

U.S. Department of Labor

Occupational Safety and Health Administration
Two Pershing Square
2300 Main Street, Suite 1010
Kansas City, Missouri 64108
Phone: 816.283.8745
Fax: 816.283.0547



Reply to the Attention of EP/WPP

April 22, 2010

Vance Miller
Attorney at Law
Armstrong Teasdale, LLP
One Metropolitan Square, Suite 2600
St. Louis, MO 63102

CERTIFIED MAIL # 7008 1830 0004 2110 8461

Re: UPS/Youngermann/7-7080-09-009

Dear Mr. Miller:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by John Youngermann (Complainant) against UPS (Respondent) under the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law No. 110-53. In brief, Complainant alleges that Respondent discriminated against him by disciplining him in retaliation for refusing to pull a trailer that did not have working tail lights or side marker lights.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region VII, finds that there is reasonable cause to believe that Respondent violated 49 U.S.C. §31105(a)(1)(B)(i) and 49 U.S.C. §31105(a)(1)(B)(ii), and issues the following findings:

Secretary's Findings

Respondent is a person within the meaning of 1 U.S.C. §1 and 49 U.S.C. §31105. It is also a commercial motor carrier within the meaning of 49 U.S.C. §31101. Respondent is engaged in transporting products on the highways via commercial motor vehicle, that is, a vehicle with a gross vehicle weight rating of 10,001 pounds or more. Respondent maintains a place of business in Earth City, Missouri.

Complainant, who is a truck driver for Respondent, is an employee within the meaning of 49 U.S.C. §31101.

Complainant's employment was terminated on April 15, 2009. On June 1, 2009, Complainant filed a complaint with the Secretary of Labor alleging that Respondent discriminated against him in violation of the STAA. As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

Respondent hired Complainant as a truck driver on or about August 25, 1977. Complainant drives Respondent's vehicles over highways in commerce to transport cargo. In the course of employment, Complainant directly affected commercial motor vehicle safety.

49 U.S.C. §31105(a)(1)(B) prohibits discharging or otherwise discriminating against an employee if the employee refuses to operate a vehicle because (i) "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security," or because (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."

There is evidence that Complainant engaged in protected activity under STAA. On April 15, 2009, Complainant informed Respondent that he refused to pull a trailer that had no working tail lights or side marker lights in addition to the fact that a headlight was burned out on the tractor.

Complainant's refusal constituted protected activity under 49 U.S.C. §31105(a)(1)(B)(i), since a driver cannot be terminated for refusing to operate a vehicle because the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety, health, or security. 49 CFR Section 393.9(a) states "All lamps required by this subpart shall be capable of being operated at all times. This paragraph shall not be construed to require that any auxiliary or additional lamp be capable of operating at all times." 49 CFR Section 393 also prohibits operation of a vehicle when lights are not working.

Complainant's refusal constituted protected activity under 49 U.S.C. §31105(a)(1)(B)(ii), because Complainant had a reasonable apprehension of serious injury to himself and the public if he continued to drive the vehicle in the unsafe condition the truck and trailer were in which violated DOT Regulations, as discussed above. Complainant gave Respondent an opportunity to fix the problem by notifying Respondent of the unsafe conditions, but Respondent continued to order the unsafe operation of a vehicle.

Respondent had knowledge of Complainant's protected activities. Respondent was aware that Complainant refused to drive. Furthermore, Complainant notified Respondent regarding the reasons for his refusal. Respondent acknowledges that Complainant told Respondent that it was unsafe to drive because the tractor headlight, trailer tail lights, and side marker lights were out.

Complainant was subjected to an adverse action when Respondent terminated his employment. Respondent terminated Complainant's employment because he refused to operate a commercial motor vehicle, as discussed above. Thus, Respondent violated 49 U.S.C. §31105(a)(1)(B)(i) and 49 U.S.C. §31105(a)(1)(B)(ii).

Complainant is required to complete a Pre-Trip inspection of the trailer prior to leaving the customer's location. During this inspection, Complainant noted defects in the equipment lights and notified Respondent by phone. The defects were a tractor headlight, trailer tail lights, and trailer side marker lights were out. Respondent instructed Complainant to turn his high beams on and turn on his flashers and return to Respondent's facility. Complainant refused stating it was not legal and unsafe to both the general public and the complainant as a driver. Respondent instructed Complainant that it was legal under Federal Motor Carrier Safety Administration (FMCSA) Regulations, Appendix G, specifically the Out-of-Service Criteria and to pull the trailer back to Respondent's facility. Complainant again refused.

Upon Complainant's return back to Respondent's facility, Complainant's employment was terminated under Article 17(i) (other serious offenses) of Respondent's agreement with the International Brotherhood of Teamsters. Complainant was disciplined for his refusal to return to the Respondent's facility with the trailer.

After Complainant was terminated for refusal to drive, Complainant's time card and the on board recording device (TACH Card) were pulled to compare them and it was discovered they did not agree. Complainant was then terminated for Article 17(a) (Dishonesty) of the Union Agreement as well. Respondent stated that the reason two termination letters dated the same date (sent by Certified Mail, at different times) were sent to Complainant was because the violation of Article 17(a) was discovered after Complainant was terminated for refusing to drive Respondent's vehicle.

In the first of two separate letters from Respondent both having the date of April 16, 2009, Complainant was notified that he was fired for violating 17(i) (other serious offenses). In the second letter from Respondent, Complainant was notified that he was fired for violating Article 17(a) (Dishonesty) and 17(i) (other serious offenses). Despite the termination letters both having the date of April 16, 2009, the records from the United States Postal Service (USPS) certified mail revealed the following:

- 1st letter certified mail receipt number 7008 1830 0001 4186 9208, received by post office on April 17, 2009, returned unclaimed May 5, 2009. USPS web site shows this letter delivered on May 07, 2009 at 12:41 p.m.
- 2nd letter (marked as Corrected copy) certified mail receipt number 7008 1830 0001 4186 9550 (with the additional charge of dishonesty), received by post office on April 21, 2009, returned unclaimed May 8, 2009. USPS web site shows this letter delivered on May 11, 2009 at 2:26 p.m.
- The date received by USPS on the 2nd certified letter revealed that the letter would have been sent to Complainant by Respondent after the April 20, 2009 grievance hearing.

Respondent stated that Federal Motor Carrier Safety Administration (FMCSA) Regulations, Appendix G, specifically the Out-of-Service Criteria, gives Respondent the flexibility in determining when a vehicle is placed out-of-service. Respondent stated that the trailer did not have functioning tail lights and side marker lights and the tractor had one headlight burnt out, but Complainant did have high beam headlights, 4 way emergency flashers and brake lights (turn signals would operate once the 4 way emergency flashers were deactivated if necessary). Respondent stated that based on this information, Respondent understood the trailer to not be out-of-service and could be driven back to the facility and repaired after being processed. Federal Motor Carrier Safety Administration (FMCSA) confirmed that if Respondent's trailer did not have at least one tail light working that was visible from at least 500 feet, then Respondent's trailer should have been placed out of service and Complainant had a right to refuse to drive the vehicle. FMCSA Regulations, Appendix G does not give Respondent the flexibility in determining out-of-service criteria. FMCSA Regulations do give Complainant the right to refuse to drive an unsafe vehicle.

Complainant refused to drive an unsafe vehicle on April 15, 2009, the length of time between the engagement in the protected activity and the adverse employment action on April 15, 2009, does lend itself well to support temporal proximity. Respondent did not show by clear and convincing evidence that Complainant was not terminated for refusing to drive an unsafe vehicle. Once Respondent had terminated Complainant for his protected activity, Respondent later alleged that Complainant's time card and GPS Card did not agree.

Animus was first displayed in Respondent's contention that Complainant was terminated for dishonesty to justify its termination of Complainant for exercising his rights under STAA. Differences in time card and GPS card were fully supported by Complainant's explanation. Animus is clear in filing the dishonesty charges after the termination and at the first level hearing on the grievance.

Animus was also shown when Respondent repeatedly instructed Complainant to drive the unsafe vehicle back but provided him no backup or assistance. Respondent's supervisors had notice of the legitimate nature of Complainant's allegation. When another employee was brought to drive the truck back, he also made the supervisor aware of his safety concerns. The supervisor agreed to follow the second driver to provide visibility. In addition, Respondent's supervisor later observed a problem caused by the trailer's defective lights on the trip back to Respondent's facility when a big truck was riding along side of the second driver who was operating only with flashers and was unable to communicate his need to move to the exit. Respondent's supervisor was required to move over and clear the lane to allow the defective truck to exit.

Despite this, Complainant was still terminated for the very act of engaging in protected activity; legitimately refusing to drive that night. Moreover, there is evidence of animus toward the protected activity. Mr. Worthy terminated Complainant because Complainant simply refused Mr. Worthy's direction. Respondent had not offered to provide an escort vehicle to Complainant.

Respondent's non-discriminatory reason for the adverse employment action was a pretext; Complainant's refusal to drive an unsafe truck was a contributing factor in Complainant's termination, but for Complainant's protected activity, Complainant would not have been disciplined. Respondent claims that Complainant simply did not want to do his job. Respondent states that after Complainant was fired for refusing to drive; Complainant was also fired for dishonesty. Respondent contends that Complainant was given two opportunities to save his job by finishing his route, but Complainant refused and was fired. As stated above, Complainant was terminated for engaging in protected activity. Respondent's position is further undercut by the fact that Respondent neither argued nor produced any evidence of past disciplinary actions taken against Complainant, a 33 year employee, for dishonesty. None of the witnesses were able to articulate or prove by any evidence that there were no problems with the wiring on the Respondent's truck and trailer; in fact all witnesses stated that the truck had wiring problems and problems with the lights.

As a result of the adverse action, Complainant reported prolonged lack of sleep and anxiety over his future due to the stress caused by Respondent's decision to discipline him.

Complainant engaged in protected activity when he refused to drive an unsafe vehicle.

Respondent does not dispute that they had direct knowledge that Complainant reported the unsafe vehicle. Moreover, Complainant complied with Respondent's policy on reporting an unsafe vehicle. In fact, Respondent does not dispute that Complainant followed its policy.

Complainant suffered an adverse action when Respondent terminated his employment on April 15, 2009.

A preponderance of the evidence indicates that Complainant's protected activity was a contributing factor in the adverse action. Moreover, the evidence indicates that Respondent's 2nd reason for discharging Complainant is a pretext, given that it was discovered after Complainant was fired.

At a Deadlock Committee hearing on December 3, 2009, Complainant's discipline was reduced to a one day suspension without pay. But Complainant has not been made whole through arbitration.

Order

1. Respondent shall remove all disciplinary action from Complainant's personnel file pertaining to the April 15, 2009 incident.
2. Respondent shall pay Complainant back wages, in the amount of \$1,785.70, which represents back pay and overtime pay while Complainant was terminated/suspended. This is over and above what was restored by the Deadlock Committee.
3. Respondent shall pay Complainant interest on back wages in accordance with 26 U.S.C. §6621, which sets forth the interest rate for underpayment of federal taxes.
4. Respondent shall pay Complainant \$5,000.00 in compensatory damages for emotional distress and mental pain and \$483.04 for expenses incurred by Complainant for hotel and mileage to attend grievance hearing in Columbia, MO.
5. Respondent shall pay Complainant \$100,000 in punitive damages for its reckless disregard for the law and complete indifference to Complainant's rights.
6. Respondent shall pay Complainant's attorney's fees.

7. Respondent shall refrain from retaliating or discriminating against Complainant in any manner for instituting or causing to be instituted any proceedings under or related to STAA.
8. Respondent shall provide to all employees a copy of the STAA Fact Sheet and OSHA Form 3113 included with this Order.
9. Respondent shall permanently post the Notice to Employees included with this Order in all areas where employee notices are customarily posted, including all monthly periodicals Respondent distributes to employees.

Respondent and Complainant have thirty 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400 North
Washington, D.C. 20001-8002
PH: (202) 693-7300; Facsimile: (202) 693-7365

With copies to:

Paul O. Taylor
Attorney at Law
Truckers Justice Center
900 W. 128th Street, Suite 104
Burnsville, MN 55337

Charles E. Adkins, CIH
Regional Administrator
Two Pershing Square
2300 Main Street, Suite 1010
Kansas City, MO 64108

The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence *de novo* for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decision under the STAA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of the complaint. The rules and procedures for the handling of STAA cases can be found in Title 29, code of Federal Regulations Part 1978, and may be obtained at www.osha.gov.

Sincerely,



Charles E. Adkins, CIH
Regional Administrator

Enclosures: (3)

cc: Paul O. Taylor (Via Certified Mail)
USDOL/OALJ-Chief Administrative Law Judge
FMCSA - Federal Motor Carrier Safety Administration

NOTICE TO EMPLOYEES

PURSUANT TO A SETTLEMENT AGREEMENT
APPROVED BY U.S. DEPARTMENT OF LABOR,



OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

THE EMPLOYER AGREES THAT IT WILL NOT DISCHARGE OR IN ANY MANNER DISCRIMINATE AGAINST ANY EMPLOYEE (including applicants or qualified individuals referred to employer to perform services) BECAUSE SUCH EMPLOYEE HAS FILED ANY COMPLAINT OR INSTITUTED OR CAUSED TO BE INSTITUTED ANY PROCEEDING UNDER OR RELATED TO THE EMPLOYEE PROTECTION PROVISIONS OF THE "SURFACE TRANSPORTATION ASSISTANCE ACT" OR HAS TESTIFIED OR IS ABOUT TO TESTIFY IN ANY PROCEEDING OR BECAUSE OF THE EXERCISE BY SUCH EMPLOYEE ON BEHALF OF HIMSELF, HERSELF OR OTHERS OF ANY RIGHT AFFORDED BY THIS ACT.

THE EMPLOYER AGREES THAT IT WILL NOT ADVISE EMPLOYEES AGAINST EXERCISING RIGHTS GUARANTEED UNDER THE AFOREMENTIONED STATUTES, SUCH AS CONTACTING, SPEAKING WITH, OR COOPERATING WITH OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) OFFICIALS EITHER DURING THE CONDUCT OF A SAFETY AND HEALTH INSPECTION OF THE EMPLOYER'S FACILITIES OR IN THE COURSE OF AN INVESTIGATION.

THE EMPLOYER AGREES THAT IT WILL NOT DISCHARGE OR TERMINATE EMPLOYEES FOR THEIR REFUSAL TO DRIVE OR FOR VOICING SAFETY OR HEALTH CONCERNS.

THE EMPLOYER AGREES THAT IT WILL NOT INTIMIDATE EMPLOYEES BY SUGGESTING OR THREATENING THAT AN EMPLOYEE'S CONTACT, CONVERSATION, OR COOPERATION WITH OSHA OFFICIALS MIGHT RESULT IN CLOSURE OF THE EMPLOYER'S FACILITIES, IN LOSS OF EMPLOYMENT FOR THE EMPLOYEES, OR IN CIVIL LEGAL ACTION BEING TAKEN AGAINST THE EMPLOYEES.

UPS

Date

Attention



Drivers

Did you know that you can act to protect yourself and the public from unsafe working conditions? For example, you may do the following:

- Report violations of vehicle safety requirements to your employer, the Department of Transportation (DOT), and other agencies.
- Refuse to operate a commercial motor vehicle* that fails to meet federal safety requirements.
- Refuse to violate a DOT regulation.
- Refuse to drive under conditions that you reasonably believe might cause serious injury to yourself or the public.
- Refuse to operate your vehicle if you are a trucker or bus driver whose employer has denied your request to correct an unsafe condition.

Did you know that it is illegal for your employer to discriminate against you in any way solely because you take any of these actions? For example, your employer may not do the following:

- Fire or demote you.
- Assign you to an undesirable job or shift.
- Take away your seniority.
- Take away earned sick leave or vacation time.
- Blacklist or threaten you.

Did you know that if you believe your employer has discriminated against you, you should complain to any OSHA office as soon as possible, but not later than 180 days after the discrimination? OSHA will investigate and may be able to restore your job and status if your complaint is substantiated.

Did you know that you can get more information about these safety and health rights from the nearest OSHA Regional Office in the following locations?

Atlanta	(404) 562-2300
Boston	(617) 565-9860
Chicago	(312) 353-2220
Dallas	(214) 767-4731
Denver	(303) 844-1600
Kansas City	(816)
New York	(212) 337-2378
Philadelphia	(215) 861-4900
San Francisco	(415) 975-4310
Seattle	(206) 553-5930

283-874-5

* A commercial motor vehicle is a vehicle that has a gross vehicle weight rating of 10,001 or more pounds; or is designed to transport more than 10 passengers, including the driver; or is used to transport materials that require a placard.



OSHA FactSheet

Whistleblower Protection for Trucking Employees

Truck drivers and other employees working for commercial motor carriers are protected from retaliation for reporting or engaging in activities related to certain commercial motor vehicle safety, health or security conditions.

On August 3, 2007, the *Surface Transportation Assistance Act of 1982 (STAA)*, 49 U.S.C. Section 31105, was amended by *The Implementing Recommendations of the 9/11 Commission Act* (Public Law 110-53) to include new rights and remedies.

Covered Employees

STAA protects private sector drivers and other employees (including owner-operators, mechanics and freight handlers) of commercial motor carriers from retaliation for reporting certain commercial motor vehicle safety, health or security conditions and for engaging in certain other safety or security activities. To qualify for coverage, employees must be involved in activities directly affecting commercial motor vehicle safety or security.

A commercial motor vehicle covered by STAA is defined as any self-propelled or towed vehicle used on the highway in commerce principally to transport cargo or passengers. To qualify for coverage, such a vehicle must also:

- Have a vehicle rating or gross vehicle weight of at least 10,001 pounds; or,
- Be designed to transport more than 10 passengers, including the driver; or,
- Transport certain hazardous materials in a quantity requiring that the cargo be placarded.

Protected Activity

If you are covered under STAA, your employer may not discharge or in any other manner retaliate against you for filing a complaint or participating in a proceeding related to the violation of a commercial motor vehicle safety or security rule; cooperating with certain federal safety or security investigations; or providing information in an investigation by a federal, state or local regulatory or law enforcement agency relating to any accident or incident resulting in injury or death or property damage related to commercial motor vehicle transportation.

In addition, under STAA, your employer may not discharge or in any manner retaliate against you for

refusing to operate a vehicle because the operation would violate a federal commercial motor vehicle rule related to safety, health, or security because you had a reasonable apprehension of serious injury to yourself or to the public related to a vehicle's safety or security condition, or for reporting accurate hours of service (HOS). (For more detail about federal HOS requirements, please visit the Federal Motor Carrier Safety Administration's website, www.fmcsa.dot.gov).

Unfavorable Personnel Actions

Your employer may be found to have violated one of these statutes if your protected activity was a contributing factor in its decision to take unfavorable personnel action against you. Such actions may include:

- Firing or laying off
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Intimidation
- Reassignment affecting promotion prospects
- Reducing pay or hours

Deadline for Filing a Complaint

Complaints must be filed within 180 days after the alleged unfavorable personnel action occurs.

How to File a Complaint

An employee, or representative of an employee, who believes that he or she has been retaliated against in violation of this statute may file a complaint with OSHA.

The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. For more information, call your closest OSHA Regional Office:

- *Boston* (617) 565-9860
- *New York* (212) 337-2378
- *Philadelphia* (215) 861-4900
- *Atlanta* (404) 562-2300
- *Chicago* (312) 353-2220
- *Dallas* (972) 850-4145
- *Kansas City* (816) 283-8745
- *Denver* (720) 264-6550
- *San Francisco* (415) 625-2547
- *Seattle* (206) 553-5930

Addresses, fax numbers and other contact information for these offices can be found on OSHA's website, www.osha.gov, and in local directories.

Complaints may be filed orally or in writing, by mail (we recommend certified mail), fax, or hand-delivered during business hours. The date postmarked, faxed or hand-delivered is considered the date filed.

Results of the Investigation

If the evidence supports your claim of retaliation and a settlement cannot be reached, OSHA will issue an order requiring your employer to reinstate you, pay back wages, restore benefits, and other possible relief to make you whole, including:

- Reinstatement with the same seniority and benefits.
- Payment of back pay with interest.
- Compensatory damages, including compensation

for special damages, expert witness fees, and reasonable attorney's fees.

- Punitive damages not to exceed \$250,000, in certain cases.

OSHA's findings and order become the final order of the Secretary of Labor, unless they are objected to within 30 days.

Hearings and Review

After OSHA issues its findings and order, either party may request an evidentiary hearing before an administrative law judge of the Department of Labor. The administrative law judge's decision and order may be appealed to the Department's Administrative Review Board for review.

Under STAA, the National Transit Systems Security Act (NTSSA) and the Federal Rail Safety Act (FRSA), if a final agency order is not issued within 210 days from the date your complaint is filed, then you may file a civil action in the appropriate U.S. district court.

To Get Further Information

For a copy of the statutes, the regulations, and other whistleblower information, go to www.osha.gov and click on the link for "Whistleblower Protection."

For information on the Office of Administrative Law Judges procedures, decisions and research materials, go to www.oalj.dol.gov and click on the link for "Whistleblower."

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.

For more complete information:



U.S. Department of Labor
www.osha.gov
 (800) 321-OSHA

DEP 11/2007