



**In the Matter of:**

**THOMAS A. ULRICH, SR.,**

**ARB CASE NO. 11-016**

**COMPLAINANT,**

**ALJ CASE NO. 2010-STA-041**

**v.**

**DATE: March 27, 2012**

**SWIFT TRANSPORTATION CORP.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Paul O. Taylor, Esq.; *Truckers Justice Center*; Burnsville, Minnesota**

***For the Respondent:***

**Ellen M. Bronchetti, Esq.; *Sheppard, Mullin, Richter & Hampton, LLP*; San Francisco, California**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.**

**FINAL DECISION AND ORDER DISMISSING COMPLAINT**

On September 8, 2008, the Complainant, Thomas A. Ulrich, Sr., filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that Swift Transportation, Corp., violated the employee protection provisions of section 405 of the Surface

Transportation Assistance Act (STAA) and its implementing regulations.<sup>1</sup> Following an investigation, OSHA dismissed the complaint because it found that Swift did not violate the Act. Secretary's Findings at 3 (Dec. 17, 2009). Ulrich appealed the matter and it was assigned to an Administrative Law Judge (ALJ) who scheduled a hearing. The hearing took place on May 26-27, 2010. Following the hearing, the ALJ issued a Recommended Decision and Order (D. & O.) denying the Complainant's complaint on November 5, 2010.

## BACKGROUND

Ulrich began working for Swift as a truck driver in 1996. D. & O. at 2. On August 22, 2008, for his next truck driving load, Ulrich retrieved a trailer in Phoenix, Arizona and examined the Bill of Lading. D. & O. at 2. The load had originated in Nogales, Mexico, before it was dropped off in Phoenix, Arizona, for Ulrich's pick up. D. & O. at 2. Ulrich noticed that the weight listed on the Bill of Lading was 39,451.28 pounds, and the weight listed on the computer dispatch was 33,656 pounds. D. & O. at 3. Ulrich was not concerned with the weight discrepancy at this time because it was common for local drivers to under-represent the weight to avoid compliance with a Swift policy concerning loads over 35,000 pounds.<sup>2</sup> D. & O. at 3. Ulrich concluded that the local driver had intentionally avoided the policy by entering the 33,656 pounds figure. D. & O. at 3.

Before he went to sleep that night, Ulrich had a conversation with his wife about illegal drugs and alien traffic coming out of Mexico. D. & O. at 3. He became concerned because the load he was to take the next day came out of Nogales, Mexico, and because he had previously learned about "coyotes" who "load people into the back of . . . sealed trailer[s] coming across a border." D. & O. at 3.

The next day, August 23, 2008, Ulrich returned to the yard and proceeded to get his trailer hooked and weighed. D. & O. at 3. The truck complied with the gross weight requirement. D. & O. at 3. After adjustments to his vehicle's axle weights, Ulrich began thinking about the gross weight of the freight. D. & O. at 4. Based on calculations he performed, he estimated that the total freight weight was 5,349.72 pounds more than the weight indicated on the Bill of Lading. D. & O. at 4. Ulrich began to feel suspicious about the load when he also noticed that the trailer had a tin seal and not a high security seal. D. & O. at 4. Before leaving the yard with the load, Ulrich called his planner, Chad DeGiorgio, but DiGiorgio did not pick up the phone. D. & O. at 4. Ulrich departed the Swift yard. D. & O. at 4. Approximately ten minutes later, Ulrich stopped at a gas station about four miles from the Swift terminal. D. & O. at 4. While Ulrich was at the gas station waiting in line, he overheard two

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<sup>1</sup> 49 U.S.C.A. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); 29 C.F.R. Part 1978 (2011).

<sup>2</sup> The company policy required trailers weighing over 35,000 pounds to be accompanied by a certified scale ticket, which was not always convenient to obtain. D. & O. at 3.

truckers discussing a drug bust that had occurred involving Swift equipment. D. & O. at 4. After overhearing this conversation, Ulrich became more bothered about the weight discrepancy and the tin seal. D. & O. at 4. He had not been able to get help from the dispatcher at Swift and it was too early in the morning for “extended team coverage.” D. & O. at 4.<sup>3</sup> At this point, Ulrich decided to call 911. D. & O. at 4. Ulrich explained to the 911 dispatcher that he noticed a weight discrepancy on his truck that he could not explain and that “[i]t could be drugs. It could be people. It could be explosives.” D. & O. at 4.

Later that morning, while Ulrich was waiting for the police to arrive, Ulrich again called DeGiorgio and left a message for him stating that he had a 5,000 pound discrepancy in load weight. D. & O. at 5. The police arrived. D. & O. at 5. The police contacted Swift and Swift’s Extended Coverage Team Manager, Christopher Drowne, went to the scene. D. & O. at 5. Soon after, a drug detection canine unit arrived and conducted a search. D. & O. at 5. The authorities inspected the trailer and no drugs, explosives, or other illegal contraband was found in the vehicle. D. & O. at 5. The authorities moved the truck back to the Swift yard and weighed it. D. & O. at 5. After an interview with Sean Driscoll in Swift’s Security Department, Ulrich asked to have the same load back to transport. D. & O. at 6. Driscoll told Ulrich that he could not have the load because it was still under investigation, and Ulrich became angry and walked out. D. & O. at 6. Driscoll assigned Ulrich a different load to get him back to work. D. & O. at 6. Two days later, on August 25, 2008, Swift terminated Ulrich’s employment. D. & O. at 7.

Based on these findings, the ALJ dismissed Ulrich’s whistleblower complaint for two reasons. First, the ALJ found that Ulrich did not establish that his complaint related to a violation of a safety or security regulation, standard, or order within the meaning of the STAA. D. & O. at 8. Second, the ALJ also found that Ulrich did not refuse to drive the load. D. & O. at 9-13. Ulrich does not dispute that he never refused to drive.<sup>4</sup> Therefore, the sole issue before us is whether Ulrich engaged in protected activity by filing a complaint related to a violation of a regulation, standard, or order under § 31105(a)(1)(A) (the complaint clause).

## DISCUSSION

As explained above, the issue before us is whether Ulrich engaged in protected activity under the STAA’s complaint clause. The ALJ found that Ulrich failed to establish that his complaints about the weight discrepancy he believed his truck had with the Bill of Lading “related to a violation of a commercial motor vehicle safety regulation, standard, or order” within the meaning of the STAA. We agree.

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<sup>3</sup> That there was no extended team coverage apparently means that there was no one for Ulrich to call for help at Swift that early in the morning.

<sup>4</sup> Ulrich did not object in his brief to the ALJ’s findings under the STAA’s refusal to drive section, therefore those findings are not at issue on appeal.

Under the complaint clause of the STAA's employee protections provisions, "[a] person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because (i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order." 49 U.S.C.A. § 31105(a)(1)(A). Although it is not necessary that a complaint expressly cite the specific motor vehicle standard, which it is alleged has been violated, the complaint must "relate" to a violation of a commercial motor vehicle safety standard.<sup>5</sup> While internal complaints about violations of commercial motor vehicle regulations may be oral, informal, or unofficial, they must be communicated to management.<sup>6</sup> For a finding of protected activity under the complaint clause of the STAA, a complainant must show that he reasonably believed he was complaining about the existence of a safety violation.<sup>7</sup>

Viewing all of the evidence of record, we affirm the ALJ's conclusion that Ulrich failed to prove that he engaged in protected activity under the complaint clause. First, the record supports the ALJ's finding that Ulrich was not objectively reasonable in believing that Ulrich's trailer contained explosives, drugs, or people. D. & O. at 11. It is undisputed that Ulrich had no direct evidence whatsoever that there were explosives, drugs, or people in his trailer. He made giant leaps of logic from facts that indicated very little. For example, Ulrich discovered a weight discrepancy, but the ALJ found and the record supports that weight discrepancies are a common occurrence in the trucking industry. See D. & O. at 8. In fact, even Ulrich admitted that he was not concerned when he first noticed the weight discrepancy "because it was a common occurrence for local drivers to under-represent the weight in order to avoid compliance" with a Swift policy requiring trailers that weighed over 35,000 pounds to have a certified scale ticket. D. & O. at 3. Many drivers simply underrepresented their truck's weight when they entered data into the Swift system so that they would not have to go through the process of finding a certified scale and obtaining a ticket. *Id.* It is undisputed that Ulrich's truck complied with all federal and state standards at the time he departed the Swift yard on August 23, 2008. D. & O. at 8. Another fact cited by Ulrich to support his concern about the presence of explosives, people, or drugs was the tin seal on his trailer rather than a high security seal. While there was some evidence that the trailer should have had a high security seal, there was no evidence that the tin seal had been

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<sup>5</sup> *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 9 (ARB Dec. 31, 2007); *Nix v. Nehi-RC Bottling Co., Inc.*, 1984-STA-001 (Sec'y July 13, 1984).

<sup>6</sup> *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037, slip op. at 6 (ARB Dec. 31, 2002).

<sup>7</sup> *Bethea*, ARB No. 07-057, slip op. at 8 (footnote omitted); *Calhoun v. United Parcel Serv.*, ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 11 (ARB Sept. 14, 2007).

tampered with or manipulated. D. & O. at 4, 5.<sup>8</sup> There is simply insufficient evidence in the record to overturn the ALJ's finding that Ulrich unreasonably believed that there were explosives, people, or drugs in the truck cab. Finally, neither that the load originated in Mexico nor that Ulrich allegedly heard a conversation between two drivers about a drug bust with Swift trucks serve to make Ulrich's belief about drugs, explosives, or people in his truck reasonable.

### **ORDER**

The ALJ's Decision and Order is **AFFIRMED**, and Ulrich's complaint is **DISMISSED**.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**

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<sup>8</sup> While Ulrich admits that he never mentioned the tin seal, he believes that he engaged in protected activity by making a complaint related to the tin seal and the weight discrepancy. See Complainant's Brief at 23. But Ulrich's claim of retaliation is based on reporting his security and safety concern related to the presence of explosives, drugs, or people in his trailer. See Complainant's Brief at 16-20 (focusing on explosives, people, and drugs). The tin seal and the weight discrepancy can be considered to determine whether his safety complaint was objectively reasonable. But, as we stated, these facts provide very little help in this case because weight discrepancies were common, and there was no evidence that the seal was tampered with or manipulated.