U.S. Department of Labor

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Issue Date: 16 December 2004

CASE NO. 2004-STA-47

IN THE MATTER OF:

RICHARD SMITH, JR.

Complainant

v.

JORDAN CARRIERS

Respondent

APPEARANCES:

RICHARD SMITH, JR., PRO SE

BRUCE M. KUEHNLE,JR., ESQ.

For the Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), and the regulations promulgated at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment.

On February 18, 2004, Richard Smith, Jr. (herein Complainant or Smith) filed a complaint against Jordan Carriers (herein Respondent) with the Occupational Safety and Health Administration (OSHA), U. S. Department of Labor (DOL), complaining of his discharge for raising various unsafe conditions and his refusal to operate one of Respondent's trucks

in violation of the motor carrier safety regulations. (ALJX-1). An investigation was conducted by OSHA and on May 21, 2004, the Deputy Regional Administrator for OSHA issued the Secretary of Labor's Findings concluding that "it is reasonable to believe that Respondent did not violate 49 U.S.C. § 31105." (ALJX-1).

On or about June 7, 2004, Complainant filed a request for formal hearing with the Chief Administrative Law Judge, Office of Administrative Law Judges. (ALJX-3). A Notice of Hearing and Pre-Hearing Order issued, scheduling a formal hearing in Shreveport, Louisiana, on August 4, 2004. (ALJX-4).

The parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Complainant proffered exhibits marked as CX-1 through CX-6 which were received into evidence. Respondent offered RX-1 through RX-3 which were received into evidence. Administrative Law Judge Exhibits ALJX-1 through 6 were also received into evidence.[1]

Briefs were due on September 13, 2004, but extended to September 27, 2004. (Tr. 146). Briefs were received from Complainant and Respondent. Based upon the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order:

I. STIPULATIONS

1. Respondent is a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105. (Tr. 9).

2. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101. (Tr. 9).

3. Respondent, which maintains a place of business in Natchez, Mississippi, is engaged in transporting products on the highways. (Tr. 9).

4. Respondent hired Complainant as a driver of a commercial motor vehicle, to wit, a truck with a gross vehicle weight rating of 10,001 pounds or more. (Tr. 10).

[1] References to the record are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___: and Administrative Law Judge Exhibits: ALJX-___.

5. Complainant was employed by a commercial motor carrier and drove Respondent's trucks over highways in commerce to haul steel. (Tr. 10).

6. In the course of employment, Complainant directly affected commercial motor vehicle safety. (Tr. 10).

7. The parties agree that Complainant's employment service ended on February 10, 2004. (Tr. 12).

II. ISSUES

1. Whether Complainant engaged in protected activity within the meaning of the STAA?

2. Whether Respondent terminated Complainant in retaliation for his protected activities in violation of the STAA?

III. CONTENTIONS OF THE PARTIES

Complainant contends he was discharged on February 10, 2004, for complaining about faulty brakes and refusing to operate a commercial motor vehicle with faulty brakes. Smith alleges he telephoned Respondent and reported problems with the brakes of his truck. He claims he waited at the vehicle until two of Respondent's employees arrived at which time he was verbally abused, called racial epithets, directed to get out of the truck and physically threatened. Smith left the truck, walked to the bus station and purchased a ticket home.

Respondent contends that Smith quit his employment with Respondent on February 11, 2004, after refusing to stay with his replacement truck and wait for needed repairs. Respondent argues that Smith failed to qualify for protection under the STAA since he "must have sought from his employer and have been unable to obtain correction of the unsafe condition." Instead, Respondent asserts Smith abandoned his truck.

With respect to any colorable claim that Respondent violated the STAA by failing to pay Complainant all of the wages due him and "by stealing his CB radio," Respondent claims Smith failed to establish that he was treated disparately regarding "tire and rim money" or that Respondent ever came into possession of his radio. Moreover, Respondent avers that it could have charged, but did not seek to collect, costs which

could have been levied against Smith for leaving his truck and requiring Respondent to travel and recover the truck.

IV. SUMMARY OF THE EVIDENCE

The Testimony

Richard Smith, Jr.

Complainant's vocational history reveals he has been a truck driver, fork lift operator, production laborer and supervisor of pastor churches. (Tr. 15). He has worked in the transportation industry off and on since 1982. (Tr. 48). He began working for Respondent on October 27, 2003, as a truck driver and was assigned Truck No. 210. (Tr. 16). Smith lived in Marshall, Texas and received dispatches by telephone. He traveled a seven state regional area. (Tr. 17-18).

On February 4, 2004, Complainant had a water leak problem in Truck No. 210. He described the problem as a leak in the reservoir of the radiator system which caused a sensor to shut down the truck when the water level went below a certain point. (Tr. 19-20.) To remedy the problem, water or anti-freeze was added to the reservoir to bring the fluid level above the sensor level. On this occasion, Complainant telephoned the dispatcher, Carl Bath, who "wouldn't do anything." He then telephoned the safety man, "Jake" [Woods]. (Tr. 21). He later testified that the dispatcher told him to try to make it to "Rip Griffin's," where Respondent had a repair account. (Tr. 22).

On February 5, 2004, Complainant stopped at Rip Griffin's to have his truck examined. He stated he was told by the inspecting mechanic that the truck had internal engine damage and he could drive the truck, but to watch the water level. (Tr. 23-24; CX-1). Thereafter, Smith completed his delivery to Grand Prairie, Texas and was then dispatched to Weyerhaeuser in Idabel, Oklahoma. (CX-2). After picking up the Idabel load on February 5, 2004, he stated the truck began stopping every 20 minutes. (Tr. 24, 26).

Complainant testified that he "made it to Marshall [and] parked the truck and went on to the house," where he went off duty on February 6, 2004. (Tr. 27-28; CX-3). He attempted to fill the truck reservoir on six to seven occasions, but the water "guzzled down" as fast as he put the water in. He telephoned Carl Bath on Sunday and reported the truck was not going to run and was told that Respondent would send a

replacement truck.[2] (CX-5). Complainant was not present when the replacement truck (No. 127) was delivered on Sunday night by Brian, the wrecker driver for Respondent, since he decided to go to a casino boat. (Tr. 29).

On Monday morning, February 9, 2004, Smith checked out Truck No. 127 and noticed that the "foot brakes were weak." He reported to Carl Bath that the replacement truck was slow in stopping, but he was going to try to take the load on to Alamo, Texas. (CX-6). Smith traveled through San Antonio, Texas in route to Alamo, Texas, but was unable to locate Alamo, Texas. He called Carl Bath for directions and stopped south of San Antonio, Texas for the night since he was out of driving hours. (Tr. 31-32, 34). He claims that on Monday he had problems with the brakes, which were weak, but he used the Jake brake to slow the truck down and maintained "a big gap between me by driving slower." (Tr. 35).

On February 10, 2004, at a time unspecified in the record, he resumed his trip and when he "hit the Jake brakes, and the first downhill run that I had, I came up off the accelerator but the Jake brakes didn't kick in . . . the truck was picking up speed . . . fortunately, there wasn't anybody in front of me." On his next downhill run, Smith down-shifted to slow down. He observed a station wagon in front of him, with a kid waving in the window, when the truck began "picking up speed and so I actually had to exit and what kept that truck from turning over, only God knows." (Tr. 32).

Smith testified that he was all shook up over the incident and spoke with "some city workers" who routed him on back roads to George West, Texas, where he parked in front of City Hall and called Carl Bath. He explained the incident to Bath and stated that he could have killed the kid and other passengers in the station wagon. Id. He testified he informed Bath that "I refused to move that truck unless somebody does something about these brakes." (Tr. 38-39).

At "6:00," Smith's wife called and reported that "George Carey," who is unidentified in the record, had called and inquired about Smith's location. (Tr. 33). Smith testified it

[2] Complainant's recollection of the dates of certain events is inaccurate. He stated he picked up the Idabel load on February 5, a Friday, and called Respondent on Sunday, February 7, 2004. (Tr. 28). In actuality, February 5, 2004 was a Thursday and the following Sunday was February 8, 2004. Thus, Smith went off duty on Friday, February 6, 2004, and Saturday, February 7, 2004. (Tr. 29).

was "just about getting dark and that's when the wrecker drove up and they came up and the other guy {passenger] had a pipe—a piece of pipe and he said, N____, get out of the truck." Smith stated the two men were employees of Respondent, but acknowledged he did not know their names. (Tr. 36). Neither the driver nor passenger asked what trouble he was having with the truck. Id. Smith attempted to get his C.B. radio and "other stuff" from the truck, but was told to "get your N____ ass on," and he began walking off "and turned back and give him a finger sign." (Tr. 33). Complainant testified that "after that happened, I didn't have anything to say to anybody, not to Jordan Carriers." Smith walked to the bus station, purchased a ticket and returned home to Marshall, Texas. (Tr. 37).

Complainant did not contact Respondent and complain about the treatment he received from the passenger of the wrecker on February 10, 2004. Id. He stated that "they had did something to offend me and I just trying to find ways to fight back." (Tr. 38). He did not inquire about his status with Respondent or whether the company was relying upon him to run dispatches. He indicated "if somebody comes and takes pipes and puts you out of a truck, you automatically assume that it's over . . . ." He acknowledged that his boss or supervisor did not engage in such conduct. He received a telephone call and a letter indicating that Respondent would send his last pay check when he sent in his last logs, but his logbook was left in Truck No. 127. (Tr. 37). Smith never telephoned Respondent to report that he was quitting or did not want to work for Respondent anymore. (Tr. 38). No one from Respondent told him what would happen to him if he refused to drive the truck. (Tr. 39).

Smith claims that he was present at the truck when the wrecker arrived on February 10, 2004, and did not know anything about an abandonment charge until he completed a job application for Maverick Trucking Company. He protested the charge through "DAC's" who purportedly gave a 30-day notice to Respondent to show abandonment. (Tr. 40). Smith obtained employment with American Eagle Lines as a truck driver in March 2004 and drove until May 2004, before he began having problems with his diabetic condition. (Tr. 41, 53; CX-4).

Complainant contends he was forcibly put out of Truck No. 127 and had to catch a bus home. (Tr. 42). He never received anything in writing from Respondent about how his employment terminated. He received his last check and a couple of phone calls from Respondent, but did not return the phone calls. (Tr. 43).

Complainant testified that "tire and rim" money in the average amount of $25.00 a week was deducted from his pay check which was reimbursable if no damage to tires or rims occurred. He was not reimbursed any "tire and rim" money. (Tr. 43-44). He stated he never retrieved his C.B. radio for which he had paid $249.00 plus tax or reimbursement for other accessories, such as Windex, valued at $100.00 which he used to clean the truck that he left in Truck No. 127. (Tr. 44-45).

On cross-examination, Complainant affirmed that he worked for Arrow Trucking Company in the year 2000 for about one month and then resigned from employment. (Tr. 48-49). He also worked for New Waverly Transportation in September 2000 for about one month before quitting or resigning his employment. In August 2001, Smith began working for Swift Transportation which lasted about two months. (Tr. 49-50). In February 2002, he started working for Frozen Foods Express, Inc. and worked for about two months before quitting his employment. (Tr. 50-51). In August 2002, Complainant returned to Frozen Foods Express, Inc. and worked for three months before quitting or resigning his employment. (Tr. 51). He worked for a private contractor as a truck driver before beginning with Respondent. (Tr. 52). In sum, Complainant acknowledged that he worked for eight employers since 2000, but none of the periods of employment lasted for more than three months. (Tr. 56-57).

Complainant confirmed that Respondent never communicated to him that he was fired or terminated. He stated when he left the truck, "I just forgot about them." (Tr. 57). He also affirmed that he never provided Respondent with copies of his logs for February 5, 6, 7 or 8, 2004, even though federal regulations required that he do so. (Tr. 59; CX-5; CX-6). Although the date of his log for Monday, February 9, 2004, was incorrect, he affirmed that he began driving from Marshall, Texas at 8:00 a.m. (Tr. 68-69; CX-6). Smith testified that his logs for February 9-10, 2004 were left in his log book in Truck No. 127. (Tr. 70). Respondent asserts the log book was not in the truck.[3]

[3] The driver's logs for February 9-10, 2004, were not introduced into evidence which would have clarified more definitively the pertinent times of events on February 10, 2004. Thus, the record does not establish when Smith began driving on February 10, 2004, or when he reached George West, Texas. Although Smith's wife telephoned at "6:00," the record does not reflect whether the call was received in the a.m. or p.m. The wrecker allegedly arrived at "dusk or dark" on February 10, 2004. Bath's testimony that Smith telephoned at "mid-morning" on February 10, 2004, from George West, Texas, provides a point of reference.

Smith testified that he knew the two individuals who arrived in the wrecker on February 10, 2004, to be employees of Respondent because he recognized the wrecker. The wrecker arrived at about dusk or dark on Monday, February 10, 2004. (Tr. 72). He remained with Truck No. 127 because he assumed that Respondent would send another truck. (Tr. 173).

Smith authenticated his signature on his employment agreement with Respondent during the October 2003 orientation. (Tr. 75-76; RX-1).

Joseph Carl Bath

Bath is presently Fleet Manager for Respondent. (Tr. 81). He is responsible for dispatching drivers and taking care of the needs of drivers, such as answering payroll questions and service on trucks. He testified that drivers are required to call into dispatch every morning between 7:00 a.m. and 9:00 a.m. to provide their location, load status, information on mileage and fuel consumption. He was the Fleet Manager while Complainant drove for Respondent. (Tr. 82).

Bath testified that on February 5, 2004, Thursday, he dispatched Smith from Grand Prairie, Texas to Idabel Oklahoma to pick up a load for delivery in Alamo, Texas, near Brownsville, Texas. (Tr. 83). That afternoon, Smith telephoned Bath and reported he was in Idabel, Oklahoma and had a small leak in the truck which had cut off on him; Bath instructed Smith to check the water and fill it when necessary. Bath stated Smith did not communicate that the truck was unsafe or that the truck was an "accident waiting to happen." (Tr. 84). Smith did not communicate to Bath that Truck No. 210 had internal engine damage nor did he ask or receive permission to stop at Rip Griffin's truck stop to have the truck inspected or examined or to travel to his home in Marshall, Texas. (Tr. 85).

On February 6, 2004, Friday, around mid-day or noon, contrary to company policy requiring call-ins between 7:00 a.m. and 9:00 a.m., Smith telephoned Bath and reported he was in Marshall, Texas. Smith stated the water leak "had gotten worse." Bath patched Smith into Dale Collins, who works on-road maintenance. Bath testified that Marshall, Texas should not have been along the route from Idabel, Oklahoma to Alamo, Texas. Bath was informed that Collins decided to take Smith a loaner truck, as a replacement for the disabled truck. (Tr. 86-88).

Bath next heard from Smith at about 8:30 a.m. on February 9, 2004, Monday, when he called in from Tyler, Texas, which is 60-70 miles south of Marshall, Texas. (Tr. 89-90). Complainant made no complaints about Truck No. 127, the replacement truck. That afternoon, Smith telephoned Bath and reported having brake problems and was patched into Dale Collins. (Tr. 90).

On February 10, 2004, Tuesday, at mid-morning, Smith telephoned Bath from George West, Texas, about 80 miles north of Alamo, Texas. Smith informed Bath that he was having brake problems again and he was not going to drive the truck. Smith stated "his wife had sent him some money, he had a bus ticket and he was going home." (Tr. 91). Bath asked Smith to "just sit tight, we'll get a mechanic over there to look at it and he said, No, I've got my bus ticket, I'm going home." Bath testified that he asked Smith to stay with the truck, but Smith refused. Smith told Bath he was going to leave the truck in a parking lot next to a judiciary building across from the police station in George West, Texas. (Tr. 92). Bath testified that Smith did not relate an experience "where he thought he was going to run over a car with children in it." Bath informed Chuck Stutzman, the Operations Manager, of Smith's telephone call and situation. To his knowledge, Stutzman telephoned Smith "to talk to him about leaving the truck." (Tr. 93).

Henry Gilmer was dispatched with the wrecker driver on February 10, 2004, to retrieve Truck No. 127 in George West, Texas. They arrived at the truck on the morning of February 11, 2004, Wednesday. Gilmer was instructed to perform a pre-trip inspection and call Bath. Gilmer made the delivery to Alamo, Texas, and was then dispatched to Dayton, Texas, northeast of Houston, Texas, to pick up a load for Alexandria, Louisiana. Gilmer completed the delivery and returned to Natchez, Mississippi in Truck No. 127. Gilmer had no complaints or problems with the brakes on Truck No. 127 or its trailer. Mechanics were assigned to examine Truck No. 127 and found no problems with the brakes of Truck No. 127 or its trailer.

Bath testified that when Smith had the water leak in Truck No. 210, a replacement truck was sent to Smith to resolve the problem. When Smith complained of the brake problems with Truck No. 127, Respondent tried to get a mechanic to the truck to solve the problem, but Smith refused to wait. Bath did not tell Smith that if he did not drive either truck he would lose his job. Bath testified that he did not have the authority to fire or terminate Complainant. (Tr. 95-96).

Bath testified that Smith had not complained "for a month" about Truck No. 210 leaking water. When Truck No. 210 was returned to Natchez, Mississippi from Marshall, Texas, mechanics found the water pump leaking. (Tr. 99).

Arnold Dale Collins

Collins has worked for Respondent for almost three years. He is presently working "over-the-road maintenance" and has the authority to decide whether a truck is to be sent "somewhere to get fixed or send a mechanic to [the truck]." (Tr. 100-101).

Collins testified that he did not receive any telephone calls from Complainant on February 9, 2004, but talked to Smith on Friday, February 5, 2004, about the brakes on his trailer not holding. (Tr. 101-102, 103). He stated he never discussed with Smith any problems he may have had with a water leak on Truck No. 210. He affirmed the brake problem related to Truck No. 127. (Tr. 102). Collins sent Smith to National Truck stop in Longview, Texas, "to get the brakes looked at." The mechanic called Collins and reported the brakes "looked to be operating right . . . the shoes was (sic) good. Everything was in working order, that he could see." No repairs were performed and Respondent was not charged for the inspection since the mechanic "hadn't done nothing (sic) to it." (Tr. 104).

Collins could not recall dispatching Smith to Rip Griffin's to have the water-leaking problem inspected on Truck No. 210. (Tr. 105). Collins confirmed that Brian Ballard and Henry Gilmer were sent to retrieve the truck left in George West, Texas by Complainant. (Tr. 106-107). When Gilmer returned to Natchez, Mississippi with Truck No. 127, an inspection was performed on the truck and its trailer, but no problems were found with the brakes. (Tr. 107).

Henry Gilmer

Gilmer has been employed by Respondent for two years as a truck driver. He recalled being dispatched in February 2004 to pick up a truck in George West, Texas. (Tr. 109). Carl Bath dispatched him on Tuesday to ride down as a passenger to George West, Texas with Brian, the wrecker driver. He arrived in George West, Texas on Wednesday morning. Complainant was not present at the truck when they arrived. He did not see Smith or have any conversations with Smith. Gilmer confirmed that since he did not see Smith it would be impossible for him to have used the "N word" in reference to Smith. Gilmer performed a pre-trip

inspection of the truck and called Bath to report that the truck was "okay." (Tr. 111-112). He affirmed that he did not find anything wrong with the brakes on the truck or its trailer. Bath instructed Gilmer to deliver the load and to telephone him when Gilmer arrived in Alamo, Texas. (Tr. 112).

After delivering the load to Alamo, Texas, Bath dispatched Gilmer to Dayton, Texas for another load to be delivered to Alexandria, Louisiana. Gilmer testified that he had no problems with the brakes on Truck No. 127. He delivered the load in Alexandria, Louisiana and "deadheaded," drove without a load, to Natchez, Mississippi. (Tr. 113). Gilmer testified that he drove 869 miles in Truck No. 127 and had no problems with the brakes on the truck or its trailer. He confirmed that Truck No. 127 was safe to drive. (Tr. 114). Gilmer stated he did not use the Jake brakes because the terrain was not mountainous and Jake brakes are not used "on just regular traveled roads in Texas." (Tr. 116).

Complainant acknowledged that Gilmer was not one of the men in the "wrecker" that arrived on Tuesday, February 10, 2004, at dusk or dark and was not the man seated in the wrecker as a passenger. (Tr. 114).

Gilmer stated that he and Brian traveled to George West, Texas in a truck, like the one he was sent to pick up, and not a wrecker. (Tr. 117). Gilmer had no knowledge of a wrecker traveling to George West, Texas and arriving on February 10, 2004, to retrieve Truck No. 127. (Tr. 118-119).

Jake Woods

Woods is currently Respondent's Safety Director and has been employed with Respondent since 1993. (Tr. 119). He testified that he is the "number one contact person" for drivers "when it comes to operating unsafe equipment." Drivers are informed during orientation to call his 1-800 number on safety issues. (Tr. 120-121).

Woods testified that he knew Smith to be a driver for Respondent and Smith never called him to make any safety complaints. (Tr. 121). Specifically, Smith never called him to report a truck with a water leaking problem or faulty brakes on a truck or trailer. (Tr. 121-122).

On cross-examination, Woods specifically denied that Smith telephoned him complaining about Truck No. 210 going "dead and I

almost got rear-ended by another 18-wheeler," or that Truck No. 210 was "an accident waiting to happen." He denied that Smith called asking for help because Bath was slow in doing anything. (Tr. 123).

Harold Ray Stutzman

Stutzman is Respondent's Operation Manager and has been so employed for the last 13 months. (Tr. 124). Stutzman recalled initiating a telephone conversation with Smith on February 10, 2004, after being informed by Bath that Smith was abandoning his truck. (Tr. 125).

He called Smith's cell number and asked him where he was to which Smith responded he was at the bus station, his wife had sent him money, he had a bus ticket and was going home. Stutzman asked Smith "about abandoning the truck, leaving the truck," to which Smith responded "I already have another job, I'm getting on the bus, I'm going home," and Smith hung the phone up. Stutzman tried to call Smith several times at the same cell number but got no answer. (Tr. 126).

Stutzman testified that Smith explained he was leaving the truck because he was "unhappy with the truck." Smith did not mention anything about the truck's brakes. Respondent's policy is if someone leaves its employment, Respondent will get them home. (Tr. 126). Stutzman offered Smith a bus ticket home and tried to prevail upon Smith to stay with the vehicle. (Tr. 126-127). Stutzman stated he did not, at any time, threaten Smith's job or tell Smith if he left the vehicle he would be fired. Stutzman testified that he did not fire Smith although he had the authority to do so. (Tr. 127).

Stutzman testified that Complainant's logs were original logs and, by federal regulation, must be turned in daily. He confirmed that Respondent did not receive Smith's logs for the period February 5-8, 2004. (Tr. 127-128; CX-1; CX-3; CX-5; and CX-6). Stutzman also stated that Respondent did not receive Smith's logs for February 9-10, 2004. If logs become seven days overdue, the log department will send the driver a letter requesting the missing logs. (Tr. 128). Respondent's goal is "to settle up immediately," when a driver separates from employment. Respondent will "make every effort to make sure [the driver's] equipment is turned in, checked out and his logs are in, no toll receipts . . . so we can get a settlement out immediately." Respondent did not receive the missing logs in response to the log department's request. (Tr. 129).

Stutzman affirmed that Brian Ballard and Henry Gilmer were dispatched to reclaim Truck No. 127 in George West, Texas. He also stated that no one else was dispatched on behalf of Respondent to retrieve the truck. Respondent did not send its wrecker with its emblem or logo to pick up Truck No. 127. (Tr. 129). Stutzman testified that Ballard and Gilmer arrived in George West, Texas on Wednesday, February 11, 2004. When Gilmer returned to Natchez, Mississippi with Truck No. 127 a maintenance inspection was performed by the maintenance department and no brake problems with the truck or trailer were found. (Tr. 130).

Stutzman explained that "tire and rim" money is only deducted from a driver's pay when actual tire/rim damage occurs for which a driver is at fault. Respondent does not deduct $25.00 from every paycheck of a driver as a bank for tire damage. (Tr. 131).

Complainant acknowledged his Employment Agreement with Respondent which provided that charges would be assessed if a driver left a "truck anywhere other than bringing it back to [Respondent's] yard where they picked it up." Since Smith was driving Truck No. 127 with a load, the Employment Agreement provided for a charge of $150.00, $20.00 per hour for two employees to retrieve the truck, plus $1.00 per mile to return the truck to the terminal. (Tr. 132-133; RX-1). Complainant's Termination Sheet reflects a total charge of $1,416.00 for: "Quit[ting] Under Dispatch"-$150.00; "Out of route miles"-$1,066; and $200.00 for 10 hours for two employees dispatched to retrieve Truck No. 127. However, Smith was not assessed the charges in his final paycheck. (Tr. 134-135, 137-138; RX-2; RX-3). The Termination Sheet also reflects that the reason for termination was "abandoned truck" and lists Complainant as "Quit" as of February 10, 2004. (Tr. 135; RX-2).

Stutzman testified he was not aware that Complainant complained about truck problems which Smith perceived to be safety problems. He stated he was not aware of the water leak problem with Truck No. 210 until Smith could not be found on Sunday night when the replacement truck was delivered, and was not aware of Smith's complaints about brake problems on Truck No. 127 before February 10, 2004. Stutzman becomes involved in safety issues which cannot be resolved between the driver and Safety Director. (Tr. 140-141). Safety complaints by drivers are the best tool Respondent has to improve the company according to Stutzman. (Tr. 142).

V. DISCUSSION

1. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 92- ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v.NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

2. The Statutory Protection

The employee protective provisions of the STAA prohibit the discharge of an employee because he has "filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding" or refuses to operate a vehicle. 49 U.S.C. § 31105(a).

Complainant's case invokes the refusal to drive provisions. The STAA prohibits discrimination against employees for refusing to drive in either of two circumstances. An employee may not be disciplined for refusing to operate a vehicle "**when** such operations constitute a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health . . . ." Discipline is also prohibited when an employee refuses to operate a vehicle "**because** of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of [the] equipment." 49 U.S.C. § 31105(a)(1)(B); see Palinkas v. United Parcel Service, Case No. 95-STA-30, @ 2 (Sec'y Mar. 7, 1996). The second ground for refusal further requires that the unsafe condition must be such that a reasonable person, under the circumstances, would perceive a bona fide hazard, and that the employee must have sought from his employer, **and have been unable to obtain**, correction of the unsafe condition.

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of enforcement through formal proceedings." (Emphasis added). Davis v. H. R. Hill, Inc., Case No. 86-STA-18 @ 2 (Sec'y Mar. 19, 1987).

3. The Burden of Proof

The pivotal issue to be resolved in this matter is whether Smith established, by a preponderance of the evidence, that he

suffered an adverse action or his employment with Respondent was terminated because he engaged in protected activity under the STAA.

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because he engaged in protected activity. A complainant meets this burden by proving: (1) that he engaged in protected activity; (2) that the respondent was aware of the activity; (3) that he suffered adverse employment action; and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. Clean Harbors Environmental Services, Inc. v. Herman, 146 F.3d 12, 21 (1st Cir. 1998); Kahn v. United States Sec'y of Labor, 64 F.3d 261, 277 (7th Cir. 1995); Shannon v. Consolidated Freightways, Case No. 96-STA-15, @ 5-6 (ARB Apr. 15, 1998).

A respondent may rebut this **prima facie** showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action, but rather his protected activity was the reason for the action. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-508 (1993).[4]

However, since this case was fully tried on its merits, it is not necessary for the undersigned to determine whether Complainant presented a **prima facie** case and whether the Respondent rebutted that showing. See Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1063 (5th Cir. 1991); Ciotti v. Sysco Foods Co. of Philadelphia, Case No. 97-STA-30 @ 4 (ARB July 8, 1998).

Once Respondent has produced evidence in an attempt to show that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any

[4] Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a **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, 509 U.S. at 510-511. See Carroll v. United States Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a **prima facie** case becomes irrelevant once the respondent has produced evidence of a legitimate, nondiscriminatory reason for the adverse action).

analytical purpose to answer the question whether Complainant presented a **prima facie** case.

Given the factual scenario presented in this matter, the relevant inquiry is whether the Complainant established, by a preponderance of the evidence, that the reason for the termination of his employment was related, even in part, to his protected activity. If he did not, it matters not at all whether he presented a **prima facie** case. If he did, whether he presented a **prima facie** case is not relevant. Somerson v. Yellow Freight System, Inc., Case No. 98-STA-9 @ 8 (ARB Feb. 18, 1999).

Since Complainant is proceeding without the assistance of counsel, further explication is warranted.

The record discloses that Complainant made internal complaints about his assigned truck and its replacement truck. Such complaints were related to safety concerns of which Respondent had knowledge. I find that Complainant had a reasonable apprehension that the conditions of both trucks established a real danger of accident, injury or serious impairment to the health of Smith or others using the highways. Truck No. 210 would abruptly stop on the highway when the water level went below the reservoir sensor causing a danger to Smith and other drivers. The alleged brake problem, as represented by Smith, would also cause a reasonable person to have a reasonable apprehension of danger or serious injury. Therefore, I find and conclude that the record establishes Complainant engaged in protected activity by submitting internal complaints to Respondent.

Following the complaints, it is undisputed that Respondent ultimately resolved the water leaking deficiencies with Truck No. 210 by replacing the truck with Truck No. 127. Respondent also sought to resolve the brake problems with Truck No. 127 under disputed factual circumstances.

The record presents a divergence of facts regarding the events of February 10-11, 2004.

Complainant's version of the events reveals that after he reported the brake problem on Truck No. 127, at an undefined time of day on February 10, 2004, he waited at the truck because he assumed Respondent would send another truck to complete his delivery. Complainant alleges that at "dusk or dark," a wrecker with two employees of Respondent arrived; the passenger, who had

a piece of pipe, uttered racial slurs at Smith and told him to get out of the truck. Smith, who acknowledged that he was offended by the passenger's language and the brandishing of a pipe, walked away from the truck. He assumed that his employment was "automatically over" when he was "put out of the truck." He "just forgot" about Respondent at that point. Smith purchased a bus ticket and went home.

Complainant generally denied Stutzman's telephone contact and request that he remain with the truck until Respondent could reclaim the vehicle. Bath's testimony that he requested Smith remain with the truck until a mechanic could be sent to look at the truck is undenied. Stutzman's testimony that he did not threaten Smith with termination if he abandoned the vehicle is uncontradicted.

A composite of the testimony of Respondent's witnesses contradicts Smith's allegations. Respondent did not send a wrecker, but a wrecker driver, to recover Truck No. 127 because Smith had refused to remain with the truck according to Stutzman and Bath. Another truck was dispatched, also at an unstated time of day but apparently after "mid-morning," with two drivers to retrieve Truck No. 127. Smith acknowledged that Gilmer, who was the passenger in the retrieval truck with Ballard, was not the person who used racial epithets and brandished a pipe. The retrieval truck traveled 1,066 "out of route" miles from Natchez, Mississippi to George West, Texas. The trip to George West took ten hours which makes an arrival at "dusk or dark" on February 10, 2004, implausible and improbable. When the retrieval truck arrived on the morning of February 11, 2004, Smith was not present, having left the day before by bus.

Smith confirmed that no one from Respondent ever communicated to him that he was fired or terminated. He did not complain to Respondent about the treatment he received from the passenger of the "wrecker" crew. He did not thereafter contact Respondent for dispatch, inquire about his status or return to work. There is no record evidence that Respondent forced, or attempted to force, Smith to drive Truck No. 127, notwithstanding the alleged condition of the brakes.

There is no record evidence that Respondent refused to correct the alleged brake problem with Truck No. 127 or that any representative of Respondent was upset or angry about Smith's safety complaints. Rather, the record evidence supports a finding that Gilmer had no brake problems with Truck No. 127 during the completion of the existing load, the delivery of a

subsequent load and the return to Natchez, Mississippi. An inspection of Truck No. 127 by Respondent's maintenance department upon its return revealed no problems with the brakes of the truck or its trailer.

Notwithstanding the opposing versions, the best case scenario for Complainant must fail because it is undisputed that he walked away from Truck No. 127 after reporting an alleged unsafe condition of a perceived bona fide hazard, but without allowing Respondent to correct the alleged unsafe condition, a crucial element in the refusal to drive provision of the STAA. Assuming for purposes of argument that the events described by Smith occurred, I find the record is devoid of any authority or agency vested by Respondent in the passenger of the retrieval truck to remove Complainant from Truck No. 127 or his employment. I find that Smith walked away from Truck No. 127 because he was offended by the alleged racial epithet and the brandishing of a pipe, not because of a safety-related concern for Truck No. 127. See Zurenda v. J&K Plumbing & Heating Co., Inc., Case No 1997-STA-16 (ARB June 12, 1998)(a work refusal for non-safety related reasons is not protected activity); Palinkas, supra (a refusal to drive because of anger over a supervisor's rebuke is not protected activity).

Accordingly, I find that Complainant refused to remain with Truck No. 127 on February 10, 2004, for personal reasons after the alleged offensive remarks. Because of his refusal, Respondent dispatched two drivers to recover Truck No. 127 who did not arrive in George West, Texas until February 11, 2004. I further find that Respondent did not take any adverse action against Smith, who chose to sever his employment with Respondent for reasons unassociated with any alleged protected activity. See Waters v. Exel North American Road Transport, Case No. 2002-STA-3 (ARB Aug. 26, 2003)(driver abandoned employment contract by failing to return to work and was not thereby subjected to adverse action in retaliation for making safety complaints).

Moreover, given the circumstances offered by Smith, I further find and conclude that the alleged actions of the passenger do not constitute the framework for a finding of constructive discharge. A constructive discharge occurs where working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. The record is devoid of any evidence that Respondent intended to force Smith to quit or resign or that Respondent intended to force Smith to work in an environment of intolerable conditions. See Hollis v. Double DD Truck Lines,

Inc., Case No. 1984-STA-13, @ 8-9 (Sec'y Mar. 18, 1985); Shoup v. Kloepfer Concrete Company, Case No. 1995-STA-33, @ 3 (Sec'y Jan. 11, 1996).

I find, as a matter of fact and law, that Complainant abandoned his vehicle and his employment with Respondent, and therefore Complainant did not meet his burden of proving by a preponderance of the evidence that Respondent subjected him to adverse action in retaliation for his protected activity in violation of the Act.

Given the foregoing findings and conclusions, it is axiomatic that Complainant's requested relief must be **DENIED.**

There is inconsistent record evidence about Smith's claim for reimbursement of "tire and rim" money. I find that Smith's employment agreement clearly sets forth Respondent's casing charges which I conclude is the best evidence of Respondent's policy. (See RX-1, p. 1, paragraph 9). In sum, the policy assesses a charge for damage to tires and rims consistent with Stutzman's testimony. There is no record evidence that Complainant was treated disparately in such assessments since the charges were made before Smith engaged in any protected activity of record. Thus, I find and conclude that Complainant failed to establish entitlement to reimbursement of tire and rim money as alleged.

Complainant's claim for the return of his C.B. radio and truck accessory items purportedly left in Truck No. 127, or reimbursement for such items, must also fail. There is no record evidence that Respondent came into possession of such items and in fact Respondent's representatives denied the presence of such items upon the return of Truck No. 127. Complainant presented no evidence that he filed a claim with Respondent for his loss or requested the return of such items. Smith did not communicate with Respondent after leaving George West, Texas, about his loss or engage in any effort to recover such items. Furthermore, no evidence was presented that Smith was denied recovery of the items for discriminatory reasons in retaliation for his safety complaints.

In the present matter, Complainant was unsuccessful and is not entitled to affirmative relief under the Act, which provides for action to abate the violation, reinstatement, costs, and compensatory damages. 49 U.S.C. § 31105(b)(3)(A). Consequently, the relief he requests is hereby **DENIED.**

VI. CONCLUSION

I find and conclude that, on the facts presented, Complainant failed to establish his complaints of discrimination under the Act have any merit. I find and conclude that, despite the temporal proximity between Complainant's protected activity and the termination of his employment, the preponderance of the record evidence establishes Respondent did not terminate Complainant, but that Complainant severed his employment with Respondent for reasons unrelated to any activities protected under the Act.

VII. RECOMMENDED ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Complainant's claim is hereby **DISMISSED.**

ORDERED this 16th day of December, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).