In the Matter of:

RICHARD E. TABLAS,

COMPLAINANT,

v.

DUNKIN DONUTS MID-ATLANTIC,

RESPONDENT.

ARB CASE NO. 11-050

ALJ CASE NO. 2010-STA-024

DATE: April 25, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, Esq., ***Truckers Justice Center*****, Burnsville, Minnesota**

For the Respondent:
Randall C. Schauer, Esq., ***Fox Rothschild, LLP*****, Exton, Pennsylvania**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; Joanne Royce,** ***Administrative Appeals Judge*****; and Lisa Wilson Edwards,** ***Administrative Appeals Judge***

DECISION AND ORDER OF REMAND

This case arises under the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended, 42 U.S.C.A. § 31105 (Thomson/West Supp. 2012), and its implementing regulations, 29 C.F.R. Part 1978 (2012). On January 18, 2008, Richard Tablas filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, Dunkin Donut Mid-Atlantic (Dunkin Donuts), terminated his employment in violation of the STAA. OSHA dismissed the complaint. On April 28, 2011, after a hearing, an Administrative Law Judge (ALJ) entered an order dismissing the complaint. Tablas petitioned the ARB for review. We reverse and remand.

BACKGROUND

A. Facts

Tablas began working as a truck driver for Dunkin Donuts in October 2005. He is an experienced, long-haul truck driver and holds a commercial driver's license. *Tablas v. Dunkin Donuts Mid-Atlantic*, ALJ No. 2010-STA-024, slip op. at 4, 7, 19 (April 28, 2011)(D. & O.).

1. Complaints about overweight loads

Tablas complained to his employer about overweight loads in June, August, and November, 2007. *Id.* at 17-18, 27. The company responded to Tablas' complaints, and directed him to return the overweight loads to the shipper and have pallets offloaded so that the vehicle would comply with the weight rules. *Id.* at 18 & n.14, 26-27.

2. Complaints about weather conditions on December 13 and 14, 2007

On December 13, 2007, a company dispatcher assigned Tablas to drive a truck from Westhampton, New Jersey through Lancaster, Pennsylvania to pick up a load, and to proceed to Bellingham, Massachusetts. *Id.* at 4, 7, 11. The approximately 400-mile trip would take about nine hours. *Id.*; see also CX 14.

Tablas "stated that he was aware, from news on the internet, there was to be a big winter storm in the Northeast." D. & O. at 7. Tablas "was apprehensive about the forecast of a snow storm due to hit the New England area" and informed his dispatchers about the forecast. D. & O. at 19; see also *id.* at 7-8. Dispatcher Howard responded that "she was aware of the weather, and there were no changes to the dispatch at that point." *Id.* at 7. Howard testified that she told Tablas that he was "required to make an attempt, and there was no bad weather at Westhampton." *Id.* at 11. Tablas also "expressed that he was concerned because his normal trailer was in the shop and he would be driving a substitute unit." *Id.* at 7. Tablas learned "by about 5:00 p.m. [that day] that the governor of Connecticut had issued a press release that . . . asked tractor trailers to stay off the interstates to give snow plows an opportunity to work." *Id.* Tablas stated that "at some point interstate highways 94 and 81 were closed" and that while "these routes were not necessarily routes he had to use to get to Bellingham, . . . that, unless he took a lengthy detour, it was necessary to go through Connecticut to get to that destination." *Id.* at 7-8. Tablas testified that "from the internet, the weather seemed to be a big mess, with sleet starting around New Brunswick, sleet and freezing rain and ice up into the New York City area, and snow starting right about at the Connecticut border." *Id.* at 8. Tablas testified that "on his return from Lancaster, he was able to tune into a New York City radio station, which was reporting route 287 was so icy that trucks were sliding across the median strip." *Id.*, citing Hearing Transcript (Tr.) at 90-100 (Tablas).

Later that night, Tablas asked Dispatcher O'Hara that he not be required to complete the trip to Bellingham because of the weather. *Id.* at 8 (citing Tr. at 88), 24. O'Hara responded that no other drivers had reported problems because of the weather. D. & O. at 8. Dispatcher

Howard had earlier told Tablas that company policy required that drivers facing hazardous conditions would be required to "pull over at the next safe place." *Id.* at 11; see also *id.* at 12 (citing Tr. at 192-199 (Howard)); 12-13 (citing Tr. at 210-220 (Peters) (testifying that the company "did not shut everything down because of the storm and the drivers were expected to at least 'give an effort'" and that he "expected a driver to find a safe haven to pull over, and stated a rest area would be the best place.")).

3. Complaint about faulty air line on truck

Tablas transported the truck with the empty trailer from Westhampton, New Jersey to Lancaster, Pennsylvania and picked up a loaded trailer of cups. During the drive to Lancaster, Tablas realized that he left his E-Z Pass in his regular truck at the company's Westhampton depot. After dropping off the empty trailer in Lancaster, he returned to Westhampton to get his EZ Pass. D. & O. at 18.

Tablas arrived back at Westhampton at about midnight. When Tablas "arrived at the depot he made two sharp right turns, in succession, and . . . this action caused the air lines connecting his truck and the trailer to come unhooked." *Id*. He prepared a report about the air line defect and submitted the report to Dispatcher Gisel Smith. *Id*. Dispatcher Smith called for a repair. Tablas asked Dispatcher Smith if he could come back in the morning to continue the trip after the tractor was repaired. He stated the he "would not be getting to Bellingham any later, considering the state of the roads." *Id.*

Dispatcher Smith testified that she was "aware of the problem with the air lines when [Tablas] reported it, and also stated she called for a repair, and that because the truck was loaded with product[,] repairs were to be done immediately." D. & O. at 18 (citing Tr. at 30-31 (Smith)). "Documentary evidence indicates[, however,] the truck was repaired, within a few days after the incident." D. & O. at 18 (citing CX 4); see also CX 3 (ALJ states "record is silent as to why the repair was made on Dec. 19, rather than on Dec. 13-14, the date the Complainant reported the problem."); Tr. at 33 (Smith testifies that she did not remember speaking with anyone from Penske after she called in the repair Tablas reported the evening of December 13).

When Smith returned to the Westhampton depot the next morning, he was informed that another truck driver transported the cups. He was told he could go home for the day. D. & O. at 9. Company Operations Manager Thomas Krzywizki fired Tablas on December 18, 2007, for refusing to complete the run December 13 to 14. *Id.* at 9, 13 (citing CX 10).

B. ALJ Decision

1. Protected activity.

The ALJ determined that Tablas' complaints about overweight loads coming from the Guida Dairy in Connecticut were protected under STAA. D. & O. at 17-18. The ALJ found that Tablas produced "'weigh tickets' showing that his rig was over the prescribed weight of 80,000 pounds" and that he "made such complaints to the dispatchers and to Mr. Krzywicki and Mr.

Peters." *Id.* at 17. The ALJ further found that company managers "testified that they were aware of the issue and took action to get the dairy to change its loading practices, to prevent overweight loads." *Id*.

The ALJ determined that Tablas' complaints to Dispatcher Smith the evening of December 13, 2007, about the air valves on his truck were not protected under STAA. D. & O. at 18-19. The ALJ observed that STAA protects from adverse action an employee who refuses to operate a vehicle based on a "reasonable apprehension of serious injury" because of the vehicle's "hazardous safety or security condition." *Id.* at 19, citing 49 U.S.C.A. § 31105(a)(1)(B)(ii). The statute requires that individuals who refuse to drive "must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." *Id.* (citing 49 U.S.C.A. § 31105(a)(2)). The ALJ found that while Tablas reported the faulty air valves to Smith, "there is no evidence that [he] sought to have the problems presented by the air lines corrected, and was refused." D. & O. at 19. The ALJ determined that Tablas' "complaint about the air lines, though reasonable and related to safety, does not constitute protected activity, because there is no evidence the Employer refused to correct the problem." *Id.*

Finally, the ALJ determined that Tablas' refusal to drive in anticipation of adverse weather conditions did not constitute protected activity under either Section 31105(a)(1)(B)(i) or (B)(ii). The ALJ reasoned that the facts did not apply to subsection (B)(i) because the circumstances did not involve an "actual violation of a regulation or standard." *Id*. at 23-24. The ALJ determined that Tablas' refusal to drive was not protected activity under (B)(ii) because Tablas had no "reasonable apprehension of serious injury." *Id.* at 24. The ALJ observed that while Tablas had a reasonable subjective belief of harm, he lacked a reasonable objective belief based on findings that "at the Dunkin Donuts facility at Westhampton, the weather was not adverse," and that "there is no indication that the conditions on December 13-14, 2007, which included rain and sleet in Connecticut and snow in both Connecticut and Massachusetts, were so hazardous that a reasonable commercial driver with the Complainant's experience and skills, would have an apprehension of serious injury." *Id.* at 25.

2. Causation

The ALJ found no causal connection between Tablas' protected complaints about overweight loads and his termination. *Id.* at 27. The ALJ observed that company officials who testified at the hearing "uniformly stated that there were no adverse consequences to the Complainant's complaints on this issue; to the contrary, they stated, they were appreciative of his actions." *Id.* The ALJ found that Tablas was "terminated from employment chiefly, if not solely, because he refused to complete the Bellingham run," but that this was not connected to any protected activity because Tablas' refusal to drive was not protected under 49 U.S.C.A § 31105. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA, and its implementing regulations at 29 C.F.R. Part 1978. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012). The ALJ's factual findings are reviewed for substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.110(b). The ARB reviews the ALJ's conclusions of law de novo. *Olson v. Hi-Valley Constr. Co*., ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

DISCUSSION

A. Statutory And Regulatory Framework

Under the employee protection provisions of the STAA, 49 U.S.C.A. § 31105(a)(1), an employee may not be discharged or discriminated against when

> (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.A. § 31105(a)(1)(B)(i), (ii). The Act states that for purposes of Section 31105(A)(1)(B)(ii), 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 hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for the 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.A. § 31105(a)(2). Thus to prevail on his STAA whistleblower complaint based on his refusal to operate his truck, Tablas must prove "by a preponderance of evidence that (1) his safety complaints to his employer were protected activity; (2) the company took an adverse

action against him, and (3) his protected activity was a contributing factor to the adverse personnel action."[1] *Blackie v. Smith Transp., Inc.*, ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 8 (ARB Nov. 29, 2012). If Tablas proves by a preponderance of the evidence that his protected activity was a contributing factor in the adverse personnel action, his employer may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event. *Id*.

B. The ALJ Erred In Determining That Tablas' Complaints About The Faulty Airlines Was Not Protected Activity Under The Act

The ALJ below determined that Tablas' refusal to drive stemmed from his concerns about anticipated adverse weather conditions. On review, we do not resolve this case on that issue since the truck was unsafe to operate the night of December 13, 2007, due to the faulty air line problem, irrespective of the weather forecast. The ALJ determined that Tablas' refusal to drive because of the faulty air lines on his truck did not constitute protected activity under Section 31105(a)(1)(B) of the Act because there was "no evidence that the Complainant sought to have the problem presented by the air lines corrected, and he was refused." D. & O. at 19 (citing 49 U.S.C. 31105(a)(2)). This was error.

Tablas argued below that his complaints were protected under Section 31105(a)(1)(B)(i) and (B)(ii).[2] Subsection (B)(i) protects an employee when "the 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." 49 U.S.C.A. § 31105(a)(1)(B)(i). Subsection (B)(ii) protects an employee who refuses to drive because of a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition, and requires a showing that the employee "sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C.A. § 31105(a)(1)(B)(ii), (a)(2). STAA's work refusal clause

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[1] Congress amended the STAA's burden of proof standard, on August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). The Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to state that STAA whistleblower complaints will be governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b) (Thomson/West 2007) (AIR 21), which contains whistleblower protections for employees in the aviation industry. Under the AIR 21 standard, complainants must show by a "preponderance of evidence" that a protected activity was a "contributing factor" to the adverse action described in the complaint. 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Act of 1982, 75 Fed. Reg. 53544, 53545, 53550 (Aug. 31, 2010). The "contributing factor" standard applies in this case.

[2] The company argues (Respondent's Brief at 11-12) that Tablas waived the argument that his refusal to drive due to the air line malfunction constituted protected activity under subsection (B)(i). This argument lacks merit, as Tablas clearly raised the issue in his post-hearing brief to the ALJ at pages 20-21, when he argued that it would have violated portions of the Federal Motor Carrier Safety regulations had he driven the truck with the faulty air lines.

thus protects *two* categories of work refusals, commonly referred to as the "actual violation" and "reasonable apprehension" categories. *Pollock v. Continental Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 8 (ARB Apr. 7, 2010). Under the actual violation category, i.e., subsection (B)(i), the refusal to drive is protected where operating a vehicle would have violated a motor vehicle regulation, standard, or order. *Id.* Unlike subsection (B)(ii), which requires the complainant to have requested and been denied correction of the unsafe condition, no other showing is required under (B)(i).

The ALJ determined that Tablas did not engage in protected activity under Section 31105(a)(1)(B)(ii) because there was "no evidence the Employer refused to correct the problem." D. & O. at 19. However, the showing required to prove protected activity under (B)(i) is that driving a vehicle would have violated a "motor vehicle regulation, standard or order." 49 U.S.C. 31105(a)(1)(B)(i). The facts of this case satisfy that showing. Specifically, the facts show that the night of December 13, 2007, when Tablas was in the parking lot of the company's Westhampton depot location, he made "two sharp turns [when] he lost air pressure and the trailer brakes locked up." D. & O. at 8; see also Tr. at 101 (Tablas testifies that an "emergency line popped . . . [or] unhooked from the trailer and then flew back up into the hanger" and the "emergency light came off."). The ALJ observed Tablas' testimony that the "emergency air line unhooked from the trailer" and that when he "put it back again . . . it popped off when he got back into the tractor." D. & O. at 8. A security guard assisted Tablas to "hold[] the line back on, so he could move the trailer out of the way of other traffic." *Id.* Tablas promptly prepared a Driver's Vehicle Condition Report and submitted it to Gisel Smith at the company's dispatch window. *Id.* (citing CX3). At the hearing, Tablas testified that the "absence of functioning air lines on his vehicle was dangerous." D. & O. at 19 (citing Tr. at 93-95). Dispatcher Smith also testified that the "lack of functional air lines constituted a safety hazard." *Id.* (citing Tr. at 30-31 (Smith testifying that if an air line comes off, when you're operating at highway speeds "your emergency brakes will lock up.")).

The record shows that, as Tablas argued below, his operation of a truck with faulty air lines would have violated various provisions of the Federal Motor Carrier Safety regulations. Complainant's Prehearing Statement (dated Feb. 24, 2010) at 3 (Tablas stating that operating the vehicle on December 13, 2007, would have violated "commercial vehicle safety regulations including, but not limited to 49 C.F.R. 394.14, 49 C.F.R. Part 393, Subpart C, and 396.7."). Indeed, Tablas' operation of the truck on December 13, 2007, would have violated 49 C.F.R. § 392.7, which reads:

> § 392.7 Equipment, inspection and use**. . . .**
>
> (b) Drivers preparing to transport intermodal equipment must make an inspection of the following components, and must be satisfied they are in good working order before the equipment is operated over the road. Drivers who operate the equipment over the road shall be deemed to have confirmed the following components were in good working order when the driver accepted the equipment:

> --Service brake components that are readily visible to a driver performing as thorough a visual inspection as possible without physically going under the vehicle, and trailer brake connections . . .
>
> --Air line connections, hoses, and couplers

Tablas' knowing operation of a truck with defective air lines would have clearly violated Section 392.7. Other Federal Motor Carrier Safety regulations that Tablas' operation of the truck that night would have violated include 49 C.F.R. § 393.45(b) (requiring proper brake tubing and hose installation), and § 393.45(d) (requiring that "connections for air, vacuum, or hydraulic braking systems . . . be installed so as to ensure an attachment free of leaks, constructions or other conditions which would adversely affect the performance of the brake system"). Tablas' operation of the truck would have also violated 49 C.F.R. § 396.3(a)(1) (requiring "parts and accessories . . . be in safe and proper operating condition at all times"), 49 C.F.R. § 396.7 (prohibiting operation of a vehicle that is in a condition "likely to cause an accident or breakdown of the vehicle"), and 49 C.F.R. § 396.13 (requiring that a driver be "satisfied that the motor vehicle is in safe operating condition").

Based on the facts and the specific requirements set out in the Federal Motor Carrier Safety regulations, the ALJ erred in failing to determine that Tablas' reporting of the faulty air lines was protected activity under Section 31105(a)(1)(B)(i) of the Act.

C. Tablas' Reporting Of The Faulty Air Lines Contributed To The Adverse Action Against Him

The ARB relies on the interpretation of "contributing factor" specified by the court of appeals in *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). In *Marano,* the court of appeals interpreted "contributing factor" in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 5 U.S.C. § 1221(e) (1), to mean "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." 2 F.3d at 1140. "*Any* weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the 'contributing factor' test." *Id*. The federal courts have consistently applied this definition of "contributing factor." *See, e.g., Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Kewley v. U.S. Dep't of Health & Human Svcs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998). In proving contributing factor, a complainant can show "either direct or circumstantial evidence" of contribution. *Smith v. Duke Energy Carolinas LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 7 (ARB June 20, 2012).

Under the extensive facts found by the ALJ, it was error to conclude that Tablas' reporting of the air lines problem did not contribute to the termination. Undisputed facts establish that on the evening of December 13, 2007, as Tablas entered the Westhampton depot lot, his truck's braking system malfunctioned. *See* D. & O. at 8. Tablas saw that the emergency air line had come unhooked from the trailer. After Tablas moved the trailer away from oncoming traffic, he reported the air line problem to Dispatcher Smith. See CX. 3 (Driver's

Vehicle Condition Report). Even though Dispatcher Smith asked Tablas to transport the truck to a local Penske location for repairs, she ultimately called Penske to come to the Westhampton depot to look at the truck. D. & O. at 8. Tablas and Dispatcher Smith both testified that operating the truck with the faulty air line break system was not safe. *Id.* at 19.

Even though it is undisputed that the truck was not safe to drive the approximately nine-hour trip from Westhampton, New Jersey to Bellingham, Massachusetts (CX 14), the ALJ found no causation because of evidence that Tablas' refusal was also based on his stated concerns about anticipated adverse weather conditions along the northeast route. D. & O. at 26. While Tablas' concern about the weather affected his proclivity to drive, it is undisputed that he essentially could not drive given the faulty air lines. The company terminated Tablas a few days after the incident due to his refusal to drive the truck that night. *Id.* at 13 (Operations Manager Krzywizki testifies that Tablas was terminated for "refusing to complete the run."). That refusal, which stemmed in part from his concerns about the weather, was also "inextricably intertwined" with his activity (reporting the faulty air lines) protected under Section 31105(a)(1)(B)(i). *See, e.g.*, *Marano,* 2 F.3d at 1143; *see also Smith*, ARB No. 11-003, slip op. at 6-7. Indeed, Tablas was not provided a substitute truck that evening (Tr. at 51 (Dispatcher Smith testifying that she "didn't request a substitute"); Tr. at 113 (Tablas testifying that he was not offered a substitute vehicle)), and the ALJ determined, based on "[d]ocumentary evidence that the truck was" not immediately repaired that night, but instead was repaired "within a few days after the incident." D. & O. at 18. The evidence shows that Tablas informed Dispatcher Smith that he would return in the morning to complete the run to Bellingham, and that he did return but was informed by a company employee that another driver had left earlier with his load. *Id.* at 8-9; *but see* Tr. at 113 (Tablas testifying that when he returned to Westhampton depot the morning of December 14, a company employee informed him that his load had been taken to Bellingham, but "noticed [his] load was still there on the way out."). Thus, under the law of contributing factor and the facts of this case, Tablas' protected activity contributed to, and was inextricably intertwined with, his termination in violation of the Act.

In light of this ruling, we remand so that the ALJ can determine whether the company can show, by clear and convincing evidence, that it would have taken the same action against Tablas absent the protected activity. *Blackie*, ARB No. 11-054, slip op. at 8. In making this determination, the record evidence in this case appears to show no basis for termination other than Tablas' refusal to drive the truck the night of December 13, 2007, which we have determined violated the Act since the refusal was protected activity under section 31105(a)(1)(B)(i). Nonetheless, we remand to the ALJ to make that determination in the first instance. Should the ALJ find no such clear and convincing evidence, the ALJ should find the company liable under the Act and determine the appropriate relief.

CONCLUSION

The ALJ's April 28, 2011, Decision and Order is reversed and remanded for proceedings consistent with this Order.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge