In the Matter of:

BARRY STROHL, **ARB CASE NO. 10-116**

COMPLAINANT, **ALJ CASE NO. 2010-STA-035**

v. **DATE: August 12, 2011**

YRC, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, *Trucker's Justice Center,* Burnsville, Minnesota

For the Respondent:
Anderson B. Scott, *Fisher & Phillips, LLP,* Atlanta, Georgia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

Complainant Barry Strohl was employed as a truck driver by Roadway Express, a predecessor company to Respondent YRC, Inc. (YRC), at all times relevant to this case.[1] Strohl alleges that YRC unlawfully retaliated against him in violation of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (Thomson/West Supp. 2011), when it issued him an official "notice of warning" (warning letter) on January 6, 2009.

[1] Shortly after the relevant events took place, Roadway Express combined its operations with Respondent YRC, Inc. *Strohl v. YRC, Inc.*, ALJ No. 2010-STA-035, slip op. at 3 (ALJ May 27, 2010) (D. & O.). For clarity, this opinion refers to both Roadway Express and YRC, Inc. as "YRC."

On March 4, 2009, Strohl filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that the January 6, 2009 warning letter constituted unlawful retaliation in violation of STAA's whistleblower protections. 49 U.S.C.A. § 31105. Having conducted an investigation, OSHA dismissed Strohl's complaint on March 23, 2010, determining that the warning letter did not rise to the level of an adverse action covered under STAA. On April 14, 2010, Strohl appealed OSHA's dismissal of his claim to the Office of Administrative Law Judges. After Strohl's appeal was referred to an ALJ for a hearing on the merits, YRC moved for summary decision. On May 27, 2010, the ALJ granted summary decision in favor of YRC, finding that the warning letter was neither discipline nor discrimination actionable under STAA. Strohl now appeals the ALJ's grant of summary decision in YRC's favor. For the following reasons, we reverse the ALJ's grant of summary decision, vacate in part, and remand for further proceedings consistent with this Decision and Order of Remand.

JURISDICTION

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the STAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.110(a) (2010). In reviewing the ALJ's conclusions of law, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029, slip op. at 2 (ARB Oct. 31, 2003).

An ALJ's recommended decision granting summary decision is subject to a de novo review. *Hardy v. Mail Contractors of America*, ARB No. 03-07, 2002-STA-022, slip op. at 2 (ARB Jan. 30, 2004). The standard for granting summary decision in our cases is set out at 29 C.F.R. § 18.40 (2010) and is essentially the same standard governing summary judgment in the federal courts. Fed. R. Civ. P. 56. Summary decision is appropriate if "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and a party is entitled to summary decision." 29 C.F.R. § 18.40(c). The determination of whether facts are material is based on the substantive law upon which each claim is based. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact arises when the resolution of the fact "could establish an element of a claim or defense and, therefore, affect the outcome of the action." *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002). "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on

which that party will bear the burden of proof at trial.'" *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The party opposing a summary decision motion may not rest upon mere allegations or denials of such pleading. 29 C.F.R. § 18.40(c). Rather, the response must set forth specific facts showing that there is a genuine issue of fact for determination at a hearing. *Id.*

BACKGROUND

Strohl's original OSHA filing alleges the followings facts that led to the issuance of the January 6, 2009 warning letter. On January 4, 2009, YRC assigned Strohl to deliver freight from its Greenville, South Carolina terminal to its terminal in Winston-Salem, North Carolina. Complaint at 2. Upon arriving at the Winston-Salem terminal, Strohl's supervisor informed Strohl that Strohl's freight had been misrouted, and that he was to immediately depart for YRC's Carlisle, Pennsylvania terminal, which Strohl did. *Id.* In route to Carlisle, Strohl informed a YRC dispatcher that he would be unable to reach Carlisle without exceeding his maximum legal allowable hours of service. *Id.* The dispatcher told Strohl to stop and go off duty in Hagerstown, Maryland, which he did. *Id.* at 2-3. On January 6, 2009, YRC issued Strohl the warning letter at issue, which indicated that Strohl had intentionally delayed freight. *Id.* at 3.

The parties have stipulated to the nature and effect of the January 6, 2009 warning letter. *See* D. & O. at 3. The warning letter is governed by the terms of a collective bargaining agreement (CBA) between YRC and covered employees, including Strohl. *Id.* The CBA requires YRC to issue a warning letter to employees before YRC can issue substantive discipline for subsequent offenses. *Id.* The CBA also provides that those warning letters "age off" after nine months. *Id.* The parties also stipulated that the particular warning letter at issue did not affect Strohl's pay or pension opportunities, assignments, seniority, or eligibility for promotion. *Id.*

DISCUSSION

The issue before us is whether the January 6, 2009 warning letter amounts to actionable discipline or discrimination under STAA, 49 U.S.C.A. § 31105. We find that we cannot resolve that question at this time with the record before us.

The ALJ's determination that the January 6, 2009 warning letter was not actionable under STAA relied upon this Board's decision in *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (Sept. 30, 2008). In that case, following a hearing on the merits, the Board held that a similar warning letter did not constitute actionable discipline or discrimination under STAA because it was not materially adverse as defined in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).[2] *Melton*, ARB No. 06-052, slip op. at 24. We

[2] We note that the ALJ incorrectly relied upon the "tangible consequences" standard advocated by a minority of the divided panel in *Melton*. *See* D. & O. at 5. That standard was rejected by *Melton's* concurring majority in favor of *Burlington Northern's* "materially adverse" standard. *See Melton*, ARB No. 06-052, slip op. at 24.

concluded that the *Melton* letter was not "materially adverse" because "it did not affect his pay, terms, or privileges of employment, did not lead to discipline, and was removed from his personnel file without consequences." *Id.*

Strohl does not contend that the ALJ improperly relied upon *Melton*, nor does he contend that the ALJ misapplied the standard from that case. Rather, Strohl asserts that *Melton* was wrongly decided, and he urges us to overturn the relevant rule in that case. Strohl's basic argument is that *Melton* was decided contrary to Board precedent that recognized warning letters as actionable in a variety of contexts.[3]

Regardless whether *Melton* was correctly decided at the time, we find that we are not bound to apply *Melton's* holding when assessing whether employer conduct amounts to adverse action under the STAA. That standard was based upon this Board's interpretation of STAA's statutory text in the absence of regulatory guidance from the Secretary regarding the scope of actionable discipline and discrimination under the Act. Subsequent to our decision in *Melton*, the Secretary has provided guidance on that point.

In August 2010, the Secretary promulgated new implementing regulations under the STAA that squarely address the scope of discipline or discrimination actionable under the Act's whistleblower protections. *See* 29 C.F.R. § 1978.102. Those regulations make it a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]" 29 C.F.R. §§ 1978.102(b), (c). The newer regulatory language represents a broader interpretation of the statutory language than the Board's interpretation expressed in *Melton*. *See* 49 U.S.C.A. § 31105(a)(1) (making it a violation for an employer to discharge or "discipline or discriminate against an employee regarding pay, terms, or privileges of employment"). Since the *Melton* decision pre-dates the current and more expansive regulatory language, we find that the Board's decision in *Melton* has been superseded by regulation.[4]

While this Board has not yet considered the implications of the new STAA regulations with regard to warning letters, we have considered the implications of similar regulatory language promulgated under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West 2007). *See Williams v. American*

---

[3] *E.g., Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, -064; ALJ No. 2000-STA-047, slip op. at 7 (ARB June 27, 2003) (affirming ALJ's ruling that suspension following issuance of a warning letter was actionable where suspension would have occurred notwithstanding the issuance of the letter); *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998-STA-008, slip op. at 11 (ARB July 28, 1999) (holding issuance of multiple disciplinary letters for refusal to drive to be violations of STAA).

[4] *See* 75 Fed. Reg. No. 15, 3925 (Jan. 25, 2010) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations and shall observe the provisions thereof, where pertinent, in its decisions.").

Airlines, Inc., ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010). In *Williams* we determined that nearly identical regulatory language promulgated under AIR 21's whistleblower provisions made warning letters presumptively adverse under certain circumstances.[5]

Considering the similarity of the relevant STAA regulations and those of AIR 21, the adverse action standard articulated in *Williams* has persuasive value. However, we hesitate to incorporate our decision in *Williams* into our STAA jurisprudence where neither party has had an opportunity to be heard on the issue, and we decline to do so at this time. Consequently, we remand so the parties may have an opportunity to consider whether our decision in *Williams* is determinative of the scope of discipline or discrimination actionable under the STAA.

CONCLUSION

Having determined that our *Melton* decision is inapplicable in light of the Secretary's clarification of the STAA's statutory language, we find that the ALJ granted YRC's motion for summary decision in error. Accordingly, we vacate the ALJ's findings and conclusions that Strohl did not suffer discrimination or discipline when YRC issued him the January 6, 2009 warning letter, and that Strohl has not established a necessary element of his STAA complaint. We remand for the ALJ to reconsider whether the January 6, 2009 warning letter constitutes an adverse action in light of the law's current state, including the regulatory language of 29 C.F.R. § 1978.102 and our *Williams* decision. In doing so, the ALJ should grant the parties an opportunity for further briefing to address their positions in light of those same considerations.

ORDER

The ALJ's D. & O. is **VACATED,** and this case is **REMANDED** to the ALJ for further proceedings consistent with our Decision and Order of Remand.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

[5] *See Williams*, ARB No. 09-018, slip op. at 11 (holding warning letters to be presumptively adverse where they are "considered discipline by policy or practice," "routinely used as the first step in a progressive discipline policy," or where they "implicitly or expressly reference potential discipline").