

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 13 September 2018

CASE NO.: 2017-STA-00083

In the Matter of:

EVELYN CASTILLO,
Complainant,

v.

FIRST MILE SQUARE LLC,
Respondent.

Before: Timothy J. McGrath, Administrative Law Judge

Appearances

Arthur Z. Schwartz, Esq., Advocates for Justice, Chartered Attorneys, New York, New York, *for the Complainant*

Lewis Goldberg, Esq., Goldberg and Weinberger, Redding, Connecticut, *for the Respondent*

DECISION AND ORDER DISMISSING COMPLAINT

I. STATEMENT OF THE CASE

This proceeding arises from a complaint of discrimination filed by Evelyn Castillo (“Castillo” or “Complainant”) against First Mile Square, LLC (“First Mile” or “Respondent”) under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (the “STAA” or the “Act”), as amended, 49 U.S.C. § 31105 and the procedural regulations found at 39 C.F.R. Part 1978. The STAA complaint filed with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) alleged First Mile unlawfully retaliated against Castillo for her refusal to drive school buses because the fuel gauges were not working properly. On August 23, 2017, the Secretary of Labor (“Secretary”), acting through his

agent, the Regional Supervisor Investigator for OSHA, found Castillo's alleged protected activity did not contribute to the adverse employment action. The Secretary dismissed the complaint and Complainant objected to the Secretary's finding and requested a *de novo* hearing before the Office of Administrative Law Judges.

I held a hearing in this matter on March 19, 2018, in New York, New York. At the hearing, the parties were afforded the opportunity to present evidence and arguments. The Hearing Transcript is referred to herein as "TR." Formal papers were admitted into evidence as Administrative Law Judge Exhibits ("ALJX") 1-4. TR 7. The parties' documentary evidence was admitted as Complainant's Exhibits ("CX") A-I, Respondent's Exhibits ("RX") A-I and Joint Exhibit ("JX") 1. TR 7, 9-11. Testimony was heard from Complainant and Leonardo Chaparro ("L. Chaparro"). TR 16-27, 104. The parties submitted post-hearing briefs¹ and the record is now closed.

II. STIPULATIONS AND ISSUES PRESENTED

The parties stipulated to the following:

1. First Mile is a corporation which operates school buses in the State of New York;
2. Castillo at all relevant times was an employee of First Mile and worked as a school bus driver;
3. On August 3, 2016, Castillo was assigned to Bus No. 381. After entering the bus, Castillo refused the assignment, claiming that the fuel gauge did not work;
4. Castillo was then directed to use Bus No. 370;
5. After entering Bus No. 370, Castillo refused the assignment, alleging this fuel gauge also did not work;
6. Castillo was not given any other work on August 3, 2016;
7. On August 4, 2016, Castillo was placed on "administrative leave pending further investigation;"

¹ On May 29, 2018, Respondent filed a post-hearing brief ("Resp. Brief"). On June 13, 2018, Complainant filed her post hearing brief ("Compl. Brief"). Subsequently, on June 21, 2018, Respondent sent a letter asking for the opportunity to respond to Complainant's brief, as it came in well after the deadline of May 25, 2018. On August 1, 2018, I issued an Order Allowing Respondent to File Reply Brief by August 17, 2018. Respondent did not file a reply brief.

8. On August 5, 2016, Castillo was terminated from employment;
9. On August 18, 2016, an arbitration hearing was held pursuant to the collective bargaining agreement between Castillo's union and First Mile;
10. On August 22, 2016, the arbitrator issued an award giving Castillo a two week suspension (from August 3, 2016 to August 16, 2016) and ordered immediate reinstatement, plus back pay from August 17, 2016 to reinstatement; and
11. Castillo filed her complaint with the Secretary of Labor on August 20, 2016.

JX 1 at 1-2.

Based on the record as a whole, I find Complainant did not engage in protected activity and, therefore, is not entitled to relief under the STAA.

III. FINDINGS OF FACT

A. **Complainant's Testimony**²

As of the date of hearing, Complainant continues to work for First Mile as school bus driver and is the "Transport Workers Union Local 100" shop steward. TR 17-18. She started in 2001 with Mile Square Transportation and transferred to First Mile in 2014, but worked in the same garage with the same supervisors the entire time. TR 18. Prior to taking a school bus out in the morning, Complainant testified she was trained to "do a proper inspection." *Id.* She stated: "I have to check everything: gauges, tires. It's a lot of stuff that I have to check so the bus can be safe for me to transport the kids." *Id.* Complainant fills out a "DOT [Department of Transportation] card" for each pre-trip inspection, which includes checking the brakes, steering, lights, reflectors, horns, wipers, mirrors, tires, wheels and rims, emergency equipment and emergency exit.³ TR 20-21; CX F; CX G. Complainant also checks the oil, water, pressure and gas gauges. TR 21. She testified about the gauges: "There is a needle that . . . if it moves, that means that something is wrong." *Id.*

² In addition to the evidence discussed herein, Complainant submitted the following regulations: 1.) 49 C.F.R. § 396; 2.) Part 721 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York; and 3.) Part 720 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York. CX A; CX B; CX C.

³ CX E appears to be an alternative pre-trip inspection checklist, but there is no evidence in the record indicating this was the checklist used by First Mile. *See* CX E.

Complainant has been certified to drive a school bus under Article 19-A of the New York law, for seventeen years. TR 42; *see* NY CLS Vehicle and Traffic § 509-a (2018). She testified Employer’s safety department trained her to check the gas gauge as part of her pre-trip inspection. TR 42-43. Every two years, Complainant must take a written test. TR 90. The School Bus Driver Pre-Service Course Trainee Manual, Unit 11, Inspections instructs drivers after starting the engine and checking the oil pressure gauge, to “check all other gauges (top-bottom, left-right).” CX D at 8. Complainant testified she has returned a DOT card to the dispatchers several times over the years since 2001 because of issues with her assigned buses. TR 21. When she returns a DOT card for a safety issue, “[e]ither they assign me another bus or they fix the problem.” TR 23. On July 14, 2016, about three weeks prior to the incident in question, Complainant was assigned Bus 370 and reported, after a pre-trip inspection, the fuel gauge was not working. TR 23-24; CX F.

On August 3, 2016, Complainant was assigned to pick up one “wheelchair child” in New Rochelle, New York, a twenty-minute drive from the bus lot in Mount Vernon, New York. TR 99-100. She was then supposed to drop the child off at school and bring the bus back to the parking lot. TR 100-01. She was to repeat this trip in reverse in the afternoon: get the bus from the parking depot, pick the child up from school, drop the child off at home and return the bus to the parking depot. TR 101.

That morning Complainant was assigned to Bus 381, a small handicap-adapted bus she was normally assigned, and started her pre-trip inspection. TR 26-27, 101-02. She testified she noticed the diesel gauge “needle was going back and forth” in a left to right motion. TR 27-28. Complainant noted on the DOT card that the gauge was not working and then went to the dispatchers’ office to let them know about the problem.⁴ TR 28-29; CX G at 1.

Cinthia Flores (“Flores”),⁵ a First Mile dispatcher, took the DOT card and then assigned Complainant to Bus 370, another small handicap-adapted bus, and the same bus Complainant reported on July 14, 2016. TR 29-30, 101-02; CX G at 2. Complainant performed her pre-trip report of Bus 370, and testified she noticed the same gas gauge issue with “the needle going left and right” in this second bus. TR 30. She noted this on her DOT card and returned to the

⁴ She testified this fuel gauge problem was the same as what she observed on July 14, 2016 in Bus 370. TR 44.

⁵ Although the hearing transcript refers to the dispatcher as “Cynthia,” RX I identifies her full name: Cinthia Flores. TR 29-30; RX I.

dispatchers' office to report that Bus 370 had the same issue as Bus 381. TR 30; CX G at 1. Flores told Complainant "she doesn't know what to do, because they have no more buses." TR 30.

While Complainant waited for instructions, she sent "a text and an email" to let her superiors know what was happening. TR 32. Her text message to operations manager, Kryz Marrero ("Marrero"),⁶ stated:

To let you know I was here to performed my route, I put 2 buses out of service because of the gas gauge not working. Leo's office send Cynthia to cover my route in bus# 370. I expect to be pay for my morning, I asked several times for another bus and they said those were the only buses that they have for me.

CX H; TR 32. Complainant also sent an email to L. Chaparro, a dispatcher and her supervisor, at 7:43 am, stating:

I'm here waiting for you're (*sic*) office to assign a bus for me. Cynthia informed me because they don't have a bus so I can performed my route, she will go herself to cover my route in bus #370. I expect to get pay for this morning.

CX I; TR 32, 79. Complainant testified she sent these messages "[t]o cover my back so they won't accuse me of insubordination, refusing to do my route." TR 32. She also testified that no one told her she had to take the bus out that morning; Flores drove the bus and performed the route. TR 33. Complainant testified she would have driven the bus only if Employer ordered her to do so in writing because she was "trained that way." TR 81-82.

A video recording and transcript⁷ of the conversations that occurred in the dispatchers' office the morning of August 3, 2016, depicts Javier Chaparro ("J. Chaparro"), a Yard & Mechanic's Assistant, telling Complainant the gas tank of the bus was full. CX J; RX I. The exchange went as follows:

Javier Chaparro: But the bus is full.⁸
Complainant: It doesn't matter.
Javier Chaparro: There's nothing to fix.

⁶ Although the hearing transcript refers to Kryz as "Chris," CX I identifies the operations manager as Kryz Marrero. TR 32, 77; *see* CX I.

⁷ The video recording is in Spanish and neither party disputes the accuracy of the translation as neither party opposed its admission into the record. *See* RX I.

⁸ Complainant explained at trial she "was trained that the problem needs to be corrected before we take the bus out." TR 84. She also explained she could not take J. Chaparro's word because she was responsible for the bus if she were to take it out. *Id.*

Complainant: I cannot take it!

RX I at 2. J. Chaparro further explained:

The bus is full, the gauge shows $\frac{3}{4}$ of a tank, but it wiggles. It's a diesel bus, not gasoline. Diesel fuel is lighter than gasoline. It's normal that in older buses the fuel gauge wiggles. It's been taken by the mechanics, they've taken it to Yonkers, there's nothing to do to it.

Id.

The bus drivers are in charge of fueling up the buses with the diesel fuel pump on the First Square premises. TR 44. Complainant testified she knows how to fuel the buses and does so routinely. TR 45. Complainant testified the reason she did not try and fill either bus herself on August 3, 2016, was because "I didn't think about that. I was just worried to transport that student to school that morning." TR 71, 76. Complainant further testified that she understood when you fill a tank, the gas house will automatically shut off so it would not overflow. TR 86. Nevertheless, Complainant did not think of trying to fill the tank on the day in question. TR 87. She also testified the dangerous safety situation is running out of gas, not a broken gas gauge. TR 73. Complainant testified she did not understand the difference between how the diesel and gas gauges operate. TR 82-83.

On August 3, 2016, Complainant was placed on "administrative leave pending investigation." TR 83; JX 1; RX C. On August 5, 2016, she attended a grievance meeting, after which First Mile denied the grievance and terminated her. TR 83; RX D; RX E; RX F. On August 22, 2016, an arbitrator reinstated Complainant after a two week suspension. TR 33-34, 83; JX 1; RX F. She lost two weeks' pay due to the suspension. TR 34; RX F.

B. Testimony of Leonardo Chaparro

L. Chaparro is a supervisor at First Mile and is the senior-most supervisor at the school bus depot located at 701 South Columbus Avenue, Mount Vernon, New York, where Complainant works. TR 105. He started as a driver in 2005 and was promoted to a supervisor about seven months later. TR 106. He has remained a supervisor for approximately ten years. *Id.* During the summertime, fewer buses are dispatched out of the depot – about 65 buses instead of the approximate 200 dispatched during the school year. TR 105.

On August 3, 2016, L. Chaparro received a call on his way to the office “from one of my dispatchers telling me that there was a problem and Evelyn [Complainant] was refusing to go out to do the route. I asked them the time of the pickup and I realized that it was late. So I gave instructions to one of my dispatchers, Cynthia (*sic*) Flores, to go out and take that child to school.” TR 108. L. Chaparro arrived at the depot at approximately 7:40 am. TR 107. When he arrived he “asked them how late was the bus running because I had to call the district, and call the parents, and of course apologize and explain to them what happened.” *Id.*

Shortly thereafter, around 9:15 or 9:30 am, L. Chaparro inspected both Bus 370 and Bus 381 and found no defects. TR 108, 110. He also conferred with a mechanic before calling the President of First Mile, Harry Rodriguez (“Rodriguez”). TR 108. Rodriguez came to the depot later that morning and inspected the two buses, between 11:50 am and 12:07 pm. TR 109; CX K. He also confirmed there was nothing wrong with them.⁹ *Id.* Flores took out Bus 370 that day and Carmen Diaz (“Diaz”), another driver, took out Bus 381 and they did not have any problems. TR 109.

L. Chaparro testified: “When they came back, I went outside and I look at them. And actually, I asked Carmen Diaz, see if there was any problem, if she found any problem with the vehicle. And she say that there was – that the vehicle was fine.” *Id.* He had a similar conversation with Flores, who found nothing wrong with Bus 370. TR 110.

At no time between 7:22 am when Complainant reported the buses for a fuel gauge malfunction and the videos of the fuel gauges taken midday, were any repairs done. TR 113. In fact, no repairs were made to the fuel gauges of Bus 370 and 381 on August 3, 2016. RX B.

L. Chaparro explained the difference between gasoline and diesel vehicles:

Well, diesel vehicles, the gauge, usually when you turn it on it kind of cycles. So it goes all the way through full, comes back, and then it starts to settle in. After

⁹ Rodriguez’s inspections of the two buses are depicted in the videos in evidence. TR 109; CX K. Rodriguez is the person narrating the videos. TR 109. CX K has two videos of the diesel gauges of importance – both are in the “Vehicles” folder and one is called “veh 370” and the other is called “veh 381.” CX K at veh 370, veh 381. The diesel gauge in Bus #370 was taped at 11:50 am on August 3, 2016. CX K at veh 370. After the bus was turned on, the gas gauge fluctuated briefly (with the needle going back and forth) and eventually settled after “F” for full. Rodriguez turned the bus on two times and the same series of movements happened each time. *Id.* The diesel gauge on Bus #381 was taped at 12:07pm on August 3, 2016. CX K at veh 381. After the bus was turned on, the gas gauge fluctuated between a ½ tank and a full tank before finally settling on “F” for full. *Id.*

Complainant testified the fuel gauge behaved differently in the video than what she observed on August 3, 2016, but could not explain the difference. TR 66-70; CX J. Complainant could not state a reason, other than a mechanic fixing the gas gauge, as to why it would look different some four hours later. TR 70-71.

like a minute then it stays still. Gasoline vehicles, you turn it on and it automatically goes straight and it show you exactly what it is, what it's marking how much fuel... I'm assuming that it has to do with the fact that diesel fuel is a little bit lighter and the operation is different.

TR 111-12. L. Chaparro explained the fluctuation of the fuel gauges on Bus 370 and Bus 381 when the vehicles are started, is the same as what he has observed during the entire time he worked at First Mile. TR 118-19.

Nevertheless, L. Chaparro testified even if the gas gauges were broken, they would not be a safety defect:

[I]t's something that is not going to really effect (*sic*) the safety of the bus. I mean, that can be corrected, either by putting gas before you leave. I mean, they got—even if it's a gasoline, we got a gas station less than a block away and they [bus drivers] have credit cards with them they can use. So we got the diesel tank right there on premises that they can fill up if there was a gauge that wasn't working, but there is ways to prevent that. So it's not really something that would affect the safety operation of the vehicle as the brakes or the steering wheel or even the warning lights.

Q: So as long as there's gas in the vehicle, the fact that the gauge may or may not work should be a safety concern?

A: No. In my opinion, the safety will be if the driver is negligent and don't put gas and run out of gas on the highway then. But even though all the buses showed that before, they don't stall, they don't just shut down. They got a warning light and they give them a good two gallons of tank, so about 15 miles to go. So any place that will occur, they have plenty of time to pull over to a safe place.

TR 147-48.

On August 3, 2016, a mechanic at First Mile, Ish Santos ("Santos"), also checked Bus 370 and 381 after 9:30 am and reported both diesel gauges were working.¹⁰ TR 119, 138; RX B. L. Chaparro testified "[t]here was no repair necessary because there was no defect . . . You can't repair something that doesn't need to be repaired." TR 136-37. He further explained Santos did not sign the DOT card because "as it says there [on the DOT card], if the above defect needs to

¹⁰ The buses are inspected by the New York State Department of Transportation Motor Vehicles Department every six months. TR 116. Bus 370 was inspected on October 30, 2015 and April 19, 2015 and passed inspection both times. TR 117; RX A at 1-2. Bus 381 was inspected on January 13, 2015 and June 22, 2016 and also passed inspection. TR 117-18; RX A at 3-4. None of the inspection reports indicate any issues or deficiencies in the gas gauges of the buses. TR 117-18.

be corrected or it does not need to be corrected, but there is no defect. So if we didn't find no defect, there is nothing that he should sign for or he should correct." TR 138.

L. Chaparro testified that filling up the bus fuel tank was a primary responsibility of the bus driver.¹¹ TR 114. L. Chaparro had no reason to doubt Complainant understood the proper procedure to fill up the buses. TR 114-15. Bus 370 and 381 can go about 300 miles on a full tank and L. Chaparro estimates the route Complainant was meant to do on August 3, 2016 was between 28 and 30 miles round-trip. TR 115.

As Complainant's supervisor, L. Chaparro was consulted by First Mile in determining whether or not Complainant should be terminated and he attended the grievance hearing and arbitration. TR 119; RX E; RX F. His "recommendation was that termination should take place" due to a "[r]efusal to work." TR 119-20. On August 8, 2016, Dianna Wessel ("Wessel"), the Transportation Assistant from the New Rochelle City School District, emailed L. Chaparro regarding Complainant. TR 120; RX G. After describing the incident the morning of August 3, 2016, and noting the special needs child was supposed to be at the school at 7:55am, but was not picked up at home until 8:00am, Wessel stated:

On 5/21/15 Ms. Castillo lost keys to her bus while on a field trip. On June 12, 2014 a citizen wrote in that she witnessed Ms. Castillo's bus run a yield sign. While driving the SAR routes we received numerous complaints from students of speeding and feeling unsafe on the school bus to the point I asked she no longer drive SAR students.

RX G. She further stated these actions are not "appropriate for a school driver." *Id.* L. Chaparro testified he also spoke with Ms. Wessel about the issue.

Q: Okay, what if anything did Ms. Wessel say to you about this issue?

A: Well, she was very upset, the fact that we left a special needs child waiting. That brought a lot of consequences. Parents were late for work, the child arrived late for her therapy session. This is a child that is – I don't know the particular situation, but it's a child that goes to a special school. She has several different problems that she got to go to certain therapies at specific times. And that's why this was one of the most complex routes.

TR 120.

¹¹ L. Chaparro testified the only protocol First Mile has as related to fuel is the driver "never leave a vehicle with less than half a tank." TR 149.

IV. CONCLUSIONS OF LAW

A. Burden Shifting Framework

This claim is governed by the two-step burden shifting framework set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 31105(b)(1); *Garrett v. Bigfoot Energy Servs., LLC*, ARB No. 16-057, ALJ No. 2015-STA-00047, slip op. at 4 (ARB May 14, 2018); *Beatty v. Celadon Trucking Servs., Inc.*, ARB Nos. 15-085 & 15-086, 2015-STA-00010, slip op. at 4 (ARB Dec. 8, 2017). First, Complainant must prove by a preponderance of the evidence: (1.) she engaged in protected activity, as defined by the STAA; (2.) she suffered an adverse action; and (3.) her protected activity contributed, in whole or in part, to the adverse action taken against her. 49 U.S.C. § 42121(b)(2)(B)(iii); *Garrett*, ARB No. 16-057, at 4-5; *Beatty*, ARB Nos. 15-085 & 15-086, at 4; *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-00071, slip op. at 5-6 (ARB May 18, 2017). If Complainant proves Respondent retaliated against her, due whole or in part to protected activity, then First Mile can only escape liability by presenting clear and convincing evidence that it would have acted the same regardless. 49 U.S.C. § 42121(b)(2)(B)(iii) & (iv); *Garrett*, ARB No. 16-057, at 4-5; *Beatty*, ARB Nos. 15-085 & 15-086, at 4; *Tocci*, ARB No. 15-029, slip op. at 5-6.

B. Complainant's Burden

Under 29 C.F.R. § 1978.102(e), “[i]t is a violation for any person to intimidate, threaten, restrain, coerce, blacklist, discharge, harass, suspend, demote, or in any other manner retaliate against any employee because the employer perceives that . . . [the employee has engaged in protected activity].” 29 C.F.R. § 1978.102(e); *see also* 49 U.S.C. § 31105(a)(1)(A)(ii). After careful consideration of the testimony and documentary evidence presented, I find Complainant has not met her burden of proving she engaged in protected activity.

The STAA prohibits employers from retaliating against an employee because:

- (B) the employee refuses 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.

49 U.S.C. § 31105(a)(1)(B).¹² The Act further states:

[A]n employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

49 U.S.C. § 31105(a)(2).

As reflected in these statutory provisions, the second subpart, of the refusal to drive provision of the STAA, protects refusals to drive based upon an objectively reasonable apprehension of serious injury to the driver or to the public because of the vehicle's hazardous safety or security condition. 49 U.S.C. §§ 31105(a)(1)(B)(ii), 31105(a)(2). This case involves a refusal to drive based upon this second subpart.¹³ See 49 U.S.C. § 31105(a)(1)(B)(ii); Compl. Brief at 3-4.

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 U.S.C. § 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). The Second Circuit,¹⁴ in *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76 (2d Cir. 1994), determined "that the objective

¹² The Second Circuit explained the refusal to drive provision has two parts. *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76, 81-83 (2d Cir. 1994). The first part which is the earlier version of 31105(a)(1)(B)(i) is referred to as the "when" clause, and requires the driver to establish a violation of federal regulation to prevail. *Reich*, 38 F.3d at 82. The second part, which is the earlier version of 31105(a)(1)(B)(ii), is referred to as the "because" clause, and requires a driver to establish only a reasonable apprehension of danger to himself or the public due to the safety condition of the truck. *Reich*, 38 F.3d at 82-83.

¹³ Respondent also addresses 49 U.S.C. § 31105(a)(1)(B)(i) in its brief. Resp. Brief at 8-9. Nevertheless, as Complainant does not argue there is a violation of a "regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security," I will not address this argument herein. See Compl. Brief; 49 U.S.C. §31105(a)(1)(B)(i).

¹⁴ This matter arises under the purview of the Second Circuit.

reasonableness of the employee's perception that an unsafe condition existed be evaluated in light of the situation that confronted the employee at the time."¹⁵ *Reich*, 38 F.3d at 82. Furthermore, "an employee need not prove the existence of an actual safety defect in order for his or her refusal to receive protection." *Id.*

I find Complainant's refusal to drive the two school buses on August 3, 2016 did not constitute protected activity. In looking at the totality of the circumstances surrounding Complainant's refusal to drive that day, it is evident she did not have "a reasonable apprehension of serious injury" to herself or to the public.

In deciding the issues presented, I considered and evaluated the rationality and consistency of the testimony of the witnesses and the manner in which their testimony supports or detracts from other record evidence. I took into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on what is contended. In *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971), the Court observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52. So much of this case depends on the credibility of the witnesses. "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963).

I did not find Complainant to be a credible witness. Complainant testified that she refused to drive Bus 381 and 370 because she believed they had faulty diesel fuel gauges. Her testimony about her supposed concerns over safety issues was illogical and frankly not believable. For example, she has seventeen years of experience as a bus driver and has driven both gasoline and diesel buses, but unconvincingly testified she does not know the difference between a diesel fuel gauge and a gasoline fuel gauge. TR 82-83. Even more suspect is on the morning in question, mechanic J. Chaparro explained the difference between diesel and gas in

¹⁵ *Reich* involved a refusal to drive claim under an earlier version of the current 49 U.S.C. § 31105(a)(1)(B)(ii).

Complainant's presence.¹⁶ RX I at 2. "Diesel fuel is lighter than gasoline. It's normal that in older buses the fuel gauge wiggles. It's been taken by the mechanics, they've taken it to Yonkers, there's nothing to do to it." *Id.* I find Complainant's statement that she did not understand the difference between diesel and gasoline fuel gauges unworthy of belief.

At trial, Complainant could not recall many things about the day in question, was uncooperative on cross-examination, frequently interrupted the attorneys and changed the subject. *See generally* TR. I found her testimony to be evasive. During cross-examination, she purported not to know the answers to many simple questions by frequently responding, "I don't recollect" or "I don't know." When questioned about mechanic J. Chaparro telling her the fuel tanks were full, she refused to directly answer the question about what she heard or understood. Even after watching the videotape at trial (which shows her standing next to J. Chaparro), she would not directly answer the question about what J. Chaparro told her. She said she was "busy with papers" and therefore refused to acknowledge that she heard J. Chaparro tell her the tanks were full. I carefully reviewed the videotape and find her explanation to be disingenuous. TR 48-59. Her refusal to acknowledge that simple fact undermines her credibility and does not assist in establishing a good faith belief of a reasonable apprehension of serious injury to herself or to the public.

Contrary to my findings about Complainant's credibility, I found L. Chaparro to be a very credible witness. He was very knowledgeable and testified clearly and convincingly about the events at issue. He explained the workings of First Mile and articulately explained the difference between diesel and gas buses and why the gauges fluctuate in normal operation. He further testified about the actions he took on August 3, 2016 in ensuring the special needs child was transported to school and about his review of the gauges. He was a very believable and credible witness whose testimony I accord great weight.

Complainant and L. Chaparro both testified that the real safety issue is not a malfunctioning fuel gauge, but rather having the bus run out of gas. TR 73, 147-148. If Complainant had a truly credible concern for safety, it could have been remedied if she filled the bus fuel tank by using the diesel pump located at the depot. Any reasonable person in Complainant's position as a bus driver with her knowledge and seventeen years' experience

¹⁶ While J. Chaparro was not directly addressing Complainant, she was standing next to him and spoke with him right after this explanation. RX I at 2.

would have recognized this. Even though she was twice advised by mechanic J. Chaparro that Bus 370 was full of fuel, she testified she could not “take [J.] Chaparro’s word,” but could not give any reason as to why she did not trust his expertise. TR 84. Instead, Complainant ignored advice of the company’s mechanic, a person with knowledge in the mechanical operations of the buses. Even if she did not believe him, she could have easily checked herself to make sure the tank was full. TR 84; RX I at 2. It is a driver’s responsibility to fuel the bus, and as Complainant knew this, it would be logical for her to fill the tank until the pump shut off so she would have firsthand knowledge the tank was full. TR 45. Despite all of this, Complainant still refused to drive Bus 370, strongly suggesting her motive for refusing to drive that day did not at all stem from a “reasonable apprehension of serious injury” due to a “broken” fuel gauge. *See* CX J; RX I at 2.

When pressed about why she did not make the effort to fill the tanks or verify the tanks were full, her response was a continual, “I didn’t think of it.” Complainant testified she “was just worried to transport that student to school that morning.” TR 71, 76. This supposed concern for the safe transport of the disabled child (which I do not find credible) was belied by her actions. Rather than checking on the fuel level in the bus at the diesel pump to see if she could do her run, Complainant went into the dispatchers’ office and took the time to write an email and a text message to her supervisors. Those messages do not express any concern for the child, but rather advise her supervisors that she expects to be paid for the morning’s work. She did this during the time she could have fueled up to avoid a fear of running out of gas. L. Chaparro testified it “shouldn’t take more than a minute for her to go to try to put gas and then – the diesel pump is... on at all times.” TR 148-149.

Employer’s concern for the child was evidenced by the actions of supervisor L. Chaparro who re-assigned Cinthia Flores from dispatcher to bus driver on the day in question. Flores performed the route without any problems. TR 109. The route was about thirty miles round trip and Bus 381 and 370 can go approximately 300 miles on a full tank. TR 115. Obviously, the trip could be made on much less than a full tank of diesel. Additionally, L. Chaparro testified the buses are equipped with a warning light that goes on once the tank has two gallons of diesel fuel left or about fifteen miles. TR 147-148. Complainant’s alleged fear of running out of gas due to a “malfunctioning” gauge was not reasonable because it could have been alleviated by simple actions by Complainant.

The evidence is overwhelming that the diesel gauges on the two buses were not broken; they fluctuated, which was normal. Even though the fluctuation was explained to Complainant she chose not to believe her First Mile supervisor or the company mechanic. While she claimed the gauges did not work during her pre-trip inspection at about 7:30 am, both buses were immediately taken out by other drivers without incident. TR 109. L. Chaparro and a mechanic then checked the bus gauges at approximately 9:30 am and confirmed they worked properly. TR 119, 138; RX B. Then at 11:45 am Mr. Rodriguez arrived, started the buses and videotaped the action of the gauges. TR 109; CX K. They were working properly. *Id.* When shown the video at trial, Complainant said the gauges “looked different” than when she did her inspection, but she could not explain how they looked different. TR 67. Complainant testified she believed the gauges were probably repaired prior to filming the video. TR 70. Complainant testified she had “no explanation” why a “gauge would suddenly go from non-operational on two separate vehicles to operational in four hours” if it was not repaired.¹⁷

I find Complainant’s purported apprehension of serious injury to herself or to the public on August 3, 2016 was not objectively reasonable given the totality of the circumstances. As such, Complainant did not meet her burden of proving she engaged in protected activity. Accordingly, I find Complainant’s activity on August 3, 2016, was not protected under the STAA.¹⁸

V. ORDER

Based on the record as a whole, I find Complainant does not have a valid STAA claim as she did not meet her burden of proving she engaged in protected activity.

¹⁷ L. Chaparro disputed this speculation; no repairs were made in the elapsed four hours, nor that day.

¹⁸ Because I find Complainant did not prove she engaged in protected activity, I need not determine whether she suffered an adverse action or whether her alleged protected activity was a contributing factor in the alleged adverse action taken against her where those are non-dispositive issues under the facts presented here. *See Prior v. Hughes Transport, Inc.*, ARB No. 04-044, ALJ No. 2004-STA-00001, slip op. at 2-3 (ARB Apr. 29, 2005) (affirming decision where ALJ refused to determine whether activity was protected because issue was non-dispositive). Given Complainant’s activity was not protected, the burden does not shift to Respondent to prove they would have acted the same regardless.

Accordingly, it is hereby **ORDERED** that Complainant's claim for relief is hereby **DENIED** and the Complaint is **DISMISSED**.
SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

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. § 1982.110(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. § 1982.110(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.

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. § 1982.110(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. §§ 1982.109(e) and 1982.110(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. §§ 1982.110(a) and (b).