In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

PROSECUTING PARTY,

and

KENNETH HELGREN,

COMPLAINANT,

v.

MINNESOTA CORN PROCESSORS, INC.,

RESPONDENT.

ARB CASE NO. 01-042

ALJ CASE NO. 2000-STA-0044

DATE: July 31, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Prosecuting Party*:**
Howard Radzely, Esq., Joseph M. Woodward, Esq., Donald G. Shaloub, Esq., Daniel J. Mick, Esq., Mark J. Lerner, Esq., Mark Richter, Esq., *U. S. Department of Labor, Washington, D. C.*

***For the Complainant*:**
Kenneth D. Helgren, *pro se, Puyallup, Washington*

For the Respondent:
Philip L. Ross, Esq., *Littler Mendelson, P.C., San Francisco, California*

FINAL DECISION AND ORDER

Kenneth Helgren complained that his employer, Minnesota Corn Processors (MCP), suspended and subsequently discharged him for refusing to drive a commercial vehicle that he believed to be unsafe. The employee protection provisions of the Surface Transportation

Assistance Act (STAA) prohibit discrimination against an employee for engaging in activities that are protected under the Act. 49 U.S.C.A. § 31105 (West 1997). In his Recommended Decision and Order (R. D. & O.), the Administrative Law Judge (ALJ) concluded that MCP had terminated Helgren's employment in violation of the STAA. We find the ALJ's determination that MCP violated the STAA reversible error, and we deny the complaint.

BACKGROUND

MCP produces and sells corn syrups and other sugar products, and from its facility at Puyallup, Washington, it distributes these products throughout the Pacific Northwest. R. D. & O. at 6. Kenneth Helgren worked as a truck driver/product handler for MCP at its Puyallup facility from May 17, 1999, to February 25, 2000. JX 1.[1] Helgren and MCP's five other drivers were each assigned a specific truck, but they also drove trucks other than the one they were assigned. Occasionally, each driver was scheduled to drive truck T416. The mechanical condition of T416 is at the heart of this dispute. R. D. & O. at 14.

Driver Vehicle Inspection Records. Pursuant to the Department of Transportation's (DOT) Federal Motor Carrier Safety Regulations (FMCSR), MCP drivers inspected the vehicles they drove both before and after completing their deliveries. *Id.* at 11. The drivers recorded the information from these pre-trip and post-trip inspections, including any problems or defects found, on the truck's Driver's Vehicle Inspection Report (DVIR). *Id.* After completing the DVIR at the end of a trip, the drivers placed a copy of it in an assigned box in the office and kept a second copy in the truck. *Id.* The Assistant Terminal Manager, Jesse Gonzalez, reviewed the completed DVIRs. If a DVIR indicated a condition that required a mechanic's inspection or repair, Gonzales made another copy of the DVIR, highlighted the problem, and left the copy for the mechanic to review. *Id.* at 6, 11. After reviewing the DVIR, the mechanic performed the necessary maintenance or repair, noted on the DVIR the work he had done, and returned the DVIR to a place in the office where it would be accessible to the drivers. *Id.*

Truck 416. This truck's multiple mechanical problems were first documented on January 7, 2000. *Id.* at 14-19. Fifteen times between January 7 and February 18, 2000, the day Helgren was suspended, various drivers reported problems with T416, almost all of them involving the truck's steering and alignment, the front end "shaking" and "shimmying," or the brake system. *Id.* After receiving these reports, MCP had several mechanics and different repair shops attempt to fix T416. None of these efforts completely or permanently resolved the reported conditions.[2] *Id.*

Refusal to Drive. On February 18, 2000, Helgren was assigned to drive T416 on his second delivery of the day. *Id.* at 28. When he reviewed the DVIRs for T416, Helgren

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[1] Citations to the record are as follows: "Tr." for the hearing transcript and "ALJX," "CX," "RX," and "JX" for the Administrative Law Judge's, Complainant's, Respondent's and Joint Exhibits, respectively.

[2] The front end problems continued well after the termination of Helgren's employment. *Id.* at 19. The repair made on March 28, 2000, may have finally corrected the problem. *Id.*

discovered that the truck still had the same front end vibration problems that he and the other drivers had repeatedly reported. He also noticed that as recently as the day before, driver Jensen had reported problems with the front end and that the DVIR for that day did not indicate that the problems had been corrected. *Id.* at 19, 28. After confirming with Jensen that the problems noted on February 17 were the same problems previously reported, Helgren went to Gonzales and asked to substitute another truck for T416. *Id.* at 29-31. Helgren said he wanted to switch trucks because Jensen had noted something wrong with T416 on the February 17 DVIR, and based on the absence of a repair notation or a mechanic's signature on the DVIR, no repair had been made. *Id*. Gonzales said there was no problem with T416 and told Helgren the truck was safe to drive. Gonzales and Helgren exchanged angry words, and Gonzales ordered Helgren to go to lunch. *Id.*

After a short time, Gonzales and the terminal manager, Bill Thomas, approached Helgren and asked if he was refusing to take the load. Helgren replied that he was not refusing to take the load, but that he was refusing to take T416. *Id.* Thomas assured Helgren that mechanics had checked the truck and had indicated that it was safe to drive. He further pointed out that, if Helgren continued in his refusal to drive T416, he would be suspended. *Id.* Helgren refused to drive T416 so MCP summarily suspended, and a week later, terminated his employment. *Id.* and CX 6. At the administrative hearing, Helgren testified that on February 18, 2000, he believed that T416 was not safe to drive. Tr. at 308-309.

On March 1, 2000, Helgren filed a STAA whistleblower complaint with the Occupational Safety and Health Administration (OSHA). R. D. & O. at 2. OSHA investigated the complaint, and on May 25, 2000, issued findings. The Department of Labor's Assistant Secretary for OSHA found reasonable cause to believe that MCP violated STAA by suspending and terminating Helgren. *Id.* at 2, 32. MCP objected to the finding, and the ALJ conducted a five-day administrative hearing in Tacoma, Washington, on August 15-18 and August 21, 2000. *Id.* 3-4. The ALJ issued his Recommended Decision and Order on February 21, 2001.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to decide this case pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and the Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

When reviewing STAA cases, the ARB must consider as conclusive all of the ALJ's findings of fact which are supported by substantial evidence on the record as a whole. 29 C.F.R. § 1978.109(c)(3) (2002). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Accordingly, we review the ALJ's conclusions of law de novo. *Dickson v. Butler Motor Transit/Coach US*, ARB No. 02-098, ALJ No. 01-STA-039, slip op. at 4 (ARB July 25, 2003).

DISCUSSION

The employee protection provisions of the STAA provide in pertinent part:

> (a) Prohibitions (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because
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> * * *
>
> (B) the employee refuses to operate a vehicle because . . .
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial vehicle safety or health; or
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> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
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> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105(a).

To prevail in a STAA case, the complainant must prove that: (1) he engaged in protected activity and the employer was aware of the protected activity; (2) the employer discharged, disciplined or discriminated against the complainant; and (3) there is a causal connection between the complainant's protected activity and the adverse employment action. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Moon v. Transp. Drivers, Inc*., 836 F.2d 226, 229 (6th Cir. 1987).

The ALJ addressed two legal issues: (1) whether Helgren's refusal to drive because of his apprehension of serious injury constituted protected activity under section (a)(1)(B)(ii) of the STAA (hereinafter referred to as section (ii)); and (2) whether Helgren's refusal to drive because it would violate a federal motor vehicle safety regulation constituted protected activity under section (a)(1)(B)(i) of the STAA (hereinafter referred to as section (i)). R. D. & O. at 34, 35.

Apprehension of Serious Injury. The Assistant Secretary (prosecuting party) contended that MCP violated section (ii). She specifically alleged that: (1) Helgren engaged in protected activity by refusing to drive a truck he feared might cause serious injury, (2) MCP knew of his refusal to drive, and (3) suspended and fired him because of it. *Id*. After reviewing the evidence, the ALJ found that Helgren's apprehension of serious injury was not reasonable,

and therefore concluded that Helgren's refusal to drive was not protected under the STAA.[3] *Id*. at 35. We agree.

An employee's refusal to drive because of an apprehension of serious injury, to be protected under STAA, must be reasonable based on the information available to the employee at the time of the refusal. *Brinks, Inc. v. Herman*, 148 F.3d 175, 180-181 (2d Cir. 1998); *see* 49 U.S.C.A. § 31105(a)(2). To determine whether Helgren's refusal to drive was reasonable, the ALJ carefully examined the information available to Helgren on February 18, 2000, and found two items particularly significant: (1) no driver, including Helgren, testified that he had problems controlling or safely operating T416 because of the various front end vibrations, and (2) no other driver testified that he believed T416 to be unsafe. R. D. & O. at 34-35. Based on these and the other specific findings about safety, which are supported by substantial evidence on the record as a whole, the ALJ found that Helgren's apprehension of serious injury was not reasonable. Therefore, he correctly concluded that Helgren's refusal to drive was not protected activity under the STAA's section (ii). *Id.*

Violation of Federal Motor Vehicle Regulations. On the other hand, in his second ruling, the ALJ determined that Helgren's refusal to drive was protected under the STAA's section (i) because driving T416 on February 18, 2000, would have violated commercial motor vehicle safety regulations, to wit, 49 C.F.R. §§ 396.11 and 396.13 (2001). *Id.* at 38, Tr. at 346-347. These Federal Motor Carrier Safety Regulations prohibit operation of a vehicle if identified defects or deficiencies in that vehicle have not been certified as corrected or as not needing correction.

Driver Jensen reported in the February 17 DVIR that T416 had multiple deficiencies, including problems with the front axle and steering. *Id*. at 26-27. The next day, Helgren reviewed the T416 DVIR and told management that he was not driving because the identified problems had not been repaired. *Id*. at 28-29, 31. Thomas and Gonzales assured Helgren that the various mechanics who worked on T416 had indicated that its problems did not cause the truck to be unsafe, but they made no such representation or notation on the DVIR as § 396.11 requires.[4] *Id*. at 28.

The ALJ found that the defects and deficiencies identified on the February 17 T416 DVIR triggered MCP's obligation to certify either that repairs had already been made or that repairs were unnecessary. *Id*. at 38. Because MCP failed to complete the appropriate

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[3] The ALJ's numerous findings of fact are thorough and detailed as are his credibility determinations. The clarity of these findings greatly facilitated the Board's efforts.

[4] 49 C.F.R. § 396.11(c)(1) reads as follows:

> (1) Every motor carrier or its agent shall certify on the original driver vehicle inspection report which lists any defect or deficiency that the defect or deficiency has been repaired or that repair is unnecessary before the vehicle is operated again.

certification on the original DVIR before ordering Helgren to drive T416, the ALJ found that Helgren's refusal to drive was protected and concluded that MCP violated section (i) of STAA. *Id*. This conclusion, however, constitutes reversible error and we therefore vacate it.

The ALJ twice noted that the prosecuting party had alleged that Helgren's refusal to drive was protected under section (i) because MCP violated the DOT regulations by failing to certify that the T416 defects had been repaired or that repair was unnecessary. *Id*. at 34, 35. However, he failed to indicate where, when or to whom such an allegation was made, and the record does not reflect any allegation, attempt to prove, or argument by the prosecuting party regarding section (i).

The fundamental elements of procedural due process are notice and an opportunity to be heard. *Yellow Freight Sys., Inc., v. Martin*, 954 F.2d 353, 356 (6th Cir. 1992) (citing *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950)). Under the Administrative Procedure Act, persons entitled to a hearing shall be timely informed of (1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. 5 U.S.C.A. § 554(b). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971) (error for Commission to rule under theory which was not presented during hearing).

Respondents in STAA cases have the right to know the theory on which the agency will proceed. The Sixth Circuit addressed this point when it reviewed the Secretary's final decision and order in a STAA "refusal to drive" case. *Yellow Freight v. Martin*, 954 F.2d at 353. The court held that Yellow Freight had been deprived of due process because the Secretary decided the case under a section of the STAA that was neither charged in any notice given Yellow Freight nor tried by the express or implied consent of the parties. *Yellow Freight v. Martin*, 954 F.2d at 357-359.

We have carefully reviewed the record to determine whether OSHA notified MCP that it was being charged with a section (i) STAA violation.[5] None of the record documents contains an allegation of a section (i) violation. Furthermore, a section (i) violation was neither raised at the administrative hearing nor tried by express or implied consent.[6]

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[5] We reviewed the OSHA Investigator's Discrimination Case Activity Worksheet, the Assistant Secretary's Findings and Preliminary Order, and the Prehearing Statement of the Prosecuting Party. ALJX 4, 1, 20.

[6] During cross-examination, Helgren stated that MCP failed to have a mechanic sign off on the DVIR, and therefore, violated the regulations at § 396.11. Tr. at 284, 348-350. Helgren further testified that he had told the OSHA investigator about his view that MCP violated the regulations regarding DVIRs. *Id*. At the hearing, the prosecuting party neither explored nor developed Helgren's testimony on this point. Furthermore, the prosecuting party does not argue, and we do not find, these passing statements sufficient to give MCP notice that it was being charged with a section (i) violation.

Because we find that MCP was never given notice of a section (i) violation and was never given an opportunity to defend against such a charge, the ALJ's sua sponte finding and conclusion that MCP violated this section of STAA is reversible error and is vacated. *See Kelly v. Heartland Express, Inc.*, ARB No. 00-049, ALJ No. 1999-STA-29 (ARB Oct. 28, 2002) (affirming ALJ decision not to consider complainant's theories raised for the first time in the post-hearing brief and dismissing complaint); *Douglas v. Owens*, 50 F.3d 1226 (3d Cir. 1995) (allowing jury to render a verdict on a theory of liability which was not tried was reversible error).

CONCLUSION

For the above-stated reasons, the ALJ's conclusion that MCP did not violate section (a)(1)(B)(ii) of the STAA is **AFFIRMED.** His conclusion that MCP violated section (a)(1)(B)(i) of the STAA is **REVERSED** and **VACATED.** Accordingly, Helgren's complaint is **DENIED.**

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge