No. 24-1150

In The

SUPREME COURT OF THE UNITED STATES OF AMERICA

CLYDE CARTER JR.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR;
MARTIN WALSH, In his official capacity as Secretary of The United States Department of Labor

and,

BNSF RAILWAY CO.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Clyde Carter, Jr., 7222 College, Kansas City, Missouri 64132, Tel. (816) 745-7431, Cartergirl1966@gmail.com

Pro se Petitioner

QUESTION PRESENTED

Petitioner, Clyde Carter, Jr., filed a complaint with the Department of Labor alleging retaliatory discharge by his employer BNSF Railway Company for wrongfully terminating him twice in violation of the protection provisions of the Federal Railroad Safety Act, 49 U.S.C. § 42121(b)(2)(B)(i)(ii)(iii), for having notified BNSF of an on the job injury.

Following hearing before the Department of Labor, Office of Administrative Law Judges, the Office found Carter had proven BNSF had violated the protection provisions of the Act and entered an award in favor of Carter.

BNSF appealed to the Administrative Review Board which affirmed the Award but on slightly different grounds and BNSF appealed to the Eight Circuit Court of Appeals which set aside the judgment and remanded the complaint for further findings.

Upon remand, the Office of Administrative Law Judges dismissed Petitioner's complaint finding Carter had been dismissed on the first occasion by someone who knew nothing of Carter's on the job injury and, the second time due to a mistake and so, retaliation could not have been a factor in either dismissal.

On appeal to the Administrative Review Board, the Board affirmed the dismissal of Carter's complaint by the Office of Administrative Law Judges but on different grounds. The Board found with regards to both dismissals Carter had not proven the elements of his complaints by a preponderance of evidence pursuant to the Department of Labor, Code of Federal Regulations 29 § 1982.109(a).

Carter appealed the dismissal by the ARB to the 8th Circuit Court of Appeals alleging – in part – the Board erred finding he failed to prove his complaint(s) by a preponderance of evidence pursuant to 29 Code of Federal Regulations § 1982.109(a), rather than the correct burden of proof of prima

facie evidence pursuant to the employee protection provisions of the Federal Railroad Safety Act, 49 U.S.C. § 42121(b)(2)(B)(i)(ii)(iii). The 8th Circuit sustained the ARB dismissal of Carter's complaint found Complainant finding Carter had failed to prove the elements of his complaint(s) by a preponderance of evidence as required by the Code of Federal Regulations § 1982.109(a).

The question presented is:

1. In consideration of Loper Bright Enterprises v. Raimondo, 603 U. S. ___ (2024), in a whistleblower complaint is the burden of proof - in the protection provisions of the Federal Railroad Safety Act - a prima facie burden pursuant to 49 U.S.C. § 42121(b)(2)(B) (i)(ii)(iii), or preponderance of evidence pursuant to 29 Code of Federal Regulations § 1982.109(a).

LIST OF ALL PARTIES

Petitioner (plaintiff-appellant below) is Clyde Carter, Jr., The Respondent (defendant-appellee below) is the United States Department of Labor and its Secretary Bienvenido E. Laguesma, and Intervener, BNSF Railway Co.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

BNSF Ry. Co. v. U.S. Dep't of Labor, 867 F.3d 942 (8th Cir. 2017).

Clyde Carter v. U.S. Dep't of Labor, 108 F. 4th 1028 (8th Cir. 2024). And,

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In the matter, Petitioner Clyde Carter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

In this matter, the panel opinion of the Eighth Circuit Court of Appeals is reported at 108 F.4th 1028 (8th Cir. 2024), and is reproduced in the Appendix beginning at 1a. The opinion of the United States Department of Labor Board of Review is reported at Agency Case Number(s): 2021-0035 2013-FRSA-00082, and is reproduced in the Appendix beginning at 15a.

JURISDICTION

The date of the decision sought to be reviewed is September 25, 2024. Jurisdiction is conferred under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

- 49 U.S.C. Sec. 20109 (d)(2)(A)(ii)(A) In general. Any action under paragraph (1) shall be governed under the rules and procedures set forth in section 42121(b), including:(i) Burdens of proof. — "Any action brought under (d)(1) [1] shall be governed by the legal burdens of proof set forth in section 42121(b)." 49 U.S.C. § 42121(b)(2)(B) (i). Required showing by

complainant. — "The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint."

- 29 Code of Federal Regulations § 1982.109(a): "A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

STATEMENT OF THE CASE

A. Legal Framework

Congress passed the Federal Railroad Safety Act - 49 U.S.C. Sec. 20109 - out of concern that railroads were not sufficiently concerned with the safety of their equipment resulting in horrific damages to lives and property to those

living along the rail lines as well as release of toxic chemicals. During their investigation into railroad safety the Congress learned that railroad workers – like Mr. Carter - were intimidated by managers who threatened workers with negative employment action if they reported unsafe conditions including on the job injuries.

To make the railroads safe for the public, the Congress concluded the railroad workers needed to be encouraged to and able to report unsafe railroad conditions without fear of employment reprisals by their managers and so, passed the Federal Railroad Safety Act - 49 U.S.C. Sec. 20109. The FRSA contains employee protection provisions for employees that who have come to be called "Whistleblowers." [49 U.S.C. Sec. 20109 (d)(2)(A)(ii)(A)].

In a FRSA complaint, the complainant files a complaint with the Department of Labor and the complainant's and is provided a hearing before the Office of Administrative Law Judges of the Department of Labor and the FRSA has

adopted the burden shifting framework contained in 49 U.S.C. Sec. 20109 (d)(2)(A)(i)(ii)(iii)(A), wherein a complainant is required to prove they suffered negative employment action as a result of notifying the railroad of an on the job injury by a prima facie amount of evidence and if they do so, the burden of proof then shifts to the railroad to prove by clear and convincing evidence that the notification of injury was not a factor in the negative employment action.

The Department of Labor has created and codified 29 Code of Federal Regulations § 1982 titled,

> "PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE NATIONAL TRANSIT SYSTEMS SECURITY ACT AND THE FEDERAL RAILROAD SAFETY ACT."

Under subsection 109(a) of the act "Decision and orders of the administrative law judge," the act states, "A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

The Department of labor's procedures for handling of retaliation complaints under the FRSA do not apply to a FRSA complaint for the reason the complaint procedures set out in the FRSA are clear and do not require the Department of Labor's procedures Code to enforce complaints and, if so applied substantially change the protection the Congress intended the railway workers to enjoy so as to encourage them to notify of unsafe conditions. By increasing the complaint's burden of proof substantially from prima facie to preponderance of the evidence the intent of Congress in passing the FRSA has been destroyed.

B. Factual Background

Petitioner was injured August 30, 2007, while working for BNSF Railway when a large piece of steel flew out of a drop-press and hit him in the shoulder causing injury that required surgery, months of medical treatment and loss of work. He immediately notified BNSF of his injury the same day he was injured and later – due to disparate treatment by

BNSF management - filed a FELA action in State District Court of Missouri. Subsequently, he was warned by other employees that now management was watching him and he had a target on his back for reporting he was injured, and further that as BNSF had incentivized management bonuses with the number of on the job injuries management would be out to get him so as to intimidate other workers from notifying BNSF of dangerous conditions or injuries. After his injury, Carter experienced troublesome behavior from managers including being assigned dirty and hard work typically assigned to apprentices and not journeymen, and he took a job far out in the railyard that most carmen did not care for just so he could avoid management.

As Carter's FELA lawsuit approached trial, BNSF lawyers deposed him for a second time, January 12, 2012 and a manager named Sherrill witnessed his manager – Thompson - reviewing the FELA discovery and they both discussed the documents and what the BNSF defense

attorneys had told Thompson concerning Carter's answers to the employment application of 2005.

On March 20, 2012 a few weeks after the FELA deposition, Manager Sherrill set up an onsite hearing concerning what he and manager Thompson believed to be dishonesty on the part of Carter concerning Carter's answers to the appellation questions concerning a question about Carter's military service, "...did you receive a dishonorable discharge?", to which Carter answered "No." BNSF alleged this was a lie because the FELA discovery revealed he had received a "other than honorable" discharge. Carter maintained this was a truthful answer. There were also answers to medical questions on the employment application BNSF alleged were dishonest mostly concerning a scope procedure to Carter's knee that Carter did not consider surgery (so did the BNSF medical expert at thed first hearing), which BNSF considered untruthful.

There was a second discharge hearing held February 9, 2012 concerning BNSF two allegations of dishonesty with regards to Carter claiming he had clocked in on time given BNSF policy although he was late but due to activity in the railyard was not. The hearing ALJ found confusion and inconsistencies in all BNSF witnesses' testimony and a timekeeper testified Carter was the only employee he had ever seen who was discharged for the timing in allegations brought against Carter by management.

On April 5, 2012 BNSF manager Sherrill dismissed Carter with regards to alleged dishonesty concerning his answers to questions on the BNSF employment application and to a medical questionnaire in 2005. On April 16, 2012 BNSF dismissed Carter a second time with regard to the disputed allegations concerning his timing in for work alleging he was dishonest.

C. Proceedings Below

Petitioner, Mr. Carter, filed a complaint with the Department of Labor pursuant to the provisions of the FRSA complaining he was terminated because he had notified his employer, BNSF Railway Company, of an on the job injury.

Pursuant to the FRSA he was afforded an in person hearing before an Office of Administrative Law Judges Administrative Law Judge. Following that hearing the ALJ found BNSF had terminated Mr. Carter on two separate occasions in part due to his notification of injury and awarded Carter damages and reinstatement of employment. BNSF appealed the decision to the Administrative Review Board of the Department of Labor which essentially affirmed the award and BNSF appealed to the 8th Circuit Court of Appeals. The 8th Circuit Court of Appeals did not agree with a "chain of events" evaluation of the complaint used by the Administrative Law Judge and remanded the complaint to

the Board of Review for further findings including credibility of witnesses. Upon remand to the OALJ, the ALJ incorrectly found Carter had been terminated by a party who did not know of Carter's injury so, Carter's notification of injury could not have been a factor in his dismissal and, the second termination concerning timing in to work, was just a mistake by management and dismissed his complaint.

Upon review by the ARB the board affirmed the dismissal of Carter's complaint by the OALJ but on different grounds given the OALJ's finding of who dismissed Carter was factually incorrect. The ARB found that on both dismissals Carter had not proven by a preponderance of evidence that his notification of injury was a factor in his terminations, essentially finding the matter was nothing more than a he said they said situation and so, Carter failed to prove his complaint by preponderance of evidence.

Upon appeal to the 8th Circuit Court of Appeals, the Panel in consideration of the Department of Labor's Code of

Federal Regulations Act 29 § 1982, subsection 109 (a), and found Carter had failed to prove the elements of his claim by a *preponderance of the evidence* - as required by the Code - that he was terminated at least in part for having notified BNSF of an injury. (Appendix pg. 7, Opinion pg. 7 footnote #2.).

Carter filed a motion for Rehearing or Rehearing in Banc Review stating that rehearing was necessary to resolve a conflict with the United States Supreme Court Opinion of, Loper Bright Enterprises et al, v Raimondo, Secretary of Commerce et al. 603 U. S. ____ (2024), and The Panel's Opinion that the Code of Federal Regulations required a FRSA complainant to proof his complaint by a preponderance of evidence whereas the FRSA clearly sets out the burden of proof for a complainant is prima facie evidence and, the Panel gave deference to Department of Labor's Act 29 Code of Federal Regulations § 1982, subsection 109 (a), and failed to follow the hearing procedure of the FRSA, 49 U.S.C. §

42121(b)(2)(B) (i) and hearing procedure of 49 U.S.C. Sec. 20109 (d)(2)(A)(ii)(A), thereby damaging Petitioner and the FRSA.

The Eighth Circuit Court of Appeals denied Petitioner's Motion For Rehearing September 25, 2024. (Appendix pg.).

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted For The reason the Decision Below Conflicts with This Court's opinion in Loper Bright Enterprises et al, v Raimondo, Secretary of Commerce et al. 603 U. S. ____ (2024), and Chevron Deference Precedents

A. Contrary to this Court's Precedents, The Eight Circuit Applied The Department of Labor Rules of Procedure in Deference To Chevron And Not The Rules of Procedure Of The Federal Railroad Safety Act

The Court below chose to use of the Department of Labor Rules of Procedure, rather than the rules of procedure written into the FRSA by the Congress, and so, ruled against Petitioner stating he had failed to prove his complaint by a preponderance of evidence. The use of the procedures in the

Department of Labor Rules of Procedure was obviously in deference of Chevron which this Court reconsidered and struck down in Loper Bright Enterprises et al, v Raimondo. (603 U. S.___ 2024).

The FRSA, 49 U.S.C. § 42121(b)(2)(B) (i) and incorporated hearing procedure of 49 U.S.C. Sec. 20109 (d)(2)(A)(ii)(A), clearly set out the procedure for a hearing a FRSA Whistleblower complaint and for the reason the procedure set out in the Act by the Congress in enacting the Act is clear there is no reason for the Department of Labor or the 8th Circuit Court of Appels to use the Department of Labor Rules of Procedure.

At the time Petitioner's appeal was pending before the 8th Circuit Court of Appeals this Court's opinion in Loper v. Raimondo, had not been handed down however, after oral argument the Loper decision was handed down and Petitioner plead Loper in his motion for review, to no avail. So, it appears the 8th Circuit was

steadfast in its continued use and deference to, the Department of Labor's Act 29 Code of Federal Regulations concerning a complainant's burden of proof (preponderance of the evidence).

Here the 8th Circuit use of the Department of Labor's Code of Federal Regulations 29 § 1982, subsection 109 (a), incorrectly requiring Petitioner to prove his complaint by preponderance the evidence rather than the prima facie burden set forth in the Federal Railroad Safety Act, 49 U.S.C. § 42121(b)(2)(B) (i) and hearing procedure of 49 U.S.C. Sec. 20109 (d)(2)(A)(ii)(A), shows a deference to the Federal Code of Regulations. Petitioner historically has argued his burden of proof of the elements of his complaint was prima facie, that argument has been met with silence from the Office of Administrative Law Judges to the Administrative Review Board to the 8th Circuit Court of Appeals.

B. The Eighth Circuit's Use of The Department of Labor Rules of Procedure is Against This Court's Opinion in Loper And Against The Intent of Congress When it Passed the Federal Railroad Safety Act.

The Congress when drafting the FRSA expressly adopted the McDonnell Douglas standard of proof applicable to AIR 21, 49 U.S.C.A. § 42121(b) (AIR-21 whistleblower cases). However, the AIR-21 burden-shifting framework that is applicable to FRSA cases increases the burden on the railways as it was intended by Congress to be much easier for a plaintiff to satisfy his burden of proof. This was in consideration of the nature of a Whistleblower's standing of one against many and a usual situation of he said she said and so preponderance of evidence would rarely be proven and so without a prima facie burden for a whistleblower the intent of the Congress in enacting the FRSA Act and making it harder for a railway to avoid liability for taking negative employment actions against a whistleblower - so as to protect the public - would be defeated.

The incorporation of the McDonnell Douglas standard evidentiary burden shifting from Complainant back to the Railway. For employers, this is a tough standard, and not by accident as it appears the intent of Congress in creating the FRSA was to protect the public against personal injury and other potentially massive damages caused by railway disasters by providing generous protection to whistleblowers from termination and so, intended the railway industry to face a difficult time defending their actions in whistleblower actions. *Hutton v. Union Pacific Railroad,* ARB CASE NO. 11-091, at 13. ALJ CASE NO. 2010-FRS-020. The AIR-21 shifting burdens of proof were modeled after the burdens of proof provisions of the 1992 amendments to the Energy Reorganization Act, 42 U.S.C.A. § 5851. *Hutton* ***id.***

The legislative history surrounding the enactment of the recent FRSA amendments demonstrates recent amendments to the FRSA reflect Congressional findings of widespread harassment and intimidation of injured rail

workers throughout the rail industry. For five years before the 2007 amendments to the FRSA, both the House and the Senate examined the inadequacy of existing whistleblower protections in the FRSA and the punitive atmosphere surrounding notification of on the job injuries. The 2007 Congressional hearings on the subject grew out of an in-depth review of railroad employee injury reporting practices undertaken by the House Committee on Transportation and Infrastructure's Oversight and Investigations staff. Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the Committee on Transportation and Infrastructure, 110th Congr. (2007) ("Impact Hearing"); see also Summary of the Subject Matter, Oversight and Investigations Majority Staff of the House Committee on Transportation and Infrastructure, 110th Congr. (Oct. 22, 2007) ("House Report"). In these hearings, Congress examined rail worker allegations abuse – including termination of employment - by railroad management to

deterred workers from reporting injuries. See Impact Hearing (written statement of Joseph H. Boardman, Administrator, Federal Railroad Administration) at 139-159.

Clearly, the Congress intended to increase the protection of whistleblowers and did so by passing FRSA and expressly adopting the burden shifting mechanism of McDonnell Douglas standard of proof applicable to 49 U.S.C.A. § 42121(b) (AIR-21), and most importantly the burden of proof for whistleblowers of prima facie.

> The Department of Labor Code of Federal Regulations § 1982, subsection 109 (a), preponderance of evidence burden of proof has defeated the intent of Congress and with will of the people who elected the Congressmen.

C. The Department of Labor has no power to act unless authorized by statute

Congress alone—has the power to make or change the law. See U.S. Const. art. I. And administrative agencies, as creatures of the Executive Branch, have "'no power to act'—including under its regulations—unless and until Congress

authorizes it to do so by statute." FEC v. Cruz, 142 S. Ct. 1638, 1649 (2022) (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)). To that end, this Court has recognized that it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." Utility Air Regul. Grp., 573 U.S. at 328. But the decision of the Eighth Circuit flouts this first principle by setting precedent that administrative agencies may rewrite statutes. See App. 6a–9a. The Eighth Circuit's theory conflicts with both the plain text, structure, and history of Swampbuster as well as this Court's longstanding recognition that "[i]n a democracy, the power to make the law rests with those chosen by the people," King v. Burwell, 576 U.S. 473, 498 (2015), and not with unelected officials at administrative agencies. The people vested Congress—and Congress alone—with the power to make law. See U.S. Const. art. I. By contrast, the people vested the President with the executive power to enforce

those laws. See U.S. Const. art. II. And the people vested the Judiciary with the power to interpret the laws Congress makes. See U.S. Const. art. III. The Constitution divided the government's powers this way not merely to resolve inter-branch conflicts or to ensure efficient government. Rather, the "doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." Myers v. United States, 272 U.S. 52, 293 (1926). **CONCLUSION**

For the aforementioned reasons, the petition for a writ of certiorari should be granted.

DATED: April 25, 2025

Respectfully submitted,

/s/Clyde Carter Jr.
Clyde Carter, Jr. Pro Se Petitioner
7222 College
Kansas City, Missouri 64132
816 745-7431
cartergirl1966@gmail.com