U.S. Department of Labor Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 15 November 2013

CASE NO.: 2013-STA-00012

In the Matter of:

JUAN NEVAREZ,
Complainant,

v.

WERNER ENTERPRISES,
Respondent.

DECISION AND ORDER DENYING WHISTLEBLOWER COMPLAINT

This action involves a complaint under the employee protection provision of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105, and its implementing regulations found at 29 C.F.R. Part 18 at 1978.

On June 18, 2013, I conducted a hearing in this matter in Las Vegas, Nevada. Juan Nevarez ("Complainant") appeared in pro se. Katherine Parks, Attorney at Law, represented Werner Enterprises ("Respondent"). During the hearing, the following exhibits were admitted into evidence: Complainant's exhibits ("CX") 1 through 5 and 7 through 10(a)-(i), as well as Respondent's exhibits ("RX") 1 through 26. Hearing Transcript ("TR") at 14-17, 113-14. As discussed below, CX 11 and 11a, which are a letter about a DVD and the DVD respectively, are also admitted. There were no closing briefs submitted.

After a thorough review of the evidence in this case, and as discussed below, I find that Complainant has not carried his burden in this matter and his complaint under STAA is denied.

I. Issues in Dispute

This matter presents the following disputed issues:

1. Did Complainant engage in protected activity under the STAA?
2. If so, did Respondent retaliate against Complainant for engaging in protected activity by refusing to pay for lodging and constructively discharging him from his truck driving position?
3. If Respondent retaliated against Complainant, is he entitled to damages as result of the retaliation?

II. RULING ADMITTING COMPLAINANT'S DVD EVIDENCE

Following the conclusion of the trial and after closing arguments of the parties, Complainant stated that he had additional evidence to offer, specifically three video clips of him making phone calls to Respondent on or about June 19, 2011, the date of the alleged protected activity. According to Complainant, the video clips were located on his laptop computer in the courtroom, but he had not transferred them to a DVD or any other device so they could be admitted into evidence or viewed anywhere besides from his personal laptop. Respondent objected to the admission of the video clips at the hearing and also filed a written opposition ("OP") on July 5, 2013.

I permitted Complainant fourteen days to submit the video clips in a transferable format, such as a DVD, for review and a ruling on their admissibility. The DVD evidence was due no later than July 2, 2013. On July 17, 2013, I issued an order denying the admission of the video clips because I had not received the DVD or any other correspondence from Complainant. I did not reach the merits of Respondent's written objections. However, on August 19, 2013, I received a letter from Complainant asserting that he had not missed the deadline. He included a copy of a certified mail receipt dated June 28, 2013, which shows the DVD evidence was received at the federal building where my office is located, though the DVD never made it to this office. I treated the letter as a motion for reconsideration and asked Complainant to resend the DVD evidence which I received on August 26, 2013. The letter accompanying the DVD is marked as CX 11 and the DVD disc is marked as CX 11a.

In its written opposition, Respondent objected to the admission of the video clips on multiple grounds. First, Respondent argued that there is no way to authenticate the videos with respect to when by whom they were actually filmed. OP 1. However, at the hearing Complainant stated that he personally filmed the videos of himself from his laptop while at the motel, which is consistent with the contents of the DVD. TR 125-128; *see* CX 11a. Also, recordings from Respondent's phone tree and answering machines can be heard in the videos, as well as the voice of a dispatcher who identified herself as Linda. *See* CX 11a.

Next, Respondent insists the video clips are irrelevant and do not support Complainant's constructive discharge claim. OP 1. Complainant contends that he made repeated attempts to contact Respondent from the motel lobby in Kingdom City, Missouri, but was instead left stranded because he refused to violate the law and drive without a Hazmat license. TR 33, 119. The video clips are arguably relevant to whether Complainant voluntarily quit or felt compelled to return home because he was stranded without money for food or shelter. Further, the video clips corroborate Complainant's testimony that he attempted to reach the company regarding his food and shelter.

Finally, Respondent argues that Complainant was informed of the proper procedures regarding the submission of evidence at trial and given advance warning of the need to produce all evidence, both at his deposition and the pre-trial hearing, and he should have offered the evidence timely. OP 2-4. An administrative law judge may elect to close the record at a date after the conclusion of the hearing. 29 C.F.R. 18.54(a). New material may be admitted after the record is closed upon a showing that it was not readily available previously. 29 C.F.R. 18.54(c).

Here, while Complainant should have offered the video clips in a proper format at hearing, and it is uncertain why he waited until after closing arguments to indicate he had the video clips, I am persuaded that the relevancy of the offered evidence outweighs any procedural defect in its submission. Further, I do not find any prejudice to Respondent by the late submission. Because the evidence is relevant to the issues to be decided in this matter, I am granting the request to admit the DVD evidence. Accordingly, Complainant's exhibit CX 11 and 11a are admitted into evidence.

III. Factual Findings

1. Complainant was hired as truck driver for Respondent in March 2011. TR 42; RX 14. His employment application noted that he did not have a Hazmat endorsement. RX 14 at 3. Complainant completed Respondent's training program and became a qualified driver in May 2011. RX 1. Since Complainant preferred to drive alone, instead of with a co-driver, he was initially assigned to his own truck. TR 42.

2. The evidence shows that on June 3, 2011, Complainant voluntarily quit and abandoned his work-truck at a dealership in Las Vegas, Nevada, and could not be reached by dispatch or his co-driver for several days thereafter. TR 40-43, 102; R-2; CX 10(a)-(i). Complainant stated that he refused to drive the truck for safety reasons, mainly because the truck was too dirty and did not have panel lighting and an air brake warning. TR 40, 43; see CX 10(a)-(i). Respondent had to recover the truck from Las Vegas at its own expense. CX 3; TR 99, 102-103. Nevertheless, Respondent rehired Complainant on June 13, 2013, and assigned him to a truck in Fontana, California with a co-driver named Antonio Mendoza. TR 45; RX 3, 4; RX-13 at 4-7. On June 14, 2013 Complainant was taken off of the team assignment because he was unable to get along with Mr. Mendoza. RX 5. Complainant said he had issues with his co-driver's inability to pass a safety test and felt he should not be teamed up with a driver who could not pass the safety test on his own. TR 46. However, Respondent's truck records reflect that Complainant said he could not work with Mr. Mendoza, and that Complainant requested time off and needed a break from the road. R 5; R 13 at 11, 135, 141. Complainant testified that the only person he wanted to team up with was his friend Rueben, who was also from Las Vegas. TR 59.

3. Complainant returned to work on or about Thursday, June 16, 2011, and received a new team assignment. TR 59; RX 6. At Respondent's request, Complainant took the bus from Fontana, California, to Indianapolis, Indiana, where he met up with co-driver Manuel Menchaca. TR 59-60; RX 13 at 164, 169-170. Mr. Menchaca is a driver-trainer for Respondent, but is not a management level employee. TR 81. Complainant stayed in a motel paid for by Respondent until he met up with his co-driver. TR 60. According to Respondent's records, Mr. Menchaca reported that Complainant and Mr. Menchaca had multiple disagreements during their drive. RX 7. The pair arrived at a gas station in Kingdom City, Missouri, late in the evening on Saturday, June 18, 2011. TR 61. According to Qualcomm, the truck's computer communication device, Mr. Menchaca, who had previously been driving the truck, reached the maximum hours allowable by law and could no longer drive; he sent a message to the dispatch center stating that he was shutting down because Complainant did not have a Hazmat endorsement and could not drive. Thus, Mr. Menchaca had to wait until his hours were restored before he could drive again. TR 27, 29, 83, 86; RX 13 at 53-57. The dispatch responded, "k," which appears to be

acknowledging the message. RX 13 at 55. Once a driver reaches the maximum number of hours, the truck has to stop until the hours return. TR 86-87. According to Complainant, at the gas station in Missouri, Mr. Menchaca instructed Complainant to drive, but he refused because he did not have the proper certification. *Id.* According to Complainant, an argument occurred between the two drivers, and Mr. Menchaca began yelling and swearing at him, demanding that he drive the truck to the point that Complainant feared for his life. TR 28-29. Complainant called Respondent for assistance, and spoke to Harold Montgomery, who worked in Respondent's safety hotline, at about 11pm on June 18, 2011. TR 30, 77, 80. Mr. Montgomery has been employed by Respondent for over 10 years, first as a trucker and then in the safety department. TR 76.

4. Mr. Montgomery prepared a report at the time of the incident using information dictated by the driver. TR 80. The report prepared by Mr. Montgomery does not reflect that Mr. Menchaca ordered Complainant to drive. Instead, the report reflects that, according to Mr. Menchaca, Complainant said he was tired of having disagreements with Mr. Menchaca, though Mr. Montgomery recalled that Complainant said he had been threatened by Mr. Menchaca. RX 7; TR 81. Mr. Montgomery advised Complainant to call the police, obtain his belongings from the truck, then go to a motel, and call back when he was out of the truck. TR 80; RX 7. Complainant called the police, and while they stood by, he retrieved his personal effects from the truck as directed and checked into a Super 8 motel. TR 30-31; CX 1. According to Mr. Montgomery, Complainant never called him back the night of June 18 or the early morning hours of June 19. TR 81-83. Mr. Montgomery's report reflects that Thomas Henley, the off-hours supervisor, advised him that Complainant would have to call for a truck assignment on the following Monday, but it was not clear if that information was told to Complainant. TR 98, 107; RX 7. Neither Mr. Montgomery nor Mr. Henley ever told Complainant to drive the truck without a Hazmat endorsement. TR 83, 100. Complainant agreed that no one from Respondent ever told him to drive the Hazmat load other than Mr. Menchaca, but he questioned why he was put on a Hazmat load in the first place. TR 68. Mr. Montgomery established that it was not uncommon to have non-Hazmat drivers on a Hazmat load, but that the non-Hazmat driver cannot touch the load. TR at 83-84. According to Mr. Montgomery, there were no issues at all with the truck stopping while the Hazmat driver got his hours back. TR at 84-85.

5. Complainant checked into a Super 8 motel on June 18, and paid $69.05 cash for the room. CX 1. Complainant stated that he was forced to use an EFS check to pay for the motel because Respondent refused to pay. TR 31; RX 15 at 9. While on the road, a driver can receive an advance on his paycheck by filling out a blank EFS check and asking a dispatcher to authorize payment. TR 91. Mr. Montgomery said that it is typical to pay for motels over the phone with a credit card in these situations, and said he never refused to pay for the motel. TR 82, 87. Mr. Montgomery was not aware of who approved the EFS check, but it was usually dispatch. TR at 89, 94-95. Yet, he was never given the opportunity to do so because Complainant never called back. TR 82. Complainant claimed that his request for reimbursement was denied verbally over the phone, but Respondent countered that at no time did Complainant submit the motel receipt for reimbursement. TR 66. Here, there is no evidence that Complainant attempted to reach Mr. Montgomery after he went to the Super 8 motel as directed. Complainant acknowledged at hearing that he never submitted a receipt to Respondent for payment of the motel charge in Missouri or the receipt for the bus trip. TR at 66-67. While Complainant states

that he was denied reimbursement, I find that he never contacted Respondent as directed and never gave them an opportunity to pay for the hotel that night. I am more persuaded by the testimony from Mr. Montgomery than that of Complainant. The record is not clear under what circumstances the EFS check was authorized, but Mr. Montgomery's credible testimony about what occurred during the phone call with Complainant is more believable and consistent with the reports and records in the case. I am not persuaded by Complainant's recitation of the events.

6. The next morning on June 19, 2011, Complainant checked out of the motel at checkout time; he was not asked to leave by the motel. TR at 63-64. After he checked out, Complainant attempted to contact Respondent multiple times using his cell phone in the motel lobby. CX 1, 11; RX 26. Complainant filmed three phone calls of himself attempting to reach Respondent by phone using the camera on his laptop computer. CX 11, 11a. He made the first call at 12:42pm CST and, after navigating the phone tree, Complainant spoke with a safety hotline dispatcher named Linda who unsuccessfully attempted to connect him to the safety department. *Id.* He then called Respondent's team development manager, J.D., and left a message that he was stranded and had "no choice but to contact OSHA." *Id.* In the third call, Complainant spoke again with Linda who apologized for her inability to reach anyone from Respondent's company on the phone. *Id.* Complainant informed her that he was headed to the bus station because felt he must return home since he had no money for food and shelter. *Id.*; TR 33. Complainant took a cab to the bus station in Colombia, Missouri, where he used a Visa card to buy a bus ticket to Las Vegas that cost $214. *Id.*; CX 2. At 9:05pm on June 19, Complainant boarded a Greyhound bus bound for his home in Las Vegas, Nevada, where he was due to arrive on June 21, 2011, at 2:30am. *Id.* Complainant did not attempt to contact Respondent again that day, nor is there any evidence that Respondent attempted to contact Complainant.

7. On Monday June 20, 2011, while Complainant was on the bus in the Colorado mountains, J.D., who is Respondent's team development manager, called Complainant and told him that he had been assigned another trucking job and asked him to return to Missouri to meet the new truck. TR 33. Complainant acknowledged that he at all times knew the company wanted him to wait for another truck, but believed because he had no money and the company had not paid, he was forced to return home. TR at 34, 65. According to Complainant, since J.D. was not willing to pay for the return to Missouri, Complainant felt he was forced to continue home. TR 34. The phone call was inexplicably disconnected, and Complainant did not attempt to contact Respondent after the dropped call and there is no evidence that Respondent attempted to reach Complainant again that day. TR 33-34. Complainant arrived in Las Vegas, Nevada, on June 21, 2011. TR 38. Complainant said he spoke to J.D. a few days later, and thought it was more likely that he called J.D., though he could not recall, and was told that Respondent believed he had "voluntarily quit." TR 34, 38.

8. Complainant contends that in addition to being discharged for refusing to violate the law, Respondent also charged him with fees for tractor cleaning, truck hauling, and airfare. TR 48-50; CX 3-5. Complainant testified that when he spoke with J.D. soon after the Kingdom City incident he asked for reimbursement of these fees, but J.D. refused. TR 66. At the hearing, Mr. Henley explained that the three charges in question were related to Complainant's previous incidents, not the incident in Kingdom City, MO. TR 98-100. He also clarified that the airfare charge was a mistake and should have been labeled bus fare, but again it was not related to the

Missouri incident. TR 98-99, 104. Mr. Henley did not advise Complainant to drive without a HAZMAT license. TR 100.

9. Complainant alleges that he would have made $61,560 per year if he continued to work for Respondent. CX 7. About a month and a half after the incident in Kingdom City, Missouri, Complainant found work with One Star Trucking, but voluntarily quit after five weeks of work because he was unable to find suitable housing in the company's location at Kermit, Texas. TR 51, 70; CX 7. In March 2012, Complainant found a job working at the Golden Gate Casino, where he is currently working as a dealer. CX 8, 9. Complainant earned $11,582.42 in 2012 while working at the casino. CX 8. Complainant seeks a total in lost wages of $49,708, which is the amount he would have earned at Respondent, less the amount he earned at the casino. CX 7. In addition, Complainant contends that being forced to work in a casino, which is a smoke-filled environment, has taken a toll on his respiratory health which entitles him to an additional $15,000 in compensatory damages. TR 56; CX 7. He also states that his period of unemployment and dismal income following the Kingdom City incident has damaged his credit and he should recover money he borrowed from friends, plus interest. *Id*. The total amount he seeks in damages is $64,708. CX 7.

IV. Analysis and Conclusions

As set forth below, the following conclusions of law are based on analysis of the entire record; arguments of the parties; and applicable regulations, statutes, and case law. 29 C.F.R. §§ 18.57, 1978.107. In deciding this matter, the administrative law judge is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. *See Germann v. Calmat Co.*, No. 99-114, slip op. at 8 (ARB Aug. 1, 2002); 29 C.F.R. § 18.29.

A. Credibility Determinations

1. *Complainant's Credibility*

Complainant has offered little evidence, beyond his own personal perceptions, that Respondent intended to induce Complainant to quit or act in violation of the law. While I believe that Complainant was truthful in his perceptions, I found his testimony colored by emotions, trucking driving inexperience, and past interactions with Respondent. *See* TR 33 ("knowing how Werner operates…I knew that I was homeless there"). For example, while leaving a message on Respondent's answering machine on Sunday morning, Complainant stated that, given Respondent's failure to answer the phone, he had "no choice but to call OSHA." CX 11. Complainant jumped to the conclusion that Respondent intentionally stranded him without money for his basic needs, even though Complainant had access to EFS checks, which Respondent had authorized for his use, and possession of a Visa charge card, which he used to purchase a bus ticket to Las Vegas. His exaggerated account of being stranded demonstrates the unreliable nature of his recollection and testimony. See *id.*

Further, Complainant's perceptions are not borne out by the other evidence in the record. Complainant stated that he knew he should go to the motel and wait for an assignment, but he then decided, without prompting from the motel or from Respondent, to leave the hotel and go home. In fact, Complainant should have been aware that waiting in motels was standard

procedure because he had waited at a motel when he was assigned to the truck that is the subject of his claim. Complainant acknowledged that Respondent wanted him to wait for a truck, which is what had occurred before. Complainant's credibility is colored by his brashness, his overwhelming sense of rightness, his lack of listening skills, and his demanding demeanor. I give his testimony and recollection less weight than I do to Mr. Montgomery and Mr. Henley, who both testified credibly, in a forth right, believable manner, and did not appear to embellish their testimony.

B. Complainant's Prima Facie Case

To prevail under the STAA, a complainant must prove by a preponderance of the evidence that he (1) engaged in protected activity, (2) that the employer was aware of the activity, (3) that there was an adverse employment action taken against the complainant, and (4) that there was a causal connection between the protected activity and the adverse employment action. 29 C.F.R. § 1978.109(a); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-18, slip op. at 4 (ARB June 29, 2011); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sec'y v. Minn. Corn Processors, Inc.,* ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003); *see Allen v. ARB*, 514 F.3d 468, 475 n.1 (5th Cir. 2008). If the complainant meets his prima facie burden, the respondent may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Williams*, ARB 09-092, slip op. at 5 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).

Complainant contends that he was constructively discharged for refusing to violate the law and drive without a proper Hazmat certification. TR 125. Respondent alleges that Complainant did not prove his prima facie because there is no evidence that Complainant engaged in protected activity or that Respondent took any adverse action against him. TR 121-122. Since the parties have not stipulated to any facts, all the elements of the *prima facie* case are at issue.

1. *Complainant Engaged in Protected Activity and*
2. *Employer was aware of the Activity*

The STAA proscribes two situations in which a refusal to drive establish protected activity. 29 C.F.R. § 1978.102(c)(1). First, refusing to drive when the operation of a vehicle would constitute an actual violation of "a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security" is considered protected activity. 49 U.S.C. § 31105(a)(1)(B)(i); *Koch Foods vs. Dep't of Labor*, __ F.3d __, No. 11-14850, slip op. at 3 (11th Cir. 2013). Second, refusing to drive when the employee has a reasonable apprehension of serious injury to himself or the public because of the vehicle's condition could be considered protected activity. 49 U.S.C. § 31105(a)(1)(B)(ii). In order to prove a reasonable apprehension based upon vehicle's condition, "the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition."

49 U.S.C. § 31105(a)(2). Internal complaints to management constitute protected activity under the STAA. *Williams*, ARB No. 09-092, slip op. at 7.

The Hazardous Materials Transportation Act dictates that the Secretary of Transportation shall prescribe regulations for the safe transportation of hazardous materials. 49 U.S.C. § 5103(b)(1). No carrier may transport hazardous material unless each employee who will operate a motor vehicle is trained for the safe operation of that motor vehicle. 49 C.F.R. § 177.816. Every motor vehicle containing hazardous materials must be driven in compliance with the laws, ordinances, and regulations of the jurisdiction in which it is operated. 49 C.F.R. § 397.3.

In the instant case, Complainant contends that Respondent was aware he lacked a Hazmat certification but still purposefully assigned him to Mr. Menchaca's truck. F.F. ¶¶ 1, 4. Respondent counters, however, that Complainant's actions are not protected activity because immediately after learning of Complainant's altercation with Mr. Menchaca, Mr. Montgomery advised Complainant to leave the truck and call the police. F.F. ¶¶ 4-5. Further, there was no evidence that any management level employee attempted to force Complainant to drive without the proper certification. *Id.*

Complainant's actions here fall within an "actual violation" of the law. Complainant testified that he was not qualified to operate a Hazmat vehicle, and wrote on his job application to Respondent that he did not have a Hazmat certification. F.F. ¶¶ 1, 4. At the time of the incident with Mr. Menchaca, Complainant's vehicle was located in Missouri. F.F. ¶ 3. In Missouri, to operate a vehicle carrying hazardous materials, a driver must have a Hazmat endorsement, or a CDL with an "H" endorsement. Mo. Ann. Stat. § 302.720.2(4) (West 2012). Respondent knew that Complainant did not have the proper Hazmat certification, but still placed him on a truck with a Hazmat load. F.F. ¶ 1. Mr. Montgomery discussed with Complainant the night of the incident that he did not have a Hazmat certification, and Mr. Menchaca sent a Qualcomm message to Respondent asking for direction since Complainant was not certified for Hazmat driving. F.F. ¶¶ 3-4. If Complainant were to drive the truck, he would be violating an actual standard of the United States related to commercial motor vehicle safety. 49 U.S.C. § 31105(a)(1)(B)(i); 49 C.F.R. §§ 177.816, 397.3 (Hazmat vehicles must be driven in compliance with the laws of the jurisdiction in which it is operated). By refusing to operate Respondent's vehicle out of fear the operation would violate a United States standard related to commercial motor vehicle safety, and expressing this concern to Respondent, Complainant has presented sufficient evidence to establish that he engaged in protected activity under STAA and Respondent was aware of his concerns. 49 U.S.C. § 31105(a)(1)(B)(i); *Koch Foods*, __ F.3d __, No. 11-14850, slip op. at 3; 49 C.F.R. § 397.3.

3. *Complainant Was Not Subject to an Adverse Action*

The STAA prohibits "discharge . . . discipline or discriminat[ion] . . . regarding pay, terms, or privileges of employment" because of protected activity. 49 U.S.C. § 31105(a)(1). In order to establish a claim for retaliation under STAA, Complainant must show that he suffered an adverse action because of the protected activity. Here, there was no evidence that Complainant suffered an adverse action.

Complainant alleges that when he refused to drive the Hazmat vehicle, Respondent retaliated against him by refusing to pay for his lodging and stranding him in Missouri without money, food, or shelter. Respondent counters that Complainant voluntarily quit because he took a bus home instead of waiting in Missouri for a new assignment, and continued to travel home rather than returning to Missouri, even when Respondent attempted to reassign him. Respondent also contends that if Complainant had submitted his receipt for the hotel or called Mr. Montgomery back, they would have paid for his hotel. Based on the record, I find that Complainant has failed to demonstrate by a preponderance of the evidence that he experienced any adverse employment actions within the meaning of 49 U.S.C. § 31105(a)(1).

i. Failure to Pay Lodging. When an employer has a policy of reimbursing drivers for certain expenses, a refusal to reimburse a complainant constitutes an adverse action. *Spearman v. Roadway Express, Inc.*, ALJ No. 92-STA-1, slip op. at 7 (Sec'y June 30, 1993). Complainant claims that Respondent refused to pay for his hotel room. I find, however, that Complainant never submitted his hotel receipt to Respondent for reimbursement, and did not call Mr. Montgomery back so that he could pay for the room with a credit card the night of the Menchaca incident. F.F. ¶¶ 3-5. Rather than wait to be contacted by Employer the next day, Complainant decided that he did not have any money to pay for another $69-night in the motel, even though Respondent had authorized an EFS check and he had a Visa charge card, which he used to pay for a $214 bus ticket to Las Vegas. F.F. ¶¶ 5-6. He was not evicted from the motel and left on his own volition. F.F. ¶ 6. Complainant has attempted to exaggerate the conditions in Missouri the day he decided to return home. The next day, a Sunday, Complainant unsuccessfully attempted to reach Respondent by phone, and, frustrated with the situation, he hastily boarded a greyhound bus less than 24 hours after the incident with Mr. Menchaca. F.F. ¶¶ 3-4, 6. He left even though he acknowledged that Respondent expected him to wait at the motel for another trucking assignment. F.F. ¶ 7. There is nothing in the record to indicate anyone from Respondent's company actually refused to reimburse Complainant, merely that no one answered the phone quickly enough to satisfy Complainant. F.F. ¶¶ 5-7. Since Complainant left Missouri so quickly, Respondent was never given the chance to pay for the motel then and, because Complainant never submitted his receipt later, Respondent could not reimburse him after the fact. I find no evidence in the record to support a finding that Respondent departed from company policy and refused to reimburse Complainant for his hotel room. Complainant did not suffer an adverse action related to lodging.

ii. Constructive Discharge. A constructive discharge occurs when "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign . . . Furthermore, it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions." *Shoup v. Kloeppfer Concrete*, ALJ No. 95-STA-33, slip op. at 3 (Sec'y Jan. 11, 1996) (quoting *Hollis v. Double DD Truck Lines, Inc.*, ALJ No. 84-STA-13, slip op. at 8-9 (Sec'y Mar. 18, 1985)).

Here, the record does not support that Respondent intended to force Complainant to work in intolerable conditions. After reporting his safety concern late Saturday night, Complainant was instructed to wait at a nearby motel for a new truck assignment, and he acknowledged that Respondent wanted him to wait for an assignment. F.F. ¶ 5-7. On Monday, Respondent called

with the new assignment, but by then Complainant had already boarded a greyhound bus and refused to turn back. F.F. ¶ 7. I find that the new assignment offered to Complainant in this case was a reasonable solution to the problem and not a constructive discharge. *Shoup*, ALJ No. 95-STA-33, slip op. at 3. Given the remote location and late hour of the incident at issue here, that it occurred late on a Saturday and early Sunday, and that Complainant told Respondent that he was taking the bus home, it is not unreasonable for Respondent to wait one day to contact Complainant with the offer of a new assignment, nor was it unacceptable for Respondent to have expected Complainant to remain in Missouri in the interim. The evidence simply does not establish any animus on the part of Respondent such that it constructively discharged Complainant. There was no evidence of intolerable working conditions forced on Complainant. On the contrary, the evidence supports a finding that Respondent acted appropriately when it instructed Complainant to leave his work truck and the difficult environment with Mr. Menchaca, go to a motel, and await further instructions.

The overwhelming evidence established that Complainant became frustrated and decided to take matters into his own hands and leave under his own volition. He was not evicted from the motel, he had a Visa charge card available to use and was not stranded, and it was his conduct, not any action by Respondent that worsened the situation. His conduct was consistent with the prior incidents when Complainant abandoned a truck and refused to drive with a co-driver. F.F. ¶ 2. Furthermore, there was no evidence that Respondent ordered or otherwise expected Complainant to drive the truck without a proper Hazmat endorsement, other than Complainant's self-serving testimony that Mr. Menchaca was attempting to force him to drive. F.F. ¶¶ 3-4. The records from Respondent reflect that Mr. Menchaca reported continual disagreements with Complainant, but do not state that he was forcing him to drive without the Hazmat endorsement. F.F. ¶ 3. In fact, Mr. Menchaca notified dispatch that he was shutting down until his hours were restored because Complainant did not have a Hazmat endorsement. F.F. ¶¶ 3-4. Further, Mr. Montgomery established that it was standard practice for a truck with two drivers to stop until one of the drivers got the hours back to drive, and that was perfectly acceptable to the company. F.F. ¶ 4. Thus, I find that the overwhelming evidence established that Complainant voluntarily quit his employment and was not constructively discharged by Respondent.

Because Complainant has not shown any adverse action, the inquiry goes no further. The evidence established that Complainant voluntarily quit his job and that leaving his job had nothing to do with any actions by Respondent. Complainant has not established any violation of the STAA. Accordingly, his request for relief is denied.

ORDER

For the reasons stated above, Complainant's claim under the STAA is DENIED. All requests for relief are denied.

Digitally signed by Richard M.Clark
DN: CN=Richard M.Clark, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

RICHARD M. CLARK
Administrative Law Judge

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).