In the Matter of:

WILLIAM S. FARRAR, **ARB CASE NO. 06-003**

COMPLAINANT, **ALJ CASE NO. 2005-STA-46**

DATE: April 25, 2007

v.

ROADWAY EXPRESS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
William S. Farrar, *pro se*, Hahira, Georgia

For the Respondent:
Carl H. Gluek, Esq., *Frantz Ward LLP*, Cleveland, Ohio

FINAL DECISION AND ORDER OF REMAND

The Complainant, William Farrar, filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that the Respondent, Roadway Express, violated the employee protection provisions of section 405 of the Surface Transportation Assistance Act (STAA)[1] and its implementing regulations[2] when, in retaliation for filing prior STAA complaints against Roadway, "Roadway agents … presented false information and other misleading statements at the grievance panel

[1] 49 U.S.C.A. § 31105 (West 2007).

[2] 29 C.F.R. Part 1978 (2006).

hearings on October 26, 2004."[3] A Department of Labor (DOL) Administrative Law Judge (ALJ) granted Roadway's Motion to Dismiss, finding that Farrar failed to file a timely complaint.

The question presented to the Administrative Review Board is whether the ALJ properly granted Roadway's Motion to Dismiss this case without addressing the basis for Farrar's complaint, i.e., his allegation that the testimony of Roadway representatives at the grievance hearing panel was retaliatory and thus warranted relief under the STAA. We remand because the ALJ did not adjudicate the complaint before him when he did not address the grievance procedure grounds for relief.

BACKGROUND

On August 1, 2004, Farrar was involved in a traffic accident in which he wrecked the tractor trailer he was driving for Roadway. Roadway relieved Farrar of duty pending an investigation of the accident. Roadway issued a notice of discharge to Farrar on August 7, 2004, informing him that his employment was terminated effective August 1, 2004. Roadway mailed the Notice of Discharge to Farrar on August 10, 2004. Following his termination, Farrar filed a grievance with the International Brotherhood of Teamsters, Local 528, citing improper discharge under Article 45 of the Teamster's National Master Freight Agreement (NMFA).[4]

Farrar filed a STAA complaint with OSHA in a letter, dated April 16, 2005. OSHA received the letter on April 20, 2005.[5] Farrar alleged that Roadway retaliated against him because he engaged in STAA-protected activities. He claimed that his discharge occurred on or about October 26, 2004, when the grievance panel upheld his discharge "based on 'his work record and the August 1, 2004 traffic accident.'"[6]

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[3] Farrar's Objections to OSHA Findings at 1 (June 14, 2005).

[4] General Teamsters Local 528 Claim # 528-04-130.

[5] This is the third complaint Farrar has filed against Roadway pursuant to the STAA's whistleblower protection provisions. Farrar filed the first complaint on November 3, 2000, in response to a warning Roadway issued to him for failing to meet his run time. Farrar filed the second complaint on October 6, 2002, after Roadway terminated his employment on May 7, 2002. Roadway contended that it terminated Farrar's employment because he had a "preventable accident;" Respondent's Motion to Dismiss, Ex. 1, para. 13. Farrar claimed that Roadway fired him in retaliation for filing his first STAA complaint. Roadway reinstated Farrar and he subsequently withdrew the October 2002 complaint. Respondent's Motion to Dismiss, Exhibit (EX) 5.

[6] Section 31105 reprisal complaint (Apr. 16, 2005).

On May 8, 2005, Farrar sent a packet of materials relating to his claim to OSHA. OSHA returned the packet unopened to Farrar. On June 2, 2005, OHSA sent Farrar a letter dismissing his STAA claim as untimely based on the fact that he did not file his complaint within 180 days of the date Roadway terminated his employment in August 2004.[7]

Farrar objected to OSHA's findings and timely requested an ALJ hearing. In his letter to the ALJ, Farrar stated:

> The investigation was not thorough in that not all evidence was taken into consideration. This claim is evidenced by the fact that the entire package of documents submitted by me to the OSHA investigator, [was] returned to me on Jun[e] 01, 2005 still sealed in the inner packaging I had sent them in. The investigator had confirmed receiving the package in a phone call made to me on May 18, 2005.
>
> Had the investigator opened that package, the first page would have explained that the complaint was filed because Roadway agents had presented false information and other misleading statements at the grievance panel hearings on October 26, 2004. Roadway's retaliatory actions on that date caused the panel to deny the grievance, timely filed by me after being issued a discharge letter on August 07, 2004. Roadway's actions on October 26, 2005 [sic] and the April 16, 2005 date of filing the complaint fall within the 180-day criteria cited. The April 20, 2005 confirmed date of receipt of the complaint by OSHA also is within the 180-day criteria.[8]

Farrar further explained:

> In the telephone discussions with the investigator on May 24 and May 25, 2005, the subject of the date of the discharge letter kept coming up, and the investigator kept insisting that I filed this complaint based on receiving the

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[7] 49 U.S.C.A. § 31105(b)(1) provides, "An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred." Farrar filed the April 16, 2005 complaint within 180 days of the October 26, 2004 grievance hearing, but not within 180 days of the August 2004 termination.

[8] Farrar's Objections to OSHA Findings at 1 (June 14, 2005).

> discharge letter on August 07, 2004. Whenever I tried to explain that I didn't file over receiving the letter, the investigator became argumentative and refused to listen to what I had to say.
>
> My letter to Ms. Laseter, dated April 16, 2005, indicated that this complaint was filed based on the company's actions of October 26, 2004, including a refusal to accept the official report of the FL Highway Patrol.[9]

The ALJ held a pre-hearing conference with Roadway and Farrar and issued a summary stating, "[s]ince there is a threshold issue regarding timeliness of the complaint which must be resolved, Respondent shall file a motion designed to frame the issue and state Respondent's position with supporting factual support and analysis and points and authorities."[10] In response, Roadway filed a Motion to Dismiss contending that Farrar's complaint was untimely because he filed it more than 180 days from the date Roadway terminated his employment in August 2004.

In response to Roadway's Motion to Dismiss, Farrar argued that he filed his complaint on October 5, 2004, when he called OSHA from an Ocala, Florida truck stop.[11] In an affidavit accompanying his response to the Motion to Dismiss Farrar averred, "Suspecting another retaliatory act by Mr. Doss and Roadway, I called OSHA, NLRB, and EOC on October 5, 2004, just to give them a head's up on what may happen [at the October 2004 grievance hearing].[12] He noted that no particular form of a complaint is required and cited *Harrison v. Roadway Express, Inc.*[13] Accordingly, he argued, his complaint was timely because he filed it within 180 days of the date on which Roadway terminated his employment.[14] In neither the opposition to the motion to dismiss, nor in the accompanying affidavit, did Farrar contend that his complaint was timely because it was filed within 180 days of the date of the grievance proceeding.[15]

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9 *Id.* at 2.

10 Summary of Prehearing Conference and Order (July 6, 2005).

11 Complainant's Brief in Opposition to Respondent's Motion to Dismiss at 1-2.

12 Complainant's Affidavit (Comp. Aff.) at para. 11.

13 1999-STA-37 (ALJ Dec. 16, 1999).

14 Complainant's Brief in Opposition to Respondent's Motion to Dismiss at 1. In his supporting affidavit Farrar averred, "The Complaint was within the 180-day statutory time limit from the date of October 5, 2004. Therefore, this complaint was timely filed." Comp. Aff. at para.16.

15 *Accord* R. D. & O. at 3.

In granting Roadway's Motion to Dismiss, the ALJ determined that the "operative event" that started the 180-day limitations period was Roadway's termination of Farrar's employment in August 2004.[16] Thus, regardless whether the clock began running on August 1st, the date of the accident when Roadway Express relieved him of duty; August 7th, when it mailed the notice of discharge; or August 11th, when Farrar received the notice, Farrar filed his April 18, 2005 complaint beyond the 180-limitations period.[17]

The ALJ also found that assuming that Farrar made the phone calls to OSHA and two other agencies on October 5, 2004, Farrar's contention that he called OSHA "just to give it a head's up about what may happen" is not sufficient to constitute the filing of a STAA complaint for past retaliation.[18] Finally, the ALJ rejected Farrar's assertion that he was under the impression from the OSHA representative to whom he spoke that he could not file a complaint until the grievance proceedings were concluded because the applicable regulation expressly provides that grievance arbitration proceedings do not toll the 180-day limitations period.[19]

According to the STAA's implementing regulations, this Board issues the final decision and order in STAA cases.[20] The Board issued a Notice of Review and Briefing Schedule apprising the parties of their right to submit briefs supporting or opposing the ALJ's recommended decision.[21] Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under STAA.[22] Because Roadway submitted

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16 R. D. & O. at 3.

17 *Id.*

18 *Id.* at 4.

19 R. D. & O. at 4. *See* 29 C.F.R. § 1978.102(d)(3).

20 29 C.F.R. § 1978.109(c)(2); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 00-STA-50 (ARB Sept. 26, 2001); *Cook v. Shaffer Trucking Inc.*, ARB No. 01-051, ALJ No. 00-STA-17 (ARB May 30, 2001).

21 29 C.F.R. § 1978.109(c)(2).

22 Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

evidence outside the pleadings in support of its Motion to Dismiss, we view it as a motion for summary decision under 29 C.F.R. § 18.40 and review the ALJ's R. D. & O. de novo.[23] The standard for granting summary decision in our cases is essentially the same standard governing summary judgment in the federal courts.[24] Accordingly summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.[25] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[26]

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 ALJ correctly applied the relevant law.[27] "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.'"[28] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[29] Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing."[30]

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[23] *Erickson v. U.S. Envtl. Prot. Agency,* ARB No. 99-095, ALJ No. 99-CAA-2, slip op. at 3 n.3 (ARB July 31, 2001).

[24] Fed. R. Civ. P. 56.

[25] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[26] *Bobreski v. U.S. EPA*, No. 02-0732 (RMU), 2003 WL 22246796, at *3 (D.D.C. Sept. 30, 2003).

[27] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002- STA-25, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 00-STA-52, slip op. at 2 (ARB Dec. 13, 2002).

[28] *Bobreski,* at *3 (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)).

[29] *Bobreski,* at *3.

[30] 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co.*, No. 93-ERA-42, slip op. at 4-6 (Sec'y July 17, 1995).

DISCUSSION

Under the STAA, as stated above,

> [a]n employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred.[31]

Roadway relieved Farrar from duty, pending investigation of the accident, on August 1, 2004. Roadway sent a discharge letter on August 7 that Farrar received on August 11, 2004, effectively terminating his employment with Roadway. Construing the dates in the best possible light for Farrar, in calculating the 180-day limitation period, Roadway terminated Farrar's employment on August 11, 2004.

Farrar mailed a letter to OSHA alleging a violation of STAA whistleblower provisions on April 16, 2005. OSHA received the letter on April 20, 2005. From August to April was over 240 days, well outside the 180-day limit the statute prescribes.

I. Farrar's Discharge from Roadway Express

The gravamen of Farrar's complaint to OSHA and his request to the OALJ for a hearing was that Roadway discriminated against him when its employees testified falsely in the grievance hearing in an effort to subvert the proceedings. It was only in response to Roadway's Motion to Dismiss on the grounds that Farrar's complaint was untimely because it was not filed within 180 days of the August termination that Farrar attempted to rely on the October 5, 2004 phone call to establish that he filed a timely claim based on the August discharge.[32] Before the Board, Farrar again relies exclusively on the grievance procedure as the basis of his complaint and argues that the ALJ erred when he dismissed his case because he failed to timely file a complaint based on the August discharge.[33] Thus Farrar has abandoned his reliance on the October 5th phone call in his brief to the Board. Generally, the Board will not consider an issue that a party has not raised and briefed and will consider any argument thereon waived.[34] Even if the Board were to consider the argument of the "head's up" call, however, Farrar would not prevail.

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31 49 U.S.C.A. § 31105(b)(1).

32 Complainant's Brief in Opposition to Administrative Law Judge's Decision (Comp. Br.) at 5-8.

33 *Id.*

In response to Roadway's Motion to Dismiss, Farrar contended that on October 5, 2004, "[s]uspecting another retaliatory act by Mr. Ross and Roadway" he called OSHA, NLRB and the EEOC "**just** to give them a heads up **on what may happen."**[35] Farrar did not argue that he filed a complaint concerning past retaliation in the October 5, 2004 phone call; only that he wanted to apprise OSHA of the possibility of future retaliation. While, as Farrar averred, 29 C.F.R. § 1978.102 provides that "[n]o particular form of complaint is required," at the very least a complainant must evince his current intention to file a complaint. Farrar has not argued that he did so in this case.

Farrar relies on the Administrative Law Judge's decision in *Harrison v. Roadway Express, Inc.*,[36] to insist that the telephone conversation counted as a filing under the STAA. In *Harrison*, the complainant did not file a timely formal written STAA complaint. Nevertheless, the ALJ found that he had timely filed a complaint when he visited the OSHA office in person to file a complaint, the OSHA representative memorialized his complaint in written notes and entered identifying information in a logbook, and "the notes the OSHA representative made … along with other records at the office sufficiently identified the 'essential nature of the complaint and the identity of the parties.'"[37] The Board agreed with the ALJ's reasoning and concluded that there was substantial evidence to support his findings.[38]

In *Harrison*, the complainant unquestionably visited the OSHA office with intent to file a STAA claim. Here, Farrar's statement that he called OSHA just to give it a "head's up" concerning future retaliatory action that "may happen" is not sufficient to raise an issue of material fact regarding whether he filed a timely STAA complaint concerning the August 2004 termination, which had already happened. Furthermore, the dispositive factor in *Harrison* was the specific and detailed nature of the information the complainant conveyed to the OSHA agent including work details, times, and names, sufficient to permit OSHA to build the entire complaint from the records of the interview. In response to the Motion to Dismiss, Farrar did not allege that he provided any such detailed information regarding his August 2004 termination nor that his phone call was memorialized in notes or a logbook as was true of the oral complaint in *Harrison.* Thus, this case is not analogous to *Harrison* and Farrar has failed to establish a material issue of

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[34] *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-7, slip op. at 8 (ARB Sept. 29, 2006).

[35] R. D. & O. at 3.

[36] No. 1999-STA-37 (Dec. 16, 1999).

[37] *Id.*

[38] *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 99-STA-37 (Dec. 31, 2002).

fact in dispute regarding the timeliness of a complaint based on the August 2004 termination.

II. Grievance Hearing Contention

The ARB will construe arguments for pro se litigants like Farrar "'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude."[39]

Under the statutory language of STAA, an employer may not "discipline or discriminate against an employee" due to participation in a protected activity.[40] In his initial letter to OSHA on April 16, 2005, Farrar states that he was "discharged on or about October 26, 2004, by decisions of the Southern Motor Carriers Multi-State Grievance Panel."[41] Farrar followed up his initial letter to OSHA with a packet of information detailing this allegation. But OSHA had already decided that Farrar's claim fell outside of the statute of limitations based on the August 2004 termination and closed its investigation. OSHA returned the packet of materials Farrar submitted without opening it. Farrar submitted a letter, dated May 8, 2005, to the ARB. He claims the returned packet contained this letter. In the letter, he explains his brief assertion from the April 26, 2005 letter in more detail, clarifying his contention that Roadway retaliated against him when Roadway officials testified untruthfully at the October 26, 2004 grievance hearing in an effort to subvert the grievance proceedings. Thus the adverse action of which he complained in his April 16th complaint was not the August 2004 firing but instead, the grievance panel's affirmation on October 26th of Roadway's termination. As Farrar states, the "events of 10/26/04 are the latest in a series of adverse actions taken against me by Mr. Doss, acting on behalf of Roadway Express…."

In his brief to the Board, Farrar reiterates that further violations of STAA section 405 occurred at the October 26, 2004 grievance hearing when Roadway employees testified that the August 1, 2004 accident was Farrar's fault. Farrar, in his brief, labels their testimony as "discriminatory."[42] Thus, Farrar contends that Roadway retaliated against him for engaging in protected activity when it presented false testimony in an effort to persuade the hearing panel to uphold the termination of his employment.

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[39] *Cummings v. USA Truck, Inc*., ARB No. 04-043, ALJ No. 03-STA-47, slip op. at 2 (ARB April 26, 2005), *quoting Young v. Schlumberger Oil Field Serv*., ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 2003), *citing Hughes v. Rowe*, 449 U.S. 5 (1980).

[40] 49 U.S.C.A. § 31105(a)(1).

[41] Letter from William Farrar to Cody Coe Laesteter, Regional Administrator for OSHA in Atlanta, GA, dated April 16, 2005.

[42] Comp. Br. at 7.

The ALJ noted in his R. D. & O. that Farrar's objection and request for a hearing relied in part on the "retaliatory conduct of the Respondent's agents in presenting false information and misleading statements at the grievance proceeding."[43] Roadway, however, in its motion to dismiss, did not address this allegation. Instead, Roadway focused exclusively on the timeliness of the August discharge. The record does not establish whether Roadway knew of the allegation of retaliation based on Roadway's testimony at the grievance hearing. But it is clear that the ALJ was aware of this basis for the complaint even though Farrar did not address this allegation in his response to Roadway's motion to dismiss.

Accordingly, the ALJ erred when he dismissed Farrar's complaint without addressing the basis for his complaint. We do not decide here whether Farrar's allegations regarding the grievance proceedings are true or whether even if proven, would constitute retaliation and adverse action under the STAA. We remand this case to the ALJ to make those determinations.

CONCLUSION

We agree with the ALJ's conclusion that Farrar has failed to demonstrate any genuine question of material fact relevant to the issue whether his complaint for the August discharge was timely filed. However, the ALJ did not address the allegation that Roadway retaliated against Farrar in violation of the STAA at the grievance hearing on October 26, 2004. Accordingly, we **REMAND** the case to the Administrative Law Judge for further proceedings consistent with this opinion.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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[43] R. D. & O. at 3.