15, 38, 39, 57, 96, 303, 340, 349, 471.

¹ Ms. Bagley testified by deposition. GX 16.

² It appears that no exhibit 32 was submitted from the Prosecuting Party and that the sequence of numbers for the Prosecuting Party simply skipped over number 32.

The official papers were admitted as Administrative Law Judge Exhibits as (“ALJX”) 1-15. TR 9-12. The parties subsequently filed briefs and reply briefs in this matter.

The findings and conclusions which follow are based on a complete review of the record in light of the parties’ arguments, applicable statutory provisions, regulations, and pertinent precedent.

III. Summary of Testimony

A. Testimony of the Complainant Peter Mailloux

Peter Mailloux testified that he began working for the Respondents sometime in late August 2004. TR 180-181. He applied for the position online from his home in Florida and was hired by Heather Bagley. TR 180-181, 185. The Respondents arranged for one of their drivers to pick the Complainant up at his home. TR 180-181. The driver dropped the Complainant off in Georgia where the Complainant picked up a truck for R&B and drove to New Hampshire. After dropping the load off, the Complainant drove the truck to Respondents’ business location in New Hampshire and reported to the office to complete his hiring paperwork. When he arrived, the Complainant met with Heather Bagley. The Complainant stated that Ms. Bagley provided documents for him to sign including tax forms, a drug release notice and other documents and instructed him how to complete the paperwork for the company so that he could obtain run money to cover tolls, and provided him a card to cover fuel. TR 181-182. The Complainant also received a handbook of the DOT’s Motor Carrier Safety Regulations. TR 182. The Complainant reported that he was never given a road test. *Id.*³

At his first face to face meeting with Ms. Bagley, the Complainant testified that he asked her whether the company ran legal, because he was “tired of running hard” and “working myself to death.” TR 185. The Complainant said that Ms. Bagley told him the Respondents ran by the book. *Id.* After completing the initial paperwork with Ms. Bagley, the Complainant was assigned a load to deliver to Florida and he left the Respondents’ facility later that same day. TR 185-187, 189-191.

The Complainant stated that almost from the start of his employment he was running over the hours permitted. Indeed, the Complainant stated that in his first work week which included his initial trip up from Florida, where he picked up the truck in Georgia, with a stop in South Carolina, and then to the Respondents’ facility in New Hampshire and his return trip to Florida, the Complainant was working in violation of the 11 hours and 70 hours of service regulation at 49 C.F.R. § 395.3.⁴ TR 191. The Complainant explained that the Respondents scheduled trips to

³ The Complainant acknowledged that GX 31 is a form indicating the Complainant’s road test with Respondents. The Complainant testified that although the form contains his personal information he did not fill out the form, nor was he ever given a road test by the Respondents. TR 182-184.

⁴ 49 C.F.R. § 395.3 titled “Maximum driving time for property-carrying vehicles” provides in relevant part, (a) “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 ... (1) More than 11 cumulative hours following 10 consecutive hours off duty” 49 C.F.R. 395.3(a)(1), or for any period after “having been on duty 70 hours in any period of 8 consecutive days.” 49

Florida to begin on Saturdays with a return to Respondents' facility early on the following Friday. TR 194. The Complainant testified that either the scheduling or complications, such as delays, encountered during the trip at drop points or pick ups, made it impossible to get back to the facility by early Friday, in order to get his 34 hours off to start a new drivers log and pick up a new load again later on Saturday. *Id.* The Complainant testified that in order to make the deliveries he had to drive more hours than permitted. TR 194, 229-230.

The Complainant began "playing games" or falsifying his log book to make it appear that he had gotten 34 hours off between weekly runs when he had not. TR 194. He stated that Ms. Bagley and Paul Beaudry knew he was falsifying his log record. According to the Complainant, when he complained to Ms. Bagley she told him the appointments had already been made and could not be changed. The Complainant told her he would see what he could do, but that this required him to violate the regulations. TR 195. The Complainant stated that for most of the four months he worked for the Respondents he was running illegally, meaning he was not in compliance with the hours of service regulations. TR 194-197. During this period he routinely falsified his log book, but he stated that on occasion he accurately recorded his log book just to let the paperwork go through. TR 197. He stated that on one occasion when he accurately recorded his log, he was written up by Paul Beaudry for violating the company policy on hours of service. TR 197-198. The Complainant immediately complained to Mr. Beaudry stating "you're kind of biting the hand that feeds you, aren't you." TR 197. Mr. Beaudry replied that another driver had just complained about the same thing. The Complainant told Mr. Beaudry that he didn't ever want to see such a write-up again as Beaudry was telling him to do this, yet slapping him on the hand. TR 198. Other than this one write-up, the Complainant was never disciplined, suspended or fined for any reason by the Respondents during his employment. *Id.*

The Complainant maintained that Respondents were aware that he was driving over hours based upon a comparison of his logs and his toll receipts. He reported that initially he turned in his logs and separated his toll receipts from the logs with a note on the toll receipts to Ms. Bagley telling her he could not make the two match. TR 199. At some point the Complainant stated he just stopped turning his driving logs in. *Id.* The Complainant said that management could tell that he was not keeping accurate logs by comparing the notations on the logs with his toll receipts. The Complainant stated that in comparing the two it would be obvious that the logs were incorrect because the logs would indicate he was in the sleeper berth but the toll receipts would show that he was driving at that same time. TR 199-200, 229-230.

The Complainant said that on occasion he would call the office during a trip and inform them he was out of hours. In particular he testified that he informed Ms. Bagley he was out of hours on several occasions and was told the appointments had already been arranged. In one such instance, the Complainant stated that Mr. Beaudry asked where he left from and how long it took him to get to his destination and then Beaudry told the Complainant it should have taken him less time. TR 200-201. The Complainant admitted that he continued to drive when he was out of hours during his employment with Respondents because he had a mortgage and bills to pay. *Id.* He explained that he was increasingly frustrated and tired of working so many hours

C.F.R. 395.3(b)(2). Subsection (c) provides "Any period of eight consecutive days may end with the beginning of any off duty period of 34 or more consecutive hours." 49 C.F.R. 395.3(c) (2003).

without adequate rest in order to meet the schedule Respondents established. TR 204. He stated that in the week before he was terminated he informed the Respondents through Ms. Bagley and Mr. Beaudry that he was going to begin driving legally. TR 205. According to the Complainant, during his last trip to Florida the Complainant spoke with Charlie Hancock, who was at the Respondents' office on December 17, 2005, and Mr. Hancock told him he had a load to pickup the following morning, a Saturday, for delivery in Boston on Monday. TR 207-209. The Complainant stated that he told Mr. Hancock he was out of hours. The Complainant reports that Mr. Hancock told him that he had already scheduled the pickup and that the Complainant had to do it. TR 207. The Complainant responded that he would make the pickup, but there was no way he was going to deliver it to Boston on Monday as he was out of hours under the 70 hour rule. TR 207-208, 215; GX 11; GX 18. At this point the Complainant refused to drive the load to arrive in Boston on Monday. TR 207. The Complainant stated he could not make the delivery to Boston until he had gotten 34 hours off. TR 207-209. The Complainant called Mr. Beaudry at home that same evening, December 17, 2004, as he was delayed by a flat tire in arriving for the scheduled pickup at Burriss and needed permission to pay a fee. TR 209. According to the Complainant, the conversation got heated when he also told Mr. Beaudry he was out of hours and was going to begin calling his hours in every day so this doesn't keep happening. TR 209-210. The Complainant testified that Mr. Beaudry responded that when the Complainant got back up to the facility in New Hampshire, he would see about getting the Complainant a ride back to Florida. According to the Complainant, he responded "I guess that means I'm fired" and he stated that Beaudry just said "get the truck back up here" and that was the end of the conversation. TR 210. The Complainant stated when he later spoke with Mr. Hill, another driver for Respondents, Hill told him "yeah, you're fired." TR 210, 212.

The Complainant explained that he continued to drive and drove the truck back to New Hampshire arriving on December 22, after pickups and the delivery to Boston, even after he understood he was terminated because he did not want to be charged with abandonment of a load. TR 212-213, 215-216; GX 11. It was during this last trip back to New Hampshire from Florida, that the Complainant contacted the OSHA area office in New Hampshire by telephone on December 20, 2004, to report he had been fired. TR 218-219, 221-222; CX 1; GX 18. When he returned to New Hampshire he met with OSHA investigator Chris Kidder. TR 219.

The Complainant received his final paycheck from the Respondents covering the period December 18-24, 2004. TR 226. Shortly after his termination, the Complainant obtained employment with Connors Refrigerated Transport. TR 227. During the period before he secured other employment, the Complainant received unemployment compensation following an appeal by the Respondents of an initial award of unemployment compensation benefits by the State of Florida. TR 226.

B. Testimony of Scott Hill

Scott Hill began work for R&B and Paul Beaudry as a driver in late August 2004. TR 98. Like the Complainant, Mr. Hill was initially hired by Ms. Bagley over the telephone, and he completed the paperwork with Ms. Bagley when he arrived in person at the R&B office in New Hampshire. TR 99-102. Mr. Hill testified the paperwork included tax forms, drug screening

forms and a form indicating he had been given a driver's test even though Mr. Hill stated that he had not taken such a test with R&B. TR 99-103. According to Mr. Hill, he had several telephone conversations with Ms. Bagley before he took the job. During those conversations Mr. Hill reports that Ms. Bagley stated that for the most part the Company ran legal, except for the occasional event when drivers were expected to stretch it a little bit, for example, if they were an hour away from a delivery point. TR 104. Hill stated that this was one of the reasons he took the job with R&B as he was "tired of working for the [current]company..., just running wide open day and night, you know, trying to make money. So I figured this would be a little bit better work environment, you know, where you get to take your legal breaks and do your log books properly." *Id.* Mr. Hill reported that by his second week at R&B he drove when he was out of hours. TR 105-109. He stated that on the trip down to Florida he was able to get his rest and drive in compliance with the regulations, but by the time he was to head back north he was out of hours. Hill stated that this occurred frequently. He explained that Respondents scheduled trips which included a trip sheet given to the drivers with all the scheduled stops, however, if the driver got delayed at a drop-off site longer than normal, the trip schedule did not account for this. TR 106. For example, Mr. Hill testified that drivers were frequently delayed when making deliveries to Walmart stores and then had to keep going in order to make the next delivery or pickup on time. TR 105-108; *see also* TR 118-119.

Mr. Hill reported that in the early part of his employment with Respondents, when he called in to Ms. Bagley at R&B's offices and told her that he was running low on hours, she replied that he had to get the product back up here or he had to make the scheduled stops. TR 108, 114. Mr. Hill said that Ms. Bagley was the "go-to" person in the office when drivers called in to check on their delivery stops or to report missing or damaged product. TR 114. According to Mr. Hill, the only time schedules were rearranged was if he arrived early to a delivery or the customer was not open or the customer was not ready for the product. TR 108-110. During the period he worked for the Respondents, from late August through December 31, 2004, Mr. Hill said he drove when he was out of hours, or in violation of the 70 hours in eight days rule, more often than not. TR 110-111, 120-121. Mr. Hill stated that he falsified his log book to make it look as if he were driving in compliance with the federal regulations. TR 111. He testified that management was aware of this because he received log book violations from the company "just about weekly...." TR 117, 111, 134-135. Mr. Hill stated that when he received a write-up with his paycheck he told Ms. Bagley "this is crazy...why am I getting a write-up for doing what I'm told" in terms of driving the truck and delivering the product. TR 133. Later Mr. Hill said that Paul Beaudry met with him and used Mapquest to show him that he could make the deliveries driving in compliance with the regulations. TR 112, 134-135. However, Mr. Hill stated that the trip could be made legally if the driver started with a fresh log and had no delays along the way, but he explained it was difficult to do that because he would return from a Florida run, the truck would be unloaded and serviced and then he would head back down to Florida on another run. TR 112-114, 118-119, 121-125. Mr. Hill also explained that the computer program PC Miler did not take into consideration actual conditions such as the time spent at delivery stops or traffic jams. TR 149-152. Mr. Hill said that he came to disagreements with Paul Beaudry a few times as to whether the schedules could be completed in compliance with the hours of service requirements and Mr. Beaudry told him that once he got to Florida he could mark the Florida deliveries as local work even though it wasn't local work, but was part of the roundtrip trip schedule for interstate delivery that he had been given from New England to Florida and return.

TR 134-135. Mr. Hill reported that even though he had received write-ups on hours of service, the write-ups didn't mean anything and he was never disciplined or warned he would be terminated. TR 134, 138-140.

Mr. Hill also said that when he returned from trips he informed Ms. Bagley that he could not make his toll receipts match his log book. TR 114-116. He explained that the toll receipts were supposed to coincide with the log book and be turned in together. TR 115. According to Mr. Hill, Ms. Bagley told him to turn in his toll receipts in a separate envelope, or to turn them in a week later. TR 116. He explained that by separating the log books and the toll receipts, it was no longer necessary "to worry about making everything match." *Id.* Mr. Hill stated that when he told Mr. Beaudry he needed "a break, I got to slow down, I want to run legal," Mr. Beaudry responded "I got other drivers that will run." TR 154-155; GX 14. Mr. Hill testified that he kept quiet and continued to drive because he had a mortgage to pay and children to support. TR 155. Mr. Hill said he stopped working for R&B on December 30, 2004, because he was "burned out" and wanted to slow down.

C. Testimony of Christine Kidder

Christine Kidder, an OSHA investigator in the Concord, New Hampshire OSHA Office, investigated the Complainant's complaint. Ms. Kidder stated that the Complainant called her office on December 20, 2005, to report that he was on his way back to New Hampshire, that he would be fired when he returned to his station in Charlestown, New Hampshire and he wanted to speak with someone. TR 319-320; GX 1. Ms. Kidder interviewed the Complainant in person on December 27, 2005. TR 320. The Complainant told her that during his employment with R&B he was continually required to drive over the hours of service regulations in order to make his deliveries assigned by Paul Beaudry, Heather Bagley or Charlie Hancock. TR 320-321. The Complainant stated that he falsified his driving logs to make it appear that he was in compliance with the DOT regulations. TR 321. As part of her investigation, Ms. Kidder also spoke with Paul Beaudry, Heather Bagley and Scott Hill. *Id.* Mr. Beaudry told Ms. Kidder that he fired the Complainant because the Complainant did not plan his trips properly and it was losing Beaudry time and money. *Id.*

Ms. Kidder asked Mr. Beaudry whether he complied with the hours of service regulations and he told her he had never been cited for violations of the hours of service regulations. TR 322. Ms. Kidder testified that after she spoke with Larry Abruzzessa of the DOT's Federal Motor Carrier Safety Administration, and based upon an audit his office carried out, and upon her review of documents issued by the Federal Motor Carrier Safety Administration, she learned that Mr. Beaudry had been cited previously by that agency for violating the hours of service regulations. TR 323-324.

Ms. Kidder interviewed Heather Bagley and testified that Ms. Bagley admitted that the Complainant and the other drivers all violated the hours of service regulations because they could not complete the trips within the regulatory hours and it was done routinely. TR 331-332. On cross-examination, Ms. Kidder acknowledged that Ms. Bagley told her that the Complainant

slept through an appointment once. TR 340-341. Ms. Kidder also stated that Paul Beaudry told her that the Complainant consistently had problems meeting his appointments. TR 341.

Ms. Kidder testified that she calculated the back wages due the Complainant as \$10,635.84. TR 327-330, 348-351.

D. Testimony of Bruce Holmes

Bruce Holmes is Division Administrator with the U.S. Department of Transportation's Federal Motor Carrier Safety Administration in New Hampshire. TR 28. Mr. Holmes' duties include responsibility for assigning agents to conduct investigations of motor carriers for compliance with federal motor carrier safety regulations. TR 28, 42. He testified that compliance reviews had been conducted for R&B Transportation and for the other trucking companies Mr. Beaudry had an interest in, including BAT Express and Beaudry Enterprises. TR 28, 30-31, 40-42. Mr. Holmes stated that the three companies, R&B Transportation, BAT Express and Beaudry Enterprises, are located in the same office and that the three companies share drivers. TR 50-51. As a result, the most recent compliance review which was initiated on January 23, 2005, reviewed all three companies. GX 25.

Mr. Holmes explained that a Compliance Review is the investigative report prepared by an agent who visits a company to determine whether the company is in compliance with the Federal Motor Carrier Safety regulations. TR 40. The most recent Compliance Review for R&B Transportation dated April 12, 2005, included four violations of the hours of service regulations among violations of other DOT regulations for the period August 23, 2004 to February 22, 2005, a period which included the period of the Complainant's employment. TR 31-32; GX 19. Mr. Holmes stated that R&B's failure to preserve the driver's records of duty status supporting documents for a period of six months as required was considered a critical violation. *Id.* He explained that the supporting documents are important as they are necessary to check the accuracy of the duty status records. TR 32. Mr. Holmes stated that R&B paid a civil penalty to resolve the violations. TR 38; GX 27.

Documentary evidence submitted shows that R&B had previously been cited by the DOT on January 22, 2001 for violating the hours of service regulations as shown in a Compliance Review dated January 22, 2001. GX 28, Case No. NH 2001-0041-US0020; USDOT 0796053.⁵ Mr. Holmes testified that BAT Express, a company Mr. Beaudry holds an interest in, also paid a civil penalty to settle violations of the Federal Motor Carrier Safety Regulations which included an hours of duty violation. TR 52-57; GX 28 Compliance Review dated September 14, 2000, USDOT 0527625 Part B; GX 25. A follow-up Compliance Review on June 14, 2001, showed that BAT Express continued to have hours of service and recordkeeping violations. GX 28.

⁵ GX 28 is a multi-page exhibit containing various Compliance Reviews and enforcement documents related to R&B Transportation and the two other trucking companies, BAT Express and Beaudry Enterprises, which share its office space, and in which Paul Beaudry has an interest or is an officer. TR 40. The exhibit pages were not sequentially numbered making it cumbersome and difficult to identify the specific page being referenced within the document.

Beaudry Enterprise was also cited for violations of the motor carrier regulations and settled the alleged violations by paying a civil penalty. TR 57-66; GX 26 and GX 28.

E. Testimony of Heather Bagley

Ms. Bagley testified via deposition. GX 16. Ms. Bagley began working for R&B Transportation in October 2003 and she was terminated in January 2005. GX 16 at 5, 32. Ms. Bagley testified that she was hired as an administrative assistant/data entry clerk. GX 16 at 5-6. In January of 2004, she took over the responsibility of looking for drivers, completing the hiring paperwork, providing drivers the Federal Motor Carrier Safety regulations pocketbook, and she took over for the human resources person at R&B. GX 16 at 7, 20-21. Ms. Bagley stated that she was initially supposed to maintain the drivers' logs, but that Trish Patrick, Paul Beaudry's daughter, told Ms. Bagley that she was going to be doing the logs. *Id.* At some point during the summer of 2004, Paul Beaudry asked Ms. Bagley to take over entering the logs. GX 16 at 9. Ms. Bagley stated that she did not take this over as she felt she had too many other duties. However, Ms. Bagley testified that when she had time and was specifically asked to do so, she entered some logs. GX 16 at 10-12. In performing this task, Ms. Bagley explained that Trish Patrick showed her what to do. GX 16 at 9. According to Ms. Bagley, Trish Patrick told her that if the logs don't match the toll receipts, the toll receipts should be put into a box without the truck number attached. Ms. Bagley explained that in such instances she was instructed to remove the truck number from the receipt and place the receipt in a box, so the company was still maintaining the receipts, but the receipts could not be matched with a specific truck or driver. GX 16 at 12-13.

Ms. Bagley stated she used a software program to enter the logs just as the driver had manually entered them on his log book. The software program would identify points where the driver may be in violation of the hours of service requirements and then R&B and Paul Beaudry would give the driver an opportunity to fix the logs, which Ms. Bagley reported meant falsifying the log so it matched. GX 16 at 13-15. Ms. Bagley testified that the Complainant complained frequently about running out of hours in violation of the regulations during trips for R&B. GX 16 at 11, 16. She stated that she referred drivers complaining of their logs and hours to Paul Beaudry because there was nothing she could do for them except try to reschedule an appointment. GX 16 at 16. Ms. Bagley stated that when she hired drivers and gave them orientation to the Company she told the drivers, as she had been directed to by Paul Beaudry, that the Company ran legally and didn't push drivers over their hours. She stated she told new drivers this knowing full well that in a couple of weeks Mr. Beaudry would push to the limit and have them running over hours. GX 16 at 17. Ms. Bagley stated the drivers would come back to her complaining and she said the company experienced a high turnover in drivers as a result. GX 16 at 17-18.

On cross-examination, she acknowledged that R&B scheduled trips did not always go as planned. She explained that drivers could oversleep and miss an appointment or get delayed at delivery points, which would mean all the subsequent appointments would be late. GX 16 at 25. Ms. Bagley stated that R&B had problems with the Complainant getting to where he was supposed to be on time. GX 16 at 26. She also stated that as far as she knew the Complainant

was never disciplined because she never filed any disciplinary forms in his personnel file. GX 16 at 27. Ms. Bagley acknowledged that she was terminated from R&B in early 2005. Ms. Bagley stated that after she was terminated she received a letter from Deborah Beaudry, Paul Beaudry's wife, dated February 8, 2005, which she described as "stating that if I pretty much didn't keep my mouth shut about what was going on, that they would sue me with a slander suit." GX 16 at 18-19, 35-36; GX 4.

F. Paul Beaudry's Testimony

Paul Beaudry is the owner of R&B Transportation. TR 377. He has been in the trucking business for thirty years. *Id.* Mr. Beaudry testified that he is also part owner of BAT Express, a trucking company, and that he owns and is president of Beaudry Enterprises, another trucking company. TR 377-378.

Mr. Beaudry acknowledged that on December 8, 2005, R&B Transportation was issued a Notice of Claim by the Federal Motor Carrier Administration alleging nine violations of 49 C.F.R. § 395.8(k)(1)⁶ for failing to preserve drivers' records of duty status supporting documents during November 2004, and assessing a civil penalty. TR 386-387; RX 26. Mr. Beaudry admitted that R&B Transportation paid a civil penalty to settle the violations alleged and to resolve the matter. TR 389. Mr. Beaudry acknowledged that Beaudry Enterprises received a notice of claim or violation from the DOT's Federal Motor Carrier Administration in 2005 and that Beaudry Enterprises paid civil penalties to settle the violations. TR 378-379, 382; RX 14. Mr. Beaudry also conceded that BAT Express was issued violations by the DOT's Federal Motor Carrier Administration in 2005. TR 384. Mr. Beaudry testified that BAT contested the violations but ultimately paid a monetary penalty to resolve the 3 violations of the hours of duty regulations occurring in November 2004. TR 386; RX 25.

Mr. Beaudry stated that the Complainant was hired as an over-the-road truck driver delivering loads primarily from New England to Florida and returning. TR 391. Mr. Beaudry reported that the Complainant was provided a copy of the Federal Motor Carrier Safety Administration regulations when he was hired. *Id.* Mr. Beaudry testified that the Complainant, like other drivers, was required to keep a daily driving log and to turn the log, along with his toll receipts, in at the end of a trip. TR 391-392. The company then processed the paperwork comparing the logs with the toll receipts. Mr. Beaudry explained that if the two do not match, for example, if the log indicates the driver was in the sleeper berth, but the toll receipt shows he was driving, the driver is given an opportunity to correct the log. If by correcting the log, a violation of the hours of service regulations occurs, Mr. Beaudry stated the driver is notified by R&B that he has a violation. TR 393-394.

Mr. Beaudry said that if he called a driver living in Florida, such as the Complainant, and asked him to drive a load that is picking up on a Monday for delivery on Wednesday, and the driver accepts the assignment, he would not expect the driver to call on Tuesday or half-way to

⁶ 49 C.F.R. § 395.8(k)(1) titled, Retention of driver's record of duty status, provides "[e]ach motor carrier shall maintain records of duty status and all supporting documents for each driver it employs for a period of six months from the date of receipt. (2003)

the destination and tell him they are out of hours. TR 394-395. Mr. Beaudry stated the driver knows how long it should take them to drive and whether the driver has the hours available to complete the assignment. TR 395. In accepting the load, Mr. Beaudry reported that he expected the driver to complete the trip according to the requirements. *Id.* Mr. Beaudry said that he instructs drivers to notify the company if they are low on hours. TR 395-396. Mr. Beaudry testified that if a driver notifies him that the driver is low on hours he does not force the driver to take a run that will bring the driver over hours in violation of the regulations. TR 395. When asked what he would do then, how he would meet his commitments in such a situation Mr. Beaudry responded, “[w]ell, for the most part, we won’t commit to something that we don’t have a driver that can do it.” TR 395.

Mr. Beaudry testified that the Complainant had violated the hours of service regulations. He stated that he did not learn of the violation until after it occurred and he explained that this is the case with 99% of the violations incurred by R&B drivers. TR 395. Mr. Beaudry also estimated that in 100% of the cases where a driver is in violation of the hours of service regulations, the driver is unaware of the violation, until the company brings it to the driver’s attention. *Id.*

Mr. Beaudry reported that prior to the Complainant’s termination the Company gave him a summary of violations and that the Complainant looked at it like it was a joke. TR 397. Mr. Beaudry stated that he attempted to sit down with the drivers and show them how to complete their logs books and the assigned trips correctly. TR 397-398. When he was asked on direct examination why he did not fire the Complainant before December 17, 2004, in light of Complainant’s difficulties, Mr. Beaudry did not give a direct answer, rather he responded generally that most drivers don’t like to do paperwork. TR 398-399.

Mr. Beaudry also stated that he had a problem with the Complainant on a couple of deliveries where some of the product was damaged and he was not notified, except when payment was made by the customer to R&B, and the payment to R&B was reduced by the value of the damaged product, some \$600 and \$180. TR 401-403. Mr. Beaudry also maintained that the Complainant missed appointments numerous times because he overslept and had difficulty waking up. TR 403-409.

According to Mr. Beaudry, as the Complainant was getting ready to make a delivery trip from New Hampshire to Florida on December 15, 2004, he asked the Complainant if he had enough time to drive there and the Complainant stated he did. TR 417. Mr. Beaudry testified that during the day of December 17, 2004, he was aware that the Complainant was trying to make a delivery in Orlando, Florida and that there was a problem with rescheduling the delivery at Burris and the Complainant was having a problem getting unloaded. TR 420. Mr. Beaudry reported that the Complainant had been talking with Charlie Hancock, with whom he co-owns the BAT Express trucking company, that afternoon to try and resolve the issue. *Id.* Mr. Beaudry said he believed the issue had been resolved and that the Complainant would get unloaded later that evening. *Id.* Mr. Beaudry recalls that the Complainant called him at home at 11:48 p.m. on the evening of December 17, 2004, when the Complainant was on his way back to Burris to get unloaded and he informed Beaudry that there was an accident on the interstate and he was not sure he would arrive at Burris on time for his appointment. Mr. Beaudry told the Complainant

that if he was late in arriving at Burris, he should simply pay the \$150 fee and get unloaded.⁷ Mr. Beaudry stated that the Complainant then complained about the rest of his schedule which included picking up a load for delivery back in Boston on Monday, and the Complainant told Mr. Beaudry that he was out of hours and that at that point in time he had already driven 75 hours that week. TR 423. Mr. Beaudry told the Complainant to get unloaded at Burris and then to call him back, so they could discuss the matter. Mr. Beaudry recalled that at this point, the Complainant told him he was “tired of this, this has got to change, I need to make a change, I’m going to start calling in my hours every day so that this does not happen anymore.” TR 424. According to Mr. Beaudry, the Complainant continued stating that “whenever I get to my 70 hours I’m just parking the truck wherever I need to and get my 34 hours.” *Id.* Beaudry stated that he responded “I guess you are right, this just isn’t working so why don’t we just make it simple and when you get back up here I’ll find you a way to go back home...because this just isn’t working out.” *Id.* Mr. Beaudry testified this was the straw that broke the camel’s back. TR 424, 440-442. Mr. Beaudry recalled that he then told the Complainant to call him before he did anything else after he got unloaded at Burris. TR 424. Mr. Beaudry explained that if the Complainant was out of hours “there was no need for him to be driving” and R&B obviously could not do the load they had committed to, so the company had to see if they could reschedule. *Id.*

Mr. Beaudry said that he fired the Complainant not because he refused to drive when he was out of hours, but because he was already driving without hours available and had been driving in violation of the regulations in making the delivery. TR 425. Beaudry also said that the Complainant’s missing appointments due to his apparently excessive sleep requirements, and his inability to follow instructions and accurately complete his driving logs played a role. TR 430-431.

Mr. Beaudry acknowledged that Heather Bagley was employed by R&B in 2004. TR 432. He recalled that her duties included inputting the drivers’ logs, and various other information and generating reports. *Id.* Mr. Beaudry also stated Ms. Bagley assisted in trying to find drivers. TR 433. He testified that Ms. Bagley did not tell him drivers were out of hours.⁸ *Id.*

G. Testimony of Deborah Beaudry

Deborah Beaudry has been the Office Manager for R&B since 1996 and she is married to Paul Beaudry. TR 356-357. She testified that she is familiar with the inner workings of the office at R&B Transportation and that she paid handled accounts receivable, paid bills and signed payroll checks, although someone else kept the payroll records. TR 357, 363-365. Mrs. Beaudry maintained that she was not involved in the hours of service recordkeeping or checking driver’s logs. TR 365. Mrs. Beaudry said that Heather Bagley worked in the office and was a friend. TR 361. Mrs. Beaudry admitted that she wrote a letter to Ms. Bagley on R&B letterhead dated February 8, 2005. TR 367-368; GX 4. In the letter, she threatened Ms. Bagley with

⁷ Mr. Beaudry explained that Burris had a policy of providing a one hour window from the time of the scheduled appointment and if a truck did not show up within that window, Burris charged a fee of \$150.00. TR 422-423.

⁸ Mr. Beaudry was not cross-examined by the Prosecuting Party or the Complainant.

slander and a defamation of character suit for talking about R&B. TR 367-368. Ms. Bagley acknowledged that she probably discussed the letter with her husband, Paul Beaudry. TR 368-369. Although she wrote the letter to Ms. Bagley, at the hearing, Mrs. Beaudry was unable to recall what Ms. Bagley had said about R&B to trigger such a letter. TR 369. Mrs. Beaudry also testified that at the time she wrote the letter to Ms. Bagley, she did not know that the Complainant had been fired. TR 374.

H. Testimony of Charles Hancock

Charles Hancock and Paul Beaudry jointly own BAT Express. TR 453. Mr. Hancock testified that he works for BAT Express and that BAT Express shares office space with R&B Transportation. *Id.*

Mr. Hancock explained that during the week of December 13, 2004, he was involved in arranging the load the Complainant was taking to Florida. TR 453-454. Mr. Hancock stated that they were offered a load from Portland, Maine to Florida and the Complainant would be expected to pick up a load in Florida and return with it to the Northeast. TR 454. Mr. Hancock received a call from the Complainant between 3:30 and 4:00 p.m. on Friday afternoon, December 17, 2004, asking what the pickup coming north would be. Mr. Hancock stated he went through the pickups with the Complainant and then the Complainant told him he was out of hours. Mr. Hancock expressed surprise at this, stating the Complainant should have told him he was out of hours before Hancock accepted and scheduled the pickup load. TR 455. Mr. Hancock also indicated that the Complainant should not have been out of hours from the time he left New Hampshire to begin the trip. *Id.*

I. Testimony of Trish Patrick

Trish Patrick, the daughter of Respondent Paul Beaudry, works as the Safety Manager at R&B and handles all receivables for the accounting department. TR 449-450. Ms. Patrick worked in the R&B office in the Fall of 2004. She testified that she knew Heather Bagley and that Ms. Bagley was responsible for making appointments for the trucks, taking care of the mileage for the trucks, entering and receiving logs, and taking the drivers expenses and receipts, as well as the bill of lading for the trips and processing them to the accounts. TR 449-450. Ms. Patrick denied that she had ever instructed Ms. Bagley to lose the toll receipts if they did not match the logs. TR 450. However, she acknowledged telling Ms. Bagley to put toll receipts from Massachusetts in a box as they did not have a time stamped on them and she would later try to match those with the correct truck. TR 451-452. Ms. Patrick denied telling Ms. Bagley to accidentally tear off the truck number from the receipt if it did not match and put the receipt in a box. *Id.*

IV. Legal Analysis

Congress included section 405(b) in the STAA for the purpose of insuring that employees in the commercial motor transportation industry who make safety complaints, participate in proceedings, or refuse to commit unsafe acts, do not suffer employment consequences because of these actions. See *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 20-21 (1st Cir. 1998) citing *Brock v. Roadway Express, Inc.* 481 U.S. 252, 257 (1987); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060 (5th Cir. 1991) (citing 128 Cong. Rec. 29192, 32510 (1982)). Consequently, the STAA protects all employees of commercial motor carriers from discharge, discipline, or discrimination for filing a complaint about commercial motor vehicle safety, testifying in a proceeding on safety, or refusing to operate a commercial motor vehicle when operation would violate a Federal safety rule or when the employee reasonably believes it would result in serious injury to himself or others. See 49 U.S.C. §31105(a). Respondents are a commercial motor carrier and Complainant operated commercial motor vehicles. The provisions of STAA are applicable to the underlying dispute.

To prevail under the Act, Complainant must prove by a preponderance of the evidence that he (1) engaged in protected activity, (2) that the employer was aware of the activity, (3) that the employer took adverse employment action against him, and (4) that there was a causal connection between the protected activity and the adverse employment action. *Clean Harbors Envtl. Servs.*, 146 F.3d at 20-21; *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Youngs Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 1, 2003); *Assistant Sec. v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ NO. 1999-STAA-5, slip op. at 7-8 (ARB March 29, 2000).⁹

⁹ In analyzing cases under the STAA, the Department of Labor's Administrative Review Board and other Federal Courts have adopted the burden shifting analysis employed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a case brought under Title VII of the Civil Rights Act. See *Clean Harbors*, 146 F.3d at 21; *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133; *Poll v. R.J. Vyhnaelek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5-6 (ARB June 28, 2002). The claimant can establish a prima facie case by showing he engaged in protected activity, employer was aware of protected activity, the employer took adverse employment action and there is a link between the protected activity and adverse action. Once the claimant has established a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. *Clean Harbors*, 146 F.3d at 21; *Moon v. Transportation Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). If the employer articulates a non-discriminatory reason for the adverse employment action, the complainant bears the burden of showing that the employer's reason is pretextual and the real reason for the adverse action was retaliation. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). However, since this case was fully tried on its merits, it is not necessary for the Court to determine whether Complainant presented a prima facie case and whether Respondent rebutted the showing. *U.S.P.S. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 (1983); *Roadway Express*, 929 F.2d at 1063; *West v. Kasbar, Inc./Mail Contractors of America, Inc.*, ARB Case No. 04-155, OALJ Case No. 2004-STA-34 (Nov. 30, 2005); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ NO. 1999-STAA-5, slip op. at 7-8 (ARB March 29, 2000). Once the respondent has produced evidence in an attempt to show that the complainant was subjected to adverse action for a legitimate reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a prima facie case. *Ciotti v. Sysco Foods of Philadelphia*, 97-STA-30 at 5 (ARB July 8, 2003). Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of whether protected activity was the reason for the adverse action. *Id.*

A. Protected Activity and Adverse Employment Action

In the present case, the Complainant engaged in protected activity on the evening of December 17, 2005, during a call to Mr. Beaudry's residence when he told Beaudry that he was out of hours, in other words, that he was driving in excess of the 70 hour/8 day regulatory maximum and that he would refuse to drive under those conditions any longer. Mr. Beaudry, president of R&B Transportation, has acknowledged this conversation and has not disputed the Complainant's testimony in this regard. Therefore, I find that the Complainant engaged in activity protected under the STAA and that the Respondents were aware of the protected activity.¹⁰

The Complainant's employment was terminated by Mr. Beaudry during this same conversation. Therefore, the Complainant has demonstrated that he was subjected to adverse action.

B. Causal Connection

The Claimant must establish a causal connection between his protected activity and his termination. Proximity in time between the protected activity and the adverse action may give rise to an inference of a causal connection. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984). The Complainant's termination coincided with his protected activity, supporting an inference of a causal relationship between the two events. The Complainant argues that Respondents' history of violations of the hours of service and duty status recordkeeping requirement, along with evidence of Respondents' knowledge of log and toll receipt recordkeeping falsification, and the temporal proximity between the Complainant's protected activity and his discharge establish that he was fired for activity protected under the STAA. Cl. Br. at 18-21. The Respondents contend that the Complainant failed to establish a causal link between his termination and his protected activity as temporal proximity alone is insufficient when there is compelling evidence that the Respondents required drivers to adhere to the hours of duty regulations and routinely disciplined drivers who drove in violation of the hours of duty regulations, and thus. Resp. Br. at 15-17.¹¹

Complainant contends that the Respondents scheduled trips so tightly that the only way for drivers to meet the schedule was to ignore the DOT regulations related to hours of service. Cl. Br. at 18-22. Both the Complainant and Scott Hill, another R&B driver, said that when they

¹⁰ The Respondents have not argued that the Complainant failed to engage in protected activity or that the Respondents were not aware of the protected activity. Resp. Br. at 15-26.

¹¹ The reasons or factors the Respondents rely upon in asserting that the Complainant failed to show a link between his protected activity and the adverse employment action are the same reasons the Respondents offer in asserting that it had legitimate business reasons for terminating the Complainant. Resp. Br. at 15-17, 22-24.

were hired by R&B, Ms. Bagley told them, in response to their specific inquiries, that the Company operated legally in compliance with the hours of service regulations. Ms. Bagley confirmed this, stating that she told drivers the Company ran legally, even though she knew that within a short period of time, Mr. Beaudry would have the drivers running over hours. The Complainant and Scott Hill stated that soon after beginning work for R&B they were running over the permitted hourly limit in violation of the 70 hour rule and they complained to Ms. Bagley.¹² Ms. Bagley acknowledged that the Complainant and Mr. Hill complained to her about having to run over hours in order to meet the delivery and pickup schedule the Respondents established. In response to their complaints, both the Complainant and Mr. Hill reported that Ms. Bagley replied they had to get the product and the delivery or pick up was scheduled. When the Complainant complained to Mr. Beaudry, Beaudry asked where he had started from and told him it should have taken him less time to reach his destination. When Mr. Hill complained to Mr. Beaudry that he needed a break and wanted to drive legal, Mr. Beaudry told him he had other drivers “that will run.” TR 154-155.

While the Respondents asserted that the trip schedule could be completed in compliance with the DOT, and used a computerized program to support its assertion, I credit the testimony of the Complainant, which was supported by Mr. Hill and Ms. Bagley, that in the abstract, and on paper, the trip schedule could theoretically have been completed in compliance with the regulations regarding hours of service, but in practice under actual conditions, traffic accidents and congestion and delivery delays would frequently throw the schedule for deliveries and pickup stops off. As a result, the drivers would have to drive over hours in an attempt make up time to meet the subsequent scheduled stops.

Upon returning from a trip, the Complainant was frequently unable to complete his logs to show compliance with the hours of service regulations. Consequently, the Complainant separated his logs from the toll receipts and turned them in separately, as directed by Ms. Bagley.¹³ Mr. Hill and Ms. Bagley corroborated the Complainant’s testimony on this point. Mr. Hill followed the same procedure, as instructed by Ms. Bagley, when he could not match his logs with his toll receipts. Ms. Bagley stated that if the toll receipts did not match the drivers’ logs she removed the truck number and put the receipts in a box, as instructed by Ms. Patrick. Ms. Patrick, Respondent Beaudry’s daughter, testified that she did not have responsibility for checking drivers’ logs and toll receipts. Ms. Bagley acknowledged that in the summer of 2004, Mr. Beaudry asked her to take over entering the drivers’ logs, but she maintained that she did not take on this duty as she had too many other responsibilities. Thereafter, Ms. Bagley said that when she was specifically asked to enter some logs she did so. Ms. Patrick said that Ms. Bagley was responsible for entering and receiving logs and taking drivers’ expenses and receipts, and

¹² 49 C.F.R. § 395.3, titled “Maximum driving time for property-carrying vehicles” provides, in relevant part, “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 ... (1) More than 11 cumulative hours following 10 consecutive hours off duty” 49 C.F.R. 395.3(a)(1) or for any period after “having been on duty 70 hours in any period of 8 consecutive days.” 49 C.F.R 395.3(b)(2). (2003)

¹³ The fact that the Complainant and Mr. Hill falsified their driving logs in an effort to appear to comply with the hours of service regulations is troubling. This fact alone, however, does not preclude the Complainant’s claim of unlawful termination.

denied telling Ms. Bagley to separate the toll receipts from the logs if the two did not match. Ms. Patrick's denial is not credible. She admitted instructing Ms. Bagley to place the toll receipts from Massachusetts in a box as they lacked a time stamp and she would later try to match them with the truck. Once the two documents were separated it was difficult for anyone to review, cross-reference and check the accuracy of the drivers' logs, and therefore, Ms. Patrick's statement that she instructed Ms. Bagley to place the Massachusetts toll receipts in a separate envelop and she would later match them up with the truck does not ring true. Rather, Ms. Patrick's instruction to separate the Massachusetts logs bolsters statements from Ms. Bagley, Mr. Hill and the Complainant that the toll receipts would be separated from the drivers logs if the two documents could not be reconciled. Comparing a driver's toll receipts with his log entries is a recognized and accepted method of monitoring hours of service and ensuring that the log entries are accurate. *See* 49 C.F.R. §395.8. If the drivers' logs were turned in without the toll receipts or vice-versa, it was impossible to cross-reference the two documents in order to assess the accuracy of the drivers log and to ensure compliance with the hours of service regulation.

Respondent Beaudry's assertion that R&B required drivers to comply with the hours of service regulations, is also undermined by DOT investigation and compliance findings that the Respondents violated the hours of service regulations and failed to maintain supporting documentation. R&B had previously been cited for such violations on January 22, 2001.¹⁴ In addition, two other trucking companies which Mr. Beaudry has an interest in, or is an officer of, and which share the same offices and drivers as R&B, Beaudry Enterprises and BAT Express, had also been cited by the DOT for violations of the hours of service regulations on September 14, 2000 and June 14, 2001. GX 28. R&B was also cited for violations following a compliance review begun in 2005 after the Complainant's discharge. GX 28.¹⁵

The DOT enforcement reports and compliance reviews show that R&B Transportation had experienced difficulty complying with the hours of duty regulations in past years prior to the Complainant's employment with the company.¹⁶ During the 2001 Compliance Review of R&B, R&B was cited for numerous false reports of record of duty status as drivers' logs were inconsistent with toll receipts. GX 28 (Case No. NH-2001-0041-US0020 (March 14, 2001

¹⁴ Mr. Beaudry told OSHA Investigator Kidder, during her investigation of the Complainant's complaint, that R&B had never been cited by DOT for hours of service violations. In lying to OSHA Investigator Kidder regarding the fact that R&B Transportation had been cited by DOT for previous violations of the hours of duty regulations, Mr. Beaudry damaged his credibility.

¹⁵ At hearing, the Respondent objected to the introduction of the DOT enforcement reports and compliance reviews related to R&B, Beaudry Enterprises and BAT Express as hearsay. TR 39, 42, 64-64. However, the regulations governing practice and procedure before the Office of Administrative Law Judges recognizes that there are several exceptions to the hearsay rule. 29 C.F.R. 18.803. One such exception is for public records and reports, statements or data compilations of public office or agencies setting forth the activities of the office or agency or factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. 29 C.F.R. 18.803(8). The DOT enforcement reports and compliance reviews are an exception to the hearsay rule as they are public records or reports or factual findings resulting from an investigation made pursuant to DOT's statutory and regulatory authority. The DOT documents have been admitted.

¹⁶ The other trucking companies Respondent Beaudry is affiliated with, BAT Express and Beaudry Enterprises, were also cited for violations of the hours of duty regulations as a result of a compliance review that was initiated on January 23, 2005, shortly after the Complainant's dismissal from R&B. GX 25; GX 28.

Notice of Claim). At that time, Paul Beaudry told the DOT that drivers were falsifying their records of duty status because they did not know how to properly fill the logs out. GX 28. The DOT informed R&B that in order to abate the hours of duty violations, the Company was to ensure all drivers' records of duty status are accurate by comparing the drivers' records of duty status with other business records, including, but not limited to toll, fuel, repair, and other on the road expense receipts, as well as invoices, bills of lading, dispatch records, trip reports...to verify the accuracy of duty status record entries. GX 28 Notice of Claim March 14, 2001.

The compliance review conducted of R&B Transportation in 2005, following the Complainant's discharge, identified additional violations of the hours of duty regulations including exceeding the permissible hours of duty limits on two occasions in February 2005, and a December 8, 2004 violation for failing to preserve driver's record of duty status supporting documents for 6 months for an instance where the carrier did not maintain toll receipts in a manner that can be identified with each driver. GX 28 NH-2005-0031-US0020 (April 12, 2005). DOT recommended that R&B "[e]stablish a system to control...drivers' hours of service and cautioned R&B "not [to] dispatch drivers who don't have adequate hours available to complete assigned trips legally." GX 28 Compl. Review 4/12/05. The DOT reviews reveal that violations of the hours of duty regulations existed before, during, and after the Complainant's employment with R&B, demonstrating that violations of the hours of duty regulations was not limited to the Complainant, but involved other drivers for Respondents as well, suggesting this was a common practice at R&B. More importantly, following the 2001 Compliance Review, Respondents' were on notice that it was necessary to improve the company's system for monitoring and ensuring that driver's complied with the hours of service regulations.¹⁷ Respondents' failure to implement the DOT's recommendations and to establish a system to control driver's hours of service following the 2001 compliance review of R&B further undercuts Respondents claim that they required drivers to adhere to the regulation. See GX 28 Enforcement Case Rept./Compl. Review R&B 1/4/2001.

Respondents' claim that it disciplined drivers who did not comply with the hours of service requirements is contrary to the evidence. When the Complainant received the write-up for the log infraction, he complained to Mr. Beaudry that he was "biting the hand that feeds you" and "you're telling me to do this, yet you're slapping me on the hand." TR 197-198. Mr. Beaudry responded that another driver was complaining about receiving a notice, but it was something he had to do. While the Complainant was issued one informal notice for his log book during his employment with R&B, he was never disciplined for inaccurate logs or for violating the hours of duty regulations. His testimony on this point was corroborated by Mr. Hill who received several of the informal write-ups but, like Complainant, was never disciplined or threatened with termination. It is apparent that the informal write-ups were simply a paper-exercise as they carried no consequences for the drivers. Indeed, Mr. Beaudry conceded at hearing that Respondents did not have a disciplinary program or procedures for hours of service violations. TR 398.

Respondents also argue that the Complainant was fired for telling Mr. Beaudry, on December 17, 2004, that in the future he was going to park the truck for 34 hours when he ran

¹⁷ Contrary to Mr. Beaudry's and Mr. Hancock's opinions, compliance with the hours of service regulations was a shared responsibility of both the driver and the trucking company.

out of hours. It is important to place this statement in context. The Complainant was increasingly frustrated driving in excess of the hours permitted by regulation to meet the delivery schedule arranged by the Respondents. On the afternoon of December 17, 2004, the Complainant arrived to make a delivery at Burris in Orlando, Florida but he was late getting there because he had had a flat tire. The Respondents made arrangements for the delivery to Burris to be rescheduled for late that evening. On his way back to the Burris facility that evening, the Complainant was delayed by an accident on the interstate and he called Mr. Beaudry at home to obtain permission to pay Burris a late fee if the accident delay caused him to be late in arriving at the Burris facility. During this conversation, which both parties agree became heated, when the Complainant told Mr. Beaudry he was out of hours and he complained that he was going to begin calling his hours in daily so he did not continue to exceed the hours of duty regulations, the Complainant stated he would park the truck for 34 hours when he reached 70 hours in eight days driving limit. The Complainant's statement that he would park the truck for 34 hours when he reached his regulatory driving limit was an expression of frustration at his repeated difficulty over the four months he had worked for the Respondents of trying to comply with the hours of service requirements and satisfy the Respondents' delivery schedule.¹⁸ Respondents' response to the Complainant's statement that he intended to start complying with the hours of service regulations was to fire the Complainant.¹⁹

After careful consideration of the evidence and the parties' arguments, I conclude that the Complainant has established a connection between his protected activity and his termination as the discharge coincided with the protected activity, the Respondents' schedule required drivers to drive in excess of the regulatory requirements in order to meet the delivery and pick-up schedule, and drivers were not disciplined for hours of service violations.

The Respondents next contend that the Complainant was fired for legitimate reasons. Resp. Br. at 22-24. I have addressed many of the Respondents alleged non-discriminatory business reasons in the preceding discussion, including failing to adhere to the hours of duty regulations, driving in violation of the hours of service regulations on the Claimant's last trip, telling Paul Beaudry on December 15 that he had sufficient hours to complete the trip to Florida

¹⁸ The Respondents' reliance on *Bates v. West Bank Containers* (DOL Admin Rev. Board April 28, 2000 (ARB No. 99-055)) is misplaced. In *Bates* the ARB concluded that the employer's unwillingness to employ a driver who reserves the right to drop loads that he considers too heavy is compelling. *Id.* at 9. In *Bates*, the driver believed that hauling more than 80,000 pounds was unsafe and he stated that if he was assigned to pick up another container that was overweight he would drop it. The employer testified there was no 80,000 pound limit on Bates' commercial driving license and the employer was concerned because by dropping a load he considered too heavy in the street, Bates could create a safety hazard for the public. In the present case, the Complainant was concerned about violating hours of duty regulations and he stated he would park the truck rather than continue to drive in violation of the regulation. Unlike the *Bates* case which posed a potential safety hazard to the public, the Claimant's statement that he would park the truck, meaning he would stop driving until he obtained the required rest, did not present a public safety hazard and in fact would permit the Complainant to comply with the regulatory requirements for hours of service.

¹⁹ Mr. Beaudry's opinion that Complainant's statement that he was going to park the truck when he reached 70 hours in eight days was the "straw that broke the camel's back" also supports a finding of causal relationship between the protected activity and the termination as it establishes that the protected activity was a factor in the decision to terminate.

and return to New Hampshire and then calling two days later to report he was out of hours, continuing to drive when he was out of hours and threatening to park the truck. Resp. Br. at 14-18, 22-24. I have determined that the evidence does not support a finding that the Respondents required drivers to comply with the hours of service requirements, or that the Respondents disciplined drivers who violated the hours of service regulations. Thus, to the extent Respondent contends that these events or actions were legitimate business reasons for the discharge, I find they are pretext.

The Respondents offer additional business reasons to support the termination. Resp. Br. at 22-24. Specifically, the Respondents assert that Complainant was fired because he frequently missed appointments as he required an inordinate amount of sleep. The evidence established that the Complainant had missed a couple of appointments in the four months he worked for Respondents. However, there was no evidence that the Respondents had ever discussed the Complainant's alleged excessive sleep requirements or any missed appointments with the Complainant, or that the Complainant was ever disciplined for missing appointments prior to his termination. In addition, the evidence established that Complainant and other drivers, including Scott Hill, would occasionally miss appointments because of unexpected traffic conditions which made it necessary for the Respondents to re-schedule the missed appointments. There was no evidence suggesting that other drivers were disciplined or fired for missing appointments. I find that this purported reason for the Complainant's termination is simply pretext.²⁰

After carefully evaluating the testimony and documentary evidence, I find that that the Respondents' delivery schedule required drivers to exceed the hours of service regulations on a consistent basis, the Respondents were aware of this fact, the Respondents did not have a system or process in place to keep logs and supporting documents together to facilitate review of drivers' logs for compliance with the hours of service regulations after each trip, and Respondents did not have a disciplinary program in place to support compliance with the regulations. The Respondents' assertion that it required its drivers to comply with the hours of duty regulations, that the company processed drivers' logs and toll receipts to ensure compliance with the hours of duty regulations, and that the company disciplined drivers who falsified logs is not supported by the evidence of record.²¹ Accordingly, I conclude that the Respondents'

²⁰ Respondents also stated that Complainant was fired because "he refused to fill out his drivers logs properly." Resp. Br. at 22. However, Mr. Beaudry conceded at the hearing that at the time he fired the Complainant on December 17, 2004, he did not have the Complainant's log book and so he could not have known about any log book deficiencies at the time of discharge. TR 425-427. Therefore, any log book deficiencies could not have factored into Mr. Beaudry's termination decision. Mr. Beaudry's repeated attempts to explain or justify Complainant's discharge on the basis of actions he could not have been aware of at the time he terminated the Complainant, and his changing reasons for the termination undercuts his credibility.

²¹ The Respondents, citing *Allen v. Revco D.S., Inc.*, 91-STA-9 (Sec. Final Dec. and Order, Sept. 24, 1991), contend that the Secretary has determined that where the employer presents evidence of a legitimate business reason for the termination (falsification of logs and records) and where the evidence permits an inference that the employer believed the schedule could be run legally and believed the complainant illegally and unnecessarily falsified his logs to cover a self-imposed violation, the termination was proper. Resp. Br. at 18. In *Allen*, the complainant had previously been cited by DOT for hours of service violations, and following that, the Company provided classroom training to all of its drivers on the hours of service regulations and the proper completion of driving logs and paperwork. Thereafter, when the company gave the complainant an additional delivery assignment, the complainant stated the run could not be completed legally. The company stated that the delivery run could be done legally and

proffered reasons for termination were pretext and that the Complainant has established by a preponderance of the evidence that Respondents fired him for his refusal to continue to drive in violation for the hours of duty regulations.

V. Relief

Having established he was terminated in violation of the STAA, the Complainant is entitled to relief including reinstatement and compensatory damages including back pay. 49 U.S.C § 31105(b)(3)(A). The Complainant does not seek reinstatement. Rather, the Complainant seeks back pay plus interest from the date of his termination on December 17, 2004 to February 27, 2005 when he obtained other employment, as well as travel expenses incurred as a result of litigating his claim.

A. Backpay

The Complainant contends that he began working for Respondents in late August 2004, and states that August 25 was the starting date. Cl. Br. at 22.²² The Complainant's last date of employment with Respondents was December 17, 2004. The Complainant worked a total of 108 days for the Respondents and earned \$14,919.66 for a daily wage rate of \$138.15 ($\$14,919.66 \div 108$).²³ Cl. Br. at 22-23; GX 17. The Complainant was out of work 72 days between his

specifically told the driver to take an eight hour break after he had driven 500 miles. The driver experienced a short delay leaving on the run and the next morning the company telephoned the first delivery stop to inform them that the complainant would be arriving late, only to learn the complainant had been there two hours earlier. When the complainant returned to the employer's facility his supervisor confronted him about the discrepancy in his driving log, complainant admitted falsifying the log and was fired. The company submitted evidence from two other drivers indicating the run could be done legally. The Secretary dismissed the complaint stating that the company's actions including training the complainant on the hours of duty requirements and contacting its customer to inform them the complainant would be late in making his delivery is compelling evidence that the company did not require or expect the complainant to violate the law, thus dispelling the complainant's theory of retaliation. slip. op. at 5-6. In the present matter, the evidence establishes that the Respondents did not have a system in place to accurately monitor drivers logs, it failed to discipline drivers for violating the hours of duty regulations, and the Respondents failed to submit evidence as the specific destinations, the miles required to make the deliveries and the time that the specific runs could be made legally.

Additionally, the fact that two other trucking companies that Paul Beaudry owned or was an officer in, Beaudry Enterprises and BAT Express, had also been cited by the DOT for violations of the hours of service regulations on September 14, 2000 and June 14, 2001, and that the Respondents had not established a system to monitor and assess drivers' compliance with the hours of duty requirements is further support for finding that Respondents did not routinely discipline drivers who drove in violation of the hours of service requirements despite Respondents assertions to the contrary.

²² The Respondents have not challenged August 25, 2004 as the Complainant's initial start date. Nor have they addressed the issue of damages in their brief or reply brief.

²³ At hearing, OSHA Investigator Kidder stated that the Complainant's total earnings were \$14,919.66. She calculated the Complainant's back wages from September 1, 2004 through December 17, 2004 for a total of 101 days arriving at a daily wage rate of \$147.72. TR 324-330. As the Complainant asserts his start date was in late August, using August 25, his job tenure was actually 108 days rather than the 101 days Investigator Kidder used to

discharge on December 17, 2004, and the start of his new job on February 27, 2005, for a wage loss of \$9,946.80. Cl. Br. at 23. Therefore, I find that the Complainant is entitled to an award of back pay in the amount of \$9,946.80 plus interest.

B. Interest

The Complainant is entitled to pre-judgment interest on his back pay award, calculated in accordance with 26 U.S.C. 6621. See *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-30 (ARB Mar. 31, 2005); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, slip op at 17-18.

C. Other Compensatory Damages

The Complainant submitted evidence showing that he traveled by vehicle for a total of 1873 miles in litigating his claim. The Complainant stated his vehicle got 14 miles to the gallon and estimated his tolls at \$47.00. There was no evidence submitted as to the price of gasoline. The Complainant urges the Court to use either the federal mileage reimbursement rate of .445 cents per mile or assuming a conservative \$2.00 per gallon to calculate the reimbursement due the Complainant. Using the federal mileage rate multiplied by the miles driven results in a reimbursement amount of \$833.49 (1873 miles x .445 cents per mile). When the \$47 toll figure is added, under this approach, the Complainant is entitled to total reimbursement in the amount of \$880.49. The alternative method the Complainant suggests using a conservative estimate of gas prices, 133.79 (1873 ÷ 14 miles per gallon) multiplied by \$2 per gallon results in reimbursement of \$267.58 plus \$47.00 tolls for a total reimbursement amount of \$314.58. After considering all of the evidence, I conclude that the second approach to calculating travel reimbursement expenses provides the Complainant a fair and adequate reimbursement for travel expenses incurred some time ago and which are based in part on estimates of expenses rather than receipts for actual expenses incurred. Therefore, I find that the Complainant is entitled to \$314.58 as reimbursement for travel expenses associated with litigation of his claim.

calculate the back wages due. Absent any objection from the Respondents, I find that the Complainant began work on August 25, 2004 and worked a total of 108 days.

VI. RECOMMENDED ORDER

For the foregoing reasons, I hereby Recommend that the Complainant be awarded the following remedy:

1. Respondents shall pay the Complainant back pay in the amount of \$9,946, plus interest calculated pursuant to 26 U.S.C. 6621;
2. Respondents shall pay the Complainant \$314.58 in travel expenses.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

The order directing reinstatement of the complainant is effect immediately upon receipt of the decision by the respondent. The relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary 29 C.F.R. § 1978.109(b).