

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 June 2008

Case No. 2007-STA-43

In the Matter of

JOSHUA J. ISRAEL,

Complainant,

v.

UNIMARK TRUCK TRANSPORT, INC.,

Respondent.

Appearances:

Joshua J. Israel, *Pro Se*
For the Complainant

Matthew T. Troha, Esq.
For the Respondent

Before: LARRY MERCK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim under the Surface Transportation Assistance Act ("STAA" or "the Act"), 49 U.S.C. § 31105¹ and the implementing regulations found at 29 C.F.R. Part

¹ The Act was most recently amended by Section 1536 of the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. No. 110-053, 121 Stat. 266 (Aug. 3, 2007) (the "9/11 Commission Act"). The 9/11 Commission Act broadened the definition of employees covered by the STAA; added to the list of protected activities; adopted the legal burdens of proof found in Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; provided for awards of special damages, and punitive damages not to exceed \$250,000.00; and, provided for *de novo* review by a U.S. District Court if the Secretary of Labor does not issue a final decision on the complaint within 210 days of its filing. Mr. Israel filed his complaint with OSHA on June 12, 2007; therefore, the 2007 Amendments are not applicable in this case.

1978.² Section 405 of the Act provides protection to covered employees who report violations of commercial motor vehicle safety rules or refuse to operate vehicles in violation of those rules from retaliatory acts of discharge, discipline, or discrimination.

Procedural History

Joshua Israel ("Complainant") filed a Complaint with the Occupational Safety and Health Administration, United States Department of Labor ("OSHA") on June 12, 2007. Complainant alleged that Unimark Truck Transport Incorporated ("UTT" or "Respondent") "discriminated against [him] by refusing to give [him] loads because [he] complained to Respondent about safety concerns regarding a truck [he was] driving" in violation of the Act.³ (RX 5).⁴ On August 1, 2007, OSHA Regional Administrator, dismissed the Complaint, based on a determination that it was reasonable to believe that Respondent had not violated 49 U.S.C. § 31105. The Regional Administrator also found there was no evidence to indicate the Respondent retaliated against the Complainant in any way or that the Complainant received an unfavorable personnel action because of his protected activity. On August 14, 2007, in accordance with § 1978.105, the Complainant objected to the Findings and requested a formal hearing before the Office of Administrative Law Judges.

A hearing was held before the undersigned⁵ in St. Paul, Minnesota, on February 6, 2008. At the hearing, the parties were provided a full opportunity to present evidence and argument as provided in the Act and applicable regulations. At the hearing, JX 1 was admitted into evidence. CX-1 through CX-14 and RX-1 through RX-5 were also admitted at the hearing. (TR at 17, 21, 35). Post-hearing Claimant offered CX 15, I have

² Unless otherwise noted, all references are to Title 29, Code of Federal Regulations ("C.F.R.").

³ The description of the gravamen of his Complaint is extracted from the Secretary's findings and dismissal order, dated August 1, 2007. (RX 5).

⁴ In this Recommended Decision and Order, "JX" refers to a Joint Exhibit, "CX" refers to Complainant's Exhibits, "RX" refers to Respondent's Exhibits, and "TR" refers to the transcript of the hearing.

⁵ This case was originally assigned to Administrative Law Judge ("ALJ"), Thomas F. Phalen, Jr., for adjudication. By Order of Recusal, issued October 12, 2007, ALJ Phalen recused himself from further participation in this matter. Thereafter, the case was assigned to me for adjudication.

received no objection to this document and it is admitted. (TR 150-151). The parties filed post-hearing briefs.

The findings and conclusions which follow are based on a complete review of the entire record, the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed, each was carefully considered in arriving at this decision.

ISSUES

The following unresolved issues were presented by the parties:

- 1) Whether Complainant engaged in activity protected by the Act?
- 2) Whether Respondent had knowledge of any alleged protected activity?
- 3) Whether the alleged adverse employment action taken by Respondent against Complainant was causally related to any putative protected activity in which Complainant engaged?
- 4) What are the appropriate remedies, pursuant to subsection (b)(3) of the Act, for any violations which are found to have occurred?

(Complainant's and Respondent's Briefs and Record of the hearing.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Evidence

STIPULATIONS

The parties have stipulated and I find that:

1. The Office of Administrative Law Judges, U.S. Department of Labor, has jurisdiction over the parties and the subject matter of this case.

2. Respondent, Unimark Truck Transport, is engaged in interstate commerce, i.e., interstate trucking operations and is an employer subject to the Surface Transportation Assistance Act (hereinafter STAA) of 1982.
3. Complainant, Joshua J. Israel, is now, and at all times material herein, an 'employee' which includes an 'independent contractor' as defined in 29 C.F.R. § 1978.101(d)(1).
4. Joshua J. Israel was an employee of Unimark Truck Transport during the applicable periods alleged in that he was employed as a driver of a commercial motor vehicle having a gross vehicle weight rating of at least 10,001 or more pounds which was used on the highways in interstate commerce to transport cargo.
5. Pursuant to 29 C.F.R. § 1978.102, Joshua J. Israel filed a complaint on June 12, 2007, with the Secretary of Labor alleging that Respondent discriminated against him in violation of Section 31105 of the Surface Transportation Act (49 U.S.C. § 31105).
6. The original complaint filed with the Secretary was timely.
7. Following an investigation, the Regional Administrator, Occupational Safety and Health Administration, issued his findings on the complaint on August 1, 2007.
8. Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on August 14, 2007.

9. The appeal of the complaint satisfied the 30-day time constraints provided by 29 C.F.R. § 1978.105(a).

(JX 1).

Testimonial Evidence and Credibility:

The undersigned has carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence analyzing and assessing its cumulative impact on the record. See e.g., *Frady v. Tennessee Valley Auth.*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995) (citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3rd Cir. 1979)); *Indiana Metal Prod. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971).

Credibility is that quality in a witness which renders his or her evidence worthy of belief. For evidence to be worthy of credit:

[it] must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal Prod., 442 F.2d at 51.

An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. See *Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 15 n.5 (3rd Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses from which impressions were garnered as to their demeanor. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

The transcript of the hearing in this case is comprised of the testimony of two witnesses: Joshua J. Israel and Marcus Burns. (TR at 23-168).

Joshua J. Israel-Complainant

The Complainant, Joshua J. Israel, testified in his own behalf. (TR 23-108). He began working for Respondent as an independent contractor⁶ on May 7, 2007. (TR at 23; JX 1). Complainant was trained by UTT "to deck a truck and undeck [a truck]." ⁷ (TR at 78-79). As an independent contractor, Complainant's job for Respondent was to operate a commercial motor vehicle. (TR at 24). He no longer works for UTT because he attempted to correct an unsafe condition and "they did not allow [him] the right to correct the unsafe condition, and then there were retaliations that destroyed his profitability and [he] could no longer stay on the road." (TR at 25; RX 5).

On May 19, 2007, Complainant picked up a "four way"⁸ load in Hagerstown, Indiana, to transport to Ontario, California. (TR at 30-31; CX 13). On Saturday, May 20, 2007, in Rolla, Missouri, Mr. Israel noticed one of the trucks was leaning to the right which possibly could have caused a "turn over." (TR at 31). He stopped and observed that the four-by-six piece of wood on the flat bed of the lead truck on which the front tires of the following truck was resting was damaged. (TR 35; CX 1, 13).⁹ He called the dispatcher¹⁰ because, according to the UTT manual, all

⁶ An "employee" is defined by the STAA as a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual who is not an employer, who directly affects commercial vehicle safety in the course of employment by a commercial motor vehicle carrier. 49 U.S.C. § 31101(2).

⁷ Complainant testified that he was charged \$40.00 for his training manual, but there was no charge for training if Complainant performed his contractual agreement to stay with UTT for ninety days following training. (TR at 79). Complainant further testified that if he did leave before ninety days, tuition would be charged at a prorated rate from a \$2,000.00 training loan. (TR at 79, 88).

⁸ A "four way" load is "one truck with a flat bed, with three trucks attached to it piggy-back style." (TR at 30; CX 13).

⁹ CX-1 was identified by Complainant as a photograph of the condition of the wood which was taken by him at approximately 8:00 p.m. on May 20, 2007. (TR at 33).

¹⁰ In the record, the dispatcher is referred to as Lee Johnson and Lee Payne. (TR. at 26, 155).

repairs over \$50.00 require supervisory approval. (TR at 32). Complainant stated that Mr. Payne was upset with him and said "just take care of it" and hung up the phone. (TR at 36).

Complainant called Mr. Payne back about thirty to forty-five minutes later; Mr. Payne told him, "Listen, you are an independent contractor. [] All this is your responsibility, you take [care] of it." (TR at 36-37). In response to Complainant mentioning to Mr. Payne that the repairs would cost more than \$50.00, Mr. Payne said, "Listen, call a wrecker, get an estimate, [you] call me back." (TR at 37).

Complainant was unable to get a wrecker to help replace the block of wood and subsequently called a safety officer from the manual provided by UTT. (TR at 38-39). He talked to an individual by the name of Ryland who listened to his story and told him that he would try to talk to the dispatcher but told Complainant that it was his responsibility. (TR at 40).

After speaking to Ryland, Complainant left a message on Mr. Payne's answering machine, as follows:

I couldn't get a wrecker, nobody has the size wood that I require to replace this disintegrating piece of wood with. . . . I'm just going to take a chance and drive the vehicle, carefully and slowly to Joplin [Missouri], and we could change it there because they have a hoist and they got the block of wood at the Joplin facility, the [UTT] Joplin Facility.

(TR at 40-41).

Complainant drove to Joplin because he believed that he had no other options. (TR at 41).

Upon arriving at Respondent's facility in Joplin, Missouri, Complainant hoisted his truck and replaced the damaged four-by-six piece of wood with a piece of wood he found at the UTT facility and secured the U bolts with additional washers (TR at 46-49). The following day he spoke to Donna Finch the UTT safety manager and Marcus Burns, Vice President of UTT, about the incident and the problem with replacing the block of wood. (TR at 51). Complainant believed that the matter was resolved

and that he would not have anymore problems, and he continued to Ontario, California. (TR at 52).

Although Complainant arrived in Ontario, California, on a Friday, he could not deliver the cargo until Tuesday May 30,¹¹ 2007, because of the weekend and Monday was a holiday. (TR at 52).¹² On May 31, 2007, Complainant picked up a "four way" load in California to transport to Joplin, Missouri. (TR at 53). Complainant testified that Robert Rauch, UTT dispatch manager who was assigned to him, instructed Complainant to "pretty much" drive five hundred miles per day. (TR at 53). However, Complainant testified it was not possible for him to do that mileage with that load because of the driving conditions through the mountains. (TR at 52-53). Complainant had to slow down coming downhill in order to keep the truck from jack-knifing and that going uphill he would be forced to drive at a maximum of twelve miles per hour. (TR at 54). Complainant stated that if he complied with Mr. Rauch's requirements that he would have had to violate the Department of Transportation maximum daily hours of driving and he did not do that. (TR at 55). When he arrived in Joplin, Missouri, he informed Ms. Finch of Mr. Rauch's requirements; she told him to drive the truck safely and that she would talk to Mr. Rauch about his requirements of 500 hundred miles a day. (TR at 55-56).

Complainant's next assignment was on June 4, 2007, from Joplin, Missouri, to Chicago, Illinois, delivering a single truck. (TR at 56-57). Complainant told Mr. Rauch he would be available for a new assignment three days after his return to Minneapolis. (TR at 58). Complainant called after three days and was told there were no assignments for him. (TR 58). He called the next day and the day after and was told there were no assignments for him. *Id.* Mr. Israel believed that because he complained about the incident with the dispatcher that he was not going to be sent out on the road again. (TR at 58).

On June 12, 2007, Complainant filed a complaint with OSHA because he believed that the lack of assignments amounted to retaliation. (TR 58). After he filed his complainant with OSHA, he did receive another assignment to deliver a truck from Ohio to Massachusetts. (TR at 59-60). He rented a car to drive from Minnesota to Ohio. (TR at 60). His expenses were "very high" and were not reimbursed by UTT. (TR at 59). Further,

¹¹ I take judicial notice of the fact that May 30, 2007 is a Wednesday.

¹² Claimant had other problems to include a vandalized window on one of the trucks he was transporting and he stopped to have it repaired in Arizona. (TR at 92-96).

Complainant believed that based on the UTT manual, he was entitled to a sixty percent reimbursement for rental cars. (TR at 59). Complainant testified that he was not reimbursed because he felt Mr. Rauch was unhappy with him because he complained about him to Ms. Finch. (TR at 61).

In addition to the Ohio to Massachusetts delivery, Complainant did get "quite a few" assignments from UTT for about two and a half months. (TR at 62). During this time, it necessitated him obtaining a rental car on "maybe" eight trips for which he believed that he should have been reimbursed.¹³ (TR at 63). Complainant made the assessment that he was owed rental car reimbursement due to the "deadhead"¹⁴ policy stating, "If you are being asked to do too much then say something to your dispatchers, they have the authority to make it right for you. Please don't get upset, work something out."¹⁵ (TR at 64). Because of this policy, Complainant testified he tried to work "something out" with Mr. Rauch regarding "deadhead" miles compensation and that because Mr. Rauch would not reimburse Complainant that was a retaliatory action. (TR at 64). Moreover, Complainant stated that he was going in to thousands of dollars in debt and that he "came off the road and stayed home[.]" (TR at 65).

About August 3, 2007, Complainant had a conversation with Mr. Burns to discuss why UTT was withholding his final settlement and the money that belonged to Complainant from the escrow account for accident-insurance purposes. (TR at 65-66). Further, Complainant points to CX-12, a newspaper advertisement placed by UTT which states, "Super Income, \$50 thousand to \$80 thousand yearly" and testified that the advertisement tells drivers that's what they can make. (TR at 69). Complainant felt that because he was with UTT for sixteen weeks, he is owed \$22,488.00 minus \$3,532.00 that he was paid. (TR at 71-73). Additionally, Complainant alleges that Ms. Finch took retaliatory action against him by altering driver mileage logs after receiving a hearing notice from the Office of Administrative Law Judges. (TR at 76). Further, Complainant alleges that UTT retaliated against him by cancelling his

¹³ Complainant attached rental car expenses at CX-7.

¹⁴ Deadhead miles are the miles between driver's delivery location and his pick up point for the next shipment of cargo. (TR at 122).

¹⁵ Complainant attached "deadhead" policy at CX-4 and rental car policy at CX-5.

insurance which left Complainant unable to transport trucks. (TR at 76-77).

On cross examination, Complainant testified that after his last delivery in July 2007, he was unemployed for "three or four" months. (TR at 80). In early December 2007, he did obtain temporary employment as a day laborer because nobody would hire him in the trucking industry. *Id.* Complainant believed nobody would hire him in the trucking industry because he filed complaints. (TR at 81). Moreover, Complainant believed there was "some sort of system" which he thought companies could check to see how many companies he had filed complaints against. *Id.* Complainant did apply for jobs with FedEx and Sears Environmental Services and was not hired. (TR at 81-82). He stated that those two potential employers are not transport trucking companies. Complainant did not apply for a job with a truck transport company out of fear that they would treat him the same way as UTT. (TR at 82).

RX 1, UTT-Independent Contractor agreement, provides in pertinent part that:

The [independent] contractor shall pay all costs and expenses incident to the performance of movements under this agreement, including but not limit[ed] to the following: fuel, transportation, food and lodging.

(TR at 85).

Complainant testified that he was informed that UTT would pay for lodging if the driver had to wait a day for his cargo. (TR at 85-86; RX 1 Appendix 1). Any truck repairs that are not the fault of the driver would be paid by UTT, and UTT gave the drivers a certain amount of money upfront for fuel. *Id.* Additionally, Mr. Israel was required to have \$1,100.00 in escrow with UTT for any damage or expense that he might be responsible for. *Id.*

On about August 3, 2007, Mr. Israel informed UTT that he would not accept any more assignments until his complaint was resolved. (TR at 103). Complainant's insurance was cancelled on September 7, 2007. *Id.* Complainant testified that, as he understood it, his trucking insurance would only be required to be paid and deducted from his check when he took a load. (TR at 104). Every time he transported cargo the insurance was deducted from his final settlement. *Id.* Complainant was asked

why UTT would pay for his insurance if Complainant was not delivering any loads, Complainant stated:

Well we were trying to resolve this matter before we come to trial on that. I, that's what I thought that we were trying to do. And, so, you know if we had resolved that day, the next week, I would have went back on the road.

(TR at 105).

Marcus Burns

Marcus Burns, vice president of operations for UTT, was called as a witness by Respondent. (TR at 108-168) His job consists of oversight of payroll, dispatch, and recruiting. (TR 109). Driver complaints about pay and other issues are initially directed to a dispatch manager and if required he will become involved. (TR 109-110). Mr. Burns was informed that Complainant did make a call to the dispatcher on May 19, 2007,¹⁶ stating that there was a safety issue with a wood support on which one of the piggybacked trucks was secured. (TR at 112). Mr. Israel drove to the Joplin facility where the wood was examined. *Id.* Mr. Burns was told that it was explained to Mr. Israel that the wood crack was not a problem and that the delivery could be continued. (TR 112-113). Mr. Burns was shown a piece of wood that was purported to be the one of concern by Mr. Israel. (TR 113). This piece of wood "had a crack in it that was basically horizontal [and] if the wood was split completely in half you would have two halves, which would still be fine." *Id.* However, if the wood was cracked vertically then there would be a safety issue. *Id.*

Mr. Burns discussed Complainant's safety concerns with him about "four way" decked loads. (TR 114). Mr. Burns told Mr. Israel that everything was certified by the Department of Transportation and that "four way" decked loads could be transported safely. (TR 115). Complainant told him that the "four-way" decked load was unsafe. (TR at 114). Mr. Israel made the decision that he only wanted to deliver singles. (TR at 115). Mr. Burns testified that he explained to Complainant that there were not many single deliveries because of UTT's business of delivering multiple-decks. (TR 115). Mr. Burns told him it was more profitable to deliver multiple decks,

¹⁶ Based on the record, the date was May 20, 2007.

rather than singles, but that Mr. Burns would accommodate his wishes. *Id.*

Mr. Burns stated that the contract that UTT has with an independent contractor put it under no obligation to pay for car rentals or lodging. (TR at 116; RX 1). However, Mr. Burns testified that at times, UTT will assist independent drivers in getting to locations to transport trucks because the company tries to move loads in the most cost effective way. *Id.*

The decking wood is replaced after a delivery. (TR 116-117). If there is a safety issue with the delivery of a load, UTT should be notified. The process is, as follows:

. . . [The driver] pretty much has to handle it. He has to determine whether it's safe or not. We can't make that decision for him because we're not there. What we do get into is a lot of these drivers have their opinions about how it should be or shouldn't be. And, so, at that point we haven't talked to safety and things to that affect, but in the end it's their decision.

(TR at 117).

Complainant's quality of work was very thorough when it came to pre-trip inspections. (TR at 117). However, Mr. Burns testified that Complainant did have some "nothing major, [but] minor" damages to the cargo in his file. (TR at 118).

Concerning Complainant's allegation that UTT called other competitors and told them not to hire Complainant, Mr. Burns testified UTT did not do that. (TR at 118). Additionally, Mr. Burns testified there were no additional comments put on Complainant's DAC¹⁷ report. (*Id.*; CX 14). Mr. Burns also testified that no companies have contacted UTT for employment verifications. (TR at 119).

Driver's insurance is paid for by deductions from a driver's pay. (CX 6). In response to why Complainant's truck insurance was cancelled on September 7, 2007, Mr. Burns testified that UTT paid for Mr. Israel's insurance in August 2007. (TR 119-120). However, the system automatically terminates insurance if there hasn't been a load taken by the

¹⁷ The witness did not define the acronym DAC but it refers to the information contained in CX 14.

driver within a certain amount of time because there would be no money to pay for this expense. (TR at 119).

Complainant did not repay the \$2,000.00 training loan provided to him by UTT. (TR at 120; RX 1). This was not marked on Complainant's DAC form which was a standard practice. *Id.* As far as how long Complainant remained with UTT, Mr. Burns stated:

. . . I think, by the time we actually did his termination based on the trips, I think it was maybe sixty or seventy days or something so a prorated amount was allowed. His last trips that he turned in, certain items that he had as far as expenses were taken off, and then money was applied to his contract and basically we called it even.

Id.

Mr. Burns testified that Complainant owed UTT money at the end of his employment. (TR at 121).

Concerning the sixty percent rental car reimbursement, Mr. Burns noted that the sixty percent policy was an advance to drivers. (TR at 121).

So, basically, if [a driver] accepted a load and it paid him five hundred dollars, we would advance him sixty percent of five hundred dollars. And then at that point what we do is we try to -- we try to give each of these drivers a basis by saying, you know, you only need sixty percent of your total pay in order to get this load settled so that way -- payroll is ran every week. So in theory, if they're running trips they would get at least forty percent or more depending on how much money they used in advances to get up to, uh, to get the load delivered. That's truly what it is; it's an advance, an advance against their pay. It's not something that the company just agrees we pay sixty percent that's, that's not the case."

(TR at 121-122).

On cross-examination, Mr. Burns testified he did not think that Complainant was charged for the window that was broken by vandals. (TR 124). Mr. Burns did not know whether Complainant

was charged for paint damage to the hood of a truck that Mr. Israel delivered in July 2007. (TR at 124-125). However, Mr. Burns did know that as an estimate, there was approximately six hundred dollars remaining in Complainant's escrow account. (TR at 125). UTT kept that money towards his contract and called it even. (TR 125-126). There was never any prorated amount agreement in the event that Complainant left before 90 days; "it was just something [UTT] did." (TR at 127; RX 1). Further, Mr. Burns believed that Complainant "technically" would have owed the two thousand dollars. (TR at 125).

In response to whether Complainant was forced to drive an unsafe truck, Mr. Burns opined that Complainant decided to drive the unit on his own because he had the ultimate and final decision. (TR 133). Further, Mr. Burns testified that what Complainant assessed as a problem was not a problem and that was the reason he made it to the facility safely. *Id.* However, regarding the piece of wood pictured in CX-1, Mr. Burns noted it "possibly" may have been a safety problem depending on road conditions. (TR at 135).

Concerning the DAC report, Mr. Burns noted that its purpose was to verify if loads had been abandoned by truckers or if truckers had too many accidents in the past in addition to other factors. (TR at 138; CX 14). As far as why the DAC was marked "ineligible" for rehire, Mr. Burns stated that box was checked because Complainant did not move decked loads. (TR at 140; CX 14).

Regarding Complainant being ordered to drive five hundred miles a day, Mr. Burns testified Ms. Finch never told him about that issue. (TR at 141). Mr. Burns testified that based on the hours that a driver is allowed to drive and the hours he must rest most drivers will drive more than five hundred miles. UTT has drivers that average almost six hundred miles a day. (TR at 141-142).

UTT Joplin facility is a repositioning point. (TR at 144). Further, in response to Complainant asking whether drivers are free to go home upon arriving at Joplin, Mr. Burns testified that once you reposition at Joplin, you are not able to go home, but must continue to your destination point regardless if you stop at UTT-Joplin. (TR at 144). According to Mr. Burns's testimony, "once you accept a load, it's yours." *Id.* Upon reaching his destination point is when a trucker can decide to go home. (TR at 145). In regards to Joplin, Mr. Burns testified that according to delivery # 5357052044 (RX-3),

Joplin, Missouri was not the final destination of the truck even though the Load History Detail sheet acknowledges that. (TR at 146). ". . . of course on this report it's going to show that the final city or delivery is Joplin because that's what [Mr. Israel] did with that load. But that was not the final destination of that load." *Id.* Mr. Burns stated that loads not delivered to their final destination are marked with "not delivered," which is not shown on RX-3. *Id.* In explaining the reason for a lack of such a mark, Mr. Burns noted that if it had been marked "not delivered," Complainant would not have been paid for his mileage. *Id.* Additionally, because Complainant did not leave the truck unoccupied in a foreign location after raising safety concerns, UTT treated it as a complete trip. (TR at 148-149).

Concerning Mr. Burns's statement at RX 2, Mr. Burns testified that he was told that "Rudy, Danny, Harry and Robert" had met with Complainant to inspect the load and wood. (TR at 158). Additionally, Mr. Burns testified that everybody agreed that the block of wood was safe and that it could be re-decked with the same materials and delivered by another driver. (TR at 158).

In response to Mr. Burns's statement at RX-2, Complainant questioned Mr. Burns regarding whether Complainant actually did complete his delivery of the Hagerstown assignment. (TR at 159; RX 2). Mr. Burns testified that his statement at RX-2 was incorrect in regards to Complainant not delivering the Hagerstown load. Mr. Burns later testified that this was the result of load assignment confusion.¹⁸ (TR at 165).

UTT does not record when an independent contractor refuses to take a load assignment. (TR at 161). However, Mr. Burns noted that there is a distinct difference between refusing to complete a load assignment and refusing a load assignment. *Id.* A record is made if a driver refuses to complete a load assignment. (TR at 162). The manner of recording such an occurrence is to inform other dispatchers that a trucker accepted a load and did not deliver it. (TR at 162).

¹⁸ The confusion between Mr. Burns's statement, RX 2, and testimony involves two trips; (1) City of Industry, California to Joplin, Missouri, and (2) Hagerstown, Indiana to Ontario, California. (TR 166-167; RX 2).

DISCUSSION

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C. § 31105(a)(1)(A). Protected activity includes filing a complaint or beginning a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order." *Id.* The Act further provides that an employer may not retaliate against an employee-driver if "the employee refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C. § 31105(a)(1)(B)(i)-(ii).

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity under the Act, (2) the respondent was aware of the activity, (3) he suffered adverse employment action, and (4) there was a causal connection between the protected activity and the adverse action.¹⁹ See *Coxen v. United Parcel Service*, ARB No. 04-093, ALJ No. 2003-STA-13, slip op. at 5 (ARB Feb. 28, 2006) (citing *Regan v. National Welders Supply*, ARB No. 2003-117, ALJ No. 2003-STA-14, slip op. at 4 (ARB Sept. 30, 2004)); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys. Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 2002-122, ALJ No. 2001-STA-33, slip op. at 8-9 (Oct. 31, 2003).

Protected Activity under the Act and Employer's Knowledge of Such Activity

Protected activity includes filing a complaint in relation to a violation of a commercial motor vehicle safety regulation. The Board has established that "the 'filed a complaint' language

¹⁹ Where the case is fully tried on the merits, as it has been here, it is unnecessary to determine whether the complainant presented a prima facie case and whether the respondent rebutted that showing. Rather, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If he or she did prevail, it is irrelevant whether a prima facie case was presented. *Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia*, 97-STA-30 (ARB July 8, 1998).

protects from discrimination an employee who communicates a violation of a commercial motor vehicle regulation, standard or order to any supervisory personnel." *Harrison v. Roadway Express, Inc.*, ALJ No. 1999-STA-00037 (Mar. 30, 2000) (*aff'd*, ARB No. 00048 (Dec. 31, 2002); See also *Clean Harbors Environ. Serv. Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998) (internal complaints are covered under the STAA).

Moreover, protection under the Act for raising a complaint does not depend on proving an actual violation of a commercial vehicle safety regulation; the complaint need only relate to such a violation. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992). A complaint need not explicitly mention a commercial motor vehicle safety standard to be protected under the STAA's whistleblower provision. The Secretary has stated:

As long as the complaint raises safety concerns, the layman who usually will be filing it cannot be expected to cite standards or rules like a trained lawyer. The statute requires only that the complaint 'relate' to a violation of a commercial motor vehicle safety standard. Finally, the plain language of section 2305(a) protects all complaints, whenever filed relating to any commercial motor vehicle safety standard. There is no basis in either the Act or its legislative history to read the limitation of section 2305(b) (refusing to operate a vehicle when doing so would violate a Federal safety standard) into subsection (a).

Nix v. Nehi-RC Bottling Company, Inc., 84-STA-1 (Sec'y July 13, 1984), slip op. at 8-9.

Where the complainant in an STAA action makes complaints to his supervisor "relating to" alleged violations of Department of Transportation regulations, these complaints constitute protected activity under the STAA. *Hernandez v. Guardian Purchasing Co.*, 91-STA-31 (Sec'y June 4, 1992). The Secretary has held that a complainant need only show that he reasonably believed he was complaining about a safety hazard to be protected by the Act.²⁰ *Schuler v. M & P Contracting, Inc.*, 1994-

²⁰ By contrast, a complaint brought under 49 U.S.C. § 31105(a)(1)(B)(i) requires that a complainant show an *actual* violation of a commercial motor vehicle safety regulation; it is not sufficient that the driver has a

STA-14 (Sec'y Dec. 15, 1994). A complaint related to a safety violation is protected under § 31105(a) of the STAA even if the complaint is ultimately determined to be meritless. *Barr v. ACW Truck Lines, Inc.*, 91-STA-42 (Sec'y Apr. 22, 1992); *Moyer v. Yellow Freight System, Inc.*, 89-STA-7 (Sec'y Sept. 27, 1990). A complainant's motivation in making safety complaints has no bearing on whether those complaints are protected activity. *Nichols v. Gordon Trucking, Inc.*, 1997-STA-2 (ARB July 17, 1997).

In the instant case, Mr. Israel made a complaint pursuant to § 31105(a)(1)(A) when he informed the UTT dispatcher, dispatch manager, safety director, and vice president that the "four way" decked truck was unsafe to drive. (TR 32, 36-39, 46-51). Specifically, he told them that the "four way" decked truck was unsafe to drive when he asserted that a four-by-six piece of wood upon which one of the trucks was mounted was damaged and could cause an accident. *Id.* Respondent does not dispute that Mr. Israel made the safety complaint. The issue ultimately lies with whether or not Mr. Israel believed that it was unsafe to drive the truck. His belief that the truck should not be driven was bolstered by the photographic evidence which shows that the block of wood was damaged. (CX 1). Additionally, Mr. Burns when shown CX 1 stated that depending on road conditions it could "possibly" be a safety problem. (TR 135). For these reasons, I find that Mr. Israel's belief that the "four way" decked truck was unsafe to drive was reasonable. Accordingly, I find that he engaged in protected activity by making a complaint under § 31105(a)(1)(A).²¹

Internal complaints to management are protected under the STAA. *Reed v. National Minerals Corp.*, 91-STA-34, (Sec'y July 24, 1992). As Mr. Israel's complaints to the UTT supervisors were internal, UTT had immediate knowledge of the Complainant's protected activity.

reasonable good faith belief about a violation. *Cook v. Kidimula International, Inc.*, 95-STA-44 (Sec'y Mar. 12, 1996).

²¹ Mr. Israel alleges that Mr. Rauch wanted him to "pretty much" drive 500 miles per day. (TR 52-55). When Complainant brought this to the attention of the safety director, she told him to drive the truck safely. (TR 55-56). I find no credible evidence that Mr. Israel has proven, by a preponderance of the evidence that he was required to violate the Department of Transportation's maximum daily hours of driving.

Allegation of Adverse Employment Actions

Whether the Respondent took adverse employment action against the Complainant, specifically whether it "discharge[d]. . . discipline[d] or discriminate[d] . . . regarding pay, terms, or privileges of employment." 49 U.S.C. § 31105(a)(1). Complainant must establish that the adverse action was taken in response to his protected activity, and not for some other reason. 49 U.S.C. § 31105(a); *Metheany v. Roadway Package Systems, Inc.*, ARB Case No. 00-063, 2000-STA-11 (Sept. 30, 2002); *Muzyk v. Carlsward Transportation*, ARB Case No. 06-149, 2005-STA-060 (Sept. 28, 2007). The Board has held that, while a party need not establish economic harm in order to show that an adverse action occurred, a party must demonstrate that the Employer's action constituted a tangible job consequence. *West v. Kasbar, Inc.*, ARB Case No. 04-155, 2004 STA-34 (Nov. 30, 2005). However, several cases have held that, where retaliatory activity is alleged, an adverse action need not rise to the level of an ultimate employment decision. *Calhoun v. United Parcel Service*, ARB Case No. 00-026, 1999-STA-7 (Nov. 27, 2002).

Complainant alleged that he filed his complaint with OSHA on June 12, 2007, because his lack of driving assignments after he reported his safety complaint amounted to retaliation. (TR 58). The record reveals that Complainant received a driving assignment on May 30 and June 4, 2007. (TR 53, 56-57). After he filed his complaint, he received "quite a few" assignments from UTT for about two and one-half months. (TR 62). Mr. Israel stopped taking assignments because it was unprofitable. (TR 65). I find nothing in the record to dispute Mr. Burns's testimony that after his meeting with Complainant on or about June 4, 2007, that Mr. Israel only asked to be assigned single loads and was aware that they were less profitable and were not often available. (TR 114-115). Even if the lack of driving assignments is characterized as an adverse employment action, I find that Complainant has failed to prove by a preponderance of the evidence that his failure to obtain as many driving assignments as he had hoped was causally related to his protected activity.

Complainant testified that he was unable to get work as a commercial truck driver because Respondent had in essence conspired with other trucking companies to keep him from obtaining a job in the trucking industry. (TR 80-83). "Blackballing" in retaliation for protected activity is a violation under the Act. See *Becker v. West Side Transport*,

Inc., ARB Case No. 01-032, 00-STA-4 (Feb. 27, 2003). In general, Complainant's evidence regarding Respondent's alleged "blackballing" is speculative. Complainant provided no information, other than his own suppositions about any communications UTT employees may have had with potential employers. For his part, Mr. Burns denied that UTT made any statements to any employers. (TR 118-119; CX 14). Based on the foregoing, I find that Complainant has failed to establish by a preponderance of the evidence that Respondent "blackballed" him in retaliation for protected activity.

Complainant testified that he ceased accepting assignments from UTT because they had made conditions such that he was unable to make a profit. (TR at 65, 103). A discharge can be either actual, as when the employer informs an employee that he is fired, or constructive. 49 U.S.C. § 31105(a)(1); *Jackson v. Protein Express*, ARB Case No. 96-194, 95-STA-38 (Jan 9, 2007), slip op. at 3.

A constructive discharge occurs where "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Held v. Gulf Oil Co.*, 684 F.2d 427, 434 (6th Cir. 1982); *NLRB v. Haberman Construction Co.*, 641 F.2d 351 (5th Cir. 1981); *Cartwright Hardware Co. v. NLRB*, 600 F.2d 268 (10th Cir. 1979). See also *Seven Up Bottling Co. of Bridgetown, N.J., Inc. and Teamsters Local 676*, 235 NLRB 93 (1978), 1978 CCH NLRB 19, 261 (assigning employee to outdoor work in very cold weather constitutes a constructive discharge); *Interstate Equipment Co. and Teamsters Local 135*, 172 NLRB 145 (1968, 1968-2 CCH NLRB 20,084 (assigning a truck driver fewer loads, according him less seniority and assigning him older, less road-worthy trucks amounts to constructive discharge). Furthermore, it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions. *Junior v. Texaco, Inc.*, 688 F.2d 377 (5th Cir. 1982); *Bourque v. Powell Electric Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980). An employer telling an employee that the employee's refusal to drive an assigned cab because he considered it unsafe was equivalent to the employee's "voluntarily quitting [his] job" may be a constructive discharge, depending on the circumstances. See *Dutile v. Tighe Trucking, Inc.*, 93-STA-31 (Sec'y Nov. 29, 1993).

Based on the evidence of record, I find that Complainant did complain about his perceived problem with the "four way" load to UTT. However, the decision to only drive single trucks

was a decision made by Mr. Israel after UTT had informed him that there were fewer loads of that type and thus less profitable to the truck driver. The decision by Complainant to stop taking loads until his complaint was resolved was a result of his decision process. From these circumstances, it is not reasonable to conclude that Complainant was constructively discharged.

In his brief or at the hearing, Complainant also contends that UTT took adverse employment actions against him casually related to his engaging in protected activity by not paying him for "deadhead" miles, i.e., car rental and other expenses, withholding his final settlement, cancelling his insurance, and altering his driving log. (TR 58, 63, 76-77, 105; *Complainant's Brief*). A complainant's testimony, standing alone, can satisfy the adverse action element of a STAA claim if not contradicted and overcome by other evidence. *Ass't Sec'y & Brown v. Besco Steel Supply*, 93-STA-30 (Sec'y Jan. 24, 1995).

Mr. Israel's allegation that UTT changed his daily travel log as a result of him filing a complaint is based on speculation. (TR 74-76; CX 10; *Complainant's Brief*). Mr. Israel's conclusion is based on assumptions that are not supported by the record. *Id.* Mr. Israel failed to prove by a preponderance of the evidence that his travel log issue is casually related to his complaint under the STAA.

Mr. Israel's allegations of adverse employment actions by not paying him for "deadhead" miles, i.e., car rental and other expenses, withholding his final settlement, and cancelling his insurance are not supported by the record. The contract that Mr. Israel entered into was explicit with regard to providing a sixty percent advance for trips, and he failed to prove that he was treated any differently than the other drivers regarding reimbursement for "deadhead" miles. (TR 64-65; CX 4, 5; RX 1). Additionally, Mr. Israel's insurance was cancelled because he refused to take any more assignments. (TR 119-120; CX 6; RX 1). Even if not paying Mr. Israel for "deadhead" miles, i.e., car rental, withholding his final settlement, and cancelling his insurance are characterized as adverse employment actions, I find that Complainant has failed to prove by a preponderance of the evidence that his failure to be reimbursed for "deadhead" miles, withholding money from his final settlement, and cancelling his insurance were causally related to his protected activity.

CONCLUSION

In sum, Mr. Israel has failed to prove by a preponderance of the evidence that UTT took any adverse employment action against him for engaging in activities protected by the STAA.

RECOMMENDED ORDER

IT IS RECOMMENDED that the complaint of Joshua J. Israel for relief under the STAA be **DENIED**.

A

Larry S. Merck
Administrative Law Judge

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, Suite S-5220, 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.