

U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)



Issue Date: 17 November 2008

CASE NO.: 2008-STA-00043

In the Matter of

DAVID SACCO
Complainant

v.

HAMDEN LOGISTICS, INC.
Respondent

CASE NO.: 2008-STA-00044

In the Matter of

ANTHONY SACCO
Complainant

v.

HAMDEN LOGISTICS, INC.
Respondent

Appearances:

Anthony Sacco, *pro se*
Branford, Connecticut

David Sacco, *pro se*
West Haven, Connecticut

Harry Schochat, Esq.,
Woodbridge, Connecticut, for the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINTS

I. Statement of the Case

This case arises from complaints filed by David Sacco and Anthony Sacco alleging that the Respondent Hamden Logistics, Inc. (“HLI”) terminated their employment in violation of the employee protection provisions of Section 405 of the Service Transportation Assistance Act (“STAA”), 49 U.S.C.A. § 31105 (West 2008). Both complaints were filed with the United States Department of Labor, Occupational Safety and Health Administration (“OSHA”) which found no reasonable cause to believe that HLI had violated the STAA in terminating either Complainant. Thereafter, both Complainants filed timely requests for hearing before the Office of Administrative Law Judges (“OALJ”).

After notices of hearing were issued, HLI filed motions for summary decision seeking dismissal of both complaints. The Complainants answered in opposition, and HLI’s motions were denied based on a determination that there were genuine issues of material fact warranting an evidentiary hearing. The cases were then consolidated for hearing which was conducted before me in New London, Connecticut on August 5, 2008, at which time all parties were afforded the opportunity to present evidence and oral argument. The Complainants appeared at the hearing *pro se*, and an appearance was made by counsel on behalf of HLI. Testimony was heard from the Complainants and from two witnesses called by HLI, Robert Tenbrink and Charles Leroux. Documentary evidence was submitted as Anthony Sacco Exhibit (“ASX”) 1 and Respondent’s Exhibits 1-5. Hearing Transcript (“TR”) at 133, 141, 155, 192, 344. HLI’s objections to David Sacco Exhibits (“DSX”) 1 – 6 and ASX 2 and 3 were taken under advisement at the hearing. TR at 54, 86-88, 216-217. Those objections were overruled in a post-hearing order issued on August 13, 2008 which admitted the challenged exhibits and closed the record. All parties submitted written closing argument.

After careful consideration of the record and the parties’ respective positions, I conclude that Complainants have not proved that any activity protected by the STAA was a contributing factor in HLI’s decisions to terminate their employment. I further conclude that HLI has shown by clear and convincing evidence that it would have terminated both Complainants’ employment even in the absence of any protected activity. Consequently, their complaints must be dismissed. My findings of fact and conclusions of law are set forth below.

I. Background

HLI is a Connecticut-based trucking company owned and operated by Charles and Cheryl Leroux who, respectively, serve as HLI’s vice-president and president. HLI primarily delivers supplies to Southeast Asian restaurants and markets in the Eastern United States. RSX 2. HLI hired David Sacco as a long-haul truck driver on June 13, 2007. TR at 33. Anthony Sacco, who is David Sacco’s brother, began working at HLI on July 7, 2007 as a class A driver. TR at 184, 185. HLI’s operations are supervised by a terminal manager who at all times relevant to this proceeding was Robert Tenbrink who hired both Anthony and David Sacco as drivers. TR at 37, 184.

II. Summary of the Evidence

A. Testimony of David Sacco

David Sacco testified that he was hired by HLI as a favor to his father because he was having difficulty as a convicted felon finding a job. TR at 33-37. He explained that he was incarcerated for six years and 18 days on a manslaughter conviction before being released from prison on February 21, 2002 to a halfway house where he served the last six months of his sentence. TR 34-35. He alleges that HLI fired him in retaliation for complaints that he made regarding: (1) HLI's practice of having drivers make cash payments to helpers; (2) HLI assigning him routes which required him to drive over the hours allowed under the Federal Motor Carrier Safety Regulations (the "FMCSRs"); and (3) the condition of the vehicles he was assigned to drive.

1. Cash Payments

David Sacco testified that he complained about HLI's practice of having drivers make cash payments to "illegal workers . . . not even on the books" who were hired by HLI to assist the drivers. TR at 52. He said that he complained on "at least five or six" occasions to Cheryl Leroux but did not complain to any other HLI manager regarding the cash payments. *Id.* at 59-60. He explained that he was concerned that the illegal workers, who sometimes rode in his truck, could have been injured, in which case he, and not HLI, would have been blamed for the illegal cash payments to workers in the event they were to file a claim for worker's compensation. *Id.* at 53. David Sacco stated that he made these complaints "[o]n and off through the whole time I worked there," and he introduced as supporting evidence truck driver expenditure sheets dated June 19, 2007, October 17, 2007, October 25, 2007 and November 1, 2007 which reflect his cash payments to helpers. *Id.* at 56; DSX 1.

2. Hours of Service

David Sacco testified that truck drivers are responsible for recording how many hours they have driven in the logbooks so that the Department of Transportation ("DOT") and law enforcement agencies can readily determine whether a driver has driven too many hours. TR at 64-65. He stated that HLI assigned Thomas Connolly ("Connolly"), a former HLI driver, to instruct him on how to complete his driver's logbooks. *Id.* at 66. David Sacco testified, "Every Thursday, I went to Philadelphia, and a lot of times [HLI would] shove Atlantic City on there too, which would push me way over on my hours." *Id.* at 67. In this regard, David Sacco stated that it was his understanding that the maximum number of hours that he could work in a single day was 14 and that he could only drive 11 hours per day. *Id.* at 68. He said that he sometimes exceeded the driving hours limitation by four hours. *Id.* at 67. He further testified that Connolly instructed him to falsify the logbooks by showing that he commenced driving two hours after the actual time. *Id.* at 69. He also said that he would also falsify the time of his return from Philadelphia. *Id.* at 84. When asked what evidence he had to show that he drove over the maximum number of allowable hours, David Sacco answered that "if you took one of these manifests when I got sent to Pennsylvania and you did the math you would see that it was

humanly impossible for anybody to do it in 11 hours of driving.” *Id.* at 72. David Sacco explained he offered his logbooks into evidence not to show that he drove more than 11 hours per day but instead to show the places he had driven. *Id.* at 73-74.

David Sacco recalled a particular Philadelphia route during which he drove for over 11 hours on October 1, 2007. TR at 74-75. His logbook for this date shows that he left at 4:00 a.m. and returned 12.5 hours later at 4:30 p.m. DSX 2. However, he testified that this route “probably took . . . 16 or 17 hours, and he added that he never completed a route to Philadelphia without driving in excess of 11 hours. TR at 76-77.

He said that he first complained to Charles Leroux about his driving hours after returning from a run to Philadelphia, but he was unable to recall the exact date. TR 77-78. He also testified that “every time I complain[ed] about it they’re like, ‘oh, well, that’s what you got to do, you either want a job or you don’t.’” *Id.* at 80. David Sacco also testified that he complained to Tenbrink about “the same thing as what I said to Mr. Leroux.” *Id.* at 81.

3. Vehicle Complaints

David Sacco also testified that he complained about the condition of the truck HLI assigned to him. TR at 110. He said that HLI told him never to fill out a vehicle inspection report and to instead tell Tenbrink what was wrong with the truck. *Id.* He testified about a specific instance when which he complained of a broken “turbo” on his truck and was told by Tenbrink to either drive the truck or not work that day. *Id.* He further testified that he drove the truck which began smoking heavily in Greenwich, Connecticut where he pulled into a weigh station. *Id.* at 111. He said that he called Tenbrink who dispatched a tow truck to pick him up along with the malfunctioning truck. *Id.*

4. Termination

David Sacco testified that he went to HLI on December 1, 2007, a Saturday, to pick up his paycheck, and complained to Charles Leroux about being told to falsify his log books. TR at 99-100. He said that he also complained to Leroux that he had been promised a route to Vermont, but HLI had instead assigned the route to another driver for less money. *Id.* at 100. Leroux reportedly responded that David Sacco could either remain an employee of HLI or leave. *Id.* at 104.

David Sacco testified that after he left Charles Leroux’s office on December 1, 2007, he encountered Tenbrink outside. TR at 104. He said that he told Tenbrink that he would not alter his log books anymore, that a new driver was stealing his runs and that he was going to “put in a complaint.” *Id.* at 105. He said that Tenbrink responded “Well, guess who’s not working this week?” *Id.* He testified that he then warned Tenbrink, “You do that to my job you’re going to be sorry.” *Id.* David Sacco related that he then left the HLI Terminal, but he telephoned Tenbrink about ten minutes later and left a message on the latter’s voicemail inquiring, without raising his voice, as to what was wrong between them. *Id.* at 106. He said that he called again about ten to fifteen minutes later, and his call was answered by a police officer who said that he had threatened Tenbrink. *Id.* He testified that he returned to the terminal because the police

officer told him to return or face arrest. *Id.* He testified that upon returning to the terminal, he told the police officer what had happened and maintained that he “never threatened [Tenbrink] personally.” *Id.* He said that the police officer then conferred separately with Tenbrink and thereafter advised him that he had been fired and should stay off HLI’s property or be arrested. *Id.* at 107.

On cross-examination, David Sacco admitted that he had an accident on June 19, 2007 when a truck that he was driving for HLI hit the bottom of a bridge. TR at 127-128. He also admitted that he had another accident on November 19, 2007. *Id.* at 130. He denied being at fault for the accident, and he said that the police officer who responded “said it was a non-fault accident.” *Id.* at 131.¹ He reiterated that Connolly had showed him “how to move the lines and manipulate the times” in his logbook and that HLI had him pay helpers on his routes “under the table.” *Id.* at 134, 136. He stated that, although he lied the first time he entered incorrect departure and arrival times in his log books, he never altered the log books after his initial entries. *Id.* at 139.

David Sacco testified that he delayed going to the Department of Labor or the Department of Transportation about his complaints against HLI because company management repeatedly told him “that things were going to get better.” TR at 143. He said that he first complained (*i.e.*, outside of HLI) on December 3, 2007 when he went to the Connecticut Department of Labor which referred him to “the federal motor safety carrier administration and OSHA.” *Id.* at 147-148. He asserted that OSHA did not properly investigate his complaints against HLI and did not carefully consider the evidence that he submitted. *Id.* at 84, 179.

Also on cross-examination, David Sacco testified that he occasionally had to demand permission from HLI to stay overnight while on a particularly long Pennsylvania route. TR at 151-153. He said that Tenbrink and Charles Leroux paid for his motel accommodation when he convinced them to allow him to stay overnight while on the Pennsylvania route. *Id.* at 150. He was asked whether he understood that a threat of violence was prohibited by HLI’s employee manual which he had signed, and he insisted that he had not threatened violence and only said that he was going to file a complaint. *Id.* at 153-154. He specifically denied telling Tenbrink, “If you . . . with me or my job, I’ll kill you and burn down your house with your wife and kids in it.” *Id.* at 157. However, he admitted to being upset on December 1, 2007 because Tenbrink had reassigned a route that would have paid him \$400.00, and he said that he warned Tenbrink not to “screw with my job.” *Id.* at 158-159. He further testified that he did not think that Tenbrink was afraid of him and believed that he was fired out of “vindictiveness.” *Id.* at 176.

David Sacco testified that he has no evidence besides his recollection that HLI’s vehicles were in dangerous condition, and he said that he never refused to drive because he could not afford to. TR at 161-162. He also testified that two of the vehicles HLI assigned him broke down and had to be towed and that the trucks leased from Edart always had problems. *Id.* at 162. He said that his responsibilities included loading HLI’s trucks when he arrived at the terminal to prepare for a route, but the trucks were sometimes already loaded when he reported to work. *Id.*

¹ HLI introduced a copy of the police motor vehicle accident information report of the January 19, 2007 accident which contains no finding of fault. RX 1.

at 167, 170. He said that the time it took to load trucks varied, but an average load took an hour to load onto a truck. *Id.* at 169. David Sacco testified that he left the terminal at 4:00 a.m. to start most routes and would often return at 7:30 p.m. when he did Philadelphia runs. *Id.* at 171.

B. Testimony of Anthony Sacco

Anthony Sacco testified that he began working for HLI after meeting with Connolly and Tenbrink on July 20, 2007. TR at 184. He said that Connolly accompanied him on some routes and taught him how to fill out driver's logbooks. *Id.* at 186-187. He testified that he had two accidents involving other motor vehicles while working for HLI but was not ticketed for either. *Id.* at 188. He also said that he had three property-related accidents while working for HLI but was only ticketed for one, and that was because the truck did not have a registration sticker on the license plate. *Id.* at 189.

Anthony Sacco further testified that he worked in excess of 70 hours in a seven-calendar-day period approximately five or six times and that he complained to Tenbrink and Charles Leroux about how many hours he had worked. TR at 196. He testified that he also complained about not being paid for an extra day that he had to add to his Virginia route and that the extra day pushed his total hours for the week over 70. *Id.* at 196-197. *See also* ASX 2. He stated that he complained to both Tenbrink and Charles Leroux about the hours he logged in excess of 70 hours in a seven-calendar-day period. *Id.* at 200-201. However, Anthony Sacco testified that he never refused to drive and that Tenbrink was sympathetic in response to his complaints that he had worked in excess of 70 hours. *Id.* at 208, 210.

Anthony Sacco testified that Tenbrink had called him several times on December 1, 2007 regarding a Florida route that would begin around 12:00 p.m. on that day. TR at 211. He testified that Tenbrink confirmed during the first or second call on that date that he was scheduled to depart on the Florida route that day, but that Tenbrink then called him back and stated that he had been involved in a confrontation with David Sacco and that he was going to call the police. *Id.* at 212-213. Anthony Sacco further testified that Tenbrink called him again and told him that Charles Leroux had decided that he would be fired along with his brother. *Id.* at 214. He stated that he then went to the HLI terminal where he was given a final check and a "pink slip" with "lack of work" listed as the reason for termination. *Id.* *See also* ASX 1. He testified that while he was at the HLI terminal on December 1, 2007, he observed the tractor trailer that he usually drove loaded and waiting with its engine running at HLI's loading dock. TR at 214. On cross-examination, Anthony Sacco agreed that he had been previously terminated from a driver's job at another trucking company. *Id.* at 248.

C. Testimony of Robert Tenbrink

Tenbrink testified that he was aware of David Sacco's criminal record upon hiring him, and he stated that HLI had two other drivers with criminal records at the time of the hearing. TR at 263. Tenbrink said that the routes David Sacco drove did not violate DOT regulations in terms of time. *Id.* at 265. However, while denying that David Sacco ever complained about working "excess hours" on the Philadelphia route, he agreed that David Sacco did complain that the route was a "long day, hard day" and "[a] couple of times . . . requested not to have the Philly

run [because] he had something to do and he didn't want to be out there that late" *Id.* at 266. He also said that David Sacco at times requested the Philadelphia route because of the additional pay. *Id.* at 266, 296-297. Tenbrink further testified that when he assigned the Philadelphia route, he would try to accommodate the driver with an easier route the next day in order to balance the amount of work the drivers were given. *Id.* at 296-297. Tenbrink testified that regardless of fault, David Sacco's accidents increased HLI's insurance premiums. *Id.* at 270.

Tenbrink testified that he had not scheduled another driver as of December 1, 2007 to replace David Sacco on his route to Vermont. TR at 271. Tenbrink testified that David Sacco asked him on December 1, 2007 where he was going and that he responded that he did not yet know. *Id.* He also testified that they continued to discuss when David Sacco's next route was scheduled, and he told David Sacco that he would let him know when he was needed. *Id.* at 272. According to Tenbrink, David Sacco then "got in my face" and while they were "nose-to-nose," David Sacco said, "if I F'ed with his job or him he would kill me, go to my house, and burn it down with my kids and wife in it." *Id.* Tenbrink testified that he believed the threat was serious, that he called the police immediately and then told Charles Leroux what had transpired. *Id.* at 272-273. He said that Leroux expressed concern that David Sacco would be punished severely if the police arrested him because of his criminal record. *Id.* at 274. He testified that he told the police officer he did not want David Sacco arrested but instead wanted him fired. *Id.* at 276. He said that he fired David Sacco only because he threatened him and that he was so afraid that he called his wife to tell her to lock the doors and windows to their house and to make sure that no one was outside. *Id.* at 293-294. He testified that although he was afraid of David Sacco and was asked by the police officer whether he wanted Sacco arrested, he did not ask the police officer make an arrest because he believes in giving people a second chance and thought that David Sacco would calm down. *Id.* at 371.

When asked whether David Sacco complained about the safety of the trucks HLI asked him to drive, Tenbrink responded, "A lot of people leave too much dirt inside the truck or this one rattles or this or that, but, with the fleet we have, anything that's wrong, they fix it." TR at 277. Tenbrink testified that is economically import for HLI to maintain a safe fleet of trucks because they are leased from Edart Truck and Leasing. *Id.* at 277-278. Tenbrink testified that HLI's practice is to fix broken trucks as soon as possible. *Id.* at 282.

Tenbrink also denied ever telling David Sacco to alter his logbook. TR at 282. He stated that HLI underwent a "class 5" DOT examination which he described as "a thorough investigation of all records, past and present" and history of drivers whom the company has terminated. *Id.* at 283-284. Tenbrink elaborated in his testimony that the DOT inspector had access to toll and hotel receipts and log books for both David and Anthony Sacco, but he admitted that he was not sure whose log books the inspector examined. TR 284. Tenbrink further testified that with the exception of one mistaken entry in a log book by another driver, the DOT inspector, after examining 50 percent of six years worth of drivers' records over the course of three days, issued a letter that confirmed HLI's satisfactory rating from the DOT. *Id.* at 289. *See also* RX 3. Tenbrink testified that a satisfactory rating "is the highest rating you can get, of anything." TR 290. Upon cross-examination, Tenbrink testified that he did not know whether

the DOT inspector examined David Sacco's logbooks and that he was not sure of what the inspector specifically looked at in HLI's files. *Id.* at 302-303.

Tenbrink testified that he is a former truck driver and that he had completed Philadelphia routes similar to those driven by David Sacco in 13.5 hours. TR at 298-299. However, he acknowledged that it is possible that various conditions could lead to the route taking more time. *Id.* at 300. He said that "on one street alone, you have seven stops, which wipes out half the truck" but added that the number of stops and the location of the stops also vary and that the average number of stops on the route is 12. *Id.* He also admitted that his description of the Philadelphia route did not include stops in Atlantic City and Camden, New Jersey, and he said that he did not have complete knowledge of every Philadelphia route HLI assigned to its drivers. *Id.* at 308, 310. Tenbrink testified that the Camden stops would add about one half hour to the Philadelphia route, though he also admitted that the route had changed and become "very slow." *Id.* at 311. Tenbrink also said that the goods for each stop on a route are stacked on pallets and that HLI's small trucks, such as the one that David Sacco drove to Philadelphia, typically carry about 12 pallets of goods. *Id.* at 312. Tenbrink explained that the goods staked on the pallets are "loose" and must be delivered in pieces to each stop. *Id.* at 313. He said that HLI hired helpers to assist its drivers in unloading the trucks because of the volume of goods involved. *Id.* at 315.

Tenbrink testified that Anthony Sacco did not sign a contract with HLI and that he was the last long-haul driver the company hired. TR at 315-316. He said that Anthony Sacco was assigned to drive a leased truck that cost HLI \$800.00 per week. *Id.* at 317-318. Tenbrink testified that although HLI had too many long-haul drivers and began assigning them reduced hours after Anthony Sacco was hired, he did not discuss termination with Anthony Sacco prior to December 1, 2007. *Id.* at 318-319. However, he testified that the decision to terminate Anthony Sacco was made before December 1, 2007, independent of the incident involving David Sacco on December 1, 2007. *Id.* at 320-322. He further testified that Anthony Sacco had not worked since November 17, 2007 and that HLI drivers occasionally wait for weeks to be assigned a route. *Id.* at 322-323.

On cross-examination by Anthony Sacco, Tenbrink testified that Connolly was fired by HLI after his truck went missing in Florida, but HLI continued to use Connolly as an instructor. TR at 325-326. He also agreed that he had spoken to Anthony Sacco several times over the telephone, but he said that he could not recall how many times or when the conversations took place. *Id.* at 329-330. When asked where Anthony Sacco would be rated on a scale of one to ten as a truck driver, Tenbrink responded that his rating would be "a good six or seven." *Id.* at 330. He further testified that HLI had not hired other class A drivers since Anthony Sacco's termination, but drivers in other classes had been hired. *Id.* He stated that Anthony Sacco was fired because his accidents had raised his insurance premiums beyond what HLI wanted to pay. *Id.* at 331. Tenbrink also stated that Anthony Sacco was terminated because "everything slowed down" at HLI. *Id.* at 333-334. He agreed that all but one of the class A truck drivers employed by HLI have had at least one "minor" accident, but only one class A driver has been involved had a "major" accident. *Id.* Tenbrink testified that he was informed by HLI management after his confrontation with David Sacco on December 1, 2007 that Anthony Sacco was to be fired, but he insisted that the decision to terminate Anthony Sacco had been made prior to the confrontation with David Sacco. *Id.* at 335.

D. Testimony of Charles Leroux

Charles Leroux testified that HLI employs several truck drivers with criminal records, that he has not had problems with them and that he wanted to give David Sacco “a chance.” TR at 338. He said that the damage from the accident in which David Sacco’s truck hit a bridge was over \$50,000.00. *Id.* Leroux added that when he looked at the police accident report regarding David Sacco’s accident with another vehicle, he determined that the accident was David Sacco’s fault. *Id.* at 340. He testified that although David Sacco claimed that he was not at fault in the accident, the police report faulted him. *Id.* at 346. He testified that no other HLI drivers had two major accidents. *Id.* He also testified explained that Anthony Sacco’s accidents were a cost problem for HLI and that he was concerned with David Sacco’s increased insurance cost to HLI and his dishonesty in reporting that the accident was not his fault. *Id.* at 348. Despite these professed concerns, Leroux stated that David Sacco would have continued working for HLI but for the events of December 1, 2007. *Id.* at 341.

Leroux testified that David Sacco entered his office on December 1, 2007 and asked where he was going. TR at 341. He responded that he did not know and told David Sacco that he should speak with Tenbrink. *Id.* He testified that not more than five minutes later, Tenbrink came into his office and said that David Sacco “had just threatened to kill him, burn his house with his wife and kids in it.” *Id.* According to Leroux’s account, Tenbrink also told him that he had called the police, and they decided to fire David Sacco based on the company’s policy against violent threats. *Id.* at 342. Leroux further testified that when he and Tenbrink met the police officer who responded to Tenbrink’s call, he told the officer that there was no need to arrest David Sacco. *Id.* He said that Tenbrink looked afraid and wanted the police officer to generate a report of what had happened. *Id.* See also RX 5.

On cross-examination by David Sacco, Leroux admitted that he was confused about the number of David Sacco’s accidents, where the accidents had occurred and which accidents the police reports introduced in evidence referred to. TR at 350-354. On redirect examination, Leroux testified that Tenbrink manages HLI on a day-to-day basis and that he does not have time to be aware of every detail of HLI’s operations. *Id.* at 360.

Regarding Anthony Sacco, Leroux testified that he made the decision to terminate the former’s employment because HLI did not have enough work to cover the cost of the \$800.00 per week lease of the truck assigned to him. TR at 360. He said that he did not know that Anthony Sacco was scheduled to drive the route to Florida until after the confrontation between David Sacco and Tenbrink on December 1, 2007. *Id.* at 361. He also said that he thought he had told Tenbrink a day and one half before December 1, 2007 “that our trucks had to go out first” and that Anthony Sacco should not be assigned to the Florida route. *Id.*

Under cross-examination by Anthony Sacco, Leroux testified that although Tenbrink was in charge of logistics, he was responsible for legal matters and financial issues which include which drivers to retain. TR at 362-363. He also said that he did not realize that Anthony Sacco had been scheduled to take the Florida route until one hour after the December 1, 2007 confrontation between David Sacco and Tenbrink. *Id.* at 363. Leroux testified that he did not

communicate his financial concerns to Tenbrink in detail prior to December 1, 2007, but he maintained that Anthony Sacco was terminated for lack of work and that HLI did not have enough routes to keep him as a driver. *Id.* at 364-366.

On redirect examination, Leroux testified that he met every Friday with the company's salesmen and that HLI's payroll is completed on Fridays. TR at 367. He stated that Fridays were chaotic that he and Tenbrink never meet on Fridays. *Id.* Leroux further testified that he was not sure whether Anthony Sacco would be needed and that his meeting with the salesmen on Friday, November 30, 2007 would help him determine future staffing requirements. *Id.* at 368. He said that the orders from the salesmen were "light" and that he wanted to eliminate leased trucks first. *Id.* He stated that the leased truck that had been assigned to Anthony Sacco was not used for the December 1, 2007 route to Florida: "We used our vehicle for that trip." *Id.*

III. Findings of Fact and Conclusions of Law

A. Credibility

As is evident from the forgoing summary of the testimony presented at the hearing, the witnesses have related sharply differing accounts of pertinent events. With the exception of Anthony Sacco who I found to be a very trustworthy witness based on my observations of his demeanor, I did not find any of the witnesses to be completely credible. While I cannot conclude with certainty that any witness was deliberately testifying falsely, I am persuaded after carefully observing David Sacco, Tenbrink and Leroux on the witness stand and considering their testimony in the context of the entire record, that each of these witnesses, especially David Sacco and Leroux, attempted to present and accentuate facts that they believed would be most helpful to their respective positions while glossing over or omitting facts that might prove inconvenient. Consequently, the process of getting to the truth in this case is necessarily dependent on an assessment of the relative credibility of the divergent testimony offered by the key witnesses.

Based on my assessment of the testimony, I find that David Sacco did complain to Tenbrink and Leroux that the Philadelphia route was difficult and at times put him in a position of having to either complete the route in a day which would push him over the maximum hours permitted under the F.M.C.S.R. or call HLI to request authorization of additional expenses in order to stay overnight. I note in this regard that while Tenbrink testified that he has been able to complete a "similar" run to Philadelphia in 13.5 hours, he admitted that David Sacco's route included additional stops and that there were a variety of factors that could increase the amount of time required to complete the route. Moreover, although Tenbrink tersely denied that Sacco ever complained about working "excess hours" on the Philadelphia route, he did admit that Sacco complained that it was a long, hard day and sometimes requested not to be assigned to the route because he did not want to be "out there that late." TR at 266. Moreover, I find that much of Tenbrink's testimony about the Philadelphia route and David Sacco's complaints was guarded and not particularly persuasive. I also find that David Sacco made some complaints about making cash payments to helpers and about the condition of his truck, noting particularly that his testimony on these points was not contradicted.

On the other hand, I find it likely that David Sacco's testimony at the hearing exaggerated the frequency and vehemence of his complaints to HLI about the Philadelphia route. I also find that his testimony that he specifically complained about being required to "falsify" his driver's logs and that he told Leroux and Tenbrink on December 1, 2007 that he would no longer do this is not credible. I find it telling that Anthony Sacco, who impressed me as a truthful and accurate witness, did not testify that he had ever been shown by Connolly or anyone else at HLI how to falsify log entries. And, it strikes me as particularly implausible that David Sacco would gratuitously tell Leroux and Tenbrink that he was refusing to falsify logs during their conversations on December 1, 2007 when he was attempting to find out whether he was going to be assigned to the potentially lucrative Vermont route. While I have not credited David Sacco's claims that he complained to HLI about being "forced" to falsify his logbooks, his testimony that Connolly showed him how to falsify logbook entries and that he did in fact falsify his logbooks to hide hours of service violations is uncontradicted.²

With regard to the December 1, 2007 confrontation between David Sacco and Tenbrink, I find that Tenbrink's version is much closer what actually transpired. While David Sacco was somewhat inconsistent in his recounting of the incident, admitting later in his testimony that he warned Tenbrink not to "screw" with his job, Tenbrink was unwavering and showed physical signs (*e.g.*, facial tension and shaking) when relating the incident that are consistent with a person who was threatened with harm and remains upset at the memory. Further, that David Sacco threatened Tenbrink is corroborated by Anthony Sacco's testimony that Tenbrink called him on December 1, 2007 and stated that he'd had a confrontation with David Sacco. I also find that David Sacco's actions in leaving the HLI terminal immediately after the confrontation and then calling Tenbrink a few minutes later in an apparent attempt to smooth things over strongly suggests that he realized that he had gone too far and wanted to minimize the potential damage. Thus, I find that David Sacco did make a specific and angry threat to do harm to Tenbrink and his family on December 1, 2007 in response to what he perceived as Tenbrink's hesitation to assign him the Vermont route.

With regard to Anthony Sacco, I specifically credit his testimony that he complained to Charles Leroux and Tenbrink regarding the hours he worked in excess of the 70 hours per week allowed by the F.M.C.S.R. I also credit Anthony Sacco's testimony regarding his telephone conversations with Tenbrink on December 1, 2007 and that that his truck was prepared and running by the time he arrived at HLI on that date.

Finally, I find Leroux's testimony to the effect that he had decided to terminate Anthony Sacco for lack of work prior to December 1, 2007 but somehow neglected to tell Tenbrink, the company's terminal manager who was responsible for day-to-day operations entirely implausible.³ Rather, it is quite clear from Anthony Sacco's very credible testimony that Tenbrink had assigned him to drive the Florida route on December 1, 2007 and that HLI did not

² Connolly was not called as a witness.

³ Tenbrink also parroted Leroux's account of the termination decision, but he also made it clear in his testimony that he was not informed of the decision to terminate Anthony Sacco until after his confrontation with David Sacco. Accordingly, I have given his corroboration of Leroux's version little weight.

decide to terminate his employment until after David Sacco had threatened Tenbrink with physical harm. Indeed, it seems that Mr. Leroux even recognized the implausibility of his story when he observed from the witness stand that Anthony Sacco's termination on the heels of his brother was a "very bad coincidence." TR at 361.

B. Analytical Framework

Burdens of proof under the STAA, as amended effective August 3, 2007,⁴ are set forth at 49 U.S.C. § 42121(b). *See* 49 U.S.C.A § 31105(b)(1) (West 2008). Under section 42121(b), a complainant must demonstrate that: (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an adverse personnel action; and (4) the protected activity was a contributing factor in the adverse personnel action. *Clemmons v. Ameristar Airways, Inc. (Clemmons)*, USDOL/OALJ Reporter (PDF), ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11, slip op. at 7, 2007 WL 1935557*4 (ARB June 29, 2007). If a complainant proves that the employer committed a violation, he is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. *Id.*

C. David Sacco's Case

1. Did David Sacco engage in activity protected by the STAA?

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle because the employee either made a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order" or refused to operate a vehicle because operation would violate a regulation, standard, or order related to commercial motor vehicle safety or health or because of a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. §§ 31105(a)(1)(A) and 31105(a)(1)(B).⁵

⁴ *See* Pub.L. 110-53, Title XV, § 1536, 121 Stat. 464 (Aug. 3, 2007). This case was litigated after the enactment of the 2007 amendments.

⁵ The STAA, as amended in 2007, added three additional categories of protected activity which are not implicated by either of the complaints under consideration. The additional categories are:

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

Pub.L. 110-53, Title XV, § 1536, 121 Stat. 464 (Aug. 3, 2007).

a. Complaints about Hours of Service Violations

It is well established that “[i]nternal complaints about violations of commercial motor vehicle regulations may be oral, informal or unofficial” provided that that such complaints “must be communicated to a manager or supervisor.” *Calhoun v. United Parcel Service (Calhoun)*, USDOL/OALJ Reporter (PDF) ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 14, 2007 WL 2718653 (ARB Sept. 14, 2007), *appeal docketed sub nom. Calhoun v. Administrative Review Board*, No. 07-2157 (4th Cir. Dec. 12, 2007). *See also Jackson v. CPC Logistics*, USDOL/OALJ Reporter (PDF) ARB No. 07-006, ALJ No. 2006-STA-004, slip op. at 3, 2008 WL 4820117 (ARB October 31, 2008); *Ridgley v. U.S. Department of Labor*, 2008 WL 4646891*4 (6th Cir. 2008) (not published).⁶ To be protected by the STAA, a complainant “must at least be acting on a reasonable belief regarding the existence of a safety violation.” *Calhoun* at 10.

I have found that David Sacco made at least some oral complaints to HLI officials that the Philadelphia route at times caused him to drive in excess of the hours of service limitations set forth in the F.M.C.S.R. Under the cited precedent, his internal oral complaints to HLI’s management sufficiently constitute protected activity. He does not have to have filed a written formal complaint to HLI, and it is not necessary for him to have complained to authorities outside of HLI. Accordingly, I conclude that David Sacco has established that he engaged in protected activity when he complained about driving in excess of the hours of service regulations. However, as I have specifically discredited David Sacco’s testimony that he told Charles Leroux and Tenbrink on December 1, 2007 that he would no longer falsify logbooks, I find that David Sacco did not engage in any activity protected by the STAA on December 1, 2007.

b. Complaints about David Sacco’s Truck and Cash Payments

I have also credited David Sacco’s uncontradicted testimony that he complained about the condition of his vehicle and about having to make cash payments to helpers, but these complaints are not protected under the STAA. There is insufficient evidence to support a finding that Sacco’s complaints about his truck were motivated by a reasonable belief that there was a safety violation which, as discussed above, is necessary to invoke the protection of Section 31105(a)(1)(A), and there is no claim that Sacco ever refused to drive which is necessary to draw the protection of Section 31105 (a)(B). *Calhoun* at 13. There also is nothing in the STAA that protects complaints about an employer’s pay practices absent some nexus to a claimed violation of a commercial motor vehicle safety regulation, standard, or order or a protected refusal to operate.

⁶ The Second Circuit, in which this case arises, has noted in *dicta* that although it has never directly addressed the question of whether the “filed complaint” language covers internal complaints to company management, the Department of Labor and other circuits have determined that internal complaints are protected by the STAA. *Harrison v. Administrative Review Board, US Department of Labor*, 360 F.3d 752, 757 n. 2 (2nd Cir. 2004).

2. Did HLI have knowledge of David Sacco's protected activity?

I have found that David Sacco engaged in activity protected by the STAA when he complained to HLI officials about having to drive in excess of the hours of service limitations promulgated under the F.M.C.S.R. Having credited his testimony that he made at least some of these protected complaints to HLI Terminal Manager Tenbrink, who made the termination decision, I find that he has proved that HLI had knowledge of his protected activity. *See Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39, slip op. at 12, 2007 WL 1935552 (ARB June 29, 2007).

3. Did David Sacco suffer an adverse action?

David Sacco must provide evidence that HLI engaged in an adverse action such as termination to support his claim. A majority of the Administrative Review Board ("ARB") recently announced that the ARB would apply the "materially adverse" standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) to determine whether an employer took an adverse action against an employee within the meaning of the STAA as well as the other federal whistleblower anti-discrimination statutes enforced by the Secretary of Labor. *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 19, 2008 WL 4462979 (ARB September 20, 2008).⁷ Noting that the Supreme Court in *Burlington Northern* held that for an action to be deemed "materially adverse," it must be such that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination," the ARB stated that "[f]or purposes of the retaliation statutes that the Labor Department adjudicates, the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity." *Id.* at 19-20 (quoting *Burlington Northern*, 548 U.S. at 57). Obviously, an employer's action is materially adverse to the employee's interests in the case of termination because the employee suffers a loss of income. *See also Bethea v. Wallace Trucking Co.*, USDOL/OALJ Reporter (PDF) ARB Case No. 07-057, ALJ Case No. 2006-STA-023, slip op. at 12, 2007 WL 4623502 (ARB Dec. 31, 2007) ("Termination is an adverse action."), *petition for review denied sub nom. Bethea v. Dep't of Labor*, No. 08-1290, 2008 WL 4487661 (4th Cir. Oct. 6, 2008) (unpublished). David Sacco and HLI agree that his employment was terminated on December 1, 2007. Therefore, I find that David Sacco has established the adverse action element of the STAA.

4. Was David Sacco's protected activity a contributing factor in his termination?

David Sacco must next prove by a preponderance of evidence that his protected activity was a contributing factor in HLI's decision to terminate his employment. *Clemmons* at 9. To

⁷ The dissenting member of the ARB argued in favor of a "tangible employment consequence" test under which a complainant must show that the employer took an action which had a substantive impact on the employee's compensation, terms, conditions, or privileges of employment. *Melton* at 9-12. There is no dispute in this case that a termination of employment qualifies as an adverse action under either the "materially adverse" or the "tangible employment consequence" test.

properly evaluate whether there is a causal relationship, “all instances of protected activity must be thoroughly assessed.” *Williams v. Capitol Entertainment Services, Inc.*, USDOL/OALJ Reporter (PDF) ARB No. 05-137, ALJ No. 2005-STA-27, slip op. at 8, 2007 WL 4623498 (ARB Dec. 31, 2007).

Based on my credibility determinations, the evidence establishes that David Sacco engaged in protected activity when he made some oral complaints to Tenbrink at unspecified times that his assigned route caused him to drive in violation the hours of service regulation and that HLI terminated his employment after it had knowledge of this protected activity. “While not ineluctable, the circumstances of a given case may support a fact-finder’s conclusion that the temporal proximity between protected activity and adverse action establishes that the adverse action was motivated by the protected activity. *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, 06-088, ALJ No. 2005-STA-40, slip op. at 6, 2007 WL 4248548 (ARB Nov. 30, 2007), (citing *Thompson v. Houston Lighting & Power Co.*, USDOL/OALJ Reporter (PDF) ARB No. 98-101, ALJ Nos. 1996-ERA-034, 036, slip op. at 6 (ARB Mar. 30, 2001)). However, temporal proximity between protected activity and an adverse employment action is not necessarily dispositive of a causal connection. As the ARB noted in *Johnson v. Rocket City Drywall*, USDOL/OALJ Reporter ARB No. 05-131, ALJ No. 2005-STA-24, 2007 WL 352460 (ARB Jan. 31, 2007), “when the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action.” Slip op. at 6 (citing *Thompson v. Houston Lighting & Power Co.*, USDOL/OALJ Reporter (PDF) ARB No. 98-101, ALJ Nos. 96-ERA-34, 38, slip op. at 6-7 (Mar. 30, 2001)). As in the *Johnson* case, the record here shows that David Sacco’s protected activity provoked no hostile reaction and no immediate adverse employment consequences. Rather, he continued to be employed driving the same routes until December 1, 2007 when he threatened Tenbrink and his family with harm if he did not get the assignment for the Vermont route. In my view, David Sacco’s conduct on December 1, 2007, which I have found not to be protected by the STAA, clearly constituted an intervening event that independently could have brought about his termination. Given the absence of any contemporaneous adverse response to any of his protected complaints, I conclude that David Sacco’s unprotected misconduct on December 1, 2007 severed any possible causal connection between his termination and prior protected activity. Simply put, I find that the credited evidence shows that David Sacco’s protected activity more likely than not played no role in HLI’s termination decision which was most likely exclusively motivated by David Sacco’s unprotected threats which immediately preceded his termination. For these reasons, I conclude that David Sacco had not proved by a preponderance of the evidence that his protected activity contributed to HLI’s decision to terminate his employment.

5. Assuming that David Sacco proved a causal relationship between his protected activity and his termination, has HLI shown by “clear and convincing” evidence that it would have terminated him in the absence of protected activity?

While it is not necessary to reach this issue because David Sacco failed to prove that his protected activity was a contributing factor in his termination; *Hafer v. United Airlines, Inc.*, USDOL/OALJ Reporter (PDF) ARB No. 06-017, ALJ No. 2005-AIR-8, slip op. at 5, 2008 WL

316034 (ARB Jan. 31, 2008); I will, in the interest of providing a full analysis for appellate review, consider whether HLI has demonstrated by “clear and convincing” evidence that it would have terminated David Sacco’s employment in the absence of any protected activity. While there is no precise definition of what constitutes “clear and convincing evidence,” the Secretary of Labor and Supreme Court have recognized that it is “a higher burden than ‘preponderance of the evidence’ but less than ‘beyond a reasonable doubt.’” *Yule v. Burns International Security Service*, USDOL/OALJ Reporter (HTML) Case No. 93-ERA-12, slip op. at 4 (Sec’y May 24, 1995) (citing *Grogan v. Garner*, 498 U.S. 279, 282 (1991) and *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 n.11 (1991)).⁸

On this record, and noting particularly the determination that David Sacco did not engage in any protected activity on December 1, 2007 when he made threats of violence toward Tenbrink and his family and the absence of any evidence or claim that HLI has tolerated comparable misconduct by other drivers, I find that HLI has clearly and convincingly demonstrated that David Sacco would have been terminated on December 1, 2007 even if he had never engaged in any protected activity. Therefore, even if it were to be found that David Sacco proved by a preponderance of the evidence that protected activity was a contributing factor in his termination, HLI would avoid an order granting him any relief under the STAA.

D. Anthony Sacco’s Case

I have credited Anthony Sacco’s testimony that he complained to Charles Leroux and Tenbrink about working in excess of the 70 hours per week allowed by the F.M.C.S.R. and that he was scheduled by Tenbrink to drive the Florida route beginning on December 1, 2007 until shortly after his brother threatened Tenbrink at the HLI terminal. I have also discredited HLI’s claim that Leroux had decided to terminate Anthony Sacco a few days prior to December 1, 2007 due to lack of work but inadvertently failed to let his terminal manager know this until after the row with David Sacco, thus creating a “very bad coincidence” that suggests the two events were related. Rather, I find that the credible evidence convincingly demonstrates that Anthony Sacco’s termination on December 1, 2007 was a direct and proximate result of David Sacco’s misconduct earlier on that day. While it may well be that HLI’s business was on the wane and that Anthony Sacco may have been let go as HLI’s as the least senior class A driver at some point after December 1, 2007 due to lack of work, I am persuaded by the evidence that but for the incident with his brother, he would not have been abruptly terminated on December 1, 2007.

Based on these factual findings, Antony cannot prevail on his STAA claims. He has proved that he engaged in protected activity, that HLI had knowledge and that he suffered an adverse employment action. However, he has not proved by a preponderance of the evidence that his protected activity was a contributing factor in the decision to terminate his employment. As in his brother’s case, there is no evidence that his protected activity was met with any

⁸ Prior to the 2007 amendments to the STAA, an employer’s burden to avoid liability in a “dual motive” case (*i.e.*, where a complainant proved that protected activity was a contributing factor, along with asserted legitimate reasons, in a challenged adverse action), was “to prove by a preponderance of the evidence” that it would have taken the challenged action in the absence of the protected activity. *See e.g.*, *Carter v. Marten Transport, Ltd.*, USDOL/OALJ Reporter ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63, slip op. at 13, 2008 WL 2624769 (ARB June 30, 2008).

hostility or adverse treatment. On the contrary, Anthony Sacco testified that Tenbrink was sympathetic. It was not until after the intervening event of David Sacco's misconduct on December 1, 2007 that anything adverse happened to Anthony. For the same reasons relied on in David Sacco's case, I conclude that the intervening unprotected confrontation between David Sacco and Tenbrink on December 1, 2007 severs any possible causal connection between Anthony Sacco's protected activity and his termination which instead was a result of Leroux's anger over the threats that David Sacco directed toward Tenbrink. It might have been unfair for HLI to terminate Anthony Sacco because of the sins of his brother, but his termination cannot be found to have violated the STAA because a preponderance of the evidence does not prove that his protected activity played any contributory role.

IV. Conclusion

David Sacco and Anthony Sacco engaged in activity protected by the STAA with HLI's knowledge, and their employment was thereafter terminated. However, as a preponderance of the evidence fails to establish that either Complainant's protected activity was a contributory or motivating factor in the termination decisions, their complaints under the STAA must be dismissed.

V. Order

The complaints filed by David Sacco and Anthony Sacco are **DISMISSED**.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

