

U.S. Department of Labor

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Issue Date: 21 January 2010

CASE NO.: 2009-STA-00032

IN THE MATTER OF

**WILLIAM L. PECK,
Complainant**

Vs.

**HAPPY TRAILS, LLC,
Respondent**

Appearances:

**William L. Peck.,
Pro Se**

**Robert J. Inger, Esq.,
On behalf of Respondent**

**Before: Clement J. Kennington
Administrative Law Judge**

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (Act) of 1982, as amended and recodified, 49 U.S.C. § 31105 and the implementing regulations at 29 C.F.R. § 18.1 *et seq.* (2001). Under Section 31105(a) of the Act, a person is prohibited from discharging, disciplining, or discriminating against an employee regarding pay, terms, or privileges of employment because the employee has made a complaint “related to a violation of commercial motor vehicle safety regulations or refuses to operate a vehicle because to do so would violate a regulation, a standard, or order of the United States related to commercial motor vehicle safety, or health, or the employee has a reasonable apprehension of serious injury to the employee or public because of the vehicle’s unsafe

condition.” Under Section 31105(a)(2), reasonable apprehension is defined as that which a reasonable employee, in the circumstances then confronting said individual, would conclude to be unsafe so as to establish a real danger of accident, injury, or serious impairment to health, provided that employee sought, but was unable to obtain, correction of the unsafe condition.

The Act protects employee complaints about vehicle-safety issues ranging from voicing concerns to one’s employer, to the filing of formal complaints related to commercial motor vehicle safety. 49 U.S.C. § 31105 (a)(1); *see Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 3-8 (ARB Feb. 28, 2003). The Act also protects two (2) categories of work refusals commonly referred to as “actual violation” and “reasonable apprehension.” 49 U.S.C. § 32205 (a)(1), (B)(i)-(ii); *Artis Anderson v. Jaro Transportation Services et al.*, ARB No. 05-011, ALJ Nos. 2004 STA-2, 2004-STA-3; *Ass’t Sec’y v. Consol. Freightways (Freeze)*, ARB No. 99-030, ALJ No. 98-STA-26, slip op. at 5 (ARB Apr. 22, 1999). For an employee to be protected under the complaint clause, it is necessary that complainant be acting on a reasonable belief regarding the existence of a violation. *Clean Harbors Env’tl. Servs., v Herman*, 146 F.3d 12 (1st Cir. 1998). For an employee to be protected under the actual violation category, the record must show that the employee’s driving of a commercial vehicle would violate a pertinent motor vehicle standard. 49 U.S.C. 31105 (a)(1); *Freeze*, slip op. at 7. Under the reasonable apprehension category, an employee’s refusal to drive is protected only if based on an objectively reasonable belief that operation of a motor vehicle would pose a serious injury to the employee and the public, and the employee has sought, but been unable to obtain, correction of the unsafe condition. 49 U.S.C. § 31105 (a)(2); *Young*, slip op. at eight (8); *Freeze*, slip op. at 7.

I. PROCEDURAL HISTORY

Procedurally, the record shows a series of three (3) complaints filed by Peck with the Federal Motor Carrier Safety Administration, Texas Department of Public Safety and the Secretary of Labor on September 12, 2008 and January 5, 2009. Peck’s first two (2) complaints filed with the Federal Motor Carrier Safety Administration and Texas Department of Public Safety on September 12, 2008, alleged that Respondent suspended him for two (2) weeks on September 12, 2008, because he refused to falsify his driving logs, and forced him to drive in excess of seventy (70) hours in a eight (8) day period or in a fatigued state thereby exposing his passengers to unsafe driving conditions, (CX-1; CX-6, CX-7).

On January 5, 2009, Peck filed a third complaint with the Secretary of Labor, concerning his suspension for refusing to violate motor carrier regulations by driving in excess of seventy (70) hours in a eight (8) day period, followed by his discharge on October 16, 2008, on pretextual grounds of allegedly making unauthorized stops at a TA Travel Center of America near Denton, Texas, rather than the customary stop in Waco, Texas and abandoning husband and wife passengers in Austin, Texas, without insuring the wife’s safety, despite the fact she was confined to a wheel chair in violation of Respondent’s policy relative to abandoning passengers. On March 12, 2009, the Regional Supervisor for OSHA dismissed Peck’s OSHA complaint, finding that a preponderance of evidence indicated that Peck’s protected activity was not a contributing factor in Complainant’s suspension and termination. On April 1, 2009 Peck, appealed OSHA’s finding resulting in the instant hearing on August 18, 2009 in San Antonio,

Texas. At the hearing, Peck testified, called six (6) witnesses and introduced twenty-one (21) exhibits, all of which except CX-11 and CX-19 were admitted during the hearing. CX-11 is a required monthly summary of Peck's July 2008 driving logs. (Tr. 57). CX-19 is a transcription of a telephone conversation between Peck and driver Joe Thornton. Having considered both documents, I find it proper to admit Peck's log summary (CX-11) as part of his official logs, but find no reason to admit CX-19, as it is unreliable hearsay and not probative of any pertinent allegation against Respondent regarding Peck especially when Thornton's testimony is considered. (Tr. 9, 11, 12, 33, 138-144).¹ Respondent was represented by counsel, who called three (3) witnesses and introduced seven (7) exhibits.

Following the conclusion of the hearing, Respondent's counsel in his brief, denied for the first time, any knowledge by Respondent prior to Peck's discharge of Peck's action in filing a complaint with either the Federal Motor Carrier Safety Administration (FMCSA) or the Texas Department of Public Safety (TDPS), concerning Respondent's suspension of him for refusing to falsify driving logs, driving in excess of the seventy (70) hour rule or driving in a fatigued state. In order to allow the parties the opportunity to fully address these issues, I permitted the parties in a telephone conference call of November 3, 2009, to submit additional exhibits, including documents from the FMCSA or the TDPS showing the date of service on Respondent of said complaints. Neither party was able to produce documents from any agency reflecting dates of service. Peck, however, did secure additional sworn statements from Alfredo Vargas, who testified at the initial hearing on August 19, 2009, and from Efren Garza who was listed as a witness by Peck, but was unable to attend the hearing.

In his statement dated November 7, 2009, Vargas who was last employed as a bus driver for Respondent from May through the end of September 2009, stated:

On September 22, 2008, I called Happy Trails Office and told Sammie Bryant that I quit and that Bill Peck and I had filed formal complaints to D.O.T. and F.M.C.S.A. about hours of service violations. I also called Paul Huang and told him also that I quit and of the formal complaints Bill Peck and I made to D.O.T. and F.M.S. C.A. I also called Efren Garza and stated to him that I just quit and told him also of the complaints that Bill Peck and I made to D.O.T. and F.M.C.S. A. of the violations. (CX-20, p. 3).

Efren Garza in his statement of November 7, 2009, stated:

I started my employment with Happy Trails in February 2004. My job description was supervisor and dispatcher Houston and San Antonio trails and also part of management staff to include hiring of new employees.

¹ The Regional Supervisor found without objection from Respondent that Respondent was a person within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105. Further, Respondent was a commercial motor carrier within the meaning of 49 U.S.C. § 31101, engaged in the interstate transportation of passengers on highways in Texas and Oklahoma, employing Claimant as a driver directly affecting commercial motor vehicle safety.

During the latter half of September, 2008, I received a phone call from Alfredo Vargas. He was very upset in regards to continued violations and he is quitting the company. He stated because of continued pressure from Armando Navarrete to violate hours of service rules and of other harassments that Bill Peck and himself had filed complaints with D.O.T. and F.MCS.A. Alfredo also stated that he had called Samie Bryant and Paul Haung [Huang] and advised of his quitting, the circumstances and that he and Bill Peck filed complaints to D.O.T and F.M .C.S.A. I called Paul Hauang and advised of complains and that he needs to handle situation. (CX-20, p. 4).

Respondent filed two (2) exhibits (RX-5; RX-6), in which it stated that Respondent was not able to locate formal complaints filed by Peck, served by either the Department of Transportation or the Department of Public Safety. However, Respondent admitted receiving a notice of formal complaint filed by Peck from OSHA dated January 6, 2008, which was sent on January 6, 2009. Further, Respondent received notices of other complaints filed by Peck with EEOC and the TWC, but gave no dates of service or provided copies of such. (RX-5). In response to Peck's submissions, Respondent claimed that Vargas' statement was simply an attempt to bolster his own hearing testimony, and Garza's statement was given after he left Respondent's employment in June 2008. (RX-6).²

II. BACKGROUND

Peck is a sixty-two (62) year old male who worked as a line haul bus driver for Respondent from September 2007, to October 16, 2008. (Tr. 24). Peck drove a bus from San Antonio, Texas, to the Windstar Casino in Thackerville, Oklahoma, a round trip distance of six hundred eighty-five (685) miles. (Tr. 31) Respondent normally ran a four (4) driver team with two (2) buses running in the day and two (2) buses running at night. (Tr. 25). At the time of Peck's suspension, Respondent was operating with only three (3) drivers, requiring drivers to alternate day and night runs. Peck reported to supervisor and dispatcher, Armando Navarrete, and began his work day at 5:30 am with a pre-trip inspection. (Tr. 27, 28, 115). Peck made his first stop at the Super Wal-Mart in San Antonio at 6:15 am. From there, he made six (6) additional stops, arriving at the casino at 1:20pm.³ After disembarking passengers, Claimant would then fuel bus at a local truck stop and return to the casino by 2:15 pm., for a total of eight and three-quarters (8.75) hours on duty. The return trip took eight (8) hours (CX-2).

The applicable Federal Motor Carrier Safety Administration regulations are those set forth in Subpart A, §§ 392.1 (Scope of the rules); 392.3 (Ill or fatigued operators); 395.3 (b) and (b)(2); and 395.3 (Maximum driving time). 392.1 (Scope of rules) provides:

Every motor carrier, its officers, agents, representatives, and employees responsible for the management, maintenance, operation, or driving of

² Unlike Peck, Vargas filed no complaint with OSHA concerning his quitting Respondent.

³ Like Peck, Vargas was one of the four (4) drivers (subsequently reduced to three (3)) assigned to the Windstar Casino run that Navarrete instructed to falsify or play with logs so as not to show actual non-driving duty time. (Tr. 101-04, 110-14)

commercial motor vehicles, or the hiring, supervising, training, assigning or dispatching of drivers, shall be instructed in and comply with the rules in this part.

Among those rules is § 392.3 (Ill or fatigued operators) which provides:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. However, in a case of grave emergency where the hazard to occupants of the commercial motor vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the commercial motor vehicle to the nearest place at which that hazard is removed.

(CX-1).

Maximum driving time for passenger carrying vehicles, § 395.5 (b) and (b)(2) provides:

(b) No motor carrier shall permit or require a driver of a passenger-carrying motor vehicle to drive, nor shall any driver drive a passenger-carrying motor vehicle regardless of the number of motor carriers using the driver's services, for any period after.....

(b)(2) Having been on duty seventy (seventy (70)) hours in any period of eight (8) consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

III. WITNESS TESTIMONY

Complainant

Peck testified that he did not drive to the Winstar casino on September 11, 2008, because he was too exhausted having driven twenty-one (21) days straight, which resulted in his falling asleep at the wheel and thus endangering both himself and his passengers. Peck was scheduled to depart at 6:30 p.m. on September 11, 2008, and after trying to reach the dispatcher, Armando Navarrete for several hours, he eventually contacted him by phone at 10 a.m. (See exhibit 1 attached to Complainant's brief, showing Peck's call to Respondent at 10:15 am on September 11, 2008). Peck told Navarrete he did not have enough hours to complete eight (8) the trip and was too fatigued to drive having fallen asleep while driving on the previous trip. Peck testified he had already logged sixty-seven (67) hours in the previous eight (8) days, and that if he drove to the casino on the same day he would have to add at least six (6) additional hours for that day, which would push him over the seventy (70) hour limit.⁴ Navarrete replied "ok" and hung up.

⁴ Peck's logs actually showed a total of sixty-four-and-a-half (64.5) hours by September 11, 2008, which was due to an error in recording hours on September 6, 2008. Peck incorrectly recorded on one-and-a-half (1.5) hours on September 6, 2008, instead of four (4) hours, which would have given him a total of sixty-seven (67) hours, excluding the additional trip he refused. (CX-5; Tr. 32-36, 73). Had he made this trip, Peck would have accumulated on September 11, 2008 at least an additional six (6) hours of on duty driving and non driving time because of necessary

The following morning Navarrete told Peck he was suspended for two (2) weeks for taking the day off. (Tr. 41).

On September 12, 2008, Peck filed a complaint with the Texas Department of Public Safety and the Federal Motor Carrier Safety Administration, concerning Navarrete's action in requiring him to work excess hours, not providing relief drivers, and instructing him to falsify logs. On September 22, 2008, Navarrete called and asked Peck to come back to work since Respondent was running short of drivers due to hurricane runs. Peck returned to work and continued to do so until October 16, 2008, when Navarrete called and told him he was fired for stopping at the Denton TA truck stop and for allegedly abandoning a couple (names unknown) on October 4, 2008, in Austin. Allegedly, the woman in question was a disabled, wheel chair bound passenger, who Peck left with her husband at a Wal-Mart shopping center bus stop in North Austin.

Peck denied any abandonment and testified that the couple in question had been drinking and arguing both up to and from the casino. On the return trip, when Peck arrived at the North Austin stop, the man got off the bus with other passengers. Peck then proceeded to drive off. There was no waiting period at this stop, but the woman told Peck he had to wait because her male companion was going to Wal-Mart. At that point, Peck began to blow his air horns to get the male passenger's attention because he had thirty (30) other passengers he had to get to their destinations and Peck was already running late. The male passenger continued on, whereupon Peck began to pull away from the bus stop.

As Peck was pulling away, the woman demanded to get off the bus. In turn, Peck pulled up to a bank area that had a walkway, got her wheel chair and said that if she wanted to get off, she was on her own. She replied "ok" and got off at about 6:30 pm. An hour or so later, Navarrete called and said some people were complaining about Peck abandoning them. Peck explained he had not abandoned them, but rather they wanted to, and did, get off the bus. Peck further told Navarrete the couple had been drinking and arguing. Navarrete said the couple had called the police, to which Peck replied that he would be glad to talk with the police and explain what happened. When Peck returned, another driver took the bus back to Austin, picked up the couple and returned them to the casino. Navarrete met the bus in Austin, after which he called Peck and told him the couple was on drugs, incoherent and barely able to walk, and that Paul Huang would take care of it. About three (3) or four (4) days later, Navarrete called and said the couple had complained about their treatment to the casino and Huang was concerned about losing his contract with the casino. Accordingly, Peck was fired. (Tr. 42-51, 62-68).⁵

pre-trip inspection, for a total of more than seventy (70) hours under either scenario of an existing, accumulated sixty-four-and-a-half (64.5) hours, or sixty-seven (67) hours on duty, in violation of the eight (8) day, seventy (70) hour rule. (Tr. 40).

⁵ Although Huang attended the hearing, he never testified in this matter. On October 7, 2008, Tina Harris, Winstar Casino Bussing Manager, sent an e-mail to Huang, advising that on Saturday, October 4, 2008, the bus driver (Peck) did not allow passengers to get off the bus to use the bathroom except outside of Denton, Texas, and that when a gentleman got off the bus in Austin to use the bathroom, he (Peck) left the man and his wife behind at that bus stop. Harris suggested the bus company come up with a plan of action that would allow other bathroom rest stops when the bus bathroom became unusable. (RX-4). Peck addressed WinStar's complaint from business manager Tina Harris concerning non-functioning bathroom on a Saturday bus. Peck testified he always operated with functioning bathrooms and that he made a routine stop in Denton, Texas for customers to eat and take a bathroom break at the Taco Bell and travel center. Further, he received no complaints about any man needing to get off in Austin to use the bathroom. (Tr. 58-60). Further, Peck was instructed on northbound trips to the casino not to stop at a TA (Travel America) truck stop located about thirty-five (35) miles south of the casino. On return trips, there were no stop restrictions at this casino. (Tr. 69). In fact, all the other drivers stopped the same TA truck stop.

Concerning the falsification of logs, Peck testified that Navarrete asked him to make back-to-back trips to the casino where he would come in at 4 a.m. and go out at 6 p.m. In order to make the second trip appear legal, Peck would push the second trip out eight (8) hours so he would not appear over the seventy (70) hour limit (CX-8; Tr. 54, 55). As a result of the back-to-back trips, Peck ran over the seventy (70) hour limit on at least six (6) occasions in July 2008. When Peck approached Navarrete about excess hours, Navarrete told him to make the assigned trip but "...shave the hours on the logs." (Tr. 57).

Concerning the North Austin incident, Peck further testified Navarrete knew or should have known that Peck did not abandon the couple in question. Rather he tried to get the male passenger back on the bus. When this was ignored, the female passenger demanded to get off the bus. Peck agreed to do so and gave her a wheel-chair, which she carried. Peck moreover drove past fuel pumps to let her off at a bank area that had a walkway.

On cross, Peck admitted falsifying his logs since September 2007 on instructions from Navarrete. (Tr. 74). Further, when declining the trip on September 11, 2008, he told Navarrete he did not have the hours and was too tired and had been falling asleep while driving. (Tr. 75). Further, the couple incident occurred at least a week before his discharge. (Tr. 61). The male passenger used the bus bathroom without any apparent problem. (Tr. 62).

B. Mario Mujica

Mujica was a passenger on Respondent's bus to the Winstar Casino, arriving on October 1, 2008, and departing on October 4, 2008. (Tr. 88). Mujica testified he left the casino several hours late and like other passengers was anxious to get home. He and other passenger had used the restroom which was functional. While in Austin, he heard a woman tell the man she was riding with he could not leave the bus. The man ignored her and got off the bus. The woman came up to Peck and told him he could not leave because the man she was with had not returned to the bus. The man and woman had been arguing since they left the casino and both appeared inebriated. Peck tried to get the man's attention by honking several times, but the man kept walking. Peck told the woman he had to go. In turn, she asked to be let off the bus. Peck honored her request driving the bus past fuel pumps and let her off with her wheel chair which Peck carried to her and which she never used at the casino. The woman walked off, joined her male companion, and the bus departed without incident. Further, leaving the casino, Mujica and another passenger asked Peck to stop at the Taco Bell TA truck stop in Denton. About 90% of the passengers got off the bus in Denton. (Tr. 89-91). The incident in Austin occurred at about 6 p.m., while there was still daylight. After departing the bus, the woman carried her wheel chair in her hands as she walked back to the Wal-Mart. (Tr. 93).

C. Alfredo Vargas, Javier Solis, and Joseph Thornton

Vargas was employed as a bus driver for Respondent for four (4) months in 2007, and from May 2008, through September 30, 2008, when he quit. (Tr. 95). As a bus driver on a return trip south bound from the Winstar Casino, he stopped in Denton at the TA stop to allow passengers at their request to use the bathroom and eat. (Tr. 96, 97). When driving north bound to the Casino, the drivers were not to stop in Denton (Tr. 98). Vargas testified that in September 2008 when Peck was suspended, Vargas complained to Navarrete about being required to drive

two (2) or three (3) hours more than allowed. Navarrete replied Vargas could alter his logs and not report the exact time he spent on pre-trip inspections or when driving or on duty at the casino, showing such time as off duty or resting. Vargas did that every time he arrived at the casino in order to keep his job. (Tr. 100-104, 114).

On cross, Vargas admitted that Respondent employed only three (3) as opposed to four (4) or five (5) drivers on the casino run requiring him to put in up to twelve (12) hours per day arrive on alternating schedules causing fatigue. (Tr. 115, 116).

Javier Solis, a former bus driver for Employer who quit about five (5) weeks before the hearing, testified he made the casino run from San Antonio to Thackerville and the return trip. During that run, he picked up a couple that was argumentative and appeared drunk. On one occasion, the couple began to fight. Solis attempted to quiet the man down and in the process drove too fast and was pulled over by the police before arriving in Fort Worth. On another occasion Navarrete called the Austin police and the couple got off the bus without incident. (Tr. 127-130, 132). Navarrete had Solis return the couple to the casino one time and on other occasions, directed Solis to return the belligerent couple to the place where he picked them up. (Tr. 135, 136).

Solis testified that he and Respondent's drivers from Houston frequently stopped at the Denton TA stop upon leaving the casino apparently without incident. Further, Navarrete instructed him to "play" with his log book by not recording time spent driving or reducing the time spent on duty, by recording such time as off duty so as not to exceed the seventy (70) hour limit. (Tr. 130, 131).

Respondent called Thornton as its first witness. Thornton testified he had worked for Respondent for four (4) years and was now classified as a senior driver out of San Antonio. As a driver, he has driven the same route from San Antonio to Thackerville. (Tr. 149). Thornton says that the trip from San Antonio to Thackerville with stop takes about six (6) hours. (Tr. 150). Thornton testified that the driver is responsible for the log's accuracy. When driving to Thackerville, a driver has the discretion to take one rest stop usually about half the distance to Thackerville, in Waco, for about twenty (20) minutes. (Tr. 150-52). On the return trip, Thornton would usually stop in Denton at TA as did Peck because it was a great stop with multiple bathrooms and good driver remuneration from the TA. (Tr. 153-55, 163).

With regard to Peck's logs, Thornton noted that Peck's logs for September 1 and 2, 2008, showed more than seventy (70) hours of on duty time (driving and non-driving time) in the past eight (8) days in violation of seventy (70) hour rule. (Tr. 160-62). On cross, Thornton described driving time as, "...all time spent at the driving controls of a commercial motor vehicle in operation" (Tr. 165). In contrast, Thornton described on duty non driving times as "...all time from the time a driver begins to work or is required to being in readiness to work until the time a driver is relieved from all responsibility for performing work." (Tr. 166). Thornton further testified that drivers running out of San Antonio were directed by Respondent not to stop going north to TA, but apparently drivers dispatched by Houston were allowed to stop there going both to and from Houston, and Navarrete was made aware of this. (Tr. 169-71).

Thornton also testified Respondent's owner, Paul Huang, told him, and he relayed to Mrs. Peck, that if individuals came into court and gave false testimony, they would not get away with it and such could be detrimental to the drivers (Tr. 141-42). Further, he told Mrs. Peck that he had been contacted by other drivers and they were on a witch hunt.(Tr. 143). Huang also told Thornton that even though he was making less run every two (2) weeks, he could not secure a driving job with another company driving to the casino because that would be working for the competition.

D. Armando Navarrete

Armando Navarrete, a dispatcher/supervisor employed by Respondent for the past seven (7) years and two (2) months, testified that on September 12, 2008, at about 6:45 p.m., he received a telephone call from a male passenger claiming he been left behind at the Wal-Mart truck stop in Austin and wanted Navarrete to inform his wife who was still allegedly on the bus. Navarrete called Peck and asked what had happened. Peck allegedly replied the male passenger was too big to use the bus bathroom and he (Peck) allowed him to get off the bus to use the bathroom, but did not wait for his return before leaving Austin in accord with company policy. (Tr. 173-174). Further, Peck had apparently abandoned his wheel-chair bound wife at the Austin stop when he let her off and did not wait for her to return to the bus. In turn, the male passenger allegedly called the Austin police and filed a missing person report when he was unable to find his wife at the Austin stop. Navarrete talked to the Austin police and gave him Peck's phone number. Later the male passenger called back and told Navarrete his wife had been found. Allegedly it took two hours to find the female passenger. During his telephone call with Navarrete, the male passenger allegedly threatened to file charges against Peck, Navarrete, and Respondent. (Tr. 175).

According to Navarrete, Respondent had a policy of not leaving anybody behind, especially a handicapped person because of liability concerns and to find a stop designated for them and try "... to make the best accommodation for them, not to leave on the side of the road...." (Tr. 176). Navarrete said he met with the couple the following date and arranged at their request a free ride back to the casino. Navarrete saw the wheel-chair in question, but never saw her use it (Tr. 177). Navarrete accused Peck of being negligent in failing to wait for the customer to return to the bus and letting the female passenger on the side of the road. (Tr. 178-79). Further, Peck described the male passenger as around six (6) feet four (4) inches tall and between two-hundred-and-fifty (250) and three-hundred (300) pounds, which could make it difficult to use the bathroom bus. (Tr. 180). Navarrete waited about a week and a half later to discharge Peck because Peck ignored his warnings not to stop at the Denton TA stop at all either coming to or going from the Casino because of customer and casino complaints. (Tr. 180-81).

Navarrete described the trip to the casino as starting at 6 a.m. and ending with the driver arriving at the casino, unloading passengers, logging off duty , parking the bus, and going to the hotel. (Tr. 182). Navarrete described the trip from San Antonio to Thackerville as taking between six-and-a-half (6.5) to seven (7) hours. (Tr. 183-84).

Concerning Peck's suspension Navarrete testified that on September 11, 2008, at about 4 p.m. or 5 p.m., Navarrete received a call from Peck saying he could not make the run because Hurricane Ike was about two (2) days out and he had to protect his property in San Antonio. Navarrete said the hurricane was expected to hit Houston and not San Antonio. Peck allegedly replied he still had to protect his property and could not work. Navarrete said, "okay, there's nothing I can do." (Tr. 185). Navarrete cancelled the run since Peck was supposed to leave at 6 p.m. and Navarrete did not have time to get another driver. (Tr. 187). In cancelling the run, Respondent lost money. (Tr. 186).

Navarrete denied telling drivers to violate any DOT rule even operating on a three (3) driver rotation. (Tr. 188-189). Navarrete admitted Peck's logs indicated on duty time in excess of seventy (70) hours on September 1 and 2, 2008, but claimed he never knew nor did Peck ever tell him he was running out of hours.⁶ Further, he apparently never did any calculation of Peck's hours and never had his log books to do any calculation.(Tr. 190-91). Navarrete suspended Peck for the sole reason he refused to do the run. (Tr. 195).

On cross, Navarrete admitted not knowing the names of wheel-chair couple, or having any statement from them about their alleged treatment by Peck; never seeing her using the wheel chair, but allegedly seeing her with a walking impairment; having no written policy about treatment of disabled passengers; and never asking any passengers what either Peck or the alleged wheel chair couple did. (Tr. 203-210). Further, the driver would normally fuel the bus in Thackerville as part of their work duties, yet Navarrete admitted to telling drivers to log off when fueling the bus. (Tr. 214-216, 220).

E. Sammy Bryant

Sammy Bryant, a current dispatcher/supervisor and past driver of ten (10) years for Respondent, testified he drove the San Antonio to Thackerville casino route on two occasions. Bryant reviewed Peck's logs and indicated they lacked or did not show pre- or post-trip inspections that could take up to thirty (30) minutes each. (Tr. 227). The logs further do not reflect fueling time. Bryant testified Peck did not records correct hours such that on September 9 2008, he showed fifty-seven-and-a-quarter (57.25) hours on duty last seven (7) days with twelve-and-three-quarter (12.75) hours available tomorrow (seventy (70) hours minus the total hours on duty last seven (7) days), and sixty-one-and-a-quarter (61.25) on duty last eight (8) days. (Tr. 233). Bryant testified that Claimant had enough hours to make the trip on September 12, 2008, but in the same breath, said Peck had been padding or adding to his hours over what he actually put it. Bryant denied authorizing drivers to stop at the TA stop. In fact, Bryant said Respondent had no customers who wanted to stop. (Tr. 234). On cross, Bryant said passengers were supposed to be instructed by the drivers to use the lavatory only for urination. (Tr. 236).

IV. ISSUES

A. Whether Peck engaged in protect activity?

⁶ Peck turned in his logs to Navarrete every two (2) weeks. (Tr. 245, 251)

- B. Whether Respondent Suspended or Discharged Peck in Whole or Part for Engaging in Protected Activity?
- C. Whether Respondent proved by a preponderance of evidence that it would have suspended and/or terminated Peck in the absence of his protected refusal to drive on September 11, 2008?
- D. Relief?

V. DISCUSSION

A. Peck's Protected Activity

For Peck to prevail, he must prove, by a preponderance of the evidence, that he: engaged in protected activity; that Respondent's supervisor, Navarrete, was aware of the protected activity; that Navarrete discharged, disciplined, or discriminated against him; and that the protected activity was the reason for the adverse action, or that there was a causal connection between the protected activity and the adverse action. See *Anderson, supra*, and other cases cited at *Anderson, fn. 19*; *BPS Trans. Inc. v United States Dep't of Labor*, 160 F.3d 38 (1st Cir, 1998); *Yellow Freight Sys. Inc. v Reich*, 27 F.3d 1133, 1138 (6th Cir 1994); *Regan v. National Welders Supply*, ARB. No. 03-117, ALJ. No. 2003-STA-014 (ARB Sept 30, 2004).

In this case, I find Peck to be a credible witness, based not only on his demeanor at the hearing, but his support from fellow witnesses, including: passenger Marlo Mujica; and former drivers Alfredo Vargas and Javier Solis. Peck testified Navarrete directed him to falsify logs to comply with DOT requirements, and ignored his protests on September 11, 2008, that he was too fatigued to drive or that he lacked the necessary hours to drive. Navarrete directed Peck and Vargas to falsify logs.

Navarrete's lack of concern about drivers exceeding seventy (70) hours in a eight (8) day periods was manifest by his failure to direct Peck not to drive and/or work excess hours when his logs showed him doing so on July 2008, when he drove and/or worked excess hours on July 12, 21-25, and 27, 2008, and by his failure to attempt any calculation thereafter. (CX-5). Respondent contends Peck was padding or adding excess hours to his logs or improperly recording such hours. However, if he was doing so Navarete never directed him to correct such action. Indeed, Navarrete had no reason to do so since his primary objective was not compliance, but having three (3) drivers do the work of four (4) drivers.

Moreover, Peck had no reason to pad or add hours since he was paid by the trip. Indeed, Peck had apparently twenty-one (21) continuous days prior to September 12, 2008, and in July 2008, had worked every day due to the driver shortage and as a result was falling asleep at the wheel when working the three (3) driver run to the Winstar Casino. Peck was fatigued and such fatigue was endangering his passengers. Peck's complaints to Navarrete about lack of hours and fatigue constituted a protected activity. *Anderson, supra*, slip op. at 7; *Ass't Sec. of Labor for Occupational Safety and Health and Peter Mailloux v. R and B Transportation, LLC*, ARB No 07-084; ALJ No. 2006-STA-012 (ARB June 26, 2009).

Peck described his day starting at 5:30 a.m., when he arrived at the yard for a pre-trip inspection. While it is not possible to tell the exact hours Peck worked prior to his suspension because of his failure to accurately records fueling time and pre- and post-trip inspections, it is possible to ascertain or arrive at a conservative approximation of such time by taking Peck's credible testimony and exhibits CX-4, CX-5, and RX-2 and by adding an additional thirty (30) minutes to each trip (fifteen (15) additional minutes for each pre- and post-trip inspections or eighteen (18) inspections multiplied by fifteen (15) or two-hundred-seventy (270) minutes or four-and-a-half (4.5) hours = sixty-seven (67) + four-and-a-half (4.5) = seventy-one-and-a-half (71.5) hours) to arrive at another violation of the seventy (70) hour rule as of September 11, 2008, without even considering adding additional hours to September 11, 2008, had Peck accepted the additional assignment and began travelling at 6:15 pm on that day.

B. Peck's Suspension and Discharge

Concerning Peck suspension and discharge, the credible testimony from Peck and Vargas, shows by a preponderance of evidence that Peck was suspended because he refused to drive in violation of the seventy (70) hour rule and because he was legitimately fatigued and had fallen asleep at the wheel due to at least twenty-one (21) days of continuous driving, with three (3) drivers doing at least the work of four (4) drivers. As such, his suspension was for his protected activities under both the actual violation and reasonable apprehension subsections of the Act and thus a violation of the Act.

In like manner, I find by a preponderance of credible testimony from Peck's discharge was not because he mistreated passengers or made unauthorized stops at the Denton TA truck stop or because of casino complaints. Rather, the credible testimony of Peck and passenger Mujica show the couple in question, which never apparently gave any written statement to either Respondent or the Austin police, were never abandoned by or mistreated by Peck. Peck let the female passenger off the bus at her request and at an appropriate place after attempting to get the attention of her husband. Although she had a wheel-chair, she never used it, and in fact, upon leaving the bus, she carried it. There is no credible evidence of negligence by Peck and Respondent knew it or should have know had they made any attempt to contact passengers to verify what if fact happened.

There is also no credible evidence to show that Peck ignored Respondent's instruction of not stopping at the Denton TA truck stop enroute from San Antonio to Thackerville. Rather, he stopped there on the southbound trip from Thackerville to San Antonio as other drivers including Thornton has done with the approval of Respondent's dispatchers. To the extent Navarrete and Bryant denied such approval, I discredit it because of the apparent widespread use of that TA truck stop by Respondent's drivers with no apparent reprisals.

Regarding the complaint from Tina Harris concerning the driver of bus 852 not letting passengers get off the bus to use the bathroom since the bus bathroom was not functional, Peck credibly testified that bus bathroom was always functional and that the couple in question never expressed any desire to use the restroom facilities in Austin. Further, Respondent provided no reason for waiting twelve (12) days from the alleged couple incident of October 4, 2008 and

Peck's discharge on October 16, 2008, if in fact Respondent was concerned about Peck's conduct which it knew about on October 4, 2008, and certainly by October 7, 2008, the date of Ms. Harris' e-mail to owner Paul Huang.

C. Respondent's Defense

Concerning Peck's suspension, Respondent contends Peck had enough hours (13.75 hours) to complete a 13 hour trip. Peck correctly notes Respondent ignores the fact that the trip was to commence on September 11, 2008, when as of that day he had already accumulated sixty-seven (67) hours. With a trip commencing at 6:15 pm and lasting even six (6) hours by Respondent's estimate Claimant would have accrued an additional five-and-three quarter (5.75) hours which would have put him over the seventy (70) hour maximum. Even with a lower estimate of sixty-four-and-a-half (64.5) hours, Peck would have accumulated more than seventy (70) hours. However Peck's logs are problematic, as Respondent argues because he was not reporting exact times for pre- and post-trip inspections, which would have increased his reported hours even more. Contrary to Bryant's testimony, Peck could and did work twenty-one (21) day due to Navarrete's working three (3) drivers to do what at least four (4) had done, and telling them not to report all hours on duty. The fact is Navarrete did not care if Peck and Vargas were fatigued as long as they made scheduled runs. Navarrete did not keep up with driver time because had he done so and cared about DOT regulations, Peck would not have worked or recorded the time he did. Peck did not have to wait until he was rested after the September 11, 2008 run because he was falling asleep at the wheel even with the rest at the casino.

Concerning Peck's discharge, Respondent claims Peck was negligent in the manner he handled the unnamed and unruly couple, and violated Respondent's policy of not stopping at the TA truck stop in Denton. The credible evidence indicates those reasons are false and pretextual, in that Respondent did not restrict stopping at Denton on a return trip from the casino. Navarrete knew of drivers stopping there on their return trip to San Antonio and took no action to stop it. Navarrete knew or should have known that Peck was not negligent in the manner he dealt with the unnamed and unruly couple. Hence, to assert negligence on Peck is too assert a false reason for his discharge.

As the ARB stated in *Anderson v. Jaro Transportation Services et al.* ARB Case No. 05-0111, ALJ Case Nos 2004-STA-2 and 2004-STA-3, discrimination may be inferred when a whistleblower shows by a preponderance of evidence that employer's reasons for taking adverse action are false. In this case, the preponderance of credible evidence shows the reasons advance by Respondent are false and hence in viewing of the time of the suspension and discharge, the later event which came after knowledge of the complaints filed by Peck, I infer and find discrimination in Respondent's suspension for Peck's protected activity in refusing to violate driving hour regulations and driving in a fatigued state, and in discharging Peck for filing complaints and refusing to violate said regulations. Respondent's argument that it would have suspended or discharged Peck in any event notwithstanding his protected activity is thus without any basis in fact even when considering Harris' complaint which through no fault of her own was based upon second hand and largely inaccurate information.

D. Relief (Reinstatement, Back pay, Compensatory Damages)

When a complainant is suspended or discharged in violation of the STAA said individual is generally entitled both to reinstatement and back pay. Back pay in this case is due Peck for the time period of Peck's suspension (September 11-21, 2008), plus from the date of his discharge forward (October 16, 2008 and continuing), until Respondent makes an bona fide, unconditional offer of reinstatement, or in very limited circumstances when an employee rejects a bona-fide offer. As a successful STAA complainant Peck is also entitled to pre- and post-judgment interest on a back pay award. However, Peck has the duty to exercise reasonable diligence to attempt to mitigate back pay damages. Respondent on the other hand has the burden to prove Peck failed to mitigate. *Assistant Secretary of Labor for Occupational Safety and Health et al v. R & B Transportation, LLC et al*, ARB Case No. 07-084, ALJ Case No. 2006-STA-012 (June 26, 2009); *Johnson v. Roadway Express, Inc.* ARB No. 99-011, ALJ No. 1999-STA-56 (ARB Mar. 29, 2000).

The instant record does not address these issues or the issue of compensatory damages for mental problems as requested by Peck. Accordingly, I recommend that the Board review and affirm the foregoing findings and then reopen and the remand the record to properly address the back pay, interest, and compensatory issues.

VI. CONCLUSION

Based upon the foregoing, I find as follows:

1. Respondent suspended Peck from September 11, 2008 to September 22, 2008 because Peck's protected activity in refusing to drive in a fatigued state in violation of Motor Carrier Safety Administration regulation § 392.3 and in excess of the maximum driving time as set for in § 395.5 (b) and (b)(2)
2. Respondent discharged Peck on October 16, 2008 because of Peck's protected activity in filing complaints under Section 31105 of the Act and his protected activity as described in paragraph 1, above.
3. Respondent shall immediately reinstatement Peck and make him whole for any loss of wages or benefits with interest as required by 29 C.F.R. § 20.58.
4. The amount of back pay, interest, loss of benefits or compensatory damages for mental anguish will be determined at a supplemental hearing to be scheduled in this matter.

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**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**

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.

The order directing reinstatement of the complainant is effective immediately upon receipt of the decision by the respondent. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).