

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 November 2012

Case No.: **2011-STA-00007**

In the Matter of:

NATHAN W. CLARK,
Complainant,

v.

HAMILTON HAULING, LLC,
Respondent.

DECISION & ORDER

This proceeding involves a complaint under the “whistleblower” employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the Act), as amended, 49 U. S. C. Section 31105 (formerly 49 U. S. C. § 2305), and its implementing regulations found at 29 C. F. R. Part 1978. Section 405 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

Mr. Nathan Clark (Complainant) filed a complaint against Hamilton Hauling, LLC (Respondent) on March 15, 2010 under the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. In brief, Complainant alleges that Respondent discharged him in retaliation for reporting mechanical problems on his assigned truck and because he took the truck to a North Carolina Department of Transportation (NCDOT) weigh station for inspection.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region IV, found that there is no reasonable cause to believe that Respondent violated 49 U.S.C. § 31105. (OSHA letter dated September 27, 2010)

On October 29, 2010 the Complainant filed a request for a formal hearing before an Administrative Law Judge.

A formal hearing was held in Asheville, North Carolina on July 11th and 12th, 2012, 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

submitted: Complainant's exhibits ("CX") 1 through 26 and Respondent's exhibits ("RX") 1 through 31. (TR 60)¹ CX 3, 4, and 17, as well as RX 3, 4, 22, 26-28, and parts of RX 29 were withdrawn.

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 Complainant is entitled to damages.

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. Complainant is a commercial motor vehicle driver within the meaning of 49 U.S.C. § 31101.

PERTINENT LAWS AND REGULATIONS

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

¹ The following abbreviations will be used as citations to the record: CX – Complainant's Exhibit; RX – Respondent's Exhibit; TR – Transcript of the hearing; JS – Joint Stipulations.

- (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. 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 *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* case 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).

CONTENTIONS

Complainant's Contentions

The Complainant states that he worked as a dump truck driver for the Respondent from April 22, 2009 to September 28, 2009.

As of September 2009, Respondent had irregular vehicle maintenance practices. Hamilton did not require drivers to maintain daily reports about their daily inspections, and Hamilton and his wife signed off on weekly inspection reports without actually determining if the inspection and routine maintenance had been performed on the vehicles. These weekly inspections were to be performed by two employees named Joe Rice, Jr. and Bill Meadows or outside vehicle maintenance shops.

On Friday, September 25, Complainant was assigned to work at the Asheville airport, hauling dirt and ash. Clark encountered a number of mechanical deficiencies and maintenance problems with Truck No. HH2, including a broken gear stick, cracked windshield, missing lug nuts, holes in the truck's bed, broken steps, and steering difficulties. Clark testified that the steering problems arose from the truck's spring shackle. (TR 75-78) That same day, Clark made a short video of the truck's cab, which confirmed the poor condition of the truck. (TR 201-03; CX 20)

That same day, Complainant notified John Hamilton of the problems with the truck. Hamilton directed Clark to take the truck to Mike's Truck and Trailer Repair ("Mike's) in Canton, North Carolina at the end of the work day so that maintenance work could be performed over the weekend. (TR 78-80, 404-05)

Complainant drove Truck No. HH2 to Mike's late in the afternoon on September 25. When he arrived, Hamilton was handing out paychecks to the drivers, including Clark, who had brought their trucks there for maintenance and repair over the weekend. Hamilton assured Clark that the truck would be repaired over the weekend. (TR 80-81, 404-05.)

Truck No. HH2 was never inspected by Mike's or employees Joe Rice Jr. or Bill Meadows over the weekend of September 26-27. As a result, any deficiencies in the truck were not recorded in the company's weekly inspection reports. (TR 396-98)

On Sunday afternoon, September 27, Complainant drove to Mike's to check on the repairs to Truck No. HH2. Clark found that the repairs had not been made. Clark called Hamilton to report the fact, and Hamilton again assured him that the repairs would be completed by the next morning inasmuch as Mike's worked seven (7) days a week. (TR 83-84, 418-22, 517)

On Monday morning, September 28, Complainant arrived at Mike's at approximately 6:00 a.m. and discovered that the repairs still had not been made to Truck No. HH2. Clark had a cell phone conversation with Hamilton at 6:12 a.m. Clark told Hamilton that the truck had not been repaired. Hamilton replied that the truck had to work that day and ordered Clark to take the truck to Penrose Quarry in Henderson County, North Carolina. Clark described Hamilton's tone of voice as "[v]ery agitated, ill, just very short." Hamilton had no recollection of the conversation. (TR 84-87, 133-34, 317-20, 552-53, CX 5i)

Clark drove the truck from Mike's but had steering problems as the vehicle pulled to the right due to a defective spring shackle.

Complainant had a second cell phone conversation with Hamilton that morning at approximately 9:48 a.m. Clark told Hamilton that the truck was not safe and that he could not drive it. Hamilton said that he did not want to hear that "stupid shit", that the truck had to work that day, and that if Clark did not want to drive the "son-of-a-bitch" to bring it back to the yard, and he would find someone who could. Clark then called his wife about the problems that he was having with the truck. (TR 323-24)

Complainant had a third cell phone conversation with Hamilton that morning at approximately 9:59 a.m. Clark told Hamilton that the truck was unsafe and that he could not hold the truck on the road. Hamilton again became irate and told Clark to drive “the mother---er” or he would be fired. Hamilton then told Clark that he was fired and told him to bring the “son-of-a-bitch” to his house and get his “shit” out of it. By this point, Clark was provoked by Hamilton’s behavior and said that he was going to take the truck to the DOT (i.e. the Department of Transportation). (TR 91-94, 144-47)

Clark went to an inspection station and an inspection began with state trooper Barnes. Shortly after the inspection started, Hamilton arrived. It is undisputed that Hamilton charged out of his vehicle and told Clark to “get the f---“ out of his truck. Clark set about getting his belongings out of the truck without making any inappropriate response. (TR 529-30) Hamilton got into the cab with Clark, leaned over within inches of Clark’s face, and told him, “I’m going to f--- you up for this. . . . You ain’t never going to drive a dump truck again.” According to Clark, Hamilton’s demeanor was “[v]ery angry, very upset, just very ill.” Clark interpreted Hamilton’s statements as a physical threat.

Words were exchanged between the two men. At that point, Trooper Barnes intervened, ordering Clark to leave the weigh station. Clark did so. (TR 97-101, 154-57, 251-54)

During his inspection, Trooper Barnes identified a significant number of violations of the federal motor carrier safety regulations. Trooper Barnes issued out-of-work citations for the hole in the truck bed and the inoperative left turn signal. (TR 256-65) For the out-of-work citations, the deficiencies had to be repaired before the truck could be moved. For the other cited deficiencies, the owner could drive the truck to another location where the deficiencies had to be repaired before the truck could be dispatched for any commercial activity. (TR 227-29, 265-67) Along with the citations, Barnes imposed a \$150.00 fine, which Hamilton paid on the spot, although he could have challenged the citations and fine through a legal process. (TR 267, 435-36)

Later, on September 28, Hamilton left a voice mail on Complainant’s cell phone. Hamilton never told Complainant that Truck No. HH2 had been repaired or that he would never be required to drive an unsafe truck again. Hamilton never requested in writing that Clark return to work and there was no further effort to reinstate Clark.

It is clear that Clark engaged in protected activity when he took the truck to the state inspection station.

Even assuming that Hamilton did not specifically tell Complainant that he was terminated during the cell phone conversation, the facts are egregious enough to find that Clark was constructively discharged. The Administrative Review Board has held that when an employee resists an employer’s orders to drive an unsafe truck, and “[w]hen no clear statements have been made by management establishing an employee’s status, ‘[t]he test of whether an employee has been discharged depends on the reasonable inferences that the *employee* could draw from the statements or conduct of the employer.’” Jackson v. Protein Express, 95-STA38 (1997) (quoting Pennypower Shopping News v. N.L.R.B., 726 F.2d 626, 629 (10th Cir. 1984) (emphasis in

original). Given Hamilton's statements to Clark, during the cell phone conversations and the altercation in the truck's cab at the weigh station (where Hamilton told Clark that he would "f-- him up" and that he would never drive a dump truck again), Clark could have reasonably concluded that Hamilton had fired him.

Alternatively, the facts warrant a finding of constructive discharge. A constructive discharge may occur under STAA when an employer orders an employee to drive a vehicle that the employee reasonably believes is unsafe or to go home. As noted, Hamilton insisted during the cell phone conversations that Clark continue to drive the truck, despite its mechanical deficiencies. Moreover, in the cell phone conversations and at the weigh station, Hamilton behaved in an aggressive, crude, and profane manner toward Clark, making statements that Clark reasonably interpreted as threats of physical violence. Hamilton's conduct was such that a reasonable person would have felt compelled to resign. Thus, Clark had legitimate grounds for not returning to work notwithstanding Hamilton's voicemail later that day.

Under STAA, a prevailing complainant is entitled to relief including abatement, reinstatement, and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A). Complainant is entitled to be offered reinstatement. In addition to reinstatement, Complainant is entitled to back pay. An award of back pay is mandated once it is determined that an employer has violated STAA. In this case, Complainant presented an expert witness, Robert Bohm, Ph.D., an economics professor from the University of Tennessee who testified that his back pay from September 28, 2009 through the date of the trial is \$45,517.00. Further, Clark is entitled to back pay less any mitigating earnings from the last day of trial until he is offered reinstatement by Respondent, based upon his employment after that date. This award shall include an award of prejudgment interest to compensate for the loss of the use of wages. Bailey v. Koch Foods, LLC, ALJ Case No. 2008-STA-061, slip op. at 20-21 (citing cases).

The Secretary and ARB have held that compensatory damages may be awarded for emotional distress caused by the discriminatory conduct. Id. Clark should also be awarded \$10,000 in compensatory damages given the difficulties that his discharge placed Clark in in terms of having to take jobs that were generally outside of his vocation of commercial driving, having to search for work due to losing jobs through no fault of his own, and the difficulty in maintaining an income following his discriminatory discharge.

Respondent's Contentions

The Respondent states that the only relevant issue in this case is whether the condition of HH2 violated the STAA on September 28, 2009 and whether a reasonable individual "in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health." 49 U.S.C.A. § 31105(a)(1)(b)(ii).

Complainant offered no credible evidence at trial that he had a reasonable apprehension of serious injury because of the vehicle's hazardous or security condition. In order to prevail on this issue, Complainant must demonstrate that his belief that a violation had occurred was both

subjectively and objectively reasonable. “Subjective reasonableness requires that the employee ‘actually believed the conduct complained of constituted a violation of pertinent law.’” An objective reasonable belief “is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience.”

Complainant’s exaggerated testimony that his truck was virtually impossible to drive is refuted in its entirety by the testimony of Trooper Barnes and the documents prepared as a result of the inspection he conducted at the weigh station that morning. (TR 288-95) Trooper Barnes conducted the most extensive Level 1 inspection on the truck at the Complainant’s request. (TR 278) The truck was not taken out of service for problems with the brake pads or the brake drums. (TR 293) It was not taken out of service for problems with the spring shackle. (TR 294) It was not taken out of service for problems with a broken frame. (TR 295)

The most telling testimony, however, is Complainant’s own admission that shortly after the inspection on HH2 was completed, Hamilton called Complainant to tell him that the truck had been repaired and to request that he return to work – even after Complainant’s inexcusable comment that Hamilton was a “stupid fucking nigger.” (TR 154) Complainant did not answer his phone so Hamilton left him a message. Hamilton never heard from Complainant and Complainant never showed up for work. (TR 166-67) When he was asked why he quit, Complainant explained: “[t]here’s no reason for an employee – an employer to treat an employee like that. Under any circumstances should that man have spoken to me that way. Under any circumstances should that man have threatened me that way.” (TR 593, Complainant depo. at 115)

The STAA imposes a duty on the Complainant to mitigate his damages. The burden is on the employer to prove that the Complainant failed to mitigate. More specifically, “[o]rordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date the complainant receives a bona fide offer of reinstatement.”

On this issue, Hamilton Hauling has met its burden of proving that (1) Complainant was offered an unconditional offer of employment; and (2) Complainant failed to mitigate his damages and that this failure was unreasonable. That is, there is no legal basis for Complainant’s position that he was constructively discharged. See In re: Atkins v. Salvation Army, 2001 WL 233689 (DOL Adm. Rev. Bd., Feb 28, 2001).

There is nothing in this record to suggest that Complainant experienced “intolerable” or “discriminatory working conditions” or a “continuous pattern of discriminatory treatment.” Indeed, any suggestion that Complainant failed to return to work because he was fearful of John Hamilton is feckless. Complainant’s racist attitude and threats toward Hamilton speak otherwise. The evidence does not support Complainant’s claim that he was terminated or constructively discharged. Complainant voluntarily left his employment and when asked to return to work, he unreasonably refused to do so.

EVIDENCE PRESENTED

At the hearing the Complainant testified that his primary occupation was as a dump truck driver. He worked for Hamilton Hauling from April until September 28, 2009. (TR 72) He was assigned truck number HH2, a 1988 Freightliner dump truck.

He would inspect the truck but the company did not use forms to report problems. Clark would call Mr. Hamilton if there was a problem and the boss would decide whether or not to take the truck to the repair shop. On September 25, 2009 he was hauling dirt near the airport. The truck had a broken windshield, problems with the gear shift, missing lug nuts on the wheels, a broken step, and broken spring shackles.

Clark called Hamilton who told him to take the truck to Mike's that Friday for repairs over the weekend. He dropped the truck at Mike's and rode home with his wife. On Sunday night Clark checked and found that the truck had not been repaired. He called Hamilton who said that it would be ready the next morning.

On Monday morning, Clark told Hamilton that the truck had not been fixed. Hamilton told Clark to drive the truck that day. Clark drove to a quarry with impaired steering. He loaded the truck with the heavy load. He called Hamilton who told him to drive the truck or he would be fired. Clark told Hamilton that he was going to take the truck to a state inspection station, and Hamilton told him he was fired. (TR 94)

Clark dumped the load and drove to the scale house. At the scale house a state trooper called in an inspector, Trooper Barnes. Hamilton arrived during the inspection. Hamilton was angry and he exchanged hostile words with Clark. Barnes told Clark to leave, and Clark rode home with a friend.

Clark acknowledged that Hamilton left a voicemail message for him later that day.

Q In that voicemail, did he ever tell you that the truck had been fixed?

A No. He just said, I got this truck here for you. And I'd have to listen to the tape to remember exactly what he said.

Q During that voicemail, did he ever tell you you would never be required to drive an unsafe or mechanically deficient truck again?

A No, sir.

Q Did you ever go back to - - did you ever have any other communication with Mr. Hamilton?

A No, sir, I did not.

Q Did you go back to work for Mr. Hamilton?

A No, sir.

Q Why was that?

A His demeanor, and I don't believe he's sincere, and I just don't think that it would have worked out.

(TR 102-03)

On cross examination, Clark admitted that he did not respond to Hamilton's afternoon call. (TR 122) They exchanged several calls that morning and this led to the argument at the scale house. Trooper Barnes started the inspection with Clark, and finished the inspection with Hamilton. The truck was cited for an inoperative turn signal and for a hole in the truck bed. If a truck is taken out of service, repairs have to be made before the truck can resume work.

The recorded message from Hamilton to Clark stated

Hey, it's about 2:30 here on Monday. I still got this job for you. I got your truck right there, man. I just don't want your little boy to suffer, so just call me, man, just work this out, get you back to work. See you.

(TR 166)

Clark stated that he felt that Hamilton had an agitated demeanor in that message. (TR 204) Clark never called Hamilton again. (TR 167) [Clark has a handicapped child who requires full time assistance]

Trooper Derrick Barnes testified that he was a motor carrier enforcement officer for the North Carolina State Highway Patrol. He had performed such work since 1997 and conducted a level one, the most intense inspection, on truck HH2. Level 1 requires inspection underneath the vehicle, including the brakes, and everything on the outside of the vehicle.

There was a discussion of citations against Hamilton Hauling and truck HH2 in recent years.

Trooper Barnes was called to the weigh station to inspect the truck on September 28, 2009. Clark reported that the truck was in bad shape and that he was being fired for not driving the vehicle. Clark and Barnes were inspecting the truck when Hamilton arrived. Hamilton was angry and there was an argument between Hamilton and Clark in the cab while Barnes was at the rear. Barnes told Clark to leave and he left in a vehicle that was waiting for him.

Then Hamilton and Barnes finished the inspection. Violations were: a broken arm to the tarpaulin, cracked windshield, inoperative speedometer, absence of visible company name on truck, inoperative brake light, inoperative turn signal, and missing lug nut on one wheel. (TR

258) There were loose nuts on some of the rails and crossmembers. There were holes in the bucket of the truck and worn bushings on the Pitman arm. Also, brake hose tubing was chafing at the air reservoir tank.

Claimant's counsel asked:

Q . . . what were the violations for which the truck was taken out of service that day?

A The first one was for the leaking, spilling, blowing, falling cargo from the underside of the bucket. And then the next one was - -

Q That was the holes in the bucket of the truck?

A Right. And the next one was the turn signal on the left rear.

(TR 264-65)

On September 28, 2009 the truck was taken out of service due to an inoperative turn signal and holes in the bed. These defects had to be repaired on site or the vehicle had to be towed for repair. (TR 290) Hamilton was assessed a \$150 fine which he paid.

Trooper Barnes stated that a driver was required to make a daily inspection of the truck prior to driving. The owner had the ultimate responsibility for maintenance. Barnes did not drive the truck to test the steering. The Trooper stated that about one half of inspected trucks are taken out of service.

Trooper Barnes stated that he did not find problems with the brakes or the steering mechanism. Clark reported a spring shackle defect but Barnes did not find such a problem. Barnes did not hear any of the conversation between Clark and Hamilton.

Pamela Clark, the Complainant's wife, testified that she picked up her husband at Mike's on Friday and drove him back there on Monday morning. Clark picked up the truck and called her and said that he could not keep the vehicle on the road. Clark told his wife about his conversations with Hamilton. (TR 325)

Robert Bohm, who has a Ph.D. in economics, testified regarding a calculation of damages for Clark. The back pay calculation was based on 2.8 years since termination less earnings in that period. The salary at Hamilton was computed at \$13.00 per hour or \$27,040.00 for 2009. Clark had earned about \$12,000.00 per year since that time. The back pay calculation was \$45,517.00 with the employer's social security contribution included. The front pay loss would be between \$201,000.00 and \$286,000.00. (TR 352)

John Hamilton testified that he began the company with one truck in 1999. He bought Truck No. HH2 in the early 1990's. The drivers performed the truck inspections but Mrs.

Hamilton maintained the paperwork. HH2 was taken out of service in early 2011 when the motor “blew”.

Clark worked for Hamilton from April 22, 2009 to September 28, 2009 working 8 to 10 hours a day on weekdays. The company did not require written documentation of inspections. (TR 379)

After Clark left, Hamilton acquired a federal DOT number which required written inspection reports. Two of the drivers performed inspections for the company.

On September 25, 2009, Hamilton told Clark to take the truck to Mike’s as the boss understood that the truck had a slick tire, a broken step, and a cracked wheel.

Hamilton testified that on September 25th Clark made no mention of a broken spring shackle, a broken windshield, or problems with the gear stick, Pitman arm, or drag link. (TR 417) Hamilton understood that Mike would work on the truck over the weekend.

Hamilton did not recall conversations with Clark over the weekend, and he did not call Mike’s. There were several conversation on Monday morning. Clark reported that he was going to take the truck to the DMV and Hamilton testified “[i]f it’s unsafe to drive, you don’t need to drive it, period. You don’t need to move it.” (TR 426) When asked about Clark driving the truck to the DMV, Hamilton replied

It was inappropriate because it was dangerous to drive and he shouldn’t drive it. When he went up there and dumped the load out, he should have stopped right there. I could have had a mechanic come to him, a wrecker if we needed to. Why drive it a hour away if it’s dangerous to drive?

(TR 427)

Q He had the right to take it to the DMV for an inspection, correct?

A Well, he had the right, but if it’s dangerous and unsafe, no, you don’t need to move it.

Q And you were antagonized about the fact that he was taking it to the DMV for an inspection?

A I was antagonized because he took the truck. You know, he didn’t even tell me where he’s taking it.

Q Now, were you angry at Mr. Clark for complaining about the truck and taking it to the DMV for an inspection?

...

A No. I was angry because he didn't tell me which one he was going to and where he was going. I didn't know where he was going to.

(TR 430)

Hamilton acknowledged that he was angry that Clark was taking the truck to the DMV. On arrival at the weigh station, Hamilton told Clark to get out of the truck and used profanity in his message. Clark responded with a racial epithet. Clark left at the request of Barnes, and the truck was back in service the next day. Some repairs were made at the station, some at Mike's, and others in the company shop. A shackle and bracket were replaced on October 3rd. On October 15th, Judy Jones Trucking repaired the steps and the tarp arm.

Q Your cell phone message to Mr. Clark on the afternoon of September 28th.

A Right.

Q In that cell phone message, as I recall there was no specific statement by you that truck HH2 had been repaired, although it will speak for itself. Do you know if you ever had any conversation with Mr. Clark after the altercation at the weigh station where you specifically told him that the deficiencies that were noted in Trooper Barnes's inspection report had been fixed?

A No.

Q And, of course, the tape will speak for itself, but did you ever have any communication with Mr. Clark after the altercation or the incident at the weigh station and after your cell phone message to him where you told Mr. Clark that he would not be required to drive an unsafe truck, where you specifically told him that?

A No.

(TR 459)

Hamilton denied that he told Clark at the weigh station that he had been fired. Hamilton called later that day to tell him that the truck had been fixed.

Hamilton testified that Clark took Truck HH2 home at night and that some of the servicing was conducted in the company shop.

Johnny Mullins testified that he had worked for Hamilton for five years. Mullins stated that Clark did not like Truck HH2 as it was ugly and did not have air conditioning. Mullins drove Truck HH2 the day after Clark left and Mullins did not have problems with the truck. If a truck had a problem a driver would call the office and the company would send repair or refer the driver to a repair shop. (TR 482)

Hamilton testified that in 2009 he had about 12 trucks and he now had 29. During a work day he might drive a truck, visit work sites, or bid on jobs. The company secured a federal DOT number in early 2011 and this required extensive record keeping. In 2009 he spent \$294,000 on truck maintenance. If a truck had a problem, the driver would take it to a shop and the mechanic would call Hamilton with an estimate.

When Hamilton arrived at the DMV he told Clark to get out of the truck. Hamilton denied that Clark was told he was fired. Mike came to the DMV and welded a plate over the holes in the truck bed and replaced one light bulb. Mike then drove the truck to his shop and made some other repairs. Clark did not respond to Hamilton's afternoon telephone call so Hamilton did not bother to write to Clark. Hamilton made the call as the two "out of service" items had been fixed and Clark normally took the truck home. Hamilton generally took a driver's words as to defects rather than inspect a vehicle himself.

DISCUSSION

The Complainant has submitted state citations for several trucks in the Hamilton fleet. (CX 1-3) Clark made a video of Truck HH2 on September 25, 2009. This shows a broken step, a broken gear shift, and a cracked windshield. (CX 20) Clark has alleged that Mike did not perform any work over the weekend, but Trooper Barnes only noted one of these items, the cracked windshield. (CX 7)

On September 28, 2009 Clark took the truck to the DMV and Hamilton acknowledged that a driver had a right to such action. The out of service items were fixed by Mike later that day.

It is clear that nasty things were said at the DMV, and Hamilton told Clark to get out of the truck. Clark alleges that Hamilton told him that he was fired while at the DMV, but Hamilton denies this allegation. Hamilton left a message for Clark that afternoon but Clark never responded.

Clark testified that he performed walk around inspections of the truck every workday but did not have to complete worksheets. Hamilton or his wife signed all of the weekly and monthly inspection reports for Truck HH2 in 2009, although neither one was considered to be a mechanic. Hamilton generally sent the drivers to local shops for truck repairs and relied on reports from the drivers and the shop mechanics. Subsequently, Hamilton acquired a DOT number and had to abide by more stringent regulations.

Under the STAA there are four elements to make a prima facie case of discrimination. In this case, on September 25, 2009 numerous defects, such as a broken windshield, were obvious in Truck HH2 as noted in the photographs taken by the Complainant. He believed that the truck was difficult to drive as it reportedly veered to the right. Such a defect was reported to Hamilton before the Complainant took the vehicle for inspection.

It is clear that Clark engaged in protected activity as it was reasonable for him to suspect that an unsafe condition could produce a real danger of accident.

Moreover, Clark sought correction of the suspected condition, informed Hamilton, and did not receive an adequate response from the employer.

However, Clark must show that he was subject to adverse employment action. There is a dispute as to whether or not Hamilton told Clark that he was fired at the DMV.

The undersigned has heard the content of the message left by Hamilton on the afternoon of September 28, 2009. That message invited Clark to return to work without any indication of an adverse action such as dismissal.

Clark has stated that Hamilton's demeanor in the afternoon call was sufficiently hostile for him not to respond or to return to work.

The undersigned has heard a tape recording of that call and concludes that Clark was requested to return to work or at least to call Hamilton.

Complainant's counsel has raised the issue of "constructive discharge". Arguably this is based on Hamilton's general demeanor on September 28, 2009 and the fact that the afternoon call did not specifically state that all of the truck defects had been repaired.

At the time of the afternoon telephone message, a reasonable person would draw the conclusion that a safe truck would be provided and that the driver would be welcomed back to work.

The undersigned has handled many STAA cases involving over the road companies where rules were rigid and records were well maintained.

Hamilton Hauling was rather informal in management and in record keeping styles.

Ultimately, the undersigned concludes that Clark was not terminated, actively or constructively. Clark had the option to return to work and a reasonable person would have explored that option.

Therefore, I conclude that Clark was not subject to adverse employment action. He has not made a *prima facie* case under the STAA.

ORDER

The claim of Nathan Clark is denied.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb/jrs
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).