U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 December 2010

CASE NO: 2010-STA-00022

In the Matter of:

MARVIN E. GILBERT,
Claimant**,**

vs.

BAUER'S WORLDWIDE TRANSPORTATION,
Respondent.

Appearances: **Marvin E. Gilbert,**
Claimant, *pro se*

Joshua D. Kienitz
Ryan E. Abernethy
Littler, Mendelson, P.C.
San Francisco, California
For Respondent

Before: **Russell D. Pulver**
Administrative Law Judge

DECISION AND ORDER

This claim arises under the Surface Transportation Assistance Act (hereinafter "STAA" or the "Act"), 49 U.S.C. § 31105, and the applicable regulations at Title 29, Part 1978 of the Code of Federal Regulations.[1] STAA protects employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance. Congress passed the Surface Transportation Assistance Act in order to "combat the 'increasing number of deaths, injuries, and property damage' resulting from vehicle accidents in the interstate trucking industry." *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76, 81 (2d Cir. 1994) (quoting 128 Cong. Rec. 32509, 32510 (1982)).

Marvin E. Gilbert ("Complainant") alleges that his former employer Bauer's Worldwide Transportation ("Respondent") violated the STAA by suspending him from his assigned route in

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[1] The STAA was amended by Public Law 110-053, §1536, 121 Stat *et seq* (Aug. 3, 2007) to expand its applicability and remedies.

retaliation for making internal and external complaints about the putative STAA violations and for refusing to drive a vehicle in violation of the Federal Motor Carrier Safety Administration ("FMCSA") hours of service regulations. Respondent argues that Complainant voluntarily quit his job and was taken off the schedule after he had refused to drive his assigned route.

On July 25, 2008, Complainant filed an STAA complaint against Respondent with the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA). RX 10. Following an investigation, the Secretary denied the claim finding that Respondent had not violated the Act. *Id*. A formal hearing with the Office of Administrative Law Judges ("OALJ") was held in San Francisco, California on May 19, 2010. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were admitted to record: Administrative Law Judge (ALJ) exhibits 1-6, Complainant's exhibits (CX) 1 -14 and 16-21, Respondent's exhibits (RX) 1-10.

ISSUES

I. Whether the settlement agreement entered into by Complainant is enforceable and precludes the current STAA action?

II. Whether Complainant engaged in protected activity under the STAA?

III. Whether Respondent took an adverse action against Complainant?

IV. Whether there is a causal nexus between the alleged adverse action and the protected activity?

FINDINGS OF FACT

Complainant began working for Respondent, a commercial provider of chauffeured transportation services, on August 28th, 2007. Tr. 40, RX 1-2. At that time, Respondent employed approximately two hundred drivers and had two main bus yards in San Francisco and Santa Clara, California. Tr. 30, 214. Respondent also operated two main lines of service – corporate transit and charter/retail.

In the corporate transit line of service, Respondent provided transportation for employees of Google, Levis and China Basin in the San Francisco Bay Area. RX 3. In order to service its main client, Google, Respondent employed around forty shuttle bus drivers. Tr. 40. During commute hours, Respondent's shuttle bus drivers picked up employees at different commute stops around San Francisco and transported them to and from the Google campus in Mountain View, California. Tr. 42. Under his employment contract, Complainant had to be "available to work at a minimum from 6pm Friday through 6am Sunday year round" and could be "assigned runs anytime" during those hours. RX 1. However, each Google shuttle bus driver was generally assigned a particular route and had a consistent work schedule each week. Tr. 247. At the time Complainant was hired, shuttle chauffeurs received a base pay of $15 per hour. RX 3. The pay was later increased to $15.50 per hour. Tr. 120.

Bauer's classified all of its other services as charter/retail work. It hired both part time and full time limousine drivers, and approximately 40 percent of its drivers did retail/charter work full time. Tr. 245. Charter/retail chauffeurs for Class "B" vehicles were paid $10.00 per hour plus a gratuity. RX 3, Tr. 213. The gratuity was automatically added to the customer's bill and was built into the Bauer's pricing structure. RX 3, Tr. 216. For certain types of events, retail drivers could earn up to $25 or $30 dollars per hour depending on the rate per hour that was charged for a particular vehicle. Tr. 245-46. Retail drivers also occasionally received cash tips directly from customers. These cash tips were not reflected in the paystub. Tr. 216.

It was a common occurrence for Bauer's drivers to switch between the charter and transit lines of work. Tr. 246. Respondent maintained a seniority list of drivers. Tr. 243, 246. When a particular route became available it was put up for bid. Tr. 246. Drivers with the highest seniority level got the route. *Id*. Certain drivers preferred to work in transit because it was considered more consistent then retail work. Tr. 246.

When Complainant began working for Respondent in August of 2007, he lived in Santa Clara and was assigned to a Google shuttle bus route during the week. Tr. 54. Complainant also drove retail runs on weekends. RX 6, CX 6, Tr. 120. As a Google shuttle driver he had some flexibility to reject assigned retail runs. Tr. 124. In September and October of 2007, Complainant was usually scheduled to drive a four hour shift in the morning and a five hour shift in the afternoon. *See* RX 6. On a typical week day, Complainant would get his morning timesheet at Respondent's office on the Google campus. Tr. 60. Respondent required its Google shuttle drivers to fill out two separate time cards for each shift. Tr. 42. After clocking in, Complainant would pick up the Bauer's bus at the Santa Clara parking lot, conduct a pre-trip inspection and drive up to San Francisco to pick up Google employees. Tr. 54-55. Occasionally, Complainant was assigned different pick up points around the Bay Area but his day to day schedule remained relatively consistent. Tr. 42. After completing his morning route, Complainant would park the bus at the Shoreline Amphitheater parking lot in Mountain View and would proceed to pick up his afternoon schedule at the Bauer's office on the Google campus. Tr. 55.

Like other Google shuttle drivers, Complainant generally had a six to seven hour break (hereinafter "split") between his morning and afternoon shifts. Tr. 204. In August and September of 2007, there was a flux of union activity, and Respondent changed some of its policies governing split time. Tr. 53, 56, 67-68. The evidence on the record shows that drivers were released from all responsibilities and could leave the Google campus during their split time. Tr. 198. Bauer's did not place restrictions on how the drivers spent their split time. Tr. 201. Many chauffeurs used this time to set up doctor's appointments and run personal errands. *Id.* Those who stayed on the Google campus had free access to various Google facilities such as the gym, volleyball courts, and a golf course. Tr. 197. The campus likewise had more than a dozen different restaurants where the drivers could eat. *Id*. Those drivers who wanted to return to their original reporting location could do so by catching a free shuttle which operated twice a day between the Google campus and San Francisco. Tr. 200. In order to have drivers available for dispatch, Bauer's paid drivers for two hours of their split time if they chose to stay on the Google campus. Tr. 76-77.

During his split time, Complainant would usually get something to eat, sleep on the bus or go to the Bauer's drivers lounge. Tr. 57. The drivers lounge was located on the Google campus and had tables, chairs, and a TV. Tr. 58. The lounge also had a separate room with mattresses on the floor where the employees could relax. Tr. 57-58. Because of his sleep apnea, Complainant had a hard time sleeping on the bus or in the break room. Tr. 63. After speaking with Lon Baylor, the Manager of Shuttle Operations, he received permission to go home after completing his morning routes. Tr. 64. For most of September, Complainant finished his morning run, signed off his time sheet and went home to sleep during his split time. Tr. 64. Because Complainant chose to go home instead of staying on the Google campus, he was no longer receiving compensation for the split time. Tr. 154.

In late September 2007, Complainant began to raise various concerns with Lon Baylor and Lee Stidham, the Safety Compliance Coordinator. Tr. 61. Complainant inquired why Bauer's didn't require its drivers to keep track of their hours using a "Record Of Duty Status" (hereinafter "RODS") log like most of his previous employers. Tr. 61. Stidham addressed the issue at several of the drivers meetings and explained that Google shuttle drivers were covered by the "100 Air Mile Radius Driver" exemption under §395.1(e)(1)(ii). Tr. 61, 137.

After independently conducting research, Complainant concluded that Respondent was violating the HOS regulations by incorrectly classifying split time as "off duty" time for the purposes of §395.5 and §395.1(e)(1). According to Complainant, his "on duty" hours encompassed the time which he spent on his splits in addition to the scheduled morning and afternoon shifts. Thus, Complainant believed that he was regularly scheduled for more than 15 hours of "on duty time" in violation of §395.5. CX 6, RX 6, Tr. 84. According to Complainant, Respondent was also violating the regulations by not requiring its shuttle bus drivers to fill out a RODS log under §395.8. At that time, Respondent only required its Google shuttle bus drivers to fill out two separate time cards for the morning and the afternoon shift. Tr. 42. Complainant believed that he did not qualify for the "100 Air Mile Radius" exemption because he was not "released from work within 12 consecutive hours" under rule 395.1(e)(1). Tr. 155.

In October of 2007, Complainant began to get involved in weekly drivers meetings and openly discussed the legality of Respondent's scheduling practices. Tr. 67-69, 164. Lee Stidham and Gary Bauer attended most of the meetings. Tr. 166. Among other things, the HOS regulations and the "100 Air Mile Radius" exemption were regularly discussed at the meetings. *Id*. Lee Stidham carried the regulations in his back pocket and would sometimes pull them out and read them out loud to the group. Tr. 167. According to Complainant, Stidham was always able to "contradict" his interpretation of the rules. Tr. 68. Complainant also discussed the regulations with the other drivers and tried to get them to "come up to speed." Tr. 67. Throughout his employment, Complainant regularly discussed his position on the appropriate interpretation of § 395.5 and §395.1(e) with different supervisors. Tr. 68, 106, 108. In the middle of an argument with Dispatch Manager, Charbel Sayhoun, Complainant stated that he "can go to CHP." Tr. 105-106. Complainant had previously hinted that he knew how to "report this type of stuff." *Id*.

When Complainant was hired, he wanted to drive the Google shuttle bus out of the San Francisco yard and "kept needling" his immediate supervisor, Lon Baylor, to remove the lengthy

split time from his schedule. Tr. 65, 68. In October of 2007, Lon Baylor accommodated Complainants requests by assigning him to a different route. Tr. 69-70. Complainant moved to San Francisco and began the new route on November 1, 2007. *Id*. Under the new schedule, Complainant reported to work at 4:30am and completed his shift by 2:30pm. RX 6, Tr. 70. He no longer had the six hour break between shifts but was still paid for seven to nine hours of driving time. *Id*.

Several times throughout his employment Complainant contacted Noel Columna at the California Highway Patrol (hereinafter "CHP") Motor Carrier Safety Division in Vallejo, California. Tr. 104, CX 7-10. Complainant first contacted Columna on December 14, 2007 to complain that Bauer's was violating §395.8 by not requiring its shuttle bus drivers to fill out a RODS log in addition to the time sheets. *Id*. Complainant told Columna that Respondent's shuttle drivers did not qualify for the 100 Air Mile Radius exemption because they were not released from duty within 12 consecutive hours. *Id*. About a month after the December 14th conversation with Columna, CHP conducted an inspection of Respondents records and premises. Tr. 107. At a drivers meeting on January 23rd, Bauer and Stidham informed employees of the CHP inspection results and encouraged drivers to bring problems to management's attention. *Id*. After receiving recommendations from the CHP, Respondent began requiring Google shuttle drivers who remain on the Google campus during their splits to fill out the RODS logs. Tr. 225.

On January 3, 2008, after the other shuttle drivers began to complain that Complainant was receiving preferential treatment, Lon Baylor reassigned Complainant to a different route. Tr. 71. The new route once again had a lengthy split between the morning and the afternoon shifts. Tr. 72. Under the new schedule, Complainant had a morning shift from approximately 4:30am to 9:30am, a 6 hour and ten minute split, and a 2:45pm to 7:45pm afternoon shift. RX 6, CX 6. Complainant believed that his new schedule once again required him to be "on duty" for longer than 15 hours a day in violation of Regulation 395.5(a)(2). Tr. 85. On January 3th and 4th, Complainant called Columna at the CHP to complain about the new schedule. CX 8. Between January 2, 2008 and January 28, 2008, Complainant was never scheduled to drive for more than 10 hours in any given day.

Throughout January of 2008, Complainant asked Baylor to change his schedule because it was allegedly illegal. Tr. 82. During a drivers meeting in January, Gary Bauer personally discussed the hours of service issue with Complainant. Tr. 166, 241. Complainant also purchased a drivers daily log and began to fill it out. Tr. 133, CX 20. When Complainant tried to give the log to Lon Baylor, Baylor told Complainant that Respondent did not utilize the logs for its Google shuttle drivers. Tr. 133, 137. Baylor also advised Complainant that he was incorrectly filling out the log by listing the "split time" as on-duty time. Tr. 220. On January 18th, Complainant also reported a problem with the front end of his vehicle. Tr. 171, 174-75. This problem was timely resolved by the Respondent. *Id*.

On January 28, 2008 Complainant was scheduled to drive a morning shift from 4:30am to 9:35am and an afternoon shift from 2:45pm to 7:45pm with a six hour split in between the shifts. RX 6. Overall, Complainant was scheduled for approximately 10 hours of on duty time with eight and a half to nine hours of actual driving time. RX 9, CX 6, Tr. 208. After completing his morning shift, Complaint approached Lon Baylor and informed him that he would not drive the

second half of the afternoon shift because it would take him over the 15 hours on-duty maximum allowed under §395.5. Complainant believed that since more than 15 hours elapsed between the start of his morning shift and the end of his evening shift he would be 15 minutes over the 15 hour maximum "on duty" time allowed under §395.5. Tr. 85, 175-76. Baylor told Complainant that after discussing the issue with Stidham, he concluded that Complainant's schedule complied with all the relevant regulations. Baylor once again informed Complainant that Bauer's does not count the split periods towards the 15 hour daily on-duty maximum. Tr. 205, 241.

When Complainant still refused to drive the route, Baylor found a replacement driver to take over Complainant's entire shift and told Complainant to go see Terry Price, the General Manager. Tr. 87, 210. Lon Baylor also sent an e-mail to Terry Price and Lee Stidman stating that if Complainant continued to argue about the perceived HOS violations the company should terminate his employment. RX 7. After speaking with Baylor, Prince told Complainant that he would discuss the issue with Gary Bauer. Tr. 87-88.

Although Complainant received several calls from the secretary indicating that he was not suspended, Complainant was not assigned to a different Google route and was out of work for three weeks following the incident. Tr. 181. Between January 28th and February 15th, Complainant took four retail runs in the city. He worked for a total of 7.13 hours and earned $151.22. CX 19 at 9. Complainant testified that he turned down two other dispatches for retail runs during this time period. Tr. 182-83. Complainant believed that he was suspended from his position as a Google shuttle driver. On February 5, 2008, Complainant filed another complaint with the CHP alleging violations of hours of service rules. CX 9.

On February 15, 2008, Gary Bauer scheduled an appointment to meet with Complainant. Tr. 96. Complainant waited for two hours in the lobby before Bauer called him in. According to Complainant, he felt like he was walking into a gauntlet because many of the other managers congregated around the door. Tr. 96. The actual conversation lasted for about two and a half hours. Tr. 99. According to Complainant, Bauer said that none of Respondent's managers want to work with Complainant because of how he embarrassed Lon. Tr. 97, 100. During the meeting, Bauer once again discussed the legality of Complainant's schedule and the applicable HOS regulations. Tr. 97. Bauer told Complainant that if he did not want to drive his assigned Google route, he could still work in retail. Tr. 97, 243-244. After Complainant rejected the offer to work in retail, Bauer wrote out a check and told Complainant to sign the "Agreement and Release" form. Tr. 99, 101, RX 8 at 4. Complainant read the agreement which contained several boilerplate provisions releasing Respondent from liability. RX 8. The second page mistakenly referred to Complainant as Mr. Masten. RX 8 at 2, Tr. 101-102.

Complainant testified that he was "almost in panic mode" and had nothing to say at that point. Complainant needed the money and felt like he had no choice but to sign the agreement. Tr. 101. Complainant took the $1,030.75 check and signed the agreement. RX 8, at 4.

DISCUSSION

A. Surface Transportation Assistance Act

The STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee because the employee has engaged in certain protected activities. Complainant may recover under the STAA if he satisfies the criteria under §31105(a)(1)(A) commonly known as the "Complaint Clause" or under §31105(a)(1)(B), the "Refusal to Drive Clause." In relevant part, the Complaint Clause states that it is impermissible to retaliate against an employee because:

> The employee…filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order…"

The Refusal to Drive Clause states that it is impermissible to take an adverse action against an employee for refusing to operate a vehicle because:

> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

Under either clause, Complainant must establish a prima facie case of retaliation by proving that: 1) he engaged in protected activity under the Act; 2) he was subject to an adverse employment action; and 3) there was a causal link between his protected activity and the adverse action of his employer. *Moon v. Transp. Drives, Inc.*, 836 F.2d 226 (6th Cir. 1987); *see also Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Osborn v. Cavalier Homes of Alabama, Inc. and Morgan Drive Away, Inc.*, 89-STA-10 (Sec'y July 17, 1991). After a prima facie case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. *Moon*, 836 F.2d at 229. If the employer articulates a non-discriminatory reason for the adverse employment action, the complainant bears the burden of showing that the employer's reason is pretextual and the real reason for the adverse action was retaliation. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). However, once the case is tried on its merits, the ultimate inquiry becomes whether complainant has proved by a preponderance of the evidence that the respondent discriminated against him because of his protected activity. *U.S. Postal Serv. Bd. of Governors v. Aiken*, 460 U.S. 711, 713-14 (1983); *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31 (ARB Sept. 14, 2007). "The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the proffered reason is not legitimate, and that the discharge was motivated at least in part by retaliation for protected activity, then the employer

must establish by a preponderance of the evidence that it would have discharged the complainant independently of his protected activity. *Faust v. Chemical Leaman Tank Lines, Inc.*, 93-STA-15 (Sec'y April 2, 1996); *Moravec v. HC &M Transp.*, 90-STA-44, slip op. at 12, N.7 (Sec'y, Jan. 6, 1992).

B. Hours of Service Regulations

Respondent stipulates that its operations generally and Complainant's driving specifically fall under the purview of the federal hours of service regulations. The Interstate Commerce Commission (ICC) promulgated the first Federal hours-of service regulations in the late 1930's. 3 M.C.C. 665, 3 FR 7, January 4, 1938. Except for an amendment in 1962, the regulations remained mostly unchanged from 1940 until 2003. *See* 65 FR 25548. Prior to 1962, driver hours-of-service regulations for both property carrying vehicles and passenger carrying vehicles were based on a 24 hour period from noon or midnight to midnight. *See* 70 FR 49979. A driver could be on duty no more than 15 hours in a 24 consecutive hour period. In 1962, the 24 hour cycle was removed and replaced by minimum off duty periods. *Id*. A driver could "restart" the calculation of his or her driving and on duty limitations after any period of 8 or more hours off duty. *Id*.

On April 28, 2003, the FMCSA promulgated a new rule which only made changes to regulations governing motor carriers and drivers operating property carrying vehicles. *See* 68 FR 22456. Compared to the previous regulations, the 2003 rule (1) required drivers to take 10, instead of 8 consecutive hours off-duty (except when using sleeper berths); (2) increased allowable driving time from 10 to 11 hours in any one duty period; and (3) replaced the so called 15 hour rule (which prohibited drivers from driving after being on duty more than 15 hours, not including intervening off-duty time) with a 14 hour rule (which prohibited driving after the 14th hour after the driver came on duty, with no exceptions for off-duty time). The previous 15 hour limit had been cumulative – so it could be interspersed with off duty time – while the non-extendable 14-hour limit was consecutive. *See* 70 FR 49979.

The new FMCSA's 2003 rule did not change any hours of service requirements for motor carriers and drivers operating passenger-carrying vehicles thus creating a dichotomy between regulations governing passenger carrying vehicles and property carrying vehicles. *Id*. Passenger carrying vehicles were required to continue complying with the hours of service rules existing before the 2003 rule. *See* 68 FR 22461-62.

It is also noteworthy that in its 2003 rulemaking process, the DOT specifically reviewed a proposal to abandon the one-size fits all approach to work rest cycles and proposed creating different mandatory rest period for five types of motor carrier operations. One of the five proposed categories, Type 3, was intended to cover commuter bus drivers and other local split shift drivers who spend most of their on-duty time driving but have several hours separating their driving shifts. 65 FR 25559; 68 FR 22461. Under the proposed rule, local split shift drivers "who operate within 6 hours' driving distance of their work reporting location and return to that location at the end of the shift must have at least 9 consecutive hours off duty during the 24-hour period with an additional 3 consecutive hours off duty at some other point during the same 24-

hour period." 65 FR 25560.[2] After reviewing comments submitted by the American Bus Association (ABA), motor coach industry associations, individual carriers and the Amalgamated Transit Union (ATU), the agency abandoned its proposal and concluded that it did not have sufficient data on the issue. 68 FR 22461-62.

The 2003 rule was subsequently vacated by the U.S. Court of Appeals for the District of Columbia Circuit on July 16, 2004. *See Public Citizens et al. v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir., July 16, 2004) (holding that the rule was arbitrary and capricious because the Agency failed to consider the impact of the rules on the health of drivers, as required by 49 U.S .C. 31136(a)(4)). However, Congress subsequently provided, through the Surface Transportation Extension Act of 2004, that the 2003 regulations will remain in effect until the effective date of a new final rule addressing the issues raised by the court or September 30, 2005, whichever occurs first. 70 FR 49979.

On August 25, 2005 after addressing concerns raised by the Court of Appeals, the FMCSA promulgated a final rule with the same provisions as the vacated 2003 rule. The 2005 Rule became effective on October 1, 2005 and is currently the governing law on the issue. 70 FR 164. In pertinent part, 49 C.F.R. Part 395 provides as follows:

§395.5 Maximum Driving Time For Passenger-Carrying Vehicles

(a) No motor carrier shall permit or require any driver used by it to drive a passenger-carrying commercial motor vehicle, nor shall any such driver drive a passenger-carrying commercial motor vehicle:

(1) More than 10 hours following 8 consecutive hours off duty; or

(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

§395.8 Driver's Record Of Duty Status

(a) Except for a private motor carrier of passengers (nonbusiness), every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24 hour period using the methods prescribed in either paragraphs (a)(1) or (2) of this section.

(1) Every driver who operates a commercial motor vehicle shall record his/her duty status, in duplicate, for each 24-hour period. The duty status time shall be recorded on a specified grid, as shown in paragraph (g) of this section. The grid and the requirements of paragraph (d) of this section may be combined with any company forms…

[2] *See also* U.S. Department of Transportation Press Release "*Proposal to Improve Highway Safety By Ensuring Truck Drivers Get Adequate Rest*, April 25, 2000, *available at* http://www.fmcsa.dot.gov/about/news/news-releases/2000/042500.htm?printer=true.

§ 395.1 Short-haul Operations Exemption from Requirements of §395.8

> (e)(1) **100 air-mile radius driver.** A driver is exempt from the requirements of Section 395.8 if:
>
> (i) The driver operates within a 100 air-mile radius of the normal work reporting location;
>
> (ii) The driver…returns to the work reporting location and is released from work within 12 consecutive hours;
>
> (iii)(B) A passenger-carrying commercial motor vehicle driver has at least 8 consecutive hours off duty separating each 12 hours on duty;
>
> (iv)(B) A passenger-carrying commercial motor vehicle driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty; and
>
> (v) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing [the time the driver reports for duty each day, the total number of hours the driver is on duty each day, the time the driver is released from duty each day, and the total time for the preceding 7 day in accordance with §395.8(j)(2) for drivers used for the first time or intermittently].

I. Complainant Waived His Right to Sue Under the STAA By Entering Into A Valid Settlement Agreement.

Before filing his OSHA complaint, Complainant signed an "Agreement and Release" (hereinafter "severance agreement") with Respondent on February 15, 2008. RX 8. Under the terms of the agreement Complainant: 1) acknowledged that he was voluntarily resigning from his position as a chauffeur; 2) warranted that he would not file any complaint against the Respondent based on any matter arising out of his prior employment relationship; 3) unconditionally released Respondent from any and all charges, complaints, claims and liabilities of any kind or nature whatsoever. Respondent agreed to pay Complainant a total of $1030.75 as consideration. *Id.*

Generally, an STAA complaint "may be ended by a settlement agreement made by the Secretary, the complainant, and the person alleged to have committed the violation." 49 U.S.C. § 31105(b)(2)(C). In relevant part, the regulations state: "At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and such settlement is approved by the Administrative Review Board, United States Department of Labor, or the ALJ. A copy of the settlement shall be filed

with the ALJ or the Administrative Review Board, United States Department of Labor as the case may be." 29 C.F.R. 1978.111(d)(2).[3]

Because of this "participation and consent" requirement, STAA settlements are treated differently than most other settlements.[4] The ARB has consistently noted that the "purpose of the employee protections that the Labor Department administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2, slip. op. at 20 (ARB Sept. 30, 2008). The Secretary of Labor explained that: "[p]rotected whistleblowing may expose not just private harms but health and safety hazards to the public, and the Secretary of Labor has been entrusted by Congress to represent the public interest in keeping channels of information open." *McClure v. Interstate Facilities, Inc*., 92 WPC 2, D&O of SOL, at 3-4 (June 19, 1995); *Beliveau v. Dept. of Labor*, 170 F.3d 83, 88 (1st Cir. 1999).

Settlements of whistleblower claims which are executed prior to the filing of a complaint are enforceable; however, such settlements must still be approved by the Secretary of Labor. *See Harrell v. Sysco Foods of Baltimore*, [5] ARB No. 08-022, -065, ALJ No. 2003-STA 50 (ARB

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[3] Complainant filed his STAA claim with the Secretary of Labor on July 25, 2008. The ALJ is not involved in approving settlements reached prior to a request for an ALJ hearing. *See Beliveau v. U.S. Department of Labor*, 170 F.3d 83 (1st Cir. 1999) (holding that OSHA investigators must transmit settlements reached during the investigatory stage to the Regional Administrator for approval on behalf of the Secretary).

[4] For example, "[t]o the extent that provisions in settlements of whistleblower cases seek to bar future claims, they are void as against public policy unless construed as relating solely to the right to sue in the future on claims or causes of action arising out of facts occurring before the date of the agreement." *Harrell v. Sysco Foods of Baltimore*, 2003 STA-00050, slip op. at 6, ft. n. 15 (ALJ Nov. 29, 2007); *see McCoy v. Utah Power*, 1994-CAA-0001 (Sec'y. Aug. 1, 1994).

[5] In *Harrell*, Complainant James Harrell filed various claims against Sysco in both state and federal courts, including a safety claim under OSHA, an NLRB claim, employment discrimination charges, and various workers' compensation claims. Harrell filed his first STAA safety claim with OSHA on September 14, 2000. On July 2, 2001, Harrell and Sysco entered into a global Settlement Agreement and General Release ("Settlement Agreement") pursuant to which Harrell agreed to release Sysco from any and all claims (including OSHA claims and workers' compensation claims). The agreement was filed with the U.S. District Court for the District of Maryland but was never approved by anyone from the Department of Labor.

Meanwhile, Harrell's first STAA complaint was found meritorious on January 16, 2002. On January 31, 2002, Sysco filed a lawsuit in Howard County alleging that Complainant breached the contract when he failed to take reasonable and appropriate steps to effectuate a dismissal of the first STAA claim, disparaged Sysco Foods, voluntarily aided and assisted third party claims against Sysco. On June 4, 2002 Harrell filed a second STAA complaint against Sysco alleging that it filed the Howard County lawsuit against him in retaliation for pursuing the September 14th, 2000 STAA complaint. Meanwhile, the Howard County Court conducted a trial and held that Harrell had breached the contract by disparaging Sysco Foods and aiding and assisting third parties in claims against Sysco. The case was appealed to the Court of Special Appeals of Maryland, which held in favor of Sysco and against Harrell in the amount of 187,305.50 plus interest.

On June 29, 2006, the ALJ conducted a hearing in Harrell's second STAA complaint and found in favor of Complainant. The ARB reversed the decision and held that the "ALJ erred when she concluded that Sysco retaliated against Harrell by filing suit for breach of contract in the Howard County Court. Rather, Sysco was enforcing a *valid settlement* that Harrell had willingly entered into in a separate action that resolved pending, NLRB, EEOC, and workers' compensation claims which required him to dismiss all other pending litigation, including the first STAA complaint."

May 14, 2010) (The ARB held that under certain circumstances settlement agreements which require the Complainant to withdraw his STAA complaints are enforceable and do not give rise to a viable retaliation complaint); *Khandelwal v. Southern California Edison*, 97-ERA-6 (ALJ Jan 17, 1997). In *Khandelwal*, Complainant executed a severance agreement and a general release as part of an early retirement package before filing his Energy Reorganization Act ("ERA") complaint. Respondent moved for summary judgment based on the release. The ALJ found that the severance agreement was a settlement and therefore had to be approved by the Secretary of Labor even though it was entered into prior to the filing of the complaint. Nevertheless, the ALJ concluded that the agreement did not violate public policy because it did not prohibit Complainant from bringing prospective claims against Respondent based on facts occurring subsequent to the execution of the agreement, and did not prohibit Complainant from participating with an investigation instituted by any government agency. *Id*.

When the complaint at issue invokes a right to sue from a federal statute (49 U.S.C. § 31105), federal law governs the validity of any settlement of that complaint. *Eash v. Roadway Express, Inc*., ARB No. 99-037, ALJ No 98-STA 28, slip op. at 2 (Oct. 29, 1999). Generally, settlement agreements which are approved by an ALJ under the whistleblower statutes must be fair, adequate, and reasonable. *Id*; *see also Fuchko and Yunker v. Georgia Power Co.*, 89 - ERA -9, 10 (Sec'y March 23, 1989); *Poulos v. Ambassador Fuel Oil Co*., 1986 - CAA - 001 (Sec'y, Nov. 2, 1987); *In re Anderson v. Waste Management of New Mexico*, 1990 WL 656079, 88-TSC- 2 (DOL Off. Adm. App., Dec. 18, 1990). Since a settlement is a contract, "its formation, construction and enforcement are dictated by principles of contract law. A settlement agreement, therefore, must meet the same requisites of formation and enforceability as any other contract." *Eash*, ARB No. 99-037, slip op. at 2 (citations omitted).

The ARB has often relied on cases decided under Title VII to resolve disputes arising under the retaliation statutes that it adjudicates. *See Hobby v. Georgia Power Co*., ARB No. 98-166, 98-169, ALJ No. 1990-ERA-030, slip op. at 15 (ARB Feb. 9, 2001); *Safley v. Stannards, Inc., d/b/a/ Stannard Moving & Storage*, ARB No 05-113, ALJ No. 2003-STA-054, slip op. at 5 (ARB Sept. 30, 2005). In *Khandelwal v. Southern California Edison*, 97-ERA-6 (ALJ Jan. 17, 1997), the ALJ applied the "totality of the circumstances" test found in *Stroman v. West Coast Grocery Co*., 884 F.2d 458 (9th Cir. 1989) to determine the validity of a severance agreement executed by an ERA whistleblower.

Under *Stroman*, the determination of whether a waiver of Title VII rights is "voluntary, deliberate, and informed" is "predicated upon an evaluation of several indicia arising from the circumstances and conditions under which the release was executed." *Stroman*, 884 F.2d 458, 463 (9th Cir. 1989) (internal citations omitted); *see also Bormann v. AT & T Communications, Inc.*, 875 F.2d 399, 402-03 (2nd Cir), cert. denied, 493 U.S. 924, 110 S.Ct. 292, 107 L.Ed.2d 272

The ARB went on to state that: "Sysco was entitled to the benefit of its bargain in the U.S. District Court …global settlement agreement. It had paid substantial sums for the benefit of the bargain. Harrell breached the agreement because he failed to withdraw his STAA claim, he assisted a co-worker in a complaint against the company, and he disparaged the company….The ARB does not have jurisdiction to determine whether a party violated a settlement agreement; the state court was the proper jurisdiction for the claim. *White v. J.B. Hunt Transportation, Inc*., ARB No. 06-063, ALJ No. 2005 STA 065 (ARB May 30, 2008). Accordingly, Sysco did not retaliate against Harrell when it filed an enforceable claim for breach of settlement agreement."

(1989). Whether the release was voluntary depends on both objective and subjective factors. *See Stroman,* 884 F.2d at 463; *Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981). Under *Stroman*, courts must consider the following factors: 1) the clarity and lack of ambiguity of the agreement; 2) plaintiff's education and business experience; 3) the presence of noncoercive atmosphere for the execution of the release; and 4) whether the employee had the benefit of legal counsel. *Stroman*, 884 F.2d at 463. Furthermore, "a valid release must be supported by consideration, i.e., something to which a party signing the release does not have an absolute right already." *Dominguez v. BCW Inc.*, 99 F. Supp. 2d 1155, 1160-61 (D. Ariz. March 22, 2000) (citing *Salmeron v. United States*, 724 F. 2d 1357, 1362 (9th Cir. 1983)).

A. <u>Clarity of the Agreement</u>

Here, the severance agreement is written in large font and has clear and unambiguous provisions. *See* RX 8. Each provision is preceded by a capitalized heading. *Id*. The agreement is only three pages long and is not overly verbose. *Id*. Although the agreement does not specifically refer to Complainant's rights under the STAA, it references several other claims which Complainant agrees to waive by signing the agreement. *Id*; *Stroman,* 884 F.2d at 462 (stating that "an agreement need not specifically recite the particular claims waived in order to be effective").

In relevant part the agreement states as follows:

> First: The Company, in consideration of the mutual covenants and promises herein contained, agrees to pay Mr. Gilbert a total amount of $1030.75. This amount shall constitute full and final payment of all wage claims by Mr. Gilbert against the Company, including overtime compensation. Further, Mr. Gilbert acknowledges that he voluntarily resigned from his position as a chauffeur on February 15, 2008.
>
> Second: Both parties represent and warrant that they have not filed any complaint, claim or action against each other, and that they will not file any complaint, claim or action against one another in the future of any matter arising out of their prior employment relationship "
>
> …
>
> Fourth: Notwithstanding the provisions of section 1542 of the Civil Code of the State of California, Mr. Gilbert hereby irrevocably and unconditionally release and forever discharges Company…from any and all charges, complaints, claims and liabilities of any kind or nature whatsoever, known or unknown ... including but not limited to claims under the California Fair Employment and Housing Act, the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964.

RX 8.

Although the second page of the agreement contains a blatant error referring to Complainant as Mr. Masten, this mistake does not affect the substance of the provisions. Complainant also testified that this was the only provision which didn't make sense to him. Tr. 101-102.

B. Complainant's Education and Business Experience

In *Stroman*, the court emphasized that complainant's work experience and education levels are highly relevant to the determination of a knowing and voluntary waiver. *Stroman*, 756 F.2d at 463 (holding that plaintiff's "training in the Amy and his business management-related community college degree" gave him the "education and skills necessary to understand that when he signed the agreement he waived all legal claims against [defendant]" and that "all claims meant all legal claims, including claims brought under Title VII"). Complainant in this case is a highly educated individual. Tr. 34. He spent six years as a technician with the U.S. Air Force. Tr. 31. After receiving an honorable discharge, he worked as a Central Office Engineer for the Bell Company which later became AT&T. *Id*. During his time at Bell, Complainant became highly familiar with various legal standards and codes which apply to the construction industry. In 2000, Complainant began working for Quest as a Senior Transport Engineer. Tr. 32. According to Complainant, he was terminated from Quest after making a threat to report various non compliance issues. Tr. 35-36. Following his termination, Complainant filed a complaint against Quest with the Department of Labor. Tr. 142. Given Complainant's background, education and work experience, the undersigned finds that Complainant possessed the intelligence to understand that he was waiving various legal claims against Respondent by signing the agreement.[6]

C. Attorney Representation

At the time Complainant signed the agreement, he was not represented by counsel. However, as in *Stroman*, there is no evidence that Complainant was precluded or discouraged from seeing an attorney. *Stroman*, 884 F.2d at 464. The third page of the agreement likewise advises Complainant to consult with an attorney of his choice prior to executing the agreement. RX 8 at 3.[7]

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[6] Although the agreement encompasses the settlement of matters arising under various laws, I have limited my review of the agreement to determine whether its terms are a fair, adequate and reasonable settlement of Complainant's STAA claims.

[7] Indeed, Complainant remains unrepresented despite having been granted a continuance of the hearing and several extensions for the filing of his post hearing brief in order to afford him the opportunity to seek assistance of counsel. I note that Complainant, while proceeding without counsel, presented his case at the hearing and in his post hearing brief with remarkable clarity.

D. Atmosphere during the Execution of the Agreement

Complainant argues that the circumstances under which he signed the agreement amounted to economic duress.[8] Complainant testified that he felt he had no other option but to sign the agreement because Respondent suspended him from driving the Google shuttle, and he had no stable income for three weeks. Tr. 101-102. Settlements which are entered into under economic duress or other duress are void if the defendant has acted wrongfully to create and take advantage of an untenable situation. *See Chouinard v. Chouinard*, 568 F.2d 430 (5th Cir. 1978); *McGavock v. Elbar, Inc*., 86-STA-5 (ALJ May 5, 1988). "The plaintiff must show that the duress was the result of the defendant's conduct, and not solely the result of the plaintiff's own necessities." *Id*.

Under similar circumstances, in *Macktal v. Brown & Root, Inc.*, the Secretary of Labor refused to void a settlement based on Complainant's allegation that Respondent took undue advantage of his economic distress which was allegedly caused by Respondent's wrongful termination of Complainant and Respondent's successful opposition to Complainant's receipt of unemployment benefits. *Macktal v. Brown & Root, Inc.*, 1989 WL 549876, at 3-4*, 86 ERA 23, (DOL Off. Adm. App. Nov. 14, 1989). The Secretary noted that "threatened dismissal or even actual dismissal…does not constitute duress making a settlement voidable." *Id*. It went on to note that "[e]very loss of employment entails financial hardship. If that alone were sufficient to establish economic duress, no settlement involving it would ever be free from attack." *Id*. (citing *DuPuy v. United States*, 67 Ct. Cl. 348, 381 (1929), cert. denied, 281 U.S. 730 (1930)); s*ee also Asberry v. United States Postal Service*, 692 F.2d 1378 (Fed Cir. 1982) (holding that "in order to successfully defend on the ground of force or duress, it must be shown that the party benefitted thereby constrained or forced the action of the injured party, and even threatened financial disaster is not sufficient"); *Jurgensen v. Fairfax County Police Department*, 745 F.2d 868 (holding that the fact that there was a threat of dismissal and that public employee was having severe financial problems and could not risk losing his job were insufficient to establish duress rendering void his agreement to a demotion for violation of a department regulation).

Here, Complainant fails to demonstrate that he was coerced into signing the agreement. Although Complainant was forced to wait for two hours in the lobby before his scheduled meeting with Gary Bauer and felt like he was located in a "gauntlet," these facts are insufficient to establish coercion. Tr. 96, 102. The actual meeting lasted for more than two hours. Tr. 99. During this time, Complainant had an opportunity to voice his concerns and allegations. Tr. 97-100. After Complainant refused to work in retail, Bauer asked him to sign the agreement. Tr. 241-244. Complainant testified that he had an opportunity to read the agreement before signing it and tried to understand its language. Tr. 190-191. Respondent also paid Complainant $1030.75 as consideration for signing the agreement. RX 8 at 4. Although Complainant generally made

[8] Courts construe arguments for pro se litigants "liberally in deference to their lack of training in the law and with a degree of adjudicative latitude." *Cummings v. USA Trucking, Inc*., ARB No. 04-043, ALJ No. 03 –STA-47, slip op, at 2 *ARB Apr. 26, 2005) (internal citations omitted).

over $1500 in gross pay during a pay period,[9] he was not already entitled to this amount by contract or law. *See Hampton v. Ford Motor Co*., 561 F.3d 709 (7th Cir. 2009) (finding that consideration was adequate where plaintiff signed the waiver in front of an employer representative, did not ask for assistance or clarification, and was free to request additional consideration for releasing any Title VII claims).

Based on the above evidence, the undersigned concludes that the severance agreement was a deliberate, valid and informed release of Complainant's STAA claim. Since, however, a considerable part of the hearing was addressed to the validity of Complainant's retaliation claim, the undersigned finds it appropriate to consider, in the alternative, the substantive STAA arguments made by the parties.

II. Complainant Engaged in Protected Activity Under the STAA

The Complainant in an STAA proceeding bears the burden of proving that he engaged in protected activity. The "Complaint Clause" of the STAA protects an employee who has "filed a complaint or begun a proceeding related to a violation of a regulation, standard, or order, or has testified or will testify in such a proceeding." 31105(a)(A)(i). The statute covers internal complaints to supervisors as well as external complaints to government officials. *See Nix v. Nehi-RC Bottling Co., Inc.*, 84 STA-1 (Sec'y July 13, 1984); *Davis v. H.R. Hill, Inc.*, 86-STA-18 (Sec'y Mar. 19, 1987); *Harrison v. Roadway Express, Inc*., 1999 STA 37 (ARB Dec. 31, 2002). Employee's complaints cannot be too generalized or informal. *Calhoun v. U.S. DOL*, 576 F.3d 201, 213-14 (4th Cir. 2009). If the "internal communications are oral, they must be sufficient to give notice that a complaint is being filed." *Jackson v. CPC Logistics*, ARB No.07-006, ALJ No. No 2006-STA-4 (ARB Oct. 31, 2008); *see Clean Harbor Env't Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir. 1998) (finding that a driver "filed a complaint" when he sent letters to his superiors explaining various safety precautions he had been taking in an attempt to explain his slow pick-up times). All complaints, whether internal or external, must "relate to" safety violations. Courts have construed "relate to" broadly to encompass violations of both federal and state laws. *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992). However, in order to qualify for protection, the complaint must be based on a "reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation." *Calhoun*, 576 F.3d at 213.

Complainant may also prevail under the "Refusal to Drive" clause of the STAA. A refusal to operate a commercial motor vehicle is protected under two provisions. The first provision, 49 U.S.C. §3115(a)(1)(B)(i), deals with "actual violations" of the law and requires Complainant to "show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive." *Yellow Freight Sys. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993). "DOT regulations extend beyond federal motor vehicle safety regulations to include any relevant motor vehicle regulation, standard, or order." *Canter v. Maverick Transp., LLC*, 2009-STA-00054, slip. op. at 11 (ALJ Oct. 28 2010); *see also*

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[9] The following figures indicate Complainant's gross pay during the various pay periods: Oct. 13-26, 2007 – $2,176.03; Oct. 27- Nov. 9, 2007 – $2,098.95; Nov. 10 – Nov. 20, 2007: $1,545; Nov. 24 – Dec. 7, 2007: $1,530.68. Dec. 8-Dec. 21, 2007: $1,722.22. Dec 22 - Jan 4, 2008: $1,525.51; Jan. 5-Jan 18, 2008: $1,830. *See* RX 9.

Chapman v. Heartland Express of Iowa, ARB No. 02-030, ALJ No. 2001-STA-35 (ARB Aug. 28, 2003). Accordingly, refusing to drive when the contemplated run would cause the driver to violate the Federal hours of service regulations is also protected activity under the STAA. *See Ass't Sec'y & Brown v. Besco Steel Supply*, 93-STA-30 (Sec'y Jan. 24, 1995); s*ee also Hamilton v. Sharp Air Freight Service, Inc.*, 91-STA-49, slip op. at 1-2 (Sec'y July 24, 1992); *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Aug. 31, 1992); *BSP Trans, Inc., v. United States Department of Labor*, No. 97-2282 (1st Cir. 1998), *aff'g Michaud v. BSP Transportation, Inc.*, 95-STA-29 (ALJ Sept. 6, 1996).

Under the second "Refusal to Drive" provision, 49 U.S.C. §31105(a)(1)(B)(ii), Complainant must demonstrate that he had a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition. *Eash v. Roadway Express, Inc.*, ARB No. 04-036, ALJ No. 1998-STA-28 (ARB Sept. 30, 2005). "This clause of the STAA covers more than just mechanical defects of a vehicle - it is also designed to ensure 'that employees are not forced to commit…unsafe acts.' " *Canter*, 2009-STA-00054, slip op. at 11 (citing *Garcia v. AAA Cooper Transp.*, ARB No. 98 -162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998)). The "apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous danger of accident, injury, or serious impairment to health." 49 C.F.R. § 31105(a)(2). In determining whether a "refusal to drive" merits STAA protection, the Court must consider the totality of the circumstances surrounding the refusal. *Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-005, slip op. at 7-8 (ARB Mar. 29, 2000).

Here, Complainant alleges that he engaged in three types of protected activity by: 1) refusing to drive the remainder of his route on January 28th, 2008, because it was allegedly in violation of the 15-hour "on duty" maximum permitted under §395.5; 2) complaining internally about Respondent's violation of § 395.8; 3) complaining to the CHP about Respondent's hours of service practices.

A. 15 Hour On-Duty Maximum Under § 395.5

Throughout his employment, Complainant engaged in heated discussions with various managers at Bauer's about the appropriate interpretation of § 395.5. Tr. 241. Complainant believed that Respondent incorrectly classified "split time" as "off-duty" for the purposes of compliance with the HOS regulations. On January 28th, 2008 Complainant refused to drive the remainder of his afternoon route because it was allegedly in violation of the 15-hour "on duty" maximum HOS rule (49 C.F.R. § 395.5), among other things. Tr. 209. On that day, Complainant was scheduled to complete his morning shift between 4:30am and 9:35am. RX 6 at 41-40. He then had a split from 9:35am to 2:45pm. *Id*. His afternoon shift was scheduled from 2:45pm to 7:30pm. *Id*. Complainant told Lon Baylor that he would not drive the last afternoon route because it would take him 15 minutes over the 15-hour maximum. Tr. 209-10. Baylor once again informed Complainant that Bauer's does not count the splits towards the 15 hour daily on-duty maximum and pointed out that Complainant was incorrectly filling out his drivers log by listing split time as "on duty" time. *Id*. Baylor also told Complainant that he had discussed the issue with Lee Stidham and concluded that the route was legal. *Id*. After this discussion, Complainant still refused to drive the route, and Baylor was forced to find a replacement driver. *Id*.

Section 395.5 provides that the driver of a passenger-carrying commercial vehicle must not drive after being on duty for 15 hours following 8 consecutive hours off duty. 49 C.F.R. §395.5(a)(2). Drivers also may not drive for more than 10 hours following 8 consecutive hours off duty. *Id*. Once the driver has driven a total of 10 hours, he must be off duty for another 8 consecutive hours before driving a commercial vehicle again. There must be no on-duty or driving time during those eight hours. Under §395.5, the 15 hour on-duty limit is cumulative and can be interspersed with off duty time. *See* 70 FR 49979. For example, the FMCSA's *Interstate Truck Driver's Guide to Hours Truck Driver's Guide to Hours of Service* provides that "[o]ff duty time taken during the day, such as a lunch break or nap does not count toward this 15 hour limit." [10]

"On duty" time is further defined in §395.2 as "all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work." 49 C.F.R. §395.2. On-duty time includes all time at a "facility or other property of a motor carrier, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier." *Id*. It also includes all time spent loading and unloading a commercial vehicle, repairing the vehicle, traveling time to and from a collection site, and other time spent performing any work for the benefit of the motor carrier. *Id*. The *Interstate Truck Driver's Guide to Hours of Service* states that in order for the time to be considered off-duty the driver "must be free to pursue activities of [his] own choosing and be able to leave the place where [his] vehicle is parked.[11] *See Hogquist v. Greyhound Lines, Inc*., 2003 STA 31, slip op. at 5 (ALJ Aug. 28, 2003) ("For Respondent's employees, off duty time occurs when a driver is relieved of all duties and may leave the premises. In between tours, when a driver has two or three hours relief from duty, he is considered to be off duty."). In contrast, the driver is considered "on-duty" when he is "required to remain with the bus, or in the vicinity; to attend to the needs of the group he [is] transporting, to maintain or fuel the bus, or to attend to breakdowns." *In the Matter of Polger v. Florida Stage Lines*, 94 STA-0046 (Apr. 18, 1995) (interpreting "on duty" time for purposes of the analogous provision which applies to property-carrying vehicles under 49 C.F.R. § 395.3(b)(2)).

Cases interpreting the definition of "work" and "on duty" time under the Federal Labor Standards Act ("FLSA"), 29 U.S.C. § 207, also provide some guidance on the issue. In cases where the on-call time is spent away from the workplace, courts balance a variety of factors to determine whether the on-call time should be treated as compensable "time work." The non-exclusive list of factors include the following: geographic restrictions placed on the employees' movement, the time in which the employees are required to respond to calls, the ease with which the employee may trade on-call responsibilities, the frequency in which the employees are required to respond to calls, and the extent of personal activities engaged in by the employees during on-call time. For example, in *Dinges v. Sacred Heart St. Mary's Hospital Inc*., the Court stated: "An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not

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[10] Federal Motor Carriers Safety Administration, *Interstate Truck Driver's Guide to Hours of Service, at* 4, *available at* http://www.fmcsa.dot.gov/rules-regulations/truck/driver/hos/fmcsa-guide-to-hos.PDF

[11] *Id*. at 5-6.

working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits." 164 F.3d 1056, 1058 (7th Cir. 1999); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Bright v. Northwest Med. Center, Auer v. Robbins*, 519 U.S. 452 (1997); *Munn v. Southwestern States Tel. Co*., 52 F. Supp. 663 (N.D. Tex 1942) (employees who are free to do as they wish while on-call, so long as they obtain a substitute to stand by in their place are not working); *Thompson v. Daugherty*, 40 F. Supp. 279 (D Md. 1941); 29 C.F.R. § 785.16(a); *Bohn v. B&B Ice & Coal Co.*, 63 F. Supp. 1020 (W.D. Ky. 1946) ("Waiting periods during which employees are completely relieved from duty and which are long enough to be used effectively for the employees' own purposes are not hours worked if the employees are told in advance that they may leave the job at a particular time and that they do not have to return to work before a specified hour."). In contrast, employees who are required to remain on call at their employers premises or to remain so close to the workplace that they cannot use the time effectively for their own purposes are "working" while on call.

In the present case, Respondent's policies governing "split time" changed while Complainant was still employed with the company.[12] However, after examining the evidence on the record, the undersigned finds that split time constitutes "off-duty" time for the purposes of the 15 hour on-duty maximum under § 395.5. Lon Baylor, the Manager of Shuttle Operations, testified that drivers could "come and go as they please[d]" during the splits, "as long as they returned in time to start their afternoon run." Tr. 201. Many chauffeurs would use this time to set up dentist appointments, doctor appointments, go shopping, or lounge around in the break room. Tr. 201. Those drivers who chose to stay on the Google campus could visit the gym, play golf or eat out at various restaurants on campus. Tr. 197.

Complainant testified that when he first started the job there was a push to keep drivers on the Google campus during their splits. Tr. 152. There was no system to turn in the keys at the end of each shift, and the "atmosphere was very tense" due to the flux of union activity at Bauer's. Tr. 53, 56, 197. According to Complainant, Respondent had a lot of demand for limousines and needed drivers to be available during their spits. Tr. 76-77. Those who chose to stay on the Google campus were compensated for two hours of their time. *Id*.

Even though Complainant could earn extra money by staying on the Google campus, he was not required to do so. Tr. 198. In fact, after speaking with Lon Baylor, Complainant received permission to go home after completing his morning route. Tr. 64. For most of September, 2007, Complainant finished his morning run, signed off his time sheet and went home to sleep during his split. Tr. 64. There is no evidence that other drivers were prevented from doing the same. Tr. 154. Complainant himself testified that as a Google shuttle driver he had some flexibility to reject retail assignments. Tr. 43-44. Complainant's schedule indicates that he never drove retail runs during his split time. RX 6, CX 6.

Accordingly, Complainant's interpretation of "on duty" time under § 395.5 is unreasonable and has no support in the relevant regulations or case law. On January 28, 2008, Complainant spent approximately 5 hours in the middle of the day off-duty on his split. Tr. 178-79, 205, 247, RX 6. If he had completed his route that day, he would have spent approximately

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[12] For example, Respondent changed its policy and began collecting bus keys in a basket. Tr. 53, 56, 197.

8.5 hours driving and approximately 10 hours on-duty. This type of schedule is permissible under the HOS regulations even though more than 15 hours was scheduled to elapse between the start of the morning shift and the end of the afternoon shift (between 4:30 a.m. and 7:45 p.m.). RX 6. Furthermore, Respondent's supervisors explained to Complainant on numerous occasions that "split time" does not constitute "on duty time." *See Harris v. C & N Trucking*, ARB No. 04-175 at 2, ALJ No 2004-STA-37 (ARB Jan. 31, 2007) (holding that protected activity loses that protected status if the grounds on which the activity is based are investigated by the employer, the employer correctly determines that there has been no violation, and such determination is timely communicated to the employee). Thus, Complainant's refusal to drive his route on January 28th based on the putative § 395.5 violation did not constitute protected activity. *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-23 (ARB Dec. 31, 2007) (holding that merely voicing complaints about scheduling which does not implicate hours of service rules is not protected activity under the STAA).

B. The "100 Air Mile Radius Driver" Under § 395.1(e)

Under section 395.8, all drivers must record their hours of service on a daily log which complies with the specified requirements and covers 24 hours of every day. A driver is exempt from the requirements of §395.8 if he qualifies as an 100 Air Mile Radius Driver under §395.1(e). To fall under the exemption the driver must: 1) operate within a 100 air-mile radius of the normal work reporting location; 2) *return to the work reporting location and be released from work within 12 consecutive hours* (emphasis added); 3) have at least 8 consecutive hours off duty separating each 12 hours on duty; 4) not exceed 10 hours maximum driving time following 8 consecutive hours off duty; and 5) the motor carrier that employs the driver must retain for a period of 6 months accurate and true time records showing the time the driver reports for duty each day, the total number of hours the driver is on duty each day, the time the driver is released from duty each day; and the total time for the preceding 7 days in accordance with §395.8(j)(2) for drivers used for the first time or intermittently. 49 C.F.R. §395.1(e).

Under the guidelines provided for this section, the DOL states that a property carrying commercial vehicle "driver - may go on- and off-duty multiple times during a duty tour, after completing at least 10 hours off duty, but the total of all on-and off-duty time accumulates toward their 12 hours. Once a driver is on duty more than 12 hours they no longer meet the 100 air-mile radius exemption." [13] Accordingly, for the purposes of the 100 Air Mile Radius exemption, the split off-duty time counts towards the 12 consecutive hours under 395(e)(1)(iii)(B). Since Complainant's splits were shorter than 8 hours and his total on-duty and off-duty time exceeded 12 hours, he was required to use a RODS log. *See* RX 6, CX 6.

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[13] Federal Motor Carriers Safety Administration, "HOS Frequently Asked Questions (FAQ)" at C-4, *available at* http://www.fmcsa.dot.gov/rules-regulations/truck/driver/hos/hos-faqs.asp. *See also Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (The Supreme Court dealt with an interpretive bulletin issued by the Department of Labor's Wage and Hour Administration. The court stated: "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling under upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

Therefore, Complainant engaged in protected activity when he informed his supervisors that he should be required to fill out the RODS log in addition to Respondent's timesheets.[14]

C. CHP Complaint

Several times throughout his employment Complainant contacted Noel Columna at the Motor Carrier Safety Division in Vallejo, California. Tr. 104, CX 7-10. Complainant first contacted Columna on December 14, 2007 to complain that Bauer's was violating §395.8. *Id*. Complainant told Columna that Respondent's shuttle drivers did not qualify for the 100 Air Mile exemption because they were not released from duty within 12 consecutive hours. *Id*. About a month after the December 14th conversation with Columna, CHP conducted an inspection of Respondent's records and premises. Tr. 107. On January 3rd and 4th, 2008, Complainant telephoned Columna to advise him that his schedule was changed and that Lon Baylor was refusing to accept his RODS log sheets. CX 8. In October of 2007, Complainant discussed the HOS regulations with Dispatch Manager, Charbel Sayhoun, and told Sayhoun that he "can go to CHP." Tr. 106. Charbel jokingly replied "Oh, you know those people?" *Id*. Complainant testified that he had previously hinted that he knew how to "report this type of stuff" but was not trying to "threaten [Respondent] every day." *Id*. After Complainant was taken off the Google shuttle route on January 28th, he once again contacted the CHP to complain about the putative HOS regulation violations and retaliatory action by Respondent. CX 9.

When Complainant called Columna, he engaged in STAA protected activity under 31105(a)(A)(i) because he was filing a complaint or beginning a proceeding related to a violation of a motor vehicle safety regulation, standard, or order. Threats to file a complaint with the DOT may also qualify as protected activity depending on the context in which they are made. *See Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63 (ARB June 30, 2008) (holding that threatening to file a complaint based on a reasonable belief regarding the existence of a violation can constitute protected activity). In *Carter*, the ARB found that Complainant engaged in protected activity when he met with management to discuss his safety concerns, threatened to call, and did then call, the FMCSA and state and local police from the Respondent's employee break room. In contrast, in *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-3 (ARB June 30, 2008), Complainant's threat to "go to the DOT" did not rise to the level of "filing a complaint" where it was made in the context of a telephone call from the Respondent's President who was asking why the Complainant was arriving late for scheduled trips, and the Complainant responded by swearing at the President and threatening contact with the DOT. Here, Complainant's statements to Sayhoun do not qualify as protected activity because they were made casually during an on-going discussion of the regulations and did not rise to the level of a definitive threat.

Furthermore, although Complainant engaged in protected activity by contacting the CHP, he fails to establish that any of Respondent's supervisors were aware of his CHP complaints. The CHP does not inform the investigated employer of the whistleblower's identity. Both Baylor and Bauer also testified that they did not know of Complainant's CHP reports. Tr. 220, 247, 254.

[14] After receiving advice from the CHP, Respondent began requiring shuttle bus drivers who stayed on the Google campus during their splits to fill out the RODS logs. Tr. 133.

Complainant's speculations that Respondent knew about the CHP complaints are insufficient to establish this fact by a preponderance of the evidence.

III. <u>Complainant Was Subject To An Adverse Employment Action</u>

In order to prevail on his STAA claim, Complainant must establish that he was subject to an adverse employment action. 49 U.S.C.A. § 31105(a)(1). In *Melton v. Yellow Transportation, Inc.,* the two member majority of the Board adopted the Title VII "materially adverse" standard which the Supreme Court applies to the anti-retaliation provisions under 42 U.S.C.A. § 2000e-3(a). *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008); *see Burlington Northern and Santa Fe Railway Co. v. Sheila White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In *Burlington Northern*, the Supreme Court held that in order for "the employer 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." *Id*. at 2415. According to the Court, a "reasonable worker" is a "reasonable person in the plaintiff's position." *Id*. The court went on to hold that there was sufficient evidence to support a jury verdict for retaliation where Plaintiff was removed from her forklift duty and assigned to perform standard track laborer tasks. *Id*. at 2417. Even though her new position fit within the same job description, it required fewer qualifications, was less prestigious, and was "by all accounts more arduous." *Id*.

In adopting the "materially adverse" standard, the ARB noted that the "purpose of the employee protections that the Labor Department administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or security concern effectively promotes the purpose of the anti-retaliation statutes." *Melton,* ARB No. 06-052, slip. op. at 20.

Under *Burlington Northern,* the phrase "adverse employment action" encompasses more than just workplace related retaliatory acts and harms; however, the adverse act must still generally amount to a significant change, such as firing, failing to promote, reassignment with significantly different responsibilities, or a significant change in benefits. *Crady v. Libery Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993); *see Duncan v. Manager, Dept. of Safety, City and County of Denver*, 397 F.3d 1300 (10th Cir. 2005), *Stover v. Martinez*, 382 F.3d 1064 (10th Cir. 2004). Mere inconveniences or alterations of job responsibilities do not rise to the level of an adverse employment action. *Id*. "The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. The employee protections under the Labor Department administration are not 'general civility codes,' nor do they make ordinary tribulations of the workplace actionable." *Melton,* ARB No. 06-052, slip. op. at 23 (citing *Smart v. Ball State Univ*., 89 F.3d 437, 441 (7th Cir. 1996); *see also Higgins v. Gonzales*, 481 F.3d 578 (8th Cir. 2007) ("Minor changes in duties or working conditions, even unpalpable or unwelcome ones, which cause no materially significant disadvantage" do not constitute adverse action upon which Title VII discrimination claims can be based.).

Involuntarily transferring an employee to a lateral position with different job responsibilities and conditions of employment, even without a reduction in salary or benefits,

may constitute an adverse employment action. *See Collins v. State of Illinois*, 830 F.2d 692 (7th Cir. 1987). For example, in *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205 (10th Cir. 2003), the Court held that evidence would support a determination that Plaintiff suffered a "materially adverse" alteration in job responsibilities where she previously served as an assistant project engineer and was later assigned to a traffic section. *Id*. at 1216. As a project engineer Plaintiff supervised contractors, kept extensive records of project development and costs, and contacted landowners to discuss the effect of construction projects on their land. *Id*. After reassignment, Plaintiff retained the same rate of pay and the same job classification; however, her main job responsibility was to stand on a street corner and manually count cars for nearly two months. *Id*; s*ee also Richardson v. New York State Dept's of Corr. Serv*., 180 F.3d 426, 444 (2d Cir. 1999) (fact finder could conclude that employee's reassignment to position with different job responsibilities and more contact with inmates was an adverse employment action); *Mayers v. Neb. Health & Human Serv*., 324 F.3d 655, 660 (8th Cir 2003) (holding that a significant change in working conditions occurs where there is "a considerable downward shift in skills level required to perform [the employee's] new job responsibilities").

Although assignment to a less desirable work shift might constitute adverse action, the clear trend of authority is to hold that a "*purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." *Williams v. Bristol-Myers Squibb Co*., 85 F.3d 270, 274 (7th Cir. 1996) (emphasis added); s*ee Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (holding that appellant did not suffer an adverse employment action where her position as the income Maintenance Supervisor III remained unchanged, and her basic responsibilities and staff size remained substantially the same); *see also Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 20-21 (ARB Feb. 28, 2003) (holding that a removal from an assignment and a transfer to another section with no change in performance standards, title, grade, or pay was not actionable).

Here, Complainant argues that he was subject to an adverse employment action when he was taken off the Google shuttle route on January 28, 2008 and offered charter/retail runs instead. Respondent asserts that an offer of continued employment driving charter routes is not an adverse action because 1) an offer of full time employment as a retail driver is not a demotion and 2) Complainant was never promised that he was entitled to only drive Google shuttle routes.

First, there is no evidence that Respondent transferred Complainant to a "full time" position in charter or offered him a "full time" position in charter. Between January 28th and February 15th, Complainant received six dispatches to drive retail runs. He took four retail runs in the city of San Francisco on February 12, 2008 and turned down two other dispatches. Tr. 182-183. During these three weeks, Complainant worked for a total of 7.13 hours and earned $151.22. CX 19 at 9. These figures do not indicate a good faith effort to provide Complainant with a full time job in the charter line of service. At a meeting on February 15, 2008, Bauer told Complainant that if he wanted to stay with the company, he could work in retail. Tr. 97, 243-44. However, the evidence indicates that Complainant understood this to mean "part time" retail work. Complainant testified that "charter runs were not lucrative" because he was not a full time retail driver and thus did not want to "work for peanuts." Tr. 100, 183. As a Google shuttle driver, Complainant generally only did retail runs on weekends. In November of 2007 and January of 2008, Complainant had almost no income from retail work. RX 6, CX 6 at 5.

Second, assuming arguendo that a transfer to a full time retail position within Bauer's would not constitute a demotion, Respondent was essentially suspended in substance if not in form between January 28th and February 15th. After Complainant refused to drive the remainder of his route on January 28th, he was taken off the Google shuttle route. Although Complainant received several calls from the secretary indicating that he was not suspended, Complainant was not provided with a stable work flow during these three weeks. Tr. 181. As noted above, Complainant only worked for a total of 7.13 hours and earned $151.22. CX 19 at 9. Respondent did not communicate to Complainant that he was being offered a retail position until February 15th, 2008. Under the circumstances, a reasonable driver in Complainant's position would believe that he was suspended. Tr. 182-183; s*ee Phillips v. MJB Contractors*, 92 STA-22 (Sec'y Oct. 6, 1992) (citing *NLRB v. Champ Corp*., 933 F.2d 688 (9th Cir. 1990) for the proposition that words or conduct which would logically lead an employee to believe that his tenure has been terminated can be sufficient to establish a discharge).

A reasonable driver would be dissuaded from engaging in protected activity knowing that he would go three weeks without a stable salary. The case is highly analogous to *Burlington Northern* where the company suspended the employee for 37 days without pay after she filed a complaint with the EEOC. *Burlington Northern*, 548 U.S. 53 (2006). The company later reversed course and reinstated her with full back pay. Nevertheless, the Court said that a suspension, even if later cured, was a materially adverse action, since a reasonable person would not make a complaint in the first place knowing that she would go 37 days without pay and with no assurance of being paid. Here, even though Complainant was not guaranteed a position as a shuttle driver under his employment contract, he had an objectively reasonable expectation of employment as a Google shuttle bus driver based on his past employment history and Respondent's practices.

Furthermore, the conditions of employment in the retail line of service appear materially different from those in the transit line of service. Bauer testified that some drivers liked transit work because of its consistency. Tr. 246. When Complainant was hired, shuttle chauffeurs for Google, received a base pay of $15 per hour. RX 3. The pay was later increased to $15.50 per hour. Tr. 120. Shuttle drivers could also supplement their income by taking on retail runs during the weekends. Tr. 202. Google shuttle bus drivers had a relatively stable schedule each week. Although Bauer's did not make any guarantees regarding scheduling, the evidence indicates that each Google driver was assigned to a particular shift. Tr. 211, 243. Thus, their salary was relatively consistent from week to week. Respondent's witness, Lon Baylor, also testified about the numerous other benefits that Google shuttle bus drivers received. According to Baylor, Google shuttle bus drivers did not have to reach into their pocket for anything. Tr. 202. Drivers were fed free breakfast, lunch and dinner. Tr. 202. Google dropped off bicycles in front of the drivers break room to ensure that chauffeurs had the ability to go anywhere on the Google campus. Tr. 198. Drivers also had access to various Google facilities such as gyms, volleyball courts and a golf course. *Id*.

Although in theory, Complainant could make more money working in retail, the salary of charter drivers was more varied. The base pay for charter drivers was $10.00 per hour. RX 3, Tr. 213. Their income was supplemented by cash tips and a gratuity which was automatically added to the customer's bill. RX 3, Tr. 216. For certain types of events, retail drivers could earn up to

$25 or $30 dollars per hour depending on rate per hour that was charged for a particular vehicle. Tr. 245-46. Because of his seniority ranking, it is not certain that Complainant would receive priority in bidding on these lucrative retail runs. Tr. 243. Respondent points out that Complainant earned an average of $16.71 per hour driving charter routes. This number is misleading because it provides no insight into a weekly salary of a full time retail driver relative to the salary of a Google shuttle bus driver.

Accordingly, based on the evidence discussed above, the undersigned finds that Respondent took an adverse employment when it suspended Complainant from the Google shuttle route.

IV. <u>There Is No Causal Link Between Complainant's Protected Activity And The Adverse Action.</u>

To establish the prima facie case, Complainant must present evidence sufficient to raise the inference that his protected activity was the likely reason for the adverse action. *See Carroll v. J.B. Hunt Transp.*, 91-STA-17, slip op. at 2 (Sec'y June 23, 1992). However, since direct evidence of any connection between the employees protected activity and the adverse action are rare, Complainant may prove that such a connection exists with circumstantial evidence. *Clay v. Castle Coal & Oil Co.*, 90-STA-37, slip op. at 6 n.5 (Sec'y Nov. 12, 1991). *Germann v. CalMat Co.*, 1999-STA-15 (ALJ Aug. 6, 1999); *Mackowiak v. Univ. Nuclear Systems, Inc.*, 735 F.2d. 1159 (9th Cir. 1864). An inference of causation may be raised if the adverse action is close in time to the protected activity. *See e.g., Bergeron v. Aulenback Transportation, Inc.*, 91-STA-38, slip op. at 3 (Sec'y June 4, 1992) (concluding that an inference was raised when the discharge immediately followed the protected activity); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991) (finding a causal connection where the employee was fired immediately after bringing the lawsuit). To succeed on his claim, Complainant must also prove by a preponderance of the evidence that Respondent's managers who decided to terminate his employment knew of the protected activity. *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-5 (ARB Sept. 28, 2007); *Osborn v. Cavalier Homes*, 89-STA-10, slip op. at 2 (Sec'y July 17, 1991).

In this case, Complainant argues that he was suspended from driving the Google shuttle route and offered a position in retail in retaliation for his complainants about the alleged HOS violations. As discussed above, Complainant engaged in protected activity when he complained to Respondent's supervisors about Section 395.8 violations. Nevertheless, after examining the totality of the evidence, the undersigned finds that Respondent's actions were not motivated by animus towards Complainant's protected activity.

Respondent took Complainant off the Google shuttle route and did not assign him to a different route because Complainant's scheduling demands were incompatible with Respondent's business model. Complainant told Baylor and Bauer that he would not drive *any* route which, under his incorrect interpretation of the regulations, had more than 15 hours of "on duty" time. Tr. 209. As discussed above, Complainant considered splits "on duty" time. During the February 15th meeting, Bauer informed Complainant that such an arrangement was not possible in the transit line of service. Tr. 247. Most Google shuttle drivers were assigned to a particular route and had a lengthy split in the middle of the day. Complainant himself had an identical schedule

week to week for the entire month of January.[15] *See* CX 6. Bauer testified: "Google wasn't an option…because he didn't want to take that order, and that's all that was open at that time. So there was nothing else to give him at that time, besides that one job. And you can't take one two hour route off the back of a run. Everybody's slots are already filled, there's nowhere to put it." Tr. 247. Lon Baylor's testimony supports this assertion. Baylor stated that all of the other drivers were scheduled. Respondent hired a back-up chauffer who was called only in case of emergencies. Tr. 211-212.

As one of the newest drivers on the team, Complainant also did not have the priority to choose the most convenient schedule. Tr. 243, 246-47. Since Complainant's original schedule was legal, Respondent was not required to rearrange its entire scheduling system, in order to accommodate Complainants requests for a shorter "split time." *Bethea v. Wallace Trucking Co.*, ARB No. 07-057, ALJ No. 2006-STA-23 (ARB Dec. 31, 2007) (holding that merely voicing complaints about scheduling which does not implicate hours of service rules is not protected activity under the STAA). Complainant testified that during the February 15th meeting Bauer told him that "Lon doesn't want to work with you anymore. Matter of fact, none of my managers do, because of how you embarrassed Lon." Tr. 97, 100. However, the record indicated that this statement was made after Complainant already flatly refused to drive any assigned route which he falsely believed was in violation of the 15 hour on-duty requirement. Tr. 97, 243.

Furthermore, temporal proximity alone "will not support an inference in the face of compelling evidence that [employer] encouraged safety complaints". *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229-30 (6th Cir. 1987) (finding no causal link between protected activity and the adverse employment action where the record showed that Respondent periodically held sessions, during which Complainant and other drivers were invited to air their safety concerns, and Complainant testified that he felt free to call his superior to complain about vehicle problems). As in *Moon*, the evidence in this case indicates that Complainant's HOS concerns were continuously addressed by Respondent's supervisors. Complainant began to voice his concerns about the putative HOS violations early on in his employment. In September of 2007, he began to discuss the issue with Lon Baylor and Lee Stidham. Tr. 60. In October 2007, complainant told Dispatch Manager Charbel Sayhoun that he "can go to the CHP" to file a complaint against Bauer's. Tr. 105. Complainant also raised the issue at numerous drivers meeting. Tr. 67-69, 241-42. Nevertheless, in October of 2007, Lon Baylor accommodated Complainants requests to drive a shuttle bus out of San Francisco and gave him a highly coveted schedule without a split. Tr. 64. In fact, when Complainant was assigned a schedule without a lengthy split, the other drivers began to complain that he was receiving preferential treatment. Tr. 71-72.

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[15] From January 4, 2008 to January 28, Complainant was on duty from 4:30am to 9:30am and from 2:45pm to 4:30pm.

Respondent likewise took steps to educate its drivers about the HOS regulations. It conducted a two week training course for all the new chauffeurs on safety and regulations. Tr. 239. Respondent's Safety Director Stidham likewise conducted bi-weekly drivers meetings with Google Shuttle drivers where the drivers were able to personally discuss any concerns they had. Tr. 68, 164. 168. Stidham often engaged in extensive discussions with Complainant about the appropriate interpretation of the HOS regulations. *Id.* Complainant testified that "the whole purpose that Lee Stidham would get into arguments with me about the regs, is to see what I was going to do." Tr. 108. However, this assertion is purely speculative. On February 15, 2008 before asking Complainant to sign the settlement, Bauer himself spend two hours conversing with Complainant about the putative HOS violations.

There is also no evidence of personal animosity towards Complainant. After Complainant refused to drive his assigned route, Bauer tried to accommodate him by providing him with the opportunity to work in the retail division. Bauer testified: "I think he's a good gentleman. I never had a problem with him. And his work, you know, has been good when he's on the job. The clients seem to like him. There was no reason to move him out the team." Tr. 245.

Based on the evidence presented above, the undersigned finds that Complainant failed to establish a nexus between his protected activity and the adverse employment action.

Conclusion

Complainant engaged in protected activity when he complained to various supervisors that Respondent was violating 49 CFR §395.8 by not requiring its Google shuttle bus drivers to fill out the "Record Of Duty Status" logs in addition to the company time sheets. However, Complainant has failed to establish that he was suspended from his Google shuttle bus schedule because of these complaints. The evidence on the record demonstrated that Respondent suspended Complainant from the Google shuttle route because Complainant was refusing to drive his assigned route and was under the mistaken belief that it was violating §395.5. Furthermore, Complainant waived his right to file an STAA complaint against the Respondent by signing a valid severance agreement.

ORDER

For the reasons described above, Complainant's actions do not qualify for protection under §31105(a)(1)(A) of the STAA. Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find that Respondent did not unlawfully discriminate against Complainant because of any protected activity and, accordingly, his complaint is hereby **DISMISSED**.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).