CASE NO.: 2009-STA-43

In the Matter of:

GEORGE B. BLACKIE, JR.,
    Complainant

v.

SMITH TRANSPORT, INC., and
BARRY SMITH,
    Respondents.

APPEARANCES:

George B. Blackie, Jr.,
    Complainant, pro se

Pamela G. Cochenour, Esq.,
Daniel J. McGravey, Esq.,
    For the Respondents

BEFORE: THOMAS M. BURKE
    Administrative Law Judge

DECISION AND ORDER

This proceeding involves a complaint under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (“STAA” or “the Act”), 49 U.S.C. Section 31105 (2007), and its implementing regulations found at 29 C.F.R. Part 1978 (2008). Section 405 of the STAA 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 BACKGROUND

On January 29, 2009, George B. Blackie, Jr. ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA"), alleging that his former employer, Franklin Logistics, terminated his employment on September 8, 2008, in violation of Section 31105 of the STAA. Franklin Logistics is the leasing company that leases drivers to Smith Transport. Barry Smith is the owner and CEO of Smith Transport. (ALJX 1). Complainant contends that Respondents discharged and discriminated against him in retaliation for engaging in protected activity under Sections 31105(a)(1)(A) and 31105(a)(1)(B)(i) of the Act. Additionally, Complainant alleges that during the time since his discharge on September 8, 2008, Respondents have further discriminated against him by blacklisting him within the trucking industry.

On May 8, 2009, the Secretary of Labor, acting through her agent, the Regional Administrator of OSHA, found that Complainant’s claim did not have merit. On May 19, 2009, Complainant filed objections to the Secretary’s findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

A hearing was held in Pittsburgh, Pennsylvania, on November 9-10, 2010, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. At the hearing, the following exhibits were admitted: ALJ exhibit ("ALJX") 1; Complainant’s exhibits ("CX") 1A-11, 13-14, 18-22A, 25, and 27-34A, and Respondents’ exhibits ("RX") 1 through 24.

FINDINGS OF FACT

Complainant was employed as a driver of a commercial motor vehicle by Franklin Logistics from February 1, 2006 through September 4, 2008. As a truck driver, Complainant was paid by the mile. (Tr. 14).

Upon beginning his employment with Smith Transport, Complainant attended a three-day driver orientation. On February 1, 2006, he received copies of the company’s “Orientation Manual” and “Drivers Handbook,” as well as a copy of the Federal Motor Carrier Safety Regulations. (RX 16; RX 17; RX 18). Page 8 of Smith Transport’s Orientation Manual states:

> It is the standard operational policy of Smith Transport that all drivers operate their equipment within the guidelines set forth in the Federal Motor Carrier safety regulations. This policy deals specifically with Part 395 - Hours of Service and Daily Record of Duties Status documents.

(RX 1). Complainant understood that it was his responsibility to provide his driver manager with his available hours of service on a daily basis, as well as to drive in compliance with the 11, 14, and 70-hour rules set forth by the federal hours-of-service regulations set forth at 49 C.F.R. §
The drivers were to provide their hours of service by submitting a “macro 62” via a messaging system known as the Qualcomm system. (Tr. 134). Complainant’s driver manager, Jaime Karlie, described the Qualcomm system as a two-way messaging system that functions like email or text messaging, allowing her to send messages to the driver and the driver to her, but does not allow her to know a driver’s hours of service at any given time. (Tr. 222). To remind drivers to maintain their log books, a sign which reads, “Is Your Log Book Current?” was placed over the payroll department door, which is located in the drivers lounge and cafeteria, located in Smith Transport’s Roaring Spring facility where Complainant worked. (RX 15).

During the course of his employment as a truck driver for Smith Transport, Complainant often violated the federal hours-of-service regulations and frequently falsified his log books. He received driver notification letters informing him that he violated the 11, 14, and 70-hour rules on several occasions.2 Pursuant to the Drivers Handbook, falsification of time records or other company documents is grounds for immediate termination at Smith Transport. (RX 2).

Because he was paid by the mile, Complainant preferred to drive the longest possible routes. On August 28, 2008, Complainant sent a message via the Qualcomm two-way messaging system expressing discontent with one of his route assignments. The message stated,

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1 The federal hours-of-service regulations are set forth at 49 C.F.R. § 395.3. Section 395.3 provides as follows:

The 11 hour rule requires that no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle for more than 11 cumulative hours following 10 consecutive hours off duty.

The 14 hour rules provides that no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle for any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of §395.1(o) or §395.1(e)(2).

The 70 hour rule provides that no motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

See § 395.3 Maximum driving time for property-carrying vehicles.
Subject to the exceptions and exemptions in §395.1:

2 Specifically, Complainant received notifications that he violated the 11-hour rule on June 7, 2007; the 70-hour rule on July 21, 2007; the 70-hour rule on August 12, 2007; the 14-hour rule on September 24, 2007; the 70-hour rule on October 12, 2007; the 11-hour rule on October 17, 2007; the 11-hour rule on October 18, 2007; the 14-hour rule on October 18, 2007; the 70-hour rule on December 22, 2007; the 11-hour rule on February 19, 2008; and the 14-hour rule on February 19, 2008. (RX 5).
“If your goin to screw me again on the last day of the pay period, give me some decent miles.” (RX 6).

On or about August 29, 2008, Complainant had a “business partnership meeting” with Karlie, in Roaring Spring, Pennsylvania. (Tr. 157). During this meeting, Complainant expressed concerns about getting a raise and obtaining a fuel card limit increase. He also expressed his preference for being assigned longer, financially advantageous trips, as opposed to short runs. Karlie raised concerns about Complainant’s use of profanity and unprofessional language in messages he sent over the Qualcomm system and by telephone. She also expressed concerns that Complainant was not sending in his macro 62s with his available hours of service. (EX 13).

After meeting with Karlie, Complainant continued to experience discontentment with his assigned routes. On September 3, 2008, Complainant sent the following message via the Qualcomm system:

Are you all having a contest to see who canscrew for the most miles and leave me sit for free the longest in one pay period? Great driver appreaciation for woking the holliday weekend! I said I am already hooked and loaded with load no. 1947834. There is a loasy 6 mile difference in the loads. And then srew me for the 290 mile run to right.

(RX 6). Extended Coverage Manager, Brian Gahagan, replied to Complainant’s message and stated, “Plz refrain from sending profanity over the Qualcomm. No1 is out to do anything 2 u, but keep u moving. Thx Brian Gahagan, Extended Coverage Mgr.” (RX 10).

On September 4, 2008, Complainant received a “pre-plan”3 from Karlie via the Qualcomm system directing him to drive a load from the Smith Transport warehouse in Bedford, Pennsylvania, to Baltimore, Maryland. (Tr. 33). While en route to Baltimore on September 4, 2008, Complainant received another pre-plan from Karlie directing him to pick up a load in Baltimore and transport it to Alexandria, Pennsylvania. According to Complainant’s daily travel log, on September 4, 2008, he had 22.7 total hours available and 14 consecutive hours available to work that day. Complainant requested a load with more miles, but was told by Karlie that he did not have sufficient available hours to drive a longer route. (Tr. 35, 37). Complainant picked up the load in Baltimore and headed to Alexandria via Carlisle, Pennsylvania, where he planned to stop to wash his truck and refuel.

Shortly after departing from Baltimore, Complainant received another pre-plan from Karlie directing him to travel from Alexandria to Vail, Pennsylvania, pick up a load, and deliver it to Amityville, New York, which is located on Long Island. (Tr. 35). Complainant testified that he questioned the dispatch by Qualcomm, arguing that he did not have sufficient miles. (Id.). Complainant was again instructed to drive the route from Vail to Amityville, and was also instructed to pick up another load in New York and drive it to Roaring Spring, Pennsylvania. (Tr. 39-40). Complainant became worried that he “was being set up” to be terminated by his

3 “Pre-plan” is the term used to describe a dispatch of instructions over Qualcomm relating to pickups and deliveries, including the locations, directions, mileage, pickup number, and delivery number. (Tr. 148-49).
employer. (Tr. 40). He was concerned that he was intentionally being sent on a trip which would cause him to exceed his available hours in order to obtain proof that he was violating the hours-of-service regulations. When he arrived in Carlisle, Pennsylvania, Complainant further responded to the dispatch by sending the following message via the Qualcomm system:

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Im delivering this load gabbing an mt and bringing it to the yard. After this weeks running illeagle all weak for chump change! 2 1/2 years worth of costantly fighting with the untouchables for miles and a decent check, running illelegal through all, weather drivers are making money or not, its the Barry Smith way, your ging to be a fedaral criminal. This week proves that once again. I thought I was as low as I could get constantly playing cachh up. I got a wake up call todayafter sending in all the hrs for the week and mac 62, well you can imagine how pissed I am rite now. When you think you cant get any lower, Smith Transport dumps more crap on ya. Im shutting my self down before you all add me to the list of vehickuler homicide. I can take my own lumps in life, but killing somebody else over fighting for a lousy pay check. I don't want to live with that, and I refuse to allow you, Barry Smith or the rest of his untoubles push in to that. Like I said I,m shutting my self down. Ya,ll cant pat your selves on the back you put another driver down! Fire me if you wish, service faliure what ever. 2 killed last year , times 25 years thats at least 50 dead and countless others injured, apparently aceptable loses for Barry Smith, I dought if there families would agree.
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(CX 33; RX 8). After sending the message via Qualcomm, Complainant dropped off the load in Alexandria and headed straight back to the yard in Roaring Spring, assuming he was fired. (Tr. 44-45).

The next day, Complainant spoke with Smith Transport’s Senior Director of Fleet Operations, Randy Calcaginio. They arranged to meet on Monday at the yard in Roaring Spring. On Monday, Calcaginio met Complainant and took him to the office of Smith Transport’s Vice President of Human Resources and Risk Management, Darryl Carter. (Tr. 46). They discussed the message that Complainant sent over the Qualcomm system, and Carter informed Complainant that his employment was being terminated. Calcaginio escorted Complainant off Smith Transport’s property. (Tr. 48).

After Complainant’s employment with Smith Transport was terminated, he applied unsuccessfully for other truck driving jobs with other trucking companies for 18 months. (Tr. 55).
SUMMARY OF TESTIMONY

A. George B. Blackie

At the hearing, Complainant testified that during his employment as a truck driver for Smith Transport, he was regularly dispatched in violation of the federal hours-of-service regulations. Complainant stated that he was instructed at his driver orientation by his trainer named “John” that he would not “get away with” turning down loads by claiming that he did not have sufficient available hours of service. (Tr. 15). Complainant stated that he was instructed by “John” as well as by Karlie, to always report 7.5 hours of service rather than his actual hours. (Tr. 134). He explained that on several occasions, he turned down a load, but received threats regarding loss of his performance bonus and possibly his job from his driver managers for insubordination. (Tr. 27-28, 32). Complainant testified that, because he could not legally drive the loads that he was being assigned without running out of available hours, he falsified and misrepresented his travel logs to avoid getting fired for turning down load assignments. (Tr. 24-25, 137). Complainant estimated that he falsified 90% of the logs he submitted by excluding the time he spent on duty waiting for a load, getting loaded, and getting unloaded. (Tr. 171, 195).

Complainant testified that he made verbal complaints to a number of his supervisors about being “dispatched illegally” in violation of the hours-of-service regulations. Specifically, Complainant testified that he “made reports to everybody within dispatch,” including the head of dispatch, Michael Schmoke and his driver managers, Bill Beers, Brian Igou, and Jaime Karlie, as well as senior director of fleet operations, Randy Calcaginio, safety director, Chip Castello, and Smith Transport’s owner and CEO, Barry Smith. (Tr. 19, 25-26). Complainant testified that he orally raised concerns about being dispatched illegally during his business partner meeting with Jaime Karlie on or about August 29, 2008, during a conversation with Barry Smith on September 2, 2008, and again during a meeting with Randy Calcaginio later that same day. (Tr. 25-26, 29-30, 32-33, 143-146, 159-60).

Regarding his termination, Complainant testified that Carter referred to his September 4, 2008 Qualcomm message and told him that he was being fired for “trashing” Barry Smith, the owner of Smith Transport, in making and sending the “unacceptable comment.” (Tr. 47). Complainant stated that Carter never said anything about firing him for driving in violation of hours-of-service regulations or being a threat to the public. (Id.).

B. Darryl Carter

Darryl Carter, Smith Transport’s former vice president of human resources and risk management, testified by deposition on August 23, 2010. Carter worked for Smith Transport for 15 years until June 11, 2010. (Carter Deposition at 5-6). Carter testified that full compliance with the Department of Transportation hours-of-service regulations is expected of all Smith Transport’s drivers, and that this expectation is communicated to the drivers at driver orientation which takes place when the driver is first hired. (Id. at 7). Carter explained that Smith Transport’s safety department conducts audits of each driver’s log books for completeness and compliance with the 11, 14, and 70-hour rules, but that it is the responsibility of the drivers to
prepare the log books accurately and drive in compliance with the hours-of-service regulations. (Id. at 9).

Carter testified that in September of 2008, Randy Calcaginio, Senior Director of Fleet Operations, approached him with an issue regarding Complainant. (Id. at 12). Calcaginio also shared a copy of the Qualcomm message that Complainant dispatched on September 4, 2008. (Id. at 14). Carter testified that in reviewing this message, he did not view its content as being a complaint by Complainant that he was being directed, encouraged, required, or requested by anyone at Smith Transport to run in violation of the Department of Transportation hours-of-service regulations. (Id. at 14-15).

Carter stated that he made the decision to terminate Complainant in his capacity as Vice-President of Human Resources and Risk Management. (Id. at 15). At the time he made the decision to terminate Complainant’s employment, he had not been made aware by anyone at Smith Transport or Franklin Logistics, including Barry Smith, that Complainant had made complaints about having to drive in violation of the Department of Transportation hours-of-service regulations. (Id. at 16). Carter testified that the language used by Complainant in his Qualcomm message caused him to be concerned that Complainant posed a risk to the motoring public, as well as his own safety, because he was very frustrated and very upset on the road. Carter stated that, from a risk standpoint, he felt that he needed to act upon his concerns. Finally, Carter testified that he made the decision to terminate Complainant’s employment because of the risk management issues that arose and were evident in the language he used in his Qualcomm message, as well as the fact that he acknowledged he was running illegally in violation of company policy, and for the disrespectful language used concerning Barry Smith, the owner and founder of Smith Transport. (Id. at 18).

C. Jaime Karlie

Jaime Karlie, Complainant’s driver manager, testified at the hearing. (Tr. 219-50). Karlie explained that as a driver manager, her job is to coordinate the freight and move the freight by scheduling trip plans for approximately 50-55 drivers. She has been in the job of driver manager since June 18, 2007, and she is assigned to Smith Transport’s Roaring Spring terminal. (Tr. 219).

Karlie testified that unless her drivers send to her their macro 62 with their available hours, she cannot determine how many available hours of service any driver has at any given time. (Tr. 222). She explained that drivers are supposed to send their available hours of service to their driver managers at the start of their shift so that the driver manager can match the appropriate load plan with the driver according to his hours. (Tr. 223). She further explained that if for some reason a driver has not sent in his available hours and he is assigned a pre-plan for which he has insufficient hours, the driver is to send the pre-plan back and indicate to his driver manager that he does not have enough hours to complete the trip so that the trip can be reassigned to a different driver. (Tr. 223-226). Karlie testified that Complainant “almost never” provided her with his available hours of service on a daily basis. (Tr. 225).

Karlie testified that during the time that she was Complainant’s driver manager she had discussions with him about his desires and expectations with regard to hauling freight for Smith
Transport. She explained that Complainant told her that he “wanted to make money and he wanted to run as many miles as possible” and that he complained to her “all the time” about how much money he made. (Tr. 221, 227). Karlie testified that Complainant never complained to her that he felt he was being forced, required, or requested to drive in violation of the hours-of-service rules. (Tr. 228).

Karlie testified that during her business partner meeting with Complainant on August 29, 2008, she prepared a report of the meeting to document the matters that they discussed. (Tr. 229). She testified that Complainant did not complain to her during the meeting that he was being required to drive in violation of the hours-of-service rules. (Tr. 232).

Karlie testified that she never told Complainant that he should not provide her with his hours of service unless his available hours of service were seven and a half hours or more. (Tr. 223). Furthermore, she stated that she never required, urged, or asked Complainant to run in violation of the hours-of-service rules. (Tr. 232). Finally, Karlie testified that she did not have any role in the decision to terminate Complainant nor did she have any discussions with Carter about Complainant before Complainant was terminated. (Tr. 239-40).

D. Randy Calcaginio

Randy Calcaginio, Smith Transport’s Senior Director of Fleet Operations, testified at the hearing. (Tr. 258-67). Calcaginio testified that in early September of 2008, he was made aware by Karlie of the Qualcomm message that Complainant sent on September 4, 2008. (Tr. 258-59). He explained that the message raised concerns:

The first concern is that we’ve had some patterns with Mr. Blackie refusing short freight and what really alarmed me and put some concern in me was the inappropriate and abusive language in the message Mr. Blackie sent via the Qualcomm towards Smith Transport and Mr. Barry Smith. (Tr. 259-60). Calcaginio further explained that he did not interpret Complainant’s message as a complaint or suggestion that he was being forced or asked to run in violation of the hours-of-service regulations. (Tr. 260). Calcaginio testified that after receiving and reading the message, he directed Karlie to have Complainant routed to the terminal to meet with him. Calcaginio met with Complainant at his office on September 8, 2008. During the meeting, Complainant expressed concerns that he was not making enough money and that he preferred to drive the longer loads instead of the shorter loads. Calcaginio reviewed Complainant’s pay, productivity, and mileage with him and explained that he is probably one of the most highly compensated drivers at Smith Transport and under Karlie’s supervision. Also during the meeting, Complainant admitted to Calcaginio that he runs illegally in violation of the hours-of-service rules in order to make enough money. (Tr. 261). Calcaginio testified that this comment caused him to become extremely concerned. (Id.). After meeting with Complainant, Calcaginio discussed with Carter the meeting he had with Complainant and told him that Complainant admitted that he had been running in violation of the hours-of-service rules in order to make more money. (Tr. 262). Calcaginio testified that he did not participate in Carter’s meeting with
Complainant, and he played no role in Carter’s decision to terminate Complainant. (Id.). Calcaginio stated that prior to his September 8, 2008 meeting with Complainant, Complainant had never complained to him that he was being forced to run in violation of the hours-of-service regulations. (Tr. 262-63).

E. John Henderson

John Henderson, Smith Transport’s Orientation Specialist, testified at the hearing. (Tr. 268-94). He explained that the responsibilities of his job include educating new drivers on such topics as road tests, the Qualcomm system, hour logs, and the Federal Motor Carrier regulations, including the federal hours-of-service regulations. (Tr. 268, 271). Mr. Henderson further explained that this material is taught to new driver’s orientation class, which last two to three days. (Tr. 269). Mr. Henderson stated that he always stresses to the drivers that they must run legally and that their driver manager is not allowed to have them run illegally. (Tr. 271). He also informs drivers that Smith Transport has a policy for disciplining drivers who accidentally or intentionally falsify their duty hour logs. (Id.). Mr. Henderson testified that he has never instructed drivers that they will be fired if they refuse a load because their available hours of service do not permit them to drive. (Tr. 275).

Mr. Henderson testified that he conducted the new driver orientation at Smith Transport in February of 2006 at the time when Complainant was hired. (Tr. 270). Mr. Henderson testified that he neither advises drivers that they are going to be required to run in violation of the hours-of-service regulations, nor instructs them to submit inaccurate hour logs. (Tr. 273-274). Rather, Mr. Henderson stated that he instructs drivers that they are to keep their driver manager accurately informed of their hours. (Tr. 273).

CONTENTIONS OF THE PARTIES

Complainant contends that he engaged in protected activity under §31105(a)(1)(A) of the STAA by filing oral complaints with his supervisors at Smith Transport alleging that he was regularly dispatched in violation of 49 C.F.R. § 395.3. Complainant also alleges that he engaged in protected activity under § 31105(a)(1)(B)(i) by refusing the dispatch to pick up a load in Vail, Pennsylvania, and deliver it to Amityville, New York, because an actual violation of 49 C.F.R. § 395.3 would have occurred but for his refusal. Complainant asserts that Respondents discharged and discriminated against him for his protected activities in violation of the STAA. Additionally, Complainant contends that since his discharge on September 8, 2008, Respondents have discriminated against him by blacklisting him within the trucking industry.

At the outset, Respondents challenge Complainant’s contention that he engaged in protected activity by filing oral complaints with his supervisors at Smith Transport alleging that he was regularly dispatched in violation of 49 C.F.R. § 395.3. Respondents maintain that the record does not support Complainant’s allegations that he complained to Jaime Karlie, Randy Calcaginio, and Barry Smith that he was regularly dispatched in violation of the federal hours-of-service regulations. Respondents also assert that Complainant’s September 4, 2008 Qualcomm message did not constitute protected activity either as a complaint under §31105(a)(1)(A) or a refusal to drive under § 31105(a)(1)(B)(i) because his complaints were not made in good faith.
Additionally, Respondents contend that Complainant is unable to establish a \textit{prima facie} case, because he cannot prove that there is a causal relationship between his alleged protected activity and his termination. Specifically, Respondents assert that they cannot be held liable under the STAA since Carter did not have knowledge of any protected activity on the part of Complainant. Moreover, Respondents contend that the evidence establishes a legitimate, non-discriminatory reason for Complainant’s termination, specifically, the “offensive” and “derogatory” comments that he broadcast over the company’s Qualcomm system pertaining to the company’s owner and CEO, and the “risk management issues” that arose and were evident in the language he used.

**GOVERNING LAW**

The STAA employee protection provision prohibits disciplining or discriminating against an employee who has made protected safety complaints or refused to drive in certain circumstances:

(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; or

(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.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee’s apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49. U.S.C. § 31105(a). Subsection (A) and (B) of the quoted provision are referred to as the “complaint” clause and the “refusal to drive” clause, respectively. \textit{LaRosa v. Barcelo Plant Growers, Inc.}, ALJ Case No. 96-STA-10, slip op. at 1-3 (ARB Aug 6, 1996).
In order to prevail on an STAA complaint, a complainant must make a \textit{prima facie} case of discrimination by proving by a preponderance of the evidence that: (1) he engaged in protected activity, (2) he was subject to adverse employment action, and (3) there was a causal link between his protected activity and the adverse action of his employer. See \textit{Clean Harbors Envtl. Serv., Inc. v. Herman}, 146 F. 3d. 12, 21 (1st Cir. 1998); \textit{Moon v. Transp. Drivers}, 836 F. 2d 226, 229 (6th Cir. 1987); \textit{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. \textit{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 \textit{prima facie} showing by articulating a legitimate, nondiscriminatory reason for the adverse action. If the employer successfully rebuts the complainant’s \textit{prima facie} case, the complainant bears the ultimate burden of demonstrating by a preponderance of the evidence that the legitimate reasons are actually a pretext for discrimination.

\textbf{ISSUES PRESENTED}

The parties do not dispute that Complainant was terminated or that termination constitutes an adverse employment action under the STAA. There is also no dispute that Complainant was terminated in response to his September 4, 2008 Qualcomm message. The focus of the controversy is whether Complainant engaged in protected activity and whether his protected activity played a causal role in the decision to terminate his employment. Thus, the issues to be decided are:

\textbf{I. Whether Complainant engaged in protected activity?}

\textbf{II. Whether Complainant suffered an adverse employment action in the form of blacklisting?}

\textbf{III. Whether there is a causal nexus between Complainant’s termination and his protected activity?}

\textbf{IV. Whether Respondent’s stated reason for terminating Complainant is legitimate and non-discriminatory?}

\textbf{V. Whether Respondent’s stated reason for terminating Complainant’s employment is pretextual?}

\textbf{DISCUSSION & CONCLUSIONS OF LAW}

\textbf{I. Protected Activity}

Under the Act, the Complainant must initially show that he engaged in a protected activity under 49 U.S.C. § 31105. A protected activity is established under 49 U.S.C. § 31105 (a)(1) by proof that:
(A) the employee 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; or
(B) the employee refuses to operate a vehicle because –
   (1) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
   (2) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.

Under Subsection (A), a protected activity may be the result of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulation, or standard. See Regan v. Nat’l Welders Supply, ARB No. 03-117, ALJ No. 03-SRA-14, slip op. at 5 (ARB Sept. 30, 2004). Complainant must prove by a preponderance of the evidence that he actually made such internal complaints. See Williams v. CMS Transportation Services, Inc., 94-SRA-5 (Sec’y October 25, 1995). Under Subsection (B), a protected activity may be the result of a refusal to drive.

As stated previously, Complainant asserts that he engaged in protected activity under §31105(a)(1)(A) by orally notifying his supervisors that he was regularly being dispatched in violation of the hours-of-service regulations. Additionally, Complainant contends that his September 4, 2008 Qualcomm message constitutes both a protected complaint under §301105(a)(1)(A), as well as a protected refusal to drive under § 31105(a)(1)(B)(i).

a. Oral Complaints to Supervisors

Despite Complainant’s testimony that he made internal complaints to his Smith Transport supervisors about driving in violation of hours-of-service regulations, the preponderance of the evidence fails to establish that Complainant engaged in protected activity under 49 U.S.C. § 31105 (a)(1)(A) by internal complaints.

Complainant testified that he raised concerns with a number of his supervisors about being “dispatched illegally” in violation of the hours-of-service regulations. Specifically, Complainant testified that he “made reports to everybody within dispatch,” including the head of dispatch, Michael Schmoke and his driver managers, Bill Beers, Brian Igou, and Jaime Karlie, as well as senior director of fleet operations, Randy Calzagagio, safety director, Chip Castello, and Barry Smith. (Tr. 19, 25-26). Complainant testified that he orally raised concerns about being dispatched illegally during his business partner meeting with Jaime Karlie on or about August 29, 2008, during a conversation with Barry Smith on September 2, 2008, and again during a meeting with Randy Calzagagio later that same day. (Tr. 29-30, 32-33, 143-146, 159-60).

The record, however, is devoid of any evidence or written documentation from any source supporting Complainant’s testimony. Complainant stated that beyond his own “mental records” that he did not keep any handwritten records of his verbal complaints to Smith
Transport that he was being forced to run in violation of the hours-of-service regulations. (Tr. 144). In addition, the testimony of Jaime Karlie and Randy Calcaginio refutes Complainant’s testimony about raising hours-of-service concerns.

Jaime Karlie testified that Complainant never raised an hours-of-service issue with her. (Tr. 228, 232). Rather, she testified that Complainant expressed concerns about driving as many miles as possible in order to make the most money. (Tr. 221, 227). Similarly, Randy Calcaginio testified that prior to his September 8, 2008 meeting with Complainant, Complainant had never complained to him that he was being forced to drive in violation of the hours-of-service regulations. (Tr. 262-63). Rather, Calcaginio testified that his communications with Complainant related to complaints that he was not making enough money and that he preferred to drive the longer loads instead of the short loads. (Tr. 261). Karlie and Calcaginio are found to be equally as credible as Complainant. Therefore, based on the foregoing, Complainant has failed to carry his burden of proving by a preponderance of the evidence that he actually made protected, internal complaints to Smith Transport management.

b. September 4, 2008 Qualcomm Message

Based on the preponderance of the evidence, Complainant’s complaint about being dispatched in violation of the hours-of-service regulations during the September 4, 2008 Qualcomm message is found to constitute a protected complaint under § 301105(a)(1)(A), but not a protected refusal to drive under § 31105(a)(1)(B)(i).

Under § 301105(a)(1)(A), a complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 356-57 (6th Cir. 1992); see also Lajoie v. Environmental Management Systems, Inc., 1990-STA-00031 (Sec’y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. Nix v. Nehi-R.C. Bottling Co., 1984-STA-00001, slip op. at 8-9 (Sec’y July 4, 1984). Rather, the communication must only be sufficient to give notice that a complaint is being filed. Clean Harbors Env’t Servs., Inc. v. Herman, 146 F.3d 12, 22 (1st Cir. 1998).

Complainant asserts that he complained about being dispatched in violation of the hours-of-service regulations during his September 4, 2008 Qualcomm message, and that the complaint constitutes protected activity under §31105(a)(1)(A). Employer disagrees, arguing that the complaint was not made in good faith. Although Complainant’s primary motivation in sending the Qualcomm message is found to be his desire to receive longer loads, there is no evidence which suggests that Complainant did not have a sincere and honest belief that he was being dispatched in violation of the hours-of-service regulations. Complainant testified that, just prior to receiving the pre-plan to drive from Vail, Pennsylvania, to Amityville, New York, Karlie had told him that he had insufficient available hours when he requested a longer load than the route he had been assigned from Baltimore to Alexandria. (Tr. 34-38). Thus, the September 4, 2008 Qualcomm message is found to include a protected complaint under § 301105(a)(1)(A).

For Complainant’s hours-of-service complaint during his September 4, 2008 Qualcomm message to come within the protection of § 31105(a)(1)(B)(i), that is, to constitute a protected
refusal to drive, Complainant must prove by a preponderance of the evidence that an actual violation of a regulation would have occurred if he had operated his vehicle. The complainant's good faith belief is not sufficient, standing alone, to prove a violation under section 31105(a)(1)(B)(i). *Yellow Freight System, Inc. v. Reich*, 38 F.3d 76 (2d Cir. 1994); *Robinson v. Duff Truck Line, Inc.*, 86-STA-3 (Sec'y Mar. 6, 1987), slip op. at 12-13, aff'd, *Duff Truck Line, Inc. v. Brock*, 848 F.2d 189 (6th Cir. 1988)(per curiam) (unpublished decision available at 1988 U.S. App. LEXIS 9164); *Brame v. Consolidated Freightways*, 90-STA-20 (Sec'y June 17, 1992), slip op. at 3.

The evidence of record fails to prove that an actual violation of the hours-of-service regulations at 49 C.F.R. § 395.3 would have occurred had he accepted a dispatch to pick up the load in Vail, Pennsylvania, and deliver it to Amityville, New York. On cross-examination, Complainant acknowledged that according to his travel log, on September 4, 2008, he had 22.7 total hours available and 14 consecutive hours available to work that day. (Tr. 165-67). Although Complainant testified that his log entries on September 4, 2008, were incorrect, he failed to prove that picking up a load in Vail, Pennsylvania, and delivering it to Amityville, New York, would have caused him to violate either the 11, 14, or 70-hour rules imposed by 49 C.F.R. § 395.3. Thus, the September 4, 2008 Qualcomm message does not constitute a protected refusal to drive under § 31105(a)(1)(B)(i).

II. Adverse Employment Action

As stated previously, the parties do not dispute that Complainant was terminated or that termination constitutes an adverse employment action under the STAA. Complainant also alleges that during the time since his discharge on September 8, 2008, Respondents further discriminated against him by blacklisting him within the trucking industry.

Blacklisting occurs when an individual or group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. *Anderson v. Jaro Transportation Services*, ARB No. 05-011, ALJ Nos. 2004-STA-2 and 3 (ARB Nov. 30, 2005), citing *Pickett v. Tennessee Valley Auth.*, ARB Nos. 00-56, 00-59, ALJ No. 01-CAA-18, slip op. at 6 (ARB Nov. 28, 2003). A whistleblower’s subjective feeling that an employer blacklisted him is insufficient to establish blacklisting. Rather, the complainant must show that a specific act of blacklisting occurred.

The evidence proves that after Complainant’s employment with Smith Transport was terminated, he applied unsuccessfully for other truck driving jobs with other trucking companies for 18 months. (Tr. 55). He requested copies of the pre-employment investigations and personal background records upon which the prospective employers relied in making the decision to deny him employment, as well as reasons why his applications were denied. Complainant received seven letters in response to his requests. (CX 32). None of these seven letters provide evidence of blacklisting. On March 23, 2010, Knox Motor Lines, Inc., informed Complainant that they did not do a background search and that the decision not to hire him was based on his two-hour interview. By letter dated March 25, 2010, Barber Trucking, Inc., informed Complainant that they did not obtain any information from his previous employers and that he was not hired based on the preliminary information he provided to their recruiter. By letter dated March 30, 2010,
Cressler Trucking, Inc., informed Complainant that the determination not to hire him was made because of DUI offenses that he listed on his application, as well as information provided by Smith Transport, Inc., on his application. Under the “Employment History” section of Complainant’s application, it states that his reason for leaving his employment with Smith Transport was – “Let go. Said an unexceptable [sic] comment.” Cressler Trucking provided no further information regarding whether they contacted Smith Transport or what Smith Transport may have told them regarding Complainant’s termination. By letter dated April 5, 2010, J.P. Donmoyer, Inc., informed Complainant that he was not hired because he did not meet the guidelines for their insurance carrier since he had no driving experience in the last 12 months. Finally, by letter dated March 23, 2010, Purdy Brothers Trucking, Inc., responded to Complainant’s request by sending him a copy of the background investigation on which they relied in deciding not to offer him employment. This report contains Complainant’s criminal records, driving records, and employment history. There is nothing in the report which indicates whether Purdy Brothers Trucking, Inc., contacted Smith Transport or what Smith Transport may have told them regarding Complainant’s termination.

As Complainant cannot prove what, if anything, Smith Transport may have told prospective employers or prove that it caused prospective employers to deny him employment, he has failed to establish that he was the subject of blacklisting by Smith Transport.

III. Causation

Complainant bears the burden of establishing that his protected activity was a contributing factor in the decision to terminate his employment.4 See Riess v. Nucor Corporation-Vulcraft-Texas, Inc., ARB No. 08-137, 2008-STA-11 (ARB Nov. 30, 2010). Complainant need not establish that his protected activity was the sole cause of the adverse action, only that it was a contributing factor.

Although Complainant’s testimony establishes that his termination occurred only four days after he complained about his hours-of-service in the Qualcomm message sent on September 4, 2008, and raises the inference that they are causally related, the evidence fails to prove that Complainant’s protected activity played any role in the decision to discharge him.

Darryl Carter provided credible testimony establishing that he was the sole decision maker regarding Complainant’s termination. Jaime Karlie and Randy Calcaginio both testified that they played no role in the decision to terminate Complainant’s employment and that they

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neither attended nor participated in the meeting during which Complainant was discharged. (Tr. 39-40, 262). Although there is no question that Carter had been made aware by Calcaginio of the September 4, 2008 Qualcomm message sent by Complainant, he testified that he did not view its content as being a complaint by Complainant that he was being directed, encouraged, required, or requested by anyone at Smith Transport to run in violation of the hours-of-service regulations. (*Carter Deposition* at 14-15).

Carter’s unrebuted testimony that he terminated Complainant’s employment for non-retaliatory reasons relating to the September 4, 2008 Qualcomm message, *i.e.*, because of “risk management issues” and because of the “disrespectful language” he used concerning Barry Smith, is found to be credible and is accepted. Carter’s testimony is corroborated by the testimony of Karlie and Calcaginio. Karlie testified that she had never seen a message like the September 4, 2008 Qualcomm message, and reacted by immediately calling Complainant’s cell phone. Receiving no answer, she sent a Qualcomm priority message, a directive which continues to beep until the driver pulls over and returns the call. When Complainant still did not call, she cancelled his pre-plan, covered the trip with another truck, and took the Qualcomm message to her supervisor, Randy Calcaginio. (Tr. 240). Karlie also testified that the root of Complainant’s grievance with Respondents was his feeling of being “screwed out of making more money” because he was not being given the longer runs, as other drivers were getting preferential treatment that allowed them to make more money. (Tr. 228).

Calcaginio testified that the Qualcomm message alarmed and concerned him because of its inappropriate and abusive content. Consequently, he told Karlie to route Complainant to the terminal to meet with him. (Tr. 260). During the meeting, Complainant expressed concerns that he was not making enough money and that he preferred to drive the longer loads. Calcaginio reviewed Complainant’s pay, productivity, and mileage with him and explained that he was probably one of the most highly compensated drivers at Smith Transport and under Karlie’s supervision. During the meeting, Complainant admitted to Calcaginio that he runs illegally in violation of the hours-of-service rules in order to make enough money. (Tr. 261). Calcaginio testified that this comment caused him extreme concern. (*Id.*). Consequently, Calcaginio related this meeting to Carter, and told him that Complainant admitted he had been running in violation of the hours-of-service rules in order to make more money. (Tr. 262).

Carter’s testimony regarding his motivation for terminating Complainant’s employment is accepted. Claimant has failed to establish that that protected activity was a contributing factor in his discharge.

**CONCLUSION**

As Complainant is unable to establish a *prima facie* case, it is unnecessary to consider whether Respondents are able to articulate a legitimate, non-discriminatory reason for Complainant’s termination or whether there is evidence of pretext.
ORDER

Based upon the foregoing findings of fact and conclusions of law, the complaint is DENIED.

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THOMAS M. BURKE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. 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). 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 must specifically identify the findings, conclusions or orders to which you object. You waive 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(a). 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(a) and (b).