

circumstances, acting unprofessionally during the investigation of the incident, and having a poor driving record.

On September 8, 2008, Complainant filed an STAA complaint against Respondent with the Secretary of Labor. Following an investigation, on April 6, 2010, the Secretary denied the claim finding Respondent had not violated the Act. A formal hearing with the Office of Administrative Law Judges (“OALJ”) was held before the undersigned in Sacramento, California on May 26-27, 2010. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were admitted to record: Administrative Law Judge exhibits (“AX”) 1-3 ; Complainant’s exhibits (“CX”) 1 -8, 10-19, 24-25 and Respondent’s exhibits (“RX”) 1-18. Hearing Transcript (“TR”) at 5-6, 11, 43, 44, 46, 77, 81-82, 87, 98, 121, 143 and 162.

ISSUE

(1) Whether Complainant engaged in protected activity under the STAA? TR at 17-20.

FINDINGS OF FACT

Complainant attended Western Truck School in West Sacramento and began working for Swift Transportation (“Swift”) as a Company Driver in 1996. Tr. 59-60. Swift maintains a place of business in Phoenix, Arizona. CX 25. At the time of his termination, Complainant was an Owner Operator of the truck and drove trucks over highways in commerce to haul freight. Tr. 332, RX 10. He signed a four- and -a half year lease on his truck with Interstate Equipment Leasing and intended to purchase the truck at the end of the term. Tr. 69. As an Owner Operator, Complainant received compensation based on the number of miles driven and had the autonomy to refuse assigned loads. Tr. 65, 332.

On August 22, 2008, Complainant completed a load delivery and returned to the Swift yard in Phoenix, Arizona between 6:00pm and 8:00pm. Tr. 164. Complainant decided to take a ten hour break before proceeding with his next delivery of load AC48250 to Provo, Utah. RX 15; CX 25 at 6. In order to prepare for the trip, he found the trailer for the load and examined the Bill of Lading (“BOL”). Tr. 123. The Bill of Lading is a document which allows Swift’s customers to track their loads and indicates the quantity, quality and the weight of the product being transported. CX 25 at 4. The shipper of a load is responsible for entering the weight of the load on the Bill of Lading. CX 25 at 5. The Bill of Lading for load number AC48250 was issued by Champion Safes De Mexico, the customer. CX 6. A Trans-Mex driver had picked up the load from Nogales Mexico, and brought the load across the border to Swift’s drop yard in Nogales, Arizona.² CX 25 at 6, Tr. 171. A local driver then picked up the load in Nogales, Arizona and delivered it to Swift’s Phoenix, Arizona terminal on August 22, 2008. *Id.*

² Trans-Mex is a Mexican motor carrier company which is 100% owned by Swift Transportation, <http://www.swifttrans.com/c-clamp.aspx?id=454> (last visited Oct. 29, 2010).

Complainant noticed that the weight listed on the Bill of Lading did not match the weight listed on the computer dispatch.³ The computer dispatch showed the freight weight of 33,656 lbs, and the Bill of Lading showed a weight of 17,986 kg (or 39,451.28 lbs). CX 6, Tr. 101. At that time, Complainant testified that he was not concerned about the discrepancy because it was a common occurrence for local drivers to under-represent the weight in order to avoid compliance with Respondent's policy. Tr. 167. Under this policy, any trailer which was delivered to the terminal and weighed over 35,000 pounds had to be accompanied by a certified scale ticket. Tr. 119. Drivers often had to drive several extra miles in order to find a certified scale and obtain this ticket. Tr. 167. Instead of going through the procedure, Complainant testified that many of the drivers would simply under-represent the weight when they entered the data into the Swift system. *Id.* Complainant concluded that the local driver had intentionally avoided the policy by entering the 33,656 lbs figure. *Id.*

Before going to sleep that night, Complainant testified that he had a conversation with his wife about illegal drugs and alien traffic coming out of Mexico. Complainant stated he became concerned since his next scheduled load (AC48250) came out of Nogales, Mexico. Tr. 185. Complainant stated he had previously learned about coyotes who "load people into the back of ... sealed trailer coming across a border." Tr. 186.

The next day, August 23, 2008, Complainant returned to the yard and proceeded to get the trailer hooked and weighed. RX 15. The scales which Swift uses to weigh its trucks have three different weight positions: Axle One (steer axle), Axle Two (the drive axles), and Axle three (the twin axles of the trailer called the tandems). Tr. 115. The sum of these axles generates the gross weight of the truck. *Id.* After weighing the truck, Complainant realized that he could not legally drive the trailer because the axles were not set at the proper legal limit and did not comply with the weight requirements of the Arizona Motor Vehicle Division, the agency which enforces the legal limits on weights for vehicles traveling in Arizona. Tr. 115-16, 212. Under Arizona and federal law, trucks cannot exceed the maximum gross weight of 80,000 lbs. Tr. 116 23 CFR Part 658, App. C. Likewise, the tandems on the truck cannot hold more than 34,000 lbs of weight without a permit. *Id.* Complainant testified that his truck complied with the gross weight requirement; however, the weight of the tandems was two thousand pounds over the limit at 36,000 lbs. Tr. 116.

Complainant approached the only dispatcher on duty at the window in order to try and resolve the problem. Tr. 169, 121, 123. Complainant told the dispatcher that the local driver did not properly scale the load with the axles and failed to obtain a ticket for the load which was over 35,000 pounds. Tr. 173. At that time, Complainant did not mention the weight discrepancy between the BOL and the computer dispatch. Tr. 175. Complainant testified that the dispatcher was very curt and told Complainant to "just get the F'ing thing legal and out of here." Tr. 123. With the help of a fuel bay attendant, Complainant adjusted the position of the wheels so that the weight was more evenly balanced on the wheels between the two groups of axles. *Id.*

³ In addition to the Bill of Lading, Swift can track loads through a computer software system called AS400. Loads are entered into the AS400 system by a Customer Service Representative who is in direct communication with the customers. CX 25 at 5. The Customer Service Representative also enters in estimated values for the weight of the load and the number of units being hauled based on previously hauled loads with the same customer. *Id.*

After adjusting the axle weights in compliance with the law, Complainant stated that he began thinking about the gross weight of the freight. According to the Bill of Lading, the freight weight was 17,932.40 kg or 39,451.28 lbs. CX 6-1. After weighing the load, Complainant knew that the total gross weight including the tractor, trailer and equipment was around 78,280 lbs. Tr. 112-13, CX 15 at 2. In order to calculate his actual freight weight, Complainant took his gross weight (78,280 lbs) and subtracted from this figure the total weight of his equipment (33,479 lbs). CX 3-1. Complainant arrived at the 33,479 figure by adding together the following items: Kenworth W900L tractor at 17,400lbs; Wabash T59/T60 series trailer at 13,334lbs; and 300 gallons of fuel at 7.15 pounds per gallon at 2,145lbs. Complainant testified that he used the 17,400 lbs for the weight of the Kenworth tractor because this was Swift's declared weight for registration purposes. Tr. 246, CX 3-1. Based on this calculation, Complainant concluded that his total freight weight was 44,801lbs or 5,349.72 pounds more than the weight indicated on the Bill of Lading. CX 3-1, RX 15 at 2.

Complainant testified that he began to feel suspicious about the load when he also noticed that the trailer had a tin seal and not a high security seal. Tr. 125, 169, 181. For security reasons, all Swift trailers with cargo onboard are sealed by the shipper until they reach their final destination. CX 25 at 8. Complainant knew that the tin seal could be easily broken and replaced without any special tools. Tr. 127. Complainant testified that he believed that a high security seal was required for all trailers which crossed the border from Mexico. Tr. 129, 182.

Complainant stated that he knew that he could refuse the load; however, he believed that the dispatcher did not have authority to assign him a replacement load. Tr. 177. Complainant testified that he had never asked a dispatcher for a different load before, and there were no Planners or managers at the facility that early on a Saturday morning. Tr. 177-78. The only other individual at the yard was a security guard who monitored the gate. Tr. 124. Before leaving the yard at 6:20am, Complainant stated he attempted to call Planner, Chad DeGiorgio, in Kaysville, Utah. Tr. 137, 139, 183, CX 12-2. DeGiorgio did not pick up the phone. *Id.*

After verifying that the axle weight and gross weight of the truck complied with the law, Complainant departed from the Swift yard. About ten minutes later, he made a stop at the Flying J Travel Center (a gas station) located approximately four miles from the Swift Phoenix terminal. Tr. 146, 179. While Complainant was waiting in line for coffee, he overheard two truckers discussing a "big drug bust from Nogales involving Swift equipment." Tr. 179. Complainant testified that this overheard conversation prompted Complainant to think about the 5,000 pound weight discrepancy. RX 15 at 2. Complainant testified as follows: "And in the time that I went from the Swift terminal to Phoenix, I'm thinking what, you know, what- its bothering me a little bit, what -there's a tin seal on here, there's a weight discrepancy, I'm not sure what I want to do. I can't get any help from the dispatcher at Swift. It's a Saturday morning. There's really nobody in the extended team coverage for another couple hours." Tr. 146.

At that point, Complainant decided to call 911. Tr. 153. The 911 dispatcher could not understand the nature of the emergency when Complainant tried to explain the weight discrepancy. Tr. 185. Finally, Complainant became flustered and stated: "I don't know what's in the trailer. It could be drugs. It could be people. It could be explosives." *Id.* Complainant had no basis for thinking that there were explosives in the truck. Tr. 103, 185-87, 198, RX 6. The

dispatcher documented Complainant stating “that he either has 6-8 thousand pounds of drugs or explosives on his rig from Mexico,” and sent the Arizona Commercial Vehicle Enforcement Unit to the scene. RX 6, Tr. 189.

At 7:21am, while he was waiting for the police to arrive, Complainant once again attempted to call DeGiorgio. Tr. 137. This time Complainant left a message stating that he had a 5,000 pound discrepancy in load weight. Tr. 183. Complainant did not mention his concerns about the tin seal in the message. *Id.* Sergeant Kevin Jex with the Arizona Commercial Vehicle Enforcement Unit arrived at the scene and conducted an investigation. Tr. 190, 210-11. Complainant informed Jex that the load was 6,000 to 8,000 pounds overweight because the BOL did not match the actual weight. Tr. 212. Because the load came from Mexico, Complainant was concerned that there might be drugs or explosives onboard. *Id.* Complainant also stated that he was suspicious because his driving route was changed. Tr. 213.

At approximately 8:20a.m., Jex contacted Sean Driscoll in Swift’s Security Department and asked one of the company representatives to come to the scene. Tr. 214. Driscoll asked Christopher Drowne, the Extended Coverage Team Manager, to respond to the call. Tr. 214, 234-35. Upon arrival, Drowne proceeded to ask Complainant basic questions in order to ascertain the nature of the emergency and the reason for the 911 call. Tr. 214, 237. According to Drowne, Complainant immediately became upset. Tr. 237. During the conversation, Complainant began yelling at Drowne and the conversation became heated and argumentative. Tr. 214, 216. Complainant told Drowne that there was a discrepancy between the weight on the BOL and the actual weight. Tr. 238. Complainant did not provide an explanation satisfactory to Drowne as to why the weight discrepancy led him to call 911. At one point, Jex had to step in between Drowne and Complainant to prevent the conversation from escalating. Tr. 215. According to Jex, Complainant was “[v]ery animated with his arms, was not listening to anything Chris had to say.” Tr. 216.

Soon thereafter, a drug detection canine unit arrived on the scene and conducted a perimeter search. Tr. 216-17. After the seal was removed, a K-9 dog inspected the trailer. Tr. 217, 371. No drugs, explosives or other illegal contraband was found in the vehicle. Tr. 217-18, 244. One of the boxes was completely opened and inspected. Tr. 371. The load consisted of large metal safes that were secured in the trailer with heavy metal pallets. CX 25 at 7. There was also no indication that the seal or the trailer were tampered with or manipulated. Tr. 340, RX 18. The Security Operation Center confirmed that the seal number on the trailer matched the seal number assigned by the shipper. *Id.* The actual seal also had the same number as the BOL. Tr. 343.

When a crowd of people began to gather around the investigation scene, Jex made the decision to move the truck to a nearby truck wash called Danny’s A Big Rig Resort where the load was weighed. Tr. 217-19, RX 8. The vehicle was then transported back to the Swift yard. *Id.* At the yard, the tractor was weighed by itself, and then the trailer and its contents were weighed. The weight of the tractor without the load was 20,620 pounds. Tr. 217, 244-45.

After Driscoll arrived at the terminal, Complainant was escorted to the Swift security office and asked to prepare a written statement. Tr. 154. Driscoll extensively interviewed

Complainant about his decision to call 911. His primary concern was Complainant's decision to inform the dispatcher that there were explosives on-board. Tr. 327- 29. Driscoll wanted to know why Complainant took the truck, which he believed had explosives, and parked it near a gas station. Tr. 327. Complainant reiterated his concerns about the weight discrepancies but did not inform Driscoll about the tin seal. Tr. 327, 339. According to Drowne, Complainant was disrespectful throughout the whole investigation. Tr. 247. During the interview Complainant's behavior was "at times compliant, and at other times very hostile, belligerent, combative, just failure to cooperate. Got up and walked out, at one point, raising his voice, cursing, just very unprofessional." Tr. 243-47, 344-45.

After the interview, Complainant requested to have the same load back. Driscoll informed Complainant that the load was still under investigation. Tr. 248. At that point, Complainant stood up and told Driscoll that he "didn't give a shit," and that Driscoll didn't need to call him with further questions, because he didn't care. Tr. 354. Next, Complainant got up and walked out as Driscoll was still addressing him. Tr. 354. In order to get Complainant back to work, Driscoll assigned him a different load. Tr. 155, 248.

Within four to five days after the incident, Drowne recommended terminating Complainant's employment to Driscoll. Tr. 248-49. In the course of making the decision, Drowne testified that he considered Complainant's demeanor, unwillingness to cooperate, abusive language, and insubordination during the August 23rd investigation. *Id.* Drowne likewise examined Complainant's file. The file contained multiple safety violations, road complaints, citations for weight violations, and write ups (PCRs). RX 16, Tr. 249. Drowne noticed that Complainant had a history of speeding and unsafe driving. Tr. 251. In 1999, Complainant was documented for "driving recklessly, cutting off others, using profanity." RX 16, Tr. 252. The following year, Complainant was again documented for speeding and cutting off others. Tr. 253. On August 14, 2000, Complainant failed to attend Swift's mandatory NSC classes. RX 16, Tr. 254. As a result, Complainant was placed on hold and could not continue working until he met the requirement. RX 16, Tr. 249, 254. In 2008, Complainant received three PCRs reprimanding him for his actions. One of the write ups was given out for citations. Tr. 255. In March, Complainant was placed on log probation. *Id.* Complainant had his trainer status revoked several times throughout his employment because of his negative road reports and violations. Tr. 253, 255. Complainant was also on trainer suspension in 2008. According to Drowne, the majority of Complainant's suspensions occurred within the last seven months of his employment. Tr. 256.

Drowne believed that Complainant's actions on August 23rd were unreasonable. Tr. 265. According to Drowne, because overweight issues were such a common occurrence in the industry, and because the seal was not broken nor showed signs of tampering, there was no reason to believe that the trailer contained contraband. Tr. 265. Drowne testified that if a driver had a reason to suspect that a security matter was at risk, he should contact the security department instead of taking the load to a public place and calling 911. Tr. 266-67.

After receiving recommendations to cancel Complainant's contract, Driscoll discussed the incident with his supervisor Gary Fitzsimmons, the vice president of the company. Tr. 348. Driscoll recommended that Fitzsimmons cancel Ulrich's contract. Tr. 349. Driscoll stated he took into consideration Complainant's driving record, his interaction with others, and his

behavior during the incident. Tr. 349. According to Driscoll, the biggest problem was the way Complainant “interacted with other, with the 911 dispatcher that I believe he became highly frustrated with, the interaction with Chris Drowne, who was an Operations Manager ... And then the interaction with me, when I actually pressed him on some of the questions that I was asking him, that if I didn’t ask the question he wanted to hear, then that wasn’t – then I didn’t get a positive response, so to speak.” Tr. 350. Fitzsimmons told Driscoll to go ahead with the decision. Tr. 349. Accordingly, Complainant's employment was terminated on August 25, 2008, and Interstate Equipment Leasing, Inc. (“IEL”) canceled his truck-lease agreement soon thereafter.

DISCUSSION

The STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee because the employee has engaged in certain protected activities. Complainant may recover under the STAA if he satisfies the criteria under §31105(a)(1)(A) commonly known as the “Complaint Clause” or under §31105(a)(1)(B), the “Refusal to Drive Clause.” In order to establish retaliation under the Complaint Clause, Complainant must show that he “has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding...” 49 U.S.C. §31105(a)(1)(A). In the alternative, Complainant can satisfy the criteria of the Refusal to Drive clause by showing that he refused to operate a vehicle because “(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition.” 49 U.S.C. §31105(a)(1)(B)(i)-(ii).

Under either clause, Complainant must establish a prima facie case of retaliation by proving that: 1) he engaged in protected activity under the Act; 2) he was subject to an adverse employment action; and 3) there was a causal link between his protected activity and the adverse action of his employer. *Moon v. Transport Drives, Inc.*, 836 F.2d 226 (6th Cir. 1987); *see also Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). After a prima facie case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. *Moon*, 836 F.2d at 229. If the employer articulates a non-discriminatory reason for the adverse employment action, the complainant bears the burden of showing that the employer’s reason is pretextual and the real reason for the adverse action was retaliation. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). However, once the case is tried on its merits, the ultimate inquiry becomes whether complainant has proved by a preponderance of the evidence that the respondent discriminated against him because of his protected activity. *U.S. Postal Serv. Bd. of Governors v. Aiken*, 460 U.S. 711, 713-14 (1983); *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB Sept. 14, 2007).

A. Complainant's 911 Call Does Not Constitute Protected Activity Under the "Complaint Clause" Of the STAA.

The Complaint Clause protects an employee who has "filed a complaint or begun a proceeding related to a violation of a regulation, standard, or order, or has testified or will testify in such a proceeding." 31105(a)(A)(i). The statute covers internal complaints to supervisors as well as external complaints to government officials. *See Nix v. Nehi-RC Bottling Co., Inc.*, 84 STA-1 (Sec'y July 13, 1984). The Secretary has held that filing complaints with a state government agency, such as a Department of Transportation, is covered by the statute. *Ass't Sec'y & Dougherty v. Bjarne Skjetne, Jr. d/b/a Bud's Bus Service*, 94-STA-17 (Sec'y Mar. 16, 1995). All complaints, whether internal or external, must "relate to" safety violations. Courts have construed "relate to" broadly to encompass violations of both federal and state laws. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992). However, in order to qualify for protection, the complaint must be based on a "reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation." *Calhoun v. U.S. DOL.*, 576 F.3d 201, 213 (4th Cir. 2009). Employee's complaints also cannot be too generalized or informal. *Id.* at 213-24.

Here, Complainant "filed a complaint" on August 23, 2008 when he called 911 and discussed his concerns with Sergeant Jex of the Arizona Department of Public Safety. *See Griffith v. Atlantic Inland Carrier*, 2002-STA-34 (ALJ Oct. 21, 2005) (finding that Complainant engaged in protected activity as prescribed under 49 U.S.C. § 31105(a)(1)(A) when he took his truck to a weight station to be inspected and spoke with an officer from the North Carolina Department of Motor Vehicle Enforcement division). However, Complainant fails to establish that this complaint relates "to a violation of a regulation, standard, or order" within the meaning of the statute. When Sergeant Jex arrived on the scene, Claimant informed him that his assigned load, which originated from Mexico, weighed 6,000 to 8,000 pounds more than the weight indicated on the BOL. Tr. 212-13. Complainant likewise stated that his route was changed. Tr. 213. Based on this information, he suspected that the load might contain drugs or explosives. Tr. 191, 212. Complainant fails to cite to specific regulations or laws which indicate that a weight discrepancy between the BOL and the actual weight is a safety violation or hazard. Weight discrepancies, such as the one Complainant encountered, were a common occurrence in the industry. Several of Respondent's witnesses testified that a weight discrepancy amounted to a safety concern only if it put the weight of the vehicle above the legal limit. Tr. 265, 312-313, 329. Complainant's vehicle complied with all federal and state standards at the time he departed the Swift yard. Tr. 181. *See Calhoun*, 576 F.3d at 212 ("Where the employer's prescribed inspection methods are themselves reasonable, an employee's additional inspection measures will typically not be reasonably necessary to satisfy him that his vehicle is safe to drive under 396.13," which provides that "before driving a motor vehicle, the driver shall...be satisfied that the motor vehicle is in safe operating condition.").

Complainant also argues that the load failed to comply with the standards set out by Customs-Trade Partnership Against Terrorism (C-TPAT) and the Free and Secure Trade (FAST) program because the trailer contained a tin seal instead of the high security seal when it crossed the border from Mexico. C-TPAT is a U.S. Customs and Border Protection (CBP) voluntary

government/private sector partnership program which is designed to enhance supply chain security and simultaneously speed up the flow of compliant cargo across the border.⁴ Respondent is a member of C-TPAT.⁵ Tr. 283, 360-61. In order to remain an eligible member of C-TPAT, Respondent was required to maintain the C-TPAT supply chain security criteria as outlined in the C-TPAT U.S./Mexico Highway Carrier agreement.⁶ Tr. 361. Under the C-TPAT Highway Carrier Security Criteria “A high security seal must be affixed to all loaded trailers bound for the U.S. All seals must meet and exceed the current PAS ISO 17712 standards for high security seals.” CX 11-2, Tr. 362-63. Complainant’s trailer only had a tin seal even though the load was transported across the border from Nogales, Mexico.

However, even assuming that C-TPAT requirements fall under the definition of “standard” within the meaning of 31105(a)(A)(i), Complainant fails to show that he informed Respondent or the police of this infraction. He never expressed his concerns about the seal to Mr. Driscoll or the Swift dispatcher. Tr. 175, 339. He likewise did not raise the issue with Sergeant Jex or Chad DeGiorgio during the investigation. Tr. 183, 237-38. Although Complainant attempted to call DeGiorgio at 7:21am while waiting for the police, he did not mention the tin seal problem in his voice message. Tr. 137, 183. Complainant’s general comments that the weight discrepancy might be caused by the contraband inside the trailer were too general to constitute complaints filed with the employer within the meaning of the STAA.

B. Complainant’s 911 Call Does Not Constitute Protected Activity Under the “Refusal to Drive Clause” of the STAA.

A refusal to operate a commercial motor vehicle is protected under two STAA provisions. The first provision, 49 U.S.C. § 3115(a)(1)(B)(i), deals with “actual violations” of the law and requires Complainant to “show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive.” *Yellow Freight Systems v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993). The second provision, 49 U.S.C. § 31105(a)(1)(B)(ii), requires Complainant to have only a reasonable apprehension of serious injury under the circumstances. *Eash v. Roadway Express, Inc.*, ARB No. 04-036, ALJ No. 1998-STA-28 (ARB Sept. 30, 2005). Whether a refusal to drive merits STAA protection requires evaluation of the circumstances surrounding the refusal under the particular requirements of each of the provisions. *Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-005, slip op. at 7-8 (ARB Mar. 29, 2000).

⁴Department of Homeland Security, U.S. Customs and Border Protection, *Securing Global Supply Chain: Customs-Trade Partnership Against Terrorism (C-TPAT) Strategic Plan*, available at http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/ctpat/what_ctpat/ctpat_strategicplan.ctt/ctpat_strategicplan.pdf.

⁵ Swift Transportation Company, <http://www.swifttrans.com/c-clamp.aspx?id=454> (last visited Nov. 1, 2010).

⁶ Department of Homeland Security, U.S. Customs and Border Protection, *Security Criteria for C-TPAT Highway Carriers*, available at http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/security_criteria/hwy_carrier_criteria/.

a. Complainant Never Refused to Drive The Load

In order to receive protection under either 31105(a)(1)(B)(i) or (ii), Complainant must actually refuse to drive the vehicle. Complainant cannot seek protection for driving under protest. *Calhoun v. United States Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB Sept. 14, 2007); *Williams v. CMS Transportation Services, Inc.*, 1994-STA-5 (Sec’y Oct. 25, 1995). The employee must also notify the employer of a safety basis for the refusal to drive. *See, e.g., Smith v. Specialized Transportation Services*, 1991-STA-22 (Sec’y Apr. 20, 1992).

Here, Complainant has failed to establish a refusal to drive. Complainant did not notify the Swift dispatcher or his Driver Manager that he was refusing to take the load. Tr. 137, 177. After making sure that the truck complied with all legal standards, Complainant departed the Swift yard on August 23, 2008. Tr. 179. When Complainant called 911, he wanted the Commercial Vehicle Inspection unit to conduct an additional investigation of the load before he continued with the trip. Tr. 191. Essentially, Complainant was not satisfied with the security procedures that Swift had in place. At the time the 911 call was placed, Swift was not apprised of the potential problems with the vehicle. As a result, it could not respond to Complainant’s concerns or correct any problems.

b. Driving the Load Did Not Result In A Violation of Any Law

Section 31105(a)(1)(B)(i) prohibits an employer from retaliating because the employee refuses to drive when to do so would violate a commercial motor vehicle regulation. “The refusal to drive under this subsection is protected only if the record establishes that the driving *actually* would have violated the motor vehicle regulation at issue. A good faith belief does not suffice.” (emphasis added) *Hillburn v. James Boone Trucking*, ARB No. 04-104, ALJ No. 2003-STA-45 (ARB Aug. 30, 2005); *see also Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-47 (ARB Apr.26, 2005) (refusing to drive a load of cargo through an area where random sniper shootings were occurring did not constitute protected activity under 49 U.S.C.A. § 31105 (1)(B)(i) because the complainant failed to prove that an actual violation of a commercial vehicle regulation would occur); *see also Landsdale v. Intermodal Cartage Co., Ltd.*, 94-STA-22 (ALJ Mar. 27, 1995) (finding that Complainant failed to make the requisite showing under 33105(a)(1)(B)(i) where Complainant’s evidence consisted of his testimony that the containers felt heavy on their drive axles, and that the courtesy weights provide by International Paper revealed that the drive axle weights on both vehicles exceeded state law limits).

Here, Complainant fails to show by a preponderance of evidence that operating the truck would have resulted in a violation of any commercial motor vehicle regulation. Before departing the Swift yard, Complainant ensured that his truck complied with all federal and state requirements. Tr. 181. He adjusted the axle weights to ensure that the tandems held less than 34,000 pounds. Tr. 179. He also weighed the truck and determined that the gross weight of the vehicle was below the 80,000 pound federal limit. Complainant conducted an additional pre-trip inspection by checking the lights, tires and electrical connections. Tr. 181. He also made sure that the seal was intact. *Id.* A tin seal was a proper type of seal for a vehicle traveling within the United States. Driving with a weight discrepancy between the BOL and the computer dispatch

did not amount to a federal or state law infraction. Therefore, Complainant's argument under 31105(a)(1)(B)(i) fails.

c. Complainant Fails to Demonstrate That His Apprehension of Serious Injury Was Reasonable Under The Circumstances.

The STAA provides protection to the employee who refuses to drive a vehicle based on a “reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.” 49 U.S.C. § 31105(1)(B)(ii). “To establish a complaint under this work refusal provision, a complainant must establish that (1) he refused to operate the vehicle because he or she was apprehensive of an unsafe condition of the vehicle, (2) his apprehension was objectively reasonable, (3) he sought to have the respondent correct the problem, and (4) the respondent failed to do so.” *Harris v. C&N Trucking*, 2004 STA-0037, slip op. at 7 (ALJ Sept. 9th 2004); *see e.g., Monde v. Roadway Express, Inc.*, 01-STA-22, 01-STA-29 at 10 (ARB Oct. 31, 2003). The STAA provides that the “employees apprehension of serious injury is reasonable only if 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. §31105(a)(2). “When examining reasonableness under 49 U.S.C. § 31105(1)(B)(ii) relevant factors include the driver’s apprehension about past experience, the vehicle’s susceptibility to the defect at issue, whether other drivers have driven under similar circumstances, and the driver’s experience.” *Harris*, slip op. at 7. Unlike Section 31105(a)(1)(B)(i), Section 31105 (a)(1)(B)(ii) does not require a complainant to establish that an unsafe condition actually existed at the time of his refusal to drive. *See Thom v. Yellow Freight System, Inc.*, 93-STA-2 (Sec’y Nov. 19, 1993).

Complainant fails to establish that his apprehension of serious injury was reasonable under the circumstances. He called 9-11 after suspecting that drugs or explosives were in his trailer because: 1) he perceived a weight discrepancy of approximately 5,000 pounds between the Bill of Lading and the vehicle’s scaled weight; 2) there was a tin seal instead of a high security seal on the trailer; 3) the shipment originated in Nogales, Mexico and passed through a known smuggling corridor into the United States; and 4) the prior driver did not scale the load or adjust the axle.

The undersigned finds that based on these factors alone, a reasonable driver would not have concluded that his load contained contraband or explosives. Both the Swift Driver Manual and the Contracted Driver Manual caution drivers not to trust “the weight on Bill of Lading as they are often-incorrect.” RX 3. According to similarly situated drivers who work for Respondent, weight discrepancies (even of 5,000 pounds) between the BOL, the dispatch weight and the actual weight of the load are a common occurrence in the industry for a variety of reasons. Tr. 265, 329, 312-313. Chad DeGiorgio, a Planner and a Driver for Swift, testified that a 5,000 pound discrepancy would only matter if it caused the load to be over the legal limit. Tr. 313. Chris Drowne, a former driver, also testified that he would not assume a vehicle was unsafe or posed a hazard to the public merely because of the weight discrepancy, stating:

“Because overweight issues are a common, everyday occurrence in the industry, and somebody with his experience should know that. And me, myself, coming from the background of driving, realize that you get loads sometimes that are overweight, the weights are wrong. And if the seal is not broken and intact, it is the seal that the customer placed on that trailer, and that seal shows no sign of tampering with, and that trailer is sealed, then I would have no reason to believe that there was bombs or drugs or anything else in that trailer. I would have scaled the load, slid the axle, got it legal, and continued on.

Tr. 265.

Drowne further testified that the weight on the BOL does not include the weight of certain packaging materials such as shrink wrap or pallets. Tr. 214. Customers also have an incentive to add extra freight to the truck because they pay by the mile and not by the pound. Tr. 241. Because of these factors, the weight recorded on the BOL often does not match the actual weight of the load at the time of delivery. The weight recorded in Respondent’s computer software system (AS400) also often differs from the actual weight for a number of reasons, including: 1) the customer could weigh the load with a different size truck than that which the Swift driver drives; 2) the shipper may use different size and types of trailers from those Swift uses to haul freight; 3) when a load is picked up and T-called at a Swift yard, the individual who picks up the load could be a local driver who drives a day cab truck, which weighs substantially less than a standard over-the-road truck. RX 25 at 5.

Ultimately, in this case, it appears that the discrepancy was caused by several factors. First, Complainant underestimated the weight of his tractor while making his preliminary calculations. Complainant’s truck actually weighed 20,620 pounds and not 17,400 pounds as Swift’s registration data indicated. Tr. 217, 245. Second, the load consisted of large metal safes that were secured in the trailer with heavy metal pallets. RX 25 at 7. These metal pallets contributed significantly to the gross weight of the trailer. This weight was not accounted for in the BOL. Despite the weight differential, there simply was no evidence that the load might contain people, explosives or drugs. Tr. 217. The trailer was sealed, and the seal information matched the information provided by the shipper. Tr. 340. As noted above, weight discrepancies were a common occurrence in the industry. Complainant himself testified that discrepancies between the dispatch weight and the BOL were a common occurrence because local drivers often underrepresented the weight to avoid Swift’s policies.

Even assuming that the combination of the various factors would raise suspicion in a reasonable driver, Complainant does not qualify for protection under the STAA because he failed to inform Respondent of his safety concerns. Complainant did not ask Swift for an investigation of the weight discrepancy or an inspection of the trailer. At the time Sergeant Jex contacted Swift’s Security Department, Respondent had no inkling that one of its loads might contain explosives, drugs or people. Complainant also did not express his concerns about the illegality of

the tin seal to anybody at Swift. Although Complainant attempted to contact his Driver Manager, he did not wait for a reply before contacting the police. Tr. 129, 137, CX 12-2. Complainant did not leave a voice message outlining the nature of the problem until after the Arizona Commercial Vehicle Enforcement Unit was on its way.

Instead of taking the load out of the yard and dialing 911, Complainant had several other viable and more reasonable alternatives. He could have contacted the Swift's Security Department, waited for a reply from his Driver Manager, or refused to take the load. In the course of his employment with Swift, Complainant should have become aware of the contact information for the Security Department. Swift prints a company Bumper-to-Bumper newsletter which is available at every dispatch windows. Tr. 269, 335, RX 17. This newsletter provides a security contact number on every single issue. *Id.* Complainant has also hauled high value loads in the past. Tr. 339. Every driver who hauls high value loads automatically receives a message with the contact information for the Security Department. Tr. 269, 316, 338-39. Likewise, when drivers are initially hired with the company they are required to watch a video which talks about the various company policies and provides a 24/7 number to call in case of security related emergencies. Tr. 334. If Complainant genuinely believed that his load could contain explosives or drugs, he should have refrained from taking the truck to a public place such as a gas station.

In sum, the Court finds that Complainant has not produced adequate evidence to demonstrate that a reasonable person, under the circumstances confronting Complainant, would conclude that there was a bona fide danger of accident or injury.

Conclusion

Because Complainant had driven for Respondent for a number of years and knew that weight discrepancies in loads are a common occurrence, it was unreasonable for him to assume that the load contained illegal materials. Instead of notifying his employer and refusing to drive the load which might contain guns, explosives, or people, Complainant drove the truck to a nearby gas station and dialed 911. For the reasons described above, Complainant's actions do not qualify for protection under §31105(a)(1)(A) of the STAA. Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find that Respondent did not unlawfully discriminate against Complainant because of any protected activity and, accordingly, his complaint is hereby **DISMISSED**.

A

Russell D. Pulver
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). 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).

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).