U.S. Department of Labor

Occupational Safety and Health Administration
Atlanta Regional Office
Sam Nunn Atlanta Federal Center
61 Forsyth Street. SW, Room 6T50
Atlanta, Georgia 30303

November 19, 2018

Ellerbee Express, LLC
Attn: Jamel Ellerbee, Owner
PO Box 37367
Raleigh, NC 27627

Re: Annett Holdings, Inc. dba TMC Transportation/Ellerbee/Case # 4-3750-19-017
DOT Number 87409

Dear Mr. Ellerbee:

This letter acknowledges receipt of the whistleblower complaint filed by you, Jamal Ellerbee (Complainant) under the whistleblower provisions of the Surface Transportation Assistance Act

(STAA), 49 U.S.C. S3 1105, as amended by the Implementing Recommendations of the 9/1 1

Commission Act of 2007, Pub. L. No. 110-53 on November 15, 2018 against the Annett Holdings, Inc. dba TMC Transportation (Respondent). In brief, you allege Respondent is violating the Federal Bill of Lading Act.

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through his agent. the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region IV, issues the following findings:

Secretary's Findings

Complainant would allege during his business actions with Respondent, Respondent is violating the Federal Bill of Lading Act.

Respondent is a motor carrier/employer within the meaning of I U.S.C. and 49 U.S.C. S31105. 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. Respondent's corporate office is located in Des Moines,

Iowa

Complainant is not an employee within the meaning of 49 U.S.C. 91 101. Complainant is not an employee of Respondent. Complainant directly affected commercial motor vehicle safety, in that

he drove trucks over highways in commerce to haul various goods and products. Complainant is located in Raleigh, North Carolina.

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

Under the STAA, Complainant is not considered an employee as STAA defines an employee as a driver of a commercial vehicle, a mechanic, freight handler or an individual but not an employer. This is employer verses employer, not employee verses employer.

Complainant would allege during the course of his business interactions with Respondent, Respondent is violating the Federal Bill Of Lading Act. Violations of this Act are not considered protected under the STAA and OSHA has no jurisdiction to investigate alleged violations of this Act.

The evidence gathered in this investigation does not support Complainant was retaliated against for engaging in protected activity under the STAA.A reasonable cause to believe Respondent retaliated against Complainant in violation of the STAA was not established. For these reasons, Complainant has not produced a prima facie case under STAA, and the complaint is hereby dismissed.

Respondent and Complainant have 30 calendar days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (AM). If no objections are filed, these Findings will become final and not subject to court review.

Objections must be filed in writing with:

Chief Administrative Law Judge
USDOL-Office of Administrative Law Judges
800 K Street NW, suite 400 North
Washington, D.C. 20001-8002
PH: (202) 693-7300; Facsimile: (202) 693-7365

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence de novo for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. Review of the AB's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the S TAA.

A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint. The rules and procedures for the handling of STAA cases can be found in Title 29, code of Federal Regulations Part 1978, and may be obtained at www.osha.gov.

Sincerely,

U.S. Department of Labor Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 11 January 2019

CASE NO.: 2019-STA-00011

In the Matter of:

JAMEL ELLERBEE,

Complainant,

v.

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

ORDER TO SHOW CAUSE

This matter purportedly arises under the employee-protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 and the implementing regulations at 29 C.F.R. Part 1978 ("STAA"). Complainant Jamel Ellerbee filed a complaint with the Occupational Safety and Health Administration on November 15, 2018 and the complaint was dismissed by the OSHA Regional Administrator on November 19, 2018, on several grounds, including (1) that Mr. Ellerbee is not an employee of TMC Transportation; (2) that because Mr. Ellerbee is not an employee, this matter is not covered under the STAA; (3) that the dispute recounted by Mr. Ellerbee was between TMC and Ellerbee Transportation, Mr. Ellerbee's employer, and therefore was a dispute between two companies rather than a dispute between Mr. Ellerbee and his employer; and (4) Mr. Ellerbee characterized the issue as involving a violation of the Bill of Lading Act, which is not protected by the STAA and therefore not within the jurisdiction of the Department of Labor. Mr. Ellerbee objected to the OSHA determination and requested a hearing before an administrative law judge. The case was docketed in this Office on December 19, 2018 and was assigned to me on January 10, 2019.

From a review of the materials forwarded by Mr. Ellerbee, it appears that he is an employee of Ellerbee Express. His company contracted with TMC to haul a load for a customer, Specialty Rolled Metals, picking it up on March 1, 2018. 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.

Discussion

The STAA provides:

(a)Prohibitions.—

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

(A)

(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a

violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because—

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or

damage to property occurring in connection with commercial motor vehicle transportation.

49 U.S.C. § 31105; *see* 29 C.F.R. § 1978.102. "Employee," in turn, is defined as "a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle)..."

From the information before, it appears that Mr. Ellerbee cannot be considered an employee of TMC, as he did not personally operate a commercial motor vehicle on March 1, 2018. Furthermore, the information does not show that he personally engaged in any of the protected activities listed above.

Finally, there is nothing in the file to show that Mr. Ellerbee, even if he can be considered an "employee" who engaged in protected activities, suffered any adverse employment action as a result. The documents in the file indicate that Ellerbee Express may have suffered certain injuries, but do not indicate that Complainant himself suffered an adverse employment action.

ORDER

Based on the foregoing, IT IS ORDERED that Complainant Jamel Ellerbee shall, not later than February 8, 2019, show cause why this matter should not be dismissed because (1) he did not engage in protected activity under the STAA; (2) he is not an "employee" under the STAA; and/or (3) he did not suffer an adverse employment action as a result of engaging in protected activity. Complainant may submit additional document (without sending additional copies of documents already submitted) and argument in support of his position.

IT IS FURTHER ORDERED that Respondent may, not later than February 22, 2019, respond to Mr. Ellerbee's submission.

SO ORDERED.

PAUL C. JOHNSON, JR.

District Chief Administrative Law Judge

PCJ, Jr./ksw

Newport News, Virginia

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 26 April 2019

CASE NO.: 2019-STA-00011

In the Matter of:

JAMEL ELLERBEE,

Complainant,

v.

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

ORDER DISMISSING COMPLAINT

This matter was filed under the employee-protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 and the implementing regulations at 29 C.F.R.

Part 1978 ("STAA" or "the Act"). Complainant Jamel Ellerbee filed a complaint with the Occupational Safety and Health Administration on November 15, 2018 and the complaint was dismissed by the OSHA Regional Administrator on November 19, 2018, on several grounds, including (1) that Mr. Ellerbee is not an employee of TMC Transportation[1]; (2) that because Mr. Ellerbee is not an employee, this matter is not covered under the STAA; (3) that the dispute recounted by Mr. Ellerbee was between TMC and Ellerbee Transportation, Mr. Ellerbee's employer, and therefore was a dispute between two companies rather than a dispute between Mr. Ellerbee and his employer; and (4) Mr. Ellerbee characterized the issue as involving a violation of the Bill of Lading Act, which is not protected by the STAA and therefore not within the jurisdiction of the Department of Labor. Mr. Ellerbee objected to the OSHA determination and requested a hearing before an administrative law judge. The case was docketed in this Office on December 19, 2018 and was assigned to me on January 10, 2019.

[1] The Respondent in this matter is designated as "Annette Holdings d/b/a TMC Transportation." Because the entity is referred to as TMC throughout the voluminous documentation submitted by Complainant, I will use that name in this Order.

Upon review of the materials forwarded by Mr. Ellerbee, it appeared that he is an employee of Ellerbee Express, which contracted with TMC to haul a load for a customer, Specialty Rolled Metals, picking it up on March 1, 2018. 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. Given those circumstances, I ordered Mr. Ellerbee to show cause why the complaint should not be dismissed because (1) he did not engage in protected activity as defined in the STAA, (2) he is not an "employee" as defined in the STAA, and/or (3) he did not suffer adverse employment action because he engaged in protected activity.

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. As part of his response, Mr. Ellerbee moved to add new complainants to this matter.

For the reasons discussed below, 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.

Facts

TMC Transportation is a transportation broker operating in interstate commerce. TMC entered into a Broker-Carrier agreement with Ellerbee Express, effective February 22, 2018. That agreement was intended to cover multiple shipments, including the shipment at issue in this matter.

TMC contracted with Specialty Rolled Metals to transport a load of stainless steel from Lawrenceville, Georgia to Fuquay-Varina, North Carolina. TMC engaged Ellerbee Express under the Broker-Carrier agreement to provide a truck and driver pick up the load on March 1 and deliver it on March 2, 2018.

On March 1, 2018, Ellerbee Express' driver, Dominic Cropper, picked up the load and began transporting it to the delivery location. After driving about 130 miles, the truck was found to be overweight when it was weighed at a highway weigh station: the load weighed about 57,000 pounds, and the truck was rated only for a load of 48,000 pounds. The state highway patrol ticketed and fined the driver. The driver then stopped at a QT truck stop, rather than proceed with the delivery, in order to avoid stopping at additional weigh stations. 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. Mr. Ellerbee also demanded that TMC pay Ellerbee Express triple the fine, costs associated with the second truck

and crane and a "detention fee." TMC refused to do so, and the parties attempted to negotiate a resolution over the next few days. Ultimately, Mr. Ellerbee decided to deliver the load to a warehouse in Goldsboro, North Carolina, and thereafter increased Ellerbee Express' demand to TMC. Specialty Rolled Metals filed a police report with the Gwinnett County Police Department, alleging that Ellerbee Express had stolen its property. However, in order to get its materials, Specialty Rolled Metals ultimately agreed to pay the demand, and received the load on March 9, 2018. Specialty Rolled Metals advised the police on that day that the matter was a civil matter, and the police were free to close their file.

Issues

1. Is Complainant an "employee" as defined in the STAA?
2. May the complaint be amended to add new complainants?

Discussion

A. Complainant is Not an Employee of TMC Under the STAA

The STAA provides:

(a) Prohibitions.—

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

(A) (i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because—

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

49 U.S.C. § 31105; *see* 29 C.F.R. § 1978.102. The Act further provides:

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.

49 U.S.C. § 31105(j).

The initial complaint filed with OSHA was filed on behalf of Ellerbee Express, a limited liability company established under North Carolina law. As set forth above, to be an "employee" under the STAA, the complainant must be an individual. Business entities cannot recover for discrimination under the Act.[2] Thus, if Ellerbee Express is the proper complainant in this case, the complaint must be dismissed. But that doesn't completely answer the mail: it may be that Mr. Ellerbee filed the complaint on his own behalf, and much of his argument in response to my order to show cause was intended to show that he personally is a proper complainant. However, from the information before me, it appears that Mr. Ellerbee cannot be considered an employee of TMC.

First, as Mr. Ellerbee admits, he is an employee[3] of Ellerbee Express, and not of TMC or Specialty Rolled Metals. Ellerbee Express contracted with TMC to carry Specialty Rolled Metals'

[2] That is – presumably and correctly – why the report of investigation called this matter "company vs. company" and therefore not within the coverage of the STAA.

[3] The Secretary's Findings issued on November 19, 2018 are addressed to Mr. Ellerbee as "Owner"; however, there is no other evidence in the file tending to show whether he was the owner of Ellerbee

load; Mr. Ellerbee personally was not a party to that contract. Thus, he is not an employee under the definition of "employee" that includes an independent contractor, because he was not a contractor at all. Furthermore, the independent contractor definition applies only to an independent contractor "when personally operating a commercial motor vehicle"; however, Mr. Ellerbee was not the operator of the truck that was involved in this incident, and was not operating a commercial motor vehicle of any sort when he engaged in the purported protected activity.

Second, Mr. Ellerbee contends that he is "an individual not an employer, who...directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier."[4] In support of this argument, Mr. Ellerbee has submitted documentation showing that Ellerbee Express is a commercial motor carrier, and that he is the Designated Employer Representative (DER), responsible for ensuring compliance with the Ellerbee Express drug and alcohol policy by its drivers. 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. However, it does not necessarily follow that he is therefore an employee of TMC. His designation as DER is for Ellerbee Express, and not for TMC. All of the actions he took were on behalf of Ellerbee Express, and not of TMC.

In *Feltner v. Century Trucking, et al.*, ARB No. 03-118, ALJ Nos. 2003-STA-1 and -2 (ARB Oct. 27, 2004), the Administrative Review Board addressed a situation similar to this one. In *Feltner*, the complainant was an independent contractor hired by Century Trucking to provide services to Mainline Road and Bridge Construction, Inc. While accepting a load at Mainline's facility, the complainant made remarks about being overloaded, and ultimately declined to accept that load and another later in the day. Mainline requested Century not to send the complainant back to its facility. The Board determined that under the facts of that case, Mainline exercised sufficient control over the terms and conditions of the complainant's employment that he could be considered an employee of Mainline. In this case, however, TMC exercised no control over

Mr. Ellerbee's employment with Ellerbee Express. He continues to work for Ellerbee Express, and has shown no effects on the pay, terms and privileges his own employment with Ellerbee Express that are attributable to TMC.

Likewise, in *Smith v. CRST Int'l, Inc.*, ARB No. 11-086, ALJ No. 2006-STA-31 (ARB June 6, 2013), the complainant was a driver for Lake City Enterprises (LCE), which had a contract with CRST International to provide trucking services. The complainant alleged that he was terminated in violation of the STAA, and prevailed on that claim against LCE. The administrative law judge,

---

Express or an employee. His exact status with respect to Ellerbee Express, however, does not affect my analysis of whether he is an employee of TMC.

[4] Again, if the complaint was filed on behalf of Ellerbee Express, rather than Mr. Ellerbee, the entity is not an individual, and is an employer, and is therefore not included in the definition of "employee."

however, granted CRST's motion for summary decision that the complainant was not its employee because it did not exercise control over the terms and conditions of his employment with LCE. The exclusive agent agreement between LCE and CRST provided that:

> ...LCE was an independent contractor that solicited freight for CRST and had "complete and sole responsibility" for hiring; setting wages, hours, and working conditions; adjusting any grievances; and supervising, training, disciplining, and firing all employees it deemed necessary to fulfill its duties and obligations under the agreement. Such employees were "subject to the full control and direction of
> [LCE] at all times and at its own expense."
>
> LCE's independent contractor operating agreement provided that LCE would use its equipment and drivers to transport, load, and unload freight such as steel coils and bars on CRST's behalf. LCE's drivers would submit to required federal and state physical examinations and comply with CRST's drug and alcohol policy, including random testing. Further, the agreement reiterated LCE's "sole responsibility" for its employees and stated that "[n]o person [LCE] may engage shall be considered [CRST's] employee."

Smith, slip op. at p. 3. The ARB determined that these provisions precluded a finding that the complainant was an employee of CRST.

The Broker-Carrier agreement between TMC and Ellerbee Express similarly provided:

> 1.3 Relationship of parties. Carrier understands and agrees that Carrier is an independent contractor of Broker and that Carrier has exclusive control and direction of the work Carrier [performs] pursuant to this Agreement. Carrier assumes full responsibility of payment for federal, state and local taxes or contributions for unemployment insurance, pensions, workers' compensation or other social security and related protections with respect to the persons engaged by Carrier for Carrier's performance of the transportation and related services for Broker or Shipper, and Carrier agrees to indemnify, defend and hold Broker and Shipper harmless therefrom. Under no circumstances shall Carrier, employees or agents of Carrier be deemed employees or agents of Broker or Shipper, nor shall Broker or Shipper be liable for any wages, fees, payroll taxes, assessments or other expenses relating to employees or agents of Carrier.

Based on (1) the express language of the Broker-Carrier agreement, and (2) the fact that TMC made no effort to retaliate against Mr. Ellerbee personally, I am persuaded by the reasoning in *Feltner* and *Smith* that Mr. Ellerbee is not an employee of TMC, and I so conclude.

B. The Complaint May Not Be Amended to Add New Complainants

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.

This matter was forwarded to the Office of Administrative Law Judges by the OSHA Regional Supervisory Investigator, who identified the complainant as Ellerbee Express, LLC/Jamal Ellerbee and the respondent as Annett Holdings, d/b/a/ TMC Transportation. There is no evidence that any of the three drivers, or Specialty Rolled Metals, filed or responded to any complaints under the STAA for the events of March 1-9, 2018. None of them participated as parties in the investigative process.

In *Wilson v. Bolin Associates, Inc.*, 91-STA-4 (Sec'y Dec. 30, 1991), the Secretary of Labor agreed with the administrative law judge's decision to allow the Complainant to amend his claim to add an individual as a party when the individual was reasonably within the scope of the original complaint, received notice from the outset of the case, and participated in the investigation and all proceedings. That isn't the case here. Although Specialty Rolled Metals and the three additional drivers likely knew of the incident giving rise to the pending complaint, there is no indication that they knew of the complaint filed by Mr. Ellerbee with OSHA, or participated in the OSHA investigation as parties.

Additionally, to allow the drivers to participate in this case as parties would be to circumvent the requirement that any victim of discrimination under the STAA file a complaint with OSHA under 49 U.S.C. § 31105. They didn't, and their failure to do so will not be excused by allowing them to come into the case after completion of the investigation and referral to the Office of Administrative Law Judges.

Although 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. Because (1) the drivers did not file complaints with OSHA, and (2) neither the drivers nor Specialty Rolled Metals participated in the investigative proceedings before OSHA, the motion to add them as parties will be denied.

ORDER

Based on the foregoing, IT IS ORDERED:

1. Complainant's request to add parties is DENIED; and

2. The complaint in this matter is DISMISSED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ, Jr./ksw

Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW,

Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See

29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1978.110(b).

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W
Washington, D.C. 20210

IN THE MATTER OF:

JAMEL ELLERBEE,

ARB CASE NO. 2019-0059

COMPLAINANT,

ALJ CASE NO. 2019-STA-00011

DATE:

1

ANNETT HOLDINGS, INC.

d/b/a TMC TRANSPORTATION,

RESPONDENT.

ORDER TO SHOW CAUSE

On May 20, 2019, Jamel Ellerbee, the Complainant in this matter, filed a Petition for Review and Brief requesting the Administrative Review Board (Board) to review the Order Dismissing Complaint issued April 26, 2019. The Secretary of Labor has delegated authority to the Board to consider such petitions under the employee protection provisions of the Surface Transportation Act.[1]

The Petition must be served on all parties. Complainant did not include a Certificate of Service showing that the opposing party has been served with the Petition for Review and brief. As such, Complainant must provide a copy of all documents filed with the Board to the Respondent and its Counsel.

A petition must also be filed within 14 days of the date of the decision of the Administrative Law Judge (ALJ). The date of the postmark, facsimile transmittal, or electronic communication transmittal will be considered to be the date of filing; if the petition is filed in person by hand-delivery or other means, the petition is considered filed upon receipt. In this matter, the Complainant apparently filed his petition on May 20, 2019—more than fourteen (14) days after the ALJ issued the Order dismissing the complaint. Accordingly, there is a question regarding the timeliness of the Complainant's petition for review.

1 Secretary's Order 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (April 3, 2019).

Nevertheless, the period authorized for filing a petition for review with the Board is not jurisdictional and is subject to modification. [5] There are three principal situations in which such modification may apply: (1) when the opposing party has actively misled the petitioner regarding a material matter that led to the delay; (2) when the petitioner has, in some extraordinary way, been prevented from filing the appeal; (3) when the petitioner has filed a timely petition for review but has done so in the wrong forum. [6] But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to the complaint. [4]

The petitioner bears the burden of justifying the application of these tolling principles. [7] Accordingly, we order the Complainant to SHOW CAUSE, within fourteen (14) days of the date of this order, why the petition should not be dismissed as untimely. If the Complainant fails to timely respond to this Order, the Board may dismiss his appeal without further notice. The Respondent may file a response to the Complainant's petition within fourteen days (14) days of the date on which the Complainant files his response. The determination as to whether the Board will accept this appeal (and any consequent briefing) will be stayed pending disposition of the Order to Show Cause.

FOR THE ADMINISTRATIVE REVIEW BOARD:

William T. Barto
Chief Administrative Appeals Judge

Note: Questions regarding any case pending before the Board should be directed to the Board's staff: Telephone: (202) 693-6200, Facsimile: (202) 693-6220 ADMINISTRATIVE REVIEW BOARD

[5] Accord Hillis v, Knochel Bros., ARB Nos. 03-136, 04-081, 04-148; ALA No. 2002-STA050, slip op. at 3 (ARB Oct. 19, 2004); Overall v. Tennessee Valley Auth. , ARB No. 98-011, ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30. 2001).

[6] See Selig v. Aurora Flight Sciences, ARB No. 10-072, ALJ No. 2010-AIR-OIO, slip op. at 3 (ARB Jan. 28, 2011).

4 Id. at 4.

[7] Accord Wilson v. Sec'y, Dep't of Veterans Affairs, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VI I case bears burden of establishing entitlement to equitable tolling).

U.S. Department of Labor Administrative Review Board

200 Constitution Avenue, N.W.
Washington, D.C. 20210

IN THE MATTER OF:

JAMEL ELLERBEE, ARB CASE NO. 2019-0059

COMPLAINANT, ALJ CASE NO. 2019-STA-00011

DATE:

JUL 3, 2019

ANNETT HOLDINGS, INC.

dib/a TMC TRANSPORTATION,

RESPONDENT.

ORDER DISMISSING PETITION FOR REVIEW

On May 21, 2019, the Administrative Review Board (Board) issued an Order to Show Cause in this case requiring Complainant to explain why his petition for review should not be dismissed as untimely filed. On May 24, 2019, the Board received Complainant's response, in which he describes delays in reviewing his mail, [1] problems filing his petition online, and the difficulties inherent in being a self-represented litigant while employed full-time. Complainant makes no assertion that Respondent or any other person prevented his timely filing or that

Complainant had misfiled the petition with another agency. The matters raised by Complainant are not extraordinary and are similar to those which confront any self represented individual attempting to file a petition with this Board. Accordingly, the Board declines to apply equitable tolling to extend the filing deadline in this matter, and Complainant's petition for review is hereby DISMISSED as untimely.

---

1 In this regard, Complainant asserts that the Decision and Order issued by the ALJ was not received by him until May 6, 2019. His petition for review was due four days later on May 10, 2019, which was 14 days after the date of the decision by the Administrative Law Judge. See 29 C.F.R. S 1978.110(a). Although not applicable to the instant facts, the Federal Rules of Appellate Procedure (FRAP) provide that three days are added to filing deadlines unless service of the document triggering the filing deadline was effected on the same day as stated in the proof of service; this could

have extended Complainant's filing deadline to May 13, 2019, had the facts favored Complainant and the Board elected to apply the FRAP standard to this matter. All that being noted, Complainant did not file his petition until May 20, 2019.

The decision and order of the Administrative Law Judge below, dated April 26, 2019, is the final order of the Secretary of Labor.

FOR THE ADMINISTRATIVE REVIEW BOARD:

William T. Barto
Chief Administrative Appeals Judge

Note: Questions regarding any case pending before the Board should be directed to the Board's staff. Telephone: (202) 693-6200, Facsimile: (202) 693-62'20

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1795

JAMEL ELLERBEE,

Petitioner,

v.

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

Respondents.

On Petition for Review of an Order of the Department of Labor. (2019-0059; 2019-STA00011)

Submitted: December 17, 2019 Decided: December 19, 2019

Before KING, FLOYD, and HARRIS, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Jamel Ellerbee, Appellant Pro Se. Alyssa C. George, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Matthew Christopher Burke, Dana Hefter Hoffman, YOUNG MOORE & HENDERSON, PA, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jamel Ellerbee petitions for review of an order of the Department of Labor's (DOL) Administrative Review Board (ARB) dismissing as untimely his petition for review of the Administrate Law Judge's (ALJ) decision dismissing his complaint alleging violations of the Surface Transportation Assistance Act of 1982 (STAA), *see* 49 U.S.C. § 31105 (2012). 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 v. 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 generally does not consider arguments newly raised in reply). And, because Ellerbee failed to timely petition the ARB for review, we lack authority to exercise judicial review over the ALJ's decision. *See* 49 U.S.C. § 31105(d) (requiring STAA judicial review to conform with Administrative Procedure Act (APA)); 29 C.F.R. §§ 1978.109(e), 1978.110(a), (b) (2019); *see also Darby v. Cisneros*, 509 U.S. 137, 147, 152-53 (1993) (recognizing circumstances under which regulation may establish intra-agency appeal as prerequisite to judicial review under APA).

Accordingly, we deny the petition for review. We grant Ellerbee's motions to submit on the briefs and to amend the record. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

PETITION DENIED

FILED: February 18, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1795
(2019-0059)
(2019-STA-00011)

JAMEL ELLERBEE

Petitioner

v.

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

Respondents

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc. Entered at the direction of the panel: Judge King, Judge Floyd, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

Additional material from this filing is available in the Clerk's Office.