No. 20 – 184

IN THE

SUPREME COURT OF THE UNITED STATES

Jamel Ellerbee, et al.,
Petitioners

v.

Annett Holdings, Inc. d/b/a TMC Transportation, et al.,
Respondents

On Petition For A Writ of Certiorari to
The United States Court of Appeals
For the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Jamel Ellerbee
Pro Se Petitioner
PO Box 37367
Raleigh, N.C. 27627
844.408.8282

July 30, 2020

QUESTIONS PRESENTED

Whether statutory construction of *49 U.S.C. § 31105* conflicts with judicial review, *29 C.F.R. § 1987.110(b)*, of the Administrative Procedure Act?

Whether the statutory kick-out provision, *49 U.S.C. § 31105 (c)*, ever expires and if administrative exhaustion is required before kick-out?

Whether after a *prima facie* has been presented to the Secretary of Labor, and has not been overturned by clear and convincing evidence, does USDOL's duty to enforce *49 USC § 31105* ever expire?

Whether the STAA covers retaliation against all hired employees, by the employer, for transportation of goods by commercial motor vehicle?

Whether OSHA's Final Rule of Implementing the 9/11 Commission Act is in direct conflict with statutory construction of *49 U.S.C. § 31105*, contrary to the equal protection and due process clauses of the *Fifth* and *Fourteenth Amendments*, and is also arbitrary, capricious, and unlawful?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), Petitioners state that the parties include:

JAMEL ELLERBEE, JAMES ELLERBEE, LORIANNE ELLERBEE, DOMINIC CROPPER, petitioners are complainants/appellants in the lower courts.

The following Respondents are defendants/appellees in the lower courts:

UNITED STATES DEPARTMENT OF LABOR

ANNETT HOLDINGS, INC. d/b/a TMC TRANSPORTATION

SPECIALTY ROLLED METALS, LLC.

MARCY NOBLE

in her official capacity with Annett Holdings, Inc. d/b/a TMC Transportation, and individually,

STEVEN FELDMANN

in his official capacity with Annett Holdings, Inc. d/b/a TMC Transportation, and individually,

STEVE LINDER

in his official capacity with Annett Holdings, Inc. d/b/a TMC Transportation, and individually,

TODD BUNTING

in his official capacity with Annett Holdings, Inc. d/b/a TMC Transportation, and individually,

JORDAN OLSEN

in his official capacity with Annett Holdings, Inc. d/b/a TMC Transportation, and individually,

NIKI BAILEY

in her official capacity with Annett Holdings, Inc. d/b/a TMC Transportation, and individually,

CHAD VANDERLINDEN

in his official capacity with Annett Holdings, Inc. d/b/a TMC Transportation, and individually,

MIKE KIEWERT

in his official capacity with Specialty Rolled Metals LLC., and individually,

WILLIAM Z. ROSS

in his official capacity with Specialty Rolled Metals LLC., and individually,

LORENA BACEROTT

in her official capacity with Specialty Rolled Metals LLC., and individually.

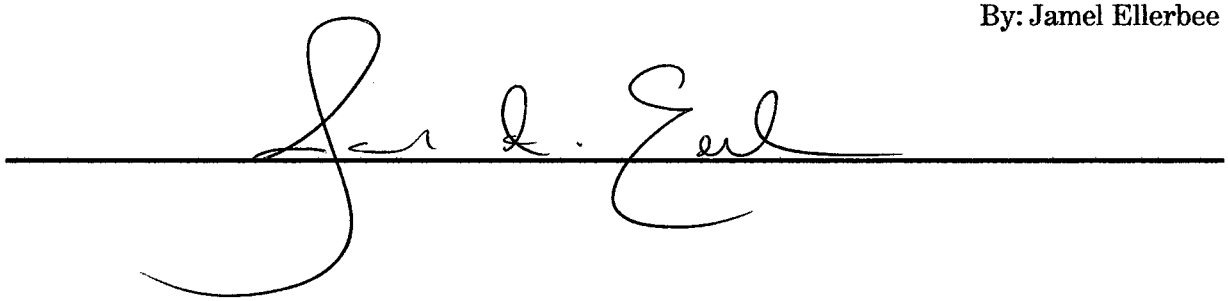
CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 26.6, petitioner discloses the following:

There is no parent or publicly held company holding 10% or more of the any of the petitioner's stock.

On: July 30, 2020

By: Jamel Ellerbee



LIST OF PROCEEDINGS

OSHA – Case # 4-3750-19-017

Ellerbee/Annett Holdings, Inc. d/b/a TMC Transportation

August 15, 2018 – Paper Request for OSHA Investigation Received by OSHA

November 19, 2018 – OSHA Dismissal Order

ADMINISTRATIVE LAW JUDGE – Case # 2019-STA-00011

JAMEL ELLERBEE, v. ANNETT HOLDINGS, INC, d/b/a TMC TRANSPORTATION

December 17, 2018 – Objection To OSHA Dismissal Order

January 11, 2019 – ALJ Issues Order to Show Cause

January 23, 2019 –Response to Order to Show Cause

April 26, 2019 – ALJ Issues Merits Order

ADMINISTRATIVE REVIEW BOARD – Case # 2019-0059

JAMEL ELLERBEE, v. ANNETT HOLDINGS, INC, d/b/a TMC TRANSPORTATION

May 19, 2019 – Petition For Review

May 21, 2019 – ARB Issues Order to Show Cause

May 22, 2019 – Response to Order to Show Cause

July 3, 2019 – ARB Issues Dismissal Order

FOURTH CIRCUIT COURT OF APPEALS – Case # 19-1795

JAMEL ELLERBEE v. ANNETT HOLDINGS, INC., d/b/a TMC Transportation; UNITED STATES DEPARTMENT OF LABOR

July 30, 2019 – Petition for Review

August 14, 2019 – Informal Opening Brief

August 28, 2019 – TMC's Informal Response Brief

September 11, 2019 – USDOL's Informal Response Brief

September 20, 2019 – Informal Reply Brief

September 25, 2019 – Motion to Amend the Record

October 4, 2019 – Motion to Submit on the Briefs

December 19, 2019 – Unpublished Opinion by Fourth Circuit

January 24, 2020 – Petition for Rehearing and Rehearing *En Banc*

February 18, 2020 – Petition for Rehearing and Rehearing *En Banc* Denial by Fourth Circuit

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OSHA

"Complainant and Respondent are, therefore, not covered by STAA."

"... Complainant has not produced a prima facie case..."

"Respondent is a motor carrier/employer within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105. Respondent is engaged in interstate commerce by transporting products on the highways via commercial motor vehicle; that is a vehicle with a gross weight rating of 10,001 pounds or more designed to transport material."

Administrative Law Judge

"The Ellerbee Express driver picked up the load and, after starting to drive, was stopped by the police and fined for having an overweight load."

*"**Respondent, although given the opportunity to reply to Mr. Ellerbee's filing, did not do so.**"*

"Mr. Ellerbee moved to add new complainants to this matter."

"I find that Mr. Ellerbee is not an "employee" of TMC within the meaning of the STAA, and the complaint must therefore be dismissed. Additionally, the motion to add new complainants will be denied."

"Furthermore, the independent contractor definition applies only to an independent contractor "when personally operating a commercial motor vehicle;"

"I accept, for the purposes of this Order, that Mr. Ellerbee is an individual who affects commercial motor vehicle safety in the course of his employment by a commercial motor carrier."

*"As part of his submission, Mr. Ellerbee requested leave to amend the complaint to add three drivers (**James Ellerbee, Lorianne Ellerbee, and Dominic Cropper**) employed by Ellerbee Express as complainants, and to add Specialty Rolled Metals as a respondent. That request will be denied."*

Administrative Review Board

"The matters raised by Complainant are not extraordinary..."

"The Board declines to apply equitable tolling..."

Fourth Circuit Court of Appeals

"Ellerbee has forfeited our review of an order of the Department of Labor's (DOL) Administrative Review Board (ARB)..."

"...this Court generally does not consider arguments newly raised in reply."

"...we lack authority to exercise judicial review over the ALJ's decision."

"We grant Ellerbee's motions to submit on the briefs and to amend the record."

JURISDICTIONAL STATEMENT

Petitioners Jamel Ellerbee, James Ellerbee, Lorianne Ellerbee, and Dominic Cropper respectfully submit this petition for a writ of certiorari to review the OSHA Dismissal Order on November 19, 2018, the ALJ Merits Order on April 26, 2019, the ARB Dismissal Order on July 3, 2019, and, the Opinion issued by the Fourth Circuit on December 19, 2019.

This Court has jurisdiction, under *28 U.S.C. § 1254(1)*, to conduct judicial review for *49 U.S.C. §* 31105, the initial statute for jurisdiction in the Fourth Circuit Court of Appeals.

The petition for rehearing and rehearing *en banc* was denied, in the Fourth Circuit, on February 18, 2020. Due to the impact of COVID-19, an extension to file any petition for writ was extended 150 days from the date of the order denying a timely petition for rehearing.

CONSTITUTIONAL PROVISIONS

Fifth Amendment of US Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the US Constitution

Section 1 – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Regulatory Background

The Surface Transportation Assistance Act of 1982 was legislated during the Reagan Administration in order to address issues with the highways and bridges across America. Section 405 was included in order to encourage reporting of noncompliance, by employees, regarding safety violations governing commercial motor vehicles. A commercial motor vehicle is defined of having a gross vehicle weight of ten thousand pounds or higher. Trucks within the length and weight specifications provided by the Act are considered "STAA Trucks." Employees with claims of retaliation for refusing to commit violations, participating in proceedings, or simply reporting are able to seek

relief from the USDOL. A written complaint can be filed within 180 days to report the retaliation to OSHA.

The 9/11 Commission Act of 2007 modified the STAA to better address the complaints, the procedures, and the rights and remedies included in the statute. The modifications expanded the definitions of protected activity and retaliation, expanded the definitions of employee, lowered the burdens of proof, included a right to *de novo* review, and included the right to a jury trial. These changes were made to properly reflect the balance of interest from government, the complainant, and the respondent. This Act directly includes independent contractors, as employees, in order to better address the complaint of retaliation.

Statement of Facts

On March 1, 2018, Specialty Rolled Metals overloaded a truck that was brokered to petitioner, by rate confirmation, issued by TMC Transportation. The driver arrived in Lawrenceville, GA to load the forty-eight thousand pounds as listed on said rate confirmation. This truck and driver were ticketed by GA Department of Safety for weight violations, after departing the loading facility. The truck and trailer weighed over eighty-seven thousand pounds at the state weigh facility and was subject to be placed "out of service" meaning that no person could operate the vehicle until the safety issue is fixed. The officer placed "needs to get legal" on the ticket and allowed the driver to proceed to a safe haven.

I, Jamel Ellerbee, received knowledge of the situation and relayed it to TMC Transportation immediately. TMC Transportation provided no help. After over 14 hours of no help, I ordered a crane and used another truck, under my authority, to alleviate the illegally overloaded and ticketed driver so that the entire load may proceed with delivery. The rate confirmation advised there was a two hundred dollar per hour late fee. This load was originally booked to move same day from Lawrenceville GA, to Fuquay Varina, NC on March 2, 2018.

TMC Transportation and Specialty Rolled Metals advised petitioner that no parties would be paid, numerous times, for the extra truck and crane needed to complete the load legally. Threats of different forms came about. Libel was placed online, visible to all transportation intermediaries, to damage our reputation (*See* Pet. App. at 99). Three police departments were used by Specialty Rolled Metals and TMC Transportation, in an attempt, to obtain possession of the goods without paying us for the work completed. Two loads were transported from GA, which was originally one truck before it was ticketed. One load weighed thirty thousand pounds and the other load weighed twenty-seven thousand pounds. Two trucks were always needed to complete legal delivery while complying with federal weight limits placed on semi-trucks.

Statement of Proceedings

A. OSHA

Approximately August 1 2018, I began to address OSHA by contacting several different state agencies by phone. I was repeatedly denied the right to file the suit, no matter which state was contacted. A paper copy of the Request for OSHA Investigation, was received by OSHA (East Atlanta Office) via United States Postal Service, on August 15, 2018. This submission contained contact information for our attorney(s), a complaint, and an exhibit array. The documentation was composed of 104 pages. This submission was timely, with regard to the statute at hand, being the incident began on March 1, 2018. OSHA advised me directly, by phone, they would not pursue the complaint. OSHA then advised our attorneys that no case would be filed. I later emailed agents, of OSHA, to inquire the status of the case. This case was only filed after persistence and directly requesting to be heard by an ALJ. I was advised the case would be opened and immediately closed. (*See* Pet. App. at 75-77)

On November 19 2018, OSHA distributed a Dismissal Merits Order from the Regional Supervisory Investigator, Matthew E. Robinson. Mr. Robinson never contacted me, nor our attorney, before distribution of the Dismissal Order.

II. ALJ

I objected to the OSHA Dismissal Merits order, timely, on November 19, 2018. The objection requested to add the drivers of the incident to the proceeding, as well as to include Specialty Rolled Metals LLC. The objection was faxed to the OALJ, and contained instructions to how to include our attorney with the proceedings.

On January 11, 2019, the ALJ assigned to the case issued an Order to Show Cause for me to address why the case should not be dismissed. This Order was not distributed to our attorney.

On January 23, 2019, I replied, timely, with a Response to Order to Show Cause that included a formal *prima facie*. The response included more exhibits to provide documentary evidence to support the claims. TMC Transportation did not respond to the request from the ALJ.

On April 26, 2019, the ALJ issued a Merits Order that dismissed the complaint entirely. The Order stated I was not an employee of TMC and improperly used case precedence to come to conclusion of relationship. The Order also used our status as independent contractors as reason to not provide coverage under the STAA. The ALJ drew conclusions of fact that do not match any of the evidentiary documentation on record. The request for leave to add the drivers and the shipper of goods (Specialty Rolled Metals, LLC) was denied, and the case was dismissed.

B. ARB

On May 19, 2019, I attempted to file a petition for review in objection to the ALJ Dismissal Order. Unfortunately, this was not possible due to technical issues what had to be resolved by the EFSR helpdesk for USDOL. On May 20, 2019, the Petition for Review was submitted successfully using the EFSR system. This petition and brief complied with the information given on

https://www.dol.gov/appeals/whistleblowers.htm, regarding timeliness. An Order to Show Cause was distributed on May 21, 2019.

I responded with a Response to Order to Show Cause on May 22, 2019 that addressed the Order. The response addressed the date at which I received the ALJ Merits Order, issues with filing electronically due to no fault of my own, the mental distress involved, the fact our attorney has not been involved, the prima facie is on record and respondent did not attempt to overturn, and the drivers have no other option for remedy, and that I may have been misled in my research.

On June 17, 2019, while awaiting the results of the Response to Order to Show Cause, a timely Opening Brief was filed by me.

On July 3, 2019 the ARB distributed an Order Dismissing Petition for Review, as untimely, that resulted in avoiding the material facts at hand. The Opening Brief was never addressed. At this moment during the proceedings, the ALJ Merits Order becomes the Final Order of the Secretary of Labor.

B. Fourth Circuit Court of Appeals

On July 3, 2019, I filed a timely Petition for Review in the Fourth Circuit Court of Appeals.

August 12, 2019, the Fourth Circuit received the Opening Brief. The brief re-addressed the *prima facie* and listed some of the issues of concern regarding the previous procedures.

On August 28, 2019 TMC Transportation filed their Informal Response Brief which did not attempt to overturn the *prima facie.*

On September 11, 2019, the USDOL introduced their Informal Reply Brief. The Informal Reply Brief argues to The Court that it lacks jurisdiction over the ARB Merits Order, readdresses our *prima facie,* requests our petition to be denied, states I am not covered by the STAA, I failed to exhaust administrative remedies which results in no jurisdiction, I waived my challenge to the ARB dismissal, and that it is unclear from the record whether our attorney was involved.

On September 20, 2019, I filed a Response Brief. This Response Brief argues that OSHA attempted to not file the case at all, no contact from the investigator occurred, the right to an attorney has been eliminated, USDOL has used the agreement/condition of employment as independent contractors as immediate dismissal, USDOL's failure to properly inform the general public, USDOL's constant failures of duty, all parties involved are now fully exposed with no relief or remedy to date, and that I seek full and complete judicial review.

On December 17, 2019, The Fourth Circuit Court of Appeals issued a Dismissal Order denying the timely Petition for Review.

On January 23, 2020, I filed a Petition for Rehearing and a Petition for Rehearing *en banc* addressing the entire Fourth Circuit. The Petition argues the panel decision as contrary to the US Court of Appeals for the Fourth and Eleventh Circuits, and the US Supreme Court, advising that I sought not to be forced to reveal damages from the ARB (the highest level of judiciary within the USDOL), and that judicial review will show that throughout the proceedings our argument never changed.

On February 18, 2020, The Fourth Circuit denied the Petition for Rehearing and Rehearing *en banc*. No judge requested a poll. No material facts were addressed, no correction of the safety violations occurred.

REASONS FOR GRANTING THE PETITION

Introduction

Every STAA Complaint affects the operators of heavy equipment involved in interstate commerce, and, the safety of the general public. The "employees" in charge of safety on the interstate highways, state roads, and local roads must make quick and logical decisions to conduct their duties at work, safely. At any point safety is compromised, the entire general public is at immediate danger and risk. A normal day of any STAA complainant could consist of truck and trailer lengths exceeding ninety feet long, possibly sixteen feet or more wide, and maybe even three hundred fifty thousand pounds heavy or more, utilizing permits to travel legally to their destination. The parties responsible for safety of these vehicles should have no question on the laws enacted to support safe movement of their equipment. In this industry, parties have seconds, or less sometimes, to make a decision. That decision will always come with life-long results that may impact society in a various number of ways. The operators must live with these decisions forever.

Loss of Life and Property

In order to prevent loss of life and property, many steps must be taken. "Employees" in direct responsibility of safety of standards set forth by Federal, State, and Local Governments must legally guarantee safety for all parties. At a standard gross weight, a tractor trailer combination can be at eighty thousand pounds. An

eighty-thousand-pound vehicle traveling at highway speeds of sixty-five miles per hour can and will destroy anything it comes in contact with. The force coming from any accident of the sort has clear and documented history of multiple deaths, damage to bridges and roads, and even traffic completely being stopped and routed away from the scene. A tractor trailer could be hauling hazardous material, flammables, and other environmental and physical threats. An "employee", respective to the STAA, is in direct control of loss of life and property. If a life is lost, it cannot be regained.

US Commerce

All STAA complainants that come forth to This Court, or any other federal proceeding, are the direct cause of commerce by trucking in this nation. Commercial truck drivers move up to forty-eight thousand pounds of goods of various kinds, on a standard truck, across the entire North American Continent. Tractor trailers are used to pick and deliver freight to the ocean ports, airports, and between all of America's businesses and homes. The nationwide economy rests on the safe and successful movement of freight across America by truck drivers, mechanics, freight handlers, and safety departments (of a motor carrier). Losses of goods sustained by lack of quality safety standards can be prevented and avoided. Any loss of efficiency in the commercial motor vehicle sector has a direct and negative impact on the entire American economy.

This Court is the only Court in the United States with the ability to hear one case and achieve proper and compete nationwide judicial statutory interpretation across all future proceedings with every other case similar, by legislative construction.

All circuit courts and the USDOL both receive direct instruction from This Court and no other court. The Federal Court System is responsible for the management of all STAA cases whether in USDOL administrative proceedings, circuit courts, or federal civil courts.

I bring to This Court, attempts to follow all guidelines given to us Petitioners by USDOL to file, defend, and sustain all rights and remedies, legislated by Congress, post 9/11 Commission Act, and attempting to exhaust all statutory remedies including a petition for rehearing and petition for rehearing *en banc*.

I. This Court Must Resolve the Statutory Conflict Between the STAA and the APA, Within Judicial Review, That Permit the ARB and Circuit Courts' Denial of Any Timely Filed Petition For Review and Clearly Establish When Judicial Review is a Right Afforded to the Complainant in Order to Remain Constitutional

The APA and STAA conflict with respect to judicial review. The APA does not provide judicial review as a right, specific to STAA or any other whistleblower statutes. USDOL and Fourth Circuit erroneously ruled the APA procedure(s) supersedes the statutory construction of the STAA, which would be counter-productive to expediently address the material facts at hand.

If/when judicial review is not conducted, a complainant may not receive justice as prescribed by statute. Retaliation, from a respondent, can be delayed, long lasting, and/or new information become available during the proceedings.

Judicial review, when petitioned for, should always be considerate of *pro se* complainants and acknowledging the documented fear of retaliation. Every time a STAA proceeding does not consider the fear of retaliation, the entire legislation is moot, and, will likely render the complainant without any rights or remedies after coming forth with reports of their witnessed and documented safety violations.

If the STAA statute does not guarantee judicial review as a right, then the entire STAA statute is unconstitutional because no equal protection under the law, as required by the *Fourteenth Amendment* exists. Also, if the STAA does not guarantee a method of judicial review over the agency, a due process violation of the *Fifth Amendment* would exist, because the actions of the USDOL are reviewable, by law.

A. ARB is NOT Required to Conduct Review of ANY Case Regardless of Timeliness

29 C.F.R. § 1978.110(b) – If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become final order of the Secretary unless the ARB, within 30 days of filing the petition, issues an order notifying the parties the case has been accepted for review. Therefore, the ARB is allowed to

"declines to apply equitable tolling..." (*See* Pet. App. at 63), and remain within USDOL regulations.

However, "Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection for reporting these violations." *See* 128 Cong. Rec 32698 (1982) (remarks of Sen. Percy); *id.*, at 32509-32510 (remarks of Sen. Danforth)), and, *29 C.F.R. § 1978.115* – In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ or ARB on review may, upon application, after three days' notice to all parties, waive any rule or issue such orders as justice or the administration of STAA requires.

The statute does not directly address judicial review, at the ARB proceedings, and the APA contains regulations that are not in line with the goal of legislation at hand. Certiorari is necessary in order to clearly state the judicial requirements of the ARB proceedings by statutory interpretation. Without interpretation from This Court, there is no guarantee that any case will ever be heard at the ARB because no review is required at all, per regulations. When attempting to address the material facts timely, there cannot be a period of time where a complainant is unsure of the status of their complaint. Once the ARB declines review, it is only then that the ALJ Merits Order becomes the Final Order of the Secretary of Labor. While the complainant is attempting to retain one's rights with the USDOL, the ARB can decline to review the

ALJ Order (which places them back to pre-petition stage), then refuse to support the kick-out provision (after the Final Order), and still remain within regulations provided by USDOL. There is nothing timely about the addressing the material facts in this manner, whatsoever.

B. Fourth Circuit Did NOT Conduct Judicial Review of ALJ Proceeding (Final Order of Secretary of Labor)

"we lack authority to exercise review over the ALJ's decision..." (*See* Pet. App. at 62)

However, *5 U.S.C. § 704* – Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority, and, the judiciary is the final authority on issues of statutory construction. (*See* Chevron, USA., Inc. v Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n. 9)

The statute directly addresses the judicial authority that rests in the Circuit Courts to review the Final Order of the Secretary of Labor. There exists no case, to my knowledge, that the Circuit Courts advised the complainant that no authority exists to conduct review of Final Order. Every reason used to deny judicial review of the timely petition for review is considered arbitrary, an abuse of discretion, capricious, and otherwise contrary to law Maverick Transportation, LLC v US Department of Labor 739 F.3d 1149 (8th Cir.). In the past, the Fourth Circuit ruled they seek to overturn agency orders that are unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all NLRB v CWI of Md, Inc 127 F.3d 319, 326 (4th Cir.), yet refused to address the material facts before the Court. Circuit Courts overturning ALJ orders that are contrary to conclusion of facts are also witnessed in Dorf v. Bowen 794 F.2d 896, 901-2 (3rd Cir.) and Kent v. Schweiker, 710 F.2d 110, 116 (3rd Cir.).

Immediate review of this case, by This Court, is necessary to save the statute from rendering any complainant without a method of relief after the Final Order of the Secretary of Labor. Absent of statutory judicial review, conducted over USDOL proceedings, the STAA is unconstitutional by the due process clause of the *Fifth Amendment.*

C. Fourth Circuit Did NOT Conduct Judicial Review of ARB Proceeding

"Initially, Ellerbee has forfeited our review of the ARB's determination that his petition for review of the ALJ's decision was untimely. See Jackson vs Lightsey, 775

F.3d 170, 177 (4th Cir. 2014) (The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief); United States v. Copeland, *707 F.3d 522, 530 (4th Cir 2013)(recognizing that this court does not consider arguments newly raised in reply)."* (*See* Pet. App. at 62)

However, *49 U.S.C. § 31105 (D)* – A person adversely affected by an order issued after a hearing under subsection (b) of this section may file a petition for review, not later than 60 days after the order is issued, in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation. Review shall conform to chapter 7 of title 5. The review shall be heard and decided expeditiously. An order of the Secretary of Labor subject to review under this subsection is not subject to judicial review in a criminal or other civil proceeding, and, where a complainant consistently made an argument throughout the administrative proceedings the argument was not waived simply because it appeared in the complainant's reply brief to the ARB rather than in the petition for review. *See* Furland v American Airlines, Inc. (11th Cir. 2011), and, *"an agency decision that uses an erroneous legal standard to avoid addressing the key fact question in this case is, without question in my view, arbitrary, capricious, an abuse of discretion, or otherwise contrary to law within the meaning of 5 U.S.C. § 706(2)(A)", See* Maverick Transportation, LLC v U.S. Department of Labor (8th Cir. 2014). Actions reviewable during review of the final agency action are directly addressed in the APA, by *5 U.S.C. § 704,* Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary,

procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

The Fourth Circuit was addressed with issues that The Court refused to hear and was deemed waived by me. Refusal to address the material facts results in no relief or remedy for the complainant(s) in question. Refusal to acknowledge the fear of retaliation mentioned in the reply brief resulted in no relief or remedy, to date. Denial to conduct judicial review, by the Fourth Circuit, was directly against the statute at hand.

II. This Court Must Hear This Case to Witness OSHA's Final Rule That is Unconstitutional and Unlawful, and Permits USDOL to Repetitiously Evade Its Legal Duties Due to The Statute

A. USDOL In Repetitious Violation of *49 U.S.C. § 31105*

I have followed all resources provided by USDOL and still have been denied rights and remedies by reasons as unlawful, arbitrary, capricious, and abuses of power exerted by the USDOL. None of the reasons presented, for the actions taken to

repetitively deny all statutory rights, correlate with any previous judicial precedent containing proper and lawful interpretation of the STAA.

1. USDOL's Repeated Misclassification of "Employee" In Direct Conflict of the 9/11 Commission Act

The STAA is legislated to designate an "employee" – "employer" relationship. With the STAA, the relationship varies and independent contractors are included as "employees."

49 U.S.C. § 31105 (J) – In this section, "employee" means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who – (1) directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and (2) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

However, *"The STAA only applies to 'a driver of a commercial vehicle (including an independent contractor when personally operating a commercial motor vehicle.')"* (*See* Pet. App. at 87) This statement by the USDOL is directly against the statute and undermines the legislation. Directly included are mechanics, freight handlers, etc. The actions of USDOL, by not properly classifying employees is completely unlawful and against the statute and case precedent.

USDOL refused to address the relationship by the causal link similar to ARB precedent which states, *"if the complainant is not the complainant's direct employer, ... the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is evidence of the requisite degree of control." See* Cf. High v. Lockheed Martin Energy Sys., Inc. ARB No. 03-026, ALJ No. 96-CAA-8. Any employer that exercises control over an employee, that directly affects employment with other employers, has been a established link for liability under the STAA. *See* Feltner v. Century Trucking, et al., ARB No. 03-118, ALJ Nos. 2003-STA-1 and -2.

No evidence on record exists to overturn the casual link established by the libel (*See* Pet. App. at 99) that hampers complainants' efforts, to this day, with obtaining employment by other employers (*See* Pet. App. at 100). The documentary evidence is on record to OSHA, ALJ, and the Fourth Circuit that shows all complainants under the requisite degree of control to invoke the STAA. Statutory interpretation, post-enactment of the 9/11 Commission Act, for an employee that is not a driver, but an employee that is in direct legal responsibility over the drivers and vehicles representing a motor carrier, has NOT been conducted by the US Supreme Court, to date. This Court must grant the writ of certiorari in order to correct the unlawful classification errors by USDOL, for the sake of the entire statute, and, in benefit of commerce.

When the STAA fails any complaint, the general public suffers immediately and directly because the safety violation(s) have not been addressed, in the benefit of safety.

2. OSHA Did Not Conduct an Investigation

With the legal duty assigned to the USDOL, all STAA claims first be managed with OSHA. OSHA, being the first point of contact for a Complainant is the most important. It is at this stage only may a Complainant receive an investigation into the matter while asserting their *prima facie.*

However, OSHA did not investigate. *"Complainant and Respondent are, therefore, not covered by STAA." (See* Pet. App. at 48) When no investigation occurs, there also is no period of discovery to obtain more documentary evidence in support of the claims in front of OSHA.

The actions of OSHA to refuse an investigation based on information not related to the material facts at hand directly conflict with the statue at *49 U.S.C. § 31105 (B)(2)(A)* – Not later than 60 days after receiving a complaint, the Secretary of Labor shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify, in writing, the complainant and the person alleged to have committed the violation of the findings. If the Secretary of Labor decides it is reasonable to believe a violation occurred, the Secretary of Labor shall include with the decision findings and a preliminary order for the relief provided under paragraph (3) of this subsection.

If OSHA is directed as "shall conduct an investigation" but does not, no fair chance exists to obtain the remedies and relief from the STAA. Without the

investigation, the agency cannot obtain the facts and documentary evidence necessary to make determination of the claims at hand. Failure to conduct an investigation by the USDOL, while in possession of a *prima facie*, creates an unlawful and unconstitutional environment that will directly damage the STAA complaint overall. Conduct in this manner by the USDOL is a violation of the due process clause of the *Fifth Amendment.*

3. USDOL's Established Breach of Duty After Final Order from Secretary of Labor

"In the Secretary's view, the purpose of the "kick-out" provision is to aid the complainant in receiving prompt decision. That goal is NOT implicated in a situation where the complainant has already received a final decision from the Secretary." See OSHA Final Rule (2012); Federal Register 77:44121 – 44139.

However, *49 U.S.C. § 31105 (C)* – With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury, and, *49 U.S.C. § 31105 (G)* – Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

Therefore, the USDOL justifies their own actions of repetitively neglecting the statute at hand and denying a complainant's equal protection under the law, as legislated in the *Fifth Amendment* of the *US Constitution. "For the foregoing reasons, the Court should deny the petition for review."* (*See* Pet. App. at 92)

However, *49 U.S.C. § 42121(b)(2)(B)(i)* – The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

Under no circumstances shall the USDOL attempt to hinder statutory relief and remedy, under the STAA, when faced with a *prima facie* that has not been overturned by the respondent. There exists no judicial interpretation of the statute that would support this action. By statute, the USDOL shall NOT dismiss a complaint showing a *prima facie.* Any and all actions used to dismiss a complaint that contains a *prima facie* on record, without response from the respondent, is an abuse of power, arbitrary, capricious, and unlawful to the statute.

4. USDOL Misleading the General Public on Timeliness

"Regulations implementing the STAA provide that a party may file a brief in support or in opposition to an ALJ's recommended decision within 30 days of the date the ALJ issues the decision." (*See* Pet. App. at 93-96)

However, *29 C.F.R. § 1978.110(a)* – A petition must be filed within 14 days of the date of the decision of the ALJ. Therefore, any party seeking information of the proceedings are misled into understanding the exact requirements necessary to petition timely. This information is seen by every party that relies on the information distributed by the USDOL. This includes attorneys, respondents, and complainants. No party is correctly and fully instructed on the process to sustain one's rights by the agency in charge of that duty. Misinforming parties of the timeliness to secure one's rights is a due process violation of the *Fifth Amendment.*

5. USDOL Failure Of Duty to Timely Address the Material Facts

The Request for OSHA Investigation was received, timely, on August 15, 2018 (*See* Pet. App. at 101). ALJ Merits Order (Final Order of Secretary of Labor) was dated April 29, 2019. Two hundred fifty-seven days elapsed until Final Order of the Secretary of Labor.

Therefore, *49 U.S.C. § 31105 (C)* – With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for *de novo* review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury, is applicable.

With knowledge of the Secretary of Labor's intent to not support the kick out provision after the Final Order, every complainant would feel forced to file in Circuit Courts as their only guaranteed remedy to address the complaint. After ARB proceedings, USDOL effectively would have had to not issue relief in order for the complainant to continue to seek remedy. When the USDOL advises or shows, by evidence, to a complainant that they will not enforce the statute under any circumstances, a legitimate fear of retaliation begins to consume the party. It is at this point; the government has asked "employees" to come forth but yet the agency assigned turns its back on the task at hand completely.

Any attempt for USDOL to restrict a complainant's rights, in any way, is unlawful and unconstitutional. Judicial review must be conducted by This Court to address the Final Rule of Implementing the 9/11 Commission Act from USDOL and how it directly relates to timeliness and the position of the petitioner.

6. *Prima Facie* to OSHA, ALJ, ARB, and Fourth Circuit Has Not Been Overturned

> "*Mr. Ellerbee filed a timely response to the order to show cause.* ***Respondent, although given the opportunity to reply to Mr. Ellerbee's filing, did not do so.***" (*See* Pet. App. at 53)

> "*I accept, for the purposes of this Order, that Mr. Ellerbee IS an individual who affects commercial motor vehicle safety in the course of his employment by a commercial motor carrier.*" (*See* Pet. App. at 56)

"Ellerbee Express contracted with TMC to carry Specialty Rolled Metals's load." See Pet. App. at 55-56. *"The Ellerbee Express driver picked up the load and, after starting to drive, was stopped by the police and fined for having an overweight load. In addition to the fine, Ellerbee Express incurred costs in redistributing the load to comply with load limits, which led to a bitter business dispute between Ellerbee Express and TMC."* (*See* Pet. App. at 53, 68-74)

49 U.S.C. § 31105 (A)(2) – Under paragraph *(1)(B)(ii)* of this subsection, 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 protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

23 C.F.R. § 658.17(b) – The maximum gross vehicle weight shall be 80,000 pounds except where lower gross vehicle weight is dictated by the bridge formula. *23 C.F.R. § 658.17(c)* – The maximum gross weight upon any one axle, including any one axle of group of axles, or a vehicle is 20,000 pounds.

"Complainant Jamel Ellerbee, an employee of Ellerbee Express, began to make arrangements for a second truck and a crane to travel to the truck stop, in order to move some of the load from the first truck to the second so that the first truck would be in compliance with its weight limit." (*See* Pet. App. at 53)

"Specialty Rolled Metals filed a police report with the Gwinnett County Police Department, alleging that Ellerbee Express had stolen its property." (*See* Pet. App. at 54)

"Respondent is a motor carrier/employer within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105. Respondent is engaged in interstate commerce by transporting products on the highways via commercial motor vehicle; that is a vehicle with a gross weight rating of 10,001 pounds or more designed to transport material." (*See* Pet. App. at 47)

The *prima facie* in this case can be generally revisited by the words of the USDOL. No attempt to claim the *prima facie* was not presented to USDOL exists. Retaliation is on record multiple times with all previous proceedings.

Whenever a *prima facie* has been distributed to OSHA, ALJ, ARB, and the Fourth Circuit, and not overturned by the respondent, the issue remains within the Federal Government to address the material facts at hand, timely. Statutory construction of the STAA addresses the differences with each case by allowing the complainant to create the *prima facie.* No two cases are the same, therefore, none should be treated as such. Similarities may exist after addressing the material facts but careful attention should be made when comparing any two cases.

Certiorari is necessary, by This Court, to preserve the *prima facie* on record, since no other procedural remedy remains for the STAA.

B. USDOL In Repetitious Violation of Equal Protection Clause and Due Process Clause of the Fifth Amendment of the US Constitution

By record, the right to a fair trial has been completely destroyed by the actions of the USDOL and threaten the Constitutionally of all whistleblower proceedings the agency is in charge of. Simply by title in the past proceedings, three Complainants and more than ten Respondents were excluded from legal process (*See* Pet. App. at 97, 98). This choice to exclude said parties was not my choice and controlled by all other parties except myself. Clarifying legislation, or, complete and total judicial statutory interpretation, by This Court only, is of immediate need to guarantee Constitutionality for all complainants and statues the USDOL is legally responsible for enforcing.

"It is not clear from the record whether Ellerbee Express's attorney represented Mr. Ellerbee in his STAA complaint." (*See* Pet. App. at 91)

However, no person shall... be deprived of life, liberty, or property without due process of law. *See 5th Amendment*, and, nor shall any state deprive any person of life, liberty, or property without due process of law. *See 14th Amendment*, and, we generally apply harmless error rule to administrative adjudications. *See* Sea 'B' Mining Co v Addison (4th Cir.). All of USDOL's proceedings all have been unlawful, unconstitutional, and abuse of power that has been left unchecked and ignored by the Fourth Circuit.

III. This Court Must Hear This Case to Manage the Procedural Issues of No Remedy Within Whistleblower Statues That the USDOL is Legally Responsible for the Management and Enforcement of

The issues raised in this case are representative of all similar statues, and the problems that may rest within the Federal Government to timely address the claims of the complainant. Hearing this case, will assure expedient remedy and relief for all future complainants with ANY whistleblower statute that the USDOL is legally responsible for managing upon intake. The 9/11 Commission Act affects more than one statute, and these same issues may arise again, being that the statues are co-mingled among USDOL regulations.

A. No Method Exists to Supplement the Record After ALJ Merits Order

ARB, Circuit Courts, and the US Supreme Court are all courts of judicial review. A Complainant attempting to add to the record, during judicial review, can have their case dismissed. Legal process to object to the ALJ Merits Order, and thereafter, is solely focused on judicial review. Unfortunately for a complainant, providing new information is a way to have their claims dismissed at the ARB and circuit courts. If no new information is allowed to be presented, then the ability to add to the record, in benefit of the complainant, is unjustly eliminated. There exists no way to address the continuing retaliation, in benefit of the complainant. The contact party assigned throughout the proceedings constantly changes and no consistency exists. Every new contact assigned is completely unfamiliar with the past proceedings.

B. The Drivers Have No Other Available Remedy

"As part of his submission, Mr. Ellerbee requested leave to amend the complaint to add three drivers (James Ellerbee, Lorianne Ellerbee, and Dominic Cropper) employed by Ellerbee Express as complainants, and to add Specialty Rolled Metals as a respondent. That request will be denied." (*See* Pet. App. at 58), and, *"29 C.F.R. § 18.36 provides that an administrative law judge may allow parties to amend their filings; that rule does not require that the judge do so." (See* Pet. App. at 58)

However, *49 U.S.C. § 31105 (B)(1)* – 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. All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section *42121(b)*. On receiving the complaint, the Secretary of Labor shall notify, in writing, the person alleged to have committed the violation of the filing of the complaint.

As witnessed in Clean Harbors Environ. Serv., Inc. V. Herman, 146 F.3d 12 (1st Cir.), the oral and written parts of the complaint are considered "filed," however OSHA did not provide any of the transcripts or recordings of the phone calls about the incident, from me, to the ALJ. The ALJ, in turn, penalized the whistleblowers for the actions of their own agency. The drivers were waiting for contact from OSHA the entire time. OSHA did not document nor manage the initial complaint fully, and the errors of which has never been corrected by any of the past proceedings.

All rights and remedies for the drivers rest in This Court, and no other Court. There is no other remedy available because the Secretary of Labor states the kick-out provision is unavailable after the Final Order of the Secretary of Labor, and the Circuit Courts are the last guaranteed statutory relief. If the STAA does not cover one driver, it may as well not cover any. Failure to conduct judicial review this case would set precedence directly against the statute for any driver based on no particular legal reasoning or case precedent.

The STAA is unconstitutional until this matter is fixed. No equal protection under the law occurred in any way. The USDOL has unlawfully eliminated all rights and remedies for the drivers for reasons NOT based on material facts. The actions taken by the Fourth Circuit and USDOL are unlawful to the statute and an abuse of power. Judicial review, conducted by This Court, is the only remaining relief for the drivers to obtain their statutory rights, as assigned by Congress.

Conclusion

OSHA has made Final Rule on the Implementing the 9/11 Commission Act which conflicts with the purpose of the STAA, the duty of the agency, and the due process and equal protection clauses of the US Constitution. By Final Rule, The Secretary of Labor can choose to not enforce the statute at OSHA, deprive any complainant of a fair trial by methods that are unlawful, arbitrary and capricious, deny a timely petition for

review at the ARB, and not support a complainant seeking the kick-out provision after Final Order from the Secretary of Labor. The Final Rule of OSHA creates a way to deny any complainants of their statutory rights based on information unrelated to the material facts and by pure choice. OSHA and USDOL advised us they would not pursue the claims the entire course of proceedings. The Fourth Circuit has provided no remedy for the repetitive, clearly visible, and irreparable damaging actions of the USDOL.

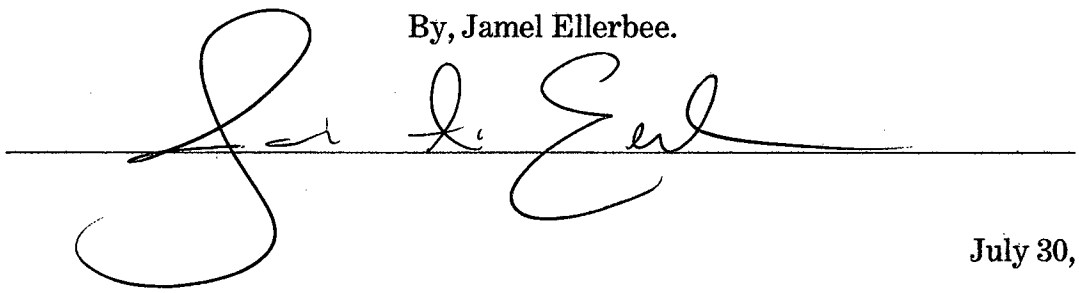
The Fourth Circuit Court of Appeals erroneously denied my timely petition for review and petitions for rehearing and rehearing *en banc* after failing to apply This Court's precedent that the Final Order of the Secretary of Labor is reviewable, splitting the Circuit Courts on the pleading standards to which a whistleblower complaint is to be held, failing to apply its' own precedent with harmless error rule in administrative adjudications, and failing to conduct judicial review as required by statute.

This Court must grant the writ of certiorari to correct the Fourth Circuit's errors, resolve splits between the Circuit Courts of Appeals, establish when judicial review is a right afforded to the complainant, make determination if OSHA Final Rule is unlawful, unconstitutional, arbitrary, and/or capricious, guarantee the STAA remains constitutional, and confirm that the 9/11 Commission Act was legislated to ensure that the STAA shall protect all employees, from all forms of retaliation, exerted by respondents, in violation of *49 USC § 31105*.

For the foregoing reasons, this petition for a writ of certiorari should be GRANTED.

Respectfully Submitted,

By, Jamel Ellerbee.



July 30, 2020

Pro Se Petitioner

PO Box 37367

Raleigh, NC 27627

844.408.8282