



In the Matter of:

GREG KRAHN,

ARB CASE NO. 04-097

COMPLAINANT,

ALJ CASE NO. 2003-STA-24

v.

DATE: May 9, 2006

**UNITED PARCEL SERVICE
OF AMERICA, INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., Truckers Justice Center, Burnsville, Minnesota

For the Respondent:

**Brauch A. Fellner, Esq., Jason C. Schwartz, Esq., Joshua Ian Rosenstein,
Esq., Gibson, Dunn & Crutcher, LLP, Washington, D.C.**

FINAL DECISION AND ORDER

Greg Krahn filed a complaint with the United States Department of Labor alleging that his employer, United Parcel Service (UPS), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act)¹ when it disciplined him and ultimately relieved him of his duties. After a hearing, a Department of Labor Administrative Law Judge (ALJ) recommended dismissing the complaint because Krahn did not establish he engaged in protected activity under the Act. We affirm the ALJ's April 30, 2004 Recommended Decision and Order (R. D. & O.) and deny the complaint.

¹ 49 U.S.C.A. § 31105 (West 1997).

BACKGROUND

Krahn worked as a tractor-trailer operator and after almost 24 years of service, UPS discharged him in August and September 2000. The stated reason for the latest termination on September 8, 2000, was Krahn's "failure to follow proper methods and supervisory instructions."²

For 12 years prior to the termination of his employment, Krahn worked as a UPS feeder driver, operating out of Phoenix, Arizona. His last regular assignment was an almost 400 mile roundtrip route between Phoenix and Winslow, Arizona. In the first leg of the trip, Krahn traveled north out of Phoenix on Interstate 17 (I-17) to Flagstaff, Arizona. This portion of the route was approximately 145 miles, traveling through the mountains rising to an elevation of approximately 7,000 feet above sea level. From Flagstaff Krahn traveled east on Interstate 40 (I-40) for approximately 55 miles. Upon arriving in Winslow he routinely exchanged his set of double trailers with another UPS driver based out of Albuquerque, New Mexico. Krahn would then make a return trip to Phoenix with a different set of double trailers. UPS determined the appropriate driving time for the Phoenix-Winslow-Phoenix route was 7.5 hours.³ Krahn regularly exceeded the allotted driving time for this route.⁴

Beginning August 7, 2000, Krahn participated in a series of on-the-job service (OJS) rides with Craig Rollie, a UPS manager.⁵ Rollie rode with Krahn on six occasions between August 7 and September 5, 2000. During these rides, Rollie identified certain deficiencies that included tailgating, wandering from the lane, improper shifting, traveling at slower speeds and excessive braking.⁶ On August 14, 2000, after accompanying Krahn on his route, Rollie recommended that he receive a letter of

² Joint Exhibit (JX) -20.

³ Hearing Transcript (TR) at 882.

⁴ TR at 362-64; Respondent's Exhibit (RX) -20. At certain points along the Complainant's route the posted speed limit was 75 miles per hour. TR at 136, 658-59. However, UPS restricted its drivers to a maximum speed of 65 miles per hour or the posted speed limit if lower than 65. JX-32, 33. Also, portions of Krahn's route along southbound I-17 included six percent downgrades. TR at 135, 137, 147, 867.

⁵ The decision to conduct OJS rides stemmed from a prior grievance Krahn filed regarding a reassignment of duties in May 2000. TR at 840-841.

⁶ After the initial OJS ride on August 7, 2000, Krahn was on sick leave through August 13, 2000. TR at 847.

warning. According to Rollie, Krahn exhibited little improvement and was generally uncooperative.⁷

The OJS rides continued and on August 16, 2000, Krahn showed “considerable improvement” in completing his route just slightly over the allotted driving time of 7.5 hours.⁸ Rollie did not accompany Krahn on August 17, 2000. However, another UPS manager, Jerry Dalzell, observed Krahn driving southbound on I-17 at a significantly reduced speed with his four-way flashing lights on. Dalzell reported this information to Rollie, who decided to resume OJS rides the following morning. Less than midway through their August 18, 2000 OJS ride, Rollie verbally terminated Krahn’s employment for “failure to follow supervisor’s instructions about maintaining a reasonable speed.”⁹ The Complainant received written notification of this termination on August 22, 2000. UPS advised him he was dismissed as a result of his August 18, 2000 failure to “follow proper methods and supervisory instructions.”¹⁰

Because of contractual obligations, UPS could not immediately terminate Krahn’s employment. Therefore, he continued to drive his regular route pending a hearing on his August 2000 dismissal.¹¹ During this working termination, UPS engaged the services of an outside agent to observe Krahn’s driving habits. He was under video surveillance on six days between August 25 and September 1, 2000. Based on his performance on August 30, 31 and September 1, 2000, UPS again fired Krahn on September 8, 2000.¹²

On January 20, 2001, Krahn filed a timely complainant with the Department of Labor alleging that UPS disciplined him for engaging in protected activity under the Act. According to Krahn, he refused to follow Rollie’s instructions because had he done so he would have violated various Department of Transportation (DOT) regulations pertaining to speed, equipment inspection and usage. He also alleged he refused to operate his

⁷ TR at 853-55, 860, 863-64, 866. The letter of warning, signed by Robert “Bart” Bartholomew, UPS Feeder Division Manager, indicates Krahn did not follow proper methods when he failed to maintain the posted speed limit. Bartholomew also noted Krahn failed to follow supervisor’s instructions when given a direct work order numerous times to maintain the posted speed limit. JX-9, 19.

⁸ TR at 882.

⁹ TR at 894-95.

¹⁰ JX-27.

¹¹ Krahn filed a grievance on September 5, 2000, challenging his August 18, 2000, discharge. JX-29.

¹² This latter discharge became final when Krahn failed to timely file a grievance with the appropriate authorities. JX-30.

feeder set at increased speeds because of a reasonable apprehension of serious personal injury or injury to the public. Upon investigation, the Secretary of Labor found insufficient evidence to support Krahn's allegations. He subsequently requested a hearing with the Office of Administrative Law Judges, which culminated in the April 30, 2004 recommended decision currently before the Administrative Review Board (ARB or Board).¹³ The issue to be resolved is whether Krahn engaged in protected activity under the Act.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Board.¹⁴ When reviewing STAA cases, the Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.¹⁵ Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁶ In reviewing the ALJ's legal conclusions, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision...."¹⁷ Therefore, the Board reviews the ALJ's legal conclusions de novo.¹⁸

¹³ When the case was pending before the ALJ, the American Trucking Associations (ATA) requested leave to file an amicus curiae brief under 29 C.F.R. § 18.12. On July 12, 2004, the Board received an additional copy of ATA's amicus brief. Because ATA's March 9, 2004 amicus curiae brief was already part of the record forwarded to the ARB and the parties did not specifically object to its resubmission on July 12, 2004, the Board will consider ATA's brief along with all other properly submitted information of record.

¹⁴ 49 U.S.C.A. § 31105(b)(2)(C); *see* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(c)(2005).

¹⁵ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995).

¹⁶ *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

¹⁷ 5 U.S.C.A. § 557(b) (West 1996).

¹⁸ *Id.*; *see Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

I. Legal Standard

The STAA protects employees who engage in certain activities from adverse employment actions. 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 making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order”¹⁹

Protection is also afforded under the Act where an employee “refuses to operate a vehicle because ... the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health”²⁰ A refusal to operate a vehicle may also be premised on an employee’s “reasonable apprehension of serious injury to [oneself] or the public because of the vehicle’s unsafe condition.”²¹ The STAA provides that “an employee’s apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health.”²² To qualify for protection under the reasonable apprehension prong the employee “must have sought from the employer, and been unable to obtain, correction of the unsafe condition.”²³

To prevail on his claim, Krahn must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action.²⁴ Failure to prove any one of these elements results in dismissal of a claim.²⁵

¹⁹ 49 U.S.C.A. § 31105(a)(1)(A).

²⁰ 49 U.S.C.A. § 31105(a)(1)(B)(i).

²¹ 49 U.S.C.A. § 31105(a)(1)(B)(ii).

²² 49 U.S.C.A. § 31105(a)(2).

²³ *Id.*

²⁴ *BSP Trans, Inc. v. United States Dep’t of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Eash v. Roadway Express*, ARB No. 04-036, ALJ No. 1998-STA-28, slip op. at 5 (ARB Sept. 30, 2005); *Densieski v. LaCorte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004).

²⁵ *Eash*, slip op. at 5.

II. Krahn's Alleged Protected Activity

Krahn did not allege UPS disciplined him for engaging in protected activity under 49 U.S.C.A. § 31105(a)(1)(A).²⁶ His claim is premised on alleged protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i) and (ii). With respect to section 31105(a)(1)(B)(i), Krahn argues that had he followed Rollie's instructions he would have violated DOT regulations 49 C.F.R. §§ 392.2, 392.6, 392.7 and 396.13. In general, these four safety regulations pertain to operating speed, equipment use and inspection. Krahn also argues that he refused to operate the vehicle as instructed because of a "reasonable apprehension of serious injury" under section 31105(a)(1)(B)(ii).

To establish he engaged in protected activity, Krahn must first show that he refused to operate his vehicle.²⁷ Krahn argues that while he continued to drive his assigned route, by refusing to follow Rollie's instructions regarding brake usage and maintaining speed, he effectively refused to operate a vehicle under section 31105(a)(1)(B). UPS argues that Krahn did not engage in protected activity because he never refused to drive his assigned route. Assuming *arguendo* Krahn's conditional refusal to operate his vehicle satisfies the threshold requirement of section 31105(a)(1)(B),²⁸ we focus our analysis on whether substantial evidence supports the ALJ's conclusion that Krahn did not engage in protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i) and (ii).

²⁶ Complainant's Brief at 4, n. 1; Complainant's Reply Brief at 9. Although the January 20, 2001 complaint did not allege protected activity under section 31105(a)(1)(A), the ALJ made findings relevant to this provision in his April 30, 2004 decision. JX-35; R. D. & O. at 10. Because appellant did not specifically raise this issue, the ALJ should not have made any findings under section 49 U.S.C.A. § 31105(a)(1)(A). *See Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357-59 (6th Cir. 1992) (due process precludes decision on STAA provisions not actually tried); *Ass't Sec'y & Helgren v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-44 (ARB July 31, 2003) (respondents in STAA cases have the right to know the theory on which the agency will proceed).

²⁷ 49 U.S.C.A. § 31105(a)(1)(B); *Zurenda v. J & K Plumbing & Heating Co., Inc.*, ARB No. 98-088, ALJ No. 1997-STA-16, slip op. at 4 (ARB June 12, 1998); *Williams v. CMS Transp. Servs., Inc.*, 1994-STA-5, slip op. at 2 (Secy Oct. 25, 1995).

²⁸ *See Beveridge v. Waste Stream Env'tl., Inc.*, ARB No. 97-137, ALJ No. 1997-STA-15, slip op. at 3 (ARB Dec. 23, 1997) (an employee who refuses to drive illegally does not lose protection under the Act by correcting the perceived illegality and then proceeding to drive). *But see Zurenda*, slip op. at 4; *Williams*, slip op. at 2.

A. Actual Violation

Krahn first argues that increasing or maintaining his speed as requested would have violated 49 C.F.R. § 392.2, which provides, in part, that “[e]very commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated.”²⁹ Krahn cited Arizona Revised Statute § 28-701 as the applicable state law for determining the appropriate speed for operating his feeder set on the Phoenix-Winslow-Phoenix route.³⁰ Pursuant to section 28-701, “[a] person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances, conditions and actual and potential hazards then existing.”³¹ The Arizona statute also provides for a reduction of the otherwise applicable maximum speed to what is “reasonable and prudent under the conditions,” taking into account factors such as “traffic,” “weather,” “highway conditions,” “[a]pproaching and going around a curve” and “[a]pproaching a hillcrest.”³²

The maximum posted speed along Krahn’s route was 75 miles per hour. UPS, however, limited its drivers to a maximum speed of 65 miles per hour. Rollie identified several points along the Phoenix-Winslow-Phoenix route where he believed Krahn should have maintained or increased his speed. These locations include: (1) mileposts 285-288, northbound on I-17 at Cooper Canyon; (2) the curve at milepost 316, northbound on I-17; (3) milepost 333 at Kachina Boulevard on I-17; (4) westbound I-40 at mileposts 239-238 and 217-212; (5) milepost 315, southbound on I-17; and (6) 17-mile hill, I-17 southbound between mileposts 312 and 299.³³ Rollie did not identify any traffic, weather or hazardous road conditions that might otherwise explain Krahn’s performance at these locations.³⁴ And Krahn did not indicate any specific problems with his equipment or braking system.³⁵

Krahn testified that in most instances UPS vehicles were unsafe at 65 miles per hour because they did not hold back very well or have as much control on the road as

²⁹ 49 C.F.R. § 392. 2.

³⁰ Because Krahn drove within the State of Arizona, the motor vehicle laws of that jurisdiction are subsumed and incorporated under both 49 U.S.C.A. § 31105(a)(1)(B)(i) and 49 C.F.R. § 392. 2. *Beveridge*, slip op. at 3.

³¹ A.R.S. § 28-701 (A) (1996).

³² A.R.S. § 28-701 (D).

³³ JX-5, 6, 20, 21; TR at 853-55, 860, 863, 887-88, 892, 901-02, 904-12.

³⁴ TR at 857, 885, 888-89.

³⁵ TR at 903-04.

other vehicle models.³⁶ He also stated the posted speed limit is “never safe” and UPS’s corporate speed limit is “not even always safe.”³⁷ Krahn indicated he always tried to drive at the “fastest safe ... speed.”³⁸ He routinely drove down 17-mile hill at 38 to 45 miles per hour. And he drove a little faster than 38 miles per hour on northbound I-17 into Cooper Canyon.³⁹ Krahn also testified that his way of driving the Phoenix-Winslow-Phoenix route was the only safe way to do it.⁴⁰ With respect to the August 16, 2000 OJS ride, which he completed in 7.51 hours of driving time, Krahn indicated he was too involved in maintaining an exact speed limit and consequently, lost focus on what was going on around him. Krahn did not believe he drove safely on August 16, 2000.⁴¹ Krahn also indicated because of UPS’s limited pre-trip inspection regimen, he was unable to detect if his brakes were properly adjusted, which was another factor in his decision to reduce his speed.⁴²

Michael G. Larson, a commercial truck driver with 26-years’ experience, was familiar with Krahn’s route having regularly driven it himself a decade earlier.⁴³ He testified it was not safe to drive 65 miles per hour into Cooper Canyon.⁴⁴ Larson believed the optimum speed into Cooper Canyon was 30 to 35 miles per hour.⁴⁵ He also indicated that it was appropriate to reduce one’s speed to 50 miles per hour approaching the curve at milepost 316, northbound I-17.⁴⁶ Additionally, Larson identified various points along 17-mile hill, southbound I-17, where it was necessary to drive as much as 30 miles below the posted speed limit.⁴⁷ He believes the driver is the best person to determine the appropriate speed descending a 6 percent grade.⁴⁸ He also stated that

³⁶ TR at 113, 324.

³⁷ TR at 162.

³⁸ TR at 163.

³⁹ TR at 257.

⁴⁰ TR at 294-95.

⁴¹ TR at 1454-55.

⁴² JX-6; TR at 136.

⁴³ TR at 500-03, 517.

⁴⁴ TR at 522, 524.

⁴⁵ TR at 530.

⁴⁶ TR at 534-35.

⁴⁷ TR at 565-72.

⁴⁸ TR at 541.

slowing down is always an appropriate action if you do not feel comfortable going a little bit faster.⁴⁹ Larson testified Krahn operated his vehicle reasonably and the driving exhibited on the surveillance videotape was “exceptional” and should be used as a training video.⁵⁰

UPS retained the services of Kerry V. Nelson, a commercial vehicle accident investigator, who reviewed various documents, including the August 2000 OJS ride reports and the videotape surveillance reports. Nelson also performed a July 7, 2003 test run along the Phoenix-Winslow-Phoenix route using the same tractor previously assigned Krahn, while also hauling a fully-loaded set of double trailers.⁵¹ He completed the test run in 7 hours of driving time at a speed of 65 miles per hour or less.⁵² Nelson descended 17-mile hill in 7th gear at a reduced speed of 55-60 miles per hour, with only light periodic application of the service brake. Nelson did not experience any brake fade during the downgrade on southbound I-17 between mileposts 312 and 299.⁵³ He also indicated that if a driver was concerned about proper brake adjustment, he should not take the vehicle on the road. Nelson noted that Krahn had access to a mechanic both at the UPS Phoenix hub and through a private vendor in Winslow, Arizona.⁵⁴ Based upon his test run and review of certain records, Nelson indicated he could not find any reasonable justification for Krahn’s failure to either maintain or increase his speed at the various locations Rollie identified.⁵⁵

Other than his general allegations that it would have been unsafe to operate his vehicle at increased speeds, Krahn has not identified a single specific incident where following Rollie’s instructions to either maintain or increase speed would have resulted in an actual violation of Arizona Revised Statute § 28-701. The Complainant has not advanced any persuasive argument or presented any evidence demonstrating that Rollie’s instructions contravened the “reasonable and prudent” standard under section 28-701.⁵⁶ UPS’s corporate speed limit was at times 10 miles per hour below the maximum posted speed limit of 75 miles per hour and there is no indication from the record that either

⁴⁹ TR at 547.

⁵⁰ TR at 581, 619.

⁵¹ RX-32, 33; TR at 1048.

⁵² TR at 1078.

⁵³ *Id.* at 1062; RX-32.

⁵⁴ TR at 1234-35.

⁵⁵ *Id.* at 1074, 1077-78.

⁵⁶ A.R.S. § 28-701 (A).

Rollie or any other UPS employee instructed the Complainant to exceed the posted speed limit or the corporate speed limit.⁵⁷ Also, Krahn did not identify any specific weather, traffic or road conditions that affected his driving on the days in question.⁵⁸ Krahn's subjective assessment that he would have violated Arizona law had he increased or maintained his speed is not proof of an actual violation. And while Larson believed Krahn operated his vehicle reasonably and his driving was "exceptional," his testimony does not establish that the alternative approach Rollie advocated and Nelson and Krahn successfully implemented on August 16, 2000, actually violated Arizona law.

Krahn also claims he refused to follow Rollie's instructions because UPS's 7.5 hour planned driving time for his route violated 49 C.F.R. § 392.6. This section provides:

No motor carrier shall schedule a run nor permit nor require the operation of any commercial motor vehicle between points in such period of time as would necessitate the commercial motor vehicle being operated at speeds greater than those prescribed by the jurisdictions in or through which the commercial motor vehicle is being operated.⁵⁹

The record does not support Krahn's allegation that completing his route in the allotted 7.5 hours of driving time would have violated Arizona's speed limitations. In fact, on August 16, 2000, Krahn drove his route in 7.51 hours. Rollie accompanied him that day and his records of the trip do not indicate Krahn exceed the posted speed limit.⁶⁰ Krahn's August 16, 2000, tachograph, which monitors among other things the driver's time and speed, indicates he attained a maximum speed of 66 miles per hour.⁶¹ Nelson completed the Phoenix-Winslow-Phoenix run in 7 hours driving time, with a maximum speed of 65 miles per hour. And he testified that UPS's 7.5 hours planned time was reasonable.⁶² Thus, the record does not establish that the 7.5 hour driving time UPS allotted the Complainant's route violated 49 C.F.R. § 392.6.

In addition to the alleged speed-related violations, Krahn claims violations under 49 C.F.R. §§ 392.7 and 396.13. Section 392.7, titled "Equipment, inspection and use," prohibits operating a "commercial motor vehicle ... unless the driver is satisfied that the [service brakes, including trailer brake connections] are in good working order" The

⁵⁷ TR at 368-69, 860-61.

⁵⁸ TR at 430.

⁵⁹ 49 C.F.R. § 392.6.

⁶⁰ JX-13, 14.

⁶¹ JX-15.

⁶² TR at 1078.

regulation further provides that a driver shall not “fail to use or make use of such parts and accessories when and as needed.”⁶³ Section 396.13 requires that a driver “be satisfied that the motor vehicle is in safe operating condition” before driving.⁶⁴

The above-reference regulations do not provide a driver the option of operating his vehicle at a reduced speed when he is not fully satisfied his service brakes are in good working order. Krahn claims he was concerned about proper brake adjustments, but he continued to operate his vehicle and he did not report any specific concerns regarding the vehicle’s condition to UPS. The record indicates Rollie did not permit Krahn to crawl underneath his vehicle to visually inspect the brakes to determine if they were properly adjusted.⁶⁵ First, UPS did not discipline Krahn for any actions related to vehicle inspection. Second, the regulations do not mandate a specific pre-trip inspection regimen. While Krahn may have preferred crawling beneath his vehicle to visually inspect his brakes for proper adjustment, he has not established that UPS’s inspection methods were unreasonable and in violation of 49 C.F.R. §§ 392.7 and 396.13.⁶⁶

Krahn also argues that he engaged in protected activity by using his service brakes “when and as needed” in defiance of Rollie’s instructions.⁶⁷ This argument is unpersuasive. The applicable regulation essentially prohibits the operation of a vehicle when certain equipment is not in good working order. In this instance, there is no evidence that Krahn’s service brakes were not in good working order on the days in question.⁶⁸ Furthermore, Krahn has not established that the instances Rollie advised him to either increase or maintain his speed contravened an otherwise “necessary” application of his service brakes. Accordingly, substantial evidence supports the ALJ’s finding that Krahn did not demonstrate an actual violation of 49 C.F.R. §§ 392.7 and 396.13.⁶⁹

Because Krahn failed to establish any of the alleged violations under 49 C.F.R. §§ 392.2, 392.6, 392.7 and 396.13, the ALJ properly found that he had not engaged in protected activity pursuant to 49 U.S.C.A. § 31105(a)(1)(B)(i).

⁶³ 49 C.F.R. § 392.7.

⁶⁴ 49 C.F.R. § 396.13.

⁶⁵ JX-6.

⁶⁶ *Monde v. Roadway Express, Inc.*, ARB No. 02-071., ALJ Nos. 2001-STA-22, 2001-STA-29, slip op. at 18 (ARB Oct. 31, 2003).

⁶⁷ 49 C.F.R. § 392.7.

⁶⁸ TR at 336.

⁶⁹ R. D. & O at 11.

B. Reasonable Apprehension

Krahn also argues that he refused to comply with Rollie's instructions with respect to speed because he had a reasonable apprehension of serious injury to himself or the public. Pursuant to section 31105(a)(2), "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health."⁷⁰ The employee's refusal to drive must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public.⁷¹

Although Krahn testified that UPS vehicles, in most instances, were unsafe at 65 miles per hour, he did not provide support for this assertion.⁷² The record reflects that the other three regularly assigned UPS drivers on the Phoenix-Winslow-Phoenix route routinely completed the trip in less time than Krahn and without incident.⁷³ Krahn also cited his pre-trip inspection as a cause for concern. But as previously discussed, he did not identify any particular braking problems on the dates in question.

Krahn's testimony reveals he is a safety-conscious individual who took a number of precautionary measures as he navigated his route. However, the potential hazards Krahn sought to minimize never actually presented themselves in August and September 2000. There were no animals or fallen rocks in the roadway, no reported disabled vehicles around blind curves, and no errant motorists exiting or entering the highway. Additionally, Krahn's brakes did not overheat and there were no other reported braking problems. He also did not report any physical conditions that interfered with his ability to operate his vehicle on the days in question. Krahn's own subjective assessment that his way of operating the vehicle was the safest method is not sufficient justification for refusing to follow Rollie's instructions. He has not identified specific weather, traffic, road or other hazardous conditions present on the days in question that might justify his claimed apprehension of serious injury. Accordingly, substantial evidence supports the ALJ's finding that Krahn did not engage in protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(ii).

⁷⁰ 49 U.S.C.A. § 31105(a)(2). Additionally, the employee "must have sought from the employer, and been unable to obtain, correction of the unsafe condition." *Id.*

⁷¹ *Jackson v. Protein Express*, ARB No. 96-194, ALJ No. 95-STA-38, slip op. at 3 (ARB Jan. 9, 1997).

⁷² TR at 113, 324.

⁷³ RX-20.

CONCLUSION

The Complaint failed to establish that he engaged in protected activity under the Act when he refused to abide by his supervisor's August 2000 instructions regarding maintaining appropriate speed and reducing excessive braking. Because the ALJ's findings of fact are supported by substantial evidence, we affirm the April 30, 2004 Recommended Decision and Order and **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge