

**U.S. Department of Labor**

Office of Administrative Law Judges  
11870 Merchants Walk - Suite 204  
Newport News, VA 23606

(757) 591-5140  
(757) 591-5150 (FAX)



**Issue Date: 07 February 2013**

ARB No: 11-021

Case Nos.: 2008-STA-00020  
2008-STA-00021

In the Matter of:

LINDELL BEATTY and  
APRIL BEATTY,  
Complainants,

v.

INMAN TRUCKING MANAGEMENT, INC.,  
Respondent.

**APPEARANCES:**

E. Holt Moore, III, Esq., for Complainants

Andrew J. Hanley, Esq., for Respondent

**BEFORE:**

DANIEL A. SARNO, JR.  
District Chief Administrative Law Judge

**DECISION AND ORDER ON REMAND**

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. § 31105 (2007), and its implementing regulations, 29 C.F.R. Part 1978 (2008) (“STAA”). On August 9, 2007, Lindell and April Beatty (“Complainants”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that Inman Trucking Management, Inc. (“Respondent” or “Inman”) had violated the employee protection provisions of the STAA, first, when Inman fired Complainants on December 14, 2007, and second, when Inman submitted a negative DAC report for the Complainants. On November 22, 2007, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, Region IV, found that Complainants’ claim had no merit. By facsimile dated December 17, 2007, Complainants filed a request for a hearing before an Administrative Law Judge. On July 15, 2008, a hearing was held in Wilmington, North Carolina.

A recommendation (R. D&O) was issued on December 9, 2008, dismissing the claims as untimely. By Final Decision and Order issued on June 30, 2010, the Administrative Review Board (Board) affirmed the recommendation to dismiss the Beatty's claims based on their terminations as being untimely filed. However, the Board reversed the recommendation to dismiss the blacklisting claims as being untimely filed. The Board determined the blacklisting claims were timely filed and remanded the case for further consideration consistent with the Board's decision.

On December 2, 2010, in an R. D&O on remand, I determined that the Beattys had not sustained their burden of proof with regards to blacklisting because they could not prove that the information in the DAC report had caused them harm. The R. D&O was appealed and, on June 28, 2012, the Board remanded with instructions that the evidence of record is sufficient to conclude that the contents of the DAC report qualify as blacklisting. The Board remanded for further consideration of whether the Beattys' protected activity contributed to the blacklisting and certain factual issues.

### **STIPULATIONS**

1. Respondent is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31101;
2. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101;
3. Respondent is engaged in transporting products on the highways via a commercial motor vehicle with a gross weight rating of ten thousand and one pounds or more;
4. Respondent maintains a place of business in Leland, North Carolina;
5. Respondent hired Complainants as team truck drivers, and they drove commercial motor vehicles, to wit, a truck with a gross vehicle weight rating of ten thousand and one pounds or more;
6. Complainants were employed by a commercial motor carrier and drove Respondent's trucks over highways in commerce to haul cargo;
7. In the course of employment Complainants directly affected commercial motor vehicle safety;
8. Complainants were employed by Respondent until being discharged on December 14, 2005, and Complainants filed this discrimination complaint on August 9, 2007.

### **ISSUES**

1. Whether Complainant engaged in activity protected under the Act, and if so,
2. Whether the protected activity was a substantial factor in the adverse employment action against Complainant, and if so,

3. Whether the Respondent's reason for suspending and then terminating the Complainant was a pretext for discrimination, and if so,
4. Whether the Complainant is entitled to damages.

### **SUMMARY OF THE EVIDENCE**

#### **A. Testimony of April Beatty**

Mrs. April Beatty testified that she resides in Wilmington, North Carolina and has been a tractor-trailer driver since 1995. (TR at 27:20-28:1.) Mrs. Beatty testified that between August 2004 and December 2005, she and her husband were employed by Inman Trucking Management ("Inman"). (TR at 28:4-14.) Mrs. Beatty testified that around October 2005, while they were driving to California, she began to smell fumes coming into the bunk while she was trying to sleep. (TR at 48:17-49:11.) Mrs. Beatty further testified that she woke up in Knoxville, Tennessee when Mr. Beatty had pulled over to call the on-call safety person. (TR at 49:5-6.) Mrs. Beatty testified that Mr. Beatty informed the on-call person that the exhaust leak was prohibiting them from sleeping in the bunk, but that they were told to go ahead to California and to stop complaining. (TR at 49:14-50:13.) Mrs. Beatty testified that they pulled over again in Oklahoma City, went under the truck, and took pictures of the muffler. (TR at 50:18-22.) At that time, Mrs. Beatty testified that they again called Inman about the muffler, but were brushed off. (TR at 50:21-22.) Still, Mrs. Beatty testified that they continued to drive until the muffler blew out in Albuquerque and they stopped to have it repaired. (TR at 49:19-20; 50:22-24.)

Mrs. Beatty further testified that they never received any formal disciplinary action while working for Inman. (TR at 47:1-5.) She also testified that she was not present when Inman terminated their employment on December 14, 2005, (TR at 28:20-22), but that she believed they were fired due to a disagreement her husband had in the office. (TR at 47:9-12, 62:22-25.) After leaving Inman, Mrs. Beatty testified that they received unemployment benefits for twenty-six weeks and then applied to work for FedEx in approximately June 2006. (TR at 38:13-21.) Mrs. Beatty testified that they worked for FedEx for three months before they left. (TR at 39:2-3.)

Mrs. Beatty testified that in August 2007, she and Mr. Beatty applied to U.S. Express, Incorporated, but that they were abruptly pulled out of orientation and were told that U.S. Express could not hire them. (TR at 29:9-15.) Mrs. Beatty testified that they had worked for U.S. Express before, and had not foreseen any problem with getting rehired. Thus, Mrs. Beatty testified that when they arrived home she called the main office in Chattanooga to inquire about the problem, and was told by a recruiter that the DAC report directly affected the reason for their dismissal. (TR at 29:23-30:2.) Mrs. Beatty testified that they next tried to seek other employment with Cargill Meats, but were told that they would not be hired due to their DAC report. (TR at 31:4-25.) Then, Mrs. Beatty testified that they tried to seek employment with three other companies, but were not given reasons for their flat denials. (TR at 36:21-24.)

Finally, Mrs. Beatty testified that Inman had essentially cleared the DAC report by November 2007, and that they were able to get employment with Covenant Transport for six

months. (TR at 39:14-40:1.) Mrs. Beatty testified that she believed that the negative DAC report was how Inman retaliated against her and her husband for whatever transpired between Mr. Beatty and the office when they were terminated. (TR at 30:17-20.) She further testified that after being fired from Inman she could have checked her DAC report, but that she did not think to check her DAC report, and therefore, did not know that negative comments had been made. (TR at 61:8-14.) Moreover, Mrs. Beatty testified that in retrospect she believes it would have been a good idea to check her DAC report. (TR at 61:15-17.)

## **B. Testimony of Lindell Beatty**

Mr. Lindell Beatty testified that he has been a truck driver since 1989 and that he was employed with Inman during the same dates as Mrs. Beatty, between August 2004, and December 2005. (TR at 64:4-15.) Mr. Beatty further testified that he did not disagree with anything in Mrs. Beatty's testimony. (TR at 64:16-21.)

Mr. Beatty testified that as a CDL driver it is his responsibility to check the truck and make sure that it is not operated in a dangerous condition. (TR at 68:21-23.) Mr. Beatty further testified that he did this all the time with Inman, and that as a result Inman labeled him a complainer. (TR at 68:23-24.) Next, Mr. Beatty testified that he was told to call FleetNet America, Inc. ("FleetNet"), an on call repair service, anytime he had to stop for repairs; however, afterwards Inman told him not to call FleetNet anymore, and to call the office instead. (TR at 69:21-24.)

Mr. Beatty testified that an exhaust leak occurred in October while they were driving truck 167 through Knoxville, Tennessee. (TR at 70:8-71:4; 75:4-5; 77:9-25.) He testified that he first called the office, which then told him to call FleetNet. (TR at 69:24-70:3.) After calling FleetNet, Mr. Beatty testified that he called the office again and told them that there was a T/A across the road, and that the office told him to go to the T/A. (TR at 69:3-7.) Mr. Beatty testified that at the T/A they found a hair-thin line on the muffler that was leaking fumes, but that they would have had to wait until the following day to get the part to fix it. (TR at 70:8-13.) Mr. Beatty testified that he called the office again, but that they didn't want him to wait, and told him to drive on. (TR at 70:13-15.) Mr. Beatty testified that they pulled to the side of the road in Oklahoma and took pictures of the muffler, which by then had a large hole in it. (TR at 76:10-77:6.) Mr. Beatty testified that by the time they arrived in Albuquerque they could go no further because the muffler needed to be fixed. (TR at 70:14-21.) Clarifying, Mr. Beatty testified that although he reported the muffler from two different cities, Knoxville, TN and Albuquerque, NM, there was only one muffler incident, and it occurred in October. (TR at 71:1-5.) Mr. Beatty testified that they waited in Albuquerque a couple days to have the muffler fixed, and Inman put them in a hotel while they waited. (TR at 71:15-16.)

After showing Mr. Beatty EX B and EX F, which depict two exhaust leaks on two separate trucks, the first occurring in October and being reported in Knoxville, and the second occurring in December and being reported in Albuquerque, Mr. Beatty testified that he believed the dates on the invoices and receipts were wrong, or mixed up. (TR at 101:15-20, TR at 102:18-19.) Mr. Beatty later testified that there may have been more than one muffler incident, and he may have gotten one of the invoice dates wrong. (TR at 104:18-21, TR at 105:14-19.)

Next, Mr. Beatty testified that many times the trucks that they were asked to drive were filthy and that when they reported the dirty conditions of the trucks, they were told that they were always complaining. (TR at 72:14-20.) Mr. Beatty testified that they had to clean the truck before every trip to California because the previous truck drivers had not cleaned out their truck. (TR at 88:6-19.) Specifically, Mr. Beatty testified that on a previous occasion he and his wife were asked to drive a truck to California, but when they arrived at Inman to pick up the truck, the truck was filthy with trash and moldy food. (TR at 73:6-21; 88:6-15.) Mr. Beatty testified that he requested to have an hour to clean out the truck, but that he was told he had to leave immediately, or not go at all. (TR at 73:15-25.) Mr. Beatty testified that they refused to take the truck that day, but returned to take pictures of the truck. (TR at 74:1-3.) The following day, Mr. Beatty testified that he showed the pictures to Darryl, a supervisor at Inman, and that Darryl understood the situation and did not fire them. (TR at 74:5-8; 87:5-7.) Still, Mr. Beatty testified that he and his wife were labeled as complainers. (TR at 89:3.)

Mr. Beatty testified that, while on a run in Idaho, he and Mrs. Beatty had loaded their truck to capacity with a load of potatoes, but were instructed to add more potatoes or get out of the truck. The Beattys took on the additional potatoes and received a ticket for exceeding the allowed weight. (TR at 84.)

Mr. Beatty testified that on December 14, 2005, he and his wife had just returned from a run and he went into the office to turn in some paperwork. (TR at 67:13-16.) Next, Mr. Beatty testified that Al Grover, Darryl and Trent were in the office, and that he began speaking with Mr. Grover. (TR at 66:16-18.) Mr. Beatty testified that the conversation occurred as follows:

[Mr. Grover] mentioned something that was very derogatory and negative to being a truck driver. . . . I blurted out, "Oh, well, so that's how it is here?" And he said, "Yes." And I said, "Well that's why I got this tape recorder." And that's when I was fired right there.

(TR at 67:21-68:3.) Mr. Beatty also testified that although he had a tape recorder with him, it did not pick up the derogatory comment, and that he does not remember what the comment was that Mr. Grover said. (TR at 92:8-25.) Mr. Beatty further testified that he did not think that he was fired for complaining, but instead, thought he was fired for having the tape recorder with him. (TR at 95:2-3.) Later, Mr. Beatty testified that he believed he was fired for complaining about safety issues. (TR at 111:3-8.)

Mr. Beatty testified that, after their termination with Inman, they didn't have a reason to check their DAC report, because to their knowledge their license was perfectly clean. (TR at 65:3-6.) Mr. Beatty also testified that after leaving Inman he filed for unemployment, and when his unemployment ended he was hired by a couple of companies driving trucks. (TR at 79:2-4.) Mr. Beatty testified that at first he had no problem getting employment, until he applied at U.S. Express. (TR at 79:4; 80:12-25.)

### **C. Testimony of Anthony Hall**

Mr. Anthony Hall is the owner of a small trucking company, where he leases trucks to Cargill, located out of Milwaukee, Wisconsin. (TR at 116:14-23.) Mr. Hall testified that he had put an ad in the paper stating that he needed a truck driver to run from Milwaukee back to the Carolinas every week, and that Mr. and Mrs. Beatty responded to the ad. (TR at 117:21-25.) Mr. Hall further testified that in early August 2007, they filled out an application, but that Cargill denied it. (TR at 118:1-8; 119:6-10.) He also testified that he did not have any personal knowledge that would have kept him from letting them drive his truck. (TR at 118:9-12.)

Next, Mr. Hall testified that Tom, the safety director at Cargill, called and told him that he could not hire them because of their DAC report. (TR at 128:1-7.) However, Mr. Hall also testified that the safety inspector would not tell him what the issue with the DAC report was, and did not identify the Inman DAC report as the problem. (TR at 128:4-15.) He next testified that the Beattys tried to straighten out their DAC report three times, and that Cargill ran the DAC report three times, but that Cargill would still not accept the application. (TR at 128:16-25.) Still, Mr. Hall testified that he believed the Beattys would have been hired if they had had a clean DAC report. (TR at 129:8-9.)

### **D. Testimony of Alan Grover**

Mr. Alan Grover is a safety director for Inman. (TR at 130:24-131:1.) Mr. Grover testified that he had personal knowledge of the repairs made to Truck Nos. 172 and 167. (TR at 131:8-10.) Mr. Grover testified that, according to an invoice from FleetNet, on October 29, 2005, after smelling exhaust in the cab, Mr. Beatty called FleetNet and reported an exhaust leak in Truck No. 172. (TR at 131:23-132:3; EX D.) Mr. Grover testified that FleetNet sent a man to the truck, but before he arrived, Mr. Beatty called FleetNet, cancelled the complaint and said they were going on. (TR at 132:7-10; EX D.) Mr. Grover testified that Inman was charged \$165.00 for the call to FleetNet. (TR at 132:22-25.) Mr. Grover further testified that the maintenance records show that no exhaust repairs were made to Truck No. 172 in October, or in December 2005. (TR at 132:18-20.)

Next, Mr. Grover testified that in December 2005, there was a second exhaust leak on a different truck, Truck No. 167. (TR at 133:3-20.) Mr. Grover testified that according to his records Truck 167 was repaired in Albuquerque, New Mexico on December 6, 2005. (TR at 133:17-21.) Mr. Grover testified that at that time the Beattys were put up in a hotel, were paid for their meals, and received layover pay. (TR at 133:23-25.)

Mr. Grover testified that company policy requires that drivers make three trips per month in order to be considered fulltime. (TR at 134:3-4.) Mr. Grover further testified that the Beattys only made two trips per month between June 15, 2005, and December 14, 2005, which is a violation of company policy. (TR at 134:8-12.) Mr. Grover testified that the Beattys were constantly being reprimanded over the fact that they weren't living up to the responsibilities that they were hired for. (TR at 134:15-18.) In fact, Mr. Grover testified that at one point Inman brought them down to part-time pay. (TR at 134:15-16.) Furthermore, Mr. Grover testified that most drivers are assigned a specific truck, but Inman was not able to assign the Beattys to a

specific truck because they were too unreliable. (TR at 134:19-25.) Mr. Grover also testified that when the Beattys would come to work they would then refuse to drive the truck because it was too dirty, or didn't have enough room for them. (TR at 135:4-14.) Mr. Grover testified that nine out of ten times the Beattys complained about the cleanliness of the trucks and not about safety issues. (TR at 136:8-14.)

Mr. Grover testified that the Beattys were fired because of their excessive complaining. (TR at 137:24-25.) He further testified that Inman had conditioned the Beattys' termination, on whether they refused their December 14th trip for any reason. (TR at 138:4-6.) Mr. Grover stated, "We were so tired of excuses and reasons why they couldn't go, that the plan was already made ahead of time that they were going to be fired." (TR at 138:6-9.) Mr. Grover also testified that they did not fire the Beattys for carrying a tape recorder or for making a safety complaint. (TR at 138:1-12).

Mr. Grover testified that he filled out the Beattys' DAC reports within a day of their termination date, (158:7-11), that the reports were originally received by DAC on December 14, 2005, (TR at 141:21-23), and that the reports were not filled out at some later date in order to blackball the Beattys. (TR at 158:5-9.) Regarding the Beattys' work record, Mr. Grover testified that the DAC report stated, "Excessive complaints, company policy violation, personal contact requested and other." (TR at 142:2-5.) First, Mr. Grover testified that the "excessive complaints" comment signified having excessive complaints from the Beattys about dirty trucks, and the size of the trucks. (TR at 142:7-12.) Second, Mr. Grover testified that "company policy violation" referred to running two trips a month instead of three, and also calling FleetNet personally instead of contacting the office first. (TR at 142:13-20.) Third, Grover testified that "personal contact requested" indicated that future employers should contact him, so that he could explain what he meant on the DAC report. (TR at 142:23-143:6.) Mr. Grover testified that he wanted to clarify to other employers that the excessive complaints were from the drivers and not from the customers. (TR at 143:1-6.) Finally, regarding "other," Mr. Grover testified that it was basically a catchall phrase. (TR at 143:7-9.) Mr. Grover testified that the reasons for the Beattys' termination, which he stated in the original DAC report, were accurate. (TR at 144: 4-8.) Mr. Grover further testified that he would not have changed the DAC report if OSHA had not offered to settle the case by changing the report. (TR at 144:25-145:6.)

Next, Mr. Grover testified that he changed the DAC report several times in order to settle with the Beattys. (TR at 146:8-147:10.) Mr. Grover testified that he first removed "personal contact requested," and then, three days later on August 27, 2007, removed "excessive complaints," and changed "eligible for rehire: no" to "review required before rehiring." (TR at 146:10-21.) Mr. Grover testified that on September 13, 2007 he submitted the specific DAC codes to make the final changes. (TR at 147:1-8.)

### **E. DAC Reports**

The following information shows the progressive changes on the Beattys' DAC report from the approximate time that they first noticed the negative information on the report, until the approximate time that the report was cleared.

**Report One** - viewed on August 20, 2007

Original data received by DAC on 12/14/2005

Period of Service: From 06/2004 To 12/2005  
Eligible for Rehire: No  
Reason for Leaving: Discharged (or Company Terminated Lease)  
Status: Company Driver  
Work Record: Excessive Complaints, Company Policy Violation, Personal Contact Requested, Other

**Report Two** - viewed on September 4, 2007

Original data received by DAC on 12/14/2005

Period of Service: From 06/2004 To 12/2005  
Eligible for Rehire: Review required before rehiring.  
Reason for Leaving: Discharged (or Company Terminated Lease)  
Status: Company Driver  
Work Record: Company Policy Violation, Other

**Report Three** - viewed on September 17, 2007

Original data received by DAC on 12/14/2005

Period of Service: From 06/2004 To 12/2005  
Eligible for Rehire: Review required before rehiring.  
Reason for Leaving: Discharged (or Company Terminated Lease)  
Status: Company Driver  
Work Record: Satisfactory

### **DAC Revision Form**

Mr. Grover submitted three forms on separate dates in order to amend the Beattys' DAC report. The forms contained the following information:

1. Date: 8/24/2007

Period of Service: Hire Date: 06/2004 Termination Date: 12/2005

Driver: Beatty A.

Deletions: Personal Contact Requested.

Authorized by: Al Grover [signed]

2. Date: 8/27/2007

Period of Service: Hire Date: 06/2004 Termination Date: 12/2005

Driver: Beatty A.

Change From: Eligible for Rehire: NO

Change To: Review required before rehiring  
Deletions: Excessive Complaints, Personal Contact Requested.  
Authorized by: Al Grover [signed]

3. Date: 9/13/2007  
Period of Service: Hire Date: 06/2004 Termination Date: 12/2005  
Driver: Beatty A.  
Change From: Code 101, Code 935  
Change To: Code 133, Code 901  
Deletions: Code 999  
Authorized by: Al Grover [signed]

#### **F. Invoice from FleetNet America, Inc. (EX D)**

The Beattys called FleetNet America in order to receive maintenance on their truck for an exhaust leak. This invoice indicates the date of the call, the maintenance issue, the truck number, and what repairs were performed. The pertinent information is reflected below.

**Invoice Date:** 12/13/2005

**Called In:** 10/29/2005

**Driver:** Lindell

**Location:** Exit 369T/A **City:** Knoxville **St.** TN

**Tractor:** 172

**Nature of Failure:** Exhaust Leak when he stops truck smells exhaust in cab.

**Repairs:** This call was cancelled by the driver. He decided to take the truck on. Called and cancelled call. Vendor and FNA charges.

#### **G. Albuquerque Invoices (EX F)**

The information found in the following invoices indicate the dates that the Beattys' truck was repaired in Albuquerque, New Mexico, the Beattys' layover time, and what maintenance was performed on the truck during their stay.

##### ***Invoice from Rush Truck Center***

Rush Truck Center, Albuquerque

6521 Hanover Dr. NW

Albuquerque NM 87121

Inman Trucking

1251 Gregory Rd.

Leland NC 28451

COMPLETION DATE: 12/06/2005

Complaint – Exhaust leak – Check and Advise.

Cause – Exhaust elbow at rear of cab below muffler leaking due to rubbed hole.

Correction – Verify, diagnose, R&R elbow and retest for leaks.

***Invoice from Super 8 Motel***

Super 8 Motel – Midtown  
2500 University Blvd NE  
Albuquerque, NM 87107  
Lindell Beatty Room: 263  
Inman 2423 White Rd Wilmington, NC 28411  
Arrive: 12/04/05  
Depart: 12/05/05  
# Guests: 2  
Room #:263 Date: 12/04/05 Amount: \$51.73  
Signature Lindell Beatty [signed]

***Invoice from Quality Inn and Suites***

Quality Inn & Suites Date: 12/05/05  
411 McKnight Ave. NW  
Albuquerque, NM 87102  
Arrival Date: 12/05/05  
Room: 113  
April Beatty Wilmington, NC 28404  
April Beatty [signed]

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The STAA provides a cause of action on behalf of an employee when his former employer blacklists him for having engaged in protected activity. *Ramirez v. Frito-Lay, Inc.*, ARB No. 06-025, ALJ No. 2005-STA-037, slip op. at 5 (ARB Nov. 30, 2006); *Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-036, slip op. at 5 (ARB July 31, 2006). We have said, “[b]lacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment.” *Murphy*, slip op. at 5.

In order to prevail on an STAA complaint, a complaint must make a *prima facie* case of discrimination by showing that: (1) he engaged in protected activity, (2) the employer was aware of his activity, (3) he was subject to adverse employment action, and (4) there was a causal link between his protected activity and the adverse action of his employer. *See Clean Harbors Env'tl. Serv., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Moon v. Transp. Drivers*, 836 F.2d 226, 229 (6th Cir. 1987); *Roadway Express, Inc. v. Brock*, 830 F.2d 179, 181 n.6 (11th Cir. 1987). Under the STAA, the ultimate burden of proof usually remains on the complainant throughout the proceeding. *Byrd v. Consol. Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, slip op. at 5 n.2 (May 5, 1998).

The employer may rebut the *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The employer must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse action. The explanation provided must be legally sufficient to justify a judgment for the employer. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Bechtel Constr. Co.*

*v. Secretary of Labor*, 50 F.3d 926, 934 (11th Cir. 1995). Once the employer produces evidence sufficient to rebut the “presumed” retaliation raised by the *prima facie* case, the inference simply “drops out of the picture,” and the trier of fact proceeds to decide the ultimate question. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 507-11 (1993).

The complainant then has the opportunity to prove, by a preponderance of the evidence, that the employer’s reason for the adverse action was mere pretext for discrimination. *Burdine*, 450 U.S. at 253. Specifically, complainant must establish that the proffered reason for the adverse action is false and that her protected activity was the true reason for the adverse employment action. *St. Mary’s Honor Center*, 509 U.S. at 507-508; *see also Bechtel Constr.*, 50 F.3d at 934 (holding that the complainant must “establish that the employer’s proffered reason is pretextual by establishing either that the unlawful reason, the protected activity, more likely motivated the [employer] or that the employer’s proffered reason is not credible and that the employer discriminated against him.”). Although the burden of production shifts, the ultimate burden of persuasion remains with the complainant to show that the employer intentionally discriminated against her. *St. Mary’s Honor Center*, 509 U.S. at 507-508. If the proof establishes that the adverse action was undertaken for both discriminatory and nondiscriminatory reasons, i.e. “mixed motives,” the employer must show by a preponderance of the evidence that it would have taken the same adverse action absent the complainant’s protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

#### **A. Protected Activity**

Section 405(a) of the Act states in pertinent part that:

(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 -

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

(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 motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

Subsections (1)(A) and (1)(B) of the foregoing provision are referred to as the "complaint" clause and the "refusal to drive" clause, respectively. *See LaRosa v. Barcelo Plant Growers, Inc.*, ARB Case No. 96-089, ALJ Case No. 96-STA-10, Rem. Ord., Aug 6, 1996, slip op. at 1-3. Complainant must prove that he engaged in activity protected by either or both of the foregoing provisions, and that he was discriminated against, at least in part, because of that protected activity. *Somerson v. Yellow Freight System*, ARB Case No. 99-004, ALJ Case No. 98-STA-9, Final Dec. and Ord., Feb. 18, 1999, slip op. at 8, (*citing Clean Harbors Environmental*

*Services v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Byrd v. Consolidated Motor Freight*, ARB Case No. 98-064, ALJ Case No. 97-STA-9, Final Dec. and Ord., May 5, 1998, slip op. at 4 n.2).

Complaints are protected activities if they relate to federal commercial motor vehicle laws and regulations. *Moravec v. HC&M Transportation, Inc.*, 90-STA-44 (Sec'y July 11, 1991). The complaint does not have to state the specific rule or regulation that it pertains to. *Id.* In addition, a complaint is protected whether it was formally filed with a government agency or internally communicated to the employer. *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998). The complaint need not be meritorious as long as the complainant can show that he reasonably believed he was complaining about an actual violation. *Yellow Freight System v. Martin*, 954 F.2d 353, 356-357 (6th Cir. 1992).

Under the STAA, a complainant's safety concerns can be oral rather than written. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that the driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors); *See Clean Harbors Env'tl. Serv. Inc. v. Herman*, 146 F.3d 12, 20-22 (1st Cir. 1998). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed. *See Clean Harbors Env'tl. Serv.*, 146 F.3d at 20-22 (1st Cir. 1998) (holding that the complaint's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

Here, the Beattys allege that they engaged in protected activity by complaining of an exhaust leak. Mrs. Beatty testified that in October of 2005 she smelled an exhaust leak in the cab of the truck and reported the leak to Inman before continuing to drive until the muffler blew out in Albuquerque. (TR at 49-50.) Mr. Beatty related essentially the same testimony. (TR at 70-71.) Mr. Grover testified that although the Beattys made a service call to FleetNet about an exhaust leak on October 29, 2005, no repairs were made at that time. (TR 131-132.) Mr. Grover stated that an exhaust leak was repaired on the Beattys truck in December of 2005 in Albuquerque after the Beattys reported the damaged muffler. (TR at 133.) Mr. Grover's testimony is confirmed by the invoices from FleetNet, Rush Truck Center, and two motels. (EX D; EX F.) An exhaust leak is governed by Federal Motor Carrier vehicle safety regulations located at 49 C.F.R. § 393.83(g). Accordingly, the Beattys engaged in protected activity when they orally reported the exhaust leaks.

## **B. Subject to Adverse Employment Action**

The STAA provides a cause of action on behalf of an employee when his former employer blacklists him for having engaged in protected activity. *Ramirez v. Frito-Lay, Inc.*, ARB No. 06-025, ALJ No. 2005-STA-037, slip op. at 5 (ARB Nov. 30, 2006); *Murphy v. Atlas Motor Coaches, Inc.*, ARB No. 05-055, ALJ No. 2004-STA-036, slip op. at 5 (ARB July 31, 2006). As found by the Board, the contents of the DAC report were disseminated and constitute negative information which on its face would affirmatively prevent the Beattys from finding employment. Accordingly, the Beattys were subject to adverse employment action.

### **C. Causal Link Between the Protected Activity and the Adverse Action**

In establishing a *prima facie* case, a complainant need only raise the inference that his engaging in protected activity caused the adverse action. *Stiles v. J.B. Hunt Transportation, Inc.*, 92-STA-34, (Sec'y 1993). The proximity in time between protected conduct and adverse action alone may be sufficient to establish the element of causation for purposes of a *prima facie* case. *Deeneway v. Matlack, Inc.*, 88-STA-20, (Sec'y June 15, 1989). A complainant can establish a causal link between the protected activity and the adverse employment action by showing that the employer was aware of the protected activity and that the adverse action followed closely thereafter. *Kovas v. Morin Transport, Inc.*, ALJ Case No. 92-STA-41, slip op. at 4 (Sec'y Oct. 1, 1993) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989).

Here, the Beattys reported one exhaust leak in October or 2005 to Fleetnet, but left before any inspection or repairs could be made. (EX D.) On or about December 4, 2005, the Beattys informed Inman that the muffler of a second truck was blown and that the truck could not be driven until it was repaired. (EX F; TR 50-51.) The Beattys were fired by Inman and the negative DAC reports were created on or about December 14, 2005. (TR 158.) Accordingly, the temporal proximity of the Beattys protected activity and the adverse employment action is sufficient to raise the inference that the exhaust leak complaint caused the filing of a negative DAC report.

### **D. Respondent's Rebuttal**

In order to rebut a *prima facie* case of discrimination, the respondent must articulate a legitimate, non-discriminatory reason for taking the adverse employment action, and is not required to "persuade the court that it was actually motivated by the proffered reason..." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The evidence must be sufficient to raise a genuine issue of fact as to whether the respondent discriminated against the complainant. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.* at 255.

Inman has asserted that it submitted the DAC report stating that the Beattys had a work record of "Excessive Complaints, Company Policy Violation, Personal Contact Requested, Other" due to the Beattys history of complaining about the size or cleanliness of the trucks and failure to drive three trips each month. Mr. Grover credibly testified that the Beattys handled the December exhaust leak in the manner he would expect and encourage, a statement supported by Inman's immediate repair of the leak and provision of lodging while the Beattys waited for the repair to be completed. (TR 160; EX F.) Further, this aligns with the Beattys' own testimony that they were labeled complainers when asked about the photographs they had taken of trash inside assigned trucks. (TR 72.) Mr. Beatty reported refusing to drive a truck because it was dirty and returning to the truck yard after hours to take pictures of the condition of the truck. (TR 73-74) Mr. Beatty testified that Mr. Grover had commented to him that the Beattys expected the trucks to be cleaned and detailed before they would drive them. (TR 86.) Mr. Beatty further testified that "every trip I'm having to deal with my wife on something [Inman] did" and that he complained to Inman about the cleanliness of the trucks "a whole lot of different times". (TR 86, 89.) Mr. Grover testified that "company policy violation" referred to running two trips a month

instead of three, and also calling FleetNet personally instead of contacting the office first. (TR at 142.) These reasons are not discriminatory and provide a legitimate business reason for the negative DAC reports.

Given Inman's legitimate, non-discriminatory reasons for the negative reports, the Beattys must now prove by a preponderance of the evidence that Inman's stated reasons for the report are a mere pretext for discrimination. If an employer successfully presents evidence of a non-discriminatory reason for the adverse employment action, the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987); *See also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the adverse employment action. The employee must prove both that the asserted reason is false and that discrimination was the true reason for the adverse action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993). *See e.g. Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec'y Feb. 16, 1989); *Simpkins v. Rondy Co., Inc.*, ARB No. 02 097, ALJ No. 01-STA-59 (ARB Sept. 24, 2003); *Moon*, supra.

The Beattys have failed to meet this burden. Complainants offered no testimony as to Inman's policy requiring three trips per month or whether they had complied with that policy, although Mr. Beatty did testify that he and his wife had refused to drive an assigned trip due to the trash in the assigned truck's cab. (TR 88.) Further, as discussed above, the Beattys' testimony supports Inman's contention that the Beattys were known as chronic complainers as to the cleanliness of the trucks. I find Mr. Grover's testimony that he intended to fire the Beattys for their cleanliness complaints and failure to make required trips to be credible. I further find credible Mr. Grover's testimony that he would have fired the Beattys based on cleanliness complaints even absent the safety complaints. Although Mr. Beatty's statement that he was tape recording their conversation may have been the impetus for the exact timing of the termination, the record does not support the Beattys' contention that their safety complaints were the cause of their termination and related DAC reports. Accordingly, the Beattys have failed to establish a causal relationship between the protected activity and the adverse employment decision.

### **ORDER**

For the foregoing reasons, I hereby **ORDER** that the complaint is **DISMISSED**.

DANIEL A. SARNO, JR.  
District Chief Administrative Law Judge

DAS,JR./JRS/jcb  
Newport News, Virginia

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of

Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).