ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

WAYNE LAIDLER,	*	
Complainant	*	
	*	ARB Case No. 15-087
v.	*	
	*	ALJ Case No. 2014-FRS-00099
GRAND TRUNK WESTERN RAILROAD COMPANY,	*	
Respondent.	*	

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS *AMICUS CURIAE*

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STATEMENT OF INTEREST

Pursuant to 29 C.F.R. 1982.108(a)(1) and the Administrative Review Board's ("Board") order of October 21, 2015, the Assistant Secretary of Labor for Occupational Safety and Health submits this brief as *amicus curiae*. The Occupational Safety and Health Administration ("OSHA") is responsible for investigating complaints of retaliation and enforcing 49 U.S.C. 20109, the Federal Railroad Safety Act ("FRSA" or "Act") whistleblower protection provision, along with several other anti-retaliation provisions that, like FRSA, prohibit retaliation against an employee who in good faith refuses to work when the employee has a reasonable belief that doing so presents a risk of serious harm to the employee. OSHA has a significant interest in ensuring that the appropriate legal standards and burdens of proof are applied when a railroad employee alleges retaliation for a protected work refusal under this Act. OSHA also has a substantial interest in ensuring that the remedies afforded to FRSA whistleblower complainants are applied correctly, in accordance with the Department of Labor's regulations and federal law.

STATEMENT OF THE ISSUES

1) Whether the ALJ applied the correct legal standards in determining that Laidler engaged in a protected work refusal under FRSA?

2) Whether the ALJ's decision to award punitive damages is consistent with applicable law?

3) Whether the ALJ erred in awarding prejudgment and postjudgment interest according the interest rate in 26 U.S.C. 6621 compounded quarterly?

STATEMENT OF THE CASE

A. Procedural History

Wayne Laidler filed a complaint with OSHA on March 7, 2013, alleging that Grand Trunk Western Railroad Company ("GTW" or "Railroad") violated section 20109(b) of FRSA, 49 U.S.C. 20109(b), by discharging him in retaliation for his protected refusal to perform a

required task under hazardous conditions. OSHA found reasonable cause to believe that GTW had violated FRSA. GTW then objected to this finding and requested a hearing before an administrative law judge ("ALJ"). On August 12, 2015, following a hearing, ALJ Christine L. Kirby found that GTW had retaliated against Laidler in violation of FRSA and ordered reinstatement, compensatory and punitive damages, and other remedies. GTW filed a petition for review of the ALJ's order on September 24, 2015.

B. Brief Summary of the Facts

On the morning of December 15, 2012, Laidler was the conductor on a train traveling from Port Huron, Michigan to Battle Creek, Michigan. *Laidler v. Grand Trunk W. R.R. Co.*, No. 2014-FRS-00099, slip op. at 9 (ALJ Aug. 13, 2015) (hereinafter ALJ D&O). Shortly before 4:00 a.m., Laidler and the train's engineer, Ted Freeman, were performing required tests and completing paperwork on the train after stopping to pick up cars at the Flint train yard. *Id*. at 9–10. As a result of adding additional cars and "stretching" the train to test the coupling joints, the train's head engine was positioned on a bridge spanning Schwartz Creek. *Id*. at 5, 50.

At the same time, a second train conducted by trainmaster Jacob Hommerding approached on the oncoming track. ALJ D&O at 10, 56. GTW's Operating Rule 523, *Inspecting Passing Trains*, stated in part that:

> "when duties and terrain permit, at least two crew members of a standing train and other employees along the right-of-way, must inspect passing trains on the ground on both sides of the track. At locations where trains will meet, the train to arrive second must notify the first train when they pass the approach to the siding, to allow crew members to be in position for inspection."

Id. at 34. Hommerding was not aware that Laidler's train was waiting to depart and did not provide a radio notification to enable Laidler and Freeman to prepare for this "roll-by" inspection. *Id*. at 10, 56. Laidler noticed Hommerding's train when it was 500 to 1,000 feet away, approaching at track speed. *Id*. at 56. Due to the head engine's position on the bridge,

Laidler and Freeman felt that the surrounding terrain made it unsafe to dismount the train without risk of serious injury. *Id*. at 6, 10. They therefore did not perform the Rule 523 roll-by inspection from the ground. *Id*. at 47.[1]

On February 1, 2013, GTW conducted an investigative hearing into Laidler's refusal to perform a roll-by inspection on the morning of December 15. ALJ D&O at 30. The interrogating officer heard testimony from Laidler and Hommerding. *Id*. at 30–32. Both presented conflicting evidence regarding the location of Laidler's head engine at the time Hommerding's train passed. *Id*. Hommerding claimed that the train's engine was not positioned on the Schwartz Creek Bridge and that the terrain would have allowed inspection from at least one side of the train. *Id*. at 32.

On February 26, 2013, GTW's general manager, Phillip Tassin, issued Laidler a Dismissal of Service letter. ALJ D&O at 33. The letter stated that the record of the investigation contained credible testimony and substantial evidence that Laidler had violated GTW's Operating Rules 523 and 100 (which stated that employees were to follow operating rules). *Id*. at 33, 57 n.18. The letter informed Laidler that he was dismissed from service. *Id*. at 33.

C. The ALJ's Decision and Order

On August 12, 2015, following a hearing, the ALJ issued her Decision and Order finding that GTW had retaliated against Laidler in violation of FRSA by discharging him for his refusal to perform a roll-by inspection from the ground under unsafe conditions. ALJ D&O at 57. Consistent with OSHA's findings, the ALJ found that Laidler could not safely perform a roll-by inspection of the passing train from the ground because the head of his train was located on the

[1] At the hearing before the ALJ, both Laidler and Freeman testified that they inspected the passing train from the cab of their own train. ALJ D&O at 6, 10. However, they did not inform GTW that they had done so. *Id*. at 12. According to Laidler's testimony, this was because he believed that an inspection from the cab was not a proper Rule 523 roll-by inspection. *Id*.

Schwartz Creek Bridge, where it was hazardous to dismount the train. *Id*. at 55–56. The ALJ further found that Laidler had no reasonable alternative to refusing to perform the inspection because GTW's operating rules did not allow him to perform the roll-by inspection from any location other than the ground. *Id*. at 55 & n.17.

Finally, the ALJ found that Laidler lacked the time to eliminate the danger or to notify GTW of his intention not to perform the inspection unless the condition was corrected immediately. ALJ D&O at 56. Laidler did not receive the required Rule 523 radio warning of a passing train and did not know of the passing train's approach until eight to thirty seconds before it arrived and he had no time to contact the dispatcher or inform GTW that he and Freeman could not perform the inspection. *Id*. Accordingly, the ALJ found that Laidler's refusal to dismount his train and perform a roll-by inspection constituted protected activity under FRSA. *Id*. at 57.

GTW's sole proffered reason for discharging Laidler was his failure to comply with Rule 523. ALJ D&O at 57. Thus, the ALJ found that Laidler's protected refusal to perform a roll-by inspection from the ground necessarily contributed to GTW's decision to fire him and GTW failed to show by clear and convincing evidence that it would have taken the same action in the absence of the work refusal. *Id*. at 57. In her Order, the ALJ awarded Laidler reinstatement, back pay with interest, and $100,000 in punitive damages, among other remedies. *Id*. at 64–65.

ARGUMENT

I. The ALJ's Decision on the Merits Appears to be Based on Substantial Evidence and is Consistent with Applicable Law

GTW seeks review of the ALJ's determination that Laidler engaged in protected activity under FRSA. Pet'r's Brief in Supp. Pet. for Review ("Pet'r's Supp. Br.") at 8. Specifically, GTW challenges the ALJ's findings that Laidler had no reasonable alternative to his refusal to work and that he lacked sufficient time to provide notice to GTW of his intention not to perform the roll-by inspection from the ground. *Id*. at 5–7. The evidence that the ALJ relied on in reaching her decision is consistent with the evidence that OSHA encountered during its investigation of this case. Thus, OSHA believes the ALJ's decision is based on substantial evidence, is consistent with applicable law, and should be affirmed. *See, e.g.*, 29 C.F.R. 1982.110(b); *Consol. Rail Corp. v. U.S. Dep't of Labor*, 567 F. App'x 334, 337 (6th Cir. 2014) (unpublished), *aff'g Bailey v. Consol. Rail Corp.***,** ARB Case Nos. 13-030, 13-033, 2013 WL 1874825, at *1 (ARB Apr. 22, 2013) (explaining substantial evidence review of the ALJ's decision under FRSA).

A. The ALJ reasonably concluded that Laidler lacked an alternative to his refusal to work.

Section 20109(b) of FRSA protects an employee's refusal to work when confronted by a hazardous safety or security condition related to the performance of his or her duties when a number of criteria are met. 49 U.S.C. 20109(b)(1). Those criteria are that:

> (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
>
> (B) a reasonable individual in the circumstances then confronting the employee would conclude that—
>
> (i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, . . . unless the condition is corrected . . . .

See 49 U.S.C. 20109(b)(2). The exact contours of the requirement that "no reasonable alternative to the refusal" be available to the employee have yet to be defined by the Board or the courts. Here, however, the evidence strongly suggests that the requirement was satisfied.

According to GTW, the ALJ erred in finding that Laidler lacked a reasonable alternative because Laidler in fact utilized an alternative inspection method, an inspection from the cab of his train. Pet'r's Supp. Br. at 8. GTW contends that this was a reasonable alternative because the union had circulated a memo to its members noting that a roll-by inspection from the platform would be acceptable where the terrain was unsafe, *id.* at 11, and because Laidler testified that he believed he could do a reasonable roll-by inspection from inside the cab, i*d*. at 9. GTW argues that the ALJ impermissibly relieved Laidler of his burden of proving that he engaged in protected activity when she found that Laidler was not "provided with a reasonable alternative, sanctioned by and explained by [GTW] . . . ." *Id*. at 12 (quoting ALJ D&O at 55).

The ALJ's decision points to substantial evidence supporting the conclusion that Laidler was disciplined specifically for failing to perform a roll by inspection *from the ground*. *See* ALJ D&O at 55 n.17. At the hearing before the ALJ, GTW maintained that Laidler's train was in a safe location to perform the roll-by inspection from the ground, and therefore no alternative inspection was permitted. *See id*. at 3, 22–23, 47. Tassin testified that determining whether Laidler's train was located on the Schwartz Creek Bridge was a key factor in the company's decision to discharge him. *Id*. at 21. Indeed, in its Statement of the Case, GTW asserted that Laidler was lying about the location of the train, that there was no need to perform a roll-by

inspection from an alternative location, and that Laidler had lied about performing an inspection from the cab. *Id*. at 3. Therefore, the ALJ determined that "whether it might have been permissible, under some circumstances, to perform a roll-by inspection from an alternate location is irrelevant" because Laidler was disciplined "for failing to dismount his train and perform that inspection from the ground in accordance with Rule 523." *Id*. at 55 n.17.

In OSHA's view, based on the evidence cited in the ALJ's decision, which is consistent with the evidence OSHA relied on in its investigation, because any alternative inspection Laidler might have performed without dismounting the train would have resulted in discipline, no such method was a reasonable alternative, regardless of whether it originated from official GTW policy or some other source. Therefore, the ALJ was correct in finding that Laidler had no reasonable alternative to his refusal to perform the roll-by inspection from the ground.

B. The ALJ reasonably concluded that Laidler lacked time to notify GTW of the hazardous condition and his intent not to work.

Section 20109(b)(1)(B) provides that a work refusal is protected only if the employee, "where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work . . . unless the condition is corrected immediately . . . ." 49 U.S.C. 20109(b)(2)(C). Here, Hommerding failed to give Laidler the GTW-required radio warning to conduct a roll-by inspection and the ALJ determined that Laidler had roughly eight to thirty seconds to respond to the approach of Hommerding's train. ALJ D&O at 56. In GTW's view, because Laidler needed no more than a few seconds to notify the Yardmaster via radio of his intention not to perform the roll-by, the ALJ erred in "excusing" him from the statute's notification requirement. Pet'r's Supp. Br. at 16–19. OSHA disagrees.

The statutory language of 49 U.S.C. 20109(b) is similar to the standard applied to work refusals under a number of whistleblower statutes enforced by the Department of Labor. For

example, for a work refusal to be protected under Section 11(c) of the Occupational Safety and Health Act ("OSH Act") or the Surface Transportation Assistance Act ("STAA"), the employee generally must have sought from the employer, and been unable to obtain, correction of the hazardous condition. *See* 29 U.S.C. 660(c); 29 C.F.R. 1977.12(b)(2) (OSH Act); 49 U.S.C. §31105(a)(2) (STAA). Although STAA contains no qualifying language for this requirement, the regulations implementing Section 11(c), like FRSA, require notification "where possible." 29 C.F.R. 1977.12(b)(2). A similar standard has been developed by the Federal Mine Safety and Health Review Commission ("FMSHRC") to enforce the whistleblower provisions of the Mine Safety and Health Act ("Mine Act"). FMSHRC outlined the requirements under the Mine Act as follows:

> "Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. 'Reasonable possibility' may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word 'ordinarily' in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances—such as futility—may excuse a failure to communicate."

Simpson v. Fed. Mine Safety & Health Review Comm'n, 842 F.2d 453, 459 (D.C. Cir. 1988) (quoting *Dunmire & Estle v. N. Coal Co.*, 4 FMSHRC 126, 133 (FMSHRC 1982)).

The purpose of the notification requirement in work refusal cases is to give the employer an opportunity to respond to the hazard before a work refusal is required. *See Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 84 n.11 (2d Cir. 1994) ("[T]he requirement under [STAA] that a complainant communicate the safety defect to an employer 'serves to permit timely correction of the problem, thus promoting safety, to permit the employer to allay worker fears if the hazard is nonexistent, and to reduce bad faith work refusals.'") (quoting *LeBlanc v. Fogleman Truck Lines*, No. 89–STA–8, slip op. at 64, 67 (Sec'y Dec. 20, 1989), *aff'd sub nom. Fogleman Truck*

Lines v. Dole, 931 F.2d 890 (5th Cir. 1991) (Table)). This purpose is evident in the language of section 20109, which requires notification of an intention not to perform a task "unless the condition is corrected immediately." 49 U.S.C. 20109(b)(2)(C). In the context of OSH Act work refusals, the Supreme Court has recognized that situations may arise where "[an] employee has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger." *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10–11 (1980).

In this case, the ALJ determined as a factual matter that Laidler became aware of Hommerding's train when it was 500–1,000 feet away, approaching at track speed. ALJ D&O at 56. She concluded that this gave Laidler less than thirty seconds to respond. *Id*. The ALJ could reasonably determine that these were the type of "exigent circumstances require[ing] swift reaction" that render notification not "reasonably possible." *See Simpson*, 842 F.2d at 459. Furthermore, had Laidler communicated the hazard to the dispatcher in the few seconds before Hommerding's train passed, it is unlikely that GTW could have corrected the hazard in time for Laidler to perform a roll by inspection from the ground, nor was there time for GTW to instruct Laidler regarding an alternative inspection. Thus, the purpose of the statute's notification requirement—giving the railroad an opportunity to abate the hazardous condition prior to the work refusal—could not have been served in this case.

In OSHA's view, the ALJ's decision regarding Laidler's protected activity is thoroughly reasoned and the decision itself indicates that substantial evidence on the record as a whole supports the ALJ's conclusion that it was not reasonably possible for Laidler to have notified GTW in advance of his refusal to perform a roll by inspection. The ARB should affirm the ALJ's finding that Laidler engaged in a protected work refusal under FRSA.

II. The ALJ's Punitive Damages Decision was Not Impermissible

Under FRSA, "[r]elief ... may include punitive damages in an amount not to exceed $250,000." 49 U.S.C. 20109(e)(3). The Supreme Court has held that punitive damages are appropriate where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Smith v. Wade*, 461 U.S. 30, 51 (1983). The purpose of punitive damages is "to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Id*. at 54 (quoting Restatement (Second) of Torts § 908(1) (1977)) (alterations omitted); *See Youngermann .v United Parcel Servs., Inc.*, ARB Case No. 11-056, 2013 WL 1182311, at *4 (ARB Feb. 27, 2013) (discussing applicability of *Smith* and *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999), to whistleblower cases).

In this case, the ALJ awarded Laidler $100,000 in punitive damages, less than half the allowable amount, upon a finding that GTW singled out Laidler for disciplinary action, conducted an investigation that amounted to a "sham," and "ignored objective evidence of record" in reaching its decision to terminate him. ALJ D&O at 61–64. This finding was consistent with the evidence that OSHA relied on in assessing punitive damages during its investigation, and thus OSHA believes that substantial evidence on the record as a whole likely supports the ALJ's determination and demonstrates GTW's reckless disregard for Laidler's rights under FRSA.

GTW challenges the ALJ's punitive damages award on two grounds. First, GTW contends that "[t]he ALJ's decision to award punitive damages despite finding that Tassin genuinely believed that Laidler was lying about the location of his train was wrong as a matter of law." Pet'r's Supp. Br. at 20. GTW further asserts that Tassin's honest belief "precludes a finding that Tassin acted with the sort of reckless disregard for Laidler's FRSA rights necessary to support an award of punitive damages." *Id*. at 21.

According to the ALJ's findings, Tassin's belief that the train was not positioned on the Schwartz Creek Bridge was not based on the objective evidence and eye witness testimony presented at the disciplinary hearing. ALJ D&O at 62. Tassin also did not conduct a re-enactment of the circumstances until after the disciplinary decision had been made. *Id*. Moreover, he made no effort to determine whether Laidler's train was equipped with a GPS system, video camera, or event recorder "which would have provided relevant and indisputable information as to the location of [Laidler's] engine and how far the train had traveled." *Id*. Based on these findings of fact, the ALJ reasonably found that Tassin's views on the location of the train, however genuine, were formed without reference to the available objective evidence of the train's location. In disciplining Laidler without considering that evidence, Tassin acted in reckless disregard to Laidler's protected right under FRSA to refuse to perform an unsafe task.

GTW next contends that the ALJ's punitive damages decision contravenes the Railway Labor Act ("RLA"). The RLA grants exclusive jurisdiction to the National Railroad Adjustment Board ("NRAB"), or certain arbitration panels established under that statute, over "minor disputes" involving interpretation of a collective bargaining agreement ("CBA") in the railroad industry. 45 U.S.C. 151 First (i). "Minor disputes" are those that "gro[w] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (quoting 45 U.S.C. 151 First (i)). GTW asserts that the ALJ's decision to award punitive damages "was based primarily on her conclusion that Tassin did not comply with the requirements for disciplinary investigations under the collective bargaining agreement," and it is therefore preempted by the RLA. Pet'r's Supp. Br. at 22.

The Supreme Court made clear in *Norris* that "minor disputes" are those "that involve duties and rights created or defined by the CBA." 512 U.S. at 258. Importantly, "the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA." *Id*. at 256. A right is independent if it cannot be "conclusively resolved by reference to an existing CBA." *Id*. at 263 (internal quotation marks and citation omitted). Courts have frequently found that rights arising under state and federal anti-discrimination statutes are independent rights and not subject to RLA preemption. *See, e.g., id.* at 258 ("Wholly apart from any provision of the CBA, petitioners had a state-law obligation not to fire respondent in violation of public policy or in retaliation for whistle-blowing."); *Felt v. Atchison, Topeka & Santa Fe Ry. Co.*, 60 F.3d 1416, 1419-20 (9th Cir. 1995) (finding that Title VII rights "exist independent of the collective bargaining agreement" and "cannot be conclusively resolved merely by consulting the CBA") (citations and internal quotation marks omitted).

The mere fact that a decision maker references a CBA in resolving a case does not trigger RLA preemption. *See Livadas v. Bradshaw*, 512 U.S. 107, 108 (1994) ("[W]hen . . . the meaning of contract terms is not in dispute, the bare fact that a collective-bargaining agreement is consulted for damage computation is no reason to extinguish the state-law claim."); *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 831–34 (7th Cir. 2014) ("[T]he fact that a collective bargaining agreement might be consulted in resolving a plaintiff's claims is insufficient to trigger RLA preclusion."); *Carmona v. Sw. Airlines Co.*, 536 F.3d 344, 349 (5th Cir. 2008) ("[F]or the federal courts to have subject matter jurisdiction over [discrimination] claims . . . do[es] not require that the CBA be irrelevant to the dispute; either party may still use the CBA to support the credibility of its claims.") (internal quotation marks omitted); *Brisbois v. Soo Line R.R. Co.*,

No. 15-CV-0570, 2015 WL 5009048, at *4 (D. Minn. Aug. 21, 2015) ("In the course of making these determinations, the Court may have to consult the CBA; after all, in a unionized workplace, just about everything is covered by a CBA.").

Under FRSA and other anti-discrimination statutes, the courts, the ALJs, and the ARB consistently consider an employer's investigative and disciplinary processes when evaluating whistleblower and other discrimination claims, including whether to award punitive damages. *See, e.g.*, *Barati v. Metro-N. R.R. Commuter R.R. Co.*, 939 F. Supp. 2d 143, 146 (D. Conn. 2013) (finding that the defendant's violation of its own policies in discharging the plaintiff was one factor supporting a punitive damages award); *Fink v. R&L Transfer, Inc.*, ARB Case No. 13-018, 2014 WL 1314284, at *3 (ARB Mar. 19, 2014) (finding punitive damages warranted in a STAA case where the defendant failed to take reasonable steps to determine whether plaintiff's safety concerns were warranted); *Anderson v. Amtrak*, ALJ Case No. 2009-FRS-00003, slip op. at 26–27 (ALJ Aug. 26, 2010) (finding punitive damages warranted in a FRSA case where defendant lacked procedures to ensure its investigations would not result in improper terminations and where its injury investigation procedures operated to dissuade employees from reporting injuries).

Here, the ALJ did not err in considering GTW's investigative procedures in awarding punitive damages. The availability of punitive damages in this case flows from the violation of Laidler's rights under FRSA, rights that are independent of the CBA. Even if GTW had adhered to specific procedures laid out in the CBA, the RLA would not preclude an inquiry into whether those procedures were applied in a retaliatory manner or in reckless disregard for Laidler's rights under FRSA.

Regardless, the ALJ's discussion regarding punitive damages does not reference the CBA. *See* ALJ D&O at 61–64. Although she heard testimony related to the CBA's requirement of a "fair and impartial hearing," *id.* at 22, her analysis rested on the fundamental unfairness of the proceedings, not on whether they comported with the CBA. The ALJ focused on verbal promises made by the investigative officer regarding Laidler's ability to examine all evidence against him and to cross-exam witnesses, opportunities that were denied to him. *Id*. at 62–63. The mere fact that the CBA in question provided for investigative procedures did not trigger RLA preemption.

Moreover, the ALJ's decision rested on two additional flaws in GTW's response: that Tassin ignored objective evidence on the record and that Laidler was singled out for disciplinary action. ALJ D&O at 62–63. Thus, even if the ALJ's analysis rested in part on a specific provision of the CBA, it could not be said that the question of punitive damages was "conclusively resolved by reference to an existing CBA." *See Norris*, 512 U.S. at 263. Thus, the award of punitive damages in this case was proper.

III. The ALJ Awarded Prejudgment and Postjudgment Interest Consistent with the Applicable Case Law and Departmental Policy

As part of her back pay award, the ALJ in this case ordered GTW to pay prejudgment and postjudgment interest calculated according to 26 U.S.C. 6621(a)(2)—the rate for underpayment of federal taxes—compounded quarterly. ALJ D&O at 59 (citing *Doyle v. Hydro Nuclear Servs.*, ARB Case Nos. 99-041, 99-042, 00-012, 2000 WL 694384, at *18–19 (ARB May 17, 2000)). GTW asserts that this was an error of law "because the appropriate methodology for interest calculation and compounding is contained in 28 U.S.C. 1961." Pet'r's. Supp. Br. at 26. It is the Secretary's view that section 6621 appropriately compensates victims of unlawful retaliation and is consistent with the remedial purposes of anti-retaliation statutes the Secretary enforces.

Moreover, section 1961 does not operate to limit the Secretary's discretion in cases adjudicated at the administrative level.

A. The competing statutes at issue

Section 1961 states that courts shall calculate postjudgment interest on "money judgment[s] in a civil case recovered in a district court . . . . at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding." 28 U.S.C. 1961(a). The section also applies to final judgments against the United States in the U.S. Circuit Court for the Federal Circuit and judgments of the U.S. Court of Federal Claims, but does not apply to internal revenue tax cases, and "shall not be construed to affect the interest on any judgment of any court not specified in this section." 28 U.S.C. 1961(c)(4).

By contrast, section 6621—which establishes the underpayment rate of interest for Internal Revenue Service ("IRS") purposes—instructs the IRS to apply an interest rate equal to the federal short-term rate plus three percentage points; in cases of a large corporate underpayment, i.e., an underpayment of tax exceeding $100,000, the rate equals the federal short-term rate plus five percentage points. 26 U.S.C. 6621. Section 6621 provides a higher rate of interest than section 1961. *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 834 (9th Cir. 2012) ("The § 6621 rate is always higher than the § 1961 rate.").

B. Section 6621 provides the appropriate standard for calculating prejudgment and postjudgment interest in cases adjudicated by the Secretary

In the Secretary's judgment, section 6621 provides the appropriate measure of compensation under FRSA and other whistleblower statutes administered by the Secretary because it ensures the complainant will be placed in the same position he or she would have been in if no unlawful retaliation occurred. *See Assistant Sec'y of Labor v. Double R Trucking, Inc.*,

ARB Case No. 99-061, 1999 WL 529753, at *5 (ARB July 16, 1999) (interest awards pursuant to section 6621 are mandatory elements of complainant's make-whole remedy). Section 6621 provides a reasonably accurate prediction of market outcomes (which represents the loss of investment opportunity by the complainant and the employer's benefit from use of the withheld money) and thus provides the complainant with appropriate make-whole relief. *See EEOC v. Erie Cnty.*, 751 F.2d 79, 82 (2d Cir. 1984) ("Since the goal of a suit under the [Fair Labor Standards Act] and the Equal Pay Act is to make whole the victims of the unlawful underpayment of wages, and since [section 6621] has been adopted as a good indicator of the value of the use of money, it was well within" the district court's discretion to calculate prejudgment interest under section 6621); *New Horizons for the Retarded*, 283 N.L.R.B. No. 181, 1987 WL 89652, at *2 (May 28, 1987) (observing that "the short-term Federal rate [used by section 6621] is based on average market yields on marketable Federal obligations and is influenced by private economic market forces").

The Secretary has a longstanding preference for using section 6621's interest rate to calculate both prejudgment and postjudgment interest in cases under the many whistleblower protection statutes administered by the Secretary. *See, e.g.*, *Furland v. Am. Airlines, Inc.*, ARB Case Nos. 09-102, 10-130, 2011 WL 3307577, at *8 (ARB July 27, 2011) (finding in an AIR 21 case that "[a] prevailing complainant is entitled to back pay . . . plus interest at the rate specified in 26 U.S.C. § 6621 . . . ."); *Cefalu v. Roadway Express, Inc.*, ARB Case No. 09-070, 2011 WL 1247212, at *2 (ARB Mar. 17, 2011); *Pollock v. Cont'l Express*, ARB Case Nos. 07-073, 08-051, 2010 WL 1776974, at *8 (ARB Apr. 10, 2010); *Double R Trucking, Inc.*, 1999 WL 529753, at *5 (interest awards pursuant to section 6621 are mandatory elements of complainant's make-whole remedy). Indeed, the Secretary's regulations under several whistleblower statutes

mandate the use of section 6621 to calculate interest. 29 C.F.R. 1980.105, 1980.109–1980.110 (SOX); 29 C.F.R. 1978.105, 1978.109–1978.110 (STAA); 29 C.F.R.1983.105, 1983.109–1983.110 (Consumer Products Safety Improvement Act); 29 C.F.R. 1987.105, 1987.109–1987.110 (FDA Food Safety Modernization Act.); *cf.* 29 C.F.R. 20.58(a) (providing that "[t]he rate of interest prescribed in section 6621 of the Internal Revenue Code shall be sought for backwages recovered in litigation by the Department"). On November 9, 2015, the Secretary issued a final rule requiring the same calculation in all FRSA and National Transit Systems Security Act cases. 29 C.F.R. 1982.109(d)(1).

The Secretary has broad discretion to fashion appropriate remedies in the whistleblower cases he enforces. *See Ind. Mich. Power Co. v. Dep't of Labor,* 278 F. App'x 597, 606-7 (6th Cir. 2008) (unpublished) (reviewing DOL's damage calculations under Energy Reorganization Act whistleblower provision for abuse of discretion). Section 1961, by its terms, does not apply to administrative proceedings and the Secretary is not bound to award interest based on the calculation found in that provision. *Hobbs v. Director, OWCP,* 820 F.2d 1528, 1531 (9th Cir. 1987) ("Section 1961 . . . is limited on its face to 'money judgment[s] in a civil case recovered in a *district court*,' and does not extend to agency awards.") (emphasis in original); *Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588, 609–10 (3d Cir. 1977) (Section 1961 did not apply to Federal Power Commission adjudication appeal, as the statute "applies by its terms only to civil cases in the United States district courts").

Nor does the inclusion of a "kick-out" provision in FRSA—allowing complainants to withdraw their administrative complaint and bring suit in district court—constrain the Secretary's discretion in cases before the Department, as GTW asserts. *See* Pet'r's Supp. Br. at 27. Contrary to GTW's contention, the ARB has continued to apply section 6621 in

whistleblower cases long after the incorporation of such kick-out provisions. *See, e.g.*, *Cefalu*, 2011 WL 1247212, at *2 (applying section 6621 to prejudgment and postjudgment interest in an STAA whistleblower case); *Pollock*, 2010 WL 1776974, at *8 (same). Moreover, the "inconsistent interest calculations" of which GTW warns already result from the district court's broad discretion in awarding prejudgment interest, to which section 1961 does not apply. *See Bhd. of Locomotive Eng'rs & Trainmen v. Long Island R.R. Co.*, 371 F. App'x 198, 198 (2d Cir. 2010) (unpublished) ("The rate of pre-judgment interest is within the broad discretion of the district court."); *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1566 (3d Cir. 1996) (finding that "[t]he matter of prejudgment interest is left to the discretion of the district court" and that section 6621 "has been used regularly by district courts to calculate prejudgment interest").

Finally, awarding prejudgment and postjudgment interest at the rate prescribed by section 6621 does not conflict either with the Ninth Circuit's decision in *Van Asdale v. International Game Technology*, 763 F.3d 1089 (9th Cir. 2014), or the position that the Secretary took as amicus before the Ninth Circuit in that case. In *Van Asdale*, the Secretary noted and the court agreed that "§ 6621 *may* apply to cases that commence—and are resolved—before the Department of Labor" even if district courts are bound to award postjudgment interest in cases tried in district court pursuant to section 1961. *Id.* at 1091 (citations omitted); *See* Br. for the Sec'y of Labor as *Amicus Curiae* at 5 n.1, 7-8, *Van Asdale, supra* (Nos. 11-16538, 11-16626) (9th Cir. filed May 9, 2014), available at http://www.dol.gov/sol/media/briefs/main.htm. Thus, the ALJ was correct to award both pre and postjudgment interest according to the interest rate in section 6621.

C. The ALJ's method of computing interest was not improper

The ALJ properly awarded prejudgment and postjudgment interest according to the methodology articulated in *Doyle v. Hydro Nuclear Services*, 2000 WL 694384, at *15. In *Doyle*, the Board instructed that "[t]o determine the interest for the first quarter of back pay owed, the parties shall multiply the back pay principal owed for that quarter by the sum of the quarterly average AFR [applicable federal rate] plus three percentage points." *Id*. This methodology has been recognized by the Board as the appropriate standard for calculating interest as recently as February 2015. *See Vyasabattu v. eSemantiks*, ARB Case No. 10-117, 2015 WL 1005041, at *5 (ARB Feb. 11, 2015). The courts have similarly sanctioned its use. *See Dongsheng Huang v. Admin. Review Bd.*, 579 F. App'x 228, 235 (5th Cir. 2014) (unpublished) (affirming an interest calculation based on the *Doyle* methodology).

Finally, the ALJ did not err in ordering that interest be compounded quarterly pursuant to *Doyle*. Although the rules under FRSA that became effective on November 9, 2015, now require that interest be compounded daily,[2] the ALJ's award is consistent with the case law applicable at the time the award was made. *See Doyle*, 2000 WL 694384, at *15 (awarding interest compounded quarterly); *Johnson v. Roadway Express*, ARB Case No. 99-111, 2000 WL 35593006, at *13 (ARB Mar. 29, 2000) (same).

CONCLUSION

For these reasons, the Assistant Secretary respectfully urges the Board to affirm the ALJ's decision with respect to her finding that Laidler engaged in protected activity under FRSA, the award of punitive damages, and the calculation of prejudgment and post judgment interest based on 26 U.S.C. 6621 and *Doyle v. Hydro Nuclear Services*.

[2] 29 C.F.R. 1982.105(a)(1), 1982.109(d)(1), 1982.110(d); *see* U.S. Dep't of Labor, Occupational Safety & Health Admin., Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act, 80 Fed. Reg. 69,115, 69,124 (Nov. 9, 2015) (discussing bases for adopting daily compounding of interest).

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CERTIFICATE OF SERVICE

I certify that copies of this BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE have been served via email on the following individuals on this 25th day of November, 2015 with courtesy copies by certified mail return receipt requested to follow:

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