



IN THE MATTER OF:

ARNOLD A. McALLISTER,

ARB CASE NO. 13-073

COMPLAINANT,

ALJ CASE NO. 2013-AIR-008

v.

DATE: May 15, 2014

LEE COUNTY BOARD OF COUNTY
COMMISSIONERS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Arnold A. McAllister, *pro se*, Fort Myers, Florida

For the Respondent:

Mark E. Levitt, Esq. and Shannon L. Kelly, Esq.; *Allen, Norton & Blue, P.A.*;
Winter Park, Florida

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown,
Deputy Chief Administrative Appeals Judge; and Joanne Royce, *Administrative
Appeals Judge*

DECISION AND ORDER OF REMAND

Complainant Arnold A. McAllister filed a complaint under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the

21st Century¹ with the Department of Labor's Occupational Safety and Health Administration (OSHA). In the complaint he alleged that on September 3, 2012, Respondent Lee County Board of County Commissioners (LCBCC) terminated his employment by eliminating his position to avoid the appearance of retaliation, after he reported to the Federal Aviation Authority that the director of operations had conducted training that he was not qualified to perform in violation of Federal aviation regulations and that LCBCC engaged in illegal billing for air transport services. OSHA dismissed the complaint.

PROCEDURAL BACKGROUND

McAllister requested a hearing before a Department of Labor Administrative Law Judge (ALJ). In response to the hearing request, the ALJ issued an Order to Show Cause. The ALJ stated in the order that there were three issues that the parties must address to determine whether the case should be dismissed or allowed to proceed to hearing: (1) Whether the complaint was timely, and, if not, whether the limitations period should be equitably tolled, (2) Whether McAllister engaged in protected activity, and (3) Whether LCBCC is an "air carrier" as defined by AIR 21. The ALJ stated in the order, "that the parties shall, not later than May 31, 2013 (postmark date), show cause whether this matter should be dismissed."

On June 6, 2013, the ALJ issued an Order Dismissing Complaint.² In the Order, he stated that while LCBCC timely filed its response to the Order to Show Cause, McAllister did not. Nevertheless, the ALJ did not dismiss McAllister's complaint on the grounds that he did not timely respond. Instead, he determined that LCBCC was not an "air carrier" under AIR 21, and dismissed McAllister's complaint on that basis.

DISCUSSION

AIR 21 provides:

(a) DISCRIMINATION AGAINST AIRLINE EMPLOYEES. —No air carrier . . . may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee [engaged in protected activity].^[3]

¹ 49 U.S.C.A. § 42121 (Thomson/West 2007)(AIR 21). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2013).

² *McAllister v. Lee Cnty. Bd. of Cnty. Comm'rs*, ALJ No. 2013-AIR-008 (O. D. C.).

³ 49 U.S.C.A. § 42121(a).

“Air carrier” is defined as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”⁴ “Citizen of the United States” is defined as:

- (A) an individual who is a citizen of the United States;
- (B) a partnership each of whose partners is an individual who is a citizen of the United States; or
- (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.^[5]

The ALJ concluded that the issue to be determined was whether LCBCC met the definition of “citizen of the United States.”⁶ The ALJ reasoned:

Florida counties are political subdivisions of the state. Art. VIII, § 1(a), Fla. Const. Lee County’s boundaries were established in § 7.36, Fla. Stat. (2012). The powers and duties of the Lee County Board of County Commissioners, Respondent in this matter, are established under state law at § 125.01, Fla. Stat. (2012). As the governing body of Lee County, the board of county commissioners clearly is not an individual who is a citizen of the United States; nor is it a partnership with partners who are citizens of the United States. Further, although Respondent was established under the laws of the state of Florida, it is not a corporation or association organized under state law: laws related to organization of corporations and associations are set forth in Title XXXVI, Fla. Stat. rather than Title XI (concerning county formation and powers). Title XI has nothing to do with county organization.^[7]

⁴ 49 U.S.C.A. § 40102(a)(2) 29 C.F.R. § 1979.101.

⁵ 49 U.S.C.A. § 40102(a)(15).

⁶ Order Dismissing Complaint (O.D.C.) at 2.

⁷ *Id.*

Consequently, the ALJ concluded that “Respondent is not a ‘citizen of the United States’ under 49 U.S.C. § 40102(a)(15), and is therefore not an ‘air carrier’ within the meaning of AIR21. Accordingly, Respondent cannot be found liable for any violation of the employee-protection provisions of the Act, even assuming that Complainant was subjected to adverse employment action because he engaged in protected activities.”⁸

On June 21, 2013, McAllister filed a petition requesting the Administrative Review Board to review the ALJ’s Decision and Order Dismissing Complaint.⁹ Upon review of the record on appeal, we found a copy of McAllister’s response to the ALJ’s Order to Show Cause.¹⁰ Upon McAllister’s request, the Board treated his petition for review as his opening brief.¹¹ In the opening brief, McAllister alleged that the FAA had issued LCBCC an Air Carrier Certificate. On August 8, 2013, McAllister filed a “Reply to Notice of Appeal and Order Establishing Briefing Schedule 05 June 2013.” Attached to this “Reply” was a copy of the “Air Carrier Certificate that FAA purportedly issued to LCBCC. This certificate provides that

Lee County Helicopter Operations . . . is hereby authorized to operate as an air carrier and conduct common carriage operations in accordance with [the Federal Aviation Act of 1958, as amended] and the rules, regulations, and standards prescribed thereunder This certificate is not transferable and, unless sooner surrendered, suspended, or revoked, shall continue in effect indefinitely.^[12]

LCBCC filed a response brief on August 22, 2013, but neither admitted nor denied that the FAA had issued it an “Air Carrier Certificate,” and it did not address the significance of the Air Carrier Certificate, if any, in its brief. McAllister filed a rebuttal brief to which

⁸ *Id.*

⁹ The Secretary of Labor has delegated authority to issue final decisions in AIR 21 cases to the Administrative Review Board. Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a).

¹⁰ The envelope in which it was received shows a postmark date of June 1, 2013. Attached to the petition for review was a certified mail receipt for mail addressed to the “US Dep Labor Assoc Ch. Law Judge” at the correct Washington, D.C. address. But although there is a Pitney Bowers stamp for \$000.00 with a May 31, 2013 date, the tracking information on the United States Postal Service website, consistent with the envelope, shows an initial date of June 1, 2013, processed through USPS Sort Facility.

¹¹ Order Accepting Petition for Review as Opening Brief (Oct. 23, 2013).

¹² Complainant’s Rebuttal to Respondent’s Brief in Response to Complainant’s Petition for Review (Aug. 26, 2013).

was attached a second copy of the same Air Carrier Certificate.

The ARB is an appellate body whose review is generally limited to the record that was before the ALJ when he or she decided the case.¹³ But the Board may consider remanding a case to an ALJ to re-open a record where a party establishes that the party has submitted new and material evidence that was not readily available prior to the closing of the record.¹⁴ Given McAllister's pro se status and the potentially significant probative value of an FAA Air Carrier Certificate in a case in which the employer is denying that it is in fact, an air carrier, we do not feel that it would be appropriate to consider the issue whether the ALJ properly found that LCBCC was not an air carrier when the ALJ has not had the opportunity to consider the ramifications, if any, of the Air Carrier Certificate that the FAA allegedly issued to LCBCC.

Accordingly, we **REMAND** this case to the ALJ to re-open the record to accept the Air Carrier Certificate as new evidence. The ALJ may then reconsider his initial conclusion that LCBCC is not an air carrier, and in so doing, permit the parties to submit additional evidence or argument, at his discretion. It is also within the ALJ's discretion to consider any other issues that he finds dispositive of this case, with appropriate additional briefing or record development as he finds warranted within his discretion.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

¹³ See *Pollock v. Continental Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 13, n.94 (ARB Apr. 7, 2010).

¹⁴ *Accord* 29 C.F.R. § 18.54(c) ("Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.").