In the Matter of:

RICHARD E. TABLAS, **ARB CASE NO. 13-091**

COMPLAINANT, **ALJ CASE NO. 2010-STA-024**

v. **DATE: February 28, 2014**

DUNKIN DONUTS MID-ATLANTIC,

RESPONDENT.

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*. Judge Edwards dissenting.

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 (2013). Richard Tablas filed a complaint with the Occupational Safety and Health Administration (OSHA) on January 18, 2008, alleging that his employer, Dunkin Donuts 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 a Decision and Order (D. & O.) dismissing the complaint. Tablas petitioned the Administrative Review Board (ARB) for review.

On April 25, 2013, we entered an order reversing the ALJ's Order, and remanded the case to the ALJ to determine whether Dunkin Donuts could show, by clear and convincing evidence that it would have terminated Tablas's employment absent his protected acts. ARB Decision and Order of Remand (dated Apr. 25, 2013) (ARB Order of Rem.). After further briefing on remand, the ALJ entered an order on August 12, 2013, determining that there was clear and convincing evidence that Tablas would have been terminated even absent his protected activity. Tablas again petitioned for review. We reverse and remand for proceedings consistent with this decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the STAA, and implementing regulations.[1] The ALJ's factual findings are reviewed for substantial evidence, 29 C.F.R. § 1978.110(b), and conclusions of law are reviewed de novo.[2]

BACKGROUND

The facts in this case are laid out in the ALJ's decisions below.[3] As the ALJ observed, there were few contested underlying facts, and the witness testimony was largely consistent. D. & O. on Rem. at 4. We include here a summary of those facts largely the same as that contained in our 2013 Order of Remand.

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. D. & O. at 4, 7, 19.

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[1] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); see also 29 C.F.R. Part 1978.

[2] *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

[3] *See Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024, slip op. at 4, 16-20, 23-28 (ALJ Apr. 28, 2011) (Decision and Order "D. & O."), and *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024, slip op. at 5-9 (ALJ Aug. 12, 2013) (Decision and Order on Remand "D. & O. on Rem.").

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

On the morning of December 13, 2007, a company dispatcher assigned Tablas to drive a truck from Westhampton, New Jersey to Lancaster, Pennsylvania and on to Bellingham, Massachusetts, with a reporting time of 8:00 p.m. *Id.* at 7. Tablas was scheduled to drive from Westhampton with an empty trailer to Lancaster, where he would pick up a trailer loaded with cups and deliver the loaded trailer to Bellingham. *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 to not require him 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.")). Tablas testified that O'Hara warned Tablas that if he did not do the run "there's going to be repercussions tomorrow, you're probably going to lose your job." *Id.* at 8.

2. Complaint about faulty air line on truck

Tablas drove the truck with the empty trailer from Westhampton, New Jersey to Lancaster, Pennsylvania and picked up a loaded trailer of cups. *Id.* During the drive to Lancaster, Tablas realized that he left his E-Z Pass in his regular truck at the company's

Westhampton depot. *Id.* After picking up the loaded trailer in Lancaster, he took a short diversion from his assigned route to return to Westhampton to retrieve his E-Z Pass. D. & O. at 8; D. & O. on Rem. at 6.

Tablas arrived at Westhampton at about midnight. *Id.* at 18. When Tablas arrived at the depot he "made two sharp right turns, and . . . he lost air pressure and the trailer brakes locked up." *Id.* at 8. The sharp turns caused the air lines connecting his truck and the trailer to come unhooked. *Id.* at 18. He prepared a report about the air line defect and submitted the report to Dispatcher Gisel Smith. *Id.* Dispatcher Smith called for a repair. *Id.* Tablas asked Dispatcher Smith if he could come back in the morning to continue the trip after the tractor was repaired. *Id.* at 8. 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). It is not clear from the record whether Smith directed Tablas to wait for a repair. D. & O. at 18; D. & O. on Rem. at 5. Because of concern about the malfunctioning brake system and the weather, Tablas went home rather than completing the run, planning to complete the run in the morning. D. & O. on Rem. at 5.

When Tablas returned to the Westhampton depot the next morning, a dispatcher told him to go home and informed him that another truck driver transported the trailer. Tablas testified, however, that he noticed his load was still at the depot that morning. D. & O. at 8-9; Tr. at 113. Company Operations Manager Thomas Krzywizki terminated Tablas's employment on December 18, 2007. D. & O. at 16-17. Although the termination letter stated that no defect was found in the air lines that would have prevented Tablas from continuing his run, the evidence of record established that, the air lines were indeed repaired on December 19, 2007. CX 10; D. & O. on Rem. at 7-8. A month before this incident, Tablas received a written warning for refusing to make a run as directed. D. & O. on Rem. at 7.

DISCUSSION

Under STAA's employee protection provisions , 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).

In her initial opinion, the ALJ determined that Tablas's refusal to drive because of the faulty air lines on his truck did not constitute protected activity under Section 31105(a)(1)(B)(ii) 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. In our 2013 Decision of Remand, we ruled the ALJ erred and we remanded based upon our conclusion that Tablas's refusal to drive because of his truck's faulty air lines was protected under the subsection (B)(i), the "actual violation" category of work refusals. We further concluded that undisputed facts established that Tablas's refusal to drive because of the malfunctioning brake system contributed to his termination. We instructed the ALJ to determine on remand whether the employer could show by clear and convincing evidence that it would have taken the same adverse action against Tablas notwithstanding his work refusal.[4] As to that question, the ALJ held on remand as follows:

> In sum, I find that, regarding the Complainant's protected activity (complaining about the air lines), the Respondent would have terminated the Complainant's employment in any event, because the Complainant did not wait at the depot for repairs to his vehicle to be made, as he should have done. Rather, the Complainant took it on himself to decide not to complete the run, and left the facility. Respondent's termination notice articulated that the reason the Complainant was terminated was based on his failure to wait on the repair to his vehicle.

[4] See ARB Order of Rem., slip op. at 9; see also D. & O. on Rem., slip op. at 4.

D. & O. on Rem. at 8-9. The ALJ concluded that Dunkin Donuts would have terminated Tablas's employment absent any protected activity primarily because Tablas did not wait for repairs to be made to his vehicle; but she also considered Tablas's concern about inclement weather, as well as his prior history of failing to make a run. *Id.* at 8-9. Because there is not substantial evidence in the record to support the ALJ's finding that Dunkin Donuts showed by clear and convincing evidence that it would have terminated Tablas's employment absent any protected activity, we reverse.

"Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'"[5] As the Eleventh Circuit observed, "[f]or employers, this is a tough standard, and not by accident. Congress appears to have intended that companies . . . face a difficult time defending themselves."[6] Thus, the question before us is whether there is substantial evidence in the record to support the ALJ's finding that it was highly probable or reasonably certain that Dunkin Donuts would have terminated Tablas's employment even if he had not engaged in the protected activity of refusing to drive based upon broken air lines. We conclude that the evidence of record is insufficient to support a finding by clear and convincing evidence that Respondent would have terminated Tablas absent his protected activity.

In her initial opinion, the ALJ stated: "Indeed, the evidence of record indicates *quite definitively* that the Complainant was terminated from employment *chiefly, if not solely, because he refused to complete the Bellingham run.*" D. & O. at 27 (emphasis added). In her second opinion on remand in 2013, the ALJ claimed to have largely adhered to her initial finding: "On remand, I again find that the Complainant's *refusal to complete the run was the principal factor* in his termination from employment, but was not the sole factor." D. & O. on Rem. at 6 (emphasis added). However, she then proceeded to list 11 additional fact findings regarding "other factors that played a part in Respondent's termination of the Complainant's employment." D. & O. on Rem. at 6. Had the ALJ stuck with her initial finding – namely, that Tablas's termination was "chiefly, if not solely because he refused to complete the Bellingham run" – it would have been logically impossible for Respondent to show by clear and convincing evidence that it would have fired Tablas in the absence of that "principal" reason. As we stated in our initial ruling: "the record evidence in this case appears to show no basis for termination other than Tablas's 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)." ARB Order of Rem. at 9.

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[5] *Coryell v. Arkansas Energy Servs., LLC*, ARB No. 12-033, ALJ No. 2010-STA-042, slip op. at 4 (ARB Apr. 25, 2013) (quoting *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 6 (ARB Feb. 29, 2012)).

[6] *See Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997). In *Stone* the Eleventh Circuit interpreted the ERA burdens of proof; however, the AIR 21 burdens of proof, explicitly incorporated into STAA, were modeled after the burdens of proof provisions of the 1992 amendments to the Energy Reorganization Act, 42 U.S.C.A. § 5851.

The ALJ skirted this nearly inevitable conclusion by re-characterizing, if not contradicting, her original decision and finding (in her second decision) that another factor, besides Tablas's refusal to complete his run, was the principal reason for his termination: "Based upon Mr. Krzywizki's testimony at the hearing, I find that the most important factor, in his judgment, was the Complainant's unilateral decision to leave the depot and go home . . . . Respondent would have terminated the Complainant's employment in any event, because the Complainant did not wait at the depot for repairs to his vehicle to be made, as he should have done." D. & O. on Rem. at 8.

By re-characterizing Tablas's refusal to complete his run as a failure to wait for repairs, the ALJ side-stepped the obvious outcome of her initial ruling and our remand – if, as the ALJ initially held, Tablas was fired chiefly for refusal to drive and if, as we held on remand, that work refusal was protected, it would be all but impossible for Respondent to prove its affirmative defense. The ALJ maintained instead that the failure to wait for repairs was the principal reason for the termination and, since that failure was not protected, it constituted clear and convincing evidence that Tablas would have been fired in the absence of his protected work refusal. We are not convinced however that Tablas's failure to wait for repairs was legally separable from his protected refusal to drive. But for the faulty air lines, there would have been no need to wait for repairs. The ARB has repeatedly found that when an ostensibly legitimate basis for termination is inextricably intertwined with protected activity, Respondent must bear the risk that the "mixed motives" are inseparable.[7]

In any case, there is insufficient evidence to support the ALJ's finding that Respondent demonstrated by clear and convincing evidence that, even in the absence of Tablas's protected refusal to drive, it would have fired him because he failed to wait for repairs. First, the ALJ makes this finding despite her acknowledgment that Respondent's evidence on the subject was contradictory and unclear. As the ALJ correctly pointed out:

> The Respondent's termination letter contained at least two statements that are at odds with the Respondent's official's testimony at the hearing . . . . [T]he letter stated that no defect had been found in the air lines, as the Complainant had reported. The evidence of record indicates the vehicle's air lines were repaired, but not until December 19, 2007, after the date of the letter. I note that Mr. Krzywizki did not testify regarding either of these inaccuracies.

D. & O. on Rem. at 7-8 (citations omitted).

Krzywizki drafted the termination letter himself. D. & O. at 13. Thus, based upon the evidence of record, he must have been either mistaken or untruthful about the status of the broken air lines when he decided to terminate Tablas. Further, as the ALJ observed, Krzywizki did not even testify regarding when or where the air lines were repaired. The ALJ also correctly

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[7] *See e.g.*, *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7 (ARB Feb. 29, 2012).

pointed out that "[i]t is unclear, from the record, whether Ms. Smith explicitly told the Complainant to wait for the repair." D. & O. on Rem. at 5. The ALJ nevertheless extrapolated from this contradictory evidence and nonexistent testimony that Complainant was fired principally because he "did not wait at the depot for repairs to his vehicle to be made, as he should have done." D. & O. on Rem. at 8.

The ALJ also makes the unsupportable statement that "Respondent's termination notice articulated that the reason the Complainant was terminated was based on his failure to wait on the repair to his vehicle." D. & O. on Rem. at 9. On the contrary, the only mention in the termination letter of the vehicle repair is the very statement that the ALJ earlier found to be contradicted by the evidence of record "Penske SOS was dispatched to the MADCP yard and found no problems with the air lines or the tractor that would affect you from delivering the load." CX 10. There is no evidence in the record that Penske sent anyone to repair the truck on the morning of December 14, much less that Penske found no problems with the air lines. And nothing else in the termination letter mentions a failure to wait for repairs. Instead, the termination letter articulates one paramount reason for his termination, namely Tablas's failure to complete the run. The letter states: "[Y]ou failed to complete your assigned route . . . . Instead of . . . going to the closest Penske shop for repairs and continuing on with your run . . . you returned to the MADCP . . . . [Y]ou committed the numerous violations as follows: . . . Failure to follow designated routing . . . Failure to complete a run . . . Refusal of a run . . . ." CX 10. The ALJ's finding that the principal reason for Tablas's termination was his failure to wait for repairs is unsupported by substantial evidence.

In her opinion on remand, the ALJ found that Tablas's concern about the inclement weather was another legitimate reason for his termination. The ALJ stated: "[T]he Complainant's apprehension about the weather forecast was a major factor in the Complainant's decision not to complete the run. On careful consideration of the evidence of record, as well as the Board's Decision, I find that the two circumstances (apprehension about the assigned run and concern about the air lines) were inextricably intertwined in both the Complainant's and Respondent's actions." D. & O. on Rem. at 8. However, in mixed motive cases, when legal and illegal reasons are inextricably intertwined, the employer must bear the risk of inseparable motives.[8] Evidence of Tablas's concern about the weather, because of its inseparability from protected activity, cannot provide strong evidence of a legitimate independent reason for his termination. In any case, given the ALJ's factual finding of the inseparability of the causes of Tablas's refusal to drive, we find that the combination of his concern about the weather and his malfunctioning brake system constituted protected activity.

In her first opinion, the ALJ thoroughly analyzed Tablas's weather-related, refusal-to-drive claim under § 31105(a)(1)(B)(ii)(reasonable apprehension of unsafe conditions). D. & O. at 19-26. Noting that it was a close issue, she found that Tablas's refusal to drive due to inclement weather, though subjectively reasonable, was not objectively reasonable. However, she initially analyzed Tablas's refusal due to inclement weather *separately* from his concern about the air lines. In her second opinion, the ALJ found that Tablas's refusal to drive was based

[8] *See Passaic Valley Sewerage Comm'rs v. U.S. Dept. of Labor,* 992 F.2d 474, 482 (3d Cir. 1993) (citations omitted).

upon *both* his concern about inclement weather *and* the broken air lines. D. & O. on Rem. at 8. We agree and under these circumstances, Tablas's refusal to drive was unquestionably protected under § 31105(a)(1)(B)(i). Undisputed evidence established that (1) Tablas was not driving his usually assigned truck; (2) 3 to 10 inches of snow fell in the region to which Tablas was dispatched; (3) by 5:00 pm the governor of Connecticut had issued a press release asking tractor trailers to stay off the interstates to give the snow plows an opportunity to work; (4) at some point, interstates highways 84 and 91 were closed; and (5) on his return to Lancaster, Tablas heard a New York City radio station reporting that route 287 was so icy that trucks were sliding across the median strip. D. & O. at 7-8, 25. Given these adverse weather conditions, once the air lines on his substitute truck broke, his refusal to drive constituted protected activity under § 31105(a)(1)(B)(i). The ALJ found that the combination of Tablas's concerns about the weather and the broken air lines was a major reason for his termination. Since those concerns constitute protected activity, we reverse the ALJ's finding that Tablas's concern about inclement weather provided Respondent with a legitimate justification for termination. D. & O. on Rem. at 9.

In sum, we find that the evidence of record is insufficient to support a finding by clear and convincing evidence that Respondent would have fired Tablas absent his protected activity.

CONCLUSION

The ALJ's August 12, 2013, Decision and Order is **REVERSED** and this matter is **REMANDED** to the ALJ to determine the issue of damages. Tablas's attorney shall have 30 days from receipt of this Decision and Order of Remand in which to file a fully supported attorney's fee petition with the ARB, with simultaneous service on opposing counsel. Thereafter, Respondent shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Judge Edwards, dissenting.

The ALJ below determined that Tablas's refusal to drive stemmed from his concerns about anticipated adverse weather conditions. In our prior April 25, 2013 decision, however, we did not resolve the case on that issue since the truck was unsafe to operate the night of December 13, 2007, due to the truck's malfunctioning air lines. ARB Order of Rem., slip op. at 6. We determined that the ALJ erred and that Tablas's reporting of his truck's faulty air lines was protected under the Act, and that this reporting contributed to the company's decision to terminate his employment. We directed the ALJ to determine on remand whether the employer could show by clear and convincing evidence that it would have taken the same adverse action

against Tablas notwithstanding his protected activity of reporting the faulty air lines.[9] As to that question, the ALJ found as follows:

> In sum, I find that, regarding the Complainant's protected activity (complaining about the air lines), the Respondent would have terminated the Complainant's employment in any event, because the Complainant did not wait at the depot for repairs to his vehicle to be made, as he should have done. Rather, the Complainant took it on himself to decide not to complete the run, and left the facility. Respondent's termination notice articulated that the reason the Complainant was terminated was based on his failure to wait on the repair to his vehicle.

D. & O. on Rem. at 8-9. Substantial evidence in the record, as relied on by the ALJ in the Decision on Remand, supports that determination.

The company's termination letter states quite specifically that the decision to terminate Tablas stemmed directly from his decision to leave the depot and go home after returning with the truck for repairs to the air lines. The termination letter states: "By you making the decision to go home was job abandonment which put the DDMADCP in jeopardy with the customer and a possibility of losing the account and missing a backhaul." See CX 10 (Company termination letter dated Dec. 13, 2007). Moreover, the ALJ relied on testimony by Tablas and determined that he "unilaterally made the decision to leave the depot and return home, rather than complete the run." D. & O. on Rem. at 7-8, citing, *e.g.*, Tr. 107-108 (Tablas). See also D. & O. on Rem. at 8 n.8 (ALJ states: "Based on Mr. Krzywizki's testimony at the hearing, I find that the most important factor, in his judgment, was the Complainant's unilateral decision to leave the depot and go home" and that "because the Complainant was aware that the problem with the air lines had been called in for repair, it was not necessary for him to go home to avoid driving an unsafe vehicle."). Substantial evidence thus supports the ALJ's determination that there was clear and convincing evidence that Tablas would have been terminated even absent any protected activity because, as the termination letter states and witness Krzywizki testified, Tablas left the truck without waiting for repairs.

LISA WILSON EDWARDS
Administrative Appeals Judge

[9] See ARB Order of Rem., slip op. at 9; see also D. & O. on Rem., slip op. at 4.