U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 November 2013

CASE NO.: 2013-STA-00009

IN THE MATTER OF

GEORGE MCGAUGHY,
Complainant

v.

PRIORITY TRANSPORTATION, INC., AND DANNY RAY,
Respondents

APPEARANCES:

Paul Taylor, Esq.
Truckers Justice Center
On Behalf of Complainant

James N. Nolan, Esq.
Constangy, Brooks, & Smith, LLP
On Behalf of Respondents

BEFORE:

Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended and recodified, 49, U.S. C. §31105. Complainant alleges that Respondents retaliated against and discharge him on June 24, 2012 in violation of the employee protection provisions of the STAA.

On August 9, 2012.Complainant filed his initial complaint with the Secretary of Labor, who through Occupational Safety & Health Administration (OSHA) Area Director, Ramona Morris , investigated and issued the Secretary's Findings on October 24, 2012 in which she found pursuant to 49 U.S.C.§ 31105 (b)(2) (b)(2)(A) "no reasonable cause " to believe that Respondents violated the employee protection provisions of STAA as alleged by Complainant. On October 29, 2010, Complainant filed timely objections to the Secretary 's findings pursuant to 49 U.S.C. 31105 (b)(2)(B).

On June 3, 2012, this case was tried before the undersigned in Birmingham, Alabama. Before trial commenced Complainant alleged and Respondent admitted (1) Complainant is/was an employee as defined in 49 U.S.C.§ 31101 residing at 407 3rd Street, N.E. Alabaster, Alabama; (2) Respondent Priority Transpiration (Priority) is/was an employer within the meaning of 49 U.S.C. § 31101; (3) and 29 U.S.C. § 1978.101 (i).; (3) Priority is/was a person subject to 49 U.S.C.§ 31105 with its place of business at 2131 3rd Avenue SE, Cullman, Alabama. 35055; (4) Respondent Danny Ray (D. Ray) is/was a person subject to 49 U.S.C. § 31105; (5) from September 11, 2011 to June 24, 2012, Priority employed Complainant to operate commercial vehicles with a gross vehicle weight rating of 10,001 pounds or more on the highways in interstate commerce; (6) U.S. Department of Labor, Office of Administrative Law Judges has jurisdiction over this proceeding pursuant to 29 C.F.R. § 1978. 107 (b)

A. Background

D. Ray is and has been the sole owner of Priority since its inception in 1995. (Tr.9). As of the hearing Priority owned and operated 40 trucks while leasing on occasion additional owner/ operators who drove exclusively for Priority (Tr. 23). [1]

[1] As of September 2012 Priority operated a total of 61 trucks including truck owner operators (Tr.13, CX-5)

Priority employed 9 office employees including D. Ray, his wife (Lucinda Ray, controller); son (Justin Ray, Vice President/Operations); daughter (Alicia Young, Safety Director; daughter-in-law (Jessica Ray, Payroll), 3 dispatchers (one of which was Edward Edmondson) and an operations manager,. (Tr.14,, 21-22, 30, 136-37, 143, 250, 268-69, 275-776 287).

Priority paid its drivers 25% of the revenue it collected from its customers with drivers in 2012 and 2013 making an annual average of $50,000. (Tr. 15, 16). Effective April 12, 2012 Priority began a new pay policy of initially withholding one paycheck until the driver completed two round trips rather than paying them upon them upon the completion of the initial round trip. Following this initial set up the driver then received his normal check after completing each round trip. (CX-1). For Complainant this meant that initially he would have to make two round trips or "turns" to California and return (his normal run) before being paid. This policy did not prevent a driver from receiving a pay advance. (Tr. 16). For the past year Justin Ray has run Employer's day to day operations. Before that Ed Edmondson ran Priority operations. (Tr. 21,22).

Complainant is a 36 year old over-the-road driver who began hauling pulp wood as a teenager and currently holds a commercial driver's license from the State of Mississippi with double, triple and tanker endorsements. (Tr. 24, 25). At age 19 Complainant started to drive over the road operating tractor / trailers for various trucking companies including Paterson Trucking and Bundy Trucking eventually working for Priority transportation in September 2011 (Tr. 26). As an over-the-driver Complainant never had a DOT chargeable accident. (Tr. 27) Before working for Priority, Complainant owned and operated his own trucking company for 8 to 9 years until the price of diesel forced him out of business. (Tr. 28).

B. Alleged Protected Activity

When working for Priority, Complainant received most of his dispatches from Ed Edmondson hauling dry freight from Alabama or Tennessee to California where he would pick up fresh fruits and vegetables and transport them to Albertville, Alabama or Toccata, Georgia. (Tr. 30,31). In May 2012 Complainant delivered a load to Publix grocery store distribution center in Jacksonville, Florida. Following this delivery Edmondson dispatched Complainant to pick up a load of chickens in Douglas, Georgia on April 30, 2012 and deliver them to Calexico California by a certain time.(Tr. 33). The delivery was made on May 4, 2012, a distance of 2,100 to 2,200 miles. (Tr. 34).

When given the dispatch, Complainant did not resist taking it but told Edmondson that he did not feel well and needed to come home. Complainant testified he was tired, had not been sleeping well, and would get drowsy and fatigued during the day having just arrived from a long trip from California. (Tr. 35). En route to California, Claimant began to experience shortness of breath, dizziness and coughing up blood and on May 3, 2012 told Edmondson he was going to the emergency room in El Paso, Texas. (Tr. 36, 37)

On May 3, 2012 Complainant went to emergency room at Del Sol Medical Center in El Paso where according to Claimant the doctors told him that he was suffering from chronic fatigue, was dehydrated and had a pulmonary embolism. Further according to Complainant the emergency room doctors told him he needed to take off and rest for 24 to 48 hours. (Tr. 38, 39).

While in the emergency room Complainant testified he called dispatch and spoke to Edmondson telling him that they were running tests and he had not heard anything to which Edmondson replied the load needed to be in Calexico the next morning and that Priority had a broker on them who also phoned Complainant on multiple occasions. Edmondson further told Complainant that if he could not have the load out there the next morning he should clean out his truck and Priority would send someone else to take the load onto its destination which Complainant understood to mean Priority would fire him and replace him without another driver who could made the delivery on time. (Tr. 40-42).

Complainant testified that after talking to Edmondson he also spoke to D. Ray and told him the doctors told him to rest for 24 hours in El Paso to which D. Ray responded: "I hired you to haul produce, not to be a cry baby." (Tr. 43)
Complainant in turn did not rest for 24 hours but drove on and delivered his load because he was afraid he would lose his job if he rested as instructed. (Tr. 44; RX-1, CX-9)[2]. Complainant had no recurrent symptoms, made the delivery to Calexico. and completed 4 to 5 pickups on his return to Priority's yard in Cullman,, Alabama where Edmondson had another driver haul the load to its

[2] Complainant's discharge instructions (CX-3) show Complainant complaining of chest pain for which the doctors at Del S0l Medical Center could not determine its cause and stated his condition did not appear serious but as a precaution to rest at home for 24 hours and avoid strenuous activity, take prescribed medicine as directed an report back to the hospital or see his doctor if his chest pain feels different., occurs more often, last longer than usual or comes with less activity than usual.; has shortness of breath,, sweating, nausea, vomiting,, dizziness or fainting, coughing up blood,, abdominal pain, dark stool or painful breathing.

scheduled drop in Albertville, Alabama because of Complainant's continuing complaints of fatigue. (Tr. 45-47).

On June 21, 2012, Complainant went to Dr. Michael L. Schendler to address Complainant's complaints of fatigue with daytime sleepiness, morbid obesity and suspected Sleep apnea. (CX-3, pp.12,13).In turn Dr. Schendler ordered a sleep study which allegedly found Complainant to have sleep apnea and issued a return to work slip for July 2, 2012 which Complainant gave to Edmondson on June 21, 2012 telling him that both he and Dr. Schendel believed it was unsafe for Complainant to drive until the sleep study could be performed (CX-2, Tr. 50-54). Edmonson told Complainant to give Dr. Schendel note (CX-2) to another office staff person, Jeannie and asked her about getting an advance for his paycheck. Jeannie told Complainant to talk to Lucinda Ray (D. Ray's wife) that it should not be a problem but D. Ray made the ultimate decision. Complainant explained the need for the advance telling her he had a paycheck coming and needed the advance to pay his doctor bills and would not be driving until July 2, 2012. (Tr. 55-58).

On June 24, 2012 Complainant spoke with D. Ray who was unloading a truck load of boxes in Priority's warehouse. (Tr. 59,60). Complainant asked for an advance and explained the need for it. D. Ray replied Complainant needed to go to California to get a check and said "Well, why are you always trying to change things, you're always trying to be in something". Complainant replied, "Danny , if this is the way it's going to be, I need to start looking for another job." Danny then said: "You know what, clean the damn truck out". (Tr. 62,63).

In the past Complainant had always been able to get an advance even as late as the Jacksonville, Florida to California trip where he went to the emergency room but before going received a $500.00 advance. (CX-4; Tr. 63-66). After leaving Priority's employment. Complainant underwent a sleep study and was able to return to truck driving in August 2012 driving for D&P Logistics followed by Sherman Smith Trucking and then Swift Transportation (CX-7; Tr.73-77).

While driving for Priority, Complainant admitted filling out falsified driver logs on many occasions. (Tr. 87). In fact Complainant admitted his logs for April May, June, 2012 were not accurate because he was forced to lie on his logs because of fear of losing his job and that everybody in Priority's Office including D. Ray told him to lie on his logs so he would never run out of hours. (Tr.96). Further, not once in his employment with Priority was he ever reprimanded or

disciplined for such conduct. Further, he never attended any safety meetings while at Priority because the dispatchers never made him available for such. (Tr. 98).

Complainant further stated that he was discharged from the hospital in El Paso at 2:15 pm on May 3, 2012 against doctor orders and arrived in Calexico, a distance of 900 miles on May 4, 2012, on the urging of Edmondson and a Broker when in fact a doctor at the emergency room wanted to admit him. Yet the hospital record (RX-5) says nothing about a doctor recommending admission. (Tr. 101-02.)

Complainant testified that after returning from his California trip he did not seek medical attention until June 21,2012 when he first saw Dr. Schendel for sleep apnea. Complainant asserted he told Dr. Schendel he had been spitting up blood on his trip to California yet there was no mention in Dr. Schendel treatment notes (RX-6) of such a complaint. In fact Dr. Schendel notes Complainant had no current complaints of abdominal pain, nausea, or vomiting and in fact Dr.Schendel found Complainant to be in good health other than smoking and obesity, (Tr. 103-08).

Complainant testified that Priority forced him to drive between 15 to 17 hours at a time on a run making 3 or 4 trip a month to California driving 15,000 miles or more between October 2011 and June 2012. (Tr. 109-12).

C. Priority's Response

In response to Complainant's assertions Priority called witnesses, Justin Ray (J. Ray), Edward Edmondson, Alicia Young, Jessica Ray (Jess Ray), Lucinda Ray (L. Ray) and Danny Ray(D. Ray). J. Ray, who has been vice president for Priority for the past 6 months, has worked for Priority in a variety of positions since his youth including janitor, simple maintenance (servicing trucks and tire changing), dispatch, vice president in charge of operations (Tr. 136,37). As vice president J. Ray also serves as a dispatcher making sure loads are picked up and delivered on a timely basis. (Tr. 138).

J. Ray testified that under DOT regulations a driver can drive for 11 hours or be on duty for 14 hours after which the driver is required to take a 10 hour break. Upon reaching 70 hours a driver has to take a 34 hour re-break or restart with a provision of recapping or reusing / regaining hours not used during the day. (Tr.139). J. Ray testified he never heard any dispatcher, including his father tell any driver , who has a duty to keep accurate logs, to falsify his/her logs. (Tr. 140).

J. Ray testified that Priority has a software system , the McLeod System, which monitors dispatches including miles driven. It also has a policy of drivers who are

on a dispatch calling in twice a day between 7am and 9 am and 2 pm and 4pm during which the driver provides his location, how the truck is running, the temperature of the load, weather conditions, and how they are feeling. (Tr. 141). The purpose of the calls is to make sure drivers are doing their job in a safe and timely manner. (RX-1; Tr. 142, 164).

On April 30 or May 1, 2012 the McLeod system (RX-1) recorded no calls from Complainant from Jacksonville, Florida but rather two calls from Complainant on April 30, 2012 where he picked up and was loading an order in Douglas, Georgia at 3.00 and 3.05 pm, and another call on May 1, 2012 at 8:44 am from Complainant in Selma, Alabama, in which Complainant indicated that everything was "Ok". On May 2, 2012, RX-1 indicated Complainant was in Shreveport, Louisiana, was running late and was not feeling well. (Tr. 143,144). On May 3, 2012 Complainant called Edmondson from Van Horn, Texas at 7.36 am stating he was not good and was going to the hospital in El Paso to which Edmondson asked, in J Ray presence, if Complainant needed an ambulance or needed someone else under the load in conformity with Priority's practice of replacing the driver with another driver to make the delivery and providing the incapacitated driver with medical assistance. (Tr. 145-46). On the same day at 2: 05 Complainant called Edmondson from El Paso said he was fine and was going to check himself out of the hospital. Thereafter RX-1 showed Complainant at 10 am on May 4 making the delivery in Calexico, California.

On June 22, 2012, J. Ray testified that Complainant came to Priority's terminal, stated he needed time off to run some tests to which J. Ray said he hoped Complainant felt better. J. Ray handed Complainant a check. Complainant stated he wanted a second check to which Complainant objected saying he was going to be off a while. J. Ray replied saying he could not do that because of Priority's policy of holding back a week of pay. Complainant became very agitated demanding his second check to which D. Ray refused.

Then Complainant according to J. Ray, started to take his keys off of his key ring and to remove his fuel card out of his wallet saying : "I done, I quit, I can't handle—I'm not—I done with this. I quit." D. Ray replied: Good. Just get your stuff out of your truck. Don't come back on my property again." Complainant then stated: "Mr. Ray, if you'd like to settle this like men, lets step outside." J. Ray then asked Complainant to come outside with him and not to start anything. (Tr.147-48)

Complainant went outside and retrieved his personal items from the truck, At no point did Complainant demand or ask for any advance or any money other that

a second pay check for his second run to Calexico, California. Before this episode Complainant had quit once before but Edmondson talked him out of it. (Tr. 151)

J. Ray testified that RX-17, a poster telling drivers to keep their log books current and legal, has been hanging in Priority meeting room ever since he began working for Priority. (Tr. 152). J. Ray testified it was not unusual for Priority to give drivers an advance. (Tr. 164). J Ray was not aware of drivers who falsified their logs but Priority had drivers in the past that violated hours of service regulations. (Tr. 167) J. Ray was aware of CX-5, a DOT program tracks drivers safe and unsafe driving conduct. (Tr. 168). J. Ray admitted CX-5 showed Priority drivers being placed out of service and fined by DOT for a false record of duty status and that Priority suspended or took some action against them also but did not fire them for such conduct. (Tr. 170, 171).

Edmondson, who has worked for Priority for the past 9 years as a driver and dispatcher, testified that in the past he had driven from Alabama to California and back 3 to 4 times a month and avoided driving in excess of regulations by gaining a 34 hour reset or doing a recap. (Tr. 176). Further when drivers are hired they are required to go through safety orientation during which they are required to demonstrate the proper way to log their time on the road. When Complainant was hired Edmondson was head dispatcher and Complainant was required to go through safety orientation. (Tr. 177).

Edmondson described RX-1 as a dispatcher's log showing Edmondson dispatching Complainant to Douglas, Georgia to which Complainant did not object or raise any issue about being out of time or unable to drive because of health issues. (Tr. 179). The next two calls from Selma, Alabama and Vicksburg on May 1, 2012 indicated everything was going "Ok". The next entry was from Complainant in Shreveport, Louisiana, indicating he was running late and not feeling good because he had injured his leg on a previous trip when he stepped out of a shower , slipped and hit his leg against a toilet. Complainant never indicated to Edmondson he could not continue with the trip. (Tr. 180,181). Complainant next talk to Edmonson on May 3, 2012 from Van Horn , Texas at 7:36 am during which Complainant thought he had a blood clot and was going to a hospital in El Paso to which Edmondson told him he would call an ambulance. Complainant declined the offer stating he would be fine. Complainant called Edmondson from El Paso at 2:05 pm and stated "All okay" although he had been coughing a lot and was being discharged from the hospital. (Tr. 182-85). On May 4, 2012 Complainant called from Yuma, Arizona and again reported "All Ok".

Edmondson testified what when Complainant was hired he signed two documents (RX-8,9) indicating he would comply federal, state and local regulations including DOT regulations and acknowledging Priority expected him to comply with such. (Tr. 186-89). Edmondson further testified that Complainant was never assigned excessive miles in a month and that Complainant's logs for his trip to California did not comport with either the hospital records or the distance from the hospital in El Paso to California (600 miles versus 980 miles as alleged). (Tr. 190-96), Also RX-1 showed no reports of ill health by Complainant on Complainant's return trip from California.

On May 9, 2012, Complainant called Edmondson and told him he was running late , not feeling well and would not be able to complete his delivery to Albertville, Alabama. Edmondson told Complainant that if he could make it to Priority's yard in Cullman he would have another driver pick up his load which he did. When Complainant arrived in Cullman he did not appear to be in distress. (Tr. 200-01).

Edmondson testified he never heard D. Ray (1) threaten a driver with loss of employment because the driver did not want to drive because of illness; (2) force a driver to drive excessive hours; or (3) encourage a driver to misstate driving time on a driver's DOT logs. Further as head dispatcher Edmondson never had any driver complain about being assigned two much work (Tr. 201-02).

On cross Edmondson could not recall the names of drivers who had been fired for falsifying logs, violating hours of service regulations but claimed it was company policy to do so. (Tr. 214-215).

Edmondson admitted that Priority did not discipline Complainant for not keeping accurate logs but claimed Priority's safety department director, Alicia Young, monitored driver's logs and reviewed them with drivers after each trip and did so in Complainant's case. (Tr. 244-45). Further Ms. Young reported to Edmondson she had issues with drivers falsifying their logs. [3]

Alicia Young , Safety Director for the past 5 years for Priority, testified that she was trained in safety when hired and was aware of Complainant driving for Priority beginning in October, 2011. (Tr. 348-49). Young trained Complainant along with Martin Spiegel when Complainant was hired and covered topics such as driver logs. hours of service and general policies and procedures. (Tr. 250-51)

[3] Complainant recorded no post trip inspections on his logs.(Tr. 247, 248).

According to Young, she used a program (Rapid Log) to measure the accuracy of a driver's log. When a driver returned from a trip she gets their log and checks the fuel against the fuel prints to make sure the driver has logged the correct times he has fueled. Then she enters the scans the hours of service in Rapid Log. In Complainant's case, she ran the program against his logs and found he was over 70hours for the trip (RX-21 Young returned his logs to Complainant, asked him to review. and make sure they were correct. Complainant said he would review his logs. Young testified that drivers who have repeated overage in their logs were disciplined but could not recall their names. (Tr.352-56).[4]

Young testified that on June 22, 2012 Complainant brought her RX-10, Dr. Schendel note dated June 21, 2012. and told her he needed time off to get a sleep study. Young stated she did not have the authority to grant time off. Rather that authority was vested in D. Ray, J. Ray and Edmondson, whom she never heard refusing to allow a driver time off for medical reasons. According to Young, Complainant became upset about not receiving his pay check right then because he was going to be off for this doctor's visit and also because he had to sign a release saying he was leaving the hospital against doctor's orders because dispatch wanted him to take a load. (Tr. 257-59).

Jessica Ray, who runs payroll for Priority paying drivers and billing customers, testified about Priority practice of paying drivers off the loads they run withholding one pay check effective April 12, 2012 (RX-11, Tr. 277). Jessica Ray testified that on June 22,2012, Complainant demanded that Priority not withhold a pay check but pay him for all turns he had made, i.e., two. Jessica Ray said a check would be withheld to make sure Priority had all of Complainant's logs, trip sheets and bills of lading. (Tr. 278, 279).

Jessica Ray asked D. Ray if Complainant could have both checks. D. Ray replied: "No. He is no different than anyone else". Complainant got upset, started to take his keys off his ring, and asked D. Ray to step outside and began to curse D. Ray. Lucinda Ray, (L. Ray) wife of D. Ray and controller for Priority, testified that following Complainant separation from Priority he never filed for unemployment.(Tr. 287) Further she identified the following drivers who were disciplined or terminated for log violations: Herndon Self, Edward Daniels, Paul Clark, Brian Thomas, and Michael Jones. (Tr. 289).

L. Ray, testified that on May 9, 2012 she was in Jacksonville ,Florida and not in Cullman, Alabama and had dinner with D. Ray at the Black Fin Restaurant in

[4] Part of this discipline included a verbal reprimand by Young.

Jacksonville, Florida. (RX-20; Tr. 292). On the next day, she and D. Ray were in Jacksonville and ate at Bono's Barbecue in Jacksonville and had no conversation with Complainant. (Tr. 293). She also testified that on June 22, 2012 she gave Complainant his second pay check only after Complaint said "I quit. I have enough of this. I'm going to have to go somewhere else," and D. Ray instructed her to give Complainant his final paycheck because he did not want him on the premises any longer and was afraid he would have to call the police. Further, there was no discussion about an advance or Complainant's health and inability to drive. (Tr. 296).

D. Ray , owner of Priority, testified on June 22, 2012, he saw Complainant, who told him he was going to be off for a week or two to have some tests run, to which D. Ray replied to take all the time he needed. At that point D. Ray went into the warehouse. A short time later Jessica Ray came to the warehouse stating that Complainant was upset and wanted his second paycheck to which D. Ray refused, saying Complainant was no better or worse than anyone else. In response Complainant became irate and started to curse, grabbed his wallet, took out his fuel card, got his key and said: "You know, I'm tired of it. I'm not going to put up with anymore. I'm out of here." Complainant renewed his cursing after which told Jessica to go back inside followed by Complainant offering to settle the matter outside which D. Ray declined to do, and then D. Ray agreeing to pay him a final check since he had quit. (Tr. 307-08). Between May 9 and June 22, 2012, D. Ray did not speak with Complainant. (Tr. 314).

D. Ray further testified that Priority was addressing the issue of driver overtime and incorrect logs by talking with drivers and instructing them on what to do so as to avoid unintentional mistakes which made up to 95 to 98% of all out of service violations. (Tr. 317). R. Ray also testified that Complainant was the first driver he had to cuss at him directly in his face.(Tr. 321).[5]

D. Complainant/ Respondents Allegations

Other than a few preliminary items the parties disagree over many facts conclusion of facts and law including:

[5] On rebuttal Complainant testified on rebuttal that held called D. Ray and told him that Edmondson put him under the load and that he was not feeling right and that he needed to come home but he also needed to pay his phone bill and that he did intended only to talk and resolve pay and medical issues. (Tr. 322-324).

(1) Whether Respondents terminated Complainant as Complainant maintains or whether he voluntarily quit as Respondent asserts;

(2) Complainant's communication with Edmondson , and D. Ray on May 1, 2012 with Complainant asserting he told them he was feeling ill and fatigued and did not have the available time to take an additional assignment and deliver a load of poultry from Douglas, Georgia to Calexico, California and return with loads to Albertville , Alabama without violating 49 C.F.R. 395.3, to which Edmondson allegedly responded he had two choices of cleaning his truck out or accepting the dispatch. Respondent asserted that D. Ray gave Complainant two choices, of delivering the goods as directed or turning around and bringing the load to Priority's facility in Cullman, Alabama, where it would be assigned to another driver. Complainant accepted the load and later that day called dispatcher J. Ray and told him he was in Vicksburg and was "ok".

(3) On May 2, 2012, Complainant did not assert any communication with Respondent. Respondents on the other hand asserted in accord with Respondents practice of the driver calling its facility twice a day. Complainant called at 8:15 am, complained he was not feeling good and was running late only to call later that day and tell Respondents he was "ok".

(4) On May 3, 2012, Complainant alleged, while near El Paso he was suffering from dehydration, fatigue due to lack of sleep, shortness of breath and coughing up blood and when he checked into the Maria del Sol Hospital was diagnosed with pulmonary embolism. Despite this condition which Complainant advised Respondents of, Complainant alleged he received calls from D. Ray and a broker insisting the load be delivered on time with D. Ray telling him to continue driving or clean out his truck and that he was "sick and tired of "crybabies". Respondents assert Edmonson called Complainant later

in the day during which Complainant said he was in the Emergency Room but was "ok" and wanted to continue driving. On May 4, 2012 Complainant called from Yuma, Arizona and said he was "ok". Later that day Complainant called and advised he was delivering the order in Calexico, California. Respondents denied telling Complainant to drive, notwithstanding his physical ailments with Complainant delivering his load one day late in Calexico.

(5) Following this delivery both parties agree that Complainant was instructed to proceed to Solanas, California to pick up a load of produce to Albertville, Al. However Complainant asserts he told Edmondson he was worn out, needed a break and was unsafe. Edmondson on the other hand asserts Complainant told him he had 12 hours of sleep and was feeling good and ready to go. Further D. Ray never told him the return load had to be delivered on time and that in fact Complainant made the delivery to Cullman, Alabama and not Albertville, Alabama because Complainant asserted he did not feel well.

(6) Complainant asserted and Respondents denied, Safety Director Young told Complainant to take off work until May 12, 2012, denied Complainant told Young or D. Ray on May 13, 2012, he wanted to file a worker's compensation claim regarding his hospitalization in El Paso, and that D. Ray refused to file any such paperwork.

(7) Respondents admitted Complainant on June 22, 2012 appeared at Priority facility, presented a note from Dr. Schendel and advised Young he was going to take two weeks off and demanded he be paid for his most recent run, but was reminded of Respondent's policy of withholding a turn upon completion of subsequent turn. Upon being denied this second paycheck, by D. Ray, Complainant told Ray in the presence of Lucinda Ray and J. Ray, "I quit", and proceeded to take his truck keys off his key chain and curse and threaten D. Ray.

(8) Complainant asserted his complaints were related to actual violations of 49 C.F.R.§§392.3 and 395.3 which would have occurred but for Complainant's refusal to drive on May 1, 2012and are protected under 49 U.S.C. §32205 (a)(1) (A)(i). Further actual violations of 49 C.F.R. §392.3 would have occurred but for Respondent's refusal to drive on or after May 3, 2012 and are protected by 49 U.S.C. §31105 (a) (1) (B) (ii).

E. Complainant's Credibility

Much of Complainant's case rests upon his credibility. After observing his demeanor while testifying and considering what he had to say versus the demeanor and testimony, of Respondent's witnesses, I find no reason to credit Complainant testimony. Rather I find Complainant to be an incredible witness who admittedly routinely falsified his logs knowing, he as a professional driver and former truck owner and business operator, had an obligation to keep accurate records and that failure to do so could result in substantial penalties including license revocation and loss of authority to operate. Complainant would have me believe that Respondents encouraged him to falsify these logs despite a lack of evidence to support this assertion and contrary testimony showing Respondents posting notices directing drivers to keep accurate logs, the safety director monitoring driver logs and telling drivers of log discrepancies, and Respondent's disciplining of drivers for repeated violations. [6]

Complainant's sickness assertion of having or suspected of having a serious heart or pulmonary embolism problems as diagnosed by emergency room physicians requiring him to rest for 48 to 72 hours was moreover not supported by any documentation but contradicted by hospital records which showed no serious heart problem, but merely an advisory to rest for 24 hours. Even Complainant's assertion of sleep apnea which Dr. Schendel suspected on June 21, 2012 was not supported by any subsequent testing.

[6] Complainant asserted Respondents' s supervisors (Edmondson and Young) when questioned about drivers being disciplined or fired for repeated log violations could not name a single driver. However L. Ray named 5 drivers who had been terminated for such violations. (Tr. 289).

Complainant assertions of arriving at the El Paso hospital at 7 am, checked into the Emergency Room at 8:30 am and released at 5:00 pm are inconsistent with hospital records showing he arrived at the hospital at 10:30 am and released at 2:15pm but are consistent with the dispatcher log showing Complainant called dispatch at 7:36 am from Van Horn about 120 miles from El Paso and that he called at 2:05 pm reporting he was being released from the hospital.

Complainant's testimony is also inconsistent with almost every other witness on one or more key points with whom I find no basis to discredit. Complainant assertion that Respondents do not respect or follow DOT regulations was not supported by DOT's Company Snapshot report showing for a two year period ending on April 25,2013 a basic overall status of "Does not exceed intervention threshold based on-road performance and investigation results." (CX-5).

Simply put the credible evidence does not show Claimant refusing to drive because to do so would be unsafe or exceed his allowable hours. Rather the credible evidence of any decline in driving assignments came only when he returned to Alabama on May 9,2012, requested and was granted a change in drivers without opposition from Edmonson.. At the start of his California turn in late April,2012, Respondent D. Ray asked Complainant if he was able to make the run and had the hours to do so and that if either situation applied he would get a substitute. Complainant declined D. Ray's offer stating he had the hours, asked for and received an advance and took the load. (Tr. 315) Indeed when Complainant informed Edmondson he was ill in Van Horn, Texas Complainant declined Edmondson offer to call an ambulance and replace him. These actions by D. Ray and Edmondson were certainly not in conformity with Complainant's assertion of uncaring Respondents who had no respect for driver safety or hours of operation.[7]

[7] 49 CFR.392.3 entitled "Ill or fatigued operator" provides as follows: No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. However, in a case of grave emergency where the hazard to occupants of the commercial motor vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the commercial motor vehicle to the nearest place at which that hazard is removed.

Moreover the credible testimony showed that after Complainant returned from California he had 3 days off, returned to work feeling better and worked without incident for about 7 weeks until he received a call from Edmondson on June 21,2012, while in Dr. Schendel's office in which Edmondson asked Complainant to take a load. Complainant responded he would get back to him. (Tr. 47-53).

F. Discussion, Findings, and Order

49 U.S.C.A. § 31105(a)(1) ("the Act"), provides that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle regarding pay, terms or privileges of employment because the employee has engaged in certain protected activity. The protected activity includes making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order." § 31105(a)(1)(A). Internal complaints to management are protected under the Act. *Reed v. National Minerals Corp*., Case No. 1991-STA-34, (Sec'y., July 24, 1992), slip op. at 4. A "commercial motor vehicle" includes "any self-propelled . . . vehicle used on the highways in commerce principally to transport passengers or cargo" with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. App. § 2301(1).

The Act further provides protection for employees who (1) refuse to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security " (§ 31105(a)(1)(B)(i) or have a reasonable apprehension of serious injury to themselves or the public due to an unsafe condition. § 31105(a)(1)(B)(ii). Whether an employee's apprehension of serious injury is reasonable is subject to an inquiry of whether a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. *Id.*

To prevail under the Act, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection (contributing factor) between the protected activity and the unfavorable personal action. ALJ No. 2009-STA-15 (ARB May 28, 2010) *Fleeman v. Nebraska Pork Partners,*ARB Nos. 09-059& 09-096, *Schwartz v. Young's Commercial Transfer, Inc.,* ARB No. 02-122, ALJ No. 2001-STA-33, slip

op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sec'y v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003).

Complainant asserts he engaged in protected activity under 49 U.S.C. §§31105 (a)(1)(A)(i) when he filed complaints with Priority alleging he had been dispatched and forced to drive when injured or impaired due to illness and fatigue which he reasonably believed to be violation of 49 CFR § 392.3 citing *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir 1992); *Ulrich v. Swift Transportation Corp.*, ARB No11-016, ALJ No.2010-STA-41 (ARB Mar. 27, 2012). Further he engaged in protected under 49 U.S.C. (a)(1)(B)(i)(actual violation clause or reasonable violation clause 49 U.S.C. (a)(1)(B)(ii) citing *Stauffer v. Wal-Mart*, ARB no. 99-107, ALJ No. 1999-STA- 21 (ARB Nov. 30 1999) and *Johnson v. Roadway Express, Inc.*, No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2002); *Asst. Secretary and Freeze v. Consolidated Freightways*, ARB No. 99-030, ALJ No. 1998-STA-26 (ARB Apr. 22, 1999); and *Brink's Inc. v. Secretary of Labor*, 148 F.3d 175 (2nd Cir 1998).

Further Complainant asserts his protected activities were a contributing in the protected activity taken against him citing *Fleeman v. Nebraska Pork Partners*, ARB Nos. 09-059& 09-096, ALJ No. 2008-STA-15 (ARB, May 28, 2010) for Complainant's burden of showing protected activity was a contributing factor; *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-55 (ARB Jan. 31, 2006) for temporal proximity of protected activity and adverse action raising an inference of discrimination; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003) for showing retaliation by employer's submission of incredible reason for adverse action; *Moravec v. H.C. & M Transportation, Inc.*, 1990-STA- 44 (Sec'y Jan. 6, 1992) for insubordination not being egregious when committed when engaging in protected activities; *Yadav v. L-3 Communications Corp.*

Complainant asserts moreover that Respondents presented no clear and convincing evidence or evidence that was highly probable or reasonably certain that Complainant's insubordination would have led to his termination or cessation of employment thereby entitling him to relief under the STAA including reinstatement, back pay, compensatory damages, punitive damages, interest, attorney fees and abatement of violation (posting of a copy of decision, deletion of personnel records of unfavorable employment action with appropriate notice to all consumer reporting agencies to delete any unfavorable employment information it may have provided them.

In response Respondents claim and I find that Complainant did not refuse to drive or claim that it would be unsafe to drive or that his driving would violate 49 CFR 392.3. Rather he asked to be relieved of driving duties when he returned to Cullman, Alabama which request Respondents granted without opposition. Moreover Complainant never claimed that he would violate the hours of service rule as provided in 49 CFR 395.3 and in fact when questioned by D. Ray after he picked up a load of chickens in Douglas, Georgia if he had the hours to make the delivery in California claimed he had the hours.

More importantly Complainant never suffered any adverse employment action when he returned from Dr.Schendel on June 21, 2012 and spoke with D. Ray not about an advance or loan but a second check that according to Respondent's policy was uniformly withheld until he made another run. Complainant objected to the policy, which D. Ray refused to change and in protest quit Respondents employment but not before cursing D. Ray and threatening to fight him which D. Ray refused to do. Simply put, none of the alleged protected activity had anything to do with his termination as alleged by Complainant.

Rather I find as follows:

1. Complainant took a load to Calexico, California without complaining about a potential hours of service violation or stating that he thought it was unsafe for him to do because of fatigue, a sleep order, heart or pulmonary or other physical condition.

2. In route to Calexico when Complainant notified Respondents was ill, he refused Respondents offer of medical attention or to have someone else take the load stating he was able to safely continue.

3. When released from the emergency room in El Paso he informed Respondents he was fit for duty and ready to continue with the load.

4. When he returned to Alabama on May 9, 2012 and informed Respondents he was too ill to deliver the load. Respondent transferred the load to another

driver as requested and at no time thereafter took any adverse action against him.

5. Rather, two months later in late June, 2012 when he demanded an exception to Respondent payment policy of withholding a paycheck, Complainant became irate and was cursing out and threatening to fight Respondent's owner, D. Ray.

6. In agreement with OSHA's Area Director I find no reasonable cause to believe Respondents violated the STAA by allegedly retaliating against and discharging Complainant.

Accordingly, I find no merit to Complainant charges against Respondents and dismiss said charges.

Digitally signed by Clement Kennington
DN: CN=Clement Kennington, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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, the Associate Solicitor, Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1978.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1978.110(b).