20-5828

In the

Supreme Court of the United States

ORIGINAL

Roderick A. Carter		Case No: 19-2135
(Petitioner)	)	No. 17-1095 Remand
	)	
	)	ARB 2018-0078
Vs.	)	ARB 15-050
	)	
CPC Logistics, Inc; CPC Medical	)	
Products , LLC; and Hospira Fleet	)	ON A PETITION FOR A WRIT
Services, LLC	)	OF CERTIORARI TO THE
	)	UNITED STATES COURT
	)	OF APPEALS FOR THE FOURTH
(Respondents)	)	CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Roderick A. Carter

P.O Box 90237

Columbia, SC 29290

(803) 361-6499

Pro Se

QUESTIONS PRESENTED

When an employer admits to a violation in writing to the federal government, should they be held accountable to their words?

When a protected activity is made, is it protected ,or is the bar so low where it can be disrupted by a ALJ simply saying that person was not telling the truth when they made the complaint?

Once a protected activity is established, can an ALJ ask for it to be interpreted to mean something different than the protected activity?

OPINIONS BELOW

The opinion of the Court of Appeals is the reported at 17-1095 and 19-2135.

JURISDICTION

The Court of Appeals entered judgment on April 7, 2020. A petition for rehearing and rehearing en banc was denied on June 9, 2020.

RELEVANT STATUTORY PROVISION

The Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C & 31105.

STATEMENT OF THE CASE

This case involves Petitioner Roderick Carter's claim that Respondents violated the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. & 31105.

Congress passed the STAA in 1982 to combat the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents" on America's highways. Brock v. Roadway Express, Inc., 481 U.S. 252, 262, 107 S.Ct. 1740, 1748, 95 L.Ed.2d 239 (1987) (quoting remarks of Sen. Danforth and summary of proposed statute at 128 Cong.Rec. 32509, 32510 (1982)); see also Lewis Grocer Co. v. Holloway, 874 F.2d 1008, 1011 (5th Cir.1989) ("Congress enacted the STAA to promote safe interstate commerce of commercial motor vehicles.") The Act seeks to reduce unsafe driving by long haul truckers in two ways. First, it prohibits discipline of trucking employees who raise violations of commercial motor vehicle rules on the part of trucking companies. 49 U.S.C. app. § 2305(a). The Act recognizes that drivers and other employees are often in the best position to detect when an operation is not running safely, but that employees often may not report violations for fear of backlash from their employers. See Brock, 481 U.S. at 258, 107 S.Ct. at 1745; Yellow Freight Sys., Inc. v. Martin, 954 F.2d 353, 356 (6th Cir.1992); Lewis Grocer, 874 F.2d at 1011.

Second, the Act encourages safer driving by prohibiting discipline of drivers who refuse to operate their vehicles under dangerous or illegal conditions. Specifically, the STAA forbids employers from discriminating "in any manner" against employees who refuse "to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards or orders applicable to commercial motor vehicle safety," or when such operation would be "unsafe" and pose "a bona fide danger" of accident or injury. 49 U.S.C. app. § 2305(b); see Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1065 (5th Cir.1991) (stating that § 2305(b) ensures that employees who "refuse to commit unsafe acts do not suffer adverse employment consequences because of their actions"). One such motor vehicle safety standard is the driver fatigue rule. This DOT regulation provides that no driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue ... as to make it unsafe for him to begin or continue to operate the motor vehicle.

In the Fourth Circuit No.17-1095 opinion they ruled that Complainant breaks and delays were a factor in his termination. The circuit also ruled that Complainant reported taking fatigue breaks to CPC management when asked about his delays. The July 15, 2011 STAA protected activity was acknowledged and accepted by the Fourth Circuit as protected activity. The Respondent acknowledged and accepted it as protected activity. The ALJ, in his first and second decision, ruled it as protected activity. The Respondent's position statement to OSHA , stated that Complainant's breaks and delays were a significant factor in his termination CX3 at 13-14. The ALJ is his second decision ruled that Complainant's rest breaks were a factor in the decision to terminate Complainant's employment. The ALJ in his second decision acknowledged the July 15,2011 STAA protected activity as a contributing factor, but tried to separate it from the termination or downplay its role in the termination. The July 15, 2011 protected activity can't be separated because Complainant was at work in route with a trailer to pick up another trailer when he stopped to take a rest break, due to fatigue and illness. The ALJ can't act like the July 15, 2011 protected activity just never happened. The Respondent's statement that Complainant's prior discipline was part of their reason for terminating Complainant is immaterial. Complainant need only to prove that his protected activity is a contributing factor in Respondent's decision to terminate his employment. If Complainant's protected activity played any part in Respondent's decision to terminate Complainant's employment , then Complainant must prevail under the STAA. The Respondent's acknowledges September 9, 2011 and October 4, 2011 as protected activity on page 8 & 9 of Respondents position paper to OSHA.

Thus, CPC knew Mr. Carter had verbally claimed that he often got sleepy while performing his duties and therefore needed frequent rest breaks, and that Mr. Carter had referred to the DOT when stating he was entitled to such breaks.

As noted above, CPC personnel discussed with Mr. Carter his claimed need to take frequent rest breaks because his fatigue would render it unsafe for him to continue driving.CPC assured Mr. Carter that it intended to comply with the law in this regard and would not require him to drive excessively fatigued.

The Fourth Circuit in its 17-1095 opinion said that the CPC's position statement to OSHA, which Carter introduced at the administrative hearing, acknowledges that Carter mentioned fatigue breaks to two supervisors when questioned about his performance. In fact, CPC and Carter agreed that Carter mentioned fatigue breaks during a telephone conversation with a supervisor about one month before he was fired, but the ALJ inexplicably found that fatigue breaks were never mentioned during that conversation. The ALJ in his second decision found that Complainant told Mr. Covert and Mr. Pruitt that his extended runtimes were caused by rest breaks. The ALJ said Mr. Carter may have told his supervisors that his long run times were caused by fatigue breaks, see CX 3, but Mr. Carter didn't make those statements while he was suffering from a bout of fatigue. Because the statements were not made contemporaneous with any bout of fatigue, and I find Mr. Carter to be generally non credible, I find those statements were merely post hoc excuses and give them no probative weight. In Yellow Freight systems V. Reich, 8F 3d 980 (4th Cir.1993). The secretary then expanded upon the ALJ conclusion that Hornbuckle had made out a prima facie case by stressing that the driver had engaged in protected activity both "when he ceased driving for an hour and a half in order to sleep" and when he complained about it after he received a warning letter. Hornbuckle exercised his statutory right not to drive his Yellow Freight truck while fatigued. In applying the Act, the secretary was entitled to protect a trucker who chose to pull over and take a nap instead of risking a catastrophe. No where under the STAA did it say, that a complaint had to be made contemporaneous with a bout of fatigue, but it did say once a complaint is made, it is protected activity. The evidence in the record showed that other drivers were taking fatigue breaks too. In the ALJ second decision under New Findings, he tries to discredit or disrupt Complainant's September 9, 2011 and October 4, 2011 protected activity by saying second the evidence demonstrates that Mr. Carter delayed his runs to spite his partner Mr. Gordon. This finding directly contradicts CPC's position statement to OSHA, in its statement to OSHA, CPC said on page 13-14.

Mr. Carter's breaks and delays were motivated not by fatigue or related safety concerns but by a desire to tailor the job to suit his personal preferences rather than the needs of CPC's customer, Hospira.

He preferred to delay his driving in order to regularize his schedule rather than to satisfy the requirements of his job, which he found inconvenient.

That Mr. Carter was taking breaks to regularize his schedule, rather than alleviate fatigue.

The desire to regulate his schedule in this manner is simply not a legitimate justification for Mr. Carter's failure to satisfactorily perform his job duties by completing his driving trips within the reasonable expected time.

In CPC's position statement to OSHA, not one time did they accuse Complainant of delaying his runs to spite his partner; actually they said the opposite, that Complainant was doing it for his own comfort and convenience. CPC position statement to OSHA directly contradicts the ALJ's findings. Shifting explanations for termination equal to retaliation. The ALJ's new findings are not supported by substantial evidence. This is not a case where it's Respondent's word against Complainant's word, the Respondent admitted to everything in writing in their position statement to OSHA, but the ALJ refused to hold them accountable. The ALJ deliberately overlooked any evidence that favors Complainant. In Yellow Freight System V. B Reich 27 F3d 1133 (sixth cir.1994), far from questioning Yellow Freight business Judgment in requiring it's drivers to report en route delays, the secretary merely held Yellow Freight to the language it used in warning Smith. Complainant has been driving trucks for over 20 years, so he knows when it is time to stop for a fatigue break. When Complainant stopped and took a fatigue or ill rest break, he did not get paid for it, so it was no cost to the Respondent's or customers. Three managers testified at trial that the customer never complained or said that Complainant had ever had a trailer late. Complainant who is pro se has been fighting this complaint for almost 9 years; he has paid a heavy financial, professional, and personal price. The Complainant did the right thing by not driving fatigued or ill and risking the lives and safety of the innocent public. Every so many years, experts have to go back and reanalyze the work and drive hours imposed upon drivers, to deescalate the fatalities that occur due to drivers being fatigued. Complainant did not want to be a part of the statistics, of innocent people dying at the hands of fatigued drivers. The only thing Complainant is asking the judges to do is stand for the law that protects the lives and safety of

the innocent public the STAA. Please don't let justice delayed, turn into justice denied.

The ALJ did not follow the fourth circuits 17-1095 ruling. The fourth circuit grant Carter's petition for review and remand for the secretary of labor to reconsider Carter's refusal to drive claim against CPC in light of CPC's statements that Carter reported taking fatigue breaks to CPC management when asked about his delays and that Carter's delays were a factor in his termination. The ALJ credit complainant July 15, 2011 STAA protected activity, even if this was the only protected activity, the complainant still must prevail under the STAA. The Respondent admitted that Complainant protected breaks and delays were a factor in his termination.

The law says if Complainant protected activity played any part in his termination, then Complainant must prevail under the STAA. The fourth circuit ruled that Carter reported taking fatigue breaks to CPC management when asked about his delays and that Carter's delays were a factor in his termination. Respondent's admission that Complainant delays were a factor in his termination, is direct evidence that Complainant protected activity contributed to his discharge. The ALJ cannot over rule the fourth circuit by saying the July 15, 2011 STAA protected break and delays did not contribute to Complainant termination, after the fourth circuit ruled that Complainant's breaks and delays were a factor in his termination. The casual relationship prong is satisfied if the employee shows that protected activity was a contributing factor to the adverse employment action.

Complainant engaged in additional instance of protected activity by refusing to drive when fatigued. Complainant did everything the STAA required of him; Complainant told CPC and Hospira that his delays were a result of fatigue breaks. The respondent acknowledges Complainant protected fatigue breaks. Complainant was subject to an adverse employment action. Respondent admitted that Complainant protected breaks and delays were a significant factor in his termination. The fourth circuit ruled that Complainant reported taking fatigue breaks to CPC management when asked about his delays and that Complainant delays were a factor in his termination, so the ALJ or the ARB can't overrule the fourth circuit by saying Complainant protected fatigue breaks and delays did not play a part in his termination.

The ARB overlooked Complainant Petition for Review/Brief. The record will show that Complainant did file a Petition for Review/Brief. The Respondents answered to the Complainant's brief in their response brief.

The Complainant shows that the ALJ new findings are not supported by substantial evidence.

Complainant objects to the ALJ findings that Respondents did not violate the act.

Complainant objects to ALJ previous finding, that Mr. Carter's delays were not caused by fatigue breaks. Even though Mr. Carter told multiple individuals from CPC and Hospira that his delays were a result of fatigue breaks. I find that, Mr. Carter was untruthful in making these statements for a number of reasons. There is no evidence in the record to show that complainant was telling a lie when he was making these statements about fatigue breaks to CPC and Hospira.

ALJ said first, I find it unbelievable that Mr. Carter suffered from fatigue on nearly every run he made. This evidence shows, other drivers took rest breaks. Mr. Covert, does not know whether Mr. Williams continues to stop and take rest breaks. Rx50-49 shows that Mr. Williams took, a rest break from 5:45 to 6:15 on October 3rd, during the same week that Mr. Carter was terminated. {Tr.,p.223.} Mr. Williams took another break during the same week from 6:00-6:45 after starting his run at 2:45. {Id.,pp.223-224.} He took another break from 4:25 to 5:00 after leaving Columbia at 2:15. {Id.pp.224-225.} Mr. Williams also took a break from 6:50 to 7:15 on a day when he left Columbia at 3:15. Respondents witnessed Mr. Gordon testify at the hearing that he got sleepy while performing his driving duties and therefore needed frequent rest breaks/ fatigue breaks. Complainant asked Mr. Gordon twice about fatigue breaks to make sure the ALJ heard Mr. Gordon say that he got sleepy while performing his driving duties, and therefore needed frequent rest breaks/fatigue breaks. The Respondents admitted at the hearing, that other drivers stopped to take rest breaks from driving when they got tired too.

Second, the ALJ said the evidence demonstrates that Mr. Carter delayed his runs, to spite his partner, Mr. Gordon. Complainant was stopping to take fatigue rest breaks years before Respondent's witness started working for the Respondents, so for the ALJ to say Complainant was doing it to spite the witness is nonsense. The company did not have a set turnaround time. The only set time drivers had was set by DOT. There is no way in the evidence to show that runs had a set turnaround time. The Complainant did not do anything to be spiteful towards Mr. Gordon. The reason discussed above in CPC's position statement to OSHA the Respondent's reasons for termination, directly contradicts the ALJ's findings that Complainant took rest breaks to spite his partner. When Mr. Gordon testified before the ALJ he

did not recall whether Mr. Davis his next partner after the departure of Mr. Carter, was there waiting every time Mr. Gordon arrived at the terminal. He did not keep a time log, of the time that he arrived before Mr. Davis arrived. {Tr.,p.161.} He did not call in and complain about Mr. Davis not being there, when Mr. Gordon arrived. {Id.p.163.} Exhibit 52 identifies several occasions on which Mr. Gordon, arrived at the terminal and, Mr. Davis was not there. But Mr. Gordon, did not, complain about Mr. Davis absence or kept a log. {Id.,pp.164-174.} At no time was Complainant belligerent or made verbal threats to any co-worker or manager. Every time Complainant had a discussion with co-worker and manager, it was over the phone, never face to face. If Complainant would have made any kind of threats or be belligerent towards any co-worker or manager, surely the company would have written up and fired Complainant.

Mr. Covert testified that he does not recall any specific production delays caused by Complainant late delivery of a trailer. {Tr.,pp.217-218.} Mr. Pruitt testified, that he was not aware of complaint from Hospira that any truck Mr. Carter drove, stopped them from making production.{Tr.,p.251.} Mr. Wallis testified, he is not aware of any complaints from Hospira that they lost any money or shut down the production line due to Mr. Carter's stopping. He had received, no complaints, from anyone but another driver. {Tr.p.268.} Complainant, never caused any late deliveries. Mr. Gordon testified at the hearing before the ALJ that he himself needed frequent rest breaks/ fatigue breaks.

Third, the ALJ said CPC had a policy requiring its drivers to call in if the driver experienced any significant delays. The fourth circuit said, the ALJ's credibility analysis on this issue, also cited Carter's failure to call dispatch when he took a rest break " as he was required to do" , but the ALJ neglected to cite any evidence indicating that a driver was required to notify dispatch each time, he took a break. There is no evidence of any kind showing that Complainant was required to notify dispatch each time, he took a break. Rx1-2 and Rx 2-7 are evidence the ALJ is trying to use against Complainant, does not have a signature. This says one fact, that Complainant did not receive or sign this Uniform Rules & Regulations package. This package was put there, to make it look like, the Complainant, was aware of CPC's call in policy. Rx3 The ALJ says clearly demonstrate that Mr. Carter was aware of CPC's call in policy. The ALJ clearly overlooked one important evidence about Rx3 is, it does not have a Rules & Regulations package with it. The only thing, in there is a paper with Complainant's name and date on it. One clear fact from Rx-3 evidence, is whatever Rules and Regulations policy, that was in there, does not match what the Respondents are saying, unless it would not have come up missing. There is no evidence indicating that a driver was required to notify dispatcher, each time, he took a break. There was no evidence, indicating,

that a driver was required, to notify dispatch while he was suffering from a bout of fatigue. There is no evidence that shows, Complainant's statement was merely post hoc excuses. The ARB at (33) said that Complainant was obligated to record his rest breaks on his trip manifest. The trip manifest is not a log book, it's a pay sheet. The truck's onboard computer with a GPS system automatically generated logs where the truck was located and whenever it stopped. Mr. Gordon testified at the hearing that he got sleepy while performing his driving duties and therefore needed frequent rest breaks/fatigue breaks. The evidence in the record shows that Mr. Gordon never recorded his rest breaks on his trip manifests, also when you look at Boston, Davis, and Moore trip manifest, they never recorded rest breaks or bathroom breaks. Complainant with good reason disagrees with the ALJ findings of fact in the Decision and Order. Complainant objects to the ordered denying his complaint.

Complainant testified that a dispatcher named, Christie called Mr. Carter to ask about a stop at a rest area and Mr. Carter told her that he had become fatigued and stopped to avoid an accident. He told Christie, that he was glad he had stopped, because when he awoke, his stomach had gone bad , and if he had been driving he would not have made it , to the restroom. {Id.,pp.30-31.} He told Christie, that any time he stopped; it was because he was fatigued and it had become unsafe for him to drive. {Id.,pp.31-32.} Mr. Carter did not take rest breaks at the port or the railroad in Jacksonville, but only while he was actually on the road. {Id.,p.35.} This conversation happened, on July 15, 2011.

Page 9 of Respondents position statement

As noted above, CPC personnel, discussed with Mr. Carter, his claimed need to take frequent rest breaks because his fatigue would render it unsafe for him to continue driving . CPC assured Mr. Carter that it intended to comply with the law in this regard and would not require him, to drive excessively fatigued.

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Thus, CPC knew Mr. Carter had verbally claimed that he often got sleepy while performing his driving duties, and therefore needed frequent rest breaks, and that Mr. Carter had referred to the DOT when stating he was entitled to such breaks. Mr. Carter, told CPC regional manager, Mr. Covert that he ran late because he got sleepy and had to pull over to rest. In another conversation, about Mr. Carter's late arrivals, Mr. Carter asked CPC Division manager Ken Pruitt over the phone, whether Mr. Pruitt was saying he couldn't stop if he was sleepy. Mr. Carter said, that he was allowed by the DOT to take rest breaks, if he needed them. In this conversation with Mr. Pruitt, Mr. Carter also accused CPC of not caring about

safety and threatened to report CPC. Mr. Pruitt testified, it was September 9, 2011 when Complainant had these conversations with him and Mr. Covert.{Tr.,pp.249-250.}

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The delays were unexplained in that Mr. Carter did not call the dispatcher or Mr. Gordon during his shift to say he was stopping for a rest break because he was fatigued. Mr. Carter's claim to have needed rest breaks for this reason came up only after the fact, when CPC management confronted him about the delays.

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Logs from September 26, 2011 (Exhibit X) and September 28,2011 (Exhibit Y) evidence the delays on these two shifts during the week of September 25,2011. These logs were generated automatically by an onboard computer with a GPS system that provides information on where the truck was located whenever it stopped. When the log shows him on duty, rather than driving, at locations other than Columbia or Jacksonville, this is evidence Mr. Carter chose to take a personal break from driving (except for the possibility of a fuel stop, which CPC could identify from the manifest on which he recorded his time and odometer readings. This evidence shows that CPC knew, these were fatigue breaks .

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When Mr. Covert questioned Mr. Carter about the above September 28 breaks. Mr. Carter had no satisfactory explanation. Mr. Carter said, he didn't remember why he stopped; that he must have been tired or needed to go to the bathroom. The date was October 4, 2011 the day before Complainant was fired, when Mr. Covert questioned him about September 26th and 28th. Complainant told Mr. Covert that he was fatigued and stopped and took a rest break.

Page 13 &14:

Mr. Carter's termination was definitely not based solely on his excessive breaks and delays, as shown by the detailed review of Mr. Carter's extremely long and unsatisfactory disciplinary record above. However, these break and delays were a significant factor.

The ALJ said he found that Complainant engaged in one instance of protected activity on July 15, 2011. The evidence shows that Complainant engaged in protected activity on July 15, 2011, on September 9.2011, and on October 4,2011. The fourth circuit said, in fact, CPC and Carter agreed that Carter mentioned

fatigue breaks during a telephone conversation with a supervisor, about one month before he was fired, but the ALJ inexplicably found that fatigue breaks were never mentioned during the conversation. Given CPC's concession that Carter mentioned fatigue breaks to his supervisors when questioned about his delays, we conclude that the ALJs finding that Carter never told his supervisors , that his delays were caused by such breaks is not supported by substantial evidence. Furthermore, because the ALJ's find that Carters delays were not truly caused by fatigue breaks rested on this factual error, we also conclude that finding is not supported by substantial evidence.

There is no legitimate disciplinary letters between the Complainant protected activity on July 15, 2011, September 9, 2011, and October 4, 2011. This evidence shows that retaliation was the true reason for Complainant termination. The only disciplinary letter between Complainant first protected activity and his last protected activity is dated September 29, 2011, but happened on September 21, 2011. First, there is no policy saying that Complainant has to answer his cell on his day off, or be home on his day off. Complainant never in his entire time employed with respondent ever received a work assignment from a manager. Driver received dispatch from a dispatcher on a pre recorded message from a driver call in line. This evidence shows that, Respondent was trying to cover their tracks and come up with a reason for termination.

Complainant needs only to prove that his protected activity is a contributing factor in Respondent's decision to terminate his employment. (See Fleeman V. Nebraska Pork Partners et al. ARB Case Nos.09-059,09-096, decided May. 28 2010). If Complainant's protected activity, played any part in Respondent's decision to terminate Complainant's employment, then Complainant must prevail under the STAA. Respondent does not dispute that Complainant's fatigue breaks, played a part in its decision to terminate his employment. In fact, Respondent's, specifically state that breaks and delays were a significant factor, in its reason for termination.

Complainant can satisfy every element of a prima facie case. Complainant made complaints to management regarding Violations of 49 C.F.R & 392.3. Complainant also made refusals to drive where in actual violations of 49 C.F.R. & 392.3 would have occurred, but for his refusal, and made refusals based on a reasonable apprehension of serious injury to himself and to members of the public. Respondents state that they were aware of Complainant's refusals and complaints. Complainant's protected refusals resulted in fatigue breaks which Respondent's state played a role in their decision to terminate his employment.

The Fourth Circuit said, we grant Carter's petition for review and remand for the Secretary to reconsider Carter's refusal to drive claim against CPC in light of CPC's statements that Carter reported taking fatigue breaks to CPC management when asked about his delays and that Carter's delays were a factor in his termination.

REASONS FOR GRANTING THE PETITION

The questions presented are exceptionally important. This situation affects everybody in the United States. At some point and time, everyone is going to be on a roadway or highway at the same time as a commercial vehicle. The highway is the most deadly place on the planet. More people are killed on the highway, than any other place on Earth. Congress has entrusted the Secretary with the duty of administering the STAA. The STAA charges the Secretary with protecting the interests of the drivers and public safety. The ALJ and the ARB clearly intentionally continue to overlook evidence even after the Fourth Circuit brought it to their attention in the 17-1095 Remand. Since the Secretary failed to do their duties administering the STAA that Congress entrusted them with demands this Court's review. Truck drivers all over the United States need to know if they do the right thing by not driving fatigued or ill and risking the lives and safety of the innocent public, the courts will back them. So this court's review is a must.

THERE IS A DISAGREEMENT IN THE CIRCUITS

This case is similar in many details to Yellow Freight Systems V. Reich 8F 3d 980(4th Cir. 1993) & Yellow Freight System V. B Reich 27 F3d 1133 (sixth cir. 1994). Had the secretary of Labor applied the same analysis that it did in the two cases above, in this case, then the Respondents would have been found to have violated the STAA like the two cases above. The Supreme Court succinctly described the effect and purpose of section 405 of the STAA in Brock V. Roadway Express, INC, 481 U.S. 252, 1075S.CT.1740, 95 L.Ed.2d 239 (1987). This court's intervention is necessary to resolve the disagreement in the Circuits and to reaffirm the STAA.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Roderick A. Carter

P.O Box 90237

Columbia, SC 29290

(803) 361-6499

Pro se