

U.S. Department of Labor

Occupational Safety and Health Administration
230 South Dearborn Street, Room 3244
Chicago, Illinois 60604
(312) 353-2220



JAN 17 2017

Andy Mishler &
Coast to Coast Logistics, LLC
C/o Thomas P. Vincent
38505 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304

Re: Coast to Coast Logistics, LLC/Mishler/Frausto/5-2700-14-046

Dear Sir:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Rudy Frausto (Complainant) under the Surface Transportation Assistance Act, 49 U.S.C. §31105 (STAA) In brief, Complainant alleges Coast to Coast Logistics, LLC (Coast) and their employee Andy Mishler (Mishler) terminated his employment because he refused to operate a commercial motor vehicle in violation of the hours of service regulations 49 U.S.C. §392.3 and 49 U.S.C. §395.3.

Following an investigation of this matter by a duly-authorized Investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region V, finds that there is reasonable cause to believe that Respondents violated 49 USC §31105 and issues the following findings:

Secretary's Findings

Complainant's employment was terminated on July 23, 2014. Complainant filed a complaint with the Secretary of Labor, the same day, alleging Respondents retaliated against him in violation of STAA. As the complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

Coast is a commercial motor carrier within the meaning of 49 U.S.C. §31101. Mishler is a person within the meaning of 1 U.S.C. §1 and 49 U.S.C. §31105.

Complainant was employed by Respondents as an over the road driver and is therefore an employee within the meaning of 49 U.S.C. §31105.

49 U.S.C. §392.3 prohibits a driver from operating a commercial motor vehicle while their ability or alertness is so impaired through fatigue as to make it unsafe to continue

operation. This also prohibits a motor carrier from requiring a driver to operate a commercial motor vehicle under the above mentioned circumstances.

49 U.S.C. §395.3 prohibits a motor carrier from requiring their driver to drive a property-carrying commercial motor vehicle for any period after the end of the 14th hour after coming on duty following ten consecutive hours off duty. The only exception is when a property-carrying driver complies with provisions §395.1 (o) or §395.1(e)(2).

On July 22, 2014, Complainant received a text message from Respondents instructing him to deliver trailer 530375 to Kellogg Community College on July 23, 2014.

On July 23, 2014, Complainant reported to work in Holland at approximately 5:30 a.m. Complainant was scheduled to drive from Holland to Battle Creek, Michigan then to Troy, Michigan and back to Holland. Complainant left Holland with trailer 530375 and arrived in Battle Creek around 8:30 a.m. When Complainant arrived in Battle Creek he realized he had transported an empty trailer, #530375, to Battle Creek. Complainant returned to Holland at approximately 11:00 a.m., connected to a loaded trailer then left Holland again and headed to Battle Creek. Complainant arrived in Battle Creek around 1:30p.m. six hours late for his scheduled 7:30 a.m. delivery. Complainant delivered the load to Battle Creek then departed for Troy. That same day at 2:22 p.m., Mishler texted Complainant and wrote: "I need your help. I need you to run an overnight run tomorrow." Later that evening at 5:18 p.m., Mishler texted Complainant; "5382 is already for you at best one...". Complainant arrived in Troy on July 23, 2014, at approximately 5:30 p.m., which was more than six hours late for his scheduled 11:00 a.m., delivery. Complainant left Troy for Holland. Mishler sent Complainant a text message at 9:26p.m. which read "I see you are almost home. Please text me when you are headed out in the a.m. Bills are in the box on the front of the trailer. 5382 at best on tire." Complainant arrived in Holland between 9:26 and 9:44 p.m., Complainant violated the Hours of Service (HOS) regulations 14 hour limit by the time he returned to Holland that evening. Complainant refused to operate a commercial motor vehicle in violation of 49 U.S.C. §392.3 and 49 U.S.C. §395.3. This occurred on July 23, 2014, after the end of the 14th hour after coming on duty following ten consecutive hours off duty. Respondents were aware of the hours of service worked by Complainant at the time of his refusal.

On July 23, 2014 at 9:26 p.m., Respondents sent Complainant a text message and ordered him to deliver trailer 5382 the following morning. Other evidence indicated the order included a departure from Holland sometime between 1:30 a.m., and 3:41 a.m., on July 24, 2014. Complainant was still operating a commercial motor vehicle and his 10 consecutive hours off duty was set to occur around 9:44 p.m. on July 23, 2014. Therefore the order was in violation of 49 U.S.C. §392.3 and 49 U.S.C. §395.3. On July 23, 2014, at approximately 9:59 p.m., Complainant refused to deliver Respondents requested load as it violated 49 U.S.C. §392.3 and 49 U.S.C. §395.3.

Complainant's refusal to operate a commercial motor vehicle in violation of 49 U.S.C. §392.3 and 49 U.S.C. §395.3 is considered a protected activity under STAA.

Respondents were aware of Complainant's protected activity.

Respondents were aware Complainant had not taken 10 consecutive hours off duty and was at the end of his 14th hour after coming on duty when the text message order was sent on July 23, 2014 at 9:26 p.m. Respondents were in fact tracking Complainant's location at the time the order was sent. Respondents knew Complainant was still operating a commercial motor vehicle when the 9:26 p.m., order was sent. Provided documents revealed trailer 5382 left Holland on July 24, 2014, at 3:41 a.m., and arrived in Columbus, Ohio around 10:26 a.m.

Therefore, Respondent's order violated the HOS ten hour rest regulation. Respondent knowledge that Complainant refused to operate a commercial motor vehicle in violation of 49 U.S.C. §392.3 and 49 U.S.C. §395.3 has been established.

Complainant was subjected to an adverse action by Respondents when his employment was terminated on July 23, 2014. Respondents, therefore took the July 23, 2014 adverse action against Complainant, in part because he refused to operate a commercial motor vehicle in violation of 49 U.S.C. §392.3 and 49 U.S.C. §395.3.

These circumstances are sufficient to raise the inference that the protected activity was a contributing factor to the adverse action. Respondents have not shown with clear and convincing evidence that they would have terminated Complainant's employment absent his protected activity.

Consequently, OSHA finds reasonable cause to believe that Respondents violated the Surface Transportation Assistance Act, (STAA), 49 U.S.C. § 31105 and issues the following order:

ORDER

1. Upon receipt of the Secretary's Findings and Order, Respondent's shall immediately reinstate Complainant to his former position. Such reinstatement shall include all rights, seniority, and benefits that Complainant would have enjoyed had he never been discharged. Such reinstatement is not stayed by an objection to this order.
2. Respondents shall pay Complainant back pay amounting to \$166,194.02. The requested damages were offset by Complainant's interim earnings of approximately \$15,305.98.
- 3.) Respondents shall pay interest on all back wages in accordance with 26 U.S.C. 6621.

- 4.) Respondents shall pay Complainant all resulting reasonable attorney's fees for representation from his counsel Paul Taylor, which totaled \$3,274.54.
- 5.) Respondents shall pay damages for emotional distress and mental pain in the amount of \$50,000.
- 6.) Respondent's shall expunge Complainant's employment records of any reference to the exercise of his rights under 49 U.S.C. § 31105, STAA.
- 7.) Respondent's shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to 49 U.S.C. § 31105, STAA
- 8.) Respondent shall post in a conspicuous place in or about Respondent's facility, including all places where notices for employees are customarily posted, and maintain for a period of no less than 60 consecutive days from the date of posting, the attached Notice to Employees, to be signed by a responsible official of Respondent and the date of actual posting to be shown thereon.

Respondent and Complainant have 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 Judge
U.S. Department of Labor
800 K Street NW, Suite 400 North
Washington, DC 20001-8002
PH: (202) 693-7300; Facsimile (202) 693-7365

With copies to:

Paul Taylor, Attorney
900 W. 128th Street, Suite 204
Burnsville, MN 55337

Ken Nishiyama Atha
Regional Administrator
U.S. Department of Labor-OSHA
230 S. Dearborn Street, Rm. 3244
Chicago, IL 60604

Mary Ann Howe, CFE
Assistant Regional Administrator
Region V Whistleblower Protection Program
U.S. Department of Labor-OSHA
230 S. Dearborn Street, Rm. 3244
Chicago, IL 60604

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence 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 decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under STAA.

A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint. The rules and procedures for handling of STAA cases can be found in Title 29, Code of Federal Regulations, Part 1978 and may be obtained at www.whistleblowers.gov.

Sincerely,



for Mary Ann Howe
Assistant Regional Administrator

cc: Paul Taylor, Attorney
FMCSA
Chief Administrative Law Judge