Case No. 20-5828

IN THE SUPREME COURT OF THE UNITED STATES

RODERICK CARTER

Petitioner,

v.

CPC LOGISTICS, INC., CPC MEDICAL PRODUCTS, LLC, AND HOSPIRA FLEET SERVICES, LLC

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT CPC'S BRIEF IN OPPOSITION

Respectfully Submitted,

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I. QUESTIONS PRESENTED FOR REVIEW

A. When an employer admits to a violation in writing to the federal government, should they be held accountable to their words? (Pet. Brief at p. 2.)

B. When a protected activity is made, is it protected, or is the bar so low where it can be disrupted by an ALJ simply saying that person was not telling the truth when they made a complaint? (Pet. Brief at p. 2.)

C. Once a protected activity is established, can an ALJ ask for it to be interpreted to mean something different than the protected activity? (Pet. Brief at p. 2.)

II. PARTIES INVOLVED IN THIS CASE

The following individuals or partnerships are parties involved in this case:

Roderick Carter, *pro se* Petitioner

CPC Logistics, Inc., Respondent

CPC Medical Products, LLC

Hospira Fleet Services, LLC

United States Secretary of Labor

III. CORPORATE DISCLOSURE STATEMENT

CPC Logistics, Inc. does not have a parent company. CPC Logistics, Inc. is not a publicly held corporation, and no publicly held company owns more than 10% of the stock of CPC Logistics. No other publicly held corporation or entity has a direct financial interest in the outcome of this litigation.

CPC Medical Products, LLC is a single member LLC with CPC Services, Inc. being the sole member. CPC Services, Inc. is a wholly-owned subsidiary of CPC Logistics, Inc. Neither CPC Medical Products, LLC nor CPC Services, Inc. is a publicly held corporation, and no publicly held company owns more than 10% of the stock of CPC Medical Products. No other publicly held corporation or entity has a direct financial interest in the outcome of this litigation.

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VII. STATEMENT OF JURISDICTION

The Department of Labor had jurisdiction over this case pursuant to the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(b), and its implementing regulations, 29 C.F.R. Part 1978.

The Fourth Circuit Court of Appeals had jurisdiction over this appeal pursuant to 49 U.S.C. § 31105(d) and Rule 4(a) of the Federal Rules of Appellate Procedure.

The United States Supreme Court has jurisdiction over the petition for writ of certiorari under 28 U.S.C. § 1254(1). This petition for writ of certiorari is taken from the final order and judgment of the United States Court of Appeals for the Fourth Circuit, entered on April 7, 2020. The Fourth Circuit denied Mr. Carter's Petition for Rehearing or Rehearing en banc on June 9, 2020. Carter's petition for writ of certiorari was docketed by the United States Supreme Court on July 29, 2020.

VIII. STATEMENT OF THE CASE

Petitioner, Roderick Carter ("Carter"), filed this suit against Respondents, CPC Logistics, Inc. and CPC Medical Products, LLC

(collectively "CPC"), claiming violations of the Surface Transportation Act of 1982, as amended, 49 U.S.C. § 31105 *et seq*.

A. **Summary of the Facts.**

CPC hired Carter on February 27, 2007, as a tractor-trailer driver for a six-person relay crew based in Columbia, South Carolina. (Appx. p. 6.) The crew transported shipping containers loaded with medical equipment from Rocky Mount, North Carolina, and Jacksonville, Florida, for CPC's customer, Hospira, Inc. (Appx. p. 6.) An hour before the end of a trip, one driver would call the relay driver with his estimated time of arrival, and the other driver would be ready and available to drive the next leg of the route. (Appx. pp. 6-7.) The goal was to maintain a synchronized schedule in order to keep Hospira's Rocky Mount production plant operational. (Appx. p. 7.) CPC drivers were required to call in if they experienced significant delays in driving their route, and Carter was aware of this policy. (Appx. p. 7.)

Carter began driving the Columbia-Rocky Mount leg, but CPC subsequently issued him numerous warning letters about logging errors, violations of CPC's call in procedures, and an accident in June 2008 found to be Carter's fault. CPC issued Carter additional warning letters over the next two years, including a five-day suspension in August 2010 when CPC discovered numerous discrepancies between the time entries in Carter's hours-of-service logs and the time he recorded on the trip reports he submitted to CPC's payroll department. (Appx. p. 7.)

In August 2010, CPC assigned Carter to the Columbia-Jacksonville leg and teamed him with Kelvin Gordon, who drove the Columbia-Rocky Mount leg. (Appx. p. 7.) The average round trip driving time for each of these legs ranged between 10 and 13 hours. (Appx. p. 7.) Gordon repeatedly complained to Ron Covert, CPC's Regional Manager, about Carter's excessive delays and lateness reporting to work. (Appx. p. 7.) Covert kept a list of the delays reported by Gordon between June 27 and September 28, 2011. This list confirmed that Carter was taking up to 14 hours to make the same drive that took Gordon 11 to 12 hours to complete. (Appx. p. 7.) Carter's excessive hours delayed Gordon's start time by about an hour each day, so that by the end of the week Gordon could not start his run until 7:00 to 9:00 p.m., instead of his scheduled 4:00 p.m. start time. (Appx. p. 7.) Gordon also complained that Carter would not be at the terminal when Gordon arrived and was frequently up to three hours late to meet Gordon, despite Gordon providing Carter with his estimated time of arrival. (Appx. p. 7.)

In August 2011, Gordon talked to Carter about his concerns. During that conversation, Carter "started to yell and curse" and said Gordon had done him "a favor" by complaining about his delays because "now I'm going to take my breaks and take my time coming back." (Appx. p. 8.) Gordon sent an email to Divisional Manager Kenneth Pruitt, relaying his conversation with Carter. (Appx. p. 8.) Further, in September 2011, Gordon complained to Covert that Carter was "taking over an hour in breaks on the way down

and the same on the way back" and he asked Covert to "[p]lease intervene." (Appx. p. 8.) Covert reviewed Carter's logs and found prolonged periods of time when Carter was on duty but not driving. When Covert asked Carter about this time he spent not driving, Carter responded that he "probably had to go to the bathroom" or "maybe he had not been feeling well." (Appx. p. 8.) Carter did not relate his breaks to protected fatigue breaks.

A comparison of the run times between Carter and the other two Columbia-Jacksonville drivers during July, August and September, 2011 indicates Carter took significantly longer than the other drivers to complete his run. (Appx. p. 26.) Further, after Gordon complained, Carter began both delaying his start times and extending his run, whereas previously he had only been delaying his start times. (Appx. p. 27.) The ALJ concluded Carter had purposefully extended his run times to spite Gordon. (Appx. p. 27.)

During his employment, Carter occasionally informed his supervisors that he was taking breaks from driving. On July 15, 2011, in an email exchange between Covert and a CPC dispatch supervisor, Covert told the dispatcher that Carter reported he was delayed because he wasn't feeling well and was entitled to a break. (Appx. p. 8.) In its statement of position to OSHA, CPC indicated Carter had mentioned fatigue breaks to two supervisors when questioned about his performance, and that Carter had claimed he often got sleepy while driving. (Appx. p. 9.) The statement of position also said that Carter had asked Pruitt if he could stop driving if he

was sleepy, and Pruitt responded that Carter was allowed by the Department of Transportation to take rest breaks if he needed them. (Appx. p. 9.) Pruitt, however, also told Carter that it was Carter's responsibility to get proper rest, and if he repeatedly needed such frequent and extensive rest breaks he must not be getting adequate off-duty rest. (Appx. p. 26.)

After Covert sent a general memorandum to all Columbia drivers on August 6, 2011, about reporting to work within an hour of the estimated time of arrival of their partner; taking too frequent, extended rest breaks; making late deliveries; and ignoring the 2:00 a.m. Monday starting time, Carter's turnaround time got worse. (Appx. p. 9.) A week before his discharge on October 5, 2011, Covert issued Carter a disciplinary letter regarding his failure to be available for work assignments. (Appx. p. 9.)

Pruitt compared Carter's manifest times with the logs of two other drivers on the team for the three-month period of July, August, and September 2011. Pruitt then recommended to his supervisor, Harold Wallis, Jr., vice president of CPC's eastern operations, that CPC fire Carter. (Appx. p. 9.) Wallis reviewed Carter's disciplinary record and Gordon's complaints about excessive delays, including a warning letter concerning Carter's falsification of his logs. (Appx. p. 9.) Carter's disciplinary record showed more than 25 violations for which he was disciplined within the past 30 months. (Appx. pp. 9-10.) Wallis concluded the progressive disciplinary process had failed to correct Carter's insubordination toward his managers

and dispatchers, his violation of CPC's call-in policy, or his excessive unexplained delays in driving the Columbia-Jacksonville run. Wallis approved the termination of Carter's employment. (Appx. p. 9.) On October 5, 2011, CPC issued Carter a letter terminating his employment due to his "continued poor job performance and insubordinate behavior." The letter stated Carter had "continuously delayed runs without reasonable explanation" and had "shown a pattern of insubordination." (Appx. pp. 9-10.)

B. **Procedural History.**

Following his termination on October 5, 2011 for continued poor job performance and insubordinate behavior, Mr. Carter filed a complaint with the United States Department of Labor on December 22, 2011. On August 29, 2013, CPC filed a motion for summary decision on this Complaint. On January 15, 2014, Administrative Law Judge ("ALJ") Alan Bergstrom denied the motion, but granted it in part as to Carter's allegations of protected activities other than taking fatigue breaks. On February 28, 2014, ALJ Paul C. Johnson, Jr. held a hearing. On April 16, 2015, ALJ Johnson denied Carter's complaint.

On April 28, 2015, Carter filed a Petition for Review with the Administrative Review Board ("ARB"). On December 22, 2016, the ARB affirmed ALJ Johnson's dismissal. On January 17, 2017, Carter filed a Notice of Appeal with the United States Court of Appeals for the Fourth Circuit.

In an opinion issued on September 5, 2017, the Fourth Circuit granted

Carter's Petition for Review and remanded the case to the ALJ in light of CPC's statements that Carter reported taking fatigue breaks to CPC management, and that Carter's delays were a factor in his termination. (*Carter I.*) The Court found that while "the ALJ provided several good reasons for finding that Carter's testimony was generally unbelievable . . . we conclude that the ALJ's particular credibility finding on Carter's claim that he reported the need to take rest breaks to his supervisors does not enjoy the same record support." (Appx. p. 21.)

On August 8, 2018, ALJ Johnson held on remand that CPC did not violate the STAA in terminating Carter's employment. In his decision, the ALJ discussed three reasons for concluding that regardless of what Carter may have told CPC supervisors, Carter's repeated, excessive delays were not caused by protected fatigue breaks:

1. It is "unbelievable that Mr. Carter suffered from fatigue on nearly every run he made," and "Mr. Carter routinely took significantly longer to complete his runs than other drivers." (Appx. p. 26.)

2. "Mr. Carter purposely extended his run times to spite Mr. Gordon," rather than due to fatigue, as he claims. (Appx. p. 27.)

3. Carter's statements about fatigue breaks "were merely *post hoc* excuses [with] no probative weight." (Appx. p. 28.)

The ALJ concluded Carter's delays were not caused by protected fatigue breaks based on: Carter's failure to call in to report his near-daily

delays of more than an hour, as required by CPC; Carter's statements to supervisors about his long-run times being caused by fatigue breaks were not contemporaneous with actual bouts of fatigue; and the ALJ's finding of Carter's general lack of credibility. (Appx. 28-32).

On August 21, 2018, Carter filed a Petition for Review by the ARB. On September 26, 2019, the ARB upheld the ALJ's Decision and Order on Remand. On October 10, 2019, Carter filed a Notice of Appeal with the United States Court of Appeals for the Fourth Circuit.

In its April 7, 2020 opinion, the Fourth Circuit held the ALJ properly considered the deficiencies in his initial decision that were highlighted in the opinion granting Carter's petition for review.[1] (*Carter II*.) The Court held substantial evidence supported the finding that there was one event when Carter engaged in protected activity, but the event was not a causal factor in Carter's discharge from employment. The Court also held that substantial

[1] In his petition, Carter repeatedly argues the Fourth Circuit ruled that taking fatigue breaks was a factor in his termination. Carter misstates the Fourth Circuit's holding. In its first opinion, the Fourth Circuit held the ALJ's finding that Carter never told his supervisors that his delays were caused by fatigue breaks was not supported by substantial evidence, and remanded the case 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. *See Carter v. CPC Logistics, Inc.,* 706 Fed. Appx. 794 (4th Cir. Sept. 5, 2017) (unpublished opinion).

evidence supported the ALJ's adverse credibility finding and, with the exception of one event, the finding that Carter's delays were not due to reported fatigue breaks. Lastly, the Court held there was ample evidence that Carter was discharged due to several factors, none of which involved a protected activity. The Court denied Mr. Carter's petition for rehearing on June 9, 2020. Mr. Carter filed his petition for writ of certiorari with the Supreme Court on July 29, 2020.

IX. REASONS FOR DENYING THE WRIT OF CERTIORARI.

Supreme Court Rule 10 states that review on a writ of certiorari is a matter of judicial discretion, and will be granted only for compelling reasons. Such reasons may include when a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; a United States Court of Appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power. *See* Supreme Court Rule 10. In addition, the rule states, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

A. Mr. Carter's Petition for Writ of Certiorari Does Not Present an Issue for Review Under the Guidelines of Supreme Court Rule 10.

In the section of Carter's petition labeled "Question(s) Presented," Carter questions the factual and credibility findings of the court and administrative tribunals below. He frames the issues as "[w]hen an employer admits to a violation . . . should they be held accountable"; [w]hen a protected activity is made . . . can [it] be disrupted by an ALJ simply saying that person was not telling the truth"; and "[o]nce a protected activity is established, can an ALJ ask for it to be interpreted to mean something different than the protected activity." Pet. Brief at p. 2. Carter sums his argument up by stating "[t]he Complainant shows that the ALJ new findings are not supported by substantial evidence." *Id.* at 8. In the ensuing pages of his brief, Carter launches an attack on several factual determinations by the ALJ. *Id.* at 8-12. These issues do not present any questions of the type described by Rule 10, but rather consist solely of criticisms by Carter of the ALJ's factual findings, credibility determinations, and a misapplication of the substantial evidence standard of review. This is precisely the kind of case Rule 10 seeks to exclude from writs of certiorari.

Mr. Carter's entire petition consists solely of arguments that the ALJ erroneously interpreted the facts to find in favor of CPC, and asks this Court to review the facts and ALJ credibility determinations because he believes the facts merit judgment in his favor. At no point does Carter argue the

Fourth Circuit elucidated an erroneous standard of law in arriving at its decision. He repeatedly argues the ALJ, the ARB, and the Fourth Circuit incorrectly determined his protected activity was not a causal factor in his termination.

This Court does not grant certiorari to determine whether a lower court incorrectly interpreted the facts of the case. *See United States v. Johnston*, 268 U.S. 220, 227 (1925); *Sentilles v. Inter-Caribbean Shipping Corp.,* 361 U.S. 107, 110 (1959). For these reasons, Mr. Carter's request for reevaluation of the factual findings and credibility determinations in this case does not merit Supreme Court review.

B. **There is No Split of Authority Between the Circuits.**

In addition, this case does not merit Supreme Court review because there is no split of authority between the circuits on the stated rule of law to be applied under the STAA, nor is the Fourth Circuit's decision in this case (*Carter II*) in conflict with the decision of another circuit on an important matter.

Carter cites to two cases, *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994), and *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980 (4th Cir. 1993). Pet. Brief at p. 13.

While Carter argues the Fourth Circuit in *Carter II* would have reached the opposite result if it had "applied the same analysis" as the courts in each *Yellow Freight* decision, he does not specifically attribute this to the application of conflicting standards of law. (Pet. Br. p. 13; Appx. pp. 1-4). In

fact, he does not even state the standard of law that he would maintain the Fourth Circuit misstated in *Carter II*. Carter's disagreement with the Fourth Circuit's decision is based solely on an alleged erroneous application of the facts as opposed to the application of a legal standard that is in conflict with the decision of another circuit.

All three decisions clearly applied consistent and identically stated standards of law relating to the protections afforded employees under the STAA.

The Fourth Circuit in *Carter II* based its decision on the application of the definition of a *prima facie* case, and on the standard of review under the STAA.

Carter II enumerated the *prima facie* standard as requiring the employee to show that "(1) he engaged in protected activity, (2) his employer took adverse employment action against him, and (3) there is a causal relationship between his protected activity and the adverse employment action." *Carter II* at p. 3 (Appx. at p. 3). Similarly, the Sixth Circuit in *Yellow Freight* utilized the same three-part test. *See Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1138.

In describing the standard of review, the court in *Carter II* quoted directly from its decision in *Yellow Freight*: "When reviewing the Secretary's determination, we are bound by his legal conclusions unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law, and by his factual findings if they are supported by substantial evidence." *Carter II* at 2 (Appx. p. 2), *quoting Yellow Freight v. Reich,* 8 F.3d 980, 984 (4th Cir. 2009). Thus, the Fourth Circuit axiomatically applied the same standard in *Carter II* as it did in its *Yellow Freight* decision. Similarly, the Sixth Circuit in its *Yellow Freight* decision also applied an identically phrased substantial evidence standard. *See Yellow Freight System, Inc. v. Reich*, 27 F.3d at 1138.

Thus, while Carter takes issue with the fact the Fourth and Sixth Circuits found the employer liable in their respective *Yellow Freight* decisions but did not find CPC liable in *Carter II*, the contrary decision is clearly not attributable to the application of any different or conflicting statement of the law. Rather, Carter's argument is merely another iteration of his opinion that the Fourth Circuit and Department of Labor made erroneous factual findings and misapplied (as opposed to misstated) the legal standards delineating the protections afforded to employees under the Surface Transportation Assistance Act (STAA).

C. The Fourth Circuit Did Not Decide an Important Federal Question in Conflict with a State Court of Last Resort.

Carter does not argue that the Fourth Circuit decided an important federal question in a way that conflicts with a decision by a state court of last resort, so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power.

D. The Fourth Circuit's Decision Does Not Depart from the Accepted and Usual Course of Judicial Proceedings.

Similarly, Carter does not argue that the Fourth Circuit so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power.

For these reasons, Mr. Carter's petition for writ of certiorari does not merit review under Supreme Court Rule 10.

X. CONCLUSION

In conclusion, CPC Logistics, Inc. and CPC Medical Products, LLC submit the Administrative Law Judge, the Administrative Review Board, and the Fourth Circuit Court of Appeals did not apply any standards of law that are inconsistent with any corollary standard of law stated by any other circuit, nor did the Fourth Circuit decide an important federal question in conflict with a state court of last resort or so far depart from the accepted and usual course of judicial proceedings, or sanction such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power.

Instead, Carter's argument to this Court is premised entirely on his disagreement with the factual conclusions and credibility determinations of the ALJ. There is no compelling issue in this case meriting Supreme Court review. For these reasons, it is respectfully submitted that this Court should deny Mr. Carter's petition writ of certiorari.

Respectfully submitted,

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